TENANTS' UNION OF NSW:

SUBMISSION

Residential Tenancies Regulation 2019

August 2019

TENANTS' UNION OF NEW SOUTH WALES

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OF NEW SOUTH WALES

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Introduction

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales. The TAAS network assists more than 25,000 tenants, land lease community residents, and other renters each year. We have long-standing expertise in renting law, policy and practice.

We have consulted heavily with the advocates of the Tenants' Advice and Advocacy Services in creating this submission, and are aware that a number of services have lodged submissions of their own. We encourage the Department to consider their experiences as professional advocates with extensive experience of the way the Act and Regulation operates in practice.

We have also consulted with a range of other stakeholders including Shelter NSW, Vinnies, the Salvation Army, the Community Housing Industry Association and Community Legal Centres such as the Women's Legal Service and the Public Interest Advocacy Centre.

We are also aware that a sizable number of tenants and organisations have submitted brief submissions regarding our pets provisions proposals. This is an issue which tenants have told us for many years is a pressing issue for them and we are pleased that so many have written in support. We strongly believe it is time for this element of unfair tenancy practice to be addressed.

We thank the staff in Regulatory Policy, Better Regulation Division at the Department of Customer Service for their work co-ordinating this consultation and look forward to further discussions around the implementation of the Regulation.

For more information regarding this submission, contact Leo Patterson Ross, Senior Policy Officer at the Tenants' Union of NSW on the contact details provided or 02 8117 3700.

Summary of responses to Regulatory impact Statement

Question	Recommendation/s
1. Is a 2 December 2019 commencement date for the proposed Regulation and Amendment Act appropriate? If not, why?	Yes, but in the event that the process of finalising the Regulation is not completed by 30th September we recommend delaying commencement closer to the end of January 2020.
2. Is a mid-2020 date appropriate for commencement of the new minimum standards for rental properties? If not, why?	The new minimum standard for rental properties commence on the same date as the proposed Regulation and Amendment Act.
4. Does the new standard form of tenancy agreement clearly define the rights and obligations of both landlords and tenants? **5. Are there other ways that the standard form of tenancy agreement can be improved? If so, how?**	**Additional terms - Pets (clauses 51 - 53)** The current additional terms at clauses 51 - 52 be removed from the standard form agreement. In their place the following Additional Term be inserted: **Additional Term - Pets (delete if strata by-laws or community rules prevent the keeping of animals)** 1. *(or however numbered)*. The tenant may keep an animal on the premises, if the tenant gives the landlord written notice that it is being kept on the premises. 2. The notice must be given not later than 14 days after the animal commences to be kept on the premises. 3. If the tenant keeps an animal on the premises, the tenant agrees that: (a) they will keep the animal within the premises, or supervise the animal when exercising it outside neighbouring premises, and (b) ensures the premises are returned in similar condition to when agreement entered into, fair wear and tear excepted (s51(3)(b)), and (c) ensures the animal does not cause a nuisance, or breach the reasonable peace, comfort or privacy of neighbours (s51(1)(b-c). (d) complies with any council requirements.

	Clause 53 If clause 53 is to remain: • the clause be reworded to remove any reference to 'fumigation'. • the clause be clarified to ensure both parties understand professional cleaning of carpets is only required where there is evidence of damage or is soiled in some way that goes beyond fair wear and tear. **Sale of premises access term** The Standard Form Agreement reference 'prospective purchasers' rather than 'potential purchasers' to ensure consistency of language with the Act. **Rent increase schedule and special conditions** For leases of 2 years or less where a rent increase is written into them, the rent increase schedule be set out on the front page of the agreement. All special conditions or additional terms be included on or before page 3 of the Agreement. **Removal of 'cheque' as a specified form of payment** Remove reference to 'cheque' when specifying the manner of payment in the section on Rent at clause (a).
6. Are there any other terms that should be prohibited from being included in a residential tenancy agreement?	Prohibit blanket 'no pet' terms or other terms that prevent tenants from keeping pets, unless pets are restricted by another law. Prohibit terms that have the effect of proscribing a tenant's use of a specified utility service provider.
7. Do you agree that these terms should not be able to be excluded or modified by a fixed term agreement of 20 years or more?	New terms relating to the repair of smoke alarms, and the liability of a tenant or co-tenant for the actions of others except for a tenant who is the victim of a domestic violence offence should not be able to be excluded or modified by a fixed term agreement of 20 years or more.
8. Are there other terms in the Act that should not be excluded or modified in fixed term agreements of 20 years or	In addition to the current list of terms that should not be excluded or modified the conditions of the premises at the beginning of the tenancy should not be modified, in particular that the premises should be fit for habitation at

more?	commencement of agreement.
9. Do you think that the proposed condition report is easy to use?	Include under the heading 'OTHER SAFETY ISSUES'': *'Does the tenant agree with all of the above? If no, specify which items'* Include a N/A option after 'Have the batteries in all the smoke alarms been replaced within the last 12 months, except for smoke alarms that have non-removable or non-replaceable batteries' under the heading 'SMOKE ALARMS'.
10. Should any other features be included in the condition report to help accurately describe the condition of the premises?	Include note in the condition report providing that photographs with physical or electronic verification of date and time provided attached to report form part of the condition report. The condition report include additional information regarding how often smoke alarm batteries need to be replaced under the Smoke Alarms section.
11. For the material fact listed under clause 8(f), are there other ways that a landlord could become aware that the property has been used to manufacture drugs	We are not aware of other ways.
12. Are the prescribed timeframes for disclosing each of the material facts listed under clause 8, appropriate? If not, why?	The prescribed timeframes for disclosing material facts listed under clause 8 should be a uniform 5 years.
13. Are the proposed material facts listed under clause 8 too broad or too narrow? If yes, why?	Neither too broad nor too narrow.
14. Are there other types of material facts that a landlord or landlord's agent should disclose to a prospective tenant?	The following be included as material facts to be disclosed to prospective tenants: • The residential premises are a heritage item. • The residential premises has been the subject of a rectification order in the last 5 years, and whether that rectification order has been complied with. • The premises has been profiled in a publication

	for purposes other than rent or sale in the previous 12 months. • There has been a death of a person at the residential premises in the past 12 months. • That rectification works, major repairs, maintenance or improvements to common or personal property including renewing or replacing such property, including any fixtures or fittings will be carried out during the fixed term of the residential tenancy agreement. Further provision be made to allow incorporation of any future recommendations from the NSW Parliamentary Inquiry, the recently appointed Building Commissioner and/or any other appropriate body regarding notification requirements to residents of possible structural defects with the premises or structural elements of common property.
15. Are clauses 9, 10 and 11 still appropriate? If so, why?	Clauses 9, 10 and 11 are not appropriate and should be deleted or amended.
16. Are there any other charges that should apply to social housing tenants?	No
17. Are there other water efficiency measures that should be prescribed? If so, why?	Expand the list of efficiency measures to include: • Requirement to ensure toilets are efficient, including dual flush and not leaking. See also our response to Q 40. • Requirement to ensure hot water systems are in good repair and operate at an adequate standard.
18. Is the newly drafted clause 13 appropriate? If not, why?	Clause 13 is appropriate

19. Do the requirements appropriately balance tenant safety and administrative costs to landlords and agents? If not, why?	Yes
20. Are there other circumstances where repairs to a smoke alarm should be carried out by a qualified professional? If so, why?	A qualified professional be required to undertake general maintenance for all smoke alarm/s as appropriate to ensure smoke alarm/s are functioning to the recommended standard.
21. Are any of the smoke alarm repair requirements unclear? If so, why?	The exemption for strata schemes from these requirements could introduce some confusion regarding responsibility for notification and a landlord's required diligence in seeking rectification via a strata scheme regards smoke alarm repairs.
22. How much notice should a tenant give a landlord to carry out repairs to a smoke alarm, given the need to repair it urgently?	Where a tenant can undertake repairs, they be able to seek reimbursement for related costs once written notice of the tenant's intention to undertake the repair has been provided to the landlord.
23. Do you agree that the prescribed list of minor alterations is reasonable? If not, why?	**Clarification of list as indicative not exhaustive** Clarification be provided that the list be considered exhaustive rather than indicative. Clause 17 (1) reflect this intention by rewording of the section, for example: "For the purposes of section 66(2A)(a) of the Act, the kinds of alterations of a minor nature, for which it would be unreasonable for a landlord to withhold consent, may include, but are not limited to, the following: " **Unintended dilution of landlords' general obligations** Subclause (f) be deleted. If the subclause is included an additional note be included to clarify that strata schemes are statutorily obliged to install window safety devices under the *Strata Schemes Regulation 2016*. Delete the words "or replacing" in subclauses (d) and (i) to ensure there is no confusion or reduction in the landlord's obligation to maintain the residential premises in a reasonable state of repair.
24. Do you agree with the list of alterations where consent may be conditional on having	For the purposes of section 66 (2A)(b) of the Act, we agree that for (i) consent from the landlord may appropriately be conditional on the work being carried out by a qualified tradesperson.

the work carried out by a qualified tradesperson? If not, why?	Agree consent be conditional for (g) with the qualification indicating this appropriate for instances where the manufacturer has recommended installation or replacement be undertaken by a qualified professional, but that such conditionality is not necessary or appropriate in instances where no such recommendation is made. The qualification set out above on the ability to apply conditional status should apply to any other subclauses added at 17(1) relating to minor alterations to improve accessibility which are added to sections (1) and (2).
25. Are there other types of minor alterations that should be prescribed, including measures to further improve accessibility for elderly or disabled tenants?	Include the following in the list of minor alterations: • installing rails (handrails or grab rails); ramps (kerb, step and threshold); and tactile ground surface indicators for the purpose of assisting elderly or disabled tenants • installing a safety or accessibility accessories where no structural modification of the building is required for the purpose of assisting elderly or disabled tenants • installing draught-proofing devices and materials to prevent draughts to doors and windows
26. Do you agree with the list of exceptions? If not, why?	**No blanket exceptions should be made for clause 17, and** the full list of current exceptions be deleted. If the exception at (d) remains the qualification be made that the exception only applies if the alteration affects common property/area and contravenes valid park rules and/or other statutory requirements. **If the exception at 3**(e) remains some form of mitigation against misuse by included.
27. Are there any other situations where clause 17 should not apply?	No - clause 17 should apply in all residential tenancy agreement. The reasonable grounds test is sufficient for any valid objection a landlord may raise.
28. Do you have any suggestions on how the wording and layout of the declaration form could be improved?	Convert questions 2 and 3 of Part 3 to a further explanation of what constitutes a domestic relationship and include as part of the 'how to complete' section. Insert a paragraph in the 'How to complete this declaration' section clarifying the declaration form is an

	alternative form of evidence for a tenant seeking to end their tenancy on the basis of domestic violence to provide appropriate context to medical practitioners, highlighting the declaration has been made available because victims of domestic violence do not feel comfortable going to the police or engaging with the justice system. We endorse the Women's Legal Service NSW submission in relation to the definition of a "competent person" in Schedule 3. We support an appropriately expanded list of practitioners who can act as a "competent person" in this context, as detailed in the Women's Legal Service NSW submission.
29. Should the exemptions provided for in clauses 19-26 continue to apply? If not, why?	**Life Tenancies, clause 24** Clause 24 be deleted in its entirety or amended to only provide an exemption for an equitable 'life estate'. **Residential colleges and halls of residence in educational institutions, clause 25** Clause 25 be deleted or amended to remove (c).
30. Is the new exemption provided by clause 27 appropriate? If not, why?	**The exemption is inappropriate and should be removed entirely.**
31. Is the new exemption provided by clauses 28 appropriate? If not, why?	The exemption is inappropriate and should be removed entirely. If the exemption is to remain, amend cl (1)(d) to ensure a minimum level of efficiency before the charges can be passed on, e.g. the common factor used to calculate the fee correlates to a heating efficiency of no less than 50%.
32. Is the new exemption provided by clause 29 appropriate? If not, why?	An exemption here may have unintended consequences. The exemption should be removed.
33. Is the new exemption provided by clause 30 appropriate? If not, why?	The regulations should specify that an exemption be made only for 'hard wired' smoke alarms. The exemption be made further conditional on the landlord informing the owners corporation of the work required and taking all necessary steps to ensure rectification in an appropriately timely manner once notified of the need for repair by the tenant.

34. Is the exemption provided by clause 31 appropriate? If not, why?	The exemption is inappropriate and should be removed. The exemption, if it is to remain, should refer only to the NSW Land and Housing Corporation and the Aboriginal Housing Office. The exemption, if it is to remain, should include a sunset provision allowing exemption (ie that the rectification order system not apply) of the NSW Land and Housing Corporation and the Aboriginal Housing Office for one year only before a review of the exemption once stakeholders have been able to consider how the rectification order system is functioning in practice and assess its usefulness in a social housing context.
35. Are the timeframes for making applications to the Tribunal appropriate? If not, why?	Yes.
36. Is the jurisdictional limit set for rental bond and other matters adequate? If not, why? **37. Are there any unintended consequences in prescribing a cumulative amount where an order is made with respect to both a rental bond and another matter?**	The jurisdictional limit be set at no more than $20,000 for claims other than bonds, and remain at $30,000 for bonds claims. Remove section 33 (3) which allows an order to be made for a cumulative amount with respect to both a rental bond and another matter.
38. Should an interest rate on rental bonds still be prescribed? Why?	Yes.
39. Are the prescribed savings and transitional provisions appropriate?	Yes.
40. Are any other savings or transitional provisions required?	If a requirement to install dual-flush toilets is included under clause 12 transitional provisions may be implemented to require installation without undue financial strain.
41. Are the changes to penalty amounts in the proposed Regulation appropriate?	Introduce a consistent relationship between penalty notice and maximum penalty, such that penalty notices are uniformly 50% of the maximum penalty.

1. Is a 2 December 2019 commencement date for the proposed Regulation and Amendment Act appropriate? If not, why?

We believe 2nd December is an appropriate commencement date. We encourage the earliest practical commencement date.

For the purpose of preparing and conducting training for Tenants' Advice and Advocacy Services and updating online legal information material we estimate a period of 8 weeks from the publication of the final Regulation is necessary. Therefore, in the event that the process of finalising the Regulation is not completed by 30th September we recommend delaying commencement closer to the end of January 2020.

2. Is a mid-2020 date appropriate for commencement of the new minimum standards for rental properties? If not, why?

We believe these standards should come into effect on the same date as commencement. These standards, and the underlying statutory obligation, are not strictly new. The standards helpfully clarify the meaning of the pre-existing obligation to ensure premises are fit for habitation. Landlords currently have these obligations and are in breach if the property does not comply, regardless of when the date actually begins. Delaying the start date will only cause confusion.

We note these amendments passed NSW Parliament in October 2018 and have simply been waiting for completion of regulations before coming into effect. We consider that this constitutes a period of more than a year in which industry participants could have been making any necessary changes to bring properties up to a minimum standard. We suggest those landlords who have not taken the opportunity to do so at this stage are no more likely to do so after the amendments commence.

3. Are there other terms in the proposed Regulation that should be defined so that their meaning is clear?

No.

4. Does the new standard form of tenancy agreement clearly define the rights and obligations of both landlords and tenants?

See Q.5

5. Are there other ways that the standard form of tenancy agreement can be improved? If so, how?

We have identified a number of improvements that could be made to the current standard form agreement to ensure the rights and obligations of both landlords and tenants are clearly and accurately set out.

Additional terms - Pets (clauses 51 - 53)

Currently the standard form agreement starts with a negative default additional term against pets. This is not required by the Act and is not in keeping with modern community standards.

There is nothing in the *Residential Tenancies Act 2010* that prohibits the keeping of a pet. On the contrary, terms restricting tenants' ability to own a pet - including any requirement to obtain the landlord's consent to own a pet - contract out of the Act in breaching tenants' reasonable peace, comfort & privacy (see section 50(2)).

We recommend the current additional terms (clauses 51 - 52) be removed from the standard form agreement and in their place the following Additional Term should be inserted to encourage responsible pet ownership and make clear for both landlord and tenant a tenant's responsibilities when owning a pet.

We suggest the following set of clauses:

> **Additional Term - Pets (delete if strata by-laws or community rules prevent the keeping of animals)**
>
> 1. *(or however numbered)*. The tenant may keep an animal on the premises, if the tenant gives the landlord written notice that it is being kept on the premises.
>
> 2. The notice must be given not later than 14 days after the animal commences being kept on the premises.
>
> 3. If the tenant keeps an animal on the premises, the tenant agrees that:
>
> (a) they will keep the animal within the premises, or supervise the animal when exercising it outside neighbouring premises, and
>
> (b) ensures the premises are returned in similar condition to when agreement entered into, fair wear and tear excepted (s51(3)(b)), and
>
> (c) ensures the animal does not cause a nuisance, or breach the reasonable peace, comfort or privacy of neighbours (s51(1)(b-c).
>
> (d) complies with any council requirements.

The Government has already made reforms in this direction. The *Strata Schemes Management Act 2016*, for example, was written in a similar structure to encourage pet ownership in NSW. Victoria and the ACT have also both introduced yet-to-commence amendments to their Residential Tenancies Acts to bring a more sensible approach to pet-ownership.

Clause 53

Clause 53 requiring the professional cleaning of carpets and/or fumigation currently degrades Parliaments' intention with the parent Act and causes much confusion for tenants and landlords. The language of the clause leads some agents and landlords to assume that the keeping of pets triggers an automatic obligation that the tenant must undertake professional carpet cleaning and fumigation at the end of a tenancy regardless of the condition of the property. This is in conflict with the tenants' obligations laid out in section 51 of the Act.

Further the inclusion of fumigation in this clause creates an obligation beyond the requirements of the Act at section 19 and should be removed from the clause. The proper test for a tenant's liability for fumigation costs is that the landlord has evidence of the

presence of a pest and further evidence suggesting that the tenant, through their action or lack of action, caused the pest to be present.

The clause should be clarified to ensure both parties understand professional cleaning of carpets is only required where there is evidence of damage or is soiled in some way that goes beyond fair wear and tear (see section 51 of the Act). If this clause is to remain we can provide a suggested wording for this clause.

Sale of premises access term

Under Sale of Premises in the Standard Form Agreement the wording has changed in relation to tenants providing access for purchasers from prospective to potential purchasers. The Standard Form Agreement should reference 'prospective purchasers' to ensure consistency of language with the Act. Consistent language across the Standard Form Agreement and the Act will avoid any confusion or dispute regarding the meaning of the Agreement.

Rent increase schedule

For leases of 2 years or less where a rent increase is written into them, the rent increase schedule should be set out on the front page of the agreement. We would further recommend that all special conditions or additional terms should be included on or before page 3 of the Agreement to ensure the tenant is aware of and consents to the terms.

Removal of 'cheque' as a specified form of payment

We recommend the removal of the reference to 'cheque' when specifying the manner of payment in the section on Rent at clause (a). The reference to cheque as a default option in this section is not useful or appropriate given that it can no longer be presumed this method of payment is reasonably available to the tenant.

We are aware of instances in which landlords and/or agents have placed pressure on tenants to adopt a third party method of payment incurring a cost by offering cheque as the one free method of payment, despite the tenant's insistence this was not reasonably available to them.

The Reserve Bank's 2016 Consumer Payments Survey, '*How Australians Pay*' shows that the use of personal cheques has continued to decline, with cheques accounting for only 0.2 per cent of payments made by participants in the survey, compared with 0.4 per cent in 2013 and 1.2 per cent in 2007.

Table 1: Consumer Payment Methods[a]
Per cent of number of payments

	2007	2010	2013	2016
Cash	69	62	47	37
Debit, credit/charge cards	26	31	43	52
BPAY	2	3	3	2
Internet/phone banking	na	2	2	1
PayPal	na	1	3	3
Cheque	1	1	0.4	0.2
Other[b]	1	1	2	4

(a) Excluding payments over $9 999
(b) 'Other' methods would include prepaid, gift and welfare cards, bank cheques, money orders, Cabcharge, and other online payment methods apart from PayPal (e.g. POLi)
Sources: Colmar Brunton; Ipsos; RBA; Roy Morgan Research

https://www.rba.gov.au/publications/bulletin/2017/mar/pdf/bu-0317-7-how-australians-pay-new-survey-evidence.pdf

6. Are there any other terms that should be prohibited from being included in a residential tenancy agreement?

We feel the following terms would usefully be included for the purposes of section 19(1) in the regulations.

Prohibition on blanket 'no pet' terms

Australia is a pet-loving country. A nationwide poll from YouGov in 2018 found that 82 per cent of Australians agree that animals make them healthier or happier. A further 62 per cent of Australians say that the love of a pet provides emotional benefits and 56 per cent say that their pet provides mental health benefits.

Renters, however, routinely miss out on these benefits. We are aware that terms prohibiting pets are frequently included in tenancy agreements and that tenants often find it very difficult to find a home that will accept or allow pets. A change.org petition calling for removal of the blanket 'no pets' clauses in NSW has over 77,000 signatures, demonstrating the breadth of feeling in the state[1]. Encouraging pets in rental homes also reduces the number of surrenders to pounds and shelters or abandonments into native environments.

As discussed previously, the *Residential Tenancies Act 2010* does not restrict or in any way prohibit the keeping of a pet. Indeed we argue that the Act provides tenants some protection against restrictions on pet ownership at section 50(2) relating to a landlord's unnecessary interference with a tenant's reasonable peace, comfort & privacy. The regulations at Part 2 (5) could very usefully include a prohibition on any terms that prevent tenants from keeping pets, unless pets are restricted by another law.

[1] 'Ban the no pets clause in NSW tenancy agreements' https://www.change.org/p/ban-the-no-pets-clause-in-nsw-tenancy-agreements

Pet ownership should be a matter of both personal choice and personal responsibility. Any risks a landlord might reasonably anticipate in the tenants owning a pet are already adequately mitigated against via existing protections set out in the *Residential Tenancies Act 2010*. The tenant already has a duty not to negligently or intentionally cause or permit damage, to keep the premises clean, and not to cause or permit a nuisance. Tenants have an obligation to pay a bond if the landlord requests it, and we know the overwhelming majority of bonds are returned in part or in whole. The Review of the Residential Tenancies Act found that additional pet bonds were unnecessary because current bonds adequately cover landlords.

Landlords should also generally hold insurance for their properties. Most landlord insurance products (as distinct from building insurance) are in the order of a dollar or two a day. Rates of coverage appear to be worryingly low and more should be done to encourage landlords to take out appropriate coverage for their business as other service providers do. We believe improved coverage of pets will be added through normal market forces as landlord demand for this type of coverage grows.

Where a pet does cause damage to a property that goes beyond fair wear and tear the landlord is able to seek compensation or require cleaning to ensure the property is returned at the end of the tenancy in similar condition as when they moved in.

Animal welfare concerns and possible nuisance issues (e.g. persistent excessive noise or consistent roaming) are most appropriately and already dealt with in a range of legislation, including the *Companion Animals Act 1998*. This legislation and other council regulations relating to keeping companion animals applies equally to owner occupiers and tenants.

Prohibition on proscribing use of a specified utility service provider

We recommend prohibiting terms that have the effect of proscribing tenants' use of a specified utility service provider.

The TU is aware of a number of new developments in which tenants have had significant pressure placed on them by landlords to use the services of nominated utility service providers. We hold strong concerns that such arrangements may be unlawful third line forcing under the *Competition and Consumer Act 2010*, and/or has the potential to substantially limit or waive rights provided through standards or guarantees available to other consumers.

7. Do you agree that these terms should not be able to be excluded or modified by a fixed term agreement of 20 years or more?

Fixed term agreements of 20 years or longer should include the new terms relating to the repair of smoke alarms and the liability of a tenant or co-tenant for the action of others except for a tenant who is a victim/survivor of a domestic violence offence, or an exempted co-tenant. Both these terms are fundamental to ensuring tenant's safety and protecting survivors of domestic violence irrespective of the length of tenancy. The TU agrees that these terms should not be able to be excluded or modified by a fixed term agreement of 20 years or more.

8. Are there other terms in the Act that should not be excluded or modified in fixed term agreements of 20 years or more?

We agree with the current list of terms that should not be able to be excluded or modified. We further recommend that the conditions of the premises at the beginning of the tenancy should also not be modified. Most importantly, the premises should be fit for habitation at commencement of agreement.

9. Do you think that the proposed condition report is easy to use?

The TU agrees that the proposed condition report is easy to use and is an improvement on the existing one. We do however recommend the inclusion of the following under the heading 'OTHER SAFETY ISSUES'': *'Does the tenant agree with all of the above? If no, specify which items'* as it is under the 'MINIMUM STANDARDS' heading.

We also recommend adding a N/A option after 'Have the batteries in all the smoke alarms been replaced within the last 12 months, except for smoke alarms that have non-removable or non-replaceable batteries' under the heading 'SMOKE ALARMS'.

10. Should any other features be included in the condition report to help accurately describe the condition of the premises?

Photographs are a readily available and non-costly way of providing a more detailed record of the state of the premises at the commencement of the tenancy. Photographs provided with physical or electronic verification of date and time could form part of the condition report. We recommend where appropriate photographs be clearly identified as a depiction of an issue identified in the condition report.

The condition report should also include additional information regarding how often smoke alarm batteries need to be replaced under the Smoke Alarms section.

11. For the material fact listed under clause 8(f), are there other ways that a landlord could become aware that the property has been used to manufacture drugs?

We are not aware of another way.

12. Are the prescribed timeframes for disclosing each of the material facts listed under clause 8, appropriate? If not, why?

For reasons of consistency the prescribed timeframes for disclosing material facts listed under clause 8 should be a uniform 5 years. Currently a landlord needs to disclose if the premises had been subject to flooding or bushfire within 5 years. We recommend that the same timeframe be provided for premises that had been used for the purposes of the manufacture or cultivation of any prohibited drug or plant. The current proposed shorter disclosure period of 2 years for this material fact appears unjustifiable given that the possible health and safety implications for a tenant could arguably be greater.

13. Are the proposed material facts listed under clause 8 too broad or too narrow? If yes, why?

The proposed material facts listed under clause 8 are neither too broad nor too narrow.

14. Are there other types of material facts that a landlord or landlord's agent should disclose to a prospective tenant?

In relation to material facts to be disclosed we recommend the addition of the following material facts that may impact a person's decision to move into premises and should not be withheld:

- **The residential premises are a heritage item.**

  This is a relevant factor because of the potential impact on possible alterations, both minor and more significant, as well as general repairs.

- **The residential premises has been the subject of a rectification order in the last 5 years, and whether that rectification order has been complied with.**

  This is a relevant factor because of potential impact on future repairs issues.

- **The premises has been profiled in a publication for purposes other than rent or sale in the previous 12 months.**

  This is a relevant factor for the potential impact on the tenant's privacy.

- **There has been a death of a person at the residential premises in the past 12 months.**

  We are aware of cases where a deceased body has not been discovered for several days and there may be legitimate concerns about whether the premises have been appropriately cleaned. We are also aware that some religious, spiritual or cultural beliefs may require action by the tenant before moving in which should be respected.

- **That rectification works, major repairs, maintenance or improvements to common or personal property including renewing or replacing such property, including any fixtures or fitting will be carried out during the fixed term of the residential tenancy agreement.**

  This is a relevant factor because of potential impact on reasonable expectations of peace, comfort and privacy of tenant during the fixed term.

Further, we propose there should be provision made to allow for the incorporation of any relevant recommendations that may be made by the recently commenced NSW Parliamentary building code inquiry (Parliamentary inquiry on the Regulation of building standards, building quality and building disputes), or by the recently appointed Building Commissioner.

We recommend incorporation of such recommendations would usefully be made through notification requirements, for example where the landlord receives notification of possible structural defects with the premises or structural elements of common property they be required to disclose this to a prospective tenant under s26(1) with reference to s8(b) - 'the residential premises are subject to significant health or safety risks that are not apparent to a reasonable person'.

15. Are clauses 9, 10 and 11 still appropriate? If so, why?

We do not believe clauses 9, 10 and 11 to be appropriate.

Clause 9

We recommend clause 9 be deleted or amended.

We are currently unclear what the purpose of the renewable energy rebate is. We believe it may be an outdated energy rebate that is no longer able to be claimed. Keeping the language without a current intended rebate may cause unintended consequences in the future.

If it is retained, we recommend the tenant must be given a statement detailing the expected benefit of the solar hot water panels without the renewable energy rebate before being asked to agree to pay the landlord the amount of the rebate.

Clause 10

We recommend deletion. We are not aware of this arrangement happening, and are sceptical that a reasonable method for charging can be applied to tenants.

Clause 11

We recommend deletion. As far as we are aware there are likely only a handful of instances in which social housing tenants of the AHO or the NSW Land and Housing Corporation have a tenancy agreement for premises in a retirement village. The only example we know of are the Dougherty Apartments in Willoughby. Despite the small numbers of tenants likely to have the charges apply, we are concerned that charges for optional services are applied via tenancy agreements.

Other residents in retirement villages generally have a residence contract and a service contract. For these residents there are a number of protections in place regards services fees and the service contract as set out in the *Retirement Villages Act 1999,* for example see the process for negotiation of a service contract as set out at section 35 - Consequences of resident's rescission of service contract. There is also provision made regards recurrent charges in respect of optional services (at section 151 of the RVA 1999) ensuring residents are not liable to pay these charges when they are absent from the premises for longer than 28 days.

We are concerned tenants who fall under clause 11 do not have adequate protections in place under the *Residential Tenancies Act 2010* for situations such as these, e.g. they wish to renegotiate their service contract or are absent from the premises for an extended period. To mitigate against any risks to their housing in these circumstances we

recommend a separate contract be entered into between the operator and the resident for provision of the optional services.

16. Are there any other charges that should apply to social housing tenants?

No. We refer to our general principle that all tenants under the *Residential Tenancies Act 2010* should be treated the same. Any exclusion should be considered both for evidence of need for different treatment and to ensure the purpose of social housing is not degraded by the exemption.

17. Are there other water efficiency measures that should be prescribed? If so, why?

Expand the list of efficiency measures to include:

- Requirement to ensure toilets are efficient. As the Regulatory Impact Statement notes, toilets are one of the key points of water consumption. We recommend toilets should be dual flush and not leaking. However, see our response to Q40.Requirement to ensure hot water systems are in good repair and operate at an adequate standard which does not lead to excessive energy and/or water consumption. We are approached by many tenants who are impacted by old, faulty or inappropriately sized hot water systems.

18. Is the newly drafted clause 13 appropriate? If not, why?

Yes.

19. Do the requirements appropriately balance tenant safety and administrative costs to landlords and agents? If not, why?

As discussed in the Regulatory Impact Statement the timely and diligent repair and maintenance of smoke alarms is fundamental to ensuring tenants' safety. The introduced clauses setting out the requirements regarding repair and maintenance of smoke alarms usefully provide clear guidance as to the responsibilities of the tenant and landlord, and an appropriate timeframe for these repairs to be undertaken.

20. Are there other circumstances where repairs to a smoke alarm should be carried out by a qualified professional? If so, why?

For those tenants who are able to replace the battery in a smoke alarm themselves or where there is no requirement for a qualified professional to replace the smoke alarm we are concerned that there is no check in place to ensure that the alarm is adequately tested on a regular basis.

We therefore recommend that there be a period after which all smoke alarms are required to be checked by a qualified professional for general maintenance to determine if they are functioning at the recommended standard. We recommend that Fair Trading work with other government agencies and stakeholders as appropriate to determine a relevant time period.

21. Are any of the smoke alarm repair requirements unclear? If so, why?

The repair requirements as set out at clauses 14 - 16 are clear. However the exemption for strata schemes from these requirements could introduce some confusion regarding responsibility for notification and a landlord's required diligence in seeking rectification via a strata scheme regards smoke alarm repairs. See our full discussion re exemption at clause 30 at Q33 below.

22. How much notice should a tenant give a landlord to carry out repairs to a smoke alarm, given the need to repair it urgently?

If a tenant is happy to undertake repairs and can under s16(1) a tenant should be able to seek reimbursement for related costs once written notice of the tenant's intention to undertake the repair has been provided to the landlord.

Given the urgency of the repair and the limited costs involved for reimbursement we do not see the need for any additional requirement that the tenant give the landlord or landlord's agent an opportunity to undertake the repairs.

23. Do you agree that the prescribed list of minor alterations is reasonable? If not, why?

Clarification of list as indicative not exhaustive

The draft regulations usefully clarify the kinds of minor alterations for which it would be unreasonable for the landlord to refuse consent. However we would be concerned if the list provided within the regulations was considered exhaustive rather than indicative. It is appropriate that Tribunal members continue to hold discretion to determine whether a proposed alteration not on the list set out in the regulations might still be considered of a minor nature. To accommodate such discretion we recommend the rewording of the clause to reflect the intention of prescribing a list that includes but is not limited to those alterations set out in the section, for example:

"For the purposes of section 66(2A)(a) of the Act, the kinds of alterations of a minor nature, for which it would be unreasonable for a landlord to withhold consent, may include, but are not limited to, the following: "

Alternatively a note inserted into the regulation providing clear guidance that the list is indicative but not exhaustive would serve the same purpose.

Unintended dilution of landlords' general obligations

We are concerned that the current form of inclusion of subclause (f) may lead to disputes or confusion regarding the requirement for window safety devices to be installed as part of the landlord's general statutory obligations relating to the health or safety of the residential premises. We recommend that subclause (f) not be included within the list. If the subclause is included we recommend an additional note to clarify that strata schemes are statutorily obliged to install window safety devices under the *Strata Schemes Regulation 2016*.

If clarity is provided to ensure the list of alterations set out in the regulations is understood to be indicative rather than exhaustive (as recommended above) then where a tenant seeks to install a safety device precaution that goes beyond the statutory requirements they would still be able to seek written consent and have the test of reasonableness apply.

In a similar vein we would also recommend removing the words "or replacing" in subclauses (d) and (i) to ensure there is no confusion or reduction in the landlord's obligation to maintain the residential premises in a reasonable state of repair. Specifically we would be concerned that a landlord may seek to dilute their responsibility to repair or replace internal window coverings where these have been damaged, and/or to do repairs for an existing phone line or other existing internet connection where these are not functioning and to shift the responsibility to organise and cover the cost of such repairs to the tenant.

24. Do you agree with the list of alterations where consent may be conditional on having the work carried out by a qualified tradesperson? If not, why?

For the purposes of section 66 (2A)(b) of the Act, we agree that for (i) consent from the landlord may appropriately be conditional on the work being carried out by a qualified tradesperson.

We also agree that consent may be conditional for (g), but recommend a similar qualification on this as that set out in sections 14 - 16 (regards smoke alarms) indicating this is appropriate for instances where the manufacturer has recommended installation or replacement be undertaken by a qualified professional, but that such conditionality is not necessary or appropriate in instances where no such recommendation is made.

The qualification set out above on the ability to apply conditional status should apply to any other subclauses added at 17(1) relating to minor alterations to improve accessibility which might be later added to sections (1) and (2).

25. Are there other types of minor alterations that should be prescribed, including measures to further improve accessibility for elderly or disabled tenants?

Accessibility

Recognising the importance of ensuring elderly and/or disabled tenants can easily make improvements to a premises to ensure liveability and safety we recommend including the following specific sub-clause relating to rails, ramps and tactile indicators:

> installing rails (handrails or grab rails); ramps (kerb, step and threshold); and tactile ground surface indicators for the purpose of assisting elderly or disabled tenants

We also recommend the inclusion of a broader sub-clause (something of a 'catch-all') that allows for:

> installing a safety or accessibility accessories where no structural modification of the building is required for the purpose of assisting elderly or disabled tenants

Energy efficiency

We also recommend the inclusion of items which may improve the energy efficiency of the premise. We refer to our previous recommendation that the list of minor alterations should not be exhaustive but recommend the inclusion of a provision regarding draught-proofing.

> installing draught-proofing devices and materials to prevent draughts to doors and windows

26. Do you agree with the list of exceptions? If not, why?

No blanket exceptions for clause 17

We believe the list of exemptions at 17(3) is unnecessary and recommend the full list be deleted. In the circumstances, a landlord who objects may be able to refuse alterations on reasonable grounds, such as the presence of by-laws, community rules, or heritage items. However not all minor alterations may be affected by these other by-laws or rules to the same extent.

An exemption for all minor alterations included in the list at clause 17(1) unnecessarily leads to a blanket exclusion of minor alterations where the landlord should still be required to exercise some thought before objecting. We believe the blanket exclusions militate against Parliament's intention.

Exception for premises in residential land lease communities and retirement villages

In particular we are concerned about the exemption of land lease community residents under a residential tenancy agreement and residents under tenancy agreements in retirement villages from the ability to make alterations under the Act at 3(d)(i). There appears to be no justification for excluding this group of tenants.

Like all other tenants they have every right to 'make home' and should be able to hang pictures and undertake other minor alterations as set out by regulations and/or appropriate. Given that many residents with agreements of this nature are likely to be older tenants or tenants with access requirements it is especially relevant there should be explicit reference to the reasonableness of their right to be able to make minor alterations that would assist with accessibility and safety – for example installation of hand held shower heads or lever style taps, etc as set out at 17(g) and any other kind of alteration relating to measures to further improve accessibility introduced into regulations (at 17).

In the case of tenancy agreements in land lease communities we imagine the exception has been included because in land lease communities the premises may come under other rules and/or statutory requirements. The "Community Rules' in Part 8 (s86-95) of the *Residential (Land Lease) Communities Act 2013* is where alterations to properties in land lease communities can be prescribed. However it is important to note for our purposes, that most minor alterations should be excluded from these as they would not be consistent with model rules - https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0011/367832/Model_community_rules.pdf). Whilst the model rules are only a guide, any rule that did not allow for minor alterations would represent an overreach in landlord control.

If the exception remains at the very least the exception at (d) could have a similar qualification to (a) i.e. the exception applies only if the alteration affects common property/area and contravenes valid park rules and/or other statutory requirements.

Mitigation against misuse of 17 (3)(e)

Further the exception at 3(e) requires some form of mitigation against misuse by a landlord who may serve a valid notice of termination well in advance to avoid the requirement to reasonably agree to a minor alteration. We are aware of some landlords who routinely issue end of fixed term notices at the beginning of the fixed term - their tenants would be entirely excluded from the minor alterations provisions.

Exception for social housing tenants

The exception of social housing landlords from the requirement at 17(4) to not unreasonably withhold consent for installation of wireless cameras on their premises is not equitable. Again we refer to the general principle that all tenants under the *Residential Tenancies Act 2010* should be treated the same. If private tenants (and owner occupiers) are able to reasonably install security cameras, social housing tenants should be given similar rights. In the circumstances, social housing landlords who object are still able to present evidence to the reasonableness of their objection.

27. Are there any other situations where clause 17 should not apply?

No - clause 17 should apply in all residential tenancy agreements. The reasonable grounds test is sufficient for any valid objection a landlord may raise.

28. Do you have any suggestions on how the wording and layout of the declaration form could be improved?

We recommend the following changes regarding the wording and layout of the declaration form:

Convert questions 2 and 3 of Part 3 to a further explanation of what constitutes a domestic relationship and include as part of the 'how to complete' section.

We do not consider that it is necessary for the medical practitioner to determine the nature of the relationship, any more than it is necessary for them to determine the specifics of the domestic violence. Regardless of the medical practitioner's declaration the tenant will need to demonstrate that the relationship meets the definition of a domestic relationship to the Tribunal if disputed, and this is more appropriate. We anticipate in the vast majority of instances the relationship will be clear.

Clarification to provide broader context

Insert a paragraph in the 'How to complete this declaration' section clarifying the declaration form is an alternative form of evidence for a tenant seeking to end their tenancy on the basis of domestic violence to provide appropriate context to medical practitioners. This could be a simplified version of the following paragraph provided in the factsheet for medical practitioners currently available on the Fair Trading website:

This declaration is one of the four acceptable forms of evidence that a tenant can use to attach to their termination notice. Other forms of evidence are a Domestic Violence Order, family law injunction or a certificate of conviction. The declaration has been made available in response to concerns that many victims of domestic violence do not feel comfortable going to the police or engaging with the justice system.

Schedule 3 - Declaration by competent person

Acknowledging that this change would require law reform, we endorse the Women's Legal Service NSW submission in relation to the definition of a "competent person" in Schedule 3.

We similarly commend the inclusion of 'medical practitioners' as a 'competent person' able to make a declaration to be used as evidence of domestic violence to enable a survivor of domestic violence to end a tenancy in the absence of an AVO. However, we have grave concerns regarding the exclusion of other experienced family violence professionals from this definition.

In our consultation with Tenants' Advice and Advocacy Services we heard of a number of instances since February 2019 where GPs have refused to sign the 'Declaration by a competent person' form because they did not feel they had sufficient medical evidence of domestic violence. By this it was understood they were referring to evidence of physical injury or trauma.

These instances suggest GPs are not always best placed to bear the burden as sole reporters of domestic violence. Some GPs may lack the experience to identify and respond to the full range of domestic violence offences appropriately. For the survivor who is disclosing the abuse, the experience of confusion and/or refusal to sign the form can cause significant distress and exacerbate the trauma of domestic violence.

The Aboriginal legal officer at the Tenants' Union has also assisted in a case in which the local GP declined to sign the Declaration for a tenant survivor seeking to end an agreement because of a concern around conflict of interest as the perpetrator was also a patient. This is an issue of particular concern in remote and regional areas where there is very often only one medical practitioner reasonably available to the tenant.

We recommend a better approach would be to allow the range of professionals to be expanded to allow the most appropriate professional person to make the observation at the most appropriate time. This may be for instance at the point that a person presents at a shelter or refuge in the presence of a worker with the Women's Domestic Violence Court Advocacy Service to address a breach of an ADVO – a domestic violence offence under the meaning of the Crimes (Domestic and Personal Violence) Act 2007. There may be no medical element to this instance of offence – it appears to us that a trained support worker at the Court is better placed to make this declaration than a medical practitioner.

We support an appropriately expanded list, as detailed in the Women's Legal Service NSW submission.

29. Should the exemptions provided for in clauses 19-26 continue to apply? If not, why?

We provide the following comment on specific clauses.

Life Tenancies, clause 24

The term 'life tenancy' and 'life estate' are often used interchangeably. This creates unnecessary confusion because they are quite different. A 'life tenancy' is contractual whereas a 'life estate' is an equitable interest in the land. Section 13 of the Act already excludes a 'life estate' because it does not fall within the definition of a 'residential tenancy agreement'.

A 'life tenancy' (or 'tenancy for life') is entirely different. It is established by contract and grants no interest in the land other than what would normally occur through a contract like a residential tenancy agreement (e.g. possession for a set term). It is then merely a matter of determining if a 'life tenancy' falls within the jurisdiction of the Act.

The consequences of excluding tenants under such residential tenancy agreements where the term of the agreement is for the life of the tenant would mean:

- they are covered under the *Landlord and Tenant Act 1899* ('1899 Act') which uses the Local Court for eviction proceedings;
- there is no obligation on the landlord to do repairs (except by way of the local government council using its powers under its various legislation) unless they signed a residential tenancy agreement or similar document;
- where they have signed a residential tenancy agreement or similar document, they will have to go to the Supreme Court to enforce its terms if the landlord reneges.

This is important given that the 1899 Act will be repealed by Section 1D on 29 June 2020 or on such earlier day as may be appointed by proclamation. Following its repeal, such tenants will have to rely upon the common law, unless parts of this Act which are still relevant today are placed into the *Residential Tenancies Act 2010* as part of "Schedule 2: Savings, transitional and other provisions', as was one option in NSW Fair Trading's consultation paper released in November 2018 - https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0011/429923/Better_Business_Reforms_Implementation_Options_paper.pdf

We recommend that Clause 24 be deleted in its entirety or amended to only provide an exemption for an equitable 'life estate'.

Residential colleges and halls of residence in educational institutions, clause 25

We object to the exemption provided under s25 'Residential colleges and halls of residence in educational institutions' which allows an exemption from the operation of the Act if the premises are 'provided for that use by a person or body that provides the premises under a written agreement with the institution to provide accommodation to students of the institution' [s25(1)(c)].

We feel that this exemption may provide a loophole for the exploitation of students generally but international students in particular as this cohort has been found to be especially vulnerable to deceptive and exploitative conduct by unscrupulous landlords.

We expect that residential agreements on university grounds may generally be excluded from the *Residential Tenancies Act 2010* because of the substantive nature of the agreement (for instance it may constitute lodgings because of the exercise of mastery and control) and a specific exclusion from the Act is unnecessary. Where the substantive nature of the agreement does not exclude the agreement, then it is appropriate that residents should have coverage of the Act.

We also bring to the Departments' attention and endorse the recommendations made by the UNSW Human Rights Clinic in their report, *No Place Like Home. Addressing Exploitation of International Students in Sydney's Housing Market* -

https://www.law.unsw.edu.au/sites/default/files/imce/files/No-Place-Like-Home-UNSW-Human-Rights-Clinic-report.pdf.

The report calls for increased accountability of student accommodation providers and calls for the NSW government to implement a code of practice for student accommodation. This code should establish a clear set of standards regarding quality and enforcement of tenants' rights and a related accreditation process. The report recommends that international students' rights and access to justice be strengthened through the amendment of the *Residential Tenancies Act 2010* and/or the *Residential Tenancies Regulations 2010*. We endorse this report.

30. Is the new exemption provided by clause 27 appropriate? If not, why?

We refer to our principle that social housing tenants and private market tenants should have the same rights unless there is a strong evidence base for different treatment. We are unsure of the policy reason for this exemption.

There does not appear to us to be a significant administrative cost to implementation as flagged in the Impact Statement. All property managers (however described) employed by social housing providers should have adequate training which would necessarily cover all information in the Landlord Information Statement. We would be deeply concerned if the position of the social housing providers is that their staff are not trained to at least that level. We do not believe this to be the case.

In any event, to satisfy the legal requirement, only one authorised person within an organisation needs to have read the Information Statement in order to be able to tick the box.

Ticking one additional box on a residential tenancy agreement can hardly be seen as adding an onerous responsibility. Given the Landlord Information Statement has not yet been finally drafted or released it is also unclear as to why a social housing provider may object to coverage.

The exemption should be removed.

31. Is the new exemption provided by clauses 28 appropriate? If not, why?

The exemption is inappropriate and should be removed entirely. We believe it is primarily an attempt to evade the effect of NCAT orders made in 2018.

Common hot water systems are often inefficient and costly. By exempting a landlord from this section it places the costs of inefficient systems on tenants who have no capacity to upgrade the system. The Tribunal made its decision and the decision was not appealed.

A landlord who insists on running an inefficient hot water system should not be able to pass on the resulting higher costs. It is appropriate that private tenants are protected from such behaviour. There appears to be no sound reason that social housing tenants should be forced to pay these higher costs.

If the exemption is to remain, we recommend amending clause (1)(d) to ensure a minimum level of efficiency before the charges can be passed on. We recommend that the common factor used to calculate the fee correlates to a heating efficiency of no less than 50%. We are aware of hot water systems reaching 97% efficiency and consider that 50% is a reasonable benchmark to start with.

32. Is the new exemption provided by clause 29 appropriate? If not, why?

This exemption is unnecessary to the extent it, as stated in the Impact Statement, is intended to apply to variations to the rental rebate. Increases in the money payable as a result of a decrease in the rental rebate are not treated as rent increases under the current provisions of the Act. An exemption here may have unintended consequences.

The exemption should be removed.

33. Is the new exemption provided by clause 30 appropriate? If not, why?

We understand the need for clause 30 to ensure the obligations at 64A do not duplicate or conflict with those set out under the *Strata Schemes Management Act 2015*. We recommend, however, that the regulations specify that an exemption be made only for 'hard wired' smoke alarms.

Given the seriousness and urgent nature of smoke alarms repairs, we also are concerned there could be some confusion regarding responsibility for notification and an unintended dilution of the landlord's general obligations regards need for repair or maintenance. With significantly limited recourse to seeking an enforcement order on strata, tenants with exempted agreements could find themselves in a situation where they were unable to effectively seek and enforce timely and diligent repairs of smoke alarms.

The decision of the Appeal Panel of the NSW Civil and Administrative Tribunal in Bhandari v Laming [2015] underlined the landlord's general obligation to ensure a premises is fit for habitation, even where this obligation interacts with strata obligations and that the landlord is still required to take 'all necessary steps' to rectify an issue once notified by the tenant.

We therefore recommend the exemption provided by clause 30 be made further conditional on the landlord informing the owners' corporation of the work required and taking all

necessary steps to ensure rectification in an appropriately timely manner once notified of the need for repair by the tenant.

34. Is the exemption provided by clause 31 appropriate? If not, why?

We do not believe this exemption is appropriate in its current form. The Regulatory Impact Statement makes reference to other, undefined, processes by which repairs issues are resolved in social housing.

We can only guess at what these processes are intended to refer to - there is no formalised process we are aware of. The most common alternative process for review of decision-making in social housing, the Housing Appeals Committee, is not permitted to consider repairs issues. We do not accept the reasoning provided for the exemption.

We are aware that social housing providers, particularly the public housing provider, have to different degrees in different areas struggled to comply with their repairs obligations. We believe this is largely due to chronic underfunding of the sector related to the residualisation of social housing, particularly the rationing of eligibility which has effectively choked rental revenue.

We are concerned this exemption is proposed because otherwise this system will inevitably place NSW Fair Trading in a position of making rectification orders against a government owned corporation, the Land and Housing Corporation, which will not be complied with. This is the position the NSW Civil and Administrative Tribunal routinely found itself in before the resolution of contempt proceedings arising from Bott vs NSW Land and Housing Corporation [2018]. Since the decision in Bott vs NSW LAHC, the Land and Housing Corporation has made significant changes to its processes in order to avoid further contempt proceedings, and has successfully done so. These changes only apply once Tribunal hearings are initiated and are not relevant to the question of this exemption.

However though we understand Government may be unwilling to place two government entities into potential conflict there remains no reason why non-government entities should be exempted from the process.

For the purposes of the exemption there should be demarcation between public housing and community housing. An exemption on the basis of avoiding intragovernmental conflict may be seen as sound reasoning for public housing, but no such reasoning exists for community housing providers. As with public housing, there is no alternative resolution mechanism available to community housing tenants. The exemption, if it is to remain, should refer only to the NSW Land and Housing Corporation and the Aboriginal Housing Office.

Given the rectification orders system has not been operationalised and there is significant uncertainty relating to the model, it is unclear what the relevant departments object to. Matters unsuccessfully resolved through rectification orders will proceed to NSW Civil and Administrative Tribunal.

We recommend that there should be a sunset provision allowing exemption (i.e. that the rectification order system not apply) of the NSW Land and Housing Corporation and the

Aboriginal Housing Office for one year only before a review of the exemption is undertaken. At that point stakeholders will have been able to consider how the rectification order system is functioning in practice and assess its usefulness in a social housing context.

35. Are the timeframes for making applications to the Tribunal appropriate? If not, why?

We believe they are appropriate.

36. Is the jurisdictional limit set for rental bond and other matters adequate? If not, why?

See 37.

37. Are there any unintended consequences in prescribing a cumulative amount where an order is made with respect to both a rental bond and another matter?

We recommend the jurisdictional limit be set at no more than $20,000 for claims other than bonds, and remain at $30,000 for bonds claims.

The 77% overall combined increase in the jurisdictional limit of the Tribunal from $45,000 to $80,000 appears excessive and unjustified.

The proposed change to the bond limit from $30,000 to $40,000 represents a 33% increase. The proposed change to the general compensation limit from $15,000 to $40,000 represents a 166% increase.

An examination of listings on domain.com on 26th July found that $5,500p/w rent was currently the most that was being asked in the NSW market. These properties, of which there were only five, would require a bond of $22,000 which is below the current jurisdictional limit of $30,000. (NB: whilst there was one property advertised for $10,000p/w and another for $20,000p/w these properties appeared to be holiday rentals even though they were not advertised as such).

An examination of the Rental Bonds Data set showed that in the available 3 and a half years, only 66 of the 1,100,253 bonds lodged, or 0.006%, would exceed the Tribunal's current jurisdictional limit for bond claims. The proportion of bonds at that level is also not currently increasing, having peaked in 2016. Given that only 10% of bonds lodged are claimed in full by the landlord, and this rate is generally lower the higher the amount of bond paid, we find it unlikely that the jurisdictional limit is a common problem in the Tribunal, or will be in coming years.The parties involved may indeed prefer to deal with any claims in the courts.

The current limit would therefore still allow for a substantial increase in rents/bonds. An increase in the jurisdictional limit for bond claims therefore appears unwarranted and should remain at $30,000.

The Tribunal is not the appropriate place to deal with large compensation claims because it is designed to resolve disputes quickly and cheaply and with as little formality as possible

(s3 Objects of the *NSW Civil and Administrative Tribunal Act 2013*). The Tribunal is also not bound by the rules of evidence and may determine its own procedure (s38 NCAT Act).

In matters dealing with larger sums of money it is appropriate that there should be a high standard of proof. The rules of evidence should not be watered down let alone dispensed with entirely. Likewise procedural rules should be consistent and robust and not ad hoc or improvised.

Proceedings dealing with larger sums of money should be dealt with in the General Division of NSW Local Courts where there is greater formality. In defended cases, the rules of evidence apply, procedural rules are followed and cases are determined by a magistrate making it the proper forum for adjudication of compensation claims over $20,000.

We are aware from NCAT statistics that the vast majority of claims in the Tribunal are made by landlords. We are concerned that the higher limit will encourage ambit claims by certain landlords seeking to intimidate tenants into paying amounts which would not stand up to scrutiny. We are aware of instances of agreements being made in conciliation which were made under the effective duress of facing a high and unsupported claim, the effect of which a larger jurisdictional limit exacerbates. Equally we are aware of certain landlords advising tenants not to attend the NCAT hearing or taking steps to discourage their attendance. Decisions made ex parte are often made without the Tribunal having the opportunity to examine all evidence in the first instance.

We do not support the limit being cumulative as proposed in clause 33(3). The effect of cumulating will be to advantage landlords without equal advantage to tenants. A landlord with a bond approaching $30,000 has significant buffer against losses already, but should also be encouraged to pay for insurance or risk consequences. An insurance excess claim will not reach above the jurisdictional limit for either bond or general claims.

38. Should an interest rate on rental bonds still be prescribed? Why?

Yes. Although current interest rates have meant that the prescribed account type pays no interest, Australia is in a period of historic low interest rates. It is likely that this economic environment will not continue in perpetuity and so there will come a period when the interest provisions do return a benefit to tenants directly. Indeed we generally recommend a higher return ought to be considered.

We note that tenants are already generous with the money being held in trust on their behalf. They fund the tenancy-related activities of NSW Fair Trading, the residential lists of NSW Civil and Administrative Tribunal (despite most of the deeply-subsidised applications being for the eviction of tenants) and most recently the accommodation costs of owner-occupiers at Mascot Towers. At the same time, landlords reap the greater benefit of these services without having to contribute to the costs.

We also note that besides any interest payments, there is only one activity funded by the NSW Rental Bond Board which operates primarily for tenants benefit - the Tenants' Advice and Advocacy Program. However the Tenants' Advice and Advocacy Program has not had a real increase in funding in more than 15 years, despite the number of tenants in NSW and the funds of the Rental Bond Board doubling in that time.

We believe in this context removing the possibility of even the historically modest return on the bond sends the wrong signal to tenants. If this possibility is to be removed in the future, it must be replaced by a program of clear and direct benefit to tenants.

39. Are the prescribed savings and transitional provisions appropriate?

Yes.

40. Are any other savings or transitional provisions required?

For our proposed requirement under clause 12 to have dual-flush toilets, we accept that some allowance may be given to allow installation without undue financial strain. In that case we recommend a transitional arrangement applies to require a dual flush toilet be installed only once a toilet has been replaced, or 5 years, whichever is earlier.

41. Are the changes to penalty amounts in the proposed Regulation appropriate?

We note that the relationship between the penalty notice and the maximum penalty in the Act is inconsistent. We recommend a consistent relationship between penalty notice and maximum penalty. This allows the relative seriousness laid out in the Act to dictate the seriousness of the penalty notice. We have examined the proposed notices and made recommendations in the table below.

We recommend penalty notices be uniformly 50% of the maximum penalty. The proposed notices reach this level for sections 64A, 65C and 105C and exceed it at 162(5). As these are some of the most recently added penalties we suggest them as the benchmark older penalties should be brought into line. We particularly note that the penalty notice for an illegal lockout - the most egregious breach of a residential tenancy agreement, appropriately reflected in the large maximum penalty - has a very low proportional penalty notice. This should be rectified.

Table: Penalty provisions and proposed notices

Provision of the RTAct	Maximum Penalty	RIS Proposed penalty notice	RIS Proposed notice as percentage of maximum penalty	TUNSW recommended penalty notice
Section 22	$2,200	$440	20%	$1,100
Section 23	$2,200	$440	20%	$1,100
Section 24	$2,200	$440	20%	$1,100
Section 26 (2) and (2A) in relation to a landlord	$2,200	$440	20%	$1,100
Section 26 (4)	$2,200	$440	20%	$1,100

Provision of the RTAct	Maximum Penalty	RIS Proposed penalty notice	RIS Proposed notice as percentage of maximum penalty	TUNSW recommended penalty notice
Section 28	$2,200	$440	20%	$1,100
Section 29 (2)	$2,200	$440	20%	$1,100
Section 31A (1) and (2)	$2,200	$440	20%	$1,100
Section 32	$2,200	$440	20%	$1,100
Section 33 (2)	$1,100	$220	20%	$550
Section 34 (1)	$1,100	$220	20%	$550
Section 35 (1) and (2)	$1,100	$220	20%	$550
Section 36	$1,100	$220	20%	$550
Section 41 (9)	$2,200	$440	20%	$1,100
Section 42 (3)	$2,200	$440	20%	$1,100
Section 46 (1)	$2,200	$440	20%	$1,100
Section 55A (1)	$2,200	$440	20%	$1,100
Section 59 (1)	$2,200	$440	20%	$1,100
Section 64A (2)	$2,200	$1,100	50%	$1,100
Section 65C (8)	$2,200	$1,100	50%	$1,100
Section 105C (3)	$2,200	$1,100	50%	$1,100

Provision of the RTAct	Maximum Penalty	RIS Proposed penalty notice	RIS Proposed notice as percentage of maximum penalty	TUNSW recommended penalty notice
Section 120 (1)	$22,000	$2,200	10%	$11,000
Section 157A (4)	$2,200	$440	20%	$1,100
Section 159 (4)	$2,200	$440	20%	$1,100
Section 160 (1)	$2,200	$440	20%	$1,100
Section 161 (1)	$2,200	$440	20%	$1,100
Section 162 (5)	$2,200	$1,100	50%	$1,100
Section 213 (3)	$2,200	$440	20%	$1,100
Section 213A	$2,200	$1,500	68%	$1,100
Section 215	$2,200	$440	20%	$1,100
Section 216 (1) and (2)	$2,200	$440	20%	$1,100
Section 216 (3)	$1,100	$110	10%	$550