5 YEARS

OF THE *RESIDENTIAL TENANCIES ACT 2010* IN NEW SOUTH WALES

The *Residential Tenancies Act 2010* is now five years old. It has made a number of positive changes for tenants in New South Wales, but there are a number of important issues that are yet to be resolved. This report highlights the provisions that are working well, and ought to be retained, as well as those that require amendment to promote fairness, security and stability for tenants.

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5 years of the *Residential Tenancies Act 2010* in New South Wales

July 2015

1. Introduction

It is five years since the New South Wales Parliament passed the *Residential Tenancies Act 2010*. The Act received assent on June 17th 2010, and commenced operation on January 31st 2011. The Act requires the responsible Minister to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. Following this review, a report is to be tabled in Parliament before June 17th 2016.

The Tenants' Union of New South Wales (TU) 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 we are the resourcing body for the statewide network of Tenants' Advice and Advocacy Services (TAASs), who have collectively handled more than 135,000 questions and requests for assistance from tenants since the *Residential Tenancies Act 2010* commenced.

The TAASs' considerable experience, along with our own research and expertise, provides a significant body of knowledge to draw upon when considering the legislation and its aims. We are in a unique position to understand and demonstrate the functions of the Act, and how it operates, with a singular focus on the one-in-three people who live in rented homes across New South Wales.

We have produced the following report to assist the Minister in reviewing the Act.

2. Report summary

The rental market continues to grow in New South Wales, in terms of the number of households residing in rental accommodation, and the number of dwellings and overall value of investment in residential property. The *Residential Tenancies Act 2010* should ensure this growing number of tenants in New South Wales, whose participation in the housing system is predominantly limited to consumption, are protected from the vagaries of an investor lead housing market.

When considering the policy objectives of the Act, it is essential to interrogate just what 'balancing the interests of landlords and tenants' should mean. While both parties make a considerable investment for their stake in the rental market, their motivations and expectations are not the same. If the task for the *Residential Tenancies Act 2010* is to strike a useful balance for landlords and tenants, we must consider the interests of these parties within the context of the outcomes that are reasonably available to them.

The *Residential Tenancies Act 2010* has made a number of positive changes for tenants in New South Wales, but there are a number of important issues that are yet to be resolved. Our report highlights the provisions that are working well, and ought to be retained, as well as those that require amendment to promote fairness, security and stability for tenants.

There are six key themes underpinning the TU's comments on the terms of the Act:

- Housing insecurity is a feature of the Act, because landlords can end tenancies without a reason
- Landlords' repairs and maintenance obligations can be difficult to enforce
- Rent and utility charges are an important part of any housing transaction, and disputes about payment should always be simple to resolve
- Regulation of residential tenancy databases should remain a high priority for Government
- The changing profile of tenants makes it critical to ensure share-housing and co-tenancy provisions are effective and appropriate
- Occupancy principles should be adapted and expanded to ensure renters who are not covered by the Act have rights

We also make recommendations to improve a number of miscellaneous provisions in the Act.

Finally, tenants' confidence in enforcing their rights has been undermined by legal developments concerning the *Civil Liability Act 2002*, occurring subsequent to the commencement of the *Residential Tenancies Act 2010*. Utilising the many penalty and enforcement provisions already in place in the *Residential Tenancies Act 2010* may bolster confidence. But excluding claims made under the *Residential Tenancies Act 2010* from Part 2 of the *Civil Liability Act 2002* must also be considered by the NSW Attorney General as part of the review of this Act.

3. The rental market in brief

The New South Wales rental market continues to grow, and provides a long-term housing option for many families and households.

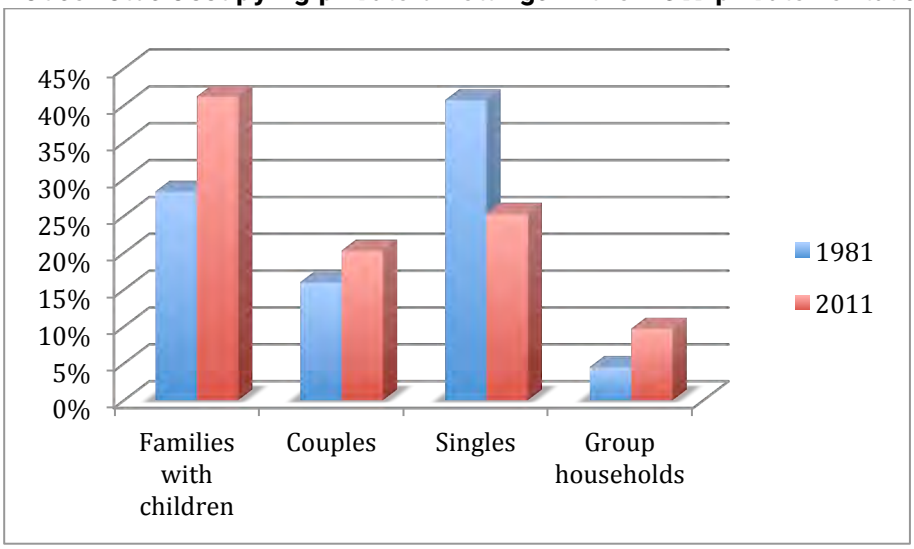
At the 2011 Census, there were 743,050 renter households in New South Wales, representing 30.1% of all private dwellings. This was an increase from 700,654 renter households in 2006 (28.4% of private dwellings) and 645,319 renter households in 2001 (27.5% of private dwellings). This trend has shown no signs of reversal. It is likely that the number or renter households will have increased further, occupying an even greater proportion of private dwellings in New South Wales at the 2016 Census.

Researchers have added to this picture. The Australian Housing and Urban Research Institute (AHURI) recently published a report on *long-term rental in a changing Australian private rental*

sector,[1] showing that over a third of the people living in the private rental sector have done so for ten years or more. The research shows that "private rental is far from a residual tenure for many households, and indeed forms part of a normative housing experience for large numbers of Australian households".[2]

AHURI's research draws out the composition of households in the private rental market, and demonstrates how this is changing. In 1981 the largest cohort of renters in the New South Wales private rental market were single person households, but in 2011 it was families with children. The incidence of group households has also increased in that time. With more people renting for longer, these demographic changes are likely to continue.

Fig 1. Households occupying private dwellings in the NSW private rental sector



Source: AHURI final report No 209, Table 5

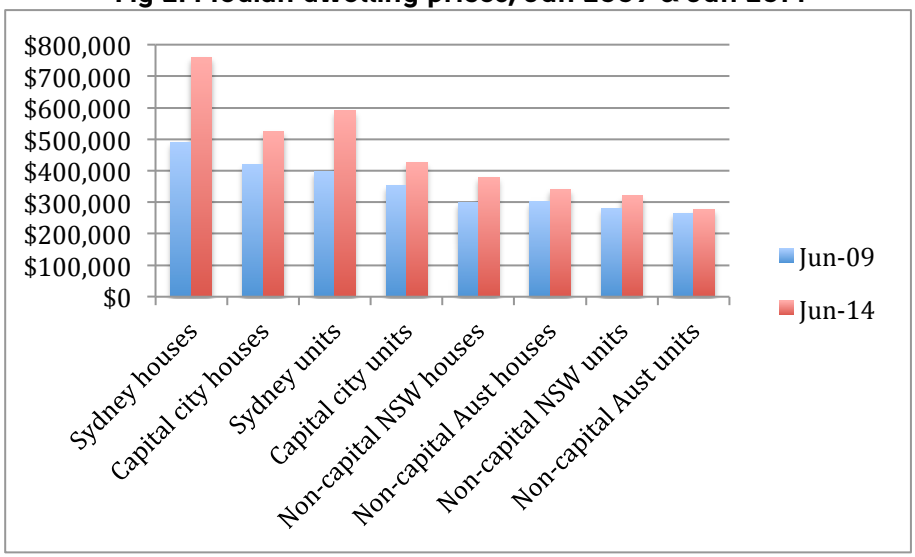
New South Wales property remains a popular option for investment. The Australian Taxation Office shows that in the 2009-10 financial year there were 746,755 rental properties in New South Wales against which taxpayers declared rental income. By 2012-13, the latest year for which data is available, this had increased to 832,685 properties. Over the four years up to and following the bill's introduction, there was an increase of 85,930 rental properties in New South Wales.

As a proportion of the Australian rental market, the number of rental properties in New South Wales is hovering around 30 per cent. This has declined slightly, dropping from 30.9 per cent in 2009-10 to 29.6 per cent in 2012-13. There could be any number of explanations for this. Such figures could be used to argue that investment in residential property has weakened in New South

[1] Stone, Burke, Hulse & Ralton, *Long term private rental in a changing Australian private renal sector,* AHURI final report No. 209, July 2013
[2] Ibid, page 25

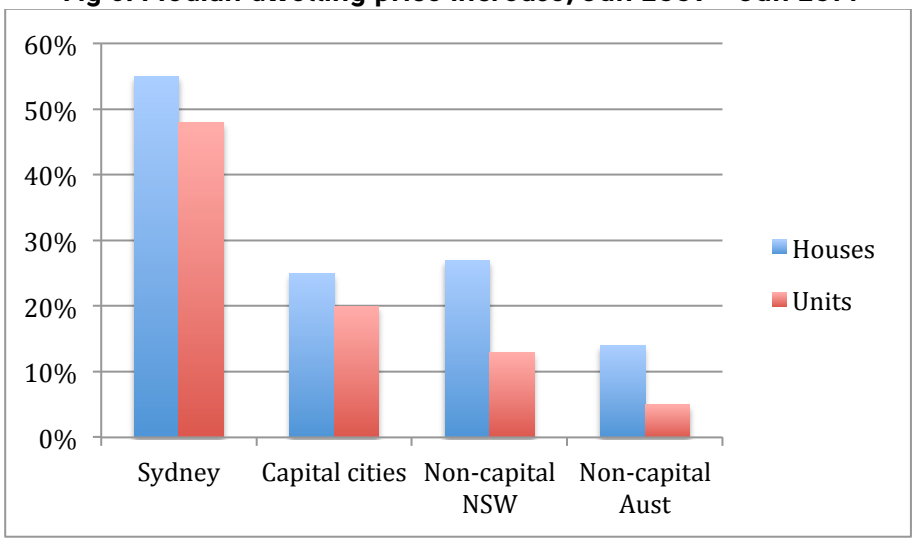
Wales since the introduction of the *Residential Tenancies Act 2010*, but other data indicate a more plausible explanation. There has been a significant increase in Australian property values over the last five years. With stronger price growth in Sydney and New South Wales than in other parts of the country, investment in our state's property markets has actually increased.

Fig 2. Median dwelling prices, Jun 2009 & Jun 2014



Source: ABS Residential Property Price Index Dec 2014, 6416 table 4
Non-NSW figures based on average of median prices

Fig 3. Median dwelling price increase, Jun 2009 - Jun 2014



Source: ABS Residential Property Price Index Dec 2014, 6416 table 4
Non-NSW figures based on average of medians prices

Looking at the value of residential property investment since 2009-10, New South Wales has seen considerable growth in real terms and as a proportion of similar investment throughout Australia. The Australian Bureau of Statistics' lending finance data[3] shows that approximately $22.3billion was lent for residential property investment in New South Wales in 2009-10, which was 31.4 per cent of all money lent for that purpose across Australia in that year. In 2013-14 this figure had more than doubled to $51.9billion, rising to 41.3 per cent of all money lent for residential property investment in Australia in that year. There can be no reasonable argument that investment in the New South Wales property market is in decline.

4. Policy objectives of the Act

The Act provides no direct insight into its policy objectives. Its long title simply describes "an Act with respect to the rights and obligations of landlords and tenants, rents, rental bonds and other matters relating to residential tenancy agreements".

The second reading speech, given by then Minister for Fair Trading Virginia Judge as the bill was introduced to the New South Wales Legislative Assembly in 2010, does provide some insight. In introducing the bill that would "modernise and reform the existing tenancy laws",[4] Minister Judge said:

> *"…This Government wants to see landlords being able to manage their investments in a way that optimises their returns; at the same time it wants to see tenants having access to suitable rental accommodation and being able to make informed choices about where they live, how long they live there and what exactly they are paying for…"*
>
> *"… We want landlords and tenants to be clear about their rights so that they are empowered to enforce those rights. We want landlords and tenants to take a responsible approach to their obligations to each other…"*
>
> *"… The bill strikes a fair and equitable balance between the often competing interests of landlords and tenants."*

In reviewing the Act, the Minister is to determine whether these policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives.[5]

For the most part, these objectives remain sound. It is appropriate that our renting laws offer clarity and promote an efficient, responsive and well-informed sector. We should strive for a law that encourages parties to take a reasonable approach to their responsibilities.

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[3] Australian Bureau of Statistics *Lending Finance Data* (series 5671 tables 8 & 19) April 2015
[4] Then Minister for Fair Trading, second reading speech June 2nd 2010 *(Hansard reference: page 23596)*
[5] *Residential Tenancies Act 2010* (NSW), s227

Landlords should be able to manage an investment and capture returns, while tenants make informed choices about where they will live and for how long. But in considering these very different interests, and the extent to which the *Residential Tenancies Act 2010* may be called upon to balance them, it is important to keep in mind the motivations from which they arise and the outcomes they produce.

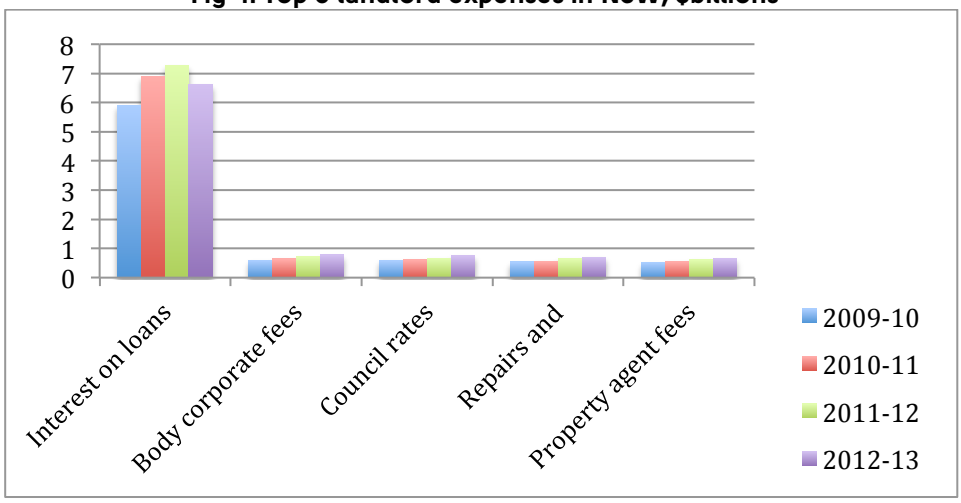
Early in 2014, the TU conducted a survey of almost 600 tenants in New South Wales. When asked "Why do you rent", 57 per cent of respondents said it was because they could not afford to buy a home. By contrast, 15 per cent said renting was more affordable in their preferred area. Just 9 per cent said they preferred the flexibility and mobility of renting.[6]

Investor motivations are quite different. As the Real Estate Institute of New South Wales said in its Preliminary Submissions on the draft Residential Tenancies Bill 2009,[7] *"the investor is not driven by a desire to provide housing; the investor simply wants a return on the investment".* This view is supported by academic research, which consistently finds that financial and economic considerations are the predominant motivating factors for property investors.[8]

It is often implied – and sometimes made very explicit – that landlords will withdraw from the rental market if tenancy legislation increases their burden, to the detriment of financial returns. But this fails to acknowledge the real costs of investing in property. Data from the Australian Taxation Office shows the overwhelming cost to landlords over the four years to 2012-13 has been the interest payments on money borrowed. Of the top five expenses claimed by landlords each year, only repairs and maintenance costs could be reasonably attributed to the imposition of residential tenancy agreements.

[6] Tenants' Union of NSW, *Affordable Housing and the NSW Rental Market 2014 Survey Report*, April 2014
[7] Real Estate Institute of NSW, *Preliminary submission on the draft residential tenancy bill 2009,* page 12
[8] See for eg. Wood & Ong, *Factors shaping the decision to become a landlord and retain rental investments*, AHURI Final Report No. 142, 2010

Fig 4. Top 5 landlord expenses in NSW, $billions



Source: Australian Taxation Office statistics, rental property schedules

On the other hand, landlords collect significant amounts of income from their tenants each year. In the 2009-10 financial year landlords declared $9.7billion in rental income for properties in New South Wales. This increased to $12.1billion in 2012-13. An increase is to be expected given the growth of the sector, but even so this represents approximately $2,175.00 more rent to landlords in 2012-13, per property, than in 2009-10. The average costs declared by landlords over the same period rose by $880.00 per property.

Landlords and tenants pay a high price for their stake in the New South Wales rental market. But while landlords base their risk on the prospect of a steady yield and ultimate capital gains, many tenants are in it simply because they can't be somewhere else. If our renting laws are to be tasked with 'balancing' their conflicting interests, we should be paying particular attention to risk and return for tenants, as well as for landlords.

This brings into very sharp focus the second question for the Minister to consider – do the terms of the Act remain appropriate for securing its policy objectives?

5. The legislation in focus

5.1 Housing insecurity as a feature of the Act

The Act fundamentally fails to ensure tenants can make informed choices about where they will live, and for how long. It does this in several ways.

5.1.1 Termination without grounds – sections 84, 85 and 94

The most significant way the Act undermines tenants' housing choices is by allowing landlords to end tenancies without grounds. Section 84 of the Act allows a tenancy to be terminated with only 30 days notice at the end of a fixed term, and section 85 allows a periodic tenancy to be terminated

with 90 days notice, without requiring a specific reason. Landlords do not need to prove or even justify their reason for termination – they simply hold the right to end tenancies on their say so.

Put another way, tenants can be made to move – at considerable personal and financial cost – without a good reason. Or, as is more likely, for a bad reason, because there is always a reason to end a tenancy. These provisions become landlords' trump card, and tenants are acutely aware of this. In our 2014 Affordable Housing Survey, 77 per cent of respondents said they had put up with a problem, or declined to assert their tenancy rights, for fear of an adverse consequence.[9]

But it's not just a question of whether tenants will baulk at raising concerns with a landlord. It is a common occurrence for tenants to receive a notice of rent increase with a no-grounds notice of termination in the same envelope, inviting them to choose which one they prefer. Nor is it unusual for tenants who take their landlord to the Tribunal, on matters of performance of residential tenancy agreements, to receive a no-grounds notice of termination some time thereafter. We are aware of one occasion where a real estate agent served a no-grounds notice of termination in the lifts on the way out of the Tribunal; and another where an agent drafted a no-grounds notice of termination and handed it to the tenant before the Tribunal member had finished delivering a decision on an application for repairs.

The 'termination without grounds' provisions affect more than just whether tenants can make informed choices about where they will live, and for how long. They serve as a constant reminder to tenants that their hold on property is tenuous, and only ever at the will of the landlord. They actively undermine the objective of ensuring tenants are empowered to enforce their rights.

The TU proposes a change to the *Residential Tenancies Act 2010* to amend sections 84 and 85 to remove the option to end tenancies without grounds, and instead provide an expanded list of grounds. This could include circumstances where the landlord requires the property for another legitimate purpose, or where the property is to be renovated such that vacant possession is required. The question should be: does the landlord's purpose require the recovery of vacant possession, or could it be affected without displacing a sitting tenant? Such a question should be subject to rigorous oversight by the New South Wales Civil and Administrative Tribunal, and the Tribunal should have discretion to decline to make termination orders where appropriate. This discretion should be available to the Tribunal even where a landlord's grounds for termination are made out, in circumstances where the tenant's need to remain in occupation outweighs the landlord's need to recover possession.

This expansion of grounds would be in addition to those that already appear in the Act, such as the tenant being in breach of the residential tenancy agreement (for fixed term and periodic tenancies) and where vacant possession is a condition of sale (for periodic tenancies). We note this would build upon and improve the model in the Tasmanian *Residential Tenancy Act 1997.*

[9] TU's *Affordable Housing Survey*, above, n6

Section 94 of the *Residential Tenancies Act 2010* also allows landlords to end long-term tenancies without grounds, by direct application to the Tribunal rather than serving notice upon a tenant. In singling out tenancies where there has been continuous occupation of premises for 20 years or more, the Act suggests long-term tenancies should be treated differently. Aside from the termination process itself, the Act treats long-term tenancies differently in two ways: first, by giving the Tribunal discretion over the termination of such tenancies (which we say should apply to all tenancies); and second, by ensuring a minimum period of 90 days for the return of vacant possession to the landlord, where the Tribunal's discretion is not exercised.

The TU recommends the intention behind section 94 be retained and strengthened. The termination of long-term tenancies by direct application to the Tribunal is appropriate, and where the Tribunal makes orders to end a long-term tenancy it should be required to suspend vacant possession orders for a minimum of 90 days. But what is considered a 'long-term tenancy' should be reviewed. A reduction from 20 years to 10 years continued occupation is appropriate, given the changing profile of tenants in the private rental market.

As noted above, families with children are now the largest cohort of renter households in Australia, and there are a growing number of people living in rental accommodation for 10 years or more.[10] There is also an ageing profile of tenants in the private rental market, and as AHURI's researchers have said: "if large numbers of long-term renters aged 45-64 years remain in the sector they could swell the number of long-term private renters aged 65 years and above quite substantially in the coming decades".[11]

The current review of the *Residential Tenancies Act 2010* can address the need for stability and security for this growing number of older people, and families with children, who are tenants in the private rental market. And it should.

5.1.2 Retaliatory notices of termination

Section 115 of the Act is said to provide the check and balance against landlords ending tenancies for bad reasons. It allows the Tribunal to consider a landlord's motivation for issuing a notice of termination, and refuse to make a termination order if it finds the notice retaliatory.

As noted in the discussion on termination without grounds, the retaliatory eviction provisions do not always dissuade landlords or agents from using them for bad reasons. Indeed, in yet another example we are aware of, a tenant received a no-grounds notice of termination less than two weeks after the Tribunal found that an earlier notice was retaliatory. As can be seen in the results of our 2014 Affordable Housing Survey, these provisions do not give tenants a great deal of confidence in asserting their rights.

It is telling that section 115 does not appear to be relied upon very frequently in the Tribunal. Perhaps this is because the Tribunal has, on the whole, taken a cautious approach when

[10] AHURI Final Report No. 209, above n1
[11] *AHURI research and policy bulletin issue 185*, Feb 2015

considering the section. There are around ten reported decisions where the Tribunal has been asked to consider whether a notice of termination was retaliatory – all but one have been decided in favour of the landlord.

With such a paucity of cases, it is difficult to say the law is settled on retaliatory evictions. The Tribunal is yet to produce a consistent series of decisions outlining the themes at play in these matters. Several decisions turn on landlords' potential other motivations, one refers to the proximity in time between the tenant's and landlord's actions, and in one case the Tribunal sees it as a discretionary power that it would decline to exercise even if it found the notice retaliatory. Notably, there is only one reported decision after 2013.

It appears that where tenants are referring to section 115 at all, they are doing so in the most clear-cut of cases. But we're also aware that retaliatory termination applications are often not proceeding to hearing in the Tribunal. These matters frequently result in termination orders by consent, because conciliators advise this is the preferable outcome when 'the relationship between landlord and tenant has broken down'. This is not in keeping with the 'balancing of interests' objective of the Act – such as it is – and is a poor reflection of our state's housing system.

Our proposal to amend sections 84 and 85 would resolve any question of landlord motivations for ending tenancies. If a landlord may only end a tenancy on specified grounds there will be a much reduced role for the Tribunal in deciding what lies behind the decision to issue a notice of termination. It will be a matter of determining whether the landlord's need to recover vacant possession can be firmly established, and that they are not merely masking their true grounds.

In any case, with the law as it currently stands, section 115 should be reviewed and strengthened, so it can be put to better use by tenants.

5.1.3 Termination for non-payment of rent – frequently failed to pay

A further provision that affects housing security is section 89, which ensures a tenancy doesn't end for non-payment of rent if the tenant makes good before their eviction. This was an innovation in the *Residential Tenancies Act 2010*, and the TU welcomed it in the consultation draft. But a last minute amendment to section 89 has undermined the provision, and makes it difficult to predict what will happen when a tenant takes steps to clear arrears in response to a notice of termination for non-payment of rent.

The amendment was the addition of subsection 89(5), which leaves it open to a landlord to proceed with the eviction process, where they can satisfy the Tribunal the tenant has 'frequently failed to pay rent owing' on or before the due date. But what is meant by 'frequently failed to pay' remains open to question. When the amendment was made it was said to discourage the deliberate withholding of rent by tenants who might only ever pay 'on the courthouse steps' if section 89 was allowed in its original form.

Although not consistent in its approach to section 89(5), the Tribunal has often interpreted it more broadly than intended. Questions of whether a tenant has ever made a late payment of rent, irrespective of the significance of the arrears in question to the hearing, have often found their way into the Tribunal's deliberations. The Tribunal regularly invokes section 89(5) in making termination orders, in one way or another, with the result that a tenant can never be sure that payment of arrears will actually result in the continuation of their tenancy. Ultimately, this is to the detriment of all parties; landlords miss out on the payment of arrears,[12] while tenants opt to put their money towards the safer venture of finding another place to live.

This is a problem that can be very easily solved. Section 89(5) could be repealed or, failing that, amended to make its intention clear: tenants who *vexatiously* fail to pay rent owing on the due date should not be assured of their continuing tenancy, when issued with a notice of termination for non-payment of rent.

5.2 Repairs and maintenance

5.2.1 Landlords' repair obligation

One of the most common complaints raised by tenants is that the landlord will not carry out necessary repairs. Despite this, the *Residential Tenancies Act 2010* has reduced landlords' repair obligations, and limited the Tribunal's ability to make repair orders by introducing a 'reasonable diligence' defence to a tenant's claim for repairs.

Section 65 of the Act sets out the remedies for tenants when a landlord fails to carry out necessary repairs: a tenant may apply to the Tribunal, and the Tribunal may order the landlord to see to the repair. But if the landlord can show they have acted with 'reasonable diligence' then the Tribunal cannot make the order. This may seem like a reasonable addition to the law, but it can leave tenants without an effective remedy when their house in poor repair.

It is also an unnecessary complication. The Tribunal retains a clear discretion over the remedy for repairs, which means it could decline to make a repair order even where a landlord has failed to meet its obligation. The change to the law means that landlords can now invite the Tribunal to eliminate its discretion, by asking it to find that the landlord has acted with reasonable diligence and is therefore not in breach.

The TU proposes the 'reasonable diligence' defence be removed from section 65 of the Act. The question of reasonable diligence is more appropriately a matter for determining remedies, than obligations to repair.

5.2.2 Ending a tenancy when the landlord fails to repair

The Act provides two methods by which a tenant can end a tenancy when the landlord fails to carry out repairs – by issuing a notice of termination and giving vacant possession, pursuant to section

[12] For a discussion on the financial benefits of sustaining a tenancy, see http://mreep.org.au/agents/

98, or by obtaining a Tribunal order pursuant to section 103. The 'reasonable diligence' defence appears to be impeding both of these, too.

Where a tenant seeks to end an agreement by issuing a notice of termination, section 98(4) allows the landlord to ask the Tribunal to decide whether it is appropriate for the tenancy to end, with regard to any effort they may have made to remedy the breach. But landlords rarely do this. Rather, they wait for vacant possession to be returned then make a claim against the tenant for abandoning the tenancy. By raising the 'reasonable diligence' defence in these matters, landlords are able to avoid the question of remedy by convincing the Tribunal that they are not in breach of the tenancy, and that the tenant is liable for abandonment, even where the property remains in need of repair.

This renders section 98 somewhat ineffective. It leaves tenants to rely on the alternative provision at section 103, which allows them to apply to the Tribunal to have the tenancy terminated on the grounds of the landlord's breach. Notably, the same issues arise as to whether the landlord has acted with 'reasonable diligence'. In the face of an identified need, the question of whether the failure to repair justifies termination is again secondary to establishing whether that failure is a breach in the first place.

The overall effect of these provisions, and the way they operate, is that it has become unwise for tenants to take decisive action when a landlord has failed to properly effect repairs. Instead, tenants must apply to the Tribunal and hope for a favourable outcome, as well as a reasonable timeframe in which to act, in circumstances where time and resources should be better employed in the pursuit of another tenancy.

The TU's proposal to remove the 'reasonable diligence' defence from section 65 of the Act should go some way to resolving these issues.

5.3 Rent and other charges

Rent plays a critical role in any relationship between landlord and tenant. Rent is a significant cost to tenants and an important source of revenue for landlords. But there are other costs associated with residential tenancy agreements, relating to the provision of and recurring charges for utilities. Tenants should be able to make informed choices about exactly what they are paying for, but they should also be able to resolve disagreements about rent and other charges quickly and simply.

5.3.1 'Retaliatory' rent increases

We have already noted the results of our 2014 Affordable Housing Survey, in which 77% of respondents said they had put up with a problem, or declined to assert their rights, because they were worried about an adverse consequence.[13] Comments in response to the question indicate it is not just the possibility of eviction without grounds that worries tenants. The prospect of a 'retaliatory' notice of rent increase also weighs heavily – as one respondent said: "any time you

[13] TU's *Affordable Housing Survey*, above, n6

contact the landlord about problems with the property, if they do fix it, they put the rent up by at least 10 per cent. It's better to stay off their radar".[14]

It is possible for landlords to increase the rent as a de facto means of ending a tenancy. By putting the rent up to make it beyond their means, tenants have no option but to end the tenancy. In a recent example from a Tenants' Advice and Advocacy Service, a landlord sought to increase the rent by $120.00 per week after their tenant took a number of complaints to the Tribunal. After several hearings and adjournments it was evident that the landlord would not take a responsible approach to their obligations, so the tenant moved out. When the landlord listed the property for rent again, it was at the original rent.

But implications flow beyond the issue of affordability and stability for tenants. If tenants are discouraged from reporting damage or asking for repairs when needed, because they are worried about the rent going up, it could impact upon their liabilities for repairs at the end of the tenancy. Similarly, it could impact upon landlords' expectations about repairs and maintenance requirements for a property.

This raises three points for consideration in the review of the legislation. First, section 44 of the Act requires the tenant to apply to the Tribunal if they wish to challenge a rent increase. As the applicant, it is the tenant who bears the onus of proof. But much of the information required to prompt full consideration of the matters the Tribunal may consider will be not be available to the tenant. It will be more readily available to landlords.

Second, the only basis for challenging a rent increase is that it is excessive. This makes it especially difficult to bring arguments to the Tribunal about the motivations behind a notice of increase, even where they are demonstrably unreasonable.

Third, while the Act has broadened the matters available for consideration by the Tribunal when in rent increase matters, the concerns listed at section 44(5) are still too limited. In particular, the restriction on considering a tenant's ability to pay an increase (at s44(5)(h) creates additional insecurity for tenants; and the lack of any direct reference to motivating factors means landlords are not minded to consider their reasons for increasing the rent before issuing a notice to their tenant.

Taking these issues into account, the TU proposes a change to the way the Tribunal considers excessive rent increase claims. Where a proposed rent increase exceeds the consumer price index over the relevant period, the onus should be on the landlord to show the increase is not excessive. Where the increase is lower than the consumer price index, the onus should be on the tenant to show it is excessive. The frequency of rent increases should be limited to once per year, to ensure tenants can make informed choices about what exactly they are paying for. And the Tribunal should be able to consider the question of affordability, and other questions relating to the

[14] TU's *Affordable Housing Survey*, above n6, page 11

landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.

5.3.2 No recovery of overpaid rent after 12 months, when notice of increase is not valid

Section 41(10) of the Act prevents the Tribunal from adjusting the rent payable and returning overpaid rent to a tenant, per section 47, where the overpayment has arisen from an invalid notice of rent increase and no recovery attempt has been made within 12 months of the increase. In effect, section 41(10) prevents a tenant from taking action in the Tribunal, concerning an invalid rent increase, after 12 months.

If section 41(10) is intended to put a time limit on claims for overpaid rent arising from invalid rent increases, it goes too far. It is also unnecessary. It allows for an unchecked wrong to become right, as long as it remains undiscovered for the required length of time. But the Tribunal is already equipped with section 47(5), which gives it discretion to order the repayment of '*rent or any other amount*'.

The TU proposes section 41(10) be removed. A landlord may make representations to the Tribunal as to the nature of any defect in a notice of rent increase, and the time that has elapsed since it was issued, in response to a tenant's application for a refund of overpaid rent. Any specific limitations in such matters, as to quantum or time limits on application, can be clarified with an amendment to the Tribunal's discretion at section 47(5).

5.3.3 Break fees

Another innovation in the *Residential Tenancies Act 2010* was the break fee (section 107), where a tenant's liabilities when ending a tenancy during fixed term are pre-determined.

The TU has generally been supportive of the break fee concept, as it provides a straightforward way for tenants to compensate landlords for the unanticipated end of a tenancy. However, we have always maintained that the fees are set too high. Prior to the break fee concept, landlords would have to calculate their loss arising from abandonment, demonstrating how it had been mitigated, and then ask the tenant to pay. The likelihood of a landlord genuinely losing the equivalent of six weeks rent when a tenancy ends prematurely has always been questionable – even in areas with high vacancy rates. But it was common for landlords and real estate agents to get this wrong, often insisting that tenants continue to pay rent until a new tenant was in place. Consequently it was also common for tenants to challenge the landlord's costs in the Tribunal.

In response to significant lobbying by others against the break fee concept, the Government of the day sought to compromise. The Act provides for both methods of calculation: either the pre-determined break fee, if agreed, or the old regime of mitigated loss arising from breach. This has lead to considerable confusion, with many landlords and real estate agents trying to claim both types of compensation at the same time.

But it has also caused another problem. Tenancies are offered on a take-it-or-leave-it basis, and landlords do not offer terms that will be against their interests, so break-fee terms tend to appear in agreements for properties where vacancy rates are low, but not where vacancy rates are high. This means windfalls for landlords who can relet their property fairly quickly, and the same old disputes about liabilities and mitigation of loss for those who can't.

These issues can be resolved by making a definite choice to legislate one method of calculation over the other. The TU remains in favour of the break fee concept because it can reduce complicated disputes over liabilities when a tenancy ends earlier than expected, but we also remain concerned that break fees are currently set too high. They should be no more than three weeks rent.

5.3.4 Utilities, water and communications

Provisions that clarify responsibility for payment of utility supply and usage charges are sensible. Ensuring tenants' actual usage of services such as electricity and water can be properly calculated is appropriate. The requirement for separate metering to be in place before such charges can be levied on tenants, at sections 38, 39 and 40, achieves this.

The TU also supports the 'water efficiency measures' provided by section 39(1)(b). We note they do not apply to leaking toilet cisterns, and there is no requirement for a landlord to demonstrate that the prescribed water efficiency measures are in place – for example by certification from their plumber. These provisions could be improved.

We note the absence of provisions concerning communication services such as fixed-line telephone and internet connections. These may be regarded as a luxury, given the availability of wireless and mobile services, but for many low income households the costs associated with mobile phone and broadband services can quickly become a major financial burden.

Issues arising from the installation of solar panels on rooftops have begun to emerge. Because solar rebates or feed-in tariffs are only available to the property owner, affected landlords must have the power connected in their name and seek to recover costs from the tenant. But where panels are installed on dwellings that are to let, prospective tenants may assume they will receive some benefit from solar rebates in much the same way they will benefit from reduced heating costs in a property with double glazed windows. Indeed, we are aware of cases where premises with solar panels have been actively marketed to elicit this kind of assumption, which may be factored into the level of rent a tenant is prepared to pay.

5.4 Database regulation

The *Residential Tenancies Act 2010* seeks to regulate the operation and use of residential tenancy databases. This was a welcome inclusion and in many respects it has been working well, allowing tenants to have vexatious or unjust listings removed and ensuring a listing no longer results in a protracted exclusion from the private rental market.

5.4.1 Debt-related listings

Section 212 of the Act provides that a database listing can only be made where a breach of a residential tenancy agreement has resulted in a debt, that is greater than the tenant's bond, accruing to the landlord; or that has resulted in a termination order in the Tribunal.

The wording of section 212 is causing problems, because it makes reference to what a person "*owes the landlord*" rather than a proven debt. Real estate agents and landlords often list tenants' personal information because of an alleged debt, without taking the matter to the Tribunal. Section 212(c) should be amended to ensure that database listings require a Tribunal order irrespective of the reason for listing.

5.4.2 Novel database products

The conduct of one database operator is testing the limits of the Act's provisions, highlighting some areas where it should be improved. It has developed a range of products that it claims are not subject to the Act's coverage, such as a database of Tribunal references that it says are a matter of public record, and a tool that allows subscribers to 'flag' tenants they wish to keep tabs on so that they will be notified if the tenant approaches another subscriber for a new tenancy. In yet another database the details of every 'tenancy history' search are retained, and we are aware that subscribers sometimes mistake these details for a 'bad tenancy history'.

The TU recommends two straightforward amendments to the Act to allow tenants to avoid the injustices that novel database products can cause.

The first is to refine the definition of 'residential tenancy database' at section 209 of the Act. The definition contains two parts, and both are too narrow. The first part (a) refers to the kind of information a residential tenancy database contains; both (i) and (ii) should be amended to include 'occupation or *prospective occupation* of residential premises'. The second part (b) refers to the purpose for which information is stored; the words '*for checking a person's tenancy history to decide whether a residential tenancy agreement should be entered into with the person*' should be deleted from this part.

The second is to refine the 'further restriction on listing' at section 213(3) of the Act, so that a database operator is entirely prevented from listing personal information in a residential tenancy database. Listings should be left to those subscribers who wish to share information with others, not to database operators themselves.

5.4.3 Excessive fees

There is a further concern where the Act prohibits database operators from charging an excessive fee for giving a tenant access to their listing (at section 216). No action may be taken against an operator who fails to comply with this requirement. The inclusion of a penalty provision at section 216(3) must be considered to ensure that tenants are not placed in financial hardship to determine whether they are listed on a residential tenancy database.

5.5 Share-housing and co-tenancy provisions

The *Residential Tenancies Act 2010* made improvements to the law for tenants who share their premises with others, while at the same time excluding a considerable cohort of share house occupants from its coverage.

5.5.1 Recognition and regulation of shared occupation

Provisions that recognise and confirm a tenant's right to transfer or sub-let a tenancy (sections 74 and 75) are especially welcome, as are provisions that allow for co-tenancies to be sensibly brought to an end without substantially affecting the landlord-tenant relationship (sections 101 and 102). The TU remains of the view that landlords should have regard to reason when considering consent for a tenant to transfer or sublet their tenancy, and propose that section 75 be amended to reflect this. We also suggest that the 'special circumstances of the case' is too high a threshold for the Tribunal to consider ending a co-tenancy (at section 102(2)), and recommend this be amended to just the 'circumstances of the case'.

5.5.2 Exclusion of sub-tenancies where there is no written agreement

Section 10 of the *Residential Tenancies Act 2010* appears to be designed to exclude from its coverage any sub-tenant who has not clearly been given an interest in a tenancy by their head-tenant. The provision is based on the assumption that occupants of a share house do not generally intend their tenancy relationships to be regulated in the same way as landlords and tenants; but where they do, they may opt into the Act by transferring part of their tenancy or executing a written sub-tenancy agreement.

Whether or not this assumption is true, the inclusion of section 10 creates significant problems for the growing number of people residing in shared housing in New South Wales. Regardless of how they see themselves, relationships between head-tenants and sub-tenants operate with some of the same power imbalances that exist between a landlord and a tenant. This is reflected in the Act's definitions of landlord and tenant at section 3, but seems to have been overlooked where section 10 is concerned. Head-tenants offer sub-tenancies on a take-it-or-leave-it basis, and prospective sub-tenants who are not offered a written agreement are unlikely to be in a position to insist on one as a condition of acceptance.

This is not to say that a head-tenant couldn't offer an interest in their tenancy, in substance, when making an offer to sub-let that is not accompanied by a written agreement. The test provided by section 10 is an arbitrary one, that doesn't necessarily reflect the intentions or the conduct of head-tenants and sub-tenants. We are aware of examples where would-be sub-tenants, aided by their head-tenants, have completed tenancy application forms to ensure they are known to real estate agents and landlords, and have attended to the transfer of interests in rental bonds in the correct way, only to find they are still not considered a sub-tenant under the Act because of section 10. However, most don't look into their legal status as a renter until a dispute of some kind arises, and by then it is often too late, as relationships have soured, to get the necessary paperwork in order.

Common problems for sub-tenants who are excluded from the Act are unfair notice periods to end sub-tenancies, and limited options to recover an interest in a bond. Sub-tenants express surprise

and dismay when informed they do not have rights under the Act, raising doubt about assumptions that share house occupants do not want their relationships to be regulated in the same ways as landlord and tenant relationships. Even so, the absence of any other legislative protection makes it all the more important for the Act's coverage of shared housing to be considered on the substance of agreements, rather than their form.

The TU recommends the repeal of section 10.

5.5.3 Domestic violence between co-tenants

Section 79 of the Act provides that a co-tenancy ends when the co-tenant is prohibited from accessing their rented premises by a final apprehended violence order. This provision is a welcome step towards giving domestic violence survivors a clear and useful means to end joint liabilities with a violent co-tenant, but it does not go far enough. In the result, it only slightly changes the nature of the problems it was intended to solve.

An interim apprehended violence order that excludes a violent co-tenant from their premises does not end a co-tenancy. But final apprehended violence orders can take a considerable amount of time to obtain, and problems arise because they must identify the premises from which a person is excluded in order for the co-tenancy to end. It is common for parties to have ceased residing together by the time final orders are made, so the necessary exclusions can be easily overlooked.

In the time it takes for final orders to be made – whether or not they are effective to end a co-tenancy – it is common for an excluded co-tenant to refuse to pay their share of the rent, or otherwise contribute to the performance of the residential tenancy agreement, while the remaining co-tenant remains bound to the tenancy. The section 100(1)(d) option to end the tenancy without penalty is not activated until a final apprehended violence order is obtained; and an application to the Tribunal to end the co-tenancy may be fraught as questions of notice and representation could facilitate a breach of the interim apprehended violence order. Even so, the threshold of 'special circumstances of the case' may be set too high, and as such the co-tenant who seeks an apprehended violence order remains just as disadvantaged by the current Act's provision as they did before its introduction.

To deal with this problem, the TU proposes amendments to sections 79 and 102(2). On the one hand, the Tribunal should be required to consider just the 'circumstances of the case' when deciding whether to end a co-tenancy. And on the other hand, it must be directed to make orders 'on the papers' where an application to end a co-tenancy has arisen from an interim apprehended violence order that prohibits a co-tenant from accessing the residential premises, but where a final apprehended violence order has not yet been made.

Further, the *Residential Tenancies Act 2010* should ensure that where damage to tenanted premises has arisen because of domestic violence during a co-tenancy, it is the perpetrator who is liable. Currently survivors of domestic violence bear some or all of the cost of such damage, because liabilities remain joint and several until the co-tenancy ends.

5.6 Coverage of the Act

The TU has long-held concerns that certain types of premises (section 7), and certain types of rental agreement (section 8), are expressly excluded from the Act's coverage. Section 10 potentially excludes a growing number of share house occupants from the Act's protection because of the type of agreement they have, but with regard to the form of their agreements rather than the substance. We note the pending repeal of the *Landlord and Tenant Act 1899* that would have given basic statutory protections to renters in at least some of these types of premises, and some of these types of agreement.

Unless covered by other statutory protection, renters who are excluded from the *Residential Tenancies Act 2010* have no protection beyond what the common law offers. One form of protection comes under the *Boarding Houses Act 2012*, which came into operation not long after the *Residential Tenancies Act 2010*. Under the *Boarding Houses Act* a number of occupancy principles apply to agreements for accommodation in registrable boarding houses. These principles could be adapted and expanded to cover all types of rental agreement that are not otherwise subject to a specific legislative scheme. Subordinate legislation or standard form agreements could set appropriate minimum standards for the various types of accommodation to which they would apply, subject to the overarching occupancy principles.

5.7 Further recommendations

The TU makes several other recommendations that will improve the Act and ensure it better meets its policy objectives.

Section 19 should be amended to prohibit terms against the keeping of pets. Tenants' obligations at section 51 are broad enough to ensure that responsible pet ownership is a term of every agreement, and that tenants will be liable for any damage or nuisance caused by their pet/s.

Section 26 requires landlords and agents to disclose certain material facts to a tenant before entering into a residential tenancy agreement. However, this does not form part of every agreement, so tenants cannot terminate tenancies for breach of this obligation. This should be rectified. There are also a number of other material facts that should be considered for disclosure at section 26, such as whether the landlord resides in close proximity, whether there are any major developments approved in the area, the extent of any repairs and maintenance works undertaken at the property during the previous 24 months, and any other factors that may have some bearing on a household's enjoyment of the property were they to take up occupation.

Section 51(1)(e) limits the number of persons who may reside in residential premises to the number specified in a residential tenancy agreement. We are aware of this provision being used to prevent a couple from adopting a child, as the landlord would not allow a third person to reside in the premises. Section 52 should be amended to ensure that landlords cannot unreasonably refuse to allow an additional occupant to move in with a tenant, provided it would not lead to over crowding. Disputes about the number of people who may reside in a property should be determined in the Tribunal.

Section 91 gives the Tribunal discretion on the question of termination for illegal use of premises. This is appropriate, as it ensures tenancies will not be brought to an end because of a tenant's vicarious liability for the illegal activity of a deceptive occupant, or the loss of housing for non-tenant family members of a tenant who engages in illegal activity. It also acknowledges that the criminal justice system is better placed than a tenancy Tribunal to respond to issues of illegal or criminal behaviour, and that the *Residential Tenancies Act 2010* is not a punitive law. The Tribunal's discretion in these matters must be retained.

Section 100 allows tenants to end a fixed term tenancy, in specified circumstances, with 14 days notice. The provision is an excellent one, ensuring tenants are not locked into agreements where particular hardship or significant disruption will arise. The provision should be extended to cover periodic agreements as well, so that notice periods align for the grounds provided by section 100.

Section 130 provides that landlords may sell goods left behind at the end of a tenancy, and account to the tenant for the proceeds of sale. But there is no obligation for landlords to obtain a fair price. This should be rectified.

Section 223(1)(a)(ii) allows the service of notice and other documents to a person apparently over the age of 16 years at the person's residential or business address, however there is no requirement to ensure or inquire as to the person's relationship to the tenant. This provision should be amended to follow a similar provision in the Uniform Civil Procedure Rules (rule 10.5), which clarifies that a person receiving notice in such a manner must apparently reside or be employed at the address of service.

6. Compliance and enforcement

There are new provisions in the *Residential Tenancies Act 2010* that are in tenants' interests, but do not appear to be functioning.

Section 165 requires landlords or agents to provide documents, such as the completed outgoing condition report, estimates and quotes, invoices or receipts, to a tenant when making a claim for their rental bond. A penalty can apply for failing to comply with the provision. Section 211 requires landlords or agents who subscribe to a residential tenancy database to provide written notice to a person who has applied for a tenancy, outlining various particulars of any personal information about the applicant listed on the residential tenancy database.

The TU is not aware of landlords and real estate agents taking up these obligations with enthusiasm, which goes to a broader discussion about compliance and enforcement of the *Residential Tenancies Act 2010*. The policy objective of empowering landlords and tenants to enforce their rights has been undermined by later legal developments concerning the *Civil Liability Act 2002*. To the extent that the *Residential Tenancies Act 2010* can address this, the mechanism is already in place.

Before this Act became law it was the common practice of the Tribunal to make orders for non-economic loss, where appropriate, to compensate tenants on account of inconvenience, disappointment and embarrassment arising from a breach of a residential tenancy agreement. While the Tribunal generally took a conservative approach to this kind of compensation, the prospect of such orders made a positive contribution to landlords' compliance with the previous Act. But shortly after the introduction of the current Act into Parliament in 2010, the New South Wales Court of Appeal found, in an unrelated decision, that a claim for damages for non-economic loss is subject to the *Civil Liability Act 2002*.[15] This decision renders it practically impossible to obtain orders for non-economic loss in the Tribunal, to the detriment of tenant's confidence in their ability to enforce their rights.

The *Residential Tenancies Act 2010* introduced penalty notices into the renting laws of New South Wales. Section 203 of the Act allows an authorised officer to issue a penalty notice if it appears a person has committed certain prescribed offenses against the Act or its regulations. Where issued, a person may simply pay the amount required by the penalty notice – in all cases substantially lower than the maximum penalty – and avoid having the matter considered for prosecution. The penalty notice provisions were intended to make it easier for both the regulator and the regulated to resolve issues of non-compliance.

With the non-economic loss developments from *Insight Vacations* it has been open to Fair Trading NSW to make more active use of these penalty notice and enforcement provisions. But Fair Trading's "Year in Review" reports indicate that there have been only 16 penalty notices issued under the *Residential Tenancies Act 2010*, up to the end of the 2013-14 financial year. Given they handle hundreds of thousands of tenancy related contacts each year, it is extremely unlikely that they have not had more matters for compliance brought to their attention.

Tenants' confidence in the law could be boosted by a more proactive approach to compliance and enforcement, but confidence could be better achieved by restoring non-economic loss claims to tenants in the Tribunal. This would require an amendment to the *Civil Liability Act 2002* to exclude claims made under the *Residential Tenancies Act 2010* from Part 2 of the *Civil Liability Act*. The TU recommends this option to the Minister, and asks that the matter be raised with the New South Wales Attorney General's office as part of the review of the Act.

7. List of proposed changes to the *Residential Tenancies Act 2010*

Sections 7&8 – Occupancy principles such as in the *Boarding House Act 2012* should be expanded and adapted to apply to all rental agreements not covered by other legislation in New South Wales.

Section 10 – This provision should be repealed. The status of share-house agreements should be determined on substance rather than form.

[15] *Insight Vacations v Young* (2010) NSWCA 137 (11 June 2010); cited with approval in *Flight Centre v Janice Louw* [2011] NSWSC 132

Section 19 – This provision should be amended to prohibit terms against keeping pets.

Section 26 – It should be a term of every agreement that the landlord warrants they have not withheld any material fact of a kind prescribed by the regulation. Further material facts should be prescribed in the regulation.

Section 39(1)(b) – 'Water efficiency measures' should include ensuring that toilet cisterns do not leak. Landlords should be required to demonstrate that prescribed water efficiency measures are in place.

Section 41(10) – This provision should be removed. Tenants should be able to seek recovery of overpaid rent in the Tribunal, when the overpayment has arisen because of a landlord's error.

Section 44 – When a tenant seeks a remedy for an excessive rent increase the burden of proof should be shared. Where a proposed increase is above CPI, the landlord should be required to show that it is not excessive. Where a proposed increase is less than CPI, the tenant should be required to show that it is excessive. Considerations of affordability for the tenant should be allowed in the Tribunal when determining excessive rent increase matters.

Section 52 – This provision should be amended to ensure that a landlord cannot unreasonably refuse to allow an additional occupant to move in with a tenant, provided it would not lead to overcrowding.

Section 65 – On the question of repair obligations, whether a landlord has acted with 'reasonable diligence' should be removed from the Tribunal's considerations for establishing breach. It should instead be a matter for the Tribunal to take into account when deciding an appropriate remedy.

Section 75 – This provision should be amended to ensure landlords are to have regard to reason when considering consent for a tenant to transfer or sub-let their tenancy.

Section 79 – A new provision should be added to ensure that where a co-tenant applies to the Tribunal to end another occupant's co-tenancy under section 102, because an interim apprehended violence order excludes the subject co-tenant from occupying the premises, the Tribunal makes the orders on the papers.

Section 84 & 85 – These provisions should be amended to ensure a landlord may only end a tenancy where there are specific grounds.

Section 89(5) – This provision creates uncertainty for tenants who wish to pay unintended rent arrears and continue with their tenancy. It should be repealed. Alternatively, it should be amended to apply only to tenants who have *vexatiously* failed to pay rent owing.

Section 94 – This provision should apply to tenants who have been in continuous occupation for 10 years or more, rather than 20 years as currently.

Section 100 – This provision should be amended so that it applies to tenants in periodic agreements, as well as those within a fixed-term.

Section 102(2) – This provision should be amended. When asked to end co-tenancies because of domestic violence, the Tribunal should be able to consider the 'circumstances of the case', rather than the 'special circumstances of the case'.

Section 107 – A decision must be made about break fees, as the current dual regime is causing problems. If break fees are to be retained, they should be reduced to three-weeks' rent in all cases.

Section 115 – Provisions about retaliatory evictions are of little use to tenants in their current form. They should be strengthened.

Section 130 – This provision should be amended. Where a landlord sells goods left behind by a tenant, they should be required to account for the value of the goods, not simply the proceeds of sale.

Section 209 – The definition of 'residential tenancy database' should be broadened to include any database in which information about occupation and *prospective* occupation is contained, and that is established for any use by landlords and real estate agents.

Section 212 – This provision should be amended to ensure that any debt that is the subject of a residential tenancy database listing has been heard and determined by the Tribunal.

Section 216(3) – A penalty provision should apply to database operators who charge excessive fee for copies of listed personal information.

Section 223(1)(a)(ii) - This provision should be amended to follow a similar provision in the Uniform Civil Procedure Rules (rule 10.5), to clarify that a person receiving notice by personal service at a tenant's residential or business address must apparently reside or be employed at the address of service.