



Focus on

Terminations and evictions 'without grounds'

Part of the NSW Office of Fair Trading's proposals for residential tenancies law reform

December 2007

In its report on New South Wales residential tenancies law, the NSW Office of Fair Trading (OFT) makes a number of proposals relating to notices of termination and evictions 'without grounds.'

The proposals would retain the ability of landlords to give notices of termination without grounds.

The proposals would change the amount of notice required from 60 days to 90 days. The proposals would also change the way in which the Consumer, Trader and Tenancy Tribunal deals with landlords' applications for termination orders without grounds.

According to the proposals, the Tribunal would lose its current discretion to decline to make termination orders, and instead would be required to terminate the tenancy. Also, in determining how much time to give the tenant to vacate, the Tribunal would be restricted in the factors it could consider.

The TU's proposal: reasonable grounds for termination

The TU considers that notices of termination and evictions 'without grounds' are unfair and should not be retained in a reformed law.

There are many reasons why a landlord might want to end a tenancy. Some reasons are fair: for example, the tenant is in breach, or the landlord wants to move in, or the premises are to be sold or renovated. However, some reasons for termination are not fair, such as retaliation or discrimination. Notices of termination without grounds give cover to terminations motivated by these unfair reasons.

The TU believes that landlords should give notices of termination only on certain reasonable grounds. The *Residential Tenancies Act 1987* already provides landlords with a number of grounds for termination that are reasonable, and these should be retained. These grounds are:

- *serious or persistent breach* – this includes where rent is unpaid for 14 days

- *frustration* – that is, the premises are uninhabitable
- *sale of premises* – and the contract of sale requires vacant possession. This notice is not available to be given during the fixed term.

The TU proposes that the following reasonable grounds should be added to the Act:

- *the landlord requires the premises for their own housing* – we propose that this notice would not be available to be given during the fixed term
- *demolition, approved change of use or major renovation* – we propose that this notice would not be available to be given during the fixed term.

The TU submits that this proposal is actually quite modest. We are not arguing for security of tenure guaranteed in the manner of the old rent control legislation of the 1940s. Law reform that provides for reasonable grounds for termination would neither require nor entail a change to the structure of the rental market or the investment strategies of landlords. Landlords would be able to redevelop their properties, or sell them in the owner-occupied market, or turn them to non-residential uses, or move into them themselves.

Law reform for reasonable grounds for termination would not disadvantage the large majority of landlords who operate reasonably and who seek to terminate tenancies only where there are reasonable grounds for doing so. It would affect the small minority of landlords who seek to terminate tenancies for unfair motives – such as retaliation and discrimination – and who use notices of termination without grounds as cover for these motives.

The OFT analysis

The TU considers that the OFT analysis on this issue is, with respect, flawed.

The analysis states that no other Australian State or Territory has introduced ‘just cause’ terminations. This is wrong: the Tasmanian *Residential Tenancies Act 1997* provides that landlords may give notices of termination on the grounds prescribed at s 42(1)(a)-(g), and makes no provision for notices without grounds.

The analysis asserts that just cause terminations would have ‘serious implications on the rental housing market.’ This assertion is unsubstantiated. The rental housing system does not depend on ‘no grounds’ terminations. The crucial thing for landlords is that tenancies can be ended where the tenant is in serious breach of the tenancy agreement, such as by non-payment of rent or damage to the property, and that their property can pass without hindrance into owner-occupation. Law reform for reasonable grounds for termination accommodates these and other interests.

The analysis asserts that ‘trying to list all valid reasons would be a difficult or impossible task.’ The TU proposes a list of five reasonable grounds. The Tasmanian *Residential Tenancies Act 1997* is formulated a little differently and provides for seven grounds. We submit that compiling a list for the New South Wales *Residential Tenancies Act 1987* is eminently do-able.

Alternatively, the *Residential Tenancies Act 1987* might provide a list of prescribed reasonable grounds and also provide for notices of termination on grounds not listed but specified in the notice by the landlord.

The proposals

44) the minimum period of time for 'no grounds' notices issued by landlords once a lease has expired be extended from 60 days to 90 days.

If notices of termination are without grounds are to be retained, the TU supports the direction of the proposal, but submits that the notice period should be longer.

The OFT analysis acknowledges that the relative length of the notice period should deter landlords from using notices without grounds. The proposed period is only one month longer than the notice period for the new grounds in proposal 47.

We submit that a notice period of six months is more appropriate to achieving the desired deterrent effect.

45) the Act should stipulate the extenuating factors on both the tenant and landlord sides for the Tribunal to consider when hearing an application to end a tenancy on the basis of a 'no grounds' notice, rather than the present broad 'circumstances of the case'. In addition, the Tribunal's power should be limited to only suspending a possession order for up to 12 months, not dismissing the application altogether, in cases where the tenant factors are present.

This proposal comprises two parts. TU strongly opposes each part.

Restricted extenuating circumstances

The first part would limit the factors that may be considered by the Tribunal in determining applications for termination orders. It seems odd that OFT considers that it cannot come up with a list of reasonable grounds for termination, but that it can come up with a list of factors for the Tribunal to consider in determining applications for termination orders. Neither the OFT analysis nor the proposal, however, indicates what factors would be considered by the Tribunal.

The OFT analysis presents no evidence of any problems arising from the Tribunal considering an open range of factors ('the circumstances of the case') when it makes its determinations.

The analysis refers to submissions from landlords and agents that characterise the phrase 'circumstances of the case' as a 'test': for example, they refer to 'the difficulty in overcoming the "circumstances of the case" test' and submit that 'this test was too heavily weighted in favour of tenants.' This characterisation is wrong: 'circumstances of the case' refers not to a test, but to a range of factors to be considered in making a determination. This range of factors is not 'weighted in

favour of tenants': it is not weighted at all, because it is an open range. The question of weighting arises only when this open range of factors is proposed to be narrowed by prescribing that only a select few factors may be considered.

No discretion – the Tribunal must terminate

The second part of the proposal would require that the Tribunal make termination orders in all proceedings arising from notices of termination without grounds. The OFT analysis presents no evidence of any problems arising from the Tribunal's current discretion to decline to make termination orders – indeed, there is no discussion at all of this part of the proposal in the analysis.

The TU's research of the Tribunal's published decisions indicates that the Tribunal exercises its discretion to decline to make orders very rarely: there are only three or four published decisions each year in which the Tribunal declines to order termination because of the circumstances of the case. Despite the rarity of its actual use, the TU considers that the discretion to decline to terminate is an important protection that helps prevent really unfair applications from being lodged in the first place.

Removing the discretion would mean that in termination proceedings without grounds, the landlord will always win. It would make 'without grounds' notices and applications attractive relative to notices and proceedings with grounds, which is contrary to the principal in proposal 44. It would disinhibit landlords from making really unfair applications for terminations, and discourage tenants from asserting their rights – the message to tenants would be that if they fall out with their landlord, the landlord will always win.

46) where a tenant receives 'no grounds' notice which they believe to be retaliatory they should have the onus of applying to the Tribunal within 4 weeks of receiving the notice to attempt to have the notice set aside.

The TU supports allowing a tenant to make an application for a determination as to whether a notice of termination is retaliatory and thus invalid. We submit, however, that they should not be *required* to do so, and they should retain the ability to make the argument that a notice is retaliatory in a hearing on the landlord's application for termination orders. Where a tenant is being pushed around by the landlord to the extent that they have received a notice of termination, it is not appropriate that the law should also push them around and make them apply for hearings.

47) the grounds upon which a landlord can seek to end a tenancy once a lease has expired be expanded to include 60 day's notice for reasons such as a need to move into the property themselves or an intention to do major renovations.

The TU supports the direction of the proposal, but submits that the two examples given should be separate grounds with different notice periods.

We consider that 60 days notice may be appropriate where the landlord or a member of the landlord's family needs the premises for their own housing. It is not appropriate where the landlord merely wants to renovate – we submit that a notice period of four months is more appropriate.