



Focus on

Mortgagees taking possession

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

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In its report on New South Wales residential tenancies law, the NSW Office of Fair Trading (OFT) proposes to change the law where a mortgagee is taking possession of rented premises. These circumstances arise when a landlord defaults on their mortgage, and the mortgagee takes legal action in the Supreme Court to get possession of the premises. Under the current law, the Supreme Court's order for possession also terminates the residential tenancy agreement.

The TU agrees that the current law relating to mortgagees needs to be reformed. There are a number of problems with the current law.

- *Little notice.* The law provides that mortgagees are required to give a tenant 'reasonable' notice of proceedings for possession of the premises. There is no guidance in the law as to what amount of notice is 'reasonable', nor is there any consistent industry practice.
- *No notice.* The notice requirement is toothless. The law expressly provides that possession orders made without prior notice to the tenant are still effective.
- *'Special circumstances'.* The law provides that the Court or the Consumer, Trader and Tenancy Tribunal may order a new tenancy between a tenant and a mortgagee. The mortgagee becomes, in effect, the landlord, which gives the tenant more certainty and time to move out. This order, however, is available in 'special circumstances' only. Most tenants do not meet this threshold.
- *Legal costs.* If a tenant tries to intervene in the mortgagee's Supreme Court proceedings to argue 'special circumstances', they may have to pay for legal representation and, if they lose, are exposed to the risk of paying the mortgagee's legal costs.
- *Tenants may be liable to the landlord.* In a cruel twist, if a tenant vacates premises in response to a demand from a mortgagee, and the mortgagee and the landlord subsequently settle their dispute without the mortgagee taking possession, the tenant may be liable to the landlord for abandoning the tenancy, and may be required to compensate the landlord for loss of rent and other costs.

The proposals

39) *tenants be entitled to at least 30 days notice if a mortgagee decides to obtain vacant possession, either during or after a fixed term tenancy.*

The TU supports the direction of this proposal, but more is required in order to properly address the problems with the current law.

The main shortcoming of the proposal is that it does not make clear at what point in time the mortgagee is supposed to give the 30-day notice, nor does it make clear when the tenancy ends. The analysis in OFT's report states that 'the outcome of Supreme Court action between the mortgagee and the landlord should not automatically end a tenancy', but this is not necessarily reflected in the proposal. If the proposal merely replaces the current 'reasonable' notice with 30 days notice, without making further changes, the problems with the current law will not be addressed.

The TU submits that law reform should address all of the following issues:

- *Mortgagee takes possession subject to the tenancy.* The TU submits that the reformed law should make clear that where the Supreme Court makes an order for possession for a mortgagee, the order does not terminate a residential tenancy agreement for the premises. The reformed law should provide that upon the order for possession being made, the mortgagee has the rights and responsibilities of the landlord; it should also provide that the mortgagee may give a notice of termination and, if the tenant does not vacate in response to the notice, apply to the Tribunal for an order terminating the tenancy.
- *Fixed terms are voided.* The OFT proposal would allow a mortgagee to terminate a tenancy during the fixed term of the agreement. The TU submits that where a mortgagee takes possession, the tenant should also not be bound by the fixed term.
- *No liability for abandonment.* The OFT proposal is silent on this issue. The TU submits that when a tenant, acting in good faith, vacates the premises in response to a notice by a mortgagee that the mortgagee intends to take possession of the premises, the tenant should not be liable to the landlord for abandonment.

40) *where a fixed term tenancy is ended early by a mortgagee, the tenant be able to withhold 2 weeks rent, or a higher amount as agreed, to offset relocation expenses, and a process put in place to allow the bond to be released.*

The TU agrees that there should be special provisions for the compensation of a tenant's relocation expenses. We submit that two weeks rent will not usually be sufficient – instead, we suggest four weeks or, alternatively, that the Tribunal be able to order compensation be paid by the mortgagee from the balance of the proceeds of the sale of the premises.