



## Focus on

# Rent arrears and terminations

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

**December 2007**

In its report on New South Wales residential tenancies law, the NSW Office of Fair Trading (OFT) proposes a new regime for dealing with rent arrears.

The proposed new regime would change the current law in a number of respects. The most significant change relates to where a landlord takes action in the Consumer, Trader and Tenancy Tribunal (the Tribunal) to terminate the tenancy on the ground of rent arrears. Under the current regime, the onus is on the landlord to apply for a hearing of the Tribunal. Under the proposed new regime, the tenant would have to apply for a hearing, and if they do not apply for a hearing, the landlord could apply to the Tribunal for a termination order without a hearing (an 'administrative order').

The Tenants' Union (TU) strongly opposes this change. We think that it would not address the issues that OFT identifies as problems in the current regime. We believe that it would reduce the Tribunal's scrutiny of termination proceedings, especially in relation to persons of poor literacy, persons from non-English speaking backgrounds, and persons from groups that have been historically disenfranchised from the legal system, such as Aboriginal people.

Some of the other proposed changes are good and should be adopted. These changes include notices that more clearly set out a tenant's options, and an assurance that a tenancy will continue where the tenant pays the arrears in full or according to an agreed payment plan.

### **OFT's analysis**

The OFT analysis is directed at two issues: the time it takes rent arrears matters to be resolved; and the large proportion of hearings that are not attended by the tenant.

In relation to the first of these issues, the analysis represents the issue as a problem. The TU submits that this view is not supported by the evidence. The analysis then

represents that the proposed new regime would address this 'problem' by reducing the time taken by proceedings. The TU submits that it is not clear that the proposed regime will do this. It appears that the proposed new regime would make it possible for some matters to proceed to determination by the Tribunal more quickly, but it also appears that some matters may proceed more slowly.

In relation to the second issue – the large proportion of hearings without an appearance by the tenant – the OFT analysis is on firmer ground in characterising this as a problem. The solution proposed, however, would not address the reasons for the problem of non-attendance, and would instead significantly reduce the scrutiny applied by the Tribunal to termination proceedings. The reduction in scrutiny would most affect tenants who have poor literacy, or who are from non-English-speaking backgrounds, or who are from groups traditionally disenfranchised from the justice system, such as Aboriginal people.

### **The 'problem' of timeframes**

The OFT analysis purports that the timeframes for proceedings in relation to rent arrears are a problem. According to the analysis, the present system takes too long: 'the present system can take up to 2-3 months or more and can cause significant financial loss for landlords.' This is, purportedly, especially a problem 'where a tenant seeks to exploit the system': there are, according to the analysis, 'tenants seeking to use the system and stay as long as they can rent-free.' The TU disputes this analysis.

#### *How long does it currently take to resolve rent arrears matters?*

The analysis presents no evidence as to the performance of the current regime or its alleged exploitation. The '2-3 months or more' claim is unsubstantiated and misrepresents the performance of the current regime. The Tribunal finalises 66 per cent of tenancy matters (not including relisted matters) within three weeks of lodgement, and 80 per cent of matters within four weeks of lodgement.<sup>1</sup> Assuming that landlords lodge their applications at the earliest opportunity, this means that 80 per cent of matters are finalised within two months of the tenant first failing to pay rent when due. The proportion of matters that go to the Tribunal and that take 'three months or more' is small.

This proportion would be even smaller if one also considered the number of matters that resolve before getting to the Tribunal. This number is unknown, because there is no available data as to the number of termination notices given, nor is there any available data as to the number of tenants who fail to pay rent when due. From their experience, it is the impression of workers in the Tenants Advice and Advocacy Services (TAASs) that the number of rent arrears matters that are resolved without proceeding to the Tribunal is much greater than that the number that do proceed. There is some support for this impression in statistics from the TAASs, which record that in the six months to July 2007, TAASs gave information and advice about rent arrears to 2 308 tenants, of whom 668 – about 29 per cent – were also given information and advice about Tribunal proceedings.

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<sup>1</sup> CTTT (2006) *Annual Management Report 2005-06*: 15.

The claim in the analysis about tenants exploiting the system is unsubstantiated. The TU acknowledges that, in some cases, a tenant who falls into arrears might make no further payment to the landlord as the tenancy proceeds to termination. We accept that in those cases, it will appear to the landlord that each week that passes is another week's rent lost. In other cases, however, tenants fall into arrears and respond to the prospect of the termination of their tenancy by attempting to pay the arrears. These cases, in our view, comprise the large majority of cases where a tenant fails to pay rent when due. In these cases, both landlords and tenants properly 'use the system' and the timeframes involved to get rent payments back on track and maintain tenancies, to the benefit of both parties.

The TU submits that, contrary to the view put in the analysis, the timeframes for proceedings are a 'non-problem'. Let us now look at the proposed 'solution', by comparing the operations of both the current regime and the proposed new regime.

#### *The current regime and the proposed new regime: timeframes compared*

The timeline for the current regime starts at the point at which a tenant fails to pay rent when due (let's call this point \$0). At \$0+15 days, the tenant may be served a notice of termination, and at \$0+30 days the landlord can apply to the Tribunal for a termination order. The Tribunal finalises 24 per cent of matters within two weeks of lodgement; 66 per cent within three weeks, and 80 per cent within four weeks. In terms of our timeline, we can say that a matter will probably be finalised by \$0+51 days, and very probably finalised by \$0+58 days.

Let's consider the proposed new regime in similar terms. Like the current regime, at \$0+15 days a tenant could be given a notice of termination. At \$0+30 days, the landlord could apply to the Tribunal for an administrative order for termination. The analysis does not say precisely at what point in time the Tribunal may make an administrative order. For the purpose of our timeline, the TU assumes a period of eight working days between lodgement and administrative order: four working days for the service of the Tribunal's notice to the tenant, and four working days for the tenant's application. We therefore estimate that a landlord might expect an administrative order to be made at \$0+41 days or \$0+43 days. This would finalise a matter at a significantly earlier point in time than under the current regime.

On the other hand, under the proposed regime there is also the question of the tenant making an application. The tenant may do so at any point after receiving the notice of termination up until just prior to the Tribunal making an administrative order: that is, at any time from \$0+15 days to about \$0+40 days. Assuming the Tribunal keeps to its current timeframes for finalising matters, a matter subject to an application for a hearing at \$0+15 days would probably be finalised at \$0+36 days, and strongly probably finalised at \$0+43 days. These are significantly earlier points in time than under the current regime. But an application lodged at \$0+40 days would probably not be finalised at \$0+54 days, but probably finalised by \$0+61 days and very probably finalised by \$0+68 days. These are later points in time than under the current regime. The TU accepts that with more matters finalised by administrative order and fewer hearings to conduct, the Tribunal may be able to reduce its timeframes, but it would have to achieve reductions of about 10 days to keep to the current benchmarks at \$0+51 days and \$0+58 days.

On this comparison, the proposed new regime would make it possible for some matters to proceed to determination by the Tribunal more quickly, while other matters might proceed more slowly. Whether the proceedings go more quickly or more slowly would depend on the actions of the tenant. By placing the onus of applying for a hearing on the tenant, the proposed new regime would remove from the landlord some of their current ability to set the pace of proceedings, and may increase the prospect of proceedings being deliberately drawn out. The proposed new regime would be more susceptible to 'exploitation' than the current regime.

We submit, therefore, that at least in relation to timeframes, the proposed new regime would be a 'non-solution' to a 'non-problem.'

### ***The problem of unattended hearings***

The second problem identified by the analysis is that proceedings under the current regime result in a large number of hearings that are not attended by the tenant. According to the analysis, about 60 per cent of hearings of applications for termination on the ground of rent arrears are conducted without the attendance of the tenant. This represents, in the terms of the analysis, 'an inefficient use of resources.'

The TU agrees that it is a problem that so many hearings of applications for termination on the ground of rent arrears are unattended by tenants. Apart from the question of the resources involved, these hearings are less satisfactory than hearings with both parties present because the Tribunal cannot consider all the aspects of the case. This is bad for the individual tenants who are parties to these proceedings. We also think that it is bad for the system generally, because the conduct of landlords and agents is generally improved where the prospect of scrutiny is strong.

The TU submits that the problem of non-attendance should be addressed by promoting attendance, rather than reducing the number of hearings.

The TU accepts that there may be some cases in which the tenant decides not to attend because they have nothing to add to the Tribunal's consideration of the application. In our experience and the experience of the TAASs, however, there are many other factors that affect tenants' decisions to not attend hearings, and we submit that attendance could be promoted by addressing these factors.

The following factors come from the TU's own legal practice and the casework of the TAASs:

- *Misunderstanding.* In some cases the tenant fails to attend because they have not understood that the matter will be heard and determined in their absence. Sometimes there is a strong element of wishful thinking in these cases; sometimes the tenant has genuinely misunderstood what is happening. Sometimes the tenant has arrived at that misunderstanding after conversations with the landlord or agent, in which the tenant was given the impression that they need not attend. In the experience of the TU and of the TAASs, these reasons for non-attendance operate especially in relation to persons with poor literacy, or those who are from non-English-speaking backgrounds.
- *Embarrassment and fear.* In some cases the tenant is embarrassed to attend the Tribunal. This is especially a problem in country towns, where the Tribunal

often uses the rooms of the Local Court and tenants are ashamed to be seen waiting outside. In other cases the tenant is so ill at ease, afraid or even terrified of the Tribunal that they feel that they cannot attend. This is especially a problem for persons who suffer from depression and anxiety, and for those who have been traditionally disenfranchised from the legal system, such as Aboriginal people.

- *Other obligations.* In some cases the tenant would attend but feels that another commitment – such as work, a job interview or a Centrelink interview – must take priority. In these cases the tenant might know that failing to attend the Tribunal will put their tenancy in jeopardy, but also feel that attending the Tribunal might jeopardise their continued receipt of an income, the loss of which would result in the loss of their tenancy anyway. In some cases, the tenant would attend the Tribunal but does not because they cannot arrange childcare. One of the TAASs gives the example of a client who was determined to attend the Tribunal, despite experiencing a number of the aforementioned factors (she was not literate and suffered depression). On route to the Tribunal, she stopped to leave her children at their usual childcare service, where she was informed that because of a change in her allocation of government-funded hours of childcare, she could not leave her children without paying a fee. Already stressed by the proceedings, this broke her will and she did not attend.

The TU is not suggesting that in any given case will the tenant's non-attendance be justified by one of these factors – on the contrary, the TU and TAASs always urge tenants to attend hearings – but they do help explain the high rate of non-attendance generally. These factors have a real effect and are a barrier to some tenants who might otherwise attend the Tribunal.

The TU and the TAASs try to address these factors every time each takes an inquiry from a tenant about Tribunal proceedings. The TAASs also conduct community education activities to the same end. We note that the Tribunal itself has recently reviewed its public relations and information resources so that it is a more familiar, accessible forum for those it calls to attend hearings.

The proposed new regime, however, does not address the factors for non-attendance, nor does it promote attendance. The proposal would, instead, present an additional barrier to attendance.

The TU is also concerned about the effect of the proposed new regime on tenants in the 40 per cent of matters where there currently is a hearing attended by the tenant. We are concerned that some would not attend a hearing under the proposed new regime because they will not apply for a hearing. It is the experience of the TU and of the TAASs that many tenants who attend the Tribunal experience the same factors that keep so many tenants away from the Tribunal, but they overcome them. We are concerned that some will not overcome them if they are also to bear the onus of making the application. Like the TAAS client whose childcare dilemma proved to be one stress too many, the additional obligation of making an application to the Tribunal will be too much for some tenants.

This would reduce the scrutiny that the Tribunal currently applies to proceedings against these tenants. Again, from our experience and that of the TAASs we believe

that the tenants most affected would be those who have poor literacy, or are from non-English-speaking backgrounds, or are disenfranchised from the legal system.

***Clearer notices and more certainty for tenants who pay arrears***

Two other changes are proposed by OFT in relation to rent arrears: notices of termination that give a clearer statement of the options available to the tenant; and an assurance that tenants who pay the arrears in full or in accordance with an agreed payment plan will not have their tenancy terminated on the ground of rent arrears.

The TU supports these changes. Notices of termination under the current regime do not give an accurate impression of the legal effect of the notice nor a clear statement of the options available to the tenant. As a result, some tenants wrongly think that a notice of termination ends their tenancy and that they have no option but to move out. Otherwise sustainable tenancies are terminated, at a cost to both parties. A clearer notice with a clear statement of options would help address this misconception and help sustain tenancies.

Similarly, the proposal that paying the arrears in full or according to a payment plan would prevent the tenancy from being terminated would give tenants more confidence in pursuing those options. This would help sustain tenancies, to the benefit of both parties.