



## Focus on

# What residential tenancies law reform can do

## Background to 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) presents 102 proposals for reform of the *Residential Tenancies Act 1987* and associated legislation.

The *Residential Tenancies Act 1987* (the Act) is the main source of legal rights, responsibilities and remedies for landlords and tenants in New South Wales. Reform of the Act is overdue. The present proposals, if implemented, would be the first comprehensive set of reforms to the Act since its commencement almost twenty years ago.

The Tenants' Union (TU) has published a series of papers, each of which focuses on a significant area of proposed reform. The present paper focuses on a basic question: what can residential tenancies law reform *do*?

### The purpose of residential tenancies law reform

Some commentary asserts that residential tenancies law reform can be used to affect the level of investment in rental housing (for example, 'Rent law revamp to lure investors', *Sydney Morning Herald*, 22 September 2007).

This assertion is not supported by the evidence. The evidence strongly indicates that residential tenancies law is not sufficiently important in landlords' investment decisions to actually encourage investment or, for that matter, cause net disinvestment. Over its recent history, residential tenancies legislation has not driven investors away from rental housing. Reforming the law will not bring them back.

### Investment

Economic factors dominate decisions to invest in rental housing, almost to the exclusion of residential tenancies law.

In 1993, the ABS surveyed investors in rental housing and asked about the factors they had considered when they invested. Of the nine factors nominated, 'tenants' rights' was the least considered: just 6.4 per cent of landlords said that they considered tenants' rights.<sup>1</sup>

More recently, Seelig, Burke & Morris have conducted interviews with landlords and agents about their motivations,<sup>2</sup> and the TU has had the benefit of a 'preview' of the findings that the researchers are currently writing up. From their interviews, it appears that residential tenancies law was the most important factor for less than two per cent of landlords, and only about seven per cent considered residential tenancies law at all.<sup>3</sup>

These results are consistent with the TU's own impressions. At present, there is a real need for large-scale investment in new, affordable rental housing. The question of how to direct investment to this end has been much discussed in policy circles and the public media. The TU has participated in this discussion and followed closely the contributions of other participants, including representatives of the construction, finance and superannuation industries. The main problem they identify is the inadequacy of rental yields relative to the high capital cost of housing. They have also pointed to deficiencies in the planning and funding of urban infrastructure; deficiencies in the data they need to assess investments in housing; and deficiencies in the size and level of skill of the tenancy and property management sector. Not once have they mentioned residential tenancies law.

## Disinvestment

Much as economic factors dominate decisions *to* invest, they also dominate decisions to disinvest.

In 1991, two years after the commencement of the *Residential Tenancies Act 1987*, the NSW Department of Housing reported on a survey of New South Wales landlords that asked, amongst other things, whether certain issues, including 'residential tenancy laws', were a 'problem' for them.<sup>4</sup> Leading questions notwithstanding, just over 10 per cent of small landlords (that is, owners of one rental property) nominated 'residential tenancy laws' as a major problem. Altogether, small landlords comprised more than 80 per cent of all landlords at the time. Of the small proportion of landlords with larger holdings, less than 30 per cent considered residential tenancy laws a major problem.<sup>5</sup>

Also in 1991, Brian Elton & Associates conducted focus groups with landlords across Australia that indicated that the recent residential tenancies law reform in New South Wales and elsewhere may have been a disincentive to investment.<sup>6</sup> The researcher considered that the impact might be more 'psychological' than

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<sup>1</sup> Castles (1994) *Investors in Rental Dwellings, Australia, July 1993*, ABS, Canberra: 12.

<sup>2</sup> Seelig, Burke & Morris (2005) *Motivations of Investors in the Private Rental Market: positioning paper*, AHURI, Melbourne.

<sup>3</sup> Seelig (2007) *Residential Tenancy Law and Rental Investment: a review of claims about rental law reform and disinvestment*, paper prepared for the Tenants' Union of Queensland, Brisbane: 2.

<sup>4</sup> DoH (1991) *Rental for Investment: a study of landlords in New South Wales*, DoH, Sydney.

<sup>5</sup> DoH, 1991: 23.

<sup>6</sup> Brian Elton & Associates (1991) *The Supply Side of the Private Rental Market*, National Housing Strategy, Canberra.

'substantial', and that it varied according to the investment strategies of landlords and the overall state of the market.<sup>7</sup>

Following up on the Brian Elton & Associates research, Paris, Randolph & Weeks conducted further consultations and found that the 'psychological impact' of residential tenancies law reform was short-lived, and that there was no evidence of net disinvestment.<sup>8</sup> They also concluded that there was no evidence that recent law reform had affected the 'fundamental economics' of investment in private rental housing, observing that the majority of landlords were motivated by equity growth and that this was not affected by residential tenancies law reform.<sup>9</sup>

### **Balance between landlords and tenants**

In terms of increasing net investment in rental housing, residential tenancies law reform does not have a lot of work to do. It *does* have a lot of work to do in balancing the relative positions of landlords and tenants.

The landlord-tenant relationship is unbalanced structurally. Landlords enjoy considerable monopoly power in relation to tenants: generally speaking, landlords are able to offer rental housing to prospective tenants on a take-it-or-leave-it basis, and once a tenancy is entered into landlords feel little competition. Tenants cannot 'shop around' for a better deal from week to week, and when they do have to move it is almost always costly financially and often costly emotionally.

Landlords are in a powerful position when it comes to enforcing the terms of a contract: they can threaten to end it. In this respect, landlords are well-served by the law, and especially the enforcement mechanism it has established in the Consumer, Trader and Tenancies Tribunal. Landlords can invoke this threat by giving a notice of termination – served personally or by post, whichever is more convenient – and applying to the Tribunal – it costs just \$32. They can expect their application to be heard within three weeks and it will most likely be finalised at the first hearing. There's no need for lawyers, no threat of costs. About three-quarters of landlords' applications to the Tribunal are for termination orders.<sup>10</sup> Landlords' applications to the Tribunal outnumber those of tenants by a factor of six.<sup>11</sup>

Tenants are in a poorer position to enforce the terms of an agreement. They cannot threaten to end the agreement without considerable financial and emotional cost to themselves.

Residential tenancies legislation approaches the achievement of balance between landlords and tenants when it treats landlords and tenants according to different standards. It approaches the achievement of a 'balance' when it is deliberately directed to strengthening the demands that tenants can make of landlords and protecting them from landlords' structural power.

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<sup>7</sup> Cited at Kennedy, See & Sutherland (1995) *Minimum Legislative Standards for Residential Tenancies in Australia*, Commonwealth Department of Housing and Regional Development, Canberra: 109.

<sup>8</sup> Paris, Randolph & Weeks (1992) *Impacts on the Investment Market following Changes to Landlord and Tenant and Associated Legislation*, National Housing Strategy, Canberra.

<sup>9</sup> Cited at Kennedy, See & Sutherland, 1995: 109; Seelig, 2007: 2.

<sup>10</sup> CTTT (2006) *Management Report 2005-06*: 4.

<sup>11</sup> CTTT (2007) *Annual Report 2006-07*: 20.