



**TENANTS' UNION OF NSW**

**SUBMISSION IN RESPONSE TO THE**

**NSW OFFICE OF FAIR TRADING**

**RESIDENTIAL TENANCY LAW REFORM OPTIONS PAPER**

**AUGUST 2005**

## **Introduction**

The Tenants' Union of NSW (TU) is the State's peak non-government tenancy organisation. We are a specialist Community Legal Centre and the resourcing body for the State-wide network of services in the Tenants Advice and Advocacy Program (TAAP).

This submission is made on behalf of the TU and the TAAP Network.

The TU welcomes the opportunity to make submissions on reform of the New South Wales Residential Tenancies Act 1987 (the Act). When the Act commenced in 1989, it made significant improvements to the State's tenancy laws and the lives of tenants. The Act does not, however, address all unfair practices in the contemporary rental market, nor the basic inequality of tenants in the landlord-tenant relationship.

The TU approaches residential tenancy law reform with two principles in mind. First, tenancy legislation is important consumer protection legislation. Landlords and tenants bargain from very different positions, and with very different sets of interests. Landlords, generally speaking, contract for profit. Tenants contract in order to secure the basic human need for shelter. For most landlords, going without a tenant for their premises for a couple of weeks should not be a problem. For a tenant, any period of time without premises in which to live is difficult, and may be devastating. This basic inequality of bargaining positions is reflected in the fact, recognised at a number of points in the options paper, that landlords can generally offer tenancy agreements on a 'take it or leave it' basis. It is always tenants who fill out applications, provide references, show pay-slips and prove themselves to landlords - not vice versa. They do so without knowledge of how many other prospective tenants they are competing against. But for residential tenancies legislation, the negotiation as to terms of agreements would be one-way.

The relative power of landlords continues past the making of a contract and throughout the term of a tenancy. A tenant cannot easily take their business elsewhere. If a person thinks that the petrol station on the corner is expensive this week, or that their bank fees are too high, they can go to another down the street. Once in a tenancy, a tenant cannot 'shop around' from week to week. For tenants, this would mean moving - at considerable financial expense, and possibly at the cost of changing neighbourhoods, schools, workplaces and services. There is little driving a landlord to 'compete' to keep a tenant. Despite the absence from the New South Wales rental market of large institutional landlords, and the predominance of small investors, there should be no mistaking that the individual relationship between a landlord and a tenant is decidedly monopolistic.

The Residential Tenancies Act should provide stronger consumer protection to tenants.

The second principle is that tenants are not merely consumers of a product like petrol, or banking services. More than contracting for the provision of

housing, tenants are making homes. Having a home fosters the growth and learning of children, and sustains a person away from work. Like all householders, tenants make a singular emotional connection with the place we call home. It goes deeply, to our security, dignity and sense of identity. Injustice in housing, therefore, cuts deeply too.

Legislators should respect that the Residential Tenancies Act is more than important consumer protection legislation, but is a law that affects basic human rights too. It should provide stronger protection of the universal values of human dignity and security in the places in which we live.

## 1. Coverage of the Act

The TU is disappointed that the options paper does not give consideration to extending the coverage of the Act to persons living in rental accommodation who are not currently covered by tenancies legislation. We note that the recent amendments to the Australian Capital Territory's Residential Tenancies Act have extended the coverage of that Act to agreements which grant a right to occupy residential premises, for value, but which are not residential tenancy agreements. The new Part 5A of the ACT Act provides a legislative framework for 'occupancy agreements' that respects their diversity and specialisation. It provides a short list of basic 'occupancy principles' for all occupancy agreements, and also provides for the making of Regulations that establish standard terms that may apply to specific types of occupancy agreements. We submit that the ACT approach to the coverage of residential tenancies legislation, and its provisions for 'occupancy agreements' in particular, deserve serious consideration by the Government.

Instead, in the present options paper a number of the options presented propose removing persons from the coverage of the New South Wales Residential Tenancies Act. The TU is dismayed that in each of these options it is especially vulnerable tenants who are proposed to lose the protection of the Act. Removing vulnerable persons from important consumer protection and housing rights legislation without providing other legislative measures for the protection of their interests is, frankly, an offensive policy.

### 1.1 exempt temporary refuge and crisis accommodation from the tenancy laws.

The TU recommends strongly against this option. In the absence of legislation that covers residents of rental accommodation excluded from the Residential Tenancies Act, the TU submits that where persons living in refuges and crisis accommodation have contracted, for value, for the right to occupy the premises, they should have a residential tenancy agreement, and come within the jurisdiction of the Consumer, Trader and Tenancy Tribunal, like any other person covered by the Residential Tenancies Act.

If the Residential Tenancies Act were amended to exclude tenants of refuges and crisis accommodation, they would not be covered by any other legislation that regulates the terms of their agreements or that provides for the resolution of disputes as to their contractual rights in relation to their accommodation. As a result, these persons would have to rely on the common law of contract and the Local and Supreme Courts to address their legal needs. This is, of course, utterly unrealistic. Persons residing in refuges and crisis accommodation are very vulnerable persons and face many barriers in participating in the legal system and accessing justice. These barriers have recently been documented in the Law and Justice Foundation's report *No*

*Home, No Justice? The legal needs of homeless people in NSW* (July 2005). The present option would deny such persons access to justice in relation to their housing.

Through their funding arrangements with the State and Federal Governments, most temporary refuges and crisis accommodation providers are accountable to the Government. They should also be accountable to the persons with whom they contract for the provision of rental accommodation. This is an important principle and it should be embodied in our residential tenancies legislation. We submit that this principle is made more important, rather than less, by the vulnerability of the persons living in refuges and crisis accommodation. The present option effectively proposes that this principle should not apply to these vulnerable persons.

The TU notes that many persons living in refuges and crisis accommodation are already excluded from the Residential Tenancies Act by operation of its other exemptions, particularly the exemption relating to boarders and lodgers (s 6(1)(d)). We also acknowledge that there may be a degree of uncertainty and inconvenience for landlords who operate refuges and crisis accommodation in relation to whether their tenancies are covered by the Act or fall within the exemption for boarders and lodgers. Considering this as a matter of the balance of convenience, the inconvenience for landlords of being covered by the Act and the jurisdiction of the Tribunal is rather less than the inconvenience for very vulnerable tenants of trying to assert their contractual rights in the Equity Division of the Supreme Court of New South Wales.

*Recommendation:*

- *Do not exclude refuges and crisis accommodation from the Residential Tenancies Act.*
- *Amend the Residential Tenancies Act to make provision for occupancy agreements.*

- 1.2. exempt student accommodation only where it forms part of a hostel, dormitory, or similar type of premises for students attending university, college, school, or other educational institution.

The TU believes that the present exemption for educational institutions should be amended, but submits that the approach indicated by the options paper does not adequately address the problems with the current exemption and is itself not properly defined or restrictive. For example, the present option does not make clear whether it would restrict the exemption to landlords who are educational institutions: we submit that an exemption in the terms of the present option might cover private landlords without a formal relationship to an educational institution who set up and let dormitory-style accommodation to students.

The TU submits that the exemption should apply only where each of the following criteria is met:

- the landlord is an educational institution;
- the tenant is currently enrolled as a student at the educational institution, or was enrolled as a student at the educational institution in the previous six months;
- the premises are either a dormitory, hostel or hall of residence;
- the premises are either located on a campus of the educational institution, or comprise part of a building used by the educational institution for the purposes of teaching, or are wholly owned or leased by the educational institution.

*Recommendation:*

- *Exclude tenancy agreements relating to educational institutions only where the landlord is an educational institution; the tenant is enrolled as a student of the educational institution or was enrolled in the previous six months; the premises are either a dormitory, hostel or hall of residence; and the premises are either located on a campus of the educational institution, or comprise part of a building used by the educational institution for the purposes of teaching; or are wholly owned or leased by the educational institution.*

- 1.3. exempt from the tenancy laws premises or agreements where the tenant's principal place of residence is elsewhere.

The TU recommends strongly against this option. If implemented it would exclude many more tenants than just persons who have taken a holiday letting, and cause injustice and suffering to those tenants.

The TU submits that there are numerous circumstances in which a tenant might enter into a residential tenancy agreement while maintaining a place of residence elsewhere. Examples include tenants who are employed or conduct business on an ongoing basis in a location that is far from their own home, and who rent premises in which to stay while they are on business; also, tenant who rent premises for use primarily by their children while the children attend school or university. These tenancies are currently covered by the Residential Tenancies Act and, we submit, it is appropriate that they should remain covered.

The TU also submits that there are numerous instances where premises cease to be a tenant's principal place of residence during the term of the tenancy. Examples include variations of the tenancies described above, and also where a tenant moves into a nursing home or other care facility. We submit that in excluding agreements or premises where the tenant's principal place of residence is elsewhere, the option may have the effect of causing some

tenancies to drop out of the Act during the term of the tenancy because of a change in the tenant's circumstances. If this is the effect of the option, it is very dangerous.

The TU submits that the option would also put in doubt many of the tenancy agreements that exist between private landlords and community housing associations, who never use premises as the association's 'principal place of residence', but who instead sub-let the premises to a sub-tenant. The TU understands that it is the usual practice of community housing associations to contract with property owners under the Residential Tenancies Act and using the standard form of agreement. We note that clause 23 of the Residential Tenancies (Residential Premises) Regulation 1995 permits the parties to contract out of the Act where the tenant is a social housing provider, but we submit that many agreements between such parties do not make this provision. We submit that there are currently many hundreds of such agreements in existence, and they are in turn the basis for many hundreds of sub-tenancies.

The TU submits that the current provisions relating to holiday letting are problematic because they actually provide for two exemptions: first, where the *agreement* is for the purposes of a holiday, and second where the *premises* are 'ordinarily used' for holiday purposes. We submit that the use of the premises by parties external to the tenancy agreement – that is, the 'ordinary use' of the premises – should be irrelevant, and that the relevant consideration is the intention of the parties in relation to the purposes of the agreement. We submit, therefore, that the current problem with the exclusion of holiday letting would be rectified by removing the second exemption.

*Recommendation:*

- *Do not exclude tenants, premises or agreements where the tenant's principal place of residence is elsewhere.*
- *Retain the current exemption for agreements in good faith for the purposes of a holiday, and remove the current exemption for premises that are ordinarily used for the purposes of a holiday.*

1.4. introduce special provisions giving greater flexibility to certain classes of tenancies.

The TU recommends strongly against this option. We should be clear that this option does not give greater 'flexibility' to certain classes of tenancies. It gives greater power to certain classes of landlord, who in almost all examples given in the options paper are defined by the relative vulnerability of their tenants.

*Recommendation:*

- *Do not allow specific exemptions or provisions, including additional grounds for termination and 'house rules' that contravene a tenant's right to quiet enjoyment, for specific classes of landlords or agreements.*

1.5. exclude tenancies where a person rents only part of a property without having a written agreement.

The TU recommends strongly against this option. The options paper suggests that the exclusion would apply to 'those involved in family and shared households, where a person pays rent or board to occupy a bedroom.' The TU submits that these are two quite different situations, and the current law deals with each differently and appropriately.

Where the parties are family members, there is a presumption at common law that they have not intended to enter into a contractual relationship, and therefore, in the absence of evidence of a contrary intention, there is no residential tenancy agreement. The TU submits that the present option would have no work to do in these situations, except to exclude them from the Act even where the parties have objectively intended for the agreement to be covered.

On the other hand, where the parties are not family members, and their relationship consists of the provision of the right to occupy part of premises for value, the Residential Tenancies Act applies (subject to the Act's existing exemptions). We submit that it is entirely appropriate that the Act applies to such relationships. If the present option were implemented, it would have the effect of removing vulnerable persons who should be covered by the Residential Tenancies Act from the protections of the Act.

The option identifies two elements – that is, the renting of only part of a property, and the absence of a written agreement – each of which is characteristic of the informal segment of the residential tenancies market. It is our experience that persons who rely upon the informal segment of the market often do so because they are excluded from the formal rental market (that is, the market in professionally managed rental properties), have few housing choices, and are vulnerable to exploitation. One of the strengths of the current Act is that it does not depend on landlords 'doing the right thing' and providing a written agreement, or tenants knowing to ask for a written agreement, in order for the tenancy to be covered by the Act. The option, if implemented, would undermine this strength.

The TU is aware of a number of share housing situations where parts of premises are let (or sub-let) to persons who are strangers to each other, and who each contract separately with the landlord (being either the owner of the premises, or a head-tenant), who does not live at the premises and who does not otherwise exercise dominion such as through a caretaker. These premises are, effectively, flats with shared kitchen and other facilities. In one case of which we are aware, the landlord (actually a head-tenant) sub-lets rooms at

up to 20 different premises in this way. In many of these arrangements, the tenants are students (often overseas students) at a nearby university, though the premises have no relationship with the university; in others, the tenants are simply persons who have a low income or are otherwise disadvantaged. Typically, agreements are not in writing; bonds are charged but not lodged; rent receipts are not given. The option proposes to remove these arrangements from the Act. The TU submits that these are precisely the sort of tenancies that most need the regulation and protection of the Act.

*Recommendation:*

- *Do not exclude agreements where the tenancy relates to part of the premises only and the agreement is not in writing.*

1.6. allow parties to excluded tenancies to agree that the tenancy laws shall apply to them.

The TU supports this option. We suspect, however, that it will be little used. Certainly it is not sufficient to completely and properly address the problems that arise as a result of excluded tenancies not being covered by any other legislation that provides appropriate regulation and dispute resolution.

*Recommendation:*

- *Allow otherwise excluded parties to 'contract into' the Residential Tenancies Act.*

1.7. allow any person to apply to the Tribunal for a determination as to whether they are covered by the Act.

The TU is not persuaded to support this option. We submit that, generally speaking, where there is uncertainty or controversy as to whether the Act applies to an agreement, tenants will seek to be covered by the Act and landlords will seek to be exempt from it. Again generally speaking, this means that a tenant will usually have a substantive application that they can make to the Tribunal (typically an application relating to a breach of quiet enjoyment), while a landlord will usually claim that there is no application they can make because they are not covered by the Act. It appears, then, that the main effect of the option would be to allow landlords to make applications for a determination that they are not covered by the Act. We are concerned by the prospect of the Tribunal making such orders in the absence of the tenant. We submit that the possibility of a tenant not attending may be heightened by the fact that in such proceedings there is no substantive issue being put by the landlord.

If the option is implemented, the TU submits that the amended Act should provide that a person may apply for an order that the Act does apply to an agreement, but that a person may not apply for an order that the Act does not apply.

*Recommendation:*

- *Do not allow applications to the Tribunal for the sole purpose of determining whether the Act applies.*

*Alternative recommendation:*

- *Allow applications to the Tribunal for a determination that the Act applies, and do not allow applications for determinations that the Act does not apply.*

## 2. Tenure

The TU is encouraged by the recognition given in the options paper, and in the Government's promotion of the paper, of the many tenants who are renting long-term. As the Government has noted, about 40 per cent of tenants have been renting for ten years or more. The security offered by the tenure is, therefore, very important to a very large number of persons and their households.

As we discuss below, the TU believes that reforming the law in relation to fixed term agreements has very limited potential to increase the security of tenants.

Instead, we submit that law reform in relation to the circumstances in which tenancies may be terminated would provide an important contribution to the security and dignity of tenants. In particular, it is the view of the TU that 'no grounds' termination notices should not have a place in NSW residential tenancy law. Under the current law, landlords may not have to give grounds for termination, but there is, of course, always a reason. 'No grounds' notices hide a multitude of bad reasons for termination.

The TU submits that the law should require that a landlord be transparent as to their reasons for seeking termination of a tenancy. The law should also require and prescribe that while some reasons constitute sound grounds for termination, others do not. We note that the Tasmanian Residential Tenancies Act makes such a provision. It is a measure of justice that is entirely appropriate to New South Wales rental market too.

(NB: in the following discussion we use the term 'notice of termination', for the purposes of consistency with the options paper and the current law. The TU proposes a change in the terminology of 'notices of termination' in the discussion of option 19.2 further below.)

- 2.1. give greater flexibility under the tenancy law to long term leases exceeding 10 years.

The TU is not persuaded to support this option. We disagree with some of the propositions put in the options paper in support of this option. We submit that the current law does not discourage long-term fixed term agreements. Tenants' rights do not accrue or increase with the passage of time, and there are no provisions in the Residential Tenancies Act that are expressed to be contingent on the length of a tenancy. It is not the law but rather the structure of the New South Wales rental property market that discourages long-term fixed term agreements. Most landlords - 76 per cent - own only one rental property (ABS, 'Household Investors in Rental Dwellings', Cat no 8711.0, June 1997). Their investments are usually geared to realising capital gains rather than rental income: in 2002-03, Australian landlords claimed in rental tax deductions \$1.37 billion more than they received in rental income (*Sydney Morning Herald*, 18 April 2005). Furthermore, the market for the sale of rental

properties is integrated with that for the sale of properties for owner-occupation: that is, rental properties are frequently sold into the owner-occupier market (and vice versa). Yates & Wood's survey of Rental Bond Board data for Sydney found that 40 per cent of dwellings in the private rental market in 1991 were no longer there in 2001 (Yates & Wood, 'Affordable Housing: lost, stolen and strayed', paper presented to the 33<sup>rd</sup> Annual Conference of Economists, University of Sydney, September 2004). Taken together, these factors are the real cause of insecurity in the rental market: individual landlords with only one investment property, seeking to make money through judicious sales rather than rents, marketing the property both to other investors and to owner-occupiers, and keeping open their options to transfer the premises with vacant possession.

This market structure and pattern of investment is shaped primarily by tax policy, and in particular the interaction between negative gearing provisions and the concessional capital gains tax rate. We submit that it is not likely to be substantially affected by giving landlords the opportunity to contract out of their obligations to do repairs. The sorts of investors our tax policies have encouraged into the rental market are more interested in being able to terminate tenancies when it suits them to realise their gains.

The TU submits that security and dignity in rental housing would be better delivered by tax policies that encourage landlords to enter into long-term fixed term tenancies in return for targeted tax expenditures and other subsidies, rather than by tenancy legislation that allows landlords to offer long-term fixed term agreements in return for a tenant's right to live in premises that are properly maintained and repaired.

We submit, therefore, that in the rental market as it is currently structured only a relatively small number of landlords would be interested in offering long-term fixed term agreements. We also submit that relatively few tenants would be interested in signing one, either because they prefer to retain their mobility or because they are cautious as to entering into an especially onerous, long-term agreement with a landlord they do not know well and in relation to a property that they do not know well.

The TU acknowledges that where both parties are interested in a long-term fixed term agreement, in some cases the tenant may be able to strike a satisfactory bargain: that is, they may have sufficient knowledge and market power to negotiate a lower rent that accommodates their liability for the cost of repairs. We are concerned that in other cases, the tenant may not have this power and may be offered a long-term tenancy, on a take it or leave basis, that makes them liable for repairs – possibly at considerable cost – but make little or no concession in terms of rent. We submit that this is especially a danger in relation to the low rent segment of the market, in which the quality of the stock is relatively low but where landlords have considerable market power as the supply of the stock declines (Yates & Wood, *op cit*). We submit that the Government should not discount the possibility that some landlords may offer such agreements on a take it or leave it basis, especially where they have existing continuing agreements with tenants who they know to be long-

term renters with few other housing options. Put at its barest, for low-income tenants the 'security' of a long-term fixed term agreement might in fact mean being tied to a run down property that they cannot afford to repair, while the rent is little or no cheaper.

If the Residential Tenancies Act is amended to make special provisions for tenancy agreements with fixed terms exceeding ten years, we submit that the following safeguards should be incorporated in the Act.

First, these long-term fixed term agreements should not be exempt from the Act or the jurisdiction of the Tribunal, but rather should be allowed to contract out of certain provisions of the Act only. In particular, this means that the requirements as to the provision of a written agreement, rent receipts and other documents, and the process relating to the termination of tenancies and recovery of possession, would still apply to long-term fixed term agreements. The Act should also provide for a standard form of agreement for long-term fixed term tenancies, in registrable form, and require that the landlord meet the costs of registration.

Second, the provisions of the Act that may be excluded from long-term fixed term agreements should be limited to those relating to repairs and maintenance (including urgent repairs), reasonable security, rent in advance and bonds. In particular, we submit that it is not appropriate to allow contracting out of the rent increase provisions of the Act. Tenants who are locked into a long fixed term should not be exposed to liability for rents that may be increased by undisclosed amounts and that are not subject to review by the Tribunal.

Third, where parties propose to enter into a long-term fixed term agreement that contracts out of provisions of the Act, the parties must make a joint application to the Tribunal for its certification of the agreement. This would allow for independent review of the proposed agreement and may expose instances of coercion or unconscionable dealings between the parties. A similar provision exists in the Australian Capital Territory's Residential Tenancies Act in relation to contracting out. We submit that where an agreement is not certified, any terms that are inconsistent with the Act should be void, and the agreement deemed to be in the usual standard form.

*Recommendation:*

- *Do not allow tenancy agreements with a fixed term of 10 years or more to be exempt from, or contract out of, the Residential Tenancies Act.*

*Alternative recommendation:*

- *Provide that tenancy agreements with a fixed term of 10 years or more are covered by the Act, and are required to be in a standard, registrable form, the costs of which are to be met by the landlord.*

- *Allow parties to such agreements to contract out of the provisions relating to repairs and maintenance, reasonable security, rent in advance and bonds only.*
- *Require parties to such agreements to make a joint application for the Tribunal's certification of the agreement, and provide that uncertified agreements are deemed to be in the usual standard form and inconsistent terms are void.*

2.2. introduce a requirement for a minimum fixed-term.

The TU does not support this option. We are not persuaded that introducing a minimum fixed-term may encourage longer term leases: on the contrary, the minimum fixed term might become, in practice, the standard offered by landlords and agents.

Some TAAP workers advise they have, on behalf of clients, have negotiated tenancies with very short fixed terms for clients who have difficulty accessing rental housing; for example, young persons. Landlords who are party to these agreements are said to treat the short fixed term as a 'probationary' period and if the tenancy is unsatisfactory, they are able to give a notice of termination relatively quickly at the end of the fixed term. Both the TAAP workers and the TU have mixed feelings about such arrangements, because they are predicated on an imbalance of power in favour of the landlord and the insecurity of the tenant; they are, however, a means of getting access to the rental market for vulnerable persons who, in the ordinary course of events, go on to a continuing agreement when the fixed term expires.

*Recommendation:*

- *Do not require a minimum fixed term for tenancy agreements.*

2.3. expand the list of grounds on which a tenancy may be terminated to include reasons such as major repairs or renovations or the need for the landlord or a family member to live in the premises.

The TU would support this option if it was part of a larger set of reforms to the provisions of the Residential Tenancies Act relating to notices of termination and, in particular, notices of termination without grounds. We submit that an expanded list of just grounds for termination should replace the current provision for termination without grounds.

The TU submits that grounds for termination, and the respective notice periods, should be as follows:

<b>Grounds</b>	<b>Notice period</b>
Breach of agreement by the tenant – rent arrears	14 days (and not before the tenant is 14 days in arrears)
Breach of agreement by the tenant – other than rent arrears	28 days
Frustration – premises uninhabitable	2 days
Landlord or member of the landlord's immediate family needs the premises to occupy as their own place of residence	4 months (and not during fixed term)
Sale of premises – contract of sale requires vacant possession	4 months (and not during fixed term)
Premises to be demolished, changed to a non-residential use, or substantially renovated such that vacant possession is required	4 months (and not during fixed term)

*Recommendation:*

- *Allow landlords to serve notices of termination on the following grounds only:*
  - *breach – rent arrears: 14 days*
  - *breach – other than rent arrears: 28 days*
  - *frustration – premises uninhabitable: 2 days*
  - *landlord or family member needs premises as own place of residence: 4 months*
  - *sale of premises – contract of sale requires vacant possession: 4 months*
  - *premises to be demolished, changed or renovated: 4 months*

2.4. extend the 'no grounds' notice period from a landlord from 60 to 90 days, and limit the power of the Tribunal to only being able to suspend rather than refuse a possession order.

This option is of two parts. The first part is to extend the period of a 'no grounds' notice of termination from 60 to 90 days. It is the TU's view that landlords should not be able to give 'no grounds' notices at all, for the reasons discussed above. We submit that if landlords are to be allowed to give notices of termination without grounds, the law should make the use of such notices unattractive. In other words, the law should recognise that a notice of termination without grounds is a notice given where there are no just

grounds for termination (for example, breach, sale or premises, or the landlord requiring the premises for their own use) as otherwise recognised by the law. Accordingly, if landlords are not to be prohibited from giving notices of termination where their grounds are not just, they should be discouraged from doing so. An important factor in making 'no grounds' notices unattractive, at least relative to other notices with grounds, is the notice period. We submit that a period of 6 months is appropriate. This is the same as the period for 'no grounds' notices of termination under the ACT Residential Tenancies Act.

The second part of this option is to remove the Tribunal's discretion to decline to terminate a tenancy where a landlord gives a notice of termination without grounds. As indicated above, 'no grounds' notices are given for all manner of reasons, good and bad. The TU submits that an application for termination without grounds is precisely the sort of application that most needs the scrutiny of the Tribunal. Also, removing the Tribunal's discretion in dealing with these applications also makes them attractive relative to other applications for termination (that is, applications with grounds). This is contrary to the principle that 'no grounds' notices should be less attractive than notices with grounds, as discussed above.

Taking the parts together, the TU recommends against this option. The extended period of notice is not sufficient to make 'no grounds' notices unattractive relative to other notices of termination. The removal of the Tribunal's discretion in dealing with applications for termination without grounds is not appropriate in any circumstances.

*Recommendation:*

- *Allow landlords to serve notices of termination that give grounds for termination, as prescribed by the Act, only.*
- *Retain the Tribunal's obligation to consider the factors provided at section 64(2) of the Act, and its discretion to decline to make orders terminating a tenancy.*

*Alternative recommendation:*

- *Allow landlords to give notices of termination without grounds, with a notice period of not less than 6 months.*
- *Retain the Tribunal's obligation to consider the factors provided at section 64(2) of the Act, and its discretion to decline to make orders terminating a tenancy.*

- 2.5. allow tenants to give twice as much notice to vacate during the fixed term than they are required to give once a fixed term has expired.

The TU supports this option. As well as giving certainty to tenants who have to leave early, and reducing the need for hardship applications, the present option would address another practical problem of which the TU is aware. In some cases where a tenant needs to terminate the tenancy during the fixed term, the tenant advises the landlord's agent of their intentions and suggests that they commence advertising for another tenant, but then does not give vacant possession and continues to pay rent (often on two premises). In these circumstances, the tenant has not actually breached the agreement, and the landlord's duty to mitigate – including the requirement that they take reasonable steps to find another tenant – does not arise. This situation can last for some considerable time – often until the tenant contacts a TAAP service which advises that make a hardship application or break the agreement, or when they finally lapse into arrears. Provision for a notice of termination would reduce such misconceptions and the expense that follow from them.

An alternative to the present option, which provides for termination without grounds, would be to instead provide for a wider range of grounds for termination by the tenant during the fixed term. We submit that the following grounds, and notice periods, are appropriate:

<b>Grounds</b>	<b>Notice period</b>
Tenant has accepted an offer of social housing	14 days
Tenant is going into accommodation that provides special care or treatment	14 days
Landlord has failed to comply with an order of the Tribunal	14 days
Landlord has placed the premises on the market	14 days
Tenant's co-tenant has died	14 days

Each of the first three of these circumstances constitutes grounds for a notice of termination by the tenant under the Victorian Residential Tenancies Act; the first is also grounds for termination by a tenant under the Northern Territory's Residential Tenancies Act. The fourth ground is discussed below in relation to option 14.3, and the fifth is discussed below in relation to option 15.2.

*Recommendation:*

- *Allow tenants to give notices of termination without grounds during the fixed term of a tenancy, with a notice period of not less than 42 days.*

*Alternative recommendation:*

- *Allow tenants to give notices of termination during the fixed term of a tenancy on the following grounds:*
  - *Tenant has accepted an offer of social housing (14 days)*
  - *Tenant is going into accommodation that provides special care or treatment (14 days)*
  - *Landlord has failed to comply with an order of the Tribunal (14 days)*
  - *Landlord has placed the premises on the market (14 days)*
  - *Tenant's co-tenant has died (14 days)*

**Additional item: tenants holding over.**

The TU submits that the current operation of the Residential Tenancies Act in relation to tenants who are holding over after termination of the tenancy is problematic. These arrangements are covered by the provisions at section 72 relating to recovery of the premises, and tenants holding over are required to pay an occupation fee, but otherwise the Act appears to make no other provisions in relation to these arrangements. The TU is aware of instances in which the Tribunal has made orders terminating a tenancy, and setting a date for possession that is a number of months hence, in which time the tenant is holding over. This is a long time for parties to be left in such an uncertain position. An alternative practice, which is available to the Tribunal under the current law and sometimes used, is for the Tribunal to make orders for termination and possession and then suspend the orders to some later date. This practice avoids the uncertainty as to rights between the parties where tenants are holding over for any period of time. We submit that the Act should be amended to clarify that when the Tribunal makes orders terminating a tenancy and returning possession to the landlord, the Tribunal must suspend the operation of the termination orders to the date given for possession.

*Recommendation:*

- *Clarify that where the Tribunal makes orders terminating a tenancy and returning possession to the landlord, the Tribunal must suspend the operation the termination orders to the date given for possession.*

### 3. Rental arrears

The TU is familiar with the concerns, recited in the options paper, about rent arrears and the time that may elapse between a tenant first falling into arrears and finally being evicted by order of the Tribunal. It should be kept in mind, however, that most cases of arrears do not proceed to that final point. In many more cases, at some point during that period of time, the tenant remedies the breach; in many others, the tenant and landlord make some arrangement for the arrears to be paid in instalments. In these sorts of cases, the time that the current process takes may in fact be time well spent, in that it allows viable tenancies to be salvaged and proceeded with to the benefit of both parties. If the process were faster, viable tenancies that might otherwise be salvagable would be terminated, to the cost of both tenants and landlords.

There will, of course, be some cases in which the tenancy will not be salvaged and arrears will accrue until it is terminated. In such cases, it is understandable that a landlord who has just evicted a non-paying tenant might, with the benefit of hindsight, rue the time that elapsed between the first non-payment of rent and eviction. We submit, however, that the purpose of residential tenancy law is not to stop landlords from suffering loss in every single case, and that to attempt to do so – such as through providing for quicker evictions – is short-sighted, and may in fact be contrary to landlords' interests more generally.

Accordingly, the TU generally supports the current provisions of the Residential Tenancies Act in relation to rent arrears and terminations. We anticipate that landlords' representatives may not. We understand that where landlords lose money on a non-paying tenant, they will blame the law and the amount of time it takes to evict them; on the other hand, where a tenancy is saved, arrears are paid and a loss avoided, landlords may be inclined to credit the management skills of themselves or their agents and forget to credit that the processes prescribed by the law permitted the time to arrive at such a solution.

- 3.1. adopt the Victorian model [of applications for orders being made simultaneously with the service of termination notices].

The TU recommends strongly against this option.

We understand that this model may hold some appeal for landlords who think their interests are served by quicker evictions, because this model has the effect of using the notice period itself as the time for the Tribunal registry's administration of an application. It does so at significant cost to tenants and to the fairness of the process generally.

The Victorian model makes termination proceedings on grounds of rent arrears more complex for the tenant. It places the onus on the tenant to make an application for a hearing. Tenants whose literacy is poor or who are from a

non-English speaking background may find this complexity especially difficult. In practical terms, this complexity may be difficult for any tenant who is in rent arrears and who is trying, in a short space of time, to make arrangements to get the money to pay the arrears. We submit that it is generally in the interests of both landlords and tenants that tenants use this period to make arrangements for the payment of arrears, rather than to make applications to the Tribunal.

This option would also reduce the scrutiny of the Tribunal. Under the Victorian model, where the Tribunal does not receive an application from a tenant, the Tribunal makes orders on the landlord's application without a hearing. This option, therefore, introduces a kind of default judgment to residential tenancy law. This is not appropriate to the consumer protection ethos of the legislation, or to matters where more than merely the payment of money – that is, the eviction of a person from their home – is at stake.

*Recommendation:*

- *Do not adopt the Victorian model.*

### 3.2. introduce a notice to remedy for minor or persistent arrears.

The TU believes that there are sound reasons for introducing into the Residential Tenancies Act provisions for a 'notice to remedy.' We submit that as well as being useful for dealing with minor or persistent arrears, a notice to remedy may also address problems that currently arise from landlords and agents using notices of termination as rent reminders. The practice is widespread and causes particular problems in relation to fixed term tenancies. The TU is aware of cases in which the landlord serves a notice of termination, on grounds of rent arrears, during the fixed term of the tenancy, whereupon the tenant vacates. The landlord then claims that the tenant has vacated in breach of the fixed term of the agreement and sues for loss of rent. In one case of which we are aware, the tenant paid the arrears before vacating, and instructs us that the tenancy was viable and they would have continued in the tenancy but for the landlord's notice that they were 'required to give vacant possession.' We submit that if landlords do not really want a tenant to vacate and lose their bargain, they should not serve notices of termination. A notice to remedy may help address this problem.

The TU submits that the Act should be amended to provide that a landlord may serve a notice to remedy when the tenant is not less than 7 days in arrears, stating that the tenant is required to pay all arrears within not less than 7 days of service of the notice. If at the end of the notice period the tenant has not paid all arrears owing to that date, the landlord may serve a notice of termination on the grounds that the tenant has failed to remedy the rent arrears. We submit that such a provision should require that a notice of termination for rent arrears could not be served unless a notice to remedy has

first been served and the tenant has failed to remedy the arrears. We note that the provision we have suggested would not add to the time taken to terminate a tenancy on grounds of rent arrears.

*Recommendation:*

- *Where a tenant is not less than 7 days in arrears, allow the landlord to give a notice to remedy.*
- *A notice to remedy should give a period of not less than 7 days in which the tenant is to pay all arrears owing to the end of the period.*
- *Where a tenant fails to pay all arrears owing to the end of the period given in a notice to remedy, allow the landlord to serve a notice of termination on the grounds that the tenant has failed to remedy the rent arrears.*
- *Require that landlords must not serve a notice of termination on grounds of rent arrears without first having served a notice to remedy.*

- 3.3. reduce the amount of arrears before a notice can be served to 7 days or reduce the notice itself to 7 days.

The TU recommends against this option. First, that a tenant is 7 days in arrears is not a reliable indicator of that the tenancy is not viable. If notices of termination were given when tenants were merely 7 days in arrears, many more viable tenancies would be terminated, to a cost to both landlords and tenants. Secondly, a notice of termination with a period of 7 days only does not give sufficient time for a tenant to arrange either for the payment of arrears or finding alternative accommodation. A notice period of 7 days would result in more applications by landlords to the Tribunal, which represents a cost to both landlords and tenants.

*Recommendation:*

- *Do not reduce number of days in which a tenant is in arrears before which a notice of termination maybe served to 7 days.*
- *Do not reduce the period of notices of termination on grounds of rent arrears to 7 days.*

#### 4. Mortgagee rights

This area of the law is increasingly important: in past years the TU was rarely called upon to give advice in relation to tenants' rights when a mortgagee becomes entitled to possession; now the question arises frequently. The answer is almost never good news for the tenant. The current law comprehensively fails to adequately protect tenants' interests.

First, there is uncertainty as to when a mortgagee actually becomes entitled to possession and, through the operation of the current law, the tenancy terminates. The TU submits that a mortgagee becomes entitled to possession when this determined by the Supreme Court; some mortgagees, however, contend that they become entitled to possession by operation of their contracts with the mortgagor. From our experience, when some mortgagees notify tenants of their intention to recover possession, they begin to negotiate with tenants for giving vacant possession of the premises as if the tenancy has in fact terminated. Most tenants in these circumstances attempt, quite reasonably, to find other accommodation and leave. The TU submits that doing so may in fact be an abandonment of the tenancy, and that if the mortgagee and mortgagor subsequently settle their dispute without foreclosure, the tenant may be liable to the mortgagor landlord for losses arising from the abandonment.

Secondly, the requirement at section 75 that a mortgagee give notice to a tenant that they propose to recover possession of the premises is rendered toothless by section 75 (3), which provides that a failure to give notice does not affect or invalidate orders for possession.

Thirdly, if a tenant receives notice of the mortgagee's recovery proceedings in the Supreme Court, and they wish to apply for a tenancy against the mortgagee, section 76 (2) appears to require that the tenant make their application in that forum - and risk the attendant costs. In *Halaseh & Halaseh v Citibank Ltd* [1996] NSWRT 139 (17 July 1996), the Tribunal considered the requirement that the application 'must be made within a reasonable time after the applicant was given notice of the proceedings' and held that it did not allow the tenant to wait for the completion of the Supreme Court proceedings to make their application in the less expensive forum of the Tribunal.

Fourthly, and again in relation to section 76, if the tenant makes an application for a tenancy against the mortgagee in either the Court or the Tribunal, the Court or Tribunal may make the order 'if it thinks it appropriate to do so in the special circumstances of the case': section 76 (3). We submit that the effect of the 'special circumstances' qualification is to require that the applicant show that there is something peculiar or out of the ordinary about their case, and prevents such order from be made in the ordinary course of events.

Taken together, the provisions of the current law relating to mortgagees offer no assistance to most tenants. Tenants who need more time to find other accommodation and move out rather than be evicted are instead left to appeal to the humanity of mortgagees.

It is also difficult to advise tenants in these situations as to what they can expect from mortgagees, as their practice varies considerably. In late 2004 the TU wrote to five major banks and asked as to their policies and procedures for dealing with tenants of defaulting mortgagors. Two responded; both indicated that they deal with these situations on a 'case by case' basis and did not indicate any general time frames or considerations as to circumstances. Both the law and practice in this area are unsatisfactory.

- 4.1. adopt the Queensland and Victorian approach of requiring mortgagees to give a specified period of notice to tenants to vacate.

The TU submits that this approach is an improvement on the current law in New South Wales, but prefers the New Zealand approach.

- 4.2. adopt the New Zealand model [of providing that the mortgagee acquires the landlord's interest subject to the tenancy].

The TU supports this option, with a minor variation. The New Zealand model provides that a mortgagee is not bound by the fixed term of a tenancy agreement and may proceed as if the agreement was a continuing one. We submit that this is appropriate, but that tenants also should not be bound by a fixed term where a mortgagee acquires the landlord's interest in the tenancy.

We submit that considering the scale of operations of most mortgagees, it is not unreasonably onerous to require that they stand in place of the landlord. It is most likely that it would not be for a long period, and that the actual management of the tenancy would be contracted to an agent.

*Recommendation:*

- *Where it is determined that a mortgagee is entitled to possession of rented premises, provide that the mortgagee acquires the landlord's interest subject to the tenancy.*
- *Provide where a mortgagee so acquires a landlord's interest in a tenancy and the tenancy agreement has a fixed term, that neither the mortgagee nor the tenant is bound by the fixed term.*
- *Where a tenant, acting in good faith, gives vacant possession in response to a representation by a mortgagee that the mortgagee intends to recover possession of the premises, provide that the tenant is not liable to the landlord for abandonment.*

- 4.3. give tenants a right to compensation if a fixed term agreement is terminated early by a mortgagee.

The TU supports this option. We submit that under the current law, where a tenancy terminates as a result of the landlord defaulting on a mortgage, the landlord is in breach of the tenant's right to quiet enjoyment and liable to compensate the tenant. The problem, of course, is that most landlords in these circumstances are not good payers. The option addresses this problem.

*Recommendation:*

- *Provide that a tenant whose agreement is terminated by a mortgagee may apply to the Tribunal for an order that the landlord compensate the tenant for losses arising from the termination of the tenancy, and directing that such compensation be paid by the mortgagee from the proceeds of the sale of the premises.*

## 5. Interest on bonds

At 30 June 2004, the Rental Bond Board held \$569.3 million in tenants' bonds. These monies generated revenue of almost \$35 million. Of this income, \$77 000 – just 2.2 per cent – was paid to tenants in interest, while the Bond Board recorded a surplus of \$5.7 million. We submit that the Bond Board can afford to give tenants a better deal on their money.

### 5.1. pay no interest at all.

The TU does not support this option. We submit that it does not respect the fact that bonds are tenants' monies. When these monies are invested, tenants should be credited some of the proceeds. That the option would 'reduce complaints resulting from small interest payments' is specious reasoning – it would assuredly provoke more complaints about there being no interest payments at all. Also, it should be remembered that payments were more substantial when interests were higher – and tenants would often use the interest on their bond to help pay for utilities connections at their next premises. If and when interest rates rise again tenants should receive part of the higher income earned on their money.

### 5.2. link the interest rate payable to another banking product.

The TU supports this option. We submit that an appropriate interest rate is that which applies to a deposit of \$100 000 in a Commonwealth Bank Streamline Account. Currently this rate is 0.20 per cent. Applied to payments made to tenants in 2003-2004, this would result in a total interest payment of \$1.54 million. This would still leave the Rental Bond Board with a large surplus (approximately \$4.2 million).

### 5.3. replace the payment of interest with a system under which the Rental Bond Board could declare an annual bond 'bonus' payment.

The TU does not support this option. We submit that a system of 'bonuses' is more likely to raise unrealistic expectations of returns on bonds than the current system of interest payments.

#### *Recommendation:*

- *Link the rate of interest paid to tenants to that paid on a deposit of \$100 000 in a Commonwealth Bank Streamline Account.*

## 6. Co-tenant disputes

There are two main problems with the way in which the current law deals – or rather, fails to deal – with co-tenancies. First, the Residential Tenancies Act does not make appropriate provision for the assignment of tenancies and shares in tenancies. Secondly, the Act does not provide for the resolution of disputes between co-tenants arising from their tenancy agreements. The TU submits that if the Act made assignments easy, and provided access to the Tribunal for the resolution of disputes between co-tenants, many practical problems would be solved.

- 6.1. amend the tenancy law to enable the names on a co-tenancy to be altered with the consent of all parties or upon application to the Tribunal.

The TU supports the general intention of this option, but submits that there is a clearer way of achieving it. As it is presently phrased, the option runs the risk of confirming the common misconception that a tenant can ‘go on’ and ‘go off’ a lease. What the option essentially proposes is the assignment of a tenancy or part thereof. In our experience this is an aspect of the law that is poorly understood by landlords, agent and tenants.

The TU submits that the Act should be amended to provide a clear regime for assignments, including a standard deed of assignment. The Act should provide that landlords must not unreasonably refuse consent to an assignment, and that the Tribunal may order an assignment without their consent where the landlord fails to show that their refusal was reasonable.

In addition, the Act should provide a clear and orderly method for co-tenants to end their liability where they have moved out and where they are unable to effect an assignment by consent. We submit that where the fixed term of a tenancy has expired, and a co-tenant under the agreement no longer resides at the premises, the co-tenant should be allowed to give a notice of 21 days to the remaining co-tenant (or co-tenants) and, at the expiration of the notice, apply to the Tribunal for orders assigning their share of the tenancy to the other co-tenant (or co-tenants). At the hearing, the Tribunal must be satisfied that all co-tenants have received notice before it effects the assignment.

We note that the options paper suggests that this option ‘would assist to resolve disputes where the relationship between co-tenants has broken down irretrievably, such as in domestic violence situations.’ Because assignments depend, in the first instance, on negotiations and consent between the parties, we submit that situations of domestic violence should be dealt with specifically and separately. We discuss this issue as an additional item, below.

*Recommendations:*

- *Prescribe a standard deed of assignment.*
- *Require that a landlord must not unreasonably refuse consent for the assignment of a tenancy or a share in a co-tenancy.*
- *Allow a tenant or co-tenant to apply for order that the assignment be effected without the landlord's consent where it is unreasonably refused. The landlord is to bear the onus of proving that their refusal was reasonable.*
- *Where the fixed term of a tenancy has expired, and a co-tenant under the agreement no longer resides at the premises, allow the co-tenant to give a notice of 21 days to the remaining co-tenant (or co-tenants) and, at the expiration of the notice, apply to the Tribunal for orders assigning their share of the tenancy to the other co-tenant (or co-tenants).*

6.2. amend the law to allow one co-tenant to claim their share of the bond upon leaving the premises.

This issue is related to that of the assignment of tenancies. The TU submits that if the present problems with assignments were dealt with as proposed above, the issue of co-tenants' respective shares of the bond would also be addressed through better use of the current provisions for changing the names in which a bond is lodged.

**Additional item: Tribunal's jurisdiction to determine disputes between co-tenants**

The TU submits that the Consumer, Trader and Tenancy Tribunal should have jurisdiction to hear disputes between co-tenants relating to the tenancy, including as to the apportionment of rent arrears and bonds. This would not prevent a landlord from pursuing and recovering monies from one of several jointly liable co-tenants; it would instead give that co-tenant the opportunity to make an application for orders as to liabilities between the co-tenants. The cost and relative complexity of the Local Court discourage co-tenants from taking their disputes there.

*Recommendation:*

- *Give the Tribunal jurisdiction to hear and determine disputes between co-tenants arising from their tenancy agreement.*

**Additional item: domestic violence**

The law should recognise that victims of domestic violence may need to end or change their tenancy arrangements in order to secure their safety. The TU believes that situations of domestic violence should be dealt separately from the assignment process. The assignment process is not appropriate where there is exists a severe power imbalance between the parties, as in cases of domestic violence.

*Recommendation:*

- *Allow a co-tenant who is the victim of domestic violence to apply to the Tribunal for an order assigning their share of the tenancy to the co-tenant who is the perpetrator of the violence*
- *Allow a co-tenant who is the victim of domestic violence to apply to the Tribunal for an order assigning the perpetrator's share of the co-tenancy tenancy to the co-tenant who is the victim of domestic violence.*
- *Allow an occupant who is the victim of domestic violence to apply to the Tribunal for an order assigning the perpetrator's tenancy to the occupant.*

## 7. Additional terms

- 7.1. extend the standard agreement to include some of the more common, lawful additional terms.

The TU recommends against this option. We submit that the standard form of agreement should embody the terms that are required by the Residential Tenancies Act to be included in every tenancy agreement. It is not appropriate to extend the standard form of agreement with additional terms that the Parliament has not prescribed for inclusion in every tenancy agreement.

We also submit that if there are doubts as to the validity of additional terms, it is appropriate that the Tribunal and the Supreme Court should determine their validity, not the Executive by way of Regulation.

*Recommendation:*

- *Do not extend the standard form of agreement to include additional terms.*

- 7.2. include a list in the Regulations of those matters which cannot be added to a tenancy agreement.

The TU supports this option.

*Recommendation:*

- *Specify in the Regulations additional terms that contract out of the Act and are invalid.*

- 7.3. provide greater education on the subject of additional terms to landlords, agents and tenants.

The TU supports this option, but notes that it is not a novel approach. Through the circulation of the Renting Guide and other initiatives, the Office of Fair Trading and its predecessor departments have been attempting to educate landlords, agents and tenants as to the provisions of the Residential Tenancies Act since its commencement. It appears to us that it is not through simple ignorance that notoriously invalid additional terms, such as that relating to steam-cleaning, keep appearing in tenancy agreements. We submit that well-publicised prosecutions of landlords who seriously or persistently contract out of the Act might prove to be the best education for many landlords and agents.

*Recommendation:*

- *Provide education to landlords, agents and tenants on additional terms, and prosecute landlords and agents who seriously or persistently contract out of the Act.*

## 8. Fees and charges

- 8.1. remove the ability for tenants to be charged for the cost of preparing a tenancy agreement.

The TU supports this option. The current provision allowing tenants to be charged for part of the cost of preparing the tenancy agreement is anomalous: under the Residential Tenancies Act, tenants are not liable to pay other costs associated with the way a landlord chooses to handle their affairs. We are also dubious as to the relationship between the charge and the real cost of preparing an agreement.

### *Recommendation:*

- *Provide that no person may require or receive from a tenant any fee for the preparation of a tenancy agreement.*

- 8.2. adopt the Queensland approach [of providing that a person paying a reservation fee has the option of deciding whether the tenancy goes ahead, not the landlord or agent].

The TU supports this option, and submits that reservation fees so regulated should be limited to not more than the equivalent of one week's rent, and that the reservation period should be not less than the equivalent number of days.

- 8.3. prohibit reservation fees.

The TU has some sympathy for this option, but does not support it. In a competitive rental market, many prospective tenants hope to make a good impression on landlords and agents by offering to pay a reservation fee, and we are concerned that they would still do so – and agents would still accept the money offered – even if the Residential Tenancies Act prohibited reservation fees. On balance, we are inclined to prefer that reservation fees be regulated per the provisions of the Queensland Residential Tenancies Act relating to 'holding deposits' (sections 85-88), as discussed above.

Note that the TU proposes a change to the terminology of 'reservation fees' in the discussion of option 19.2, further below.

### *Recommendation:*

- *Regulate reservation fees per the provisions for 'holding deposits' under the Queensland Residential Tenancies Act.*

- *Limit the amount of a reservation fee to not more than the equivalent of one week's rent, and prescribe that the reservation period should be not less than the equivalent number of days.*

8.4. require all tenants to pay for water usage where the water supply is individually metered.

The TU supports the principle that tenants should pay for water according to use as measured by an individual meter. We note that there is in many existing residential tenancy agreements an additional term to this effect. In relation to existing agreements that do not include this additional term, we submit that generally landlords treat the cost of water as an outgoing that is factored into the rent. To insert into these agreements a new term requiring the tenant to pay for water usage according to the metered usage would have the unfair effect of requiring them to pay for water twice.

Accordingly, the TU submits that any new term that requires tenants to pay for water usage where the supply is individually metered should apply only to agreements entered into after the enactment of the amending legislation.

*Recommendation:*

- *Provide that it is a term of every tenancy agreement that where the premises are individually metered for the supply of water, the tenant shall pay for water.*
- *Do not insert the new term into existing agreements.*

8.5. require landlords to pass on a copy of the water bill to tenants paying for water without undue delay.

The TU supports this option. Most agents and landlord already do this; those who do not, should.

*Recommendation:*

- *Where a tenant pays for water according to metered use, require the landlord to provide the tenant with a copy of the water bill without delay.*

8.6. amend the law to clarify that tenants are entitled to receive any rebates for water supply interruptions.

The TU supports this option. This entitlement follows from the principle that tenants pay for water use. We note that tenants should receive the benefit of any rebates for supply interruptions whether or not the water supply is individually metered: as discussed at 8.4 above, tenants who do not pay according to an individual meter instead in fact pay for water through their rent, in which the landlord's outgoings on water are a factor. If the supply is interrupted, these tenants are not getting part of what they are paying for, so they too should receive the benefit of any rebates.

*Recommendation:*

- *Require landlords to pay to tenants the value of any rebates received for interruptions in the supply of water.*

8.7. extend the urgent repair provisions to include the repair or replacement of leaking water appliances, where the tenant is paying for water usage.

The TU supports this option. The TU also submits that the limit on the cost of urgent repairs should be increased. When the Residential Tenancies Act commenced in 1989, the cost limit was \$500, and it has remained unchanged since. Had the limit increased with inflation, it would now be approximately \$750. We submit that a limit of \$1 000 is appropriate.

*Recommendation:*

- *Allow tenants to repair or replace leaking water appliances under the provisions relating to urgent repairs.*
- *Allow tenants to make urgent repairs, and seek compensation from the landlord, to the value of \$1 000.*

8.8. introduce an obligation on landlords that when carrying out repairs or renovations water efficient appliances must be used.

The TU supports this option. The obligation is especially appropriate where tenants pay for water according to its metered use; but it is also a sound policy generally.

*Recommendation:*

- *Require that landlords use and fit water efficient appliances when carrying out repairs, maintenance and improvements.*

### **Additional item: remedies where utilities are not properly connected**

Under the current law, there is a problem relating to the payment of electricity supply charges by tenants to electricity companies where the residential premises are improperly wired and not separately metered. Subclause 5.1 of the prescribed standard form of residential tenancy agreement provides that: 'The tenant agrees to pay... for electricity'. In most cases, the tenant contracts directly with an electricity supply company, and pays according to their metered use of electricity. In other cases, the landlord contracts with an electricity supply company and the landlord supplies the tenant with electricity. Under the Electricity Supply Act 1995, the landlord may charge the tenant a fee for electricity supplied this way, but only if the premises are separately metered. Landlords who supply electricity and who have not installed a separate meter at the premises may not charge the tenant for electricity, and must bear the cost themselves.

The problem is that rather than supplying the electricity themselves, landlords of premises that are not separately metered may simply leave it to the tenant to contract with the electricity supply company. The tenant then pays for the supply of electricity to not just their own premises, but also to neighbouring or adjoining premises, including in some instances the landlord's own. This is a particular problem in single-owner blocks of flats, houses that have been subdivided into duplexes or flats, dual-occupancy 'granny-flat' arrangements and, especially, rural properties. The TU is aware of cases where landlords have run pumps, work sheds and other items of farm machinery on electricity paid for by their tenants.

The TU has been advised by the Energy and Water Ombudsman of NSW (EWON) that because these arrangements fall outside of the Electricity Supply Act 1995, EWON cannot deal with them. This advice has been confirmed with the NSW Department of Utilities, Energy and Sustainability, who also advise that they too are not resourced to deal with these improper metering arrangements. A number of these arrangements have been the subject of proceedings under the Residential Tenancies Act, but the Tribunal has not made consistent determinations: see compare *Carver & Bolt v Berghoffer & Berghoffer* [1996] NSWRT 200 (28 November 1996) and *Wright & Pring v Shannahan & Shannahan* [2001] NSWRT 169 (16 July 2001).

The TU submits that the underlying intention of the provisions of the Electricity Supply Act relating to rental premises is that where landlords do not properly - that is, individually and separately - meter their rental premises, the landlord should pay for the supply of electricity. Currently the Residential Tenancies Act, and the standard form of tenancy agreement, give landlords who have improperly metered premises a means of undermining that intention.

The TU notes that while our experience of this problem is in relation to the supply of electricity, it potentially affects other utilities too.

*Recommendation:*

- *Amend the Act to provide the following term is a term of every tenancy agreement:*
  - *The landlord agrees that the tenant shall pay for utilities provided that the premises are individually and separately metered in relation to that utility, and that where the premises are not individually or separately metered in relation to a utility the landlord shall pay for the supply of that utility.*

**Additional item: fees for references and government agency documents**

The TU is aware of instances of agents charging fees to tenants for the provision of a written reference, and for completing the following government agency documents:

- Centrelink Rent Assistance forms
- Department of Housing bond assistance (RentStart) forms
- confirmation to the Department of Housing that the agent has no accommodation suitable for the tenant.

We regard these fees as inappropriate. The provision of a written reference is not onerous and arises from functions that the agents has performed – and been paid for – by the landlord. Persons who require forms to be completed for the purposes of applying for assistance from Centrelink and the Department of Housing are invariably disadvantaged persons who need housing. Charging fees for the completion of assistance forms is exploitative of their housing need.

*Recommendation:*

- *Provide that no person shall receive or require from a tenant a fee for providing a reference or for completing government agency documents relating to housing assistance.*

## 9. Bond lodgement

9.1. extend the period in which bonds must be lodged to up to 30 days.

The TU recommends against this option. Landlords and agents who receive payment of a bond should lodge it immediately – it is the tenant’s money.

*Recommendation:*

- *Do not extend the period in which bonds must be lodged.*

9.2. allow landlords to retain bonds paid by instalments until the bond is fully paid, or a period of 3 months has elapsed.

The TU recommends against this option. Landlords do not need to collect bonds by instalments: if they are concerned that a tenant cannot afford to pay a bond at the commencement of the tenancy, they need not require it to be paid at all, or they may require that it be paid at a later date.

*Recommendation:*

- *Do not allow landlords to retain partial payments of bond beyond the usual 7 day lodgement period.*

## 10. Rent payments and receipts

The TU submits that the options paper makes a serious oversight in not considering the problematic operation of the current provisions relating to rent increases. We will discuss these problems as an additional item, below.

- 10.1. amend the standard tenancy agreement to include a process under which a method of rent payment can be varied after adequate notice and consent.

The TU recommends against this option. The TU submits that as the law currently stands, the method of rent payment contained in a tenancy agreement may be varied by the consent of both parties. The present option appears to add nothing except a requirement that there be some form of notice as well.

It might be more useful for the standard form of agreement to expressly note that the methods of payment under the agreement may be altered with the mutual consent of the parties only.

### *Recommendation:*

- *Retain the current process for variation of rent payment methods under the agreement by mutual consent.*
- *Add to the standard form of agreement a statement that the methods of payment under the agreement may be altered with the mutual consent of the parties only.*

- 10.2. limit the maximum rent in advance that can be required for all tenancies to two weeks rent.

The TU supports this option. For the purposes of clarity it may be useful for the Act to state expressly that this requirement does not prevent tenants from paying more than two weeks rent in advance if they so choose from time to time.

### *Recommendation:*

- *Prohibit landlords from requiring rent to be paid more than two weeks in advance.*

- 10.3. give tenants the right to seek reimbursement of overpaid rent at any time for any reason.

The TU supports this option. The current provision's limitations as to the period of rent overpaid (that is, up to 12 months only), and as to the cause of the overpayment (that is, as a result of an invalid rent increase notice only), are not appropriate to the consumer protection ethos of the legislation.

*Recommendation:*

- *Provide that a tenant may apply to the Tribunal for an order that the landlord reimburse them for rent overpaid for any reason, and in respect of any period during the tenancy.*

- 10.4. update rent receipt requirements to take account of modern rent payment mechanisms.

This option is unclear. If it means to clarify that landlords and agents are not required to provide or post a receipt where the payment is made electronically, the TU supports the option if it is part of a reform that entitles tenants to receive a quarterly statement of rent transactions, as suggested by option 10.5.

- 10.5. give tenants the right to request a rent transaction statement from the landlord/agent, either quarterly or annually.

The TU supports this option. As the options paper acknowledges, many of the rent payment methods that have developed since the introduction of the Residential Tenancies Act do not include a notation as to the period of the payment or the date to which rent is paid. We submit that providing for a quarterly rent transaction statement would be appropriate, and aid in the timely resolution of disputes and tenants' own management of their affairs.

*Recommendation:*

- *Provide that tenants are entitled to receive a quarterly statement of rent transactions.*

- 10.6. amend the law to require landlords and agents to retain rent records for the duration of a tenancy, plus at least a further 30 days.

The TU supports this option. We submit that such a requirement would aid in the resolution of disputes by preserving important evidence as to the state of liabilities between parties. It should already be the practice of prudent landlords and agents to retain records for the life of a tenancy.

*Recommendation:*

- *Require landlords to keep records relating to a tenancy for the duration of the tenancy, and for not less than 30 days after the termination of the tenancy.*

10.7. include a new provision to clarify that tenants cannot be charged for a rent payment card, deposit book or service fee by a landlord, agent or a non-authorized deposit-taking institution.

The TU supports this option. Under the current law, agents using rent collection companies who charge fees that agents themselves are prohibited from charging. The effect is that agents are outsourcing the administration of rent payments at the expense of tenants. This is not consistent with the consumer protection ethos of the legislation.

An alternative to the present option would be to require that every tenancy agreement provide at least one method of payment that does not entail a cost or charge to be paid by the tenant. In other words, agreements might provide for other methods of payment that involve a cost to the tenant, and the tenant may choose to use that method if it suits them.

*Recommendation:*

- *Provide that no person shall receive or require from a tenant any fee for the payment or collection of rent.*

*Alternative recommendation:*

- *Provide that every tenancy agreement shall include at least one method of rent payment that does not require the tenant to pay a fee to any person.*

### **Additional item: excessive rent increases**

The provisions of the current Residential Tenancies Act relating to excessive rent increases do not provide effective protection to tenants. Under the current law, the legal process for increasing the rent is initiated by service of a notice by the landlord, but the onus is on the tenant to prove that it is excessive. Furthermore, the evidence necessary to discharge this onus is generally in the hands of the landlord. As a result, tenants have great

difficulty in successfully pursuing these proceedings. We submit that where a landlord has given a notice to increase the rent, and the Tribunal is to determine whether the increase is excessive, it is appropriate that the landlord should bear the onus of proving that the increase is not excessive.

We also submit that it is appropriate to limit the frequency of rent increases to not more than once in 12 months. The Residential Tenancies Acts of South Australia, Tasmania, Victoria, and Western Australia allow not more than one increase in 6 months; the Australian Capital Territory's Residential Tenancies Act allows not more than once increase in 12 months.

*Recommendations:*

- *Allow landlords to increase the rent not more than once in any 12 month period.*
- *Provide that where the Tribunal is to determine whether a rent increase is excessive, the landlord bears the onus of proving that the increase is not excessive.*

## 11. Furnished premises

- 11.1. remove the ability for landlords to charge a higher bond on furnished premises.

The TU supports this option. The current provisions create a loop-hole whereby a landlord may leave a couple of sticks of furniture in the premises and call them furnished, and so require tenants to pay a higher bond. We do not have direct knowledge of any real examples of this sharp practice, and if it does occur it is not widespread, but the loop-hole should be closed.

We submit that if it not closed, the incentive to exploit the loop-hole will increase over time. In the past, when the rent for most premises was less than \$250 per week, the difference between the bonds for furnished and unfurnished was the equivalent of two weeks rent (that is, the difference between 6 weeks and 4 weeks rent) – a relatively small reward for sharp practice. As the general level of rents rises, and the going rent for more premises passes the \$250 per week threshold, the difference that a few sticks of furniture may make is considerably larger.

We also submit that as (genuinely) furnished premises are let at higher rents than equivalent unfurnished premises, the bond will be higher anyway. This fact, plus the availability of insurance, should be sufficient to address any increased exposure to loss that comes from landlords letting furnished premises.

### *Recommendation:*

- *Limit bonds to the equivalent of not more than 4 weeks rent, regardless of whether the premises are furnished or unfurnished.*

## 12. Service of notices

Proceedings under the Residential Tenancies Act, especially where they relate to the termination of tenancies, are important proceedings. They are more important than the sums of money involved would indicate – people lose their homes in these proceedings.

It is appropriate that the service of notices that commence these proceedings is tightly prescribed. This gives landlords the certainty that their notices have been effective, and tenants the certainty of actually being notified of proceedings or changes in their tenancies.

12.1. adopt the ACT approach of giving wider powers to the Tribunal to waive defects in service or content.

The TU recommends strongly against this option. It would not bring certainty to the conduct of proceedings; on the contrary, it would encourage inconsistent practice by landlords and agents. It would prevent tenants advocates and other sources of information for tenants from giving clear information and advice. For example, tenants could not be reliably informed as to whether a termination notice was invalid; nor could tenants be reliably informed as to whether a notice of rent increase is invalid and hence could not be certain as to the rent they are liable to pay.

*Recommendation:*

- *Do not give the Tribunal wider powers to waive defects in the content or service of notices.*

12.2. prescribe model notices under the Regulations.

The TU supports this option, and submits that their use should be required of landlords and agents. Model notices could include references to the 4 working day postal service rule and other prescriptions, and would aid in the drafting and service of effective notices.

*Recommendation:*

- *Require landlords to use model notices, as prescribed in the Regulations.*

12.3. commence the time periods from the actual date on the notice rather than the date of receipt.

The TU recommends strongly against this option. It is an encouragement to mischief. It is already open to landlords and agents to serve a notice on the same day that it is drafted by serving the notice personally – if time is of the essence, this is the method they can and should use. In relation to notices served by post, the option ignores the reality that the notice will spend some time in transit. The effect would be to deem that a party is on notice of proceedings when in fact, for at least part of that time, they could not possibly be.

*Recommendation:*

- *Do not allow the date of the notice to be the date of service regardless of how the notice was served.*

12.4. reduce the period of tenancy related notices sent by post from 4 working days to 2.

The TU recommends strongly against this option. The 4 working days rule is provided by section 76(1)(b) of the Interpretation Act 1987. The point of the provision (and, indeed, of the whole Act) is to provide regularity and certainty, rather than relying on so-called ‘general community understanding.’

The TU notes that this provision of the Interpretation Act 1987 does not merely give a time period; it provides that service itself is effected. In other words, it is the basis on which landlords are allowed to assume that the notice they posted did in fact arrive. The 4 day rule, therefore, is a compromise that benefits all parties and we submit that it should be retained.

*Recommendation:*

- *Retain the rule that notices sent by posted are served on the fourth working day after postage.*

12.5. adopt the Victorian approach of requiring termination notices not hand delivered to tenants to be sent by registered mail.

The TU recommends against this option. Collecting registered mail is not always convenient. This may mean that tenants may, innocently or otherwise, fail to receive notices in a timely manner.

*Recommendation:*

- *Do not adopt the use of registered mail for service of notices.*

12.6. allow notices to be placed in a tenant's or landlord's letterbox or under the door of an agent's office.

The TU recommends against the option. Landlords are entitled to serve notices personally or by post; this option mixes the methods and may produce uncertainty. The two current methods of service are represent a workable system for reliably effecting service of notices. For example, where a tenant is away from the premises, it is reasonable to assume that service by post will be effective, because the tenant has the opportunity to redirect their mail. A tenant in those circumstances would not receive a notice slipped under the door.

*Recommendation:*

- *Do not allow service of notices by placement in a letterbox or under a door.*

12.7. recognise modern methods of service delivery, such as e-mail and couriers.

The TU recommends against this option. The internet is not sufficiently reliable as a means of serving notices: parties' internet service providers may change; messages may be blocked; user accounts may not be checked regularly We also submit that it is not appropriate to use couriers as if they were process servers.

*Recommendation:*

- *Do not allow service of notices by e-mail or courier.*

### 13. Reasonable security

In addition to the options presented, the TU submits that consideration should be given to clarifying that the landlord's obligation to provide reasonable security includes an obligation to change locks between tenancies. We discuss this at the additional item, below.

13.1. give greater emphasis to security in the premises condition report.

The TU supports this option.

*Recommendation:*

- *Require greater detail as to locks and security in the condition report.*

13.2. adopt the Queensland approach of prescribing factors for the Tribunal to consider in 'reasonable security' cases.

The TU supports this option. We submit that the list at section 123 (2) of the Queensland Residential Tenancies Act is appropriate.

*Recommendation:*

- *Adopt the list of factors relevant to 'reasonable security' at section 123 (2) of the Queensland Residential Tenancies Act.*

13.3. prevent tenants from seeking compensation after a break-in, unless they have previously raised security concerns.

The TU recommends strongly against this option. It would allow landlords to escape liability where the failure to provide reasonable security was latent or otherwise not discernable to the tenant. For example, in *Dimakopoulos v Mancuso & Mancuso* [2001] NSWRT 93 (2 May 2001) an agent engaged to let the premises continued to distribute keys after the premises were let and occupied by the tenant. The tenant discovered the breach only after a person who had been given keys by the agent, let themselves in while the tenant was at home. In that case, there was no physical defect, and nothing about the premises or the locks disclosed that the premises were not secure: the failure of security arose through the actions of parties of which the tenant had no knowledge. It is also possible to conceive of cases where there is a physical defect that affects the security of premises, but which is not readily noticeable

or identifiable as a defect by a tenant: for example, an exterior door with a hollow core.

Parties to any sort of contract should be entitled to take the one another's promises at their word. Tenants should be entitled to do so in relation to landlord's promises as to the security of premises.

*Recommendation:*

- *Do not prevent tenants from applying for compensation for losses arising from a breach of the landlord's obligation to provide reasonable security.*
- *Provide that in proceedings before the Tribunal where the landlord claims that reasonable security was provided, the onus of showing that reasonable security was provided is on the landlord.*

13.4. clarify the right of tenants to receive keys to all locks relating to the premises, free of charge.

The TU supports this option. Each co-tenant under a tenancy agreement should receive a complete set of keys. We anticipate that some landlords – particularly landlords of premises in strata schemes – may object on the grounds of the cost of providing more than one copy of keys to common area locks. We submit that this cost is balanced by the greater security against loss that the landlord derives from contracting with a number of jointly and severally liable co-tenants, rather than just one tenant.

*Recommendation:*

- *Clarify that each co-tenant is entitled to receive a complete set of keys to the premises without charge.*

### **Additional item: changing locks between tenancies**

The TU submits that an aspect of the landlord's obligation to provide reasonable security is to change the locks where the premises were occupied by persons other than the landlord immediately prior to the commencement of a tenancy. If the landlord does not do so, they cannot be assured that the previous occupant has not kept a copy of the keys, or that they have not distributed a copy to other persons, and as a result they cannot properly assure the new tenant that the premises are reasonably secure. Differently constituted Tribunals have made inconsistent comments as to whether this means landlords should replace locks between tenancies: see, for example, *Eliezer v Li* [1996] NSWRT 164 (26 August 1996); *Cross v Kuga Pty Ltd* [1997] NSWRT 270 (25 November 1997).

To clarify the situation, the Residential Tenancies Act should be amended to state that where the premises were occupied by persons other than the landlord immediately prior to the commencement of a tenancy, and the landlord has not changed the locks, the landlord has breached the obligation to provide reasonable security.

*Recommendation:*

- *Clarify that as part of their obligation to provide reasonable security, landlords must change the locks where the premises were occupied by persons other than the landlord immediately prior to the commencement of a tenancy.*

## 14. Access for sale

From the TU's experience, and the experience of TAAP workers, there is probably no area of the current law that so frequently disappoints tenants' expectations of fairness as the law relating to access for the purposes of the sale of rented premises.

Where the sale and access is taking place during the fixed term of the tenancy, the tenant's disappointment is likely to be extreme. Many tenants assume that just as the fixed term ties them to the property for its duration, so too does it bind the landlord. That it does not is disappointing for them; that they will have to endure visits from strangers while they are trying to settle in is likely to outrage them.

It should be kept in mind what tenants are required to put up with when a landlord decides to put the premises on the market. Inevitably there is the uncertainty as to whether a purchaser will require the tenant to move out. Almost always, there is some degree of inconvenience arising giving access to prospective buyers. Many tenants prefer that they are present during the access, to protect their privacy and guard against theft; this means that they will stay home for the access where they might otherwise be out. Many tenants will clean up before an inspection; meaning that they will spend time cleaning at a time determined by the landlord or agent, rather than what suits them.

Many tenants, however, are expected to endure even more than this. It is common for selling agents to conduct 'open house' inspections, during which an unknown number of strangers are invited to walk through the tenant's home, without being vetted by the landlord. 'Open houses' of let premises are invasive and detrimental to the tenant's security. Often, selling agents take photographs of the interior of premises and advertise them - along with the tenant's goods - to the world. Some selling agents are even more high-handed: recently, the TU heard of a selling agent proposing to conduct a 'champagne night' for prospective purchasers during access to tenanted premises (whether the tenant was expected to serve drinks or do the washing up is not known).

We submit that the current provisions for access fail to protect tenants because the interests and expectations of landlords and selling agents are at such variance from those of tenant that the word 'reasonable', undefined in the Act, is not a meaningful restraint. If they are to be more effective, the provisions must be more prescriptive.

- 14.1. adopt the Qld approach of requiring landlords to give tenants written notice of their intention to sell.

The TU supports this option. We note, however, that such an amendment by itself would not address the current problems with access.

*Recommendation:*

- *Require landlords to give written notice to tenants of their intention to sell the premises.*

14.2. require a schedule of access to be negotiated and signed by the tenant and selling agent prior to any access.

The Tenants' Union supports this option if it is part of reforms that also prescribe some basic conditions of access. It is not appropriate that rights of access by a landlord and their agents are entirely left to negotiation between the landlord and tenant. As we suggested above, the expectations of landlords and tenant are often at considerable variance, and the present option still does not give objective guidance as to what is fair access. Furthermore, under the current law the landlord holds a trump card – a notice of termination – and so negotiates from a much stronger position.

The TU submits that the Act should provide the following regime of basic conditions of access in the event of a sale:

- no more than two instances of access per week may be required.
- no more than one hour of access may be required in each instance.
- where the landlord (or their agent) and the tenant agree to the times and days for access, the landlord may access the premises without notice; otherwise, the landlord must give not less than 48 hours notice of access.
- during the fourth and fifth weeks after access is first required, no access may be required.
- the landlord must not advertise the premises using photographs in which the tenant or the tenant's goods are depicted.
- the landlord must keep a record of all persons who access the premises.

We submit that this regime should form the basis for landlords and tenants to negotiate a schedule of access to suit their own particular circumstances: for example, a schedule of access might provide, consistent with the above regime, that the selling agent will have access on Saturdays between 9 am and 10 am, and Wednesdays between 4 pm and 5 pm.

The TU also submits that parties should be allowed to negotiate a schedule that 'contracts out' of the prescribed regime. For example, a tenant might agree to allow an additional instance of access, or an open house inspection, in return for a rent reduction.

Finally we submit that a standard form of access schedule, setting out the prescribed basic conditions of access, should be included in the Regulations

and required to be used in negotiations between landlords and tenants. The standard form of access schedule should be presented in such a way as to allow parties to strike out, vary or retain the basic conditions, and incorporate other items such as rent reductions, depending on their negotiations.

*Recommendations:*

- *Prescribe the following basic conditions of access for the purposes of sale:*
  - *no more than two instances of access per week may be required.*
  - *no more than one hour of access may be required in each instance.*
  - *where the landlord (or their agent) and the tenant agree to the times and days for access, the landlord may access the premises without notice; otherwise, the landlord must give not less than 48 hours notice of access.*
  - *during the fourth and fifth weeks after access is first required, no access may be required.*
  - *the landlord must not advertise the premises using photographs in which the tenant or the tenant's good are depicted.*
  - *the landlord must keep a record of all persons who access the premises.*
- *Allow landlords and tenants to negotiate a schedule of access, based on the prescribed conditions of access, and allow parties to contract out of the prescribed conditions.*
- *Require landlords to use a standard form of access schedule.*

14.3. allow tenants to end a tenancy during a fixed term if the property is put on the market without prior disclosure of the landlord's intention to sell in the lease.

The TU shares the concern expressed in the options paper that the present option would encourage landlords and agents to include in every tenancy agreement a 'disclosure' of the possibility of sale during the fixed term, regardless of the landlord's actual intentions. We submit that the proviso relating to disclosure should be dropped from the present option. This would provide that tenants would be allowed to give a notice of termination during the fixed term of a tenancy on the grounds that the landlord has placed the premises on the market for sale, regardless of whether the landlord disclosed an intention to sell in the tenancy agreement. This would also encourage landlords to negotiate for access in a way that minimises inconvenience to the tenant.

*Recommendation:*

- *Allow tenants to give a notice of termination on the grounds that the premises have been placed on the market for sale during the fixed term of the tenancy.*

14.4. adopt the Victorian approach of requiring at least 24 hours notice.

The TU recommends against this option. It is not an adequate safeguard for tenants' reasonable peace, comfort and privacy while premises are on the market. It does not regulate the number of visits or their manner (that is, it does not control against open houses and other intrusive practices), nor does it encourage agents to negotiate with tenants to minimise inconvenience and disputes.

*Recommendation:*

- *Do not adopt the Victorian approach to access for the purposes of sale.*

## 15. Death of a tenant

The TU believes that the most important principle to be observed making laws relating to the death of a tenant is that the tenant's representative, co-tenants and other household members are afforded choices in how to proceed. We submit, therefore, that provisions that operate automatically upon a tenants' death are generally to be avoided.

- 15.1. provide that a tenancy ends upon the death of the tenant, subject to their estate being liable to pay an occupation fee (equal to a day's rent) for each day until the tenant's possessions are removed.

The TU recommends strongly against this option. It does not take into account the situation of non-tenant occupants of the premises – that is, the household members of the deceased tenant. We submit that the option would have the effect of removing such occupants from the protections of the Act and exposing them to the possibility of summary eviction by the landlord.

- 15.2. adopt the Victorian model [to provide that the deceased tenant's representative may give 28 days notice, or the parties can agree to end the tenancy sooner].

The TU supports a variation on this option. We submit that the death of a tenant should constitute grounds for termination of the tenancy, including during the fixed term, by the tenant's representative or a co-tenant. A notice period of 14 days is appropriate (though, of course, the tenant's representative or the co-tenant may give more notice).

- 15.3. adopt the Queensland and ACT approach of transferring the agreement upon the death of a co-tenant.

The TU recommends against this option. It would have the effect of making the surviving co-tenant (or co-tenants) suddenly wholly liable for the payment of rent and other charges under the agreement. In practical terms, this may be of little significance where the surviving co-tenant is the major beneficiary of the deceased co-tenant's estate, but it would be relevant where the affairs of co-tenants are no so entwined, such as in many share houses. It is appropriate that the estate of a deceased co-tenant should remain jointly and severally liable with the surviving co-tenant until such time as the estate's liability is terminated by either the termination of the tenancy, or the assignment of the deceased co-tenant's share of the tenancy by voluntary assignment between the parties or by order of the Tribunal.

*Recommendation:*

- *Allow the representative of a deceased tenant, or a co-tenant of a deceased tenant, to give a notice of termination, including during the fixed term of a tenancy, on the grounds that the tenant has died.*

## 16. Uncollected goods

The provisions of the Act and the Regulation relating to uncollected goods fail tenants in two ways. First, they provide a regime for dealing with goods that too readily permits the disposal or destruction of tenants' belongings, especially where the belongings are of mostly sentimental or personal value. Secondly, where landlords do not deal with goods according to the regime, the Act offers no remedies to tenants.

In *Hobbins v St George Community Housing Co-operative* [2002] NSWCTTT 420 (21 August 2002), the landlord destroyed the tenant's uncollected goods on the same day she was evicted from the premises – clearly in breach of the Regulation. In that case, the Tribunal determined that it could not make orders for compensation because the provisions of the Regulations are not a term of the tenancy agreement. Nor are they a penalty provision; in fact, the Tribunal commented:

Frankly, other than providing some useful guidelines for a bailment claim... there appears to be no work for those regulations at all. This is clearly an unsatisfactory situation....

As it is... these regulations certainly do not provide “common sense, quick, cheap and easy means of resolving disputes” as being the intention of Parliament in the introductory speech by the then Minister, Mr. Carr on 9 April 1987 in introducing the Residential Tenancies Bill...

### 16.1. simplify the current process of dealing with uncollected goods in the Regulations.

The TU submits that the process for dealing with uncollected goods is already quite simple: a landlord may apply to the Tribunal for orders in relation to the goods or follow the process given in the Regulation. The overall process is similar to that provided in relation to uncollected goods generally by the Uncollected Goods Act 1995. If anything, the process under the Residential Tenancies Act and the Regulation is simpler, because it does not make distinctions according to the value of the goods, and the notice periods are shorter.

The TU recommends strongly against the examples of ‘simplification’ given in the options paper. We submit that the ‘no obvious monetary value’ test is virtually a licence to destroy the possessions of tenants of modest means. The *Hobbins* case is an example of a landlord deciding that goods left behind had ‘no economic value’ or were ‘rubbish’, with devastating consequences for the tenant. We also submit that the suggested requirement that landlords and agents take ‘take all reasonable steps to notify the tenant’ may in practice be reduced to the sending of a letter to the tenants’ last known address – that is,

the premises from which they have just vacated or been evicted. We submit that the notification process needs to be prescriptive.

The problem with the current provisions is not that they lack simplicity; rather, they lack sensitivity as to the circumstances in which goods are left behind, and as to the different types of goods left behind. We submit that the Act should make the following provisions in relation to goods left behind:

- The landlord is not to remove goods from the premises earlier than the third working day after they recover possession of the premises.
- Upon the third working day, or as soon as possible thereafter, the landlord is to make an inventory and remove the goods. Perishable goods may be disposed of. Other goods must be stored.
- Goods that are personal goods, being personal documents, photographs, jewellery, tools of trade, therapeutic furniture or therapeutic devices, must be stored for not less than 6 months.
- Goods that are not personal goods must be stored for not less than 60 days.
- Upon storage of the goods, the landlord is to take all reasonable steps to notify the former tenant, including by placing notices in newspapers.
- At all times the tenant, or another person who is entitled to one or more of the goods, may recover the goods. The landlord must not, for any reason, prevent the tenant or other person entitled to the goods from recovering the goods.
- On recovering goods, the tenant or other person entitled to the goods is liable to the landlord for reasonable expenses incurred in their removal from the premises and storage.
- If goods (other than personal documents and photographs) remain unrecovered after being stored for the relevant period, the landlord must cause the goods to be sold at public auction. The landlord is liable to account to the tenant the proceeds of the sale, less the reasonable expenses incurred in the removal, storage and selling of the goods.
- If personal documents or photographs remain unrecovered after 6 months, the landlord must forward the documents to the Public Trustee.
- Notwithstanding the above, on or after the third working day after recovering possession of the premises, the landlord may apply to the Tribunal for an order that they be allowed to deal with goods left behind other than as prescribed. The Tribunal must not make the order unless it is satisfied that, in the special circumstances of the case, it is appropriate to do so. The order must specify the goods and how they are to be dealt with.

Also, the TU submits that some disputes in relation to goods left behind could be avoided by including in the Act an express reference to the abolition of distress for rent at section 177A of the Conveyancing Act 1919. This particular provision is not well known to tenants nor, it appears, some landlords and agents.

16.2. require defined 'personal documents' to be held by the landlord/agent for a longer period or forwarded to the Public Trustee.

The TU supports a variation on this option, as indicated above. We submit that stronger protections for personal documents are appropriate, but that certain other goods – specifically, photographs, tools of trade, and therapeutic furniture and device – have a similar personal significance that should also be protected. By their nature, most personal documents, photographs and jewellery are relatively easy to remove and store. We acknowledge that tools of trade and therapeutic furniture and devices would usually be less easy to remove and store than documents and photographs, but they would be no more difficult to deal with than most other items, and if ultimately sold at auction the proceeds would go to the cost of storage.

16.3. make a distinction between items ordinarily left behind and those that only arise as a result of the landlord recovering possession of the premises.

The TU submits that the process suggested in the discussion of option 16.1 deals appropriately both with goods left behind by a tenant who has voluntarily vacated the premises, and with goods left behind by a tenant who has been evicted.

*Recommendation:*

- *Allow landlords to deal with goods left behind, subject to the following:*
  - *The landlord is not to remove goods from the premises earlier than the third working day after they recover possession of the premises.*
  - *Upon the third working day, or as soon as possible thereafter, the landlord is to make an inventory and remove the goods. Perishable goods may be disposed of. Other goods must be stored.*
  - *Goods that are personal goods, being personal documents, photographs, jewellery, tools of trade, therapeutic furniture or therapeutic devices, must be stored for not less than 6 months.*
  - *Goods that are not personal goods must be stored for not less than 60 days.*

- *Upon storage of the goods, the landlord is to take all reasonable steps to notify the former tenant, including by placing notices in newspapers.*
- *At all times the former tenant, or another person who is entitled to one or more of the goods, may recover the goods. The landlord must not, for any reason, prevent the former tenant or other person entitled to the goods from recovering the goods.*
- *On recovering goods, the former tenant or other person entitled to the goods is liable to the landlord for reasonable expenses incurred in their removal from the premises and storage.*
- *If goods (other than personal documents and photographs) remain unrecovered after being stored for the relevant period, the landlord must cause the goods to be sold at public auction. The landlord is liable to account to the former tenant the proceeds of the sale, less the reasonable expenses.*
- *If personal documents or photographs remain unrecovered after 6 months, the landlord must forward the documents to the Public Trustee.*
- *Allow the Tribunal, in special circumstances, to make orders that a landlord may otherwise deal with goods left behind.*
- *Amend the Residential Tenancies Act to refer expressly to the abolition of distress for rent.*

16.4. give tenants the right to seek compensation if 'uncollected goods' are unlawfully dealt with.

The TU supports this option. We submit that the provisions of the Act relating to uncollected goods should be amended to allow the Tribunal, on the application of a former tenant or another person with an interest in the uncollected goods, to make an order that the landlord compensate the tenant or another person where the uncollected goods have been dealt with in contravention of the Act, Regulation or order of the Tribunal.

*Recommendation:*

- *Amend the Residential Tenancies Act to provide that a former tenant, or another person entitled to the goods, may apply to the Tribunal for an order that the landlord compensate them for losses arising from any unlawful dealings with uncollected goods.*

## 17. Alterations by tenants

- 17.1. the right of landlords to refuse consent to add fixtures or make alterations be limited to situations where the tenant's request is 'unreasonable.'

The TU supports this option. It strikes an appropriate balance between landlords' rights in relation to their assets, and tenants' interests in making their homes secure and comfortable. In our experience, common fixtures and alterations include window locks and security doors, where the tenant wants a higher level of security than that provided by the landlord under the agreement. In most cases, the installation of these items is entirely reasonable, and should proceed. On the other hand, where, for example, a security door would contravene fire regulations, the landlord's refusal of consent would be reasonable.

We submit that the option would be best implemented by providing that it is a term of every agreement that the landlord must not unreasonably withhold consent for the installation of a fixture or alternation to the premises. This would give tenants a cause of action where consent is unreasonably refused. The Act should also specify that in such proceedings, the onus is on the landlord to show that their refusal was reasonable, and that the Tribunal may order that the installation of a fixture or alteration proceed as specified in the application of the tenant.

### *Recommendation:*

- *Provide that it is a term of every agreement that the landlord shall not unreasonably refuse consent to the installation of a fixture or alteration to the premises.*
- *Allow a tenant to apply for orders permitting the installation of a fixture or alteration as specified, and provide that the onus is on the landlord to show that their refusal was reasonable.*

- 17.2. tenants be given the right to remove any fixtures they have added to the property, without needing the landlord's consent, unless such removal would cause irreparable damage.

The TU supports this option, as it gives a wide right to tenants for the removal of fixtures. We anticipate, however, that landlords' representatives may object to the option, and in particular the term 'irreparable damage'; and we submit that there may be disputes and evidentiary problems in relation to this term. It may be more convenient to limit the threshold to 'damage in excess of the value of the fixture.' This would provide, for example, that if

removing a \$300 air conditioner would put a \$500 hole in the wall, the landlord may decline to give consent and pay for the air-conditioner.

*Recommendation:*

- *Allow tenants to remove, without the consent of the landlord, any fixtures they have added to the property, unless removal would cause irreparable damage.*

*Alternative recommendation:*

- *Allow tenants to remove, without the consent of the landlord, any fixtures they have added to the property, unless removal would cause damage in excess of the value of the fixture.*

## 18. Bond claims

The TU submits that it is useful to clarify what is meant in the options paper by 'bond claims.' All four of the following different claims might be described as 'bond claims':

1. a claim by a tenant lodged with Renting Services for the return of a bond
2. a claim by a landlord lodged with Renting Services for the payment of a bond
3. an application by a tenant to the Tribunal for an order for the return of a bond (from either Renting Services or the landlord)
4. an application by a landlord to the Tribunal for an order for compensation for loss arising from a breach (which may be paid wholly or in part from the bond).

In our discussion of the options presented we will refer to these different types of 'bond claim' by the numbers given above.

### 18.1. introduce a time limit for Tribunal claims against bonds.

The TU submits that in relation to type 1 claims, there is currently no time limit, nor should there be. There is no legal action involved here; when the tenant asks for the return of their money, and it is no longer needed as security under a tenancy agreement, Renting Services gives it back. The bond is the tenant's money, and Renting Services never has any claim of its own upon it.

In relation to type 2 claims, the TU submits that the law should require that claims by landlords must be lodged with Renting Service not later than 30 days after the termination of the tenancy. This is consistent with the time limit for applications under section 16 of the Residential Tenancies Act.

In relation to type 3 claims, the TU submits that Limitation Act 1969 applies, both to applications for orders directing Renting Services to return a bond to the tenant, and to applications for orders directing a landlord to return a bond to the tenant. We submit that the effect of section 14 of the Limitation Act is to provide that applications for orders of either sort must be made within 6 years of the end of the tenancy. This is, we submit, an appropriate time limit considering that the bond belongs to the tenant unless the landlord can prove a liability arising from a breach of the tenancy agreement. A shorter notice period may have the effect of allowing landlords to keep bond monies despite having no valid claim against the tenant.

The TU submits that type 4 claims are in fact applications for compensation for breach under section 16 of the Residential Tenancies Act, and that they may result in orders relating to a bond under section 85 of that Act is merely

incidental. The TU submits that the time limit provided by section 16 – 30 days – applies to these claims.

*Recommendation:*

- *Limit the period in which a landlord may lodge a claim with Renting Services for payment of the bond to 30 days from the date of termination of the tenancy.*

18.2. extend the period to challenge a Notice of Claim where a forwarding address is not provided.

The TU supports this option. We submit that what the options paper refers to as the ‘period to challenge a Notice of Claim’ is actually time given by Renting Services, having received a type 2 claim, for contrary instructions by the tenant; the expiration of the period does not prevent a tenant from making a type 3 claim and ‘challenging’ the landlord’s claim on the money. In our experience, and the experience of TAAP workers, landlords and agents often do not include in their claim a forwarding address for the tenant – even where the tenant is adamant that this information was provided. We submit that the option would provide tenants who did not give a forwarding address (or did not have one to give) with a more reasonable opportunity to instruct Renting Services to withhold payment, as well as discouraging landlords and agents from engaging in underhanded or unprofessional practices.

*Recommendation:*

- *Extend the period in which a tenant may instruct Renting Services not to pay the bond to the landlord to 30 days, where the landlord’s claim does not provide a forwarding address for the tenant.*

18.3. adopt the American approach [to provide that if a landlord or agent lodges a claim without the tenant’s signature, and the claim later proves to be unsubstantiated, the tenant must be compensated by the landlord a sum equal to the amount of the original claim].

The TU is intrigued by this option, but is not persuaded to support it. It would introduce penalties between parties to NSW residential tenancies law, which the TU submits would generally not be consistent with the consumer protection ethos of the legislation.

*Recommendation:*

- *Do not adopt the American approach to landlords’ claims on bonds.*



## 19. Legislative consolidation

19.1. the Rental Bonds Act and the Residential Tenancies Act be combined into one Act.

The TU notes that the Rental Bonds Act applies to tenancies other than those covered by the Residential Tenancies Act: bonds lodged in relation to tenancies under the Landlord and Tenant Act 1948 and the Residential Parks Act 1998 are also dealt with under the Rental Bonds Act. Any consolidation of the Rental Bonds Act and the Residential Tenancies Act should preserve the provisions made by the former Act in relation to other legislation.

The TU supports changing the terminology of 'lessor', 'lessee' and 'lease' in the Rental Bonds Act to the terminology of 'landlord', 'tenant' and 'residential tenancy agreement' used in the Residential Tenancies Act.

### *Recommendations:*

- *Ensure that in any legislative consolidation of the Rental Bonds Act into the Residential Tenancies Act, the current provisions of the Rental Bond Act continue apply to bonds lodged in relation to residential tenancy agreements under other legislation.*
- *Use the terminology of 'landlord', 'tenant', and 'residential tenancy agreement' in any consolidated legislation.*

19.2. Various options regarding tenancy terminology include:

- 'tenancy agreement' or 'lease'
- 'landlord', 'lessor' or 'owner'
- 'tenant', 'lessee' or 'renter'
- 'rental bond' or 'security deposit'

The TU admits to being somewhat bemused by the interest shown by representatives of landlords and real estate agents for changing the language of 'landlord and tenant.' This is particularly so in relation to their apparent concern that there is a derogatory connotation to the word 'tenant'. We appreciate their solicitude, but it really is not necessary. 'Tenant' is not a dirty word. Its Latin root, *tenere*, means 'to hold' – that is, a tenant holds property of the landlord. As such it is cognate with 'tenacious', 'tendency', 'tensile', 'tenet' and 'tentacle' – all perfectly acceptable words.

If landlords and their agents really feel discomfited by the word 'tenant', we suspect it is the pangs of a guilty conscience, rather than the word itself.

These thoughts aside, the TU submits that the terminology of residential tenancy law should be considered from a perspective of practicality. With this approach in mind we will discuss each of the specific options in turn, then a number of other terminological changes that the TU submits should be made in a redrafted Residential Tenancies Act.

- 'tenancy agreement' or 'lease'

The TU considers that 'tenancy agreement' is the more appropriate term. The word 'lease' is in common use – in our experience, it is probably used by tenants more often than 'tenancy agreement' – but it tends to be used specifically to refer to a written agreement.

- 'landlord', 'lessor' or 'owner'

The TU considers that 'landlord' is the most appropriate term. It is not antiquated: the term is in common use and is well understood by contemporary landlords, tenants and the public generally. 'Lessor' is not in common use and is apt to be confused with 'lessee.' TAAP workers with long experience in community education advise that the terminology of 'lessor-lessee' is confusing especially for tenants from non-English speaking backgrounds. 'Owner' is inaccurate in some circumstances (for example, sub-tenancies).

- 'tenant', 'lessee' or 'renter'

The TU considers that 'tenant' is the most appropriate term. It is consistent with important terms, such as 'Residential Tenancies Act' and 'Consumer, Trader and Tenancies Tribunal', as well as 'landlord.' 'Lessee' is not in common use and is apt to be confused with 'lessor', especially by tenants of non-English speaking backgrounds. 'Renter' may be understood to include persons who rent but are not actually covered by the Residential Tenancies Act (for example, boarders and lodgers are renters).

- 'rental bond' or 'security deposit'

The TU considers that 'rental bond' is the more appropriate term. It is well understood by landlords, tenants and the public generally. 'Security deposit' is accurate, but may be confused with other deposits and fees requested by agents: specifically, the deposit commonly requested by agents for the return of keys given to prospective tenants for the purpose of inspecting premises, and reservation fees.

*Recommendation:*

- *Retain the terminology of 'landlord', 'tenant', 'residential tenancy agreement' and 'rental bond'.*

## **Additional items: the terminology of 'notice of termination' and 'reservation fee'**

The TU submits that the term 'notice of termination' is misleading as to the legal effect of the notice. In our experience, tenants very often believe, mistakenly, that a notice of termination itself terminates the tenancy at the date given in the notice. This misconception is compounded by the words 'you are required by the landlord to give vacant possession of the premises on [date]', which are commonly used in agents' notices. We submit that the term 'notice of request to vacate' is more accurate, and should replace 'notice of termination' throughout the Act and associated legislation.

In relation to the term 'reservation fee', the TU submits that the term 'reservation deposit' is more appropriate, considering that 'fee' is in all events either refunded to the tenant (where the landlord declines to offer a tenancy to the applicant), credited to the rent (where the applicant enters into a tenancy agreement) or used to cover the landlord's loss of rent (if the applicant declines to enter into a tenancy agreement and delays communication of this to the landlord).

### *Recommendation:*

- *Use the term 'notice of request to vacate' in place of the term 'notice of termination' throughout the Act and associated legislation.*
- *Use the term 'reservation deposit' in place of the term 'reservation fee' throughout the Act and associated legislation.*

## 20. 1899 Act

20.1. the Landlord and Tenant Act 1899 be repealed, subject to provisions dealing with the rights of a spouse and retaliatory eviction being incorporated into the Landlord and Tenant (Amendment) Act 1948.

The TU is concerned that the Landlord and Tenant Act 1899 applies to more situations than are countenanced in the options paper. We submit that the 1899 Act appears to apply to tenants who own their dwelling, where this is other than a moveable dwelling, and rent the ground on which it sits. Arrangements of this nature can be found on the Pottery Estate in Lithgow, as considered in *Ceedivoe Pty Ltd v May, Timms, McFadden & Mudway* [2005] NSWSC 222 (18 March 2005). These residents are tenants who hold ground leases, and are covered by neither the Residential Tenancies Act, the Residential Parks Act 1998, nor the Landlord and Tenant Act 1948. The TU is informed by Dr Robert Mowbray, formerly of Western Sydney Tenants Service and now of Shelter NSW, that he has identified up to 30 tenancies, including the Pottery Estate tenancies, that appear to be excluded from these pieces of legislation and that instead are covered by the 1899 Act.

The TU submits that the provisions of the 1899 Act do not deal appropriately with these tenancies. The situation of these tenants is, in some ways, similar to that of park residents who own their dwelling and rent a residential site. We submit that the Residential Tenancies Act should be amended to include tenants who hold a ground lease for land on which a dwelling (other than a moveable dwelling) is erected, and provide rights equivalent to a resident in a residential agreement under the Residential Parks Act 1998.

The TU also submits that tenancies excluded from the Residential Tenancies Act by operation of section 6(1)(a), (b) and (c) of the Act maybe caught by the 1899 Act. We submit that tenancies as described in section 6(1)(a) exist and may continue to be created; in fact, they probably arise quite frequently but are of a short duration. We also submit that tenancies as described in section 6(1)(c) exist and new tenancies of this kind may continue to be created. We submit in relation to each of these sorts of tenancies that it is appropriate that they should be subject to a protection against lock outs, such as is provided by the 1899 Act. The TU is not aware of any real examples of the tenancies described by section 6(1)(b). We note that the tenancies excluded by operation of section 6(1)(d) and (e) of the Residential Tenancies Act are subject to similar exemptions from the 1899 Act.

### *Recommendations:*

- *Retain the provisions of the 1899 Act as they relate to the Landlord and Tenant (Amendment) Act 1948.*

- *Require that where premises are the subject of a residential tenancy agreement that is excluded from the Residential Tenancies Act, the recovery of possession of premises must proceed through proceedings brought in the Supreme Court.*
- *Provide that tenants who hold a ground lease for land on which a dwelling (other than a moveable dwelling) is erected are covered by the Residential Tenancies Act with rights equivalent to a resident in a residential site agreement under the Residential Parks Act 1998.*

## Summary of recommendations

### 1. Coverage of the Act

#### Option 1.1

##### Recommendation:

- Do not exclude refuges and crisis accommodation from the Residential Tenancies Act.
- Amend the Residential Tenancies Act to make provision for occupancy agreements.

#### Option 1.2

##### Recommendation:

- Exclude tenancy agreements relating to educational institutions only where the landlord is an educational institution; the tenant is enrolled as a student of the educational institution or was enrolled in the previous six months; the premises are either a dormitory, hostel or hall of residence; and the premises are either located on a campus of the educational institution, or comprise part of a building used by the educational institution for the purposes of teaching; or are wholly owned or leased by the educational institution.

#### Option 1.3

##### Recommendation:

- Do not exclude tenants, premises or agreements where the tenant's principal place of residence is elsewhere.
- Retain the current exemption for agreements in good faith for the purposes of a holiday, and remove the current exemption for premises that are ordinarily used for the purposes of a holiday.

#### Option 1.4

##### Recommendation:

- Do not allow specific exemptions or provisions, including additional grounds for termination and 'house rules' that contravene a tenant's right to quiet enjoyment, for specific classes of landlords or agreements.

#### Option 1.5

Recommendation:

- Do not exclude agreements where the tenancy relates to part of the premises only and the agreement is not in writing.

Option 1.6

Recommendation:

- Allow otherwise excluded parties to 'contract into' the Residential Tenancies Act.

Option 1.7

Recommendation:

- Do not allow applications to the Tribunal for the sole purpose of determining whether the Act applies.

Alternative recommendation:

- Allow applications to the Tribunal for a determination that the Act applies, and do not allow applications for determinations that the Act does not apply.

## **2. Tenure**

Option 2.1

Recommendation:

- Do not allow tenancy agreements with a fixed term of 10 years or more to be exempt from, or contract out of, the Residential Tenancies Act.

Alternative recommendation:

- Provide that tenancy agreements with a fixed term of 10 years or more are covered by the Act, and are required to be in a standard, registrable form, the costs of which are to be met by the landlord.
- Allow parties to such agreements to contract out of the provisions relating to repairs and maintenance, reasonable security, rent in advance and bonds only.
- Require parties to such agreements to make a joint application for the Tribunal's certification of the agreement, and provide that uncertified agreements are deemed to be in the usual standard form and inconsistent terms are void.

## Option 2.2

### Recommendation:

- Do not require a minimum fixed term for tenancy agreements.

## Option 2.3

### Recommendation:

- Allow landlords to serve notices of termination on the following grounds only:
  - breach – rent arrears: 14 days
  - breach – other than rent arrears: 28 days
  - frustration – premises uninhabitable: 2 days
  - landlord or family member needs premises as own place of residence: 4 months
  - sale of premises – contract of sale requires vacant possession: 4 months
  - premises to be demolished, changed or renovated: 4 months

## Option 2.4

### Recommendation:

- Allow landlords to serve notices of termination that give grounds for termination, as prescribed by the Act, only.
- Retain the Tribunal's obligation to consider the factors provided at section 64(2) of the Act, and its discretion to decline to make orders terminating a tenancy.

### Alternative recommendation:

- Allow landlords to give notices of termination without grounds, with a notice period of not less than 6 months.
- Retain the Tribunal's obligation to consider the factors provided at section 64(2) of the Act, and its discretion to decline to make orders terminating a tenancy.

## Option 2.5

### Recommendation:

- Allow tenants to give notices of termination without grounds during the fixed term of a tenancy, with a notice period of not less than 42 days.

Alternative recommendation:

- Allow tenants to give notices of termination during the fixed term of a tenancy on the following grounds:
  - Tenant has accepted an offer of social housing (14 days)
  - Tenant is going into accommodation that provides special care or treatment (14 days)
  - Landlord has failed to comply with an order of the Tribunal (14 days)
  - Landlord has placed the premises on the market (14 days)
  - Tenant's co-tenant has died (14 days)

Additional

Recommendation:

- Clarify that where the Tribunal makes orders terminating a tenancy and returning possession to the landlord, the Tribunal must suspend the operation the termination orders to the date given for possession.

### **3. Rental arrears**

Option 3.1

Recommendation:

- Do not adopt the Victorian model.

Option 3.2

Recommendation:

- Where a tenant is not less than 7 days in arrears, allow the landlord to give a notice to remedy.
- A notice to remedy should give a period of not less than 7 days in which the tenant is to pay all arrears owing to the end of the period.
- Where a tenant fails to pay all arrears owing to the end of the period given in a notice to remedy, allow the landlord to serve a notice of termination on the grounds that the tenant has failed to remedy the rent arrears.
- Require that landlords must not serve a notice of termination on grounds of rent arrears without first having served a notice to remedy.

### Option 3.3

#### Recommendations:

- Do not reduce number of days in which a tenant is in arrears before which a notice of termination may be served to 7 days.
- Do not reduce the period of notices of termination on grounds of rent arrears to 7 days.

## **4. Mortgagee rights**

### Option 4.1 [see Option 4.2]

### Option 4.2

#### Recommendations:

- Where it is determined that a mortgagee is entitled to possession of rented premises, provide that the mortgagee acquires the landlord's interest subject to the tenancy.
- Provide where a mortgagee so acquires a landlord's interest in a tenancy and the tenancy agreement has a fixed term, that neither the mortgagee nor the tenant is bound by the fixed term.
- Where a tenant, acting in good faith, gives vacant possession in response to a representation by a mortgagee that the mortgagee intends to recover possession of the premises, provide that the tenant is not liable to the landlord for abandonment.

### Option 4.3

#### Recommendation:

- Provide that a tenant whose agreement is terminated by a mortgagee may apply to the Tribunal for an order that the landlord compensate the tenant for losses arising from the termination of the tenancy, and directing that such compensation be paid by the mortgagee from the proceeds of the sale of the premises.

## **5. Interest on bonds**

### Option 5.1 [see Option 5.3]

### Option 5.2 [see Option 5.3]

### Option 5.3

#### Recommendation:

- Link the rate of interest paid to tenants to that paid on a deposit of \$100 000 in a Commonwealth Bank Streamline Account.

## **6. Co-tenant disputes**

### Option 6.1

#### Recommendations:

- Prescribe a standard deed of assignment.
- Require that a landlord must not unreasonably refuse consent for the assignment of a tenancy or a share in a co-tenancy.
- Allow a tenant or co-tenant to apply for order that the assignment be effected without the landlord's consent where it is unreasonably refused. The landlord is to bear the onus of proving that their refusal was reasonable.
- Where the fixed term of a tenancy has expired, and a co-tenant under the agreement no longer resides at the premises, allow the co-tenant to give a notice of 21 days to the remaining co-tenant (or co-tenants) and, at the expiration of the notice, apply to the Tribunal for orders assigning their share of the tenancy to the other co-tenant (or co-tenants).

### Option 6.2 [see Option 6.1]

#### Additional

#### Recommendation:

- Give the Tribunal jurisdiction to hear and determine disputes between co-tenants arising from their tenancy agreement.

#### Additional

#### Recommendations:

- Allow a co-tenant who is the victim of domestic violence to apply to the Tribunal for an order assigning their share of the tenancy to the co-tenant who is the perpetrator of the violence
- Allow a co-tenant who is the victim of domestic violence to apply to the Tribunal for an order assigning the perpetrator's share of the co-

tenancy tenancy to the co-tenant who is the victim of domestic violence.

- Allow an occupant who is the victim of domestic violence to apply to the Tribunal for an order assigning the perpetrator's tenancy to the occupant.

## **7. Additional terms**

### Option 7.1

Recommendation:

- Do not extend the standard form of agreement to include additional terms.

### Option 7.2

Recommendation:

- Specify in the Regulations additional terms that contract out of the Act and are invalid.

### Option 7.3

Recommendation:

- Provide education to landlords, agents and tenants on additional terms, and prosecute landlords and agents who seriously or persistently contract out of the Act.

## **8. Fees and charges**

### Option 8.1

Recommendation:

- Provide that no person may require or receive from a tenant any fee for the preparation of a tenancy agreement.

### Option 8.2 [see Option 8.3]

### Option 8.3

Recommendations:

- Regulate reservation fees per the provisions for 'holding deposits' under the Queensland Residential Tenancies Act.
- Limit the amount of a reservation fee to not more than the equivalent of one week's rent, and prescribe that the reservation period should be not less than the equivalent number of days.

#### Option 8.4

##### Recommendation:

- Provide that it is a term of every tenancy agreement that where the premises are individually metered for the supply of water, the tenant shall pay for water.
- Do not insert the new term into existing agreements.

#### Option 8.5

##### Recommendation:

- Where a tenant pays for water according to metered use, require the landlord to provide the tenant with a copy of the water bill without delay.

#### Option 8.6

##### Recommendation:

- Require landlords to pay to tenants the value of any rebates received for interruptions in the supply of water.

#### Option 8.7

##### Recommendation:

- Allow tenants to repair or replace leaking water appliances under the provisions relating to urgent repairs.
- Allow tenants to make urgent repairs, and seek compensation from the landlord, to the value of \$1 000.

#### Option 8.8

##### Recommendation:

- Require that landlords use and fit water efficient appliances when carrying out repairs, maintenance and improvements.

#### Additional

Recommendation:

- Amend the Act to provide the following term is a term of every tenancy agreement:
- The landlord agrees that the tenant shall pay for utilities provided that the premises are individually and separately metered in relation to that utility, and that where the premises are not individually or separately metered in relation to a utility the landlord shall pay for the supply of that utility.

Additional

Recommendation:

- Provide that no person shall receive or require from a tenant a fee for providing a reference or for completing government agency documents relating to housing assistance.

## **9. Bond lodgement**

Option 9.1

Recommendation:

- Do not extend the period in which bonds must be lodged.

Option 9.2

Recommendation:

- Do not allow landlords to retain partial payments of bond beyond the usual 7 day lodgement period.

## **10. Rent payments and receipts**

Option 10.1

Recommendation:

- Retain the current process for variation of rent payment methods under the agreement by mutual consent.
- Add to the standard form of agreement a statement that the methods of payment under the agreement may be altered with the mutual consent of the parties only.

Option 10.2

Recommendation:

- Prohibit landlords from requiring rent to be paid more than two weeks in advance.

Option 10.3

Recommendation:

- Provide that a tenant may apply to the Tribunal for an order that the landlord reimburse them for rent overpaid for any reason, and in respect of any period during the tenancy.

Option 10.4 [see Option 10.5]

Option 10.5

Recommendation:

- Provide that tenants are entitled to receive a quarterly statement of rent transactions.

Option 10.6

Recommendation:

- Require landlords to keep records relating to a tenancy for the duration of the tenancy, and for not less than 30 days after the termination of the tenancy.

Option 10.7

Recommendation:

- Provide that no person shall receive or require from a tenant any fee for the payment or collection of rent.

Alternative recommendation:

- Provide that every tenancy agreement shall include at least one method of rent payment that does not require the tenant to pay a fee to any person.

Additional

Recommendations:

- Allow landlords to increase the rent not more than once in any 12 month period.

- Provide that where the Tribunal is to determine whether a rent increase is excessive, the landlord bears the onus of proving that the increase is not excessive.

## **11. Furnished premises**

### Option 11.1

#### Recommendation:

- Limit bonds to the equivalent of not more than 4 weeks rent, regardless of whether the premises are furnished or unfurnished.

## **12. Service of notices**

### Option 12.1

#### Recommendation:

- Do not give the Tribunal wider powers to waive defects in the content or service of notices.

### Option 12.2

#### Recommendation:

- Require landlords to use model notices, as prescribed in the Regulations.

### Option 12.3

#### Recommendation:

- Do not allow the date of the notice to be the date of service regardless of how the notice was served.

### Option 12.4

#### Recommendation:

- Retain the rule that notices sent by posted are served on the fourth working day after postage.

### Option 12.5

#### Recommendation:

- Do not adopt the use of registered mail for service of notices.

#### Option 12.6

##### Recommendation:

- Do not allow service of notices by placement in a letterbox or under a door.

#### Option 12.7

##### Recommendation:

- Do not allow service of notices by e-mail or courier.

### **13. Reasonable security**

#### Option 13.1

##### Recommendation:

- Require greater detail as to locks and security in the condition report.

#### Option 13.2

##### Recommendation:

- Adopt the list of factors relevant to 'reasonable security' at section 123 (2) of the Queensland Residential Tenancies Act.

#### Option 13.3

##### Recommendation:

- Do not prevent tenants from applying for compensation for losses arising from a breach of the landlord's obligation to provide reasonable security.
- Provide that in proceedings before the Tribunal where the landlord claims that reasonable security was provided, the onus of showing that reasonable security was provided is on the landlord.

#### Option 13.4

##### Recommendation:

- Clarify that each co-tenant is entitled to receive a complete set of keys to the premises without charge.

#### Additional

Recommendation:

- Clarify that as part of their obligation to provide reasonable security, landlords must change the locks where the premises were occupied by persons other than the landlord immediately prior to the commencement of a tenancy.

## **14. Access for sale**

### Option 14.1

Recommendation:

- Require landlords to give written notice to tenants of their intention to sell the premises.

### Option 14.2

Recommendations:

- Prescribe the following basic conditions of access for the purposes of sale:
  - no more than two instances of access per week may be required.
  - no more than one hour of access may be required in each instance.
  - where the landlord (or their agent) and the tenant agree to the times and days for access, the landlord may access the premises without notice; otherwise, the landlord must give not less than 48 hours notice of access.
  - during the fourth and fifth weeks after access is first required, no access may be required.
  - the landlord must not advertise the premises using photographs in which the tenant or the tenant's good are depicted.
  - the landlord must keep a record of all persons who access the premises.
- Allow landlords and tenants to negotiate a schedule of access, based on the prescribed conditions of access, and allow parties to contract out of the prescribed conditions.
- Require landlords to use a standard form of access schedule.

### Option 14.3

Recommendation:

- Allow tenants to give a notice of termination on the grounds that the premises have been placed on the market for sale during the fixed term of the tenancy.

#### Option 14.4

##### Recommendation:

- Do not adopt the Victorian approach to access for the purposes of sale.

### **15. Death of a tenant**

#### Option 15.1 [see Option 15.3]

#### Option 15.2 [see Option 15.3]

#### Option 15.3

##### Recommendation:

- Allow the representative of a deceased tenant, or a co-tenant of a deceased tenant, to give a notice of termination, including during the fixed term of a tenancy, on the grounds that the tenant has died.

### **16. Uncollected goods**

#### Option 16.1 [see Option 16.3]

#### Option 16.2 [see Option 16.3]

#### Option 16.3

##### Recommendation:

- Allow landlords to deal with goods left behind, subject to the following:
  - The landlord is not to remove goods from the premises earlier than the third working day after they recover possession of the premises.
  - Upon the third working day, or as soon as possible thereafter, the landlord is to make an inventory and remove the goods. Perishable goods may be disposed of. Other goods must be stored.

- Goods that are personal goods, being personal documents, photographs, jewellery, tools of trade, therapeutic furniture or therapeutic devices, must be stored for not less than 6 months.
- Goods that are not personal goods must be stored for not less than 60 days.
- Upon storage of the goods, the landlord is to take all reasonable steps to notify the former tenant, including by placing notices in newspapers.
- At all times the former tenant, or another person who is entitled to one or more of the goods, may recover the goods. The landlord must not, for any reason, prevent the former tenant or other person entitled to the goods from recovering the goods.
- On recovering goods, the former tenant or other person entitled to the goods is liable to the landlord for reasonable expenses incurred in their removal from the premises and storage.
- If goods (other than personal documents and photographs) remain unrecovered after being stored for the relevant period, the landlord must cause the goods to be sold at public auction. The landlord is liable to account to the former tenant the proceeds of the sale, less the reasonable expenses.
- If personal documents or photographs remain unrecovered after 6 months, the landlord must forward the documents to the Public Trustee.
- Allow the Tribunal, in special circumstances, to make orders that a landlord may otherwise deal with goods left behind.
- Amend the Residential Tenancies Act to refer expressly to the abolition of distress for rent.

#### Option 16.4

##### Recommendation:

- Amend the Residential Tenancies Act to provide that a former tenant, or another person entitled to the goods, may apply to the Tribunal for an order that the landlord compensate them for losses arising from any unlawful dealings with uncollected goods.

## **17. Alterations by tenants**

#### Option 17.1

##### Recommendation:

- Provide that it is a term of every agreement that the landlord shall not unreasonably refuse consent to the installation of a fixture or alteration to the premises.
- Allow a tenant to apply for orders permitting the installation of a fixture or alteration as specified, and provide that the onus is on the landlord to show that their refusal was reasonable.

#### Option 17.2

##### Recommendation:

- Allow tenants to remove, without the consent of the landlord, any fixtures they have added to the property, unless removal would cause irreparable damage.

##### Alternative recommendation:

- Allow tenants to remove, without the consent of the landlord, any fixtures they have added to the property, unless removal would cause damage in excess of the value of the fixture.

### **18. Bond claims**

#### Option 18.1

##### Recommendation:

- Limit the period in which a landlord may lodge a claim with Renting Services for payment of the bond to 30 days from the date of termination of the tenancy.

#### Option 18.2

##### Recommendation:

- Extend the period in which a tenant may instruct Renting Services not to pay the bond to the landlord to 30 days, where the landlord's claim does not provide a forwarding address for the tenant.

#### Option 18.3

##### Recommendation:

- Do not adopt the American approach to landlords' claims on bonds.

### **19. Legislative consolidation**

## Option 19.1

### Recommendations:

- Ensure that in any legislative consolidation of the Rental Bonds Act into the Residential Tenancies Act, the current provisions of the Rental Bond Act continue apply to bonds lodged in relation to residential tenancy agreements under other legislation.
- Use the terminology of 'landlord', 'tenant', and 'residential tenancy agreement' in any consolidated legislation.

## Option 19.2

### Recommendation:

- Retain the terminology of 'landlord', 'tenant', 'residential tenancy agreement' and 'rental bond'.

## Additional

### Recommendation:

- Use the term 'notice of request to vacate' in place of the term 'notice of termination' throughout the Act and associated legislation.
- Use the term 'reservation deposit' in place of the term 'reservation fee' throughout the Act and associated legislation.

## **20. 1899 Act**

## Option 20.1

### Recommendations:

- Retain the provisions of the 1899 Act as they relate to the Landlord and Tenant (Amendment) Act 1948.
- Require that where premises are the subject of a residential tenancy agreement that is excluded from the Residential Tenancies Act, the recovery of possession of premises must proceed through proceedings brought in the Supreme Court.
- Provide that tenants who hold a ground lease for land on which a dwelling (other than a moveable dwelling) is erected are covered by the Residential Tenancies Act with rights equivalent to a resident in a residential site agreement under the Residential Parks Act 1998.

