RESIDENTIAL TENANCY ACT 2010

NSW DRAFT GOVERNMENT (REVIEW) BILL 2016

Submission from
The Property Owners Association of NSW Inc

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The Property Owners Association of NSW is the peak body representing the interests of the private landlord market and has done so since 1951.

This submission is in relation to the RTA 2010 (5 year review) and we are passing comment by response to the Residential tenancy Amendment (Review) Bill 2016 issued to POANSW on 6 April 2017. This submission has been prepared by the POANSW executive committee and committee of management members who have all been short to long term landlords providing residential accommodation across the NSW market place but in particular the Sydney market. The committee is made up of licensed real estate agents, valuers, boarding house operators, boutique hotel operators and single to multiple investment property landlords.

We do thank Fair Trading for the opportunity to make comment on this review however request that more able time is given then that was given on this review occasion (7 working days) for such an important review that affects some 31.4% of the NSW population who are renting and the landlords who provide their accommodation.

The Residential Tenancies Act is in need of major and far reaching review in order to match tenancies to the considerable pressures of housing in the State of NSW.

These pressures include:-

1. The rapid rise in housing prices currently occurring.
2. The inability of many people to have the ability to own a home of their own. This especially applies to first home buyers most of whom are attempting to move from the rental market to become owner occupiers.
3. The increasing inability of private people to own more than one investment property is placing great pressure on the supply of rental properties and adding pressure on rent values to rise rapidly.
4. The inability of the State Government to expand the social housing supply to match the needs and demands of those seeking to occupy state owned properties.

The key strategies for a revised Residential Tenancies must be to:-

1. Ensure the viability of the private landlord in order to allow private ownership of rental property. If there is no viability then there is no rental home and thus no tenancy.
2. To ensure that the terms and conditions imposed by a Residential Tenancies Act are not an impediment to rental property ownership.
3. That the Residential Tenancies Act is uniform and functional to all forms of residential tenancies in order to reduce the confusion of hard to read and interpret rules and regulations.

Below are some must have's that need attention in the revision of the RTA

That the RTA should apply evenly to all formal residential tenancies no matter who the owner is or who the landlord is.
State owned, provider owned and privately owned property should have only one form of tenancy agreement AND that these agreements should apply to all tenants no matter their characteristics or rent paid.

That all student accommodation be excluded from the RTA
Students are a class of tenant that have their own set of housing needs and the RTA is inappropriate to meet their needs.

That properties in which residential activities and a home business is conducted be considered as a commercial lease.

Properties used for commercial activates extend the use of the property well beyond the scope of a sole residence. This business activity may impact on the quiet enjoyment of the neighbourhood; have traffic implications and tax implications. Commercial tenancies are designed to accommodate commercial activity.

That leases with an option to purchase be excluded from the provisions of the RTA.
The prime consideration of ultimate purchase overshadows the rental regulation requirements.

That water as a household utility should be on the same basis as gas, electricity, phone, internet and almost all services provided to a property. The Tenant should be required to hold a customer contract for water supply and use (similar to the current QLD model)

There is simply no sound basis for the modern water supply provisions to not be a contractual arrangement between the Tenant and the service provider.
Water conservation and responsible water use is almost exclusively in the hands of tenants. Water metering, water marketing and water customer contracts are now very different to by gone eras. Given that water supply contracts are not uniform statewide the adoption of the supply contract by the tenant will simplify the arrangements.

The RTA should include an education campaign with Government funding equally distributed to landlords and tenants alike.

A residential tenancy is a partnership by the property owner and the tenant where the tenant pays for housing to be provided by a third party due to the inability of the tenant to fund their own property ownership.
This is an important partnership that brings with it very serious obligation by both parties. Educational packages that clearly spell out the rules and obligations are essential to a harmonious partnership and a reduction in conflict.

Section 29 Condition reports

POANSW would like to see additional clause under this section. Where the tenant fails to fully complete and or return the condition report to the Landlord/agent within the prescribed 7 day period the copy originally issued by the landlord or landlords agent will be deemed as the report and be binding on the tenant should the tenant fail to return the report within the 7 days.

Section 29.2

Why is it necessary to give the tenant 2 x copies of the condition report? Surely 1 copy is sufficient enough and this would be the deemed report that the tenant fills out, comments on and returns to the landlord/agent. We recommend amending this to 1 copy of the condition report.

Section 54.1 Liability of tenant for actions of others

It recommended that the word"vicariously" is taken out of this current current section of the Act. Acts of parliament should be written in plain English for all to understand and interpret. We have surveyed many landlords who cannot give meaning to the word in the context of the clause. We question what was the intent of using the word.

Section 54.1 (1A)

POANSW opposes this proposed clause until further consultation with Fair Trading, NCAT & possibly the insurance industry in relation the legal remedy a landlord would have if property damage has occurred. Given the scenario that a victim of domestic violence could be the sole person named of a tenancy agreement we question against whom are orders then being sought for potential compensation claim or loss. Secondly who will indemnify the landlord's loss?

Failure of the tenant to make full disclosure to the landlord should be grounds for termination (Sec75 of RTA)

The provision of premises to a tenant for their exclusive use is a major commitment by a Landlord. This financial exposure by the Landlord involves considerable risk and exposure. It is essential that the Landlord, the insurer and the financier are fully aware of their exposure. This exposure must be fully recognized and acknowledged by the Tenant in the strongest terms. The current RTA addresses sub-letting with or without consent but due to the expanding interest from consumers on using short term stays platforms (which are not currently regulated)

Last year's landmark VCAT case of tenants sub-letting the whole of the premises without landlords consent via Airbnb brought about a scenario of a tenant sub-letting the whole of the premises. Such scenarios are growing in numbers of which landlords are now experiencing as a result of a loophole in current NSW tenancy agreements.

That is an additional clause under Sec 75 to highlight and prevent such practices of tenants secretly sub-letting the whole of the premises as a short term/holiday profiteering endeavour without the landlords consent.

A sub-let is not specifically defined as a short term stay/holiday letting which is except from the RTA under sec 8.H .Nor is it defined under Sec's 74 & 75 of RTA.

The judge of the Victorian case made that very clear distinction in his verdict of the difference between exclusive use right inside a lease arrangement v a license agreement to carry on short term stays. However the rental industry has not caught onto this precedent, as it is a mind-boggling thing to have to think about, too technical to discuss or define in words inside a tenancy agreement or having to confront tenants with an explanation prior to occupation of the premises. However it is real issue that is not going to go away anytime soon, until it is spelt out inside tenancy agreements/regulations and is made very clear when tenants and landlords are entering into a tenancy agreement. There is a commercial need to spell it out in the tenancy form that short term/holiday lettings are prohibited by tenants unless they have consent to do so by the landlord or their agent. It should constitute a breach of tenancy if a tenant is caught advertising or promoting the whole of the premises to the public and should warrant a remedy notice or possible termination by 2 week notice should the landlord wish to do so.

Section 101(A) Termination by tenant in circumstances of domestic violence

POANSW welcomes provisions to protect victims of domestic violence inside residential tenancies but we do so with a workable fair framework for both the victim (the tenant) and the landlord who may be financially impacted by the termination of the tenancy under this proposed provision with no recourse.

Domestic Violence and any other form of criminal activity not involving the landlord are the sole responsibility of the tenants and adverse situations should be resolved by the tenants without loss of revenue to the Landlord.

The landlord should assist with implementing any reasonable requests of the tenants to minimize the impact of the criminal activity or domestic violence particularly where children, elderly or other disadvantage people are involved

Where a cotenant wishes to be released from a tenancy agreement the remaining tenants must agree to take over the tenancy responsibilities of the departing tenant.

This may be done by either:-

1. Creating a new lease and winding up the existing Agreement. OR
2. Substituting a new tenant in place of the terminating tenant with the agreement of the remaining tenant and landlord. OR
3. The remaining tenants being assigned the rights and responsibilities of the departing tenant

POANSW strongly opposes the gesture of having to deal with the perpetrator of a domestic violence situation, which could well be a co-tenant or a sub-tenant, an occupant or an invitee on the premises. We reject the notion of having to communicate with the felon/criminal charged with an act of domestic violence or issued with an interim or final AVO as the available recourse/remedy for the landlord.

We further seek clarity from Fair Trading as to which party to the tenancy agreement are orders going to be made by NCAT as compensation to the property owner if premises are damaged, there is cleaning costs, possible rubbish/uncollected goods

removal and rental arrears if a tenancy is actually terminated under this provision. Surely it's not against a perpetrator who is not a legal party to the tenancy agreement.

We believe that an interim AVO could be used as a scapegoat attempt by some tenants to issue a termination notice under these grounds and as such appose extending the current legislation (Sec 79) to include an interim AVO as evidence to justify termination. It would be of interest to explore the statistics, if any are available, on how many interim AVO's go on to be final AVO's.

Section 107 (27) Landlords remedies on abandonment

POANSW in its submission of the RTA review in January 2016 proposed to have only 1 method of a break fee to be calculated and not have option clauses that landlords and tenants have to negotiate as the path forward inside a tenancy agreement. It was also not clear in the market place as to who's clause it is to delete or poor keep as desired, i.e. was it the tenants clause or the landlords clause to pick and choose the break fee method? This in itself caused unnecessary angst between parties before a tenancy agreement was entered into and became an unnecessary area of friction.

POANSW supports a single method to give clarity & to reduce the confusion of break lease. We support strongly the current system of 4/6 week break lease costs which seems fair and was the original intention at the time of drafting the 2010 Act. We also seek further clarity if this break lease clause is just for abandonment of premises or extends to the tenancy agreement under other circumstances where the tenant wishes to break their agreement within the fixed term for any other reason besides abandonment.

We understand concerns raised by The Tenants Union who want more certainty for tenants who break their lease, however not all rental markets in NSW are on an even playing field with inner Sydney being completely different rental market to outer/ greater Sydney or regional/country suburbs who experience higher vacancy rates.

Section 223 Service of Notices

POANSW notes that service of notices by delivery to the tenant's residential premises or business address letterbox has been removed. We would like this to re-instated as this is one of the most efficient and practical ways to deliver notices.

POANSW welcomes the service of notices by electronic means. However some instances have occurred with communication between landlords and tenants whereby the original email address supplied by either party has ceased to the be the primary email address e.g. a tenants primary email address supplied to the landlord was their work email and since then the tenant has changed their place of work then failing to supply their new email address as it is not mandatory to do so.

Not dissimilar to the electronic bond lodgement regime whereby say in a shared tenancy arrangement a primary tenant of a co-tenancy arrangement is issued a request to pay their bond, it should be acknowledged in the RTA that a primary email address is nominated on the tenancy and that this primary email address is deemed served the notices on all the tenants.There should not be an argument created between co-tenants and their landlord/agent that each party did not receive their notice by electronic means. Secondly any change to the primary email address should be notified to the landlord within 7 days and/or vice versa to the tenant to make it fair.