

**RESIDENTIAL TENANCY
LAW REFORM**

**OPTIONS PAPER
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Prepared By

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Introduction

Leah Jay Property Management manages in the order of two thousand properties for hundreds of owners in the Newcastle, Lake Macquarie and Maitland regions.

We have prepared this submission on the basis of the following:

- 1) Directing 'landlords' via our newsletter to the 'Option Paper' and requesting their input.
- 2) Running advertisements in the Newcastle and Maitland newspapers, which directed 'landlords' to the 'Option Paper' and requested their input.
- 3) Conducting in-house sessions with our Property Managers to review the paper and generate response and input.

The input from our landlord clients was in the main in email form and focused understandably on those points likely to have greatest impact. In a few cases, where we received comprehensive written submissions, we have chosen to forward them separately as well as considering their substance for the submission we make on behalf of all clients.

General Comments on the Options Provided

While we accept that many of the proposals could pass for 'housekeeping' and common sense tidying up, we suggest the paper, on balance, is slanted towards further enhancing the tenants position. Indeed rather than merely protecting tenants' rights, it appears to advance them, without necessarily proposing anything substantive for owners.

It must be said however that landlords overwhelmingly accept the need for tenants to have their rights enshrined in legislation and regulations. There are very few of our client landlords who do not support those rights and see our role in part as representing them.

Increasingly though, owners are expressing disenchantment at what they see as disincentives for them to have their investment in residential housing. In many instances it is their life savings, their form of superannuation. In social terms it is the housing for many tenants who either choose of their own accord to rent rather than buy or those who cannot bridge the gap to own their own home. The reaction to the State Government's land tax hike and vendor duty imposition in 2004 clearly demonstrates this point. We have no doubt that as the months passed and the market tightened, upward pressure on rents saw the tenants start to wear the cost of those initiatives. The very constituents the tenancy laws are designed to protect.

It is irrefutable that it is not just financial imposts that create disincentive! Feedback from owners exiting the market often carries the message that at times it's just too hard. They refer to the constraints and demands of holding tenanted properties. While we might not always concur and in fact see our role to minimise the stress; we would argue it is not prudent, giving regard to all social objectives including the demands on public housing, to add further difficulties and hence barriers and disincentives to would be property investors. Rest assured the concerns are real and need to be seriously considered in framing further protection and entitlements for tenants, albeit done with seemingly good intention.

LJPM has a policy of support for tenants. In practice we respect and work constructively with our tenant clients. In preparing this submission we seek to retain our objectivity but in giving balance to the whole issue we sincerely believe there is a need to represent strongly the interests of landlords; who in the main are reasonable and fair minded while seeking to protect their hard earned property investment.

Submission Structure

In the main we follow the format of the Option Paper and address the Options in order.

We have however not attempted to offer comment on all aspects covered by the paper. Instead as part of our submission process, we sought to identify key elements, in an attempt to give emphasis to issues deemed priority by our landlord clients.

2. Tenure

This section perhaps exemplifies a point we made in our introduction.

While putting forward the argument that the short term nature of existing agreements causes insecurity for many tenants, the option is provided for them to exit agreements before the tenancy expires (Option 2.5).

It appears at the same time as providing greater security to tenants, there is a will to remove them from their responsibility in short term tenancies, while simultaneously reducing security for the landlord. The thrust appears to be to give long-term tenure to the tenant, only as long as they feel the need to adhere to the agreement. It is our contention that there is a general tendency in the community to remove responsibility from individuals; so much centres on 'rights' and diminishes the 'responsibility' side of the equation.

Hence, while in theory the long term leases might appear reasonable, even sensible; the fear is that the obligations required to be placed on the tenant to balance the issue, will not occur. That is, the need for vigilant maintenance and perhaps improvement of the premises; the ability to maintain real returns and lack of flexibility act as deterrents for landlords to embrace the spirit of these options.

That is certainly the general feedback we received; the suspicion and doubt brought about by the pendulum creep, whether by actual regulation or interpretation at Tribunal, makes owners naturally fearful and conservative when it comes to change. Better the 'devil we know!'

Long Term Leases

Option 2.1

It is our view that the vast majority of tenants will still seek shorter term tenancies; many are reluctant to undertake tenure for more than 12 months. Any move towards 5 or 10 year terms would need to have clear provisions of responsibility on the tenant. In general, tenants appear to become more complacent the longer the term. Unless stringent provisions were in place, we would recommend landlords against entering into such arrangements.

Option 2.2

There is strong opposition amongst owners to minimise fixed terms. Flexibility is an essential element for landlords. In any case most will accommodate longer terms; it is often the tenant looking for shorter periods. We can see no real argument that this would improve the system.

Recommendation: No Change

Termination

Option 2.3

On face value this option appears reasonable in being able to communicate reasons to tenants; as long as it is not bundled with some other provision that burdens the landlord.

Option 2.4

If it wasn't for the Swain decision, the existing clause appears to offer landlords equitable access to their property; which should be a fundamental tenet of any system.

In principle, landlords are opposed to an extension of the notice period. We hold the view 60 days is adequate for all circumstances. However, perhaps the compromise might be:

- If 60 days 'no grounds' is sought then, as is the case now, the tenant is able to dispute if they choose.
- If 90 days 'no grounds' notice is issued, there is absolutely no right of appeal by the tenant.

Option 2.5

We found no support for this option; in fact this probably prompted the strongest response. While we understand circumstances change, there has to be a limit to how much landlords are expected to carry through no fault of their own. Landlords must have some confidence when planning, not least of all financially, for their properties. In reality, changing circumstances of a landlord do not allow them to opt out of any agreement.

3. Rental Arrears

Perhaps as much in this area as any other is there a need to fully understand that what appears fine in policy, may not be so easily put into practice. There is also a need to minimise the layers of process to balance cost against the recovery of losses.

Option 3.1

Adopting the Victorian model appears to offer a more workable solution to that currently in place. Some matters need to be clarified. For example, when is application to Tribunal made? At the time of sending application or the service date? See also 3.3 below.

Option 3.2

Whenever possible, avoid further layers, which add cost and generally proves to be ineffective.

If 3.1 is adopted and works in conjunction with 3.3, this option would be redundant.

Option 3.3

An example of fine in theory but almost un-manageable; possibly generating greater angst.

We agree on reducing the period but to 10 (ten) days, which allows clear determination that tenants are a 'week behind'. Therefore notice would be served on the 11th day and no service time required.

Recommendation: adopt the Victorian model and reduce the amount of arrears before a notice can be served to 10 days, with no service time required.

4. Mortgagee Rights

Little feedback has been received on this issue but Option 4.1, adopting the Queensland and Victorian approach, appears to offer improvement on the current situation.

5. Interest on Bonds

The current situation seems impractical. It is likely at present that not paying interest would lead to greater net benefit. This is certainly preferable to returns being eaten up by administration costs.

This is likely to be an issue regardless of any other option employed. However in principle it would be desirable to provide some return on monies held by Government instrumentalities. Perhaps, utilising available data, some break-even period could be determined and interest paid on bonds held beyond that term. For example, it might be that tenancies extending beyond 12 months attract some return, whether it be a linked rate or 'bonus' as prescribed in Option 5.3. We feel the latter might be easier to administer by.

Recommendation: As prescribed in 5.3 for Tenancies beyond a pre-determined period; or Option 5.1, pay no interest at all.

6. Co- Tenant Disputes

In principle we hold the view that tenants enter into an arrangement to lease a premises of their own accord and presumably as it suits their circumstances. It should not be left to the landlord, agent or Tribunal to bear the cost when such arrangements fracture. Allowing a tenant to walk away from a situation that is untenable might be reasonable; however it must be remembered that places extra burden on both agent and landlord to pursue the bond shortfall.

Again this appears a move to alleviate stress on tenants without real concern for those affected by the shift of burden.

Option 6.1

This option appears reasonable, provided the costs are borne by the tenants. Again, why should the landlord carry the impost for something not of their doing!

Option 6.2

Definitely not, for reasons stated above.

7. Fees and Charges

Here is further evidence of the move to shift burden from tenant to landlord. It is precisely this move that we allude to in our introduction when we talk of shared responsibility. Our premise is that the agreement supposedly benefits and protects both parties; so claimed in the introduction to the Option Paper. While the tenant certainly incurs costs, it is irrefutable that the landlord does also. We genuinely believe that philosophically the tenant should have some financial ownership of the agreement and ethically the cost should be shared.

8. Lease Preparation Costs

Option 8.1

Definitely not, as stated above. Furthermore the amount should be indexed. It is unimaginable authorities would operate with such constraints i.e. where fees are effectively capped for years. The fee is in fact far too low; it bears no relativity to cost and should be in the order of \$60. We also believe that the arguments presented for this option are largely spurious.

Bringing NSW in line with other states seems to be an argument of convenience. There is no option in the paper where tenants might shoulder greater responsibility, and no doubt NSW is out of step in some of those instances. Might we see tenants in NSW pay a leasing fee as they do in Western Australia? If this was nationally administered legislation, such points might carry more weight.

So too the claim that the small barrier to entry may encourage more agreements to be renewed! Our experience suggests otherwise; why should the 'small barrier' prevent tenants from now seeking valuable protection of their tenure.

To our way of thinking the anomaly is not in the lease fee but that it is so small and the only cost borne by the tenant in establishing their 'home'.

And once again the argument this move may provide greater flexibility over the fee charged to landlords suggests its ok to charge the owners what they can bear but not the tenants. This reflects the archaic attitude that tenants are poor, owners rich. Not necessarily true in either case but again there is haste to add further disincentive to landlords.

There are two further points we would make. We do not receive any complaints from tenants about paying this fee. They understand there is a real cost in preparing something from which they derive benefit.

We also submit there has to be a cost to both parties. Tenants should understand the commercial reality. If they change the start date for example, there is a real cost involved. If it

doesn't cost, it doesn't matter as much to people. That is the plank of user pay; respect for the service and product provided.

Recommendation: maintain the current situation but substantially increase the fee to reflect the real cost of preparation.

Reservation Fees

There is little doubt that paying a reservation fee does reflect some form of commitment from a prospective tenant. It is our practice to take one deposit only on a property and that is from an approved applicant. True, there can be a change of mind on both sides but in our experience it is far more common for a tenant to have a change of heart after approval. Often the process of marketing is put on hold at that point, so withdrawal means added costs to the landlord. In our view, the current system provides an equitable balance.

Recommendation: maintain the current system; but with the fee to be paid only by an applicant approved for the property.

Water Usage

User pay for water has been in place in the Hunter longer than in any other part of the state. It is accepted and when it is applied to tenants, it meets little opposition. There are fundamental conservation and equity issues that underpin this issue, hence it is not a matter of whether but how the system of user pays is universally applied.

Option 8.4

Yes, should apply. The argument about de-facto rent increases is convenient. The possibility of billing tenants direct, as in Victoria and Western Australia, is logical and arguably more efficient.

Option 8.5

This is our current practice, however billing direct is a better option.

Option 8.6

It is reasonable to expect that if tenants are paying for water usage, they should receive rebates for interruptions.

Option 8.7

Like most repair matters, leaking water appliances represent varying degrees of urgency. Perhaps there is a need to define more accurately what represents a leak of an urgent nature. Some do not demand weekend or after hours attention; others might. It comes back to the professional judgement of the managing agent in conjunction with the owner; with the understanding there is recourse to financial remedy for the tenant in the case of undue delay or inaction.

Option 8.8

Appears reasonable and indeed is usually applied in any case.

9. Bond Lodgement

Options 9.1 and 9.2

While we find no reason to oppose either of the options, we also have no difficulty with the current situation. We believe that an efficient system can operate comfortably within the existing parameters.

10. Rent Payment and Receipts

We find the current situation generally satisfactory, though the options in the main appear reasonable.

Option 10.1

It is desirable to be able to amend the method of rent payment without the need to re-do the tenancy agreement.

Option 10.2

Ok

Option 10.3

While this appears reasonable, unlimited access could create administrative problems and costs in some instances. We would argue that a time limit must be set, perhaps in the order of 30 days.

Options 10.4, 10.5 & 10.6

Ok

Option 10.7

We would contend that a number of recent initiatives have actually reduced cost and been more convenient for tenants. There is usually a cost in providing these services and it is reasonable for tenants to share in the cost, as well as the benefits.

12. Service of Notices

In general, any move to recognise contemporary methods of service delivery and to remove technicalities preventing fair remedies, are most welcome.

Option 12.1

Agree

Option 12.4

Agree

Option 12.5

Strongly disagree. While there are occasional issues with mail delivery, it is not on a scale that justifies significant cost increases to agents or owners.

Option 12.6

Agree

Option 12.7

Agree, and suggest this method of communication will increase.

13. Reasonable Security

To date we have found the current situation workable. In essence it amounts to the application of the term 'reasonably secure' and while this involves subjectivity, there's little to suggest that would not be the case with any new approach. It calls for interpretation by experienced professionals who can seek advice and relate and compare various situations.

We would strongly argue that it should not be insurance companies alone who dictate what reasonable security is. Their requirements should not be imposed on owners, so that they can reduce their exposure to risk by passing it back to the owners. This just acts as another deterrent to those who might invest in residential property.

It is generally appreciated by landlords that their properties must be reasonably secure and we accept that needs to be monitored. However, along with other aspects of tenancy, there must be shared responsibility by the tenant and we should not have the situation where a tenant moves into a property and then imposes their sense of ideal security at significant cost to the landlord.

Options 13.1 and 13.2.

No, for the reasons above.

Option 13.3

Appears sensible, as long as it does not result in any notification by tenants being seen as reason to make the landlords responsible for break-ins. We might then see the ridiculous situation where it becomes common practice for tenants to automatically report security concerns, encouraged by insurance companies, as a pre-emptive measure.

Option 13.4

We take this approach in practice now; it makes the situation clear for all parties. However, if keys are lost at any stage, the tenants must cover the cost of replacement.

14. Access for Sale

There is a crucial element that needs to be considered in this matter. In reality, managing agents are often not informed that the property is for sale until the tenant receives a phone call or a knock on the door.

In practice, it is not within our power to control the sales agents. Certainly we can inform the tenants and will always do so when information is at hand. But it is unreasonable and impractical to believe that the managing agent, as a third party, can control the process, despite their best intentions. It is not uncommon for the owner to place the property on the market without notifying us.

Option 14.1

Requiring landlords to give tenants written notice is reasonable, it might also mean that we will be informed and can assist a little more in the process.

Option 14.2

Might be a starting point, at least as a framework but in practice with owners and selling agents keen to get prospective purchasers through; it will come back to the willingness of the tenant and negotiating skills of the agent.

It should be incumbent on the sales agent to investigate and manage the process, in conjunction with the owner. While we can assist owners and tenants where possible, it is impractical and a great source of annoyance to be held responsible for sales access.

Option 14.3

Disagree strongly, for the reasons stated in the option paper. Even with best intentions, circumstances of the landlord do change and in practice it is not wise for an owner to tenant a property if they have intentions of selling. While it might seem prudent cash flow wise, an uncooperative tenant in a property is generally self defeating and it reduces the likelihood of sale to an owner occupier.

Option 14.4

Certainly 24 hours notice is reasonable, though in practice many agents and owners will seek to put that aside. Returns to the negotiating skills of the listing agent and it must be their responsibility to give the notice; not managing agents who will become the convenient scapegoat for 'not having passed on the notice'.

15. Death of a Tenant

Option 15.1

Should apply in the case of when there is one tenant. In the case of two or more tenants option 15.3 seems more practical.

16. Uncollected Goods

Another area where the system works adequately but the options presented seem to offer improvement.

In principle, we have no issue with any of the options, as long as the intent to simplify (Option 16.1) is the outcome of any change.

17. Alterations by Tenants

'Unreasonable' leaves the matter open to interpretation. By way of example, consider the discussion of the current situation in the Option Paper (p26)... "however, the written consent of landlords is also required for minor changes such as affixing picture hooks to walls". Minor according to whom? There are instances where such a 'minor' change, whether only one or numerous hooks, is out of place. The 'make good' at the end of tenancy may in some cases be a real battle.

We abide by the fundamental principle that the landlord should retain the right to determine what alterations occur to their asset; also that the tenant leases and therefore accepts the premises as presented, excepting faults of course.

We also find that in the vast majority of cases, landlords will allow tenants alterations when they see potential improvement and often as a gesture of good faith to their tenant. A very good recent example is the connection of cable television to premises. The growing demand from tenants has persuaded landlords who were otherwise hesitant, to allow installation. The reality is that owners, who are continually 'unreasonable', find it increasingly difficult to secure good tenants.

Option 17.1 and 17.2
Definitely not.

18. Bond Claims

Option 18.1
We agree that a time limit should be set for Tribunal claims against bonds. We suggest 30 (thirty) days from the date of refund to lodgement of dispute claim.

Option 18.2
No.

Option 18.3
Definitely no.

19. Legislative Consolidation

Option 19.1
Appears to make sense.

Option 19.2
We find the following terms more appropriate:

- 'lease' – as it is an agreement to lease the premises, which involves tenancy.
- 'owner' – certainly not landlord, we agree it is antiquated. 'Owner' more accurately reflects the position of the owner, who happens to choose to also lease the premises.
- 'tenant' – who resides at the premises and by virtue of the lease agreement, is also lessee. Definitely not renter.
- 'security deposit' – because it reflects the broader meaning and purpose; rather than the connotation of just covering rent.

General Recommendation

We contend that in general there is a large gulf between professional managing agents and owners who self manage their properties; as to the understanding and application of the tenancy laws. It is anomalous that as agents we are subject to ever increasing scrutiny of all

aspects of our daily operations and application of regulations, yet this same rigour cannot be applied in practice to owners who are in theory subject to the same tenancy laws at least. We have no issue with the bar being raised but to ensure consistency across the board and better protection for tenants, **compulsory accreditation or licensing should apply to anyone responsible for tenanted properties.**