RTA Report Card 2007

Submissions regarding
the
Residential Tenancies Act 1997

Tenants' Union ACT Inc.

Welfare Rights & Legal Centre

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RTA Report Card 2007

1. INTRODUCTION

1.1. BACKGROUND

The Tenants' Union (TU) and the Welfare Rights and Legal Centre (WRLC) are the primary providers of information, advice and education to tenants in the ACT.

The TU membership consists of private, public and community housing tenants, occupants of other forms of accommodation, as well as individuals interested in tenancy issues. The TU represents people renting in the ACT (private, public, community), works to promote the rights and interests of tenants and undertakes housing and tenancy-related projects.

The TU is a Community Legal Centre providing tenancy advice, information and referral through the Tenants' Advice Service (TAS). TAS also undertakes community legal education activities designed to promote tenant participation. TAS is funded through the Department of Justice and Community Safety by a proportion of the interest earned from bonds lodged with the Office of Rental Bonds.

In the last year (2006/07) TAS reported 3,175 direct phone contacts with ACT tenants on tenancy/housing issues (over 37,000 since 1994). In addition to this there was direct contact with people renting through a variety of other forums including presentations, workshops, information stalls, and community meetings. Furthermore the TU participates in a range of networks and forums with community service workers and providers who have contact with people renting.

The Welfare Rights and Legal Centre is a Community Legal Centre which specializes in tenancy and public housing law. The Centre provides case work assistance to public and community housing tenants, and for those people who rent privately on a low income, in the form of information, advice, referral and representation. The Centre also conducts community legal education and engages in policy development both at legislative and community level.

In 2006/07 the WRLC provided 3,766 telephone advices and acted in 139 cases. WRLC appear regularly in the ACT Residential Tenancies Tribunal and also in the ACT Supreme Court in matters arising under the *Residential Tenancies Act 1997* (RTA).

The issues discussed in this paper are presented in response to a request from the Attorney-General's office for the TU to support applications made during a meeting with the Minister's staff in relation to the need for amendments to the RTA As requested we have expanded on issues raised as well as provided case studies and references to relevant research. These issues are significant and the document is necessarily extensive however it must not be viewed as being a comprehensive overview of all issues we have encountered.

In terms of format, we have been asked to present what we believe to be non-contentious issues and recommendations first and then detail other issues that while perhaps contentious are so significant to tenants that they must be considered. Finally we have noted some other issues including the possibility of future work as well as matters relating to other legislation.

1.2. TENANCY IN THE ACT

According to the 2006 Census, in August 2006 the ACT population was estimated to be 324,034. Figures show that the usual residents of the ACT occupied 122,901 private dwellings. Of these, 29% (35,139) were rented properties, significantly above the national average of 27%. The average household size in the ACT was 2.6 people. Using this figure we can estimate that there are over 91,000 people in rental accommodation in the ACT.

The comparatively high proportion of rented dwellings reflects the ACT's relatively mobile population, with more renters and hence a greater reliance on rental accommodation than some other states. However, it must be noted that nationally the proportion of renters has increased as people find it more difficult to access affordable homes for purchase.

1.3. VACANCY AND RENT RATES

Statistics from the Real Estate Institute of Australia (REIA) indicate that in the quarter to September 2007 the vacancy rate in the ACT improved from an annual (and historical) low of 1.1% to 2.2%. While this is an improvement, Canberra is still at the lowest level of vacancies it has experienced for many years. The higher vacancy levels may be a reflection of the period of a large amount of building at the high end of the property (apartment) market. The REI sees a "healthy" vacancy rate as between 3 – 4%.

It is important to note that vacancy rates are only broad indicators of the 'true' vacancy rates at any particular point in time. They are an aggregate across all rented properties and do not qualify the level of rent in properties. A rise in vacancy rate doesn't automatically mean an increase in the availability of affordable rental properties and in fact can result in a decline in affordability as relatively affordable older stock is redeveloped. The only positive trend in the longer term may be an increase in affordability if a glut develops at the higher end and landlords are forced to drop rents. We are yet to witness such a change. In fact while the vacancy rate has risen somewhat, rents have continued to increase dramatically. This has resulted in the ACT being in the dubious position of maintaining the record of having amongst the highest rents across the country.

The ACT rental figures for the September quarter 2007 continue to repeat trends of 2002 - 2006 and 2007 with Canberra experiencing among the highest rents across the country, at second place after Darwin. The table below shows median weekly rents for 3 bedroom houses[1].

Table 1. Median weekly rents

City	Median weekly rent 07	Median Weekly rent 06
Canberra	350	320
Sydney	295	270
Darwin	440	305
Brisbane	300	285
Melbourne	260	240
Adelaide	255	235
Hobart	270	250
Perth	300	260

These rent levels and vacancy figures significantly affect tenants' ability to move within the ACT, they limit choice and bargaining power. It is difficult to argue for shorter fixed terms and lower rent if the landlord knows they can just go to the next person on the extensive list. We

have anecdotal evidence from tenants that it can take up to several months to find a new home that is affordable and appropriate. Lack of choice regarding movement can also mean that tenants will stay, or take up tenancies they can't really afford because they have no other alternative. Additionally, knowledge of this situation and difficulty in finding affordable accommodation means that tenants are reluctant or fearful of asserting their rights in addressing problems within existing tenancies for fear (whether this is based on fact or imagined) that they may lose that accommodation and face difficulties in finding anywhere else. It has been widely acknowledged that the ACT has a serious problem with housing affordability and that tenants, and in particular private tenants, face an affordability crisis.

Exacerbating this shortage is the tendency of higher income households to 'trade down' and occupy dwellings at the low-to-moderately priced end of the rental market in an effort to minimise their housing costs. This may assist more prosperous households to save for a deposit on their own home, but increased competition for a diminishing number of properties makes it even more difficult for low-income households to secure affordable housing. In fact, a 2006 TU Victoria report on affordability found that Canberra was the only jurisdiction where there wasn't a level of affordability for people on a minimum wage, let alone people on government benefits (see Table 2 below for an indication of affordability levels)[2]. This situation is only going to worsen with the next report since we have seen through REI figures that advertised rent levels in the ACT have grown significantly since the end of 2006.

Table 2. Rent and affordability levels

	Total Income	**Affordable Rent**
Single – Austudy	$174.05	**$52.00**
Single - Youth Allowance	$179.77	**$54.00**
Single - Unemployed (>21yrs)	$228.94	**$69.00**
Single - Unemployed (>21yrs) - Sharer	$228.94	**$69.00**
Single - Aged Pension	$297.71	**$89.00**
Sole Parent (1 child)	$433.61	**$130.00**
Sole Parent (3 children)	$664.01	**$199.00**
Couple - Newstart (no children)	$421.06	**$126.00**
Couple - Newstart (2 children)	$611.33	**$183.00**
AWE - Couple (2 children)	$964.11	**$289.00**
Min Wage - Couple (2 children)	$868.34	**$261.00**
Min Wage - Couple (no children)	$646.96	**$194.00**
Min Wage – Single	$467.40	**$140.00**

Tenancy issues that flow on from initial unaffordability and difficulty in accessing insufficient stock are serious for the many tenants in existing accommodation. Often these problems are addressed to some extent by legislation, however many tenants are unaware of their rights and will accept actions contrary to the legislation and sometimes suffer quite significantly because of it. Current tenants are facing excessive rent increases as landlords seek to profit based on the increases in the market rents for vacant premises. Additionally tenants are being issued with

termination notices as lessors seek to remove them in order to install new tenants at higher rents (see below for more details about evictions). The fear of eviction will lead many tenants to be very reluctant to assert their rights in relation to their existing tenancy. This fear is very real and is being exacerbated by media stories highlighting the problems in finding new properties.

It is all of the above issues that inform the comments that we make in relation to the need for amendments to the RTA.

2. ISSUES AND RECOMMENDATIONS

2.1. SALE OF PREMISES

'Sale of premises' is a common reason for tenants to seek advice from TAS, to the extent that it was the subject of one of the first of TAS' "Tips Sheets".

During the fixed term, sale of premises is not a ground for termination of the tenancy by either party, although at any time the lessor can devolve themselves of the tenancy by selling the premises. This presents a serious imbalance between parties in relation to a sale, especially considering the effect that putting the premises on the market has on a tenant's quiet enjoyment and ability to use the premises (their home). Many tenants believe that they are able to terminate the tenancy because they cannot endure the disruptions any longer.

While the disruption to the tenant is generally limited to the period of the sale process, this process can often be lengthy and dramatically impact upon a tenant's life. The stress and disruption caused to the tenant by the sale process occurs without any compensation or even acknowledgement of their right under the RTA to quiet enjoyment as set out in clauses 52 and 53. For example, lessors often insist that the tenant is to maintain the premises at showroom standard without any recognition that this is well beyond the normal day-to-day standard required by the tenancy agreement. Additionally, clause 81 requires a tenant to permit reasonable access to premises, on the lessor giving 24 hours notice, to allow inspection of the premises by prospective purchases. In reality, tenants are required to provide access to a myriad of people in addition to prospective purchasers, including selling agents and property valuers.

Tenants often bemoan the unfairness of being in a situation over which they had no control and state that they would not have entered into the tenancy had they known that the premises was going to be sold. At the conclusion of the process, the tenant finds themselves in a contract with a party about whom they know nothing and with whom they did not choose to contract. Tenants often express frustration and disbelief that the RTA does not consider their experience in relation to a decision that has such an effect on them and is completely outside their control.

Recommendation 1
Amend the RTA so that where a lessor notifies the tenant in writing of the lessor's intention to sell the premises, the tenant can elect to have an automatic rent reduction from the date of notification OR to terminate the tenancy, irrespective of whether it is a fixed term or periodic tenancy.

2.2. WATER CONSUMPTION

A tenant is liable for water consumption charges pursuant to clause 46. A lessor can agree to be responsible for this cost pursuant to clause 42.

Lessors are presenting tenants with water bills in respect of several periods (often up to several years' worth) in response to a tenant having asserted a right such as requesting a repair to be carried out, challenging an excessive rent increase, or choosing to terminate a tenancy.

TAS recently advised a tenant who was being required to pay for water consumption in respect of a 12 month tenancy which had been terminated and during which the lessor had never asked the tenant to pay for water consumption.

This is a particular problem where retrospective payment for water consumption is used as a punishment for tenants who assert their rights under the RTA. In one case, a tenant who had previously been advised by TAS in respect of an attempted unlawful termination was subsequently required by the lessor to pay five years worth of water consumption (amounting to $1,300).

Another tenant who asserted her rights in relation to an unlawful rent increase was subsequently required by the lessor to pay for water consumption since the commencement of the tenancy. The lessor's action was quite clearly in response to the tenant not accepting the proposed unlawful rent increase and an attempt to recoup the money the lessor would have received from the proposed increase.

Recommendation 2
Amend the RTA so that a tenant is only liable for water consumption where the tenant receives the water bill within a certain time frame (for example, 4 weeks) of the date the bill is due for payment.

2.3. PENALTIES

Among tenants and tenant advocates across the country the ACT has a disquieting reputation for the worst behaved real estate agents in the country. Services assisting tenants constantly encounter behaviour, and even agents citing policies, in contravention of the RTA, e.g. inspections 1–2 days after tenants have vacated; blatant and continual use of unendorsed inconsistent terms; access without permission; unlawful rent increases, unlawful fees and charges (e.g. lease breaking fees and re-advertising fees) and incorrect notice periods. A significant number of calls we receive concern unconcealed breaches and misrepresentations of the RTA. There are no disincentives for bad behaviour and ignoring the law. Penalties exist in other jurisdictions and will help address bad processes and bad behaviour. Currently a tenant has to go to the RTT for redress and while this may be resolved in relation to this specific tenancy this does not result in changes in tenancy management processes for other tenancies. We have seen cases where an agency appears before the RTT and is informed by the member that their actions are unlawful and then we have subsequently received reports from tenants that the same agency has continued the unlawful practice with new tenants. The introduction of penalties for breaches will act as an incentive to change bad behaviour and practice.

Recommendation 3
That existing penalties for unlawful actions by lessors be expanded to include granting the RTT power to penalize lessors for breaches of the Standard Residential Tenancy Terms.

2.4. TENANT DATABASES

Our service is encountering an increasing number of tenants reporting threats by agents to list tenants for various unsubstantiated reasons. While the RTA does include provisions relating to databases (Part 6A) the details about the reasons for listings and period for listings have not been regulated counteracting the effectiveness of the section.

Recommendation 4
To develop regulations in relation to reasons and time limits as per Part 6A of the RTA (Tenancy Databases).

2.5. BOND DISPUTES

The bond is the tenant's money and a tenant is entitled to its return at the end of the tenancy unless a lessor has a lawful claim to it pursuant to section 31 of the RTA. However, in our experience this is not what is happening in practice.

Section 31 sets out the circumstances in which a lessor is entitled to deduct an amount from the bond. However, there is nothing to prevent a lessor from making a claim to the Office of Rental Bonds (ORB) on the tenant's bond without a lawful basis or from making a claim for the entire amount of the bond, despite a lesser amount being in dispute. It has been TAS' experience that some lessors hold up the return of a tenant's bond without legal basis simply because they can. For example, in one case the tenant advised his landlord that water costs were not something that could lawfully be claimed from the bond. The landlord's response was that he couldn't take other things from the bond either but he had anyway.

The parties are in a very unequal position in relation to the bond because often a tenant is dependent upon its timely return in order to be able to afford to secure a new tenancy. In respect of a new tenancy, a tenant can be required to pay an amount exceeding eight week's rent (i.e. bond amounting to four weeks rent and up to a month's rent in advance), and based on an average rent of $350 this is on average $2,800. Whilst often a tenant cannot afford to have the bond in dispute for any length of time, a lessor can afford to prolong its return indefinitely. It has been TAS' experience that the tenant's need to have the bond returned quickly in order to be able to enter into a new tenancy can and does result in the tenant simply foregoing the amount the lessor is claiming in order to receive the balance quickly. For example, one tenant who was being advised by TAS in respect of a bond dispute exclaimed that he would forego what the lessor was seeking *"because otherwise they will hold up the return of my entire bond"*. TAS advised a tenant early this year where the lessor was seeking to keep $215 of the tenant's bond. The real estate agent advised the tenant that if she didn't agree to that amount being taken from her bond they would dispute the return of the entire bond.

Having to pay an application fee to the Tribunal can be a further deterrent to tenants pursuing their rights. A tenant is unlikely to make an application to the Tribunal in circumstances where the amount in dispute is $150 or less given that they are going to have to pay a $54 application fee. In addition to this, the vast majority of bonds are now well over $1,000 and therefore incur the higher application fee.

Recommendation 5
That the RTA be amended so that the bond is automatically returned to the tenant unless a lessor disputes the return of the bond within 5 working days of the end of a tenancy.

Recommendation 6
If the previous recommendation is not accepted then it is recommended that the RTA be amended so that a lessor is prevented from disputing the release of a bond to a tenant at the ORB stage without having a lawful basis under section 31 of the Act.

One way of achieving this would be to require a lessor making a claim for the bond with the ORB to simultaneously lodge the grounds relied on pursuant to section 31. A bond claim form is not to be accepted by the ORB without such grounds being attached. The lodged grounds will need to be filed by the lessor in any application or defence made to the Tribunal. Where the Tribunal is satisfied that the lessor had no lawful basis under section 31 for making a claim on the bond or has made a claim for the whole amount of the bond despite a lesser amount being in dispute, then the Tribunal be given power to make a costs order against the lessor in circumstances where the RTT application fee was paid by the tenant.

2.6. TERMINATIONS AND EVICTIONS

Legislation dealing with terminations and evictions has a profound impact on tenants and how they experience their tenancies and how this affects other aspects of their lives. The issues highlighted below have been identified as having very serious implications for tenants and it is crucial that they are addressed.

2.6.1 Termination for failure to pay rent

Clause 92(f) provides that in any tenancy in which the lessor has previously served two notices to remedy, the lessor may serve a notice to vacate one week after the rent has fallen due without serving a further notice to remedy.

Clause 92(f) is designed to prevent landlords having to repeatedly issue notices to remedy in circumstances where the tenant has demonstrated a pattern of failing to comply with the tenancy agreement. Given that many tenancies last for years or even decades and problems with rental payments may occur and be remedied within a relatively short timeframe, the open-ended nature of clause 92(f) may have unintended and unfortunate consequences, particularly in long term tenancies.

By way of example, consider the situation of a tenant who receives a notice to remedy for missing one week's rent as a result of illness. The tenant remedies the oversight and then pays rent consistently for 15 years. She then misses another rent payment as a result of a failure in her bank's direct deduction facility and receives a further notice to remedy which she addresses promptly. She then returns to regular and prompt rent payments. As the law currently stands, if the tenant misses one more week of rent (for whatever reason), the landlord can proceed straight to issuing a notice to terminate, regardless of the circumstances or how many years have elapsed since the last notice.

This is particularly of concern given that:

- many tenants do not understand that they can defend a notice to vacate and believe they must simply comply with the notice; and
- there is no requirement on a lessor to prove that the previous notices to remedy were valid. There is nothing to stop a landlord from issuing a notice to remedy on the basis of an error, allowing the matter to lapse and then relying on the erroneous notice at a later date to justify the issue of a notice to vacate. Such a problem would only be uncovered if the tenant understood that they had a right to challenge the notice to vacate *and* the tenant had

maintained records which proved that the original notice was invalid. Where the erroneous notice may have been issued years before, this may not be possible.

Providing an 'expiration date' for notices to remedy would allow landlords to proceed to eviction in the case of tenants who have a recent history of failing to comply with the tenancy agreement, but would also protect tenants who have a good history of compliance when considered in the light of the tenancy as a whole.

We note that there are good policy reasons for promoting the service of notices to remedy, as they provide a useful check in circumstances where the tenant may not be aware of the breach (for example where a bank direct deduction has failed), where the landlord may be mistaken as to the state of the rental account or where there may be a simple explanation for a problem with the rent account. Lessors should only be permitted to bypass the notice to remedy system where a persistent and recent pattern of non-compliance has emerged.

The suggested amendment would also help prevent this provision from being used as a de facto "no cause" eviction tool, which is increasingly a concern in a buoyant property market, particularly for tenants in long term tenancies who may face eviction by a lessor who seeks to start a new tenancy at a higher rate of rent.

Recommendation 7
Amend clause 92(f) to provide that the lessor may serve a notice to vacate once the rent has been in arrears for one week provided that two notices to remedy have been issued for non-payment of rent in the last twelve months.

2.6.2 Termination for breach other than non-payment of rent

Clause 93(d) provides that if the tenant breaches the terms of the tenancy on 3 occasions on any ground—on the 3rd occasion the lessor may serve a notice to vacate and need not give the tenant 2 weeks to remedy the breach.

Firstly, it is not clear whether this clause is intended to cover termination for a breach other than non-payment of rent where one of the previous notices to remedy relates to non-payment of rent. This needs to be clarified. In our view, both this clause and clause 92(f) are intended to allow lessors to circumvent the normal procedure where the tenant has established a pattern of a particular type of breach. Lessors should therefore not be permitted to take the clause 92(d) short cut where one of the notices to remedy relates to a breach which falls outside that pattern, especially since there is no simple means of ascertaining whether the breach being relied on was serious enough to justify termination or was even valid.

Secondly, as explained above, this clause has the potential to unjustly penalize a tenant whose rental history is good when considered over the life of the tenancy, as notices to remedy currently remain valid for the entire life of the tenancy.

Recommendation 8
That clause 93(d) be amended to exclude notices to remedy issued on the basis of failure to pay rent.

That clause 93(d) be amended to provide that the lessor may serve a notice to vacate provided that two notices to remedy have been issued for breaches other than non-payment of rent in the last twelve months.

2.6.3 Without Cause Terminations – Clause 94

Clause 94 of the standard terms allows a lessor to terminate a periodic tenancy without grounds by giving a tenant a 26 week Notice to Vacate. The ability of lessors to evict tenants without grounds seriously undermines the legal protections contained in the Act as it discourages tenants from asserting their rights due to the fear of being issued with a 'without grounds' notice to leave.

Clause 94 is a very real deterrent to tenants pursuing their rights particularly in the current ACT rental market[3]. For example, we have encountered tenants who elect not to require lessors to comply with their obligation to maintain premises in a reasonable state of repair, or choose not to negotiate or challenge excessive rent increases for fear of being forced to leave. Tenants seeking advice from TAS regularly express fear at the thought of enforcing their rights and repeatedly ask the question: *"Yeah but can't the landlord just evict me if I make them carry out the repair or challenge the rent increase?"* The reality is that although the landlord may not be able to immediately evict the tenant, ultimately a lessor can evict the tenant.

In our experience, retaliatory &/or improper evictions are an inevitable consequence of the RTA permitting without cause terminations. For example, a tenant sought advice from TAS in 2007 in relation to an action the lessor was requesting the tenant take. The lessor had no lawful basis upon which to require this action. Despite this and as a sign of good faith the tenant undertook the action but not to the lessor's exact specifications. The tenant was subsequently served with a clause 94 Notice to Vacate.

It is our experience that lessors are also using clause 94 to evict tenants and subsequently re-advertising the premises at a higher rent in order to avoid having to propose a rent increase to the current tenants and being subject to the excessive rent increase provisions. This is a common complaint to TAS. In October 2007 a tenant contacted TAS because her tenancy had been terminated pursuant to a clause 94, 26-week no cause termination being served. Four days after termination the premises was advertised on *www.*all*homes.com.au* at an increased rent of $70 per week. By way of another example, in January 2008, a tenant sought advice from TAS regarding an unlawful rent increase. Her concern was that if she challenged the unlawful rent increase she would ultimately be evicted given that her colleague who is a lessor in the ACT had advised her that he had just served a clause 94 notice on his tenant so that he could advertise the rent at an increased rate because he *"would be mad not to do so in the current rental market"*.

See Attachment 1 for further information about security of tenure.

Recommendation 9
The ability to evict a tenant without grounds, currently permitted by clause 94, should be removed from the RTA.
If clause 94 is not removed the RTA should prevent lessors from using clause 94 as a means of circumventing the excessive rent increase provisions, for example, by prohibiting a rent increase for a period of 12 months following a clause 94 eviction.

A further recommendation regarding retaliatory use of clause 94 is made at 2.6.6 below.

2.6.4 Without Cause Terminations – Clause 95

Currently clause 95 gives a tenant who is required to vacate the premises in accordance with clause 94 the ability to vacate the premises at any time during the two weeks before the date specified in the notice, upon giving the lessor 4 days notice of intention to vacate.

Only allowing a tenant to vacate 2 weeks prior to the date specified in a clause 94 notice renders the 26 week notice period largely redundant because the tenant is unable to vacate the premises until the last 2 weeks of the notice period. The point of 26 week's notice is to give the tenant time to find alternative accommodation. If the tenant is not permitted to leave the property until 2 weeks prior to the expiration of the notice, there is no point in a tenant searching for a new property until close to the end of the period. If a tenant finds alternative accommodation earlier in the notice period, the tenant is forced to pass up this opportunity because they remain in a legally binding tenancy for the first 24 weeks of the notice period. In the current market, vacancies can be difficult to find and are almost non-existent in the lower end of the market. Tenants can't afford to turn down offers and need to be able to use the notice period to search in the knowledge that they can accept an offer if it is made. An amendment is needed so as to allow the tenant to vacate and move into alternative accommodation at any time during the 26 week notice period.

Recommendation 10
Amend clause 95 to enable a tenant who has been served with a clause 94 notice to vacate the premises at any time during the notice period by giving the lessor 3 week's notice of their intention to vacate.

2.6.5 With Cause Terminations – Clause 96

Clause 96 allows a lessor to terminate a tenancy by giving:

- 4 weeks notice where the lessor, the lessor's immediate relative or an interested party intend to live in the premises (cl 96(1)(a)(b) &(c));
- 8 weeks notice if the lessor intends to sell the premises (cl 96(1)(d)); or
- 12 weeks notice where a lessor intends to reconstruct, renovate, or make major repairs to the premises and such work cannot reasonably be carried out with the tenant living in the premises (cl 96(1)(e)).

Insufficient time
Four weeks is insufficient time in which to find alternative accommodation in the current rental climate and in which to relocate a household. As already noted, anecdotal evidence from tenants shows that it can take many months to find appropriate accommodation. This is not a matter of tenants being choosy, but looking for something they can afford and will be successful in applying for. Tenants are reporting that inspections are attended by large numbers of potential applicants, well more than 10 per property. In a recent case more than 50 applications were received for a Braddon property[4]. This is of concern, especially since our recent anecdotal evidence came to us at a time when there is traditionally an increase in properties on the market as people vacate towards the end of the year.

Another shortcoming of the 4 week notice period has been demonstrated when tenants have reported receiving 4 week's notice while they are away from the premises due to holidays, illness or work. Upon their return they may find they only have a week to find alternative accommodation.

Recommendation 11
That the 4 week notice period required pursuant to clause 96(1)(a)(b)&(c) be increased from 4 weeks to 12 weeks.

Unlawful termination
We have received anecdotal evidence that clause 96 is being abused by some lessors.

TAS receives many calls from tenants who have been served with a Notice to Vacate pursuant to clause 96 and either (i) suspect that the lessor has no genuine intention or (ii) vacate only to find the premises advertised for lease (usually at a significantly increased rent). See examples below.

There is usually very little a tenant can do in either scenario because the tenant has no evidence of wrong-doing prior to the termination of the lease. For example, in respect of a notice served pursuant to clause 96(1)(c), it is very difficult for a tenant to establish that a lessor does not genuinely believe that an interested person intends to live in the premises (at the time of serving the notice), or to counter the lessor's usual claim in scenario (ii) that they did have the requisite intention at the time of serving the notice but that their intention subsequently changed. Changes to the law are needed to place tenants in an informed position.

Recommendation 12
That a lessor be required to provide details with any Notice to Vacate served pursuant to clause 96. The details required will depend on the circumstances of each case but they need to be sufficient for the tenant to be able to reasonably determine whether or not a genuine intention exists.

Sufficient details to be able to identify either the "immediate relative" or "interested party" in a clause 96(1)(b) or (c) notice need to be provided (without having to provide names). For example, where a notice is served pursuant to clause 96(1)(b), the lessor be required to give details such as: *My sister intends to move into the premises on x date as a result of having accepted a job in the ACT on x date. She currently resides interstate.*

Where a lessor serves a notice pursuant to cl 96(1)(e) requiring a tenant to vacate on the basis that a lessor genuinely intends to reconstruct, renovate, or make major repairs to the premises, details of the intended reconstruction, renovation or major repairs should be provided with the notice. TAS advised tenants in June and November 2007 who were served with a clause 96 notice to vacate on the grounds that the "owner has decided to carry out major works to the property"/ "intends to renovate the premises". Less than two weeks after vacating, the tenants saw the premises advertised on '*www.*all*homes.com.au'* at a weekly rent of $420 per week. The tenants had been paying rent of $300 per week. They subsequently learned that the carpet had been replaced, some of the rooms had been painted, and the guttering and eaves had been replaced. Had these details been provided with the notice, then the tenant would have been in a position to argue that it was not a lawful termination as such work could reasonably be carried out with the tenant in the premises, particularly as the tenant had for some time been requesting both that the carpet be repaired or replaced and that the gutters be repaired and had advised the lessor that they were quite happy for the work to be undertaken with them in the premises. Alternatively, if the lessor argued that his intention had changed after the tenants had vacated the premises then the tenants would be in a much better position to be able to assess whether there was a legitimate change in intention, given that they knew what the initial intention was.

It is submitted that the benefit of lessors being required to provide such details is twofold. Firstly, it enables a tenant to be able to make an informed decision about whether a lessor has a genuine intention at the time the notice is served and secondly, it places a tenant in a much better position to be able to determine/establish whether there has been a legitimate change in intention or not.

Recommendation 13
Amend the RTA so that the lessor must notify the tenant of the change in intention, within a reasonable time of the intention changing (e.g. 3 days) where a lessor's intention changes after serving a clause 96 notice. The requirement to notify continues until one month (or some other reasonable time) after the tenant vacates or the notice expires; whichever is the latter.

Examples
The following are a small sample of the many matters that TAS has advised on:

- A Notice to Vacate was issued by the lessor pursuant to cl 96(1)(a) with termination to take effect, on, or before 10 October 2007. The reason stated for termination was that the lessor's son and family were going to move into the premises. On 11 October 2007, the premises were advertised on *www.*all*homes.com.au* for an extra $100 rent per week.
- The lessor issued a cl 96 Notice to Vacate giving the tenant 4 week's notice to vacate on the ground that the lessor's daughter was moving into the premises. The tenant vacated. The daughter did not move in and the premises were re-advertised at an increased weekly rent of $35 per week. The agent advised that the daughter was all set to move in and then plans changed. The tenant contacted TAS in October 2007.
- TAS advised a tenant in November 2007 who had received a notice of a proposed rent increase together with an offer to enter into a new 12 month fixed term tenancy. The tenant (who is on a disability pension) rang the agent to advise that she was going to find the proposed rent increase "a bit of a struggle". The agent immediately responded, "That's okay the lessor wanted you out anyway as he's going to either move in or sell the premises".

2.6.6 Retaliatory evictions

Currently, section 57 of the RTA enables the Tribunal to refuse to make a termination and possession order (TPO) if it is satisfied that a lessor seeks to terminate a tenancy on a retaliatory basis. This section is of little use to a tenant who has been served with a 26-week Notice to Vacate (pursuant to clause 94) and suspects that it has been done so on a retaliatory basis. The tenant is effectively left in a position of vulnerability and uncertainty for 26 weeks as the tenant cannot rely on section 57 until a TPO is sought by the lessor if the tenant fails to vacate by the date specified in the notice. The tenant either ignores their suspicion and vacates or the tenant acts upon their suspicion; refuses to vacate the premises by the required date and forces the lessor to apply to the Tribunal for a TPO. In the event that a TPO is made, the maximum time the tenant will have to vacate the premises is three weeks and can be made to vacate immediately, leaving the tenant with insufficient time in which to vacate and find alternative accommodation.

In our view, the protection against retaliatory evictions should be available to tenants both as a defence to an application by the lessor for a TPO and as an action initiated by an application to the Tribunal at the time the tenant becomes aware that the notice may be retaliatory. This would allow the issue to be resolved without having to wait until the notice period has expired, allowing a tenant who is mistaken about the validity of the notice sufficient time to find alternative accommodation.

Recommendation 14
That section 57 be expanded to:

- enable a tenant to take action prior to a lessor applying for a TPO, so that where a tenant suspects that a Notice to Vacate has been issued on "retaliatory grounds", the tenant can make an application to the Tribunal pursuant to section 57 without having to wait for the lessor to apply for a TPO; and
- give the Tribunal the power to declare the Notice to Vacate invalid upon the tenant presenting evidence of any of the factors listed in section 57(1)(b).

2.6.7 Defective Termination Notices

Sections 58 and 60 provide that compensation for loss is available to a party who receives a defective notice of termination. Unfortunately, the compensation provisions state that compensation is available where the notice *'is not in the form approved under section 133'*. As no notice forms have been approved under section 133, all notices to vacate currently served in the ACT are technically defective and could potentially attract compensation.

Recommendation 15
Either:

- that sections 58 and 60 are amended to replace the reference to forms approved under section 133 with a reference to forms which comply with the requirements of the RTA; or
- that forms for notice of termination are approved by the Minister under section 133 of the RTA.

2.7. CO-TENANCY – 'OPTION TO REMAIN'

Currently a periodic co-tenancy terminates for all co-tenants by a single co-tenant giving a lessor three week's notice to terminate the tenancy pursuant to clause 88. The tenancy ends on the date specified by the co-tenant. Similarly, a fixed term co-tenancy terminates at the expiration of the fixed term where a single co-tenant gives the lessor three weeks notice to terminate the tenancy pursuant to clause 89. In both cases, the tenancy terminates irrespective of the wishes of the remaining co-tenants.

The law as it currently stands is fine where the rest of the co-tenants wish to leave. However, where the remaining co-tenants wish to stay, they are left in an extremely vulnerable position as they are only entitled to do so if the lessor lets them stay and there is no requirement for the lessor to do so. This was not a significant issue until recently. Now it has become a widespread and serious matter as agents have developed policies to automatically advise the remaining tenants that their tenancy has to end and they have 3 weeks to vacate in accordance with the end of the tenancy. In some cases, agents are requiring the remaining co-tenants to physically vacate the premises, remove all their belongings and put in a new application to rent the premises. This is an unnecessary and unreasonable requirement which places a substantial and costly burden on tenants. This is a significant change in agency practice that causes distress and hardship for those people wishing to remain.

Remaining co-tenants should not be forced to leave the premises; co-tenants should not be any less protected than single tenants who cannot simply have the tenancy terminated by someone else without reason or a 26 week notice period. It is important to note that the remaining co-tenants have been forced into a situation over which they have no control.

Where notice is given by a co-tenant unexpectedly, the remaining co-tenants often find that 3 weeks is insufficient time in which to vacate, particularly in the current market. Furthermore, the period of actual notice can be less than 3 weeks as there is no requirement for a co-tenant to give notice to other co-tenants and so it may be some time before they become aware that notice to terminate has been given.

This is a serious issue that affects many (often disadvantaged) tenants across the ACT. The solution is simple and will not adversely affect any party however it requires further development.

Recommendation 16
Amend the RTA so that where notice to terminate a co-tenancy is given pursuant to clause 88 or clause 89 any co-tenant(s) wishing to remain at the premises have the right to do so pursuant to a new tenancy (without being required to physically leave the property).

Recommendation 17
Amend the RTA so that a notice to terminate (pursuant to clause 88 or clause 89) must be signed by all co-tenants; with all co-tenants indicating whether they will be vacating pursuant to the notice or remaining at the premises pursuant to a new tenancy.

2.8. RENT INCREASES

Rent is the issue about which tenants most frequently contact TAS. We have already provided background information about constant and ongoing increases in rents for properties on the market and the difficulties this creates for people seeking to rent as well as for people currently renting. There is another aspect of increasing market rents that is not widely portrayed in the media however it can and does create very significant and serious problems for current tenants. This is the market rent being linked to rent increases. The table below shows rent increases brought to the TAS line from November to December 2007.

Table 3. Rent Increase presented to TAS Nov – Dec 2007

$ Increase per week (annual)	% increase	Corresponding RTA formula increase	Comments
40 (2,080)	**14**	**$ 17.80**	
60 (3,120)	**18**		
30 (1,560)	**11**		
45 (2,340)	**19**		
20 (1,040)	**8**		
40 (2,808)			
60 (3,120)	**20**	**$28.40**	
40 (2,080)		**$20**	
40 (2,080)			
60 (3,120)			
60 (3,120)			
45 (2,340)	**17**		**$25/wk increase previous year and $35/wk increase year before that**
50 (2,600)		**20**	
70 (3,640)			
54 (2,808)	**18**		
70 (3,640)	**24**		
20 (1,040)			**Tenant suggested $10/week, received 8 week NTV**
40 (2,080)	**8**		
25 (1,300)			
70 (3,692)			
35 (1,820)	**16**		
35 (1,820)	**11**		
55 (2,860)			
30 (1,560)			
20 (1,040)			
60 (3,120)			
30 (1,560)			
15 (780)			
30 (1,560)			
45 (2,340)			**One bedroom unit**

When considering the amount and effect of these increases, it is essential to bear in mind that the increase for the CPI for dwelling rents from September 2006 to September 2007 is 6.1% and the general CPI increase was 1.1% [5]. This difference in CPI figures shows that the calculation used

in the RTA does produce a figure greater than the general CPI increase. When looking at the effect of the increase it is also very important to consider that we are looking at quite substantial increases being borne at a time when the minimum wage increase was $27.36/week ($1,423). This increase in income does not equal many of the rent increases proposed, and does not provide people with the ability to cover other costs; this is clearly exemplified by a recent TAS call where the proposed rent increase took the rent to significantly more than the tenant's wage. In relation to other cost mechanisms, the current inflation rate is 1.9% [6] and the official interest rate increase by the Reserve Bank for the period November 2006 to November 07 was 0.75%[7].

The basis for allowing rent increases is to ensure the landlord does not suffer a loss because of increased costs. When initially advertising the premises the landlord sets the rent at a rate that reflects both its value ongoing maintenance, and other costs. The contract (lease) is made on the basis of this agreed value. Tenants enter into leases on the basis that the rent is affordable; significant increases in rents can cause quite substantial hardship.

The problem is illustrated in the following recent example. The tenant was an administrative worker at the ANU, earning $43,000 per annum. The tenant had to share a house in order to be able to afford to live near work and save travel costs. Sharing with two others allowed the tenant to rent an ex-government 3-bedroom house in O'Connor for $300 per week. The house was in original condition in a street where there has been extensive redevelopment and older houses were being demolished and new substantial properties built.

The tenants had difficulty in getting the landlord to do basic maintenance including a number of plumbing issues. The tenant was granted permission to erect a small shed in the yard. The tenants received notification of a $40 per week increase, which equates to a 13% increase. On application of the CPI figure, a fair increase would be $5.72. When asked why he was asking so much, the landlord said the increase reflected the market increase and the fact that he had work done. (The only work which had been done had been necessary repairs/maintenance).

The tenant was not very confident or articulate. One housemate decided to move out and another applied for work in Sydney. The tenant contacted the TU and was advised of the RTA formula and encouraged to negotiate a fair increase with his landlord. It is unlikely that this tenant will ever make an application to the Residential Tenancies Tribunal.

This example is typical of a large number of complaints received by TAS and WRLC and clearly illustrates the problems many tenants are facing. We are particularly concerned by issues regarding rent increases since many tenants are unaware that there are limits on a landlord's right to increase rent, let alone having the personal resources to negotiate or take the matter to the RTT. We suspect we are seeing only the "tip of the iceberg" in relation to rent increase problems.

In general, tenants are not in a position to negotiate with a lessor. The lessor can easily say "accept the increase or move out and I can get higher rent again from someone else with nowhere to live". This is not a palatable option for many people. This is an outcome that was foreshadowed by the Community Law Reform Committee of the ACT in its Report on Residential Tenancy Law in the ACT which concluded that:

> *… excessive rent increases are an unwarranted burden on those tenants affected. The Committee also considers that the ability to impose excessive rent increases undermines legislative protections which restrict the manner and circumstances in which a lessor can terminate a tenancy. These two problems will not resolve themselves without intervention. The rental market will not prevent an excessive increase where the lessor believes the higher rent is obtainable or the lessor desires the departure of the tenant.*[8]

Both TU and WRLC have ample anecdotal evidence that excessive rent increases are occurring, and the provisions that currently exist in relation to reviews of increases are not being effective in providing affordability or security for ACT tenants, thereby causing significant stress and hardship.

The reluctance of tenants to take action in the RTT is reflected in the numbers of tenants accessing the RTT, as illustrated in the table below.

Table 4. Applications to the Residential Tenancies Tribunal

	2006 /2007	2005/2006	2004/2005
Apps – tenant	178	140	149
Apps – landlord	481	618	597
Apps – Housing ACT	201	208	168

It is worth noting that the figures for applications by tenants are substantially lower than those for applications made by lessors, particularly given that 'applications by tenants' includes all applications by tenants of Housing ACT, whereas the 'applications by landlord' figures are separate to 'applications by Housing ACT'.

There are many reasons tenants don't access the RTT, among them is the fear of retaliatory action by the landlord or their agent in the form of eviction (see 2.6.3). Tenants are also fearful of retaliatory action in the form of listing on tenancy databases and not having favourable references in the future. To a tenant, these are strong arguments in favour of taking no action.

The extent of tenants' apprehension in approaching the RTT and ignorance of the protections in the RTA can be demonstrated by the number of increase notices that are being issued in clear contravention of the RTA – increases within the first 12 months of the tenancy, even in the first 3 months of the tenancy.

2.8.1 Rent increase formula (Section 68)

When considering a rent increase to determine whether it is excessive or not the Residential Tenancies Tribunal member must consider a list of matters that are provided in section 68 of the RTA:

> *(3) If a tenant or lessor proposes that a rental rate increase is or is not excessive, the tribunal, in considering whether it is satisfied about the proposal, must consider the following matters:*
> *(a) the rental rate before the proposed increase;*
> *(b) if the lessor previously increased the rental rate while the relevant tenant was tenant-*
> *(i) the amount of the last increase before the proposed increase; and*
> *(ii) the period since that increase;*
> *(c) outgoings or costs of the lessor in relation to the premises;*
> *(d) services provided by the lessor to the tenant;*
> *(e) the value of fixtures and goods supplied by the lessor as part of the tenancy;*
> *(f) the state of repair of the premises;*
> *(g) rental rates for comparable premises;*
> *(h) the value of any work performed or improvements carried out by the tenant with the lessor's consent;*
> *(i) any other matter the tribunal considers relevant.*

The problem with this list is the inclusion of "(g) rental rates for comparable properties". This problem has been articulated by many community members as well as tenants themselves. When a rental market is experiencing the extraordinary rates that we have been witnessing in the ACT this comparison with "comparable premises" places an unfair burden on tenants in existing leases with rents that were set at amounts that both parties established as fair and affordable. While it can be argued that the definition of "comparable premises" is narrower than a mere reference to market rates, this is not yet been tested in the RTT and unlikely to be an argument the tenant would feel able to run. As noted already, in a market such as that we now experience, the tenant is not in the position to negotiate or challenge an increase, except by way of a review by the RTT.

When the RTT reviews the increase it considers the current market with no clear reference for the need to balance this by considering affordability issues for the tenant. The RTT can consider any other matter in its determination, yet it is essential to clarify the importance of affordability when dealing with matters of housing and accommodation. At the most basic level rental spending is not a discretionary expense. The existence of specific tenancy legislation demonstrates the special nature of rental housing transactions. The current problems in the market highlight the need for significant changes to the legislation.

The hardship for tenants is currently compounded by the practices of "rent bidding" and "rent auctions", in which landlords and agents seek to play applicants off against each other in order to increase the value of the initial contract. In our view, this practice should be clearly prohibited by the RTA as well as general consumer legislation. These practices distort the market, place unfair burdens on tenants and can lead tenants to taking on tenancies at the very top of their affordability, compounding their vulnerability when the rent is subsequently increased during the term of the agreement. The practices are not regulated by any existing legislation and they are very different from the auctioning of premises for purchase. Rents are set on the basis of cost and value. The choice of one tenant from a large list of applicants is the role of a property manager or a landlord, and should not be left for tenants to fight it out amongst themselves.

The supply issues are complex and will not be solved in the immediate short-term. They must be addressed in the longer term and steps must be taken now to ensure the crisis does not worsen. However, the ACT Government is in the position to make some legislative changes that will drastically improve the position of people now anticipating or experiencing significant hardship. These changes would present minimal cost to Government and would be a significant first step to demonstrating its commitment to ensuring accessibility to affordable secure housing in the ACT.

We anticipate resistance to our call for a control on rents from real estate and lessor bodies claiming that this will stymie investment in private tenancy. In response to such calls we note that no research or evidence supporting that claim has yet materialised. Given the seriousness of the situation, opposition to important short term solutions should only be taken seriously if it can be reasonably substantiated.

Recommendation 18
Limitations should be placed on rent increases, linking them to affordability measures or even the CPI. This allows landlords to continue to cover the costs of their investment and at the same time recognises that there was initially an agreed value of the property relating to rent, and that any increases are to cover unforseen events only.

The requirement to consider rent on comparable properties should be deleted and affordability or hardship to the tenant added to the list of issues in section 68 of the RTA.

Recommendation 19
The practice of rent auctioning or rent bidding should be expressly prohibited in the RTA, with landlords bound to offer the property at the rent advertised.

These amendments would recognise and address the obvious current imbalance in the tenancy sector. They strengthen the legislation without imposing additional burdens on landlords. There are landlords in the ACT who are content to not exploit the current crisis by increasing rent, or who increase it only to reflect their genuine expenses and we support and encourage these landlords.

2.8.2 Clause 35

Clause 35 provides that rent may not be increased at intervals of less than 12 months from the beginning of the Tenancy Agreement, or from the date of the last increase for second and subsequent increases.

Whilst the intention of clause 35 appears to be to prevent rent increases occurring within periods of less than 12 months, the position in reality is less clear. It is not certain whether clause 35 prevents a lessor from increasing the rent more than once in a 12 month period where less than 12 month fixed term tenancy agreements are offered. For example, where an initial six-month fixed term tenancy has expired, arguably clause 35 does not prevent the lessor from offering a subsequent six-month fixed term tenancy at an increased rent. Such uncertainty should be removed.

Our services have advised several tenants where lessors have offered tenancies with fixed terms less than 12 months and have sought to increase the rent at expiration of the fixed term.

Recommendation 20
That clause 35 is amended to ensure that tenants are not subject to more than one rent increase in a 12 month period, regardless of the length of any fixed term.

2.9. COMPENSATION PURSUANT TO SECTION 107

Section 107 details the compensation a lessor is entitled to claim where a tenant seeks to terminate a tenancy prior to expiration of the fixed term.

Section 107(1)(b)(ii) enables the lessor to apply to the Tribunal for compensation in respect of "*the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to another person*".

The compensation awarded for advertising and re-letting the premises cannot exceed one week's rent and, in deciding the amount of compensation, the Tribunal must have regard to when the fixed term would have expired and the lessor would have incurred the costs.

Among agents there is a widespread failure to appreciate that compensation is not an automatic entitlement and depends on the landlord being able to provide evidence of his or her loss. There also seems to be almost no understanding that landlords are required to mitigate their loss under section 38 of the RTA. In our experience, agents automatically charge tenants a "lease breaking fee" equal to one week's rent (with some additionally charging GST), irrespective of when the lease is broken and without any regard to, or substantiation of, costs actually incurred. Sometimes the lease breaking fee is charged in addition to an 'advertising fee', also equal to one week's rent. Agents often refuse to undertake any advertising until a tenant pays the fee(s).

Recommendation 21
Amend the RTA so that lessors cannot claim any costs from tenants vacating prior to the expiration of the fixed term of a tenancy unless the lessor:

- advises the tenant in writing that lessors are not entitled to automatically charge tenants fees for breaking the lease and that the lessor has a duty to mitigate his/her loss;
- substantiates actual costs incurred in advertising and re-letting the premises;
- demonstrates that the lessor had regard to the principles in s 107(4) in arriving at the amount claimed; and
- advises the tenant that section 107 of the RTA details the compensation that may be sought by a lessor if they were to make an application for compensation to the Tribunal.

Recommendation 22
Amend the RTA to provide penalties for any breach of the above requirements.

Section 107(4) currently sets out the factors to be determined by the Tribunal when deciding the amount of compensation due for the reasonable costs of advertising a property. It is not clear from the wording of the section whether those factors are also to be considered when deciding the amount of compensation due for the reasonable costs of giving a right to occupy the premises to another person. It appears that the omission of the relevant words was simply an oversight. There is no reason why the advertising costs should be pro-rated but not the costs of giving a right to occupy the premises to another person.

Recommendation 23
Amend section 107(4) to read:
"In deciding the amount of compensation that may be awarded in relation to the reasonable costs of advertising, and of giving a right to occupy the premises to another person, the tribunal must have regard to …"

2.10. SUB-LETTING

Clause 72 provides that a tenant must not sublet premises without the written consent of the lessor.

Currently a person residing at premises as a 'subtenant' with the knowledge and consent of the lessor, has no rights if the landlord has not confirmed their consent in writing. Lessors will often not put their consent in writing (and there is nothing compelling them to do so) knowing that to do so creates rights for the 'subtenant'. Such person is afforded no protection by the RTA and has no standing to make an application to the Tribunal. They can be evicted from the premises without any notice by either the lessor or the head tenant.

The intention of clause 72 is to prevent tenants from subletting premises without the lessor's consent. Removing the requirement for written consent does not affect the purpose of the clause or diminish a lessor's rights but merely affords protection to 'subtenants' who are residing at premises with a lessor's full knowledge and consent.

The issue should be whether a lessor has consented to a subtenancy rather than whether such consent has been evidenced in writing, in the same way that a tenancy agreement is not required to be evidenced in writing by the RTA.

Recommendation 24
That the requirement for consent to be written be removed from clause 72.

2.11. SECTION 125 - APPEALS FROM TRIBUNAL TO SUPREME COURT

A party to a Tribunal hearing has 28 days in which to appeal a decision to the Supreme Court (pursuant to section 125 of the Act, and the Supreme Court Rules). Parties can request written reasons for the decision (pursuant to section 106 of the Act) but there is no time limit on the Tribunal in which to provide reasons.

Parties should have access to written reasons in deciding whether or not to lodge an appeal to the Supreme Court.

Recommendation 25
Amend the RTA/Supreme Court Rules so that a party has 28 days from the receipt of written reasons to lodge an appeal to the Supreme Court.

In relation to asking for written reasons, currently a party must ask for reasons within two weeks of the order being made, section 106 of the Act. In the interest of consistency and fairness this should be extended.

Recommendation 26
Amend the RTA so that a party has 28 days from the date of the order to seek written reasons.

3. OTHER ISSUES AND POSSIBLE PROJECTS

3.1. INCONSISTENT CLAUSES

Since the introduction of the RTA the use of clauses which are inconsistent with the terms of the RTA and the standard terms has had significant effects on tenants and their understanding of their rights, as well having ongoing and significant resource implications for the RTT. After this period of time there is enough data and experience to provide an accurate picture of how these clauses are being used, what they look like and what the effect of them is on ACT tenancies and the structures that support them. We suggest that work is done to collate this information, report on the use of inconsistent terms and make recommendations about the current system.

3.2. UNIT TITLES

The growth in redevelopment activity in the ACT has seen an increase in the interactions between tenancy issues and unit titles regulations. In its submission to the review of the *Unit Titles Act 2001*[9], the TU detailed the issues and the need for them to be addressed. The TU and the WRLC are interested to know what the timeframe is in relation to this review and the release of the anticipated draft legalisation.

3.3. COMPULSORY SMOKE ALARMS

On 28 July 2006 the TU provided a response to a discussion paper on the introduction of compulsory smoke alarms in the ACT. The TU and WRLC are interested to know what progress has been made in relation to this issue.

3.4. OCCUPANCY – STANDARD AGREEMENTS

The TU recently submitted a report to the Department of Justice and Community Safety on the impact of the occupancy amendments to the RTA. We ask that this report be considered with regard to recommendations relating to amendments to the RTA, with particular emphasis on the need for the development of regulations providing standard agreements for various types of occupancies in order to provide at the least a minimal level of certainty and protection for some of the most disadvantaged people in the ACT.

3.5. CLIMATE CHANGE AND TENANCY

As issues relating to climate change and the ACT community grow in importance, it is crucial that the ACT government not overlook the impact of changes on tenants. We urge the ACT government to carefully consider people in all forms of rental accommodation when developing responses to all aspects of climate change.

3.6. TENANCY APPLICATIONS FORMS

A particularly difficult and ongoing issue continually raised by tenants, and an issue of concern to those advocating for tenants, is the content of application forms used by real estate agents across the ACT. Many application forms require prospective tenants to provide information that is at the best irrelevant to determining applicants suitability, and at worst could be seen as the basis for decisions that breach anti-discrimination legislation. While applicants find these requirements offensive and difficult, it is made clear to them that failure to fully complete forms will result in the application not being considered. We urge the ACT government to take steps to develop a standard application form to be included in the RTA.

ATTACHMENT 1

SECURITY OF TENURE – ADDITIONAL SUBMISSIONS BY THE TENANTS' UNION

Given the changing role of the private rental market, increasing tenants' security of tenure must be a central factor in any amendments to the RTA. If tenants were to achieve greater security of their tenure, many other benefits would flow as a consequence. For example, complaints by tenants about the actions or omissions of lessors would not be so fraught if the tenancy itself were secure. The threat of eviction is an overriding factor in the unequal relationship between tenants and lessors.

There are a number of different definitions of security of tenure. The Tenants' Union's view is that security of tenure should deliver to tenants the choice to stay in their home or to leave, although there are obvious exceptions which we detail below[10]. Security of tenure is not the introduction of long-term leases. It is the ability for a tenant to choose themselves, rather than be forced by unreasonable terms, when to leave a property and establish their home in a new location.

The availability of 'without ground' terminations results in tenants being evicted for all manner of unstated reasons, many extremely unsound and unreasonable. The Tenants' Union contends that wide ranging, reasonable and sound grounds are already established in the Act, and eviction should only occur under those conditions. We note that opposition to this view from lessors and agents on the ground that security of tenure stifles investment is not supported by any evidence to this effect. We also note that the ACT did rely only on specific grounds under the *Landlord and Tenant Act* for nearly 40 years and investment did grow during that time.

This response in law would protect tenants against the unreasonable actions of lessors and agents. Further, it would provide a link between the investment encouragement for private lessors at a Commonwealth level (via taxation policies) and the right of individuals to housing. Whilst lessors and agents may argue against such market intervention on the basis that they should be able to do what they wish with their property, the acceptance of tax breaks and other subsidies has already determined that the market is not run on a pure supply and demand basis. Tenancy law is a vehicle to protect tenants' rights, in this case security of tenure, given the investment encouragement provided to lessors.

In order to give tenants the choice to remain in or to leave the premises (when they are not in breach of their agreement), 'without ground' evictions should be abolished. The RTA already provides for 'with ground' terminations: where the lessor or their immediate family has a bona fide and immediate intention to move into the property; where the lessor has a bona fide and immediate intention to reconstruct, renovate or make major repairs which cannot reasonably be carried out with the tenant in residence; where the lessor intends to sell the property; and where there has been a breach of the tenancy agreement by the tenant.

The ability to use without ground evictions effectively undermines tenants' willingness to pursue other tenancy rights, due to concerns about losing their tenancy and home. For tenants who are told to leave without grounds, the exercise is costly, especially for those with children at a local school, disabilities requiring access to nearby medical practitioners or other local community connections which they cannot sustain if forced to leave. If the property is going to continue to be a rental property, little reason exists to force a tenant to move out.

The ability of a tenant to have a notice to vacate overturned on the ground that it is retaliatory (s57), was an attempt to deal with tenants' concerns regarding risks in pursuing their tenancy rights. However, the effectiveness of the current retaliatory eviction clauses has been limited, to say the least. Whilst a tenant taking action under s57 may succeed in having a 'without ground' notice to leave overturned once, it is unlikely to protect a tenant in the longer term. In our experience, agents openly admit that, since 'without ground' evictions are lawful, a lessor need only to re-issue the notice 'without grounds' at some point in the future. Subsequent action under s57 will fail to bring protection to the tenant unless the connection between the former complaint and the new notice can be proved.

In the TU's view, this one particular change – removing the use of 'without ground' eviction - is the most important of the changes currently sought and will effect the most change in the current environment. It is, however, unlikely to gain support from agents and lessors, who may see it as a loss of control. Indeed, lessor representatives have commented in the past that you cannot take control away from lessors regarding what they do with their properties.

As noted above, however, the argument for market intervention has already been had, with the Commonwealth's taxation polices of negative gearing, capital gains tax savings and writing down expenditures on out-goings intervening to encourage speculative investment in housing. The market does not operate on a pure supply and demand model.

Further, it is hard to see how an argument by lessors or agents to allow them to choose when a tenant is to leave the property could be sustained. If the property continues to be supply stock and the tenant is not in breach of the agreement, it is surely to the benefit of agents and lessors for the tenancy to continue on foot. Any argument about the loss of control is surely based in a fear of change that will be unrealised.

Termination of Agreements

We have made comments above, recommending prevention of 'without ground' evictions, on the basis that the law should require the lessor to be transparent regarding reasons for forcing a tenant to leave. The scope and shape of further recommendations regarding terminations will be, to some extent, dependent upon the success or otherwise of that proposal.

However, the Tenants' Union is of the firm view that, whether 'without grounds' evictions remain or not, there are other aspects of the terminations process which require review. The availability of and process involved with terminating a tenancy goes to the very heart of security of tenure and tenants' ability to retain their homes.

The Tenants' Union's views about terminations are based around a number of key principles which the law should provide for. These are set out below.

Firstly, *that evictions should only ever occur for a reason ('with grounds') established under the law*. We have detailed our view on this in the earlier section about security of tenure.

Secondly, *that tenants have a right to be informed of the reasons for evictions*. The current provisions allow the use of 'without ground' evictions. In most cases, there are reasons for eviction but it is only in certain circumstances that a lessor must inform the tenant what they are. The use of 'without grounds' masks the variety of reasons behind evictions, which do not fall into other defined categories. Many of these are unreasonable, for example, the tenant has not

carried out an unlawful request of the agent such as changing their rent payment method. The tenant may have won the rent payment method dispute, but lost out in the long run because they are subsequently given a without ground eviction. Coupled with a change noted under the first principle, this would substantially contribute to tenants' security of tenure and dignity.

Thirdly, *that termination time periods should be extended to maximise notice to tenants*. The Tenants' Union contends that termination times when tenants are not in breach of the agreement are generally too short. Depending on how long base termination notice periods become, consideration should be given to allowing additional time for each year a tenant has been in residence.

The Tenants' Union's view is that termination time periods, should be reasonable and not cause hardship to tenants.. We support the recommendation made by the National Association of Tenant Organisations (NATO) in *Leaking Roofs*.[11]That is, that the general notice period for terminations which are not related to breaches by tenants, be increased to 120 days (on periodic agreements only).

ATTACHMENT 2

LIST OF RECOMMENDATIONS

1. Amend the RTA so that where a lessor notifies the tenant in writing of the lessor's intention to sell the premises, the tenant can elect to have an automatic rent reduction from the date of notification OR to terminate the tenancy, irrespective of whether it is a fixed term or periodic tenancy.

2. Amend the RTA so that a tenant is only liable for water consumption where the tenant receives the water bill within a certain time frame (for example, 4 weeks) of the date the bill is due for payment.

3. That existing penalties for unlawful actions by lessors be expanded to include granting the RTT power to penalize lessors for breaches of the Standard Residential Tenancy Terms.

4. To develop regulations in relation to reasons and time limits as per Part 6A of the RTA (Tenancy Databases).

5. That the RTA be amended so that the bond is automatically returned to the tenant unless a lessor disputes the return of the bond within 5 working days of the end of a tenancy.

6. If the previous recommendation is not accepted then it is recommended that the RTA be amended so that a lessor is prevented from disputing the release of a bond to a tenant at the ORB stage without having a lawful basis under section 31 of the Act.

7. Amend clause 92(f) to provide that the lessor may serve a notice to vacate once the rent has been in arrears for one week provided that two notices to remedy have been issued for non-payment of rent in the last twelve months.

8. That clause 93(d) be amended to exclude notices to remedy issued on the basis of failure to pay rent.
That clause 93(d) be amended to provide that the lessor may serve a notice to vacate once the rent has been in arrears for one week provided that two notices to remedy have been issued for non-payment of rent in the last twelve months.

9. The ability to evict a tenant without grounds, currently permitted by clause 94, should be removed from the RTA.
If clause 94 is not removed the RTA should prevent lessors from using clause 94 as a means of circumventing the excessive rent increase provisions, for example, by prohibiting a rent increase for a period of 12 months following a clause 94 eviction.

10. Amend clause 94 to enable a tenant who has been served with a clause 94 notice to vacate the premises at any time during the notice period by giving the lessor 3 week's notice of their intention to vacate.

11. That the 4 week notice period required pursuant to clause 96(1)(a)(b)&(c) be increased from 4 weeks to 12 weeks.

12. That a lessor be required to provide details with any Notice to Vacate served pursuant to clause 96. The details required will depend on the circumstances of each case but they need to be sufficient for the tenant to be able to reasonably determine whether or not a genuine intention exists.

13. Amend the RTA so that the lessor must notify the tenant of the change in intention, within a reasonable time of the intention changing (e.g. 3 days) where a lessor's intention changes after serving a clause 96 notice. The requirement to notify continues until one month (or some other reasonable time) after the tenant vacates or the notice expires; whichever is the latter.

14. That section 57 be expanded to:

- enable a tenant to take action prior to a lessor applying for a TPO, so that where a tenant suspects that a Notice to Vacate has been issued on "retaliatory grounds", the tenant can make an application to the Tribunal pursuant to section 57 without having to wait for the lessor to apply for a TPO; and
- give the Tribunal the power to declare the Notice to Vacate invalid upon the tenant presenting evidence of any of the factors listed in section 57(1)(b).

15. Either:
- that sections 58 and 60 are amended to replace the reference to forms approved under section 133 with a reference to forms which comply with the requirements of the RTA; or
- that forms for notice of termination are approved by the Minister under section 133 of the RTA.

16. Amend the RTA so that where notice to terminate a co-tenancy is given pursuant to clause 88 or clause 89 any co-tenant(s) wishing to remain at the premises have the right to do so pursuant to a new tenancy (without being required to physically leave the property).

17. Amend the RTA so that a notice to terminate (pursuant to clause 88 or clause 89) must be signed by all co-tenants; with all co-tenants indicating whether they will be vacating pursuant to the notice or remaining at the premises pursuant to a new tenancy.

18. Limitations should be placed on rent increases, linking them to affordability measures or even the CPI. This allows landlords to continue to cover the costs of their investment and at the same time recognises that there was initially an agreed value of the property relating to rent, and that any increases are to cover unforseen events only.
The requirement to consider rent on comparable properties should be deleted and affordability or hardship to the tenant added to the list of issues in section 68 of the RTA.

19. The practice of rent auctioning or rent bidding should be expressly prohibited in the RTA, with landlords bound to offer the property at the rent advertised.

20. That clause 35 is amended to ensure that tenants are not subject to more than one rent increase in a 12 month period, regardless of the length of any fixed term.

21. Amend the RTA so that lessors cannot claim any costs from tenants vacating prior to the expiration of the fixed term of a tenancy unless the lessor:
- advises the tenant in writing that lessors are not entitled to automatically charge tenants fees for breaking the lease and that the lessor has a duty to mitigate his/her loss;
- substantiates actual costs incurred in advertising and re-letting the premises;
- demonstrates that the lessor had regard to the principles in s 107(4) in arriving at the amount claimed; and
- advise the tenant that section 107 of the RTA details the compensation that may be sought by a lessor if they were to make an application for compensation to the Tribunal.

22. Amend the RTA to provide penalties for any breach of the above requirements.

23. Amend section 107(4) to read:
"In deciding the amount of compensation that may be awarded in relation to the reasonable costs of advertising, and of giving a right to occupy the premises to another person, the tribunal must have regard to …"

24. That the requirement for consent to be written be removed from clause 72.

25. Amend the RTA so that a party has 28 days from the receipt of written reasons to lodge an appeal to the Supreme Court.

26. Amend the RTA so that a party has 28 days from the date of the order to seek written reasons.

Endnotes

[1] Real Estate Institute of Australia, "Real Estate Market Facts", September Quarter 2007.

[2] Tenants Union of Victoria, Rental Housing Affordability Bulletin - A National Perspective, September 2006 http://www.tuv.org.au/social_change/research_statistics.aspx?RS=Bulletins

[3] As already noted, the housing and rental markets in the ACT have significantly changed since the enactment of the Act and there is no indication that we are going to see favourable changes in the market for tenants.

[4] This is from a tenant who has just signed a lease on a place in Braddon and was told there will be no problem breaking the fixed term as there were more that 50 applications (provided he pays an unlawful 'advertising' charge).

[5] http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0

[6] http://www.rba.gov.au/

[7] A.2 Reserve Bank of Australia – Monetary Policy Changes, http://www.rba.gov.au/Statistics/Bulletin/A02hist.xls

[8] ACT Attorney-General's Department, "The Community Law Reform Committee of the ACT, Report No. 8 – Private Residential Tenancy Law," 1994, p78.

[9] Submission of the Tenants' Union to ACT Planning and Land Authority, dated 1 December 2006.

[10] In brief, we are referring to a property which will continue to be available in the rental sector and a tenant who is not in breach of their agreement.

[11] Hazel Blunden, and the National Association of Tenants' Organisations. "Leaking Roofs - Australian Tenancy Law: A Report by the National Association of Tenancy Organisations" 2003, Produced by: The Tenants' Union of New South Wales.