

# ***'THE RESIDENTIAL TENANCY REVIEW 2009'***

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## **THE COLONY 47 SUBMISSION IN RESPONSE TO THE DISCUSSION PAPER**

### ***About this submission***

The Colony 47 Housing Services welcomes the opportunity to make this submission. Before addressing the questions raised in the discussion paper, we provide a brief outline of the arguments that have shaped our response.

We submit that one of the major issues for reform of tenancy law is the question of whether housing is a commodity just like any other or a fundamental human need. It is our position that the residential tenancies legislation should guarantee the satisfaction of housing as a human need. Burke (1999)<sup>1</sup> has already discussed the implications of Australian residential tenancy legislation that accommodates, first and foremost, an owner's right to use the property as an object of investment and exchange. In particular, noting that this 'right' is especially problematical in a context of a Commonwealth government agenda promoting a market solution to the provision of social housing. What Burke could not anticipate a decade ago was exactly how the Howard Coalition government's agenda of housing policy reform would play out in the lives of private rental tenants.

We submit that with the introduction of Commonwealth Rent Assistance, the residualisation of public rental housing and a crisis in housing affordability, it is no longer appropriate to treat 'market values' as either a fair, or an objective determinant of rent reasonableness. Data collected by the Colony 47 Housing Services shows that owners and/or their agents are increasingly exploiting their bargaining power and extracting from tenants excessive rents. Consider, for example, the following case. A property in Lenah Valley was tenanted in October 2006 for a rent of \$125wk. In December 2009, it was tenanted for a rent of \$335wk. The rent on this property has nearly trebled in little more than thirty-six months. This is not an isolated case. When our laws end up ratifying greed, we are all poorer as a result; the divide between the rich and the poor becomes greater, the number of homeless continues to grow, and social stability is threatened.

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<sup>1</sup> Burke, Terry (1999) 'Private Rental in Australia' <http://www.housing.infoexchange.net.au>

It is the view of the Colony 47 Housing Services that whilst tenancy law remains solely concerned with providing for an orderly relationship between tenants and owners, this relationship will remain unbalanced structurally. In other words, such an objective in and of itself has not been able to ‘protect’ tenants from the structural power that resides with the owners of residential tenancy properties; reforming the Act with only this objective in mind is unlikely to result in a different outcome. It is the interests of social stability and consideration of social inclusion that has shaped our response to the discussion paper. It is our view that the recommendations included in this submission would disadvantage neither tenants nor owners. At core, they simply recognise that tenancy law reform should not be isolated from other social goals.

It is the belief of the Colony 47 Housing Services that the majority of Tasmanians would prefer to be part of communities where every child and every adult can have a safe home to go to at night. It is also our belief that whilst tenancy law reform cannot be used directly to affect the level of investment in rental housing, it can be used to create stable and robust private rental markets in Tasmania, which in turn, are more likely than not to ‘encourage’ further investment. Indeed, a consistent finding in studies on investment in the private rental market in Australia is that whilst there is a range of factors that influence decisions to invest and disinvest in property, ‘market conditions’ are certainly not unimportant. Seelig et al’s (2009: 2)<sup>2</sup> recent study, for example, linked the importance of market conditions to a perception widely held amongst the investors they interviewed of property ‘as something relatively easy to invest in (not mysterious or complex like some other investments).’ Beer et al (2006: iii)<sup>3</sup>, in an earlier AHURI study on the private rental sector in Australia, postulated that ‘high levels of tenancy disputes and evictions within the private rental market may generate a perception of market failure amongst landlords, who then become reluctant to invest in low cost rental housing.’ Oscillating vacancy rates, frequent and/or excessive rent increases, slum housing and poor management practices are proper concerns of residential tenancies legislation. More importantly, these concerns are addressable through amendment of the current Act. Addressing these concerns would go a long way towards creating needed and desired stability in Tasmania’s private rental markets; and would provide for regulation of residential tenancy arrangements that reflects current social conditions.

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<sup>2</sup> Seelig, Tim, Alice Thompson, Terry Burke, Simon Pinnegar, Sean McNelis and Alan Morris (2009) *Understanding what motivates households to become and remain investors in the private rental market* AHURI Final Report No.130

<sup>3</sup> Beer, Andrew, Michele Slatter, Jo Baulderstone and Daphne Habibis (2006) *Evictions and housing management* AHURI Final Report No. 94

## *The role of the Residential Tenancy Act*

**Is there a need to develop an integrated or whole of Government approach to issues in the rental market? What is the role of the RTA in responding to marketplace issues such as shortages in the supply of housing?**

Whilst there is clearly a pressing need to develop an integrated or whole of Government approach to issues in Tasmania's rental markets, it is the conviction of the Colony 47 Housing Services that this need should not be relegated to secondary status consideration of reform of Tasmania's residential tenancy law.

Informing the Colony 47 Housing Services consideration of the role of the RTA (the Act) in responding to marketplace issues such as shortages in the supply of housing is the belief that a refinement of its perceived object or key purpose is timely.<sup>4</sup> Many injustices have been produced by the failure of the Act to concern itself with *the sustainability and stability of rental markets* in Tasmania. Oscillating vacancy rates provide perhaps the most compelling evidence of cycles of 'boom and bust' in a rental market. The Figure below - sourced from the Australian Bureau of Statistics (ABS) - shows the cycles of boom and bust in Australia's capital cities rental markets between 1998 and 2008.

### **WEIGHTED AVERAGE OF CAPITAL CITY RENTAL VACANCY RATES**



Source: REIA quarterly vacancy rates, ABS Estimated Resident Population.<sup>5</sup>

<sup>4</sup> The precedent for refining the purpose of residential tenancy law in Australia has already been set. In 1975, the Commonwealth Commission of Inquiry into Poverty in Australia published reports by Bradbrook and Sackville containing recommendations for the reform of the existing tenancy legislations in Australia. Central to these recommendations, as Kennedy (cited in Slatter and Beer 2004: 4) argues, was 'the perception of the tenant as the consumer of housing services in an essentially contractual agreement'. Although Tasmania's reform of its residential tenancy law did not come into force until the 1<sup>st</sup> July 1998, it nevertheless broadly followed the recommendations contained in the reports by Bradbrook and Sackville. In doing so, it changed the key purpose of residential tenancy legislation in Tasmania from regulation of the tenant/landlord relationship to regulation of the contractual arrangement between consumers and suppliers of housing.

<sup>5</sup> Australian Social Trends 2008 (Cat. No. 4102.0)

Inevitably, in any reconsideration of the purpose of residential tenancy law, we are faced with the difficulty that whilst it is the stability and sustainability of rental markets that define the parameters that set limits for the range of choices tenants and owners can make, it is the conduct of tenants and owners (or their agents) that construct tenancy situations. The Colony 47 Housing Services believe that it is naïve to suggest that tenancy law is not already intervening in private rental markets in Tasmania. Nevertheless, these services propose that the following stipulation inform any consideration of the use of tenancy law reform as a mechanism for responding to marketplace issues such as shortages in the supply of housing.

The stability and sustainability of Tasmania's private rental markets is the pivotal marketplace issue taken into account here. Indeed, by highlighting the issue of shortages in the supply of private rental housing there is a risk of downplaying the issue of shortages in the supply of public rental housing. The Colony 47 Housing Services assert that shortages in the supply of private rental housing must be addressed first and foremost by increasing the supply of public rental housing.

The principle that underpins this approach to tenancy law reform is that it is in the interests of the ongoing viability of private rental markets that tenancy law should now recognise residential tenancies as complex contractual arrangements for the provision of not simply 'housing'. Rather, what is being provided is a property or residential premise that is more or less habitable, more or less energy efficient, more or less likely to be subject to rent increases, and more or less likely to be repaired.

The Colony 47 Housing Services have observed that the private rental sector in Tasmania is not only becoming increasingly tiered or layered in terms of the quality of the housing stock, but also in terms of expectations that all tenants will, or can, experience approximately the same kinds of benefits (and/or drawbacks). If we accept that existing residential tenancy legislation across Australian States and Territories has, amongst other things, sought to alter the tenant/landlord relationship to one of consumer/supplier, reform of tenancy law must respond to and reflect the profound change to the culture of the private rental sector this has wrought.

The change to the culture of the private rental sector wrought by a shift in focus of tenancy law from tenants/landlords to consumers/suppliers should not be underestimated. As AHURI

housing researchers Slatter and Beer (2004: 7)<sup>6</sup> describe, ‘the consumer focus’ that underpins current tenancy law in each of Australia’s states and territories was intended to ‘primarily advantage tenants’; specifically, it was intended to redress the earlier situation of owner’s property rights being ‘more extensive’ than the property rights of tenants. Indeed, as Slatter and Beer (2004: 7-8) further describe, the common perception amongst legislators was that the only benefits for owners would be in terms of ‘improvements in process’; specifically, a reduction in the time, money and uncertainty involved in evicting tenants. And in principle, tenancy law across Australia does provide for tenants and owners to negotiate lease terms. However, Tenants Unions across Australia maintain that a power imbalance exists between tenants and owners, with tenants having little power in comparison to owners. Observations made by the Colony 47 Housing Services are that tenancy agreements or leases in Southern Tasmania are rarely negotiated. Rather, owners or their agents typically offer them to tenants on a take-it-or-leave-it basis. Similarly, poor quality, even substandard premises are understood by these services to be increasing in number rather than decreasing.

Thus, whilst the Colony 47 Housing Services are encouraged by the acknowledgement made in the discussion paper that residential tenancy law reform in Tasmania could, for example, play a role in facilitating good quality rental housing stock, we fear that without any reconsideration of the purpose of the RTA such developments will never become a reality.

***Recommendation:***

- The Act concern itself with the stability and sustainability of rental markets in Tasmania.

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<sup>6</sup> Slatter, Michele and Andrew Beer (2004) *Evictions and Housing Management: Toward More Effective Strategies* AHURI Positioning Paper

## *Security of Tenure*

### **Should tenants be able to extend an agreement where the owner intends to rent a property for a further period?**

The Colony 47 Housing Services propose that the RTA should require and prescribe grounds for the non-renewal of tenancy agreements.

The role that private rental has served in Australia for most of the latter half of the twentieth century, that is, as a short-term transitional tenure, has fundamentally changed. For much of the latter half of the twentieth century private rental housing in the Australian context was conceived of as ‘a staging post’ for entry into either home purchase or public housing (Burke 1999)<sup>7</sup>. For most of the last decade however, ABS census data has posed a serious challenge to this conceptualisation. For example, analysis of this data has revealed that the proportion of Australian households that have remained in this tenure for a period greater than ten years has steadily increased (Yates and Wulff 2000: 45)<sup>8</sup>. Indeed, as Yates and Wulff (2000: 45) argue, it is likely that private rental will become the permanent form of housing tenure for an increasingly large number of people and, for many others, a long-term rather than short-term solution to their accommodation needs.

A number of housing researchers’ have suggested that private rental housing in Australia has come to serve a dual role of providing ‘choice for the more affluent and constraint for the poor’.<sup>9</sup> In other words, ‘affluent’ households are understood to be choosing private rental housing because it provides them with flexibility and diversity in housing, while ‘poor’ households are understood to be forced into remaining in this form of housing because they are unable to access any other. Poor households include some of the most vulnerable members of our communities and thus great care needs to be taken in ensuring that their interests cannot be made secondary to the desire of an owner to evade current unreasonable rent increase provisions. Data collected by the Colony 47 Housing Services over the last decade reveals that households renting privately move frequently and that the rent charged for a particular property is more likely to be ‘significantly’ increased with each new tenant, rather than each renewal of a lease or passing of 6 months.

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<sup>7</sup> Burke, Terry (1999) ‘Private Rental in Australia’ <http://www.housing.infoxchange.net.au>

<sup>8</sup> Yates, Judith and Maryann Wulff (2000) ‘W(h)ither Low Cost Private Rental Housing?’ *Urban Policy and Research* 18(1): 45-64.

<sup>9</sup> See, for example, Yates, Judith (2002) ‘The Limits to Choice in the Private Rental Market’ *Just Policy* 25: 32-48.

Noted in the discussion paper is ‘an acceptance’ that the important reason for residential tenancy law reform is to update it in line with current practices or changes in the rental market. If we also accept that one of the major recent changes in the rental market has been the increasing numbers of long-term renters with few if any other housing options, then a consideration of expanding the role of the RTA in limiting the circumstances in which tenancies are terminated is timely and appropriate.

**Recommendations:**

- In addition to the retention of just cause evictions, the RTA be amended to include just cause non-renewal of tenancy agreements. Analogous criteria for what is to be considered ‘just’ could be employed, that is, if the property is to be used for another purpose or where the tenant has on more than one occasion failed to comply with the tenancy agreement. Non-urgent repairs or non-structural renovations should not necessarily be treated as a just ground for non-renewal of a tenancy agreement.
- The role of the Residential Tenancy Commissioner be expanded to include determination of disputes about whether just grounds exist for non-renewal of tenancy agreements. The Act should also provide a right of appeal against a decision by the Commissioner on this matter to the Magistrates Court.
- A new standard lease be created for a fixed term tenancy in Tasmania which includes the option to renew. In those instances where a property is not intended to be rented for a further period, a clause to this effect would then need to be included in the agreement.
- A ‘*notice to remedy*’ be issued to the tenant on their first and second failure to pay the rent, rather than a ‘notice to vacate’. This change would avoid the creation of unnecessary confusion and distress. It is also appropriate that the owner or agent be required to issue this notice no later than 3 working days after the rent was due. A notice period of not more than 3 working days would ensure that rent arrears are not ‘left’ to get to an amount that is beyond the capacity of a tenant to address.<sup>10</sup>

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<sup>10</sup> The Colony 47 Housing Services recognise that the decision to leave off informing a tenant of their failure to pay the rent is often kindly meant. It is the observations of these services however, that this practice is likely to do more harm than good.

## *The cost of rent and increases in rent*

### **Do you agree that rent should only be increased every 12 months? Should all rent increases be subject to a reasonableness test?**

It is the contention of the Colony 47 Housing Services that simply changing the current 6-month provision to a 12-month provision in and of itself will not contribute to stable and sustainable private rental markets in Tasmania. Indeed, the risk here is that such an amendment may have the unintended consequence of reducing the length of the typical fixed term agreement in Tasmania from 12 to 6 months.<sup>11</sup> It is for this reason that the Colony 47 Housing Services call for *restrictions on rent increases to be located with properties* rather than tenancies, we would then also support amending the permitted frequency of rent increases from once every six months to once every 12 months. We submit that the Act should limit the frequency that rent can be increased on any given *property* to once every 12 months, rather than during each tenancy.

Statistics compiled by the ABS show that average rents across Australia's capital cities have long been rising at a rate above the CPI. Of particular concern is the finding that 'in the 12 months to March 2008 . . . the rents component [of the CPI] rose by 7.1%, outstripping the increase of 4.2% in overall inflation.'<sup>12</sup> Findings such as this point to the failure of tenancy law in Australia in the matter of preventing or impeding owners' unreasonable exploitation of their bargaining power in an unstable rental market. Whilst it may well occur that over time the rent on some properties has fallen out of line with 'market values', and thus these properties are the subject of a large jump in rent, this scenario cannot account for the magnitude of the rise in the cost of renting found by the ABS. Indeed, the Colony 47 Housing Services have observed that during this current period of low vacancy rates, there are numerous tenancies where the rent is increased every six months as a matter-of-course, skewing the determination of 'market rents' in the process.

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<sup>11</sup> It is the conviction of the Colony 47 Housing Services that the best interests of most Tasmanian tenants are rarely served by securing an affordable tenancy that has no duration beyond 6 months. The costs are not just those directly arising from having to exit a tenancy, that is, cleaning and removals. There can be a cost to a person's health and mental well-being. For elderly people and children in particular, there can often be a great deal of stress associated with having to pack up one's belongings and attempt to create a feeling of home in a new property, often in a completely new neighbourhood. There can be costs to children's educational attainment if they are required to change schools because of a change of rental premises. Whilst starting a new school at the beginning of a school year can be difficult, changing schools part way through a year is especially challenging. Moreover, funding for State schools is based on enrolments at the commencement of a school year and is not adjusted to reflect changes through the year. There can also be costs to a community and its capacity to promote social inclusion if significant segments of its residents are transient.

<sup>12</sup> Australian Social Trends 2008 (Cat. No. 4102.0)

This shift in focus away from tenancies to properties would provide a simple mechanism for subjecting every rent increase in Tasmania to a reasonableness test. Current provisions in the tenancy law of all States and Territories in Australia to control excessive and/or overly frequent rent increases have simply failed. In part, this is because ‘market rent’ is neither a reliable nor an objective tool for measuring rent reasonableness. Market rent is ‘decided’ through a calculation of the average rent of similarly sized and located properties. The calculation of average rent is of course easily skewed, as the existence (or creation) of ‘outliers’ or properties with extremely high (or low) rents will have the effect of dragging the average towards them.

***Recommendations:***

- That the current provisions available in the Act for court intervention in respect of unreasonable rent increases and the frequency of rent increases be amended to be applicable to the property rather than the tenancy. Apart from major renovations or sale, no other consideration for allowing rent to be increased on a property more than once in a 12-month period should be receivable.
- The Act also be amended to include the requirement of an owner or their agent to alert the Residential Tenancy Commissioner, in writing, of an intent to increase (or decrease) rent on a property. A standard form should be made available for this requirement.
- The role of the Residential Tenancy Commissioner be expanded to include determination of disputes about the reasonableness of a rent increase. The Act should also provide a right of appeal against a decision by the Commissioner on this matter to the Magistrates Court.
- That the Act recognises that ‘market rent’ is an unreliable tool for determining rent reasonableness. [It has proven to be inadequate for stopping excessive rent increases and should be viewed as a constitutive element, rather than a symptom, of market instability.] Exploration should be undertaken of the fairness of using the percentage change in the CPI over the given 12-month period to determine whether a rent increase is reasonable. In the absence of any major repairs or major renovations, this measure could be used in place of ‘market rent’.

Alternatively, what is to be classed as evidence of a reasonable rent increase should be amended to include both necessary and sufficient evidence. For example, whilst having not exceeded 'market rent' is currently necessary evidence of the reasonableness of a rent increase, it may not always be sufficient. The Residential Tenancy Commissioner should be required to determine, on a case-by-case basis, whether sufficient evidence exists to class a rent increase as reasonable. If the Act was amended to include the requirement of owners or their agents to alert the Commissioner of an intent to increase (or decrease) rent, a bank of information would soon be assembled. This information could then be used by the Commissioner to inform their determination of whether a rent increase is reasonable, providing for a fair and efficient decision making process.

- One further amendment to the current unreasonable rent increase provisions would add to their effectiveness. The requirement that tenants or potential tenants must demonstrate that a rent increase is unreasonable be abolished. This requirement be replaced with the provision that owners or their agents bear the onus of proving that a rent increase is reasonable and not excessive.

## ***Rent Bidding***

Is rent bidding a problem and if so, is there a legislative solution to rent bidding?

In the ten years since the commencement of operation of the RTA in Tasmania, there have arisen particular practices that unreasonably preclude prospective tenants from rental housing. Whilst rent bidding has not yet become a prevalent practice in Tasmania, rent banding is in fact little different in its intent. The Colony 47 Housing Services advance that reform of the Act should seek to stop rent bidding and rent banding, as well as the practice currently engaged in by certain owners or their agents of refusing a particular contribution to a security deposit.

It is the conviction of the Colony 47 Housing services that the legislative solution to the problem of rent bidding currently in use in Queensland would effectively stop this and other practices that unreasonably preclude prospective tenants from rental housing in Tasmania. Indeed, in his critical analysis of the English law of private property, Vincent-Jones (1987: 455)<sup>13</sup> observed that there has yet to be a 'defensible argument' for leaving entirely to the market the allocation of housing. The RTA already goes some way to ensuring that prospective tenants not be unreasonably precluded from rental housing by regulating the fees that tenants can be charged.

It concerns the Colony 47 Housing Services that the practice employed by certain owners or agents<sup>14</sup> of refusing a contribution towards a security deposit if Colony 47 (or Anglicare) is providing it is based on a misapprehension that this form of government financial assistance is somehow undeserved, unwarranted or unfair, or that it is somehow unnecessary. The practice of refusing a particular contribution towards a security deposit is a discriminatory practice. It effectively serves to deny access to rental housing to low-income households. The Colony 47 Housing Services submit that the discussion paper makes a serious oversight in not considering the problematic nature of the practice of owners or agents refusing a particular contribution to a security bond.

Indeed, the average rent across all of Tasmania suggested in the discussion paper was \$235wk. The typical start-up costs of a tenancy with a weekly rent of \$235 when the owner

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<sup>13</sup> Vincent-Jones, Peter (1987) 'Exclusive Possession and Exclusive Control of Private Rented Housing: A Socio-Legal Critique of the Lease-Licence Distinction' *Journal of Law and Society* 14(4): 445-458.

<sup>14</sup> The real estate agents that currently refuse to accept a contribution to a bond provided by Colony 47 are EIS, PMM, some PRD offices and the Swansea office of Roberts. Interestingly, PMM uses rent banding as well.

only requires the rent to be paid two weeks in advance is \$1410.00. This cost to the tenant does not include their cleaning, removalist and service connection costs. Data collected by the Colony 47 Housing Services demonstrates that many households in Tasmania do not have the capacity to raise such a large sum of money. Refusing to accept a particular contribution towards a security deposit would seem therefore, to serve no useful purpose.

***Recommendations:***

- A rental bond or security deposit may *not* be taken if the owner or agent refuses a particular contribution towards it from a third party.
- An owner or agent can require no more than two weeks rent in advance from a tenant. The two-week period is consistent with the pay periods of most employers and Centrelink.
- A rental bond or security deposit may only be taken if the property is advertised for rent at a fixed price.

## ***Dispute Resolution***

**Do you agree that there can be improvements to the existing dispute resolution process?**

**Do you support expanding the role of the Residential Tenancy Commissioner to include other orders under the Act?**

The Colony 47 Housing Services agree that improvements can be made to the existing dispute resolution process, but propose that any 'improvements' that are to be made have as their primary object the provision of simpler pathways and a more user-friendly process.

The current pathways available to tenants and owners assume a certain level of awareness, literacy and capacity to engage with 'correct procedure'. Thus, whilst giving the Act a greater educative role may address people's lack of knowledge about the dispute resolution process, this would not address the difficulties certain people may encounter in trying to negotiate it. Observations made by the Colony 47 Housing Services are that the range of people that may struggle here is much broader than those who have poor literacy or come from a non-English speaking background. Any tenant or any owner can become so emotionally drained by the worry about the problem that they too struggle with the current process.

The Colony 47 Housing Services submit that the continued failure on the part of legislators to provide for a user-friendly dispute resolution process is a major limitation on the effectiveness of tenancy law in Tasmania. We strongly support exploration of ways to promote dispute resolution by mediation.

Indeed, the assumption of many tenants who contact the Colony 47 Housing Services for assistance in securing a new tenancy because of problems with their current tenancy is that 'the court' is not an effective resource for tenants to use in attempting to address power imbalances between themselves and owners. In one sense, they are correct. Under the Act, a residential tenancy agreement is treated as a contractual agreement not merely in essence, but in legal actuality. Treating tenancy agreements in this way introduces the idea of mutual contractual obligation into tenancies. In other words, Magistrates are obliged to interpret the existence of a residential tenancy agreement as making the relationship between a tenant and owner a voluntary, free and therefore, equal relationship. Thus, the meaning that a Magistrate can give to a tenancy agreement is not one that can admit to the possibility of there being an imbalance of power arising from the owner retaining the controlling rights associated with the ownership of property. Contractual obligation in the absence of a fair and easily accessible

system of dispute resolution neither recognises nor respects general considerations of justice and equity.

**Recommendation:**

- Provide for a properly functioning system of mediation to deal with tenancy disputes. This would seem to be the most desirable option as it has the greatest potential to produce satisfaction amongst disputing parties and it is user-friendly.

The Colony 47 Housing Services are aware that the Magistrates Court attempts to provide mediation/conciliation services. However, the obvious advantage that a non-court based system of mediation would bring to tenancy dispute resolution cannot be overestimated.

Bradbrook (1998: 11)<sup>15</sup> reminds us that leaving jurisdiction over tenancy matters to Magistrates' Courts effectively 'fl[ies] in the face of the Poverty Inquiry recommendations.'<sup>16</sup> For Bradbrook, a long-time advocate of residential tenancy law reform in Australia, there are three important factors that must be taken into account here: 'magistrates have no special knowledge of tenancy issues, their courts detract from the informality of proceedings, and they already have a heavy workload and a rapid turnover of cases' (p.11).

It is the belief of the Colony 47 Housing Services that expanding the role of the Residential Tenancy Commissioner would remove the risk of tenancy disputes being dealt with by someone who has no special knowledge of tenancy issues. However, it is worth noting that this option does not guarantee less formal proceedings as the Commissioner can still decide to carry out a formal hearing with both parties being required to be present. Statistics made public by Magistrate Willee show an upwards trend in the number of cases heard in the Magistrates Court concerning tenancy disputes with the passing of the Act in 1998.<sup>17</sup> There is no reason to believe that the direction of this trend has altered in the past few years. Further increasing the workload of the Commissioner could therefore be a risky venture. The greatest danger here being that certain tenancy matters will be dealt with in a perfunctory manner and there will be little if any provision made to ensure that all parties are able to present their case in an adequate manner. Nevertheless, these 'problems' are not solved by leaving jurisdiction

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<sup>15</sup> Bradbrook, Adrian J (1998) 'Residential Tenancies Law – The Second Stage of Reforms' *Sydney Law Review* 17: 1-27.

<sup>16</sup> In 1975, the Commonwealth Commission of Inquiry into Poverty in Australia published two reports that contained recommendations for the reform of tenancy law in Australia. To varying degrees, as Slatter and Beer (2004: 4) point out, all Australian residential tenancy legislations still follow the recommendations contained in these reports.

<sup>17</sup> Willee, Roger (2003) 'Tasmania - a residential tenancy overview' *Flinders Journal of Law Reform* 7(1): 165-74.

of the majority of tenancy disputes with the Magistrates Court. As discussed in other parts of this submission, there is value in the Commissioner assuming a greater role in general dispute resolution, as well as being given various other powers (refer also Appendix 2).

## *Standards of Accommodation*

**Do you agree that the Residential Tenancy Act should contain a requirement for accommodation of a suitable standard? What should be the minimum standards for rental accommodation?**

The Colony 47 Housing Services commend the acknowledgement made in the discussion paper that residential tenancy law reform could play a role in facilitating good quality rental housing stock. We submit that consultation on whether there should be a provision in the Act that imposes minimum standards of accommodation be wide-ranging.

All Tasmanians have an interest in this matter. Slum conditions are a debasement of our communities. Dilapidated or deteriorating housing discourages investment and tourism. It is in the interests of all Tasmanians that tenancy law play a role in stopping owners from shoring up their profits by skimping on general upkeep, maintenance and repairs.

The law must also reflect current social conditions. Much of Tasmania's rental housing stock is old; some of it was once known as 'shacks', built for summer holidays rather than year round accommodation. Data collected by the Colony 47 Housing Services point to *mould and cold* as the two most pressing complaints that tenants have about their accommodation. These two problems are interconnected, an uninsulated house is unlikely to be 'aired' and mould is more often than not the consequence.

The Colony 47 Housing Services concur with the observation of the Tenants' Union of NSW (2007: 70)<sup>18</sup> that housing standards is 'an issue that is expanding beyond its original focus on the health of occupants of housing to also address . . . environmental sustainability.'

We submit that addressing environmental sustainability should underpin the formulation of minimum standards for rental accommodation in Tasmania.

For example, one area where this is appropriate is that of basic water efficiency standards. We note that Queensland residential tenancy law limits the obligation of tenants' to pay the full charge for water when the premises they are renting do not meet basic water efficiency standards.<sup>19</sup> In this jurisdiction, owners are obliged to pay for a 'reasonable supply of water' if a dwelling is devoid of such basic water saving devices. We also note that in the *NSW Draft*

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<sup>18</sup> Submission in response to the NSW Office of Fair Trading residential tenancy law reform report: A New Direction

<sup>19</sup> That is, dual flush toilets and showerheads and internal cold-water taps with a flow rate no greater than 9 litres per minute.

*Residential Tenancies Bill 2009*, one of the ‘main proposals’ is that ‘water charges will only be able to be passed on to tenants if the premises meet prescribed water efficiency guidelines.’<sup>20</sup>

***Recommendation:***

- In addition to the conditions currently prescribed in Tasmanian residential tenancy law concerning when an owner can charge a tenant for water consumption, it should also be law that the meeting of these conditions may not always be sufficient for passing on the total water charges. Similar provisions around water charges to those already passed into law in Queensland would be entirely appropriate for Tasmania. That is, tenants not be required to pay the entirety of the water charges for the property they are renting until such time as it is equipped with basic water saving devices (and a meter).

However, we acknowledge the recent changes to water bills in Tasmania, where water bills are soon to be sent directly to all tenants, in some instances regardless of whether the supply is metered or not. Thus, it is perhaps too late to suggest returning water charges, or part thereof, to owners. However, conservation of Tasmania’s water resources will remain as pressing a public policy concern in six months time as it is now. For this reason, the Colony 47 Housing Services submit that if the above recommendation cannot be supported, reform of tenancy law in Tasmania follow the Victorian *Residential Tenancies Act 1997* in this matter and require owners to make repairs with water efficient appliances, fittings and fixtures. This would achieve a gradual upgrading of appliances, fittings and fixtures - owners only being obliged to upgrade when they were obliged to repair or replace the appliance, fitting or fixture anyway.

***Alternative Recommendation:***

- Owners be required to make repairs to toilets, showers, taps or any other water appliance using products with at least a Standards Australia ‘A’ rating. Products in this category prevent water waste.

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<sup>20</sup> This Draft Residential Tenancies Bill constitutes the third consultation phase of the review of tenancy laws in NSW

## *Maintenance*

**Do you agree that there should be better redress for maintenance under the Act? Do you agree that the difference between fair wear and tear and maintenance should be clearer? Do you support a clarification of the meaning of ‘functioning’ under section 33 of the Act?**

Current redress for maintenance under the Act is limited to the tenant either applying to a magistrate for an order that an owner carries out a repair or, under s 32(4), their serving of a notice to terminate the residential tenancy agreement on the basis that the owner has not fulfilled their obligations. These provisions, in practice, are insufficient for the setting right of what is wrong. This is because they fail to recognise or take into account the contextual complexities at play here. As the Tenants’ Union of NSW (2005)<sup>21</sup> notes:

The relative power of landlords continues past the making of a contract and throughout the term of a tenancy. A tenant cannot easily take their business elsewhere. . . . Once in a tenancy, a tenant cannot ‘shop around’ from week to week. For tenants, this would mean moving – at considerable financial expense, and possibly at the cost of changing neighbourhoods, schools, workplaces and services.

Indeed, observations made by the Colony 47 Housing Services suggest that tenants do not apply to magistrates for an order for repair not only because it ‘is time consuming, difficult and costly’, but because they fear it will jeopardise their chances of having their tenancy agreement renewed or their rent left at an affordable level. It is worth noting here that of the 1017 cases heard by Magistrate Willee between July 1998 and June 2001, not a single case concerned an order for repair.<sup>22</sup>

Neglect of minor repairs can often lead to major expenditure down the track; an owner’s attention to maintenance however will ensure that problems are resolved quickly. Moreover, a well-maintained property is not as prone as a poorly maintained property to wear and tear. The appropriate conclusion to be drawn from this line of reasoning is that rather than attempting to clarify what is an example of reasonable wear and tear and thus not an issue of maintenance, and vice versa, owners should instead be stopped from shoring up their profits by skimping on maintenance and repairs. However, clarification of the meaning of

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<sup>21</sup> Tenants’ Union of NSW (2005) *Submission in response to the NSW Office of Fair Trading residential tenancy law reform options paper*

<sup>22</sup> Willee, Roger (2003) ‘Tasmania - a residential tenancy overview’ *Flinders Journal of Law Reform* 7(1): 165-74.

‘functioning’ under s33 of the Act is achievable by substituting the word functioning with the phrase ‘fully functioning’.

The Colony 47 Housing Services contend that tenancy law in Tasmania should continue to reflect in its terms the right of the tenant to occupy a property that is both properly maintained and properly repaired. We submit however that the law should also recognise that it is neither useful nor fair to expect the tenant to bear the entire responsibility or burden of getting recalcitrant owners to meet their repair and maintenance obligations. We propose that consideration be given to passing on some of this burden to the Residential Tenancy Commissioner. Specifically, we submit that the Commissioner be given the role of administering an escrow account<sup>23</sup> that tenants can pay their rent into whilst disputes over repairs and maintenance are resolved. The Commissioner already has the role of determining disputes about security deposits, which themselves often involve deciding on the difference between fair wear and tear and maintenance. It seems logical and expedient that the Commissioner also be given the role of determining disputes about repairs and maintenance. As with disputes about security deposits, the Act should also provide for a right to appeal against the Commissioner’s decision to the Magistrates Court.

***Recommendations:***

- The Act be amended to provide for a ‘*notice to repair*’. Where an owner or their agent has not responded to a verbal request from a tenant to make a necessary or urgent repair within the prescribed period, allowing the tenant to serve a notice to repair on the owner or their agent would provide a clearly prescribed next action. This amendment would also contribute to the creation of simpler pathways to dispute resolution. [At present, many tenants erroneously believe that the only action available to them after notifying of a need to repair is to withhold their rent.] The Act should also prescribe that the owner or agent, within not more than 28 days of service of the notice, either have carried out the necessary repairs or provided the tenant with a written statement detailing why they will not be doing so. If the matter remains in dispute, having this kind of written record would more likely than not facilitate resolution of the matter by the Commissioner, Magistrate or a mediation service; also more often than not negating any need for a formal hearing.

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<sup>23</sup> An escrow is a contract, deed, bond or monies that are deposited with a third person who agrees to deliver them to the promisee on the fulfilment of some condition.

- Provide that the Residential Tenancy Commissioner deal with disputes over repairs and maintenance. Also, provide that any party who disagrees with the decision of the Commissioner can appeal to the Magistrates Court.
- Expand the powers of the Commissioner to cover the administration of an escrow account that tenants can pay their rent into whilst disputes over repairs and maintenance are resolved. Provide for tenants to begin to deposit their rent into this account not less than 28 days after the serving of a notice to repair. The Commissioner will make a decision, or the matter will proceed to the Magistrates Court for a decision, and then the Commissioner will disburse the monies accordingly.
- Amend the Act to allow tenants *three* business days after the commencement of the tenancy agreement to add any details to the entry condition report. It is important that tenants be given adequate time to ascertain the condition of the property at the start of the tenancy. Two days is not adequate. Three business days would also ensure that tenants do not have to complete the condition report in the presence of the owner or their agent.
- Consideration be given to the usefulness of requiring tenants and owners to complete an exit condition report at the end of the tenancy as one way to resolve disputes relating to bonds. Data collected by the Colony 47 Housing Services suggests that owners can easily fall into the habit of making spurious claims on the bond for cleaning and/or damage and/or the replacement of missing items.
- Clarify the meaning of 'functioning' under s33 by replacing it with the phrase 'fully functioning'.

## ***Rent Cards***

### **Should owners be required to provide a no-cost option for rent payment?**

The Colony 47 Housing Services propose that the RTA should require that every tenancy agreement must provide *at least one* no-cost option for rent payment, and that this option must *not* entail that any charges are to be paid by the tenant either.

It is submitted that inclusion of this provision in the Act would be analogous in intent to already existing safeguards around ensuring that prospective tenants be not unreasonably precluded from rental housing. Indeed, in this sense, this amendment to the Act would simply serve to ensure that tenancy law in Tasmania continues to adapt to take account of changing social times.<sup>24</sup> Specifically, the recent emergence of rent collection companies and the misguided conclusion of some real estate agents that they might cut costs by outsourcing the administration of rent payments. If a real estate agent cannot 'afford' to provide this service, then perhaps they should not be taking on the management of private rental tenancies in the first place. Perhaps if they charged owners a flat fee, rather than a percentage of the rent charged on a property, they would be less inclined to encourage owners to charge excessive rents and better able to balance their budgets.

It is also worth noting that real estate agents are able to avoid having to provide cash receipting facilities at their offices by simply providing a tenant with a deposit book for payment through a bank. Internet banking provides flexibility to those tenants who cannot make it into a bank. Centrepay is available to all Centrelink clients and this method of bill payment does not entail any charge to ever be paid by those who use it, unlike direct debiting from a bank account where there is a risk of an 'honour fee' being charged if sufficient funds are not available.

#### ***Recommendation:***

- That the Act be amended to include the provision that every tenancy agreement include the option of at least one method of rent payment that does not entail a cost or charge to be paid by the tenant.

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<sup>24</sup> The issues paper released by the Hon. Peter Patmore, Minister for Justice, for the 1999 *Post Implementation Review of the Residential Tenancy Act* makes clear that whilst 'debate has ensued about the precise meaning of section 17 and the extent of its limitations', the Act is intended to serve as a tool for regulating charges relating to residential tenancies.

## ***Enforcement***

### **What improvements can be made to enforcement of the Residential Tenancy Act?**

A private rental system depends on tenants consenting to property norms. Indeed, a large-scale defiance by tenants of the norm of paying rent would disrupt the rights of property and over time, eventually bankrupt any private rental system. Tenancy law in Tasmania recognises this. As discussed earlier in this submission, an objective of the RTA is the provision of a user-friendly and efficient process for owners to terminate a tenancy where the rent falls significantly in arrears and to gain from the tenant possession of the property in these circumstances. The discussion paper nevertheless notes that there is a prevailing perception amongst Tasmanians that rental relationships have a ‘private nature’. Observations made by the Colony 47 Housing Services suggest that this is perhaps too simplistic a view. Many tenants do not perceive their ‘tenancy problems’ to be of a private nature, likely to be resolved through creating a better relationship with the owner. Instead, they view the action, or inaction, of ‘the government’ to be largely responsible for the fact that they can find themselves living in slum conditions, paying a rent they can no longer afford, and feeling that they have little if any stability in their housing.

In part, this is a valid connection. The State and Territory governments in Australia have made themselves ultimately responsible for residential tenancy matters. They have done this by recognizing the need for, and subsequently implementing regulation in this area. However, for the Tasmanian government to recognize that enforcement of the RTA ‘is almost always reactive’, that ‘it is difficult to conduct proactive enforcement’, and that people may be ‘reluctant to refer matters to Consumer Affairs and Fair Trading’ suggests that currently they may be failing in this regulatory ‘duty’.

That said there is acknowledgement, at least among some sections of our communities, that the late twentieth century rise of the ‘regulatory state’ in Australia signalled the breakdown, if not fundamental dissolution of the old order of the Keynesian welfare state. Braithwaite (2000: 222)<sup>25</sup> for example has conceded that at least in the Australian context, the formulation of the regulatory state has been a ‘Hayekian response’ to ‘the globalising logic of risk management’. That is to say, privatisation combined with state ‘rule at a distance’ or, using Osborne and Gaebler’s (cited in Braithwaite 2000: 223) metaphor, state steering but not rowing – the rowing having been given over to markets and civil society. For Braithwaite

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<sup>25</sup> Braithwaite, John (2000) ‘The New Regulatory State and the Transformation of Criminology’ *British Journal of Criminology* 40: 222-38.

(2000: 222), it is no longer tenable to present as some kind of continuance the shift from welfare state to regulatory state because the ‘new form of regulatory state [is] premised upon a neo-liberal combination of market competition, privatised institutions, and decentred, at-a-distance forms of state regulation.’ What all this means for reform of tenancy law in Tasmania is that the suggestion included in the discussion paper that CAFT ‘should conduct more proactive enforcement’ may in fact be out of sync with the workings of contemporary forms of a ‘state regulation’.<sup>26</sup>

The Colony 47 Housing Services submit that to improve compliance with the Act any focus on formulating a more legal-adversarial style of regulation is coupled with a focus on ‘closing off’ recognised loopholes in the Act. We submit that the following recommendations, in particular, thus be further considered in this light.

The amendment of the Act to locate restrictions on unreasonable rent increases with a property rather than with each tenancy. This would close off what is perhaps the most common form of evasion of tenancy law in Tasmania at present, the evasion of unreasonable rent increase provisions.

The additional amendment of the Act to require an owner or their agent to notify the Commissioner, in writing, of their intent to increase (or decrease) rent on a property would serve as a particularly effective and efficient compliance tool here.

The amendment of the Act to allow tenants, in those situations where there has been unsatisfactory response to a verbal request, to serve an owner or their agent with a ‘notice to repair’. This would make it more difficult for evasion of provisions in the Act around repairs.

The additional amendment of the Act to require the owner or agent, within not more than 28 days of service of the notice, to either address the repair matter or provide the tenant with a written account of why they will not be doing so would serve as an effective and efficient compliance tool here.

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<sup>26</sup> The *Report on Regulatory Reform* of the OECD (Organisation for Economic Cooperation and Development 1997) defines regulation as ‘the diverse set of instruments by which governments set requirements on enterprises and citizens.’ If we accept that in Australia regulation has become a kind of government control that now occurs at arms-length, then we must also accept that it is a kind of control that relies on such things as laws, rules, procedures, norms and protocols coming to be treated by people as stable, reproducible and *effective*.

## *Scope of the Act*

### **Are there gaps in the coverage of the Residential Tenancy Act? Are there current exemptions that should be removed?**

If we accept that there is a range of external forces<sup>27</sup> constraining an increasing number of persons in Tasmania to live in share-house or co-tenant arrangements, then one of the more significant gaps in the coverage of the RTA is the omission of certain provisions relating to these arrangements. Tasmania is leading the other States and Territories in relation to the tenancy arrangements of those persons affected by domestic violence, through provisions contained in the *Family Violence Act 2004* that allow the court to make an order to either terminate or establish a ‘new’ tenancy agreement for the person protected by the FVO. The Colony 47 Housing Services submit that this current discussion about tenancy law reform cannot ignore the increasing likelihood that any number of Tasmanians may unwittingly find themselves in a co-tenancy that similarly is unsafe, distressing or threatening.

The Colony 47 Housing Services would like to believe that in situations where the relationship between co-tenants has broken down irreconcilably, there would be recognition amongst *all* parties to the tenancy agreement that the worst-case scenario in ‘requiring’ it to continue is too great to risk. However, we appreciate that not every owner concerns themselves with the matter of the well-being and safety of their tenants; and whilst most may, they may still not accept that their tenants should avoid liability if they seek to terminate their tenancy agreement early. Nevertheless, we wonder if in Tasmania at least, these kinds of owners are in the minority rather than the majority. For this reason, we propose the following recommendation for further consideration.

#### ***Recommendations:***

- Rather than hold co-tenants to their agreements for the duration of the fixed-term, the Act include provision for co-tenants to apply to the Residential Tenancy Commissioner for a determination of whether they can terminate their agreement without liability (or with reduced liability). Principles relating to irreconcilable relationship breakdown should be developed to assist the Commissioner in this role.<sup>28</sup>

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<sup>27</sup> In particular, economic and labour market restructuring and changing household structures.

<sup>28</sup> It is worth noting here that an option similar to this recommendation is included in the NSW Office of Fair Trading (2007) *Residential Tenancy Law Reform Report: A New Direction*.

# APPENDIX 1

## *Summary of Recommendations*

The Role of the Act	The Act concern itself with the stability and sustainability of rental markets in Tasmania.
Security of Tenure	In addition to the retention of just cause evictions, the RTA be amended to include just cause non-renewal of tenancy agreements.
	The role of the Residential Tenancy Commissioner be expanded to include determination of disputes about whether just grounds exist for non-renewal of tenancy agreements.
	A new standard lease be created for a fixed term tenancy in Tasmania which includes the option to renew.
	A 'notice to remedy' be issued to the tenant on their first and second failure to pay the rent, rather than a 'notice to vacate'.
The cost of rent and increases in rent	That the current provisions available in the Act for court intervention in respect of unreasonable rent increases and the frequency of rent increases be amended to be applicable to the <i>property</i> rather than the tenancy.
	The Act also be amended to include the requirement of an owner or their agent to alert the Residential Tenancy Commissioner, in writing, of an intent to increase (or decrease) rent on a property.
	The role of the Residential Tenancy Commissioner be expanded to include determination of disputes about the reasonableness of a rent increase.
	Replace 'market rent' with a more appropriate tool for determining the reasonableness of a rent increase.
	Require owners to bear the onus of proving that a rent increase is reasonable and not excessive.
Rent Bidding	A rental bond or security deposit may <i>not</i> be taken if the owner or agent refuses a particular contribution towards it from a third party.
	An owner or agent can require no more than two weeks rent in advance from a tenant.
	A rental bond or security deposit may only be taken if the property is advertised for rent at a fixed price.
Dispute Resolution	Provide for a properly functioning system of mediation to deal with tenancy disputes.

Standards of Accommodation	<p>Tenants <i>not</i> be required to pay the entirety of the water charges for the property they are renting until such time as it is equipped with basic water saving devices.</p> <p><i>Alternative Recommendation</i></p> <p>Owners be required to make repairs to toilets, showers, taps or any other water appliance using products with at least a Standards Australia ‘A’ rating.</p>
Maintenance	Provide for a ‘ <i>notice to repair</i> ’.
	Provide that the Residential Tenancy Commissioner deal with disputes over repairs and maintenance. Also, provide that any party who disagrees with the decision of the Commissioner can appeal to the Magistrates Court.
	Expand the powers of the Commissioner to cover the administration of an escrow account that tenants can pay their rent into whilst disputes over repairs and maintenance are resolved.
	Amend the Act to allow tenants <i>three</i> business days after the commencement of the tenancy agreement to add any details to the entry condition report.
	Consideration be given to the usefulness of requiring tenants and owners to complete an exit condition report at the end of the tenancy as one way to resolve disputes relating to bonds.
	Clarify the meaning of ‘functioning’ under s33 by replacing it with the phrase ‘fully functioning’
Rent Cards	Provide that every tenancy agreement include the option of at least one method of rent payment that does not entail a cost or charge to be paid by the tenant.
Enforcement	A shift in focus from ‘proactive enforcement’ to the closing of loopholes as the most effective means of improving compliance with the Act.
Scope of the Act	The Act provide for <i>co-tenants</i> to apply to the Residential Tenancy Commissioner for a determination of whether they can terminate their tenancy agreement without liability (or with reduced liability).

## APPENDIX 2

### *Expanded Role and Powers of the Residential Tenancy Commissioner*

