

Residential Tenancies Review
Consumer and Business Services
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SUBMISSION TO THE SA GOVERNMENT ON THE RESIDENTIAL TENANCIES REVIEW

We, Associate Professor Hossein Esmaili and Senior Lecturer Brendan Grigg, are academics in the law programme at the College of Business, Government and Law at Flinders University and have been teaching and researching in property law and related areas for over a decade.

Thank you for the opportunity to provide this submission on the review of the *Residential Tenancies Act 1995* (SA) and associated regulations. We make this submission jointly.

As noted in the Government's *Discussion Paper* there have recently been a range of reforms across a range of Australian States and Territories. We welcome the SA Government's decision to review its current residential tenancy scheme and consider that it is time for South Australia to follow these jurisdictions and ensure a better framework for landlords and tenants in this state.

This submission addresses only the following issues raised in the *Discussion Paper*:

- **Section 1: Longer Tenancies**
- **Section 3: Rent Bidding**
- **Section 6: Housing Standards and retaliatory evictions; and**
- **Section 13: Modernisation of Language**

The details of our submission are provided in the pages that follow.

Should you wish to discuss any of these submissions please feel free to contact us through Brendan Grigg, via email at brendan.grigg@flinders.edu.au .

Yours sincerely,

Brendan Grigg and Hossein Esmaili

Section 1: Longer Tenancies

Reforms to improve or increase security of tenure for tenants are to be applauded. Prescribing the reasons for termination and non-renewal is one significant means of doing this and we consider that the Victorian legislation provides a model that South Australia should follow.

Another means of increasing security for renters is by supporting longer fixed-term rental agreements. This is an area where there appears to be a complex and not-well understood relationship between the *Residential Tenancies Act 1995 (SA)* and the *Real Property Act 1886 (SA)*.

We note that the *Discussion Paper* reports that the real estate industry has indicated that agents and landlords are reluctant to offer tenancies longer than 12 months because of the fear that this will give a renter a right to lodge a caveat over the landlord's property pursuant to the *Real Property Act 1886 (SA)*.

Section 191 of the *Real Property Act 1886 (SA)* provides that any person claiming to be 'interested at law or in equity' may lodge a caveat. While it is true that section 191(1)(a)(i) of the *Real Property Act 1886 (SA)* states that a caveat may 'prohibit absolutely the registration or recording of any instrument dealing with the land' this is not the only thing that a caveat may do. Section 191(1)(a)(ii) sets out an alternative, namely that a caveat may:

provide that the registration or recording of an instrument dealing with the land may only occur subject to the claim of the caveator, and provided that, if any conditions are expressed in the caveat, the instrument complies with those conditions.

We do not understand why it appears that the focus of landlord concern lies solely on the absolute caveat referred to in section 191(1)(a)(i) and appears to ignore the balance that the permissive caveat referred to in section 191(1)(a)(ii) provides. Moreover, as the *Discussion Paper* indicates, there is nothing in the *Real Property Act 1886 (SA)* that means the length of a tenancy agreement determines whether a lease can be caveated: a lease of any length is a property right and therefore 'an interest in law or equity'¹ that can be caveated.

Nevertheless, the perception appears to be a problem to the wider adoption of longer-term leases. This raises some fundamental issues about the Torrens title system in South Australia created by the *Real Property Act 1886 (SA)* and its relationship with the *Residential Tenancies Act 1995 (SA)*.

One of those fundamentals is the Torrens title system's insistence on registration as the source of legal and enforceable real property rights.² As the High Court of Australia has explained, the Torrens Title system is 'not a system of registration of title but a system of title by registration.'³ This puts unregistered interests in a vulnerable and precarious position because they can easily be defeated by later interests that become registered. For example, the concern from the

¹ *Real Property Act 1886 (SA)*, s 191(1).

² *Real Property Act 1886 (SA)*, s 69.

³ *Breskvar v Wall* (1971) 126 CLR 376, 385 per Barwick CJ.

perspective of a tenant whose lease is unregistered is that should the landlord sell the property, the incoming registered proprietor might refuse to recognise the lease.

The Torrens title scheme does, however, provide some protection through its caveat scheme, referred to above. In South Australia, when a caveat is lodged, it is noted on the register and remains there until a dealing that is inconsistent with the caveator's claim is lodged and/or proceedings challenging the caveat are commenced. In this way, a caveat acts as an injunction to the Registrar and provides notice to those who search the Register.⁴ Many commentators have noted that the caveat system has generated more litigation than other areas of the Torrens system.⁵ The costs associated with any challenge to a caveat, the effect that a caveat could have on the market value of land and the burden it imposes on the ability to sell are all reasons why a landlord might seek to ensure that a tenant was not able to lodge a caveat.

The role of the caveat in protecting unregistered equitable interests can be contrasted to the protection (described as indefeasible) that section 69 of the *Real Property Act 1886 (SA)*, one of the pillars of the Torrens Title system, gives to registered interests. Section 69 provides that subject only to certain qualifications contained the Act that:

[t]he title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible

One such qualification that is relevant to this issue is contained in section 69(h). It provides that:

where at the time when the proprietor becomes registered a tenant shall be in actual possession of the land under an unregistered lease or an agreement for a lease or for letting for a term not exceeding one year: In which case the title of the tenant under such lease or agreement shall prevail.

Section 69(h) protects the rights of a tenant who, when a person becomes the registered proprietor of land, is already in actual possession under an unregistered lease or an agreement for a lease or for letting for a term not exceeding one year. Where these conditions are met, the rights of the tenant are 'absolute and indefeasible' and therefore, protected even though they are not registered in the Torrens title system. They do not need to be caveated to obtain this protection.

In New South Wales, the ACT, the Northern Territory, Queensland and Tasmania, the equivalent of section 69(h) extends the protection to unregistered leases that do not exceed three years.⁶ In Western Australia the protection is conferred on leases of up to five years.⁷

⁴ *Goldstraw v Goldstraw* (2006) V Conv R 54-712; [2002] VSC 491.

⁵ Anthony Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters, 7ed, 2020) 298.

⁶ *Land Titles Act 1925 (ACT)* s58(1)(d); *Real Property Act 1900 (NSW)* s42(1)(d); *Land Title Act (NT)* s 189(1)(b); *Land Title Act 1994 (Qld)* s 185(1)(b); *Land Titles Act 1980 (Tas)* s 40(3)(d)(ii).

⁷ *Transfer of Land Act 1893 (WA)*, s68(1A)

In this context, section 69(h) of the *Real Property Act 1886* (SA) is an outlier and may explain the view that once an unregistered lease extends beyond 1 year, it needs to be caveated to be protected.

Section 69(h) could be amended to make it consistent with the majority of other Australian jurisdictions so that it protected unregistered leases of up to three years duration. This could encourage more longer-term leases, which may provide security and peace of mind to both tenants and landlords. It would do so without the need for the tenant to caveat the lease and expose the landlord to the expense and uncertainty that a caveat could bring. In addition, it also means that if a landlord sells the property, the incoming registered proprietor would take ownership subject to the unregistered lease.

Section 3: Rent Bidding

In addition to the impact on rental affordability, the practice of rent bidding may subject prospective tenants to potential unconscionable conduct on the part of landlords and their agents.

Victoria,⁸ Queensland⁹ and Tasmania¹⁰ have all introduced reforms to criminalise the practice of rent bidding. Reforms currently before the ACT legislature propose a similar response.¹¹

As recently as 12 December 2022 the New South Wales government announced that it would act quickly in response to concerns about rent bidding via a regulation pursuant to the *Property and Stock Agents Act 2002* (NSW) that would be in place by 17 December 2022.¹²

While these reforms may be described as targeting rent bidding, the Victorian, Queensland and Tasmanian schemes do not criminalise the offer by prospective tenants of higher rents. They criminalise the advertisement of premises for rent at a price that is not a fixed price and the invitation by a landlord or an agent to a prospective tenant to make an offer to become a tenant at a price higher than the price advertised. It would seem impossible to target uninvited or unsolicited offers made by prospective tenants to secure a rental agreement and it would, in any case, infringe the general right to freedom of contract.

We submit therefore that South Australia should follow other Australian jurisdictions in this regard. The reforms should ensure that landlords and land agents be prohibited from

- advertising a property within a rent range;
- putting a property up for a rent auction;
- soliciting offers to pay an amount of rent above the advertised price.
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⁸ *Residential Tenancies Act 1997* (Vic), s 30F.

⁹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s57.

¹⁰ *Residential Tenancy Act 1997* (Tas) s16B.

¹¹ Residential Tenancies Legislation Amendment Bill 2022 (ACT), cl 9.

¹² <https://www.nsw.gov.au/media-releases/nsw-government-to-make-rent-bidding-illegal>

Section 6 Housing Standards and retaliatory evictions

The building sector is a substantial user of energy globally and the energy consumption of residential buildings is a major contributor to anthropogenic greenhouse gas emissions.¹³

Australia began introducing stringent energy requirements for new and renovated housing in the 1990s. Since 2003, minimum housing energy performance requirements, measured using the Nationwide House Energy Rating Scheme (NatHERS) have been set through the Building Code of Australia. In 2003 the initial standard was set at 4 NatHERS Stars.¹⁴ The 2022 National Construction Code, when fully implemented will require the equivalent of 7 NatHERS Stars.¹⁵

The increased minimum energy requirements are welcome given the need to decarbonise the economy and to reduce living costs and improve thermal comfort.

These minimum energy standards do not apply retrospectively to existing housing stocks and rental housing stocks. Indeed, Better Renting's *Cold and Costly Renter Researchers' Experiences of Winter 22* report shows, Australian homes are often colder in winter than houses in much colder countries that are much better weatherproofed and insulated. This leads to higher energy costs, poor respiratory and cardiovascular health outcomes and can impact mental health.¹⁶

The Better Renting report points out that renters are particularly affected by this as they are unable to make the modifications that would improve thermal performance of their rented property. As a result, rental properties tend to have the worse energy performance meaning that renters spend a greater proportion of their income on energy than homeowners.¹⁷

As Better Renting's *Cold and Costly Renter Researchers' Experiences of Winter 22* report indicates, the temperature in houses it surveyed, nationally, in Winter 2022 were below the WHO recommended minimum healthy temperature of 18°C for 74% of the time.¹⁸ In South Australia, the 12 houses surveyed were below 18°C for 79.2% of the time, equating to 41.2 days below 18°C.¹⁹

We therefore support the gradual imposition of minimum energy efficiency standards in rental properties.

¹³ Trivess Moore, Stephen Berry, Michael Ambrose, 'Aiming for mediocrity: The case of Australian Housing Thermal Performance' (2019) 132 *Energy Policy* 602, 602.

¹⁴ Trivess Moore, Stephen Berry, Michael Ambrose, 'Aiming for mediocrity: The case of Australian Housing Thermal Performance' (2019) 132 *Energy Policy* 602, 604.

¹⁵ <https://www.abcb.gov.au/news/2022/building-ministers-finalise-ncc-2022>

¹⁶ Dignam, J., Barrett, B. "Cold and costly: Renter Researchers' Experiences of Winter 22" Canberra: Better Renting, August 2022, 1.

¹⁷ As above.

¹⁸ As above.

¹⁹ As above.

In doing so, we note that this kind of regulatory intervention is not unprecedented in Australia. For example, the *Residential Tenancies Amendment Regulation 2022 (No 1)* (ACT) reflects the ACT's commitment to staged minimum energy performance requirements for rental properties under Action 4.7 of its *Climate Change Strategy*.²⁰ It will become effective in April 2023.

The regulation comprises a minimum standard for ceiling insulation in residential rental properties in the ACT and requires lessors with rental properties without ceiling insulation or with ceiling insulation with an R value of less than R2, to install or upgrade the insulation to ensure the ceiling insulation meets a minimum R-value of R 5, which is typically installed in new builds in the ACT.²¹

South Australia's *Climate Action Plan 2021-2025*²² also notes how the built environment can make contributions to greenhouse gas emission reduction targets.²³ Gradually imposing increased minimum energy efficiency standards in rental properties would increase thermal comfort for renters but would also be a sound step towards a more sustainable future for the entire community.

In addition to the above, we point out that it would be a mistake to assume that all renters will consent to the interruptions to their lives that complying with increased minimum standards would bring, however temporary.

This problem was evident in the South Australian Court of Appeal's decision in *South Australian Housing Authority v Rossiter* [2021] SASCA 113, handed down in October 2021. In that case a tenant of the South Australian Housing Authority ('SAHA') withheld his consent to SAHA's request to allow contractors to access his property to replace existing windows with double glazed windows. SAHA relied on a term of the tenancy agreement which stated that the tenant gave permission for SAHA (or its agents) to enter the premises at any time to carry out repairs. The dispute led SAHA to issue a notice of termination and to seek access orders from the South Australian Civil and Administrative Tribunal. The tenant challenged these actions and, ultimately, the Court of Appeal overturned the SAHA's notice of termination stating that the tenant was entitled to refuse to give SAHA's contractors permission to enter his premises. This was because the Court of Appeal held that the replacement of unbroken and functioning windows with double-glazed windows did not constitute a repair. It was, instead, a refurbishment.

Therefore, in order to overcome the ability for a term of a lease to inhibit genuine attempts by a landlord to improve the energy efficiency of a rental property, we suggest that any reforms in this regard ensure that a tenant's consent to refurbishments to improve a property's energy

²⁰ <https://www.climatechoices.act.gov.au/__data/assets/pdf_file/0003/1414641/ACT-Climate-Change-Strategy-2019-2025.pdf>

²¹ Australian Capital Territory, Explanatory Statement, Residential Tenancies Amendment Regulation 2022 (No 1) Subordinate law SL2022-16 made under the *Residential Tenancies Act 1997*

²² South Australian Government Climate Change Action Plan 2021-2025

<<https://cdn.environment.sa.gov.au/environment/docs/climate-change-action-plan-2021-2025-summary.pdf>>

²³ South Australian Government Climate Change Action Plan 2021-2025, 36.

performance, is deemed to be given or, alternatively, cannot be unreasonably withheld and that this requirement override any express terms of a lease to the contrary.

Section 13 Modernisation of Language

Given the difficulties that have been identified in the *Discussion Paper* in relation to the use of the caveat, the interaction between the *Residential Tenancies Act 1995 (SA)*, which is expressed in modern, plain English and the *Real Property Act 1886 (SA)*, which clearly is not, is a difficult one.

This is a matter that modernisation of the language of the *Residential Tenancies Act 1995 (SA)* is not likely to overcome easily. Nevertheless, we consider that whenever the opportunity presents, legislation ought to be examined to see if it could be better expressed. The term *landlord*, for example, ought to be replaced with non-gendered alternative such as *rental provider or property owner*.