FORMATION OF TENANCIES
Factsheet

The Residential Tenancies Act 2010 (RTA 2010) and the *Residential Tenancy Regulation 2010* (RTR 2010) commenced on 31 January 2011.

This fact sheet will look at sections of *the Residential Tenancies Act 2010* (RTA 2010) *Residential Tenancies Regulation* 2010 (RTR 2010) that relate to the formation of tenancies.

FORMATION OF TENANCIES

Application of the RTA 2010

Schedule 2 of the RTA 2010 provides that

- The RTA 2010 applies to residential tenancy agreements in respect of residential premises whether made before or after the commencement the Act (section 6 of the RTA 2010).
- On commencement of the RTA 2010 the terms included in a residential tenancy agreement by the RTA 2010 are included in any existing residential tenancy agreement.
- The RTA 1987 continues to apply in relation to any application made to the CTTT under the RTA 1987 which has not been finally determined before the commencement of the RTA 2010.
- The RTA 1987 continues to apply in relation to any termination notice given before the commencement of the RTA 2010 or proceedings commenced before the commencement of the RTA 2010, relating to the termination of an existing residential tenancy agreement or goods left on residential premises.
- The RTA 1987 continues to apply in relation to the enforcement of a termination of a residential tenancy agreement that occurred before the commencement of the RTA 2010 and in relation to the recovery of possession of residential premises consequential on any such termination.
- Any bond deposited under the *Landlord and Tenant (Rental Bonds) Act 1977* which was not paid out before the commencement of the RTA 2010 is taken to have been deposited under the RTA 2010.
- Any bond claim made under the *Landlord and Tenant (Rental Bonds) Act 1977* which has not been finally determined before the commencement of the RTA 2010, is taken to have been made under the RTA 2010.

Premises not included

- Boarders and lodgers are still outside the RTA 2010
- Serviced apartments, hotels, motels, backpackers' hostels, hospitals, nursing homes and parts of clubs that provide accommodation are outside the RTA 2010
- The RTR 2010 may also exempt persons, agreements, premises or persons (e.g. university colleges) from the application of the Act
- The RTR 2010 currently provides exemptions for the following premises:
    - Clause 14 - Excludes certain refuge and crisis accommodation
    - Clause 15 - Excludes certain equity purchase agreements
    - Clause 16 - Excludes certain tenancy agreements relating to heritage items
    - Clause 17 - Excludes certain tenancy agreements relating to St Patricks Estate, Manly
    - Clause 18 - Excludes certain premises to which the Residential Parks Act 1998 applies

- Clause 19 - Excludes life tenancies from the RTA 2010
- Clause 20 - Exempts defined residential colleges associated with educational institutions from the RTA 2010, except where the premises are funded or have applied for funding under the *Commonwealth National Rental Affordability Scheme Act 2008* or the college and tenant agree that the premises will be subject to the RTA 2010.

Holiday and short-term rentals

- There is **no** general exemption from the RTA 2010 for holiday homes. The old total exemption for dedicated holiday homes **has gone**.
- However, an agreement will not be subject to the RTA 2010 if it is made for the purpose of giving a person the right to occupy residential premises for a period of **not more than 3 months for the purpose of a holiday**.
- There is no general exemption for 'short term' rentals (e.g. short term executive rentals) to be excluded at all. If there isn't a purpose of a holiday, there must be a tenancy agreement.

Tenancy agreements

- The RTR 2010 prescribes a basic standard form tenancy agreement and a condition report. These are schedules 1 and 2 of the RTR 2010.
- The same standard form agreement can be used for tenancy agreements under, or over, 3 years. Agreements over 3 years can be registered.
- REINSW will prepare a more comprehensive and compliant tenancy agreement and condition report prior to the commencement of the RTA 2010 and RTR 2010.
- Tenancy agreements may be express, or implied, and may be fully or partially oral or may be fully or partially in writing.
- However, s 14 of the RTA 2010 provides that a landlord under a residential tenancy agreement must ensure that the agreement is in writing at the commencement of the agreement. It contains a "penalty" where a tenancy agreement is not in writing at the commencement of the tenancy in that:
  - the rent under the residential tenancy agreement must not be increased during the first 6 months of the tenancy, **and**
  - the landlord is not entitled to terminate the residential tenancy agreement under section 85 (termination of periodic agreement by 90 days no grounds notice) during the first 6 months of the tenancy.

Monies that can be taken

The only charges which a tenant can be required to pay before or when they enter into a residential tenancy agreement are:

1. Holding fee (note this is not a reservation fee, see below);
2. Rent;
3. Bond (bond can only be taken when the Agreement is signed, see s 159(2) of the RTA 2010); and
4. Registration fee (if required) for registration of the agreement under the *Real Property Act 1900.*

A person must not require or receive from a tenant an amount for the costs of preparation of a residential tenancy agreement: section 23(2). Agents can no longer charge tenants a "lease preparation fee".

Holding fees vs reservation fees

A holding fee under the RTA 2010 is not the same as a reservation fee under the RTA 1987.

A reservation fee under the RTA 1987 had the effect of preventing the landlord from letting the premises to someone else, whilst the tenant's application was **considered**. If the tenant's application was refused, the tenant got the fee back. If the tenant was approved, but elected not to proceed, they lost a proportion of the fee. There are no provisions requiring proportional refunds in the RTA 2010.

Under the RTA 2010, a holding fee can only be required or received from a tenant whose application has been **approved** by the landlord. There is probably a slight loss of power on the tenant's part in relation to the new provision as agents would generally have taken the property off the market when a reservation fee was paid and an application was being considered.

A holding fee cannot exceed 1 week's rent and a prescribed receipt must be given.

Once a tenancy application has been approved and a holding fee taken, a landlord must not enter into another agreement within 7 days (which can be extended by consent) unless the tenant advises they do not wish to proceed.

Accepting a holding fee takes the property off the market as you now have an approved tenant.

A holding fee can be retained by a landlord only if the tenant enters into a residential tenancy agreement, or refuses to enter into a residential tenancy agreement. If the tenant enters into the residential tenancy agreement, the holding fee must be paid towards rent.

Condition reports

- The condition report is the prescribed form as per Schedule 2 of the RTR 2010.
- REINSW will prepare a more comprehensive and compliant tenancy agreement and condition report prior to the commencement of the RTA 2010.
- The prescribed condition report is very similar to the REINSW “long form” condition report.
- As with the RTA 1987, the outgoing condition report is required to be completed in the presence of the tenant, however it is not a breach of this section if the agent has afforded the tenant a ’reasonable opportunity’ to be present and the tenant is not present.
  - Clause 21 in the RTR 2010 provides an exemption from section 29 of the RTA 2010 (the obligation to complete a condition report) where the landlord and tenant enter into a new residential tenancy agreement for the premises already occupied by the tenant and the landlord and tenant agree to use the previous condition report.

Prohibited terms in tenancy agreements

The RTA 2010 now provides that tenancy agreements must not contain certain terms. It prohibits any term:

- providing that the tenant must have carpet professionally cleaned, or pay the cost of such cleaning, at the end of the tenancy. This term is not prohibited if the tenant has approval to keep a pet in the premises (refer also to clauses 43-45 of the standard form tenancy agreement).
- providing that the tenant must take out a specified, or any, form of insurance.
- exempting the landlord from liability for any act or omission by the landlord, the landlord’s agent or any person acting on behalf of the landlord or landlord’s agent.
- providing that if the tenant breaches the agreement, the tenant is liable to pay all or any part of the remaining rent under the agreement, increased rent, a penalty or liquidated damages. However, note section 107(2) of the RTA 2010 regarding abandonment, and section 187 of the RTA 2010 regarding orders that can be made by the CTTT following breach; (for example orders for the payment of money or orders as to compensation).
- providing that if the tenant does not breach the agreement, the rent is or may be reduced or the tenant is to be, or may be paid, a rebate of rent or other benefit.

The RTR 2010 prescribes an additional prohibited term. A residential tenancy agreement must not contain a term having the effect that the tenant must use the services of a specified person or business to carry out any of the tenant’s obligations under the agreement.

An example quoted by NSW Fair Trading might be requiring the tenant to use a particular mowing or gardening service or cleaner.

Note that this clause relates to a *tenant’s* obligations. The tradespersons nominated as emergency contractors in tenancy agreements are to assist landlords in discharging the *landlord’s* obligations under the agreement and can still be included in a tenancy agreement.

The RTA 2010 also provides that any standard form of residential tenancy agreement must be consistent with the RTA 2010 and RTR 2010. A residential tenancy agreement may include additional terms, but only if those

additional terms do not contravene the RTA 2010, the RTR 2010 or any other Act and are not inconsistent with the terms set out in the standard form.

Material fact and disclosure of information to tenants

Note: Material fact as handled under the *Property, Stock and Business Agents Act 2002* (PSBA Act) and the RTA 2010 are not the same thing.

Section 26 of the RTA 2010 deals with:

- not making false, misleading or deceptive representations or promises;
- not knowingly concealing a material fact;
- requiring the disclosure of proposals to sell premises; and
- disclosing possession proceedings by mortgagees.

Material fact

A landlord or agent must not “knowingly conceal” a material fact prescribed by the RTR 2010. An agent must have knowledge of the material fact in order to be liable under s 26 of the RTA 2010. The penalty for a breach of s 26 of the RTA 2010 is 20 penalty units ($2,200).

Material facts under the RTA 2010 are limited to those listed in clause 7 of the RTR 2010. REINSW has successfully lobbied to significantly restrict the scope of the material fact doctrine under the RTA 2010. The RTR 2010 prescribes the following material facts. These are whether:

- the residential premises have been subject to serious flooding or bush fire in the preceding 5 years (if an event has not occurred, no disclosure is required).
- the residential premises are subject to significant health or safety risks that are not apparent to a reasonable person on inspection of the premises. (Fair Trading has advised that two examples of when they consider disclosure will be required are when the landlord or agent has knowledge of the presence of asbestos or lead paint in the premises. If anything is readily apparent to a reasonable person on inspection of the premises, disclosure is not required).
- the residential premises have been the scene of a serious violent crime within the preceding 5 years.
- council waste services will be provided to the tenant on a different basis than is generally applicable to residential premises within the area of the council (this appears to relate to whether the tenant will be required to pay for council waste bins or domestic waste services).
- that because of the zoning of the land, or other laws applying to development on the land, the tenant will not be able to obtain a residential parking permit (in an area where only paid parking is provided) (for example, where a condition of development consent provides that a residential parking permit will not be available for a particular strata apartment).
- the existence of a driveway or walkway on the residential premises which other persons are legally entitled to share with the tenant.

Fair Trading have advised REINSW that the policy intention is that this information does not have to be actively sought from the landlord. If the agent has knowledge of any of these material facts they must be disclosed to the

tenant. This list of material facts is much shorter than that originally proposed by Fair Trading and is a result of REINSW lobbying. It is also a much more specific and limited concept than the more vague provisions contained in the PSBA Act.

Fair Trading have advised that the Commissioner's Guidelines issued under the PSBA Act with respect to material fact will be amended so far as they relate to property management to more closely reflect the material fact doctrine in the RTA 2010.

Note: an order to refund a holding fee can be made following a misrepresentation by an agent or for a failure by an agent to disclose a material fact.

A tenant might also seek compensation for failure to disclose a material fact by making a general application to the Tribunal under s187 of the RTA 2010.

Premises

- There is a new general obligation to comply with the landlord's statutory obligations relating to the health or safety of the residential premises.
- A Landlord's responsibility for cleanliness and repairs remains but is dealt with in 2 sections in the RTA 2010, section 52 and section 63.
- Section 52:
    - provides that a landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant; and
    - the landlord must not interfere with the supply of services or utilities to the premises.

- Section 63 provides that:
    - a landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises. (which is a similar obligation as under the RTA 1987);
    - A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.
    - A landlord is not in breach of the obligation to provide and maintain the residential premises in a reasonable state of repair if the state of disrepair is caused by the tenant's breach of this Part.

Rental bonds

- The *Landlord and Tenant (Rental Bonds) Act 1977* (L&TRB Act 1977) has been brought into the RTA 2010. The form of rental bond lodgement notice will change; you will need copies of the new forms.
- **ALL** bonds will now be capped at 4 weeks rent. Penalties apply.
- No topping-up of bond permitted.
- You can't accept a bond before a tenant signs a residential tenancy agreement.
- There is **NO** provision for increased bonds for furnished premises.
- Deposit of bonds – for a bond paid to a landlord's agent—the time period has been increased to 10 working days after the end of the month in which the bond is paid.
- A landlord or agent can only demand one bond per agreement.