MACKAY REGIONAL
COMMUNITY LEGAL CENTRE Inc.

2018

MRCLC: Submission to "Open Doors to Renting Reform"

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Overview

Mackay Regional Community Legal Centre Inc. ("MRCLC") is an independent non-profit community organisation. MRCLC provides free legal services pursuant to several programs throughout the Mackay, Whitsunday and Isaac regional council areas. One of these programs is the Queensland Statewide Tenant Advice and Referral Service ("QSTARS"). The MRCLC operates this service throughout Queensland in partnership with Tenants Queensland Inc. ("TQ") and 6 other QSTARS partners. Prior to QSTARS, the MRCLC provided assistance in a small number of tenancy matters within its service area. This greatly increased with the commencement of QSTARS on 1 October 2015. Since that time the MRCLC has provided tenants with more than the following:

- 1,192 instances of legal advice – These can be by phone or in person in Mackay, Bowen, Proserpine, Cannonvale or Sarina.
- 53 legal tasks - Legal tasks include corresponding with an agent/lessor on behalf of a tenant and preparing documents and written submissions for the Queensland Civil and Administrative Tribunal ("QCAT").
- 93 instances of ongoing casework assistance - This is where the MRCLC has opened a file because the client will require regular support and assistance to resolve their matter.

MRCLC is a member organisation of the Make Renting Fair in Queensland Alliance ("the Alliance") and supports the submission of the Alliance.

An examination of some of the most common legal issues MRCLC clients face in a regional setting has led to the identification of the following issues which require law reform:

1. Co-tenancy disputes
2. Tenant databases
3. Bond disputes

MRCLC advocates for changes be made to the *Residential Tenancies and Rooming Accommodation Act 2008* ("the Act") as detailed in this submission.

Recommendations for law reform

1. Co-tenancy disputes

Current situation: The Act provides only very limited opportunities for a co-tenant to end their liability under a lease agreement where the other interested parties, being the lessor or other tenants, withhold their consent. This is limited to circumstances of domestic violence or excessive hardship suffered by a tenant and requires an order of QCAT.

Tenants may be required to move out of a shared rental property due to being required to move to a new town for new work opportunities or carer responsibilities, health reasons which require the tenant to move closer to a hospital or medical specialist, relationship breakdowns or personality clashes with other co-tenants.

Apart from the exceptions stated above, the written consent of the agent/lessor and all other co-tenants is required for a co-tenant to end their liability under a lease agreement, whether it is a fixed term or periodic lease. This includes the situation where the fixed term period has ended and the lease has continued beyond the initial period agreed upon. In the absence of the written consent of all parties, the co-tenant who wishes to leave has limited options and is effectively 'trapped' in the lease.

There are no desirable options available to a co-tenant who wishes to leave. For example, the co-tenant may have to move out of the shared rental property and commit to another lease, thereby making themselves liable for two separate sets of rent. This can cause the tenant to experience financial hardship especially where the tenant continues to pay the original rent for many months until a new tenant is found.

Rent arrears can arise where the tenant who left cannot afford to continue to pay their share of the rent for the original property. This is compounded where the remaining co-tenant/s do not or refuse to pay the full rent. While the co-tenant's name is on the lease, they can be held responsible for rent arrears and damage caused to the property by visitors and/or the remaining co-tenant/s.

In the circumstances outlined above, it is unfair that the tenant should remain responsible for damage caused to the property, especially by a visitor the tenant did not know was allowed in to the property.

The remaining co-tenant/s may have little incentive to keep paying the full rent where the tenant who has left paid most or all of the bond. The remaining co-tenant/s know that any rent arrears would be covered by the departing tenant's bond.

Subject to establishing excessive hardship and domestic violence in a QCAT decision, neither a lease agreement nor the Act allow a co-tenant to end their liability under a fixed term or periodic lease without reliance on the other parties. This means that the lease lacks certainty. Effectively, the tenant's liability under the lease agreement is "open-ended".

Proposed reform: Introduce provisions in the Act that allow a co-tenant to end their liability under a lease agreement where the fixed term of the lease agreement has ended or the lease is a periodic agreement.

The Act should include a provision which allows a co-tenant to issue a termination notice to the agent/lessor and each other co-tenant if the fixed term of the lease agreement has ended, or the agreement is a periodic agreement. This would prevent the co-tenant's liability under the lease agreement being "open-ended" and would provide certainty to all interested parties about the tenant's obligations. The wording in section 101 of the *Residential Tenancies Act 2010 (NSW)* ("the NSW Act") should be used to insert a new provision to the Act.

Section 101 of the NSW Act is as follows:

> ***101 Termination by co-tenant of own tenancy***
>
> *(1) A co-tenant may give a termination notice to the landlord and each other co-tenant if the fixed term of the residential tenancy agreement has ended or the agreement is a periodic agreement.*
>
> *(2) The termination notice must specify a termination date that is not earlier than 21 days after the day on which the notice is given.*
>
> *(3) A co-tenant ceases to be a tenant under the residential tenancy agreement on the termination date if the co-tenant gives a termination notice in accordance with this section and vacates the residential premises.*
>
> *(4) The Tribunal may, on application by a co-tenant, make a termination order for the residential tenancy agreement if it is satisfied that a termination notice was given by another co-tenant in accordance with this section.*

Proposed reform: Introduce provisions in the Act that allow a co-tenant to end their liability under a fixed term agreement where there are special circumstances.

The Act should include a further provision which allows QCAT to make an order terminating the tenancy of a co-tenant under a fixed term lease agreement where appropriate in the circumstances, upon application by a co-tenant. The co-tenant who wishes to end their liability under the fixed term lease agreement would need to supply QCAT with reasons and evidence as to why their circumstances justify a change in the lease.

The wording in section 102 of the NSW Act should be used to add a new provision to the Act. Section 102 of the NSW Act is as follows:

102 Termination of agreement or co-tenancies by Tribunal

(1) The Tribunal may, on application by a co-tenant, make any of the following orders:

(a) an order terminating the tenancy of the co-tenant or another co-tenant under the residential tenancy agreement from a date specified in the order,

(b) an order terminating the residential tenancy agreement,

(c) any necessary ancillary orders relating to the residential tenancy agreement or liabilities under that agreement.

(2) The Tribunal may make an order under this section if it is of the opinion that it is appropriate to do so in the special circumstances of the case.

(3) If the Tribunal terminates the tenancy of one or more, but not all, of the co-tenants under the residential tenancy agreement, the Tribunal must, in the order terminating the tenancy, specify the day on which the tenants whose tenancies are terminated must vacate the residential premises.

(3A) Such an order is taken to be an order for possession of the residential premises in favour of the remaining tenant or co-tenants.

Note. Section 121 provides that a warrant for possession may be issued on the application of a person in whose favour an order for possession is made.

(4) The Tribunal may order a co-tenant under a residential tenancy agreement that is terminated under this section before the end of the fixed term of a fixed term agreement to pay an amount, not exceeding the applicable break fee for the tenancy specified in section 107.

(5) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.

(6) The Tribunal must give the landlord notice of an application under this section. The landlord has a right to be heard in the proceedings.

(7) An application may be made under this section whether or not a termination notice has been given under section 101.

2. Tenant databases

Current situation: The use of tenant databases entrenches disadvantage felt by tenants and creates a real risk of homelessness. The Act does not do enough to prevent "unlawful listings" as defined in the Act and the Residential Tenancies and Rooming Accommodation Regulations 2009 ("the Regulations").

The Act creates an imbalance of power between an agent/lessor and a tenant in relation to creating a listing on a database. Section 459 of the Act provides that a tenant may only be listed on a database where there is a prescribed reason under the Regulations. Despite the severe consequences of a database listing to a tenant, such as potential homelessness, the Act fails to make an agent's/lessor's contravention of section 459 an offence.

Effectively, an agent/lessor can list a tenant on a database at any time during or after the tenancy without penalty even if the listing is unlawful, and the onus is on the tenant to disprove the validity of that listing.

A further complication for a tenant who is listed on a database is their limitation period to object to the listing in section 460(2) of the Act. Currently, a tenant has a limitation period of six (6) months from the date they become aware of the listing to apply to QCAT to seek an order that it be removed. In its current state, if the tenant misses the time limit the Act effectively allows a listing to remain on a database even if it is in contravention of the Act's own provisions. The tenant could be left with an unlawful listing which could remain on the database for 3 years.

Introducing a penalty for listing a tenant unlawfully would act as a deterrence for agents/lessors.

Proposed reform: Amend section 459 of the Act to make a contravention of this section an offence which attracts penalty units. Further, remove section 460(2) from the Act to eliminate the limitation period for a tenant to apply to QCAT about a breach of section 459(1).

Case study – Unlawful listing

Andrew rented a property on the Gold Coast. His lease came to an end without any issue and he never heard from the property manager again.*

12 months later Andrew applied for a rental and was knocked back because his property manager from the Gold Coast property had listed his details on a tenancy database.

MRCLC assisted Andrew by corresponding with the property manager about the reason for the listing. The property manager told MRCLC that Andrew owed them money for rent arrears, carpet cleaning, cleaning, change of locks, repairs and replacement of light bulbs.

MRCLC pointed out to the property manager that the alleged rent arrears were less than the bond and there was no QCAT order in relation to the other amounts. MRCLC informed the property manager that they therefore had no lawful reason pursuant to the legislation to list Andrew on a tenancy database. The property manager removed Andrew's listing.

Andrew was free to rent a property again, but only after experiencing temporary homelessness and undue stress caused by the unlawful listing.

**Name has been changed*

3. Bond disputes

Current situation: The bond refund process is unfair for tenants.

Bond disputes are quite common, and the legislative framework designed to resolve them needs to be amended to address the imbalance of power between agents/lessors and tenants. The problem is that tenants are not aware of their responsibilities under the Act and are unfamiliar with the bond refund process. More commonly, agents/lessors have unrealistic expectations that a tenant must return the property in the same or better condition than at the start of the tenancy and subsequently expect to receive the full amount of a tenant's bond.

Currently, for a tenant to receive their bond back from the Residential Tenancies Authority ("RTA") they must obtain either agreement of the agent/lessor or an order from QCAT. A tenant should receive their bond if they have complied with section 188(4) of the Act which states:

"*At the end of the tenancy, the tenant must leave the premises and inclusions, as far as possible, in the same condition they were in at the start of the tenancy, fair wear and tear excepted.*"

Bond disputes arise frequently due to the nature of the current bond refund process which is legislated in the Act. The process requires either the tenant, the agent/lessor or both the tenant and the agent/lessor to lodge a Form 4 'Refund of rental bond' with the RTA. If all parties agree about how the bond is to be paid, there is no issue. If the agent/lessor claims the bond, it is the tenant's responsibility to dispute the claim by lodging a Form 16 'Dispute resolution request' within 14 days, then make an application to QCAT if RTA conciliation is unsuccessful.

The Act and the bond refund process present three notable problems which make it difficult for a tenant to receive their bond back.

Firstly, where the agent/lessor claims the bond it is possible that the tenant's correct forwarding address is not entered on the Form 4 by the agent/lessor. This means that the notice the RTA sends to the tenant about the agent's/lessor's bond claim will not be sent to the correct address. The tenant is therefore unaware that their 14-day time limit to dispute the bond claim has started, and the bond will likely be refunded to the agent/lessor.

MRCLC has assisted tenants who forwarded their updated contact details to the agent/lessor, and still did not receive notice of the bond claim. There is no positive obligation on the agent/lessor to add the tenant's correct contact details in the Form 4. Tenants are unaware that they should independently inform the RTA of their new contact details at the end of their lease. Tenants place a great deal of trust in their agent/lessor who will sometimes make untrue representations that the tenant will receive their bond in full.

Secondly, if the dispute is not resolved in RTA conciliation where the agent/lessor claimed the bond first, the onus is on the tenant to apply to QCAT to establish why they should receive their bond back. This is inherently unfair, since the starting position should be that the bond is the tenant's money and it is the agent/lessor who alleges the bond should be applied to their claims.

Further, many tenants struggle to complete the necessary QCAT application form, due to a lack of access to a computer, the internet and a printer. Their struggle is further compounded by a lack of knowledge about the particular provision of the Act upon which to rely in their QCAT application, and a lack of evidence to support their argument. Where a tenant must make the QCAT application they are required to anticipate the agent's/lessor's claim and respond to them, rather than respond to an appropriately particularised claim. It is the experience of the MRCLC that an agent/lessor may refuse to provide the tenant with evidence of their claim, including photos from the vacate inspection and quotations and/or invoices for work allegedly required to be done. This is usually provided during the QCAT process, and sometimes only at the hearing.

Thirdly, the Act does not provide a definition of "fair wear and tear". Previous QCAT decisions which offer a definition of fair wear and tear are not binding precedent, which means that the term is open for interpretation by an agent/lessor.

Often, an agent/lessor will make a claim for compensation for things that are later found to be properly characterised as fair wear and tear by QCAT. Resolution of bond disputes in QCAT is a lengthy process and a tenant is unable to access their bond during the dispute which may prevent them from obtaining another rental. It is also difficult for people who have obtained a bond loan to obtain a second bond loan while they await the outcome of the dispute.

Proposed reform: Amend the bond refund process to ensure that a tenant never needs to dispute a bond claim or make an application to QCAT for the refund of their bond from the RTA.

The Act should provide that at the end of a tenancy the bond will be refunded to the tenant unless the agent/lessor lodges a Form 16 Dispute resolution request with the RTA within a specified time period. Further, the Act should provide that if the matter does not proceed to RTA conciliation, or if the matter is not resolved at RTA conciliation, the onus is on the agent/lessor to make an application to QCAT within 7 days of the unsuccessful conciliation.

Removing the requirement for a tenant to respond to an agent's/lessor's bond claim within 14 days prevents the situation where the tenant may not receive notice of the bond claim. Having the matter proceed to QCAT if no RTA conciliation occurs, or if no resolution is reached at RTA conciliation, ensures that an agent's/lessor's claim for the bond will be tested in QCAT. A tenant's bond should never be paid to the agent/lessor where a dispute exists and their claims remain untested in QCAT.

Proposed reform: Amend the Act to introduce a definition of fair wear and tear.

Section 188(4) of the Act should be amended to include a definition of fair wear and tear. The following cases provide useful guidance and the basis for the proposed definition.

Griffin v Gini [2011] QCATA 325:

"*The phrase "wear and tear" has been common in leases and tenancy agreements for centuries. In general, the ordinary meaning if the phrase is concerned with the consequences of ordinary, not*

extraordinary damage. In the case of 'wear', this might mean, for example, fading paint work on internal and external walls caused by sunlight over time; 'tear' refers to disrepair caused by a tenant through unintentional action or through the normal incident of a tenant's occupation. Depending on the specifics of the obligations outlined in the tenancy agreement, this might include the accidental ripping of an aged, worn fly screen. In summary, fair wear and tear, in the context of residential tenancy, refers to damage or disrepair caused, or resulting from ordinary use".

In *Joliffe-Martin and Anor v Ferguson and Anor* [2011] QCAT 365, it is stated that it is unreasonable for a lessor to "*expect a property be left in a perfect condition as it was at the commencement of the tenancy without taking into consideration something which happens during the normal use or changes that happen with aging. It is relevant to consider:*

- *The term of the tenancy*
- *Whether the premises and its inclusions are original or recently renovated*
- *The number of approved occupants*
- *Whether the property was tenanted by a family with children*
- *Whether approval was given by the lessor for pets to be kept inside the premises; and*
- *Whether reasonable steps were taken by the parties to minimise loss or damage to the premises and its inclusions."*

MRCLC submits that the following definition be included in section 188 of the Act:

"Fair wear and tear means damage or disrepair caused by, or resulting from, ordinary use. In considering the degree of fair wear and tear, the tribunal may have regard to:

- The term of the tenancy
- The age of the property and its inclusions
- The number of approved occupants
- Whether the property was tenanted by a family with children
- Whether approval was given by the lessor for pets to be kept inside the premises;
- Whether reasonable steps were taken by the parties to minimise loss or damage to the premises and its inclusions; and
- Anything else is considers relevant".

Case study – bond dispute over fair wear and tear

Fran rented a property for 5 years. The property was approximately 20 years old and was situated in the tropics. The linoleum was estimated to be around 15 years old and it had not been replaced during Fran's tenancy.*

When her tenancy ended, Fran believed she had complied with her obligation to return the property in the same condition she found it 5 years ago, with exception for fair wear and tear. The linoleum was worn by the end of the tenancy and had developed strange pink stains which she suspected were mould, since Cyclone Debbie had recently made landfall nearby.

The real estate agent made a claim in QCAT seeking Fran's bond to pay for replacement of the old linoleum with brand new linoleum, at a cost of approximately $5,000. Fran argued that the condition of the existing linoleum was due to fair wear and tear over the life of the linoleum, and that her bond shouldn't be taken from her.

QCAT agreed with Fran that the linoleum's worn condition was caused by fair wear and tear and dismissed the real estate agent's claim.

The bond dispute process lasted 6 months, during which Fran experienced financial hardship from being unable to access her bond. The drawn-out bond refund process coupled with the agent's demands to pay $5,000 caused Fran to suffer a nervous breakdown.

**Name has been changed*

In summary

The MRCLC proposes the following law reform:

1. Introduce provisions in the Act that allow a co-tenant to end their liability under a lease agreement where the fixed term of the lease agreement has ended or the lease is a periodic agreement.

2. Introduce provisions in the Act that allow a co-tenant to end their liability under a fixed term agreement where there are special circumstances.

3. Amend section 459 of the Act to make a contravention of this section an offence which attracts penalty units. Further, remove section 460(2) from the Act to eliminate the limitation period for a tenant to apply to QCAT about a breach of section 459(1).

4. Amend the bond refund process to ensure that a tenant never needs to dispute a bond claim or make an application to QCAT for the refund of their bond from the RTA.

5. Amend the Act to introduce a definition of fair wear and tear.

We thank you for considering our submission. Please contact us if we may be of further assistance at admin@mrclc.com.au.

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