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Residential Tenancies Amendment Bill 2009

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| Published: 26 May 2009 Prepared by John McSoriley BA LL.B, Barrister Legislative Analyst P: (04) 471-9626 (Ext. 9626) F: (04) 471-1250 | Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill. |

Purpose

The purpose of the Bill is to amend the Residential Tenancies Act 1986 (the Act) and other legislation to adapt the law to " ... significant changes in the structure and dynamics of the residential rental market [which have]] taken place since the Act came into force' and the fact that " ... the number of people living in rental housing has increased with a corresponding decline in home ownership rates". The particular aim of the legislation is to:

- "encourage the development of a rental market that provides stable, quality housing to those who rent their homes;
- "enable landlords to manage their properties more effectively;
- "clarify and appropriately balance tenant and landlord rights and obligations"¹.

¹ Residential Tenancies Amendment Bill, 2009 No 34-1, Explanatory note, General policy statement, p. 1.

Background

"The key provisions in the Bill:

- extend the protection of the Act (including access to advice, information and dispute resolution services) to more people involved in renting, such as tenants in boarding houses;
- clarify responsibility for outgoings by introducing overarching principles to indicate when landlords or tenants are responsible for charges such as rates or electricity;
- introduce clearer and fairer processes for terminating and renewing tenancies to provide an appropriate balance between flexibility and certainty of tenure;
- encourage landlords and tenants to comply with their obligations under the Act by increasing the value of existing fines and exemplary damages and introducing new sanctions;
- provide for the majority of tenancy disputes to be resolved quickly, fairly and cost effectively [by] increasing the Tribunal's monetary jurisdiction; increasing the monetary threshold on the automatic right to use legal representation, [and] allowing the Tribunal to order applicants to be compensated for their filing fee if their claim is partially or fully upheld;
- improve the enforceability of Tribunal orders by giving the Tribunal jurisdiction to make an order against a guarantor of a party to a tenancy agreement; allowing a party to recover reasonable private debt collection costs associated with enforcing a Tribunal order; [and] assisting Tribunal creditors to locate debtors, by facilitating the release of address information held by government agencies to the District Court"².

Particular issues dealt with by this Bill include:

- termination of tenancies by notice;
- expiry of fixed-term tenancies;
- termination in special circumstances;
- security for tenants' obligations;
- rent increases;
- rights of entry;
- absentee landlords;
- clandestine laboratories;
- administration of the Act and Tenancy Tribunal procedure;
- the ownership of tenant's fixtures abandoned on the premises;
- the validity of notices sent to an email address or post office box;
- when a person is considered to be 'residing' in the premises;
- the Retirement Villages Act 2003;

² Residential Tenancies Amendment Bill, 2009 No 34-1, Explanatory note, general policy statement, pp. 2 and 3.

- the Unit Titles Act 1972;
- the Property Law Act 2007; and
- the extension of the Act to cover boarding houses.

Main Provisions

What tenancies are covered by the Act?

The Bill repeals the current exclusions from the Act of tenancies with a substantial service component and of boarding houses. The exclusion of premises used principally as a residence by the landlord or the landlord's family is extended to cover the owner or the owner's family. It is also made clear which School hostels (i.e. those within the meaning of section 2 of the Education Act 1989) are exempt from the Act. It is also made clear that for tertiary student accommodation to be exempt from the Act the accommodation must:

- be used exclusively to accommodate tertiary students; and
- must be owned or operated by a tertiary education provider or a person who has a written agreement with the relevant tertiary education providers setting out the respective rights and obligations of the parties, providing for a dispute resolution process and relate to services to the students over and above the services required under the Act (*Part 1, Clause 6 (amending Section 5 of the Act) and Clause 7 (inserting New section 5B into the Act)*).

Fixed term tenancies

The Bill reduces the period of fixed term tenancies exempted from certain provisions of the Act from 120 days to 90 days and also provides that the parties may not enter into such short fixed-term tenancies in order to provide a trial period for testing the suitability of the parties (*Part 1, Clause 8, amending Section 7 of the Act*).

Landlord must appoint agent

The Bill requires landlords who are absent from New Zealand for longer than 21 days to appoint an agent and to notify the tenant of the agent's name, contact address, and address for service. If a bond is held in respect of the tenancy, the chief executive must be notified of those particulars in the prescribed form. An agent appointed under this section has, vis-à-vis the tenant, all the rights and obligations of the landlord. (*Part 1, Clause 13 inserting New Section 16A into the Act*).

Body corporate rules part of tenancy agreement and rent reassessment

The Bill provides that where a unit under the Unit Titles Act 1972 is subject to a tenancy agreement the body corporate rules which affect the tenant must be set out in the agreement. The Bill also permits a tenant of a unit who is affected by a change in the body corporate rules to apply for a rent assessment within three months of being notified of the change or otherwise becoming aware of the change (*Part 1, Clause 13, inserting New Section 16B into the Act; Clause 19, amending Section 25 of the Act*).

Landlords may not demand additional security

The Act at present prohibits landlords from requiring tenants to provide landlords with a security that is not either a bond permitted by the Act or a guarantee.

The Bill clarifies that the provision of security includes means by which landlords are given access to the accounts of tenants, such as the imprints of credit cards or PIN numbers of credit cards or charge cards. Requiring a tenant to provide security (other than a permitted bond or guarantee) is declared to be an unlawful act and the Tribunal is given power to award exemplary damages to the tenant (*Part 1, Clause 14 inserting New Section 18A into the Act*).

Landlords duties on receipt of bond

The Bill clarifies that the landlord's duties on receipt of a bond apply also in the case of part-payments on account of a bond and also provides that those duties do not apply in the case of a bond paid by a tenant under a boarding house tenancy, as long as the bond does not exceed one week's rent (*Part 1, Clause 15, amending Section 19 of the Act*).

Refund of bonds

The Act at present provides that if the parties agree on an application for a refund of a bond, the refund is made in accordance with the application. If a party contests an application, the chief executive refers the matter to the Tenancy Tribunal. If a party does not respond, the chief executive has a discretion whether to make the refund or refer the matter to the Tribunal.

The Bill provides as follows:

- in cases where the bond is in dispute, it is for the parties, not the chief executive, to take the dispute to the Tenancy Tribunal. If a party applied to the chief executive for a refund of a bond that is in dispute, the chief executive would be obliged tell the parties how to apply to the Tenancy Tribunal for determination of their dispute;
- a landlord would not be able to apply to the chief executive if more than two months had passed from the termination of the tenancy, but would instead have to apply to the Tenancy Tribunal directly;
- where no claim was made within two months of the termination of a tenancy or the bond monies are not uplifted within two months after a refund is approved, the chief executive may exercise a discretion to take steps to refund the bond (including, if necessary, accessing information under the Social Security Act 1964 to supply address information to the chief executive for the purpose of refunding the bond) (*Part 1, Clause 16, repealing Section 22 of the Act and inserting New Sections 22 to 22E into the Act*).

Responsibility for outgoings

The Bill provides that the landlord is responsible for all outgoings that are incurred whether or not the premises are occupied, such as general rates, insurance, and, where applicable, body corporate levies. The landlord is also responsible for outgoings for common facilities.

The tenant is responsible for outgoings that are exclusively attributable to the tenant's occupation of the premises or the use of the facilities. The Bill sets out examples such as charges for electricity and gas, telephone and Internet, and charges for water based on consumption (*Part 1, Clause 23 substituting Section 39 of the Act*).

Tenant's responsibilities and tenant's burden of proof relating to damage

The Bill provides that a tenancy agreement may stipulate the maximum number of persons that may reside in the premises and creates four new types of unlawful acts as follows:

- a tenant's failure, without reasonable excuse, to quit the premises on the termination of the tenancy;
- using the premises for an unlawful purpose;

- contravening the obligations imposed by Section 40 ("Tenant's responsibilities") in circumstances that amount to the harassment of other tenants or neighbours; and
- contravening a stipulation as to the maximum number of persons who may reside in the premises.

The Bill also provides that the tenant must prove that any damage to the premises (not due to fair wear and tear) was not caused intentionally or negligently (*Part 1, Clause 24, amending Section 40 of the Act*).

Tenant's fixtures

The Bill provides that fixtures put up by the tenant and not removed on the expiry of the tenancy become the property of the landlord unless there is a contrary agreement or arrangement or if anything the landlord has said or done has led the tenant to reasonably believe that he or she is entitled to remove the fixtures after the expiry of the tenancy. The tenant remains liable for any damage caused by removing fixtures (*Part 1, Clause 25 amending Section 42 of the Act*).

Comment

This restates the common law position relating to tenant's fixtures.

Landlord's responsibilities

The Bill requires a landlord of premises without a reticulated water supply to provide adequate means for the collection and storage of water. and adds two types of unlawful acts as follows:

- failing to comply with the obligations imposed by Section 45(1) of the Act concerning cleanliness, maintenance, and health and safety; and
- interfering with the supply of services (eg, electricity).

It is also made clear that the landlord's obligation to compensate a tenant for repairs paid for by the tenant arises not just when the tenant has attempted to notify the landlord of the disrepair but also when the tenant has successfully done so (*Part 1, Clause 27 amending Section 45 of the Act*).

Landlord's right to enter premises

The Bill makes it clear that a landlord may enter premises if that is necessary to enable services to be provided in accordance with the tenancy agreement and also extends the landlord's right to enter the premises so that the premises can be shown to prospective tenants or purchasers or to a registered valuer to include experts or real estate agents engaged to appraise or sell the premises as well as persons authorised to inspect the premises under any enactment. The maximum fine for a landlord who uses, or threatens to use, force in entering premises is increased from \$500 to \$2,000 (*Part 1, Clause 28, amending Section 48 of the Act*).

Termination of tenancy in certain circumstances

The Bill clarifies that fixed-term tenancies may be terminated by notice if a mortgagee takes possession of the premises or in circumstances involving the destruction of or serious damage to the premises. In the case where a sole tenant dies the tenancy terminates on the earliest of the following:

- 21 days after the personal representative of the tenant or a person who is the tenant's next of kin gives the landlord written notice of the death of the tenant; or
- 21 days after the landlord gives the personal representative of the tenant or a person who is the tenant's next of kin written notice to vacate the premises that are the subject of the tenancy agreement; or

- on a date agreed in writing by the landlord with the personal representative of the tenant or with a person who is the tenant's next of kin;
- on a date determined by the Tribunal on an application made, without notice, by the landlord (*Part 1, Clause 29 (amending Section 50 of the Act), Clause 30 (inserting New Section 50A into the Act)*).

Termination of tenancy by notice

Under the Act at present, the landlord must give 90 days' notice, and the tenant 21 days' notice of termination. However, the landlord need only give 42 days' notice where the landlord requires the premises for occupation by the landlord or a member of the landlord's family or where the landlord has sold the premises and is required to give vacant possession.

The Bill makes the following changes:

- a notice that gives the tenant less than 90 days' notice for the termination must set out the reasons for the termination
- it is clarified that, in order to qualify for the shorter period of 42 days on the ground that the premises are required by the landlord, the premises must be required by the person who owns the premises or by a member of that person's family as the principal place of residence by the owner or a member of his or her family (a requirement by a non-owner, such as the landlord's agent, will not qualify);
- the justification for giving only 42 days' notice on the ground of having to give vacant possession under an agreement for sale and purchase is limited to agreements that have become unconditional

The Bill also provides for a period of notice of 14 days in cases where a tenant, who has been granted a tenancy because of his or her status as a student, ceases to be an eligible tenant.

The Bill also deals with cases where mortgagees become entitled to the possession of the premises and take the place of the landlord for certain purposes. The Act at present gives the mortgagee the right to terminate a fixed-term tenancy as if it were a periodic tenancy. The Bill gives tenants the corresponding right to terminate a fixed-term tenancy as against mortgagees in possession.

The Bill also provides for reduced periods of notice or abatement of rent where the destruction of premises or serious damage to the premises rendering them uninhabitable is the fault of either party. In that case, the party who is not at fault may give a shorter period of notice terminating the tenancy (7 days' notice, in the case of the landlord, and 2 days' notice, in the case of the tenant) (*Part 1, Clause 31, amending Section 51 of the Act; Clause 33, inserting New Section 53A into the Act; Clause 37, amending Section 58 of the Act; Clause 39, inserting New Section 59A into the Act*).

Renewal or extension of tenancy

The Bill automatically converts expired fixed-term tenancies into periodic tenancies on the same terms as the expired tenancy, unless either party gives notice to the contrary within a period starting 90 days before the expiry of the tenancy, and ending 21 days before the expiry. The Tribunal may order that a tenancy continued as a periodic tenancy under this provision be terminated at an earlier date if satisfied that the hardship the applicant would suffer from the effect of the continuation of the tenancy exceeds the hardship the other party will suffer from the early termination. The applicant may be required to compensate the other party for any loss resulting from the early termination (*Part 1, Clause 40, inserting New Section 60A into the Act*).

The Bill also requires a tenant to exercise any right to a renewal or extension of the tenancy by giving written notice to the landlord not later than the 21st day before the expiry of the tenancy. However, if that time limit is missed, the Tribunal may nevertheless order a renewal or extension, if satisfied that

without the order the tenant would suffer greater hardship than the landlord (*Part 1, Clause 40, inserting New Section 60B into the Act*).

It is made clear that the fact that a tenancy is extended or renewed is not a separate justification for a rent increase (*Part 1, Clause 40 inserting New Section 60C into the Act*).

Boarding houses

The Bill makes provision in relation to boarding house tenancies including the following :

- providing that the particular provisions in the Bill relating to boarding house tenancies are generally in substitution for the provisions of the rest of the Act that do not apply (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66A*);
- defining "boarding houses" as residential premises containing one or more boarding rooms along with facilities for communal use by the tenants, and intended to be occupied by at least six tenants, a "boarding house tenancy" as one that is intended to, or does in fact, last for 28 days or more and stating that where a tenant shares a boarding room with another tenant, the tenant does not have an exclusive right to occupy the boarding room, but only sleeping quarters in a room (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66B*);
- providing for the requirements of a boarding house tenancy agreement, which are additional to those required of other tenancies under the Act (*Part 1, Clause 47, inserting New Part 2A into the Act, New section 66C; Cf. Section 13A of the Act*);
- providing that there is no obligation for a boarding house landlord to lodge a bond with the chief executive if the bond is for no more than one week's rent (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66D*);
- providing that, in relation to outgoings incurred in respect of a boarding house, the landlord is responsible for all ongoing outgoings that are incurred whether or not the boarding house is occupied (eg, rates), for common facilities, and for outgoings incurred in respect of rooms occupied by more than one tenant, and a tenant is responsible for all outgoings that are exclusively attributable to the tenant's occupation of a room that is exclusively occupied by the tenant (examples are set out such as separately metered electricity supplied to the tenant's room or charges for a telephone connected to the tenant's room and the landlord must provide the tenant each week with an itemised account for any services, where payment for the services is not included in the rent) (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66E*);
- providing that boarding house tenancies, unlike some other residential tenancies, are not assignable by the tenant (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66F*);
- setting out the basic entitlement of the tenants to quiet enjoyment of the premises (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66G; cf. Section 38 of the Act*);
- setting out the landlord's obligations at the start of a tenancy (including providing the tenant with a copy of the house rules and schedule of services, and providing the room in reasonable order) and the landlord's ongoing obligations (including ensuring that the premises are kept in a reasonable state of cleanliness and repair, and that all statutory requirements relating to buildings, health, and safety are complied with and ensuring that the tenant has access at all times to his or her room and to toilet and bathroom facilities, as well as access at all reasonable hours to other facilities) and other obligations (*Part 1, Clause 47, inserting New Part 2A into the Act, New Sections 66H-66J; cf. Sections 36, 37, and 45 of the Act*);
- setting out the obligations of the tenant, including paying the rent on time, ensuring that the tenant's boarding room is occupied principally for residential purposes (and is kept reasonably clean and tidy), observing the house rules, notifying the landlord of damage and paying for damage caused by the tenant and a tenant must not intentionally or carelessly damage or alter the

premises or interfere with the peace, comfort, or privacy of neighbours (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66K; cf. Sections 40, 42, and 46 of the Act*);

- authorising a boarding house landlord to make house rules which must not be inconsistent with the Act, or require or purport to permit anything that is or would be illegal (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66O*);
- providing that a tenant who objects to a house rule, or to the way a house rule is being applied, may apply to the Tribunal for an order declaring the house rule unlawful, or requiring the landlord to apply the house rule in a particular manner, or varying the rule, or setting the rule aside altogether (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66P*);
- providing that a landlord may enter a boarding house at any time but the landlord may not use the facilities for his or her own domestic purposes unless he or she resides at the boarding house (*Part 1, Clause 47, inserting New Part 2A into the Act, New Sections 66Q-66T*);
- providing for termination of a boarding house tenancy by a landlord (including the formal requirements for such termination) which may be carried out,
 - immediately, if the tenant causes, or threatens to cause, serious damage, or endangers, or threatens to endanger, people or property or causes, or threatens to cause, serious disruption to other residents,
 - on 48 hours' notice, if the tenant is more than 7 days in arrears with rent, is using the room for an illegal purpose, or has abandoned the room,
 - on 14 days' notice, if reconstruction, repairs, or renovations are required,
 - on 28 days' notice, in which case no reason need be given (but note that section 54 of the principal Act, which provides protection against notice being served as a retaliatory measure, applies to boarding house tenancies) (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66U*);
- providing that a tenant may terminate a tenancy by giving 48 hours' notice, and that the notice need not be in writing and a boarding house tenancy terminates on the death of a sole tenant. (*Part 1, Clause 47, inserting New Part 2A into the Act, New Sections 66V and 66W*);
- setting out a procedure for when the landlord thinks the tenancy has been abandoned (the landlord may, on giving 24 hours' notice, enter the room, and must make all reasonable efforts to contact the tenant's contact person (if one has been identified in the tenancy agreement) and then terminate the tenancy on 48 hours' notice) (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66X*);
- making provision for the landlord's duties after abandonment of the tenancy (the landlord must store the tenant's goods for 35 days, during which time the tenant or the contact person may claim the goods, on payment of actual and reasonable storage costs and, after 35 days, the landlord must deliver any personal papers to the police, may dispose of goods worth less than \$100, and must apply to the Tribunal for an order about what to do with goods worth more than \$100) (*Part 1, Clause 47, inserting New Part 2A into the Act, New Section 66Y*).

Administrative matters relating to the Tenancy Tribunal

The Bill makes detailed amendments in relation to the operation of the Tenancy Tribunal (*Part 1, Clauses 48-54*).

Jurisdiction of the Tenancy Tribunal

The Jurisdiction of the Tenancy Tribunal is altered as follows:

- its jurisdiction is made subject to the Limitation Act 1950;
- its monetary jurisdiction is extended from \$12,000 to \$50,000;
- it is given jurisdiction to determine disputes between landlords and guarantors;
- it is precluded from determining disputes so far as they concern the provision by the landlord of health and disability services about which complaints may be taken to the Health and Disability Commissioner; and
- its jurisdiction is extended to deal with boarding house tenancies and the matters provided for in New Part 2A of the Act (*Part 1, Clause 55 amending Section 77 of the Act*).

Procedure and orders of the Tenancy Tribunal

The Bill permits an owner of premises that have not been let to apply to the Tenancy Tribunal for an order declaring the status of those premises. The application may be made without notice. An order made on such an application is binding in any subsequent proceedings, but the Tenancy Tribunal may rescind the order if satisfied that it is wrong or that there has been a change in circumstances. The Bill also makes detailed amendments relating to the procedure of the tribunal and the offices of mediator and adjudicator (*Part 1, Clauses 56 -67, amending Sections 78, 86 (substituted), 87 (substituted), 88, 9, 92, 93, 95, 99, 102 and 108 of the Act and inserting New Sections 83A and 91A*).

Exemplary damages for unlawful acts

Particular actions by a party to a residential tenancy are identified as "unlawful" acts. The Bill increases the amounts that the Tenancy Tribunal may award as exemplary damages for certain unlawful acts and sets new amounts for acts declared to be unlawful acts by other clauses in the Bill (*Part 1, Clause 68, amending Section 109 of the Act; Schedule 1A of the Bill sets out clearly all the unlawful acts affected, their section references and the amounts of exemplary damages which may be claimed*).

Enforcement of orders

The Bill provides for the establishment of a procedure to assist parties who have obtained a Tenancy Tribunal order in their favour to enforce that order (*Part 1, Clause 72, inserting New Sections 112A to 112F*).

Administrative and procedural amendments

The Bill makes other administrative and procedural amendments to the Act (*Part 1, Clauses 73-85*).

Transitional provisions

The Bill provides, with qualifications and exceptions, that the amendments made by the Bill apply to tenancies in existence before the relevant amendments took effect (*Part 2, Clauses 86-92*).

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