From: [redacted]
Sent: Monday, 12 July 2021 7:11 PM
To: Community Support and Services Committee
Subject: Fw: Law Reform required: Residential Tenancy Law
Attachments: letter to Minister Dick.docx; Minister Dick...bond dispute submissions.docx; Cameron Dick's response to submissions.pdf; DOC210111 MARTINSEN.pdf; response to Doc's response on submissions.docx; DOC230311.pdf

Dear Sir/Madam,

Please accept this email and its attachments as my submissions on the current operation of the residential tenancies law and your attempt to change it.

I have read your proposed Bill and I am concerned about its effect on tenants in Queensland. If this Bill is enacted, it will effectively remove every right a tenant currently has. For example, the right to receive a Breach Notice and a period of time in which to remedy that alleged breach or dispute the Notice through a Dispute Resolution Request Form in the RTA seeking a conciliated settlement perhaps. No real estate agency or lessor will bother to do this; they will simply issue a 'with ground' (end of fixed-term) notice to leave and the tenant has no recourse whatsoever. Is this fair?

What is even more sinister, is that it appears that a tenant's legal interest in the property will extinguish at the expiration of the fixed-tem agreement and they will not be holding over on a periodic basis with all the terms and conditions of their agreement continuing. There appears to be no need to apply for a 'termination' of the agreement anymore, only an application for a warrant of possession based only on the fact that the fixed term has expired.

If this is correct, a tenant who remains in their home after the handover date contained in a Notice to Leave may well be subject to the subsequent tenant's costs in not being able to move in as contracted. This will happen when a lessor or their agent leases the property to a 'new' tenant starting on the day after the handover day and the current tenant has not vacated and a warrant of possession is needed in order to render them homeless.

If you take the time to read and consider my attached submissions you will see that the existing law does provide what you're seeking to achieve if it is read correctly and in context. The Act provides for the 'continuation of fixed-term agreement'. The without ground notice is 'highly qualified'. These are the Rights you're removing from every tenant in Queensland.

What will the Government think when the real estate lobby start only 'offering' a three month fixed-term agreement in every tenancy in Queensland. If a tenant ever bothered to get a 'repair order' they would be well and truly in their next property before it is complied with.

Lets not even discuss how difficult it is to find alternative accommodation when we're discussing how to make it easier to evict a tenant....my God...you think this is fair and balanced?

Jeff Martinsen
[redacted]

The Minister has spoken about 'fair and balanced' and protecting the 'rights' of tenants, this is not what your proposed changes will support. It is truly unfair and unbalanced and it will operate to remove any semblance of a tenant's right.

From: Jeffrey Martinsen [redacted]
Sent: Wednesday, 2 June 2021 1:05 PM
To: south.brisbane@parliament.qld.gov.au <south.brisbane@parliament.qld.gov.au>
Subject: Fw: Law Reform required: Residential Tenancy Law

From: Jeffrey Martinsen [redacted]
Sent: Friday, 22 April 2011 1:43 PM
To: [redacted]
Subject: FW: Law Reform required: Residential Tenancy Law

From: [redacted]
To: [redacted]
Subject: Law Reform required: Residential Tenancy Law
Date: Fri, 22 Apr 2011 14:12:12 +1030

Dear Sir/Madam,

From the attached submissions and letters of response, you will see that I have been actively working toward reform of the *Residential Tenancies and Rooming Accommodation Act 2008* with, unfortunately, little success to date.

The Act is silent on when a residential tenancy agreement becomes binding upon the parties and is misconstrued and unworkable in other areas, as is outlined in my submissions.

The responses received from the relevant Ministers is unacceptable in my opinion. The responses fail to address any of the issues I've raised in a logical and meaningful way.

I have been a tenancy advice and advocacy worker in several TAASQ offices throughout Queensland since 1997 and continue to assist and represent tenants through the Mount Gravatt East Community Hub Inc. (mtgeco.org.au). I have also completed 3 years of law at JCU and QUT but am not currently studying. The issues raised in the attached submissions address legal issues that have plagued tenants in Queensland since I first began tenancy law here. The same issues occur over and over and always cause excessive hardship and potential homelessness. I was, and am, simply trying to have the current statute properly interpreted and applied, and amended ever so slightly, so that this 'constant hardship' can end.

QCAT is assisting in resolving some of the erroneous interpretations and applications that have existed for many years under the Small Claims Tribunal jurisdiction. However, some of the erroneous matters are so engrained in society that they have become the 'norm'. I currently have an appeal before the Appeals Tribunal which clearly makes this point (Caruana). I have a copy of the audio recording of Caruana and it will shock you in terms of errors of law and denial of natural justice. We are putting a copy of this transcript on the mtgeco.org.au website, so if you're interested, you can simply click on the link and listen.

If the issues I've raised are of interest to your organisation, as they are to every tenant in Queensland, then please contact me and I will assist in any way I can. The paper trail is much longer than the few attachments I've provided to you here.

On another matter, I would like to offer my assistance to you in terms of providing residential tenancy advice and assistance to tenants through your 'free' evening sessions. As I am a fully qualified TAASQ worker, I cannot see any issues arising from me providing advice in respect of the Act to tenants at your organisation.

Thank you for your consideration. Please contact me on [redacted] or by reply email if you wish.

Sincerely,

Jeff Martinsen

24 November 2010

Hon Cameron Dick MP
Member for Greenslopes
Attorney-General and Minister for Industrial Relations
Level 18, State Law Building
50 Ann Street
Brisbane QLD 4000
GPO Box 149, Brisbane QLD 4001

Dear Minister,

1. I seek to raise three very important issues which affect tenants in Queensland adversely. The first involves the issue of when an agreement becomes binding upon the offeror and the offeree. The second involves the issue of forced 'subsequent' agreements. The third involves retaliatory evictions and the current 'precedent' in QCAT in respect of this issue[1].

2. The result of a proper resolution of these issues is that the tenants of Queensland will no longer be under the 'hammer' of real estate agents and some lessors. It will also restore 'security of tenure'. It will help to put an end to discrimination and the concept of 'clandestine' rental auctions which are based on who is more successful in life, and not whether or not the 'prospective' tenant can reasonably comply with the terms of the offer. This is an offer; it is not an invitation for 'tender'.

Offer and acceptance

3. The Residential Tenancies and Rooming Accommodation Act 2008 (Qld) is silent on the question as to when a contract, or agreement, becomes binding upon the parties.

4. It used to be the case that each real estate agent, or lessor, that a tenant made an 'application' to could argue that the tenant was bound to them because the application was an offer of which the lessor could accept and they would often refuse to return a holding deposit on the basis that there was a breach of a binding contract.

[1] *Bamfield v Zanfan Pty Ltd t/a Main Street Realty Caloundra* [2010] QCATA 1

In most cases, the lessor/agent will try to have the prospective tenant pay rent for the premises they didn't move into until such time as a 'suitable' replacement tenant was found.

5. I believe this would be correct if an 'application' is in fact an offer. It appears much more likely that an application for a premises made in writing by a tenant is in fact an 'acceptance' of the offer made to a tenant by a lessor, or their representative. Is the 'application' an invitation to treat?

6. The distinction between an offer and an invitation to treat is that you cannot accept an invitation to treat whereas you can accept an offer. If the prospective tenant, after hearing the offer directly from the lessor, or their agent, pays a cash deposit for keys and expends time and money travelling to the offered property, views the prospective/offered property and returns to the real estate agent and says, "Great, we'll take it…it's a done deal", then an argument exists that at that point in time the prospective tenant has accepted the offer and that it is binding upon the parties.

7. Who is making the offer in a residential tenancy agreement? Is it the prospective tenant saying 'we offer to rent that property that you advertised and have verbally confirmed to us its availability'? Or, is it the lessor/agent saying, 'here is a property we are offering to rent for a price'? Is a prospective tenant limited to only one application at a time; for fear of being liable to more than one contract/application at the same time?

8. A prospective tenant in Queensland should be able to walk into a real estate agency and inquire as to what is on offer. They should be able to ask for a copy of the offered lease agreement, and its terms and conditions (in accordance with s. 58 of the Act), before they walk out the door and expend money on a speculative venture. They certainly shouldn't have to wonder if they are, or will be, discriminated against, or whether or not they are wasting their time and money as they continue to seek a home. It is often the case that the only reason the tenant is on the market for accommodation is because they were just evicted by the tribunal 'without grounds' and for no other reason than that the lessor/agent wanted to get 'rid' of them and replace them with a stranger who may in fact be a far worse tenant.

9. So far, I've addressed the issue of the hardship of a prospective tenant who has attempted to accept an offer. Consider the invasion to the current tenant in having to allow an unlimited number of strangers through their home when in fact the first 'prospective tenant' had attempted to accept the offer for rent. This would not occur

if all prospective tenants were pre-qualified prior to inspection of any premises, especially where the premises is currently occupied. The first pre-qualified, or prospective, tenant to accept the offer would get the premises and the current tenant would not have to endure an endless line of 'prospective tyre-kickers' through their home, some of whom the agent may have no intention of renting to.

10. Pre-approval, if legally provided for, of someone who attempts to accept an offer to rent a property should be based on that applicant's ability to comply and adhere to the terms of the offered agreement. Pre-approval should not be based on whether or not someone that makes more money, or has no children also attempts to accept the offer. This would seem to be more like an auction and not an offer/acceptance situation.

11. This invasion of quiet enjoyment and privacy is the one reason I always recommend that if a tenant wants to vacate a premises and needs to divest their legal interest in the land, or is being evicted and doesn't seek to dispute the eviction but seeks to minimize their liability for the early termination of the fixed-term, that they self-advertise and find a replacement tenant to take over the tenancy (if the fixed term is still current) and apply to QCAT for a transfer of their interest to the person, if the agent or lessor unreasonably refuses to agree to the transfer, without the lessor's consent.

12. Section 238 of the Act provides that the lessor/agent must act reasonably in refusing the transfer of interest. If the current tenant advertised, and found a prospective tenant who could reasonably maintain the terms of the agreement, and the lessor/agent unreasonably refused to transfer the interest in writing, then the tenant could make an application to the tribunal seeking an order to transfer the interest without the lessor's/agent's consent. The lessor/agent would have to state why they are refusing such a reasonable prospective tenant and satisfy the tribunal that the refusal was not unreasonable in the circumstances.

13. Section 239 of the Act provides matters for the tribunal to consider when determining whether or not to order the transfer of interest. Subsection (3) provides that the tribunal may have regard to the likelyhood of the proposed transferee fulfilling the tenant's obligations under the agreement and the risk of damage to the premises or inclusions.

14. The tribunal is not limited to these two considerations; however, it is unlikely that the tribunal would consider it relevant that the lessor, or their agent, would prefer someone else in circumstances where the proposed transferee can satisfy those terms and conditions.

15. How can it be that a prospective tenant, who responds to an advertisement placed by a tenant, could be much more likely to obtain that premises through the fairness of the tribunal process than they would be if they had responded to the agent's advertisement?

16. This issue affects not only the prospective tenant in terms of fairness and discrimination, it also arises specifically when the current tenant needs to vacate and 'break' their fixed-term provision contained in the lease agreement. None of this would be relevant except for the fact that the penalty for breaking a fixed-term agreement is that the tenant is sued for a re-letting fee which is generally considered to be one weeks rent, advertising costs and rent until the agent finds a 'suitable' replacement tenant.

17. A real estate agent will often wait until they have received many applications/acceptances from prospective tenants before they even contact the lessor for approval. This is time wasted and, unfortunately, the leaving tenant is always charged for it in the inevitable bond dispute. This puts the agent in a position where they can afford to be extremely particular in whom they rent to and many reasonable prospective tenants are simply dismissed after having spent time and money in consideration of the offer.

18. On the other hand, if a tenant finds a transferee there are no additional advertising costs, there is no re-let fee payable and there is no rent until a further 'suitable' tenant is found. There are simply no break-lease fees whatsoever as the lease has not been breached; it has been assigned.

19. Section 57 of the Act provides that a fixed amount for rent must be advertised or 'offered'. Rent bidding is not allowed but you may offer more if you feel like it. What I don't understand about the offer/acceptance issue is how a person can make a counter-offer but cannot accept an offer?

20. Section 192(1)(f) provides that a lessor/agent may issue an Entry Notice to a tenant to enter the premise in order to show the premises to a prospective tenant. If the

person entering a rental premises under this provision is considered to be a 'prospective' tenant, surely they would reasonably be seen to be someone who could accept the offer to rent the premises, the very reason they are entering someone else's home. A real estate agent will always pre-qualify a buyer; this should also be the case with prospective tenants. It is so much harder to discriminate against a family if the only relevant factor is whether or not the prospective tenant can reasonably comply with the terms and conditions of the offer.

21. A notice to enter a rental premises for the purpose of showing the premises to a prospective tenant should be considered invalid unless the person is pre-qualified and is truly a prospective tenant. It takes about ten minutes to do a tenancy database check and contact an employer or view employment or pension details. If the first person to view the premises can reasonably comply with the terms and conditions on offer, then the premises should be theirs if they accept the offer.

22. There is no legal right to refuse acceptance of a contractual offer that has not been withdrawn before communication of acceptance has been received (that I know of). However, this is not how the real estate industry views an offer to rent premises. Until the matter is tested in the tribunal, or a pro-active government makes some needed regulatory changes to resolve the problems and hardships that tenants face due to the real estate industries' view, prospective tenants will continue to drive around in circles while current tenants suffer a breach of their quiet enjoyment through multiple and unnecessary viewings.

Forced Subsequent Agreements

23. There is no legal requirement in the Act which would compel a tenant to always be locked into a fixed-term agreement. Section 70 of the Act provides that a fixed-term agreement continues on a periodic basis unless a notice to leave has been issued to the tenant. The provision provides that the parties may enter into another agreement for the premises but it does not compel such subsequent agreement. It certainly doesn't state that it must be another fixed-term agreement.

24. A residential tenancy agreement does not end when the fixed-term contained in the agreement has elapsed, or expired[2]. A residential tenancy agreement only terminates in way provided for in s. 277 of the Act. This section provides, inter alia, that a

[2] *Du Preez v Linda's Homes Pty Ltd* [2010] QCATA 2 at para [9]

tenancy agreement terminates if a notice to leave is issued to the tenant and the tenant leaves 'on or after' the handover date stated in the notice to leave or notice of intention to leave. If a tenant receives a notice to leave and does not vacate 'on or after' the handover date, then the agreement continues on unaffected by the notice. A lessor, or agent, must make an application in QCAT within fourteen (14) days after the handover date seeking a termination for failure to leave; s. 293 of the Act. There is no legal requirement for a tenant to vacate a property in accordance with a notice to leave. Any statement that the lease has 'expired' is erroneous.

25. Often a tenant will be issued, approximately three (3) months into their fixed-term agreement, another fixed term agreement to sign which takes effect at the expiry of the original fixed-term. Tenants are often told that if they don't sign and return the subsequent agreement they will be evicted on the basis that they failed to sign a subsequent fixed-term agreement and return it. If the tenant fails to sign and return the subsequent agreement, the agent will issue a Notice to Leave 'Without Grounds' to the tenant and seek to evict them. There is no ground provided for in the Act which would allow an eviction based on the fact that the fixed-term contained in an agreement has, or will, expire. A tenant who is told that they will be evicted if they do not sign and return the subsequent agreement, and in fact signs such a subsequent fixed-term agreement, could argue that they signed the contract, or agreement, under duress and that it is not enforceable. The issue of what constitutes 'retaliatory' eviction in the context of a 'without ground' notice to leave is discussed below.

26. It is obvious why a lessor/agent would want a tenant to always be on a fixed-term agreement; a tenant is always subject to 'break lease fees and compensation from that tenant until such time as a new, or replacement, tenant is found for the property. The law does not require a tenant to always be on a fixed-term. The law provides that a tenant may remain on a 'periodic' basis under the current agreement and is given liberty, by the legislature, to remain indefinitely under the original agreement and to vacate 'without penalty' by the giving of fourteen (14) days notice of intention to leave. A notice to leave issued 'without grounds', but on the basis that a tenant refused to subject themselves to further liability by signing a further fixed-term period, should be seen as retaliatory by the tribunal.

27. The issue of real estate agents and lessors threatening to evict tenants because they don't want to sign for a further fixed-term, and always be subjected to these penalties, leads to serious hardship for tenants in almost every case. Tenants in Queensland do not live in six month blocks. The result of tenants signing under duress

is one that leads to loss of bonds for no good reason and a huge cost to the government in terms of funding applications for terminations which are based on hardship and the subsequent, unjustified, claims on tenant's bonds or agents' applications for termination for the tenant's failure, or inability, to leave.

28. A fixed-term agreement must be viewed as a 'minimum' period of time in which penalties may apply. After that 'negotiated' minimum period of time has expired, the tenant should be able to continue to reside at the premises and be able to vacate thereafter, by giving proper notice and without penalty. If a lessor wanted a prospective tenant to be 'locked' into a two or three year fixed-term agreement then that should have been negotiated at the start of the tenancy, not three or four months later under the duress of eviction. It costs thousands of dollars for a tenant to secure alternative accommodation and move.

29. Fixed-term agreements are not necessary other than to ensure that a new tenant will remain in the premises for at least a reasonable, and agreed upon, minimum amount of time. This minimum period of time somewhat compensates the lessor for the lessor's initial costs in finding the tenant and for costs associated in the preparation of documents.

30. There is no real security of tenure in a fixed-term tenancy agreement. Agreements can be terminated on the basis of excessive hardship by either party, which is exactly what I advise tenants to do where there are circumstances beyond their control and they constitute excessive hardship. If, a lessor fails to meet their obligations under a mortgage, the mortgagee in possession can serve notice and evict the tenant irrespective of the tenant's remaining fixed-term agreement. Security of tenure must also be found in a 'periodic' tenancy agreement.

31. There are only two reasons why the real estate industry would seek to force a subsequent fixed-term agreement on a tenant. The first is that they make the tenant forever liable to severe penalties should the tenant need to vacate. The second is that they can force an immediate and unilateral rent increase upon the tenant without the need to issue a rent increase notice and provide two months notice as is required under the Act. Queensland's rents have been artificially driven up through this process of 'sign this lease which has a huge rent increase included in it or else we will evict you'. As the tenant cannot afford the rent increase, and nor can they afford to move, they are forced, under duress, to sign the agreement and then find themselves, shortly thereafter, in a situation of rental arrears and eviction; then comes the

subsequent claim against the tenant for compensation for breaking the very lease they were forced to sign under duress.

32. This cannot have been the intention of the Parliament of Queensland when it provided a provision for the 'continuation of fixed-term agreements' in the Act. The Legislature must make clear a tenant's right to remain in the tenancy on a periodic basis at the expiration of the fixed-term, under the terms and conditions of the existing agreement, as is currently provided for in the Act, and that any notice to leave 'without grounds' issued to a tenant simply on the basis that the tenant is about to go on a periodic tenancy, or is on a periodic tenancy, is, prima facie, retaliatory in nature or clearly state otherwise in the legislation.

Retaliatory Eviction

33. The issue of forced subsequent agreements is an excellent example of 'retaliation' at work. The real estate industry has generally accepted the scheme of only 'doing' six month residential tenancy agreements irrespective of the fact that the potential tenant may be seeking a two or three year fixed-term lease agreement, and, in circumstances where the premises is a 'rental premises' and not someone's primary residence.

34. The reason this is done is that the tenant may be unilaterally evicted from their tenancy/home by the issuance of a 'without grounds' Notice to Leave. If, for example, a tenant falls behind in their rental payments the lessor/agent can issue a Notice to Remedy Breach and provide seven days to remedy the breach. If the breach is not remedied within the remedy period the lessor/agent may issue a Notice to Leave and provide a minimum of seven days to the hand-over date. If the tenant does not hand over vacant possession of the premises on the hand-over day the lessor/agent may apply to QCAT for an order which terminates the tenancy and a warrant of possession.

35. An urgent application in QCAT may take several weeks to occur at which time the adjudicator must consider whether or not the breach justifies termination of the agreement. If, for example, the tenant had paid their arrears by the time of hearing and was in a position to maintain their rental payments for the premises, the tribunal would be unlikely to find that the breach did justify a termination of the agreement and the subsequent hardship and potential homelessness of the tenant and their

family. In any event, this whole process takes approximately one and one-half months before the matter is heard in QCAT and there is often, if properly argued, a good chance that the termination will be refused and the tenant will be allowed to remain in their home. This process applies whether the tenant is in a fixed-term or on a periodic tenancy.

36. Although I have used the issue of rent arrears to illustrate the legal process involving termination for unremedied breach, a breach can be 'allegedly' anything. If a child rides a bicycle on the road in a strata complex in breach of the 'rules' the above process could be followed to seek to evict the tenants from the premises. Would the tribunal find that that child's breach justifies eviction? Not likely, however, the adjudicator might consider the safety of drivers and others, especially, I suspect, the welfare of the child in that situation. What if all the breach notices that were issued to the tenant were invalid? The point is that it would be up to the tribunal to make a careful consideration of all the facts and laws relevant and come to a fair and just decision as to whether or not to evict the tenant on the grounds alleged.

37. Many real estate agents seek to avoid the difficulty of proving that the often minor breach, or breaches, relied upon to justify termination, yet still seek to 'get rid' of the tenant, simply issue a 'without ground' Notice to Leave to the tenant if the tenant is on a 'periodic' tenancy or will be on a periodic tenancy at the point in time when the minimum two month notice period has elapsed. All that protection and fairness afforded to the tenant under the legislative provisions of the Act, which I've just mentioned, have simply vanished. The only protection remaining for a tenant who is issued a 'without ground' Notice to Leave is to argue that the notice is in contravention of s. 291(3) of the Act and is 'retaliatory' in nature.

38. This last protection has been effectively rendered redundant by the recent QCAT decisions of *Bamfield v Zanfan Pty Ltd t/a Main Street Realty Caloundra* [2010] QCATA 1 and *Du Preez v Linda's Homes Pty Ltd* [2010] QCATA 2. (You will note that the issue of retaliation was involved in the first and second residential tenancy application for leave to appeal adjudicated upon in the brand new Queensland Civil and Administrative Tribunal's appellate jurisdiction).

39. In both of these cases the tenants had argued that the Notice to Leave was retaliatory in nature in that the termination request was based on the alleged objectionable behavior of the tenants and/or their children and that the lessor was not seeking 'vacant possession' of the premises but was, in fact, seeking to have that tenant

evicted so that they could put another tenant into the premises. This is clearly not a case where a lessor is seeking vacant possession of their premises for non-retaliatory reasons, but is, in fact, a case of eviction, which must, logically, be based on some causally connected event, of which, causes the lessor, or, more generally, their agent, to issue a Notice to Leave Without Ground.

40. In *Bamfield's* case, it was accepted that the Notice to Leave 'Without Ground' was issued in response to Mr. Bamfield's offensive and unpleasant behavior and that the agent didn't appreciate that behavior and suggested to the owner that they evict him, which subsequently led to the issuance of the notice to leave. Instead of issuing a Notice to Remedy Breach and allow the tenant to modify his behavior and then lodge a Notice to Leave for Unremedied Breach if the behavior continued to be offensive, and then apply to the tribunal for a termination of the tenancy agreement, whereupon, the tribunal would have to consider whether or not the breach justified a termination and warrant of possession; the agent simply issued a 'without grounds' notice and avoided all of that 'trouble'. The agent could have also lodged an 'urgent' application in QCAT seeking a termination for objectionable behavior whereupon the tribunal would make the same considerations.

41. This would have brought the issue of 'objectionable behavior' before the tribunal much sooner than it did as the 'without grounds' notice required the giving of two months notice to the tenant whereas the 'urgent' application could have been lodged immediately and would likely be heard within two weeks. Would the tribunal have found that the long term tenant's behavior justified that the tenant incur the several thousand dollar expense and hardship of being evicted and having to find, if possible, adequate alternative accommodation after many years of taking care of the premises and was otherwise a good tenant?

42. Although the tribunal accepted that the notice was issued in retaliation, or response, to Mr. Bamfield's conduct, it was found that it was not a 'retaliatory act' in the sense as was intended by the legislature when it provided for s. 291(3) of the Act. The President of the appeal tribunal ruled that it could not have been the intention of the legislature to have the word 'retaliatory' read so widely as to protect a tenant from this sort of retaliatory action. He found that the 'act' connoted by the dictionary definition of 'retaliatory' must be directly referable to the matters expressed in s. 291(2). In his decision, the learned President stated;

[21] It is unclear where the onus of proving a Notice to Leave was, or was not,

retaliatory lies under the section. In its ordinary meaning, to 'retaliate' is to return like for like, especially evil for evil; or, requital; or, to take reprisals (Macquarie Dictionary). It connotes a causal connection between the initial act, and the act said to be retaliatory; and, looks to the nature of each act, and the motivation of the second actor.

[22] Although similar provisions have now appeared on legislation governing the landlord/tenant relationship for some time (*Residential Tenancies Act* (Qld) 1994, s 165; (Vic) 1997, s 266; (NSW) 1987, s 65), it does not Appear that their meaning and effect has received judicial attention. There have been some decisions in the NSW Consumer, Trader and Tenancy Tribunal concerning s 65 which focus upon the 'motivation' of the landlord In giving the notice; they reflect the wording of the NSW section, which asks whether the '…*landlord was wholly or partly motivated to give notice of termination by …*' the kinds of matters set out in (Qld) s 291(2)[1].

[23] Section 291(3) requires careful consideration of the particular circumstances of each case in which it is raised. If 'retaliatory' is construed too broadly, almost any complaint by a tenant to an agent or landlord, or even a less than amicable exchange between them, might qualify. It is improbable the legislature intended that the provision would provide the tenant with such an absolute shield.

[24] Rather, the section appears to be designed to protect the tenant who has justifiably taken action of the kind set out in s 291(2) (or something similar has occurred, like non-compliance with an unwarranted or unjustified notice to remedy under s 281) and has then been served with a Notice which is apparently responsive to the tenant's acts but also, in the prevailing circumstances, unreasonable, excessive or vindictive.

[25] It follows that in each case the decision-maker is required to consider the particular facts and circumstances which arise, and determine whether or not they can fairly be categorised as falling within the section.

[26] Here, the relevant circumstances included a long tenancy during which the tenant had regularly asserted his rights in respect of defects in the premises, none of which resulted in a Notice to Leave being issued. Shortly after an incident in which his conduct was offensive, however, a notice was served. That a lessor might reasonably determine that conduct of that kind towards its agents should not be countenanced is hardly surprising.

[1] Nuta v Fahey [2002] NSWCTTT 10; Short v Fedderson [2000] NSWRT 239; Harris Tripp P/L v Sinanovic [2005] NSWCTTT 303; Ni & Ngo v Kovska [2005] NSWCTTT 106; Harken & Cavanagh v Moon [2007] NSWCTTT 465; Public Trustee of NSW v Gourley [2008] NSWCTTT 788; Ferguson v Borg [2009] NSWCTTT 673

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[27] The learned Magistrate said this:

… I think the situation between the agency and the tenant, I had no

> evidence that it is retaliatory; I would have to make the decision on the balance of probabilities, that it is retaliatory. You do appear to look after the property well, but as valid a reason for it being retaliatory, for asking for some things to be repaired, which in fact were – another explanation is that the agents don't appreciate your behaviour, and passed this on to the owner (transcript of hearing, p 11).
>
> And:
>
> I will refuse your application today. I am sorry, but I do not consider it retaliation (transcript of decision, p 2).

[28] These passages indicate a conclusion, on the Magistrate's part, that the Notice was causally connected to an event which involved unacceptable behaviour by the tenant, but it was not retaliatory in the sense s 291 envisages because the conduct leading to it did not involve any assertion of a right by the tenant, followed by a retaliatory act. It was, rather, conduct which persuaded the owner that its relationship with the tenant should not continue.

[29] Other evidence before the Magistrate supported that conclusion: in particular, the fact that he had reported defects or problems or complained about them regularly during the tenancy and had never, previously, been given a Notice to Leave.

[30] She was also entitled to conclude, on the basis both of the evidence and of Mr Bamfield's actual conduct during the hearing that his behaviour towards the agents had been offensive and unpleasant, and that it was
t his conduct which, on the balance of probability, lay behind the notice.

[31] Although her reasons are terse the learned Magistrate, it may safely be inferred, determined that the Notice followed upon Mr Bamfield's behaviour but was not retaliatory in the sense intended by the provision. That conclusion was, for the reasons just set out, open to her and not, in the circumstances, erroneous or unreasonable. The learned Magistrate was also correct to refuse the relief sought in respect of the bond (which was premature) and compensation.

[32] There is, then, no demonstrated or discernable error in the learned Magistrate's decision. An appeal would inevitably fail. All the arguments open to Mr Bamfield have been canvassed; there is no question of importance about which further argument and a decision of the Appeal Tribunal would be of public advantage[2]. Leave to appeal should, then, be refused. In the absence of leave the application for a stay becomes futile.

[2] *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577.

43. I respectfully submit that the learned President erred in finding that the act of the tenant, of which caused the agent to issue the Notice to Leave, did not constitute an act as is prescribed in s. 291(2), and therefore, it could not be retaliation of the type intended by the legislature when it provided s. 291(3). The fact that the tenant can

only defeat a 'without ground' Notice to Leave on the basis of retaliation if the Notice was issued on the basis that the tenant has taken some action of which falls squarely within subsection (2) renders subsection (3) entirely redundant. Section 291 reads as follows:

291 Notice to leave without ground

(1) The lessor may give a notice to leave the premises to the tenant without stating a ground for the notice.

(2) However, the lessor must not give a notice to leave under this section because--

(a) the tenant has applied, or is proposing to apply, to a tribunal for an order under this Act; or

(b) the tenant--

(i) has complained to a government entity about an act or omission of the lessor adversely affecting the tenant; or

(ii) has taken some other action to enforce the tenant's rights; or

(c) an order of a tribunal is in force in relation to the lessor and tenant.

(3) Also, the lessor may not give a notice to leave under this section if the giving of the notice constitutes taking retaliatory action against the tenant.

(4) A notice to leave under this section is called a notice to leave without ground.

Editor's note--

See sections 329(2)(j) (Handover day for notice to leave for premises that are not moveable dwelling premises) and 330(2)(l) (Handover day for notice to leave for moveable dwelling premises) for requirements about the handover day for a notice to leave given without ground for a periodic agreement.

44. The provisions of s. 291 apply irrespective of whether or not the tenancy began as a fixed term agreement or as a periodic agreement. It is also irrelevant that the fixed-term is about to 'go' periodic in nature. There is no 'ground', or 'right', to terminate a tenancy on the basis that the fixed term of the agreement is expiring. The provisions of the Act apply equally in both cases.

45. Subsection (1) states 'that the lessor may give a notice to leave the premises to the tenant without stating a ground for the notice'. Does this mean that a lessor/agent can give this Notice to Leave in order to terminate the tenancy for breach of agreement simply by 'not stating the ground relied upon'? The legislature has provided a lessor the means by which to obtain vacant possession of their premises in circumstances where there are no grounds; it could not have been the legislature's intention that the provisions of the Act relevant to the ground that is not being 'stated', and the avenues of redress provided therein, can be abrogated, or defeated,

simply by 'not stating the ground'. This appears to be a clear misuse of the section. It also appears to be the case that subsection (3) would operates to prevent this misuse if not so narrowly defined.

46. It cannot be seen to be the case that the lessor is seeking 'vacant possession' of their property if the facts of the case show that the lessor has employed the agent to evict the current tenant in order to find a stranger to replace them with as little disruption to their rental income as possible. In fact, often, the lessor has no real position in respect of the eviction of the tenant and it's simply the case that the lessor is acting on the 'advice' of their real estate agent.

47. The learned President found that there was a question as to 'where the onus lay' in terms of s. 291 but did not continue on and decide on the question. It is respectfully submitted that the onus lies upon the lessor/agent to prove that is was not 'retaliatory' in nature; that the Notice was not based upon a ground that was simply not stated, and that it was not the fact that the tenant sought to 'enforce' their rights under their contract or under the Act, whether formally or informally, that led to the agent's desire to evict; and, with consideration of the fact that the lessor's agent may have gotten their 'without ground' Notice to Leave to the tenant before the tenant had a reasonable opportunity to lodge a formal dispute, of which, might satisfy the requirements of subsection (2) of the Act.

48. The *Bamfield* decision was also based on the fact that the NSW's legislation only referred to a focus on the 'motivation' of the landlord in giving the notice in respect of issues similar to Queensland's s. 291(2). NSW did not, at that time, have a similar provision to s. 291(3) of the Qld Act. The learned President referred to NSW decisions based on s. 65 of the NSW 1987 Act. Section 65 of the NSW's 1987 legistation provides:

RESIDENTIAL TENANCIES ACT 1987 - SECT 65

Suspension or refusal of orders for termination

65 Suspension or refusal of orders for termination

(1) The Tribunal may suspend the operation of an order for possession of residential premises (other than premises which are part of the landlord's principal place of residence) for a specified period if it is satisfied that it is desirable to do so, having regard to the relative hardship likely to be caused to the landlord and the tenant by the suspension.

(1A) The Tribunal may, as a condition of the suspension of the operation of an order for possession, require the tenant to pay to the landlord an occupation fee specified by the Tribunal for the period for which the order for possession is suspended.

(2) Notwithstanding section 64, the Tribunal may refuse to make an order terminating an agreement and an order for possession under that section if it is satisfied:

(a) that the landlord was wholly or partly motivated to give notice of termination by the fact that:

(i) the tenant had applied or proposed to apply to the Tribunal for an order,

(ii) the tenant had complained to a governmental authority or had taken some other action to secure or enforce his or her rights as a tenant, or

(iii) an order of the Tribunal was in force in relation to the landlord and the tenant,

(b) that in the case of a notice given by the landlord on the ground of a breach of the residential tenancy agreement by the tenant-the tenant has remedied the breach, or

(c) that in the case of a notice given by the landlord on the ground that the landlord has entered into a contract for the sale of the residential premises-the sale is not proceeding.

(3) In this section, a reference to a tenant includes a reference to a person who has applied to the Tribunal for an order under section 35 (which relates to the recognition of certain persons as tenants).

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49. The NSW Act of 1987 has been repealed and a new Residential Tenancy Act was enacted in 2010. The Residential Tenancies Act 2010 (NSW) has now addressed the issue of 'retaliation' in s. 115:

RESIDENTIAL TENANCIES ACT 2010 - SECT 115

Retaliatory evictions

115 Retaliatory evictions

(1) The Tribunal may, on application by a tenant or when considering an application for a termination order or in relation to a termination notice:

(a) declare that a termination notice has no effect, or

(b) refuse to make a termination order,

if it is satisfied that a termination notice given or application made by the landlord was a retaliatory notice or a retaliatory application.

(2) The Tribunal may find that a termination notice is a retaliatory notice or that an application is a retaliatory application if it is satisfied that the landlord was wholly or partly motivated to give the notice or make the application for any of the following reasons:

(a) the tenant had applied or proposed to apply to the Tribunal for an order,

(b) the tenant had taken or proposed to take any other action to enforce a right of the tenant under the residential tenancy agreement, this Act or any other law,

(c) an order of the Tribunal was in force in relation to the landlord and tenant.

(3) A tenant may make an application to the Tribunal for a declaration under this section before the termination date and within the period prescribed by the regulations after the termination notice is given to the tenant.

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50. Subsection (2)(b) refers to a tenant 'taking any other action to enforce a right'. How will NSW case law address this new provision? What would the finding be if, for example, the tenant had become upset because the lessor, or their agent, were refusing to make repairs or maintain the premises and goes to the agent's office to 'enforce' their right to have the premises properly and lawfully maintained? Perhaps their behavior may be offensive and perhaps unpleasant, while they attempted to enforce their rights, but is the Notice to Leave not 'motivated' by the fact that the tenant was taking an action to enforce their rights? Would it not be more appropriate for the agent to lodge an application for termination for 'objectionable behavior' now that subsection (2)(b) exists? Is the tenant not 'taking an action to enforce their rights'? Would they find that s. 115 was restricted to only those things provided for in the repealed s. 65?

51. Queensland's provision is worded quite differently. Section 291(3) begins with the word 'also'. This connotes 'in addition' to subsection (2). Its interpretation must not be limited to only those things mentioned in subsection (2). Subsection (3) provides for matters that do not relate to subsection (2); such as where the notice was issued because the tenant took 'any other action to enforce their rights' and that act led to the motivation to evict.

52. I respectfully submit that Queensland's legislature intended to give the tenants of Queensland some degree of 'security of tenure' in their homes. For example, s. 82 of the RTRA Act 2008 provides for the continuation of fixed-term agreements. Queensland has also had its 'retaliatory' provision for many years, although it had not, until recently, been judicially reviewed; and now that it has, it has been rendered redundant in the most part.

53. I mentioned the *Dupreez* case above. I submitted submissions on behalf of the Dupreez' family and was successful in the application for leave to appeal but the appeal itself was dismissed due to the decision contained in *Bamfield's* case. The

Dupreez family, which contained several young children, were evicted by a 'new' on site manager, of whom the Dupreez family maintained was attempting to micro-manage the 'raising' of their children and what the children should be allowed to do. The agent issued several breach notices to the tenants about the behavior of the tenant's children and then a notice to leave based on the breach notices. The tenants came to me for assistance in respect of the nonsense and invalidity of the breach notices and the subsequent Notice to Leave. I discussed this issue with the agent/respondent and advised her that the notices to remedy breach did not provide the 'minimum' seven day notice period; she advised me that instead of issuing a 'valid' notice to remedy breach to the tenants she would simply issue a notice to leave 'without ground'…the RTA had advised her that she could simply issue a 'without ground' notice.

54. In this case, the tenant came to a governmentally funded organization (Bayside TAASQ) in order to 'enforce their right to a valid notice to remedy breach' and to put an end to the minor dispute. Perhaps I was negligent in failing to expressly state the reasons I was in the tribunal seeking to represent these tenants and the obvious fact that the tenants had come to me to enforce their rights, however, the fact that the tenant had been issued a Notice to Leave for 'unremedied breach' and was, after my intervention, issued a 'without ground notice' should have put the tribunal on notice of a matter which may well have fallen under the provisions contained in s. 291(2) or could otherwise have been classified as 'retaliatory' in nature.

55. Although the solicitors at the Tenant's Union of Queensland wanted to assist me in a Supreme Court appeal, they were not in a position to indemnify the Dupreez family for costs which might be incurred in appealing a decision that affects every tenant in Queensland and, therefore, the issue remains unresolved. The Dupreez family, although they wanted to appeal the decision, were not in a financial position, after the eviction, to pursue any avenues of redress that may otherwise have been available to them even though I was prepared to act on their behalf for free. I also, could not indemnify them for legal costs which would likely have been awarded if the tenant's argument was rejected.

56. It now appears that in Queensland a tenant may be unilaterally, and with malice, evicted from their homes because they had a 'less than amicable exchange between them'. Surely this was not the intention of our legislature? It appears more probable that the intention of the legislature, when it provided for a 'without ground' notice, was to ensure the tenant's security of tenure and provide that any notice issued to

evict a tenant on the basis of a less than amicable exchange would be set aside as retaliatory in nature and, at the same time, give to a lessor the right to use his premises for a purpose other than as a rental premises if they so choose; but not as a means of preventing the operation of provisions specifically designed to address the 'real' motivation.

57. One must look at the operation and effect any particular interpretation would have on the people it affects. The tenant's reality in respect of its effect is that the tenant is forced to spent large sums of money driving around in circles and applying for as many homes as possible in the hope that they will 'have their offer accepted'. They must also find approximately $2000.00 or more as rent and bond in the event that they do find alternative accommodation. They must often relocate children from schools and daycare units and travel arrangements for access to doctors, dentists, shopping and an endless list of other things that are simply incurred as a result of the 'less than amicable exchange'. These issues cause the tenant and their families an incredible amount of hardship and stress.

58. Imagine the stress of becoming homeless because you do not have enough personal property to pawn at Cash Converters in order to come up with the required bond, rent and moving expenses for the new place. These tenants are referred to the Department of Communities for emergency housing and are told that no accommodation is available and refer them on to organizations such as Mangrove Housing Inc. where they are also told there is no suitable accommodation available and refer them on to other organizations that provide shelter. Parents and children are often precluded from these refuges because of age or sex. These tenants end up living 'rough'. Moreover, they must then prepare for the inevitable bond dispute and lodge notices in the RTA and attend tribunal hearings where they are generally ordered to pay for some cleaning and painting etc. Tenants who are living rough generally don't get notices or lodge them. They generally lose their bonds or a significant part of them as they are often forced to stop paying rent at the current premises in order to help in saving up for the eviction. They may even find that they have been listed on a tenancy database and find that no agent will 'accept' them.

59. The lessor's perspective is that they can kick out a tenant for any reason whatsoever, and, in the process, get the premises 'freshened up' at the expense of the tenant they evict. A lessor can often avoid the expense of repair and maintenance issues, which are often the cause of the dispute, by simply evicting the tenant. The agent's perspective is that they will get a 're-letting fee' and other expenses paid to them by

the lessor under their PAMDA 20A agreement every time a tenant on a periodic tenancy is evicted and they are employed to find a replacement tenant. Finding a replacement tenant is certainly not difficult when there are so many 'prospective' tenants out there that may also have been evicted 'without grounds'.

60. Imagine the situation where a tenant has in fact been successful in obtaining a tribunal order for the 'transfer of interest' to another tenant, or tenants, in circumstances where the lessor was found to have acted unreasonably in refusing consent; would it be reasonable that the lessor/agent could hand the new tenants a two month eviction notice 'without grounds' while the new tenants are still sitting in the hearing room on the basis that they never wanted them in the first place? Would this be seen as retaliatory? Would it be different again if the lessor/agent waited a week?

61. I respectfully submit, that in order to stop this negative and harmful effect, s. 291(3) must be read widely enough, and in context, in order to provide protection to a tenant in terms that might be defined as 'security of tenure'. It must be read widely enough to prevent an eviction which is motivated by a breach of agreement but that ground is simply not stated. It must be read widely enough to prevent an eviction based on a less than amicable exchange between the parties. If the intention of the lessor, or their agent, is to kick one, otherwise good, tenant out and put a stranger in their place, it must connote 'retaliation'. Otherwise, tenants in Queensland will forevermore be required to sign a subsequent fixed-term agreement or be evicted 'without grounds' if they refuse. If they have an argument they can be evicted. If a new property manager doesn't get along with them they can be evicted. It goes on and on.

62. Taxpayers will continue to fund the many millions of dollars the government expends trying to provide services to evicted tenants such as the DOC, RTA, QCAT and TAASQ services as well as others. All a lessor, or their agent, has to do is not offer a subsequent fixed-term agreement to the tenants in order to evict them when the 'arbitrary' fixed-term has expired. This cannot, in my respectful opinion, have been the intention of the legislature, given the unnecessary hardship it causes to both tenants and taxpayers generally.

Conclusion

63. I have raised three separate issues which cause hardship and/or homelessness to the tenants of Queensland. There is one further issue which should be viewed in the

overall context of terminations and that is the bond legislation and how it is effectively unworkable in its current manifestation. However, if these three issues are resolved then the bond dispute will become far less frequent and therefore, I will address it specifically in the near future.

64. Although these are three separate and distinct issues, they clearly interact with each other. For example, termination would not constitute such hardship if the tenant was able to accept an offer. You cannot say that the situation is other than a 'forced subsequent agreement' when, in fact, the tenant will be evicted on the bases of failure to sign a subsequent agreement or be evicted 'without grounds; and where this is not seen to be 'retaliatory in nature' and at law.

65. There are fundamental distinctions between the Qld legislation and the NSW legislation in respect of residential tenancy law. Queensland's Act should be interpreted in accordance with the express laws of Queensland and upon the desired operation and effect held by the Queensland legislature and the citizens and residents of Queensland.

66. If I was a real estate agent, or a shrewd landlord, I would only issue or 'offer' a three month fixed-term agreement and then evict the tenant if I wanted to, and/or, be in a position to increase their rental amount without notice every three months, at which time I also force them into a further period in which they will be liable to penalties if they ever need to vacate. I could have my cake and eat it too! There would be no need, or benefit to me, in signing a six month agreement, or, for that matter, a two year agreement, because I could effectively force a continuous three month fixed-term agreement. What would be the difference? I would still be able to have the tenants pay for the expenses I incurred in having an agent find me a new tenant if I can evict them on the basis of breach of agreement during the three month fixed-term and, if that's not possible and/or they cause me any grief whatsoever, I kick them out by giving them two months notice 'without ground', …no questions asked! I avoid the need to issue a breach notice, followed by a notice to leave and then attend the subsequent hearing where I will have to establish that the breach justifies termination. I would also be in a position to have my premises professionally cleaned at the departing tenant's expense every three months or so if I chose to do so.

67. The intention of the parties at the start of a tenancy agreement is not an intention to have the lessor/agent in a position to unilaterally evict the tenants in a period of only several months time, or in years to come, on the basis of a less than amicable

exchange with a real estate agent, or lessor, whom may be aggressive and overbearing, by way of the issuance of a 'without ground' Notice to Leave. Tenants pay thousands of dollars in order to move into these rental premises, they should not so easily be made to pay thousands more every six months; not where the notice is predicated by the tenant trying to get the lessor/agent to comply with their obligations under the Act and their agreement, whether formally or informally, or where there are other legislative provisions which more appropriately deal with the question of whether or not the tenancy should be terminated in the circumstances of the case.

68. These submissions do not diminish a lessor's rights under the Act in any way. They are still entitled to the terms of the agreement. They are still entitled to their rental income. They can still increase the rent by the giving of proper notice. They are simply denied a right to always have a tenant subjected to penalties after the initial fixed-term has expired.

69. I cannot see the hardship to a lessor in having a tenant, who could have vacated the premises at the expiration of the initial fixed-term without incurring any penalties whatsoever, remain in the premises thereafter for many years and effectively defer their right to leave 'without penalty' to such future date as is convenient for their departure. How can it be correct that if the tenant leaves now there is no penalty but if they stay a bit longer there may well be one? Penalties should only apply during the initial fixed-term of the tenancy agreement and not thereafter.

70. The number of QCAT applications that are currently made will decrease dramatically. Most tenants would be on a periodic tenancy at the end of the initial fixed-term and could simply issue two weeks' notice of intention to leave; there would be very few 'break lease' related claims made in the tribunal where the breach was the tenants' need to leave; there would be far fewer applications for claims against the bond for 'break lease' fees; there would be far fewer applications for termination based on 'hardship' as they could simply issue two weeks' notice and leave; many applications may be avoided by reasonable RTA conciliation which is based on claims that do not involve 'penalties' that could be avoided, or waived, if the tenant makes a tribunal application for termination for hardship; and, there would be far fewer applications to have 'without ground' notices to leave set aside as 'retaliatory'.

71. All of this is possibly by simply stating that a tenant has a right to remain on a periodic basis at the expiration of the initial 'mutually agreed' fixed-term; that they cannot be

evicted on the basis that they are not on a fixed-term; that it is prima facie evidence of retaliation where a 'without ground' notice to leave is used to evict one tenant so that they may be replaced with a stranger; and, that it is a misuse of a 'without ground' notice to leave where its use constitutes seeking to avoid the operation of provisions of the Act which directly relate to the truthful reason for seeking a termination.

72. The phrase 'without stating a ground' cannot be read as referring to a 'ground' that is otherwise provided for; it should be read as being a reference to a 'ground' that is not otherwise provided for. A 'without ground' notice should only be used in circumstances where the lessor is truly seeking 'vacant possession' of the premises and not as an alternative means of eviction.

73. Any assistance you can provide in resolving these issues will be greatly appreciated by not only me, but by every tenant and/or prospective tenant in Queensland.

Thank you,

Jeff Martinsen

5 December 2010

Hon Cameron Dick MP
Member for Greenslopes
Attorney-General and Minister for Industrial Relations
Level 18, State Law Building
50 Ann Street
Brisbane QLD 4000
GPO Box 149, Brisbane QLD 4001

Dear Minister,

1. I seek to raise several issues for your consideration which relate to the operation and effect of the current 'bond' legislation. This legislation causes hardship to tenants and often causes them to lose their bonds, or a large portion of them, unfairly and unjustly.

2. The problem arises as a result of the 'first in, best dressed' operation of Chapter 2, Part 3, Division 3 of the Residential Tenancies and Rooming Accommodation Act 2008 (Qld). The problematic issue applies whether there is only one bond contributor or several contributors.

3. Division 3 operates according to which party gets their 'valid' Bond Refund Form 4 into the Residential Tenancies Authority first, and thereafter, by how payment is directed. The relevance that this has to a tenant is the very reason that the number one thing for a tenant to do when they hand over vacant possession of a premises is to get their form 4 into the RTA as a matter of utter urgency, whether they may owe any money to the lessor or not. If they do not, they may lose their bond in circumstances where the lessor, or their agent, has not, and may not be able to, substantiate their claims against the tenant's bond in a tribunal hearing.

4. Real Estate Agents know the importance, and benefit, of getting the form 4 into the RTA first and will often lodge their form 4 before negotiations with the tenant about alleged breaches even begin. In fact, according to the current interpretation of this legislation, a lessor, or their agent, may lodge their form 4 and claim the tenant's entire bond amount before they have even conducted their final inspection of the premises[1]. There are several reasons that may act to

[1] The incidents where this occurs would be reduced significantly if section 39 of the *Property Agents and Motor Dealers Act (Real Estate Agency Practice Code of Conduct*) Regulation 2001 was strictly enforced. This section provides that an agent must take all reasonable steps to ensure that the final inspection is conducted 'on vacation' of the property…with the tenant present… There is a misconstruction that occurs between this section and the lessor's duty to sign and return an Exit Condition Report to the tenant within 3 working days as is required under the RTRA2008.

motivate the agent to 'claim the bond' but one good example is where the tenant is in some amount of 'alleged' rental arrears at the time of acquiring vacant possession of the premises. The race to the RTA begins!

5. If the RTA receives a valid form 4 from a lessor/agent first and the application directs that a payment be made to the lessor/agent, then, under s. 128(3)(a), the RTA must give the interested person (usually the tenant) a notice under s. 136. A tenant will be sent a Notice of Claim[2] by the RTA and be given 14 days in which to lodge a Dispute Resolution Request into the RTA[3]. What happens next is dependent upon whether or not the tenant gets their Dispute Resolution Request into the RTA prior to 5pm on the date stated in the Notice of Claim.

6. If the tenant lodges their Dispute Resolution Request in time, a conciliation process is initiated under Chapter 6. If conciliation is achieved, the matter is resolved and the RTA pays the money out accordingly. However, if the conciliation process fails, or a party does not wish to participate in the conciliation process[4], the RTA must issue a Notice of Unresolved Dispute to the tenant[5] and advise the tenant that ***they must lodge an application in QCAT and notify the RTA that such application has been lodged within 7 days of the Notice of Unresolved Dispute being issued***[6] or the RTA will pay the lessor/agent's claimed amount to them out of the tenant's bond the following day[7]. I respectfully submit that it is this last requirement that causes all of the tenant's hardship and injustice; it also renders the legislation effectively unworkable.

7. To fully understand the operation and effect of this provision, it is necessary to view it from the tenant's perspective. Although this provision acts equally on all tenants irrespective of the particular reason for handing over vacant possession of the premises, lets assume that the tenant has been evicted from their home by the tribunal on an application for termination for failure to leave after being issued a 'without ground' notice to leave and in circumstances that the tenant felt were retaliatory in nature; and, after pleading with the adjudicator to dismiss the application because there was no good reason to evict them, and, moreover, that they had no money to afford to move and would be rendered homeless if the application was not dismissed. (Not all of these tenants become homeless, but every last one of them is in serious financial hardship). This example illustrates the worst-case scenario.

8. The one thing that might alleviate some of the hardship and injustice that occurs is immediate access to some, or all, of the tenant's bond. This is impossible unless the tribunal makes an order about the bond at the hearing for termination. Generally speaking, this only occurs when the termination is based on rent arrears and the order is in favor of the lessor. Money is almost

[2] *Residential Tenancies and Rooming Accommodation Act 2008 (Qld); s. 136(2)*
[3] s.136(3)(a)
[4] s.406(1)
[5] s.136(3)(c)(iii)
[6] s.136(3)(c)(iv)
[7] s.136(3)

never released to a tenant prior to the giving of vacant possession and would, in any case, only be done with the lessor's consent.

9. The lessor may incur costs in the nature of storage and removal, and possible disposal costs, of the tenant's goods after the police execute the warrant of possession and physically removed the tenants to the sidewalk. The lessor, or their agent, will also claim compensation for having to change all the locks contained at the property. As the tenants stated that they 'had no money', there will likely be further claims on the bond for professional cleaning, steam-cleaning carpets, pest control and perhaps repairs that cannot be ascertained until the final inspection has been completed and, therefore, the bond is not released.

10. In addition to the hardship already experienced, the tenant must now, in accordance with the deadline contained in the Notice of Unresolved Dispute, lodge an application in the tribunal and pay a filing fee, which may be over $80.00, in order to stop the payment of what may be entirely unreasonable and unsubstantiated claims against the tenant. They must then ensure that the RTA receives notification of the tribunal application by the deadline or the bond is paid out. This last requirement is somewhat redundant in that the tenant's tribunal application will proceed whether or not the RTA holds a bond for the premises at the time of hearing[8]; and when the lessor, or their agent, fails to establish their claim's of breach of the residential tenancy agreement, the lessor is ordered to return any money paid to them by the RTA out of the tenant's bond.

11. Assume that the tenant finds the filing fee and complies with all of the requirements necessary to prevent the payout of their money by the RTA under s. 136(3). The first question that is raised is, 'what section of the Act did the tenant lodge the application under'? It is quite clear that the tenant must make the application, but there is no specific, or express, provision to do so under the Act; certainly not one that doesn't lead to absurdity and redundancy.

12. Chapter 6, Division 3 sets out the general powers of the tribunal. There are only two sections in Division 3 that could possibly be applicable or relevant to the application required by s. 136(3)(c)(iv)(A). The first is s. 429 which provides for an application about a 'general dispute' between the lessor and tenant 'about an agreement' and gives the tribunal the power to make any order it considers appropriate in order to resolve the dispute. There are two problems with this being the appropriate, or proper, provision to lodge the application under; the fact that this is an application about a 'general' dispute is one, and the wide, unlimited, discretion given to the tribunal in order to resolve the general dispute is the second.

13. This is not a 'general' dispute between the lessor and the tenant about an agreement; here the lessor is claiming that the tenant has in fact 'breached' the agreement and is seeking compensation for the alleged breach. There is a considerable distinction between the two. A

[8] s..419(4)(c)

general dispute might be properly categorized as something in the nature of a dispute over whether or not a pet was of a type agreed upon or whether the animal's offspring could remain for a period of time at the premises, or other such disputes that do not amount to a claim for compensation for a breach of the agreement. Moreover, s. 419 specifically, and expressly, provides for applications to the tribunal for compensation for 'breaches' of agreement. Would the use of s. 429 in this instance not render s. 419 redundant in the most part? Does the unlimited discretion and power given to the tribunal to resolve a 'general' dispute under s. 429 not also render s. 420 redundant?

14. Section 420 appears particularly relevant. It operates to restrict the tribunal, to some extent, in what it can do, or order, in the event a person makes an application for breach of a residential tenancy agreement under s. 419. Section 421 goes on to specifically address issues the tribunal must consider when determining whether or not to award compensation to a lessor for a tenant's breach of agreement where an application under s. 419 is made. Is it not the case that s. 419 and s. 420 are rendered completely redundant if s. 429(1) can be read widely enough to encompass 'breaches of agreement'?

15. Some confusion as to the proper interpretation of s. 429 may be caused by its proximity to s. 430, which provides for an application to the tribunal by a co-tenant to resolve a dispute about a bond, as between the co-tenants. If the intention of the legislature was, in fact, to enact s. 429 as the means, and provision, by which a tenant prevents the release of their money being paid to a lessor, or real estate agent, from their bond contribution, then surely they would have expressly stated that in s. 429 and not specifically referred to issues relating to general disputes about an agreement.

16. How can it be correct that the tribunal can award compensation to a lessor, under an application lodged by a tenant to prevent the payment of the bond by the RTA to the lessor, for rent payable until either the fixed-term expires or the premises are relet, advertising costs incurred by the lessor in re-letting the premises and any work carried out in order to re-let the premises under s. 429(1) when s. 421(1) expressly provides for those matters of compensation? These are always the claims being alleged in order to obtain the bond money from the tenant.

17. It appears clear enough that s. 429 cannot be the provision intended for use in determining a lessor's claims against a tenant for compensation for breaches of agreement even though it is the provision relied upon by the Small Claims Tribunal for many years and may still be the provision used by QCAT today. QCAT will accept the tenant's application but will not advise as to what section of the Act the application is accepted under.

18. The only other section that might be applicable is s. 419. However, this section has problems that show that it also cannot be the proper section for the tenant to lodge their application to prevent the payment of their bond monies to a lessor, or their agent, in the tribunal. Firstly, the tenant is not claiming that the lessor breached their agreement and they are not consequently

seeking compensation for the alleged breach, they simply don't want the RTA to give any of their money to the lessor; it is the lessor that is claiming that the tenant has breached the agreement and is the person seeking compensation. Secondly, if the tenant's application is properly lodged under s. 419, how can the tribunal award money or other compensation to the respondent under s. 420? Section 420 requires an application about a breach be made in the tribunal which sets out the particulars of the alleged breach, and, for which a filing fee is paid. The tenant's application in this instance discloses no breaches whatsoever. For s. 420 to operate properly there must be an 'application about a breach of a residential tenancy agreement' before the tribunal before it can award compensation to a lessor for the breach.

19. Therefore, in each and every bond related dispute, the lessor must lodge an application under s. 419 in order to obtain compensation under s. 420. The tenant's application to prevent the bond payout at the RTA becomes entirely redundant at the hearing of the tenant's application. I understand that QCAT may now require the lessors and/or their agents to lodge a 'counter-claim' in order to have jurisdiction to hear the lessor's claims.

20. Is this a proper use of a counter-claim? Is a counter-claim not a means by which someone can raise claims against a person whom has raised claims against them? Is it not brought by way of defense? If the tenant has no claims of breach of agreement against the lessor, how can the lessor lodge a counter-claim? How can a lessor, or their agent, initiate s. 419 by way of a counter-claim without paying a filing fee for their claims? Is it not an 'application' lodged under s. 419 and not a 'counter-claim' that s. 420 requires before the tribunal can award compensation? Would it not seem far more appropriate if the lessor actually lodged their application for compensation under s. 419 and paid a filing fee and the tenant be put in the position to then lodge a counter-claim and raise matters that they otherwise were not going to raise in response?

21. Would it not be more appropriate if it was the lessor, or their agent, that was required to lodge an application in the tribunal under s. 136(3)(c)(iv)(A) when a conciliation process has ended without resolution at the RTA? Why is it that it's the tenant who must suffer further hardship, both financially and emotionally, when it is the lessor who is asserting that the tenant has breached the agreement and must, in any event, lodge an application under s. 419?

22. Would it not be more appropriate for the lessor, or their agent, to lodge the application due to the fact that they, especially their professionally trained real estate agents, have ready access to application forms, fax machines, telephones and the resources and knowledge necessary in order to comply with the strict 7 day requirement whereas the tenant may have no money and no real means in which to comply with the requirement?

23. In many cases, even though the lessor was acting unreasonably in determining their claims against the tenant, and would not be able to substantiate those claims at a hearing, the lessor gets their unreasonable claims paid to them simply because the tenant was unable to lodge the

somewhat complicated application in triplicate, pay the filing fee and notify the RTA within 7 days. This allows for unjust enrichment.

24. Given that the lessor, or their agent, must lodge an application in any event, and given that the real estate industry is well placed to lodge such an application whereas the tenant is generally not, and given that the legislation does not provide an actual provision which would allow the tenant to make such an application, I respectfully submit that s. 136(3)(c)(iii) be amended to state, 'the authority gives the lessor, or their agent, a written notice about the ending of the conciliation process and'. Further amend, s. 136(3)(c)(iv)(A) to, 'the lessor, or their agent, does not apply to a tribunal for an order about the payment, and give the authority a written notice informing it of the application, within 7 days after the notice under subparagraph (iii) is given; or'. Similar changes to s. 136(4) would also be necessary.

25. Real Estate Agents know that if they get their form 4 into the RTA first they might get a windfall simply by claiming the bond, when in reality they are not entitled to it. They also put themselves in an advantageous position in that they can say to the tenant, 'if you sign this here form 4 and release to us $400 dollars for the replacement of the fifteen year-old carpet that you stained and a further $300 dollars for re-painting the premises that has not been painted for over ten years as compensation for your three year-old marking a few spots with a crayon, we'll release the balance of $1300.00 in bond immediately, otherwise it may take several months before you see a cent of your bond money'. Many tenants sign money over to the lessor, or their agents, under these very circumstances. Some money is better than no money when one is desperate. The agent knows how many difficult hoops the tenant must jump through and that there is a good chance that the tenant will not comply with, or clear, all of those hoops. Often, an agent, or lessor, will claim the entire bond in their form 4 in hopes of the windfall but reduce their claim substantially if the matter ever goes before the tribunal under the tenant's questionable application.

26. I question the appropriate use of a form 4 (bond refund form) by a lessor, or their agent as a means of obtaining compensation for alleged breaches in any event. They are not seeking a refund of their bond money; they are seeking compensation for an alleged breach. It would seem much more appropriate in the circumstances for a Dispute Resolution Request (form 16) to be lodged in the RTA by the lessor, or their agent. Clearly there is a dispute between the parties involving the tenant's liability for alleged breaches. The bond could quite easily be 'held' pending the outcome of the conciliation process; and, should the conciliation process end without a resolution, the Notice of Unresolved Dispute, and its requirement to lodge a tribunal application within 7 days of the date of issue, would be issued to the lessor, or their agent, in every case and would thereby avoid the erroneous operation of the legislation as it now stands.

27. There are none of the above issues if the tenant races to the RTA and gets their form 4 in first. Now the tenant can just sit back and possibly get their bond back without doing anything. If there's a tribunal hearing, they simply rock up. They may even decide to lodge a counter-claim

and not have to pay a filing fee. The lessor, or their agent is the one that must lodge a dispute resolution request into the RTA within 14 days or the bond gets paid to the tenant. It is the lessor, or their agent, that must lodge an application in the tribunal within a further 7 day time limit. At least in this case, there is no question as to what section of the Act the application was lodged under as it is clearly s. 419 and there is no question of jurisdiction.

28. In conclusion, amending the provisions as suggested, or stopping the use of a form 4 by a lessor, or their agent, would put an end to the whole 'first in, best dressed' concept that most often puts the lessor, or their agent, in a very advantageous position. It would allow the legislation to work as it was intended. It would put the onus upon the person seeking compensation for a breach of agreement to lodge an appropriate application and thereby give the tribunal jurisdiction to hear those claims. It would remove the hardship that a tenant endures when lodging their otherwise redundant application, and it will remove the 'unjust enrichment' that occurs when a tenant cannot comply with the strict requirements as they currently stand. How can it be correct that all of this absurdity should be allowed based only on a question of who gets a form 4 into the RTA first?

29. Imagine how many tribunal applications may be avoided altogether simply because the lessor, or their agent, would be encouraged to make reasonable claims in the first instance and then reasonably negotiate them in the conciliation process knowing that they will have to file and lodge an application in the tribunal within 7 days or the tenant will get their money back if negotiations fail irrespective of the fact that they got their form 4 into the RTA first. Imagine how many TAASQ offices would not have to assist uninformed tenants lodge their tribunal applications. Would it not be appropriate to make the person making the unilateral claims against another person's money, jump through the many and difficult hoops?

Submitted by,

Jeff Martinsen

[redacted]

Hon Cameron Dick MP
Member for Greenslopes

Queensland Government

In reply please quote: 534376/1; J/10/07696; J/10/07756; J/10/07971

Attorney-General
and Minister for Industrial Relations

17 DEC 2010

Mr Jeff Martinsen
[redacted]

Dear Mr Martinsen

Thank you for your emails dated 24 and 28 November 2010 and 5 December 2010, regarding residential tenancy laws.

I note you have raised various issues affecting tenants under residential tenancy agreements. As these issues fall under the portfolio responsibilities of the Honourable Karen Struthers MP, Minister for Community Services and Housing and Minister for Women, a copy of your letter has been forwarded to Minister Struthers for her consideration and direct reply to you.

I would like to acknowledge the significant time and effort involved in preparing your submission.

Thank you for taking the time to raise your concerns with me.

Yours sincerely

Hon Cameron Dick MP
Attorney-General
and Minister for Industrial Relations

Level 18 State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone +61 7 3239 3478
Facsimile +61 7 3220 2475
Email attorney@ministerial.qld.gov.au
ABN 65 959 415 158

Queensland Government

Office of the
Minister for Community Services and Housing and
Minister for Women

Our reference: COM 00005-2011

21 JAN 2011

Mr Jeff Martinsen
[redacted]

Dear Mr Martinsen

Thank you for your emails of 24 and 28 November and 5 December 2010 to the Honourable Cameron Dick MP, Attorney-General and Minister for Industrial Relations concerning residential tenancy laws. Your correspondence was forwarded to the Minister for Communities and Housing and Minister for Women, the Honourable Karen Struthers MP, who has asked me to respond to you on her behalf.

I note from your submissions that the major issues you are concerned with are the notion of 'offer and acceptance' in relation to prospective tenancies, the ability for lessors/agents to issue Notices to Leave to tenants 'without grounds', and rental bond refund processes.

With regards to the legal argument of 'offer and acceptance', the *Residential Tenancies and Rooming Accommodation Act 2008* applies once the parties have entered into a tenancy agreement and does not cover the application process. The exception is where money is taken, such as rent in advance or bond, which may bind the tenant to the agreement and the Act then applies to this financial transaction. The Act also now requires that a copy of the tenancy agreement must be provided to the tenant before accepting a document committing the tenant to enter the tenancy, or before accepting money such as a holding deposit.

In terms of fixed-term agreements, it appears to be a common industry practice to prefer fixed-term agreements over periodic agreements for a variety of reasons, including insurance coverage. The Act does not prevent periodic agreements from occurring, and it specifically provides for this by allowing fixed-term agreements to convert to periodic agreements. This is similar to most other jurisdictions.

The Rental Tenancies Authority (RTA) conducted a thorough review of tenancy legislation which resulted in the *Residential Tenancies and Rooming Accommodation Act 2008*. The issue of lessors and agents, as well as tenants, being able to issue notices to end agreements 'without grounds' was examined extensively during the review, and a number of submissions had been received from tenant advocate groups. The Queensland Government supported the retention of 'without grounds' terminations, but increased the notice period to two months in both fixed-term and periodic agreements to provide tenants with further protection through a longer notice period.

Level 13
111 George Street Brisbane
GPO Box 806 Brisbane
Queensland 4001 Australia
Telephone +61 7 3235 4280
Facsimile +61 7 3210 2186
Email communityservices@ministerial.qld.gov.au
ABN 65 959 415 158

In relation to the bond refund processes, the RTA's statistics indicate that the number of agreed rental bond refunds has remained around the 70 to 75 per cent mark since legislation was introduced in 1989. This indicates that the vast majority of tenants and their lessors/agents agree on how the bond amount is to be released. The process of submitting refund forms where not every party has signed the form is designed to provide all parties with the opportunity to dispute the bond claim, including where the bond dispute is between tenants. The RTA continues to monitor the bond refund processes.

While there are no immediate plans to undertake a significant review of the legislation in the near future, your submissions have been noted by the RTA and will be kept on file to reference in future reviews.

If you require any further information or assistance in relation to this matter, please contact Mr David Breen, Manager, Policy and Education Services, Residential Tenancies Authority on [redacted]

Yours sincerely

David Copeman
Senior Policy Advisor

24 February 2011

Hon Cameron Dick MP
Member for Greenslopes

Re: Minister for Community Services and Housing and Minister for Women's 'response to my residential tenancy law submissions'.

Dear Minister,

I had previously raised several legal issues, which I felt were adversely affecting residential tenants in Queensland, with you. I drafter these issues submissions under four headings; offer and acceptance, forced subsequent agreements, retaliatory evictions; and bond refunds. You felt that it was appropriate to forward those submissions to the Honorable Karen Struthers MP for her attention. Her department's responses to those submissions raise serious concerns.

Offer and Acceptance

The issue of offer and acceptance sought to explain how the Act's 'silence' on the question of when the residential tenancy agreement, or contract, becomes binding on the parties is allowing the real estate industry to conduct 'clandestine' auctions, which of course, are unlawful and lead to hardship and discrimination to decent tenants.

I argued that the fact that the Act does not address this issue is why the Common Law and its contractual indicia must apply and that it is the failure of the real estate industry to understand and apply the law of offer, acceptance, consideration, certainty and intention in their contractual dealings with tenants who seek to accept their offer, is what is causing the problems.

I pointed out that under the Act the lessor/agent must advertise or 'offer' the premises for a 'fixed' price. I pointed out that a residential tenancy agreement may be written, oral and/or implied and that a 'written' residential tenancy agreement may never be provided or signed. So when does the agreement become binding?

My argument is that it becomes binding when the tenant conveys acceptance of the 'fixed-price' offer; that the lessor cannot offer the premises to another tenant once the offer has been accepted; that there cannot be fifteen (15) applications for a premises.

I know of no other Common Law doctrine that would allow an offeror to ignore acceptance and the formulation of a binding agreement in a hope that subsequent offerees may make 'higher' counter-offers.

This problem manifested itself quite clearly in the recent flood disaster. Everyone complained of this exact problem and it made the papers on several occasions. This should not have occurred. The first person that walked into the real estate agency, and accepted the offer, should have been bound by their acceptance as was the lessor. When the second person asked if the premises was still 'on offer' they should have been advised that it was not; that there was a binding agreement already and not waste everyone's time in the hope that a clandestine bidding war will occur, which of course, did.

What is the point of providing that an offer must be at a fixed price? How can someone make a counter-offer but not be able to accept the original offer? Would a person walk into a car rental agency that is offering to rent a car at a fixed price of $40.00 per day and say 'I'll give you $50.00'? Could, or would, the car rental agent be able to refuse the persons acceptance of their $40.00 offer, or tell them they'll 'let them know if the owner will rent the car to them in a few days, so that they can see if someone richer, or with no children, also tries to rent that car and accept their $40.00 offer?

The Minister's response to this issue was that the Act is silent on the 'application' process and only applies once the parties have entered into a tenancy agreement. So when does the agreement become binding? Just because a lessor/agent did not give the tenant a copy of the tenancy agreement does not mean that there is no binding residential tenancy agreement. It is a 'penalty' provision only; it does not affect creation of the contract. Would a tenant who is living in a residential premises for the last two (2) years, on a completely oral and implied periodic residential tenancy agreement, not be bound by both the Act and the implied terms of their agreement? Of course they would.

The Minister's response seems to focus only on when they, incorrectly, believe the tenant may be bound, they are not looking at the important question I have raised; which is, 'when is the lessor bound'?

When this question is properly addressed, you will see an end to clandestine rent bidding and general discrimination. This tenant/landlord relationship is not governed by the Act in isolation, without regard to laws which are not, as yet, codified.

Forced Subsequent Agreements

The issue of 'forced subsequent agreements' has also not been properly identified, or addressed, in the Minister's response. I argued that the Act clearly provides that every fixed-term residential tenancy agreement becomes 'periodic' at the expiration of the fixed-term and that the expiration of the fixed-term is not a relevant consideration for a tribunal when determining whether or not a 'without ground' Notice to Leave should be set aside as being in contravention of s. 291(2) of the Act. There is no ground, or 'right', to terminate a residential tenancy agreement on the basis that the fixed-term has elapsed.

My concern is that tenants are being told that if they don't sign a subsequent 'fixed-term' agreement, which will include an immediate and often excessive rent increase, they will be evicted on the basis that the tenant no longer has a tenancy agreement or any rights under the Act to remain in the tenancy.

I argued that this constituted 'duress', given the hardship and potential homelessness that is the consequence of not signing the subsequent agreement. I argued that I often represent tenants, who were forced to sign under these circumstances, either terminate the agreement, on the basis of hardship, or try to mitigate their losses/liability in a bond claim when the very reason they did not want to commit to a further 'fixed' period occurs and they are required to vacate and 'breach' the very agreement they were forced to sign under duress. There is no right to say, 'sign this or we'll evict you'.

The tenant has a right, under the Act, to remain at the premises on a periodic basis at the expiration of a fixed term and cannot be evicted on the basis that they wouldn't sign a further fixed-term agreement. The Minister's response was, '…it appears to be a common industry practice to prefer fixed-term agreements over periodic agreements for a variety of reasons…'.

I set out the industry's reasons in my submissions; and they included, always having the tenant liable to 'break' a fixed-term and pay for all of the lessor's expenses. They force the tenant into always being unable to vacate with two (2) week's notice, and be continually liable for all rent until a new rent-paying tenant comes along (and that's after twenty- odd applications are obtained), on the basis that they cannot get rent insurance unless the tenant is liable for the loss of rent under the fixed-term and can be made liable to indemnify the insurance broker for their loss.

The Minister's response clearly states that the Act provides for a tenancy to continue on a periodic basis but does not address, at all, the issue of how the real estate industry prevents the operation of the Act by threatening eviction if a further fixed-term is not entered into. They have entirely missed the point. I suppose 'duress' is a Common Law matter, and, since the Act is silent on 'duress', it is not relevant to the Minister, or her representatives.

Retaliatory Evictions

What was relevant to the Minister, or her representatives, was the fact that the Government supported unilateral evictions, irrespective of the operation of s. 82 or s. 291 of the Act, and believed that the answer to this unfair interpretation and operation was to give the tenant a two (2) month notice to leave period; and that this was somehow a 'further protection' to the tenant.

This 'notion', shows the Minister, and her Department's, lack of understanding as to how this 'two month notice period' operates in reality. Recent New South Wales legislation has addressed this issue quite succinctly and is an example of what this Government should provide for its tenants as a 'real' further protection from the hardship.

A two (2) month notice period is entirely useless to a tenant. If, for example, a tenant receives such a notice, and goes out on the first day and is 'extremely fortunate' and is accepted, then, generally speaking, they immediately become liable for two contracts and two sets of rent at the same time. This is untenable; the tenant must inevitably break one of their contracts and subsequently be sued for rent until a 'suitable' tenant is found plus advertising, real estate agent fees and attendance at the inevitable QCAT hearings that ensue.

The only way a tenant can avoid this 'dual' liability is to wait until the two (2) month notice period has almost elapsed and then start trying to accept an 'offer' at a real estate agency. That way, they can simply vacate the premises 'on or after' the hand-over day provided for in the two (2) month 'without ground' Notice to Leave and, thereby, limit their liability.

If they find that they are not as desirable as other 'hopeful' tenants, and are unable to secure a new rental premises in which to call 'home', they can remain at the premises after the hand-over day and the lessor/agent must apply to the tribunal for a termination order within fourteen (14) days of the hand-over day stated in the notice, otherwise the tenant may remain at the premises indefinitely. If an application in the tribunal is made, and the tenant has yet to become 'extremely fortunate', the tenant can plead with the adjudicator for an adjournment in order to allow the tenant, and their family, to find alternative accommodation.

The actual termination hearing may not occur until three or more weeks after the hand-over day, and, in that time, the tenant may have become successful in finding accommodation and the hearing for termination becomes unnecessary, if not redundant, as the agreement is lawfully terminated when the tenant vacates the premises under a Notice to Leave. This is far from ideal, but at least the tenant is not forced to pay two amounts of rent at the same time.

As I mention above, New South Wales has enacted new legislation and has provided that if a tenant is given a termination notice they may leave at any time after the notice is given, 'without penalty'. As this provision is so significant and relevant to the problem caused by the termination notice period, I have set it out below;

RESIDENTIAL TENANCIES ACT 2010 - SECT 110

Tenant may vacate at any time before end of termination notice given by landlord

110 Tenant may vacate at any time before end of termination notice given by landlord

(1) A tenant who is given a termination notice by the landlord, or who gives a termination notice, may give vacant possession of the residential premises at any time before the termination date.

(2) If a termination notice is given by a landlord, the tenant is not liable to pay any rent for any period after the tenant gives vacant possession of the residential premises and before the termination date.

A provision similar to this one would have been a 'further protection' from the hardship that occurs when a tenant is unilaterally evicted on the basis that their three week fixed-term has expired. Three weeks, six months, what's the difference? It's certainly not 'negotiated', and it certainly doesn't reflect the notion of 'a home' or any other notion of security of tenure for a tenant in Queensland. Such a provision would allow a Queensland tenant to actually utilize the 'whole' notice period, irrespective of whether or not the Notice itself contravenes s. 291(2) or (3). It would not resolve the issue of retaliation, but it would lessen the hardship that occurs when a tenant and their family is forced to find alternative accommodation.

It is apparent that the Residential Tenancies Authority, who I understand would be, or is, advising the Minister on this issue, is again reading the Act in isolation. Not one of the parties to this contractual relationship intended that the tenant could, or would, be unilaterally evicted at the end of the 'fixed-term' contained in the agreement, regardless of its length, in circumstances in which the tenant could allege are retaliatory, or otherwise contravene s. 291. The tenant would have entered into any such agreement in the understanding that s. 82 and s. 291 of the Act would apply.

Rental Bonds

The issue I sought to raise in respect of rental bond disputes, was that there is no 'actual', or 'specific', provision in the Act that would allow a tenant to apply to the tribunal for an order which prevents a lessor/agent from obtaining the tenant's bond, and that, in such circumstances, a tribunal's decision to order compensation be paid to the respondent out of the applicant's bond is 'ultra vires'; the respondent has not made the required application.

I argued that the 'first in, best dressed' premise of the legislation caused a serious hardship to tenants who may have no liability for any unsubstantiated allegations of breach of agreement that the lessor/agent might allege.

I further argued, in my submissions, that the tribunal has no 'jurisdiction' to award, or otherwise order, that compensation is to be paid to a respondent who has not made an application under s. 419 of the Act. I also argued that it is an absurdity that a person should have to pay money to lodge an application in a tribunal in order to prevent someone else from claiming, and often receiving, an unwarranted amount of the tenant's money from a rental bond under a provision of the Act that does not exist.

The Minister's response to these issues was to state that 70 to 75 percent of bonds released by them were 'agreed' payouts. I would question this statistic. Does this percentage represent the number of Bond Refund Form's received by the RTA which had all party's signatures, or does it represent the total number of bonds paid out as the result of one of the parties to the bond not lodging a Dispute Resolution Request in the RTA within the short period of time provided for such a lodgment? Does this statistic represent, in some degree, the payout of a bond as the result of a party to the bond dispute not lodging a tribunal application within the seven (7) days provided to them in which to do so?

Does the RTA statistic represent the fact that many tenants will agree to release an amount of their bond, or all of it, to the agent under 'duress'. For example, the agent tells the tenant that if they release $800.00 to them, for carpets, cleaning and the like, without regard to fair wear and tear or depreciation, they will get the remaining amount of bond immediately. Otherwise, it may take several months before a tribunal hearing is held and the tenants won't see a penny of their money until then. Add to this the fact that the real estate industry knows of the major importance of getting their Bond Refund Form into the RTA first and how it places the tenant in a further position of hardship and duress and the tenant, generally, does not.

In any event, the Minister's response focused only on how many 'agreed' bond payouts had occurred and did not address the issue I raised, which is, the legislation's un-workability and the subsequent chaos that occurs when the tenant is required to lodge an application in the tribunal in order to stop the RTA from paying out their bond to a lessor/agent. Again, they missed the point entirely.

I was focusing on what happens to at least 30 percent of all tenants in Queensland, and by any interpretation of the RTA's statistics, this represents a lot of people who experience what I was addressing on a daily basis, and yet, it was not even mentioned in the Minister's response. The issues I raised only occur when the parties are unable to 'agree' on how the RTA should pay out the bond, which makes their perceived 'happy' statistics irrelevant. The erroneous nature of the bond legislation has not been sufficiently addressed in the Minister's response.

Conclusion

In my introduction I raised the fact that there were four areas of the tenant/landlord relationship that were not sufficiently, or properly, addressed in the current Act and sought to have this Government address them in order to either resolve, or lessen, the hardship I was identifying in my submissions, and, thereby, limit the number of tribunal hearings and their associated costs being put to the taxpaying public of Queensland.

With respect, the Minister's approach appears to be one of denial. Not one of the issues I raised can reasonably be seen to have been adequately considered, if considered at all.

In terms of 'offer and acceptance', the response was that the Act is silent on that 'notion'. In terms of 'forced subsequent agreements', the response was that lessor/agents prefer to always have the tenant liable to pay penalties over allowing the tenant the right to remain on a periodic basis and vacate without penalty, as is actually provided for in the Act. In terms of 'retaliatory evictions', the Minister's response was that this issue has been 'adequately' addressed by the Government by the giving of two (2) months notice to a tenant to 'get out'; and in terms of 'bond refunds', the Minister's response to this issue was that 70 to 75 percent of all bonds are paid out by the RTA without a tribunal order which directs how the RTA should make the 'refund'.

I find this response to be somewhat unconscionable in the circumstances. It effectively demonstrates a 'willful blindness' on the part of the Minister and her department in failing to identify the issues I raised, let alone addressing them.

These issues remain unaddressed at present and any assistance you may provide in assisting me in making Queensland a better place to live for its tenants will be greatly appreciated. If these matters are no longer within your portfolio, please forward them on to the appropriate Minister. Thank you.

Sincerely,

Jeff Martinsen

Queensland Government

Hon Karen Struthers MP
Member for Algester

Our reference: H/11/00196
COM 02690-2011

Minister for Community Services and Housing and Minister for Women

23 MAR 2011

Mr Jeff Martinsen
[redacted]

Dear Mr Martinsen

I refer to your correspondence of 24 February 2011 to the Honourable Cameron Dick MP, Minister for Education and Industrial Relations concerning residential tenancy laws. As this matter falls within my portfolio responsibilities as Minister for Community Services and Housing and Minister for Women, your letter has been forwarded to me for reply.

I understand from your email that you are not satisfied with the reply to your correspondence that was forwarded to you on 21 January 2011. The matters outlined in this reply were the issue of offer and acceptance in relation to tenancy agreements; the use of Notices to Leave without grounds to end tenancies; and rental bond refund processes.

Officers of the Residential Tenancies Authority (RTA) have advised me that these issues were thoroughly considered in the last major review of the legislation in 2007–2008. This review ultimately led to the introduction of new legislation, the *Residential Tenancies and Rooming Accommodation Act 2008* in July 2009. While I understand that you have very clear views about these issues, other stakeholders have quite different views. The provisions in the legislation are a balanced response to the competing views of all of the stakeholders with an interest in residential tenancies.

Since the legislation has been in place for a relatively short time, no review of it is currently planned. As you were advised in the earlier reply, your comments have been referred to the RTA and noted for consideration in a future review of the Act.

If you require any further information or assistance in relation to this matter, please contact Mr David Breen, Executive Manager, Policy and Education Services, Residential Tenancies Authority, on [redacted]

Yours sincerely

Karen Struthers MP
Minister for Community Services and Housing
Minister for Women

Level 13
111 George Street Brisbane
GPO Box 806 Brisbane
Queensland 4001 Australia
Telephone +61 7 3235 4280
Facsimile +61 7 3210 2186
Email communityservices@ministerial.qld.gov.au
ABN 65 959 415 158