LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

ECONOMIC POLICY SCRUTINY COMMITTEE

Public Briefing Transcript

12.00 pm, Wednesday, 21 March 2018

Litchfield Room, Parliament House, Darwin

Inquiry into the Residential Tenancies Amendment Bill 2018

Members:

Mr Tony Sievers MLA (Chair), Member for Brennan
Mr Jeff Collins MLA (Deputy Chair), Member for Fong Lim
Ms Selena Uibo MLA, Member for Arnhem
Mr Gary Higgins MLA, Member for Daly

Witnesses:

Mr Douglas Burns: Senior Policy Lawyer, Department of the Attorney-General and Justice

Ms Fiona Hardy: Senior Policy Lawyer, Department of the Attorney-General and Justice

The committee commenced at 12:30 pm.

Mr CHAIR: Welcome, Douglas and Fiona, to the committee. I will introduce the committee members. I am Tony Sievers, Chair of the Economic Policy Scrutiny Committee. This is my Deputy Chair, Jeff Collins. Selena Uibo is one of our members and Gary Higgins is one of our members as well. Gerry Wood is a member of this committee as well. Gerry is running a bit late.

I have to go through some procedural stuff first and then we will get you to maybe do an opening statement or something.

On behalf of the committee, I welcome everyone to this public hearing on the Residential Tenancies Amendment Bill 2018. I welcome to the committee Mr Douglas Burns and Ms Fiona Hardy. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and we look forward to hearing from you both today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee applies. This is a public briefing and is also being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website. If at any time during the hearing you are concerned that what you will say should not be made public, you may ask the committee to go into closed session and take your evidence in private.

Could you please state your name and the capacity in which you are appearing here today?

Ms HARDY: My name is Fiona Hardy. I am a Senior Policy Lawyer with the Department of the Attorney-General and Justice.

Mr BURNS: Doug Burns, also a Senior Policy Lawyer, Department of Attorney-General and Justice.

Mr CHAIR: Thanks, Doug. Would either of you like to make an opening statement to the committee?

Mr BURNS: I assume you have had the opportunity to familiarise yourself with the bill. You obviously were there for the first reading speech and things like that. Is there anything in particular you want us to discuss about what the objectives are? Or are you …

Mr CHAIR: It is open to you, how you want to start. The committee decided to give you a list of the queries we had. You may go through and address that as you feel. The committee may stop you at any time and ask certain questions.

Mr BURNS: Okay. A background, I suppose, from the Territory's perspective is that this has been something that has been ongoing for about eight years. But it originated earlier than that in the late 1980s when credit rating agencies were regulated by the Commonwealth. That then saw a deficiency or a lack of tools that real estate agents and landlords could then access to vet—for want of a better description—potential tenants.

Following that, a number of databases set themselves up in commercial operation just to focus on tenancy-related matters. Through the operation of those in the 1990s it was identified that there were some issues that were arising in how they operated.

The then Standing Committee of Attorneys-General—which is now the Council of Attorneys-General at the national level—undertook some investigations in late 2008–09 and decided that they would then have a coordinated national approach to regulation.

That was based on actions taken by Queensland in 2003, where they also undertook several investigations and came up with their own provisions which they then legislated for. The model provisions which we have introduced mirror, pretty much, what the Queensland base was, with some minor modifications based on the national …

Mr CHAIR: Okay. I open it up to the committee. Any …

Mr COLLINS: What was the nature of the minor modifications?

Mr BURNS: It was just to reflect a national stance. That is effectively what happened there.

Consultation throughout 2009 and 2010 was not only at the national level but also at the jurisdictional level—so in the Territory as well. A draft bill was circulated for public comment and the then Department of Justice undertook that consultation here. On the basis of national feedback, there were some minor amendments that were made to the provisions and then it was settled upon, which is now what is reflected in the bill.

Mr CHAIR: All right.

Mr BURNS: Since then, while other jurisdictions have been enacting it, other priorities have taken place in the Territory. However, there has still been significant stakeholder engagement at the government level. We have been approached on many occasion by various stakeholders, either representing tenants or landlords, in relation to their respective positions.

Mr CHAIR: All right. We have a number of questions here, so I might go through some of those. Feel free to jump in at any time.

NAAJA has expressed concern at the scope of the personal information that may be listed on a database. Can you please outline the extent to which the bill prevents the listing of irrelevant personal information?

Mr BURNS: The proposed section 128 covers that. It limits what can be listed to the name and other information that identifies the tenant. It was a precursor on the fact that the tenant has breached the agreement and the breach has resulted in the tenant owing the landlord an amount of money that exceeds the security deposit, or NTCAT has ordered the termination of the tenancy. That is the information that is allowed to be provided.

It is further qualified by having a requirement that that information is clear, unambiguous, indicates the nature of the breach—for example, that the tenant was in rent arrears and the arrears were more than the security deposit. So, it is just not a matter of listing anybody. There has to be a reason. That reason has to result in either an order of the NTCAT terminating the tenancy or it has been proved that the tenant owes more money than the security deposit was. If it is less than that, there is no listing.

Mr CHAIR: Great. All right.

Mr BURNS: So, there has to be that substance behind it.

Mr CHAIR: All right. A number of submissions raised concern that a co-tenant who has seized the co-tenancy could be listed as a result of the subsequent actions of their former co-tenant. There are a few questions on this. Is it permissible under the bill for a former co-tenant to be listed for actions taken after they have left the tenancy?

Mr BURNS: That one and question (c) are about those who do not remove themselves. So, I will set the setting. With a co-tenancy, you are listed as a party to that contract. So, if Fiona and I were co-tenants, we would both be on there. We are both, jointly and severally, responsible for the performance of that and so we are equally responsible.

Where question (c) comes into it, what happens if somebody moves and they do not take themselves off the tenancy? They are still liable. They are still legally part of that contract. They are still a party.

Mr CHAIR: Right.

Mr BURNS: Where a co-tenant leaves and takes themselves off—they formally have themselves removed—that ends their liability under that contract. They are not responsible for anything that occurs from that day forth. But they are responsible for things that occurred while they were actually a party to the contract. So, in databases and things like that, if there was a breach of the tenancy agreement that occurred while they were a co-tenant, then technically they could be responsible and be listed.

But then, you have to go through that other process, which is that the breach has resulted in them owing money that exceeds the amount of the bond, or the tenancy agreement was terminated by NTCAT. If they left before then and the tenancy agreement is still going on and it does not relate to when they were a tenant, there is no legal avenue to be listed.

Mr COLLINS: How easy is it to amend the tenancy agreement to remove yourself?

Mr BURNS: It is just a matter of negotiating with the landlord and saying, 'I wish to bring this to an end. I wish to be taken off'. If the landlord and the co-tenant are happy with that, it is just a matter of signing a variation, and off you go.

Mr COLLINS: Are tenants ever in a situation where they have a tenancy agreement for, say, 12 months and they want to keep it? If one of the co-tenants leave, is there ever a point where the tenant would fear not having that tenancy agreement amended because there is only one tenant there, one employed person, as opposed to two? Can you foresee a situation where that one tenant would not want to change the tenancy agreement to leave themselves vulnerable?

Mr BURNS: That is a possibility. That is why it comes down to that sort of negotiation. If you have a situation where you have a tenant who wants to leave and the other one does not, then obviously that relationship has broken down, so it is a matter for them to resolve that through …

Mr COLLINS: I can see instances where people will not be thinking about that—there will be a tenant who wants to keep the agreement going. Are there appeal processes? If someone is …

Mr BURNS: No, that is just a contract.

Mr COLLINS: No, in being listed? If someone finds themselves blacklisted because of the actions of their co-tenant after they left a house?

Mr BURNS: Okay. Certainly there are. If you have been listed, you have the avenues of just going to the database and seeing whether you have been listed, or you can challenge that through NTCAT. If the process is followed properly, the landlord would notify the tenant that they were to be listed and the reasons why they were to be listed. You then have processes in place to challenge that. That is under section 130, I think, from memory.

Mr COLLINS: But, does section 130 provide for situations where you have ended that contractual agreement and you find yourself on the list, or in circumstance as I pointed out …

Mr BURNS: If you were not on the tenancy agreement at the time that the event that arose led to the listing, you are not liable because you were not part …

Mr COLLINS: No, I understand. I heard what you said.

Mr BURNS: If you were on the tenancy agreement at that time, then the next stage is that the tenant actually caused the breach. So, if you did not cause the breach, then there is no ground for listing either. Then it becomes a matter of establishing who caused the breach. In order to—and this is part of the process—do things like get the bond back—the bond is the tenant's money. If the landlord wants to access it they have to go to NTCAT and apply for it and provide reasons why.

This is all part of the process that has been established—whether there was actually a breach, whether there was money owing, whether that exceeded the bond and so forth. So, it is an establishment process. There is no automatic listing because it is not capable of being verified at that stage.

Mr COLLINS: The circumstances as said, where I can see that there will be tenants who do not get themselves removed from the contract—they are then still contractually liable because they are on the tenancy agreement. But they actually were not there; they may have vacated six months earlier and the tenant who remains then breaches. Then both of them end up on the list.

Mr BURNS: Well, that does complicate it in so far as they are legally liable for the tenancy.

Mr COLLINS: Yes, I get that.

Mr BURNS: Where the distinction comes through is in section 128. It requires you to establish that the tenant you are listing is the tenant who was responsible for the damage.

Mr COLLINS: Would NTCAT not just look at that and say, 'Well, you are both on the agreement, so therefore you are both contractually liable?'

Mr BURNS: Not necessarily. Even in terms of distributing bonds and things like that, there are plenty of NTCAT decisions that have drilled down into who is actually responsible for what …

Mr COLLINS: All right.

Mr BURNS: … in those situations where someone has not taken themselves off the lease yet.

Mr COLLINS: Okay.

Mr CHAIR: All right. Someone is ringing in. It might be Gerry.

Mr COLLINS: Tell him I have his sandwich.

Mr CHAIR: We will move onto number four. A number of submissions noted that the bill does not include a time limit for creating listing after a tenancy agreement has ended. Why does the bill not limit the time in which a listing can be made?

Mr BURNS: As I was intimating before, it is not an instantaneous thing. It is not a matter of the landlord deciding you have breached the agreement and, therefore, you are listed. You have to go through that NTCAT process first in order to establish where there has actually been a breach, or money is outstanding that is in excess of the bond and things like that.

So, to provide a time frame in which to do the listing, without taking into account the processes which are associated with verifying the listing before it is legally allowed to be put up—creates the possibility of somebody deciding to jump the gun and get a listing in there before that cut-off time and then run the risk of actually being in breach of the Act because they have jumped the gun.

Mr COLLINS: Would it not make sense, though, to have some sort of time at least in which to commence NTCAT proceedings?

Mr BURNS: That is covered by NTCAT generally. From memory, it is something like three years from the event.

Mr COLLINS: Yes, okay.

Mr BURNS: Obviously, it is in the landlord's best interest if they are finding themselves out of pocket because of a breach. That is perfectly within the landlord's rights to commence proceedings and take care of that aspect and, from then, go about doing the listing.

I suppose, on the other end of the extreme is the notion of there not being a time and a landlord that then waits 10 years or something like that. I think that was bandied around at one point.

Mr COLLINS: Yes.

Mr BURNS: The foreseeability of that is probably negligible. It is not something you would be thinking about doing.

Mr COLLINS: Would it not be simple, though, to make a reference to the limitation period and NTCAT?

Mr BURNS: That is something, if you were mindful of doing, we could certainly explore, but it is not something that raises its head as an immediate challenge.

Mr COLLINS: Okay. But it gives some finality to it. It makes the landlords put their minds to whether they are owed money or there is something there that needs to be addressed, rather than just leave it open.

Mr BURNS: Again, that is generally covered off by the limitation period. I would have thought that the primacy would have been the money rather than the listing, but …

Mr COLLINS: You can take that.

Mr CHAIR: All right. A lot of the feedback we are receiving is that the bill does not go far enough. Can you go through a process why? We have obviously followed Queensland and the national one. Some have said it has not gone far enough. Can you give us some …

Mr BURNS: In terms of far enough, are you able to …

Mr CHAIR: There are a number of things we have around—what was the one that was the main …

Mr BURNS: Question six—you had one where the equivalent of the New South Wales legislation only allowed database operators to make a listing at the request of the landlord, in contrast to ours where it talks about a listing, a database operator or a landlord. Or the other way around—a landlord or database operator lists.

Mr CHAIR: Yes, the New South Wales legislation allows a database operator to make a listing at the request of a landlord or their agent. Is there any reason why such a provision has not been included in the bill?

Mr BURNS: Ultimately, what occurs is through the landlord making a request. It is actually the database operator who makes that listing. It is the database operator's database. The national framework was established to provide a bit of a catch-all. It is not only the landlord, it is also the database operator. So, it provides a double opportunity for safekeeping.

In the case of what is proposed in the Territory, if the landlord decides that they want to risk a 20 penalty unit fine or $3000-odd by not complying with the requirements, it then gets to the next stage of the database operator, who then also has to comply with the requirements to notify the tenant and go through that process of verifying the information with the tenant.

That would be the reason why we maintain it, to provide that extra stopgap, so you have two levels to go through in that verification. It provides that protection for the tenant. It also provides protection to the database operator that they then have the opportunity to get involved without risking a fine.

Mr CHAIR: Right.

Mr BURNS: It also allows NTCAT to make orders directly against the database operator to correct the database or remove things if that is required.

Mr CHAIR: Yes, great. All right. Any other questions on that? No?

Mr COLLINS: No.

Mr HIGGINS: Could I ask one from a different angle? We have a database here that is keeping information about tenants. Do we look at the reverse of that—keeping information about landlords?

Mr BURNS: That is being considered in Victoria at the moment as a result of their recent root and branch review of their legislation. There is nothing stopping us from doing that. However, they have a very large government organisation that is able to resource things like that. In order to establish a database and then maintain it—because we are not establishing databases here for residential tenancies; that is on a commercial basis by others. It would require us to actually establish one and then maintain it and the associated costs that would run with that. So, it is probably not feasible, from the Territory perspective, at this stage.

In addition to that, we are a small jurisdiction, so word of mouth gets around a bit as to who is dodgy and who is not. In addition to that, there is also the Agents Licensing Board that publishes disciplinary actions against agents—not necessarily landlords. Given that well and truly over 50% of tenancies are granted through agencies, it is a pretty wide net that is already available.

Mr CHAIR: Gary?

Mr HIGGINS: No. It does not mean I am necessarily happy with the answer.

Mr CHAIR: Okay, very good. Another thing where they have said things have not gone far enough is under the powers of the tribunal. A number of submissions have recommended the inclusion of an unjust clause similar to those in New South Wales, Queensland, Tasmania and the ACT to provide guidance when a tribunal is considering making an order. Without such a clause, what discretion does the tribunal have to require the removal of a listing that is legal but it considers unjust in the circumstances?

Mr BURNS: Again, we are based on the requirement of it being accurate, unambiguous and complete. NTCAT has a broad discretionary power with which to inquire into matters and inform itself fully. It gets the full picture as to what has gone on there.

Where it is found wanting in those basic facts in listings, it has the ability to prohibit the listing or order its removal. There is that contrast, to an extent, between the tenant entering into obligations under the contract and then failing to apply them, against having inaccurate information that is recorded against them.

The NTCAT has that ability to—in accuracy and factualness and to make it unambiguous—inquire into whatever reasons the listing is there, provided it meets those first two primary tests, which are either NTCAT has already terminated the contract or there is an award for a debt against the tenant that exceeds the bond.

Mr CHAIR: Okay. So, you are saying NTCAT takes care of that?

Mr BURNS: NTCAT has a reasonably broad discretion to deal with those things, yes.

Mr CHAIR: Right.

Mr COLLINS: It does have a discretion, but ultimately, if this was a provision that was in the Act it would be something that it would be directed to consider?

Mr BURNS: Yes, a well chance.

Mr CHAIR: So, did we consider that in these provisions?

Mr BURNS: In keeping with the national model it was noticed that New South Wales had those provisions but nobody else has. So, for consistency across the board, we elected to continue with the model provisions and rely on NTCAT to make that discretionary judgment.

Mr CHAIR: Okay.

Mr COLLINS: Along those similar lines is the notification of listing. It is question 10, where section 129(3) talks about the landlord or database operator not being required to provide the tenant and opportunity to review or object to the listing in circumstances where the information is listed on the database, already publicly available from the court and tribunal records.

Given the potential for these situations where somebody leaves and goes to another address, it is quite conceivable that they would have a default judgment against them that they are not aware of. Why would it not be reasonable for them then to be notified?

Mr BURNS: Clearly, those things come down to what the situation was and the circumstances behind it. At a broad sense, it is a matter of engagement of the tenant—the tenant having entered into the contract being engaged with the processes to go about to end the contract.

Mr COLLINS: It would be nice if everyone was engaged all the time, but they are not.

Mr BURNS: That is true, but there is, again, that default position that when a prospective tenant applies for another lease and the agent of the landlord says, ‘Sorry, we will not give it to you’, the landlord or agent is then obliged to notify the tenant that they have been listed and the reasons why, and how to go about dealing with it.

Mr COLLINS: In the meantime, they do not get the house they are looking for or the apartment …

Mr BURNS: That is true.

Mr COLLINS: … which may be an emergency situation. It may be that they really need accommodation.

Mr BURNS: That is true as well. But the purpose of this legislation is to provide some safeguards in the operation of these databases, not to …

Mr COLLINS: I can understand …

Mr BURNS: … provide a rear-guard action for tenants for matters that are really within their control.

Mr COLLINS: Right. Notification and unjust clauses are not necessarily rear-guard actions for tenants. I tend to disagree with you on that. But, it is a reasonable approach in the circumstances, particularly in the Territory. Anyhow, as Gary said, I might choose to disagree.

Mr HIGGINS: I tend to agree. I believe they should be advised. It is not right to presume, when you said people need to be engaged in the implications and the tenant needs to be engaged. But that is presuming that the landlord is above doing something wrong, which I do not think is the case.

Mr BURNS: True. I suppose the base assumption really is the tenant has entered into the contract; they are there for whatever period of time; and then they leave. You would have to be aware, on some base level, as to the circumstances in which you left. You would be aware that you or maybe the Department of Housing has paid for the bond. So, there has been a bond exchange at some point as well.

There are some basic processes in place there, and it is a matter of just how prescriptive we then deal with the termination of a tenancy and the implications that arise from that.

Mr HIGGINS: What we are seeing at the moment is that while we presume that, yes, a contract has been entered into, been signed and money has changed hands, a lot of those large organisations—specifically banks—have not been real kosher in how they have been doing things. It is reasonable to presume that you would need to protect the tenant in some way. That is why I tend to agree that we need to be notifying these people. They are being missed. I cannot see that there is a problem there. I am not inclined to think that everyone follows the law and does everything honestly, otherwise we would not need laws.

Mr BURNS: That is correct. That is one of the reasons why we are here today.

Mr CHAIR: All right. I have a question on fees, for information. Proposed section 132 allows landlords and database operators to charge a fee to provide a copy of a listing. However, the fee must not be excessive. Why is a fee allowed for a person to get a copy of their own listing? How is the fee determined to be too excessive?

Mr BURNS: Okay. The Constitution intervenes there. Quite simply, the Commonwealth has regulated the use of databases through the Commonwealth *Privacy Act*. While it is concurrent, APP or the Australian Privacy Principle 12.8 specifically states that where an organisation charges a person to view or obtain a copy of personal information, that charge must not be excessive. We cannot regulate anything else other than that, otherwise it will be unconstitutional and run the risk of having it invalidated.

The Privacy Principles operate on the presumption that it is not being regulated against. It is, therefore, legal for somebody to charge to access information. Currently, the Commonwealth, through the Privacy Principles or elsewhere, has not made it illegal to charge, so it is a legal right to charge. Where they have regulated it is to say it must not be excessive. That is as far as we can go.

Mr COLLINS: Is it not only invalid insofar as it is inconsistent? If you were to …

Mr BURNS: Invalid insofar as it is inconsistent means it would be read down and our law would be invalid. So, we cannot enforce a no payment.

Mr COLLINS: No. If you were setting or regulating an amount that could not be deemed to be excessive, then would you not be consistent?

Mr BURNS: That would be a subjective test that would be open to challenge. Again, we would be running the risk of it having been invalid. To override …

Mr COLLINS: You could take it to the High Court.

Mr BURNS: … a general presumption to say, 'Okay, this is what we are seeing as excessive' would be open to challenge as well.

Mr COLLINS: Just on that point …

Mr CHAIR: The question on all our minds is, what is the fee that is not excessive?

Mr BURNS: At the moment, fees that database operators charge range between it being free, depending on whether you do it by fax or email, through to $55 for an annual account with one of the database operators. The average there is about $30 in order to access that information.

Mr CHAIR: All right. Transitional provisions: concerns have been raised that the transitional provisions delay a person who was listed on a tenancy database prior to the commencement date from challenging a listing for three months. What was the rationale behind drafting the transitional provisions in this way?

Mr BURNS: They were designed to provide immediate cover for those listings that came into effect after commencement and to allow a database operator the opportunity to retrospectively apply all the requirements to their existing databases. As you could probably appreciate, that would be a reasonable volume of information that had to go through to try to backdate it.

Why we did not apply the appeals process—for want of a better description that is required—is you end up having the unintended consequence of diverting those database resources to dealing with complaints, rather than getting in and addressing the underlying issue of historical records that should not be there anymore. At the end of the three months, anything that is three years old or more is removed. The primacy of it was to get everyone up to speed. It is certainly acknowledged that there is a three-month window there in which somebody may have an issue because they are listed.

An application to NTCAT is not necessarily there, but even if it was, you would probably still have that same three-month period in which to get it addressed. If you were going that way, it does not remove your ability to approach the database operator directly. In fact, you will be alerted to it if you are applying for something from commencement on—that you have been listed.

So, you are getting that protection insofar as you are being made aware that you are listed. It then gives you the opportunity to address it through standard means of dealing with the database operator and explaining the situation, as well as explaining the situation to the prospective landlord. In fact, it is a balancing effect.

Mr CHAIR: Okay. I have one last question. Non-compliance: a number of submissions have advocated for the inclusion of non-compliance penalties for landlords and database operators under proposed sections 130, 131 and 132. Non-compliance penalties have been included in the equivalent sections of the legislation in a number of jurisdictions. Is there any reason why non-compliance penalties have not been included in other provisions in the bill, but not sections 130, 131 and 132?

Mr BURNS: Again, this is something that is covered by the *Privacy Act*. Australian Privacy Principle 13 requires organisations to take such steps that are reasonable to correct information held by them. A failure to do that enables the Commonwealth Privacy Commissioner to commence proceedings and seek enforcement of the obligation to correct, as well as other things like compensation, public notices, ranging through to civil penalties. We thought that was a sufficient avenue in which to address that.

Mr CHAIR: Okay. Anything else from the committee?

Mr HIGGINS: That point was that non-compliance penalties have been included in the equivalent sections in a number of other jurisdictions. You are saying they are in breach of the *Privacy Act*?

Mr BURNS: I do not dare to suggest that. I am just saying we made the decision not to.

Mr CHAIR: Okay, thank you. Any other questions from the committee?

All right. On behalf of the committee, thanks for coming in today and answering those questions. We will go through all the answers and if we have any further we will come back to you. Thank you for your time today. We appreciate you coming to the committee.

Mr BURNS: Thank you, Mr Chairman.

Mr CHAIR: Thank you, Douglas. Thank you, Fiona.

The committee concluded.
