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Proposed changes to the Residential Tenancies Amendment Bill

By Michelle Igasan*

The Residential Tenancies Amendment Bill (No 2) (Bill) provides yet further amendments to the Residential Tenancies Act 1986 (RTA).

The Bill seeks to address a number of current issues, namely: liability for damage to rental premises caused by a tenant; methamphetamine contamination in rental premises and tenancies over rental premises that are unlawful for residential use.

The Bill has progressed to Second Reading stage, which recommends it be passed with various amendments, from there it will go on to be considered and debated further in Parliament. This article looks at each of the three issues set out in the Bill and the amendments suggested by the Select Committee.

Part One:Liability for damage to rental premises caused by a tenant

The Bill clarifies the issue of who is responsible for paying for careless or negligent damage caused to a rental property following the Court of Appeal's decision in Holler v Osaki [2016] NZCA 130 (Osaki), in which the Court of Appeal found the tenant was not liable for her act of carelessness that resulted in fire damage to her rental property. The tenant successfully argued sections 268 and 269 of the Property Law Act 2007 (PLA), which in short excluded the tenant from any liability for any carelessness, or negligence where a landlord holds adequate insurance to cover such damage or destruction.

Until the Osaki decision, there was an assumption these two sections of the PLA did not apply to residential tenancies. The aftermath of Osaki has left landlords in a precarious position of being unable to claim costs of careless damage and any insurance excess from a tenant.

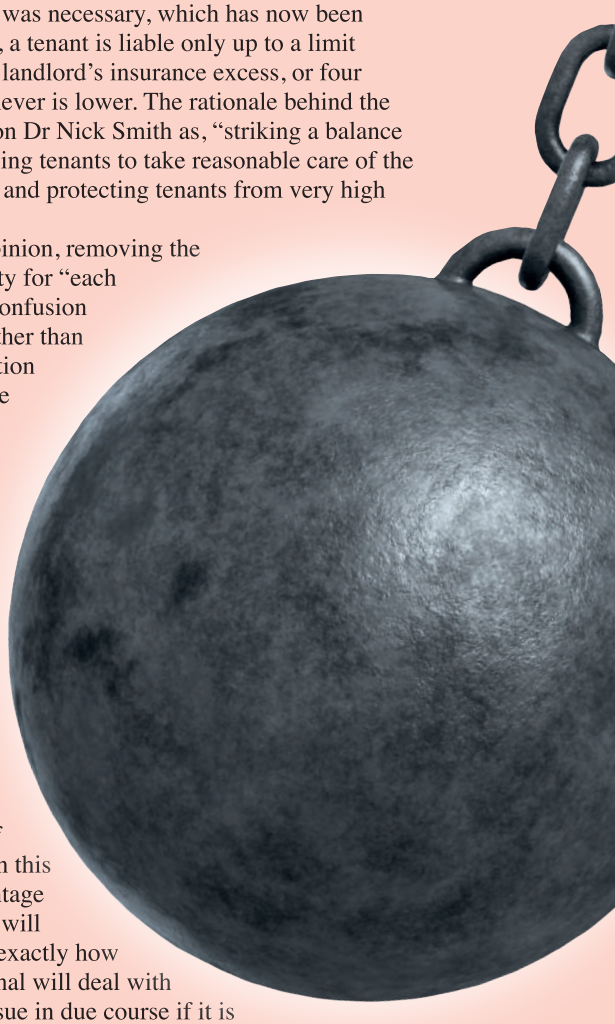
Key sections relating to damage

The Bill seeks to amend current section 49 of the RTA (relating to mitigation of damage for loss) by inserting new sections, 49A to 49E, which provide that a tenant is not liable for accidental or careless damage to premises (including force majeure events: fire, flood, earthquake), nor is a tenant liable for fair wear and tear.

However, the Bill also introduces a new clause 49B, that provides a tenant is not excused from liability where destruction or damage was caused intentionally, or where a tenant's act or omission (although this must constitute an imprisonable offence) has invalidated the landlord's insurance policy.

Under section 49B(7), the onus falls to a landlord to prove that any damage is not fair wear and tear and that the damage or careless act was intentional. Conversely, a tenant is also required to prove the opposite; that any damage was not done intentionally and it was not as a result of a careless act or omission on the part of the tenant.

In respect of the cap on tenant's liability provided in clause 49B(3) the Select Committee did not consider that the previous wording for the cap to apply in respect of "each incident" was necessary, which has now been deleted. Therefore, a tenant is liable only up to a limit of the value of the landlord's insurance excess, or four weeks' rent, whichever is lower. The rationale behind the cap is stated by Hon Dr Nick Smith as, "striking a balance between incentivising tenants to take reasonable care of the premises they rent and protecting tenants from very high cost and risk".



In the writer's opinion, removing the reference to liability for "each incident" creates confusion and uncertainty rather than clarifying the position for landlords. Is the net result now that landlords cannot seek damages from the tenant in respect of multiple claims if the amount exceeded the cap in clause 49B(3)? Does this now mean there is a limit of one claim and one cap regardless of multiple events? If this is the case then this is a gross disadvantage to landlords and it will remain to be seen exactly how the Tenancy Tribunal will deal with this contentious issue in due course if it is enacted in its current form.

A further requirement outlined in the Bill is that it seeks to impose an obligation on the landlord to include in any tenancy agreement a statement setting out the relevant insurance details of the landlord's insurance policy, including insured risks and any exclusions, and making failure to disclose this an unlawful act with a maximum penalty of $500 for non-compliance.

With these new changes on the horizon, landlords should be contemplating undertaking a thorough review of their existing insurance policies to ensure they hold appropriate coverage and to ascertain what exclusions might apply. Particularly as the Bill also removes the insurer's right to subrogation, which could inevitably result in higher premiums being passed on, as insurers seek to mitigate against the risk of providing insurance for which they no longer hold this right.

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Part Two: Contamination in rental premises

The Bill addresses methamphetamine (meth) contamination in rental premises. Part Two of the Bill is designed to protect both landlord and tenants from the effects of meth and to provide some clarity around levels of contamination. The Select Committee recommended replacing references to methamphetamine to a broader reference of "Contaminant", which is intended to encompass not only meth but a range of other contaminants such as asbestos, fungal toxins and lead paint (though this is non-exhaustive). The Governor General by Order in Council would make regulations prescribing substances or classes of substances prescribed as a "contaminant" under the RTA.

Key provisions under the Bill are the landlord's right of entry to test for contaminants, the requirement to provide the tenant with the results of any testing and if a property is seriously damaged so as to be uninhabitable, it gives a tenant a right to terminate at short notice if levels are unsafe (this is the current position under s59 of the RTA and requires just two days notice if premises are destroyed). Contamination thresholds are being prepared for inclusion into the Bill and once determined these will be enforceable before a Tenancy Tribunal. The Bill also provides that in instances where only part of a premise is found to be contaminated, the tenancy can still continue whilst the landlord remediates the partial contamination, although there is a finite timeframe in which to remedy this.

The proposed changes under the Bill mandate greater responsibility on a landlord for testing for contaminants before, during and following a tenancy. It also gives landlords the ability to terminate a tenancy where contaminants are found by an errant tenant (again by reference to section 59 of the RTA, although a landlord is required to give no less than seven days' notice) albeit the requisite contamination threshold must be proved first. The Bill intends that this Part Two will be brought into force on the first anniversary of the date of Royal Assent in order to allow time for regulations to be formulated properly.

Part Three: Tenancies over rental premises that are unlawful for residential use

The Bill also addresses "unlawful residential premises". Unlawful residential premises are premises that cannot legally be occupied by a person where a landlord has failed to comply with all requirements in respect of buildings, health and safety under the RTA (for example: unconsented building work, or work deemed unsafe and/or unsanitary by a Territorial Authority).

The proposed amendment is a direct result of the High Court decision in Anderson v FM Custodians Ltd [2013] NZCH 2423 and now gives the Tenancy Tribunal full jurisdiction regarding cases that are "unlawful for residential purposes".

Once a determination of unlawfulness has been made, the Bill empowers the Tribunal to make various orders such as full or partial rent repayments to a tenant. The Tribunal is also empowered to refuse a termination order made by a landlord on grounds that rent is in arrears, and it cannot order a tenant to pay to the landlord any monetary sum for compensation or damages, although it should be stated that each case will be decided on its merit (these rights are in addition to existing rights and remedies of the parties under the current provisions of the RTA).

Importantly, where a tenancy is unlawful from its commencement date and remains unlawful, a tenant may now terminate the tenancy on giving not less than two days' notice to the landlord (as discussed above).

This aspect of the Bill is significant for landlords who may have carried out, or acquired properties (or commercial units, for that matter) that have been converted for residential use, or for some reason are unconsented, and could set in motion a plethora of claims from tenants seeking to rely on this provision as a financial gain. Landlords should ensure all their rented premises are fully consented.

HARRIS TATE
Lawyers • Notaries

***MICHELLE IGASAN**
is a Senior Legal Executive of Harris Tate Ltd
P +64 07 571 3660 **E** michellei@harristate.co.nz
W www.harristate.co.nz