REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Red Tape Review
Fair Trading Policy
PO Box 972
PARRAMATTA NSW 2124

By email: policy@services.nsw.gov.au

23 January 2013

Dear Sirs,

Reducing Regulatory Burden Issues Paper
Landlord and Tenant Act 1899* and *Landlord and Tenant (Amendment) Act 1948

This submission by the Real Estate Institute of New South Wales (**REINSW** or the **Institute**) is in response to the *Making NSW Number 1 Again: Reducing Regulatory Burden Issues Paper* (the **Issues Paper**).

The REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interests of members and the property sector on property related issues, and in doing so the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

General

The Issues Paper seeks comment on the proposed repeal of six separate pieces of legislation relating to various industries. The REINSW is an industry body representing real estate professionals and is therefore not in a position to comment on aspects other than those directly affecting the property sector. Accordingly the Institute's comments will be confined to the *Landlord and Tenant Act 1899* and the *Landlord and Tenant (Amendment) Act 1948*.

Landlord and Tenant Acts

The Institute is in principle supportive of measures to reduce regulatory burden and the cost of transacting business in NSW. REINSW believes that reducing costs and unnecessary red tape in the property sector will stimulate activity, which will in turn bring the associated benefits to the NSW economy.

The Institute does not oppose the repeal of the *Landlord and Tenant Act 1899*.

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It is the Institute's view that the *Landlord and Tenant (Amendment) Act 1948* should be immediately repealed because it:

- is outdated and uncompetitive;
- disadvantages landlords as it prevents them from being able to use or deal with their properties; and
- adversely affects values of properties which are subject of protected tenancies.

Whilst the Institute recognises that the interests of any remaining protected tenants in vulnerable circumstances should be protected, it is submitted that it is the function of Government to make appropriate arrangements for the care of protected tenants in such situations.

The Issues Paper suggests two options for streamlining the legislation in order to preserve key protections for existing protected tenants. It is submitted that the costs of re-drafting the legislation would possibly outweigh the costs of Government providing alternative accommodation and care for any remaining protected tenants.

The REINSW is therefore of the view that the *Landlord and Tenant (Amendment) Act 1948* should be repealed and that the NSW Department of Housing should put in place a plan to accommodate and care for any affected vulnerable protected tenants who are placed in a position of hardship as a result of the repeal of the legislation.

The REINSW has commented on these issues on a previous occasion – please find enclosed a copy of the Institute's letter to the Commissioner of Fair Trading of 25 October 2011, which contains more detail as to the Institute's reasoning for its position on these issues.

The REINSW appreciates the opportunity to comment on the Issues Paper and would welcome the opportunity to discuss it further.

Yours faithfully,

Tim McKibbin
Chief Executive Officer

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COPY

Rod Stowe
Commissioner for Fair Trading
PO Box 972
PARRAMATTA NSW 2124

25 October 2011

Dear Commissioner,

Thank you for your letter of 13 September 2011 (copy **enclosed**).

Landlord and Tenant Act 1899
The REINSW does not oppose the repeal of the *Landlord and Tenant Act 1899.*

***Landlord and Tenant (Amendment) Act 1948* (the Act)**
Put plainly, this Act constitutes rent control legislation for residential premises. Rent control has few, if any, remaining proponents and even the tenants union concedes that such measures are tough on landlords and that this legislation is not "*...a model for contemporary tenancy law...*"[1].

The Act affects properties under residential leases existing before 1986 which means there are now no, or very low numbers of, affected properties. Fair Trading's best estimate in 2009 was that the Act probably governed "only a few hundred" properties; a decrease from estimated figures of around a thousand at the turn of the century; and down from around 200,000 in 1960. The experience of the REINSW is that the actual number is now probably much less than the "few hundred" previously estimated by Fair Trading.

The REINSW believes that there is absolutely no merit in maintaining the current Act, or carrying forward these provisions in other legislation, unless the actual number of affected properties can actually be determined with certainty. If there are next to no controlled properties left, there is really no barrier to immediately repealing the legislation entirely. After canvassing its entire Residential Property Management Chapter Committee (who have a vast and diverse range of managements between them), the REINSW was only able to locate 1 protected property. This single tenancy is about to end as the tenant has recently given notice. Locating past examples of hardship to landlords, their heirs and dependants, was far easier.

New South Wales' first steps towards fixing rents came with the *Fair Rents Act 1939 (NSW)* which was then partially displaced by Commonwealth regulations. The policy of rent control, when first enacted, was intended to provide security of housing for servicemen and their families 'for the duration'. It was not originally intended to have everlasting operation.

[1] http://tunswblog.blogspot.com/2009/08/landlord-and-tenant-act.html

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That much is evident from the fact that all new lettings and leases were exempted from the operation of the Act in 1954. Further measures to de-control controlled premises came into effect in 1956 and 1958. In 1960, nearly two thirds of all private rentals were still controlled which prompted a Royal Commission, whose recommendations to further unwind the operation of the Act (including a 60% increase of controlled rents (which simply demonstrated how uncommercial controlled rents had become over 20 years)) were ignored.

It is no secret that the Act has encouraged dereliction of properties and was one of the most technically incomprehensible pieces of legislation ever enacted in NSW.

The Act is outdated and uncompetitive. It does not recognise the hardship the legislation places upon a landlord or their dependants or their heirs. Such effects include denying them the ability to live in their own premises, should their own circumstances require it. Having protected tenants also destroys the market value of any protected property denying the landlord any benefit that they may otherwise derive from the equity in the property.

The argument that the repeal of the Act would result in windfall gains for landlords is disingenuous, as it fails to take in to account the tremendous losses incurred by these landlords over many years through the inability to sell or lease their properties at full market rates. The REINSW also rejects that the assertion that no action should be taken as it will impose housing costs upon the government; after all, that is one of Government's functions and, as such, that sort of comment is merely an admission that the sole purpose of the Act is to continually impose an obligation to provide social housing upon private landlords. That was a policy that the then Minister for Fair Trading expressly disavowed during the genesis of the *Residential Tenancies Act 2010.*

The Tenants' Union's argument that the Act should remain on the statute books because old tenancy agreements have been made under it and, that accordingly, they should never be altered is flawed in that it means that policy decisions of one government would never be subject to review by later governments.

The real fact is that many successors in title to the original landlords have never had any opportunity to revisit arrangements which were imposed at a time of vastly different social circumstances.

The immediate repeal of the Act would have an effect on only a very small number of tenants, who could still be able to seek protection in the CTTT. This could be achieved by simply deeming any protected tenancy agreement to be a tenancy agreement for the purposes of the *Residential Tenancies Act 2010* (RTA 2010) to bring them within the provisions of that act. Any affected tenant will also always have recourse to Social housing or, if subjected to a manifestly excessive rent increase following the repeal of the Act, recourse through section 44 of the RTA 2010.

Similar legislation has been abolished in all jurisdictions other than NSW and Victoria. The former government and NSW Fair Trading made much of the principal of adopting the 'best' policy outcomes and legislative provisions from other jurisdictions when drafting the RTA 2010. The REINSW submits that the current government should take note of the complete

absence of this sort of legislation in other jurisdictions and heed their own policy mantra by immediately repealing the Act.

The REINSW submits that the time has come for both Acts under review to be immediately repealed to achieve the Government's stated intention of reducing red tape.

Anything less than a full repeal would be a 'clayton's' repeal as the weight of the statute books would not actually be reduced, as one act would simply be subsumed by another with no real net impact of the amount of 'red tape' governing properties in NSW.

Thank you for the opportunity to contribute to the policy discussion in relation to these important issues.

Yours sincerely,

Tim McKibbin
Chief Executive Officer

Fair Trading

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Mr Tim McKibbin
Chief Executive Officer
Real Estate Institute of New South Wales
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Tim
Dear Mr McKibbin

The New South Wales Government has given a commitment to a 20 percent reduction in red tape and introduced a 'one on, two off' policy for new regulation.

As part of this process, the Government has identified a range of possible reforms to existing legislation to achieve these goals. One such proposal involves the *Landlord and Tenant (Amendment) Act 1948.*

New South Wales and Victoria are the only two remaining States with this legislation on the statute books. Victoria is moving towards transferring tenancies covered by its Act to the general tenancy laws, while at the same time preserving the key protections of the remaining 'protected tenants'. A similar proposal is now being considered in NSW.

The proposal is a preliminary one at this stage and the Government is keen to seek the views of key stakeholders. Before considering a way forward, it is important to identify the approximate number of protected tenancies still in existence. Your advice on how many protected tenants you believe there are in NSW would be appreciated.

It is also proposed to repeal the outdated *Landlord and Tenant Act 1899.* As you may recall this was a recommendation arising from the recent review of the tenancy laws. However, it was not acted upon because it was suggested by some stakeholders that this Act may still be in use. It would be appreciated if you could please advise of any actual cases you are aware of from the last five years where the 1899 Act applied and the circumstances involved.

Your views on the above proposals will be important in shaping the preferred options. Advice on the above matters is sought by 14 October 2011. If you wish to discuss any of the above please contact Ms Virginia McKay, Senior Policy Officer, Fair Trading Policy on 9338 8924 or by email to virginia.mckay@services.nsw.gov.au.

Yours sincerely

Rod Stowe
Commissioner for Fair Trading
13/9/11