REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Submission

Amendments proposed by the REINSW to the

Residential Tenancies Act 2010

and

Residential Tenancies Regulation 2010

To:

The Hon. Anthony Roberts MP
Minister for Fair Trading
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Contents

A. GENERAL INTRODUCTION

This Real Estate Institute of New South Wales (REINSW) submission is in response to the commencement and recent amendment of the *Residential Tenancies Act 2010 (the **RTA 2010**) and the Residential Tenancies Regulation 2010* (the **RTR 2010**).

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 interest of members and the property sector on property related issues, and in doing so the REINSW has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW lodged submissions in relation to the public consultation versions of the *Residential Tenancies Regulation 2009* (RTR 2009) and both the RTA 2010 and RTR 2010 and was (and remains) actively involved in lobbying for changes to both.

The REINSW is grateful for the opportunity to lodge this submission and would be willing to discuss the issues raised by this submission with the Minister and/or policy officers from NSW Fair Trading.

This submission will outline some of the REINSW's objections to provisions of the RTA 2010 and RTR 2010 at both policy and drafting levels and will also include some suggestions for further amendments.

B. RESIDENTIAL TENANCIES ACT 2010

1. Failure to pay rent - "saving tenancies"

Under the RTA 1987, where a tenant failed to pay rent a landlord was able to issue a termination notice and regain possession of the premises if the CTTT was satisfied that it was appropriate to do so. Subsequent payment of arrears was not necessarily a bar to the landlord regaining possession and meant that landlords were in a position to evict tenants who failed to pay rent on time, or at all. Tenants still had the ability to apply to the CTTT to vary, set aside, stay or suspend a possession order to prevent eviction.

Under the RTA 2010, the landlord's ability to enforce payment of rent on time has been seriously weakened as the CTTT's discretion to terminate tenancies has been reduced, if not eliminated altogether in certain circumstances.

Under the RTA 2010, a landlord can be put to significant delay and expense in enforcing payment of rent under a tenancy agreement despite the requirements of section 33(1) of the RTA 2010 (which obligates a tenant to pay rent on or before the day set out in the agreement. It is also interesting to note that the penalty previously proposed for breach of this section by a tenant was subsequently abandoned, weakening its effect substantially. Even if the landlord obtains an order for possession and engages the Sheriff to regain possession, the mere payment of arrears can render any orders obtained by the landlord to be of no effect. This represents a significant power shift in favour of the tenant.

There are no provisions to allow the landlord to recover any interest on arrears or costs 'thrown away' once the tenant pays arrears. So, for example, whilst a landlord's obligations as a mortgagor would continue (which would include the payment of interest on the principal to the mortgagee), there is no corresponding right to obtain interest on arrears payable by the tenant. Such a position is inequitable, and contrary to the stated objects of the RTA 2010, which was to balance the rights as between a landlord and tenant. It is particularly inequitable when the amount of arrears is caused by the delay or obfuscation of the tenant, or by the listing procedures of the CTTT. In some regional areas, a mere adjournment of proceedings can cost a landlord several weeks delay in resolving what should be a simple matter. An amendment to enable landlords, upon application to the CTTT, to recover interest on arrears, and/or for an order for the 'costs thrown away' as a result of the late payment of arrears by a tenant should be inserted into the RTA 2010.

Unless appropriate amendments are made , section 33(1) has absolutely no teeth, as the practice of the CTTT appears to be not to terminate tenancies for breaches of section 33(1), but to make specific performance orders and to 'wait and see' (often for some months) whether the tenant

complies with them. In situations where the tenant is simply unable to pay arrears, all this serves to do is increase the landlord's ultimate loss.

Section 89(5) was inserted into the RTA 2010 after REINSW lobbying as an attempt to redress the balance, but it does not go far enough, and does not provide any guidance as to what 'frequently' means. It also must be specifically pleaded by the landlord, whereas it would be more beneficial if any failures to comply with section 33(1) during the course of the tenancy (whenever occurring), was a mandatory consideration which the CTTT had to take into account when considering any application for termination due to non-payment of rent.

There is also now evidence, following recent applications to the CTTT, that the sheriff is becoming an (involuntary) arbiter of whether or not tenants have, in fact, paid arrears in full, and are adopting a very guarded approach in relation to evicting tenants in accordance with warrants issued by the CTTT. A simple amendment to clarify the fact that the meaning of rent 'paid', means cleared funds received by the landlord (or the landlord's agent), would greatly assist in such situations.

The REINSW submits that the provisions of the RTA 1987 with respect to non-payment of rent worked well and ensured that there was a sufficient incentive upon a tenant to ensure that rent was paid on time. The onus should be upon the tenant to convince the CTTT that any termination order made should be suspended, stayed or set aside, not to have any order 'cease to have effect' upon payment of arrears. The ability for a tenant to cause significant financial hardship to a landlord, by a single continuing deliberate failure to pay rent, should not be underestimated.

If the existing provisions of the RTA 2010 are to be retained, section 89(5) should be amended, as discussed above, to make it a mandatory consideration in all applications for termination for non-payment of rent, and additional provisions to enable the landlord to recover the costs of any enforcement proceedings and/or interest on arrears until the date of payment, should, in fairness, be inserted into the RTA 2010.

Finally, the breach by a tenant of an agreed repayment plan should also be defined as a *per se* breach of a tenancy agreement.

2. Termination of periodic tenancies - liability to pay rent.

Under the RTA 1987, when a landlord gave a tenant 60 days 'no grounds' notice of termination, a tenant was able to counter-serve a 21 day notice of termination and depart at the end of that 21 day period.

This ensured two things. The tenant did not have to stay for the entire 60 days if they had secured alternate accommodation, and the Landlord was assured at least 21 days rent.

Under the RTA 2010 the period of notice which the landlord is required to give with 'no grounds' notices has increased (to 90 days[1]) and the requirement to counter serve notice in relation to a termination initiated by a landlord, has been entirely removed. Instead, the tenant can deliver up vacant possession and pay rent only until that date[2].

Accordingly, when terminating a periodic tenancy, a landlord must now give a period of 90 days notice (increased from 60 days) and has no guaranteed amount of rent in return. This is particularly inequitable when the landlord intends to move back into the property on a certain date (a common example is when they return from an overseas job or holiday), and they are then left with a property with no tenant, no rent and no ability to find a short term tenant given the limited time left until their return. The landlord is penalised twice by the having to give increased notice and by the loss of rent which can then ensue.

The REINSW submits that when a landlord instigates a termination of a periodic agreement and the tenant does not wish to stay for the full 90 days, the requirement that the tenant serve notice on the landlord should be reinstated, and the period of notice should be not less than 21 days (which is the period of notice a tenant would be required to terminate a periodic tenancy).

If, over time, the CTTT adopts a policy of allowing tenants a standard period of 14 or 21 days to vacate premises after they have failed to deliver up vacant possession at the end of the 90 day notice period, then the RTA 2010 will only have achieved the result of increasing the time periods within which a landlord can regain possession of their property. That is not an outcome which will appeal to investors and is not one which balances the rights and obligations of landlords and tenants, contrary to the stated objects of the RTA 2010.

At the very least, the requirement that the tenant serve a notice of not less than 21 days notice should be reinstated.

The REINSW also welcomes the recent decision to insert a new section 110(3) into the RTA 2010 (based upon clause 13 of the RTR 2010 – which was inserted into the regulation after REINSW lobbying).

3. Section 110

The words *"or who gives a termination notice"* should be deleted from section 110(1) of the RTA 2010. The words are inconsistent with the heading and thrust of the section, which deals with terminations initiated by the landlord. Their inclusion would appear to be a drafting error as the subsection would make the giving of any statutory period of notice by a tenant redundant. Why, for example, would a tenant give a 21 day 'no grounds' termination notice in advance, when they could simply deliver an 'immediate' notice with the keys when delivering up vacant possession?

[1] Section 85
[2] Section 110(2)

An amendment to the heading and a new subsection to section 110 (in similar terms to the following) should then also be added for the sake of clarity as to the payment of rent (as this issue has already been the result of some confusion in the industry):

> *"Unless otherwise provided by this Act[3], if a termination notice is given by a tenant, the tenant remains liable to pay rent for any period after the tenant gives vacant possession of the residential premises until the termination date stated in the termination notice."*

A similar concept has already been adopted in the wording of the new section 110(3), which was added by the *Statute Law (Miscellaneous Provisions) Act 2011,* and would give great certainty as to the obligation of the tenant to give paid notice, unless otherwise provided by the RTA 2010, which is currently not sufficiently clear in the current section 110(1) of the RTA 2010.

4. Section 26(2)(a) - Disclosure of sale

The obligations under section 26(2)(a) of the RTA 2010 in relation to disclosure of sale need to be clarified. That section provides (emphasis added).":

> *"A landlord or landlord's agent must disclose the following to the tenant before the tenant enters into the residential tenancy agreement:...*
>
> *(a) any **proposal** to sell the residential premises, if the landlord has prepared a contract for sale of the residential premises,..."*

The REINSW is concerned that several public statements by Fair Trading officers have stated that an agent will have an obligation to disclose any contract which has been prepared for a property, regardless of whether the owner still proposes to sell the property or not. In other words the existence of the contract gives rise to the obligation to disclose.

There are many reasons why an owner will put a property onto the market; including sudden financial hardship, loss of job, death in the family or relocation; and other instances such as those are not always known to the landlord at the time a residential tenancy agreement is executed. Accordingly, the REINSW believes that owners should only be required to disclose *active* proposals to sell (which are current as at the time a tenancy is being considered and for which a current contract for sale has been prepared), not stale proposals to sell which the vendor may have had at some previous time and for which a contract for sale was prepared. In other words, the focus of the section and regulation (and information statement) should be upon whether there is an active proposal to sell at the date the tenancy agreement is entered into, not merely whether a contract is in existence.

See also the discussion of section 100(1)(c) below.

[3] for example section 100 or 110(3) of the RTA 2010

5. Section 100(1)(c) – sanction for non-disclosure on sale

Incredibly poor drafting has resulted in inequitable outcomes for landlords in at least two recent CTTT cases[4] and appropriate amendments are **urgently** required (as has previously been raised by the REINSW with the Minister's office). What is even more disappointing is that these potentially inequitable outcomes were highlighted by the REINSW in its submission concerning the RTA 2009 and that these warnings were then ignored. The situation was again highlighted by the REINSW the night before the RTA 2010 was introduced into parliament and a hasty (yet clearly inadequate) amendment was made. The time has come for the situation to be correctly addressed.

The intention of section 100(1)(c), as represented to the REINSW throughout the course of the drafting process, was that section 100(1)(c) was the sanction for a breach of section 26(2) of the RTA 2010. The nature of the amendment made at the eleventh hour also clearly demonstrates this policy intent. Instead, tenants have been successful in using section 100(1)(c) as a standalone remedy to terminate tenancies by convincing the CTTT to read section 100 independently from section 26.

The transitional provisions of the RTA 2010 are inadequate in that they fail to exclude agreements executed prior to the commencement of the RTA 2010 from the operation of either sections 26(2)(a) or 100(1)(c). Accordingly, the landlords in the *Kutzner* and *Farrugia* cases (whom the REINSW understands are both investors) have now incurred liability for failing to inform tenants of 'intentions' which did not exist (and which they had no obligation to disclose under the RTA 1987) at the date of the execution of the tenancy agreements. The end result is simply absurd. Appropriate amendments to both the transitional provisions, and in linking section 26 and section 100(1)(c), need to be made *immediately*. If not, vendors with fixed term tenancies predating the commencement of the RTA 2010 have no certainty of selling residential properties subject to existing tenancies. The practical difficulties that this interpretation may cause the parties to a contract for the sale of residential land, which provides that the sale is subject to an existing tenancy (which is then subsequently terminated by the tenant), should not be underestimated.

6. Section 75 - Consent to transfer of tenancy or sub letting

The REINSW submits that section 75(3) of the RTA 2010 should be clarified to state that a person is not able to transfer a fractional share of that single person's 'tenancy'. In other words, one tenant should not be able to transfer ½ of their tenancy to another person (such as an occupant) to create 2 tenants – which was previously stated to be an option by a Fair Trading Policy Officer.

The RTA 2010 is also silent as to the method of transfer. It appears that the provisions of Section 23C of the *Conveyancing Act 1919* have not been displaced. However, is the standard commercial practice of preparing a Deed of Consent required (to bind all parties to the assignment and avoid arguments as to the consideration provided for the assignment), or is a simple written memorandum of assignment sufficient? It is assumed that the policy intention was for such transfers to be quick

[4] *Kutzner v Kamp and anor* CTTT RT 11/21677 and *Faruggia*

and expedient and not to require the assignor to obtain legal advice. It is submitted that the RTA 2010 could usefully be amended to provide some better guidance (or, indeed, a precedent form or forms) in relation to this issue.

7. Material fact

The REINSW is still awaiting an update in relation to the rewriting of relevant Fair Trading supervision guidelines as to misrepresentation offences as they affect residential property management. There is still confusion in the market about the interplay between section 52 of the *Property, Stock and Business Agents Act 2002* (PSBA) and the RTA 2010 with respect to property management.

A consequential amendment to the PSBA should be made by the RTA 2010 removing material fact matters relating to residential property management from the ambit of the PSBA entirely.

The harmonisation of the obligation between landlords and agents with respect to defined material facts for residential property management has generally been seen as a very positive step by the industry.

8. Water Efficiency Measures

The REINSW continuously objected to the enactment of what is now section 39(1)(b) of the RTA 2010, which is also governed by clause 11 of the RTR 2010.

The REINSW submitted that there should be the ability for the parties to a residential tenancy agreement, by consent, to opt out of the proposed compulsory water efficiency measures. In other words, the Regulation should provide that no water efficiency measures are required where the parties agree not to install them and agree that the tenant will continue to pay for water usage. This remains REINSW's position.

The REINSW is aware that many tenants are more than happy to pay for water usage, especially for things like hot showers, without being forced to install "investment property" shower heads or other flow restricting devices.

The introduction of prescribed water efficiency measures has been one of the most problematic areas of change for residential property managers under the RTA 2010. The changes have not been well understood by the market; are extremely unpopular with tenants (who have then unfairly vented at their landlords and managing agents); have been addressed in a wide variety of ways by landlords and agents (with many simply raising rents by way of response); and have imposed an additional cost (which are ultimately passed onto tenants) and administrative burden upon landlords with no measureable benefit.

The measures have introduced yet another item which must be managed before, during and at the change of tenancies (as the compliance of any installed measures will need to be verified and documented in a way to ensure any subsequent claim by a tenant in the CTTT can be defended); are of dubious efficacy in actually reducing water consumption; and have resulted in some landlords having to expend further monies to upgrade hot water and other systems which are not low-flow compatible. None of this is conducive to attracting and keeping property investors in the NSW residential tenancies market. The REINSW is also aware that some parties are attempting to contract out of the RTA 2010 in an effort to avoid the implementation of these measures, with the resulting potential for subsequent dispute.

The prior Government grossly underestimated the compliance costs for landlords installing these measures. To suggest full compliance could be achieved by landlords by simply spending around $22 was disingenuous and was quickly debunked when Sydney Water rapidly hiked the costs of the Waterfix program to investor landlords. The actual cost per property is much higher and, as discussed above, will contain an ongoing cost component on top of the initial cost.

The REINSW submits that the imposition of these requirements upon residential landlords was poorly thought out; is inequitable (as no similar requirements were imposed upon owner occupied properties) and that the measures should be deleted entirely from the RTA 2010. Such measures, if thought warranted, should not have been regulated by the RTA 2010, but by general legislation. If the government wishes to impose such measures, they should have applied to all properties not just tenanted properties where they have simply acted to increase levels of cost and dispute associated with the provision of residential properties.

The REINSW calls for section 39(1)(b) of the Act to be immediately repealed.

If s39(1)(b) is not repealed then the NSW Government should publicly ensure that extant programs such as Sydney Water's Waterfix program continue and are adequately funded to reverse the price hike imposed by Sydney Water early in 2010. The Government should also now ensure that:

- Sufficient funding is budgeted to subsidise installation of compulsory water efficiency measures in all rental properties in NSW;
- Water authorities other than Sydney Water should offer similar programs, otherwise regional and rural landlords may suffer disproportionally;
- Ensure that the water authorities offering such programs undertake to convert all necessary taps and fittings in a property as part of their service and not refuse to convert any particular tap or fitting on the grounds that it might be damaged in the process (which the REINSW understands is not an uncommon situation with the current waterfix program). Unless this undertaking is given, the utility of the Waterfix program will be diminished as a plumber will still need to be privately engaged, at some expense, to fix any other items;

- If the provisions are to remain mandatory, there should still be a cost ceiling which governs whether the measures need to be installed (for example, some instantaneous water heaters do not handle low flows well and can turn on, or off, unexpectedly with attendant risks). If a landlord is going to have to incur a significant cost to upgrade a water heater, for example, they should be exempt from installing water efficiency measures.
- The RTR 2010 should very clearly provide that any removal, tampering or damage to installed measures by a tenant constitutes damage which can be claimed from a rental bond.
- The RTR 2010 should also provide that the removal of, or damage to, any water efficiency device(s) by the tenant does not preclude the landlord from recovering water usage from the tenant.

9. Insurance

Landlords should, if they so wish, be able to require a tenant to take out contents insurance for the tenant's goods, at least to a minimum prescribed amount or be absolved of liability for a tenant's goods where the tenant refuses to take out insurance.

Widespread and effective tenant's insurance will reduce claims by tenants in the CTTT for loss or damage to their possessions (which are often argued in the CTTT under the guise of other issues such as security of premises or water damage when goods are inappropriately stored by the tenant). An environment in which tenants can be required to take responsibility for their goods by taking out a basic level of contents insurance will ensure an adequate level of competition in the insurance market.

The inequity in the situation is that a landlord does not currently have an insurable interest in a tenant's goods and cannot themselves insure against a potential liability (which many would otherwise be willing to do).

Accordingly, section 19(2)(b) of the RTA 2010 – prohibited terms – should either be amended to delete insurance for tenants contents from the list of prohibited clauses; and/or consideration should be given to inserting an appropriate section in the RTA 2010 which would permit landlords to require a minimum level of contents insurance to be taken out by tenants and, in default of such insurance being taken out, be indemnified from any liability for any loss subsequently suffered by the tenant.

A further alternative might be to give landlords, by express statutory provision, an insurable interest in a tenant's goods, to enable them to take such steps as they might wish to manage the attendant risks.

The REINSW would also submit that a clause enabling a landlord to insist upon tenants taking out appropriate insurance (for example, public liability insurance) prior to undertaking any 'minor works' be included in section 66 of the RTA 2010).

10. Smoke alarms

There is currently considerable confusion in the market in relation to what the obligation to 'maintain' smoke alarms in properties actually is (incidentally, the term "smoke alarm" is also a term which should be standardised throughout the RTA 2010, RTR 2010 and tenancy agreements, displacing the words smoke detectors, which appear to have crept in from language adopted from another jurisdiction).

However, it must also be asked why the provisions relating to smoke alarms under the RTA 1987 were changed at all. Given their troubled birth, the REINSW is yet to receive a cogent explanation as to why it was felt necessary to amend them in the way that occurred.

The legislation removed the obligation to install new alkaline batteries in non-mains wired smoke alarms on commencement of each new tenancy. Why? The industry had finally come to terms with that requirement and had implemented procedures to comply with it.

The only positive change to the smoke alarms provision was to clarify, but only in the standard form tenancy agreement (not in the RTA 2010 itself in a way which would clearly displace competing obligations under other acts) that tenant's have an obligation to change alkaline batteries during a residential tenancy.

Such a requirement arguably does not affect a landlord's obligations under the *Environmental Planning and Assessment Act* or regulations. If Parliament's laudable intent was to shift responsibility for the maintenance of battery operated smoke alarms to tenants during a residential tenancy, then the inclusion of such a clause in the standard form tenancy agreement may probably not achieve that end.

The EPAA talks of 'maintaining', whilst the regulations made under that act talks about 'functioning'. Neither provides any guidance as to what either of those terms actually mean.

Clearly, immense assistance could be given by, for instance, having the RTA 2010 or RTR 2010 deal, succinctly, with how a landlord or agent can discharge an obligation to provide a working smoke alarm(s) at the commencement of a tenancy (whether battery or hard wired) (e.g. who is qualified to test an alarm and what they must do (or not do) to test it) and to provide that the obligation to routinely 'maintain' such alarms (i.e testing, cleaning and replacing alkaline batteries) shifts entirely to the tenant(s) during the tenancy. Such a clear explanation and delineation of responsibilities would certainly be welcomed by the industry.

A recent approach by the REINSW requesting that such advice be given was rebuffed by NSW Fire and Rescue on the grounds that that department did not wish to commit to an interpretation of the

various legislative provisions about the respective obligations of a landlord, or landlord's agent, or tenant in such situations.

Such a position is absurd, and it is submitted that the Department of Planning, Fair Trading and Fire and Rescue NSW should take some immediate steps to reach a consensus as to what the appropriate procedures are in relation to checking an alarm is functioning and that material outlining what constitutes proper maintenance of an alarm (by what steps and how often) be produced.

The absence of such clear information is currently causing some angst amongst the profession as a number of third party providers are using a variety of scaremongering tactics to frighten agents into signing up for service contracts for their managed properties.

Finally, if the landlord is to retain an obligation to maintain smoke alarms, then a clearer right to access premises for this express purpose should be included in the RTA 2010. As it stands, such a right is arguably only found in the general OH&S/maintenance right of access provisions. Further clarification on such an important topic would be most useful.

11. Tenancy Databases

Prior to its repeal upon commencement of the RTA 2010, the old Schedule 6A of the PSBA previously governed tenancy databases.

Where a tenant was listed for non-payment of a debt, if that debt was paid within 3 months of the listing, the listing was required to be amended to delete reference to the debt, and be deleted within 7 days of the agent notifying the database owner of the payment of the debt (refer clause 6(c) of Schedule 6A).

Where a tenant was listed for non-payment of a debt, if that debt was paid **after** 3 months of the listing, the listing was required to be amended to show that the debt had been paid, within 7 days of the agent notifying the database owner of the payment of the debt (refer clause 6(d) of Schedule 6A).

Clause 6(3) also provided:

> *"(e) if a person has been listed on the database for a reason other than for non-payment of a debt, the personal information relating to the listed person must, on the third anniversary of the date of the listing:*
>
> > *(i) be amended to delete any reference to the reason for the listing, and*
> >
> > *(ii) be deleted entirely from the database (unless the person has also been listed for any one of the reasons referred to in clause 4 (2) for less than 3 years)."*

There was no corresponding provision in the regulation in relation to the situation where a person had been listed **for** non-payment of a debt, and the debt had **not** been paid.

Accordingly, non-payment of a debt was an exemption from the requirements to delete listings from the database on the third anniversary of the listing. That is a circumstance which accords with common sense.

Section 218 of the RTA 2010 now provides:

> ***"Limit on period of listing***
>
> *(1) A database operator must not keep personal information in the operator's residential tenancy database for longer than:*
>
> *(a) if the national privacy principles require the operator to remove the personal information within a stated period of less than 3 years—the stated period, or*
>
> *(b)* ***in any other case—3 years.***
>
> *(2) However, this section does not apply to a person's name if it is necessary to keep the name in the residential tenancy database for the purposes of other personal information about the person in the database that is not required to be removed under this section or another law.*

Accordingly, the effect of this change appears to be that whilst the 3 year limit did not previously apply to listings for non-payment of a debt, a 3 year limit now does apply to listings for all listings including for the non-payment of a debt.

In circumstances where a CTTT order can be registered as a judgment of, and enforced through, say, the Local Court (for a period of up to 12 years – refer section 17 of the *Limitation Act* 1969 (NSW)), why should landlords only be able to be aware of that 'live' debt for a period of 3 years? It is in no way unusual in the industry for "old" debts to be paid, years after listing, as the tenant wishes to secure a new tenancy and the only way to ensure that the tenant can present a clean tenancy history to a potential landlord is to pay all outstanding debts.

Section 218 of the RTA 2010 has the effect of now protecting tenants who fail to pay their debts at the expense of landlords (despite the stated objectives of the RTA 2010), merely because it might be *convenient* for a tenant not to be listed. It is inequitable to deny this information to a prospective landlord. It is submitted that the easiest way for a tenant to ensure a listing based upon non-payment of a debt is appropriately expunged, is to simply pay the debt.

It would be more appropriate for section 218 to provide that a database operator is not required to delete any listing based upon the non-payment of a debt, where the debt is the subject of a judgment which is still capable of enforcement.

12. Sale of tenanted properties – termination orders and applications for possession

The wording of section 86(4)(a) of the RTA 2010 should be amended from:

> *"...(4) The Tribunal may, on application by a landlord, make a termination order if it is satisfied that:..."*
>
> *to*
>
> *"...(4) The Tribunal must, on application by a landlord, make a termination order if it is satisfied that:..."*

If the CTTT is satisfied as to the matters contained in section 86(4)(a) and (b), there should be no reason why the order should not be made. The situation where a landlord is selling premises with the standard 42 day settlement period is precisely the time that a landlord requires certainty in relation to regaining vacant possession.

Currently, when a tenanted property is sold, and the tenancy is outside the fixed term, the landlord is able to give a termination notice pursuant to section 86. However, where a tenant refuses to deliver up vacant possession, the vendor can be caught out by the strict timeframes which are usual in a standard conveyancing transaction. In transactions where the usual 42 settlement period applies, there is very little margin for error where a 30 day notice period is required to be given to a tenant. The tenant is therefore well placed to easily retaliate by refusing to deliver up vacant possession on the termination date.

The current, usual, 2 -3 week wait for a listing date and the further 7 days usually ordered by the CTTT for the tenant to deliver up vacant possession, puts transactions at risk and exposes landlords to unexpected liability.

In such circumstances, it would be of great utility to landlords to be able to make application to the CTTT, in a fashion similar to that specified in section 88(4), to ensure that if a dispute arises in relation to the delivery of vacant possession, it can be dealt with expeditiously before the CTTT rather than putting a conveyancing transaction at risk. Allowing the early filing of applications would allow matters to be listed contemporaneously with the termination date. Any such listing which is not ultimately required, can then simply be vacated.

Alternatively, section 86 could simply provide that the CTTT must list such matters within a limited time (a few days at most) following the filing of an application by the landlord. This would provide certainty for the landlord, rather than the current case where there is no certainty that their circumstances would merit expedition.

It is submitted that either approach would work equally well.

13. Holding Fees

Section 24(3) of the RTA 2010 does not take into account two practical issues which commonly arise for landlords and their agents.

Firstly, not all tenants contact the landlord or agent to confirm that they will not be proceeding with a tenancy, even though they have no intention of doing so. Accordingly, the landlord must sit on their hands and await the end of the 7 day period before continuing with their marketing and liaising with other prospective tenants. This prevents other tenants from securing the property and results in inconvenience for them. It would assist in such circumstances if the conduct of the tenant could be taken into account when determining whether the tenant has notified the landlord that they no longer wish to enter into the agreement. A tenant's conduct such as failing to attend an appointment to execute a tenancy agreement (on one or more occasions), could simply be deemed by the RTA 2010 to amount to a refusal by a tenant to enter into the tenancy agreement, which would allow the landlord to move on and service other prospective tenants.

The second issue is that whilst the parties might agree to extend the holding period for any number of weeks, landlords are sometimes reluctant to do so (which disadvantages tenants), as section 24(1)(b) only allows them to charge a maximum of 1 week's rent. It would give greater certainty for both landlords and tenants if the RTA 2010 allowed the holding fee to be increased on either a pro-rata basis, or even just on an agreed amount exceeding 1 week's rent, to enable both parties to have greater comfort that a tenancy will be secured pending the execution of a tenancy agreement, and adequate recompense if it doesn't.

14. Short Term Rentals

As previously submitted by the REINSW in its submission about the *Residential Tenancies Bill 2009*, the REINSW believes that there is merit in exempting from the operation of the RTA 2010, a class of agreements under which furnished properties are let for the purposes of 'executive' or short term rentals. Such accommodation is often used for stays longer than would usually be taken in a hotel, but where a longer term residential tenancy is not appropriate, **nor desired** by the parties.

Such accommodation is often used by people needing temporary accommodation whilst they locate a more suitable property for a longer tenancy, or by people who need short term accommodation for a particular purpose (e.g whilst working on a particular short term project), but who do not wish to create, or have to then finalise, a more formal landlord/tenant relationship. An exemption for letting agreements relating to furnished premises with terms of less than 3 months would be appropriate. The REINSW would be pleased to discuss this proposal further.

15. Section 42 – rent increases

The REINSW notes with approval the recent changes to section 42 by the *Statute Law (Miscellaneous Provisions) Act 2011),* which harmonises the obligations under section 41 and 42 to notify the tenant of the amount of the *increased rent*, rather than the *amount of the increase*.

However, the change in terminology from "more than 2 years" to "2 years or more" was not expected and simply introduces another source of confusion into the market. The reason for this is quite simple: by nominating a 2 year fixed term tenancy, a landlord will be bound to a limit of 2 rent reviews during that 2 year fixed term.

This change will probably simply lead to the practice of terms of tenancies being nominated as 1 year and 364 days to overcome this recent amendment. It will not be surprising to find many landlords will become unwittingly bound to 2 rent reviews during a 2 year fixed term.

Whilst that may have been the express intention of the amendment it would be interesting to know why such a change has been made given one of the stated policy objectives of the RTA 2010 was to increase the number of longer term residential tenancies, not to make their administration trickier.

The better amendment would simply have been to amend section 42(1) by changing the words "not more than 2 years", to "2 years or less".

It is also interesting to note that whilst the terminology in section 42 was amended, the same terminology in section 99 wasn't.

16. Signage for sale and letting of premises and open houses

Sections 55(2)(e) and (f) of the RTA 2010 provide clear guidance as to the rights of the vendor/landlord to gain access to the premises to show the premises to prospective tenants and prospective purchasers (who may even wish to buy the premises subject to existing tenancies). One issue which is not as clearly dealt with is the vendor's or landlord's ability to erect signage for the sale or letting of the premises. Another is the absence of a clear right to conduct an open house which is a usual method adopted for marketing properties.

Where a vendor's or landlord's agent has complied with their obligations under the *Property, Stock and Business Agents Regulation 2003* to inform the tenants of the sale of the premises; or has complied with their obligations under the RTA 2010 in relation to the giving of the specified notice of the termination of a fixed term or periodic tenancy, the vendor or landlord should immediately be able to affix appropriate signage to the premises to protect their commercial interests and to have their agent market the property through all available methods. Currently, a tenant can frustrate the sale or letting of the premises by refusing to consent (usually on 'privacy', 'security' or 'quiet enjoyment' grounds) to the erection of any signage in retaliation for the vendor's or landlord's decision to sell or re-let the premises. They could also, arguably under the wording of section 55(2),

refuse access to anyone who the ***tenant*** does not believe might be a 'prospective' purchaser or tenant.

The REINSW submits that this was clearly not the intention of the RTA 2010 which should clearly contain a right for the erection of signage and for the conduct of inspections and open houses in such circumstances.

17. Section 66 – minor works

Subsections 66(1), (2) and particularly subsection 66(3) are poorly drafted. Subsection 66(2) is presumably relating to the *installation* of a fixture. The drafting of subsection 66(3) should be reviewed. It may be that the words "alteration, addition or renovation to the residential premises" should be substituted for the words "action by the tenant that is permitted under this section".

18. Sections 78 and 108 - Death of tenants

Section 78 of the RTA 2010 provides that a co-tenant can terminate upon giving a landlord 21 days notice following the death of a co-tenant, but the REINSW notes section 108 of the RTA 2010 provides no guidance as to an appropriate period of notice by the landlord, or by the deceased tenant's estate, following the death of a sole tenant.

In relation to section 78, any surviving co-tenant(s) should have an obligation to inform the landlord of the death of a co-tenant within a reasonable time and should also have an obligation to inform the landlord within a reasonable time of their intention to continue the tenancy or not.

As a minor point, it is also submitted that it would be useful for a cross referencing note to be included in sections 78 and 108 to reference each other.

It would also be extremely useful, for the purposes of section 108, if the RTA 2010 addressed the situation where the identity of the legal personal representative of the tenant is unknown or cannot be readily ascertained by the landlord or agent, which is a common occurrence. A landlord should not be required to investigate the tenant's personal or legal affairs, and is not qualified to determine who the correct legal personal representative of a tenant might be, particularly when faced with competing claims.

The RTA 2010, for example, could usefully provide that, for the purposes of section 108, service by the landlord of a termination notice could be given:

- To a person who has produced a grant (or a re-sealed grant) of probate or letters of administration; or
- at the premises; and upon the Public Trustee (in whom the deceased's estate vests upon death pursuant to section 61 of the *Probate and Administration Act 1898*).

and that such service will be sufficient to discharge the landlord's obligations under the section. This position is supported by CTTT precedent[5].

19. Time limits for applications relating to breach

Sections 87 and 98 could usefully contain a cross referencing note to section 190.

20. Section 88 - form of termination notices for non-payment of rent

For clarity, it would assist if a note referring to section 87 was inserted in section 88 or the word 'breach' appeared in some way in the heading to section 88. The REINSW has had a number of agents and their representative's dispute that section 88 is subject to the provisions of section 87. It is submitted that this issue could be easily and permanently addressed by a simple amendment to put the issue beyond doubt.

21. Section 88(3) – Prescribed note in termination notices

The CTTT Member in the recent case of *Wu v De Palma*[6] felt the need to make the following comments about the warning prescribed by section 88(3) (emphasis added):

> *"47. In my opinion, the statement made in the applicant's non-payment termination notice pursuant to RTA2010 s 88(3)* ***does not constitute a promise by the applicant landlord not to seek termination, nor does it create an estoppel, nor is it an inducement nor a statement that is capable of being misleading or deceptive when made by the landlord to the tenant.*** *It is a statutory notice required by RTA 2010 s 88(3) and is subject to the operation of the RTA 2010 and relevantly s 89(5) which preserves a statutory right in the landlord to seek termination and possession notwithstanding the payment of arrears prior to the hearing."*

Section 88(3) provides (emphasis ***added****):*

> *"A non-payment termination notice must inform the tenant that the tenant* ***is not*** *required to vacate the residential premises if the tenant pays all the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord."*

Given that section 89(5) was a late amendment to the RTA 2010 in response to REINSW lobbying, the REINSW submits that the words "is not" should be replaced by the words "may not be", to deal with the issues set out by the Member in his decision. To allow such issues to be continuously ventilated would be a mischief given the intent of section 89(5).

---

[5] *Goodger v Wright* [1997]

[6] RT 11/14717

22. Section 88(4) - Termination notices for non-payment of rent

The REINSW submits that the Regulation should provide that no application fee is payable to the CTTT until the matter proceeds to a hearing. To provide otherwise is to simply penalise landlords for any inefficiencies (or, more likely, a lack of allocated resources) of the CTTT in rapidly listing matters for hearing.

23. Section 51 - Use of premises by tenant

Section 51 should contain a penalty provision to enable a tenant to be prosecuted in relation to breaches of sections such as section 51(1)(c) in addition to, or in the alternative to, the right of termination. Otherwise, such conduct might be simply displaced to another area without necessarily ever being addressed. Such an amendment would also give greater discretion to regulators to pursue serial offenders.

24. Section 92 - Threat, abuse, intimidation or harassment

The operation of section 92 should also be extended to include neighbours in the class of affected persons. If tenants or their occupants intimidate or harass neighbours in breach of section 51, landlords and their agents should be able to utilise section 92 to obtain termination of tenancies in appropriate circumstances. Terminations under section 92 are already subject to the checks and balances of a CTTT hearing.

It is anomalous that tenancies can be terminated pursuant to section 90 for injury to neighbours or serious property damage to neighboring property, but not for intimidation or harassment of neighbours not leading to physical injury. Such an amendment would give further teeth to section 51(1)(c), which provides that a tenant must not interfere with *"...the reasonable peace, comfort or privacy of any neighbour..."*.

25. Section 99 – long term leases

Section 99 is, quite simply, illogical. What is the point in negotiating the terms of a residential tenancy agreement in advance, if the provisions are not enforceable? The practical effect of this section is diametrically opposed to one of the stated policy objectives of the RTA 2010 – to increase the number of long term residential tenancies. This section will ensure that objective is *never* met.

If a tenant's circumstances have changed in the period between execution of a tenancy agreement and the date of a rent increase, the tenant always has recourse to section 104 of the RTA 2010.

If the issue which was sought to be addressed was one of manifestly excessive rent increases being made, tenants have recourse to section 44 of the RTA 2010.

Section 99 *might* have made some sense if it only applied to fixed term tenancy agreements exceeding 2 years which did not contain *any* details about rent increases or the methods by which

they would be made, but not in the cases where the tenant is expressly on notice at the commencement of the agreement as to their potential liability under the proposed tenancy agreement.

The wording used in section 99(1) should also be reviewed given other recent amendments to the RTA 2010.

26. Section 100(1)(a) – Social Housing

As a stated objective of the RTA 2010 was to fairly balance the rights and obligations of landlords and tenants, this section should provide that this section does not apply to a tenant if they have failed to disclose before or when they submit an application for tenancy, that they have made an application for social housing premises. If a landlord is required to disclose a proposal to sell premises (which might give rise during the fixed term to mere inconvenience to the tenant due to inspections by prospective purchasers), a tenant should also be required to disclose whether they have lodged an application for social housing, which, pursuant to section 100(1)(a) may result in a tenancy being completely terminated without any compensation whatsoever to the landlord.

27. Section 104 - Caps on landlord's damage

Section 104(2) of the RTA 2010 provides a cap on the amount of compensation payable by a tenant where a tenant is successful in having a tenancy agreement terminated by the CTTT on the grounds of hardship. The section completely disregards the fact that a landlord may be relying heavily, or entirely, upon the rent paid by a tenant to assist with paying mortgage repayments or to finance their self funded retirement.

No such cap exists in section 93 of the RTA 2010 in relation to the amount of damages which the CTTT might order a landlord to pay to a tenant in similar circumstances.

The REINSW submits that either the CTTTT's discretion should not be fettered by the cap in section 104(2) with respect to the amount a tenant should pay, or that, equitably, an equal cap should be imposed upon a tenant's loss in similar circumstances.

28. Section 107

The words "limited to" should be deleted from section 107(3). The policy intent as represented throughout the consultation process was that a break fee, where applicable, was not to be calculated on a *pro rata* basis and that a landlord was not liable to refund any portion of the break fee if they were able to re-let premises quickly. The deletion of the words "limited to" would make it unambiguously clear that the break fee **is** the amount set out in the agreement, or as prescribed by the legislation, and not any lesser amount. This proposed amendment would also make section 107(3) consistent with the wording contained in section 107(4).

The REINSW also submits that the clauses of the standard form agreement dealing with break lease fees (clauses 41 and 42 of the standard form), should not appear in schedule 1 of the RTR 2010.

As drafted, the current standard form tenancy agreement adopts an 'opt out' approach to break fees, rather than the 'opt in' approach which was clearly intended by parliament, as is evident from section 107(3) (emphasis **added**):

> *"The compensation payable by a tenant under this section in respect of a fixed term agreement is limited to the amount of the applicable break fee for the tenancy,* ***if the agreement provides for such a limitation."***

Clause 4(1) of the RTR 2010 provides that:

> *"The standard form of residential tenancy agreement is the form set out in Schedule 1."*

By including what are, in effect, only 'suggested' additional terms in schedule 1, the regulation in effect *prescribes* that a tenancy agreement **must** include the 'suggested' break fee clauses, which must then be struck out by the parties if they do not wish them to apply.

Such drafting is arguably *ultra vires* section 107(3) of the RTA 2010 and also favours tenants, as break fees will apply to any agreement where the parties neglect to strike the clauses out.

Instead, the REINSW submits that these 'suggested' additional clauses should be moved to a separate schedule of the RTR 2010 from which they could be voluntarily adopted (with any desired amendments) by anyone wishing to do so.

29. Section 159 – Payment of rental bonds

Section 159 of the RTA 2010 has resulted in inconvenience for both landlords and tenants as it does not appropriately deal with payments of rental bonds by EFT, or the situation where tenants wish to lodge rental bonds (paid in any form) with an agent in advance of executing a tenancy agreement. Many tenants utilise EFT as a method of paying both rent and a rental bond to an agent. The section prevents an agent from requiring or receiving a bond which a tenant may be more than willing to transfer.

One solution would be for the RTA 2010 to specifically provide that a licensee operating a trust account under the PSBA, can receive and hold funds equal to the amount of rent and/or a rental bond in their trust account, pending the execution of a tenancy agreement and that upon the tenant executing the tenancy agreement, the agent is authorised to pay the rental bond to the Rental Bond Board in accordance with the provisions of the RTA 2010. This would be of great utility to many landlords and tenants and the usual checks, balances and obligations upon the agent to account for any monies paid into a trust account would still apply.

If this change is not made, industry practice may simply change to the compulsory provision of bank cheques upon execution of tenancy agreements as it will be poor agency practice to execute a tenancy agreement in the mere hope that a rental bond will turn up electronically sometime in the future, or that a personal cheque will not bounce.

The wording of section 159(2) is also directly at odds with the wording of section 23(1)(c) which, on its face, allows the acceptance of rent and a rental bond before the tenant enters into a tenancy agreement as the rental bond is specified as one of the permitted exemptions. This ambiguity needs to be resolved and the REINSW would suggest that it be resolved in favour of a practical and commonsense approach of allowing licensed agents to receive such payments, in advance of executing a tenancy agreement.

30. Service of notices

Section 223(1)(a)(i) of the RTA 2010 provides that personal service can only be effected at the tenant's residential or business address, which was not the position with section 130 of the RTA 1987. This amendment is illogical and is proving unworkable in practice.

This section precludes personal service of notices upon the tenant at any other place including, for example, the agent's place of business.

By way of example, section 78 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (which will govern service of any documents required to be served in the course of proceedings to enforce a termination notice), provides:

> *"...78 Notices, service and lodgment of documents*
>
> *(1) For the purposes of this Act, a notice or document may be given to a person (and a document may be served on a person):*
>
> *(a) in the case of a natural person—by:*
>
> *(i) delivering it to the person personally,..."*

Personal service should mean unqualified personal service and the RTA 2010 should be amended accordingly. To allow a notice to be served by placing it a letterbox at the person's residential address, but not allowing personal service by handing it to the person standing on the road outside the residence, or in the agent's office is a nonsense.

31. Strata by-laws and Community Land management statements

Clause 35 of the standard form residential tenancy agreement provides:

> *"[Cross out if not applicable]*

> ***35. The landlord agrees*** *to give to the tenant within 7 days of entering into this agreement a copy of the by-laws applying to the residential premises if they are premises under the Strata Schemes Management Act 1996, the Strata Schemes (Leasehold Development) Act 1986, the Community Land Development Act 1989 or the Community Land Management Act 1989."*

Section 46 of the *Strata Schemes Management Act 1996 (***SSMA***)* is the source of the obligation in clause 35 for strata schemes. Section 19 of the *Community Land Management Act 1989* appears to be the source of the obligation in clause 35 for Community Land Schemes.

In reality, it can currently take longer than 7 days to obtain copies of such by-laws from an owners corporation or managing agent and this is a particular problem where there is a new management or there is a change of managing agent.

To assist landlords and their agents to comply with clause 35 of the standard form tenancy agreement, it is submitted that either:

- an amendment to section 108 of the SSMA, which is the section relating to the inspection of records held by the owners corporation, (and any similar sections of the other acts) be made to require a scheme to maintain a complete and up to date set of by-laws (whether in paper or electronic form) and to allow a copy (or an electronic copy) of all relevant by-laws or management statements, applicable to the lot being leased, to be obtained by an owner or their managing agent, in less than the 7 days prescribed by section 46 of the SSMA (and, thus, clause 35 of the standard form tenancy agreement). In other words, instead of requiring a person to physically inspect the records of the relevant scheme, they could simply lodge an application for a copy (or electronic copy) of the applicable by-laws; or
- to extend the 7 days period contained in section 46 of the SSMA to match (or exceed) the time period provided in section 108 of the SSMA which is currently 10 days. In other words, obfuscation by a strata scheme should not put a landlord or agent in breach of their obligation under section 46.

In the first case, as no physical inspection of documents would actually be required, provision of such documents in electronic form should probably not attract a fee. A maximum nominal fee to cover physical copying costs could otherwise be prescribed. It is submitted that it is surely not unreasonable to require a scheme to have a complete and ready copy of its by-laws, which could be readily scanned, faxed or copied as required. Perhaps a new function needs to be added to section 22 of the SSMA? As many strata managing agents will not even consider providing copies of such documents until payments have cleared, and as some are currently charging exorbitant amounts for the production of such documents, the issues with clause 35 becomes even more problematic.

A failure to make such amendments may simply have the effect of delaying the execution of tenancy agreements to put tenants into accommodation in a timely fashion.

C. RESIDENTIAL TENANCIES REGULATION 2010

32. Clause 6 – condition report

The RTR 2010 should expressly provide that a condition report forms part of the standard form of residential tenancy agreement which becomes an important consideration where a condition report is not completed for a particular tenancy.

Section 29(3) of the RTA 2010 provides that a tenant must return a condition report, and schedule 2 of the RTR 2010 prescribes a standard form for that report. So why is the condition report not expressly stated to be part of the standard form of tenancy agreement?

This was the effect of section 8(4) of the RTA 1987. A similar section really needs to be inserted as a subsection to section 15 of the RTA 2010 and section 29(6) of the RTA 2010 needs to be amended to change the word "may" to "must".

The REINSW submits that the simple edits proposed would do much to remove any possible ambiguity about whether the condition report, although prescribed, is actually part of the residential tenancy agreement.

33. Amendment to the condition report

Clause 6 of the RTR 2010 should be amended to provide that additional items, terms and comments (or space for them) may be added to the form of condition report provided they are not inconsistent with the RTA 2010 or RTR 2010. This would clearly allow more user friendly forms by the addition by form providers of any items omitted from the current prescribed report (or a section of it), or which invent themselves from time to time (e.g computer networking sockets, wireless devices, home automation items, solar panels, grey water systems etc).

There are also a number of items which the REINSW would like to insert into its condition report which it is currently unable to.

A similar intent is already evident in section 15(4) of the RTA 2010 in relation to the standard form of the tenancy agreement, but this does not apply in the same way to the condition report as there is no equivalent section in the RTA 2010 to section 8(4) of the RTA 1987. In other words, the standard form agreement and the condition report are now contained in separate schedules to the RTR 2010, whereas in the RTR 1987, they were both contained in the one schedule.

To address both of the above issues, the REINSW proposes some simple amendments to clause 6 of the RTR 2010 along the following lines:

> ***"Standard form of condition report***
> *(1) A condition report is to be in the form set out in Schedule 2 and forms part of the standard form of the residential tenancy agreement.*

(2) Variation of standard form of condition report
A condition report for which a standard form is prescribed may include additional terms, but only if:
(a) the terms do not contravene the Act or the Regulations or any other Act, and
(b) the terms are not inconsistent with the terms set out in the standard form."

A good example of the sort of problem this amendment would address is that the prescribed condition report currently asks the landlord to indicate whether prescribed water efficiency measures are "in place". The condition report asks 3 questions, but only gives two Yes/No options to answer them. Form providers such as the REINSW, cannot correct this error to allow the landlord to make the necessary 'indication' without making their forms technically non-compliant with the RTR 2010. Instead of being able to easily correct such errors as they are identified, form providers such as the REINSW instead have to lobby for changes to the RTR 2010. The proposed amendment is a quick, simple and cheap way such issues could be addressed.

34. Amendments to current policy documents

The REINSW welcomed the comments set out in the Regulatory Impact Statement for the Regulations about redrafting the Commissioner's guidelines on misrepresentation offences to reflect the new material fact regime contained in the Regulation, but submitted in response that it might be easier to provide new guidelines dedicated specifically to property management. To remove any confusion, an appropriate amendment needs to be made to section 52(1) of the *Property, Stock and Business Agents Act 2002 (***PSBA***)* as soon as possible, to exclude the application of section 52 of that act to property management, given the new provisions in the RTA 2010.

The REINSW also welcomed the format of the subclauses to regulation 7 which only require the disclosure of occurrences or factual situations which are within the actual knowledge of the landlord or agent; and which strictly defines those material facts. The specific identification of material facts and the addition of time frames for some subsections will assist to bring greater certainty to this area of property management for all stakeholders.

35. Clause 21

The effect of clause 21 of the Regulation should be embodied in a new prescribed term in the standard form tenancy agreement, rather than an additional term.

36. Clause 22

Clause 22(3) provides a 7 day time limit for an application to be made to the CTTT following service by a tenant of a termination notice for breach. The RTR 2010 should be amended to provide that the filing of an response by a landlord (or agent) to such a notice issued by a tenant under section

98(4) of the RTA 2010 (for alleged breach of the agreement by the landlord), automatically stays the termination of the agreement by the tenant until such time as the CTTT has the opportunity to consider the matter. If a tenant gives early possession of the premises and the breach alleged by the tenant is not upheld by the CTTT, the tenant will have inadvertently exposed themselves to a potential order for compensation resulting from abandonment. Accordingly, it would be in all parties' best interests, for a tenancy to be 'saved' wherever possible and to avoid exposing tenants to adverse orders from the CTTT by having the tenancy continue until the CTTT's decision is delivered.

This is particularly important given the apparent ambiguity between the heading (and apparent intent) of section 110 of the RTA 2010 and the words *"or who gives a termination notice"* in section 110(1) of the RTA 2010 (as discussed above) which could well trigger a dispute about the validity of a section 98(4) notice.

D.STANDARD FORM TENANCY AGREEMENT

37. Paraphrasing of the Act

The REINSW reiterates its concern, which has previously been related to NSW Fair Trading, that terms of the standard form tenancy agreement have been paraphrased from sections of the RTA 2010 in a way which gives rise to ambiguity.

For example, compare section 67(3) of the RTA 2010 and Clause 27.2 of the standard form agreement:

Section 67(3)

> *"...Despite subsection (1), a tenant is not entitled to remove a fixture without the consent of the landlord if the fixture was installed at the landlord's expense or the landlord provided the tenant with a benefit equivalent to the cost of the fixture..."*

Clause 27.2

> *"...not to remove, without the landlord's written permission, any fixture attached by the tenant that was paid for by the landlord or for which the landlord gave the tenant a benefit..."*

Section 67(3) in one alternative, allows a landlord to prevent removal of a fixture whose **installation** the landlord paid for. That alternative does not require the landlord to have paid for the fixture itself.

Clause 27.2 introduces a requirement for **written** consent (which is not a requirement of the section) and provides that the tenant is not able to remove a fixture **that the landlord paid for**, which as

stated above, is not what section 67(3) says. It also appears that the benefit referred to in clause 27.2 could be less than the cost of the fixture, which is also not what section 67(3) provides.

Yet another example is the different words used in section 35(2) of the RTA 2010 ("...must *permit* a tenant to pay...") and clause 4.1 of the standard form of tenancy agreement ("...to *provide* the tenant with at least one means to pay..."). To 'permit' and to 'provide' are two different obligations. This last example has already caused considerable confusion in the industry.

The REINSW has concerns that ambiguities such as these will end up in the CTTT for interpretation and, where the interpretation is inconsistent with the prescribed form of the tenancy agreement, will result in confusion for all parties, and result in the need to amend and reprint the versions of the standard form of tenancy agreement.

Most tenants and landlords are not going to read the RTA 2010 or RTR 2010 or be able to fully understand the complexities of it, so the tenancy agreement, as the agreement they each sign, will be the document they initially turn to in order to discover their respective rights and obligations. Accordingly, the REINSW submits that it should be an all encompassing document which contains all necessary information, in an easy to understand format. If the provisions of the RTA 2010 are too complex to enable people to understand their respective rights and obligations, then the drafting of the RTA 2010 is flawed. It is not the role of (or within the ability of) the tenancy agreement to re-write the RTA 2010.

The REINSW still submits that it is incumbent upon the NSW government to identify and, where necessary, rectify, all such inconsistencies.

Another instance which concerns the REINSW is the total omission of sections which qualify, limit or aid the interpretation of other clauses of the tenancy agreement. It is presumed that it was intended that the prescribed information guide will refer to all such sections but, where clauses have been specifically stated by parliament to form part of **every** agreement (and the prescribed information guide **does not** form part of the agreement), the REINSW believes they should be included in the agreement.

Some quick examples of this are the omission from the standard form agreement of section 39(1)(c), which provides that water usage charges claimed by the landlord can't exceed the usage charge in the water supply authority's bill; section 57(1)(c) which provides that a person who enters premises in accordance with the RTA 2010, but without the consent of the tenant, must not stay on the premises longer than necessary to achieve the purposes of entry; section 63(2) which provides that a landlord's obligation to provide and maintain premises in a reasonable state of repair is not abrogated if the tenant knew of that state of repair before entering into the agreement; and section 63(3) of the RTA 2010 which provides that a landlord is not in breach of their obligations under s63(1) if the state of disrepair is caused by the tenant's breach.

The REINSW submits that the inclusion of the above sections (and other similar sections) be reconsidered for the information and protection of all stakeholders.

38. Light Globes

There is no express provision in the RTA 2010 relating to the provision, and changing, of light bulbs. Clauses 16.4, 17.5 and 18.2 of the standard form agreement appropriately deal with this issue. A provision in the RTA 2010 further clarifying these obligations would be of utility.

39. Exclusion of parts of premises and certain items

The REINSW submits that the standard form residential tenancy agreement should allow certain parts of the premises or particular items to be excluded, and/or allow for the exclusion of maintenance for a particular specific (non-essential) item.

For example, disputes (and attendant orders for compensation) commonly arise where it is not sufficiently clear whether a part of the premises such as a storeroom or garage is included in, or excluded from, the premises. This confusion is not usually the result of malice, but simply miscommunication. Nevertheless a dispute then arises.

In a similar fashion, landlords may wish to provide an item on an "as is" basis, by consent, on the understanding that the item will not be repaired should it fail and that its inclusion is not being taken into account in the calculation of the rent. Examples of such items are old fridges (often in garages) or appliances such as older dishwashers or washing machines which may still have some utility to a tenant and which may prevent a tenant from incurring an immediate cost. This proposal is not aimed at essential items such as stoves or water heaters and the RTA 2010 and RTR 2010 could specifically exclude such essential items from this proposal by listing the items that cannot be excluded. Where the parties are able to reach agreement on such matters prior to the execution of a residential tenancy agreement, the RTA 2010 should be flexible enough to accommodate this. Under the current regime, such items simply become unavailable to tenants as landlords will simply remove such items to avoid any liability for maintenance or replacement costs being imposed by the CTTT.

A similar regime can be seen with the standard form of contract for the sale of land which has sections in which both inclusions and exclusions can be clearly listed. These were inserted in the standard form contract in an effort to prevent disputes between vendors and purchasers in relation to the identity of items the subject of the contract for sale. The REINSW submits that this system already works well and should be considered for use in the standard form residential tenancy agreement. The REINSW has already adopted this proposal in its own residential tenancy agreement.

40. Suggested amendments to the form of Condition Report

As mentioned above, the following suggestions for amendments are made:

Under heading "how to complete" on the first page

- clause 3 - "has agreed" should probably read "is required to"

Under heading "Important notes about this report"

- Clause 1 - in the second sentence, change "may be used as" to "it is" - refer section 30(1) RTA 2010
- Clause 1 - Change "at the commencement of the tenancy" to "the day specified in the report". These two dates will not always be the same and the suggested amendment reflects the actual wording used in section 30(1) RTA 2010.

Under heading "Condition report"

- In most 'room' sections, there is a duplication of "lights" and "light fittings" one of which should be deleted
- "skirting boards" should be added to all 'rooms'
- "tv points" should be added to lounge, dining, bedrooms and "other" box
- In Security/Safety, "External door" should read "external doors/door locks"
- There should be a box for "other room"
- There should be an extra section to list keys and other opening devices
- There should be extra details for pools to list water clarity, algae, equipment etc.
- The garage is a room and urgently needs changing. It has doors, windows, locks, ceiling, paving/concrete, lights , power points etc. More than one line is required.

The REINSW thanks you for the opportunity to provide this submission and would welcome the opportunity to discuss it further.

16 November 2011

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

Sam Kremer
Legal Counsel
Real Estate Institute of New South Wales