The Real Estate Institute of New South Wales Limited

Addendum to Submission dated 22 August 2018

Consultation Paper
Easy and Transparent Trading – Empowering Consumers and Small Business

28 August 2018

TO: Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
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Introduction

REINSW had the privilege of attending the Rental Bonds Roundtable Meeting on 24 August 2018, hosted by the Department of Finance, Services and Innovation (**Department**), to discuss the proposed reforms in relation to rental bonds surety products. That meeting was held subsequent to REINSW lodging its submission on 22 August 2018 in response to the Consultation Paper on *Easy and Transparent Trading – Empowering Consumers and Small Business* (**Paper**). A copy of that submission is **enclosed**.

REINSW has prepared this addendum to its submission as a result of discussions held at the Rental Bonds Roundtable Meeting.

Addendum to Section 2.7 - Rental Bond Surety Products

40. What option do you support? Why?

REINSW reiterates its strong opposition to options 2 and 3 set out in Section 2.7 of the Paper and, therefore, supports maintaining the status quo.

Undoubtedly, there are risks associated with the involvement of third parties in a landlord/tenant relationship. REINSW specifically wishes to draw attention to the use of alternative online bond "solutions" that, more often than not, place landlords in a position that is subordinate to their position under the status quo.

REINSW is aware of service providers in the market who promote the use of insurance bonds and guarantees rather than conventional bonds lodged with the Rental Bond Board. These bond insurance and other surety product providers offer complicated schemes with the aim of paying funds equivalent to the amount claimed. However, and unfortunately, this is not what happens in practice. Some providers of such products have strict claim processes that are managed in-house, which creates an administrative nightmare for landlords, not to mention the requirement for them to negotiate with third parties for the payment of a claim when their rental agreement is with the tenant and not the third party. This creates an unjust and unfair process for landlords seeking to make a claim on the bond. More often than not, bond surety providers work on the basis that claims must firstly be made through them and, if an agreement cannot be reached, then a landlord may apply to the NSW Civil and Administrative Tribunal (**NCAT**). This creates a two-step process for negotiation, thus creating more work for everyone involved. REINSW is also concerned that the use of third party surety providers limits the ability for tenants and landlords to negotiate and resolve the issue privately. Ordinarily, a landlord may refund a bond once the tenant has completed its make good obligations or the parties may, between themselves, agree on the terms of any refund. The ease and efficiency of such negotiation is hindered by the involvement of third parties who apply their own procedures and steps that need to be taken by the parties, removing much of the freedom from the hands of the landlord and their tenants.

REINSW would like to highlight the commercial benefit gained by rental bond surety providers from being in control of the claims process. In practice under the current system, the efficiency of the Rental Bond Board allows for landlords to claim 100% of the bond amount without the tenant's signature and the tenant has 14 days to respond to the claim or apply to NCAT if they dispute it. NCAT is independent and impartial, likely to have the best interests of the parties

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involved. In contrast, rental bond surety providers are likely to have their own commercial interests in mind (and those of their shareholders, if any) as they become increasingly in control of the claims process. It is in their best interest to determine that a claim is invalid, allowing them to avoid fronting the costs of claims made by landlords. It is also in the provider's interest to pay out the lowest amount possible in order to reduce the debt that they then have to chase from the tenant in an event of a successful claim.

Such a scheme also means that a landlord is unable to lodge a claim without the tenant's signature, something that is a practical and necessary step in the process under the current regime. Take the hypothetical situation whereby a tenant has abandoned the premises, leaving it damaged or in an unclean state. In these circumstances, it becomes incredibly difficult to locate the tenant once they have abandoned the premises. As a result of the tenant's wrongdoing and without having the tenant's signature on a claim form, how will a landlord be compensated? With added layers of unnecessarily complicated bureaucracy, landlords may be forced to face the out-of-pocket expenses with no relief available. Unfair processes such as these make it undesirable for landlords to continue to lease their properties, which will have a detrimental impact on the NSW rental market.

REINSW is adamant that Government taking security away from landlords is not an appropriate course of action. REINSW questions what will occur in situations where rental surety product providers enter into liquidation. In that circumstance, what security is afforded to landlords who have not lodged a bond with the Rental Bond Board because of the tenant's engagement with alternative rental surety providers? In addition, where rental bond insurance has been taken out by a tenant, what happens to landlords when a tenant decides to cancel or does not renew their policy? One of the main reasons that the current bond system works is that it creates a strong incentive for tenants to act in good faith and to do the right thing when renting a property. The introduction and use of rental bond surety products undermines the security and safety of the current scheme and exposes landlords to significant, unfair and unnecessary risk.

REINSW supports the current Rental Bond Board scheme because funds are invested back into the economy with a majority of the interest earned on the collective pool of rental bonds being used to cover services such as Tenants Advice and Advocacy Programs, NCAT and many other organisations that benefit consumers at all levels. This is in stark comparison to rental bond surety providers who commercially benefit from exploiting the vulnerable. With these products aimed at those who are unable to afford rental bonds upfront, bond surety providers are able to take advantage of those who are in financially vulnerable positions. Accordingly, these providers often have excessive interest rates and costs associated with their products, allowing them to benefit from a tenant's inability to afford to cover their costs of living. In light of this, tenants are better off using their credit cards to cover the rental bond for their new premises. Using a credit card means that once the refund from their previous tenancy is made, the tenant is able to use these funds to pay off the debt accrued on their credit card. With a short turnover period in between vacating their previous rental premises and having that bond refunded to them, tenants are unlikely to incur any interest or charges. This avoids the high interest repayments on offer from the alternative bond surety providers and REINSW sees value in supporting this system which keeps tenant costs to a minimum.

In addition, REINSW is also concerned that alternative bond surety products are likely to create a market of tenants that are perpetually unable to cover their upfront fees and debts as

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they fall due. These products, like many others in the market, are creating a sense of reliance amongst consumers who are buying things before they are able to afford them. With a market of tenants who constantly rely on such schemes to pay for their bonds when entering into a tenancy, landlords will permanently be placed in a position of significant and unfair risk, being forced to accept alternate methods of bond payments as less and less tenants are able to cover their bonds upfront and without assistance.

Another reason why REINSW is of the view that the use of rental bond surety products creates an unnecessary administrative and unfair burden is that it would require landlords to not only come to an agreement with tenants with respect to the payment of a claim, but also the tenants' third-party rental bond surety product providers. This creates the opportunity for unnecessary delay and demands negotiating with individuals and organisations who are not party to the residential tenancy agreement.

Whilst REINSW appreciates that there are technologies and systems which provide new alternatives in the rental market, REINSW strongly encourages the Department to consider if there is even a problem that needs to be fixed in the first place.

To reiterate, and as mentioned in REINSW's Submission dated 22 August 2018, REINSW is not opposed to short-term bond financing where the landlord is provided with a cash bond if it so chooses to accept. In that circumstance, landlords are placed in the same position as if the tenant was funding the bond themselves. However, REINSW strongly opposes the use of rental bond surety products and products that are imposed on landlords by way of legislation.

REINSW thanks the Department for the opportunity to lodge this addendum and is happy to discuss the issues above with the Department if the Department would like.

Yours faithfully

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The Real Estate Institute of New South Wales Limited

Submission on the *Easy and Transparent Trading – Empowering Consumers and Small Business Consultation Paper*

22 August 2018

TO: Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
policy@finance.nsw.gov.au

Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Easy and Transparent Trading – Empowering Consumers and Small Business Consultation Paper as issued by the Department of Finance, Services and Innovation (**Department**) in July 2018 (**Paper**).

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

This Submission responds to the issues raised in the Paper that are relevant to real estate agents, namely:

- the proposal to remove real estate auctioneer licences;
- removing categories of home building licences;
- the repeal of redundant legislation;
- a potential review of the Continuing Professional Development (**CPD**) requirements;
- rental bond surety products; and
- allowing strata lot owners to choose their own utility providers.

These topics are discussed below in detail, reflecting the same section references and question numbers as those used in the Paper.

1.5 Real estate auctioneer licence

10. Would there be any unintended consequences with implementing the above option?

Unfortunately, this is not the Government's first attempt at deregulation of the auctioneer's profession. The Government has gone down this disastrous path before and it seems that no lessons have been learnt from its failed delicensing regime. Under the *Statute Law (Miscellaneous Provisions) Act 1993* (NSW), the *Property, Stock and Business Agents Act 1941* (NSW) (formerly, the *Auctioneers and Agents Act 1941* (NSW)) was amended by removing "an auctioneer" from section 20 such that auctioneers no longer required a licence to trade. Not surprisingly, on 1 September 2003, due to problems with the auction system arising from the deregulation and delicensing of auctioneers, the *Property, Stock and Business Agents (Auctioneers Qualifications) Order* commenced which reintroduced licensing requirements for auctioneers. Accordingly, REINSW questions why deregulation occurred in the first place since licensing requirements were subsequently reintroduced into the profession. Considering the amount of Government time and resources invested in this current proposal and the failed delicensing regime in the past, REINSW wonders why the Government thinks it is a good idea to go down the same path that previously failed. With respect, REINSW believes that before the Government starts "solving problems" by deregulating a profession, it should determine whether there is an actual problem to solve.

REINSW would like to point out that the goal of Part 1 of the Paper states that it is "*centred on removing unnecessary obligations that do not improve consumer outcomes…*". However, removing the requirement to hold an auctioneer's licence and the deregulation of the auctioneer's practice achieves quite the opposite effect.

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REINSW opposes de-licencing and deregulation within any area of the real estate profession. In a de-licenced and deregulated environment, there are no requirements for probity checks of service providers and, alarmingly, no training. Without the requisite competencies, knowledge and skills required to deliver services in this complex area, consumers will be exposed to significant risks and the industry and profession will be damaged. These points are discussed below at length.

REINSW also wishes to highlight that if the Department moves forward with the proposed deregulation, it will be the only State in Australia to do so.

Training Reforms and Damage to the Credibility of the Industry

As the Department is aware, REINSW has been heavily involved in the Government's drive to improve the professionalism, standards and credibility of the real estate industry. REINSW is of the view that the removal of the requirement to hold a licence to be an auctioneer is counter-productive to the overall effort to improve levels of compliance, transparency, accountability and fair trade in the real estate sector. An effect would be damage to the credibility of both the industry and the Government because the new training package and licensing reforms have the intention of moving to a more highly educated, licensed and compliant industry, not the opposite which would result from the proposed deregulation.

REINSW believes that the proposed deregulation undermines the interests of the consumer and will likely lead to an increase in consumer complaints, ultimately damaging the credibility of the industry and real estate professionals. REINSW is concerned that this will also undermine the push towards improving the knowledge, education and professionalism of the industry as a whole.

Education

In practice, education and awareness of an auctioneer's obligations can prevent non-compliant activities and adequately equips an auctioneer with the resources to address issues such as dummy bidding, collusive practices and complex buying situations (such as when a purchaser wishes to act on behalf of a trust or company when making a bid). Amongst many other things, auctioneers need to be adequately licenced and trained to effectively manage events and occurrences that may expose the vendor to legal action or damages.

While the Department's preference is to encourage selling agents and auctioneers from other fields to conduct auctions of real estate or stock without training, REINSW strongly urges the Department to change its preference to maintaining the status quo. The licensing regime puts hurdles in place to ensure real estate professionals are compliant and ethical. Deregulating the licencing of auctioneers threatens to invite untrained, inexperienced, underqualified operators into the marketplace, thus undermining recent efforts in increasing the professionalism of the real estate industry (which is discussed in more detail below).

REINSW would like to highlight that NSW Fair Trading states on its website the following:

"*Property, Stock and Business Agents Act 2002 and the Property, Stock and Business Agents Regulation 2014 regulate the way that auctions of residential property and rural land are*

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conducted in New South Wales. ***Real estate agents, stock and station agents and auctioneers need to understand their responsibilities*** **[emphasis added].***"*[1]

Quite clearly, the legal obligations on auctioneers are strict and abundant in nature. The auctioneer also has many duties and responsibilities that are not patently obvious. REINSW has been informed by some of its Members that, in practice, it is the auctioneer who is often guiding the selling agent as to what is to be done on the day of, and at, an auction, not the other way around. To rely on a selling agent's limited knowledge and application of an auctioneer's legal obligations is profoundly dangerous for consumers and the economy. It is a mistake to think that selling agents are well versed in auction compliance as most agents themselves are not aware of an auctioneer's legal obligations under the relevant legislation.

Further, REINSW questions who, in a de-licensed environment, is required to comply with the auction conditions and other legislative provisions imposed on auctioneers (for instance, section 21, Part 5 Division 2 and Part 6 of the *Property, Stock and Business Agents Act 2002* (NSW) (**PSBA Act**) as well as clause 15 of the *Property, Stock and Business Agents Regulation 2014* (NSW)). What enforcement mechanisms will be in place to ensure compliance? Without being a trained and qualified auctioneer, REINSW doubts whether the inexperienced and unqualified person conducting the auction would be aware that those auction conditions even exist. Accordingly, for consumer protection purposes, REINSW recommends that a significant amount of training is necessary to educate these agents and auctioneers in other fields before they become real estate auctioneers. This will inevitably increase Government resources and red tape, which is contrary to the intention of the Paper.

REINSW is of the view that there is no substitute for a properly trained and regulated service provider. The proposed deregulation ultimately undermines the value of those auctioneers who have spent years to build on their experience to be adequately trained and licenced in their area of practice.

Threats to the consumer

REINSW does not consider it to be in the best interest of consumers to allow an unlicensed auctioneer who may also be an undischarged bankrupt or convicted felon to be able to auction consumers' most valuable and prized possessions. Unfortunately, this undesirable scenario is inevitable in an unlicensed environment.

Auctioneering is a very visual aspect of the property services industry in action and, like all experts, the auctioneer makes it look easy. However, the theatrical nature of an auction often takes away from the fact that the auctioneer and the auction itself is a key role in the making of a contract for an extremely valuable asset. Accordingly, REINSW is concerned that the proposed deregulation is likely to severely impact the quality of services being offered to the consumer. Such a decrease in quality may also lead to an increase in non-compliant and/or non-binding sales that consumers are left to deal with. The purpose of licencing laws, as mentioned in the Paper, is to ensure that auctioneers discharge their functions in a fair, lawful and honest manner. REINSW is of the opinion that deregulation is a reckless proposition that threatens the protection of consumers in many ways and in a manner that is counterproductive to the intentions of the Paper.

The Paper states that "*Auctioneers from other fields may be willing to conduct auctions of real estate or stock* ***without the training and costs imposed by the current system [emphasis***

[1] https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/auction-laws-and-conditions

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added]". REINSW challenges this statement on the basis that it is fundamentally flawed and offers no protection to consumers. Rather than remove the costs imposed by the current system, REINSW is concerned that an effect of delicensing auctioneers is that costs payable by consumers will significantly increase.

Whilst the intention is to improve competition and reduce costs of auctioneers, the actual cost to the consumer is likely to be higher if an inexperienced and underqualified agent is used to auction a property. Through the use of unlicensed and potentially unskilled auctioneers, vendors may experience situations whereby their property sells for a significantly lower price than may be achieved by a qualified, experienced auctioneer. Saving a few hundred dollars in auction fees could ultimately cost the vendor tens of thousands or even hundreds of thousands of dollars in reduced sale prices. Inexperienced auctioneers may also expose the vendor to unnecessary and costly litigation, potential redress by the purchaser and total loss of a secured sale through the non-compliant actions of an unlicensed auctioneer.

Costs to consumers may also be in the form of the mishandling of sale proceeds and other funds without any protection mechanisms in place in an unregulated industry. REINSW has significant concerns regarding the operation of a trust account for auctioneers who are unlicensed and inexperienced, specifically, stock and station auctioneers who are less likely to engage a listing agent to manage the holding of funds. Section 86 of the PSBA Act lists stringent requirements for the operation of a trust account and the handling of trust funds. What happens to such requirements in dealing with trust funds in an unlicensed environment? Will there be a requirement for unlicensed auctioneers to hold money in trust accounts in situations where the listing agent is not holding such funds? An unlicensed stock and station auctioneer could be holding sale proceeds in a personal account without any protection being afforded to consumers. As emphasised above, it is not in the best interest of consumers to allow an unlicensed auctioneer who may also be an undischarged bankrupt or convicted felon to be able to freely deal with sale proceeds without strict requirements and the enforcement of same.

REINSW believes that with the ability for inexperienced, underqualified and untrained sales agents to act as auctioneers, consumers will experience an increase in illegal, unscrupulous and non-compliant auction activity. This may occur due to an agent's sheer ignorance or a lack of incentive or imperative to act in a compliant manner. Without limitation, REINSW envisages that, as a consequence, there will be an increase in the following activity that will have significant negative impacts on consumers, the industry and the Government:

(a) a failure to recognise or take action to prevent dummy bidding and collusive practices;

(b) misrepresentation of the reserve price to buyers or selling the property below the reserve price;

(c) non-compliance with the placement and number of vendor bids (for example, situations where the vendor bids above the reserve or where there are multiple vendor bids);

(d) selling the property without proper authority;

(e) loss of a secured sale for the vendor as a consequence of a failure to understand the rights of the auctioneer (for example, failure to understand that an auctioneer can sign on a buyer's behalf should they fail to sign the contract post-auction or any other behaviour that may expose the vendor to subsequent legal action);

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(f) a failure to understand the correct process surrounding the execution of auction day contracts, again putting the validity of the sale in jeopardy;

(g) a failure to identify bids that may be against the best interest of the vendor(s); and

(h) any other general behaviour that is non-compliant during communications with the buyers on the action floor.

Undoubtedly, the proposed deregulation will likely lead to an increase in non-compliant, illegal and unscrupulous activities and, ultimately, a spike in dissatisfied consumers. This, in itself, will increase the number of consumer complaints lodged with NSW Fair Trading, increasing the amount of Government resources invested in resolving complaints. REINSW recognises that this is counter-productive to the Department's intention of making it easier to do business and reducing Government red tape and resources. Accordingly, REINSW urges the Department to reject the proposal to de-licence and deregulate auctioneers.

Disincentive for Compliance

REINSW believes that if an auctioneer relies on their licence for their livelihood, compliance and professionalism is paramount to the success of their career. For the casual or occasional auctioneer, the issue of compliance is likely to be less of a concern. Licenced auctioneers risk their licence when undertaking non-compliant or illegal practices in the course of their auction. The incentive to ensure that auctioneers are compliant with legislation acts as a self-regulating mechanism whereby auctioneers are unlikely and unwilling to risk suspension or cancellation in circumstances of illegal or non-compliant activities. Quite simply, a licence cannot be taken away from someone who does not have one in the first place – expecting someone to act in good faith without any form of enforcement or sanction mechanism in an unlicensed environment is unrealistic and is not likely to encourage compliance. REINSW is concerned that, with a disincentive for compliance, what protection is afforded to consumers?

Professional Indemnity Insurance and Public Liability Insurance

REINSW has further concerns surrounding insurance coverage and policies to be taken out by inexperienced and unqualified auctioneers. REINSW is of the opinion that it is very unlikely and extremely difficult for inexperienced and unqualified auctioneers to take out and maintain the appropriate level of coverage of insurances. REINSW questions whether the Department, along with Government, will ensure that all persons engaging in auctions of property and stock will hold the relevant insurances. If so, how will this be monitored and enforced in such an unlicensed and deregulated environment? Does the Government expect the insurances of selling agents to cover the activities of auctioneers because, if it does, then the relevant premiums will drastically increase but, regardless, auctioneers should have their own professional indemnity insurance in place (which would be difficult to obtain without any experience or qualification)?

This raises questions regarding the level of protection for consumers in a deregulated industry. REINSW is of the opinion that it is reckless and counter-intuitive for the Government to allow auctioneers to deal with consumers' greatest and most valuable assets in such a manner that affords little to no protection to the consumer themselves.

Without the appropriate coverage under relevant insurance policies (including, without limitation, professional indemnity and public liability insurance policies), the negligent and non-compliant actions of inexperienced and unqualified auctioneers create a significant risk exposure for both the auctioneer and consumers at large. REINSW recommends that

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sufficient insurance coverage be required to ensure that there is the appropriate level of redress available to consumers to protect them when something inevitably goes wrong.

Selling Agents and Others to Comply

REINSW does not support the proposition that selling agents or other auctioneers in different fields are able to assume the licensed auctioneer's compliance obligations. REINSW questions whether that will mean that these people must be licensed agents. If that is the intention, then a practical burden is placed on agencies whereby principals or licensed agents will need to be present at auctions. This is particularly so where selling agents hold certificates of registration and auctioneers in other fields hold no real estate qualification. An unintended consequence of the proposed deregulation is that it removes the autonomy of selling agents in their daily practice and it may not be feasible for some agencies from an employment management perspective for licensed agents and principals to attend all auctions.

Another problem arises where an auctioneer in an unlicensed environment is acting for a commercial sales agent who is not required to be licensed under the PSBA Act. Both are unlicensed so REINSW questions who is responsible in that scenario?

Further, there is a distinct difference between real estate auctioneers and goods and chattel auctioneers. They are like chalk and cheese when it comes to the auction process, speed of auction and value of the item being auctioned. More often than not, real estate is a vendor's biggest and most valuable asset and REINSW is opposed to it being auctioned by a selling agent or auctioneer other than a real estate auctioneer on the basis that the former are likely to be inexperienced and unqualified to carry out a compliant auction.

1.6 Removing 13 Categories of Home Building Licences

11. Do you support the removal of the above 13 licence categories? If not, which do you believe need to be retained and why?

REINSW's position in response to the deregulation of the 13 categories of home building licences is much the same as its position on the deregulation of auctioneers, as set out in detail above. Again, REINSW questions the problem that the Department is trying to solve by introducing this proposal. The industry works very well, with the licenses providing an incentive for legislative compliance.

REINSW appreciates that the *Home Building Act 1989* (NSW) is not the only source for consumer protection (as referenced in the Paper), however, it has serious concerns regarding the suggested reforms. REINSW proposes that consumer protection law is not the only factor to consider in the potential removal of these categories of licences, and that consideration needs to be given to the dangers of the proposed changes.

The current status quo of prohibiting a person from trading or working in an industry or occupation without an authority to trade being granted by the regulator offers the most protection to consumers and the real estate industry. For example, landlords have an obligation to provide and maintain the premises in a reasonable state of repair. For property managers, this means engaging *qualified* tradespersons on behalf of their landlords to carry out maintenance, installation and repair work in properties. In these situations, licences indicate and almost guarantee that the tradesperson engaged is competent and experienced in their field of work.

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The Paper itself states:

> *"requiring that an independent regulator assess a person's fitness and propriety prior to their trading in a certain industry or working in a certain occupation reduces the likelihood that the person will engage in conduct that is relevantly against the public interest."*

In light of the above statement, REINSW strongly urges the Department to reconsider its proposal to remove these categories of building licences. If the licenses were removed, insurance premiums would sky-rocket commensurate with the significant increase in risk from unqualified tradespeople. There would also be a spike in contractors who would breach statutory warranties under the *Home Building Act* but who are unlicensed such that section 18B and associated provisions under that Act would not apply, leaving the consumer unprotected and exposed.

Consumer Safety

Deregulation of the subject professions will have significant effects on consumer safety. Without proof that the regulator is satisfied of a person's fitness and proprietary to trade and work, REINSW questions how consumers can guarantee that they are engaging a competent and qualified tradesperson to carry out maintenance and work in their home. Whilst the Department has proposed a scheme whereby traders who fail to satisfy certain standards may be required to pay compensation, this is an inadequate remedy where their negligence or failure to carry out the work in a competent manner results in significant cost, damage, loss, death or serious injury, which are real consequences of the reforms. The responses proposed are reactive rather than proactive and fail to prevent unqualified or incompetent tradespersons from carrying out work. REINSW is of the view that licensing schemes do not create barriers to entry but are hurdles in place to protect the consumer, particularly by ensuring that only those who are competent and licenced can trade. REINSW does not believe this produces a negative outcome for consumers.

Although the Department's argument is that there are fees associated with the licensing scheme which drives up prices, thus causing a spike in the number of complaints the Government has to deal with, REINSW is of the belief that (as with the de-licensing of auctioneers) removal of the licensing scheme will not solve this issue. In fact, such de-licensing is likely to increase the number of complaints as a result of incompetent tradespersons being able to trade and carry out work without a licence. An increase in complaints lodged with NSW Fair Trading means an increase in Government resources invested in resolving those complaints, which is not a positive outcome for consumers, taxpayers or the Government.

The trades listed on page 17 of the Paper have been considered to "*not appear to justify the pre-assessment, the additional revenue raising or knowledge which requires refreshing through training*". The Paper further states that these trades appear to involve less complex tasks which, if done badly, are not likely to give rise to major safety risks. REINSW strongly opposes the Department's position in this respect and discusses some of these licence categories below in an effort to demonstrate how important it is for these tradespeople to be licensed.

<u>Glazing</u>

NSW Fair Trading defines glazing as "*the work involved in installing glass, acrylic or other like materials in prepared openings, such as windows, door panels, screens, fences, balustrades*

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or partitions"[2]. REINSW finds it difficult to believe that this is a trade that involves "less complex tasks". With cases such as *Jones v Bartlett*[3], it is evident that an inability to install and maintain the relevant safety standard of glass throughout the home can pose significant risks to tenants and occupants. In this case, the respondents rented a house to tenants whose son sustained injuries when he walked into a glass door in the house. The glass door complied with the relevant building standard at the time the house was built in the late 1950s but did not comply with the relevant building standard at the time the house was rented to the respondents, which provided for thicker toughened safety glass. Had an expert glazier been called to conduct an inspection of the property for safety purposes, it was contended that they would have been able to detect that the glass in the door was not of the required standard. As the door was in good working order and appeared to operate smoothly, the expert glazier in the case claimed that the general public would not be capable of knowing whether the glass complied with the appropriate standards. As this case demonstrates, unlicensed tradespeople or even the layman who does the job themselves might not be aware that they must comply with the relevant building standard, posing safety and other risks to consumers.

If tradespersons are not licenced and, therefore, do not require "refreshing through training", renewed safety standards and improved practices will not be made known to such tradespersons, likely to lead to significant injury or even death if adequate safety standards are not in place for the installation of glass throughout the home.

This argument can also be applied to shower screen installations.

Splashback installation

Splashbacks are often installed next to or behind ovens and other cooking implements which require a certain clearance to avoid the risk posed by potentially combustible materials. Such requirements are regulated by the Building Code of Australia and a failure to comply with the Code could result in catastrophic consequences. REINSW does not see how this trade can be considered as "less complex" or unlikely to lead to significant risks "if done badly". If anyone is able to install a splashback within a home, the risks of non-compliance increase along with the potential fire and safety hazard if incorrect materials are used or there is not enough distance between cooking appliances and the installed product.

Fencing

Statistical evidence as provided by NSW Fair Trading indicates that inadequate pool fencing is a major contributing factor to drownings.[4] There are three different Pool Safety Standards that apply in NSW depending on when the pool was constructed. These requirements are defined under the relevant Australia Standard and the *Swimming Pool Act 1992* (NSW) as amended from time to time. Swimming Pools operate under a Certificate of Compliance scheme, one that is complex and has stringent requirements. Requirements not only apply to the height of fences themselves but also to the doors in pool barriers, the latches on such doors, and general pool fence and gate maintenance for bolts, screws, fasteners, hinges and locks. REINSW struggles to comprehend how an unlicensed fencer will be equipped with the required knowledge to adequately construct and install fencing around swimming pools without leading to significant safety risks (including, without limitation, serious injury or drownings). This goes against the intention of the swimming pool legislation. As emphasised

[2] https://www.fairtrading.nsw.gov.au/trades-and-businesses/licensing-and-qualifications/licence-classes-and-qualifications/glazing
[3] *Jones v Bartlett* (2000) 176 ALR 137
[4] https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/pools-and-pool-safety/pool-fencing-requirements

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for several trades throughout this section of the Submission, it is concerning to classify fencing as unlikely to lead to significant risks "if done badly".

Other Trades

Inadequate paving can result in a trip hazard and, in some circumstances, can cause serious injury or even death (for instance, where an individual trips on loose or protruding paving and hits their head). Whilst paving may not be considered to possess the same level of complexity as other trades, if done badly, there are serious dangers to human safety.

Plastering is another significant concern for REINSW. Gyprock and plastering work often involves repairs, maintenance and installation of walls and ceilings within the home. If not done correctly, ceilings may collapse on people, causing serious harm and injury. Again, while this task may be subjectively less complex than others, REINSW considers the potential danger or threat to safety that can arise from negligent or careless acts of unlicensed plasterers to be significant.

For many years, REINSW has been lobbying the Government to address the dangers associated with lead paint and asbestos in the home (amongst other products that are incredibly dangerous). To remove the licensing requirements for painters is not the solution REINSW had in mind and recommends against it, particularly since painters need to be adequately educated and qualified to deal with these potential safety issues. Exposure to particles of lead or asbestos can be poisonous and, therefore, caution must be taken when renovating or carrying out works in the home. Accordingly, REINSW has grave concerns for the misconception that if a painter carries out their work inadequately, it is unlikely to lead to significant risks. It is often overlooked that there is more to painting than simply applying a coat of paint to surfaces. If asbestos or lead paint is in poor condition, or is disturbed or removed, REINSW considers that the best way forward is for a professional to be contacted to arrange for the safe handling of such contaminants. It is unlikely to believe that unlicensed painters will be adequately trained or knowledgeable in this respect to handle this type of scenario, not to mention the many others that may come to light.

Maintain the Status Quo

As emphasised under heading 1.5 above, REINSW opposes de-licencing and deregulation within *any* area of the property industry, including those rules and regulations that govern builders and tradespersons who play a pivotal role in the real estate industry.

To reiterate, in a de-licenced and deregulated environment, consumers will be placed at risk. Whilst not all of the 13 categories have been explicitly referenced above, REINSW overall opposes the proposal with respect to all 13 categories and encourages the Department to "maintain the status quo".

1.12 Repealing Redundant Statutes

23. Would there be any unintended consequences with taking this possible action?

(a) Landlord and Tenant (Amendment) Act 1948
(b) Landlord and Tenant Act 1899

REINSW's position is that, before the *Landlord and Tenant (Amendment) Act 1948* is repealed, the Government must not only be aware of the number of properties protected under the Act but must also be prepared to immediately provide re-housing for those living in the

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protected properties. If succession rights are removed and the Act is repealed, the Department must be conscious of the fact that some of the affected individuals depend on protected (or cheap) rent in order to survive. They are unlikely to be able to afford the rent charged by private landlords. REINSW is concerned that, once the Act is repealed, these individuals may be without housing and will require immediate intervention from the Government. REINSW suggests that this may be in the form of prequalifying for immediate social housing or assistance with relocating to housing that is affordable based on their particular financial circumstances. In any event, REINSW is of the opinion that this is a matter for Government and not private landlords.

REINSW has submitted two submissions (dated 25 October 2011 and 23 January 2013) in response to the repeal of the *Landlord and Tenant (Amendment) Act 1948 and Landlord and Tenant Act 1899.* For ease of reference, REINSW **encloses** these submissions.

To reiterate, REINSW is, in principle, supportive of measures to simplify, repeal and reform existing legislation. Accordingly, REINSW has previously stated that it does not oppose the repeal of the *Landlord and Tenant (Amendment) Act 1948* and *Landlord and Tenant Act 1899.* In fact, REINSW has strongly expressed the view that there is no merit in maintaining the current *Landlord and Tenant (Amendment) Act* or carrying forward these provisions in other legislation. However, REINSW recognises the need for the Government to deal fairly and immediately with the protected tenants affected by the repeal.

1.15 Review of Continuing Professional Development requirements

26. ***What issues should be considered in the proposed review of CPD arrangements?***
27. ***Should a review of CPD requirements be undertaken across the whole of the NSW Government first rather than commence in the Innovation and Better Regulation portfolio?***

REINSW has been working with NSW Fair Trading as part of the Real Estate Reference Group (**RERG**) for three and a half years to improve training in the property services industry and to make real estate professionals aware of the continuous development of legislative and regulatory instruments imposing obligations on their profession.

REINSW is extremely disappointed that no warning was provided to it and other members of the RERG in relation to the Government's contemplation of a review of CPD requirements. To REINSW's surprise, it became aware of this proposal only upon reviewing the Paper. REINSW strongly opposes a review of CPD being undertaken within the Innovation and Better Regulation portfolio as this completely undermines the work completed by the RERG to date. Instead, REINSW recommends that if the Department has an issue with the CPD requirements then a more appropriate, effective and efficient way to resolve the matter is to raise its concerns directly with the experts who comprise the RERG.

2.7 Rental bond surety products

40. ***What option do you support? Why?***

REINSW is strongly opposed to options 2 and 3 set out in Section 2.7 of the Paper and, therefore, supports maintaining the status quo.

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Whilst the mechanics of the proposal set out in the Paper are not entirely clear, REINSW strongly opposes the creation of more red tape and the implementation of a scheme that does not seem to secure rental bonds and their payments. In principle, it is only fair that landlords have the unfettered discretion to choose the type of security they require to protect their property. It should not be left to an obligatory statutory regime, one which does not guarantee the recovery by landlords of the rental bond from their tenants. From REINSW's perspective, a new landlord has no relationship with the tenant's previous landlord and if a tenant does not have the capital or funds to cover a bond for a new property, these types of tenants are high risk and are unlikely to have the funds to cover their rental payments for the duration of the tenancy.

REINSW questions how this proposal fits in with break fees. The Paper states that, under the new regime, tenants could pay a smaller upfront fee at the start of the tenancy (as little as 5-10% of the bond amount), instead of the 4 weeks rent required for a bond. REINSW recommends the Department clarify how this will affect break fees because it is REINSW's interpretation that the current proposal means that if a tenant breaks their lease early on in the tenancy, landlords are unlikely to have enough bond to cover the break fee. Surely, this is not the intention of the proposed reform.

REINSW wishes to bring to the Department's attention that there are services currently available for tenants to seek short-term loans in order to fund rental bonds, noting that tenants are charged a fee for such services. For example, *easyBondpay*[5] provides same day rental bond loans which can be repaid over 6 or 12-months. REINSW is not opposed to these third-party loan arrangements provided that the landlord receives 100% of the bond at the commencement of the tenancy and that the bond is lodged with the Rental Bond Board. To agree otherwise would reduce the revenue received by the Rental Bond Board, which is surely not the intended consequence of the proposed reforms. With services like these already out in the market, there is no need to introduce complex statutory regimes which upset the current status quo.

REINSW supports the status quo on the basis that it is simple, understood and accepted by tenants, provides surety to landlords and minimises red tape compared to other more complex arrangements.

Despite the above, if Government nonetheless elects to continue with the broadening of rental bond security options, REINSW emphasises the need to ensure that neither of the introduced security options are imposed on landlords without their consent or acceptance to participate in such a scheme. Any changes introduced must be on an 'opt-in' basis only.

2.8 Allowing strata lots to choose their own utilities provider

41. Would legislative reform assist in addressing this issue?
42. Which option do you support and why?

REINSW, in principle, does not oppose the proposed legislative changes to allow residents in strata schemes to have more freedom when choosing their own utility providers. Specifically, REINSW is strongly opposed to the current status quo whereby developers and owners corporations lock in residents to particular utility providers. REINSW does not see that it meets the objectives of the proposed regulatory reforms.

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[5] http://easybondpay.com.au/

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In terms of the options supported, REINSW is not explicitly opposed to either options 2, 3 or 4, provided that consideration be had to the varying circumstances that have bearing on the choices a consumer makes when engaging utility providers. For example, pensioners may base their decision solely on those providers who offer pensioner discounts or those who charge the least amount in comparison to competitors. Others may choose a provider based on the loyalty programs they have to offer or their affiliation with other products and services that the consumer may benefit from. With a wide range of variables that consumers are entitled to take advantage of, utility providers may offer incentives that are more favourable to some consumers compared to others. Accordingly, REINSW is of the view that it should not be for developers and owners corporations to lock in residents to particular utility providers.

When deciding about the appropriate mechanism to be implemented, the Department should note the possible practical issues that comes with each of the proposed solutions. For example, option 4 may have some practical issues with its application. As the market is always changing, what is attractive at the commencement of a contract may not be the case in the future. It would also be impractical to impose such a scheme when it is often difficult to compare rates and network charges that are constantly changing based on peak and off-peak timings.

Conclusion

In conclusion, REINSW reiterates its encouragement in removing industry red tape and Government's overall goal at improving trading for consumers. However, REINSW emphasises and is adamant on the fact that these changes cannot be at the expense of much needed regulation, licenses, education and safety standards in the manners discussed above.

When changes stand to increase consumer risk and safety, REINSW strongly opposes those changes. For this reason and for those set out in this Submission, REINSW recommends that the Department reconsider its proposals for deregulation as set out in the Paper.

With respect to the proposal to review the CPD requirements across licensing regimes, REINSW encourages the Department to consult the Real Estate Reference Group if it believes those requirements need to change. REINSW considers this to be a more appropriate, effective and efficient way to address the issue as it involves the experts out in the field.

REINSW appreciates the opportunity to provide this Submission and would be pleased to discuss it further, if required.
Yours faithfully

Tim McKibbin
Chief Executive Officer

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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

REINSW

REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

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

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Mr Tim McKibbin
Chief Executive Officer
Real Estate Institute of New South Wales
30-32 Wentworth Avenue
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Dear Mr McKibbin Tim

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

A division of the Department of **Finance and Services**