The Real Estate Institute of New South Wales Limited

Position Statement

Statutory Review of the Residential Tenancies Act 2010 (NSW)

Date: 30 January 2017

To: The Hon. Matthew Kean
Minister for Innovation and Better Regulation

By Hand

1. Introduction

This Position Statement has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Statutory Review of the *Residential Tenancies Act 2010* (NSW) dated 17 June 2016 (**Review**), issued by NSW Fair Trading.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It 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.

Although NSW Fair Trading has not invited the public to respond to the Review, REINSW feels it is imperative for this Position Statement to be brought to the attention of The Hon. Victor Dominello, Minister for Innovation and Better Regulation. By doing so, REINSW hopes that the Minister will consider REINSW's stance on the recommendations in the Review that are included in this Position Statement and take the appropriate and necessary actions. For clarity, this Position Statement only sets out the recommendations and sections in the Review that REINSW feels strongly about raising with the Minister either for further consideration or removal from implementation. REINSW has no further comments on the recommendations in the Review that do not appear in this Position Statement.

Please note that this Position Statement should be read in conjunction with the Review as well as REINSW's submission dated 29 January 2016 which was in response to NSW Fair Trading's Discussion Paper on the Statutory Review of the *Residential Tenancies Act 2010* (NSW) issued in October 2015, both of which are **enclosed**.

2. REINSW's Responses to the Review

Response to Recommendation 2

That the Government give further consideration to:

(i) whether it is appropriate to provide occupancy rights to sub-tenants without a written tenancy agreement and/or to boarders not covered by the Boarding Houses Act, and

(ii) what kinds of occupancy rights should be provided to these groups.

In considering these questions, the Government should consult with interested stakeholders.

REINSW is of the view that the Government cannot determine whether sub-tenants should have occupancy rights without consulting with interested stakeholders on the issue.

The Government needs to bear in mind that it is ultimately the landlord who has the right to determine who lives in their property and the landlord should not be precluded, in any respect, from knowing the identity of the person occupying their property or how it is being used by the occupant.

REINSW believes that a written agreement between the tenant and any sub-tenant, which must be approved by the landlord, would address the Government's concerns. This written agreement would serve the following purposes:

(a) it would give sub-tenants more legal certainty and rights in a shared-housing arrangement;

(b) it would provide the landlord with certainty as to the identity of occupants living in their property; and

(c) it would be evidence of the fact that the occupants actually live in the property.

REINSW refers to clause 32 in the prescribed form of residential tenancy agreement set out in Schedule 1 to the *Residential Tenancies Regulation 2010* (NSW). That provision prevents a tenant from transferring a tenancy or subleasing a property without the written consent of the landlord, such consent only to be refused (whether or not it is reasonable to do so) if the transfer or sublease is in relation to the whole of the premises, not part. With Airbnb and the like becoming more prevalent in the market, REINSW requests that the Government reconsider clause 32 in the standard form residential tenancy agreement. REINSW proposes that clause 32 should permit the landlord to refuse consent (whether or not it is reasonable to do so) to the partial transfer of a tenancy or partial sublease of the premises, in the same way and for the same reasons as the landlord is able to refuse consent to the transfer of the whole of the tenancy or sublease of the whole of the premises. That amendment supports the landlord's right to know the identity of the occupants in their property, particularly in shared-occupancy scenarios, in the same way as the landlord has the right to determine the tenant before the head lease is signed.

Response to Recommendation 3

That a term be inserted in the standard form residential tenancy agreement to provide that landlords are to:

(i) disclose any matters required to be disclosed under section 26 of the Act, and

(ii) not knowingly conceal any of the material facts set out in clause 7 of the Residential Tenancies Regulation.

REINSW understands from the Review that this recommendation has come about because the Tenants' Union would like to see an enforcement mechanism for a breach of section 26, namely the ability for the tenant to terminate a tenancy for failure to disclose or conceal a material fact.

Whilst REINSW is not opposed to the position of the Tenants' Union, it is opposed to penalising the landlord or landlord's agent twice for a breach; once for breach of contract if the recommendation were to be implemented, and a second time for breach of section 26 where a maximum penalty of 20 penalty units already exists. REINSW appreciates that the tenant does not receive the money paid by the landlord or landlord's agent for breaching section 26. However, to include a clause in the standard form residential tenancy agreement as that proposed in the recommendation would be extremely unfair and unjust to landlords and agents because a failure to disclose would make them liable under both contract and statute. REINSW is of the view that the landlord or landlord's agent should only suffer one consequence for a breach of section 26.

REINSW believes the proposed clause as set out in the recommendation needs to be redrafted as it does not address the concern raised by the Tenants' Union. Rather, it gives a contractual obligation on the landlord or landlord's agent to make the disclosures required by section 26 so that if they fail to comply then two causes of action would unfairly arise, one in contract and one under statute.

REINSW proposes that the solution is for the proposed clause in the recommendation to be redrafted to allow the tenant the right to terminate the tenancy for a breach of section 26, without any monetary compensation payable to the tenant for damages incurred and with a requirement of 14 days' notice of termination, consistent with any other breach of the agreement.

That section 26 of the Act be amended to provide that, for properties in strata schemes, a landlord must:

(i) provide the strata by-laws to the tenant before or at the same time that the tenant enters into a tenancy agreement; and

(ii) disclose that a strata renewal committee has been formed.

REINSW has no issue with the first paragraph of this proposal, but notes that the section needs to be consistent with section 186 of the *Strata Schemes Management Act 2015* (NSW), which relevantly requires the landlord of a lot or common property in a strata scheme to give the tenant a copy of the by-laws not later than 14 days after the tenant becomes entitled to possession of the lot.

REINSW also notes the requirement in section 178(2)(e) of the *Strata Schemes Management Act 2015* (NSW) for the by-laws to be recorded in the strata roll and the requirement in section 177 for the owners corporation to prepare and maintain the strata roll. Accordingly, the by-laws are available from the secretary of the owners corporation or strata managing agent (if any) should the tenant require them.

Before the second paragraph of this recommendation can be enacted, the *Strata Schemes Management Act 2015* (NSW) must be amended to impose an obligation on the strata managing agent and/or owners corporation or secretary of the owners corporation to notify those property managers managing properties in the scheme (if any) of the establishment of a strata renewal

committee. Section 162 of the *Strata Schemes Management Act 2015* (NSW) requires the secretary of the owners corporation to notify the owner of each lot, in writing and within 14 days, that a strata renewal committee has been established. The section is silent on property managers receiving such notice but REINSW is of the view that they should also receive written notification of the same kind. That will avoid the situation where a landlord may be aware of the formation of such a committee yet not realise the importance of informing their property manager or of the ramifications associated with not doing so. For instance, a property manager may not know of the existence of a strata renewal committee yet a tenant may sue them for non-disclosure under the proposed recommendation or they may be liable for breach of section 26 without being aware of the existence of a committee.

That clause 7 of the Regulation be amended to include in the list of material facts that must not knowingly be concealed:

(i) that the premises have been the scene of a drug crime in the last two years; and

(ii) that the premises have been the scene of drug manufacturing in the last two years.

REINSW considers the terms "drug crime" and "drug manufacturing" to be too broad and suggests that they be defined in the legislation. Such definitions would make it abundantly clear what constitutes drug manufacturing and a drug crime, and would avoid confusion and ambiguity in the market, for instance in relation to whether growing or using marijuana for medical reasons would constitute drug manufacturing or a drug crime.

Another concern that REINSW has with the recommendation, and which requires further consideration, is that property managers may not be aware that a premises has been the scene of drug manufacturing or a drug crime in the last two years. Without that knowledge, agents do not need to disclose under section 26, reducing the impact and effect of introducing the amendment.

That consideration be given as to whether five years remains generally appropriate as a time limit for the disclosure requirements under section 26.

REINSW believes that different factual circumstances require different timeframes and those timeframes depend on the nature and severity of the matter to be disclosed. REINSW accepts that five years is generally appropriate as a time limit for the more serious matters with longer-term effects (for instance, flooding, bushfires and earthquakes) but considers two years to be sufficient for a violent crime or drug-related activity that requires disclosure under section 26.

Response to Recommendation 6

That four weeks' rent should continue to be the maximum amount that can be received from a tenant as a rental bond.

REINSW maintains its position as set out in its Submission dated 29 January 2016 and requests that the bond regime be further considered to take into account REINSW's position. Unfortunately, a bond equivalent to 4 weeks' rent is an insufficient amount and fails to cater for the current marketplace. Since that amount only covers minor breaches, REINSW proposes that the threshold be raised to 8 weeks' rent, being a far more appropriate bond amount.

The current maximum rental bond of an amount equivalent to 4 weeks' rent is not an equitable amount for both parties. It does not take into account the varying circumstances across the market, such as higher rents for higher valued properties and those which are furnished. REINSW submits that other Australian States recognise the existence of circumstances warranting a higher bond amount (for instance, it is one month in Victoria). Furthermore, Victoria, South Australia, Queensland and Western Australia have legislated that a higher bond can be applied where the rent exceeds a nominated threshold. Accordingly, it is REINSW's position that the New South Wales legislation should provide for the ability to apply a bond of 8 weeks' rent where the premises are furnished or where the rent exceeds a threshold of $450 per week.

REINSW would also like to see the introduction of a bond top-up option if a tenant occupies the premises for more than 3 years. For example, the bond on a property that has been leased for 7 years could, in real terms, only represent 3 weeks' rent today, as opposed to when it was leased 7 years ago. This situation creates difficulties for landlords who may need to carry out repairs at current market prices applicable at the time the tenant vacates. The tenant is also protected by having to top-up their bond because their bond would be in line with the market, ensuring no financial hardship or surprise in relation to a bond amount when finding new premises at the end of the lease.

REINSW sees no reason why landlords should be prevented from accepting a higher bond amount with the tenant's consent. Some prospective tenants, who have no previous rental history, have a limited ability to demonstrate their capacity to be good tenants and are seen as higher-risk by landlords. Allowing the landlord to accept a slightly higher bond amount (for example, 5 weeks' rent) could improve the chances for first time tenants to enter the rental market.

Finally, where furnished property is concerned, and to further enhance the marketplace for landlords and tenants, REINSW feels it necessary to reinstate the furnished property bond at an amount equivalent to at least 8 weeks' rent. Landlords see risk in leaving their furniture in the premises because the bond amount is too low to cover the cost of damage, repairs or cleaning to furniture as well as the premises itself. In these circumstances, landlords often choose to store their furniture and pay for removalist fees rather than lease the premises furnished. REINSW believes that a higher bond amount would result in more furnished rental properties in the market, which would benefit both tenants and landlords.

Response to Recommendation 7

That the payment of interest to tenants on rental bonds be abolished and the purposes for which Rental Bond Interest Account money can be spent should be widened to include consumer protection more generally.

REINSW is of the view that the interest earned on bonds is a nominal amount once distributed to individual tenants and agrees that it should not be paid directly to them. REINSW suggests that, instead, the interest earned on bonds should be applied to a Government fund or account used for the purpose of funding property damage caused by domestic violence (refer to REINSW's response to Recommendation 20(iii)(e) below for more on this proposal).

Response to Recommendation 8

That the Act require all landlords and agents to register with Rental Bonds Online and provide tenants with an invitation to use Rental Bonds Online prior to bond lodgement.

REINSW reiterates its position as set out in its Submission to NSW Fair Trading dated 17 October 2016, in response to the amendment to the *Residential Tenancies Act 2010* (NSW) relating to the online rental bond service.

Property managers have advised REINSW that there is a reluctance in the market to use the online rental bond service because of the insufficient refund process at the back end of the system.

The online rental bond system, as it currently stands, allows the tenant to claim the bond immediately upon vacating the premises. The system also negatively impacts the necessary timeframe required for the parties to communicate and conciliate in relation to the release of the bond. If there is insufficient time for the parties to conciliate properly, the only likely way forward is for either party to apply to NCAT (which is costly in both time and money as it involves the landlord paying the NCAT application fee and all parties waiting 14 days). Unfortunately, this process will have a significant impact on NCAT as it will substantially and unnecessarily increase the number of NCAT hearings, ultimately increasing NCAT's time, costs and other resources as well as red tape. As a result, the online service will work against the idea of reducing burden on all stakeholders involved.

REINSW applauds the feature in the online system which comprises a checklist for the tenant to complete before applying for the release of the bond. However, the tenant may incorrectly or even fraudulently complete the checklist with no penalty as it is not currently enforceable. As an alternative, REINSW recommends that the legislation be enhanced by the inclusion of a 7-day grace period (commencing upon vacation of the premises and the return of keys) whereby both parties are prevented from making a claim on the bond during the 7 days without mutual consent. This grace period will enable effective conciliation to take place between the parties. REINSW believes that the online system is currently unattractive because it permits tenants to apply for the release of the bond immediately, which is counterproductive to any form of conciliation or agreement.

REINSW has recently discussed its concerns with NSW Fair Trading and understands that NSW Fair Trading has decided to take a reactive, rather than proactive, approach to see whether REINSW's concerns actually eventuate down the track. REINSW disagrees with NSW Fair Trading's approach and recommends action be taken sooner rather than later to implement a 7-day grace period to allow for conciliation to take place before lodging any application to NCAT.

Response to Recommendation 9

That the condition report provides a page that can contain photos of the property if the tenant or landlord wishes to use them.

REINSW supports this recommendation provided that the requirement for a written condition report is maintained. The inclusion of photos in the written report must not diminish the report's importance or focus, being evidence as to the condition of the premises at the commencement of the lease. REINSW is of the strong opinion that photos cannot replace the written report, which should maintain its prescribed format.

REINSW believes that photos included in the condition report should only be used to support defects or damage identified in the written report, and the number of photos included must be limited so as not to detract from the importance of the written document.

REINSW feels that clarity is required as to what constitutes "a page" of photos because there are different page sizes (for example, A4, A3, etc). Further, a page could be double-sided or have a layout comprising of up to 32 pages per sheet of paper, and if that sheet was double-sided then there could technically be up to 64 photos per sheet of paper. Surely that is not the intention of the recommendation.

REINSW appreciates that the number of photos appropriate to be included in the condition report will depend on the size of the premises. Accordingly, REINSW suggests the following tiered approach to determining the number of photos included in a condition report:

- 1-bedroom dwelling – a maximum of 10 photos;
- 2-bedroom dwelling – a maximum of 15 photos;
- 3-bedroom dwelling – a maximum of 25 photos;
- 4-bedroom dwelling – a maximum of 35 photos; and
- 5-plus bedroom dwelling – a maximum of 40 photos.

REINSW proposes that the tenant should be given the photos either electronically or in hardcopy, but those photos must be attached to the written condition report.

Response to Recommendation 10

That landlords/agents be required to:

(i) consult with the tenant before taking photos to be used in advertising and provide the tenant with an opportunity to move any possessions that can reasonably be moved; and

(ii) obtain the tenant's written permission to use photos containing the tenant's possessions in advertising.

That tenants are prohibited from unreasonably withholding consent to the use of photos in advertising.

REINSW is not opposed to the first paragraph of the recommendation provided that a time period be included in relation to how long the tenant has to move their possessions. In that regard, REINSW recommends that the tenant should have 48 hours to move any possessions that can reasonably be moved. REINSW also recommends that the tenant's personal belongings be included in this paragraph in addition to their possessions.

With respect to the second paragraph of the recommendation, REINSW does not agree that the consent of the tenant should be written consent and suggests that any form of consent should suffice. A requirement for written permission imposes a more onerous obligation on the tenant, which is an unnecessary requirement in practice. However, REINSW recommends that if the tenant refuses to give such consent then they should be required to give written reasons for such refusal. The benefit of providing written reasons includes the potential to resolve any issues or disputes on the matter. In addition, REINSW suggests that the word "possessions" in the second paragraph of the recommendation be replaced with "personal belongings" because personal belongings would not capture items such as couches, tables and the like that would be difficult or impractical not to include in a photo.

Response to Recommendation 11

That the condition report be required to be completed by the tenant and provided to the landlord or agent no later than seven days after the tenant obtains possession of the rented premises.

REINSW is of the view that it is more appropriate for the tenant to provide the completed condition report to the landlord or agent no later than seven days after commencement of the tenancy, rather than seven days after the tenant obtains possession of the premises. The recommendation does not accurately reflect all types of scenarios when a premises is leased. For instance, possession occurs when the keys to the premises are given to the tenant, however, some tenants choose not to move into the premises for a month after collecting the keys. In that circumstance, the recommendation is impractical and REINSW suggests it be amended so that the report is provided to the landlord or agent no later than seven days after the lease commencement date.

Response to Recommendation 14

(i) That the Act be amended to remove the "reasonable diligence" defence to:

- *a claim for an order that the landlord carry out specified repairs; and*

- *a tenant's ability to terminate a tenancy on the grounds that the landlord has not carried out repairs.*

Whilst REINSW appreciates the intention behind this proposed amendment, it disagrees with the recommendation. The "reasonable diligence" defence allows Tribunal members the ability to consider the particular facts of the matter to determine whether the landlord acted with reasonable diligence in the particular situation. The landlord cannot be expected to go beyond what is reasonable in the circumstances and the Tribunal is able to apply precedents to determine, objectively, what an ordinary person would have done in the same set of circumstances.

REINSW's primary concern if this defence were removed from the Act is that landlords would be unfairly disadvantaged in certain circumstances. For instance, third parties such as tradespeople or suppliers may be the reason why a repair is not fixed within the Commissioner for Fair Trading's reasonable timeframe for carrying out the specific repair, despite the agent taking all reasonable steps to rectify the repair and exercising reasonable diligence in the circumstances. For that and other similar reasons, REINSW considers it unjust to remove the "reasonable diligence" defence from section 65.

Response to Recommendation 15

That the Act be amended to clarify that a landlord may not unreasonably refuse consent to minor alterations or fixtures which are designed to make the premises liveable for disabled or elderly tenants.

REINSW has huge concerns with this proposed reform and strongly recommends that it not be implemented. This proposal to amend the Act has absolutely no regard for the landlord's property or the landlord's right and freedom to do what it considers best for its property. Of equal concern is the fact that a renovation might appear to be minor in nature but may result in an extremely expensive make-good for the tenant, or landlord if the tenant fails to make-good. For instance, the installation of grab rails in bathrooms requires drilling into wall tiles which may be discontinued products no longer available for purchase or the tiles may be part of a $100,000 bathroom and, hence, extremely expensive to replace.

REINSW insists that this recommendation be discarded and that the requirement be on the tenant to determine whether the premises are suitable to their needs from time to time. REINSW cannot see why a landlord should not have the absolute discretion in relation to alterations made to, or fixtures installed in, their property. It is their property to do as they see fit and it is only fair for that discretion to be unfettered. REINSW considers the only logical and fair response, if a premises becomes unsuitable to the tenant during the lease, is for the tenant to vacate the premises and relocate as appropriate.

REINSW is concerned where tenants fail to make good at the end of their tenancies, leaving such minor alterations or fixtures in the premises, limiting the ability for landlords to re-lease the premises. It is difficult for a landlord to find a replacement tenant that is elderly or disabled and, hence, requiring the installed facilities. Such a tenant would fall within the minority population and it is unjust and unfair for legislation to dictate when a landlord cannot unreasonably refuse consent to such minor alterations or fixtures.

REINSW is of the view that tenants should seek the consent of the landlord to these alterations or fixtures before the commencement of the tenancy and, if such consent is refused, then the tenant is at liberty to find another, more suitable property.

REINSW would like to point out that owners and occupiers are in the exact same position as the elderly or disabled in that, if their circumstances change and they require minor alterations or fixtures to the premises to suit their new needs, they will need to move to a more appropriate premises. The fact that people can move when a premises becomes unsuitable is a major benefit to the nature of tenancies.

REINSW also makes a parallel between a retail or commercial lease and the residential lease in that a retail or commercial tenant must be satisfied, before entering into the lease, that the premises can be lawfully used for the permitted use and the tenant must occupy and use the Premises at its own risk. Similarly, a residential tenant should carry out proper due diligence before entering into a lease. That way, if the premises are unsuitable to their needs or desired use then they should not enter into the lease.

If this recommendation were to proceed to implementation stage, REINSW recommends the following in relation to the proposed reform:

- The inclusion of definitions of what constitutes minor alterations or fixtures, the elderly and even the disabled. With such clarity, the potential for confusion and ambiguity is minimised, particularly since these terms are subjective and open to different interpretations depending on experience and perspective (for instance, one might consider a 55-year old to be old or a person with a hearing impediment to be disabled).

- An exclusion in the Act in relation to wet areas. That is, there must be no minor alteration or fixture to any wet area in the premises and the landlord can unreasonably withhold its consent in that regard. There is danger in that what may appear to be a minor alteration may not, in fact, be minor. For example, drilling holes in bathroom tiles to install a grab rail might unintentionally result in a broken waterproofing membrane.

Response to Recommendation 16

(i) That section 20 be amended to reduce the applicable term to 5 years to encourage longer fixed term tenancies.

Property management industry experts comprising REINSW's Property Management Chapter committee have advised REINSW that the current practice of entering into leases with a term of 6 or 12 months does not need to change as it is acceptable in the market and works well for all parties. These experts have also confirmed that the majority of tenants are not seeking nor do they wish to enter into longer term leases because their primary focus is on the flexibility, mobility and spontaneity associated with shorter term tenancies. Further, with interest rates currently at an all-time low, tenants are more interested in buying their own property rather than locking themselves in to a long-term lease. Having said that, REINSW recognises that there is a very small cohort that do want longer term tenancies and, for that reason, REINSW sets out its position on the recommendation below.

It is important to note that neither the Review nor the Government have provided any substantial guidance on the implementation of this recommendation so REINSW presents its position based on advice it has received from industry experts.

Whilst REINSW agrees that an incentive for people to enter into longer fixed term tenancies would be to reduce the applicable term from 20 years to 5 years, a bigger incentive for landlords to enter into leases with 5-year terms would be to remove the registration obligation and the requirement to pay registration fees. Accordingly, REINSW recommends that section 53 of the *Real Property Act 1900* (NSW) (**RPA Act**) be amended to require registration of a lease if that lease has a term of more than 5 years as opposed to 3 years. If landlords are not required to pay registration fees for registering a 5-year lease, then they will be encouraged to use these longer-term leases. Alternatively, REINSW proposes that residential leases with a term exceeding 5 years should be exempt from the registration requirement in section 53 of the RPA Act.

In addition to REINSW's proposal to amend section 53 of the RPA Act, REINSW also suggests that it is not made mandatory to offer a 5-year lease on the basis that a lease of that duration is not always suitable because tenants have differing circumstances.

Another motivation for landlords to use 5-year leases would be to enable them to stipulate terms and conditions that are prohibited or not included in the current standard form residential tenancy agreement. However, for ease of administrative purposes, REINSW proposes a framework be provided where both parties to the lease could clearly understand all of their rights and responsibilities. The framework would have set terms that may be negotiated by the parties including, without limitation, provisions about maintenance and repair, bonds, carpet cleaning, rent increases and rent reviews.

If this recommendation were to proceed, REINSW also recommends that there be a prescribed but not mandatory 5-year lease which includes terms incentivising landlords to use that lease as opposed

to the standard form residential tenancy agreement. Such terms should include but are not limited to:

- the tenant being responsible for making certain repairs (for example, to door handles or damage from the use of hot plates on stoves);
- the tenant being responsible for repairing damage from minor alterations (for instance, drilling into walls, tiles, etc);
- a bond top-up option;
- the inclusion of a break fee provision whereby the break fee is a higher amount than that in the standard form residential tenancy agreement because the balance of the term is likely to be longer;
- obligations on the tenant to reimburse the landlord for any call out fees where the tenant fails to provide access to the premises for safety inspections (e.g. smoke alarms);
- obligations on the tenant to advise the landlord immediately if there is an issue with a safety matter on the premises (e.g. smoke alarms, pool fences or window locks);
- obligations on the tenant not to interfere with safety installations on the premises (e.g. smoke alarms, pool fences or window locks);
- the insertion of an additional term prohibiting smoking;
- the inclusion of a provision to deal with the prevention of mould by the tenant;
- the inclusion of a provision that the tenant is to pay for any pest control required after the first 90 days of the commencement of the tenancy;
- the option available under the previous residential tenancies legislation whereby the landlord and tenant could agree on the timing and responsibility for payment of carpet cleaning;
- the ability for the landlord to require a higher bond in respect of furnished premises or where pets are kept on the premises;
- the inclusion of a provision that the tenant will have the carpet professionally cleaned and have the property fumigated in leases where the keeping of pets is permitted (currently the lease requires the tenant to either professionally clean the carpet or fumigate if pets are permitted, however, REINSW believes it should offer both);

- the optional ability to provide for servicing of residential premises (eg. cleaning); and

- the insertion of a holding over clause in the operative provisions of the agreement rather than in the Notes where it currently sits.

To be clear, REINSW envisages that the proposed 5-year prescribed agreement would have no impact on the current standard form residential tenancy agreement and would be a stand-alone agreement.

It is REINSW's understanding from its attendance at the Stakeholder Roundtable Meeting on options for long-term tenancies held on 21 November 2016 that the Minister is interested to have a prescribed 5-year lease prepared and used in the market. REINSW encourages the Minister to ensure that his interest becomes a reality.

(ii) That the Government give further consideration to other changes that could be made to the Act to further incentivise the use of longer fixed term tenancies.

There is no guidance in this part of the recommendation on what other amendments to the Act will be further considered by Government. Accordingly, REINSW cannot comment on this recommendation other than to note that it requires more clarity on the changes.

Response to Recommendation 18

Section 107 of the Act should prescribe a method for calculating a tenant's liability to the landlord upon breaking a fixed term lease prior to its expiry.

To reiterate REINSW's position as set out in its submission dated 29 January 2016, REINSW is of the view that there should not be a requirement in the residential tenancy agreement imposing break fees. Therefore, REINSW does not feel it necessary to prescribe a method for calculating a tenant's liability to the landlord if it breaks a fixed term lease prior to expiry.

REINSW feels that the question of whether a break fee should be applicable is dependent on each specific matter and should be negotiated between the parties, having regard to the current market conditions, particular property features and circumstances of the parties. However, there should be more education and awareness for the parties in relation to the consequences of having a break fee in the agreement and having it removed.

REINSW proposes that that following provision could be included as an additional clause in the agreement as an alternative (that is, the parties choose one or the other option) to the current break lease clause:

> *If the tenant terminates the agreement before the expiry of the fixed term and clauses 41 and 42 have been crossed out, then, subject to the landlord's obligation to mitigate their loss, the tenant is liable to*

pay the landlord compensation for an amount equivalent to rent and other costs reasonably incurred by the landlord until such time as the landlord finds a suitable replacement tenant or until the expiry of the fixed term tenancy agreement, whichever occurs first.

There are reports from members of REINSW's Property Management Chapter that there are tenants who manipulate the break lease provisions by falling in arrears and forcing the landlord to terminate the lease for non-payment of rent. There have been instances where NCAT has denied compensation to the landlord in these circumstances. This results in an unfair outcome for the landlord and needs to be remedied.

If the Government were to implement a mandatory break fee payment if a tenant ends the fixed term lease prior to expiry, REINSW suggests that section 107 and clause 41 of the standard form residential tenancy agreement be amended in relation to the applicable amount of the break fee.

REINSW recommends that there should be one applicable break fee regardless of when a fixed term lease ends before its expiry date. Section 107(4) should not distinguish between a lease that ends with less than half of the fixed term expired and a lease that ends with more than half of the fixed term expired. REINSW submits that the break fee should be 6 weeks because 4 weeks does not cover the landlord's costs associated with a tenant ending a lease before its expiry and that those costs are the same regardless of when a lease ends. For instance, irrespective of when a lease ends, a landlord incurs a letting fee of 1 weeks' rent plus GST, advertising costs which is usually hundreds of dollars and a fee associated with preparing and signing a new residential tenancy agreement.

In addition, the mandatory break fee should only apply to properties with a rent of less than $1,200 per week. REINSW contends that landlords who rent their properties for less than $1,200 per week should not be required to comply with the requirement to mitigate their loss pursuant to section 107(2). However, properties on the high-end of the scale or in major regional centres face demographic and geographic issues to the extent that the landlord's costs will be higher if tenants break fixed term leases of these types of properties. Such properties are leased at higher rents and will take longer to find a new tenant after the lease has ended. Accordingly, if properties have a rent of $1,200 per week or more then the way in which a break fee should be calculated is the loss the landlord has incurred (including loss of rent) caused by the tenant's actions provided that the landlord takes reasonable steps to mitigate that loss, as required by section 107(2).

Response to Section 4.4.4: Landlord's decision to sell property – Section 100(1)(c)

Although not a specific recommendation, the Review discusses section 100(1)(c) and the Government's intention for introducing it into the Act.

REINSW does not agree with the Review's conclusion that there is no need to further amend section 100(1)(c). In fact, REINSW maintains its position that the section is a constant source of confusion for all parties concerned and should be repealed or, if not, re-drafted. NSW Fair Trading may not consider there to be an issue with the section, however, there is uncertainty in the market over the

section's intent and interpretation, and REINSW does not believe the provision was clarified when it was amended under the *Statute Law (Miscellaneous Provisions) Act 2014* (NSW).

The Government has specifically acknowledged in the Review that section 100(1)(c) is contentious in nature. REINSW strongly believes that the section remains as contentious as before its re-draft because nothing was clarified by the amendment. It is quite clear in the market that the amended section does not place its operation beyond doubt, as the Review suggests. Unfortunately, the Government's time, money and resources were unnecessarily consumed by amending the section because the re-draft failed to address stakeholder concerns, noting that the same issues and confusion as before continue to persist.

The drafting and interpretation of section 100(1)(c), along with the word 'intention' used in the section, lead to constant frustration for landlords, tenants and agents. Further, REINSW still considers the section to conflict with section 26(2)(a), which requires disclosure where the contract for sale has already been prepared.

The section is aimed entirely to protect the tenant with an incorrect and unfair assumption that all landlords are deemed to be devious. However, issues arise when a landlord's circumstances change after the lease has commenced and the landlord needs to sell the property. Such circumstances include but are not limited to:

- ill health;
- loss of a partner through death;
- loss of ability to maintain income through sudden disability;
- divorce;
- debt;
- local council or state government planning changes that impact the viability of the premises to lease in the future;
- needing to sell the premises in order to finance the purchase of a home; or
- simply genuine hardship via loss of employment.

The section has the (presumably unintended) effect of allowing tenants to terminate the lease even at the point where the landlord has exchanged contracts for the sale subject to the tenancy. If the tenant vacates at this late stage then this can put the landlord in a position of being in breach of the contract for sale, losing the purchase and possibly having to pay damages to the prospective purchaser. This situation needs to be rectified in the legislation.

REINSW finds it difficult to see the rationale for section 100(1)(c), since any new owner would be bound by the residential tenancy agreement in the same manner as the original landlord and any inconvenience arising from the sale process ceases after exchange has occurred.

Response to Recommendation 20

That:

(i) the Act be amended to allow a victim of domestic violence to end their tenancy immediately by serving a notice of termination on the landlord and any other co-tenants, and providing evidence of domestic violence. Acceptable evidence of domestic violence would include:

*(a) a provisional, interim or final apprehended violence order (**AVO**);*

REINSW strongly believes that a final AVO should be the only acceptable means of proving domestic violence. That way, the potential for frivolous or false claims would be minimised. A final AVO would indicate that the situation is one which warrants the issuance of such an extreme order. REINSW is concerned that, by extending the evidence to include a provisional or interim AVO, tenants could abuse the system because to do so would simply offer an easy way to get out of a tenancy.

(iii) That further amendments to the Act be made to:

(a) provide that a Tribunal order under section 102 of the Act terminating the tenancy of a co-tenant can be made in cases of domestic violence;

REINSW believes that this proposed amendment to the Act should be extended to allow a landlord to apply to the Tribunal for an order to terminate the tenancy in cases of domestic violence. REINSW sees no reason why landlords should not be able to apply to the Tribunal particularly in circumstances where, for instance, the perpetrator is the tenant who remains in the premises or has left the premises but the co-tenant is unable to pay the rent alone. REINSW's rationale is that the landlord is not in the same position as it were before the domestic violence occurred and the tenants' circumstances have changed since the landlord reviewed and approved their application for tenancy. REINSW insists that the landlord should not be disadvantaged in any way in cases of domestic violence.

In addition, section 102 should not be limited to an order made by the Tribunal on application by a co-tenant or landlord (as above). Rather, the section should also allow for urgent hearings to take place where an occupant of a premises is aware of the existence of domestic violence and the premises is consequently exposed to imminent or potential threat, danger or damage.

(b) to amend section 71 to include within the list of reasonable excuses to change locks that it is necessary to protect a tenant from domestic violence;

REINSW supports this recommendation provided that the tenant notify the landlord and landlord's agent of any alteration or removal of, or addition to, a lock or other security device and provided that the tenant gives them the key to the lock or method of accessing another security device.

(c) to amend section 54 to remove, in cases of domestic violence, the automatic liability of a tenant for the damage caused by others who are on the premises;

REINSW is strongly opposed to this recommendation and proposed amendment to section 54 on the basis that it is extremely unfair to landlords and diminishes their rights as property owners. It is REINSW's position that the tenant should be responsible for damage caused by domestic violence, not the landlord. REINSW reiterates its proposal (as set out in its response to Recommendation 7 above) that the funding to repair such damage should come from a Government fund established for that purpose and financed by the interest earned on rental bonds. REINSW believes that, in this case, the Government is the appropriate entity to determine whether a tenant is a victim of domestic violence and qualifies for the funding after having applied to the Government for such funding.

To permit this amendment to section 54 would be to open up a Pandora's box. For instance, it would provide an avenue for tenants to claim "domestic violence" where damage to the property has actually occurred as a result of a party hosted by the tenants.

Whilst REINSW appreciates the serious and devastating nature and effects of domestic violence, the landlord should not suffer any of the consequences. If their property were damaged as a result of domestic violence, it is fair to say that the damage incurred resulted from the tenants' occupation of the premises and activities that occurred within the premises during such occupation. The amendment would negatively impact the landlord despite these circumstances being outside their control. Although domestic violence is a matter also outside the control of the victim tenant, in some cases it may be the tenant who invited the perpetrator onto the premises or the perpetrator may be a co-tenant. In no way do these scenarios suggest that the landlord should be liable in any respect.

REINSW supports the well-established principle of make good where it is the obligation of the tenant to make good the premises at the end of the lease and that the premises should be in the same condition as it were at the commencement of the lease, even in cases of domestic violence which are beyond the control of the landlord.

REINSW believes that the landlord's position, in cases of domestic violence, should be akin to that in common law where damages are suffered due to breach of contract or tort. In the case of *Gates v City Mutual Life Assurance Society Ltd* (1986) 10 CLR 1, the joint judgement of Mason, Wilson and Dawson JJ confirmed that there are two established measures of damages:

- In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed — he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss).

- In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed.

With this judgement in mind, REINSW recommends that the Government seriously consider the landlord's position in cases of domestic violence and insists that the Government follow established common law principles supporting the fact that the landlord should be placed in the position they would have been in had the domestic violence not occurred. To that end, REINSW suggests that the Government seriously consider establishing a Government fund for cases of domestic violence, the mechanics of which are discussed above.

REINSW envisages that a potential consequence of the Government not seriously considering the landlord's position further may be the refusal, by landlords, of entering into tenancies with past

victims of domestic violence because they do not want to assume the risk of potential future damage and repair costs.

(d) to give the Tribunal a discretion, in cases of domestic violence, to find that only the perpetrator is liable for damage to the property arising from domestic violence;

Again, REINSW believes that the tenant is liable for damage to property arising from domestic violence and so does not agree with the implementation of this recommendation. To do so would cause great havoc, panic, tension and disadvantage to landlords if the perpetrator cannot be located or if their name is unknown, particularly in circumstances where there is no bond or the bond amount is insufficient to cover the cost of the damage.

In addition, the reference to "damage" in this recommendation should be changed to "malicious damage" so that the perpetrator is only liable for malicious damage, minimising the potential for this amendment to be used inappropriately or misused.

(e) to prohibit landlords and agents from listing a tenant on a tenancy database where they are aware the tenant's breach or debt is the result of domestic violence and the tenant in question was not the perpetrator of the violence.

REINSW is of the view that the tenant should always be responsible for paying its debts and, if paid, there would be no reason to list them on a tenancy database. If the Government were to adopt REINSW's idea of establishing a Government fund for the purpose of paying for damage to property caused by domestic violence, then the tenant would not be listed on any tenancy database if they provide evidence that the Government has determined that they qualify for the funding.

If the Government chose not to establish this Government fund, then the tenant should be required to notify the landlord or its agent if someone else is living with them, particularly if that person is a perpetrator of domestic violence. A final AVO should suffice as evidence of domestic violence. Such notification would allow the landlord or agent to conduct proper due diligence enquiries just as they had done for the tenant before occupation.

(iv) That the Department of Justice and the NSW Civil and Administrative Tribunal be consulted on appropriate definitions of domestic violence and on the criteria for proving domestic violence in recommendations (iii)(a)-(e).

REINSW strongly agrees with this recommendation as it is likely to resolve many contentious issues discussed above.

Response to Recommendation 22

The Act should allow for notices to be served electronically via email or by other agreed electronic methods (excluding SMS) if the parties so agree.

REINSW supports this proposal and encourages bringing the process into the 21st century. The new *Strata Schemes Management Act 2015* (NSW) permits the service by email in recognition of contemporary communication technology and there is no reason why the service methods under the *Residential Tenancies Act 2010* (NSW) should not be modernised.

Australia Post has changed its delivery speeds which impacts on the timing of postal deliveries, including notices served in the mail. To guarantee delivery in 4 working days an additional postage charge applies.

REINSW is of the view that fax should be discontinued as a method of service with the advent of email service, and that personal and postal service should remain as alternate methods of service.

Tenants and landlords frequently request email as the preferred method of communication. REINSW cannot see any reason why email should not be a legislated method of service for agents, landlords and tenants, particularly when NCAT serves notices by email.

REINSW contends that service of notices by email is the most efficient and beneficial method for all parties, and some of the reasons are as follows:

- tenants as well as landlords will be able to issue notices by email;
- parties can receive notices wherever they are, for example, when on holidays or absent on business;
- it is more convenient and logistically practical for tenants and landlords, particularly where they comprise of multiple parties, to receive notices electronically rather than to physically attend an agent's office for that purpose;
- modern devices such as smartphones, tablets and laptops make email the fast and efficient method of delivering and receiving vital information such as notices in 'real time';
- parties can act instantly on a notice received by email;
- it encourages good business practices; and
- email offers a record of events.

The Act should provide for the email addresses of tenants and agents to be stated on the lease and that the landlord and the tenant agree that it is their responsibility to inform all parties of any changes to the nominated address, within 14 days of the change occurring.

Response to Recommendation 23

The Act and standard form of agreement should allow the parties to opt in to receiving and sending electronic notice.

REINSW supports this proposal provided that both parties agree to a party receiving and sending electronic notices and that this agreement is formally documented and notified to each party, e-mail not being a sufficient method of formal notification.

Response to Recommendation 24

The Act should require parties to notify the other of any change to their email address within 7 days and to opt out of receiving notices electronically by written notice to the other party.

REINSW agrees, in principle, with this recommendation but suggests that the 7-day timeframe be changed to 5 business days so as to exclude errors due to weekends and public holidays. REINSW also recommends that the Act should make it clear that such written notice includes notice in an electronic format (for instance, email, but not SMS).

Response to Recommendation 25

That the standard form residential tenancy agreement include a note stating that section 9 of the Electronic Transactions Act applies to enable the agreement to be approved by electronic means.

REINSW supports this recommendation on the basis that the word "approved" is replaced with "signed" and, hence, that the note should provide guidance in that the agreement can be electronically signed.

REINSW recognises the risk, albeit low, where a party to the agreement is a company and signs electronically, preventing each counterpart from relying on the assumptions set out in section 129 of the *Corporations Act 2001* (Cth). In this regard, REINSW refers to the exclusion in Item 30 of Schedule 1 to the *Electronic Transactions Regulation 2000* (Cth).

Accordingly, REINSW recommends that the note in the standard form residential tenancy agreement provide the guidance required in relation to signing electronically and should specifically state that section 9 of the *Electronic Transactions Act* applies to enable the agreement to be signed electronically but that parties should rely on their own due diligence and enquiries in relation to the validity of the signatures.

Response to Recommendation 26

The Government deliver Rental Bond Board data online directly to the public, in a downloadable, searchable, manipulable format, without revealing personal information.

REINSW has no issue with this recommendation on the basis that:

(a) the actual data cannot be manipulated but rather its presentation or format can change (for instance, if some of the data is relevant for a particular purpose then only the data's format can be manipulated to remove the unnecessary information); and

(b) landlords and real estate agents or agencies must not be identifiable from the data.

In relation to paragraph (b) above, there will be negative consequences if the public were provided with the identity of landlords, agents or agencies. The agent or agency a landlord engages is considered to be private information, disclosure of which would constitute a breach of professional confidentiality. It has also been known for people with that type of information to use it in other databases for the purpose of determining who the agents/agencies act for and which properties they list.

REINSW is of the view that the only types of information that should be made available to the public from the Rental Bond Board data is the type of property, amount of rent, number of bedrooms and the month in which the property was leased.

Response to Recommendation 27

In drafting legislative amendments recommended by this review, the Government should include those minor amendments that are considered to have merit and which are consistent with Government policy.

Unfortunately, REINSW cannot comment on this recommendation because insufficient information has been provided in the Review to enable REINSW to avail it of any serious consideration. Before commenting, REINSW would like to review the list of the minor amendments because, if history repeats itself, the Government might consider an amendment to be minor in nature but, by changing what may be a simple word, the entire meaning and intent of the legislation could change.

3. Conclusion

Although not requested to do so, and despite the Review not being in the public domain specifically for consultation purposes by stakeholders, REINSW feels strongly about raising the issues in this Position Statement with the Minister directly. As the peak industry body, REINSW is constantly made aware of areas in the Act and in the standard residential tenancy agreement that require review and amendment in order to:

- address frequently encountered residential tenancy issues for the parties;
- remedy the balance of outcomes achieved via the application of the legislation;
- remove some of the unintended unfair consequences which ensue from the current drafting of the Act; and
- create a better residential tenancy system for all parties involved and for the economy generally.

REINSW feels obliged to respond to the Review in order to present issues it feels need to be further considered by the Government. REINSW appreciates the opportunity to provide this Position

Statement to the Minister and welcomes discussion of the issues raised with the Minister and/or policy officers at NSW Fair Trading.

Yours sincerely

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