



REINSW

for members
since 1910

REAL ESTATE INSTITUTE OF NEW SOUTH WALES REAL TENANCY POLICY

01. Real Tenancy Policy

REINSW seeks amendments to the existing regulatory regime for residential tenancies to strike a proper balance between the legitimate interests of residential investors and the provision of proper safeguards for residential tenants.

Striking a proper balance must involve:

- Recognising the importance of removing unnecessary impediments which discourage investors from choosing residential real estate as a preferred investment.
- Implementing a regulatory regime which is user-friendly rather than needlessly complex and prescriptive.
- Resourcing appropriately the dispute resolution facilities in the residential tenancies sector.

Removal of unnecessary impediments for residential investors

“Everyone shares the right to a decent standard of living. Essential to the achievement of this standard and therefore to the fulfilment of human life beyond simple survival is access to adequate housing. Housing fulfils physical needs by providing security and shelter from weather and climate. It fulfils psychological needs by providing a sense of personal space and privacy. It fulfils social needs by providing a gathering area and communal space for the human family, the basic unit of society. In many societies, it also fulfils economic needs by functioning as a center for commercial production.”¹

In New South Wales, residential accommodation plays a key role in maximising access to adequate housing. According to 2010 figures, at that time there were some 800,000 residential rental properties in New South Wales, of which approximately 82% were held by private landlords (as distinct from social housing). The vast majority of landlords rely on the services of licensed real estate agents to let and/or manage the property on their behalf. Just under one third of the population live in rented premises.²

The past two decades in particular have seen a broadening of the available opportunities for investment of capital. The advice that “the best and safest investment is bricks and mortar” is no longer followed as frequently as it was last century. Investments in shares or financial derivatives do not generate the positive financial by-product of providing accommodation for families. Government should, at the very least, not take steps which actively discourage availability of housing stock. The adverse effects on the availability of accommodation as a result of the changes to the tax treatment of negative gearing interest expenses between mid-1985 and September 1987 should never be forgotten.

A needlessly complex and prescriptive regulatory regime

REINSW recognises the need for a legislative and regulatory framework which appropriately protects the interests of landlords and tenants of residential property. The provisions of the *Residential Tenancies Act 2010* have been the subject of detailed comment by REINSW and repeated calls for change.

It is of concern that it is considered necessary to regulate the rights and obligations of residential landlords and tenants in a statute which comprises 227 sections and two Schedules plus, a regulation comprising of 25 clauses and 3 Schedules.

The Residential Tenancies Acts in both South Australia and the ACT consist of approximately 120 and 136 sections respectively. Western Australia manages the task in under 100 sections. While some jurisdictions (for example, Victoria and Queensland) have lengthier statutes than even New South Wales, those statistics strongly suggest that the sector in New South Wales is comparatively over-regulated.

In case it is thought that somehow New South Wales real estate has some unique feature which necessitates extensive regulation, it is notable that no other category of real estate in this state bears the same compliance burden as bedevils residential tenancies. For retail leases, the governing statute³ comprises some 159 sections (and no Regulation); for farming leases, the relevant legislation⁴ comprises 46 sections. For other commercial property, no specific legislation has been enacted.

There are a number of factors arising from the residential tenancies legislation which would discourage investors from becoming residential landlords, including:

- The fact that there are no penalties on the tenant for failure to pay rent and it is time consuming and costly for landlords to enforce payment of rent;
- The landlord is at the mercy of the tenant when it comes to sale of the premises if the tenant under a periodic agreement fails to vacate in accordance with the notice from the landlord or, alternatively, where the tenant breaks a fixed term agreement as the legislation currently allows the tenant to do;⁵
- There is no ability under the legislation for the landlord and tenant to agree on certain things as they are prescribed – for example, tenants are frequently happy to pay for water consumption if it means being able to have proper showers, however the legislation is very prescriptive as to the circumstances when the landlord is permitted to recover water consumption charges (i.e. requirement to install water saving measures) and does not permit the landlord and tenant to agree otherwise;⁶
- The legislation requires landlords to provide working smoke alarms however there is no consensus among the Department of Planning, the Office of Fair Trading, and Fire Rescue NSW as to how this obligation is to be discharged or as to what constitutes proper maintenance of a smoke alarm.

To take a further example of over-regulation, it is doubtful whether requiring a separate information statement to be given to a prospective tenant prior to the tenant entering into the agreement⁷ adds anything to the transaction. The residential tenancy agreement is in a standard, prescribed form; that document should be sufficiently clear on its face to render an additional information statement redundant. If it is not sufficiently clear, it should be re-drafted to make it so.

It is vital that the residential tenancies legislation be monitored and reviewed to ensure that the legislation does not impede the effective operation of the sector. If that review were only to occur after five years as contemplated in the 2010 Act⁸ the results for the rental market would be potentially disastrous. Any review must occur sooner, and must include meaningful consultation with all stakeholders.

Proper resourcing of dispute resolution facilities

REINSW appreciates the role of the Tenancy Division of the Consumer, Trader and Tenancy Tribunal in providing access to relatively efficient and cost-effective dispute resolution facilities. Such facilities are vital to the effective operation of the residential rental market in New South Wales.

REINSW is concerned however about some aspects of the existing dispute resolution regime.

Feedback from the real estate profession suggests that the volume of applications has increased due to additional compliance obligations under the 2010 Act, with the attendant lengthier delays between application and determination. At the same time, there have been closures of CTTT branches in various locations throughout Sydney, leaving the remaining branches to deal with the overflow. (Indeed, given the current housing affordability crisis it is likely that the number of applications will continue to increase simply by virtue of the growing number of tenanted properties). The Tribunal must have necessary additional personnel with the appropriate expertise and other resources to meet growth in demand for its services.

The commitment of additional resources must extend to rural and regional New South Wales. Anecdotal evidence suggests that unacceptably lengthy delays exist in some parts of the State in having matters listed for determination.

There has been some disquiet in the industry about apparent inconsistencies in decisions made by different Tribunal members on some of the more common categories of disputes. Such inconsistencies create uncertainty in the sector. One way of minimising the possibility of those uncertainties arising is for more decisions to be available online. Another would be for an increased use of Chairperson's Directions.

Sources:

1. Human Rights Education Associates: The Right to Housing – Study Guide (http://www.hrea.org/index.php?doc_id=411, accessed 5 October 2010).
2. Quoted in Regulatory Impact Statement accompanying draft Residential Tenancies Regulation 2010, p 3.
3. Retail Leases Act 1994
4. Agricultural Tenancies Act 1990
5. Residential Tenancies Act 2010, s 100(1)(c) and s 86(4)
6. Residential Tenancies Act 2010, s 39.
7. Residential Tenancies Act 2010, s 26(4).
8. Residential Tenancies Act 2010, s 227