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The Real Estate Institute of New South Wales Limited

Submission 29 January 2016

Statutory Review of the Residential Tenancies Act 2010

To:

Statutory Review of the
Residential Tenancies Act 2010
Fair Trading Policy

By email:

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 NSW Fair Trading Discussion Paper on the Statutory Review of the *Residential Tenancies Act* 2010 issued in October 2015 (**Discussion 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 its members and the property sector on property related issues. In doing so, the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

This Submission has been principally prepared by members of the Property Management Chapter of REINSW (the **PM Chapter**). Members of the PM Chapter are licensed real estate professionals with particular experience and expertise in the residential property management area of real estate practice, which includes the leasing and management of residential properties.

This Submission addresses the questions raised in the Discussion Paper and canvasses additional issues relevant to tenants, landlords and the real estate profession. It is REINSW's hope that NSW Fair Trading will implement the suggestions in this Submission in order to create an improved residential tenancy system for New South Wales.

REINSW responses to questions in Discussion Paper

Question 1

Are the aims and objectives of the Act, outlined above, still valid?

Response to Question 1

REINSW is of the view that the aims and objectives of the *Residential Tenancies Act* 2010 (the **Act**) are still valid in 2016. Although the Act operates reasonably well, there are several areas which need to be adjusted and refined in order to provide clarity for tenants, landlords and real estate professionals and to assist in the administration of residential leases. These areas have been discussed throughout this Submission.

Question 2

How can the regulation of residential tenancies in NSW adapt to effectively support the changing profile of the rental market into the future?

Response to Question 2

REINSW believes that the residential tenancies market, as regulated under the Act, is not likely to change in the near future. However, the short-term letting market in NSW is continually expanding with the proliferation of online booking platforms. Short-term lettings are currently largely

unregulated. One problem, which has become increasingly common, is the breach by tenants of their residential tenancy agreements by allowing short term stays to occur within the tenanted premises. This is common in city and beach areas.

Another problem occurs where tenants, who only want a short-term lease but also want the protections under the Act, enter into a lease for a term longer than desired and then break the lease because they did not intend to stay for that length of time in the first place.

REINSW has made a submission to the Parliamentary Inquiry by the Committee on Environment and Planning into the inadequacy of the regulation of short-term holiday letting in NSW and has made suggestions for the improvement of regulation in the short-term letting space. This submission is, at the time of writing, subject to parliamentary privilege. REINSW would be pleased to provide a copy of this submission to NSW Fair Trading once submissions to the Parliamentary Inquiry become public.

Question 3

Are there any types of occupancy arrangements which should be included or excluded from the Act?

Response to Question 3

The Act should cover situations where holiday premises are leased for more than 3 months, but not as a permanent residence. REINSW believes that the Act needs to better provide for residential tenancy agreements where landlords provide services to the tenant and the premises, including cleaning. Servicing is becoming more popular with landlords beyond short-term offerings.

Question 4

Are there any provisions of the standard tenancy agreement or condition report which can be improved or updated (see Appendix A and C)?

Response to Question 4

It is submitted that there are a number of amendments and enhancements, which should be made to the standard residential tenancy agreement in order to benefit tenants and landlords and to provide clarity for both parties. These are discussed in more detail elsewhere in this Submission. Some recommended amendments and insertions include:

- the insertion of a holding over clause in the operative provisions of the agreement (rather than in the Notes where it currently sits);
- 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, window locks);
- obligations on the tenant not to interfere with safety installations on the premises (e.g. smoke alarms, pool fences, 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 for carpet cleaning should be reintroduced in the new legislation;

- the optional 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); and

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

REINSW would be pleased to provide NSW Fair Trading with a copy of the REINSW Residential Tenancy Agreement, which includes some of the above provisions as additional terms.

Holding fees

There are a number of issues which arise for landlords in connection with holding fees. REINSW submits that the following issues should be resolved in the revised legislation:

- when a landlord accepts a holding fee, they are obliged to take the property off the market immediately;

- the holding fee binds the landlord to the approved applicant and the landlord cannot change their mind;

- the holding fee does not bind the applicant, who can withdraw their application at any time before the tenancy agreement is signed. The applicant's only penalty is forfeiting the holding fee;

- when an applicant is approved and the 7 days' holding fee is paid, there are many circumstances where the applicant fails to attend to sign the lease or does not sign the lease within 7 days, often withdrawing their application. The landlord has held the property waiting for the applicant to sign, meanwhile missing out on other potential tenants; and

an applicant cannot place a holding fee to secure a property prior to the existing tenant vacating, because the landlord is held to a commencement date and is liable to pay costs for the new tenant's temporary accommodation, if the property is not available when promised by the previous tenant.

To address these issues, REINSW submits that the Act should provide for the following:

- if the holding period exceeds 7 days, the holding deposit should be able to be increased to the equivalent of a maximum of 14 days' rent;

- if a holding fee is accepted whilst an existing tenant is in the premises (prior to vacating), it must be subject to the existing tenant vacating and 14 days' holding fees would be payable, as the tenancy agreement will not be able to be signed until after the existing tenant vacates. This will give surety to the applicant tenant and will protect the landlord should the existing tenant fails to vacate when they originally indicated; and

- if the applicant fails to sign the tenancy agreement within the 7-day holding period or by the original agreed date to sign the agreement (whichever is the earlier), the landlord should be permitted to give notice (by SMS or email) to the applicant that they are placing the property back on the market to seek a new tenant and the tenant automatically loses their holding deposit.

Question 5

Should there be any additional prohibited terms beyond those listed in section 19 of the Act?

Response to Question 5

REINSW submits that no additional prohibited terms are needed.

Section 19 requires more clarity to ensure fair and equitable outcomes when the residential tenancy agreement is ending. In particular, there should be a specific provision to the following effect:

> *Notwithstanding section 19(2)(d), a residential tenancy agreement may include a term that allows a landlord to claim compensation with respect to loss of bargain damages in relation to a breach of the tenancy agreement by the tenant.*

Question 6

Is the 'New Tenant Checklist' a useful resource (see Appendix B)? Are there any other important matters which should be covered in the checklist?

Response to Question 6

REINSW is of the view that the New Tenant Checklist is a useful resource for tenants.

It is submitted that there should be a similar checklist for landlords. The landlord checklist should set out the matters for which the landlord is responsible and which should be in place before the tenancy commences. Landlords should be better informed and educated in relation to their responsibilities under the Act, including as to the condition of the premises and statutory matters such as smoke alarms, pool fences and window locks. Frequently landlords are not aware of these responsibilities and this results in delays and confusion when the premises are being prepared for letting.

Question 7

Should the 'New Tenant Checklist' include, or be accompanied by, specific information on required safety features e.g. smoke detectors, electrical safety switches, pool fencing etc.?

Response to Question 7

It would be useful for the New Tenant Checklist to include information on compliance matters and the tenant's obligations in relation to those matters.

Question 8

Should any other information be required to be disclosed by landlords at the time of entering into an agreement?

Response to Question 8

REINSW submits that there is no need for further landlord disclosure.

Question 9

What incentives would encourage the use of longer term leases?

Response to Question 9

The PM Chapter professionals report that there are no perceived issues with the length of leases which need to be addressed in the Act. The length of the lease is negotiated between the parties. The current average term of agreements is 6 to 12 months and this is widely accepted by landlords and tenants. Tenants do not necessarily want long leases. If the tenant asks for a longer lease, the landlord would generally consider the request.

It is the experience of REINSW's PM Chapter professionals that landlords respect good tenants who look after the premises and pay rent on time. A landlord will generally not terminate a tenancy, and will be reluctant to increase the rent to market level, where the tenant complies with the lease and maintains the premises in a good state, unless the landlord's circumstances change the and the landlord needs to sell the premises or have family or themselves occupy the premises.

Question 10

What are the key challenges for landlords in offering longer term leases? How could longer term leases be managed?

Response to Question 10

Please see REINSW's response to Question 9 above.

Also, the inability to increase the amount of the bond is viewed by landlords as a disincentive to offering longer term leases.

In addition, if due to unforeseen circumstances the landlord needs to sell the property, a longer term lease will limit the landlord's ability to sell to owner-occupiers as they can only sell to an investor. Please also see REINSW's comments and concerns in relation to section 100(1)(c) under Question 32 of this Submission.

Question 11

Is the maximum bond amount of 4 weeks' rent appropriate?

Response to Question 11

It is submitted that there are several aspects of the bonds regime, which need to be enhanced and modernised in order to cater for the current marketplace:

- The current maximum bond equivalent to 4 weeks' rent is not an equitable balance for both parties, covering all circumstances, such as higher rents (for higher value properties) and furnished properties. Other States recognise that there are circumstances that warrant a higher bond than that of 4 weeks' rent (or a month in Victoria). For example, they legislate a higher bond can be applied where the rent exceeds a nominated threshold - which is the case in Victorian, South Australian, Queensland and Western Australian legislation. It is submitted that the New South Wales legislation should provide the ability to apply a bond of 6 weeks' rent, where the premises are furnished or the rent exceeds a threshold of $450 per week.

- A bond top-up option should be permitted where the tenant has been in occupation of a 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 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 their bond in line with the market, ensuring no financial hardship or surprise in relation to a bond amount when finding a new premises at the end of their lease.

- Prospective tenants with pets are often overlooked by landlords. To offer a level playing field for all prospective tenants, a pet bond should be introduced. Prospective tenants regularly offer to pay landlords a pet bond even though the legislation does not allow for it. If the legislation required a pet bond, then all applicants have the possibility of being the successful tenant despite the additional risk. A pet bond could be created via either a separate form or part 2 of the existing bond form, available online under the new online bond lodgement system. An additional clause could be included in the residential tenancy agreement to the following effect:

  > *The parties agree that an additional pet bond is payable by the tenant to the landlord if the tenant keeps a pet on the premises, such bond not to exceed an amount equivalent to 2 weeks' rent.*

- Landlords should be permitted to accept 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 a good tenant 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.

- Where furnished property is concerned and, to further enhance the marketplace for landlords and tenants, it is necessary to reinstate the furnished property bond at the equivalent of at least 6 weeks' rent. Landlords see risk in leaving their furniture when moving interstate or overseas for work or family reasons because the bond amount is too low to cover the cost of any damage to furniture as well as the cost of damage, repairs or cleaning with respect to the actual premises. In these circumstances landlords often choose to store their furniture and pay for removalist fees rather than to lease the premises furnished.

Question 12

Should a portion of the interest on rental bonds continue to be paid to tenants, or should this portion also be used to fund services for tenants?

Response to Question 12

The interest earned on bonds is a nominal amount once distributed to individual tenants. REINSW is of the view that the interest should not be paid directly to tenants, but rather, be used by government to provide improved tenancy services, including more tenancy advocacy staff at NCAT hearings.

Question 13

Does the process for refunding bonds and resolving bond disputes work well? What could be improved?

Response to Question 13

REINSW recommends that first hearings of bond disputes should be allocated by the NSW Civil and Administrative Tribunal (**NCAT**) a minimum hearing time of 30 minutes. The bond refund and dispute resolution process can be improved by changing the practices at the NCAT. REINSW submits that the current practice by NCAT of adjourning hearings results in wasted time and additional costs for all parties. The allotted hearing timeframes under NCAT operations and procedures should not impact the rights of tenants and landlords to a just, expedient and cost effective resolution of real issues. Hearings should only be adjourned in exceptional circumstances.

Question 14

Are the current notice periods for rent increases appropriate?

Response to Question 14

REINSW has no issue with the current 60-day notice period for rent increases. The issue REINSW has is that where a rent increase clause is written into the tenancy agreement from the outset specifying

when the rent will increase and by how much, there should be no requirement for an additional notice to be served on the tenant (where the increase will come into effect more than 60 days after lease commencement). This would remove the red tape associated with complying with section 41(5). It is submitted that no additional notice is required and if a tenant disagrees with the amount of the increase then they would still have the right to seek a hearing at NCAT.

Question 15

Do the existing provisions governing excessive rent increases strike the right balance between the interests of landlords and tenants? If not, how could they be improved?

Response to Question 15

REINSW is of the view that the Act is satisfactory in this respect. Landlords and tenants can negotiate the rent increase terms and, failing agreement, can apply to NCAT for a resolution.

Question 16

Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?

Response to Question 16

REINSW submits that changes are needed in order to address the current imbalance between the interests of the tenant and the interests of the landlord. It is submitted that the current timeframe whereby a landlord has to wait for 14 days to elapse before giving a termination notice for non-payment of rent is excessive. By the time a hearing with NCAT is registered and heard, the tenant is in significant arrears which could result in hardship for the landlord and is not covered by 4 weeks' bond.

Serving earlier notices of termination for arrears will assist the tenant by reducing the amount owed to the landlord if they do vacate.

As the tenant has protections under the Act allowing them the opportunity to rectify non-payment of rent (section 89), REINSW believes the landlord should be able to serve a termination notice for non-payment of rent after 7 days, rather than waiting 14 days. This creates an equitable balance for all parties.

Question 17

Should the introduction of late fees for rent owing be considered? Please give reasons.

Response to Question 17

REINSW is of the view that the introduction of late fees should be considered. Late fees could deter tenants who routinely manipulate the system by being 13 days in arrears and may encourage these tenants to pay on time. This would also alleviate some of the burden at NCAT.

Question 18

How can the 'split incentive' issue be addressed in the residential tenancy market?

Response to Question 18

Whilst the issues of water and energy efficiency are extremely important, the residential tenancy regime is not the appropriate forum to address these issues. It is submitted that governments should address these issues as part of a separate strategy involving all properties and users, not just residential tenancies. Tenanted properties should not be subject to requirements which do not apply to owner-occupied properties.

Where solar panels are concerned, it may be appropriate to include a clause in the tenancy agreement, which defines the agreement between the landlord and the tenant as to how entitlements and rebates in connection with the solar panels are to be treated.

Question 19

What incentives might encourage landlords or tenants to improve energy and water efficiency?

Response to Question 19

Please see the response to Question 18 above.

It is submitted that tenants should be billed directly by the water authority and should be subject to late interest and disconnection, as is the case with other utilities such as electricity. This would improve water efficiency. Currently, there is no imperative for tenants to pay water bills on time and the burden unfairly falls on the landlord, together with interest and re-connection fees.

Question 20

Is there an appropriate balance between the general rights and obligations of landlords and tenants under the Act?

Response to Question 20

Many areas of the current Act lack direction and awareness and do not result in a fair outcome for all parties.

Quiet enjoyment by tenant

It is submitted that the provisions of the current section 50(3) of the Act require clarification, in that a landlord should not be held liable for the actions of tenants of neighbouring properties where those neighbouring properties are not owned by the same landlord.

NCAT recently ordered a landlord to pay a substantial sum in compensation to a tenant for failing to provide premises that are fit for habitation in circumstances where an occupier of a neighbouring unit was continuously smoking and the smoke drifted into the tenanted premises. Although the landlord had attempted to resolve the situation, ultimately the issue was outside the landlord's control.

An additional sub-clause to the following effect should be included after clause 50(3):

> *A landlord who does not own neighbouring property is not responsible for their tenants' quiet enjoyment being impacted from neighbouring properties.*

A corresponding section should be inserted in the Act. It is draconian and unreasonable to expect a landlord to influence and change events, environmental conditions and behaviours which they have absolutely no control over and to be penalised for failing to do so.

Safety obligations

The obligations of tenants with regard to their safety need to be clarified. It is submitted that the following changes to the standard residential tenancy agreement are required in order to benefit tenants (and landlords) via increased awareness around vital safety issues including, but not limited to, fire, swimming pools, spa pools and window safety locks. The table below references current provisions in the standard residential tenancy agreement, the safety aspects and the obligations which need to be addressed:

Safety	**Obligations**
Fire Smoke Alarms (currently clauses 38-39) - insert an additional clause to the following effect: *The tenant agrees:* *(a) To notify the landlord or the landlord's agent immediately if any smoke detector or smoke alarm in the residential premises is not working properly so that the landlord can attend to the landlord's obligation referred to in clause 38 of this agreement;* *(b) Not to cover, remove or interfere with the operation of a smoke alarm installed on the residential premises.*	**Fire** Smoke Alarms (currently clauses 38-39) - insert an additional clause to the following effect: *The tenant agrees:* *(a) to pay, within 30 days of being requested to do so, for:* *(i) any call out fees payable where the call out has been arranged with the tenant and the tenant has failed to provide access to the residential premises for any reason, preventing the relevant service from taking place;* *(ii) any cost or expense of any kind incurred by the landlord to replace or fix an item, fixture or fitting in or on the residential premises that was required to be replaced or fixed as a result of a fire audit or fire inspection, provided that item, fixture or fitting needed replacing or fixing due to the activities carried out by the tenant in or on the residential premises (including, without limitation, creating holes in, or attaching hooks to, fire safety doors); and* *(iii) any fire, penalty or costs of any recovery action incurred by the landlord arising out of or in connection with the failure of a body*

	corporate, community association or company to comply with a statutory requirement (including, without limitation, the lodgment of an annual fire statement) if that failure was caused or contributed to by the tenant; *(b) to pay any call out payable to the fire brigade or other authorities which become payable in the event that a smoke alarm fitted to the residential premises is activated by activities carried out by the tenant on the residential premises, including but not limited to, due to burning food.*

Safety	**Obligations**
Swimming Pools and Spa Pools Swimming Pools (currently clause 40) - insert an additional clause to the following effect: *Unless otherwise agreed by the landlord and tenant in writing, the tenant agrees:* *(a) to notify the landlord or the landlord's agent as soon as practicable of any problems with the pool, equipment, safety gate, access door, fence or barrier;* *(b) not to interfere with the operation of any pool safety gate, access door, fence or barrier including not propping or holding open any safety gate or access door, nor leaving any item or object near a pool safety gate, access door or fence barrier which would aid or allow access by children to the pool area or allow children to climb the safety gate, access door, fence or barrier; and* *(c) to ensure that the pool safety gate or access door is self-closing at all times.*	**Swimming Pools and Spa Pools** Swimming Pools (currently clause 40) - insert an additional clause to the following effect: *The tenant agrees to reimburse the landlord, within 30 days of being requested to do so, for any call out fees payable where the call out has been arranged with the tenant and the tenant has failed to provide access to the residential premises for any reason, preventing the relevant service from taking place.*

Safety	**Obligations**
Windows – Locks and Security Devices Locks (currently clause 30) –insert an additional clause to the following effect: *The tenant agrees, where the residential*	**Windows – Locks and Security Devices** Locks (currently clause 30) –insert an additional clause to the following effect: *The tenant agrees to reimburse the landlord,*

premises are subject to the Strata Schemes Management Act 2015 or the Strata Schemes (Leasehold Development) Act 1986, to immediately notify the landlord or the landlord's agent of: *(a) any windows in the residential premises that do not have locks or other window safety devices; or* *(b) any locks or other window safety devices in the residential premises that are non-compliant with legislation or needing repairing,* *so that the landlord or landlords agent can ensure compliance with the relevant provisions of the Strata Schemes Management Act 2015 with respect to window safety devices.*	*within 30 days of being requested to do so, for any call out fees payable where the call out has been arranged with the tenant and the tenant has failed to provide access to the residential premises for any reason, preventing the relevant service from taking place.*

Use of premises by tenant

With regard to clause 26 of the standard residential tenancy agreement, an additional sub-clause should be included to recognise the fact that the tenant's action or inaction can result in fines and charges and that the tenant is responsible for payment of those charges. A clause to the following effect should be inserted:

> *The tenant agrees to reimburse the landlord within 14 days of written demand by the landlord in respect of any fees or expenses incurred by the landlord as a result of the tenant's act or omission or failure by the tenant to give access to the premises for any inspections permitted under this agreement.*

Question 21

Is further guidance required in relation to whose responsibility it is to repair the premises and when the repairs must be carried out?

Response to Question 21

No further guidance is required in relation to responsibility and timing for repairs to the premises.

Question 22

Are the current provisions regarding making alterations to a rental premises appropriate?

Response to Question 22

REINSW considers the Act is satisfactory in this regard. Landlords should be able to determine in their absolute discretion what improvements or alterations are made to their property. REINSW does not support a list of any kind of improvements or alterations that should be made to a landlord's property.

Question 23

Are there other types of work a landlord should be able to refuse permission for a tenant to undertake?

Response to Question 23

Further to the response to Question 22, consent to alterations should be in the landlord's absolute discretion.

Carpet cleaning

REINSW is of the view that the parties to a residential tenancy agreement should be able to reach agreement with respect to carpet cleaning. The following additional provision should be inserted in section 19 of the Act:

> *If, by agreement between the landlord and the tenant, the landlord agrees to professionally clean the carpet prior to the commencement of the tenancy (as evidenced by a paid & dated tax invoice provided to the tenant), the tenant agrees to professionally clean the carpet (as evidenced by a paid & dated tax invoice provided to the landlord) at the cessation of the tenancy.*

The introduction of this section will be cost-effective for tenants who often professionally clean carpets at the commencement and at the end of their tenancies. The tenant enjoys the benefit of fresh, professionally cleaned carpet for the term of the lease and protects the carpet for the landlord.

Smoking

Smoking has now been legally recognised as a potential nuisance for neighbours in the *Strata Schemes Management Act* 2015. The residential tenancies legislation needs to be updated to keep up with the strata legislation.

As previously mentioned, NCAT recently ordered a landlord to pay a substantial sum in compensation to a tenant for failing to provide premises that are fit for habitation in circumstances where an occupier of a neighbouring unit was continuously smoking and the smoke drifted into the tenanted premises.

For clarity and fairness, a clause to the following effect should be inserted in the additional terms of the standard residential tenancy agreement:

> *The tenant agrees not to smoke on the residential premises.*

This amendment would ensure that future tenants do not occupy premises with odours from previous tenants who smoked.

Strata legislation changes

In reviewing the Act, NSW Fair Trading will need to consider other consequential amendments flowing from the new strata legislation.

Surveillance cameras

In light of many recent reports in the media surrounding landlords who have installed surveillance cameras inside their rental properties, the Act needs to protect a tenant's right to privacy. To that end, a clause to the following effect needs to be included in the standard residential tenancy agreement (perhaps as clause 18.6):

> *The landlord agrees that at the time of entering into this residential tenancy agreement, any existing surveillance cameras or similar devices must be disclosed to the tenant in writing including the number of devices and the location of the devices on the residential premises. Any surveillance cameras or other devices must not be operational at any time during the tenancy. The landlord must not install surveillance cameras or similar devices on the residential premises without the prior express written consent of the tenant and such consent must be witnessed by a justice of the peace or legal practitioner.*

Mould

One of the most commonly encountered problems in residential properties is the issue of mould growing in the premises which can cause health issues for people.

Frequently the growth of mould can be prevented by the tenant taking simple measures to keep the property ventilated. It is vital for tenants to be made aware of how their choices can affect mould growth. Accordingly, the following clause is suggested to be inserted as an additional provision in clause 16 of the residential tenancy agreement, in order for tenants to acknowledge responsibility around the issue of mould in daily living:

> *to dust the walls, wipe away condensation on surfaces including windows, window sills and walls and, to allow reasonable air flow and ventilation in the residential premises in order to prevent the growth of mould.*

Pest control

REINSW submits that the landlord's general obligations in section 63 need to be clarified, in particular when it comes to pest control.

The NSW Fair Trading Fact Sheet "Pest and Vermin" provides a guide to responsibility, but does not specify time frames to clarify the 'start of the tenancy'. There is also no clarification in the standard residential tenancy agreement, which, if inserted, would assist in conflict resolution in relation to the issue of pest control.

There have been instances where NCAT has ordered the landlord to arrange pest control one year after the commencement of the tenancy, with reference to the obligations in section 63.

Pest control is an issue for tenants, landlords and property management professionals. The way a tenant lives can impact the presence of pests. The environment in and around, the premises can also have an impact on pests being present on the property.

The Act is currently silent on the responsibilities of tenants where pest control is concerned. These need to be spelled out. It is vital for tenants to be made aware of how their choices can affect the existence of pests on the premises.

A new subclause setting out a tenant's responsibility for pest control should be included in clause 16 of the residential tenancy agreement to the following effect:

> *to make all reasonable efforts to ensure that the premises are maintained in a manner that minimises pest infestation and that, in the event of pest control being required on the premises due to the action or inaction of the tenant, the tenant agrees to pay for such service.*

Question 24

Are the notice periods for carrying out inspections appropriate?

Response to Question 24

It appears there is an error in the Discussion Paper in that the second bullet point under the heading "Inspections and the right to privacy" states that 14 days' written notice is required for inspections to show the property to potential buyers. In fact, section 53(1) of the Act provides for 14 days' initial notice before the premises are first made available for inspection by prospective purchasers and, subsequently, under section 55(f) 2 days' notice for inspection if the landlord and tenant cannot agree under section 53.

REINSW suggests that there should be prescribed maximum notice period of 14 days in respect of each of the common reasons for inspection, including periodic inspections, formal valuations and financing purposes, regular pest control, building maintenance and structural reports. A tenant should be compelled to provide access after the maximum period has expired. Too often landlords are placed in a situation of uncertainty and are faced with dealing with delays and increased costs because the tenant has not provided access.

REINSW recommends that the use of terms such as "reasonable notice" in the legislation be avoided on the basis that a court ultimately decides what is reasonable using an objective test.

Question 25

Should the number of inspections allowed per year be reduced for long term tenants? If so, how long should a tenant have continuously occupied the same premises to be classified as a 'long term tenant'?

Response to Question 25

REINSW would support the number of periodic inspections per year being decreased to afford greater privacy for all tenants. REINSW suggests that a fair and equitable solution for all parties would be to allow 3 inspections in a 12-month period as opposed to the existing 4 periodic inspections in a 12 month period. However, if a re-inspection is required subsequent to and

associated with one of the 3 periodic inspections, the re-inspection should not count as one of 3 periodic inspections in one year (as is the case under the current Act).

These provisions should apply to all tenancies, not just long-term tenancies. In some instances landlords demand an inspection every 13 weeks but this can be seen as a privacy breach by tenants and it is not uncommon for a tenant to object, particularly those who care well for the property. If a maximum of 3 inspections per year are allowed, this would reduce the need to encroach on a tenant's privacy. An agent can generally form an opinion after 2 periodic inspections as to the manner in which the tenant is looking after the landlord's property.

With regard to access for valuers, the Act states one inspection in any 12 month period is permissible. It is REINSW's view that this is not practical. The Act is restricting the landlord's right to refinance or have a depreciation schedule inspection. A landlord may not be happy with their bank's valuation and may wish a new bank to inspect. It is submitted that this restriction should be removed and that this aspect of inspection should fall under the general access conditions. REINSW suggests that a 'minimum of two days' notice unless otherwise agreed is a better outcome for all parties. If a landlord cannot achieve the required finance this could result in the tenant not having a property to lease. Refinancing generally does not occur annually but, when it does happen, it is important that the requirement for access by the valuer be respected in the legislation.

Question 26

Are any additional protections needed for tenants and landlords regarding inspections and privacy?

Response to Question 26

REINSW is of the view that the Act should specify that photographs and videos being taken as part of the routine inspection process are permitted (but are not compulsory) and that the photographs or videos must not be used for advertising purposes.

Tenants need to be made aware that the photographs or videos are part of the modern inspection and management process. They are used for reporting to landlords who are unable to attend the premises themselves, or for record-keeping purposes. Further, insurers often ask for photographic evidence at times when landlords are making an insurance claim.

Taking photographs or videos can demonstrate to landlords the care that the tenant is taking in looking after their property. The result may be a lower rent increase than the market rent in order to show appreciation to the tenant for keeping the premises in order, thereby encouraging a long-term tenancy. This change to the legislation would be in the spirit of full disclosure of processes while giving balance to both parties.

It is important to note that the agent or tenant should not be forced to provide photos or videos under the legislation but, if they are available, NCAT should take them into evidence. If photographic evidence is not available in a particular instance, it is important that NCAT should not compel parties

to produce such evidence. In such instances, NCAT should only rely on the available written inspection report.

Photos and videos, when used as best practice, can assist parties in avoiding disputes being escalated to NCAT. They can be an invaluable tool in resolving issues.

Question 27

Should there be specific provisions in the Act that deal with the use of photographs or videos showing a tenant's personal property to advertise premises for sale or lease?

Response to Question 27

It is REINSW's view that using photographs or videos showing a tenant's property for advertising purposes understandably creates serious privacy concerns for tenants and should not be permitted unless the tenant's prior written permission is obtained. Agents are frequently able to use photographs that were taken whilst the property was vacant or, alternatively, tenant's possessions and furniture can be edited out of photographs used for advertising purposes.

However, landlords should not be restricted from only using external photographs and videos when listing a property for sale.

Question 28

Does the Act adequately protect the interests of sub-tenants/co-tenants and landlords in shared tenancy arrangements?

Response to Question 28

REINSW submits that this area is adequately dealt with in the current Act.

Question 29

Do the existing provisions in the Act and other legislation in relation to the standard of rental properties strike the right balance between the need to protect tenants and the need to contain costs for landlords?

Response to Question 29

REINSW submits that any regulation relating to the safety and standard of residential premises should apply to all residential premises, not just tenanted residential premises. Inspection and enforcement of any building or safety requirements needs to be done strictly by appropriately qualified building professionals.

It is submitted that property managers are currently placed in a position where they have to make representations about the integrity and mechanical worthiness of a number of aspects of a property in respect of which they are not qualified to comment, including:

- glass
- asbestos

- window safety locks;
- smoke alarms;
- decks and balconies;
- lead paint;
- electrical installations;
- swimming pools;
- cord safety; and
- hazardous activities including use of the property as a meth amphetamine lab.

Property managers do not possess the requisite skills, expertise, knowledge or competencies to discharge this obligation adequately, and accordingly tenants and other consumers relying upon their opinions are being placed at risk.

REINSW has raised concerns with Government and the NSW Coroner about this aspect of property management on numerous occasions.

REINSW is strongly of the view that any compliance matters should be certified either by the landlord as the person who is most familiar with the property or by a qualified building professional. Specific information and education is required for landlords to raise awareness in relation to the matters which the legislation requires to be in place before a tenancy can proceed. Often landlords are reluctant to carry out repairs and alterations as they are not aware of the legislative requirements.

REINSW would support a checklist for landlords and tenants, however, in the interest of public safety, property managers should not be required to comment on building and safety matters for which they are not qualified.

Question 30

Are there alternative ways to improve the standard of rental properties?

Response to Question 30

As noted above in the response to Question 29, if there are prescribed standards for residential property, those standards should apply to all residential properties and not only rented premises.

Question 31

Are the provisions applying to long term tenancies appropriate?

Response to Question 31

The practitioners from REINSW's PM Chapter are not aware of any particular issues arising in practice with regard to long-term tenancies.

It should be noted, however, that the Act (as currently drafted), does not appear to have consideration for the long-term tenants when termination of tenancies is concerned. Section 94 allows the landlord to make an application directly to NCAT without giving the tenant a termination notice. REINSW is of the view that it would be better for landlords to give long term tenants (who

are mostly elderly persons) a 90-day termination notice, which the tenant can choose to accept or apply to NCAT to have the notice period determined (which can be an extremely stressful experience for an elderly person).

Question 32
Are the current termination notice periods appropriate?

Response to Question 32
Under the current regime, where a landlord gives a 90-day no-grounds notice of termination, the tenant is able to vacate the property immediately, thereby leaving the landlord with no opportunity to find a replacement tenant and having to bear the associated costs and losses. It is submitted that the Act should be amended so that when the landlord gives a 90-day no-grounds termination notice, the tenant should give the landlord at least 21 days' notice if the tenant wishes to vacate before the expiry of the 90-day period.

REINSW also submits that the notice periods for termination of a tenancy at the end of a fixed term agreement should be the same for the landlord and the tenant. Currently, the landlord has to give 30 days' notice whereas the tenant can move out with 14 days' notice. It is suggested that the minimum notice period for both parties should be revised to 21 days. The parties would still be free to provide longer notice periods if they agree.

Section 100(1)(c)
Section 100(1)(c) is a constant source of confusion for all parties concerned. The drafting and interpreting of the section, along with the word 'intention' being used in the section, all lead to constant frustration for landlords, tenants and agents. NCAT attempted to obtain clarity via a redraft of the section, however the same issues continue to arise. Section 100(1)(c) conflicts 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 assumption in the section 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 for the landlord 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 where the landlord has exchanged contracts for the sale subject to the tenancy. 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 would be happy to assist with the re-drafting of this section in order to provide for fairness to both parties.

REINSW finds it difficult to see the rationale for this section, since any new owner would be bound by the residential tenancy agreement in the same manner as the original landlord.

Termination by tenant for breach

It is submitted that in relation to termination by a tenant for breach, it is important to consider the nature of the breach – is it persistent, significant or serious? In an effort to create scope for the parties to resolve any issues, section 98(1) needs to be amended so that the termination permitted is for breach by the landlord of an essential or material term of the tenancy agreement. The amended clause could be to the following effect:

> *A tenant may give a termination notice on the ground that the landlord has repeatedly breached the residential tenancy agreement in an essential or material respect.*

Question 33

Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reasons should be considered?

Response to Question 33

REINSW considers that the reasons set out in the Act are sufficiently exhaustive and no further reasons should be prescribed or required from landlords.

Sherriff fees

The Act provides that, any time up to the property being secured by the Sheriff, if the tenant produces the money then the eviction does not proceed. The cost of the Sheriff and the agent's charges in relation to the attempted eviction are not recoverable by the landlord.

For fairness and equity in costs, the tenant should be required to pay the costs. These costs include any fees and charges associated with an eviction order if the tenant makes the relevant payment required by the order.

Question 34

Should the Act require all residential tenancy agreements to have provisions imposing break fees?

Response to Question 34

REINSW is of the view that there should not be a requirement in the residential agreement imposing break fees. This is a matter to be negotiated between the parties having regard to the market

conditions and the specific features of the property. However, there should be more education and awareness for the parties as to the consequences of choosing to cross out the optional break lease fee or to leave it in the agreement.

An additional clause could be included as an alternative (i.e. the parties choose one or the other option) to the current break lease clause to the following effect:

> *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 REINSW's PM Chapter members 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.

Question 35

Should there be any additional grounds on which a tenant can terminate a residential tenancy agreement without compensation?

Response to Question 35

There should not be any additional grounds allowing the tenant to terminate without compensation. Please also refer to the comment above in relation to section 100(1)(c).

Question 36

Is the notice period for mortgagee repossession appropriate?

Response to Question 36

REINSW is not in a position to comment on this question as it is outside the expertise of real estate professionals.

Question 37

Are additional protections needed for tenants in cases of mortgagee repossession?

Response to Question 37

REINSW is not in a position to comment on this question as it is outside the expertise of real estate professionals.

Question 38

Are there any other termination issues that the Act could better address?

Response to Question 38

It is the experience of REINSW's PM Chapter professionals that possession orders do not currently work very efficiently. The agent needs to be able to apply for the warrant before the tenant vacates. If the tenant is still in occupation 5 days before the date required for possession, by having the ability to apply for the warrant before that date, the agent is ready to act efficiently and hand the order to the Sheriff on the date for repossession.

If the landlord has engaged the Sherriff and the tenant continues occupying the premises by paying the outstanding rent, the tenant should also reimburse the landlord for the Sherriff's fees.
In addition, the tenant should be obliged to notify the landlord of the exact date on which the tenant vacates the premises and to return the keys. This will enable the landlord to commence the re-letting process.

Question 39

Do the current information, advice and dispute resolution services operate effectively?

Response to Question 39

REINSW submits that conciliators should be members of NCAT who know and understand the legislation and who can keep the conciliation process on track so it does not digress to issues which are not relevant to the dispute at hand. Having NCAT members as conciliators would also remove the parties' concerns about bias. NCAT is designed to be a properly balanced, fair and just dispute resolution service and removing any bias is vital.

Question 40

Do you have any other suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?

Response to Question 40

Parties could be encouraged to settle disputes early by increasing the NCAT application fee to, say, $100. This could deter vexatious applicants, and reduce claims.

As mentioned in response to Question 13, the current practice by NCAT of adjourning hearings results in wasted time and additional costs for all parties. REINSW recommends first hearings of bond disputes and disputes other than rent arrears should be allocated a minimum hearing time of 30 minutes. The allotted hearing timeframes under NCAT operations and procedures should not impact the rights of tenants and landlords to a just, expedient and cost effective resolution of real issues. Adjourning a hearing should be done only in exceptional circumstances.

Question 41

Do you have any suggestions for improving the current provisions relating to residential tenancy databases?

Response to Question 41

REINSW submits that the provisions regarding tenancy databases could be improved in a number of respects. The listing period should not be limited to 3 years and should be extended to the statutory limitation period for unpaid debts, as is the case with credit reporting listing. REINSW also recommends that a listing should be permitted to be made once the tenant has been in arrears of rent for 28 days or more. An NCAT order should not be required in order to make a listing before a tent vacates.

Question 42

Should email or SMS be accepted as methods of giving written notice? What safeguards would be needed to reduce any potential disputes?

Response to Question 42

It is submitted that the Act should allow for service of notices by email. The recently assented to *Strata Schemes Management Act* 2015 permits the service by email in recognition of contemporary communication technology.

Recent moves by Australia Post to change delivery speeds will have an impact on postal deliveries. To guarantee delivery in 4 working days an additional postage charge applies.

Fax should be discontinued as a method of service with the advent of email service, and personal service and posting of notice should remain as an alternate method 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. NCAT sends service of notice via email.

Email service of notices is the most efficient and beneficial method for all parties, including because:

- 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;
- 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; 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.

Conclusion

As noted throughout this Submission, there are areas in the Act and in the standard residential tenancy agreement which 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.

The REINSW appreciates the opportunity to provide this Submission and welcomes discussion of the issues raised with the policy officers at NSW Fair Trading.

Yours sincerely,

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