TENANTS' UNION OF NEW SOUTH WALES

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Regulatory Policy, BRD
Department of Finance, Services and Innovation

To whom it may concern:

**TUNSW Submission: Easy and Transparent Trading Consultation Paper**

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the statewide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales.

We have long-standing expertise in renting law, policy and practice. We have been a key stakeholder throughout the development and implementation of both the 1987 and 2010 Residential Tenancies Acts. One of the earliest legislative processes we were involved in was the creation of the Rental Bond Board through the Landlord and Tenant (Rental Bonds) Act 1977 and we continue to have a representative sit on the Rental Bond Board. In all these processes we ensured tenants' interests and perspectives were considered and we believe better outcomes achieved as a result.

We support the intent of the consultation paper to improve transparency and consumer choice, but warn that neither of the current proposals will achieve this and run real risks of worsening consumer experience.

We know the Minister and the Department are also committed to ensuring a more positive experience for the consumers of New South Wales including renters. We hope our comments are taken in the spirit of that joint commitment and look forward to working further with the Minister and Department to further our shared goals.

Our comments are focussed on two parts of the Consultation Paper: the proposed repeal of the *Landlord and Tenant Act 1899* and the *Landlord and Tenant (Amendment) Act 1948*; and the legalisation of bond surety products in the residential tenancies sector.

While we won't comment here in greater detail, we also support the following options. We are happy to offer further comment if it is of assistance to the Department:

**1.9 Streamlining financial reporting requirements**

Option 2 – this would create significant efficiency gains for ourselves and the Tenants' Advice and Advocacy Services with positive flow on effects to our clients.

**1.11 Streamlining uncollected goods regulation**

A combination of option 1 and 3. We are concerned that a streamlining of uncollected goods may have an unintended consequence on residential tenants of stripping them of a well-functioning system designed for use in residential settings. This will lead to poor outcomes for those people. The *Residential Tenancies Act 2010* provisions particularly make allowance for items of no financial value but high personal value such as identification documents, as well as already utilising modern communication standards. We would recommend that the Residential Tenancies Act provisions work well in a residential setting, and believe it is important to acknowledge the difference between that and a commercial setting. We encourage the Department to continue the provisions of the *Residential Tenancies Act 2010* in relation to uncollected goods and consider expanding them to other residential settings, such as boarding houses.

**2.5 Consumer information standards**

Option 2 – there may be future developments in residential tenancies for which a consumer information standard may be desirable. Giving NSW Fair Trading the flexibility to be able to respond to this change would be a sound step to take at this point.

**2.8: Allowing strata lots to choose their own utilities provider**

Option 2 – tenants do not get to vote on by-laws and may continue to be pushed into unfair contracts if they are not permitted to choose their own utility provider.

We understand that consumer advocacy group Choice are also offering comments in relation to the bond surety products, and that Combined Pensioners and Superannuants are offering comments in relation to the Landlord and Tenant Acts. We strongly encourage the Department to take on board those submissions.

Regards,

Leo Patterson Ross
Senior Policy Officer
Tenants' Union of NSW

## 1.12 Proposed repeals of *Landlord and Tenant (Amendment) Act 1948* and *Landlord and Tenant Act 1899*

### Introduction

The Consultation paper identifies the *Landlord and Tenant (Amendment) Act 1948* ('1948 Act') and *Landlord and Tenant Act 1899* ('1899 Act') as redundant and proposes a repeal of both Acts. For reference we set out the preferred option outlined in the Consultation Paper below:

*Landlord and Tenant (Amendment) Act 1948*

**Preferred option**
NSW follow the Victorian approach and repeal the Act, with appropriate savings provisions inserted into the *Residential Tenancies Act 2010* to protect the rights of the few remaining protected tenants (and their spouses) until their deaths. The succession rights of dependent children should be removed. To facilitate future full repeal the savings provisions could be linked to a register of protected premises kept by NSW Fair Trading. Protected tenants could be given 12 months to register. Monitoring the register will enable NSW Fair Trading to know when the laws are no longer applying to anyone and can be fully removed.

*Landlord and Tenant Act 1899*

**Preferred option**
The repeal date could be brought forward and proclaimed to commence before the end of 2018.

The Tenants' Union NSW (TUNSW) feels strongly that the 1948 Act and 1899 Act continue to have practical value and application. Both provide important safeguards for existing tenants, albeit a small number, who will be seriously disadvantaged by their repeal.

Below we discuss each piece of legislation in turn setting out our concerns regarding the potential unintended consequences of their repeal.

### Landlord and Tenant Act 1899

In 2015 the *Landlord and Tenant Act 1899* was amended, providing for the automatic repeal of this Act in five years' time (or before). At present the 1899 Act will cease to exist no later than 15 July 2020. The Consultation Paper proposes moving this date forward to the end of 2018.

Today the 1899 Act is largely limited to procedures relating to recovery of possession of rented premises. With the enactment of the *Residential Tenancies Acts* in NSW (*Residential Tenancies Act 1987* ('1987 Act'), and subsequently the *Residential Tenancies Act 2010* ('2010 Act'), most residential tenancies ceased to be covered by this Act. Nevertheless, the Tenants' Union of NSW believes the remaining protections provided by the 1899 Act, including those related to evictions and the recovery of possession of rented premises, are valuable. We submit that the question of repealing the Act is worth re-visiting.

We previously provided comment on the potential consequences of repeal of the 1899 Act in 2015.[1] The concerns raised remain relevant and extracts of the discussion from our 2015 submission are provided below:

**The repeal will add to red tape and regulatory burden**

The 2010 Act expressly excludes a number of tenancies on the basis of the type of premises occupied by the tenant (at Section 7), or the nature of the agreement between the parties (at Section 8). The 1899 Act provides a mechanism by which landlords may lawfully recover premises, and a safeguard against eviction without court order, for these tenancies.

The removal of this mechanism will create a great deal of uncertainty for affected parties. In particular, landlords will face uncertainty as to the recovery process, and tenants will face considerable expense to obtain a remedy if they are wrongfully put out of a tenancy.

A return to the common law would mean a tenancy not covered by the 2010 Act could be brought to an end by re-entry. In circumstances where this occurs prematurely, the tenant would need to seek an injunction or other relief against forfeiture in a court of equity, such as the Supreme Court of New South Wales.

A return to the common law would also create uncertainty as to the creation of tenancies and the legal relationships between parties. It would require consideration of parts of the *Conveyancing Act 1919* and the *Real Property Act 1900* for the construction of leases.

**The 1899 Act is still very much alive**

A quick scan of relevant legal decisions reveals several contemporary cases in which the 1899 Act was referred to or relied upon by a party in a court or tribunal, or in which a court has made some use of the Act.

> In *Janos v Chama Motors Pty Ltd* [2011] NSWCA 238 (at 5-8), Young JA provided a useful discussion of the common law of landlord and tenant and the implications

[1] TUNSW, 'Comment on the proposed repeal of the Landlord and Tenant Act 1899', June 2015, available at: https://files.tenants.org.au/policy/comment_on_proposed_repeal_of_the_landlord_and_tenant_act.pdf, viewed August 2018

for parties where a lease is ended by re-entry, with reference to statutory interventions including the *Landlord and Tenant Act 189*9.

In *Ceedive Pty Ltd v Connell* [2013] NSWCTTT 467 (at 49), the applicant referred to provisions of the *Landlord and Tenant Act 1899* to establish a tenancy, in circumstances where the occupant owns the dwelling but not the land upon which it is affixed.

In *Willoughby City Council v Roads and Maritime Service* [2014] NSWLEC 6 (at 129-135), the court considered a claim for mesne profits against a tenant holding over, noting that the *Landlord and Tenant Act 1899* provides a more simple and effective mechanism than the common law, for bringing such a claim to court.

**Main provisions of the 1899 Act**

Large chunks of the 1899 Act have been repealed, but the Act retains the following provisions:

i) Section 2AA. No taking possession of dwelling-house without court sanction. This provision makes lock-outs illegal for a 'dwelling-house'. For a definition of the term 'dwelling-house', see Derek Cassidy and Brian Ralston, *Australian Tenancy Law and Practice*, pp 4025,6: [3.2.005]: 'place of abode occupied ... by persons living as one household, which constitutes a separate structure or is divided from other building by vertical walls.' [3.2.010] '*flat* is a separate dwelling house.'

ii) Section 2B. A spouse has tenancy rights on separation or desertion.

iii) Section 3. Supreme Court or Local Court may refuse to give judgement in the case of retaliatory eviction where tenant previously had applied to NCAT in relation to rent payable or rent increase, with onus on landlord to prove not retaliatory. Modern amending legislation appears to have unintentionally made this provision meaningless.

iv) Part 2 and Part 4. Eviction procedures in Supreme and Local Court respectively.

TUNSW believes the remaining provisions of the 1899 Act provide an important safety net for tenants not covered by current residential tenancies legislation (i.e. the *Residential Tenancies Act 2010*, the *Boarding Houses Act 2012* or the *Residential (Land Lease) Communities Act 2013*).

The 1899 Act provides some protections for those who otherwise fall through the net regarding evictions where the property is a dwelling house. Tenants who may rely on the provisions of the 1899 Act include those living in:

- farm houses where the predominant use of the premises is for the purposes of agriculture (Section 7 (c))
- share housing where there is a sub-tenancy not the subject of a written residential tenancy agreement (Section 10 (b))
- head leases involving social housing providers (Section 156)
- heritage properties (Clause 16).
- life tenancies (Clause 19)
- rent control premises (Section 7 (a)) but without the protection of the 1948 Act: such residents may be occupants who are neither a protected tenant nor a 'statutory protected tenant', but living in premises still subject to 1948 Act. It can be argued that they are protected from 'lockouts' because of the existence of the 1899 Act. Examples exist today in Sydney and the Hunter region.

TUNSW has in recent years provided assistance to tenants we believe might usefully have relied on the provisions of the 1899 Act:

I. Social housing tenants in Millers Point (and elsewhere) were not covered by the 2010 Act until 30 October 2015 when an amendment to the *Residential Tenancies Regulation 2010* took effect, because of the operation of Clause 16 ('Heritage properties') of the *Residential Tenancies Regulation 2010*. This covered nearly 400 tenancies in Millers Point alone and would have also applied to many more elsewhere.[2] Although this particular instance was resolved, it speaks to the need for the catch-all nature of the provisions of the 1899 Act.

II. Where a landlord grants their tenant a term which is the promise of residing there 'for the rest of your life', then this tenancy is exempt from the provisions of the 2010 Act, because of the operation of Clause 19 ('Life tenancies') of the *Residential Tenancies Regulation 2010*. This provision was not part of the *Residential Tenancies Act 1987* or its regulation. TUNSW has assisted a number of people who have held residential tenancies where an authorised representative of the landlord wrote to prospective tenants stating: 'I urge you ... to take up the offer of one of these units where you can spend the rest of your life.'

**Our recommendation**

(i) Section 1D of the 1899 Act should be repealed (this being our first preference), or in the alternative;

(ii) The 2010 Act be amended to include the 1899 Act and its Regulation as a new Schedule to the Act, or in the alternative;

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[2] TUNSW, 'The case of the lost public housing heritage tenancies', December 2013, available at: http://tunswblog.blogspot.com/2013/12/the-case-of-lost-public-housing.html,

(iii) The 2010 Act be amended to include a new Schedule that sets out those benefits that existing tenants enjoy under the 1899 Act. Amongst other amendments this can be achieved by enacting a new Part in the *Residential Tenancies Act 2010* that provides for the recovery of possession of residential premises through the NSW Civil and Administrative Tribunal for tenancies that are excluded from the 2010 Act. There also should be a provision that provides for a spouse having tenancy rights on separation or desertion.

Another issue we have previously raised is the adverse effect the repeal of the 1899 Act will have on the operation of the 1948 Act. We provide a more detailed discussion of this issue as Appendix 1.

## Landlord and Tenant (Amendment) Act 1948

**Main provisions of the 1948 Act**

Large portions of the 1948 Act have been repealed, but the Act retains the following provisions that are still enjoyed by tenants.

1. Section 81. Use or enjoyment of premises.

Sub-section (1) reads:

> A person shall not, whether as principal or agent or in any other capacity, without the consent of the lessee of prescribed premises, or without reasonable cause (proof whereof shall lie upon the defendant), do, or cause to be done, any act, or omit, or cause to be omitted, any act whereby the ordinary use or enjoyment by the lessee of the premises or of any goods leased therewith, or of any conveniences usually available to the lessee, or of any service supplied to, or provided in connection with, the premises is interfered with or restricted.

This is much broader than the right to quiet enjoyment enjoyed by tenants under Section 50 of the 2010 Act.

In arbitrating offences under this section, courts can, on top of penalties, order actions to remedy the breach. Failure to comply with these orders is also an offence with daily penalties [*s81(2)*].

Where breach of a tenant's use or enjoyment leads to the loss of the tenancy and the landlord is prosecuted for the breach, courts can order compensation in any amount sufficient to compensate for damage or loss to the tenant [*s81(3A)*].

The most serious breach of tenants' rights is where a landlord locks a tenant out, by either changing the locks or by disconnecting or restricting services. To do so is a serious offence under the 1948 Act and the landlord can be prosecuted and face a gaol term.

2. Section 88D Implied powers in lessor.

This is all about access and reads:

> 88D Implied powers in lessor
>
> (1) In every lease of prescribed premises there shall be implied the following covenants by the lessee:
>
> (a) that the lessor or his or her agents may, twice in every year at a reasonable time of the day between eight o'clock in the morning and eight o'clock in the evening on any day other than a Saturday, Sunday or public holiday and after at least seven days' notice in writing of intention to do so has been given to the lessee, enter upon the premises and view the state of repair thereof,
>
> (b) that the lessor or his or her agents, servants, workmen or contractors may enter the premises for the purpose of effecting necessary repairs or maintenance after reasonable notice has been given to the lessee.
>
> (2) The expression "reasonable time" in paragraph (a) of subsection (1) does not include any time at which the lessee and the other adult members of his or her household are ordinarily absent from the prescribed premises in the course or by reason of their respective trades, businesses, occupations or employments. ...

Access may be sought by the landlord and granted by the tenant in other cases, but only voluntarily or through negotiation.

3. Part 2 Fair Rent.

This sets out what is a fair rent, the means by which rents can be increased and the administrative processes for those increases to be effective. Protected tenants have the right to a fair rent [*s35(1)*] and limitations on the frequency, method and amount of rent increases [*s17A(4) & s32(2)*].

Landlords who breach the above provisions face penalties, including fines and prison terms.

Protected tenants are entitled to pay a 'fair rent'. A fair rent may be set by:

- the Fair Rents Board, or
- a registered agreement between the landlord and tenant (commonly called a '17A Agreement").

Tenants can enforce their right to pay no more than the fair rent by seeking recovery of the overpaid rent in a local court [*s35(2)*]. Recovery is limited to overpayment over the last six years and is recoverable from the person to whom the rent was paid [*s35(3)*].

Rent determinations cannot be varied within twelve months of their effective date, except on specified grounds [*s32(2)*]:

An application for a fair rent determination is made to the Fair Rents Board. However, the Board and the Director-General have authority to vary a determination of their own motion [*s32(1)(b)*]. Rent can be reduced if agreed repairs are not done by the landlord [*s32(2)(d)*].

Rent can only be varied in accordance with the Act, using one of the following methods:

(i) Rent determination by a Fair Rents Board, *s18 & Ors*
(ii) Registration of an agreement with the tenant, *s17A(3)*
(iii) Current market values, where the tenant is declared 'wealthy, *s31MCA.* The prescribed amount is calculated by multiplying the maximum fortnightly age pension (single rate) by 65. At 1 July 2018 this is $53,703 per annum.

4. Section 62 Grounds for eviction.

Perhaps the most significant benefit of being a protected tenant is the greater security of tenure provided under the legislation as compared with most other residential tenants. Unlike current the *Residential Tenancies Act 2010*, the 1948 Act does not allow for evictions without a reason.

Landlord may seek vacant possession of premises only with a reason that complies with those specified in section 62 (5) of the 1948 Act. The main grounds used today are:

**Ground (c):** The tenant has failed to take reasonable care of the dwelling or has committed waste. This ground does not refer to premises falling into disrepair because the dwelling is old and has not been maintained. It refers to failure by the tenant to take care of the premises, such as failing to adequately keep the premises clean or not maintaining the yard in a reasonable manner.

**Grounds (g):** The dwelling is reasonably required by the landlord for personal use as a residence, or by someone who ordinarily resides with the landlord and is wholly or partly dependent upon the landlord.

**Ground (m):** The premises are reasonably required for reconstruction or demolition. To establish the ground the landlord must prove that intended work involves structural changes or transformation, and that the work or reconstruction cannot be done whilst the premises are occupied. Section 70(2A) (b) 1948 Act requires the court to be satisfied that the local government council has given consent, for example approved a development application.

**Ground (p) (ii):** The tenant still has possession of the premises, but has not lived at the premises for more than six months. Typically this occurs where frail aged tenants are relocated to an aged care facility by their family or a hospital.

**Ground (w):** The means of the tenant and any person ordinarily residing in the premises are such that it is reasonable they acquire or lease other dwellings. Under this ground the landlord must establish the 'means' of the tenant including their income, capital, assets or property of any description, and that those means are reasonable for the tenant to acquire other premises.

The Local Court has jurisdiction for hearing recovery of premises. [*s69*] Apart from the formalities of Part 3 of the Act, including periods and form of notice and establishing the grounds relied on, the court must consider hardship and may place conditions on an order of possession or refuse to make an order, even if one or more of the prescribed grounds are established [*s70*].

Where possession is sought on some of the grounds ((g), (h), (i), (j), (l), (m), (s), (t) and/or (v)), the court also considers whether reasonably suitable alternative accommodation is available for the tenant to occupy [*s70(1)(c)*].

Where possession is sought on ground (m), the court also considers whether, where it is necessary to obtain the approval under any Act of any body to the carrying out of the work referred to in the notice to quit, approval has been obtained [*s70(2A)(b)*] and whether the work can be carried out without unduly interfering with the tenant's use of the premises [*s70(2A)(c)*].

The Act places some limitations on when notices of eviction may be served.

5. Section 36 Settlement to vacate premises.

A protected tenant may negotiate a settlement and enter into a deed to vacate premises with the approval of the Fair Rents Board, as permitted under Section 36 (1) (a) of the 1948 Act. Such a situation generally arises when the landlord indicates they would like the tenant to leave and the tenant, often after varying degrees of harassment, agrees to vacate in return for payment of a lump sum payment. TUNSW is aware of settlements as high as 6 figures (in excess of $100,000) in recent years. In any savings provision, TUNSW submits the Tribunal should have no jurisdictional limit where the landlord and the protected tenant negotiate payment of money for the tenant agreeing to vacate.

**Statutory Protected Tenants**

Some people can 'inherit' a protected tenancy. They are known as a 'statutory protected tenants'. The proposal to remove 'statutory protected tenants' from the benefits of the 1948 Act will impact severely on those who currently hold this status. Only a person who is living with a protected tenant and is in receipt of a pension at the time of their parents death inherits the protections. In all cases we are aware of, the statutory protected tenant is someone who has been living in the premises for many years, and would be very vulnerable in the market if they lost this status.

In 2013, the Tribunal in *Ceedive P/L v Connell* [2013] (RT12/60255) addressed the questions as to firstly, whether premises are premises to which the 1948 Act applies and, secondly, whether the respondent was entitled "to continue in possession ... as the former lessee would have if he or she had not died", being the son of the tenant, in receipt of a pension and living with his mother at the time of her death, as provided for in section 83A. The Tribunal found that the 1948 Act applied and that the respondent was entitled to the benefit of this section. This tenant continued to occupy the premises as a 'statutory protected tenant.'

However, the preferred option of the NSW Department of Finance, Services and Innovation is to follow the Victorian approach and repeal the Act, with appropriate savings provisions inserted into the *Residential Tenancies Act 2010* to protect the rights of the few remaining protected tenants (and their spouses) until their deaths. They state that the succession rights of dependent children should be removed. TUNSW submits that if such a provision is to be enacted, then it should only apply to future children and existing 'statutory protected tenants' should retain the benefit of any savings provisions.

If the status of 'statutory protected tenants' is to be abolished, then consideration also needs to be given to children who were residing with their parents at the time of their death but were not in receipt of a pension. Currently, these people are in a limbo. The house will remain subject to the 1948 Act, and excluded from the Residential Tenancies Act, but the residents will not have the 1948 Act protections.[3] There is good reason to ensure that those residents will come fully under the Residential Tenancies Act 2010.

**Register of protected premises**

NSW Department of Finance, Services and Innovation has suggested that in order to facilitate future full repeal of the savings provisions, this could be linked to a register of protected premises kept by NSW Fair Trading. Protected tenants would be given 12 months to register. Monitoring the register will enable NSW Fair Trading to know when the laws are no longer applying to anyone and can be fully removed. However, this understanding of who is a protected tenant lacks an in-depth knowledge of how the law works in practice.

No one knows how many protected tenants remain. The 2011 submission by the Older Persons Tenants Service estimated there were between 600 and 1,400 protected tenants in NSW at 30 June 2011.[4] Clearly, this figure would be considerably less today, but the TUNSW estimate their numbers would still reach in the three figures. TUNSW holds serious

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[3] It is worth noting that if the 1899 Act remains these tenants will have some limited protections from lock-outs under the 1899 Act.

[4] Older Persons Tenants Service (OPTS) under the auspice of the Combined Pensioners & Superannuants Association of NSW Inc (CPSA), Submission to the Commissioner for Fair Trading, Proposed repeals of the Landlord and Tenant (Amendment) Act 1948 and the Landlord and Tenant Act 1899, (Sydney: 14 October 2011) at 8

concerns that a register would not provide an accurate reflection of the actual number of existing protected tenants.

For a Register to be complete, all tenants who have resided at their current premises since 1 January 1986 and where their premises were built before 16 December 1954 will have to be made aware of its existence. Many of these people will be particularly hard to reach. As a useful comparison, despite widespread community education campaigns following the introduction of the *Boarding Houses Act 2012* many residents of boarding houses remain unaware that they have protection under legislation. These residents are much easier to reach than most protected tenants.

Protected tenants are generally older persons who find it difficult to access the necessary information to clarify the status of their tenancy. Confirming their status as protected tenants will require more than just a telephone call. It is often complicated and will involve specialist knowledge that today is held by very few practitioners. At the end of the day, only a court may be able to determine their status. For those who believe that they may be protected tenants, many may be reluctant to place their name on a government register. Some will fear retaliatory eviction by their landlord.

In addition many tenants who fall under the Act are unaware of their legal status until there is a dispute and they seek assistance from a Tenants' Advice and Advocacy Service (TAAS) or legal service. Two examples of tenants who became aware of their status as 'protected tenants' only because they sought legal assistance from a TAAS: those who 'became' protected tenants as a result of a Supreme Court decision (*May v Ceedive*); or where the Crown ceased to be their landlord (Welfare Street, Homebush West):

1. *Pottery Estate, Lithgow:* In what is now a leading case, *May v Ceedive*, the NSW Court of Appeal ruled in 2005 that a resident who previously lived on land owned by a mining company and thought he owned the house but rented the land and had lived there for many years was in fact a protected tenant. The TUNSW is aware of a very similar scenario being played out in the Hunter region currently. As in the *May v Ceedive* case a number of residents are affected.
2. *Welfare Street, Homebush West:* Two rows of six cottages each were built for abattoir workers in the 1920s. They were owned by statutory bodies (Meat Board to Sydney Olympic Park Authority) continuously until November 2014. Within a month after selling by tender the houses were on-sold at an auction as separate lots, with a massive $4.7 million windfall to the speculator. However, with the sale of the properties the shield of being the Crown and therefore exempt from the 1948 Act, was removed from the landlord. Before the auction, each of the tenants received termination notices. Some accepted money to vacate. Four of the remaining tenants – all pensioners - had lived in their houses for between 30 and 70 years. They asserted that they were protected tenants and were assisted by their local

Tenants Advice and Advocacy Services. After a protracted negotiations they received substantial settlements.[5]

We are aware a previous attempt to require protected tenants to register was abandoned in June 1990 because of the poor take-up.[6] We do not believe that a renewed attempt to require registration would be any more successful. If anything, the challenges faced in this early attempt to establish a register will have only been exacerbated.

**Our recommendation**

- The Government not proceed with the establishment of a register;
- The Government not proceed with the repeal of the 1948 Act (this being our first preference), or in the alternative;
- If the NSW Government proceeds with the repeal of this Act, then the 2010 Act be amended to include the 1948 Act and its Regulations as a new Schedule to the Act, or in the alternative;
- If the NSW Government proceeds with the repeal of this Act, then the 2010 Act be amended to include savings provisions which protect the rights of those who currently are covered under it. This covers just-cause eviction; control of rents; tighter access provisions; ability to negotiate a settlement if they agree to vacate (without a jurisdiction limit to any payment made). Further, if the succession rights of dependent children are to be removed, then it should only apply to future children and currently existing 'statutory protected tenants' should also get the benefit of savings provisions.

## Other coverage

An examination of the substantive rights and issues concerning coverage of the *Residential Tenancies Act 2010* gives the Department an opportunity to consider the current exclusions regime of that Act.

Many of the tenants who are currently covered by the 1899 Act are covered by that act only because they are excluded from the 2010 Act. TUNSW strongly believes that all people paying value for their principal place of residence should have at least basic rights concerning eviction from their home and access to effective dispute resolution mechanisms.

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[5] Wendy Bacon, , 'Winning on Welfare Street', 2015 available at: http://www.wendybacon.com/investigations/winning-on-welfare-street, viewed August 2018

[6] For further detail regarding this attempt see Combined Pensioners & Superannuants of NSW, *Guide to Protected Tenancies in NSW*, 4th Edition, p4

In NSW residential renters of all types can be evicted from their homes without justification. This causes significant hardship and disadvantage for a large and growing section of society and undermines current legal rights for renters.

Most renters, such as tenants or occupants in boarding houses, have some legislated rights but the law is either incomplete or ineffective. A large group of renters have no legislative protection at all.

All renters should have the right to:

- know the reason for their eviction;
- protection from unfair evictions
- effective dispute resolution, including of eviction decisions, by a low-cost and accessible jurisdiction.

**Recommendation:**

NSW Fair Trading considers the current exclusions of the *Residential Tenancies Act 2010* and implements a scheme of occupancy agreements to cover all residents who government determines should not be covered by mainstream residential tenancy agreements.

## *Appendix 1*

### Relationship between *Landlord and Tenant (Amendment) Act 1948* and *Landlord and Tenant Act 1899*

Another issue raised in both the Tenants' Union of NSW's document dated 1 June 2015 and Older Persons' Tenants Services' submission dated 14 October 2011 is that the repeal of the 1899 Act will adversely affect the operation of the 1948 Act should the latter Act continue, which we believe is crucial.

The 1899 Act provides the 'machinery' that a landlord must follow in order to evict a tenant covered by the 1948 Act. In relation to the smooth running of the latter Act, it is not wise for the Government to remove these provisions, but this is not our concern.

We reproduce extracts from the Tenants' Union of NSW's document to highlight the impact of the repeal of the 1899 Act on the 1948 Act.

> There are a number of specific references to the *Landlord and Tenant Act 1899* in the 1948 Act. In particular are references to section 22A in the definitions of *lease*, *lessor* and *lessee*. Section 22A creates a conclusive presumption of a 'tenancy at will' where rent is paid in respect of land, and that the tenancy is between the person holding the land and the person to whom rent is paid.
>
> Absent this provision, tenants under the 1948 Act may have to rely on earlier constructions of 'tenancy at will', presumably under the common law with reference to the *Conveyancing Act 1919* and the *Real Property Act 1900*. Where rent is being paid to a person other than the owner of the property, they would be required to establish that the person receiving the rent is the owner's agent, in order to be sure they had a contract with the owner.
>
> Most importantly, the *Landlord and Tenant Act 1899* provides an important protection for tenants under that 1948 Act, against unlawful eviction. Section 62 of the 1948 prevents recovery proceedings without a valid notice to quit, and section 81 prohibits interference with use or enjoyment of premises – but there is no equivalent in the 1948 Act of the prevention of eviction without court order provided by section 2AA of the *Landlord and Tenant Act 1899*.
>
> Protection of 'quiet enjoyment' is not the same as an express prohibition on recovery of possession without a court order, particularly where it countenances 'reasonable cause' (as is the case with section 81 of the 1948 Act). As an analogy,

this is why we have both a provision against interference with a tenant's 'quiet enjoyment' (section 50), and a prohibition against repossession of residential premises without a warrant (section 120) in the *Residential Tenancies Act 2010.*

The repeal of the *Landlord and Tenant Act 1899* will be to the significant detriment of tenants under the 1948 Act, as it will remove their fundamental protection against eviction without regard to the courts. Critical to this point is that the repeal of the *Landlord and Tenant Act 1899* will also remove part of the mechanism by which possession orders may be obtained under the 1948 Act. Because there is no equivalent in the 1948 Act to the provisions at Part 4 of the *Landlord and Tenant Act 1899*, setting out a procedure for recovery of possession as the outcome of a court action, such action relies by implication upon the 1899 Act. This implication is bolstered by the express exclusion of sections 26 and 27 of the 1899 Act in proceedings under the 1948 Act, at section 69(3) of the 1948 Act.

## 2.7 Rental bond surety products

### 40. Which option do you support? Why?

We cannot recommend the legalisation of bond surety products. We do support changes to improve the function and systems surrounding the Rental Bond Board, particularly the ability to transfer bonds.

**Bond surety products will not improve tenant choice**

While we see and endorse the claim for greater tenant choice, we do not think it is credible as a likely outcome.

The consumer tenants' choice is lost because the decision maker in the instance will not be the tenant, but the landlord. Bond surety products will not change the tenants' choice but rather the landlords. It is for this reason that while the products market themselves to tenants, they are very clear that the only real potential benefits flow to landlords and that without landlords support the products will fail.

The use of bond surety products potentially jeopardises the tenants' application depending on the landlords preference. Some agents have signalled that the use of bond surety products will mark the user as a higher risk proposition.

If the landlord does not want to utilise the bond surety but the tenant does, particularly if they have invested time and paid out alternative claims to access 'no claims' bonuses or sold their personal data for the application process, then the tenant's application may either be rejected or their pool of potential landlords reduced.

The tenant may also be disadvantaged if they refuse to use the product but the landlord makes clear they do want to utilise it.

There is currently no regulation of application processes outside of discrimination law and the handling of holding deposits. It is reasonable to expect that application forms will quickly come to include questions about the use of bond surety products.

We expect that ultimately, the choice of whether to use bond surety products will become that of the service provider landlord, and not the consumer tenant.

**Bond surety products are high cost, low value propositions for tenants.**

The bond surety products have made arguments about inefficiencies and inequities relating to bonds. There may be some truth to some parts of these, but the solution offered doesn't address the needs identified.

A clear example is around the issue of the cost of covering two bonds for tenants. For a tenant facing this issue, bond surety products will tie the person into an ongoing cost amounting to somewhere between 10-30% of the value of the bond.

Financially it makes much better sense to take a short term loan or put the cost of the bond on a credit card. Placing a second bond on a credit card with a cash advance rate of 12.49% will cost a person $20.43 in interest over a month. Even with a delay of 3 months, the interest would amount to no more than $61.59 – less if the person made part payments. In contrast this amount would not even cover the administrative fee for Snug's BondCover on their current rates.

Further, in stark contrast to the marketing claims made by the bond surety providers, at the Tenants' Union we are aware of bonds being returned in less than 24 hours after the claim is lodged. Any delay in finalising claims through NCAT will not be addressed by the bond surety providers products as disputes will have to go through NCAT in any event.

**Bond surety products do not assist with affordability.**

While we know all parts of government are concerned with the welfare of the community, we do not believe NSW Fair Trading is currently constituted in a way to address housing affordability concerns. If concerns exist around the affordability of rental bonds, particularly for low income people, we recommend the Department encourage Family and Community Services to improve and expand the no-interest RentStart bond loan product beyond the current income restrictions[1]. This would be in line with NSW Government's Future Directions in Social Housing document which recommended the expanded use of assistance in the private rental sector.

We would be pleased to provide FACS with our recommendations on how to improve the RentStart bond loan system to ensure it is an efficient and effective system. NSW Fair Trading and the bond surety providers may also be able to offer valuable insights. There may even be opportunity for FACS to contract with the bond surety providers to ensure they are using the cutting-edge technology and design. This would be a better direction for the bond surety providers' commitment to improving renting in NSW.

**Regulatory costs will be unacceptably high**

If products are to be legalised, a registration and pricing regime must be put in place. We think the Department has done an excellent job of identifying many of the requirements in the paper, and add some further dimensions. We will expand on some of these in response later questions. Through higher administrative costs and, unless covered, lower revenue streams we believe the legalisation of bond surety products will jeopardise the operation of what may be Australia's best practice Rental Bond Board.

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[1] https://www.facs.nsw.gov.au/housing/factsheets/rentstart-bond-loan

We also believe NSW Rental Bond Board currently has the best use of bonds data in the country, and this best practice will also be jeopardised if bonds are no longer lodged with the Rental Bond Board.

**There is uncertainty about the products**

It is unclear what products we are even proposing to legalise – it is clear that the process of regulation will substantially alter the product. Both bond surety providers have made clear that we can not rely on any information provided by them as it continues to change. Information on their websites we are told are out of date, and in conversation details change within minutes.

In effect the bond surety providers are seeking to use the government and key stakeholders as free consultancy services. It should not be governments role to create the product, rather it is up to private enterprise to propose a product and government to decide whether the product complies or not with the regulatory system.

## 41. How should the claims process against surety products be integrated with the claims process for rental bonds?

If the legalisation of bond surety products were to proceed, we strongly urge for regulation to require the existence of the bond surety must still be registered with Rental Bond Board. See section 43 for some discussion of the need to preserve the integrity of data around renting in NSW.

We believe that consistently with other civil claims, if there is not agreement between the tenant and landlord about any costs owing at the end of the tenancy the landlord must make application to NCAT for orders against the tenant and those orders used to satisfy evidence requirements of the surety provider.

The provider must then notify the Rental Bond Board of the end of the registration and the nature of any payouts made.

## 42. How should rental bond interest revenue be recouped from surety product providers?

We strongly support the Department in noting that there is significant risks to the loss of revenue should bond surety products be legalised. The loss of bond held in the Rental Bond Board will have significant impact on the efficient functioning of the entire rental regulatory system. It may become necessary for NSW Fair Trading to require money to be taken from general revenue if bond surety products do not cover the entirety of their cost to the current bonds system, or degrade the level of service provided by the Department.

The rate should be set at whichever is projected to be highest over the coming financial year between: the current return on investments achieved on the TCorp-managed Rental Bonds Interest Account or a rate required to cover the current expenditure of the Rental

Bond Board, including administration of bond surety products. The decision should be set by the Rental Bond Board and may be delegated to our proposed Bond Surety Office (see q43). From our calculations and examination of returns over we estimate the required amount be around 5.5% per annum.

We see two options for the mechanism of collection of the equivalent of the rental bond interest.

The first option would be through a calculated surcharge upon registration of each surety. This would be calculated to cover the entirety of the lost revenue represented by that bond. The average length of tenancies based on time held by the Rental Bond Board over the last two years is 2.22 years (812 days). The calculation would be:

Bond surety surcharge = $B\,(1+r)^n$

where,

- ***B*** is the amount of the bond surety is provided for;
- ***r*** is the annual return determined by the Rental Bond Board (as a decimal);
- ***n*** is the expected number of years the bond will be held.

Using 5.5% and 2.22 years as an example, the surcharge levied on a $2000 bond would be $252.43. We suggest this calculation gives the Department some indication of the true cost of legalising bond surety products.

The second option would be a similarly calculated annual levy paid by the bond surety provider based on the total amount of bond surety provided throughout the year. This would also rely on the regular and timely provision of data by the providers to enable NSW Fair Trading to calculate the levy accurately.

We suggest consideration could be given to a mutual charge payable equally by landlord and tenant. In the current models of bond surety only tenants are charged. A mutual contribution may be appropriate, particularly as landlords are identified by the bond surety providers themselves as the true beneficiaries of the product.

### 43. What information should be provided to tenants to ensure they make sound purchasing decisions? What other factors should be considered in designing the model?

The information must include a full account of the fees and charges as with other products. One provider currently describes the fees in terms of a percentage of the bond, but does not disclose other fees until later in the application process.

The information statement must include a disclosure of any benefit, including commission, fee or other value received by the landlord or agent in return for recommending or using the product.

The information should ensure clear guidelines as to the process of whether and how surety providers will assess claims, incl. assessment of liability, depreciation tables, mitigation of loss. We do not believe, and have been given no information to suggest, the providers or the insurance companies supporting them have adequate experience in assessing claims in the residential tenancy space in line with NCAT decisions.

The information statement should provide an indication of the actual cost of product compared to your bond at the end of each year. This indication should include realistic information of how long a tenant may stay in premises – for example, a statement of the average length of tenure. Some bond providers currently make claims on the cost of the product on the assumption that a tenant may stay in the property for as long as they wish. This practice creates misleading product information.

The information statement should also include a clear comparison of what else you might realistically achieve with the money you have left – noting that tenants will have already paid out significant portions of the bond.

**Other factors**

We propose a Bond Surety Office within NSW Fair Trading's Property services division to oversee a number of aspects of the bond surety providers. This will be necessary as there are multiple aspects of the products that interplay. The office will be in a position to regulate the previously discussed elements of the regulatory model including the information statement and oversee the collection of bond surety surcharges as well as the following:

- Pricing: In attempting to sway opinion both bond surety providers have claimed that they expect their prices to come down. There is no credible reason they will reduce the cost on their own as the pricing of the products is opaque. A role of the Bond Surety Office could be to act as an independent pricing regulator to ensure prices charged reflect the actual risk being covered. This function could also be provided by the Independent Pricing and Regulatory Tribunal.
- Licencing: Bond surety providers should be regulated similarly to other financial services providers with ongoing breaches resulting in a suspension of their ability to continue to trade in the industry. We leave the specific model of licensing to NSW Fair Trading's expertise in the area.
- Commissions: Agents and landlords should not receive a benefit from using the product, as is currently the practice of at least one of the proposed providers. If this structure exists, it must be disclosed to landlord and tenant. Alternatively, the bond cover fee should be paid by landlord.
- Data: Currently, bonds give NSW government and the public a wealth of information through data collection. It would be unacceptable to jeopardise the data collection that the bonds currently provide. No other data source gives the same information or can be used in a timely manner.

If it proceeds, surety products need to be registered with the RBB providing the same information in the same time frames that are currently provided, or becomes required in the future. Currently, this includes property type, amount of rent, address and party names. The information is provided to the Rental Bond Board within 10 days of receipt of the bond (slightly longer for real estate agents). At the point of claim the RBB must be notified of the payout and the amount of any claim. The de-identified data regarding lodgements and refunds are released publicly around 20 days after the end of the relevant calendar month. Bond surety products must not be allowed to jeopardise this excellent data source.

## 44. What protections would be required if tenants were allowed to transfer bonds between rental properties?

**Implementing transfers of bonds through provisional certificates**

We propose the Rental Bond Board could ease the issues tenants face moving between tenancies by introducing a provisional certificate at the point of lodging the bond through Rental Bonds Online. This would be at the request of the tenant, and it should remain open to a tenant to provide the payment in the current ways.

The provisional certificate will state the current amount of the bond held by the applicant tenant in the Rental Bonds Online system. Co-tenants with a joint share of a bond should also be able to access this transfers system but this may need progressive implementation. The RBO system may need to be upgraded to efficiently deal with this. Tenants not using the Rental Bonds Online system may also not be able to access it, but this may be unavoidable unless an alternate 'offline' system is developed.

The applicant tenant is required to pay any difference between the bond held and stated in the provisional certificate and the new bond in the same process as currently instituted in the online lodgment process.

From the new landlord's perspective, the lodgement of the bond is now functionally complete. RBB has allotted their account with the bond, though the system will note that it remains provisional.

At the end of the existing tenancy, the current bond claim process would apply. At the time that the parties agree or the NCAT makes an order, any amount that would be returned to the tenant is instead released to fulfil the provisional certificate. Any deficit caused by a claim should then be replaced within a short timeframe (we suggest 14 days), but this will then be added by the tenant through the RBO system.

In order to preserve the current ways enforcement of bond payment occurs, if the tenant does not add the shortfall within the timeframe then this would become a breach of the agreement in the same way current non-payment of bond does. The TU recommends bond payments as an inclusion in sections 88 and 89. We can also see some benefit in NSW Fair

Trading taking on some role in enforcing payment but acknowledge this may be a cost to the Department.

However, the continuing ability for LLs to make claims and use the cost of NCAT action as a barrier to tenants disputing the claim needs to be addressed. Bond claims should be treated in the same manner as all other civil claims – the party claiming loss should make the application to the court or tribunal. This is also consistent with the Victorian claims process.

## Other matters

**Do bonds reduce rents?**

The consultation makes this claim, but we do not believe it to be the case. We suggest that rents are set by supply and demand – and not, as is commonly claimed by landlord representatives, by the cost of provision of housing. There is no clearer example of this than the relationship between rents and interest rates. A landlord with a new mortgage and a landlord who has paid off the mortgage entirely charge the same rent, all else being equal. Indeed, many landlords pay much more on their mortgage than they receive in rent – this is the basis for having negative gearing.

The potential costs which are materialised in the bond also do not affect rent levels. We can examine this further by wondering if rents reduce bonds, but landlords know that the lump sum nature of a bond is a frustrating inconvenience for otherwise good tenants, then why don't some landlords at least offer the choice of a higher rent in exchange for no bond.

On a $500 week rent, the equivalent of the bond could be gained over one year by charging $538 a week. This would be financially beneficial to a landlord as they could effectively receive amount of the bond well before the end of the tenancy and still have the capacity to pursue any loss through NCAT if needed. It would also increase the real estate agent's commission which a bond does not, and reduce the agent's paperwork with associated efficiency gains.

There is no regulatory barrier to this. The only barrier is that it would not work – clearly the bond is not so great a barrier that it would substantially change the supply-demand equation to allow the landlord to demand such a premium.