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Comment on the proposed repeal of the *Landlord and Tenant Act 1899*

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On Wednesday May 27th 2015 the Minister for Innovation and Better Regulation, the Hon. Victor Dominello, introduced the 'Fair Trading Legislation (Repeal and Amendment) Bill 2015' into the New South Wales Legislative Assembly. Among other things, the bill will repeal the *Landlord and Tenant Act 1899*.

The Tenants' Union is concerned that the repeal of the *Landlord and Tenant Act 1899* will prevent the bill from achieving its objectives. There are three reasons for our concern.

1. The repeal will add to red tape and regulatory burden

In his second reading speech, the Minister cited the reduction of red tape and regulatory burden as the impetus behind the bill. The repeal of the *Landlord and Tenant Act 1899* is likely to have the opposite effect, for the following reasons:

> The *Residential Tenancies Act 2010* expressly excludes a number of tenancies on the basis of the type of premises occupied by the tenant (at section7), or the nature of the agreement between the parties (at section 8). The *Landlord and Tenant Act 1899* provides a mechanism by which landlords may lawfully recover premises, and a safeguard against eviction without court order, for these tenancies.
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> 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.
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> The *Landlord and Tenant Act 1899* repealed an earlier Act of Parliament known as the *Summary Ejectment Act of 1853*. The *Summary Ejectment Act* repealed the earlier *Act to facilitate the recovery of possession of Tenements after due determination of the tenancy*. It is not clear whether that Act repealed earlier legislation, or modified the common law, but it is clear that a process for recovering possession of tenanted property has been a long-standing issue of concern for the Parliament of New South Wales.
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> A return to the common law would mean a tenancy not covered by the *Residential Tenancies Act 2010* 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.

2. The Act has its uses for those who would rely on it

In his second reading speech, the Minister also said the *Landlord and Tenant Act 1899* was surplus to need as it had not been put to recent use in the Local Court. A quick scan of relevant legal decisions reveals several contemporary cases in which the 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 for parties where a lease is ended by re-entry, with reference to statutory interventions including the *Landlord and Tenant Act 1899*.

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.

3. The repeal will affect the operation of the *Landlord and Tenant (Amendment) Act 1948*

We welcome the decision not to include the repeal of the *Landlord and Tenant (Amendment) Act 1948* in this bill. The 1948 Act provides important protections for those whose tenancy is covered by it. But the repeal of the *Landlord and Tenant Act 1899* will have adverse consequences for the 1948 Act, for the following reasons:

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.

More information

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