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**Re: Review of The Agents Act 1968 and The Auctioneers Act 1959**

Dear Commissioner

You will find attached a submission from Welfare Rights and Legal Centre and the Tenants' Union (ACT) in relation to the above review.

We thank you for the opportunity to have input into this process.

Yours sincerely

Jackie Finlay  
Solicitor  
on behalf of  
Welfare Rights and Legal Centre

Deborah Phippen  
Executive Officer  
on behalf of  
Tenants' Union

**13 July 2001**

## **Submission by Tenants' Union (ACT) and Welfare Rights and Legal Centre**

### **1. Introduction**

- 1.1. Welfare Rights and Legal Centre (WRLC) and the Tenants' Union (TU) are two of the primary providers of information and assistance to tenants in the ACT. Each organisation provides services separately.
- 1.2. WRLC is a community legal centre providing tenancy advice, information and referral through their paralegal service, as well as casework by the Centre's solicitors. Tenancy comprises one of the Centre's areas of expertise.
- 1.3. The Tenants' Union is a voluntary organisation whose membership consists of public and private tenants, as well as individuals interested in tenancy issues. The TU represents tenants (private and public), works to promote the rights and interests of tenants and undertakes tenancy-related projects.
- 1.4. The two organisations also jointly manage the Tenants Advice Service (TAS). The TAS provides information, advice and referral through its advice worker and undertakes community legal education and development, producing information, conducting workshops and presentations, promoting tenant participation. The TAS is funded through the Department of Justice and Community Safety, by a proportion of the interest earned from bonds lodged with the Office of Rental Bonds.
- 1.5. The consequence of this experience and range of services within the organisations is extensive first hand knowledge of tenancy and housing issues in the ACT. Accordingly the TU and WRLC are providing a joint submission to this review responding to issues and items from the discussion paper identified as being of particular relevance to the organisations and their expertise. TU/WRLC welcome this review as an opportunity to address some long-standing issues concerning the Agents Act and its links, or lack thereof, with tenants and tenancy issues.

### **2. Chapter 1: Introduction**

- 2.1. As organisations representing and advocating on behalf of tenants TU/WRLC welcome the review and the opportunity to have input regarding issues with the Agents Act that are broader than the review required under the National Competition Principles Agreement. Having no involvement in the relationship between landlords and agents it is very important that we are able to identify another consumer group in the real estate industry that has not been properly acknowledged to this point. This group is of course tenants. Tenants have direct contact with real estate agents and agents behaviour/actions have direct impact on tenants' lives and on the landlord's asset that is the tenants' home.
- 2.2. In the last year (1999 – 2000) our advice services advised over 6,300 tenants on a range of issues. In many cases these issues are related to a real estate agent (REA) breaching a tenancy agreement. The effect of these breaches can range from premises being unsafe to harassment of a tenant. While tenants have some recourse in these matters under the Residential Tenancies Act 1997 (RTA), and the Residential Tenancies Tribunal, this is only in relation to each separate breach and the REA will only be directed to rectify the breach and in some cases compensate for losses. The RTA does not provide for penalties on parties who breach the standard terms or the Act. This omission means that too often we see REAs repeatedly breaching the same terms for different tenancies.
- 2.3. In some cases the REA's actions will impact on an individual landlord, i.e where a REA fails to have repairs done and the condition of the premises deteriorates. However, usually the action will not impact directly on the landlord in the first instance eg harassment of the tenant, entry without notice etc. This means that it is not common for a landlord to want or need to initiate action regarding an agent's behaviour, leaving the tenants to seek resolution of the problem themselves.
- 2.4. To date the Agents Act has not really benefited a significant group of consumers in the real estate industry. Our experience shows that changes to the regulation of REAs is necessary.

### 3. The Existing Regulatory Scheme

#### Consumer concerns about the market

- 3.1. The number of complaints received by the Office of Fair Trading and the Agents Board does not accurately reflect dissatisfaction with REAs' delivery of services because tenants have not had the ability to make complaints about service delivery. To give an indication of the extent of tenant issues with REAs, in the period 1 July 2000 to 19 June 2001, 70% of TAS contacts with tenants (where it was recorded an agent was managing the property) were regarding issues with REAs, this amounts to 1 657 matters. The figures for WRLC are similar. Of course not all matters are issues that would be referred to a complaints body but many are breaches of tenancy agreements by REAs and can involve misrepresentations by agents or harassment.
- 3.2. It must also be noted that tenants have not been encouraged to make complaints to the Office of Fair Trading regarding the activities of REAs. It has always been stressed that tenants are not REAs clients and that matters should be resolved through existing tenancy legislation. Unfortunately tenancy legislation did not, and still does not deal with issues that the Agents Act can in relation to conduct. It must also be pointed out that with the commencement of the Residential Tenancies Act 1997, the Office of Fair Trading widely promoted the fact that it no longer dealt with tenancy issues, advising services that they should not refer matters to it. This explains a drop in numbers, not any change in REA behaviour or legislation that better regulates these particular issues.

### 4. Barriers to Entry - the Agents' Services Markets

- 4.1. We agree and stress that any perceived negative consequences of effective regulation are justified because a regulatory scheme provides valuable protection to consumers, and in this case to consumers that have not been considered or recognised by the industry. Tenants are consumers in a very unbalanced power situation – it is not a simple matter for a tenant to say they are not happy with the way an agent is conducting himself or herself. A tenant cannot take their business away from an REA, especially in the current rental market and if they are in a fixed term lease. It is not a straightforward case of transferring business but of moving house and possibly incurring liability.

#### Issue

##### **#1. Should the scheme be simplified by only providing for licences?**

- 4.2. In light of the points provided in the discussion paper, and our earlier comments we believe it is clear that registration is vital and that all steps necessary must be taken to ensure good character and an appropriate level of knowledge and experience in the real estate industry.
- 4.3. It is our experience that too many property managers and selling agents are ignorant of residential tenancy legislation, or at the very least actively ignore regulations. This is particularly concerning when it is also clear that many tenants are unaware of their rights and even if they are aware often feel they are not in a position to assert those rights. Any diminution of existing requirements will have a negative impact on consumers.

#### Issue

##### **#3. Should the education requirement be mandatory?**

##### **#4. Is the three year industry experience requirement necessary?**

- 4.4. As noted above experience and appropriate education are necessary because this is an industry involved with significant amounts of money and people's homes. There are significant areas of

law that REAs must operate under and it is vital for themselves, and all their consumers that they have a demonstrated understanding of regulations and requirements.

***What are the public benefits of the current scheme?***

- 4.5. While it is theoretically true that a tenant can choose not to rent through a particular REA, or any REA, the reality is that such a decision may severely limit the tenants' access to housing, especially in the current ACT rental market. Therefore, while many tenants may have concerns about REAs or particular REAs if they want a home in a particular area they will often have to reconsider those concerns and weigh them up against the importance of acquiring a home.
- 4.6. That said, many tenants do assume that REAs are aware of legal requirements and will act in accordance with those requirements, more so than private landlords. There is also an assumption that REAs will act with personal and professional integrity, and tenants are often very surprised (and outraged) when this is not the case.
- 4.7. The current scheme does provide standards however tenants do not have the ability to utilise the existing sanctions. There must be changes to re-address this inequity. There must be an extension of the coverage of the Agents Act to incorporate the relationship between REAs and tenants. The risks that are outlined already apply to tenants. A prime example of the impact of exploitation and malpractice is evident in a possibly widespread practice that has been brought to the attention of our services, and the Residential Tenancies Tribunal. The practice is of REAs telling tenants in share houses that it will cost 1 – 2 weeks rent to “add” another person (a co-tenant) onto a lease. This is in direct contravention of S17 RTA and clause 24(a) of the Prescribed Terms.
- 4.8. *Case study: A tenant signed onto a lease for a house with the clear understanding and agreement of the REA that they would be searching for a co-tenant. On finding a co-tenant, the tenant contacted the REA and was told it would cost 2 weeks rent (\$700) to have this person added to the lease. They were told that the money is lodged with a government body along with the lease, this is not true. The tenants refused and the co-tenant remained in the tenancy without changes to the lease. Some time later the tenants approached the REA again to have the co-tenant added, and this time the REA said it would cost one weeks rent and the money would go to the landlord. The tenants refused and were confused by the conflicting information and sought advice.*
- 4.9. The issue of REA fees highlights another problem for tenants. It is noted that fees are a matter of negotiation. This has a significant impact on tenants who have to “break” leases. Under the RTA (S 107) on breaking a lease a tenant is liable for the costs a landlord incurs because they have to find a new tenant. The amount of compensation a landlord is entitled to is limited to 26 weeks rent and the costs associated with finding a replacement tenant, up to and not exceeding one week's rent. It is not argued that this compensation is unreasonable. The problem arises because of the practice of REAs to automatically charge the landlord, and therefore the tenant, an administration fee of one week's rent for finding and signing up a new tenant, regardless of the amount of work undertaken by the REA. This does not include advertising costs. The issue is that a tenant who pays \$120/week rent (or a landlord who charges it) will be charged \$120 and a tenant paying \$450/week will be charged \$450 for the same amount of work. This is clearly inequitable. We have also heard of instances where an REA “double-dips” and both the landlord and the tenant have been charged the fee.

**Issues**

**#6. Is retention of regulation of the industry justified in the public interest?**

**#7. If regulation is retained, should the regulatory requirements be streamlined to reduce costs, and if so, how?**

- 4.10. The proposal of self-regulation as an alternative is not acceptable from a tenant perspective. As already noted, there is no recognition of any direct relationship and responsibility to tenants from the sector, demonstrated by the REIA's Code of Conduct. There is also the fact that not all REAs are members of the peak body. The REI, while it has a positive relationship with our organisations has demonstrated that it is rarely in the position to take up and act on complaints from tenants.

- 4.11. It is clear that regulation is justified in the public interest, and that regulation must be expanded to incorporate practices impacting on tenants. The cost of regulatory requirements is necessary to maintain the integrity of the industry. The costs associated with training and experience are costs that any professional organisation should be willing to bear to ensure and maintain quality.

### PART 3

## 5. Administration of the Regulatory Scheme

### Issues

**#23. Should the responsibility for the existing complaints and disciplinary system currently administered by the Agents Board be conferred on a Committee chaired by the Commissioner for Fair Trading, assisted by other people, with appeal rights to the AAT? Or**

**#24. Should the Commissioner for Fair Trading bring complaints and disciplinary matters before an independent body for determination; that body being either: an independent disciplinary tribunal; or the Administrative Appeals Tribunal?**

- 5.1. It is obvious that the current structure must be changed. Either structure would be acceptable as long as there is transparency and accountability. An associated issue is that the membership of either independent body must include consumers. It is not acceptable that a disciplinary body be made up of primarily sector members, for the reasons provided in the discussion paper.
- 5.2. In addition, it must be clear that whatever option is chosen it must be properly resourced. While one of the reasons for the proposed change is streamlining and better use of resources, there must be adequate resources allocated to properly and thoroughly take on matters and issues. It has long been a concern of ours that the Office of Fair Trading while sometimes in the legal position to take on matters on behalf of tenants, have not been able to adequately do so because the necessary resources were not available.

## 6. Coverage of the Act Gaps in the Present Scheme

Rules of Conduct for agents

### Issue

**#25. Should the Rules of Conduct be broadened in scope to cover a wider range of conduct engaged in by agents? If so, what sort of conduct should be covered by the Rules?**

- 6.1. It has already been stressed that the Agents' Act must be broadened to include all consumers, specifically tenants. Tenants' are consumers of REA services. It follows that the Rules of Conduct must be broadened to cover this relationship. The example provided in the discussion paper highlights one aspect of REA conduct that must be addressed i.e, that REAs must not misrepresent themselves in order to obtain assistance they would not otherwise be entitled to. This is closely linked to the provision in S72 (1)(j) of the Agents Act, however the current provision is limited to publishing a statement. It should be broadened to include not making such statements.
- 6.2. Other conduct that should be clarified is the duty to abide by all relevant legislation, this is in relation to the RTA, and the Prescribed Terms, and can also include other ACT and Federal legalisation. This would include the duty to abide by provisions in relation to access to tenanted properties, requirements to do repairs, harassment and threats. This would enable tenant advocates to make a complaint if they become aware that a REA continually breaches the RTA. Currently there is no avenue for such action to deter REAs from conducting themselves in this way. It would also be beneficial for the complaint body to keep records of complaints and if there are a number of complaints in relation to a particular REA the body could investigate the matter further and take action on their own initiative. This would enable tenants to make complaints against a REA and if the complaints body finds that there are many complaints, action can be taken to prevent the particular problem from continuing. This would be a positive step and demonstrate that there is appropriate monitoring of the Code of Conduct.
- 6.3. In addition to the conduct that is linked to the RTA this presents an opportunity to provide guidelines of acceptable practice in relation to other issues such as the use of personal information. There is currently no regulation of the use of personal information collected by REAs when tenants apply for properties, or that

collected through the course of the tenancy. While National Privacy legislation has been developed it will not come into effect until December 2001 at the earliest, and if REAs are able to claim exemptions this may be delayed or avoided completely. It is very important that there are some guidelines about the type of information collected, and once it is collected how it is used. It must be clear that only information directly related to a person's suitability for a property is collected, and that the information does not breach privacy guidelines. At the very least the Code of Conduct should provide that REAs must abide by the National Privacy Principles. This matter is linked to S72(1)(i) of the Act, if this section was broadened to include tenants it would improve the very inequitable situation for REA consumers.

- 6.4. Inclusion of these matters in the Code of Conduct would not conflict with a REAs duty in relation to the landlord.

Employees

**Issue**

**#26. Do the public benefits exceed the costs of requiring employees of licensed agents to hold prescribed competency qualifications and undertake police checks?**

- 6.5. As the examples of misconduct and lack of competency already provided clearly show, it is obvious that the public benefits exceed the costs of including the above requirements. While agents may have been disciplined in the past because of the acts of their employees it is not a sufficient inducement for agents to ensure that the above requirements of good business practice are met. To ensure that agents take reasonable steps to ensure that employees are reputable, honest and competent should not be an onerous requirement by agencies concerned about such matters. REAs do have responsibilities under a range of legislation and they must be fully aware of those responsibilities – not just the tenants' responsibilities.

Compensation

**Issues**

**#27. Is there any merit in amending the Act to allow for punitive or other damages to be awarded for breaches of the Rules of Conduct by agents?**

**#28. If so, who should pay?**

**#29. Is there any merit in amending the Act to allow for out-of-pocket expenses from the Fund to compensate applicants for consequential loss?**

- 6.6. As with other measures already addressed, there is great advantage in broadening the scope of the Agents Act to ensure REAs are directly responsible and accountable for misconduct.

**7. Additional Issue**

- 7.1. We would like to take this opportunity to raise an issue of inequity regarding the use of funds lodged with ACT Government bodies. This is a matter linked to the SIA. Currently tenants' money (bonds) is lodged with the Office of Rental Bonds and the interest earned on the funds contributes to the operation of the Office of Rental Bonds, the RTT and the TAS. From the information provided in Attachment "C", and to our knowledge agents' money does not contribute to the RTT. While it is acceptable that agents' money does not contribute to the operation of the body administering bonds, and that it funds the REI training centre (which undertakes some of the roles for agents that the TAS does for tenants), it is questionable why there is no contribution to the RTT. It is inequitable that it is only tenants' money that contributes to the body that resolves disputes for tenants and landlords (and their agents). This is especially inequitable since tenants do not initiate matters at the RTT as often as REAs and landlords. Contributions must be made by all tenancy stakeholders, not just the consumers. This is possible through use of the SIA funds.