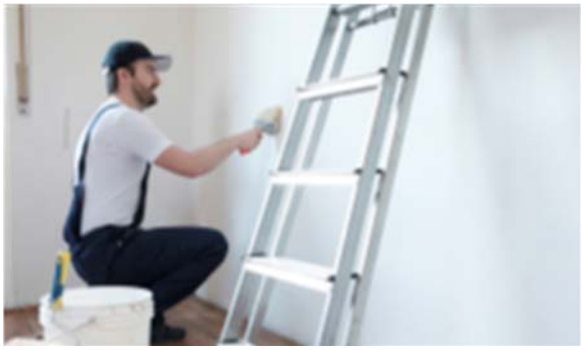

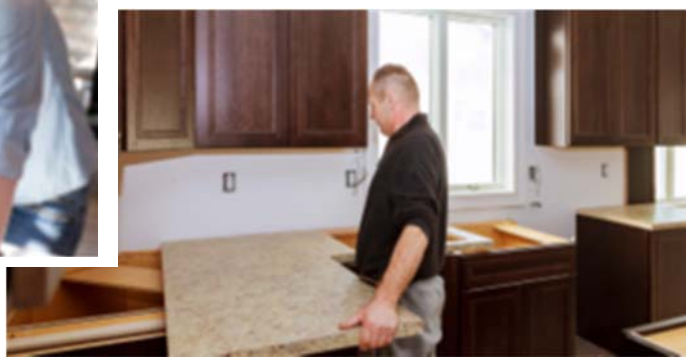

Better Business Reforms –

Implementation

Options Paper – November 2018

NSW GOVERNMENT

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Introduction

On 24 October 2018, the NSW Parliament passed the first of two Bills in the Government's package of Better Business Reforms. The reforms will empower everyday people by cutting red tape, and giving consumers the information they need to make meaningful decisions about their future.

The reforms are the culmination of a comprehensive review of legislation in the Better Regulation portfolio, in consultation with business and the wider community. Independent consultants ACIL Allen, undertook a comprehensive impact evaluation of the reforms. As part of the impact evaluation, they estimated the financial impact of each individual reform, as well as the total package.

They estimated that collectively, the reforms could deliver:

- benefits to businesses of almost $500 million over 10 years, and
- savings for consumers in the order of $150 million over the same period.

The Better Business Reforms aim to create opportunities for small business by reducing costs and complexity, without reducing consumer protections. The reforms also increase transparency and protections in consumer transactions without overly burdening businesses. The headline reforms include extending tradies' licenses, making it easier for tradies to get the qualifications they need to work in the motor vehicle industry, and requiring businesses to be upfront and explicit about any terms and conditions, which could significantly impact customers.

There are more than 40 reforms in the Better Business Reforms package, most of which are contained in the Fair Trading Legislation Amendment (Reform) Bill 2018, and the Fair Trading Legislation Amendment (Miscellaneous) Bill 2018. Some of the reforms have already commenced. Many require subordinate legislation, administrative and ICT changes before they can be implemented. In many cases, these tasks are well understood and will be progressed over the next 12 to 18 months.

However, a small number of the reforms require further consultation to ensure stakeholders and the community have the opportunity to provide input into the details of the reform before they are finalised and implemented. For other reforms, further consultation will ensure that stakeholders and other interested parties can contribute to the decision-making process about the most appropriate commencement date.

The purpose of this Paper is to provide further detailed information about these select reform areas and to set out options for consideration. The Paper also provides a formal mechanism to make submissions on the issues.

HAVE YOUR SAY

We invite you to read this paper and provide comments. You may wish to comment on only one or two matters of particular interest, or all of the issues raised.

We prefer to receive submissions by email and request that any documents provided to us are produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at http://webaim.org/techniques/word/

If you do not wish for your submission or any part of your submission to be published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*).

HOW TO LODGE YOUR SUBMISSION

You can provide a submission by email to policy@finance.nsw.gov.au or by post to the following address:

Better Business Reforms Implementation
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

Submissions close COB Wednesday 19 December 2018

NEXT STEPS

All submissions received will be acknowledged. Once the consultation period has closed, feedback will be analysed and all potential options assessed. More information about the progress of the implementation of the Better Business Reforms package will be made available from time to time on NSW Fair Trading's website at www.fairtrading.nsw.gov.au

1. Disclosure of Key Terms

1.1 What is the current law?

Many terms and conditions for the purchase or acquisition of goods and services are lengthy, difficult to access and not written in plain English. As a result, everyday experience indicates that consumers do not always fully inform themselves of the terms and conditions on which they transact – frequently consumers press "agree" to online terms and conditions without reading them or sign a contract without having read it all first.

In testimony to the US Congress, Facebook CEO, Mr Mark Zuckerberg, in response to the proposition that a very small percentage of Facebook users "actually read the terms of service, the privacy policy, the statement of rights and responsibilities" accepted that "most people do not read the whole thing". The issue is not new: over 45 years ago, Lord Denning MR observed in *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, on a series of cases relating to tickets for travel that "[n]o customer in a thousand ever read the conditions. If he stopped to do so, he would have missed the train or the boat."

A number of laws traverse this issue: *first*, there is the equitable principle of unconscionable conduct. Unconscionable conduct in this sense is also prohibited and expanded by the Australian Consumer Law (ACL) s 20 and s 21 respectively.

Second, the ACL contains provisions and remedies for unfair contract terms. At the state level, there is also the *Contracts Review Act 1980*, which confers on the Court the power to issue a remedy where a "Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made": s 7. "Unjust" includes "unconscionable, harsh or oppressive" and the Court is required to consider whether a party had access to expert advice and the form and intelligibility of the contract: s 9(2). However, for these legislative provisions to apply there must be an argument that a contract term is unfair or unjust. The threshold of proof in such cases is high. This is quite different to whether a consumer has notice of terms that would substantially influence whether they decided to enter into the agreement. In most instances, the contract term may not be unfair or unjust but the consumer may not be aware of it and may not have entered into the contract had they been.

Third, there are a number of laws which require mandatory product disclosure statements which simply state the key terms of a contract so that the consumer can form a worthwhile judgment as to his or her own interests. For example, a disclosure statement highlighting the key terms and conditions must be given to prospective residents of a retirement village to read and consider before they can sign a contract to become a resident of the village.

However, as can be seen from the above, there are regulatory gaps in the current legislative framework and the general law. This leaves many consumers in a situation where they do not have all the information they need to make informed choices.

1.2 Who is affected by the current law?

All traders who supply goods or services to NSW residents, and who have terms and conditions which could substantially prejudice the interests of consumers, are affected by the current law. It does not matter if the goods or services are supplied from a physical location or online. All consumers who seek to purchase goods or services from these traders are similarly affected by the law.

1.3 How will the Better Business Reforms change the law?

Once the laws recently passed by the NSW Parliament commence, they will amend the *Fair Trading Act 1987* (*FT Act*) and its subordinate legislation. The amendments will require all suppliers of goods or services in NSW to take reasonable steps to ensure that a consumer is aware of the substance and effect of any term or condition that may substantially prejudice the interests of the consumer. This disclosure obligation needs to be complied with upfront, before the goods or services are supplied to a consumer.

The amending legislation gives guidance as to the types of terms that are to be considered to substantially prejudice the interests of a consumer. The legislation lists these as the following:

(a) a term that excludes the liability of the supplier, or

(b) a term that provides that the consumer is liable for damage to goods that are delivered, or

(c) a term that permits the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the third party to identify the consumer, or

(d) a term that requires the consumer to pay an exit fee, a balloon payment or other similar payment.

The above is not an exhaustive list. As discussed in 1.4 below the regulations may prescribe other terms, or classes of terms, that may substantially prejudice the interests of consumers. It is important to note that despite the list of terms as examples in the legislation each supplier will need to decide if any of their other terms and conditions could substantially prejudice the interests of consumers and need to be disclosed.

1.4 Are there any regulation-making powers?

Yes, the amendments to the *FT Act* include a range of powers to prescribe further detail about the disclosure of key terms in the regulations. The regulations may provide for:

1. What may or may not constitute reasonable steps taken by suppliers to ensure consumers are aware of the substance and effect of terms or conditions relating to the supply of goods or services that may substantially prejudice the interests of consumers;

2. Further clarity on the type of terms, or classes of terms, that may or may not need to be disclosed under this new requirement; and

3. Exemptions from the disclosure requirement, because there are already adequate disclosure provisions under other legislation or for other reasons.

1.5 Could the reform commence without making regulations?

Yes, it would be possible for the law to operate without regulations. However, there is likely to be greater understanding and less disputes if regulations are made first. For example, regulations could give more certainty to businesses and consumers about the types of terms that need to be disclosed. Regulations setting out acceptable methods of how this disclosure obligation can be complied with would also provide greater clarity and certainty for businesses and consumers. Additionally, if the regulations prescribed certain exemptions this would avoid any duplication or conflict with other legislative requirements. This could include situations where a product disclosure statement is already required for the supply of the goods or services involved.

1.6 What needs to be done before this reform can commence?

Any submissions proposing that regulations should be made prior to commencement will need to be considered, along with all other submissions. A decision can then be made as to whether regulations should be made prior to commencement. If so, regulations would need to be developed. Once assented to, the regulations could commence concurrently with the legislative amendments.

NSW Fair Trading will need to undertake an information and education campaign to bring awareness of the new requirements to the community and affected traders.

Traders who will be affected by the new laws will need to put measures in place to ensure they are complying with the new requirements. Traders who currently do not disclose key terms to consumers in an upfront and explicit manner will need to make any necessary changes to their websites, consumer contracts, other documentation and/or businesses processes.

NCAT would need to amend its systems to deal with disputes over these requirements and provide training to its members.

1.7 When could this reform commence?

Preferred option

A commencement date of 1 September 2019 is currently proposed. This date would give the necessary time to consult, make regulations and proclaim the commencement date. There would then be sufficient time to communicate the new requirements to the community and traders. It would also provide sufficient lead time for traders to prepare for the change. This would also coincide with the remaking of the *Fair Trading Regulation 2012* which is due to occur on 1 September 2019.

Of course, given the NSW Parliament has already passed these laws, traders that do not presently meet the new requirements could commence preliminary steps towards compliance now.

Questions:

1. **How feasible is the proposed start date for the disclosure of key terms? Are there reasons why these amendments should start sooner or later?**
2. **What industries already have adequate disclosure requirements regarding terms that could substantially prejudice a consumer's interests?**
3. **Section 1.4 contains the matters for which regulations can be made. Do you think that all of these matters require regulations before the reforms can commence? If you think some or all are required, what do you believe needs to be contained in those regulations?**

2. Disclosure of commissions and referral fees

2.1 What is the current law?

In certain circumstances, consumers are protected by non-specific laws when traders do not disclose commissions or referral fees. For example, the ACL, prohibits traders from engaging in deceptive and misleading conduct. In some serious cases, failing to disclose commissions and referral fees will amount to a breach of these laws. The *Crimes Act 1900* (the *Crimes Act*) also protects consumers in the most extreme cases, by providing sanctions for fraudulent conduct. Finally, the general law provides protections for a small number of consumers who are in a particular relationship with the trader providing the services. This is where there is a legal and ethical obligation for the trader to act in the consumer's best interest. In these cases, the trader is typically a fiduciary, that is, someone entrusted with the care of money or property.

In addition, there are some industries that are regulated by specific Commonwealth laws that require the disclosure of commissions, fees and 'kick-backs', such as the financial services industry. There are also a few NSW laws which have specific requirements for traders regulated by these laws to disclose conflicts of interest when providing consumer advice or recommendations. For example, the *Property, Stock and Business Agents Act 2002* requires licensees to disclose conflicts of interest when making referrals. The *Strata Schemes Management Act 2015* regulates the disclosure of commissions and benefits in the context of strata schemes.

As can be seen from the above, there are clear regulatory gaps in the current legislative framework and the general law. This leaves many consumers in a situation where they do not have all the information they need to make informed choices.

The problems posed by the current regime for commissions and referral fees include:

- Non-disclosure of commissions or referral fees to consumers may impede the ability of the consumer to assess the veracity of the advice provided.
- Financial incentives to sell products can bias, or at least appear to bias, the advice, information or recommendations provided to consumers.
- The issue of product/service advice, information or recommendations appearing to be biased because the provider of the advice is financially incentivised to recommend certain products.

2.2 Who is affected by the current law?

All traders, those engaged in trade or commerce or other business activities, and members of the community that transact with them, are affected by the operation of the ACL. The whole community is affected by the fraud provisions in the *Crimes Act* and fiduciaries by the general law. In sectors where there are disclosure requirements under specific regulatory

regimes, the traders and licensees regulated under those laws and members of the community that engage with them are affected by those laws. The community is affected by the regulatory gaps in the current legislative framework and general law. This includes when the community and consumers engage with intermediaries that are paid a commission or a referral fee by a third party. This situation commonly occurs with aggregate product/service comparison websites or other traders or licensees who, in providing their service, also recommend or refer the consumer to other service providers.

2.3 How will the Better Business Reforms change the law?

Once the laws recently passed by the NSW Parliament commence, they will amend the *FT Act* and its subordinate legislation. The amendments will require traders to disclose the existence of financial incentives for providing or referring goods or services. The new laws will require traders to take reasonable steps to ensure the consumer is aware of the existence of these fees and commissions before the consumer engages with the trader. Financial incentives have been defined to include commissions, referral fees or another kind of payment prescribed by the regulations.

The reforms are designed to ensure the consumer is alerted to the fact the trader has a financial relationship with the third party so that they can make informed choices. However, importantly, to respect the 'commercial-in-confidence' nature of some of these arrangements, the reforms do not require the trader to disclose the amount or percentage of these payments.

The reform will apply broadly, including to product comparison websites that incur referral fees or commissions.

2.4 Are there any regulation-making powers?

Yes, the amendments to the Act include powers to prescribe the detail or additional matters by regulation. These are:

- the method of communicating the existence of such arrangements to consumers (i.e. what constitutes reasonable steps?);
- whether any other type of financial incentive beside a commission or a referral fee is captured by these new obligations;
- expanding the definition of 'intermediary'; and
- excluding a person, or a class of persons, from the new obligations (for example, because they have adequate disclosure requirements under legislation that specifically regulates their industry).

2.5 Could the reform commence without making regulations?

Yes, it would be possible for the law to operate without regulations. However, its commencement would likely be more straightforward if regulations are made first, to give

certainty for businesses and associations, especially where multiple disclosure obligations apply.

2.6 What needs to be done before this reform can commence?

Regulations must be developed to support the amendments. Once these regulations are drafted, the amendments would commence with the new regulations. Stakeholders will be consulted on their development.

Traders who will be affected by the new laws, will need to put measures in place to ensure they are complying with the new requirements. Many traders already comply, so there would be nothing for them to do. Traders who currently do not clearly bring the existence of commissions and referral fees to the attention of consumers, will need to make necessary changes to ensure they do.

NSW Fair Trading will need to undertake an information and education campaign to bring awareness of the new requirements to the community and affected traders.

2.7 When could this reform commence?

Preferred option

A commencement date of 1 January 2020 is currently proposed. This date would give the necessary time to consult, make regulations and proclaim a commencement date. There would then be sufficient time to communicate the new requirements to the community and traders. It would also provide sufficient lead time for any traders that would not presently meet the new requirements, to prepare for the change.

Of course, given the NSW Parliament has already passed these laws, traders that do not presently meet the new requirements could commence preliminary steps towards compliance now.

Questions:

4. **Section 2.4 contains the matters for which regulations can be made. Do you think that all of these matters require regulations before the reforms can commence? If you think some or all are required, what do you believe needs to be contained in those regulations?**

5. **Is 1 January 2020 an appropriate start date for the disclosure of commissions and referral fees? Do you believe there are reasons why this reform should start sooner or later?**

3. Streamlining the uncollected goods regime

3.1 What is the current law?

The purpose of the *Uncollected Goods Act 1995* (*Uncollected Goods Act*) and uncollected or abandoned goods provisions in other legislation, is to protect the owner of these goods (the bailor), while ensuring the holder (bailee) can legally dispose of the goods where necessary. Under the various statutes, different rules apply regarding how long the goods must be kept, what efforts must be made to return the goods to their owner and the process of selling or otherwise disposing of the goods.

Currently there is duplication, inconsistency and discrepancies between the *Uncollected Goods Act* and specific provisions in other Acts that deal with uncollected or abandoned goods.

The problems posed by the current regime for uncollected goods include:

- Outdated thresholds that have not increased in many years, even though the value of goods has dramatically increased. The higher the value of good, the stricter the requirements for how they can be disposed of. Because the thresholds have not increased with the passing years, laws designed to protect higher value goods at the time are now putting those higher requirements on what are now low value goods. This imposes unnecessary costs on service providers, including costs of storing uncollected goods, costs of advertising the intended disposal and direct costs of disposal.

- There is no sound policy reason for the different requirements between the Acts for the same value goods. This results in unequal treatment of both businesses and owners of uncollected goods.

- Outdated communication requirements, for example having to advertise in a newspaper. These requirements at times do not allow the use of less expensive and more effective digital means of communication.

3.2 Who is affected by the current law?

Those affected by the *Uncollected Goods Act* include drycleaners, for clothes that are never collected; accommodation providers, for a hotel's 'lost and found'; motor mechanics, where a car is left for service or repairs and is never picked up and paid for; and other industries that may involve goods being left behind.

Other legislation like the *Strata Management Act 2015*, *Holiday Parks Act 2002* and the *Retirement Villages Act 1999*, regulate how goods are dealt with under specific circumstances. Affected stakeholders include managers and residents of residential land-lease communities, landlords, agents and tenants, occupants of strata accommodation, holiday parks and retirements villages.

3.3 How will the Better Business Reforms change the law?

Once commenced, the reforms will amend the *Uncollected Goods Act* to streamline and harmonise the various uncollected goods provisions into one set of laws. The reforms allow for the use of more contemporary means of communication and provide for contemporary thresholds. Under the reforms, the local court system will no longer have jurisdiction to hear disputes over goods. Instead, the New South Wales Consumer and Administrative Tribunal (NCAT) will be able to hear such disputes and make orders regarding the disposal of uncollected goods.

The reforms will also increase the existing monetary thresholds for the value of goods. The thresholds determine how and when uncollected goods can be disposed of. Goods considered to be low-value, will now be goods under $1000 (rather than under $100); medium-value goods will be goods between $1000-$20,000 (rather than $100-$5000) and high-value goods will be goods that have a value of over $20,000 (rather than goods over $5000).

Notification requirements will also change. The owner of the goods can be notified verbally or in writing for low-value goods, in writing for medium-value goods and the holder of the goods will require an order from the NCAT for high-value goods. Under the amendments, the time the holder of the uncollected or abandoned goods will have to keep the goods before disposing of them will also change. It will be 14 days after notification for low-value goods and 28 days for medium-value goods and personal documents. High-value goods will require an order from NCAT to dispose of them. Records about the disposal of low-value goods will only have to be kept for 12 months, instead of the current 6 years.

Table 1: Outline of new requirements for the disposal of uncollected goods.

	Rubbish and Perishables	Low Value Goods (less than $1000)	Medium Value Goods ($1000-$20,000)	High Value Goods (above $20,000)	Personal Documents
Notice requirements	None	Verbal or written	Written	NCAT order	Written
Time to keep before disposal	None	14 days	28 days	NCAT order	28 days
Disposal Method	Any appropriate manner	Any appropriate manner	Public Auction or private sale for fair value	NCAT order	Secure destruction or return to author
Disposal of motor vehicles	N/A	Motor vehicles must not be disposed of without a certificate from the Commissioner of Police and written search results confirming the vehicle is not stolen			N/A
Period to keep records	None	12 months	6 years	6 years	6 years
Jurisdiction for disputes	N/A	NCAT	NCAT	NCAT	NCAT
Can move or store goods?	N/A	Yes	Yes	Yes	Yes
Recover costs incurred for storage	N/A	Yes	Yes	Yes	No

3.4 Are there any regulation-making powers?

Yes, regulation making powers exist for:

- Prescribing other types of situations where goods are 'uncollected goods' and thereby come under the new regime;
- Exempting other Acts or instruments from the legislation;
- Extending the definition of personal documents; and
- Time periods in which an application must be made to NCAT.

3.5 Could the reform commence without making regulations?

The reforms could potentially commence without making regulations. However, to ensure the proper operation of the new laws, it is preferable that the time periods in which an application must be made to NCAT be prescribed at the outset.

The other regulation making powers have been included to provide flexibility. This means that the law can be adjusted in the future in response to emerging issues, or changes in technology and legislation. This provides a mechanism to ensure the laws will remain fit for purpose in the coming years.

However, in consultation, stakeholders may raise reasons why making certain regulations now may make the operation of the laws more efficient and effective when they commence. For example, it could be argued that there are other situations where goods are "uncollected goods" and should be covered by the new laws. These could include the following situations:

- Goods left behind by former residents of boarding houses;
- Goods apparently abandoned on common property in a community scheme; or
- Goods left by a former co-tenant or a person in a share household where the other tenant/s are still living in the premises.

3.6 What needs to be done before this reform can commence?

Any submissions proposing that regulations should be made prior to commencement will need to be considered, along with all other submissions. Regulations would then need to be developed, in particular to prescribe the time periods for lodging an NCAT application. Once the regulations are approved by the Governor-in-Council, they could commence concurrently with the legislative amendments.

NSW Fair Trading will need to undertake an education and information campaign to bring awareness to affected traders and the community about the new laws. This would include engaging directly with associations representing and advising strata managers, owners corporations, tenants, landlords, agents, motor mechanics, dry cleaners, retirement villages, holiday parks, residential land-lease communities, accommodation providers and other affected industries.

Existing information in the public domain (e.g. information on the Fair Trading website) will need to be updated to reflect the changes to the uncollected goods regime.

Significantly, the Local Court and NCAT will need to put in place structural and procedural changes. Documentation and manuals will require amendment and other necessary changes to accommodate respectively losing and gaining jurisdiction.

3.7 When could this reform commence?

Preferred option

The preferred commencement date is 1 October 2019.

Given the action required under paragraph 3.6, this would provide the necessary lead time to undertake those activities. In particular, this date will allow the necessary structural and procedural changes for the local courts and the NCAT to be assessed and scoped. It will also provide at least three months for those changes to be made prior to commencement.

An information and education campaign can be developed in early 2019 and delivered in the months leading up to commencement.

Questions:

6. **Do you think that any regulations need to be made under the new uncollected goods requirements?**
7. **Do you think that the start date provides sufficient time to ensure affected groups have time to prepare for the change in requirements for the disposal of uncollected goods?**
8. **Do you think that the Government needs to take any other action about changes to the *Uncollected Goods Act*? If so, what should that action be?**
9. **Are there any other issues with starting the uncollected goods reforms on 1 October 2019? Are there reasons the changes should start sooner or later?**

4. Utilities supply agreements in Strata

4.1 What is the current law?

The *Strata Schemes Management Act 2015* (*Strata Act*) governs the self-management of strata schemes in NSW. The law enables owners' corporations to enter into agreements for the supply of goods and services for their strata scheme, particularly for common property. This includes agreements for the supply of utilities such as gas and electricity.

Developers of strata titled developments must enter into arrangements to supply utilities to the strata scheme prior to an owners corporation being formed by the new owners of the lots. There are no laws which specifically prohibit developers entering into long term contracts with energy and telecommunications suppliers when the strata scheme is in this 'initial period'.

These contracts then commit future owners' corporations such that the owners of these properties can collectively find themselves 'locked in' to long term supply contracts for the common property. This means they are not able to choose the offering that best suits the needs of the owners in the strata plans.

The above arrangement differs from the way in which contracts for the supply of other services are governed by the *Strata Act*, such as with building managers and strata managing agents. The *Strata Act* stipulates that those agreements automatically expire after three years for most strata managing agent contracts and annually for building management contracts. These laws were put in place to facilitate autonomy, choice and competition.

4.2 Who is affected by the current law?

There are over 873,000 individual lots in over 79,000 strata schemes registered in NSW. Many of these have been registered since strata laws commenced in 1965. The practice of some developers entering into these long-term utility contracts is only relatively recent in the context of strata laws and registration of strata plans.

The general law of contract applies to these contracts, as it does to all contracts. However, there are no express legislative provisions that regulate these contracts for strata schemes. As a result, potentially all new developments, particularly the larger schemes, could find themselves locked into these long-term utility contracts if it suited the needs of the developer to do so.

4.3 How will the Better Business Reforms change the law?

<u>Agreements for supply of utilities will automatically expire</u>

The reforms will amend the *Strata Act* to place a time limit on utility supply agreements entered into by developers in the 'initial period'. Specifically, these agreements (including any additional term under an option to renew) will expire either:

- at the conclusion of the first annual general meeting of the owners corporation, if the agreement was executed before the meeting, or

- in any other case, 3 years after the date on which the agreement first commenced.

However, this does not prevent owners corporations from renewing a utility supply agreement for supply by resolution at a general meeting, on or after the expiry of the agreement. Agreements that commence before this law commences shall expire a maximum of 10 years after they were first executed.

The above rules will apply unless the agreement expired or ended for some other reason before the new time limit was reached.

Embedded networks are excluded

In some sites, usually apartment complexes, retirement villages and caravan parks, the electrical wiring is organised in a way to enable the owner of the site to sell energy to the tenants and residents who live there. This is known as an embedded network.

The new laws will not apply to agreements for the supply of electricity to residents in strata schemes through an embedded network.

Annual general meetings to include utilities agreements agenda item

Further, the reforms amend Schedule 1 to the *Strata Act,* which sets out the matters that must be considered at annual general meetings (AGMs). The amendments will make consideration of agreements for the supply of electricity, gas and other utilities a mandatory agenda item at all AGMs.

4.4 Are there any regulation-making powers

No, the amendments for this reform do not include any regulation making powers and therefore the reforms can commence without making regulations.

4.5 What do affected parties need to do to prepare for commencement of this reform?

Self-managing owners corporations may need to:

- inform owners and residents of the change;
- review existing utilities agreements to establish expiry dates and investigate options for changing suppliers; and
- ensure proposed AGM agendas include the new mandatory item on utilities supply agreements, noting AGM papers must be circulated to lot owners at least 7 days prior to the AGM.

Strata managing agents may need to:

- inform owners corporations of the change;
- review existing supply agreements to establish expiry dates and investigate options for changing supplier; and

- ensure proposed AGM agendas include the new mandatory item on utilities supply agreements, noting AGM papers must be circulated to lot owners at least 7 days prior to the AGM.

Electricity, gas and other utilities retailers will need to:

- update standard contract information to account for new mandatory expiry dates; and
- communicate with existing customers regarding options for renewal or opting out.

NSW Fair Trading will need to undertake an information and education campaign, to communicate the impending change to all affected stakeholders. Internal administrative training and education material will need to be updated. Minor updates will also be required to website fact sheets and other communications materials.

4.6 When could this reform commence?

Preferred option

Given the steps outlined above, a commencement date of 1 July 2019 is proposed.

This would allow sufficient time to prepare information and education material and then disseminate that to the community and industry associations in the months leading up to commencement. In addition, this would provide sufficient time for self-managing owners corporations, strata managers and utility retailers to make the necessary changes to be compliant.

Questions:

10. **Do you believe there are any other steps affected parties will need to take to prepare for the changes to the *Strata Act*? If so, what are they and who is affected?**
11. **Are there any reasons the changes to the *Strata Act* should start sooner or later than 1 July 2019?**

5. Innkeepers Act 1968 repeal

5.1 What is the current law?

The *Innkeepers Act 1968* (*Innkeepers Act*) was originally designed to overcome the common law strict liability that placed an unfair burden on innkeepers for the property of guests lost or stolen during their stay. The *Innkeepers Act* set a $100 limit on the liability of accommodation providers for property of guests lost or stolen, unless the cause of the loss or damage was some default, neglect or wilful act of the innkeeper or their employees. To get the benefit of the limited liability, accommodation providers must include a notice at the back of the door of each room that provides accommodation.

However, several of the *Innkeepers Act's* provisions are severely outdated. These include the exclusion of a traveller's horse and harness equipment, the minimal $100 liability cap and excessive notification requirements imposed on accommodation providers.

5.2 Who is affected by the current law?

The two broad groups impacted by the *Innkeepers Act* and the proposed changes are accommodation providers regulated by this law and guests and travellers who stay in such accommodation.

5.3 How will the Better Business Reforms change the law?

The reform follows a similar approach adopted in 2012 by Victoria, which repealed its old *Carriers and Innkeepers Act 1958* and inserted the key provisions into Part 5.2 of the Victorian *Australian Consumer Law and Fair Trading Act 2012.*

Under the Better Business Reforms, the *Innkeepers Act* will be repealed. Liability for damage to property, exclusion and limitation of liability, and innkeeper's lien provisions, will be transferred to Schedule 7 to the *FT Act*.

Liability cap to be raised

Under the amendments, the liability cap for accommodation providers will be increased from the current $100 to $300, which is generally in line with other Australian jurisdictions. Raising the liability cap to a higher level is appropriate given the current cap was set 50 years ago and has not risen in line with inflation. It also constitutes an important step to bring the rights of guests in line with contemporary standards in other jurisdictions. Consumer Affairs Victoria advise the liability cap for Victorian innkeepers was lifted to $300 to reflect movements in the Consumer Price Index since it was first set.

This was considered to be an appropriate level of liability for NSW as well, given the legislative amendments were made by Victoria recently and the increase is only moderate. It also creates a harmonised approach across jurisdictions, this is important to reduce the compliance costs for accommodation providers that operate across jurisdictions.

Signage requirements to be removed

The Better Business Reforms will also remove the overly archaic requirement for accommodation providers to place signage about their liability for damaged or lost property in each room and at the reception desk. There are more modern methods of advising guests of this cap, such as by including details in the booking terms and conditions.

5.4 Are there any regulation-making powers?

There is only one regulation making power and that is the ability to increase the $300 liability limit. As this $300 amount is a new cap it is not proposed to use this regulation making power at this stage. Including this ability to revise the amount by regulation in the future, ensures the reforms will remain fit for purpose in the coming years.

5.5 Could the reform commence without making regulations?

Yes. As noted in paragraph 5.4, it is not necessary or appropriate to make a regulation amending the amount of the liability, when the amount has just been amended by the reforms.

5.6 What do affected parties need to do to prepare for commencement of this reform?

Accommodation providers can continue to notify their guests of their limited liability in the ways they have always done. The reforms simply allow other methods of notification to be used as well. However, any information provided to guests will need to be updated to reflect the changes, particularly the increase in the liability cap.

NSW Fair Trading will need to undertake an information and education campaign, raising awareness directly with industry associations, and generally with the community, about the changes.

5.7 When could this reform commence?

Preferred option

A commencement date of 22 February 2019 is currently proposed. This would provide all parties sufficient time to communicate and prepare for the change.

The proposed commencement date will provide sufficient time to consult with external stakeholders, and allow lead time for the introduction of changes, for example the amendments to signage. It will also allow for the creation and dissemination of information and education material.

Questions:

12. **Do you believe that any further action is required before the *Innkeepers Act* can be repealed and the substantive provisions transferred to the *FT Act*? If so, what should that action be?**
13. **How feasible is the proposed start date for the repeal of the *Innkeepers Act*? Are there reasons this reform should start sooner or later?**

6. Landlord and Tenant Act 1899 repeal

6.1 What is the current law?

The *Residential Tenancies Act 2010* (*RTA*) regulates all residential tenancies in NSW. In its day, the *Landlord and Tenant Act 1899* (*1899 Act*) applied to all residential tenancies in NSW. The primary purpose of the *1899 Act* was to provide landlords with procedures for the recovery of possession and to prohibit unlawful lock-outs without a court order. Over the years, many provisions have been repealed and the remaining operable provisions do not apply to tenancies regulated under the *RTA* and the *Residential (Land Lease) Communities Act 2013.* The *1899 Act* also does not apply to a range of other types of accommodation, including holiday or employment accommodation or boarding houses or motels.

6.2 Who is affected by the current law?

There are differing views as to who may be affected by the *1899 Act*. When the repeal of the Act was passed by Parliament in 2015, the Minister at the time said:

> *'The Act has no practical application or relevance in today's society where there are specific laws dealing with residential, retail, agricultural and other forms of tenancies. Whilst the Property Law Committee of the Law Society of New South Wales suggested that there was utility in maintaining some sections of the Act during the consultation process, the Chief Magistrate of the Local Courts has advised that cases under the Act are very rare indeed. The Chief Magistrate provided details of only five matters under this Act in the five years to 2013, each of which appears to have been a misguided application with none proceeding to hearing and all being settled out of court.'*

However, during consultation stakeholders argued that the *1899 Act* continues to provide minor, but nevertheless appropriate and important protections for tenants who are not captured by the *RTA*. This is because the list of exemptions from the *RTA* are not included in the remaining provisions of the *1899 Act*.

These classes of tenancies potentially include:

- Tenancies under leases of flats and cottages located in the grounds of any of the premises referred to in section 7 of the *RTA* (e.g. nursing home or club)
- 99-year tenancies referred to in s 8(1)(j) of the *RTA*
- Leases and licences under the *Crown Land Management Act 2016* s 8(1)(e) of the *RTA*
- Social housing head-tenancies (s 156 of the *RTA*)
- Heritage property tenancies (cl 16 of the *Residential Tenancies Regulation 2010* (*RTR*))
- St Patrick's Estate, Manly, tenancies (cl 17 of the *RTR*)
- Life tenancies (i.e. leasehold tenancies for the term of the tenant's life) (cl 19 of the *RTR*)

- Individuals sharing premises with a tenant and who are not named on the lease or do not have a written tenancy agreement with the tenant (s 10 of the *RTA*)

6.3 How will the Better Business Reforms change the law?

The *Fair Trading Legislation (Repeal and Amendment) Act 2015*, inserted a provision into the *1899 Act* which operates to repeal the Act in 2020. The provision also allows an earlier date to be proclaimed.

The reforms to the repeal of the *1899 Act* are twofold. First, as a result of the outcomes of consultation, 'savings' regulations will be made under Schedule 5 of the *FT Act* to maintain the operation of the substantive protections in the *1899 Act*. These savings and transitional regulations will also modify the operation of these 'saved' provisions to simplify the process for landlords in enforcing their rights under those provisions. Second, once the regulations have been made, an earlier date for the repeal of the *1899 Act* can be proclaimed.

6.4 Are there any regulation-making powers?

Yes, Schedule 5 to the *FT Act* enables provisions of a savings or transitional nature to be prescribed under the regulations.

6.5 Could the reform commence without making regulations?

No. The reform is reliant on making the savings and transitional regulations to maintain the operation of the substantive protections in the *1899 Act*.

6.6 What needs to be done before this reform can commence?

Consultation with stakeholders on the regulations is required before they can be developed. In particular stakeholder feedback will be sought on the types of modifications that should be made to the *1899 Act* provisions that the regulations will 'save'.

Once draft regulations have been prepared, further consultation with stakeholders will need to be carried out. The savings and transitional regulations will then need to be made before an earlier repeal date is proclaimed and the *1899 Act* is fully repealed.

NSW Fair Trading will need to undertake an information and education campaign which would include direct consultation with associations representing and advising tenants, landlords and agents. There will also need to be a general awareness campaign for the wider public.

Finally, if the modifications to processes made by the regulations involve changes to jurisdiction, the courts and the NCAT would also need to make all necessary changes to allow for the loss and gaining of jurisdiction respectively.

6.7 When could this reform commence?

Preferred option

The preferred commencement date for the savings and transitional regulations and the proclamation for repeal is 1 October 2019.

This would allow sufficient time for meaningful consultation with stakeholders on the draft savings and transitional regulations before they are made. It will also allow sufficient lead time for the courts and the NCAT to make any necessary changes and for NSW Fair Trading to undertake an information and education campaign with affected stakeholders.

Questions:

14. **Do you think that there are any other issues that need to be addressed before the repeal of the *1899 Act* can be implemented?**
15. **How feasible is the proposed start date for the savings and transitional regulations? Are there reasons the repeal of the *1899 Act* should start sooner or later?**