

10 February 2017

By email: yoursay@fairersaferhousing.vic.gov.au

Residential Tenancies Act Review
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

Dear Sir/Madam

Residential Tenancies Act Review: Options Discussion Paper

The Consumer Action Law Centre (**Consumer Action**) is pleased to provide brief comment on the Residential Tenancies Act Review – Options Discussion Paper (**Options Paper**). While we do not generally operate in the area of residential tenancies, (and therefore have limited dealings with the *Residential Tenancies Act 1997 (RTA)*) there are two key issues raised by the Options Paper on which we do wish to provide comment. First, we take the view that standard agreement approach to residential tenancies should be retained, with tighter restrictions on importing additional terms – additional terms should be not permitted unless approved by the Director of Consumer Affairs Victoria (**CAV**) or the Victorian Civil and Administrative Appeal Tribunal (**VCAT**). Second, we strongly support the inclusion of energy efficiency measures as part of a suite of minimum standards for residential housing, and do not support ‘conditional letting’ which would exempt some properties from meeting the minimum standards set. Further, there must be provision for a third party regulator (most likely CAV) to enforce minimum standards, and apply strong penalties when they have not been met.

Finally, we are aware of the excellent work that the Tenants Union of Victoria (**TUV**) does in this policy area and have conferred with the TUV prior to making this submission. We are supportive of the positions taken by TUV in their response to the Options Paper. We are also aware of the ‘One Million Homes’ initiative to improve energy efficiency in Victorian housing. The review of the RTA should seek to promote energy efficiency wherever possible.

Our comments are detailed more fully below.

Consumer Action Law Centre

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About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

1. Prescribed agreements and additional terms

Consumer Action is acutely aware of the inherent power imbalance between landlords and tenants when negotiating a lease, and for that reason we strongly support retaining and strengthening the prescribed tenancy agreement model, by providing for the prohibition of additional terms unless they are approved by the Director of CAV or VCAT. While we are aware that, technically, tenants may be able to successfully challenge unfair additional terms on the basis that they breach the unfair contract terms provisions of *Australian Consumer Law (ACL)*, the practical reality is that very few tenants are likely to do this – many may not even be aware of their right to do so. Therefore, we support option 4.9 of the Options Paper, “A comprehensive standard prescribed tenancy agreement”,¹ with stronger oversight of additional terms.

By allowing for the inclusion of additional terms through an informed approval process, residential tenancy agreements will retain a degree of flexibility – while still ensuring that unfair terms are not written into the agreement. The Australian Capital Territory (**ACT**) utilises this approach to residential tenancy agreements, and there is strong case for adopting the same principle in Victoria. The relevant terms of the *ACT Residential Tenancies Act 1997* are reproduced below:

8 Standard residential tenancy terms

(1) A residential tenancy agreement—

(a) must contain, and is taken to contain, terms to the effect of the standard residential tenancy terms mentioned in schedule 1; and

(b) if the lessor and tenant agree—may contain a fair clause for posted people; and

(c) may contain any other term—

(i) that is consistent with the standard residential tenancy terms; or

(ii) that is inconsistent with a standard residential tenancy term if the term has been endorsed by the ACAT under section 10.

...

10 Endorsement of inconsistent tenancy terms by ACAT

¹ Consumer Affairs Victoria, *Residential Tenancies Act Review – Options Discussion Paper*, 2017, p 44.

- (1) The parties to a residential tenancy agreement may apply in writing to the ACAT for endorsement of a term of the agreement (the inconsistent term) that is inconsistent with a standard residential tenancy term.*
- (2) If the parties apply for endorsement of the inconsistent term, the ACAT must do 1 of the following:*
 - (a) endorse the inconsistent term;*
 - (b) substitute the equivalent standard residential tenancy term for the inconsistent term.*
- (3) In making a decision under subsection (2), the ACAT must consider—*
 - (a) the criteria determined under subsection (6); and*
 - (b) whether the inclusion of the inconsistent term in the residential tenancy agreement was obtained by fraud or undue influence.*
- (4) The ACAT must not endorse a term that is inconsistent with this Act (other than a standard residential tenancy term).*
- (5) The ACAT must not endorse a term mentioned in section 15 (5) in relation to a tenant unless satisfied that the tenant owes an amount to the housing commissioner.*
- (6) The Minister may determine criteria for subsection (3) (a).*
- (7) A determination is a disallowable instrument.*

2. Minimum standards and ‘conditional’ leases

Consumer Action does significant consumer advocacy work in the retail energy sector, and accordingly we support the proposal for the inclusion of energy and water efficiency in prescribed minimum standards for rental housing.²

Energy efficiency measures will reduce energy costs for vulnerable consumers, and lower hardship and disconnection rates. For communications and administrative simplicity, (which is also likely to generate higher levels of compliance), we support a flat transition date for the application of minimum standards – as proposed by option 8.14B of the Options Paper.³ To be effective, this would require a significant lead-in date – three years is not unreasonable. We also strongly support third party enforcement of minimum standards, which would most appropriately sit with CAV. Penalties should be sufficiently strong to deter non-compliance.

In our view, “conditional letting” as proposed by option 8.15A of the Options Paper represents a dangerous loophole that undermines the intention of minimum standards, and should be rejected. Minimum standards should be set that are reasonable, achievable, well

² Consumer Affairs Victoria, *Residential Tenancies Act Review – Options Discussion Paper*, 2017, p 99-100.

³ Consumer Affairs Victoria, *Residential Tenancies Act Review – Options Discussion Paper*, 2017, p 104.

communicated and implemented with sufficient lead-in time to allow landlords to comply. Vulnerable consumers must have access housing of acceptable quality, and minimum standards are important to ensuring that this occurs. Permitting leasing of properties which do not meet minimum standards through a “conditional” letting regime undermines this goal.

Please contact Zac Gillam on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'Zac Gillam', written in a cursive style.

Zac Gillam
Senior Policy Officer