Tenants Union of Victoria
response to

Rights and Responsibilities of Landlords and Tenants Issues Paper of the Residential Tenancies Act Review

May 2016
About Us

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state.

We operate an integrated service model that combines three main areas of activity:

> client services (advice and advocacy),
> community education, and
> social change

Our aim is to promote and protect the rights and interests of residential tenants in Victoria.

The TUV's activities can be divided into three broad categories:

1. Client Services (advice & advocacy)

The purpose of our client service is to provide accessible and effective assistance to residential tenants across Victoria. Advice is provided by telephone, in person, by email and through secondary consultations with other services.

During 2014/15, the TUV handled more than 19,200 enquiries. The TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, and attended 350 outreach visits to 250 rooming house, caravan parks and services.

2. Community Education

The TUV produces a wide range of publications and practical resources for tenants, rooming house and caravan park residents, and community service workers to assist tenants to understand their rights and responsibilities and to resolve their own tenancy problems. We have about 150,000 unique users accessing resources through our website each year.

The TUV also runs a training program for community sector workers to provide basic training in tenancy rights and responsibilities. During 2014/15 we did 29 training sessions and other community education presentations.

3. Social Change

The TUV undertakes a broad range of social change activities to represent the interests of tenants and to highlight the impact of living in the rental sector. This work includes research, policy formulation, lobbying and media liaison.

Across these three areas of activity our strategic goals can be summarised as:

> Better rights
> Better resources
> Better services
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Summary of Recommendations

BEFORE A TENANCY

Discrimination against prospective tenants

R1. The Act should be amended to provide that landlords or agents must not refuse to rent, assign or sublet to individuals, or issue them with a notice to vacate on the basis of a protected attribute within the meaning of the *Equal Opportunity Act 2010*.

Screening practices

R2. The Act should be amended to mandate a prescribed application form to minimise discrimination in the rental application process.

R3. The Act should be amended to include an offence provision against using an application form that is not in the prescribed form.

R4. The Act should be amended to prohibit the use of a tenancy application form as a tenancy agreement.

R5. The Act should be amended to mandate standardised written rental references.

Security deposits

R6. The Act should amended to provide a clear definition that a holding deposit is an act of good faith by the tenant, specifically that they are genuine in their intention to rent the premises, and that the payment of the deposit is in consideration for exclusive dealings with the landlord.

Tenancy databases

R7. The Act should be amended to allow for a mechanism for tenants to apply to be removed from a database on hardship grounds.

R8. CAV should have the power to audit residential tenancy database records every 12 months and fine the operators if they discover entries that should not be recorded.

R9. The Act should be amended to provide that there must be one free method available for a tenant to obtain their record from a database operator.

Disclosure statements

R10. The Act should be amended to include mandatory disclosure of specific information prior to the signing of any residential tenancy agreement. This information should include:

> Are utilities connected and/or separately metered
> Is there a functional telephone line installed that is connected to the telephone exchange and capable of carrying the internet/Is the property connected to the NBN
> Is there a connected television antenna that is capable of receiving a clear digital television signal
> Is there a working heater and when was it last serviced
> Is there a working air conditioner and when was it last serviced
> Is there a Green bin provided
> Is there parking available (including council permit information for on-street parking)
> Is the landlord planning to sell the premises
> Has a mortgagee started court proceedings to enforce a mortgage over the premises
> Have there been any VCAT repair orders in the last 2 years. Details.
> Are there any known planning applications in the vicinity of the property.

**R11.** The Act should be amended to permit a tenant to apply to the Tribunal to terminate their lease agreement if the correct information has not been provided by the landlord in the disclosure statement.

**The “New Tenant Checklist”**

**R12.** CAV should introduce a “New Tenant Checklist” and legislate that it must be provided prior to the signing of a lease agreement.

**Consideration period**

**R13.** The Act should be amended to introduce a minimum consideration period of at least 3 clear business days for residential tenancy agreements and to make an offence to offer or accept an agreement without the consideration period.

**Tenancy agreement**

**R14.** The Act should be amended to state that additional terms in a residential tenancy agreement must be approved by the CAV Director to be enforceable.

**R15.** The Act should be amended to include that the Director may not approve an additional lease term that restricts the tenant’s exclusive possession of the property. This should include the tenant’s ability to keep a pet subject to their duties under the Act.

**R16.** The Act should be amended to introduce a duty to obtain explicit informed consent to any additional terms in a tenancy agreement and a provision rendering unenforceable any terms where explicit informed consent was not obtained.

**R17.** The Act should be amended to create an offence similar to section 53 of the RTA (QLD) to prohibit contracting out of the RTA.

**DURING A TENANCY**

**Service of documents**

**R18.** The Act should be amended to include that notices to vacate must be exempt from electronic communication and must not be served electronically.

**R19.** The Act should be amended to include that a landlord must not serve a notice via email or other electronic means, unless the tenant has expressly consented to the service of those notices in writing.

**R20.** The Act should be amended to ensure that consent is not sought before or at the time of entering into a tenancy agreement.

**R21.** The Act should be amended to provide that a tenant who has consented to receive a notice electronically may revoke their consent at any time.

**R22.** The consideration of when a notice is deemed served and notice periods must be reviewed.

**R23.** The Act should be amended to legislate that a standard form document, separate to any standard form tenancy agreement must be provided to a new tenant to enable tenants to give permission to receive notices electronically.

**R24.** Update CAV’s tenants’ and residents’ rights handbook to include a section on electronic service of notices.

**R25.** Update CAV’s Website and RentRight App to include a section on electronic service of notices.

**R26.** The Act should be amended to provide that the standard form electronic notice consent form must be provided to tenants.

**Duties**

**R27.** The Act should be amended to state that in order for VCAT to grant possession for illegal use that person must be convicted rather than just charged of a relevant offence.

**R28.** Section 60(1) and (2) (Tenant must not cause nuisance or interference) of the Act should be amended to replace terms “in any manner” with “in an unreasonable manner prohibited by law”
R29. Section 61(1) (Tenant must avoid damage to premises or common areas) of the Act should be amended to include the word ‘reasonable’ – A tenant **must** ensure that reasonable care is taken to avoid damaging the rented premises.

R30. The Act should be amended to include a definition of ‘reasonably clean’. This definition should describe a standard which allows for the ordinary course of living so as not to interfere with the quiet enjoyment of the tenant.

R31. Section 63 (Tenant must keep rented premises clean) should be restricted to the end of the tenancy to provide that the tenant must leave the property in a reasonably clean condition.

R32. The Act should be amended to state that a landlord cannot unreasonably withhold consent for the installation of additional fixtures.

R33. The Act should be amended to ensure that disability fixtures are at all times permitted to be installed, with specific reference to section 53 of the Equal Opportunities Act 2010.

R34. The Act should be amended to allow a tenant to apply to the Tribunal to install reasonable fixtures.

R35. The Act should be amended to allow a tenant to terminate a tenancy if the property is not found vacant or in a reasonably clean condition.

35.1 If the premises is not vacant or reasonably clean at the time of gaining possession a tenant should be permitted to apply to VCAT for an order that either:
   (a) entitles the tenant to terminate the lease by giving immediate notice of intention to vacate; or,
   (b) requires the landlord to remedy the breach.

35.2 The Act should be amended such that the grounds for making this application should include that the rented premises are not reasonably clean.

35.3 The Act should be amended to:
   (a) Enable a tenant to make this application within 3 business days of taking occupation; and,
   (b) Specifically state that this application must be heard by VCAT within 2 business days; and
   (c) If the Tribunal orders that the lease cannot be terminated and the landlord must remedy the breach, the Tribunal should have power to reduce the rent until the landlord has done so.

R36. The Act should be amended to strengthen the landlord’s duty in relation to quiet enjoyment by providing that the tenant is entitled to privacy, peace and quiet and normal use of the rented premises.

R37. The Act should be amended to expressly prohibit open house inspections and on-site auctions without the written consent of the tenant.

R38. The Act should be amended to expressly prohibit the use of photographs or videos of a tenant’s possessions without the written consent of the tenant affected.

R39. The Act should be amended to clarify that a landlord is in breach of their duty to maintain the premises in good repair if there is any defect or fault in the premises or the appliances provided by the landlord.

R40. The Act should be amended to include the following under urgent repairs: air conditioners, significant mould, fault causing significant damage to tenants’ possessions, fault to existing phone and internet connection.

R41. The Act should be amended to allow a tenant to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.

R42. The Act should be amended to enable a tenant to pay rent into the rent special account at the time a CAV repairs report is issued.

Breaches of duty

R43. **The Act should be amended to improve compliance orders.**

43.1 Repeal S332(1)(b)(iii) the breach of duty is not a recurrence of a previous breach of duty.

43.2 Amend S332(1)(b)(i) to include the word ‘or’, as shown below:
S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible; and/or S332(1)(b)(ii) there will not be any further breach of the duty.

R44. The Act should be amended to repeal s249 Successive breaches by tenant and s240 Successive breaches by the landlord.

Pets

R45. Terms restricting the tenants' ability to keep a pet should not be included in a tenancy agreement.

45.1 The landlord should be able to make an application to the Tribunal to object to a pet if the keeping of a pet can be proven to cause severe hardship to the landlord if the hardship suffered by the landlord would be greater than any hardship that the tenant would suffer if the lease term was included.

R46. The Act should be amended to allow the landlord to make an application to the Tribunal to object to a pet. The tribunal should only be able to make an order if the pet is an inappropriate size or type for the particular property. Or if the pet can be proven to cause severe hardship to the landlord, if the hardship suffered by the landlord would be greater than any hardship that the tenant would suffer if the Tribunal were to make an order against the pet.

Entry requirements

R47. Section 88 of the Act should be amended to require the landlord to provide the specific time and detailed reasons for the entry.

R48. Section 85(b) of the Act should be amended to require:

- 7 days' notice of entry for a routine inspection;
- 48 hours' notice for all other entries except urgent repairs; and
- 24 hours' notice of entry for an urgent repair

R49. The Act should be amended to provide that the landlord must negotiate a convenient time for entry with the tenant as far as is practicable.

R50. Section 90 of the Act should be amended to require the landlord to compensate the tenant for any loss or damage including theft which occurs while the landlord is exercising a right of entry under the Act.

Assignment

R51. The Act should be amended to provide for a prescribed assignment form to be completed by the incoming parties.

R52. The Act should be amended for assignment to be deemed to be in effect 7 days after the tenant(s) serve the prescribed notice on the landlord or agent if the landlord or agent has not applied to the Tribunal to object to the assignment within the 7-day period.

R53. The Act should be amended to clarify that the tenant should only be liable to pay an assignment fee if a written assignment is prepared, and then, only for the cost of the preparation of the written assignment.

Violence in managed premises

R54. The Act should be amended to increase penalties for issuing a notice to leave without reasonable grounds (section 368A).

R55. The Act should be amended to make it an offence for an unregistered rooming house to serve a notice to leave.

R56. The Act should be amended to state that the notice to leave must include sufficient details to describe the nature and reason for the notice.

R57. The Act should be amended to provide that a person serving a notice to leave must attach a statutory declaration outlining the grounds, events, and reasons for the notice to leave being given.

R58. Section 368(1)(b) and section 368(2)(b) of the Act should be amended to say "serious and imminent danger of harm".

R59. The Regulations should be amended so that the information on the notice to leave is as follows:

(a) You should call VCAT during your exclusion period (03) 9628 9800; and,
(b) You should attend VCAT shortly after the expiration of the 2 business days to determine if any application or orders have been made.

R60. The Act should be amended to provide that the Tribunal may adjourn an application under Section 374 (urgent applications to Tribunal) for a period of not more than 5 business days at which time the matter must be determined at that hearing unless parties consent to a further adjournment.

R61. The Act should be amended to provide an exemption to allow an authorised agent to attend the premises to collect any necessary goods for a suspended person who has been issued a notice to leave.

Notice to restrict certain guests
R62. The Act should be amended to state that a manager may issue a "prescribed trespass notice" to any visitor of any resident in the rooming house or on the grounds (in substitution of section 368(2)).

R63. The Act should be amended to state that if a resident's visitor has been criminally charged and convicted in relation to the serious act of violence that has taken place in the rooming house, the manager may apply to VCAT for an order to prevent the resident's visitors from visiting the rooming house for a period of up to 6 months.

R64. The excluded visitor may apply for revocation or a variation order if they can show cause that a similar incident will not occur.

AT THE END OF A TENANCY
Terminations by the landlord
R65. The Act should be amended to abolish no reason and end of fixed-term notices to vacate.

R66. Section 259(notice to vacate for sale of property) of the Act should be amended to provide that the notice can only be served if the premises has been sold, and if the premises is to be occupied by the new owner as their principal place of residence, and if contract of sale has a condition that the landlord must provide vacant possession.

Terminations by the tenant
R67. Protect tenants in certain circumstances from lease break fees by introducing a provision similar to section 100 of the NSW RTA.

R68. The Act should be amended to introduce a provision to allow co-tenants to terminate their own tenancy.

Goods left behind
R69. The Act should be amended to provide that goods of monetary value must be stored if the value of all or part of the goods left behind exceeds the cost of removal and storage of those goods.

Family violence
R70. The Act should be amended to include a definition of family violence. This definition should mirror the definition used in section 5 of the Family Violence Protection Act 2008.

R71. The Act should be amended to include a new part to address termination of both fixed-term and periodic tenancies where there is family violence. This part would incorporate the existing "creation of a tenancy agreement" provisions with some additional provisions to clarify the effect of a "reduction of a fixed term" and to enable the termination of either fixed term or periodic agreements where there is family violence.

R72. The Act should be amended to provide the Tribunal with a specific power to apportion liability between tenants when a notice of intention to vacate has been given by a tenant with a final intervention order; or the Tribunal has made an order to terminate the lease because the tenant has an intervention order under the FVPA or has been affected by family violence.
R73. The power to apportion liability should be the same as that provided to the Tribunal by section 233C, in the case of a creation of tenancy. This would mean that the Tribunal could apportion any existing liabilities under the tenancy and the RTA, including the bond and outstanding utility bills. This would enable the Tribunal to apportion liability for damage to the rental property, rent and any compensation payable to the landlord for the lease ending early.

R74. The Tribunal should be given a general power to apportion liability between tenants when there has been family violence to deal with situations where family violence is a factor but the provisions of the Act do not specifically allow for that to be taken into account.

R75. The Act should be amended to provide that it is an offence to list a person on a tenancy database for reason relating to family violence.

R76. The Act should be amended to enable a tenant to make an application to VCAT for an order that they be removed from the tenancy database because the incident that was listed occurred due to family violence.

R77. The Act should specifically state that the Tribunal is able to make an order under this section even if the applicant has returned the keys of the rental property.

R78. The Act should be amended to allow a tenant who is an affected family member under a final family violence intervention order to be able to give an immediate notice of intention to vacate the rental property.

R79. The amendment should specifically state that the person who gives this notice ceases to be a tenant if they vacate in accordance with this notice.

R80. Section 64 of the Act should be amended to state that the landlord must not unreasonably withhold consent to a request to modify the rental property, when modifications are requested to improve the security of the rental property, and the tenant is affected by family violence.

R81. DHHS housing staff be provided with training on their policies regarding tenant damage and family violence.

R82. DHHS should not issue any further compensation claims against tenants which are not reduced for depreciation or that claim for fair wear and tear.

R83. DHHS policies should be reviewed to ensure that outstanding charges do not prevent people affected by family violence from accessing public housing in the future.

Conduct of agents
R84. The Act should be amended to regulate rental bidding by a provision with the same effect as section 57 of the RTA (QLD).
Introduction

The Tenants Union of Victoria welcomes the opportunity to contribute to the Rights and Responsibilities of Landlords and Tenants Issues Paper as part of the Residential Tenancies Act Review.

There are over 515,500 rental properties in Victoria, representing over a quarter of all households. Importantly, private rental should no longer be considered a ‘transitional tenure’, which individuals and households inhabit for a relatively brief time before moving to home ownership. As housing prices soar, private rental has become an increasingly long term housing solution for many households who have become long-term renters, renting privately for 10 years or more. These long-term renters are increasingly comprised of families and older people.¹

Most landlords, arguably, enter the investment property market as speculators, negatively geared and looking to make capital gains from house price appreciation. For many, tenants’ rights and tenancy law is simply an afterthought. At present the Act heavily favours the property rights of landlords over the rights of tenants to make and keep a secure home, and enjoy simple pleasures as any other grown, responsible adult.

At the heart of the issue is the grant of exclusive possession that tenants receive upon entering into a lease agreement with a landlord. This allows the tenant the right to exclude all other people from the property and to use the property as their own for the period of the lease agreement. A tenant should essentially be able to behave in any manner that an owner occupier would, so long as they are not interfering with the landlord’s principle in the property. Despite this fact, common practice indicates a view that the landlord’s ownership of the property is a higher claim, treating tenants as a lessor party in the transaction. Given the changing landscape of private rental and its increasingly pivotal position as the only long-term housing choice for many households, there is now a need to redraw the balance of power between landlords and tenants.

This submission covers rights and responsibilities for landlords and tenants across all stages of a tenancy – before a tenancy, during a tenancy and at the end of a tenancy. It also covers specific recommendations and provisions relating to family violence. Many of the recommendations have been made in previous submissions to earlier issues papers during the RTA review process. The submission draws upon the legal work undertaken by the TUV. A number of case studies have been used throughout. Names have been changed for confidentiality reasons. This has been indicated throughout with the use of an asterisk.

Before a tenancy

Discrimination

R1. The Act should be amended to provide that landlords or agents must not refuse to rent, assign or sublet to individuals, or issue them with a notice to vacate on the basis of a protected attribute within the meaning of the Equal Opportunity Act 2010.

Currently a tenant is not able to effectively address discrimination by their landlord or agent. For example, if a tenant believes a notice to vacate has been issued due to discrimination, they are not able to take action to stop the eviction as the Equal Opportunity Act 2010 cannot be considered by the VCAT at the challenge or possession order stage. The process under the Equal Opportunity Act will generally not run its course until after the eviction has been effected.

Screening practices

Discrimination is still a major barrier for many tenants when it comes to accessing rental properties.

A study by TUV in 2008 found that discrimination by landlords against prospective tenants was ‘rife’. The study found that whilst agents do understand that they are legally obliged to view every applicant equally, many do not.

Migrants, Cultural and Linguistically Diverse communities, Aboriginal and Torres Straight Islanders, young people, single mums, people on low income or with disabilities all report to have difficulty accessing properties in the private rental market.

Whilst agents select applicants first and foremost on tangible criteria such as income and rental history, they often use subjective factors to make a final recommendation where more than one applicant is suitable.

It can be very difficult for low income tenants to access properties, and many are forced to live in substandard accommodation or in fringe locations far from jobs and services. Even then rents are unaffordable, and unfortunately tenants on low incomes will almost certainly be considered a lower priority than other applicants.

Application process

R2. The Act should be amended to mandate a prescribed application form to minimise discrimination in the rental application process.

R3. The Act should be amended to include an offence provision against using an application form that is not in the prescribed form.

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3 Ibid
The best way to protect against discriminatory screening practices is to limit the amount of information that can be collected from applicants. This will minimise possible discrimination against prospective tenants.

Proving that discrimination has occurred can be virtually impossible, particularly in a tight rental market. A tenant may suspect that they are not being selected for a property due to discrimination however they are unlikely to be able to prove it. This is why a mandated application form should be introduced to enhance professional practice and accountability amongst estate agents.

We support the use of the current CAV application as the standard prescribed form. However we recommend that the form be amended in two ways:

1. Include a space for applicants to include Centrelink details if this is their source of income, as it currently only provides space for employment details.
2. Remove the question asking tenants to disclose whether they have a pet. The provision of this information may lead to discrimination against tenants who own pets.

Tenancy application forms used as tenancy agreements

R4. The Act should be amended to prohibit the use of a tenancy application form as a tenancy agreement.

We are aware of some estate agents using application forms as an application and then as a tenancy agreement once the tenant has been accepted. This is risky for a number of reasons. The tenant may make multiple applications at a time for different properties, if their application defaults to a signed agreement they may be locked in to more than one tenancy agreement, risking high lease break fees. Additionally a tenant may change their mind after submitting their application and they should have the right to do so.

Written rental references

R5. The Act should be amended to mandate standardised written rental references.

The power imbalance that exists between landlords and tenants is a powerful influencer of tenant behaviour. Accordingly, tenants report a reluctance to exercise their rights under the Act due to a fear of negative ramifications for future tenancies. It is viewed as too easy to be described as a ‘problem tenant’ simply by asking for your rights to be upheld.

Too often tenants who ask for repairs, or who demand that the landlord undertakes their duties, are described as whingers when they are in fact completely within their rights under the Act.

The introduction of standardised written rental references would safeguard against agents passing on irrelevant information that may jeopardise a tenants’ ability to be accepted into a new property.

We suggest that the reference form should include the following questions:

> What was the length of tenancy?
> How much was the rent charged?
> During the tenancy did the tenant receive a notice to vacate for rent arrears?
> During the tenancy did VCAT give orders concerning a tenant breach of duty?
> Why did the tenancy end?
The introduction of a written reference will help to shift the culture away from verbal references which will safeguard tenants from having ‘off the record’ statements about their character used against them during the selection process. This type of information has no place in the screening process for residential tenancies and prevents tenants from accessing their rights during tenancies.

Consideration needs to be given to how the written references will work in practice and how to ensure compliance.

It is suggested that a tenant request a reference when either a notice to vacate, or a notice of intention to vacate has been issued. The agent must complete the reference within five business days of the request. An additional inspection of the property could be undertaken in order to properly complete the reference form. Once completed the agent would provide the form to the tenant.

The following legislative changes should be considered:
> The landlord or estate order must return the completed prescribed reference form within five business days.
> An exemption from the 6 months entry provision would need to be created to allow the agent to inspect the property even if they had already done so within the last 6 months.
> There needs to be a penalty for non-compliance. A suggested figure is 10 penalty units, this is the amount given for non-compliance with the provision of a condition report under section 35 of the RTA.
> A provision would need to be included to provide for tenancies that end by other means such as unfit for habitation.
> There would need to be a provision to either prohibit the charging of a fee or to limit the fee to a reasonable amount.

Security deposits

R6. The Act should amended to provide a clear definition that a holding deposit is an act of good faith by the tenant, specifically that they are genuine in their intention to rent the premises, and that the payment of the deposit is in consideration for exclusive dealings with the landlord.

There is a significant degree of confusion about the definition, purpose and process for dealing with holding deposits. This confusion is creating disputes about whether or not part performance of a tenancy agreement has occurred and under what conditions. Payments are very rarely receipted as holding deposits and are often mischaracterised as part payment of rent in advance or bond. Most tenants do not understand the significance of this distinction and do not immediately object to how the payment is characterised.

We believe that some of this confusion can be cured by a clear articulation in the Act of the process for contracting which is outlined below. However, a clearer definition and expression of the purpose of a holding deposit would help to distinguish between a holding deposit and part performance.

Tenancy databases

R7. The Act should be amended to allow for a mechanism for tenants to apply to be removed from a database on hardship grounds.
R8. CAV should have the power to audit residential tenancy database records every 12 months and fine the operators if they discover entries that should not be recorded.

R9. The Act should be amended to provide that there must be one free method available for a tenant to obtain their record from a database operator.

Tenants who find themselves on a tenancy database are essentially locked out of the private rental market until the time that they are removed from the list. Although the reasons a tenant can be entered into a database are limited, there is no safeguard against being listed for a situation that may be a once off or outside of the tenants control. For example a sudden job loss or emergency causing financial strain, family violence, or episodic mental health issues should not lead to a tenant being blacklisted from the private rental market. Protections need to be in place to allow tenants to be removed from a database if they have experienced hardship.

Additionally there needs to be greater compliance to ensure that tenants are not incorrectly listed, or listed for longer than the time limit prescribed in the legislation.

The Tenants Union of Victoria would welcome a landlord and estate agent database. Tenants entering into fixed-term tenancy agreements with landlords are equally at risk of being negatively affected by a landlord or agent who does not undertake their duties. Tenants, unlike landlords, are unable to obtain any information about the other party before signing into an agreement.

**Disclosure statements**

R10. The Act should be amended to include mandatory disclosure of specific information prior to the signing of any residential tenancy agreement. This information should include:

- Are utilities connected and/or separately metered
- Is there a functional telephone line installed that is connected to the telephone exchange and capable of carrying the internet?
- Is the property connected to the NBN?
- Is there a connected television antenna that is capable of receiving a clear digital television signal
- Is there a working heater and when was it last serviced
- Is there a working air conditioner and when was it last serviced
- Is there a Green bin provided
- Is there parking available (including council permit information for on-street parking)
- Is the landlord planning to sell the premises
- Has a mortgagee started court proceedings to enforce a mortgage over the premises
- Have there been any VCAT repair orders in the last 2 years. Details.
- Are there any known planning applications in the vicinity of the property.

R11. The Act should be amended to permit a tenant to apply to the Tribunal to terminate their lease agreement if the correct information has not been provided by the landlord in the disclosure statement.

There is systemic information asymmetry between tenants and landlords at the point of contracting. Landlords and estate agents are able to check references for prospective
tenants and generally have surplus demand to enable them to make choices about their preferred tenant. It is virtually impossible for the tenant to know many significant details regarding the rented premises, the tenancy history and the landlord’s (or real estate agent’s) management practices and reputation. By contrast to many other consumer transactions (including many of less significance than renting a home), a tenant is grossly “in the dark” about many material aspects of the proposed tenancy. Based on our research, this lack of knowledge about the premises and the other party is one of the key reasons that many tenants do not want to be locked into fixed-term agreements of any length.

The common problems resulting from this absence of information include:

> Unsafe facilities and higher than expected running costs (including the absence of electrical safety switches, the presence of asbestos, the lack of insulation, higher tariff appliances, inadequate servicing of gas heaters etc.)
> Recurrence of problems experienced by previous tenants (including noise problems, anti-social behaviour in adjoining premises, intolerant owners corporations, chronic dampness or persistent mould, poor landlord conduct etc.)
> Prolonged disruption due to sales campaigns commencing shortly after the tenancy agreement
> Problems with connecting telephony and internet where wall sockets imply a functioning connection that doesn’t exist. This problem will be ongoing with the rollout of the NBN as tenants will be unable to ensure that the connection to the network is complete and functioning and will particularly effect low-income households who may not be able to afford either the cost of connecting someone else’s premises or alternative means of communication.

At present a tenant could seek some or all of this information and may have an action against the landlord or estate agent if the information provided was false or misleading. However, the real estate agent or landlord is under no obligation to provide any of this information. It is also unclear what remedies VCAT could require to properly rectify any problems.

Under the current circumstances it is unrealistic to expect prospective tenants to be the agent of these enquiries. It is unlikely that any tenant who wanted to rent the prospective premises would endanger that by asking too many questions.

We believe that these problems can be partly addressed by mandatory disclosure of critical information by the landlord. This could be done through a simple prescribed checklist that the landlord or their agent must complete, declare and provide to the prospective tenant prior to the signing of any tenancy agreement.

It is important that the tenant is provided with adequate information to assist finding housing that is appropriate to their needs. This will improve longevity of tenancies as renters will be aware of what they are signing up for.

New South Wales provides that certain information must be provided to the tenant before they enter into a tenancy agreement, whilst other information must not be knowingly concealed. Similarly when purchasing a property section 32 of the Sale of Land Act 1962 outlines information that must be provided to the potential buyer. We do not recommend something as onerous as the section 32 however the information would significantly empower tenants and allow them to make informed choices about their housing.

The introduction of any new requirement must include enforcement measures to ensure that they are complied with. We recommend that a tenant should be able to break a fixed-term or periodic lease at no cost if it is because they did not receive the prescribed information prior to signing the agreement.
The “New Tenant Checklist”

R12. CAV should introduce a “New Tenant Checklist” and legislate that it must be provided prior to the signing of a lease agreement.

The NSW “New Tenant Checklist” provided to tenants communicates critical information in a clear and easy to read format. For example it alerts tenants to check the terms of their lease agreement to ensure that it does not include illegal terms such as a requirement to have the carpet professionally cleaned at the end of a tenancy. The checklist informs the tenant that they should record any promised repairs in writing, and details the upfront costs that they are legally obliged to pay.

The CAV booklet that is given to tenants in Victoria is a comprehensive guide however tenants still do not know their rights. In 2014/15 Consumer Affairs Victoria (CAV) received almost 74,000 enquires about residential tenancy issues, and TUV received almost 20,000 enquiries.

It would be highly beneficial to Victorian tenants if a checklist similar to that used in NSW were introduced. We would look forward to working with CAV to develop a checklist that could address common misconceptions made by tenants to be introduced in Victoria.

Consideration period

R13. The Act should be amended to introduce a minimum consideration period of at least 3 clear business days for residential tenancy agreements and to make an offence to offer or accept an agreement without the consideration period.

A consideration period would allow a tenant to seek independent advice about the application and effect of the terms and conditions outlined in their lease agreement and would allow them to negotiate with the landlord or agent if they believe that any of the terms should be varied or removed.

The consideration period effectively mirrors the requirements for agreements relating to Part 4A dwellings under section 206I of the RTA.

Alternatively tenants should be allowed a cooling off period, similar to that which is available to people purchasing residential property under the Sale of Land Act 1962. Under this Act when purchasing a residential property in Victoria the buyer is given a three day cooling off period. This would be hugely beneficial to tenants, particularly given the high-pressure environment of the application process in a highly competitive rental market.

Tenancy agreement

R14. The Act should be amended to state that additional terms in a residential tenancy agreement must be approved by the CAV Director to be enforceable.

R15. The Act should be amended to include that the Director may not approve an additional lease term that restricts the tenant’s exclusive possession of the property. This should include the tenant’s ability to keep a pet subject to their duties under the Act.

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5 Tenants Union of Victoria Annual Report 2015-16.
While the Act provides for a prescribed tenancy agreement, tenancy agreements now routinely include additional terms that are far more numerous and of greater ambit than the prescribed terms.

Section 26 of the RTA states that

(1) If a tenancy agreement is in writing, it must be in the prescribed standard form.

(2) A landlord or tenant must not prepare or authorise the preparation of a tenancy agreement in writing in a form that is not in the prescribed standard form.

Penalty: 10 penalty units.

Despite this clear provision tenancy agreements are very rarely in the prescribed form.

Very few tenants properly understand the additional terms and conditions to which they are agreeing despite the ritual observed by many landlords and real estate agents to require the tenant to initial each additional term. Commonly tenants are required to pay the bond and rent in advance at the same time or before they sight the written agreement. That process is inimical to informed consent.

The Tenants Union has previously reported to CAV about problems with additional terms in residential tenancy agreements. In particular, many of the common additional terms are unfair in relation to the considerations in the ACL, invalid under section 27 of the RTA or potentially harsh and unconscionable.

Whilst it may be possible for a tenant to defend against the enforcement of any such unfair, invalid or harsh terms, a tenant would have to be sufficiently aware of this defence to contest any action by the landlord or their agents including the landlord’s insurers. We believe that the sole purpose of these terms is to create the misleading impression that a tenant must comply. It remains unclear why such terms should be allowed to remain.

Many such terms also require access to other information that the tenant cannot know and may be unable to discover. For example, a common additional term in residential tenancy agreements is that the tenant will not engage in conduct that may invalidate the landlord’s insurance. The prospective tenant will have no idea whether the landlord is insured, who the insurer is, what specifically is insured and what conduct (by act or omission) may give rise to invalidation of the policy.

The above recommendation would bring Victorian legislation in-line with that in the ACT where additional terms must be endorsed by ACAT.

We would welcome the inclusion of more terms under the Victorian prescribed tenancy agreement to make it more practicable to be used by all parties. These terms should be in-line with the rights and duties outlined in the RTA. All other Australian jurisdictions include many more terms than the 11 including in the Victorian agreement.

Explicit consent

R16. The Act should be amended to introduce a duty to obtain explicit informed consent to any additional terms in a tenancy agreement and a provision rendering unenforceable any terms where explicit informed consent was not obtained.

By contrast to residential tenancy agreements, when entering into a contract for energy supply the retailer must demonstrate that they have obtained explicit informed consent.

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^6 TUV (2006), Unfair Terms in Residential Tenancy Contracts (and Source Documents)
to the terms and conditions of any agreement. Lack of explicit informed consent can then enliven a number of remedies for the consumer through alternative dispute resolution.

We believe that there are two important elements to ensure explicit informed consent in regard to residential tenancy agreements:

a) A requirement that additional terms and conditions are properly explained to the tenant by the landlord or their agent; and,

b) That the tenant has a consideration period before signing the agreement to generally consider whether they want to be bound to the terms and conditions.

To give proper effect to explicit informed consent landlords and agents would have to demonstrate that various terms had been properly and clearly explained to the prospective tenant. For example, this would include that where the tenant has limited proficiency in English reasonable efforts have been made to explain the terms and condition to the person in their preferred language. To encourage compliance with these requirements, the Act would need to be clear that a term or condition that lacked explicit informed consent was unenforceable.

Contracting out of the Act

R17. The Act should be amended to create an offence similar to section 53 of the RTA (QLD) to prohibit contracting out of the RTA.

We have seen a number of agreements that purport to contract out of the Act either in part or completely. The current protection against invalid terms is limited in its application.

By contrast, the RTA (QLD) has a broader and more clearly stated prohibition on contracting out of the law.

53. Contracting out prohibited

(1) An agreement or arrangement is void to the extent to which it purports to exclude, change or restrict the application or operation of a provision of this Act about the terms of a residential tenancy agreement.

(2) A person must not enter into an agreement or arrangement with the intention, either directly or indirectly, of defeating, evading or preventing the operation of this Act.

Maximum penalty—50 penalty units.
During a tenancy

Service of documents

R18. The Act should be amended to include that notices to vacate must be exempt from electronic communication and must not be served electronically.

R19. The Act should be amended to include a landlord must not serve a notice via email or other electronic means, unless the tenant has expressly consented to the service of those notices in writing.

R20. The Act should be amended to ensure that consent is not sought before or at the time of entering into a tenancy agreement.

R21. The Act should be amended to provide that a tenant who has consented to receive a notice electronically may revoke their consent at any time.

R22. The consideration of when a noticed is deemed served and notice periods must be reviewed.

The introduction of electronic service of notices will disadvantage vulnerable tenants and residents of rooming houses and caravan parks, who for a variety of reasons often do not have regular access to email, and therefore may not receive important notices, including notices to vacate, that are served electronically.

The Australian Bureau of Statistics indicates that while 97 per cent of those earning $120,000 or more a year are internet users, only 77 per cent of those earning less than $40,000 a year are 7.

Additionally recent research by the Australian Communications Consumer Action Network into access to ICT of people who are homeless or at risk of homelessness found that while 77 per cent of respondents had a smart phone, ‘shortage of credit, service and power restrictions, number changes and handset loss resulted in partial or restricted access to one or a number of mobile and Internet services’ 8.

The same study also found that vulnerable consumers with complex needs had the most significant payment and debt issues relating to telecommunication services 9. Where individuals in these groups had previously indicated they would receive notices electronically, the subsequent loss of, or intermittent access to, personal email accounts could result in them not becoming aware of important issues affecting their housing, including notices to vacate, notices of inspection, breach of duty notices, and others.

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8 Humphry, J. 2014, Homeless and Connected: Mobile phones and the Internet in the lives of homeless Australians, Australian Communications Consumer Action Network, Sydney, p.3
9 Ibid
Our main concern is for notices to vacate, as these notices have the largest consequences to the lives of those receiving them. The electronic service of notices such as breach of duty notices and notices of entry also remains problematic. The electronic service of notices of entry poses significant privacy concerns. Under current legislation an agent may send a notice of entry 24 hours prior to entering the property. If this is allowed to occur electronically, the tenant may not check their emails for a day and will have the agent on their doorstep without their prior knowledge.

We also reiterate the following recommendations that have been made by the Tenancy Working Group of the Federation of Community Legal Centres.

R23. The Act should be amended to legislate that a standard form document, separate to any standard form tenancy agreement must be provided to a new tenant to enable tenants to give permission to receive notices electronically.

This document should enable tenants to clearly specify the email address(es) for electronic service, and should provide clear information about the consequences of giving consent, as well as how consent can be revoked. The consent form should also alert the tenant that they should advise the real estate agent of a change in their electronic contact details as soon as possible. The document should inform tenants that consent can be revoked verbally or in writing, and that the revocation of consent is effective as soon as it has been received by the landlord or their real estate agent. The document should include a separate section that tenants can complete and send to their landlord to revoke consent in writing, should they require proof of revocation.

R24. Update CAV’s tenants’ and residents’ rights handbook to include a section on electronic service of notices.

The standard booklet required to be provided to tenants and residents at the commencement of a tenancy or residency should be updated to include information about electronic service of notices under the RTA. Similar information should be covered as outlined above in relation to the standard form document.

R25. Update CAV’s Website and RentRight App to include a section on electronic service of notices.

R26. The Act should be amended to provide that the standard form electronic notice consent form must be provided to tenants. This can be achieved by amending s506 of the Residential Tenancies Act 1997 to include that consent for electronic service must be gained explicitly through the standard form document. Alternatively the standard form document could be included in the CAV tenant’ and residents’ rights handbook, or the proposed ‘new tenant checklist’.

The Tenants Union of Victoria is disappointed that an amendment to the RTA has been enacted through the Consumer Acts and Other Acts Amendment Bill 2015. This Bill was introduced to parliament during the RTA review process with no prior consultation with stakeholders. We are extremely dissatisfied that this change has occurred allowing the service of notices by electronic means with no opportunity to provide feedback. We are confused as to why this change has occurred prior to the completion of the RTA review and note that this change significantly decreases tenants’ security of tenure.

Duties

Tenant duties

To a large extent the rights and duties detailed in the Act touch on an issue at the heart of tenancy legislation; exclusive possession. As the tenant is granted exclusive
possession of the property for the period of the lease agreement they should be provided with the same occupancy rights as an owner occupier, so long as they do not interfere with the landlord’s interest in the property. This means that the tenant should be able to live in the premises as they see fit and to make the house their home. The tenant should, as any responsible adult, be able to make their own choices and largely this should not be of concern to the landlord. What we see however is a distinct belief that as the landlord is the owner of the property they are able to continue to obtain a certain level of control over the property that inherently interferes with the tenant’s exclusive possession of the property. While this imbalance exists tenants will continue to suffer from a lack of security of tenure and quiet enjoyment in their homes.

Illegal use

R27. The Act should be amended to state that in order for VCAT to grant possession for illegal use that person must be convicted rather than just charged of a relevant offence.

The notice to vacate for illegal use of premises is problematic in a number of ways. Firstly a notice for illegal use allows a tenant to be evicted without conviction of a crime. This could mean that a tenant is evicted from their home only later to be proven innocent in a court of law.

Additionally the Tenants Union of Victoria is of the belief that criminal activity should not be addressed through tenancy legislation. If a tenant is undertaking criminal behaviour they should be dealt with by the criminal system. There should be no reason for this to jeopardise their tenure on top of the appropriate consequences administered through the criminal system.

Nuisance

R28. Section 60(1) and (2) (Tenant must not cause nuisance or interference) of the Act should be amended to replace terms “in any manner” with “in an unreasonable manner prohibited by law”

Section 60 states that a tenant is in breach of the Act for use of the property in “any manner” that causes a nuisance. There are many instances where a resident of a property may undertake activity that is within their rights of the law that may be perceived by a neighbour to be a nuisance. This is an inherent issue behind many neighbourhood disputes, where residents of neighbouring properties have different lifestyles and needs. A tenant has exclusive possession of the property, it is therefore unreasonable that a tenant should be held to a higher account than an owner occupier with regard to how they behave inside their own home, as long as they are behaving in a lawful manner.

Damage

R29. Section 61(1) (Tenant must avoid damage to premises or common areas) of the Act should be amended to include the word ‘reasonable’ – A tenant must ensure that reasonable care is taken to avoid damaging the rented premises.

Section 61(1) and (2) refers to damage to the rented premises and common areas. These two subsections use inconsistent language with subsection 2 stating that ‘reasonable care’ must be taken, whilst subsection 1 states that only ‘care’ is to be taken. These should be amended for consistency.

Reasonably clean

R30. The Act should be amended to include a definition of ‘reasonably clean’. This definition should describe a standard which allows for the ordinary
course of living so as not to interfere with the quiet enjoyment of the tenant.

**R31.** Section 63 (Tenant must keep rented premises clean) should be restricted to the end of the tenancy to provide that the tenant must leave the property in a reasonably clean condition.

The fact that there is no definition of ‘reasonably clean’ in the Act is the cause of many disputes between landlords and tenants. A tenant can be served a breach of duty notice that they may disagree with, but because there is no definition the tenant may not know whether they are truly in breach or not. Additionally one of the most common reasons that bond disputes occur is over whether or not the tenant has left the property in a reasonably clean condition.

When a tenant leases a property they are granted exclusive possession and should be able to use the property as they wish, so long as they are not causing damage. It is not the concern of the landlord whether or not the property is reasonably clean during the tenancy. The landlord themselves may have an untidy house, but is still able to make demands on the tenant’s lifestyle. There is a separate notice under the Act to deal with any damage caused to the property. Section 63 should be amended so that the duty only applies to the end of the tenancy agreement when they hand back the property to the landlord. This would bring it inline with the landlord’s duty to provide the property in reasonably clean condition.

**Fixtures**

**R32.** The Act should be amended to state that a landlord cannot unreasonably withhold consent for the installation of additional fixtures.

**R33.** The Act should be amended to ensure that disability fixtures are at all times permitted to be installed, with specific reference to section 53 of the Equal Opportunities Act 2010.

**R34.** The Act should be amended to allow a tenant to apply to the Tribunal to install reasonable fixtures.

Although tenants have an exclusive possession of the rental property, section 64 prohibits tenants from treating the property like their home. Under the Act there is no way for landlords to be compelled to install or allow the installation of a fixture, except for the case of disability modifications under the Equal Opportunities Act.

The broad language used in this section; “make any alteration, renovation or addition to the rented premises” and “install any fixtures on the rented premises” essentially mean that nothing can be added to the property, even the placing of BluTack on a wall would constitute a breach. This issue however most commonly occurs with respect to items such as telephone line installation and installing curtain railings.

The ability of people with disabilities to install fixtures is an issue of great importance. And this is a barrier to tenants with disabilities access private rental properties. It can be difficult for people with disabilities to gain permission from landlords. Installing disability fixtures can be a financial burden and when there is little certainty that the tenancy will last beyond the first fixed-term, making the decision to outlay the costs to install items can be a difficult one.

Additionally, the Act states that the property must be restored to its original condition prior to moving in. This does not take into account that the fixtures may add value to the property and the landlord may wish to keep them installed.
Landlord duties

Premises vacant and reasonably clean

R35. The Act should be amended to allow a tenant to terminate a tenancy if the property is not found vacant or in a reasonably clean condition.

36.1 If the premises is not vacant or reasonably clean at the time of gaining possession a tenant should be permitted to apply to VCAT for an order that either:
(a) entitles the tenant to terminate the lease by giving immediate notice of intention to vacate; or,
(b) requires the landlord to remedy the breach.

36.2 The Act should be amended such that the grounds for making this application should include that the rented premises are not reasonably clean.

36.3 The Act should be amended to:
(a) Enable a tenant to make this application within 3 business days of taking occupation; and,
(b) Specifically state that this application must be heard by VCAT within 2 business days; and
(c) If the Tribunal orders that the lease cannot be terminated and the landlord must remedy the breach, the Tribunal should have power to reduce the rent until the landlord has done so.

Under section 226, a tenant can terminate a lease ‘before taking possession’ under certain circumstances outlined in the Act. The Tribunal has not interpreted ‘taking possession’ consistently, in some cases saying that if keys have been collected then the tenant has taken possession, in others saying that the tenant has not taken possession until they actually move in. What constitutes ‘good repair’ in this context is also unclear.

This puts tenants in a very precarious position; if they terminate and have grounds to do so then their entire bond and rent should be refunded, but if VCAT thinks that they didn’t have grounds then the landlord could seek lease breaking costs. Although the tenant can give a breach of duty notice under section 65 if the rental property is not reasonably clean at the time agreed they were to occupy the rental property, they do not clearly have a right to end the lease for this reason.

These issues need to be clarified to give greater certainty to tenants needing to utilise this avenue.

Providing information to prospective tenants

The Tenants Union of Victoria supports the provision that prescribed information should be supplied to new tenants before they enter into a tenancy agreement. The CAV booklet that is given to tenants is a comprehensive guide however tenants still do not know their rights.

As has been recommended earlier in this submission, CAV should introduce a “New Tenants Checklist” to outline the most important information to tenants at the time of signing their agreement. It is believed that this will prevent future disputes and clarify the rights and duties to net tenants.

Also detailed above is the recommendation to provide tenants with a disclosure statement outlining certain information. We reiterate that this should be legislated and enforced.

Quiet enjoyment
The Act should be amended to strengthen the landlord’s duty in relation to quiet enjoyment by providing that the tenant is entitled to privacy, peace and quiet and normal use of the rented premises.

In its recent report the Victorian Law Reform Commission (VLRC) observed the following:

**Victorian tenants do not currently enjoy an express right to privacy, although they have an obligation not to interfere with the reasonable peace, comfort and privacy of their neighbours. Rooming house residents, caravan park residents and site tenants have a right to privacy, peace and quiet …**

With the exception of Victoria, the residential tenancy legislation of every state and territory in Australia incorporates an express right to reasonable peace, comfort and privacy within the statutory right to quiet enjoyment…

The current quiet enjoyment protections for tenants are woefully inadequate and antiquated. As the VLRC observed a breach of quiet enjoyment would ordinarily be understood to require a substantial interference with the tenant’s right to possess the property or to enjoy it for all usual purposes. This narrow interpretation means that many unreasonable actions may still be allowed including breaches of privacy.

**Open Houses**

The Act should be amended to expressly prohibit open house inspections and on-site auctions without the written consent of the tenant.

Open house inspections cause disruption and stress to tenants. Generally the landlord requires the property to be kept in immaculate condition, and they may conduct multiple open house inspections for months at a time. The Act does not specifically prohibit open house inspections being conducted without consent, although tenants have successfully obtained restraining orders prohibiting open house inspections on the basis that this is not a ground for entry under the Act.

Auctions are also an unnecessary disturbance to the tenant, and there is no reason for them to take place on the premises.

It should be noted that this conduct can also occur during a fixed-term agreement creating significant disturbance for the tenant who cannot avoid it without the cost of terminating the fixed-term agreement.

**Case Study**

James* was in a fixed-term tenancy agreement although the landlord was planning on selling the property. James received notification that the landlord would be conducting an open house inspection the next day. James’ daughter was very unwell with vomiting and diarrhoea. James requested that the open house inspection not go ahead, but the landlord insisted that it would go ahead saying that they would not go into the daughter’s room. This was unsatisfactory as the daughter needed privacy and access to the bathroom.

By contrast, the Residential Tenancies Act in Queensland has strong protections against this conduct.

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11 ibid, p50
204 Lessor or lessor’s agent must not conduct open house or on-site auction without tenant’s consent

(1) The lessor or lessor’s agent for premises must not do either of the following without the tenant’s written consent—
   (a) conduct an auction, or allow an auction to be conducted, on the premises;
   (b) conduct an open house, or allow an open house to be conducted, on the premises.

Maximum penalty—20 penalty units.

(2) In this section— open house means an advertised period during which premises that are for sale or rent may be entered and inspected by prospective buyers or tenants generally.

We recommend that similar provisions are introduced in Victoria.

Photographing tenant’s possessions

R38. The Act should be amended to expressly prohibit the use of photographs or videos of a tenant’s possessions without the written consent of the tenant affected.

Under current law the inside of a tenant’s home along with all of their possessions can be photographed and displayed on the internet and billboards outside the house without the tenant having any say in the matter. This is an appalling breach of privacy and can be a risk to personal security or theft. The Act does not contain any specific provisions relating to photographing tenants’ possessions. Rather than recognising this as a problem, the VLRC outrageously concluded that whilst such conduct may be a breach of the tenant’s privacy, in Victoria this would not constitute a breach of the narrower duty to take reasonable steps to provide quiet enjoyment of the premises.

Case Study

Anna* moved into a new property after finalising a family violence intervention order against her former partner. Anna was pregnant and for safety reasons did not want her former partner to know her new address. The landlord was selling the property and the Estate Agent had entered the property to take photographs to advertise the property.

Anna was concerned that her partner would recognise her furniture as it had distinctive markings. She raised this concern with the Estate Agent who responded rudely and with little concern saying that the furniture was not distinctive and that he would go ahead and use the photographs.

By contrast, the Residential Tenancies Act in Queensland has strong protections against this conduct.

203 Lessor or lessor’s agent must not use photo or image showing tenant’s possessions in advertisement

Unless the lessor or lessor’s agent has the tenant’s written consent, the lessor or agent must not use a photo or other image of the premises in an advertisement if the photo or image shows something belonging to the tenant.

Maximum penalty—20 penalty units.

Property sales have continued in Queensland unhampered by this provision.
R39. The Act should be amended to clarify that a landlord is in breach of their duty to maintain the premises in good repair if there is any defect or fault in the premises or the appliances provided by the landlord.

R40. The Act should be amended to include the following under urgent repairs: air conditioners, significant mould, fault causing significant damage to tenants’ possessions, fault to existing phone and internet connection.

In current residential tenancy legislation a failure of an air conditioner is not classified as an urgent repair. This is unlike a breakdown of heater, which is deemed to require immediate attention. This seems to be an oversight as extreme weather, either hot or cold, is a health risk particularly for young or elderly tenants.

Mould is a common and recurring problem faced by residential tenants. In many cases mould outbreaks are so severe that urgent repair is necessary to ensure the safety of the property is maintained. This is currently not addressed in the RTA under the definition of an urgent repair or elsewhere. Often when issues of mould are raised, the responsibility of the outbreak is put back on the tenant, who is also required to provide reports from mould specialists to prove whether the mould is hazardous. This can be a very expensive and lengthy process. During this time the tenant is exposed to the mould and their possessions may be damaged as a result and need to be thrown away.

There are times when a fault in the property is not classified as an urgent repair, but may be causing damage to the tenants’ possessions. An example of this is a minor roof leak in the rental property. A tenant may be unable to move certain items such as furniture and the fault may cause significant damage to the tenants’ possessions. As this would not be classed as an urgent repair it may not be rectified for six weeks or longer, in the meantime the tenants’ possessions may be significantly damaged or ruined.

Telecommunications are now an essential part of the home environment and are often needed for safety, health and everyday necessities. In some cases the landline phone may be the only phone available; in this instance it is a safety risk to have no access to phone in the event of an emergency. This is particularly a concern for the elderly or those in rural locations. Despite this risk, a fault with the telephone line is not classed as an urgent repair.

R41. The Act should be amended to allow a tenant to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.

The most common frustration and cause for complaint from tenants is the landlord’s failure to do repairs in a timely and proper manner. Our experience over a long period of time is that tenants will make many requests of the landlord or estate agent prior to seeking any further advice or taking any further action.

Tenants are often reluctant to serve a formal notice of repair on the landlord and are even more reluctant to apply to VCAT for a repair order.

Tenants express frustration at the numerous steps in the repair process and the length of time it will take to resolve the problem usually after a considerable period that they have already spent trying to get the repairs done. As we have noted, many tenants would prefer to terminate the agreement (lease break or otherwise) than follow the further steps required.

R42. The Act should be amended to enable a tenant to pay rent into the rent special account at the time a CAV repairs report is issued.
Compliance around repairs is a major issue affecting security of tenure in rental properties. There are many cases where a landlord simply will not comply with a CAV report or VCAT order and currently there is very little compelling them to do so.

The Rent Special Account in its current form has proven to be ineffective. VCAT rarely uses its discretion to have rent paid into the Rent Special Account and it would appear to be the rationale of VCAT that to require a landlord to undertake works at the same time as financially depriving them of rental income is unreasonable.

However, this approach has the practical effect of subverting the intention of the provision which is to provide an incentive to the landlord to comply by withdrawal of rent until compliance is affected. The landlord is not deprived of the income, the income is simply deferred.

It is recommended that a mechanism is put in place that would allow the tenant, upon receiving a CAV report, to pay their next rent payment into the rent special account. The money should not be released until the repairs have been completed and any compensation has been paid to the tenant.

**Water appliance must meet minimum efficiency rating**

Under the Residential Tenancies Regulation 2008 the prescribed rating system is defined as:

(a) a 3 star rating in the WELS Scheme as defined in the Water Efficiency Labelling and Standards Act 2005 of the Commonwealth; or

(b) if, because of the age, nature or structure of the plumbing in the rented premises, a replacement with a 3 star rating cannot be installed or, when installed, will not operate effectively—a one star rating or a 2 star rating in the WELS Scheme.

The proposed standard of three stars out of six is not particularly efficient and is at best a bare pass.

The legislation allows for sub-standard replacements with a one or two star rating to be installed if water pressure is not sufficient for a three star rated appliance, fixture or fitting. The TUV's position is that the landlord should fix old or dysfunctional plumbing.

This issue will be discussed in more detail in our submission to the Property Conditions and Standards Issues Paper.

**Breaches of duty**

**R43. The Act should be amended to improve compliance orders.**

44.1 Repeal S332(1)(b)(iii) the breach of duty is not a recurrence of a previous breach of duty.

44.2 Amend S332(1)(b)(i) to include the word ‘or’, as shown below:
S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible; and/or S332(1)(b)(ii) there will not be any further breach of the duty.

44.3 Compliance orders should have a 6 month time limit.

Under s332 (Order not to be made in certain circumstances) of the RTA the Tribunal must consider:

> S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible,

> S332(1)(b)(ii) whether there will be any further breach of the duty, and
S332(1)(b)(iii) whether the breach of duty is not a recurrence of a previous breach of duty.

This section has the potential to provide safeguards to tenants from unnecessary eviction however because of the inclusion of S332(1)(b)(iii) it is virtually meaningless. If the breach of duty is not a recurrence of a previous breach there would not be grounds to make a possession order. This is because to obtain a compliance order under section 212 the landlord must establish that there has been a breach of a duty provision.

This section should be amended to enable it to achieve its purpose, which is to enable a tenant to retain their tenancy if the breach of the order is trivial and the issue is not likely to reoccur in future.

This would bring the legislation in line with Australian Capital Territory legislation where:

The ACAT may, if satisfied that it is appropriate and just to do so in relation to an application mentioned in subsection (1)(a) refuse to make a termination and possession order if—

(i) the tenant has remedied the relevant breach; or
(ii) the tenant undertakes to remedy the breach within a reasonable specified period and is reasonably likely to do so"

R44. The Act should be amended to repeal s249 Successive breaches by tenant and s240 Successive breaches by the landlord.

The successive breaches pathway to eviction is inherently flawed as there is no pathway for a tenant to challenge a breach of duty notice. The perceived breach of duty can often be subjective and can be a matter of dispute between the parties. For example a breach of duty may be given due to the property being perceived as not reasonably clean, however if the tenant believes that the property is in fact clean they have no way of disputing the notice. If the matter progresses to a notice to vacate for successive breaches under s249 the tenant is still unable to dispute the breach and VCAT does not have discretion to determine whether the breaches were valid and must award the possession order.

This process puts the tenants at great risk of eviction and allows estate agents and landlords to serve unreasonable notices with no mechanism for oversight or repercussion.

S249 notice to vacate for successive breaches is unnecessary as s248 notice to vacate due to failure to comply with a Tribunal order serves essentially the same purpose but provides a far more rigorous process.

The current processes under which a tenant would receive a notice to vacate for successive breaches or failure to comply with a Tribunal order are detailed in the table below.
<table>
<thead>
<tr>
<th>Successive breaches</th>
<th>Failure to comply with Tribunal order</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong> Landlord issues first breach of duty notice (s208) – tenant has 14 days to comply</td>
<td>Landlord issues breach of duty notice (s208) – tenant has 14 days to comply</td>
</tr>
<tr>
<td><strong>2</strong> Landlord issues second breach of duty notice (s208) – tenant has 14 days to comply</td>
<td>Landlord applies to VCAT for a compliance order (s209)</td>
</tr>
<tr>
<td><strong>3</strong> Landlord serves Notice to vacate for successive breaches (s249)</td>
<td>VCAT issues compliance order detailing how tenant must remedy the breach</td>
</tr>
<tr>
<td><strong>4</strong> Landlord seeks possession order through VCAT</td>
<td>Landlord issues notice to vacate due to failure to comply with a Tribunal order (s248)</td>
</tr>
<tr>
<td><strong>5</strong> VCAT awards a possession order if: - on two previous occasions the tenant has been in breach of the same provision and - tenant has received 2 breach of duty notices</td>
<td>Landlord seeks possession order through VCAT</td>
</tr>
<tr>
<td><strong>6</strong> Tenant has 14 days to vacate premises</td>
<td>VCAT awards a possession order if it is satisfied that: - the failure to comply with the order was trivial or remedied as far as possible; - there will not be any further breach of the duty; and - the breach is not a recurrence</td>
</tr>
<tr>
<td><strong>7</strong></td>
<td>Tenant has 14 days to vacate premises</td>
</tr>
</tbody>
</table>

The Tenants Union of Victoria believes that the 14 day time period to rectify a breach of duty is appropriate and should not be reduced.

**Pets**

R45. Terms restricting the tenants’ ability to keep a pet should not be included in a tenancy agreement.  
45.1 The landlord should be able to make an application to the Tribunal to object to a pet if the keeping of a pet can be proven to cause severe hardship to the landlord if the hardship suffered by the landlord would be greater than any hardship that the tenant would suffer if the lease term was included.

R46. The Act should be amended allow a tenant to give notice of a pet during their tenancy.  
46.1 The landlord should be able to make an application to the Tribunal to object to a pet. The tribunal should only be able to make an order if the pet is an inappropriate size or type for the particular property. Or if the pet can be proven to cause severe hardship to the landlord, if the hardship suffered by the landlord would be greater than any hardship that the tenant would suffer if the Tribunal were to make an order against the pet.

Tenants with pets have considerable difficulty accessing rental properties due to the large number of landlords who do not permit pets in their properties. This issue also
constrains tenants who are in existing properties from getting a pet even if they wish to do so.

According to the RSPCA over 700 pets were surrendered to their shelters in Victoria in the last financial year because the owner was unable to keep them in a new home. Clearly this is an issue affecting many renters.

Changes in the rental market over the past decade have seen an increase in long term renters. Families are the largest household type and many people are renting into old age. The restrictions on pets that are included in many lease agreements mean that many long term renters are forced to remain without pets for their entire lives.

Tenants are granted exclusive possession of the rental property for the duration of their tenancy agreement. This means that they should be able to live in the property as they see fit so long as they are adhering to their responsibilities under the Act. Contrary to popular belief the RTA does not outline whether a tenant is allowed to keep a pet. Despite this, lease agreements frequently contain clauses either banning pets or detailing that pets are not permitted without the landlord’s consent. It is questionable as to whether these lease terms are enforceable. However whether they are or not, tenants are of the belief that what the landlord says goes, and this is having a large impact on tenants being able to access their rights, or accessing housing without discrimination.

Tenancy agreements should not be permitted to include any terms that restrict the tenants’ exclusive possession of the property; this includes the tenants’ ability to keep a pet.

A tenant, like any adult, should be able to make their own decision about keeping a pet. After all having a pet is a personal choice; it is not a decision that should be up to the landlord.

The Act already provides safeguards to protect the landlord from financial loss due to damage. The tenant pays their bond at the start of a tenancy to cover any potential damage to the property. Additionally the landlord can apply to the tribunal to seek compensation for any damage that exceeds the amount of the bond.

Local council by-laws regulate the type and number of pets that are allowed in different property types, they also detail safety, registration and noise complaints; and nuisance and cleanliness provisions are captured by the RTA.

In some circumstances it may be appropriate for a landlord to object to a pet being kept on their leased premises, this is why there should be a mechanism whereby the landlord can apply to VCAT to object to a tenant housing a pet on their property. This should only be in certain circumstances, for example if the pet is an inappropriate size or type for the particular property.

It is important to ensure that issues such as animal welfare are not conflated with tenancy issues. Whilst at times animal welfare may be a genuine concern, this should not be dealt with under residential tenancy legislation as it is a separate issue.

**Entry requirements**

R47. **Section 88 of the Act should be amended to require the landlord to provide the specific time and detailed reasons for the entry.**

R48. **Section 85(b) of the Act should be amended to require:**

- 7 days’ notice of entry for a routine inspection;

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12 RSPCA Victoria, 2016, Submission to the Residential Tenancies Act Review Rights and Responsibilities of Landlords and Tenants – Issues Paper
• 48 hours’ notice for all other entries except urgent repairs; and
• 24 hours’ notice of entry for an urgent repair

R49. The Act should be amended to provide that the landlord must negotiate a convenient time for entry with the tenant as far as is practicable.

R50. Section 90 of the Act should be amended to require the landlord to compensate the tenant for any loss or damage including theft which occurs while the landlord is exercising a right of entry under the Act.

A notice of entry only requires 24 hours written notice. It is understood that in the case of an urgent repair this is an appropriate period of notice, however for many other reasons 24 hours is an unnecessarily short notice period. A routine inspection for example should be able to be planned in advance and does not need to occur at short notice.

A 24 hour notice period will be particularly problematic with the introduction of electronic service of notices. Tenants, unlike a business, cannot be expected to regularly check their emails. Tenants could easily not check their emails for a day and have their landlord at the door unexpectedly.

Additionally a notice of entry should state the specific time of entry, not a range as is current practice. For example, a notice of entry given may state that the entry will occur between 9 and 5 pm, when the purpose of entry is only likely to take 30 minutes. This is disruptive if the tenant wants to be home at the time of the entry or wants to use the rental property without being interrupted by the landlord.

Some notices of entry do not provide sufficient details for a tenant to assess whether the entry is legitimate or not. For example, a notice of entry might simply state that the entry is to carry out the legal duty as landlord, but does not specify what legal duty this is or how it will be carried out.

Additionally the Act does not clearly make the landlord liable for theft that occurs while the landlord is exercising a right of entry, although the landlord may be required to compensate the tenant for damage that occurs during this period.

**Short-term accommodation**

The issue of short-term accommodation is one that has grown in recent years and legislation remains somewhat unclear in a number of areas. Recent VCAT decisions have indicated that a tenant is within their rights to use online short-term accommodation platforms such as Airbnb to rent out part or all of the premises for a period of time.

The grant of exclusive possession should allow tenants to host guests in their home and whether or not payment is received should be of no concern to the landlord. The tenant remains liable for any damage or nuisance caused by any guests in the property.

**Assignment**

R51. The Act should be amended to provide for a prescribed assignment form to be completed by the incoming parties.

R52. The Act should be amended for assignment to be deemed to be in effect 7 days after the tenant(s) serve the prescribed notice on the landlord or agent if the landlord or agent has not applied to the Tribunal to object to the assignment within the 7-day period.
The assignment process is unclear and often tenants do not understand the process or the legal consequences of an assignment.

Additionally tenants report having difficulty getting consent from the landlord or agent. The process of gaining consent for a changeover of tenants is a time sensitive task, however, often agents simply do not reply to the tenant's request for approval. Usually neither of the tenant parties want to commence the assignment by applying to VCAT for the landlord's consent not to be required. This process simply doesn't work and invites workarounds.

The provision allowing for an automatic assignment after 7 days would give proper effect to the apparent intention of the current Act. Section 82 would then be redundant and should be repealed as part of the amendment.

R53. The Act should be amended to clarify that the tenant should only be liable to pay an assignment fee if a written assignment is prepared, and then, only for the cost of the preparation of the written assignment.

Whilst the Act currently prohibits the charging of a fee for granting consent to an assignment it also provides:

*This section does not prevent a landlord from requiring the tenant to bear any fees, costs or charges incurred by the landlord in connection with the preparation of a written assignment of a tenancy agreement.*

This approach is similar to the manner in which commercial tenancies are dealt with, specifically, that a written assignment would be prepared to articulate properly the interests of all the parties and the tenant would ordinarily bear the cost of preparing such an agreement. However, in residential tenancies such written assignments are rarely, if ever, provided. In addition, VCAT is now interpreting this provision to require tenants to bear any of the costs associated with an assignment rather than the limited costs apparently intended by the Act. These problems further frustrate the assignment process.

Often the assignment is practically effected by simply changing the signatures on the existing written agreement and/or by completion of the bond transfer form. Both of these approaches seem legally dubious.

If longer tenancy agreements, either fixed-term or periodic, are to be encouraged then the process of assignment will need to be substantially simplified.

**Violence in managed premises**

**Misuse of notices to leave**

R54. The Act should be amended to increase penalties for issuing a notice to leave without reasonable grounds (section 368A).

R55. The Act should be amended to make it an offence for an unregistered rooming house to serve a notice to leave.

R56. The Act should be amended to state that the notice to leave must include sufficient details to describe the nature and reason for the notice.

R57. The Act should be amended to provide that a person serving a notice to leave must attach a statutory declaration outlining the grounds, events, and reasons for the notice to leave being given.

R58. Section 368(1)(b) and section 368(2)(b) of the Act should be amended to say "serious and imminent danger of harm".
Notices to leave are used as management tools in managed premises. If a resident (or their guest) has committed a serious act of violence or if any person's safety on the managed premises is at threat, the manager is able to issue a notice to leave. The person receiving the notice must immediately leave the premises and must remain away until a VCAT hearing has occurred (usually after 48 hours but sometimes up to two weeks later).

Unfortunately notices to leave are abused and can easily be used to intimidate residents. Protection against abuse of the notices does not do enough to stop their misuse. For people receiving a notice to leave the impact can be catastrophic, any routine in their life will be significantly interrupted and the person may be pushed into homelessness. To safeguard against their misuse we detailed the recommended above.

**Fairer process for notices to leave**

**R59.** The Regulations should be amended so that the information on the notice to leave is as follows:
(a) You should call VCAT during your exclusion period (03) 9628 9800; and,
(b) You should attend VCAT shortly after the expiration of the 2 business days to determine if any application or orders have been made.

**R60.** The Act should be amended to provide that the Tribunal may adjourn an application under Section 374 (urgent applications to Tribunal) for a period of not more than 5 business days at which time the matter must be determined at that hearing unless parties consent to a further adjournment.

**R61.** The Act should be amended to provide an exemption to allow an authorised agent to attend the premises to collect any necessary goods for a suspended person who has been issued a notice to leave.

Under a notice to leave a resident is immediately rendered homeless and will often sleep rough during this time. It is unclear how many residents attend the subsequent VCAT Hearings; however it is believed to be very low. In many instances residents do not understand the process and do not know that the Hearing is on as they have no way of being notified. In an attempt to remedy this we have recommended that the information contained on a notice to leave should be changed to be easier to understand.

Additionally we are aware of some hearings that have been granted adjournments resulting in the matter not being resolved for almost 2 weeks. This can cause issues with medication or medical needs, security of personal goods, and relapsing for some clients. During this time the tenant is also without an address to receive their notice to attend VCAT. We are recommending that an urgent application must always be heard in a period of not more than five business days.

Once a notice to leave is received a resident must immediately remove themselves from the premises. There is generally not enough time to properly collect their belongings and this can lead to complications especially when critical items such as medication remain on the property. We have recommended that an agent of the resident be allowed to enter the premises to collect personal items for the suspended person.

**Notice to restrict certain guests**

**R62.** The Act should be amended to state that a manager may issue a "prescribed trespass notice" to any visitor of any resident in the rooming house or on the grounds (in substitution of section 368(2)).
R63. The Act should be amended to state that if a resident’s visitor has been criminally charged and convicted in relation to the serious act of violence that has taken place in the rooming house, the manager may apply to VCAT for an order to prevent the resident’s visitors from visiting the rooming house for a period of up to 6 months.

R64. The resident or excluded visitor may apply for revocation or a variation order if they can show cause that a similar incident will not occur.

In many instances problem behaviour comes not from the tenants themselves but from their guests. One way to manage this problem could be to exclude the guest from the premises for a period of time. If this mechanism was introduced there would need to be adequate safeguards put in place to ensure that the provision was not abused by the manager of the premises.
At the end of a tenancy

Terminations
Terminations by the landlord

R65. The Act should be amended to abolish no reason and end of fixed-term notices to vacate.

The Tenants Union of Victoria is of the firm belief that landlords should only be permitted to end a tenancy for a specific reason that is outlined within the Act. These should include either a breach by the tenant or a specified change of use.

No reason notices have been a feature of residential tenancies legislation since the inception of the Residential Tenancies Act 1980. At this time the period of notice for these was 6 months.

The Tenants Union of Victoria has long argued that these notices are unnecessary and open to abuse. The extensive range of other notices available to a landlord or owner provides sufficient scope to remove a tenant for a legitimate purpose.

The fact is that no reason and end of fixed-term notices are too open to abuse. An example of this was highlighted by a recent VCAT case. The tenant was represented by TUV at VCAT to challenge a notice to vacate for assignment or subletting without consent. The tenant had been using Airbnb on the apartment, whilst still living there. VCAT found in favour of the tenant and ordered that the notice to vacate was invalid (Swan v Uecker). The landlord, who was unhappy about the decision appeared on Chanel 10’s The Project (28/4/16) and openly discussed that she would not be renewing the tenant's lease stating that they would be evicted in two months’ time when the lease came to an end. In this example the tenant was not in breach of the Act, they had a VCAT decision supporting their actions but still the landlord was able to evict the tenant.

Abolishing these notices is absolutely necessary to guarantee security of tenure for tenants.

R66. Section 259(notice to vacate for sale of property) of the Act should be amended to provide that the notice can only be served if the premises has been sold, and if the premises is to be occupied by the new owner as their principal place of residence, and if contract of sale has a condition that the landlord must provide vacant possession.

Section 259 (Premises to be sold) enables a landlord to give 60 days’ notice to vacate if the landlord intends to sell the rental property or offer it for sale immediately after the termination date; or if the rental property has been sold, within 14 days of the contract of sale being entered into; or, if a conditional contract of sale has been entered into, within 14 days of the conditions being satisfied.

Current practice in many instances is to serve a notice prior to sale to enable the property to be sold with vacant possession. It is common for the property to be sold to another investor who will simply re-let the property after purchase. In these instances the tenants will have been uprooted unnecessarily. Similarly, at times a property will
not be successfully sold and will be returned to the rental market to be re-let. Again in these cases the tenant’s eviction would be needless.

To avoid unnecessary evictions section 259 should be amended such that the notice can only be served if the premises has been sold and if the premises is to be occupied by the new owner as their principal place of residence and if contract of sale has a condition that the landlord must provide vacant possession. Subsequently, if the new owner wishes to live in the property they are also able to issue a notice to vacate under s258 (Premises to be occupied by landlord or landlord's family).

Additionally in our previous submissions we have outlined a number of recommendations to prevent notices from being issued in bad faith. These are listed below.

- Increase evidence required when issuing notices to vacate.
- Restrict notices from being served in retaliation.
- Prohibit re-letting after serving notices to vacate for all ‘change of use’ notices.
- VCAT should have discretion to determine whether a possession order be made given certain considerations.
- Repeal notices to vacate for successive breaches.
- Improve compliance orders by:
  - Repealing S332(1)(b)(iii);
  - Amending S332(1)(b)(i) to include the word ‘or’; and
  - Limiting compliance orders to 6 months.
- Introduce a pre-eviction checklist and reasonableness test for all potential evictions.

Terminations by the tenant

R67. Protect tenants in certain circumstances from lease break fees by introducing a provision similar to section 100 of the NSW RTA.

Under section 100 of the NSW RTA a tenant is allowed to break their lease without paying compensation to the landlord in the following circumstances:

- that the tenant has been offered, and accepted, accommodation in social housing premises,
- that the tenant has accepted a place in an aged care facility or requires care in such a facility,
- that the landlord has notified the tenant of the landlord's intention to sell the residential premises, unless the landlord disclosed the proposed sale of the premises before entering into the residential tenancy agreement as required by section 26,
- that a co-tenant or occupant or former co-tenant or occupant is prohibited by a final apprehended violence order from having access to the residential premises.

We believe this is an important addition to section 234 of the Victorian RTA which allows a tenant to apply to the Tribunal for a reduction of a fixed term tenancy if they have experienced unforeseen severe hardship. This is an important provision however it does not provide certainty to the tenant as they must first go to VCAT to receive a determination.
In NSW breaking a lease in other circumstances costs a tenant a set fee regardless of the actual cost to the landlord. We would not support a fixed fee, however support a maximum cap on break fees to give a tenant more certainty. The fee should also be reflective of the landlord’s actual expense; if they are able to relet the property immediately then the fee should reflect this.

R68. The Act should be amended to introduce a provision to allow co-tenants to terminate their own tenancy.

NSW provides an avenue to allow co-tenants to separately terminate their own tenancy if they wish to leave at a separate time to the other parties on their lease agreement. This is outlined in section 101. An introduction of this provision would allow greater flexibility between co-tenants and allow parties who wished to remain in a tenancy to do so even if other parties wished to leave.

**Goods left behind**

R69. The Act should be amended to provide that goods of monetary value must be stored if the value of all or part of the goods left behind exceeds the cost of removal and storage of those goods.

There is no obligation for a landlord to obtain a report from CAV in circumstances where goods are left in the premises after the tenancy is terminated. This can occur when the tenancy is terminated by VCAT but the tenant is unable to remove their goods prior to execution of a warrant of possession or where the tenancy is terminated by abandonment.

The CAV report provides an indemnity to the landlord if they dispose of the goods left behind having relied on the report. However, in many cases, goods are disposed of without obtaining a report.

The provisions relating to the storage of personal documents are relatively clear. However, the provisions relating to storage of the other goods are less straightforward. The Act currently provides the following test for storage of goods left behind:

*If goods of monetary value have been left behind, the owner of premises may remove and destroy or dispose of those goods if the total estimated cost of the removal, storage and sale of all those goods combined is greater than the total monetary value of all those goods combined.*

Unfortunately, we have seen a number of instances where some goods of high value have been disposed of as the value of storing ALL the goods exceeded the value of those goods. We believe this problem requires a more nuanced approach.
Family violence

We support the recommendations made by Royal Commission into Family Violence to amend the RTA to provide greater safeguards for people affected by family violence.

1. ‘Empower Victorian Civil and Administrative Tribunal members to make an order under section 233A of the Act if a member is satisfied that family violence has occurred after considering certain criteria—but without requiring a final family violence intervention order containing an exclusionary condition.’

To best implement this recommendation we recommend:

R70. The Act should be amended to include a definition of family violence. This definition should mirror the definition used in section 5 of the Family Violence Protection Act 2008.

This would enable a tenant who has been affected by family violence, but has not obtained an intervention order, to make an application.

R71. The Act should be amended to include a new part to address termination of both fixed-term and periodic tenancies where there is family violence. This part would incorporate the existing “creation of a tenancy agreement” provisions with some additional provisions to clarify the effect of a “reduction of a fixed term” and to enable the termination of either fixed term or periodic agreements where there is family violence.

2. ‘Provide a clear mechanism for apportionment of liability arising out of the tenancy in situations of family violence, to ensure that victims of family violence are not held liable for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence.’

To best implement this recommendation we recommend:

R72. The Act should be amended to provide the Tribunal with a specific power to apportion liability between tenants when a notice of intention to vacate has been given by a tenant with a final intervention order; or the Tribunal has made an order to terminate the lease because the tenant has an intervention order under the FVPA or has been affected by family violence.

R73. The power to apportion liability should be the same as that provided to the Tribunal by section 233C, in the case of a creation of tenancy. This would mean that the Tribunal could apportion any existing liabilities under the tenancy and the RTA, including the bond and outstanding utility bills. This would enable the Tribunal to apportion liability for damage to the rental property, rent and any compensation payable to the landlord for the lease ending early.

R74. The Tribunal should be given a general power to apportion liability between tenants when there has been family violence to deal with situations where family violence is a factor but the provisions of the Act do not specifically allow for that to be taken into account.
3. ‘Enable victims of family violence to prevent their personal details from being listed on residential tenancy databases, and to remove existing listings, where the breach of the Act or the tenancy agreement occurred in the context of family violence.’

To best implement this recommendation we recommend:

R75. The Act should be amended to provide that it is an offence to list a person on a tenancy database for reason relating to family violence.

R76. The Act should be amended to enable a tenant to make an application to VCAT for an order that they be removed from the tenancy database because the incident that was listed occurred due to family violence.

4. ‘Enable victims of family violence wishing to leave a tenancy to apply to the Victorian Civil and Administrative Tribunal for an order terminating a co-tenancy if the co-tenant is the perpetrator of that violence—including, where relevant, an order dealing with apportionment of liability for rent (or other tenancy-related debts) between the co-tenants.’

To best implement this recommendation we recommend:

R77. The Act should specifically state that the Tribunal is able to make an order under this section even if the applicant has returned the keys of the rental property.

R78. The Act should be amended to allow a tenant who is an affected family member under a final family violence intervention order to be able to give an immediate notice of intention to vacate the rental property.

This should apply whether the lease is fixed-term or periodic. The Notice to Landlord form could be modified to be used for this purpose. The notice should be served on the landlord and all other tenants, and have a certified copy of the intervention order attached. The legislation should state that the person who gives this notice is not liable for any compensation to the landlord for early termination of the lease.

R79. The amendment should specifically state that the person who gives this notice ceases to be a tenant if they vacate in accordance with this notice.

A similar provision exists in New South Wales. Under section 100 of the Residential Tenancies Act 2010 (NSW) (‘RTA NSW’), a tenant can give a 14 day termination notice to terminate a lease if a co-tenant, occupant or former co-tenant or occupant if prohibited from accessing the rental property by a final apprehended violence order.

Under section 100(4), a tenant is not liable for any compensation as a result of early termination. We believe that an immediate, rather than a 14 day notice, is appropriate due to the risk to safety of the person giving the notice. The RTA already enables a landlord to give an immediate notice to vacate if a tenant endangers the safety of neighbours, and either landlord or tenant can give an immediate notice to terminate the lease if the rental property is unfit for human habitation. We believe that these situations are analogous. We are also concerned that the perpetrator may cause damage to the rental property if a longer notice period is required.

5. ‘Prevent a landlord from unreasonably withholding consent to a request from a tenant who is a victim of family violence for approval to reasonably modify the rental property in order to improve the security of that property.’

To best implement this recommendation we recommend:
R80. Section 64 of the Act should be amended to state that the landlord must not unreasonably withhold consent to a request to modify the rental property, when modifications are requested to improve the security of the rental property, and the tenant is affected by family violence.

Public housing

To assist families in public housing we recommend:

R81. DHHS housing staff be provided with training on their policies regarding tenant damage and family violence.

R82. DHHS should not issue any further compensation claims against tenants which are not reduced for depreciation or that claim for fair wear and tear.

R83. DHHS policies should be reviewed to ensure that outstanding charges do not prevent people affected by family violence from accessing public housing in the future.
Conduct of agents

Estate agents manage the majority of residential tenancies in Victoria, with 74 per cent of all rental properties being handled by estate agents, an increase from 60 per cent in 1996 (ABS 2011).

Frequent complaints from both tenants and landlords indicate that there is a continuing need to improve the professional conduct of property managers.

Tenants are in a unique situation as they do not directly engage the estate agent for their services or pay a fee directly to the estate agent. Rather, tenants pay for the service indirectly through their rent payments to the landlord, who in turn pays the fee. In this way the tenant is a consumer of the estate agent service whereas the landlord is the client.

Through our telephone advice and tenant advocacy programs we receive a significant number of complaints about poor professional conduct by property managers. The most common of these complaints are detailed below:

> Estate agents not responding to tenants requests for repairs or informing the tenant of the process to enforce repairs.

> Estate agents disturbing tenants’ quiet enjoyment of their home by entering rental properties without providing the tenant with the form of notice required by the Residential Tenancies Act 1997 (RTA).

> Estate agents pressuring tenants to make properties available for inspection an unreasonable number of times per week.

  Case study

  Sam* moved in to a property and was given a six month lease as he was told the landlord would move in to the property after that time. Soon after they moved in, Sam was told that the property was being put on the market. During the two month period that followed Sam was subjected to eight open house inspections, 20 private inspections, and one auction. Sam objected to the number of inspections and asked the Estate Agent for compensation. The Estate Agent ignored the request but continued with the inspections.

> Estate agents misrepresenting the law and bullying tenants to achieve a specific outcome.

  Case study

  Gillian* was on a periodic lease and had been in occupation of the property for over 10 years. She was informed that the rent had been increased from $900 to $1,400. The Estate Agent threatened that if Gillian didn’t sign a new fixed-term tenancy agreement they would increase the rent in another three weeks.

> Estate agents charging illegal fees.

  Case study

Tenants Union of Victoria 40
James* was in a fixed-term tenancy agreement and was seeking to assign the property to a new tenant as he had experienced a change of circumstance and needed to move house. The Estate Agent informed James that it would cost him $660 for the assignment fee (two weeks rent).

The Tenants Union of Victoria has made a number of recommendations to improve conduct of agents through the Consumer Property Acts Review in relation to the Estate Agents Act 1980.

Rental bidding

R84. The Act should be amended to regulate rental bidding by a provision with the same effect as section 57 of the RTA (QLD).

Rental bidding occurs when an offer is either made or invited for a rental property that is higher than the advertised rent.

Up until recently, this practice has been limited to particular market segments (higher amenity premises) and market cycles (low vacancy rates) but we are now seeing the process occurring in some market segments irrespective of the general vacancy rate.

This is a further indication of supply and demand pressures. However, landlords should not be able to unreasonably profit from poor market conditions even if this is limited to certain market segments. In addition, the practices involved are characterised by a lack of transparency about the identity of the alternative bidder and the quantum of any alternative bids.

Case study

Thomas* inspected a property at an open house inspection. Towards the end of the inspection he and his partner were approached by the Estate Agent who informed them that if they wanted a good chance of getting the property they would be advised to offer more than the asking price, as there were a number of people interested in the property. Thomas and his partner offered $10 per week more, and ultimately were awarded the property, despite none of their references being called.

The tenant may have some protection under the misleading and deceptive conduct provisions of the ACL but it is completely unclear whether VCAT or any other body would have the power to retrospectively adjust the contract price even if the tenant was able to overcome all the hurdles involved in establishing the unlawfulness of the conduct.

It is tempting to believe that this problem can be addressed by simply introducing rules governing the bidding process as currently exist for other forms of auctions. However, as is evident from the public discourse around auctions for residential sale, to deal with a great diversity of situations that may be encountered, such rules are invariably complex and are difficult to enforce.

The Queensland Government addressed these problems in its most recent review of its residential tenancies legislation. The RTA (QLD) now provides as follows:

57 Premises must be offered for rent at a fixed amount
(1) A lessor or lessor's agent must not advertise or otherwise offer a residential tenancy for premises unless a fixed amount is stated in the advertisement or offer as the amount of rent for the premises.
Maximum penalty—20 penalty units.

(2) A lessor or lessor’s agent must not accept a rental bond from the tenant of premises if the residential tenancy for the premises was advertised or offered without stating a fixed amount of rent for the premises.

Maximum penalty—20 penalty units.

(3) A person does not contravene this section merely by placing a sign on or near premises advertising or offering a residential tenancy for the premises without stating the amount of rent for the premises on the sign.

We believe that in combination this is a very effective solution to regulate and discourage rental bidding.
References


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