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1 April 2016

Mr Simon Cohen
Director
Consumer Affairs Victoria
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MELBOURNE VIC 3000
Via email: Simon.Cohen@justice.vic.gov.au

Dear Mr Cohen,

Review of the Residential Tenancies Act 1997 – Rent, Bonds and Other Charges Issues Paper – Tribunal submission

Thank you for the opportunity to respond to the Rent, Bonds and Other Charges Issues Paper (Issues Paper). Justice Garde AO RFD is currently on leave until 12 April 2016.

I enclose *Tribunal Response to Rent, Bonds and Other Charges Issues Paper*. It addresses questions 1, 4, 7-9, 12, 22-24, 27-28 and 31 in the Issues Paper, as these raised jurisdictional, procedural and/or substantive issues of relevance to VCAT.

Yours faithfully,

Judge Pamela Jenkins
Acting President

Attachment: Tribunal Response to Rent, Bonds and Other Charges Issues Paper

Victorian Civil and Administrative Tribunal (VCAT)
President's Chambers
55 King Street
Melbourne VIC 3000

TRIM REF: BC/16/8468

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Tribunal Response to Rent, Bonds and other Charges Issues Paper

The Tribunal interprets and applies the *Residential Tenancies Act 1997* ("the Act") and does not hold or express an opinion of the Act.

General Comments - Bonds

The Act covers categories of tenure – residential tenancies, rooming houses, caravan parks and Part 4A parks.

The requirement to pay a bond may be provided in the tenancy or residency agreement. It is not a requirement of the Act. If a bond is required, the bond provisions of the Act apply.

Bond provisions are separately found in the Act under each category of tenure:

- residential tenancies ss.31-35
- rooming houses ss.95-98
- caravan parks ss.146-149
- Part 4A parks ss.206K-206R

Bonds must be lodged with the Residential Tenancies Bond Authority ("RTBA") (s.405). Sections 404-439 apply to all categories of tenure.

The Tribunal makes submissions with respect to questions 1, 4, 7-9, 12, 22-24, 27-28 and 31.

General Comments – Rent increases and excessive rent

Rent provisions are separately found in the Act under each category of tenure:

- residential tenancies ss.44-48
- rooming houses ss.101-106
- caravan parks ss.152-159
- Part 4A parks ss.206V-206 ZB

Question 1: "What issues arise from the way in which provisions for bonds in the Act currently balance the interests of tenants and landlords?"

and

Question 4: "How important is it to limit the amount a landlord can charge as a bond?"

The common expectation of parties entering a new tenancy agreement is that the tenant will pay a month's rent in advance and a bond equal to a month's rent. However under s.31 (3) (a), if rent exceeds $350.00 per week the bond a landlord may charge is not limited. That figure has been in the Act since 1997 and $350.00 per week no longer reflects the high end of the rental market.

If the amount of bond were not limited, undue pressure may be placed on low income tenants to borrow money or to "outbid" another contender for the premises. The Director of Housing ("DOH") has a bond loan scheme. The amount available from the DOH may not meet the amount demanded by a landlord if unregulated.

Question 7: "What are the advantages and disadvantages of allowing landlords to review the bond amount for some tenancies every time a new tenancy agreement arises, or when there is a rent increase?"

In s.34, the Act prohibits a subsequent bond unless the rent exceeds $350.00 per week.

Suggested advantages of allowing increases of bond:

- Amount held as the bond better reflects the rental value of premises
- The increased amount provides increased security against loss or damage
- It may be used as additional security where circumstances of the tenancy change. For example, landlords may be more willing to allow a tenant to keep a dog if an extra bond was paid.

Suggested disadvantages of allowing increases of bond:

- The affordability of premises may suffer where rent and bond both increase.
- Tenants may be unable to obtain additional bond money from the DOH
- There would be necessarily additional paperwork for the landlord or agent with potential for landlord to pay additional fees to the agent.

Question 8: "Are there issues with taking a variable approach to bonds, for example in the context of rooming houses, caravan parks and residential parks?

Where a tenant or resident may typically be low income or in receipt of Centrelink benefit, a bond equivalent to two weeks' rent may be more affordable in this type of accommodation. Bonds in rooming houses are limited to 2 weeks (s.96).

Question 9: "What are your views about the current arrangements for claiming and paying amounts from bonds at the end of a tenancy?"

The Act provides that a "landlord" (defined in s.404 to include all tenures) must apply to the Tribunal within 10 business days after the tenancy has ended for an amount of bond (s.417). The Tribunal is frequently asked to extend this time using its power under s.126 *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"). An extension will be granted when the landlord has a reasonable excuse for not complying with the time limits. From the perspective of a tenant, any delay in receiving all or some of the bond may cause financial hardship, especially at a time when money is needed for a new tenancy and moving costs.

There is no time limit in the Act in relation to claims for compensation under s.210.

No application fee is charged for a bond claim. A claim under s.210 for compensation attracts a fee.

Landlords and agents may prefer to attend the Tribunal once only. Where loss is claimed that exceeds the bond, one application may be made for both bond and compensation (ss.418, 419 and 210). This may raise a number of issues:

- a claim that is out of time
- 10 business days may be insufficient to obtain quotes or invoices for works which may lead to a claim that lacks details including amounts claimed
- the landlord or agent may fail to serve quotes or invoices on the tenant as required by the VCAT Rules

While a claim by a landlord against a bond is usually straightforward, the RTBA assumes that all named tenants contributed equally to the amount of bond unless otherwise stated.

Tenants can argue over which of the tenants should receive any sum left after a payment to the landlord. They may also argue that one person in the household was responsible for damage.
However, the Tribunal does not determine issues between tenants and suggests that it may minimise these types of disputes if, on lodgement of a bond, accurate details are given on the lodgement form of how much was paid and by whom.

Also, there may be issues either during the tenancy or at the end of the tenancy about the registered details of who contributed to a bond or in whose name it is held at any particular time.
Increasingly, tenancies are entered into by shared households. This includes students from Australia and overseas. Typically 3 or 4 tenants move in and pay the bond together. If the

members of the household change, it may not be possible to complete a bond transfer, especially if a former tenant has departed Australia. The Act (and the requirements of the RTBA) do not permit a bond to be transferred in the absence of a signature. The Tribunal is not infrequently asked to make a direction to the RTBA to transfer the bond into the names of the current members of the household but this is resource intensive for all. A procedure to allow a transfer by another method such as statutory declaration could be considered.

After a tenancy has ended, Section 416 allows a tenant to claim a bond where the landlord (or agent) has failed to sign over the bond or claim it under s.417. Where a bond is held in more than one name and a previous tenant cannot be located, an application may be made under s.416. That application will seek a payment out of the bond other than to the named tenants equally. Again, that procedure is complicated and time consuming.

Despite the RTBA being in place since 1998, the Tribunal still receives applications from tenants for return of bond where the bond has not been lodged. This presents difficulties. The application is typically made under s.416 and no fee paid. Where the Tribunal cannot make a direction to the RTBA because it does not hold the bond, the order is made against the landlord for compensation. An application for compensation requires a fee.

Question 12: "What other requirements for bonds should be considered for family violence situations?"

The bond is usually held in the joint names of the tenants and each tenant is entitled to half the bond.

Under the family violence provisions of s.233A, the Tribunal may end a tenancy and, under s.233B require a new tenancy be entered into between the landlord and the protected person. Under s.233C, the Tribunal can determine the tenants' liabilities "in relation to the bond "and under the tenancy agreement. It seems this means liabilities to the landlord and items in the premises for which the tenant is responsible eg utility charges .The provisions of section 233C include an attempt to protect the landlord's interests by allowing an inspection of the premises, presumably to find out if there is any damage to the property.

The meaning of s.233C is unclear and does not address the main dispute between the tenants in this situation which is what should happen to the bond. Often the excluded tenant wants their share of the bond to be refunded to them so they can use it to obtain accommodation and the protected person in the new tenancy of the rented premises wants the whole bond to be used for their new tenancy. There has been an increasing number of applications by these tenants for the Tribunal to determine to whom the bond should be refunded and in what sum.

The legislation could provide that if a landlord does not make an application with respect to the bond under section 418 (within 10 working days) and, subject to any determination in the landlord's favour, the bond is to be paid to the tenants in equal shares.
Any argument between the tenants as to their shares of the bond could be met by the previous comments in question 9 that the bond receipt act as an accurate record of who paid money towards the bond and the amount provided by each person.

Question 22: "How effective is CAV's rent assessment process in resolving concerns about a rent increase?

At the commencement of a tenancy, the parties are free to negotiate the rent. However, when a landlord is able to increase the rent, the Act (s.46) grants a remedy to a tenant if the increase or proposed increase is "excessive". Once a tenant has established their family in rented premises, a move in the face of a rent increase is costly and stressful. The tenant may lack bargaining power. The Act (s.45) requires a tenant to first obtain a report from Consumer Affairs Victoria ("CAV"). Leases and tenancy agreements other than residential tenancy agreements must include a formula for rent increases, e.g. 2% per annum, increases at rate of CPI.
In place of a formula, the Act grants a tenant a two-step remedy when they receive notice of a rent increase. A report from CAV may be followed by an application to the Tribunal which considers the factors in s.47(3)(a)-(i). These factors do not include CPI or other formula increases.

In 2015 there were 20 applications by tenants for a declaration that a proposed rent increase was excessive. This number could be compared against the number of CAV rent assessments in that year to better gauge the effectiveness of the process.

Question 23: "What is an appropriate notice period for a rent increase?"

and

Question 24: "What is an appropriate frequency for rent increases? Does this change for longer term tenancies?"

The rent can be increased six monthly and the notice period for the increase is currently 60 days. The Act should clarify that the landlord is required to give a valid Notice of Rent Increase if a tenancy agreement permits an increase during the fixed term or if a new tenancy is entered into by the same parties at the end of a fixed term i.e. the tenancy continues. The ability of a tenant to challenge an increase is based on there being a Notice of Rent Increase.

Question 27: "What issues might arise from the fact that the late payment of rent (i.e. late by less than 14 days) is not currently a reason to allow a landlord to issue a breach of duty notice?"

Payment of rent on the due date is a duty provision for residents of rooming houses. However a rooming house owner typically requires rent via Centrepay. In residential tenancies, collection of rent "on time" is important to the perceived professional expertise of agents who sometimes advertise that "their" tenants pay "on time".
Would making payment of rent a breach of duty (s.207) discourage or stop late payments? The remedy for a breach of duty works very differently from the remedy provided when rent is more than 14 days in arrears. A Breach of Duty Notice must give the tenant a specified time to comply. For example the "required time" under the residents' breach of s.112(1) is 3 days. Section 249 provides the remedy to the landlord of giving a 14 day Notice to Vacate when a tenant has breached the same duty for a third time and two previous Notices of Breach of Duty have been served and the tenant has failed to remedy the breach. There is no

time limit between service of the Breach of Duty Notices. In this event, a tenant could be at risk of eviction if "late" on 3 occasions over many months.

Question 28: "What are the arguments for or against allowing a landlord to claim compensation for incurring financial losses because rent has been paid late?"

A landlord may arrange that rent is directly used to pay a mortgage. The landlord's financial institution may charge a penalty if a mortgage payment is late. There is a clear argument for allowing the landlord to claim the late fee as compensation from the tenant. However there may be more reasons why this could be perceived as unfair or inappropriate:

- it is not a tenant's responsibility to ensure that the landlord's mortgage is paid
- the details of a landlord's financial affairs are not known to the tenant
- a tenant should not be, in effect, penalised for a landlord's "late" mortgage payment
- it may be financially imprudent for a landlord to be so highly geared that a "late" payment of rent causes a late payment of interest.

Question 31: "Why are tenants currently required to pay the transaction costs of using third-party rent collectors?"

The Tribunal refers to s.51(3)(b) and to the decision of I Lulham, DP in *Palmer v Hutchinson* [2013] VCAT 873. If this practice is referred to the Tribunal, the payment is disallowed.