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Tribunal Response – Regulation of Property Conditions in the Rental Market 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.

Introductory Comments

The responses of the Tribunal reflect the issues that arise in hearings conducted by the Tribunal and feedback from the parties. While the Tribunal acknowledges the work done in identifying the competing interests of the parties to a tenancy or residency agreement, it will not revisit the issues already identified in the issues paper

The issues raised in this paper result from cases that have come before the Tribunal in its residential tenancies jurisdiction.

While it may be challenging to define terms and provide examples in the Act, the Tribunal supports this approach. Definitions provide clarity; a benchmark against which to interpret and apply legislative provisions and promote consistency in decision making. They assist to simplify the advice given and the information published by Consumer Affairs Victoria (CAV), advocacy or advisory services. Definitions can be drafted so as to accommodate future changes in housing requirements, for example, they can be prefaced by the word 'includes' and where appropriate, the inclusion of a phrase such as, 'or as determined by the Tribunal'. The provision of examples in the Act, while not exhaustive, is helpful to illustrate the intention or meaning of particular provisions.

The Tribunal makes submissions with respect to questions 1, 4, 6-7, 12-17, 24, 26-28 and 32-35.

Question 1 – To what extent do the rights and responsibilities for landlords and tenants in respect of property conditions strike the right balance?

Whether the rights and responsibilities in respect of property conditions strike the right balance will vary between stakeholders.

The rental market is highly segmented. Property conditions which are considered standard in higher priced rental properties may differ from those in lower priced rental properties.

A tenant may be reluctant or choose not to exercise his or her rights regarding the condition of the property, for fear of being served with a notice to vacate. The protections given to a tenant to pursue his or her rights could be given more emphasis in the Act.

Question 4 – What does the term reasonably clean imply? What would be the advantages and disadvantages of defining it?'

A definition of the term 'reasonably clean' in the Act would set a standard by which tenants, landlords and property managers could assess whether the property, including external areas such as gardens and lawns, satisfy this condition. A definition would assist to clarify the difference between cleanliness and 'unfit for human habitation' (s 226(b)). Any definition of 'reasonably clean' would need to contain a sufficient level of detail for it to be useful. A definition would provide a reference point which could minimise unreasonable expectations and assist parties to reach a

common understanding. The definition could be complemented by including examples based on decisions of the Supreme Court of Victoria and VCAT.

It is difficult for tenants to avail themselves of the remedies under ss 65(2) and (3) of the Act where the premises are not in a reasonably clean condition or under s 226(b) where the premises are unfit for human habitation, as they are dependent upon the tenant taking action based on an individual assessment of the state of the premises. There is no provision under the Act for tenants to apply to the Tribunal to ratify their decisions to exercise their rights under those provisions. It is appropriate that a tenant is able to make an application of this type.

Question 6: Do the current responsibilities for charges related to access to services strike the right balance between landlords and tenants?

Question 7: How should responsibility for access to telecommunications infrastructure be balanced as between landlords and tenants?

There is currently no requirement for a tenant to pay for the installation of services at the rented premises. Where the Act is silent about responsibility for services and charges, the Tribunal has determined that the owner of the property should pay for the improvement of the asset.

The provision of an essential service at the commencement of occupation is the responsibility of the landlord.

The provision of upgraded services is an issue that has been brought before the Tribunal and can include questions such as the availability of cable or broadband internet, the quality of TV reception and whether a landline should be included in all rented premises.

Question 12: If minimum standards are prescribed, how should compliance with the standards be monitored and enforced? What are the barriers to ensuring that a property complies with minimum standards?

The discussion under sections 3.2 and 3.3 of the issues paper encapsulates the issues brought before the Tribunal. Some additional issues and/or barriers for consideration include:-

- Premises in country areas may be without mains water and need to rely on rainwater tanks.
- Tenants express reluctance to leave windows, especially at ground level, open for ventilation and moisture evaporation when premises are unattended.
- Compliance with minimum standards may not prevent mould infestation caused by a tenant's living conditions. For example, where clothes dryers are situated where there is minimal ventilation or clothes are dried indoors.
- It may be difficult for a tenant to prove failure to comply with a minimum standard as this may require the cost of an expert report.

Question 13 – To what extent does the condition report provide an effective means of recording the condition of the property at the start of the tenancy?

Question 14 – What issues does the format, content and timing of the report raise for landlords and tenants, and how might the report be improved?'

The format for a condition report should clearly invite and provide sufficient space for a tenant's comments.

The condition report records the condition of the premises at the start of the tenancy and is used to establish any changes in the condition of the premises or to particular items, if a dispute arises at the end of the tenancy, which may be some years later.

Matters limiting the effectiveness of a condition report include:-

- The practical inability of a tenant to complete and return the condition report within three business days (s 35(2)).
- A tenant may sign a condition report before making a careful inspection of the premises. In responding to a claim at the end of the tenancy, tenants often raise issues about items that they did not record on the condition report as they were not apparent at the time they moved into the premises.
- A tenant may fail to sign and return a copy of the condition report.
- The accuracy of the annotations made by or on behalf of the landlord. For example, in a dispute about an appliance, it may come to light at the Tribunal that the landlord has not tested the appliance before noting on the condition report that it was in good working order.
- Property managers increasingly use photographs taken at the beginning of a tenancy to support comments in the condition report. These photographs typically show wide-angle views of rooms and do not demonstrate specific areas or items which are later claimed to be damaged or unclean. On the other hand close up photos are usually taken at the end of the tenancy of an item for which there is a claim.
- Condition reports do not record the age or initial cost of items (which are subject to depreciation). The Tribunal applies the depreciation scale of the Australian Taxation Office to determine the value of items at the end of the tenancy.
- Condition reports fail to take into account 'fair wear and tear'. The term 'fair wear and tear' is referred to in s.419 (bond claims) of the Act, but the Tribunal allows for fair wear and tear when determining applications for compensation under s 210. Fair wear and tear should be expressly included in s 210. Reference to fair wear and tear should also be included in the condition report.

Question 15 – How should the tenant's duty not to damage a property be further defined? What would be the advantages and disadvantages of defining the tenant's duty not to damage a property in greater detail?

It is unclear why the wording of the tenant's duty to avoid damaging the rented premises in s 61(1) of the Act differs from the wording used in s 61(2). It would be beneficial if a tenant's duty not to damage a property was further defined. Consideration should be given to including the following in any definition:-

- A tenant's duty extends to his or her family and visitors.
- A tenant's duty excludes fair wear and tear.
- The definition should expressly state that damage caused by matters beyond the tenant's control such as, building defects, movement and age, do not constitute a breach of s.61.

Question 16 – Should the same standard of care expected of tenants apply to both the property itself and any common areas?

Section 137 of the *Owners Corporations Act 2006* (the OC Act) specifies the duties of occupiers of lots and tenants are occupiers for the purpose of the OC Act. Section 136 of the OC Act requires that a lot owner give the occupier of the lot a copy of the owners corporation rules.

A lot owner is not required to inform the owners corporation if premises are rented and an owners corporation will typically require the lot owner to pay for any damage to the common property caused by the lot owner's tenant. The lot owner in their capacity as landlord may seek to claim the cost from the tenant. The question then arises whether this is a breach of s.61(2) or a dispute under s 452.

It would be beneficial for stakeholders if there was clarity regarding the areas that depend upon a standard of care.

Question 17: To what extent does the prohibition on malicious damage, and its current interpretation, enable landlords to respond to risks to their property?

Section 243 of the Act should be amended to provide that a notice to vacate must provide full details of the alleged malicious damage. The Tribunal notes that s 243 cannot be used by a landlord where the risk to the premises arises from behaviour that is not malicious, for example, neglect, hoarding, vermin infestation or the accumulation of flammable material.

Question 24 - What are the benefits and limitations of the tenant's current duty to maintain the property by ensuring it remains reasonably clean during the tenancy?

Private landlords or their property managers are entitled to inspect the premises at six monthly intervals. Alleged lack of cleanliness may be reported to the tenant following the routine inspection.

A breach of s 63 of the Act does not entitle a landlord to serve a Notice to Vacate but to make application to the Tribunal for a compliance order following service of a breach of duty notice served under that section. The issues raised in the breach of duty notice are typically those referred to in paragraph 4.5.1 of the issues paper.

Section 26 - How effective are the processes in the Act to complete repairs including:

(a) Is it useful to distinguish between urgent and non-urgent repairs, and if so, how well do the processes prescribed in the Act for undertaking these repairs provide for the differences in each case?

(b) What additional steps could be taken to reduce the causes of disputed repairs?

Applications for urgent repairs are required to be heard within two business days under s 73(2) of the Act which, in country areas, may require a telephone hearing or a listing at a venue some distance from the rented premises.

The process for bringing non-urgent repairs before the Tribunal is lengthy and relies on an inspection and report from CAV.

A tenant's application may incorrectly categorise the repairs or include a combination of urgent and non-urgent repairs. The effect being that the Tribunal will need to adjourn the non-urgent repairs component of the application, to allow for the tenant to obtain a report from the Director of CAV. The application for urgent repairs often acts as the impetus for including claims for any unresolved non-urgent repairs.

Parties typically do not want to attend the Tribunal on more than one occasion.

Though it is useful to define urgent repairs in the Act, consideration should be given to reviewing the definition, particularly s 3(k) which provides *'any fault or damage that makes rented premises, a rooming house, a room or a caravan unsafe or insecure;'* This is broad and largely subjective.

Additional steps that could be taken to reduce disputes as to repairs include:-

- Clarify that tenants in certain circumstances, such as those relating to essential services, have the right to arrange for an urgent repair to be carried out by a qualified tradesman up to a cost of $1800. The landlord should have the option of nominating a tradesperson in the tenancy agreement or as notified from time to time.

- Where a tenant pays for essential services repairs, they should have the right to apply rent money to cover the cost. The landlord and tenant would have the right to apply to the Tribunal, to determine any dispute.

- The majority of landlords in Victoria employ managing agents who could be required to retain in trust an amount equal to a prescribed amount for urgent repairs.

- A tenant should be able to make an application to the Tribunal for a determination as to whether the landlord's breach enables the tenant to vacate the premises under ss 238-240 of the Act.

Question 27 – How effective are our existing processes for addressing repairs and maintenance issues? What additional measures or information would benefit the parties when a repair or maintenance issue arises?

Some additional matters to those discussed in paragraph 4.6.1 of the issues paper include:-

- The Tribunal receives claims made by the tenant for compensation, for failure by the landlord to carry out reported repairs. This claim is often made after the tenancy is ended. A common reason given by tenants to the Tribunal for not pursuing repair recovery during the tenancy is the fear of eviction.

- A landlord may undertake the repairs or ask a relative, friend or general handyman to undertake the repairs. This may result in substandard repairs undertaken by a person who lacks the requisite expertise.

- Tradesmen are usually available at certain times. Apart from ss 85 and 86(1)(c) of the Act, there is no provision in the Act as to how the tradesperson is to be supervised. Agents often give the tenant the tradesperson's phone number so that the tenant can arrange a suitable time and expect the tenant to effectively supervise the repairs. Consideration should be given to clarifying the responsibility of the landlord or the landlord's agent, to be present to supervise tradespeople.

Question 28 – What are the benefits and limitations of the landlord's duties to maintain the property, as currently prescribed in the Act?

The Tribunal generally agrees with the matters discussed in paragraph 4.7 of the issues paper. It wishes to highlight and/or clarify the following:-

- The Tribunal requires repairs to be undertaken in a proper manner, meaning that relevant qualified tradesperson(s) must be employed where required.

- Where a tenant complains about areas or items requiring repairs, the Tribunal may direct the landlord to employ a suitable tradesperson to investigate the complaint and either undertake

the repairs; or where the landlord considers that the tenant is responsible, report the results of the investigation to the tenant. This approach may be adopted where the complaint relates to a pest infestation, mould, plumbing or electrical issues, which are matters that may arise from the tenants living conditions or from defects in the premises.

- Generally, the Tribunal considers the pruning of trees to be the responsibility of a landlord while weeding and trimming bushes is the responsibility of the tenant. The cleaning of gutters, which may be above ground level and/or on common property is generally considered by the Tribunal to be the responsibility of the landlord.

- Tenants have told the Tribunal of fire alarms that have gone off in response to normal usage of kitchen appliances, which has caused a dispute over liability for the cost of the fire service call out. This can amount to several thousand dollars.

- The Tribunal has dealt with a number of disputes where an undetected water leak has resulted in the tenant receiving a water usage bill of thousands of dollars.

- An argument put forward by landlords to the Tribunal is that the tenant did not inform the landlord of the defect, so the duty to repair did not arise.

Question 32 – What are the specific repairs and maintenance needs of parties to a rooming house, caravan park and site agreement, and how well are these needs currently met?

Question 33 – Should different rules be adopted for these type of arrangements, and if so, what should they be?

Premises identified (and registered) as a rooming house are regulated under ss.142B, 142BA and 142C of the Act.[1]

A rooming house is defined in s.3 of the Act to include a building where there are one or more rooms for rent in which the total number of people who may occupy those rooms is not less than four. The effect is that premises where rooms are let or sublet to four or more people will be subject to the rooming house provisions of the Act.

The Tribunal has dealt with cases of overcrowding in rooming houses where conditions and facilities are substandard. The rooming house owner (as defined under the Act) may claim by way of defence to be unaware that they were operating a rooming house or that rooming houses are regulated under the Act.

Caravan parks typically provide accommodation or sites for residents under the Act and also for annual visitors and holidaymakers. Tensions and issues can arise between different occupiers in relation to facilities and maintenance, such as disputes regarding the closure or restriction from use of recreational facilities, car parking and operation of boom gates.

Question 34 – 'What issues (if any) does the absence of an explicit duty relating to the condition of a rental property at the end of the tenancy raise for landlords, tenants and property managers?'

Disputes often arise from the landlord's expectations regarding the condition of the premises at the end of the tenancy. The Tribunal considers the condition of the premises to be subject to fair wear and tear, taking account of the length of the tenancy and quality of the premises at the beginning of the tenancy. This standard could be made explicit, so as to avoid or minimise unreasonable and unrealistic expectations.

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[1] See commentary in *VCAT – Annotated Residential Tenancies Act 1997* published by ANSTAT.

An issue not raised in section 5 of the issues paper, but worth highlighting relates to Part 10A of the Act - Residential tenancy databases. Tenants have expressed to the Tribunal apprehension about being included in a database which may be accessed as part of the process of applying for a future tenancy.

The Tribunal has been informed by tenants that an application for tenancy usually includes the question 'Have you ever had a deduction made from your bond?' The form only provides for a 'Yes' or 'No' response, without any further explanation. A deduction from the bond may have been made by consent of the landlord and tenant, for example, where there has been for an accidental breakage. The inability of the tenant to explain the circumstances giving rise to the deduction, may impact adversely on a tenant's ability to secure a new tenancy.

Question 35 – How effectively do the current remedies in the Act address problems relating to property conditions and standards? What alternative or additional tools or initiatives could assist parties to independently resolve disputes?

It would be beneficial if the Act clearly defined terms and set out property conditions and standards based on modern community expectations. This would allow parties to assess whether one or the other was complying with their obligations based on a relatively objective standard. It would also assist to more effectively managing the expectations of landlords and tenants; encourage parties to independently resolve disputes; and minimise the escalation of disputes to the Tribunal. An information or advisory service provided by CAV which parties could use to check whether certain standards have been met or a duty breached, could also be useful.

The Tribunal also suggests that clarification in the Act of the rights and duties of a landlord and tenant may be helpful. For example, the principle that a landlord gives up possession of premises in return for rent can be misunderstood or difficult for some landlords to accept. Some tenants mistakenly believe that they can repaint premises with their choice of colour, attach stickers or insert picture hooks without the landlord's consent or without liability to the landlord.