



Response to
**Laying the Groundwork – Residential
Tenancies Act Review Discussion Paper**

August 2015

Yes, what else but home?
Robert Frost

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Abbreviations

Throughout this submission many abbreviations are used which we have tried to summarise below (apologies in advance for any omissions):

ACL	Australian Consumer Law [or Australian Consumer Law & Fair Treading Act 2012]
ACLFTA	Australian Consumer Law & Fair Treading Act 2012
CAV	Consumer Affairs Victoria
OCA	Owners Corporations Act 2006
RTA	Residential Tenancies Act 1997 [also referred to as the Act or RTA (VIC)]
RTA(NSW)	Residential Tenancies Act 2010 (NSW)
RTA(QLD)	Residential Tenancies And Rooming Accommodation Act 2008 (QLD)
VCAT	Victorian Civil & Administrative Tribunal [also referred to as the Tribunal]
VCATA	Victorian Civil and Administrative Tribunal Act 1998

Response to Questions

The Discussion Paper poses seventeen questions which our submission addresses in broad detail. However, based on our submission we provide the following summary answers to the questions posed.

1. Does the current Act enable and encourage a rental market that provides sustainable, secure and safe housing to Victorians? Why or why not?

Numerous research studies and the common experience of most tenants indicate that the market does not deliver sustainable secure and safe housing for renters, in particular for renters on low incomes or with other forms of social disadvantage. The Act in its current form has only a very modest effect on the operations of the private rental market and the success of social housing is largely dependent on policy settings that provide significant additional protections.

2. (a) What issues would you like examined in the Review of the current Act?

The Review of the Act provides an opportunity for comprehensive amendments to enhance the protection of tenants as consumers and to better regulate the provision of rented housing as a basic necessity.

(b) What are your preferred outcomes, and what evidence base is there to support them?

Housing is a valuable social resource. It is the most basic building block of home and an essential platform for proper social and economic participation. Reliance on rented housing should not mean second-class treatment or outcomes. Across the world, many countries or regions within countries, have significantly better outcomes for tenants in terms of accessibility, affordability, security and quality. It is possible to achieve better outcomes if the legislative framework is clearer and more robust in its intent.

3. (a) Are the principles and objectives underpinning the current Act relevant today? Why or why not?

No. The current purposes of the Act are generic and simply reflect a functional imperative to describe the relative rights of parties. Greater reliance on the rental sector as a provider of long-term housing will require purposes that are broader and more rights focussed.

(b) Given current trends, what principles and objectives do you think will be important in regulating the rental sector in the future?

The overarching principal for reform of the Act should be better protections for consumers of an essential human need to ensure greater security and choice.

The objectives of reform should be:

- > To ensure rented housing is of decent standard consistent with current community expectations,

- > To reduce access barriers to rented housing particularly relating to discrimination and cost;
- > To improve affordability of rented housing;
- > To enhance the experience of living in rented housing;
- > To reduce unnecessary evictions.

4. What is working well about the current Act and what needs to be improved?

The current Act is probably superior to reliance on the ordinary common law. However, the current Act is most effective at providing a simple and efficient process for eviction. This is the purpose of most applications to VCAT. The current Act does not provide effective remedies for the common problems experienced by most tenants.

5. What can Victoria learn from the approach to the regulation of residential tenancies in other Australian jurisdictions and internationally?

As noted above, many countries or regions within countries, have significantly better outcomes for tenants in terms of accessibility, affordability, security and quality. These outcomes are underpinned by more robust legislative requirements which drive market change.

6. What are the challenges and barriers to reform of the rental sector?

The most significant barrier to legislative reform is the hysterical reaction of industry and investors to any change. Despite numerous research findings that tenancy law reform has a negligible impact on investment patterns and investor decisions, every single attempt at reform has been greeted with the standard response that rented properties will be sold and rents will go up. Significantly better outcomes based on more robust protections are possible in the German rental sector, which has a very similar market structure to Australia. Small landlordism does not need to be barrier to reform but industry fear mongering may unnecessarily defeat an evidence-based approach.

7. What considerations need to be given to the regulation of rooming houses, caravan parks and residential parks?

Both of these rental sub-markets have their particular dynamics and requirements. However, a general principle should be to standardise the consumer protections across the tenures where possible. The old excuses about residents being more mobile in these sub-markets should to be set aside.

8. (a) What are the key issues for regulating the private rental sector that arise from the:

- (i) growing number of families and proportion of older tenants
- (ii) tenants renting for longer periods, and
- (iii) decreasing proportion of tenants renting in multi-unit properties (flats, units or apartments), especially given the increasing proportion of households living in multi-unit properties more generally?

These trends in the rental sector indicate that the previously simple housing careers for many Australians have broken down. As has been noted, this will mean more households reliant on rented housing for more significant periods of their life than ever before. Other social and economic trends indicate that this reliance on rented housing is unlikely to diminish in the foreseeable future. We do need to be cautious about over estimating the effect of increasing proportions of tenants in detached or semi-detached dwellings. There remain a

number of issues in multi-unit tenancies that the current law does not address effectively. The law will need to respond more effectively to both situations.

(b) How should residential tenancies regulation take into account these trends in the private rental sector?

Based on our research and experience, all tenants want better security. However this should not be misunderstood as every tenant wanting to live in the one premises for a long period. The majority of tenants value mobility and choice. Tenants simply want more control over when they are compelled to leave their rented home.

Many issues can cause housing insecurity within a tenancy not just the formal notice to vacate and eviction process. Rent increases, neighbour problems and poor conduct by landlords and real estate agents also create insecurity. Reform of the current tenancy law across a range of areas will be needed to enhance rental housing security.

9. How do changes in tenant mobility impact on the current balance of rights and responsibilities between landlords and tenants?

The common practice of compelling tenants to sign fixed-term agreements at the commencement of a tenancy is simply creating disputes when tenants are required to move. Even with the relatively short 12-month fixed-term agreements the level of lease breaking is relatively high. In particular, when reducing a fixed-term for reasons of hardship due to unforeseen circumstances, a tenant is still required to compensate the landlord rendering these protections largely useless. The review should examine the practice of requiring tenants to enter into fixed-term agreements, the cost of breaking an agreement when a tenant is required to move and the complexity of assigning tenancies.

10. What situations trigger issues of affordability in the rental housing sector, and how do these affect tenants and the choices they make?

Numerous studies, going back to the Henderson Inquiry into Poverty in 1975, have indicated that the most significant affordability problem is amongst low-income households in the private rental market. Affordability is a product of low incomes relative to rents. Access barriers mean that many tenants are often required to contract into tenancies that are unaffordable. In addition, many events can arise during the course of a tenancy that further exacerbate affordability such as the loss or reduction of employment or a rent increase. The clearest indication of these problems is the high level of application for eviction and orders for possession for rent arrears at the VCAT.

11. From a tenant's perspective, what role does residential tenancies regulation play in enabling access to rental housing?

The current Act has express provisions that are intended to reduce overt discrimination and to regulate tenancy databases, both of which affect access to rented housing. Database operators are continuing to engage in practices to subvert the intention of the regulation. The inter-relationship between redress under the Equal Opportunity Act and redress under the Residential Tenancies Act needs to be clarified and improved to provide practical means of addressing some access issues.

At a deeper level the regulation is currently allowing practices, such as rental bidding, that may exacerbate existing access barriers.

12. How do investor trends affect the current and future management of tenancies and the availability of rental housing?

Current trends seem to indicate an increasing level of investment in rental housing including investment levels that may lead to an oversupply of rental

housing in some sub-markets. Unfortunately demand is not sufficiently flexible or mobile to absorb the oversupply in these sub-markets. No amount of one bedroom studio apartments in Docklands is going to satisfy the demand for detached rented housing for families in middle ring suburbs where housing will continue to cycle through different tenures. Current trends are largely driven by existing taxation and superannuation arrangements that may be subject to change. At best, the patterns of investment are so variable that they would be a poor guide to market conditions in 5-10 years' time.

The basic issue remains that irrespective of the quantum, the rented housing that is supplied must be better regulated.

13. From a landlord's perspective, how does residential tenancies regulation influence the ongoing supply of rental housing?

This question has been addressed in a number of Australian research studies and the answer has always been the same – residential tenancies regulation is largely irrelevant to investor decision-making, which is much more affected by desire/capacity for capital gain and tax reduction. This question is like the zombie of Australian housing policy – you can't kill it off no matter how much it's debunked!

14. How do estate agents influence the relationship between landlord and tenant, and what implications does the increasing use of agents as property managers have for residential tenancies regulation?

Professional property managers should be of benefit to both landlords and tenants. Whilst the agent's primary role is to represent the landlord, their knowledge of tenancy law and professional practice should act to minimise disputes. Unfortunately this is not the case in many residential tenancies. The high turnover and apparently limited training and supervision mean that many property managers do not properly understand the legal requirements for residential tenancies and often exacerbate or even cause disputes. There is no evidence that estate agent managed properties are any more likely to be successful tenancies than those managed directly by landlords.

15. What more could be done, or what could be done differently, to enable landlords and tenants to effectively manage their tenancy relationship?

From a tenant's perspective the law needs to be better focussed on consumer protections, and the processes simplified significantly to encourage tenants to deal more directly and transparently with their landlord. In essence, the law has to better address the power imbalance between the parties at all stages of the relationship.

16. Are the current arrangements for resolving disputes and providing access to redress for both landlords and tenants sufficient, or are other mechanisms needed?

The basic presumption of the Act, that the parties will obtain compliance through the redress procedures outlined has proven to be flawed. For a range of reasons tenants are demonstrably disinclined to use the formal steps outlined in the Act, particularly final recourse to VCAT. This aversion extends to claims and applications made by landlords. In addition, the interpretation of the law by VCAT has become more complex and idiosyncratic so that reliable advice to tenants about the outcome of any VCAT Hearing is difficult. Many tenants that do appear have less than satisfactory experiences that make them disinclined to either apply or appear again. The failure of the current dispute resolution processes encourages inappropriate self-help behaviour by tenants and landlords. For example, many tenants are still reluctant to pay their last month's rent due to the common experience of trying to regain their bond in a timely manner.

17. What factors contribute to tenants exercising, or not exercising, their rights?

The basic problem is that most tenants feel insecure in their rented housing. Tenants do not want to take any action that will invite retaliation by the landlord compromising their current housing and potentially creating a bad reputation for future tenancies. This feeling of insecurity is pervasive but affects low income and other disadvantaged tenants more significantly as the relative costs of eviction or relocation are more difficult to manage. The Review of the Act provides a very important opportunity to modernise the tenancy law, providing better protections for tenants to improve housing outcomes in the rented sector.

Our family have been in rented accommodation in Switzerland, South Africa, Czech Republic, Hong Kong and Jordan. What Australian would imagine, I wonder, that all those experiences were measurably better than our experience here? Certainly it was a huge shock to us. Ironically both my husband and myself have been landlords, in the UK. We let out our flats when we first travelled overseas. We diligently observed our obligations to our tenants, hired reputable agents and had no issues at all. Tenants' rights here are in the dark ages aren't they?

Introduction

The Tenants Union of Victoria welcomes the opportunity to respond to the Laying the Groundwork Discussion Paper.

Our submission is presented in two parts:

Part A which looks at broader issues and problems from the perspective of critical events in a tenancy; and,

Part B which takes a more detailed look at other provisions of the Act that are not working effectively.

In our submission we have tried to lay out the broad range of issues that the Review should engage with if the law regarding tenancies is to operate more effectively into the future.

The submission is based on the everyday experience of many tenants and we have provided examples of common experiences and real enquiries from tenants throughout the body of the submission.

We have not gone into a high level of detail in relation to every recommendation as we understand that there will be further Discussion Papers that will allow for many issues to be examined more deeply. However, we have tried to provide sufficient detail to give a good indication of the direction of any proposed reforms.

Part A: Context

Based on current research the social context for residential tenancies can be summarised as follows:

- > Many households and individuals are spending longer periods of their life in the rental sector, particularly in the private rental market. The relatively quick transition from parental home to home purchase has been significantly deferred.
- > These longer periods in the private rental market may be interspersed between periods of home purchase (or ownership) largely as a result of household formation and dissolution.
- > Following a significant period of targeting to public housing, access to public housing in particular remains very difficult and the number of allocations per annum (excluding internal transfers) has stabilised at about 5%.
- > As housing of last resort, discretionary exits from social housing to the private rented sector or home ownership are relatively small. If anything, intergenerational reliance on social housing is increasing. Forced exits (evictions) from social housing are relatively high considering the detriment to the persons affected.
- > Those households that are now reliant on the private rental market include a significant number with moderate incomes and the majority of households with people of working age on fixed or low incomes.
- > There have been relatively few periods when the general vacancy rate was above the level considered to be a balance between supply and demand and which would give some tenants in the market greater bargaining power.
- > The main complaints from tenants remain; failure to do repairs, getting the bond back, lease breaking, receiving a notice to vacate, privacy, rent increases and claims for compensation (against both parties). These problems account for more than 50% of the enquiries we receive and have since the inception of the Residential Tenancies Act in the early 1980's.

I'm after some advice regarding my lease. My brother Peter & I were leasing a property in Docklands but were having issues with our agent. We reported repairs which were never fixed. We also had an issue with the tempering valve in the property which was faulty. The water wouldn't stabilise and would switch from hot to cold, and it was really hard to shower, as we scolded ourselves a few times. Due to that I was going to a hairdresser to have my hair washed. The agents were in no hurry to have this repaired. This went on for 2 weeks, of us arguing with them to get it repaired. During this time, the stress was just too much for me. I was suffering migraines daily, having trouble breathing, heart palpitations as well as acne breakouts due to this situation. And since I have multiple sclerosis the extra stress didn't help. I had to

take myself out of this situation, so Peter & I decided to break the lease. We have paid the advertising costs to the agent and stated we would pay what we owe once a new tenant is found. We have noticed since, that even though the property is being advertised online, they are not holding any open inspections. Don't they need to hold open inspections? We have no way of knowing if they are holding any inspections at all. We have attempted communicating with them, and sent them emails but they just ignore us. At the final inspection the agent said she was happy with the condition we left the property in, and would forward us a bond form. This was never done. So we pre-filled out a bond form & emailed it to them but it was never lodged nor did we receive a reply. Are they allowed to do this? We were also asked to sign a blank bond form which we refused, and asked to not disconnect the electricity till a new tenant was found. This didn't sound right to us. We have retained all emails and documentation from our communications with them. We have also had to put our things in storage which we pay monthly, and had to impose on our parents by moving in with them till this is settled. We can't look for another place until this is sorted out. What are our options here? What can we do about this?

The rental sector, particularly the private rental market is characterised by a high degree of housing insecurity. The average tenancy is less than 18 months and many of tenancies end in unwanted evictions. The primary causes of this insecurity are:

- > High costs relative to incomes, particularly for those renting households with low incomes. The greatest housing affordability problem in Victoria (and Australia) is for low income private renters. This problem manifests in a high level of evictions for rent arrears.
- > A plethora of reasons for which vacant possession of the premises can be obtained including possession for “no reason” at all. This creates a constant sense of insecurity which has a stifling effect on tenants exercising their rights. The protections against retaliatory eviction are woefully inadequate in most circumstances due to the narrow construction of those protections and the high evidence barrier required to prove retaliation.
- > Market based rent increases that bear little relationship to costs but often result in financial “shocks” for tenant households. This creates crisis points for many tenants in which they have to choose between the high cost of moving and the capacity to pay increased recurrent costs.
- > Persistent problems with the conduct of landlords and real estate agents including failure to do repairs, invasions of privacy etc. Many tenants respond to these problems by ending the tenancy, even where this involves breaking a fixed-term agreement rather than persevere through the protracted resolution processes required by the Act.
- > Breakdown of relationships in joint tenancies or group households including family violence.

In an efficient and effective market many of these problems would be corrected over time by tenants moving to landlords providing better quality service and leaving poor performing landlords with vacant premises. However, persistent problems within market segments and cycles, including chronic access problems for low income and disadvantaged households, mean that there is a steady stream of demand in most market segments irrespective of poor performance. This problem is most starkly illustrated by the emergence of marginal forms of

housing such as rooming house and long-stay caravan park occupancy to soak up the excess demand that the mainstream market is incapable of absorbing. There is virtually no record of the rental history of landlords or property managers so tenants cannot even protect themselves from poor conduct by review or diligence. The result is that after many reforms to the residential tenancies law the top five complaints we receive from tenants stubbornly remain. Each of these persistent problems will be addressed elsewhere in our submission.

The residential tenancies law needs to properly engage this reality rather than try to pretend that market cycles, supply or reciprocal rights will correct these problems.

Principles for law reform

Given the history and social context of residential tenancies law in Victoria, it is important that any reform of the law is guided by some clear principles.

At a high level the Tenants Union believes that the guiding principles of reform should be:

- > To adequately protect tenants as consumers of rented housing and recognise the social importance of home
- > To reduce rental housing insecurity without frustrating tenant's ability to respond to changing circumstances
- > To promote fair renting practices in the market irrespective of market cycles and segments
- > To encourage an efficiently functioning rental market where poor service has clear market consequences.

Whilst the legislation should be a universal piece of consumer protection, it should be recognised that many of the consumers in the market are low-income and disadvantaged with particularly constrained capacity for exercising choice and limited market power.

Purposes of the Act

The current purposes of the Act are framed in a very generic manner. In effect, the Act could have 2 or 2,000 provisions or be unfairly or fairly weighted to the respective parties and still satisfy these vague purposes.

By contrast to other similar legislation, the Act makes no overt reference to a consumer protection purpose. This is ironic in terms of both the amounts of money involved in a rental transaction, and the importance of housing as a necessity and the social significance of home.

R1. The current purpose of the Act should be subordinated to a broader over-arching purpose such as:

The purpose of this Act is to ensure that tenants have appropriate rights and protections and to encourage fair and efficient practices for residential renting.

Structure of the Act

We support the current structure of the Act whereby all of the relevant tenures are contained in the one piece of legislation.

However, we believe that within this structure there is significant opportunity to rationalise provisions by applying best practice in each similar provision to all tenures, with the necessary changes. For example, the tenant's right to quiet enjoyment should provide an equivalent protection in each tenure. It is ironic that rooming house residents appear to have a stronger right to privacy than residential tenants even though the latter has a grant of exclusive possession and the former has a residency right (or statutory licence).

On this basis, there would be some expanded general rights and duties shared across all tenures and only the specific exceptions would need to be provided for in the respective Parts.

In addition, whilst Part 4A residents remain site tenants we cannot see any compelling policy rationale for extracting these provisions into another enactment.

General Procedure

The general procedure under the Act could essentially be summarised as follows:

- > Articulation of the respective rights and duties of the parties
- > A method of redress if either of the parties does not comply with a duty usually commencing with a formal notice to the other party
- > In most instances, final determination by the Tribunal if matters are unresolved.

This basic procedure seems to be founded on the belief that the parties have relatively equal power and that the most effective way to ensure compliance with the Act is to enable the parties themselves to seek redress.

However, as noted above, long experience with this general procedure has illustrated that tenants are very reluctant to follow the formal steps required by the Act particularly final determination by VCAT. This feeling is so pervasive that tenants very rarely attend VCAT even when they are a respondent and the matter involves a claim against them.

For example, enquiries regarding repairs are vastly disproportionate to either the number of repair inspections undertaken by CAV or to determinations made by VCAT. We do not believe that these enquiries are academic in nature. They are more likely to relate to specific repair problems that remain unresolved. Theoretically, all of these problems should be capable of resolution by simply following the required steps. Yet rented housing remains far more likely to have significant repair problems or structural defects than owner occupied housing¹.

Interestingly, applications to VCAT by tenants have remained stagnant in real terms by contrast to significant increases in complaints to industry ombudsman schemes in a number of different consumer contexts. Residential tenancies

¹ ABS (1992), Housing Characteristics and Decisions: A comparative study of Sydney, Melbourne, Adelaide and Canberra 1991.

seem to be immune from the outbreak of consumer complaints evident in these other consumer jurisdictions.

Exclusions

The Act has many long standing exemptions and exclusions. We are particularly concerned about those outlined below:

Agreements of more than 5 years

The current exemption of the application of the Act that applies to fixed term tenancy agreements of more than 5 years has very little practical effect as long fixed term agreements are rarely offered by landlords. However, if longer fixed term agreements were to be encouraged or offered this exemption would be problematic.

Whilst longer fixed term agreements could stipulate terms and conditions that mirrored the current legislative provisions (as is essentially the case with most agreements) it is unlikely that these could have the effect of conferring jurisdiction on VCAT for dispute resolution purposes. As VCAT is a creature of statute then this power would need to be expressly clarified.

It would be simpler to repeal this exemption which lacks any rationale and may frustrate other efforts to enhance security of tenure through longer fixed term agreements.

R2. The current exemption under section 6 of the Act should be repealed.

Joint tenancies

Many of the common problems in the rental sector arise from the inability for individual interests to be severed from a joint tenancy.

This problem has been partly addressed in the family violence provisions in the Act, through the ability of VCAT to terminate an existing agreement and create a new agreement on the same terms and conditions. However, this is a blunt and very specific power.

Whilst group housing has declined as a proportion of all residential tenancies this is largely as a result of other household types becoming more prevalent in the market rather than any particular decline in shared housing per se. It is also likely as the generational wave of longer term renters washes through the market that group housing will increase. In this context, the current complex and slow process for assignment of joint tenancies is not fit for purpose.

Common problems are:

- > Confusion by all parties about the correct steps to be taken to properly effect an assignment
- > Confusion about whether consent has been given and assignment effected simply by lodgement of a bond transfer
- > Long delays in communicating whether consent is being given or not frustrating both the assignment and the ability for the tenant to take further steps
- > Frustration of assignment, particularly in periodic tenancies, by the breakdown of the relationship between the joint tenants

- > Uncertainty about the timing and process of bond payments between incoming and outgoing tenants
- > Consequential difficulties unravelling lawful and unlawful assignments to ascertain liabilities and determine bond refunds.

The complexity of the process of assignment in joint tenancies means that all parties try to work around the process obstacles in ways that often create further problems or are legally dubious. This is not helped by the lack of consistency about how real estate agents approach this problem.

For example, it remains unclear what the legal effect is for all parties of the practice of simply crossing out the name of one party to a written agreement and adding another name.

We believe that the resolution of many of these common problems would be made easier if VCAT at least had the clear power to sever an interest in a joint tenancy agreement in certain specifically defined circumstances. This would require a clear power to deal with disputes between joint tenants and particular types of orders that VCAT would be empowered to make.

R3. The Act should be amended to give VCAT express powers in certain circumstances to sever an interest in or unilaterally terminate a joint tenancy and make consequential orders to give effect to the severance or termination.

Rented Housing Standards

Unlike many other common consumer transactions there are no minimum standards that apply to the quality of all rented premises. This was confirmed by a comprehensive research project undertaken by the State Government in 2007.² Where superior Courts have examined implied warranties or a landlord's general responsibility for safety they have established a very low level of duty required to the tenant with no specific responsibility to ensure that a premises is safe prior to letting.

In Victoria there have been a number of instances of death or injury in rented premises within the last decade related to the standard of the premises including the fixtures or appliances provided. These situations have involved various housing elements including pool fences, fire safety equipment and faulty gas heaters. There are also commonly occurring problems with chronic dampness and other structural defects. Both VCAT and the superior Courts have also interpreted the landlord's duty to maintain the premises in good repair very narrowly taking into account the age and general state of repair of the premises rather than any specific problem or defect. Consequently, previous research by the Australian Bureau of Statistics has indicated that rented premises are significantly more likely than owner occupied dwellings to have structural defects and require major repairs³.

In addition, as energy and water regulators have increasingly used price as a signal to moderate consumption, the efficiency of appliances provided by the landlord is a source of additional cost to a tenant. Whilst the consumption of low-

² Ernst and Young (2007), Minimum Amenity Standards In Private Rental Accommodation

³ ABS (1992), Housing Characteristics and Decisions: A comparative study of Sydney, Melbourne, Adelaide and Canberra 1991.

income households is generally less than higher income households, low-income households with inefficient appliances are forced to pay proportionately higher costs for basic and necessary supply. Upgrading of rented premises is lagging behind owner occupied premises and rented premises have been underrepresented in all retro-fit schemes.

In the context of longer term renting, this anomaly with rented housing needs to be addressed.

The minimum rented housing standards should at least incorporate the following categories and elements:

Health

- Building must be weatherproof
- Building must be maintained without risk of damp
- Building must be vermin proof (no structural defects enabling infestation)
- Flyscreens on all opening windows
- Adequate lighting (preferably by natural light)
- Adequate ventilation
- Running hot and cold potable water
- Adequate waste provision (such as rubbish bins)

Safety

- Building must not be a fire hazard
- Approved gas (if available and connected) and electricity connection
- Appliances maintained in accordance with relevant standards
- Single action deadlocks installed on all external doors and window locks on windows
- Adequate electrical outlets
- Electrical safety switches
- Hard wired smoke detectors

Efficiency

- A minimum level of thermal insulation.
- Access to at least one form of in built heating (in the main living area) with a minimum energy efficiency standard
- Efficient and properly installed cooking appliance
- Efficient and properly installed hot water system
- Dual flush toilet
- Water efficient shower heads
- A basic level of window covering

Rented housing standards are not about:

- > Mandating high quality, or even new, appliances. The only requirement should be a reasonable health, safety and energy efficiency rating.
- > Mandating high levels of amenity- clearly lower cost rental properties are going to have less in the way of internal and external amenity than higher cost ones (quality curtains, floor coverings, gardens and other fixtures). Minimum standards are about basic human habitation standards and not about high cost amenity.
- > Forcing owners to regularly invest in their properties. While landlords are likely to benefit from regular investment and maintenance, minimum standards are not about planned repair or upgrade. In almost every case the required standards will result in a one off cost with long lasting benefit to occupiers and owners.

The proposed minimum standards essentially create a floor under which it is not lawful to rent out residential premises similar, for example, to a roadworthy certificate for a motor vehicle. It does not mandate that everyone gets a Ferrari!

The process for adopting minimum rented housing standards should be as follows:

- > Amend the Act to provide a broad power for the Minister to make regulations for minimum standards for all residential tenancies.
- > Establish the initial minimum standards to be specified in the regulations and incorporate the current standards for moveable dwellings and the minimum standards for rooming houses.
- > Amend the Act to provide for both an offence for noncompliance with the relevant standards and a duty to comply with the relevant standards. This means that a landlord (including a rooming house, caravan park or caravan owner could be both prosecuted by the regulator for non-compliance and a tenant or resident could seek a compliance order and be compensated if the non-compliance caused them to suffer a loss.
- > Provide a reasonable length of time for all existing properties to transition to the new minimum standards. This could also be staged as, for example, after two years the premises must meet the standards for each new letting and then after five years all premises must meet the standards. This transition is important for reducing the likelihood that compliance requirements will be gamed into rent increase for sitting tenants.
- > Provide either a grants or loans program for those landlords that are asset rich but income poor and can demonstrate a need for financial assistance. The grants or loans should be subject to terms and conditions that restrict profiteering and discourage churning of tenancies. Again this is important to reduce the likelihood of withdrawal of supply in the low-cost market segment.

We do not believe that the minimum standards will have a deleterious effect on rents for a number of reasons:

- > Minimum standards of habitation, though poorly enforced, existed in Victoria up to the late 1990's so much of the established housing stock would have been built to comply with these health and safety standards and should not require major structural modifications
- > The standards are minimum standards and the expectation would be that significant retrofitting for compliance would only be an issue with a small number of rented properties.
- > The rented properties affected will still have to compete in the market at essentially market based rent levels. A poor quality one bedroom dwelling compliant with the standards will still rent at about the same level as any other poor quality one bedroom dwelling in the same location.
- > Elsewhere we have discussed changes to the existing rent assessment methods to better regulate rent increases for sitting tenants. Under our proposed changes, landlords would have to make a compelling case that any increase to a sitting tenant was consistent with the actual costs required for compliance.

Tenure Security

Tenure security is considered to be important as longer-term stable residency enables people to construct a home and make connections to their community that facilitate social and economic participation. Tenure security is seen as a problem when people are not able to ensure sufficient security to achieve these purposes.

Strictly speaking, tenure security, relates to the ability of the landlord to end the tenancy agreement. On this strict definition, fixed-term tenancy agreements seem to offer the greatest level of tenure security for tenants but this security has other undesirable consequences. Hence, even with the relatively short leases offered currently, lease breaking, and the associated costs, is a major issue for many tenants.

It should be noted that there is no limitation on the ability to offer or accept longer fixed-term agreements now. The current exclusion under the Act for fixed term tenancies of more than five years does not prevent tenancies being offered from zero (i.e. periodic to begin with) to 5 years but these are rarely offered or negotiated and most tenants do not believe that they can negotiate such agreements.

Tenure security, more generally speaking, is about the ability of tenants to control the termination of the agreement. Tenure security, as it is more generally understood, is affected by many factors including the conduct and circumstances of both parties. It is not just a simple issue of whether there is a fixed term tenancy agreement or not. This common misunderstanding has the potential to do more harm than good.

Problems with security of tenure (both strictly and generally understood) are evidenced in a number of ways:

- > The most common fixed-term agreements offered are for 12 months and it is very difficult for a tenant to secure a fixed-term agreement for a longer period of time (i.e. it's hard to get better security of tenure strictly understood)
- > The average length of tenancy is now about 15 months (i.e. actual tenancies are relatively short)
- > Whilst rates of movement within one year have declined the overall mobility of tenant households is significantly greater than the same households in owner occupation (i.e. tenants tend to move more than other tenures)
- > The number and proportion of applications for possession to VCAT are relatively high (i.e. a significant number of the moves are involuntary).

We believe that improving tenure security in its general sense will require a range of changes to the tenancy law including:

- > Ensuring the Act and the relevant dispute resolution processes apply to the tenancy agreement irrespective of the term of the tenancy offered or the length of occupation
- > Better regulation of rent increases for tenants during continuous occupation
- > Easier options for the resolution of common breaches of duty by the landlord particularly getting repairs done and invasions of privacy

- > Tightening the conditions under which tenants can be evicted for no fault including abolishing all no-reason notices to vacate.

However recognising that many tenants value the mobility opportunities provided by the private rental market any enhancements that improve tenure security must be done in a way that doesn't diminish or frustrate voluntary mobility.

What is needed is less compulsion for tenants to enter into useless fixed-term agreements, more willingness to negotiate agreements that suit the tenants' circumstances and less readiness to terminate those agreements when there is no-fault on the part of the tenant.

Based on what tenants tell us, better tenure security will mean that many tenants will want to move less often (like similar households in owner occupation) but they will still need to respond to changing circumstances in a manner that is not costly or complicated.

Family Violence

We have previously made recommendations to the Family Violence Royal Commission about changes to the residential tenancy law that would benefit those experiencing family violence.⁴

In addition to the recommendations contained in that submission we would add the following comments.

A tenant can be given an immediate notice to vacate under section 243 of the Act if they or their visitor causes malicious damage to the rental property. A victim of family violence could be given this notice to vacate as a result of the perpetrator committing family violence if this led to the rental property being damaged. As this is an immediate notice to vacate, this could lead to a victim of family violence being made homeless due to an event beyond their control.

- R4. Section 332 of the Act should be amended to state that a possession order must not be made if the notice to vacate has been given to a tenant who has experienced family violence and the malicious damage referred to in the notice was caused by the perpetrator of the family violence.**

The current provisions of the Act relating to locks for rented premises subject to an intervention order do not address locks and keys in common areas controlled by an Owners Corporation such as garage or storage keys.

- R5. Section 70(A) of the Act should be amended to provide that an excluded tenant must return any keys to the landlord or real estate agent including keys to the common areas.**
- R6. Section 70(A) of the Act should be amended to include that the owners corporation must not give an excluded tenant a key to any common areas.**

⁴ TUV (2015), Submission to Family Violence Royal Commission

Discrimination

We continue to have fairly persistent reports of discrimination against tenants with protected attributes identified in the Equal Opportunity Act.

These reports include problems with accessing rented housing, with responses from landlords and real estate agents during the tenancy and with termination of tenancy.

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 cannot be considered by the VCAT at challenge or at possession order stage. The process under the Equal Opportunity Act will generally not run its course until after eviction has been effected.

R7. 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.

In the alternative, VCAT could be specifically empowered to consider the lawfulness of actions generally, including claims of discrimination, when hearing disputes under the Act.

Offences

Whilst the primary means of ensuring compliance with the Act is through compliance action by the parties, offences are nevertheless important to provide an active disincentive for unlawful conduct.

In order for these offences to work effectively there must be:

- > A penalty of significant quantum to act as genuine deterrent, and,
- > A real prospect of being investigated and prosecuted for the offence.

Despite changes to the quantum of offences under the Act in 2008, the quantum of many penalties lags behind the level of penalties in other consumer protection legislation. This sends a strong message to the primary parties to residential tenancies agreements and to prosecutors and judges that the law itself does not take these breaches very seriously.

For example:

MOTOR CAR TRADERS ACT 1986
38. Odometer tampering

- (1) A person must not—
- (a) tamper with any instrument or device in a motor car for the recording of distance travelled by a motor car; or
 - (b) install in substitution for an instrument or device in a motor car for recording the distance travelled by the motor car another instrument or device for recording the distance travelled by the motor car.

Penalty: In the case of a natural person—**240 penalty units or imprisonment for 2 years or both.**

In the case of a body corporate—**1000 penalty units**.

compared to:

RESIDENTIAL TENANCIES ACT 1997

229. Offence to obtain possession etc. of premises

- (1) A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act, require or compel or attempt to compel the tenant under the tenancy agreement to vacate the rented premises.

Penalty: 60 penalty units in the case of a natural person

300 penalty units in the case of a body corporate.

- (2) A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act, obtain or attempt to obtain possession of the rented premises by entering them, whether the entry is peaceable or not, unless there are reasonable grounds to believe that the tenant has abandoned the premises.

Penalty: 60 penalty units in the case of a natural person

300 penalty units in the case of a body corporate.

On this assessment, odometer tampering is three or four times more significant than an illegal eviction from rented premises. This seems grossly out of step with ordinary community sentiment about the relative significance of these offences. This is not an argument to reduce the penalty for odometer tampering but to increase the penalties for residential tenancies offences in order to create a stronger incentive for compliance and to change behaviour.

R8. Penalties for offences under the residential tenancies and caravan parks parts of the Act should be at least doubled immediately and all penalties should be better aligned with penalties for comparative detriment in other consumer protection legislation over time.

This does not require that every offence must involve a prosecution and penalty. The CAV Director has wide powers to secure undertakings that may also be effective in restraining or preventing unlawful conduct. Unfortunately, the Director's manifold powers are used too infrequently in residential tenancies as other areas of consumer protection or compliance are given greater priority.

We also strongly support the use of infringement notices for some offences under the Act and believe that their use should be extended and focussed on areas foundational to a tenancy and where there is unlikely to be a reasonable incentive for an individual to pursue the compliance process (if available). We have noted elsewhere in our submission where we believe infringement powers should be extended to particular conduct.

Role of Real Estate Agents

Professional property managers should be of benefit to both landlords and tenants. Whilst the agent's primary role is to represent the landlord, their knowledge of tenancy law and professional practice should act to minimise disputes. Unfortunately this is not the case in many residential tenancies.

The high turnover and apparently limited training and supervision of many property managers means that they do not properly understand the legal

requirements for residential tenancies or related law and often exacerbate or even cause disputes. There is no evidence that estate agent managed properties are any more likely to be successful tenancies than those managed directly by landlords. In fact, many self-managing landlords have significantly better practices.

R9. Compulsory professional development (CPD) should be introduced for all property managers similar to the current CPD requirements for practicing lawyers.

In addition, it is a constant frustration for most tenants that whilst they are required to deal with the landlord through their agent that agent is not always authorised to make decisions. Problems often occur where information is not accurately communicated to the landlord or there are significant delays in the communication.

Role of landlords

One notable omission amongst the many duties imposed on the landlord is a duty to act in good faith and with due care and diligence. We consider that this is an import overriding duty that would have a positive effect in a number of common tenancy situations. This would also allow VCAT the discretion to interrogate some actions by the landlord more effectively.

R10. The Act should be amended to provide for a duty of the landlord to act honestly and in good faith and with due care and diligence.

Starting the Tenancy

In the well-known words of Mary Poppins, “Well begun is half done!” Unfortunately for many residential tenancy agreements the subsequent problems experienced by tenants have their genesis in the contracting and commencement of the tenancy.

Applications

We are concerned that many of the application forms and processes require some information to be disclosed that seems to invite discrimination or to circumvent other consumer protections (for example, around the disclosure of credit ratings). We understand that the Landlord (or their agent) is entitled to exercise due diligence over the prospective tenant but the application process should not invite or make possible unfair or unlawful assessments.

Previous research undertaken on behalf of the TUV has indicated that the process of risk assessment by real estate agents is very shallow and often confounded by inappropriate considerations.⁵

R11. The Act should be amended to prescribe a standard application form and that any additional application requirements should be subject to approval by the CAV Director.

Rental bidding

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.

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.

⁵ TUV (2008), Improving access to the Private Rental Market: addressing discrimination and other barriers for low-income and disadvantaged households

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.

R12. The Act should be amended to regulate rental bidding by a provision with the same effect as section 57 of the RTA (QLD).

Holding Deposits

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.

R13. The Act should be 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.

The effect of this would be that either the prospective tenant and the landlord agree to a contract in the process outlined below or they do not.

Where an agreement is entered into, then the holding deposit may be converted into part payment of either bond or rent in advance. Where an agreement is not entered into, the holding deposit must be refunded.

If a holding deposit is not paid then the tenant is entitled to infer that they may not be dealing exclusively with the landlord.

Contracting

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.

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.

I have moved out of my previous property and steam cleaned the carpets myself, my agent says it has to be professionally steam cleaned as that was indicated in the initial agreement. I have had the power disconnected to the house and now I don't know where I stand. Do I have to go get the power back on again just to have a place professionally steam cleaned?? The carpets look and smell clean.

The Tenants Union has previously reported to CAV about problems with additional terms in residential tenancy agreements⁶. 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.

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.

If there is any doubt about the power of the CAV Director to undertake this role under either the ACLFTA or the RTA then the Act should be amended accordingly.

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

⁶ TUV (2006), Unfair Terms in Residential Tenancy Contracts (and Source Documents)

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.

R15. The Act should be amended to state that the CAV Director should be able to impose conditions on the inclusion of any such terms in a tenancy agreement for example to require disclose of other information.

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 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.

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.

The consideration period also allows the tenant to seek independent advice about the application and effect of the terms and conditions and 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.

R17. 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.

The Act currently contemplates verbal tenancy agreements and it is important that where conduct constructs a tenancy agreement through a grant of exclusive possession and the payment of rent that the absence of a written agreement does not defeat the application of the Act. However, the Act should be amended to make clear that where a verbal tenancy agreement exists that only the prescribed terms and conditions apply to that agreement and that any additional terms are unenforceable. This should encourage clearer contracting without removing protections from those tenants who enter into verbal agreements in good faith.

Duration of Lease

Current practice in residential tenancies is that most real estate agents will require a new tenant to sign a 6-month or 12-month fixed-term agreement as a condition of letting the premises. It is very rare for a tenant to be able to secure a new agreement for a lesser period or for no fixed-term and it is almost equally rare for a tenant to be able to secure a new agreement for a longer fixed-term. This practice seems to suit very few tenants. As a consequence lease breaking is endemic even at the relatively short fixed-term periods commonly offered.

The reasons proffered for lease breaking by tenants seeking our advice are many and varied including: unexpected illness, loss of employment or redeployment, family violence or other forms of relationship breakdown, conflicts between joint tenants, and landlord conduct such as failure to do repairs or invasions of privacy usually relating to sale of the premises. In relation to the latter, it is significant that many tenants would prefer to break their lease, even at some cost to them, rather than persevere with the processes outlined in the Act to address the landlord's substantive conduct issues.

As the cost of lease breaking is usually borne by the outgoing tenant, there is no incentive for real estate agents (or landlords) to stop this practice.

R18. The Act should be amended to provide that if a landlord requires a tenant to sign a fixed-term agreement then compensation is not payable for any early termination of the agreement due to a forced or unforeseen change in the tenant's circumstances.

Disclosure

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 affect 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.

Picked up keys. Property Manager was not present. Young staffer asked me to signing key register, and lease. I proposed amendments to lease including "premises [address] including gas, electricity, water and sewerage, fixed line telephone and internet broadband cabling, digital TV antenna and co-axial points, installed and functional" signed by me. Staffer could not accept amendments to lease and told me this was not legal. I offered to work with her to make the wording more clear. After seeking advice from colleagues, staffer said that any amendment was illegal and required me to meet with Property Manager. I signed key register and offered to fully sign the amended lease, however, I said that I would prefer not to sign any standard lease until I sought further advice. I had a removalist truck booked for the next day.

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.

R19. The Act should be amended to include mandatory disclosure of some specific information prior to the signing of any residential tenancy agreement.

It should, however be made clear with any such amendment that the prescribed disclosure does not indemnify, protect or mitigate the landlord from a breach of their duties and the ability of a tenant to claim compensation where relevant.

Whilst disclosure may enable some tenants to exercise better informed choices prior to contracting, the benefits of this disclosure are unlikely to flow strongly to low-income and disadvantaged tenants unless there is the ability for the tenant to rely on this disclosure to seek redress after the event for recurrent problems.

Contracting Process

Based on the issues outlined above, we believe the Act should be amended to make clear that the process for contracting residential tenancies is as follows:

1. Application
2. Selection
3. Payment of holding deposit (if required)

4. Provision of proposed agreement (including explanation of additional terms)
5. Provision of Disclosure Statement
6. Consideration period (3 business days)
7. Signature by Tenant
8. Signature by Landlord
9. Conversion or return of holding deposit (if paid)
10. Payment of balance of bond and rent in advance
11. Provision of signed copy of agreement
12. Provision of keys and prescribed information
13. Provision of condition report
14. Return of condition report (as per current timeframe)
15. Bond lodgement

Avoidance

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.

- (3) In this section—agreement includes an agreement that is not a residential tenancy agreement.

R20. The Act should be amended to create an offence similar to section 53 of the RTA (QLD).

During the Tenancy

Rent Payment

I recently signed a new lease in which the method of payment was not specified. After inquiring as to the BPAY details or direct debit arrangements from my real estate agents I was given the option of electronic payment via entering into an agreement with TransCard or Rental Rewards only. Though other methods of payments were subsequently offered (cheque or money order) I noted that these methods also incurred costs on the tenant and was finally offered cash payment method.

Highly variable methods of rent payment have emerged in the last decade that were not contemplated when the legislation was substantially reviewed in the late 1990's. The provisions of the Act haven't kept up with the emerging diversity of rent payment methods.

Many of these methods require the tenant to bear the cost of paying their rent or involve contracting directly between the tenant and a third party rent collector. An important principle is that a landlord should not be able to require a tenant to incur additional costs for the payment of their rent.

By contrast section 35 of the RTA (NSW) provides that the tenant can pay their rent by at least one method where they do incur any costs.

35. Manner of payment of rent

- (1) A landlord, landlord's agent or other person must not require a tenant to pay rent by a cheque or other negotiable instrument that is post-dated.

Maximum penalty: 10 penalty units.

- (2) A landlord or landlord's agent must permit a tenant to pay the rent by at least one means for which the tenant does not incur a cost (other than bank fees or other account fees usually payable for the tenant's transactions) and that is reasonably available to the tenant.

Maximum penalty: 10 penalty units.

- (3) A landlord and the tenant may, by agreement, change the manner in which rent is payable under the residential tenancy agreement.

R21. The Act should be amended to ensure that a tenant is entitled to pay their rent by at least one payment method that does not incur any fees or charges.

It is arguable that many of the arrangements requiring a tenant to enter into a contract for rent payment with a third party are already unlawful, however these arrangements are apparently continuing unabated.

- R22. The Act should be amended to expressly prohibit the practice of compelling a tenant to contract with a third party for the payment of rent.**

Repairs

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.

On seeking advice 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.

- R23. The Act should be amended to ensure that a tenant is entitled 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 Rent Special Account 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.

- R24. The Act should be amended to vest responsibility for the Rent Special Account with the CAV Director who may at their own discretion receive payments of rent directly from an affected tenant where the landlord has failed to comply with the report.**

There is however a further problem with how the landlord's duty is expressed in the Act and how VCAT and superior Courts have interpreted this duty, particularly in relation to claims for compensation.

In essence, for the repairs process it is common to interpret the landlord as being in breach of this duty if there is any defect or fault within the rented premises including any of the appliances provided by the landlord. This is important to ensure that any fault or defect can be corrected and is consistent with the manner in which items are described in the definition of urgent repair.

However, for the compensation process (and for some termination matters) VCAT has interpreted this duty as requiring that the premises as a whole are not in good repair given the general age and condition of the dwelling. On that interpretation, even a number of faults or defects may not necessarily mean that the landlord has breached their duty and that the tenant is entitled to compensation if those defects have caused the tenant to suffer a loss.

These are clearly not the same tests in relation to the same duty, and create confusion for the parties about whether or not the duty is being complied with.

We would be very concerned if the latter interpretation became more accepted as this would leave many repair issues incapable of resolution.

R25. The Act should be amended to make it clear 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.

Rent Increases

Rent is often the most significant single financial outlay for a tenant household. The Act partly regulates rent increases within a continuous occupancy and the main problem with rent increases is their effect on a sitting tenant. Rent increases have the potential to create a financial “shock” that makes the tenancy insecure or compromises the ability of the tenant to pay for other necessities.

Rent increases have to been seen in the context of a high level of affordability problems in the rental sector. Rent increases are both cause and consequence of these affordability problems (or at least the underlying conditions creating affordability problems).

One of the larger inhibiting factors for tenants to seek resolution of their issues is the threat of having their rent increased in response. This is often a risk when asking for repairs to be done to the property. There are cases where landlords increase rent in retaliation to these type of requests from tenants and the current legislation does not prohibit this from occurring. Typically, the landlord sees this as simply recovering their cost whilst the tenants sees this as punitive.

Section 47 of the Act outlines a number of factors to be considered by the Tribunal in assessing whether or not a rent increase is excessive. Our experience in the limited number of these applications considered by VCAT, is that VCAT overwhelmingly relies on the test in section 47(3)(a), which is effectively the rent payable for a similar property in a similar location, and subordinates any other factors to that basic test.

R26. The Act should be amended to ensure that all of the relevant factors in section 47 of the Act are reported by the CAV Director (and, if required, are properly considered by the Tribunal).

Whilst the factors to be considered by the Tribunal include a number that relate to the contribution made by the tenant to the tenancy agreement there is no general test of whether or not the costs to the landlord associated with the provision of the rented premises, including the cost of any appliances or services, have increased. This absence means a landlord with no actual increase in costs can simply raise their rent on the tide of surrounding rents. The inclusion of this factor would at least partly shift the balance of rights in relation to rent increases between the parties and would allow the Tribunal to look at the relative effects as they are empowered to do in other provisions within the Act.

R27. Section 47(c) of the Act should be amended to provide a more general test relating to any increase in the landlord’s costs associated with the provision of the rented premises including the costs of any goods or services provided by the landlord.

This process again places most of the emphasis for action onto the tenant in a number of steps, particularly the requirement to obtain the report of the CAV Director and apply to VCAT for an order. This process could be shortened by not

requiring the tenant to seek an Order from VCAT. This would require the report from the CAV Director to be definitive and enforceable.

R28. The Act should be amended to provide that a tenant is entitled to rely on the report of the CAV Director where the Director finds that the proposed rent is excessive taking into account all of the relevant factors.

The provision of a copy of the report to the landlord should only be required where the report finds that rent increase is excessive. The current provision seems to be solely intended to dissuade the tenant from seeking the report in case it does not conclude in the tenant's favour. Our experience is that many CAV inspectors will refuse to provide the report in those circumstances which can only be done if the tenant withdraws their complaint.

R29. Section 45(3)(a) of the Act should be amended to provide that a copy of the report is only to be provided to the landlord where the CAV Director finds that the proposed rent increase is excessive.

Consequential amendments would be required to make any rent payment in excess of the report of the Director invalid and refundable and to create an offence for the report not to be complied with. In addition, the current provisions relating to the limitation on rent increases following a VCAT order would need to be extended to the report of the CAV Director.

The same principles would be applied, with the necessary changes, to a rent assessment based on the withdrawal of services by the landlord.

Rent Increases in Fixed Term Agreements

Up until about a decade ago, the long standing practice, reflected in the standard additional terms and conditions in many tenancy agreements, was that the rent could not be increased during the fixed term. This practice was in effect a better protection than the Act itself afforded. About a decade ago, the standard REIV lease in particular was changed to incorporate a term that the rent could be increased during the fixed-term. This change in practice immediately started to undermine what had been a significant additional benefit to fixed-term agreements. It is a cautionary tale about relying on existing practice when the actual legislated protections are insufficient.

R30. The Act should be amended to provide that rent cannot be increased during a fixed-term agreement of 14 months or less.

If longer fixed-term agreements are to be encouraged then this issue will need to be dealt with properly. The basic risk with a longer fixed-term agreement under the current law is that the rent could increase, in accordance with the provisions of the Act, unpredictably and quite considerably during the fixed-term. The tenant would have no real protection against this occurring and may find themselves caught between paying higher (and potentially unaffordable) recurrent costs or the cost of breaking the fixed-term agreement and moving premises. This would exacerbate existing problems with lease breaking and would make rented housing less secure not more secure.

Under the existing law, the effect of a specific term within the tenancy agreement to increase the rent is unclear if that specific term does not include the actual quantum of the increase. For example, a term that stated that the rent may be increased by CPI may not be enforceable, or, a term that simply stated a method of calculating the rent increase may not be enforceable. Any term may be challenged if it restricts or modifies the statutory rights of either of the parties.

For example, if the effect of the term was to seemingly allow for an excessive rent increase (as defined by the Act) then the tenant could challenge the term on that basis.

As with many other consumer contracts, terms that enable rent increases during a fixed-term period will introduce further complexities in determining the true price of the tenancy agreement. The longer the fixed-term the more robust and clear the rent increase conditions will need to be to provide clarity to the parties and minimise the potential for disputes.

R31. The Act should be amended to state that any additional terms in a tenancy agreement that relate to rent increases during a fixed-term should be subject to approval by the Director to ensure fairness and clarity.

Privacy

In its recent report the Victorian Law Reform Commission observed (inter alia) 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...⁷

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.⁸ This narrow interpretation means that many unreasonable actions may still be allowed including breaches of privacy.

R32. 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.

There are also some very specific issues that are regular sources of complaint and dispute in relation to privacy.

Open Houses

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.

⁷ Victorian Law Reform Commission (2015), Photographing and Filming Tenants' Possessions for Advertising Purposes: Report

⁸ *ibid*, p50

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.

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

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.

R33. The Act should be amended to expressly prohibit open house inspections without the written consent of the tenant.

Filming/Photographing Tenants' Possessions

[Our landlord is selling the rental property. The real estate agent asked for access to the property to take photographs for the sale campaign. He told us that the landlord can give us two weeks' notice to vacate if we didn't let them do this. We let the real estate agent take photos in the property, but when we got home we found that he had moved our furniture and our possessions around without our consent.](#)

Currently, tenants are frequently forced into having their possessions photographed and displayed on the internet and billboards if the property is being sold or relet. 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 see this situation as the 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.

By contrast, the Residential Tenancies Act in Queensland also 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.

- R34. 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.**

Assignment and sub-letting

Assignment and subletting are very different process; currently they are conflated in the Act on the basis that consent is required for either.

- R35. The Act should be amended to provide discrete sections for assignment and subletting.**

Assignment

The assignment process is unclear and often tenants do not understand the process or the legal consequences of an assignment.

My friend is an international student. His English is limited. He is currently moving out of an apartment than he moved into about three years ago. His name was transferred onto an existing contract that the estate agent had with the outgoing tenants. The contract commenced in 2007, which is when the condition report was done. There have been a total of 7 people registered with the Residential Tenancies Bond Authority for this property since the bond was lodged in 2007. The condition report, done 5 years before my friend moved in, was never shown to him by the agent. The agent never discussed the condition report with my friend, and didn't do an inspection of the property when my friend moved in. The agent hasn't done any inspections during my friend's tenancy. He is now being asked to pay for damage that occurred before he got there.

Additionally tenants often have 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.

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.

- R36. The Act should be amended to clarify that the tenant should only be liable if a written assignment is prepared, and then, only for the cost of the preparation of the written assignment.**

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.

R37. The Act should be amended to provide for a prescribed assignment form to be completed by the incoming parties.

R38. 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.

This 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.

Subletting

As the consequence of lawful subletting is to impose some additional obligations on the landlord, particularly responsibilities under section 231 of the Act, we are not proposing any changes to that process.

Owners Corporations

There are many problems that occur in multi owner buildings with an owner's corporation. These problems have become more evident over the last decade. Whilst multi-unit dwellings have declined as a proportion of all tenancies (largely as families have taken up detached dwellings in the market) they are nevertheless a significant segment of the market.

Repair Problems

It is often difficult for a tenant to discern which repair problems are the province of the owners corporation and which are within the control of their landlord. For example, a lift is unlikely to be located in the rented premises rather than a common area. In blocks of units, hot water services are often shared between multiple units in a common area. A service pipe or roof drainage may be the property of the Owners Corporation. The tenant will often not have any contact details for the Owners Corporation.

R39. Section 66 of the Act should be amended to provide that relevant details for the Owners Corporation (and their agent or manager) are provided by the landlord at the commencement of a tenancy within a building or land controlled by an Owners Corporation.

The tenant may be unsure how and who to take action against to have the repair problems rectified or who to claim compensation against if they suffer a loss. This puts the tenant in the position of notifying their landlord who may or may not be responsible, causing time delays and inconvenience. Some repair problems would be considered urgent repairs but are in common areas controlled by the Owners Corporation. At present it may be possible to seek an urgent Hearing under the OCA but there is no express right or timeframe for such a Hearing.

**R40. (a) The Act should be amended to clearly enable VCAT to join and make enforceable orders against an Owners Corporation in relation to urgent repairs in a common area; OR,
(b) The OCA should be amended to introduce an urgent repairs**

definition and process similar to the RTA, with the necessary changes, that could be used by tenants or owner occupiers.

Utilities

Whilst some arrangements for energy on-selling and shared utilities have been evident in multi-unit buildings, these arrangements have assumed more prominence in the last two decades, particularly as the structure of the energy and water markets have changed. Unfortunately the current provisions of the Act have not kept pace with changes in practice.

The Act defines "separately metered" as follows:

"separately metered" means that there is, in respect of rented premises, a room or a site, a meter—

- (a) that has been installed or approved by the relevant supplier of the utility; and
- (b) that measures, in relation to those premises or that room or site only, the quantity of a substance or service that is supplied to, or used at, those premises or that room or site;

Our understanding is that in the current competitive energy market and in relation to water supply, there is no relevant supplier who installs or approves meters in an embedded, essentially private, network. Theoretically this would mean that no metering could pass this definitional test. However, our understanding is that VCAT has previously found that as no approval is required then all metering would pass the test (assuming it satisfies the other criteria). This would seem to render this definition useless.

R41. The Act should be amended to provide that a meter satisfies the relevant Australian Standard and has been installed in accordance with the manufacturer's instructions or proper industry practice.

In addition, the Act is intended to provide a protection to tenants in relation to on-selling of energy and water:

In relation to on-selling, section 56 of the Act states:

Landlord must not seek overpayment for utility charge

- (1) The landlord of separately metered rented premises must not seek payment or reimbursement for a cost or charge under section 55 that is more than the amount that the relevant supplier of the utility would have charged the tenant.

Penalty: 20 penalty units.

- (2) If the relevant supplier of the utility has issued an account to the landlord, the landlord cannot recover from the tenant an amount which includes any amount that could have been claimed as a concession or rebate by or on behalf of the tenant from the relevant supplier of the utility.
- (3) Subsection (2) does not apply if the concession or rebate—
 - (a) must be claimed by the tenant and the landlord has given the tenant an opportunity to claim it and the tenant does not do so by the payment date set by the relevant supplier of the utility; or
 - (b) is paid directly to the tenant as a refund.

It is impractical if not impossible for most tenants to establish whether or not this requirement has been complied with.

The intention of the section seems to be:

- > that a landlord cannot on-sell energy or water to a tenant at a price higher than they paid for the energy or water; or,
- > at a price higher than the tenant could have paid for the energy or water if they received a concession.

It is also seemingly impractical for many landlords to determine whether or not they have complied with this provision. They would need at least to obtain information from the tenant about their ability to access concessional payments.

R42. The Act should be amended to clarify the intention of and simplify the protections afforded to tenants in on-selling arrangements.

The application of these provisions to embedded networks controlled by an Owners Corporation is even less clear, particularly as a tenant may be compelled to enter into an agreement with the Owners Corporation to supply energy or water as a condition of their tenancy agreement. It should be noted, that these arrangements effectively remove many tenants from the competitive market for energy provision.

R43. The Act should be amended to clarify how the on-selling requirements for utilities apply to tenants within a building or land controlled by an Owners Corporation.

Ending the Tenancy

Fixed-Term Lease Breaking

Whilst there is no specific reference within the Act, the common compensation awarded to a landlord if a tenant breaks a fixed-term agreement is:

- > rent until the end of the fixed-term or until a new tenancy commences (whichever is the lesser); and,
- > the reasonable cost of advertising and re-letting the premises.

Depending on the market conditions at the time of the lease break, the costs for rent can quickly mount up.

The only limitation to a claim is a general requirement for the landlord to mitigate their loss if they are subsequently seeking to claim the loss from the tenant. In the circumstances of a lease break, mitigation would generally require the landlord to re-let the premises as efficiently as possible.

The major problems with breaking of fixed-term tenancy agreements are:

- > Many tenants are required to sign a fixed-term agreement at the commencement of their tenancy irrespective of their needs or wants. Most of these initial fixed-term agreements are for a 12-month period. Even at these relatively shorter periods, lease breaking is a common problem due to many circumstances that may compel a tenant to break the agreement.
- > It was common in the past for initial fixed-term agreement to expire and for the tenancy to simply roll over into a periodic agreement. However, many real estate agents are now adopting the practice of signing tenants to rolling fixed-term agreements for substantial parts of their continuous occupancy.
- > Whilst this practice appears to provide greater security to the tenant, in fact, the practice means the tenant can receive a 90 day notice to vacate for the end of the fixed-term, in effect a shorter no-reason notice to vacate.
- > In addition, during these rolling fixed terms the tenant is continuously bound to the agreement making it difficult and costly to vacate irrespective of any changing circumstances. As noted elsewhere, these changing circumstances may relate to the tenant (such as relationship breakdown, redeployment or additional children or dependents) or to the conduct of the landlord (such as selling the premises or failure to do repairs) or to the conduct of other parties (such as neighbour disputes).
- > The tenant is even bound to the fixed-term when the landlord serves a notice to vacate for the end of the fixed-term or another notice to vacate that expires immediately after the end of the fixed-term. This invariably means that the tenant is required to pay rent until the end of the fixed-term even if they have to secure alternative housing in between the service of the notice and the end of the fixed-term. There is very little chance to avoid

paying rent on two premises at once with a significant period of overlap in many instances.

R44. The Act should be amended to enable a tenant to give a shorter notice period in response to receiving a Notice to Vacate irrespective of whether the tenant intends to vacate prior to the end of the fixed-term.

- > Section 234 of the Act enables a tenant to apply to VCAT to reduce the fixed-term because of significant hardship due to unforeseen circumstances. This provision also expressly provides that the landlord may be compensated even if an Order is made, making it almost useless to a tenant. If the basis for success in this application is severe hardship to the tenant, it seems contradictory to impose further costs on the tenant.
- > VCAT has interpreted section 243 to conflate the reduction of a fixed-term with lease breaking and termination. It would make more sense, if VCAT reduced the fixed-term to a specific date or period, which would then enable the tenant to serve a Notice of Intention to Vacate therefore legitimately terminating the agreement at minimum cost.

R45. The Act should be amended to provide that where VCAT makes an order to reduce the fixed-term for reasons of severe hardship due to unforeseen circumstances, compensation is strictly capped.

- > In practice, it is very difficult for a tenant to demonstrate that a landlord has not mitigated their loss. The tenant would have to be continuously vigilant after they vacate the premises to consistently check that the premises was being re-let. There are also further complications, such as, where the landlord increases or decreases the rent at the point at which they are re-letting or the general condition or state of repair of the premises.
- > The quantum of the fees and charges related to re-letting are highly variable and the basis for these claims against the tenant are not always properly tested by VCAT. In theory, the tenant should only be liable for the re-letting fee if the fee must actually be paid by the landlord (or has been paid) based on their contract with the agent. However, even if the landlord's agreement with the real estate agent requires them to pay such a fee there should be an additional test that the fee is reasonable and proportionate for the work involved in the process.

R46. The Act should be amended to provide that the tenant is only liable for reasonable fees and charges associated with the cost of advertising and re-letting of the rented premises, and only if the landlord is liable at law or under contract for the payment of such fees and charges.

If longer fixed-term agreements are to be promoted then the problems with potentially significant compensation for lease breaking would need to be rectified or the potential for more significant financial harm to tenants will be substantial.

Notices to Vacate

One of the major factors affecting security of tenure is the relative ease with which a tenant may be evicted from the premises with a range of notices to vacate. The range of reasons and the periods of notice for the various reasons are short by comparison to many other countries, particularly many European countries.

The general principle should be that eviction is used as a last resort.

It should be noted that extending notice periods does little to improve security of tenure unless the periods provide a disincentive for a landlord to use those notices.

Notices to Vacate can essentially be categorised in three ways:

- > Notices to vacate that are served on the tenant for a breach of the Act or the tenancy agreement. The notice periods vary depending on the seriousness of the alleged breach with immediate notice for serious breaches and 14 days' notice for less serious breaches.
- > Notices to Vacate that are served on the tenant for a reason specified in the Act. The notice period for these notices is generally 60 days with the notable exception of the mortgagee's repossession notice that is 28 days.
- > Notices to vacate for no specified reason. We include the Notices to Vacate for the end of a fixed-term agreement in this category as the presumption elsewhere in the Act is that the tenancy agreement would simply become periodic at the end of the fixed-term. These notice periods are generally 120 days or 60 days for a shorter fixed-term agreement.

In general terms to enhance security of tenure:

- > Notices to Vacate for the less serious breaches should be subject to reasonable opportunities for remedy of any alleged breach
- > Notices to Vacate for a specified reason should have tighter conditions and better substantiation at the point of service
- > Notices to Vacate for no reason should be repealed or the notice periods significantly extended to discourage their use.

We have made specific recommendations for the relevant notices to vacate in the section below.

Notices to Vacate for Breaches

Section 244: Danger

The wording of section 244 should not be altered to expand the grounds for giving a notice to vacate for danger. As this is an immediate notice to vacate, the grounds for giving this notice should be narrow.

It is recommended that no changes are made to section 244.

Section 248 - Failure to comply with Tribunal order

Section 332 - Order not to be made in certain circumstances

Section 248 of the Act enables a 14 day notice to vacate to be given if a tenant is alleged to have breached a Tribunal order made under section 212.

Section 332(1)(b) states that a possession order in relation to a notice to vacate for this reason must not be made if the Tribunal is satisfied that:

- > the failure to comply with an order of the Tribunal was trivial or has been remedied as far as possible; and
- > there will not be any further breach of the duty; and
- > the breach of the duty is not a recurrence of a previous breach of duty.

However, if the breach of the duty is not a recurrence of a previous breach of duty then there would not be grounds to make a possession order anyway. This is because to obtain a compliance order under section 212 of the Act 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 the future.

R47. Section 332(1)(b)(iii) of the Act should be repealed.

Section 249: Successive breaches by tenant

Unlike the case with a notice to vacate given under section 248, the Tribunal does not have any power to consider whether a breach of duty is trivial.

R48. Section 332(1)(a) of the Act should be amended to include a notice to vacate under section 249.

Section 262: Tenant no longer meets eligibility criteria

Section 262A: Tenant in transitional housing refuses alternative accommodation

Both section 262 and 262A only have effect if criteria are published in the Government Gazette. No criteria have been published since these sections were enacted.

R49. The criteria referenced in section 262 of the Act should be gazetted or the section should be repealed.

Notices to Vacate for No Fault

Section 255: Repairs

A notice to vacate may be given under Section 255 if; the landlord intends to repair, renovate or reconstruct the premises immediately after the termination date; the landlord has obtained all necessary permits and consent to carry out the work; and the work can't properly be carried out unless the tenant vacates the rented premises.

Often these notices are given as a way to push out unwanted tenants; however it is hard for a tenant to prove that the landlord's claims of repairs are false. It would significantly improve tenants' security if landlords had to provide more evidence of their intended works.

Additionally a tenant may be willing to temporarily relocate (as opposed to being evicted permanently) while works are completed, and if the duration of the repairs or renovations is not expected to take long, they should be able to do so.

R50. Section 255 of the Act should be amended to require the landlord to detail the nature, extent and estimate time period required for the repairs. The landlord should also attach any permits and a tradesperson's quote for the planned works.

R51. Section 255(1)(c) of the Act should be amended to specify that the works cannot properly be carried out unless the tenant permanently vacates the rented premises.

As a consequence of the above:

- R52. Section 321B of the Act should be amended to provide that a tenant may challenge the validity of a notice to vacate given under section 255 on the basis that they are prepared to temporarily move out of the rental property while the works are completed.**
- R53. Section 312C of the Act should be amended to enable VCAT to make ancillary orders to enable temporary relocation while repairs or renovations are completed. These orders may relate to the period of relocation, payment of rent and removal and storage of goods.**

Section 256: Demolition

Section 256 enables a landlord to give 60 days' notice to vacate if they intend to demolish the rental property. The landlord must have obtained the required permits for demolition prior to serving the notice to vacate. It can be difficult for a tenant to verify whether this is the case unless the permits are provided with the notice to vacate.

- R54. Section 256 of the Act should be amended to require the landlord to attach copies of any permits that are required for the demolition.**

Section 257: Premises to be used for business

Section 257 enables a landlord to give 60 days' notice to vacate if they intend to use the rental property for a business or purpose other than for a residence. The notice to vacate should specify the nature of the business or purpose that the rental property will be used for. This will assist tenants to assess whether or not the notice to vacate is genuine.

- R55. Section 257 of the Act should be amended to state that the notice to vacate should specify the nature of the business or purpose that the rental property will be used for.**

Section 258: Premises to be occupied by landlord or landlord's family

Section 258 enables a landlord to give 60 days' notice to vacate if the landlord or a member of their immediate family will be moving in to the rental property.

Often these notices are given as a way to push out unwanted tenants; however it is hard for a tenant to prove that the landlord's claims are false. It would significantly improve tenants' security if landlords had to provide more evidence with their notice.

This notice to vacate should specify the name of the person moving in to their rental property and their relationship to the landlord. The Act should require a statutory declaration from the person who will be moving in to be attached to the notice to vacate to confirm that this is true.

- R56. Section 258 of the Act should be amended to:**
- (a) require the notice to vacate to specify the name of the person moving in to the rental property and their relationship to the landlord; and,**
 - (b) require a statutory declaration from the person who will be moving in to be attached to the notice to vacate to confirm that this is true.**

Section 259: Premises to be sold

Section 259 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.

Currently a tenant can be evicted from a rental property using this notice even if the property does not end up selling.

R57. Section 259 of the Act should be amended to provide that a notice to vacate can only be given when a rental property has been sold and the new owner intends to occupy the rental property as their principal place of residence.

Section 260: Premises required for public purposes

Section 260 enables a landlord to give 60 days' notice to vacate if the rental property is owned by a public statutory authority authorised to acquire land for its purposes and the rental property is required for a public purpose immediately after the termination date.

The notice to vacate should specify the public purpose that the property is required for and specify the basis for the public statutory authority's to use the property for that purpose. The notice to vacate should also attach evidence of the time that the works will be commenced.

R58. Section 260 of the Act should be amended to require:
(a) the notice to vacate to specify the public purpose that the property is required for;
(b) the notice to vacate to specify the basis for the public statutory authority's to use the property for that purpose;
(c) evidence to be attached to the notice to vacate of the time that the works will be commenced.

Section 268: Notice by mortgagee

A mortgagee is able to give a tenant 28 days' notice to vacate if the landlord has defaulted on their mortgage, if the tenancy agreement is entered into after the mortgage. The tenant is unlikely to be aware that the landlord is at risk of default until they receive this notice from the mortgagee.

This notice to vacate should be 60 days' notice in line with the other notices to vacate that can be given when the tenant is not at fault.

R59. Section 268 of the Act should be amended to require the tenant to be given 60 days' notice to vacate.

Notices to Vacate for No Reason

Section 261: End of fixed-term tenancy

This section enables a notice to vacate to be given due to the end of the fixed term. This notice contributes heavily to a tenant's lack of security and should not be able to be used.

R60. Section 261 of the Act should be repealed.

Section 263: Notice to vacate for no specified reason

Section 263 enables a landlord to give 120 days' notice to vacate without specifying a reason. Giving landlords the option of evicting their tenants for no reason greatly disadvantages tenants and expressly states that the landlord's right to flexibility and control or their asset outweighs the tenant's right to a secure and stable home.

R61. Section 263 of the Act should be repealed.

Retaliatory Evictions

Tenants are often reluctant to exercise their rights against the landlord because they are afraid that they will be given a notice to vacate if they do so.

Currently, only no reason notices to vacate (including for the end of a fixed-term) can be challenged for being given in retaliation to the tenant exercising their rights under section 266.

R62. The Act should be amended include a provision enabling a tenant to apply to VCAT to challenge a notice to vacate given under section 255, 256, 257, 258 or 259 of the Act if the notice to vacate has been given in response to the tenant exercising their rights under the tenancy agreement or the Act or proposing to exercise these rights.

R63. The Act should be amended to provide that if a notice to vacate is declared to have been given in retaliation by VCAT, the Act should state that no further notices to vacate can be given by the landlord under sections 255, 256, 257, 258, 259 or 261 within 6 months of the VCAT order. If a notice to vacate is given within this period, the Act should state that this notice to vacate is invalid.

Prohibition on reletting after Notices to Vacate

It is an offence under section 264 to relet a rental property within 6 months of giving a notice to vacate because the rental property is to be demolished, used for a business other than a residence, to be occupied by the landlord or their family member, or if the landlord is selling the rental property. The purpose of this prohibition is to discourage inappropriate use of the respective notices.

However, there is not an equivalent provision that applies in relation to a notice to vacate given for repairs or renovations. This means that the landlord can relet the rental property immediately after the termination date, even if repairs or renovations have not actually been completed.

The landlord should be prohibited from reletting the rental property within 4 months of the notice to vacate being given for the purpose of repairs. This reflects the requirement for the notice to vacate only to be given when significant repairs or renovations are to be completed which cannot be done while a tenant is in occupation.

Section 264 is an offence provision to try to ensure that the landlord is genuine in giving these notices to vacate, and does not mislead the tenant. The Tribunal should not have the power to enable the landlord to relet the property within 6 months.

R64. Section 264 of the Act should be amended to make it an offence to relet a rental property within 4 months of giving a notice to vacate under section 255.

R65. Section 264(2)(b) of the Act should be repealed.

Goods Left Behind

Currently, 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 straight forward. 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.

R66. 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.

Bond Recovery

The second most common complaint to our service relates to problems getting the bond back at the end of the tenancy.

Whilst the introduction of the Residential Tenancies Bond Authority (RTBA) was welcomed it has done very little to change behaviour in the market at the end of a tenancy. Landlords and real estate agents still effectively control the process of refund and significant delays are common. In addition, when tenants do get a response to their enquiries, they are often confronted with claims against the bond that are vague and inflated.

The most basic problem is the time delays at the end of the tenancy whilst a landlord contemplates or makes a claim.

Section 417 of the Act currently provides the following:

Application to Tribunal by landlord

- (1) A landlord may apply to the Tribunal for a determination directing the Authority to pay an amount of bond to or on account of the landlord if—
 - (a) the landlord is unable to obtain the tenant's agreement to make an application to the Authority for a refund; and
 - (b) the landlord considers that the landlord is entitled under section 418 or 419 to a refund of that amount of bond.
- (2) An application under this section must be made within 10 business days after—

- (a) the tenant delivers up vacant possession of the rented premises;
or
- (b) the landlord becomes aware that the tenant has abandoned the rented premises.

However, our experience is that this time limit is routinely ignored. To compound this, at the point of any VCAT Hearing, even if the tenant objects to the time delay, VCAT will simply waive the requirement, usually on the grounds that the parties are all present and it would just be simpler to hear the matter then and there rather than require the landlord to make a subsequent claim for compensation. The consequence of this practice is that landlords and agents simply ignore the time limit, as they understand that there will be no practical consequence. This is hardly likely to encourage compliance. We would welcome VCAT making publicly available the average time after the end of the tenancy when these applications are actually heard.

As many tenants will be trying to carefully manage their cash flow and the costs of transitioning from one rented premises to another, these time delays put the tenant at a considerable disadvantage trying to recover their own money.

R67. The Act should be amended to provide that the bond must be refunded to the tenant if the landlord does not make a claim within the 10 business days' time limit.

This of course does not preclude the landlord from making a subsequent claim for compensation but it would reverse the initial onus of initiating an application and providing the necessary evidence.

Many of these bond problems have their genesis in the beginning of the tenancy, particularly through incorrect completion of the condition report. It is common for tenants to receive the condition report and to find all of the sections completed by the landlord or agent endorsed as clean, undamaged and working even where this is demonstrably not the case. Many tenants are unaware that they should note any disagreement with the condition report and return it to the agent or they are unwilling to note any disagreement at the commencement of the tenancy. When the tenant is willing to disagree, the standard form is often too small to note all of the potential problems that may be a cause of dispute at the end of the tenancy.

Section 36 of the Act currently provides:

Condition report is evidence of state of repair

- (1) A statement in a condition report under section 35 is conclusive evidence, for the purposes of this Act, of the state of repair or general condition of the rented premises on the day specified in the report if the condition report is signed by or on behalf of the landlord and the tenant.
- (2) Subsection (1) does not apply to—
 - (a) a state of repair or general condition that could not reasonably have been discovered on a reasonable inspection of the premises; or
 - (b) a statement with which the tenant disagrees under an endorsement on the report.

Unfortunately, the practical effect of this provision is that disputes regarding the original condition of the premises remain unresolved until the end of the tenancy. At which point the evidence of the original condition will be exceedingly difficult to provide. Unless any photographs taken at the commencement of the tenancy are of a sufficiently high quality they will be unlikely to show any of the damage or other problems that are the subject of claims at the end of the tenancy. In many instances there are no photographs. As the landlord is likely to assume that any damage or problem has been caused by the outgoing tenant this approach is predisposed to create disputes.

R68. The Act should be amended so that the CAV Director can inspect and provide a report regarding the original condition of the premises if there is a dispute between the parties about the condition report.

To encourage proper compliance, the CAV Director should be able to recover the cost of these inspections from the landlord or real estate agent if the condition report has not been completed by the landlord or agent with due care and diligence.

Whilst it is accepted that the tenant should not be liable for “reasonable wear and tear” of the premises, VCAT’s interpretation of this basic concept is so widely variable that it is difficult to provide reliable advice to tenants about their liability in relation to any alleged damage. Again this uncertainty predisposes the parties to a dispute. The landlord has nothing to lose as it’s the tenant’s money at stake, there is no application fee and the costs for an estate agent may be already sunk in the agent’s commission. Whilst there is a good argument that a tenant should not have to pay a fee to recover their own money (and that VCAT is effectively paid for by the forgone interest from all tenant bonds), there seems to be no compelling reason why a landlord would not have to pay a fee for this application.

Many claims that are made against a bond are simply inflated. There does not appear to be any practical consequence if a claim against the bond (or for compensation) is grossly inflated. Current practice is that evidence to support the claim does not have to be provided to the tenant until the Hearing. This makes it very difficult for the tenant to assess whether the claim is justified, and, if so, whether or not the amount being claimed is reasonable. This inhibits the advice that can be given to the tenant and the ability of the parties to properly negotiate to avoid a Hearing.

R69. The Act should be amended to provide that any application by the landlord for claiming all or part of a tenant’s bond must be, as far as is practicable, accompanied by the evidence that will be relied upon to support the claim.

Other Tenures

Many of the problems and recommendations outlined in the previous sections in this Part of our submission would apply equally with the necessary changes, to the other tenures contained in the Act.

In this section, we are outlining some of the major issues specific to the other tenures.

Rooming Houses

Tenancy agreements

A significant area of confusion has arisen in relation to tenancy agreements in rooming houses. It remains completely unclear what criteria is being applied to determine the existence of a tenancy agreement in a rooming house, making it impossible for residents themselves to understand their rights and responsibilities or to provide reliable advice to residents. As this is a foundational issue, it should be clear to the parties themselves.

The Act itself defines a tenancy agreement thus:

“tenancy agreement” means an agreement, whether or not in writing and whether express or implied, under which a person lets premises as a residence;

and elsewhere that an agreement may be for a fixed-term or periodic.

Our understanding is that the defining feature of a tenancy agreement is a grant of **exclusive possession**, which is the significance of the use of the phrase “lets premises” in the definition. A grant of exclusive possession may be conferred by practice irrespective of the intention of the parties.

Despite any previous assumptions, it appears that in many instances a resident would be able to satisfy the necessary requirements for a grant of exclusive possession, particularly where there is a lock on the room. The effect of the rooming house provisions of the Act is to override this grant of exclusive possession by applying a form of statutory licence (the residency right) to the occupation of the room. Obviously, where a room is shared there could not be a grant of exclusive possession.

If this is the case, then any resident may have a tenancy agreement. In the alternative, if the intention is that all of these occupations are considered to be residency rights then what is the critical feature that would then determine a tenancy agreement?

Unfortunately these provisions are rarely tested by residents or subject to review by higher courts. We believe VCAT has often erred by conflating the meaning of a “tenancy agreement” with any agreement for a fixed-term or, even worse, with any agreement in writing nominally titled a “tenancy agreement”.

These considerations are far from academic as all of the rights and responsibilities of the parties, including possible offences and penalties, flow from whether or not the occupation is a tenancy agreement or a residency right.

The current provisions of the Act also create an additional source of confusion because they imply that at some point a tenancy agreement in a rooming house may cease to exist and become a residency right. If however, there was a grant of exclusive possession at the outset it is completely unclear how this would ever revert to a residency right unless the tenancy agreement was terminated in accordance with the Act and a new or different occupation commenced.

In the past, we were of the view that these protections were necessary particularly to protect residents in self-contained apartments in rooming houses and those residents who wanted to rely on a fixed-term period. However, the conduct of many operators (particularly in the private sector) is such that the existence of a purported tenancy agreement is simply being used to shoehorn residents into fixed-terms that will invariably be broken, largely as a consequence of the often chaotic living conditions in rooming houses. This regular “lease breaking” is simply providing a steady stream of compensation claims against residents for bond and rent in advance at the higher amounts allowed under the residential tenancies provisions.

Importantly, the current situation also creates confusion about whether or not a resident is entitled to give the shorter notice of intention to vacate under the rooming house provisions.

This important jurisdictional issue must be clarified.

**R70. (a) The Act should be amended to clarify the requirements for tenancy agreements in a rooming house and to sufficiently protect residents in self-contained units, OR,
(b) Section 94 should be repealed.**

Operator Licensing

Whilst this issue is being dealt with in a separate process, we reinforce the need for operator conduct to be properly regulated through an effective licensing scheme.

This is an essential component of the reforms that were proposed during the Rooming House Taskforce in 2008. Our views about this reform have been communicated previously.

Head Leasing

One of the major problems to emerge in the rooming house sector is head leasing and churn of rooming houses. Rooming houses are easily established and easily abandoned without significant economic consequences or sanctions preventing duplication of the operation. Even when a rogue operator is uncovered as operating unlawfully, the primary detriment is to the residents.

Whilst head-leasing in itself is not problematic, providing there is clear and unambiguous consent of the landlord or owner, head-leasing does provide the conditions that enable churning of rooming houses whereby an operator can simply close down a rooming house and move on to the next head-lease with very little cost. The transience of these rooming houses raises challenges for all regulators.

In addition, building owners and real estate agents often claim that they had no knowledge that a rooming house was operating in the rented premises. Whilst

previous changes to regulate the rooming house sector and the commitment to licensing for operators with a fit and proper person test will greatly assist with this problem we also believe that the details of the building owner should be provided to residents as part of the rooming house owners obligations under section 125 of the Act.

R71. The Act should be amended to require that a rooming house owner, who is not the owner of the building in which the rooming house is operating, must provide a resident with relevant information about the building owner (or their agent or manger).

Standards

One smaller issue that we have identified with the rooming house standards is that under Regulation 13 of the minimum standards it states that there should be sufficient hot water for laundering, but not for bathing. It seems absurd that hot water should be provided for one necessity but not for another.

R72. The rooming house minimum standards should be amended to incorporate a requirement for sufficient hot water for bathing given the number of residents who may at any time be occupying the rooming house.

Caravan Parks

Application of the Act

We remain concerned about the current definition of resident in relation to caravan parks.

The definition of resident in relation to caravan parks states the following.

"resident" means—

- (b) in relation to a caravan park, a person (other than a site tenant) who occupies a site in the caravan park as his or her only or main residence and—
 - (i) who has obtained the prior written agreement of the caravan park owner to do so (whether that agreement was given in respect of that site or another site in the caravan park); or
 - (ii) who has so occupied any site in the caravan park for at least 60 consecutive days;

Given the requirement in the first part of this provision that a resident must be occupying the site as their only or main residence we believe that subsection (ii) is an unnecessary restriction on the protections that should be afforded to a resident from their first day of occupation.

R73. Section 3(b)(ii) of the Act should be repealed.

Part 4A Parks

The Part 4A Model

There remains a very significant challenge at the heart of the regulation for (Part 4A) moveable dwellings in (Part 4A) caravan parks.

The value of the dwelling is inextricably linked to the site occupation including the terms and conditions of the site agreement. In law, the value of the dwelling is entirely separate and independent of the interest in the site. It is only upon severance of the dwelling from a site tenancy that the economic reality of the

transaction becomes clear. For example, when a dwelling is purchased for \$150,000 on site, and it may be resold with a site tenancy agreement at \$150,000 or more, the dwelling appears to maintain value. However, if for any reason, the dwelling must be removed from the site, and sold at auction as a chattel independent of the site, it will only sell for a fraction of its value on the site.

At the point of contracting the proposed resident should be able to obtain a genuine and true valuation of the dwelling prior to entering into any agreement. As part of the contract disclosure, it should be required that the dwelling which is being purchased has an independent valuation certificate as if it were sold as a mere chattel (i.e. with no onsite value). This valuation should include comparison to how much such a structure would fetch at market if it were sold from a yard and an estimate of the cost of relocation and re-assembly if required.

Unless the law requires this valuation, the dwellings worth will continue to be deceptively inflated with the site and park in which it is located. If it is not then there is significant potential for economic harm to the individuals concerned.

The prospective site tenant purchased a Part 4A dwelling directly from previous dwelling owner. The purchase took place prior to the purchaser being granted a site tenancy agreement by the site owner. The site tenant had paid approximately \$90,000 of the dwelling, and completed the sale of the Part 4A dwelling located on site. The site owner provided the prospective site tenant with the agreement. The site tenant was not happy with some of the terms in the agreement, but felt they had no choice, as the site owner said that if they didn't sign the agreement, she would have to take her dwelling out of the park on the back of a truck or sell the dwelling again. The site tenant reluctantly signed the agreement, and was advised to challenge the terms under the ACLFTA and s206F and 206G. Because the dwelling was purchased prior to site agreement and there was no condition precedent for the site tenancy to be granted, sections 206J and 206ZZH failed to provide adequate protection.

In the alternative, the regulation would need to be significantly enhanced to effectively give a site tenant a right akin to ownership of the site where the dwelling owner is able to assign the agreement and the site owner cannot frustrate or game the assignment. In that instance, consent to the assignment by the site owner is not required unless the assignment would breach a term or condition of the occupancy (for example, to a resident not eligible for occupation of the site under the park's rules).

This would allow the effective preservation of value in perpetuity as an interest in land, unless the nature of the use of the land changes, or a substantial portion of the land changes. The basis of this framework is already provided for under section 311 but may require some amendments. Ultimately, the issue of perpetuity would require the abolition of no reason notices or end of fix term notices in relation to Part 4A sites.

In addition, at the back end of many agreements, sales commission are being required with little relationship to the underlying value of the dwelling.

The site tenant took occupation of a dwelling in 2011 and signed a site tenancy agreement. The agreement provided for a home resale agreement at the commencement of the tenancy as part of the terms of the lease. The terms of the agreement stated that the consent to act as an agent was irrevocable, and that they were

entitled to approximately 2% of the sale price as commission (approximately \$3500). The home resale agreement also provided for the site owner to have a reserved right to buy back the dwelling. The site tenant died in 2014. The executors of the estate then sought to sell the dwelling via the site owner in accordance with the terms of the agreement. The dwelling did not sell for over a year, and during this period the dwelling remained on site, and the estate remained liable for rent, and it is unclear if genuine efforts were being made to sell the dwelling.

- R74. The Act should be amended to cap or control sales commissions or to enable VCAT to determine commissions commensurate with chattel sale, and not land sale.**

Deferred Management Fees

Deferred management fees are now commonplace in the sector.

Whilst this is a practice carried over from the retirement villages sector there has never been any rationale for the application of these fees in parks where the site rent and other charges are ostensibly for the same purposes. It appears to be double dipping at the expense of the residents at point of sale.

- R75. The Act should be amended to provide that deferred management fees are prohibited (given the payment of site rent) or strictly regulated.**

Site Maintenance and Fixtures

The Act is unclear about the specific responsibility for site maintenance and the ownership or responsibility for fixtures that have become attached to the site.

The site tenant had purchased the dwelling in 2011. The dwelling had been constructed and purchased on site. The dwelling had been constructed on top of a concrete slab laid by a third party. Several years later, the slab had shown some minor cracking. Further, there appeared to be movement in either the slab or the dwelling, causing cracks in walls to appear, doors to jar and the floors to become un-level. The site tenant believed that it was the movement in the ground beneath the slab. The site owner alleged that it was an issue with the Part 4A dwelling. It was unclear as to whether the cause was in relation to the dwelling, the concrete slab or the earth that made up the site. The site tenant discovered there was no repair mechanisms or obligations specific to the site, save for the section 61 of the Australian Consumer Law, in relation to the site being fit for purpose. It was further unclear as to the nature and responsibility of the concrete slab. That is to say, was the concrete slab a fixture of the land, and whose responsibility it would be to repair the slab if there was a defect, or if the dwelling had to be relocated who would be responsible for laying a new slab or removing the old slab if a new dwelling was required to be placed onto the site. The dwellings also contained additional fixtures such as a veranda and carport.

- R76. The Act should be amended to clarify that the site owner is responsible for maintenance of the site including any structures that have become attached to the site.**
- R77. The Act should be amended to include urgent and non-urgent repair processes that mirror the provisions in the Act in relation to tenancies.**

Disputes

Reducing Disputes

Residential tenancies in Victoria appear to be highly disputatious.

However, it is very hard to get a proper estimate of the actual amount of disputes and their respective seriousness. At one end of the spectrum there were more than 60,000 applications (nearly 59,000 case finalisations) to VCAT last year⁹. Most of these were landlords seeking possession presumably in situations where the tenant did not want to vacate. At the other end of the spectrum, the combined number of enquiries to CAV and TUV in relation to residential tenancies is more than 100,000 per annum. Whilst some of these enquiries are prospective (in the sense of seeking to avoid a problem) our experience is that the vast majority of enquiries to our service are disputes. We would be surprised if tenant enquiries to CAV were much different.

Whilst there is some overlap in these numbers we at least know in relation to tenants that very few of the legitimate complaints that tenants make to our service materialise as VCAT applications. As noted elsewhere we believe that this is fundamentally because tenants are afraid of retaliation both within their current tenancy and afterwards and it remains extremely difficult to convince tenants that such action by landlords or real estate agents will not be effective.

It would be in the interests of both landlords and tenants to reduce disputes in residential tenancies.

In order to minimise disputes there needs to be much better compliance with the tenancy law in the first instance.

To facilitate better compliance:

- > the law needs to be clear about the rights and duties of the respective parties,
- > the rights and duties need to be properly understood by the parties,
- > the rights and duties need to make sense and be practical for the parties (otherwise they will seek to circumvent them), and,
- > there must be incentives to encourage compliance.

Unfortunately as we have noted elsewhere:

- > The tenancy law and the many additional terms in tenancy agreements are complex,

⁹ VCAT (2014), 2013/14 Annual Report

- > The parties (including real estate agents, who should know better) are often confused about their respective rights,
- > Many of the provisions of the Act are impractical and encourage self-help and workarounds, and,
- > The consequences for non-compliance are often remote and insignificant.

Given the role of agents in more than 2/3 of tenancies, the fact that almost every tenant receives the statement of rights and duties (at least in the mainstream rental market) and that there is a significant amount of information on (and use of) the CAV and TUV websites; it is particularly vexing that both landlords and tenants seem to be unable to understand their respective duties. Whatever we are currently doing with educating the parties does not appear to be working. We do not believe that the prescribed statement can properly achieve its statutory purpose in its current format.

R78. The current statement of rights and duties (the Red Book) should be significantly simplified and market tested to improve its use and effectiveness for tenants.

In the alternative, the parties are sufficiently aware of their duties but simply choose to ignore them because they are impractical or inconvenient. For example, the lack of confidence that the bond will be refunded in a reasonable and timely manner understandably leads many tenants to ignore the restriction on not paying the last month's rent. In this alternative, the current incentives for compliance are demonstrably inadequate.

We make a significant number of recommendations that would improve the usefulness of many of the provisions of the Act to minimise the need for the parties to use workarounds.

In addition, we are suggesting an increase in the current penalties to send a strong message about the importance of compliance.

Resolving Disputes

The final piece in the puzzle is the need for there to be a real sense that non-compliance will be detected and dealt with. The current system primarily requires tenants to initiate all levels of compliance from basic breaches to significant offences.

The processes for compliance with basic breaches need to be simplified in terms of the number of steps and time required for resolution. Most tenants are reluctant to use the formal processes of the Act and do not attend VCAT as an applicant or as a respondent even when a claim involves recovering their own money. After 35 years of this basic procedure under the Act there is no indication that any proposed reforms at VCAT will significantly alter this situation. This leaves a considerable gap in the compliance regime for residential tenancies.

In part, we believe that this gap requires a greater role for CAV to enforce the rights that tenants are entitled to. To be clear, we do NOT support a greater role for conciliation as this will in most part introduce further delays and it is likely that the weaker party, often the tenant, will settle for less than the law entitles. We do support a greater role for resolution in accordance with the law at the earliest stage in any dispute.

This means shifting the dispute resolution process in an “ombudsman-like” direction where disputes are resolved by CAV consistent with law and proper industry practice. This would require the Director to have clear determinative powers, however, based on the experience of many Ombudsman schemes, these powers would rarely be used.

R79. The Act should be amended to provide for the CAV Director to have determinative powers for dispute resolution in relation to some specific provisions of the Act.

Ultimately, we believe it would be better that there was an independent dispute resolution scheme as CAV may be conflicted with multiple other compliance and policy making responsibilities. This would reduce VCAT’s role to only hearing orders for possession under the Act which they are mainly doing now. All other issues should be resolved through simpler and less legalistic processes.

Consumers are now very familiar with independent dispute resolution schemes. Ombudsman schemes in particular have experienced significant increases in demand for both enquiries and actual disputes. Most of these schemes have found very effective ways to reach out to consumers and build confidence in their processes. Importantly, the schemes provide impartial, timely and effective resolution.

Enforcement

The processes for offences should also be simplified with greater use of infringement notices for offences.

We also believe that the civil penalty power of VCAT under the OCA should be extended to residential tenancies. The OCA provides:

166. Penalty for breach of rules

If VCAT determines that a person has failed to comply with a rule of the owners corporation that imposes an obligation that is binding on the person, VCAT may make an order imposing a civil penalty not exceeding \$250.

Note: The penalties imposed under this section will be paid into the Victorian Property Fund

This would enable, or in some instances, require, VCAT to award a civil penalty against a landlord where there is a finding of fact that an offence has been committed. For example, where a landlord has without reasonable excuse not either refunded the tenant’s bond or made a claim against the bond within 10 business days then VCAT could award a civil penalty payable by the landlord. We think this would be a much more efficient and effective means of encouraging and enforcing compliance with the requirements of the Act.

R80. The Act should be amended to empower VCAT to Award civil penalties for prescribed breaches of the Act.

More serious breaches would still be prosecuted through the Magistrates Court and these would continue to be focussed on systemic problems with widespread reach or impact. It is right that serious offences should be subject to criminal test and sanction.

Part B: Miscellaneous Provisions

In Part B of our submission we have addressed a number of other sections of the Act which we consider are not operating effectively or as intended.

Whilst we have presented these sections based on the different tenures, the amendments recommended in the residential tenancies section should be applied to the other tenures, with the necessary changes.

We have restricted recommendations relating to the other tenures to provisions that are strictly and properly limited to those tenures.

Residential Tenancies

Section 3: Definition of urgent repair

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.

The air-conditioner broke last summer. I told the landlord but he said that he would not repair it because he plans to demolish the house and doesn't want to spend any money on it. He said that we should buy a portable air-conditioner. The air conditioner has not been working for the past 9 months. Can we legally force him to fix the air conditioner? Summer has arrived and we desperately want a working air conditioner again. Our split system air-conditioner/heater broke four months ago in mid-summer. The landlord has sent 3 companies to look at the air-conditioner and they have all said that it must be replaced. Instead he is trying to find a way to repair it. We have a baby. We have had to give him cold baths and keep the fan running at night. It is now getting colder and we are wanting to use the heater, but the split system has still not been fixed.

R81. The definition of an urgent repair should be amended to cover the breakdown of a cooling appliance provided by the landlord.

We reported mould in the rental property months ago. We told them that the mould was affecting our health. We think that the mould is caused by a leak but the leak hasn't been fixed. We were told to use a portable heater at night to reduce the mould. We have had to throw out most of our clothes because they have become mouldy.

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.

R82. The definition of an urgent repair should be amended to include the presence of significant mould.

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.

R83. The definition of an urgent repair should be amended to include a fault that is causing significant damage to the tenants' possessions.

We recently moved in to a rental property. None of the telephone line connection points work. Telstra have attended and said that they are not responsible for the fault that the issue is with the wiring in the house. We reported this to the real estate agent a week ago and have no response. We need to be able to use the internet as my partner is studying an online university course.

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.

R84. The definition of an urgent repair should be amended to include a fault with a telephone and internet line.

Section 79: Landlord may do repairs and tenant liable for costs

Landlords are currently able to require their tenant immediately undertake repairs, or to pay for the costs of a repair. This is an overly harsh provision, compelling the tenant to undertake the repair in a very short period of time. This provision is largely unnecessary as at this point the landlord has suffered no loss. If the issue has not been repaired by the end of the tenancy the landlord will be compensated through the bond or by applying for compensation.

It also unnecessarily interferes with the tenant's quiet enjoyment of the property and may cause additional expenses for the tenant. For example, if a tenant's child has drawn on the walls and the landlord issues a repair notice, the tenant is required to outlay a large cost to repair the damage. If the child draws on the walls again before the tenancy ends they will have to need to pay for the repair a second time, rather than just once at the end of the tenancy.

R85. Sections 78 and 79 of the Act should be repealed.

Section 80: Declaration under Housing Act 1983

This section is redundant as section 64 of the housing Act has been repealed.

R86. Section 80 of the Act should be repealed.

Section 31: What is the maximum bond?

Bonds are capped at one month's rent; unless the rent payable per week exceeds \$350, as stated in section 31(3). Given that the median weekly rent in Victoria is currently at \$350 this subsection of the Act is out of date and needs to be modernised. However, simply adjusting the current amount will merely defer this problem. There is no compelling policy rationale for this section.

R87. Section 31(3) of the Act should be repealed.

Landlords and real estate agents are refusing to accept bonds that are offered through the Bond Loan Scheme. This is discrimination and must be protected against.

R88. The Act should be amended to ensure that a bond payment cannot be refused no matter what format it is paid.

Section 34: Not more than 1 bond is payable

[My Auntie has rented the same apartment since 2001. Her landlord wants to increase her bond by \\$300 and giving her 60 days' notice. The landlord claims this will mean it will equate with other bonds applying to apartments in the block.](#)

Sometimes a landlord seeks to top up bonds for long term tenants as their rent increases over time. The current legislation states that an additional bond is able to be claimed if the rent for the premises is greater than \$350 per week. Given that the median weekly rent in Victoria is currently at \$350 this subsection of the Act is out of date and needs to be modernised.

R89. Section 34(a) of the Act should be repealed.

Section 35: Condition report

The timeframe given for the tenant to return the condition report is too short at only three business days. It can be difficult for a tenant to inspect the property and make amendments to the report in this timeframe due to work and the many commitments associated with moving house. Often a tenant will not begin occupancy of a property immediately and it may be difficult to inspect the property before this time.

R90. The Act should be amended to increase the timeframe in which the condition report is to be returned from three business days to five business days.

R91. The Act should be amended to permit an extension where the tenant is able to prove illness during this time period or any other valid reason why they could not do the report.

Section 36: Condition report as evidence of the state of repair

There are often disputes at the end of tenancy concerning damage to the property and the refunding of bonds. The condition report is sometimes vague and cannot always be used to adequately represent the state of the property at the beginning of occupation.

R92. The Act should be amended to state that the landlord or agent must include photos of each room and any damage reported on the condition report.

Section 37: Certain guarantees prohibited

Young people entering into the rental market are often subject to age-based discrimination and can find it very difficult to secure a rental property due to their lack of rental history. It is common practice for landlords or agents to encourage prospective tenants to provide a guarantor. This is currently prohibited in the Act where payment of bond is required, however it is still occurring.

The purpose of the bond is to protect the landlord from loss of income due to rent arrears or property damage; this should provide sufficient security and therefore an additional guarantee is unnecessary. The legislation needs to be strengthened to ensure this behaviour does not continue.

R93. The Act should be amended to state that a landlord or agent must not accept a guarantee if the tenant has paid or is required to pay a bond under a tenancy agreement.

Section 40: Limit on rent in advance

The Act states that a landlord must not require the tenant to pay more than one month's rent in advance. Subsection 2 states that this does not apply to tenancy agreements where one week's rent exceeds \$350. This does not accurately reflect the current rental market and needs to be amended.

R94. Section 40(2) of the Act should be repealed.

Section 43: Receipts for rent

In a retail environment it is standard practice for receipts to be issued as formal recognition of the purchase of a good or service. This is not the case however when rent payments are made by tenants. Currently receipts are only required if rent is paid in cash, or if a tenant pays by another method and requests a receipt. This can often lead to confusion, particularly in rooming houses, as to whether or not rent has been paid and received.

I have repeatedly asked them for a written contract, but the(y) refused to do so. They want the money by cash without any receipt. When I asked for the receipt and written agreement, they ask me to move out.

R95. The Act should be amended to state that tenants must be provided with a receipt after each rent payment.

Section 52: Liability for utility charges - Telecommunications

Telecommunications are an essential part of the home environment and are often needed for safety, health and everyday necessities. Particularly for elderly or those in rural locations the landline phone may be the only phone available. There are no provisions in the Act that relate to responsibility for the cost of installing telephone or internet infrastructure. This can be an issue when a tenant rents a property which appears to have a phone line connected (with phone connection points inside the property). In many cases there may be no telephone line connected between the rental property and the street. A recent problem has arisen with the roll out of the NBN and confusion over who is liable when installation costs need to be paid.

R96. Section 52 and 53 of the Act should be amended to state that installation costs for telephone and/or internet connections are the responsibility of the landlord.

Section 52: Liability for utility charges – Water Leaks

A leaking pipe or hot water service may not be detected by the landlord or tenant. This can cause very high bills to be incurred. If the tenant cannot prove that the landlord knew or ought to have known about this fault, they will be liable for the bills. The bills can be thousands of dollars.

I received an excessive water bill because of a faulty hot water service. I first knew about the leak when I received a letter from the water company advising me that my water usage had significantly increased. A week later I received the water bill, which was over 10 times the usual amount. I checked the hot water service to find the leak and the hot water service was fixed a couple of days later. My gas bill was also increased because gas is used to heat the hot water service. Is my landlord responsible for the increase in the bill, or do I have to pay it?

- R97. The Act should be amended to require landlords to pay for electricity, gas and water usage costs incurred due to a fault in an appliance, fitting or fixture provided by the landlord, regardless of whether the landlord was aware of the fault.**

Section 58: Indemnity for taxes and rates

The requirement for a landlord to indemnify a tenant for any rates and taxes recoverable by a statutory authority does not apply to a fixed term tenancy exceeding one year. This is likely to be an issue particularly if longer leases are encouraged by the legislation.

- R98. Section 58 of the Act should be amended to remove the exception for tenancies exceeding one year.**

Section 60: Tenant must not cause nuisance or interference

Currently tenants are subject to a reduced right of quiet enjoyment by comparison to a person who is an owner occupier. The current wording of section 60 states that a tenant is in breach for use in “any manner” that causes a nuisance. There are many cases 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 where residents of neighbouring properties may have differing lifestyles and needs. It is unreasonable that a tenant be held to 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.

- R99. Section 60(1) and (2) of the Act should be amended to replace terms “in any manner” with “in an unreasonable manner prohibited by law”**

Section 61: Tenant must avoid damage to premises or common areas

Section 61(1) and (2) refers to damage to the rented premises (1) and common areas (2). These two subsections use inconsistent language with (2) stating that ‘reasonable care’ must be taken, whilst (1) states that ‘care’ is to be taken. It does not make sense that different levels of care would be required.

- R100. Section 61(1) 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 63: Tenant must keep rented premises clean

Tenants are often served unreasonable breach of duty notices with regards to the state of cleanliness of the property. This on many parts is due to the lack of clear definition of the term 'reasonably clean'.

Receiving a breach of duty notice can cause significant stress and disruption to the tenant, even if VCAT rules in favour of the tenant. Commonly, a breach of duty notice of this type is used to compel the tenant to keep the house in an immaculate condition during sales campaigns.

R101. 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.

R102. The Act should be amended to prohibit a landlord from serving a breach of duty notice unless the state of the property would cause a fire, or health risk, damage to the property, or constitute a breach of council laws.

Section 64: Tenant must not install fixtures etc. without consent

Section 64 prohibits tenants from treating rental properties like their home. Currently there is no way for a tenant to compel a landlord 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 seedling for a vegetable garden in the ground may be a technical breach. This issue however most commonly occurs with respect to items such as telephone line installation and installing curtain railings.

R103. The Act should be amended to state that a landlord cannot unreasonably withhold consent for the installation of additional fixtures.

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.

R104. 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.

R105. The Act should be amended to allow a tenant to apply to the Tribunal to install reasonable fixtures.

In the latter case, the Tribunal may require conditions if the fixtures are approved such as an additional bond.

Section 66: Landlord must give tenant certain information

Section 66 states that certain information must be provided to the tenant. Tenants however face a number of issues in relation to information that is or is not received. In addition to the broad issues noted elsewhere, common problems are detailed below:

- > The tenant and landlord enter into a contractual agreement with one another when the tenancy agreement is signed. Despite this, the name and contact details of the landlord are often not provided to the tenant. The Act states that the name of the landlord should only be provided where there is no agent acting on their behalf. This is not in accordance with contract law whereby both parties in a contract must be known to one another.
- > Often real estate agents use their own internal forms in substitution of prescribed forms. For example a real estate agent may provide their own maintenance request forms, however they do not provide receipt or confirmation of receiving the forms. This leads to greater confusion amongst tenants who are then not aware of the relevant prescribed forms such as the Breach of Duty Notice.
- > Section 66(2)(b) states that an emergency telephone number must be provided to the tenant for use in the case of urgent repairs. This contact number is often for a plumber or trades person of the landlord. As the tenant is contacting the tradesperson directly it creates confusion around who is hiring. It should not be the tenant's responsibility to make these arrangements.
- > Section 66(4) states that the landlord must give the tenant notice in writing if certain information changes, however this rarely occurs and is currently not well enforced. This is relevant to the real estate agent being discharged or another agent involved in the sale of the property.
- > Some tenancy agreements include provisions that prohibit certain conduct on the basis of the landlord's insurance requirements, however it is not specified what constitutes a breach. In addition the insurance policy is not provided to the tenants so they have no way of knowing how to comply with the provision.
- > It is a requirement that Owner's Corporation rules are provided (section 136 Owner Corporation Act 2006). Frequently this does not occur.
- > The boundaries of the private rented space and common areas are often not provided to the tenant which can be confusing and cause neighbour disputes.
- > Location and access to utility meters or control valves are often not known, identified, or accessible. This can give rise to a serious defect and large claims under section 52-54 of the Act, large numbers of estimate readings, and the inability to mitigate loss for serious leaks.
- > Appliances supplied by the landlord often do not come with proper use manuals. This means that a tenant may never know how to properly use a supplied appliance, and may damage it or incorrectly believe it is broken. This may cause technicians to be called out unnecessarily which may incur a fee to the tenant or cause disputes.
- > Modern apartments include high risk services such as car stackers that require training. Additionally fire alarm systems are often centrally controlled, meaning that a simple case of burnt toast may result in a call out to the fire brigade. This results in the tenant being liable for high fees. This could be easily avoided if tenants were provided information or were trained.

R106. Section 66 of the Act should be amended to effectively address the issues outlined above.

Section 67: Quiet Enjoyment – Pest Infestations

Pest infestations are a major issue in many rental properties. Requests for assistance from the landlord or agent are generally met with accusations and a refusal to act. Often the problem is endemic to the property and needs extensive work to eradicate the pests.

R107. The Act should be amended to state that a landlord must take all reasonable steps to ensure that any pest infestation is adequately removed and that the premises are able to be kept reasonably hygienic, sanitary and undisrupted for the purposes of residential accommodation.

Section 70: Locks

Currently, regulation about security and locks is very limited. The Act states that the landlord must provide locks to all external doors and windows of the rented premises, however it does not provide further protection to ensure security of tenants' possessions (as required under section 123). We see many issues relating to access to security cards such as key fobs, issues around the duplication and management of keys, and access to the residence by agents and even police under warrants. Currently, there are not adequate copies of keys given to tenants, and there is profiteering in relation to key cutting by Owners Corporations.

In many case keys and security are seminal to issues of family violence and illegal evictions.

R108. Section 70 of the Act should be amended to state that the landlord must provide each tenant their own copy of all keys and access cards enquired to enter any relevant dwellings or services on the rented premises (as per section 70 of the RTA (NSW)).

R109. Section 70 of the Act should be amended to state that the landlord or owners corporation cannot reasonably withhold consent to supply or duplicate keys at cost to the tenant.

Section 85: Entry of a rented premises

A notice of entry currently 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. For example, a routine inspection proposed by the landlord should be able to be planned in advance and does not need to occur at short notice.

R110. 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**

Section 88: What must be in a notice of entry?

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.

R111. Section 88 of the Act should be amended to require the landlord to provide the specific time and detailed reasons for the entry.

Section 90: What if damage is caused during entry?

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.

R112. 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.

Section 208: Breach of duty notice

Breach of duty notices don't lapse. This is a serious threat to long term tenancies. It also does not address nor recognise the vicissitudes of mental health or other episodic dispositions.

R113. Section 208 of the Act should be amended to state that a breach of duty notice becomes of no effect 12 months from the date of being served on the tenant.

Section 226: Termination by tenant before possession

Currently, 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.

R114. The Act should be amended to enable a tenant 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.

R115. The Act should be amended such that the grounds for making this application should include that the rented premises are not reasonably clean

R116. 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.

Section 234: Reduction of fixed term tenancy agreement

Under section 234 a tenant can apply to VCAT for an order reducing a fixed term lease if they have had an unforeseen change in circumstances, resulting in severe hardship to the tenant, which outweighs hardship to the landlord.

Although this section is intended to provide important protection to tenants who are in severe hardship, it does not operate this way in practice.

In our experience, VCAT will dismiss the application if the tenant has already vacated the rental property and returned the keys, on the basis that the tenancy has already terminated. As a result, the tenant is liable for lease breaking costs. Tenants may be in this situation if they did not seek advice on their rights prior to vacating the rental property.

I moved from interstate to Victoria to be closer to my family member who was unwell. I found work in the area and signed a 12 month lease. I have lost my job since signing the lease and my family member has passed away. I spoke to the real estate agent about ending the lease, who said that I would need to break the lease, and pay the landlords costs to find a new tenant. As a result, I have vacated the property and moved to another area where I could obtain work. I am currently staying with friends because I can't afford to pay the rent on two rental properties.

R117. Section 234 of the Act should be amended to specifically state that an order may be made under this section even if the tenancy has terminated.

Section 237: Reduced period of notice in certain circumstances

A tenant offered community housing can't give a reduced period of notice as they could if they were offered public housing.

R118. Section 237(1) of the Act should be amended to include offers of community housing.

Currently, a tenant is required to apply to VCAT for a reduction of fixed term if they meet the circumstances in section 237(1)(b), (c) and (d) and this can delay the process of ending the lease.

R119. Section 237(2) of the Act should be repealed.

Section 239: Failure of landlord to comply with Tribunal order

When a landlord refuses to conduct repairs to the property, the tenant can get an order under section 212, however this rarely occurs, with tenants much more likely to seek a report from Consumer Affairs requiring the repair.

R120. Section 239 of the Act should be amended to enable a tenant to give a Notice of Intention to Vacate if an order under Section 73 or the report from CAV under section 74 of the Act is not complied with.

Section 247: Failure to pay bond

This section states that a tenant can be given 14 days' notice to vacate if "the tenant fails to comply with a provision of the tenancy agreement relating to payment of a bond." This could include not paying the bond in the manner specified by the agreement. This section could be better worded to only enable a notice to vacate to be given if a tenant has failed to pay the bond by the date required in the tenancy agreement. The wording of this section means that a possession order could be made even if the client paid the bond prior to the hearing.

- R121. Section 247 of the Act should be amended to state that a notice to vacate to be given if a tenant has failed to pay the bond by the date required in the tenancy agreement.**
- R122. Section 332 of the Act should be amended to state that a possession order must not be granted in relation to a NTV under section 247 if the tenant has paid the bond.**
- R123. Section 331 of the Act should be amended to enable the Tribunal to adjourn the application for possession based on a notice to vacate under section 247 if satisfactory arrangements have been made to pay the bond within a reasonable time.**

Section 250: Use of rental property for illegal purpose

The original intention of the illegal use provisions were to protect the reputation of the premises. The current use has moved far beyond this, and it now applies to any form of illegal behaviour.

This provision allows people to be evicted without conviction as a notice to vacate gives only two days to leave the premises in which time the person is unlikely to have been convicted or otherwise. It is unfair that tenants are at greater risk of homelessness than an owner occupier who would not have their housing security threatened by the same behaviour.

An eviction for potential illegal activity serves as a double punishment and should be prohibited.

- R124. The Act should be amended to state that in order to for VCAT to grant possession for illegal use that person must be convicted rather than just charged of a relevant offence. Relevant offences should only relate to use which damages the reputation of the property i.e. illegal brothel, drug dealing, drug cultivation and/or production, gambling etc.**

Section 416: Application to Tribunal by tenant or Director of Housing

Sometimes a landlord or agent will not lodge a tenant's bond even though it has been paid. When this occurs the tenant is unable to apply free of charge to have their bond returned. They instead have to pay to apply to VCAT.

- R125. The Act should be amended to allow the Tribunal to make an order under this section that the landlord must return the bond if it can be shown a bond has been paid.**

Section 439G: Ensuring quality of database listing

Database operators are often non-compliant with the legislation and sometimes listings are left on the database for longer than the time limit prescribed in the legislation. It seems that CAV has power under sections 109 and 110 the ACLFTA to look at the database records but it's not particularly clear.

- R126. The Act should be amended to give CAV the power to audit residential tenancy database records every 12 months and fine the operators if they discover entries that should not be recorded.**
- R127. The Act should be amended to ensure there is one free method available for a tenant to obtain their file from a database operator.**

R128. The Act should be amended to allow for a mechanism for tenants to apply to be removed from a database on hardship grounds, particularly in cases of family violence.

R129. The Act should be amended to include a greater obligation on the agent to inform the tenant that they will be put on a database.

Pets

Pets are viewed by landlords as a significant risk to rented premises. However local laws regulate safety, registration and noise complaints, and nuisance provisions should already capture some of these concerns.

Largely the concerns could be redressed by additional terms to be approved by the Director.

R130. The Act should be amended allow a tenant to give notice of a free roaming pet. In the absence of any order by the Tribunal preventing the tenant from keeping a pet (for reason of nuisance or damage) a tenant may retain a pet on the rented premises.

Rooming Houses

Section 108 – Separately metered rooms

The Act prohibits rooming house operators charging for electricity and gas if the room is not separately metered, however it does not mention water. This is inconsistent with the residential tenancy and caravan park provisions, which state that charges can only be made for water and sewerage disposal if it is separately metered.

R131. The Act should be amended to prohibit the rooming house operators charging for water usage.

Section 112: Resident's duty to pay rent

Rent payment should not be a duty as it exposes residents to an unnecessary risk to their tenure. If rent is not paid then a notice to vacate can be served. There is no need for this additional provision. Section 112(2)(a) and 112(2)(b) in relation to shared rooms is unnecessary as exclusive occupancy should already prohibit cohabitation of residents unless they consent.

While section 112(2) is useful, it is seldom applied or known by the general community of residents, and the remedy for relief against rent should not be the conduct of unlawfully overcrowding or imposing another person against an exclusive occupancy right.

R132. Section 112 of the Act should be repealed.

Section 113: Quiet enjoyment - resident's duty

Section 113 places an overly burdensome responsibility on the resident by using the phrase “anything” rather than “unreasonably.”

It is also unreasonable for a resident to be expected to control the behaviour of a guest when they are not only in the rooming house but near it. It puts responsibility on the resident for behaviour of another in what potentially could be a public space. The rules around guests and relationships should be better addressed in the context of house rules.

R133. Section 113(1) of the Act should be amended to state that a resident must not unreasonably do anything in their room or on the premises of the rooming house, or allow his or her visitors to unreasonably interfere with the privacy and peace and quiet of the other residents or their proper use and enjoyment of the rooming.

Section 116: Resident must notify owner and compensate for damage

This section is inconsistent with the equivalent provision for residential tenancies. It has a harsher requirement of the tenant and could place unfair financial burden on people who are already financially strained.

Further, the compensation amount is likely to be the subject of a dispute, and compliance is impossible to determine.

R134. The Act should be amended to state that a resident or his or her visitor must not cause damage to the room or rooming house. A resident must report to the rooming house owner any damage to or breakdown of facilities, fixtures, furniture or equipment provided by the rooming house owner of which the resident has knowledge.

Section 117: Resident must not keep pet without consent

Rooming house residents represent a complex cohort of people, with poor mental health being overrepresented in this cohort. The therapeutic value of a pet should not be underestimated as an aspect of quiet enjoyment and should not be arbitrarily deprived. The therapeutic benefit may in fact reduce anti-social behaviour, or social isolation.

R135. The Act should be amended to state that a rooming house owner must not unreasonable withhold consent to a pet.

R136. The Act should be amended to allow a resident to apply to VCAT if consent is being unreasonable withheld.

R137. The Act should be amended to allow the Tribunal to authorise a resident to keep and be responsible for a pet without the rooming operators consent.

Section 119: Resident must observe house rules

House rules are essential to ensure the functional operation of a rooming house. Currently, many houses either do not display rules according to the Act, or the rules are inconsistent with the Act. The rules are also often used as a form of retaliation.

In many cases, there is no way for a resident to challenge the validity of the rules and in many cases they may be made homeless unfairly.

R138. The Act should be amended to state that a resident is not in breach of section 119 if the rooming house operator has failed to ensure that house rules are displayed in the common area and the resident's room.

R139. The Act should be amended to state that a resident who has been served a breach of duty notice is at no time in breach of section 119 if the rule is found to be invalid.

Section 120: Good repair - Rooming house owner's duty

Good repair is a huge issue in rooming houses. There are also major issues with respect to the arrangement for compliance with the Public Health and Well Being

Act - in particular cleanliness. Regulation 18 of the Public Health and Well Being Regulations proposes that it is the rooming house operator's responsibility to keep the accommodation including bedrooms, toilets, bathrooms, laundries, kitchens, living rooms and any common areas in good working order; clean, sanitary and hygienic; and in a good state of repair. This is currently not occurring.

R140. Section 120 of the Act should be amended to state that a rooming house owner must ensure that the rooming house and its rooms and any facilities, fixtures, furniture or equipment provided by the rooming house owner are maintained in good repair and good working order.

R141. Section 120 of the Act should be amended to state that a rooming house operator must maintain rooming house and all toilets, bathrooms, laundries, kitchens, living rooms and any common areas provided with the accommodation in a clean, sanitary and hygienic condition.

R142. The Act should be amended to state that if a rooming house owner is repairing or renovating residents' facilities, the owner must:
(a) minimise inconvenience and disruption to the residents; and,
(b) if necessary, provide temporary substitute facilities. This being in the form of temporary alternative accommodation or reasonable compensation for the purposes of alternative accommodation if the resident's room is being repaired.

Section 122: Quiet enjoyment - rooming house owner's duty

The role and occupation of a manager is often unclear in rooming houses. In many cases, rooming house managers can occupy common spaces, and are not required to strictly comply with the entry requirements. As a result many tensions and opportunity for intimidation or disputes arise in this unregulated space.

Seldom does VCAT consider the unnecessary attendance of a rooming house operator as a breach of section 122, because of the nature of the entry provisions (entry notice is only required in relation to the room, not the common area).

R143. Section 122 of the Act should be amended to state that a rooming house operator should not attend a rented premises without a lawful excuse and must do so in a reasonable manner.

Section 123 - Security

Anti-social behaviour and intimidation is a severe issue in rooming houses. Regulation of security is significant to the welfare and protection of people and of personal property.

Section 123 states that a rooming house owner must take all reasonable steps to ensure security of a residents' property, but it does not state that they must take reasonable care to ensure the security of the resident themselves. Additionally residents do not have security with respect to their mail - which is federally regulated by the criminal code for good reasons. This is a serious issue with respect to service of court documents and privacy. A provision of separate post boxes would assist with this and would also serve as a community identifier for rooming houses given they have to be registered.

R144. Section 123 of the Act should be amended to state that a rooming house owner must take all reasonable steps to ensure security of

the residents' person while on rented premises of the rooming house, and the property of a resident in his or her room.

- R145. Section 123 of the Act should be amended to state that a rooming house owner must provide a separate mail box for each room provided for rent by the rooming house operator in compliance with Part 10.5 of the Federal Criminal.**

Section 124: Display of statement of rights and house rules

Many residents do not have rules displayed in their rooms. They are also not provided with the relevant mandatory disclosure information.

The current summary of rights and rules is overwhelming and does not provide residents with the necessary framework to expedite actions. It is also important that the minimum standards are detailed as part of a condition report, or in some way upon the tenancy commencing. For example when the last electrical or gas inspection was done, allocation of food cupboards, hot water capacity etc.

- R146. Section 124 of the Act should be amended to state that the house rules, and the rights and duties must be displayed in the common areas as well as the resident's room.**

Section 125: Owner to give additional information

Property owners often do not know that their property is being used as a rooming house. Residents have no way to determine if the owner of the premises has consented to the premises being used as a rooming house.

The following recommendation is made in addition to our comments under Section 66, and may also be incorporated into the registration requirements.

- R147. The Act should be amended to state that the rooming house operator must display a sign with the name and contact details of the owner of the property, and written evidence of the consent to use the premises as a rooming house.**

Section 126: House rules

There are currently no standard house rules and this is being taken advantage of by many operators. Rules are frequently used to regulate the use of heaters to limit gas or electricity bills where premises are not separately metered. Rules are also often used to create a cleaning roster, which is the rooming house operator's responsibility. Rules can also be used as a source of retaliation. Standardised rules would help limit abuse of rules and inappropriate delegation to vulnerable residents.

- R148. Section 126 of the Act should be amended to include standard model rules that every rooming house must adopt. If additional rules are to be added or amended, they must be approved by the Director.**

- R149. The Act should be amended to include an additional minimum standard outlining a minimum litre capacity or rate per person in terms of hot water for bathing and laundering.**

Section 137(e): Grounds for entry of a room

In rooming houses, routine inspections can be carried out once every four weeks. This is an unnecessary disruption and invasion of privacy to the resident.

R150. Section 137(3) of the Act should be amended to state that room inspections should be conducted no more than once every three months.

Section 142D: Unregistered rooming houses

Estate agents, landlords and tenants alike all struggle between what constitutes a licensee arrangement and a rooming house. Often agents are ignorant that a property is being used as a rooming house, but often they falsely claim ignorance. This contributes to the continued operation of unregistered rooming houses.

The knowledge and culpability of this provision needs to be strengthened to ensure that unregistered rooming houses cease to operate.

R151. The Act should be amended to state that if in the course of proceedings the Tribunal finds that a person described in section 142D knew or ought to have known the premises was not registered with local Council, the Tribunal may issue a civil penalty for a prescribed amount.

Section 289A: Notice by owner of building or other person

Leased properties are often being used as rooming houses without the knowledge or consent of the owner. This places the residents of the rooming houses in a vulnerable position, particularly if a notice to vacate is given to the operator. Often the residents of the rooming house do not know the landlord's details so are unable to challenge a notice to vacate.

R152. The Act should be amended to include a duty provision that a rooming house must have written consent from the owner to operate.

Section 345: Order of Tribunal

A landlord can apply for a possession order if they allege that the property has been occupied without consent. However, the rental property may have been operating as a rooming house. In this case, the Tribunal should not be able to make a possession order unless a notice to vacate has been given under 289A and the notice period provided by this notice has passed.

R153. Section 345 of the Act should be amended to state that the Tribunal must not make a possession order unless it is satisfied that anyone entitled to a notice to vacate under section 289A has been given the required notice.

Section 352: Postponement of issue of warrant in certain cases

Section 352 does not enable a rooming house resident or a caravan park resident to seek a postponement of the issue of the warrant due to their hardship.

R154. Section 352 of the Act should be amended to enable a rooming house resident or a caravan park resident to seek a postponement of the issue of the warrant due to their hardship.

Section 368: Manager may give person notice to leave

Notices to leave are being abused and used to intimidate residents. Currently, there are protections in place to prevent abuse of these. For many residents' the notice to leave, renders the tenant homeless and living rough until the matter is determined.

In some cases, adjournments have been given and the matter has not been 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.

While this is a necessary provision, the utilisation of the "cooling off period" cannot be resolved unless the tenant pursues the matter. In most cases, residents are simply grateful for not being evicted and losing all their possession, and there is a legitimate fear of another notice to leave.

R155. The Act should be amended to make it an offence for an unregistered rooming house to serve a notice to leave.

R156. Section 368(1)(b) and section 368(2)(b) of the Act should be amended to say "serious and imminent danger of harm".

R157. 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.

The current information on the notice to leave is incorrect and grossly inadequate for the resident.

R158. 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.

These notices are often given due to the conduct of a resident's visitor.

R159. 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)).

R160. The Act should be amended to state that if a resident's visitor has been criminal 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.

R161. The excluded visitor may apply for revocation or a variation order if they can show cause that a similar incident will not occur.

Section 368A: Offence to give notice to leave without reasonable grounds

The current offence provision is useful and has the appropriate requirements to register the notice to leave with the registrar despite not having to apply to the application. The current penalty unit is grossly insufficient.

As there is also not written requirement to describe the events. This may be remedied by a proposal in section 373 to lodge the notice to leave as well as a statutory offence.

R162. The Act should be amended to proportionately increase the penalty for a breach of section 368A.

Section 372: Offence to re-enter premises during suspension

People who are on medication or have other important property or information may need to send a person to collect their goods.

R163. The Act should be amended to include a specific exemption to allow a visitor to attend the property to collect any necessary goods for a suspended person.

Section 373: Notice to principal registrar

There is a major issue with compliance with this provision. It is intended to be a register that creates accountability however this is not occurring.

R164. The Act should be amended to require 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.

Section 375: Tribunal must hear application urgently

Delays caused by adjournments once the matter is contested have severe consequences for residents who have been served a notice to leave. The resident is effectively rendered homeless and in most cases will be living rough during this time.

R165. The Act should be amended to state that the Tribunal may adjourn an application under Section 374 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.

Caravan Parks**Section 3: Definition of a moveable dwelling**

In some rare situations there are buildings (not being a Part 4A) that are fixed to a concrete slab on land not intended to be house a dwelling. These buildings may potentially be construed as a caravan. These dwellings need to be excluded if used for tenancy purposes, and be regulated by Part 2 despite existing on the land that is registered as a caravan park.

Section 143: Residency right

The nature of a residency right in a caravan park creates similar problems to those in a rooming house. There are some minor features that distinguish it from exclusive possession. But they are not insignificant. For example, once death occurs, the site interest cannot be transferred, and the residency right cannot be conveyed to family members. It appears in Part 4A, the dwelling being capable of being occupied is enough for the site tenancy to survive death by virtue of the chattel continuing to occupy the land.

A right to occupy is inferior to exclusive possession. Section 94 shows that this makes nominal difference with respect to the practical use of a site. Caravans are not shared between residents in any other context other than joint tenancy or a similar covenant. There is no reason not to grant exclusive possession of the site and the caravan is hired.

R166. Section 143 of the Act should be amended to state that a resident has a right to exclusive possession of the site which he or she occupies; and a right to exclusive possession of the caravan on that site.

Section 161: Fee for supply of key

Residents have to pay for the first key/swipe card but presumably they have to return them when the leave. This is inconsistent with the rest of the legislation.

R167. Section 161 (and section 206ZD) of the Act should be amended to state that the site owner is liable to provide resident with first copy of key/swipe card but tenant is responsible for any subsequent keys/swipe cards.

Part 4A Parks

Section 206Z: Site tenant's use of site

Terms of site agreements are often restrictive and the wording of this section seems to place an unnecessarily high burden on the resident. As a duty provision the consequences for a breach may be disproportionate to the conduct involved.

R168. The Act should be amended to provide for reasonable and lawful use of the site and park facilities.

Section 214A: Compensation for terminated site agreement

Further, the cap of compensation for a Part 4A to continue to occupy a site, appear to be illusory (section 214A) - because of the effect of 214A(2). Therefore, it is unclear the purpose of this provision. Whilst the compensation for forgone rent would be capped the compensation for other losses would not.

The site tenant was served a no reason notice to vacate. There has previous been some personal disputes between the site tenant and the site owner. The site owner indicated that they wanted to construct a new dwelling on the site and would therefore not offer any purchaser of the dwelling a site tenancy agreement. The site tenant tried to sell the dwelling, but no one wanted to purchase because of the moving costs. The site owner then made an offer which appeared to be significantly below the sale price of other dwellings, the site tenant felt they had few alternatives.

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