

Final Report

Unfair Terms in Residential Tenancy Contracts

June 2006

Prepared by
Lee Hansen LLB (Melb)

Tenants Union of Victoria Ltd
ACN 081 348 227
55 Johnston Street
Fitzroy 3065
Admin 9411 1444
Fax 9416 0513



CONTENTS

Introduction	1
Routine tenancy Problems	2
General Comments	2
The Terms of Residential Tenancy Agreements.....	2
The Problem of Inconsistency	3
Misleading the Tenant.....	3
Misleading the responsible property manager	3
Taking Advantage	4
Confusion	4
Harming Relationships	4
Concern for Reputation	4
Preliminary Comment on Inconsistency	4
Particular Problems with Tenancy Terms	5
Landlord’s purporting to limit or avoid their mandatory duties.....	5
Penalties	5
Rent.....	6
Other financial burdens.....	6
Restrictions upon use.....	6
Duration of a Tenancy	7
Principal Place of Residence Clauses.....	7
Tenant Declarations	7
Charging the tenant through third party agreements	8
Other problems.....	8
Analysis of Typical contract terms.....	9
Excluded Contracts	9
Invalid Terms	9
1. Disclaimers	9
2. Repairs.....	9
3. Eviction	10
4. Sanctions	10
5. Assignment & Subletting	10
Restrictions on Use.....	11
Landlord’s purporting to limit mandatory duties	11
Rent & Duration	12
Terms Required or Expressly Permitted by Law	12
Guidelines of the Office of Fair Trading in the United Kingdom	13
Application of Part 2B of the Fair Trading Act	14
Consumer Contracts	14
Agreements Whether or Not in Writing	14
Personal, Domestic or Household Use or Consumption.....	14

Goods or Services	15
In Trade or Commerce	15
Public & Social Housing	15
Tribunal Practice	15
Broad Application to Residential Tenancies	17
Restrictive Application to Residential Tenancies	17
1. Agents that provide, grant or confer in trade or commerce	17
2. Analogy with misleading conduct cases	17
3. Other case Law	18
Effect and enforcement	19
Void and Unenforceable	19
Complete Voidness	19
Severability	19
Declarations	19
Barriers to Enforcement	20
Integrity of the Tenancy Agreement: RTA	20
Appendix A: Compliance Chart	23
Methodology	23
Compliance Chart	23

INTRODUCTION

In recent years the advocacy services of the Tenants Union of Victoria have placed greater emphasis on the role of the Fair Trading Act 1999 (FTA), both in determining and advising tenants of their rights, and to aid in the resolution of disputes that arise out of the relationship between tenant and landlord.

In the early days the FTA was appreciated in tenancy matters, predominantly for its prohibition on misleading and deceptive conduct and for the ability to circumvent the \$10000 compensation limit for applications to VCAT under the Residential Tenancies Act 1997 (RTA).

The substantial amendments to the FTA in 2003 have enhanced and underscored the role of the legislation as a broad and vital supplement to the RTA in regulating the relationship between landlord and tenant, and in providing a framework for the resolution of tenancy disputes where the principal legislation is silent.

At first blush the measures against unfair contract terms seemed to have potential to significantly impact upon the content of tenancy agreements. Part 2B of the FTA relates intimately to the experience of tenants as they seek out and sign-up for rented premises: the lack of good faith, the significant imbalance and the take it or leave it approach to contracting.

Our researches have confirmed this initial speculation. A considerable portion of the additional terms that are placed into tenancy agreements are amenable to challenge on the ground that they are unfair and offend against Part 2B. Tenants would be encouraged to dispute the validity of such terms and ultimately to exercise their right to have such terms declared void by VCAT. The widespread use of such terms, however, is a systemic problem that calls for intervention and enforcement by the regulator.

This special project was made possible by the provision of funding from Consumer Affairs Victoria. We thank Dr Elizabeth Lanyon and Kelly Saunders for the assistance that they provided to the author.

ROUTINE TENANCY PROBLEMS

This section of the paper outlines those problems routinely encountered by consumers arising from the terms of residential tenancy agreements.

General Comments

This section provides a general description of the problems that arise as a result of the terms of residential tenancy agreements. We have excluded any problems that arise specifically from the terms contained in the REIV standard form agreement. We have referred to types of terms that routinely appear and are from a broad consumer perspective problematic. We do not in this section apply an analysis of whether these terms offend Part 2B of the *Fair Trading Act 1999* (FTA), however many of the comments made will be relevant to our later considerations of fairness under Part 2B. It may be that some of these problems are not remediable by Part 2B.

This section of the paper does contain legal analysis in so far as problems with the terms of residential tenancy agreements arise as a result of their relationship with the provisions of the *Residential Tenancies Act 1997* (RTA). An understanding of where contractual terms fit within the broader scheme of the RTA is therefore of initial assistance.

We have been asked to focus on contract terms and not on surrounding processes such as misleading or illegal conduct. We take this to refer to pre-contractual conduct or other conduct unrelated to the terms of the tenancy agreement. Such conduct may impugn terms in particular instances but not at large. This is distinct from the situation where the term itself is the source of illegality or misleads consumers; we take such circumstances as entirely relevant to questions of fairness. In our view an adequate account of the application of Part 2B would be deficient without reference to such matters.

The Terms of Residential Tenancy Agreements

The primary source of rights and obligations for residential tenants and landlords in Victoria is the RTA. That Act has the express purpose of defining ‘the rights and duties of landlord and tenants of rented premises’. It also seeks to provide for the ‘inexpensive and quick resolution of disputes’ that arise under the Act.

The RTA devolves to the parties the power to determine further rights and obligations between themselves within the terms of a tenancy agreement. This authority is ultimately recognised by the comprehensive provisions within the RTA for the enforcement of terms of the agreement.

One restraint upon the contracting power of the parties is contained in s 28 of the RTA. Where a term of a tenancy agreement is harsh, unconscionable or such that a court exercising equitable jurisdiction would grant relief a tenant may apply under sub-s (1) for an order either varying or declaring the term invalid. The term “harsh” has been given restrictive treatment in this context and as result applications under this provision are rare.

Whilst the RTA will only apply where in the first place the parties have reached an agreement for the letting of premises, it should not be forgotten that a tenancy agreement

and the terms it contains are subordinate to the provisions of the RTA. The terms of the agreement are a supplementary source of rights and obligations and are invalid where they are inconsistent with the RTA. This is provided for at s 27:

- (1) *A term of a tenancy agreement is invalid if it purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying-*
- (a) *the application to that tenancy agreement of all or any of the provisions of this Act; or*
 - (b) *the exercise of a right conferred by this Act.*

Referring to the predecessor of the 1997 Act it has been said:

In assessing which terms of an agreement are inconsistent with or exclude, restrict or modify the provisions of the Acts we are not dealing with two sources of equal standing which are to be reconciled with one another where possible.¹

There may be a direct inconsistency between the terms of the agreement and the RTA. In some cases it is clear that the RTA was intended to exhaustively determine the rights and obligations of the parties within a specific sphere of tenancy law. Provisions determining the manner in which a tenancy may be terminated present the most notable example. Section 216 states:

Despite any Act or law to the contrary, a tenancy agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8.

In some other instances an implication may be drawn that the RTA exhaustively determines a tenant or landlords rights and obligations in a particular sphere of tenancy law.

The Problem of Inconsistency

Inconsistency between these two sources of rights and obligations does not merely present the technical legal problem of construction of the contract document in light of the provisions of the principal legislation. Rather, inconsistency creates a number of significant obstacles to tenants who are seeking to determine or exercise their rights. These are set out below:

Misleading the Tenant

The invalid term instructs the tenant to do or refrain from doing something. It purports to create a legal obligation and for the tenant who is unaware of their legal rights it creates the clear impression that the obligation is legally binding. Where it is further relied upon in demands made by the landlord or agent then the misleading effect of the term is compounded by that latter conduct.

Misleading the responsible property manager

The invalid term may misdirect the property manager in charge of the tenancy as to what the actual rights of the landlord or tenant are.

¹ Bradbrook, MacCallum & Moore, *Residential Tenancy Law & Practice* (1983) p.176

Taking Advantage

The invalid term creates an imbalance between the parties, it gives the landlord or agent the ability to benefit from an invalid term. The benefits may flow without any further misleading conduct on the part of the landlord or agent, since they may result simply from the tenant complying with the invalid term. Invalid terms also place the landlord or agent in a position where they may deliberately or unconscientiously take advantage of the tenant's position.

Confusion

Inconsistencies can cause unnecessary confusion in the mind of the consumer as to what their rights actually are. What may be the clear right of a tenant may be obfuscated by the existence of an inconsistent provision within the agreement. This may dissuade an already reluctant tenant from exercising their rights.

Harming Relationships

Although they may be perfectly entitled to do so on the ground of inconsistency, a tenant may be concerned that departing from a promise contained within a tenancy agreement may harm the relationship between tenant and landlord or tenant and estate agent. They may consider that maintaining a healthy relationship is their primary concern, especially where they have had previous difficulties in seeking out suitable housing. The weaker bargaining position of the tenant in this situation has not only determined the content of the tenancy agreement but has also determined the tenant's effective rights. If the invalid terms were not contained in the agreement in the first place, these tenants would not have to concern themselves with the question of whether they ought to depart from their own promises.

Concern for Reputation

Related to this last concern we consider that the inclusion of invalid terms is the conduct that ought to be impugned. However, where the parties are dealing between themselves and there is a significant imbalance in bargaining power, it is quite easy for imputations of wrongdoing to be reversed. Rather than the tenant asking the question of the agent why they have included this invalid and misleading term in the preparation of the tenancy agreement, the agent may ask of the tenant why they have signed and agreed to be bound by a term if they don't believe it to be valid. Where a tenant is concerned about their reputation as a tenant such allegations of disingenuousness, however unfounded, may be powerful.

Preliminary Comment on Inconsistency

It has become apparent during the course of our research that a considerable proportion of terms of tenancy agreements are invalid under s 27.

The relationship between invalidity under the RTA and the operation of Part 2B of the FTA is discussed in section 2 of this paper within the general comments that precede our analysis of typical terms and their variants.

Particular Problems with Tenancy Terms

Landlord's purporting to limit or avoid their mandatory duties

The RTA assigns a number of mandatory duties upon landlords including:

- ensuring that the premises are maintained in good repair;
- providing the premises vacant and reasonably clean; and
- taking reasonable steps to ensure that the tenant has quiet enjoyment of the premises

Some terms attempt to avoid these duties entirely, more frequently they will reduce or limit the operation of these duties by:

1. permitting the landlord to commit certain specified acts or omissions which do or may contravene a mandatory duty;
2. transferring to tenants specified tasks that are by virtue of the mandatory duties within the landlord's sphere of responsibility; or
3. restricting tenants from using specified facilities provided with the premises with the intention of avoiding these mandatory duties.

Section 27 of the RTA renders all such terms invalid. Our discussion of the misleading and imbalancing effect of invalid terms applies to all terms that exclude or otherwise restrict or modify these mandatory duties.

Penalties

Penalty clauses appear within many tenancy agreements, most usually in the form of lease break clauses that impose a fixed re-letting fee. Such clauses fail to even meet the basic common law requirement of being a reasonable pre-estimate of loss since they are not charged in proportion to the time remaining on the lease. Other penalties include rent fines and fixed charges for dishonoured cheques. Some terms penalise tenants for non-compliance with the RTA or the agreement by requiring the tenant to pay for administrative or legal costs that result from the breach.

A concern from a consumer viewpoint is that penalty clauses diminish the comprehensive scheme for compensation and compliance that is set out in the RTA. It is an accessible and inexpensive enforcement regime that could hardly be said to be deficient in protecting the landlord's legitimate financial interests.

Of greater concern from a legal viewpoint is that the imposition of very many of the penalties that are included in tenancy agreements is prohibited by s 505 of the RTA. Sub-section (1) states:

A person must not demand or accept from a tenant under a tenancy agreement who has failed to comply with the tenancy agreement or with any of the provisions of this Act relating to the tenancy agreement the payment by reason of the failure of any amount other than

(a) subject to this Act, rent under the tenancy agreement; or

(b) *an amount or penalty provided for in this Act.*

Penalty: 20 Penalty units.

The conjunction of that provision with s 27 of the RTA has the effect of invalidating many penalty clauses that appear within tenancy agreements. Though they are invalid their presence within tenancy agreements has the misleading and imbalancing effect that we have described as well as potentially facilitating the commission of an offence under s 505.

Rent

The rent to be paid is itself a term of the tenancy agreement and the reasonableness of the amount charged is often raised as a concern by tenants where latent defects in the property or other problems with the situation of the premises are revealed. The RTA provides a partial remedy by allowing tenants to ask that the rent be assessed where facilities have been reduced. Also where there is some other breach by the landlord the tenant may be entitled to compensation.

Section 42 provides that the place for the payment of rent and the manner of payment of rent may be specified in the tenancy agreement. Problems can arise if the arrangements lead to the parties “continually confronting each other”.²

Landlords and agents will in most instances accept so-called ‘part payments’ of rent, perhaps reaching the pragmatic realisation that such a payment is better than no payment at all. On the occasions that they refuse to, they may rely on terms of the agreement that require the rent to be paid in full, usually monthly in advance. Section 39 of the RTA however makes it clear that rent accrues on a daily basis and is recoverable accordingly.

Other tenancy terms purport to limit the obligation of an agent to provide rental receipts.

Other financial burdens

Some terms purport to impose financial burdens that are more onerous than those provided in the RTA. This may result in the invalidity of the term under the RTA. This is the case where a term requires a tenant to pay for steam cleaning of carpets at the end of a tenancy irrespective of the actual condition of that carpet. Clauses requiring tenants to pay for stamps where a receipt has been requested also fit within this class.

Terms placing financial burdens on tenants are also problematic where they are unreasonable in the circumstances. Clauses requiring tenants to obtain contents insurance fall within this category.

Restrictions upon use

The RTA imposes several duties that restrict the use that may be made of the premises by tenants. These include ensuring that care is taken to avoid damaging the premises, keeping the premises reasonably clean and not interrupting the quiet enjoyment of neighbours.

The terms of tenancy agreements often go far beyond the restrictions that are set out in the RTA. These include no-pets clauses, smoking bans, restrictions on pot-plants and clothes hanging and limitations on the number of persons who may occupy the premises. Such

² Billings, Kefford & Vassie, *Annotated Residential Tenancies Act 1997* (2005) ANSTAT, commentary at [42.01]

clauses are often broadly termed and may extend to prohibit entirely harmless behaviour the classic example is the no-pets clause that prohibits the keeping of goldfish.

From a consumer viewpoint a tenant ought to be left alone to live their lifestyles in privacy. This goes beyond the technical legal right to quiet enjoyment which concerns itself with outside interference with a tenants possession of the premises. Clauses that prohibit tenants from using the premises in a manner that is objectively reasonable exercise an overreaching level of control and domination over the everyday lives of tenants. This in a context where the RTA already provides extensive protections of the landlord's interest.

Duration of a Tenancy

The telephone advice service of the Tenants Union of Victoria receives a considerable volume of enquiries from tenants who have been bound to tenancy agreements for a fixed term and who wish for a variety of reasons to terminate the agreement early. Lease-breaking can be an expensive exercise for tenants who may find themselves liable for a large amount of lost rent and other incidental charges. Tenants will often not consider, unless their attention is brought to the matter, whether they are better served by a tenancy for a lesser fixed term or indeed a periodic tenancy. Where twelve month tenancies are offered without regard to the particular circumstances of the tenant the result is an increased incidence of lease-breaking.

Principal Place of Residence Clauses

Section 254 of the RTA provides for a reduced notice to vacate period of 14 days where the landlord lets their principal place of residence and intends to re-enter into occupation of the premises when the tenancy ends. The tenancy agreement must however specify that the premises were the landlord's principal place of residence and that the landlord so intends to re-enter into occupation.

The RTA permits the use of these clauses where they accurately reflect the situation and intention of the landlord. We acknowledge that in some instances the use of this clause will be appropriate. It is apparent however that these clauses are appearing within tenancy agreements as a matter of course irrespective of who it was that occupied the premises prior to the tenancy and what use will be made of the premises after it. We are aware of one case in which a brand new premises offered by a corporation had never been resided in by anyone and was let with a principal place of residence clause. Such clauses appear frequently in the additional or special term sections of tenancy agreements and often do not appear to be modified based on the actual circumstances.

Tenant Declarations

Terms routinely require tenants to make declarations. Most common amongst these are statements that a tenant has read and understood the tenancy agreement. The Office of Fair Trading in the UK ("UK OFT") have published a Guidance on Unfair Terms in Tenancy Agreements ("Guidance") in which they have said in relation to the appearance of such terms within tenancy agreements in that jurisdiction:

Sometimes, the contract may require the tenant to agree to the declarations for the contract to proceed, whether or not the declarations reflect the facts and true position. Tenants often

*regard the declarations as a mere formality, and are unable to predict the potential disadvantage of apparently making them.*³

We consider that such concerns apply equally to tenant declarations made within Victoria.

Charging the tenant through third party agreements

Problems also arise where the protections offered under the RTA are avoided by the use of agreements between the tenant and third parties to provide services which are the landlord's responsibility.

In *Chen v Mulholland*,⁴ Member Vassie of the Victorian Civil and Administrative Tribunal ('VCAT') was of the view that a tenant may sign an enforceable contract with a third party such as a body corporate or a utility company to provide a utility service and that such contract may impose liabilities upon the tenant that were not envisioned under the RTA.

Whilst these are not terms of a tenancy agreement, they are worthy of further analysis for compliance under Part 2B.

Other problems

- Terms do appear with some frequency that purport to interfere with the ordinary standards of evidence or legal processes.
- Some terms purport to incorporate other documents such as body corporate rules, concerns arise where those rules are not provided at the time that the agreement is made.
- Other terms are poorly expressed, ambiguous, or use legal terms erroneously.

³ Office of Fair Trading (UK), *Guidance on Unfair Terms in Tenancy Agreements*, [4.20]

⁴ *Chen v Mulholland (Residential Tenancies)* [2005] VCAT 2912 (15 December 2005)

ANALYSIS OF TYPICAL CONTRACT TERMS

Our analysis of typical and variant contract terms for compliance with Part 2B and s 163 is arranged as follows:

- general comments provided below.
- a compliance chart containing an analysis of those terms. Refer to Appendix A.
- a separate volume of source documents.

Excluded Contracts

We have excluded from our analysis any term that is included in the REIV standard form contract. We have also excluded caravan park and rooming house agreements as directed in our discussions with CAV staff. Whilst license agreements and tenancies that are excluded from the protections of the RTA are not examined, we do note that Part 2B provides some potential for significant remedial benefits with those tenancies and other forms of tenure where occupants are less protected than tenants under the RTA.

Invalid Terms

Earlier we looked at the misleading and imbalancing effects of clauses that are placed into tenancy agreements despite their invalidity under s 27 of the RTA. Our research has revealed the widespread occurrence of such terms; we make some general comments on their relationship with Part 2B.

The UK OFT's Guidance saw the misleading potential of clauses as a source of contractual unfairness. Some key examples provided in the Guidance are:

1. Disclaimers

Disclaimers that are made invalid under other legislation. The UK OFT says their inclusion as terms is both pointless and potentially misleading.

The fact that a term is void under other legislation, and therefore unenforceable before a court, does not make it fair under the Regulations.⁵

2. Repairs

Terms that transfer the landlord's repair obligations to the tenant are objected to on the grounds that they are 'void, unenforceable and misleading.'⁶ Terms that only partially detail a landlords repair obligations are potentially unfair because they may mislead.⁷

⁵ OFT Guidance, [3.5]

⁶ *ibid*, [3.15]

⁷ *ibid*, [3.14]

3. Eviction

Terms purporting to permit eviction without court order would be challenged on the ground that they are “seriously misleading.”⁸

4. Sanctions

An unfair imbalance results from terms imposing “sanctions over and above those that can actually be imposed.”⁹

5. Assignment & Subletting

Terms that give landlords “excessive discretion to refuse consent to any proposed assignment or subletting” are objected to on the ground that they are misleading.”¹⁰

We consider that clauses that have been included in tenancy agreements despite their inconsistency and invalidity under s 27 of the RTA, will in many cases fail the balancing test contained in s 32W because:

- Invalid terms frequently seek to confer a benefit upon the landlord whilst imposing a burden on the tenant.
- Where a term is invalid, performance of the term passes a benefit to the landlord that is completely gratuitous and the tenant does not receive any reciprocal benefit.
- Where invalid terms mislead a tenant they may have the practical effect of depriving the tenant of a benefit of the legislation whilst having the effect of assisting the landlord to avoid its obligations.
- Where invalid terms mislead a tenant they cause an imbalance between the tenants knowledge of their rights and their actual rights. This is often in a context where an estate agent can be imputed with considerably greater knowledge of the relevant legislation.
- Where invalid terms mislead a tenant they permit the landlord or agent to use the inclusion of invalid terms in a contract to exert a level of control or influence over the tenant that is beyond their legal authority.
- Invalid terms give agents and landlords the opportunity to take advantage of the misleading effect of the terms to the detriment of the tenant.
- Such term give landlords or agents the ability to indicate that tenants should not depart from their promise, or at least benefit from the reluctance of some tenants to depart from their promises.
- To the extent that they practically restrict tenants from exercising their actual rights and obligations such terms partially recreate the imbalance in bargaining power that the RTA was intended to address.

Whether the imbalance created can be characterised as significant will depend upon the particular term and the legal context. If the right or obligation concerns a matter of real

⁸ *ibid*, [3.71]

⁹ *ibid* [4.15]

¹⁰ *ibid*, [4.26]

consequence that is not trivial, and the misleading effect of the term is real and not improbable, then it is likely that the resulting imbalance will be significant.

Particular invalid terms that have a misleading effect may also fit within the list of specific matters at s 32 X. Under that section a court or the tribunal may look at both the ‘object and effect’ of the term: a phrase that ought to operate beyond the mere legal effect of the term. The specific matters most relevant to invalid terms will be sub-s 32X (a) where the landlord is reducing their responsibilities under the contract and sub-s 32X (k) where the clause purports to have the effect of limiting the tenant’s right to take legal action under the RTA.

Where we consider that a clause is invalid or potentially invalid under s 27 of the RTA we have mentioned this. Where we have done so we have considered it a cause of unfairness in its own right. If the clause is unfair for other reasons too we have referred to these for completeness.

Restrictions on Use

The RTA provides some potential for terms to impose unreasonable restrictions on the use of the premises. The following comments of the UK OFT published in their guidance are relevant to this question of unfairness under the general balancing test:

We will generally consider terms to be unfair if they impose requirements or restrictions on the tenant that are more severe than is necessary to protect the landlord's real interest in safeguarding his property...

Landlords need to restrict the tenant's use of the property to a degree and impose obligations in the interests of good estate management. However, these terms must be reasonable, taking into account the type and location of the property, and whether the particular term has been introduced as a result of obligations placed on the landlord...

We object to terms in tenancy agreements that impose obligations or restrictions that are or can be wholly unreasonable, or that give the landlord the power to make unreasonable conditions. Our objections apply even if such a term does not always operate wholly unreasonably in all circumstances. There is less risk of unfairness where a term's scope is limited to the problem it is designed to prevent or resolve.¹¹

These considerations may be applied to terms occurring in Victoria that interfere with a residential tenant’s use of the premises. We will look at the severity of the interference and how it balances with the harm against which it is intended to protect. Where the term protects against deterioration in the premises that is not more than fair wear and tear we are likely to object to it. In considering the protective intention of a term the backdrop of existing legal protections available for safeguarding the property will be relevant.

Landlord’s purporting to limit mandatory duties

In the first section of the paper we have referred to terms that purport to limit or avoid the landlord’s mandatory duties to repair and in relation to the provision and condition of the premises at commencement. Section 32X(a) refers to limiting or avoiding performance of

¹¹ *ibid*, [4.47-4.51]

the contract, for this reason we have included in our analysis reference to the secondary source of the same duties, the tenancy agreements themselves.

The duties make their way into the agreements because they are contained in the prescribed standard agreement as set out in the Residential Tenancies Regulations 1997. Section 26 of the RTA requires that any written agreement must be in the prescribed standard form.

Rent & Duration

In the first section of the paper we also described how problems may arise from the amount of rent or the duration of a fixed term. In the UK the regulations may not generally be applied to core terms, and it is likely that both would therefore be excluded. There is no such restriction in Part 2B of the FTA. Whilst there is nothing stopping a tenant from claiming that in the circumstances such a term is unfair under part 2B, such a person would have quite a task ahead of them given the prominence such terms usually take in the pre-contractual processes and general reluctance of the courts to intervene with respect to the adequacy of consideration.

Terms Required or Expressly Permitted by Law

The terms of a tenancy agreement become a legal obligation as a result of the general law of contract. To this extent they are not expressly permitted by law. The RTA places limits on this contracting power, section 27 in particular places such limits extensively. The Act also sets out a process for resolving disputes arising out of the terms of the tenancy agreement, namely applying to the tribunal under ss 210 and 452. In neither case does the contribution of the RTA amount to an express permission.

The prescribed standard terms are required by law and may therefore not be impugned under Part 2B.

It is arguable that terms that accurately reflect the provisions of the RTA are expressly permitted by law. Generally such terms raise concerns as to fairness when they go beyond the provisions of the Act to impose related but additional obligations. Part 2B will usually apply to that aspect. Moreover there will be a question whether such terms modify the provisions of the RTA and are invalid for that reason.

The RTA does in specific instances expressly reserve certain obligations to be determined by the tenancy agreement. These reservations are an express permission and thus part 2B will not apply. Most relevantly section 42 states that rent is payable in the manner and place stated in the agreement. An unfair rental payment method is therefore not amenable to challenge under Part 2B unless it is inconsistent with the RTA.

Regulation 219 and Form 1 of the *Subdivision (Body Corporate) Regulations* 2001 apply standard rules to the membership of bodies corporate. The member is obligated to ensure that an occupier of their lot complies with the rules. A term in a tenancy agreement that is required by those standard rules may therefore be excluded from the operation of Part 2B.

Whilst Part 2B may not apply to terms that are required by the standard rules we maintain that terms required by additional rules are covered. Regulation 220 permits the membership of a body corporate to make additional rules by special resolution. Where tenancy agreements impose obligations upon occupiers that reflect those additional rules the

question will arise as to whether that term is expressly permitted or required by law. Our position is that where additional rules require a member to control the occupier's use of the premises, it may be within the rule-making power of the body corporate but this does not amount to expressly permitting or requiring the contractual term by law. We note that changes to the legislation and regulation of bodies corporate are currently proposed.

Guidelines of the Office of Fair Trading in the United Kingdom

Our analysis has contained detail of the Victorian legal context with specific reference to the RTA. There are significant differences between the UK and Victorian regulation of residential tenancies which confines the application and relevance of many of the areas covered by the UK OFT Guidance.

We have referred to the UK OFT Guidance where we consider that the comments made therein are relevant to the issues that we have discussed or to considerations of fairness under the Victorian provisions. We make two further observations below.

In defining the scope of the guidance the UK OFT make a statement that might appropriately be adapted to suit the Victorian context:

The guidance assumes that, in general, landlords can be considered 'suppliers' and private tenants 'consumers' for the purposes of the Regulations. In the event of a dispute as to whether an individual small landlord is a supplier, it will be for a court to decide whether the Regulations apply in that case.

Considerations discussed under Group 18(h) “Unreasonable ancillary obligations and restrictions” will be relevant in the Victorian context where it is argued that a term offends against s 32W simply because it is unreasonable. Moreover a useful suggestion made at [4.55] is:

“One way to avoid unfairness is for the term to provide that the conduct is allowed only 'with the landlord's consent, which will not be unreasonably withheld or delayed'.”

APPLICATION OF PART 2B OF THE FAIR TRADING ACT

The UK OFT's Guidance refers to the decision of the Court of Appeal of England and Wales in *The London Borough of Newham v Khatun* [2004] EWCA Civ 55 as establishing that:

1. "the Directive and Regulations apply to contracts relating to land (that is, contracts for the disposal of an interest in or rights of occupation over land);
2. "that the Directive and the Regulations apply to public authorities such as a local council (even where the landlord has a duty to supply housing);
3. "and that, when acting in a business capacity (eg: as a landlord), a council is a 'seller or supplier' and tenants are 'consumers' within the meaning of the Regulations and the Directive."

These three issues arise when considering the application of Part 2B to residential tenancy agreements in Victoria, they are addressed in this section.

Consumer Contracts

A residential tenancy agreement will be covered by Part 2B if it can be established that it is a 'consumer contract' as that term is defined in s 3 of the FTA. That definition contains several elements that are material to the question of how tenancy agreements apply to Part 2B.

Agreements Whether or Not in Writing

Tenancy agreements are defined under s 3 of the RTA to apply to agreements to let premises as a residence 'whether or not in writing'. Consumer contracts under s 3 of the FTA equally arise whether or not the agreement is in writing.

Personal, Domestic or Household Use or Consumption

Consumer contracts arise only where goods or services meet the twin requirements of being

"...of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purpose of the ordinary personal, domestic or household use or consumption."

Residential tenancy agreements are by definition the letting of premises for residential use and therefore the first of these requirements is easily met. The second requirement looks to the purpose behind a particular transaction, however in most circumstances where premises are let exclusively as a residence the second of these requirements will be met.

Issues of greater subtlety arise where the premises are used partly for residential purposes and partly in connection with a trade, profession or business. For consumer contracts the question is what is the ordinary use that will be made of premises. In determining whether the agreement is covered by the RTA, however, you must look to whether or not the premises are to be used primarily for residential purposes. The distinction between ordinary and primary is a matter for further attention.

Goods or Services

A consumer contract may only arise in an agreement to supply goods or services. The definitions of goods and services in s 3 of the FTA enlarges upon the ordinary meaning of those terms. In the case of residential tenancy agreements it is likely that reliance will be placed on the definition of services contained in s 3 since it is specifically expressed to extend to “any rights (including rights in relation to and interests in real or personal property) provided, granted or conferred in trade or commerce.” The letting of premises as a residence is the grant of an interest in real property. What is left to determine is whether the grant occurs ‘in trade or commerce’.

In Trade or Commerce

The question of whether entering a tenancy agreement involves the supply of a service and therefore whether it occurs ‘in trade or commerce’ is not restricted to the application of Part 2B. There have been cases that have dealt with the question with respect to the application of other parts of the FTA.

Public & Social Housing

In *Director of Housing v Debbie Young* [2002] VCAT 227 (11 April 2002), Deputy President Levine considered whether the VCAT had jurisdiction under s 107 of the FTA. The respondent was a former tenant of the applicant, Victoria’s public housing authority. The applicant asked VCAT to exercise its powers under s 107 of the FTA as a means of bypassing the limitation against claims exceeding \$10000 in the RTA.

In order that it might exercise jurisdiction under s 107 of the FTA the tribunal needed to find that the applicant was a supplier of services and that the respondent was a purchaser of services. It therefore needed to be satisfied that the tenancy was supplied ‘in trade or commerce’ a phrase defined at s 3 of the FTA to include “a business not carried on for profit”. The enlarged definition was relevant because of the public nature of the applicant’s service.

In his written reasons Deputy President Levine said:

In the FTA to be in the field of trade or commerce as defined this Applicant must carry on a business albeit not for profit. In my view the repetitious and continuous nature of the Applicant's activities in the letting of premises as residences to tenants is sufficient to find that it is carrying on a business of providing its services within the definition of “trade or commerce”.

As a result of this decision it is clear that terms of residential tenancy agreements offered by the Office of Housing are covered by Part 2B. Other providers of social housing that let premises repetitiously and continuously will also be covered.

Tribunal Practice

Since this decision in 2002 the FTA has been widely applied to disputes arising under Residential Tenancies. This practice has certainly not been limited to public and social housing tenancies.

It is apparent that the “trade or commerce” limitation has not posed any particular difficulty in applying the FTA to residential tenancies generally.

The view that a letting of residential premises necessarily involves acting in trade or commerce can be gleaned from decisions of the tribunal such as the following:

As between the tenants and the landlord, there is no doubt that the Tribunal has jurisdiction to decide any dispute, not only under RTA but also under FTA because by letting the rented premises to the tenants the landlords were conferring a right upon them in trade or commerce and so were supplying services to them as purchasers of the services.¹²

Moreover the Annotated RTA, which is authored by three senior members of the Tribunal, states:

A landlord or owner supplies “services” (as defined by s 3 of the Fair Trading Act) to a tenant or resident, who is a “purchaser” of those services, and so a dispute between landlord and tenant or between owner and resident is a “consumer and trader dispute” (formerly called a “fair trading dispute”) which under Part 9 of the Fair Trading Act the Tribunal has jurisdiction to hear and determine: Zeus and Ra Pty Ltd v Nicolaou (2003) 6 VR 606¹³.

Notably the case cited in the above quote involved a commercial lease and not a residential tenancy. The premises were to be used as for a car wash, car detailing, café and automotive repairs.

In that case Charles and Eames JJ.A (Winneke P concurring) cited a decision of the tribunal with approval:

In Humphries & Cooke Ltd. v. Essendon Airport Ltd. [26] Deputy President McNamara said that -

"It appears that sections 107 and 108 of the Fair Trading Act 1999 bestow a general landlord and tenant jurisdiction on this Tribunal. They give the Tribunal power to determine fair trading disputes which are defined as disputes between the suppliers and purchasers of goods and services. Services are defined in s.3 of the Act to include interests in real or personal property, and supply is defined to include grant. It follows in my view that whether or not the Retail Tenancies Reform Act applies to these premises the Tribunal has jurisdiction in a general sense to deal with a dispute between the landlord and tenant in the present circumstances."

We agree with the Deputy-President's interpretation of ss.107 and 108, which was applied by Judge Bowman in rejecting the appellant's application to strike out paragraphs [3] and [4] of Zeus & Ra's claim.

It is notable that the case cited by the Court of Appeal also concerned a commercial tenancy, but despite this the jurisdiction supplied by s 107 was referred to as a “general landlord and tenant jurisdiction”.

¹² Winter v Buttigieg [2004] VCAT 2430 (10 December 2004) [62]. Our emphasis

¹³ ibid, commentary at [446.05]. see also commentary at [28.03]

Broad Application to Residential Tenancies

The broad approach where the trade or commerce limitation barely rates a mention appears to be the result of an implicit view that tenancies will in most if not all instances have a sufficient commercial or trading character.

Referring to the UK Regulations on Unfair Terms in Consumer Contracts a commentator has said that in order that the regulations will apply

*The supplier must enter into the contract as part of their course of business. This should usually be easy to satisfy in tenancy cases, as rarely will property be let other than in the course of business.*¹⁴

Again referring to the UK Regulations the Law Commission has said

*The Office of Fair Trading has indicated that there will be circumstances under which private landlords will not be considered to be acting for such purposes. These presumably include where landlords are not making their living out of letting, but have some other business and are only letting their home temporarily while waiting for a better opportunity to sell it or while working in another area.*¹⁵

The example given by the Law Commission is nonetheless consistent with a reasonably broad application of Part 2B to residential tenants.

Restrictive Application to Residential Tenancies

The following issues arise if a more a restrictive approach is taken to applying Part 2B to residential tenancies.

1. Agents that provide, grant or confer in trade or commerce

Where the owner is not engaged in trade or commerce, is the trading or commercial character of an Estate Agency sufficient to bring the contract within the scope of s 32W and the definition of consumer contract? Since in those circumstance the contract is being provided, granted or conferred in trade or commerce, our position is that s 32W and Part 2B is enlivened.

2. Analogy with misleading conduct cases

The relevance of the case law surrounding s 52 of the *Trade Practices Act 1974* (Cth). i.e. The prohibition against misleading conduct in trade or commerce.

The particular area of interest is the exclusion of private transactions from the scope of s 52 of the TPA such transactions not occurring ‘in trade or commerce’: *O’ Brien v Smolgonov* (1983) 53 ALR 107 (Full Fed Ct). That case concerned the sale of land.

Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112 involved the sale of a private house. The conduct of the agent was not sufficient to impugn the conduct

¹⁴ Daniel Dovar, ‘Unfair Tenancy Agreements’, 21 January 2005, *Solicitors Journal*, <http://solicitorsjournal.com/story.asp?storycode=5032>, accessed at 24 February 2006

¹⁵ The Law Commission (UK), *Renting Homes 1: Status and Security – A Consultation Paper*, Consultation Paper No. 162 (2002) [6.43]

of the vendor vicariously because the vendor was not acting in trade and commerce. However the agent and solicitor acknowledged that they were acting in trade or commerce.

In both cases the sale of land involved a one off transaction which was the realisation of a capital asset, to the contrary the letting of premises is a continuing relationship and is an income earning activity.

3. Other case Law

Reference may be made to the case law flowing from other uses of the phrase “trade or commerce”. Other tests of whether a person is engaged in business may also be of assistance.

In the field of taxation the ATO advises persons to consider

- commercial character of the activity
- size, scale and permanency
- whether the activity is planned, organised or engaged in a business-like manner
- whether there is a purpose of profit or a prospect of profit
- whether there are business records and books of accounts, business premises, licences or qualifications and a registered business name

EFFECT AND ENFORCEMENT

Void and Unenforceable

Section 32Y of the FTA is headed “effect of unfair terms”. Sub-section (1) provides that the unfair term is void. The tenant is not required to comply with such terms nor will they be enforced by a court or tribunal. A term of a tenancy agreement that offends against s 27 of the RTA will be treated in the same manner, it is invalid and unenforceable.

Complete Voidness

Where a term is expressly permitted or required by law Part 2B will not apply to it to the extent that it is expressly permitted or required. It may be inferred then that s 32Y(1) may touch upon and make void those elements of the term that are not expressly permitted or required where they are unfair.

Apart from the abovementioned exception, unfairness in the term will lead to the term as a whole being void and unenforceable. A term that is drafted in a manner that is consistent with Part 2B may continue to derive an appropriate benefit or mitigate against a targeted harm whereas a term that is void can have no legal effect even though some form of less onerous obligation may have been appropriate. This result should act to motivate those who draft tenancy agreements to strive to comply with Part 2B.

Severability

Section 32Y(3) provides that, “The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.” By inference if the contract is unable to exist without the unfair term then it will not continue to bind the parties. Section 108(2)(g) also empowers the tribunal to resolve a consumer and trader dispute by rescinding a contract.

In the residential tenancies context a difficulty arises where the impugned term is so fundamental to the contract that it is not capable of existing without it. Whilst ss 32Y and 108(2)(g) appear to indicate that the consumer contract may come to an end or be rescinded this does not occur where the tenant is in possession of rented premises. That is because s 216 of the RTA provides that “Despite any Act or law to the contrary, a tenancy agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8.” There appears to be no other provision in the RTA that would act to terminate the agreement. This issue in any case is academic since in most conceivable instances the tenancy agreement will be capable of existing without the unfair term.

Declarations

Where the fairness of a term is the subject of disagreement between the parties there is some risk for the tenant if they simply decide not to comply with the term. They may do so in the hope that they would succeed in their defence of the claim by relying on Part 2B. However, if that defence fails they may be liable for compensation for losses arising from the breach or other remedies may be available under the RTA. That risk may be avoided or

mitigated if the tenant makes a pre-emptive application to the tribunal which has the power under s 108(2)(d) to “declare that a term of a contract is, or is not, void”.

The RTA contains no equivalent declaratory power in relation to s 27, it does contain the particular right to apply to have a harsh or unconscionable term declared invalid under s 28. Section 124 of the VCAT Act does give the tribunal the power to grant declaratory relief and clause 75 of schedule 1 of that enactment permits the presiding member to grant such relief in a residential tenancy matter.

Barriers to Enforcement

Earlier we discussed the problems that flow from including unenforceable terms in tenancy agreements. The terms may mislead the parties as to their actual rights and vulnerable consumers may be reluctant to exercise their rights. These concerns arise whether the term is invalid under s 27 of the RTA or void under Part 2B.

A further concern applies in the context of residential tenancies. Where a tenant is exercising a right under the RTA there is some moderate protection against retaliatory eviction. Where a 120 day notice to vacate has been given for no specified reason under s 263 or a 90 or 60 day notice is given at the end of a fixed term tenancy under s 261, then s 266(2) provides that the notice:

“is of no effect if it was given in response to the exercise, or proposed exercise, by the tenant of a right under this Act.”

The protection against retaliatory eviction that is contained in the above section does not apply to the exercise of a right under the FTA. As a result tenants that are concerned about the security of their tenure may be reluctant to make an application seeking a declaration that an unfair term is void.

Integrity of the Tenancy Agreement: RTA

We noted earlier that s 27 of the RTA places the tenancy agreement in a subordinate position to the RTA as the principal source of rights and responsibilities. Apart from making inconsistent terms invalid it does little else to ensure the integrity of the tenancy agreement.

Section 26 of the RTA requires that tenancy agreements be in a standard form. Failure to comply with that provision constitutes an offence but does not make the agreement illegal, invalid or unenforceable. The standard form agreement is contained in Form 1 of the *Residential Tenancies Regulations*. The ‘Additional Terms’ section of that document commences with “Additional terms which do not take away any rights and duties included in the Residential Tenancies Act 1997 may be set out in this section.” It is not clear whether the inclusion of inconsistent terms brings the contract outside of the standard form and is therefore conduct constituting an offence against the provision. It would seem to be a difficult argument to establish.

Section 501 creates a number of offences in relation to misrepresentations that are both false and fraudulent. The result is that the inclusion of an unenforceable obligation in a

tenancy agreement will not be a contravention of the RTA unless it has been included fraudulently. It may be difficult to obtain evidence of any such fraud.

We conclude that there are only modest safeguards within the RTA to promote the integrity and accuracy of the tenancy agreement.

Integrity of the Tenancy Agreement: FTA

In contrast, the FTA and Part 2B assist Consumer Affairs Victoria to promote the integrity and accuracy of tenancy agreements by:

- Publishing guidelines in relation to the operation and enforcement of Part 2B in connection with tenancy agreements: s 100(1)(bb).
- Advising tenants, landlords and estate agents of their rights and obligations under Part 2B in connection with tenancy agreements: s 100(1)(a).
- Receiving and investigating complaints concerning the use of unfair terms by landlords or estate agents: s 32ZB, 100(1)(b),(c),(g)(i).
- Requiring the production of tenancy agreements or other information for the purpose of investigating a complaint on the use of unfair terms: s 32ZB.
- Accepting an undertaking in relation to the use or recommendation of an unfair term in tenancy agreements: s 146.
- Seeking an injunction against any person using or recommending the use of an unfair term in tenancy agreements: s 32ZA
- Issuing a public warning statement: s 162A.
- Prosecuting offences in relation to prescribed unfair terms: s 32Z.
- Seek a declaration or advisory opinion from the tribunal: s32ZC, 32ZD.
- Report to the Minister that a term in a standard form tenancy agreement ought to be prescribed unfair by the regulations: s 100(1)(h).

Legislative Amendment or Enforcement of Part 2B

We have been asked to comment on whether as a matter of strategy, the problems that we have identified would more comprehensively be addressed by legislative amendment rather than through enforcement of Part 2B.

The advantages of Part 2B are that it is concisely expressed, addresses substantive unfairness, contains a comprehensive compliance and enforcement regime and is the current law. Comprehensive legislative amendment may not necessarily contain the first three elements and until enacted does not contain the fourth. Having said that, legislative amendment addressing the problems identified is not inconsistent with enforcement of Part 2B. Since the problems identified are wide-ranging it would make sense to concentrate legislative amendment to those areas to which Part 2B contributes limited or no remedial benefit.

As the case law and other learning on unfair terms develop we will be in a better position to determine whether Part 2B adequately remedies the problems that we have identified or whether further legislative amendment is necessary.

The RTA already invalidates many of the terms that we have considered. The RTA may be strengthened to proscribe the inclusion of those terms in tenancy agreements, however the ability to seek an injunction under Part 2B provides a useful remedy.

Problems associated with the enforcement of Part 2B include the possibility of a restrictive approach to the ‘in trade or commerce’ limitation, confusion caused by the fragmentation of sources of obligation and inherent uncertainty surrounding the assessment of unfair terms.

On balance however, we consider that the benefits of Part 2B outweigh the abovementioned problems and that all available measures for compliance and enforcement should be utilised where appropriate.

APPENDIX A: COMPLIANCE CHART

Methodology

We have sourced the terms for analysis from a sample of thirty-four tenancy agreements offered between 2004 and 2006 by estate agents operating throughout metropolitan Melbourne. We have selected agreements within that period because s 32Y(1) of the FTA applies to terms entered after 9 October 2003.

We excluded from our analysis the prescribed standard terms which are required by law and the REIV standard terms. The remaining terms, which are the standard additional or special terms of particular agencies, were examined.

Where the occurrence of a term was repeated throughout the sample they have generally been treated as typical or variant terms.

We reduced the range of terms to a core of typical terms with a selection of variant terms. All terms included in the compliance chart raised concerns for compliance with Part 2B of the FTA. The terms have either been extracted from tenancy agreements verbatim or have been constructed as a composite of terms that were substantially identical.

Whilst the analysis is concerned with typical and variant terms, a significant number of atypical and idiosyncratic terms were encountered during the course of this project. Without conducting a detailed analysis of those terms it was apparent that many of them could be subjected to challenge under Part 2B.

Terms not appearing in our analysis will not necessarily be compliant with Part 2B. We may have excluded them as atypical. Alternatively it may be that upon further review or as the case law or other learning on Part 2B develops other typical terms may be impugned.

Compliance Chart

Some notes on the chart:

- Typical terms are set out immediately beneath the sub-headings; variant terms then follow. The typical terms with their variants appear roughly in order of prevalence.
- We have adopted the phrases ‘unenforceable and misleading’ and ‘more severe than necessary to safeguard the property’ from the UK OFT’s Guidance.
- Source documents are contained in the separate volume of that name.

<blank>

Table A1: Review of typical and variant terms of tenancy agreements for compliance with Part 2B of the FTA

Typical and Variant Terms	FTAs	Legal Context	Commentary on the Term	Source
<p>Lease-Breaking:</p> <p>Re-letting Fee</p> <p>In the event of the tenant terminating the lease prior to the expiry of the fixed term, the tenant will pay :</p> <p>- the Agent/Landlord a letting fee equivalent to one week's rental.</p>		<p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than "rent under the tenancy agreement or; an amount or penalty provided for in this Act."</p> <p>Remedies for lease-break may be sought by resort to ss 210, 211 & 419 of the RTA rather than by reliance on an invalid penalty clause.</p>	<p>The term in charging a fixed letting fee of one week's rent specifies an amount that is payable if the tenant breaks the lease. This is prohibited by sub-s 505(1). The term is therefore invalid under s 27, unenforceable and misleading.</p> <p>The fee is not a reasonable pre-estimate of loss since it is not proportionate to the time left to run on the fixed term.</p> <p>Further, tenancy agreements invariably fail to impose early termination penalties upon landlords where their repudiatory conduct or breach results in early termination.</p>	<p>B1 [1w], D37(a) [2w], H37(c) [1.5w], M37 [2w], O37(c) [1.5w], P42, Q36 [1.5w], S45 [1.5w], T11 [1w], U39 [2w], W39 [1.5w], Y46(a) [1w], AA41(c) [1.5w], AB37 [1w], AC1 [1w], AF5(b), AG [1w] [w = weeks]</p>
<p>- a re-letting fee which is equivalent to 5% of the gross annual rent.</p>	32X (c)	See above.	Despite the different method of calculation the above objections apply.	A1, N(c) [6%], C12(c) [3.3%]
<p>- a letting fee.</p>	32X (c)	See above.	The term is not expressed to be proportionate to the time remaining on the lease. The above objections apply.	142, L, S41(c), AD45(f), AH42(3)
<p>Lease-Breaking:</p> <p>Advertising</p> <p>In the event of the tenant terminating the lease prior to the expiry of the fixed term, the tenant will pay:</p> <p>- all advertising costs incurred in relation to the re-letting of the premises.</p>	32X (c)	See sub-s 505(1) of the RTA and also ss 210, 211 & 419 cited above.	<p>The term purports to permit the charging of an amount that is not provided for in this Act' contrary to s 505(1) and invalid.</p> <p>The fee is not a reasonable pre-estimate of loss since it is not proportionate to the time left to run on the fixed term.</p> <p>Tenancy agreements invariably fail to impose early termination penalties upon landlords where their repudiatory conduct or breach results in early termination.</p>	<p>C12(c), D37(c), E44, G40, H37(c), I42, L, N(c), O37(c), P42(e), Q36, R4(e), S41(e), S45, U39(c), V10(c), W39, Y46(a)b, AB37, AC1, AD45, AG, AH42(3)</p>
<p>- an advertising levy of \$75,00 which the Tenant agrees to be deducted from the bond, if not paid prior to vacating.</p>	32X (c)	See above.	As above.	AA41(b)

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>- advertising on a weekly basis until the property is re-let.</p>	<p>32X (c) 32X (m)</p>	<p>See above.</p>	<p>All of the above objections apply, in particular the weekly payment of advertising costs is not provided for in this Act and the term is therefore contrary to s 505(1) and invalid.</p> <p>The term requires the tenant to pay an amount that may be in excess of their liability.</p> <p>Further, where the tenant makes an application for reimbursement of such amounts paid, the term has the effect of shifting the evidential burden to the tenant as applicant.</p>	<p>A1, B1</p>
<p>Lease-breaking: Liability for Rent</p> <p>In the event of the tenant terminating the lease prior to the expiry of the fixed term, the tenant will pay:</p> <p>- rent in accordance with the current lease until the commencement of the following tenancy or the expiry of the lease.</p>	<p>32X (c) 32X (m) 163</p>	<p>See sub-s 505(1) of the RTA and also ss 210, 211 & 419 cited above.</p> <p>Under sub-s 211(e) the Tribunal in determining a compensation claim under s 210 may take into account whether the landlord has taken action to mitigate the loss or damage.</p> <p>Under the RTA the tenant can unilaterally terminate the tenancy agreement (s220). (See commentary in the Annotated Residential Tenancies Act [220.03])</p>	<p>Rent is payable for so long as the tenancy continues. The obligation to pay rent ends when the tenancy terminates. Generally a tenant who has broken a lease will be liable to pay compensation for lost rent. However, in determining the amount of compensation payable the tribunal ought to have regard to the matters listed at s 211. Most relevant of these is whether the landlord has taken action to mitigate the loss or damage, specifically whether the landlord has sought new tenants.</p> <p>An object of the term is to require the tenant to pay rent when it would have been payable had the tenancy continued. This is an attempt to bypass the process for claiming compensation set out in RTA and specifically to avoid s 211.</p> <p>Further where the tenant makes an application for reimbursement of amounts paid pursuant to the term, the term has the effect of shifting the evidential burden to the tenant as the applicant.</p> <p>The demand to “pay rent in accordance with the lease” is ambiguous since the tenancy agreement has terminated. Contrary to sub-s 505(1) the rent demanded is in fact not “rent under the tenancy agreement” (since the agreement has terminated) nor is it “an amount or penalty provided for in this Act”.</p> <p>The term is invalid under s 27. It is unenforceable and misleading.</p>	<p>B1, D37(a), G40, H37(b), R4(b), V10(b), ACl, AG</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>- continue paying rent until the expiry of the lease or up until the day new tenants occupy the premises, whichever occurs first.</p>	<p>32X (c) 32X (m) 163</p>	<p>See above.</p>	<p>The phrase “continue paying rent” purports to strengthen the obligation to pay rent as it would have accrued if the tenancy continued, nevertheless the term is invalid and the above objections apply.</p>	<p>A1, S41(d), T11, AD45(ii)</p>
<p>- the rental payments of the property until the commencement of the following tenancy.</p>	<p>32X (c) 32X (m) 163</p>	<p>See above.</p>	<p>All of the above objections apply. Further, liability to compensate for lost rent cannot extend beyond the date that the fixed term was due to expire. In contrast to the above terms, this term purports to impose liability until new tenants are found irrespective of whether the period of the fixed term has expired.</p>	<p>D37(b), E44, G40, H37(b), H37(c), I42, L, M37(b), N(c), O37(b), P42(d), Q36, R4(b), W39, AA41(a), AB37, AF5(c), AG, AH42(2)</p>
<p>Lease-breaking: Continue Residing Should the tenant find it essential to vacate the premises before the expiry of the lease he/she will: - continue living in the said premises and pay rent in accordance with the Agreement until the commencement of the following tenancy.</p>	<p>32X (b) 32X (c)</p>	<p>Under the RTA and in contrast to the general law the tenant can unilaterally terminate the tenancy agreement by abandonment (s220). (See commentary in the Annotated Residential Tenancies Act [220.03]) Where this is done prior to the expiry of the fixed term a landlord may claim compensation for lease breaking costs. A tenancy does not and must not be terminated except in accordance with Division 1 of Part 6, Part 7 or 8 of the RT Act.</p>	<p>To place conditions on the manner in which abandonment may be effected modifies the operation of the termination provisions. The term is therefore invalid under s 27.</p>	<p>CI2(b), H37(b), S41(b), P42(b), U39(c), V10(b)</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Lease-breaking:</p> <p>Communicating Intention</p> <p>Immediately inform the Managing Agent of his/her desire to do so and ask them to find an acceptable person to whom the lease shall be assigned or who will execute a new lease.</p>	<p>32X (b)</p> <p>32X (c)</p>	<p>See above.</p>	<p>To place conditions on the manner in which abandonment may be effected modifies the operation of the termination provisions. The term is therefore invalid under s 27.</p> <p>The manner of abandonment may however be relevant to any compensation claim made under the RTA.</p> <p>The demand to act immediately is unnecessary and unreasonable.</p> <p>In seeking new tenants an agent is mitigating the landlord's losses and thereby acting for the landlord within the scope of the contract of agency. Some variants purport to require tenants to engage, instruct or appoint the agent to find new tenants. The concern arises that such an appointment or engagement may conflict with the Agent's fiduciary duty to the landlord.</p>	<p>C12(a), D37(a), H37(a), M37(a), O37(a), P42(a), R4(a), S41(a), U39(a), V10(a), AC1, AH42(1)</p>
<p>Lease-breaking:</p> <p>Notice Period</p> <p>If the tenant wishes to break their lease they will give the Estate Agent 28 days notice.</p>	<p>32X (a)</p> <p>32X (b)</p> <p>32X (c)</p>	<p>See above.</p>	<p>To place conditions on the manner in which abandonment may be effected modifies the operation of the termination provisions. The term is therefore invalid under s 27.</p> <p>In practice it is in the tenant's interest to give a reasonable amount of notice so that replacement tenants may be found. However, the notice period cannot be prescribed in the tenancy agreement, rather the period given is a matter that may be relevant to any compensation claim for lease breaking made by the landlord under the RTA.</p>	<p>W39, AA41, AC1</p>
<p>Steam Cleaning</p> <p>The Tenant agrees to have the carpet professionally steam/dry cleaned:</p> <p>- upon vacating the property and provide a copy of the receipt to the agent.</p> <p>- upon vacating the property.</p>	<p>32X (h)</p> <p>32X (h)</p>	<p>The RTA balances the obligation of the tenant to leave the premises in a reasonably clean condition upon termination (s 63) with the landlord's duty to provide the premises in such condition at commencement (s 65).</p> <p>See above.</p>	<p>Being more onerous than the requirements of the RTA, the term is invalid under s 27. The term is unenforceable and misleading.</p> <p>The term provides no reciprocal obligation upon the landlord to provide steam-cleaned carpets at the commencement.</p> <p>As above.</p>	<p>D48, F39, G45, J40, L, M45, Q36, I48, T8, U37, V11, X44, Z13, AA51, AD38, AF7, AH38</p> <p>E43, K40, N(p), R11, O42, W48</p>

Typical and Variant Terms	FTAs	Legal Context	Commentary on the Term	Source
- upon vacating the property by a reputable/recognised steam cleaning firm.	32X (h) 163	See above.	Words such as 'reputable' or 'recognised' are irrelevant and vague. The relevant question is whether or not the carpet has been left in a reasonably clean condition. The words may introduce excessive discretion for landlord or Agent to determine whether duty to clean has been complied with.	H38, AB42
- to the satisfaction of the Landlord or Agent prior to the vacation of the premises.	32X (h)	See above.	Gives an excessive discretion for landlord or Agent to determine whether term has been complied with.	A10, B10, P34, S43
- all carpets must be professionally steam-cleaned when the tenants vacate and a receipt produced.	163	See above.	Term states that steam cleaning must be done but does not specify whether the landlord, tenant or some other party is responsible for this.	A10, B10
As all carpets throughout these premises were either brand new or professionally cleaned for the commencement of this tenancy, the tenant undertakes to arrange at his/her own expense the complete professional cleaning of all carpets at the end of his/her tenancy.	32X (h)	See above.	In relating the obligation to the condition of the carpet at the commencement the term seeks to strike a fairer balance. However the term operates as a declaration of the condition of the premises and such description will more appropriately be located within the condition report. The term remains invalid as it is more onerous than the provisions of the RTA.	C9, Q62, Y41, AG

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Tenant Declarations I/We, as the undersigned tenant(s), hereby declare that : - I/ we have read and understand my/ our obligations with respect to all of the above.</p>	<p>32X (a) 32X (h)</p>	<p>Section 163 of the FTA imposes an obligation upon suppliers to use consumer documents that are ‘easily legible’ and ‘clearly expressed.’</p>	<p>The UK OFT have said with regard to “read and understood” clauses, that: “The inclusion of a declaration of this kind requires tenants to say these conditions (that is legibility and clarity) have been met, whether that is true or not.” (Guidance [4.33]) Their concern, which we share, is that: “In practice, tenants often do not read, and rarely understand fully, any but the shortest and simplest agreements. The fact that this may be undesirable does not justify the inclusion of declarations of doubtful truth or validity. The purpose of declarations of this kind is clearly to bind tenants to terms, regardless of whether they have any real awareness of what they mean.” (Guidance [4.34])</p>	<p>E47; 155, 157; Q, T, E</p>
<p>- have clear understanding of the terms of the tenancy agreement.</p>		<p>See above.</p>	<p>The above concerns are compounded here, the tenant is said to have divined a “clear understanding”.</p>	<p>Z1</p>
<p>- any term of the tenancy agreement that was not clearly understood has been explained to me/ us in a satisfactory manner.</p>	<p>32X (a) 32X (h)</p>	<p>See above.</p>	<p>Again the above concerns are compounded here, the tenant in many instances will be in a poor position to determine whether any explanation proffered is satisfactory.</p>	<p>D</p>
<p>- I/ we have received a copy of the Statement of Rights and Duties.</p>	<p>32X (a)</p>	<p>Sub-section 66(1) of the RTA requires the landlord to give to the tenant on or before occupation day the booklet presently entitled “Renting a home A guide for Tenants and Landlords”.</p>	<p>The term states that the agent or landlord has discharged the legal responsibility imposed by sub-s 66(1). Such terms are usually embedded within the special or additional terms sections of tenancy agreements. This will ordinarily give the appearance that the term must be agreed to for the contract to go ahead, whether or not the statement is an accurate reflection of the facts. We concur with the UK OFT (Guidance [4.30], [4.32]) that such terms ought to be treated as “unfair and legally ineffectual.”</p>	<p>C17, R2, AC16, AF4</p>
<p>- I/ we have received upon signing hereof a photocopy of this agreement pursuant to Section 29 of the Residential Tenancies Act 1997.</p>	<p>32X (a)</p>	<p>Section 29 of the RTA requires the provision of a copy of the tenancy agreement to the tenant for their own use before the agreement is offered for signing.</p>	<p>As above.</p>	<p>AA50, AF4</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>- the bond has been deposited in accordance with the requirements of the Residential Tenancies Act 1997 with the Residential Tenancies Bond Authority.</p>	32X (a)	<p>Section 406 of the RTA requires that the landlord lodge the bond within 10 business days of receipt.</p>	<p>Again the term states that the agent or landlord has discharged the legal responsibility imposed by s 406. The above concerns apply to this term also. Since frequently the bond is paid at the time that the tenancy agreement is signed the veracity of this term may often be doubtful.</p>	L, O50, Y43, AD40, AG
<p>Occupants <i>Sub-letting</i></p> <p>The Tenant acknowledges that the persons named on this tenancy agreement are those who will occupy the premises during the term of the tenancy agreement, and that any change in those occupying the premises must be immediately reported to the agent.</p>	163	<p>The RTA places limits upon tenants sub-letting and assigning their interest in the property. Written consent must be sought from the landlord. Where such consent is unreasonably withheld, the tenant may seek an order from the tribunal waiving that requirement. Bypassing the process both invalidates the sub-tenancy or assignment and permits the landlord to issue 14 days notice to vacate.</p> <p>Sub-tenancies and assignments are narrowly defined at law and it is very common indeed for laypeople to mis-describe as a sub-tenancy a situation where a tenant has taken on licensees, boarders or lodgers.</p> <p>If a tenant has not parted with possession of the whole or part of the premises they will have neither sub-let nor assigned their interest.</p>	<p>The heading 'sub-letting' conflicts with the broader reference to occupation in the main body of the term, thereby causing considerable ambiguity.</p> <p>To the extent that term refers to 'sub-letting' it is misleading because it implies that it is sufficient to merely report the new arrangement to the agent. What is in fact required is the written consent of the landlord before the sub-letting occurs. The serious sanction of eviction may flow where that does not occur.</p> <p>For other forms of occupation that are not an actual or purported sub-letting or assignment, the obligation imposed by the term to notify the landlord is reasonable (except to the extent that it requires immediate action).</p>	L, G50(without heading), J53(subheading is 'occupants'), O54, Y39, AD36, AE39

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
I/ we tenants agree to use the premises as a dwelling for () adult/ s and () child only.	32X (a)	Whilst the RTA deals with actual and purported sub-letting and assignment of the tenant's interest in the premises, it does not stop tenants from permitting other types of occupation of the premises.	<p>It is reasonable for a landlord to seek to prevent the overcrowding of residential premises. The term may successfully stop overcrowding but is so broad so as to exclude an increase in occupation of the premises in reasonable numbers. Where a tenant's family circumstances change during the tenancy the term prevents new family members from moving in.</p> <p>The term does not even seemingly provide for the landlord to consent to an increase in the number of persons occupying the premises.</p> <p>This is more restrictive than the requirements of the RTA for sub-letting and assignment.</p> <p>The severity of this restriction on use of the premises is not proportionate to the landlord's real interest in safeguarding the property.</p>	A17, B18, J53, O36, Q39, T12, AF1, X36
The tenant shall not allow any other person/ s to reside at the premises without the Landlord's written consent.	32X (a) 32X (g)	Section 30 of the RTA prohibits a person from refusing to let premises on the grounds that a person intends to live in them with a child.	<p>This term presents additional concerns because of its limitation of a right to occupy to tenants. Custodial children who are minors will not usually be listed as tenants. This term is so broad so as to exclude them from occupying the premises even if the landlord knew at the time that the agreement was entered that it was the tenant's intention to reside at the premises with their children.</p> <p>The term is invalid to the extent that it limits sub-letting and assignment beyond what is required by the RTA.</p> <p>The requirement to obtain consent gives the landlord excessive discretion. The term would be improved by a qualification requiring the landlord not to unreasonably withhold consent.</p>	A13, B13, S52, AB40, AC5, AG, AH41

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>No person, other than herein named may at any time reside on these premises without full consultation with and a written authorisation from the Agent. In accordance with the Residential Tenancies Act 1997, any failure to comply with this condition will invoke legal action (Section 81(1)).</p>	<p>163 32X (a) 32X (g)</p>		<p>Beyond being an unreasonable restriction on the use of the premises the term implies that all additional occupation results from sub-letting or assignment.</p>	<p>C8, U38, RW7, U38, V7</p>
<p>The tenant will not, without prior written consent of the landlord, permit any person to reside at the premises other than the tenant or immediate family.</p>	<p>32X (a) 32X (g)</p>		<p>By permitting immediate family to reside at the premises the term improves upon many of the preceding terms. The term would be further improved by a qualification requiring the landlord not to unreasonably withhold consent.</p>	<p>D43, M36</p>
<p>Condition Report The Tenant acknowledges that the Condition Report provided at the commencement of the tenancy must be signed and returned to the Agent within 3 days after entering the premises. If the Condition Report is not returned, the copy held by the Agent will be accepted as conclusive evidence of the state of repair or general condition of the rented premises, as at the commencement of this tenancy.</p>	<p>32X (h)</p>	<p>The RTA sets out the procedure and effect of condition reports in residential tenancies: Section 35 sets the procedure for the completion of the condition report by landlord and tenant or their respective representatives. Subject to two exceptions s 36 operates to deem a condition report that has been completed and returned in accordance with s 35 as conclusive evidence of the condition of the premises at the commencement of the tenancy. One of those exceptions applies where the tenant has noted their disagreement with a statement made by the landlord or agent within the report. The other exception applies where the state of repair or condition is not one that could have been discovered on a reasonable inspection of the premises.</p>	<p>Where condition reports have not been returned to the Agent in accordance with s 36, the term attempts to use the copy of the report retained by the Agent as 'conclusive evidence of the state of repair or general condition of the rented premises'. Neither of the two exceptions at s 36 are expressed to apply to this term. The copy will necessarily not have been endorsed with a tenant's disagreements with the landlord or Agent's description of the condition or state of repair of the premises. The pre-existing legal position sets a fairer balance between the parties. It treats the co-signed, completed and returned report as conclusive evidence. Where the report has not been returned to the agent it treats the document with only the comments of the landlord or agent as relevant but not determinative. Moreover in a tribunal or court the tenant may be asked to explain why they did not complete and return a condition report and this may be relevant in determining the weight that should be given to the incomplete report held by the agent. Note: the term is invalid under s 27.</p>	<p>A4, B4, G51, J51, L, O55, W47, Y40, AD37, AE40, AG</p>

Typical and Variant Terms	FTAs	Legal Context	Commentary on the Term	Source
<p>Contents Insurance</p> <p>The tenant acknowledges that the tenant shall insure their possessions. The tenant also acknowledges that the landlord's insurance policy will not provide cover for such possessions.</p>	32W	<p>The RTA is silent on home contents insurance.</p>	<p>We object to this term on the ground that it has the potential to impose an unreasonable financial burden upon tenants. We concur with the view of the UK OFT “whether tenants wish to insure their own personal belongings is a matter for them and ... it is unreasonable for the landlord to make this a contractual requirement.” (Guidance, [4.15])</p>	141, J49, K46, S51, AC3
<p>Principal Place of Residence</p> <p>The tenant acknowledges that immediately before the tenancy agreement was entered into, the rented premises were the landlord's principal place of residence and the landlord intends to resume occupancy of the premises on termination of the tenancy agreement.</p>	32X (a)	<p>Section 254 of the RTA permits a landlord to serve a notice of not less than 14 days for a tenant to vacate the premises where three conditions are met:</p> <ol style="list-style-type: none"> 1) the premises were the landlord's principal place of residence immediately before the tenancy agreement or immediately before the prior tenancy agreement (254(a)) 2) the tenancy agreement states this fact (254(b)) 3) the tenancy agreement states that the landlord intends to resume occupancy of the premises on the termination of the agreement (254 (c)). 	<p>Part 2B of the FTA does not apply to contractual terms that are “expressly permitted by law, but only to the extent required or permitted.” The extent that such clauses are required or permitted under the RTA is the extent to which they accurately reflect the situation and intention of the landlord. They are not required or permitted by the RTA where they are placed into agreements as a matter of course without regard to the actual situation or intention of the landlord. The practice is both misleading and imbalancing.</p>	C18, AB56, J42, K43

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p><i>Principal Place of Residence</i></p> <p>Where a Landlord under a fixed term tenancy agreement lets the Landlord's premises that immediately before entering into the agreement was his Principal Place of Residence, the Landlord may at least fourteen (14) days before the end of the term of the tenancy agreement give to the tenant notice to vacate specifying a termination date that is the date of or a date after the end of the term.</p> <p>The legislation provides for the landlord/agent to issue a minimum of 14 days notice to vacate prior to the termination date of this agreement.</p>	<p>163 32X (a)</p>	<p>See above.</p>	<p>This term is both ambiguous and unsatisfactory. It reads as an incomplete and misleading description of the right of landlord to issue a notice under s 254 because it makes no reference to the landlord's intention to resume occupancy of the premises (sub-s 3).</p> <p>Moreover it is unclear whether it is intended to operate as a general description of a right to issue a notice or purports to be in fact a statement made under sub-s 2 & 3. In the former case it is inaccurate and unnecessary. In the latter case it does not conform with the requirements of section 254 and is ineffective.</p>	<p>O51</p>
<p>No Pets</p> <p>The tenant shall not keep any pets on the premises without prior consent from the Landlord.</p>	<p>32W</p>	<p>The stated purpose of the RTA is to "define the rights and duties of landlords and tenants". The Act neither expressly permits or forbids the keeping of pets in residential premises. Relevantly the Act does require a tenant to:</p> <ol style="list-style-type: none"> 1) ensure that care is taken to avoid damaging the premises; 2) maintain the premises in a reasonably clean condition; and 3) not cause nuisance or interference with neighbours. <p>An extensive enforcement process is provided where these duties are breached. Commentators have generally considered that no pets clauses are not inconsistent with the RTA.</p>	<p>The restriction is more severe than necessary to protect the landlord's real interest in safeguarding the property. The existing duties and enforcement regime arguably provides adequate protection.</p> <p>The ban is too broad in scope, for example it applies to pets that are unlikely to cause damage such as goldfish. The UK OFT have said:</p> <p>Our objection is to blanket exclusions of pets without consideration of all the circumstances... We are unlikely to object to a term prohibiting the keeping of pets that could harm the property, affect subsequent tenants or be a nuisance to other residents. (Guidance p 64)</p> <p>Several courts in the EU applying similar provisions have ruled no pets clauses invalid.</p>	<p>C2, I51, M48, T4, V2, W41, Z6, AC19</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Notice of Intention to Vacate</p> <p>If the tenant wishes to vacate the premises at or after the expiration of the tenancy agreement, the tenant is required to give twenty-eight days notice, in writing.</p>	<p>32W 32X (h)</p>	<p>Section 237 of the RTA provides that a tenant may give a reduced period of notice of intention to vacate, 14 days, in the specified circumstances.</p>	<p>This term is invalid under s 27 and is misleading.</p>	<p>A2, C11, F42, N(a), P40, P41, S40, V9, Z2, AC2, AG, AAA40</p>
<p>Dishonoured Cheques</p> <p>The tenant acknowledges and agrees that a fee of \$50.00 will be charged for dishonoured cheque. Should a rental cheque dishonour, personal cheques will no longer be accepted under any circumstance.</p>	<p>32X (c)</p>	<p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than “rent under the tenancy agreement or; an amount or penalty provided for in this Act.”</p>	<p>The fee is prohibited by s 505. The term is invalidated by s 27, is unenforceable and misleading. The fee is charged irrespective of whether the bank has charged the Agency. The term does not penalise the landlord for his or her dishonoured cheques.</p>	<p>D45 (\$30), J47 (\$30)</p>
<p>Stamps</p> <p>Rental payments forwarded by mail in the form of cheques will be receipted but receipts will not be sent unless accompanied by a stamped, self-addressed envelope.</p>	<p>32X (a)</p>	<p>Section 43 of the RTA provides that where rent has been paid otherwise than by cash, and a request is made at that time, the person receiving the payment must give a written receipt within 5 days of receiving payment. This is a penalty provision. Where a document must be given under the Act, s 506 specifies the manner in which such a document must be given. This includes posting the document or delivering it personally it does not include printing the document out and filing it away.</p>	<p>The term attempts to avoid a mandatory provision of the RTA. It is invalid, unenforceable and misleading. The term purports to transfer part of the financial burden of complying with the mandatory provision from the landlord to the tenant. There is no balancing right for the tenant to be reimbursed for postal costs that arise from landlord demands.</p>	<p>M42, O44</p>

Typical and Variant Terms	FTAs	Legal Context	Commentary on the Term	Source
<p>Part Payments</p> <p>All rental payments shall be made on time and for the full amount. No part payments will be accepted.</p>	<p>32W 32X (a) 32X (c) 32X (h)</p>	<p>Section 40 of the RTA restricts a landlord from requiring the payment of rent under a tenancy agreement more than one month in advance, unless the weekly rent exceeds \$350. Section 39 of the RTA states that 'For the purposes of the Act rent under a tenancy agreement accrues from day to day and, subject to section 242, is recoverable or refundable accordingly.' Section 242 deals with the retention of paid rent in the case of abandonment. A notice to vacate for rental arrears may be issued if a tenant is 14 days in arrears. In dismissing or adjourning an application for possession based on rent arrears for the reason that satisfactory arrangements can be made to avoid financial loss to the landlord, the tribunal might see fit to make an order that arrears be paid off by part payments (s 331).</p>	<p>The term is inconsistent with s 39 and is not redeemed by s 40.</p> <p>The term purports to restrict the tenant from making part payments. Whilst the tenant is thus restricted the landlord may demand full payments pursuant to the term or part payment pursuant to s 39.</p>	<p>M39, R5, S56(a),(b), Y46(a)c</p>

Typical and Variant Terms	FTAs.	Legal Context	Commentary on the Term	Source
<p>Changes to Phone Number</p> <p>The tenant agrees to notify the landlord/ agent of any change of private/work telephone numbers, if any.</p>	32W	<p>Section 66 of the RTA requires the landlord to provide certain information to the tenant. A private landlord is required to provide an emergency phone number for urgent repairs only. A private landlord is not required to provide their business or any particular phone number for this purpose. If an agent is acting they are required to provide the agency's phone number and an emergency repairs phone number, these may be the same number. The RTA does not require the tenant to provide any phone number.</p> <p>Where the purpose of collecting all of a tenants phone numbers is to facilitate the collection of rent arrears or other debts the operation of s 21(2)(f) of the FTA (which allows a debtor to ask that a particular method of contact not be used) may be relevant. Subject to limited exceptions a breach of that request constitutes harassment under s 21 of the FTA.</p>	<p>We consider that this term places an unreasonable obligation upon the tenant.</p> <p>All persons including tenants have a legitimate interest in controlling access to their personal contact details. Circumstances may demand caution in releasing such details, for example persons who have been the victim of family violence or stalking may need to take significant measures to protect their privacy.</p> <p>We consider it unfair to impose a requirement upon the tenant to supply their phone contact details without a term in the agreement providing a reciprocal restriction upon the agency and landlord against the unauthorised release of that information to third parties.</p> <p>If a work number is used for work or business purposes it may be unsuitable to provide those details. A home or mobile number may be more appropriate. An improvement suggested by the UK OFT is that the tenant designate a main contact number and notify the landlord or agent of changes to that.</p>	C16 (home number), Q38, Z17, AB59, AG
<p>Vermis</p> <p>The tenant is responsible for the cost of removing vermin, ants, insects etc from the property if they appear during the term of the tenancy.</p>	32X (a)	<p>The landlord must let the premises in a reasonably clean condition (s 65) and maintain them in good repair (s 68). A tenant is otherwise required to maintain the premises reasonably clean (s 63).</p>	<p>Where vermin result from a breach of ss 65 or 68 then the landlord will be responsible for rectifying the problem. The term purports to bypass these duties and is invalid by virtue of s 27.</p> <p>It is reasonable to require tenants to attend to vermin that result from a breach of s 63. Vermis may appear without there having been a breach of the RTA. A term that is targeted to the above two contingencies is less likely to be the subject of objection.</p>	P36, W44, S38, X43, AA46

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Broken Glass</p> <p>The tenant/s shall be responsible for any broken glass during the term of the tenancy, or shall be liable for any excess on insurance cover claims during the term of the tenancy</p>	<p>32X (a) 32X (h)</p>	<p>The RTA comprehensively allocates responsibility for damage to the premises. Section 61 imposes liability on tenants where they have failed to ensure that care is taken to avoid damaging the premises, excepting fair wear and tear. The landlord bears the burden of all other damage. Under s 68 if such damage renders the premises in bad repair then the landlord must rectify it.</p>	<p>As a class of damage there is nothing intrinsic to broken glass that would suggest that its incidence will necessarily be caused by a tenant's failure to take care. For example the damage may be caused by a fallen tree, a design defect or a breach of the landlord's repair duty. The term limits the landlord's duty under s 68 and expands the tenants duty beyond s 61.</p> <p>The term is invalid under s 27. It is unenforceable and misleading.</p>	<p>I35(a), 140, N(a) Q55, S97</p>
<p>Fireplaces</p> <p>Fireplaces must not be used without the written consent of the landlord or agent.</p>	<p>32X (a)</p>	<p>Section 68 of the RTA requires a landlord to maintain premises in good repair. Where facilities such as heating have been reduced the tenant may seek a re-assessment of the rent: s45.</p>	<p>A term prohibiting the use of a fireplace must have as its object avoidance of the mandatory statutory duty and contractual duty to maintain the premises in good repair. This transfers the burden of the repair obligation from the landlord (where it legally belongs) to the tenant. The term is invalid under s 27.</p>	<p>D41, S44, Z14</p>
<p>The tenant acknowledges that the fireplace is not to be used. However should the tenant wish to use the said fireplace, the tenant agrees to arrange at their own expense a professional chimney sweep to clean and to check its safety.</p>	<p>32X (a)</p>	<p>See above.</p>	<p>The term raises the further objection that it transfers from the landlord to the tenant the responsibility of checking the chimney's safety. Ensuring the chimney is kept in a safe condition falls within the landlord's duty to maintain the premises in good repair.</p>	<p>AB45</p>
<p>Clothes Hanging</p> <p>The tenant agrees not to hang or place any article of clothing/ washing outside the premises or on any part or portion of the balcony.</p>	<p>32X (a)</p>		<p>The restriction is more severe than necessary to protect the landlords real interest in safeguarding the property.</p>	<p>Q51</p>

Typical and Variant Terms	FTAs.	Legal Context	Commentary on the Term	Source
<p>Vehicles</p> <p>The tenant/s agrees not to keep any vans, trucks, boats, trailers or immobile vehicles on the premises at any time without the landlords/agents permission.</p>	<p>32X (a) 32X (h)</p>	<p>The RTA does not expressly deal with the parking of vehicles on the residential premises.</p>	<p>The part of this term that we particularly object to is the ban on vans and trailers. The term is more onerous than the restrictions on use contained in the RTA. No specific benefit is offered in compensation for the restriction. The term imposes a restriction that is more severe than necessary to protect the landlord's real interest in safeguarding the property. The term is particularly pernicious where it applies to a person wishing to park a trailer or ute related to their trade, or where it limits the ability of parents to transport their children in a van.</p>	<p>C3, AF10, AH37</p>
<p>Pot-plants</p> <p>The tenant shall not place any pot plants on the carpet/polished floor boards.</p>	<p>32X (a)</p>	<p>Section 61 of the RTA requires the tenant to take care not to damage the premises.</p>	<p>This term is more onerous than s 61 and is invalid under s 27.</p> <p>The restriction is more severe than necessary to protect the landlord's real interest in safeguarding the property.</p>	<p>G38, O47, R15, AB39, AH44</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Time for Return of Keys</p> <p>Keys should be returned to our office by 10.00am/10.30am on the day you vacate the property.</p>	32X (a)	<p>Section 216 of the RTA provides that tenancy agreements must terminate in accordance with Division 1 of Part 6, Part 7 or 8 of the Act. Section 219 provides that the tenancy will terminate where a tenant has been given a notice to vacate or has given a notice of intention to vacate and either the tenant vacates the rented premises or the tribunal process for possession is duly followed. The termination provisions do not empower landlords to set a time of day at which possession is to be handed over.</p>	<p>The return of the keys will ordinarily be the act that completes the return of possession of the premises to the landlord. The term therefore is not merely imposing a direction as to how the keys are to be returned, but rather the term is seeking to control the time of day at which the tenancy does in fact terminate. The RTA however exhaustively determines the manner in which a tenancy may terminate. The term is therefore invalid under s 27.</p> <p>There is no reciprocal promise to provide the premises to the tenant before 10.30 am on the commencement date.</p> <p>Such a brief window of time for the return of the keys is an unreasonable demand in its own right and simply impractical when one considers the logistics around a tenant vacating a property.</p>	G43, R3, W53
<p>Rent Where Keys Unreturned</p> <p>Rent is charged up until the keys are returned.</p>	32X (c)	<p>Section 3 of the RTA defines rent as “the amount paid to a landlord by a tenant to occupy rented premises and use facilities and services.”</p> <p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than “rent under the tenancy agreement or; an amount or penalty provided for in this Act.”</p> <p>Under a tenancy agreement rent is payable from the date of commencement until the date that the tenancy terminates.</p> <p>When there is some question as to the date that the tenancy terminates the date upon which the keys were returned will in many cases be the sole or primary consideration. This will however not always be determinative.</p>	<p>The term has the potential to penalise the tenant for not returning the keys to a level that may be out of proportion to the loss that is actually suffered.</p> <p>We concur with the position of UK OFT “We would also object to a term requiring payment of damages, to an amount equal to the full former rent, for the period that all the keys are not returned at the end of the tenancy. The costs of replacing the locks, where required, or obtaining replacement keys may be considerably less than the penalty charge demanded.” (Guidance [3:52])</p>	A2, B2, C11, G43, R3, V9, AC2, K48, Z4, AG

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>No-smoking</p> <p>The tenant acknowledges and agrees to the landlord's request for the tenant and any visitors not to smoke inside the property.</p>	32W	<p>The RTA neither expressly permits or forbids smoking within the premises.</p>	<p>This is an unreasonable restriction on the tenant's use of the premises. The term is not proportionate to the harm against which it is aimed to protect. The RTA sufficiently protects the landlord's real interest in safeguarding the property.</p>	EA2, 146, J54, AA58, AB47
<p>As Is Clause</p> <p>The tenant acknowledges that the property is let 'as is' except for 'emergency' repairs, and accept the landlord's decision regarding same.</p>	32X (a) 32X (h) 32X (k)	<p>Section 68 of the RTA imposes a mandatory duty upon landlords to maintain let premises in good repair. The duty is also contained in the prescribed standard form contract.</p> <p>Section 65 requires the landlord to ensure that premises are vacant and reasonably clean on the day that the tenant is to take occupation. Again the duty is reflected in the prescribed standard form contract.</p> <p>Tenants may enforce these duties. They are also not required to move into the premises until s 65 is complied with. Under s 226, tenants may also terminate the tenancy before moving in by giving notice where they are not in good repair.</p>	<p>The term is completely inconsistent with the mandatory duties contained in the RTA. It is invalid, unenforceable and misleading.</p> <p>The term purports to permit the landlord to significantly limit his or her obligations under the tenancy agreement.</p> <p>The requirement that the tenant must accept "the landlord's decision regarding same" purports to give the landlord the power to interpret the contract with respect to the condition of the premises.</p>	A8, B8, AB51, AC6
<p>The tenant acknowledges and accepts the condition of the premises as it was upon inspection of the property and as per their condition report.</p>	32X (a) 32X (h) 32X (k)	<p>See above.</p>	<p>As above.</p>	AC6

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>The tenant acknowledges that no promises representations, warranties or undertakings have been undertakings have been (sic) given by the landlord or agent in relation to the suitability of the premises for the tenants purpose or in respect of the furnishings, fittings, or appurtenances of the premise otherwise than as provided herein. Furthermore, the tenant agrees to rent the property in its present condition and will make no claim whatsoever for the present condition or improvement to the property after the tenant has taken possession of the key.</p>	<p>32X (a) 32X (h) 32X (k)</p>	<p>See above.</p>	<p>As above.</p>	<p>B8</p>
<p>Tenant Vacating The tenants undertake to pay their rent to the vacating date and delivery of vacant possession. If they are unable to give vacant possession to the subject property on the vacating date, they agree to indemnify both the landlord and Agent against any legal action bought against them. The tenant/s also agree that any variation of their vacating date must be applied for in writing and agreed to by the landlord or his agent and if necessary the next subsequent tenant of the subject property.</p>	<p>32X (a) 32X (c)</p>	<p>Section 216 of the RTA provides that the Act exhaustively defines the manner in which a tenancy agreement may terminate. Until the tenancy terminates the tenant will have a right to possession of the premises and the landlord a right to rent. If a tenant has served a notice of intention to vacate under s 235 of the RTA the tenancy will not terminate until either the tenant moves out or VCAT makes a possession order under s 330 and a warrant of possession is executed. Under s 229 '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.' Section 505 prohibits penalties that are not permitted by the Act.</p>	<p>The term is invalid under s 27 of the RTA, it is unenforceable and misleading. It is inconsistent with the scheme for termination and offends both against ss 229 and 505. The tenancy agreement contains no reciprocal penalty upon the landlord.</p>	<p>A3, B3, K47</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Set-off</p> <p>The tenant will not withhold rent due to malfunction or damage to any appliance or part of the property subject to Section 129.</p>	<p>32X (a) 32X (k)</p>	<p>Tenants who withhold their rent because repairs will have a tough time of it whether under the general law or the RTA. Under the general law the right to claim such a set-off is well recognised. Arguably despite the comprehensive regime for repairs offered under the RTA a tenant may still claim a set-off. Indeed s 331 of RTA permits the tribunal to dismiss or adjourn an application for possession that arises from rental arrears where it considers that “satisfactory arrangements have been or can be made to avoid financial loss to the landlord”.</p>	<p>The term purports to limit the right of a tenant to claim a set-off for repairs against rent; it places no such limitation upon the rights of a landlord to claim a set-off.</p>	<p>J44(ii), K43(ii), Q45, AC4</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Phone Contact for Maintenance</p> <p>The tenant agrees that should any maintenance be required at the premises the tenant's contact details can be given to the agent's tradespeople.</p>	<p>32X (a)</p>	<p>Section 67 of the RTA provides that the landlord must take reasonable steps to ensure that the tenant has quiet enjoyment of the premises.</p> <p>Section 68 requires the landlord to maintain the premises in good repair. In undertaking this duty it will be the responsibility of the landlord or their representative to make necessary arrangements with tradespeople to attend to the maintenance.</p> <p>As a matter of practicality it may be in the tenant's interest to be flexible as they will ordinarily want the repair to be completed promptly. For this reason a tenant may choose to volunteer their contact details to a tradesperson. A tenant is entitled however to require a landlord to comply with the entry provisions of the RTA. Since a tradesperson is usually an independent contractor and not an agent of the landlord the tenant is entitled to insist that the entry be supervised by the landlord or the landlord's agent. The tenant need not be in attendance during such entry.</p> <p>Moreover such an entry under s 85 entitles the tenant to compensation from the landlord where the tenants belongings have been damaged by the tradesperson. This is a protection that is not available if the entry is not an entry under s 85.</p>	<p>The disclosure of the tenant's private contact details will only be necessary if the tenant consents to the entry in the absence of the landlord or the landlord's agent. The relevant time for seeking such consent is at the time that the repairs issue arises and not at the commencement of the tenancy. Consent may only be granted up to 7 days prior to entry. An unlimited right for landlords to release the tenants' details to tradespeople may lead to a breach of a tenant's right to quiet enjoyment. It may result in pressure being applied directly or indirectly for them to not rely on their legal right to insist that any entry be made under s 85. The entry provisions balance the landlord's right to enter the premises with necessary persons for the purpose of undertaking repairs with the tenants' right to quiet enjoyment of the premises. This term departs from that balance to the detriment of the tenant. Furthermore it has the apparent object of shifting the landlord's responsibility to organise repairs to the tenant.</p>	<p>AB54</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Legal Costs</p> <p>The tenant shall meet the legal costs incurred by the application and appearance of the Agent at the Residential Tenancies Tribunal (sic), during the term of the tenancy.</p>	<p>32X (c) 32X (k)</p>	<p>Generally before VCAT, each party is to bear their own costs: s 109(1) VCAT Act. In the courts costs will ordinarily follow the event.</p> <p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than "rent under the tenancy agreement or: an amount or penalty provided for in this Act."</p>	<p>This term requires the tenant to bear all legal costs incurred, the term upsets the balance reached by both the VCAT Act and general law.</p> <p>Such costs would penalise the tenant for exercising their rights where that involves legal action or causes legal costs to be incurred. Where action results from a breach by the tenant the RTA sets the amount that may be charged by a landlord or agent as a result of the breach.</p> <p>The term penalises the tenant for breach in circumstances where no such penalties apply to the landlord.</p>	<p>N(n)</p>
<p>It is agreed by the tenants herewith that should the Estate Agent find it necessary to serve any notices on the tenants for any act/promise in which they have failed to keep as set out under this lease/Residential Tenancies Act 1997, then the tenants agree to reimburse any such costs to the agent.</p>	<p>32X (c) 32X (h)</p>	<p>See above.</p>	<p>The term penalises the tenant for breach in a manner that is inconsistent with sub-s 505(1) of the RTA.</p> <p>The term fails to provide any reciprocal penalty for the landlord's breach.</p> <p>The term gives excessive discretion to the agent to determine whether the contract has been breach or interpret its meaning.</p>	<p>E46</p>
<p>The tenants shall meet any costs incurred by the Managing Agents to retrieve arrears of rent.</p>	<p>32X (c)</p>	<p>See above.</p> <p>Section 213 states that a landlord is not entitled to claim compensation for non-payment of rent unless the tenant is in 14 days of arrears or on two previous occasions the tenant has fallen into arrears of greater than 14 days.</p>	<p>This clause is contrary to sub-s 505(1) and is invalidated by s 27. There is no reciprocal penalty imposed upon the landlord.</p>	<p>D40, E39, M40, X48</p>
<p>All tenant's rental must be paid on time. If rental payments are more than 5 days in arrears a late charge of \$25.00 will be payable for each letter or reminder until rent is fully paid.</p>	<p>32X (c)</p>	<p>See ss 213 & 505 cited above.</p>	<p>The term is a rent fine; it is prohibited by ss 213 and sub-s 505(1) and made invalid by s 27.</p> <p>The tenancy agreement fails to place any reciprocal penalties upon the landlord.</p>	<p>C20</p>

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
All costs incurred by the Landlord and Agent to retrieve rental arrears or as a consequence of the Tenant's default shall be met by the tenants.	32X (c)	See above.	As above.	R6, I43
Should the Landlord or Agent have to apply to the Victorian Civil and Administrative Tribunal in regards to the tenancy i.e. rental arrears, the Tenant/s shall pay the fee incurred to do so. (min \$25,00)/\$37.00	32X (c)	See above.	As above.	Y46(c), AA56
Availability The Tenant agrees that this lease is subject to the property being available for occupation by the commencement date of this lease and will not hold the Agent or Landlord responsible if the property is not available at that time.	32X (a) 32X (k)	Section 65 of the RTA requires the landlord to ensure that "the rented premises are vacant and in a reasonably clean condition". Section 216 ensures that a tenancy cannot terminate except in accordance with the Act.	Section 27 invalidates the term, it is plainly contrary to ss 65 and 216 of the RTA. Note also that the restriction against holding the Agent or landlord responsible seeks to restrict the ability of the tenant to sue.	E38, F41, AE42
Nuisance The tenant will not act and will not allow any visitors to act in a manner to cause nuisance or annoyance to other tenants or neighbours. The agent's opinion as to whether such nuisance or annoyance is being caused will be final.	32X (n)	Section 60 of the RTA imposes upon the tenant a duty not to cause or permit a nuisance and to avoid interference with the reasonable peace, comfort or privacy of neighbours. A landlord may issue a breach of duty notice and any factual issue in dispute will be determined by VCAT or court if the matter proceeds to hearing.	The landlord's representative is purportedly vested with the power to determine whether the term has been breached. This interpretative power is inconsistent with the compliance regime contained in the RTA, and the term is therefore invalid.	A12, B12, Q47

Typical and Variant Terms	FTA s.	Legal Context	Commentary on the Term	Source
<p>Pilot Light The tenant will reimburse the landlord for unnecessary costs incurred in having plumbers/gasfitters attend to re-light pilot lights to hot water services/heaters, except where such equipment is found to be faulty.</p>	<p>32X (a) 32X (m)</p>	<p>Where the hot water service or heater is failing the urgent repairs provisions apply which provide for the expeditious rectification of the problem. Division 6 of Part 2 of the RTA makes no provision with respect to the incorrect designation of a problem as a repair.</p>	<p>The term purports to transfer to the tenant costs associated with the landlord's enforcement of the repair duty. The term purports to transfer the evidential burden to the tenant.</p>	<p>D47, M44, S49</p>

<end doc>