Housing for the Aged Action Group
ABN: 80 348 538 001 Reg: A0017107L
Postal address: 1st Floor, Ross House
247-251 Flinders Lane, Melbourne 3000
Home at Last phone: 1300765178
Admin phone: 9654 7389 Fax: 9654 3407
Email: haag@oldertenants.org.au
Website: www.oldertenants.org.au

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By email: yoursay@fairersaferhousing.vic.gov.au

Heading for Home
Residential Tenancies Act review
Options Discussion paper

This submission is a response by Housing for the Aged Action Group (**HAAG**) to the 'Heading for Home' options paper, forming part of the Residential Tenancies Act (**RTA**) review. HAAG is happy to acknowledge the contribution and feedback of our members, which forms the basis for this submission.

1. Do the proposed objectives meet the needs of the contemporary market and will they continue to do so into the future?

HAAG is disappointed that consumer protection is not a proposed objective of the RTA. Older renters in particular are at significant risk in the private rental market. Our view is that the protection of tenants – who are, as a group, at a serious structural disadvantage in relation to landlords – should be a key objective of any residential tenancies legislation.

8. What are the potential benefits and risks of developing an optional prescribed long-term lease as under option 3.2?

Certain provisions and features common to tenancy agreements would need to be modified to practically support long fixed terms – in particular, around rent increases. Rent increases are not permitted in most fixed terms, which could mean tenants faced extremely high rents at the commencement of their tenancies to compensate for lost future increases. Or, if rent increases are allowed, a tenant locked into a long-term lease and suddenly facing an increase beyond their capacity to pay would be in a very poor position. The possibility of an increase forcing a vulnerable tenant into rent arrears is a key risk of a longer lease. The main benefit of an optional prescribed long-term lease would be in providing clarity and certainty about this and the other respects in which such agreements differ from standard 12-month leases.

A further risk associated with such agreements is that vulnerable tenants seeking security of tenure might take them on without fully understanding the commitments

they were making, especially if such agreements are structured to incentivize landlords to offer them.

9. What features should be included in a long-term agreement to provide the correct balance of incentives for tenants and landlords?

HAAG's view is that the longer term itself should form the major incentive. In our experience, a minority of landlords prefer the steady returns provided by stable, long-term tenancies over the capital gains and other financial benefits of shorter tenancies. Older tenants as a group are more likely to hold such long-term tenancies, simply because they have been renting long enough to fall into them, and they tend to prefer long-term stability to frequent moves. (Similarly, it tends to be older landlords who prefer to offer such arrangements.) Such landlords and tenants would gravitate towards an optional long-term lease without a need to provide further incentives.

However, we are concerned that the attempt to 'incentivize' other landlords to select such a lease might become very onerous for tenants likely to seek them out – that is, older tenants in particular, and low-income tenants in general.

18. Should each of the items of information listed in option 4.6 warrant disclosure before entering into a tenancy agreement, and should any other material facts be considered?

Each of the items of information listed in option 4.6 warrant disclosure before entering into a tenancy agreement.

We would also favour a requirement for landlords to disclose whether there have been any instances or reports of mould in the property in the previous year. Tenants often find they move into property where mould has been cleaned but will return in the next winter or other wet period, and there is currently no reasonable way for tenants to know this will be the case, especially if they take up the tenancy during summer.

23. Should each of the prohibited terms listed in option 4.10 warrant inclusion in a blacklist, and should any further terms be included?

We are concerned that a prohibition on "a term which purports to prohibit the tenant from conduct on the basis of the landlord's insurance requirements, if a copy of the relevant insurance requirements has not been provided to the tenant" tends to suggest a landlord can restrict the tenant's conduct on the basis of insurance requirements if they are provided to the tenant, even if this would tend to restrict or modify the tenant's rights under the Act.

25. Is option 4.12A or option 4.12B preferable, and why?

4.12A is preferable.

The problem with option 4.12B, in particular, is that it would require tenants to pay to clean carpets that are already clean. By requiring tenants to pay for cleaning where the carpets were professionally cleaned before the start of the tenancy, this would

require virtually all tenants to pay for cleaning. In fact, it disincentivizes tenants from keeping carpets clean, as they will only have to pay to have them cleaned at the end of the tenancy anyway.

Many older tenants are very house proud and are surprised and insulted when agents suggest they should steam clean carpets that are uncontroversially already clean. HAAG workers have had numerous conversations with agents on this point. The conversations invariably run along similar lines:

HAAG: The tenant says you won't return their bond because they didn't steam clean the carpet.

Agent: That's right.

HAAG: But she says the carpets were already clean.

Agent: That's right.

HAAG: So the carpets are clean but you still want her to steam clean them?

Agent: That's right?

HAAG: But why? If the carpet is clean there's no reason to clean it.

Agent: They have to, it's in their lease.

The suggestion that tenants be required, not only to leave carpets clean, but to follow a particular and costly method of doing so, even when there is manifestly no need to do so, is a pointless and arbitrary exercise of power on the part of landlords. It does not correspond to any actual need – if there is a need to steam clean carpets in order for them to be clean, this is already required by the tenant's regular duties.

26. Under option 4.12B, should the processes for a breach of duty apply equally to breaches of additional terms, or should the process for enforcing compliance with an additional term be different?

The processes that apply to breaches of duty, which relate to fundamental aspects of a tenancy and include penalties that can include speedy eviction, should remain distinct from the process for enforcing compliance with additional valid terms, which may be relatively minor in comparison.

27. Under option 5.1, for breaches where the remedy requires the party to refrain from doing something, should the required timeframe to comply be immediate, as soon as practicable, or some other timeframe?

HAAG's view is that it remains appropriate for a party to be required to end the conduct within 14 days. This is simpler than the alternative in that it imposes a single timeframe for all breaches, and allows reasonable time for the party to seek advice about their rights and the validity of a breach notice, as well as contacting any support services that could assist them to remedy and prevent recurrence of the breach.

We note that where there is a breach that is ongoing or imminent, parties have the option of making an urgent ex-parte application for a restraining order with respect to the conduct. Such orders can include a term specifying that a breach of the order may constitute contempt of the tribunal, a criminal offence. That is, such orders can provide strong disincentives to the continuation of conduct in breach of a party's duties, and differs from a compliance order only in that it cannot form the basis for a possession order. In our view, it is appropriate in all that the most serious circumstances that a party has an opportunity to seek advice and/or remedy a breach before they are subject to proceedings that can end their tenancy.

28. Which option is preferable in terms of process for successive breaches of duty, and why?

Given the options set out in this paper, HAAG favours the retention of the existing arrangements in the current RTA.

29. What are the risks, if any, of unintended consequences arising with the measures proposed in options 5.2A, 5.2B, and 5.2C?

A consequence of Option 5.2A is that more tenants could be evicted for breaches of duty even though they have immediately remedied all breaches, and no particular breach has recurred. This seems to us to be a strikingly harsh outcome.

The consequence of Option 5.2B would be reduced certainty for all parties as to what conduct could form the basis for eviction. There would be no way a tenant could know what would or wouldn't constitute grounds for eviction. Given widespread perceptions that VCAT decisions tend to be inconsistent, it could lead parties to take their chances either for or against eviction in a particular circumstance, and intensify uncertainty as to what the consequences of given behavior could be.

A consequence of Option 5.3B could be that social housing providers which have previously relied on 'three strikes' approaches shift towards a more punitive breach-compliance order-notice to vacate framework – effectively meaning tenants could be evicted based on two, rather than three, breaches – and so increasing the prospects of eviction, and decreasing opportunities to modify behavior, for greater numbers of tenants. It would also leave no recourse against a party who repeatedly breached their duties but consistently remedied the breaches within 14 days.

30. Which obligations of landlords and tenants should be subject to the breach of duty process beyond the current duty provisions – all terms in the prescribed tenancy agreement (if the prescribed agreement is made more comprehensive, as proposed)? What about additional terms to the tenancy agreement?

At risk of tautology, the only obligations that should be subject to the breach of duty process are duties – that is, breach of contract terms should not form a possible basis for termination. Contract terms typically include obligations at a wide range of levels of seriousness, and contractual breaches that are not also breaches of a duty should not be subject to a breach of duty process.

31. Which obligations of landlords and tenants should not be subject to the breach of duty process?

Those obligations which are not duties should not be subject to the breach of duty process.

32. Should the RTA differentiate between a breach of duty and a breach of contract, and what should be the remedy and process for enforcement in each instance?

Duties are fundamentally different from, and more serious than, non-duty-based contract terms. We have no view on the appropriate process for enforcement of contract terms. However, we strongly believe that tenants should not face eviction in any circumstances for the breach of contract terms if they are not also breaches of a duty under the Act.

33. Under option 5.3A, what would be an appropriate amount for a pet bond, and should the amount be calculated as equivalent to a number of weeks' rent for the tenancy?

Given that tenants are already liable for any damage caused by their pets, the appropriate amount for a pet bond is zero. Any pet bond will tend to unfairly disadvantage low income tenants, including many whose pets will not cause damage to the property and for whom the bonds with therefore remain redundant. It will tend to undermine the protections against excessive up-front costs currently included in the RTA (i.e., limits on rent in advance and maximum bond).

34. How could the concern that introduction of a pet bond may disadvantage lower-income tenants with pets be addressed?

The most obvious way to address this concern is to prohibit pet bonds. Increased up-front costs are will raise barriers for low-income tenants seeking to access housing. Any alternative, any arrangement that includes pet bonds, will disproportionately disadvantage low-income tenants.

That said, if pet bonds were to be allowed we would favour arrangements that limited their use such that they could not be required to be paid until 30 days after the tenancy commenced, and that tenants who believed a pet bond to be unreasonable could apply to VCAT for an order waiving such a bond. Grounds for such a waiver could include that the type of pet was unlikely to cause damage; that the tenant could provide references showing the pet was unlikely to cause damage; or that the tenant's hardship if a bond was paid would be greater than the landlord's hardship if it was not. We note that this is a seriously suboptimal outcome, given that low income tenants are strongly disinclined to make VCAT applications.

35. Under option 5.3B, what cleaning-related obligations would be appropriate for inclusion in an optional clause in the standard prescribed form agreement?

Option 5.3B is misconceived, in that it proposes to introduce requirements for the tenant to carry out certain kinds of cleaning *if they are necessary*, but tenants are already required to carry out all kinds of cleaning, to a reasonable standard, if they

are necessary. Any cleaning requirements it introduced would either be redundant (duplicating the existing duty to keep the property reasonably clean) or pointless (if they were not necessary to keep the property reasonably clean).

40. Under option 5.5, should seven days' notice be required for a valuation as well as for a general inspection, or should seven days' notice only be required for a general inspection?

Seven days notice should be required for a valuation or for a general inspection. It is difficult to imagine circumstances where a landlord would be disadvantaged by scheduling a valuation a week ahead.

42. Does option 5.7 sufficiently balance the rights of landlords and tenants where a property is being shown to prospective purchasers?

Option 5.7 comes close to a reasonable balance of the interests of landlords and tenants where a property is being shown to prospective purchasers. However, we remain concerned that this would introduce a right for landlords to conduct open-house inspections, and there would be no recourse for a tenant who had reasonable grounds to prefer this not to happen. Older tenants as a group are more likely than other renters to hold serious concerns around privacy and security in relation to open-house inspections.

We note that the option is weaker in relevant respects than, and tends to subvert the protections offered by, options 59A and B. That is, a tenant under option 59A or B has options where they have a reasonable concern that their safety would be compromised by the display of particular images; there is no comparable protection here for a tenant with a reasonable belief their safety would be compromised by the display of their belongings during an open-house inspection. We would prefer, in line with other provisions of the Act, that if a landlord believes a tenant's consent to inspections is being unreasonably withheld they should be entitled to make an application to VCAT for an order that the consent is not required. This would avoid situations where tenants with reasonable concerns from being forced to accommodate open-house inspections.

43. Should tenants be entitled to compensation for each inspection to show the premises to prospective purchasers, and should the RTA quantify that compensation in some way?

Sales inspections represent a serious disruption of tenants' rights to quiet enjoyment, and tenants should be compensated for them. This would also encourage landlords to maximize the efficiency of sales campaigns, reducing inconvenience to tenants. It could be appropriate for the Act to quantify such compensation, or at least, to set a minimum rate. A fixed formula could reduce desirable forms of flexibility, i.e., where landlords often seek specific forms of conduct on the part of tenants during sales campaign which go beyond their normal duties. That is, parties should be able to negotiate reasonable additional compensation where a landlord desires cleaning beyond a 'reasonably clean' standard, or that the tenant either attend or not attend the property during viewings.

45. Is option 5.9A or option 5.9B preferable for regulating entry to take advertising pictures where the property is being sold or re-leased, and why?

Older tenants as a group tend to hold significant concerns about their information and images being displayed online. On this basis, we consider option 5.9B preferable, which more strongly incentivizes compromise and negotiation to reach mutually acceptable arrangements to resolve tenant privacy concerns without unduly restricting landlords' commercial needs.

46. Would option 5.10 capture arrangements that are not properly characterized as commercial short-term accommodation, or other arrangements that should not require consent?

Option 5.10 would capture a wide range of arrangements that are not properly characterized as commercial short-term accommodation. In particular we are concerned for the effects of such an option on:

1) Carer arrangements. For example, a tenant who was recovering from surgery and invited a family member to provide care, letting them stay in the spare room. The tenant would be parting with possession of part of the premises, and care work could constitute a form of consideration – or the carer might contribute to the rent.
2) Housesitting. For example, a tenant who went on holidays for a fortnight and let a friend stay in exchange for the friend feeding the cat and watering the plants. The tenant would have parted with possession, and the trivial services provided by the friend could constitute consideration.
3) Sharehousing arrangements. Many tenants seek to mitigate rental stress by taking on short or long-term housemates. Sometimes they seek and/or obtain landlord consent to an assignment, but often the landlord fails to provide such consent in writing. If the landlord does provide consent, it can be a time-consuming process (making a request to the agent, waiting for a response) when tenants often need a new housemate to move in and begin paying rent immediately.

47. How should the arrangements in option 5.10 be defined, and should the reference to consideration be confined to monetary consideration?

We note first that this option, on its own terms, need only apply to tenants who rent part of the property via AirBnB without breaching any of their other duties. Should AirBnB guests damage the property, cause a nuisance to the neighbours, etc, the regular breach of duty provisions would apply and so landlords could seek appropriate remedies. Given that the Supreme Court has held that renting all of the premises via AirBnB can constitute subletting, there is also already a remedy in those circumstances. We further note that it is not clear to us – we do not believe it has been established – that there is a genuine need for landlords to have recourse against tenants who rent part of the rented premises on a short-term basis without breaching any of their duties. The perceived problem seems motivated more by landlord resentment that they are losing a monopoly on rental income for the property than any serious concern for damage, etc.

That said, if the purpose of this option is to regulate AirBnB, it should refer specifically to AirBnB or require tenants to obtain the landlord's consent before offering all or part of a rental property for rent on prescribed online platforms, so that the provision remains relevant to the changing marketplace. The attempt to provide general enough terms to capture all possible apps and websites can only result in overbroad definitions that inappropriately capture a wide range of ordinary tenancies.

We do not believe that restricting the relevant forms of consideration to monetary ones adequately address these concerns.

49. Is option 5.12A or option 5.12B preferable, and why?

HAAG favours 5.12B for improved clarity for all parties. Option 5.12A corresponds to the current situation, in which it's very difficult for tenants to find out or assess whether a particular fee is reasonable. While 5.12B would not totally resolve this problem, it would partially limit unreasonable claims.

58. Are the special circumstances outlined in option 6.5 appropriate, and should there be any additional grounds on which a tenant can end a tenancy without compensation?

The circumstances set out in option 6.5 are appropriate. We would suggest that an appropriate additional ground would be where one of a number of co-tenants has passed away. This arises for us most often where one member of a couple has died, leaving the remaining tenant unable to afford the rent and/or too distressed to continue living in the premises. Our experience has been that landlords are generally amenable to termination by agreement without lease-breaking costs in such circumstances, but the occasional need for tenants to contest lease-breaking costs in such circumstances is unduly onerous.

81. Are the proposed condition reporting triggers adequate? Should a condition report be required more or less often?

It is not obvious to us what the benefits would be to completing condition reports during a tenancy. A condition report completed at the commencement of a tenancy is evidence of its condition, and essentially functions to indemnify a tenant against any damage that occurred to the property prior to their occupation. Any change subsequent to this, and before the tenancy ends, has undoubtedly occurred during the tenant's occupation, and any number of condition reports associated with routine inspections would not change this.

Moreover, an obligation to complete a condition report during every routine inspection could make such inspections longer and more onerous. It could also tend to become very onerous for a tenant whose landlord conducted an inspection, and consequently completed a condition report the tenant would then also have to complete, every six months.

90. Do any of the features listed go beyond basic standards and, if so, could they be addressed through other means (for example, by permitting particular

modifications or via the tenant adopting their own solution – such as a portable air conditioner?)

The issue of minimum standards arises because some tenants, in seeking properties they can afford to live in, take on tenancies in fundamentally unacceptable and dangerous premises, and that landlords are able to offer inappropriate forms of accommodation to vulnerable tenants. Standards are required to ensure exploitative landlords are not able to take advantage of tenants in such circumstances, and that tenants are not endangered by their living conditions. However, the standards must be tailored to remove unacceptable properties from the market without compromising any more than necessary the capacity of tenants to seek tenancies they can afford, even where those tenancies are in premises that are sub-ideal, or lack amenities that are commonly enjoyed or even expected but not essential. To put this another way, minimum standards must be *minimum* standards.

A property without a functioning toilet, without heating or that is so lacking in energy efficiency measures that it is prohibitively expensive to heat, or that is not structurally sound should not be rented out – it should be removed from the market until it can meet basic standards. HAAG is not convinced as to whether or not all of the features listed in option 8.13D are so necessary that a property without them should be removed from the market.

92. Should a landlord be able to lease out a property that is fit for habitation, clean and has working features, regardless of whether it meets any other standards?

Existing arrangements, in which landlords can lease out any property that is fit for habitation, clean, and has working features, have left a significant number of low-income tenants in unacceptable and unsafe conditions. HAAG routinely sees tenants who have taken on properties that do not have heating, or with serious mould problems that appear to be causing respiratory issues for the tenants – even though the properties when leased were clean and in working order. It is essential that landlords are bound by further minimum standards to protect the basic safety and amenity of their tenants.

98. Would the proposed options support the most critical types of modifications?

The most critical types of modification are those required by tenants with disabilities and these options support those.

99. Are there any advantages to retaining a requirement to seek the landlord's consent for all modifications?

There are no advantages to the retention of this requirement from a tenant perspective. It has not historically promoted positive relations between parties, but fostered resentment and secrecy on the part of tenants.

102. Should tenants be able to dispute the imposition of a supply related charge in social housing?

Tenants are entitled to information about the basis on which a supply charge in social housing is calculated, and should be able to dispute the charge where it is either calculated incorrectly, or where the charge is calculated in an unreasonable way.

106. Does damage need to be defined in the RTA, or would the proposed guidelines suffice?

HAAG's view is that there is no way to define 'damage' such that it avoids ambiguity or differing interpretations in situations where there are opposed views as to whether a given issue is damage or fair wear and tear. Ambiguity arises because parties can reasonably hold different views of what a specific issue *is*, and cannot be defined away.

107. Would the proposed rewording of the tenant's duty make it easier for the parties to understand what is expected in terms of the tenant not damaging the property?

This question mischaracterizes the proposed change. It would not be a change of wording which clarifies an existing expectation; it would change the expectation – the duty – itself. Specifically, it would make tenants liable for damage even where they had taken care to avoid it – meaning there would be nothing an unlucky tenant could do to avoid breaching a duty. There is no other duty that cannot be avoided by good faith and care; landlords do not breach their duties, for example, if they have not fixed a problem of which they were not aware.

109. Would the proposed options encourage landlords to respond promptly to a request for a repair?

The proposed options would encourage landlords to respond promptly to repair requests; but more importantly, they would provide practical remedies for tenants where landlords fail to do so. Recourse to funds from a maintenance bond and/or the Rent Special Account to pay for repairs where the landlord is recalcitrant or unable to do so substantially improves the tenant's position.

110. Would the proposed changes in option 8.32 improve the existing process for handling repairs?

Option 8.32 misstates the current process for handling urgent repairs: "Under this option, the landlord would now have seven days (instead of the current period of 14 days) to dispute the tenant's request for an urgent repair." This seems to conflate the period within which a landlord is required to reimburse a tenant who has undertaken an urgent repair with the requirement for VCAT to list an application for urgent repairs within two days (in practice, VCAT is rarely if able to list a matter that quickly). In neither case is there a time limit for a landlord to 'dispute' a tenant's request. In the instance that a landlord does not believe a particular repair is urgent, or does not believe that a repair is required, they can present this argument if and when any hearing of the tenant's claim (for a repairs or compensation order) is heard at VCAT.

This option does not improve existing processes.

111. What unanticipated impacts would these options have on either party?

The requirement for landlords to lodge a maintenance bond would substantially increase the amount of interest accumulated on bonds held by the RTBA. The increased funds could be used to improve tenant advocacy and support and/or conflict resolution services.

142. What are the costs and risks, if any, associated with a specialist administrative dispute resolution service that provides binding orders?

The key risk of this approach is that it would simply fail to achieve its desired outcomes. The intention of such an option seems to be the creation of an environment that is less formal, adversarial, and intimidating – in particular to tenants – than VCAT. But VCAT is already a minimally formal environment, and it's the nature of the disputes with which it deals (if not simply the structure of the landlord-tenant relation) that makes it adversarial. That is, this option tends to the superficial. It's hard for us to see how our members, or other tenants, would be any less intimidated by a service making binding decisions about their tenancies if it was called a specialist administrative resolution service rather than a tribunal. A nicer name won't make this service any less threatening to tenants who have, or face having, orders made against them.

145. What further information is required to determine the extent to which there is a problem with the quality of VCAT decision-making?

There is complete consensus among regular VCAT Residential Tenancies list users that the Tribunal's decisions lack consistency, transparency, and accountability. If there is not a problem with the quality of the decision-making, there is unquestionably a problem with user confidence in that decision-making. If this unanimous feedback is not already sufficient, it is not clear to us what could be sufficient.

146. Would the features of re-hearing process at VCAT as outlined in option 10.4A address the concerns relating to the quality of VCAT decision-making?

Option 10.4A would significantly improve the quality and accountability of VCAT decision-making. Our preference would be that appeals be heard by a panel of (perhaps three) VCAT members, rather than shifting the decision to a single more senior VCAT member, as we believe this would tend to improve the quality of decision-making, and reduce doubt or distrust in the basis for decisions rendered.

We would also prefer to avoid a situation where all final decisions by non-judicial members would be open to appeal; we believe parties should only be able to appeal on the basis that they believe there has been an error of law on the part of the original decision-maker. We are concerned that the alternative would reduce confidence in VCAT as any decision would be open to possible appeal until the deadline for lodging an appeal had passed.

151. What are the potential benefits and risks of introducing a termination order process to the RTA?

HAAG is concerned that there are a number of respects in which the termination order process would reduce security of tenure for vulnerable older tenants. In

general, our view is that this option misunderstands the issue it seeks to address and so fails on its own terms.

The options paper explains that "[i]t is intended that a mechanism which removes the landlord's ability to give a notice to vacate in the first instance will reduce the scope for unnecessary and unfair evictions". But this would only be the case if tenants were more likely to attend VCAT hearings than they were to contest notices to vacate, and nothing we know about tenant attendance at VCAT suggests this is the case. The option would tend, if anything, to reduce the time tenants had to seek advice about the notices they had received. Our experience is that tenants are, if anything, more likely to be intimidated by the prospect of a Tribunal hearing than they are by receipt of prescribed notices.

The suggestion here seems to be that vulnerable tenants who do not properly understand their rights may move out in response to an invalid notice to vacate. But there is no obvious reason why the same tenants would not move out in response to an invalid application for a termination order. From the nonspecialist perspective of the average tenant, notices to vacate and applications for termination orders would both simply represent eviction notices.

Further, this option would seriously expand VCAT's powers to facilitate eviction and eliminate an important safeguard currently enjoyed by tenants – i.e., that VCAT does not have the power to amend a notice to vacate. The consequence, as established by the Supreme Court in Smith v Director of Housing, is that a notice to vacate must clearly state the reasons that it is given, so that a tenant can determine whether or not they can or should contest the notice. VCAT can, however, amend a VCAT application. The termination order process would allow situations where a tenant prepared to defend an application, only for the Tribunal to amend the application during the hearing so that the tenant could not adequately seek advice or prepare a defence. VCAT routinely exercises the discretion to amend applications, including over the objections and to the detriment of tenants – in particular with respect to bond applications where the landlord supplies additional particulars subsequent to the application, including at the hearing. We are very concerned that this could also become the case with respect to evictions. *The fact that a notice to vacate may not be amended is one of the strongest protections tenants have against unfair evictions*, and this option would eliminate it.

153. What are the potential benefits and risks of expanding VCAT discretion to make possession orders and requiring a pre-eviction checklist as under option 11.2?

The obvious benefit of option 11.2 is that it creates a discretion for VCAT to decline to make a possession order where this is not necessary – that is, to reduce unnecessary evictions. There is no question that this is a desirable outcome.

A risk of this option, however, is that the Tribunal's discretion over any given case might be taken as an adequate safeguard either for provisions of the Act, or for particular possession applications, that are overbroad or poorly defined. It should be very unusual that, where the landlord was entitled to serve a notice to vacate (and

notwithstanding exceptions such as the capacity of a tenant to repay arrears and avoid loss to a landlord), the eviction of a tenant would not be reasonable. In general, landlords should not be able to serve a valid notice that would unreasonably evict a tenant – the relevant provisions should be drafted so as to avoid this. An assessment of the reasonableness of a given eviction should be a final consideration.

We are concerned that allowing the Tribunal to consider the reasonableness of a given eviction should not be seen to diminish the requirement that the provisions for notices to vacate be appropriately and narrowly targeted at conduct and situations which are, in themselves, reasonable. For example, we would be disappointed and concerned if an overly broad power to serve a notice to vacate based on parting with possession for consideration were allowed on the basis that the Tribunal could decline to make a possession order if it were not reasonable.

154. What alternative options are there to ensure VCAT decisions regarding possession adequately take into account the reasonableness of the termination and the hardship of the tenant?

Notwithstanding the above concerns, we support the proposal that VCAT enjoy the discretion to consider whether a given eviction is reasonable in all the circumstances.

156. What are any potential benefits and risks of requiring a termination order from VCAT in lieu of giving a notice to vacate?

Please see our comments on termination orders in response to question 151.

158. What are the potential benefits and risks of amending the language and scope of the provisions for danger?

HAAG acknowledges that it could be appropriate to broaden the scope of the notice to vacate for danger to include the landlord and their agents. We are generally concerned, however, that decisions around this kind of notice can require VCAT – which is not bound by the rules of evidence, and operates on a balance-of-probabilities standard of proof – to make findings on allegations of conduct that is often criminal or quasi-criminal in nature and should properly be determined by a court, according to the rules of evidence and beyond reasonable doubt. That is, we accept the reason for the broadening but are very concerned by any move that would expand or extend the basis for eviction beyond this.

In our view, the options paper seriously misconstrues the current situation and so responds to issues that do not exist. The paper correctly observes that VCAT interprets the notice to vacate for danger as requiring evidence of “continuing endangerment” – that is, not just a one-off occurrence. However, the conclusion drawn from this that VCAT is required or able to “predict” the tenant’s behavior is misconceived. The Tribunal can’t, and doesn’t seek, to predict the tenant’s future conduct. What they require is that the landlord prove the grounds for giving a notice – in this case, that there is an ongoing danger. It accepts that a single incident of dangerous conduct which is unlikely to recur should not be the basis for such a speedy method of terminating a tenancy.

In many cases, this is trivial because there is a clear pattern of behavior – that is, the danger has recurred. The changes proposed here would allow a landlord to terminate a tenancy based on a single incident, even if it was extremely unlikely the incident would recur. This could include self-defence; on a strict reading, it could require the eviction of a victim of family violence who defended herself against, and then obtained orders excluding, an attacker. In general, it radically shifts the purpose of the notice for danger – from being aimed at the prevention of further harm, towards the punishment of individual acts. In our view, it is inappropriate for consumer legislation to take such a punitive approach.

160. What are the potential benefits and risks of removing VCAT's discretion to make possession orders based on the likeliness of a recurrence of the behavior?

Again, this badly mischaracterizes the situation. VCAT does not have the discretion to decide whether or not to award possession based on the likeliness of behavior recurring. They are required to make a possession order if the landlord has proved the basis of the notice (i.e., that there is ongoing danger), and they have no jurisdiction to make a possession order if the landlord has not proved the basis of the notice.

And again, the shift suggested by this option is from termination designed to prevent harm, to termination designed to punish misconduct. This is simply inappropriate. We offer the following case studies of HAAG clients who received notice to vacate for danger but were not evicted after VCAT determined there was no evidence of ongoing danger:

Case study: Mike, 65, received a notice to vacate for danger after striking another rooming house resident. The facts of the incident were not in dispute: while he was for the most part gentle and easygoing, he had a serious drinking problem and had struck his neighbour during an alcoholic black out. He was extremely distressed when he realized what he'd done, and took immediate steps to address his drinking problem, obtaining support from a rehabilitation service. At the hearing, the Tribunal accepted that there was not evidence that the incident was likely to recur: he had lived in the property for a number of years without incident, and had taken practical steps to deal with the issues that caused the violence. A year later he continues to live in the rooming house, and there have been no further incidents of violence. He apologized profusely to the neighbour he had assaulted and they maintain a friendly relationship.

Case study: Manuia, 58, had an argument with a neighbour on Christmas Day. During the argument, Manuia clenched his fists and the neighbour found his demeanour threatening – although there was no physical violence as such. Manuia received a notice to vacate for danger, and the Tribunal accepted that conduct which intimidated his neighbour was sufficient to constitute danger. However, the Tribunal found no evidence the danger was part of a pattern or likely to recur, and observed that Christmas Day is itself an unusual day which puts individuals under unique strains.

Apart from clients of ours who have sustained tenancies after receiving notices to vacate, we note a particular concern that the proposed change would seem to require the Tribunal to evict people who had acted in self-defence, including victims of family violence.

161. What are the potential benefits and risks of requiring termination by application to VCAT?

Please see our comments on termination orders in response to question 151.

173. What alternative options are there to incentivize or facilitate timely payment of rent?

At present, a tenant who consistently fails to pay rent on time faces eventual eviction and the likelihood that they will receive a poor reference, making it extremely difficult to find new rental accommodation. We submit that tenants not dissuaded from late rent payment by the risk of homelessness will not be 'incentivized' by any other plausible arrangements.

175. What are the potential benefits and risks of including repeated late payment as grounds for termination on application to VCAT?

There is no other option, or set of options, proposed in this paper that would so seriously reduce security of tenure for older tenants as making repeated late payment of rent a ground for termination.

HAAG is less concerned by the benefits and risks of this option than its intended consequence: that tenants will be evicted for late payment of rent, even where there is no financial loss to the landlord. The predictable consequence of this option would be a significant increase in evictions and corresponding loss of security of tenure. Many of HAAG's clients and members would have been evicted and become homeless under such a rule.

For pensioners and older renters reliant on Newstart, a single large or unanticipated expense – including funeral or medical costs, the resetting of the PBS safety net threshold, car repairs, etc – can make it impossible to pay rent in full on time. For many older renters, this failure is deeply shameful and corrected as quickly as possible. Under this option, it would only take a handful of such unexpected expenses – a run of bad luck – to see someone evicted even where they pay back the amounts owed.

We are also particularly concerned about the effect of such a change on older workers who are employed on a casual and/or intermittent basis, i.e., those whose income is irregular. Many older workers, facing age discrimination in employment, are forced to rely wholly or partially on contract work. Anyone in such circumstances would face radically reduced security of tenure if late payment in itself were grounds for termination.

We note that this option would also radically reduce the usefulness of brokerage programs like the Housing Establishment Funds (HEF), which pays arrears for tenants who meet certain eligibility criteria so as to prevent both eviction, and loss to

the landlord. There would be no reason for these funds to exist if the payment could not prevent eviction.

At present, tenants who are in rent arrears have a significant incentive to repay the arrears; they will be evicted if they don't. In a situation where they could be evicted even if they repaid the arrears, this incentive would be reduced.

We also note that, in turning away from the idea that eviction for rent arrears occurs to prevent loss to the landlord, this option also tends to treat termination as a punishment for misconduct, rather than a mechanism to prevent harm or detriment. We continue to consider this deeply inappropriate and misguided.

176. What alternative options are there to facilitate and incentivize the use of repayment plans for tenants to pay rent arrears?

At present, tenants who fail to pay back rent arrears face eviction; they are also likely to receive poor references from their landlords and agents and may be listed on tenant databases. We suggest there is not a stronger disincentive than this that can reasonably be applied under consumer legislation, and that tenants who are not motivated by these threats will not be further motivated by any other incentives offered.

178. What are the potential benefits and risks of requiring a landlord to apply for a termination order from VCAT for failure to comply with a VCAT order as under option 11.20?

Please see our comments on termination orders in response to question 151.

179. What are the potential benefits and risks of removing VCAT's discretion not to make a possession order based on a prediction about the tenant's future actions?

Please see our comments on the misunderstanding reflected in this question in our response to question 160.

184. How effective would provisions for parting with possession for consideration without consent be in clarifying that use of the property for financial or other form of gain is grounds for termination, as under option 11.23?

Option 11.23 would not represent a 'clarification', as this question suggests; it is a substantive change. The use of a rented premises for financial gain is protected under the current RTA, specifically in section 7 which allows tenants to use a rented premises to carry on a trade, profession or business so long as the premises are used primarily for residential purposes. The suggestion that the use a property for financial gain become a ground for termination substantially infringes tenants' right of quiet enjoyment. We object strongly both to this proposed change and the mischaracterization of the change as a clarification. It is a *fundamental* aspect of quiet enjoyment that tenants decide who enters their home and under what circumstances, with the single exception of the need for consent to assignment and subletting.

To put this another way, option 11.23 is not an effective mechanism for clarifying the RTA but an ineffective mechanism for regulating AirBnB.

185. What are any alternative options are there to achieve this outcome?

Again, we do not accept that it has been established that this outcome is desirable. We do not believe stakeholders have made a case that it is desirable or necessary that the use of a property for financial gain should be grounds for termination. Tenants have a right of quiet enjoyment, that is, to make use of their property in the ways they choose, so long as those ways are lawful and do not cause a detriment to their landlords. The argument against allowing tenants to use AirBnB seems driven more by annoyance on the part of landlords than by a sincere concern for their properties. We note again that existing arrangements are sufficient to terminate the tenancy of a tenant who either lets the entire rented premises on AirBnB, or whose guests repeatedly breach duties to avoid damage and nuisance to neighbours, etc.

186. What circumstances could arise that could put a tenant at risk of wrongful eviction as a result of provisions for parting with possession for consideration without consent?

HAAG's view is that this option captures a very broad range of ordinary tenancies and would expose a huge part of the rental market to eviction. In particular, we raise again the cases of particular concern discussed above under question 46:

1) Carer arrangements. For example, a tenant who was recovering from surgery and invited a family member to provide care, letting them stay in the spare room. The tenant would be parting with possession of part of the premises, and care work could constitute a form of consideration – or the carer might contribute to the rent.
2) Housesitting. For example, a tenant who went on holidays for a fortnight and let a friend stay in exchange for the friend feeding the cat and watering the plants. The tenant would have parted with possession, and the trivial services provided by the friend could constitute consideration.
3) Sharehousing arrangements. Many tenants seek to mitigate rental stress by taking on short or long-term housemates. Sometimes they seek and/or obtain landlord consent to an assignment, but often the landlord fails to provide such consent in writing. If the landlord does provide consent, it can be a time-consuming process (making a request to the agent, waiting for a response) when tenants often need a new housemate to move in and begin paying rent immediately.

189. What are the potential benefits and risks of removing the option for a landlord to terminate a tenancy at the end of a fixed term tenancy agreement, as under option 11.25a?

Please see our response to question 195, which considers substantially the same issues.

190. How effective would provisions enabling tenants to challenge notices to vacate for the end of the fixed term as under option 11.25b be in protecting tenants against unfair terminations?

Please see our response to question 194, which considers substantially the same issues.

194. How effective would provisions enabling tenants to challenge the notice to vacate as under options 11.27B and 11.27C be in protecting tenants against unfair terminations?

HAAG's view is that these options would both substantially reduce protections against retaliatory evictions.

HAAG's experience in challenging notices which tenants believe to be given in response to the exercise of their rights is that these challenges only succeed if the landlord fails to provide another reason for having given the notice. On numerous occasions we have sought to challenge notices as retaliatory, based on sometimes quite compelling (if inevitably indirect or circumstantial) evidence connecting the notice to the exercise of a right. Even where we have established a prima facie case the notice was retaliatory, we have never succeeded in a case where the landlord or agent offered another reason – most commonly, along the lines of 'we intend to do renovations but they won't commence immediately on the termination date', or, often, 'we were entitled to give 60 days notice for a particular reason but wanted to give the tenant extra time'. It is, as a rule, practically impossible to prove such claims false and so a landlord who offers such a defence will almost always satisfy the Tribunal that the notice was not retaliatory.

We have only succeeded in challenging retaliatory notices where the landlord did not provide an alternative reason for serving the notice. In practice, this has only happened with private landlords not employing real estate agents. Such landlords are the only ones likely to admit to the Tribunal that they gave the notice because the tenant requested repairs, etc.

These options would require the landlord to provide a reason, and we think it's likely that even the least savvy landlord would refrain from admitting in writing that the notice was retaliatory or discriminatory. Any other reason given would provide a pretext for the notice and make a successful challenge to the notice much more difficult.

196. Which of the options in this section would be most effective in protecting tenants against unfair terminations while providing adequate scope for landlords to exit an agreement other than by at-fault evictions or prescribed changes of use?

Our view is that this question is misconceived in that it supposes there are a range of reasons which are not prescribed but that are fair bases for eviction. From the point of view of tenants, there are not fair circumstances where they have done nothing wrong, and the landlord does not intend to change the use of the property, which justify termination. This question effectively asks 'how can we protect tenants from unfair eviction while preserving the right of landlords to carry out unfair evictions?'

Once you accept that landlords must be able to end tenancies for reasons other than tenant fault and change of use, you are accepting that unfair evictions will occur. This

question seeks to reconcile fundamentally incompatible interests. What would be the hypothetical ‘fair’ evictions? Those where allegations against the tenant are unprovable? Those where the tenant is annoying and therefore deserving of eviction and possible homelessness? These are not ‘fair’ scenarios.

We note here that there are no consultation questions regarding the risks and benefits of option 11.27D, the removal of the no-reason notice. But this is the only option that seriously reduces the risk of unfair terminations.

197. What are any alternative reforms to the provisions for terminating a tenancy for no specified reason that could better protect tenants against unfair termination while providing adequate scope for landlords to exit an agreement other than by at-fault evictions or specified changes of use?

The elimination of the no-reason notice is the appropriate reform.

199. How workable and effective would requirements to accompany a notice to vacate for change of use be in ensuring notices to vacate are valid as under option 11.28?

We strongly favour clarifying and standardizing the evidentiary requirements for these notices. Lack of clarity and consistency as to the requirements for service of such notices often leads to otherwise needless VCAT hearings. We consider the proposed requirements workable and likely to significantly reduce the service of invalid (or arguably invalid) notices to vacate, as well as confusion as to what constitutes a valid notice.

200. What are the potential benefits and risks of expanding VCAT’s discretion to make possession orders in relation to a notice to vacate for change of use as under option 11.29?

This option seems to be misconceived in that it appears the intent is to provide improved security to tenure by increasing VCAT’s scope not to make possession orders in certain circumstances. However, the circumstances given are all ones in which VCAT currently *cannot* make a possession order – if the landlord can not prove the grounds for the notice, if it is not given in good faith, or if a notice for repairs has been given when the tenant could remain in the property while the repairs were carried out. If it became a matter of Tribunal discretion whether to make a possession order in these circumstances, this would expand the possibility of eviction to no clear benefit.

202. What is an appropriate notice period for terminations for changes of use?

HAAG favours increasing the notice period for change of use to 120 days. Older tenants often find it extremely difficult to rehouse themselves within 60 days, for reasons including difficulties using the internet for property searches, the physical and logistical difficulties involved in the legwork of finding a house, as well as actually packing and moving, and the general shortage of affordable properties..

We also believe that landlords commonly make major plans for change of use substantially in advance, and that this notice period would not cause any difficulty to

landlords in most cases. It would also have the benefit of tending to discourage the illegitimate use of false change-of-use notices as pretexts to terminate tenancies on relatively short notice.

209. Which of the models most effectively provides an appropriate balance of protections to the tenant against unfair termination of their tenancy, while also providing landlords with adequate confidence that they can manage the risks associated with letting property?

Model 1 is the only model offered here that seriously protects tenants against unfair terminations. We remain skeptical of the value of a termination order process (as discussed elsewhere in this submission) and do not believe it should be described as a safeguard, but this is nonetheless the only options that makes a serious attempt to prevent illegitimate evictions.

The inclusion of termination for repeated late payment of rent in models 2 and 3 radically decreases security of tenure for tenants reliant on social security payments or performing casual or intermittent work – which includes a very large proportion of older tenants. These models facilitate the eviction of older renters.

215. What is the most appropriate period of notice that a tenant should be required to give in these circumstances?

14 days is the appropriate period.

Compiled for HAAG by:
Shane McGrath
Tenancy Worker
shane.mcgrath@oldertenants.org.au