

21 December 2015

Residential Tenancies Act Review
Consumer Affairs Victoria
GPO Box 123
Melbourne Vic 3001

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

Dear Sir / Madam

Residential Tenancies Act Review - Security of Tenure Issues Paper

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comments in relation to Consumer Affairs Victoria's (CAV) 'Residential Tenancies Act Review - Security of Tenure Issues Paper' (Issues Paper).

General comments

The majority of residential leasing work in Victoria is undertaken by real estate agents with little direct, day-to-day involvement from legal practitioners. The LIV is keen to contribute to CAV's review of the *Residential Tenancies Act 1997* (Vic) (the Act) by identifying and exploring alternative legislative mechanisms and regimes which successfully operate in the context of commercial leasing and which may also be beneficial in a residential leasing context. This submission is informed by the LIV's Leases Committee, which comprises lawyers with extensive experience in commercial and retail leasing.

Given our members' expertise, our submission focuses on matters raised in the Issues Paper that are relevant in both the commercial and residential leasing context. Specifically, our submission provides general responses to the issues identified in questions 1-24 of the Issues Paper.

Questions 1 to 7 – What are the needs and preferences for security of tenure in the Victorian rental market?

The LIV suggests that landlords may sometimes be reluctant to commit to long-term leases for fear that they may be locked into a lease situation with tenants who may prove to be unsuitable for a range of reasons; do not look after the property; or breach the terms of the residential tenancy agreement. The LIV also suggests that the perceived and actual difficulties in ending leases for breach may mean that landlords prefer to use the "no reason" procedures at the end of a fixed period (usually 12 months) lease as a more efficient and practical means of terminating a residential tenancy agreement with an unsatisfactory tenant.

Questions 8 – 24 – How does the Residential Tenancies Act provide for security of tenure in general residential tenancies?

Lease terms – long versus short-term leases

The Issues Paper states that tenants are sometimes reluctant to assert their rights under the lease (for example, by requiring the landlord to undertake repairs) for fear of the landlord terminating the

lease or increasing the rent. To address this concern, one option is to provide for more secure longer-term residential leases (between five to ten years). Longer-term leases have benefits for both tenants and landlords.

For tenants, longer-term leases:

- strengthen security of tenure;
- reduce the perceived or actual risks associated with asserting rights under the lease; and
- provide more certainty regarding rent increases.

For landlords, longer-term leases:

- provide certainty of tenure, avoiding the costs of re-leasing at regular intervals and periods of vacancy;
- provide certainty of rental income over a long period; and
- may provide for regular rental increases over the period of the lease.

The LIV notes that longer-term leases will not suit all tenants and landlords. For many reasons, tenants and landlords may prefer short-term leases (up to five years). The LIV cannot comment on market demand for longer leases (between five and ten years). However, if long term leases (between five and ten years) are provided for in the Act, the LIV does not consider that any additional protections would be required for tenants who are seeking only short term leases. The LIV considers that market forces will determine which option, each with attendant risks and benefits, a tenant or landlord chooses depending on their individual circumstances.

Lease terms – options to renew

Options to renew a lease are generally included in commercial (including retail) leases. The *Retail Leases Act 2003 (Vic)* (RLA 2003) specifies a legislative framework for options to renew in retail premises leases. The concept of options to renew is not explored in the Issues Paper.

While we are not aware of any restriction on residential tenancies agreements having options to renew, we understand that they are not widely used in the residential tenancies market. Options to renew can promote security of tenure for tenants, as well as provide the landlord with some level of certainty about the tenant's long term occupation of the premises.

In our members' experience, the grant of options to renew leases for a further fixed term create the following issues for security of tenure:

- tenants may forget to exercise their option within time, which invalidates the option; and
- the landlord may impose onerous conditions on the tenant that restrict the tenant's ability to exercise the option. For example, it is not unusual for a tenant in a commercial lease to be unable to exercise an option if it was in default at any time during the lease, meaning the tenant cannot exercise its option if it is as little as one day late in payment of its rent on one occasion.

The RLA 2003 addresses these concerns in the following ways:

- section 28 of the RLA 2003 requires the landlord to give the tenant notice of between 6 and 12 months of the last date to exercise its option. If the landlord is late in giving that notice, s28 extends the lease term and the last date for exercising the option; and

- section 27(2) of the RLA 2003 restricts the landlord's ability to refuse to accept the exercise of the tenant's option for a further term.

In the LIV's experience, these provisions have, on the whole, worked well to address the issues identified above.

If options to renew are to be regulated under the Act, the LIV suggests that consideration also be given to the following issues:

- section 27(1) of the RLA 2003 regulates the content of an option to renew. However, there are no consequences for non-compliance, which creates problems for enforcement; and
- in other states, tenants are able to seek an order for relief from forfeiture of an option in some circumstances (see discussion in Bradbrook, Croft and Hay, *Commercial Tenancy Law*, 3rd ed, 2009, at [14.6]). The LIV believes the regulation of options in the RLA 2003 is preferable as it reduces the need for resort to the Victorian Civil and Administrative Tribunal or the Courts.

The LIV suggests that the Act should incorporate a framework similar to that in the RLA 2003 which enables tenants to exercise options to renew residential tenancy agreements and regulates landlords who refuse to accept the exercise of an option. This would offer tenants flexibility in terms of their long term plans to remain at the residential premises (as they could decide whether or not to exercise the option), and also increase their security of tenure. Landlords would also have greater certainty as to the tenant's long term occupation of the premises if the tenant exercises the option to renew.

Termination provisions

The LIV considers that the termination provisions in the Act are overly complicated. As noted in the Issues Paper, the Act currently prescribes a number of different notice periods for landlords to terminate leases after the expiry of the fixed term for a range of specific-purpose reasons (such as sale, renovation, own use or a catch-all 'no specified reason'). While the LIV understands that the varied notice periods may have been introduced over time with a view to balancing the differing needs of tenants and landlords, the LIV considers that the range of specific-purpose reasons needs to be simplified and streamlined to remove the current complexities of the provisions. It is not easy for either tenants or landlords to navigate the provisions to determine which notice period applies for the lease to be properly terminated.

One possible solution is a single notice to vacate if the tenant is not in breach and the landlord wishes to terminate the lease. In these circumstances, the tenant would be served with a notice to vacate which provides the tenant with a fair minimum amount of time to vacate. The notice to vacate and the amount of time provided to the tenant to vacate would be the same regardless of the landlord's reasons for requiring the tenant to vacate.

However, the LIV acknowledges that the competing needs of the tenant and landlord will need to be carefully considered in streamlining the provisions which allow the landlord to terminate after the expiry of the fixed term where the tenant is not in breach. If a single notice to vacate is not a viable option, then the LIV suggests that the Act could provide for two notice periods:

- one period for specific purpose reasons such sale, renovation or own use by the landlord, and this period may be shorter; and
- one period for 'no specified reason' termination by the landlord, and this period could be longer.

Rent increases

Under s44(4A) of the Act, rent increases cannot occur more than once every six months. The LIV considers that this is excessive as it undermines security of tenure, and suggests that s44(4A) should be amended so that rent increases cannot occur more than once every year. Annual rent increases are common in commercial leases and more frequent increases are rare. This provides tenants with certainty as to the rent payable for a greater length of time.

In relation to longer-term residential leases (for example, between five and ten years) the LIV submits that a regime for rent increases similar to that in ss35 and 37 of the RLA 2003 should be explored. Section 35 provides that, if a retail premises lease provides for a rent review, the lease must state when the reviews are to take place and the basis or formula on which the reviews are to be made. The main rent review methods are fixed percentage increase, consumer price index increase or market rent review. This would enable landlords and tenants to negotiate the rent for a longer term lease within a prescribed rent review regime, and increase tenants' security of tenure through greater certainty about rent increases.

Section 37 of the RLA 2003 regulates the conduct of a market rent review. This may be simplified for a residential tenancy as, for example, rent concessions and tenant's goodwill are unlikely to be relevant to residential tenancies.

One of the main consumer protection issues for the facilitation of a market rent review procedure in residential tenancies is the cost of having a market rent review conducted by an external valuer. The LIV submits that consideration should be given to a low-cost market rent review being conducted by Consumer Affairs Victoria or by a panel of valuers appointed by it.

Further, noting the LIV's proposal to provide for options to renew residential tenancy agreements, rent reviews could be tied to the exercise of the option to renew. This is also common practice in commercial leasing.

Repairs, maintenance and modifications

The extent of the landlord's repair and maintenance obligations under the Act should be reviewed. Landlords are currently required to ensure that the premises are vacant and in a reasonably clean condition on the day the tenant moves in, and to keep the premises in good repair. The LIV suggests that:

- as currently provided for in the Act, all repair and maintenance obligations should be allocated to the landlord, except for fair wear and tear and those caused by tenant's misuse;
- the scope for landlords to be required to maintain premises to an objective standard should be explored. It is also important to consider whether the standard should be referable to the condition of the premises at the commencement of the lease.

Section 52 of the RLA 2003 requires the landlord to maintain the premises in a condition consistent with the condition of the lease when the lease was entered into. This has been the source of significant uncertainty and litigation and, in the experience of our members, has not been a successful provision. The main issues have been proving the condition of the premises when the lease was entered into, arguments over the effect of the exercise of an option and how to deal with latent defects that would not have been apparent to a tenant on inspection prior to moving in.

Members' experiences with s52 of the RLA 2003 lend weight to an argument that landlords should be required to maintain premises to an objective standard that is not referable to the condition of the premises at the time of the commencement of the lease. However, the LIV recognises that the rent payable by the tenant is generally set by the market and may reflect the condition of the premises at the time the tenancy agreement was entered into. In those circumstances, it might not be a fair outcome for landlords if tenants can take on a property at a lower rent which reflects its current condition, but then demand significant improvements.

- the scope for the tenant to have an express right of set-off reserved for the tenant if the tenant elects to undertake repairs itself could be explored. The LIV suggests that this right should only arise if the repairs are in fact the responsibility of the landlord and the tenant has made reasonable attempts to contact the landlord and request that the repairs be undertaken. The LIV acknowledges that such provisions would need to be carefully drafted to ensure that a tenant is not able to effect 'repairs' which are not actually needed, and then assert that the landlord is responsible for the cost of those 'repairs'.

The LIV notes that the Issues Paper is the first of six issues papers to be released in late 2015 to early 2016, and that an Options Paper is to be released in mid-2016. The LIV looks forward to contributing further to the review of the Act when subsequent papers are released.

If you would like to discuss any of the above comments in further detail, please contact Karen Cheng, Rebekah Farrell or Barton Wu, LIV Property & Environmental Section, at kcheng@liv.asn.au, rfarrell@liv.asn.au or bwu@liv.asn.au.

Yours sincerely



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