

TRIM ref: CD/19/978919

Wednesday, 18 December 2019

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Dear [REDACTED],

RESPONSE TO PROPOSED RESIDENTIAL TENANCIES REGULATIONS

We are writing to provide a formal response to the Regulatory Impact Statement (the RIS) for the Residential Tenancies Regulations 2020 (the Regulations).

We acknowledge the substantial work undertaken by the departmental officers to complete the RIS and the Regulations which give effect to the reforms legislated in 2018. The Regulations largely reflect the intentions of the reformed legislation.

We have limited our comments to a small number of critical issues outlined below.

Modifications

We are concerned about the the exclusion of “brick walls” from the “as of right” modifications (r.26) and their inclusion in the “consent must not be unreasonably withheld” modifications (r.28). This approach is impractical and undermines the intention of the reform.

For example, the renter must be able to tell what kind of walls are in the rented premises which may not be obvious and requires technical knowledge or skill that most renters are unlikely to possess. If the renter has furniture that needs to be fixed to a wall to be safe (shelves etc) they would need to seek the provider’s consent for any brick wall. In the absence of being able to identify a brick wall, the renter would be obliged to seek permission for any installation. If the landlord refuses, then the renter would have to seek an order at VCAT for the installation. During the time taken to resolve consent, the renter will not be able to unpack their goods and the furniture will be empty and more likely to tip or to cause injury. For as long as consent is unresolved the renter and their family will be at risk.

The Commissioner for Consumer Protection in WA summed up this risk succinctly;

“... a small amount of damage to a wall, which can easily be repaired, is a small price to pay for ensuring the safety of children living in a rental home.”

We do not consider that the Regulations strike the right balance in this respect and recommend that the reference to “brick walls” should be removed. There are adequate protections elsewhere to ensure any modifications are rectified.

Pre-contractual disclosure

The Regulations

We strongly support the principle of informed contracting through explicit pre-contractual disclosures by rental providers. We are generally supportive of the matters that are included in the Regulations for disclosure with the following recommendations:

- a) that any reference to the “rental provider” should be worded as “the rental provider or their agent” to avoid the agent purposefully withholding information from the rental provider; and,
- b) including any recommendations from previous gas and electrical safety checks in the list r.16 (2)(c)

Timing of disclosures.

The timing of any disclosure is critical for the renter’s decision making. We are concerned that this reform may be subverted by the common industry practice of providing voluminous information to the prospective renter at the time that they are asked to sign the rental agreement or pay the bond and rent in advance (or after they have already paid the bond or rent in advance). In these circumstances, the intention of the disclosure is unlikely to be achieved. We understand that the timing of the disclosure cannot be addressed in the Regulations and would need to be clarified through an amendment to the principal Act.

We recommend that an amendment is made to the principal Act as soon as possible to specify a reasonable timeframe for disclosure prior to entering into a rental agreement.

Prescribed prohibited terms

We note that several of the issues identified in our previous paper about prescribed prohibited terms in rental agreements have been adopted.

One significant omission is the common term in many tenancy agreements that purports or requires a tenant to pay “lease breaking fees”. There is no lawful basis for such fees and these terms are therefore inherently misleading or unfair. The rental provider may be entitled to compensation for early termination of a fixed-term rental agreement, but this entitlement is qualified by the provider’s conduct or that of their agent (for example, mitigation of any losses). VCAT has also consistently found that any such claims must have a reasonable basis and cannot simply be a standard fee or charge. This problem causes significant delay and dispute in many tenancies and should be properly regulated.

We recommend that terms which purport to make the renter liable for any fixed fees for early termination of a rental agreement are prohibited. This would not alter the rental provider’s entitlement to claim compensation but would avoid misrepresentation of the factors to be considered for any such claim.

Compensation for Sales Inspections

Basis for the compensation

We note that there are divergent views about the appropriate level of compensation to be paid to renters for a sales inspection. The proposed compensation of ½ days' rent per inspection assumes that a typical open house does not require additional inconvenience to the renter in the form of cleaning or adjusting furniture. If the ½ days' rent is retained in the Regulations, we consider it crucial that this assumption is clearly communicated to industry stakeholders with the understanding that a renter may be entitled to additional compensation if there is additional inconvenience for an inspection.

Timing of the compensation

We consider that the timing of any compensation payment is important to its effectiveness for the affected renter. We understand that the timing of payments cannot be addressed in the Regulations and would need to be clarified through an amendment to the principal Act.

We recommend that an amendment is made to the principal Act as soon as possible to clarify the timing of any payment of compensation.

We would welcome the opportunity to review and discuss the stakeholder feedback to the RIS prior to the development of any final recommendations for the Regulations.

Please do not hesitate to contact my Strategic Adviser, [REDACTED], if you wish to discuss or clarify any of the above.

Yours faithfully,

[REDACTED]

p.p.

Dr Heather Holst

Commissioner for Residential Tenancies