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Residential Tenancies Act Review

Options Discussion Paper

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About this options paper

On 24 June 2015, as part of its *Plan for Fairer, Safer Housing*, the Victorian Government launched a comprehensive evidence-based review of the *Residential Tenancies Act 1997* (RTA).

Between late 2015 and 2016, a series of issues papers were released that sought to draw out evidence and commentary from stakeholders about the nature of issues and extent of any problems in residential tenancies.

This paper responds to issues that were of the most importance to individuals and organisations that made submissions to the review. The purpose of this paper is to outline for discussion potential legislative changes that could be made to the RTA, and to gather stakeholder views on those changes.

How to get involved?

We invite your views and comments on the potential options outlined in this paper, as well as your responses to the series of questions posed throughout the paper.

Until **Friday 10 February 2017** you can make a submission:

By mail:

Residential Tenancies Act Review
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

By email:

yoursay@fairersaferhousing.vic.gov.au

Online, by registering at:

Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>

Publication of submissions

Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process.

Submissions may be subject to Freedom of Information and other laws.

CAV reserves the right not to publish information that could be seen to be defamatory or discriminatory.

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Glossary

ABS	Australian Bureau of Statistics
CALD	Culturally and Linguistically Diverse
CAV	Consumer Affairs Victoria
CPLR	Consumer Property Law Review
DELWP	Department of Environment, Land, Water and Planning
DHHS	Department of Health and Human Services
EOA	*Equal Opportunity Act 2010*
DSCV	Dispute Settlement Centre of Victoria
FLR	Frontline Resolution
FVPA	*Family Violence Protection Act 2008*
MFB	Metropolitan Fire Brigade
NCC	National Construction Code
NDIS	National Disability Insurance Scheme
OC	Owners Corporation
PHWA	*Public Health and Wellbeing Act 2008*
PHWR	Public Health and Wellbeing Regulations 2009
Red Book	CAV guide *Renting a home: A guide for tenants*
REIV	Real Estate Institute of Victoria
RIS	Regulatory Impact Statement
RSA	Rent Special Account
RTA	*Residential Tenancies Act 1997*
RTBA	Residential Tenancies Bond Authority
TAAP	Tenant Advice and Advocacy Program
TUV	Tenants Union of Victoria
VCAT	Victorian Civil and Administrative Tribunal
VCAT Act	*Victorian Civil and Administrative Tribunal Act 1998*
VLRC	Victorian Law Reform Commission
VUCHS	Victorian Utilities Consumption Household Survey

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Executive Summary

In November 2014, the Victorian Government announced a comprehensive evidence-based review of the RTA. The priorities for the review included strengthened security of tenure for tenants and provision for long term leasing, greater certainty about the frequency of rent increases, and greater protections for parks residents.

Since its launch on 24 June 2015, two stages of the review have been completed: Stage 1 involved the release of a public consultation paper, *Laying the Groundwork*, while Stage 2 involved consultation on a series of six papers examining a broad spectrum of issues raised by people's experience of the RTA.

Stage 3 of the review has focused on developing suggested reform options, informed not only by the results of the preceding stages of public consultation, but also by a major independent market study conducted by EY Sweeney on behalf of Consumer Affairs Victoria (CAV), which gathered primary data from tenants, parks residents and landlords about their views, preferences and behaviours in the rental sector.[1] The options were further shaped and refined through targeted consultation with key public stakeholders, including the Tenants Union of Victoria (TUV) and the Real Estate Institute of Victoria (REIV).

More broadly, the options have been designed to support the overarching policy aims of the Victorian Government's various housing related work streams, and to further any recommendations emerging from relevant processes, such as the Royal Commission into Family Violence, the government's 2015 Energy Efficiency and Productivity Statement, and the review of the current electricity licence exemptions framework.

Finally, it is noted that the options primarily target general residential tenancies and rooming houses, and apply equally to both the social housing and private rental sectors. Options responding to issues affecting people operating or living in caravan and residential parks have been deferred until the release of the final report of the Parliamentary Inquiry into the Retirement Housing Sector (the Inquiry), which is due to conclude in March 2017. It is critical that this category of options is informed by any key findings or recommendations of the Inquiry, to ensure a comprehensive response to regulatory challenges in that sector.

Guide to the options

The options presented in this paper do not in any way represent an approved government position on what the changes to the RTA should be. These options are for discussion and require the input of the Victorian public before a final reforms package can be compiled.

In some instances, although only one option may be proposed for discussion, this should not be interpreted as the preferred option, but as an indication of the limited range of options available in that particular case. Furthermore, all of the options discussed involve some form of departure from existing regulation. However, retaining the status quo may also be an option, even if this has not been included.

For some issues, a set of 'alternative options' are presented for reform while for other issues a 'stand-alone option' is presented for consideration and feedback. Stand-alone options are presented for issues where only one approach is considered to be feasible. While feedback is sought on each of

1 Consumer Affairs Victoria, *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria,* Final Report, 17 May 2016, accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

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the options in the alternative sets of options and also on the stand-alone options, views are also sought on the potential cumulative effect of adopting certain options. If the status quo is preferred on any issue, views are sought on the rationale for that position.

The options do not necessarily address every issue raised by stakeholders, but focus on matters that, on balance, are supported by some form of evidence, whether this involves anecdotal reporting by stakeholders, data from statistically significant population studies conducted by the Australian Bureau of Statistics (ABS), or CAV's independent market research.

In some instances, the options draw on approaches employed elsewhere in Australia or overseas. It is not the intention of the paper to provide a statement on the effectiveness of those approaches, but merely to highlight how other jurisdictions have responded to similar issues arising in their residential tenancy sectors.

In terms of thematic approach, the options are framed around the reality that a growing proportion of Victorians are priced out of home ownership, are likely to rent for longer periods of time and that there is, consequently, a need to rebalance the market through additional protections for tenants.

Structure of the paper

This options paper is organised into three parts:

Part A (chapters 1 to 2) provides an overview of the process that has occurred to date, and how the remainder of the review will be conducted. This part describes the approach that has been taken to the review and to regulatory reform in the rental sector more generally.

Part B (chapters 3 to 9) contains options relevant to starting and maintaining a tenancy. This addresses long term leasing, in addition to the range of rights and responsibilities of both parties on entering, and during the life of a tenancy.

Part C (chapters 10 to 12) contains options relevant to dispute resolution, and to ending a tenancy. This includes options for improved dispute resolution services and mechanisms in the residential tenancies sector. In addition, this part outlines options for reforms of termination of a tenancy by both tenant and landlord. Three models for security of tenure in the context of the terminations provisions are put forward for consideration. This part also includes options relating to family violence.

A conscious effort has been made to avoid duplicating the discussion of issues and options that overlap or have some interdependency. In this instance, a cross-reference to the related part of the paper has been provided.

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Focus on security of tenure

Security of tenure was identified as an important aspect of the review, given that more Victorians are renting their homes for longer. Security of tenure refers to the degree of certainty a person has about their residential circumstances. Someone with a high degree of security of tenure in rental accommodation is likely to:

- have a choice to stay or leave
- have legal protections regarding their tenancy
- pay a sustainable rent, and
- have certainty that the property will be maintained appropriately.

The degree of security of tenure that a person enjoys is cumulatively influenced by various aspects of a tenancy – the property, its management and the legislative framework that defines the rights and responsibilities of the parties to the agreement.

According to this definition, for example, security of tenure is influenced by lease terms, rules regarding when and how the agreement can be terminated by either party, when and how rents may be increased, and the standard to which the property must be maintained. In addition, the avenues through which legal protections can be invoked and enforced are also relevant to security of tenure.

Therefore, rather than confining discussion to a single chapter, security of tenure is an underlying consideration throughout this options paper. That said, three models are presented in Part C considering how the terminations provisions interact with security of tenure.

Importantly, creating the conditions for a viable or robust rental sector is critical to promoting security of tenure. It is important that both parties feel confident to participate in the sector and contribute to a non-adversarial culture. An environment (the legislative framework and sector practices) that supports positive relationships between tenants and landlords, is one that will support strong security of tenure through enduring tenancies. This is also an underlying consideration that has been applied throughout this options paper.

Next steps

The options have been included for the purpose of public consultation. In particular, the review is seeking insights from stakeholders into the viability, or otherwise, of each of the options, which can be supported by evidence and/or analysis. Consultation questions have been included at the end of each section as a guide, although any additional relevant information is welcomed.

When providing feedback on the review, it is important to note that each option cannot be considered in isolation, but will be viewed as part of a broader package of reforms that balances the rights and responsibilities of tenants and landlords, while ensuring a supply of rental housing that is sustainable, well-maintained and capable of catering for the needs of a variety of people from all walks of life for lengthy periods at a time.

Following consultation on the options, the Victorian Government will consider a comprehensive reform package and make decisions which will form the basis of the development of new legislation and regulations. Legislation is expected to be introduced into the Victorian Parliament in 2018.

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Part A: Overview

1 Approach to the review

Since the RTA was introduced, the rental market has changed significantly. More Victorians are renting for longer, the renting population has become more diverse, and the numbers of property managers and landlords have increased.

The Victorian Government is reviewing the RTA to ensure a modern and dynamic rental market, in which tenants are safe and secure, and which will meet the current and future needs and expectations of tenants and landlords.

The RTA regulates four types of residential tenancy arrangements: general tenancy agreements, residency rights for rooming house residents, residency rights for caravan park residents, and site agreements for park residents who own movable dwellings. The RTA covers both private rental and social housing tenancies (including public and community housing), but does not apply to holiday accommodation such as hotels, motels, and bed and breakfasts.

The terms of reference provided at the time the review was announced are as follows – Review of the *Residential Tenancies Act 1997* – Terms of Reference

The review will be broad based and will:

1. assess whether the Act is operating efficiently, in particular, meeting its objectives and balancing the needs and responsibilities of tenants and landlords with respect to starting, maintaining and ending tenancies
2. examine the objectives of the regulation of residential rental accommodation and consider whether those objectives remain relevant and will continue to be so into the future, and if not, propose alternative aims and objectives
3. consider the appropriate level of regulatory flexibility needed to accommodate the range of contemporary residential rental transactions and relationships, and future developments and trends
4. consider the potential impact that issues surrounding the supply and affordability of private tenancies have on the operation of the mechanisms and procedures under the Act
5. assess whether the Act is effective in empowering tenants and landlords to manage tenancies and resolve issues without the need for external intervention, or, where a dispute cannot be resolved by agreement between the parties, in providing access to affordable and effective dispute resolution processes

6. consider and advise on specific issues taking into consideration the interests of both tenants and landlords, and the contemporary legal, economic and social environment, including but not limited to the –
    - length and security of tenure
    - inspections, rights to entry, privacy, repairs, rent assessments, smoke alarm maintenance and other matters arising during a tenancy
    - bonds, termination arrangements, goods left behind and other matters arising at the end of a tenancy
    - standards of property management
    - protections for vulnerable tenants including older tenants and residents of caravan and residential parks.
7. explore opportunities to clarify, simplify and streamline regulatory requirements and processes, and to modernise and enhance the Act for digital arrangements and transactions
8. research and consider approaches and developments in other Australian states and territories and overseas
9. identify options and make recommendations for reform.

The review will be evidence-based using quantitative and qualitative data and information to examine issues and support reform proposals.

1.1 The review process

1.1.1 Consultation on issues

The review has been conducted in a staged approach, beginning with the release of a consultation paper, *Laying the Groundwork*, outlining the characteristics in the Victorian rental sector, and seeking public comment on the effects of different trends in that sector.

The next stage consisted of a series of six issues papers released for public consultation from late 2015 to mid-2016. These issues papers focused on understanding the nature and extent of any issues identified relating to the following themes:

- security of tenure
- bonds, rent and other charges
- rights and responsibilities of landlords and tenants
- dispute resolution
- property conditions and standards, and
- alternate forms of tenure.

Participants responded through different channels including social media posts, online forums, written submissions, and posting stories online. The issues papers had a total of 1,980 contributors and 232 written submissions.

Summaries of stakeholder views on each issues paper can be found at the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

1.1.2 Independent market research

As a supplement to public consultation, CAV commissioned separate market research through EY Sweeney.[2] The purpose of this was to gather information that could provide an indication of the extent to which issues identified by stakeholders occurred across the entire Victorian rental market. To this end, primary data from tenants, landlords, and residents of moveable dwellings and caravan parks was collected and analysed in relation to their experiences in the rental market, the impact of those experiences, and their rental expectations and preferences.

The market research was a comprehensive quantitative study consisting of an online survey with tenants, telephone interviews with tenants, landlords, and property managers, and a hard copy survey with parks residents. The design of the quantitative research was informed by qualitative focus groups with tenants and landlords and in-depth interviewed with parks residents. The themes explored in the research were aligned with those covered in the issues papers.

1.1.3 Developing the options

This options paper forms the third stage of the review process. It asks stakeholders to respond to a range of possible ways to address the issues that were raised during public consultation in Stages 1 and 2. Many of the options in this paper reflect reform options that were put forward by stakeholders. The purpose of this round of public consultation is to obtain input and insights that will inform the development of reform proposals for introduction into the Victorian Parliament in 2018 (Stage 4 of the review).

To support the preparation of the options paper, a stakeholder reference group was established as a forum where key stakeholders representing different sectors of the rental market could meet with Victorian Government departments leading the review of the RTA to discuss options for reform.

The role of the reference group was to provide advice and feedback on framing the options and possible approaches from which the government will select its reform package.

Neither the reference group nor its members were asked to make a decision on, or to make recommendations with respect to options.

The reference group comprised members from the following organisations:

- Brotherhood of St Laurence
- Community Housing Federation Victoria
- CAV (Chair)
- Council to Homeless Persons
- Department of Health and Human Services (DHHS)
- Housing for the Aged Action Group
- REIV
- Registered Accommodation Association of Victoria

2 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

- TUV
- Victorian Caravan Parks Association, and
- Victorian Multicultural Commission.

To complement the stakeholder reference group, CAV undertook additional consultation with groups representing culturally and linguistically diverse (CALD) tenants, Aboriginal tenants, victims of family violence, and vulnerable and disadvantaged tenants. For example, CAV met with Victoria Legal Aid, and the DHHS Support Services Working Group[3] to discuss options responding to family violence in residential tenancies.

1.2 Related inquiries and cross-cutting initiatives

1.2.1 Access to Justice Review

On 22 October 2015, the Attorney-General, the Hon Martin Pakula MP, asked the Department of Justice and Regulation to undertake the Access to Justice Review.

The Access to Justice Review's report was released on 4 October 2016, outlining 60 recommendations. These recommendations are now being considered by the Victorian Government and have informed the development of options for dispute resolution in Part C of this paper.

The aim of the Access to Justice Review was to identify ways to improve access to justice for Victorians with an everyday legal problem and ensure that the most disadvantaged and vulnerable in our community receive the support they need when engaging with the law and the justice system.

While the operation of the Victorian Civil and Administrative Tribunal (VCAT) and its processes was within the scope of the Access to Justice Review, pathways to VCAT to resolve residential tenancies issues and disputes are being considered as part of the RTA review.[4]

Submissions to the RTA review that raised issues around access to justice and the way in which VCAT operates were provided to the Access to Justice Review team for its consideration.

1.2.2 Alternate forms of tenure and Parliamentary Inquiry into the Retirement Housing Sector

The sixth issues paper, *Alternate forms of tenure: parks, rooming houses and other shared living rental arrangements*, canvassed issues arising under the forms of tenure regulated under the RTA other than general tenancies: residency rights for rooming house residents and caravan park residents, and site agreements for park residents who own movable dwellings (typically but not always in residential parks). The paper also considered issues relating to independent living units and rental villages (other forms of shared living rental arrangements currently regulated under the general tenancies provisions).

In March 2016, the Victorian Parliament's Legal and Social Issues Committee commenced a comprehensive inquiry into the operation and regulation of the retirement housing sector (the Inquiry). Retirement villages (regulated under the *Retirement Villages Act 1986*), caravan parks,

3 This group was established by DHHS to support its implementation of recommendations made by the Royal Commission into Family Violence.

4 Specifically, improvements to VCAT that would require legislative amendment to the *Victorian Civil and Administrative Tribunal Act 1998* are being considered as part of the Access to Justice Review, while issues around residential tenancies disputes and VCAT that are within the remit of the RTA are being considered as part of the RTA review.

residential parks and independent living units (regulated under the RTA) are all included in the scope of the Inquiry.

The Inquiry's terms of reference include examining the existing legislation to determine any necessary reforms, and ensuring there are proper consumer protections in place, adequate dispute resolution procedures, fair pricing and consistent, simplified management standards and regulations across the sector. Comparable reviews and recommendations for reform in other Australian and overseas jurisdictions are also being considered, and the Inquiry is undertaking extensive consultation with residents of retirement housing, their families, and retirement housing owners and managers.

The Inquiry is due to report on its findings and recommendations for reform by 1 March 2017, and the government's response to any recommendations by the Inquiry will be due six months after the report is tabled in the Victorian Parliament.

In order to ensure a comprehensive response to issues arising within alternate forms of tenure, the government must consider the views expressed not only via the RTA review, but also through the Inquiry, as well as the findings and recommendations in the Inquiry's final report before framing options for legislative reform. For this reason, this paper does not include options relating specifically to the regulation of caravan parks, residential parks, independent living units and rental villages. Instead, options for reform affecting these tenure types will be deferred until after the release of the Inquiry's final report. This paper does, however, include options for reform in relation to rooming houses (see Part B).

Where relevant, other parts of this paper examine whether issues arising in general tenancies are also replicated in other tenure types and whether any options suggested in response can be adapted across the entire spectrum of agreements and living arrangements. For example, many of the issues relating to the payment of rent, repairs and maintenance, and terminations are universal in nature and will have applicability across tenure types.

1.2.3 Royal Commission into Family Violence

The Royal Commission into Family Violence delivered its report to Government in March 2016, of which all 227 recommendations have been accepted by the Victorian Government.

Recommendation 116 of the Royal Commission's final report provides clear parameters for reviewing existing responses to family violence in the RTA, and forms part of a broader range of recommendations aimed at ensuring a holistic response across relevant areas of the Department of Justice and Regulation, including funded services, education and online services, as well as courts and tribunals. Options implementing this recommendation are included in Part C of this paper.

1.2.4 Energy efficiency

The Victorian Government has been working on improving rental housing sustainability in consultation with a range of stakeholders including the energy efficiency sector, households and businesses, the building and property sector, and environmental and welfare organisations. Part of this work includes considering measures to improve the energy and water efficiency of rental properties.

Outcomes of this work on energy efficiency – currently being led by the Department of Environment, Land, Water and Planning (DELWP) – may impact on the legislative framework for residential tenancies relating to property conditions, which is discussed in Part B of this paper.

1.2.5 Victorian Government housing strategy

The Victorian Government is developing a whole-of-government housing strategy that will set a clear vision to support the provision of affordable housing through initiatives across the Treasury, Health and Human Services, Planning and Consumer Affairs portfolios.

The strategy will guide future policy-making relating to housing matters.

1.2.6 Consumer Property Law Review

The Consumer Property Law Review (CPLR) aims to modernise and improve four key pieces of consumer property legislation, including the *Estate Agents Act 1980* and the *Owners Corporations Act 2006*, taking into consideration the experiences of stakeholders and developments that have taken place since each Act came into operation.

Issues raised during the review of the RTA about the impact on landlords or tenants of agent conduct or of rules applying to owners corporations (OC) have generally been referred to the CPLR, which is currently seeking comment on suggested reform options on related topics, including the roles and responsibilities of estate agents, conduct in property management and continuing professional development. Legislative amendments are due to be considered by Parliament in 2018.

2 Snapshot of current market issues

Extensive stakeholder consultation, to date, has yielded a vast amount of information on the operation of the current regulatory framework.

While both landlords and tenants are impacted by a range of issues, these issues reflect a stark dichotomy of interests.

For landlords, the outcomes of consultation generally indicate overall satisfaction with the framework, with suggestions for improvement concentrated in key systemic areas, such as the effectiveness of dispute resolution processes.

For most tenants, the private rental market also generally works well. They are able to rent a property in a location that suits them, for a price and duration that meet their expectations.

However, for some vulnerable tenants, certain issues can affect them in a disproportionately greater way because the options available to them in the private rental market are more limited. This plays out particularly in the context of property conditions or rental affordability, where these tenants may not be able to access good properties, or maintain tenancies that meet their needs due to income constraints, language barriers, or discrimination they experience based on disability, gender or sexuality, cultural or linguistic background or family status. Individual small-scale landlords, who are the principal providers of rental accommodation in the private market, can often have a limited capacity to agree to requests to which an institutional landlord with greater resources would have more easily been able to accommodate.

A snapshot of the issues identified by stakeholder submissions and public engagement across the six thematic areas of the review is provided below. Further information regarding the extent of the issues and the ways in which various cohorts are affected by those issues can be found in CAV's market research report and other complementary data sources.[5]

2.1 Themes

2.1.1 Security of tenure

Extensive stakeholder input was provided in relation to security of tenure. In particular, although some tenants would like more certainty and stability in their rental arrangements, the private rental market does not cater well for tenants who want long term tenancies.

Concerns were expressed regarding the scope landlords have to end a tenancy, and the impact this can have on the level of certainty tenants have to stay in their rented property and to exercise their rights under the RTA.

Further common observations made about security of tenure included that:

- 'no fault' terminations provisions in the RTA provide scope for landlords to unfairly evict tenants

5 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting> as well as, for example, customised ABS data available at the same website; and Tenants Union of Victoria, *Online survey of Victorian Private Market Renters: 2015* accessed via the Tenants Union of Victoria website <tuv.org.au>.

- tenants who have breached a residential tenancy agreement and triggered one of the grounds for termination may be evicted inappropriately because VCAT has limited scope to take into account the reasonableness of the termination
- landlords considered that the removal of the notice to vacate for 'no specified reason' would unduly limit their scope to manage their property, and would increase the risks of letting property as the RTA (and VCAT processes) do not adequately enable them to evict a problematic tenant
- greater scope for tenants to make modifications to a property and have pets would make tenants feel more at home. Landlords, however, have concerns about the decline in the quality of the property associated with the freedom to make modifications and keep pets, and
- uncertainty about the frequency and amount of rent increases detracted from security of tenure for some tenants.

2.1.2 Rent, bonds and other charges

Landlords consistently noted that bonds often do not cover the costs of repairs and rent arrears when a tenancy goes wrong. However, in terms of the frequency of rent increases, landlords consistently indicated support for yearly, instead of six monthly, increases.

For their part, tenants identified high upfront and ongoing costs as the greatest obstacle to sustaining a tenancy. Tenant representatives further criticised current industry self-regulation of rental bidding, citing issues with compliance, transparency and disproportionate impacts on low-income tenants.

Stakeholders on both sides raised issues with the speed and consistency of bond repayments and processes for resolving bond disputes.

2.1.3 Rights and responsibilities

Tenants consistently expressed concerns that the lack of a standard tenancy application form makes the application process prone to inconsistency, and facilitates undesirable practices such as discrimination or screening of tenants on the basis of irrelevant characteristics.

Further dissatisfaction was cited with the level of pre-contractual disclosure by landlords about factors that had the potential to impact greatly on their decision to enter into a tenancy, or their long-term prospects for remaining in a property. These factors included any intention to sell, build or move into the property in the near future, details about utility connections, proof of the landlord's legal right to rent the property, and the landlord's contact details.

Pets in rented premises were frequently a source of concern, with tenants taking the view that landlords often unreasonably withheld consent to a request to keep a pet. Landlords, on the other hand, expressed concern about their ability to validly enforce a 'no pets' rule through the tenancy agreement.

Scope for tenants to make modifications to a rented property was also frequently raised. In particular, the difficulties for people with a disability who require modifications for access and amenity were identified.

The current processes for goods left behind at the end of a tenancy were also characterised as cumbersome and outdated, with many landlords arguing that they were unfairly required to store goods that ought to have been removed by the tenant. In contrast, tenants argued insufficient protections against disposal of goods that may have been left behind due to hardship.

2.1.4 Dispute resolution

Issues relating to dispute resolution were highly systemic in nature, and stemmed from the existing services and mechanisms available to the parties for responding to problems when they arose.

VCAT is often the first port of call for parties to resolve a dispute, as it is the only mechanism that provides binding decisions and orders. However, engaging in a tribunal process in the first instance can be disproportionately adversarial, and not well suited to the tenant-landlord relationship. Further, it was argued that there is an imbalance of power between tenants and landlords in dispute resolution settings as landlords can have a greater understanding of the system and are often represented by property managers.

Reported inconsistencies and a lack of transparency in VCAT decision making were also leading to a lack of confidence in VCAT for all parties, particularly for the purposes of adapting their behaviour to prevent future disagreements.

Finally, the avenues for enforcement of VCAT orders were generally viewed as inadequate, with the parties rarely seeking to have their orders enforced by the Supreme Court or Magistrates Court, as is currently required.

2.1.5 Property conditions

Regulation of property conditions was a source of dissatisfaction for both sides of the market.

Overwhelmingly, stakeholders identified a need for clear guidance as to the meaning of key terms in the RTA (i.e. cleanliness, good repair, maintenance duties, fair wear and tear, and damage), as a means of reducing disputes.

There was bilateral support for clearer maintenance responsibilities, particularly with regard to safety devices (smoke alarms), and servicing of fixed electrical and gas appliances.

Tenants advocated strongly in favour of minimum standards as a way of helping landlords provide better living conditions for tenants and reduce disputes about repairs, while landlords favoured clarifying the condition in which vacant premises needed to be left at the end of a tenancy to assist tenants in understanding how well they needed to clean the property before leaving.

Improvements in condition reporting were strongly suggested to ensure the collection of adequate and accurate information about the condition of the premises at the start of a tenancy, and then at key intervals (i.e. change in tenant, incidents on the premises). Further, the evidentiary status of the report as a notification to the landlord of the need for property repairs needed to be emphasised, and greater support for tenants was needed to ensure that they not only completed reports but confirmed the accuracy of their content.

Support for reasonable modifications to rental properties was a key theme of stakeholder feedback, in light of the diversity of tenant needs now and into the future. Modifications supporting better health, safety and accessibility outcomes were seen as particularly important, and as taking precedence over the landlord's preferences not to change the features of their property.

Stakeholders also emphasised that processes for resolving a dispute relating to repairs needed to be faster, offer greater incentives to landlords to perform repairs, and protect tenants against retaliatory eviction notices or excessive rent increases.

2.1.6 Alternate forms of tenure

The definition of a rooming house was raised as an issue of concern, with stakeholders on both sides arguing the definition should either be extended to include a broader range of emerging accommodation models, or be amended to more clearly exclude some similar accommodation models. Tenants argued that the definition should relate to the business purpose or accommodation function, not to the number of residents.

There was strong support amongst stakeholders that tenancy agreements can be problematic in rooming houses, as they are not flexible enough to consider the changing needs of the resident and may also limit the operator in terms of their ability to evict a disruptive resident. Landlords, although supportive of using the RTA to create fixed term residency agreements more suited to a rooming house environment, did not support limiting the type of agreement that could be entered into.

Concerns were raised about the ability of rooming house operators to ensure the safety and quiet enjoyment of other residents when dealing with a violent or disruptive resident or their visitor. Landlords argued that the means for operators of removing such people are limited under the RTA, while tenants argued that it was unrealistic for residents to be held responsible for a guest's behaviour when the guest is merely 'near' the rooming house.

In terms of stakeholder feedback that will inform options responding to caravan and residential park issues, there were views about when caravan park occupants should be considered 'residents' for the purposes of the RTA: landlords argued a written agreement should be required for the RTA to apply, while tenants argued the RTA should be presumed to apply to any person living in the park unless a written agreement states otherwise.

There was general support amongst stakeholders for standalone legislation for 'Part 4A parks' (often known as residential parks), in line with other Australian jurisdictions, though consideration would need to be given to how 'hybrid' parks that contain both caravan sites and Part 4A sites would be regulated.

For both caravan parks and residential parks, there was bilateral support for using the RTA to address circumstances where the park closes, and the extent to which the park owner may be required to compensate residents for relocation costs.

As noted in chapter 1.2.2, options for reform affecting caravan parks and residential parks will be deferred until after the release of the Inquiry's final report.

2.2 Current and future needs of the Victorian residential tenancies sector

The RTA must cater for a market with the specific characteristics of Victorian landlords and tenants at any given time. In particular, it is critical that the reformed RTA reflects the current rental market while being adaptable to future changes, including ensuring the balance of rights and responsibilities caters for:

- tenants with diverse characteristics and needs
- small and large scale investors who choose to enter and remain in the market
- significant life events (for example, family violence and sudden changes in health), and
- fluctuations in broader government policy impacting on supply and demand for residential housing.

Some of the overall indicators of the attitudes towards the rental market and the RTA produced by CAV's market research were as follows:[6]

- 73 per cent of tenants reported being satisfied with their rental experience in Victoria, however this was higher for first time renters (81 per cent), and lower for those with a Health Care Card (64 per cent) and those with a disability or health condition (58 per cent)
- 86 per cent of landlords were satisfied with their experience of the rental market
- 50 per cent of tenants believed the rental laws were adequately balanced, and 6 per cent believed they favoured tenants, and
- 39 per cent of landlords believed that the laws were adequately balanced, and 58 per cent believed they favoured tenants.

2.2.1 Landlord and housing provider characteristics

The residential tenancies sector in Victoria is for the most part a commercial environment in which private individuals supply residential accommodation for rent to other private individual tenants and households.

In Victoria, 83 per cent of residential rental properties are supplied by private individual landlords, most of which lease out a single property. Public and community housing providers fit into the category of institutional landlords, and together make up approximately 17 per cent.

In 2011-12, within the private rental sector, 73 per cent of landlords owned one property, 19 per cent owned two properties, and 8 per cent owned 3 or more properties.[7] In Australia the number of private institutional landlords is negligible. The most commonly cited reason for the near absence of private institutional providers is a lack of adequate returns. The dominance of private individual landlords over institutional landlords in this market may also be due to arrangements that incentivise individuals to let residential property.

The remaining 17 per cent of housing providers in Victoria consist of the Director of Housing – the landlord for Victorian public housing tenants – and community housing organisations, which together make up the social housing sector. Accurate data on private (for-profit) institutional landlords is not available, but their presence in the market is considered negligible.

2.2.2 Tenant characteristics

Some key trends for tenants in the Victorian rental market include:

- between 1996 and 2011, the number of households renting in the private rental sector increased by 50 per cent to over 435,000 households. The proportion of private rental households has also increased over time, from almost 75 per cent of the overall rental sector in 1996, to almost 83 per cent in 2011

6 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

7 ABS, Customised Survey of Income and Housing report, 2015.

- tenants are becoming less mobile. In 1996, most households renting privately (over 80 per cent) had changed their address during the previous year. By 2011, there had been a strong shift in the opposite direction and the majority of households renting privately (around 60 per cent) had remained at the same address for at least one year[8]
- around 128,000 (or 7 per cent) of Victorians living in privately rented households with a reported disability. This number includes people with a severe disability
- home ownership rates are in decline and the 35-54 year age group shows the greatest decline in home ownership (77 per cent to 68 per cent), with a corresponding increase in proportion of renter households (from 21 per cent to 30 per cent), since 1994-95
- the fastest growing age groups of people living in the private rental sector in 2011 were 55 years and over
- more rental households are paying a higher proportion of their income in rent. In 1996, around 35 per cent of all households renting privately paid more than 30 per cent of their income in rent. By 2011, this had increased to about 38 per cent, and
- more low-income households are paying more than 50 per cent of their income on rent (severe rental stress). Between 1996 and 2011, the proportion of low-income households experiencing severe rental stress increased from 29 per cent to just under 39 per cent.

2.2.3 Managing regulatory risk

Legislation that regulates a private commercial market must take into account the composition and characteristics of the suppliers in that market. In particular, proposed regulatory solutions need to take into account the ways in which market participants are likely to use and interact with that regulation, and the possible unintended consequences that could result.

This is relevant if reforms aim to bring about public benefits and greater social equity by introducing further regulation (that is, additional rights and protections for tenants). There are a range of factors that need to be balanced, as any corresponding increases in cost and risk for suppliers without increases in return will influence their decisions with regards to letting property, and these could impact adversely on the most vulnerable tenants.

It is important to acknowledge that some of the risks of regulating the market could affect its function and the provision of affordable, secure, rental housing:

- **Supply impacts and displacement of low-income tenants** – Regulation that increases the risks or costs associated with an activity without increasing returns, is likely to feature as a deciding factor in investment decisions and activities.

  One of the risks to supply comes from property owners selling properties in the low cost end of the market (where arguably costs and risks of letting are highest). While this may create home ownership opportunities for people renting in the mid-cost range of the market, and put downward pressures on rents in that sector, it could result in a loss of low cost rental accommodation for low income tenants who have fewer accommodation choices available them.

8 CAV's market research found that the length of time that the current tenants have lived in the property varied widely, with nearly equal proportions of new tenants (less than six months tenure; 19 per cent), medium-term tenants (3-5 years tenure; 19 per cent), and longer-term tenants (more than five years; 18 per cent): op cit, page 33.

- **Withdrawal of properties from the residential tenancies sector –** Some property owners may choose to repurpose their rental properties. For example, properties may be offered on the short stay market, rented as commercial premises or left vacant. When a property is repurposed in one of these ways there is a loss of rental accommodation available to the existing pool of tenants. Already there are shortages at the low cost sector of the market, and there is strong reliance on individual investors for rental housing. This has implications for affordability and access to rental accommodation, and could contribute to imbalances in bargaining power that favour landlords in some sectors of the market.
- **Risk management behaviour and access to rental accommodation –** If regulation reduces a landlord's ability to manage their property effectively, they may exercise greater caution in selecting tenants, and avoid letting to tenants they perceive to be 'risky' and who lack positive rental histories. This has implications for access to the rental accommodation for some tenants, particularly those who are vulnerable or disadvantaged, have financial constraints, or have not established a rental history (including young homeless people and women escaping family violence).
- **A risk premium on rents –** If landlords perceive there to be increased risks associated with letting property, or if they are required to outlay funds on property upgrades, for example, they may attempt to compensate for this by increasing rents. This has implications for the affordability of rental accommodation.
- **Circumventing or opting out of regulation –** A proportion of landlords may structure their tenancy arrangements in ways they otherwise would not, in an attempt to manage risks and uncertainty. They may also choose to not comply with regulation. This has implications for the conditions and security of housing, and could potentially have the greatest effect on vulnerable tenants and at the low cost end of the market, where tenants may be less able or likely to exercise their rights. This could place pressure on the services and mechanisms to resolve disputes and provide enforcement, and place costs directly on the parties. It could also contribute to an adversarial environment over time.
- **Overall functionality of the market –** Regulation that fails to balance the rights and responsibilities of the parties will affect the quality of relationships in the sector, which could contribute to an adversarial culture and climate in which parties are less confident to participate, and less confident in achieving positive outcomes.

2.3 Options for enabling a healthy rental sector

The package of reforms eventually put to government for approval will focus on building a healthy rental sector with the following characteristics:

1 balanced bargaining power between the parties

2 a positive and non-adversarial culture, which includes:

- an appropriate balance of rights and responsibilities, and this matches with the perceptions parties have of the market, and
- effective dispute resolution functions that allows disputes to be resolved constructively.

The options presented in this paper should therefore be assessed in terms of the extent to which they contribute to these outcomes.

The development of the government's reform package will consider the need for a flexible rental market, and one that can cater for diverse groups of tenants, including low income tenants,

increasing numbers of older tenants, and increasing numbers of tenants with a disability, who will be entering the private rental market with the rollout of the National Disability Insurance Scheme (NDIS).[9]

The needs of the sector and the capacities and constraints of the market to address those needs will also inform the development of the reform package to ensure that the RTA:

- reflects current community expectations regarding what is a fair balance of rights and responsibilities of parties to residential tenancy agreements
- is relevant to the current and future market environment in Victoria, and
- is conducive to a well-functioning sector for the benefit of all participants (healthy rental sector principles).

2.4 Policy objectives for a modern framework

Many Victorian Acts, such as the RTA, have a 'purposes' section to detail the technical functions of the provisions of the Act. The purposes of the RTA are to:

- define the rights and duties of the parties
- establish a centralised system for the administration of bonds, and
- provide for the inexpensive and quick resolution of disputes.

In this regard, the purposes of the RTA are distinct from the underlying policy objectives, which set the overarching intended outcomes of the regulatory framework for residential tenancies.

There is consensus among stakeholders that the policy objectives of the RTA need to be reset in response to the changing characteristics of the market. However, stakeholders have differing views of what the objectives should be for the contemporary market and into the future.

Stakeholders representing tenants considered that the RTA should have stronger consumer protection objectives that recognise the importance of housing as a necessity and the social significance of a home. They argued that as consumers of rental housing, tenants are entitled to protections to ensure the quality and fitness of purpose of the premises they rent. With tenants increasingly renting for longer, principles that promote choice, security of tenure, fair practices, non-discrimination and privacy are seen as essential along with objectives aimed at preventing unnecessary evictions, hardship and homelessness. Stakeholders that represent vulnerable and disadvantaged tenants, consider that the special needs of those tenants should be recognised in the objectives for the RTA.

While affordability was also raised, it was recognised that the RTA is limited in what it can achieve and that the issue extends into broader areas of housing policy as outlined in Part B of this paper. It is important, however, that the RTA does not create conditions that exacerbate affordability problems in the rental market (as discussed in chapter 2.2.3 above).

Both stakeholders representing tenants and those representing landlords supported objectives that provide for enhanced dispute resolution mechanisms.

9 Though the NDIS will not directly fund housing for the majority of participants, it is expected to increase access to appropriate housing through a range of accommodation related supports: home modifications; personal care and support with activities of daily living; support to maintain tenancy, and information and linkage supports to identify and access affordable housing, through the Information, Linkages and Capacity Building Policy Framework.

As the RTA regulates transactions in a predominantly commercial environment where housing is provided for the most part by private landlords to private tenants, both individuals and households, any review of its objectives must consider the mix of equity and public interest, and economic efficiency purposes it serves.

In terms of equity and public interest the RTA extends rights and protections to tenants recognising that housing is an essential commodity and a diverse cross section of the community rents. In addition, secure stable housing has public interest benefits.

The economic efficiency aims of the RTA are concerned with:

- addressing information problems and transaction costs for both parties through prescribed forms and agreements and prescribed processes
- contributing to the functioning of the market by providing certainty, for example, clear remedies that assist with the management of risk in a cost-effective way, and
- delivering market enabling mechanisms that provide the right incentives and trigger or facilitate more efficient decisions.

The following objectives are proposed for consideration and draw on objectives for residential tenancy legislation in place in New South Wales (NSW) and the Northern Territory (NT), and on stakeholder feedback. They also take into account the changing needs of the Victorian rental market.

The proposed objectives for the RTA are to establish a regulatory regime for residential tenancies in Victoria that:

- provides clarity and certainty about the rights and responsibilities of tenants and landlords
- promotes transparency and fair practice in the residential rental market by landlords, property managers and tenants
- promotes equity and efficiency and reduces unnecessary costs for both landlords and tenants
- ensures that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure without frustrating a tenant's or landlord's ability to respond to changing circumstances
- facilitates landlords receiving a fair rent in return for providing safe and habitable accommodation to tenants
- encourages both landlords and tenants to take a responsible approach to their obligations to each other, to the people they share their home with and to their neighbours and the wider community, and
- ensures that landlords and tenants have access to effective mechanisms to resolve disputes early with fair outcomes and to enforce their rights under tenancy agreements and under the RTA.

Consultation questions

1. Do the proposed objectives meet the needs of the contemporary market and will they continue to do so into the future?
2. What changes could be suggested to further tailor the objectives to the needs of all parties?

2.5 Modern terminology for parties to a residential tenancy

The RTA uses terminology to describe the parties to a residential tenancy lease that is consistent with that included in residential tenancy legislation in NSW, South Australia (SA) and the NT. The terminology includes landlord and tenant for general tenancies where the landlord is defined as the person who lets or is to let premises, and the tenant as the person to whom the premises is let or is to be let.

For other types of residential tenancies, the RTA uses different terminology such as rooming house owner, caravan park owner and site owner for the owner of the premises or property, and resident and site tenant for the occupier of the premises.

Some stakeholders providing feedback to the review considered that the use of the terms landlord and tenant contribute to the sense of imbalance between the parties to a residential tenancy lease and can even be seen as being gender biased and derogatory.

Although residential tenancy legislation in Queensland, Western Australia (WA), Tasmania and the Australian Capital Territory (ACT) continue to refer to tenants, the term landlord is replaced with lessor, or owner in Tasmania.

While landlord and tenant are established terms with legal authority, alternative terminology is presented for consideration and feedback to replace references in the RTA to:

- landlord – property owner, owner or lessor, and
- tenant – property renter, renter or lessee.

Consultation questions

3. Which, if any, of the proposed terms should replace the current references in the RTA to landlord and tenant and why?
4. What other terms could be considered to replace the current references in the RTA to landlord and tenant, and why?

Heading for Home

Residential Tenancies Act Review

Options Discussion Paper

Part B: Starting and maintaining a tenancy

3 Application of the RTA and lease lengths

In its *Plan for Fairer Safer Housing* the Government identified expanded scope for long term leases of up to ten years as an important consideration in this review.

While research indicates that shorter fixed term agreements are still the most preferred by both tenants and landlords, there are some groups of tenants who would prefer the certainty of a long fixed term lease. These groups include tenants with school aged children, older tenants and tenants with disabilities [10]

There are a number of ways in which reforms could remove obstacles to parties entering into long leases, while maintaining the flexibility that is also offered by the rental sector.

3.1 Limitations to the scope of the RTA

Currently the RTA does not apply to fixed term agreements of five years or longer. The limitation of the scope of the RTA could pose an obstacle to parties seeking to enter long leases because they would not be covered by the RTA.

Stand-alone option

- **Option 3.1 – Remove the five-year limit on the scope of the RTA.**

Background

Under current arrangements parties are free to enter residential tenancy agreements of any length without limitation.

However, the RTA states that it does not apply to fixed term tenancy agreements exceeding five years. As such, where parties choose to enter a fixed term agreement that is longer than five years in duration, that agreement will not be covered by the RTA.

In those cases they would need to rely on contract and common law, and would not have access to VCAT as an avenue for resolving disputes related to their residential tenancy agreement.

Issues

Tenants within certain groups, such as families with children, older people and people with disabilities, indicated that they would be interested in the greater stability and certainty that long fixed term agreements could provide. To the extent that the existing limitation to the scope of the RTA influences their decisions, expanding the scope of the RTA would remove an obstacle to those seeking such agreements.

Further, the inclusion of long fixed term agreements could have benefits for community housing providers in that it could facilitate the sector's capacity for growth. Currently 61 per cent of community housing properties are leased from a third party (mostly from the Director of Housing) for a period of up to five years. Longer term lease agreements on properties managed on behalf of the Director of Housing would:

10 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>, p.33.

- allow the sector to undertake long-term asset planning
- provide greater financial security through longer term rental revenue streams, and
- offer certainty and confidence to private investors.

The lease length for managing properties on behalf of the Director would ultimately be a policy decision, but would no longer be tied to a legislative benchmark.

Relaxation or removal of the limitation could signal to the market, including potential institutional investors, that long-term agreements could be accommodated by the RTA. It could increase the scope for innovative housing provision schemes and initiatives (for example that are based on head leasing arrangements with institutional providers).

An amendment to the RTA of the type discussed in the options could result in long term leasing arrangements between landlords and institutional residential accommodation providers (such as managed apartment complexes) being captured by the RTA. This may limit their flexibility to create the terms of their own contracts, however it may also offer benefits through reduced complexity and transaction costs, increased certainty and access to dispute resolution arrangements.

Option 3.1 – Remove the five year limit on the scope of the RTA

Under this option, the provisions limiting the scope of the RTA would be removed.

This would mean that the RTA would apply to any fixed term residential tenancy agreements, including those of five years or more. Parties would be subject to the obligations of the RTA and would be covered by the protections of the RTA, including the dispute resolution arrangements.

Consultation questions

5. What costs or risks could arise from the changing the scope of the RTA to cover longer fixed term agreements as per option 3.1?
6. What are the potential benefits of amending the RTA to cover longer fixed term agreements as per option 3.1?
7. What are any other relevant considerations or implications of amending the scope of the RTA?

3.2 Long-term leasing in general tenancies

There are limited options or incentives available for parties to enter into long term tenancy agreements. It can be difficult for tenants to negotiate a fixed lease term longer than 12 months. In addition, the prescribed standard lease agreement does not cater well to long term arrangements, or provide incentives to the parties to enter such agreements.

Stand-alone options

- **Option 3.2 – Introduce an optional prescribed fixed-term agreement for general tenancies agreements of five years or longer.**
- **Option 3.3 – Provide for the option for tenants to extend fixed term leases for a subsequent period.**

Background

Lease terms are not currently regulated by the RTA, although the legislation includes provisions that apply to fixed term agreements.

Sector practices are such that 12 months is the standard length of a standard lease with many agreements automatically rolling over to an ongoing periodic tenancy agreement.[11]

Research indicates that landlords would consider fixed term agreements longer than 12 months with both new and existing tenants (65 per cent and 79 per cent respectively). The most common barriers to long term lease agreements cited by landlords were:

- risk of problematic tenants
- if tenant is unknown to them, and
- issues with tenant/landlord relationship.[12]

Around 50 per cent of landlords said they would consider a fixed term lease of five years under each of the following circumstances:

- if the tenant paid for certain property related expenses
- if eviction processes could ensure that a problematic tenancy could be terminated
- if the tenant were known to them, and
- if the tenant had a good rental history.[13]

Issues

Stakeholders noted that the current standard agreement under the RTA caters to leases of six to 12 months, but may not be well suited to longer term arrangements. Tenants and landlords who have a preference for a long term agreement may be more likely to seek such an arrangement if a tailored agreement were available for use.

Some stakeholders also suggested incorporating an option for the tenant to extend a lease as is the case for commercial leases under the *Retail Leases Act 2003*. Under these arrangements a tenant can sign an initial fixed term agreement which includes an option to extend the lease for a further specified period, or as long as the initial period of the lease.

It is necessary that the RTA retains the flexibility that both tenants and landlords expect. In addition, it is relevant to consider the differences between landlords in the private residential tenancies sector and landlords who offer commercial properties for lease. In particular landlords within the residential sector are likely to have less scope to enter into agreements that could potentially lock them into long-term commitments.

11 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>, p.32.

12 *Ibid*. p.36.

13 *Ibid*. p.37.

Option 3.2 – Introduce an optional prescribed fixed-term agreement for general tenancies agreements of five years or longer

This option assumes that the RTA would be amended to apply to agreements longer than five years as discussed above in option 3.1.

An optional standard agreement could be tailored specifically for longer-term leases (for example, of five years or longer).

An optional lease agreement could be made available for tenants or landlords who elect to enter into long fixed term agreements. Such an agreement would incorporate adequate incentives and assurances for the parties, and contain terms that appropriately reflect the longer term nature of the arrangement.

A tailored long term agreement would aim to make variations to the standard prescribed agreement under the RTA that would provide both parties with the appropriate protections and incentives to enter into a long-term arrangement. The intention would be to accommodate and facilitate parties' wishes to enter a long term arrangement, rather than to mandate long term leases or any terms and conditions therein.

The design and features of the long term lease would to be such that use of the agreement offered sufficient value and incentive to both parties. Protections would be put in place to ensure that both parties are informed decision-makers and genuine parties to the agreement.

Further consultation would be required to finalise the design of the optional long term agreement. However, it is envisaged that it would contain variations to the standard agreement in the following areas:

- rent increases
- allowances for pets and modifications
- notice periods for terminating the agreement, and
- lease breaking

Option 3.3 – Provide for the option for tenants to extend fixed term leases for a subsequent period

The RTA would incorporate a framework similar to that in the Retail Leases Act, which enables tenants to exercise options to renew residential tenancy agreements and requires landlords 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.

The agreement would need to be honoured by any new owner in the case of a change of ownership during the term.

Consultation questions

8. What are the potential benefits and risks of developing an optional prescribed long-term lease as under option 3.2?
9. What features should be included in a long-term agreement to provide the correct balance of incentives for tenants and landlords?
10. What features would not be appropriate for inclusion in a long-term lease agreement?
11. What are the potential benefits and risks of providing the option for tenants to extend fixed term lease agreements as under option 3.3?
12. What other relevant considerations are there for facilitating long-term leases for tenants and landlords who may be interested in this type of arrangement?

4 Rights and responsibilities before a tenancy

Submissions to the paper, *Rights and responsibilities of landlords and tenants* (the rights and responsibilities issues paper), identified a range of issues arising under the current framework during the tenancy application process, and the process of forming a tenancy agreement. These issues included:

- allegations of unlawful discrimination against applicants and tenants
- the potential misuse of information provided in a tenancy application
- fairness in relation to the use of residential tenancy databases
- appropriate disclosure of information to give tenants an opportunity to make an informed decision about whether to enter a tenancy agreement
- adequate disclosure of details so that enforceable orders can be made against a party, and
- the extent to which additional terms to a tenancy agreement are enforceable.

4.1 Unlawful discrimination against applicants and tenants

Stakeholder consultation identified concerns about unlawful discrimination occurring in tenancies, and the lack of redress under the RTA where unlawful discrimination occurs.

Stand-alone options

- **Option 4.1 – Include an information statement about unlawful discrimination in application forms.**
- **Option 4.2 – Strengthen linkages between the RTA and the *Equal Opportunity Act 2010.***

Background

Other than provisions prohibiting landlords from refusing applicants with children except in limited circumstances, the RTA does not explicitly deal with discrimination against applicants and tenants.

The *Equal Opportunity Act 2010* (EOA) prohibits discrimination on the basis of certain personal attributes (such as race, sex, age, family responsibilities, disability, employment activity, marital status) when offering to provide accommodation or in the course of providing accommodation. VCAT hears matters about unlawful discrimination in its Human Rights List.

Issues

From the landlord's perspective, the application process aims to find the most desirable candidate who demonstrates an ability to pay the rent and a likelihood that they will not damage the property. Additionally:

- for operators of rooming houses, an important consideration is whether the applicant demonstrates a willingness and ability to live in harmony with the existing community of residents, and

- for social housing, applicants need to meet the relevant eligibility requirements of the relevant social housing program, which in some cases may be targeted to particular disability/ethnic/age/gender groups – targeted programs of this nature can be exempted from prohibitions in the EOA.

Allegations of landlords and agents unlawfully discriminating against applicants and tenants were raised in several submissions to the review. Given that landlords are often selecting from a pool of applicants, it can be difficult to detect or clearly demonstrate the extent to which a landlord or agent may have been unlawfully discriminatory. Submissions called for clearer links between the RTA and the EOA prohibitions.

In 2012, the Victorian Equal Opportunity and Human Rights Commission published a report on discrimination in Victoria's private rental market t, *Locked Out: Discrimination in Victoria's Private Rental Market*. The action items arising from the Commission's report centred on educating agents, landlords and tenants about discrimination legislation.

Submissions to the review also called for a prescribed tenancy application form and prescribed form for written tenant references from previous landlords, but these suggestions have not been included as options. Basic identifying information about an applicant, such as name and source of income, is needed in order for the landlord to be able to verify an applicant's identity and to make an informed choice about the most suitable tenant. Discrimination may occur where basic identifying information provided in a form gives rise to assumptions about certain attributes of an individual (for example, their presumed ethnicity or gender), but no evidence has been provided to the review of conduct such as the routine inclusion of clearly unlawfully discriminatory questions in forms, that could be meaningfully addressed by prescribing an application form.

Option 4.1 – Include an information statement about unlawful discrimination in application forms

Under this option, every tenancy application form would be required to include a prescribed information statement that educates applicants and landlords/agents about unlawful discrimination and the positive duty under the EOA to take measures to prevent discrimination from occurring.

The information statement would include information about what an applicant or tenant can do if they believe they have been unlawfully discriminated against when applying for a rental property or in the course of a tenancy. Providing this information at the application stage (instead of in the CAV guide *Renting a home: A guide for tenants*, known as the 'Red Book', given to tenants at the start of a tenancy) would ensure applicants are informed as well as tenants and landlords.

In addition, awareness of landlord and tenant rights and obligations around unlawful discrimination would be fostered through ongoing education or communication initiatives.

Option 4.2 – Strengthen linkages between the RTA and the Equal Opportunity Act

Under this option, clearer links between the RTA and the prohibitions in the EOA would be introduced. Penalty provisions would be added to the RTA providing that:

- a landlord must not refuse to let rented premises, or instruct or permit their agent to refuse to let rented premises, on the basis of an attribute protected under the EOA
- a landlord's refusal to give consent (for example, to modifications, sub-letting or assignment) is unreasonable if the refusal is on the basis of an attribute protected under the EOA, and

- a notice to vacate issued on the basis of an attribute protected under the EOA can be challenged.

Consultation questions

13. What additional information, if any, do you think should be included in the proposed information statement, other than the information outlined in option 4.1?
14. If an applicant is unlawfully discriminated against at the application stage, what practical redress can the RTA provide, if any, particularly if the premises has already been let to someone else?

4.2 Privacy and use of tenancy application information

There is the potential for information provided in a tenancy application to be misused by landlords and agents not bound by the principles in the *Privacy Act 1988*.

Stand-alone option

- **Option 4.3 – Prohibit a landlord or agent from using information in a tenancy application for other purpose.**

Background

While Part 10A of the RTA regulates the use of tenancy databases, the RTA does not directly regulate the use of information provided by prospective tenants in tenancy applications.

The Australian Privacy Principles in the Commonwealth *Privacy Act 1988* cover businesses with an annual turnover of more than $3 million, which covers many commercial agents. Landlords and agents covered by the Privacy Act must comply with the principles, which encompass what personal information can be collected, how the information can be used and disclosed, and obligations to keep the information secure.

Issues

Submissions to the review raised concerns about the potential for misuse of tenancy application information by private landlords and agents not covered by the Privacy Act (though no evidence of actual misuse was provided), particularly in relation to personal information concerning identity and income. It has been suggested that the RTA include a provision applying to all landlords and agents to ensure this information is not misused, to guard against those not covered by the Privacy Act from misusing applicants' personal information.

Option 4.3 – Prohibit a landlord or agent from using information in a tenancy application for other purpose

Under this option, a landlord or agent must not use personal information provided by an applicant in a tenancy application for a purpose other than to assess the applicant's suitability as a tenant.

Consultation question

15. Is the scope of the protection proposed in option 4.3 sufficient to address concerns around misuse of applicants' personal information and, if not, what other measures are required?

4.3 Tenancy databases

Tenants can be charged a fee to find out if they are listed on a tenancy database, and there is no external process to amend or remove an unjust listing on a tenancy database.

Stand-alone options

- **Option 4.4 – Prohibit charging fee to tenant for copy of tenant's listing.**
- **Option 4.5 – Give VCAT power to make an order if database listing is unjust in the circumstances.**

Background

National rules regulate the use of tenancy databases, sometimes known as tenancy 'blacklists', and these rules are reflected in the RTA. Tenants can only be listed on a tenancy database if they breached their agreement (for limited reasons prescribed in the RTA) and because of the breach they owe an amount more than the bond, or VCAT has made a possession order.

Database operators and landlords must notify a tenant before listing them (and provide an opportunity to object), must correct inaccurate listings, and must notify a tenant applicant if their details are found on a database and how they can check, change or remove the listing.

Database operators and landlords who list personal information about a tenant must provide the tenant with a copy of the information within 14 days if asked. A fee can be charged for giving the information, but it must not be excessive and must not apply to lodging a request for accessing the information. A tenant who discovers an inaccurate or out-of-date listing can ask for the listing to be corrected or removed. If this is not done, a tenant may apply to VCAT to have the listing corrected or removed.

Issues

Feedback received in the review expressed concern that database operators and landlords can charge tenants a fee to find out if they are listed on a database and to access their information. Given the very serious consequences of being listed on databases, it was argued that this information should be free to the tenant, with costs borne by the parties who benefit from the databases.

Other feedback received in the review suggested that VCAT should have the power to amend or remove a listing if the listing is unjust in all the circumstances, consistent with legislation in five other Australian jurisdictions. CAV does not collect data on these issues and has relied on anecdotal evidence provided by stakeholders.

Options relating to amending or removing a database listing in cases involving family violence are discussed separately in chapter 12.4.

Option 4.4 – Prohibit charging fee to tenant for copy of tenant's listing

Under this option, database operators and landlords would be prohibited from charging a tenant a fee to find out if they have been listed on a database and to receive a copy of their listing. This approach would be consistent with a recommendation of the Statutory Review of the NSW *Residential Tenancies Act 2010*.

Option 4.5 – Give VCAT power to make an order if database listing is unjust in the circumstances

Under this option, a tenant would be able to apply to VCAT to have a listing amended or removed, if VCAT was satisfied that the listing is unjust in the circumstances, with regard to the reason for the listing, the tenant's involvement, and any adverse consequences.

This approach would be consistent with equivalent provisions in the residential tenancies legislation in NSW, Queensland, WA, Tasmania and the ACT. An example of an unjust listing given in the Queensland legislation is where a person is listed for rent that was unpaid for two months because the person was in hospital recovering from a serious accident during that period, and was unable to make arrangements for payment.

Consultation questions

16. Should option 4.4 require a tenant to be offered a fee-free option rather than outright prohibiting a fee and, if so, why?
17. Is there a reason why the measure proposed in option 4.5 should not be introduced in Victoria?

4.4 Disclosures and representations prior to entering a tenancy

Prospective tenants are sometimes unaware of material facts impacting upon a tenancy before they enter into an agreement with the landlord.

Stand-alone options

- **Option 4.6 – Require disclosure of certain information prior to tenancy.**
- **Option 4.7 – Prohibit false, misleading or deceptive representations prior to tenancy.**

Background

At the start of a tenancy, a landlord must provide the tenant with a copy of the Red Book, copies of the condition report if the tenant is paying a bond, a name and address for service of documents (discussed in more detail in chapter 4.5) and an emergency phone number for urgent repairs.

While the Australian Consumer Law prohibits agents from engaging in misleading or deceptive conduct in trade or commerce (for example, making a false or misleading representation about a tenancy, or failing to disclose relevant facts about a tenancy), the RTA does not impose any specific disclosure obligations on landlords other than the items listed above.

Issues

Feedback received in the review contended that landlords should disclose to a prospective tenant certain information prior to entering a tenancy, and that the RTA should provide tenants with a practical remedy where a landlord or agent provided false or misleading information to induce a tenant to enter the agreement, by allowing the tenant to apply to VCAT to terminate the tenancy. The prohibitions in the Australian Consumer Law do not cover private landlords, and do not provide tenants with a practical remedy.

Specific information that submissions argued can significantly impact upon a tenancy and should be disclosed prior to a tenancy includes: where the landlord has decided to sell the premises during the tenancy, where a mortgagee is taking action for possession of the premises, and (where the landlord is not the owner of the premises) whether the landlord has a legal right to let the premises to the tenant.

Another issue raised as information that should be disclosed is where the premises is in an embedded electricity network. An embedded electricity network is a private electricity network where an operator purchases electricity in bulk from an authorised retailer or distributor and on-sells it to residents in the network, effectively becoming the electricity retailer for each resident. Embedded networks are becoming an increasingly popular electricity distribution model in multi-tenanted developments such as high-rise buildings, apartment complexes and residential parks.

DELWP is currently undertaking a review which considers protections for consumers within an embedded network, including whether they have a choice of retailer. In its draft position paper for that review, DELWP has recommended mandatory disclosure of information about the embedded network to customers before they enter contractual arrangements. A copy of DELWP's paper is available at the Review of the General Exemption Order webpage on the Victorian Government's Earth Resource website <energyandresources.vic.gov.au/energy/about/legislation-and-regulation/georeview>.

The following package of options has been developed to facilitate disclosure of certain material facts and to prevent misrepresentations prior to entering a tenancy, consistent with the approach adopted in the NSW legislation. The options also give tenants a mechanism if these requirements have not been properly met. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Information disclosures about the state of the premises in the condition report, which is completed after an agreement is signed but before or upon occupation commencing, are considered in chapter 8.2.

Option 4.6 – Require disclosure of certain information prior to tenancy

Under this option, a landlord or their agent would be required to disclose to the tenant before a entering into a tenancy agreement:

- any proposal to sell the residential premises, if the landlord has engaged an agent to sell the premises or prepared a contract for sale of the premises
- that a mortgagee is taking action for possession of the premises, if a mortgagee has commenced proceedings to enforce a mortgage over the premises
- that the landlord has a legal right to let the premises, if the landlord is not the owner of the premises (for example, if the landlord is subletting), and

- details of the embedded electricity network, if the premises is in an embedded electricity network.

The details that the landlord would be required to disclose if the premises was in an embedded network are subject to the outcomes of the DELWP embedded network review. Other issues relating to the DELWP embedded network review are examined in chapter 8.8.

Failure to comply with the disclosure requirements would be an offence under the RTA. A tenant would be able to apply to VCAT to terminate the tenancy if the landlord did not comply with the disclosure requirements or because they provided false or misleading information in making the disclosures. VCAT would be able to make an order terminating the tenancy if the landlord's conduct was considered by VCAT in the circumstances of the case sufficient to justify terminating the tenancy.

Option 4.7 – Prohibit false, misleading or deceptive representations prior to tenancy

Under this option, a landlord or their agent would be prohibited from inducing a tenant to enter an agreement by making any representation the landlord or agent knows to be false, misleading or deceptive (for example, if the agent tells a prospective tenant that the house has a high-speed internet connection, when the agent knows the house does not have a high-speed internet connection). A representation can include an omission of information. Breaching the prohibition would be an offence under the RTA. This prohibition would be in addition to prohibitions under the Australian Consumer Law that apply if the representations are 'in trade or commerce', and would be separate to the disclosure requirements for the specific information listed in option 4.6.

A tenant would be able to apply to VCAT to terminate the tenancy if a false, misleading or deceptive representation was made. VCAT would be able to make an order terminating the tenancy if the landlord's or agent's conduct was considered by VCAT in the circumstances of the case sufficient to justify terminating the tenancy.

Consultation questions

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?
19. Which factors are important or most likely to influence the tenant's decision to enter into a tenancy agreement, and which are more appropriately dealt with in a condition report?
20. Would a prohibition on false, misleading or deceptive representations under option 4.7 have unanticipated consequences, or be unduly burdensome for landlords and agents to satisfy?

4.5 Details of landlord for legal proceedings

Failure to disclose a landlord's full name and address can preclude a court or tribunal from being able to make an enforceable order in favour of a tenant.

Alternative options

- **Option 4.8A – Landlord's details must be provided in tenancy agreement, or**
- **Option 4.8B – Agent must provide landlord's details upon request of court or tribunal.**

Background

At the start of a tenancy, the landlord must provide the tenant with the landlord's full name and address for service of documents under the RTA. If the landlord is using an agent, the tenant can be provided with the agent's full name and address for service of documents under the RTA, instead of the full name and address of the landlord.

Issues

Feedback received in the review observed that as a matter of practice, where an agent is acting for a landlord, tenants are often not given adequate details of the actual landlord (the full name of the individual or legal entity) and the tenant is therefore unable to determine the party with whom they are contracting. This can become problematic if legal proceedings are initiated at VCAT and an order is made against the landlord, because VCAT needs the full name and address of the landlord to make an order that is enforceable by the tenant.

While an agent's name and address can be used for the service of documents (for example, notices) under the RTA and for the purposes of a VCAT proceeding, they cannot be used for the purposes of enforcement. To enforce a monetary order against a landlord, the tenant needs to register the order with the Magistrates' Court and have a warrant of distress issued, and the Sheriff's Office requires the physical address of the landlord to execute the warrant.

Submissions argued that the landlord should be required to disclose their full name and address for the purposes of legal proceedings. Other submissions have argued that landlords should be allowed to provide the details of an agent instead of their own, and that requiring the landlord to provide their own details raises privacy and safety concerns. CAV does not collect data on this issue and has relied on anecdotal evidence provided by stakeholders.

Option 4.8A – Landlord's details must be provided in tenancy agreement

Under this option, a landlord would be required to state in the tenancy agreement the landlord's full name, ACN/ABN if the landlord is a corporation, and address for the purposes of legal proceedings. The landlord could still nominate an agent's name and address for the service of RTA notices and for all communication during the tenancy.

The landlord's address for the purposes of legal proceedings would have to be a physical address of the landlord, not a post office box or email address. Where the landlord is a corporation, the address could be the registered office.

Failure to provide these details in the tenancy agreement would be an offence under the RTA.

Option 4.8B – Agent must provide landlord's details upon request of court or tribunal

Under this alternative option, a landlord using an agent would not be required to state the landlord's details for the purposes of legal proceedings in the tenancy agreement. However, if legal proceedings were initiated and a court or tribunal requested that an agent provide the landlord's details for the purposes of the proceedings, the RTA would require that an agent must disclose the details to the court or tribunal.

Consultation question

21. Is option 4.8A or option 4.8B fairer for all parties, and why?

4.6 Terms of tenancy agreement

Consultation identified concerns around the imbalance in bargaining power for tenants and landlords negotiating additional terms to a tenancy agreement, and the extent to which those terms are enforceable.

Stand-alone options

- **Option 4.9 – A comprehensive standard prescribed tenancy agreement.**
- **Option 4.10 – Blacklist of tenancy agreement prohibited terms.**
- **Option 4.11 – Offence to include invalid or prohibited term.**

Alternative options for enforcement of additional terms

- **Option 4.12A – Maintain status quo for enforcement of additional terms, or**
- **Option 4.12B – Additional terms enforceable, with limited exceptions.**

Background

The current prescribed tenancy agreement (which must be used if the agreement is not verbal) is brief, listing some key statutory obligations but including a general obligation for the parties to comply with the RTA.

In addition to the terms in the prescribed agreement, the parties can agree to additional terms. However an additional term cannot purport to exclude, restrict or modify the operation of the RTA (for example, if an additional term said the landlord does not have to lodge the bond with the Residential Tenancies Bond Authority (RTBA), when it is a requirement of the RTA that the landlord must lodge the bond with the RTBA). Any term that does this is invalid, as is any term that VCAT declares to be harsh or unconscionable following an application to VCAT.

Additional terms are not specifically enforceable under the RTA. A tenant or landlord can apply to VCAT for a compensation order for loss suffered because the other party breached the agreement, but cannot obtain a compliance order for a breach of an additional term.

Issues

Feedback received in this review suggested that the prescribed tenancy agreement should more comprehensively address common points of contention, and some submissions argued that

additional terms should be enforceable at VCAT. Other submissions raised concerns that an imbalance in bargaining power favouring landlords means that many tenants feel they have no choice but to agree to whatever terms the landlord offers, and may believe the terms are all fully enforceable even if some are technically invalid.

Submissions also suggested that the current protection against terms that purport to contract out of the RTA is limited in its application, and that it should be an offence to contract out of the RTA (in line with a similar offence provision in Queensland's residential tenancies legislation).

The following options aim to ensure that tenants and landlords retain a degree of contractual flexibility and the ability to negotiate some terms of their agreement, but that parties are not unfairly bound to inappropriate terms. The option to propose a 'blacklist' of prohibited additional terms is in line with a similar provision in NSW residential tenancies legislation. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 4.9 – A comprehensive standard prescribed tenancy agreement

Under this option, the prescribed tenancy agreement would become more comprehensive than the current version, setting out the core rights and responsibilities for landlords and tenants and clearly indicating all duties for which a breach of duty notice can be served.

The prescribed tenancy agreement would include optional prescribed terms around a) lease break fees, and b) cleaning required as a condition of the landlord providing written consent to the tenant keeping a pet. These terms are discussed in more detail in chapter 6.1 and chapter 5.2, respectively.

Option 4.10 – Blacklist of tenancy agreement prohibited additional terms

In addition to the terms in the prescribed tenancy agreement, landlords and tenants would have the contractual flexibility to negotiate and add further (non-prescribed) additional terms, provided that in each instance:

- the additional term does not exclude, restrict or modify a provision or the application of a provision of the RTA, and
- the additional term is not a term prohibited by the RTA.

Under this option, the 'blacklist' of terms prohibited by the RTA would include:

- a term obliging the tenant to take out a form of insurance in respect of the premises
- a term exempting the landlord from liability for any act or omission by the landlord or their agent
- a term which purports to bind a tenant to the rules of any OC, if a copy of the rules has not been provided to the tenant
- 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
- a term which purports to make a tenant who breaches the agreement liable to pay a penalty, increased rent or liquidated damages, and
- any other term prescribed in the regulations as a prohibited term.

Option 4.11 – Offence to include invalid or prohibited term

Under this option, a landlord or tenant would be prohibited from preparing or authorising the preparation of a written tenancy agreement that includes an additional term that:

- is invalid because it purports to exclude, restrict or modify the operation of the RTA, or
- is on the blacklist of prohibited terms.

Failure to comply with this requirement would be an offence under the RTA. The creation of an offence for attempting to contract out of the RTA would be consistent with the approach taken in Queensland's legislation.

Option 4.12A – Maintain status quo for enforcement of additional terms

Under this option, provided an additional term was not invalid or on the blacklist of prohibited terms, the current processes for enforcement of additional terms would be retained.

A tenant or landlord would still be able to apply to VCAT for a compensation order for loss suffered because the other party breached the agreement, but would not be able to obtain a compliance order under the Residential Tenancies List for a breach of an additional term.

Option 4.12B – Additional terms enforceable, with limited exceptions

Under this alternative option, provided an additional term was not invalid or on the blacklist of prohibited terms, the additional term would be enforceable at VCAT. If the term was breached, a breach notice could be served on the party in breach and if the breach was not remedied within the required time, the other party could seek a compliance order at VCAT.

There would however be some further limited exceptions listed in the RTA where an additional term would be unenforceable (but it would not be an offence to add them to an agreement):

- the RTA would provide that a 'no pets' clause is unenforceable if the restriction or limitation was unreasonable. This clause is discussed in more detail below in chapter 5.2, and
- the RTA would provide that a clause requiring tenants to have the carpets professionally cleaned is unenforceable, except:
  - where the cleaning is required as a condition of the landlord providing written consent to the tenant keeping a pet
  - where the carpet was professionally cleaned immediately before the commencement of the tenancy, or
  - the condition of the carpet at the end of the tenancy was such that professional carpet cleaning was required to restore the carpet to its pre-tenancy condition.

The professional cleaning of carpets is discussed in more detail in chapter 8.3 and chapter 8.5.

Consultation questions

22. If a more comprehensive tenancy agreement was introduced in line with option 4.9, which requirements of the RTA should be included as prescribed terms and which should not be included?
23. Should each of the prohibited terms listed in option 4.10 warrant inclusion in a blacklist, and should any further terms be included?
24. Is there a reason why a contracting out offence, as set out in option 4.11, should not be introduced in Victoria?
25. Is option 4.12A or option 4.12B preferable, and why?
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?

5 Rights and responsibilities during a tenancy

Submissions to the rights and responsibilities issues paper identified a range of issues arising under the current framework in relation to rights and responsibilities during a tenancy. These issues included:

- the workability of the processes for individual and successive breaches of duty
- the extent to which a landlord can prohibit a tenant from keeping a pet
- a landlord's right to enter the premises, particularly where the premises is being sold or re-leased, and
- whether tenants using the premises to provide short-term accommodation constitutes a sub-let, and what fee can be charged in relation to assigning a tenancy agreement.

5.1 Processes for breach

Processes for breach of duty could be made more workable, particularly where there are successive breaches of duty.

Stand-alone option

- **Option 5.1 – Tailor remedy for breach of duty to nature of duty and any loss suffered.**

Alternative options for successive breaches

- **Option 5.2A – Broaden the three strikes rule, but limit it to a 12 month period and require a VCAT order to terminate for repeated breaches, or**
- **Option 5.2B – Abolish the three strikes rule, allow VCAT to terminate if breach is sufficient to justify termination, or**
- **Option 5.2C – Abolish notices of termination for successive breaches.**

Background

In addition to the obligations a landlord and tenant owe to each other because they are specified in the tenancy agreement ('contractual obligations'), landlords and tenants also owe each other obligations that are spelled out in the RTA ('statutory obligations').

- Some statutory obligations are sufficiently serious that if they are not met, they can directly result in termination of the tenancy (for example, if the tenant uses the premises for illegal purposes, or puts neighbours in danger). These are discussed in more detail in chapter 11.
- Some statutory obligations are 'duty provisions', and reflect broad principles for encouraging ideal behaviour within a tenancy (for example, the landlord duty to maintain the premises in good repair, the tenant duty to not cause a nuisance with neighbours, the landlord duty to ensure the tenant's quiet enjoyment of the premises, the tenant duty to avoid damaging the premises). The RTA sets out a specific process that should be followed where a party who owes a duty does not meet that duty (breaches the duty).

The process for breaches of duty is as follows:

- If a party (either the landlord or the tenant) breaches a duty provision, the other party can give them a breach of duty notice. The breach notice states that the party in breach must comply with the notice by remedying the breach if possible, or by compensating the other person, within the required time (14 days for most breaches, 3 days for some provisions relating to rights of entry).
- If the party in breach does not comply with the breach notice within the required time, the other party can either:
  - apply to VCAT for a compensation order or a compliance order – if the party in breach fails to comply with the VCAT compensation order or compliance order, the other party can then issue a 14 day notice of termination (notice to vacate or notice of intention to vacate), or
  - issue another breach notice, requiring the party in breach to comply with that notice within the required time.
- If one party has been given two breach of duty notices for a given duty provision, and a breach of the same duty provision occurs a third time, the other party can issue a 14 day notice of termination. The 'three strikes' rule can apply even if the previous breach of duty notices were complied with within the required time.

The following figures illustrate the process for breaches of duty, and how the three strikes rule can operate where:

- there are multiple occasions where the same duty provision is breached (figure 5.1), and
- there is a single breach which is not remedied within the required time (figure 5.2).

Figure 5.1: Operation of the three strikes rule (multiple breaches)

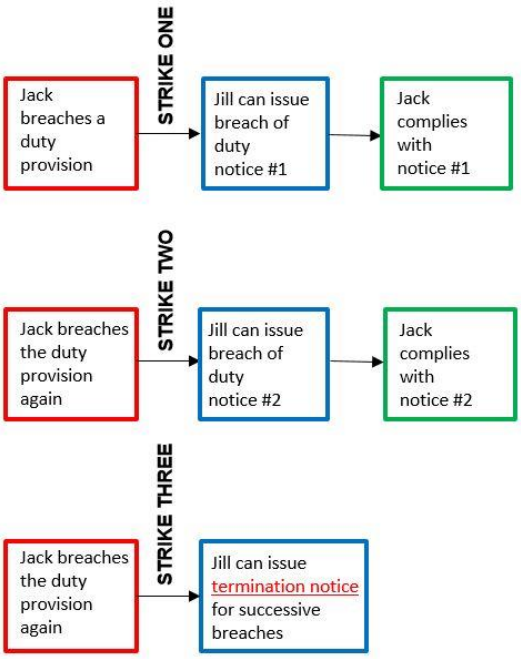
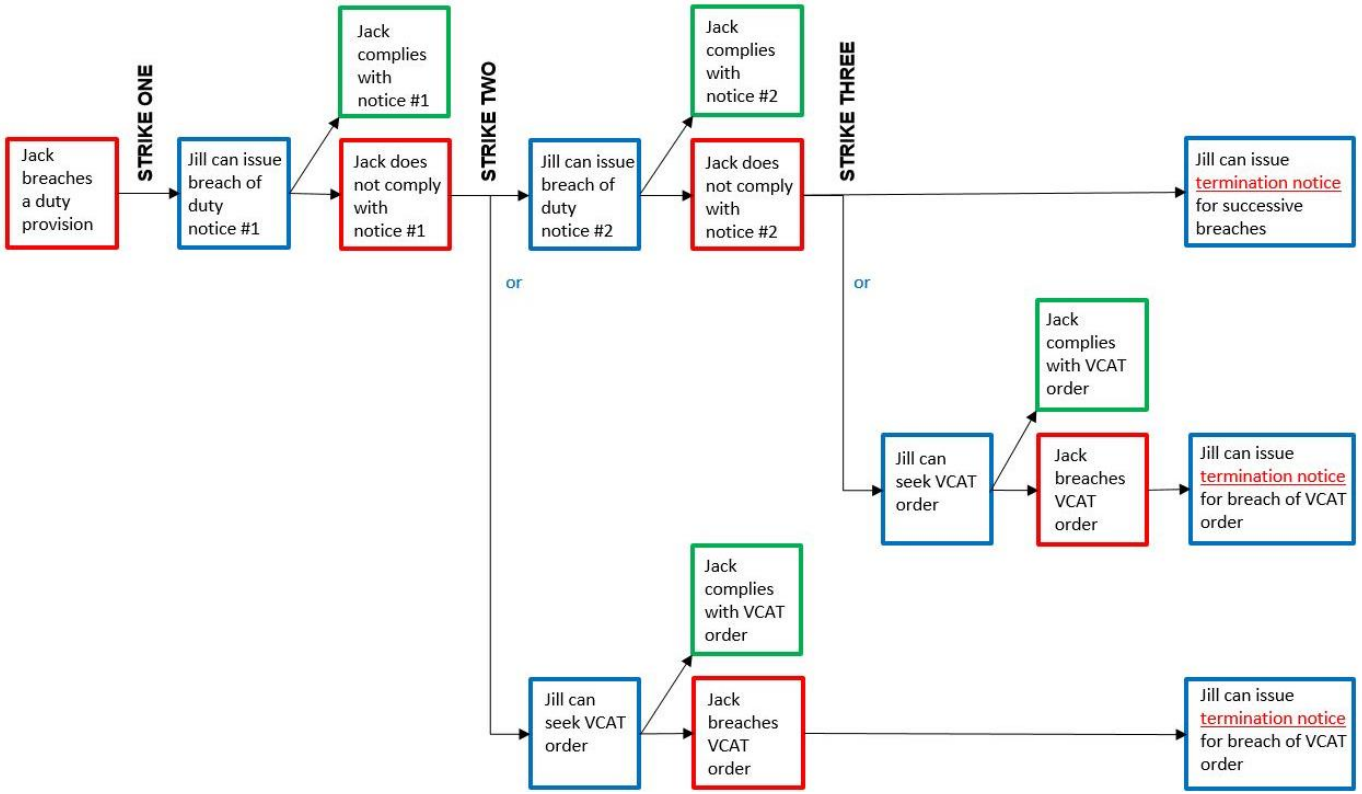


Figure 5.2: Operation of the three strikes rule (single breach)



Issues

Feedback to the review was that the breach of duty process is cumbersome, does not adequately deal with instances of non-compliance, and unreasonably binds the parties to an agreement where there is ongoing non-compliance. The current 'three strikes rule' which applies only if the same duty provision is breached three times means that parties can breach a range of different duties without a cumulative effect. Other submissions raised concerns that changes to the current scheme may result in higher numbers of tenancies being terminated by landlords, and relatively trivial breaches of duty by a tenant resulting in termination.

Some submissions also raised concerns about the workability of the current process in terms of the remedy matching the nature of the breach. Where compliance requires the party in breach to stop doing something (for example, a tenant who must stop disturbing neighbours) rather than requiring a positive action, the current process does not allow the other party to serve a second breach notice or apply to VCAT for a compliance order until the 14 day window has elapsed (for example, the tenant served with a breach notice could continue to disturb the neighbours for a further 14 days before the landlord could take any further action).

If changes are made to the provisions in the RTA dealing with no-fault terminations, consideration must be given to ensure the at-fault termination provisions are adequate and that the RTA provides the correct incentives for parties to comply with agreements. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

VCAT compensation and compliance orders are discussed in more detail at chapter 11.1.8.

Option 5.1 – Tailor remedy for breach of duty to nature of duty and any loss suffered

Under this option, where a party is served with a breach of duty notice, the required time within which the breach must be remedied would depend on the nature of the breach:

- for breaches where the remedy requires the party to do something (for example, tenant must repair damage they caused, tenant who gets locks changed must give landlord new key, landlord must install lock on external window), the current timeframes would apply (14 days for most breaches, 3 days for some provisions relating to rights of entry), and
- for breaches where the remedy requires the party to refrain from doing something (for example, tenant to refrain from causing nuisance or interference, tenant to refrain from damaging the premises or common area, landlord to refrain from disturbing tenant's quiet enjoyment), the required timeframe to comply would be immediately.

Compensation would only be required if the breach has resulted in financial loss or damage to the other party.

Option 5.2A – Broaden the three strikes rule, but limit it to a 12 month period and require a VCAT order to terminate for repeated breaches

Under this option, the current process for an initial breach of duty and compensation/compliance orders would be maintained, but the 'three strikes' rule for successive breaches would be broadened so that the three breaches would not have to be for the same duty and time-limited so that the successive breaches must occur within a 12-month period.

Where a party has already previously been issued with two breach of duty notices (which would not have to be breaches of the same duty) within a 12 month period, upon the occurrence of a third breach of any duty within the 12 month period the other party could no longer issue a notice of

termination but could apply to VCAT for a termination order for repeated breaches without having to issue a third breach of duty notice.

In determining whether to issue a termination order, VCAT would be required to take into account the seriousness of each breach, having regard to the extent of any inconvenience or financial or other disadvantage suffered, and other relevant circumstances of the tenancy. This consideration would be consistent with the approach adopted in the Queensland legislation, as a safeguard against termination for relatively trivial breaches. The 12 month period within which the successive breaches must occur (before the three strikes rule 'resets') would also be consistent with the Queensland approach. VCAT would also have the power under this option to issue a compensation order or a compliance order as an alternative to a termination order.

Option 5.2B – Abolish the three strikes rule, allow VCAT to terminate if breach is sufficient to justify termination

Under this alternative option, if a party in breach is given a breach of duty notice and it is not complied with within the required time, the other party could apply to VCAT either for a compensation order, a compliance order or a termination order.

VCAT would only be able to issue a termination order if it was satisfied that the breach was sufficiently serious to justify termination, with consideration to the nature of the breach, any previous breaches, any steps taken to remedy or address the breach, and other relevant circumstances of the tenancy. VCAT could issue a compensation order or compliance order as an alternative to termination.

More detail about VCAT termination orders, proposed in option 5.2A and option 5.2B, is set out in chapter 11.1.1.

Option 5.2C – Abolish notices of termination for successive breaches

Under this alternative option, the current process for a breach of duty and compensation/compliance orders would be maintained, but there would no longer be a process for successive breaches. Each instance of breach would require the other party to issue a breach of duty notice and, if the notice was not complied with within the required time, a compensation order or compliance order could be sought at VCAT. Breach of a VCAT order would continue to be grounds for termination.

Consultation questions

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?
28. Which option is preferable in terms of process for successive breaches of duty, and why?
29. What are the risks, if any, of unintended consequences arising with the measures proposed in options 5.2A, 5.2B and 5.2C?
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?
31. Which obligations of landlords and tenants 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?

5.2 Pets in rented premises

Consultation canvassed the extent to which a landlord can prohibit a tenant from keeping a pet, and possible mechanisms to encourage landlords to accept pets.

Alternative options

- **Option 5.3A – An optional pet bond lodged with RTBA, or**
- **Option 5.3B – Optional pet consent clauses in standard prescribed tenancy agreement.**

Stand-alone option

- **Option 5.4 – A 'no pets' clause is unenforceable if it is unreasonable.**

Background

The RTA does not directly address the issue of pets in rented premises. Many landlords insert 'no pets' clauses as a standard additional term in tenancy agreements, but are generally only successful at enforcing the term at VCAT if they can prove the pet caused the tenant to breach a statutory duty.

The following discussion is concerned with pets, as distinct from assistance dogs. The EOA prohibits landlords from refusing to provide accommodation to a person with a disability because that person has an assistance dog. An 'assistance dog' is defined by the EOA to mean a dog that is trained to perform tasks or functions that assist a person with a disability to alleviate the effects of their disability. The Explanatory Memorandum for the EOA confirms that the definition is not intended to apply to companion or comfort dogs, but the definition of an assistance dog 'may include assistance with navigating social interactions where the nature of the impairment is such that this helps to alleviate the impairment'.

Issues

The issue of pets in rented premises was a major theme in the review, with many submissions calling for the RTA to either increase or limit landlord discretion in relation to allowing pets. Feedback noted the great value many Victorians place in being able to keep household pets for companionship and related wellbeing reasons, and questions the extent to which it is reasonable for landlords to prevent tenants from keeping pets, particularly where the pet is contained (for example, reptile, fish or bird).

Some submissions argued that landlords should be prohibited from inquiring whether tenants or tenant applicants own pets, and that tenants should have a right to keep pets with limited grounds of landlord objection. Other submissions have argued that landlords should have discretion regarding consent to pets and should be able to enforce 'no pets' clauses.

In CAV's market research project, 24 per cent of landlords reported that they 'always' allow pets, 38 per cent 'sometimes' allow pets depending on the type of pet, and a further 38 per cent of landlords 'never' allow pets. Feedback received in the review has noted common reasons for landlord reluctance to allow pets include concerns they will disturb neighbours or cause significant damage to the premises (such as requiring fumigation, professional carpet cleaning, replacement of carpets or curtains, etc.) that may exceed the bond. In some cases, OC rules may also prohibit or limit the keeping of pets.

It was suggested that an optional 'pet bond' be introduced to incentivise landlords to accept pets who have concerns around damage. Among those landlords surveyed in the CAV market research project who do not 'always' allow pets, 41 per cent would either 'definitely' or 'might' allow pets if they could charge an additional pet deposit.

Other feedback opposed pet bonds, contending that lower-income tenants may be unable to afford a pet bond and that pet-related damages should be dealt with through the existing bond. The options below have been developed to enable those landlords who may be amenable to permitting pet to manage some of the key risks associated with keeping pets in rented premises. The options also aim to facilitate reasonable compromises to be reached regarding pets.

Option 5.3A – An optional pet bond lodged with RTBA

Under this option, the parties would be able to agree at any time in the tenancy to the tenant paying an optional additional pet bond (for an amount prescribed in regulations), in exchange for the landlord granting written consent to the tenant keeping a pet or pets in the rented premises. The pet bond would be lodged with the RTBA separate to the regular bond, would only be payable where the tenant actually keeps a pet or pets, and could not be charged for an assistance animal or pet that is contained (for example, fish, caged bird).

A pet bond lodged with the RTBA could only be claimed by the landlord if cleaning or repairs are needed because of damage caused by the pet/s.

Option 5.3B – Optional pet consent clauses in standard prescribed tenancy agreement

Under this alternative option, the parties can agree to optional clauses in the standard prescribed tenancy agreement. The optional clauses would provide that:

- the landlord consents to the keeping of a specified pet or pets
- the tenant agrees that if the premises needs to be fumigated because of the pet/s or the carpets need to be professionally cleaned because of damage caused by the pet/s, the tenant agrees to pay for the cost of fumigation or professional carpet cleaning.

Option 5.4 – A 'no pets' clause is unenforceable if it is unreasonable

Under this option, if an additional clause is added to the tenancy agreement that prohibits or limits the keeping of pets in the premises, the term will be unenforceable if the prohibition or limitation is unreasonable.

If a dispute arises because of a 'no pets' clause, parties would be able to seek a determination from VCAT about whether the clause is unreasonable. The criteria for VCAT to consider would be:

- the type of each pet and its size
- whether each pet is free roaming or contained
- the nature of the rented premises and their suitability for the type of pet
- any pet bond paid by the tenant, or agreement of the tenant to pay additional pet-related costs
- whether the 'pet' is an assistance dog
- any pet references provided by the tenant
- any relevant OC rules or local government requirements
- the total number of pets, and
- any other relevant factors.

Consultation questions

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?
34. How could the concern that introduction of a pet bond may disadvantage lower-income tenants with pets be addressed?
35. Under option 5.3B, what cleaning-related obligations would be appropriate for inclusion in an optional clause in the standard prescribed tenancy agreement?
36. How should option 5.3A and option 5.3B distinguish between costs and cleaning related to the pet, and costs and cleaning related to the regular bond and state of the property?
37. Would either, both, or neither of option 5.3A and option 5.3B be likely to incentivise more landlords to accept more tenants with pets?
38. Is option 5.4 likely to facilitate reasonable compromises to be made in relation to pets in tenancies, and what other options could facilitate reasonable compromises?
39. What criteria would be appropriate for VCAT to consider under option 5.4, and should any other criteria be considered?

5.3 Rights of entry

A landlord's rights of entry during a tenancy need to be balanced against the tenant's right to quiet enjoyment, particularly in circumstances where the property is being sold or re-leased.

Stand-alone options

- **Option 5.5 – Seven days' notice for general inspection or valuation.**
- **Option 5.6 – Landlord liable for tenant loss caused during entry.**
- **Option 5.7 – Reasonable inspections to show to prospective purchasers, with right to compensation for tenant.**
- **Option 5.8 – 48 hours' notice for entry to show to prospective tenants, within 21 days of termination.**

Alternative options

- **Option 5.9A – VLRC recommendations for entry to take advertising images, or**
- **Option 5.9B – Tenant's reasonable consent for entry to take advertising images.**

Background

A landlord has a right to enter the rented premises either by agreement (at any time agreed with the tenant), or by notice – provided the landlord gives the tenant at least 24 hours' written notice stating the purpose of entry, and enters between 8am and 6pm (not on a public holiday).

The landlord has a right to enter for the following purposes:

- to show the premises to prospective tenants (entry for this purposes is only allowed within 14 days of the tenancy termination date)
- to show the premises to prospective purchasers or lenders
- to enable the landlord to carry out a duty under the RTA, the tenancy agreement or other laws
- for valuation purposes
- the landlord/agent has reasonable grounds to believe the tenant has failed to comply with a duty
- to conduct a general inspection (once in any six-month period, but not within first three months of the tenancy), and
- to conduct an inspection relating to the family violence provisions of the RTA.

A person exercising a right of entry must do so in a reasonable manner, and the tenant has the right to apply to VCAT for compensation for any damage caused during an entry.

Issues

Feedback to the review raised concerns about the adequacy of 24 hours' notice, and indicated that longer timeframes for some of the reasons should be introduced in line with the approach taken in several other Australian jurisdictions, appropriately tailored to the nature of the reason for entry.

It was also submitted that the tenant's right to seek compensation at VCAT for damage caused during an entry should be expanded to compensation for any loss of the tenant's goods that may occur during an entry. This would be in line with the approach taken in the NSW legislation.

A key issue identified in submissions was difficulties around rights of entry where premises are being sold. While landlords place great value in the ability to show the premises to prospective purchasers, frequent intrusions and pressure to keep the property in a heightened state of neatness and cleanliness for sales inspections could significantly disrupt the tenant's quiet enjoyment. Concerns have been raised that the RTA does not adequately articulate what the rights of landlords and tenants are in relation to sales inspections.

CAV's market research project found that tenants and landlords have different perceptions of the number of sales inspections per week that would be considered reasonable. Two in three tenants believe that a maximum of one inspection per week is reasonable, but only four in ten landlords agree with this. Nearly four in ten (37 per cent) landlords consider that up to two inspections per week is reasonable (but only 11 per cent of tenants agree with this).

Only one in ten surveyed tenants were offered compensation during the sale of the property. Of those who were not offered compensation and felt that the number of inspections was unreasonable, 83 per cent report that they would have felt the number of inspections was reasonable if compensation (such as a reduction in rent) had been offered.

Surveyed landlords are divided over whether it should be mandatory to offer some form of compensation to tenants who occupy a property that is being sold (47 per cent agree, 53 per cent do not). Landlords who have previously sold a rental property that was occupied are more in favour of mandatory compensation (65 per cent agree, compared to 44 per cent of landlords who have not previously sold an occupied property).

Where premises are being re-leased, some submissions to the review suggested that more flexibility should be allowed for entries to show the premises to prospective tenants, particularly in relation to the current reference to only allowing entry for this purpose during the final 14 days of the tenancy. Earlier inspections, it was argued, would allow the tenant to pack and get organised in the last 14 days.

Concerns were also raised about whether landlords have a right to enter to take advertising images (photos or videos) of the property, and what the rights of the tenant are where the images may show the tenant's possessions. The Victorian Law Reform Commission (VLRC) released its report on this issue in 2015. Stakeholder consultation to this review noted that under the VLRC recommendations, the onus is on the tenant to object to the landlord exercising a right to enter, rather than on the landlord to seek the consent of the tenant to enter. A copy of the VLRC paper is available at the Photographing and filming tenants' possessions for advertising purposes page on the Victorian Law Reform Commission website <lawreform.vic.gov.au/all-projects/ptp>.

The following options have been developed to allow landlords to sell their property without being unduly hindered, but with reasonable limits so that the quiet enjoyment of the tenants is not unfairly compromised and so that tenants have more ability to negotiate appropriate entry times.

An option addressing the circumstances where a tenant, notified of an intention to sell the premises, can elect to end the tenancy is set out in chapter 6.3 below.

Option 5.5 – Seven days' notice for general inspection or valuation

Under this option, a landlord wishing to give notice requiring entry to conduct a general inspection would be required to give seven days' notice rather than the current requirement of 24 hours' notice. Seven days' notice would also be required if giving notice requiring entry for valuation purposes.

As with the current RTA, a landlord wanting to enter earlier than the notice period permits would be able to do so with the negotiated agreement of the tenant.

Option 5.6 – Landlord liable for tenant loss caused during entry

Under this option, in addition to a right to seek compensation for damage, the tenant would be able to apply to VCAT for compensation for any loss of the tenant's goods caused by any person in the exercise of the landlord's right of entry. This would include any loss by theft that may occur during an inspection by prospective tenants or prospective purchasers.

Option 5.7 – Reasonable inspections to show to prospective purchasers, with right to compensation for tenant

Under this option, a landlord would be required to give the tenant notice of intention to sell the premises at least 14 days before the premises are first made available for inspection by prospective purchasers.

Under this option, the landlord would be required to make all reasonable efforts to agree with the tenant on days and times for the premises to be periodically available for inspection by prospective purchasers, whether by way of inspections open to the public or closed inspections for particular individuals. The tenant would not be able to unreasonably refuse, but would not be required to agree to the premises being available for inspection by prospective purchasers more than twice a week.

Where the parties are unable to agree, the landlord would be able to show the premises to prospective purchasers not more than twice in a week, and would be required to given the tenant at least 48 hours' written notice each time.

The tenant would also be entitled to reasonable compensation (for example, in the form of a rent reduction) for each sales inspection that takes place.

Option 5.8 – 48 hours' notice for entry to show to prospective tenants, within 21 days of termination

Under this option, a landlord wishing to give notice requiring entry to show the premises to prospective tenants would be required to give 48 hours' notice, rather than the current requirement of 24 hours' notice. Provided 48 hours' notice was given, entry for this purpose could be within 21 days of the tenancy termination date (rather than the current requirement of entry only within 14 days of the tenancy termination date).

Option 5.9A – VLRC recommendations for entry to take advertising images

This option would implement recommendations of the VLRC. Under this option, a landlord would have a right to enter to take advertising images of the premises. The landlord would be required to give seven days' notice of the entry, and would be required to make a reasonable attempt to arrange a suitable time for the entry if the tenant wished to be present.

The tenant would be able to prevent an image being taken by objecting in writing where the image would show a possession of the tenant's that:

- directly identifies the tenant or another occupant
- reveals sensitive information about the tenant or another occupant, or
- is valuable and would place the tenant at a heightened risk of theft,

and it would be unreasonable to expect the tenant to remove or conceal the possession.

The tenant could also prevent an image being taken by objecting in writing where the image could identify an occupant of the premises at risk of family violence or personal violence.

Option 5.9B – Tenant's reasonable consent for entry to take advertising images

Under this alternative option, a landlord would be required to obtain the tenant's consent to enter to take advertising images of the property that include the tenants' possessions. The tenant would not be able to unreasonably withhold consent, and an unreasonable withholding of consent could be challenged by the landlord at VCAT.

If VCAT determined the withholding of consent was unreasonable, VCAT could make an order specifying a day and time for the entry. The criteria for VCAT would consider when determining whether withholding consent was unreasonable would include:

- whether images would show a tenant's possession that directly identifies or reveals sensitive information about the tenant or another occupant, and it would be unreasonable to expect the tenant to remove or conceal it
- whether images would show a tenant's valuable possession that would place the tenant at heightened risk of theft, and it would be unreasonable to expect the tenant to remove or conceal it
- whether images could identify an occupant at risk of family violence or personal violence
- whether the landlord has made reasonable efforts to negotiate a day and time for the proposed entry to take images that does not unduly inconvenience the tenant, and
- whether the landlord has made reasonable efforts to address any other reasonable concerns of the tenant.

Consultation questions

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?
41. Under option 5.6, is there a reason why a landlord should not be liable for any loss of the tenant's goods caused when the landlord is exercising a right of entry?
42. Does option 5.7 sufficiently balance the rights of landlords and tenants where a property is being shown to prospective purchasers?
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?
44. Does option 5.8 sufficiently balance the rights of landlords and tenants where a property is being shown to prospective tenants?
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?

5.4 Sub-letting and assignment

The RTA could clarify that landlord consent is needed before tenants use the premises to provide accommodation on a commercial basis (for example, Airbnb-type arrangements), and could better articulate the fee that can be charged in relation to an assignment.

Stand-alone options

- **Option 5.10 – Landlord consent required for parting with possession for consideration.**
- **Option 5.11 – Fee for consent to parting with possession for consideration.**

Alternative options

- **Option 5.12A – Assignment fee: reasonable expenses, or**
- **Option 5.12B – Assignment fee: fixed cap prescribed in regulations.**

Background

Sub-letting occurs where one of more existing tenants rents out part or all of the property to other people. The tenants who signed the initial tenancy agreement are the 'head tenants' and those tenants renting from them are the 'sub-tenants'. Sub-letting is different to a co-tenancy, where every tenant signs the tenancy agreement and all names appear on the bond lodgement form.

Assignment occurs where a tenant's interest in a tenancy is transferred to another person so that the other person becomes the tenant in their place. Residents in rooming houses cannot assign their residency rights.

A tenant must not sublet or assign the lease without the landlord's written consent, and doing so without consent is grounds for termination. The RTA provides that a landlord must not unreasonably withhold consent, and must not charge a fee for giving consent to a sublet or assignment.

While the landlord cannot charge a fee for consent, the landlord can require the tenant to bear any costs incurred by the landlord in connection with the preparation of a written assignment of the agreement.

Issues

Feedback received in the review raised concerns about the growing practice of tenants listing all or part of their rented premises as short-term accommodation on platforms such as Airbnb without the landlord's consent, and whether or not this practice constitutes sub-letting.

Concerns for landlords about the practice include the commercialisation of the residential premises, increased wear and tear and security risks, the relative anonymity and transitory nature of the guests, any OC rules that may apply, and any effect on the amenity of neighbours or the terms of the landlord's insurance policy. Other submissions argued that tenants should be allowed to host guests in their home and whether or not payment is received should be of no concern to the landlord.

A recent VCAT case held that an arrangement of this kind amounted to a mere licence to occupy (therefore not constituting sub-letting) rather than a lease, but the decision was overturned on appeal with the Supreme Court holding that the Airbnb agreement for occupation of the whole apartment was properly characterised as a lease.

While the Supreme Court (*Swan v Uecker* [2016] VSC 313) found the particular arrangement in that case had granted the guests 'exclusive possession' to the premises and amounted to a lease, it could be helpful if the RTA provided greater clarity on whether tenants can rent out all or part of the premises, and whether landlord consent is needed.

Options around this issue aim to clarify that tenants require landlord consent to allowing the premises to be possessed by another party on a commercial basis (parting with possession of the premises for consideration), without inadvertently capturing non-commercial guests of the tenant.

Another issue raised in feedback to the review concerns fees charged by landlords for an assignment of a tenancy agreement that may be excessive or unreasonable. While the RTA states that the tenant can be charged costs incurred by the landlord in connection with the preparation of a written assignment of the agreement, submissions have contended that a written assignment is rarely prepared and that some tenants are charged any and all costs associated with an assignment rather than the more limited costs apparently intended by the RTA. It has been argued variously that there should be a prescribed assignment form, or a standard assignment fee.

Option 5.10 – Landlord consent required for parting with possession for consideration

Under this option, the tenant would have to obtain the landlord's consent before parting with possession of the whole or part of the rented premises for consideration. As with subletting and assignment, a tenant doing so without consent would be grounds for termination.

The landlord would not be able to unreasonably withhold consent. However, it would not be unreasonable for a social housing landlord to withhold consent because it would disadvantage people on a waiting list.

Option 5.11 – Fee for consent to parting with possession for consideration

In contrast to the prohibition on fees for consent to a sublet or assignment, under this option a landlord and tenant would be able to negotiate a reasonable fee for consent for parting with possession for consideration.

Permitting the parties to negotiate a fee for consent to parting with possession for consideration may assist tenants by acting as an incentive for landlords to consent in certain circumstances, for example by covering the cost of insurance premiums to cover the short-term stay arrangements.

Option 5.12A – Assignment fee: reasonable expenses

Under this option, the RTA would provide that the landlord cannot charge a fee for consent to an assignment, but can require the tenant to bear any reasonable expenses incurred by the landlord in assigning the agreement. A requirement that fees be reasonable and related to the expenses incurred by the landlord because of an assignment requested by the tenant is consistent with the approach taken in the residential tenancies legislation in other Australian jurisdictions.

Option 5.12B – Assignment fee: fixed cap prescribed in regulations

Under this alternative option, the RTA would provide that a landlord cannot charge a fee higher than an amount prescribed in the regulations.

Consultation questions

46. Would option 5.10 capture arrangements that are not properly characterised as commercial short-term accommodation, or other arrangements that should not require consent?
47. How should the arrangements in option 5.10 be defined, and should the reference to consideration be confined to monetary consideration?
48. What are the risks and benefits of permitting a fee for consent to parting with possession for consideration, as outlined in option 5.11?
49. Is option 5.12A or option 5.12B preferable, and why?
50. For option 5.12B, what would be an appropriate cap for a fixed assignment fee?

6 Rights and responsibilities at the end of a tenancy

Submissions to the rights and responsibilities issues paper identified a range of issues arising under the current framework in relation to rights and responsibilities at the end of a tenancy, after it is terminated. These issues included:

- appropriate compensation when a tenant breaks a lease
- when severe hardship suffered by a tenant should be taken into account
- whether tenants should be liable to pay lease break costs in other extenuating circumstances, and
- the workability of the procedures landlords must follow when goods are left behind by tenants at the end of a tenancy.

6.1 Lease break fees

Where a tenant breaks a lease by not giving the required notice, what is an appropriate break fee may be uncertain.

Stand-alone options

- **Option 6.1 – Codify common law compensation principles for lease break fees.**
- **Option 6.2 – Fixed lease break fees as an optional clause in prescribed tenancy agreement.**

Background

Currently, the RTA does not require a tenant to pay fees in relation to breaking a lease, but does provide that if a tenant causes financial loss to the landlord, the landlord may seek compensation by applying to VCAT. Compensation may cover:

- rent until the property is re-let, or until the end of the lease (though VCAT will consider whether the landlord has taken steps to mitigate their loss)
- reasonable costs of readvertising the premises, and
- re-letting fees, usually calculated on a pro-rata basis and detailed in the lease, or in information provided at the start of a tenancy.

A tenant who believes they have been charged an excessive lease break fee can also apply to VCAT.

Issues

Feedback to the review was that the current system of compensation creates uncertainty for both parties over the lease break costs. Demand-side stakeholders contended that in many cases it can amount to substantial financial repercussions for a tenant, without providing a sufficient incentive for landlords or agents to find a new tenant promptly. The factors that VCAT considers when assessing a compensation claim and the steps a landlord should take to mitigate loss may not always be properly reflected in the lease break fees tenants are charged. Feedback has also noted that uncertainty about lease break costs may deter tenants from going into long term agreements.

Options developed around lease break fees aim to give greater certainty to parties about the liability of a tenant in the event of a lease break, and what is a reasonable fee. A fixed lease break fee should

not significantly exceed actual costs incurred by the landlord, but needs to sufficiently acknowledge the commitment of the fixed term that is being broken. Options 6.1 and 6.2 could operate in conjunction with each other, or as stand-alone options. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 6.1 – Codify common law compensation principles for lease break fees

Under this option, the common law principles generally applied by VCAT would be codified into the RTA, to give greater guidance around reasonable lease break fees. This would include:

- requiring advertising costs and re-letting fees to be calculated on a pro rata basis
- requiring the pro rata loss to be a percentage of what the landlord actually paid (not what the landlord may now be asked to pay the agent) for securing the tenant who is breaking the tenancy agreement
- preventing landlords from claiming for loss of rent where the landlord had served a notice to vacate, and
- requiring a landlord claiming for loss of rent to mitigate loss by placing the premises back on the rental market promptly at the same rent, and not unreasonably rejecting proposed new tenants.

Option 6.2 – Fixed lease break fees as an optional clause in prescribed tenancy agreement

Under this option, to provide certainty and administrative simplicity, an optional break fee clause would be added to the prescribed tenancy agreement, in lieu of the landlord seeking compensation.

For fixed term agreements, the fixed break fee would be five weeks' rent if a tenant breaks the lease in its first half, and four weeks' rent if the tenant breaks the lease in its second half.

Consultation questions

51. What other principles around compensation could be considered under option 6.1 to be codified into the RTA, to give greater guidance around reasonable lease break fees?
52. How can fixed lease break fees strike a balance between acknowledging the commitment of the lease that has been broken, and compensating for the actual loss incurred by the landlord?
53. Should the optional fixed lease break fee in option 6.2 be a set amount, or should the RTA prescribe a method for calculating the fee in proportion to the remaining term of the lease?
54. Should the optional fixed lease break fee in option 6.2 be higher for long term leases discussed in chapter 3.2, and if so, what factors should be relevant?
55. How can the RTA provide appropriate incentives for a landlord to find a new tenant promptly once a lease is broken?

6.2 Severe hardship

A tenant or landlord suffering severe hardship can only have that hardship taken into account by VCAT if the tenancy is still ongoing – if the tenancy has already ended, VCAT cannot consider the hardship when awarding compensation.

Stand-alone options

- **Option 6.3 – VCAT can take a tenant or landlord's severe hardship into account when awarding compensation after a lease is broken.**
- **Option 6.4 – In cases of tenant severe hardship, compensation to landlord capped at two weeks' rent.**

Background

The RTA sets out a procedure for severe hardship:

- VCAT can end a fixed-term tenancy early by reducing the fixed term, if VCAT is satisfied that, because of an unforeseen change in the applicant's circumstances, the severe hardship of the party applying to VCAT (either the tenant or the landlord) if the tenancy were to continue outweighs any hardship the other party would suffer if the tenancy were to end early, and
- VCAT has discretion to award compensation to the other party.

'Hardship' is not defined in the RTA, but VCAT interprets the term to encompass non-financial as well as financial forms of hardship.

Where a term is reduced on the application of the tenant, the factors examined by VCAT in considering compensation include whether the landlord will incur advertising expenses, have to pay pro-rata re-letting fees, and suffer any reasonably anticipated loss of rent at the end of the reduced term.

Where a term is reduced on the application of the landlord, the factors examined by VCAT in considering compensation include whether the tenant will incur reasonable relocation expenses, reasonably be able to obtain satisfactory alternative accommodation at the end of the reduced term, and suffer any other inconvenience for which compensation should be awarded.

Issues

Stakeholders suggested that compensation to a landlord should be capped or waived in cases that recognise a tenant's severe hardship. Concerns have also been raised that under the current RTA, a severe hardship application can only be heard if the tenancy is still on foot – if the tenant has abandoned or vacated the premises, the tenancy has ended and the tenant will be liable to compensate the landlord for breaking the lease. It was argued that VCAT should be able to take a party's hardship into account whether or not the tenancy has ended. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 6.3 – VCAT can take a tenant or landlord's severe hardship into account when awarding compensation after a lease is broken

Under this option, if a tenant or landlord can demonstrate severe hardship that outweighs the hardship suffered by the other party, VCAT should be able to take the severe hardship into account whether or not the tenancy has ended:

- if the tenancy is still on foot, in an application to end the fixed term early, or
- if the tenancy has ended, when awarding compensation to the other party.

Option 6.4 – In cases of tenant severe hardship, compensation to landlord capped at two weeks' rent

Under this option, where a term is reduced on the application of the tenant, the compensation that VCAT can award to the landlord would be capped at the equivalent of two week's rent.

Where a term is reduced on the application of the landlord, VCAT would retain its current discretion to award compensation to the tenant as it sees fit on a case by case basis.

Consultation questions

56. What are the risks, if any, of unintended consequences arising under option 6.3?
57. Is two weeks' rent an appropriate cap for compensation to the landlord in cases of tenant hardship as provided in option 6.4, should compensation be capped at some other amount or waived altogether, or should VCAT retain discretion to award compensation on a case by case basis?

6.3 Lease breaking in special circumstances

Tenants are liable to pay lease break costs even when there are extenuating circumstances.

Stand-alone option

- **Option 6.5 – Tenants in special circumstances not required to pay lease break fees.**

Background

Where a tenant requires temporary crisis accommodation or special or personal care, or is offered public housing, the current RTA recognises these special circumstances by permitting the tenant to give a 14 day notice of intention to vacate instead of the usual 28 days. However, this reduced notice period cannot be used to end a fixed-term tenancy agreement before the end of the fixed term without rendering the tenant liable for lease break costs.

Issues

Feedback received in the review suggested that if special circumstances apply the tenant should not be liable for lease break costs, consistent with the approach taken in the NSW legislation.

Under the NSW legislative model, tenants are not penalised for breaking a lease with 14 days' notice where limited special circumstances apply. The special circumstances include where a landlord

notifies the tenant of their intention to sell the property during the fixed term of the tenancy, if the tenant was not already informed of the proposed sale before the tenancy started. The aim of this provision is to resolve the tension between the landlord's right to sell their property and the tenant's quiet enjoyment of the property, and the loss of amenity of a tenant during a sale.

Another special circumstance where it has been argued that a tenant should be permitted to end a tenancy with 14 days' notice without paying lease break fees is where the landlord has refused the request of a tenant with a disability to make reasonable modifications to the property to meet their special needs. Property modifications are discussed in more detail in chapter 8.7.

It was also suggested that the current special circumstance relating to public housing should cover both forms of social housing (public housing and community housing), but only apply where the tenant offered social housing in fact accepts the offer.

In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 6.5 – Tenants in special circumstances not required to pay lease break fees

Under this option, a tenant would be permitted to end a tenancy with 14 days' notice without paying lease break fees or other compensation, if any of the following special circumstances applied:

- the tenant has been offered and accepted accommodation in social housing (public or community housing)
- the tenant requires special or personal care (including if the tenant has been offered and accepted a placement in Specialist Disability Accommodation)
- the tenant requires temporary crisis accommodation, or other alternative accommodation following an incident involving family violence
- the landlord notifies the tenant of their intention to sell the property during the fixed term, if the proposed sale was not already disclosed to the tenant before the tenancy agreement commenced, or
- the landlord has refused the request of a tenant with a disability to make reasonable modifications to the property to meet their special needs.

Consultation question

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?

6.4 Goods left behind

Stakeholder consultation identified that the procedures for goods left behind are cumbersome and outmoded, and should be updated in line with contemporary communication and selling practices.

Alternative options for stored goods procedure

- **Option 6.6A – Stored goods procedure based on NSW model, or**
- **Option 6.6B – Stored goods current procedure streamlined and modernised, or**
- **Option 6.6C – Stored goods current procedure with exception for high-value goods.**

Stand-alone options

- **Option 6.7 – Update notification requirements for stored goods.**
- **Option 6.8 – Retarget and streamline CAV assessment process.**

Background

Under the current RTA, the procedures that a landlord must follow when dealing with goods left behind by a tenant at the end of a tenancy are as follows:

- The landlord can immediately dispose of perishable foodstuffs, dangerous goods, and goods of no monetary value.
- Personal documents – the landlord must store personal documents for at least 90 days and take reasonable steps to notify the tenant, allowing the tenant to reclaim the personal documents after paying the landlord's reasonable costs. If the personal documents are not reclaimed after 90 days, the landlord can dispose of the documents in accordance with the law.
- Goods of monetary value – the landlord may only dispose of goods of monetary value if the total estimated cost of the removal, storage and sale of all those goods is greater than the total monetary value of all of those goods combined. Landlords can request that CAV inspect and make a formal assessment of which goods must be stored.
- Goods that cannot be disposed of – the landlord must store all goods that cannot be disposed of for 28 days and must notify the former tenant within seven days (by sending a prescribed notice to their forwarding address or, if it is not known, by publishing a prescribed notice in the newspaper), and must allow the former tenant to reclaim their goods after paying the landlord's reasonable costs.

  If the stored goods are not reclaimed after 28 days, the landlord must arrange for the goods to be sold at public auction as soon as possible, and must notify the former tenant via any known forwarding address or, if it is not known, by advertising the auction in the newspaper at least 14 days before the auction. The landlord must deal with any proceeds from the auction, after deducting their own expenses, in accordance with the *Unclaimed Money Act 2008* (lodging it with the State Revenue Office) and may appeal to VCAT for compensation from the Residential Tenancies Fund for any deficit.

  The former tenant can apply to VCAT for compensation if they suffered loss because the landlord did not follow the goods left behind procedures in the RTA. If VCAT finds that a landlord is liable for goods they disposed of, but the landlord relied on a CAV assessment

when disposing of the goods, VCAT can order that compensation be paid to the landlord from the Residential Tenancies Fund.

Issues

Feedback to the review raised concerns that the current procedures are cumbersome and outmoded (in particular, the references to placing advertisements in newspapers and arranging public auctions), and should be streamlined and modernised. Some submissions also raised concerns that the current test to assess which goods of monetary value must be stored can result in the disposal of some high-value goods.

The following options have been developed to ensure procedures for goods left behind align with contemporary communication and selling practices, and to enable tenants to recover goods left behind in a reasonable timeframe, without placing unreasonable burdens on landlords. Consideration has also been given to the need to accommodate people in special circumstances (e.g. those fleeing family violence).

It is not proposed that there would be any changes to the existing procedures for immediate disposal of perishable foodstuffs, dangerous goods, and goods of no monetary value, or the existing procedures for personal documents left behind.

Option 6.6A – Stored goods procedure based on NSW model

Under this option, a landlord would have to store all goods of monetary value for 14 days, regardless of whether their value outweighs any removal, storage and sale costs.

If the former tenant reclaims the goods, the landlord can charge an occupation fee (the equivalent of one days rent for each day they hold the goods, up to the equivalent of 14 days rent).

If the stored goods are not claimed within 14 days or a further agreed period, the landlord would be able to sell the goods (by any method of sale) or simply dispose of them in any other lawful manner. If the landlord sold the goods, the landlord would have to keep a record of the goods sold, and after covering their reasonable costs lodge the balance of the sale proceeds with the State Revenue Office. The current ability to claim compensation from the Residential Tenancies Fund for any deficit would be removed.

Option 6.6B – Stored goods current procedure streamlined and modernised

Under this alternative option, the current test for assessing which goods must be stored would be retained – goods of monetary value must be stored unless the total estimated cost of the removal, storage and sale of all those goods is greater than the total monetary value of all those goods combined, in which case the goods can be disposed of.

Detailed CAV guidance materials would assist landlords with making assessments, but the ability to request a CAV assessment would be limited to specific circumstances (see option 6.8 below).

If the stored goods are not claimed within 28 days, the landlord would be permitted under this option to either sell the goods (by any method of sale) or simply dispose of them in any other lawful manner. The requirement to publish a notice of any auction would be removed. If the landlord chose to sell the goods, the landlord would have to keep a record of the goods sold, would be able to cover their reasonable costs from the sale proceeds, and would be required to lodge any remaining balance with the State Revenue Office. The current ability to claim compensation from the Residential Tenancies Fund for any deficit would be removed.

Option 6.6C – Stored goods current procedure with exception for high-value goods

Under this alternative option, a landlord would be automatically required to store for 28 days any item with an estimated monetary value of $500 or more.

For the remaining goods of monetary value, the current test for assessing whether they need to be stored would be retained – they only need to be stored if the total monetary value of all those remaining goods combined is greater than the total estimated cost of the removal storage and sale of all those remaining goods combined. If the remaining goods must be stored, they too must be stored for 28 days.

Detailed CAV guidance materials would assist landlords with making assessments (both generally and for high-value goods), but the ability to request a CAV assessment would be limited to specific circumstances (see option 6.8 below).

If the stored goods are not claimed within 28 days, the landlord would be permitted under this option to either sell the goods (by any method of sale) or simply dispose of them in any other lawful manner. The requirement to publish a notice of any auction would be removed. If the landlord chose to sell the goods, the landlord would have to keep a record of the goods sold, would be able to cover their reasonable costs from the sale proceeds, and would be required to lodge any remaining balance with the State Revenue Office. The current ability to claim compensation from the Residential Tenancies Fund for any deficit would be removed.

Option 6.7 – Update notification requirements for stored goods

Under this stand-alone option, the requirements to publish prescribed notices in newspapers would be removed. Instead landlords would be required to take reasonable steps to notify the former tenant – this could include via any known forwarding address, email address, telephone number (call or SMS), legal personal representative, next of kin, emergency contact or place of work.

Option 6.8 – Retarget and streamline CAV assessment process

Under this stand-alone option, consistent with detailed CAV guidance materials to assist landlords to make self-assessments of any goods that may need to be stored, the CAV inspections would be retargeted instead to particular instances of risk.

Landlords would be required to contact CAV prior to disposing of any goods of monetary value, if the landlord was aware of any of the following particular circumstances:

- death or hospitalisation of the tenant
- incarceration or detention of the tenant
- the tenant is in a family violence situation, or
- any other circumstance prescribed in the regulations.

CAV may provide advice to the landlord and/or conduct an assessment in these circumstances.

Consultation questions

59. Which of the alternative options outlining procedures for dealing with goods to be stored best balances the interests of landlords and tenants?
60. Under option 6.7, to what extent should the RTA set out the reasonable steps a landlord must take to attempt to notify a former tenant about goods left behind?
61. In what circumstances are landlords most in need of assistance from CAV for advice and assessments in relation to goods left behind?
62. Under option 6.8, should landlords be under an obligation to contact CAV in the outlined circumstances, and if so, how should the obligation be framed and what should be the consequences of non-compliance?

7 Bonds and rent

This chapter sets out stakeholder feedback and presents options on the following issues concerning the processes and rules for bonds and rent:

- maximum bonds and rent in advance
- bond claims where all parties are in agreement or where there is a dispute
- the frequency of rent increases and rent increases during a fixed term tenancy
- rent payment fees and methods, and
- rental bidding.

In particular, options in this chapter seek to ensure that:

- the RTA reflects current market conditions and is adaptable to meet future changes
- the upfront costs of entering a tenancy are not excessive and reflect the ongoing costs of the tenancy
- landlords and tenants can feel assured that a bond is being held in trust that can be accessed to meet the cost of minor repairs or rent arrears
- tenants and landlords are able to place and be paid bond amounts in an efficient and timely fashion to assist them with moving costs or repairs
- the rules governing rent and bonds contribute to a positive culture where neither party feels penalised by the RTA and do not discourage supply in the market, and
- a positive non-adversarial culture is promoted within the rental sector generally where parties fell confident to confident to participate in the sector, and to respond appropriately when problems arise and achieve fair outcomes.

7.1 Maximum bond amounts and rent in advance

Current exemptions to both the maximum bond amount and maximum rent in advance (one month's rent) are not functioning as intended when the RTA was enacted. This can lead to the upfront costs of entering a tenancy being higher than 2 months' rent, which can disproportionally impact low income tenants.

Alternative options

- **Option 7.1A – Update high value exemption to reflect current market rents, or**
- **Option 7.1B – Update high value exemption to reflect current market rents and remove other exemptions, or**
- **Option 7.1C – Remove all exemptions but the VCAT exemption.**

Background

Bonds and rent in advance are charged prior to the commencement of a tenancy and impact the upfront costs of entering a tenancy. To ensure that bond amounts and maximum rent in advance are proportionate to the rent, the RTA sets a maximum amount that a landlord can request.

The maximum bond amount generally cannot exceed one month's rent under the tenancy agreement.

A landlord can ask for a bond amount in excess of one month's rent, or a guarantee in addition to a bond, where:

- the weekly rent is more than $350
- the tenancy agreement states that the property is the landlord's principal residence and the landlord intends to live there at the end of the tenancy, or
- the landlord applies to VCAT and is granted an exemption under section 33 of the RTA.

A rooming house resident cannot be charged a bond amount that exceeds 14 days' rent.

As with bonds, the RTA sets out rules for the maximum amount of rent in advance a landlord can require a tenant to pay. The amount of rent in advance that can be charged depends on how frequently rent is due, and whether the rent is more than $350 per week.

Table 7.1: Maximum rent in advance

Frequency and amount of rent payable	Maximum amount of rent in advance
Rent is required to be paid weekly (no monetary cap)	The landlord cannot ask for more than 14 days' rent in advance
Rent is required to be paid other than weekly (ie fortnightly or monthly), and is $350 per week or less	The landlord cannot ask for more than one months' rent in advance
Rent is higher than $350 per week	No limit on amount of rent in advance (the landlord can charge rent in advance for up to the full term of the tenancy agreement)

A rooming house resident cannot be asked for more than 14 days' rent in advance.

Issues

Feedback to the review raised concerns about the exemption to maximum bonds and rent in advance that applies when weekly rent exceeds $350 (the high value exemption). Stakeholders noted that bonds commonly exceed one month's rent, because a weekly rent of $350 is no longer high value.

Analysis of the ABS survey of income and housing shows that 13.8 per cent of private rental tenants in Victoria pay bonds that are higher than one month's rent.

In a study commissioned by the TUV, tenants were asked about the factors they considered most important in selecting a dwelling. Affordability of the bond was the least frequently selected as important. Respondents earning less than $40,000 were more likely to rate 'the affordability of the bond' (70 per cent) as very important, while fewer (58 per cent) of those earning $60,000-80,000 rated this as important.

When tenants were asked to give general feedback about their rental experiences in Victoria during CAV's market research project, 1 per cent of tenants raised that they felt bonds were too expensive.

Submissions to the review raised the issue of the rent in advance being allowed to exceed one month's rent for a greater proportion of tenancies than was intended when the high value exemption was legislated. This can lead to tenants facing higher upfront costs for entering a tenancy.

The exemption for properties with weekly rent exceeding $350 was originally intended to apply to high value properties (at the time, the top 20 per cent of properties in Melbourne). When the RTA was introduced, $350 was more than three times the weekly rent for Victoria.

In the June quarter 2016, over 50 per cent of new tenancy agreements in Victoria had a weekly rent higher than $350. Therefore this nominal value is no longer relevant in today's prices.

A number of submissions to the review also raised that maximum bond amount does not always cover the cost of repairs and rent arrears when tenancies go wrong, particularly with longer term tenancies.

The following options have been developed to update how the RTA allows exemptions to the maximum bond amount and rent in advance to reflect current market conditions and to be adaptable over time.

Option 7.1A – Update high value exemption to reflect current market rents

High value exemption

Under this option, the high value exemption to the maximum bond amount and maximum rent in advance would be updated to reflect current market rents in a way which can adjust over time, for example, 3 times the median rent for Victoria for the most recent March quarter (based on a relevant market indicator, adjusted annually at financial year).

This amount would be published on the CAV website prior to 1 July.

The high value rental amount could be set out in the regulations to enable greater flexibility to update it if required.

Other exemption categories (applicable only to maximum bond amounts, not maximum rent in advance)

Maintain the current exemption categories for maximum bond amounts allowed under the RTA, where:

- the tenancy agreement states that the property is the landlord's principal residence and the landlord intends to live there at the end of the tenancy (principal residence exemption), or
- the landlord applies to VCAT (or another appropriate body) and is granted an exemption under section 33 of the RTA, under which VCAT must have regard for the character and condition of the property and its fittings (the VCAT exemption).

Option 7.1B – Update high value exemption to reflect current market rents and remove other exemptions

Under this alternative option, the high value exemption to the maximum bond amount and maximum rent in advance would be updated as per option 7.1A and there would not be any other permitted exemptions to the maximum bond amount.

Option 7.1C – Remove all exemptions but the VCAT exemption

Under this alternative option, the high value exemption (to the maximum bond amount and maximum rent in advance) and the principal residence exemption (to the maximum bond amount) would be removed but the VCAT exemption to the maximum bond amount would remain.

Consultation questions

63. Which option most fairly balances the needs of tenants in limiting the upfront costs of entering a tenancy, and for landlords to have security that tenants will meet the costs of damage to the property or unpaid rent?
64. Would any of the options for limiting maximum bonds and rent in advance result in unintended consequences?

7.2 Bond claims

Current processes for bond claims can lead to unnecessary delays to the repayment of bonds and cause undue uncertainty about financial obligations for both tenants and landlords.

Stand-alone option

- **Option 7.2 – Speedier bond repayments when all parties are in agreement.**

Alternative options

- **Option 7.3A – Current model strengthened, or**
- **Option 7.3B – Automatic bond repayments when a bond claim is not disputed, or**
- **Option 7.3C – Automatic bond repayments for tenants when a claim is not disputed and evidence based claims for landlords.**

Background

The RTA sets out two processes for allocating the bond at the conclusion of a tenancy; one process for when the landlord and tenant agree on the allocation of the bond, and one process for when the landlord and tenant cannot reach agreement.

When the landlord and tenant agree on the allocation of the bond:

- both the landlord and the tenant must sign a completed bond claim form stating the amount to be paid to each party,
- where any part of the bond is to be paid to the landlord, the bond claim form cannot be signed more than seven days before the end of the tenancy, and
- the RTBA then pays the bond to the bank accounts nominated on the claim form.

When the landlord and the tenant do not agree on the allocation of the bond:

- either the landlord or the tenant may apply to VCAT for a hearing to resolve the disagreement, and
- the landlord must apply to VCAT within 10 business days of the tenant vacating the property.

The tenant has the option of applying to VCAT at any time following the conclusion of a tenancy. There is no fee for making a VCAT application for a bond refund.

Issues

Submissions to the review raised that tenants often face unnecessary delays in the return of their bond. This can include when there is agreement between parties and when the bond is in dispute.

CAV's market research project did not directly ask tenants and landlords about bond claims, however both tenants and landlords raised bond claim related issues in their responses to questions about their experiences of the rental market, their perceptions of whether rental laws favour tenants or landlords and dispute:

- 3 per cent of landlords raised difficulties with the RTBA and the length of time to claim bonds as issues when asked to give general feedback about their rental experience
- 8 per cent of landlords who believe that rental laws favour the tenant raised their difficulty in recovering funds from the bond (including time to receive claims or the bond not meeting repair costs) when asked about why they perceive that laws favour tenants, and
- 33 per cent of tenants perceive that bond claims are a main area of disputes (3rd most common).

When the landlord and tenant agree on the amount of the bond to refund (and to whom) at the end of a tenancy, both parties must agree the amount to be paid to either party, which the landlord or agent then lodges with the RTBA.

When there is agreement between parties on the allocation of the bond, the RTA does not specify how quickly landlords and agents must lodge a bond claim form to reimburse tenants with their agreed portion of the bond.

Stakeholders raised that, in some cases, considerable delays can occur – for example, if agents only lodge claim forms monthly as part of their business practice. These delays can create financial stress for tenants when they are moving from one rental property to another.

As tenants are often not present at final inspections, it can be unclear to tenants if the landlord intends to claim against the bond and the landlord or agent may not take reasonable steps to notify the tenant.

Submissions to the review noted that VCAT commonly grants landlords extensions beyond the ten business days allowed to claim against the bond. Supply-side stakeholders have also noted that this is because VCAT may not grant a hearing without invoices for completed work and it can be difficult to arrange for repairs to be completed within 10 business days of a tenancy.

In cases where only part of the bond is in dispute, there is no process for the part of the bond which is not in dispute to be paid out to the tenant.

Delays to distributing a disputed bond at the conclusion of a tenancy can cause undue uncertainty about financial obligations for both tenants and landlords, and also make it difficult for tenants experiencing financial hardship to cover the bond for a subsequent rental agreement.

The following options have been developed to encourage quicker repayment of bonds and to incentivise landlords and tenants to resolve bond disputes independently. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 7.2 – Speedier bond repayments when all parties are in agreement

Under this option, when all parties are in agreement about the repayment of the bond at the conclusion of a tenancy the landlord must lodge their consent to the bond being paid out as agreed within 14 days (or another prescribed period) of the conclusion of the tenancy. This would bring the timeline into alignment with when landlords must lodge a claim against the bond to VCAT.

Option 7.3A – Current model strengthened

Under this option, when all parties cannot reach agreement about the repayment of the bond, either the landlord or the tenant would be able to apply to VCAT (or another appropriate dispute resolution body) for a hearing to resolve the dispute.

- New requirement: in order to apply to VCAT the landlord must demonstrate that a reasonable attempt was made to resolve the dispute with the tenant (including sending copies of the final inspection/condition report, along with any estimates, quotes, invoices or receipts relating to the claim to the tenant).
- The landlord must apply to VCAT within 14 days of the tenant vacating the property.

As with the current RTA, the tenant has the option of applying to VCAT at any time following the conclusion of the tenancy if the landlord has not applied within the 14 days.

Option 7.3B – NSW model (automatic bond repayments when a bond claim is not disputed)

Under this alternative option, either party may apply to the RTBA to have the bond released without the other party's consent.

- The RTBA will notify the other party, which then has 14 days to apply to VCAT (or another appropriate dispute resolution body) to dispute the claim otherwise the claimed amount will be paid.
- When lodging the application to VCAT, agents/landlords must attach copies of the final inspection/condition report, along with any estimates, quotes, invoices or receipts relating to the claim and provide them to the tenant.
- The RTBA must be notified once the application to VCAT has been made. The RTBA will hold the bond until a decision has been made.

Option 7.3C – Automatic bond repayments for tenants when a claim is not disputed and evidence based claims for landlords (hybrid of current model and NSW model)

Under this alternative option, the tenant could apply to the RTBA to have the bond released if the landlord does not dispute the claim. However, if the landlord lodged a claim against the bond without the tenant's agreement, the landlord would be required to substantiate their claim at VCAT or another prescribed dispute resolution body.

Tenant application

- Where the tenant applies the landlord is immediately notified of the claim and has 14 days to apply to VCAT (or another prescribed body) to dispute the claim or the bond will be paid out to the tenant/s.

- When lodging an application to VCAT, agents/landlords must attach copies of the final inspection/condition report, along with any estimates, quotes, invoices or receipts relating to the claim and provide them to the tenant.
- The RTBA must be notified once the application to VCAT has been made. The RTBA will them hold the bond until a decision has been made.

Landlord application

- The landlord would apply to VCAT (or another appropriate dispute resolution body) for a hearing to resolve the dispute.
- In order to apply to VCAT the landlord must demonstrate that a reasonable attempt was made to resolve the dispute with the tenant (including sending copies of the final inspection/condition report, along with any estimates, quotes, invoices or receipts relating to the claim to the tenant).
- The landlord must apply to VCAT within 14 days of the tenant vacating the property.

Consultation questions

65. How well does option 7.2 address stakeholder concerns about delays to bond repayments when all parties are in agreement?
66. Which option/s do you prefer for facilitating bond repayments when parties cannot reach agreement, and would you suggest any changes to improve the operability of the option?
67. Are the additional protections for tenants under option 7.3C necessary and/or fair, or is the administrative simplicity and balance of the NSW model preferable?

7.3 Frequency of rent increases

The frequency of rent increases (6 monthly) allowed under the RTA, while rarely used, can make it difficult for tenants to adequately plan for their expenses.

Stand-alone options

- **Option 7.4 – Annual rent increases.**
- **Option 7.5 – Disclosure of rent settings in fixed term leases.**

Background

The RTA restricts a landlord's ability to increase rent to once every six months, but does not restrict the amount by which rent can be increased.

Currently, rent increases cannot occur more than once every six months and the landlord must give 60 days' notice of the increase.

The rent cannot be increased during a fixed term tenancy unless provision is made for a rent review in the agreement. If such a provision exists, 60 days' notice of the rent increase must be given.

While the RTA does not explicitly limit the amount by which rent is increased, it provides grounds for challenging a rent increase on the basis that the effect of the increase causes the rent to be

unreasonably in excess of market rents. The underlying rationale of this requirement is that rent should be fair, and not excessive or extortionate so as to cause hardship to tenants and undermine security of tenure.

Tenants who feel that a rent increase is excessive may ask CAV to perform a rent assessment, which is based on a comparison of market rents for comparable properties. If the rent assessment finds the increased rent is excessive, a tenant or resident can use the assessment report, if they wish, to seek a ruling on their rent at VCAT. The tenant or resident has 30 days from receiving the rent assessment report to apply to VCAT for a hearing.

Issues

A number of submissions to the review suggested limiting how often landlords can increase rent.

CAV's market research project asked tenants about the frequency of rent increases and 35 per cent felt that it was reasonable for rent to increase once per year, while 54 per cent though once every two years was reasonable and only 2 per cent felt that once every 6 months was reasonable.

When asked about how often they increase rent, less than 1 per cent of landlords said they increase rent 6 monthly, whereas 23 per cent of landlords generally increase rent once every 12 months, 39 per cent increase rent less frequently than every 12 months. Similarly only 4 per cent of property managers increase rent every 6 months, while 62 per cent increase rent every 12 months and 15 per cent less frequently than every 12 months.

The survey results indicate that 6 monthly rent increased are uncommon and generally rent increases occur once every 12 months or less frequently.

The frequency of allowable rent increases is particularly critical to the question of how to make tenancies sustainable. The amount and frequency of rent increases can impact on a tenant's ability to meet the ongoing costs of their accommodation.

Rent increases can leave tenants vulnerable to rental stress, especially low-income tenants, or tenants who experience changed financial circumstances or an increase to non-housing living costs.

The following options have been developed to improve certainty for tenants about the ongoing costs of their tenancy without discouraging supply.

Option 7.4 – Annual rent increases

Under this option, rent would only be allowed to be increased once every 12 months during a tenancy.

Option 7.5 – Disclosure of rent settings in fixed term leases

For fixed term tenancies, rent could only be increased if the tenancy agreement sets out the amount of or method of calculation for the increase (for example, no more than X per cent in a 12 month period), and the increase occurs 60 days after notice is provided and 12 months after the commencement of the tenancy.

Consultation questions

68. What are the benefits and risks of restricting rent increases to once per year?
69. Are there any unintended consequences from requiring landlords to disclose how rent will be set during a fixed term tenancy?

Rent control

A number of stakeholder submissions to the review suggested introducing rent price controls to address their concerns about rental affordability.

Rent price controls represent a significant economic lever with far-reaching consequences for both stock quality and supply. In addition to reducing incentives for landlord investment in rental stock, rent price controls reduce incentives to properly maintain rental properties and reduce tenant mobility by discouraging tenants from moving as their needs change.

Rent price controls are not in place in any other State or Territory of Australia. While rent price controls exist in certain markets overseas (for example, Germany), these markets are fundamentally different to Victoria, both in terms the nature of landlords in the market (larger institutional investors that can better manage risks) and easier pathways for landlords to evict tenants who are not meeting their obligations.

Because of this, rent price controls should not be viewed purely in the context of the review of the RTA. They form part of the broader debate on affordability and would need to be viewed holistically in the context of future directions in government housing policy across the entire housing market.

7.4 Rent arrears

The processes for rent arrears are discussed under terminations in chapter 11.1.7 of this paper.

7.5 Rent payment fees and methods

A tenant can currently be charged for paying rent through a third-party rent collector, which is often the method for paying rent required by their landlord and set out in their tenancy agreement.

Stand-alone options

- **Option 7.6 – One fee-free method of paying rent.**
- **Option 7.7 – Landlords must accept Centrepay payments**

Background

The RTA states that tenants must pay rent in accordance with the terms of their tenancy agreement. It does not set the frequency or method of rent payments.

The RTA sets out that a landlord cannot charge a tenant for issuing a rent payment card or establishing or using direct debit facilities.

Issues

Developments in modern banking and payment processing mean that rent is mostly paid by electronic funds transfers, direct debits or rent payment cards, whereas cheques and cash were more common in 1997.

Submissions to the review noted that agents, like other businesses, are increasingly using external (third-party) service providers to access administrative systems that, due to cost, are normally only available to larger organisations. The large volume of residential rent payments that must be received, processed and banked each month, has created a market for businesses that specialise in rent payment services.

While the RTA does not allow tenants to be charged for the establishment or use of a direct debit facility to pay rent (section 51), third-party rent collectors (excluding Centrepay) often charge tenants for the use of their service to pay rent on a monthly basis, as well as for dishonouring a direct debit.

Legal precedent for rent payment fees appears to be at odds with current industry practice. In several cases, VCAT has upheld the position that fees charged by a third-party rent collector for the direct debit of rent are prohibited and ordered that the tenant be refunded any fees charged.

The RTA provides that rent under a tenancy agreement is payable in the manner (if any) specified in the agreement. In practice, tenants may not have a choice about whether to use a third-party collector if that is how their landlord or agent chooses to manage rental payments, particularly as there is no requirement for tenants to be offered particular options for rent payment, such as electronic transfer, phone, BPay and POSTbillpay.

Submissions to the review raised the issue of some landlords not accepting Centrepay. Centrepay is a voluntary service operated by the Commonwealth Department of Human Services that helps tenants by automatically deducting bills, including private rent, from their Centrelink payments. It also benefits landlords by ensuring that rent is paid in a timely manner. Landlords are charged $1 per transaction by Centrepay for the service.

The following options have been developed to address a gap in the RTA resulting from technological advancements, and to limit discrimination based on payment methods. In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 7.6 – One fee-free method of paying rent

Under this option, based on the NSW model, landlords would be required to offer tenants at least one fee-free, convenient method of paying rent (a common method of accepting payment, for example an electronic transfer).

Landlords would also be required to informed tenants about any extra costs involved with a particular method of payment before they consented to use it.

Option 7.7 – Landlords must accept Centrepay payments

Under this option, landlords would be required to accept Centrepay (or another prescribed payment service) as a method of payment from tenants.

Consultation questions

70. Would option 7.6 appropriately balance the interests of landlords and tenants in regulating rent payment fees?

71. Are there any unintended consequences that could result from requiring landlords to accept Centrepay payments?

7.6 Rental bidding

Rental bidding can result in a lack of transparency and unfairly impact tenants at the application stage, both in terms of increased costs and poor agent/landlord conduct.

Alternative options

- **Option 7.8A – rental properties must be advertised at a fixed price and landlords and agents cannot request rental bids, or**
- **Option 7.8B – rental properties must be advertised at a fixed price and landlords and agents cannot request or accept rental bids.**

Background

The RTA does not prohibit rental bids or auctions, although advertising a rental property at a price that is lower than a landlord will accept may contravene the prohibition on misleading or deceptive conduct in the Australian Consumer Law.

Issues

Rental bids occur when applicants for a rental property offer more than the advertised rent for a property (or more rent in advance than would be requested by the landlord) in order to secure a lease. Landlords and agents can actively encourage rental bids through practices such as advertising properties with a rental range instead of a fixed price or requesting bids.

The lack of transparency in the rental bidding process, which is controlled by the landlord or agent, creates an information asymmetry between the parties that could allow agents or landlords to falsely 'bid-up' prices. This could have a disproportionate impact on vulnerable tenants.

An argument in favour of allowing rental bids and auctions is that it establishes the true market rent, or the maximum people are willing to pay in a competitive rental market. However, the lack of transparency in the bidding process, which is controlled by the landlord or agent, creates an information asymmetry between the parties that could allow agents or landlords to falsely 'bid-up' prices. This could have a disproportionate impact on disadvantaged tenants.

In response to evidence of rental auctions in 2007, the REIV implemented guidelines for its members to prevent misleading and deceptive conduct by agents. These guidelines require agents to:

- ensure the initial advertised price is realistic
- refuse any counter-offer once a tenant has been told their application is successful
- use a range of prices when advertising
- ensure the initial advertised price is realistic, and

- not initiate a bidding process for a rental property.

The effectiveness of the REIV guidelines in preventing misleading conduct by agents and landlords may be limited. CAV's market research project indicated that 19 per cent of tenants have offered a rental bid and of those 23 per cent chose to offer a rental bid did so at the request or suggestion of the agent or landlord.

15 per cent of property managers frequently experience tenants offering rental bids and 48 per cent occasionally experience rental bids.

Only 8 per cent of property managers felt that rental bidding always assists tenants to secure a property, whereas 48 per cent felt that bidding sometimes helps and 42 per cent felt that rental bids do not help to secure a property.

The research results indicate that while generally rental bidding is led by tenants, a significant proportion of rental bids are solicited by landlords and agents.

The following options have been developed to address stakeholder concerns about rental bidding through discouraging agents and landlords from soliciting rental bids, and in the case of option 7.8B, accepting them.

Option 7.8A – Rental properties must be advertised at a fixed price and landlords and agents cannot request rental bids

Under this option, the landlord or agent would be required to:

- advertise the property at a fixed price (for example, no rental ranges)
- not invite a prospective tenant to make an offer at a price higher than the fixed price, and
- not accept a bond for a tenancy that was not advertised at a fixed price.

Option 7.8B – Rental properties must be advertised at a fixed price and landlords and agents cannot request or accept rental bids

Under this option, the restrictions applied in option 7.8A would apply and an additional requirement would be that landlords would be restricted from accepting a rental bid from a prospective tenant (including offers of higher weekly rental or rent in advance).

Consultation questions

72. In your view, should the new RTA regulate rental bidding?
73. Which option for regulating rental bidding do you prefer, and why?
74. Would option 7.8B unfairly restrict a tenant's ability to offer a rental bid?

8 Property conditions

Residential tenancies legislation sets basic expectations about the condition in which rental properties must be offered and maintained by both parties to a residential tenancy agreement.

Property conditions are regulated in both the private rental housing and social housing sectors, with the exception of particular types of accommodation (for example, temporary crisis accommodation, and health or residential services regulated under other specialist legislation, including the *Health Services Act 1988*, the *Mental Health Act 2014*, and the *Disability Act 2006*). With some exceptions, regulation is largely replicated across other tenure types (that is, rooming houses, caravan parks, and residential parks).

The dual aims of protecting the landlord's asset, while also ensuring a habitable and safe environment for the tenant, are achieved through protections relating to:

- cleanliness, security and access to services
- property modifications
- damage, and
- maintenance and repairs.

8.1 Effectiveness of current regulation

As previously outlined in the issues paper, *Regulation of property conditions in the rental market* (the property conditions issues paper), rental property conditions are consistently the cause of enquiries and complaints reported to CAV, and the subject of proceedings at VCAT. Dominant issues are usually the tenant's failure to maintain, or avoid damage to, the property, and the timeliness of the landlord's response (if any) to requests for repairs.

Submissions to the property conditions issues paper identified a range of issues arising under the current framework, with the following recurring themes:

- the property condition report does not contain enough adequate information to support a tenant or landlord during their tenancy. Problems with the content and timing of condition reporting for vacant premises, as well as at relevant points during a tenancy (for example, when a tenant is replaced by someone else)
- the inadequacy of existing obligations requiring rental properties to meet current expectations relating to health, safety and modern amenities
- difficulty distinguishing property defects arising from wear and tear from wilful or malicious damage
- the inability to make property modifications for a diverse array of purposes, including to support tenants with a disability
- a lack of clarity about the standard of cleanliness, maintenance and repairs expected of both parties – including responsibility for types of maintenance not specified in the RTA (for example, maintaining smoke alarms)
- persistent complaints about delays in obtaining repairs, and
- a lack of appropriate sanctions for non-compliance with the RTA.

This chapter outlines a range of options that respond to these issues, drawing both on suggestions made by stakeholders and approaches adapted from other Australian jurisdictions. Although the options primarily target general tenancies, in some instances they also foreshadow potential applications to other tenure types, notably rooming houses.

Some issues relating to property conditions may be discussed in other parts of this paper, particularly those dealing with powers of entry for various purposes (including repairs), termination of leases for malicious damage, and property modifications and liability for damage relating to family violence.

Certain issues raised by stakeholders in response to the property conditions issues paper may not be addressed because they fall within other Victorian Government portfolio areas, such as building or planning legislation, which also regulate certain aspects of property conditions and are responsible for setting consistent state wide policy on particular matters (for example recommended smoke alarm technology for residential housing). A similar approach is taken to issues relating to asbestos-containing materials, which are regulated under occupational health and safety laws. The reason for this is that, although residential tenancies legislation often plays a role in facilitating compliance with obligations set out in other legislation, it cannot impose these obligations in the first instance as they are already subject to a whole-of-Government approach aimed at promoting consistent policy outcomes.

8.2 Condition reporting – Measuring changes in a property's condition

Although condition reporting is regarded as a valuable process for landlords and tenants, stakeholders identified a range of improvements that could be made – for example, more frequent reporting to ensure evidence is collected about the state of a property that might better clarify the parties' liability for any damage; photographic evidence to increase accuracy of reporting; longer timeframes to enable tenants to complete and return reports; content relevant to the parties' respective duties to maintain the condition of the property; and protections against false, misleading or deceptive reporting.

Stand-alone options

- **Option 8.1 – Expanded circumstances in which a condition report is required.**
- **Option 8.2 – Change timeframe for returning condition report.**
- **Option 8.3 – Condition report as evidence of need for repair.**
- **Option 8.4 – Tenant to complete condition report if one is not provided.**
- **Option 8.5 – Condition report checklist.**
- **Option 8.6 – Prohibition on false, misleading or deceptive information.**

Background

So that a tenant is not held responsible for anything they have not caused, and to provide a point of comparison with the state of the property at any later point, the parties must complete a document known as a condition report.

This documents the state of the property when the tenant moves in, and subsequently when a property inspection occurs (for example, every six months or on request). It is intended to be useful if there is a dispute about whether anything needs to be repaired, and who should pay for any cleaning, damage, or replacement of missing items. For this reason, it is treated as conclusive evidence of the

state of repair or general condition of the rented property on the date specified in the report (section 36 of the RTA). Its form is not prescribed, although a sample has been developed by CAV to assist landlords and tenants. The expectation is that the report will indicate anything that can be discovered through a reasonable inspection of the property, and either party can disagree with the contents of the report – for example, by writing on the relevant part of the report (section 36 of the RTA for general tenancies, sections 97-98 for rooming house residents).

Once the tenant has paid a bond, the landlord or agent give the tenant two signed copies of the condition report before they move in, and faces a criminal penalty punishable by a fine of up to 10 penalty units if they do not. The tenant then has three business days from the time they move in to sign the report and return it to the landlord or agent.

Issues

Stakeholder feedback showed that existing processes for recording the condition of rented premises need to be refined. For most tenure types, the evidence base for these issues is largely anecdotal, although some were acknowledged by stakeholders from both the supply and demand sides of the rental sector, as well as by VCAT. Key issues highlighted that:

- a condition report often may not be completed at all, regardless of whether a bond has been taken
- tenants may not understand that they can disagree with the contents of the report once they have moved into the property, or if they do understand, may not feel empowered to disagree because of limited housing options
- the content of the report is limited in that it does not provide crucial information, such as whether any appliances have been recently serviced and are in good working order
- the tenant may not have had an opportunity to inspect the vacant premises before taking possession, either at all or during daylight hours
- the current three-day limit for the tenant to complete and return the report is too short, particularly if they have difficulty reading or writing in English or live in a rural or regional area where postal services may take longer to reach, and
- reports are not always updated when a property is sub-let or an existing tenancy right is assigned, potentially exposing the incoming tenant to liability for damage they did not commit.

Repairs issues are the biggest cause for dispute under the RTA, including claims on bonds by landlords and applications for compensation for reduced amenity by tenants. So that the condition report remains an important source of evidence for both parties who, at some stage, may rely on it to support their claim, the RTA should support the parties' ability to:

- obtain a condition report at key points of a tenancy lifecycle
- obtain information that is as accurate as possible about the state of the premises, and
- have their views on a property's condition documented, where relevant.

Option 8.1 – Expanded circumstances in which a condition report is required

Drawing on an equivalent approach in Queensland (section 65 RTA) and NSW (section 29 RTA), the following option expands the set of circumstances in which a condition report must be completed.

A condition report would be required even when a bond is not collected.

For condition reports completed at the start of a tenancy, the RTA would provide that the:

- report must be completed by or on behalf of a landlord and given to the tenant on or before the day the tenant is to take possession of the property
- tenant must be given an opportunity to inspect the property in a vacant state before they move in
- landlord or agent must provide two copies of the condition report, and keep a third copy for their records as proof of what was given to the tenant, and
- tenant (or tenants, if there are more than one) must complete the report once they have moved in, and subsequently give a signed copy to the landlord or landlord's agent

A condition report would also need to be completed at the end of a tenancy, at, or as soon as practicable after, the termination of a residential tenancy agreement. The landlord or landlord's agent must record the condition of the property on the copy of the ingoing condition report and give it to the tenant to sign.

In addition, a condition report must be completed, subject to any notice of entry requirements (indicated in brackets), under the following circumstances:

- for the purposes of a periodic inspection, on the day of the inspection (7 days' notice)
- when a lease is transferred or sub-let, on or before the day the assignee or sub-tenant is to take possession of the premises, and
- where the landlord has been notified of an incident involving family violence on the premises (24 hours).

Option 8.2 – Change timeframe for returning condition report

This option changes the time frames in which the tenant must complete and return a condition report:

- at the start of a tenancy, the report would need to be completed, signed by all tenants and returned, no later than five business days after moving in (or if the report is given to them after they move in, five business days from the time they receive it).
- at the end of a tenancy, the:
  - report would need to be completed and returned by the tenant no later than five business days after receiving the report, and
  - tenant, if they are no longer living in the premises, would need to be given a reasonable opportunity to inspect the premises and complete the report within those five days.

Option 8.3 – Condition report as evidence of need for repair

A report that is completed at the end of the tenancy and at any other point required by the RTA would also be conclusive evidence of its contents, as for the initial condition report.

The tenant would be able to disagree by endorsing the report accordingly. In this instance, the report would only be evidence of the state of the property to the extent of the parties' agreement.

The RTA would further clarify that the landlord is taken to have been notified of any defects or outstanding repairs noted in the report, entitling the tenant to invoke the processes for obtaining either an urgent or non-urgent repair (see chapter 8.10 of this paper).

Option 8.4 – Tenant to complete condition report if one is not provided

Under this option, the RTA would put beyond doubt that a tenant who is not provided with a condition report – either at all, or within the time frame provided by the RTA – can complete a condition report and give it to the landlord or agent at any time between inspecting the premises and five business days after moving in. The landlord or agent must sign and return a copy of the report to the tenant, subject to any dispute about its contents.

Option 8.5 – Condition report checklist

Under this option, which is influenced by a similar approach in NSW, the condition report would prescribe the inclusion of certain information that would assist in determining whether a property complied with the parties' various duties in the RTA to maintain its condition (see chapter 8.6 of this paper). The parties would have the flexibility to compile a more detailed report.

In addition to providing ample space to make any notes about a property's features, the report would require time stamped photos of the property's features to be taken during an inspection and attached to the report. Guidelines on how to produce such photos will be developed to assist the parties, as well as property managers, to comply with this requirement.

The report would also indicate:

- a clear warning to tenants outlining the importance of the document, that they may disagree with what is listed, and they must return the document within the required timeframe
- whether any services to the property (including essential services, telecommunications and internet connections) are working
- whether any mandatory requirements in the RTA have been satisfied. This would be achieved through a checklist with specific criteria reflecting the features discussed in chapter 4.4 of this paper – for example, indicators of:
  - cleanliness (for example, the property is free of rubbish and the previous tenant's belongings, and surfaces have been swept and washed)
  - good repair (for example, service history for gas and electrical appliances, and safety devices such as smoke alarms)
  - security (for example, deadlocks on external doors and windows that may be secured against entry)
  - proposed measures such as fitness for habitation (for example, the property does not exhibit pest or vermin control issues or evidence of problems relating to mould in main living areas caused by external or structural factors, as opposed to tenant-generated mould such as not using exhaust fans where necessary, or not cleaning up spills), and
  - compliance with any other proposed minimum standards (for example, the property is structurally sound, meets any water or energy efficiency requirements etc. See chapter 8.5 for further discussion)
- additional matters responding to recurring complaints raised by landlords and tenants:
  - the availability of a council waste bin, and

- the state of any special or protected features of the property covered by a term or condition of the agreement.

In the context of rooming houses, the report would include a checklist indicating compliance with the rooming house minimum standards.

This option would be supported by stakeholder information developed by CAV about the impacts of not returning a completed condition report on their ability to prove any claims relating to the state of the property (either in defending a bond claim, or claiming compensation for reduced amenity or loss). Communication channels would include the Red Book, the RentRight App, and tailored material for CALD and other vulnerable and disadvantaged audiences. Agents and landlords would also be targeted via education about their obligations to provide a condition report.

Option 8.6 – Prohibition on false, misleading or deceptive information

In light of the evidentiary status of a condition report, the RTA would be amended to include a specific prohibition on making any false, misleading, or deceptive statements within a condition report. This is intended to overcome the difficulties in accessing the protections under the Australian Consumer Law, as discussed in chapter 4.4.

The aim of this option would be to deter the parties from falsifying the contents of a report (for example, by changing any notes made by the other party) or alleging compliance with any requirements in the RTA that cannot be verified through a physical inspection of the property.

Where either party suffers loss (including a loss of amenity) or other damage as a result of relying on the information, VCAT would be empowered to make any order it considers appropriate in the circumstances, including compensation and any of the remedies that are enlivened by a breach of duty.

Consultation questions

75. Does the requirement for providing the tenant with a condition report on or before the day they move in give the tenant sufficient time to determine whether vacant premises are suitable for occupation? If not, should the RTA be more specific – for example, should the RTA specify that the report must be completed and provided to the tenant a specified number of days before they are due to take possession of the premises?
76. Alternatively, should the condition report be completed at the time the tenant is presented with a tenancy agreement for signing? Are the premises likely to be vacant at that time so as to enable an accurate condition report to be completed?
77. Do the proposed changes to the contents of the condition report strike a balance between relevance and ease of completion? Should more details be included (such as water and power meter readings)?
78. What property features particularly relevant to other tenure types should be documented in a condition report?
79. Is five days after occupation too long a period for allowing the tenant to complete and return the condition report?
80. Does the proposed inclusion of photos in the report mitigate the risk of disagreement with the contents of a condition report?
81. Are the proposed condition reporting triggers adequate? Should a condition report be required more or less often?

8.3 Condition of vacant property at the start and end of a tenancy

The condition in which their property is left is important for landlords because it can impact on their ability to relet it to new tenants without delay. It can also minimise the risk of any trailing issues associated with a previous tenancy.

For tenants, the end state of the property can impact on the tenant's ability to recover their bond. Any damage not noted in the condition report and which is not ordinary wear and tear may give the landlord a right to compensation or deduction from the bond.

Stakeholder feedback indicates that the meaning and scope of existing requirements relating to the state of vacant premises are unclear. Recent case law has also identified a mismatch between the standard expected under the RTA, and actual practices when renting out premises that fall short of this standard.

Stand-alone options

- **Option 8.7 – Composite repair and cleanliness duties and consideration of additional criteria.**
- **Option 8.8 – Cleanliness and good repair clarified through guidelines.**
- **Option 8.9 – Prescribed cleanliness and repair checklist.**
- **Option 8.10 – Opportunity to repair or clean premises after vacating.**

Background

At the start of a tenancy agreement, a landlord must ensure that their rental property is vacant and in a reasonably clean condition (section 65). This is in addition to the landlord's duty to maintain the property in good repair (section 68). There is no equivalent cleanliness requirement for other tenure types, although the RTA imposes specific ongoing maintenance and repair obligations for caravan park, site and rooming house owners.

A tenant may delay moving in and avoid paying rent until the property is raised to the requisite standard, but cannot terminate the tenancy before moving in unless the state of the property is so serious that it is unfit for human habitation, destroyed so as to be rendered unsafe, or is not in good repair (section 226).

As the RTA does not explicitly provide for the tenant to leave a property in a particular condition, the applicable standard against which the property is assessed derives from:

- the tenant's duties to take care to avoid damaging the property (and reasonable care not to damage any common areas), not to make unauthorised modifications to the property, and to keep it reasonably clean during the tenancy, and
- the landlord's duty to maintain the premises in good repair.

Issues

The term 'reasonably clean' is not defined in the RTA, something that stakeholder consultation identified as an ongoing source of confusion about the exact state in which the property should be provided to incoming tenants and left by outgoing tenants.

In particular, conflict can arise when the parties' perceptions or expectations of cleanliness do not align. Stakeholders noted that, because of the absence of a definition, landlords can have a lower tolerance of ordinary wear and tear or modifications to the property, and end up placing unreasonable expectations on tenants that might subsequently lead to action for a breach of duty. This may be caused by various unpredictable factors, including overprotectiveness towards the property, and different personal standards or expectations of cleanliness. A lack of shared experience or understanding of the obligation to accommodate family members (for example, in the case of landlords with Aboriginal tenants) can also lead to a different understanding of what impacts on the property may be reasonable over the term of a tenancy.

There is currently no precedent for defining the term 'reasonably clean' in Australian residential tenancy law. Reliance is instead placed on non-binding, non-legislative options, such as guidance issued by regulators and legal precedent developed by tribunals interpreting the law.

The following examples are drawn from instances where VCAT has found rented premises to have fallen short of a reasonable standard of cleanliness:[14]

- exposed electrical wiring
- evidence of pest infestations, such as rats or mice on the property
- a visible accumulation of unregistered vehicles on the property
- excessively long, untended grass that is the subject of a notice from a local council or fire authority
- storage of salvaged material and goods, and
- hoarding of excessive amounts of furniture, papers and/or household goods, which may involve fire risk and occupational health and safety.

Barriers to repair

Rent levels can often be influenced by the age and condition of a property, and landlords who charge amounts commensurate with such factors may feel less inclined to rectify any existing defects. Stakeholder feedback noted that poor maintenance is often not a barrier to letting out properties, particularly in the lower-cost sector of the market, and that incoming tenants inherit a situation that can reduce the amenity and, in really serious cases, the health and safety of the living environment within the property. For tenants who have more limited housing options and may find themselves limited to renting properties of a lower standard, requesting repairs early in a tenancy may also strain the tenancy relationship and affect their security of tenure.

Research commissioned by CAV recently found that rental property conditions were reported as generally good, with two in three (68 per cent) tenants describing their property as in 'excellent' or 'good' condition when they moved in (including 39 per cent 'good').

While available data on housing quality does not currently indicate how much of Victoria's rental housing stock would be classified as dilapidated or uninhabitable, CAV's research found that low income tenants (those in the bottom two income quartiles) more likely to report that their property was in 'poor' condition (11 per cent compared to 7 per cent overall) and less likely to report that it was in 'excellent' condition (22 per cent compared to 29 per cent, overall).

14 These examples are drawn from VCAT's interpretation of both the landlord's duty to provide vacant premises in reasonably clean condition, as well as the tenant's duty to keep the premises reasonably clean during the tenancy.

While the RTA enables a tenant who has not taken possession of the property to terminate the lease if the property is in disrepair, stakeholders noted that this is ultimately a poor housing outcome, and does not eliminate the possibility that the property is not subsequently leased to someone who is willing to live there. In order to address any defects, that tenant would need to be motivated to pursue their rights through the formal repairs processes set out in the RTA, something that is anecdotally uncommon amongst vulnerable or disadvantaged tenants, who may fear retaliation or eviction and who may not feel that they are entitled to repair defects of which they had prior notice when taking possession of the property.

Options

In practice, it cannot be assumed that the parties will always have the same expectations about what a clean property in good repair should look like, or that their views will be informed by existing precedent, of which they may not even be aware.

Due to factors such as age and reasonable wear and tear, properties are not currently expected to be pristine. Stakeholder feedback indicated that landlords and tenants require assistance, however, in setting clear and achievable expectations of what is meant by 'cleanliness' and 'good repair'.

All other Australian jurisdictions have taken steps to clarify that the landlord's general duty of repair applies to the initial provision of the property[15]. Most jurisdictions specify a reasonable standard of repair, taking into account factors such as the age, character, initial condition, market rent and potential lifespan of the premises,[16] although one jurisdiction has opted to prescribe an unqualified 'good repair' standard.[17]

In Victoria, the recent Supreme Court case of *Shields v Deliopoulos*[18] recently provided authority for the proposition that the landlord's existing repair obligation under section 68 was 'strict and absolute', and that the state of the property at the beginning of the tenancy and the rent payable did not qualify or dilute this obligation. The Supreme Court further concluded that:

- the duty required a landlord to identify and rectify any defects of which they were aware, or ought to have been aware
- in considering what constitutes 'good repair', the age and character of the premises were relevant, and the duty required the premises to be maintained such that they are 'reasonably fit and suitable for occupation' or of 'tenantable repair', and
- the duty obliged the landlord to put a property in good repair at the start of the tenancy.

In terms of cleanliness, all jurisdictions set a requirement for cleanliness, but variously describe the standard as 'clean'[19] or 'reasonably clean'.[20] While there is no technical definition of the term

15 See section 63(2) *Residential Tenancies Act 2010* (NSW), section 185(2) *Residential Tenancies and Rooming Accommodation Act 2008* (QLD), section 68(1)(a) *Residential Tenancies Act 1995* (SA), section 42(2)(a) *Residential Tenancies Act 1987* (WA), section 32(1) *Residential Tenancy Act 1997* (Tas), section 71E(1)(a) *Residential Tenancies Act 1997* (ACT), section 57(1)(a) *Residential Tenancies Act* (NT).

16 Section 63(1) NSW RTA, section 42(2)(a) WA RTA, section 68(1)(a) SA RTA, section 32(1) TAS RTA, section 71E(1)(a)(ii) ACT RTA.

17 Section 185(2)(b) QLD RRAA.

18 [2016] VSC 500.

19 Section 185(2)(a) QLD RRAA, section 36J(a) TAS RTA.

20 Section 52(1) NSW RTA, section 42(2)(a) WA RTA, section 67 SA RTA, section 71E(1)(a)(i) ACT RTA, section 48(1)(c) NT RTA.

'reasonable', the standard it implies in practice is not assumed to be low or 'average', but nor does it imply a state of perfection, as VCAT has previously noted in its guidance on the RTA.

Option 8.7 – Composite repair and cleanliness duties and consideration of additional criteria

Under this option, the parties' existing cleanliness and repair obligations would be combined to create a composite duty:

- ***State of cleanliness and repair at the start of a tenancy***
  - Similar to the approach taken in most other Australian jurisdictions, the RTA would be amended to incorporate a reference to the criteria considered by the Supreme Court in *Shields v Deliopoulos*. The landlord would therefore be required to provide the property in a reasonably clean condition and in good repair, so as to be reasonably fit for occupation, having regard to the age and character of the property.
  - Consistent with the authority laid out in *Shields v Deliopoulos*, the landlord's duty would be stated to apply even if the tenant was aware of any disrepair before entering into occupation of the residential premises.
- ***State of cleanliness and repair at the end of a tenancy***
  - In order to ensure that the tenant is not held to a standard that is higher than what was provided to them in the first place, they would explicitly be required to leave the premises reasonably clean, and as nearly as possible in the same condition, fair wear and tear excepted, as when the tenant entered into possession of the property.[21]
  - Any requirement in the tenancy agreement specifying that the tenant must professionally clean the carpet before vacating the property would only be valid if:
    - the tenant had a free roaming pet on the premises
    - the landlord professionally cleaned the carpet immediately before the commencement of the tenancy, or
    - such cleaning was needed to return the carpet to the condition it was in at the start of the tenancy, taking into account fair wear and tear.

The above options would be adaptable to other tenure types (including common areas and facilities).

Option 8.8 – Cleanliness and good repair clarified through guidelines

Under this option, the Director of CAV would issue guidelines, to be reviewed periodically, setting out examples or instances of cleanliness and repair.

VCAT would be required to have regard to any guidelines issued by the Director in deciding whether a property complies with the RTA.

Examples would be inclusive to avoid eliminating any instances not identified in the guidelines. The guidelines would address common features in a property and have regard to existing case law, as well as examples in other jurisdictions. Examples of cleanliness might include:

- the property is free of any pest infestations

21 A similar standard is applied in NSW (section 51 RTA) and QLD (section 188 RRAA).

- there are no signs of damp or mould problems, particularly in main living areas[22] caused by external or structural factors (that is, building quality issues), as opposed to tenant-generated mould (not using exhaust fans where necessary, or not cleaning up spills). It is noted that small amounts of mould in wet areas such as bathrooms are not unusual, but the risk of which can be reduced through habitual use of exhaust fans by tenants or by landlords ensuring access to adequate ventilation
- surfaces have been dusted or swept, as well as washed or mopped (includes walls, floors and any fixtures)
- carpets have been steam cleaned (see option 8.7, above)
- rubbish and accumulated debris has been cleared, and
- flower beds and gardens have been tended to.

Good repair examples would include the absence of any defect that:

- falls into the category of an urgent repair (for example, a burst water service, blocked toilet, a gas leak, storm damage)
- prevents the ordinary use of any fixtures or features of the property (for example, a broken ceiling fan)
- creates a health or safety risk (for example, an absent or a non-functioning safety device such as a smoke alarm, pool fence, or electrical safety switch)
- would breach any other prescribed standards for rental premises (see chapter 8.5, below), and
- render the premises unfit for occupation.

The guidelines would distinguish cleanliness and repair from fair wear and tear attributable to natural deterioration that occurs due to aging and other natural forces, and the tenant using the premises in a reasonable fashion – for example:

- minor surface marks and scratches
- stains, marks or scratches on surfaces that do not impact on the tenant's amenity and which are reasonable given the type, age and condition of the surface at the beginning and end of the tenancy
- discoloured or chipped paint
- cracked plaster due to settling (provided this does not affect the structural soundness of the property)
- cracked glass caused by warping of window frames (provided the glass is not at imminent risk of falling out, in which case an urgent repair would be required), and
- reasonable use of equipment relating to a disability (for example, indoor wheelchair use).

Option 8.9 – Prescribed cleanliness and repair checklist

The RTA may further require the landlord to ensure the property satisfies a checklist with specific, enumerated criteria for cleanliness and good repair. These criteria would be based on the examples in the guidelines and incorporated within a condition report, which is evidence of the state of the

22 These issues can also be cited as examples of poor maintenance by either party, depending on the cause.

property at the time of the report. The checklist is discussed in greater detail, above (see chapter 8.2 of this paper).

Option 8.10 – Opportunity to repair or clean premises after vacating

Landlords currently have the ability to make a claim on the bond if, at the end of a tenancy, the tenant has failed to meet their duties to maintain the property or repair any damage they have caused. Under this option, the tenant would be able to request that they be allowed to return and clean or repair the property within five business days of vacating it. The tenant would be responsible for arranging to return, and both the request and the cleaning / works must be completed within the five day period.

This would align with the timeframe for completing an outgoing condition report, leaving the parties with another five business days to dispute the contents of the condition report and confirm their agreement (or disagreement) as to whether the bond should be returned.

This option would grant tenants the opportunity to return within a specified period of time to clean the property or repair any damage (subject to certain conditions), in the same way that landlords are able to rectify the state of the property before the tenant moves in.

Consultation questions

82. Other than the current test of reasonableness, and the proposed Director's guidelines, what other factors might VCAT consider when assessing whether a property has been provided or left in the condition required by the RTA?
83. Is the age and character of a property relevant to determining whether it could reasonably be considered to be clean and in good repair?
84. What specific tailoring of the options is required to assist the parties in alternate tenure types?

8.4 Locks and security devices

Currently, locks are required on external windows and doors. While evidence indicates that most properties have functioning locks, stakeholders suggested that improvements should be considered to increase security more generally, with a particular focus on deadlocks.

Stand-alone options

- **Option 8.11 – Single action deadlocks on external doors.**
- **Option 8.12 – Requirement for reasonable security measures.**

Background

While smoke alarms and pool fences are required under building legislation, there are no other requirements about the type or maintenance of any safety devices in rental properties. The only guidance that is provided relates to the landlord's requirement to provide locks on all external doors and windows.

Submissions suggested existing regulation is inadequate to meet the needs of tenants, and that properties should have particular safety devices in place from the beginning of a tenancy:

- deadlocks on windows and doors
- lock cylinders that have been replaced between tenancies to address the risk of the previous tenant – or anyone who had a key to the premises – entering, and/or
- tamper-proof, functioning smoke alarms and compliant pool fences, where relevant.

Issues

CAV's research indicates that around 83 per cent of rental properties have functioning locks on external windows and doors, compared with four per cent that reportedly did not. The remaining 12 per cent reported having locks, albeit not in good working order.

There is no indication as to whether deadlocks are the norm for doors or windows in general residential dwellings (although, anecdotally, deadlocked doors are common). However, deadlocks and lockable windows in registered rooming houses would breach the rooming house minimum standards. Expert stakeholders, such as the Metropolitan Fire Brigade (MFB), have strongly opposed the installation of deadlocks on external windows on the basis that this poses a safety risk to tenants in the event that they are obstructed from leaving the premises – for example, by a fire.

While NSW and Victorian tenancy laws focus on the provision of locks in the context of security, most other jurisdictions require the landlord to take steps to provide and maintain locks and other security devices necessary to ensure the property is reasonably secure.

The following options address issues relating to security features, and primarily canvass suggestions for increasing basic security requirements for rental properties. Options relating to safety devices such as smoke alarms and pool fences are discussed in greater detail in chapter 8.6 of this paper.

Option 8.11 – Single action deadlocks on external doors.

Under this option, the landlord would provide single-action deadlocks to all external doors and a mechanism for otherwise securing external windows – for example, a latch or lock. This option does not contemplate deadlocks on windows, which are not recommended due to concerns about obstructing access to, or egress from, buildings in response to safety hazards. The landlord would also be responsible for providing adequate locks or locking devices on all entrances to common areas.

The tenant would retain the ability to change the locks according to the current process set out in the RTA.

Option 8.12 – Duty to provide reasonable security measures

This option would involve a specific duty requiring the landlord to ensure that the property is fitted with locks and any other security devices necessary to ensure the property is reasonably secure. What is reasonable would be clarified through guidelines issued by the Director of CAV, to which VCAT must have regard.

If the tenant wishes to add further devices, the landlord must not unreasonably refuse a request from the tenant to install them (at the tenant's cost), except on reasonable grounds such as:

- other legislation prescribing a certain type of lock or device, or otherwise conflicting requirement

- changing existing locks or devices would damage or devalue the property in a way that cannot be remedied through appropriate repairs, or
- the age of the property does not support the installation of a particular lock or device.

Consultation questions

85. In practice, would the requirement for deadlocked external doors improve security in rental properties?
86. What other security measures (for example, lockable screen door, sensor lighting) could landlords reasonably be expected to provide?
87. Could these options be applied to other tenure types without significant adaptation?

8.5 Health, safety and amenity standards at point of lease

Stakeholders highlighted limitations in existing requirements requiring properties to be clean and in good repair, noting that current market dynamics are not effective at eliminating rundown properties from the pool of available rental stock. Minimum standards were proposed as a way of assisting tenants to ensure that properties satisfy basic levels of safety, amenity and sustainability before they are leased out. Alternative approaches include a specific requirement that premises be habitable.

Alternative options – property standards at point of lease

- **Option 8.13A – Requirement that vacant premises are safe for habitation, or**
- **Option 8.13B – Adapt minimum standards for rooming houses for general tenancies, or**
- **Option 8.13C – Adapt social housing reletting standards for general tenancies, or**
- **Option 8.13D – Minimum health, safety, amenity standards for vacant premises.**

Alternative options – transition arrangements

- **Option 8.14A – Staggered implementation, or**
- **Option 8.14B – Flat transition date.**

Alternative options – remedies for sub-standard properties

- **Option 8.15A – Conditional letting where properties meet particular requirements, or**
- **Option 8.15B – Complete prohibition on letting non-compliant properties.**

Background

Stakeholders noted that even properties that are clean or in good repair can lack features that impact on their overall quality, and which would help ensure a healthy, safe, comfortable and sustainable living environment, including:

- heating and cooling
- connections to hot water

- window coverings for privacy, and
- economical fixed appliances.

Aside from a duty to ensure that any water appliances that are replaced meet a 3-star water efficiency standard, the RTA does not otherwise prescribe any specific habitation or amenity requirements at point of lease.

A notable exception is in the case of rooming houses, where owners are also under a duty to ensure that any rooms, facilities and common areas meet prescribed minimum standards at any given time as a condition of being able to operate (section 120). Standards made under the RTA are set out in the Residential Tenancies (Rooming House Standards) Regulations 2012 (the rooming house standards).

Other specialist legislation prescribes extensive technical requirements for the construction, features and habitation of residential property, focusing on matters such as:

- health and sanitation
- access and egress (that is, entries and exits)
- disability access
- building safety and design
- energy and water efficiency
- fire safety and emergency management, and
- swimming pools and spas (where present).

Issues

Except in the case of rooming houses, landlords may rent out properties that fall short of the conditions required by the RTA, or which are otherwise unsuitable for habitation because they are in poor condition or lack the necessary services or features to provide a tenant with a comfortable living environment.

The RTA assumes that tenants will utilise the remedies that are available to them – that is, delay moving in until it is raised to the requisite standard or, if the property is so serious that it is unfit for human habitation, terminate the tenancy before moving in. In the case of requirements imposed by other legislation, the tenant must pursue a remedy through the local council or any other specifically appointed statutory bodies (such as the Victorian Building Authority and Energy Safe Victoria), who have the ability to require alterations or improvements to property to ensure compliance with an occupancy permit, building regulations (for example, smoke alarm and pool fencing requirements), or any minimum health and wellbeing standards.

Stakeholder submissions throughout the review repeatedly stressed that this assumption is false, particularly for vulnerable or disadvantaged tenant groups, whose housing options are usually limited due to:

- shortages in appropriately designed, accessible and supported accommodation for older tenants or people with a disability
- lack of crisis housing and refuges for women and children escaping family violence
- limited affordable housing

- alleged discrimination and screening practices employed by property managers or landlords on the basis of a person's race, family status, recent migrant/refugee status and income source, or
- cultural practices that involve supporting or housing extended family members.

Tenants whose housing options are limited and who find themselves faced with the prospect of living in a poorly maintained house may have nothing to fall back on if they turn it down.

While there is no shortage of regulation in the area of building regulation, the current dynamics of the Victorian rental housing market may also incentivise renting out a property no matter what its condition, due to excess demand for affordable rental housing. Furthermore, market rents can be influenced by the age and condition of a property, and landlords who charge rent commensurate with such factors may feel less motivated to raise the standard of their property.

Data on housing condition and amenities

Available data on housing quality does not currently indicate how much of Victoria's rental housing stock would be classified as dilapidated or uninhabitable.

Recent ABS data indicates that around 83.6 per cent of surveyed rental properties were structurally sound. Similarly, research commissioned by CAV recently found that rental property conditions were reported as generally good, with two in three (68 per cent) tenants describing their property as in 'excellent' or 'good' condition when they moved in (including 39 per cent 'good').

In terms of amenities, tenants surveyed for CAV's research reported living in rental properties with:

- functioning access to electricity, water, a toilet, a shower, and laundry facilities (90 per cent or more of tenants)
- access to cooking facilities, locks on all external doors, and heating that are in good working condition (more than 80 per cent of tenants)
- telecommunications features such as TV antenna for free-to-air channels, landline telephone connection, and internet connectivity that were in good working condition (about 75 per cent of rental properties), and
- air conditioning and outdoor security lighting in good working condition (more than 60 per cent of properties).

Problems with housing were less frequently reported, although when they did arise, these problems tended to relate to critical amenities. For example:

- a very small minority of tenants (3 per cent) reported that their electricity and water was not in good working condition, or not connected at all
- 18 per cent reported having no heating, or heating that was not in good working condition, and
- 12 per cent reported faulty or malfunctioning locks on external doors.

Facilities for pay TV and flyscreens on windows were present in working condition in less than 50 per cent of rental properties.

More broadly, 11 per cent of tenants described their property condition as 'poor' or 'very poor' when they moved in, with low income tenants (those in the bottom two income quartiles) more likely to

report that their property was in 'poor' condition (11 per cent compared to 7 per cent overall) and less likely to report that it was in 'excellent' condition (22 per cent compared to 29 per cent, overall).

Energy and water efficiency

Since data about energy efficiency is self-reported, it is difficult to accurately determine the presence of specific energy efficiency features. The energy efficiency of most Victorian rental housing is generally assumed to be higher in newer properties built after 2005 (when a 5-star requirement was introduced), and in older properties that are owner-occupied. Properties built after 1991 would also be assumed to have ceiling insulation following the introduction of associated requirements at that time.

The 2015 Victorian Utilities Consumption Household Survey (VUCHS) recently found that home owners/buyers (95 per cent) were much more likely than private renters (58 per cent) or public renters (55 per cent) to have some level of ceiling insulation. By comparison, CAV's research found that 76 per cent of landlords reported that all of their rental properties were insulated (that is, roof and/or floor). The discrepancy between the two findings may partially be due to reporting errors by private renters, who may not be able to verify whether the property they are living in has insulation; 27 per cent of private renters and 28 per cent of public renters in the VUCHS 'couldn't say' whether they had any level of ceiling insulation.

Other prevalent energy efficient features reported by landlords were water saving showerheads (66 per cent), while energy efficient heating (42 per cent) and cooling (32 per cent), hot water services (41 per cent), and draught proofing (44 per cent) were less likely to be present.

Parameters for minimum standards

While not all landlords can offer properties to modern levels of quality and amenity, rental properties should not be rented out in an unacceptable state, regardless of how low the market rent for those properties might be set. This principle is particularly relevant as existing stock ages or rental availability tightens.

Overall, the available evidence suggests that the majority of Victorian tenants are living in suitable, appropriate rental housing. For those that are not, respondents to the property conditions issues paper argued strongly in favour of introducing mandatory minimum standards in housing quality, safety and amenity, to be met at all times during a tenancy with the aim of eliminating the worst performing properties in Victoria from the pool of available rental housing.

Only South Australia and Tasmania currently require general residential properties to meet prescribed standards prior to letting. Both models share similarities with a model currently operating in Ireland in that they impose 'features based', or specific characteristics for properties, rather than generic standards (for example, 'good repair'), which are characteristic of the approach to minimum public and community housing standards in the UK.

An alternative approach in other Australian jurisdictions involves prescribing a requirement that the property be fit for habitation, and compliant with health and safety laws.[23]

Public and community housing properties leased or re-let by the Director of Housing are required to meet guidelines relating to safety, cleanliness, security, amenity, services and windows/glass. However, where physical limitations such as age, design or construction type of an existing property hinder the application of the standards, or where excessive costs will result, discretion is exercised in adopting alternative solutions.

23 Section 185(2)(b) and (d) RRAA (QLD), section 47 RTA (NT), section 52(1) RTA (NSW).

The types of standards identified by stakeholders as being critical to the health, safety and amenity of tenants are summarised below.

Energy and water efficiency features have been included on the basis that less efficient properties – typically older properties – are costlier to run, disproportionate to the available household income of those who normally end up renting them.

Table 8.1: Feedback from stakeholders on types of minimum standards needed

Category	Recommendation
Health	• Adequate natural light • Ventilation (including natural cross-flows) • Weatherproofing • No damp and mould • Insulation
Security/safety	• Structural soundness • Functioning smoke alarm and safety switch • Deadlocks on external doors • Windows that can be secured against external entry
Amenities	• Electricity and/or gas connection (subject to any infrastructure availability) • Cooking, laundry and bathroom / toilet facilities • Hot and cold water connections in kitchen, laundry and bathroom • Functioning heating and cooling in main living area • Window coverings for privacy in bedrooms and living areas • Serviced, functioning fixed appliances
Energy and water efficiency	• Efficient fixed appliance (including water heaters) • Efficient showerheads and dual flush toilets

Property standards at point of lease

The following options canvass possible approaches for achieving health, safety and amenity standards in vacant properties at the start of a tenancy, including minimum standards.

Where an option involves minimum standards, the relevant principles informing what has been suggested are:

- 'start small', focusing on the most critical issues affecting low-cost properties, and particularly those that impact on the fitness of the property for habitation
- focus on 'value for money' improvements (particularly in the case of energy efficiency measures)
- set clear and achievable requirements, and
- allow for generous lead-in times.

The options also incorporate references to potential minimum energy efficiency standards, consistent with work currently being undertaken by DELWP to assess different models for achieving minimum energy efficiency standards in rental residential housing. The outcomes of this assessment will inform whole of Victorian Government policy on this issue, and any measures that may be created to support this policy, including a requirement that rental properties meet a broad range of prescribed basic standards. Potential energy efficiency standards will be the subject of separate consultation conducted by DELWP and underpinned by a formal cost-benefit analysis.

While smoke alarms are relevant to the question of whether a vacant property meets safety requirements, options relating specifically to smoke alarms are discussed in chapter 8.6 of this paper.

Option 8.13A – Requirement that vacant premises are safe for habitation etc.

Under this option, the RTA would introduce a duty that, prior to letting, vacant premises (other than rooming houses) and any common areas or facilities must be fit for habitation and meet all health and safety requirements specified under an Act that apply to residential property and any common areas or facilities. This duty would be in addition to the landlord's obligations as to cleanliness and good repair.

Subject to the outcomes of DELWP's Energy Efficiency and Productivity Strategy, and the Victorian Government's decision on whether to pursue the future introduction of a minimum energy efficiency standard, this option could be amended to the effect that a property must also meet anything else prescribed in the regulations. Possible examples would include low flow showerheads, energy efficient lighting, draught proofing, insulation and energy efficient heating.

The Director of CAV would issue guidelines on what 'fit for habitation' means in practice. This term is not defined, although there would be overlap with requirements imposed by health and safety laws. Case law on the meaning of the term 'unfit for human habitation' has previously been held by courts to include:

- structural or other defects, and unfitness for any reason more generally,[24] and
- properties that, even if it is physically possible to live in them, are such that there is a risk of injury to the body or health of a person living in them.[25]

Possible examples would include:

- defects increasing the risk of fire or accident (for example, absent or non-functioning smoke alarm and/or pool fence)
- inadequate ventilation, light, or sanitary facilities
- infection with a contagious illness
- dilapidation, disrepair, structural defects
- uncleanliness
- overcrowding, or
- inadequate drainage.

What amounts to an uninhabitable environment would vary depending on the circumstances. For example, only one factor may render the premises unfit for habitation, depending on the nature of

24 *Hall v Manchester Corporation* (1915) 84 LJ Ch 732 at pp 741, 742.

25 *Summers v Salford Corporation* [1943] AC 283 at p 289.

the problem, and how it interacts with the property. The layout or location of the house might also be relevant (for example, the inability to close a window if a property is near a refinery or tip might expose the tenant to increased environmental risks that render the house unsafe to live in).

Option 8.13B – Adapt minimum standards for rooming houses for general tenancies

Under this alternative option, the RTA would provide that a property must comply with specific minimum standards prior to letting. This may be done by creating a power in the RTA requiring compliance with standards that are subsequently outlined in accompanying regulations.

The minimum standards were enacted in 2012 following an extended process of public consultation. Although the scheme has not been in place for relatively long, it addresses objectives similar to those raised by stakeholders in the current review – that is, addressing sub-standard conditions in rental housing.

It is noted that standards mirroring relevant requirements in the PHWR would need to be enacted through those same regulations given that portfolio responsibility for public health and safety rests with the Minister for Health.

Not all of the existing rooming house minimum standards would be suitable for a general tenancy setting. Relevant standards might include:

- a specified number of working, safe power outlets in each room
- adjustable window coverings that provide privacy in main living areas
- access to a vermin-proof rubbish bin (for example a council bin, communal refuse removal facilities)
- food preparation and storage facilities (that is, working sink, cooktop and oven that can hold a full-sized dinner plate or medium casserole dish, room for a standard sized refrigerator and a 100 litre cupboard exclusively for food storage)
- toilet and bathing facilities (at least one toilet, bath or shower and basin)
- laundry facilities (that is, wash trough or basin, hot and cold water supply outlets for a washing machine, and room for a clothes line or other drying facility)
- continuous and adequate supply of water (including potable water and hot water) to all toilet, bathing, kitchen, laundry and drinking water facilities
- natural and artificial lighting in both habitable rooms and internal corridors and hallways that is sufficient to permit the resident to move about the property safely
- any electrical wiring within the property is protected by a switchboard type residual current device that complies with Australian Standards (that is, a safety switch)
- levels of ventilation comply with the National Construction Code (NCC) requirements for Class 1 (detached houses) and Class 2 (apartments) buildings
- security of doors and windows (that is, windows that may be secured without a key, external doors with deadlocks)
- two-yearly safety checks on gas installations / fittings and five-yearly safety checks on electrical installations and fittings
- functioning smoke alarm(s) as required by the Victorian Building Regulations, and

- provision for any standards relating to energy efficiency, such as low flow showerheads, energy efficient lighting, draught proofing, insulation and energy efficient heating (subject to outcome of DELWP's Energy Efficiency and Productivity Strategy).

The minimum standards would sit alongside the landlord's duty to ensure the property is provided in a reasonably clean condition and in good repair.

Option 8.13C – Adapt social housing reletting standards for general tenancies

Under this alternative option, the reletting standards that currently apply to public and community housing would be adapted for private residential housing, applying consistent standards and expectations of conditions across all rental property, social and private.

As the reletting standards are currently under review, it is not possible to provide greater detail other than to note that public and community housing properties leased or re-let by the Director of Housing must meet requirements relating to such matters as safety, cleanliness, security, amenity, services and windows/glass. Where physical limitations such as age, design or construction type of an existing property hinder the application of the standards, or where excessive costs will result, discretion is exercised in adopting alternative solutions.

Option 8.13D – Minimum health, safety, amenity standards for vacant premises

Under this option, the landlord would be under a duty not to enter into a rental agreement (or renew a rental agreement) unless the property meets a set of minimum standards incorporating features consistent with those in other minimum standards regimes, for example, in Australia and the other international jurisdictions mentioned in the property conditions issues paper.

A property would therefore need to:

- be weatherproof and structurally sound, making sure the roof, floors, ceilings, walls and stairs are:
  - in good repair
  - not significantly damp, and
  - not liable to collapse because they are rotted or otherwise faulty.
- not have evidence of problems relating to mould in main living areas caused by external or structural factors (that is, building quality issues), as opposed to tenant-generated mould (not using exhaust fans where necessary, or not cleaning up spills)
- provide an adequate cooktop for the size of the premises, oven, sink, and food preparation area
- provide external windows that can be secured against entry
- provide deadlocks on any external doors
- provide natural lighting in living and bedroom areas
- provide a flushable toilet with adequate ventilation, that is connected to a sewer, septic system or any other council approved waste disposal system
- provide window coverings in any room that the owner knows is likely to be a bedroom or living area
- allow for adequate ventilation (that is, through opening windows, vents or exhaust fans)

- provide fly screens on external windows
- provide connections to adequate hot and cold water in the kitchen (drinking water), laundry and bathroom
- be fitted with a functioning smoke alarm
- have fixed electrical and/or gas appliances that have been serviced by a licensed practitioner as recommended by Energy Safe Victoria or another prescribed period [26]
- be fitted with an electrical safety switch
- provide adequate electrical sockets in main living areas and bedrooms
- provide functioning heating in main living areas and options for cooling[27], and
- comply with any prescribed energy efficiency features, such as low flow showerheads, energy efficient lighting, draught proofing, insulation and energy efficient heating (subject to outcome of DELWP's Energy Efficiency and Productivity Strategy).

Transition arrangements

Option 8.14A – Staggered implementation

Under this option, different commencement dates would apply to particular duties, taking into account the need for more or less time for landlords to achieve compliance. For example:

- cleanliness, security, good repair and habitation requirements would apply for all tenancies (existing or new) immediately following the commencement of the RTA, and
- all other minimum standards would apply within two years of commencement for existing tenancies, and within a year of commencement for new tenancies

The introduction of energy efficiency requirements would be subject to the outcome of DELWP's separate work stream.

Option 8.14B – Flat transition date

Alternatively a transition date (for example, three years) could be applied to all standards other than any that relate to cleanliness, security, good repair and habitation requirements, which would apply immediately upon commencement of the RTA for all tenancies.

Remedies for sub-standard properties

Merely introducing standards will not ensure that they are adhered to. There must be an accompanying shift in the parties' incentives for engaging with their rights and responsibilities:

- tenants must feel empowered to seek redress, or at worst, to leave a property if it is sub-standard

26 For example, DHHS has a five year program to service gas heaters and services electrical (including smoke alarm checks) and gas appliances every time properties are vacant.

27 These can vary according to the type of property. Some properties may not require built-in cooling due to their structure and level of sun exposure. Others may require a permanent installation, such as split system air conditioner or, alternatively, could make do with a ceiling fan or portable cooling system that does not require structural changes to the property.

- landlords must be encouraged to see their property not only as an investment but as a public good
- law-abiding landlords must have certainty about what is expected of them, and
- recalcitrant landlords must be deterred from repeated non-compliance.

The desired outcome for tenants most likely to end up in poorer quality housing is that they do not inherit unresolved issues which they would need to dispute at the beginning of their tenancy.

Option 8.15A – Conditional letting where properties meet particular requirements

This option would allow a tenant to terminate, or delay, a tenancy before they have moved in, where the property is not clean or in good repair, destroyed, uninhabitable, or does not meet any prescribed minimum standards. In this instance, tenants who have incurred losses as a result of the landlord's breach would also be able to seek compensation – for example, to cover alternative accommodation or storage costs.

The tenant may only move into premises that do not comply with all of the minimum standards provided that they are otherwise clean, in good repair, secure and safe for habitation.

The tenant would also be entitled to seek compliance with any outstanding minimum standards; the landlord would be prevented from subsequently issuing a notice of termination unless the tenant had breached any duties or other terms of the agreement. Other remedies for a breach of the landlord's duties would also be enlivened (see option 8.37, which includes proposed restrictions on rent increases).

A tenant who has taken possession of a property that is uninhabitable would be able to apply to VCAT for a declaration to this effect, terminate the tenancy and obtain a full refund of any rent paid, as well as access other existing remedies available for a breach of the landlord's duties (for example, compensation for reduced amenity, loss or damage). The refund would apply regardless of how long the tenant has lived in the property and whether they were aware the property was uninhabitable before moving in. The aim of this would be to discourage owners of unsafe properties from renting them by denying them any financial gains for breaching the RTA.

From a regulator's perspective, CAV would be able to:

- seek an order that the landlord is prohibited from subsequently reletting the property until it is fully up to standard
- seek to impose a criminal penalty or, alternatively, a civil penalty for egregious non-compliance, and
- issue a public warning notice where a property has been declared to have breached the standards.

Option 8.15B – Complete prohibition on letting non-compliant properties

Under this option, a property may not be rented unless it meets the requirements that apply to vacant property conditions.

A tenant who has not taken possession may terminate the tenancy or delay taking possession until the property is rectified.

A tenant who has taken possession of a property and subsequently discovers it is non-compliant may apply for a declaration of non-compliance and terminate the tenancy without penalty. In that instance,

Where the property is uninhabitable, the remedy proposed in option 8.15A would also apply (that is, termination and refund of all rent). CAV would, similarly, have access to the same enforcement outcomes.

Consultation questions

88. In light of available evidence on current property conditions, how difficult would it be in practice for a property to achieve compliance with basic minimum standards prior to lease?
89. Is there any overlap between the duties relating to good repair or reasonable cleanliness and, if so, should those particular requirements instead be dealt with through the earlier guidelines in option 8.8?
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)?
91. What is an optimal transition period for ensuring that landlords have adequate time to bring their properties up to any legislative standards?
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?
93. Would allowing conditional non-compliance with any standards undermine or weaken the landlord's incentives for addressing defects in their property?
94. Would the proposed additional remedies and protections against eviction encourage tenants to take possession of properties that are in poor condition at the start of a tenancy?

8.6 Condition of premises during a residential tenancy

Both parties are responsible for maintaining the property throughout the duration of a tenancy agreement. Stakeholder consultation revealed a strong consensus for these duties to be clarified to avoid overlap, reduce confusion, and provide certainty about what can reasonably be expected from the either party.

Stand-alone options

- **Option 8.16 – Rental agreement to clarify responsibility for particular maintenance.**
- **Option 8.17 – Maintenance guidelines to which VCAT must have regard.**
- **Option 8.18 – Specific provision for safety related maintenance.**
- **Option 8.19 – Offence to tamper with any safety devices.**

FAIRER SAFER HOUSING

Background

A common theme throughout the RTA is that the property should be cared for and preserved against anything other than the effects of ordinary usage over time. This is also the basis for explicit responsibilities:

- for landlords, the duty to maintain the property in good repair, and
- for tenants, the duties to keep the property reasonably clean, avoid damaging the property and to take reasonable care to avoid damaging any common areas.

As discussed in chapter 8.3 of this paper, because 'reasonably clean' and 'good repair' are not defined, these duties can be interpreted in different ways, resulting in persistent disagreement about whether the parties have met their obligations.

During a tenancy, stakeholders noted that this lack of clarity is compounded by:

- confusion as to who is responsible for particular maintenance tasks, notably pest control, mould, guttering and gardening
- unfair allegations of intrusiveness by the landlord, particularly if frequent cleaning is needed (for example as is the case in some rural areas)
- reliance on contractual terms and conditions that are not prescribed by, or consistent with, the RTA
- safety issues, particularly relating to smoke alarms, pool fences, and frequency of appliance servicing
- the involvement of an OC, particularly in the case of common property or facilities
- impacts on a property's condition that might have been mitigated through early or regular intervention, and
- unnecessary applications to VCAT in instances where the parties may have avoided a dispute through clearer guidance.

Any uncertainty about responsibility for critical maintenance issues is exacerbated in the case of vulnerable or disadvantaged tenant cohorts due to limited, or no:

- awareness of their tenancy rights, and/or
- knowledge of the appearance and use of, or requirement for, particular property features or devices.

Issues

According to CAV's recent research, approximately four in ten (44 per cent) property managers believe that changes need to be made to the provisions in the RTA relating to repairs and maintenance, especially specifying responsibility for certain types of repairs (such as telephone and internet connections).

Seven in ten residents (or 71 per cent) in moveable homes report that their site agreement specifies who is responsible for repairs and maintenance to their site. Among those, in most cases (69 per cent) the resident is responsible for repairs and maintenance, with the park manager responsible in one in four (27 per cent) cases.

More broadly, tenancy agreements often provide for the division of responsibility for certain tasks (such as minor gardening and smoke alarms battery replacement). However, where these terms and conditions do not have a statutory basis (that is, because they are not prescribed under the RTA), disputes arise about whether anything required by those terms and conditions is enforceable.

Complaints about tenant maintenance

Existing VCAT data (Table 8.2) does not separately identify the number of disputes directly attributable to a tenant's failure to maintain the property. However damage or maintenance-related claims would account for a certain proportion of the 24,056 claims in 2014-15 classified as 'other', as well as the various combined claims made by the landlord at the end of a tenancy (that is, for possession, bond and/or compensation).

Table 8.2 – Applications to VCAT by case type

Application	2012-13	2013-14	2014-15
Bond – unpaid rent and loss or damage or both (Landlord)	9,761	9,877	9,973
Bond and compensation (Landlord)	6,656	6,635	6,696
Possession and rent	14,165	13,901	12,586
Possession, rent and bond (Landlord)	6,263	6,169	5,873
Others	22,610	24,544	24,056
Total	**59,455**	**61,126**	**59,184**

Complaints about landlord maintenance

A landlord's fulfilment of their maintenance and repair duty is usually judged by the number of complaints about urgent and non-urgent repairs. This type of complaint is currently the second biggest cause of tenants contacting CAV (8,521 or 14 per cent).

Conversely, CAV's recent research found that landlords receive requests for repairs or maintenance occasionally (37 per cent) or rarely (46 per cent). Only 7 per cent have experienced frequent requests and 10 per cent never receive requests from their tenants. These results reflect a variety of possible scenarios:

- landlords are diligent and proactive in undertaking maintenance
- tenants are not aware of the landlord's maintenance obligations
- tenants are not motivated to follow up on any maintenance because they assume that the landlord has already thought of it
- tenants are reluctant to request maintenance due to concerns about the security of their tenure, and/or
- tenants are undertaking maintenance without reporting anything to the landlord.

Issues relating to safety devices

The expectation under existing building regulation is that all residential properties (including rooming houses and movable dwellings) must have smoke alarms that meet the requirements applied to their building class and date of construction. The same applies to pool fencing.

However, these laws do not clarify how any safety devices are to be maintained by the parties in the context of a residential tenancy. Parties must, instead, rely on expert advice provided via a range of channels.

For example, VCAT has previously found that a property without a functioning smoke alarm is dangerous and uninhabitable[28], in breach of the landlord's duty to ensure the property is kept in good repair.

Further, the MFB and Country Fire Authority have issued guidance identifying the landlord as responsible under the RTA for both the installation and maintenance of a smoke alarm. This follows a 2008 coronial report recommending that, at the beginning of a tenancy agreement and every year thereafter, a landlord or agent should certify that each smoke alarm at the rented property has been properly installed in the correct location (as required by building legislation), as well as tested and cleaned in accordance with the manufacturer's instructions.

Stakeholders have noted, however, that even diligent landlords who follow expert advice can often be undermined by tenants who remove batteries or otherwise tamper with alarms to stop them from beeping, but subsequently fail to notify the landlord of the need to repair or replace the alarm.

Pool fences

Stakeholders concerned with the prevention of pool drowning maintained that rental property residents are at greater risk of experiencing a backyard pool drowning, as pool barrier checks and maintenance can often be overlooked in rentals, especially if tenants may not have lived in a home with a pool or spa before, and are unaware of common faults to look out for or what parts of the barrier they should be regularly checking and maintaining, as required under building regulation.

Appliance servicing

Energy Safe Victoria recommends that landlords should ensure that a safety check for all gas and electrical appliances is carried out at agreed intervals and at least every two years, and that appliances are deemed to be safe at point of lease. Regular servicing is preferred over placing reliance on a carbon monoxide alarm.

Options for clarifying the terms 'cleanliness' and 'good repair' have been discussed in chapter 8.3 of this paper. The following options aim to clarify how these standards would be achieved in practice by identifying maintenance activities that would reasonably fall within the scope of the parties' roles, having regard to any existing VCAT precedent, common areas of dispute, and expert or technical advice.

In the context of smoke alarms, it is noted that the Legal and Constitutional Affairs References Committee of the Federal Senate (the Committee) recently issued a report[29] recommending that the NCC 'be amended to require the installation of interconnected, and preferably mains powered, photoelectric smoke alarms, supplemented where appropriate by ionisation smoke alarms, in every residential property, and to specify the type of smoke alarm to be used at different locations within each residential property, taking into account the different smoke detection properties of photoelectric and ionisation smoke alarms' (recommendation 3).

28 *Zygorodimos v Belchuk* (Residential Tenancies) [2015] VCAT 976 (27 April 2015).

29 The Senate, Legal and Constitutional Affairs References Committee, *Use of smoke alarms to prevent smoke and fire related deaths*, April 2016, Commonwealth of Australia.

The Committee recommended that:

- all States and Territories adopt the amended NCC and apply it to all residential properties, irrespective of property age (recommendation 4)
- all States and Territories implement mandatory compliance checks of smoke alarms in residential properties whenever a property is sold, tenanted or hired (recommendation 5), and
- implement a package of measures for educating Australians about matters including who has responsibility for installing and maintaining smoke alarms (recommendation 6).

The Committee received the coronial findings from a Victorian house fire which resulted in the deaths of three men in 2008, which involved a property that had been rented for some time, between different real estate agencies and without any direct landlord involvement, and where no person could definitively state whether any smoke alarms had been installed in the property and, if they had, whether or not the alarms had been maintained. The Victorian Coroner in that case recommended that:

- Victorian law be amended to ensure that all properties be fitted with hard-wired smoke alarms which have a 10 year tamper-proof battery as a backup, on every floor of every residence, regardless of the residence's age
- Victorian law be amended to clarify who bears responsibility for maintaining and testing smoke alarms, and
- information be disseminated to landlords, real estate agents and property managers as to the installation and maintenance of smoke alarms.

It is unclear to what extent the RTA may prescribe requirements as to the type and location of smoke alarms in residential properties given that this is currently regulated by the NCC and the Victorian Building Regulations 2006. Changes proposed by the Senate Committee will first have to satisfy the requirements of a Regulatory Impact Assessment (RIS), which is unlikely to take effect until 2019, when the next three-yearly edition of the NCC will be published. DELWP has the option of developing changes on behalf of the Victorian Government, but it is noted that any substantial increase in requirements (for example, retrofitting existing residential buildings) would similarly be subject to a RIS.

Likewise, DELWP is currently considering changes to clarify maintenance and operation responsibilities for pool fences, to be incorporated in Regulation 1220 of the Building Regulations 2006. As such, the parties' responsibilities would not need to be provided for in residential tenancies legislation, but could be replicated as a term of the tenancy agreement and/or in any guidance to the parties (see options 8.16 and 8.17). Under the changes proposed by DELWP:

- the landlord would need to take all reasonable steps to ensure that a barrier restricting access to a swimming pool or spa is properly maintained
- the tenant would need to take all reasonable steps to ensure that a barrier restricting access to the swimming pool or spa is operating effectively (that is, by not placing anything nearby that might reduce its effectiveness, such as a barbecue or other object that someone may use to climb over the barrier), and

- the tenant (and any other person on the property) would need to take all reasonable steps to ensure that any gate or door forming part of a barrier restricting access to a swimming pool or spa remains closed except when a person is entering or leaving the part of the land containing the swimming pool or spa.

In the meantime, options are outlined below addressing the risk posed by absent or non-functioning safety devices.

Option 8.16 – Rental agreement to clarify responsibility for particular maintenance

The parties' obligations would be clarified through the inclusion of a schedule of maintenance activities in any standard form tenancy agreement prescribed under the RTA. The RTA would also allow for this schedule to be amended from time to time.

It would be a term of the agreement that maintenance would be carried out by a suitably qualified person, who would include someone who is licensed or otherwise has the relevant expertise to carry out the maintenance. In practice, this would not prevent the tenant from undertaking maintenance themselves, particularly when only common sense may be involved (for example, taking out the rubbish).

However, it would discourage the tenant from attempting maintenance that requires a level of skill or technical ability they do not have, and would also reduce the risk that they will be held liable for any damage that might eventuate.

Non-compliance with these terms would attract remedies for a breach of duty. A failure to perform any maintenance tasks would be treated as a breach if:

- for the landlord, it led to a repair of which they were aware, and which was subsequently not rectified, and
- for the tenant, it resulted in property damage (including the need for repairs) that they failed to address.

For landlords, relevant maintenance activities would include:

- keeping a record of any maintenance requested and undertaken at the property
- providing the tenant with any particular instructions relating to the use and/or cleaning of particular property features or fixtures
- servicing any gas and/or electrical appliances at least once every two years, using a licensed tradesperson[30]
- special provision for safety devices (see option 8.18, below)
- substantial or difficult tasks, such as painting, repairing fences, tree lopping, clearing gutters, or washing the outside of any windows (particularly on upper levels), and building work affecting the property's structure
- garden maintenance in any common areas
- periodically checking any septic tanks for blockages
- pest control and removal of mould linked to the structure of the premises (or emanating from any common areas), and

30 Exceptions may need to be made for social housing. For example, DHHS has a five year program to service gas heaters and, when properties are vacant, services electrical and gas appliances, as well as smoke alarms.

- any maintenance activities relating to common areas and facilities (for example, replacing light bulbs in common areas like laundry, recreational and storage rooms).

For tenants, these activities would focus largely on the inside of the property, but would also include minor duties relating to the exterior of the property. For example:

- notifying the landlord of any repairs or defects that need to be attended to
- special provision for safety devices (see option 8.18, below)
- maintenance of any fixtures they have installed
- minor gardening duties and yard maintenance, such as weeding, pruning or lawn mowing
- replacing light bulbs in the property
- weekly disposal of garbage and other household waste (including waste related to pets)
- removing accumulated rubbish or debris from inside and outside the property
- periodic dusting and wiping down of any surfaces, including heating / cooling vents
- periodic cleaning of any carpets and floors to remove debris and/or stains
- periodic cleaning of the inside of any windows and tracks
- cleaning the inside and outside of the balcony doors, windows and tracks
- cleaning the stove top, elements and oven according to instructions provided by the landlord
- periodically emptying the dishwasher filter (if any) according to the manufacturer's instructions
- cleaning behind and underneath any appliances that can be moved if the landlord tells them how to do this without injuring themselves or damaging the floor, and
- washing scuff marks, finger prints, etc. off the walls unless the texture of the wall prevents wiping.

Maintenance in rooming houses

In the context of rooming houses, an operator would have carriage of all repairs and maintenance, with a resident being responsible for cleanliness in their room and any common areas.

Option 8.17 – Maintenance guidelines to which VCAT must have regard

As an alternative to a schedule in the tenancy agreement, VCAT would be required, in determining whether the duty was complied with, to have regard to guidelines issued by the Director of CAV, based on the same division of maintenance duties in option 8.16.

Option 8.18 – Specific provision for safety related maintenance

Under this option, the parties would be required to comply with specific safety-related repairs and maintenance prescribed in the regulations. In consultation with relevant stakeholders, the Director of CAV would also develop and disseminate to landlords information about their obligations for safety-related repairs and maintenance.

Appliance servicing

Based on stakeholder feedback, the regulations would require that any gas or electrical installations and fittings be serviced by a licensed professional at least once every two years, and that records of these checks must be kept. This approach is consistent with similar requirements currently applying to rooming houses.

Tenants would be responsible for reporting appliance faults to the landlord or the landlord's agent.

Smoke alarms

Consistent with stakeholder feedback and expert advice from the MFB, landlords would be responsible for:

- confirming that a smoke alarm is installed and in working condition in any condition report completed about the premises, including any details about the next scheduled date for testing
- testing the alarm according to any manufacturer's instructions at least once every six months, and replacing or servicing the alarm if it is not working[31]
- immediately arranging for a smoke alarm to be repaired or replaced if they are notified that it is not in working order, consistent with the process for urgent repairs, and
- giving the tenant prescribed information about their obligations not to tamper with the smoke alarm and to report any faults.

Tenants would be responsible for:

- dusting or wiping around the cover of the smoke alarm once every 12 months
- testing the alarm monthly, and
- immediately advising the landlord if a smoke alarm is not in working order (for example, if it does not beep when tested, or makes an occasional 'chirping' noise).

These obligations would apply to residents of rooming houses.

Option 8.19 – Offence to tamper with any safety devices

The RTA would include a prohibition on removing, deactivating or otherwise interfering with the operation of a smoke alarm or pool fence that has been installed in compliance with building legislation, unless the reason for removal was to repair or replace it.

In the latter instance, the tenant would need to demonstrate that they reported the problem with the alarm or fence as an urgent repair and the landlord failed to comply with the process set out in the RTA.

A breach of this prohibition by the tenant would otherwise attract a monetary penalty imposed by the Director of CAV. It would also amount to a breach of the duty not to damage the property and enliven the remedies that normally apply for such breaches, including the landlord's ability to seek compensation to replace or repair a damaged device.

31 An exception may need to be made for social housing. For example, Director of Housing owned properties are already required to have hard-wired smoke alarms that are replaced every 10 years.

Consultation questions

95. Does the proposed list of maintenance activities accurately reflect common practice in different tenure types?
96. Are additional measures needed to prevent tenants from being required to take on onerous maintenance activities?
97. Under what circumstances would it be acceptable for the landlord and tenant to agree to different maintenance arrangements?

8.7 Modifications

Stakeholder feedback was that the current requirement for landlord approval means that all requests for a modification, whether major or minor in nature, can potentially be refused, even in cases where the modification has a negligible impact or, alternatively, is permitted under other legislation (such as the *Equal Opportunity Act 2010*). Suggested options aim to vary (but not exclude) the landlord's discretion in proportion to the nature of the modification, such that particular categories of modifications (for example, for safety reasons) must be given due consideration and cannot unreasonably be refused. Another option involves clarifying who would bear responsibility, including costs, for any maintenance requirements associated with the modification.

Modifications associated with family violence are discussed in chapter 12 of this paper.

Alternative options

- **Option 8.20A – Landlord may not unreasonably refuse consent to certain modifications, or**
- **Option 8.20B – No requirement to approve certain modifications.**

Stand-alone option

- **Option 8.21 – Liability for removing fixtures and/or restoring the property.**

Background

To preserve the condition of the property, the tenant has a duty to avoid causing any change to the property that is either not first approved by the landlord or which cannot be characterised as fair wear and tear. The requirement for landlord approval applies to all modifications, with an exception for changing locks in response to family violence.

Stakeholders noted that this prohibition impacts on a tenant's ability to make their rental property feel more homely and reflective of their personal tastes. As people are increasingly remaining in the rental market for longer periods, there is a question as to whether tenants should have the flexibility to make minor, easily restorable modifications without the landlord's consent, such as draught proofing, changing curtains, or improving gardens without having to restore the property.

Issues of safety have also arisen where, for example, a tenant may not be allowed to secure furniture to the wall, despite evidence (such as a manufacturer's warning) indicating that such action may be necessary, or to increase a property's safety features in response to family violence (for example, by installing surveillance systems).

Section 55 of the EOA requires a person providing accommodation to allow a person with a disability to make reasonable modifications to meet any special needs. While this should protect tenants who require modifications, problems can arise because:

- landlords and property managers are unfamiliar with the provisions of the EOA and tend not to understand their obligations
- tenants can have trouble navigating the forms of advice, advocacy, and dispute resolution appropriate to tenancy and/or discrimination issues, and
- there is no right of redress under the RTA where a landlord serves a no-reason notice to vacate in response to a request from a tenant with a disability to carry out modifications, because the power to modify the property sits under the EOA.

In the event that a landlord consents to any necessary modifications at the expense of the tenant or their carer(s) (if any), tenants may not remain in the property long enough to realise the value of their investment.

Unless a landlord voluntarily invests in energy efficiency upgrades to their rental property, a tenant must rely on approval to make any modifications that would improve their energy and water usage, as well as their level of comfort within the home.

Conversely, landlords bear the risk that any changes (or poorly executed changes) impact on the value of their investment. Over time, cumulative changes, particularly more substantial modifications, may generate longer-term repair issues, impacting on the property's sustainability and use for rental housing.

Other complications affecting both parties relate specifically to:

- residences such as apartments, where the ability to undertake any modifications may depend on obtaining approval from the OC, and
- who should be liable for modifications that may improve the asset (such as service connections).

Issues

Private rental conditions, particularly in older housing, may be ill-suited to supporting people with complex needs. For this reason, these tenant cohorts may require assistance to ensure these houses meet their needs. These tenant cohorts may also be more reliant on social housing, not-for-profit independent living units, and properties sourced through informal networks (homelessness and accommodation support)

Recent ABS disability statistics from 2012 indicate that there are around 128,000 Victorians with a disability living in private or community-run rental housing, with a further 36,000 living in public housing.

Of these, 105,000 people are expected to be eligible under the NDIS by mid-2019. By introducing portable lifetime funding to people with disability, NDIS roll out will fuel a currently undetermined level of demand for affordable and accessible housing in both the public and private rental sector through a range of accommodation related supports, including home modifications.

The requirement that tenants must obtain consent to modifications acknowledges that landlords are entitled to exercise discretion about something directly affecting the condition of their property.

In practice, not all modifications pose a risk of damage and may even be beneficial if they improve safety, raise a property's standard, and contribute to a stable tenancy. The legislation already contemplates that the primacy of the landlord's right may be limited in certain circumstances such as in equal opportunity cases or changing locks.

The diverse needs of different tenant cohorts may be difficult to meet if there is not enough new housing to meet tenants' needs in the immediate term. A stable, well-functioning rental market must be equipped to evolve and adapt to this diversity over time, while also:

- protecting properties against devaluation
- discouraging discriminatory selection processes or retaliatory evictions, and
- enabling landlords to comply with any other important obligations (for example, insurance requirements and safety regulations, particularly in the context of rooming houses).

Option 8.20A – Landlord may not unreasonably refuse consent to certain modifications

Under this option, a tenant must not install fixtures or modify the property without the landlord's consent, or unless the tenancy agreement permits. Consent would need to be provided in writing or another documented form.[32]

Unless the landlord agrees, the modification would be made at the tenant's expense.

The landlord may also require the tenant to use a suitably qualified person to make the modification. A suitably qualified person would include someone who is licensed or otherwise has the relevant expertise to carry out the modification. As previously noted, this would not necessarily prevent the tenant from undertaking maintenance themselves, particularly when only common sense may be involved (for example, taking out the rubbish). However, it would discourage the tenant from attempting maintenance that requires a level of skill or technical ability they do not have, and would also reduce the risk that they will be held liable for any damage that might eventuate.

In the case of disability-related modifications, assessment to determine the need for home modifications would be conducted by accredited occupational therapists, or other allied health practitioner as appropriate.

A landlord would not unreasonably be able to refuse consent to any prescribed modifications, including reasonable modifications that:

- are of a minor nature
- do not involve penetrating or permanently changing the surfaces, fixtures, or structure of the premises (for example, attaching items to walls using adhesive stickers or tape)
- are essential to health and safety (for example, properly affixed furniture anchors)
- would support the tenant's access to a private retail energy hardship program (for example, substitution of energy efficient lightbulbs and low-flow tapware compatible with any existing fittings, if not already present)

32 As defined in section 38 of the *Interpretation of Legislation Act 1984*, and including anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.

- meet the needs of someone with a disability as per section 55 of the EOA (see option 4.2 of this paper – for example, by addressing trip hazards, installing features such as grab rails in key areas such as bathrooms and toilets, updating smoke detection alarms to cater for people with a hearing disability etc.)
- protect a tenant from family violence (see chapter 12 of this paper), and
- permit the installation of telephone cables, or another type of communications technology (see chapter 8.8 for options dealing with liability for access to services).

Circumstances where the landlord's refusal may be reasonable could include:

- imminent change of use or ownership of the property (for example, evidenced by entry into a building contract or contract of sale)
- whether the property has special or heritage characteristics
- the need for significant change to the building
- risk of damage, or devaluation, to the building, and/or
- risk of non-compliance with other legislation or administrative rules (for example, for rooming house or parks operators, and common property overseen by an OC).

Landlord hardship would also require consideration to the extent in which major modifications that increase accessibility actually decrease a property's aesthetic appeal and impact a property's market value.

Where the necessary changes are not feasible, the tenant would be empowered to terminate the tenancy, in some instances without penalty (as discussed in chapter 6.3).

In the context of rooming houses, given the existence of standards and restrictions in other regulation, it would not be proposed to allow modifications to be made without the operator's prior approval.

Option 8.20B – No requirement to approve certain modifications

Under this alternative option, tenants would only need to seek landlord approval for modifications requiring structural change, affecting common property, or significantly changing the property's appearance. Landlords may not unreasonably refuse, subject to the circumstances described in option 8.20A.

Tenants would otherwise not be required to seek approval for non-structural modifications (for example, putting an adhesive hook on the wall). Guidelines would be developed to provide further clarity about the types of modifications that would be classified as structural or non-structural.

The tenant would also be required to maintain a record of all modifications made to the property without needing the landlord's approval and use a suitably qualified person to make any modifications where a particular level of expertise is required. A suitably qualified person would include someone who is licensed or otherwise has the relevant expertise to carry out the modification.

Option 8.21 – Liability for removing fixtures and/or restoring the property

Under this stand-alone option, the landlord would still be able to require the tenant to restore the property at the end of the tenancy, as some modifications may be very specific to an individual tenant or might require ongoing upkeep or maintenance.

In the case of health, disability, ageing, safety or security related modifications, landlords would have to demonstrate that retaining the modification at the end of the tenancy would cause them hardship before they can request that a tenant remove it.

Hardship would include, but not be limited to:

- additional cost of upkeep / maintenance that would otherwise not exist were the modification removed
- a reduction in the market value of the property, and
- structural damage caused by the modification.

If the modification is removed when the tenancy ends, the tenant (or government scheme that funded the modifications) would have to repair any damage caused to the premises.

If the tenant leaves a modification that the landlord did not agree the tenant could erect, the tenant would be responsible for the cost of removing it at the landlord's request.

Whether a modification has been authorised or unauthorised, any resulting damage would be covered by the remedies associated with the tenant's duty to prevent damage to the property (see chapter 8.9).

Consultation questions

98. Would the proposed options support the most critical types of modifications?
99. Are there any advantages to retaining a requirement to seek the landlord's consent for all modifications? For example, does this promote better relations between the parties, or avoid unnecessary disputes?
100. Are there any disadvantages to continuing to strictly regulate modifications in other tenure types?
101. Would the use of a suitably qualified person reduce landlord concerns about approving a modification?

8.8 Liability for access to services

Disputes often arise because the parties disagree about who must pay to connect services other than utilities to the property. In some instances, there is a need to clarify liability for the different steps that may be involved in obtaining a connection to services.

In other tenure types, reliance on bulk distribution mechanisms such as embedded energy networks has also made it difficult to accurately bill lot tenants or site residents for their individual consumption, obstructing sustainable use of resources.

Stand-alone options

- **Option 8.22 – Update landlord's liability in line with modern installation and supply practices.**
- **Option 8.23 – Recovery of reasonable service charges in social housing.**

Background

A property need not be connected to utilities or other essential services at point of lease. However, if access to such services is already available, the RTA outlines the parties' respective obligations for installation and usage charges, as discussed in the property conditions issues paper. The RTA also provides for reimbursement rights if either party pays for something the other should have (section 55 of the RTA), unless the landlord has agreed in writing to take over liability for any cost or charge.

Additional connections are treated as voluntary property modifications under section 64 of the RTA and require the landlord's consent. As with other discretionary modifications, the assumption is that the tenant is responsible for any charges, unless otherwise negotiated with the landlord. The same principle applies to television access, although conflicting outcomes have occurred where a property with incomplete infrastructure for operating a television was judged to be in disrepair and rectified at the landlord's cost.[33]

The most common issue raised by stakeholders related to who should be responsible for the installation of other services, such as telephone or internet infrastructure, which can cost hundreds of dollars. Views conflicted on this matter:

- one view was that the rise of wireless technologies negated the need for landlords to provide access to telecommunications infrastructure, which should therefore remain a discretionary modification, and
- conversely, it was argued that landlords should bear the cost of installing telecommunications infrastructure on the ground that it was an improvement of their asset. This view is consistent with the approach applied by VCAT in matters where the parties are disputing who should pay to connect additional services to the property.

Stakeholder consultation otherwise revealed limited concerns with the current liabilities for fees and charges for essential services.

Prevalence of telecommunications infrastructure

As noted in the property conditions issues paper, ABS data for 2014-15 shows that 86.2 per cent of Victorian households are now connected to the internet. Analysis of 2011 ABS data by the TUV

33 *Guo v E&E Castles Enterprises Pty Ltd* (Civil Claims) [2016] VCAT 501 (7 April 2016).

further identified an overwhelming majority of tenants (76.3 per cent) as having broadband internet, compared with tenants who had no connection (13.4 per cent).

CAV's recent research found that, overall, around 75 per cent of rental properties in Victoria have functioning access to telecommunications features such as TV antenna for free-to-air channels, landline telephone connection, and internet connectivity.

In the case of pay TV, low income tenants (those in the bottom two income quintiles) were less likely to report that their property had a facility (47 per cent reported this compared to 54 per cent overall).

Review of embedded networks

Other issues related mainly to the adequacy of protections for residents living in parks with embedded electricity networks. Although most of these issues are outside the scope of residential tenancies legislation, DELWP's review of the Victorian electricity licence exemption framework will culminate in recommended responses to improve protections and clarify charges for consumers affected by an embedded network (see chapter 4.4).

DELWP's draft position paper on the outcomes of the review acknowledges that there is inconsistency and confusion about what an embedded network operator may charge for the use of its network. It notes that the Australian Energy Regulator's approach to this matter is that, where an embedded network exists, network establishment and maintenance costs should be met through initial purchase/entry fees and ongoing maintenance fees for the relevant facility, and that any charge for accessing network services should be disallowed.

Option 8.22 – Update landlord's liability in line with modern installation and supply practices

The list of fees and charges payable by the landlord would be updated to reflect contemporary practice across the full range of essential services.

A landlord would be liable for:

- rates, taxes or charges payable under any Act (other than charges stated to be payable by the tenant)
- the installation costs and charges for initial connection to the residential premises of an essential service (includes electricity, water, gas, bottled gas or oil supply service)
- all charges for the supply or use of electricity, gas (except bottled gas) or oil to the tenant at the residential premises that are not separately metered
- all charges related to the supply or hire of gas bottles to the rented premises
- all charges (other than water usage charges) in connection with a water supply service to separately metered residential premises that are not based on the amount of water supplied to the premises
- all costs and charges related to a water supply service, and water supplied, to residential premises that are not separately metered
- all sewerage disposal charges in respect of rented premises that are not separately metered, imposed by a water corporation under the *Water Act 1989*

- all charges for the supply of sewerage services or the supply or use of drainage services to or at the residential premises, and
- any other charges prescribed by the regulations (for example, the cost of installing telecommunications infrastructure, but not for activating or using such infrastructure).

Provision would be made to include any usage charges in separately metered properties associated with an appliance that was not replaced in compliance with a specified efficiency standard. At the moment, this only relates to replacement water devices that do not meet a 3-star Water Efficiency Labelling and Standards rating.

This list would be amended to incorporate the outcome of DELWP's review of embedded electricity networks, including a final position on fees and charges that may be levied under such networks. Other changes would include providing that a park resident or site tenant is liable for connection of utilities services from a supply point on the site to their dwelling.

A landlord would still be able to agree to take over liability for any cost or charge for which the tenant is liable. Any such agreement would need to be in writing and be signed by the landlord.

Option 8.23 – Recovery of reasonable service charges in social housing

This option would enable registered community housing operators to impose a service charge for any water, central heating, laundry or utility services or facilities made available to the tenant. At present, this is only available to the Director of Housing.

Changes to the cost of providing the services or facilities must be disclosed to ensure tenants are properly informed of the method of calculating the change.

Consultation questions

102. Should tenants be able to dispute the imposition of a supply related charge in social housing?
103. Should the list of fees and charges borne by landlords also include pump out charges for septic tanks?
104. If park / site owners were able to recover supply or usage charges for bulk metered utilities, what types of information would they base their calculations on?
105. Under what circumstances would telecommunications infrastructure not amount to a capital improvement?

8.9 Reporting and addressing damage

As with other undefined terms in the RTA, 'damage' can be interpreted in different ways by landlords and tenants, particularly when distinguishing fair wear and tear or property defects from negligence or vandalism. Practical difficulties in attributing damage – for example, due to issues with condition reporting – are discussed in chapter 8.2, while damage arising from family violence or malicious incidents are discussed in chapter 12 and chapter 11.1.3.

Stand-alone options

- **Option 8.24 – Tenant must notify landlord of, and compensate for, damage.**
- **Option 8.25 – Guidelines and explicit exclusion of fair wear and tear.**
- **Option 8.26 – Remedies for damage.**
- **Option 8.27 – Consideration of depreciation in claims for compensation.**
- **Option 8.28 – Requirement for tenant email and / or forwarding address.**

Background

Throughout a tenancy, the tenant must avoid damaging the property and take reasonable care to avoid damaging any common areas (section 61 of the RTA). A tenant who becomes aware of damage to the rented property must, as soon as practicable, give notice to the landlord specifying the nature of the damage (section 62 of the RTA).

The landlord may issue a written notice requiring the tenant to repair any stated damage within 14 days of receiving the notice (section 78 of the RTA), or advising them that the repairs will be undertaken separately at the tenant's expense (section 79 of the RTA). The landlord can also undertake a repair if the tenant's own repairs have not been to a tradesperson's standard, as currently required by VCAT. Reimbursement in both cases is limited to making a claim for reasonably incurred costs, and the landlord may also serve a breach of duty notice.

Stakeholders reported difficulty in achieving a consistent expectation of what amounts to 'damage' as compared with fair wear and tear. Other issues reported by stakeholders related to:

- difficulties in attributing damage caused to common areas and when a lease has been assigned or sub-let
- obtaining compensation from tenants who have not rectified any damage they may have caused
- confusion about the different standard of care that applies when avoiding damage to common areas, and
- assistance in rectifying damage caused by tenants suffering from a mental illness, but who are not eligible for subsidies that are otherwise available to people using public mental health services.

In the context of damage caused by a tenant suffering mental illness, it is noted that the ability to amend a person's eligibility for payments out of the Victorian Carer Support Fund lies outside the scope of this review.

Attribution of liability for damage where there is a change in the parties residing within a property (for example, after an assignment or sub-lease) is discussed in chapter 8.2 on condition reporting.

Issues

CAV's market research identified damage caused by a tenant as the main reason in 10 per cent of cases where a landlord has declined a maintenance or repair request. More broadly, complaints by landlords relating to damage tend to be an aggregate of complaints about tenant maintenance of the property, as illustrated by the statistics referenced in chapter 8.10 of this paper. Evidence of issues reported by stakeholders is otherwise largely anecdotal.

Option 8.24 – Tenant must notify landlord of, and compensate for, damage

This option would amend the current drafting of the tenant's existing duty to take care to avoid damaging the property, and reasonable care to avoid damaging any common areas, to align with the drafting of the equivalent duty for rooming house residents (section 116 of the RTA).

The result would be that a tenant would be under a duty to notify the landlord of, and compensate them for, any damage to the property and any common areas or facilities caused by the tenant or their visitors. This would not include malicious damage, which would continue to be treated separately.

This approach would not create a substantively different duty in that the tenant would still be responsible for addressing any damage they or their visitors have caused. The new wording would eliminate any need to interpret whether the tenant has taken care or reasonable care not to damage the premises and any common areas.

The provision would provide that the tenant must – consistent with the process set out in section 78 and 79 of the RTA – repair any damage or compensate the landlord for the reasonable cost of any repairs made on their behalf.

The timeframe for notifying the landlord would be clarified by retaining the current requirement in section 62 that such notice occur as soon as practicable after the tenant becomes aware of the damage.

Consistent with other options relating to modifications or property maintenance, the tenant's obligation to repair damage would require the use of a suitably qualified person (that is, including someone who is licensed or otherwise has the relevant expertise to carry out the repair).

Option 8.25 – Guidelines and explicit exclusion of fair wear and tear

Under this option, the tenant's duty would incorporate an explicit reference distinguishing damage from fair wear and tear. This distinction would be replicated throughout the RTA wherever damage is referenced (for example, section 210 of the RTA, which provides for compensation following loss or damage).

The definition of fair wear and tear would be clarified through guidelines issued by the Director of CAV, as referenced elsewhere in this paper (see chapter 8.3). These guidelines would also be expanded to clarify the definition of damage by drawing on examples from existing jurisprudence as well as the tenant's other duties. For example, this would include:

- 'patchy' spot repairs of marks left by wall hooks
- floor stains caused by overwatered indoor plants

- pet-stained curtains
- structural damage to the property caused by modifications (whether authorised or unauthorised), and
- deterioration of any part of the property caused by a failure to keep the premises reasonably clean.

The guidelines would be strengthened by requiring VCAT to have regard to them in determining whether the tenant has breached their duty.

Option 8.26 – Remedies for damage

A failure by the tenant to carry out any repairs would allow the landlord to issue a repair notice as per the existing process in section 78, apply for reimbursement of any repairs under section 79, or to engage the remedies for a breach of duty (that is, formal compliance order, followed by a notice to vacate and order for possession).

In the event that the landlord issues a repair notice, the RTA would be amended to clarify that the existing obligation to reimburse the landlord for any reasonable repair costs must be satisfied within 14 days of the landlord issuing the notice or another longer period agreed between the parties in the form of a payment plan. A similar proposal for a payment plan is discussed in chapter 11.1 of this paper.

These remedies would also apply in instances where the damage affects common property managed by an OC. The RTA would clarify that the OC would be eligible for a remedy under sections 78 and 79 by way of a general application to VCAT (available under section 452). However, the ability to access remedies for a breach of duty would be limited to a landlord.

Option 8.27 – Consideration of depreciation in claims for compensation

In any claim for compensation against the tenant, the RTA would formalise existing approaches to calculating compensation whereby the landlord must take into account any applicable depreciation when determining the costs owed by the tenant. This aims to minimise excessive claims for damage where a capital improvement has been made to the property. An appropriate scale of depreciation would be that issued and updated by the Australian Tax Office, as currently used by VCAT.

Option 8.28 – Requirement for tenant email and / or forwarding address

In order to guard against a landlord not being able to contact a tenant who has either vacated or abandoned their rental property, the RTA may consider requiring the provision of:

- an email address at the time the tenant enters into an agreement, or another mode of communication that does not include their current residential address, and
- a forwarding address at the time the tenant gives notice of their intention to vacate the premises (or alternatively, this could be included in the exit condition report).

Ordinarily, tenants would need to give consent to being contacted by email. In the event that they do not have a forwarding address, or some other way of being contacted (that is, fax, phone number, next of kin), they would need to provide an email address.

Consultation questions

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

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?

108. Apart from email, what other effective communication channels could be used to ensure that landlords or property managers are able to contact tenants in order to ensure that any issues relating to unrepaired damage is resolved?

8.10 Resolving disputes about repairs

Both stakeholder consultation and independent research point to credible obstacles encountered by tenants in obtaining timely repairs, or compensation for repairs that should otherwise have been performed by the landlord. Delays may be, but are not always, caused by the landlord's deliberate refusal to comply with the law; other reasons include genuine confusion about what constitutes a reasonable time frame for responding to a repair request, a reluctance or failure on the part of tenants to request repairs, the involvement of an OC, or damage caused by the tenant themselves.

Existing dispute resolution options may be ill-suited to repair claims that would otherwise be amenable to a more rapid resolution process, and do not involve the determination of complex issues (for example, mould). Further enhancements relate to the passage of time – for example the need to update existing monetary thresholds within which a tenant or property manager may authorise a repair.

The balance of remedies and incentives may not have as strong a deterrent effect as originally anticipated due to factors such as underuse (such as in the case of the Rent Special Account), and a lack of punitive options. There is also a need to clarify the parties' liability for excess water usage charges caused by hidden defects, in light of industry practice on this matter.

Stand-alone options

- **Option 8.29 – Expand list of urgent repairs.**
- **Option 8.30 – Require tenant to report defects.**
- **Option 8.31 – Guidelines clarifying time frames for responding to urgent repairs.**
- **Option 8.32 – Faster resolution of repairs disputes.**
- **Option 8.33 – Enabling property owners to join an owners corporation to proceedings.**
- **Option 8.34 – Increase authorised repair amount.**
- **Option 8.35 – Landlord repairs and maintenance bond.**
- **Option 8.36 – Better access to Rent Special Account.**
- **Option 8.37 – Increased range of remedies for a breach of repairs duty.**
- **Option 8.38 – Special provision for excessive usage charges caused by leaks, intermittent faults or hidden problems.**

Background

Urgent repairs

The RTA currently assumes that certain property defects (that is, not damage caused by the tenant) must be addressed immediately due to their urgent nature, and that any other defects need only be rectified following a process of establishing that the landlord has breached their duty to maintain the property in good repair.

The list of defects requiring immediate repair currently covers:

- a burst water service
- a blocked or broken lavatory system
- a serious roof leak
- a gas leak
- a dangerous electrical fault
- flooding or serious flood damage
- serious storm or fire damage
- a failure or breakdown of the gas, electricity or water supply to rented property, a rooming house or a caravan
- a failure or breakdown of any essential service or appliance provided for hot water, water, cooking, heating or laundering by a—
  - landlord in rented property
  - rooming house owner in a rooming house
  - caravan park owner or a caravan owner in a caravan park or caravan
- an appliance, fitting or fixture provided by a landlord, rooming house owner, caravan park owner or caravan owner that uses or supplies water and that is malfunctioning in a way that results or will result in a substantial amount of water being wasted
- any fault or damage that makes rented property, a rooming house, a room or a caravan unsafe or insecure
- a serious fault in a lift or staircase, or
- any damage of a prescribed class.

If the landlord or their agent has not carried out an urgent repair immediately, the tenant may arrange the repair themselves. The tenant must give the landlord 14 days written notice of the repair and costs. The landlord must reimburse the tenant the lesser of $1,800 or the reasonable cost of the repair (including call out fees).

Alternatively, the tenant can apply to VCAT for an order that the landlord or their agent carry out the repair if the:

- tenant cannot afford to carry out the repair
- repairs cost more than $1,800, or
- landlord will not agree to reimburse them.

VCAT must hear the application within 2 business days.

Non-urgent repairs

Anything not characterised as an urgent repair is treated as a non-urgent repair. In this instance, the tenant may apply to the Director of CAV to investigate a breach of duty to maintain the property in good repair if the:

- tenant has notified the landlord in writing that a non-urgent repair is required, and
- landlord has not carried out the repairs within 14 days of the written notice.

The Director of CAV:

- must investigate and report back to the tenant in writing, and
- may negotiate for repairs to be carried out if the landlord has breached their duty.

If repairs are still outstanding, the tenant may apply for a VCAT order within 60 days of receiving the Director's report (or within 90 days of applying for the report if the tenant has not yet received it).

Issues

Stakeholders indicated that, with a few exceptions (namely air conditioning and smoke alarms) the categories of urgent repairs are generally broad enough and useful in clarifying which repairs must be prioritised. However, there appear to be specific factors limiting the effectiveness of the repair provisions.

The most prominent issue relates to timeliness. Certainly, all home owners can experience delays in effecting even serious repairs. However, tenants may unduly tolerate a failure to repair because they have nowhere else to go and/or afraid they will be evicted in retaliation for enforcing their rights.

Although the RTA allows tenants to make urgent repairs if the landlord has not responded to their request, this does not always mean that tenants have the ability to fund repairs themselves and that they are willing to pursue the landlord for any costs. Tenants who can afford to pay for repairs may still need to apply for a VCAT order for reasonable costs if the current authorised repair limit of $1,800 does not cover an expensive repair, for example replacing a hot water system.

Other key challenges to the effectiveness of current repairs powers include:

- in the absence of minimum rental property standards, requiring tenants to rely on the repairs powers in the RTA when their rental premises do not meet basic habitation and amenity requirements (as discussed in chapter 8.5 of this paper)
- the requirement that a tenant obtain an inspection report from CAV before applying for an order from VCAT requiring a non-urgent repair exacerbates delays that a tenant may already experience when trying to obtain a repair
- where a residence is part of an apartment building or another complex managed by an OC, landlords may need to obtain approval before commencing repairs. Alternatively, a repair may have been caused by factors relating to the common property, such that the landlord would need to obtain redress from the OC
- the RTA does not prohibit the parties from undertaking repairs themselves, and anecdotal feedback from stakeholders notes that this sometimes results in a poor standard of work that either does not fix the problem or causes other problems requiring repair, and

- the RTA does not assist in resolving disputes involving complex issues, namely mould and undetected water leaks of which the landlord may not be aware.[34]

Incidence and causes of complaints

Repairs generate the second highest number of complaints. According to CAV's recent research:

- nearly four in ten (37 per cent) tenants have made requests for urgent repairs/maintenance and seven in ten (71 per cent) have made requests for non-urgent repairs/maintenance in the property that they are currently renting
- nearly one in two (47 per cent) tenants who requested urgent work report that the request was completed promptly and to an acceptable standard. For non-urgent works, 40 per cent of cases were reported to be fixed in a reasonable time to an acceptable standard
- for tenants who have requested repairs/maintenance, around one in two (53 per cent) experienced problems in getting the work completed
- tenants from the highest income quintile are more likely to have requested urgent repairs, while tenants who pay less than $300 per week in rent are more likely to have requested non-urgent repairs, and
- there were no differences in requesting non-urgent repairs by income level.

Tenants who were surveyed, and indicated that the outcome of requesting an urgent repair was unsatisfactory, were concerned that the issue was:

- fixed but took a long time to resolve (27 per cent), or
- fixed quickly, but not to an acceptable standard (5 per cent).

Similar results were obtained in the case of non-urgent repairs (20 per cent and 3 per cent, respectively).

The average length of time taken to complete an urgent repair was approximately two weeks (14.4 days) and nearly one month for non-urgent requests (28.4 days).

Repairs to existing appliances had the longest average response time (37.5 days), whereas plumbing-related repairs were addressed most quickly (20.1 days on average).

The most common factors identified by CAV as influencing a landlord's decision to decline a maintenance request are that the:

- request is unreasonable (46 per cent)
- cost of repairs is too expensive (15 per cent), and
- tenants were responsible for the damage (10 per cent).

Recent VCAT advice indicates that 241 applications for urgent repair orders and 144 applications for non-urgent repair orders have been made, out of more than 3,931 applications by tenants in 2014-15.

34 While leaking water pipes or hot water services are classified as urgent repairs, any excessive usage charges incurred as a result remain the responsibility of the tenant if they cannot demonstrate that the landlord was aware of the problem and failed to act. Similar issues can occur with gas and electrical appliances.

Agencies that assist vulnerable and disadvantaged tenants who are experiencing problems with their tenancies report that repairs and maintenance are an area of concern. For example, according to data reported in CAV's Tenant Advice and Advocacy Program (TAAP), 17 per cent of applications involved compensation claims in quarters 1 and 2 of 2014-15. A survey conducted by the then Footscray Community Legal Service also found that 71 per cent of survey respondents claimed to need repairs (including urgent repairs), but of these, 51 per cent chose to leave the repairs unfixed when they did not receive a reply from the landlord, citing fear of eviction as the reason. For some tenant cohorts, such as Aboriginal tenants, 54 per cent of whom live in rental dwellings (compared with 29 per cent of non-Aboriginal households), and for whom repairs and maintenance can be the principal area of dispute or problems, living with outstanding repairs may be the only course of action available to them.

Repairs and maintenance issues are inevitable in tenancies, making it all the more important that:

- processes in the RTA are clear, effective and efficient
- landlords are incentivised to respond to repairs requests without tenants needing to take coercive action
- timeframes for repairs are realistic and proportionate to the risk to safety, loss of amenity and the difficulty of the repair
- tenants are empowered to address neglected repairs that should properly have been dealt with by the landlord, without the risk of incurring financial loss, and
- disputes are addressed in a timely, cooperative fashion, with only the most complicated disputes requiring extensive intervention.

Option 8.29 – Expand list of urgent repairs

This option would update the current list of urgent repairs to include any specific features that may be imposed in the context of vacant properties. For example, this would include any minimum standards that may be introduced or, alternatively, requirements associated with cleanliness, energy and water efficiency and fitness for habitation (for example, pest infestations, ventilation, heating and cooling).

Expanding the list of urgent repairs would enable the tenant to access the remedies that are currently available for urgent repairs that are not addressed, such as the Rent Special Account (RSA), while also signalling to the landlord the types of repairs that must be prioritised.

It is noted that, in the event that any energy or water efficiency minimum standards are introduced, the tenant's existing discretion to replace any defective water appliances with an item that meets a prescribed water rating would need to be removed. This is so as to avoid the risk of the landlord being held responsible for breaching the relevant efficiency standard. The risk of any hardship to the tenant would be mitigated by providing that the tenant be eligible for reimbursement as set out in the process for urgent repairs.

Option 8.30 – Require tenant to report defects

A tenant who becomes aware of the need for a repair to the rented premises would have to give notice as soon as practicable to the landlord or their agent. The aim would be to minimise any reluctance the tenant may feel to request a repair that has not previously been documented (for example, in the condition report), and to ensure that landlords are able to prevent damage to the premises that may otherwise be avoided.

This requirement would not amount to a duty. However, a failure to report a defect would be a relevant factor in any subsequent claim by the tenant against the landlord for a:

- breach of their repair duty and the question of whether the landlord (or their property manager) had been notified of the problem giving rise to the repair
- claim for damages based on reduced amenity, or
- retaliatory eviction notice.

Option 8.31 – Guidelines clarifying time frames for responding to urgent repairs

This option would involve the Director of CAV issuing guidelines clarifying the practical implications of the landlord's existing obligation to take steps to arrange a repair immediately after being notified by the tenant of an urgent repair.

The aim of the guidelines would be to indicate examples of reasonable timeframes for responding to different types of repairs as a way of managing the parties' expectations about how quickly certain repairs should be carried out. Urgent repairs would necessarily be subject to shorter timeframes.

Further, the RTA would provide that, in deciding whether the landlord has complied with their obligations, VCAT would be required to have regard to the Director's guidelines and the effect of the landlord's failure on the tenant's amenity, health or safety. This latter consideration would be relevant in the event that a failure to comply is due to factors outside the landlord's control (for example, the involvement of an OC).

Option 8.32 – Reduced time for landlords to dispute an urgent repair

Urgent repair disputes

Currently, a tenant may apply for a VCAT order within two days requiring the landlord to carry out an urgent repair if the:

- tenant cannot afford the upfront cost of an urgent repair
- the cost of the repair exceeds the approved threshold, or
- landlord refuses to carry out the repair.

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 is intended to minimise the risk that disputes about critical repairs become unnecessarily drawn out, as well as the potential impacts on the property and the tenant's comfort and amenity.

Non-urgent repair disputes

This option would amend the existing process for responding to a landlord's failure to comply with a request for a non-urgent repair.

Rather than the current approach of applying to CAV to investigate a breach of the landlord's duty to maintain the property in good repair, this option would enable the tenant to choose to apply directly to VCAT (or any other dispute resolution service empowered to resolve disputes) for a repairs order if the:

- tenant has notified the landlord in writing that a non-urgent repair is required, and
- landlord has not carried out the repairs within 14 days of the written notice.

Whereas there is currently no specified time frame for hearing the tenant's application, this option would specify a period of 7 days.

Relevant factors to consider

When considering an application, the RTA would require VCAT (and any other dispute resolution service empowered to resolve disputes) to consider:

- whether the need for repair arose as a result of (i) the fault of the tenant, or (ii) non-compliance with a provision of the residential tenancy agreement
- whether the landlord (or their agent) had been notified of the repair, and if they had, whether they had been given a reasonable opportunity to make the repair (for example, whether the tenant obstructed entry to the premises, even though the landlord had given adequate notice of entry)
- whether the repair falls within the scope of the landlord's duty
- whether the repair is damage caused by the tenant or can otherwise be characterised as fair wear and tear
- findings of routine inspections (that is, condition reporting)
- whether the landlord was advised of the repair, and
- any other relevant factors.

Remedies

If the landlord fails to comply with a repairs order made by VCAT, the tenant would subsequently have access to the remedies for a breach of duty (see option 8.37, below).

Inspection processes

CAV's existing power to inspect a rental property that is the subject of a non-urgent repairs dispute would be substituted with a broader inspection power integrated within the administrative dispute resolution service discussed in chapter 10 of this paper.

In effect, this would give both landlords and tenants access to an inspection for the purposes of resolving a dispute, rather than retaining inspections as a precursor to the tenant applying to VCAT for a repairs order.

Option 8.33 – Enabling property owners to join an owners corporation to proceedings

Where a defect originates in common property, the landlord would be empowered to join their OC as a party to any proceeding brought by a tenant for a breach of the landlord's repair duty. Further, VCAT would be granted the power to hear and determine an OC dispute in the Residential Tenancies List.

The effect of these changes would not be to provide a defence to a breach of the landlord's duty under the RTA, or to circumvent the timeframes for undertaking any repairs; the intention would not be to force the tenant to endure delays caused by a dysfunctional OC. Rather, the aim would be to enable the landlord to run a concurrent proceeding against their OC for damages the landlord may ultimately be required to pay to the tenant for a breach of their residential tenancies obligations.

Option 8.34 – Increase authorised repair amount

Under this option, a tenant who has paid for any repair that is the landlord's responsibility would be able to seek reimbursement within seven days for the lesser of the tenant's:

- reasonable repair costs, or
- costs up to a new prescribed limit.

The current prescribed limit up to which tenants and property managers may authorise a repair was last amended in 2011 and would be increased having consideration to the average cost of a common urgent repair.

If, within seven days of receiving a reimbursement request, the landlord has not reimbursed the tenant, the tenant may apply for a VCAT order that they be compensated within seven days.[35]

The landlord would subsequently have seven days (instead of 14) to dispute the tenant's claim, or a repair order, at the time of a hearing on the grounds that:

- they were not notified of the repair
- the need for repair arose as a result of (i) the fault of the tenant, or (ii) non-compliance with a provision of the residential tenancy agreement
- they were not given a reasonable opportunity to make the repairs, where notice was given (for example, whether the tenant obstructed entry to the premises, even though the landlord had given adequate notice of entry)
- the tenant did not make a reasonable attempt to arrange for a licensed or otherwise suitably qualified person nominated in the agreement, to carry out the repairs, if such a person was nominated,
- the repairs were not carried out by a licensed or otherwise properly qualified person, and the landlord has to engage someone to verify the quality of the repair,
- the tenant has not provided documented evidence of the details of the repair, including receipts or copies of receipts for costs actually paid, and
- any other relevant matter.

Option 8.35 – Landlord repairs and maintenance bond

Landlords would be required to lodge a prescribed amount with the RTBA as security against future claims for non-performance of repairs, or for a failure to reimburse the tenant for repairs they have undertaken on the landlord's behalf.

A tenant who has either funded repairs, or who cannot fund them, may apply to VCAT for a payment out of the bond amount to cover their costs or to schedule repairs if the landlord breaches an order directing them to carry out the repairs.

The same timeframes would apply for making a claim:

- seven days for a reimbursement claim (plus another seven days allowing the landlord to appeal), or

35 Draws on section 219 of the *Residential Tenancies and Rooming House Accommodation Act 2008* (QLD)

- as soon as practicable after an order directing urgent repairs to be carried out has not been complied with.

The rationale of this option would be to ensure that landlords quarantine a proportion of their finances for repairs and maintenance services. Where a claim on the bond is approved, the landlord would be required to top up the remaining amount within a specified period of time.

Option 8.36 – Better access to Rent Special Account

If repairs remain outstanding after the tenant has notified the landlord, the tenant would be able to apply for a VCAT order to have their rent paid into the RSA.

The RSA would be streamlined to allow payments to be made into and out of the RSA quickly and remotely. Administration would be transferred to the RTBA, while VCAT would remain responsible for ordering payments into the RSA. The landlord would only be able to reclaim the redirected rent upon submitting to the RTBA a form (endorsed by the tenant) that repair works had been performed by a suitably qualified tradesperson. In the event that the tenant does not agree, the landlord would be able to apply to VCAT for an order determining that they have given effect to the repairs and that the money be paid out.

VCAT's discretion to refuse a request to redirect rent into the RSA would be limited to instances where the landlord has accessed any hardship programs offered by their lender to avoid defaulting on their loan. In the latter case, the tenant would be able to access any of the other remedies for a breach of duty (see Option 3, below).

Option 8.37 – Increased range of remedies for a breach of repairs duty

Under this option, the RTA would provide for additional remedies aimed at incentivising the landlord to perform any outstanding repairs. These additional remedies would include:

- an order freezing any rental increases until property complies with all condition requirements
- an order prohibiting the landlord from charging market rent where tenant is able to demonstrate diminished amenity relative to other compliant properties, and
- a prohibition on reletting a non-compliant property (where the repair relates to a minimum standard).

A further change would be that a tenant who was exercised their rights under the RTA related to a repair would be protected against subsequent eviction unless the landlord is able to demonstrate that the tenant has breached their duties.

These remedies would be granted by VCAT or any other dispute resolution service supporting landlords and tenants. However, due to their serious impacts, certain remedies would only be available through VCAT (for example, a prohibition on reletting non-compliant property).

Option 8.38 – Special provision for excessive usage charges caused by leaks, intermittent faults or hidden problems

While leaking water pipes or hot water services are covered as urgent repairs, stakeholders have noted that excessive usage charges incurred as a result of hidden leaks, intermittent faults or hidden problems remain the responsibility of the tenant if they cannot demonstrate that the landlord was aware of the problem and failed to act. Similar issues can occur with faulty gas and electrical appliances.

In the context of water usage charges, it is noted that the following principles apply for the purposes of allocating liability:

- the water authority is responsible for problems beyond the connection point/meter to the water main
- all plumbing from the meter to the house are internal pipes of the property and are owned and maintained by the property owner. So, if the leak (or rupture) is in a home's internal pipes or tap, the landlord is responsible and will need to contact a local plumber, and
- all private extensions are owned and maintained by the property owner.

Where a tenant has received an excessive usage bill attributable to a hidden fault, the landlord would be held liable for anything over an amount consistent with the tenant's average ordinary usage provided immediately upon becoming aware of a possible leak / fault / problem, the tenant is able to prove that:

- they took steps to immediately notify the landlord or agent in writing of the problem, and
- the problem was not due to any action or omission by the tenant.

The onus would be on the tenant to prove that they notified the landlord or agent of the problem, whereas the landlord would need to prove any contributory action by the tenant.

The landlord would be liable for reimbursing the tenant for any reasonably incurred costs of engaging a licensed professional to investigate the source or cause of the problem, and any repairs that are needed in response.

The landlord would not be liable if the fault were due to a problem with a device that was the responsibility of a relevant essential services provider. In that instance, the landlord may join the relevant provider as a party to the proceedings.

VCAT may apportion liability and, in doing so, must have regard to:

- whether the tenant was aware of the problem (where damage is clearly noticeable, then the tenant must report it, as previously discussed)
- whether the tenant took reasonable steps to notify the landlord or agent
- whether the landlord followed the process for urgent repairs
- any assessment made by a water authority or other licensed professional about the source and cause of the problem
- maintenance and repairs conducted by the landlord, and
- may have regard to any other factor VCAT deems relevant.

Consultation questions

109. Would the proposed options encourage landlords to respond promptly to a request for a repair?
110. Would the proposed changes in option 8.32 improve the existing process for handling repairs? What other changes would promote the timely resolution of repairs disputes, and give VCAT or another dispute resolution service access to all relevant information?
111. What unanticipated impacts would these options have on either party?
112. How well would these options translate to other tenure types?
113. Are any further options needed to ensure that requests for repairs are reasonable?

9 Rooming houses

Submissions to the issues paper, *Alternate forms of tenure: parks, rooming houses and other shared living rental arrangements*, identified a range of issues arising under the current framework in relation to rooming houses. These issues included:

- what models of accommodation should be regulated as rooming houses
- what types of buildings should be able to be declared as rooming houses
- identification of unregistered rooming houses
- buildings used to operate a rooming house without the consent of the building owner
- the use of tenancy agreements in rooming houses
- the display and content of house rules
- pets in rooming houses
- general inspections of a resident's room
- water consumption for separately metered rooms
- minimum standards in rooming houses
- personal security and security of mail, and
- quiet enjoyment of other residents.

Other chapters of this paper that touch specifically on provisions for rooming houses canvass issues such as the payment of bonds and rent in advance (in chapter 7.1); property conditions (in chapter 8); and termination for damage, danger and disruption (in chapter 11.1). More broadly, other chapters in this paper examining issues arising in general tenancies discuss principles which may have applicability to the regulation of rooming houses.

9.1 Rooming house definition and emerging accommodation models

Stakeholder consultation suggested that the definition of rooming house under the RTA should be amended to better capture emerging accommodation models that should be regulated as rooming houses, and to distinguish accommodation that is not a rooming house. Due to interdependencies with the *Public Health and Wellbeing Act 2008*, the RTA definition cannot be considered in isolation as part of this review.

Stand-alone option

- **Option 9.1 – Future inter-governmental project to consider whether rooming house definition requires amendment to capture emerging accommodation models.**

Background

A 'rooming house' is defined under the RTA as a building in which there is one or more rooms available for occupancy on payment of rent–

- in which the total number of people who may occupy those rooms is not less than four, or

- the building has been declared by the Minister of Housing to be a rooming house (see chapter 9.2).

A 'room' is defined as a room in a building, where the room is occupied or intended to be occupied for the purpose of a residence by a person having a right to occupy the room together with a right to use in common with other any facilities in the building, but does not include a 'self-contained apartment' (which is defined as a portion of a building which forms a self-contained residence, including kitchen and bathroom and toilet facilities, under the exclusive possession of the occupier).

The RTA definition of rooming house is consistent with the definition of rooming house in the Public Health and Wellbeing Regulations 2009, which make rooming houses a form of 'prescribed accommodation' for the purposes of the *Public Health and Wellbeing Act 2008* (PHWA). The PHWA states that a person who provides prescribed accommodation must register that accommodation with the local council in order to operate legally, and must comply with the other health and wellbeing requirements of the PHWA.

Issues

There are two main types of rooming houses, 'traditional' and 'new model' rooming houses, as well as an emerging third type, known as 'new generation' rooming houses. Each type tends to be operated according to a different business model.

- 'Traditional' rooming houses tend to be purpose-built, with many bedrooms, and are most commonly located in inner and middle ring suburbs. They are often well-established with on-site management, and residents tend to be single, low-income workers, students, unemployed persons or individuals with high needs. The number of traditional rooming houses has been in decline in recent decades.
- Smaller 'new model' or 'mini' rooming houses are a more recent development. Typically, they are existing residential houses that have been converted into rooming houses (sometimes involving building modifications to create new bedrooms) where each resident has a separate residency arrangement directly with the operator. They cater for a wide variety of people, including international students. This segment of the market is said to be growing rapidly, particularly in suburban areas. Because these new model rooming houses are typically not purpose-built and were previously suburban private rental or owner-occupied houses, they are often not as easily identified as the larger traditional rooming houses.
- In inner Melbourne a new class of so-called 'new generation' rooming houses is emerging to cater to young professionals (such as health professionals wanting to reside near hospitals) and international students. 'New generation' rooming houses may include purpose-built developments providing residents with their own en-suite facilities, and may be operated as rooming houses but designed to have very few shared facilities.

Feedback received in the review about emerging models of rooming houses and similar accommodation noted additional emerging models, including an increase in 'rooming houses' being operated out of groups of apartments in modern, high-rise apartment towers, and clusters of dwellings with common spaces and shared amenity within or external to the building, akin to a rental village.

Other submissions referenced room-share arrangements with varying degrees of formality, often targeting international students in the inner city and close to educational institutions, characterised by over-crowding and ad-hoc partitioning of rooms. Degrees of formality can complicate share house arrangements, particularly in circumstance where there are multiple separate and unrelated tenants living in a standard house, who may not have a choice about their co-tenants in the way tenants in a

typical share house have. It was suggested that the RTA needs to clearly distinguish what types of share houses should be considered 'rooming houses' for the purposes of regulation.

More broadly, submissions raised concerns about the definition of 'rooming house', arguing that residents living in accommodation run in the same manner as a rooming house but with fewer than four residents should have the protections afforded in the RTA to rooming house residents. It has been suggested that the definition should not refer to the total number of residents, but should capture smaller operations by taking a more purposive approach tailored to the nature of the occupancy right and the business model, in line with definitions in other jurisdictions.

Submissions to the review also raised concerns that some operators evade the operation of the rooming house provisions or general tenancy provisions of the RTA by placing occupants on licence arrangements, rather than leases or residency rights. It was suggested that the RTA should define licences and leases, and that the definitions of rooming house and other classes of prescribed accommodation (such as 'residential accommodation', 'hostels' and 'student dormitories') regulated by the PHWA, and exempted under the regulations, should also be reviewed to ensure they reflect the current accommodation industry.

Due to the interdependencies of the RTA definition of 'rooming house' with the PHWA, the definition should not be reviewed in isolation from the PHWA within the scope of the current review. Nevertheless, in light of the changing rooming house sector and uncertainty around whether certain forms of accommodation are captured or should be captured by the rooming house definition, a review could be timely.

Option 9.1 – Future inter-governmental project to consider whether rooming house definition requires amendment to capture emerging accommodation models

Under this option, the Government would pursue future work to consider whether the definition of rooming house should be amended for the purposes of the RTA and the PHWA. This inter-governmental project would include CAV, DHHS, local government and other government agencies, and would need to consider which emerging accommodation models should be regulated as rooming houses, and to determine the impacts any change would have on operators, residents, government, and requirements for council registration and operator licensing.

Consultation question

114. What other related issues ought to be canvassed if an inter-governmental project like the one described in option 9.1 were to be convened?

9.2 Declared rooming houses

A building composed of one or more self-contained apartments can only be declared to be a rooming house if it is owned or leased by the Director of Housing. Stakeholder consultation has proposed that similar buildings owned or leased by a registered housing agency should also be able to be declared rooming houses.

Stand-alone option

- **Option 9.2 – Buildings owned or leased by registered housing agency can be declared rooming houses.**

FAIRER SAFER HOUSING

Background

The owner of a building containing one or more rooms available for occupancy on payment of rent that does not meet the definition of a rooming house (because the total number of people who may occupy the rooms is less than four) may apply to the Minister for Housing for a declaration that the building is a rooming house for the purposes of the RTA.

Where a building containing one or more self-contained apartments is owned or leased by the Director of Housing, the RTA provides that the Minister may declare the building to be a rooming house for the purposes of the RTA at the request of the Director of Housing.

Issues

Submissions received in the review noted that the rooms in many community-managed rooming houses have been converted into self-contained apartments, and that the title of some of these buildings has been transferred from the Government to registered housing agencies. Due to the wording of the declaration provision, the Minister no longer has the ability to declare these buildings as rooming houses if they are no longer owned or leased by the Director of Housing.

Despite the self-contained nature of each apartment, some of these buildings may still have many of the same features as traditional rooming houses, with common area corridors and stairways, high density close proximity living and residents with complex needs and difficult behaviours. Feedback from community housing stakeholders is that these buildings should be able to be declared rooming houses, so that registered housing agencies can manage them more effectively, by having enforceable house rules and shorter compliance periods for breach notices.

CAV does not collect data on this issue and has relied on anecdotal evidence provided by stakeholders.

Option 9.2 – Buildings owned or leased by registered housing agency can be declared rooming houses

Under this option, a building containing one or more self-contained apartments that is owned or leased by the Director of Housing or by a registered housing agency could be declared by the Minister for Housing to be a rooming house for the purposes of the RTA at the request of the Director of Housing.

Consultation question

115. Are these any concerns with permitting registered housing agency buildings to be declared as rooming houses, in the manner outlined in option 9.2?

9.3 Unregistered rooming houses

Stakeholder consultation questioned whether the test for the requirement to notify council of an unregistered rooming house should be amended for building owners and their agents.

Stand-alone options

- **Option 9.3 – Test where building owner or agent ought to have known premises was unregistered rooming house.**
- **Option 9.4 – Enhanced inspection powers for CAV rooming house inspectors.**

Background

An owner of a building, or that owner's agent, must notify the relevant local council if they have reason to believe that:

- the building is being used as a rooming house, and
- the building is not registered with the local council as prescribed accommodation under the PHWA.

Issues

Feedback received in the review about unregistered rooming houses in part related to enforcement action by councils under the PHWA, which is beyond the scope of the current review. In relation to the provisions of the RTA, submissions called for broader powers for CAV to monitor and enforce compliance with requirements for rooming houses.

In relation to the requirement to notify council if a building owner or their agent has reason to believe the building is being used as an unregistered rooming house, submissions have alleged that some agents falsely claim ignorance that a building is operating as an unregistered rooming house, and have called for a penalty if the building owner or their agent knew or ought to have known that the building is operating as an unregistered rooming house. CAV does not collect data on this issue and has relied on anecdotal evidence provided by stakeholders.

Guidance for estate agents on the CAV website lists physical signs that may indicate that a building is being used as a rooming house, and advises that:

- The obligation to notify arises when the owner or agent forms the reason to believe. The reason to believe may be based on supporting evidence uncovered during an inspection of the building or otherwise in the ordinary course of an owner or agent's duties, or on information from others (neighbours, current or past residents of the building, community legal centres or tenancy advocacy services, CAV, other government agencies or local councils).
- A reason to believe is a firm opinion on conclusion based on objective facts or evidence in the circumstances of the case, and not just a suspicion. If an agent observes evidence consistent with occupation of the building by a number of people, rather than the identified tenants, this may provide grounds for a reasonable belief.

Option 9.3 – Test where building owner or agent ought to have known premises was unregistered rooming house

Under this option, the RTA would clarify that for the purposes of the reporting requirement, a building owner or their agent has a reason to believe if they know, or in all the particular circumstances ought to have known, that the building is being used as a rooming house and is unregistered.

Option 9.4 – Enhanced inspection powers for CAV rooming house inspectors

The RTA already applies certain inspection and enforcement powers set out in the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*, under which CAV may:

- inspect residential premises by consent or with a warrant, and any common areas of residential premises without warrant or consent
- request that a person provide certain information, documents and evidence, and
- obtain an order from a court requiring the landlord to comply with a request of the Director of CAV or an authorised inspector.

Obtaining a warrant is difficult, in practice, without sufficient evidence that may exclusively be in the possession of the occupier (who may not otherwise consent to entry, or answer a request for information).

Enforcement of the RTA rooming house provisions would be enhanced by conferring inspection powers allowing access to rooms of rooming houses, not just the common areas. This would be consistent with powers of local council inspectors, who may enter residential premises without a warrant provided they believe the requirements for rooming houses are not being complied with.

Consultation questions

116. What are the risks, if any, of unintended consequences arising if the clarification in option 9.3 were introduced?
117. What evidentiary issues, if any, would be raised if the clarification in option 9.3 were introduced?
118. Could option 9.4 result in better enforcement outcomes in the rooming house sector?

9.4 Operation of rooming house without building owner consent

Background

The RTA provides for a building owner who is not a rooming house operator to give rooming house residents at least 45 days' notice to vacate if the agreement under which the rooming house operator was occupying the building comes to an end. The building owner does not have to issue notices to vacate to residents if the building owner or another lessee intends to directly operate the rooming house.

Issues

Submissions observed that residents can be in a particularly vulnerable position in circumstances where the operator has leased a building and is using it to operate the rooming house without their

landlord's (that is, the building owner's) knowledge or consent. The nature of the vulnerability experienced by residents was not articulated, but is likely to be related to the prospect of a building owner deciding to close the rooming house after becoming aware of it, in which circumstances residents have only a limited period in which to find new accommodation. To address this vulnerability, it was suggested that:

- a rooming house operator should be required to provide details of the building owner to residents
- a rooming house operator should be required to display a sign with the name and contact details of the building owner and written evidence of the consent to use the building as a rooming house, and
- a rooming house operator should owe a duty to the resident to have written consent from the building owner to use the building as a rooming house.

It is not immediately evident how these suggestions would reduce the vulnerability experienced by residents. Knowing the name and details of the building owner is unlikely to assist residents, given that no legal relationship exists between residents and the building owner, and the building owner is under no obligation to continue to operate the rooming house. It is similarly unclear what protection residents would have if the requirement to display a sign listing the building owner's details was introduced, for the same reasons.

The suggestion to provide written evidence of consent is also problematic. Introducing an obligation on a rooming house owner to obtain consent from the building owner in order to operate a rooming house raises a number of practical issues, for example where a building owner does not respond to the request for consent, gives only verbal consent, gives only partial consent, or gives consent and then later withdraws it. Consent could also be falsified by an unscrupulous operator. Consideration would need to be given to what effect this would have on the overall legitimacy of the rooming house, and the security of its residents.

It is unclear what practical benefit the third suggestion would provide residents, that is, if an obligation was framed as a duty enforced through the breach of duty process. The breach of duty process is designed to enable residents to enforce a rooming house operator's ongoing obligations that affect residents' day to day occupation of the rooming house.

Another complexity in relation to this issue is that the question of consent of the building owner for a building to be operated as a rooming house is separate from the question of whether the rooming house is registered with council. While there is an obligation on building owners to notify the relevant local council if they have reason to believe that their building is being operated as an unregistered rooming house (discussed in chapter 9.3 above), the obligation to register the rooming house as prescribed accommodation lies with the proprietor of the accommodation (that is, the operator), not the building owner, and obtaining the consent of the building owner is not required when the operator is registering the accommodation with council under the PHWA.

The issue of rooming houses operating without the consent of the building owner remains a matter of concern, and it is important to recognise the impact on residents of these rooming houses where a building owner doesn't know about the rooming house, as this may lead to the rooming house closing abruptly and disadvantaging residents. The regulatory framework for rooming houses will be significantly strengthened with the introduction of the rooming house operator licensing scheme, as acknowledged by the submission that made the suggestions. This is expected to have an effect on unscrupulous rooming house operators.

Because of the complexities discussed above, it is preferable to defer this issue to see if it still remains a problem following introduction of the licensing scheme, and if so, to consider this issue more broadly as part of future work on the regulatory framework for rooming houses proposed in option 9.1 in chapter 9.1.

The notice to vacate that a building owner can give to rooming house residents if the agreement under which the rooming house owner was occupying the building comes to an end is discussed further in chapter 11.2.

Consultation questions

119. What evidence is there of operators using a building as a rooming house without the consent of the building owner, and causing detriment to residents?

120. What other measures could be considered to prevent rooming house operators from using a building as a rooming house without the consent of the building owner?

9.5 Tenancy agreements in rooming houses

Stakeholder consultation identified concerns about the suitability of tenancy agreements for regulating occupancy of a room in a rooming house, and enabling residency agreements for a specified occupancy period, appropriately tailored for the tenure type.

Stand-alone option

- **Option 9.5 – Allow rooming house residency agreements with a specified occupancy period, and remove use of tenancy agreements for occupancy of rooms in rooming houses.**

Background

It is not compulsory for a rooming house resident to enter into a written agreement with an operator; the agreement to reside in a room under a residency right conferred by the rooming house provisions in Part 3 of the RTA can be a verbal agreement. If the parties choose to enter into a written agreement for occupation of a room, it can be either a written agreement for a Part 3 residency right (sometimes referred to as a residency agreement) or a tenancy agreement regulated by Part 2 of the RTA.

A tenancy agreement is the type of agreement typically used when a person rents an entire premises from a landlord. Where a rooming house resident and operator enter into a tenancy agreement in relation to a particular room in the rooming house, the RTA provides that the rooming house provisions do not apply to the occupation of that room by that resident while the tenancy agreement continues. What this means is that while the Part 3 provisions continue to apply to the provision of the room and to the common areas of the rooming house, the provisions relating to occupancy for Part 2 tenants regulate the occupancy of that room for the duration of the tenancy agreement.

To illustrate how rights can differ under a tenancy agreement, some of the key requirements that change when a resident signs a tenancy agreement and becomes a Part 2 tenant are set out below.

Table 9.1: Comparison of different requirements for rooming house residents and tenants

Requirement	Part 3 resident	Part 2 tenant
Minimum period of notice of intention to vacate	2 days	28 days, but cannot be used to end a tenancy agreement before the end of the fixed term
Maximum rent payable on termination without notice	Capped as the lesser of: 2 days after vacating, or until another resident takes up occupancy	Lease breaking rules apply – landlord can seek compensation for loss, which can cover rent until premises re-let or end of lease (but should mitigate loss)
Maximum equivalent period of rent which can be required as bond	14 days	1 month
Duty owed to pay rent on time	Yes	No
Minimum period of rent arrears before notice to vacate may be served	7 days	14 days
Entry by owner into room permitted for routine inspection	Every 4 weeks	Every 6 months
120 day notice to vacate for no specified reason may be served	At any time	Cannot be used to end a tenancy agreement before the end of the fixed term, but can be served at any time during a periodic tenancy agreement
Immediate notice to vacate can be served for disruption – causing serious disturbance to the peace and quiet of other residents	Yes	No
Duty owed to comply with house rules	Yes	No
Duty owed to not keep pet without consent	Yes	No
Immediate notice to vacate for damage – standard of proof	'resident or visitor intentionally or recklessly causes or allows serious damage'	'tenant or visitor maliciously causes damage'

Unlike residency rights under Part 3 of the RTA, which are not time-specific and can be ended at any time provided the appropriate notice period has been given, tenancy agreements entered into under Part 2 of the RTA can be for fixed terms (that is, have a start and an end date). For this reason,

entering a tenancy agreement may be desirable for cohorts of rooming house inhabitants such as international students who want security of tenure for a particular period of time.

In situations where a rooming house contains both rooms with shared facilities and self-contained apartments, if the ratio of rooms to apartments is at least 3:1 (or if the building has been declared to be a rooming house), then the rooms and apartments are all treated as rooms for the purposes of the RTA. If the ratio of rooms to apartments is less than 3:1, then the Part 3 provisions do not apply to each self-contained apartment and they may each be let under a tenancy agreement.

Issues

Submissions received in the review questioned the practice of operators entering into tenancy agreements with rooming house residents. Concerns were raised that it is hard for residents who have signed a tenancy agreement to understand their rights and responsibilities, and there can be confusion between the parties about whether the tenancy agreement applies just in relation to the resident-tenant's room and whether the Part 3 rooming house provisions continue to apply in respect of the common areas of the rooming house. It has been argued that the Part 2 provisions are ill-suited to the communal living aspects of a rooming house, and that the Part 3 provisions are better tailored to the complexities of this form of tenure.

While the certainty of a fixed term may suit some cohorts of residents, it was argued that many cohorts of rooming houses residents (highly vulnerable residents and itinerant worker residents) are disadvantaged by agreements that hold them to a fixed term, in accommodation where conditions are frequently chaotic and residents have no control over who occupies the other rooms. Submissions contended that most residents, used to high levels of resident churn in a rooming house, are accustomed to providing two days' notice when they want to leave and do not understand the consequences of signing – and breaking – a tenancy agreement. The higher amounts of bond that are permitted under a tenancy agreement can contribute to the compensation operators can claim where a vulnerable rooming house resident breaks a tenancy agreement.

While submissions were generally supportive of a mechanism to allow fixed term residencies in rooming houses regulated by Part 3 of the RTA, industry submissions did not want to limit the type of arrangements that can be entered into by rooming house operators and residents, citing advantages for those operators that choose to offer tenancy agreements and commercial consequences if this were to change. The cited advantages include stabilised income, the ability to take a larger bond, to seek and keep mortgage finance and specialty insurance, to meet DHHS Housing Establishment Fund receipt guidelines, to prove a land tax exemption under pre-2013 guidelines, to meet long term requirements of housing referral agencies, and to use a standard property manager for the premises.

Other submissions argued that an operator letting several rooms rather than an entire premises will not suffer the same type of loss as a landlord of a single premises if a tenancy agreement for an individual room in a rooming house is broken, and that compensation for lease breaking should be capped in a rooming house.

The following options have been developed to recognise the inherent differences between renting a room in a rooming house and renting an entire property, and that occupancy in rooming houses should be regulated by provisions tailored to rooming houses.

The options also acknowledge that while some residents may live in a rooming house for an extended period of time, the complexities of this form of tenure mean that residents require the protection of being able to leave with two days' notice, and should not be charged the higher bonds, rent-in-advance and lease breaking fees that apply in respect of a tenancy agreement.

Option 9.5 – Allow rooming house residency agreements with a specified occupancy period, and remove use of tenancy agreements for occupancy of rooms in rooming houses

Under this option, a residency agreement specifying the terms and conditions of the resident's occupancy of the rooming house under Part 3 would be able to specify a fixed occupancy period if the parties wanted to agree to a fixed term.

During the specified term of occupancy, the operator would only be able to serve a notice to vacate for reasons where the resident was at fault (for danger, damage, non-payment of rent etc), but would otherwise not be able to terminate the agreement until the end of the term of occupancy fixed by the parties. A resident would be permitted to give a two day notice of intention to vacate the rooming house at any time, even before the end of the term of occupancy. The maximum rent payable if the resident left without notice would be capped at the lesser of 2 days' rent, or rent until another resident takes up occupancy (consistent with the current requirements under Part 3).

This approach would be consistent with the approach taken in Part 4 of the RTA which permits a caravan park operator and resident to enter into a caravan park residency agreement with a specified occupancy period, whereby the operator cannot issue a notice to vacate unless the resident is at fault but the resident can give a seven day notice of intention to vacate at any time.

Also under this option, a rooming house operator and resident would no longer be able to enter into a tenancy agreement in respect of a room in a rooming house. Occupancy of a room in a rooming house would be regulated by the Part 3 provisions, with parties having the option of a residency agreement with a specified occupancy period.

Transition arrangements would be made to phase out current tenancy agreements for rooming house rooms, permitting existing tenancy agreements to expire at the end of their current fixed terms (rather than rolling over into period tenancy agreements) and for any continuing occupancy arrangements to be governed by the Part 3 provisions instead.

Where a rooming house contains both rooms and self-contained apartments, the current ratio would continue to apply:

- if the ratio of rooms to apartments in the rooming house is less than 3:1, each self-contained apartment could continue be let under a tenancy agreement, and
- if the ratio of rooms to apartments is at least 3:1, the rooms and apartments would all be treated as rooms for the purposes of the RTA, and could not be let under a tenancy agreement.

Consultation questions

121. What outcomes would arise under option 9.5 for current occupants of rooming houses, for operators and for the rooming house sector more broadly?
122. Should the cap on rent payable for termination without notice of a residency agreement with a specified occupancy period under option 9.5 be increased from 2 days' rent, and if so, what would be an appropriate cap?
123. Are there rooms in rooming houses that would still require the provisions of Part 2 rather than Part 3, if the measures in option 9.5 were introduced with scope for exemptions?
124. Are there any other factors that would need to be considered for fixed-occupancy residency agreements under Part 3 of the RTA?
125. Does the ratio for determining which self-contained apartments are 'rooms' under the RTA need to be changed, and if so, how?

9.6 House rules

Stakeholder consultation identified concerns about the content of house rules, and where they should be displayed in rooming houses. If a house rule is declared invalid or was not made in accordance with the RTA, it is argued that a resident should not be compelled to vacate as a result of not observing that rule.

Stand-alone options

- **Option 9.6 – Display of house rules required in common areas as well as in each resident's room.**
- **Option 9.7 – Development of guidance for model house rules.**
- **Option 9.8 – No termination for breach of house rules if rules invalid or not properly made.**

Background

A rooming house operator may make house rules relating to the use and enjoyment of facilities and rooms in the rooming house. A resident must be given a copy of the house rules on or before the day they move in, and a copy must be prominently displayed in each resident's room.

Residents owe a duty under the RTA to observe all house rules, and operators owe duties to take all reasonable steps to ensure that the house rules are observed by all residents, and to ensure that the house rules are reasonable and are enforced and interpreted consistently and fairly.

If a resident feels that a house rule is unreasonable, they can apply to VCAT to seek an order declaring the rule to be unreasonable and invalid. An operator must give a resident at least seven days written notice of any proposed change to the rules.

Issues

In relation to the requirement to display the house rules, some submissions argued that the house rules should have to be prominently displayed in common areas of the rooming house, as well as in each resident's room. Other submissions disagreed with this proposal, with one housing provider stating that its members try to make its rooming houses as homelike as possible, minimising signage

in common areas (except for fire safety signs) to try to avoid an 'institutional' feel to the premises. Another housing provider suggested house rules should be displayed in the common areas but not in each resident's room.

Other feedback received in the review concerned the content of house rules, with submissions contending that there should be a mandatory uniform set of house rules for rooming houses, with variations permitted only with the approval of CAV. Other submissions argued that a uniform set of rules would be unworkable in the increasingly diversified rooming house sector, and that rules often need to be tailored to suit the specific property and sometimes tailored to issues prevalent in the resident population. It was also noted that some rooming houses elect to not have house rules.

In lieu of a uniform set of rules, it was suggested in feedback to the review that RTA could include, or CAV could provide, a set of principles or model rules, to provide guidance as to best practice and rules that are not appropriate. Such guidance could build on the draft house rules published by the Registered Accommodation Association of Victoria, and could be developed in collaboration with rooming house operators, resident stakeholders and advocates.

Finally, submissions noted that a breach of duty notice can be issued if a house rule is not observed, and successive breaches of rules can result in a resident being issued a notice to vacate – even if a rule that was not observed is declared invalid by VCAT, or was not made in accordance with the RTA (for example, the proper notice of a proposed change to the rule was not given). It was proposed that a notice to vacate for successive breaches should be of no effect if issued for breaches of house rules that are declared invalid or were not made in accordance with the RTA.

In developing these options, CAV has relied on anecdotal evidence provided by stakeholders.

Option 9.6 – Display of house rules required in common areas as well as in each resident's room

Under this option, operators would be required to prominently display a copy of the house rules in a common area of the rooming house as well as in each resident's room.

Option 9.7 – Development of guidance for model house rules

Under this option, CAV would work with industry and resident stakeholders and advocates to develop a set of model rules, guidance on best practice, and guidance on rules that are not appropriate.

Option 9.8 – No termination for breach of house rules if rules invalid or not properly made

Under this option, if a house rule that was not complied with by a resident is declared invalid by VCAT or was a rule not made in accordance with the RTA, the resident's non-compliance with the rule cannot be used as grounds for a termination for breach. A notice to vacate is of no effect if the notice states the resident's non-compliance with such a rule as grounds for giving the notice.

Consultation questions

126. Where should house rules be displayed in a rooming house – in residents' rooms, at the entrance, in one or more common areas, or some combination of these – and why?
127. What matters would be most suited for inclusion in model rules under option 9.7, and what types of rules are not appropriate?
128. How can model rules best accommodate the diversity within the rooming house sector, or should there be different model rules for different segments of the sector?
129. Are these any concerns with the measures proposed in option 9.8?

9.7 Pets in rooming houses

The RTA prohibits the keeping of pets in rooming houses without the consent of the operator. These prohibitions recognise the shared nature of residence in this form of tenure, where residents live in close proximity to one another and share common areas/facilities, and the disruptive effect one resident's pet may have on other residents.

Some submissions received in the review were in favour of the RTA stating rooming house operators must not unreasonably withhold consent to a pet but other submissions disagreed, arguing that pets (particularly cats and dogs) can be problematic in a rooming house where the wellbeing of all residents must be considered, and that operators should retain discretion to make decisions about pets in the accommodation they manage. No change is proposed to the current provisions: residents require the consent of the operator to keep a pet in a rooming house.

9.8 Rights of entry

The frequency with which an operator may conduct a general inspection of a resident's room was canvassed in stakeholder consultation.

Stand-alone option

- **Option 9.9 – Two month frequency for general inspection of resident's room with 48 hours' notice.**

Background

In a rooming house, an operator may enter a resident's room if they give at least 24 hours' written notice and entry is for one of the purposes set out in the RTA, which include to conduct a general inspection (once in every four-week period), or if the operator has reasonable grounds to believe the resident has failed to comply with a duty.

An operator may enter a resident's room without notice if the resident gives permission, if there is an emergency situation and entry to the room will save life or valuable property, or if they are delivering services (such as bed linen) during hours specified in the house rules.

Issues

Submissions to the review questioned the four-week frequency of the right to conduct a general inspection of a resident's room, arguing that it constitutes an unnecessary breach of a resident's privacy and dignity, and that three months would be a more appropriate frequency period.

Other submissions disagreed with this suggestion and maintained that the law should remain unchanged. They argued that rooming houses present higher dangers in terms of fire and other health and safety issues than a general residential tenancy, and that higher accommodation density means that more people are at risk when issues such as hoarding and poor sanitary conditions arise.

Other feedback to the review felt variously that 24 hours' written notice to conduct a general inspection was insufficient, and operators should have the right to perform unplanned inspections to investigate complaints by other residents in relation to matters such as drugs, weapons, theft, noise, pets, hygiene and odours.

In developing this option, CAV has relied on anecdotal evidence provided by stakeholders.

Option 9.9 – Two month frequency for general inspection of resident's room with 48 hours' notice

Under this option, the frequency with which an operator can conduct a general inspection of a resident's room would be changed from once every four weeks to once every two months. The operator would be required to give 48 hours' written notice, rather than the current 24 hours' written notice. The other existing reasons for an operator exercising a right of entry would continue to require 24 hours' written notice.

If the operator had reasonable grounds to believe the resident has failed to comply with a duty (such as the duty to obey house rules, to keep the room clean and in a condition that will not create a fire or health hazard, or to not use the room for an illegal purpose), the operator would still be able to enter the room with 24 hours' notice, as is currently permitted under the RTA. The operator would also be able to enter a resident's room without notice for the existing reasons listed above.

Consultation questions

130. Does option 9.9 sufficiently balance the rights residents with the responsibilities of operators with regard to the frequency of general inspections of a resident's room?
131. Should the notice period for a two-monthly general inspection of a residents' room be extended to 48 hours under option 9.9, or is 24 hours adequate?

9.9 Utilities

Stakeholder consultation suggested that operators should be able to charge a resident for water consumption if the room is separately metered.

Stand-alone option

- **Option 9.10 – Operator can charge resident for water consumption for separately metered rooms.**

Background

A rooming house operator may charge a resident a charge not included in rent for electricity and/or gas consumed in the room if the operator is responsible for the payment of that utility and if the room is separately metered (though this does not apply to a resident of a shared room).

Issues

Feedback to the review noted that some rooming houses now provide rooms with individual bathrooms and washing facilities, and that the RTA is silent on liability for water consumed in the room. It was proposed that operators should be able to charge for water consumption in the same way that they can charge for electricity and gas consumption.

Option 9.10 – Operator can charge resident for water consumption for separately metered rooms

Under this option, an operator would be able to charge a resident a charge not included in rent for water consumed in the room if the operator is responsible for the payment of the water and the room is separately metered (though this would not apply to a resident of a shared room).

Consultation question

132. Are these any concerns with permitting operators to charge a resident for water consumption if the room is separately metered, in the manner outlined in option 9.10?

9.10 Minimum standards

Stakeholder consultation suggested that the rooming house minimum standards should include greater specificity about power points and laundry facilities.

Stand-alone option

- **Option 9.11 – Amend rooming house minimum standards.**

Background

Rooming house operators must comply with minimum standards set out in the Residential Tenancies (Rooming House Standards) Regulations 2012. The minimum standards apply to a rooming house and its rooms, and relate to privacy, security, safety and amenity.

Issues

Issues arising in the context of rooming houses related to the quality of amenity of premises that were not purpose built for use as a rooming house, and allegations of widespread non-compliance with existing minimum standards.

In terms of the minimum standards themselves, there was confusion around the number of free power sockets required in each bedroom, as well as a lack of specificity around the number of laundry areas to be provided relative to the number of residents, leading to situations where a large number of residents could be required to share as few as two washing machines. A lack of clarity about what constituted an adequate supply of hot water to bathing facilities under the Public Health and Wellbeing Regulations 2009 (PHWR) (Regulation 20) prompted suggested changes to the capacity or flow rate of hot water for bathing and laundering.

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Option 9.11 – Amend rooming house minimum standards

Under this option, the existing standards would only be amended in direct response to the issues raised by stakeholders – that is, to:

- clarify that a resident's room must have a certain number of power points that are unoccupied, working and safe, and
- require the provision of laundry facilities as currently prescribed for every 10 persons or fraction of that number of persons occupying the accommodation. This is consistent with the approach taken in the PHWR to assessing the adequacy of available toilet and bathing facilities.

Changes to hot water flow rates and volumetric capacity are outside the scope of the rooming house minimum standards and best addressed through changes or guidelines clarifying the meaning of Regulation 20 of the PHWR.

Consultation question

133. Are these any concerns with amending the rooming house minimum standards in the manner outlined in option 9.11?

9.11 Personal security and security of mail

Stakeholder consultation identified concerns around security of mail for rooming house residents.

Stand-alone option

- **Option 9.12 – Operator to provide mail box for each room and ensure sorting of mail.**

Background

A rooming house operator owes a duty to take all reasonable steps to ensure security of the property of a resident in his or her room.

Issues

Feedback to the review suggested that this duty be expanded to taking all reasonable steps to ensure security of the resident's person while at the premises, as well as the security of their property. Submissions noted that the chief danger to a resident's personal security is often the conduct of other residents, and called for the strengthening of provisions relating to residents endangering others and committing serious acts of violence, to protect the security of remaining residents and the operator. These provisions are discussed at chapter 11.1.

Another suggestion made in feedback to the review to protect personal security and the security of property was that the RTA mandate the installation of video surveillance cameras in common areas of a rooming house, to help address issues of theft and violence that may occur. The review considers that compulsory video surveillance of rooming house residents in their place of residence raises serious privacy concerns, and is not warranted.

Other feedback to the review raised concerns around the security of a resident's mail in a rooming house, with reported instances of mail going missing, being stolen or opened by other residents, and

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residents not receiving important mail such as notifications of legal hearings. Submissions suggested that a rooming house owner should be required to provide separate secure mail boxes for residents. In developing this option, CAV has relied on anecdotal evidence provided by stakeholders.

Option 9.12 – Operator to provide mail box for each room and ensure sorting of mail

Under this option, a rooming house operator would be required to provide one secure mail box for each room of the rooming house, and would be required to ensure that mail for residents delivered to the rooming house's external mail box was sorted into the internal mail boxes.

Consultation questions

134. Under option 9.12, should the RTA specify how an operator must comply with the requirement to ensure external mail is sorted into the internal mail boxes?

135. In the alternative to option 9.12, what other measures, if any, could be introduced to protect the security of residents' mail?

9.12 Quiet enjoyment of other residents

Stakeholder consultation identified concerns that a resident's duty to ensure the quiet enjoyment of other residents can encompass conduct that occurs outside the property boundary of a rooming house.

Stand-alone option

- **Option 9.13 – Restrict resident's quiet enjoyment duty to conduct within property boundary of rooming house.**

Background

A rooming house resident owes a duty to not do anything in or near the rooming house or allow his or her visitors to the rooming house to do anything which interferes with the privacy, peace and quiet of the other residents, or their proper use and enjoyment of the rooming house. This duty acknowledges the impact that other residents can have on the quiet enjoyment of each individual resident.

Issues

Feedback to the review noted the difficulties inherent in controlling the behaviour of a visitor, and suggested that the duty should be amended to prohibit conduct by the resident in question or their visitors only where it unreasonably restricts of interferes with the quiet enjoyment of other residents. Other submissions disagreed with this suggestion, arguing that residents should have to take responsibility for their actions and the behaviours of their visitors to assist with ensuring the quiet enjoyment of their fellow residents.

Concerns were also raised in submissions about the reference to conduct 'near' the rooming house, and what this meant in practice. It was suggested that regulating conduct near a rooming house is unrealistic and unnecessary, and should be removed from the provision. Submissions also observed it is arguable that for a person to be considered a visitor to the rooming house, that person would need

to be within the boundary of the property and not merely on the street nearby. In developing this option, CAV has relied on anecdotal evidence provided by stakeholders.

Option 9.13 – Restrict resident's quiet enjoyment duty to conduct within property boundary of rooming house

Under this option, the duty a resident would owe would be to not do anything in the rooming house or within its property boundary or allow his or her visitor to the rooming house to do anything which interferes with the privacy, peace and quiet of the other residents, or their proper use and enjoyment of the rooming house.

Consultation questions

136. Does option 9.13 adequately balance the interests of the resident in question and the interests of other residents in the rooming house?

137. Are there legitimate circumstances in which conduct 'near' a rooming house should be captured by this duty owed by residents?

Heading for Home

Residential Tenancies Act Review

Options Discussion Paper

Part C: Dispute resolution and ending a tenancy

10 Dispute resolution services and mechanisms

This chapter presents options that respond to issues raised by stakeholders concerning the processes and mechanisms for the resolution of residential tenancy disputes. These issues included:

- the low level of awareness among tenants and landlords of their rights and responsibilities in in the context of resolving disputes
- the limited options available to providers of accommodation including landlords and rooming house operators to resolve disputes early with the assistance of a third party
- the availability of mechanisms for parties to resolve disputes rapidly in an informal and non-adversarial way that provides the certainty of binding determinations and orders
- the quality and consistency of VCAT decisions on residential tenancy dispute cases, and
- limited compliance and enforcement activities.

The options presented aim to achieve outcomes that are consistent with a healthy rental sector, such that:

- the system caters for the broad spectrum of disputes, in terms of the nature and stage of the dispute, and the outcomes sought by the parties involved
- problems are addressed early, enabling the preservation of relationships and tenancies by preventing the escalation of disputes and negative experiences for both parties
- parties can achieve certainty in a constructive manner, bringing about positive practical outcomes in individual tenancies, and
- a positive non-adversarial culture is promoted within the rental sector generally where parties feel confident that fair outcomes can be achieved, so that they are able to respond appropriately and proportionately when problems arise.

Dispute resolution is most usefully considered as a spectrum on which various services and mechanisms may be appropriate for different disputes at different times for different parties. The residential tenancies sector has a diverse population of participants, and the range of options available should cater to that population, and to the various stages of the disputes that arise.

Options for greater protections against the threat of arbitrary, unfair and retaliatory terminations are put forward in chapter 11 of this paper. Similarly, options for the pathways to VCAT and the criteria it may consider in deciding a residential tenancy dispute are presented in the relevant chapters of this paper. These options should be read in conjunction with the options for improved dispute resolution services and mechanisms set out in this chapter.

As noted in chapter 1 of this paper, reform options specifically relating to caravan and Part 4A residential parks will be addressed separately following the completion of the Parliamentary Inquiry into the Retirement Housing Sector. However, parks residents and operators, as parties to agreements under the RTA, would continue to have access to the services and mechanisms for residential tenancies disputes. Therefore, parks residents and operators can be assumed to be included in the following discussion of options.

10.1 Tools for independent resolution of disputes

There is a low level of awareness by tenants and landlords across the residential rental sector about their rights and responsibilities under the RTA.

Stand-alone option

- **Option 10.1 – Enhance CAV's information and advice services.**

Background

Research commissioned by CAV[36] found that 24 per cent of tenants reported having been involved in a dispute with a landlord, and of those 57 per cent had raised the dispute. The top three areas of dispute nominated by tenants were:

- property repairs and maintenance (62 per cent)
- agent and landlord conduct (36 per cent), and
- bond claims (33 per cent).

Of the landlords surveyed, 44 per cent reported having been involved in a dispute with a tenant and 24 per cent had raised the dispute with the tenant. The top three areas of dispute nominated by landlords were:

- rent payment (51 per cent)
- damage to property (33 per cent), and
- tenant conduct and behaviour (22 per cent).

Ideally disputes can be resolved in the first instance without the intervention or assistance of third parties. Information and advice regarding parties' rights and responsibilities under the RTA, and about the pathways or options available to them to resolve their disputes are important tools in this process.

There are a number of agencies that provide information and advice in the rental sector. CAV, in addition to the Dispute Settlement Centre of Victoria (DCSV) and the TAAP agencies, which provide specialist support to vulnerable and disadvantaged tenants, report approximately 80,000 contacts per year.[37]

One of CAV's functions is to undertake programs to inform or educate the public about the provisions of the RTA, and the services provided under the RTA by CAV. In fulfilling this function, CAV provides an information and advice service directly to tenants, residents, landlords, property managers, and rooming house and parks operators. As part of this service it provides referrals where appropriate to a network of government funded services. In addition, CAV funds industry training programs and runs extensive community education and outreach programs to make direct connections with a range of community groups, and participant groups in the sector.

36 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

37 Dispute Resolution issues paper, May 2016, accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

Issues

Stakeholders raised concerns that there is a low level of awareness of rights and responsibilities under the RTA, among both tenants and landlords, including rooming house and parks residents and operators.

The following stand-alone option identifies aspects of CAV's service that can be enhanced to address the specific gaps that were identified by stakeholders during Stages 1 and 2 of the review.

Option 10.1 – Enhance CAV's information and advice services

Under this option, CAV's overall service delivery capacity would be expanded through the provision of additional digital and online services. However, the current level of services provided by telephone to those who do not use digital and online services would be maintained.

Additional materials and tools would be developed including:

- plain language practical guides to assist parties to interpret rights and responsibilities under the RTA, and
- guides to enable parties to navigate the dispute resolution system and select the service or mechanism that is suitable for their particular dispute which would include comprehensive information about the services and mechanisms available, their suitability for different types of disputes, the outcomes they can provide, and where they are situated on the escalation spectrum.

Key information would also be included on prescribed publications, forms and notices where appropriate. This would include information about how to seek further assistance, and how to challenge notices and decisions.

While CAV would continue to provide materials in accessible-formats and languages other than English, and make available interpreter services, connections with CALD communities and seniors groups would be strengthened.

Consultation questions

138. What are any risks or costs associated with the proposed additions to CAV's information and advice service?
139. Taking into account CAV's existing education programs and initiatives targeted to different groups in the residential sector, what other options would contribute to raising awareness of rights and responsibilities and thereby assisting dispute prevention and independent resolution?

10.2 Third-party assisted non-binding dispute resolution

There are few assistance services for dispute resolution available to landlords, property managers, and rooming house and park operators, whose first port of call for third-party intervention for the early resolution of disputes is often VCAT.

Stand-alone option

- **Option 10.2 – Extend CAV's Frontline Resolution and conciliation services to landlords, property managers, and rooming house and park operators.**

Background

Under the RTA, one of CAV's functions is to conciliate:

- a complaint made by a tenant that the landlord is in breach of a duty to maintain the rented premises in good repair
- any dispute in relation to a tenancy agreement between a landlord and a tenant that can be referred by the landlord or the tenant
- any matter arising under the rooming house provisions, and
- any matter arising under the caravan park provisions and the site agreement provisions upon written application by any of the parties.

CAV fulfils this function through its Frontline Resolution (FLR) and formal conciliation services, which are offered to tenants and residents of rooming houses and parks.[38]

FLR is provided at the request of tenants and residents, and involves an FLR conciliator making contact (by telephone or email) with the landlord, or rooming house or park operator to advise them of their relevant responsibilities under the RTA. They may seek to gain a verbal undertaking from the landlord to a particular course of action on behalf of the tenant or resident.

Conciliation is provided by written application, and unlike FLR, conciliators refer to relevant documentation provided by either of the parties. Participation is voluntary and the agreements reached are non-binding. If either of the parties default on the agreement they can elect to escalate to another decision making forum such as VCAT.

Given these services are voluntary and non-binding, and are usually conducted by shuttle (where both parties are contacted separately), the risks of unfair outcomes resulting from any power imbalance that may exist between the parties is minimal. Instead, FLR and conciliation offer the opportunity for assistance at an informal level, through an independent conciliator who informs the parties separately of their rights and responsibilities under the RTA, and suggests ways to resolve the dispute.

Issues

It was reported in stakeholder consultation that landlords, property managers, and rooming house and parks operators have limited access to this type of assistance. A further concern was that some

38 Data regarding the use of these services is provided in the Dispute Resolution Issues Paper via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

vulnerable and disadvantages tenants and residents, particularly those experiencing financial difficulties, may not be accessing specialist services at the time they are needed.

The following stand-alone option proposes that CAV's conciliation services be extended to landlords, property managers, and rooming house and parks operators to assist with early and non-adversarial resolution of problems in tenancies and disputes. It could also assist in the early referral of tenants to appropriate assistance services.

Option 10.2 – Extend CAV's Frontline Resolution and conciliation services to landlords, property managers, and rooming house and park operators

Under this option FLR and conciliation services that are currently provided to tenants and residents would be extended to landlords, property managers, and rooming house and park operators. The level of service provision to tenants and residents would be unchanged.

The extension of these services would enable a greater overall volume of disputes in the residential tenancies sector to be addressed in a timely and non-adversarial manner. This could prevent some disputes from escalating, which could assist in preserving tenancies.

The extension of these services to landlords, property managers, and rooming house and park operators would also assist in the referral of tenants and residents to specialist assistance services, who may otherwise not seek assistance or be aware that assistance is available.

No amendments to the RTA would be required as provision is already made for services to be offered to any party in relation to a relevant agreement. Extension of the services could be made at an operational level within CAV.

Consultation questions

140. What are any risks or costs associated with extending CAV's Frontline Resolution and conciliation services to landlords, property managers, and rooming house and park operators?
141. Where the landlord has a dispute with their tenant or resident, what other options would contribute to:
    - early intervention and prevention of disputes escalating?
    - constructive resolution of disputes and preservation of tenancies?
    - early referrals of vulnerable and disadvantaged tenants and residents, and tenants and residents experiencing financial difficulties to appropriate specialist services?

10.3 Binding agreements, orders and determinations

There is a gap in the dispute resolution system for a mechanism that can facilitate binding agreements, and provide binding decisions and orders in an informal and non-adversarial setting.

Stand-alone option

- **Option 10.3 – Establish a specialist administrative dispute resolution service that makes binding orders.**

Background

VCAT is the primary mechanism for obtaining binding orders and determinations for disputes that arise under the RTA. In its 2015-2016 Annual Report, VCAT reported that it handled approximately 60,000 cases for the year in its Residential Tenancies List, the majority of which are brought by landlords for bonds, rent and possession.

Issues

Stakeholders considered that there are a number of obstacles to tenants exercising their rights that are related to the nature of VCAT processes. Some of these included, but were not confined to, the reliance on VCAT for binding decisions and orders, the complicated processes involved and the formal and intimidating environment of a tribunal.

Some stakeholders identified tenants' reluctance to use VCAT or defend VCAT matters brought against them as an issue. Tenants' use of VCAT is relatively minor compared to landlords; in 2015-16, seven per cent of the 60,000 cases were brought by tenants. However, this may be because there are many fewer provisions in the RTA that require a tenant to obtain a VCAT determination or order, than there are for landlords.

It was also noted that there are additional difficulties for vulnerable and disadvantaged tenants in exercising their rights.

Many stakeholders considered that there are insufficient options for parties to address and resolve disputes rapidly, that are informal and non-adversarial, and provide the certainty of binding determinations and orders. In many cases, VCAT is the first port of call for parties to a dispute, and the only avenue through which to obtain a binding decision. In addition to the various issues identified regarding VCAT practices and processes, concerns focused on the formal and adversarial nature of a tribunal setting, and the appropriateness of such a setting for the resolution of disputes where the preservation of relationships between the parties is often important.

Stakeholders suggested that a less formal mechanism providing binding decisions could facilitate early intervention and resolution of disputes in a way that enables the parties to gain certainty and maintain a relationship through an ongoing tenancy agreement.

A number of stakeholders favoured an ombudsman model to address this gap. Features of an ombudsman that may be attractive in this context are:

- scope to choose from a toolbox the most appropriate method of dispute resolution for the dispute and the parties
- relative informality compared to a tribunal
- processes that are less adversarial than a tribunal
- cases decided by an impartial referee with reference to the legislation
- transparent outcomes, and
- sector-wide issues identified and addressed at a sector level.

While an ombudsman would not typically be considered a suitable model for handling disputes between private individuals in the residential tenancies sector,[39] certain features that characterise ombudsmen could be applied to a dispute resolution function for the sector.

An option is proposed to assist parties to resolve disputes early. These options also have the potential to contribute to a positive, non-adversarial culture in the rental sector with scope to reduce the overall volume of cases brought to VCAT each year.

Option 10.3 – Establish a specialist administrative dispute resolution service that makes binding orders

A specialist administrative (non-tribunal) dispute resolution service would be established under the RTA for the private and community-housing sector. It would be mandatory for all residential tenancy disputes, other than termination and possession matters, to be handled by the new specialist administrative dispute resolution service before an application could be made to VCAT.

The service would make orders by agreement in the first instance, or provide a decision where an agreement cannot be reached. In either case, the service would make a binding order, which would be enforceable by the courts. If the parties do not reach agreement, and either is seeking to terminate the tenancy or a possession order, the matter would be referred to VCAT

There would be a merit review option with an appropriate setting to promote finality of the dispute resolution service decision making. For example, costs would be awarded if VCAT did not make a more favourable decision than the dispute resolution service. There would be no merits re-hearing option after the matter had been referred to VCAT and a decision made (see option 10.4A).

The service would have access to disincentives and penalties to bring about compliance with the orders it makes. It would also have to power to order payments into and out of the RSA or a similar facility where rent payments can be redirected until necessary repairs have been done, or where reimbursement is required for urgent repairs (chapter 8).[40]

This service would be free to users. It would incorporate a quality control process and be bound by the rules of natural justice. There would be scope to deliver services online in the future.

39 The United Kingdom's housing ombudsman is often referred to as an example of the use of such a model, however that ombudsman exists to handle complaints against social and institutional landlords, for whom membership is mandatory. Membership by private landlords and letting agents is permitted on a voluntary basis. A more accurate comparison would be the systems and processes in place for public and community housing tenants in Victoria. A DHHS appeals process and the Housing Registrar provide complaints mechanisms for social housing tenants. In addition, public housing tenants are able to seek review of decisions regarding their housing arrangements via the Victorian Ombudsman, consistent with its power to investigate complaints about State and local government authorities.

40 VCAT currently manages and makes orders regarding payment the RSA. Those powers would be retained regardless of which agency manages the Account.

Consultation questions

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

143. What other features or functions if any, should be delivered by a specialist administrative dispute resolution service to ensure that outcomes that are fair, fast, informal, and provide certainty to the parties in a non-adversarial environment?

144. If a specialist administrative dispute resolution was introduced in Victoria, who should it be delivered by and how should it be funded?

10.4 Quality of decision-making by VCAT

VCAT practices and processes are determined largely by the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) and are therefore outside the scope of this review. Nonetheless, stakeholder submissions regarding VCAT practices and processes have been taken into consideration during the course of both this review and the recent Victorian Government Access to Justice Review.

The Access to Justice Review reported on a number of aspects of VCAT's practices and processes, with particular reference to small civil claims. It is possible that many of the findings and recommendations of that review would be applicable across VCAT as an organisation given that any reforms to the administrative systems and processes, and decision making practices, would not be confined to a single list or claim type.

The Access to Justice Review made recommendations regarding both administrative processes and decision-making practices aimed at achieving:

- improvements in customer service and user experience, including through improved technology and upgrading of systems
- reduced restrictions on requesting written reasons
- increased user confidence in VCAT's ability to respond to complaints and improve operations through greater transparency in relation to complaints – specifically by publishing data in the VCAT Annual Report about the number and nature of complaints made
- strengthening of formal quality assurance processes to improve quality and consistency of decisions, including through peer-to-peer reviews, and
- simplification of the process for enforcing VCAT orders.

The recommendations of the Access to Justice Review are currently being considered by the Attorney-General.

Stakeholders considered that there are inconsistencies in VCAT practices and processes regarding the resolution of residential tenancy disputes, including decision-making.

Alternative options

- **Option 10.4A – Introduce re-hearing process for residential tenancies cases at VCAT, or**
- **Option 10.4B – Support consideration of peer-to-peer review of decision of non-judicial members by VCAT for the Residential Tenancies List.**

Background

Unlike a court, VCAT is not bound by the rules of evidence. Each decision a VCAT member makes stands alone and has no value as a precedent for another member.

A VCAT decision can only be appealed to the Supreme Court of Victoria on a point of law. To appeal a decision made by a VCAT member who is a judge of the Supreme Court or the County Court, leave must be sought from the Court of Appeal. To appeal a decision made by any other VCAT member, leave must be sought from the Supreme Court. There are time limits for seeking leave and starting an appeal.

Except for some guardianship and administration cases, power of attorney cases and disability cases, there is no internal review mechanism for VCAT decisions, including decisions for residential tenancies disputes. For those cases where there is provision for internal review or re-hearings, the powers are set out in the relevant Acts and not the VCAT Act.

Issues

Submissions to the review identified a range of issues associated with VCAT practices and processes. These included, but were not limited to, fees, applications, notices, waiting times, reviews, appeals processes, enforcement of orders, and use of advocates, among others.

Specifically there were concerns that inconsistencies in VCAT decision-making, and lack of accountability for decisions and outcomes made the process unpredictable and created uncertainty for tenants, residents, landlords, and rooming house and parks operators.

Although these concerns were reported by frequent users on both demand and supply side, it was difficult to determine the nature or extent of inconsistencies in decision-making, and no data or specific evidence of divergent or contradictory decisions being made about similar cases was available. Residential tenancies matters frequently have a high degree of specificity and this can complicate uniform decision making, particularly where VCAT attempts to balance the interests and potential for hardship of the parties to the dispute.

Stakeholders considered that an internal appeals process would assist in building a body of jurisprudence and, therefore, improving accountability in relation to decision-making at VCAT. Stakeholders noted that jurisdictions that have amalgamated tribunals, such as NSW, SA, Queensland and the ACT, provide internal review processes for a range of cases, including residential tenancy cases. It was suggested that the features of these processes should guide an internal appeals process for residential tenancy cases at VCAT.

While it was noted that an internal appeals process was not recommended for the small civil claims list by the Access to Justice Review because the cost to the parties and to VCAT was disproportionate to the value of a small claim, there may be a case to consider an internal appeals mechanism for residential tenancy cases. Residential tenancy decisions by VCAT were considered to have a substantial impact on the parties, in particular tenants, similar to guardianship and administration cases that have an internal appeal process at VCAT.

Two alternative options are presented to improve the quality and consistency of decision-making at VCAT.

Option 10.4A – Introduce re-hearing process for residential tenancies cases at VCAT

Under this option the RTA would be amended to introduce re-hearing process at VCAT for all residential tenancy cases, except for cases that appealed a decision made by the proposed

administrative dispute resolution service. This would provide for the rehearing of cases by a more senior member.

Key features of the process would include:

- the right to appeal being limited to final decisions by non-judicial members of VCAT
- the appeal application being lodged within a set time frame, for example 28 days.
- separate consideration being given to staying any final order pending an appeal
- the appeal being heard by a senior, deputy presidential or presidential member, and
- a fee for an application for an internal appeal.

In addition to the application fee they would be cost for the parties to prepare their case and be represented.

This approach is consistent with the range of cases that can be re-heard by VCAT under the *Guardian and Administration Act 1986*, the *Power of Attorney Act 2014* and the *Disability Act 2006*. It is also consistent with the approach to internal appeals at the NSW Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal.

While this option will promote the guidance and principles a re-hearing process can build, it would impose additional costs for VCAT and costs and time delays for the parties. Some stakeholders may consider that this could exacerbate any existing barriers to achieving timely resolution of disputes.

Option 10.4B – Support consideration of peer-to-peer review of decision of non-judicial members by VCAT for the Residential Tenancies List

Under this alternative option, if the government supports the recommendation by the Access to Justice Review to strengthen quality assurance at VCAT in relation to small civil claims, VCAT would be supported to introduce an appraisal process for the peer review of hearing and decisions by non-judicial members also for residential tenancies matters.

While there would be no direct costs for applicants, this process may be less transparent for the parties.

Consultation questions

145. What further information is required to determine the extent to which there is a problem with the quality of VCAT decision-making?
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?
147. What are any other features or mechanisms that would address the issues and be effective for both VCAT and the parties to a dispute?

10.5 Compliance and enforcement

Penalties prescribed under the RTA are seen as being too low, and not an effective deterrent to non-compliance.

Stand-alone option

- **Option 10.5 – Expand civil remedies under the RTA.**

Background

CAV's compliance and enforcement activities focus on matters where there is adequate evidence to support a successful action, and where conduct:

- presents serious or extensive detriment to the community (and particularly vulnerable groups)
- is systematic and deliberate, and
- is likely to continue.

Matters are considered on a case-by-case basis. The criteria that are applied to case selection are described in CAV's compliance and enforcement policy. [41]

Issues

Some stakeholders suggested expanding CAV's compliance and enforcement mechanisms as a way to address instances of non-compliance in the sector and to improve levels of compliance by landlords and rooming house and parks operators.

In particular, stakeholders considered the absence of significant fines or other penalties for non-compliance with the RTA (such as bans on leasing out poorly maintained properties) means that landlords are not compelled to adequately maintain their rental property, make timely repairs or comply with instructions from CAV or VCAT. Tenants must then seek a remedy, which may not be a viable option, particularly for vulnerable and disadvantaged tenants.

Consistent with existing Australian precedent, CAV (or another responsible body) would be able to investigate any matter at its own discretion or in response to a complaint, and or refer a complaint for investigation by another relevant agency (such as Energy Safe Victoria or local council inspectors).

The effectiveness of this regime could be enhanced through the following features.

Option 10.5 – Expand remedies under the RTA

Due to restrictions on the size of infringement penalties (which limit their deterrent value), the RTA would be amended to empower CAV to apply for civil penalties for specified breaches. This would be added to CAV's current powers under the RTA to seek orders requiring compliance with a direction, a range of injunctions, and corrective advertising orders.

41 Data regarding CAV's compliance and enforcement activities is provided in the Dispute Resolution Issues Paper via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

Other additional powers that could be explored include:

- the ability to issue a range of binding orders aimed at achieving compliance with minimum standards, including that the landlord undertake a repairs schedule if they wish to continue renting the premises (chapter 8), and
- the ability to issue a warning notice (see s 223 of the Australian Consumer Law, for example).

CAV otherwise has existing powers to seek a range of injunctions from a court to order a person to do, or refrain from doing, anything specified in an order.

Consultation questions

148. What are the disadvantages, if any, of introducing civil penalties under the RTA?
149. Which of proposed additional powers would most assist in addressing non-compliance?
150. Are there any other powers or approaches that should be considered?

11 Terminations and security of tenure

Terminations provisions regulate the circumstances under which the parties can end a tenancy agreement.[42] The RTA provides a range of protections over and above contract law in acknowledgement that housing is essential and needed continuously, and moving is costly.

Key issues raised by stakeholders included that:

- the grounds for termination do not adequately protect tenants from unfair terminations of their tenancy
- the existence of terminations provisions where reasons are not required undermine tenants' security of tenure and their confidence to exercise their rights under the RTA for fear or retaliatory termination of their tenancy
- the grounds for tenant at-fault terminations do not have the appropriate coverage and landlords resort to using the notice to vacate for no specified reason in order to address problems that arise from these gaps
- tenants do not have appropriate flexibility to exit an agreement in response to a landlord giving notice to vacate or where the terms of the tenancy changed, and
- there needs to be greater discretion for VCAT in making possession orders to avoid tenants having their tenancies unfairly terminated.

Quantitative data regarding the frequency and reasons for moves provides an indication of the extent of certain issues as they occur across the sector. Overall, people are moving less frequently than they were 15 years ago.[43] ABS data, and research commissioned by CAV indicate that moves are initiated by tenants in around 80 to 90 per cent of cases.[44]

For those tenants whose move was initiated by the landlord, the main reasons cited related to change of use (sale, moving in, renovations). Four per cent of tenants received a notice to vacate for no specified reason. [45]

When asked if they thought they would be able to stay in the property for as long as they liked, 55 per cent of tenants indicated they definitely or probably would; 24 per cent said they did not know; and 21 per cent said definitely or probably no. The most common reasons for the latter response were:

- landlord's situation may change (39 per cent)
- rent increases/rent becoming too expensive (45 per cent), and
- own personal situation may change (27 per cent).

42 For the ease of comprehension of this chapter, tenancy agreement encompasses a residency right or agreement.

43 ABS, Customised 2011 Census report, 2015 cited in *Laying the Groundwork*, p16 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

44 Based on surveys with tenants. ABS, Customised Survey of Income and housing 2014; *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria, Final Report*, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>, p41 and 43.

45 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria, Final Report*, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

According to research commissioned by CAV, 26 per cent of landlords reported having ended their previous tenancy. Of those, 29 per cent evicted the tenant for rent arrears, and a further 11 per cent evicted for reasons other than rent arrears.[46]

Of tenants who reported having their previous tenancy terminated by the landlord, 74 per cent stated that the notice period was long enough to find another property. This was higher where the notice period was 90 days (92 per cent) and 120 days (83 per cent).[47]

This chapter includes options for reforms to terminations provisions in response to these issues. It should be assumed that the status quo is an option in each case.

The provisions of the RTA that have been identified as areas for reform are addressed in this chapter roughly in the order that they appear in Part 6 of the RTA, as follows:

Table 11.1: Terminations provisions identified as areas for reform

Type of termination	Area for reform
Terminations instigated by the landlord	
Tenant at fault	• Damage • Danger • Termination by a notice to leave • Disruption • Non-payment of rent • Failure to comply with a VCAT order • Successive breaches of terms of the agreement • Use of premises for illegal purposes • Parting with possession for consideration (new provisions) • Antisocial behaviour (new provisions) • VCAT discretion in granting possession
Tenant not at fault	• End of fixed term • No specified reason • Changes of use • Mortgagee repossession
Terminations instigated by tenant	
Landlord at fault	• Successive breaches of agreement and failure to comply with a VCAT order
Landlord not at fault	• After death of sole tenant • Reduced periods of notice under certain circumstances • Lease breaking

46 *Ibid*. Note that the sample of landlords used for this study had a higher proportion of self-managing landlords than exists in the population of landlords in the private rental sector.

47 *Ibid*. p.42.

The chapter also provides three models for enhancing security of tenure through terminations provisions. While security of tenure is influenced by many aspects of residential tenancies legislation and the broader environment (see Executive Summary),[48] provisions for landlord initiated terminations are important because they affect the length of the agreement, the circumstances under which the agreement may be terminated and protections against unfair termination.

Family violence

There are a number of issues relevant to terminations, which may be instigated either by the landlord or tenant, where family violence has occurred. These are addressed separately in chapter 12 of this paper.

11.1 Terminations instigated by landlord or owner: tenant at fault

As noted above, research indicates that the most common reason for a landlord to terminate a tenancy is for rent arrears. While tenant responses indicated that at-fault terminations accounted for about 4 per cent of terminations instigated by the landlord, there is no quantitative data about the specific nature of, or circumstances surrounding those terminations.

11.1.1 Processes for termination

Some stakeholders considered that under the current arrangements there is excessive scope for arbitrary evictions to occur where it is contended that a tenant has breached the terms of the agreement. This can result in unfair and unnecessary evictions.

Stand-alone option

- **Option 11.1 – Introduce a process for termination orders to the RTA.**

Background

Under existing arrangements, where a tenant has breached the tenancy agreement, a landlord may evict the tenant by giving a notice to vacate specifying how the tenant has contravened the terms of the RTA and the date on which they are required to vacate.

In cases where the tenant does not vacate on the specified date, the landlord is required to obtain a possession order from VCAT. In making a decision about whether to grant a possession order, VCAT must observe the conditions and processes set out in Part 7 of the RTA. These conditions and processes provide an additional layer of scrutiny beyond those imposed on the landlord to give a valid notice to vacate.

Issues

Some stakeholders expressed concerns that landlords can give a notice to vacate to terminate the tenancy when they believe the tenant has breached the terms of the agreement, without any independent review. This can result in tenants unnecessarily leaving a tenancy, and in some cases becoming homeless.

It was suggested that tenants be afforded a greater degree of protection, particularly for at-fault terminations where notice periods can be as short as the same day. It is intended that a mechanism

48 Also the Security of Tenure Issues Paper via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting> provides a detailed discussion.

which removes the landlord's ability to give a notice to vacate and imposes the scrutiny of a possession order hearing in the first instance, will reduce the scope for unnecessary and unfair evictions under the at-fault terminations provisions of the RTA.

Option 11.1 – Introduce a process for termination orders to the RTA

A termination order would replace the notice to vacate. An application for a termination order would be heard in the same way as a possession application. That means the same level of scrutiny would be applied to the application, and as a result the tenant afforded a higher degree of protection in the first instance. The tenant would be given the same opportunities to challenge the application for a termination order as they would for a possession order application.

The termination order process would be particularly beneficial to those tenants would otherwise vacate a rented premises without having challenged a notice to vacate, where the notice has been given unfairly or unnecessarily.

VCAT would be required to refer to a framework for assessing and weighing the risks to the property, landlord, any other relevant parties, and to the tenant when making decisions in relation to termination and possession (as discussed in this chapter 11.1.2 below).

Consultation questions

151. What are the potential benefits and risks of introducing a termination order process to the RTA?
152. What alternative options are there to provide an appropriate level of checks and balances in cases of at-fault evictions with creating undue burden or barriers to legitimate tenancy terminations for landlords?

11.1.2 VCAT decision-making process in granting termination and possession orders

An issue was identified in relation to VCAT's discretion in making possession orders, in particular, regarding the reasonableness and proportionality of a termination, and the potential hardship to the tenant.

Stand-alone option

- **Option 11.2 – Require VCAT consideration of reasonableness in making possession orders.**

Background

The RTA specifies the conditions under which VCAT must make a possession order. These generally require that certain administrative requirements are met such as that the landlord was entitled to give the notice to vacate and has not withdrawn the notice, they have complied with the requirements of the RTA, and so forth.

Even where all of the conditions are satisfied, there are circumstances under which the RTA specifies that VCAT may dismiss or adjourn an application for possession, and where it must not make an order for possession. For example, VCAT:

- may dismiss or adjourn an application relating to rent arrears if satisfied that arrangements have been made such that the landlord can avoid financial loss

- must dismiss an application if all arrears have been paid
- must not make a possession order if it considers a failure to comply with a tribunal order was trivial or has been remedied; there will be no further breaches; and the breach is not a recurrence, and
- must not make a possession order for disruption if the disruption has ceased, is not a recurrence and will not be repeated.

In addition, when making decisions regarding terminations under each of the specific provisions, VCAT takes into account a range of considerations and applies various tests regarding the nature of the action or activity leading to the termination, as described in the preceding sections of this chapter.

Issues

Some stakeholders were concerned that VCAT does not have adequate discretion to take into account hardship that may be experienced by the tenant, and other courses of action that may preserve the tenancy. It has been suggested a further test be applied to terminations such that VCAT must not make a possession order unless it is reasonable and proportionate in the circumstances, taking into account hardship to the tenant. This is particularly important in light of the fact that in some cases, the end of a tenancy could result in homelessness for the tenant.

More generally, it was considered that clearer guidelines could formalise VCAT's decision making process to ensure that the risks to the property, landlord, any other relevant people, and to the tenant are taken into account when making decisions in relation to termination and possession.

Option 11.2 – Require VCAT consideration of reasonableness in making possession orders

VCAT would be required to take into account the reasonableness and proportionality of termination of the tenancy, and the potential hardship to the tenant, balanced against the interests and potential hardship (or harm, as the case may be) to the landlord/owner/mortgagee, neighbours, other residents or any other people affected by the tenant's actions or behaviour.

Documentation would be required to accompany an application for (termination or) possession with a pre-eviction checklist, detailing, for example:

- the nature, frequency and duration of the tenant's conduct leading to the notice to vacate
- the effect of the tenant's conduct on others, and
- whether the landlord has considered other courses of action before beginning the eviction process.

Consultation questions

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?
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?

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11.1.3 Damage

Issues were raised regarding the wording used to describe damage (for general tenancies), and the processes for terminating the tenancy.

Stand-alone options

- **Option 11.3 – Clarify the description of damage and include injury.**
- **Option 11.4 – Require a landlord to apply directly to VCAT for a termination order for damage.**

Background

For general tenancies, a landlord may give a tenant a notice to vacate a rented premises if by the conduct (by act or omission) of the tenant or the tenant's visitor, damage is maliciously caused to the premises or common areas.

For rooming houses a notice to vacate may be given where the resident or resident's visitor intentionally or recklessly causes or allows serious damage to any part of the premises.

The termination date may be the same day on which the notice is given.

The provisions for malicious, and intentional and reckless damage are distinguished from the duty provisions for each of the tenure types regarding damage caused by the tenant other than fair wear and tear. Breaching these duties is not grounds for immediate termination.

Steps to gain possession follow the standard procedure.

With regards to the interpretation of 'malicious damage', VCAT has stated that in practice it has taken the view that this termination provision was designed to be utilised in urgent, current and imminently threatening situations concerning damage to a property, or where the conduct is continuing at the time the notice to vacate is given.

Issues

Some stakeholders submitted that the definition of damage should not require that it be urgent, current, or imminent, or continuing conduct.

In addition, it has been suggested that this provision include intentional damage to safety equipment, such as smoke alarms.

Other stakeholders recommended that more detail about the nature of the malicious damage should be included in the notice to vacate.

Stakeholders also suggested allowing an application to VCAT for a termination order or order of possession in the first instance, which would eliminate the step of issuing a notice to vacate.

Option 11.3 – Clarify the description of damage and include injury

This option aims to reduce the ambiguity associated with the word 'maliciously' for damage in general tenancies, by aligning the description with that used elsewhere in the RTA and more commonly in other jurisdictions.[49]

A tenancy could be terminated if the tenant had intentionally or recklessly caused or permitted serious damage to the premises or any common areas. Serious damage would include any damage to safety equipment such as smoke alarms.

The provision would apply similarly if the tenant had intentionally or recklessly caused or permitted serious injury to the landlord, the landlord's agent, an employee or contractor of either, or a neighbour or person on neighbouring property or premises used in common with the tenant.

Option 11.4 – Require a landlord to apply direct to VCAT for a termination order for damage

Under this option the landlord would be required to apply directly to VCAT for a termination order instead of giving a notice to vacate to the tenant.

As described at the beginning of this chapter, a termination order would combine the steps of giving a notice to vacate and obtaining a possession order. It would incorporate the checks and balances provided by VCAT in the first instance, while allowing the process to be undertaken in a single step.

Consultation questions

155. What are any alternatives to clarifying the type of damage and the circumstances under which the damage is caused that would appropriately constitute grounds for immediate termination?
156. What are any potential benefits and risks of requiring a termination order from VCAT in lieu of giving a notice to vacate?
157. What are any alternative considerations or procedures that would be appropriate for terminations for damage?

49 For rooming houses, caravan parks, and Part 4A parks in the RTA, the damage must be intentional and reckless. In residential tenancies Acts of other Australian jurisdictions (for example, NSW and Queensland) equivalent provisions are for both damage and injury, and the kind of damage relevant to the provisions is described as intentional and reckless.

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11.1.4 Danger

There is insufficient clarity about the circumstances giving rise to termination for danger.

Stand-alone options

- **Option 11.5 – Clarify the description and guidelines for interpretation of danger.**
- **Option 11.6 – Require a landlord to apply directly to VCAT for a termination order for danger.**

Background

A landlord may give a tenant a notice to vacate rented premises if the tenant or the tenant's visitor by act or omission endangers the safety of occupiers of neighbouring premises.

The equivalent provisions for rooming houses (and caravan parks and Part 4A parks) specify that the resident or visitor, by act or omission 'causes a danger'.

According to the VCAT practice notes[50] the word 'endangers' is interpreted in the present tense and the purpose of the provision is to protect neighbours rather than punish the tenant. Therefore it is normally necessary for the landlord to demonstrate that at the time the notice to vacate was given, the danger to neighbours was continuing. If VCAT considers that an incident was isolated and unlikely of being repeated it may conclude that there are insufficient grounds. If instead the tenant or visitor is likely to continue to be a source of danger to neighbours there may be grounds.

Second, VCAT considers that there must be a connection between the tenant and the property, and the neighbour and the neighbouring premises. An example would be where a tenant assaults their neighbour somewhere not located near the rented premises.

Third, if a tenant or visitor has threatened a neighbour, VCAT will consider whether the threat is likely to be carried out so that the tenant could reasonably be said to endanger the neighbour.

The termination date may be the same day on which the notice is given. However, a landlord is not entitled to give a notice to vacate if a notice to leave has been given for violence on managed premises in respect to that incident (see this chapter 11.1.5 below).

Issues

A number of issues were identified regarding the scope of provisions in relation to general tenancies:

- The word 'endangers' is interpreted strictly by VCAT in the present tense, and therefore requires certainty of continuing endangerment. It was questioned whether this is adequately protects neighbours from the harm that may have been caused by the tenant's actions. VCAT's discretion to predict whether the behaviour will continue or recur is considered problematic.
- The provision is restricted to occupiers of neighbouring premises and should include danger to any others who legitimately come in contact with the property including the landlord, their agent and any contractors.
- As with termination provisions for damage (see this chapter 11.1.3 above), it has been suggested that the landlord should be able to apply directly to VCAT for a termination order or order of possession without issuing a notice to vacate.

50 VCAT residential tenancies practice notes, P6-40 July 2016.

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Option 11.5 – Clarify the description and guidelines for interpretation of danger

The provisions for residential tenancies would be amended to broaden their scope, and provide clarity and consistency with other parts of the RTA.

A tenancy could be terminated if the tenant or the tenant's visitor by act or omission had caused a danger to any of occupiers of neighbouring premises, the landlord, their agent, contractors or any other person on the premises.

The language would clarify that the grounds for termination relate to an act that has been committed. By implication, in making a decision on termination or possession order applications, predictions regarding the likeliness of a recurrence of the act, and the requirement for the danger to be continuing would no longer be taken into account.

Option 11.6 – Require a landlord to apply directly to VCAT for a termination order for danger

The landlord would be required to apply directly to VCAT for a termination order instead of giving a notice to vacate to the tenant.

As described at the beginning of this chapter, a termination order would combine the steps of giving a notice to vacate and obtaining a possession order. It would incorporate the checks and balances provided by VCAT in the first instance, while allowing the process to be undertaken in a single step.

Consultation questions

158. What are the potential benefits and risks of amending the language and scope of the provisions for danger?
159. What are any alternatives to clarifying circumstances under which a tenant had caused danger to another person that would constitute grounds for termination?
160. What are potential benefits and risks of removing VCAT's discretion to make possession orders based on the likeliness of a recurrence of the behaviour?
161. What are the potential benefits and risks of requiring termination by application to VCAT?
162. What are any alternative considerations or procedures that would be appropriate for terminations for danger?

11.1.5 Termination by a notice to leave for violence on managed premises

Notices to leave for violence on managed premises need to balance the rights of the perpetrator whose residency is suspended with the obligation of the landlord/operator to protect other residents from future violence. Conditions could also be improved for suspended residents in terms of more practical guidance, a timely resolution of their suspension, and the ability to have any necessary goods collected for them from the premises.

Stand-alone options

- **Option 11.7 – VCAT must terminate tenancy if it was appropriate to give notice to leave.**
- **Option 11.8 – Notice to leave can be served on resident for visitor's serious violence.**
- **Option 11.9 – Notice to leave to include practical information for suspended resident.**
- **Option 11.10 – Suspended resident can arrange for authorised representative to collect goods.**
- **Option 11.11 – VCAT must hear application within two business days, with adjournment of no more than five business days.**

Background

The RTA contains provisions for addressing violence that occurs on-site in managed high-density buildings, rooming houses, caravan parks and residential parks. If an on-site manager has reasonable grounds to believe that a serious act of violence by the resident or their visitor has occurred on the premises, or that the safety of any person is in danger from the resident or their visitor, the on-site manager can issue the perpetrator with a notice to leave. It is an offence for the on-site manager to issue a notice to leave without reasonable grounds. A notice to leave cannot be given if a notice to vacate has already been given in respect of the same incident.

The prescribed notice to leave requires the on-site manager to indicate which of the two reasons for giving a notice to leave applies, and informs the resident of their rights. An on-site manager must give the notice to leave as soon as it is possible for the manager to safely do so after the serious act of violence has occurred or the safety of a person has been endangered. A resident or visitor given a notice to leave must leave the premises immediately, and it is an offence to remain on the premises.

If a resident is given a notice to leave, their residency is suspended and they must not return for two business days (at which point the residency resumes) or until the matter is heard at VCAT, if the landlord/operator makes an urgent application to VCAT during the suspension period to terminate the tenancy.

When making the application to VCAT, the landlord/operator must specify the acts, facts, matters and circumstances, including relevant dates, being relied on in support of the application. VCAT can make an order terminating the tenancy, or an order allowing the resident to resume occupation if VCAT is satisfied the circumstances giving rise to the giving of the notice to leave will not be repeated.

Issues

Feedback received in the review observed that notices to leave can be difficult to execute, given the circumstances that give rise to them, and that police can be unsure whether they have the right to remove a resident issued with a notice to leave. While some submissions argued that the requirements for evidence be reduced because witnesses can be reluctant to provide evidence for

fear of retribution, other submissions argued that a notice to leave should have to include a statutory declaration outlining the grounds, events, and reasons for the notice.

The current provisions aim to balance evidentiary requirements by allowing a notice to leave to be completed quickly and issued as soon as possible to remove the source of the serious violence or danger, with full particulars provided at the VCAT application stage if the matter progresses to VCAT.

Other feedback received in the review raised concerns about VCAT's ability to reinstate the resident's occupancy, notwithstanding that the notice to leave was appropriately given, if VCAT is satisfied the circumstances giving rise to the giving of the notice to leave will not be repeated. It was argued that the test requires VCAT to conduct 'an exercise in mind-reading' out of step with changing community attitudes to issues such as family violence, that makes it difficult for an operator to ensure the future safety of other residents and neighbours from future serious violence. It was suggested that the provision should be amended so that if VCAT determines it was appropriate to give the notice to leave, the tenancy must be terminated.

The RTA provides that if a resident's visitor commits a serious act of violence or endangers the safety of any person, a notice to leave can be served on the visitor. Submissions have argued that this is of limited usefulness and that the landlord/operator should be able to also issue a notice to leave on the resident, arguing that such an approach would be consistent with other provisions in the RTA which hold the resident responsible for the behaviour of their visitors (for example, a resident can be issued an immediate notice to vacate if their visitor causes serious damage, causes serious disturbance to the peace and quiet of other residents, or puts others' safety in danger). It is maintained that the landlord/operator would still be required to satisfy VCAT of the link between the resident and the visitor, if the matter progressed to VCAT.

Other submissions suggested that more practical information for a suspended resident should be included in the prescribed notice to leave, and that a suspended resident should be able to send an authorised representative to collect any necessary goods from the premises for the resident while the suspension is in force.

Finally, submissions raised concerns that notwithstanding the requirement for VCAT to hear a notice to leave application within two business days of the application being made, sometimes adjournments of up to two weeks are given and residents are effectively rendered homeless and may be forced to sleep rough in the meantime. It was suggested that the matter cannot be adjourned for more than five business days, unless the parties consent to a further adjournment.

The following stand-alone options seek to address these issues.

Option 11.7 – VCAT must terminate tenancy if it was appropriate to give notice to leave

Under this option, where the landlord/operator makes an application to VCAT to terminate the tenancy, VCAT would be required to do so if VCAT determined that it was appropriate to give the notice to leave. VCAT would no longer have the ability to allow the resident to resume occupancy if VCAT determined that it was appropriate to give the notice to leave.

Option 11.8 – Notice to leave can be served on resident for visitor's serious violence

Under this option if a resident's visitor committed a serious act of violence or endangered the safety of any person, the landlord or operator would be able to serve a notice to leave on the visitor and, if appropriate, also on the resident.

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Option 11.9 – Notice to leave to include practical information for suspended resident

Under this option, the prescribed notice to leave should include further practical information for a suspended resident, advising them to contact VCAT during their suspension period and shortly after the end of two business days to determine whether or not an application has been made.

Option 11.10 – Suspended resident can arrange for authorised representative to collect goods

Under this option, a suspended resident can make arrangements with the landlord/operator to have an authorised representative collect any necessary goods that belong to the resident from the premises during the resident's suspension period. The suspended resident must provide the name and contact details of the representative to the landlord before the representative attends the premises.

Option 11.11 – VCAT must hear application within two business days, with adjournment of no more than five business days

Under this option, VCAT would be required to hear an application within 2 business days after the application is made, and any adjournment must be for no more than five business days at which time the matter must be determined, unless the parties consent to a further adjournment.

Consultation questions

163. In what circumstances, if any, is it appropriate for a resident who was served a notice to leave on reasonable grounds to be permitted to resume occupancy, and how can the landlord/operator ensure the safety of other residents against future harm from that resident?
164. Should a landlord or operator be able to serve a notice to leave on a resident due to the conduct of their visitor in the manner proposed in option 11.8, or should this ability be confined to particular circumstances?
165. Is there any other practical information that should be included for a suspended resident on an updated notice to leave, other than the information noted in option 11.9?
166. Are there any practical issues that arise for landlords or operators, suspended residents and their representatives under the proposal in option 11.10?
167. Under what circumstances may it be necessary to adjourn an application under option 11.11?

11.1.6 Disruption

Issues were identified regarding the scope for interpretation of serious disruption and the consequences of immediate loss of tenancy, which may be disproportionate.

Stand-alone options

- **Option 11.12 – Increase notice period for termination for disruption.**
- **Option 11.13 – Amend the conditions under which a possession order must not be made.**
- **Option 11.14 – Require a landlord to apply directly to VCAT for a termination order for disruption.**

Background

Under current provisions a rooming house resident may be given a notice to vacate if they or their visitor seriously interrupts the quiet and peaceful enjoyment of the premises by other residents.

The date of termination can be the same as the date on which the notice is given or later. The notice may be challenged by the resident at VCAT.

If a possession application is made in relation to the notice, VCAT must not make a possession order if it is satisfied that the interruption has ceased, and is not a recurrence and will not be repeated.

In addition, residents have a duty not to interfere with the quiet enjoyment of the premises by other residents. The VCAT practice notes do not provide commentary on how disruption under this provision is differentiated from the general duty provisions for quiet enjoyment.

Issues

Stakeholders submitted that the provisions for terminating a tenancy for disruption, and in particular the same day notice period, are overly strict and not proportionate to the harm likely to be caused.

The seriousness of the disruption is likely to be open to interpretation. In any case, it is reasonable to assume that disruption is generally less likely to cause harm to others in the same way as violent or dangerous behaviour. It is also more amenable to being remedied by the resident.

Stakeholders highlighted that there is a risk that tenants may leave immediately in accordance with the notice without the time or opportunity to remedy the situation or challenge the notice.

It was nonetheless noted that guidelines requiring that VCAT must not make a possession order if the disruption will not be repeated are of questionable value given that it is not possible for a member to determine whether or not the disruption will recur.

Option 11.12 – Increase notice period for termination for disruption

The notice period would be increased from the same day to seven days, with VCAT discretion to extend the period to 14 days.

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Option 11.13 – Amend the conditions under which a possession order must not be made

The requirement that VCAT not make a possession order where the disruption will not be repeated would be removed.

Option 11.14 – Require a landlord to apply directly to VCAT for a termination order for disruption.

The landlord would be required to apply directly to VCAT for a termination order instead of giving a notice to vacate to the tenant.

As described at the beginning of this chapter, a termination order would combine the steps of giving a notice to vacate and obtaining a possession order. It would incorporate the checks and balances provided by VCAT in the first instance, while allowing the process to be undertaken in a single step.

VCAT would have discretion to specify a notice period up to a maximum of 14 days.

Consultation questions

168. What is an appropriate notice period for termination for disruption?
169. What are the potential benefits and risks of removing VCAT discretion to make possession orders based on predictions of future behaviour?
170. What are the potential benefits and risks of requiring a landlord to apply for a termination order from VCAT as described under option 11.14?
171. What are any alternative considerations or procedures that would be appropriate for terminations for disruption?

11.1.7 Non-payment of rent

A number of issues were identified in relation to provisions for termination for non-payment of rent. These relate to: the possibility for unnecessary evictions, risks associated with the length of termination processes and repeated late payment, and the additional obligations imposed on rooming house residents.

Stand-alone options

- **Option 11.15 – Provide option for tenant to negotiate repayment plan where seven days' rent owed.**
- **Option 11.16 – Require that repayment of arrears invalidate termination processes.**
- **Option 11.17 – Enable VCAT to make a termination order for repeated late payment of rent.**
- **Option 11.18 – Amend provisions for rooming houses to be consistent with general tenancies.**

Background

Under the current provisions for non-payment of rent, the landlord may give a notice to vacate if the tenant owes at least:

- 14 days rent, with 14 days' notice for general tenancies, and
- 7 days rent, with 2 days' notice for rooming houses.

A landlord may apply to VCAT for a possession order at the time they give a tenant a notice to vacate.

The tenant can pay the rent and stay, or they can give a notice of intention to vacate, including during a fixed term agreement (that is, the tenant can break the lease without penalty where they have received a notice to vacate for rent arrears).

In instances where the tenant does not pay the rent and does not leave on the date specified on the notice to vacate, the following possession process applies:

1. VCAT ordinarily makes an order for a repayment plan (providing the tenant attends the hearing), which allows the tenant to repay the arrears over a specified period (usually three to 12 months) If the tenant defaults on the plan, the VCAT hearing can be reopened and the plan extended

2. if the tenant continues to default, VCAT will consider this when the landlord makes further applications for a possession order. VCAT must dismiss the application if the tenant has paid the arrears and not accrued further arrears

3. if a possession order is made and a warrant of possession purchased by the landlord, the warrant can be postponed by up to 30 days if VCAT is satisfied that the tenant would suffer hardship if not postponed and it would be greater than that suffered by the landlord. VCAT also has discretion to cancel a warrant of possession for reasons it sees fit.

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Additional obligations for rooming house residents

In addition to non-payment of rent as a grounds for termination, payment of rent is a duty for residents of rooming houses. This means a residency right can be terminated if the resident repeatedly fails to pay rent as it falls due according to the successive breach of duty process (as described in chapter 5.1) or fails to comply with a VCAT order where a compliance order is sought.

The possession procedure for rooming houses in relation to a notice to vacate for successive breaches of duty to pay rent follows the standard procedure. Therefore VCAT's discretion to dismiss or adjourn an application for possession, as described above, does not apply in these cases.

Issues

Scope for unnecessary evictions for non-payment of rent

Non-payment of rent was identified as a principal reason for tenancies ending. Termination for non-payment of rent can therefore increase the risk of homelessness for some tenants, who may have difficulty paying on time.

Stakeholders expressed concerns that even where a tenant's difficulty paying the rent is temporary and they have are able to repay the arrears, they could lose their tenancy without having the opportunity to negotiate a repayment plan with the landlord.

When assessing an application for possession related to a notice to vacate for non-payment of rent, VCAT practice is to adjourn the application and put in place a repayment plan, as described below. Nonetheless, if the notice to vacate is not challenged by the tenant, or the application is not defended, in some instances they may not get the opportunity to repay the arrears and maintain the tenancy.

It was suggested that if repayment plans were put in place prior to a tenant receiving a notice to vacate, there may be greater scope for them to remain in the tenancy and for the landlord to recover the arrears. Some stakeholders noted that the early negotiation of repayment plans is already common practice within the property management sector.

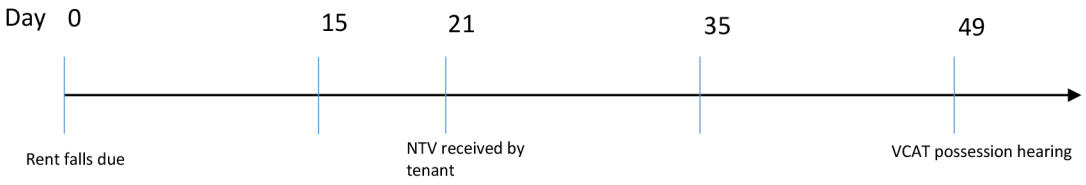
Length of termination processes

From the supply side perspective, late and non-payment of rent is a key risk associated with letting property. The rules and processes set by the legislation can influence the perceived risk profile of letting property generally.

Stakeholders further noted that although the notice period for termination is 14 days, landlords could, in practice, be without rent for a minimum of 35 days, once the initial 14 days of late payment have elapsed, allowance is made for service of the notice to vacate and the notice period passes.

If the tenant does not vacate on the date specified in the notice, the periods of time the landlord must sustain the tenancy without rent can become protracted (figure 11.1).

Figure 11.1: Timeline for terminating a tenancy for non-payment of rent



*NTV refers to a notice to vacate.

Following the VCAT possession hearing a number of alternative outcomes are possible, including for example:

- VCAT grants possession order and landlord requests warrant. The warrant must be executed within 30 days
- the tenant requests a review if they did not attend the hearing, and
- VCAT adjourns the hearing and orders a repayment plan.

Repeated late payment of rent

A related but separate issue is the repeated late payment of rent. Stakeholders submitted that the 14-day period before which a notice may be given in general tenancies, combined with an absence of penalties for failing to pay rent on time, discourages some tenants from paying on time. Over time this can create financial difficulties for landlords. They proposed that landlords be able to issue a notice to vacate earlier and be able to lodge a claim in VCAT for costs such as interest and bank fees and charges.

However, other stakeholders suggested that a separate process addressing repeated late payment of rent would unduly disadvantage vulnerable tenants.

Termination for successive breaches of duty to pay rent for rooming house residents

Stakeholders suggested that the 14 day allowance for rent payment in general tenancies be consistent across tenure types, noting there is no clear rationale for why rooming house residents should be given reduced scope for late payment. It is further noted that rooming house residents are frequently on low incomes and therefore more likely to require a longer allowance than seven days to pay rent. In addition, given that income payments in many cases are made on a fortnightly basis, the seven day allowance for late payment may unduly penalise them.

It was noted in addition that payment of rent as a duty for rooming house residents, places them at greater risk of having their residency rights terminated because they can be given a notice to vacate for successive breaches of their duty to pay rent as it falls due, or failure to comply with a VCAT order to pay rent. Further, residents of rooming houses who have been given a notice to vacate via these provisions have less protection in a possession hearing than if they had been given a notice to vacate for non-payment of rent.

The challenge for creating fair and equitable legislation is to

- determine what is an appropriate amount of time before action can be taken for rent owing
- determine what is an appropriate allowable frequency for late payment of rent

- facilitate the continuation of the tenancy where the tenant's inability to pay rent is due to a difficulty that is temporary
- enable the repayment of arrears over a period of time that is suitable to both parties, and
- provide appropriate processes for landlords to recover losses, and for the property to be made available to other tenants.

Option 11.15 – Provide option for tenant to negotiate repayment plan where seven days' rent owed

Where at least seven days' rent is owed, the landlord would be required to give notice that the rent is late and offer to negotiate a repayment plan with the tenant before taking steps to terminate the tenancy. If the tenant defaulted on the repayment plan, the landlord would be entitled to take action to terminate the tenancy either by giving a notice to vacate with 14 days' notice, and making an application for a possession order, or alternatively by applying for a termination order.

VCAT would have discretion to grant one extension on the repayment plan if it is satisfied that the reasons for default were unavoidable and temporary.

A financial hardship code could be development by CAV in conjunction with relevant stakeholders and experts to assist landlords and tenants to manage financial hardship.

Provision would be made for a landlord to seek leave to terminate a tenancy without entering into a repayment plan if they are experiencing severe financial hardship or are at risk of losing the property.

Option 11.16 –Require that repayment of arrears invalidate termination processes

A process for termination of a tenancy solely on the ground of non-payment of rent would cease to have effect if the tenant pays all the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord and the tenant has not vacated the residential premises.

If a tenant repays all the rent owing, or where a repayment plan has been entered into and the tenant fully complies with that plan, the landlord must notify:

- VCAT, if the landlord has applied for a possession order on the ground of non-payment of rent and the application has not been finally dealt with, or
- the Sheriff, if a possession order has been made and a warrant for possession of the residential premises has been issued but has not been enforced by the Sheriff.

As per current provisions, VCAT would be unable to grant a possession order or warrant for possession if the tenant has repaid the arrears or complied with the repayment plan.

Option 11.17 – Enable VCAT to make a termination order for repeated late payment of rent

Notwithstanding the cessation of termination procedures where rent is fully repaid as described above, separate provision would be made to address repeated late payment of rent.

VCAT could, on application by a landlord, make a termination order if it is satisfied that the tenant has frequently failed to pay rent owing on or before the day set out in the residential tenancy agreement.

A termination order would include an order to terminate the tenancy and a possession order. Where a termination order is made, an order for possession could be issued, even if the tenant had paid all rent owing or complied with a repayment plan.

In making its decision, VCAT would be required to take into account a range of factors, including the history of attempted repayment plans and the balance of interests of the tenant and landlord.

Option 11.18 – Amend provisions for rooming houses to be consistent with general tenancies

Processes regarding late payment of rent, repayment of arrears, repeated late payment of rent and possession would be made consistent with provisions for general tenancies. In particular:

- the allowance period for late payment of rent would be increased from seven days to 14 days, and
- payment of rent would be removed as a resident duty. This would mean that a residency could not be terminated for successive breaches of duty or failure to comply with a VCAT order, where the resident fails to pay rent as it falls due.

Consultation questions

172. What is the period of time following the due date for rent payment that would be appropriate before action can be taken to negotiate a repayment plan or to terminate a tenancy for non-payment of rent?
173. What alternative options are there to incentivise or facilitate timely payment of rent?
174. What are the potential benefits and risks to removing payment of rent a duty from rooming houses and applying the relevant protections via the provisions for assessing application for possession?
175. What are the potential benefits and risks of including repeated late payment as grounds for termination on application to VCAT?
176. What alternative options are there to facilitate and incentivise the use of repayment plans for tenants to pay rent arrears?

11.1.8 Failure to comply with a VCAT order

It was considered that the indefinite nature of compliance orders and the appropriateness of the circumstances under which VCAT must not make a possession order for failure to comply with an order can lead to unfair evictions.

Stand-alone options

- **Option 11.19 – Place time limitations on compliance orders.**
- **Option 11.20 – Require a landlord to apply directly to VCAT for a termination order for failure to comply with a VCAT order.**
- **Option 11.21 – Amend conditions under which a possession order must not be made.**

Background

Under the current provisions a landlord may give a tenant a notice to vacate rented premises if the tenant fails to comply with VCAT order. The notice periods are

- 14 days for general tenancies, and
- 2 days for rooming houses.

Provisions for possession follow the standard procedures, and a possession order must not be made if VCAT is satisfied that:

- the failure is trivial or has been remedied as far as possible
- there will not be any further breach of the duty, and
- the breach of duty is not a recurrence of a previous breach of duty.

Issues

Some stakeholders submitted that once a VCAT order has been made against a tenant, the tenant may be given a notice to vacate at any time during their tenancy if they fail to comply. On this basis some stakeholders called for VCAT orders to include a time limitation, such as six or 12 months.

In addition, stakeholders considered that the circumstances under which VCAT must not make a possession order, as listed above, do not provide appropriate protections from unnecessary eviction. In particular, it was suggested that the requirement for VCAT to be satisfied that the breach is not a recurrence of a previous breach of duty negates any protection that may be offered by the provision.

That said, the provision does not require that VCAT make an order if satisfied in the positive, that the breach is a recurrence. Moreover, it is appropriate that VCAT must not make a possession order unless the breach of duty is a recurrence (otherwise it would not constitute a failure to comply with the initial order). Given that the purpose of the provision is to effect duty provisions that aim to capture repeat non-compliance, the recurrence of the breach is a relevant consideration. Removing this from the list of considerations would create conditions where breaches could occur infinitum during a tenancy, yet providing the first two tests were met, VCAT would never be able to give effect to the notice to vacate. In any case, it is not common VCAT practice to interpret ‘recurrence’ broadly

and any repeated breach would ordinarily be required to have some proximity either in time or context.[51]

With regard to the second test (that there will not be any further breach of duty), stakeholders submitted that it is inappropriate for VCAT members to make decisions regarding possession based on a prediction about a tenant's future behaviour.

Option 11.19 – Place time limitations on compliance orders

An expiry date would be specified on the compliance order, after which the order would no longer apply. A breach of the terms outlined in that order could no longer be considered grounds for termination of the tenancy, and any notice to vacate would be invalid.

The expiry date would be specified at VCAT's discretion with a minimum duration of six or 12 months, for example.

Option 11.20 – Require a landlord to apply directly to VCAT for a termination order for failure to comply with a VCAT order

The landlord would be required to apply directly to VCAT for a termination order instead of giving a notice to vacate to the tenant.

As described at the beginning of this chapter, a termination order would combine the steps of giving a notice to vacate and obtaining a possession order. It would incorporate the checks and balances provided by VCAT in the first instance, while allowing the process to be undertaken in a single step.

Option 11.21 – Amend conditions on which a possession order must not be made

Under this option, the conditions on which a possession order must not be made would include:

- the failure is trivial or has been remedied as far as possible, and
- the breach of duty is not a recurrence of a previous breach of duty.

The condition that 'there will not be any further breach of the duty' would be removed.

Consultation questions

177. What are the potential benefits and risks of time limiting compliance orders as under option 11.19?
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?
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?
180. Are there any alternative decision making guidelines VCAT should observe when determining whether a possession order should be made for failure to comply with an order?

51 See, for example, Director of Housing v Drechsel (Residential Tenancies) [2016] VCAT 128 (29 January 2016).

11.1.9 Use of premises for illegal purpose

Issues identified with these provisions include that there is risk of unjust eviction as the termination can be based on alleged illegal use. In the case that a tenant is convicted of illegal activity, termination of their tenancy can cause additional hardship.

Alternative options

- **Option 11.22A – Require a conviction to be in place for a notice to vacate for use of the premises for illegal purpose, or**
- **Option 11.22B – Require a landlord to apply directly to VCAT for a termination order for use of the premises for illegal purposes.**

Background

Under these provisions a landlord may give a tenant a notice to vacate if they have used the premises or permitted the use of the premises for any purpose that is illegal at common law or under an Act. The notice periods are:

- 14 days for general tenancies, and
- 2 days for rooming houses.

According to VCAT practice notes[52] premises are used for an illegal purpose if a criminal offence arises out of the use of the premises. It is not enough to show that an offence was committed on the premises (such as an assault)); the offence has to be shown to arise out of the use of the premises (such as an illegal gaming house).

A tenant permits use where they:

- know or have reason to suspect that an illegal act will take place or is likely to take place, and
- have the power to prevent it, but
- fail to prevent the illegal act from taking place.

It is further noted[53] that VCAT can and must decide for itself whether the purpose was 'illegal'. It will decide whether the facts alleged in the notice to vacate have been proved on the balance of probabilities, to its reasonable satisfaction. It notes, however, of the seriousness of the allegation that the purpose was 'illegal', reasonable satisfaction should not come from inexact proofs, indefinite testimony, or indirect inferences.

With regards to 'use' – it is not enough for the landlord to prove an illegal act or an illegal purpose. The landlord must prove that the tenant has 'used' the rented premises or permitted their use for the illegal purpose.

Issues

Some stakeholders expressed concern that provisions expose tenants to being wrongly accused of illegal activity and losing their tenancies as a result. It has also been noted that if a tenant has committed a crime, losing their tenancy may exacerbate their hardship. On this basis, it has been

52 VCAT Residential Tenancies Practice Notes, P2-47 August 2015.

53 VCAT Residential Tenancies Practice Notes, P6-50 July 2016.

suggested that a notice to vacate should not be given unless the tenant has received a conviction for the alleged activity, and that there be a relevant connection between the activity and the use of the property.

However, it may also be argued that VCAT already closely scrutinises the facts to determine if there are grounds for the tenancy to be terminated, and that requiring a conviction may add considerable length to the process. Additional guidance for VCAT may provide improved clarity for determinations.

Option 11.22A – Require a conviction to be in place for a notice to vacate for use of the premises for illegal purpose

Under this option a landlord would only be entitled to give a notice to vacate and make an application for possession if a conviction were in place in relation to the illegal use of the premises.

Option 11.22B – Require a landlord to apply directly to VCAT for a termination order for use of the premises for illegal purposes

Under this alternative option, in order to terminate the tenancy, the landlord would be required to apply to VCAT for a termination order.

The NSW Residential Tenancies Act offers the following example, which gives greater clarity to the nature of the activity, and greater guidance regarding the considerations to be made by its Tribunal. Under this option the RTA would be amended to:

- enable VCAT, on application by a landlord, to make a termination order if it is satisfied that the tenant, or any person who although not a tenant is occupying or jointly occupying the residential premises, has intentionally or recklessly caused or permitted:
  - the use of the residential premises or any property adjoining or adjacent to the premises (including any property that is available for use by the tenant in common with others) for the purposes of the manufacture, sale, cultivation or supply of any prohibited drug within the meaning of the relevant Act, or
  - the use of the residential premises for any other unlawful purpose and that the use is sufficient to justify the termination.
- In considering whether to make a termination order, VCAT would consider (but is not limited to considering) the following:
  - the nature of the unlawful use
  - any previous unlawful uses, and
  - the previous history of the tenancy.

The termination order would specify that the order for possession takes effect immediately.

Consultation questions

181. What are the potential benefits and risks of requiring that grounds for termination for use of the premises for illegal purpose include that a conviction be in place as under option 11.22A?

182. How effective would provisions such as those described under option 11.22B be in addressing concerns about the misuse of the notice to vacate for use of the premises for illegal purpose?

183. What alternatives are there to ensure that the provisions are used correctly to avoid wrongful evictions while adequately protecting landlords where illegal activity is occurring on the premises?

11.1.10 Parting with possession for consideration without consent

There is scope to clarify the circumstances under which a tenant cannot part with possession of their rented property, where definitions of subletting and licensing are insufficient.

Stand-alone option

- **Option 11.23 – Include parting with possession for consideration without consent as grounds for termination.**

Background

Chapter 5.4 of this paper describes an option for introducing a provision that distinguishes parting with possession for consideration from subletting and assignment, for the purposes of clarity.

Given a recent VCAT decision and subsequent Supreme Court appeal[54] regarding the validity of a notice to vacate to a tenant who was hosting a rental property to Airbnb guests, and the conjecture regarding whether giving use of the property to Airbnb guests could be considered subletting, there is a need for clarity regarding the definition of the activity and whether it can be considered the same way as subletting and assignment without consent.

Issues

Stakeholders considered that activities such as letting the property to Airbnb guests or similar, unduly increases risks for landlords and property owners. This is because they do not know who is using the property, particularly when unsupervised by the tenant. Although the tenant may be ultimately liable for any damage to the property, in practice this may be difficult to recover depending on the extent of the costs incurred. In addition, the movement in and out of the property of short term guests is likely to place an additional layer of wear and tear on the property compared to what would occur during standard residential use, however it would be difficult to clearly account for this at the end of a tenancy. These are some of the reasons why short term accommodation typically fetches higher rents than long term residential rental.

It is relevant also to consider the purpose of the protections available in the RTA over and above those under common and contract law, that is, that they apply to the tenant's residential accommodation. Arguably, such a suite of protections would not be required for the purpose of letting a property to short term guests.

54 See *Swan v Uecker* [2016] VSC 313 (10 June 2016). The Supreme Court of Victoria determined that there were grounds to terminate the tenancy based on the tenants' parting of possession of the property (however labelled or termed) to Airbnb guests.

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Option 11.23 – Include parting with possession for consideration without consent as grounds for termination

The inclusion of this provision would codify common law in relation to rights to terminate a tenancy on the grounds that the premises had been let to guests by tenants for some form of payment or exchange.

Under this option a landlord would be entitled to give a tenant a notice to vacate if the tenant parted with possession for consideration the whole or any part of the rented premises without the landlord's consent. The notice period would be 14 days.

Consultation questions

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?
185. What are any alternative options are there to achieve this outcome?
186. What circumstances could arise that could put at tenant at risk of wrongful eviction as a result of provisions for parting with possession for consideration without consent?

11.1.11 Antisocial behaviour

Issues relate to the lack of scope in the RTA to appropriately address the full range of anti-social behaviours that can cause harm or distress not only to neighbours and other occupants of the property, but to landlords, agents and others who are required to attend the premises.

Stand-alone option

- **Option 11.24 – Expand the definition of antisocial behaviour to include a wider range of behaviours and people who may be affected by those behaviours.**

Background

The RTA currently addresses behaviours that would be considered types of anti-social behaviour (table 11.2, below).

In most cases, the provisions for general tenancies relate to behaviour directed at neighbours (except for damage). In rooming houses the relevant behaviour is that directed at, or affecting, others on the property.

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Table 11.2: Anti-social behaviours leading to termination in the RTA

Behaviour	Tenure types	Nature of action	Response
Damage (chapter 11.1.3)	All	Malicious (or intentional and reckless) damage by tenants or their visitors to the premises, including common areas	Notice to vacate Immediate
Danger (chapter 11.1.4)	All	Credible and continuing danger to the safety of neighbours in residential tenancies, and in rooming houses and parks – danger to any person or property on the premises or in the park	Notice to vacate Immediate
Violence (chapter 11.1.5)	• Managed premises (usually rooming houses, parks and public housing complexes)	Violence or endangering the safety of anyone on the premises	Suspension of residency for 48 hours with pathway to terminate the tenancy by application to VCAT
Disruption (chapter 11.1.6)	• Rooming houses • Caravan parks • Part 4A parks	Serious interruption of the quiet and peaceful enjoyment of the property by other occupants	Notice to vacate Immediate
Nuisance (tenant duty)	• General tenancies	Repeated instances where a tenant causes nuisance or interference with the reasonable peace, comfort or privacy of neighbours.	Notice to vacate for successive breaches of duty. 14 days following third breach or failure to comply with VCAT order
Use of premises for illegal purpose (chapter 11.1.9)	All	A criminal offence arises out of the use of the premises	Notice to vacate 14 days

Most modern residential tenancies legislation contains definitions of anti-social behaviour that capture a wide range of behaviours that can cause harm or distress to others.

For example, the *Private Housing (Tenancies) (Scotland) Act 2016* provides as grounds for termination, anti-social behaviour defined as follows:

- doing something which causes or is likely to cause the other person alarm, distress, nuisance or annoyance, and

- pursuing in relation to the other person a course of conduct which—
  - causes or is likely to cause the other person alarm, distress, nuisance or annoyance, or
  - amounts to harassment of the other person.

'Conduct' includes to speech and 'course of conduct' refers to conduct on two or more occasions. In assessing the claim, the Tribunal gives regard to who the behaviour was in relation to and where it occurred.

The NSW Residential Tenancies Act enables a landlord to make a termination order if it is satisfied that the tenant, or any person who although not a tenant is occupying or jointly occupying the residential premises, has:

- seriously or persistently threatened or abused the landlord, the landlord's agent or any employee or contractor of the landlord or landlord's agent, or caused or permitted any such threats, abuse or conduct, or
- intentionally engaged, or intentionally caused or permitted another person to engage, in conduct in relation to any such person that would be reasonably likely to cause the person to be intimidated or harassed (whether or not any abusive language or threat has been directed towards the person).

Issues

Stakeholders identified gaps in the treatment of anti-social behaviour in the RTA, in particular in relation to:

- the range of problematic behaviours that cause harm or distress and which could be described as anti-social behaviour
- those who can potentially be harmed or distressed by anti-social behaviour.

While the RTA prescribes specific behaviours, these are narrowly defined and can have specific conditions placed on the circumstances. For example, danger must be credible and continuing – threats to cause danger are not sufficient grounds for termination, and the danger must be considered by VCAT as likely to continue rather than an isolated incident (see this chapter 11.1.4 above).

Stakeholders suggested that the fear in the victim of repetition of the action or threat by the offender is sufficient grounds for termination. This would place the safety of victims as being the paramount consideration given that the risk of harm to the victim is of greater weight than the early termination of a tenancy.

Anti-social behaviour directed at landlords and agents, and others who come in contact with the tenant or attend the property in the course of their work is considered to be a source of distress, however there are no avenues available in the RTA for terminating a general tenancy on these grounds.

Some stakeholders noted that expanded grounds for termination for anti-social behaviour could disadvantage tenants with mental illness.

Option 11.24 – Expand the definition of antisocial behaviour to include a wider range of behaviours and people who may be affected by those behaviours.

The RTA would include a new provision enabling termination by application to VCAT for anti-social behaviour by a tenant (or tenant's visitor or other occupant of the premises) in relation to another person (which would include, in addition to neighbours, landlords, agents and any contractors or employees of either).

Anti-social behaviour would be defined as doing something which:

- seriously or persistently threatened or abused the landlord, the landlord's agent or any employee or contractor of the landlord or landlord's agent, or caused or permitted any such threats, abuse or conduct, or
- intentionally engaged, or intentionally caused or permitted another person to engage, in conduct in relation to any such person that would be reasonably likely to cause the person to be alarmed, distressed, intimidated or harassed (whether or not any abusive language or threat has been directed towards the person).

Termination would be by application to VCAT for a termination order. In assessing the claim, the VCAT would give regard to who the behaviour was in relation to and where it occurred. Appropriate protections would be in place for tenants with mental illness.

Consultation questions

187. What are the potential benefits and risks of expanding the grounds for termination for anti-social behaviour as under option 11.24?
188. What alternative options are there to define the level and type of anti-social behaviours that would appropriately constitute grounds for termination in the RTA?

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11.2 Terminations instigated by landlord or owner: tenant not at fault

11.2.1 Notice to vacate for end of fixed term tenancy

The main issue raised in relation to this notice was that it can be used to unfairly or unnecessarily terminate a tenancy. A separate issue was the need for greater flexibility around the time of issue of the notice and date of termination.

Alternative options

- **Option 11.25A – Remove the notice to vacate for the end of a fixed term agreement, or**
- **Option 11.25B – Retain the notice to vacate for the end of a fixed term agreement and provide additional protections against unfair termination.**

Stand-alone option

- **Option 11.26 – Enable the notice to vacate for the end of a fixed term agreement to specify date on or after the end of the fixed term.**

Background

Under existing policy settings, provision is made for the continuation of a tenancy following the end of a fixed term agreement. If neither the landlord nor the tenant give notice terminating the tenancy at the end of the fixed term in the way prescribed by the Act, a periodic agreement is automatically created. The agreement continues to exist with reference to the terms and conditions of the original fixed term agreement, and is covered by the provisions of the RTA relating to periodic tenancy agreements.

A fixed term agreement cannot be terminated by the landlord before the end of the fixed term. To terminate a tenancy, the landlord must give a notice to vacate that specifies a termination date that coincides with the end of the fixed term, with notice as follows:

- at least 90 days' for a fixed term agreement of six months or more, and
- at least 60 days' for a fixed term agreement of less than six months.

The notice is to have no effect if it was issued in response to an exercise of rights or proposed exercise of rights under the RTA.

The landlord cannot apply to VCAT for an order of possession until the end of the fixed term has passed and the tenant has not vacated, and providing they have issued the tenant with a further notice prior to the termination date.[55] The tenant may object to the application as per the standard process.

55 For tenancies of 6 months or more must give the notice not less than 14 days and not more than 21 days before the termination date specified in the notice to vacate. For tenancies of less than six months, not less than 7 days and not more than 14 days before the termination date specified in the notice to vacate.

Issues

Some stakeholders considered that the current settings do not provide tenants with sufficient certainty regarding the continuity of their tenancy following an initial fixed term agreement. In particular, it was submitted that they do not adequately protect tenants from unfair and retaliatory terminations, and therefore undermine tenants' security of tenure and scope to exercise their rights under the RTA.

The requirement for tenant certainty must be balanced with property owners' requirements for certainty about the period of time they wish to let the property for. Small scale individual property owners may not feel confident to enter a contract that is effectively of indefinite length and can only be terminated by changing the use of the property in a way specified by the RTA. Property owners and landlords may argue that the option to end a fixed term agreement is an enshrined common law principle and fundamental right of either party to an agreement where a fixed end date is specified. Two alternative options are provided in response to this issue.

A separate, technical issue was identified regarding the current wording of the provisions. It was suggested that the existing requirement that the termination date coincide with the date of the end of the fixed term was unduly restrictive. Stakeholders considered that provisions requiring that the termination date be, instead, on or after the end of the fixed term. This would allow flexibility around the date notice must be given (and received by the tenant) while ensuring the tenant receives the full amount of notice. A single option is provided in response to this issue.

Option 11.25A – Remove the notice to vacate for the end of a fixed term agreement

Under this option, the relevant provision of the RTA would be repealed such that the option to give a notice to vacate for the end of the fixed term would not be available.

Option 11.25B – Retain the notice to vacate for the end of a fixed term agreement and provide additional protections against unfair termination

Under this alternative option, the tenant could challenge a notice to vacate for the end of the fixed term agreement at VCAT. In making a decision, VCAT would be required to give consideration to the following factors:

- if the notice is vindictive or retaliatory in nature
- if the notice is discriminatory under the EOA
- the interests (personal and financial) of the tenant in maintaining the tenancy, and
- the interests (personal and financial) of the landlord in terminating the agreement.

VCAT would be required, on application by a landlord, to grant a possession order if it is satisfied that notice to vacate was given correctly and the tenant had not vacated the premises as required by the notice.

The notice periods for the notice to vacate for the end of a fixed term agreement would be retained.

Tenants would be entitled to give notice of intention to vacate with 14 days' notice in response to the notice to vacate, even where the termination date would then be before the end of the fixed term.

Option 11.26 – Enable the notice to vacate for the end of a fixed term agreement to specify date on or after the end of the fixed term

Under this stand-alone option a landlord could, at any time before the end of the fixed term of a fixed term agreement, give a notice to vacate for the end of the fixed term to take effect on or after the end of the fixed term.

The notice to vacate would be required to specify a termination date that is on or after the end of the fixed term and not earlier than 90 days after the day on which the notice is given. The existing minimum notice periods would be retained.

Tenants would be entitled to give a notice of intention to vacate with 14 days' notice in response to the notice to vacate, even where the termination date would be before the end of the fixed term.

Consultation questions

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 agreement, as under option 11.25A?
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?
191. What alternative reforms to the provisions for terminating a tenancy at the end of the fixed term could better protect tenants against unfair termination while providing landlords with adequate certainty about the period of time they will be letting the property and the length of any particular agreement?
192. What are the potential benefits and risks of enabling the termination date to be on or after the end of the fixed term as under option 11.26?

11.2.2 Notice to vacate for no specified reason

Issues relate to the notice to vacate providing means for arbitrary and unjust termination.

Alternative options

- **Option 11.27A – Extend the notice period for a notice to vacate during periodic tenancy, or**
- **Option 11.27B – Require a reason to be specified for a notice to vacate during periodic tenancy, or**
- **Option 11.27C – Require a landlord to apply directly to VCAT for a termination order where termination is for reasons not specified in the RTA, or**
- **Option 11.27D – Remove the notice to vacate for no specified reason.**

Background

A landlord may give a tenant a notice to vacate rented premises without specifying a reason for the giving of the notice.

The notice must specify a termination date that is not less than 120 days after the date on which the notice is given. These notices to vacate are exempt from the requirement to provide a reason for the notice that applies to other notices to vacate under the RTA.

There are certain circumstances under which notices have no effect. A notice to vacate for no specified reason has no effect if issued in response to exercise of rights or proposed exercise of rights under the RTA.

In addition, this notice is invalid where a VCAT order is in force relating to excessive rent or proposed rent.

The landlord cannot apply for a possession order until the termination date has passed and the tenant has not delivered possession. An application for possession may be made at the time the notice is given to a rooming house resident.

Issues

The notice to vacate for no specified reason was identified as a key issue in the review, as stakeholders submitted that it does not adequately protect tenants against unfair termination of their tenancies, and may compromise their ability to access other protections in the RTA during a tenancy, for fear of retaliatory termination. In particular, tenants may feel unable to make legitimate complaints or requests

In addition, stakeholders noted that landlords should only be able to end an agreement for reasons that are prescribed by the RTA, and that can be substantiated by evidence.

Supply-side stakeholders stated that the option to terminate a tenancy is important because it is often difficult to prove that there are grounds for eviction of a tenant, that the processes can be lengthy and uncertain, and that problematic relationships with tenants can have both personal and financial costs.

According to some stakeholders, the notice is often given because rent payments are frequently late or inconsistent. Community housing providers note that it can be used as a last resort where a tenant is demonstrating a range of behaviours that are not listed as grounds for eviction under the RTA but nonetheless cause other residents, neighbours and staff to feel intimidated and distressed. Similar points were made by rooming house operators.

It is noted that often problematic behaviour may not constitute grounds for eviction, or if it does, in many cases may be too difficult to prove. It is reported that this is exacerbated by the fact that other residents can be reluctant to provide evidence or act as witnesses against the resident or tenant in question for fear of reprisal.

These stakeholders called for the 120 day notice period to be reduced to 90 days highlighting that the notice period in RTA for terminating a tenancy for both specified changes of use and non-specified reasons are longer than most other jurisdictions in Australia.

Research commissioned by CAV asked both tenants and landlords about their experiences with the use of the notice to vacate for no specified reason, who respectively reported the following: [56]

- four per cent of tenants reported having received such a notice at some time in their rental history, and

56 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

- nine per cent of landlords reported having ever used the notice.

This indicates that across the sector generally the notice is used rarely.

Further, 83 per cent of tenants stated that 120 days was long enough for them to find another property.[57]

That said, submissions from community organisations and tenants' advocates reported that the notice to vacate for no specified reason is used frequently amongst their clients.

It was also noted that the name of the notice is confusing and is often mistakenly interpreted as a notice to vacate 'for no reason', which may seem illogical and concerning to a tenant. To the extent that this notice attempts to capture any other use or reason not stated in the RTA, opportunities to increase the transparency around the use of the notice in order to address concerns about misuse, and to provide the tenant with a justification or rationale for ending the tenancy could be considered.

Option 11.27A – Extend the notice period for a notice to vacate during periodic tenancy

Under this option, a notice to vacate could be given during a periodic tenancy agreement without the requirement to provide a reason.

The notice period would be extended to 26 weeks or 182 days.

VCAT would be required to make a possession order on application of the landlord if it were satisfied that the notice to vacate had been given in accordance with this section and the tenant had not vacated the premises as required by the notice.

The option to give a notice to vacate would not be available to the landlord where a tenant has been in continual possession of a rented premises for five or more years. In these cases, a termination order from VCAT would be required and VCAT could specify a notice period longer than 182 days.

Tenants would be entitled to give 14 days' notice of intention to vacate in response to a notice to vacate at any time during the notice period (see this chapter 11.5.2 below).

Option 11.27B – Require a reason to be specified for a notice to vacate during periodic tenancy

This alternative option would remove the exemption to provide a reason for these notices as they apply to general tenancies and rooming houses. Consistent with other notices to vacate, a reason would be required on the notice, but need not be a reason prescribed by the RTA.

To reflect this change the notice would require renaming, for example, 'notice for vacate (other)' or 'notice to vacate during periodic tenancy' as is consistent with the equivalent provision for Part 4A parks.

The reason provided in the notice could be challenged at VCAT by the tenant. In making a decision, VCAT would be required to give consideration to the following factors:

- whether the notice is vindictive or retaliatory in nature
- whether the notice is discriminatory under the EOA
- the interests (personal and financial) of the tenant in maintaining the tenancy, and

57 *Ibid*. Note that some tenants were given 120 days' notice for changes of use such as landlord moving in or selling the property.

- the interests (personal and financial) of the landlord in terminating the agreement.

The option to give this type of notice to vacate would not be available where a tenancy has been on foot for five or more years. In these cases, the landlord would be required to apply to VCAT for a termination order in the first instance.

Tenants would be entitled to give 14 days' notice of intention to vacate in response to this notice to vacate (see this chapter 11.5.2 below).

Option 11.27C – Require a landlord to apply directly to VCAT for a termination order where termination is for reasons not specified in the RTA

Under this alternative option, rather than being able to give a notice to vacate as under option 11.27B, the landlord would be required to apply to VCAT for a termination order where termination is for reasons that are not specified in the RTA. In granting a termination order VCAT would have regard to the following factors:

- whether the notice is vindictive or retaliatory in nature
- whether the notice is discriminatory under the EOA
- the interests (personal and financial) of the tenant in maintaining the tenancy, and
- the interests (personal and financial) of the landlord in terminating the agreement

The existing notice period would be retained.

Where a tenant has been in continual possession of a rented premises for five years or more, VCAT could prescribe a notice period longer than the prescribed notice period.

Tenants would be entitled to give 14 days' notice of intention to vacate in response to a termination order made by VCAT (see this chapter 11.5.2 below).

Option 11.27D – Remove the notice to vacate for no specified reason

This alternative option would repeal the notice to vacate for no specified reason as it applies to general tenancies and rooming houses.

This would mean that the landlord could only terminate a tenancy where the tenant is at fault, for a prescribed change of use, or where there is a mortgagee repossession.

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Consultation questions

193. What would be the potential risks and benefits of increasing the notice period to 182 days for this notice to vacate as described in option 11.27A?
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?
195. What are the potential benefits and risks of removing the notices to vacate during a periodic tenancy as under option 11.27D?
196. Which of the options in this section would be most effective in protecting tenants against unfair termination while providing adequate scope for landlords to exit an agreement other than by at-fault evictions or prescribed changes of use?
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?
198. What are any alternative reforms that would provide appropriate additional protections to tenants who have been in a tenancy for five years or more?

11.2.3 Notices to vacate for changes of use

Issues relate to risks of misuse of the change of use notices to vacate, to the length of notice periods, as well as VCAT discretions to determine whether the property can be re-let, and whether a possession order may not be granted.

Stand-alone options relating to grounds for termination

- **Option 11.28 – Require notice to vacate to be accompanied by evidence of change of use.**
- **Option 11.29 – Allow for greater VCAT discretion granting possession orders.**

Alternative options relating to notice periods

- **Option 11.30A – Extend notice periods to 90 days for change of use terminations, or**
- **Option 11.30B – Extend notice periods for long term tenancies.**

Stand-alone option for end of building lease notice arrangements for rooming houses

- **Option 11.31 – Clarify conditions under which rooming house residents are given notice when building lease terminates.**

Background

Changes of use refer to:

- repairs, renovation or reconstruction
- demolition
- business use (or any other purpose other than residential letting)

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- landlord or family moving in (including reduced notice periods for the end of a fixed term where the property is the landlord's principal place of residence)
- sale
- required for public purposes, and
- discontinuation of building lease (rooming houses).

The notice period is 60 days, and if given during a fixed term agreement the termination date must be after the end of the fixed term. That is, a tenant cannot be asked to vacate during a fixed term agreement.

The provisions specify requirements relating to each as follows:

- for notices given for repair, renovation or reconstruction and demolition, the works must be scheduled for commencement immediately after the date of termination, the landlord is required to have obtained all of the necessary permits, and the work cannot be carried out while the tenant is there.
- for a notice given where a landlord or family member is moving in, an eligible family member includes the landlord's partner, son, daughter, parent or partner's parent; or another person who normally lives with the landlord and is wholly or substantially dependent on the landlord, and
- for a notice given for sale, the premises must be sold, or to be offered for sale with vacant possession immediately after the termination date.

The tenant may challenge a notice to vacate for change of use on the basis that it is invalid and VCAT can determine whether the notice is invalid according to the above requirements.

A person may apply to VCAT for a review of a determination on the ground that there has been a breach or a failure to comply with the RTA.

The landlord must not re-let the property for six months as a principal place of residence, except where they or the specified family member are moving in, or unless VCAT determines that it may be re-let.

Discontinuation of building lease (rooming houses)

Where the lease of a building that houses a rooming house is being discontinued, the person ending the lease (whether the building owner or another person who is party to the lease), a notice to vacate must be given to each resident in the rooming house, unless the property is to continue to be used as a rooming house.

The resident must vacate the building on a date which is the later of: 45 days from the date of the notice to vacate, or the date on which the building lease expires. This notice to vacate does not prevent a rooming house operator from giving a notice to vacate to a resident with a shorter period of notice, such as where there are at-fault grounds for termination.

Issues

The change of use provisions have been generally uncontentious, and there were not any widespread calls to expand or reduce the list.

Stakeholders expressed concerns that some landlords may wrongfully use the change of use notices to vacate in order to end a tenancy agreement. The risk of this occurring could increase if greater restrictions were placed on other avenues for terminating a tenancy. That said, if a notice were challenged the landlord would be required to demonstrate the validity of the notice.

Some stakeholders recommended that the evidentiary requirements for landlords giving notices for change of use be strengthened such that documentation is required to accompany the notice. For example, this could include copies of planning permits, contracts for repairs or renovation, a statutory declaration from a landlord or family member moving into the property.

Some stakeholders considered that the notice periods should be extended, for example to 90 days. Tenants have not indicated however that the notice periods are insufficient.[58] Other stakeholders noted that the 60 day notice period is longer than that for equivalent notices in other Australian jurisdictions.

It has also been suggested that VCAT's discretion to determine whether a property can be re-let before the end of the prohibition period. However, it is not clear that the risks associated with the existence of this discretion are high, and it is plausible that a range of circumstances could arise leading to a change in the landlord's situation.

It was also suggested that VCAT be granted discretion to determine that, in the context of change of use notices, possession not be granted under certain circumstances given that the tenant is not at fault. Such discretion might be considered a significant expansion in the scope of powers and discretion that VCAT has to restrict or constrain a property owner's legitimate use of their property or management of their personal affairs.

Discontinuation of building lease (rooming houses)

It was raised that the provisions regarding the giving of notice to rooming house residents when a building lease is to be discontinued could clarify that the requirements apply whether or not the building owner knew about the operation of the rooming house, and therefore their obligation to provide notice to residents (see chapter 9.4).

Option 11.28 – Require notice to vacate to be accompanied by evidence of change of use

Under this option a landlord who gives a notice to vacate for change of use would be required to provide relevant documentation as evidence of their intended change of with the notice.

Examples of evidence include:

- repairs: details of the nature, extent and estimated time period required for the repairs. Any permits and a tradespersons quote for the planned works to be attached
- demolition: permits required for demolition
- premises used for business: details of the nature of the business and any documentation to be provided
- premises to be occupied by landlord or landlords' family: details of the name of the person to move in and their relationship to the landlord. A statutory declaration from the landlord or relative to be provided, and

58 *Rental experiences of tenants, landlords, property managers, and parks residents in Victoria*, Final Report, 17 May 2016 accessed via the Review of the Residential Tenancies Act 1997 website <fairersaferhousing.vic.gov.au/renting>.

- public purpose: details and evidence of the public purpose that the property is required for, the basis for the public statutory authority to use the property for that purpose, and the time that the works will be commenced.

In addition, the notice to vacate would provide advice to the tenant about how to challenge the notice if they believed it to be invalid.

The notice would also advise the landlord that the notice could be challenged, and if declared invalid by VCAT could result in a compensation claim by the tenant.

Option 11.29 – Allow for greater VCAT discretion granting possession orders

Under this option, VCAT would be given greater discretion in deciding whether to grant possession orders in relation to notices to vacate for changes of use. For example, it would be required to take into account:

- whether the notice was served in good faith
- whether the evidence provided by the landlord is correct and sufficient, and
- whether or not it would be possible for the tenant to remain in the property (for example in the case of a notice to vacate for repairs).

Option 11.30A – Extend notice periods to 90 days for change of use terminations

Under this option, the notice periods for change of use notices would be extended from 60 to 90 days.

Option 11.30B – Extend notice periods for long term tenancies

Under this alternative option, the notice periods for the change of use notices would be extended from 60 to 90 days where a tenancy has been on foot for more than five years.

In addition to these options, tenants would be entitled to give 14 days' notice of intention to leave in response to a change of use notice to vacate, including where the termination date would be before the end of a fixed term agreement (see this chapter 11.5.2 below).

Option 11.31 – Clarify conditions under which rooming house residents are given notice when building lease terminates

Under this stand-alone option, the RTA would clarify that the requirements of a building owner or person entitled to discontinue the lease of a building in which a rooming house is operating such that the provisions apply whether or not the building owner or person discontinuing the lease was aware that the rooming house was being operated.

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Consultation questions

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?
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?
201. What are any alternatives that could ensure that terminations do not occur unnecessarily yet do not infringe on landlords' scope to change the use of their properties?
202. What is an appropriate notice period for terminations for changes of use?
203. What are any additional provisions that may be required to adequately cover the range of possible changes of use?
204. What are any additional reforms that would be required to adequately protect rooming house residents where the building lease is being discontinued as under option 11.31?

11.2.4 Notice to vacate mortgagee repossession (general tenancies)

Issues relate to the fact that notice periods given by mortgagees in possession are shorter than those required under the tenant's agreement, and that mortgagees in possession are not required to honour a fixed term agreement.

Stand-alone options

- **Option 11.32 – Require disclosure of any mortgagee repossession proceedings at point of lease.**
- **Option 11.33– Require mortgagee in possession to produce court judgment for possession order.**
- **Option 11.34 – Require mortgagee in possession to give 60 days' notice to vacate and compensate tenant.**
- **Option 11.35 – Require mortgagee in possession to honour agreements where consent granted.**

Background

If a mortgagee becomes entitled to possession of, or to exercise a power of sale over the premises under a mortgage, the mortgagee may give the tenant a notice to vacate the premises with 28 days' notice.

The provision does not apply if the tenancy agreement was entered into before the mortgage.

Possession procedure

A mortgagee in possession may apply for a possession order for rented premises if they have given the tenant a notice to vacate and the tenant has not given vacant possession of the premises by the specified date.

The possession procedures are then the standard procedures outlined in the RTA.

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Mortgagee position

Unlike the case where a property is owner-occupied and a mortgagee in possession is not required to give notice of possession, the RTA provides an additional protection to tenants by requiring that mortgagees in possession give 28 days' notice to vacate the property.

Where property owners obtained mortgage finance to purchase a principal place of residence, they are usually required to obtain the mortgagee's permission if they wish to lease the property. However, this condition does not apply to investment loans.

Issues

Stakeholders noted that under the current provisions, a mortgage provider is not required to honour a fixed term agreement once it repossesses a property, and therefore a tenant who has signed a fixed term agreement may be given a notice to vacate with 28 days' notice.

Most property owners do not obtain the mortgagee's permission for the tenancy. Mortgage providers would most likely object to proposals for them to take over the responsibilities of a landlord should they repossess a property that is tenanted under a fixed term agreement, having not been a party to the agreement in question.

In addition, VCAT must establish the mortgagee's entitlement to possession or to exercise a power of sale. Currently this can be done either with a court judgment declaring its entitlement, or where there is no court judgment, providing VCAT with evidence to demonstrate the fact. VCAT has noted that, in the latter case, there can be uncertainty where proceedings against the mortgagor have not been finalised.

Option 11.32 – Require disclosure of any mortgagee repossession proceedings at point of lease

The landlord would be required to disclose any mortgagee repossession proceedings underway to the tenant at the point of lease.

Option 11.33 – Require mortgagee in possession to produce court judgment for possession order

A court judgment demonstrating the mortgagee's entitlement to possession and to exercise a power of sale would be required to accompany an application for possession.

Option 11.34 – Require mortgagee in possession to give 60 days' notice and compensate tenant

The notice period would increase to 60 days during a periodic or fixed term agreement. This would align more closely with other notice periods given for change of use.

The tenant would be entitled to withhold or recoup rent payable during the notice period given during a fixed term agreement. That is, the tenant would not be required to pay any rent, fee or other charge to occupy the premises, and would be entitled to reimbursement of any rent paid in advance for that period.

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Option 11.35 – Require mortgagee in possession to honour agreements where consent granted

A mortgagee in possession that has given consent to a borrower, implicitly or explicitly, to let the property would be subject to all the provisions of the RTA as though it were the landlord, including provisions relating to giving notice to vacate for the end of the fixed term.

Consultation questions

205. What issues could arise from the requirement to disclose any mortgagee repossession proceedings at the point of lease as under option 11.32?
206. What issues could arise from the requirement for mortgagee to produce a court judgment in order to obtain as possession order as under option 11.33?
207. What are any alternative workable approaches to providing an adequate period of notice and compensation for the termination of a tenancy due to mortgagee repossession?
208. What are any alternative options for providing an adequate level of protection for tenants where a mortgagee repossession is in process?

11.3 Terminations provisions and security of tenure

Security of tenure is discussed in greater detail in the introduction to this paper. It has been identified as a priority issue for consideration in this review, and one which cuts across the residential tenancies legislation including lease terms, rents, property standards and maintenance and terminations.

Terminations provisions are important to tenants' security of tenure because they:

- influence the level of certainty regarding the length of their agreement
- provide flexibility to exit their agreement when circumstances change
- provide scope to exit the agreement when the other party defaults, and
- prevent the agreement being unjustly or unfairly terminated.

The terminations provisions define the property rights that a tenancy agreement confers on a tenant, and are therefore central to their security of tenure.

From a landlord's point of view, placing restrictions on their scope to exit an agreement increases the risks associated with letting property. If the scope for discretionary termination is reduced, they may expect that the grounds and processes for at-fault termination (eviction) and regaining of possession provide them with adequate confidence that they will be able to exit an agreement that is causing personal or financial loss or stress.

Given the interconnectedness of the terminations provisions, three different models have been provided below, which propose various combinations of terminations provisions. These apply to general residential tenancies only.

The solution most likely to be considered acceptable by all parties will be one that provides balance such that both tenant and landlord have sufficient incentive to comply with the terms of the agreement, tenants are adequately protected from the misuse of the terminations provisions by the landlord, and the landlord can be confident of being able to exit an agreement that is imposing personal or financial costs.

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Depending on the model chosen, further consultation would be required with regard to the details.

Model 1

Model 1 provides tenants with strong security of tenure. The scope for termination of a tenancy agreement by the landlord is restricted under this model by the removal of an avenue for termination for reasons not specified in the RTA and for the purpose of selling the property, restrictions on notices for changes of use, as well as restrictions on terminations where the tenant is at fault (eviction).

Model 2

Model 2 places restrictions on landlords' ability to end an agreement for reasons other than those provided in the RTA. Rather than issuing a notice to vacate that is exempt from the requirement to specify a reason, under this model they would be required to specify the reason. The protections against misuse of the notice would be bolstered in that the notice could be challenged on grounds that it is retaliatory, vindictive or discriminatory in nature, regardless of whether the notice was given in response to an exercise of rights under the RTA. VCAT would also be required to take into account the interests of both parties.

As mentioned above, research undertaken by CAV suggests that the actual usage of the notice to vacate for no specified reason is rare, with 4 per cent of tenants reporting having ever received one, and 9 per cent of landlords reporting having ever given one. The problem with the existence of a provision for discretionary termination in the context of security of tenure may therefore more specifically be associated with the threat of its misuse and tenants' reluctance to exercise their rights under the RTA as a result. Retaining the ability for landlords to exit the agreement for reasons that are not specified in the RTA would avoid unduly increasing the risks associated with letting property (and potential unfavourable market responses). The additional layers of protection will provide assurance to tenants in exercising their rights under the RTA.

Several changes are made under this model to the grounds for eviction (termination where tenant is at fault), to update the RTA in line with other modern residential tenancies legislation and to correctly align incentives for tenants to comply with a tenancy agreement.

Model 3

Model 3 responds to stakeholder calls to lengthen the notice period for the notice to vacate for no specified reason. The new notice period would be 182 days (or 6 months).

Protections against misuse of this notice and the notice to vacate for the end of a fixed term agreement would be bolstered as per Model 2. It also incorporates updated grounds for at fault terminations as per Model 2.

The remaining existing termination provisions would be retained.

Consultation questions

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

210. What alternative models could provide a more appropriate balance?

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Table 11.3: Security of tenure models

	Notices to vacate during periodic agreement and for end of fixed term	**Change of use notices to vacate** (Landlord use, renovation or repair, sale, demolition, business use, public purpose)	**At fault terminations**
Model 1	Remove provisions for: • landlords to give a notice to vacate for the end of a fixed term agreement **(option 11.25A)** • landlords to give a notice to vacate without specifying a reason (**option 11.27D**).	• Retain remaining change of use provisions. • Require notices to vacate to be accompanied by relevant documentation demonstrating intended use (**option 11.28**) • Greater VCAT discretion in decision-making regarding change of use notices (**option 11.29**). • Increase notice periods from 60 to 90 days (**option 11.30A**). • Retain and enforce prohibition on reletting for prescribed periods subsequent to change of use termination.	• Retain current arrears and notice period requirements. • Reform rent arrears process and require the landlord to negotiate repayment plan with tenant **(option 11.15)** • Additional safeguards, including requirements for landlord to seek termination orders instead of giving notices to vacate (as outlined for each of the provisions in chapter 11.1 above) • Time-limit compliance orders to 6 months **(option 11.19).** • Retain current provisions for anti-social behaviour as described in table 11.2.

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	Notices to vacate during periodic agreement and for end of fixed term	Change of use notices to vacate (Landlord use, renovation or repair, sale, demolition, business use, public purpose)	At fault terminations
Model 2	• Bolster protections against unfair eviction by expanding grounds for challenging the notices during periodic agreement and for end of fixed term agreement on grounds that they are retaliatory, vindictive or discriminatory, and regardless of whether in response to an exercise of rights under the RTA (**option 11.25B**). • Amend notice to vacate for no specified reason during a periodic agreement with 120 days' notice to require specification of a reason for the notice (**option 11.27B**). • Retain notice to vacate for the end of the fixed term with 90 days' notice. • Tenants would be entitled to give notice of intention to vacate with 14 days' notice in response to either the 90 or 120 day notices **(option 11.37)**	• Retain existing arrangements and 60-day notice period for changes of use. • Retain ability to challenge notices to vacate for change of use. • Retain prohibition on reletting for prescribed periods subsequent to change of use termination, and retain VCAT discretion to reduce the prohibition period in certain circumstances. • Additional protections for long term tenants (eg **option 11.30B**). • Tenants would be entitled to give notice of intention to vacate with 14 days' notice in response to a notice to vacate **(option 11.37)**	• Additional safeguards, including requirements for landlord to seek termination orders instead of giving notices to vacate (as outlined for each of the provisions in chapter 11.1 above) • Include broader provisions for anti-social behaviour as grounds for termination of the tenancy by application to VCAT **(option 11.24).** • Broaden three strikes system for breaches of duty for the same duty, to cover breaches of any duty (**option 6.2**). • Repeated late payment of rent would be grounds for termination by VCAT, even where all rent has been paid **(option 11.17**)

	Notices to vacate during periodic agreement and for end of fixed term	Change of use notices to vacate (Landlord use, renovation or repair, sale, demolition, business use, public purpose)	At fault terminations
Model 3	• This model is based on (option 11.27A) • The provisions for terminating a fixed term agreement would be retained • Replace notice to vacate for no specified reason to notice to vacate during periodic agreement. • Lengthen notice period to 26 weeks (182 days) as in the ACT. • Tenants would be entitled to give notice of intention to vacate with 14 days' notice in response to either the 90 or 120 day notices (option 11.37).	As for Model 2	As for Model 2

11.4 Terminations instigated by the tenant: landlord at fault

11.4.1 Successive breaches by landlord and failure to comply with VCAT order

The processes for successive breaches of duty and the triggers for termination as a result of breaches of duty are discussed in detail in chapter 5.1.

One of the responses to a breach of duty is an application to VCAT for a compliance order. Failure to comply with a VCAT order is addressed above (this chapter 11.1.8).

The options presented in those sections would be applied to breaches of duty and failure to comply with a VCAT order by the landlord.

11.5 Terminations instigated by the tenant: landlord not at fault

11.5.1 Termination after death of sole tenant

Issues relate to the potentially unnecessary delays reletting the property after the death of a sole tenant, including the creation of a new tenancy for a person living in the premises but not named on the agreement.

Alternative options

- **Option 11.36A – Enable landlord to apply for termination order from VCAT in first instance, or**
- **Option 11.36B – Streamline provisions and provide for VCAT discretion.**

Background

Under the current provisions if a sole tenant (the only tenant on the tenancy agreement) dies, the tenancy terminates at the earliest of the following dates:

- 28 days after the landlord has been given written notice of the death of the tenant by the legal personal representative or next of kin of the tenant; or
- 28 days after the landlord has given a notice to vacate to the legal personal representative or next of kin of the tenant; or
- a date agreed in writing between the landlord and the legal personal representative or next of kin of the tenant; or
- the date determined as the termination date of the tenancy agreement by the Tribunal on the application of the landlord. The landlord may apply to VCAT for an order to terminate the tenancy if they have not been able to give the notice to vacate.

Issues

The 28 day notice periods were identified as factor leading to the property being unnecessarily left vacant in some cases. For example, the property may be left uninhabited while waiting for a death certificate to be issued for the tenant who has died so that the next of kin can vacate the property and deliver possession

There can also be delays in the creation of a new tenancy for another person living in the property but not named in the tenancy agreement. During these delays the person has no rights as a tenant despite the property being their principal place of residence.

It was suggested that there are frequently cases in which landlords need to gain access to the property promptly after the death of a tenant, if for example, it has been left insecure or is a biohazard.

The current provisions do allow for an earlier date of termination by agreement or by application to VCAT, however in the case of the latter, the application can only be made where landlord has been unable to give a notice to vacate.

Option 11.36A – Enable landlord to apply for termination order from VCAT in first instance

Under the current provisions, if the landlord has been able to give the notice to vacate, the 28 day period is the default unless agreed otherwise with the legal representative or next of kin. The landlord is only able to apply to VCAT for a termination order if unable to give a notice to vacate to the legal representative of next of kin. Under this option the current provisions would be retained, however the landlord could opt to make an application to VCAT to terminate the tenancy in the first instance.

The RTA would therefore provide that the tenancy would terminate at the earliest of the following dates:

- 28 days after the landlord has been advised of the death of the tenant by the legal personal representative or next of kin of the tenant
- 28 days after the landlord has given a notice to vacate to the legal personal representative or next of kin of the tenant
- a date agreed in writing between the landlord and the legal personal representative or next of kin of the tenant, or
- the date determined as the termination date of the tenancy agreement by VCAT on the application of the landlord. An application must be heard by VCAT within five business days after the application is made.

Option 11.36B – Streamline provisions and provide for VCAT discretion

This alternative option would streamline the provisions and provide for VCAT to exercise discretion in the interests of the legal personal representative or next of kin of the deceased tenant to make a case for a longer notice period if required.

On the death of the sole tenant under a residential tenancy agreement, either the landlord, or the legal personal representative or next of kin of the deceased tenant could give a notice to vacate/notice of intention to vacate to the other.

The termination date could be before the end of any fixed term of the residential tenancy agreement if it is a fixed term agreement.

VCAT could, on application by a landlord or the legal personal representative or next of kin of the deceased tenant, make a termination order if it is satisfied that a termination notice was given in accordance with this section and that vacant possession of the residential premises has not been given as required by the notice. VCAT could specify a termination date that is after the date on the original notice.

The legal personal representative or next of kin of a deceased tenant who is given a termination notice by the landlord could give vacant possession of the residential premises at any time before the termination date specified in the termination notice.

The estate of the deceased tenant would not be liable to pay any rent for any period after the legal representative gives vacant possession of the residential premises and before the termination date.

Consultation questions

211. Do the options adequately address the issues raised in relation to the processes for termination of a tenancy following the death of a sole tenant?
212. Which of the options would provide the most effective process for termination of a tenancy following the death of a sole tenant?
213. What are any alternative processes that would be more effective?

11.5.2 Reduced period of notice of intention to vacate in certain circumstances

Circumstances were identified under which it may be appropriate for a tenant to give a reduced period of notice of intention to vacate, including during a fixed term tenancy agreement.

Stand-alone options

- **Option 11.37 – Enable tenant to give notice of intention to vacate at any time before the termination date specified by a notice to vacate under prescribed circumstances.**
- **Option 11.38 – Enable tenant to give reduced period of notice where they have accepted offer of public or community housing.**

Background

The RTA specifies the circumstances under which a tenant may give a notice of intention to vacate during a periodic tenancy with a shorter notice period than would otherwise apply. The tenant may give a notice of intention to vacate during a fixed term agreement however the termination date must be on or after the date of the end of the fixed term.

The circumstances specified in this section include where:

- the tenant has been given a notice to vacate by the landlord for changes of use or no specified reason, or because they are no longer eligible for public housing
- the tenant requires special or personal care and must vacate in order to obtain that
- the tenant has received a written offer of public housing from the Director of Housing, and

- the tenant requires temporary crisis accommodation and needs to vacate in order to obtain that.

Issues

It was proposed that there are a number of additional circumstances under which it may be appropriate for a tenant to give a reduced period of notice.

In addition, it was suggested that the option to give a notice of intention to vacate under certain circumstances would appropriately apply including where the date of termination would be before the end of a fixed term.

These circumstances can be categorised as follows:

- where the landlord has given a tenant a notice to vacate, or
- where a tenant has been given notice of an event or change of circumstances that will impact their tenancy.

It was considered that the option to give a notice of intention to vacate having received an offer of public housing could appropriately be confined to instances where the tenant has accepted an offer. The provision could be expanded however, to encompass both public and community housing.

Option 11.37 – Enable tenant to give notice of intention to vacate at any time before the termination date specified by a notice to vacate under certain circumstances

Notice of sales campaign

The tenant would be able to give 14 days' notice of intention to vacate whether during a fixed term agreement or a periodic agreement after receiving notice of a sales campaign for the rented property.

This option would not apply if the tenant had been notified of the sales campaign (including the timing of the campaign) prior to entering the tenancy agreement.

Notice of rent increase

The tenant would be able to give 14 days' notice of intention to vacate whether during a fixed term agreement or a periodic agreement in response to a rent increase.

This option would not apply if the tenant had been notified of the rent increase (including the timing of the increase) at the time they entered the tenancy agreement.

Notices to vacate where tenant not at fault

The tenant would be able to give 14 days' notice of intention to vacate in response to the notices currently prescribed during a periodic agreement.

The tenant would also be able to give 14 days' notice of intention to vacate, whether or not that date occurs before the end of the fixed term agreement, in response to any of the notices listed above as well as in response to a notice to vacate for the end of a fixed term agreement.

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Option 11.38 – Enable tenant to give a reduced notice period where they have accepted offer of public or community housing

The RTA would be amended to require the tenant to have accepted an offer of public or community housing in order to give a reduced period of notice of intention to vacate.

The notice period would be 14 days whether during a periodic agreement or during a fixed term agreement where the termination date is prior to the end of a fixed term agreement.

Consultation questions

214. What are any other circumstances in which tenants would be appropriately entitled to give a reduced period of notice of intention to vacate?

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

12 Family violence

Evidence recently provided to the Royal Commission into Family Violence (the Royal Commission) highlighted areas in which amendments to the RTA could allow for more appropriate responses to instances of family violence in rental housing.

Recommendation 116 of the Royal Commission's final report specifically states that the Review of the RTA should consider amending the RTA to:

a) empower VCAT members to make an order under section 233A of the RTA if a member is satisfied that family violence has occurred after considering certain criteria – but without requiring a final family violence intervention order containing an exclusionary condition

b) provide a clear mechanism for apportionment of liability arising out of the tenancy in situations of family violence, to ensure that victims of family violence are not held liable for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence

c) enable victims of family violence to prevent their personal details from being listed on residential tenancy databases, and to remove existing listings, where the breach of the RTA or the tenancy agreement occurred in the context of family violence

d) enable victims of family violence wishing to leave a tenancy to apply to VCAT for an order terminating a co-tenancy if the co-tenant is the perpetrator of that violence – including, where relevant, an order dealing with apportionment of liability for rent (or other tenancy-related debts) between the co-tenants

e) prevent a landlord from unreasonably withholding consent to a request from a tenant who is a victim of family violence for approval to reasonably modify the rental property in order to improve the security of that property.

This chapter responds to recommendation 116, as well as other family violence-related residential tenancies issues raised by stakeholders in the course of the review. CAV does not collect data on these issues and has relied on evidence and discussion contained in the Royal Commission's final report to inform the development of options in this chapter.

In particular, options in this chapter seek to:

- improve access to family violence protections in the RTA
- provide for the termination of residential tenancies in the context of family violence
- enable reasonable modifications to be made to a rented premises to improve security
- ensure that victims of family violence are not unfairly listed on residential tenancy databases
- enable victims of family violence to challenge notices to vacate where the relevant action or conduct that gave rise to the notice is attributable to a person who committed an act of family violence
- enable liability to be fairly apportioned in the context of family violence, and
- make it easier for victims of family violence to serve notices and documents when making a family violence-related residential tenancy applications at VCAT.

The Government is also progressing with recommendation 119 of the Royal Commission's final report. This requires consideration of any legislative reform that would limit as far as possible the

necessity for individuals affected by family violence with proceedings in the Magistrates' Court of Victoria to bring separate proceedings in VCAT in connection with any tenancy related to the family violence.

Recommendation 119 is being considered as part of a separate process. However, outcomes of the RTA Review as it relates to recommendation 116 will inform the response to recommendation 119.

12.1 Access to family violence protections in the RTA

The Royal Commission recommended that consideration be given to empowering VCAT members to make an order under section 233A of the RTA if a member is satisfied that family violence has occurred after considering certain criteria – but without requiring a final family violence intervention order containing an exclusionary condition.

Alternative options for improving access to family violence protections in the RTA

- **Option 12.1A – Restrict criteria to a family violence safety notice, interim intervention order, or final intervention order being made, or**
- **Option 12.1B – Allow VCAT to also consider other evidence of family violence, or**
- **Option 12.1C – Allow VCAT to consider anything it believes relevant.**

Stand-alone options

- **Option 12.2 – Family violence related applications to be heard by VCAT within a specified time (for example, 3 business days).**
- **Option 12.3 – An applicant may include a parent or guardian of a child who is a victim of family violence.**

Background

The RTA currently enables the following:

- a protected person to apply to VCAT for an order terminating an existing tenancy agreement and requiring the landlord to enter into a new tenancy agreement with the protected person
- VCAT to consider the ability of a protected person to comply with the duties of a tenant, and the relative impact and hardships of a protected person and landlord, prior to making an order, and
- VCAT to apportion liability between the protected person, the excluded tenant and any other tenants under an existing tenancy agreement in relation to bond, utility charges, and other liabilities such as damage.

The provisions apply only where a final family violence intervention order (or final personal safety intervention order)[59] is in place with an appropriate exclusion condition.[60] They can apply in circumstances where the protected person is a party to the tenancy agreement, and where the

59 A personal safety intervention order is an order made by a magistrate to protect a person from harm caused by someone who is not a family member.

60 Under section 82 of the *Family Violence Protection Act 2008*, if the court decides to make a family violence intervention order, the court must also consider whether to include an **exclusion condition**, excluding the respondent from the protected person's residence.

protected person has been residing in the rented premises as their principal place of residence, but is not a party to the tenancy agreement.

Issues

VCAT cannot currently make an order under the family violence provisions in the RTA unless a final intervention order with an exclusion condition is in place. This can take a significant amount of time[61] and sometimes an exclusion condition is not included in the intervention order.

The Royal Commission noted that the process of seeking assistance for family violence is not linear and that there are many entry points into the system for those affected. Some examples of how victims can enter the system include:

- disclosing violence they have experienced to a person or organisation that comes into contact with them for other reasons. Many of these are generalist service providers such as hospitals, general practitioners or other health practitioners, maternal and child health nurses, or teachers or school counsellors
- seeking legal advice from a lawyer
- seeking help from the police, who might respond by issuing a family violence safety notice or seeking an intervention order on behalf of the victim(s) and/or charging the perpetrator with a criminal offence
- contacting a specialist family violence service for advice and assistance
- being contacted by a specialist family violence service after police have made a family violence risk assessment and management report and referral
- going directly to a magistrates' court to seek a family violence intervention order
- seeking entry to a refuge through a specialist family violence service or through a homelessness access point, and
- telling a friend or family member or someone from whom they are receiving pastoral care.

Consistent with the Royal Commission's recommendation, the options below are proposed to provide access to any family violence protections in the RTA, unless exceptions are set out. An exclusion condition would not be required under any of the options below.

It is noted that in broadening access to family violence protections, there is a risk that due process associated with the issuing of a final family violence intervention order may be circumvented. This process can aid in determining the identity of the 'primary aggressor',[62] which may have been incorrectly identified at previous stages,[63] and to address the issue of cross-intervention orders. Cross-intervention orders, that is where both a perpetrator and victim of family violence have intervention orders made against each other, are common and can mean that the existence of an intervention order is not always good evidence that the protected person under that order is a victim.

61 Evidence presented to the Royal Commission suggested that most intervention orders were finalised within six months, but that there was an increasing number of matters pending for more than 12 months.

62 The Code of Practice for the Investigation of Family Violence defines 'primary aggressor' as, *the party to the family violence incident who, by his or her actions in the incident and through known history and actions, has caused the most physical harm, fear and intimidation against the other.*

63 The Royal Commission heard from various stakeholders that police members can incorrectly identify the 'primary aggressor' in family violence cases. This can lead to family violence safety notices being issued against a victim of family violence.

This risk is expected to be mitigated by training to be provided to VCAT on identifying and responding to risk factors associated with family violence.

Option 12.1A – Restrict criteria to a family violence safety notice, interim intervention order, or final intervention order being made

Under this option, criteria that VCAT must consider to be satisfied that family violence had occurred, are whether the applicant provides evidence of a family violence safety notice,[64] an interim intervention order, or a final intervention order.

Option 12.1B – Allow VCAT to also consider other evidence of family violence

Under this alternative option based on the South Australian model, criteria that VCAT must consider to be satisfied that family violence had occurred, are whether the applicant provides evidence of a family violence safety notice, an interim intervention order, a final intervention order, or other evidence of family violence (for example, statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health nurse/worker).

Option 12.1C – Allow VCAT to consider anything it believes relevant

Under this alternative option based on the Queensland model, VCAT, in considering an application under any family violence-related provision, may take into account:

- whether an application for an intervention order has been made
- if an application was made, whether an order was granted and/or is still in place
- if an order was granted, whether an exclusion condition exists, and
- anything else VCAT considers relevant.

Out of all the options, this option enables VCAT to consider the broadest scope of criteria relevant to the context of family violence. This can, for example, enable VCAT to consider a range of factors in making a determination where cross-intervention orders exist.

Option 12.2 – Family violence related applications to be heard by VCAT within a specified time

Under this option, VCAT would be required to hear family-violence related applications within a specified time from receiving such an application (for example, 3 business days).

Option 12.3 – An applicant may include a parent or guardian of a child who is a victim of family violence

Under this option, family violence related protections under the RTA could be accessed by a parent or guardian of a child who is a victim of family violence, where the parent or guardian lives in the same rented premises as the child. This would ensure that where family violence had occurred against a minor, family violence related protections under residential tenancies legislation would be available.

For example, a parent or guardian of a child who is a victim of family violence would be able to make reasonable modifications to rented premises (discussed below at chapter 12.3) even though the child is not a party to the tenancy agreement.

64 An application for a family violence safety notice is made by the police. The safety notice is also considered an application for a family violence intervention order.

Consultation questions

216. Which alternative option do you support and why?

217. What would be a reasonable time within which VCAT should hear a family-violence related application?

12.2 Terminating a tenancy

The Royal Commission recommended that consideration be given to enabling victims of family violence wishing to leave a tenancy to apply to VCAT for an order terminating a co-tenancy if the co-tenant is the perpetrator of that violence – including, where relevant, an order dealing with apportionment of liability for rent (or other tenancy-related debts) between the co-tenants.

Alternative options

- **Option 12.4A – Termination of tenancy by VCAT, or**
- **Option 12.4B – Termination of tenancy by notice to vacate.**

Background

Section 234 of the RTA allows a person to apply for an order from VCAT to reduce the term of a fixed-term tenancy. VCAT must be satisfied that the applicant has experienced an unforeseen change in their circumstances that will cause severe hardship. This includes situations where the applicant is a protected person under a family violence intervention order (interim or final) and is seeking to break the tenancy in order to protect their own or their children's safety.

In a periodic tenancy, a tenant can terminate the lease by giving 28 days' notice.

Issues

Section 234 has generally been used by a victim of family violence who is a co-tenant (i.e. they are a party to the tenancy agreement) in a fixed-term tenancy situation, who wishes to leave the tenancy.

However, stakeholders expressed concern to the Royal Commission that where an application has been made under section 234 but one party remains in possession, a periodic tenancy will be created and both tenants may continue to be jointly and severally liable.

Further, under section 234, VCAT can order that the applicant pay compensation to the landlord, such as the cost of advertising the premises and lost rent. This order can only be made against the applicant (the victim of family violence) and there is no provision for VCAT to apportion liability in this situation.

In the context of a periodic tenancy, a tenant can terminate the lease by giving 28 days' notice. However, this notice may be treated as invalid if it is only signed by one tenant. Further, a tenancy will usually only terminate when the tenants deliver vacant possession, which requires all tenants to leave the premises, remove their belongings and return the keys.

The gaps in the current legislation are summarised in the table below which maps out four situations – where the victim of family violence wants to stay or leave rented premises, and where the victim is or is not a co-tenant (i.e. whether their name is or is not on the tenancy agreement):

Table 12.1: Scenarios where victim wants to stay and wants to leave (co-tenant or not co-tenant)

	Victim wants to stay	Victim wants to leave
Victim is a co-tenant	Currently enabled under ss. 233A-233C	Limited provision under section 234 (fixed term tenancy) and 235 (periodic tenancy), as discussed above
Victim is not a co-tenant	Currently enabled under ss. 233A-233C	Victim of family violence can leave at will

Option 12.4A – Termination of tenancy via VCAT

Family violence provisions already exist in the RTA for situations where a victim of family violence wishes to remain in premises (discussed in chapter 12.1). This option proposes similar provisions to address a situation where a victim of family violence is a co-tenant (i.e. they are a party to the tenancy agreement) and wish to leave.

Under this option, the RTA would include provisions that:

- enable a victim of family violence who is a co-tenant to apply to VCAT for an order to terminate a fixed term or periodic tenancy, without requiring consent from the co-tenants
- require VCAT to consider the relative impacts and hardship of each party to the tenancy agreement, prior to making an order
- enable VCAT to make an order requiring the landlord or agent to ensure that the victim of family violence has access to the rented premises to remove their belongings
- enable VCAT to apportion liability between the relevant parties in relation to bond, utility charges, other liabilities such as damage, and compensation for early termination of the tenancy agreement (if relevant). VCAT would be able to determine that the perpetrator of family violence was fully liable.
- enable VCAT to specify a termination date that must not exceed a certain period of time from the making of the order (for example, two weeks), and
- enable VCAT to make an order preventing a landlord, agent and database operator from making a listing on a tenancy database.

To address the impact on co-tenants and landlords, VCAT, when making an order to terminate the tenancy, may also make an order to:

- terminate the tenancy agreement, or
- terminate the existing tenancy agreement and create a new tenancy agreement with one or more of the remaining co-tenants (with the same terms and conditions as the original tenancy agreement).[65]

65 It is envisaged that in this situation, standard processes around termination of a tenancy agreement and creation of a new tenancy agreement would apply. For example, release of the bond related the old tenancy agreement, and new condition report and bond lodged for the new tenancy agreement.

In making such orders, VCAT must consider any matters raised by the remaining co-tenants and the landlord, including but not limited to:

- the ability of each of the remaining co-tenants to comply with the duties of a tenant, and
- the relative impact and hardship of each of the remaining co-tenants and the landlord.

Option 12.4B – Termination of tenancy via notice to vacate

This alternative approach is based on reforms in NSW. Rather than requiring a victim of a family violence to terminate a tenancy by seeking an order from VCAT, this option would enable a victim of family violence to terminate a tenancy by issuing a notice to vacate.

Under this alternative option, the RTA would include provisions that:

- enable a victim of family violence who is a co-tenant (whether fixed or periodic) to end their tenancy immediately by serving a notice to vacate to the landlord and co-tenants. Where serving a notice to vacate to the co-tenant who is the perpetrator of family violence, the notice to vacate could be served electronically or by placing it at the rented premises
- specify that acceptable evidence of family violence would include a family violence safety notice, interim or final intervention order, or other prescribed evidence (for example, report or statutory declaration by a GP, police, specialist family violence services, psychologist/counsellor or maternal and child health nurse/worker). A copy of this would be provided with the notice to vacate to the landlord
- specify that the victim of family violence would not be liable to pay any compensation for the early termination of the agreement, and
- enable the landlord or co-tenant to challenge the notice to vacate on procedural grounds (for example, that the notice to vacate was not issued in accordance with legislation).

The existing tenancy agreement is still considered to apply, despite the victim of family violence terminating their tenancy. The victim of family violence would not be liable to pay any rent from the date of the giving of the notice.

However, if subsequently a final intervention order is made and the person that issued the notice to vacate is determined to be the primary aggressor, the notice to vacate can be appealed at VCAT and invalidated. That person is then liable for any compensation or loss arising from the early termination of their tenancy, to both the landlord and any other co-tenants.

In terms of the impact on landlords and co-tenants, under this alternative option, the landlord, within a set period of time from the notice to vacate being served (for example, four weeks), must either:

- terminate the tenancy, or
- enter into a new tenancy agreement with the remaining co-tenant(s).

If the landlord decides to terminate the tenancy, they must give a notice to vacate to the remaining co-tenant(s) with a termination date no less than 14 days from the serving of the notice.

If the landlord does not take any action within the specified period of time, a new tenancy agreement is automatically created between the landlord and the remaining co-tenant(s) under the same terms and conditions of the original tenancy agreement.

Standard processes around termination of a tenancy agreement and creation of a new tenancy agreement would then apply. That is, the landlord would be required to release the bond related to the old tenancy agreement, lodge a new bond and prepare a condition report etc. If there was any damage or other liabilities, the landlord would still be able to seek a claim against the bond or seek a compensation order if applicable (see chapter 12.6) for options in relation to this in the context of family violence).

Consultation question

218. Which option best addresses the needs of victims of family violence while providing for any potential impacts on landlords and other co-tenants? Why?

12.3 Modifications to rented premises

The Royal Commission has recommended that consideration be given to amending the RTA to prevent a landlord from unreasonably withholding consent to reasonably modify the rented premises in order to improve security.

Alternative options

- **Option 12.5A – Landlord not to unreasonably withhold consent, or**
- **Option 12.5B – Non-structural modifications can be made without consent.**

Background

The RTA requires a tenant to obtain the landlord's consent to install any fixtures or make any alteration, renovation or addition to the rented premises. Before a tenancy agreement terminates, a tenant who has installed fixtures or made alterations (with or without the landlord's consent), must restore the premises to its original condition or pay the landlord an amount equal to the reasonable cost of restoring the premises to its original condition. This does not apply if the tenancy agreement provides otherwise, or the landlord and tenant agree otherwise.

Section 70A already gives a right for a protected person who has a family violence intervention order, family violence safety notice or a personal safety intervention order, with an exclusion condition, to change any external door or window lock of the rented premises, whether or not the protected person is a party to the tenancy agreement.

Section 70A also requires that as soon as practicable after making the changes, the protected person must give the landlord or agent a key to the lock and either a certified extract or copy of the intervention order, and give a key to parties to the tenancy agreement other than the excluded tenant.

Where the conditions outlined above are not in place, a tenant may apply to VCAT under section 71 of the RTA to change locks without a landlord's consent if the landlord withholds consent and the tenant believes that the withholding of the consent is unreasonable.

Issues

A person affected by family violence who may wish to increase security on the premises, for example, by installing video cameras, requires the landlord's consent to do so. The landlord can refuse to allow the modification, regardless of the reason.

The Royal Commission has recommended that consideration be given to amending the RTA to prevent a landlord from unreasonably withholding consent to reasonably modify the rented premises in order to improve security.

Given that section 70A already enables the changing of external door or window locks without requiring prior consent from a landlord, the Royal Commission's recommendation is taken to mean all other security-related modifications except locks.

Option 12.5A – Landlord not to unreasonably withhold consent

Under this option, a landlord would be prohibited from unreasonably withholding consent to reasonable modifications to the rented premises that would improve security for a tenant who is a victim of family violence. Sub-options are provided in relation to the term 'reasonable modification'.

To support this provision:

- the tenant would be required to ensure that the landlord and any other co-tenants (except for the perpetrator of family violence) can access the rented premises after making the modifications
- the modifications would be made at the tenant's expense and require the tenant to return the premises to its original condition or pay the landlord an amount equal to the reasonable cost of restoring the premises to its original condition, unless otherwise provided by the tenancy agreement or agreed with the landlord
- the landlord would be required to provide a response to the tenant within a certain period of time (for example, two business days)
- the tenant would be able to seek an order from VCAT to make reasonable modifications if the landlord withholds consent. VCAT would be required to schedule such a hearing within a certain period of time (for example, two business days), and
- in making the above order, VCAT would:
  - establish whether the applicant was a victim of family violence, based on the same grounds as that for other family violence provisions (as discussed in chapter 12.1)
  - establish whether the proposed modifications were reasonable, and
  - consider any relevant matters raised by the landlord and co-tenants (if any).

If the tenant does not restore the premises to its original condition or pay the landlord an amount equal to the reasonable cost of returning the premises to its original condition, the landlord would be able to make a claim against the bond and/or apply to VCAT for a compensation order.

- **Sub-option A** – 'Reasonable modifications' not defined

  Under this option, 'reasonable modifications' would not be defined but left open for interpretation on a case-by-case basis.

- **Sub-option B** – 'Reasonable modifications' to be defined

  Under this alternative option, 'reasonable modifications' would be defined and a list of examples could be provided that could include (but not be limited to), security cameras, alarm system, security lighting and window coverings.

Option 12.5B – Non-structural modifications can be made without consent

Under this alternative option, a tenant would be able to make certain modifications to improve security without requiring a landlord's consent.

To support this provision:

- the tenant would be required to notify the landlord/agent and co-tenants (if any) prior to making the modifications
- the tenant would be required to ensure that the landlord and any other co-tenants (except for the perpetrator of family violence) can access rented premises after making the modifications
- modifications would be made at tenant's expense and require the tenant to return the premises to its original condition or pay the landlord an amount equal to the reasonable cost of restoring the premises to its original condition, unless otherwise provided by the tenancy agreement or agreed with the landlord
- the modifications would be prescribed and could include for example, non-structural modifications such as window coverings, security cameras that are not hard-wired, and improved lighting
- the landlord would be able to seek an order from VCAT to require the tenant to return the premises to its original condition. In making the order, VCAT would:
  - establish whether the applicant was a victim of family violence, based on the same grounds as that for other family violence provisions (as discussed in chapter 12.1)
  - establish whether the modifications were consistent with those prescribed modifications that are allowed without a landlord's consent
  - consider any relevant matters raised by the landlord and co-tenants (if any), and
- other 'reasonable modifications' to improve security would be subject to the process outlined in option 12.5A.

If the tenant does not restore the premises to its original condition nor pay the landlord an amount equal to the reasonable cost of returning the premises to its original condition, the landlord would be able to make a claim against the bond and/or apply to VCAT for a compensation order.

Consultation questions

219. If 'reasonable modifications' were to be defined under option 12.5A, what would be an appropriate definition?

220. If non-structural modifications were prescribed under option 12.5B, what should it include?

12.4 Residential tenancy databases

The Royal Commission recommended that consideration be given to enabling victims of family violence to prevent their personal details from being listed on residential tenancy databases, and to remove existing listings, where the breach of the RTA or the tenancy agreement occurred in the context of family violence.

Stand-alone options

- **Option 12.6 – Prohibit estate agents and landlords from making a listing on a tenancy database.**
- **Option 12.7 – VCAT order to remove and prevent listings in tenancy databases.**
- **Option 12.8 – VCAT order to remove or edit information from listings in tenancy databases.**

Background

Under the RTA,[66] tenants' details can be listed on a residential tenancy database, where one or more tenants have breached certain provisions of the RTA or the tenancy agreement and the landlord is either owed more than the bond will cover, or VCAT has made a possession order in respect of the rented premises. Breaches that can result in such a listing include the failure to pay rent and damage to premises.

Personal information listed on the tenancy database must relate only to the breach and must be accurate, complete and unambiguous.

A landlord or database operator must not list personal information about a person unless they have, without charging a fee, given the person a copy of the personal information or have taken reasonable steps to disclose the personal information to the person.

Further, a landlord or database operator must not make such a listing unless they have given the person at least 14 days to review the personal information and make submissions objecting to its entry into the database, or about its accuracy, completeness and clarity. A landlord or database operator must consider any submissions made before making a listing.

Issues

As noted in the Royal Commission's final report, in the context of family violence, breaches that can lead to a listing in a tenancy database are often the result of a perpetrator's actions.[67] However, the details of a victim of family violence may be unfairly listed due to the actions of a perpetrator.

Being listed is a significant barrier for victims of family violence trying to access the private rental market.

There may also be instances where a victim's details are listed in a tenancy database as a result of their own actions (i.e. not related to family violence). In these circumstances, there is a risk that a victim's personal details may be obtained by a perpetrator with access to a tenancy database.

Consistent with the Royal Commission's recommendation, the aim of any reform is to remove existing listings relating to family violence, and prevent the personal details of victims of family

66 Provisions relating to residential tenancy databases are found in Part 10A of the RTA

67 Volume 4, p113 of the Royal Commission's final report.

violence from being listed on residential tenancy databases, where the breach of the RTA or the tenancy agreement occurred in the context of family violence.

Option 12.6 – Restriction on listings made by landlords and agents

Under this option, the RTA would include a provision that would enable a tenant to make a submission to the landlord, agent or tenancy database operator objecting to a proposed listing, on the grounds that they were a victim of family violence and the associated breach resulted from the actions of another person who has committed an act of family violence.

The submission to the landlord, agent or tenancy database operator should include supporting evidence from a prescribed list of options (for example, a statutory declaration made by the tenant or GP, or copy of a police report or intervention order).

Option 12.7 – VCAT order to remove and prevent listings in tenancy databases due to actions of another person

Under this option, the RTA would include a provision to enable VCAT to make an order that the landlord, landlord's agent or a database operator must remove an existing listing or not make a listing on a residential tenancy database in relation to a victim of family violence, where it is satisfied that the breach of the tenancy agreement resulted from the actions of another person who has committed an act of family violence.

Option 12.8 – VCAT order to remove or edit information from listings in tenancy databases due to risk to safety

Under this option, the RTA would include a provision to enable VCAT to make an order that a database operator must remove or edit information associated with an existing listing in relation to a victim of family violence, where it is satisfied that not removing or editing the information would pose a risk to the safety of the victim of family violence (for example, current contact details).

The scope of the VCAT order would be restricted such that information related to the nature of the breach that resulted in the listing would not be removed or edited.

Consultation question

221. Do these options adequately address the issue of victims of family violence being listed on residential tenancy databases? If not, how can they be improved?

12.5 Challenging notices to vacate

Concerns have been raised that actions by a perpetrator of family violence may lead to victims of family violence being unfairly given a notice to vacate, sometimes requiring them to leave immediately.

Stand-alone option

- **Option 12.9 – Enable a notice to vacate to be challenged in the context of family violence.**

Background

The RTA enables a landlord to give a tenant a notice to vacate if by the conduct of the tenant or the tenant's visitor, damage is maliciously caused to the premises or common areas. Similarly, a notice to vacate may be given if the tenant or the tenant's visitor by act or omission endangers the safety of occupiers of neighbouring premises. These notices may specify a termination date that is the date on which the notice is given.[68]

The RTA also specifies that it is a tenant's duty not to cause nuisance or interference. If a tenant breached a duty successively and did not comply with a breach of duty notice within the required time, the landlord can give the tenant a notice to vacate, which may specify a termination that is no less than 14 days after the date on which the notice is given.

Issues

Stakeholders raised concerns that actions by a perpetrator of family violence may lead to victims of family violence being unfairly given a notice to vacate, sometimes requiring them to leave immediately.

Option 12.9 – Enable a notice to vacate to be challenged in the context of family violence

Under this option, a notice to vacate can be challenged on the grounds that the relevant action or conduct was committed by a perpetrator of family violence.

The tenant must apply to VCAT challenging the validity of the notice to vacate on or before the hearing of an application for a possession order.

In determining whether the notice to vacate is invalid, VCAT would need to be satisfied that:

- the applicant is a victim of family violence, based on the same grounds as that for other family violence provisions (discussed in chapter 12.1), and
- the relevant action or conduct was attributable to another person who committed an act of family violence.

VCAT would also be required to consider the following:

- any steps that have been taken to remove the perpetrator from the rented premises, or ensure that the perpetrator does not attend the rented premises
- the likelihood of the action or conduct re-occurring, based on evidence tendered, for example by the police
- the relative impact and hardship on the landlord and co-tenants (if any), and
- any other relevant matter raised by the landlord and co-tenant (if any).

Consultation question

222. Does this option strike an appropriate balance between protecting a victim of family violence and managing risks to landlords and other co-tenants? If not, how can this option be improved?

68 Similar notices to vacate exist for all other alternate forms of tenure.

12.6 Compensation orders and claims against the bond

The Royal Commission recommended that consideration be given to providing a clear mechanism for apportionment of liability arising out of the tenancy in situations of family violence, to ensure that victims of family violence are not held liable for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence.

Stand-alone options

- **Option 12.11 – Apportioning liability in the context of family violence where a perpetrator is a co-tenant.**
- **Option 12.12 – Apportioning liability in the context of family violence where a perpetrator is not a co-tenant.**

Background

The RTA enables a landlord to apply to VCAT for a compensation order or payment out of a bond for loss or damage because the tenant has breached their duty under the RTA or failed to comply with the tenancy agreement.

Issues

The Royal Commission heard that issues can arise for victims of family violence in relation to the apportionment of liability, where parties are co-tenants on the lease. This issue is considered in chapter 12.2 where a victim of family violence is a co-tenant and wishes to terminate a tenancy.

However, there may be situations where a landlord has applied for a compensation order before a victim of family violence has applied to terminate a tenancy. In these circumstances, tenants are generally considered to be jointly and severally liable for any loss or damage. A landlord seeking an award of compensation can therefore make their claim against any or all of the co-tenants to the tenancy agreement.

Similarly, a landlord may make a claim against the bond when a tenancy terminates, to compensate for any loss or damage. While a bond may be registered in joint names, the entire bond amount would be available to be claimed against.

According to stakeholders, compensation claims are most commonly brought under the RTA against victims of family violence in one of the following two ways:

- a landlord claims compensation against all co-tenants in relation to damage caused by a single co-tenant who is the perpetrator of family violence, and
- the landlord claims compensation for rent arrears that accrued after a victim of family violence fled the premises and a perpetrator remained in possession.

In response to the above issues, the Royal Commission's recommendation is that consideration be given to provision of a mechanism for the apportionment of liability arising out of a tenancy in situations of family violence to ensure that victims of family violence are not held liable for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence.

Option 12.11 – Apportioning liability in the context of family violence where perpetrator is a co-tenant

Under this option, VCAT, when making a compensation order or determining payment out of a bond, would be able to:

- consider whether another party to the agreement is a victim of family violence, based on the same grounds as that for other family violence provisions (as discussed in chapter 12.1)
- apportion liability between co-tenants, including determining that the perpetrator of family violence be fully liable for the landlord's loss or damage, and
- exclude the victim's share of the bond from being made available for compensation, if the victim's name is registered against the bond.

Option 12.12 – Apportioning liability in the context of family violence where perpetrator is not a co-tenant

Under this option, VCAT, when considering an application for a compensation order or determining payment out of a bond, would be able to determine that a tenant who is a victim of family violence is not liable for any loss, debt or damage.

In making such a determination, VCAT would need to be satisfied that:

- the loss or damage resulted from the actions of another person who has committed an act of family violence, and
- an order (interim or final) with an exclusion condition had been made against the perpetrator of family violence.

Consultation question

223. What are the risks, if any, of unintended consequences arising from the options proposed?

12.7 Serving notices and documents

Stakeholders expressed concern that where a victim of family violence makes an application to VCAT under family violence provisions, they are required to serve a notice to the perpetrator of family violence.

Alternative options

- **Option 12.13A – Include an option for VCAT to serve notices and documents to the perpetrator of family violence, or**
- **Option 12.13B – Require that VCAT serve the notice to the perpetrator of family violence.**

Background

Where a tenant who is a victim of family violence makes an application to VCAT under the family violence provisions of the RTA, they are required to serve a notice to other parties to the tenancy agreement to advise of the application. This can include the perpetrator of family violence.

The RTA currently requires that the notice or document be served or given:

- by delivering it personally to the person
- leaving it at the address nominated by the person under the *Family Violence Protection Act 2008*[69] (FVPA) with a person apparently over the age of 16 years and apparently residing or employed at that place
- by sending it to the person by post or email to the address nominated by the person under the FVPA
- by leaving it at the person's last known address (other than a place from which the person is excluded under the FVPA) with a person apparently over the age of 16 years and apparently residing or employed at that place
- by sending it to the person by post or email to the person's last known postal or email address (other than to an address from which the person is excluded under the FVPA), or
- in the manner ordered by VCAT.

Issues

The RTA is currently silent on whether VCAT can serve documents on behalf of the victim of family violence.[70]

Stakeholders raised concerns that victims can find the process of a notice or document under the current provisions costly, difficult, confronting and dangerous.

Option 12.13A – Include an option for VCAT to serve notices and documents to the perpetrator of family violence

Under this option, the list of ways in which a notice or document may be served or given would include through VCAT.

Option 12.13B – Require that VCAT serve notices to the perpetrator of family violence

Under this alternative option, notices or documents to be served or given to a perpetrator of family violence in the context of family violence-related applications would be required to be served or given through VCAT.

Notices or documents to be served or given to landlords or any other party would not be required to be done through VCAT.

Consultation question

224. Are there any other factors that should be considered in the serving of notices or documents as part of family violence-related residential tenancies applications?

69 Section 33 and 85 of the FVPA requires police (where a family violence safety notice is issued) and the court (where a family violence intervention order with an exclusion condition is made) to ask the respondent for an address for the service of documents. The respondent is not required to comply with the request to provide an address.

70 VCAT is able to serve notices and documents in other lists.