Tenants Union of Victoria
response to
Rent, bonds and other charges Issues Paper of the Residential Tenancies Act Review
April 2016
About Us

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state.

We operate an integrated service model that combines three main areas of activity:

- client services (advice and advocacy),
- community education, and
- social change

Our aim is to promote and protect the rights and interests of residential tenants in Victoria.

The TUV’s activities can be divided into three broad categories:

1. **Client Services (advice & advocacy)**

   The purpose of our client service is to provide accessible and effective assistance to residential tenants across Victoria. Advice is provided by telephone, in person, by email and through secondary consultations with other services.

   During 2014/15, the TUV handled more than 19,200 enquiries. The TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, and attended 350 outreach visits to 250 rooming house, caravan parks and services.

2. **Community Education**

   The TUV produces a wide range of publications and practical resources for tenants, rooming house and caravan park residents, and community service workers to assist tenants to understand their rights and responsibilities and to resolve their own tenancy problems. We have about 150,000 unique users accessing resources through our website each year.

   The TUV also runs a training program for community sector workers to provide basic training in tenancy rights and responsibilities. During 2014/15 we did 29 training sessions and other community education presentations.

3. **Social Change**

   The TUV undertakes a broad range of social change activities to represent the interests of tenants and to highlight the impact of living in the rental sector. This work includes research, policy formulation, lobbying and media liaison.

   Across these three areas of activity our strategic goals can be summarised as:

   - Better rights
   - Better resources
   - Better services
# Contents

1. Summary of Recommendations ................................................................. 3  
2. Rental affordability ...................................................................................... 5  
   2.1 Affordable housing ............................................................................... 5  
   2.2 The need for social housing ................................................................. 6  
   2.3 Rent regulation .................................................................................... 6  
3. Bonds ........................................................................................................ 11  
   3.1 Landlord bonds .................................................................................... 11  
   3.2 Maximum bonds .................................................................................. 11  
   3.3 Failure to pay bond ............................................................................ 11  
   3.4 Bond increases .................................................................................... 12  
   3.5 Bonds in other tenures ........................................................................ 12  
      3.5.1 Bonds in rooming houses .............................................................. 12  
      3.5.2 Bonds in caravan parks ............................................................... 12  
   3.6 Bond claims ........................................................................................ 12  
   3.7 Bonds and family violence .................................................................. 14  
   3.8 Landlord insurance ............................................................................ 14  
   3.9 Bonds and guarantors ........................................................................ 14  
   3.10 Bond loan scheme ............................................................................ 14  
4. Rent and other payments .......................................................................... 16  
   4.1 Rent in advance .................................................................................... 16  
   4.2 Rental bidding and auctions ................................................................. 16  
   4.3 Rent increases ...................................................................................... 17  
   4.4 Timely/late payment of rent ................................................................. 19  
   4.5 Rent receipts ....................................................................................... 20  
   4.6 Rent in social housing ......................................................................... 20  
      4.6.1 Rents in public housing ............................................................... 20  
      4.6.2 Rents in social housing ............................................................... 21  
   4.7 Rents in rooming houses ..................................................................... 22  
   4.8 Other payments and charges ............................................................... 22  
      4.8.1 Holding deposits ......................................................................... 22  
      4.8.2 Charges for paying rent .............................................................. 23  
      4.8.3 Assignment fees ......................................................................... 24  
5. References .................................................................................................. 25
Summary of Recommendations

Rental Affordability
R1. The Victorian Government should establish a new Social Housing Supply program with funding of $200 million per year (indexed) over 20 years to enable growth of a minimum 800 homes annually.

R2. Introduce a rent regulation system similar to Germany.

Bonds
R3. Remove the exemption for maximum bonds by repealing section 31(3) of the Act.

R4. Remove the exemption for bond increases by repealing s34(a) of the Act.

R5. Bonds in caravan parks should be capped at two weeks’ rent.

R6. The bond should be automatically refunded to the tenant if the landlord does not make a claim within the 10 business days’ time limit.

R7. The landlord must provide evidence to support any claim that is made for all or part of a tenant’s bond.

R8. Ensure that un-lodged bonds are to be returned to the tenant by amending the Act to allow the Tribunal to make an order under s416 that the landlord must return the bond if it can be shown a bond has been paid.

R9. Allow the power to apportion liability in the case of a creation of a tenancy (s232) by giving the Tribunal the same powers as are provided under s233C.

R10. A landlord or agent must not accept a guarantee if the tenant has paid or is required to pay a bond under a tenancy agreement.

R11. Amend the Department of Health and Human Services Bond Loan Scheme Policy and Procedures manual to allow a tenant to access a second bond loan where they are transitioning to a new property and their outstanding bond is yet to be released.

R12. Safeguard against discrimination against bond payments via the bond loan scheme by legislating that a bond payment cannot be refused no matter what format it is paid.

Rents
R13. Remove the exemption for rent in advance by repealing s40(2) of the Act.

R14. Regulate rental bidding by including a provision in the Act to the same effect as s57 of the RTA (QLD).

R15. Prevent unfair and unpredictable rent increases by introducing the German system of rent regulation.
R16. Improve the tenants’ ability to dispute a rent increase by legislating that the CAV Director’s rent report should be binding.

R17. Improve the tenants’ ability to dispute a rent increase by legislating that all factors under s47(3) must be considered when determining whether a rent increase is excessive.

R18. Rent increases should not occur if there are outstanding repair orders or an outstanding CAV report for repairs.

R19. Section 45(3)(a) of the Act should be amended to provide that a copy of the rent report is only to be provided to the landlord where the CAV Director finds that the proposed rent increase is excessive.

R20. Any additional terms in a tenancy agreement that relate to rent increases during a fixed-term should be subject to approval by the Director to ensure fairness and clarity.

R21. Tenants must be provided with a receipt after each rent payment.

R22. The public housing rental rebate system should be reviewed.

R23. Increased regulation through the Housing Registrar.

R24. Community Housing Agencies policy manuals including rent policies should be publicly available.

R25. S112 (Resident’s duty to pay rent) of the Act should be repealed.

R26. The use of holding deposits should be clarified by amending the Act to provide a clear definition that a holding deposit is an act of good faith by the tenant, specifically that they are genuine in their intention to rent the premises, and that the payment of the deposit is in consideration for exclusive dealings with the landlord.

R27. Tenants should be entitled to pay their rent by at least one payment method that does not incur any fees or charges.

R28. The practice of compelling a tenant to contract with a third party for the payment of rent should be expressly prohibited under the Act.
The biggest issue in the private rental market is rental unaffordability. In Victoria rents are higher than ever before and this continues to be a problem that cuts across low and moderate income earners. A higher proportion of the population are now falling into rental stress with 76% of all low income private renters paying over 30% of their incomes in rent.

For low income tenants in particular, private rental housing can be incredibly difficult to access and maintain. It is hard to find housing that is suitable in terms of location, size and condition. Low income tenants are continually pushed to areas of low amenity such as the urban fringe where there is minimal access to jobs and infrastructure. Low income households often find themselves in substandard properties as this can be the only properties that they can access and are able to afford.

Table 1 below highlights the impact of median rents on low income tenants, with the disparity between income and average rents so high that most households would need to pay the majority of their income to rent an average dwelling.

<table>
<thead>
<tr>
<th>Melbourne</th>
<th>Weekly Income</th>
<th>Affordable Rent (30%)</th>
<th>% of Income</th>
<th>Difference from AHPL*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austudy - Single</td>
<td>$278</td>
<td>$83</td>
<td>$290</td>
<td>104.3%</td>
</tr>
<tr>
<td>Newstart - Single (&gt;21yrs)</td>
<td>$326</td>
<td>$98</td>
<td>$290</td>
<td>88.8%</td>
</tr>
<tr>
<td>Newstart - Single (&gt;21yrs) Sharing</td>
<td>$305</td>
<td>$91</td>
<td>$190</td>
<td>62.3%</td>
</tr>
<tr>
<td>Newstart - Couple (2 children)</td>
<td>$755</td>
<td>$227</td>
<td>$460</td>
<td>60.9%</td>
</tr>
<tr>
<td>Aged Pension - Single</td>
<td>$491</td>
<td>$147</td>
<td>$290</td>
<td>59.0%</td>
</tr>
<tr>
<td>Parenting - Single Parent (1 child)</td>
<td>$588</td>
<td>$176</td>
<td>$380</td>
<td>64.6%</td>
</tr>
<tr>
<td>Average Weekly Earnings - Single</td>
<td>$1,163</td>
<td>$349</td>
<td>$290</td>
<td>24.9%</td>
</tr>
<tr>
<td>AWE - Couple (2 children)</td>
<td>$1,283</td>
<td>$385</td>
<td>$460</td>
<td>35.9%</td>
</tr>
<tr>
<td>Min Wage - Single</td>
<td>$599</td>
<td>$180</td>
<td>$290</td>
<td>48.4%</td>
</tr>
<tr>
<td>Min Wage - Couple (2 children)</td>
<td>$935</td>
<td>$280</td>
<td>$460</td>
<td>49.2%</td>
</tr>
</tbody>
</table>

Table 1 TUV December 2015 Affordability Bulletin

This strain has also been highlighted in a TUV report\(^1\), which provided a snapshot of the rental market by looking at all the available properties advertised on a particular day. The study found that there were very few options for

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households on low incomes. In fact for singles on Newstart or Austudy, there were zero properties that were both appropriate and affordable in the whole of metropolitan Melbourne; a single aged pensioner had slightly more luck with two suitable properties, whilst a single parent household could afford only one property.

The need for social housing

There is no doubt that there is a need for more affordable housing in Victoria. The market fails to both adequately provide sufficient affordable housing supply, and properly allocate affordable properties to those who need them.

It is recognised that solutions need to come from all levels of government and through multiple departments. Additionally measures should be far ranging from private rental assistance, to varying levels of affordable housing provided through provisions such as inclusionary zoning schemes, right through to government commitment to community and public housing. The Tenants Union supports a coordinated government approach to tackling the affordability issue.

Ultimately an increase in funding for the supply of new public and community housing stock needs to be included in the mix of affordable housing measures. Without this households who are in highest need of housing assistance will continue to languish on ever increasing social housing waiting lists. In Victoria there are over 59,000 households on the waiting list for social housing. However research suggests that relying solely on waiting lists to measure expressed need for social housing is inadequate and may undercount the real need for social housing. There are now more Victorians in need of social housing than ever before. At the same time social housing dwellings, as a proportion of all dwellings are in decline.

R1. The Victorian Government should establish a new Social Housing Supply program with funding of $200 million per year (indexed) over 20 years to enable growth of a minimum 800 homes annually.

Rent regulation

Rents and rent increases are an important contributor to the level of security experienced by tenants. Considerations pertaining to the capacity for tenants to afford rent payments, both at the outset and into the future, represent a de facto issue of security of tenure. Whilst some households value flexibility and choice rather than security, skyrocketing house prices and an inadequate supply of social housing has meant the private rental market in Victoria is housing an increasing number of households who have little choice but to rent in this sector.

There are clear issues of rental affordability, particularly for low income households as already high, market-derived rents continue to escalate and rent assistance remains insufficient to ameliorate the deteriorating sense of financial insecurity. It is for these reasons, in addition to the fact that moving costs can act as a barrier to tenants being able to change their situation, that some form of rent regulation should be imposed as a means to constrain rapidly rising rents in Victoria and curtail the current monopoly power of landlords to increase rents.

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The ‘Rent, bonds and other charges’ issues paper implies that there is a causal relationship between the existence of rent regulations and a decrease in the supply of private rental housing. The source cited compares rent regulation in six European countries and concludes that the private rental sector is stable or growing in countries which have less regulation compared to those whose regulations are stricter.  

Particularly, the experience of England is put forward to highlight the effects of rent regulation on the level of private renting – rent regulation was considered an important element of its decline in the twentieth century and deregulation, in the late 1980s, an important element in its growth in the last few decades. However, contemporary research suggests the conclusion that deregulation will result in an improved private rental system is questionable.

Indeed, a comparison of the private rental markets in England and Germany, suggests that the assumptions on the relationship between the free market model and a “financially viable and vibrant private rental housing market” is not necessarily correct, and more likely driven by cultural norms and ideological positions. The observable decline of private rental in England last century had as much to do with asymmetric fiscal support for other tenures and the demographic characteristics of tenants renting privately, as it did with rent controls or other regulations.

In short, as much current research states, regulation is not inconsistent with the existence of a viable and vibrant private rental sector. Many countries with regulated rents have substantive, and growing, private rental markets. In fact, there are no simple and clear relationships between changes in regulations and the size or rate of change of private renting in Europe over the last two decades. Moreover, some form of regulation can even be positive for landlords. If a tenant feels secure about future rental costs, that tenant is less likely to relocate, minimising the landlord’s costs associated with re-letting the property and providing long-term, secure source of income for the landlord.

In addition, a cross-country comparison of four countries by the OECD concluded that both “over-regulation” and ‘under-regulation’ of rent setting can lead to a marginal [private rental sector]. It was shown that the complete deregulation of rent setting, such as that implemented in Finland and the Czech Republic, witnessed a short-term rapid increase in supply of private rental housing but ultimately contributed to a decline in demand for this housing tenure over the longer term. However, the long-term stabilisation of the sector has only been achieved in Germany, a country with moderate, market-led rent regulations.

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There are many countries which regulate rents and/or rent increases. It is important to differentiate between 'hard' rent regulations and 'soft' rent regulations. Firstly, most countries have moved away from 'hard' forms of rent regulation since the 1970s, but such controls remain in some private rented dwellings in Denmark and US cities such as San Francisco and New York. Strict rent controls governing the ways rents are initially set and increased during a tenancy remain dominant in Sweden and the Netherlands, for example. Sweden’s rents are typically negotiated by the Swedish Union of Tenants and public and private landlords, with rents based on the utility value of the dwelling rather than demand.12

In the Netherlands, initial rents are determined using a system of points reflecting the size and quality of the dwelling and rent increases are typically a percentage set by the national government.13 In addition, Ireland and Scotland have both recently moved to curb escalating rents. Ireland has implemented a rent freeze for the next four years, limiting rent increases to once every 2 years, while Scotland has introduced legislation to empower municipalities to introduce local rent controls in areas where rents are deemed to be too high.

Forms of 'soft' rent regulation, on the other hand, are more widespread. Around the world there are numerous countries and jurisdictions – Austria, Belgium, British Columbia (Canada), Czech Republic, Denmark, New Jersey (US) and Norway – which currently permit the initial rent to be set by market forces, whilst regulating subsequent rent increases, typically by tying increases in rents to indexes such as the Consumer Price Index.14 In Ontario, Canada, rent increases are set as a percentage which is determined by the provincial government.15

In France and Germany, while rents are still market-driven, there are also effective regulations to soften the pressure of escalating rents, particularly in large cities where demand is high. Rents in France’s larger cities are regulated so that the determination of initial rents for new tenancies or rent increases for existing tenancies is tied to a benchmark index of reference rents.16

Additionally, Paris has recently become a pilot city for a ‘rent cap’, which came into effect in 2015. This regulation aims to prevent landlords from charging rents more than 20 per cent above, or 30 per cent below, the local comparative rent. The comparative rent, set annually, is based on four criteria: type of rental (furnished or unfurnished), number of rooms, year of construction and location.17

The German model is, arguably, one of the best examples of moderate rent regulation which supports a large, vibrant and stable private rented housing sector, one of the largest rental sectors in the OECD, while providing a more level playing field in a market-driven housing sector, balancing strong renter protection and incentives for investors.18 Germany’s rent regulations, explained below, provide room for market forces in rent setting and reasonable landlord profits, but increases the tenant security concerning future rent increases by dampening the impact of rents when they are rising.

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13 Schmid & Dinse 2014.
16 Schmid & Dinse 2014.
18 Schmid & Dinse 2014.
In Germany rents are determined in a way that provides stability, reliability and affordability to tenants, whilst still giving landlords a steady income stream. This occurs through a number of mechanisms which determine the level of rent that can be charged.

The *mietspiegel* is a database of all rents in a local area. It keeps track of all of the agreed rents in a local area for the preceding four years. The landlord uses this database to determine an appropriate rent for the property by referencing the average rent from the previous four years, for dwellings of comparable size, quality and location in the area (the ‘reference rent’).

The *mietspiegel* is the market element in Germany’s rent control system; however, it plays a significant role in smoothing rent increases by tying allowable rents to a four year average. Determining rents in this way helps to balance the interest of tenants and landlords, and importantly, this form of rent price regulation is relatively flexible, and investors indicate that in practice it does not form a barrier for investment.

During a tenancy, the rent can be increased every 12 months using the ‘reference rent’. The rent may not be raised by more than 20% over three years, and in some regions this increase can be no more than 15%.

The *mietspiegel* is the most common mechanism to determine rent increases, however there are two other forms that are sometimes used:

> Stepped rent – Declared through a clause in the rental agreement, stepped rents detail a determined increase every 12 months or more.

> Indexed rent – Declared through a clause in the rental agreement, indexed rent is an increase determined by the price index for the cost of living of all private households in Germany. This again can only occur every 12 months.

The landlord may also increase the rent if they have renovated the property. The increase of the annual rent may not amount to more than 11% of the costs spent on the modernisation.

Finally, the rent may be increased due to changes in operating costs. The landlord must observe the principle of economic efficiency and may demand an adjustment only to a reasonable amount.

The landlord must declare and justify any rent increases to the tenant in writing. The written declaration from the landlord must state one of the possible references to justify the increase. Usually, the landlord justifies a rent increase by reference to the *mietspiegel*.

If the landlord wants to increase the rent because of renovations, the declaration must provide the calculation of the increase based on the incurred costs. In addition, an increase in rent because of changes in operating costs requires that the basis of the apportionment is referred to and explained in the declaration.

The tenant is given three months’ notice of a rent increase. However the tenant also has to approve the increase. If the tenant does not grant their approval by the end of the second month after receiving a valid declaration, then the landlord may take the tenant to the tribunal within three additional months.

A tenant has a special right to terminate the tenancy contract within two months after receipt of the declaration of the increase if the landlord asserts a right to a rent increase. Then, the tenancy ends after three months, and the rent increase does not take effect.
The Czech Republic is considering introducing a local reference rent system similar to the German model.¹⁹

Until relatively recently, the mietspiegel system served as protection for existing tenants as opposed to tenants signing new tenancy agreements. This difference in protection between new and existing tenants caused large differences in rental prices for similar dwellings in overheated housing markets like Berlin and rental affordability has become an increasingly pressing issue in many large cities in Germany.²⁰ Germany has recently implemented a ‘rent brake’, similar to the rent cap in France, in which local governments can cap the rents for re-letting in areas where rents are under pressure. In these areas, landlords are barred from raising rents for new tenants by more than 10 per cent above the local reference rent. This regulation also means that there is little advantage in the landlord replacing an existing tenant with a new one in order to raise the rent.

This soft regulation has an effect of slowing down an otherwise out of control rental market and better balances the rights between landlords and tenants. It also creates a more stable and secure environment for both landlords and tenants.

Many of the basic elements needed to apply such a method of rent regulation in Victoria already exist; they would just need to be strengthened. The government already collects data on average rents by local government area and publishes it quarterly in the Rental Report. Provisions under s47(3) of the Act outline similar aspects to determine value of the property as are provided through the mietspiegel. These elements and the rent report could be combined to regulate rents in a soft market driven mechanism similar to that used in Germany.

**R2. Introduce a rent regulation system similar to Germany.**

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¹⁹ de Boer & Bitetti 2014.
²⁰ de Boer & Bitetti 2014.
Bonds

Landlord bonds

There is a definite need for additional measures to ensure landlords comply with their obligations under the Act. Currently there is little compelling landlords to comply with their obligations.

The tenants' bond is a safeguard that the landlord can rely on in the event the tenant breaches their obligations under the Act. The tenant however is not awarded this same privilege; there is not the same protection to ensure the landlord undertakes their duties, or is liable to pay compensation to the tenant, in the event that they do not.

Through our legal service we encounter a high proportion of matters where the landlord ignores orders to pay the tenant compensation. The only option to the tenant is to take the matter to the Magistrates court, a process that is usually too time consuming and costly to undertake.

Late last year, VCAT ordered the landlord to pay Julia approximately $1000 as compensation. Despite a number of requests for payment, the landlord has not paid the compensation ordered. The landlord has also refused to provide their residential address to Sam which is needed to enforce the debt through the Magistrates Court of Victoria.

Greater safeguards for compliance would allow tenants improved security and satisfaction in their homes.

TUV welcomes any measure that helps to balance the power between landlords and tenants. Landlord bonds could be one way to ensure greater fairness and compliance between the parties, particularly during the repairs process and after vacating the property.

We have also made a number of recommendations around compliance in previous submissions, and will do so again in the Issue Paper on dispute resolution.

Maximum bonds

R3. Remove the exemption for maximum bonds by repealing section 31(3) of the Act.

The amount that can be charged as a bond is an important issue. If a bond is too high it can be a barrier to being able to secure a tenancy.

Bonds are capped at one month’s rent; unless the rent payable per week exceeds $350, as stated in section 31(3). Given that the median weekly rent in Victoria is currently at $350 this subsection of the Act is out of date and needs to be modernised. However, simply adjusting the current amount will merely defer this problem.

It is our recommendation that it would be best to remove the section all together.
**Bond increases**

R4. Remove the exemption for bond increases by repealing s34(a) of the Act.

Sometimes a landlord seeks to top up bonds for long term tenants as their rent increases over time. The current legislation states that an additional bond is able to be claimed if the rent for the premises is greater than $350 per week. Given that the median weekly rent in Victoria is currently at $350 this subsection of the Act is out of date and needs to be modernised.

Pathways already exist for landlords to recover any costs that exceed the bond amount. There is no need to burden the tenant with additional expenses throughout their tenancy. It is our recommendation that the exemption be removed altogether.

**Bonds in other tenures**

**Bonds in rooming houses**

In rooming houses the bond is capped at two weeks rent as opposed to four weeks in other tenure types. This is important because the population utilising this type of housing generally have low incomes and would be unlikely to be able to pay a higher bond. This fits with the two week rent cycle that is present in rooming houses. We recommend maintaining the two week rent cap for bond payments in rooming houses.

There is widespread non-compliance in many aspects of rooming house management, and this includes bonds. Assisting rooming house residents we have witnessed systemic issues such as:

- Bonds not being lodged with the RTBA
- Condition report not being provided
- Charging additional bonds, sometimes called ‘furniture bonds’.

It is noted that this is part of a wider systemic issue around compliance and enforcement in rooming houses.

**Bonds in caravan parks**

R5. Bonds in caravan parks should be capped at two weeks’ rent.

Caravan parks are home to similar populations as those living in rooming houses; generally with a low income and unable to access the private or public housing market.

**Bond claims**

R6. The bond should be automatically refunded to the tenant if the landlord does not make a claim within the 10 business days’ time limit.

Under the s417(2) of the RTA an application for the tenant’s bond must be made within 10 business days after the tenant delivers up vacant possession of the property. This however frequently does not occur, with landlords lodging claims well over the 10 business day period, as it is understood that there will be no practical consequence of a late application.

It is recognised that VCAT is required to act with minimal formality and has the power to dispense with procedural requirements, including time limitations. This however is aimed at achieving fairer outcomes, whereas delaying bond claims...
can greatly disadvantage tenants who often rely on the refund of their bond to pay their bond at their next property.

Vivaan* contacted the TUV call centre. He had ended a tenancy two months earlier and still had not had his bond returned.

There needs to be adequate protections in place to ensure that tenants’ bonds are able to be fairly returned to the tenant where appropriate. It should not be the tenant’s responsibility to apply to have their bond returned; it is the tenant’s money after all.

The Tenants Union of Victoria is not in favour of incorporating provisions used in jurisdictions such as New South Wales. In NSW if the landlord makes a claim on the bond it is the tenant’s responsibility to lodge an application to the Tribunal in order to dispute the claim. This process unfairly burdens the tenant with the responsibility of defending their bond, rather than requiring the landlord to substantiate their own claim.

As we know the current VCAT process does not work for tenants. Of the 59,184 applications to the Residential Tenancies List in 2015/16 less than 7 per cent were lodged by tenants\(^2\). Introducing a process that requires tenants to utilise a system that currently does not work, will unfairly disadvantage tenants, and will result in an outcome where it is more likely that the landlord will receive some, or all, of the tenants’ bond.

This is currently the case in New South Wales where 47 per cent of tenants lose some or all of their bonds to landlords’ claims.\(^2\) In contrast in Victoria only 37 per cent of tenants lose some, or all, of their bond.\(^2\)

Another issue with the NSW model is that the tenant’s ability to challenge a claim for their bond relies on their knowledge that a claim has been made. Currently it is common practice for landlords to post applications for bond to the vacated property, even in situations where an agent or landlord has been in recent telephone or face-to-face contact with the outgoing tenant.

We advocate that the bond should be automatically refunded to the tenant after 10 business days if the landlord has not made a claim during this time. If the landlord does make a claim, they should go through the VCAT process to ensure their claims are legitimate.

We recognise that there is currently a problem with the timeframe in which tenants’ bonds are refunded. We recommend that any changes keep in mind that this 10 day period needs to be enforced through additional regulation and enforcement.

R7. The landlord must provide evidence to support any claim that is made for all or part of a tenant’s bond.

Tenants are often confronted with claims against their bond that are vague and inflated. Landlords are currently not substantiating their claims with evidence of


damages and detailed cost estimates. It should be the responsibility of the landlord to include evidence with their claims against the bond.

R8. Ensure that un-lodged bonds are to be returned to the tenant by amending the Act to allow the Tribunal to make an order under s416 that the landlord must return the bond if it can be shown a bond has been paid.

S416 of the Act provides an avenue for the tenant to access a bond refund if they are unable to obtain the landlord’s agreement. This option is only available if the bond has been lodged with the RTBA. Sometimes a landlord or agent will not lodge a tenant’s bond even though it has been paid. When this occurs the tenant is unable to apply free of charge to have their bond returned. They instead have to pay to apply to VCAT.

**Bonds and family violence**

R9. Allow VCAT the power to apportion liability in the case of a creation of a tenancy (s232) by giving the Tribunal the same powers as are provided under s233C.

We support the recommendations made by the Royal Commission into Family Violence\(^\text{24}\) to give VCAT the power to apportion liability between co-tenants where there has been family violence. This will ensure that victims of family violence are not held liable for debts such as rent arrears or damage caused by the perpetrator of the violence.

**Bonds and guarantors**

R10. A landlord or agent must not accept a guarantee if the tenant has paid or is required to pay a bond under a tenancy agreement.

Young people entering into the rental market are often subject to age-based discrimination and can find it very difficult to secure a rental property due to their lack of rental history. It is common practice for landlords or agents to encourage prospective tenants to provide a guarantor. This is prohibited in the Act where payment of bond is required, however it is still occurring.

The purpose of the bond is to protect the landlord from loss of income due to rent arrears or property damage; this should provide sufficient security and therefor an additional guarantee is unnecessary. The legislation needs to be strengthened to ensure this behaviour does not continue.

**Bond loan scheme**

If a tenant is struggling financially they are able to apply to the Department of Health and Human Services for a bond loan. More than 12,000 Victorians accessed this service in 2013-14.\(^\text{25}\) This is a vital scheme that helps many Victorians secure a home where they may otherwise be unable to do so.

R11. Amend the Department of Health and Human Services Bond Loan Scheme Policy and Procedures manual to allow a tenant to access a second bond loan where they are transitioning to a new property and their outstanding bond is yet to be released.

The Tenants Union of Victoria supports the bond loan scheme; however we do recognise that there are some structural issues with the scheme. One major

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\(^{24}\) Royal Commission into Family Violence p133

\(^{25}\) AIHW, ‘Housing Assistance in Australia’ Financial Assistance Supplementary Tables, Table 9, May 2015.
barrier to tenant’s accessing the scheme is that a bond loan can only be granted if they have fully repaid the previous loan. This can be a problem because tenants will most likely need to pay the bond to secure a new property well before the previous bond has been returned.

R12. **Safeguard against discrimination for bond payments via the bond loan scheme by legislatively that a bond payment must not be refused based on the format it is paid.**

We have assisted tenants who have attempted to pay their bond through the loan scheme only to be told by the Estate Agent that bonds of this type are not accepted. Greater measures need to be taken to protect tenants from this type of discrimination.
Rent and other payments

Rent in advance

R13. Remove the exemption for a limit on rent in advance by repealing s40(2) of the Act.

The limit of four weeks’ rent in advance applies only to properties whose rent is less than $350 per week. As with other sections of the Act, this cap of $350 no longer has practical meaning due to the increase in rents since the provision was first written.

It is our belief that all residential tenancy properties should be legislated consistently and therefore the exemption should be removed.

Rental bidding and auctions

R14. Regulate rental bidding by including a provision in the Act to the same effect as s57 of the RTA (QLD).

Rental bidding occurs when an offer is either made or invited for a rental property that is higher than the advertised rent.

Up until recently, this practice has been limited to particular market segments (higher amenity premises) and market cycles (low vacancy rates) but we are now seeing the process occurring in some market segments irrespective of the general vacancy rate. This is a further indication of supply and demand pressures. However, landlords should not be able to unreasonably profit from poor market conditions even if this is limited to certain market segments.

In addition, the practices involved are characterised by a lack of transparency about the identity of the alternative bidder and the quantum of any alternative bids.

The tenant may have some protection under the misleading and deceptive conduct provisions of the ACL but it is completely unclear whether VCAT or any other body would have the power to retrospectively adjust the contract price even if the tenant was able to overcome all the hurdles involved in establishing the unlawfulness of the conduct.

It is tempting to believe that this problem can be addressed by simply introducing rules governing the bidding process as currently exist for other forms of auctions. However, as is evident from the public discourse around auctions for residential sale, to deal with a great diversity of situations that may be encountered, such rules are invariably complex and are difficult to enforce.

The Queensland Government addressed these problems in its most recent review of its residential tenancies legislation.

The RTA (QLD) now provides as follows:

57 Premises must be offered for rent at a fixed amount
(1) A lessor or lessor’s agent must not advertise or otherwise offer a residential tenancy for premises unless a fixed amount is stated in the advertisement or offer as the amount of rent for the premises.

Maximum penalty—20 penalty units.

(2) A lessor or lessor’s agent must not accept a rental bond from the tenant of premises if the residential tenancy for the premises was advertised or offered without stating a fixed amount of rent for the premises.

Maximum penalty—20 penalty units.

(3) A person does not contravene this section merely by placing a sign on or near premises advertising or offering a residential tenancy for the premises without stating the amount of rent for the premises on the sign.

We believe that in combination this is a very effective solution to regulate and discourage rental bidding.

Tasmania also prohibits rental bidding.

Case Study

Susan attended an inspection recently where the rental price was advertised as $380 to $400 per week. When Susan sought clarification on the price the agent advised that he was accepting offers “in that area” and went on to tell her about how he recently advertised a property for $460 and ended up getting $560 after various offers.

Rent increases

R15. Prevent unfair and unpredictable rent increases by introducing the German system of rent regulation.

Described in our chapter on rental affordability (p7), the German model for rent regulation provides room for market forces in rent setting and reasonable landlord profits, but also increases tenants’ security by providing more predictable rent increases.

As already discussed, many of the basic elements needed to apply such a method of rent regulation in Victoria already exist; they would just need to be strengthened. The government already collects data on average rents by local government area and publishes it quarterly in the Rental Report. Provisions under s47(3) of the Act outline similar aspects to determine value of the property as are provided through the mietspiegel. These elements and the CAV Director rent report could be combined to regulate rents in a soft market driven mechanism similar to that used in Germany.

This regulation should apply during a tenancy as well as in-between agreements to ease overall affordability pressures, and to stabilise rents during tenants’ occupation.

R16. Improve the tenants’ ability to dispute a rent increase by legislating that the CAV Director’s rent report should be binding.

Whether or not the German model is introduced, there are measures that should be introduced to protect tenants from unfair rent increases. This includes simplifying the processes already in place, such as CAV Director’s rent report.
Allowing the Consumer Affairs Victoria (CAV) report to deliver a binding result would greatly improve tenants’ access to justice as tenants would be more likely to initiate the CAV process as it is a much simpler and less onerous process.

R17. **Improve the tenants’ ability to dispute a rent increase by legislating that all factors under s47(3) must be considered when determining whether a rent increase is excessive.**

S47 of the Act outlines a number of factors to be considered in assessing whether or not a rent increase is excessive. Our experience in the limited number of these applications considered by VCAT, is that VCAT overwhelmingly relies on the test in s47(3)(a), which is effectively the rent payable for a similar property in a similar location, and subordinates any other factors to that basic test. Other factors listed under s47 such as ‘the state of repair and general condition of the rented premises’ and ‘any charges in respect of the rented premises for which the landlord is or may be liable’ are other important aspects that should be considered by are currently not being incorporated into VCAT’s findings.

R18. **Rent increases should not occur if there are outstanding repair orders or an outstanding CAV report for repairs.**

A prohibition on rent increases in properties with outstanding repair orders would incentivise landlords to undertake repairs and improve the standard of properties more broadly.

R19. **Section 45(3)(a) of the Act should be amended to provide that a copy of the rent report is only to be provided to the landlord where the CAV Director finds that the proposed rent increase is excessive.**

The provision of a copy of the report to the landlord should only be required where the report finds that rent increase is excessive. The current provision seems to be solely intended to dissuade the tenant from seeking the report in case it does not conclude in the tenant’s favour. Our experience is that many CAV inspectors will refuse to provide the report in those circumstances which can only be done if the tenant withdraws their complaint.

R20. **Any additional terms in a tenancy agreement that relate to rent increases during a fixed-term should be subject to approval by the Director to ensure fairness and clarity.**

Under the existing law, the effect of a specific term within the tenancy agreement to increase the rent is unclear if that specific term does not include the actual quantum of the increase. For example, a term that stated that the rent may be increased by CPI may not be enforceable, or, a term that simply stated a method of calculating the rent increase may not be enforceable. Any term may be challenged if it restricts or modifies the statutory rights of either of the parties. For example, if the effect of the term was to seemingly allow for an excessive rent increase (as defined by the Act) then the tenant could challenge the term on that basis.

As with many other consumer contracts, terms that enable rent increases during a fixed-term period will introduce further complexities in determining the true price of the tenancy agreement. The longer the fixed-term the more robust and clear the rent increase conditions will need to be to provide clarity to the parties and minimise the potential for disputes.
**Timely/late payment of rent**

Low income tenants are extremely vulnerable to falling into rent arrears, particularly as there is a recognised and widespread problem of affordability in the private rental market. 76 per cent of low income private renting households are in rental stress. Houses paying such a high proportion of their income in rent are vulnerable to external pressures. An unexpected expense such as a medical bill or medical expense may be enough to affect a household’s ability to pay the rent for a period of time.

Allowing a tenant to pay the landlord compensation for a late payment of rent will place tenants under further financial burden at a time when they are already struggling financially. It is highly inappropriate to charge additional fees or compensation for an inability to pay the rent. Late payments can be considered a business risk and from time to time may be the cost of investing in rented housing.

**More protections for those experiencing financial hardship**

As mentioned in our submission to the Security of Tenure Issues Paper there needs to be additional safeguards to protect vulnerable tenants from unnecessary eviction, particularly in instances of financial hardship.

**Introduce a pre-eviction checklist and reasonableness test for all potential evictions.**

The relative ease with which tenants can be evicted into homelessness is a major social issue and a flaw in the housing system in Australia.

There are minimal legislated safeguards for tenants experiencing financial difficulties, with 14 days of arrears potentially triggering the eviction process. With ever increasing affordability issues in the private rental market more people are struggling to keep up with their rent payments.

There is an opportunity to greatly improve security of tenure by including additional safeguards into the eviction process.

Scotland provides inspiration with a distinct consideration of security of tenure. Under the Housing (Scotland) Act there are legislated 'pre-action requirements' that the landlord must undertake and substantiate before serving a notice to vacate. These are detailed below:

**Pre-Action Requirements**

1. The landlord has provided the tenant with clear information about the terms of tenancy agreement, the outstanding rent and any other outstanding financial obligation of the tenancy, including a description of any charges likely to be incurred if the money due is not paid.
2. The landlord has made reasonable efforts to provide the tenant with advice and assistance on whether the tenant may be able to get housing benefit or other financial help (such as benefits or grants).
3. The landlord has provided the tenant with information on where to go for debt advice and assistance.
4. The landlord has made reasonable efforts to agree with the tenant a reasonable plan for paying the money due and paying the rent in the future.

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5. The landlord has asked the tenant if they have made an application for housing benefit and, if they have done, the landlord has considered the likely effect of that application on the money due.
6. The landlord has considered whether the tenant is taking any other steps to pay the money due.
7. The landlord has considered whether the tenant is keeping to an agreed plan for paying the money due and continuing to pay the rent.
8. To be completed where the landlord is a Registered Social Landlord: The landlord has advised the tenant to contact their local authority about their housing situation.

Scotland also legislates an additional protection whereby all potential evictions must be considered against a 'reasonableness test' by the Tribunal before a possession order can be made.

The tribunal must consider:

- The nature, frequency and duration of the tenant’s conduct leading to the notice to vacate;
- The proportion of which the tenant is personally responsible, or whether it was the consequence of acts or omissions of others;
- The effect of the tenant’s conduct on others; and
- Whether the landlord has considered other courses of action before beginning the eviction process.

These considerations are particularly relevant where there is an allegation of a breach of duty or rent arrears. It is recommended that similar measures are implemented in Victoria to ensure tenants are evicted only as a last resort.

**Rent receipts**

**R21. Tenants must be provided with a receipt after each rent payment.**

In a retail environment it is standard practice for receipts to be issued as formal recognition of the purchase of a good or service. This is not the case, however, when rent payments are made by tenants. Currently receipts are only required if rent is paid in cash, or if a tenant pays by another method and requests a receipt. This can often lead to confusion, particularly in rooming houses, as to whether or not rent has been paid and received.

**Rents in social housing**

**Rent in public housing**

**R22. The public housing rental rebate system should be reviewed.**

Determining rent in public housing is a complex process.

Under the RTA, rent is defined as ‘the amount paid to a landlord by a tenant to occupy rented premises and use facilities and services’. In public housing, rent has two different meanings:

- Market rent is determined each year in August and is based on equivalent properties in the private rental market in the same location. This figure is subject to the provisions under the RTA with regard to notice for rent increase etc.

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27 Housing (Scotland) Act 2001, s16(3)
Rebated rent is the actual amount charged to the tenant and is calculated at 25 per cent of the tenants’ base income. There are additional inclusions and exemptions for other forms of income. The rebated rent is reviewed twice a year in February and August.

Essentially in public housing there are two rents, but the one that the tenant doesn’t pay is the one that is defined as rent under the RTA.

Because the actual rent paid is not classed as rent under the RTA rent increases are not subject to the usual provisions under the Act. This can be particularly problematic when a rental rebate is retrospectively reduced or cancelled. This can occur if the tenant has provided insufficient or incorrect information, and the Department calculates that for a time period that has already passed the tenant should not have been receiving all, or some, of their rebate. This can result in a large and instant amount of rental arrears, of up to thousands or tens of thousands of dollars. A tenant may believe they are up to date with their rent, and suddenly receive a notice of rent arrears and potentially a notice to vacate.

This can also occur if the number of tenants is deemed to have changed. Whether a person staying with the tenant is deemed to be a guest, a licensee or a tenant can be confusing, and can affect some culturally and linguistically diverse communities disproportionately, who tend to host more visitors and extended family members for periods of time.

It is recognised that the Department uses the retrospective rent determinations to ensure that tenants are not gaming the system by falsely reporting their income, or the amount of people living in households. However it cannot be denied that the real effect of this practice can be unfair debts and evictions for public housing tenants.

Fatima* submitted an application for rental rebate, with supporting documents such as pay slips and bank statements. Initially, DHHS refused to process the application for rental rebate because Fatima had not provided proof of her husband’s income. The tenant provided proof from Centrelink that her husband had applied for assistance as he was out of work. DHHS accepted this proof that he was not working, but then said that Fatima needed to provide pay slips which indicated the amount of tax that she paid. As Fatima was receiving a low income, she did not pay any tax, and she had already provided her pay slips with the initial rebate application. DHHS advised Fatima that she was required to pay market rent rather than rebated rent (which was approximately $350 higher per fortnight) and that she was 7 days in rent arrears as a result.

Rent in community housing

R23. The Housing Registrar as a regulatory body should be reviewed.

R24. The **Housing Act 1983** should state that any housing provider that relies on internal policies must make them publically available.

Rents in community housing vary greatly between housing providers and can vary even amongst properties of an individual provider.

Community housing agencies are regulated through the Housing Registrar, and are meant to comply with the Gazetted Performance Standards.
One Standard states that ‘The registered agency makes information about its policies and procedures to determine and manage rents available in a variety of formats.’ Despite this, community housing agencies rarely have this information available.

Additionally we have encountered problems around the jurisdiction of the Registrar in relation to community housing agencies and providers.

Case Study

One of our lawyers was dealing with an unfair notice to vacate issued to a tenant by a community housing provider (UnitingCare Harrison). The notice to vacate did not comply with the Performance Standards. We wrote to the Housing Registrar to raise the issue and were subsequently told that the Registrar did not have jurisdiction to investigate this matter because UnitingCare Harrison was not a registered housing agency. This meant that, even though UnitingCare Harrison has a direct relationship with UnitingCare Housing Victoria Ltd, UnitingCare Harrison is not regulated by the Housing Registrar and could not be held accountable.

It effectively means that community housing providers, if not registered themselves, are not within the jurisdiction of the housing registrar and are not held accountable or adequately regulated.

Rents in rooming houses

R25. S112 (Resident’s duty to pay rent) of the Act should be repealed.

Rent payment should not be a duty as it exposes residents to an unnecessary risk to their tenure. If rent is not paid then a notice to vacate can be served. There is no need for this additional provision. S112(2)(a) and 112(2)(b) in relation to shared rooms is unnecessary as exclusive occupancy should already prohibit cohabitation of residents unless they consent.

While s112(2) is useful, it is seldom applied or known by the general community of residents, and the remedy for relief against rent should not be the conduct of unlawfully overcrowding or imposing another person against an exclusive occupancy right.

Other payments and charges

Holding deposits

R26. The use of holding deposits should be clarified by amending the Act to provide a clear definition that a holding deposit is an act of good faith by the tenant, specifically that they are genuine in their intention to rent the premises, and that the payment of the deposit is in consideration for exclusive dealings with the landlord.

There is a significant degree of confusion about the definition, purpose and process for dealing with holding deposits. This confusion is creating disputes about whether or not part performance of a tenancy agreement has occurred and under what conditions. Payments are very rarely receipted as holding deposits and are often mischaracterised as part payment of rent in advance or bond. Most

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tenants do not understand the significance of this distinction and do not immediately object to how the payment is characterised.

We believe that some of this confusion can be cured by a clear articulation in the Act of the process for contracting which is outlined below. However, a clearer definition and expression of the purpose of a holding deposit would help to distinguish between a holding deposit and part performance.

The effect of this would be that either the prospective tenant and the landlord agree to a contract in the process outlined below or they do not.

Where an agreement is entered into, then the holding deposit may be converted into part payment of either bond or rent in advance. Where an agreement is not entered into, the holding deposit must be refunded.

If a holding deposit is not paid then the tenant is entitled to infer that they may not be dealing exclusively with the landlord.

**Charges for paying rent**

**R27.** Tenants should be entitled to pay their rent by at least one payment method that does not incur any fees or charges.

**R28.** The practice of compelling a tenant to contract with a third party for the payment of rent should be expressly prohibited under the Act.

Highly variable methods of rent payment have emerged in the last decade that were not contemplated when the legislation was substantially reviewed in the late 1990’s. The provisions of the Act haven’t kept up with the emerging diversity of rent payment methods.

Many of these methods require the tenant to bear the cost of paying their rent or involve contracting directly between the tenant and a third party rent collector. An important principle is that a landlord should not be able to require a tenant to incur additional costs for the payment of their rent.

By contrast section 35 of the RTA (NSW) provides that the tenant can pay their rent by at least one method where they do incur any costs.

35. **Manner of payment of rent**

(1) A landlord, landlord’s agent or other person must not require a tenant to pay rent by a cheque or other negotiable instrument that is post-dated.

Maximum penalty: 10 penalty units.

(2) A landlord or landlord’s agent must permit a tenant to pay the rent by at least one means for which the tenant does not incur a cost (other than bank fees or other account fees usually payable for the tenant’s transactions) and that is reasonably available to the tenant.

Maximum penalty: 10 penalty units.

(3) A landlord and the tenant may, by agreement, change the manner in which rent is payable under the residential tenancy agreement.

South Australia provides that there must be at least one means of paying rent that does not involve payment of cash or collection of rent by a third party.

It is arguable that many of the arrangements requiring a tenant to enter into a contract for rent payment with a third party are already unlawful, however these arrangements are apparently continuing unabated.
Assignment fees

Under s84 of the Act a landlord must not charge a fee for giving their consent to assign the property to a new tenant. Whilst this is the case, costs associated with ‘the preparation of a written assignment of a tenancy agreement’ are allowed to be charged. Despite this it is common for Estate Agents to over-charge tenants when completing an assignment. This is an issue that we have raised in relation to Agent conduct in the review of the Consumer Property Acts.

Case study

James* was in a fixed-term tenancy agreement and was seeking to assign the property to a new tenant as he had experienced a change of circumstance and needed to move house. The Estate Agent informed James that it would cost him $660 for the assignment fee (two weeks rent).
References

AIHW, ‘Housing Assistance in Australia’ Financial Assistance Supplementary Tables, Table 9, May 2015.


