WEstjustice
Western Community Legal Centre

Residential Tenancies Act Review – *Fairer, Safer Housing*

Submission in response to the 'Rents, bonds and other charges' issues paper

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1. Introduction

1.1 About WEst Justice (Western Community Legal Centre)

WEst Justice (Western Community Legal Centre) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEst Justice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

WCLC has a particular focus on working with newly arrived communities. More than 40% of our clients over the last four years spoke a language other than English as their first language. Further, approximately 57% of our clients during that period were newly arrived, having arrived in Australia in the last five years.

1.2 About the WEst Justice Tenancy Program

WEst Justice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in Melbourne's West. In the past five years WCLC's tenancy program has assisted over 1,100 clients with almost 1,800 tenancy matters. Our catchment area includes suburbs in Melbourne's inner-West (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-West (including Werribee, Wyndham Vale, Hoppers Crossing and Melton).

As part of our tenancy program, we also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal ("**VCAT**") in Werribee. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses, public and community housing.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

WEst Justice also undertakes specialist insurance casework within the context of our tenancy program. This program has focused on the impact of landlord insurance policies on tenants. WEst Justice's submission and recommendations are informed by our significant experience in utilising the *Residential Tenancies Act 1997 (Vic)* (**the Act**) in the course of the above casework.

2. Executive Summary

Rent, bonds and other charges are fundamental to the contract between landlord and tenant. Where these costs are consistent, predictable and manageable, tenants enjoy financial and social security and landlords enjoy a reliable stream of rental income. This stability has beneficial flow-on effects to the wider community.

A significant portion of WEstjustice's tenancy case work relates to issues around rent (particularly arrears or increases in rent) and issues tenants encounter with bonds. This case work founds the basis of a number of our recommendations, along with a close reading of the Residential Tenancies Act 1997.

Our core conclusions are that a number of provisions in the Act are in need of update or repeal as they do not reflect the nature of the rental market in 2016; that some significant questions must be asked around the continued practicality and fairness of the tenant bond system; and the absence of an effective industry code for real estate agents and property managers must be rectified.

In Part 4 of our response, we briefly assess the current rental situation in Victoria, and highlight the ways in which the assistance of specialist tenancy lawyers or caseworkers is ultimately limited in the face of widespread rental stress. We note that amendment of the Residential Tenancies Act and associated instruments and institutions is only one lever in addressing housing affordability and invite government to develop a broader action plan to ensure households can rent sustainably.

In Part 5 of our response, we analyse the current disadvantages in the bond system and propose alternatives that would constitute a significant departure for the current arrangement for tenants' bonds. These include the development of a parallel system of 'landlord bonds', or the replacement of tenants' bonds with an arrangement to pay landlord insurance policies. We also look at ways to reduce the hardship that bond claims place on households under the current system.

Part 6 of our response looks at present legislative provisions around rent. We recommend that rent in advance be capped, and that the VCAT be given additional criteria on which to determine that a rent increase is excessive. We also look at the current state of self-regulation in the real estate and property management industry with regard to rental bidding and auctions, and strongly recommend the development of an effective and enforceable industry code.

Lastly, in Part 7, we take a look at those miscellaneous fees and charges which the Residential Tenancies Act 1997 covers. We recommend the repeal of the ambiguous and obsolete provisions on holding deposits, and recommend the law be changed to clearly allow tenants a means to pay rent that doesn't incur additional fees. We also highlight the need for wider industry understanding and use of Centrepay, the Department of Human Services' payment system that allows rent to paid to landlords directly out of a Centrelink benefit before the balance is transferred to a tenant.

As an appendix, we have attached our October 2015 report on the impact of landlord insurance policies on tenants, which has also been circulated to major insurers and VCAT. This response discusses matters relating to landlord insurance and bonds which the earlier report delves into in greater detail.

3. Summary of recommendations

Recommendation 1 :

Amend the Act to institute a parallel system of security deposits for landlords.

Recommendation 2 :

Remove the present exemption under the Act that allows landlords to charge more than one month's rent in bond for properties above a particular weekly rent threshold.

Recommendation 3 :

Develop effective industry codes that deal with bond release towards the termination of tenancies, or failing this, amend the Act to allow tenants to apply for early release of their bond where a valid notice of intention to vacate has been issued, or within 14 days of the termination date where certain notices of vacate are given to tenants.

Recommendation 4 :

Allow the immediate release of any non-disputed funds to tenants in all bond claims.

Recommendation 5 :

Require that all bonds revert back to the tenant automatically where no claim is made by the landlord within ten working days of the tenant's vacating.

Recommendation 6 :

Amend the existing VCAT application form (both paper and online) so that parties are required to state whether they have made an associated claim under an insurance policy.

Recommendation 7:

Amend section 211 of the Act (matters to be considered by the Tribunal when hearing a compensation claim) to require the Tribunal to take into account the existence of any claim against the tenant under a landlord's insurance policy before making an order for compensation.

Recommendation 8:

Allow tenants to choose between the current requirement to pay a bond and the option to pay the premium on a landlord policy for the property.

Recommendation 9 :

Amend the Act to cap the amount of rent that a landlord may require be paid in advance under a tenancy agreement.

Recommendation 10:

Limit rent increases under the Act to once every 12 months.

Recommendation 11 :

Amend the Act so that VCAT is obliged to consider a rent increase relative to CPI when determining whether rent is excessive.

Recommendation 12:

Amend the Act to establish that certain notices to vacate are of no effect if given in response to the exercise or proposed exercise of a tenant's right.

Recommendation 13:

Make evidence of reasonable efforts to agree with the tenant on a payment plan for arrears a pre-requisite for any application for a possession order under section 245 of the RTA.

Recommendation 14:

Amend the RTA to confirm that if a tenant has paid their arrears prior to a hearing for an application for possession under s246 of the RTA, the application cannot succeed.

Recommendation 15:

Encourage industry bodies, in the first instance, to develop self-regulatory codes that meet federal benchmarks in effectively addressing rental bidding and rental auctions.

Recommendation 16:

Repeal section 50 of the Act, which deals with holding deposits, and amend the Act to confirm that holding deposits cannot be a prerequisite to entering into a tenancy agreement.

Recommendation 17:

Amend the Act to require that tenants have at least one means by which the tenant does not incur cost and that is reasonably available to the tenant to pay rent.

Recommendation 18:

Encourage the Department of Human Services to organise education and awareness around Centrepay through the Real Estate Institute of Victoria and similar peak bodies.

Recommendation 19:

Encourage the Department of Human Services to investigate a fixed Centrepay fee for licensed real estate agents who implement the service in order to increase participation in the scheme.

4. Rental Affordability

4.1 The rental market in Victoria

As of September 2015, the overall median rent in Victoria sat at $355 per week, while the median weekly rent for metropolitan Melbourne was $380 a week[1]. This contrasts with the same quarter five years ago, when the overall median rent was $320 a week (an increase of nearly 10%), and metropolitan Melbourne's median rent was $340 a week (an increase of 10.5%)[2].

27.5% of households in Victoria rent – of these, 424,316, or 26.1% of all Victorian households, rent through private landlords, up from 16.9% in 1994[3]. 24% of a median income in the state goes toward a median rent[4]. However, the poorest 40% of Victorian family households face spending more than 30% of their income on rent and entering a state of 'rental stress'.

Most alarmingly, the poorest 40% of Victorian non-family households (primarily lone person households) face paying over half of their income toward rent[5] and facing an untenable state of severe rental stress.

Long-term private rental is on a steady increase nationally. Today, a third of all private renters are long-term renters (defined as renting for periods of 10 years or more continuously), an increase from just over a quarter in 1994[6]. This increasing long-term rental demand is exacerbated by a shortfall in supply. In 2012, the National Housing Supply Council identified a growing cumulative shortfall of

[1] Victoria State Government Department of Health and Human Services (DHHS), "Rental report statistics – September quarter 2015", September 2015. Accessed at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0005/956894/Rental-Reptort-September-quarter-2015.pdf, 16 December 2015.
[2] Victoria State Government Department of Health and Human Services, "Rental report – September quarter 2010", September 2010. Accessed at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0004/589261/Rental-Report-September-2010.pdf, 16 December 2015.
[3] Australian Bureau of Statistics 2013, Housing Occupancy and Costs 2011-12, State and Territory data, 1994-1995 to 2011-2012, cat no. 4130.0, Table 18: Vic Households, Selected household characteristics.
[4] Wendy Stone, Terry Burke, Kath Hulse and Liss Ralston, *Long-term private rental in a changing Australian private rental sector*, Table 8: Median rents as a percentage of median income, states and territories 1981 and 2011, p.20. Australian Housing and Urban Research Centre (AHURI), Swinburne-Monash Research Centre, July 2013. Accessed at http://www.ahuri.edu.au/downloads/publications/EvRevReports/AHURI_Final_Report_No209_Long-term_private_rental_in_a_changing_Australian_private_rental_sector.pdf, 16 December 2015.
[5] SGS Economics & Planning, National Shelter, Community Sector Banking, "Rental Affordability Index Release Report", November 2015. Accessed at http://www.sgsep.com.au/assets/RAI-Release-Report-Final-231115.pdf, 16 March 2016.
[6] Stone et al, p.2.

dwellings in Victoria, with an estimated gap of 10,000 between estimated dwelling demand and supply as of 2011[7].

Vacancy rates in Victoria continue to fluctuate significantly. Metropolitan Melbourne has risen since 2010 from under 2.5% to 3.1%, while regional vacancy rates have fluctuated between 1.5% and 3.5%, and are currently at 2.4%[8]. Victoria's private tenants (and tenants in general) are more likely to be on lower incomes, be under the age of 45, and be relatively recent migrants to Australia[9].

Supply in the private rental market can be contrasted with the number of applicants on the waiting list for public housing in Victoria (32,564 in total)[10]. In the past, public housing was perceived to act as a lever on rental affordability for those individuals and families who could not afford the cost of housing in the private system. It is apparent that demand for this option now vastly exceeds supply.

These indicators show that the "breathing room" for low-income renters is scarce. With limited flexibility in their own household budgets to manage rent, bond and other charges, it is essential that the law preserves stability and affordability over their renting lives, insofar as is feasible.

4.2 Implications for our client base

Those impacts of a lack of affordable housing in Victoria outlined in the current Issues Paper at 1.2 and 1.21 are particularly pertinent to our client base. Often, tenancy issues we provide assistance with reveal barriers and risks to clients that cannot be dealt with by merely applying or interpreting the Residential Tenancies Act 1997 (RTA).

Case Study 1: Meng

Meng[11] is a recent migrant who has been living in a central Melbourne rooming house. He works two casual jobs – one as a cleaner, one in a fast food store. He lives separately from his girlfriend of two years, who is not working, lives in another rooming house, and is expecting their first child. Although they would like to live together, it is not possible on their budget to afford a private rental in inner Melbourne, and they would face an unfeasibly long waiting list for public housing.

[7] NHSC, *Housing Supply and Affordability – Key Indicators, 2012*, Table 4.3: Estimated dwelling gap since June 2011, states and territories, p.25.
[8] Real Estate Institute of Victoria (REIV), "Rental Vacancy Rates, 6-Month Average Trend", November 2015. Accessed at http://www.reiv.com.au/property-data/rental-data/vacancy-rates on 30 March 2016.
[9] NHSC, Table 13: Select demographic characteristics of long-term and other private renters in Australia (2007-08), p.29.
[10] Victoria State Government DHHS, "Public housing waiting and transfer list, December 2015". Accessed at http://www.dhs.vic.gov.au/__data/assets/excel_doc/0006/953403/Public-Housing-Waiting-and-Transfer-List-Dec-2015.xls on 16 March 2016.
[11] All case studies have been deidentified to protect the identities of clients.

Meng has been looking as far west as St Albans for housing options in his price range, but he faces a catch-22 if he moves. With no car, he will be unable to commute to and from home for the 4am start-times and 1am end-times his current jobs require. In order to take up similar roles in the Outer West (with similar hours), he will need to move west first. The difficulty of the timing makes life extremely precarious for the new family.

Case Study 2: Eamonn

Eamonn lives alone. Although he derives some self-employed income from odd jobs, he is limited in how much work he can do from an injury received several years ago that left him with permanent impairment. He had lived in the same rental for several years. Although the rent has not been raised during this time, the rental property lapsed into a serious state of neglect and needed a range of urgent and non-urgent repairs. Eamonn did not ask for these to be fixed as he was worried his rent would increase as a result.

One evening, a fire significantly damaged the property. Eamonn has now been told he will have to vacate in order for significant repairs and renovations to take place. Eamonn depends heavily on the company and friendship of his nearby neighbours and friends. However, it looks unlikely that he will be able to afford a new place in the same area, as rents have increased significantly over the past decade.

Knowing and acting on their rights under the Residential Tenancies Act will not solve these renters' problems overnight. Rather, they involve systemic issues of access to affordable and appropriate housing that the Act alone cannot remedy.

4.3 Affordability and the RTA

We recognise for the purposes of this paper that the complex interacting factors affecting housing and rental affordability are outside the scope of the RTA itself, and indeed beyond the scope of the Victorian Government. We welcome and encourage the range of current state-based reviews considering housing policy.

The Issues Paper's comments at 1.4 state that the Review of the Act is not the sole appropriate forum for any discussion of rent price controls, and this is noted. However, we also note that none of the current Victorian Government reviews affecting housing policy consider rent control (or less administratively onerous proposals such as matching rent to CPI) and their advantages or disadvantages. The number of lower-income tenants spending nearly half of their income on rent is alarming, and the flow-on effects on these tenants in terms of their ability to save or build wealth are significant for themselves, their families, and society at large. Whether or not this debate falls within the ambit of the Act, it would be useful for one arm of government to own any discussion heading forward.

5. Bonds

Rental bond-related issues are a frequent source of enquiry or complaint from Victorians seeking legal advice on a tenancy. Consumer Affairs Victoria's Summary Report from 2014-2015 for its Tenancy Advice and Advocacy Program (TAAP) confirmed that bond claims were the third most common tenancy matter dealt with by their funded services, making up slightly less than 15% of all cases.[12]

In actuality, bonds are certain to be a more common issue – the first and second most common types of tenancy cases received by TAAP providers are for possession/notice to vacate and compensation matters respectively.[13] These will frequently involve some sort of claim on the bond initiated by the landlord.

Whether or not they are ultimately paid back to the tenant in full, bonds are a source of significant stress to tenants. Low-income households without savings are dependent on having their bond wholly or substantially returned to afford the bond on their next home. Even "model tenants" who are confident that they will get their bond back describe the anxiety of successfully applying for a new property, only to be forced to wait for a private landlord or property manager to get around to signing a bond release form so that they can pay the bond on a new property. In these situations, a financial incentive can quickly become a financial liability.

5.1 Balancing the interests of tenants and landlords

The essential concept of a bond as a financial incentive to treat a rental property with care is sound. We believe the issues associated with residential tenancy bonds tend to be a mixture of the following:

- Unreasonable delays in releasing bonds at the termination of a tenancy;
- Claims on bonds made by landlords under the RTA that may lack merit ;
- Issues of poverty external to the RTA (households have little in the way of savings and cannot fund a new bond easily if an existing one is forfeited to the landlord).

However, we note that while landlords also have significant obligations under the RTA to avoid situations which may cause loss or damage to their tenants, they have no correlating financial incentive to do so.

Worse, where a client becomes entitled to compensation through a VCAT order, they may face an uphill battle to recover this money from the landlord. If the landlord refuses to pay, lives overseas or interstate, or provides no further address for service, the cost of pursuing a debt in the Magistrates'

[12] Consumer Affairs Victoria, *Summary Report July 2014-June 2015, Tenancy Advice and Advocacy Program (TAAP)*, October 2015, p.9

[13] Ibid, p.9. Possession or notice to vacate matters form 24% of all matters dealt with, and compensation matters form nearly 15% of all matters dealt with.

Court can become prohibitive. This can lead to situations where tenants' rights are appropriately recognised under the present Act, but practically unenforceable.

Case Study 3: Jack

Jack was living in a private rental. Jack's toilet was broken, but Jack's landlord refused to carry out repairs to the toilet for over 12 months. At times, Jack had to use the public toilet down the road. Jack eventually applied to VCAT and was awarded $1000 in compensation for his landlord's failure to maintain the property. His landlord, however, refused to pay. Jack attended WEstjustice for advice about enforcing his compensation order.

We advised Jack that he could not start proceedings in the Magistrates' Court without his landlord's personal address; Jack's lease listed his real estate agent's address only. After doing a property title search, we found that Jack's landlord lived overseas. Due to the cost of serving the enforcement documents overseas, Jack could not enforce the compensation order against his landlord and was unlikely to ever recover his $1000.

Case Study 4: Mohammad

Mohammad and his partner are parents of four young children. To be closer to community support, Mohammad's family moved from regional New South Wales to a property in Sunshine. In an effort to secure housing, Mohammad paid the landlord $3,000 for his Sunshine property, comprising rent in advance and the bond.

When he arrived at the property, along with all of his possessions, Mohammad saw the house was uninhabitable and in dire need of repair. He refused to sign a lease, sought crisis accommodation and demanded his bond and rent in advance back from the landlord. Insofar as Mohammed's bond is concerned, it should have been registered with the bond authority upon receipt.

The landlord refused several requests to return the money, and the matter proceeded to VCAT. Mohammed received an Order that the full $3,000 be reimbursed, however the landlord continuously disobeyed these Orders.

Mohammad had no other choice but to pursue the landlord through the Magistrates' Court, adding unnecessary expense and stress. He has been particularly aggrieved at how one part of the justice system has ordered that the funds be returned, but to see this money again, and because of the landlord's disregard for the VCAT Order, he must now pursue the matter in a relatively costly manner.

Both these cases illustrate situations in which a "landlord's bond" could have avoided a set of inconvenient and unfair outcomes. Money found owing to the tenants in an order of VCAT could have been deducted from a security deposit paid by a landlord, without the need to fruitlessly chase the landlord for additional compensation.

More broadly, a stronger financial incentive to lease and maintain rented premises in a state of good repair would have discouraged landlord behaviour of the kind described in the first place.

An arrangement involving a landlord bond would be without precedent. In Australian and other jurisdictions, security deposits have historically been an obligation for tenants alone. However, we believe that this minimal (and refundable) outlay for rental property owners would be transformative for the rental market for the following reasons:

- Currently, it can be argued that landlords who do not abide by their duties under the RTA enjoy an uncompetitive advantage over those that do. Fewer than 10% of all applications to VCAT's Residential Tenancies List are initiated by tenants, with a smaller proportion of these being for compensation[14]. Anecdotally, we find that tenants with actionable claims for compensation do not bring applications, particularly after the tenancy in question has ended and they are trying to establish themselves in new accommodation. Non-compliant landlords operate in confidence that compensation claims by tenants are infrequent, and that if need be, they can avoid payment of VCAT orders. A deposit would incentivise non-compliant landlords to 'catch up', and raise awareness of landlord obligations overall.

- Recognition of a shared incentive to meet the requirements of the RTA may foster an attitude of mutual good faith between landlords and tenants, rather than unhelpful perceptions that tenants need bonds because they are untrustworthy, or that landlords don't care what state a property is in as long as they are receiving rent from it.

- With both landlords and tenants aware of an "at-risk" security deposit, complex fact situations where there have been recognised breaches of the Act or the tenancy agreement itself by both parties could be resolved informally, rather than having to proceed to VCAT.

- Fewer VCAT matters involving claims against a landlord would need to proceed to the Magistrates' Court for enforcement, in turn reducing that Court's case burden.

How would it work?

We envisage the arrangement for landlords' bonds dovetailing with the current format for tenants' bonds outlined in Part 10 of the Act. At the commencement of letting a property, landlords would be required to lodge a bond equivalent to that of their first tenants.

At the conclusion of the tenancy, both landlord and tenant will have the opportunity to sign off on bond release. In the same way that existing claims against tenants' bonds must have a lawful foundation, any claim by a tenant on a landlords' bond would need to be in accordance with the obligations of the Act.

For example, a tenant who had never brought a repair issue to a landlord's attention (and thus given them opportunity to repair it) could not turn around at the tenancy's end and claim on the bond due

[14] Victorian Civil and Administrative Tribunal, *2014-15 VCAT Annual Report*, p.39. Accessed at https://www.vcat.vic.gov.au/system/files/2014-2015_vcat_annual_report.pdf, 30 March 2016.

to a breach of duty. Tenants would face equivalent time limits under which to lodge a claim against a landlord's bond.

Unlike tenants' bonds, which will be frequently withdrawn, landlords' bonds may remain lodged for the lifetime they use the property as a rental. However, where deductions were made to a tenant, a landlord would be required to 'top up' to make sure that their bond was always at least equivalent to that of the tenant's.

Reflecting the fact that these properties are investments, there may be merit in having these bonds accrue interest which is payable to the landlord upon withdrawal. This would also serve as buy-in for landlords, who we recognise may see this as a significant departure from the structure of bonds in the past.

Recommendation 1: Amend the RTA to institute a parallel system of security deposits for landlords.

5.2 Maximum bond amounts

We concur that the current level of bond exemption under the Act (weekly rent in excess of $350.00 a month)[15] is no longer fit for purpose.

As the Issues Report notes at 2.1:

> *"…a bond is a financial incentive to tenants to treat their rental property with care."*

There is a risk that uncapped bonds go beyond achieving this reasonable outcome, and extend to landlords seeking financial protection that would be more appropriately obtained through the right insurance product.

One month's rent is a considerable outlay for a renter, no matter their income. It is difficult to envisage the circumstances in which a renter would take less care with a property simply because their bond was capped at that level. However, the right of a landlord under the Act to apply to the Tribunal and increase the maximum amount of bond could be retained for exceptional circumstances[16].

Recommendation 2: Remove the present exemption under s31(3) of the RTA that allows landlords to charge more than one month's rent in bond.

[15] Section 31(3), Residential Tenancies Act 1997
[16] Section 32, Residential Tenancies Act 1997

5.3 Resolving bond claims fairly

The actual timeline on which bonds are settled and released can be confusing and stressful for tenants. We frequently encounter situations where our clients are seeking new properties and facing the prospect of paying a fresh bond (as well as a month's advance rent) while waiting for the determination of the bond on the property they are exiting.

This is the case even where it is highly likely that a bond will be returned in full.

Case Study 5: Cassie
Cassie received a valid 60 day notice to vacate because her landlord's daughter was moving into the property. She had kept the property in a good condition and was up to date on her rent when she received the notice. She began actively looking for a new place to live.

Cassie received an offer of a new property and was asked to pay bond and one month's rent in advance by a date before the termination of her old agreement. She gave 14 days' notice of intention to vacate to the landlord's agent, as she was entitled to under the Act.[17]

She asked if her bond could be released. The landlord's agent refused to do so until the day she handed back the keys as she wanted to make sure nothing happened "between now and then". Cassie was afraid her new property would fall through if she didn't make her new bond in time, and borrowed from family to pay it. She was later able to pay them back with the bond returned from the first property, but still found that the experience was stressful for her and her family.

In this situation, a tenant can be required to pay for two bonds within the period of one tenancy, even where the reason for vacating relates to a request from the landlord. The financial imposition on the tenant is onerous and unreasonable.

Although the legislation covers how a bond must be lodged and on what basis it can be claimed and released, the Act is currently silent about the timing of exactly when a tenant is required to pay bond as part of a new tenancy agreement.

The Act is also not prescriptive as to when landlords or their agents must conduct exit inspections or sign bond release forms.

We suggest that creating prescriptive legal requirements around when the tenant is to pay bond in the context of commencing a *new tenancy agreement* may create unforeseen consequences for both landlords and tenants.

However, more could be done during the notice period of *existing tenancy agreements* to arrange for earlier determination of the bond.

We see **two** options for dealing with this challenging aspect of the tenancy process.

[17] Section 237(1) of the Residential Tenancies Act 1997 enables the tenant to give reduced rent in circumstances such as this.

The **first** would involve the real estate and property management sector establishing its own code of practice and conduct for how exit inspections and bond release fees are to be dealt with in a way that fairly balances both tenant and landlord rights, and recognises the importance of timely and practical resolution of bond matters.

We further discuss the nature of self-regulation and industry codes in the context of the Real Estate Institute of Victoria (REIV)'s current practice guidelines in Section 6.4 of this Issues Paper. Put briefly, an effective and accessible industry code in matters such as these would avoid the need for further amendments to the RTA itself, but the current standard of industry self-regulation in Victoria is not sufficient.

In the alternative to major reform and expansion of industry codes of practice, we suggest a **second** option involving amendment of the Act. Statutory provision could be made as follows:

"Section xx: Early Release of bond

(1) A tenant may request that the landlord consent to early payment out of the bond either:

(a) At any time between a tenant's lawfully giving notice of intention to vacate under s235 or s237 and the termination date specified, or;

(b) Not more than 14 days before the specified termination date under a notice to vacate given to a tenant under section 255, 256, 257, 258, 259, 260, 262 or 263;

(2) The landlord's consent may not be unreasonably withheld.

(3) For the purposes of section (xx (2)), a bond will not be deemed to be unreasonably withheld if the landlord has grounds to make an application under section 417, 418 or 419 of the Act."

Much as with section 82 of the present RTA, which allows a tenant to apply to the Tribunal where they believe a landlord has unreasonably held consent for an assignment or sublet, a corresponding section should allow the Tribunal to order that bonds be determined prior to the termination date where there is not agreement between the parties.

In practice, it would be envisaged that this has the effect of 'bringing the exit inspection forward' – of the landlord assessing the condition of the premises and consenting to full or partial release of the bond depending on the state of the property, and thus enabling a tenant to pay bond at a new property sooner if they need to and avoiding the necessity for the payment of a second bond within a single rental period.

Although a landlord may not be asked to release the bond before the termination date in most tenancies, this amendment would provide a much-needed mechanism for the tenants described at 2.3.4 of the Issues Paper who face financial difficulties when moving from one rental property to another.

We envisage that appropriate industry guidelines or a legislative amendment would work best in tandem with Recommendation 4 below, which would allow the immediate payment of that portion of a bond that was not in dispute.

Recommendation 3: Develop an effective industry code that deals with bond release towards the termination of tenancies, or amend the RTA to allow tenants to apply for early release of their bond where a valid notice of intention to vacate has been issued, or within 14 days of the termination date where a notice to vacate has been given to a tenant in certain circumstances.

Having reviewed the information provided on other jurisdictions in Table 2.1 of the Issues Paper, we believe the following aspect of Queensland's bond claim process is worth incorporating:

- **When tenants and landlords disagree on the bond refund amount either party can submit a claim to the Residential Tenancies Authority, which will then release any non-disputed amounts and hold disputed amounts**.

Currently, in Victoria, a tenant who disputes the bond refund amount has two choices: go ahead and sign a bond release form anyway to receive their balance, or wait to dispute the matter in VCAT. This can deprive a tenant of money that is not in dispute at a time when they need it most (generally, as bond or advance rent on their next property).

For example, a low-income household facing a $700 landlord claim on a $1400 bond may feel pressured to sign a bond release form to get a substantial amount of money back straight away, rather than finding themselves in hardship by waiting weeks to argue for receiving the full bond back at VCAT.

Recommendation 4: Allow the immediate release of any non-disputed funds to tenants in all bond claims.

Our experience is that the current time limit of 10 working days for a landlord to claim bond from a tenant under s417 of the Act is not consistently observed by either landlords or, indeed, by VCAT itself. We find this causes financial stress for tenants, who can sometimes approach us weeks after a tenancy agreement terminates and are unsure of the status of their money.

As the overwhelming majority of applications before VCAT relate to properties which are professionally managed, it is not clear why these applications are not issued promptly.[18]

We recommend that where a landlord does not make an application under s417, 418, or 419 of the Act within ten working days the bond automatically reverts to the tenant.

Recommendation 5: Require that all bonds revert back to the tenant automatically where no claim is made by the landlord within ten working days of the tenant's vacating.

[18] VCAT, *2014-15 VCAT Annual Report*, p.39. Out of the 54,520 applications made to VCAT by landlords in the financial year, only 2,705 were brought by private landlords directly. The rest were brought by estate agents and property managers or agents of the Director of Housing.

5.4 The bond system and landlord insurance

As noted in our response to the 'Laying The Groundwork' paper in 2015[19], we have identified instances of landlords 'double dipping' by making simultaneous claims against a tenant in VCAT while also making a claim from their insurer for the same loss.

Under the right of subrogation, insurers may pursue tenants for amounts paid out under the policy, unaware that the landlord has already claimed these items against the tenant.

Since our 'Laying The Groundwork' response, we have had a number of successful negotiations with insurers where it has been agreed not to pursue tenants for non-malicious damage. Insurers have also been refining their understanding of VCAT's process for handling bond and compensation.

In the joint covering letter addressed to VCAT by our centre and Suncorp Group (attached to this response, along with our paper on landlord insurance), we summarise our key issues in this area of casework as follows:

- Double dipping by landlords with a substantively similar loss brought both as an insurance claim and a subsequent claim for compensation before VCAT;
- Insurers pursuing claims against tenants where there is no legal basis for asserting a tenant's liability;
- Policy issues in relation to negligence actions against uninsured renters arising from fire or flood damage.

We believe that VCAT should be better equipped to identify the double dipping issue in the first instance, before a matter reaches the hearing stage.

Recommendation 6: Amend the existing VCAT application form (both paper and online) so that parties are required to state whether they have made an associated claim under an insurance policy.

Recommendation 7: Amend section 211 of the RTA (matters to be considered by the Tribunal when hearing a compensation claim) to require the Tribunal to take into account the existence of any claim against the tenant under a landlord's insurance policy before making an order for compensation.

Historically, a landlord was unable to insure a property against loss caused by a tenant. Landlord insurance is a relatively recent innovation but now offers a significantly broader protection than a bond. That is, landlord policies provide cover for rental losses including legitimate early termination by a tenant, and other losses not covered by a bond. In this situation, we question whether there really is a need for a tenant to have a financial incentive to look after the property.

[19] Western Community Legal Centre, "Submission in Response to the 'Laying The Groundwork' Consultation Paper", August 2015. Accessed at http://fairersaferhousing.vic.gov.au/public-submissions/documents/25744/download on 30 March 2016.

Bonds of $1400 or more are a massive obligation on low income tenants that could easily be substituted with an obligation for the tenant to pay the cost of the premium of a landlord policy. The current bond system could be contrasted with car ownership, where third party insurance for other vehicles is not compulsory, and car owners are expected to insure their own vehicles.

In this light, it could be argued that the existing system of rental bonds is rapidly becoming an historical anomaly maintained by the real estate industry and the legislation, despite the creation of a cheaper, more effective and more efficient mechanism by the insurance industry.

The vast majority of landlords already insure the building against fire and structural damage and the bond only covers relatively minor damage or rent. Arguably, the bond should not cover rent as it is not related to the care of the property. Again, the landlord can insure against loss of rent.

Accounting for how often landlords make claims on tenant bonds, It may be more cost-effective (at least with leases of up to 5 years) for tenants to pay their landlord's annual premiums rather than pay bond. This may become less effective where leases run longer than 5 years, as the requirement to pay a landlord's insurance premiums may eventually exceed the total cost of a bond. However, for the reasons identified above, we believe tenants should gain the option between agreeing to pay a bond and agreeing to pay the premium on a landlord policy for the property.

A shift toward paying premiums over paying bonds would not only benefit tenants. The reform would reduce the administrative cost of tenancy to landlords, agents and the Department of Justice. It would also significantly reduce the number of bond and bond-related disputes and free up resources at VCAT.

Recommendation 8: Allow tenants to choose between the current requirement for a bond and the option to pay the premium on a landlord policy for the property.

5.5 Bonds in the context of family violence

Family violence raises broader issues about how tenants' responsibilities are enforced and on what basis they can face claims under the RTA. WEstjustice intend to make a more comprehensive submission on tenancy and family violence in our next Fairer Safer Housing response.

For the purposes of this response, we note that Recommendations 3 and 4 above are likely to be of particular assistance to survivors of family violence when ending tenancies. The ability to determine and release bonds in full or in part at the earliest possible point minimises the risk of further homelessness and trauma for these tenants.

6. Fairer rent arrangements

In the absence of those mechanisms that should form part of a broader debate on housing affordability, much can still be done within the confines of the RTA to ensure that a tenants' obligation to pay rent does not become too onerous.

6.1 Rent in advance

As with the provisions for uncapped bonds under s31(3) of the RTA, the legislative provisions of s40(2) of the RTA set rent of more than $350 a week as the threshold to impose a significant financial burden on tenants. This is no longer a reasonable measure for 'high-value properties' and should be removed.

We note that while our casework regularly involves tenants who pay rents of more than $350 a week, landlords in most cases invariably demand no more than one month's rent in advance, suggesting the limit no longer reflects market behaviour.

Even accounting for an irrelevant threshold under the current version of s40(2), we believe that the amount of rent that can be demanded in advance from a tenant should be firmly capped for the following reasons:

- In the Victorian rental market, a simple monetary threshold for what denotes a high-value property will capture situations where it would be onerous for a landlord to be able to demand rent in excess of a month. For example, a family on a high income renting a semi-rural lifestyle property may pay the same weekly rent as a group of four students living in an inner-city share house. A requirement that the tenants in the latter situation (and not all those living in the house may be on the tenancy agreement) pay rent in advance without an upper limit would constitute a barrier to affordable housing close to study and work.

- Even if more than one month's rent in advance is not required under a tenancy agreement, paying larger amounts of rent in advance could be used as an alternative to rental bidding. Unlike rental bidding situations, there are currently no industry guidelines prohibiting this practice.

- There have been recent VCAT judgments in which tenants pay rent in advance up to the full term of the agreement (i.e., 12 months' rent), only to terminate the agreement early because of misrepresentation by the landlord and similar breaches of the tenancy agreement.[20] Such tenants are then placed in the difficult position of recovering large amounts owing to them via enforcement at the Magistrates Court level.

[20] See, for example, *Kyriakou v Northcote Developments Pty Ltd* [2016] VCAT 85.

Recommendation 9: Amend the RTA to cap the amount of rent that a landlord may require be paid in advance under a tenancy agreement.

6.2 Rent increases

The RTA currently provides a number of crucial protections for tenants in terms of how rent increases may be notified and reviewed. In the first instance, there are compliance requirements for landlords in terms of the form and content of rent increase notices.[21] In the second, there is a review process conducted by Consumer Affairs Victoria (CAV) that is prompt and thorough.[22] In the third, tenants can seek a formal order from the Tribunal for a declaration that rent or proposed rent is excessive.[23]

In our prior response to the review on Security of Tenure, we expressed our concern that the current legislation, which allows rents to be increased every 6 months, presented a threat to security of tenure.[24] The ability to schedule increases at this frequency disproportionately affects renters on lower incomes and reduces their certainty around budgeting and finances, especially for those households experiencing rental stress.

Recommendation 10: Limit rent increases under the RTA to once every 12 months.

Section 47 of the RTA lists the considerations (including any report made by Consumer Affairs Victoria) that the Tribunal should take into account when evaluating whether proposed rent is excessive. We note that the rent review mechanisms of the Australian Capital Territory (ACT) under their Residential Tenancies Act offer the following additional parameters for the bases on which rent may be considered excessive[25]:

S68 Guideline for Orders

(1) The ACAT must allow a rental rate increase that is in accordance with the standard residential tenancy terms unless the increase is excessive.

(2) For subsection (1) –

(a) ***unless the tenant satisfies the ACAT otherwise, a rental rate increase is not excessive if it is less than 20% greater than any increase in the index number over the period since the last rental rate increase or since the beginning of the lease (whichever is later); and***

(b) ***unless the lessor satisfies the ACAT otherwise, a rental rate increase is excessive if it is more than 20% greater than any increase in the index number over the period since the last rental rate increase or since the beginning of the lease (whichever is later)***

[21] Section 44, Residential Tenancies Act 1997.
[22] The process for a tenant to seek this is outlined in section 45 of the Residential Tenancies Act 1997.
[23] Sections 46-48, Residential Tenancies Act 1997.
[24] WEstjustice, "Western Community Legal Centre submission in response to the 'Security of Tenure' issues paper", p.30-32. http://www.footscrayclc.org.au/~footscra/images/stories/Security_of_Tenure.pdf, accessed on 5 April 2016.
[25] Residential Tenancies Act (ACT) 1997. http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf, accessed on 5 April 2016.

Section 68 of the ACT legislation goes on to elaborate on the additional considerations that may otherwise satisfy ACAT when determining whether or not rent is excessive (that is, those additional considerations that either tenant or landlord must bring to its attention). They are similar to those currently set out in section 47 of the RTA (state of repair, fixtures, goods or services supplied by the landlord as part of the tenancy).

In New South Wales, the State Green Party has made matching rent increases to CPI increases part of their housing policy.[26] The Tenants Union of NSW, comparing the Greens' proposal to the ACT experience, concluded that "for the most part Canberra rents have tracked very closely to Sydney's since the introduction of the scheme". It further noted that such a reform "does not, and nor is it intended to, deal with housing affordability at a broad level." Instead:

> *"All that is intended by this kind of proposal is that landlords who do wish to increase the rent above a certain level, take on the burden of demonstrating why it is justified in those circumstances."*[27]

We note that unlike the ACT legislation, which has no equivalent provision to section 45 of the RTA, VCAT's decision when exercising its jurisdiction under section 47 of the RTA will be heavily influenced by the reasoning of CAV in its report. Section 45 is not prescriptive about what CAV must consider in its report.

There may be merit in inserting a similar provision to section 68(2) of the ACT legislation into section 47 of the RTA. This would not act as a statewide 'cap' on rents – instead, it would guide the Tribunal's reasoning where a tenant and landlord had not been able to reach agreement on a proposed rent increase even with the expert input of CAV. Landlords would be free to argue for increases larger than equivalent CPI rises where they could establish additional value to the property that justified a larger than normal increase.

Recommendation 11: Amend the RTA so that VCAT is obliged to consider a rent increase relative to CPI when determining whether rent is excessive.

One alarming consequence of tenants exercising their right to challenge a proposed rent increase is that certain landlords will then seek to evict them from the property using the RTA, presumably to re-let the property at a higher rate. Although 'no reason' notices to vacate given under the RTA will be deemed of no effect if they were given in retaliation to a tenant's exercise of their rights, we have encountered instances where tenants have received for-reason notices to vacate that are clearly in retaliation to a successful rent rise challenge, but cannot not be declared invalid on that basis.

[26] The Greens New South Wales, "The Greens NSW – Housing and Homelessness Principles", item 52. http://nsw.greens.org.au/policies/nsw/housing-and-homelessness, accessed on 5 April 2016.
[27] Tenants' Union of New South Wales, "Caps, Controls and CPI", 21 July 2015. http://tunswblog.blogspot.com.au/2015/07/caps-controls-and-cpi.html, accessed on 5 April 2016.

Case Study 6: Tom and Kate

Tom and Kate are a couple in their early sixties living in Outer-West Melbourne. They are both on a Disability Support Pension for physical and intellectual disabilities. Our office helped Tom and Kate understand a notice of rent increase they had received. On their instructions we wrote to the Director of Consumer Affairs Victoria (CAV) requesting a report. The Director notified the landlord's agent that the proposed rent increase was excessive, having mind to the area and the property's condition.

The landlord's agent immediately issued a 60-day Notice to Vacate under section 255 of the RTA (for proposed repairs and renovations). There had been no suggestion prior to the Notice to Vacate that such repairs and renovations were planned.

Although we successfully challenged the notice at VCAT, the argument that this notice was purely retaliatory was not available to the tenant at law as section 255 does not allow a tenant to challenge a notice to vacate for repairs on the basis that it is a response to a tenant exercising his or her right. This is despite the landlord's agent verbally telling our lawyer "if (the tenants) were opposing the rent, we would get someone in who is willing to pay more".

Recommendation 12: Amend the RTA to establish that certain notices to vacate are of no effect if given in response to the exercise or proposed exercise of a tenant's right.

6.3 Timely payment, breaches of duty and applications for possession

Part 3.1.3 of the Issues Paper notes that late payment of rent (where rent is less than 14 days' late) is not currently grounds to issue a breach of duty notice to a tenant in a general tenancy agreement.

We will be discussing some of the current issues with the RTA's breach of duty notice system in a future paper. Our view is that it presents a disproportionate risk to security of tenure and is unwieldy for tenants who wish to issue challenges. Suffice to say, we believe that breach of duty notices for late payment of rent should not be introduced at this time.

In our Security of Tenure paper, we observed that some notices to vacate issued under section 246 of the RTA (where a tenant was more than 14 days' in arrears at the time the notice was given) proceed to a possession order hearing without a sound basis. There are cases in which landlords have refused to withdraw proceedings even when the tenant has cleared all arrears before the matter gets to VCAT.

We made the following observations about these circumstances:

- Agents frequently express their understanding that a possession order will not be granted where arrears have been paid or a satisfactory payment plan can be arranged, but explain they must act on landlords' instructions.
- Tenants are required to incur travel costs and aggravate their financial circumstances (missing shifts of casual work or self-employed income opportunities) to attend unnecessary hearings.
- VCAT is required to allocate time for matters that could have been settled pre-hearing.

We recommended that section 246 of the RTA be amended so that landlords be required to show they have attempted good faith negotiations to resolve the arrears situation - before applying for a possession order.[28]

Canvassing similar issues in their response to the Security of Tenure Issues Paper, the Tenants' Union of Victoria cited the Housing (Scotland) Act and the legislated 'pre-action requirements' that the landlord must undertake before serving a notice to vacate.[29] These include, amongst other requirements:

- Clear information about the outstanding rent;
- Reasonable efforts to provide the tenant with advice and assistance on where the tenant may be able to get housing benefit or other financial help;
- Reasonable efforts to agree with a tenant a reasonable plan for paying the money due and paying the rent in the future.

Presently, the only documentation required to accompany a landlord's application to VCAT for a possession order is a copy of a valid notice to vacate.[30] A summary of proofs, outlining in simple form when rent was last paid, and how much is owing, is not usually supplied to a tenant until the day of the hearing itself. Some tenants may be dependent on a printout of the landlord or agent's ledger, which they may struggle to understand.

We recommend that a landlord's application to VCAT for possession in rent arrears matters be required to include clear information about the outstanding rent, and evidence that the landlord or their agent have undertaken reasonable efforts to agree on a plan for paying the arrears. Making this a formal requirement prior to any application will allow agents to better manage their landlord's expectations, and avoid fewer claims proceeding to VCAT without good cause.

Requiring these efforts prior to possession or eviction will bring landlords into line with the providers of other essential services, such as power, water and other utility companies. Under the National

[28] WEstjustice, "Western Community Legal Centre submission in response to the 'Security of Tenure' issues paper", p.29

[29] Tenants' Union of Victoria, "Response to Security of Tenure Issues Paper of the Residential Tenancies Act Review", December 2015, p.19-20. http://www.tuv.org.au/articles/files/submissions/151223-TUV-RTA-Security%20of%20Tenure.pdf, accessed on 5 April 2016.

[30] Victorian Civil and Administrative Tribunal Rules 2008 (SR No 65 of 2008) – Reg 6.25 (7).

Customer Energy Framework, retailers are generally obliged to offer payment plans where difficulty paying bills arises, and cannot simply disconnect services because someone is in arrears as long as certain steps are being taken to settle the debt.[31]

Recommendation 13: Make evidence of reasonable efforts to agree with the tenant on a payment plan for arrears a pre-requisite for any application for a possession order under section 246 of the RTA.

Recommendation 14: Amend the RTA to confirm that if a tenant has paid their arrears prior to a hearing for an application for possession under s246 of the RTA, the application cannot succeed.

6.4 Rental bidding, auctions and industry self-regulation

In February 2007, the REIV became the first state peak body to issue guidelines forbidding rental bidding or auctions. These guidelines were supported by the Real Estate Institute of Australia, and in the REIV's own words, reflected a "need for real estate agents to deal fairly and honestly with prospective tenants, and treat them with courtesy, especially in the tight residential letting market".[32]

We note that although 3.3.2 of the Issues Paper suggests that the guidelines require agents "use a range of prices when advertising", the guidelines actually forbid using a rental price range in advertising in order to ensure prices are in line with market expectations.

The practice of rental bidding and auctions currently occupies a grey area – nominally prohibited by industry guidelines, but not subject to penalties or enforcement under the RTA. We have the following concerns about the existing regime:

- ***Rental auctions and bidding are still occurring.*** We have encountered clients who have by their own admission offered higher rent to secure a property quickly. Although these are not situations where agents have initiated a bidding process for a rental property, they are instances where higher offers are permitted and accepted. Unfortunately (and ironically) this has led to some circumstances where households ultimately end up paying a rent which ends up exceeding their means – a reduction in working hours or an unexpected financial burden can then cause them to default on rental payments. The REIV's guidelines oblige agents not to accept counter-offers, but still allow for these initial offers.

[31] Australian Energy Regulator, "Energy retailers' customer hardship policies". http://www.aer.gov.au/retail-markets/energy-retailers-customer-hardship-policies, accessed on 5 April 2016.
[32] "Rogue rental agents face crackdown", *The Age,* 27 February 2007. http://www.theage.com.au/news/business/rogue-rental-agents-face-crackdown/2007/02/27/1172338584311.html, accessed on 5 April 2016.

- ***Industry guidelines do not cover other forms of 'bidding'.*** We have encountered situations in which tenants offer a larger amount of rent in advance to secure a property (e.g., two months' rent in advance rather than one).

- ***Existing guidelines are not readily available to consumers.*** Although the REIV has myriad guidelines and practice notes around property sales and residential and commercial leasing, these are not centralised and collated in one area. A search of REIV or CAV's respective websites for the phrases "rental bidding" or "rental auction(s)" yields no results, and repeated use of a search engine such as Google only provides old news stories about the guidelines' implementation from 2007. We believe that as a result, consumer awareness of these guidelines is poor.

This feeds into a wider issue around the ***adequacy of industry self-regulation in Victoria***. These regulations are of no effect if they are not being enforced, and limited effect if consumers are not aware of what agents can and cannot do. Currently, industry self-regulation is spread across the REIV's Rules of Practice[33], a number of guidelines (not all accessible), and practice notes that give some direction on how agents are to conduct themselves (but are not available to the general public). The Rules of Practice clearly cover obligations under commercial leases, but not residential leases.

Although real estate agents will not necessarily be involved in advising on or issuing financial products or services (though it could be argued that property management involves stewardship over and advice on a significant investment), ASIC's Regulatory Guide on Approval of financial services sector codes of conduct (RG 183) provides a useful benchmark on the key criteria for sector self-regulatory initiatives.[34] ASIC describes their ideal standard for industry codes as follows:

> "*To us, a code is essentially a set of enforceable rules that set out a progressive model of conduct and disclosure for industry members that are signed up. Codes should therefore improve consumer confidence in a particular industry of industries.*"[35]

ASIC's criteria include expectations that a code:

> Be freestanding (that is, one set of guidelines that can be accessed in one location) and written in plain language;

[33] Real Estate Institute of Victoria, The Real Institute of Victoria Ltd Rules of Practice 2006 (incorporating amendments to 17 March 2008). https://www.reiv.com.au/news/library/legal/reiv-rules-of-practice.aspx, accessed on 5 April 2016.
[34] Australian Securities & Investments Commission (ASIC), *Regulatory Guide 183: Approval of financial services sector codes of conduct*, March 2013. http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf, accessed on 5 April 2016.
[35] Ibid, p.4.

> Reflect a consultative process for development of the code, and addresses stakeholder issues (including the issues of residential tenants);
> Be capable of being monitored and enforced, with oversight that includes stakeholders;
> Be backed with appropriate remedies and sanctions;
> Be adequately promoted, and;
> Be subject to a mandatory three-year review.[36]

Even with a generous reading, it is hard to conclude that REIV's current assortment of practice guidelines and requirements meet established federal benchmarks for effective self-regulation.

We believe that effective enforcement of its own guidelines would enable REIV to prevent inappropriate conduct relating to rental auctions or bidding, and avoid the need to establish a prescriptive regime in the RTA itself that goes beyond the existing requirements of Australian Consumer Law. This presents an opportunity for the industry to bring its self-regulation up to a modern and effective standard with a degree of autonomy. Whether it takes that opportunity up will determine what, if any, amendment to the RTA is needed.

Recommendation 15: Encourage industry bodies, in the first instance, to develop self-regulatory codes that meet federal benchmarks in effectively addressing rental bidding and rental auctions.

[36] Ibid, p.6.

7. Other payments and charges

The RTA presently lacks clarity on certain payments and charges, even in circumstances where case law or commentary itself is somewhat clearer. This is an issue both for application and holding deposits (under section 50) and ancillary charges to payment of rent (under section 51). An associated issue may be a lack of enforcement where landlords or agents are in breach of the law.

7.1 Holding deposits

Section 50 of the RTA reads as follows:

"***Application and holding deposits***

A person who in respect of a proposed tenancy agreement receives a payment from a tenant as a sign of good faith must refund the payment to the tenant—

(a) on the agreement being entered into, if it is entered into before the end of 14 days after the day on which the person received the payment; or

(b) on the next business day after the end of that period, if the agreement was not entered into within that period.

Penalty: 20 penalty units."

This appears to make it clear that Victorian tenancy law anticipates that a holding deposit will always be refundable, whether a tenant chooses to enter into a lease or not. However, the Act sheds no light on when a deposit can be required, or to what amount.

We share the TUV's concern about the purpose, timing and operation of these deposits.[37] The open-ended nature of section 50 may require a tenant to submit a holding deposit payment in tandem with an application to be considered with a tenancy; it may be consideration after a tenancy application is accepted for the tenant to receive a copy of the application for signing.

If the former, this would constitute a major obstacle for our clients. It is typical for homeseekers in our catchment to apply for multiple tenancies at any one time and unreasonable for them to place multiple holding deposits for each.

Even if the holding deposit is payable *after* an application is accepted, this is effectively a financial burden on lower income renters, who will already be making arrangements for bond and rent in advance, and may have limited disposable income for an additional payment, even where this is fully refundable. We note that holding deposits are not presently capped under the RTA.

[37] Tenants' Union of Victoria, "Response to Laying The Groundwork – Residential Tenancies Act Review Discussion Paper", August 2015, p.21. https://www.tuv.org.au/articles/files/submissions/150916-TUV-RTA-Review_Laying%20the%20Groundwork.pdf, accessed on 5 April 2016.

While we are yet to come across a situation in which agents fail to comply with section 50 of the RTA and refund a holding deposit, we have seen private landlords treat such deposits as non-refundable, either in ignorance of or wilful disregard for the law. It is not clear how many of these individual cases are subject to sanction and enforcement by CAV.

Given that the existing legislation appears to state that a holding deposit will always be refundable to a tenant, it is difficult to see what additional security section 50 offers to landlords. On those occasions where landlords breach the Act and retain a holding deposit, it constitutes another source of financial risk to low-income renters, without the oversight and protections of the RTBA. We believe that section 50 should be removed from the RTA and that the legislation should clearly state that a holding deposit may not be required as part of entering into a tenancy agreement.

Recommendation 16: Repeal section 50 of the RTA, which deals with holding deposits, and amend the RTA to confirm that holding deposits cannot be a prerequisite to entering into a tenancy agreement.

7.2 Payment fees

We remain concerned that despite clear and well-canvassed legal precedent to the contrary in *Palmer v Hutchinson*[38] and *Rossetto & Anor v Calder & Ors*[39], both third-party rental collectors and even agents themselves continue to breach section 51(3)(b) of the act by charging tenants for "the establishment or use of direct debit facilities for payment of rent under a tenancy agreement".

Particularly galling are instances where a tenant who is facing serious challenges affording rent seeks to begin paying rent via Centrepay, Centrelink's method for allowing the payment of certain re-occurring costs and bills directly out of a Centrelink benefit. They may request this, only to be told an agent will not establish facilities for this transaction on their end (a simple matter of verifying where funds from a Centrelink payment will be transferred to).

Instead, they are encouraged to authorise direct debits to the third-party rent collector of the agent's choice and required to pay fees for establishment, use, and any dishonour in violation of the RTA. We note that section 51(3)(b) does not make an exemption for dishonour fees.

We endorse the modification of the RTA to include a requirement analogous to that of section 35(2) of NSW's Residential Tenancies Act 2010, which states:

> *"…A landlord or landlord's agent must permit a tenant to pay the rent by at least one means by 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."***

For low-income households who rent, Centrepay appears to be the best of both worlds: a reliable direct debit-style system that enables consistent payment, but that also does not place onerous

[38] *Palmer v Hutchinson* [2013] VCAT 873
[39] *Rosetto & Anor v Calder & Ors* [2012] VCAT 816

charges on the poor. We have encountered numerous arrears matters in which the use of Centrepay as a payment method would have benefitted both tenants and landlords alike and spared agents the loss of valuable time.

All the same, we frequently encounter resistance from many agents when requesting they consider Centrelink as a method of payment. In some circumstances, this is because they are resistant to incurring the minor transaction fees associated with the use of Centrepay (currently $0.99 per transaction). Centrepay would therefore involve 26 transactions ($26) over the period of a twelve month lease which would absolutely remove the risk of default in rental payments.

However, in most, agents are not even aware of what Centrepay is and lack official guidance on how to use it.

Case Study 7: Katja

Katja is a solo mother of four who works part-time in a distribution centre and lives in Outer-West Melbourne. Her meagre earned income is supplemented by Centrelink. She has been battling a gambling problem for the past 2 years and her losses playing pokies ultimately put her in serious arrears. An application for possession of her home was made by her landlord's real estate agent.

We were able to put Katja in touch with a primary care organisation to get financial and therapeutic counselling for her addiction. With their advice, she arrived at the decision that Centrepay would be the best arrangement to ensure that even if she was to relapse, gambling would never make her and her children homeless.

Although we were able to secure Katja's continued tenancy and establish a payment plan to reduce her arrears at VCAT, we were not able to force her agent to establish itself as a Centrelink payee.

We believe that stable and secure tenancies reduce the burden both on households themselves and the state. Given the fundamental importance of a roof over one's head, we believe the Department of Health and Human Services should reach out to the REIV and other peak bodies and run sessions designed to educate and encourage sign-up to Centrepay.

Additionally, given the singular importance of housing, the DHHS should consider capping the monthly amount that licensed real estate agencies should have to pay for Centrepay use. By keeping this amount at a low level that does not fluctuate, it will be difficult to argue that retaining Centrepay facilities disadvantages landlords or agents, even where they have a large number of tenants it as their rent payment method. On the contrary, it could save hardship for both.

Recommendation 17: Amend the RTA to require that tenants have at least one means by which the tenant does not incur cost and that is reasonably available to the tenant for payment of rent.

Recommendation 18: Encourage the Department of Health and Human Services to organise education and awareness around Centrepay through the Real Estate Institute of Victoria and similar peak bodies.

Recommendation 19: Encourage the Department of Health and Human Services to investigate a fixed Centrepay fee for licensed real estate agents who implement the service in order to increase participation in the scheme.