Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**
Consumer Protection

Consultation Regulatory Impact Statement

A review of the Residential Tenancies Act 1987 (WA)

December 2019

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Rethinking renting in WA

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How to have your say

Making a submission

A number of questions are included throughout the Consultation Regulatory Impact Statement (CRIS) about the proposed reform options. You do not have to respond to all the questions or all the options. Please feel free to focus on the areas that are important and relevant to you.

There is no specified format for submissions or responses. You are welcome to:

- write a letter or send us an email outlining your views;
- tell us your own experience; and/or
- respond specifically to the questions included in the CRIS.

You are also welcome to suggest alternative options for addressing matters of concern to you. When providing your submission or response to questions, it would be helpful if you could include the reasons behind your suggestions, along with the potential costs and benefits of them.

This will help the Government to better understand your viewpoint and will assist assessing the potential impact of the most suitable options for reform.

Written submissions or letters can be emailed to consultations@dmirs.wa.gov.au or posted in hard copy to the following address:

Attention: Residential Tenancies Act Consultation

Department of Mines, Industry Regulation and Safety

(Consumer Protection Division)

Locked Bag 100

EAST PERTH WA 6892

Closing date

The closing date for providing comments on this CRIS is Friday 1 May 2020.

Who are you?

When making your submission please let us know which part of the industry you are from. For example, whether you are a lessor, tenant, real estate professional or industry body.

How your input will be used?

The Government will carefully consider all the information gathered through this consultation process and will publish a DRIS outlining its final policy position.

Information provided may become public

After the period for comment concludes, all responses received may be made publicly available on Consumer Protection's website. Please note that as your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate this in your submission.

As all submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become publically available.

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Message from the Commissioner

It has been 30 years since the *Residential Tenancies Act 1987* (WA) (the RTA) first came into operation in Western Australia. Back then, renting was something that most people did when they were young, before moving on to the phase of home ownership. The challenge for the new laws back in 1987, as noted during the second reading speeches in Parliament, was to establish the principles of fair dealing between landlords and tenants,[1] to provide a clear statement of the rights and responsibilities of the parties and to provide a fast and efficient dispute resolution process.

Fast forward 30 years. The rental landscape has changed. People are now renting for longer. No longer is renting predominantly an option for people who are saving a deposit to buy their first home. For many, renting is now their only option. We are seeing more families in the rental market, and we are seeing more of our older Australians renting. This latter category will increase into the future too, as those in the younger age brackets who currently will not be able to afford to purchase their own home remain in the rental market into their older years.[2]

The takeaway message from these changes in the rental market is that for people who rent, the rental premises is potentially their long term home.

However, despite the trend towards renting for longer and renting for life, there are many practices within the rental industry that do not reflect this change. For example, there remains a proliferation of six and 12 month fixed term tenancies being offered to tenants; even to those who have been in the same premises for substantial periods of time. This practice has the negative effect of undermining a tenant's sense of security of tenure.

It could also be argued that the RTA has failed to keep pace with this sense of a rental premises being the tenants' home. For example, tenants must still seek permission to make minor alterations to premises such as hanging pictures on a wall, and they must seek permission to keep a pet at the premises.

Prior to the 2017 election, WA Labor stated that "West Australians in rental properties deserve the opportunity to have a place where they can enjoy their lives, raise a family, have a pet and call their home".[3] In light of this, the McGowan government has committed to conducting this review in consultation with all stakeholders.

The challenge for this review is to examine the changing landscape of the rental market and make recommendations for change that will support security of tenure and reflect the need for tenants to make a rental premises their home. At the same time, it is important that reforms continue to support and encourage investment, and not lose sight of the objectives from 1987 and reasons for the introduction of tenancy laws.

[1] Hansard Mr Carr, Minister for Local Government, 29 October 1987, 30.
[2] https://grattan.edu.au/wp-content/uploads/2019/04/CPRC-Renters-Forum-25-February-2019.pdf
[3] WA Labor Party, *2017 WA Labor Platform,* 100.

1. Introduction

This Consultation Regulatory Impact Statement (CRIS) is a critical stage in the review of the *Residential Tenancies Act 1987* (WA) (the RTA). The key focus of this stage of the review is to obtain stakeholder feedback about those parts of the RTA that work well and those parts that do not, or that require modernising to allow them to be relevant into the future. This will be vital in weighing up the costs and benefits of the various options presented in the paper and will ultimately assist in making recommendations to the Government about proposed reforms.

Since the RTA's inception, the WA rental marketplace has been subject to significant change. The last major amendments were made to the Act in 2013. This review is looking at ways to not only improve the operation of the RTA but to also look to the future to ensure that beneficial outcomes can be achieved for both lessors and tenants.

This paper is structured to follow the stages of the tenancy process and potential issues that may arise at each of these stages. Within each section there is a discussion of issues which require a full regulatory impact assessment given they are likely to have a significant impact on stakeholders. There are also proposals which are considered more minor in nature, that are unlikely to be of significant impact on stakeholders or where there is an identified clear policy rationale for change.

Stakeholder comment is sought on all proposals. Through the delivery of regulatory services to the community, Consumer Protection collects data on complaints and enquiries in regards to residential tenancy matters. Where this is relevant to the proposal, such data is included to inform the discussion of potential reforms. Stakeholder comment will assist Consumer Protection in collecting additional data beyond what is currently captured, particularly for matters where the affected party may choose to pursue other avenues such as court action rather than approach the Department.

1.1. The Residential Tenancies Act 1987 (WA)

Since 1989, the RTA is the law that governs the legal relationship between tenants and landlords in Western Australia. Most residential tenancy agreements that arise within the community are regulated by the RTA and includes such things as:

- the form of a written residential tenancy agreement and other information a tenant must receive;
- the amount of bond, rent in advance and other fees that can be charged to a tenant;
- where bonds are to be held during the tenancy and processes for the disposal of the bond at the end of the tenancy agreement;

- the rights and responsibilities of lessors and tenants during the tenancy period;
- how tenancy agreements are terminated; and
- dispute resolution processes.

The Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection) administers the RTA and provides a range of regulatory services in support of the Act. Consumer Protection receives a number of enquiries and complaints regarding residential tenancy matters. From 1 July 2017 to 30 June 2019, approximately 3,114 complaints and 81,211 enquiries were received. Of these complaints, 1,087 were referred to conciliation, 50 resulted in the issuing of fines and four residential tenancy matters were prosecuted by Consumer Protection.

1.2. Changing rental landscape

The WA rental sector is experiencing substantial change. No longer a transitional housing option, tenants are increasingly diverse in terms of age, income and life stage. These trends are mirrored in rental markets across Australia. There are also indications that some households, particularly singles and couples, increasingly view the private rental sector as a more flexible housing arrangement that suits their lifestyle.[4]

The private rental sector has experienced significant growth throughout Australia, growing at twice the rate of all households over the ten year period from 2006-2016.[5] Approximately one quarter of all Australian households now live in the private rental sector.[6] In Western Australia, approximately 28.3 per cent of occupied private dwellings are rented.[7] This is an increase of 3.4 percent in rented dwellings. By contrast, the change in the occupied premises owned outright or owned with mortgage categories combined increased by only 0.6 percent over this same period.[8]

Home ownership rates are continuing to decline across Australia and with fewer people entering the housing market, it is expected that demand for the rental market will continue to increase. Data from the Australian Bureau of Statistics shows that the steepest decline in home ownership rates over a 25 year period were for people aged 25-35 years, an age group typically entering the housing market.[9] This represents a 21 per cent decline over this period to 39 per cent attaining home ownership in this age group in 2013-14 compared to 60 per cent in 1988-89.[10]

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[4] Australian Housing and Urban Research Institute, Final Inquiry Report - *Inquiry into the future of the private rental sector* (August 2018), p12.
[5] Ibid, p2.
[6] Ibid.
[7] ABS 2016 Census QuickStats (https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/5GPER?opendocument#mortgage-rent)
[8] Above n 6 and 7.
[9] Australian Institute of Health and Welfare 2017, *Australia's welfare 2017*, p5.
[10] Ibid.

1.3. Diverse tenant demographic

Tenants are increasingly from a broad demographic. An increasingly diverse tenant group requires a private rental sector that can achieve good outcomes for all.

Key trends across rental markets include:

- greater diversity of income groups;
- more families are now renting with 36 per cent of private rental households containing children;[11]
- increasing pattern of long-term and lifelong renting;[12] and
- changing demographic with diverse tenant groups (a growing proportion of tenants are now older persons entering the rental market after home ownership).

The private rental market is also housing a growing share of low income households, with the proportion of low-income households renting privately in Australia increasing from 16 per cent in 1994-95 to 27 per cent by 2017-18.[13]

The Productivity Commission in its recent research into vulnerable renters found:

- the fastest growth in private renting has been among households that include at least one Indigenous person, a person aged over 65 years, or a person with a disability or long-term health condition;[14] and
- most of the increase in private renting has come from families with children and single parents, who value certainty of access to schools and other services.[15]

Persons from older age groups are also now forming a growing tenant base. Recent research has found that in WA '…the rate of renting amongst persons aged 55 years and over is higher in this state than the rest of Australia'.[16] Approximately 11 per cent of all WA residents in rental accommodation are over the age of sixty-five.[17] This trend appears to be growing with estimates that by 2036 a quarter of all Australian retirees will be renters.[18]

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[11] Bankwest Curtin Economics Centre, *The private rental sector in Australia: public perceptions of quality and affordability,* p.5.
[12] Australian Housing and Urban Research Institute, Final Inquiry Report - *Inquiry into the future of the private rental sector* (August 2018), p2.
[13] Productivity Commission Report, *Vulnerable Private Renters; Evidence and Options*, September 2019. p.17.
[14] Ibid. p.4.
[15] Ibid, p.21.
[16] Bankwest Curtin Economics Centre, *Older Renters in the Western Australian Private Rental Sector,* BCEC Research Report No. 19/18, October 2018, p. ix (referencing Dockery et al, 2015).
[17] Australian Bureau of Statistics 2011 Census data.
[18] The Senate Economics References Committee, 2016 referenced in n16 above.

Older tenants in particular may face less choice in negotiating housing that meets their needs as a result of fixed incomes, the common industry practice of short leases, lack of affordable housing options and limited capacity to modify a rental property. These factors contribute to the difficulties faced by older renters in finding security of tenure. Research conducted by the Bankwest Curtin University Economics Centre (BCEC) found that this demographic is typically less secure and more financially vulnerable:

- 44 per cent of older renters in housing stress indicated they were forced into renting because of lack of choice;[19]
- 63 per cent of older renters pay more than 30 per cent of their income as rent;[20]
- 21 per cent of older renters pay more than 60 per cent of their income towards rent;[21]
- 54 per cent of all respondents had been renting for more than 10 years with only 3 per cent renting for less than a year;[22] and
- 41 per cent of older renters were forced to leave their previous dwelling through circumstances outside their control (and most leases were for 12 months).[23]

1.4. Security of tenure

The concept of security of tenure can perhaps best be described as "the right to choose to stay – not to be forced to move – from one's home".[24] In light of the changing rental marketplace, the need for security of tenure for all tenants has been identified as a key driver for regulatory reform in recent jurisdictional reviews of residential tenancy legislation.[25]

The capacity of the private rental sector to provide stable housing options for a broad demographic will assist in delivering better outcomes for the community. Lack of security of tenure disproportionately impacts vulnerable renters, including households that have limited financial resources. Security of tenure provides overall community benefits by enabling disadvantaged groups to avoid further social exclusion and disadvantage. It allows families to stay in the same area to provide continuity for work and schooling.

As more tenants rent for longer and seek longer term tenancies, security of tenure will become increasingly important. In Australia, a third of private renters have been renting for 10 or more years.[26] The BCEC found that although respondents were in favour of longer lease terms, of those surveyed, only 11 per cent had entered into a

[19] Above n 16, p.v.
[20] Ibid.
[21] Ibid.
[22] Ibid, p. 19.
[23] Ibid, p.v
[24] Mark Bennett, "Security of Tenure for Generation Rent: Irish and Scottish Approaches" (2016) 47 *Victoria University of Wellington Law Review* 363, 368.
[25] For example, New Zealand, Victoria and Queensland have proposed options to increase security of tenure as part of their respective tenancy reviews.
[26] Above n 12, p8.

tenancy agreement longer than one year.[27] Currently, tenants seeking to secure a longer term tenancy may face greater financial risk and less mobility if they later seek to end their tenancy agreement.

Short term tenancies, while providing flexibility for both tenant and landlord, reinforces a culture of renting as a transitional housing option. The degree to which the private rental market can provide security of tenure is influenced by the costs and risks that both tenants and lessors currently face when seeking to enter into long term tenancy agreements.[28] Victoria, in its review of its residential tenancies legislation, noted the willingness of lessors to provide security of tenure may also be impacted by a lack of incentives to provide social or 'merit' goods, which includes security of tenure.[29]

As noted in the above discussion on the changing nature of renting and an increasingly diverse tenant group, security of tenure is central to providing beneficial outcomes for the sector. Chapter 2 of this CRIS examines how the current operation of the RTA may impose barriers to greater security of tenure and how measures could be introduced to facilitate increased security of tenure for the benefit of tenants and lessors.

1.5. Private Lessors in WA – a snapshot

The rental market in Western Australia includes both lessors who privately manage their rental property and those where the property is managed by a property manager. Data from the Bond Administrator for the 2018-19 financial year, showed that approximately 85 per cent of the rental market is managed by a property agent on behalf of a lessor.[30]

It is not uncommon to hear the term "mum and dad investors," or "mum and dad landlords" when people refer to private lessors.[31] The predominance of 'mum and dad landlords' in WA is not uncommon among other rental markets internationally. For example, in Germany approximately 64 per cent of rented properties are owned by small-scale landlords, with 36 per cent owned by 'professional landlords'.[32]

Private lessors therefore are effectively a small business delivering a core service to the Western Australian community; the service of primary accommodation. We need private landlords to continue to invest in the rental market. They are a provider of a

[27] Above n 11, p.34.
[28] Vic RTA Review Issues Paper, Security of Tenure, p27.
[29] Vic RTA Review Issues Paper, Security of Tenure, p27.
[30] Note this data is extracted from the Department's bond lodgement system and will only reflect properties where a security bond is held by the Department.
[31] See for example reference to labelling in Elizabeth Redman *Federal election 2019: More bosses than teachers get negative gearing tax breaks, ATO figures show* (Domain, April 25, 2019) https://www.domain.com.au/news/federal-election-2019-more-bosses-than-teachers-get-negative-gearing-tax-breaks-ato-figures-show-831065/
[32] Institute for Public Policy Research, *Lessons from Germany: tenant power in the rental market* (January 2017), p.8.

core service within our community. According to CHOICE,[33] only 4 percent of the rental market is provided by social housing providers, including the State and not-for-profit community housing organisations. That means that private landlords provide 96 percent of the rental accommodation across Australia.

[33] CHOICE, *UNSETTLED: Life in Australia's private rental market* (February 2017) 4, https://www.choice.com.au/money/property/renting/articles/choice-rental-market-report

2. Improving security of tenure

As noted in the introduction, one of the overarching policy objectives of this review is to improve security of tenure, particularly for those tenants who are no longer able to afford to purchase their own home and because of their stage of life, are dependent upon a stable rental environment for their home.

This chapter considers the key issues currently perceived as impacting upon security of tenure for tenants.

2.1. "No grounds" termination

Issue

A "no grounds" termination notice or a "section 64 termination notice" allows a lessor to issue a tenant with a notice to terminate a periodic tenancy agreement without having to specify any reason.

Other sections of the RTA require lessors to give a reason for terminating the tenancy; for example, where a tenant has breached the tenancy agreement,[34] or where the lessor is selling the premises.[35]

Having the ability to terminate a tenancy agreement under section 64 of the RTA does not mean that a lessor does not have a reason for terminating the agreement. It simply means that the lessor does not need to disclose those reasons to the tenant. The availability of no grounds terminations for lessors is often cited as a significant barrier to tenants seeking to exercise their rights such as asking for repairs to premises.[36]

Objective

To improve security of tenure for tenants.

Discussion

In an open letter in 2018 written by academics who have conducted extensive research into housing and residential tenancy laws in Australia and overseas, having no grounds terminations is increasingly out of sync with the rest of the world and even within Australia.[37] For example, Tasmania has not had "no grounds" termination provisions in its residential tenancy legislation for many years and Victoria has recently amended its residential tenancy legislation to remove no grounds terminations except for at the end of the first fixed term of a tenancy agreement.[38] The New Zealand and

[34] *Residential Tenancies Act 1987* (WA), section 62.
[35] Ibid, section 63.
[36] See for example https://www.rentersrights.org.au/tags/no_grounds_evictions, CHOICE, *Disrupted: The consumer experience of renting in Australia* (2018), 4.
[37] https://www.domain.com.au/news/time-evict-no-grounds-termination-open-letter-rental-housing-reform-nsw-766696/
[38] Ibid.

Queensland governments are each considering removing no grounds terminations as part of their respective residential tenancy act reviews.

In WA, the Residential Parks (Long-stay Tenants) Amendment Bill 2018 (the Amendment Bill) that is currently before Parliament proposes to amend that Act to remove the park operator's ability to terminate a site-only agreement without providing specific grounds. The Amendment Bill inserts a series of grounds for termination of a site-only agreement in lieu of the "no grounds provision".[39]

Internationally, "no grounds terminations" are also becoming a thing of the past. According to the open letter by the academics, "many European countries, as well as most of the Canadian provinces and the largest US cities, do not provide for "no grounds" terminations by landlords."[40] Scotland has also recently amended their residential tenancy laws to remove the "no grounds" termination provision.[41] In Ireland, if the tenancy lasts for more than six months, the lessor cannot terminate "without grounds".[42] In Wales, the government there is currently undertaking an enquiry to look at extending the notice period for a no grounds termination from two months to six months and placing other restrictions on the use of a no grounds termination, including:

- restricting a lessor from using a no grounds termination in the first six months of a periodic tenancy; and
- prohibiting a lessor from issuing a no grounds termination notice within six months of the expiry of a previous notice.[43]

Use of no grounds terminations in WA

The Department of Communities advises that during 2018 and 2019, it has issued approximately 20 "no grounds" termination notices to its tenants. All bar one of these notices were issued in lieu of taking action under section 75A of the RTA for objectionable behaviour either because the impacted neighbours were too afraid to testify in court or the next available court date to hear a section 75A application was more than 12 months away.[44]

For the period February 2018 to March 2019, the Bond Administrator conducted a survey of lessors and tenants at the time of disposal of security bond. The purpose of the survey was to get an understanding of which party was terminating the tenancy agreement and which provisions of the RTA were being used. A total of 23,445 responses were received during this period. These responses do not include the termination notices issued by the Department of Communities as discussed above

[39] http://www.parliament.wa.gov.au/parliament/bills.nsf/screenWebCurrentBills
[40] Above n 132.
[41] Ibid.
[42] https://onestopshop.rtb.ie/ending-a-tenancy/how-a-landlord-can-end-a-tenancy/landlords-grounds-for-ending-a-tenancy/
[43] https://gov.wales/written-statement-consultation-about-increasing-notice-period-no-fault-eviction?_ga=2.210978832.442977933.1563176583-1848056189.1548857070
[44] Information provided by Department of Communities.

because the Department of Communities no longer requires its tenants to pay a security bond.

Of the responses received in the survey, only 418 terminations were by a lessor using a "no grounds termination".[45] That equates to less than two percent of the terminations reported in the survey.

The other reasons for terminations of tenancies as recorded in the survey were;

REASON FOR TERMINATION OF THE TENANCY AGREEMENT	**NUMBER**
Sale of premises / mortgagee repossession	741
Abandoned premises	205
Early break of lease by tenant	3084
21 days' notice provided by tenant	2433
Termination for breach	804
End of fixed term / decision not to renew	15272
No grounds termination by the lessor	418
TOTAL	**23445**

This data could be interpreted in a number of ways. It could be argued that because "no grounds" terminations are rarely used they are not being used inappropriately in WA and therefore should be allowed to remain. Alternatively it could be argued that because the "no grounds" termination appears to be rarely used in WA there would not be a significant impact to lessors in removing "no grounds" terminations from the RTA.

Alternatives to "no grounds" terminations

In those jurisdictions where no grounds terminations are prohibited, the legislation provides a range of grounds a lessor can rely upon to terminate the tenancy agreement. Generally the legislation provides the following types of grounds:

Tenant conduct

- tenants not living in the premises or not using the premises for residential purposes;
- breach of the tenancy agreement that is not remedied;
- rent arrears;

[45] This data does not include social housing tenancies terminated using section 64 of the RTA as the Department of Communities does not collect security bonds from tenants and therefore they were not captured by this survey.

- using the premises for an illegal purpose of risk of serious damage to the premises;
- threatening or causing harm to the lessor or property manager; and
- anti-social behaviour.

Tenant eligibility

- tenant no longer an employee (if employment linked housing);
- tenant no longer eligible for supported accommodation or social housing;
- tenant no longer a student (if student accommodation); and
- premises no longer suits the tenants needs (e.g. under occupancy).

Alternative use of the premises

- lessor intends to sell the premises;
- lessor needs premises for self or family member to move in;
- lessor intends to refurbish or demolish the premises; and
- lessor intends to change the use of the premises for non-residential purposes (e.g. lease to small business).

Other reasons

- mortgagee intends to repossess the premises;
- person with superior title takes back possession of the premises;
- legal impediment to renting the premises (e.g. change of zoning laws, premises declared uninhabitable);
- agreement is frustrated (e.g. through fire in the premises);
- hardship to the lessor; and
- death of last tenant.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. Lessors would continue to be able to use section 64 of the RTA to terminate without grounds, giving tenants 60 days' notice to terminate the tenancy agreement.

Option B – Replace no grounds termination with prescribed grounds for termination

The RTA would be amended to remove no grounds terminations. A number of new grounds would be inserted which a lessor may rely on to terminate the tenancy agreement. The new grounds for termination of the tenancy agreement would likely

reflect the grounds listed in the discussion above, but would be developed in consultation with key stakeholders. The notice period would remain as 60 days.

Option C – Retain no grounds termination but increase the notice period

This option would increase the notice period a lessor would be required to give a tenant from the current 60 days' notice to a longer period; for example, three months or six months' notice.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • Maintains status quo to allow lessors to end periodic tenancy without grounds. **Tenants** • None discernible. **Government** • None discernible.	**Lessors** • None discernible. **Tenants** • No improved security of tenure. • Tenants continue to have barriers to enforcing rights. **Government** • Risk that private housing sector will not provide adequate security of tenure.
Option B – Replace no grounds termination with prescribed grounds for a lessor to terminate the tenancy agreement	**Lessors** • Retain right to terminate tenancy for grounds other than breach of agreement. **Tenants** • Improved security of tenure for tenants and transparency. • Tenants may have greater confidence to enforce their rights. **Government** • May reduce number of enquiries and complaints to Consumer Protection.	**Lessors** • Reduced flexibility to terminate the lease for reasons other than breach of agreement. • Risk that grounds for termination may not cover all circumstances. **Tenants** • May increase use of short fixed term agreements. **Government** • None discernible.

Option C – Increase the notice period for no grounds termination	**Lessors** • Retains option of using no grounds termination. **Tenants** • May reduce use of no grounds terminations. • Improved security of tenure for tenants. • Longer notice periods. **Government** • May reduce number of enquiries and complaints to Consumer Protection.	**Lessors** • May increase risk of retaliatory damage to the premises or non-payment of rent by some tenants. **Tenants** • Tenants continue to have barriers to enforce their rights. **Government** • None discernible.

Questions

1. *Which option do you prefer and why?*

2. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

3. *What do you think would be the cost implications of the different options? Please provide as much information if possible.*

4. *If Option B is pursued, what should be the prescribed grounds for a lessor to terminate a tenancy agreement? What would be a sufficient notice period for each ground?*

5. *If Option C is pursued, what should be the notice period for a no grounds termination notice? For example, three months, six months, longer? Why?*

6. *If you are a tenant or landlord, have you ever used a no grounds termination to end a tenancy agreement or been subject to one? Please specify in your answer whether you are a lessor or tenant.*

2.2. Fixed term tenancy agreements

Issue

The RTA does not limit the period for which a fixed term tenancy agreement runs.

While some tenants prefer a fixed term tenancy agreement for the certainty that it provides, there are other tenants who want to remain in premises for longer than the six or 12 months that is offered, yet cannot have certainty beyond the currency of their fixed term.

Shorter fixed term tenancy agreements shift the power advantage to the lessor. A tenant can never be assured of tenure at the premises beyond the end of the fixed term period because a lessor can simply choose not to renew the tenancy agreement. This can have the effect of making tenants reluctant to enforce their rights, such as asking for repairs to the premises.

Objective

To improve security of tenure for tenants through longer term tenancy agreements.

Discussion

The RTA currently provides for two types of residential tenancy agreements; fixed term and periodic. A fixed term tenancy is an agreement which allows a tenant to rent the premises for a set period with a specific start and finish date. A periodic agreement has a start date but no end date. It continues on with the same terms and conditions until either the tenant or the lessor gives the appropriate notice to end it.

Despite the RTA not limiting the period that a fixed term tenancy may operate as mentioned above, lessors in Western Australia predominantly offer fixed term tenancy agreements of six or 12 months duration.[46] In consultation discussions with key stakeholders when asked about why only six and 12 month tenancy agreements are offered, responses included:

- we have always done it this way; or
- we can test the tenant's conduct during this shorter period and it is easier to terminate the tenancy if the tenant is not suitable.

Data from the Bond Administrator indicates that the average length of a tenancy in Western Australia at present is 24 months. This suggests that there appears to be a substantial proportion of tenants seeking to live in premises well beyond a six or 12 month fixed term.

[46] AHURI research noted that in 2011, 94% of fixed term tenancies were for 12 months or less, https://www.ahuri.edu.au/policy/ahuri-briefs/which-state-has-the-longest-rental-leases-in-Australia ; see also CHOICE *Unsettled: Life in Australia's private rental market* February 2017, 8.

While all Australian states and territories have both fixed term and periodic tenancy agreements, no state or territory requires a minimum period for a fixed term tenancy, and there are no limits placed upon when a fixed term tenancy can be offered.

All jurisdictions require a lessor and/or tenant to give the other party a minimum period notice if they are not going to renew a fixed term tenancy agreement or to allow it to roll over into a periodic agreement. The notice periods vary between jurisdictions. These are set out in Table 1 below.

Table 1: Required period of notice for termination of fixed term tenancies

	Period of notice	
	Tenant	Lessor
ACT[47]	3 weeks' notice	A lessor is not able to terminate a fixed term tenancy agreement unless they have specific grounds as set out in the Act.
NSW[48]	14 days' notice	30 days' notice
NT[49]	14 days' notice	14 days' notice
QLD[50]	14 days' notice	2 months' notice
SA[51]	28 days' notice	28 days' notice
TAS[52]	14 days' notice	between 42 and 60 days' notice
VIC[53]	28 days' notice	60 days' notice if the tenancy was less than six months; 90 days if the lease was between six months and five years; 120 days' notice if the tenancy was greater than five years.
WA	30 days' notice	30 days' notice

Internationally, most jurisdictions allow for both fixed and periodic agreements. However, from December 2017, fixed term tenancies are no longer used in Scotland,[54] and in Germany, a fixed term tenancy can only be used in three circumstances:

- where the lessor or a member of the lessor's family intends to use the premises as his or her own principle residence at a certain point in time;[55]

[47] *Residential Tenancies Act 1997* (ACT), schedule 1.
[48] *Residential Tenancies Act 2010* (NSW) section 84 for lessor notice and section 96 for tenant notice.
[49] *Residential Tenancies Act 1999* (NT) section 90 for lessor notice and section 95 for tenant notice.
[50] *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) section 329(k) for lessor notice and section 331(2)(g) for notice by a tenant.
[51] *Residential Tenancies Act 1995* (SA) section 83A for notice by a lessor and section 86A for notice by a tenant.
[52] *Residential Tenancies Act 1997* (TAS) section 42.
[53] *Residential Tenancies Agreement 1997* (VIC) section 261.
[54] https://www.gov.scot/policies/private-renting/private-tenancy-reform/
[55] For example, where the lessor is travelling for 12 months and wants to lease out their home for this period only.

- where the lessor intends to substantially renovate the premises or demolish them at a certain point in time; or
- where the tenancy is being used by the lessor's employee.[56]

New Zealand has considered whether fixed term tenancies should be allowed as part of their recent review of their residential tenancies legislation. The review noted that if "no grounds" terminations are prohibited, lessors may use short fixed-term tenancy agreements as an alternative form of ending a tenant's tenancy.[57]

Longer fixed term tenancies

In NSW and Victoria amendments to tenancy laws have been made to incentivise greater use of longer term tenancy agreements.

In NSW,[58] where a tenancy agreement is longer than 20 years, the lessor and tenant may contract out of some provisions of the Act, such as responsibility for repairs and maintenance, and may add in additional terms. The only terms of the Act that cannot be contracted out of in relation to a long term lease are:

- any term relating to the payment of rates, taxes and charges by the lessor;
- the prohibition against more than one rent increase a year; and
- any right under the Act to make an application to the Tribunal.

Amendments made in Victoria in 2017 mean that fixed term residential tenancy agreements of more than five years are now subject to the *Residential Tenancies Act 1997* (Vic). Special terms apply to these long term agreements. These are:

- the lessor can ask the tenant to top up the bond after five years;
- the rent can be increased once every 12 months, with the date and amount of rent increase included in the lease agreement, based on a fixed dollar amount or fixed percentage, the Consumer Price Index (CPI) or the Statewide Rent Index (SRI);
- lessors and tenants can agree to certain modifications up front and include these in the agreement;
- the lessor can inspect the property once every 12 months; and
- if a tenant wishes to break the lease, the lessor can request one month's rent for every full year remaining on the lease (capped at six years).

Mandating minimum longer terms for fixed term leases could also be considered. While this has not yet been implemented in Australia for residential tenancies, as noted above, other states and territories have introduced measures to generate longer term

[56] Julia Cornelius and Joanna Rzeznik, "National Report for Germany" *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*, 128.
[57] https://www.hud.govt.nz/news-and-resources/consultations/consultation-reform-of-the-residential-tenancies-act-1986/
[58] *Residential Tenancies Act 2010*, section 20.

tenancy agreements. This has been implemented for other types of occupation agreements in Australia such as those under the *Residential (Land Lease) Communities Act 2013* (NSW) where a minimum fixed term of 3 years is mandated[59] and those under the *Residential Tenancies Act 1997* (Vic) where a site only agreement in a residential park must be for a minimum of five years.[60]

Looking internationally, it has been reported that not many jurisdictions mandate the use of long fixed term tenancy agreements.[61] Of those that do, Belgium requires a nine year fixed term lease whereas Spain requires a three year lease.[62] In both of these examples any modification of rights and obligations existing under these longer fixed term leases is generally favourable to tenants.[63]

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. Lessors and tenants would continue to be able to enter into both fixed and periodic tenancy agreements in all circumstances.

Option B – Use of fixed term agreements prohibited in all circumstances

Under this option, only open ended, periodic tenancies would be allowed under the RTA. This would only be effective if no grounds terminations were removed from the RTA so that a lessor could not just terminate a periodic tenancy at will; rather a lessor would have to have one of the specified grounds prescribed within the RTA to terminate the tenancy. The grounds for termination of a tenancy agreement would be amended in consultation with stakeholders so that there are adequate grounds available to lessors and tenants to terminate the tenancy in appropriate circumstances (for example the lessor needs to move back into the premises) and so that the notice periods themselves are appropriate. By removing the ability of a lessor to choose not to renew an agreement, and by allowing for terminations in specified circumstances, the tenant will have greater certainty that the tenancy should be available to them for as long as they need it and as long as they are complying with their obligations under the Act.

[59] *Residential (Land Lease) Communities Act 2013* (NSW), s.31.
[60] *Residential Tenancies Act 1997* (Vic), s206H.
[61] Chris Martin, "Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Term Agreements" (2018) 7 *Property Law Review* 184, 185.
[62] Ibid.
[63] Ibid.

Option C - Fixed term tenancies permitted in only limited circumstances

Under this option, fixed term tenancies would only be permitted in circumstances where the premises are genuinely only available for a limited period of time; for example, if the premises are the lessor's primary residence and the lessor chooses to lease the premises while they are travelling or living elsewhere for a known period, where the lessor intends to demolish or substantially renovate the premises at a certain point in time, or where the tenancy is linked to an employment contract.

As per Option B, the RTA would be amended in consultation with key stakeholders to develop appropriate grounds and timeframes for termination of the other periodic tenancies.

Option D – Fixed term tenancies permitted, with tenants entitled to an option to renew for a total minimum period of five years

Under this option, fixed term tenancies would be permitted, however tenants who are granted a fixed term tenancy agreement of less than five years would be entitled under the RTA to an option to renew, for a total period of at least five years. A tenant would not be obliged to exercise the option if they did not want to, however would be required to give notice to the lessor of their intentions. The notice period would be developed in consultation with stakeholders. The introduction of trial periods, for example, an initial 6 month tenancy which the lessor is not under obligation to renew, could result in an increased risk to tenants' security of tenure.

Option E – Amend the RTA to incentivise the use of longer fixed term agreements

Under this option, the RTA would be amended to incentivise the use of longer fixed term agreements by allowing lessors and tenants to contract out of some provisions of the Act, such as responsibility for repairs and maintenance, and add in additional terms. The terms that could be contracted out of, and those that may be added in, would be prescribed in the legislation and determined in consultation with stakeholders.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • Status quo maintained. • No additional costs of compliance. **Tenants** • Status quo maintained. **Government** • No change.	**Lessors** • Shorter fixed term tenancies continue. **Tenants** • No improved security of tenure. **Government** • No change.
Option B – Fixed term tenancy agreements prohibited	**Lessors** • Lessors can still terminate the tenancy agreement in appropriate circumstances **Tenants** • Improved security of tenure. • Flexibility of tenure driven by tenants' needs. • Tenants may have greater confidence to enforce rights under the RTA. **Government** • Reduced impost on public housing.	**Lessors** • Lessors have less certainty about length of tenancy agreement and rental income. • Lessors lose opportunity to choose not to renew agreement. **Tenants** • Decreased flexibility for tenants who prefer fixed term agreements. **Government** • None discernible.
Option C – Fixed term tenancy agreements permitted in only limited circumstances	**Lessors** • Lessors retain flexibility to use fixed term in prescribed circumstances. **Tenants** • Improved security of tenure. • Increased transparency up front about any limited availability of the premises. **Government** • Reduced impost on public housing.	**Lessors** • Lessors lose opportunity to choose not to renew agreement unless for prescribed circumstances. **Tenants** • None discernible. **Government** • None discernible.

Option D – Fixed term tenancies permitted, with tenants having a statutory right to an option to renew for a total period of at least five years	**Lessors** • Preserves certainty of length of tenure for lessors. **Tenants** • Improved security of tenure for tenants. • Retains flexibility in length of tenure for tenants. • Increase in tenant confidence to enforce their rights under the RTA. **Government** • Reduced impost on public housing.	**Lessors** • May limit a lessor's flexibility in the use of the premises for the option period. • Limits flexibility in choosing not to renew a tenancy agreement. **Tenants** • Continued risk to security of tenure if trial periods were introduced (i.e. where a lessor could choose not to renew after initial 6 month term). **Government** • None discernible.
Option E – Incentivise longer fixed term agreements	**Lessors** • Retains flexibility in the market for the use of fixed term or periodic tenancy agreements in marketplace. **Tenants** • Improved security of tenure for tenants. • Retains flexibility in the market. **Government** • Reduced impost on public housing.	**Lessors** • None discernible. **Tenants** • Vulnerable tenants may be impacted by contracting out. **Government** • None discernible.

Questions

7. Which option do you prefer and why?

8. Can you think of other ways to address this issue? Please provide as much detail as possible.

9. What do you think would be the cost implications of the different options? Please provide as much information if possible.

10.	*If Option D is pursued, for how many years should the option to renew the agreement apply? For example, three years, five years? Should there be an initial trial period if this option was pursued?*

3. Before the tenancy begins

Before a tenancy begins, a number of key steps are taken by the parties, including:

- the lessor advertises the premises for rent;
- applicants lodge an application, supplying information requested by the lessor and potentially paying an option fee to the lessor for each application;
- the lessor assesses the applications and possibly conducts tenant and credit reference checks;
- the lessor informs the successful applicant; and
- if the successful applicant accepts, the necessary steps are taken to enter into a binding tenancy agreement.

Only some of the elements of these steps are regulated under current law, and only to a limited extent:

- Under the Australian Consumer Law, a lessor must not make representations, or fail to disclose relevant information in trade or commerce, that is misleading or deceptive or is likely to mislead or deceive.[64]
- The RTA regulates the amount of an "option fee" that may be required and how that option fee is to be treated.[65]
- The RTA regulates the checking of a tenant's rental history on a residential tenancy database.[66]
- If the premises are managed by a real estate agency (property manager) and the agency has an annual turnover of $3 million or more, the *Privacy Act 1988* (Cth) will apply. The Privacy Act stipulates that a "real estate agent can only collect personal information that is reasonably necessary for one of their functions or activities. A real estate agent is not allowed to collect more information than is necessary because it is convenient or they think it may be useful in the future."[67]
- The Equal Opportunity Act 1984 (WA) prohibits a lessor from discriminating against a prospective tenant on a range of grounds in the advertising of the property, in deciding who to lease the premises to, and in any conditions that may be added to the residential tenancy agreement.
- Common law contract law and the RTA[68] governs the formation of the contract.

Importantly, the remaining elements of the process are not regulated. For example, the RTA does not regulate the questions that can be asked of a prospective tenant or the information they can be asked to supply. Nor is there protection for the prospective

[64] *Australian Consumer Law (WA)* sections 29 and 30.
[65] *Residential Tenancies Act 1987* section 27(2)(a).
[66] Ibid, Part VIA.
[67] https://www.oaic.gov.au/privacy/your-privacy-rights/tenancy/
[68] Ibid, section 27A.

tenant's privacy and the handling of their personal information once that information is handed to a lessor.[69]

The purpose of this chapter is to look at key steps that happen before a tenancy begins and consider whether there is a need to amend the RTA to regulate these processes.

3.1. Regulating the tenancy application process

The application process is not currently regulated under the RTA. Consumer Protection has, over the years, received enquiries and concerns from prospective tenants about the type of information that is being asked of them at the application stage. For example, in the first half of 2019, Consumer Protection received 14 calls from tenants enquiring about such matters as whether a lessor can access their credit report, ask for bank statements or access a copy of a residency visa. During the same period, Consumer Protection received eight calls from landlords wanting to know if they could require an applicant to provide a police clearance certificate or whether they needed to include a privacy statement in the application form. Consumer Protection is not aware of any concerns having been raised about improper use of personal data or improper disposal of personal information. However, with identity theft and similar issues being of national concern, it is reasonable to canvass whether there is a need to regulate the collection of personal data from rental applicants and the subsequent use, storage and destruction of that information.

Issue

Whether the application process should be regulated under the RTA.

Objective

To ensure that a tenant's privacy is protected while not impacting on the ability of a lessor to obtain information to make a proper assessment of the tenant's suitability.

Discussion

The types of information a lessor can ask for and evidence they can require a tenant to provide can vary. In general, it is understood that prospective tenants are asked for the following:

- details of income, including copies of pay statements;
- bank account details, sometimes including copies of recent bank statements;
- previous rental history;
- employment details and history; and
- references, often including from an employer.

[69] An exception to this could occur if a property manager has been appointed to lease the premises and the property manager's employer is of a sufficient size as to be captured by the *Privacy Act 1988* (Cwth).

Tenants will also be asked to provide 100 points of identification documents and some lessors ask a prospective tenant for a National Police Clearance certificate.

In providing initial feedback to the review of the RTA, industry stakeholders have suggested that tenants should be required to disclose at the application stage:

- whether the applicant is subject to a bankruptcy order;
- previous terminations of tenancy agreements by lessors for non-payment of rent;
- previous terminations by the applicant for breaking a lease; and
- previous terminations by lessors for reasons other than non-payment of rent.

At any given time a lessor may receive an application from more than one prospective tenant. This means that a lessor will have in their possession quite detailed personal information about individuals, with no rules applying as to what purpose that information can be used for, or as to how the information should be stored, and then subsequently disposed of.[70]

Other jurisdictions

No other Australian jurisdiction currently regulates the information a lessor can seek from a prospective tenant nor how the information should be used, held or disposed of.

In the recently completed review of the residential tenancy laws in Victoria, one of the reforms identified is that "inappropriate questions in a residential rental application form will be able to be prohibited through regulations, should certain types of questions become problematic in the Victorian market in the future".[71] Consultation is currently occurring in Victoria around prohibited terms, including that the lessor must not ask the following questions:

- whether the applicant has previously taken legal action or has had a dispute with a lessor or residential park operator;
- the rental applicant's rental bond history including whether the applicant has ever had a claim made on their bond;
- a passport, if alternative proof of identification is provided;
- a statement from a credit or bank account which has not been redacted; and
- details of the rental applicant's nationality or residency status, if this information is not required to assess eligibility for public housing or community housing.

[70] The *Privacy Act 1988* (Cwth) does not apply to individual lessors and only applies to property managers if the annual turnover of the real estate business is $3 million or greater.
[71] Victorian *Review of the Residential Tenancies Act 1997*, Reform 8 (https://engage.vic.gov.au/fairersaferhousing) accessed 18 October 2019.

Another reform proposed in Victoria is prohibiting all lessors from misusing information received in a rental application.

Proposed change

As outlined above, the RTA does not currently prescribe the information that can be asked of a prospective tenant or how this information is used, stored or disposed of by lessors or property managers. There are gaps in existing protections which leave tenants vulnerable to their confidential information being improperly used, stored or disposed of. In light of this, it is proposed that the RTA be amended to prohibit certain information being required from a prospective tenant and to introduce regulation in relation to the use, storage and disposal of information such as:

- prohibiting any information provided by the prospective tenant being used for any purpose other than assessing the person's rental application;
- prohibiting the information being passed to a third party unrelated to the tenancy agreement; and
- requiring that any information received by a lessor from any applicant be held in a secure manner and if disposed of, that it be disposed of in a secure manner.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

11. *As a tenant, have you been asked for information that you felt was inappropriate? Tell us what you were asked for and why you thought it was inappropriate.*

12. *As a lessor, is there certain information that you must have access to allow you to make an informed decision about an applicant tenant? If so, what information must you have access to and why?*

13. *Are there other ways to address this issue? Please outline your suggestion with as much detail as possible.*

14.	*As a lessor, what costs do you think you would incur? Please provide as much information if possible.*
15.	*Which third parties, if any, does a lessor need to be able to pass on information about prospective tenants and for what purpose?*

3.2. Lessor disclosure

Issue

A recent report by the Consumer Policy Research Centre (CPRC) found that most tenants are unable to access the information they need about the lessor and the premises they are seeking to rent.[72] The CPRC identified one of the key policy challenges for governments is improving information disclosure for tenants, in particular, information about the quality of the lessor offering the premises for rent.[73]

Objective

To ensure tenants have timely access to appropriate information about the lessor and premises to inform their decision making.

Discussion

As can be seen from the discussion in the previous section, a lessor can and does ask a prospective tenant for a comprehensive package of information in order to assist their assessment of the applicant's suitability as a future tenant. Most lessors, through their property managers, also have access to historical data about tenants in the form of tenancy databases.

Prospective tenants, by contrast, do not have access to the same type of information about a prospective lessor or property manager.

It is acknowledged that there are some elements of a property that can be ascertained by a tenant during an inspection of the premises. Other factors, however, cannot be ascertained so readily, or they relate to behaviours or decisions by a lessor that can only be discovered if a lessor discloses them to a tenant. Some examples include:

- if a lessor intends to sell the premises in six months' time, but does not disclose this to a prospective tenant in advance for fear that they will not find a tenant who wants to take on a short lease – even if the tenant has a fixed term tenancy agreement and therefore cannot be evicted to allow a sale with vacant possession, they may still have to endure frequent home opens until the property sells;

[72] Consumer Policy Research Centre *The Renters Journey*, 3 accessed at https://cprc.org.au/wp-content/uploads/The-Renters-Journey_Full-Report_FINAL_13Jun2019.pdf
[73] Ibid, 4.

- if the lessor is experiencing financial hardship and it is possible that a mortgagee will take action to repossess the premises in the foreseeable future;
- whether or not the premises are insulated, a factor that may have a significant impact on the running costs of the premises;
- whether the lessor has responded to requests from previous tenants to perform repairs on the premises or whether the lessor has a history of not performing repairs;
- whether the premises have previously housed a drug lab or if there has been other drug history at the premises; and
- whether there has been criminal activity at the premises previously that may leave a future tenant vulnerable.

Other jurisdictions

As part of the recent reforms in Victoria, a lessor will now be required to disclose the following information to a prospective tenant before entering into a tenancy agreement:

- any ongoing proposal to sell the property;
- any ongoing mortgagee action to repossess the property;
- that the lessor has a legal right to let the property (if the lessor is not the property owner);
- details of any embedded electricity network; and
- any other prescribed matters, such as the presence of asbestos.[74]

Victoria is also implementing a new Rental Non-compliance Register for lessors and agents that will enable tenants to identify those lessors who have previously breached their obligations under their respective residential tenancy laws.[75]

In NSW, a lessor is prohibited from inducing a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the lessor knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed by the regulations, and must disclose to a tenant:

- any action to sell the premises if the lessor has prepared a contract for sale of the residential premises; or
- that a mortgagee is taking action for possession of the residential premises, if the mortgagee has commenced proceedings in a court to enforce a mortgage over the premises.[76]

In South Australia, a lessor must ensure that a prospective tenant is advised, before entering into a residential tenancy agreement, if the lessor has advertised, or intends to advertise, the residential premises for sale and of any existing sales agency agreement for the sale of the residential premises.[77]

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[74] Above n 80.
[75] Ibid.
[76] *Residential Tenancies Act 2010* (NSW) section 26.
[77] *Residential Tenancies Act 1995* (SA), section 47A.

In the ACT, the requirement for mandatory disclosure relates to the energy efficiency rating of the premises. In any advertisement of the premises for rent, the advertisement must include details of any existing energy efficiency rating for the premises or if an assessment has not been conducted, the fact that the premises have not yet been assessed.[78] In addition, a lessor must provide a tenant with an asbestos assessment report or asbestos advice, whichever is available for the premises.[79] If the premises are defined as crisis accommodation premises, the lessor must also give a prospective tenant information about the timeframe for notice of termination from the premises.[80]

The remaining jurisdictions require a prospective tenant to be given a standard information sheet about their rights and obligations under the Act, but this information does not extend to include any information about the specific premises or the lessor or their agent.

The Australian Consumer Law

The ACL prohibits any person, in commerce or trade, from making representations, or alternatively failing to disclose relevant information, that is misleading or deceptive or is likely to mislead or deceive.[81] This applies to real estate agents and property managers and while this can apply to lessors, it can be difficult to establish that the renting was done in trade or commerce, particularly if the lessor is renting out their principal home for a period of time while they are residing elsewhere.

The Real Estate and Business Agents and Sales Representatives Code of Conduct 2016

Where premises are managed by a registered property manager, the *Real Estate and Business Agents and Sales Representatives Code of Conduct 2016* (WA) (the REBA Code) will apply to the leasing transaction. Clause 42 of the REBA Code requires a property manager to ascertain and verify all facts that are material to the transaction and to communicate a material fact to any person who may be affected by the material fact and yet appears to be unaware of it. Some of the facts it would be reasonable for a property manager to disclose to an applicant tenant, if known, include if the lessor intends to sell the premises in the foreseeable future, if a murder or other serious crime has occurred in the premises and if the premises are contaminated by drug residue.

The REBA Code does not apply to premises leased and managed directly by a lessor.

[78] *Residential Tenancies Act 1997* (ACT) section 11A.
[79] Ibid, section 12.
[80] Ibid.
[81] *Australian Consumer Law (WA)* sections 29 and 30.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. The ACL and the REBA Code will continue to apply.

Option B – Mandatory disclosure about the premises

Amend the RTA to require a lessor to disclose to any prospective tenant information that is material to their decision to lease the premises. The items to be subject to mandatory disclosure would be developed in consultation with key stakeholders but the mandatory disclosure requirements in other jurisdictions will provide guidance.

Option C – Mandatory disclosure about the premises and database of lessor non-compliance

As per Option B. In addition, as is proposed in Victoria, Consumer Protection could establish a database to record substantiated instances of non-compliance with the RTA by lessors. This information would likely be similar to information currently available about tenants on a tenancy database. As outlined in Chapter 10.2, developing a register of lessors is also being considered by this review. If this proposal to require all lessors to register or as a minimum a register of those lessors who have been found to be non-compliant through civil or prosecution action with Consumer Protection is pursued, this register could hold the information about lessor non-compliance under the RTA.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • No change of practice required. **Tenants** • None discernible. **Government** • None discernible.	**Lessors** • None discernible **Tenants** • Tenants continue to lack access to important information. **Government** • None discernible.

Option B – Mandatory disclosure about the premises	**Lessors** • May incentivise lessors to improve compliance with the RTA. **Tenants** • Better access to information for tenants. • Tenants can make better informed decisions about suitability of premises to meet their needs. **Government** • Potential for less disputes between lessors and tenants.	**Lessors** • Initial costs for lessors in preparing disclosure material. • Loss of potential earning capacity **Tenants** • Any increased cost to lessors may be passed on to tenants in the form of increased rents. **Government** • None discernible.
Option C – Mandatory disclosure about the premises and a database of lessor non-compliance	**Lessors** • Database may incentivise lessors to improve compliance with the RTA. **Tenants** • Better access to information for tenants. • Tenants can make better informed decisions about suitability of premises to meet their needs. **Government** • Improves available data on non-compliance.	**Lessors** • Initial costs for lessors in preparing disclosure material. • Loss of potential earning capacity **Tenants** • Any increased cost to lessors may be passed on to tenants in the form of increased rents. **Government** • Significant cost to Government in establishing and maintaining a database.

Questions

16. Which option do you prefer and why?

17. Are there other ways to address this issue? Please outline your suggestion with as much detail as possible.

18. What do you think would be the cost implications of the different options? Please provide as much information if possible.

19. *If mandatory disclosure regarding the premises is pursued, what information should a lessor be required to disclose? For example, energy efficiency of the home, intended sale, presence of asbestos? Please give reasons for your answers.*

20. *Are there other matters which arise during the tenancy that should be disclosed? If so, what are they and what should be disclosed to a tenant?*

4. Rents, bonds and other charges

Section 27 of the RTA currently restricts payments a lessor can receive from a tenant for or in relation to a residential tenancy agreement including:

- rent;
- bond;
- option fee; and
- other amounts permitted under the Act (at present this is limited to payment for utilities that are in the lessor's name).

The purpose of this chapter is to explore whether there is any need to make changes to the current requirements.

4.1. Option fees

Issue

Option fees can act as a barrier to a tenant entering into a tenancy agreement, particularly if vacancy rates are low and there is high competition for most properties. History has shown that a tenant is often forced to make multiple applications at any given time in order to improve their chances at securing one of the properties. They also may have to pay multiple option fees. If they are unable to afford paying multiple option fees, this can impede or prevent a person securing a tenancy.

Objective

To ensure a lessor is compensated as a consequence of a prospective tenant deciding not to enter into a tenancy agreement and that such fees are not a barrier to renting.

Discussion

An option fee is an amount that a lessor can require from each applicant for rental premises at the time an application is lodged. The RTA describes the option fee as "consideration for an option to enter into a residential tenancy agreement". If an applicant is successful, the option fee must be refunded to the applicant or alternatively it can be applied as rent in advance. If an applicant is unsuccessful, the option fee must be refunded within seven days.[82] A lessor can only retain a part of the option fee if an applicant is successful and subsequently refuses to enter into a tenancy agreement for the premises. The lessor can only retain an amount equivalent to a loss the lessor has incurred as a consequence of the applicant's refusal to enter into a tenancy agreement. In 2013, the RTA was amended to regulate the amount of option fee a lessor can require from an applicant. Current amounts are outlined in Table 2 below:

[82] *Residential Tenancies Act 1987* (WA), section 27(2)(a).

Table 2: Option fee amounts

Option fee table based on location		
Weekly Rent of the Property	**Location of the Property**	
	Above 26th parallel*[83]	**Below 26th parallel***
$0 to $500	$50 maximum	$50 maximum
More than $500 and less than $1200	$100 maximum	$100 maximum
$1200 or more	$100 maximum	$1200 maximum

Since the introduction of limits on the option fee, industry stakeholders have stated that the new levels are inadequate. Industry stakeholders view the option fee as a tool to ensure that only serious applicants are lodging applications. However, this view confuses the purpose of the option fee. The purpose of the option fee is not to show a tenant's good faith in making an application and it is not to compensate the property manager or lessor for their time in sorting through numerous applications. As noted above, it is paid as consideration for an option to enter into a tenancy agreement, and if applicable, be used to compensate a lessor where the tenant does not proceed with entering into the tenant agreement.

Historically there was merit in having an option fee. In the past, lessors could only advertise their properties for lease in the newspaper and in Western Australia, this tended to occur on a Wednesday and again on the weekend. Therefore, if a successful applicant then refused to enter into a lease for the premises, it could be another week before a lessor could re-advertise the premises. This scenario arguably reflected a lost

[83] The 26th parallel is a line of latitude that is sometimes used in legislation to differentiate between the norther and southern parts of Western Australia. It is located within Shark Bay and runs across in a straight line to the South Australian/Northern Territory border.

opportunity cost for the lessor. Historically, lessors would seek an option fee of the equivalent of one weeks' rent as the option fee.

In 2019, advertising of rental properties is largely internet based. While option fees can be used to cover a loss incurred by a lessor where a successful applicant decides not to proceed with the tenancy, potential losses are to some extent offset by the benefits of advertising online.

In addition to this, there is the administrative cost of handling option fees. All option fees must be refunded to any unsuccessful applicant, either in cash or electronically. This means that the lessor must make arrangements to meet with the applicant in person to refund the option fee or ask for their bank account details to make the electronic transfer. If a property manager is used, the option fee must be deposited into the agent's trust account and a receipt issued before it is subsequently refunded. This contributes to costs for the property management, including costs associated with auditing the trust account. The property manager does not receive any interest that might be earned on the option fees while they are held in the trust account. This interest is paid to the Real Estate and Business Agents Interest Account.[84]

Other jurisdictions

Each jurisdiction has different regulations regarding option or holding fees. Some jurisdictions continue to allow for an option fee to be collected from each applicant, while many have shifted to allowing the collection of a holding fee from only one potential applicant at a time. (See Table 3 below).

Table 3: State and territory holding and option fees

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Option and holding fees prohibited	✓	✗	✓	✗	✗	✗	✗	✗
Single holding fee permitted	✗	✓	✗	✓	✗	✓	✗	✗
Option fee permitted	✗	✗	✗	✗	✓	✗	✗	✓
Good faith payment	✗	✗	✗	✗	✗	✗	✓	✗

[84] *Real Estate and Business Agents Act 1978* (WA), section 68B(1).

How a holding fee works

If a lessor offers a residential tenancy agreement to an applicant and the applicant tenant asks for time before making a decision on whether to accept the agreement, the lessor can ask the applicant to pay a holding fee. In the jurisdictions[85] that allow a lessor to ask for a holding fee, the amount of the holding fee is generally capped at no more than one week's rent.

The lessor and applicant tenant will negotiate and agree on a period of time that the premises will be held available for the applicant tenant . During this time, the lessor is not allowed to offer the premises to any other applicant. If the applicant tenant refuses to enter into a tenancy agreement, or does not get back to the lessor in that time, the holding fee or part of it may be forfeited to the lessor. If the applicant tenant proceeds with the tenancy agreement, the holding fee must be refunded to the tenant or credited towards the rent payable for the premises.

The key difference between a holding fee and an option fee therefore, is that a lessor may only receive one holding fee at a time, whereas a lessor may accept an option fee from all applicants for the premises.

The holding fee appears at face value to be beneficial in that it will not act as a barrier to tenants applying for premises, but still allows a lessor to manage against the risk of loss in the event an applicant tenant later chooses not to proceed with entering into the tenancy agreement. It will also significantly reduce the administrative burden for lessors and property managers as there will be far less payments to record, issue receipts for and provide refunds for.

Proposed change

Option fees currently act as a barrier for tenants in securing a rental property, particularly at times where the rental market is highly competitive and requires tenants to lodge multiple rental applications to secure a property.

It is proposed that the RTA be amended to prohibit a lessor from requiring applicants to pay an option fee. Instead it is proposed that a lessor be able to obtain a holding fee from a tenant whose application has been assessed and who has been offered a tenancy agreement for the premises. The amendment will also prohibit a lessor who has received a holding fee from entering into a tenancy agreement with another person for the period covered by the holding fee.

This proposal is unlikely to have a significant impact on stakeholders as opposed to the alternative option of prohibiting all option and holding fees. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides evidence of unintended consequences from this course of action.

[85] New South Wales, Queensland and Tasmania currently permit lessors to request a holding fee.

Questions

21. Are there other ways to address this issue? Please outline your suggestion with as much detail as possible.

22. If a single holding fee is permitted, what should be the maximum holding fee that a lessor could require from a tenant? For example, is it reasonable that the maximum holding fee be equivalent to one week's rent?

4.2. Amount of security bond

Issue

A security bond is a payment made in advance by a tenant to cover the costs for which they may be liable at the end of the tenancy, such as for damage, outstanding water usage or unpaid rent. It is appropriate, given the changing nature of the tenancy market, to again consider whether to increase the maximum amount of security bond that a lessor may require from a tenant.

Objective

To determine a level of security bond that appropriately protects a lessor's interests in recovering compensation for damage to premises while ensuring it is not unduly burdensome on prospective tenants.

Discussion

The RTA currently allows a lessor to receive up to four weeks' rent as a security bond, plus an additional amount of $260 as a pet bond,[86] unless the weekly rent for the premises is greater than $1200 per week, in which case the amount of bond is not limited.[87]

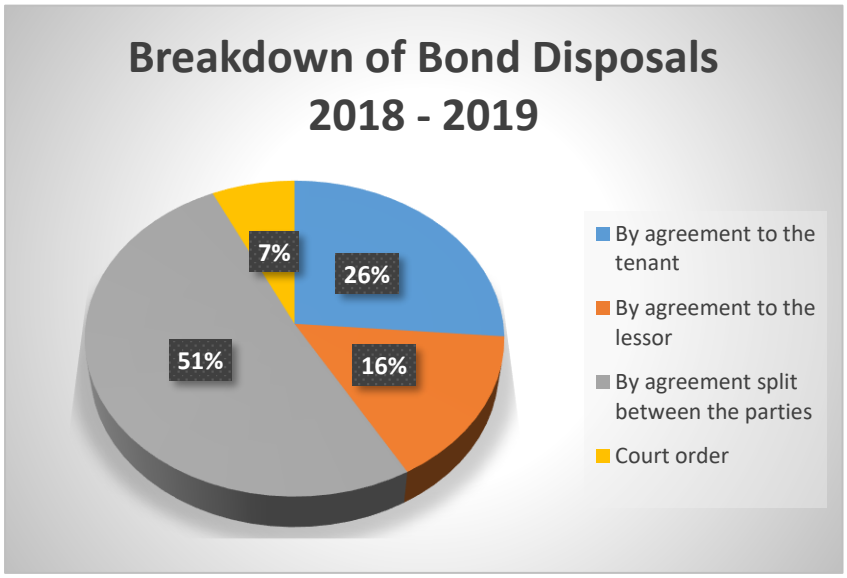
The limit of four weeks' rent as a security bond has not changed since the RTA commenced. The question as to whether there should be an increase in the cap on a security bond was considered as part of the last statutory review of the RTA. It was found at that time that any increase would likely act as a further barrier to tenants entering the tenancy market and a decision was made not to increase the cap on bonds.

[86] This is a one off payment irrespective of how many pets the tenant is permitted to keep at the premises (*Residential Tenancies Act 1987* (WA), section 29).
[87] *Residential Tenancies Act 1987* (WA), section 29.

In considering whether the current amount of security bond is appropriate, data from the Bond Administrator was analysed in relation to who receives the bond at the end of the tenancy agreement.

As can be seen from Chart 1 below, in the 2018-19 financial year, 93 percent of bond disposals were made by way of joint agreement between the parties. Split payments between the lessor and tenant represented the most frequent outcome, at 51 percent of disposals of security bond. Based on the bond data, the average amount paid to the lessor was $423 while the average refund to the tenant was $1203. The next largest proportion was the payout of the full bond to the tenant. The previous financial year demonstrated similar figures.

Chart 1: Breakdown of bond disposals for 2018-2019



This data suggests that in the majority of instances (77 percent of bond disposals), the current amount of bond was more than adequate to compensate the lessor for any amounts owing to them. Where serious damage has occurred to the rental premises which exceeds the security bond, additional funds may have passed between the lessor and tenant by mutual agreement to cover these additional costs.

The law relating to security bonds in the other states and territories is set out in Table 4 below. All jurisdictions except South Australia limit the amount of security bond that can be required from a tenant to the equivalent of four weeks' rent.

Table 4: State and territory required security bond

	Maximum amount of security bond
ACT[88]	Equivalent of 4 weeks' rent
NSW[89]	Equivalent of 4 weeks' rent
NT[90]	Equivalent of 4 weeks' rent
QLD[91]	Equivalent of 4 weeks' rent
SA[92]	Where the rent is up to $250 per week, equivalent of 4 weeks' rent; Otherwise equivalent of 6 weeks' rent.
TAS[93]	Equivalent of 4 weeks' rent
VIC[94]	Equivalent of 4 weeks' rent
WA[95]	Equivalent of 4 weeks' rent

Proposal

The monetary limits on security bonds in Western Australia is consistent with other states and territories. Data from the Bond Administrator indicates that the current levels of security bond provide adequate compensation for the majority of lessors.

Where serious property damage has occurred that is not able to be covered by the security bond, lessors have other available measures including landlord insurance to compensate for any additional costs. This review is also considering prescribing a penalty for wilful damage in the RTA (as detailed in Chapter 5.7) to assist lessors in seeking compensation in these circumstances.

Consumer Protection is therefore proposing to retain the current provisions in the RTA for the level of security bond unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

[88] *Residential Tenancies Act 1997* (ACT) section 20.
[89] *Residential Tenancies Act 2010* (NSW) section 159.
[90] *Residential Tenancies Agreement 1999* (NT) section 29.
[91] *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) section 112.
[92] *Residential Tenancies Agreement 1997* (SA) section 61.
[93] *Residential Tenancy Act 1997* (TAS) section 25(4).
[94] *Residential Tenancies Act 1997* (VIC) section 31.
[95] *Residential Tenancies Act 1987* (WA) section 29.

Questions

23. Do you agree with this proposal? Why or why not?

24. Have you had multiple circumstances where the level of security bond was not sufficient? Please tell us your experience.

25. Is there alternative evidence to support an increase in the amount of security bond? If so, please provide this.

4.3. Bond guarantees and alternative bond products

Issue

In recent years, some private companies have sought to offer bond guarantees as an alternative to a tenant paying a security bond up front. Providers of such products state it will free up tenants' money which would otherwise be 'locked away' in bonds, while still offering similar protections to lessors. These providers suggest that, with their products, tenants can use their money for other things they want. Although bond guarantees may reduce barriers to entry into the rental market for those tenants who are unable to afford up front lump sum payments, providers impose considerable restrictions on eligibility. Common restrictions imposed on tenants by these providers include:

- good credit history;
- must not have been subject to a successful claim against their bond in the previous two years;
- must not be listed on a tenancy database; and
- that they are not bankrupt.

Objective

To determine the appropriate laws to apply to the payment of security bonds.

Discussion

How a bond guarantee works

In exchange for a monthly or annual fee,[96] the company will provide a guarantee of the bond to the lessor. If, at the end of the tenancy agreement, the lessor makes a valid claim against the bond guarantee, the company will pay the amount of the claim, up to the level the security bond would have been, and then in most instances, will seek to recover this amount from the tenant. If the lessor's claim is greater than the amount covered by the guarantee, the lessor will need to take separate action against

[96] Monthly or annual fees are usually determined as a percentage of the annual rent for the premises or a percentage of what the traditional bond would have been.

the tenant to recover that amount. This is similar to action a lessor would take to recover an amount owing that exceeds a traditional bond.

These products are being promoted to tenants as freeing up their cash capital; that rather than having their lump sum security bond sitting with the Bond Administrator for the term of the tenancy, they could have access to and use that cash now by instead paying a monthly premium. It is also argued that the bond guarantee reduces the cost of renting, by eliminating one of the large upfront payments that tenants are currently required to make.

Why the bond guarantee products are currently unlawful

In 2018 all Australian states and territories wrote to key providers of bond guarantee products to inform them that the respective regulators are of the view these products are currently in breach of the respective residential tenancy law in their jurisdiction. That is because the premium paid by a tenant to the company is technically a bond under the current law. As the payment falls within the definition of a bond, the company is obliged to deposit the premium with the respective Bond Administrator.[97] The business model, however, of these bond guarantee products is prefaced on the company retaining the premium.

Potential issues in relation to bond guarantee products include:

- Tenants may end up paying more than they would if they had deposited their bond with the bond administrator – if a tenant pays a premium to the company and the lessor makes a successful claim against the guarantee, the company will in most instances seek to recover this amount from the tenant. This means that a tenant will have paid a premium plus the bond.
- Long term tenants may end up paying more than the security bond – the terms and conditions of bond guarantees generally require that a tenant pay an annual premium. This is generally calculated as a percentage of what the security bond would have ordinarily been for the premises. If a tenant, for example, were to pay 12.5% of the security bond value as their annual premium, after eight years, the tenant will have paid more than the original security bond and they will never receive this money back. This holds true even if an individual moves between premises.
- Lessors may be left exposed – a tenant is required to renew their bond guarantee annually. If a tenant does not renew their bond, the tenancy will cease to be covered. While this would result in the tenant being in breach of their tenancy agreement and trigger the lessor to being able to commence breach and ultimately terminate proceedings, this can be costly and the lessor may not be covered by the guarantee in the meantime. By contrast, once a tenant's security bond is lodged with a bond administrator, it cannot be withdrawn except by the consent of all parties or with a court order. The

[97] Footnote required.

lessor is therefore covered to the amount of the security bond for the duration of the tenancy agreement.

- Less funds in the Rental Accommodation Account (the RAA) – if tenants start to use bond guarantees, this will result in less security bonds being deposited in the RAA which will have a negative impact on revenue available to fund core functions including dispute resolution, education and advocacy of the tenancy network and Consumer Protection's role in compliance and administration the RTA. If revenue is not available from the RAA, it will need to be obtained from another source.

Other jurisdictions

In 2018, a legislative amendment was introduced in the ACT to make it unlawful to enter into a bond guarantee contract if the contract has not previously been approved by the Commissioner.[98] No guarantee contracts have been approved to date.

Proposal

Bond guarantee products do not result in beneficial outcomes for lessors or tenants and are currently considered unlawful in all states and territories. Although bond guarantee products may reduce upfront costs to tenants, in the longer term, tenants may be liable for greater costs than the original security bond due to providers retaining a premium. It is proposed to retain the current prohibition on bond guarantee products in the RTA.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

26. *Do you agree with this proposal to not allow bond guarantee products? Why or why not?*

27. *Have you, as a lessor or tenant, used a bond guarantee previously? If so, please tell us of your experience.*

[98] *Residential Tenancies Act 1997*, section 16.

4.4. Frequency of rent increases

As the experience of renting is shifting to more long term tenancies, this review is considering whether it is appropriate for the RTA to continue to allow rent increases every six months. Western Australia is out of step with many other Australian states and territories which have moved to increase the interval allowed for rent increases.

Objective

To ensure the frequency of rent increases is not excessive for tenants, while maintaining the flexibility for lessors to adequately recover costs and make a reasonable return on their investment.

Discussion

Currently the RTA allows for rents to be increased every six months provided that:

- The tenant is given at least 60 days' notice of the increase; and
- In the case of a fixed term tenancy agreement, the agreement specifies the amount of the increase or a method of calculating the agreement.

If a lessor proposes to increase the rent after renegotiating a lease with the same tenants at the same premises, the rent increase cannot commence until 30 days after the commencement of the new agreement. This provision was introduced in 2013 to prevent lessors from avoiding the requirements under the RTA through using a series of fixed term agreements of less than six months duration each and increasing the rent at the commencement of each new agreement.

The law in relation to when rents can be increased varies across all states and territories. Table 4 below illustrates the frequency in relation to periodic agreements. .

Table 4: Allowable rent increases for periodic agreements

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
	PERIODIC AGREEMENTS							
12 monthly intervals with 60 days' (8 weeks') notice	✓	✗	✗	✗	✓	✓	✓	✗
Six monthly intervals with 30 days' notice	✗	✗	✓	✗	✗	✗	✗	✗
Six monthly intervals with 60 days' notice	✗	✗	✗	✓	✗	✗	✗	✓
No limit on frequency but minimum of 60 days' notice	✗	✓	✗	✗	✗	✗	✗	✗

In all states and territories, rent can only be increased during a fixed-term tenancy agreement if the terms of the agreement stipulate that an increase may occur. In both South Australia and Tasmania, that is all that the tenancy agreement must detail. In all of the other states and territories, a fixed term tenancy agreement must also specify either the amount of any proposed rent increase or a method of calculating the increase (for example, CPI).

In the Northern Territory, the lessor needs to give a tenant 30 days' notice of a proposed rent increase during a fixed term tenancy agreement. In all other states and territories, the notice period is 60 days or two months.

Table 5 below provides the frequency of rent increases permitted during a fixed-term tenancy agreement in each of the states and territories.

Table 5: Allowable rent increases for fixed term agreements

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
	FIXED-TERM AGREEMENTS							
No minimum interval	✗	✓ (for a tenancy agreement less than 2 years)	✗	✗	✗	✗	✗	✗
Six monthly intervals	✗	✗	✓	✓	✗	✗	✗	✓
12 monthly intervals	✓	✓ (for a tenancy agreement longer than 2 years)	✗	✗	✓	✓	✓	✗

Recent changes to Victoria's residential tenancy laws has seen a change to regulation of rent increases. From June 2019, the rules are as follows:

- For a short term tenancy (of up to five years) - The landlord or agent must not increase the rent:
    - before the end date of a fixed-term agreement, unless the terms of the lease allow for an increase;
    - more than once in any six-month period, for leases that started before 19 June 2019; or
    - more than once in any 12-month period, for leases starting on or after 19 June 2019.
- In respect of long term leases (more than five years), the lessor and tenant must agree as part of the terms of the tenancy agreement that rent increases can occur. If the landlord and tenant agree to rent increases, these cannot occur more frequently than every 12 months.

Tenants must be given at least 60 days' notice of the proposed rent increase, unless the rent increase is a specified dollar amount, in which case the lease agreement will specify the date that the rent is to be increased.

International jurisdictions

Many international jurisdictions have moved to only allowing rent increases at not less than 12 monthly intervals and with adequate notice periods for tenants:

- Ireland - the rent cannot be increased more frequently than every two years,[99] and the tenant must be given at least 90 days' notice of a proposed rent increase.[100]
- Scotland - rent cannot be increased more frequently than every 12 months and a tenant must be given at least three months' notice of any proposed increase from December 2017.[101]
- In British Columbia - rent increases cannot occur more frequently than every 12 months, and the amount of increase permitted is regulated by legislation.[102] Tenants must receive three months' notice of the proposed increase.[103]
- New Zealand – rent can be increased at six monthly intervals after giving the tenant at least 60 days' notice in writing of the proposed increase.[104] Fixed term tenancy agreements must specify that the rent can be increased.[105] A current review of the residential tenancies law in New Zealand has canvassed whether rent increases should be limited to every 12 months and whether a lessor should be required to disclose how they will calculate any future rent increases.[106]

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change to the current laws. Lessors will continue to be allowed to increase the rent every six months provided a tenant is given at least 60 days' notice of the proposed increase.

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[99] Unless there has been substantial work to the premises that would increase the rental value of the premises (https://onestopshop.rtb.ie/during-a-tenancy/rent-reviews-outside-an-rpz/)
[100] https://onestopshop.rtb.ie/during-a-tenancy/rent-reviews-outside-an-rpz/requirements-for-a-valid-rent-review-notice-outside-an-rpz/
[101] https://www.mygov.scot/landlord-increases-rent/
[102] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/during-a-tenancy/rent-increases
[103] Ibid.
[104] https://www.tenancy.govt.nz/rent-bond-and-bills/rent/increasing-rent/
[105] Ibid.
[106] A current review of the residential tenancies law in New Zealand has canvassed whether rent increases should be limited to every 12 months and whether a lessor should be required to disclose how they will calculate any future rent increases. (https://www.hud.govt.nz/news-and-resources/consultations/consultation-reform-of-the-residential-tenancies-act-1986/)

Option B – Allow for rent increases at not less than 12 monthly intervals

Under this option, a fixed term tenancy agreement would still need to allow for a rent increase during the term, but in both fixed term and periodic agreements, rent increases could not occur more frequently than at 12 monthly intervals.

Option C – Allow for rent increases at not less than 2 yearly intervals

Under this option a lessor would not be able to increase the rent more frequently than at two yearly intervals unless the lessor has undertaken substantial improvements in the amenity of the premises during this period.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - No change	**Lessors** • No change to current practice. **Tenants** • No change. **Government** • No change.	**Lessors** • No change. **Tenants** • Tenants remain vulnerable to frequent rent increases. **Government** • No change.
Option B – Rent increases at not less than 12 monthly intervals	**Lessors** • Retain option to increase rent but at lengthier interval than currently allowed. **Tenants** • Tenants have longer periods of certainty of rent. • May slow impact of rent increases during periods of economic boom. **Government** • Reduced risk of tenants not being unfairly impacted by frequent rent increases.	**Lessors** • Lessors have less flexibility to increase rent in line with changing market conditions. **Tenants** • May result in larger rent increases for tenants at each new interval. **Government** • None discernible.
Option C – Rent increases at not less than 2 yearly	**Lessors**	**Lessors**

intervals unless substantial improvement to the premises.	• Retain option to increase rent but at lengthier interval than currently allowed. **Tenants** • Tenants have longer periods of certainty of rent. • May slow impact of rent increases during periods of economic boom. **Government** • Reduced risk of tenants not being unfairly impacted by frequent rent increases.	• Lessors have less flexibility to increase rent in line with changing market conditions. **Tenants** • Tenant may be forced to pay increased rent for improvements to the premises they did not ask for. • May result in larger rent increases for tenants at each new interval. **Government** • None discernible.

Questions

28. Which option do you prefer and why?

29. Can you think of other ways to address this issue? Please provide as much detail as possible.

30. What do you think would be the cost implications of the different options? Please provide as much information as possible.

31. Irrespective of which option above is pursued, how much notice should a tenant be given prior to a proposed rent increase? For example, should it remain at 60 days' notice, or should the period be increased or decreased. Please explain your answer.

4.5. High pressure rent zones

Issue

The RTA does not currently regulate the size of any rent increase that can be imposed by a lessor. It does, however, allow a tenant to apply to the court for an order that the rent payable for the premises is excessive.[107]

[107] *Residential Tenancies Act 1987*, section 32.

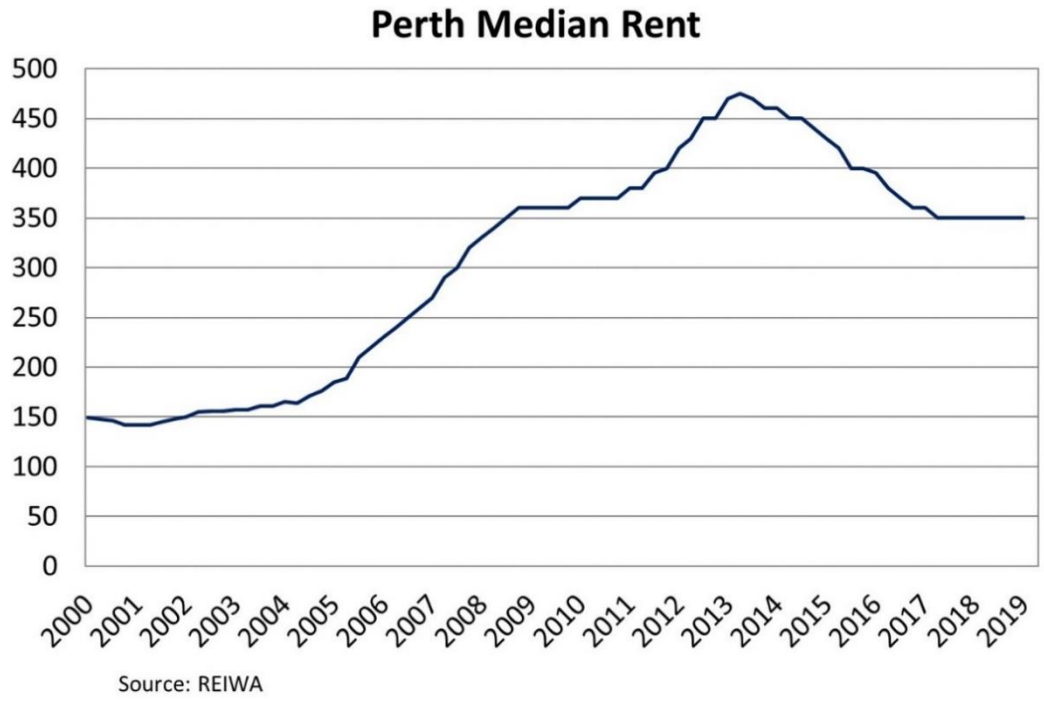
Objective

To provide fairness and certainty in relation to rent increases for tenants, while maintaining the flexibility for lessors to make a reasonable return on their investment.

Discussion

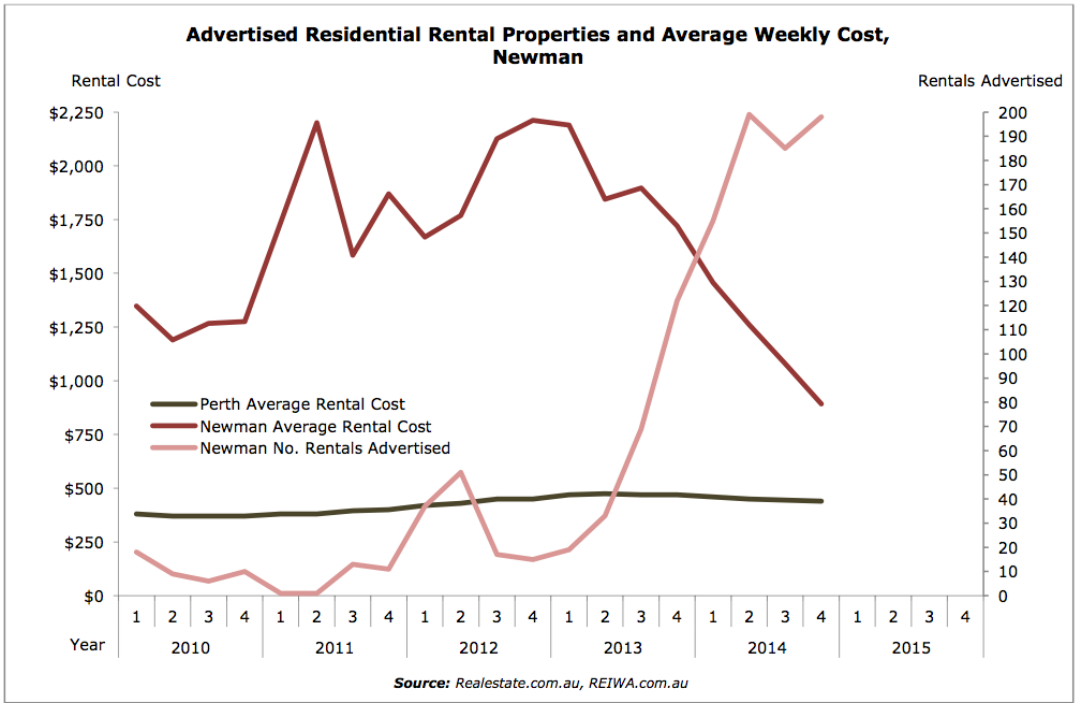
The experience of rent increases in WA has been varied. In the recent mining boom in WA, the median rent increased substantially in a number of suburbs as is demonstrated by the changes to the Perth median rent outlined in Chart 2[108] below. In the regions, and in mining towns in particular, the rent rises were so great that long term residents found themselves priced out of the market.[109]An example of the rental market increases at the peak of the mining boom can be seen in Chart 3 below, which illustrates the rental property trends in Newman, in the Pilbara, from 2010 to 2015.[110] In this table, it can be seen that the average rental price in Newman increased from approximately $1300 per week in the first quarter of 2010 to almost $2250 per week in the first quarter of 2011.

Chart 2



[108] Chart courtesy of the Department of Communities.
[109] https://www.ahuri.edu.au/__data/assets/pdf_file/0012/2901/AHURI_RAP_Issue_120_Housing-affordability-and-shortages-in-resource-boom-towns.pdf
[110] Jessie Richardson, *The Pilbara's property market descent* in Property Observer https://www.propertyobserver.com.au/finding/location/wa/40361-the-pilbara-s-property-market-descent.html

Chart 3



Excessive price increases can have a substantial impact on tenants. The impact of moving is not just financial. Moving is stressful. If there are children, they may have to change schools, disrupting friendships and their education. Moving also disrupts social and support networks of the adults and may result in an increase in transport costs.

Excessive rent increases also impact the local community. Pricing long term residents out of the market disrupts the social fibre of the community. If the long term residents move away from the town, once the boom is over and the workers leave, the town may be left with a high number of vacant premises; a ghost town. This in turn places financial pressure on local businesses, such as retailers, who rely on the business of local residents to survive. The lessors are also impacted as long term vacancies can mean no rental income for a substantial period of time.[111]

No Australian jurisdiction applies a limit to the amount a lessor may increase the rent. In the previous statutory review of the *Residential Tenancies Act*, Stamfords Advisors and Consultants recommended that the *Residential Tenancies Act* not be amended to prescribe a maximum allowable rent increase, either directly (by way of a stated maximum percentage increase) or indirectly (by link to the CPI or other index). The report noted that the appropriateness of a rent increase depends on many factors,

[111] Ibid; and Professor Fiona Haslam McKenzie, Submission to the Senate Standing Committees on Economics - Affordable Housing; House of Representatives Standing Committee on Regional Australia, *Cancer of the bush or salvation for our cities? Fly-in, fly-out and drive-in, drive-out workforce practices in Regional Australia* February 2013.

including the current rent paid, current market rent, and whether any improvements have been made to the premises. The imposition of a prescribed allowable increase would not take into account such factors.

In its response to the Stamfords Report, the Department proposed that there be no introduction of rent level setting or capping in the Residential Tenancies Act as "…such regulation would act as a disincentive to investment and have a detrimental impact on both property owners and tenants in terms of property values and availability of housing stock to rent."

Historically, government is reluctant to impose caps, or place significant restrictions on, levels of rent in a tenancy market.

Other jurisdictions

By contrast a number of international jurisdictions apply a cap to the amount rent may be increased. In some instances this restriction applies to the entire region; in other jurisdictions it applies to what are sometimes referred to a high pressure rent zones.

In British Columbia, the maximum amount of rent increase is controlled by the regulations.[112] In the current year, the maximum amount of rent increase is 2.5 percent.[113]

In Ireland, rent cannot be increased above four per cent in high pressure rent zones. According the government's website, "Rent Pressure Zones are located in parts of the country where rents are highest and rising, and where households have the greatest difficulty finding affordable accommodation. They are intended to moderate the rise in rents in these areas and create a stable and sustainable rental market".[114]

Scotland also has capacity to prescribe high pressure rent zones but has not yet done so.[115] According to AHURI, countries such as Spain and Belgium restrict rent increases across the board to CPI.[116] In Germany, rents can be increased in one of two ways; an automatic rent increase clause included in the tenancy agreement, or by CPI. If the increase is linked to CPI, the lessor may further increase the rent if substantial improvements have been made to the premises.[117]

[112] *Residential Tenancy Act [Sbc 2002] Chapter 78*, section 43.
[113] http://www.housing.gov.bc.ca/rtb/WebTools/RentIncrease.html
[114] https://onestopshop.rtb.ie/rent-pressure-zones
[115] https://www.mygov.scot/rent-pressure-zone-checker/
[116] https://www.ahuri.edu.au/policy/ahuri-briefs/how-does-australia-compare-when-it-comes-to-security-of-tenure-for-renters
[117] Above n 68, 135.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime. Lessors will continue to be able to determine the level of rent increase provided that, in the case of fixed term tenancy agreements, the agreement sets out the actual amount of the increase or the method of calculating the increase.

Option B – Cap on rent increases in designated zones

Under this option, certain zones would be designated in the legislation as high pressure rent zones. These zones will be determined by historical data and based on those regions that have shown themselves to be highly susceptible to sharp spikes in rental affordability, for example, mining towns like Port Hedland and Karratha. The method of calculating rent increases in these zones would be prescribed in the regulations and would be applied at times when pressure is being exerted on rents.

Option C – Cap on rent increases for all rentals

Under this option, the legislation would place a cap on all rent increases across the State, for example, limiting rent increases to the Consumer Price Index (CPI).

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • No change to current practice. **Tenants** • No change. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Tenants on periodic lease have no certainty about rent increases. • Tenants still vulnerable to excessive rent increases in times of economic boom. **Government** • No change.

Option B – Cap rent increases in high pressure rent zones	**Lessors** • Retain ability to increase rent up to a capped amount. **Tenants** • Protects tenants in high risk communities from potentially being priced out of the rental market. • Helps to preserve the stability of the community in high pressure rent zones. **Government** • Reduced risk of rental unaffordability. • Increases economic and social sustainability of areas impacted by economic boom into the future.	**Lessors** • Loss of potential revenue beyond the cap for lessors. **Tenants** • Potential for increased risk of lessors artificially increase rents prior to implementation of regulation. • Potential for increased risk of lessors offer only short term rentals to increase rents at each lease changeover. **Government** • May dampen investment in the rental market.
Option C – Cap all rent increases	**Lessors** • Retain ability to increase rent up to CPI. **Tenants** • Protects tenants from being priced out of the rental market. • Greater certainty to tenants about potential rent increases. **Government** • Reduced risk of rental unaffordability. • Increases economic and social sustainability of areas impacted by economic boom into the future.	**Lessors** • Loss of ability to increase rents to meet market conditions. **Tenants** • Potential for increased risk of lessors artificially increase rents prior to implementation of regulation. • Potential for increased risk of lessors offer only short term rentals to increase rents at each lease changeover. **Government** • May dampen investment in the rental market. • Reduced housing stock – potential greater pressure on public housing.

Questions

32. *Which option do you prefer and why?*

33. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

34. *What do you think would be the cost implications of the different options? Please provide as much information as possible.*

4.6. Charges for utilities

Issue

In 2013, the RTA was amended to regulate lessor and tenant responsibilities in relation to the cost of public utility services. Section 49A of the RTA states that if an account for a utility such as electricity or gas is in the name of the lessor, the tenant can only be required to pay charges in relation to the consumption of the utility and, if the premises are not separately metered, only if the tenancy agreement includes an alternative method for calculating the charge to be paid by the tenant. This means that if the utility account is in the name of the lessor, it is the lessor who must pay any supply charge and other administrative charges on the account, not the tenant. This is contrasted with the situation that if the utility account was in the name of the tenant, the tenant would have to pay the supply and other charges.

Objective

To ensure the RTA fairly allocates responsibility for the costs of supply and consumption of public utilities.

Discussion

Prior to 2013, the RTA was silent on the issue of a lessor's right to pass on to a tenant the cost of utilities where the account is held in the lessor's name. What was happening at the time in these situations was that tenants were being charged a range of additional fees viewed as ancillary to the utility account, including:

- administration fees (for time required to calculate the tenant's share of the account);
- photocopying charges (for the cost of copying the master account);
- postage fees;
- credit card fees if the lessor chose to pay the utility account by credit card (even if the tenant had paid the lessor or property manager in cash); and

- late payment fees if the lessor paid the account after the due date.

It was considered at the time that tenants should not be required to pay these additional costs and so the RTA was amended to make clear that tenants should only pay for charges related to consumption. Some confusion continued to exist and subsequently, section 49A of the RTA was amended by the *Consumer Protection Legislation Amendment Act 2019* to further clarify that the charges relating to consumption did not include the supply charges.

Other jurisdictions

Most jurisdictions contain provisions regarding the lessor and tenant responsibilities for paying utilities. South Australian and Tasmanian residential tenancy laws however are silent in relation to the tenant's obligation to pay for utilities where the account is in the lessor's name. The approach of the remaining jurisdictions is set out in Table 6 below.

Table 6: Responsibility for utility charges

	Tenant and Lessor responsibility for utility charges
ACT[118]	The lessor is responsible for the cost of all utilities for which there is not a separate metering device to accurately determine the amounts consumed during the tenancy. The tenant is responsible for all charges associated with the consumption of utilities supplied to the premises.
NSW[119]	If the premises are separately metered, the tenant must pay all charges for the supply of the utility to the tenant. If the premises are not separately metered, the lessor must pay all charges for the supply of the utility to the tenant.
NT[120]	A lessor must not require a tenant to pay charges other than charges payable by the lessor for electricity, gas or water supplied to the premises.
QLD[121]	If the premises are not separately metered, a tenant can be required to pay an amount for utilities only if the agreement stipulates this and includes a method for calculating how the master account will be apportioned.
VIC[122]	If the premises are separately metered, the tenant must pay all charges for the supply of the utility to the tenant. If the premises are not separately metered, the lessor must pay all charges for the supply of the utility to the tenant.
WA	The tenant must pay only for the charges related to the consumption of the utility. If the premises are separately metered, the tenant must be provided with a copy of the meter reading and charge per unit of consumption. If the premises are not separately metered, the lessor and tenant must have agreed in writing to an alternative method of calculating the charge for consumption.

[118] *Residential Tenancies Act 1997* (ACT), schedule 1, clauses 43 and 46.
[119] *Residential Tenancies Act 2010* (NSW), sections 38 and 40.
[120] *Residential Tenancies Act 1999* (NT), section 117.
[121] *Residential Tenancies and Rooming Accommodation Act 2008* (QLD), section 165.
[122] *Residential Tenancies Act 1997* (VIC), sections 52 and 53.

Solar rebates and solar installations

Consumer Protection is aware of two reasons why lessors keep the utility account in their own name. One of these is that the premises being leased is not separately metered and therefore an account cannot be established in the name of the tenant for those rental premises.

Another frequently occurring reason is that the lessor has installed solar panels on the premises and as such is entitled to some form of rebate, either the Feed in Tariff, or the Renewable Energy Buyback Scheme (REBS) or both. The Feed in Tariff, payable for a period of ten years, could not be transferred to the lessor's new premises if they relinquished the account from their name.[123] Likewise, for the lessor to receive the REBS payments, the account must be in their name.

Consumer Protection understands that some lessors, in retaining the Feed in Tariff or the REBS payments for themselves, do not pass these savings on to the tenants. Rather, they continue to require the tenant to pay for the gross cost of the electricity consumption. One issue that flows from this is whether the tenant should be the beneficiary of these rebates or payments, in the form of reduced electricity consumption costs, or whether the lessor should remain entitled to benefit from these rebates and payments as a means of offsetting the capital cost of installing solar.

Another question that follows, and that was raised in the Parliamentary debates mentioned above, is what happens in scenarios such as a house with a granny flat that is rented, or on farming properties with workers cottages that are leased, and the lessor installs a solar panel system that powers all of the premises, not just the lessor's home. In these circumstances, should the lessor be allowed to pass on some of the capital cost of solar panel installation to the tenants who may benefit from the solar power generated by the system?

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime. Irrespective of whether the premises are separately metered or not, where the utility account is in the lessor's name, tenants will only be required to pay for consumption of the utilities. In these instances, the lessor will continue to pay other additional charges including those for supply and administration of the utility account.

Option B – Amend the RTA to provide that a tenant will only be required to pay for utility costs if the premises are separately metered

Under this option, if the utility account is in the name of the lessor, the cost of supply and consumption could only be passed on to the tenant if the premises are

[123] https://www.wa.gov.au/sites/default/files/2019-08/Feed-in-Tariff-Frequently-Asked-Questions_0.pdf

separately metered. If the premises are not separately metered, the lessor would be required to pay the full cost of the utilities.

Option C – Amend the RTA to provide that a lessor must not require a tenant to pay charges other than charges payable by the lessor for the utilities supplied to the premises

Under this option, if the utility account is in the name of the lessor, the lessor could pass on to the tenant the supply and consumption charges shown on the master account, but not any other charges, for example, the cost of photocopying the account.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • Lessors can only charge tenants for consumption of utilities where they are in the lessor's name. **Tenants** • Tenants can only be charged for consumption of **Government** • No change.	**Lessors** • None discernible. **Tenants** • Tenants are vulnerable **Government** • No change.
Option B – Amend the RTA to provide that a tenant will only be required to pay for utility costs if the premises are separately metered	**Lessors** • Lessors can pass on supply charges where premises are separately metered. **Tenants** • Costs limited to where premises are separately metered. **Government** • None discernible.	**Lessors** • Increased cost liability for lessors if the premises are not separately metered. **Tenants** • Increased costs liability for tenants in separately metered premises. **Government** • Increased risk of tenant detriment particularly for vulnerable tenants.
Option C - Amend the RTA to provide that a lessor must not require a tenant to pay charges	**Lessors** • Allows lessors to pass on all costs that a tenant would otherwise pay if the	**Lessors** • None discernible. **Tenants**

other than charges payable by the lessor for the utilities supplied to the premises	utility account was in their name. **Tenants** • Not required to incur costs for ancillary charges such as administration fees. **Government** • None discernible.	• Increased cost liability for tenants. **Government** • Increased risk of tenant detriment particularly for vulnerable tenants.

Questions

35. *Which option do you prefer and why?*

36. *If you are a lessor and keep the utility accounts in your name, what is your reason for doing this? For example, is it because the premises are not separately metered or you need to keep the account in your name to receive the solar rebates?*

37. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

38. *What do you think would be the cost implications of the different options? Please provide as much information if possible.*

39. *Are there other utility related costs that a lessor should be able to pass on to a tenant? For example, pro rata costs for the installation of solar panels?*

40. *Are there utility related rebates or savings that a lessor should be required to pass on to the tenant? For example, Feed in Tariffs and REBS payments for solar power?*

4.7. Rates and other charges

Issue

The RTA currently requires a lessor to pay all rates, taxes and charges in respect of the premises under the following laws:

- the *Local Government Act 1995* (WA);
- the *Land Tax Act 2002* (WA)

- *Water Agencies (Powers) Act 1984* (WA) (other than for water consumed); and
- the Strata Titles Act 1985 (WA).[124]

During preliminary discussions for this review, some industry stakeholders expressed a view that if tenants are going to be leasing premises for longer, they should then be required to pay for expenses such as council rates, water rates and strata fees. The rationale for this argument is that they would have to pay these charges if they owned the premises, and therefore the lessor is subsidising the tenant's living arrangements.

Objective

To ensure the RTA fairly allocates or apportions responsibility for land ownership expenses.

Discussion

All Australian jurisdictions prohibit a lessor from passing on rates and charges applicable to the premises to the tenant, even in longer term tenancy arrangements.

It is important to note that currently a lessor can claim all of these property related taxes and charges as a tax deduction against any income earned from the rental business. If a lessor were to require a tenant to pay these rates and charges, it is unlikely that the lessor would be entitled to claim the deduction in those circumstances.

In England, Wales and Scotland, a residential tenancy agreement will usually stipulate who is to pay the council tax. This is usually the tenant.[125] It is important to note that the council tax is a mix of personal and property tax, not just strictly a property tax.[126]

If the proposal to allow longer fixed-term leases to include special provisions, it may be appropriate in this type of lease for a tenant to pay certain aspects of the charges related to the property, for example, the rubbish collection costs included within the council rates.

[124] This will include the *Community Titles Act 2018* (WA) when it comes into effect.
[125] UK Government, *How to Rent: The checklist for renting in England*, 6. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/821379/6.5707_MHCLG_How_to_Rent_v4.pdf
[126] https://www.valuationtribunal.gov.uk/your-appeal-type/council-tax/

Proposal

All Australian jurisdictions prohibit a lessor from passing on rates and charges to the tenant, regardless of the length of the tenancy agreement. Lessors can currently claim all of these property related taxes and charges as a tax deduction against any income earned from the rental business. Given the above, it is not proposed to amend the RTA to allow a lessor to pass any rates and charges for the premises on to the tenant.

This proposal maintains the status quo. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

41. Do you agree with this proposal? Why or why not?

42. Can you think of other ways to address this issue? Please provide as much detail as possible.

5. The premises

5.1. Minimum standards

Issue

Whether there is a need to amend the law in relation to the standards of premises to ensure that premises offered for rent in Western Australia are fit for purpose.

Objective

To ensure rental premises are fit for purpose and comply with minimum standards relating to safety, health and community expectations in relation to amenity.

Discussion

Consumer Protection frequently receives calls from tenants enquiring about their rights as the premises they are residing in either have not met habitable standards from the commencement of the tenancy or, more commonly, have deteriorated during the tenancy such that they may no longer be reasonably habitable. For example, from a snapshot of calls to Consumer Protection from September 2018 to November 2018, at least 36 tenants rang to obtain information in relation to uninhabitable premises. The issues raised by these tenants included:

- mould infestations;
- ceiling collapses;
- termite infestation affecting the structural integrity of the premises;
- electrical safety; and
- access to basic utilities.

CASE STUDY

A tenant and his wife were renting an apartment with their 7 month old baby. The apartment had a mould infestation and despite many emails and telephone calls to the property manager, nothing had been done to inspect or remedy the issue. The baby's room was uninhabitable and the master bedroom was rapidly becoming affected by the mould. The tenant's possessions had been damaged by the mould and the tenant and his baby were experiencing ill health caused by the mould. An independent mould expert engaged by the tenant advised them to cease living in the premises. The tenant is in the process of reporting the premises to the local council. The only option now for the tenant is to terminate the lease and move, at great cost to themselves.

CHOICE recently undertook a series of studies with tenants across Australia.[127] From those reports, CHOICE discovered that only a quarter of all renters surveyed had not

[127] CHOICE, *UNSETTLED: Life in Australia's private rental market* (February 2017), https://www.choice.com.au/money/property/renting/articles/choice-rental-market-report and *DISRUPTED: The consumer experience of renting in Australia* (2018) https://www.choice.com.au/money/property/renting/articles/choice-rental-rights-report-dec-2018

experienced any problems with their current rental premises.[128] That means that three quarters of rental properties under this survey had some form of defect or required a noticeable level of repair. As CHOICE puts it, "Imagine paying tens of thousands of dollars a year for an important product, only to find that there is a greater than 50% chance there are problems with it".[129] In any other consumer space, this level of non-compliance just wouldn't be tolerated.

There are already some laws in operation in Western Australia that apply to the standards of premises made available for lease. For example, section 42(2)(c) of the RTA requires that the lessor must comply with all requirements in respect of buildings, health and safety under any other written law that applies to the premises, while section 45 of the RTA requires that the lessor provide and maintain prescribed security on the premises.

CASE STUDY

A tenant and his partner were residing in a house in a regional country town. They were at risk of homelessness and were therefore desperate for housing. The house they were able to lease failed to meet a number of basic standards:- the only toilet in the premises was blocked and not functioning for more than 2 months, which resulted in raw sewerage sometimes running through the laundry and toilet; the showers could not be turned on properly; there were no smoke alarms and no RCDs; the tenants did not have keys to the locks so the tenant had to lock the door from the inside and then climb through a window whenever going out. There were live wires hanging from the ceiling in the lounge room and there were no functioning cooking facilities. When Consumer Protection became involved, the lessor's response was "if they don't like it, they can leave".

The Building Regulations 2012 (WA)[130] require a lessor to have compliant smoke alarms installed in the premises before premises are made available for rent.

The Electricity Regulations 1947 (WA)[131] requires a lessor to have at least two residual current devices (RCDs) installed on the rental premises protecting all power and lighting circuits.

The *Health (Miscellaneous Provisions) Act 1911* (WA)[132] requires all residential premises to have sanitary conveniences, as well as bathroom, laundry and cooking facilities.

Yet, as can be seen from the case studies on the previous two pages, there continue to be premises available in the rental market in Western Australia that do not comply with minimum standards that are usually targeted at more vulnerable tenants.

[128] CHOICE, *UNSETTLED: Life in Australia's private rental market* (February 2017), 13.
[129] CHOICE, *DISRUPTED: The consumer experience of renting in Australia* (2018), 5.
[130] Section 58.
[131] Regulation 14.
[132] Section 99.

Several other states and territories have amended their relevant residential tenancy legislation to prescribe minimum standards that premises must comply with in order to be leased. The different approaches are set out in Table 7 below.

Table 7: State and territory prescribed minimum standards

	NSW	QLD	SA	TAS	VIC
Structurally sound	✓	✓	✓	✓	✗
Cleanliness	✗	✓	✓	✓	✗
Adequate light	✓	✓	✓	✗	✗
Ventilation	✓	✓	✓	✓	✗
Insulation	✗	✓	✗	✗	✗
Protection from damp and flooding	✗	✓	✓	✓	✗
Electricity and gas supply	✓	✗	✓	✓	✗
Compliant plumbing and drainage	✓	✓	✓	✓	✗
Supply of hot and cold water for drinking, washing and cleaning	✓	✓	✓	✓	✓
Private bathroom facilities	✓	✗	✓	✓	✓
Dimensions of the rooms	✗	✓	✓	✗	✗
Laundry and cooking facilities	✗	✓	✓	✓	✓
Energy efficiency	✗	✓	✓	✗	✗
Free from vermin	✗	✓	✓	✗	✓
Access to and within premises	✗	✗	✓	✗	✗

Fire safety (i.e. working smoke alarms)	✗	✗	✓	✗	✗
Heating device in main room	✗	✗	✗	✓	✓
Window coverings	✗	✗	✗	✓	✓

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime.

Option B – Amend the RTA so that minimum standards for rental premises, and the process for monitoring and enforcing those minimum standards, can be prescribed

Under this option, the RTA would be amended to allow the regulations to prescribe any minimum standards that premises are required to meet and also to prescribe processes for the monitoring and enforcement of minimum standards. If minimum standards are prescribed, these would be developed in consultation with key stakeholders.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • No potential increased costs. **Tenants** • No potential increased costs. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Vulnerable tenants at risk of renting sub-standard premises. **Government** • Non-compliance with current laws will continue – risk that sub-standard rental premises will continue to be leased.

Option B – Amend the RTA so that minimum standards for rental premises and the process for monitoring and enforcement of the standards can be prescribed	**Lessors** • Increased awareness of obligations under the RTA – will make premises compliant **Tenants** • Improve quality of available rental premises. • Clear guidelines will minimise disputes. **Government** • Greater confidence that tenants will not be at risk from sub-standard rental premises. • Increased compliance with health and safety standards.	**Lessors** • Increased costs for some lessors to make premises compliant. • Increased maintenance costs. **Tenants** • Additional cost for lessors may result in increased rents. **Government** • None discernible.

Questions

43. Which option do you prefer and why?

44. Can you think of other ways to address this issue? Please provide as much detail as possible.

45. What do you think would be the cost implications of the different options? Please provide as much information if possible.

46. If option B is pursued, what matters do you think the minimum standards should cover?

47. If Option B is enforced, how should compliance be monitored and enforced? For example, should there be a proactive inspection regime or should there only be an inspection if a tenant makes a complaint? Why?

5.2. Modifications to the premises

Issue

Tenants are increasingly renting for longer and throughout different life stages. Having the ability to make a rental property a home by making modifications to suit a tenant's needs reflects the changing nature of renting and is a key theme that came out of early discussions with tenant groups in the lead up to this review.

Objective

To set clear parameters for modification of the premises that appropriately balances the interests of tenants and lessors.

Discussion

Modifications to residential premises can take many forms and may be for different reasons. For example, recent amendments to the RTA have resulted in tenants who have been victims of family and domestic violence having the right to change the locks or to make prescribed security upgrades to the premises without requiring the prior permission of the lessor.[133] Further amendments to the RTA allow a tenant to affix furniture to the wall for the safety of children or persons with a disability, with the lessor being able to refuse consent in only very limited circumstances.[134]

Older tenants and tenants with a disability may need to affix mobility aids to the walls, or install a ramp at the front door. Some tenants simply want to change the colour of the walls, hang picture hooks on the wall or install a vegetable garden, all without having to wait on a lessor's consent.

Currently section 47 of the RTA allows a lessor to stipulate in the residential tenancy agreement that a tenant is either prohibited from making alterations or affixing fixtures to the premises, or that they may do so but only with the lessor's consent. While section 47(2)(a) of the RTA prohibits a lessor from unreasonably withholding consent if the latter option is included in the tenancy agreement, it is Consumer Protection's understanding that tenants continue to find it very difficult to obtain permission to make even the most minor of modifications.

Other jurisdictions

Victoria and the ACT have recently amended their tenancy legislation to change the laws in relation to tenants making different types of modifications to their premises. Table 9 below outlines the recent changes.

[133] *Residential Tenancies Legislation Amendment (Family Violence) Act 2019* (WA).
[134] *Consumer Protection Legislation Amendment Act 2019* (WA), section 67.

Table 9: Victoria and ACT modification requirements

	Requirements for tenant modification of the premises
ACT[135]	**Special modifications** - where the landlord cannot refuse consent unless they seek orders from the Tribunal permitting them to refuse; and **Special modifications** are modifications made for the following reasons: • for the safety of people on the property (e.g. furniture anchors or child safety gates); • to assist a tenant who has a disability (e.g. access ramps, safety rails) – the tenant must provide a written recommendation of a health practitioner in support of their request; • to improve the energy efficiency of the property; • to allow access to telecommunication services; • for the security of the property or people on the property (e.g. deadlocks or alarms); or • minor modifications. **Minor modifications** - changes that can be removed or undone so that the property is restored to substantially the same condition it was in at the start of the tenancy (fair wear and tear excepted). The Tribunal may make an order permitting the landlord to refuse consent to a special modification (or impose conditions on consent) if: • the lessor would suffer significant hardship if the modification were made; • the special modification would be contrary to law; • the special modification is likely to require modifications to other residential properties or common areas (e.g. in apartment buildings); or • the special modification would result in additional maintenance costs for the landlord.
VIC[136]	Two new categories of modifications: **Prescribed modifications -** changes to allow the tenant to make the premises a home and that do not require the lessor's prior consent; **Other modifications** – includes disability-related modifications. The tenant must seek the lessor's prior written consent, but that the lessor cannot unreasonably refuse. Prescribed modifications are likely to include: • changing curtains (where the originals are retained); • nailing hooks on the wall that can be restored; • furniture anchors; • adhesive child safety locks; • LED light globes which do not require new light fittings; and • weather seals and draught excluders in rented premises without gas heaters. The lessor may require the tenant to pay an additional amount of bond, to put toward the costs of restoring the premises to its condition before the modification was made.

[135] *Residential Tenancies Amendment Act 2019* (ACT) clause 14.
[136] *Residential Tenancies Amendment Act 2018* (Vic).

The other Australian jurisdictions currently have provisions with similar effect to those currently in place in Western Australia, that is, that alterations and modifications are either not allowed or only permitted with the lessor's consent.

The approach to alterations to the premises in European jurisdictions is varied. While many follow the approach currently law in Western Australia, a number of other jurisdictions, including Germany, the Netherlands, Sweden and Belgium, allow a tenant to make alterations to the premises that do not affect the structural integrity of the premises, and are of a decorative nature that can readily be undone, such as painting the walls or hanging picture hooks.[137]

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime. A lessor will continue to be able to stipulate in a residential tenancy agreement that the tenant is either prohibited from making any alterations to the premises, or may only make alterations with the lessor's consent, which cannot be unreasonably withheld.

Option B – Amend the RTA so that a tenant is entitled, without consent of the lessor, to make minor modifications that do not impact the structural integrity of the premises and can be easily reversed, or to improve disability access and ageing in place, and to make any other modifications with the lessor's consent, which cannot be unreasonably withheld.

Under this option, a tenant would be entitled at all times to make minor changes to the premises that can be removed or undone so that the property is restored to substantially the same condition it was in at the start of the tenancy (fair wear and tear excepted). A tenant would also be entitled to make modifications needed to improve disability access or ageing in place.

Any modifications to the premises beyond the above would continue to require the consent of the lessor, but the lessor cannot unreasonably withhold their consent. This is consistent with the Victorian model which also provides that the lessor may require an additional amount of bond to assist in restoring the premises to its condition before the modification was made.

[137] Christoph U Schmid and Jason R Dinse (eds), *My rights as a tenant in Europe: A compilation of the national Tenant's Rights Brochures from the TENLAW Project*, 1 December 2014.

Option C – Amend the RTA so that a tenant may make alterations to the premises only with the lessor's consent, but that the lessor must obtain an order that withholding of the consent is justifiable in the circumstances.

Under this option, if a lessor wants to withhold consent, they must obtain an independent order or certificate verifying that it is reasonable in the circumstances to withhold the consent. If it is a certificate that is issued, this task could be done by the Commissioner for Consumer Protection, similar to the process of issuing an abandoned goods certificate. Alternatively it may be an application to the court for an order. There may be a cost to the lessor for the making of an application in either scenario.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • No additional costs. • No change to lessor's control over property. **Tenants** • No change. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Restricts tenant's ability to make modifications. **Government** • Risk that private rental market will not provide for tenants with certain needs, including disability and ageing requirements.
Option B – tenant may make minor modifications and modifications necessary to improve disability access or ageing in place without the lessor's consent	**Lessors** • Lessors retain control over property unless modification relates to specific need or are minor in nature. **Tenants** • Tenants may modify premises to meet ageing and disability access requirements. • No consent required for minor modifications.	**Lessors** • Lessor's asset at risk if modifications not reversed or cause damage to premises. **Tenants** • Increased right to make modifications applies in limited circumstances – either where they are minor in nature or relate to a disability or ageing requirement. • Potential for increased rent or security bond.

	Government • Reduced risk of vulnerable tenants not having housing that meets their disability and ageing needs.	**Government** • Potential for increased complaints.
Option C - tenant may make alterations to the premises only with the lessor's consent, but that the lessor must obtain an order that withholding of the consent is justifiable in the circumstances	**Lessors** • Lessors may withhold consent in some circumstances, for example, where the premises contain asbestos. **Tenants** • Increases ability of tenants to make the rental premises their home. **Government** • Reduced risk of tenants not being able to make reasonable modifications.	**Lessors** • Requiring order imposes administrative burden on lessors. • Increased costs. **Tenants** • Increased costs – potential for increased rent or security bond. **Government** • Cost to Government in assessing lessor's application to withhold consent.

Questions

48. Which option do you prefer and why?

49. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

50. *What do you think would be the cost implications of the different options? Please provide as much information as possible.*

51. *If Option B or C is pursued, should a lessor be allowed to seek an additional bond to cover reversal of the modifications? Why or why not? If yes, how much additional bond should be permitted?*

52. *If Option C is pursued, which entity should have responsibility for authorising a lessor to withhold consent? For example, the Commissioner for Consumer Protection, the Magistrates Court or another entity? Please explain your answer.*

5.3. Pets in rental premises

Issue

Tenants who currently have pets or wish to have a pet often face limited choice in the number of rental premises available or face uncertainty if they move to another rental property.

Objectives

To identify the most appropriate regulation of pets in rental premises.

Discussion

Currently, tenants must seek the permission of lessors to keep pets on the premises. The lessor is not required to provide grounds for refusing the request and tenants have no further recourse if the request is refused.

Where permission to keep a pet is granted, lessors have the right to seek a pet bond from tenants prior to the commencement of the tenancy agreement if the pet is capable of carrying parasites which can affect humans. A pet bond cannot be charged where a tenant requires an assistance dog.[138] The pet bond can be no more than $260 unless the rent is more than $1200 per week.[139]

Other jurisdictions

Several jurisdictions are currently considering or will shortly be implementing reforms around the keeping of pets by tenants in rental premises. Unlike Western Australia, other states and territories do not currently allow the lessor to charge a pet bond.

In particular, proposed reforms in Victoria will mean that lessors will be taken to have consented to the tenant's request to keep a pet unless they apply to the Victorian Civil and Administrative Tribunal (VCAT) within 14 days of the request. Lessors can terminate the lease if the tenant does not comply with a VCAT order that pets not be kept on the premises. The VCAT can consider a number of prescribed factors in determining whether it is reasonable for the lessor to refuse to consent to pets being kept on the premises.[140]

In the ACT, similar reforms are being implemented. Lessors will be taken to have consented to the tenant's request to keep a pet on the premises unless they apply within 14 days of the request to the Administrative and Civil Appeals Tribunal (ACAT) for an order approving the lessor's refusal. Lessors may also seek approval from the

[138] RTA provides references to pets do not include assistance dogs as defined under the *Dog Act 1976*, section 8(1).
[139] Schedule 4, Form 1AA, Residential Tenancies Regulations 1989, as at 1 July 2019.
[140] Factors the VCAT may take into account include the type of pet, character and nature of the property, character and nature of the appliances, fixtures and fittings on the property, whether refusing consent to keep the pet on the property is permitted under the Act, any prescribed matters and anything else the VCAT considers relevant.

ACAT for conditions to be imposed on the approval of the tenant's request to keep a pet including in relation to the number of animals and the cleaning or maintenance of the premises.[141]

Both Queensland and New Zealand are considering similar amendments in their respective reviews of their residential tenancy laws.

Proposal

In line with the increasingly long-term nature of renting for many in the community and in keeping with the legislative amendments in other jurisdictions, it is proposed to amend the RTA to allow tenants to keep pets at the premises unless the lessor applies for and obtains approval confirming it would be unreasonable to allow the tenant to keep the pet at the premises.

Lessors will retain the ability to charge a pet bond to cover any potential damage resulting from tenants keeping a pet at the property. This proposal appropriately balances the interests of lessors in protecting their property from potential damage with the recognition that the keeping of pets provides well-known benefits to social and mental well-being.

This proposal is unlikely to have a significant impact on stakeholders. It is likely that lessors may incur some costs if they choose to apply to the courts or the Commissioner to apply for approval to refuse the tenant's request to keep a pet. It is not anticipated that these costs would be significant. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

53. *Do you agree with the proposal? Why or why not?*

54. *As a lessor, have you allowed tenants to keep pets? Please outline your reasons why you have or have not agreed to a tenant's request to keep pets.*

[141] The ACAT may make an order approving the lessor's refusal or order the lessor consent to the tenant's application but impose stated conditions on the consent if it is satisfied that the premises are unsuitable to keep an animal, keeping an animal on the premises would result in unreasonable damage to the premises, keeping the animal on the premises would be an unacceptable risk to public health or safety, the lessor would suffer significant hardship or keeping the animal on the premises would be contrary to a territory law.

55.	*As a tenant, what has been your experience in seeking permission to keep pets in a rental property?*
56.	*When would it be reasonable for a lessor to refuse a tenant's request to keep a pet at the premises?*
57.	*Are any other changes need to the RTA to reduce the risk a lessor might face from allowing a tenant to keep pets at the premises? If so, please give details.*

5.4. Ongoing maintenance and repairs

Issue

A frequent concern raised with Consumer Protection by both tenants and property managers is the number of lessors who are unable or unwilling to undertake necessary repairs to the rental premises because they do not have the financial resources to do so. In the two years from 2017 to 2019, Consumer Protection received more than 4300 calls from tenants regarding lessors not performing maintenances on the premises. This accounts for approximately 10 percent of the calls received from tenants during that period. CHOICE had similar findings in their research, with at least eight percent of tenants are in premises that require urgent repairs, and approximately 20 percent are living in premises that are in a general state of disrepair.[142]

Under the RTA, lessors have ongoing obligations regarding repairs and maintenance during a tenancy. However, for urgent and essential repairs, lessors must respond within 24 or 48 hours to a request for repairs depending on the nature of the repair issue.[143] Repairs necessary for the supply or restoration of an essential service prescribed in the RTA Regulations must be responded to by the lessor within 24 hours.[144] This review will consider how to ensure that lessors fulfil their obligations under the RTA to ensure repairs are undertaken and requests for repairs are responded to in a timely manner.

Objective

To ensure that lessors perform maintenance and repair obligations in a timely manner.

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[142] CHOICE, *Unsettled; Life in Australia's private rental market* (February 2017), 13.
[143] *Residential Tenancies Act 1987* (WA), s43 prescribes for the remedying of urgent and essential repairs.
[144] Essential services are defined under r.12A of the Residential Tenancies Regulations 1989 to include electricity, gas, functioning refrigerator, sewerage and other waste water treatment and water, including the supply of hot water.

Discussion

While it is understandable that a lessor's financial circumstances may change over time and a number of unforeseen circumstances can see them in financial hardship, a tenant having to live in a property in need of urgent repairs is often also experiencing hardship.

It is not just about a lessor being unable to afford repairs and maintenance, there are also complaints about lessors and property managers who simply do not respond to requests for repairs and maintenance, or terminate a tenancy agreement if the tenant asks for repairs.

CASE STUDY

The house was in serious disrepair. The local government inspected the property and put an order on it due to its condition. The lessor claims this was all due to the tenants living style. The local government inspector refuted this claim stating that the disrepair was caused by lack of maintenance and attention on the part of the lessor.

One key problem was that a dividing fence to the premises had been broken for 4 or 5 months. The fence had a swimming pool on the other side and the tenant had 5 young children residing with her. Despite the lessor claiming the fence had been made safe, the local government pool inspector disagreed and issued an infringement for a non-compliant pool fence.

The lessor was so reluctant to perform any repairs or maintenance on the premises that the property manager withdrew their management agreement, leaving the tenant to deal directly with the lessor.

CASE STUDY

Tenant advised the property manager on a number of occasions about maintenance issues that have not been responded too. The tenant is now having to turn off the mains water supply as taps are leaking prolifically throughout the premises. The tenant also has no electric lights due to an electrical fault. The property manager at times suggested the tenant over reacts to issues. The tenant contacted Consumer Protection when she received a text message advising her that she has 7 days to vacate the premises.

Current options to compel a lessor to undertake repairs under the RTA

A tenant has the following options currently under the RTA to remedy a situation where a lessor has not attended to repairs.

- Section 43(3) of the RTA provides that where a lessor cannot be contacted or has not made the necessary arrangements for an urgent repair within the required timeframe, a tenant can arrange the repairs to the minimum extent necessary and the lessor must reimburse the tenant as soon as practicable.
- A tenant could issue the lessor with a notice of breach of the tenancy agreement for failing to comply with repair and maintenance requirements under section 42 of the RTA. If the lessor fails to remedy the breach, the tenant can apply to the court for termination of the tenancy agreement due to breach of the agreement by the lessor.
- A tenant could make an application under section 15 of the RTA for an order of the court compelling a lessor to comply with their obligations under section 42 or 43. In addition to making an order for specific performance by the lessor, the court can also authorise payment of the rent be made to the Magistrates Court until the repair has been performed.
- In 2013, new section 59D was inserted so that when a court that makes a tenant compensation order under section 15 of the RTA against a lessor, the court may make a further order requiring the lessor to pay a tenant compensation bond to the Bond Administrator to cover any future tenant compensation orders that might be made against the lessor.

While these provisions give some options to a tenant to make repairs happen, they have their own set of limitations. For example, a tenant may not be able to afford to pay for repairs upfront and then have the capacity to wait for a lessor to reimburse them. Breaching and potentially terminating a tenancy agreement means moving house. This could be cost prohibitive for many tenants, as well as being costly and extremely disruptive to the lives of those who do choose to move. Going to court can also be a harrowing experience for many, and this may be enough to make some tenants to choose to live with the disrepair rather than pursue it. Many studies have found that tenants are often afraid to ask for repairs in case the lessor takes action to terminate their tenancy agreement instead or increase their rent.[145]

The tenant compensation bond

As noted above, the RTA was amended in 2013 to insert section 59D into the Act. Section 59D allows a court, if making an order that a lessor compensate a tenant for repairs and maintenance costs already incurred by the tenant, may also make an order requiring a lessor to lodge a tenant compensation bond with the bond administrator. This tenant compensation bond can then be used to compensate any future claims by a tenant against the lessor for their failure to undertake necessary repairs to the premises.

[145] See for example CHOICE, *DISRUPTED: The consumer experience of renting in Australia* (2018),5.

No orders under this provision have been made by the court to date. One possible reason for this is that it does not relate to the current claim for compensation before the court, but to any future claims that might be made against the lessor. Alternatively, the tenant may be unaware of this avenue to seek compensation or may be unwilling to pursue court action for repair and maintenance costs. The provision was intended to be used in relation to those lessors who repeatedly fail or refuse to undertake repairs of their premises. There would be very few lessors that would fall into this type of "repeat offender" category. That, however, does not address the difficulties faced by many tenants in seeking to have repairs and maintenance performed on a timely basis.

One alternative to the tenant compensation bond is to require all lessors to lodge a bond with the Bond Administrator to cover repairs and maintenance. Tenants could make a claim on the bond if the lessor fails to carry out repairs in the required time or a reasonable timeframe. A repairs and maintenance bond would particularly benefit low-income and vulnerable tenants who are often unable to afford to pay for the repairs upfront and then later seek reimbursement from the lessor.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime. Lessors will continue to have obligations to undertake urgent and essential repairs within prescribed timeframes and all other repairs within a reasonable period. If a lessor fails to undertake repairs, a tenant will continue to be able to make arrangements for those repairs and seek compensation from the lessor, or alternatively apply to the court for an order that the lessor perform the repairs.

Option B – Require all lessors to lodge a lessor bond with the Bond Administrator

As per above, lessors will continue to have obligations to undertake urgent and essential repairs within prescribed timeframes and all other repairs within a reasonable period, however, if the lessor fails to comply with their repair obligations, rather than the tenant having to pay for the repairs upfront, the tenant could make an application to the Bond Administrator for the repairs to be paid from the bond. Similarly to the security bond required of tenants at the start of a tenancy agreement, the lessor bond would operate to ensure that lessors meet their duties and obligations under the residential tenancy agreement in regards to repairs and maintenance.

The amount of the security bond would be prescribed in the legislation. The amount would be determined in consultation with stakeholders. It is possible that different amounts will apply where a lessor owns multiple properties.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • No additional costs. **Tenants** • No change. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Unlikely to be any change to the way some lessors respond to requests for repairs, leaving some tenants living in sub-standard premises. • Low income tenants likely to remain particularly vulnerable as they are unlikely to be able to afford to pay for repairs in the first instance. **Government** • No change.
Option B – Require all lessors to lodge a lessor bond with the Bond Administrator	**Lessors** • Lessors will have certainty that they can meet their repair obligations under the RTA. **Tenants** • Reduced risk that repairs and maintenance will not be undertaken. • Repairs and maintenance bond can be accessed to compensate lessor is repairs are required. **Government** • Potential for disputes and action pursued in the courts to be minimised.	**Lessors** • Increased cost for all lessors in having to deposit a repairs and maintenance bond with the bond administrator. **Tenants** • Potential for increased rents. **Government** • Potential significant cost to government in receiving and holding additional bonds with the Bond Administrator.

Questions

58. Do you agree with this proposal? Why or why not?

59. Can you think of other ways to address this issue? Please provide as much detail as possible.

60. What do you think would be the cost implications of the different options? Please provide as much information as possible.

5.5. Drug testing of the premises

Issue

There is a growing concern that a number of rental properties may be contaminated with illicit drug substances, particularly where the property has been used to manufacture methamphetamine. Media attention and lobbying from some business sectors has increased attention around whether mandatory testing of rental premises prior to each tenancy should be required.

Objectives

To identify an appropriate risk based regulatory response to testing rental premises for illicit substances.

Discussion

Currently under the RTA, lessors are required to lease properties that comply with health and safety laws.[146] If premises were known to be contaminated with drug residue, it is the responsibility of the lessor to demonstrate that the premises has been remediated of any contamination, or that remediation is not required because the contamination levels are so low.

The Department of Health (DoH) has released guidance materials, including one titled *Illegal Drug Activity in Homes: Managing Risk* (the Guidance) for identifying and managing illicit drug contamination of residential rental properties.[147] The Guidance notes it is important for lessors, agents and tenants to be alert to indicators of illicit drug activities and outlines appropriate management responses including:

- no need for mandatory testing of premises;
- testing of premises where risk of contamination is identified;

[146] Section 42(2)(c).
[147] https://healthywa.wa.gov.au/Articles/J_M/Meth-smoke-houses

- routine precautionary cleaning between tenancies recommended and regular property inspections as risk mitigation strategies; and
- remediation recommended where there is evidence of contamination (with the level of remediation required being dependent on level of risk of contamination).

Other jurisdictions

The response of other states and territories to drug testing of rental premises varies. Generally, each jurisdiction's public health laws provide for a framework of roles and responsibilities to remediate premises that are or are suspected of being contaminated with drug residues.

Proposed amendments to NSW tenancy laws will prescribe material facts which a lessor or lessor's agent must not knowingly conceal from tenants when entering into a lease to include:

- if the landlord has been notified by the council or the NSW Police that the premises have been used to manufacture or cultivate any prohibited drug or prohibited plant in the last 2 years; and
- if a person has been convicted of a drug offence under the *Drug Misuse and Trafficking Act 1985* that took place at the premises in the last 2 years.

New Zealand has introduced amendments to its residential tenancies legislation to prevent lessors from leasing a property to a tenant if it is known to be contaminated with substances based on tests carried out in accordance with regulations, and that the property has not been properly decontaminated.

The question of whether there should be mandatory disclosure by a lessor of previous drug activity at the premises is considered at chapter 3.2.

Proposal

Consumer Protection has assisted the DoH in finalising the Guidance to ensure that lessors, property managers and real estate agents are aware of their existing obligations to prospective tenants in disclosing any material facts about a property, meeting health and safety standards and remediating any affected properties.

It is not proposed to amend the RTA to require mandatory testing for drug residue during or between tenancies. Rather, it is proposed that lessors, property managers and tenants be educated to follow the DoH Guidance. The DoH Guidance clarifies the obligations and responsibilities of lessors and property managers in managing potential risks arising from drug contamination. Providing further education for lessors and property managers in following the DoH Guidance rather than via amendments to the RTA is a risk based response. As outlined in the DoH Guidance, lessors and property managers have existing duties to disclose material facts about a property and ensure that health and safety standards are met. This proposal is unlikely to have a significant impact on stakeholders.

The Department is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

61. Do you agree with this proposal? Why or why not?

62. Can you think of other ways to address this issue? Please provide as much detail as possible.

5.6. Swimming pool fence certification

Issue

Both lessors and tenants are responsible for ensuring that any fence or barrier restricting access to a private swimming pool is maintained and operating effectively. Lack of awareness and gaps in ensuring accountability in ensuring swimming pool fences in rental premises are compliant can lead to catastrophic consequences.

Objectives

To improve compliance with pool fencing laws in rental premises.

Discussion

Following findings from the Western Australian Coroner's Report[148], the 2017 Ombudsman Report, *Investigation into ways to prevent or reduce deaths of children by drowning* and representations made to Consumer Protection, consideration of how to mitigate risks to the safety of tenants is required. It has become clear that in some instances, rental premises are being leased without swimming pool fences meeting required safety standards or repairs to swimming pool enclosures are not being undertaken in a prompt manner.

Both of these reports made specific recommendations recognising that further strategies are required to ensure that the safety of tenants in rental premises containing swimming pools is not compromised.

The Building Regulations 2012 (WA) provide the regulatory framework for the maintenance of pool barriers, including the onus on owners and occupiers to be responsible for ensuring that a suitable enclosure is provided around a swimming pool

[148] Western Australian Coroner Barry King, *Inquest into the death of name withheld (A Child),* Coroner's Court of Western Australia, Kalgoorlie, 30 October 2013.

or spa pool on the property.[149] These rules also apply to portable swimming pools that have a depth of more than 300mm of water. All private pools must be registered with the relevant local government council.

As this responsibility also extends to occupiers, tenants who become aware that a fence, wall, gate, window, or other barrier around a swimming pool or spa pool is not in working order or does not comply with the Building Regulations 2012 (WA), are required to contact the lessor or property manager immediately to arrange repairs. Repairs required to a pool barrier are considered urgent under the RTA and as such, can be authorised by tenants where the property manager or lessor has not responded within 48 hours.

Tenants can be left in a vulnerable position where they have reported concerns about the pool barrier to the lessor or property manager, but no action is taken to rectify within a reasonable amount of time. The following case study highlights two key issues affecting tenants, where the property is leased without the swimming pool enclosure being compliant and where repairs to the enclosure are not carried out promptly.

CASE STUDY

A tenant took out a six month lease on premises along with her husband and five year old child. The tenant was paying in excess of $700 per week in rent for the premises. Two weeks after moving into the premises, the local council attended the premises and informed the tenant that the pool enclosure was non-complaint. The council officers also stated that they were surprised the premises had been re-let as they had informed the lessor some time earlier about the need to make the pool enclosure compliant. The tenant contacted the property manager and asked for the repairs to be made. It took more than eight weeks for the lessor to take any action, because he needed to wait for more affordable parts to be brought into the State, despite there being suitable parts already available. During this time, the tenant's son made his way into the pool area unsupervised. The tenant had to relocate at great cost to herself and her family as she did not want to risk her son drowning.

The Building and Energy Division (Building and Energy), Department of Mines, Industry Regulation and Safety is currently undertaking a review of the regulatory requirements for private swimming pools and their safety barriers. Consumer Protection will continue to work with Building and Energy to ensure that any future

[149] Penalties apply under regulation 50, Building Regulations 2012 (WA) where the pool barrier is not maintained to the required standard. Note the obligation to ensure that a safety barrier is installed or provided where there is a private swimming pool only applies to owners and occupiers in certain local government districts and areas (as listed in Schedule 5 of the Building Regulations 2012 (WA), regulation 49).

reform is aligned with the RTA to achieve the best possible outcomes for lessors and tenants.

Other jurisdictions

States and territories have different requirements for property owners that seek to rent a property with a pool. Queensland and New South Wales have gone a step further than most states and territories by imposing a requirement on property owners to ensure a valid pool safety certificate is in place prior to the start of a tenancy agreement.

In Queensland, property owners are required to register residential pools with the Queensland Building and Construction Commission. This provides a register that is easily accessible by the community and can be utilised by tenants to ensure a prospective rental property complies with required safety requirements. Furthermore, rental premises containing a pool must have a pool safety certificate in effect before entering into a tenancy agreement regardless of when the tenant starts residing at the property. Real estate professionals who collect a commission for a property that does not have a valid pool safety certificate may be liable for disciplinary action under the *Property Occupations Act 2014*.

New South Wales also requires lessors to register their pool with the NSW Swimming Pool Register and ensure that a valid pool safety certificate is in place prior to leasing a property. Lessors must provide a copy of the certificate of compliance to the tenants at the time of entering into the residential tenancy agreement.[150] A certificate of compliance can only be issued by a local council inspector or accredited certifier if the pool barrier is compliant with the applicable Australian Standard. The NSW Swimming Pool Register can be utilised by prospective tenants to ensure that rental properties with pools are compliant. Property agents responsible for the leasing of properties with a pool are required to ensure that the lessor has provided the tenant with a certificate of compliance.

Proposal

There is substantive evidence showing a clear regulatory gap in the compliance of some rental properties that contain a swimming pool. To prevent tenants being at risk and to ensure that properties are only leased if they have a compliant pool safety barrier, it is proposed to amend the RTA to require a lessor to provide a tenant with a swimming pool barrier certificate of compliance at the commencement of the tenancy.

Where a pool safety barrier expires during a tenancy and is found to be non-compliant on re-inspection, lessors and property managers must ensure action is taken to ensure compliance to protect the safety of tenants. As currently provided

[150] *Swimming Pools Act 1992* (NSW).

for under the RTA, tenants may authorise repairs to pool safety barriers where the lessor or property manager has not responded within 48 hours.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

63. *Do you agree with this proposal? Why or why not?*

64. *Can you think of other ways to improve compliance with swimming pool fence laws? Please provide as much detail as possible.*

65. *Is there a need to amend the RTA to address situations where a tenant installs a portable swimming pool? Why or why not?*

5.7. Tenant and lessor rights and responsibilities

Issue

Both lessors and tenants have rights and responsibilities under the RTA. In the context of increasing longer term tenancies, it is appropriate to consider whether reform to some of these rights and responsibilities is required.

Objective

To ensure the RTA appropriately balances the rights and responsibilities of lessors and tenants.

Discussion

Tenants

Tenants have a number of responsibilities prescribed under the RTA, as set out in Table 10 on the following page.

Table 10: Tenant responsibilities

Responsibilities	Prohibitions
Payment of rent and other utility consumption costs on due date.	Must not intentionally or negligently cause or permit damage to the property.
Keep premises in a reasonable state of cleanliness including basic household and general garden maintenance.	Must not use the premises or permit the premises to be used for any illegal purpose.
Inform the lessor about any damage or need for repairs as soon as possible.	Must not permit or cause a nuisance.
Return property to similar condition when vacating (taking into account fair wear and tear).	

Additional rights and responsibilities of tenants can be set out in Part C of the prescribed residential tenancy agreement, as long as any additional terms do not breach the Act or conflict with the tenancy agreement. Any additional clauses must also comply with unfair contract term provisions in the *Fair Trading Act 2010* (WA).

The responsibilities of tenants also extends to any persons they allow on the property which means that for example, a tenant can be held liable for any damage or nuisance caused by a guest.

Lessors

Lessors have a range of responsibilities in renting out their property to tenants under the RTA as outlined in Table 11 below.

Table 11: Lessor responsibilities

Responsibilities	Prohibitions
Ensure that the rental premises are clean, habitable and vacant on the day of possession.	Must not interfere with the quiet enjoyment of the tenant.
Keep premises in a reasonable state of repair including major garden maintenance (i.e. tree lopping, maintenance of fire breaks).	Must not allow another tenant to interfere with the reasonable peace, comfort or privacy of the tenant in the use of the premises.
Ensure premises comply with building, health and safety laws (such as smoke alarms and pool fencing).	Must not unreasonably refuse a request from tenant to sublet the premises if provided for in the residential tenancy agreement.

Arrange repairs to essential services within 24 hours of being notified and address urgent repairs within 48 hours.	Must not unreasonably refuse a request from tenant to affix any fixture or make any renovation, alternation or addition to the premises if this is provided for in the residential tenancy agreement.
Ensure the property is reasonably secure.	
Responsible for the payment of annual water and council rates.	
Provide proper notice if seeking to enter the premises including for routine inspections.	
Meet costs arising from fair wear and tear (such as carpet wear, paint flaking).	
Repair of damage caused by a third party or events outside the tenant's control (such as break-ins).	

Some responsibilities held by lessors will depend on the particular circumstances and the agreed details of the tenancy agreement. The rights and responsibilities of each party to the tenancy agreement balance the tenant's right to privacy with the lessor's right to protect their property.

Potential impact of longer tenancies?

If longer term tenancies become the norm, there may be a need to consider whether tenants should have additional responsibilities in relation to the repair and maintenance of the premises. For example, if the tenancy agreement is for more than five years, should the tenant be responsible to remedy a pro rata proportion of the fair wear and tear on the premises? If so, should the tenant be exempt from having to pay a security bond for those longer term tenancies? Likewise, in longer term tenancies, should the tenant have greater rights to make minor modifications to the premises in order to make the premises their home and to meet any mobility or access needs they might have?

Breach of the tenancy agreement

In discussions with stakeholders, concerns have been raised about the difficulty of dealing with repeated breaches of the RTA, for example, the tenant who is repeatedly late in paying rent but brings rent up to date before termination action can be taken, or the lessor who repeatedly breaches the tenant's right to quiet enjoyment. Both Queensland and Victoria provide for a strike system that allows for termination of the tenancy agreement in circumstances where there are repeated breaches of the Act.

In Queensland, the party incurring the breach can apply directly to the Queensland Civil and Administrative Tribunal (QCAT) for termination of the agreement where a

repeated breach has occurred for the third time within a 12 month period.[151] Safeguards are in place to ensure that tenancy agreements are not terminated for trivial breaches.

Victoria is implementing reforms to implement a 'strike' system where the first four times a tenant is given notice to vacate for non-payment of rent are treated differently to the fifth and subsequent times a notice is given within a 12 month period. For the first four times in a 12 month period, a lessor can give the tenant a 14-day notice to vacate for unpaid rent when the tenant owes 14 days rent or more. If the tenant pays back the rent owed within the 14 day notice period, the notice to vacate has no effect. For the fifth and subsequent times, the notice to vacate is valid regardless of whether the tenant pays the rent owed within the 14 day notice period. If the tenant does not vacate within the 14 day notice period, the lessor can apply to the Victorian Civil and Administrative Tribunal (VCAT) for a possession order to evict the tenant. In deciding whether to make a possession order, the VCAT must consider whether doing so is reasonable and proportionate.[152]

Wilful damage of premises

In Western Australia, where a tenant is found to have intentionally or recklessly caused damage to the rental premises or is likely to do so, lessors may currently apply to the Magistrates Court to terminate the residential tenancy agreement.[153] Some stakeholders have expressed concern at the length of time it can take to obtain a hearing in the court in relation to property damage and that during this time, further damage can occur.

The RTA does not provide a penalty for the wilful damage of premises by tenants. Although there is a penalty under the *Criminal Code* (WA)[154] for wilful damage, lessors have previously informed Consumer Protection that it is difficult to obtain a prosecution for this offence in relation to tenants.

[151] For termination of the agreement, the following factors must be satisfied: notice to remedy the breach was given each time, each breach was for the same problem and was rectified and the problem is of a serious nature. If the breach is not serious, QCAT may not end the agreement.
[152] The VCAT can consider a number of factors in making a possession order including the nature, frequency and duration of the conduct of the tenant, whether the breach is trivial, whether the breach was caused by the conduct of any other person other than the tenant and whether the breach has been remedied as far practicable.
[153] The Magistrates Court, on application of the lessor, may terminate a residential tenancy agreement where the tenant is found to have intentionally or recklessly caused or permitted or likely to cause or permit, serious damage to the premises.
[154] Section 444 of the Criminal Code provide penalties for criminal damage where any person wilfully and unlawfully destroys or damages property. Section 443 under the Criminal Code holds that that where a person does an act or omission intending to destroy or damage property or knowing or believing that the act or omission is likely to result in the destruction of or damage to property that person is regarded as having wilfully destroyed or damaged property.

Proposal

The RTA requires amending to clarify the rights and responsibilities of lessors and tenants, particularly as renting becomes increasingly long-term for many in the community. Consumer Protection has received previous stakeholder feedback that it can be difficult under existing provisions of the RTA to adequately address repeated breaches of the tenancy agreement or where serious property damage has occurred. It is proposed to amend the RTA to:

- allow lessors and tenants to agree for the tenant to share in the repair and maintenance of the premises where the tenancy period is greater than five years and the tenant has greater rights in relation to making modification to the premises;

- allow a lessor or tenant to commence termination proceedings where the other has committed repeated serious breaches of the agreement or the Act within a twelve month period; and

- create an offence under the RTA of wilful damage to the premises.

For termination of the tenancy agreement by either the tenant or lessor, the number of strikes within a 12 month period would be determined through further consultation with stakeholders and consideration of similar models in other states and territories. For example, as noted above, Queensland provides for termination of the tenancy agreement where a repeated breach occurs for the third time in a 12 month period. Safeguards would be developed to ensure that tenancy agreements could not be terminated for a trivial breach.

It is anticipated that lessors will support longer-term tenancies where tenants have a greater role in the repair and maintenance of premises where a long-term tenancy agreement is in place. This proposal represents a balanced approach to the rights and responsibilities of lessors and tenants and is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action. Noting of course that we have discussed in previous chapters, mechanisms to enable measured rent reviews in longer term tenancies.

Questions

66.	*Do you agree with this proposal? Why or why not?*
67.	*Do you think lessor and tenant obligations in the RTA are well understood? If no, how could this be made clearer?*
68.	*What do you think would be the cost implication of the different options? Please provide as much information as possible.*
69.	*What other changes might be needed to lessor and tenant rights and responsibilities to modernise the RTA so that it can appropriately respond to changing trends in the rental market?*
70.	*Are there sufficient repercussions for lessors and tenants who don't meet their obligations under the RTA? If not, what changes are needed?*

6. Termination of tenancy agreements

The purpose of this chapter is to examine grounds for termination of tenancy agreements and whether these are appropriate. The first part of this section will focus on grounds for the lessor to terminate the tenancy agreement. The latter part of this section will focus on termination of the tenancy agreement by the tenant.

Termination is the word used to describe ending a residential tenancy agreement. Section 60 of the RTA lists the current circumstances under which a tenancy agreement, or a tenant's interest in a tenancy agreement, may be terminated. These are:

- where the lessor or tenant gives notice of termination under this Act and —
  - the tenant vacates the premises as per the notice; or
  - the court makes an order terminating the tenancy agreement;
- if the tenancy agreement is a fixed term tenancy agreement, either the lessor or tenant gives the other notice of intention not to renew the agreement and —
  - the tenant vacates the premises; or
  - the court makes an order terminating the tenancy agreement;
- if family violence has occurred and the victim tenant wants to leave the premises —
  - the victim tenant gives notice together with at least 1 of the documents required under section 71AB(2); and
  - the tenant vacates the premises as per the notice;
- if family violence has occurred and the victim tenant leaves the premises —
  - if a co-tenant gives notice of termination to the lessor; and
  - the co-tenant vacates the premises as per the notice;
- if family violence has occurred the court terminates the perpetrator's interest in the tenancy agreement;
- where the court terminates the agreement under sections 73, 74, 75 or 75A;[155]
- where a person having superior title to that of the lessor becomes entitled to possession of the premises;
- where a mortgagee in respect of the premises takes possession of the premises;
- where the tenant abandons the premises;
- where the tenant delivers up vacant possession of the premises pursuant to an agreement in writing between the lessor and the tenant to terminate the residential tenancy agreement;
- where the agreement terminates by merger;
- where every tenant dies.

[155] *Residential Tenancy Act 1978* (WA), s. 73 (termination where tenant causing serious damage or injury), s.74 (termination where lessor or tenants would otherwise suffer undue hardship, s.75 (termination of social housing agreement due to objectionable behaviour, s.75 (termination of agreement for breach by lessor).

6.1. Eligibility related grounds of termination

Issue

During initial discussions with stakeholders in the lead up to this review, various lessor stakeholders have expressed the need for the RTA to include specific provisions to allow for termination of a tenancy agreement where either the tenant is no longer employed in the position that entitled them to the tenancy, where the tenant is no longer eligible for their supported accommodation or where a student is no longer enrolled at the educational institution related to the accommodation.

Currently, the only termination provision specific to eligibility criteria is in relation to termination of a social housing tenancy agreement on the grounds that the tenant is no longer eligible for social housing premises.[156]

Objective

To ensure the RTA appropriately balances the needs of lessors and tenants in relation to termination of eligibility related tenancies.

Discussion

Australian jurisdictions have different approaches to the termination of employment and other eligibility related tenancy agreements. Table 12 below details which jurisdictions allow for termination of the tenancy agreement on the basis of either the tenant being no longer employed by the lessor or the tenant no longer being eligible for social housing premises.

Table 12: Terminated on eligibility related grounds

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Termination of tenancy on grounds no longer employed	✓	✗	✓	✓	✗	✗	✗	✗
Termination of tenancy on grounds no longer eligible for social housing[157]	✗	✓	✗	✓	✓	✓	✓	✓

[156] *Residential Tenancies Act 1987*, section 71C.
[157] Note that under the WA *Residential Tenancies Act 1987*, social housing only includes premises provided by the housing authority and excludes other types of community housing.

Proposal

Stakeholder feedback in the initial stages of this review has identified a need to amend the RTA to provide for the lessor to terminate the tenancy agreement based on prescribed eligibility related grounds.

It is proposed to amend the RTA to allow a lessor to terminate the tenancy agreement if the tenant is no longer employed by the lessor or, in relation to social housing tenancy agreements, the tenant ceases to satisfy the eligibility criteria for the tenancy.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

71. *Do you agree with this proposal? Why or why not?*

72. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

73. *In terminating the tenancy agreement, should the lessor be required to issue a notice of termination to the tenant, or to apply to the court to seek an order terminating the tenancy agreement?*

74. *If this proposal is pursued, how much notice should a tenant be given to vacate the premises? Why?*

6.2. Sale of the rental premises

Issue

Currently under section 63 of the RTA, a lessor can terminate a periodic tenancy agreement if the lessor has entered into a contract for sale of the premises, and vacant possession is a condition of the sale. The notice period for the tenant to vacate the premises is 30 days. However, a fixed term tenancy agreement cannot be terminated on this ground.

This provision has not been amended since the RTA was first introduced in 1989. It is therefore appropriate to review this provision to determine if it appropriately balances

the interests of tenants and lessors and if the notice periods are reasonable. Furthermore, if the RTA is to be amended to limit or remove the use of fixed term tenancy agreements, it is appropriate to review the provisions relating to termination of a periodic agreement on the grounds the premises have been sold.

Objective

To ensure the RTA appropriately balances a tenant's right to security of tenure with a lessor's need to have flexibility in dealing with their asset.

Discussion

In the survey conducted by the Bond Administrator discussed at chapter 3.3, sale of the premises and mortgagee repossession[158] accounted for the ending of a tenancy agreement on 741 occasions in the 13 month period from February 2018 to March 2019. This accounts for approximately three percent of terminations during this period.

The majority of states and territories prohibit the termination of a fixed term tenancy agreement on the ground the premises have been sold. The residential tenancy legislation in the Northern Territory is silent on termination of the tenancy agreement for sale of the premises. What differs between the jurisdictions is the period of notice that must be given by the lessor requiring the tenant to vacate. The relevant notice periods are set out in Table 13 below.

Table 13: State and territory notice periods for sale of premises

	Notice period required
ACT[159]	8 weeks' notice.
NSW[160]	30 days' notice.
QLD[161]	4 weeks' notice.
SA[162]	60 days' notice.
TAS[163]	60 days' notice.
VIC[164]	60 days' notice.
WA	30 days' notice.

[158] The survey grouped sale of premises and mortgagee repossession together. It is therefore not possible to separate these grounds and determine what proportion of terminations related to each ground.
[159] *Residential Tenancies Act 1997* (ACT) Schedule 1 clause 96(1)(d).
[160] *Residential Tenancies Act 2010* (NSW) section 86.
[161] *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) section 286 and 329(f).
[162] *Residential Tenancies Act 1995* (SA) section 81.
[163] *Residential Tenancy Act 1997* (TAS) section 47.
[164] *Residential Tenancies Act 1997* (VIC) section 259A.

Alberta and British Columbia only allow a lessor to terminate a tenancy agreement on the grounds the premises are being sold if the purchaser of the premises is intending to use the premises for their own purpose or to change the use of the premises from residential tenancy to something else. This means that, if the buyer is purchasing the premises as an investment property and intends to rent the premises, the existing tenant must be allowed to remain.[165]

Options

The following options are being considered in relation to this issue.

Option A – Status quo

No change to the current legislative regime. Lessors will continue to be entitled to terminate a periodic tenancy agreement with 30 days' notice to the tenant if a contract has been entered to sell the premises and vacant possession is a condition of the sale.

Option B – Increase the notice period to 60 days

A lessor will continue to be able to terminate a periodic agreement only on the grounds that the premises have been sold and that vacant possession is a condition of the sale. However, the notice period to be given to a tenant would be not less than 60 days' notice. No termination of fixed term agreements would continue.

Option C – Amend the RTA to prohibit a lessor from terminating the tenancy agreement unless the purchaser requires the premises for their own residence or intends to change the use of the premises.

This option is modelled on the legislation in Alberta and British Columbia. A lessor may issue a notice of termination to an existing tenant on the grounds that the premises have been sold, but only if a purchaser intends to use the premises for their own residence or the residence of a family member, or if the purchaser intends to change the use of the premises. For example, converting the premises from residential premises to a retail outlet or a small business office. Evidence in the form of a declaration of the purchaser, or evidence of application to the local council for a change of purpose rating, may be required to accompany the notice of termination. The period of notice would be determined in consultation with stakeholders.

[165] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/during-a-tenancy/selling-a-tenanted-property; and https://www.alberta.ca/ending-rental-agreement.aspx

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • Lessors retain flexibility to terminate periodic tenancies. **Tenants** • No change. **Government** • No change.	**Lessors** • No change. **Tenants** • Security of tenure at risk. **Government** • Risk that rental market will not provide security of tenure.
Option B – Increase notice period to 60 days' notice	**Lessors** • Lessors retain flexibility. **Tenants** • More time for tenant to find alternative accommodation. **Government** • None discernible.	**Lessors** • May impact on settlement date for sale of the premises. **Tenants** • Unlikely to improve security of tenure for tenants. **Government** • None discernible.
Option C – Tenancy agreement may only be terminated if the purchaser requires the premises for their own use or intends to change the purpose of the premises	**Lessors** • Lessors retain flexibility. **Tenants** • Likely to substantially improve security of tenure for tenants. **Government** • Provides greater security of tenure across the rental market.	**Lessors** • Sale of rental premises may be impacted - buyers may not want to take on existing tenants. **Tenants** • None discernible. **Government** • None discernible.

Questions

75. Which option do you prefer and why?

76. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

77.	*What do you think would be the cost implications of the different options? Please provide as much information as possible.*
78.	*If Option C is pursued, how much notice should a tenant be given to vacate the premises? Why?*

6.3. Mortgagee repossession of the rental premises

Issue

Currently under the RTA, a residential tenancy agreement ends when a mortgagee takes possession of the premises in pursuance of the mortgage.[166] In 2013, the RTA was amended to insert new section 81A, which requires a mortgagee to give a tenant not less than 30 days' notice to vacate the premises. This applies to both fixed term and periodic tenancies. During this time, a tenant is not required to pay rent to the mortgagee.

Given the continued cycle of high rate of housing loans in arrears in Western Australia that occur from time to time, and the current high number of applications to the Supreme Court for possession of the premises, it is important that we take this opportunity to examine the rights of tenants when a mortgagee repossesses the premises to ensure they are appropriate.

Objective

To ensure the RTA protects the interests of a tenant in circumstances where a mortgagee is taking possession of the premises without unduly dampening lending practices of the financial institutions in relation to investment properties.

Discussion

Currently Western Australian mortgages account for the majority of housing loans in arrears in Australia.[167] According to data provided by the Supreme Court of Western Australia, there were just over 1300 applications for possession of premises in the 2018 to 2019 financial year.[168] While these figures do not differentiate between owner occupier and investor repossessions, there is no doubt some of these applications will have related to premises that were tenanted. As noted by the Reserve Bank of Australia, one of the causes of this high rate of housing loans in arrears is likely to be the recent period of high vacancy rates in rental properties in Western Australia, which has likely had downward pressure on rental incomes for the lessor, which in turn places pressure on a lessor's ability to maintain mortgage payments.

[166] Section 60(1)(e).
[167] Johnathon Kearns, Reserve Bank of Australia, *Understanding Rising Housing Loan Arrears*, 18 June 2019, https://www.rba.gov.au/speeches/2019/sp-so-2019-06-18.html
[168] https://www.supremecourt.wa.gov.au/S/statistics_print.aspx

In most of the Australian states and territories, a mortgagee, as a superior title holder, is entitled to terminate the tenancy agreement if they have obtained possession of the premises pursuant to the mortgage by way of court order. In NSW, Queensland and Victoria, however, the right to terminate the tenancy agreement does not apply if the mortgagee expressly or impliedly gave consent for the premises to be leased.[169] In these instances, the mortgagee becomes the lessor.

Proposal

To improve tenants' security of tenure in circumstances where a mortgagee takes possession of the premises, it is proposed to amend the RTA to provide that a tenancy agreement does not automatically terminate on possession of the premises where the mortgagee has expressly or impliedly consented to the premises being leased. Possession of the premises can only occur after an order is made by the Supreme Court.

In these circumstances, the mortgagee would be able to avail themselves of the other grounds for termination of the lease under the RTA, including any provisions relating to the termination of the tenancy agreement where the premises are to be sold.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

79. *Do you agree with this proposal? Why or why not?*

80. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

[169] See *Residential Tenancies Act 2010* (2010) (NSW), https://www.fairtrading.nsw.gov.au/housing-and-property/renting/during-a-tenancy/mortgagee-repossession; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), section 317; *Residential Tenancies Amendment Act 2018* (Vic) section 91ZZK.

6.4. Termination of the tenancy agreement by the tenant

Issue

Currently under the RTA, a tenant can terminate a periodic tenancy agreement by giving the lessor 21 days' notice to terminate the tenancy agreement.[170]

A tenant cannot terminate a fixed term tenancy agreement under the RTA unless:

- by issuing the lessor a notice of intention not to renew the agreement at the end of the fixed term;
- by issuing a lessor notice of termination as either a tenant or co-tenant if family violence has occurred in the premises;
- by application to the court on grounds of breach of the agreement by the lessor;
- by application for a court order on the grounds of hardship to the tenant;
- by written agreement with the lessor; and
- by abandoning the premises (break lease).

Tenants and tenant stakeholders have expressed concern that tenants in fixed term tenancy agreements sometimes cannot afford to terminate their tenancy agreement in order to move into social housing or aged care, or if they have lost their employment.

Objective

To ensure the RTA appropriately balances the interests of tenants who need to terminate a fixed term tenancy agreement in certain circumstances with the rights of lessors to certainty of contract.

Discussion

As outlined in chapter 2.1, a survey of why tenancy agreements had been terminated was conducted by the Bond Administrator. Approximately two thirds[171] of the tenancy agreements had been ended by the tenant at the conclusion of the fixed term tenancy agreement.

During that same period, however, 14 percent of tenants terminated the tenancy agreement by way of breaking the lease or abandoning the premises. The survey did not ask tenants why there was a break of lease, however some of the reasons why a tenant may seek to break a fixed term tenancy agreement prior to its end date include:

- break down of relationship between the co-tenants;
- tenant has been offered social housing premises;
- tenant needs to move into aged care;
- tenant loss of income due to loss of employment or illness;

[170] *Residential Tenancies Act 1987*, section 68.
[171] One reason for this proportion is that during the survey period, vacancy rates were high and rents were in decline. It is possible that a proportion of tenants were terminating their tenancy agreement at the conclusion of the fixed term to secure alternative rental premises at a lower weekly rent.

- significant reduction of rents in similar premises; and
- need to relocate due to change of employment.

This list is not exhaustive.

Irrespective of the reason, break of lease can be complicated and expensive for both the tenant and the lessor. If a tenant seeks to break a fixed term lease prior to the end of the term, they will approach the lessor and ask for agreement, or they will abandon the premises. Either way, a tenant will be liable to pay the rent for the premises until another tenant can be found and to compensate the lessor for other reasonable expenses incurred as a result of breaking the contract early.

Other jurisdictions

The approach of the states and territories in Australia in relation to tenants terminating a fixed term tenancy agreement prior to its end date are set out in Table 14 below.

Table 14: Grounds for tenant termination of fixed term tenancy agreement

	ACT	NSW	NT	QLD	SA	TAS	VIC
Lessor has breached the tenancy agreement	✓	✓	✗	✓	✓	✓	✗
Premises have become uninhabitable	✓	✗	✓	✗	✗	✗	✗
The lessor has caused or threatened serious damage or injury	✓	✗	✗	✓	✗	✗	✗
A co-tenant has caused or threatened serious damage or harm	✗	✗	✗	✓	✗	✗	✗
Lessor made false and misleading statement to induce the tenant	✓	✗	✗	✗	✗	✗	✗
The tenant is being posted away from the State	✓	✗	✗	✗	✗	✗	✗
Tenant would suffer hardship	✓	✗	✓	✓	✗	✗	✗

To move into social housing premises	✗	✓	✓	✗	✗	✗	✓
To move into aged or specialist care	✗	✓	✗	✗	✗	✗	✓
Tenant needs temporary crisis accommodation	✗	✗	✗	✗	✗	✗	✓
Lessor is going to sell the premises but did not state this prior to the agreement	✗	✓	✗	✗	✓	✗	✓
Lessor does not carry out repairs within 28 days	✗	✗	✗	✗	✗	✓	✗

In addition to the above grounds allowing a tenant to terminate a fixed-term tenancy agreement without having to pay compensation to the lessor, both the ACT and NSW allow for the tenancy agreement to include a "break lease" clause. A "break lease" clause sets out the precise compensation that is payable to a lessor if a tenant breaks a fixed-term agreement. This is in contrast to the current requirement of the RTA that a tenant must pay the rent until such time as the premises are re-let and all other reasonable compensation to the lessor. Table 15 below shows how the break lease clause operates in both NSW and the ACT.

Table 15: Break lease clauses in NSW and ACT

TERM OF THE AGREEMENT	COMPENSATION PAYABLE TO THE LESSOR
Less than three years in total and less than half of the fixed-term has expired (for example 3 months into a 12 month agreement).	Equivalent to six weeks rent.
Less than three years in total and more than half of the fixed-term has expired.	Equivalent to 4 weeks rent.
Agreement is longer than three years, irrespective of how much of the agreement has expired.	As agreed between the lessor and tenant and stated in the agreement.

A number of different international jurisdictions provide other examples of the law in relation to a tenant terminating a fixed term tenancy agreement.

In Ireland, a tenant can break a fixed term tenancy agreement if:

- a lessor has breached their responsibilities under the agreement;

- the lessor has refused to allow the tenant to sublet; or
- the lessor has refused a request for assignment of the lease.

Irish tenancy law allows a tenancy agreement to include a break lease clause.[172]

In Scotland, because fixed term tenancy agreements are no longer available under their residential tenancy laws, there is no need to break a lease. The maximum notice a tenant may be required to give is 28 days' notice to terminate the lease.[173]

In the UK and Wales, tenancy agreements are permitted to include a break lease clause. A tenant may only terminate the lease early if the tenancy agreement includes a break lease clause or the tenant negotiates with the lessor to end the tenancy agreement.[174]

In British Columbia, a tenant may end a fixed term tenancy agreement early if the tenant is fleeing family violence or the tenant has been assessed as needing aged care or has been offered a place in an aged care facility. The lease agreement may include a liquidated damages clause.[175]

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this model there is no change to the current legislative regime.

Option B – Amend the RTA to allow tenants to terminate a fixed tenancy agreement in specified circumstances.

Under this option, a tenant would be allowed to terminate a fixed term tenancy agreement in certain prescribed circumstances without incurring break lease fees, including:

- the tenant requires care in an aged care facility and has accepted an offer of a place in such a facility;
- the tenant has been offered a place in social housing, community housing or other supported accommodation; or

[172] https://onestopshop.rtb.ie/ending-a-tenancy/ending-a-fixed-term-tenancy/
[173] https://www.mygov.scot/rent-private-landlord/ending-a-tenancy/
[174] https://www.gov.uk/private-renting-tenancy-agreements/how-to-end-your-tenancy
[175] https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/ending-a-tenancy/tenant-notice

- the lessor has placed the house on the market for sale and is proposing to conduct home open inspections, and the proposed sale was not disclosed to the tenant prior to entering into the tenancy agreement.

Consideration could also be given to prescribing other grounds for termination, such as the tenant has suffered a substantial decrease in income due to loss of employment or illness, or the tenant is required to relocate for employment. It is intended that this amendment, if pursued, would not affect current provisions in the RTA allowing a tenant to terminate their interest in a tenancy agreement on the grounds they have been a victim of family and domestic violence, or by court order on the grounds they would suffer undue hardship.

Option C – Amend the RTA to allow a residential tenancy agreement to include a break lease clause

This option would allow a tenant to break a fixed term tenancy agreement in any circumstances, provided a pre-determined break lease fee amount was paid to the lessor.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • Lessors not at risk of loss of income due to early termination of lease. **Tenants** • No change. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Tenants at risk of being locked into fixed term tenancy agreements including where they incur hardship. **Government** • Will not reduce disputes being heard by the Magistrates Court regarding reasonable compensation for the lessor.
Option B – Allow a tenant to terminate a fixed term tenancy agreement in prescribed circumstances	**Lessors** • Likely reduce number of break leases. • Reduces the circumstances that could give rise to a dispute	**Lessors** • Lessors will incur cost of re-letting premises. **Tenants** • None discernible.

	between a lessor and a tenant about reasonable compensation. **Tenants** • Likely to increase flexibility for tenants in circumstances of hardship. • Reduces the circumstances that could give rise to a dispute between a lessor and a tenant about reasonable compensation. **Government** • Reduce number of disputes being taken to the Magistrates Court which is likely to lead to cost savings.	**Government** • None discernible.
Option C – Allow a tenancy agreement to include a break lease fee clause.	**Lessors** • Likely reduce number of break leases. • Reduce disputes between lessors and tenants about reasonable compensation. • Lessor knows what they will receive if the tenancy agreement is terminated early. **Tenants** • Likely to increase flexibility for tenants in circumstances of hardship. • Reduce disputes between lessors and tenants about reasonable compensation. • Tenant has certainty about costs they will incur if the tenancy agreement is terminated early.	**Lessors** • As above. **Tenants** • May still be cost prohibitive for low income tenants to break a fixed term tenancy. **Government** • None discernible.

	Government • Reduce number of disputes being taken to the Magistrates Court. • Cost saving for government.	

Questions

81. Which option do you prefer and why?

82. Can you think of other ways to address this issue? Please provide as much detail as possible.

83. What do you think would be the cost implications of the different options? Please provide as much information if possible.

84. If Option B, is pursued, should a tenant be required to seek an order from the court or be allowed to terminate the tenancy agreement by giving notice to the lessor? If notice to the lessor, how much notice should a tenant be required to give to vacate the premises? Why?

85. If Option B is pursued, are there other grounds that should be prescribed to allow a tenant to terminate a fixed term tenancy agreement? Please provide details.

86. Should the RTA also be amended to allow a lessor to apply to the court to terminate a fixed term tenancy agreement without having to pay compensation to the tenant in limited circumstances of hardship? Why or why not?

87. If Option C is pursued, how should the break lease fee be structured? Please explain your reasons.

7. Dispute resolution

The purpose of this chapter is to explore options for the resolution of disputes arising under the RTA. The discussion will look first at disputes relating to the disposal of security bonds, and then dispute resolution generally for all other types of disputes. The intention is not to limit discussion to a question of simply choosing between the Magistrates Court or the State Administrative Tribunal (SAT) as the appropriate jurisdiction for resolution of tenancy disputes, but rather to have a broader look at trends in dispute resolution and devise a model that is user friendly, efficient and cost effective in delivering legal redress for lessors and tenants.

When disputes occur between lessors and tenants that cannot be resolved by the parties themselves, it is vital that an effective and efficient dispute resolution service is available.

Currently the RTA provides that the Magistrates Court has exclusive jurisdiction to resolve residential tenancy disputes. Having disputes heard by the Magistrates Court is unique within Western Australia when compared to disputes arising under other tenancy like legislation, such as the *Residential Parks (Long-stay Tenants) Act 2006* (WA), the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) and the *Retirement Villages Act 1992* (WA), which are heard in the State Administrative Tribunal (SAT). It is also unique when compared to most other Australian states and territories whose residential tenancy disputes are heard by their respective civil and administrative tribunals.

There are some benefits to having residential tenancy disputes heard by the Magistrates Court in Western Australia. The location of court houses in many regional towns means that lessors and tenants across the state have ready physical access to their services. Commencing a matter in the Magistrates Court costs $71.70 compared to $101.50 for applications in the SAT.

However, in discussions with stakeholders, there are a number of concerns held by both lessors and tenants in relation to the Magistrates Court jurisdiction. These include:

- the absence of written reasons for decisions means there is no library of decisions that can assist lessors, tenants, regulators and advocates to better understand the court's interpretation of the RTA;

- a perceived lack of consistency in decision making between courts, often attributed to the absence of written reasons for decisions being available to support greater consistency; and

- the length of time taken to reach the hearing stage for some matters, which can result in lengthy and protracted eviction proceedings during which time a tenant may not be paying rent and/or causing damage to the premises.

7.1. Disposal of security bonds

Issue

Currently under the RTA, the Bond Administrator may only dispose of a security bond if:

- the parties have signed a Joint Application for Disposal of Security Bond form, signed by all parties to the bond; or
- there is an order from the court.

The issue for consideration is whether there is a more effective process for the disposal of the security bond that will continue to safeguard the interests of all parties to the bond.

Objective

To ensure the RTA provides a cost effective and efficient mechanism for the disposal of the security bond that appropriately safeguards the interests of all parties to the bond.

Discussion

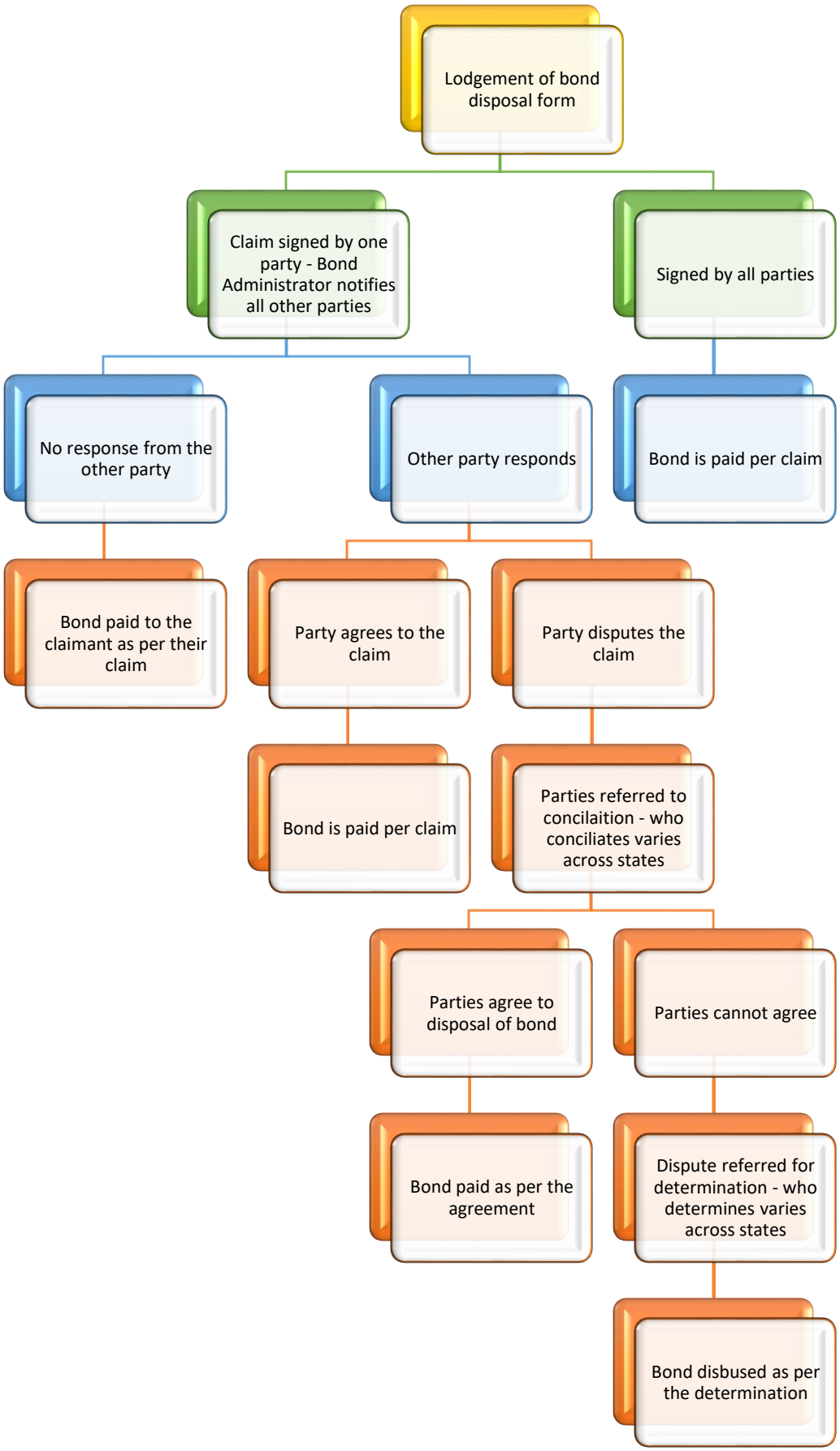
Over the past five years, applications to the Magistrates Court to resolve bond disputes has increased by 20 percent. In the 2017 to 2018 financial year, 7,535 security bonds were dispersed based on a court order. This represents just over 50 percent of residential tenancy applications made to the Magistrates Court in that year.

There is a cost of $71.70 for making an application to the court for an order to dispose of the security bond. There is also time for the parties to attend the court, which may take some hours on the day depending on the court list. If the matter cannot be settled by conciliation before a Registrar, the matter will need to be set down for a hearing. Hearing wait times can extend from weeks to months, depending on the court's workload at the time.

While some of these applications require dispute resolution because the parties to the bond could not agree whether damage is a result of tenant liability or fair wear and tear, other applications would have been made to the court simply because one or more signatures could not be obtained. For example, where a tenant has abandoned the premises or a former tenant has long since moved on from the premises, but their name remains on the bond record.

New South Wales, Queensland, South Australia and Tasmania all have a system whereby one party to the bond can make a claim on the bond, and the Bond Administrator notifies the other party that the claim has been lodged. If there is no response after a period of time, or if the parties agree, the bond is dispersed per the claim and/or the agreement. The diagram below illustrates the bond claim process.

CHART 4 – GENERALISED MODEL OF BOND DISPOSAL BASED ON NSW, QLD AND TAS



These models provide various steps in the process for the disposal of the bond to be finalised without a dispute having to be referred to the court or tribunal. The RTA does not allow for any of these options. Under the RTA, either all parties sign the bond disposal form or an application must be made to the court.

Determining a dispute

Where the above jurisdictions differ is in relation to how a dispute is determined if the parties cannot reach agreement.

In NSW, if one of the parties disputes the claim made on the bond by the other party, that disputing party must lodge an application with the NSW Civil and Administrative Tribunal (NCAT) to determine the dispute.[176] The Bond Administrator will pay the bond in accordance with an NCAT order.

In Queensland, if either party disputes the bond disposal claim, any undisputed amount will be paid and the disputed amount will be held until the dispute is finalised. The parties will be referred to the Residential Tenancy Authority's (RTA) dispute resolution service in the first instance. If this process results in the parties reaching an agreement, the parties sign a joint form agreeing to the release of the bond. If the parties cannot agree at this stage, the disputing party can apply to the Queensland Civil and Administrative Tribunal (QCAT) for a determination. If the disputing party does not lodge an application to QCAT within the prescribed period of time, the RTA will pay the bond as per the first application received. If the disputing party does lodge an application with QCAT, the RTA will make a payment in accordance with a QCAT order.[177]

In South Australia, if only one party lodges a claim with the Commissioner, the Commissioner must notify the other party and invite them to respond within a prescribed period of time. If the application is made by a lessor/property manager and the tenant does not respond, the Commissioner will still require the lessor to produce evidence of their claim prior to releasing any of the security bond to the lessor.[178] If either party notifies the Commissioner of a dispute over the dispersal of the bond, the Commissioner must refer the dispute to the South Australian Civil and Administrative Tribunal (SACAT). The Commissioner will dispose of a security bond in accordance with a SACAT order.[179]

In Tasmania, if there is a dispute over the dispersal of the security bond, it is the Residential Tenancy Commissioner who determines the dispute in the first instance.[180] If the parties are unhappy with the determination of the Commissioner, either party can lodge an appeal against the determination with the Magistrates Court. The court

[176] https://www.fairtrading.nsw.gov.au/housing-and-property/renting/ending-a-tenancy/getting-your-bond-back
[177] https://www.rta.qld.gov.au/Renting/Ending-a-tenancy/Bond-refunds
[178] https://www.sa.gov.au/topics/housing/renting-and-letting/residential-bonds/bond-refunds
[179] *Residential Tenancies Act 1995* (SA), s63.
[180] *Residential Tenancies Act 1997* (Tas), s29G.

must conduct a new hearing and can either affirm the determination of the Commissioner or vary the determination of the Commission.[181]

Proposal

The RTA currently requires either all parties to sign the bond disposal form or an application be made to the court for the disposal of the security bond. The RTA requires amending to provide for a more efficient bond disposal system in line with other states and territories.

It is proposed to amend the RTA to allow either party to apply to the Bond Administrator for release of the security bond and that the Bond Administrator is obligated to seek the views of all other interested parties before releasing the security bond. The Bond Administrator would do this by sending an email to all other persons whose names are on the bond record, as currently occurs in New South Wales, Queensland, South Australia and Tasmania. If the Bond Administrator does not receive a response, or the parties agree to the original claim, the Bond Administrator will dispose of the bond. If the claim is disputed, then dispute resolution is to be applied.

The dispute resolution process proposed is that, in the first instance, the parties will be referred to Consumer Protection for mediation. If the parties are unable to reach agreement, or are unwilling to participate in mediation, the dispute will be referred to the Commissioner for determination. Ultimately, the parties will be entitled to appeal the Commissioner's determination to either the Magistrates Court or SAT, depending on the jurisdiction decided for tenancy disputes into the future.

There is likely to be some cost impost on the RAA of this proposal as both the medication function and the Commissioner determination functions will need to be funded. However, it is anticipated that a large proportion of this cost will be offset in savings achieved by far less matters progressing to the court.

This proposal is unlikely to have a significant negative impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

[181] Ibid, s30.

Questions

88. Do you agree with this proposal? Why or why not?

89. If there is a dispute between the parties about the disposal of the security bond, should the dispute be referred to mediation and/or for determination by the Commissioner Why?

90. Are there any other amendments that need to be made to the RTA to safeguard the interests of any of the parties? Please describe.

7.2. Resolving other disputes

Issue

According to data from the Magistrates Court, there are, on average, more than 9000 Form 12 applications lodged each year. A Form 12 application is lodged when an applicant is seeking a court order for a resolution of a dispute that has arisen under the RTA. This equates to, on average, almost 25 applications per day to the Magistrates Court across the state.

In the last review of the RTA, a recommendation was made that a specialist tenancy tribunal be created and jurisdiction for resolution of disputes under the RTA be transferred to that body. Before the recommendations of the previous review could be implemented, the SAT was created and the government of the day determined that RTA disputes could be heard by SAT. A transfer of jurisdiction never eventuated, however, due to budgetary constraints at the time as well as concerns relating to access for rural and remote stakeholders

Objective

Develop a dispute resolution system that:

- is fast, fair and delivers outcomes consistent with the law;
- is accessible across the state;
- facilitates and maintains, where possible, constructive relations between the parties;
- facilitates better compliance with the law;
- provides certainty and confidence in the market; and
- is cost effective.

Discussion

Since the last review, and as noted above, concerns have continued to be raised about the resolution of RTA disputes remaining in the Magistrates Court; namely

- the length of time for some matters to be resolved, particularly as delays in dispute resolution can lead to increased damage to the premises and/or non-payment of rent; and
- the absence of written reasons for decision which creates the perception of lack of consistency of decision making across the court locations.

Concerns have also been raised in relation to transfer of the jurisdiction to SAT, in particular the ability of the SAT to deliver accessible state wide services. SAT is located in the Perth CBD and all metropolitan matters would be heard at this SAT location. This may have time and cost impacts for lessors, property managers and tenants in outer metropolitan locations such as Joondalup, Mandurah, Midland and Armadale who can currently access dispute resolution at their local court house. It will have impacts for regional parties as well. The SAT has previously indicated that it would operate circuits in the major regional towns, however a number of these major regional towns already have very crowded court facilities so it may be difficult for SAT to secure regular and frequent hearing space in these locations. For those in other regional towns not covered by a circuit, services would be delivered via teleconference, video conference and the like. Some in those towns may perceive this as a reduction in the service they currently have available at the court.

It is therefore not a simple decision to change jurisdiction from the Magistrates Court to SAT. There is also now a much greater focus in the community on alternative dispute resolution as a means of involving the parties in the resolution of their disputes. For these reasons, it is timely to look at the whole dispute resolution process to determine if the RTA should be amended to provide a more viable and effective model.

It is important to remember that the nature of the parties in rental disputes (predominantly private individuals), and the nature of what is at stake (an essential service vs a key business asset), may result in different needs or focus in dispute resolution when compared to other civil disputes, such as commercial contract disputes.

Housing is something a tenant requires in continuation, moving is costly, and rental housing is often in short supply. These factors can contribute to an imbalance of bargaining power between the parties and can influence the way in which both parties choose to handle disputes. With regards to the dispute resolution process itself, an imbalance of power can arise between the parties in some instances because:

- landlords can benefit from being represented by property managers, who are familiar with formal dispute resolution processes; and
- vulnerable and disadvantaged tenants are less able to effectively defend a case against them, or pursue their desired outcomes through dispute resolution processes.

In particular, vulnerable and disadvantaged tenants can face difficulties in seeking assistance, exercising their rights and accessing dispute resolution services because:

- they may not be aware of their rights or options, or of assistance available to them;
- they may not be empowered to exercise their rights or access dispute resolution services; and
- they may be fearful of losing their tenancy, or being discriminated against in their current and future tenancies, if they exercise their rights.

For lessors, quick and final resolution of disputes can be important, particularly where they are reliant on rental payments, including to service loan repayments or because it is their sole source of income.[182]

Existing models for resolving disputes

Online dispute resolution

In British Columbia, the Civil Resolution Tribunal (CRT) has been recently developed as an online tribunal to handle small claims disputes.

Using the online system, parties can engage in a process that provides information, problem diagnosis and relevant information about the application of the law, as well as facilitated monitored party-to-party negotiation. If parties are not able to resolve their dispute at this stage, they may access assistance from a mediator, and if necessary can subsequently gain a binding decision from an adjudicator. The CRT enables people to control the process, accessing dispute resolution at a time and location that is convenient to them, and tailoring the timelines and steps to their needs. Telephone assistance is available at each stage, as are mail and face to face options in the mediation and adjudication phases.

Mediation

In Queensland, the Residential Tenancies Authority (RTA) offers a mediation service. The RTA employs qualified conciliators who assist the parties to resolve their disputes. The conciliators do not make judgement about who is right or wrong, however they are able to assist the parties to make informed decisions. Conciliations are generally conducted by telephone, either with all of the parties together in the one discussion, or by shuttle discussions if this is determined appropriate in the circumstances.

Parties cannot be compelled to participate in the mediation, however in order for most matters to progress to QCAT for determination, the parties must have a certificate of unresolved dispute from the RTA.[183]

In Western Australia, disputes between retail shop tenants and their landlords must be referred to the Small Business Development Corporation (SBDC) in the first instance for alternative dispute resolution and mediation.[184] If the matter cannot be

[182] Borrowed, with gratitude, from Consumer Affairs Victoria Residential Tenancies Act Review, *Dispute Resolution Issues Paper*, 8-9.
[183] https://www.rta.qld.gov.au/Disputes/Dispute-resolution
[184] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA), s.25D.

resolved, or is not appropriate for mediation, the SBDC Commissioner will issue a certificate, allowing the matter to proceed to SAT.[185]

Mediation is also offered as part of the suite of dispute resolution services in Ireland. Mediation can only proceed if the Residential Tenancies Board (RTB) of Ireland considers that it is appropriate for the matter to be resolved by way of mediation and if the parties agree. Mediation can be conducted by telephone or face-to-face. Once agreement is reached in mediation, a report of the agreement is prepared by the mediator and is given to all parties. The parties then have a 10 day cooling off period in which to decide whether to proceed with the agreement or reject the agreement.[186]

Determinations

Determinations are sometimes referred to as adjudications.

In Tasmania, the Residential Tenancies Commissioner (RTC) has authority to make determinations in relation to disputes about the disposal of a security bond,[187] a lessor's failure to undertake repairs,[188] and an allegation by a tenant in relation to unreasonable rent increase.[189]

The RTB in Ireland also allows for adjudication of tenancy disputes. Tenancy disputes in Ireland are referred to an adjudicator if the RTB determines that the dispute is not suitable for mediation or if the parties are not willing to participate in mediation.[190]

Other legislation in Western Australian jurisdictions allow for adjudication. The *Building Services (Complaint Resolution and Administration) Act 2011* (WA) allows for the Building Commissioner to make determinations in relation to the prescribed disputes. The types of orders the Building Commission may make include requiring the parties to participate in conciliation, interim orders (to avoid further and imminent detriment), remedy orders or referral of the dispute to SAT.[191] Any party that is aggrieved by an order of the Building Commissioner may apply to the SAT for a review of the Building Commissioner's decision.[192]

Courts and Tribunals

In most Australian states and territories, jurisdiction for the resolution of residential tenancy disputes rests with their respective civil and administrative tribunal. Only

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[185] Ibid, s. 25C.
[186] https://www.citizensinformation.ie/en/housing/renting_a_home/disputes_between_landlords_and_tenants.html
[187] *Residential Tenancies Act 1997*(TAS), s29G.
[188] Ibid, s36A.
[189] Ibid, s23.
[190] Above n 149.
[191] https://www.commerce.wa.gov.au/sites/default/files/atoms/files/195685_building_complaint_resolution_-_a_guide_for_consumers_feb19.pdf
[192] *Building Services (Complaint Resolution and Administration) Act 2011* (WA), s57.

Tasmania and Western Australia have jurisdiction for residential tenancy disputes vested in the Magistrates Court.

One key cited difference between tribunals and courts is that tribunals are less formal and are not bound by rules of evidence. However, residential tenancy disputes in WA are treated as minor case matters, which means the proceedings are held in private and with as little formality as the court decides is appropriate in the circumstances.[193] Furthermore, section 21 of the RTA provides that in residential tenancy disputes the court is not bound by the rules of evidence. In theory, court and tribunal proceedings would likely be very similar.

However, it is noted that this may not be the case for all lessors and tenants. For some, the court environment may be daunting, despite the minor case nature of proceedings, and this may impact on the ability or willingness of different individuals to participate.

Another core difference between the two in Western Australia is the availability of written reasons for decision. Traditionally the Magistrates Court does not provide written reasons for decision. A key reason for this is that minor cases are intended to be resolved quickly. Requiring written reasons for decision may delay outcomes in some cases.

In contrast, the SAT can and does give written reasons for decisions, although not in all cases. If the SAT does not propose itself to give written reasons for decision, a party to the proceeding can request that written reasons for decision be given.[194]

Some stakeholders have argued that by having access to a library of written reasons for decisions, lessors, property managers and tenants would be able to make better informed decisions in relation to resolution of their dispute as they will have a better understanding of how similar disputes have been decided historically. It is perceived that this may lead to a reduction in disputes being lodged with the court or tribunal, and a greater willingness on behalf of the parties to resolve disputes earlier.

The Impact of Burns v Corbett

In 2018, the High Court of Australia held that a tribunal, because it is not a chapter III court under the Constitution of Australia, cannot hear a dispute between individuals who reside in different states.[195]

The current dispute resolution regime for tenancy disputes is not affected by this decision because the Magistrates Court is capable of being a chapter III court for the purposes of these matters. However, if there is to be a change to the dispute resolution regime, for example by transferring jurisdiction for dispute to SAT and/or allowing the Commissioner to determine prescribed disputes, there will need to be a mechanism

[193] *Magistrates Court (Civil Proceedings) Act 2004* (WA), s29.
[194] *State Administrative Tribunal Act 2004* (WA), s78.
[195] *Burns v Corbett* (2018) 353 ALR 386

included so that those disputes where the lessor and tenant reside in different states can be referred to the Magistrates Court.

Options

The following options based on combinations of the above existing mechanisms are being considered in relation to this issue. However, this is only a snapshot of the vast range of options available and stakeholders are encouraged to propose alternative options for resolution of residential tenancy disputes.

Option A – Status quo

Under this model there is no change to the current dispute resolution regime.

Option B – Jurisdiction for tenancy disputes is transferred to the SAT

Under this model, the only change to the current regime is that disputes would be heard by SAT rather than the Magistrates Court.

Option C – Matters proceed to mediation in the first instance, and then if not resolved, to the court or tribunal

This model would be similar to the process adopted in Queensland. Before matters (other than some urgent matters) could proceed to a court or tribunal for final determination parties must apply to have the dispute resolved through mediation.

The mediation service would be provided by Consumer Protection and the officers would be qualified in mediation and/or conciliation. Mediation would likely be offered through both face to face and telephone mediation options. If parties reach agreement at mediation, a statement of the agreement would be prepared. If the parties do not reach agreement or if one or more of the parties do not agree to participate in the mediation, a certificate of non-agreement would be issued so that the matter could proceed to the court or tribunal.

Option D – Dispute resolution consisting of a range of options including mediation in the first instance, determination of prescribed disputes by the Commissioner and final adjudication by the court or tribunal.

This model would be similar to the approach adopted in Ireland and under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA).

As per option C, Consumer Protection would provide a mediation service staffed by qualified mediators/conciliators. If agreement is not reached at mediation or the matter is not suitable for mediation, the dispute would be referred to the Commissioner for Consumer Protection to make determinations in prescribed disputes. The types of disputes that would likely involve the Commissioner would be disputes regarding non-payment of rent, repairs to premises, access to premises for

inspections and bond disputes. Matters such as applications for termination of the tenancy would likely be referred directly to the court or tribunal.

If a party is aggrieved by a determination by the Commissioner, or if the matter is one that requires immediate referral to the court or tribunal, then the court or tribunal would be the final arbiter of the matter.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • No change. **Tenants** • No change. **Government** • No additional cost to government.	**Lessors** • Risk of continued perceived delays and inconsistency of decision making. **Tenants** • Risk of continued perceived delays and inconsistency of decision making. **Government** • No opportunity to minimise disputes and streamline dispute resolution process.
Option B – Jurisdiction for tenancy disputes is transferred to the SAT.	**Lessors** • Potential for less disputes pursued as parties will have greater knowledge of reasons for decisions. • Potential improved consistency of decision making. **Tenants** • Potentially less disputes pursued as parties will have greater knowledge of reasons for decisions. • Potential improved consistency of decision making.	**Lessors** • Loss of physical access to the courts for lessors in outer metropolitan and regional areas. **Tenants** • Loss of physical access to the courts for tenants in outer metropolitan and regional areas. **Government** • This option may result in an increase cost to government because the cost of dealing with tenancy disputes in SAT may be greater than the

	Government • Potential for reduced disputes and less non-compliance.	costs for the Magistrate Court.
Option C – Matters proceed to mediation in the first instance, and then if not resolved, to the court or tribunal.	**Lessors** • Timely and cost effective dispute resolution. • Helps preserve relationship between lessors and tenants. **Tenants** • Timely and cost effective dispute resolution. • Helps preserve relationship between lessors and tenants. **Government** • Reduces burden on courts/tribunal in only having to respond to serious disputes.	**Lessors** • Overall timeframe to resolve disputes may take longer if matter proceeds through to court or tribunal. **Tenants** • Overall timeframe to resolve disputes may take longer if matter proceeds through to court or tribunal. **Government** • Cost to government in establishing mediation service – it is anticipated that this cost may be offset by savings from a reduced number of disputes being lodged with the court.
Option D - Dispute resolution consisting of a range of options including mediation in the first instance, determination of prescribed disputes by the Commissioner and final adjudication by the court or tribunal.	**Lessors** • Likely lead to more timely and more cost effective dispute resolution. **Tenants** • Likely lead to more timely and more cost effective dispute resolution. **Government** • Commissioner determinations likely to further reduce matters proceeding to the court or tribunal.	**Lessors** • Overall timeframe to resolve disputes may take longer if matter proceeds through to court or tribunal. **Tenants** • Overall timeframe to resolve disputes may take longer if matter proceeds through to court or tribunal. **Government** • Cost to government in establishing mediation service – although may be offset by savings from reduced number of disputes lodged with the court.

Questions

91. Which option do you prefer and why?

92. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

93. *What do you think would be the cost implications of the different options? Please provide as much information if possible.*

94. *If Option C or Option D is pursued, should jurisdiction for disputes remain with the Magistrates Court or be transferred to the SAT? Please give reasons for your answer.*

8. Boarding and lodging

In 2016-7, Consumer Protection consulted with the broader community to determine if there was a need to regulate boarding and lodging in Western Australia. As was noted in the discussion paper released by Consumer Protection at the time, Western Australia was, and remains, the only Australian jurisdiction that does not have some form of regulation of the boarding and lodging sector.

The options for regulation canvassed in the consultation were:

Option A – Status quo

Under this option the regulation of the residency relationship between boarder and landlord would continue under the common law.

Option B –Modified tenancy regulation

Under this option, specific new laws based on the rights and responsibilities applicable to landlords and tenants under the RTA would be developed, but would be modified to suit the requirements of the boarding sector. Boarders would be defined for the purposes of this regulation.

Option C – Occupancy principles

Under this option an overarching set of principles would be implemented within the framework of residential tenancy law. Parties will remain free to negotiate the terms of their residency agreements within the parameters of these occupancy principles. Boarders and lodgers would be defined for the purposes of this regulation.

Option D – Include a definition of boarders in the RTA

Under this option, the regulation of boarders would remain under the common law; however a definition of boarders would be inserted in the RTA for the purpose of clarifying exactly which circumstances are considered to be boarding and therefore not subject to the Act. This option would create a clearer distinction between boarders and tenants without changing the legal relationship between the landlord and resident. The purpose of inserting the definition is to minimise the incidence of confusion that currently exists within the marketplace.

Option E – Voluntary Code of Practice

Under this option, the boarding and lodging industry would be encouraged to develop a code of conduct that could be voluntarily agreed to be signatories. In order for this model to be feasible, an industry group representing boarding and lodging accommodation providers would need to be formed.

In all, 20 submissions to the consultation paper were received. The submissions were from a range of stakeholders including government departments, tenant advocates, community housing providers and the real estate industry. A further 95 survey responses were received, of which 30 percent came from lessors and 70 percent came from tenants or residents.

Respondents overwhelmingly supported the notion of there being some form of regulation of the boarding and lodging industry and preferred options B and C, with support for each of those models evenly divided.

Issue

The issue now to be determined is what form the regulation of the boarding and lodging industry will take.

Objective

To ensure the RTA provides appropriate protection for the rights of boarders, lodgers and rooming house residents while maintaining sufficient flexibility for lessors and without unduly impacting on their ability to recognise a return on their investment.

Discussion

Over time, the role of a boarding house has changed. Boarding houses are now seen as a low cost form of accommodation and source of emergency housing. They provide accommodation for people who are generally unable to access other private rental accommodation or social housing. This may be due to an inability to afford rental costs, a lack of references, a preference for shared accommodation or a need for additional support services.

The boarding house sector continues to play an important role in providing affordable accommodation in Western Australia (WA). Occupants of boarding houses are often vulnerable people on low incomes who are seeking affordable accommodation, such as the unemployed, disability pensioners and single parents. Some boarding houses provide support services for those with mental illness, a drug history or the homeless. However, students, particularly international students, seasonal workers, backpackers, fly in/fly out workers and retirees may also use boarding arrangements, as do those who choose this style of housing for reasons such as low establishment costs and flexibility.

Data issued by the Australian Bureau of Statistics (ABS), from the 2011 census showed that the number of persons staying in “boarding houses” in WA was 1,337.[196] By 2016, it was estimated that this figure had dropped to 991.[197] It is widely acknowledged, however, that it is difficult to accurately record people living in boarding houses, therefore it is likely that these numbers under reflect the reality.

[196] Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2049.0.
[197] Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2049.0.

Key issues for stakeholders

In addition to releasing a discussion paper, Consumer Protection also hosted workshops and meetings with key stakeholder groups to identify key issues affecting the sector. Key stakeholder groups included:

- tenant or resident advocates;
- not-for-profit accommodation providers;
- private (for-profit) rental accommodation providers and property managers; and
- local governments.

Table 16 below summarises the main issues as identified in these workshops.

Table 16: Stakeholder responses to consultation

Stakeholder	*Key issues*
Resident advocates	• Privacy • Getting the bond back • Payment of rent • Penalties charged e.g. for failure to pay rent • Termination process in general • The ability to terminate a tenancy without notice • Services being removed e.g. internet access removed, washing machine removed • Consistent/fair lease agreement (some support for a standard prescribed lease agreement) • Dispute resolution processes • Maintenance and repairs • Overcrowding • Unsafe living conditions, e.g. no smoke alarms
Not-for-profit accommodation providers	• Improved laws to protect vulnerable residents in boarding and lodging situations, both in private and not-for-profit services • Consistent access for boarders to bond assistance loans from the Housing Authority • Ability to quickly refund the bond as boarders are more transient and need faster access to their bond refund • Better laws to assist with responding to emergency situations, such as violence to other residents

Stakeholder	*Key issues*
	• Security of rooms and facilities for residents
Private (for-profit) accommodation providers and property managers	• Ability to evict a resident where there is violence or aggressive or anti-social behaviour towards other residents, e.g. drug taking or excessive drunkenness etc. • Any new regulation should be flexible and have minimal administrative costs/burdens, otherwise people will not offer this type of accommodation • Cleaning of common areas
Local governments	• Impact of privately run boarding houses/rooming houses on local amenity, for example, excessive parking on the street, rubbish left on verges, overcrowding of premises, excessive noise • Health risks to residents from overcrowding and burden on sanitation systems, safety of electrical, plumbing and other modifications • Being able to identify privately operating boarding houses and being able to control their impact on the community

The complaint data gathered by Consumer Protection in the lead up to the release of the discussion paper demonstrated that most complaints related to bond disputes, with other issues including:

- conditions at the property, for example smoking on the premises;
- termination of agreement for matters such as erratic or violent behaviour;
- inadequate cleaning of the premises following termination of the agreement;
- return of keys; and
- unpaid bills.

Different types of lodging arrangements

In the survey responses from lessors, 45 percent of lessors resided in the premises where they also lease out rooms while the remaining 55 percent of lessors did not. Very few lessors employed a caretaker to live at the premises.[198]

In terms of the number of residents residing at the premises, 17 premises were reported as having between one and four residents, while a further 10 premises housed between five and 10 residents. These were the two most frequently reported size of operations.

Although the survey size is not statistically sufficient, it does suggest that there may be a need to contemplate a two tiered model of regulation; one model for boarding

[198] 20 percent of lessors indicated they employed a caretaker.

arrangements where the lessor lives in the premises and leases out some spare bedrooms, and a different model of regulation for boarding or rooming arrangements that are more tenancy like in their nature insofar as the lessor does not reside in the premises and there are multiple residents in the premises.

This is the approach adopted in most other states and territories as the statutes apply in most circumstances but the common law applies in situations where the number of residents is below a particular threshold.

Table 17 - Minimum number of residents required by each state or territory in order for boarding or rooming house laws to apply.

State or Territory	*Minimum number of residents*
ACT	N/A
NSW	5 persons.
NT	3 persons.
QLD	3 rooms.
SA	3 persons.
TAS	3 rooms where the owner resides in same house.
VIC	4 persons.

As noted in the boarding and lodging consultation paper, there has been criticism of this approach on the basis that all boarders and roomers have the same need for protection under the law, not only those in larger facilities.[199] There is also an argument that by offering some form of statutory regulation to these smaller enterprises, it gives better protections to the accommodation providers as well, particularly where there is a need to evict the resident and regain possession of the premises. By giving this certainty to process and rights, more home owners may be encouraged to offer boarding and lodging accommodation.

[199] Adrian J Bradbrook, "Creeping Reforms to Landlord and Tenant Law" (2004) 10 *Australian Property Law Journal* 157,164.

Proposal

It is proposed to amend the RTA to introduce regulations for boarding and lodging. The proposal is that where the premises are capable of accommodating above a threshold number of residents, modified tenancy regulations will be drafted and implemented. Where the premises are capable of accommodating below a threshold number of residents, for example in the landlord's own home, the proposal is to introduce occupancy principles. The detail of the modified tenancy laws and the occupancy principals, as well as the threshold number of residents, will be developed in consultation with key stakeholders during the drafting stage.

The types of matters that would be regulated by the modified tenancy laws include:

- form of agreement;
- rent in advance;
- security bonds;
- property condition reports;
- rights and obligations of the accommodation provider and the resident;
- house rules;
- urgent eviction; and
- termination of the agreement.

The occupancy principles would address such matters as:

- minimum content of a residency agreement;
- security bonds;
- house rules; and
- terminations of tenancies.

Questions

95. *Do you agree with this proposal? Why or why not?*

96. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

97. *What do you think the threshold number of residents should be to distinguish the type of regulation applicable? Why?*

9. Modifying the RTA in certain circumstances

Issue

While the Act is drafted with the intention that, to the greatest extent possible, all lessors and all tenants will have the same rights and obligations, given the breadth of variety of tenancies in WA, it is sometimes necessary to modify the way the Act applies. Sometimes the modification occurs within the RTA itself; for example, the provisions within Part V Division 3 of the RTA apply only to social housing premises. More commonly, though, the modification is achieved by way of regulation pursuant to section 6 of the RTA.

As this review is seeking to develop tenancy laws that will produce better and fairer outcomes for lessors and tenants into the future, it is important to look at when the provisions of the RTA might need to operate differently for certain tenancies to achieve this objective.

Objective

To develop a policy framework for guiding future modifications of the application of the RTA.

Discussion

Section 6 of the RTA allows the Governor, by regulation, to provide that a provision of the RTA shall not apply, or shall apply in a modified way, to particular agreements, or particular premises, or particular persons.

The power to modify or exempt the application of the RTA has been used over the years for a variety reasons. These include:

- to exempt the Housing Authority from having to provide the tenant with receipts for rent paid;[200]
- modifying the minimum standards of security required for premises in rural zones or that are listed on the Register of Heritage Places;[201]
- in circumstances where the Housing Authority leases premises from a private lessor for the purposes of sub-letting the premises, for example to a government employee, exempting the head lease from having to be in the prescribed form;[202] and
- modifying the application of section 70A of the RTA (in relation to the amount of notice required to be given to end a tenancy at the end of a fixed term) in relation to a community housing provider so that the community housing provider could offer initial short fixed term trial tenancies.

Some of the discussion in this consultation paper is already looking to modify how the RTA might work in certain circumstances. For example, section 6.1 is looking at

[200] Regulation 5A.
[201] Regulation 7A.
[202] Regulation 5AB.

whether there should be the capacity to terminate a tenancy agreement where there is an eligibility element involved, for example NDIS housing, and the tenant no longer qualifies for support or accommodation under that program, and section 4.5 is looking at whether there is a need to cap rent increases in zones susceptible to higher rent spikes as a consequence of local industry activity.

Consumer Protection is canvassing whether there are other premises, or types of tenancy agreements or types of lessor/tenant that warrants a different application of the RTA in specified circumstances. For example, should the RTA apply differently in remote Aboriginal communities, or should different rules apply to tenancy agreements where the primary tenant is a young person under the age of 18?

Beyond this, Consumer Protection is seeking input into the policy framework that could guide future applications for modifications of the RTA.

Questions

98.	*In considering requests to modify the application of the RTA, what policy considerations do you think should guide the decision making process? Please give reasons for your answer.*
99.	*Of the issues canvassed in this consultation paper, are there any that you think would need to be modified in certain circumstances? If so, which provisions and in what circumstances*
100.	*Are there current provisions in the RTA that are not addressed in this discussion paper that require modification in certain circumstances? If so, what are they and how should they be modified?*

10. A quality rental market

10.1. Knowledge of the law

Issue

A matter for consideration is whether private lessors who self-manage their rental premises should be required to demonstrate an awareness and basic level of understanding of the RTA.

Objective

To reduce the incidence and consequences of non-compliance with the RTA.

Discussion

A private lessor is not obliged under the RTA to engage a qualified property manager to manage their premises. Furthermore, although Consumer Protection provides a range of educational materials for lessors, including *Renting out your property - a lessor's guide*, there is no requirement for a private lessor who chooses to self-manage their premises to acquire any knowledge about the RTA. Therefore, it is possible that an individual can offer residential premises for lease with little or no awareness or understanding of the RTA. This lack of knowledge can have substantial negative consequences for the tenant, for the lessor themselves and for the rental market as a whole.

Consumer Protection's experience is that while complaints by tenants about the conduct of self-managing lessors is significantly less than the proportion of complaints by tenants regarding the conduct of property managers, the nature of the non-compliance by self-managing lessors and therefore the consequences of their conduct is often far more significant.

The following case studies illustrate some of the consequences that a lack of lessor knowledge about the RTA can have for the parties involved. This issue was considered in a review of the private rental market in the UK.[203] What the report found was that poor practices could be evident amongst self-managing lessors who are simply

CASE STUDY

A data matching exercise between the Housing Authority Bond Assistance Loans system and the Bond Administrator's records showed that 10 per cent of bonds had not been lodged with the Bond Administrator. Of these, 90 per cent were paid to self-managed landlords. One particular lessor who owned more than 20 properties had not lodged bonds for any of them. The lessor claimed to have no knowledge of the RTA or their obligation to lodge bonds with the Bond Administrator.

[203] Julie Rugg and David Rhodes, *The Private Rented Sector: Its Contribution and Potential* (Centre for Housing Policy, University of York, 2008) 58-59.

unaware that their practices are ill-judged or in contravention of regulations, and also self-managing lessors who are fully aware of the law but act illegally nonetheless.[204] The report is quick to note that the majority of lessors fall somewhere in the continuum between having no knowledge of the law through to where they largely are aware of and comply with the law, though not always. The report describes it like this:

Professional landlord practice might shade into informality if a certain property or tenant warrants a less rigid approach: for example the need for a deposit might be waived if a tenant appears desirable but simply cannot afford to pay money up front. Some landlords might also consider that it is reasonable to 'accelerate' repossession of a property if a tenant in shared accommodation is behaving in a way that distresses other tenants.[205]

Consumer Protection is not suggesting that a lack of knowledge of the RTA is the sole cause of all instances of non-compliance; to the contrary, as noted above, the majority of complaints made by tenants to Consumer Protection relate to complaints about registered property managers who have undertaken studies in the RTA. However, it is clear from Consumer Protection's experience that there are a number of self-managing private lessors who are not complying with their obligations under RTA because they simply do not know better.

If a self-managing private lessor or a property manager acts contrary to the RTA, this cannot always be categorised as just a simple breach of the law that can be remedied by an apology, by allowing the tenant to leave and find an alternative rental or by awarding them a compensation payment; it can have far more serious consequences. This can be seen in some of the case study outlined above.

Furthermore, a lessor's lack of knowledge does not only impact on the tenant. It can also impact on the lessor themselves. For example, a lessor who changes the locks to the property in order to force a tenant to leave without having a court order to terminate the tenancy could be liable under the RTA for a fine of up to $20 000, even if the tenant is many months behind in paying their rent. Alternatively, a lessor who does seek to take a matter through the court, but issues the wrong notices could see their application to the court dismissed.

CASE STUDY

A lessor put a tenant in a rural property without a written residential tenancy agreement. The tenant had stopped paying rent and utilities over 3 years ago. The lessor rang Consumer Protection for advice and was surprised to hear that they could issue the tenant with a breach notice and if the breach was not remedied, issue the tenant with a notice of termination of the tenancy agreement. The lessor thought that as it was a rural property and there was no written residential tenancy agreement, the RTA did not apply to them.

[204] Ibid, 58.
[205] Ibid, 59.

Currently no Australian state or territory requires a self-managing lessor to demonstrate any understanding of the relevant tenancy law prior to entering into a residential tenancy agreement with a tenant.

Property manager training

In Western Australia, property managers are required to demonstrate a level of understanding of the RTA before they can receive a certificate of registration under the *Real Estate and Business Agents Act 1978* (the REBA Act) allowing them to work as a property manager in WA. This is demonstrated by successful completion of a range of units of competency in relation to leasing[206] from the Property Services Training Package (CPP07).

Property managers also undertake compulsory professional develop (CPD) every year to maintain their certification.

This process of requiring property managers to be registered ensures only suitably qualified people operate in the real estate industry. It requires applicants to have certain qualifications, experience, and be a person of good character and repute.

The international experience

Scotland and Northern Ireland offer voluntary landlord training for private landlords that manage their own tenancies.[207]

In Scotland, the training is attached to a landlord accreditation scheme. To become accredited, a lessor must complete a self-assessed checklist in order to demonstrate they comply with the *Scottish Core Standards for Accredited Landlords*. Once accredited, a landlord must attend a Core Standards training session annually. This ensures both that a lessor has a sound understanding of the law before leasing and continues to maintain that knowledge, particularly if the law changes at any time. Training is generally subsidised or free for accredited lessors.

A stated benefit of accreditation is that lessors can promote their accreditation status to prospective tenants.[208] In a market with high vacancy rates, this could be a way for a lessor to distinguish themselves from other competing properties for rent.

In Northern Ireland, training is offered to private lessors by the Chartered Institute of Housing (CIH) and is subsidised by the Department for Communities.[209] CIH is a registered charity and not-for-profit organisation whose stated purpose is to provide everyone involved in housing with the advice, support and knowledge they need to be

[206] Real Estate and Business Agents Regulations 1979 (WA), reg 6A(1)(e).
[207] For Scotland see https://www.landlordaccreditationscotland.com/landlords/; For Ireland see http://www.cih.org/ni/learning2let
[208] https://www.landlordaccreditationscotland.com/landlords/
[209] http://www.cih.org/ni/learning2let

brilliant and supporting housing professionals to create a future in which everyone has a place to call home.[210]

On successfully completing the training, a private lessor is awarded a CIH Level 2 Award in Letting and Managing Residential Property. According to CIH, the course provides the knowledge, skills, and confidence a private lessor needs in order to provide excellent standards of practice, and ensure full compliance with all legal obligations.[211] Once the qualification has been achieved, a lessor is able to promote themselves to prospective tenants as holding the qualification so that, as is the case in Scotland, a lessor can distinguish themselves from other lessors and properties for rent.

Wales has taken a slightly different approach to training for private lessors. In Wales, all private lessors who manage their own properties must be both registered and licensed.[212] In order to be licensed, a lessor must complete mandatory training.[213] The training can be completed through the government agency RentSmart, or with an accredited provider. At a minimum, the training must cover:

- the statutory obligations of a landlord and tenant;
- the contractual relationship between a landlord and tenant;
- the role of an agent who carries out lettings work or property management work;
- best practice in letting and managing dwellings subject to, or marketed or offered for let under, a domestic tenancy; and
- the role of a landlord who carries out lettings activities or property management activities.

Once this training has been successfully completed, a private lessor is eligible to apply for a licence. A licence is valid for up to five years.

An example from another industry

It is not unheard of to require people wanting to undertake a task or business operation to demonstrate a basic level of knowledge and skill in the interests of consumer protection and better community outcomes. In Australia, it is common for mandatory training to be required for certain industries. For example, Under the *Residential (Land Lease) Communities Act 2013 (NSW)*, park operators are required to complete a mandatory education briefing approved by the Commissioner within 30 days of being registered.

An estimate of cost

It is not possible to determine at this point in time the actual cost of lessor training. The actual cost will depend a great deal on whether the training is mandatory or voluntary, as lower demand for courses may increase the cost of delivery of the course. Cost will

[210] http://www.cih.org/whoweare
[211] Above n 35.
[212] https://www.rentsmart.gov.wales/en/landlord/landlord-licensing/
[213] Ibid.

also depend on how comprehensive the course is, and whether it is offered online or in the classroom. However, in order to establish an idea of range of possible costs, the fees for courses in the other jurisdictions is provided below.

In Wales, where training is mandatory for lessors, the training is available both online and in the classroom. It is provided by both the government itself and is also available through private registered training organisations. The fees for the mandatory training are approximately (AU) $56 for the online course, and ranging between (AU) $150 to (AU) $190 for the class room based course, depending on the provider and venue costs.

In Scotland, the cost of a core standards training course is (AU) $170. A range of course are available on various aspects of renting, however lessors are obliged to attend only one course per year to maintain their accreditation status. In Ireland, the Level 2 course in Letting and Managing Residential Property is subsidised for lessors and therefore costs (AU) $190 to complete. The CIH states on their website that if the course was not subsidised, it would cost lessors (AU) $700 to complete.

The mandatory education briefing for park operators under the *Residential (Land Lease) Communities Act 2013 (NSW)* has a cost free option as operators can satisfy the education requirement by reading certain pages on the regulator's website.

Continuing professional development (CPD) for property managers in Western Australia falls into two categories; mandatory courses and electives. Mandatory training is at no cost to the property manager as this is subsidised out of the Real Estate and Business Agents education account. Elective courses cost a property manager $210 per annum if the courses are done online or $350 per annum if the course is classroom based.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. There would be no training specifically developed and tailored for the benefit of self-managing private lessors. Self-managing private lessors would continue to have access to information resources provided by Consumer Protection and by landlord organisations.

Option B – Voluntary qualification for private lessors

Consumer Protection could work with registered training organisations (RTOs) to develop a training course that is specifically targeted to the needs of private lessors. The course would be developed in consultation with key stakeholders, but would be likely to cover such topics as

i. lessor rights and obligations under the RTA;
ii. the role of a property manager and how to choose a property manager;
iii. managing the relationship with the tenant;
iv. dispute resolution, including alternatives to court; and
v. building standards and maintenance of premises.

There would be a cost associated with completing the course. The cost would be set by the RTO. The course would be available in person and/or online. Once a lessor successfully completes the course, they would receive a qualification or statement of competency. A lessor could then advertise this qualification when advertising their premises for let as a means of setting them apart from other private lessors.

Option C – Mandatory training for all private self-managing lessors

As per above, Consumer Protection would develop an appropriate course in consultation with key stakeholders and the course would be available in person and/or online. The course may be delivered by an RTO and/or by Consumer Protection. The course would be mandatory for any private lessor who self-manages their rental premises. There would be a cost to lessors associated with completing the course. There may also be a compliance cost to government in ensuring that all those required to undertake the course have done so.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • No additional cost or time commitment for lessors. **Tenants** • No change. **Government** • No change.	**Lessors** • None discernible. **Tenants** • Incidence of lessor non-compliance with RTA will continue. • Tenants at risk from lessors who do not have adequate knowledge. **Government** • Continue to bear cost of dealing with avoidable disputes.

Option B – voluntary accredited training	**Lessors** • Improved knowledge of and compliance with the RTA. **Tenants** • Better protection from non-compliant lessors who are unaware of their obligations under the RTA. **Government** • May reduce incidences of non-compliance and disputes.	**Lessors** • Increased cost on lessors to undertake training. **Tenants** • Increased costs to lessors may result in increased rent. **Government** • Cost impost to government to: - develop training course - monitor lessor compliance with training - audit RTO delivery of training. • Voluntary training reduces potential benefits across the marketplace.
Option C - mandatory training	**Lessors** • Improved knowledge of and compliance with the RTA. **Tenants** • Better protection from non-compliant lessors who are unaware of their obligations under the RTA. **Government** • Likely reduce government's ongoing compliance and dispute resolution costs.	**Lessors** • Increased cost on lessors to undertake training. **Tenants** • Increased costs to lessors may result in increased rent. **Government** • Cost impost to government to: - develop training course - monitor lessor compliance with training audit RTO delivery of training.

Questions

101. Which option do you prefer and why?

102. *Can you think of other ways to address this issue? Please provide details.*

103. *What do you think would be the cost implications of the different options? Please provide as much information if possible. For example, if you are a lessor, beyond the cost of enrolling in the course, would you have to take time off work or arrange childcare to attend?*

If you are a tenant, please provide details of experiences of non-compliance where you have had a private landlord.

10.2. Register of lessors

Issue

There is currently no central register of private lessors in Western Australia. The absence of any centralised or complete list of private lessors in Western Australia gives rise to a number of issues. From a compliance perspective, Consumer Protection is unable to undertake proactive compliance inspections with all private lessors as it has no way of knowing who they are. This is to be contrasted with Consumer Protection's annual program of proactive compliance visits with property managers, who are all registered with the Department.

Objectives

To improve information about the private rental market to assist with better compliance, enable better communication with private lessors in an effort to produce better outcomes for tenants and without unduly impacting the efficiency of the market.

Discussion

Some private lessors will be registered with the Bond Administrator if they collect a security bond from their tenant and lodge this with the Bond Administrator. However, lessors are not obliged by the RTA to collect a security bond,[214] therefore if a private lessor chooses not to collect a security bond, they will not be registered with the Bond Administrator. Furthermore, not all lessors lodge any security bond collect from a tenant with the Bond Administrator.[215]

[214] *Residential Tenancies Act 1987*, section 29.
[215] See for example, http://www.commerce.wa.gov.au/announcements/landlords-warned-comply-law-after-conviction-and-10000-fine-mark-adam

This situation is to be contrasted with that of property managers. All property managers must hold a certificate of registration,[216] and the Commissioner for Consumer Protection must maintain a register of all holders of a certificate of registration.[217] This has the effect that all property managers operating lawfully in Western Australia are registered with the Department.

Another point of contrast is community housing providers as lessors. The Department of Communities also maintains a register of all community housing providers funded by that Department.

The purpose of proactive compliance visits is to aim to ensure the laws are followed, help educate about what the laws means on a practical level and provide information about changes. The visits are conducted on a one-on-one basis, allowing for a service provider or trader to ask questions specific to their experience and knowledge level and for the Department to share information about best practices they have observed on their visits.

The absence of a central register also impedes Consumer Protection's communication with private lessors for the purposes of education, for example, notifying private lessors about changes to the RTA. Consumer Protection provides a range of e-bulletins for the property industry. While Consumer Protection is able to send the e-bulletins to all property managers as they are all registered with the Department. The e-bulletin for private lessors is currently only sent to those who are aware of the e-bulletins and have subscribed to receive them. Consumer Protection promotes the availability of the e-bulletins through social media, mainstream media, with Bond Administrator communications and on its webpage. Unfortunately even this is not sufficient to reach all lessors. If all lessors were registered on a central register, the contact details provided could be used for all communication about changes to the law, education forums and consultation opportunities.

Proactive compliance and education are important tools used by Consumer Protection to reduce incidences of non-compliance in a range of industries. Better compliance by traders leads to better outcomes for consumers; in this context better outcomes for tenants.

No other Australian jurisdiction at this point in time requires private lessors to be registered. However, a number of international jurisdictions have introduced a registration requirement.

In Northern Ireland, Scotland and Wales, it is now mandatory for all private lessors to register themselves and each property they lease.[218] The licence in each jurisdiction varies between three and five years in duration. There are penalties applicable in each

[216] *Real Estate and Business Agents Act 1978*, section 44.
[217] *Real Estate and Business Agents Act 1978*, section 133.
[218] For Northern Ireland see https://www.nidirect.gov.uk/articles/landlord-registration-scheme; For Scotland see https://www.landlordregistrationscotland.gov.uk/about;For Wales see https://www.rentsmart.gov.wales/en/landlord/landlord-registration/

jurisdiction for offering a private property for rent if both the lessor and the property are not registered.[219]

According to the Northern Ireland authorities, some of the benefits of the lessor register are that a register:

- allows tenants, neighbours and local councils to identify lessors;
- provides information on the number of lessors providing properties for rent and allows lessors to receive regular updates on the duties and responsibilities of lessors and tenants;
- provides education and support to lessors; and
- improves tenants' confidence in their lessors and increase lessors' accountability by:
  - promoting good practice; and
  - ensuring the right advice and help is available.[220]

Filling the information gap currently experienced by tenants

A recent report by the Consumer Policy Research Centre (CPRC) found that most tenants are unable to access the information they need about the premises they are seeking to rent and the lessor they are seeking to lease from.[221] The CPRC identified one of the key policy challenges for governments is improving information disclosure for tenants, in particular, information about the quality of the lessor offering the premises for rent.[222]

Victoria has recently sought to address this information gap in part by introducing a new Rental Non-compliance Register for lessors and agents.[223] This has been described as a "landlord and agent 'blacklist' that will be available to all tenants so they can identify landlords and agents who have previously breached their obligations under the Residential Tenancies Act".[224]

A register of private landlords, combined with the existing register of property managers in WA, could fill a similar purpose. Information about proven non-compliance by lessors and property managers could be listed on the register. In addition, if a model of voluntary lessor training combined with accreditation is adopted, a lessor's accreditation status could also be listed on the register.

A register as a tool to fight fraud and unlawful sub-letting

The RTA currently provides that a residential tenancy agreement can contain terms either allowing a tenant to sub-let or prohibiting any sub-letting of the premises.[225]

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[219] Ibid.
[220] https://www.nidirect.gov.uk/articles/landlord-registration-scheme
[221] Consumer Policy Research Centre *The Renters Journey*, 3 accessed at http://cprc.org.au/wp-content/uploads/The-Renters-Journey_Full-Report_FINAL_27Feb19-1.pdf
[222] Ibid, 4.
[223] https://engage.vic.gov.au/fairersaferhousing
[224] https://www.vic.gov.au/rentfair-rental-reforms-victorians
[225] *Residential Tenancies Act 1987*, section 49.

Despite many agreements prohibiting or restricting a tenant's right to sub-let, it is not unheard of for tenants to lease out part or all of the premises, either as a short stay on platforms such as Airbnb or for longer term occupation.[226] This creates problems for both the lessor, whose property may suffer damage that is not covered by their insurance, and for the sub-tenant who finds their right to occupy the premises ceases if the head tenant's tenancy ends.

A more recent phenomenon in the Western Australian rental market has been rental scams.[227] WA ScamNet has received reports about fake advertisements for rental properties that attempt to scam two weeks of rent as a deposit, plus bond money. In this scam, prospective tenants responded to advertisements on Gumtree for rental properties that initially appeared to have been put up by the owner. Instead, they were fake advertisements based on legitimate listings on realestate.com.au and real estate agent websites.[228] In 2014, around 30 accommodation scam victims contacted WA ScamNet and between them the total monetary loss was almost $43,000 – an average loss per victim of nearly $1,500.[229]

A register of private landlords and the properties they are leasing may help to combat both of these problems in the market. A register would allow a prospective tenant to conduct a search of the lessor and property; if the records they find do not correspond with what is being advertised, then the chances are high that it is a scam, or the advertisement is unlawful in some other way, such as unlawful sub-letting by a head tenant.

A register as a tool for public policy

Housing supply and affordability is a substantial issue that governments across Australia are seeking to address. Understanding what supply is available and deficits in supply is key information that governments need to effectively combat the increasing lack of affordability in both home ownership and rental markets.

A register of all private lessors and the properties they have available for rent would be an excellent tool for providing aggregate data to government departments to support their planning and development roles. While there is currently data available through real estate providers and platforms, this data is based on properties advertised through those services and therefore is unlikely to capture the rental stock of self-managing lessors who advertise through platforms such as Gumtree, or by word of mouth.

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[226] See for example https://www.news.com.au/finance/real-estate/renting/illegal-airbnb-subletting-exposed/news-story/7313a9518e70ac066b3a395340d11a60

[227] See for example https://www.watoday.com.au/national/western-australia/wheatbelt-family-seeking-sea-change-left-homeless-in-rental-scam-20190110-p50qnc.html

[228] https://www.scamnet.wa.gov.au/scamnet/Scam_types-Buying_or_selling-Classified_scams-Fake_rental_advertisements.htm

[229] https://www.scamnet.wa.gov.au/scamnet/Scam_types-Unexpected_money-Upfront_payment__advanced_fee_frauds-Tenancy_Tip__avoid_rental_scams.htm

A tool to allow for giving and receiving of notices under the RTA

Lessors and tenants are increasingly seeking to give and receive notices electronically as this saves time and money. If a database of all lessors is created, this platform could be available to also allow parties to give and receive notices in a secure manner.

Logistics of a lessor database for Western Australia

If a decision is made to require all private lessors to be registered, it will be necessary to develop a database for these purposes. One option would be for the current database maintained by the Bond Administrator to be expanded to include details of all lessors, not just those who have lodged a security bond. Given this database is already in existence, there would likely be only minimal cost to Government to make the necessary changes. If this was the case, this would mean that Consumer Protection, in partnership with the Bond Administrator, would maintain the database and the data on it. The current bonds database operates by way of a web portal. This means that lessors, property managers, and tenants, enter their own data. This would minimise the cost to government of operating the database. This in turn would ensure the cost to the lessor for registering on the database could be kept to a minimum. An alternative would be to develop a new database that mirrors the register of property managers that is maintained by Consumer Protection. This would likely require greater set up costs, but, like the bonds database, could be developed with a web portal interface so that private lessors could enter their own data.

Estimates of cost of registration

By looking at the fees of registration in both Ireland and Scotland, where all lessors must be registered, it is possible to establish a possible ball park of what the cost of registration might be for lessors in in WA if this option is pursued.

In Ireland, a lessor must pay the equivalent of (AU) $145 to register a tenancy with the Board.[230] This registration must be done each time the premises are let or the tenancy agreement is renewed. In 2020, Ireland will be moving to an annual registration of rental premises, however the fees for this process are not yet known.

In Scotland, a lessor must pay the equivalent of (AU) $121.50 to register themselves as a lessor and an additional (AU) $28 per property they lease.[231]This registration must be renewed every three years.

In Wales, every lessor must be both registered and licensed.[232] The cost of registration is equivalent to (AU) $ 63 and the cost of a licence is (AU) $ 269. The registration and licence must be renewed every five years.

[230] https://onestopshop.rtb.ie/register-a-tenancy/registration-fees/
[231] https://www.landlordregistrationscotland.gov.uk/fees-information
[232] https://www.rentsmart.gov.wales/en/faqs/#0506

By contrast, a property manager, when applying to be registered, must pay $218 as a registration fee, and subsequently pay $180 at the time of renewal every three years.

If the option of registration of all lessors is pursued in WA, the actual cost of registration will be based on a cost recovery basis, and so will be dependent upon the cost of developing and managing the registration database. While the actual cost cannot be determined at this point, it is likely, based on the experience in these other jurisdictions and registration regimes that the cost will be in the vicinity of $100 to $250 per landlord. It is likely that renewal of registration will be required every three years.

Limits on data sharing

Any legislative amendment implementing a lessor register could create strict rules for the purpose to which that information could be used. For example, current data held by the bond administrator can only be used for the purposes of holding and disposing of tenant security bonds. The data cannot be released to other government departments for their independent compliance actions. Information to be made available for planning purposes could be limited to de-identified and aggregate data so that no individual lessor could be identified in that exercise.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. There would be no requirement for private lessors to register with Consumer Protection.

Option B – A register of all private lessors is implemented

The RTA would be amended to require all private lessors to register with Consumer Protection. The database model would be developed in consultation with key stakeholders. The RTA would stipulate what information is to be maintained on the database and for what purpose the information can be used. There would be a cost to the lessor for registration. This would be to cover the cost of developing and maintaining the register. However, if the database operates through a web based portal so that lessors could enter their own data and edit the data when their circumstances change, this would keep the costs of registration to a minimum.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	Potential disadvantages
Option A - no change	**Lessors** • No additional cost or time commitment. **Tenants** • No change. **Government** • No cost impost for government.	**Lessors** • None discernible. **Tenants** • No change. **Government** • Continued risk that not all lessors are aware of or being reached Consumer Protection in relation to information about RTA.
Option B – mandatory register of all lessors	**Lessors** • Likely reduce incidence of non-compliance by lessors. **Tenants** • Improved outcomes in knowing whether lessors have completed training or have history of non-compliance. **Government** • Allows Consumer Protection to readily identify all lessors. • Likely to improve Consumer Protection's engagement with private lessors. • Provides data to assist Government with better planning.	**Lessors** • Cost and time commitment for lessors to register and update details as required. **Tenants** • None discernible. **Government** • Costs to government to develop, maintain and monitor register of lessors.

Questions

104. Which option do you prefer? Why?

105. Can you think of other ways to address this issue? Please provide as much detail as possible.

106. What do you think would be the cost implications of the different options? Please provide as much information if possible.

107. If a decision is made to have a register of lessors, what information should be held on the register? For example, should the register include details about each property offered for lease by the lessor, or only the lessor's details? Should information about any incidences of non-compliance with the RTA that have been substantiated by Consumer Protection be included? Should lessors be allowed to include details of any relevant training they have completed?

108. What restrictions, if any, should be placed on how any information is used?

10.3. Code of Practice

Issue

While non-compliance with the RTA is a primary source of complaints from tenants, it is Consumer Protection's experience that a large number of tenant complaints can be traced back to the way lessors or property managers interact with tenants. For example, complaints are received about the timing of inspections and a perceived lack of willingness by the lessor or property manager to engage positively with a tenant to resolve issues about the premises. It are these types of behavioural or attitudinal matters that could possibly be improved through the introduction of a code of practice.

Objective

To reduce complaints by tenants that are caused by improper conduct by lessors and property managers.

Discussion

Codes of Practice set out industry standards of conduct. They are guidelines for fair dealing between the business and their customers, and let customers know what the business agrees to do when dealing with them. Usually, codes of practice are

established through consultation with industry representatives and the community. They can be mandatory or voluntary.[233]

Codes of practice are widely used in the consumer protection arena to provide guidance to traders and service providers. Examples of Codes of Conduct currently in operation in WA include the Fair Trading (Retirement Villages Interim Code) Regulations 2019; Fair Trading (Fitness Industry Interim Code) Regulations 2018; and the Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 (the REBA Code). A Pre-Paid Funerals Code is currently under development.

In WA, there is no code of practice for lessors. The REBA Code applies to certified property managers but it does not apply to private lessors. Furthermore, the primary focus of the REBA Code is the property manager's relationship with the lessor rather than their relationship with the tenant. Therefore there is no set standard to guide lessors and property managers in their interactions with tenants.

Wales has developed a code of conduct that all private lessors and property managers must comply with. "The Code of Practice has been created by the Welsh Government as a way to ensure a consistent standard of letting and management practice in Wales".[234] It is compulsory in Wales for all lessors to be registered, and it is a condition of registration that lessors and property managers comply with the code.

The code has been drafted to incorporate mandatory compliance requirements and best practice options or suggestions. This latter information is intended to assist lessors and property managers to raise the level of rental practice above minimum standards.[235]

The code addresses all stages of the tenancy from preparing the property for renting and the application stage through to ending the tenancy.

In Scotland, while it is not a mandatory code of practice, there is the *Scottish Core Standards for Accredited Landlords* (the core standards). The core standards forms part of the accreditation process and provides a framework for setting and monitoring the achievement of good management practice by private landlords. Like the Welsh code of practice, the core standards reflect a combination of current legislation and good practice.[236] Landlord Accreditation Scotland states that most lessors, if operating according to the law, will be able to comply with the standards.[237]

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[233] Taken from https://www.business.gov.au/products-and-services/fair-trading/codes-of-practice
[234] https://www.rentsmart.gov.wales/en/faqs/
[235] Rentsmart Wales, *Code of Practice for Landlords and Agents licensed under Part 1 of the Housing (Wales) Act 2014*, (October 2015). https://www.rentsmart.gov.wales/Uploads/Downloads/00/00/00/01/DownloadFileEN_FILE/Code-of-practice-for-Landlords-and-Agents-licensed-under-Part-1-of-the-Housing-Wales-Act-2014-English-Doc-1.pdf
[236] https://www.landlordaccreditationscotland.com/wp-content/uploads/Scottish-Core-Standards-for-Accredited-Landlords-and-Letting-Agents-2019.pdf
[237] Ibid.

Options

The following options are being considered in relation to this issue.

Option A – Status quo

Under this option there would be no change. There would be no requirement for lessors to comply with a Code of Practice.

Option B – A voluntary code of practice to apply to lessors

The RTA would be amended to allow for a voluntary code of practice to be developed in consultation with key stakeholders. While compliance with the code would be voluntary, those lessors that did comply with the code could promote themselves as being compliant as a means of distinguishing themselves from other competitors in the market.

Option C - A mandatory code of practice to apply to all lessors

The RTA would be amended to allow for a mandatory code of practice to be developed in consultation with key stakeholders. The Code of Practice would set out minimum standards of conduct required by lessors and any persons acting on behalf of the lessor. The Code may also extend to providing examples of best practice to encourage conduct beyond the minimum standard.

Impact analysis

The following table outlines some potential benefits and disadvantages of the identified options.

	Potential benefits	**Potential disadvantages**
Option A - no change	**Lessors** • No additional cost or time commitment required by lessors. **Tenants** • No change. **Government** • No additional costs for government to develop and monitor Code of Practice.	**Lessors** • No change. **Tenants** • No reduction in disputes related to inappropriate conduct. **Government** • Continued risk of non-compliance.
Option B – Voluntary Code of Practice	**Lessors** • Cost impost limited to only lessors who choose to comply.	**Lessors** • Additional costs for lessors who choose to comply.

	• Provides greater guidance to avoid non-compliance. **Tenants** • Provides additional information to tenants in choosing a rental premises. **Government** • May reduce number of disputes referred to Consumer Protection caused by inappropriate conduct of lessor and their agent.	**Tenants** • Not all lessors will choose to comply with the code. **Government** • Costs for government in drafting code of practice and monitoring compliance. • Stakeholders may be unclear whether the lessor code of practice or the REBA Code of Practice applies.
Option C – Mandatory Code of Practice for lessors	**Lessors** • Provides greater guidance to avoid non-compliance. **Tenants** • Provides additional information to tenants in choosing a rental premises. **Government** • May reduce number of disputes referred to Consumer Protection caused by inappropriate conduct of lessor and their agent. • Likely improve consistency of lessor conduct across the market.	**Lessors** • May impose costs on lessors to bring their practices into compliance with the code. **Tenants** • None discernible. **Government** • Costs for government in drafting code of practice and monitoring compliance.

Questions

109. Which option do you prefer and why?

110. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

111.	*What do you think would be the cost implications of the different options? Please provide as much information if possible.*

11. Miscellaneous

11.1. Disposal of abandoned goods

Issue

Currently lessors are required to dispose of any abandoned goods of value at public auction. Lessors in rural or remote locations where public auction houses are not easily accessible may face greater costs in arranging for the storage and disposal of abandoned goods.

Objectives

To modernise the requirements for disposal of abandoned goods in the RTA.

Discussion

Currently, the RTA provides lessors with the right to sell abandoned goods at public auction where the value of the goods is greater than the cost of storage and sale.[238] Lessors who wish to sell the tenant's abandoned goods at public auction must comply with the RTA – notably, that the lessor removes and stores the goods, provides and published notice to the tenant, waits 60 days before selling, retains the costs associated with storage and sale and pays the balance to the court.[239] Lessors may incur penalties where abandoned goods are not stored in accordance with the RTA.

Lessors in rural and remote areas

Feedback has been received that lessors in rural or remote areas are at a disadvantage in complying with the operation of the abandoned goods procedure under the RTA. Where lessors in regional areas are not able to easily access a public auction house in order to lawfully dispose of a tenant's abandoned goods, they may be required to transport the goods to another location. This significantly increases the cost to lessors in disposing of abandoned goods.

Public auction house requirement

Although the RTA does not define what constitutes a public auction house, it does not specifically exclude the potential for online sellers to be included within its scope. Whether online sellers could be deemed to be a public auction house was considered by the New South Wales Supreme Court in *Smythe v Thomas*. It was held that online sellers that have the characteristics of an auction, including a bidding process and an automatic closing of this process, are equivalent to a public auction house.[240]

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[238] Under section 79(1) of the RTA, lessors may dispose of abandoned goods that are perishable or where the cost of storage and sale is greater than the value of the goods.
[239] Section 79.
[240] Rein AJ of the NSW Supreme Court that the 'automatic close of bidding at a fixed time and the generation of an eBay advice headed 'won' appear to have been accepted by the parties to an eBay auction as the equivalent of the fall of the hammer.'

Not all online sellers will fall within the definition of a public auction house. For example, platform like Gumtree only allow goods to be sold by private treaty and in some instances, eBay where a public bidding process is not in use.

Licensed goods

Although the RTA does not prohibit lessors from selling abandoned goods that are licensed or registered (for example, motor vehicles), lessors may experience difficulties in selling abandoned goods that fall within this category. Reputable auction houses may be unwilling to facilitate the sale of abandoned goods which are licensed or registered. The abandoned goods may also have interest registered against them on the personal property securities register (PPSR) such as a vehicle loan. Where the goods have an interest registered against them, lessors may expose themselves to liability for any debts.

Other jurisdictions

Most states and territories require sale of any abandoned goods of a certain value by public auction although New South Wales provides for a broader range of disposal methods available to lessors. The New South Wales model appears to give the greatest flexibility in that lessors may dispose of a tenant's abandoned goods in any lawful manner, including selling the item privately or donating the items to charity or to the local council. This applies to any goods that are non-perishable and are deemed by the lessor to be of value.

The approach of other states and territories in how lessors may dispose of a tenant's abandoned goods vary and is outlined below in Table 18 below.

Table 18: Other jurisdictions' disposal of abandoned goods process

	Disposal of abandoned goods
QLD	Lessor may sell or dispose of the goods if they believe on reasonable grounds that: • total market value of the goods is less than $1500; • storage of the goods would be unhealthy, unsafe or would completely or substantially depreciate the market value of the goods; • cost of removing, storing or selling the goods would be more than the proceeds of the sale; and • where the above does not apply, the lessor must store the goods and sell at auction if not collected by the tenant.[241] If the tenant claims the goods prior to disposal, they must reimburse the lessor for the reasonable costs of r removal and storage. • If the lessor sells the goods they may keep the proceeds of the sale to cover the reasonable costs of removing, storing and selling the goods. Any balance must be paid to the public trustee within 10 days of the sale.

[241] The lessor can also apply to the Tribunal to make an order for the sale or disposal of the goods.

	• Lessor/agent may apply to the Tribunal to claim money from the sale proceeds for costs such as rent arrears, cleaning or damage to the premises caused by the tenant. • Tribunal can make orders for compensation where tenant disputes disposal method.
ACT	• Goods with a net value of more than $500 required to be sold at public auction after 3 months. • Lessor must give public notice at least 7 days before the auction date and provide details of place of auction, time and a general description of the goods to be sold. • Where the owner of the goods claims them before disposal, they may be required to reimburse the lessor for any reasonable costs incurred including storage costs and any unpaid rent. • Owner of the goods may apply to the Magistrates Court for a review of any costs that the lessor requires the owner to pay.
VIC	• Goods can be disposed of where their combined value is less than the estimated cost of removing, storing or selling the goods. • Lessor may request the Director of Consumer Affairs to assess the value of the goods. • Where the goods are of greater value, they must be stored for 28 days. • Lessor must follow process for providing proper notice to the tenant, either directly or by publishing a public notice. • If goods are not claimed within 28 days of being stored, they must be sold at public auction. Any proceeds may be used to cover any outstanding costs owed by the tenant. • Tenant may apply to the VCAT for compensation if the lessor destroys, disposes of or sells general goods without following the prescribed process. • Tenants can also apply to the Tribunal to have any remaining proceeds of sale returned to them (minus any expenses owed to the lessor).
TAS	Lessors may: • dispose of goods that have no value and verify by statutory declaration how the goods are disposed of. • sell the goods if they appear to have a value less than the prescribed amount; and • apply to the court for an order permitting sale of the goods for the best price reasonably obtainable. Proceeds of the sale must be used to cover reasonable costs associated with the sale and any debts owed by the tenant.[242]
NT	Lessors: • may dispose of the goods if they are perishable or of a value less than a fair estimate of the cost of their removal, storage and sale. • must secure the abandoned goods in a safe place and manner until they are reclaimed or auctioned.

[242] Any remaining proceeds to be kept in an interest bearing account for 6 months. If the tenant does not claim any of the remaining balance of proceeds from the sale of the abandoned goods within 6 months, the proceeds become the property of the Commissioner.

	• must give notice within 14 days of storing the goods to the tenant.[243] • publish a notice in a newspaper that has circulation in the Territory. Where the tenant claims the goods, they must pay for the lessor's reasonable costs. If the goods are not claimed within 30 days of the lessor taking possession of the premises, the goods must be sold at public auction. Lessor may retain proceeds of sale by public auction for reasonable costs.[244] Tribunal may make orders resolving disputes between the lessor and the tenant for these matters.
SA	Lessor may dispose of goods where their value is less than the estimated cost of removal, storage and sale. For goods of greater value, lessor must make reasonable attempts to notify the tenant of the abandoned goods and take reasonable steps to keep the property safe for at least 28 days. If valuable abandoned property is not claimed within 28 days, the lessor may sell or otherwise lawfully dispose of the property. Lessor may retain out of the proceeds of sale, reasonable costs incurred in disposing of the abandoned goods and any amounts owed under the residential tenancy agreement.
WA	Lessor may dispose of goods where their value is less than the estimated cost of removal, storage and sale. For goods of greater value, lessor must notify the tenant of the abandoned goods by sending them an approved form and store the property safely for at least 60 days. If valuable abandoned property is not claimed within 60 days, the lessor must cause the goods to be sold by public auction. Lessor may retain out of the proceeds of sale, reasonable costs incurred in storing and disposing of the abandoned goods. Any surplus funds must be paid into the Rental Accommodation Account.

Proposal

The current process for the disposal of abandoned goods via public auction is overly restrictive on lessors, particularly for those in rural or remote locations where access to a public auction house may be limited.

[243] Notice can also be provided to any persons that has an interest in the goods to the knowledge of the lessor.

[244] Any remaining balance from the sale proceeds must be paid the owner of the goods or if they cannot be located, to the Commissioner for the credit of the Tenancy Trust Account to be held on trust for the owner.

It is proposed to amend the RTA to allow a lessor to determine how to dispose of the goods (whether by sale or donation) except where the goods are of significant value, in which case the lessor must dispose of the goods by public auction.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

112.	Do you agree with this proposal? Why or why not?
113.	Can you think of other ways to address this issue? Please provide as much detail as possible.
114.	How long should a lessor be required to hold on to abandoned goods before being allowed to dispose of them? Why?
115.	Are any other amendments to the RTA needed to safeguard a tenant's interest in the abandoned goods? What are they?

11.2. Rights of occupants in shared housing arrangements

Issue

Although the RTA does not apply to boarders and lodgers, other occupants in shared housing arrangements, such as sub-tenants and co-tenants are included within the scope of the Act. The rights and responsibilities of occupants in shared housing arrangements may require clarifying to streamline processes around change of co-tenants and co-tenancy disputes, as well as recognising the rights of sub-tenants, particularly where the head tenant faces eviction.

Objectives

To clarify the rights and responsibilities of occupants of shared housing, specifically co-tenants and sub-tenants.

Discussion

As the rental market continues to evolve into a long-term housing option for many people, it is anticipated that demand for the shared housing sector will also grow. Clarifying the rights and responsibilities of each party under a shared housing arrangement may also be required in light of the increasing incidence of shared housing arrangements.

11.2.1. Sub-tenants

Although sub-tenants are afforded rights as tenants under the RTA, their security of tenure is vulnerable if the head tenant faces eviction. Where the lessor terminates the head tenant's tenancy agreement, this automatically applies to any sub-tenants and unless the sub-tenant successfully negotiates directly with the lessor to enter into a new residential tenancy agreement, they will also be required to vacate the property.

Other jurisdictions

In Victoria, the RTA provides for a sub-tenant to become the head tenant where the head tenancy agreement is terminated. The new tenancy agreement is deemed to be on the same terms as the previous sub-tenancy agreement.

Likewise, in Scotland,[245] where a head tenancy is terminated, the sub-tenant becomes the head tenant under a new tenancy agreement unless the head tenant was evicted on a prescribed ground or where the Tenancy Tribunal makes a determination that the provision should not apply. The new tenancy agreement has the same terms as the sub tenancy agreement.[246]

11.2.2. Co-tenants

Co-tenants are one of a number of people formally recognised on the residential tenancy agreement as being a tenant. Co-tenants are jointly and severally liable for all debts to the lessor arising under a residential tenancy.

Common disputes that arise between co-tenants include where one co-tenant leaves the tenancy early and seeks a return of their portion of the security bond prior to the end of the tenancy or where a former co-tenant may find themselves liable for damage caused after they ceased to occupy the premises. Disputes also arise where one co-tenant is acting in a manner that disturbs another co-tenant's right to quiet enjoyment or engages in threatening behaviour towards other co-tenants.

Unless the relationship between the co-tenants and the behaviour of any of the co-tenants falls within the definition of family violence, the RTA does not provide a

[245] *Private Housing (Tenancies) (Scotland) Act 2016.*
[246] *Private Housing (Tenancies) (Scotland) Act 2016*, s.47 prescribes a number of grounds where protections for sub-tenants on eviction of the head tenant do not apply including where the lessor intends to sell the property, where the property is to be sold by the mortgage lender or where the lessor intends to live in the property.

mechanism for a co-tenant to terminate only their own interest in a tenancy agreement and to compel disposal of their share of the security bond. The RTA only addresses disputes between co-tenants in relation to non-payment of amounts owning under the tenancy agreement.

Other jurisdictions

The Northern Territory, in its recent review of its residential tenancy legislation noted that given similar amendments have been made to address co-tenant obligations arising under a tenancy in a domestic violence situation, it would be reasonable for there to be a general mechanism to facilitate assignment of a vacating co-tenant's obligations and entitlements.

The NT review recommended that where a request of a vacating co-tenant to assign their portion of the security bond or to have their name removed from the lease is unreasonably refused, the NTCAT should be given the power to make an order to determine rights and liabilities. Unreasonable refusal could include where the vacating co-tenant has found a replacement tenant who has a similar capacity to meet obligations under the tenancy agreement but the remaining co-tenants or lessor refuse to accept the proposed tenant on grounds unrelated to that person's ability to maintain the lease.

Proposal

Clarification of the rights and responsibilities of co-tenants and sub-tenants under the RTA, including providing for greater security of tenure where appropriate, is required. Shared housing arrangements are anticipated to increase and measures to clarify these arrangements will provide certainty for the sector.

In relation to sub-tenants, it is proposed to amend the RTA to provide that a sub-tenant becomes the head tenant, in circumstances where the head tenant is evicted.

In relation to co-tenants, it is proposed to amend the RTA to provide that a co-tenant may terminate their own interest in a tenancy agreement either at the end of a fixed term or if the agreement is a periodic agreement. It is also proposed to amend the RTA to clarify the process for determining the departing co-tenant's rights to any proportion of the security bond at the conclusion of their interest in the tenancy agreement.

This proposal is unlikely to have a significant impact on stakeholders. Consumer Protection is proposing to proceed with this recommendation unless stakeholder feedback provides substantive evidence of unintended consequences from this course of action.

Questions

116. *Do you agree with the proposal? Why or why not?*

117. *Can you think of other ways to address this issue? Please provide as much detail as possible.*

118. *Are there any circumstances in which a sub-tenant should not become the head tenant if the former head tenant is evicted? What are they?*

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