

Discussion Paper

Review of the *Residential Tenancies Act 1999*

July 2019

Document details

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|------------------------|---|
| Document title | Discussion Paper: Review of the <i>Residential Tenancies Act 1999</i> |
| Contact details | |
| Approved by | |
| Date approved | |
| Document review | |

Change history

| Version | Date | Author | Changes made |
|----------------|-------------|---------------|---------------------|
| 1.0 | July 2019 | | First Version |
| | | | |
| | | | |

Acronyms

You will find the following acronyms in this document.

| Acronyms | Full form |
|---------------------------|---|
| CAALAS | Central Australian Aboriginal Legal Aid Service |
| Commissioner | Commissioner of Tenancies |
| Consumer Affairs | Consumer Affairs Northern Territory |
| DCLS | Darwin Community Legal Service |
| DoH/Department of Housing | The Northern Territory Government agency responsible for public housing |
| DVLS | Domestic Violence Legal Service |
| LGANT | Local Government Association of the Northern Territory |
| NAAJA | North Australian Aboriginal Justice Agency Ltd |
| NTCAT | Northern Territory Civil and Administrative Tribunal |
| NTLAC | Northern Territory Legal Aid Commission |
| REINT | Real Estate Institute of the Northern Territory |
| TEWLS | Top End Women's Legal Service |
| The Act | <i>Residential Tenancies Act 1999</i> |
| The Regulations | <i>Residential Tenancies Regulations 2000</i> |

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Overview

The *Residential Tenancies Act 1999* (the Act) has now been operating for eighteen years. In that time there has been a shift in rental patterns away from the traditional view of renting as a short-term pathway towards home ownership, to one where tenants are renting for longer periods. Legislation such as the Act will not, on its own, drive the cultural shift needed to adapt to the emerging changes in the rental market. With the Territory having the highest average weekly rent and the highest level of people renting Australia, those changes will need 'buy-in' from all participants – landlords, their agents, and tenants. The Act can, however, continue to provide a guiding framework for interactions between landlords and tenants.

This Discussion Paper covers 36 broad issues of reform and is divided into three parts. Part A considers stakeholder comments on the 2010 Issues Paper. Additional issues raised in stakeholder submissions to the 2010 Issues Paper are discussed in Part B, and issues arising since 2010 are discussed in Part C. This Overview provides a high-level outline of the issues assessed in this Paper and the recommendations and questions from that assessment. Parts A to C provides more detailed technical discussion.

Recommendations

Recommendation 1: Application of the Act (Issue 1)

The Act applies to all tenancy arrangements unless they are excluded under section 6, or are exempted under section 7 of the Regulations. Stakeholder feedback in 2010 indicated that exclusions relating to boarders/lodgers, managed and supported accommodation, student accommodation and emergency accommodation needed clarification.

Recommendation:

- a. The Commissioner consider whether fact sheets regarding boarders and lodgers need revising.
- b. Consider amending section 6 to:
 - i. exclude managed and supported accommodation;
 - ii. exclude retirement villages;
 - iii. exclude on-campus accommodation provided and operated by educational institutions generally; and
 - iv. omit reference to use on the basis of homelessness, unemployment or disadvantage for charitable purposes.

Recommendation 2: Charging of lease break fees (Issue 4)

Landlords who use an agent often charge the tenant a 'lease break' fees when the tenant ends a lease early. 'Lease break' fees are an administrative cost charged by a real estate agent to a landlord for work associated with finalising a lease, locating a new tenant, and starting a new lease, and are an expense private landlords do not face. Compensation for 'lease break' fees is not an automatic right, and depends on the landlord actually suffering a loss.

'Lease break' clauses lead to landlords and tenants misunderstanding their rights and obligations, and elevate a landlord's possible claim for compensation under the Act to a right in the tenancy agreement. For this reason, 'lease break' clauses have been found to be in breach of the Act. Despite this, 'lease break' clauses are often used by landlords.

Recommendation:

Consider amending the Act to specify that:

- a. a landlord is only entitled to compensation for losses reasonably incurred as a direct result of the tenant's breach of its obligations under the Act due to early termination e.g. actual rent forgone between leases (if any), and that 'lease break' fees are not recoverable; and
- b. 'lease break' clauses are prohibited.

Recommendation 3: Condition reports (Issue 5)

While completion of an ingoing or outgoing condition report is not mandatory, the Act sets out rules on how and when a report will be done if one is to be completed. One of those rules is that the report may be made entirely of images. Stakeholders have raised concern about the reliability of reports that are only made from images.

Recommendation:

- a. Consider amending section 24A to remove the option that condition reports may be entirely image based.
- b. Consider inserting a provision in the Regulations that prescribes the information required to be in ingoing and outgoing condition reports, including:
 - i. a requirement that images be clear and of sufficient detail to accurately represent the condition at the time the image is captured; and
 - ii. that the following information be recorded for each image; date taken, the room the image is taken in, the name of the person taking the image, the name of other persons present when the image was taken, and any additional information necessary to assist in the explanation of the condition of the property that is depicted in the image.

Recommendation 4: Co-tenants and Sub-tenants (Issue 6)

Co-tenants

While the Act formally recognises co-tenants, and sets out how a bond will be divided between them, the Act does not cover processes for changing co-tenants during a tenancy, transferring or refunding bonds when co-tenants change, and what happens when a co-tenant has abandoned the premises.

Recommendation:

- a. Consider providing the NTCAT with the power to:
 - i. order assignment of a vacating tenant's portion of a bond to the remaining co-tenant(s), or order a landlord to refund a vacating tenant's portion of a bond to that person, with ancillary orders (where necessary) that the remaining co-tenant(s) pay the vacating co-tenant or the landlord (as the case may be) the sum equal to that portion; and
 - ii. remove a person's name from a tenancy; with
 - iii. the need for an order under (i) or (ii) to be subject to a test of being necessary due to the unreasonable refusal of a co-tenant/landlord to assign the vacating tenant's portion of the bond and/or remove the vacating tenant from the lease;

- b. Consider clarifying that a former co-tenant is not liable for any loss caused by an act or omission of any other tenant remaining in occupancy of the premises if that act or omission occurred after the co-tenant ceased to occupy those premises.

Recommendation 5: Co-tenants and Sub-tenants (Issue 6)

Sub-tenants

With share-housing and other informal living arrangements on the rise, stakeholders have suggested there is a need for clarification about the rights and responsibilities that sub-tenants, lodgers and other arrangements have.

Recommendation:

It is recommend that the Commissioner and/or community legal services consider whether current information platforms sufficiently communicate the rights, responsibilities and differences between sub-tenants and lodgers.

Recommendation 6: Increases in Rent s.41 (Issue 7)

While the Act says that rent may be increased if the tenancy agreement allows an increase during the tenancy, there is some confusion about whether rent can be increased at other times, and if so, when and how.

Recommendation:

Consider making the following amendments to section 41.

- a. Clarify that if a tenancy agreement does not provide for increases in rent, then, rent cannot be increased during the term of that tenancy even if the parties later agree to an increase. That is, the common law right of a landlord and tenant to mutually increase rent is abolished, and the rent for the premises is set by the original agreement even if that agreement is changed or replaced. This would also apply where improvements are made to the premises, e.g. furnishings or a pool, unless the original agreement allowed for rental increases in those situations.
- b. If a fixed term expires and: a periodic tenancy applies under section 83; a new term is agreed to resulting in an extension of the agreement; or a new agreement is entered into, the arrangement is to be deemed a continuation of the tenancy. Therefore, a tenancy does not terminate and a new tenancy is not created upon the occurrence of any of those events. A tenancy only terminates in the situations provided for in section 82.
- c. If a tenancy becomes a periodic tenancy under section 83 and the tenancy agreement that existed immediately prior did not provide for rent increases, then there should not be an ability for the landlord and tenant to increase rent, except through the creation of an entirely new tenancy agreement. It should also be clarified that a periodic tenancy is not a periodic tenancy at common law, to avoid any argument that there is an ability for a landlord and tenant to enter into further contractual arrangements unless it is to create an entirely new tenancy agreement. In such circumstances, the formal processes to terminate a periodic tenancy are to apply before any new tenancy may be entered into.
- d. Clarify that section 41 applies to periodic tenancies generally.
- e. Increase the period of notice for rent increases from 30 days to 60 days in section 41(2).

Recommendation 7: Landlord's right to enter premises (breaking of locks) (Issue 9)

A landlord is permitted to lawfully enter the premises under certain circumstances, and may apply to the Northern Territory Civil and Administrative Tribunal (NTCAT) for an order to enter if a tenant has

unreasonably prevented that lawful entry. A question arises about what happens if a tenant changes or adds extra locks (or does other things) to prevent the landlord entering with an NTCAT order.

Recommendation:

Consider amending section 77 to:

- a. clarify that the power of the NTCAT to order entry onto premises includes a power to authorise the use of reasonable means (excluding physical contact between persons) to gain entry;
- b. state that if a landlord damages an item of the tenant while gaining entry, the landlord must organise and pay for its replacement or provide compensation, except where that item was used to prevent entry; and
- c. state that if a landlord gains entry in accordance with an order under section 77(1), the landlord or its agents cannot be held criminally or civilly liable for reasonable actions taken in gaining that entry (other than the statutory requirement to reinstate a lock or the requirement in (b) above)).

Recommendation 8: Termination (Issue 10)

The Act sets out a process for a landlord to terminate tenancies that are a condition or benefit of employment when the tenant's employment has been terminated. The Act does not, however, set out a process for terminating the tenancy when the tenant resigns. If a tenant resigns and does not terminate the lease, the landlord has to rely on the general termination provisions. The result is the former employee may remain in occupation of the employer's premises for up to 42 days.

If a tenant breaches the agreement (other than by not paying rent), the landlord may give the tenant a notice requesting the breach be remedied within a certain time. If the landlord is not satisfied with the remedy, the landlord can seek an order for termination from the NTCAT.

Recommendation:

- a. Consider amending section 91 to enable an employer to terminate a tenancy where an employee resigns from employment, with the notice period to be the same period of notice as per the resignation, or where the resignation notice period is waived by both parties, the same period as is currently provided in section 91(2)(b) (i.e. 14 days).
- b. Consider amending section 96B to clarify that the test is that the landlord is to be reasonably satisfied that the tenant has (or has not) taken the required steps.

Recommendation 9: Roles of the Court or Commissioner on termination and other issues (Issue 11)

Where the NTCAT has ordered a tenant to give the landlord vacant possession of a premises, the NTCAT can suspend that order if it would cause severe hardship to the tenant. The suspension can last a maximum of 90 days, and is subject to the tenant paying rent during that period. Stakeholders have raised questions about how/when the NTCAT can intervene if a tenant fails to pay rent during the suspension.

Recommendation:

Consider amending section 105 to provide an avenue for a landlord to apply to the NTCAT to revoke a suspension of an order for possession.

Recommendation 10: Service of Notices (Issue 12)

The Act sets out processes and requirements when giving the other party formal notice. However, there are some technical differences with the processes under the Act and the general processes for service under the *Interpretation Act 1978*. Those differences, together with changes to the frequency of postal service delivery, have caused some confusion and raise questions about the most effective way to give notice.

Recommendation:

- a. Consider amending section 154 of the Act so that methods of service better align with those under section 25(1) of the *Interpretation Act 1978*, with the addition that service may be made by email.
- b. Consider inserting a provision in section 154 that requires the person relying on service of a notice to provide evidence of its service, with a rebuttable presumption that such evidence is deemed sufficient to establish that service took place (thus legislatively overriding the 'ordinary course of post' presumption).

Recommendation 11: Repairs generally (Issue 14)

There is inconsistency in the Act when it comes to tenants notifying landlords of the need to repair things. The Act allows the tenant to verbally report issues, but also says the landlord can request that report be made in writing. In the case of emergency repairs, the tenant is required to notify the landlord in writing. This can create delays in actioning repairs. Also, water heaters, air-conditioners and household heaters are essential items, but are not listed as items considered to require emergency repair.

Recommendation:

- a. Consider amending sections 58 and 63(1)(c) to remove the requirement that notification of the need for repair be in writing.
- b. Consider amending section 63(2) to list water heaters, air-conditioners and household heaters as items which the emergency repair provisions apply.

Recommendation 12: Termination (Issue 16)

The Act uses the term 'notice of termination', which causes confusion as that notice does not actually terminate the agreement. That notice is, in fact, used to notify the other party of an intention to terminate the agreement in accordance with the processes set out in the Act. The agreement may only be terminated with the consent of the parties, or by order of the NTCAT.

Recommendation:

Consider replacing references to 'notice of termination' throughout the Act with reference to 'notice of intention to terminate'.

Recommendation 13: Section 85 termination of periodic lease effective despite inadequate notice (Issue 18)

Section 85 is an avoidance of doubt provision that says strict compliance with the timeframes for notification is required, and that those timeframes are not overridden by the common law. Section 85 is, however, difficult to understand and could benefit from rewriting in plain English.

Recommendation:

Consider rewording section 85 to better reflect the nature of that provision.

Recommendation 14: Enable persons under 16 to enter tenancy agreements (Issue 20)

There are times when people under the age of 16 need access to rental housing (such as a young mother and baby escaping domestic violence), but the Act does not allow people under the age of 16 to enter into tenancy agreements.

Recommendation:

Consider removing the minimum age qualification of 16 years for a minor to enter into a tenancy agreement from section 8 of the Act.

Recommendation 15: Tenancy Trust Account Penalties (Issue 29)

If bond money has not been paid to the person entitled to it within six months of the end of the tenancy, the landlord or their agent is required to place bond monies in the Tenancy Trust Account. The Commissioner of Tenancies reports that agents are not doing this in a timely manner and the Commissioner is not able to enforce the requirement.

Recommendation:

- a) Consider amending section 116 to provide a strict liability offence, subject to a penalty of 20 penalty units, for failure to comply with the requirement to place unclaimed bond monies in the Tenancy Trust Account; and
- b) Consider amending the Regulations to provide discretion for the Commissioner to issue an infringement notice of 4 penalty units for an offence against section 116.

Recommendation 16: Application to tribunal after lease has concluded (Issue 31)

Compensation may be sought under section 122 by a landlord or tenant who has suffered loss due to the other party's breach of the tenancy agreement or the Act. Section 122 is silent on the timeframe for when an application might be made, implying that the general limitation period of three years applies. A recent NTCAT decision held that claims arising from a previous tenancy would not be considered as the issues raised by the tenants were old. This decision is at odds with the usual practice of landlords seeking compensation for loss of rent and/or damages after a tenancy has ended.

Recommendation:

Consider amending section 122(1) to clarify that an application for compensation may be brought either during or after the end of a tenancy agreement.

Recommendation 17: Waiving of rights under the Act/Consent to breaches of the Act and Compensation (Issue 32)

Compensation may be awarded under section 122 where a person has suffered loss due to the other party's breach of the tenancy agreement or the Act. Compensation will not be awarded where the person has waived their rights and accepted the breach. A recent NTCAT case held that a tenant will have waived their rights and accepted the breach if they do not seek to enforce their rights in the NTCAT straight away. This does not take into account the many reasons why a tenant might not seek to fully enforce their rights, including the trade-off between all the efforts and risks with re-establishing a home elsewhere, against the efforts and risks with enforcing the right to occupy a well maintained premises.

Recommendation:

Consider amending section 122(3)(b) to clarify that, when taking into account an applicant's consent to a breach, the NTCAT is to have regard to whether the applicant obtained tangible benefit from the

waiver that the applicant would otherwise not have obtained had the Act and the tenancy agreement been complied with.

Recommendation 18: Alternative Bond Products (Issue 35)

Bond surety products are marketed as a simple, innovative approach to cash flow issues associated with traditional bonds. However, as is the case with most financial products, a certain level of consumer sophistication is required. Although the up-front cost for bond surety products is small when compared against the total of a bond, the end-cost for a tenant may exceed that of an actual cash bond. The tenant may end up being liable for payments to the landlord that the bond would have covered, in addition to the fee paid to the surety provider, regardless of whether the provider denies or pays a landlord's claim. There are no express provision providing for bond products under the Act.

Recommendation:

The Act should not be amended to permit bond surety products as an alternative to the security deposit.

Questions

Question 1: No-cost rent payment options (Issue 3)

The transition to cashless payment options has seen some tenants being charged fees for using those options. Some stakeholders have said tenants should not have to pay those fees, while another stakeholder has suggested that no payment option, including cash, was entirely free. The Reserve Bank recently introduced regulations to limit certain electronic and other transaction fees to the actual cost of the service. Tasmania prohibits rent payment fees.

Question:

- a. Have the concerns of stakeholders been largely addressed by the increase in electronic transaction options and the Reserve Bank's regulation of transaction fees?
- b. Are there non-regulatory alternatives available, such as changes in business practices that enable product differentiation amongst landlords and real estate agents, or should a provision like section 17(3A) of the *Residential Tenancy Act 1997* (Tas) be considered?

Question 2: Notice Periods and 'No Grounds' Evictions (Issue 17)

Concern has been raised with the ability for a landlord to terminate a tenancy without specifying a ground as it undermines a tenant's security of tenure. The notice periods for all forms of termination in the Territory are the lowest across Australia. Several jurisdictions have abolished or are in the process of abolishing 'no reason' terminations.

Question:

- a. Should the notice period for 'no reason' landlord initiated terminations be extended from 14 days to 120 days?
- b. Alternatively, should the 'no reason' termination be abolished for landlord initiated terminations?

Question 3: Occupant to remain as tenant where tenant has died (Issue 19)

The Act states that a tenancy does not end because of the tenant's death, which offers some protection for close relatives of a tenant who dies, provided they had occupied the premises with the tenant with the landlord's knowledge. This protection does not apply to occupants of public housing. The reason for this distinction is not clear.

Question:

Should the Act be amended to:

- a. apply section 82(1)(e) to public housing tenancies?;
- b. limit the application of the deemed continuation of the tenancy under section 82(1)(e) to a set period, say six months, to enable smooth transition to a new tenancy?

Question 4: Extend period of time to vacate in sections 100A and 104(3) (Issue 21)

Where the NTCAT is satisfied that a tenancy is terminated, it may make an order for possession. Under that order, possession must be given within five days. If the order would cause severe hardship to the tenant, the NTCAT may suspend that order for up to 90 days. Some stakeholders have raised concern with the five day timeframe of the order, suggesting it does not give enough time for appeal. Given the NTCAT has the discretion to suspend the order, the issue would benefit from further discussion.

Question:

Does section 105 provide sufficient direction and discretion to the NTCAT to consider and suspend an order of possession (under sections 100A or 104) where it is likely that a tenant might appeal the order, or should the Act be amended to align the effective period of an order for possession with the appeal period (i.e. remove the five business day requirement to deliver up vacant possession).

Question 5: Inspections by prospective tenants or purchasers (Issue 22)

A landlord may enter the premises to show it to a prospective tenant or purchaser provided it has given the tenant 24 hours notice. Viewings may only be conducted between 7am and 9pm, and if a landlord is showing the premises to a prospective tenant, this may only occur in the last 28 days of the tenancy. The number of inspections is limited to no more than a reasonable number of occasions. While the Act generally reflects the balance adopted throughout the various tenancy laws around Australia, some stakeholders have questioned whether it is fair.

Question:

- a. Does section 74 strike a fair balance between a landlord's need to access a premises to show prospective purchasers/tenants, and the tenant's right to quiet enjoyment?
- b. Would that balance be improved if section 74 was amended to specify a specific number of inspections within a certain period and/or include an indemnity for the tenant's property?

Question 6: Pets (Issue 27)

There have been calls from several stakeholders over recent years to amend the Act to allow tenants to have pets. The Act does not prohibit pets. Whether a tenant may have a pet is up to the parties, but most landlords do not allow pets. Some stakeholders have suggested that a separate pet bond on top of the traditional bond would persuade landlords to allow pets. Other stakeholders disagree, and consider additional bonds to be an unjustified burden to tenants for something that should be seen as a basic right.

Question:

- a. Would a specific pet bond address landlord reluctance towards permitting pets? If so, how should the level of that bond be determined?
- b. Alternatively, does a general rebuttable presumption in favour of keeping pets better reflect the changing rental market landscape?

Question 7: Picture hooks (Issue 28)

The Act allows tenants to make modifications to a premises provided the landlord has approved. However, it is standard practice for landlords to prohibit any modification at all, including placing picture hooks or adhesive on walls. With tenants renting for longer periods, the difficulties that tenants face with social practices associated with homemaking, such as personalising a dwelling, also increases.

Question:

- a. Should section 55 of the Act be amended to allow tenants to make minor alterations (limited to a certain dollar value or a list of permissible activities) without requiring the landlord's consent?
- b. Should the Act be amended to qualify that a landlord's consent to alterations or additions may not be unreasonably withheld?
- c. Does section 55(3) provide a landlord with sufficient safeguard and recourse in respect of tenant alterations?

Question 8: Agent's Authorisation of Repairs (Issue 30)

Agents are generally considered to just be representatives of the landlord. However, they are often given authority to do certain things on behalf of the landlord, like sign tenants to leases, take their rent, and organise certain repairs. The Act, however, deems an agent to be the landlord, with all the rights and responsibilities that a landlord has. A recent NTCAT decision ordered the agent to undertake and pay for repairs from the rent if the landlord continued to ignore them.

Question:

- a. Should the Act be amended to stipulate that in addition to the landlord, an agent is also responsible for repairs and maintenance? If so, should there be a limit on the agent's level of responsibility, such as a monetary cap or set scope of works that the agent may authorise?
- b. Alternatively, should there be an obligation placed on an agent to disclose to the tenant, or prospective tenant, the level/nature of 'pre-authorisation' to undertake repairs and maintenance provided by the landlord to the agent under the agent/landlord property management agreement?

Question 9: Mortgagee in Possession (Issue 36)

Currently, a mortgagee who wishes to take control of a defaulting landlord's property has to apply to the Supreme Court for an order of possession and then make a separate application to the NTCAT to replace the landlord in the tenancy agreement. This can be an expensive and inefficient process.

Question:

Should section 107 of the Act be amended to enable the Supreme Court to vest the landlord's interest under a tenancy agreement when it grants an order of possession to a mortgagee?

Executive Summary

Introduction

The Act was enacted in 1999, following extensive community consultation that began in 1991. It commenced operation on 1 March 2000, replacing the ‘inadequate’¹ *Tenancy Act* (repealed), that had been in place since September 1979.

The Act established a framework which assists parties to residential tenancy agreements to interact with clear and consistent guidelines. The Act contains minimum terms of residential tenancy agreements, and rules over security deposits, condition reports, and payment of rent. It clarifies what the rights and responsibilities of tenants and landlords are over repairs and maintenance of the premises, and sets out how and when a tenant or landlord can terminate the tenancy.

The Act is administered by the Commissioner², who provides guidance to landlords and tenants on the general principles and operation of the Act. The Commissioner is also responsible for enforcement of the Act, which includes the power to issue infringement notices for certain breaches of the Act. To date, there have been no prosecutions for contraventions of the Act.

The objectives of the Act (section 3 of the Act) are:

- to fairly balance the rights and duties of tenants and landlords;
- to improve the understanding of landlords, their agents, and tenants of their rights and obligations in relation to residential tenancies;
- to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements and the Act;
- to ensure that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure; and
- to facilitate landlords receiving a fair rent in return for providing safe and habitable accommodation to tenants.

The Act has been amended a number of times since 1999, to address technical issues surrounding the handling of security deposits, termination and notices of unpaid rent, and condition reports. The most significant changes to the Act have been:

- the introduction of Acceptable Behaviour Agreements for public housing tenants, and provision for third parties to seek termination of a tenancy where they have been adversely impacted by unacceptable behaviour emanating from a public housing tenancy³;
- the transfer of dispute resolution jurisdiction from the Commissioner to the NTCAT⁴; and
- the inclusion of nationally agreed provisions that regulate the recording and use of information on a tenant’s rental history⁵.

¹ Hansard Debates 19 August 1999 p4272: <http://www.territorystories.nt.gov.au/jspui/handle/10070/278988>

² In the absence of a specific appointment, the Commissioner of Consumer Affairs is deemed by section 13 of the Act to be the Commissioner.

³ *Antisocial Behaviour (Miscellaneous Amendments) Act 2006*.

⁴ *Northern Territory Civil and Administrative Tribunal (Conferral of Jurisdiction Amendments) (No. 2) Act 2014*.

⁵ *Residential Tenancies Amendment Act 2018*. Those provisions commenced on 1 July 2018 for tenancy agreements entered into, or listings made on databases on or after that date. The amendments apply to tenancy agreements and database listings whenever made from 1 October 2018.

Why a Review?

The Act has now been operating for eighteen years. Overall, the Northern Territory Government is satisfied that the Act continues to balance the interests of landlords and tenants in the Northern Territory. However, given the changing landscape of housing, the government is of the view that a general review would be beneficial.

A national trend has emerged which is seeing a shift in rental patterns away from the traditional view of renting as a short-term pathway towards home ownership, to one where tenants, including families on middle to high incomes, are renting for longer periods⁶. While that national trend may be partly due to significant increases in house prices, and the often reported housing affordability issues, the trend is not as obvious in the Territory⁷ due to the traditionally higher transitory nature of the Territory's population. However, the same issues around renting are present, with the Territory continuing to have the highest level of renting⁸, and the highest average weekly rent⁹ in the nation, notwithstanding the recent 'cooling' of the housing market.

There is a growing body of research on the increase in housing stress and insecurity for long-term tenants which highlights the growing gulf between the emerging rental trends and traditional practices. That research indicates "tenants want a place to live, a home, and increasingly expect and require a high level of service for the rent that they pay, including timely and accurate responses to requests"¹⁰. While this may be due, in part, to tenants expectations over value for money¹¹, it is also influenced by the "disruption and cost of frequent moves between [rental] dwellings; [a] lack of responsiveness [by landlords] to requests for repairs; and restrictions on the social practices associated with home making such as personalising a dwelling..."¹². These expectations sit against the lack of security of tenure that short-term fixed or periodic leases offer, and the unpredictable financial trade-offs between rent increases or relocation costs. This is intensified for lower income households that "have fewer resources to access [rental] housing and to deal with involuntary mobility and re-establishing a home, including bond recovery and payment, rent in advance, relocation costs and connection to utilities"¹³.

In describing this emerging trend as a slow 'cultural change' in the market, the research also suggests that the "challenge appears to be to establish some common directions of change rather

⁶ Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf pp8-9.

⁷ Or at least has not been highlighted in the press or by stakeholders.

⁸ 50.3% of all dwellings rented compared to 30.9% nationally in 2016; 49.1% compared to 29.6% nationally in 2011: ABS Census: Tenure Type.

⁹ \$535 in 2015-16, compared to the next highest of \$440 in NSW and \$381 nationally: ABS Housing Occupancy and Costs 2015-16. It is however noted that over 2017-18, there has been a softening in the real estate market (rental and sales) with the REINT's March 2018 REALM Report recording a fall of 2.2% in house rents to \$477, against a 1.1% increase in unit rents to \$366 over the quarter, while yields remained static at 4.9% for houses and increased by 1% to 5.5% for units in comparison to March 2017. The REINT's December 2018 REALM Report recorded house rents at \$460 (up 7% from the September quarter) and unit rents at \$340 (down 3.1%), with yields remaining static across the periods.

¹⁰ Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf p6.

¹¹ Possibly due to high rental prices.

¹² Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf p12.

¹³ Ibid.

than reinforce adversarial positions as private renting increases”¹⁴. Along with the increase in private rental agreements, there has been a shift in landlords seeing “themselves as being in the business of being a housing provider, rather than in an informal arrangement to ‘let’ someone use their property”¹⁵. This reflects the shift in rental property owners from being the accidental landlord through inheritance, to the purposeful investment manager¹⁶ with personal detachment from the property.

However, the provision of satisfactory rental accommodation is not solely a business transaction. As the Australian Capital Territory’s 2014 review of its *Residential Tenancy Act*¹⁷ identified¹⁸, there are human rights considerations. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to an adequate standard of living, including adequate food, water and housing, and to the continuous improvement of living conditions. For rental housing, this means more than adequate shelter or a roof over one’s head. It extends to adequate privacy, space, security, lighting and ventilation, and a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats, all at a reasonable cost.

This raises additional considerations for tenancy laws. Legislation such as the *Residential Tenancies Act 1999* will not, on its own, drive the cultural change needed to adapt to the emerging changes in the rental market. Those changes will need ‘buy-in’ from all participants – landlords, their agents, and tenants. The Act can, however, continue to provide a guiding framework for interactions between the participants. While regulatory intervention is often criticised as restricting investment through excessive ‘red tape’, international research in the rental setting indicates that “There appears to be ‘no clear relationship’ between [rental market] size and growth and the degree of regulation...”¹⁹.

Scope of the Review

On 13 May 2010, the then Department of Justice released an Issues Paper (the 2010 Issues Paper) inviting stakeholders and other interested persons to provide comments on a range of residential tenancy topics identified by the Department, or on any other issues stakeholders wished to raise. Stakeholders made submissions on several policy and operational issues, from both tenant and landlord perspectives about options for reform.

A number of other issues have been identified since the 2010 Issues Paper which would benefit from further stakeholder input. Some of those issues relate to the changing residential tenancy environment, while others have been identified through reform of other areas of the law, such as that relating to domestic and family violence, or reviews undertaken in other jurisdictions.

This Discussion Paper covers 36 broad issues and is divided into three parts. Part A considers stakeholder comments on the 2010 Issues Paper. Additional issues raised in stakeholder submissions to the 2010 Issues Paper are discussed in Part B, and issues arising since 2010 are discussed in Part C.

¹⁴ Ibid p6.

¹⁵ Ibid.

¹⁶ Ibid p30. See also the preceding discussion pp26-29.

¹⁷ Review of the *Residential Tenancies Act 1997* (ACT) Discussion Paper July 2014.

¹⁸ Ibid p4.

¹⁹ Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/_data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf p18.

Consultation

You are invited to provide comments on this Discussion Paper to the Department of the Attorney-General and Justice. Comments can be as short or informal as an email or letter, or it can be a more substantial document. Comments do not have to address all aspects of this Discussion Paper. Electronic copies should be sent whenever possible.

Comments should be sent to:

Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722,
DARWIN NT 0801
Or by email to Policy.AGD@nt.gov.au

The closing date for comments on this Discussion Paper is Sunday 25 August 2019.

Any feedback or comment received by the Department of the Attorney-General and Justice will be treated as a public document unless clearly marked as 'confidential'. In the absence of such clear indication, the Department of the Attorney-General and Justice will treat the feedback or comment as non-confidential.

Non-confidential feedback or comments may be made publicly available and published on the Department of the Attorney-General and Justice website. The Department of the Attorney-General and Justice may draw upon the contents of such and quote from them or refer to them in reports, which may be made publicly available.

Any requests made to the Department of the Attorney-General and Justice for access to a confidential submission, feedback or comment will be determined in accordance with the *Information Act 2002*.

Note: Although every care has been taken in the preparation of this Discussion Paper to ensure accuracy, it has been produced for the general guidance only of persons wishing to provide comments on the issues. The contents of the paper do not constitute legal advice or legal information and they do not constitute Government policy documents.

PART A: 2010 Issues Paper Findings and Recommendations

Part A covers the issues raised in the 2010 Issues Paper, and discusses stakeholder responses. It makes recommendations for reform and poses questions for further consideration.

Issue 1: Application of the Act

The Act applies to all tenancy arrangements unless they are excluded under section 6, or are exempted under section 7 of the Regulations. Tenancy arrangements excluded by section 6 include:

- ‘informal’ arrangements between family or friends²⁰;
- where the premises are provided for the use of homeless, unemployed or disadvantaged persons for charitable purposes²¹;
- where the premises are provided for the purposes of providing emergency shelter or accommodation²².

The Regulations currently exempt tenancy agreements:

- where board or lodging is provided, except where there are three or more boarders or lodgers at the premises²³; and
- for residency at North Flinders International House (situated at Charles Darwin University)²⁴.

The 2010 Issues Paper sought comments regarding the application of the Act and raised the following:

- “Do any of the exclusions cause a problem? Is there confusion about what arrangements are or are not excluded from the Act?”²⁵; and
- “Do any of the exemptions cause a problem? For example, does the Act need to clarify its application to “share” arrangements? Are there problems distinguishing between “boarders” and sub-tenant type arrangements?”²⁶.

In the context of boarders and lodgers, the 2010 Issues Paper noted that through using the same criteria of ‘three or more people’ to determine whether a premises was a boarding house, the Regulations and the then *Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations* (repealed) acknowledged that informal share arrangements were purely private, non-commercial arrangements that should be excluded from the scope of the Act.

While regulation of boarding houses has changed significantly since the *Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations* (repealed) were replaced by the *Public and Environmental Health Regulations 2014*²⁷, regulation 25 of the *Public and Environmental Health Regulations 2014* maintains the distinction between commercial and private arrangements.

²⁰ Section 6(1)(g) *Residential Tenancies Act 1999*.

²¹ Section 6(1)(f) *Residential Tenancies Act 1999*.

²² *Ibid.*

²³ Regulation 4 *Residential Tenancies Regulations 2000*.

²⁴ Regulation 4A *Residential Tenancies Regulations 2000*.

²⁵ Question 1 in the 2010 Issues Paper.

²⁶ Question 2 in the 2010 Issues Paper.

²⁷ The *Public Health (Shops, Boarding Houses, Hostels and Hotels) Regulations* were repealed and replaced on 1 July 2014 by the *Public and Environmental Health Regulations 2014* (SL No. 11 of 2014).

Stakeholder comments

In respect to boarders and lodgers, stakeholders were of the view that the distinction between boarders/lodgers and tenants and the intended scope of the section 6 exclusions could be made clearer, particularly in the context of the managed and supported accommodation setting.

Stakeholders also questioned whether:

- retirement villages should also be excluded²⁸;
- the North Flinders International House exclusion should be extended to on-campus accommodation at any university campus²⁹; and
- Aboriginal housing in remote and urban communities met the section 6(1)(f) criteria of “premises provided for the use of homeless, unemployed or disadvantaged persons for charitable purposes”³⁰.

On the basis of stakeholder comments, it would appear that there is a need to increase clarity around the types of accommodation arrangements that are intended to be captured by the Act. How this might occur depends on the type of accommodation. For example, while the position for boarders/lodgers is well established by the Act, the Regulations and the *Public and Environmental Health Regulations 2014*, boarders and lodgers may benefit from guides or fact sheets that explain their position.

Managed and supported accommodation, however, is more complex. Although supported accommodation often exhibits boarding house traits³¹, the intensive support and assistance provided to residents is very different to the traditional commercial boarding house. With supported accommodation being a holistic care service, rather than a traditional rental arrangement, regulation of a single part of the service (accommodation) under the Act is not appropriate. Section 23 of the *Residential Tenancies Act 1998* (Vic) provides a useful example of such an exclusion. It may also be beneficial to amend the Act to exempt retirement villages to confirm that the *Retirement Villages Act 1995* is the scheme intended to cover such accommodation³².

Student on-campus accommodation also exhibits boarding house traits. However that accommodation is generally provided on a not-for-profit basis, and includes additional services over and above ‘room and board’, such as tuition and extra-curricular activities. In its response to the 2010 Issues Paper, DoH noted that while regulation 4A exempted Charles Darwin University’s (CDU) North Flinders International House, the Act continued to apply to student accommodation at CDU’s Katherine Campus. As on-campus student accommodation is generic in nature, the reason for excluding one particular facility while continuing to apply the Act to others is not clear³³. It would seem appropriate to extend the exemption to on-campus accommodation provided and operated by educational institutions generally³⁴.

CAALAS/NAAJA raised issue with the exclusion of housing provided for charitable purposes, noting that there is confusion whether the term ‘charitable purpose’ applies to the entity providing the accommodation (i.e. a charity), or whether the housing itself is provided on a charitable basis. In

²⁸ DoH noting that retirement villages are already regulated under the *Retirement Villages Act*.

²⁹ DoH noting that North Flinders International House is exempted by the Regulations whereas Katherine CDU campus is not.

³⁰ DCLS, CAALAS, NAAJA, NTLAC, NT Shelter and TEWLS indicated that this group of persons should not be excluded and that it needs to be made clear in the Act.

³¹ There are often more than three people residing in the one house.

³² See for example: regulation 3 *Residential Tenancies Regulations 1989* (WA).

³³ There are a number of other educational institutions that provide on-campus accommodation, including St John’s College and Yirarra College.

³⁴ Similar exemptions exist in residential tenancy legislation in other jurisdictions. See for example: section 5(1)(a)(ii) *Residential Tenancies Act 1995* (SA); section 21 *Residential Tenancies Act 1997* (Vic).

highlighting this, CAALAS/NAAJA noted a case study where an organisation claimed that its charitable status exempted it from operation of the Act even though it was providing rental accommodation at public housing rates³⁵. Reliance on a broad term like ‘charitable purpose’ is somewhat problematic, not least due to Commonwealth legislation³⁶ covering the scope of charitable operations³⁷. For this reason alone, exemption on the basis of charitable status is questionable and may require amendment to clarify the intent, or remove the exclusion in entirety.

Section 6(1)(f) has two parts – the premises may be offered for emergency shelter, implying temporary accommodation; or on a more long term basis for ‘charitable purposes’. Most jurisdictions have exempted emergency or crisis accommodation³⁸ due to the obvious urgent and temporary nature of the accommodation and the general absence of intent to enter into a landlord/tenant relationship. That the accommodation is provided on a charitable basis does not appear to influence the exemption as the focus is on its urgent and temporary nature³⁹.

As CAALAS/NAAJA noted, the question of ‘charitable purpose’ comes about where a charitable organisation offers accommodation on a commercial or semi-commercial basis (such as charging rent at public housing rental rates)⁴⁰, and is compounded where that operation is subsidised through a Commonwealth housing program. It may be that, as in the CAALAS/NAAJA example⁴¹, such accommodation might well be considered and be better reflected as being managed and supported accommodation notwithstanding the organisation’s charitable status.

Recommendation 1

- a. The Commissioner consider whether fact sheets regarding boarders and lodgers need revising.
- b. Consider amending section 6 to:
 - i. exclude managed and supported accommodation;
 - ii. exclude retirement villages;
 - iii. exclude on-campus accommodation provided and operated by educational institutions generally; and
 - iv. omit reference to use on the basis of homelessness, unemployment or disadvantage for charitable purposes.

³⁵ The point presumably being that public housing provided by the government is not exempt and that charging comparable rates is not necessarily a benevolent activity in the pure sense.

³⁶ Such as the *Charities Act 2013* (Cth).

³⁷ Giving rise to Constitutional issues were Territory legislation to intervene and regulate, not least due to the broad spectrum of activities which the Commonwealth legislation ascribes as being open to undertaking for charitable purposes.

³⁸ Examples of such exclusions: section 8(1)(d) *Residential Tenancies Act 2010* (NSW) refers to refuge or crisis accommodation of a kind prescribed by regulation, with the regulations narrowing the accommodation to that provided by a prescribed authority; section 22 *Residential Tenancies Act 1998* (Vic) refers to temporary crisis accommodation provided on a non-profit basis for a period of less than 14 days; section 36 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

³⁹ That the accommodation is provided by a charitable organisation (often supported through government funding) is more reflective of service delivery policy than any other prevailing market factor.

⁴⁰ Giving rise to the question of whether it should be considered on the basis of the organisation’s overall charitable status, or more strictly aligned to the nature of the particular operation being undertaken, such as a commercial landlord, even where that operation is subsidised by other facets of the organisation or externally (such as a Commonwealth grants program).

⁴¹ CAALAS/NAAJA made reference to the organisation providing support services in addition to accommodation for at risk youth.

Issue 2: Additional fees and charges – Section 24

Section 24 of the Act states that the only fee a landlord can charge other than rent is the security deposit. The 2010 Issues Paper, however, noted that there appeared to be a practice amongst some landlords and agents to impose additional charges on tenants, such as missed appointment fees, or replacement key charges. The 2010 Issues Paper asked whether the Act should more explicitly exclude such fees⁴².

Stakeholder comments

CAALAS/NAAJA indicated that charging additional fees, other than rent and security deposit, should be specifically excluded from the Act⁴³. DoH and REINT, on the other hand, submitted that tenants should be required to pay for replacement keys if they lose their set, and for the direct financial loss incurred by a landlord because a tenant has failed to be at home at pre-arranged times to provide access to workers or contractors. DCLS and NT Shelter indicated that many tenants did not know their rights in relation to extra charges and that these should be more clearly defined in the Act.

CAALAS/NAAJA recommended that a provision based on section 51 of the *Residential Tenancies Act 1997* (Vic) should be adopted. That provision prohibits charges for:

- the continuation or renewal of a tenancy agreement (i.e. a premium, bonus, commission or key money as an inducement);
- inspection of premises by a prospective tenant (i.e. prior to lease); or
- issuing of a rent payment card or use of direct debit facilities.

CAALAS/NAAJA submitted that the provision should go further to also exclude a fee for any other purpose.

The case for amending section 24 to reflect the wording of the Victorian provisions is not strong. Section 24 currently prohibits the charges set out in the equivalent Victorian provision, and extends to charges not necessarily covered under the Victorian provision, such as a fee for replacement keys.

Conversely, the case for permitting additional charges is also not strong. In respect to fees for replacement keys, both the Act and the prescribed residential tenancy agreement require the landlord to take reasonable steps to provide and maintain locks and other security devices. That requirement includes the provision of devices to operate the lock, and by extension, the provision of replacement devices. With the landlord generally possessing a copy of the key, obtaining a replacement (i.e. having a new key cut) is not prohibitive for a standard key. In respect to fees to cover a landlord's call out/no access costs due to failure of a tenant to allow access, the absence of evidence on either the frequency or cost prevents detailed consideration of the issue. It is, however, noted that tenants (as do home owners) often face the situation of 'no show'⁴⁴, and face costs associated with time off work⁴⁵ in order to be present. In principle, with access relating to asset management, equity would dictate that tenants be compensated for their time associated with management of the landlord's asset. As the Act currently balances the competing interests between landlord and tenant interests, there is arguably no need for amendment.

⁴² Question 3 in the 2010 Issues Paper.

⁴³ CAALAS/NAAJA made reference to DoH's then \$40 'no access fee' charged to tenants who are not present at the premises when repairs are scheduled to be undertaken.

⁴⁴ Namely the trade or service provider fails to attend a prearranged 'appointment' (expanded in footnote 43 below).

⁴⁵ The prevailing practice is for trades and other service providers to offer 'windows' of attendance (i.e. morning or afternoon), rather than specific times, requiring a minimum of a half day absence from work to ensure availability. It is also noted that despite the pre-arranged 'window', it is not uncommon for the provider to actually attend outside that 'window' or not at all.

Issue 3: No-cost rent payment options

The 2010 Issues Paper raised the question of whether landlords should be required to provide a no-cost option for rent payment, noting that some real estate agents have implemented non-cash systems for the payment of rent that require the tenant to pay rent through an intermediary, often at a cost to the tenant⁴⁶.

Stakeholder comments

DoH, DCLS, NT Shelter, TEWLS and DVLS indicated the legislation should provide for at least one no-cost option for the payment of rent. CAALAS/NAAJA submitted that the Act should be amended to prevent a landlord from refusing to accept legal tender as payment for rent. REINT provided support for giving tenants a choice in how they pay rent, though it questioned the notion of ‘no-cost’, stating that a tenant would face bank withdrawal fees and travel expenses (presumably to the bank and then to the real estate agent’s office if the tenant elected to pay in cash). The REINT also believed that an obligation to provide a ‘no-cost’ option would be an “unreasonable and unjust financial impost”.

The issue of refusing to take cash money aside⁴⁷, the question over whether a person is charged for a financial transaction is subject to a number of considerations, not least the arrangement between the individual landlord/agent and the financial institution/method of payment they use. It is noted that the Reserve Bank of Australia has recently regulated the third party transaction fees that may be charged to that of cost incurred⁴⁸. It is also noted that in at least one jurisdiction, agents are prohibited from charging fees in relation to receiving rent⁴⁹.

Question 1

- a. Have the concerns of stakeholders been largely addressed by the increase in electronic transaction options and the Reserve Bank’s regulation of transaction fees?
- b. Are there non-regulatory alternatives available, such as changes in business practices that enable product differentiation amongst landlords and real estate agents⁵⁰, or should a provision like section 17(3A) of the *Residential Tenancy Act 1997* (Tas) be considered?

Issue 4: Charging of lease break fees

The 2010 Issues Paper questioned whether tenants should be required to pay a ‘lease break’ fee given that landlords may seek compensation for losses arising from a tenant’s breach of the tenancy agreement. A secondary question was if a ‘lease break’ fee were permitted, should the fee’s calculation be regulated?⁵¹

Most tenancy management agreements between landlords and real estate agents include a letting fee, which is associated with the agent’s activities of finding a new tenant⁵². When a tenancy ends early, a proportion the security deposit is often claimed by the landlord to offset the letting fee (generally termed a ‘lease break’ fee). The thought process behind this is that by ‘breaking the

⁴⁶ Question 4 of the 2010 Issues Paper.

⁴⁷ While there is apparently no law prohibiting the refusal to accept legal tender, <https://banknotes.rba.gov.au/legal/legal-tender/>, businesses generally factor the opportunity cost of such decisions into their business model, namely that opportunity cost being the potential for lost sales, against the cost of handling cash.

⁴⁸ Such as point of sale credit card based transactions.

⁴⁹ Section 17(3A) of the *Residential Tenancy Act 1997* (Tas).

⁵⁰ For example, an agent may differentiate itself through promoting tenant friendly payment options.

⁵¹ Question 5 of the 2010 Issues Paper.

⁵² Including, but not limited to, advertising, property inspection attendances by prospective tenants, and negotiations and reports involved with signing up a new tenant.

lease', the tenant has failed to comply with the agreement⁵³, and the landlord would be out of pocket for the letting fee arising from the early termination if it were not compensated. Claims for 'lease break' fees are generally accompanied by claims for loss of rent between the date the lease was 'broken' and the end date set out in the tenancy agreement.

The argument against imposing 'lease break' fees is that the letting fee normally paid by a landlord has simply been brought forward by the early departure of the outgoing tenant⁵⁴. The weight of this argument is stronger where the lease break occurs towards the end of the fixed term. The argument is less strong when a lease is broken early in the tenancy, or where several leases are broken consecutively in a short period. The landlord could then be required to pay for several letting fees in a relatively short period. This does, however, raise the question of why a landlord would find itself in the situation of multiple terminations in short succession, and whether there are underlying issues that are unrelated to tenants that the landlord may need to address.

Stakeholder comments

Stakeholders generally acknowledged that 'lease break' fees were an administrative cost imposed by a real estate agent on a landlord; however, stakeholders were divided on when, and whether, a landlord should be able to pass that cost on to the tenant. For example, in offering support for the recovery of reasonable costs associated with re-letting a premises, the REINT noted that 'lease break' fees would not apply in circumstances where the lease was terminated legally⁵⁵. On the other hand, in advocating for prohibition of 'lease break' fees, TEWLS⁵⁶ was of the view that the costs associated with leaving a tenancy and taking up a new tenancy were major considerations behind whether someone would leave or remain in a violent domestic relationship⁵⁷. LGANT, however, was of the view that letting fees were a routine administrative cost that are presumably factored into the rent and therefore should not be charged separately in the event of early termination. Further differences were seen among those stakeholders who generally supported the charging of 'lease break' fees⁵⁸, but varied significantly over whether such fees should be capped⁵⁹, and if so, what level the cap should be set at⁶⁰.

The issue of 'lease break' fees has also been the subject of discussion in decisions of Delegates of the Commissioner, and more recently the NTCAT. The general position taken is that 'lease break' fees are not an automatic right; that they should only be entertained where the landlord has in fact suffered actual loss and, notwithstanding the actions of the tenant⁶¹, the landlord has the duty to take reasonable steps to mitigate that loss⁶².

⁵³ By leaving earlier than agreed.

⁵⁴ When a tenancy ends, the landlord would be paying a letting fee if it wanted to rent the premises out again.

⁵⁵ The REINT noted that in extreme hardship cases, both parties have recourse to termination by the courts (now NTCAT) under section 99 of the Act and that 'lease break' fees would not apply in such circumstances as the lease was terminated legally.

⁵⁶ DVLS supported TEWLS's submission.

⁵⁷ Noting that "the 'lease break' fee, new bond, up front rent are all part of this cost": TEWLS submission.

⁵⁸ DoH, DCLS, CAALAS/NAAJA, REINT

⁵⁹ REINT – no cap.

⁶⁰ DCLS – maximum equivalent of 2 weeks rent; CAALAS/NAAJA – maximum equivalent of 1 weeks rent; DoH – "be comparable to the effort required to secure a replacement tenant... (and) (i)n return for payment of the fee the landlord or agent should be held accountable for pursuing a replacement tenant within a reasonable timeframe".

⁶¹ Whether it be the early termination of the tenancy, or efforts undertaken by the tenant to secure a new tenant.

⁶² See for example: *Clayton & Ingles v Aitenbichler* [2008] NTRTCmr 10; *Sandy v Sananikone & Do* [2015] NTRTCmr 1; *Gatty & Darcey v Nou* [2016] NTCAT 249.

The use of 'lease break' clauses⁶³ in tenancy agreements has also drawn heavy criticism. Despite their unlawfulness, the NTCAT has found that these clauses lead to landlords and tenants misunderstanding their rights and obligations, and complicate assessment of whether a landlord is entitled to compensation for early termination⁶⁴. This is particularly the case where the clauses are applied in the mistaken belief that they remove the landlord's obligation to minimise its loss.

Stakeholder commentary that 'lease break' fees are not applicable in cases where lawful termination has occurred highlights the confusion 'lease break' clauses create. Most, if not all, tenant initiated terminations are lawful. Section 95, for example, permits a tenant to terminate a fixed term tenancy at any time. Likewise, section 96 permits a tenant to terminate a tenancy⁶⁵ if the tenant secures public housing. Indeed, the Act does not prohibit any tenant initiated termination.

Stakeholder suggestions on an appropriate cap for a 'lease break' fee further highlights the difficulty of the concept. This is seen in suggestions that the fee be capped at an equivalent of weekly rent. Linking the fee to the level of rent reinforces the misconception that it is an entitlement, rather than compensation for actual losses incurred by early termination. Rent is a payment for occupation of a premises, and a 'lease break' fee only arises after a tenant has vacated and no longer occupies the premises. The fee is not based on occupation (it is the exact opposite) and rent, or the loss thereof, is a separate and distinct compensation issue⁶⁶.

The 'lease break' fee represents the letting fee that a real estate agent charges a landlord and only arises where a landlord engages an agent to manage the property. As stakeholders have noted, the fee is an administrative cost incurred by the landlord on the basis of the business model the landlord has adopted. That business model incorporates other fees and charges incurred by the landlord's use of an agent⁶⁷, which do not involve specific recovery from the tenant. Those charges are factored into the overall rent price, along with other operating expenses such as insurance, mortgage and interest payments, repairs and maintenance, and prudential allowances for when the property is vacant. The question, therefore, appears to be whether 'lease break' fees are directly attributable to the tenant's obligations under the tenancy agreement.

The Tasmanian Parliament has said it is not. Section 17 of the *Residential Tenancy Act 1997* (Tas) prohibits the charging of 'lease break' fees on the basis that the use of an agent is purely the choice of the landlord, and the agent's fees structure is not related to the tenant's obligations to the landlord under the tenancy agreement⁶⁸. This position is consistent with the section 24 prohibition on payments other than rent/security deposit.

⁶³ Clauses that, amongst other things, require the tenant to pay the landlord a 'lease break' fee, hold the tenant liable for rent until such time that the premises are re-let, and authorise the landlord to deduct bond monies.

⁶⁴ See for example: *Sandy v Sananikone & Do* [2015] NTRTCmr 1; *Gatty & Darcey v Nou* [2016] NTCAT 249.

⁶⁵ Fixed or periodic.

⁶⁶ Indeed, the weekly amount of rent will vary from tenancy to tenancy, often with significant differences in price based on the 'quality' of the dwelling. The level of rent has no relation to the cost of letting a premises other than if the rent sought is so unrealistic that it causes the premises to remain unlet for a considerable period of time. If a letting fee so happens to be based on a percentage of rent, that rightly is a matter between the landlord and agent, where a prudent landlord would be expected to be mindful of costs reflecting actual expenses.

⁶⁷ Such as the percentage of rental based property management fee, and the letting fee in cases where the tenancy ends 'normally'.

⁶⁸ See: http://www.consumer.tas.gov.au/renting/ending_lease_early. It is likely that letting fees will vary amongst agents and letting fees would not be incurred if a landlord self-managed rather than elect to use an agent.

Recommendation 2

Consider amending the Act to specify that:

- a. a landlord is only entitled to compensation for losses reasonably incurred as a direct result of the tenant's breach of its obligations under the Act due to early termination e.g. actual rent forgone between leases (if any), and that 'lease break' fees are not recoverable; and
- b. 'lease break' clauses are prohibited.

Issue 5: Condition reports

Section 24A allows a condition report to be made either through writing and use of images or wholly through images. The 2010 Issues Paper asked whether there were any difficulties with making condition reports using images and whether there was a need for any modification of the provision⁶⁹.

Stakeholder comments

Stakeholders generally supported the use of images in inspection reports⁷⁰. However, some concern was raised around the process of acceptance and validation of image based reports. That concern centred on issues with image quality⁷¹, the risk that images could be altered⁷², and a need to have commentary supporting the images⁷³. A general theme was that images should not be used or relied upon on their own, that images should form part of a written report⁷⁴ and that that photographic images be physically signed and dated⁷⁵. It is noted that no other jurisdiction expressly permits reports based solely on images⁷⁶. Not raised by stakeholders, but identified during the review process, is an issue relating to the requirement to sign a condition report where that report is entirely image based, and the practicalities of doing so.

While there is broad support for the use of images, stakeholder preference is that images should only be used as part of a written report, rather than as a stand-alone tool.

⁶⁹ Question 6 of the 2010 Issues Paper.

⁷⁰ For example, CAALAS/NAAJA stated that “[v]ideos may give a more accurate representation of the premises...” and that “[t]he advantage of images is that they can provide a more comprehensive basis on which to assess the condition of a property at a point in time. They can also provide a helpful basis for those who do not have good literacy to agree on the property.”

⁷¹ CAALAS/NAAJA were of the view that some images may be of poor quality and not accurately represent the condition of fixtures and fittings, and that issues may arise where those images are compared against higher quality images.

⁷² DoH raised concern around the ability to alter date recordings or the image itself.

⁷³ LGANT suggested that video also be accompanied by audio commentary; CAALAS/NAAJA suggested that the nature of the image should be described (e.g. room, item).

⁷⁴ REINT noted that this was the preferred practice within the real estate industry.

⁷⁵ DoH, DCLS and CAALAS/NAAJA suggested that photographic images be physically signed and dated by both parties.

⁷⁶ The majority of interstate residential tenancy laws require written reports; however, those reports may be supplemented with images. Where images are utilised, it is a common requirement that those images be signed by both parties.

Recommendation 3

- a. Consider amending section 24A to remove the option that condition reports may be entirely image based.
- b. Consider inserting a provision in the Regulations that prescribes the information required to be in ingoing and outgoing condition reports, including:
 - i. a requirement that images be clear and of sufficient detail to accurately represent the condition at the time the image is captured; and
 - ii. that the following information be recorded for each image; date taken, the room the image is taken in, the name of the person taking the image, the name of other persons present when the image was taken, and any additional information necessary to assist in the explanation of the condition of the property that is depicted in the image.

Issue 6: Co-tenants and Sub-tenants

Despite the significant legal distinctions between, and rights and responsibilities of, co-tenants⁷⁷ and sub-tenants⁷⁸, that difference is not covered in detail by the Act. Reference is made to co-tenants in section 33, which enables a bond to be divided between co-tenants as a means of formally setting out the amount paid by each listed tenant toward the bond⁷⁹. Another section dealing with co-tenants is section 115, which enables a co-tenant to authorise another co-tenant to claim their portion of the bond. However, the Act does not cover processes for changing co-tenants during a tenancy, transferring or refunding of bonds when co-tenants change, and circumstances where a co-tenant has abandoned the premises.

In relation to sub-tenants, while section 78 of the Act permits sub-letting⁸⁰, the Act does not set out the relationships between head-tenant and sub-tenant. This absence of specifics was discussed in some detail by the Delegate of the Commissioner in the matter of *Mouhalis v Defence Housing Australia* [2007] NTRTCmr 5 (*Mouhalis*), where the Delegate stated, “I concede at the outset that the meanings of “lodger”, “subtenant,” “occupant” and the like are not as well defined as one would like”⁸¹. The issue in *Mouhalis* was the conflict between the definition of tenant⁸², the section 78 reference to sub-letting as equating to exclusive possession entirety of the premises⁸³, and the landlord’s view that the fact that a person (not listed as a tenant) was residing at the premises⁸⁴ made that person a sub-tenant. The sub-tenant/lodger problem has also been raised in subsequent matters⁸⁵. Through the discussion below, it is clear that the ability to determine the status of an occupant has significant implications in terms of the rights, responsibilities, and options a person may have under the Act.

⁷⁷ Co-tenant being one of a number of people formally recognised on the tenancy agreement as being a tenant, and therefore subject to the full protections and obligations of a tenancy and the Act.

⁷⁸ Sub-tenant being a person who has acquired a right of occupancy from a tenant as opposed to the landlord, and is therefore not formally recognised on the lease, yet may still have rights and obligations under the Act, but against the tenant (as a deemed landlord) rather than the landlord.

⁷⁹ Presumably so as to avoid conflict between tenants at the end of the tenancy.

⁸⁰ Subject to consent of the landlord.

⁸¹ Per Delegate Johnson *Mouhalis v Defence Housing Australia* [2007] NTRTCmr 5.

⁸² Being someone who ‘has a right of occupancy of residential premises because of an assignment from a former tenant or a subtenancy’ per section 4 **tenant** (b).

⁸³ Not a room with general non-exclusive access to communal areas.

⁸⁴ The Delegate considered “to have been some sort of lodging arrangement...”.

⁸⁵ See for example: *Ginnis & Ginnis v Marshall* [2008] NTRTCmr 21, *Jatis v Fitzgerald* [2008] NTRTCmr 12, and more recently, *Gaunt v Rogers & McCartney* [2015] NTCAT 189.

The 2010 Issues Paper raised the following questions which stakeholders responded to:

- “Does section 33 work well in practice? Are there any difficulties when tenants change?”⁸⁶;
- “Are there any problems experienced at the end of a tenancy in obtaining orders for compensation if co-tenants have changed?”⁸⁷;
- “Does the Act need to be amended to accommodate the situation where co-tenants may change during the course of a tenancy (perhaps even where at the end of a tenancy, there are no original “tenants” left)? Would this relieve administrative burden on landlords/Real Estate Agents or would this cause more problems than might be resolved?”⁸⁸; and
- “Should the Act provide for the termination of the interest of a co-tenant where the co-tenant has apparently abandoned the premises or where there are circumstances where a co-tenant wishes to have their interest in the tenancy agreement terminated?”⁸⁹.

Stakeholder comments

Co-tenants

It would appear from stakeholder comments that difficulties in clarifying bond payment arrangements only arose where co-tenants fail to appreciate the implications of the default position of equal apportionment, and fail to convey their particular arrangements to the landlord⁹⁰. Stakeholders generally considered that this is something that is better addressed through improved tenant awareness, rather than legislative intervention.

The issue is not necessarily that clear cut however. While a landlord may distribute a bond amongst co-tenants in accordance with the agreed apportionment, or otherwise equally at the end of a tenancy, the landlord is prevented from doing so on assignment of an interest in the tenancy. Section 80⁹¹ requires the outgoing tenant to assign its interest in the bond to and, by implication, negotiate reimbursement direct from, the other co-tenant(s). While this might not be viewed by stakeholders as particularly troublesome⁹², difficulties arise when there is acrimony between the tenants, which results in delays or non-payment⁹³. This difficulty is heightened in cases where there is domestic violence present⁹⁴, and is increasingly being recognised as a form of abuse in and of itself.

Another factor is the related question of ongoing liability of a co-tenant after that person has vacated the premises. This is not a concern where the remaining tenant(s) and the landlord have consented to the vacating tenant assigning over their interest in the lease⁹⁵. However, where that consent is

⁸⁶ Question 7 of the 2010 Issues Paper.

⁸⁷ Question 8 of the 2010 Issues Paper.

⁸⁸ Question 9 of the 2010 Issues Paper.

⁸⁹ Question 18 of the 2010 Issues Paper.

⁹⁰ It appears that the norm is for tenants not to notify landlords of any particular payment arrangement and manage the matter among themselves.

⁹¹ Section 80 requires a tenant to assign their interest in the bond when they assign their interest in the lease.

⁹² The REINT’s submission noted that in most cases, one of two situations generally occurred:

- the tenants enter into a private arrangement where the outgoing tenant assigns their portion over to the new/remaining tenant, the new/remaining tenant pays the outgoing tenant their portion and this is then communicated to the agent/landlord in writing; or
- less commonly, the incoming/remaining tenant pays their share direct to the landlord and the landlord refunds the outgoing tenant their share.

⁹³ Where one tenant refuses to assign their interest, or reimburse the other tenant following an assignment.

⁹⁴ The TEWLS submission discussed this in some detail, providing a case study which highlighted that, in the absence of agreement, a co-tenant seeking to leave an abusive relationship was often faced with the prospect of either negotiating with or suing the co-tenant to obtain their portion, or forgoing a significant amount of money whilst in a somewhat vulnerable position.

⁹⁵ As the REINT noted, the remaining tenant(s) are legally responsible for all the obligations under the lease.

not provided (or requested), there is a potential for the vacating tenant to remain liable⁹⁶. This is of concern to stakeholders where there is acrimony between co-tenants, and particularly in domestic violence situations⁹⁷.

In both situations, the landlord is not authorised to unilaterally intervene under the Act as the arrangements between the co-tenants are just that, and are therefore not a matter for the landlord. However, while this may, represent the business nature of the landlord's position, it ignores the potential risk that the presence of a corrosive tenancy may place upon the landlord's asset (the premises) and the short-term income produced from that asset (rent). Under such circumstances, it would seem preferable that there be some legislative scope to assist in the assignment of interests in the tenancy and the bond.

Legislative intervention has, to an extent, already taken place. Section 23 of the *Domestic and Family Violence Act 2007* enables the Local Court to remove a person from a tenancy agreement⁹⁸ where there is a court based Domestic Violence Order in place preventing that person from accessing the premises, or alternatively, remove a protected person from the lease if the protected person no longer wishes to reside at the premises. An order under section 23 of the *Domestic and Family Violence Act 2007* terminates the rights and obligations of the person removed from the lease going forward, and activates the return of bond provisions under Part 12 of the Act.

While section 23 of the *Domestic and Family Violence Act 2007* addresses co-tenant obligations arising under a tenancy⁹⁹, it does not apply to issues between co-tenants which are not characterised as domestic violence. It would seem reasonable to amend the Act to provide a general mechanism that facilitates assignment of a vacating co-tenant's obligations and entitlements. Such intervention would, in relation to assignment of the bond, necessarily be influenced by the manner in which the bond is proportioned amongst tenants under section 33 of the Act¹⁰⁰.

Having concluded that it may be appropriate for the NTCAT to intervene, the next question to consider is when this should be done. Unlike section 23 of the *Domestic and Family Violence Act 2007*, which is based on there being a public interest in changing a tenancy agreement to protect a person from ongoing domestic violence, the proposed intervention here (in the non-domestic violence setting) should achieve a reasonable balance between landlord/tenant rights and obligations. Under the circumstances, a co-tenant seeking to leave a tenancy should firstly seek agreement of the remaining co-tenants and the landlord, with recourse to the NTCAT only where that consent is unreasonably refused¹⁰¹.

⁹⁶ This will depend on the circumstances. In *Chamberlain v Tukaki & Staite* [2015] NTRTCmr 22, Delegate Bruxner, stated that it is incumbent upon the landlord to establish that the former co-tenant was legally responsible for issues that arose prior to the former co-tenant's departure.

⁹⁷ The TEWLS submission noted that this can occur in in one of two scenarios:

- the tenant wishes to leave and consent is not provided, resulting in the vacating tenant remaining on the lease, and thus liable for the obligations under the lease; or
- the vacating tenant refuses to assign their interest, and whilst not physically present, continues to be not only liable for obligations, but more importantly in the contextual setting, be entitled to exercise their rights under the lease.

⁹⁸ Under section 23(2), the court may terminate the tenancy agreement and create a new agreement for the benefit of the person remaining at the premises on the same terms of the terminated agreement (including any end date), thereby effectively removing a co-tenant from the lease.

⁹⁹ When section 12(3) of the Act is taken into account together with any apportionment of liability amongst co-tenants.

¹⁰⁰ That is, on the basis of equal contribution amongst the tenants, or as provided through prior agreement between the tenants: see for example *Rewar, Bhuriya & Thawinan v Gabriel & Gabriel* [2017] NTCAT 111 at para 78.

¹⁰¹ An example of unreasonable refusal might be where the vacating co-tenant has found a replacement tenant who has similar capacity as the vacating co-tenant to meet the lease requirements (i.e. pay the required bond

Recommendation 4

- a. Consider providing the NTCAT with the power to:
 - i. order assignment of a vacating tenant's portion of a bond to the remaining co-tenant(s), or order a landlord to refund a vacating tenant's portion of a bond to that person, with ancillary orders (where necessary) that the remaining co-tenant(s) pay the vacating co-tenant or the landlord (as the case may be) the sum equal to that portion; and
 - ii. remove a person's name from a tenancy; with
 - iii. the need for an order under (i) or (ii) to be subject to a test of being necessary due to the unreasonable refusal of a co-tenant/landlord to assign the vacating tenant's portion of the bond and/or remove the vacating tenant from the lease;
- b. Consider clarifying that a former co-tenant is not liable for any loss caused by an act or omission of any other tenant remaining in occupancy of the premises if that act or omission occurred after the co-tenant ceased to occupy those premises.

Sub-tenants

There was little comment from stakeholders around the topic of sub-tenants, though DoH suggested that “clarification of the definition of terms such as sub-tenant, lodger, boarder, co-tenant, and occupant etc” is required. DoH was of the view that increasing clarity around landlord and tenant responsibilities (in whatever form the occupation of the premises took) may make share housing a more attractive option for certain client groups. CAALAS/NAAJA also suggested that there is a “need for boarders and lodgers (as distinct from sub-tenants) to have clear rights and protections” under the Act. These calls for clarity are generally reflective of the changing rental market dynamic, particularly in relation to the expanding informal rental market sub-tenanting/rent by room practices predominantly among, but not limited to, the lower end of the income/rental spectrum¹⁰².

While need for clarity has, to an extent, been identified in decisions of delegates of the Commissioner, and more recently the NTCAT¹⁰³, that each case has been determined on the basis of its own circumstances highlights the difficulty in providing strict definitions for what may, at times, be fluid arrangements¹⁰⁴. At best, what can be seen from those cases is that there may be a sub-tenancy in effect at law in circumstances of shared use of ‘common property’, such as the kitchen and bathroom, provided the person has been given exclusive possession of a bedroom, as distinct from the situation where the landlord provides the person with “attendance or services that require

contribution and meet rent and other expenses), and the remaining co-tenant/landlord refuses to accept the proposed tenant on grounds unrelated to that person's ability to maintain the lease.

¹⁰² See for example the discussion in: Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne,

https://www.ahuri.edu.au/data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf at Chapter 4.2.5.

¹⁰³ For example: *Ginnis & Ginnis v Marshall* [2008] NTRTCmr 21, *Jatis v Fitzgerald* [2008] NTRTCmr 12; *Gaunt v Rogers & McCartney* [2015] NTCAT 189.

¹⁰⁴ The authors noted that legislation such as that relating to ‘traditional’ boarding houses does not provide the “flexibility and scope for variation to suit individual circumstances”: Hulse, K., Parkinson, S. and Martin, C. (2018) Inquiry into the future of the Private Rental Sector, AHURI Final Report 303, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/data/assets/pdf_file/0026/24695/AHURI_Final_report_303_Inquiry_into_the_future_of_the_private_rental_sector.pdf p47.

the landlord... to exercise unrestricted access to... the (whole of) the premises"¹⁰⁵, in which case the person is considered to be a lodger.

The legal distinction between sub-tenant and lodger is only relevant where there are fewer than three people residing in the premises¹⁰⁶. Going by the small number of cases in the Territory, the issue arises more often than not in the single occupant/landlord setting¹⁰⁷, where the parties argue lodger or tenant based on their particular position in the dispute (and whether they and the other party should be bound by the Act or not). This suggests that the issue may be more to do with either a lack of forethought about the nature of the relationship before entering the agreement, or a more deliberate approach to classifying an occupancy arrangement one way or another after the event. Increasing public awareness about the differences and implications between sub-tenant and lodger, where identified necessary, may be of greater benefit than any attempt to legislatively define those terms. It is noted that Consumer Affairs has two brochures that discuss sharing a house and the differences between tenants and lodgers¹⁰⁸.

Recommendation 5

It is recommend that the Commissioner and/or community legal services consider whether current information platforms sufficiently communicate the rights, responsibilities and differences between sub-tenants and lodgers.

Issue 7: Increases in Rent s.41

Section 41 of the Act states that the amount of rent paid under a tenancy agreement may only be increased if the tenancy agreement permits an increase during the tenancy, and the agreement sets out the amount of increase or the method of calculation. Section 41 requires that notice of the increase be given to the tenant 30 days before the increase, and limits the frequency or interval between increases to a minimum of six months from the date the agreement commenced, or the last rental increase.

The 2010 Issues Paper asked the following questions in relation to rental increases during a tenancy:

- “Should section 41 (increases in rent) be amended to include a provision allowing the parties to agree in writing to an increase in rent, even if the agreement doesn’t contain such a provision? If so, should such a provision explicitly exclude the ability for parties to agree to increases that do not comply with notice periods set out in section 41(2) and (3) (i.e. continue to prohibit “contracting out” of the Act)?”¹⁰⁹;

¹⁰⁵ *Gaunt v Rogers & McCartney* [2015] NTCAT 189 per Member McCrimmon at para 5 quoting Lord Templeman in *Street v Mountford* [1985] 1 AC 809 at 817.

¹⁰⁶ Regulation 4(b) *Residential Tenancies Regulations 2000*. The three person count does not include the landlord who resides at the premise, and by implication, excludes a tenant (or tenants) who sub-let a room, as those tenants become landlords by their offering a spare room for rent.

¹⁰⁷ Which would see those matters fall outside of the framework offered by the Act where a lodging arrangement is found.

¹⁰⁸

http://www.consumeraffairs.nt.gov.au/ForConsumers/ResidentialTenancies/Documents/sharing_a_property_factsheet.pdf

http://www.consumeraffairs.nt.gov.au/ForConsumers/ResidentialTenancies/Documents/boarders_lodgers_sub_tenants_factsheet.pdf

¹⁰⁹ Question 10 of the 2010 Issues Paper.

- “Should 60 days notice for a rental increase be required? What is the justification for such a change? What affect would this have on the rental market?”¹¹⁰;
- “Should rent increases be limited to every 12 months? What is the justification for such a change? What affect would this have on the rental market?”¹¹¹;
- “Should the amount of rent increase be capped – for example by a percentage? If so, what is the justification for such a change? What affect would this have on the rental market?”¹¹².

The questions stem from the matter of *Holdeth Investments Pty Ltd v Ivinson and Halliday* [2009] NTMC 16 (*Holdeth*), where His Honour, Dr Lowndes SM, found that section 41(1) does not prevent a landlord and tenant from mutually agreeing to rent increases during a tenancy even where the original agreement did not specifically allow an increase, or specify the amount of any increase (or state how any increase would be calculated).

The issue in *Holdeth* was whether or not section 41 prohibited increases other than those that complied with section 41. His Honour considered that parliament did not use express language in section 41 of the Act to abolish the common law right for parties to mutually agree to changes to terms of their contract.

Stakeholder comments

Increasing rent

While stakeholders did not wish to see amendments to section 41(1) to include reference to subsequent agreement between the landlord and tenant to vary rental payments, there was significant differences in their reasons. The submissions of CAALAS/NAAJA and TEWLS/DVLS were effectively that the outcome of *Holdeth* should be legislatively reversed by specifically prohibiting rental increases during the term of the tenancy, regardless of whether it was agreed between the landlord and tenant at the start, or at some later time. CAALAS/NAAJA and TEWLS/DVLS considered that the unequal bargaining position between the parties could place a tenant in a vulnerable position where they feel they must agree to the increase¹¹³.

DCLS took the view that for balance and fairness, any increase should be agreed only at commencement of the tenancy, and be expressed in the tenancy agreement. The REINT took a similar view, noting that following *Holdeth*, section 41(1) was largely redundant in the context of most leases being for either six or 12 months duration; however, section 41(1) did have some role to play in respect of those leases that ran longer than 12 months. The REINT submitted that “The profession does however support the notion that if the parties enter into a fixed term lease for 12 months or less, then the rent should not be increased during this period...”, but that section 41(1) could be amended to incorporate situations where there has been mutual agreement following improvement to the property (such as installation of a pool).

It is, however, arguable that the question really is: should section 41 of the Act replace the common law in respect of rental increases generally, including when a fixed term lease rolls into a periodic lease, or when otherwise initially entered into on a periodic basis? His Honour, Dr Lowndes SM, in *Holdeth*, determined (in obiter) that section 41 ceased to apply when a fixed term lease rolled over into a periodic lease, with the implication that the common law will apply to rent variations thereafter. The common law is clear that each period constitutes a new tenancy and, as a result, the tenancy

¹¹⁰ Question 11 of the 2010 Issues Paper.

¹¹¹ Question 12 of the 2010 Issues Paper.

¹¹² Question 13 of the 2010 Issues Paper.

¹¹³ TEWLS also submitted that it would not be “...fair to allow these increases as a tenant should know what obligations they have agreed to when they enter into an agreement.”

may be subject to rental increases at the start of each period¹¹⁴, notwithstanding the ‘continuity’ (or rolling on) of the tenancy¹¹⁵.

Periods of notice, frequency of rent increases and excessive rent

The majority of stakeholders (DoH, DCLS, CAALAS/NAAJA and NT Shelter) indicated that the notification period should be increased from 30 days to 60 days as it reflected the notification period in other jurisdictions¹¹⁶, and it would give the tenant a greater amount of time to put measures in place to meet the additional rent, undertake negotiation with the landlord, or find alternative housing. DCLS and CAALAS/NAAJA were also of the view that the ability to increase rent should be limited to once every 12 months. DoH suggested that there may be trade-offs with imposing a 12 month restriction on rent increases; while tenants may gain more certainty about their obligation over a 12 month period, that certainty may be off-set by a larger increase at the end of that period, or landlords deciding to offer only six month leases. REINT’s view was that as the majority of leases are for either six or 12 months, “the parties are at liberty to negotiate the rent rate at will at the time they negotiate a new lease term”.

DCLS, CAALAS/NAAJA and NT Shelter also stated that some level of control should be placed on rental increases. DCLS and CAALAS/NAAJA argued for the imposition of a cap, with DCLS preferring a simple base increase of between five per cent and 10 per cent, while CAALAS/NAAJA preferred a weighted index of 20 per cent of the rents component of the housing group of the Consumer Price Index¹¹⁷. CAALAS/NAAJA and NT Shelter considered that the assessment of rental increases should be undertaken on an affordability basis, rather than the more simplistic and “self-fulfilling prophecy”¹¹⁸ of viewing the market rates for comparable properties. REINT did not support a cap.

While no jurisdiction imposes a statutory cap on rental increases¹¹⁹, each jurisdiction has a test on whether an increase is excessive or not. In the Territory, a two part test is set out in section 42(3) of the Act as either:

- having regard to general levels of rent for comparable properties, factoring in services provided by either the landlord or tenant; or
- assessment of a reduction in the level of services provided under the tenancy agreement.

With the exception of Tasmania¹²⁰, all other jurisdictions set out a range of factors to be taken into account when considering whether a rent increase is excessive. Those factors include: the amount of the increase and when the last increase occurred¹²¹; landlord’s outgoings under the lease¹²²; cost of goods and services provided under the lease by the landlord and/or tenant¹²³; nature and value

¹¹⁴ That is, weekly for weekly leases, fortnightly for fortnightly leases, monthly for monthly leases and so on.

¹¹⁵ *Holdeth* at paragraph 129. See also *Bortoli & Bortoli v Webber* [2015] NTRTCmr 28 which favoured this position.

¹¹⁶ All jurisdictions, with the exception of Queensland, which provides a two month notification period, require 60 days notice.

¹¹⁷ This weighted index is applied in the Australian Capital Territory for determining whether rent is excessive or not under section 68 *Residential Tenancies Act 1997* (ACT).

¹¹⁸ CAALAS/NAAJA submission.

¹¹⁹ Section 31B *Residential Tenancies Act 1987* (WA), however, does restrict the amount of rent that may be charged within the first 30 days of a new lease where that lease immediately follows an expiring lease for the same premises.

¹²⁰ Section 23(2) of the *Residential Tenancy Act 1997* (Tas) gives regard to the general level of rents for comparable premises or “other relevant matters”.

¹²¹ See for example section 92(4) *Residential Tenancies And Rooming Accommodation Act 2008* (Qld); s47(3) *Residential Tenancies Act 1997* (Vic).

¹²² Section 44(5) *Residential Tenancies Act 2010* (NSW); s56(2) *Residential Tenancies Act 1995* (SA); s32(3) *Residential Tenancies Act 1987* (WA); s47(3) *Residential Tenancies Act 1997* (Vic).

¹²³ Section 56(2) *Residential Tenancies Act 1995* (SA); s47(3) *Residential Tenancies Act 1997* (Vic); s32(3) *Residential Tenancies Act 1987* (WA).

of chattels provided under the lease¹²⁴; the state of repair and general amenity of the premises¹²⁵; and the capital value of the premises¹²⁶.

The NTCAT considered the topic of excessive rent in the context of comparable rent under section 42(3)(a) in *Carloss & Carloss v Freehan & REINT* [2015] NTCAT 129. Prior to *Carloss & Carloss*, the issue of excessive rent in the context of reduced services (section 42(3)(b)) was considered by the Delegate of the Commissioner in *Fearon v Gerich* [2015] NTRTCmr 4. Both of those cases concluded that while reduced services assessments may be relatively straightforward as it simply compares the rent level against the reduced scope of services received for that rent, for rent to be considered excessive in respect of comparable properties, the assessment must go beyond a simple comparison of the rent sought for similar properties¹²⁷.

The test for whether or not rent is excessive in the Territory depends “upon an assessment whether the rent is excessive ‘having regard’ to the rents payable in respect of relevantly comparable premises”¹²⁸, in the context of whether a landlord exhibited questionable behaviour at the time the rent was set¹²⁹, rather than a specific “circumstance ‘because’ of which rent may be regarded as excessive”¹³⁰, which tends to be the test outside of the Territory.

¹²⁴ Section 44(5) *Residential Tenancies Act 2010* (NSW); s56(2) *Residential Tenancies Act 1995* (SA); s32(3) *Residential Tenancies Act 1989* (WA).

¹²⁵ Section 44(5) *Residential Tenancies Act 2010* (NSW); s92(4) *Residential Tenancies And Rooming Accommodation Act 2008* (Qld); s56(2) *Residential Tenancies Act 1995* (SA); s47(3) *Residential Tenancies Act 1997* (Vic); s32(3) *Residential Tenancies Act 1987* (WA).

¹²⁶ Section 56(2) *Residential Tenancies Act 1995* (SA); s47(3) *Residential Tenancies Act 1997* (Vic); s32(3) *Residential Tenancies Act 1987* (WA).

¹²⁷ For example, an internet search of properties with similar features, on its own, may not be sufficient per *Fearon v Gerich*, with a preference to expert evidence of a professional valuer or independent real estate agent. *Carloss & Carloss* suggests that this is “at least highly desirable” at para 20.

¹²⁸ *Carloss & Carloss* at para 42.

¹²⁹ “...dishonest, unfair or unconscionable conduct on the part of a landlord in the negotiation of the residential tenancy agreement; or ...where a difference between increased rent under a residential tenancy agreement and comparable ‘market’ rent is a result of the landlord taking advantage of a rent increase provision otherwise than in good faith...” *Carloss & Carloss* at para 43.

¹³⁰ *Carloss & Carloss* at para 42.

Recommendation 6

Consider making the following amendments to section 41.

- a. Clarify that if a tenancy agreement does not provide for increases in rent, then, rent cannot be increased during the term of that tenancy even if the parties later agree to an increase. That is, the common law right of a landlord and tenant to mutually increase rent is abolished, and the rent for the premises is set by the original agreement even if that agreement is changed or replaced. This would also apply where improvements are made to the premises, e.g. furnishings or a pool, unless the original agreement allowed for rental increases in those situations.
- b. If a fixed term expires and: a periodic tenancy applies under section 83; a new term is agreed to resulting in an extension of the agreement; or a new agreement is entered into, the arrangement is to be deemed a continuation of the tenancy. Therefore, a tenancy does not terminate and a new tenancy is not created upon the occurrence of any of those events. A tenancy only terminates in the situations provided for in section 82.
- c. If a tenancy becomes a periodic tenancy under section 83 and the tenancy agreement that existed immediately prior did not provide for rent increases, then there should not be an ability for the landlord and tenant to increase rent, except through the creation of an entirely new tenancy agreement. It should also be clarified that a periodic tenancy is not a periodic tenancy at common law, to avoid any argument that there is an ability for a landlord and tenant to enter into further contractual arrangements unless it is to create an entirely new tenancy agreement. In such circumstances, the formal processes to terminate a periodic tenancy are to apply before any new tenancy may be entered into.
- d. Clarify that section 41 applies to periodic tenancies generally.
- e. Increase the period of notice for rent increases from 30 days to 60 days in section 41(2).

Issue 8: Repairs, maintenance and security

Questions raised in the 2010 Issues Paper on this topic on which stakeholders provided comment were:

- “Should it be a term of a tenancy agreement that a tenant will, during the term of the agreement, repair damage to the premises that the tenant has caused?”¹³¹;
- “Does the Act need amending to make clear that circumstances surrounding domestic violence constitute “reasonable excuse” for a tenant to alter locks, or is the current wording sufficient to cover this situation?”¹³²; and
- “Should the (NTCAT) have the power to compel a body corporate (under the *Unit Titles Act* or the *Unit Titles Schemes Act*) to undertake emergency repairs (as set out in section 63(2))?”¹³³.

Stakeholder comments

Repairs by tenant

DCLS, CAALAS, NAAJA, TEWLS and DVLS all submitted that a tenant should not be required to undertake repairs. Various reasons were provided in support of this, such as: the absence of control on the standard of repairs made; a number of options are already available to a landlord under the Act (see sections 51(1), 58(1), 57, 71, 96B and 122); the potential for a tenant to face undue financial

¹³¹ Question 14 of the 2010 Issues Paper.

¹³² Question 15 of the 2010 Issues Paper.

¹³³ Question 16 of the 2010 Issues Paper.

hardship; landlords are already adequately protected by the security deposit and landlord's insurance; and that it risks the passing off to the tenant or reversal of the obligation of the landlord to maintain the premises.

LGANT and REINT supported a mechanism where a tenant is obliged, at the option of the landlord, to either repair the damaged or compensate the landlord for the reasonable cost of repairs. DoH indicated that it would continue with its preference of employing "preventative measures where damage is suspected... rather than seek to enforce pecuniary hardship on the tenant in the first instance".

Given that a tenant is obliged to report damage to the landlord¹³⁴ and, where the tenant is responsible for causing the damage, is required to make good on it either through compensating the landlord or paying for repairs themselves¹³⁵, the Act meets stakeholder requirements.

Alteration of locks in a domestic violence setting

DCLS, CAALAS/NAAJA, NT Shelter, TEWLS and DVLS suggested that sections 52 and 53 should be amended to clarify that domestic violence is a reasonable excuse to alter locks without the landlord's consent. Those stakeholders suggested this could be achieved by inserting a list of examples of what could be a reasonable excuse¹³⁶. LGANT, DoH and REINT indicated that the current wording of the Act was sufficient and that no amendment was necessary, and DoH viewed the problem as more to do with advising tenants about when they can change locks in an emergency.

While providing an example may guide the NTCAT about what reasonable excuse might be, examples, even non-exhaustive, also have a potential to unintentionally narrow that focus¹³⁷. This becomes more problematic where the example has restrictions, such as excluding perpetrators, as it limits the ability to "readily encompass other scenarios"¹³⁸. As all stakeholders have acknowledged that a domestic violence setting could give rise to a reasonable excuse to change locks, it is unlikely that the NTCAT or the courts would form the opposite view¹³⁹. Amendment of either section 52 or section 53 does not appear necessary.

Body corporates

In its response to the question, DCLS were of the view that the NTCAT should be given the power to require body corporates to undertake emergency repairs "as the failure to have any of these fixed immediately would cause the agreement between the tenant and landlord... to be breached and/or bring about a right of termination". The REINT on the other hand called for caution when considering emergency repairs, stating that as the "Unit Titles legislations require a body corporate to repair and maintain common property with appropriate remedial action being available...", there was "...no need to complicate the issue by extending jurisdiction into the [Act]".

Under both the *Unit Titles Act 1975* and the *Unit Title Schemes Act 2009*, a body corporate has ownership and control of common property and responsibility for its maintenance and repair. Although they may be physically connected, common property is legally separate from the landlord's premises. The problem that this creates in a tenancy setting was noted by the Delegate of the Commissioner in *Peisker V O'Donoghues First National* [2012] NTRTCmr 86 (*Peisker*): "I am afraid it is not unheard of for body corporate managers in this city to take a passive view of their responsibilities when it comes to tenants of units suffering loss and damage as a result of a defect in the body corporate complex." The Delegate considered that, "the onus lies heavily on the landlord

¹³⁴ Section 51(1)(b).

¹³⁵ Section 122, and in particular section 122(3)(g).

¹³⁶ TEWLS' called for care in drafting, stating that "Problematically, too wide a definition of domestic violence is open to abuse by perpetrators, while a definition that is too narrow will miss real cases of domestic violence".

¹³⁷ As TEWLS' comment at n 149 indicates.

¹³⁸ CAALAS/NAAJA submission.

¹³⁹ Especially if the parties represent it as such.

or his agent to take whatever action is available, including legal action if necessary, to ensure that problems emanating from common property or adjoining units are fixed within a reasonable time”, otherwise the landlord would fall foul of the requirement to take reasonable steps to maintain the premises in a reasonable state of repair, and face the prospect of compensating the tenant.

That prospect became a reality in *Macnee & Lindley V LJ Hooker* [2008] NTRTCmr 5 (*Macnee*). Although the leaky roof was the responsibility of the body corporate, the Commissioner’s Delegate ordered, in addition to a rent reduction, that the landlord compensate the tenants for the inconvenience, danger and time consumed by the tenants’ repeated approaches to the body corporate to get the problem resolved. Against the landlord in this case was the lack of effort the landlord put in to get the body corporate to take action.

Recent amendments to the *Unit Titles Act 1975*¹⁴⁰ means that both Unit Titles Acts now enable a landlord¹⁴¹ and the tenant¹⁴² to bring a dispute with the body corporate about maintaining or repairing the common property before the NTCAT for resolution¹⁴³. While the amendment to the *Unit Titles Act 1975* increases the options available to tenants, they do not reduce the landlord’s obligations or exposure under the *Residential Tenancies Act 1999*. When viewing the decision of *Macnee* against the avenues available under both Unit Title Acts, it would appear that a landlord may only reduce its liability toward a tenant through actively seeking resolution of common property issues personally under the respective Unit Title Act¹⁴⁴. Under the circumstances, unit owner landlords, their agents, and body corporate managers might benefit from developing a greater appreciation of their obligations and the rights of unit occupiers (tenants).

Issue 9: Landlord’s right to enter premises (breaking of locks)

While the topic heading in the 2010 Issues Paper was phrased in relation to the landlord’s right to enter the premises, the discussion was limited to whether section 77 needed to include a power authorising the breaking of locks as part of an order to gain access to the premises¹⁴⁵.

The 2010 Issues Paper noted that, although an order made under section 77 allows a landlord to enter premises where a tenant has unreasonably impeded or failed to permit lawful entry, section 77 did not cover the situation of a tenant fitting additional locks to prevent entry under the order. Notwithstanding this, a number of orders of Delegates of the Commissioner provided for the breaking of locks, which has raised concern about whether a landlord could be held criminally or civilly liable for the forcing of entry (even with an order).

Stakeholder comments

In addition to a need to clarify the position of the landlord, DoH also identified a need to clarify whether the tenant should be liable for costs involved with breaking/replacing locks. REINT indicated that this was generally not an issue with the private sector, but supported clarifying the subject of

¹⁴⁰ Section 34 *Agents and Land Legislation Amendment Act 2019*.

¹⁴¹ As a unit owner.

¹⁴² As the occupier.

¹⁴³ Section 106 *Units Titles Act 1975*; section 86 *Units Title Schemes Act 2009*. How such a dispute may be conducted may vary dependant on which Act the unit title falls under. While there is a statutory obligation to maintain common property under sub-sections 34(b) and (c) of the *Unit Titles Act 1975*, the absence of such a direct obligation in the *Unit Title Schemes Act 2009* would necessitate reliance on an implied duty to maintain and repair that could be expected to arise through the body corporate’s ownership and control of common property and the requirement that the body corporate use unit owner annual contributions to fund maintenance and repair of common property under clause 49(b) of Management Module 1, Schedule 1 *Unit Title Schemes (Management Modules) Regulations 2009*.

¹⁴⁴ Namely, commence NTCAT dispute proceedings against the body corporate for breach of duty.

¹⁴⁵ Question 17 of the 2010 Issues Paper.

forced entry in the Act. CAALAS and NAAJA generally questioned whether such a power was needed.

It seems reasonable that having gained authorisation from the NTCAT to gain entry to a premises, the landlord ought to be able to make that entry. The ability to gain entry should, however, be limited to steps reasonably necessary to actually gain entry¹⁴⁶. It would also be appropriate for the landlord to compensate the tenant where the tenant's items are damaged in the process of gaining entry, other than those items that were used to prevent the landlord gaining entry in the first place.

Recommendation 7

Consider amending section 77 to:

- a. clarify that the power of the NTCAT to order entry onto premises includes a power to authorise the use of reasonable means (excluding physical contact between persons) to gain entry;
- b. state that if a landlord damages an item of the tenant while gaining entry, the landlord must organise and pay for its replacement or provide compensation, except where that item was used to prevent entry; and
- c. state that if a landlord gains entry in accordance with an order under section 77(1), the landlord or its agents cannot be held criminally or civilly liable for reasonable actions taken in gaining that entry (other than the statutory requirement to reinstate a lock or the requirement in (b) above)).

Issue 10: Termination

The 2010 Issues Paper raised two specific questions relating to termination of a tenancy, which stakeholders provided comment on:

- “Should the Act make provision for termination of employment related tenancy where the employee has resigned?”¹⁴⁷; and
- “Should the word “reasonable” be inserted in section 96B(2)(d) (and similarly in 96C), to make clear that the test of whether a breach has been remedied is an objective one (i.e. what a “reasonable” landlord or tenant would require under the circumstances, not what the individual landlord or tenant might require)?”¹⁴⁸.

Section 91 deals with employment related tenancies, setting out periods of notice to be given to terminate a tenancy that is provided as a condition or benefit of employment. While section 91 requires a landlord to give notification of an intention to terminate the tenancy¹⁴⁹ when the tenant's employment has been terminated, there are no special provisions where the employee has resigned. The 2010 Issues Paper noted that while the employer termination notice periods provided a fair balance between employer and former employee needs¹⁵⁰, the lack of a similar provisions for

¹⁴⁶ For example, where a locksmith may be able to unlock a door, it would be unreasonable for the landlord to ‘kick it in’.

¹⁴⁷ Question 19 of the 2010 Issues Paper.

¹⁴⁸ Question 20 of the 2010 Issues Paper.

¹⁴⁹ 2 days notice where the employment was terminated for a breach of the employment agreement (section 91(2)(a)), or 14 days notice where the employment was terminated for a reason other than a breach of the employment agreement (section 91(2)(b)).

¹⁵⁰ The employer needing to free the house up for another employee, and the employee's need to find alternative accommodation.

tenants who resign¹⁵¹ could have the unintended consequence of the employer needing to give, and wait out the general 42 days notice¹⁵² period even though the tenant is no longer working for them.

Section 96B deals with termination of a tenancy where the tenant has breached a tenancy agreement other than by failing to pay rent. This provision requires a landlord to give notice to the tenant of the alleged breach, and state that the breach is to be remedied to the landlord's satisfaction by a certain date. The 2010 Issues Paper questioned whether the landlord's 'satisfaction' was objective or subjective, recommending that 'reasonable' be inserted to clarify that the test was what an objective person would consider appropriate remediation.

Stakeholder comments

Employment related tenancies

As the Act provided for other situations arising from employment related tenancies, DoH was of the view that provision for employee resignation would be a "logical addition" that provided practical benefit. LGANT supported inclusion of termination following resignation of an employee, noting that it was of particular relevance to local governments as staff are provided accommodation in remote areas. While the REINT did not see this as an issue within the private sector, it supported amendment.

DCLS, however, suggested that the reference to "in any other case" in section 91(2)(b) covered termination following an employee's resignation. Reading section 91 as a whole would suggest that it is limited to situations where the employer terminates the employment of the tenant, and not where the tenant resigns. Section 91(1) gives an employer the ability to terminate a tenancy if the employer has terminated the tenant's employment¹⁵³, where the tenancy itself is a condition or benefit of the employment¹⁵⁴ (i.e. accommodation provided as a result of that employment, and for the duration of employment). Section 91(2) sets out the amount of notice the employer must give the employee. The section 91(2)(b) reference to "in any other case" relates to any employer initiated termination of employment other than for a breach of the employment agreement.

Remedy of breach to landlord's satisfaction

DoH, DCLS, CAALAS/NAAJA and LGANT supported making the section 96B test an objective one¹⁵⁵. REINT was strongly opposed to the inclusion of the word 'reasonable', suggesting that "[c]hanging the existing subjective nature of the existing framework to an objective framework is an illusionary concept. It would make the 'objective' determinant entirely at the discretion of the person arbitrating which would merely result in a 'subjective' application by that [arbiter]".

The need for reasonable objectivity in deciding whether a breach has been remedied is highlighted by the number of disputes over standards of cleanliness (either during the tenancy or on vacation) demanded by landlords that Delegates of the Commissioner, and more recently the NTCAT have found to exceed the level required under the Act¹⁵⁶. As those cases show, the standard that is

¹⁵¹ Namely, the tenant being required to give up the premises within 14 days notice of resigning from the employer.

¹⁵² Being the general notice that a landlord must give for termination of a periodic lease under section 89.

¹⁵³ Section 91(1)(b).

¹⁵⁴ Section 91(1)(a).

¹⁵⁵ Namely, what a reasonable landlord would consider to be a satisfactory remedy of a breach in the particular circumstances.

¹⁵⁶ See for example the discussions in: *Webb v Leisure Property Group Pty Ltd* [2015] NTCAT 182 especially at paras 24 and 25; *Habitat (NT) Pty Ltd v Ivanoski* [2011] NTRTCmr 90; *Weber v Fleay & Fleay* [2008] NTRTCmr 26; and *Rosas v Chief Executive Officer (Housing)* [2015] NTRTCmr 25; *Chief Executive Officer (Housing) v Pearce* [2007] NTRTCmr 7.

required is not what a landlord (or tenant) might personally desire. Instead, it is the level of action that is necessary to ensure compliance with the requirements of the Act¹⁵⁷.

The decision whether or not to terminate the tenancy requires an impartial and objective assessment of the tenant's compliance with the landlord's notice to remedy a breach. If the NTCAT is to make that order, it is entirely appropriate that it assesses whether the order is reasonable and appropriate.

Recommendation 8

- a. Consider amending section 91 to enable an employer to terminate a tenancy where an employee resigns from employment, with the notice period to be the same period of notice as per the resignation, or where the resignation notice period is waived by both parties, the same period as is currently provided in section 91(2)(b) (i.e. 14 days).
- b. Consider amending section 96B to clarify that the test is that the landlord is to be reasonably satisfied that the tenant has (or has not) taken the required steps.

Issue 11: Roles of the Court or Commissioner on termination and other issues

The 2010 Issues Paper raised a number of questions in relation to considering applications for termination of a tenancy under Part 11 of the Act. The vast majority of those questions¹⁵⁸ are no longer relevant now that jurisdiction has been conferred on the NTCAT. However, two questions remain relevant, namely:

- “Would the “serious breach” and “unacceptable behaviour” provisions of the Act be improved if further guidance was provided in the Act to (NTCAT) on what behaviour will “trigger” these provisions and the circumstances under which (NTCAT) should terminate a tenancy (for example, by setting out some of the matters (NTCAT) should consider before exercising the discretion to terminate)?”¹⁵⁹; and
- “Does the Act need to be amended to clarify what action a landlord has to take to obtain possession, in the event an order for possession under section 105 (sic) is postponed and a tenant allows rent to fall into arrears?”¹⁶⁰.

Stakeholder comments

Clarification of ‘serious breach’ and ‘unacceptable behaviour’

DoH and DCLS both supported clarifying what is meant by ‘serious breach’ and ‘unacceptable behaviour’ to guide the NTCAT on factors that should be taken into account when deciding whether to order immediate termination of the tenancy. On the other hand, CAALAS and NAAJA suggested that the legislation already provides sufficient guidance.

¹⁵⁷ This difference in standards is highlighted by the REINT's general comments on amendments made to the condition report processes, where it suggested that as “[t]here are few tenants if any who live in a manner consistent with the standard of cleanliness provided at the commencement of a lease...”, when registering concern over the section 28B prohibition on forcing tenants to vacate the premises where a condition report is sought when a fresh lease is used to extend an existing tenancy. The REINT's concern was that landlords “would have to take the ‘condition’ as found at the time” of the inspection, i.e. in an occupied state, rather than in a condition the landlord would require when presenting an unoccupied premises to prospective tenants.

¹⁵⁸ Questions 22-29 of the 2010 Issues Paper.

¹⁵⁹ Question 21 of the 2010 Issues Paper.

¹⁶⁰ Question 30 of the 2010 Issues Paper.

What constituted serious breach was first considered by her Honour Fong Lim SM, in *CEO Housing v Coonan* [2010] NTMC 30¹⁶¹ (*Coonan*). Despite the absence of past decisions or guidance in the Act, Fong Lim SM was able to form the view¹⁶² that the seriousness of the behaviour needed to be considered in context of the surrounding circumstances¹⁶³, and conclude that an order would more likely be made where the behaviour was significant and on-going¹⁶⁴. This case suggests that the NTCAT would be more than capable of considering whether a serious breach or unacceptable behaviour occurred, and whether the tenancy should be terminated without guides in the Act¹⁶⁵.

Suspension of order for possession

REINT submitted that section 105 should clarify what steps a landlord needs to take if a tenant defaults on rental payments, strongly supporting “a system that provides for immediate possession for default in such circumstances”.

DCLS, on the other hand suggested that sections 105(4) and (5) gave the landlord immediate possession. DCLS stated that sections 105(4) and (5) “appeared to be sufficient” in terms of establishing a process that entitled a landlord to take possession. DCLS did, however, question the inability of a tenant to dispute the notice.

A plain reading of section 105 suggests that a suspension of an order of possession is subject to the tenant paying rent, and that a failure to pay rent will reactivate the order. The mechanism for reactivating the order is the landlord’s notice of termination, which entitles the landlord immediate possession¹⁶⁶, subject to the date provided in the notice¹⁶⁷ and the tenant vacating.

While section 105 is relatively straightforward, the REINT and DCLS submissions raise valid questions about how to ensure a tenant actually vacates following receipt of a section 105(4) notice, and whether the notice should be able to be challenged.

As the NTCAT issues the section 104 order of possession, and suspends it under section 105 due to hardship to the tenant, it would be appropriate for any non-compliance to come back before the NTCAT for final determination. Although this may remove the immediacy of final termination, it would provide a more solid and conclusive path for a landlord to obtain possession. It would also give the tenant an opportunity to challenge the notice, and enable the NTCAT to consider the question of non-compliance with its earlier order¹⁶⁸.

Recommendation 9

Consider amending section 105 to provide an avenue for a landlord to apply to the NTCAT to revoke a suspension of an order for possession.

¹⁶¹ DCLS raised this in support of its position.

¹⁶² Having regard to similar provisions in other jurisdictions and decisions of the (then) New South Wales Tenancy Tribunal and the New South Wales Court of Appeal (per *Coonan* at para 13).

¹⁶³ Including circumstances leading up to, and surrounding the actual behaviour being complained of (per *Coonan* at para 51).

¹⁶⁴ Or there being a likelihood of that behaviour continuing (per *Coonan* at para 51).

¹⁶⁵ In *Coonan*, Fong Lim SM concluded, at para 54, that while the respondent’s behaviour was “unacceptable and reprehensible”, she was “not satisfied the discretion should be exercised” given the particular circumstances surrounding the matter.

¹⁶⁶ Section 105(4) entitles the landlord to terminate a tenancy extended by section 105(1) where a tenant subsequently fails to pay rent within seven days after it falls due. This is to be achieved by the landlord giving the tenant a notice of termination seven days after the non-payment of rent under section 105(4), with section 105(5) requiring the tenant to give up possession on the date specified in the section 105(4) notice.

¹⁶⁷ Namely, 14 days after the rent became due.

¹⁶⁸ Section 87 of the *Northern Territory Civil and Administrative Tribunal Act 2014*. It is also an offence under section 84B to fail to comply with an order of the Tribunal.

Issue 12: Service of Notices

The 2010 Issues Paper noted that the general presumption about delivery of notices in the ordinary course of the post had been ‘disturbed’ by an amendment to section 25 of the *Interpretation Act 1978*¹⁶⁹, and asked whether section 154 of the Act (which deals with how to serve notices) needed to be amended to restore the presumptions about delivery of notices.¹⁷⁰

Stakeholder comments

DCLS suggested that there was an amount of confusion with both landlords and tenants about service requirements. DCLS recommended amending the Act to clearly state timeframes for delivery, and the types of delivery methods. DCLS expanded on this by stating:

- a. ““Sent by post” should be amended to be “sent by registered post” ...” to establish a verifiable record of delivery”;
- b. “The notice should be dated 3 days after the sending... to take into consideration delays in delivery and receipt...”;
- c. “Leaving the notice at the front door or in the letter box... should not be sufficient service under the personal service provision”; and
- d. “[Sections] 154(a) and (b) are confusing and a dispute could arise as to the correct address of a body corporate or whether a body corporate is the correct term to use when referring to the landlords agent.”

CAALAS/NAAJA also raised issue with the absence of time periods for service and deemed receipt, suggesting it was a deficiency that had consequences on tenant and landlord rights in relation to termination and breaches.

DoH was of the view that restoration of the general presumption about delivery would be beneficial, though noted that many of its regional and remote clients did not have access to postal services. REINT strongly supported service by post.

The issue of section 154 and its impact on service of notices through the post was identified in a decision of the Local Court in *Brown & Lemmers v Elenis & Elenis* [2007] NTMC 004 (*Brown*). In *Brown*, her Honour Oliver SM, found that there were issues associated with importing the implied service in section 25 of the *Interpretation Act 1978* in the ordinary course of post, not least the requirement to establish what that ‘ordinary course’ was¹⁷¹. Notwithstanding the absence of evidence establishing what the ‘ordinary course of post’ was (and thus whether it was complied with), the decision in *Brown* ultimately turned on the question of whether section 25 of the *Interpretation Act 1978* applied to the service of notices under section 154 of the Act. Oliver SM found it did not on the basis that section 25 of the *Interpretation Act 1978* was generic in nature, and therefore its application is subject to any specific enactment to the contrary¹⁷².

According to *Brown*, the ‘disturbance’ in the presumption about service of notices by post under section 154 of the Act arose through the 2006 amendment to the *Interpretation Act 1978*, which changed the application of the then section 25 to service of documents generally by post to a more specific requirement of a notice being sent to the recipient’s latest address, among a variety of non-postal alternatives not considered in the former section 25. It is this distinction in postal addresses¹⁷³, and the inclusion of other methods of service, that Oliver SM noted as giving rise to

¹⁶⁹ Section 26 *Justice Legislation Amendment Act 2006*, which repealed the then section 25 and inserted the current wording of section 25.

¹⁷⁰ Question 31 of the 2010 Issues Paper.

¹⁷¹ *Brown & Lemmers v Elenis & Elenis* [2007] NTMC 004 at para 25.

¹⁷² As per section 3(3) *Interpretation Act 1978*.

¹⁷³ i.e. “properly addressing and posting it by prepaid post” under the former section 25 *Interpretation Act*, the requirement to “send by post addressed... to the person’s last known... postal address...” under section 154

the inability to apply the presumption of service in the ordinary course of post to notices, when the specific wording of section 154 of the Act¹⁷⁴ and the implication of section 3(3) of the *Interpretation Act 1978*¹⁷⁵ were taken in to account.

Notwithstanding the findings of Oliver SM, the ordinary reading of section 3(3) of the *Interpretation Act 1978* together with section 154 of the Act, suggests the intent of section 154 was to replace the general requirement of service with a specific process¹⁷⁶. Regardless of whether the 2006 amendment to the *Interpretation Act 1978*, or the general operation of section 3(3) of the *Interpretation Act 1978* together with the specific wording of section 154 of the Act dispensed with the ordinary course of post presumption, it is apparent that the presumption was relied upon at least until *Brown*.

With the ‘standard’ delivery time by Australia Post for ordinary surface mail being extended by its policy of delivery every two days (rather than daily)¹⁷⁷, against its published delivery timeframe of between two and six days¹⁷⁸, the question is not necessarily should the presumption be restored. Rather, the question appears to be whether the presumption is either reliable or appropriate, particularly in the setting where a notice is itself subject to preconditions of timing or other actions¹⁷⁹.

The influence of notice preconditions, and their impact on the presumption of ordinary course of post, has been highlighted on a number of occasions by the NTCAT, most recently in *Rewar, Bhuriya and Thawinan v Gabriel* [2017] NTCAT 111 (*Rewar*) and *Meier v Andersen & Eylward* [2016] NTCAT 063 (*Meier*). It is clear from these and other cases that there is indeed “some confusion”, as DCLS puts it, about what is required to ensure that a notice is given correctly. This confusion seems more to do with a lack of understanding of the specific requirements of the respective notices, rather than any deficiency in section 154 itself¹⁸⁰. As both *Rewar* and *Meier* discussed, section 154 is not inclusive. Rather, section 154 sets out a process that a person may follow to give notice; however, for that notice to be given validly, all associated requirements must be met, including ensuring that the notice gives sufficient time for compliance, and that all necessary accompanying documents actually accompany the notice.

Rewar and *Meier* do, however, question whether service may only be given in the manner set out in section 154¹⁸¹. In *Meier*, President Bruxner suggested¹⁸² that section 154 was discretionary in nature and the focus should be whether the notice complied with the particular requirements of that

of the Act, and “...sending it by prepaid post addressed to the recipient at the recipient’s address” under the amended section 25 *Interpretation Act 1978*.

¹⁷⁴ In particular the statement “Unless otherwise provided by or under this Act...”

¹⁷⁵ Where a provision of the *Interpretation Act 1978* is to yield to the appearance of an intention to the contrary in a provision of another Act.

¹⁷⁶ The general statutory interpretation position being that where a specific provision is enacted that expresses a contrary intent to a general provision previously enacted elsewhere (such as in an Interpretation Act), the specific will displace the general – see generally Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia* 5th Edition, Butterworths 2001. With the Act commencing after the *Interpretation Act 1978*, the presumption was arguably displaced well before the 2006 amendment to the *Interpretation Act 1978*.

¹⁷⁷ <https://auspost.com.au/general/changes-to-your-letters-service>; <https://www.smh.com.au/national/snail-mail-gets-even-slower-20160317-gnldtg.html>

¹⁷⁸ <https://auspost.com.au/parcels-mail/calculate-postage-delivery-times/#/option/domestic/0870/0860>

¹⁷⁹ As was the case with *Brown*, the section 96A notice given under section 154 had a lead time of seven days from receipt, the effect of which necessitated actual receipt at least eight days prior to it having effect. With Australia Post delivery timeframes of up to a week, a notice under section 96A would need to be sent at least two weeks prior to the remedy date to avoid any issue with receipt ‘in the ordinary course of post’.

¹⁸⁰ Indeed, para 20 of *Meier* cautions prospective parties on the need to “be wary of timing issues and build some leeway into their notices”.

¹⁸¹ Namely, delivered personally or sent by post to a natural person’s last known place of business, residence or postal address, or for corporations, in accordance with the *Corporations Act 2001* (Cth).

¹⁸² *Rewar* also endorsed and applied that interpretation to conclude that service had been made by email.

notice and had been brought to the recipient's attention, rather than how it was served¹⁸³. While this position was supported and adopted by Member Stewart in *Rewar*, it is likely that the discretion is more limited¹⁸⁴: having made a decision to serve a notice, the discretion is whether or not to serve the notice personally or by post, rather than a choice between those options or another method. Regardless, the discussion validly raises the question of whether service should be restricted to a method that is less reliable and becoming increasingly drawn out¹⁸⁵, given the availability of more instantaneous modes of notification, such as email¹⁸⁶.

The call by DCLS and NAAJA/CAALAS for specific timeframes for service, however, are not able to be addressed through amendments to the Act. While the method of delivery of a notice may be standardised, through a provision such as section 154, the timeframes associated with that notice vary depending on the issue that the notice is addressing. For example, notice to effect repairs has a much shorter lead time (24 hours)¹⁸⁷ than that required for a no grounds notice to terminate a periodic tenancy (42 days)¹⁸⁸. As *Rewar* and *Meier* have noted, for lead times to be complied with, service of notices will need to be given at least one day earlier. For this to occur, the person giving the notice will need to calculate the time needed for the notice to be received one day prior to the start of the lead time based on how they intend to deliver it. It is not possible to legislate a timeframe, as delivery times will be determined by the chosen delivery method.

Other issues have also been identified with service by post, particularly in relation to sending notices to the tenant's last known address. The Full Federal Court's discussion in *Secretary, Department of Social Security v O'Connell* (1992) 38 FCR 540 (*O'Connell*) held that sending a letter to the last known address did not constitute service where the intended recipient had left that address some time prior. *O'Connell* followed a number of Federal Court and Administrative Appeals Decisions arising from *Re Todd and Secretary, Department of Social Security* (1989) 18 ALD 36, which concluded posting a notice to the last known address of a person was not proper notice when the sender had knowledge that the recipient no longer resided at that address.

The Delegate of the Commissioner in *Desouza & Desouza v Solien* [2011] NTRTCmr 92 (*Desouza*) on the other hand, held that sending a notice to the residential premises even though the landlord knew the tenant had abandoned the premises would be effective stating, "If the tenant does not see fit to arrange post office re-direction then that is his problem."¹⁸⁹ Despite the contrast that arises between the outcomes in *Desouza* and *O'Connell*¹⁹⁰, that comment highlights the primary failure of the section 154 option of notice being given by sending it by post to the person's last known address. The clear inability to put someone on notice by sending it to a place that the person is known to no longer be connected with, is only exacerbated by including a presumption that the notice will be deemed to have been given after a specific period that cannot be guaranteed with any certainty, such as the ordinary course of post. Such a notion would generally be considered novel in ordinary circumstances¹⁹¹.

¹⁸³ Section 154 of the Act "Unless otherwise provided by or under this Act, a notice required by or under this Act to be given to a person *may* be delivered personally to the person or sent by post addressed: ..." (italics added). President Bruxner viewed 'may' as providing a discretion.

¹⁸⁴ Particularly when considering the requirements for service under sections 109X and 601CX of the *Corporations Act 2001* (Cth).

¹⁸⁵ With Australia Post published delivery timeframes now extending up to a week, notices would need to be sent at least two weeks prior to the remedy date to avoid any issue with receipt in the ordinary course of post.

¹⁸⁶ Noting that the NTCAT has the discretion under section 113(2) to disregard ineffective service.

¹⁸⁷ Under section 71 of the Act.

¹⁸⁸ Under section 89 of the Act.

¹⁸⁹ *Desouza & Desouza v Solien* [2011] NTRTCmr 92 at pg2.

¹⁹⁰ Even disregarding the fact that a post office re-direction was in place in *O'Connell* but failed to deliver the letter.

¹⁹¹ Although dealing with service under the NTCAT Rules rather than the Act, the matter of *Newham v Mangos* [2016] NTCAT 293 also noted the difficulty with satisfying the requirement of bringing the notice to

With the common availability of near instantaneous, verifiable electronic communication, and the general decline in the effectiveness of the postal service for timely notification, it would seem appropriate that section 154 be amended to at least formally permit notification by email.

Recommendation 10

- a. Consider amending section 154 of the Act so that methods of service better align with those under section 25(1) of the *Interpretation Act 1978*, with the addition that service may be made by email.
- b. Consider inserting a provision in section 154 that requires the person relying on service of a notice to provide evidence of its service, with a rebuttable presumption that such evidence is deemed sufficient to establish that service took place (thus legislatively overriding the 'ordinary course of post' presumption).

the tenant's attention by posting it to an address they are known not to occupy (that case relating to an abandoned premises).

PART B: Other Issues Raised in Responses to the 2010 Issues Paper

Part B deals with additional issues raised in stakeholder responses to the 2010 Issues Paper. It makes recommendations or poses questions for further consideration.

Issue 13: Condition Reports: Signatures and On-going Tenancies

Signatures

In its response to the 2010 Issues Paper, DCLS suggested that “Condition reports at the end of the tenancy should be completed by the landlord/agent on a new document and not marked up on the original ingoing inspection report. This is because the tenant may have signed the ingoing inspection report and confusion can arise as to whether they have signed the outgoing report, both at the time of provision to the tenant and at future dispute resolution forums”.

Although the Act does not require the preparation of ingoing or outgoing condition reports, it does set out a process for completing them if they are undertaken¹⁹². One of the statutory requirements is that the report must be signed by both the landlord and tenant if they agree on its contents. While there may be a chance for confusion if the one form is used for both the ingoing and outgoing report, that confusion will only arise where the form has not been completed in full. Considering DCLS’s example, one of three scenarios will arise if there is a dispute:

- the NTCAT finds that the ingoing condition report was not signed (and agreed) by the tenant, in which case there is no value in the document,
- the NTCAT finds that the outgoing condition report was not signed (or agreed) by the tenant, and further enquiry is required, or
- the tenant agrees (or the NTCAT finds) that it had participated in both inspections and agrees with both reports, and the document is accepted by NTCAT as representing the condition of the premises at the start and end of the tenancy.

The fact that a report covers both ingoing and outgoing assessments is not necessarily a problem¹⁹³. Indeed, that format is likely to provide a ready comparison of both points in time. If necessary, this issue could be resolved through minor amendment to the form by including spaces for both landlord and tenant signatures at the end of each inspection. Alternatively, the landlord/agent or the tenant could insist on a separate document being used for each inspection.

On-going tenancies

The REINT’s submission to the 2010 Issues Paper also raised concern with section 28A. That section provides that a condition report that was agreed to at the start of a tenancy will continue to apply if that tenancy continues after expiry of the initial term, and a new condition report is not produced at the time the tenancy is continued. The REINT’s issue was the requirement that one of the original tenants must be part of the continuing tenancy, which in its opinion, was unwarranted and unworkable. The REINT suggested that “[a]s a condition report is a ‘snap shot in time’ one would have to take the ‘condition’ as found at the time”. The REINT indicated that this was problematic when the tenants are still in residence as “[t]here are few tenants if any who live in a manner consistent with the standard of cleanliness provided at the commencement of a lease”.

Section 28A was inserted into the Act in 2010¹⁹⁴ along with a new section 28B, which prohibited a landlord from requiring a tenant to vacate the premises when conducting a condition report. The REINT’s concern is perhaps more aligned with section 28B rather than section 28A. As the REINT

¹⁹² Sections 25, 26 and 110.

¹⁹³ Subject to the discussion above in Issue 5 regarding the content of inspection reports.

¹⁹⁴ Section 28 *Residential Tenancies Amendment Act 2010* (Act No. 8, 2010).

noted, section 28B was inserted to avoid unnecessary upheaval of the tenant¹⁹⁵. The REINT was of the view that section 28B went against common sense, leaving landlords “between a ‘rock and a hard place’”, facing the choice of either conducting “an unsatisfactory condition report with a tenant still living there or forgo the protection of the original report”. The REINT suggested that retention of section 28B would lead a landlord to consider the option of simply terminating the tenancy and seeking new tenants.

The reason of the REINT’s position is not entirely clear when considering the whole of the inspection processes. An ingoing inspection identifies the condition of the premises at that point of the tenancy, and an outgoing inspection does so equally at the end of the tenancy. There are also a number of periodic inspections during the tenancy to ensure that the tenant is looking after the landlord’s asset and to provide opportunity along the way to address issues¹⁹⁶. An inspection conducted during occupation of a premises would not reveal a property in the exact state of condition prior to occupancy. What it will do is identify the areas that are crucial to the comparison of ingoing and outgoing condition – that is, the general cleanliness and whether there has been any damage¹⁹⁷. To suggest otherwise would question the reason for, and necessity of, the periodic inspection.

In relation to the appropriateness of section 28A, it is not clear why there would be issue with reliance on the initial inspection report if one of the original tenants remained in the ongoing tenancy. Presumably the continuity would assist, rather than detract from the outgoing assessment process. The absence of any original tenant would compound the process as those ‘new’ tenants were not a party to the initial inspection. Such tenants could argue they are not bound to that report as the tenancy ceased on the exit of the last original tenant, and a new tenancy came into effect. Section 28A appears to provide certainty to landlords, rather than detriment. Section 28B would appear to be a fair and equitable trade-off for that certainty.

Issue 14: Repairs generally

The combination of Division 1 (Landlord’s responsibilities) and Division 3 (Repairs) of Part 7 of the Act establish the base requirement that a landlord is to provide and maintain premises in a suitable state of repair. In their submission to the 2010 Issues Paper, CAALAS/NAAJA were of the strong view that the Act needed extensive review and reform in relation to repairs and maintenance generally. CAALAS/NAAJA said the scheme lacked “a clear path of action with finite timeframes for repair”, and called for strengthening provisions that required a landlord to undertake repairs.

CAALAS/NAAJA were critical of the processes for notification of a need for repair, particularly on the issue of verbal verses written notification, and the time delays that occur between the first verbal notification and ultimate repair. CAALAS/NAAJA took issue with the conflict that subsections 58(1) and (3) created where a tenant verbally notified a landlord of the need for repair in accordance with subsection (1), and the cancelling effect that subsection (3) has when a landlord then requests it in writing¹⁹⁸. CAALAS/NAAJA also noted the tension between the option to provide verbal notice under section 58(1), and the requirement under section 63(1)(c) for the notice be in writing before the NTCAT may intervene.

Given delays in making repairs may arise from this requirement¹⁹⁹, CAALAS/NAAJA submitted that a timeframe should be included to link performance of the repair requirement to the first notification,

¹⁹⁵ Namely, having to remove all their belongings including furniture.

¹⁹⁶ For example, maintenance or damage.

¹⁹⁷ As opposed to general wear and tear.

¹⁹⁸ While section 58(1) states that the tenant may notify the landlord of a need for repair either orally or in writing, section 58(3) permits the landlord to request that notice be put in writing.

¹⁹⁹ That a delay may arise by the requirement to provide further notification is an inevitable outcome, simply due to the natural process brought about by the request that the notification be in writing regardless of whether such a delay was intentional or not.

especially with carrying out emergency repairs. Some sympathy may be given to this argument given the increasing timeframes associated with the postal service²⁰⁰, in addition to literacy issues identified by CAALAS/NAAJA. There are, however, more instant methods of providing written notice available now than was the case when the Act was drafted. Arguably, email, SMS/MMS text messaging and interactive web portals provide as instant a notification as a telephone call, only in writing, with the additional security of a verifiable track that a telephone call does not independently provide²⁰¹.

There is also the unusual feature that the Act says a tenant may notify verbally, but then is constrained in enforcing the obligation to repair by another requirement to provide the notice in writing. This unusual situation does not appear to exist in other jurisdictions, at least for urgent/emergency repairs²⁰². There is, however, an additional consideration where a tenancy agreement itself requires all notifications to be in writing. While verbal rather than written notification does not disadvantage the landlord (as the landlord has been informed, arguably in a quicker manner too), the tenant equally should not be disadvantaged when it comes to the landlord's compliance with its higher obligation to maintain and repair the premises²⁰³. On balance, the Act should be amended to remove this anomaly.

CAALAS/NAAJA also took issue with the five and 14 day timeframes in section 63(1)(d) for arranging and carrying out emergency repairs. CAALAS/NAAJA suggested that applications to the NTCAT should be made within three business days of the landlord being given notice to carry out the repairs, and that the NTCAT should hear the application within two days as it is "entirely unacceptable that tenants should be without essential services or live with a dangerous fault for more than 5 business days". The timeframes for making emergency repairs appears to be consistent with other jurisdictions, and generally takes into account the time associated with contacting the appropriate trade/service, having them attend to inspect and assess the issue, and then organise the necessary parts/equipment and undertake the repairs²⁰⁴. Noting that a tenant may be entitled to compensation²⁰⁵ where occupation of the premises is impacted by the time taken to resolve the

²⁰⁰ Australia Post published delivery timeframes now extending up to a week: <https://auspost.com.au/parcels-mail/calculate-postage-delivery-times/#/option/domestic/0870/0860>.

²⁰¹ There is, however, a broader issue with methods of notification which is discussed above under Issue 12. In terms of verification, something that was not available when the Act was drafted is that telephone calls are now individually logged and available to be recalled by the user (at least for mobile devices). While this does not necessarily verify the nature of the call, it does provide some evidence that a call took place.

²⁰² Section 74(1)(a) *Residential Tenancies Act 1997* (Vic) requires written notice to be provided in the case of enforcement of non-urgent repairs, although that Act appears otherwise silent on method of notification for urgent repairs. The *Residential Tenancy Act 1997* (Tas) only requires notification and does not elaborate on the form of that notification. Section 65 of the *Residential Tenancies Act 2010* (NSW) only requires notification of the landlord, and not the form of that notification for the New South Wales Civil and Administration Tribunal to make orders requiring repair; however, a landlord is not obliged to reimburse a tenant for urgent repairs if the tenant has not provided written notice of the cost of those repairs carried out by the tenant under section 64 of the NSW Act. The Schedule 1 standard residential tenancy terms under the *Residential Tenancies Act 1997* (ACT) only requires notification to effect repairs and is otherwise silent on method of notification: c.f. the requirement in clause 79(1) of the standard terms which requires written notice of a routine inspection. Section 217 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) requires notification of the lessor, or in the case of emergency repairs, the nominated repairer or the landlord if the nominated repairer cannot be contacted. Section 68(2)(a)(i) of the *Residential Tenancies Act 1995* (SA) simply requires the landlord to have notice of a defect requiring repair. Section 43(2)(a) of the *Residential Tenancies Act 1987* (WA) requires the tenant to notify of urgent repairs, and permits the tenant to arrange such repairs if the tenant is unable to contact the lessor (s43(3)).

²⁰³ This is of course disregarding the problem that section 20 has with tenancy agreements going beyond what the Act says.

²⁰⁴ There is nothing presently to suggest that some form of temporary immediate intervention is not possible where a dangerous situation exists.

²⁰⁵ Or other redress such as termination.

issue, the timeframes seem reasonable²⁰⁶. There may, however, be some benefit in the REINT and Consumer Affairs exploring whether an educational campaign would improve responses of landlords and agents to tenant requests for repairs given the general shift in the rental market toward professional investment in an environment that is experiencing increasing volatility.

Essential Items

CAALAS/NAAJA took further issue with the Act's silence on whether heating²⁰⁷ and cooling services are essential items, submitting that the maintenance/repair of such services should be covered in the list of emergency repair items under section 63(2)²⁰⁸. CAALAS/NAAJA noted that New South Wales, Victoria and Tasmania made specific reference to hot water and heating services in their respective emergency repair lists²⁰⁹. Similar provisions apply in relation to hot water and heating elsewhere in Australia²¹⁰.

The necessity for air-conditioning in the Territory's climate has been considered in a number of determinations by Delegates of the Commissioner²¹¹. In those determinations, it was noted that a combination of the presence of air-conditioners in a premises²¹², together with the general knowledge of the extreme weather²¹³, imposed an obligation on the landlord to ensure that air-conditioners worked, and any repairs were carried out in an urgent manner. Those determinations also noted that where diligence was not applied, compensation would be awarded in favour of the tenant. Given that a number of these decisions have been made relatively recently, and with consideration to the general reliance that modern building design has on air-conditioning, clarification of its essential nature is appropriate.

Non-urgent repairs

CAALAS and NAAJA further submitted that the Act needs to be amended to provide tenants with greater certainty around the actioning of non-urgent repairs, and when a tenant can apply to NTCAT for orders for repair. CAALAS/NAAJA considered that specific provisions should be inserted into the Act that "empowered tenants to issue a notice to remedy, which if not complied with within 14 days, will give rise to a right to either seek an order for repair from the [NTCAT], compensation for breach and/or reduction in the utility of the dwelling, and/or termination for breach".

There is some merit in the CAALAS/NAAJA suggestion as it would give a level of certainty to the tenant about when to expect repairs to be made, and when to raise the issue at NTCAT. It also reflects the timeframes imposed on tenants to comply with their obligations. There are, however, several factors which influence the timing of non-urgent repairs, such as the nature of the fault, how

²⁰⁶ Resolution of the issue between oral and written notification may likely reduce CAALAS/NAAJA's concerns in this regard.

²⁰⁷ Both hot water services and house heating.

²⁰⁸ Noting that both air-conditioning and heating were essential items in Central Australia (and air-conditioning in the Top End) given the extreme range of weather experienced between seasons.

²⁰⁹ Section 62 *Residential Tenancies Act 2010* (NSW); section 3 *Residential Tenancies Act 1997* (Vic); section 33(6)(e) *Residential Tenancy Act 1997* (Tas).

²¹⁰ Clause 60(j), Standard residential tenancy terms, Schedule 1 *Residential Tenancies Act 1997* (ACT); Section 214 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); regulation 12A *Residential Tenancies Regulations 1989* (WA) – hot water.

²¹¹ See for example: *Macnee & Lindley v LJ Hooker* [2008] NTRTCmr 5; *Fearon v Gerich* [2015] NTRTCmr 4; and *Tate v MPZ Builders Pty Ltd* [2015] NTRTCmr 19.

²¹² This creates a term of the lease that the air-conditioner would be functional, in part due to its mere presence: per *Fearon v Gerich* [2015] NTRTCmr 4 citing *Huskisson v Roper* [2011] ACAT 41, and the fact that the rent is likely to reflect the inclusion of functioning air-conditioners: per *Macnee & Lindley v LJ Hooker* [2008] NTRTCmr 5.

²¹³ The Delegate in *Tate v MPZ Builders Pty Ltd* [2015] NTRTCmr 19 went to the extent in that determination to make the judicial note that "There is a doctrine of evidence which allows a court or tribunal to recognise and accept the existence of a particular fact commonly known by persons of average intelligence without establishing its existence by admitting evidence in a civil or criminal proceeding".

it impacts the ordinary occupancy of the premises, and the availability of the appropriate trade service/parts. These factors are recognised by Consumer Affairs who acknowledge that it is not unusual for delays of between two to six weeks to be experienced for non-urgent repairs. Consumer Affairs considers that delays beyond that point would tend to fall outside of the diligence spectrum. When that happens, Consumer Affairs generally advises tenants to apply to NTCAT for orders either to undertake the repair work or terminate the lease.

Amendment of the Act to specify timeframes for non-urgent repairs would unnecessarily restrict the NTCAT's ability to consider all the circumstances in determining whether reasonable diligence²¹⁴ was applied, and whether/what orders would be appropriate at the time. As is the case with emergency repairs, the REINT and Consumer Affairs might wish to explore whether an educational campaign would be of benefit to landlord and agent responses to tenant requests.

Recommendation 11

- a. Consider amending sections 58 and 63(1)(c) to remove the requirement that notification of the need for repair be in writing.
- b. Consider amending section 63(2) to list water heaters, air-conditioners and household heaters as items which the emergency repair provisions apply.

Issue 15: Bond Holding Authority

In their submissions to the 2010 Issues Paper, DCLS and CAALAS/NAAJA called for the establishment of a centralised bond holding authority, reporting that tenants “regularly experienced difficulties in obtaining their bond back from their landlord”²¹⁵ and that “without an independent authority the collection and return of Bonds is an ongoing issue particularly within the private rental market”²¹⁶.

In March 2015, the Department of the Attorney-General and Justice published an Issues Paper: ‘Development of a Central Bond Holding Scheme in the Northern Territory under the *Residential Tenancies Act*’ (the Bond Board Issues Paper). The purpose of that paper was to seek comment from the public on a proposal to establish a rental deposit authority in the Northern Territory. Nine submissions were received on behalf of 11 identified Territory based stakeholders²¹⁷. A further three stakeholders external to the Territory²¹⁸ either made written submissions, or endorsed Territory based stakeholder submissions.

While the majority of submissions were generally supportive of the concept of establishing a central bond holding scheme, two submissions were not: a submission from the REINT, and a submission from a real estate agent in its own capacity. The REINT's submission raised strong opposition to the concept, primarily arguing a lack of solid evidence that such a scheme was either necessary or required in the Territory at the time.

There have been a number of further calls since publication of the Bond Board Issues Paper for the establishment of an independent bond holding authority in the Territory, including most recently by

²¹⁴ Section 57(2)(b).

²¹⁵ CAALAS/NAAJA submission.

²¹⁶ DCLS submission.

²¹⁷ Territory based stakeholders were: Law Society Northern Territory; Ms Monica Baumgartner; Northern Territory Legal Aid Commission; Top End Women's Legal Service; Darwin Community Legal Service; North Australian Aboriginal Justice Agency; NT Shelter; REINT; Northern Territory Young Lawyers; Central Australian Women's Legal Service; Katherine Women's Information and Legal Service.

²¹⁸ Tenants' Union of Tasmania; Tenants' Union Victoria; Tenants' Union ACT.

the Members of the Legislative Assembly during their consideration of the Residential Tenancies Amendment Bill 2018²¹⁹.

In response, the Department of the Attorney-General and Justice is developing a Discussion Paper that will seek stakeholder input into the possible structure and operation of a centralised residential tenancy bond holding scheme in the Northern Territory.

Issue 16: Termination

Stakeholder submissions to the 2010 Issues Paper raised several concerns about termination, ranging from clarification of when termination of a tenancy occurs, through to grounds for termination and notice periods. Stakeholders' concerns are summarised and discussed below.

When termination occurs

CAALAS/NAAJA stated that "The various provisions which provide for termination are confusing, such that it is difficult to readily understand when either:

- a tenancy may terminate following the service of, and failure to comply with, a termination notice; or
- when [NTCAT] is required to order the termination of the tenancy".

CAALAS/NAAJA suggested that "When the context is the purported ending a tenancy, that is, of a family's right to reside in their home, the utmost clarity and complete procedural fairness are essential" (sic). CAALAS/NAAJA suggested that the Act be amended to:

- "...adopt the terminology 'notices to vacate' and 'notice of intention to vacate' as more appropriate and accurate descriptors";
- amend section 82(1)(f) "so as to provide for mutual termination (whereby a tenancy terminates where both parties agree in writing to the termination). This section does not currently contemplate the situation where a landlord may approach a tenant to seek a consensual end to the tenancy"²²⁰;
- repeal section 103 to allow the "tenancy to remain on foot until such time as the tenant vacates in accordance with the notice, or the tenancy is terminated by [NTCAT] upon the application of the landlord"; and
- amend section 82 "so that a tenancy is terminated if a tenant vacates the premises in accordance with a notice to vacate".

Notice terminology

The phrase 'notice of termination' does have the potential to cause confusion as the actual notice is not something that requires the immediate handing over of vacant possession. Rather, in the context of how those notices are required to be given under the Act, a 'notice of termination' is, in fact, a notice of an intent to terminate on a specific date. It is not final as it is open to withdrawal under section 102, or a declaration by the NTCAT under section 84 that the notice is of no effect. It would

²¹⁹ During consideration of the Residential Tenancies Amendment Bill 2018, there was uniform support from the Opposition, Independent Members, and Government Backbenchers for the establishment of an independent bond board: Hansard Debates – Thursday 10 May 2018 from 3930: <http://www.territorystories.nt.gov.au/jspui/bitstream/10070/299026/5/Debates%20Day%206%20-%2010%20May%202018.pdf>

²²⁰ Parentheses supplied.

be appropriate to clarify that the person who issued the notice intends for the tenancy to cease on the date specified in the notice unless it is withdrawn or rescinded by the NTCAT.

Recommendation 12

Consider replacing references to 'notice of termination' throughout the Act with reference to 'notice of intention to terminate'.

Mutually agreed termination

For sound policy reasons²²¹, Part 11 of the Act displaces the common law principles relating to freedom of contract and termination of leases for residential tenancies²²². The circumstances in which a tenancy may be terminated are limited to seven scenarios set out in section 82(1), and further limited by minimum notification periods that are determined by the specific reason for termination²²³.

That there are constraints on the termination process does not, however, prevent the parties mutually agreeing to the tenancy's termination once the process has been initiated. In relation to CAALAS/NAAJA's suggestion above about mutual termination, while not worded in that specific manner, section 82(1)(f) contemplates mutually agreed termination regardless of who requested it²²⁴. It is entirely possible that a tenant or landlord might raise the prospect of bringing the tenancy to an early end with the other party, mutually agree on how that might occur, and then voluntarily terminate the tenancy prior to expiry of the notification period²²⁵. There is, however, a need for mechanisms to be in place to ensure inappropriate influence has not been exerted in obtaining consent. Part 11 arguably achieves that balance.

Repeal Section 103

CAALAS/NAAJA's concern with section 103 is not entirely clear. Having received notice that the landlord intends to terminate the lease on a specific date, the tenant has several options, including vacating the premises within the notice period while the tenancy is still on foot²²⁶. If a tenant does not deliver vacant possession on the nominated day, the landlord may seek possession of the premises through an application to (and order of) the NTCAT under section 104.

If CAALAS/NAAJA's concern is to protect the tenant by ensuring that the tenant has somewhere to reside while a landlord's intent to terminate is being challenged, it seems section 104 achieves that. For there to be an order from the NTCAT for the landlord to take possession, the NTCAT needs to be satisfied that the tenancy has in fact been terminated, after considering the tenant's position on the subject. Until such time that the NTCAT makes an order for possession, the tenant remains in possession of the premises. The need to repeal section 103 does not appear to be strong.

Termination on vacation as per notice

Where a tenant gives the landlord vacant possession of the premises in accordance with a landlord's notice of intent to terminate, the tenant has agreed to the landlord terminating the tenancy, satisfying

²²¹ Namely, to protect a tenant's right to secure housing, and the landlord's right to certainty of occupation, and income.

²²² See discussion in *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at para 57-58.

²²³ See sections 86 – 100A of the Act.

²²⁴ Section 82(1)(f) provides that a tenancy may be terminated where a tenant gives up vacant possession (presumably voluntarily) with the landlord's consent.

²²⁵ Without seeking to enforce rights that might otherwise have arisen under the tenancy.

²²⁶ Notwithstanding the notice of intention to terminate, the tenancy does not formally end until such time that the parties agree, or the NTCAT declares.

the section 82(1)(a) termination scenario. It is not clear how amendment of section 82(1) would be of benefit under the circumstances.

Termination by tenant

CAALAS/NAAJA suggested that the Act should be amended to incorporate a provision similar to clause 84 of the Australian Capital Territory's (ACT) Standard Terms²²⁷ to enable a tenant to end a fixed term tenancy early. CAALAS/NAAJA may have misconstrued the nature of clause 84 in the ACT's standard terms. While that notice may, at face value, suggest that a tenant may terminate the tenancy at any time, the clause 84 notice is limited by section 36²²⁸, which sets out the circumstances under which a tenancy may be terminated. Any early termination on the part of the tenant is further limited by the need to seek an order from the ACT Civil and Administrative Tribunal²²⁹. Overall, the situation in the ACT is not too dissimilar to that in the Northern Territory.

DCLS submitted that the Act was "...silent on what to do when a tenant breaks a fixed term tenancy", stating "[t]his happens regularly in the Northern Territory and is often an area of dispute between tenant (sic) and landlords". DCLS' concerns may benefit from expansion of the issue, as presently under the Act, early termination of a tenancy by a tenant occurs through the tenant giving 14 days notice of its intention to terminate under section 95, and is managed accordingly by the parties.

Grounds for termination – Anti-social behaviour

CAALAS/NAAJA raised issue with the 2006 insertion²³⁰ of the Acceptable Behaviour Agreement (ABA) policy into the *Housing Act 1982* and the Act. CAALAS/NAAJA's concern was about security of tenure and procedural fairness, implying that the use and enforcement of ABAs is a blunt instrument for managing one aspect of a complex, multi-faceted problem²³¹. CAALAS/NAAJA stated that section 99A²³² should be repealed as section 100²³³ "provides ample grounds for termination by a social housing provider".

Under the 2006 amendments, the Chief Executive Officer (Housing) can compel a tenant to enter into an ABA where the tenant agrees not to engage in antisocial behaviour at the premises. If the tenant fails to sign an agreement, or breaches the agreement, the Chief Executive Officer (Housing) may seek an order from the NTCAT terminating the tenancy.

There are three mechanisms within the Act that may permit termination due to antisocial behaviour: section 97(2) where serious damage or personal injury has, or is likely to occur; section 99A; and section 100. Subtle distinctions exist between the three. Termination under section 97 may occur for a one-off event where the behaviour was significantly serious²³⁴, while a pattern of repeat behaviour must be established for a termination under section 100²³⁵. Neither process for

²²⁷ Schedule 1 *Residential Tenancies Act 1997* (ACT).

²²⁸ *Residential Tenancies Act 1997* (ACT).

²²⁹ Termination initiated by tenant, Part 4, Division 4.3 *Residential Tenancies Act 1997* (ACT).

²³⁰ The *Antisocial Behaviour (Miscellaneous Amendments) Act 2006*.

²³¹ For example, CAALAS/NAAJA made reference to social housing tenants as being the "most disadvantaged members of the community", who often face various forms of hardship stemming from mental health issues, disability and social exclusion.

²³² Section 99A enables the Chief Executive Officer (Housing) to terminate a tenancy under the *Housing Act 1982* and seek an order for possession where a tenant has either breached an ABA, or has refused to enter into an ABA.

²³³ Section 100 permits the NTCAT to terminate a tenancy and make an order for possession on the application of either the landlord or an interested person where the tenant has: used the premises for an illegal purpose; repeatedly caused a nuisance on or from the premises; or repeatedly caused interference with the reasonable peace or privacy of a person residing in the immediate vicinity of the premises.

²³⁴ *CEO Housing v Coonan* [2010] NTMC 30.

²³⁵ The threshold level of behaviour need not be significantly serious.

termination requires the tenant to be forewarned about the unacceptable nature of the behaviour, or the risk that behaviour may have on continuation of the tenancy.

Section 99A on the other hand, which only applies to housing provided under the *Housing Act 1992*, embeds the security of tenure and procedural fairness requirements CAALAS/NAAJA has concern with. Termination under section 99A requires not only serious or multiple acts of antisocial behaviour to have occurred, but requires that activity to have occurred after the tenant has been notified that it is unacceptable, warned of the potential consequences of its continuance, and having been given the opportunity to accept that position, fail to make the necessary adjustments to their behaviour.

The DoH also has a 'Red Card' Policy²³⁶ "[t]o appropriately and effectively respond to incidents of antisocial behaviour related to public housing premises, and conduct that interferes with the reasonable peace and privacy of another person's use of premises or land in the immediate vicinity of the tenant's premises while adhering to the principles of natural justice". With DoH preferring to pursue preventative rather than punitive measures²³⁷, it would appear that CAALAS/NAAJA's concerns are largely addressed.

Issue 17: Notice Periods and 'No Grounds' Evictions

In their response to the 2010 Issue paper, CAALAS/NAAJA raised issue with the ability for a landlord to terminate a tenancy without specifying a ground under sections 89 and 90, stating that 'no reason' terminations undermine "the whole notion of security of tenure". CAALAS/NAAJA also took issue with the timeframes for those notices, recommending that if sections 89 and 90 were not repealed, the timeframes should be increased to reflect national standards. More recently, DCLS has called for the abolition of arbitrary evictions as part of its 'Fair rental law 10 point plan'²³⁸, stating that, "[r]easons should be provided when terminating a tenancy to ensure there is adequate protection for home stability, fairness, and freedom from discrimination in dealing with renters."

Under section 90 of the Act, a landlord may terminate a fixed term tenancy by giving the tenant a written notice of termination 14 days before the fixed term expires. If the landlord does not give that notice, and the tenant does not vacate the premises, the tenancy rolls over into a periodic lease. The provision of 14 days notice of an intention to not renew a fixed term lease is the shortest in Australia. Nationally, the next shortest period in which a landlord may give notice of that intention is 28 days in South Australia²³⁹. The longest period is 26 weeks in the Australian Capital Territory²⁴⁰.

Similar differences also exist when it comes to notification requirements when not renewing periodic leases. In the Territory, the notification period for terminating a periodic lease (without specifying a ground for termination) is 42 days under section 89 of the Act. This is again the shortest period nationally, which ranges from 60 days in South Australia²⁴¹, to 120 days in Victoria²⁴².

The notice periods for tenants wishing to end a lease, on the other hand, is 14 days for both fixed and periodic tenancies in the Territory²⁴³, as is the case in Tasmania²⁴⁴ and Queensland²⁴⁵. The longest notification period required by a tenant is 28 days in Victoria²⁴⁶. Aside from the Territory, the

²³⁶ https://dhcd.nt.gov.au/_data/assets/pdf_file/0004/266134/Red-Card-policy-RELEASED-23-11-2016.pdf

²³⁷ DoH 2010 submission relating to repairs by tenants (Issue 8 above).

²³⁸ <https://www.dcls.org.au/legal-and-advocacy-services/tenants-advice/make-renting-fair-safe-and-certain/>

²³⁹ Section 83A *Residential Tenancies Act 1995* (SA).

²⁴⁰ Clause 94, Schedule 1 *Residential Tenancies Act 1997* (ACT).

²⁴¹ Section 83 *Residential Tenancies Act 1995* (SA).

²⁴² Section 263 *Residential Tenancies Act 1997* (Vic).

²⁴³ Sections 94 and 95.

²⁴⁴ Section 39 *Residential Tenancy Act 1997* (Tas).

²⁴⁵ Section 331 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

²⁴⁶ Section 235(2) *Residential Tenancies Act 1997* (Vic).

common theme nationally is that notice periods required by tenants is significantly shorter than that for landlords.

This reflects the significant difference vacating a premises has on tenants and landlords. While there are some basic similarities in terms of time taken to either obtain new accommodation or a new tenant, the impact of vacating is more acute for a tenant when the tenant is faced with involuntary relocation. While the landlord would face some costs due to the ending of the tenancy²⁴⁷, those costs are arguably part of the overall cost of doing business²⁴⁸. The tenant on the other hand, is faced with the cost of trying to secure, and move into, a new home.

As part of its reforms to residential tenancy law, Victoria is seeking to “[bolster] security of tenure by ending ‘no fault’ evictions by removing the ‘no specified reason’ notice to vacate and restricting the use of ‘end of the fixed term’ notices to vacate to the end of an initial fixed term agreement”²⁴⁹. The reason offered for this move was to improve transparency and balance the bargaining power between landlords and tenants as ‘no reason’ terminations have a “chilling effect on renters’ behaviour [which] ...can lead to an unwillingness to request repairs... ultimately leading to run down properties and diminished enjoyment of their home”²⁵⁰. As the Minister noted, this “chilling effect” may also have a negative on the landlord – if tenants fear ‘no reason’ eviction for requesting repairs, the property will deteriorate, reducing its value and ability to generate income.

From a tenant’s security of tenure perspective, there is sound argument for removing the landlord’s ability to unilaterally elect not to renew a lease. In addition to the ‘behavioural’ aspects noted by Victoria, there is the ‘bigger picture’ of making a house a home²⁵¹. In that context, the reforms proposed by Victoria do not necessarily address security of tenure, at least in the initial term, which is arguably where the greater risk lies. Objectively, ‘fit’²⁵² does not factor in a dispassionate setting where a tenant has met all its obligations under the tenancy agreement, while ending the relationship due to the tenant breaching the agreement and/or the Act would. This is highlighted when the underlying difference between landlords and tenants is considered: the landlord is offering up a premises for occupation on a commercial basis, the motivation being financial gain²⁵³; and the tenant is taking up that offer, the motivation being the need not just for housing, but a home.

Tasmania, on the other hand, appears to have legislated greater security of tenure for tenants, at least in relation to periodic tenancies. The Tasmanian Act specifically restricts a landlord’s ability to terminate a periodic lease to circumstances²⁵⁴ where the premises are to be sold, renovated, or where the premises are to be used either by a member of the landlord’s family, or for a purpose other than as a rental, and imposes a 42 day notice period for such terminations²⁵⁵. For fixed term leases, there is a ‘no reason’ 60 day notice period prior to expiry of the fixed period²⁵⁶.

²⁴⁷ Such as agent letting fees and possible absence of rent pending take up by a new tenant.

²⁴⁸ Such costs are likely inevitable regardless of whether the tenant or the landlord initiated the termination.

²⁴⁹

http://hansard.parliament.vic.gov.au/search/?LDMS=Y&IW_DATABASE=*&IW_FIELD_ADVANCE_PHRASE=be+now+read+a+second+time&IW_FIELD_IN_SpeechTitle=Residential+Tenancies+Amendment+Bill+2018&IW_FIELD_IN_HOUSENAME=ASSEMBLY&IW_FIELD_IN_ACTIVITYTYPE=Second+reading&IW_FIELD_IN_SittingYear=2018&IW_FIELD_IN_SittingMonth=August&IW_FIELD_IN_SittingDay=9

²⁵⁰ <https://engage.vic.gov.au/fairersaferhousing> Termination and security of tenure Reform 69 and Reform 70.

²⁵¹ This has broad considerations ranging from general uncertainty through to relocation costs and personalisation as discussed throughout this paper.

²⁵² In terms of the tenant ‘fitting’ the landlord’s preference of wishing to continue the ‘relationship’ with the existing tenant, as opposed to liking to give another tenant a go.

²⁵³ The purposeful investment manager as opposed to the accidental landlord or benevolent benefactor.

²⁵⁴ Other than due to a breach of the tenant.

²⁵⁵ Section 42(1)(b) *Residential Tenancies Act 1997* (Tas).

²⁵⁶ Section 42(1)(d) *Residential Tenancies Act 1997* (Tas).

If:

- a. the tenant is paying the rent; and
- b. the tenant is not destroying the premises or is otherwise in breach;

the need for a landlord to have the option to terminate the tenancy without a reason on 14 days notice, or at all, is questionable. The lack of fault gives further cause for concern when compared to the timeframes associated with terminating a tenancy due to an actual breach²⁵⁷. Equity would suggest that a tenant should not be adversely impacted by a tight timeframe because they 'did the right thing by the landlord' during the tenancy.

A related consideration is tenant initiated 'no reason' terminations which are also subject to a 14 day notice period. While landlords may be disadvantaged by the short notice, there are significant differences between landlords and tenants as noted above. Unlike the landlord whose interest in the premises is entirely economic, the tenant's interest is purely having a home²⁵⁸. While the loss that a landlord may suffer due to the ending of the tenancy might be reduced by the provision of additional time²⁵⁹, the 14 day notice requirement tends to balance those interests without unduly restricting a tenant's right to choose where they reside.

Question 2

- a. Should the notice period for 'no reason' landlord initiated terminations be extended from 14 days to 120 days?
- b. Alternatively, should the 'no reason' termination be abolished for landlord initiated terminations?

Issue 18: Section 85 termination of periodic lease effective despite inadequate notice

Section 85 of the Act provides that a notice of termination of a periodic lease will be valid even where:

- the period given to vacate in the notice is less than that required by law had the Act not been made²⁶⁰; or
- the effective date for ending the tenancy is not the last day of the actual tenancy period²⁶¹.

In its submission to the 2010 Issues Paper, CAALAS/NAAJA called for repeal of section 85 on the grounds that it "means that a landlord is able to issue a notice of termination of periodic tenancy with no or minimal notice provided to the tenant", claiming that it "places the balance of the tenant's right to secure housing with the landlord's right to terminate the tenancy too heavily in favour of the landlord". CAALAS/NAAJA noted that there was a risk "that a person not given the required notice would face homelessness and or hardship as a result" and that "[as] security of tenure is of manifest importance, we consider landlords should be required to strictly comply with the requirements of the RTA, particularly in regards to termination".

²⁵⁷ There being a 14 day notice period advising of the breach and the requirement to rectify it, the rectification period, and a further 14 day period thereafter in which to make the application for termination.

²⁵⁸ Which is influenced by personal circumstances such as financial capacity, proximity to requirements (work, schools etc) and familial factors.

²⁵⁹ Although additional time may not necessarily result in a positive outcome in some cases, see for example, *Gatty & Darcey v Nou* [2016] NTCAT 249.

²⁶⁰ Section 85(a).

²⁶¹ Section 85(b).

Her Honour Blockland SM in *Jetsleaf Pty Ltd t/as Raine & Horne v Meara & Fraser* [2005] NTMC 059²⁶² stated at paragraph 14 that “[t]o interpret the words “apart from this Act” as meaning that the periodic tenancy rules at law may apply (rather than “the Act”) would frustrate a very large part of the legislative regime”, when concluding that section 85 “...makes it clear that the old rules (required by law) have been subsumed by the statute in terms of notice. It clarifies that those rules do not apply to tenancies governed by the *Residential Tenancies Act*”²⁶³.

On the basis of this, section 85 not only addresses CAALAS/NAAJA’s concern, but reinforces, as an avoidance of doubt provision, that strict compliance with the timeframes for notification are required, and that those timeframes are not open to whim, a failure to properly allow for due service, or override by the common law²⁶⁴. Some consideration could, however, be given to rewording section 85 (and its heading) in plain English.

Recommendation 13

Consider rewording section 85 to better reflect the nature of that provision.

Issue 19: Occupant to remain as tenant where tenant has died

In its response to the 2010 Issues Paper, CAALAS/NAAJA submitted that in respect to *Housing Act 1982* tenancies, section 82(2) of the Act should be amended to provide that where a public housing tenant dies and leaves behind a person who was occupying the premises with the tenant, the tenancy should remain on foot where:

- the remaining occupant is a spouse, de facto or dependent of the deceased;
- the housing provider has been informed of the persons occupying the premises during the tenancy; and
- the remaining occupant is eligible for housing assistance.

The ending of a tenancy on the death of the tenant would have significant adverse impacts of those occupants who were residing with the tenant, but were not formal tenants themselves. Aside from dealing with bereavement, those occupants will also face the instantaneous position of being without a home and the need to acquire one. Section 82(1)(e) addresses this concern by continuing the tenancy, it limits that protection to occupants whom the tenant has previously informed the landlord about. Section 82(2) however removes that limited protection for non-tenant occupants of public housing, raising the question of why the Act would distinguish between public and private housing providers when public housing is considered the provider of last resort.

One answer is that, in the public housing setting, it is likely that the occupant would meet the eligibility criteria for assistance, and should be able to take up a tenancy in their own right with minimal difficulty. However this does not consider that public housing tenancies tend to be for longer duration, often reflecting the difficulty a person might have with meeting residential tenancy obligations, in contrast to private sector tenancies, which generally have shorter leases (six or 12 months) at higher rent, which requires greater capacity (financial or otherwise) to maintain the lease.

The issue over capacity goes not only to a person’s ability to manage the situation generally, but more prominently, their capacity to secure and maintain a new lease in their own right (either of the

²⁶² <https://localcourt.nt.gov.au/sites/default/files/decisions/2005NTMC059.pdf>

²⁶³ *Jetsleaf Pty Ltd t/as Raine & Horne v Meara & Fraser* [2005] NTMC 059 at para 14.

²⁶⁴ In respect of the common law, the position was that the period of notice reflected the period of the tenancy – for example, a periodic lease of seven days required seven days notice; a periodic lease of one day: one day’s notice.

current property or another). While a person's eligibility for public housing may discount this risk²⁶⁵, it ignores the short-term impact of forced relocation from their home due to the death of the person they reside with.

Question 3

Should the Act be amended to:

- a. apply section 82(1)(e) to public housing tenancies?;
- b. limit the application of the deemed continuation of the tenancy under section 82(1)(e) to a set period, say six months, to enable smooth transition to a new tenancy?

Issue 20: Enable persons under 16 to enter tenancy agreements

As part of its response to the 2010 Issues Paper, DoH submitted that section 8 should be amended to allow people under the age of 16 to enter into tenancy agreements under certain circumstances. DoH indicated that there is some demand for public housing from people under the age of 16, such as young single females with children requiring access to safe housing. However, under the current Act, DoH is unable to offer housing to them.

While the common law tends to consider contracts with minors voidable²⁶⁶ as children are considered vulnerable due to their age²⁶⁷, section 8 of the Act allows minors who have attained the age of 16 to be bound by a tenancy agreement, except when the NTCAT considers the agreement to be harsh or unconscionable²⁶⁸. Western Australia also allows minors between the age of 16 and 18 to enter into tenancy agreements²⁶⁹, while Queensland and the Australian Capital Territory have no age restrictions in relation to who can enter into a tenancy lease²⁷⁰.

Although section 8 and its interstate counterparts have not been judicially considered, it would appear that there are sufficient safeguards built in to prevent exploitation of children²⁷¹. With an identified need, at least in the public housing space, it would seem appropriate for the Act to be amended to remove the age restriction.

Recommendation 14

Consider removing the minimum age qualification of 16 years for a minor to enter into a tenancy agreement from section 8 of the Act.

²⁶⁵ In respect of public housing, the issue of whether a remaining occupant is eligible for assistance will depend on their individual circumstances at the time. For example, the type of dwelling they may be eligible for may not be the type that they currently reside in.

²⁶⁶ There is an exception to unenforceability of contracts with minors where the contract relates to the provision of necessities for maintenance of life or beneficial employment. See for example *Nash v Inman* [1908] 2 KB 1.

²⁶⁷ In the Territory, this vulnerability is acknowledged in the *Age of Majority Act 1974*.

²⁶⁸ This reflects the common law's position that the contract is enforceable only to the extent that it provides the necessities.

²⁶⁹ Section 59A *Residential Tenancies Act 1987* (WA).

²⁷⁰ Section 28 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); section 132 *Residential Tenancies Act 1997* (ACT). Both the Queensland and Australian Capital Territory provisions also appear to contemplate minors as landlords.

²⁷¹ The absence of cases on section 8 would suggest that it sufficiently protects both tenants and landlords.

Issue 21: Extend period of time to vacate in sections 100A and 104(3)

Section 104 enables a landlord to seek an order for possession from the NTCAT when a tenant has failed to vacate the premises in accordance with the landlord's notice of intention to terminate issued under section 101. Where an order is made, the tenant must give vacant possession of the property to the landlord within five business days.

In their submissions to the 2010 Issues Paper, DCLS and CAALAS/NAAJA both suggested that the timeframe for the delivery of vacant possession should align with the timeframe for appealing the order. Both organisations were of the view that five business days was not enough time for a tenant to receive legal advice about the order, file appeal papers, and conduct a hearing on whether the orders should be stayed, all while the possession order is counting down. CAALAS/NAAJA described the situation as “[p]ractically, this means that a tenant can lose possession of the tenancy, but still be within time to appeal the decision to terminate...”, suggesting that “it cannot have been intended by the drafters ...that a right to appeal should have no real application or effect”. DCLS phrased it as a question of why “[w]ould a tenant who is no longer in possession of a property want to appeal the Order for Possession?”. Both recommended amending section 104(3) to make the effective date 14 days. CAALAS/NAAJA considered that the Act should be amended to compel the NTCAT to automatically stay an order of possession on lodgement of an appeal.

The five business day timeframe for giving up vacant possession also applies where a landlord or tenant makes an application to the NTCAT under section 100A²⁷² to terminate the tenancy and make an order for possession. Under section 105, the NTCAT has the power to suspend an order for vacant possession made under section 100A and section 104 for up to 90 days. Section 105, reflects the position that once the tenancy is terminated and vacant possession is ordered, the premises should be handed over to the landlord as soon as possible, however acknowledges there are times where it may not be possible or appropriate for the tenant to handover possession immediately.

Section 105 provides direction and discretion to the NTCAT about making an order for possession²⁷³, allowing the NTCAT to suspend an order after considering all the relevant factors of the matter, including any possible hardship to the tenant²⁷⁴, the actual nature of the breach²⁷⁵, and the risk to the landlord of further breaches. While that discretion could extend to factors such as the prospect of the order being appealed, thereby addressing DCLS' and CAALAS/NAAJA's concerns, the topic would benefit from further discussion.

Question 4

Does section 105 provide sufficient direction and discretion to the NTCAT to consider and suspend an order of possession (under sections 100A or 104) where it is likely that a tenant might appeal the order, or should the Act be amended to align the effective period of an order for possession with the appeal period (i.e. remove the five business day requirement to deliver up vacant possession).

²⁷² It applies in circumstances where either the tenant or the landlord has breached a term of the agreement and they have not remedied the breach.

²⁷³ **“If the Tribunal is satisfied** that the landlord is entitled to an order for possession of the premises **but** the making of an order for immediate possession of the premises would cause severe hardship to the tenant, the Tribunal **may**:...” temporarily suspend the order for possession and reinstate the tenancy provided the tenant pays rent: section 105(1) (emphasis added).

²⁷⁴ Such as immediate homelessness and the social policy position of providing temporary reprieve while alternative accommodation is arranged.

²⁷⁵ Notwithstanding that the breach technically permits orders for termination and possession.

Issue 22: Inspections by prospective tenants or purchasers

Section 74 provides that a landlord may enter the premises to show it to a prospective tenant or purchaser. The landlord is to give the tenant 24 hours notice, and viewings may only be conducted between 7am and 9pm. If a landlord is to show a premises to a prospective tenant, this may only occur in the last 28 days of the current tenancy. Section 74 limits the number of inspections to “no more than a reasonable number of occasions”²⁷⁶.

In its submission to the 2010 Issues Paper, DCLS suggested that guidelines should be provided on what constitutes ‘a reasonable number of occasions’. DCLS noted that some clients have complained that they have been required to prepare and open their homes for inspections for sale every weekend or while they are at work. DCLS also sought clarification on what constitutes ‘a reasonable number of occasions’ when a tenant transitions from a fixed term tenancy to a periodic tenancy, suggesting that it can become a far longer period than “the last 28 days of a fixed term lease agreement where the tenant remains on a periodic lease following the expiry of the fixed term”.

The right for a landlord to enter the premises under section 74 reflects the fact that the premises is the landlord’s, and that the landlord is entitled to dispose of the property, or minimise any time in which the premises may be vacant. Section 74, however, acknowledges that there are competing interests between the landlord’s rights to deal with the premises, and the tenant’s general right to quiet enjoyment of the premises. Section 74 generally reflects the balance adopted throughout the various tenancy laws around Australia, although there are some noticeable differences in when the right of entry may be exercised²⁷⁷.

It is not entirely clear whether DCLS’ comment regarding tenant concerns over inspections conducted while the tenant is at work relates to perceptions of risk over the tenant’s personal property during the inspection, or whether it is being conducted in their absence. While perception of risk may be addressed by providing a statutory indemnity²⁷⁸, the general absence of the resident during the inspection is customary practice when agents conduct property viewings²⁷⁹. With some jurisdictions prohibiting inspections on Sundays²⁸⁰ and public holidays²⁸¹, there would appear to be limited windows to settle on mutually agreeable times for undertaking an inspection.

DCLS’ concern about the transition from a fixed to periodic tenancy is also unclear. For a landlord to be permitted to gain access to show the premises to prospective tenants, section 74(1)(b) requires that the lease be in the process of being terminated²⁸². By operation of section 83, a fixed term tenancy does not terminate automatically. Rather, it ‘rolls over’ into a periodic tenancy unless a notice of intent to terminate had been given and accepted prior to the end of the fixed term²⁸³. Where a fixed term rolled over to a periodic tenancy, the landlord would be required to provide 42 days notice of an intent to terminate. The landlord would only be able to show the premises in the last 28 days²⁸⁴.

²⁷⁶ Section 74(3) of the Act.

²⁷⁷ For example, in relation to inspection by a prospective tenant, entry may only be permitted within 14 days of termination where a notice to terminate has been given: section 55 *Residential Tenancies Act 2010* (NSW). In relation to inspection by a prospective purchaser, entry may occur on no more than two occasions in a seven day period: section 72 *Residential Tenancy Act 1995* (SA).

²⁷⁸ See for example section 46(8) *Residential Tenancies Act 1987* (WA).

²⁷⁹ Regardless of whether the occupant is a tenant or the resident owner.

²⁸⁰ See, for example, section 46(1) *Residential Tenancies Act 1987* (WA); section 57(1) *Residential Tenancies Act 2010* (NSW).

²⁸¹ Section 85 *Residential Tenancies Act 1997* (VIC); section 57(1) *Residential Tenancies Act 2010* (NSW).

²⁸² That is, a notice of intention to terminate has been validly served on, and has been accepted by, the landlord/tenant.

²⁸³ That notice being given no less than 14 days prior to the end of the fixed term – section 89.

²⁸⁴ Arguably the period reduces to 14 days where the tenant initiates termination given that is the period required for tenant initiated terminations (sections 94 and 95).

Question 5

- a. Does section 74 strike a fair balance between a landlord's need to access a premises to show prospective purchasers/tenants, and the tenant's right to quiet enjoyment?
- b. Would that balance be improved if section 74 was amended to specify a specific number of inspections within a certain period and/or include an indemnity for the tenant's property?

Issue 23: Effect of a drug premises order

Section 88A of the Act allows a landlord to give 14 days notice of its intent to terminate where the premises has been declared a drug premises under the *Misuse of Drugs Act 1990*.

In its submission to the 2010 Issues Paper, TEWLS objected to inclusion of the section 88A ability to terminate the lease on the bases that:

- "...housing law is not an appropriate tool to deal with drug addiction and related behaviour. It is the role of the criminal law to deal with these issues"; and
- the powers contained in section 88A were too broad because they;
 - i. did not take the circumstances behind the declaration into account, such as "whether the supplier of the drugs was a visitor who acted without the knowledge of the tenant", and
 - ii. did not provide the tenant with the opportunity to challenge the eviction.

TEWLS considered that section 88A should be amended so that the landlord has to apply to the NTCAT for a termination order, rather than automatic termination. TEWLS stated that the NTCAT "should have to consider whether the termination is from public or charitable housing, and will result in the tenant and any children being evicted into homelessness". TEWLS also stated that "the [NTCAT] should also look at the impact on those occupants of the home not involved in any illegal activity".

CAALAS/NAAJA also called for the repeal of section 88A as the "...tenancy terminates on the issue of a conforming notice, not by order of the [NTCAT] or the Court". CAALAS/NAAJA stated that a drug premises declaration "...based solely on a Court's acceptance of a reasonable belief of a police officer, is not a sufficient basis to ground the termination of a tenancy on the issue of a notice by the landlord." CAALAS/NAAJA considered that section 100(1)(a) had sufficient power to "...enable a landlord to seek termination of a tenancy where the premises have been used for an illegal purpose".

A premises may be declared a drug premises following an *ex parte*²⁸⁵ application by the Commissioner of Police to the Local Court under section 11D of the *Misuse of Drugs Act 1990*. A drug premises order may be granted by the Local Court where the court is satisfied that a dangerous drug had been supplied at or from the premises within 12 months before the application²⁸⁶, or must be granted where "a dangerous drug (has been) found at (the premises) on 2 or more separate occasions within 12 months" of a police officer first finding, and recording, the presence of a dangerous drug at the premises²⁸⁷. A drug premises declaration has effect for 12 months, unless revoked earlier²⁸⁸.

²⁸⁵ Section 11H of the *Misuse of Drugs Act 1990* states that "no notice is to be given of the application..." and that the application is to be determined "in the absence of the owner, landlord, tenants or licensee of the premises...". Section 11J(3) further provides that an application is to be held *in camera*.

²⁸⁶ Section 11K *Misuse of Drugs Act 1990*.

²⁸⁷ Section 11L *Misuse of Drugs Act 1990*.

²⁸⁸ Section 11M *Misuse of Drugs Act 1990*.

Section 88A was inserted into the Act in 2002²⁸⁹ to assist a landlord having a drug premises declaration revoked²⁹⁰. While a landlord (or other affected party)²⁹¹ may apply to the Local Court to have the declaration revoked, it is likely that would only occur following eviction of the tenants given the difficulty the landlord would have establishing that the declaration was no longer necessary if the tenants remained²⁹². In what appears to be the only reported appeal against the Local Court's refusal to revoke a declaration, Olsson AJ's discussion in *Pache v Commissioner of Police* [2009] NTSC 34 indicates that, as far as it goes for tenants, much more is required than a mere say so that the premises are no longer being used as drug premises.

In respect of TEWLS' and CAALAS/NAAJA's specific issue around the tenant's ability to contest eviction, section 88A, much like other termination options under Part 11 of the Act, does not result in immediate eviction²⁹³. Rather, section 88A provides the tenant with 14 days notice of the landlord's intention to terminate the tenancy. Division 6 of Part 11 then applies to the giving up of possession. As is always the case, the tenant may voluntarily give vacant possession on the date nominated by the landlord in the notice to terminate. The tenant may also request that the landlord withdraw the notice under section 102, seek a declaration from NTCAT that the termination is of no effect²⁹⁴, or challenge the termination under section 104 and/or seek a suspension of any order for possession under section 105²⁹⁵.

The tenant can 'put its side of the story' throughout the above processes. While the presence of section 88A is not entirely necessary²⁹⁶, and may well be described by some as a blunt instrument, it does not deny the tenant the opportunity to challenge the proposed termination, nor would it result in immediate eviction and homelessness of children²⁹⁷. Revocation of section 88A on the grounds suggested by TEWLS and CAALAS/NAAJA does not appear warranted.

Issue 24: Excessive rents and valuations

In its submission to the 2010 Issues Paper, the REINT stated that free valuations should not be provided by the Commissioner under section 42A, as this would "simply encourage tenants to invoke

²⁸⁹ Section 3 *Misuse of Drugs (Consequential Amendments) Act 2002*.

²⁹⁰ "The court may take into account the fact that the landlord has evicted or served a notice to quit on the tenants in deciding whether to revoke the declaration. The court is empowered to revoke the order if it is satisfied that the premises are no longer being used as drug premises": https://legislation.nt.gov.au/api/sitecore/Bill/SC_OtherDoc?itemId=2101b0f0-1280-490e-8115-ef147049b9bf&type=SpeechBody.

²⁹¹ Including the tenant: section 11P(1) *Misuse of Drugs Act 1990*

²⁹² The continued occupancy by the tenants raising the reasonable presumption that drug related activity will likely continue due to their mere presence given the declaration was made during their occupancy.

²⁹³ Arguably, section 100 provides for more 'immediate' termination and possession than section 88A. Section 100 does not require a 14 day notice period or require the tenant to have failed to give up vacant possession before recovery proceedings may occur.

²⁹⁴ Section 84 of the Act.

²⁹⁵ Noting that the NTCAT has a discretion as to whether to make an order for possession ("may"), in preference for, say a declaration that the termination is of no effect under section 104, or stay any order for vacant possession under section 105 to give the tenant up to three months to find alternative accommodation.

²⁹⁶ Noting that under section 100(1), the tenancy may be terminated on the grounds that the tenant has used, caused, or permitted the premise to be used for an illegal purpose. Conceivably, the declaration of the premises as a drug premises would be prima facie evidence of that fact, enabling termination and possession to be gained under section 100.

²⁹⁷ A tenant could have up to five months to vacate the premises from the initial declaration of the premises as a drug premises: 14 days plus time for service for the section 88A notice of intention to terminate, one to two months for the landlord's application and hearing before the NTCAT for vacant possession under section 104, and up to three months stay of the order under section 105.

this means whenever a rent increase is proposed, creating “a ‘race to the bottom’ exercise” as landlords were forced to “retaliate by providing their own valuation”.

While this would more likely create a ‘race to the middle ground’ rather than the ‘bottom’²⁹⁸, there is some argument that a landlord might incur an additional expense in having to defend its proposed increase. This would only occur where the landlord has no objective basis in which to support the proposed increase in the first place. With the diligent landlord having determined the need for an increase following a robust commercial assessment of its operating model, the prospect of such a situation would be low. It would not be out of the ordinary for an assessment to consider comparable properties so that the landlord did not inadvertently price itself out of the market. The need for a diligent landlord to incur further expenses in obtaining a rebutting valuation is questionable.

The policy intent behind section 42A is to provide tenants of limited means with the ability to challenge a proposed rental increase where the increase seems disproportionate. As discretion is placed on the NTCAT whether to make a request of the Commissioner, section 42A appears to strike an appropriate balance.

²⁹⁸ The scenario raised by the REINT that there is a duel between the competing valuations. Such a duel would ordinarily see an assessment of the tenant’s ‘lower’ valuation and the landlord’s ‘higher’ valuation produce a result somewhere between the two. A ‘race to the bottom’ would suggest that the landlord would submit a valuation that was lower than that of the tenant, which would be an unusual course of events.

PART C: Issues Raised by Stakeholders since the 2010 Issues Paper

Part C presents further issues for consideration as raised by stakeholders since the 2010 Issues Paper, and makes recommendations or poses questions for further consideration.

Issue 25: Presence of tenants for inspection reports

Some stakeholders have questioned whether the requirement for the landlord to conduct the ingoing condition inspection in the presence of the tenant²⁹⁹ is unnecessarily arduous. It has been suggested that the time required to undertake the inspection (between one and three hours) often exceeds the time that a tenant can take off work. Landlords have attempted to alleviate this by conducting the inspection at a time more convenient to the tenant, after the tenant has moved in, however this makes it difficult to identify pre-existing damage to the property and damage caused by the tenant while moving in. Concern was also raised about identifying goods and chattels provided by the landlord under the lease, and those of the tenant once the tenant has moved in.

As noted in the discussion under Issue 5, the purpose of an ingoing condition report is to establish an agreed baseline for the condition of the property to enable assessment of the reasonable wear and tear against other matters at the end of the tenancy. Although there is a requirement that the condition report be completed in the presence of the tenant, section 25(3) acknowledges that there are times where this might not be practical, or the tenant fails to attend a pre-arranged time for the inspection. Under such circumstances, the remainder of the condition report process takes precedence, with the landlord to provide the tenant with a signed copy of the report, and the tenant either accepts or returns a modified report for further consideration by/negotiation with the landlord.

As it is at the landlord's discretion whether a condition report is undertaken³⁰⁰, section 25 does not appear to generate the above concerns on its own. The election to complete one triggers the requirement to do it within three business days of the tenant taking possession of the premises³⁰¹ in the presence of the tenant unless it is genuinely impractical for the tenant to be present, as opposed to being inconvenient for the landlord³⁰². The issue relating to identifying landlord verses tenant chattels seems readily rectifiable through the landlord keeping a list of such items³⁰³. On balance, there does not appear to be a need to amend the requirement for the tenant to be present during the ingoing inspection.

Issue 26: Long-term leases

As part of its 'Fair rental law 10 point plan'³⁰⁴, DCLS calls for reforms to support long-term leases that increase security of tenure, stating that this "would benefit both landlords and tenants and

²⁹⁹ Section 25(3) of the Act.

³⁰⁰ While condition reports are prudent (the absence of an agreed incoming inspection report will see section 51(5) deeming that the tenant has complied with its obligations re cleanliness and damage), there is no statutory requirement to undertake one.

³⁰¹ Or within 3 business days after the start of a new tenancy where the tenant remains in occupation of the premises from a previous tenancy.

³⁰² *Naqui & Qamar v Ellis & Ellis* [No 3] [2016] NTCAT 69 indicating that the Tribunal's view that the 'default' position is that the report is completed in the joint presence of the landlord and tenant, noted at para 39: "A landlord who seeks to rely upon a report prepared otherwise than on that basis risks a finding that there is no incoming condition report for the purposes of the RT Act."

³⁰³ Arguably such a list should already be in existence at the least for insurance related purposes, if not for a record of the landlord's property.

³⁰⁴ <https://www.dcls.org.au/legal-and-advocacy-services/tenants-advice/make-renting-fair-safe-and-certain/>

encourage more harmonious relationships”³⁰⁵. In support of its call, DCLS notes that “[s]table tenancy arrangements guarantee a consistent return on investment in a falling housing market”³⁰⁶.

While long-term agreements can provide certainty and reduce the costs and risks associated with short-term leases, the basis for DCLS’ call is not clear. While ‘prohibitions’ on long-term rental agreements have been removed in recent years in other jurisdictions³⁰⁷, no ‘prohibition’ has ever existed in the Act. Any absence of longer term leasing in the Territory is therefore possibly a product of market self-conditioning on the back of historical population movements that has seen a preference for flexibility over long-term security. Given there is no legislative prohibition, if longer-term leasing is desired, it seems preferable that the market be allowed to test demand and adapt accordingly. Although the need for government intervention is not present, there may be some benefit derived from stakeholders exploring options to promote market acceptance of longer term leases.

Issue 27: Pets

There have been calls from several stakeholders over recent years to amend the Act to make it easier for tenants to have pets. This suggests that the Act presently prohibits or limits tenants from having pets. This is not the case. The Act does not mention pets at all, let alone prohibit them.

Whether a tenant may have a pet or not rests on agreement between the parties. It is on this basis that, anecdotally, the ‘prohibition’ on pets arises, with the apparently routine inclusion of ‘standard’ pet clauses in leases. This arises through landlords or their agents³⁰⁸ inserting a clause into the tenancy agreement prohibiting pets at the premises. However, the prohibition is not blanket, with some landlords permitting pets at the premises. That permission often results in the inclusion of an additional clause requiring the tenant to fumigate the premises on vacation.

While it seems reasonable that a tenant be required to clean up after the pet, clauses that compel a tenant to have a premises professionally treated (or cleaned) are prohibited by the Act. As Delegate Johnson noted in *Litchfield Realty v Miles* [2008] NTRTCmr 7 (*Miles*), the Act requires the tenant to “act reasonably regarding matters such as cleanliness, etc and subject of course to fair wear and tear” (sic)³⁰⁹. In the context of a claim against the bond for failure to undertake professional fumigation in accordance with the “fairly typical”³¹⁰ pets clause, Delegate Johnson found that the claim could not stand without evidence that the tenant was “actually... responsible for the presence of ticks and fleas in or about the residence there was no reasonable requirement to have a tick and or flea spray carried out at the cost of the tenant”³¹¹.

As *Miles* indicated, it is unreasonable (and illegal) to have clauses that automatically require the tenant to do something, like steam clean carpets or spray for ticks and fleas. A tenant is only required

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

³⁰⁷ See for example: *Residential Tenancies Amendment (Long-term Tenancy Agreements) Act 2018* (Vic). While this Act has tended to be viewed as removing the ‘prohibition’ on leases greater than five years, no such prohibition existed in law. Rather, until the *Residential Tenancies Amendment (Long-term Tenancy Agreements) Act 2018* (Vic), the *Residential Tenancies Act 1997* (Vic), excluded leases greater than 5 years duration from the scope of that Act. The *Residential Tenancies Amendment (Long-term Tenancy Agreements) Act 2018* (Vic) removed that exclusion.

³⁰⁸ It is perhaps the inclusion of such clauses by this latter group that has led to the coining ‘standard’, in the sense that the majority of agents applying such a clause likely do so in the form of the REINT’s standard agreement.

³⁰⁹ Per Delegate Johnson at pg 5.

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

to take reasonable steps to address those things that the tenant is responsible for, and that the need to do it must be shown by evidence that doing it is reasonably required³¹².

The REINT has, for some time, expressed support for the introduction of a separate bond similar to that in Western Australia, which specifically covers pet related issues. The REINT suggests that a pet bond would increase the peace of mind that a landlord had toward permitting pets, and remove the need for the general prohibition. Although the REINT has not settled on an amount, it has suggested that a bond of around \$300 would be appropriate.

Western Australia is the only jurisdiction in Australia that allows an extra bond over and above the traditional security deposit³¹³. The amount of the pet bond is capped at \$260³¹⁴. The application of the pet bond is limited to the cost of any fumigation of the premises that may be required on the termination of the tenancy³¹⁵. The exact method for setting the Western Australian cap is not known; however, it is noted that the average cost for an internal and external 'vacate treatment' for pests in Darwin is around \$243³¹⁶. A separate and distinct pet bond would provide additional security to landlords over and above the traditional bond. The application of a pet bond could also alleviate the conflict that the 'standard' pet clauses have with the Act, as the bond would only be used if there was a proven need. In accordance with *Miles*, if there were no ticks or fleas present, the bond would be returned to the tenant in full.

There are, however, equally valid arguments against pet bonds. These include that the assumption that pets cause nuisance and damage to property is false³¹⁷; the difficulty with having a sliding scale of bonds to cover different pets³¹⁸; that the traditional bond, together with the ability to recover damages provides sufficient protection³¹⁹; and that a pet bond does not address a failure to properly manage a property as pet related issues should, as with all issues, be identified during routine inspections³²⁰. Albeit tongue in cheek, it has also been suggested that if pet bonds are to become

³¹² Ibid.

³¹³ Section 29(1)(b)(ii) *Residential Tenancies Act 1987* (WA).

³¹⁴ Regulation 10A *Residential Tenancies Regulation 1989* (WA).

³¹⁵ Section 29(1)(b)(ii) *Residential Tenancies Act 1987* (WA).

³¹⁶ Informal telephone survey of pest control operators in Darwin 14 August 2018 and 4 April 2019.

³¹⁷ Submission to the RTA Review, RSPCA Victoria: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4414/8765/1508/RSPCA_Victorian_-_submission_to_the_RTa_review_-_Rights_and_Responsibilities.pdf; Pet-friendly rental properties are a good investment, Thompson, J: <https://www.domain.com.au/advice/pet-friendly-rental-properties-are-a-good-investment/>; Submission to the RTA Review, ECLS: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/3314/8765/1498/Eastern_Community_Legal_-_submission_to_the_RTa_review_Rights_and_responsibilities.pdf

³¹⁸ Submission to the RTA Review, CHFV: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/8714/8765/1497/CHFV_-_submission_to_the_RTa_review_-_Rights_and_Responsibilities.pdf

³¹⁹ Submission to the RTA Review, ECLS: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/3314/8765/1498/Eastern_Community_Legal_-_submission_to_the_RTa_review_Rights_and_responsibilities.pdf; Pet Bonds, are they necessary? OPA

NSW: <https://www.poansw.com.au/rentals/pet-bonds-are-they-necessary/>; Submission to the RTA Review, TUV: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1514/8765/1510/TUV_-_submission_to_the_RTa_review_Rights_and_responsibilities.pdf; Submission to the RTA Review, HAAG:

https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/3414/8765/1513/WEstjustice_-_submission_to_the_RTa_review_Rights_and_responsibilities.pdf; Submission to the RTA Review, HHS:

https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/6214/8765/1500/Haven_Home_Safe_-_Submission_to_the_RTa_-_Rights_and_Responsibilities.docx; Submission to RTA Review, University of Melbourne: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1514/8765/1510/University_of_Melbourne_-_submission_to_the_RTa_review_-_Rights_and_Responsibilities.pdf

³²⁰ Pet Bonds, are they necessary? OPA NSW: <https://www.poansw.com.au/rentals/pet-bonds-are-they-necessary/>; Submission to the RTA Review, HAAG: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/3414/8765/1513/WEstjustice_-_submission_to_the_RTa_review_Rights_and_responsibilities.pdf

the norm, regulators should also introduce child bonds given the propensity for children to cause damage³²¹.

A notable objection to an additional pet bond was that it increased the financial burden on tenants when entering a lease (on top of that associated with rent in advance and the traditional bond)³²². An additional bond will have up-front cost considerations, although, that cost would also occur if the tenant is required to pay for fumigation at the end of the tenancy³²³. However, as is the case with the traditional bond, those funds should be promptly released to the tenant if the bond is not called upon. The question of a pet bond is whether it brings forward a likely cost and protects both landlord and tenant interests by ensuring that funds are available to meet that cost, or whether the bond is an unreasonable expense based on a mere possibility.

The recently completed Victorian review of the *Residential Tenancies Act 1997* (Vic) considered three options to address the issue over allowing pets. Those options were:

- providing for a separate pet bond;
- the inclusion of optional pet consent clauses where the tenant agrees to professionally clean or fumigate the premises if the pet causes damage; or
- render 'no pets' clauses unenforceable where they unreasonably limit or prohibit the keeping of pets.

The recent amendments³²⁴ in Victoria have adopted the third option. The amendments reverse the onus about pets, establishing a general right for tenants to keep a pet provided they ask the landlord first. Where a landlord does not wish to consent to a pet to be kept at the premises, the landlord must apply to the Victorian Civil and Administrative Tribunal for an order stating that the landlord's refusal was not unreasonable under the circumstances³²⁵. Under the Victorian amendments, the tenant will continue to be held to the requirement to "keep the rented premises in a reasonably clean condition"³²⁶, with any call on the traditional bond for a failure to do so at the end of the tenancy. The Victorian amendments also seek to normalise the anecdotal situation of tenants keeping pets without the landlord's consent; a situation that would not necessarily be addressed through application of a pet bond.

More recently, the ACT³²⁷ has introduced amendments similar to Victoria to provide a general right for tenants to have pets, and Queensland³²⁸ is undertaking stakeholder consultation on the topic.

³²¹ Pet Bonds, are they necessary? OPA NSW: <https://www.poansw.com.au/rentals/pet-bonds-are-they-necessary/>

³²² Submission to the RTA Review, Dr Joyce Chia: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/4714/8765/1500/Joyce_Chia_-_submission_to_the_RTa_review_-_Rights_and_Responsibilities.docx

³²³ Subject to it having been established between the landlord and tenant or by the NTCAT that fleas/ticks were present at the end of the lease, were not present at the start, and that they appeared as a result of the tenant's failure to "act reasonably regarding matters such as cleanliness" per *Miles*.

³²⁴ *Residential Tenancies Amendment Act 2018* (Vic).

³²⁵ Having regard to the type of pet, the nature of the premises, whether refusal is permitted under another Act, and any other relevant consideration: Section 61 *Residential Tenancies Amendment Act 2018* (Vic).

³²⁶ Section 63 *Residential Tenancies Act 1997* (Vic); the Territory equivalent being the section 51(1)(a) requirement to "not maintain the premises and ancillary property in an unreasonably dirty condition".

³²⁷ Residential Tenancies Amendment Bill 2018 (No 2) (ACT) introduced 1 November 2018.

³²⁸ https://www.yoursayhpw.engagementhq.com/ahouseandahome/forum_topics/pets

Question 6

- a. Would a specific pet bond address landlord reluctance towards permitting pets? If so, how should the level of that bond be determined?
- b. Alternatively, does a general rebuttable presumption in favour of keeping pets better reflect the changing rental market landscape?

Issue 28: Picture hooks

As noted in the discussion of why the Act should be reviewed, attention has refocused on some of the difficulties that tenants face with the social practices associated with home making, such as personalising a dwelling. Personalisation is not limited to the style of furniture that a tenant may favour, but extends to decorative finishes like wall pictures, window dressings and other aesthetics, including gardens, that make an otherwise empty building a home.

The ability to personalise a home is permitted by the Act. However, where that personalisation results in an alteration or addition to the premises, it is only permitted if the landlord has given consent³²⁹. While there may be some question as to whether placing a picture hook on a wall would amount to an alteration or addition in the strict legal sense, that is generally considered to be the case by landlords, and not by tenants. This may be seen through a blanket ban, found within the REINT standard tenancy agreement, which states a tenant is “Not to put any nails, screws, tape, Blu-Tack, stickers or any fasteners into any of the walls, floors, doors, ceilings or timbers (sic)” without prior permission. Despite this, it is not uncommon for tenants to install picture hooks and use adhesive materials without prior consent.

There are, however, times where a tenant may wish to make more substantive alterations in order to functionally use the premise as a home, such as installing a wheelchair ramp or grab rails in the bathroom. While a person may not be discriminated against in accessing suitable rental accommodation, a landlord is not required to make modifications if it would cause unjustifiable hardship to the landlord³³⁰. This hardship exclusion does not extend to situations where a tenant may be able to undertake necessary modifications at their own expense³³¹.

There are also possible safety modifications that may be minor in nature, such as fixing a piece of furniture to the wall³³², and the installation of security cameras³³³ that a tenant might wish to make. With there being no avenue for review of a landlord’s refusal to permit alterations, there is an absence of data to indicate whether section 55 facilitates tenant desires to personalise the premises to improve their amenity. It is, however, instructive to note that the recent Victorian review concluded that in the modern setting, the ability to personalise a rental property increases the security of tenure for both the tenant and the landlord. Section 49 of the *Residential Tenancies Amendment Act 2018* (Vic) amends the Victorian equivalent of section 55 by:

- permitting a tenant to undertake prescribed modification without the landlord’s consent;
- retaining the requirement that a landlord consent to modifications that are not prescribed modifications, with the qualification that the consent cannot be unreasonably be refused (and

³²⁹ Section 55(1).

³³⁰ See generally the *Disability Discrimination Act 1992* (Cth) and the Australian Human Rights Commission: <https://www.humanrights.gov.au/know-your-rights-disability-discrimination>.

³³¹ Though it will be a matter that comes down to the individual circumstances on a case by case basis of the extent to which any modification interacts with the premises as a whole.

³³² See for example: <https://www.abc.net.au/news/2018-10-07/toddler-crushed-by-drawers-inspires-new-bill-for-rentals/10348590>, though it does not appear that the proposed amendments have made their way to legislation.

³³³ See for example section 47(4) *Residential Tenancy Act 1987* (WA) and regulation 12BA *Residential Tenancies Regulations 1989* (WA).

introducing non-exhaustive lists of matters that would constitute unreasonable and reasonable refusal³³⁴); and

- allowing for an additional restorative bond in certain circumstances.³³⁵

Question 7

- a. Should section 55 of the Act be amended to allow tenants to make minor alterations (limited to a certain dollar value or a list of permissible activities) without requiring the landlord's consent?
- b. Should the Act be amended to qualify that a landlord's consent to alterations or additions may not be unreasonably withheld?
- c. Does section 55(3) provide a landlord with sufficient safeguard and recourse in respect of tenant alterations?

Issue 29: Tenancy Trust Account Penalties

Section 116 requires that bond to be transferred to the Tenancy Trust Account if it has not been returned to the tenant/landlord³³⁶ within 6 months of the end of the tenancy. The reason behind section 116 is to place unclaimed bonds in a central account to relieve landlords/agents of the burden of having to maintain a quarantine over small amounts over a long period of time, while providing a single point of access to those entitled to receive the money. The Commissioner facilitates that access through a publicly accessible database³³⁷.

Although the requirement to transfer unclaimed bonds to the Tenancy Trust Account is mandatory, the Commissioner reports a disturbing pattern of non-compliance. While it is difficult to assess the level of compliance by self-managing landlords³³⁸, the Commissioner has noted that agents are not always diligent at meeting the statutory timeframes for transfer; with regular examples of agents submitting payments in bulk only after compliance reminders, sometimes for tenancies that had finished well after the six month timeframe, and often with incomplete/inaccurate details of the tenancy, such as the name of the tenant(s) and landlord.

Even though these practices undermine the purpose of section 116, and compromise the ability for people to access monies due to them, the absence of an offence provision means the Commissioner's ability to address the practice is limited to enforcement through request.

³³⁴ Such as where the modification would significantly change the premises or result in non-compliance with another law: see s49(2) *Residential Tenancies Amendment Act 2018* (Vic).

³³⁵ Where a bond may be permitted, the amount sought must be proportionate to the reasonable cost of restoring the premises. A bond may not be sought where that cost would be less than \$500: s49(2) *Residential Tenancies Amendment Act 2018* (Vic).

³³⁶ In the case of bonds due to a tenant, section 116(1) requires the landlord to place the money in the Tenancy Trust Account within 28 days of the end of the 6 month period. Section 116(2) reflects the situation where a landlord has engaged an agent: here the agent is required to place monies due to the landlord in the Tenancy Trust Account if the agent has not returned to the landlord that part of the bond that was due to them.

³³⁷

<http://www.consumeraffairs.nt.gov.au/ForConsumers/OwedResidentialTenancyBondMonies/Pages/default.aspx>

³³⁸ There are no centralised records kept of tenancy agreements entered into.

Recommendation 15

- a) Consider amending section 116 to provide a strict liability offence, subject to a penalty of 20 penalty units, for failure to comply with the requirement to place unclaimed bond monies in the Tenancy Trust Account; and
- b) Consider amending the Regulations to provide discretion for the Commissioner to issue an infringement notice of 4 penalty units for an offence against section 116.

Issue 30: Agent’s Authorisation of Repairs

The case of *B & E Christie-Johnston v Murphy* [2017] NTCAT 761 (unreported) (*Christie-Johnston*), raised several issues, including the authorisation of repairs. *Christie-Johnston* concerned a list of emergency repairs that had been requested by the tenant, but had not been carried out as they had not been authorised by the landlord³³⁹. In directing the landlord to undertake the repairs within four weeks, Member Gearin ordered the landlord’s agent to “...take the necessary funds from the rental income paid to them by the Applicants” to undertake the repairs “[i]f the landlord does not authorise and or provide the necessary funds...”³⁴⁰.

The decision in *Christie-Johnston* raises a number of considerations, not least what an agent’s role is in relation to carrying out maintenance and repairs in a diligent manner. The initial reaction to the decision in *Christie-Johnston* was that, as Member Gearin noted, the agent is placed in an “invidious position”³⁴¹. In respect of undertaking repairs and maintenance, the agent is just that, a mere agent or representative of the landlord. Orders requiring the agent to step into the landlord’s shoes and manage repairs and maintenance from the rental income requires the agent to make investment decisions on behalf of the landlord in isolation of other considerations the landlord would ordinarily be expected to consider³⁴².

On the other hand, the Act deems an agent to be the landlord, with all the associated duties and obligations that attach to a landlord³⁴³. This is generally seen in the interactions between the tenant and the agent, such as when there is a need to account for the rent paid³⁴⁴. In respect of repairs and maintenance, it is seen though the general ability for the agent to inspect the premises under section 70, and the ability to authorise another person, such as a tradesperson, to enter the premises and carry out repairs under section 71. This implies that the agent has the authority to engage the person to carry out the repairs or maintenance in the first place.

There is also a general practice of agents being provided with authorisation by the landlord, through the agent/landlord property management agreement, to manage necessary repairs and maintenance without seeking approval on a case by case basis. While ‘pre-authorisations’ are common, the scope may also vary from agent/landlord based on value/significance of the works. As an agent is deemed to have responsibility through inclusion in the definition of landlord, it is arguable

³³⁹ It would appear that the landlord had been hospitalised at some point and had generally been difficult to contact, however when contacted by the landlord’s agent, the landlord either refused to authorise the repairs, or simply did not respond to requests – *B & E Christie-Johnston v Murphy* [2017] NTCAT 761 (unreported) per Member Gearin at para 7.

³⁴⁰ Order 9: *B & E Christie-Johnston v Murphy* [2017] NTCAT 761 (unreported).

³⁴¹ Invidious in terms of effectively being caught ‘between a rock and a hard place’ in terms of the agent’s ability to respond to the tenant’s needs being subject to the landlord’s approval.

³⁴² Including, but not limited to, financial capacity to promptly meet variable expenses having regard to fixed budget items such as income (rent or other income) against outgoings such as mortgage, rates and other fixed expenses.

³⁴³ Section 4 Definition: landlord “includes... “(d) an agent of the landlord...”.

³⁴⁴ For example, in respect of keeping proper records of rent (section 36), providing a receipt (section 37), or collecting rent under section 69.

that any authority provided in a property management agreement is a guide to assist landlord and agent interactions, rather than a specific allocation of responsibilities³⁴⁵.

Question 8

- a. Should the Act be amended to stipulate that in addition to the landlord, an agent is also responsible for repairs and maintenance? If so, should there be a limit on the agent's level of responsibility, such as a monetary cap or set scope of works that the agent may authorise?
- b. Alternatively, should there be an obligation placed on an agent to disclose to the tenant, or prospective tenant, the level/nature of 'pre-authorisation' to undertake repairs and maintenance provided by the landlord to the agent under the agent/landlord property management agreement?

Issue 31: Application to tribunal after lease has concluded

Section 122 provides that an application for compensation can be made by a landlord or tenant for loss or damage under a tenancy agreement due to failure to comply with a tenancy agreement or obligation under the Act. However, section 122 is silent on the timeframe for when an application might be made. The general wording of section 122 suggests that as long as there is, or was, a tenancy agreement, an application could be made at any time (either during the tenancy or after it concluded) provided there had been some loss or damage suffered by the applicant during the tenancy. Reflecting this interpretation, section 122 is generally used³⁴⁶ by landlords seeking compensation for loss of rent and/or damages shortly after the tenancy has concluded.

Christie-Johnston, however, raises some question over that general interpretation. In *Christie-Johnston*, Member Gearin determined that claims arising from previous tenancy terms would not be considered as the issues raised by the tenants were old³⁴⁷. Precluding consideration of compensation for issues under an expired lease, particularly where there is a time lag between the event and the making of the claim is not generally unreasonable as this may prejudice due consideration or response. However, there is argument in support of permitting such applications. The most obvious argument is that as landlords are permitted to seek compensation post-lease for things the tenant has done during the lease (such as damage to the premises or non-payment of rent), then a tenant should also be able to recover against landlord breaches during the term of the lease, at least as far as those claims are able to be brought within the limitation period (which in the Territory is three years from the date of the cause of action³⁴⁸).

A number of jurisdictions have sought to clarify when a claim may be made:

³⁴⁵ With the Act deeming an agent to be a landlord, and thereby imposing the same obligations to maintain and repair the premises, an agreement between the landlord and agent that otherwise assigns those obligations could, if it the proposition is accepted, be considered to be 'contracting out' contrary to section 20. That section 20 purports to cover agreements or arrangements inconsistent with the Act, rather than the more specific 'tenancy agreement' generally applied throughout the Act, gives further credence to the proposition.

³⁴⁶ While tenants have also sought s122 applications, a cursory review of NTCAT decisions indicates that tenant applications are less frequent than landlord applications.

³⁴⁷ *Christie-Johnston* per Member Gearin at para 4. Member Gearin also noted that some matters would have fallen foul of the limitation period in which to bring a proceeding, and those matters presumably still within the limitation period (but also presumably from past leases) were not able to be appropriately considered as they had not been brought to the Tribunal's attention in a timely manner. In any event, Member Gearing considered that "old issues" had been resolved by the effluxion of time (and the entering into of subsequent leases).

³⁴⁸ Section 12 *Limitation Act 1981*.

- section 82 of the *Residential Tenancies Act 1997* (ACT) enables a tenancy dispute to be brought before the Australian Capital Territory Civil and Administrative Tribunal within six years after the end of the tenancy;
- section 190 of the *Residential Tenancies Act 2010* (NSW) confirms that an application may be made either during or after the end of a residential tenancy agreement. The general limitation period of 6 years from the date of the cause of action would apply³⁴⁹;
- section 419 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) states that an application may be made either during or after the end of an agreement³⁵⁰, though any such application must be made within 6 months of the applicant becoming aware of the breach³⁵¹.

Recommendation 16

Consider amending section 122(1) to clarify that an application for compensation may be brought either during or after the end of a tenancy agreement.

Issue 32: Waiving of rights under the Act/Consent to breaches of the Act and Compensation

A further implication from *Christie-Johnston*³⁵² was that renewal of the tenancy amounted to acceptance or consent by the tenant to the landlord's failure to maintain the premises during the previous lease. There are several considerations which question this, including:

- section 20, which prohibits contracting out³⁵³ and voids the waiving of rights provided under the Act³⁵⁴;
- a distinction is drawn on whether a tenant is entitled to seek compensation for a landlord's breach based on whether the tenant continues to occupy the premises or not;
- the apparent conflict that arises between the section 20(3) voiding of a waiver of rights under the Act (and therefore preserving those rights), and the requirement under section 122(3)(b) for the NTCAT to take that waiver into account when considering whether compensation should be awarded (presumably to the detriment of the person who previously waived those rights); and
- each tenancy, including any 'renewal', is a separate and distinct agreement.

As Member Gearin noted, section 122 enables compensation to be awarded to a tenant where the landlord has failed to comply with an obligation under either the tenancy agreement or the Act, as "[a]fter all, that is what the tenant is entitled to expect pursuant to the lease when paying their rent"³⁵⁵. Section 122 is, however, limited in its scope. Awarding compensation is restricted to circumstances where the failure to comply with a requirement has resulted in the applicant suffering loss or damage. In the case of a tenant, such loss may include the inability to access a bathroom³⁵⁶; use

³⁴⁹ Section 14 *Limitation Act 1969* (NSW)

³⁵⁰ Section 419(4)(a) *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

³⁵¹ Section 419(3) *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

³⁵² *B & E Christie-Johnston v Murphy* [2017] NTCAT 761 (unreported) per Member Gearin.

³⁵³ Section 20(1).

³⁵⁴ Section 20(3).

³⁵⁵ *Ibid* at para 9.

³⁵⁶ For example, *Drysdale v Cummins & Cummins* [2017] NTCAT 436.

air-conditioners³⁵⁷; or the cumulative effects of taking up occupation of a premises that was not in a reasonable state of repair³⁵⁸.

Section 122(3) sets out considerations that the NTCAT must take into account when determining whether compensation should be awarded, including whether the applicant consented to the respondent's non-compliance³⁵⁹. Disregarding, for the moment, what section 20 has to say on the subject, section 122(3) presupposes that the applicant should not derive benefit (compensation) for a breach that the applicant has agreed to. While this has some merit at face value, in the residential tenancy setting it leads to questions, in the case of a tenant, about:

- what is the benefit that a tenant might gain over the landlord by waiving their rights?; and
- what detriment would a landlord suffer by a later compensation claim?

Unless the tenant receives some tangible up-front benefit, like discounted rent, then it seems the landlord gains the benefit of non-compliance, most likely in the form of reduced expenses³⁶⁰, to the detriment of the tenant. The detriment is the tenant not receiving the full benefit of the lease agreement that the tenant is paying for³⁶¹.

Although any 'renewal' is a separate and distinct lease³⁶², and is subject to negotiation and agreement prior to being entered into³⁶³, automatically deeming that a tenant has consented to non-compliance fails to take into account the circumstances surrounding an election to continue to reside in the premises. While the applicants in *Christie-Johnston* were apparently generally happy with where they resided, and did not wish to terminate the lease³⁶⁴, there are no doubt a number of competing factors that would have influenced that position, including relocation costs, bond recovery and payment for a new premises, rent in advance, and connection to utilities³⁶⁵.

Deriving a benefit under section 122(3)(b), in this case, does not mean the benefit of a roof over one's head or the receipt of income – the former being an essential human right, and the latter being the natural outcome of leasing out a premises. Rather, the benefit, if there was one in *Christie-Johnston*, would reflect the trade-off between all the efforts associated with re-establishing a home against the

³⁵⁷ For example, *Macnee & Lindley v LJ Hooker* [2008] NTRTCmr 5.

³⁵⁸ For example, *Naqui & Qamar v Ellis & Ellis* [No 3] [2016] NTCAT 069.

³⁵⁹ Section 122(3)(b).

³⁶⁰ With the majority of tenant claims for compensation centring on a landlord's failure to maintain an essential or necessary element of the premises, it is not implausible that the landlord is obtaining some level of financial benefit through not spending funds on repairing/maintaining the item – the natural course being that if the landlord had spent the funds, the breach would not have occurred.

³⁶¹ *Cox v O'Donnell* [2015] NTRTCmr 15 discussed the situation of an apparent waiver on the part of a landlord at para 35-36, concluding that a possible waiver by the landlord of the required notice period by the tenant would likely preclude the landlord from seeking compensation for loss of rent for the balance of the period between the notice period required by the landlord (48 hours) and that required under section 94 (14 days) even though the possible waiver would have been void under section 20. As the tenant vacated at the landlord's request so that the premises could be painted, the benefit here, if there was one for the landlord, is that the landlord obtained immediate possession of the premises.

³⁶² *Holdeth Investments Pty Ltd v Ivinson and Halliday* [2009] NTMC 16.

³⁶³ Indeed, the implication drawn by Member Gearin in *Christie-Johnston* that the parties agreed that the landlord would not comply with the requirement to maintain the premises when entering a new lease is not borne out given the tenants repeatedly raised issues throughout their occupation of the premise. By all accounts, the decision was a unilateral one on the part of the landlord.

³⁶⁴ *Christie-Johnston* per Member Gearin at para 2.

³⁶⁵ Other considerations might well include the availability of alternative accommodation, the desire/need to reside in a particular location, and the costs and efforts (which were ultimately borne out in any event) of an application to NTCAT.

right to occupy a well maintained premises: something that does not readily lend itself to an assessment under section 122(3)(b) or otherwise³⁶⁶.

Recommendation 17

Consider amending section 122(3)(b) to clarify that, when taking into account an applicant's consent to a breach, the NTCAT is to have regard to whether the applicant obtained tangible benefit from the waiver that the applicant would otherwise not have obtained had the Act and the tenancy agreement been complied with.

Issue 33: Minimum Standards

As part of its 'Fair rental law 10 point plan'³⁶⁷, DCLS calls for amendment to the Act to provide for minimum standards for rental homes. While the DCLS plan does not outline what standards should be legislated, it generally mirrors similar calls in other jurisdictions for rental laws to broadly set out minimum standards in respect of general amenity, safety and privacy.

The Victorian Parliament recently passed amendments³⁶⁸ making it an offence to rent a premises that do not comply with a set of prescribed minimum standards covering:

"basic, yet critical requirements which no reasonable person could object to, such as:

a vermin proof rubbish bin;

a functioning toilet;

adequate hot and cold water connections in the kitchen, bathroom and laundry;

external windows that have functioning latches to secure against external entry;

a functioning cooktop, oven, sink and food preparation area;

a functioning single action deadlock on external entry doors;

functioning heating in the property's main living area; and

window coverings to ensure privacy in any room the owner knows is likely to be a bedroom or main living area... (and)

*...incorporate standards imposed under other Victorian legislation"*³⁶⁹.

The intent of the amendment is to bridge the gap between the sole current requirement to provide the premises in a clean condition. Those minimum standards are yet to be developed.

³⁶⁶ It is interesting to note that section 122(3)(b) was amended in 2010 to include reference to breach of the Act as well as the tenancy agreement as a consideration: section 32 *Residential Tenancies Amendment Act 2010*. The interesting aspect is that the genesis for this amendment was *Holdeth*, with the Second Reading noting that the amendment was being made on the basis that *Holdeth* "raised issues concerning the equity of the landlords having to pay compensation for breaches of the act (sic) in situations where the breach may have been agreed to by the tenant, and where the breach was in the long-term interest of the tenant": https://legislation.nt.gov.au/api/sitecore/Bill/SC_OtherDoc?itemId=f6a4b9e9-4fc7-48a6-be5c-6853c911622f&type=SpeechBody. While *Holdeth* found that there had been no breach as a new agreement had been created, the underlying consideration of whether agreement to a breach "was in the long-term interest of the tenant" is an assessment of whether the applicant obtained tangible benefit from the waiver. It would be appropriate to clarify this.

³⁶⁷ <https://www.dcls.org.au/legal-and-advocacy-services/tenants-advice/make-renting-fair-safe-and-certain/>

³⁶⁸ Via section 51 *Residential Tenancies Amendment Act 2018* (Vic).

³⁶⁹ Parliament of Victoria Parliamentary Debates (Hansard) Legislative Assembly Thursday 9 August 2018 at p2735: https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2018/Assembly_Daily_Extract_Thursday_9_August_2018_from_Book_10.pdf

South Australia, however, has regulated minimum standards for residential premises since 1940³⁷⁰, and recently updated that regulation through the *Housing Improvement Act 2016* (SA), continuing “the regulation of minimum standards for existing houses with more effective provisions for compliance and enforcement ... [and regulation of] the rent payable for unsafe and unsuitable housing... [with] the concept of a general duty, which provides for balanced obligations of both owner and occupant”³⁷¹.

Section 34 of the *Housing Improvement Act 2016* (SA) places a statutory duty on an owner of property to ensure that the premises are safe and suitable for human habitation, and where the premises are rented, the premises are to remain so throughout the tenancy³⁷². Section 34 also imposes an obligation on the tenant to take reasonable steps to comply with the landlord's actions relating to ensuring the premises are safe and suitable for human habitation and ensure that the premises are maintained in a reasonable state for the purposes of human habitation³⁷³. The *Housing Improvement Regulations 2017* (SA) set out a number of prescriptive matters to be considered with direct reference to associated building and planning requirements. The South Australian standards apply to all residential premises, owner-occupied or tenanted.

In the Territory, Part 7 of the Act places obligations on landlords and tenants to ensure that the premise are habitable, secure, clean, and maintained/repared with appropriate haste. In relation to ‘minimum standards’, section 47 prohibits a landlord entering, or offering to enter into, a tenancy where the premises and ancillary property are not habitable or do not meet all applicable health and safety requirements under other Acts. The maximum penalty for a breach is 100 penalty units (currently \$15 500). Neither South Australia nor Victoria have an equivalent provision to section 47 in their respective residential tenancy Acts.

Arguably the underlying themes of the legislation in South Australia and as proposed for Victoria are captured by the obligations under Part 7 of the Act to ensure that the premises is habitable, secure, clean, and maintained/repared with appropriate haste. With the premises having been initially constructed and certified in accordance with the Building Code and standards of the time, and any subsequent repairs/modifications required to be compliant with prevailing standards, it is questionable whether regulations need to be developed to replicate those standards specifically for rental premises. Arguably, any breach of building/sanitation standards would give rise to action under Part 7 without having to specifically repeat each standard in the Act³⁷⁴.

A recent group action arising in Santa Teresa against the DoH³⁷⁵ heavily suggests that, in relation to minimum standards, actual habitability, and diligent repairs and maintenance, the NTCAT has little difficulty in applying Part 7 to determine whether or not a premises is maintained to an appropriate standard, and when compensation might be expected.

Issue 34: Tenancy Databases

As noted in the Executive Summary, the Act was amended in May 2018 to include provisions regulating the use of residential tenancy databases³⁷⁶. During its assessment of the amendments, the Economic Policy Scrutiny Committee, reflecting some stakeholder concerns, questioned whether

³⁷⁰ *Housing Improvement Act 1940* (SA).

³⁷¹ Hansard 23 September 2015:

<http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-20828>

³⁷² Subsections 34(1) and (2)(a) *Housing Improvement Act 2016* (SA).

³⁷³ Section 34(2) *Housing Improvement Act 2016* (SA).

³⁷⁴ For example replicating or referencing each aspect of standards and codes applied by the *Building Act 1993*.

³⁷⁵ *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7.

³⁷⁶ *Residential Tenancies Amendment Act 2018*.

the amendments were enough to safeguard against unjust listings by landlords³⁷⁷. In response to those concerns, the Attorney-General undertook to monitor the application of the amendments to see if they provided sufficient protection³⁷⁸.

At the time of publication of this Discussion Paper, there had been no applications to the NTCAT regarding any listing on a tenancy database. As the amendments are still relatively new, the Department of the Attorney-General and Justice will continue to monitor the situation.

Issue 35: Alternative Bond Products

Security deposits are routinely sought by landlords at the commencement of a tenancy. The security deposit is often viewed as a minimum guarantee that the landlord will not be out of pocket at the end of the tenancy due to breaches caused by the tenant, such as damage or non-payment of rent, and as an inducement for tenants to 'do the right thing'. While security deposits are not mandatory, dealings with them are regulated under Part 5, Division 2 of the Act.

Section 29 limits the amount paid as a security deposit to the equivalent of four weeks rent³⁷⁹, and requires the money paid as a security deposit to be held on trust³⁸⁰. Section 4 defines a security deposit as being 'an amount of money a tenant has paid, or is required to pay under a bond'. The Act requires that where a bond is requested by a landlord, that bond is to comprise of cash to the maximum equivalent of four weeks rent, or an equivalent transfer of finances, from the tenant to the landlord for the duration of the lease.

Acknowledging that it may be difficult at times to gather the cash equivalent of four weeks rent in a short period of time to pay a bond, governments and benevolent organisations have for some time offered low income households the opportunity to access interest free loans to meet a bond, subject to repayment of the loan³⁸¹. For-profit loan providers are also known to offer bond loans. More recently, several businesses have developed and started marketing surety products that claim to replace the traditional cash bond.

For the payment of a fee or premium by the tenant based on digital reputation and risk assessments, alternative bond surety providers offer an insurance style guarantee to pay the landlord up to the equivalent of the bond if the tenant defaults on the tenancy agreement. These products do not, however, remove the tenant's obligations under the tenancy, nor do they limit the tenant's financial exposure either under the terms and conditions of cover or the Act itself. The tenant continues to remain liable for claims made against them by the landlord, and may be subject to recovery action from the provider for any money paid out to the landlord under the guarantee. Any payment under the guarantee is also at the discretion of the product provider. A provider may decline to pay a claim, leaving the tenant exposed.

While the up-front cost for bond surety products is small when compared against the total of a bond (the fee or premium being based on a percentage of the bond), the end-cost for a tenant may exceed that of an actual cash bond. The tenant may end up being liable for payments to the landlord that the bond would have covered, in addition to the fee paid to the surety provider, regardless of whether the provider denies or pays a landlord's claim under the guarantee. In the event that the tenant has 'done the right thing' and no claims are made, the tenant is still out of pocket to the extent of the fee

³⁷⁷ <https://parliament.nt.gov.au/committees/EPSC/43-2018>

³⁷⁸ Hansard Debates – Thursday 10 May 2018 at 3943:

<http://www.territorystories.nt.gov.au/jsui/bitstream/10070/299026/5/Debates%20Day%206%20-%2010%20May%202018.pdf>

³⁷⁹ Section 29(2) *Residential Tenancies Act 1999*.

³⁸⁰ Section 29(3) *Residential Tenancies Act 1999*.

³⁸¹ In the Northern Territory see: <https://nt.gov.au/property/renters/find-out-about-rental-costs/help-with-set-up-costs-for-a-private-rental>

paid for the guarantee: the tenant does not receive the bond back as no bond was paid, nor does the tenant receive any interest that might have accrued while it was held in trust.

There is also potential for conflict between the tenant and the surety provider where the provider accepts and pays a landlord's claim even if the tenant disputes the landlord's claim. The potential for conflict is also present where the provider denies a claim the tenant considers valid³⁸². Landlords are not immune from issues arising as a result of a bond product either. In the absence of any contractual right to seek payment of claims under the guarantee, a landlord would be required to take the matter to the NTCAT and proceed against the tenant without the security of a cash bond being available.

Bond surety products are marketed as a simple, innovative approach to cash flow issues associated with traditional bonds. However, as is the case for most financial products, a certain level of consumer sophistication is required. Careful consideration needs to be given to whether such products should be permitted, and the setting in which they might operate, given that the target market is invariably those who have limited financial means to acquire a cash bond in the first place. There are no express provision providing for bond products under the Act.

Recommendation 18

The Act should not be amended to permit bond surety products as an alternative to the security deposit.

Issue 36: Mortgagee in Possession

Under section 107 of the Act, a mortgagee in possession is required to apply to the NTCAT to have the landlord's interest in the tenancy transferred to it following a grant of possession by the Supreme Court. The operation of section 107 was considered by the NTCAT in *Bendigo and Adelaide Bank Limited v Spedding and Walker* [2016] NTCAT 267 (*Bendigo*) where President Bruxner raised the question of whether the power to transfer the landlord's interest in the tenancy to the mortgagee in possession should also be given on the Supreme Court to avoid the need for two separate proceedings in two different forums.

Currently a mortgagee must first seek an order of possession in the Supreme Court, and then commence separate proceedings in the NTCAT to have the mortgagee recognised as the new landlord under the tenancy agreement. President Bruxner's call seems sensible. Providing the Supreme Court with the ability to transfer the landlord's interest under the tenancy agreement would reduce both time and cost associated with the process by allowing all matters to be dealt with in the one application. This would not affect the tenant's rights under the tenancy agreement³⁸³.

Question 9

Should section 107 of the Act be amended to enable the Supreme Court to vest the landlord's interest under a tenancy agreement when it grants an order of possession to a mortgagee?

³⁸² Either way the tenant may be liable – to the landlord for a valid claim that the provider denied, or to the provider if it pays.

³⁸³ And indeed may provide greater certainty to the tenant: *Bendigo and Adelaide Bank Limited v Spedding and Walker* [2016] NTCAT 267 at para 6.