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Issues Paper

Unfair Terms in Residential Tenancy Contracts

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INTRODUCTION

In recent years the advocacy services of the Tenants Union of Victoria have placed greater emphasis on the role of the Fair Trading Act 1999 (FTA), both in determining and advising tenants of their rights, and to aid in the resolution of disputes that arise out of the relationship between tenant and landlord.

In the early days the FTA was appreciated in tenancy matters, predominantly for its prohibition on misleading and deceptive conduct and for the ability to circumvent the \$10000 compensation limit for applications to VCAT under the Residential Tenancies Act 1997 (RTA).

The substantial amendments to the FTA in 2003 have enhanced and underscored the role of the legislation as a broad and vital supplement to the RTA in regulating the relationship between landlord and tenant, and in providing a framework for the resolution of tenancy disputes where the principal legislation is silent.

At first blush the measures against unfair contract terms seemed to have potential to significantly impact upon the content of tenancy agreements. Part 2B of the FTA relates intimately to the experience of tenants as they seek out and sign-up for rented premises: the lack of good faith, the significant imbalance and the take it or leave it approach to contracting.

Our researches have confirmed this initial speculation. A considerable portion of the additional terms that are placed into tenancy agreements are amenable to challenge on the ground that they are unfair and offend against Part 2B. Tenants would be encouraged to dispute the validity of such terms and ultimately to exercise their right to have such terms declared void by VCAT. The widespread use of such terms, however, is a systemic problem that calls for intervention and enforcement by the regulator.

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ROUTINE TENANCY PROBLEMS

This section of the paper outlines those problems routinely encountered by consumers arising from the terms of residential tenancy agreements.

General Comments

This section provides a general description of the problems that arise as a result of the terms of residential tenancy agreements. We have excluded any problems that arise specifically from the terms contained in the REIV standard form agreement. We have referred to types of terms that routinely appear and are from a broad consumer perspective problematic. We do not in this section apply an analysis of whether these terms offend Part 2B of the *Fair Trading Act 1999* (FTA), however many of the comments made will be relevant to our later considerations of fairness under Part 2B. It may be that some of these problems are not remediable by Part 2B.

This section of the paper does contain legal analysis in so far as problems with the terms of residential tenancy agreements arise as a result of their relationship with the provisions of the *Residential Tenancies Act 1997* (RTA). An understanding of where contractual terms fit within the broader scheme of the RTA is therefore of initial assistance.

We have been asked to focus on contract terms and not on surrounding processes such as misleading or illegal conduct. We take this to refer to pre-contractual conduct or other conduct unrelated to the terms of the tenancy agreement. Such conduct may impugn terms in particular instances but not at large. This is distinct from the situation where the term itself is the source of illegality or misleads consumers; we take such circumstances as entirely relevant to questions of fairness. In our view an adequate account of the application of Part 2B would be deficient without reference to such matters.

The Terms of Residential Tenancy Agreements

The primary source of rights and obligations for residential tenants and landlords in Victoria is the RTA. That Act has the express purpose of defining ‘the rights and duties of landlord and tenants of rented premises’. It also seeks to provide for the ‘inexpensive and quick resolution of disputes’ that arise under the Act.

The RTA devolves to the parties the power to determine further rights and obligations between themselves within the terms of a tenancy agreement. This authority is ultimately recognised by the comprehensive provisions within the RTA for the enforcement of terms of the agreement.

Whilst the RTA will only apply where in the first place the parties have reached an agreement for the letting of premises, it should not be forgotten that a tenancy agreement and the terms it contains are subordinate to the provisions of the RTA. The terms of the agreement are a supplementary source of rights and obligations and are invalid where they are inconsistent with the RTA. This is provided for at s 27:

- (1) *A term of a tenancy agreement is invalid if it purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying-*

- (a) the application to that tenancy agreement of all or any of the provisions of this Act; or
- (b) the exercise of a right conferred by this Act.

Referring to the predecessor of the 1997 Act it has been said:

In assessing which terms of an agreement are inconsistent with or exclude, restrict or modify the provisions of the Acts we are not dealing with two sources of equal standing which are to be reconciled with one another where possible.¹

There may be a direct inconsistency between the terms of the agreement and the RTA. In some cases it is clear that the RTA was intended to exhaustively determine the rights and obligations of the parties within a specific sphere of tenancy law. Provisions determining the manner in which a tenancy may be terminated present the most notable example. Section 216 states:

Despite any Act or law to the contrary, a tenancy agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8.

In some other instances an implication may be drawn that the RTA exhaustively determines a tenant or landlords rights and obligations in a particular sphere of tenancy law.

The Problem of Inconsistency

Inconsistency between these two sources of rights and obligations does not merely present the technical legal problem of construction of the contract document in light of the provisions of the principal legislation. Rather, inconsistency creates a number of significant obstacles to tenants who are seeking to determine or exercise their rights. These are set out below:

Misleading the Tenant

The invalid term instructs the tenant to do or refrain from doing something. It purports to create a legal obligation and for the tenant who is unaware of their legal rights it creates the clear impression that the obligation is legally binding. Where it is further relied upon in demands made by the landlord or agent then the misleading effect of the term is compounded by that latter conduct.

Misleading the responsible property manager

The invalid term may misdirect the property manager in charge of the tenancy as to what the actual rights of the landlord or tenant are.

Taking Advantage

The invalid term creates an imbalance between the parties, it gives the landlord or agent the ability to benefit from an invalid term. The benefits may flow without any further misleading conduct on the part of the landlord or agent, since they may result simply from the tenant complying with the invalid term. Invalid terms also place the landlord or agent in a position where they may deliberately or unconscientiously take advantage of the tenant's position.

¹ Bradbrook, MacCallum & Moore, *Residential Tenancy Law & Practice* (1983) p.176

Confusion

Inconsistencies can cause unnecessary confusion in the mind of the consumer as to what their rights actually are. What may be the clear right of a tenant may be obfuscated by the existence of an inconsistent provision within the agreement. This may dissuade an already reluctant tenant from exercising their rights.

Harming Relationships

Although they may be perfectly entitled to do so on the ground of inconsistency, a tenant may be concerned that departing from a promise contained within a tenancy agreement may harm the relationship between tenant and landlord or tenant and estate agent. They may consider that maintaining a healthy relationship is their primary concern, especially where they have had previous difficulties in seeking out suitable housing. The weaker bargaining position of the tenant in this situation has not only determined the content of the tenancy agreement but has also determined the tenant's effective rights. If the invalid terms were not contained in the agreement in the first place, these tenants would not have to concern themselves with the question of whether they ought to depart from their own promises.

Concern for Reputation

Related to this last concern we consider that the inclusion of invalid terms is the conduct that ought to be impugned. However, where the parties are dealing between themselves and there is a significant imbalance in bargaining power, it is quite easy for imputations of wrongdoing to be reversed. Rather than the tenant asking the question of the agent why they have included this invalid and misleading term in the preparation of the tenancy agreement, the Agent may ask of the tenant why they have signed and agreed to be bound by a term if they don't believe it to be valid. Where a tenant is concerned about their reputation as a tenant such allegations of disingenuousness, however unfounded, may be powerful.

Preliminary Comment on Inconsistency

It has become apparent during the course of our research that a considerable proportion of terms of tenancy agreements are invalid under s 27.

The relationship between invalidity under the RTA and the operation of Part 2B of the FTA is discussed in section 2 of this paper within the general comments that precede our analysis of typical terms and their variants.

Particular Problems with Tenancy Terms

Landlord's purporting to limit or avoid their mandatory duties

The RTA assigns a number of mandatory duties upon landlords including:

- ensuring that the premises are maintained in good repair;
- providing the premises vacant and reasonably clean; and
- taking reasonable steps to ensure that the tenant has quiet enjoyment of the premises

Some terms attempt to avoid these duties entirely, more frequently they will reduce or limit the operation of these duties by:

1. permitting the landlord to commit certain specified acts or omissions which do or may contravene a mandatory duty;
2. transferring to tenants specified tasks that are by virtue of the mandatory duties within the landlord's sphere of responsibility; or
3. restricting tenants from using specified facilities provided with the premises with the intention of avoiding these mandatory duties.

Section 27 of the RTA renders all such terms invalid. Our discussion of the misleading and imbalancing effect of invalid terms applies to all terms that exclude or otherwise restrict or modify these mandatory duties.

Penalties

Penalty clauses appear within many tenancy agreements, most usually in the form of lease break clauses that impose a fixed re-letting fee. Such clauses fail to even meet the basic common law requirement of being a reasonable pre-estimate of loss since they are not charged in proportion to the time remaining on the lease. Other penalties include rent fines and fixed charges for dishonoured cheques. Some terms penalise tenants for non-compliance with the RTA or the agreement by requiring the tenant to pay for administrative or legal costs that result from the breach.

A concern from a consumer viewpoint is that penalty clauses diminish the comprehensive scheme for compensation and compliance that is set out in the RTA. It is an accessible and inexpensive enforcement regime that could hardly be said to be deficient in protecting the landlord's legitimate financial interests.

Of greater concern from a legal viewpoint is that the imposition of very many of the penalties that are included in tenancy agreements is prohibited by s 505 of the RTA. Sub-section (1) states:

A person must not demand or accept from a tenant under a tenancy agreement who has failed to comply with the tenancy agreement or with any of the provisions of this Act relating to the tenancy agreement the payment by reason of the failure of any amount other than

(a) subject to this Act, rent under the tenancy agreement; or

(b) an amount or penalty provided for in this Act.

Penalty: 20 Penalty units.

The conjunction of that provision with s 27 of the RTA has the effect of invalidating many penalty clauses that appear within tenancy agreements. Though they are invalid their presence within tenancy agreements has the misleading and imbalancing effect that we have described as well as potentially facilitating the commission of an offence under s 505.

Rent

The rent to be paid is itself a term of the tenancy agreement and the reasonableness of the amount charged is often raised as a concern by tenants where latent defects in the property or other problems with the situation of the premises are revealed. The RTA provides a partial remedy by allowing tenants to ask that the rent be assessed where facilities have been reduced. Also where there is some other breach by the landlord the tenant may be entitled to compensation.

Section 42 provides that the place for the payment of rent and the manner of payment of rent may be specified in the tenancy agreement. Problems can arise if the arrangements lead to the parties “continually confronting each other”.²

Landlords and Agents will in most instances accept so-called ‘part payments’ of rent, perhaps reaching the pragmatic realisation that such a payment is better than no payment at all. On the occasions that they refuse to, they may rely on terms of the agreement that require the rent to be paid in full, usually monthly in advance. Section 39 of the RTA however makes it clear that rent accrues on a daily basis and is recoverable accordingly.

Other tenancy terms purport to limit the obligation of an Agent to provide rental receipts.

Other financial burdens

Some terms purport to impose financial burdens that are more onerous than those provided in the RTA. This may result in the invalidity of the term under the RTA. This is the case where a term requires a tenant to pay for steam cleaning of carpets at the end of a tenancy irrespective of the actual condition of that carpet. Clauses requiring tenants to pay for stamps where a receipt has been requested also fit within this class.

Terms placing financial burdens on tenants are also problematic where they are unreasonable in the circumstances. Clauses requiring tenants to obtain contents insurance fall within this category.

Restrictions upon use

The RTA imposes several duties that restrict the use that may be made of the premises by tenants. These include ensuring that care is taken to avoid damaging the premises, keeping the premises reasonably clean and not interrupting the quiet enjoyment of neighbours.

The terms of tenancy agreements often go far beyond the restrictions that are set out in the RTA. These include no-pets clauses, smoking bans, restrictions on pot-plants and clothes hanging and limitations on the number of persons who may occupy the premises. Such clauses are often broadly termed and may extend to prohibit entirely harmless behaviour the classic example is the no-pets clause that prohibits the keeping of goldfish.

From a consumer viewpoint a tenant ought to be left alone to live their lifestyles in privacy. This goes beyond the technical legal right to quiet enjoyment which concerns itself with outside interference with a tenants possession of the premises. Clauses that prohibit tenants from using the premises in a manner that is objectively reasonable exercise an overreaching

² Billings, Kefford & Vassie, *Annotated Residential Tenancies Act 1997* (2005) ANSTAT, commentary at [42.01]

level of control and domination over the everyday lives of tenants. This in a context where the RTA already provides extensive protections of the landlord's interest.

Duration of a Tenancy

The telephone advice service of the Tenants Union of Victoria receives a considerable volume of enquiries from tenants who have been bound to tenancy agreements for a fixed term and who wish for a variety of reasons to terminate the agreement early. Lease-breaking can be an expensive exercise for tenants who may find themselves liable for a large amount of lost rent and other incidental charges. Tenants will often not consider, unless their attention is brought to the matter, whether they are better served by a tenancy for a lesser fixed term or indeed a periodic tenancy. Where twelve month tenancies are offered without regard to the particular circumstances of the tenant the result is an increased incidence of lease-breaking.

Principal Place of Residence Clauses

Section 254 of the RTA provides for a reduced notice to vacate period of 14 days where the landlord lets their principal place of residence and intends to re-enter into occupation of the premises when the tenancy ends. The tenancy agreement must however specify that the premises were the landlord's principal place of residence and that the landlord so intends to re-enter into occupation.

The RTA permits the use of these clauses where they accurately reflect the situation and intention of the landlord. We acknowledge that in some instances the use of this clause will be appropriate. It is apparent however that these clauses are appearing within tenancy agreements as a matter of course irrespective of who it was that occupied the premises prior to the tenancy and what use will be made of the premises after it. We are aware of one case in which a brand new premises offered by a corporation had never been resided in by anyone and was let with a principal place of residence clause. Such clauses appear frequently in the additional or special term sections of tenancy agreements and often do not appear to be modified based on the actual circumstances.

Tenant Declarations

Terms routinely require tenants to make declarations. Most common amongst these are statements that a tenant has read and understood the tenancy agreement. The Office of Fair Trading in the UK ("UK OFT") have published a Guidance on Unfair Terms in Tenancy Agreements ('Guidance') in which they have said in relation to the appearance of such terms within tenancy agreements in that jurisdiction:

Sometimes, the contract may require the tenant to agree to the declarations for the contract to proceed, whether or not the declarations reflect the facts and true position. Tenants often regard the declarations as a mere formality, and are unable to predict the potential disadvantage of apparently making them.³

We consider that such concerns apply equally to tenant declarations made within Victoria.

³ Office of Fair Trading (UK), *Guidance on Unfair Terms in Tenancy Agreements*, [4.20] Guidance

Charging the tenant through third party agreements

Problems also arise where the protections offered under the RTA are avoided by the use of agreements between the tenant and third parties to provide services which are the landlord's responsibility.

In *Chen v Mulholland*,⁴ Member Vassie of the Victorian Civil and Administrative Tribunal ('VCAT') was of the view that a tenant may sign an enforceable contract with a third party such as a body corporate or a utility company to provide a utility service and that such contract may impose liabilities upon the tenant that were not envisioned under the RTA.

Whilst these are not terms of a tenancy agreement, they are worthy of further analysis for compliance under Part 2B.

Other problems

- Terms do appear with some frequency that purport to interfere with the ordinary standards of evidence or legal processes.
- Some terms purport to incorporate other documents such as body corporate rules, concerns arise where those rules are not provided at the time that the agreement is made.
- Other terms are poorly expressed, ambiguous, or use legal terms erroneously.

⁴ *Chen v Mulholland* (Residential Tenancies) [2005] VCAT 2912 (15 December 2005)

ANALYSIS OF TYPICAL CONTRACT TERMS

Our analysis of typical and variant contract terms for compliance with Part 2B and s 163 is arranged as follows:

- general comments provided below, and
- a compliance chart containing an analysis of those terms. Refer to Appendix A.

Excluded Contracts

We have excluded from our analysis any term that is included in the REIV standard form contract. We have also excluded caravan park and rooming house agreements as directed in our discussions with CAV staff. Whilst license agreements and tenancies that are excluded from the protections of the RTA are not examined, we do note that Part 2B provides some potential for significant remedial benefits with those tenancies and other forms of tenure where occupants are less protected than tenants under the RTA.

Invalid Terms

Earlier we looked at the misleading and imbalancing effects of clauses that are placed into tenancy agreements despite their invalidity under s 27 of the RTA. Our research has revealed the widespread occurrence of such terms; we make some general comments on their relationship with Part 2B.

The UK OFT's Guidance saw the misleading potential of clauses as a source of contractual unfairness. Some key examples provided in the Guidance are:

1. Disclaimers

Disclaimers that are made invalid under other legislation. The UK OFT says their inclusion as terms is both pointless and potentially misleading.

*The fact that a term is void under other legislation, and therefore unenforceable before a court, does not make it fair under the Regulations.*⁵

2. Repairs

Terms that transfer the landlord's repair obligations to the tenant are objected to on the grounds that they are 'void, unenforceable and misleading.'⁶ Terms that only partially detail a landlords repair obligations are potentially unfair because they may mislead.⁷

3. Eviction

Terms purporting to permit eviction without court order would be challenged on the ground that they are "seriously misleading."⁸

⁵ OFT Guidance, [3.5]

⁶ *ibid.*, [3.15]

⁷ *ibid.*, [3.14]

4. Sanctions

An unfair imbalance results from terms imposing “sanctions over and above those that can actually be imposed.”⁹

5. Assignment & Subletting

Terms that give landlords “excessive discretion to refuse consent to any proposed assignment or subletting” are objected to on the ground that they are misleading.”¹⁰

We consider that clauses that have been included in tenancy agreements despite their inconsistency and invalidity under s 27 of the RTA, will in many cases fail the balancing test contained in s 32W because:

- Invalid terms frequently seek to confer a benefit upon the landlord whilst imposing a burden on the tenant.
- Where a term is invalid, performance of the term passes a benefit to the landlord that is completely gratuitous and the tenant does not receive any reciprocal benefit.
- Where invalid terms mislead a tenant they may have the practical effect of depriving the tenant of a benefit of the legislation whilst having the effect of assisting the landlord to avoid its obligations.
- Where invalid terms mislead a tenant they cause an imbalance between the tenants knowledge of their rights and their actual rights. This is often in a context where an Estate Agent can be imputed with considerably greater knowledge of the relevant legislation.
- Where invalid terms mislead a tenant they permit the landlord or agent to use the inclusion of invalid terms in a contract to exert a level of control or influence over the tenant that is beyond their legal authority.
- Invalid terms give Agent’s and landlords the opportunity to take advantage of the misleading effect of the terms to the detriment of the tenant.
- Such term give Landlords or Agents the ability to indicate that Tenants should not depart from their promise, or at least benefit from the reluctance of some tenants to depart from their promises.
- To the extent that they practically restrict tenants from exercising their actual rights and obligations such terms partially recreate the imbalance in bargaining power that the RTA was intended to address.

Whether the imbalance created can be characterised as significant will depend upon the particular term and the legal context. If the right or obligation concerns a matter of real consequence that is not trivial, and the misleading effect of the term is real and not improbable, then it is likely that the resulting imbalance will be significant.

Particular invalid terms that have a misleading effect may also fit within the list of specific matters at s 32 X. Under that section a court or the tribunal may look at both the ‘object and effect’ of the term: a phrase that ought to operate beyond the mere legal effect of the

⁸ *ibid.*, [3.71]

⁹ *ibid.* [4.15]

¹⁰ *ibid.*, [4.26]

term. The specific matters most relevant to invalid terms will be sub-s 32X (a) where the landlord is reducing their responsibilities under the contract and sub-s 32X (k) where the clause purports to have the effect of limiting the tenant's right to take legal action under the RTA.

Where we consider that a clause is invalid or potentially invalid under s 27 of the RTA we have mentioned this. Where we have done so we have considered it a cause of unfairness in its own right. If the clause is unfair for other reasons too we have referred to these for completeness.

Restrictions on Use

The RTA provides some potential for terms to impose unreasonable restrictions on the use of the premises. The following comments of the UK OFT published in their guidance are relevant to this question of unfairness under the general balancing test:

We will generally consider terms to be unfair if they impose requirements or restrictions on the tenant that are more severe than is necessary to protect the landlord's real interest in safeguarding his property...

Landlords need to restrict the tenant's use of the property to a degree and impose obligations in the interests of good estate management. However, these terms must be reasonable, taking into account the type and location of the property, and whether the particular term has been introduced as a result of obligations placed on the landlord...

We object to terms in tenancy agreements that impose obligations or restrictions that are or can be wholly unreasonable, or that give the landlord the power to make unreasonable conditions. Our objections apply even if such a term does not always operate wholly unreasonably in all circumstances. There is less risk of unfairness where a term's scope is limited to the problem it is designed to prevent or resolve.¹¹

These considerations may be applied to terms occurring in Victoria that interfere with a residential tenant's use of the premises. We will look at the severity of the interference and how it balances with the harm against which it is intended to protect. Where the term protects against deterioration in the premises that is not more than fair wear and tear we are likely to object to it. In considering the protective intention of a term the backdrop of existing legal protections available for safeguarding the property will be relevant.

Landlord's purporting to limit mandatory duties

In the first section of the paper we have referred to terms that purport to limit or avoid the landlord's mandatory duties to repair and in relation to the provision and condition of the premises at commencement. Section 32X(a) refers to limiting or avoiding performance of the contract, for this reason we have included in our analysis reference to the secondary source of the same duties, the tenancy agreements themselves.

The duties make their way into the agreements because they are contained in the prescribed standard agreement as set out in the Residential Tenancies Regulations 1997. Section 26 of the RTA requires that any written agreement must be in the prescribed standard form.

¹¹ *ibid*, [4.47-4.51]

Rent & Duration

In the first section of the paper we also described how problems may arise from the amount of rent or the duration of a fixed term. In the UK the regulations may not generally be applied to core terms, and it is likely that both would therefore be excluded. There is no such restriction in Part 2B of the FTA. Whilst there is nothing stopping a tenant from claiming that in the circumstances such a term is unfair under part 2B, such a person would have quite a task ahead of them given the prominence such terms usually take in the pre-contractual processes and general reluctance of the courts to intervene with respect to the adequacy of consideration.

Terms Required or Expressly Permitted by Law

The terms of a tenancy agreement become a legal obligation as a result of the general law of contract. To this extent they are not expressly permitted by law. The RTA places limits on this contracting power, section 27 in particular places such limits extensively. The Act also sets out a process for resolving disputes arising out of the terms of the tenancy agreement, namely applying to the tribunal under ss 210 and 452. In neither case does the contribution of the RTA amount to an express permission.

The prescribed standard terms are required by law and may therefore not be impugned under Part 2B.

It is arguable that terms that accurately reflect the provisions of the RTA are expressly permitted by law. Generally such terms raise concerns as to fairness when they go beyond the provisions of the Act to impose related but additional obligations. Part 2B will usually apply to that aspect. Moreover there will be a question whether such terms modify the provisions of the RTA and are invalid for that reason.

The RTA does in specific instances expressly reserve certain obligations to be determined by the tenancy agreement. These reservations are an express permission and thus part 2B will not apply. Most relevantly section 42 states that rent is payable in the manner and place stated in the agreement. An unfair rental payment method is therefore not amenable to challenge under Part 2B unless it is inconsistent with the RTA.

APPLICATION OF PART 2B OF THE FAIR TRADING ACT

Consumer Contracts

A residential tenancy agreement will be covered by Part 2B if it can be established that it is a 'consumer contract' as that term is defined in s 3 of the FTA. That definition contains several elements that are material to the question of how tenancy agreements apply to Part 2B.

Agreements Whether or Not in Writing

Tenancy agreements are defined under s 3 of the RTA to apply to agreements to let premises as a residence 'whether or not in writing'. Consumer contracts under s 3 of the FTA equally arise whether or not the agreement is in writing.

Personal, Domestic or Household Use or Consumption

Consumer contracts arise only where goods or services meet the twin requirements of being

"...of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purpose of the ordinary personal, domestic or household use or consumption."

Residential tenancy agreements are by definition the letting of premises for residential use and therefore the first of these requirements is easily met. The second requirement looks to the purpose behind a particular transaction, however in most circumstances where premises are let exclusively as a residence the second of these requirements will be met.

Issues of greater subtlety arise where the premises are used partly for residential purposes and partly in connection with a trade, profession or business. For consumer contracts the question is what is the ordinary use that will be made of premises. In determining whether the agreement is covered by the RTA, however, you must look to whether or not the premises are to be used primarily for residential purposes. The distinction between ordinary and primary is a matter for further attention.

Goods or Services

A consumer contract may only arise in an agreement to supply goods or services. The definitions of goods and services in s 3 of the FTA enlarges upon the ordinary meaning of those terms. In the case of residential tenancy agreements it is likely that reliance will be placed on the definition of services contained in s 3 since it is specifically expressed to extend to "any rights (including rights in relation to and interests in real or personal property) provided, granted or conferred in trade or commerce." The letting of premises as a residence is the grant of an interest in real property. What is left to determine is whether the grant occurs 'in trade or commerce'.

In Trade or Commerce

The question of whether entering a tenancy agreement involves the supply of a service and therefore whether it occurs 'in trade or commerce' is not restricted to the application of Part 2B. There have been cases that have dealt with the question with respect to the application of other parts of the FTA.

Public & Social Housing

In *Director of Housing v Debbie Young* [2002] VCAT 227 (11 April 2002), Deputy President Levine considered whether the VCAT had jurisdiction under s 107 of the FTA. The respondent was a former tenant of the applicant, Victoria's public housing authority. The applicant asked VCAT to exercise its powers under s 107 of the FTA as a means of bypassing the limitation against claims exceeding \$10000 in the RTA.

In order that it might exercise jurisdiction under s 107 of the FTA the tribunal needed to find that the applicant was a supplier of services and that the respondent was a purchaser of services. It therefore needed to be satisfied that the tenancy was supplied 'in trade or commerce' a phrase defined at s 3 of the FTA to include "a business not carried on for profit". The enlarged definition was relevant because of the public nature of the applicant's service.

In his written reasons Deputy President Levine said:

In the FTA to be in the field of trade or commerce as defined this Applicant must carry on a business albeit not for profit. In my view the repetitious and continuous nature of the Applicant's activities in the letting of premises as residences to tenants is sufficient to find that it is carrying on a business of providing its services within the definition of "trade or commerce".

As a result of this decision it is clear that terms of residential tenancy agreements offered by the Office of Housing are covered by Part 2B. Other providers of social housing that let premises repetitiously and continuously will also be covered.

Tribunal Practice

Since this decision in 2002 the FTA has been widely applied to disputes arising under Residential Tenancies. This practice has certainly not been limited to public and social housing tenancies.

It is apparent that the "trade or commerce" limitation has not posed any particular difficulty in applying the FTA to residential tenancies generally.

The view that a letting of residential premises necessarily involves acting in trade or commerce can be gleaned from decisions of the tribunal such as the following:

As between the tenants and the landlord, there is no doubt that the Tribunal has jurisdiction to decide any dispute, not only under RTA but also under FTA because by letting the rented premises to the tenants the landlords were conferring a right upon them in trade or commerce and so were supplying services to them as purchasers of the services.¹²

¹² *Winter v Buttigieg* [2004] VCAT 2430 (10 December 2004) [62]. Our emphasis

Moreover the Annotated RTA, which is authored by three senior members of the Tribunal, states:

A landlord or owner supplies "services" (as defined by s 3 of the Fair Trading Act) to a tenant or resident, who is a "purchaser" of those services, and so a dispute between landlord and tenant or between owner and resident is a "consumer and trader dispute" (formerly called a "fair trading dispute") which under Part 9 of the Fair Trading Act the Tribunal has jurisdiction to hear and determine: Zeus and Ra Pty Ltd v Nicolaou (2003) 6 VR 606¹³.

Notably the case cited in the above quote involved a commercial lease and not a residential tenancy. The premises were to be used as for a car wash, car detailing, café and automotive repairs.

In that case Charles and Eames JJ.A (Winneke P concurring) cited a decision of the tribunal with approval:

In Humphries & Cooke Ltd. v. Essendon Airport Ltd. [26] Deputy President McNamara said that -

"It appears that sections 107 and 108 of the Fair Trading Act 1999 bestow a general landlord and tenant jurisdiction on this Tribunal. They give the Tribunal power to determine fair trading disputes which are defined as disputes between the suppliers and purchasers of goods and services. Services are defined in s.3 of the Act to include interests in real or personal property, and supply is defined to include grant. It follows in my view that whether or not the Retail Tenancies Reform Act applies to these premises the Tribunal has jurisdiction in a general sense to deal with a dispute between the landlord and tenant in the present circumstances."

We agree with the Deputy-President's interpretation of ss.107 and 108, which was applied by Judge Bowman in rejecting the appellant's application to strike out paragraphs [3] and [4] of Zeus & Ra's claim.

It is notable that the case cited by the Court of Appeal also concerned a commercial tenancy, but despite this the jurisdiction supplied by s 107 was referred to as a "general landlord and tenant jurisdiction".

Broad Application to Residential Tenancies

The broad approach where the trade or commerce limitation barely rates a mention appears to be the result of an implicit view that tenancies will in most if not all instances have a sufficient commercial or trading character.

Referring to the UK Regulations on Unfair Terms in Consumer Contracts a commentator has said that in order that the regulations will apply

The supplier must enter into the contract as part of their course of business. This should usually be easy to satisfy in tenancy cases, as rarely will property be let other than in the course of business.¹⁴

¹³ *ibid*, commentary at [446.05]. see also commentary at [28.03]

¹⁴ Daniel Dovar, 'Unfair Tenancy Agreements', 21 January 2005, *Solicitors Journal*, <http://solicitorsjournal.com/story.asp?storycode=5032>, accessed at 24 February 2006

Again referring to the UK Regulations the Law Commission has said

*The Office of Fair Trading has indicated that there will be circumstances under which private landlords will not be considered to be acting for such purposes. These presumably include where landlords are not making their living out of letting, but have some other business and are only letting their home temporarily while waiting for a better opportunity to sell it or while working in another area.*¹⁵

The example given by the Law Commission is nonetheless consistent with a reasonably broad application of Part 2B to residential tenants.

Preliminary Comment on Other Issues

Other issues of some complexity that arise in connection with these questions include:

1. Restrictive application to residential tenancies

Whether there is any prospect of a more restrictive application of the ‘in trade or commerce’ limitation to residential tenancies.

2. What if Agent’s provide, grant or confer in trade or commerce?

The conjunction of the definition of consumer contract and s 32W of the FTA. The proprietary right must be provided, granted or conferred in trade or commerce. What is the necessary nexus between the owner and the act of providing, granting and conferring the service? That is to say where the owner is not engaged in trade or commerce, is the trading or commercial character of an Estate Agency sufficient to bring the contract within the scope of s 32W and the definition of consumer contract.

3. Analogy with misleading conduct cases

The relevance of the case law surrounding s 52 of the *Trade Practices Act 1974* (Cth). i.e. The prohibition against misleading conduct in trade or commerce.

4. Exclusion of private transactions

The relevance of the exclusion of private transactions from the scope of s 52 of the TPA: *O’Brien v Smolgonov* (1983) 53 ALR 107 (Full Fed Ct)

5. O’Brien’s case generally

O’Brien’s case concerned the sale of land. To what extent does this case apply to the letting of premises for residential purposes? The sale of land involved a one of transaction which was the realisation of a capital investment, to the contrary the letting of premises is a continuing relationship and is an income earning activity.

6. Argy v Blunts & Lane Cove case

The relevance of *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112. The case involved the sale of a private house. The conduct of the agent was not sufficient to impugn the conduct of the vendor vicariously because the vendor was not acting in trade and

¹⁵ The Law Commission (UK), *Renting Homes 1: Status and Security – A Consultation Paper*, Consultation Paper No. 162 (2002) [6.43]

commerce. However the agent and solicitor acknowledged that they were acting in trade or commerce.

7. Indicia derived from Tax Law

Relevance of the taxation case law. The relevance of indicia in other fields such as those provided in relation to taxation. The ATO advises persons to consider

- commercial character of the activity
- size, scale and permanency
- whether the activity is planned, organised or engaged in a business-like manner
- whether there is a purpose of profit or a prospect of profit
- whether there are business records and books of accounts, business premises, licences or qualifications and a registered business name

8. Other case Law

The relevance of the case law flowing from s 51(i) use of the phrase “trade or commerce”.

APPENDIX A: COMPLIANCE CHART

Methodology

We have sourced the terms for analysis from a sample of approximately thirty tenancy agreements offered by estate agents operating throughout metropolitan Melbourne.

Since s 32Y(1) of the FTA applies to terms entered after 9 October 2003 we have generally restricted the agreements that we have considered to those entered between 2004 and 2006. However, some terms have not occurred in our main sample that we would have expected to observe based on the experience of our advocacy staff, in those instances we have analysed those terms where they appear in a small sample of agreements from 2003.

We excluded from our analysis the prescribed standard terms which are required by law. The REIV standard terms have also been excluded. The remaining terms, which are the standard additional or special terms of particular agencies, were examined. This presented us with approximately 500 terms for analysis.

The occurrence of many of these terms was repeated throughout the sample. The particular mode of expression used was identical in a good many cases; in other instances the term could be distinguished only in form (eg. by variation in the choice of diction or syntax) but in substance imposed an identical obligation. Often however, the terms varied more substantially across the span of agreements and the effects of this on how the terms operated ranged from slight to significant.

We reduced the range of terms to a core of typical terms which were apt to express the type of term at a basal level. It became apparent that these typical terms did present the significant and difficult issues for legal analysis. These terms and issues have been included in our compliance chart. The typical terms have either been extracted from tenancy agreements verbatim or have been constructed as a composite of terms that were substantially identical.

We have included several variant terms in our analysis also. The variant clauses often accentuate the unfairness of the typical term, less frequently they do act to ameliorate it. At other times the concern with the term is derived from ambiguity or lack of clarity or the problem is otherwise more incidental. We found the classification of variant terms to be a particularly complex exercise. Once that process has been completed we may then include an analysis of the range of variants in the compliance chart and accurately indicate the source of both typical and variant terms.

Compliance Chart

Some notes on the chart:

- The fields for this issues paper have been limited to term, FTA section number, legal context and commentary on the term.
- The typical terms are set out immediately beneath the sub-headings; variant terms then follow. The terms have not otherwise been presented in any particular order.
- Where we have referred to s 32W the lack of 'individual negotiation' mentioned at s 32X will also be relevant.
- We have adopted the phrases 'unenforceable and misleading' and 'more severe than necessary to safeguard the property' from the UK OFT's Guidance.

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Review of typical and variant terms of tenancy agreements for compliance with Part 2B of the FTA

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Steam Cleaning</p> <p>The Tenant agrees to have the carpet professionally steam/dry cleaned upon vacating the property and provide a copy of the receipt to the agent.</p>	<p>32X (a) 32X (h)</p>	<p>The RTA balances the obligation of the tenant to leave the premises in a reasonably clean condition upon termination (s 63) with the landlord's duty to provide the premises in such condition at commencement (s 65).</p>	<p>Being more onerous than the requirements of the RTA, the term is invalid under s 27. The term is unenforceable and misleading.</p> <p>The term provides no reciprocal obligation upon the landlord to provide steam cleaned carpets at the commencement.</p>
<p>The Tenant agrees to have the carpet professionally steam/dry cleaned to the satisfaction of the Landlord or Agent prior to the vacation of the premises.</p>	<p>32X (h)</p>		<p>Gives an excessive discretion for Landlord or Agent to determine whether term has been complied with.</p>
<p>All carpets must be professionally steam-cleaned when the tenants vacate and a receipt produced.</p>	<p>163</p>		<p>Term states that steam cleaning must be done but does not specify whether the landlord, tenant or some other party is responsible for this.</p>
<p>The Tenant agrees to have the carpet professionally steam cleaned upon vacating the property by a reputable/recognised steam cleaning firm.</p>	<p>32X (h) 163</p>		<p>Words such as 'reputable' or 'recognised' are irrelevant and vague. The relevant question is whether or not the carpet has been left in a reasonably clean condition.</p> <p>The words may introduce excessive discretion for Landlord or Agent to determine whether duty to clean has been complied with.</p>
<p>Occupants</p> <p>Sub-letting</p> <p>The Tenant acknowledges that the persons named on this tenancy agreement are those who will occupy the premises during the term of the tenancy agreement, and that any change in those occupying the premises must be immediately reported to the agent.</p>	<p>163</p>	<p>The RTA places limits upon tenants sub-letting and assigning their interest in the property. Written consent must be sought from the landlord. Where such consent is unreasonably withheld, the tenant may seek an order from the tribunal waiving that requirement. Bypassing the process both invalidates the sub-tenancy or assignment and permits the landlord to issue 14 days notice to vacate.</p> <p>Sub-tenancies and assignments are narrowly defined at law and it is very common indeed for laypeople to mis-describe as a sub-tenancy a situation where a tenant has taken on licensees, boarders or lodgers.</p> <p>If a tenant has not parted with possession of the whole or part of the premises they will have neither sub-let nor assigned their interest.</p>	<p>The heading 'sub-letting' conflicts with the broader reference to occupation in the main body of the term, thereby causing considerable ambiguity.</p> <p>To the extent that term refers to 'sub-letting' it is misleading because it implies that it is sufficient to merely report the new arrangement to the agent, what is in fact required is the written consent of the landlord before the sub-letting occurs. The serious sanction of eviction may flow where that does not occur.</p> <p>For other forms of occupation that are not an actual or purported sub-letting or assignment, the obligation imposed by the term to notify the landlord is not unreasonable (except to the extent that it requires immediate action).</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
I/we tenants agree to use the premises as a dwelling for () adult/s and () child only.	32X (a)	Whilst the RTA deals with actual and purported sub-letting and assignment of the tenant's interest in the premises, it does not stop tenants from permitting other types of occupation of the premises.	It is reasonable for a landlord to seek to prevent the over-crowding of residential premises. The term may successfully stop overcrowding but is so broad so as to exclude an increase in occupation of the premises in reasonable numbers. Where a tenant's family circumstances change during the tenancy the term prevents new family members from moving in. The term does not even seemingly provide for the landlord to consent to an increase in the number of persons occupying. This is more restrictive than the requirements of the RTA for sub-letting and assignment. The severity of this restriction on use of the premises is not proportionate to the landlord's real interest in safeguarding the property.
The tenant shall not allow any other person/s to reside at the premises without the Landlord's written consent.	32X (a) 32X (g)	Section 30 of the RTA prohibits a person from refusing to let premises on the grounds that a person intends to live in them with a child.	This term presents additional concerns because of its limitation of a right to occupy to tenants. Custodial children who are minors will not usually be listed as tenants. This term is so broad so as to exclude them from occupying the premises even if the landlord knew at the time that the agreement was entered that it was the tenant's intention to reside at the premises with their children. In so doing the term is unreasonable and is broadly inconsistent with s 30 of the RTA. The term is invalid to the extent that it limits sub-letting and assignment beyond what is required by the RTA. The requirement to obtain consent gives the landlord excessive discretion. The term would be improved by a qualification requiring the landlord not to unreasonably withhold consent.
No person, other than herein named may at any time reside on these premises without full consultation with and a written authorisation from the Agent. In accordance with the Residential Tenancies Act 1997, any failure to comply with this condition will invoke legal action (Section 81(1)).	163 32X (a) 32X (g)		Beyond being an unreasonable restriction on the use of the premises the term implies that all additional occupation results from sub-letting or assignment.

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>The tenant will not, without prior written consent of the landlord, permit any person to reside at the premises other than the tenant or immediate family.</p>	<p>32X (a) 32X (g)</p>		<p>By permitting immediate family to reside at the premises the term improves upon many of the preceding terms. The term would be further improved by a qualification requiring the landlord not to unreasonably withhold consent.</p>
<p>Set-off</p> <p>The tenant will not withhold rent due to malfunction or damage to any appliance or part of the property subject to Section 99(3).</p>	<p>32X (a) 32X (k)</p>	<p>Tenants who withhold their rent because repairs will have a tough time of it whether under the general law or the RTA. Under the general law the right to claim such a set-off is well recognized. It is reasonably arguable that despite the comprehensive regime for repairs offered under the RTA a tenant may still claim a set off. Indeed s 331 of RTA permits the tribunal to dismiss or adjourn an application for possession that arises from rental arrears where it considers that “satisfactory arrangements have been or can be made to avoid financial loss to the landlord”.</p>	<p>The term purports to limit the right of a tenant to claim a set-off for repairs against rent; it places no such limitation upon the rights of a landlord to claim a set-off.</p>
<p>Changes to Phone Number</p> <p>The tenant agrees to notify the landlord/agent of any change of private/work telephone numbers, if any.</p>	<p>32W</p>	<p>Section 66 of the RTA requires the Landlord to provide certain information to the tenant. A private landlord is required to provide an emergency phone number for urgent repairs only. A private landlord is not required to provide their business or any particular phone number for this purpose. If an agent is acting they are required to provide the agency’s phone number and an emergency repairs phone number; these may be the same number. The RTA does not require the tenant to provide any phone number.</p> <p>Where the purpose of collecting all of a tenants phone numbers is to facilitate the collection of rent arrears or other debts the operation of s 21(2)(f) of the FTA which allows a debtor to ask that a particular method of contact not be used may be relevant. Subject to limited exceptions a breach of that request constitutes harassment under s 21 of the FTA.</p>	<p>We consider that this term places an unreasonable obligation upon the tenant.</p> <p>All persons including tenants have a legitimate interest in controlling access to their personal contact details. Circumstances may demand caution in releasing such details, for example persons who have been the victim of family violence or stalking may need to take significant measures to protect their privacy.</p> <p>We consider it unfair to impose a requirement upon the tenant to supply their phone contact details without a term in the agreement providing a reciprocal restriction upon the agency and landlord against the unauthorised release of that information to third parties.</p> <p>If a work number is used for work or business purposes it may be unsuitable to provide those details. A home or mobile number may be more appropriate. An improvement suggested by the UK OFT is that the tenant designate a main contact number and notify the landlord or agent of changes to that.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Condition Report</p> <p>The Tenant acknowledges that the Condition Report provided at the commencement of the tenancy must be signed and returned to the Agent within 3 days after entering the premises. If the Condition Report is not returned, the copy held by the Agent will be accepted as conclusive evidence of the state of repair or general condition of the rented premises, as at the commencement of this tenancy.</p>	32X (h)	<p>The RTA sets out the procedure and effect of condition reports in residential tenancies:</p> <p>Section 35 sets the procedure for the completion of the condition report by landlord and tenant or their respective representatives. Subject to two exceptions s 36 operates to deem a condition report that has been completed and returned in accordance with s 35 as conclusive evidence of the condition of the premises at the commencement of the tenancy. One of those exceptions applies where the tenant has noted their disagreement with a statement made by the landlord or agent within the report. The other exception applies where the state of repair or condition is not one that could have been discovered on a reasonable inspection of the premises.</p>	<p>Where condition reports have not been returned to the Agent in accordance with s 36, the term attempts to use the copy of the report retained by the Agent as 'conclusive evidence of the state of repair or general condition of the rented premises'. Neither of the two exceptions at s 36 are expressed to apply to this term. The copy will necessarily not have been endorsed with a tenant's disagreements with the Landlord or Agent's description of the condition or state of repair of the premises. The pre-existing legal position sets a fairer balance between the parties, it treats the co-signed, completed and returned report as conclusive evidence and where the report has not been returned to the agent it treats the document that bares only the comments of the landlord or agent as relevant but not determinative. Moreover in a tribunal or court the tenant may be asked to explain why they did not complete and return a condition report and this may be relevant in determining the weight that should be given to the incomplete report held by the agent.</p> <p>Note: the term is invalid under s 27.</p>
<p>Fire Places</p> <p>Open fire places must not be used without the written consent of the landlord or agent.</p>	32X (a)	<p>Section 68 of the RTA requires a landlord to maintain premises in good repair. Where facilities such as heating have been reduced the tenant may seek a re-assessment of the rent: s45.</p>	<p>A term prohibiting the use of a fireplace must have as its object the avoidance of the mandatory statutory duty and contractual duty to maintain the premises in good repair.</p> <p>This transfers the burden of the repair obligation from the landlord where it legally belongs to the tenant. The term is invalid under s 27.</p>
<p>The tenant acknowledges that the fireplace is not to be used. However should the tenant wish to use the said fireplace, the tenant agrees to arrange at their own expense a professional chimney sweep to clean and to check it's safety.</p>	32X (a)		<p>The term raises the further objection that it transfers from the landlord to the tenant the responsibility of checking the chimney's safety. Ensuring the chimney is kept in a safe condition falls within the landlord's duty to maintain the premises in good repair.</p>
<p>No-smoking</p> <p>The tenant acknowledges and agrees to the landlord's request for the tenant and any visitors not to smoke inside the property.</p>	32W	<p>The RTA neither expressly permits or forbids smoking within the premises.</p>	<p>This is an unreasonable restriction on the tenant's use of the premises. The term is not proportionate to the harm against which it is aimed to protect. The RTA sufficiently protects the landlord's real interest in safeguarding the property.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Tenant Declarations</p> <p>I/We, as the undersigned tenant(s), hereby declare that I/we have read and understand my/our obligations with respect to all of the above.</p>	<p>32X (a) 32X (h)</p>	<p>Section 163 of the FTA imposes an obligation upon suppliers to use consumer documents that are ‘easily legible’ and ‘clearly expressed.’</p>	<p>The UK OFT have said with regard to “read and understood” clauses, that:</p> <p>“The inclusion of a declaration of this kind requires tenants to say these conditions (that is legibility and clarity) have been met, whether that is true or not.” (Guidance [4.33])</p> <p>Their concern, which we share, is that:</p> <p>“In practice, tenants often do not read, and rarely understand fully, any but the shortest and simplest agreements. The fact that this may be undesirable does not justify the inclusion of declarations of doubtful truth or validity. The purpose of declarations of this kind is clearly to bind tenants to terms, regardless of whether they have any real awareness of what they mean.” (Guidance [4.34])</p> <p>Our previous concerns are compounded here, the tenant is said to have divined a “clear understanding”.</p>
<p>I/We have read, initialled and understand all of the above clauses. Any clause that was not clearly understood have been explained to me/us in a satisfactory manner. I/we agree to abide by the above clause for the duration of/my our tenancy.</p>	<p>32X (a) 32X (h)</p>		
<p>Pot-plants</p> <p>The tenant shall not place any pot plants on the carpet/polished floor boards.</p>	<p>32X (a)</p>	<p>Section 61 of the RTA requires the tenant to take care not to damage the premises.</p>	<p>This term is more onerous than s 61 and is invalid under s 27.</p> <p>The restriction is more severe than necessary to protect the landlord’s real interest in safeguarding the property.</p>
<p>Vehicles</p> <p>The tenant/s agrees not to keep any vans, trucks, boats, trailers or immobile vehicles on the premises at any time without the landlords/agents permission. Where applicable, the tenant/s is authorised to park one (1) currently registered and roadworthy motor vehicle or motor cycle on the premises in the space allocated. At no time is a vehicle to be parked on the nature strip or grassed area of the property.</p>	<p>32X (a) 32X (h)</p>	<p>The RTA does not expressly deal with the parking of vehicles on the residential premises.</p>	<p>The part of this term that we particularly object to is the ban on vans and trailers. The term is more onerous than the restrictions on use contained in the RTA. No specific benefit is offered in compensation for the restriction. The term imposes a restriction that is more severe than necessary to protect the landlord’s real interest in safeguarding the property. The term is particularly pernicious where it applies to a person wishing to park a trailer or ute related to their trade, or where it limits the ability of parents to transport their children in a van.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Stamps</p> <p>Rental payments forwarded by mail in the form of cheques will be receipted but receipts will not be sent unless accompanied by a stamped, self-addressed envelope.</p>	32X (a)	<p>Section 43 of the RTA provides that where rent has been paid otherwise than by cash, and a request is made at that time, the person receiving the payment must give a written receipt within 5 days of receiving payment. This is a penalty provision. Where a document must be given under the Act, s 506 specifies the manner in which this may be done. This includes posting the document or delivering it personally if does not include printing the document out and filing it away.</p>	<p>The term attempts to avoid a mandatory provision of the RTA. It is invalid, unenforceable and misleading.</p> <p>The term purports to transfer part of the financial burden of complying with the mandatory provision from the landlord to the tenant.</p> <p>There is no balancing right for the tenant to be reimbursed for postal costs that arise from landlord demands.</p>
<p>Availability</p> <p>The Tenant agrees that this lease is subject to the property being available for occupation by the commencement date of this lease and will not hold the Agent or Landlord responsible if the property is not available at that time.</p>	32X(a) 32X(k)	<p>Section 65 of the RTA requires the landlord to ensure that “the rented premises are vacant and in a reasonably clean condition”. Section 216 ensures that a tenancy cannot terminate except in accordance with the Act.</p> <p>A note on conditions precedent and conditions subsequent. The definition of tenancy agreement at s 3 of the RTA refers to an agreement but not a proposed agreement. Part 2B of the FTA also applies to an agreement but not a proposed agreement. It is arguable therefore that a condition precedent can not be the subject of challenge under s 27 or Part 2B.</p> <p>Since a condition subsequent does not prevent the tenancy agreement from forming, rather it may ordinarily be relied on to terminate where the condition has not been met, it may be the subject of a challenge under those provisions.</p>	<p>In so far as the term might be read as a condition precedent, that form of mechanism may successfully avoid the obligation imposed by s 65. It is arguable that such a clause may not be properly treated as a term of a tenancy agreement prior to the formation of the agreement. It would therefore arguably not be subject to challenge under s 27 or Part 2B.</p> <p>It is likely however that the courts or tribunal would construe a condition such as this as a condition subsequent.</p> <p>Section 27 would invalidate the clause, it is plainly contrary to ss 65 and 216 of the RTA.</p> <p>Note also that the restriction against holding the Agent or Landlord responsible seeks to restrict the ability of the tenant to sue.</p>
<p>Vermis</p> <p>The tenant is responsible for the cost of removing vermin, ants, insect's etc from the property if they appear during the term of the tenancy.</p>	32X(a)	<p>The landlord must let the premises in a reasonably clean condition (s 65) and maintain them in good repair (s 68). A tenant is otherwise required to maintain the premises reasonably clean (s 63).</p>	<p>Where vermin result from a breach of ss 65 or 68 then the landlord will be responsible for rectifying the problem. The term purports to bypass these duties and is invalid by virtue of s 27.</p> <p>It is reasonable to require tenants to attend to vermin that result from a breach of s 63. Vermis may appear without there having been a breach of the RTA. A term that is targeted to the above two contingencies is less likely to be the subject of objection.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Principal Place of Residence</p> <p>The tenant acknowledges that immediately before the tenancy agreement was entered into, the rented premises were the landlord's principal place of residence and the landlord intends to resume occupancy of the premises on termination of the tenancy agreement.</p>	<p>32X (a)</p>	<p>Section 254 of the RTA permits a landlord to serve a notice of not less than 14 days for a tenant to vacate the premises where three conditions are met:</p> <ol style="list-style-type: none"> 1) the premises were the landlord's principal place of residence immediately before the tenancy agreement or immediately before the prior tenancy agreement (254(a)) 2) the tenancy agreement states this fact (254(b)) 3) the tenancy agreement states that the landlord intends to resume occupancy of the premises on the termination of the agreement (254 (c)). 	<p>Part 2B of the FTA does not apply to contractual terms that are "expressly permitted by law, but only to the extent required or permitted." The extent that such clauses are required or permitted under the RTA is the extent to which they accurately reflect the situation and intention of the landlord. They are not required or permitted by the RTA where they are placed into agreements as a matter of course without regard to the actual situation or intention of the landlord. The practice is both misleading and imbalancing.</p>
<p>Principal Place of Residence</p> <p>Where a Landlord under a fixed term tenancy agreement lets the Landlord's premises that immediately before entering into the agreement was his Principal Place of Residence, the Landlord may at least fourteen (14) days before the end of the term of the tenancy agreement give to the tenant notice to vacate specifying a termination date that is the date of or a date after the end of the term.</p> <p>The legislation provides for the landlord/agent to issue a minimum of 14 days notice to vacate prior to the termination date of this agreement.</p>	<p>163 32X (a)</p>		<p>This term is both ambiguous and unsatisfactory. It reads as an incomplete and misleading description of the right of a landlord to issue a notice under s 254 because it makes no reference to the landlord's intention to resume occupancy of the premises (sub-s 3). Moreover it is unclear whether it is intended to operate as a general description of a right to issue a notice or purports to be in fact a statement made under sub-ss 2 & 3. In the former case it is inaccurate and unnecessary. In the latter case it does not conform with the requirements of section 254 and is ineffective.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Legal Costs</p> <p>The tenant shall meet the legal costs incurred by the application and appearance of the Agent at the Residential Tenancies Tribunal (s1c), during the term of the tenancy.</p>	<p>32X (c) 32X (k)</p>	<p>Generally before VCAT, each party is to bear their own costs: s 109(1) VCAT Act. In the courts costs will ordinarily follow the event.</p> <p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than "rent under the tenancy agreement or; an amount or penalty provided for in this Act."</p>	<p>This term requires the tenant to bear all legal costs incurred, the term upsets the balance reached by both the VCAT Act and general law.</p> <p>Such costs would penalise the tenant for exercising their rights where that involves legal action or causes legal costs to be incurred. Where action results from a breach by the tenant the RTA sets the amount that may be charged by a landlord or agent as a result of the breach.</p> <p>The term penalises the tenant for breach in circumstances where no such penalties apply to the landlord.</p>
<p>Tenant Vacating</p> <p>The tenants undertake to pay their rent to the vacating date and delivery of vacant possession. If they are unable to give vacant possession to the subject property on the vacating date, they agree to indemnify both the landlord and Agent against any legal action brought against them. The tenant/s also agree that any variation of their vacating date must be applied for in writing and agreed to by the landlord or his agent and if necessary the next subsequent tenant of the subject property.</p>	<p>32X (a) 32X (c)</p>	<p>Section 216 of the RTA provides that the Act exhaustively defines the manner in which a tenancy agreement may terminate. Until the tenancy terminates the tenant will have a right to possession of the premises and the landlord a right to rent. If a tenant has served a notice of intention to vacate under s 235 of the RTA the tenancy will not terminate until either the tenant moves out or VCAT makes a possession order under s 330 and a warrant of possession is executed. Under s 229 'a landlord or a person acting on behalf of a landlord must not, except in accordance with this Act – require or compel or attempt to compel the tenant under the tenancy agreement to vacate the rented premises.' Section 505 prohibits penalties that are not permitted by the Act.</p>	<p>The term is invalid under s 27 of the RTA, it is unenforceable and misleading. It is inconsistent with the scheme for termination and offends both against ss 229 and 505.</p> <p>The term entitles the landlord to a continued right to rent but penalises the tenant for exercising their right to possession. The tenancy agreement contains no reciprocal penalty upon the landlord.</p>
<p>Broken Glass</p> <p>The tenant/s shall be responsible for any broken glass during the term of the tenancy, or shall be liable for any excess on insurance cover claims during the term of the tenancy</p>	<p>32X (a) 32X (h)</p>	<p>The RTA comprehensively allocates responsibility for damage to the premises. Section 61 imposes liability on tenants where they have failed to ensure that care is taken to avoid damaging the premises, excepting 'fair wear and tear'. The landlord bears the burden of all other damage. Under s 68 if such damage renders the premises in bad repair then the landlord must rectify it.</p>	<p>As a class of damage there is nothing intrinsic to broken glass that would suggest that its incidence will necessarily be caused by a tenant's failure to take care. For example the damage may be caused by a fallen tree, a design defect or a breach of the landlord's repair duty.</p> <p>The term limits the landlord's duty under s 68 and expands the tenants duty beyond s 61.</p> <p>The term is invalid under s 27; it is unenforceable and misleading.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Clothes Hanging</p> <p>The tenant agrees not to hang or place any article of clothing/washing outside the premises or on any part or portion of the balcony.</p>	32X (a)		<p>The restriction is more severe than necessary to protect the landlords real interest in safeguarding the property.</p>
<p>Phone Contact for Maintenance</p> <p>The tenant agrees that should any maintenance be required at the premises the tenant's contact details can be given to the agent's tradespeople.</p>	32X (a)	<p>Section 67 of the RTA provides that the landlord must take reasonable steps to ensure that the tenant has quiet enjoyment of the premises.</p> <p>Section 68 requires the Landlord to maintain the premises in good repair. In undertaking this duty it will be the responsibility of the Landlord or their representative to make necessary arrangements with tradespeople to attend to the maintenance.</p> <p>As a matter of practicality it may be in the tenant's interest to be flexible as they will ordinarily want the repair to be completed promptly. For this reason a tenant may choose to volunteer their contact details to a tradesperson. A tenant is entitled however to require a landlord to comply with the entry provisions of the RTA. Since a tradesperson is usually an independent contractor and not an agent of the landlord the tenant is entitled to insist that the entry be supervised by the landlord or the landlord's agent. The tenant need not be in attendance during such entry.</p> <p>Moreover such an entry under s 85 entitles the tenant to compensation from the landlord where the tenants belongings have been damaged by the tradesperson. This is a protection that is not available if the entry is not an entry under s 85.</p>	<p>The disclosure of the tenant's private contact details will only be necessary if the tenant consents to the entry in the absence of the landlord or the landlord's agent. The relevant time for seeking such consent is at the time that the repairs issue arises and not at the commencement of the tenancy. Consent may only be granted up to 7 days prior to entry. An unrestrained right for landlord's to release tenants' details to tradespeople may lead to a breach of a tenant's right to quiet enjoyment. It may result in pressure being applied directly or indirectly for them to not rely on their legal right to insist that any entry be made under s 85. The entry provisions balance the landlord's right to enter the premises with necessary persons for the purpose of undertaking repairs with the tenants right to quiet enjoyment of the premises. This term departs from that balance to the detriment of the tenant. Furthermore it has the apparent object of shifting the landlord's responsibility to organise repairs to the tenant.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>No-pets</p> <p>The tenant shall not keep any pets on the premises without prior consent from the Landlord.</p>	32W	<p>The stated purpose of the RTA is to “define the rights and duties of landlords and tenants”. The Act neither expressly permits or forbids the keeping of pets in residential premises. Relevantly the Act does require a tenant to:</p> <ol style="list-style-type: none"> 1) ensure that care is taken to avoid damaging the premises; 2) maintain the premises in a reasonably clean condition; and 3) not cause nuisance or interference with neighbours. <p>An extensive enforcement process is provided where these duties are breached.</p> <p>Commentators have generally considered that no pets clauses are not inconsistent with the RTA.</p>	<p>The restriction is more severe than necessary to protect the landlord’s real interest in safeguarding the property.</p> <p>The existing duties and enforcement regime may be said to adequately provide such protection.</p> <p>The ban is too broad in scope, for example it applies to pets that are unlikely to cause damage such as goldfish.</p> <p>The UK OFT have said:</p> <p>Our objection is to blanket exclusions of pets without consideration of all the circumstances... We are unlikely to object to a term prohibiting the keeping of pets that could harm the property, affect subsequent tenants or be a nuisance to other residents.</p> <p>Several courts in the EU applying similar provisions have ruled no pets clauses invalid.</p>
<p>Dishonoured Cheques</p> <p>The tenant acknowledges and agrees that a fee of \$50.00 will be charged for dishonoured cheque. Should a rental cheque dishonour, personal cheques will no longer be accepted under any circumstance.</p>	32X (c)	<p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than “rent under the tenancy agreement or; an amount or penalty provided for in this Act.”</p>	<p>The fee is prohibited by s 505. The term is invalidated by s 27, is unenforceable and misleading.</p> <p>The fee is charged irrespective of whether the bank has charged the Agency.</p> <p>The term does not penalise the landlord for his or her dishonoured cheques.</p>
<p>The tenant shall pay \$30.00 for any dishonour cheques incurred to the Estate Agent - \$10 bank fees and \$20 administration fees. Should this cost not be met at the time of dishonour, then the tenant agrees for the Estate Agent to deduct the amount from their security deposit.</p>	163	<p>The scheme for the lodgement and release of bonds does not empower an Estate Agent to make deductions from bonds based on an agreement reached at the commencement of the tenancy. Rather the parties may agree no earlier than 7 days before the termination of the agreement for the release by the RTBA of an amount of bond to the landlord. Sections 414, 417, 418 and 419 define the grounds upon which a landlord may apply for an order from the Tribunal that the RTBA release an amount of bond.</p>	<p>Reference to a security deposit does have some, albeit marginal, effect on the intelligibility and clarity of the term since the RTA uses the word bond and the schedule and remainder of the tenancy agreement in which this term appears uses the word bond.</p> <p>The meaning of ‘deduction’ is unclear as it makes no reference to the need for either consent of both parties or involvement of the tribunal in an application for a bond amount.</p> <p>More fundamentally such an application may only be made on the grounds listed at the abovementioned sections, an invalid penalty clause is not a valid ground for application under these sections.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Late Rent Penalty</p> <p>The tenants shall meet any costs incurred by the Managing Agents to retrieve arrears of rent.</p>	32X (c)	<p>Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than “rent under the tenancy agreement or; an amount or penalty provided for in this Act.”</p> <p>Section 213 states that a landlord is not entitled to claim compensation for non-payment of rent unless the tenant is in 14 days of arrears or on two previous occasions the tenant has fallen into arrears of greater than 14 days.</p>	<p>This clause is contrary to s 505 and is invalidated by s 27. There is no reciprocal penalty imposed upon the landlord.</p>
<p>As Is Clause</p> <p>The tenant acknowledges that the property is let ‘as is’ except for ‘emergency’ repairs, and accept the landlord’s decision regarding same.</p>	32X (a) 32X (h) 32X (k)	<p>Section 68 of the RTA imposes a mandatory duty upon landlords to maintain let premises in good repair. The duty is also contained in the prescribed standard form contract.</p> <p>Section 65 requires the landlord to ensure that premises are vacant and reasonably clean on the day that the tenant is to take occupation. Again the duty is reflected in the prescribed standard form contract.</p> <p>Tenants may enforce these duties. They are also not required to move into the premises until s 65 is complied with. Under s 226, tenants may also terminate the tenancy before moving in by giving notice where they are not in good repair.</p>	<p>The term is completely inconsistent with the mandatory duties contained in the RTA. It is invalid, unenforceable and misleading.</p> <p>The term purports to permit the landlord’s to significantly limit his or her obligations under the tenancy agreement.</p> <p>The requirement that the tenant must accept “the landlord’s decision regarding same” purports to give the landlord the power to interpret the contract with respect to the condition of the premises</p>
<p>Periodic Inspections</p> <p>The tenant acknowledges that periodic inspections will be carried out at six monthly intervals or at any given time by prior arrangement.</p>	163 32X (a)	<p>Section 85 of the RTA provides that consent may be provided by the tenant for entry into the rented premises up to 7 days prior.</p>	<p>The reference to “prior arrangement” is too imprecise. It underplays the need for the tenant’s consent if the entry is not under s 86 (a) second general inspection within 6 months will not be under s 86) and makes no reference to the 7 day time limit.</p>
<p>Notice of Intention to Vacate</p> <p>If the tenant wishes to vacate the premises at or after the expiration of the tenancy agreement, the tenant is required to give twenty-eight days notice, in writing.</p>	32W 32X (h)	<p>Section 237 of the RTA provides that a tenant may give a reduced period of notice of intention to vacate, 14 days, in the specified circumstances.</p>	<p>This term is invalid under s 27 and is misleading.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Part Payments</p> <p>All rental payments shall be made on time and for the full amount. No part payments will be accepted.</p>	<p>32W 32X (a) 32X (c) 32X (h)</p>	<p>Section 40 of the RTA restricts a landlord from requiring the payment of rent under a tenancy agreement more than one month in advance, unless the weekly rent exceeds \$350. Section 39 of the RTA states that 'For the purposes of the Act rent under a tenancy agreement accrues from day to day and, subject to section 242, is recoverable or refundable accordingly.' Section 242 deals with the retention of paid rent in the case of abandonment. A notice to vacate for rental arrears may be issued if a tenant is in 14 days of arrears. In dismissing or adjourning an application for possession based on rent arrears for the reason that satisfactory arrangements can be made to avoid financial loss to the landlord, the tribunal might see fit to make an order that arrears be paid off by part payments (s 331).</p>	<p>The term is inconsistent with s 39 and is not redeemed by s 40.</p> <p>The term purports to restrict the tenant from making part payments. Whilst the tenant is thus restricted the landlord may demand full payments pursuant to the term or part payment pursuant to s 39.</p>
<p>Time for Return of Keys</p> <p>The Tenant/s agree to return all keys to the premises including all relevant remote controls, to the Agent by 10.30 am on the day of vacating the premises. The Tenant/s will continue to pay rental until the key/ and remote controls are returned.</p>	<p>32W 32(a)</p>	<p>Section 216 of the RTA provides that tenancy agreements must terminate in accordance with Division 1 of Part 6, Part 7 or 8 of the Act. Section 219 provides that the tenancy will terminate where a tenant has been given a notice to vacate or has given a notice of intention to vacate and either the tenant vacates the rented premises or the tribunal process for possession is duly followed. The termination provisions do not empower landlords to set a time of day at which possession is to be handed over.</p>	<p>The return of the keys will ordinarily be the act that completes the return of possession of the premises to the landlord. The term therefore is not merely imposing a direction as to how the keys are to be returned, but rather the term is seeking to control the time of day at which the tenancy does in fact terminate. The RTA however exhaustively determines the manner in which a tenancy may terminate. The term is therefore invalid under s 27.</p> <p>The term provides to the landlord a right to receive rent but seeks to permit the landlord to avoid performance by demanding the early hand-back of possession.</p> <p>There is no reciprocal promise to provide the premises to the tenant before 10.30 am on the commencement date.</p> <p>Such a brief window of time for the return of the keys is an unreasonable demand in its own right.</p>

Typical and Variant Terms	FTA Sec. No.	Legal Context	Commentary on the Terms
<p>Contents Insurance</p> <p>The tenant acknowledges that the tenant shall insure their possessions. The tenant also acknowledges that the landlord's insurance policy will not provide cover for such possessions.</p>	32W	The RTA is silent on home contents insurance.	We object to this term on the ground that it has the potential to impose an unreasonable financial burden upon tenants. We concur with the view of the UK OFT "whether tenants wish to insure their own personal belongings is a matter for them and ... it is unreasonable for the landlord to make this a contractual requirement." (Guidance, [4.15])
<p>Lease breaking (1)</p> <p>Pay the Agent a letting fee equivalent to one weeks rental, plus all advertising.</p>	32X (c)	Sub-section 505(1) of the RTA prohibits a landlord from demanding or accepting any amount other than "rent under the tenancy agreement or; an amount or penalty provided for in this Act."	The term in charging a fixed letting fee of one week's rent, specifies an amount that is payable if the tenant breaks the lease. This is prohibited by sub-s 505(1). The term is therefore invalid under s 27, unenforceable and misleading. Further both the letting fee and advertising are not a reasonable pre-estimate of loss since they are not proportionate to the time left to run on the fixed term. Further tenancy agreements invariably fail to impose upon landlords early termination penalties where their repudiatory conduct results in early termination.
<p>Lease breaking (2)</p> <p>Pay rent in accordance with the current lease until the commencement of the following tenancy or the expiry of the lease.</p>	32W 32X (c) 163	See s 505(1) cited above. Section 211 set out the matters that may be considered by the Tribunal in determining a compensation claim, including whether the landlord has taken action to mitigate the loss or damage. Under the RTA the tenant can unilaterally terminate the tenancy agreement (s220). (See commentary in the Annotated Residential Tenancies Act [220.03])	Rent is payable for so long as the tenancy continues. The obligation to pay rent ends when the tenancy terminates. Generally a tenant who has broken a lease will be liable to pay compensation for lost rent. However, in determining the amount of compensation payable the tribunal ought to have regard to the matters listed at s 211. Most relevant of these is whether the landlord has taken action to mitigate the loss or damage, specifically whether the landlord has sought new tenants. The object of the term is to require the tenant to pay rent when it would have been payable had the tenancy continued. This is an attempt to bypass the process for claiming compensation set out in RTA and specifically to bypass s 211. The demand to "pay rent in accordance with the lease" is ambiguous since the lease has terminated. Contrary to s 505 the rent demanded is in fact not "rent under the tenancy agreement" nor is it "an amount or penalty provided for in this Act". The term is invalid under s 27. It is unenforceable and misleading.

