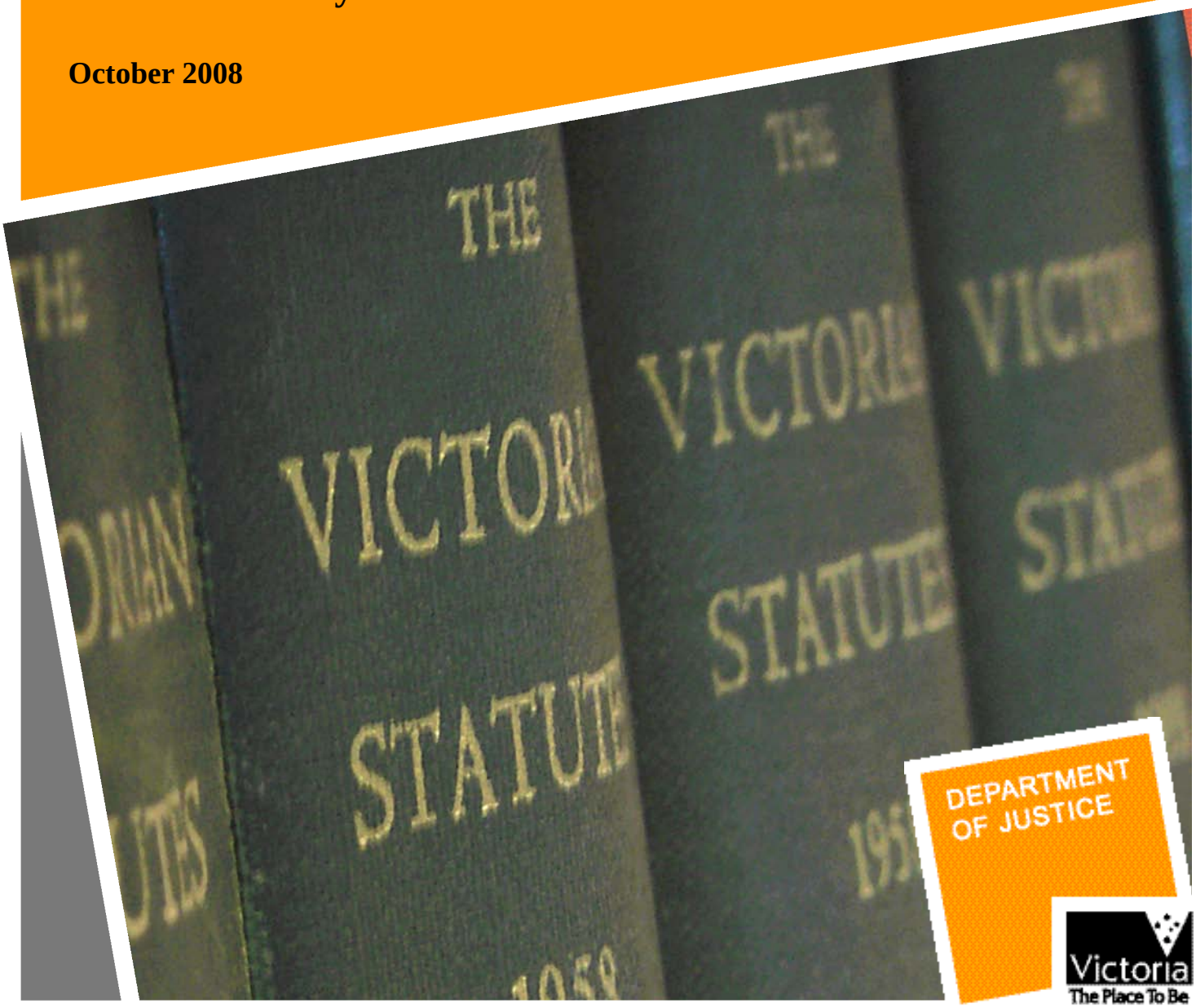
Landlord and Tenant Act

Options Paper

Consumer Affairs Victoria

Modernising Victoria's Consumer Policy Framework

October 2008



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STATEMENT FROM THE MINISTER FOR CONSUMER AFFAIRS

Consumer Affairs Victoria administers 49 Acts and 50 supporting Regulations. This number has grown over time in response to a range of consumer and business needs.

I have initiated a project to modernise Victoria's consumer protection legislation. Among other things, this project will review and, where appropriate, make recommendations to repeal or update potentially redundant or outdated legislation. The project will also seek to remove any regulatory duplication or requirements that impose an unnecessary administrative or compliance burden or make it difficult for consumers and businesses to understand their obligations.

As part of this project, I have asked Consumer Affairs Victoria to review the *Landlord and Tenant Act 1958* to determine whether the Act may be redundant or could be updated.

This helps meet the Victorian Government's commitments to:

- complete the process of modernising all of Victoria's legislation so that by 2010 all laws will have been reviewed and modernised within the past ten years
- repeal all old and redundant legislation to reduce the number of laws by 20 per cent compared to 1999, and
- ensure all laws are written in plain English and are easy to understand.

In order to assist in determining the current status of the Landlord and Tenant Act, Consumer Affairs Victoria has prepared the attached Options Paper, which discusses the Act and its current operation, and presents options for reform.

I encourage all stakeholders with an interest in this area to make a submission to help inform future policy development.

HON TONY ROBINSON MP

MINISTER FOR CONSUMER AFFAIRS

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1. Executive Summary

The purpose of this paper is to review Victoria's *Landlord and Tenant Act 1958* (the Act) which regulates tenancy relationships not covered by residential or retail tenancy legislation. Prior to the 1980s, which saw the introduction of specific residential and retail tenancy legislation, the Act and common law governed all relationships between landlords and tenants.

Today, the Act has three main policy objectives. The first objective, which is contained in Part V is to subject any increase in the rental of prescribed premises to the independent arbitration of a Fair Rents Board (administered by the Victorian Civil and Administrative Tribunal (VCAT)). The second objective, also contained in Part V, is to limit the capacity of the landlord to evict tenants of prescribed premises, especially where significant hardship to the tenant can be demonstrated. These two objectives only apply to the letting of any 'prescribed premises' — any premises that has been let as a residence between 31 December 1940 and 1 February 1954, and where the current tenancy agreement has continued since 1 January 1956.

The third objective, pertaining to Parts I-IV is generally to protect leases not covered by specific residential or retail tenancies legislation. Given the wording contained in those provisions, it would seem that they mainly cover, but are not limited to, agricultural leases. For example, provisions with general application contained in these Parts prohibit the common law remedy of 'distress for rent', which allows a landlord to take possession of tenant's possessions if the tenant is in arrears in their rent, and also a tenant to remove and be compensated for fixtures that they erect or improve whilst in ownership of the lease.

Since the implementation of specific residential and retail tenancy legislation, the use of the Act has diminished considerably. Therefore, it is worth examining whether it is still necessary to retain these provisions. However, repealing the Act in its entirety, without retaining the protections contained in Part V accorded to protected tenants would disadvantage the small group of tenants still in long term leases. Furthermore, there may be other provisions contained in the Act that are of some use today, such as the abolition of distress for rent or relating to the removal of fixtures.

After consideration of all the legislative options, it is recommended that the following changes be made:

- the Act be repealed
- provisions relating to protected tenancies found within the Act be modernised and moved to the *Residential Tenancies Act 1997* (RTA).

2. Background

The Consumer Affairs portfolio encompasses a large suite of consumer protection and business licensing legislation — 49 Acts and 50 regulations. This body of legislation has grown over time in response to specific consumer protection issues and the development of key industry sectors.

The Victorian Government has committed to modernising Victoria's legislation so that by 2010 all laws will have been reviewed and modernised within the past 10 years, the statute book will be reduced by 20 per cent compared to 1999 and the regulatory burden on business will be reduced.

To help meet these commitments, the Minister for Consumer Affairs, Mr Tony Robinson MP, has initiated a project to modernise the consumer affairs legislation. This project aims to:

- rationalise the statutes and regulation for which Consumer Affairs Victoria is responsible
- provide a simpler framework for ensuring consumer protection
- review the language used in this legislation to be both more user friendly and consistent with reforms in other jurisdictions.

Part of this project is identifying legislation that may be redundant or dated and, through community consultation, resolve its status and propose appropriate actions. Maintaining this legislation causes confusion and unnecessary compliance costs for business and consumers as well as increasing the monitoring costs of enforcement agencies. Removing or reforming redundant or dated legislation, along with providing 'plain English' consumer protection legislation, will provide a more informed market.

In reviewing the Consumer Affairs statute book, the Act has been identified as either potentially redundant or in need of reform. The Government is prepared to consider removing legislation where it is clear that such legislation no longer assists consumers and business in better trade and commerce. However, it does so recognising that the Act may serve other purposes.

In order to assist in reviewing the Act, this discussion paper has been prepared which discusses the Act and seeks stakeholder feedback.

2.1 Structure of this paper

In reviewing the Act, the paper follows the process established by the Victorian Competition and Efficiency Commission (VCEC) in its *Review of the Labour and Industry Act*, which examined that Act to determine whether its repeal would place an undue burden on any sections of the community, or prevent the achievement of the Victorian Government's policy objectives.

Through its work, VCEC established a process for assessing the ongoing usefulness of legislation. This paper follows this process established by VCEC; it addresses the questions outlined above and seeks public comment.

2.2 Scope of the paper and the review process

In discussing the Act the following questions should be considered:

- is the Act redundant, in whole or in part?
- is there other legislation that could provide equivalent outcomes to the Act?
- could relevant parts of the Act be incorporated into other legislation?

In answering these questions this discussion paper:

- outlines the policy objectives of the legislation
- reviews the operation of the Act and the history of the Act
- identifies what aspects of the Act are potentially redundant
- reviews alternative means of achieving the same policy outcomes and considers the merit of transferring provisions to other pieces of legislation to maintain the broad objectives of the Act
- presents a range of options for dealing with the Act
- presents a preferred recommendation.

The purpose of this discussion paper is to elicit additional viewpoints and data from stakeholders to assist the government in determining the best course of action for dealing with this Act.

Submissions from stakeholders in response to this paper are welcome.

3. About the Landlord and Tenant Act 1958

3.1 Context to the introduction of the Act

Prior to 1981, the *Landlord and Tenant Act 1958* (the Act) and common law governed relationships between landlords and tenants. The Act itself reflects the desire of the Victorian Government during and immediately after the Second World War to legislate to protect tenants (in particular, returning servicemen and women and their families) of residential and farming rental properties from, among other things, rising rents and property speculation. These problems resulted from a shortage of housing and low rates of home ownership at the time (The Asher Report: 1995, p. 77).

Large parts of the Act are derived from the *Landlord and Tenant Act 1928*, which was in turn modelled on similar English tenancy legislation. This older Act reflected landlords' rights as derived from nineteenth century English case law. It did not interfere with the lease which was drawn up by the landlord, or with property rights.

Although provisions for rent control by state or federal authorities were in force during the depression of the 1930s, the first rent control provisions were contained in the Victorian *Fair Rents Act*, which came into force in 1938. This Act provided for a landlord or tenant to apply to a Court of Petty Sessions for the fair rent of the premises to be determined.

In 1939, over 50 per cent of Australians were residential tenants of private landlords. Therefore, the Federal Government deemed it necessary to fix and control the level of rents for both homes and business as part of general price controls imposed at the start of the Second World War. In 1941, the Commonwealth introduced new National Security (Landlord and Tenant) Regulations, replacing 1939 regulations of the same name. Under these regulations, rents in Victoria were frozen at the amount payable on 31 December 1940 and the role of a Commonwealth Rent Controller was established to determine appropriate evictions and variations to rent. Restrictions on eviction were even more stringent where the tenant had any record of war service.

In 1948, with the expiration of regulations made under the National Security Act, the *Landlord and Tenant (Amendment) Act* transferred the responsibilities of the Rent Controller to a Fair Rents Board. Under this Act, the Governor-in-Council could constitute a Board in any place in Victoria that was deemed to be appropriate. Each Board consisted of one stipendiary magistrate.

In 1956, the *Landlord and Tenant (Amendment) Act 1956* was assented to. This Act provided that any tenancy started after 1 January 1956 was no longer protected. High rents could still be referred to the Fair Rents Board, but its powers were now very limited unless the property was one of the very few 'special premises' put under control of the board on the evidence of excessive rents being charged.

The introduction of the *Landlord and Tenant Act 1958* kept what was left of the wartime regulations in a separate section (Part V) to cover pre-1956 tenancies and the few 'special premises' created by government order. Part V also continued to grant additional special rights to tenants with war service, though these rights were gradually reduced.

In 1956, when the cut-off point to qualify as 'protected tenant' was established (the Act refers to a 'prescribed premises' in which a tenant lives, rather than a 'protected tenant'), it was estimated that there were approximately 180,000 tenancies in Victoria

(virtually all rented homes). However, by 1971 this estimate, by reason of tenants moving from their properties, had dropped to somewhere between 15,000 and 20,000. (Macrae: 1995, p. 96)

In Victoria, with the return of servicemen from the Second World War, share-farming and tenant farming grew in importance. At the time many tenant farmers in Australia were people with limited farming knowledge and experience and very limited capital. They were vulnerable to exploitation and ill-equipped to protect their own interests. Parts I, II, III and IV of the Act, although not limited to agricultural matters, were introduced to provide, among other things, protection to agricultural tenants.

Parts I, II, III and IV provided the content (Part I) and responsibilities that form part of the deeds and leases over farming property, such as 'agricultural leases'; the execution, seizure and management of goods and produce by a third party (Part II); the removal of fixtures (Part III); proceedings to recover possession (Part IV); and the removal and disposal of goods that remain on a vacated property (Part IVA). These provisions were modelled on English legislation of the mid-nineteenth century (*Agricultural Tenancies Act 1851*).

By the end of the 1980s, the position of tenant farmers and sharefarmers had changed considerably. The number of people employed in farming and the number of farms had reduced substantially. Although the actual number of these leases is not known, land tenure today is mostly under freehold title or some form of long term lease from the Crown (to which the Act does not apply), with freehold being predominant in the more productive and closely settled regions (ABARE: 2006).

3.2 Reviews of the Act

In 1980, this decline in protected tenancies prompted the Victorian Government to propose phasing out protected tenancies with tenants instead being covered by the *Residential Tenancies Act 1980*. The 1980 Residential Tenancies Act gave landlords 12 months after it came into effect in November 1981 to register their protected tenants. By November 1983, the property would cease to be controlled. If the tenancy was not registered by the landlord by November 1982, the tenant would lose the protected status accorded to them under the Act immediately. However, when the government changed in 1982, these provisions were repealed.

A register was established as a prelude to the proposal to eliminate Part V of the Act. The register contained properties registered by landlords of tenancies known to still be protected by the records of the Fair Rents Board and the Rental Investigation Bureau. In 1982 the register tallied 726 protected properties (Macrae: 1995, p. 96).

The Ministry for Consumer Affairs (now Consumer Affairs Victoria), in 1991, reviewed and updated the register (now held by VCAT) by sending a questionnaire to all known controlled premises and found that there were 220 properties housing 265 tenants (Ministry for Consumer Affairs: 1991).

In 1995, the Tenants Union of Victoria (TUV) predicted that there were approximately 155 protected tenancies remaining, housing approximately 220 people (Macrae: 1995, p. 26). This is the last available figure regarding the number of remaining protected tenancies.

The Asher Report of 1995 provided a discussion on protected tenancies demonstrating the views on the Act from particular stakeholders. For example, some individual landlords suggested that, given the low numbers of protected tenancies remaining, the

Act should be abolished and provide immediate possession of such properties to the owners. Many owners considered that the Act is unfair and has an adverse financial effect on them, and that the cost for support of protected tenants should be borne by the government (The Asher Report: 1995, p. 78).

The Real Estate Institute of Victoria (REIV) considered that the right of succession for protected tenants should be removed and supported initiatives through legislation to phase out protected tenancies over a period of time (The Asher Report: 1995, p. 78).

The Victorian Consumer Affairs Committee, Victorian Council of Social Service, Prahran Community Housing, the TUV, and Wimmera Regional Housing Council all preferred that protection for tenants be maintained under the Act, as all the tenants are elderly, many are in a state of poor health and moving may present them with great trauma (The Asher Report: 1995, p. 78).

It was argued in the Asher Report that many protected tenants have regularly performed general maintenance and some have in the past upgraded the standard and the facilities of their properties. However, at the time, it was indicated that many of these properties were becoming very run down, and this is likely to have become worse in the ensuing 13 years. Many landlords have no incentive to maintain or upgrade their property, claiming that the rent return is not sufficient to afford the cost of repairs or upgrade. Given the value of the land the property is located on, others plan to demolish the building at the conclusion of the protected tenancy.

The Residential Tenancies Legislation Review Committee recommended that a satisfactory resolution of the issues for both protected tenants and landlords could be achieved through a change in housing policy rather then legislative reform. The Committee recommended that the Minister for Housing institute a 'Protected Tenants Policy' with the following characteristics:

- protected tenants who choose to remain in their current dwellings have the right to do so. This would see the existing provisions of Part V of the Landlord and Tenant Act remain. Because of the legal doubt regarding succession, the Act should be amended to ensure that the only succession rights are to a cohabiting spouse (there continues to be uncertainty regarding whether children of the lessee, who have remained in continuous occupation of the property since 1956, can succeed to the protected tenancy)
- the Minister for Housing makes an offer of priority public rental housing of an appropriate size and location to each protected tenant, with standard public housing conditions to apply including provision of affordable rebated rent and security of tenure
- where such an offer cannot be made, or is unacceptable to the tenant, the Office of Housing may enter into a head leasing arrangement with the owner of the property, where the Office of Housing would pay full market rent to the owner, and sub-lease, at the current rent, to the protected tenant
- in situations where the property does not meet appropriate standards and where the owner, despite receipt of full market rent, was not in a position to upgrade the property, the Minister for Housing may provide low cost finance, secured by a charge against the property, to enable the owner to undertake necessary repairs.

However, none of these recommendations was implemented. The Ministry for Consumer Affairs published the *Information Paper on Protected Tenants in Victoria* in 1991, which stated that natural attrition would result in very few protected tenancies remaining by the year 2000.

There have been no reviews with regard to the provisions found within Parts I-IV of the Act, which apply to, among other things, agricultural leases. New South Wales introduced the *Agricultural Tenancies Act 1990* and subsequently reviewed this Act in 1998-99, with amendments being made in 2001.

3.3 Content of the Act

Protected Tenancy Leases

Part V of the Act covers tenants that have been in continuous occupation of any "prescribed premises", which is generally defined as a premises:

- that has been let as a residence at some time between 31 December 1940 and 1 February 1954, and
- where the current tenancy has continued from prior to 1 January 1956.

Once prescribed, a premises generally remains so under the Act, until such time as the tenant:

(i) enters into a lease for three years or more

(ii) vacates, or

(iii) dies. Where the tenant's spouse was living at the premises immediately prior to the tenant's death and continues in occupation afterwards, the premises remains prescribed. If the tenant died before 1 May 1972, the premises may also remain prescribed where a parent, sibling or child of the tenant has continued in occupation. However, this would depend on a decision by the Victorian Civil and Administrative Tribunal (VCAT) in each individual case.

Other leases covered by the Act

Parts I, II, III and IV of the Act relate to the content (Part I) and responsibilities that form part of the deeds and leases over land (and accompanying buildings etc), such as 'agricultural leases', although leases covered by the Act are not limited to agricultural leases. Section 3 of the Act suggests that that deeds and leases do not necessarily need to be in the form outlined in the Schedules of the Act. Further, it seems that for the lease to be an 'agricultural lease' the objective nature of the premises, not the subjective intention of the occupiers, would need to be taken into account (See *Gallo Shire Council v Dawson Bloodstock Agency Pty Ltd* (1972) 25 LGRA 256). Generally, only the immediate use of the property is what is relevant and this must involve the growing of stock or crops (See *G Cramp & Sons Ltd v FCT* (1965) 115 CLR 171).

Generally, the provisions found within Parts II-IV relate to:

- the execution, seizure and management of goods and produce by a third party (Part II)
- the removal of fixtures (Part III)

- proceedings to recover possession (Part IV)
- the removal and disposal of goods that remain on a vacated property (Part IVA).

3.4 Objectives of the Act

Protected tenancy leases

With regard to protected tenancies, the Act has two primary policy objectives that aim to protect tenants that have been in continuous occupation of any "prescribed premises", which is generally defined as a premises that has been let as a residence at some time between 31 December 1940 and 1 February 1954, and where the current tenancy has continued from prior to 1 January 1956.

These objectives are reflected in Part V of the Act. The first objective is to subject any increase in the rental of prescribed premises to the independent arbitration of a Fair Rents Board (administered by VCAT), and to ensure that rents were fixed on the basis of the tenant's ability to pay, rather than simply the market rent or the wishes of the landlord. The second is to limit the capacity of the landlord to evict the tenant, especially where significant hardship to the tenant can be demonstrated.

The landlord may apply to VCAT for a determination that a premises should cease to be prescribed, on the grounds that the total earnings and income of the tenant and members of the tenant's family "ordinarily residing" at the premises are such that no hardship would be caused to the tenant if the premises ceased to be prescribed.

Other Leases covered by the Act

Although there is no comprehensive statute for the protection of agricultural tenants in Victoria, parts I-IV of the Act contain provisions that regulate those leases not covered by specific legislation relating to retail or residential tenancies. This is reflected in the wording used in those provisions, such as farms, turnips, crops and farm houses for example. However, these Parts are not limited to agricultural leases.

For example, provisions contained in these Parts importantly prohibit the common law remedy of 'distress for rent', which allows a landlord to take possession of tenant's possessions if the tenant is in arrears in their rent, and also a tenant to remove or be compensated for fixtures that they erect or improvements they make to the property.

Therefore, it seems, the primary objective of Parts I-IV of the Act is to protect leases not covered by specific residential or retail tenancies legislation.

3.5 The Landlord and Tenant Act 1958 today

Protected tenancy leases

Since the establishment of the Act, its scope has diminished considerably. Particularly given that the origin of the legislation, as discussed, comes from the desire to protect the rented homes of returning (and non-returning) servicemen and women and their families, from rising rents and property speculation resulting from a shortage of housing at the time (The Asher Report: 1995, p. 77). Indeed, at this time, in the 1950s, there were approximately 180,000 such tenancies in Victoria which warranted such legislation. However, in 1995, this figure had fallen to 155.

Of the 155 protected tenancies remaining in Victoria in 1995, 60 per cent were in Melbourne's inner suburbs and apart from the 3 per cent in rural and regional Victoria they were all located in the Melbourne metropolitan area. The greatest concentration was in St Kilda/Elwood (24 per cent); 14 per cent were located in Melbourne CBD; 8 per cent in South and Port Melbourne; and 6 per cent in Richmond. There were five (3 per cent) protected tenancies remaining in country Victoria and the remaining 37 per cent of tenancies were in Melbourne's middle and outer suburbs (Macrae: 1995, p 2).

It was estimated that these tenancies housed 220 people and on average the tenancies were begun 51 years ago, with the earliest being 1917 and the most recent in 1955. In 1995, the oldest tenant was 98, the youngest was 65 and the average age was 80. Seventy-three per cent had been widowed, 63 per cent lived on their own and 66 per cent of all protected tenants were women (Macrae: 1995, p 2).

Based on these figures it is likely that only a small number of protected tenancies would be remaining in 2008, with the youngest tenant being at least 77 years old. An approximate amount may be generated using the Australian Bureau of Statistics (ABS) life table, which provides a snapshot of, among other things, Australian life expectancy rates (Australian Bureau of Statistics: 2006, cat. no. 3302.0.55.001).

According to the life table approximately 55,000 out of 100,000 people can expect to live to the age of 80 (the average age according to the last protected tenancy count of 1995). Out of this 55,000, only around 11,000 may be alive at the age of 93 according to the life table, which is approximately 20 per cent. Therefore, out of the 220 protected tenants identified in 1995, there may only be about 44 protected tenants today.

Therefore, it is assumed that some protected tenancies still remain, although the exact number is not known. Therefore, the same issues involved with repealing the Act that were discussed earlier in this paper and that were raised in the Asher Report would still apply today.

Other leases covered by the Act

There is no way to determine the actual number of other leases remaining in Victoria affected by the Act, although it may be assumed that with regard to agricultural leases, the intent of the provisions is no longer practical given the nature of farming today.

Indeed, the time the Act was introduced was such that small-time farming arrangements were common throughout Victoria. However, over the last 40 to 50 years this trend has reversed with Australian commercial farms having halved from about 200,000 to 100,000 whilst the average area of these farms has increased by almost 50 per cent from 2800 hectares to 4100 hectares (Ashby: 2003, pp. 1-2). Furthermore, the average proportion of farmland that is leased across Australian states is only about 6 per cent (Ashby: 2003, p. vii).

It has been argued that since the wool boom of the 1950s farmers have experienced a long term downturn in rural commodity prices, that there have been periodic upturns but overall the long term trend is down (Ashby: 2003, p. 1). Farmers responded to this pressure on prices by either leaving the land or expanding their farm size. Successful farmers have focused on increasing the productivity and scale of their farm enterprises in order to combat this trend.

Therefore, the farming climate today arguably has fallen outside the boundaries of the original intentions of the Act.

However, a search of Victorian legal databases indicates that approximately 23 cases have been brought before VCAT and the Supreme Court over the last 10 years that refer to the Act. The majority of these relate to the provision regarding the removal and construction of or compensation for fixtures (section 28). Some cases relating to the common law remedy of distress for rent (allowing landlords to seize tenants' property as compensation) also exist (section 12 of the Act abolishes this right of the landlord). Therefore, despite not knowing the amount of leases affected by the Act, in particular Parts I-IV, it is clear that these particular provisions continued to be relied upon in certain cases.

3.6 Regulation in other jurisdictions

Protected tenancy leases

New South Wales (NSW) is the only state that can be compared to Victoria. Of the other states that once had protected tenants, South Australia has retained rent controls in its *Housing Improvement Act 1940*. However, the controls are designed to force improvements to sub-standard rental housing rather than to protect tenants from eviction or increasing rent. Queensland abolished their protected tenancies in 1970 (Macrae: 1995, p. 27).

After 1940, the legislation in NSW followed a very similar pattern to Victoria. The number of protected tenants protected in NSW would have been as low as in Victoria. However, a legal anomaly, which allowed the creation of many new protected tenancies between 1969 and 1985, resulted in many more subsequent tenancies. As of 1995 it is estimated that protected tenancies in NSW numbered between two and five thousand (Macrae: 1995, p. 27). It is not known how many protected tenancies remain today.

Other leases covered by the Act

Most Australian jurisdictions have legislation that, to varying extents, regulates the kind of leases covered by the Act, such as agricultural leases. Queensland has the *Property Law Act 1974* (Part 8, Division 6); Tasmania has the *Landlord and Tenant Act 1935*; NSW has the *Agricultural Tenancies Act 1990*; and South Australia has the *Landlord and Tenant Act 1936*.

The content of each of these Acts is generally similar with the exception of NSW. For example, each state's legislation makes provisions relating to the construction and/or improvement of fixtures by a tenant, and the tenant's right to compensation at the completion of the tenancy.

While Victoria and most other states have in their Act some provisions that apply, but are not limited to, agricultural leases, NSW has a comprehensive, and reasonably modern, statute for the protection and regulation of agricultural tenants and leases.

Queensland's legislation contains many of the provisions found within the NSW Act. For example, the Queensland and NSW legislation both contain provisions relating to the construction or removal of fixtures and improvements; right to compensation for improvements; rights of entry; and rights to arbitration.

The objectives of the NSW Act are to encourage agricultural land-holders and their tenants and sharefarmers to:

- have regard in farming practices to maintaining sustainable agricultural production and preventing the degradation of the environment
- encourage the use of written agreements for agricultural tenancies
- set terms that apply to all agricultural tenancies, including terms setting out the rights of parties
- provide a mechanism for resolution of disputes between the parties to agricultural tenancy agreements through mediation
- to provide an arbitration mechanism to parties to agricultural tenancies that is outside the court system.

4. Analysis of the Landlord and Tenant Act 1958

4.1 What is the perceived current impact of the Act?

Protected tenancy leases

Part V provides the protections of rent control and the inability of the landlord to evict the tenant without first attending VCAT, who would assess whether other suitable accommodation can be found. The attention this part of the Act has received over time reflects the importance of its objective and its use.

However, compared with when the Act was introduced, when tenancies numbered around 180,000, the Act's relevance has decreased over time. This is reflected by the decreasing number of protected tenancies remaining and by the lack of enquiries and complaints received by CAV and VCAT.

Other leases covered by the Act

It is difficult to determine the precise impact of the Act today with respect to other leases. There is a lack of literature that can be found on leases not covered by retail or residential tenancies legislation, such as agricultural leases: the Act's provisions are not mentioned in guides for farmers (Ashby: 2003) or in on-line law assistance websites (for example, www.rurallaw.org.au). However, the lack of cases where the Act has been cited suggests that the provisions are seldom relied upon.

As discussed earlier, the time the Act was introduced was such that small-time farming arrangements were common throughout Victoria. However, over the last 40-50 years this trend has reversed with Australian commercial farms having halved from about 200,000 to 100,000 whilst the average area of these farms has increased by almost 50 per cent from 2800 hectares to 4100 hectares (Ashby: 2003, pp. 1-2).

Although leasing has a role to play in producing income for many small farmers who currently make very little from the land and in helping to provide a better return on capital, and that small scale lease farming arrangements would still exist despite the trend discussed above, it seems that they may now be regulated by private contracts. This is reflected, for example, in the modern terminology being used referring to 'lease agreements' and 'share farming agreements' (see Ashby: 2003, pp. 5-10).

The range of farm leasing options that exist; that they are likely now to be governed by private contract; and the changing climate of the farming industry seem to suggest that many of the provisions contained within Parts I-IV found within the Act may now be obsolete insofar as they relate to 'agricultural leases'.

However, provisions relating to the removal of buildings and fixtures (section 28) and the abolition of the common law 'distress for rent' (section 12) may continue to have some continuing relevance for commercial tenancies today.

Removal of buildings and fixtures

The common law has from early times permitted tenants to remove fixtures they have brought onto land provided that the fixtures were installed for trade, domestic or ornamental purposes. However, this common law right of removal does not extend to fixtures brought onto land for agricultural purposes. This has led to legislative change to provide some protection to tenants in these circumstances.

Section 28 deals with the statutory rights of a tenant with respect to removing buildings and fixtures. Section 28(1) provides that the tenant of a farm or land, who has constructed improvements (such as a farm building) for agricultural purposes with the written consent of the landlord may, on giving the landlord one month's notice of the intention to do so, remove them, unless the landlord purchases the improvement(s) at an agreed price.

However, subsection 1 appears to have been largely superseded by subsection 2, which applies to erected improvements in general (rather then for agricultural purposes as in sub-section1) by the tenant during tenancies signed after 24 September 1907. It states that buildings, fences, plants and fixtures erected by the tenant do not become the landlord's property and the tenant may remove them during or at the expiry of the term of the lease. Several recent cases have cited section 28(2) (see *Tymbook Pty Ltd v State of Victoria* [2007] VSC 140 (9 May 2007) for example). However, this provision does allow the parties to contract out of this statutory right.

Distress for rent

The common law right of distress for rent is abolished in all jurisdictions in Australia except for South Australia where the right still exists in relation to commercial premises and Tasmania, where tenancies covered under the Landlord and Tenant Act such as rooming house agreements and commercial tenancies (but not tenancies under the Residential Tenancies Act) may still be subject to distress for rent.

Section 49 of the RTA prohibits landlords taking and selling goods for rent owing under residential tenancies (while it is silent on a landlord detaining a tenant's goods, part 9 of the RTA limits actions in this respect after a tenancy has ended). However, it only applies to residential tenancies, rather than retail and agricultural tenancies.

With the abolition of distress for rent in section 12 of the Act, a landlord, despite having a lien for unpaid rent, cannot seize a tenant's property and sell it to satisfy the debt.

If the Act was repealed, this could allow landlords to come into a tenant's rented premises without their consent and seize a tenant's property as compensation for rental arrears if the tenancy is not covered by the RTA.

4.2 Enquiry, Complaint and Enforcement Action

Consumer Affairs Victoria (CAV) has received 17 enquiries regarding the Act in the 2006-07 period, and only one investigation in the last ten years. This is amongst approximately 640,000 enquiries received in the same period. This statistic reflects the lack of usage of the Act for CAV.

Statistics from the VCAT show a similar trend. The VCAT has advised that since 1 January 1998, they have received a total of 20 applications under Part V of the Act, with none in the last two years. These applications included:

- one application under section 43 (Application to determine whether the premises as a prescribed)
- four applications under section 57 and 64 (Application to determine the rent of the prescribed premises)
- 15 applications under section 82 (Application for substituted service and/or possession).

The Magistrates' Court, VCAT and, in some cases, the Supreme Court have jurisdiction to hear cases with regard to the provisions contained in Parts I-IV of the Act. Data from these Courts over the last ten years suggests that the provisions contained in Parts I-IV of the Act are not used frequently.

Austlii lists 23 cases that have been brought before VCAT (16) and the Supreme Court (7) over the last ten years, the most common of which relate to the provision regarding the removal and construction of or compensation for fixtures (generally section 28 of the Act). A small number of retail tenancy cases also raise the abolition of the common law remedy of distress for rent, which allows landlords to seize tenants' property as compensation (see for example *Kiwi Munchies Pty Ltd v Nikolitsis (Retail Tenancies)* [2006] VCAT 929 (29 May 2006), a case where the plaintiff's property was detained by the defendant in an attempt to effect payment of arrears of rent).

4.3 Is it likely that the provisions of the Act are covered by other legislation? Are there cross references to other Acts?

A strong argument in recommending repeal of the Act is that the *Residential Tenancies Act 1997* (the RTA) is more appropriate to address the objectives of Part V of the Act (if protected tenancies are to continue in their present form), and to some extent Parts I to IV insofar as they relate to residential tenancies.

Furthermore, the use of a single tenancy Act such as the RTA would likely result in greater compliance, and would be a better and more succinct instrument to address the concerns of all tenants. However, the RTA does not cover the protected tenancy provisions.

The Residential Tenancies Act 1997

The objectives of the RTA are to strike a balance between the interests, rights and responsibilities of landlords and tenants that enter into residential tenancies (but not commercial or agricultural tenancies). To ensure this balance is maintained, CAV monitors complaints and markets trends.

The continuing challenge for Government is to keep pace with social and economic change to ensure that policy and legislation remains relevant to Victorians' experiences in the marketplace.

The RTA covers the application and content of a tenancy agreement between a tenant and a landlord; bonds; rents; the general duties of tenants and landlords with particular regard to maintenance, repairs and conduct, assignment and sub-letting, rights of entry, compensation and compliance, termination of a lease, goods left behind, and regaining possession. The following table compares provisions within the Act and the RTA:

Parts of Landlord and Tenant Act 1958	Landlord and Tenant Act 1958	Residential Tenancies Act 1997
Part I – Leases	Contains provisions regarding the form and application of leases (deeds); rent and its recovery; penalties for outstaying eviction (double rent). Suggests that lease does not need to be in the form or schedule prescribed by the Act	Contains provisions regarding 'residential tenancy agreements'; rent and its recovery; VCAT discretionary penalties with regard to outstaying eviction.

	(s.3).	
Part II – Provisions as to execution and seizure by third party	Does not allow tenant to remove or sell goods or produce unless rent is paid; provides for the involvement of a Sheriff in these disputes; provides Sheriff with indemnity powers, powers to levy rent, and ability to dispose of goods or produce to acquire rent.	Does not contain any similar provisions because the RTA does not apply to farming or grazing tenancies. Does contain inspection powers, but only generally with regard to goods left behind and rent.
Part III – Emblements: Fixtures	Allows tenant to construct and remove fixtures or improvements with written consent of landlord; allows landlord to purchase fixtures or compensate for improvement.	Similarly, allows tenant to construct or remove fixtures or alter or renovate the property with written consent or if agreement stipulates; VCAT has power to award compensation to tenant.
Part IV – Summary proceedings to recover possession	Contains provisions relating to the involvement of the Magistrates' Court if tenant refused to leave after notice to quit is served; outlines process the recovery of possession where premises has been deserted; obtaining warrant and process of its execution; the outlay of costs; and that death of a party will not terminate the proceedings.	Contains similar provisions with regard to process of re-possessing the property if tenant refuses to leave. However, involves VCAT not Magistrates' Court.
Part IVA – Removal and disposal of goods left on vacated premises	Details process for the disposal or sale of goods left behind; rights of landlord and tenant with regard to sale.	Details similar process; allows landlord to dispose or sell goods subject to certain requirements.
Part V – Control of rents and recovery of possession	Contains rent and eviction control provisions; allows serving of notice to quit (end tenancy) in certain circumstances; VCAT discretion on deciding rent and eviction (e.g. must consider hardship).	Does not contain rent control provisions, although it does follow a similar process for eviction, albeit not as stringent; VCAT has similar discretionary powers with regard to hardship.

Therefore, if the RTA and the Act are compared generally, aside from Part II of the Act, the RTA has similar provisions to the Act, albeit with subtle differences. For example, the RTA contains provisions relating to the tenancy agreement itself; rent and its recovery; goods left behind; recovery of possession; the construction of fixtures, amendments or alterations; compensation; and eviction processes.

Subtle differences involve, for example, different time frames within which to serve notices and different jurisdictional proceedings, such as using VCAT rather than the Magistrates' Court.

Part V of the Act, which offers the protection of rent control and the inability of the landlord to evict the tenant unless other suitable accommodation can be found, is the clearest difference between the two Acts.

5. Options for Reform

Option 1: Repeal the Act and transfer protected tenancy provisions to the RTA

The Act would be repealed and the protected tenancy provisions, such as rent and eviction control, would be transferred to the RTA. The RTA would then be the primary instrument to address the concerns of all Victorian residential tenants. Agricultural leases would be governed by private contracts and the common law.

The advantages of repealing the Act are:

- the law relating to all residential tenancies would be expressed in plain English. However, the policy intention of the transferred provisions would not be altered
- the RTA may be a better and more succinct instrument to address the concerns of all tenants. Indeed, many provisions contained in the Act are also included in the RTA
- distress for rent would continue to be prohibited for residential tenancies through section 49 of the RTA
- the remaining protected tenants would remain protected
- the common law may be more appropriate for dealing with agricultural leases, particularly given these leases appear to be predominately entered into outside the Act, for example, through private contract.

The disadvantages of repealing the Act are:

- landlords whose property is subject to protected tenancies would continue to be unable to gain access to full market rents, decreasing incentives to improve the standard of their property for the tenant
- in addition to current responsibilities, landlords may have to provide repairs to tenants' accommodation
- the Act contains a number of provisions that regulate the particular rights of some classes of tenants (such as agricultural or retail tenants), such as the right to remove fixtures. The repeal of such provisions and the reliance on the common law may disadvantage these tenants
- the reliance on the common law may increase costs on agricultural tenants and landlords in matters that require legal intervention.

Option 2a: Repeal the Act, with Head-Leasing for protected tenants.

The Act would be repealed and the landlord of a protected property would be required to enter into a 'head leasing' arrangement with the Government to ensure the tenants remain protected. The Government would become head lessee and pay full market rent to the landlord.

The Government would subsequently sub-let the property to the protected tenant, who would remain at the current rent, although adjusted in terms of movements in their incomes (whether as a pensioner or through employment). The duration of the lease would be for as long as the protected tenant originally had rights to the property.

As in option 1, this option would also provide the opportunity for the legal ambiguity with regard to the succession of the protected lease to be made clear so that, for example, succession rights only apply to a cohabitating spouse.

As in option one, agricultural leases would be governed by private contracts and the common law.

The advantages of this option are:

- the tenancy would fall under the RTA, thereby according the protected tenant the same rights as tenants under that Act
- landlords of protected tenants would be recompensed fully at market rates, which may in turn provide the landlord with incentive to repair and maintain their property
- the low number of protected tenancies remaining and the likelihood that they will soon be obsolete suggests that the cost on government for the subsidisation would be minimal
- the common law may be more appropriate for dealing with agricultural leases, particularly given these leases appear to be predominately entered into outside the Act, for example, through private contract.

The disadvantages of this option are:

- a cost would be imposed on Government for the subsidisation of landlords
- unless appropriate provisions were implemented in the RTA, protected tenants may be at a greater risk of termination of the tenancy
- the Act contains a number of important provisions that regulate particular rights of agricultural tenants, such as the right to remove fixtures. The repeal of such provisions and the reliance on the common law may disadvantage these tenants
- the reliance on the common law would increase costs on tenants and landlords in disputed matters.

Option 2b: Repeal the Act, with the Residential Tenancy Fund or the Victorian Property Fund paying a subsidy to protected tenants

The Act would be repealed and protected tenancies would be abolished. However, to mitigate the effect of this abolition, a subsidy could be paid from either the Residential Tenancies Fund established under the RTA or, alternatively, the Victorian Property Fund established under the *Estate Agents Act 1980* (with appropriate amendments to section 75 of that Act) to each protected tenant on the application of the tenant. The subsidy would be capped at an amount equal to the difference between the controlled rent that applied at the time of abolition of the protected tenancy and the prevailing market rent.

As in option 1, this option would also provide the opportunity for the legal ambiguity with regard to the succession of the protected lease to be made clear so that, for example, succession rights only apply to a cohabitating spouse.

Agricultural leases would be governed by private contracts and the common law.

The advantages of this option are:

- the tenancy would fall under the RTA, thereby according the protected tenant the same rights as tenants under that Act, such as a right have repairs carried out
- protected tenants would not face rent increases
- landlords of protected tenants would receive rents at market rates, which may in turn provide the landlord with incentive to repair and maintain their property
- the low number of protected tenancies remaining and the likelihood that they will soon be obsolete suggests that the cost on the Victorian Property Fund for the subsidisation would be minimal and likely to decline over time as protected tenancies decrease in number
- the common law may be more appropriate for dealing with agricultural leases, particularly given these leases appear to be predominately entered into outside the Act, for example, through private contract.

The disadvantages of this option are:

- unless suitable provisions were introduced into the RTA to restrict the grounds on which protected tenancies are terminated, protected tenants may face a greater risk of eviction
- a cost would be imposed on government to administer the subsidy program
- the Act contains a number of important provisions that regulate particular rights of tenants, such as the right to remove fixtures. The repeal of such provisions and the reliance on the common law may disadvantage affected tenants
- the reliance on the common law would increase costs on tenants and landlords not covered by residential or retail tenancies legislation in disputed matters.

Option 3: Phase out protected tenancies and transfer provisions relating to agricultural tenancies to another Act

Protected tenancies as covered under the Act would be phased out over a period of time, perhaps giving twelve months notice for the tenant to find alternative accommodation.

The remainder of the Act containing the agricultural lease provisions could be transferred to another Act more suitable for agricultural tenancy provisions. The provisions would then need to be modernised with, perhaps, the NSW Agricultural Tenancies Act 1990 being used as a model.

The advantages of this option are that:

- landlords would regain the right to charge full market rates for their property
- agricultural tenants could be updated so agricultural tenants would be protected via a specific and modern Act.

The main disadvantage of this option is that unless suitable provisions were introduced into the RTA to restrict the grounds on which protected tenancies are terminated and rents increased, protected tenants may face a greater risk of eviction and/or increased rent.

6. Preliminary recommendations

After consideration of all the legislative options, it is recommended that the following changes be made:

- the Act be repealed
- provisions relating to protected tenancies found within the Act should be modernised and moved to the RTA.

7. How to make a submission

There is no specified format for a submission. Submissions may range from a letter addressing one issue to a systematic analysis of the impact of the reform of regulation of landlord and tenant legislation. Submissions will be accepted in electronic or hard copy form.

Submissions will be regarded as a public document and will be posted on Consumer Affairs Victoria's website unless your submission is marked 'CONFIDENTIAL'. Notwithstanding any such marking, documents held by government may be the subject of a request for access under the Freedom of Information Act 1982. Documents are assessed under the Act and not all information is automatically made available.

The suggested topics in the Options Paper are presented only as a guide. Participants should not feel the need to address all of the topics or be restricted to only the issues raised under each topic.

Participants are encouraged to provide data, examples, case studies or other evidence to support the arguments presented in their submissions. Please indicate in what capacity you are making your submission. If your submission is on behalf of a representative group, please give a summary of the people and organisations that you represent.

Submissions are due by Friday 28 November 2008 and can be sent to:

Landlord and Tenant Act Consultation
Consumer Affairs Legislation Modernisation Project
Consumer Affairs Victoria
GPO Box 123
MELBOURNE 3001

Or by email to: calm@justice.vic.gov.au

For any enquiries regarding this paper, please call Sam Owens on (03) 8684 6497.

8. References

Australian Bureau of Agricultural and Resource Economics (ABARE) (2006) *Agricultural Economies of Australia and New Zealand*, found at www.abareconomics.com

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Ministry for Consumer Affairs (1991) *Information Paper on Protected Tenants in Victoria*, December

Report to the Minister for Housing, the Honourable Rob Knowles and the Minister for Fair Trading, the Honourable Jane Wade from the Residential Tenancies Legislation Review Committee, "The Asher Report" (1995).

www.austlii.edu.au

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Regional offices are located in Ballarat, Bendigo, Geelong, Morwell, Mildura, Wangaratta and Warnambool.

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