16 December 2022

South Australian
Civil and Administrative Tribunal

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Dear Commissioner

**RESIDENTIAL TENANCIES ACT 1995 – REVIEW AND CONSULTATION**

I write in response to your letter addressed to Her Honour Justice Hughes dated 14 November 2022 seeking feedback from the South Australian Civil and Administrative Tribunal (SACAT) on the South Australian Government's review of the *Residential Tenancies Act 1995* (RTA).

Please accept this written submission as SACAT's comment in response to that request. SACAT's response is divided into two parts. The first part addresses the RTA Review Discussion Paper and provides feedback on the issues raised in that Paper. The second part of this submission proposes additional amendments to the RTA that the Government may wish to consider as part of its review.

As is appropriate, SACAT will refrain from making comment on issues of policy.

**PART 1: RESIDENTIAL TENANCIES ACT 1995 REVIEW DISCUSSION PAPER**

**1. Longer tenancies**

Prescribed reasons for termination and non-renewal

Introducing requirements to the RTA for landlords to provide a prescribed reason for termination of a periodic lease or the non-renewal of a fixed-term tenancy agreement would, from the Tribunal's perspective, likely lead to an increase in contested, reason-based disputes being brought to SACAT.

Applications of this kind might involve landlords making statements in support of a prescribed reason for termination, for example, that the premises will be occupied by a parent or child,

which are difficult to prove before the Tribunal and may lead to drawn out disputes between parties.

Further, landlords may be prevented from termination or non-renewal for a reason that is not prescribed under the RTA. For example, assuming the prescribed reasons were based on the grounds in section 81A of the RTA, a situation where a landlord finds that a tenant has provided false information in their application or a false referee, they would be unable to terminate.

If the proposal is to proceed, SACAT suggests the following for consideration:

- Any disputes arising from reason-based termination ought to be capable of being adjudicated simply and cost effectively.

- Landlords be provided a "safety-net", such as an ability to apply to SACAT for an order to terminate where there is a reason for termination that is not captured by the prescribed reasons.

Longer fixed term agreements

While there is no prohibition in the RTA, preventing parties from entering into longer fixed term tenancy agreements, SACAT acknowledges that such arrangements are rare and that the proposed amendments may be useful in encouraging parties to enter into fixed term tenancy agreements that continue for a period of five years or more.

In SACAT's observation, the current short-term nature of tenancy agreements in South Australia, and Australia more broadly, may be a cultural issue within the sector and best resolved through a cultural change rather than legislative amendment.

With regard to break lease arrangements, SACAT has observed that the formulae currently applied to re-letting fees and advertising costs are often not known to tenants and put tenants at a disadvantage when the costs applied are inappropriate.

If there is a proposal to change the existing default position in relation to break-lease claims, then that position needs to be made known to the parties and may benefit from further examination as part of the RTA review process.

Termination notice periods

In the Tribunal's experience, landlords and land agents work on a model of short advertising and renewal cycles for offering new tenancies and usually do not to enter into contracts in advance. Given the model described above, even if the notice period is extended, most tenants will still be confined to the last 28 days of their agreement to secure a new tenancy.

The way that the rental industry operates in offering new tenancies may diminish the efficacy of the policy initiative that has been proposed and these issues may only be resolved through a cultural change in the industry rather than through legislative amendment.

Extending the notice period may well assist a segment of renters – likely those who are able to pay double rent to secure a tenancy as soon as it becomes available, and a longer notice period may assist renters in other ways.

These types of matters come before the Tribunal where the tenant does not move out at the end of the lease and notice of termination has been given. The landlord can then apply to the SACAT for an order for possession of the premises. There is only a very limited basis upon which the Tribunal can or should make orders in respect of a vacant possession application where the tenancy has been terminated at the end of a fixed term, with an appropriate notice.

Whether the tenancy was for a fixed term or periodic, if a notice of termination has been served giving the required notice, then the term of the tenancy has expired. At that point it is not appropriate for the Tribunal to make an order to reinstate the tenancy – the only question is when vacant possession should be granted and given the amount of notice the person has had, it may be unfair to grant a lengthy period.

Vacant Possession

Further to the issue of termination notice periods and vacant possession, the Tribunal has observed that the requirements regarding vacant possession that currently exist under the RTA are quite stringent. In normal circumstances, seven days is the maximum period that can be ordered (subject to the Tribunal's discretion to suspend the order for possession on the grounds of undue hardship). That is often not enough time for the tenant to vacate and find a new tenancy. Even in circumstances where rent arrears are the basis for the application, in the Tribunal's observation, it is still too soon for a tenant to vacate. This position was exacerbated as a result of the COVID-19 pandemic and now the current rental crisis in South Australia.

The seven-day rule is directed at rent arrears and/or significant inappropriate behaviour of tenants; however, there are applications for vacant possession where hardship should not be the only criterion for a longer vacate date.

A change in the dates for vacant possession to between 14 and 90 days, or a removal of a timeframe altogether should be considered as an amendment to the RTA and would go some way to assisting tenants find new tenancies, especially in the current climate. If an order for vacant possession is beyond seven days, a requirement that an order be balanced against the landlord's interests having regard to the amount of the bond in place should also be considered.

## 2. Residential bonds

Maximum bond amount

The proposal to increase the relevant limit to $800 when the weekly rent of the property is under a prescribed amount is a significant departure from the current limit of $250. An increase to $500 might be a more appropriate increase in South Australia.

Another potential solution to this issue might be to stagger the payment of the bond, i.e., two weeks rent in advance as a first payment, then a greater amount for potential damage thereafter.

Bond guarantees

In respect of the SA Housing Authority (SAHA) bond guarantee model, operating under the Private Rental Assistance Program Policy, it may be useful for Consumer and Business Services (CBS) to investigate whether the bond guarantee model is working efficiently and how many bonds are being recovered by Housing SA from CBS at the end of a tenancy.

Disputes between co-tenants

Disputes commonly arise at SACAT in relation to security bonds where there are multiple tenants under a tenancy agreement and each tenant is jointly and severally liable to the landlord where a loss has been incurred. Disputes can arise where one or more tenants have vacated the premises early but have not been properly released from their obligations under the agreement and have not been repaid their bond. Issues may arise where the remaining tenants cause damage to the premises and/or accrue rent arrears.

It may be beneficial for the Tribunal to have the power to order the greater proportion of compensation to be borne by the culpable tenant. Presently, the Tribunal rarely does so, other than in matters of domestic violence under section 89 of the RTA, because it is unclear if it has the power to do so. This is because:

- The Tribunal has no inherent equitable jurisdiction.
- The Tribunal has no specific statutory power.[1]
- The parties do not generally receive notification that the Tribunal is considering making a contribution order, and therefore the Tribunal cannot make such an order.[2]

If these disputes are unable to be dealt with by SACAT, the only option is for them to be dealt with in the Magistrates Court of South Australia, which can be a costly and lengthy process for parties.

An amendment to the RTA to capture disputes between co-tenants, particularly in relation to the payment of the security bond, would be of benefit to co-tenants and align with SACAT's existing jurisdiction to deal with bond disputes under the RTA.

Part-payment of bond

Upon the termination of a tenancy, the deposit is returned to the tenant in accordance with section 63 of the RTA. If a party disputes a claim to the deposit, the RTA provides a mechanism for resolution.

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1 RTA s 3 (definition of 'residential tenancy agreement').

2 *Duke Group Ltd (In Liq) v Pilmer* & Ors (No 5) [2003] SASC 381.

There are circumstances where the Tribunal will make an order for possession of a property where rent arrears are less than the amount of the bond. In those circumstances, the Tribunal is unable to make an order that part of the bond be paid out to the landlord in satisfaction of rent arrears due to the way in which the Residential Tenancies Fund is administered under section 110(1)(i) of the RTA,[3] which only allows the Tribunal to make an order in relation to the bond.

An amendment to sections 110(1)(i) and 63 of the RTA to allow the Tribunal to make an order which deals with part of the bond only may be useful for the Tribunal to be able to effectively and efficiently deal with the payment of bonds.

## 3. Rent bidding

The Tribunal is not aware of the practice of rent bidding occurring in South Australia except in circumstances where a particular rent is advertised, and a prospective tenant offers rent above the advertised price without solicitation or request from the landlord or land agent. It is understood that this practice will not be banned under the proposed amendments.

## 4. Rooming houses and shared accommodation

General observations

In SACAT's view, the proposals considered by the Discussion Paper to amend the RTA in respect of rooming house agreements and shared accommodation are too narrow and only partly address the myriad different renting arrangements for shared accommodation currently encountered by SACAT.

In its experience of rooming house disputes, SACAT provides the following observations:

- Rooming houses were historically used by transient residents as an inexpensive form of short-term accommodation, often provided at a low standard. As such, the law regulating rooming houses provides limited protection for residents.

- The Tribunal has seen a major change in the use of rooming houses. For example, agreements are often for a fixed term of six or 12 months. Rent is often on par with residential tenancy rent levels and some accommodation offered is at a very high standard. This might be attributed to the increase in the number of international students in South Australia.

- International students are often disadvantaged residents as they are young, inexperienced, and frequently have a language barrier. Further, they will regularly return overseas for the holiday period and do not claim their bond when they leave.

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[3] Section 110(1)(i) of the RTA provides that the Tribunal may, on application by a party to a tenancy dispute, "require that a bond (including a bond under Part 7) paid into the Fund be paid out and applied as directed by the Tribunal".

- SACAT regularly deals with circumstances where rooming house proprietors have required payment of a bond and rent in advance which far exceeds the amount which can be claimed.

- Conversely, where agreements are fixed term for 12 months, the bond and rent in advance is often inadequate protection for the proprietor, and the general rooming house provisions provide inadequate protection for both parties.

- While some rooming houses are well run by private operators, there are many problematic rooming houses: for example, proprietors who rent out sheds or garages to residents that are of a low standard for a high cost.

- Often, the issues that come before the Tribunal involve a misrepresentation as to what is advertised as opposed to what is actually on offer – a clarification as to whether the principles of misrepresentation apply to rooming houses (and residential tenancies) might be of assistance in this regard.[4]

- Rooming house provisions have not kept up with the changes in the marketplace, even with the amendments which occurred from 1 March 2014 under the *Residential Tenancies (Miscellaneous) Amendment Act 2013.*

- Noting all of the above, and the need for the RTA to evolve to keep up with changes in the marketplace, rooming house operators can offer a good source of cheaper accommodation for certain groups, such as international students. Further compliance regulation, for example, by way of a registration scheme, may pass on additional costs to this group and be counter-intuitive to the purpose that rooming houses serve in the rental market.

To create a more equitable arrangement for rooming house agreements, and to keep up with the changes to the marketplace, SACAT makes the following suggested amendments for consideration by the Government based on its observations of rooming house disputes before the Tribunal. Many of the suggestions are for equivalent provisions in respect of residential tenancy agreements and rooming house agreements.

Boarders and lodgers

Any dispute concerning boarders and/or lodgers is currently excluded from the jurisdiction of the Tribunal.[5]

The definition of "rooming house" requires rooms to be available on a commercial basis for rent and for there to be accommodation for at least three persons at the house.

A person is likely to be a boarder or lodger if the person:

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4 This will be addressed in Part 2 of this Submission.

5 RTA s 5(1)(b).

- does not have exclusive occupation of that part of the premises being rented by them,[6] particularly if the owner continues to reside there;[7]
- their room is not able to be secured;
- if there is accommodation for less than three persons in a particular property (in which case the arrangement will fall outside the definition of "rooming house");[8] or
- is being provided with other services such as food or laundry.

Historically, the justification for not including such arrangements within the scope of the Tribunal's jurisdiction was that they were frequently arrangements within a family. The reality is that it is reasonably common for family arrangements to come to the Tribunal – whether as a tenancy, rooming house or on some other basis. The same test should apply to arrangements with boarders and lodgers as with other disputes in the Tribunal: that is, did the parties intend to create legal relations, or was it intended to be a domestic arrangement? If the arrangement was intended to be a legally binding one, then SACAT proposes that it is appropriate for the Tribunal to deal with it.

The consequence of the current exclusions is that any dispute between a boarder or lodger and the owner/operator must be taken to the Magistrates Court of South Australia. This is a more expensive and lengthy process than that offered by the Tribunal.

Bond and rent in advance

Where a rooming house agreement is for a fixed term of 12 months, the proprietor should be able to claim a bond of four weeks rent and require two weeks rent in advance. Where an agreement is for a fixed term of six months, then the bond could be four weeks rent but the rent in advance should remain as one week.

Undue hardship

There is no equivalent provision in the RTA for undue hardship as a basis for terminating for rooming house agreements. Where a rooming house agreement is for a fixed term of six months or longer, it may be appropriate for the Tribunal to terminate the agreement in circumstances of undue hardship as is the case for residential tenancies under section 89 of the RTA.

Compensation for condition of room at the end of an agreement

There is no equivalent provision in the RTA obligating a rooming house resident in relation to the premises (or room) for cleanliness, damage or loss in rooming house agreements. It might be appropriate to replicate the provisions contained section 69 of the RTA, which relate to

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6 *Street v Mountford* [1985] 2 WLR 877.

7 *Frieze v Unger* [1960] VR 230, in which Sholl J decided that the exclusive use of a bedroom was consistent with the owner's right to control the room.

8 SACAT notes the proposal for comment on page 5 of the Discussion Paper to amend the definition of rooming house to include rooming houses that accommodate two or more residents.

residential tenants' obligations, so that the proprietor may bring a claim for compensation to the Tribunal.[9]

Termination of agreement by frustration

There are no provisions which allow for a rooming house agreement to be terminated either by a resident or proprietor on the grounds of frustration. This should be permitted in similar circumstances to residential tenancy agreements in line with sections 83B and 86B of the RTA.

Compensation of rooming house proprietor for lost rent where a resident vacates after a notice of termination has been served

Section 80(2) of the RTA was amended from March 2014 to allow a landlord to claim for compensation including loss of rent where a tenancy was terminated by way of service of a notice of termination and the tenant vacated after that notice was served (provided the landlord acts to mitigate any loss).

No such amendment was made to the provisions dealing with rooming houses and it is proposed that this be included in any future amendments under the rooming house provisions.

Advocacy and support for resident

A further consideration is the issue of advocacy and support for residents.

## 5. Renting with pets

Reasonable conditions

As is appropriate, the Tribunal has no comment on the policy position behind a renting with pets amendment to the RTA. SACAT observes that it may be appropriate to impose a distinction between requests to keep an "ordinary" number of larger pets – such as cats and dogs – and requests to keep a "larger" number of pets. Local councils may be able to provide information as to the average number of pets (cats and dogs) within an average household to inform any proposals in this regard.

From SACAT's perspective, there would be no reason to institute such a prohibition on pets that do not tend to cause property damage – like small, caged animals.

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[9] It is important to note that section 105R(1) of the RTA requires residents to keep their room in a condition that does not give rise to a fire or health hazard and to notify the proprietor of any damage to the rooming house. However, there are several difficulties with the current rooming house provisions in this regard, being:

- there is no requirement for residents to be provided with inspection sheets at the commencement of the rooming house agreement;
- it is unclear that there is a general obligation on a resident to maintain the property in a reasonable condition and reasonably clean during the agreement and to return it in that manner (subject to fair wear and tear); and
- it should be for the Commissioner or the Tribunal to refund the bond, not the rooming house proprietor. Likewise, the proprietor should not have the capacity to make any determination about their own claims on the bond.

With regard to the additional jurisdiction to SACAT in relation to renting with pets proposed in the Discussion Paper, SACAT would like to preserve its position with regard to whether any further funding would be needed in order to undertake this work and suggests that obtaining statistics on disputes from similar interstate jurisdictions that have adopted these reforms may be useful.

Pet bonds

SACAT has no information as to the proportion of rental households with pets that result in damage. However, claims for compensation for damage caused by pets are relatively frequent and the Tribunal considers that a pet bond of $260 is unlikely to cover the costs when damage is caused. In the Tribunal's experience, when a pet such as a puppy causes damage, that damage is often significant such as to woodwork or curtains, to doors or floors, and rectification costs are high

**Housing standards and retaliatory evictions**

Housing standards and retaliatory evictions

Section 84 of the RTA, which limits the landlords right to terminate where the premises have been the subject of an inspection under the *Housing Improvement Act 2016* or are subject to a housing assessment order, housing improvement order, housing demolition order, preliminary rent control notice or rent control notice, already provides protection from retaliatory evictions.

It is SACAT's observation that "retaliatory evictions" are enabled by 12-month tenancy agreements, which are common in South Australia. Adopting policies to effect cultural change in this regard may go some way in addressing this issue.

## 6. Safety modifications and minor changes

Safety modifications

If the RTA is amended to prevent the unreasonable refusal of safety modifications and minor changes, the Tribunal considers that the tenant should be required to remove or make right those modifications and changes at the end of the tenancy – i.e., return the property to the conditions it was in at the commencement of the tenancy (unless the landlord otherwise agrees, in which case the tenant should be compensated for the improvement).

Any proposed amendment should also address defective modifications made by tenants.

Security of premises – installation of cameras

The proposed amendment includes consideration of the installation of wireless outdoor cameras. As it stands, the installation of security cameras is not expressly addressed by section 66 (security of premises) or section 70 (fixtures) of the RTA.

As is contemplated by this proposed amendment, the installation of outdoor cameras has become prevalent in South Australia, this issue has also come before the Tribunal on a number of occasions. It is unclear as to whether a camera is a ***security device*** under section

66 of the RTA and whether or not the tenant is prevented from installing cameras without consent.

An amendment to section 66 and/or section 70 of the RTA may also be beneficial in addressing this issue if it is not fully addressed by the proposed amendments in respect of safety modifications.

## 7. Start of tenancy requirements

Tenant blacklists and access to personal information on tenant databases

The Tribunal agrees with the proposal that prohibits landlords, land agents and database operators from charging a fee to a person requiting their personal information and suggests that the extent of use of databases and their content should be ventilated further.

## 8. Domestic violence

SAHA has instituted the Domestic Abuse Policy, which, amongst other things, allows SAHA to assist people affected by domestic abuse by writing off debt, including bond debts, owed as a result of domestic abuse. This policy has a significant positive impact for domestic abuse victims but is not often known or accessed by them.

From the Tribunal's perspective, domestic violence victims can only stand to benefit from strengthened financial protections under the RT, but note that any such amendments and/or policies should be known about and made easily accessible.

## 9. Water billing

Water billing

In respect of water billing, it has been a long-held view of the Tribunal that the best approach is that water bills should be placed in the name of the tenant, as is the case for other utilities such as gas and electricity. The Tribunal considers that it would see a noticeable reduction in disputes if the current arrangements regarding water bills were simplified in this manner. The parties, and the State, are currently bearing the cost of those disputes.

Water leaks

Landlords have an obligation to repair known and reported water leaks under section 68 of the RTA. If a landlord fails to meet their obligation, then the tenant can make an application for compensation to the amount of any "excess" water, resulting from that failure. Additionally, if the landlord has not used reasonable diligence to repair a defect, then the tenant can arrange for the defect to be repaired by a qualified tradesperson and seek to recover the cost.[10]

It is not uncommon for issues to arise where there is a water leak that the parties are unaware of, for example, a latent defect, and this circumstance is not addressed by the proposed amendment.

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[10] RTA s 68(3).

### 10. Illegal drug activity

SACAT understands that the testing and remediation work associated with illicit drug production or smoking is exorbitantly expensive and usually not able to be covered by landlord insurance. This issue might best be dealt with under the insurance industry model, rather than under the contractual model laid out by the RTA.

If a proposal in this regard is progressed, a requirement to undertake necessary remediation work should only apply where the landlord knows, or there are reasonable grounds to believe, that the previous occupants had been producing or smoking illicit drugs from which it is likely there would be a residue which would be injurious to the health of future occupants. This might also be addressed by clarification as to whether the principles of misrepresentation apply to the RTA.[11]

### 11. Third party payments

In SACAT's view, the proposal to prohibit landlords or land agents charging tenants additional fees to make rental payments is in line with the policy position under sections 53 and 56A of the RTA and remains reasonable.

### 12. Modernisation of language

The Tribunal considers that it would be appropriate to modernise the language used in the RTA and that this should be extended to SAHA conditions of tenancy, tenancy forms and agreements. The Tribunal would be willing to assist in conveying which terms appear to be often misunderstood by parties.

## PART 2: PROPOSED AMENDMENTS TO THE RESIDENTIAL TENANCIES ACT 1995

I understand that as part of the Government's review of the RTA, comments and suggestions for additional amendments will also be considered. The Tribunal takes this opportunity to provide suggestions for proposed amendments which arise from its considerable experience adjudicating disputes under the RTA.

### SACAT's jurisdiction under the Residential Tenancies Act 1995

Historically the RTA has been drafted to specify types of rental accommodation to which the Act applies. From the Tribunal's perspective, a logical approach is for SACAT to be conferred jurisdiction to deal with most, if not all, disputes concerning rental accommodation – unless there is a particular reason to exclude such disputes.[12]

As the legislation stands matters not captured by the RTA require examination on a case-by-case basis for a determination to be made as to whether the Tribunal has jurisdiction to consider those disputes. The Tribunal often sees significant confusion between parties as to

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[11] This will be addressed further in Part 2 of this Submission.

[12] This has been partially addressed in Part 1 of this Submission at pages 4-5, *Disputes between co-tenants,* and pages 6-7, *Boarders and lodgers*.

the actual rights and obligations of parties and the correct forum for the resolution of any dispute.[13]

SACAT reiterates that amendment to the RTA to expand the Tribunal's jurisdiction to include disputes between co-tenants and boarders and lodgers would provide more efficient and equitable access to justice for those parties and adds the following:

Short-term accommodation / holiday rentals

Further to those amendments for expansion of jurisdiction suggested in Part 1, SACAT considers that short-term accommodation, or "holiday" rentals, offered through platforms such as Airbnb, Flatmates.com and Bookings.com are not adequately addressed by the RTA.

The RTA does not apply to "an agreement genuinely entered into for the **purpose** of conferring on a person a right to occupy a premises for a holiday".[14] This does not accommodate for Airbnb rentals (or other similar online booking platforms) where the purpose of the rental is unknown. If the agreement is for a serviced apartment for 60 days or more, the onus is on the landlord to prove that the agreement is in respect of holiday premises.[15]

An amendment to the RTA addressing short-term rental platforms, such as Airbnb, including where the purpose of the rental is unknown might be useful in addressing this "grey area" under the RTA.

As an aside, SACAT understands that the *Short Term Holiday Rental Accommodation Bill* was introduced into Parliament in June 2021 and provides, amongst other things, oversight and regulation of the short term holiday rental property market but has not been progressed since it was introduced.

**Cleanliness and landlord's obligation to repair**

The landlord has a duty to provide premises in a reasonable condition and reasonably clean at the commencement of the tenancy under sections 67 and 68 of the RTA and a continuing obligation to use reasonable diligence to carry out repairs to defects once the landlord is notified of a defect (section 68). In the Tribunal's experience, ingoing and outgoing inspections are performed more frequently by photographs; however, there is no guidance under the RTA or the Regulations, for documenting the state of the property in this manner. The Tribunal spends a significant amount of time in hearings comparing photographs of various quality.

SACAT considers that it might be beneficial for the parties, and for the efficiency of the Tribunal, to amend the RTA or the Regulations to provide a common approach for documenting a property inspection by photograph.

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[13] See, e.g., the decisions of Deputy President Johns in *Nejad v Rochow* [2020] SACAT 62 and *Azadegan v Kirby* (2020) SACAT 10. Both decisions considered whether a residential tenancy agreement existed between parties.

[14] RTA s 5(1).

[15] *Residential Tenancies Regulations 2010* reg 6(2) (Regulations).

### Legally qualified members

Section 35 of the RTA gives "legally qualified" members special powers to make orders for an injunction (including an interim injection) or for specific performance without the approval of a Presidential member of the Tribunal. However, there is no definition under the RTA as to what constitutes a "legally qualified" member – creating doubt as to which members are able to make such orders without approval.

SACAT suggests that an amendment to section 35 should be considered which changes "legally qualified" to some other definition that does not create any doubt as to its meaning or to consider making those special powers exercisable by a member on whom the power has been authorised by the President of the Tribunal.[16]

### Limitations of Actions

Currently, there is no limitation on actions on which an application can be made under the RTA – the Tribunal understands that this is based on the need for flexibility for ongoing long-term tenancies.

In the decision of *Taylor & Anor v Marveggio & Ors*,[17] the applicant sought an order of the Tribunal for compensation for a tenancy that had finished 12 years prior. The Attorney-General at the time, made submissions following an invitation to intervene, and it was determined by the Tribunal that a tenancy dispute before SACAT is not an "action" within the meaning of the *Limitations of Actions Act 1936*, because by implication, the relevant definition of "action" in that Act means legal proceedings of any kind in a court and SACAT is not a court.

The lack of time limits within the RTA, stands at odds with other jurisdictions of the Tribunal and it would be beneficial for the efficiency of the Tribunal, as well as the security of parties, if a time limit for proceedings under the RTA were legislated or if the application of the *Limitations of Actions Act 1936* were clarified.

### Misrepresentation

In the Tribunal's experience, the RTA lacks clarity on the issue of misrepresentation as there are no provisions relating to misleading or deceptive conduct in relation to entering into residential tenancy agreements or rooming house agreements.

An amendment which prohibits landlords and land agents from inducing someone to enter a residential tenancy or rooming house agreement by misleading or deceptive conduct or omission of information would be of benefit across the Tribunal's jurisdiction.[18] An example of this could be a failure to disclose a persistent mould issue.

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[16] See, e.g., section 61 of the *South Australian Civil and Administrative Tribunal Act 2013* (SACAT Act), which provides that the Tribunal's power to preserve the subject matter of proceedings is only exercisable by a Presidential member or any other legally qualified member who is authorised by the President to make such an order.

[17] [2020] SACAT 68

[18] Refer to pages 6 and 11 of this Submission which discuss situations which may benefit from misrepresentation being clarified under the RTA.

A similar offence should be created for persons who engage in misleading or deceptive conduct in order to induce a landlord to enter into a residential tenancy or rooming house agreement.

**Payment plans**

There is currently no mechanism in the RTA, for an application by a landlord for a payment plan without first making an application for vacant possession for a breach based on rent arrears. When those matters come before the Tribunal for hearing, a payment plan is what will usually be imposed by the Tribunal with respect to the majority of those matters.

A mechanism for parties to apply jointly for a payment plan on a prescribed form should be considered as a possible amendment to the RTA. A prescribed form should inform the tenant that:

- they do not have to agree to a payment plan; but if they do not agree, the landlord or land agent may apply for vacant possession; and
- at hearing, the Tribunal may order a payment plan with the same or different terms or make an order for vacant possession.

Failure by a tenant to adhere to a payment plan should enliven in the landlord the right to apply to the Tribunal for an urgent hearing. The payment plan parameters would need regulation so that they are not exploited.

**Protection from self-incrimination**

Persons appearing before the Tribunal are protected from self-incrimination under section 69 of the SACAT Act, because they are excused from answering questions or producing documents or other material if their response may incriminate them.

This provision creates significant practical difficulties for the Tribunal when dealing with applications under sections 90 and 87(2) of the RTA, as it is reasonably common for the grounds of those applications to be subject to criminal charges or likely to be subject to criminal charges.

In that situation, the Tribunal member conducting the hearing is obliged to warn the respondent tenant that the proceedings are being recorded, the recording may be used in other proceedings against them and therefore they are not required to respond to the allegations made against them in the SACAT proceedings. This can result in the respondent feeling that they have been denied procedural fairness as they are unable to state their case to SACAT because of their concerns about self-incrimination. It also puts the member in the difficult position of having to make a decision about an application without having heard the respondent tenant's version of events.

SACAT proposes that the policy implications of a departure from section 69 of the SACAT Act, by amending the RTA to protect tenants from self-incrimination when giving evidence, be considered.

## Representation in Tribunal proceedings

A party to a tenancy dispute can only be represented by a lawyer in certain limited circumstances.[19] Under section 3 of the RTA, a ***lawyer*** for the purposes of the RTA, is a person "entitled to practise the profession of the law under the *Legal Practitioners Act 1981*".[20]

There has been an instance where a lawyer holding a practising certificate from interstate was employed by SAHA and did not fall within the definition of "lawyer" under section 3 of the RTA as they were neither local nor an interstate practitioner. That person was able to attend as a representative in their capacity as an employee of SAHA.

This situation highlighted that further clarification is required as to the definition of "lawyer" under the RTA.

Further to the above, SACAT has observed that there have been may instances where parties would benefit from legal representation on internal review and suggest an amendment to section 113 of the RTA to allow for representation by a lawyer on internal review would be appropriate. A concurrent amendment to section 56 of the SACAT Act might also be considered.

## Compensation decisions – right of internal review

The Tribunal considers that consideration should be given as to whether it is appropriate that the right to an internal review of a decision regarding a claim for compensation for damage by tenants or for the failure to undertake repairs by landlord, be restricted to claims over a particular monetary value. That might be $2,000, $3,000 or $5,000. The purpose for imposing such a limit would be to respond to the disproportionate application of the parties' time, and a cost to the community, for the Tribunal to re-hear these matters.

The limit may only be justifiable in matters where both parties participated in the original hearing. There may be a need to include or exclude cases where rent is a component of compensation. But the re-hearing of compensation matters where both parties have been heard in the original proceedings has not been very effective. The dissatisfied party will commonly be disputing the amount of compensation that has been awarded, without understanding that the right of an internal review is not simply an opportunity for the same issues to be re-agitated a second time. The applicant will often not identify an error in process

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[19] RTA s 113.

[20] *Legal Practitioners Act 1981* s 5(1):

> ***legal practitioner*** or ***practitioner*** means—
>
> (a) a person duly admitted and enrolled as a barrister and solicitor of the Supreme Court; or
>
> (ab) an interstate legal practitioner who practises the profession of the law in this State;
>
> ***local legal practitioner*** means a legal practitioner who holds a practising certificate;
>
> ***interstate legal practitione***r means a natural person—
>
> (a) who has been admitted as a legal practitioner in a participating State; and
>
> (b) who holds an interstate practising certificate issued or given by a regulatory authority in that State or is entitled by admission or otherwise to practise the profession of the law in that State; and
>
> (c) who is not a local legal practitioner; and
>
> (d) whose principal place of legal practice is not this State;

in the original hearing, or an error in outcome with the decision under review. It is difficult to explain to the applicant that there must be a reason why the decision under review is not the correct or preferable order which is something other than their opinion. Although an application for review can only be made with leave, this is a difficult concept for unrepresented parties to grasp, and it can be delicate to handle appropriately because the nature of the review is that it is a merits review and not an appeal.

Another solution may be an on-the-papers reconsideration of the original hearing by a senior or Presidential member, though it may not be considered transparent enough and it would still entail a lot of work on the part of the Tribunal to undertake what is essentially a "second look" at a matter because a party is dissatisfied without identifying a proper basis for the dissatisfaction. These matters can be distinguished from vacant possession matters in which the outcome is concerned with the more significant issue of a person potentially having no place to live.

The Tribunal suggests consideration of a limit to the right of internal review for compensation matters to a particular monetary value or an on the papers internal review process for particular types of compensation matters.

**Squatters and trespassers**

The Tribunal receives requests from landlords for the bailiff to evict persons who are at a property without the consent of the landlord, after the bailiff has already performed an eviction (sometimes this will be where the tenant has gone back to the property, or the tenant has allowed others to be at the property). At present, the Tribunal is unable to deal with these requests and will refer the landlord to the South Australia Police (SAPOL). Generally, SAPOL are reluctant to get involved in these matters.

An amendment to the RTA to allow the Tribunal to make an order for possession to evict squatters and trespassers would allow SACAT to deal with these matters and protect the rights of landlords without the need to involve the police. Such a provision might be modelled on sections 344 and 345 of the *Residential Tenancies Act 1997* (Vic), which provide for application for possession orders if a premises is occupied without consent.

**Statements / receipt of rent**

Section 58 of the RTA provides for certain obligations of landlords to provide statements of information or receipts for rent. Given that it is prevalent and easy for landlords and agents to keep tenants informed of rent payments by email – it may be that an amendment to section 58 would be in keeping with modern methods of communication.

**Termination**

Notice of termination by a tenant

Section 85 of the RTA allows a tenant to serve a notice of termination for a breach by the landlord. If the landlord does not remedy the breach within the time permitted, then the tenancy will terminate by virtue of section 85(1)(b).

This provision creates significant confusion amongst tenants and landlords alike. If a landlord disputes the notice, then the landlord should apply to the Tribunal for an order – this rarely happens. If the landlord does not remedy the breach within the time permitted in the notice, then the tenant should apply to the Tribunal for an order as to the validity of the notice and to determine whether or not the tenancy should actually be terminated. The Form 4 in the Regulations, which prescribes the notice, does not make this clear.

Unfortunately, this has led to situations where a tenant vacates, and the Tribunal subsequently finds the notice to be invalid. The consequence is that the tenant is liable for break lease costs.[21] An amendment to the RTA and the Form 4 to clarify this issue should be considered.

Application by landlord

Under section 87 of the RTA, the Tribunal has the power to order a termination of a residential tenancy where the tenant has committed a breach of the agreement that is sufficiently serious to justify termination of the tenancy.

Applications brought under section 87(2) of the RTA relate to incidences involving serious damage to the premises or personal injury to the landlord (or their agent) or a person in the vicinity of the premises (or the likelihood of such incidents occurring should the tenancy continue).

If, on the balance of probabilities, a serious breach can be established, the Tribunal may make an order for immediate possession. It is not always appropriate or necessary to make an order for immediate possession in those circumstances.

An amendment to section 87 of the RTA to allow the Tribunal discretionary power to order immediate possession in applications brought under section 87(2) of the RTA is suggested to allow the Tribunal to appropriately deal with applications under section 87 dependent on the facts before it.[22] An amendment for discretionary powers could be modelled on section 90 of the RTA.

Hardship

Under section 89 of the RTA, the Tribunal may terminate an agreement on application by either a landlord or a tenant if it would result in ***undue hardship*** to either party. ***Undue hardship*** is not defined under the RTA and there is ambiguity in relation to its application.

For example, where a tenant has asked to have a residential tenancy agreement terminated because they have received an offer of public housing, it is unclear whether the Tribunal can apply section 89 of the RTA to terminate a tenancy on the grounds of undue hardship. From a strict legal perspective, there is doubt as to whether section 89 applies in this instance. Although a tenant will have been offered the accommodation for a good reason (e.g., financial

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[21] See, e.g., *Cogswell & Gaughran v Mok & Mok* [2018] SACAT 8.

[22] Where the Tribunal decides to terminate the tenancy under section 87(2) of the RTA, it may be possible to postpone the vacate date by applying section 119(1) of the RTA to modify the application of section 87(2), but it would be preferable to provide the Tribunal with a discretion.

circumstances or health issues), that does not necessarily satisfy the undue hardship test in section 89 of the RTA.

An amendment to section 89 of the RTA to broaden or clarify what constitutes "hardship" under that provision would be of great assistance to parties and the Tribunal.[23]

**Forms 2A and 4B of the Residential Tenancies Regulations 2010**

A drafting error has been identified in Form 2A and Form 4B in Schedule 1 of the Regulations. The forms currently state:

> I give you notice to deliver up vacant possession of the premises at:
> Address of premises: [insert address of rented premises]
> on: [insert date the fixed term ends]
> being a date that is not less than 28 days **before** this notice is given.

The Tribunal suggest that an amendment to change "28 days **before** this notice is given" to "28 days **after** this notice is given".

Thank you for consulting with SACAT on the Government's review of the RTA.

Yours faithfully

Anne Lindsay
**Principal Registrar**
**South Australian Civil and Administrative Tribunal**

[23] The amendments to section 89 of the RTA under section 8(1)(h) of the *COVID-19 Emergency Response Act 2020* were useful for Tribunal members when they were in effect. Notably the power to make an order other than an order to terminate the tenancy. While the broad discretion in that legislation may not be appropriate on a long-term basis, more flexibility would be useful.