

3 May 2016

By email: yoursay@fairersaferhousing.vic.gov.au

Residential Tenancies Act Review
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

Dear Sir/Madam

Residential Tenancies Act review: Issues Paper 3—Rights and responsibilities of landlords and tenants

Consumer Action Law Centre (**Consumer Action**) is pleased to comment on *Issues Paper 3—Rights and responsibilities of landlords and tenants* as part of Consumer Affairs Victoria's (**CAV's**) review of the *Residential Tenancies Act 1997 (Vic) (RTA)*.

This submission is focused on rent-to-buy schemes in the residential property market, building on our previous submissions to this review. Consumer Action is also providing comment on rent-to-buy and vendor terms schemes to CAV's current review of consumer property laws. There are typically similar risks for buyers and vendors in both of these types of schemes.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

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Rights of tenants in residential lease-option schemes

Consumer Action's previous submissions to this review have outlined the [problems inherent](#) in rent-to-buy schemes, in particular the [financial risks](#) to hopeful buyers. Another risk seen in these schemes is the unclear nature of the rights of tenants in lease-option arrangements and their ability to exercise these rights. In this submission, we use 'tenant' to describe the person who is both the tenant under the residential tenancy agreement and the purchaser under an option contract.

In rent-to-buy arrangements, there is typically a standard residential tenancy agreement covering the tenant's occupation of the property, and a separate option agreement under which the tenant pays fees for the 'option' to purchase the property at a later date (typically in three years). The option agreements seen by Consumer Action appear to be based on template documents provided by spruikers (who promote rent-to-buy, vendor finance and related schemes) to property investors (who become brokers of these deals). The documents are often prepared by lawyers associated with these spruikers.

Option agreements generally specify what will happen in the case of default (non-payment of option fees) by the tenant. Critically for tenants, under the option agreements that Consumer Action has seen, option fees paid by a tenant are not refundable if the purchase is not completed.

The brokers of these deals seem to intend for option agreements to fall outside the RTA. The RTA appears to be silent on whether option agreements could be additional terms of a lease and therefore potentially invalid if their terms exclude, restrict or modify the application of the RTA or the exercise of a right under the RTA.¹ The giving of an option to purchase land is considered a 'sale' of land under the *Sale of Land Act 1962* (Vic)² and therefore that legislation will regulate the option agreement. This will provide the tenant with some remedies in the event of a vendor's breach of the agreement or the law. However, to pursue those remedies, a tenant will need to be proactive and have the resources to sustain legal action, which vulnerable tenants will often not have.

Consumer Action's experience has been that lease-option arrangements are also used to circumvent federal consumer credit laws (which apply to vendor terms contracts—an alternative but very similar method of selling residential property). Rather than providing an opportunity to own a home, these deals exploit the desire of marginalised people to buy a home and leave them with legal rights that can be murky and difficult to exercise.

It is Consumer Action's view that, in line with our previous submissions:

- there is a real question as to whether lease-option agreements should have a role in the residential property market at all,
- if residential lease-option agreements do continue, certain rights of tenants under lease-option agreements should be expressed in the RTA, including (but not limited to):
 - that the rent under a tenancy agreement and option fees under an option agreement be treated separately by a landlord or agent, with all option fees

¹ Under s 27 of the RTA.

² Under s 2 of the *Sale of Land Act 1962* (Vic).

- paid to be held on trust for the tenant by a solicitor, conveyancer or estate agent, and
- o that if a lease-option arrangement does not lead to the tenant becoming the legal owner of the property, all option fees (less any amount recognised as market rent in advance), be repaid to a tenant.

Express duties for landlords and agents

Consumer Action supports the suggestion in the initial stages of this review that an express duty for landlords to act honestly and in good faith, with due care and diligence, would reinforce tenant confidence.³ This is particularly important in rent-to-buy agreements which involve heightened risks for both the tenant and landlord, compared with standard residential tenancies.

Consumer Action has also [submitted](#) recommendations in relation to estate agent conduct to CAV's current consumer property laws review. In rent-to-buy deals, the broker's conduct as an agent of the property owner is typically the most problematic aspect of the transaction. Given that tenants in Victoria make many complaints against agents which fall outside the current RTA,⁴ Consumer Action would support enshrining agent-specific obligations in the RTA to ensure that tenants' rights are better recognised and protected.

Please contact Susan Quinn on 03 9670 5088 or at susan@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE



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³ Western Community Legal Centre in Consumer Affairs Victoria, *Rights and Responsibilities of Landlords and Tenants – Issues Paper: Residential Tenancies Act Review*, p 19.

⁴ Consumer Affairs Victoria, *Rights and Responsibilities of Landlords and Tenants – Issues Paper: Residential Tenancies Act Review*, p 38.