

THE PATH OF LEASE RESISTANCE

A review of tenancy terms
in the ACT

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Pippen, Deb, "The path of lease resistance: A review of tenancy terms in the ACT", Canberra, June 2021

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We acknowledge the support of Hands Across Canberra and the Chief Ministers Charitable Fund in making this report possible.



What is a home?

Over one third of the ACT population rent their homes. Thanks to the presence of non-standard terms in their tenancy agreements, many of these renters expect and believe that somebody else can control who they have living with them in their home, or whether they can have pets.

Because of the non-standard terms, many believe that they can be forced to pay for things, even if those things are unneeded. Renters in the ACT live in their homes under these and other unfair conditions. Many believe, incorrectly, they have no option but to do so.

This report examines the use of tenancy agreements in the ACT. While the Residential Tenancies Act (RTA) regulates tenancies and renting, and also sets out Standard Residential Tenancy Terms (SRTT) that apply to all tenancies, a number of factors weaken the efficacy of these protections. Reviewing the development of the legislation, we highlight the clear intention of the community experts, and show how decisions by others have thwarted those intentions. Drawing on direct input from tenants, along with tenancy experts, community service providers, and real estate agents, we have identified how lessors and agents are subverting standard tenancy terms. Facing legislation designed to protect tenants, agents have taken the path of least

resistance through the routine addition of inconsistent, unenforceable additional terms.

The effects of these practices are wide-ranging. In some cases, we see tenants paying out money and undertaking tasks they are not legally responsible for. In others, tenants are effectively unable to use their home as a home in the ordinary sense. Such restrictions and controls are, in some cases, outrageous. Examples include:

- ***I will never invite friends home for party or overnight stay***
- ***There is \$50 penalty for smoking in the house/patio/garage area***
- ***Standard operating hours for ducted heating during winter is no more than 6 hours a day at 21 degrees temperature***
- ***the owner can visit and inspect on 10 hours notice***

The fact that these requirements are inconsistent with the RTA, and are not enforceable, is largely irrelevant.

The people we heard from generally misunderstood the current state of the law. There is a general lack of awareness amongst tenants of the coverage of the standard terms, and the power imbalance between renters and landlords leads to renters' fear of retaliation if they assert their rights.

The ACT Government can address these issues and improve the lives of renters. All that is needed is to recognise the problem and take appropriate action. To that end, we have made a series of recommendations linked to the different aspects of the issues.

Our recommendations are easily achievable. Together, they cover all elements of this fundamental issue. They are crucial for a Government to achieve the intent of the Residential Tenancies Act.

Our principal recommendations:

1. Introduce a prescribed tenancy agreement reflecting the existing SRTT.
2. Establish penalties for the use of inconsistent terms or misleading/inaccurate communication with tenants.
3. Establish a landlord register, including a requirement for landlords to undertake training in their legal obligations.
4. Remove the endorsement provisions in the RTA. If this does not happen, amend the endorsement process to require that the process occur only at least one week after the Tenancy Agreement is signed, to ensure that parties are on a more even footing.

Supporting recommendations:

1. Amend the pet and modifications clauses of the SRTT to include a clear statement that a landlord can only refuse consent if they make an application to ACAT for approval to do so and, further, that if the lessor does not respond to the request within 14 days then consent is deemed to be given.
2. Schedule reviews of RTA amendments such as pets clauses to determine and respond to unintended consequences.
3. Empower and require ACAT to collect and report on endorsed terms, along with applications for refusing pets and modifications, in order to build a clear picture of what is happening.
4. Review the publication of *The Renting Book* as an objective source of information on obligations and rights for all parties to tenancy agreements, with an emphasis on transparency and accuracy. Report on the number of downloads of the publication to have a very basic estimate of use.
5. Develop and promote a clear and transparent government strategy for raising awareness of the RTA and changes to ensure all parties are aware, not just professional stakeholders.

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Introduction

In the ACT, over one third of people rent their homes.¹ This means almost 150,000 people living in a home they do not own. Unlike homeowners, who are able to do what they will with their home, these renters are controlled in what they can do with their homes by the contract they have signed with their landlord.

Because of the unique and fundamental importance of the home, however, renting a residence is unlike other contractual transactions. Recognising this, governments regulate these unique relationships using residential tenancy law. In the ACT, this is the Residential Tenancies Act 1997 (the RTA), which regulates all residential tenancies in the ACT. When the RTA was introduced, it also introduced standard contractual terms that cover all residential tenancies.

For the vast majority of tenants, the standard terms in the form of tenancy agreements (leases), are their only direct contact with tenancy law. But, despite the standard terms having existed for 24 years, many tenants are not aware of the details of the terms, or of their compulsory nature. This is coupled with entrenched practices among some lessors and real estate agents, who add conditions to leases that are not consistent with the standard terms. The result is that many tenants incorrectly

believe they are bound by requirements that are onerous, sometimes costly, and often affect their ability to use their home in peace and comfort.

This project has sought to determine how inconsistent terms are affecting renters in the ACT. We collected information through online questionnaires from renters, agents, and community sector employees. We received responses from renters directly about their individual agreements, as well as broader views and experiences from people who work in services that assist renters. Some real estate agents also provided responses to questions about their experience of standard terms. This report was further informed by discussion with tenants, workers, and specialists in ACT tenancy law.

From this body of evidence, we find the following: first, the current state of affairs is unjust, unreasonable, and inconsistent with the original intent underpinning the Residential Tenancies Act; second, a set of modest changes could significantly improve the unfair situation for renters and address the unreasonable obligations placed on them in their homes. We strongly recommend the changes.

¹ 34% of households in the ACT were renting in 2018. ABS <https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/2017-18#states-and-territories>

The origin of 'standard terms'

A standard agreement recognises that, like most people, tenants and landlords rarely access legislation because it is assumed to be complex and confusing. A standard agreement is a prescribed form that must be used by every landlord and agent. It sets out terms that cover most issues that may arise in a tenancy, including and reflecting relevant sections of the law. The law itself is more complex and deals with processes. A standard agreement ensures consistency for tenants, landlords, and agents, and it also leads to a development of a clear understanding of what to expect in every tenancy. Where standard terms exist they automatically cover all tenancies, whether agreements are in writing or not, and thus provide comprehensive protection.

In 1994, the ACT Community Law Reform Committee (CLRC) report prepared the way for modern tenancy law and the replacement of the Landlord and Tenant Act 1949. It recommended a standard tenancy agreement to clarify rights and obligations of tenants and landlords.² Speaking of the report, the ACT's then Attorney-General noted:

In relation to the nature of a tenancy agreement, the CLRC recommended that the legislation include a standard

tenancy agreement that would form the basis of all ACT tenancy agreements. The CLRC proposed that parties would not be able to contract out of this arrangement, although they would be able to include additional provisions in the agreement, provided they were consistent with the agreement.³

The CLRC report determined that:

A standard agreement contains all the rights and obligations, that is, the rules which ...should apply in every relationship of lessor and tenant.... it is intended to be a compulsory set of rules for universal use.⁴

In 1995, when introducing the new law, the Attorney-General in the then Liberal government did not adopt the full recommendation. Instead, the government opted for standard terms that must be included in every tenancy agreement. These 100 terms form the Standard Residential Tenancy Terms (SRTT) and are included as a Schedule to the Act.

² Residential tenancy law: Summary of Recommendations [1994] ACTCLRC 8, <http://www.austlii.edu.au/au/other/lawreform/ACTCLRC/1994/8.html>

³ Hansard 15 May 1997 <http://www.hansard.act.gov.au/hansard/1997/week05/1455.htm>

⁴ para 93, p 26, The Community Law Reform Committee of the Australian Capital Territory, Report No. 8 Private Residential Tenancy Law, ACT, Canberra 1994

Additional terms

Neither the SRTT nor the RTA itself specifically refers to additional terms. The acceptance of additional terms is implied because the Act declares that additional terms are void if they are inconsistent with the Act. Tenants and landlords are thus left to agree to additional (proposed) terms on a case-by-case basis, making their own assessments as to the consistency and validity of each term. While the RTA doesn't provide any guidance for these informal assessments of additional terms, the ACT Government has recently provided some guidance and examples in the new *Renting Book*.⁵ Under the SRTT, this publication is required to be provided to each tenant on signing their lease. In practice, this seems to occur rarely and many tenants in our study were unaware of the existence of the *Renting Book*.

Inconsistent terms

In a further departure from the CLRC's intentions to provide clarity and fairness, in introducing the RTA the Attorney-General stated:

While I accept the desirability of standardised obligations, I believe that parties should have more latitude in the way in which the tenancy agreement is drawn.⁶

This led to the endorsement process. This is a process whereby a party to a lease (almost invariably the lessor) can make an application to the ACT Civil and Administrative Tribunal (ACAT) for endorsement of terms that are inconsistent with the SRTT. This process is used by landlords and their agents. It is a process unique to the ACT.

In practice, the existence of the endorsement process results in asymmetrical knowledge, to the disadvantage of tenants. If an inconsistent term is present in a lease, but not endorsed, tenants have no way to establish that the term is in fact inconsistent, and thus unenforceable. It is left to the tenant to identify that it is inconsistent, and therefore invalid and unenforceable, and then challenge any claim by a landlord or agent based on the clause. The stated motivation, in the initial introduction of the RTA, was a desire for "more latitude" in agreements. The power imbalance of the rental relationship means that this "latitude" skews strongly in favour of the landlord.

⁵ pp14 - 15, *Renting Book*, <https://justice.act.gov.au/sites/default/files/2021-01/Renting%20Book%202021.pdf>

⁶ Hansard 15 May 1997 <http://www.hansard.act.gov.au/hansard/1997/week05/1455.htm>



Other jurisdictions

All jurisdictions across Australia have prescribed terms to varying degrees. Some have a standard form for agreements which must be used. All except the Australian Capital Territory explicitly prohibit 'contracting out'. That is, other than in the ACT, terms in a tenancy agreement which contradict the prescribed terms are unenforceable. Victoria and NSW each

have a list of prohibited additional terms, and a tenant can make an application to a Tribunal and have a term determined to be inconsistent and void.⁷ In all jurisdictions except the ACT, penalties apply for contracting out of their Act.⁸ In Victoria and WA, penalties apply for failing to use the prescribed tenancy agreement. The ACT is the only jurisdiction where a landlord can contract out of any element of the SRTT.

⁷ S11 Residential Tenancies Regulations 2021, <https://content.legislation.vic.gov.au/sites/default/files/2021-01/21-003sra%20authorised.pdf>

⁸ S82 Residential Tenancies Act 1987, https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_821_homepage.html

Tenant experiences of non-standard terms

The following information is based on responses from tenants sharing their experiences and copies of their leases. The majority of respondents sharing leases with additional terms are renting through agents, and they provided agency agreements that were apparently template agreements for the business. Given that around two in three private market rentals in the ACT are managed through real estate agents⁹, who will likely be using templates across all of the tenancies they manage, each unique agency lease seen in compiling this report was unusually informative: every individual non-standard term that we saw would be used for many tenancies, and possibly also across agencies.

How additional terms are included

The standard practice appears to be to provide tenants with a copy of the SRTT and an attachment of Tenant Obligations, Rules, Conditions or Information Sheets that the tenant is then required to initial and sign.

LJHooker requires that tenants sign a list of 18 tenant agreed responsibilities.¹⁰

Once the tenant has signed these terms, they believe they are committed to them. In general, a tenant will believe that the documents they receive are valid: tenants rarely question or even read them.

In some cases, a list of special conditions will mix consistent and inconsistent terms. This muddies the waters, making it harder for renters to know which terms are enforceable. An example is the “special conditions” form used by an agency that provides 12 special conditions a tenant is required to sign when they sign their lease. Of these 12, only five are consistent with the SRTT.

Consistent terms

Many additional terms are redundant, as they are consistent with the SRTT and merely repeat existing terms with extra detail. For example:

⁹ b32 Tenure and Landlord Type by Dwelling Structure, Canberra Community Profile, ABS 2016 Census of Population and Housing, https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/communityprofile/CED801?opendocument

¹⁰ Unless noted otherwise, this and other quotations are derived from tenancy agreements supplied by ACT renters.

The tenant acknowledges that any keys lost or missing by the tenant shall be the responsibility of the tenant to replace at their own cost.

Garden – the tenants are responsible for the maintenance and upkeep of the rear and front gardens including the nature strip.

The tenant agrees to be responsible for water consumption payments as per Section 46 of the Standard Residential Tenancy Terms.

Additional terms are also used to emphasise to a tenant the severe consequences of breaches:

The tenant acknowledges that in the event that the rent is in arrears that, a Termination Notice may be served in line with the lease and Residential Tenancy Act.

This adds to the length and complexity of the agreement being provided, and also serves to minimise the salience of other elements, such as the use by agents of renters' private information.

The use of additional terms in this way is problematic because it adds unnecessary complexity to an already lengthy contract of 100 terms.

Omissions

A serious issue we observed is the omission of information to give a false impression of tenants' rights. This was particularly apparent in relation to pets. On 4 March 2020, ACT law changed to make it explicit that tenants have a right to have pets, except in some circumstances. The SRTT were changed to include a new clause:

74A (1) The tenant may keep an animal, or allow an animal to be kept, on the premises...

(2) The residential tenancy agreement may require the tenant to obtain the lessor's prior written consent to keep an animal, or allow an animal to be kept, on the premises (time limits for the lessor to refuse consent are set out in the Residential Tenancies Act).

The Act itself was also changed to include a new process that cannot be contracted out of: a landlord cannot refuse the request without approval from the ACT Civil and Administrative tribunal (ACAT), and they must apply to ACAT within 14 days of receiving the request, or they will be taken to have consented.¹¹ Under 71AE(4) a landlord can impose a condition on consent if it is in relation to the number of animals or the cleaning and maintenance of the premises.

¹¹ s71AE Process for tenant seeking consent—animals, and s71AF Lessor to apply to ACAT for refusal - animals, Residential Tenancies Act 1997, <https://www.legislation.act.gov.au/View/a/1997-84/current/PDF/1997-84.PDF>

The response from some landlords and agents has been to add additional terms that refer to the need for permission for a pet, with no indication or reference to RTA sections providing that a landlord cannot refuse without approval from ACAT, or that consent is assumed if the landlord takes more than 14 days to make an application. The wording is careful. While not a flat-out lie, it gives the impression that a landlord or their agent can just refuse permission:

Pets are not to be kept on the premises unless approved by the owner in writing.

No pets have been approved to reside at this property during the tenancy. Pet approval is as per the tenancy schedule.

I/we agree no animals may be kept on the property without written permission from the lessor/agent. To keep a pet without written permission is a breach of your tenancy and will result in a Notice to Vacate being served upon you.

This practice misleads tenants about their rights and, in effect, attempts to circumvent the changes to the law.



Examples of common inconsistent terms

Inconsistent additional terms	Standard terms and reason for inconsistency
<p>Rewashing of taps is the tenant's responsibility.</p>	<p>63. During the tenancy, the tenant must –</p> <p>a) not intentionally or negligently damage the premises or permit such damage; and.....</p> <p>c) take reasonable care of the premises and their contents, and keep them reasonably clean, having regard to their condition at the time of the commencement of the tenancy and the normal incidents of living.</p> <p>Washers wearing out is general maintenance and modern plumbing means it is often not a simple process that can be undertaken without specialist tools. There is also a real risk for tenants that attempting to do this without training and tools can result in damage.</p>
<p>The Security Bond will be held by the Office of Rental Bonds until the agent is satisfied with the condition of the property when handed back by the tenant.</p>	<p>This misrepresents the ORB process. A tenant can make a claim if they believe the condition of the property is sufficient. The agent does not have control of the process to return the tenant's money.</p>
<p>If the final inspection is unsatisfactory, rent will be charged on a daily basis until all issues are rectified.</p> <p>If the final inspection is unsatisfactory, rent will be charged on a daily basis until all issues are rectified and all keys are returned</p>	<p>84 (1) If the tenant serves a notice of intention to vacate and vacates the premises in accordance with the notice, the tenancy terminates on the date of vacating the premises.</p> <p>Once a tenant returns the keys and vacates no rent can be charged because the tenancy has ended. The landlord or agent doesn't have ultimate determination, and a tenant can dispute a claim that the condition is unsatisfactory.</p>

<p>The tenant is aware and agrees that if the property as a whole and particularly the windows, kitchen, bathrooms and oven are not 100% professionally clean then a cleaner will be called to remedy the issues and the money will be held back from their bond money.</p>	<p>Under clause 64 the requirement is not “professionally” clean, see above.</p>
<p>The tenant is responsible for the replacement of broken glass.</p>	<p>This is not necessarily the case. A tenant is only responsible for their own (and their guests) intentional or negligent damage. If damage occurs through no fault of theirs, they are not liable.</p>
<p>Your tenancy agreement specifies the names and numbers of people who can occupy the premises. If you wish to alter this, you are obliged to contact your property manager immediately to provide and seek approval to alter the original contract.</p> <p>NB - There are many variations of this clause, all seemingly restricting the number of people living in the property, for example:</p> <p>Number of persons permitted; 2 Adults, 0 Children</p>	<p>This is used as an example in the Renting Book - “This term is inconsistent with clause 52 of the Standard Terms which provides that a landlord must not cause or permit interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises. It cannot be included unless you as the tenant agree and it is endorsed by ACAT.”</p> <p>It is also inconsistent with clause 53 that gives the tenant exclusive use of the premises.</p> <p>The agreement cannot restrict the number of people who live in the property, only the people who are given rights under the agreement. A tenant can have guests and new children in the property.</p>

Responses from other stakeholders

Community worker responses

We heard from people working in community organisations who assist renters with their tenancy or other issues. This provided a more systemic view of issues relating to general understanding and use of leases. In general, workers did not have a good understanding of tenancy terms and the endorsement process, with few having received any relevant training. Many community workers also observed that tenants rarely understand the difference between consistent and inconsistent terms.

Tenants usually need legal advice in order to understand standard vs inconsistent terms and would not ordinarily have an opportunity to appear at ACAT to contest any term sought to be endorsed by the lessor. In our experience, ACAT does not require or seek input from the tenant.

Responses from real estate agents

Agents have a different perspective on tenancies and tenancy agreements. Their insights are valuable because each agency manages many tenancies. There are over 1200 licensed real estate agencies in the ACT,¹² and an agent may manage as many as 150 tenancies using pro-forma agreements. Agent practices have a significant impact on many tenancies.

In relation to the the use of additional terms, agents are open about their use:

They are used consistently however tenants don't seem to read them - too excited to move in. Private owners are usually the culprits adding their own rules without having them endorsed.

¹² <https://www.accesscanberra.act.gov.au/app/services/occupational/#/RA>



Agents reported routinely using various additional terms. Some are indicated here, as well as whether the term is consistent or inconsistent.

- required daily cleaning of the kitchens, toilet, dishwasher and shower (inconsistent)
- prohibited pets and parties (inconsistent)
- allowed the owner to sell and the tenant to vacate on one months' notice (inconsistent)
- prohibited any slandering, or attacking online will be recorded and evidenced for the local police reference (inconsistent with RTA and other legislation)
- the tenants have to respect the landlord or landlady
- the tenants are responsible for the connection and payment of their utilities (consistent)
- the tenants have to be WeChat or phone/email communicable
- the owner can visit and inspect on 10 hours notice (inconsistent)

The role of the ACT Civil and Administrative Tribunal

The ACAT is part of the ACT Courts system and is an independent body that resolves civil disputes, including tenancy and other renting disputes. Under the Residential Tenancies Act 1997, the ACAT has jurisdiction to hear and determine disputes arising from tenancies and occupancy agreements in relation to private and public housing. The Tribunal also considers applications for endorsement of inconsistent terms of tenancy agreements and holds negotiation conferences for matters referred from the Office of Rental Bonds.

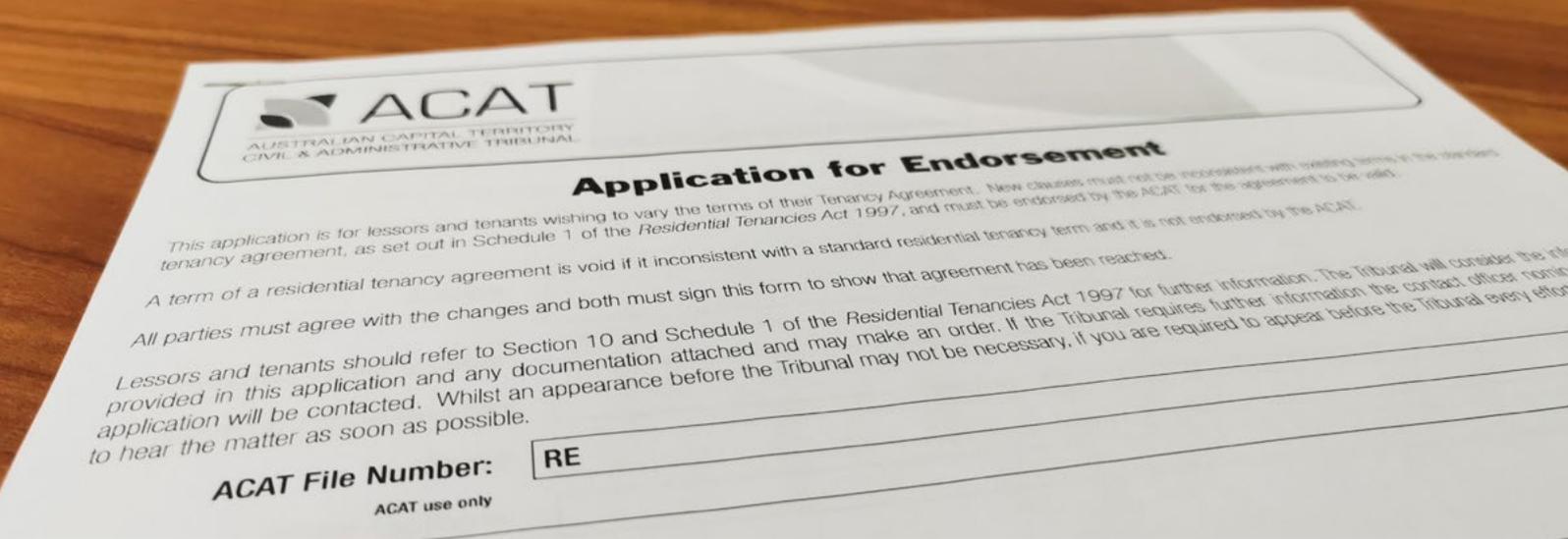
ACAT does not give advice. However, it has provided guidance in the form of practice directions to professional stakeholders (overwhelmingly property managers and housing providers). Such directions have listed terms that ACAT held did not need endorsement if included in a particular way, as well as clarification of what terms require endorsement.

The table provides the extent of records reported on and collected by ACAT regarding endorsed terms. ACAT does not keep records on whether endorsement applications are accepted or refused, nor what terms are accepted or refused.

Over the years, tenant advocates have raised this glaring omission, and ACAT recognises the need to address this. However, the Tribunal has been constrained by lack of resources. Similarly with the new processes relating to permission for pets and modifications, while numbers of applications will be reported and in some cases written decisions will be produced, there is no details of what type of requests are being made, nor reasons for refusal, unless specifically requested by the parties.

ACAT Applications & Endorsements ¹³	2014-15	2015-16	2016-17	2017-18	2018-19
Applications for resolution of a dispute lodged	1,191	1,175	1,093	1,068	730
Endorsement applications	374	358	335	335	246

¹³ https://www.acat.act.gov.au/_data/assets/pdf_file/0003/1450299/10548-ACAT-Annual-Review-201819_FA_tagged-update.pdf



Tenant experience of the endorsement process

There is no reporting on the breakdown of who makes applications. However, based on previous figures (2015 - 2018), on average less than 6% of ACAT applications were by tenants. Unlike landlords and agents, tenants have little knowledge or experience of ACAT processes and are wary of making applications because of fear of consequences.

The ACAT endorsement process is free and involves the submission of an application form signed by both parties. The form requires details of negotiations and statements about whether the term would disadvantage a party, as well as a copy of the tenancy agreement.¹⁴ These applications are usually considered in chambers by an ACAT Member. On the face of it this is a fair process, but this is not the experience of tenants.

Tenants feel pressured to sign forms because if they don't sign they won't get the tenancy. One example we saw also demonstrates the failure of this process for tenants. In the example, the inconsistent term was "If the washing machine, dryer, microwave fail or break they will not be repaired or replaced". Issues identified include:

- The form lodged with ACAT provided no details regarding negotiations between the parties,
- The form said the tenant would not be disadvantaged by this term. This is clearly incorrect because the tenant would bear the cost of repairing or replacing the goods provided by the landlord, and
- The tenancy agreement the tenant provided to us, included in the application to ACAT, included other inconsistent terms not identified or considered by ACAT.

¹⁴ https://www.acat.act.gov.au/_data/assets/pdf_file/0004/1364521/af2015-144_application_for_endorsement.pdf

Implications and recommendations

In our rental market, people needing a home will do what they need to do to secure a place to live. It is not an equal negotiation: if tenants don't sign the terms put in front of them, the landlord/agent will simply go for the next applicant. The value of the standard terms should be that, although tenants may be struggling to find a home, they can at least be confident that their rights and obligations are consistent and fair, and that they will not be further disadvantaged by the lack of bargaining power. This is not currently being achieved in the ACT.

Principle recommendations

Make it harder for lessors to circumvent the law.

The intention of the RTA is clear: the existence of the SRTT enables clear, consistent, and understandable rights and obligations for all tenancies. However, this is not the reality for many tenants. While the SRTT appear to be used across tenancies managed by real estate agents, agents also routinely use additional terms that are not consistent. They use lengthy, repetitious templates that add complexity to an already long document. Landlords

managing tenancies directly appear to be more likely to disregard the SRTT, particularly in shared housing.

Recommendations

- Introduce a prescribed tenancy agreement reflecting the existing SRTT that prevents the use of novel additional terms.
- Establish penalties for the use of inconsistent terms or misleading/inaccurate communication with tenants, even if it isn't in the lease.¹⁵

This means that tenants are missing out on the protections that are meant to be enshrined in law. The use of Standard Terms rather than a standard tenancy has allowed for this. A simple first step is to introduce a prescribed agreement including the SRTT that is readily accessible on government websites. This would ensure that all parties have easy access to it. To ensure that this is not ignored or undermined as the current Terms are, the ACT Government should introduce and enforce a penalty for failing to use the prescribed agreement.

¹⁵ <https://www.commerce.wa.gov.au/consumer-protection/infringements-lessors>



Hold lessors to a professional standard

Recommendation

Establish a landlord register¹⁶, including a requirement for landlords to undertake training in their legal obligations. Any costs for this register should be covered by registration fees for lessors.

Responses demonstrated that private landlords directly managing tenancies were less likely to use the SRTT, and they were more likely to use invasive terms that have significant impacts on tenants' privacy and quiet enjoyment of their home. While the Agents Act regulates real estate agents, albeit weakly, there is no regulation relating to how a landlord operates their business. The actions of landlords can have

a profound effect on tenants' lives and there must be regulation of those activities. As noted by Leo Patterson Ross of Tenants' Union NSW:

Landlords are running a business and there should be some training or quality control like with running many other businesses.... What's appropriate in many other industries is also appropriate for property investment. Landlords need to understand the law and their business set-up and be holding the right insurance and undergo training to manage properties in an effective way. Everyone should be registered to give them visibility and transparency and to weed out the bad participants.¹⁷

A registration system for landlords is fair and necessary. It must also be a business cost for landlords, rather than a system funded by the interest on bonds held by the Office of Rental Bonds.

¹⁶ <https://www.landlordregistrationscotland.gov.uk/about>

¹⁷ Tenants' Union NSW Blog, <https://www.tenants.org.au/blog/getting-your-ll-plates> 23/2/2021

Curb misuse of the endorsement process

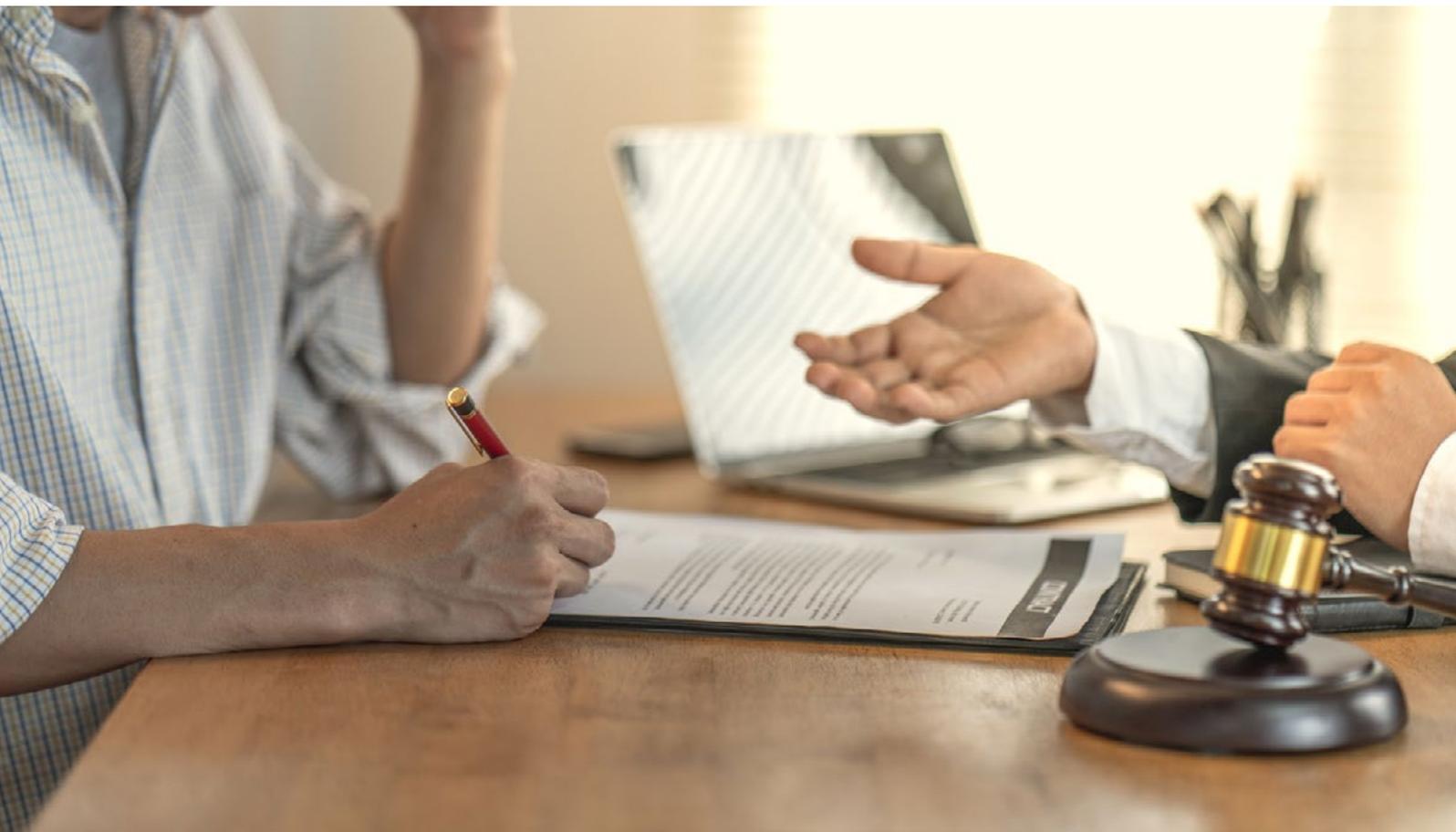
Recommendation

Remove the endorsement provisions in RTA. If this does not happen the legislation must be amended to require that the endorsement process occur at least one week after the Tenancy Agreement is signed.

The ACT is the only jurisdiction that allows contracting out of the standard terms. The endorsement process is unfair and problematic. It adds complexity and confusion to what should be a simple matter of a standard tenancy agreement. Its existence undermines the intention of standard terms.

While most people are unaware of the process, even those who are aware of it do not understand it. There are no public records to show what sort of terms are endorsed and there is no transparency to determine if endorsed terms are fair and show that there has been any balancing of rights. Concerns that this would be a 'tick and flick' process for lessors are being realised.

The process is unfair because of the pressure on a prospective tenant to agree to all terms or lose the property. The only way the process could at least approximate fairness would be if any additional terms were negotiated only once the tenancy agreement had commenced. With such a change, the balance of power would shift slightly, as tenants would not be pressured to agree to additional terms in order to secure a tenancy.





Supporting recommendations

In addition to our principle recommendations, we have identified supporting recommendations that would improve the transparent functioning of tenancy law in the ACT.

- **Amend the pet and modifications clauses of the SRTT** to include an unambiguous statement that a landlord can only refuse consent if they make an application to ACAT for approval to do so, and that if the lessor does not respond to the request within 14 days consent is taken to be given. This will improve transparency for tenants who are unlikely to check the RTA for specific details of the process.
- **Schedule reviews of RTA amendments.** This will allow the government to identify and respond to unintended consequences.
- **Require ACAT to collect and report on endorsed terms as well as applications for refusing pets and modifications.** This will improve transparency and build data on what is happening.
- **Review *The Renting Book*** as an objective source of information on obligations and rights for all parties to tenancy agreements, with an emphasis on transparency and accuracy. Report on the number of downloads of the publication to have a basic estimate of use. This will make it easier to determine if *The Renting Book* is helping tenants to know their rights.
- **Develop and promote a government strategy for raising awareness of the RTA and any changes** to ensure all parties are aware, not just professional stakeholders. This should include use of the Office of Rental Bonds contact details. This will help to reduce information asymmetry and make it easier for tenants to know and exercise their rights.

Conclusion

The regulation of tenancy terms in the ACT is a failure of seemingly well-intentioned legislation. As with many similar regulatory failures, the reason is clear: a lack of appreciation and understanding of the people it is meant to protect.

While there are standard tenancy terms enshrined in the Residential Tenancies Act, the reality for ACT tenants is that their usefulness is compromised by many factors:

- The lack of bargaining power for tenants in the unbalanced ACT rental market;
- The widespread lack of knowledge of the RTA and standard terms, by renters but also community service providers, real estate agents, and landlords;
- The existence of the endorsement process with its inherent complexity and unfairness;
- The inclusion of two inconsistent terms that don't need endorsement in the Act; and
- The lack of clarity in the law about consistent additional terms.

In 1994, the CLRC designed and recommended a simple process. It was intended to ensure that consistency and clarity for all parties in relation to rights and obligations in residential tenancies. Over time, however, this system

has metamorphosed into something complex and confusing for all involved. Understanding it requires reference to legislation, a handbook, and even ACAT. It has led to the widespread use of additional terms, undermining the ability of the RTA to provide for the standard rights and obligations of renters and lessors.

People renting their homes should have consistent rights and protections under the law. Our recommendations will help to provide this consistency by preventing lessors or agents from sidestepping the protections of the Residential Tenancies Act. With more people renting in the ACT, and renting for longer, the ACT Government cannot sit back while thousands of citizens are being taken advantage of by a more powerful, better-informed cohort, who know how they can avoid their obligations under the law.



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