

Residential Tenancies Amendment (Long-term Tenancy Agreements) Bill 2017

Introduction Print

EXPLANATORY MEMORANDUM

General

The object of this Bill is to amend the **Residential Tenancies Act 1997** (the Act) to remove the existing restrictions on its application to tenancy agreements for a fixed term of more than 5 years, and to enable the prescription in regulations of an optional alternative standard agreement or agreements containing terms and conditions suited to long-term tenancy agreements.

Clause Notes

Part 1—Preliminary

- Clause 1 sets out the purpose of the Bill, which is to amend the Act to provide for tenancy agreements for a fixed term of more than 5 years and to make consequential amendments.
- Clause 2 sets out the scheme of commencement for the provisions of the Bill. It provides that—
- the Bill comes into operation on a day or days to be proclaimed; and
 - if not proclaimed earlier, the Bill comes into operation by default on 1 August 2018.
- Clause 3 provides that the **Residential Tenancies Act 1997** is referred to in the Bill as the Principal Act.

Part 2—Amendments relating to tenancy agreements

Part 2 contains clauses 4 to 12, which set out amendments to the Act relating to tenancy agreements.

Clause 4 amends definitions in section 3(1) of the Act.

Subclause (1) inserts a definition of *standard form tenancy agreement* into the Act. The expression is defined to mean—

- the standard form prescribed for the purposes of section 26(1) in relation to a tenancy agreement for a fixed term not exceeding 5 years; and
- the standard form prescribed for the purposes of section 26(1A)(b)(ii) in relation to a tenancy agreement for a fixed term of more than 5 years.

Subclause (2) amends the definition of *fixed term tenancy agreement* to insert the words "including, in the case of a fixed term tenancy agreement for more than 5 years, any extension of that tenancy agreement exercised in accordance with a term permitting the extension of that tenancy at the end of the fixed term". This is intended to avoid any doubt about the status of a fixed term tenancy agreement for more than 5 years which is extended in accordance with a term of the agreement.

Clause 5 repeals section 6 of the Act.

Section 6 excludes the application of the Act to tenancy agreements for a fixed term of more than 5 years. Repeal of section 6 subjects all tenancy agreements to the Act, regardless of the length of the fixed term.

Clause 6 amends section 26 of the Act, which relates to the requirement that written tenancy agreements be in standard form.

Subclause (1) substitutes a new section 26(1). Substituted section 26(1) provides that a tenancy agreement for a fixed term that does not exceed 5 years that is in writing must be in the standard form tenancy agreement prescribed for the purposes of section 26(1).

Subclause (2) inserts new section 26(1A) into the Act. Section 26(1A) provides that a tenancy agreement for a fixed term of more than 5 years must be in writing, and must either be in the standard form applicable to tenancy agreements for a fixed term not exceeding 5 years, or an alternate standard form

applicable to tenancy agreements for a fixed term of more than 5 years.

Subclause (3) amends section 26(2) to insert the words "for a fixed term not exceeding 5 years" in section 26(2) to restrict the application of subsection (2) to tenancy agreements for a fixed term not exceeding 5 years.

Subclause (4) inserts new section 26(2A) into the Act. Section 26(2A) provides that it is an offence to prepare or authorise the preparation of a tenancy agreement for a fixed term of more than 5 years if the agreement is not in either of the standard forms referred to in section 26(1A). The penalty associated with this offence is 10 penalty units.

Clause 7 inserts new section 26A into the Act, which relates to prescribed prohibited terms in tenancy agreements for a fixed term of more than 5 years. Clause 12 will amend the regulation making power in section 511 of the Act to enable terms to be prescribed as prohibited terms for tenancy agreements, or classes of tenancy agreements, for a fixed term of more than 5 years.

Section 26A(1) makes it an offence to include a prohibited term in a tenancy agreement for a fixed term of more than 5 years and provides for a penalty of 10 penalty units.

Section 26A(2) provides that a prohibited term in a tenancy agreement for a fixed term of more than 5 years is void and unenforceable.

Clause 8 substitutes new section 27 and inserts new section 27A into the Act. Section 27 provides for invalidity of certain terms in tenancy agreements. Section 27A relates to the inclusion of additional terms in fixed term tenancy agreements of more than 5 years.

New section 27(1) provides that, subject to subsection (3), a term of a tenancy agreement that purports to exclude, restrict or modify the application of all or any provisions of the Act to that tenancy agreement, or the exercise of a right conferred by the Act, is invalid.

Substituted section 27(2) extends the application of subsection (1) to terms not set out in the tenancy agreement but incorporated into it by another term. This provision is identical to existing section 27(2).

Substituted section 27(3) provides that subsection (1) does not apply to terms that may be inconsistent with or vary the requirements of Part 2 where those terms are in the prescribed standard form tenancy agreement for a fixed term of more than 5 years.

Substituted section 27(4) provides that a provision in a written tenancy agreement that requires a party to the agreement to bear any fees, costs or charges incurred by the other party in connection with the preparation of the tenancy agreement is invalid. This provision reproduces existing section 27(3).

New section 27A(1) provides that parties to a tenancy agreement for a term of more than 5 years may agree to add terms that are additional to the terms contained in the prescribed standard form tenancy agreement for that agreement.

Section 27A(2) provides that it is an offence for a person to include an additional term in a tenancy agreement for a fixed term of more than 5 years, if that term excludes, restricts or modifies or purports to exclude, restrict or modify any provision of the relevant standard form tenancy agreement. The penalty associated with this offence is 10 penalty units.

Clause 9 inserts new section 34(2) into the Act. Section 34 prevents the payment of multiple bonds. New section 34(2) excludes tenancy agreements for a fixed term of more than 5 years in the standard form tenancy agreement referred to in section 26(1A)(b)(ii) from this restriction.

Clause 10 inserts new sections 34A and 34B into the Act.

New section 34A provides that an additional amount of bond may be required by a landlord under a tenancy agreement for a fixed term of more than 5 years, even though the tenant has been in continuous occupation of the rented premises, but only where that tenancy agreement is in the form referred to in section 26(1A)(b)(ii). The right to require an additional amount of bond does not apply to a tenancy agreement for a fixed term of more than 5 years that is in the form referred to in section 26(1).

New section 34A(1) provides that section 34A applies to a tenancy agreement for a fixed term of more than 5 years that is in the standard form tenancy agreement referred to in section 26(1A)(b)(ii).

New section 34A(2) provides that the landlord may require the tenant to pay an additional amount of bond if—

- the landlord has given the tenant 120 days written notice in a form approved by the Director requiring an additional payment of bond; and
- the additional payment is required by the landlord after the expiry of a period of 5 years continuous occupation by the tenant; and
- the term of the tenancy agreement referred to in section 26(1A)(b)(ii)—
 - is extended by a period of at least 5 years from the expiry of the first fixed term; or
 - has an unexpired period of 5 years; or
 - commences after a periodic tenancy; or
 - commences after the expiry of a fixed term tenancy agreement, whether in the form prescribed for the purposes of section 26(1) or 26(1A)(b)(ii).

New section 34A(3) sets out how an additional amount of bond under section 34A(2) is to be determined. The amount is determined by—

- calculating a total amount of bond for the next 5 year period of the tenancy agreement using the rent payable at the commencement of that period as a basis for the bond's calculation; and
- subtracting the total amount of bond currently lodged with the Residential Tenancies Bond Authority from the amount calculated as the bond for the next 5 year period.

An Example following section 34A(3) demonstrates how the calculation of the additional amount would occur in practice.

New section 34A(4) requires that the tenant must pay the additional amount of bond on or before the end of the 120 day notice period referred to in section 34A(2)(a).

New section 34A(5) provides that the landlord must not require an additional amount of bond more than once in any 5 year period of a tenancy agreement to which section 34A applies.

New section 34B(1) provides that a tenant may apply to VCAT to vary a term in a tenancy agreement that permits the landlord to require an additional amount of bond or to vary the amount of additional bond to be paid.

New section 34B(2) gives VCAT the power to make any order that it considers appropriate if it is satisfied that to not make the order would result in severe hardship for the tenant.

New section 34B(3) provides that, in making an order under new section 34B(2), VCAT is to have regard to—

- whether the landlord or tenant are in breach of any other term of the tenancy agreement or of the Act; and
- the financial circumstances of the tenant and landlord; and
- the condition of the rented premises; and
- any other matter VCAT considers relevant to the making of the order.

Clause 11 amends section 94 of the Act, which relates to the right to use tenancy agreements in rooming houses.

Section 94(1) provides that a resident of a rooming house can enter into a tenancy agreement with a rooming house operator.

Subclause (1) amends section 94(1) to insert the words "for a fixed term not exceeding 5 years" to restrict the application of the section to tenancy agreements for a fixed term not exceeding 5 years.

Subclause (2) inserts new section 94(3B) into the Act.

Section 94(3B) prohibits a rooming house owner and resident from entering into a tenancy agreement for a fixed term of more than 5 years.

Clause 12 amends section 511 of the Act, which sets out regulation making powers under the Act.

Subclause (1) amends section 511(1)(f) of the Act to insert the words "for a fixed term not exceeding 5 years". As amended, section 511(1)(f) will authorise a standard form tenancy

agreement for a fixed term not exceeding 5 years to be prescribed.

Subclause (2) inserts new paragraphs 511(1)(faa) and (faab) into section 511 of the Act.

New paragraph (faa) allows regulations to be made prescribing standard form tenancy agreements for tenancy agreements, or classes of tenancy agreements, for a fixed term of more than 5 years, including but not limited to—

- terms that are inconsistent with or that vary requirements set out in Part 2 of the Act (other than Division 2 of that Part); and
- alternative terms that can be used in standard form tenancy agreements.

New section (faab) authorises regulations to be made prescribing prohibited terms for tenancy agreements, or classes of tenancy agreements, for a fixed term of more than 5 years.

Part 3—Amendments relating to compensation and compliance

Part 3 contains clauses 13 to 14, which set out amendments to the Act relating to compensation and compliance.

Clause 13 inserts new section 209AA into Part 5 of the Act.

New section 209AA(1) provides that, subject to section 209AA(2), if a party to a fixed term tenancy agreement for more than 5 years has breached a term of the tenancy agreement, the other party may apply to the Tribunal for a compensation order or a compliance order.

New section 209AA(2) provides that section 209AA(1) does not apply in respect of an additional term in a fixed term tenancy agreement for more than 5 years that is included in a tenancy agreement under section 27A(1). This means that the ability to apply to the Tribunal under section 209AA(1) will only be in respect of a breach of a term that formed part of the standard form tenancy agreement.

Clause 14 inserts new section 212(1A) into section 212 of the Act.

New section 212(1A) provides that where an application is made to the Tribunal under section 209AA and the Tribunal is satisfied that a term of the tenancy agreement has been breached, it may make all or any of the following orders—

- that the party in breach must remedy the breach as specified in the order;
- that the party in breach must pay compensation as specified in the order;
- that the party in breach must refrain from committing a similar breach.

Part 4—Amendments relating to termination

Part 4 contains clauses 15 to 18, which set out amendments to the Act relating to termination.

Clause 15 amends section 230 of the Act, which relates to the creation of a periodic tenancies.

Section 230(1) provides for the automatic creation of a periodic tenancy following the term of a fixed tenancy agreement.

Subclause (1) substitutes section 230(1)(b) of the Act with the effect that, where the term of a fixed term tenancy agreement ends and a tenant continues in occupation of rented premises otherwise than as a tenant under a fixed term tenancy agreement or, in the case of a fixed term tenancy agreement of more than 5 years, otherwise than in accordance with a term in the agreement that permitted the extension of the term of that tenancy, the tenant will be deemed to occupy the premises under a periodic tenancy.

The automatic creation of a periodic tenancy does not occur in a tenancy agreement for a fixed term tenancy of more than 5 years as long as continued occupation of the rented premises by the tenant is in accordance with a term in the agreement permitting the extension of the term of that tenancy at the end of the fixed term.

Section 230(3) currently provides that an automatic periodic tenancy will be on the same terms as the terms of the original fixed term tenancy agreement. Subclause (2) amends

section 230(3) to insert the words "in the case of a tenancy agreement for a fixed term not exceeding 5 years".

Amended section 230(3) limits the application of section 230(3) of the Act to only tenancy agreements for a fixed term not exceeding 5 years.

Subclause (3) inserts new section 230(3A), which provides that the terms of an automatic periodic tenancy arising following the expiration of the term of a fixed term tenancy agreement for a fixed term of more than 5 years will be based, as far as applicable, on the prescribed standard form tenancy agreement for fixed term tenancies not exceeding 5 years. This amendment recognises that it may not be appropriate for some of the provisions of a standard form tenancy agreement for a fixed term of more than 5 years (and which may have varied requirements of Part 2 of the Act) to continue to apply where a periodic tenancy has been created.

Clause 16 inserts new section 237A which provides that if a tenancy agreement for a fixed term of more than 5 years does not comply with the requirements of section 26A(1) that it be in writing and in a prescribed standard form, the tenant may give the landlord notice of intention to vacate specifying a termination date not less than 28 days after the date on which the notice is given.

Clause 17 substitutes section 261(3) which relates to the amount of notice that must be given to end a tenancy at the end of a fixed term tenancy agreement, to include provision for fixed term tenancies of more than 5 years.

Section 261 of the Act prescribes the notice period as not less than 90 days for a fixed term tenancy agreement for a fixed term of 6 months or more, and not less than 60 days for a fixed term tenancy agreement for a fixed term of less than 6 months. Substituted section 261 also includes a notice period of not less than 90 days or a greater prescribed period for a fixed term tenancy agreement of more than 5 years.

Clause 18 substitutes section 263(2) of the Act, which relates to the notice period for a notice to vacate for no specified reason. Section 263(2) of the Act provides that the notice period must be at least 120 days. Substituted section 263(2) retains the 120 day notice period for tenancy agreements for a fixed term not exceeding 5 years. Substituted section 263(2)(a) provides that a

period of more than 120 days may be prescribed for fixed term tenancies of more than 5 years but if no such period has been prescribed the notice period will be 120 days. Substituted section 263(2)(b) provides that a period of more than 120 days may be prescribed for a periodic tenancy agreement referred to in section 230(3A) but if no such period has been prescribed the notice period will be 120 days.

Part 5—Repeal of amending Act

Part 5 contains clause 19, which provides for the repeal of the amending Act.

Clause 19 provides that the amending Act is repealed on 1 August 2019.

The repeal does not affect the continuing operation of the amendments made by the amending Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).