



Victorian
Law Reform
Commission

Photographing and Filming Tenants' Possessions for Advertising Purposes

REPORT | MARCH 2015

A COMMUNITY LAW REFORM PROJECT

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Preface

Although the *Residential Tenancies Act 1997* (Vic) (RTA) reflects several decades of debate about how to balance the interests of tenants and landlords, it does not address the practice of entering the leased premises to take or use advertising images of tenants' possessions.

In 1997, when the Act was adopted, Google did not exist, almost all household internet access in Australia was via dial-up connection, and prospective tenants and buyers found a home by looking at brochures and physically inspecting the property. In today's digital world, the online distribution of advertising images transcends physical boundaries. While this has enhanced the capacity of owners to reach prospective tenants and buyers, it has also triggered tenant concerns about their inability to control the dissemination of personal and sensitive information, and about their exposure to theft and personal harm.

This report forms part of the Commission's community law reform program, which enables members of the community to contribute their ideas about how the law could be improved. Under the *Victorian Law Reform Commission Act 2000* (Vic), the Commission may initiate inquiries into issues of limited legal size and scope but of general community concern. The Commission initiated this inquiry after the Tenants Union of Victoria expressed concern that the taking and use of advertising images is not supported by a clear legislative framework, leaving tenants uncertain about their rights.

While a number of landlords and agents have been taking and using advertising images of tenants' possessions without obtaining tenant consent in the belief that it is lawful for them to do so, the Commission is of the opinion that they are mistaken. It is unlawful for a landlord or agent to enter other than in accordance with the RTA and the Commission considers that the RTA does not permit entry for the purpose of taking advertising images without tenant consent.

In this environment, practices have emerged that often leave tenants beholden to the goodwill and professionalism of landlords and agents when it comes to responding to tenants' concerns. While many landlords and agents fairly negotiate with tenants to address their concerns, too often this is not the case.

In response to this issue, legislators in Queensland have introduced a tenant consent requirement when a landlord or agent wishes to use advertising images that show tenants' possessions. The Commission is of the view that this unduly restricts the capacity of landlords to advertise their properties effectively.

The Commission's recommendations adopt a practical middle ground between the current positions in Victoria and Queensland. The Commission proposes that an express right be given to landlords to take and use advertising images, coupled with appropriate safeguards for tenants. In modernising the law, the Commission has sought to maintain a fair balance between the desire of tenants to live in their homes free from unwanted interference, and the desire of landlords to sell and lease their properties.

I wish to thank the many people, including tenants, landlords, real estate agents, community organisations and legal practitioners who gave their time to assist the Commission with this inquiry. In particular, I express my appreciation to Consumer Affairs Victoria, whose director, Dr Claire Noone, and senior legal policy adviser, Claire Davie, were of substantial assistance to the Commission in this project.

I would also like to thank my fellow Commissioners, Alison O'Brien and Eamonn Moran PSM QC. Their contribution and expertise were invaluable to this review.

Finally, I thank the community law reform team, Eve Gallagher and Si Qi Wen, for their hard work on this inquiry.

I commend this report to you.



The Hon. Philip Cummins AM
Chair, Victorian Law Reform Commission

March 2015

Terms of reference

[Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 19 December 2013.]

The Victorian Law Reform Commission will consider and review aspects of the *Residential Tenancies Act 1997* (Vic) and other laws relevant to the practice of publishing photographs of residences which include tenants' possessions when advertising rented properties for sale or lease.

The Commission will:

- Identify the practices that are commonly followed by landlords and landlords' agents who photograph tenanted residential properties.
- Examine the effect of the practices on tenant privacy, security and possessory rights, as well as the tenant's 'right to quiet enjoyment' under the *Residential Tenancies Act 1997* (Vic) (s 67).
- Determine the source, scope and adequacy of the legal basis on which landlords and their agents rely when photographing and publishing images of tenants' possessions.
- Consider whether the current law provides adequate access for landlords and their agents for the purposes of advertising rented premises for sale or lease.
- Consider whether the current avenues of dispute resolution available to tenants, landlords and landlords' agents are sufficient and effective if disputes arise.

The Commission will consider legislative developments in Australian and international jurisdictions, with a particular focus on Queensland and Tasmania.

Executive summary

This report examines the law relating to photographs and videos of tenants' possessions that are used to advertise properties for sale or lease.

Right to enter

Under *the Residential Tenancies Act 1997* (Vic) (RTA), a landlord or agent may enter a rental property at any time with tenant consent, provided they enter within seven days of obtaining consent.¹ Evidence provided to the Commission suggests that landlords and agents often ask tenants for permission before entering to take advertising images of tenants' possessions.

However, the Commission has also been told of a number of cases in which advertising images of tenants' possessions have been taken or used without tenant consent, causing distress and harm to the tenants involved. The central question in these situations is whether landlords and agents have a right to enter to take advertising images of tenants' possessions without first obtaining the tenants' consent.

The RTA lists several grounds upon which landlords and agents may enter a rental property without tenant consent.² Taking advertising images is not specifically listed as a ground for entry. In this report, the Commission reviews this section of the Act, before reaching the conclusion that these grounds do not establish a right of entry to take advertising images. It follows that entry for this purpose without tenant consent is unlawful.

The Commission also considers whether the law sufficiently protects the right of landlords to sell their properties while addressing the legitimate concerns of tenants in relation to the taking and use of advertising images that show tenants' possessions. The Commission is of the opinion that it does not. Accordingly, it recommends establishing a right of entry for landlords and agents that is subject to the legitimate concerns of tenants. These concerns relate to possessions that identify the tenant, reveal sensitive information about the tenant or place the tenant at risk of theft or personal harm.

Right to use

The Commission was told that tenants have concerns about advertising images of their possessions being re-used years after they were taken, as well as images that were taken for other purposes being used in advertising material. In both of these instances, the Commission recommends placing an obligation on landlords and agents to obtain the tenants' written consent before using the images.

1 *Residential Tenancies Act 1997* (Vic) s 85(a).
2 *Ibid* s 86.

Notice of entry

When a landlord or agent enters upon one of the grounds listed in the RTA, they must give the tenant 24 hours notice in writing.³ In this report, the Commission reviews stakeholder feedback on the notice of entry provisions in the RTA. It then recommends ways to enhance communication among the parties involved if entering to take advertising images were included in the RTA's grounds for entry. These recommendations include extending the notice period to seven days, requiring additional information in the notice of entry and permitting the delivery of notices via electronic communication.

Quiet enjoyment

The RTA states that landlords must take reasonable steps to ensure the tenant has quiet enjoyment of the rental property.⁴ The common law right to quiet enjoyment prohibits landlords and agents from substantially interfering with the tenant's right to possess the property and enjoy it for all usual purposes.⁵ The Commission concludes that the right to quiet enjoyment would not ordinarily assist tenants with concerns about advertising images, a finding that makes the Commission's recommendations all the more important.

Underlying many of the concerns of tenants, landlords and agents is the fundamental role online advertising now plays in selling and leasing a property. The very exposure that enhances the capacity of owners to sell and lease their properties leaves many tenants feeling vulnerable. The Commission's recommendations strike a balance between the needs of landlords and agents on the one hand, and the needs of tenants on the other.

3 Ibid ss 85(b), 88.

4 Ibid s 67.

5 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23; *Sanderson v The Mayor of Berwick-upon-Tweed* (1884) 13 QBD 547, 551.

Recommendations

Right to enter

- 1 The landlord and landlord's agent should have an express right to enter to take advertising images.
- 2 When exercising the express right to enter to take advertising images:
 - (a) The landlord or landlord's agent must not take, or permit to be taken, an advertising image where the tenant has objected in writing to the image being taken because it would show:
 - (i) a possession that directly identifies the tenant or another occupant,
 - (ii) a possession that reveals sensitive information about the tenant or another occupant, regardless of whether that occupant's identity is also revealed, or
 - (iii) a valuable possession which places the tenant at a heightened risk of theft and it would be unreasonable to expect the tenant to remove or conceal the possession.
 - (b) The landlord or landlord's agent must not take, or permit to be taken, an advertising image showing a tenant's possessions where the tenant has objected in writing to the image being taken because:
 - (i) the tenant or other occupant is at risk of family or personal violence, and
 - (ii) the image would show possessions that may reveal the identity of that occupant to the person posing the risk.

Right to use

- 3 Where a landlord or landlord's agent wishes to use an advertising image showing a tenant's possessions more than 12 months after the image was taken, the landlord or landlord's agent should be required to obtain the written consent of the tenant or former tenant before using the image.
- 4 Where an image showing a tenant's possessions was taken for a purpose other than advertising, the landlord or landlord's agent should be required to obtain the tenant's written consent before using the image for advertising purposes.

Notice of entry

- 5 When relying on the grounds of entry in the *Residential Tenancies Act 1997* (Vic) to enter to take advertising images, the landlord or landlord's agent should be required to:
 - (a) provide the tenant with at least seven days notice; and
 - (b) enter between 8 am and 6 pm except on public holidays, unless the tenant consents to a time of entry outside those hours.
- 6 The landlord or landlord's agent should be required to include the following information in a notice of entry to take advertising images:
 - (a) the purpose of entry;
 - (b) the date and time of entry;
 - (c) the name and contact details of the landlord/agent;
 - (d) the tenant's opportunity to remove possessions from view;
 - (e) the tenant's right to object to images being taken in certain circumstances; and
 - (f) the tenant's right to be present when images are taken.
- 7 It should be lawful for the landlord and landlord's agent to deliver a notice of entry via electronic communication where the tenant has consented.
- 8 The standard tenancy agreement should make provision for parties to consent to the delivery of a notice of entry via electronic communication.
- 9 If a tenant states that they wish to be present when advertising images are taken, the landlord or landlord's agent should be required to make a reasonable effort to arrange for the visit to occur at a time when it is convenient for the tenant to be present (having regard to the work and other commitments of both the tenant and the person entering).

Introduction

- 2** **Origins**
- 2** **Current law in Victoria**
- 3** **Our process**
- 4** **Structure of the report**

1. Introduction

Origins

- 1.1 On 19 December 2013, the Commission initiated a community law reform project on the photographing and filming of tenants' possessions for advertising purposes.
- 1.2 Under section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* the Commission may initiate its own inquiries into legal issues of general community concern, provided they are limited in size and scope. The Commission calls these inquiries community law reform projects as it invites community members and groups to contribute proposals for improving Victorian law.
- 1.3 This project arose out of discussions with the Tenants Union of Victoria (TUV). Landlords, or agents on their behalf, routinely advertise rental properties by displaying images of the properties, many of which contain tenants' possessions. The TUV informed the Commission that it had received a number of complaints about photographs of tenants' possessions being included in advertising images without the tenants' consent.¹
- 1.4 The Commission's preliminary investigation revealed that several complaint-handling bodies had received enquiries about the rights of landlords and tenants in these circumstances. Privacy and Data Protection Victoria noted that the number of enquiries from tenants about possessions being included in images without their consent had increased significantly in recent years.²
- 1.5 This issue is of relevance to a significant number of Victorians. One quarter of Victoria's 1.95 million households rent and the average length of a tenancy is 18 months.³ In these circumstances, it is likely that many Victorian households have had, and will continue to have, images of their possessions taken and used for advertising purposes.

Current law in Victoria

Right to enter

- 1.6 The *Residential Tenancies Act 1997* (Vic) (RTA) stipulates that the landlord or agent may enter at any time agreed to by the tenant as long as they enter within seven days of the tenant granting consent.⁴ The law is clear on this matter and the Commission's inquiry is not concerned with situations in which tenants have no issue with landlords or agents entering to take advertising images that show their possessions.

1 Preliminary consultations with the Tenants Union of Victoria (30 August 2013 and 29 January 2014).

2 On 17 September 2014, the Office of the Victorian Privacy Commissioner (Privacy Victoria) became the Office of the Commissioner for Privacy and Data Protection (Privacy and Data Protection Victoria). In this report, it is referred to as Privacy and Data Protection Victoria, except when citing its submission, which was received on 18 August 2014.

3 Tenants Union of Victoria, *Key Housing and Tenancy Statistics* (February 2014) 1 <<http://www.tuv.org.au/wp-content/uploads/2014/04/Housing-and-tenancy-stats.pdf>>.

4 *Residential Tenancies Act 1997* (Vic) s 85(a).

- 1.7 The central question is whether landlords and agents have a right to enter the property to take advertising images without tenant consent and, on exercising that right, whether they may take images that contain tenants' possessions.
- 1.8 At common law, tenants have a right to exclusive possession, which allows the tenant to exclude the landlord and all others from the property.⁵ However, the RTA grants landlords and their agents a limited right of entry without tenant consent by listing certain grounds upon which they may enter.⁶
- 1.9 Entering to take advertising images is not specifically listed as a ground for entry. Entering to show the property to a prospective tenant and entering to show the property to a prospective buyer are listed as grounds for entry.⁷ A landlord who wishes to exercise their right to enter on one of the grounds listed must provide written notice to the tenant at least 24 hours in advance.⁸
- 1.10 A broad reading of the RTA is that entering to take advertising images that contain tenants' possessions falls within the scope of, or is sufficiently incidental to, two of the grounds listed. However, the Commission is of the opinion that landlords and agents do not currently have a right to enter to take advertising images without the tenant's consent, for reasons stated in Chapter 3.

Right to quiet enjoyment

- 1.11 In Victoria, the landlord must take all reasonable steps to ensure the tenant has quiet enjoyment of the property.⁹ At common law, the right to quiet enjoyment protects the tenant's rights to possession and the lawful and ordinary enjoyment of the property.¹⁰ A breach of quiet enjoyment requires a substantial interference with the right.¹¹
- 1.12 The Commission considered whether taking and using advertising images that show tenants' possessions without tenant consent would ordinarily amount to a breach of quiet enjoyment, and found that it would not. Therefore, the right to quiet enjoyment does not assist in resolving the issue under consideration.

Our process

- 1.13 The Commission's inquiry was led by the Hon. Philip Cummins AM and a Division which he chaired. The Division members were Eamonn Moran PSM QC and Alison O'Brien.
- 1.14 The Commission conducted preliminary research to identify issues with the law, including an examination of current law and practice in other Australian jurisdictions. It also met with tenant advocates, real estate agents and staff from government agencies. Among these were representatives of the Real Estate Institute of Victoria (REIV) and the TUV.
- 1.15 In June 2014, the Commission published a consultation paper that reviewed the law and practice and identified possible options for reform.¹² The consultation paper invited people with experience or expertise in this area to make a submission.
- 1.16 The Commission received 20 submissions, which can be found on the Commission's website.¹³ A list of submissions appears in **Appendix A**.

5 *Radaich v Smith* (1959) 101 CLR 209, 222 (Windeyer J).

6 *Residential Tenancies Act 1997* (Vic) s 86.

7 *Ibid* ss 86(1)(a)–(b).

8 *Ibid* ss 85(b), 88.

9 *Ibid* s 67.

10 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23.

11 *Ibid*.

12 Victorian Law Reform Commission, *Photographing and Filming Tenants' Possessions for Advertising Purposes*, Consultation Paper No. 22 (2014).

13 Victorian Law Reform Commission, *Photographing and Filming Tenants' Possessions for Advertising Purposes: Submissions* (23 December 2014) <<http://www.lawreform.vic.gov.au/projects/photographing-and-filming-tenants-possessions-advertising-purposes/submissions>>.

- 1.17 The Commission undertook 38 consultations across Victoria. A list of consultations can be found in **Appendix B**. Consultees included tenants, tenant advocates, landlords, real estate agents, legal practitioners, academics and relevant government agencies.
- 1.18 The Commission held a roundtable consultation on 22 August 2014. Participants discussed the current operation of the law and possible reform options. Representatives from the REIV, the TUV and the Victorian Civil and Administrative Tribunal participated in the roundtable. A representative from Consumer Affairs Victoria attended as an observer.
- 1.19 The Commission also conducted an online survey aimed at tenants, tenant advocates, landlords and real estate agents to obtain the views of individuals most affected by this issue. The survey was publicly available on the Commission's website from July to September 2014. The Commission received 279 responses. The survey questionnaire is at **Appendix C**.
- 1.20 The breakdown of survey respondents is as follows:
- 56.1 per cent tenants
 - 16.2 per cent real estate agents
 - 10.1 per cent landlords
 - 10 per cent other
 - 7.6 per cent tenant advocates.

Structure of the report

- 1.21 Chapter 2 discusses the prevalence and nature of tenant concerns, and the responses of landlords and agents to those concerns.
- 1.22 Chapter 3 explains why landlords and agents do not currently have a right to enter to take advertising images of tenants' possessions. It also explains why landlords and agents should have a right to enter to take advertising images of tenants' possessions, subject to the legitimate concerns of tenants.
- 1.23 Chapter 4 discusses how the RTA's notice of entry requirements should be improved if landlords and agents are given a right to enter to take advertising images.
- 1.24 Chapter 5 explains why the common law right to quiet enjoyment does not assist tenants with concerns about advertising images.
- 1.25 Numerous stakeholders highlighted the importance of good communication when it comes to taking and using advertising images. This is discussed in Chapter 6.
- 1.26 Chapter 7 concludes the report.

Tenant concerns

- 6** Introduction
- 6** Number of tenant concerns
- 9** Nature of tenant concerns

2. Tenant concerns

Introduction

- 2.1 This chapter considers the prevalence and nature of tenant concerns relating to the taking and use of advertising images that show tenants' possessions, as well as landlord and agent responses to those concerns.
- 2.2 Many landlords and agents have been taking and using images of rental properties that show tenants' possessions without tenant consent in the belief that it was lawful for them to do so. On closer inspection, the law does not establish a right to enter for this purpose and tenants have raised legitimate and cogent concerns about the publication of images of their homes.¹

Number of tenant concerns

- 2.3 The Commission approached various complaint-handling bodies for information about the number of inquiries they had received about advertising images of tenants' possessions. While the data provided by these bodies indicates a significant and growing number of enquiries are made about this issue each year, stakeholders also told the Commission that the level of concern may be higher than the data suggests.

Government and statutory agencies

- 2.4 Consumer Affairs Victoria (CAV) is responsible for providing advice to Victorians about their rights and obligations under residential tenancy law. Data provided to the Commission by CAV indicates that it received 266 enquiries about photographs of rental properties taken for advertising purposes in the four years to June 2014.² Over that same period, CAV received a further 215 enquiries about photographs taken of rental properties for unknown purposes. These photographs may have been taken for advertising purposes, or for some other purpose such as showing the landlord the condition of the property during a routine inspection.³
- 2.5 Privacy and Data Protection Victoria is responsible for providing advice to Victorians about their rights under the *Privacy and Data Protection Act 2014* (Vic) (Victorian Privacy Act). The Victorian Privacy Act regulates the handling of personal information by Victorian government agencies, councils and contracted service providers.⁴

1 The Commission's findings in this regard are set out in more detail in Chapter 3.
2 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014 and 30 January 2015).
3 Ibid.
4 Submission 14 (Privacy Victoria).

- 2.6 Although complaints about private landlords and agents fall outside its jurisdiction, Privacy and Data Protection Victoria regularly receives enquiries about photographs showing tenants' possessions. Privacy and Data Protection Victoria's submission stated that it received 50 enquiries about this issue in 2013-14, which was over three times more than in the previous financial year.⁵ Of those 50 enquiries, 20 concerned photographs taken for advertising purposes, 11 concerned photographs taken for inspection or maintenance purposes, and 19 did not state the purpose for which the photographs were taken.
- 2.7 According to Privacy and Data Protection Victoria, the increase in the number of enquiries it receives indicates this issue is of growing concern. Its submission suggested that part of the reason is that:
- ... real estate agencies photographing rental properties as a common practice for maintenance, inspection and/or advertising purposes has grown in line with the proliferation of on-line real estate services.⁶

The Real Estate Institute of Victoria

- 2.8 The submission from the Real Estate Institute of Victoria (REIV) stated that the number of enquiries CAV receives about advertising images that show tenants' possessions is small when compared with the number of properties advertised for sale or lease each year.⁷ It also noted that the Victorian Civil and Administrative Tribunal (VCAT) has not received an application for an order restraining a landlord or agent from using images showing their possessions for advertising purposes.⁸
- 2.9 At the Commission's roundtable, REIV representatives said that the vast majority of tenants had no problem with their possessions being included in advertising images, and that agents reached mutually agreeable outcomes with tenants who expressed concerns.⁹ The representatives were of the opinion that the law works well as it is, and any changes might be overly prescriptive and unworkable.¹⁰
- 2.10 Evidence provided by various stakeholders throughout the Commission's inquiry indicated that the majority of landlords and agents try to do the right thing by tenants when it comes to taking and using advertising images that show tenants' possessions.¹¹ These landlords and agents notify tenants in advance that advertising images of their possessions will be taken, and work with tenants to address their concerns.¹² Affording tenants the opportunity to remove items from view and excluding items from view when taking images were the most common strategies adopted to alleviate the concerns of tenants.

Tenant advocates

- 2.11 The Tenants Union of Victoria's (TUV) submission stated that in the three years from 2011 to 2013 approximately 90 people sought its help in relation to their possessions being photographed for advertising purposes.¹³

5 Ibid.

6 Ibid.

7 Submission 10 (Real Estate Institute of Victoria).

8 Ibid.

9 Consultation 37 (Roundtable).

10 Ibid. Agents the Commission consulted with expressed divergent views, with some agreeing that the law works well in relation to advertising images and others saying that greater clarity would be helpful.

11 Submission 10 (Real Estate Institute of Victoria). Consultations 10 (Rachel Spurgeon, sales consultant, LJ Hooker Geelong); 28 (Gina Butera).

12 Consultations 8 (a real estate agent); 10 (Rachel Spurgeon, sales consultant, LJ Hooker Geelong); 17 (a real estate agent).

13 Submission 13 (Tenants Union of Victoria).

- 2.12 At the Commission's roundtable, TUV representatives agreed that many landlords and agents are respectful of tenants when it comes to taking and using advertising images, and that many tenants do not have any concerns about their possessions appearing in such images.¹⁴
- 2.13 However, TUV representatives stated that in their experience, even well-meaning landlords and agents sometimes inadvertently violate the rights of tenants and cause them harm, while others blatantly disregard their basic obligations to tenants, including by failing to inform tenants before taking and using advertising images showing their possessions. Furthermore, regardless of the conduct of the agent or landlord, some tenants simply do not want their possessions displayed in advertising images.¹⁵
- 2.14 A number of clients have contacted the Peninsula Community Legal Centre for advice about advertising photographs that show their possessions,¹⁶ and Housing Justice, an ARC Justice program that assists tenants in the Loddon Mallee region, has received occasional queries about this issue.¹⁷

Data gaps

- 2.15 Stakeholders identified four reasons why the level of concern among tenants may be greater than the above data suggests:
- Tenants may have a limited understanding of their rights and not know who to complain to.¹⁸ The Peninsula Community Legal Centre's submission stated that 'there appears to be a lack of certainty around what tenants can agree to and what they can refuse to do, particularly where those tenants are vulnerable and disadvantaged.'¹⁹ Several tenants who spoke to the Commission confirmed this view.²⁰
 - Tenants may be confused by conflicting advice.²¹ While CAV advises tenants that landlords and agents have a right to enter to take advertising images, the TUV advises tenants they do not.²² Both organisations provide information about the Australian Privacy Principles, which may prevent large real estate agencies (but not small agencies or individual landlords) from collecting and using advertising images that capture personal information, such as the tenant's name or image.²³
 - Tenants who do not want advertising images taken or used may not complain for fear of retaliation.²⁴ The most common concerns of tenants are that voicing their objections will result in a bad reference,²⁵ eviction²⁶ or a loss of bond money.²⁷
 - The information collected by complaint-handling bodies may not be sufficiently detailed or easy to extract. According to Assistant Professor Bruce Arnold, none of Australia's states or territories collects comprehensive empirical data that reflects the concerns and values of tenants, including the 'disquiet that many tenants appear to feel about imaging'.²⁸

14 Consultation 37 (Roundtable).

15 Ibid.

16 Submission 9 (Peninsula Community Legal Centre).

17 Submission 6 (Housing Justice). ARC Justice was formerly known as the Advocacy and Rights Centre.

18 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). Submission 9 (Peninsula Community Legal Centre). Consultations 18 (Jacky Welgus); 21 (a tenant).

19 Submission 9 (Peninsula Community Legal Centre).

20 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). Consultations 18 (Jacky Welgus); 21 (a tenant).

21 Consultations 4 (a tenant); 31 (a tenant); 33 (a tenant).

22 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014). Tenants Union of Victoria, *The landlord is selling* (July 2013) <<http://www.tuv.org.au/advice/during-your-tenancy/your-landlord-is-selling/>>.

23 Ibid.

24 Consultation 33 (a tenant). VLRC online survey.

25 Submission 1 (Tenants' Union ACT). Consultation 31 (a tenant). VLRC online survey.

26 Consultations 3 (Tenants Queensland); 6 (Tenants' Union of New South Wales).

27 VLRC online survey.

28 Submission 11 (Assistant Professor Bruce Arnold).

Commission's conclusions

- 2.16 The Commission accepts that this issue is of significant and growing concern to tenants. Further, the Commission is of the view that the issue will continue to create conflict between tenants, landlords and agents until the law provides greater clarity.

Nature of tenant concerns

- 2.17 The Commission's investigations revealed that tenants are primarily concerned about privacy, risk of theft, risk of personal harm and inconvenience.

Privacy

- 2.18 Privacy was the primary concern of tenants consulted during the Commission's inquiry. Sixty-eight per cent of people who responded to the Commission's survey indicated that they were worried about the privacy implications associated with the taking and use of advertising images that show tenants' possessions.²⁹

Taking advertising images

- 2.19 Assistant Professor Bruce Arnold told the Commission that privacy is embodied in the traditional aphorism that 'a man's home is his castle'.³⁰ As Arnold explains it, the home is seen as 'a space from which the uninvited can and should be excluded, a space that should be inviolate irrespective of whether the individual is at home or not'.³¹
- 2.20 A number of people the Commission spoke with described a disconnect between the tenant's experience of the property as their home, and the landlord's experience of the property as an asset.³² A lifelong tenant described this disconnect in detail:
- ... the word 'home' invokes ... respect and landlords should recognise that while this is a business transaction, there are many underlying things which make it a home. And when [advertising] photos are taken, it is not your home anymore ... Because it is all just business on both sides.³³
- 2.21 Several tenants expressed discomfort at photographers and agents re-arranging their furniture without their permission.³⁴ One tenant said that agents fail to respect the dignity of the tenant and the sanctity of the home when they move possessions around without permission.³⁵ According to this tenant, who is an aged-care worker, there has been increasing recognition within her profession of the autonomy of the people they care for and the need to ask for permission before moving items around their room or home. The tenant would like to see a similar attitudinal change among real estate agents.³⁶

29 159 of 233 respondents said that the photographs or videos could violate the tenant's privacy.

30 Submission 11 (Assistant Professor Bruce Arnold).

31 Ibid.

32 Consultation 18 (Jacky Welgus). VLRC online survey.

33 Consultation 18 (Jacky Welgus).

34 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014) and by the Tenants Union of Victoria (15 August 2014).

35 Consultation 18 (Jacky Welgus).

36 Ibid.

Particularly private spaces

- 2.22 Bedrooms were seen to be particularly private spaces. An agent said that they rarely take photographs of bedrooms as they are seen as 'very private spaces'.³⁷
- 2.23 Peninsula Community Legal Centre said that tenants were concerned about their children's loss of privacy and the risks that may expose them to.³⁸ One tenant objected to photographs taken of anything relating to their child, including the child's bedroom.³⁹ In that case, the agent chose not to photograph the room even though CAV had informed her that she could photograph the room minus the identifying possessions.⁴⁰

Particularly private periods of time

- 2.24 Some tenants felt a heightened sense of vulnerability when photographs were taken during particularly private periods in their lives. One tenant contacted CAV about whether advertising images could be taken while she was pregnant:
- I am 35 weeks pregnant ... and have a 1 and 3 year old. We obviously want some privacy for the coming months but we are not sure what we are entitled to do.⁴¹
- 2.25 Another tenant contacted CAV to find out if images could be taken after they had received a call from their landlord, who wanted to take photographs later that day.⁴² They were upset at the lack of notice as they were at home sick.⁴³

Aboriginal tenants

- 2.26 Nellie Flagg from the Victorian Aboriginal Legal Service told the Commission that older Aboriginal people in particular may feel afraid or ashamed if a landlord or agent were to enter their home and take photographs and videos without their permission.⁴⁴ According to Flagg, 'Their homes could be beautiful but due to the stigma and judgment they have felt their whole lives, it could be very confronting.'⁴⁵
- 2.27 This feeling of being judged on the basis of the presentation of one's home is not exclusive to Aboriginal tenants. A non-Aboriginal tenant told the Commission that 'it is not a pleasant experience to have complete strangers wandering through your home and passing judgement on how you live.'⁴⁶

Landlord and agent responses

- 2.28 While the majority of agents and landlords were in favour of a right to enter to take advertising images, many agents emphasised the need to respect tenants and accommodate their requests while exercising that right.⁴⁷ As one agent told the Commission:

I don't think [tenants] should have a right to refuse [to have advertising images of their possessions taken], but certainly compromises about the time for photos and respect while photos are taken should happen. If there are concerns, we should come to a compromise room by room.⁴⁸

37 VLRC online survey.
38 Submission 9 (Peninsula Community Legal Centre).
39 Preliminary consultation with real estate agent (3 February 2014).
40 Ibid.
41 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014).
42 Ibid.
43 Ibid.
44 Consultation 32 (Victorian Aboriginal Legal Service).
45 Ibid.
46 VLRC online survey.
47 Consultations 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office); 8 (a real estate agent); 22 (Corina Bailey, CEO, Landlord Specialists).
48 Consultation 22 (Corina Bailey, CEO, Landlord Specialists).

Using advertising images

- 2.29 A number of tenants described themselves as particularly private people who did not want information about their home online without good reason.⁴⁹ One tenant's explanation for this was because 'the way you have your house is the way you express your personality.'⁵⁰
- 2.30 Many tenants expressed concern that the information contained in the advertising images was online 'for the world to see'.⁵¹
- 2.31 Other tenants were more concerned about people who already knew where they lived purposefully searching for their address and accessing sensitive information.⁵² One tenant was concerned that people who knew her might see posters on the wall that disclosed her sexuality.⁵³ Another tenant said she had items of a very personal nature on her bedside table.⁵⁴
- 2.32 Another tenant was of the opinion that advertising images 'could be used by current or future employers, credit providers ... to assess the lifestyle, wealth/poverty of the tenant'.⁵⁵

Identifying children

- 2.33 Tenants expressed particular concern about advertising images that identify children.⁵⁶ The Commission was informed of a case in which a child was photographed in their home (as opposed to in a photo that was in their home) and the image was then used on a billboard in front of the property.⁵⁷ The tenant was not aware that advertising images showing her child had been taken.
- 2.34 In another incident reported to the Commission a tenant objected to advertising images that contained photographs of her children, but the agent initially refused to remove them even after the tenant explained she was at risk of family violence.⁵⁸ The agent only removed the images after the tenant obtained legal advice and threatened to take action against the landlord.⁵⁹

Identifying deceased people

- 2.35 A tenant told the Commission that although images advertising the property in which she lived contained photographs of several members of her family, she found it particularly distressing that photographs of her deceased brother were displayed in advertising material.⁶⁰ The tenant had been present when the images were taken, but says she did not pay attention to what the agent was doing as they had agreed that he would not take images showing her possessions.⁶¹ When the tenant called to complain after seeing the images online, the agent dismissed her concerns, noting that the owners were very happy with them.⁶²

49 Consultations 31 (a tenant); 33 (a tenant); 35 (a tenant).

50 VLRC online survey.

51 VLRC online survey. See also Consultations 11 (a tenant); 18 (Jacky Welgus).

52 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

53 VLRC online survey.

54 Information provided to the Commission by the Tenants Union of Victoria (10 July 2014).

55 VLRC online survey.

56 Submissions 9 (Peninsula Community Legal Centre); 14 (Privacy Victoria). Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

57 Consultation 3 (Tenants Queensland).

58 Consultation 13 (Linda Grady, tenant advocate and domestic violence support worker).

59 Ibid.

60 Consultation 31 (a tenant).

61 Ibid.

62 Ibid.

- 2.36 Victorian Aboriginal Legal Service told the Commission that photographs showing deceased people could be highly offensive to the family members of Aboriginal people. Older Aboriginal people, who may be more traditional than younger Aboriginal people, might be particularly alarmed. Traditionally, when an Aboriginal person dies, many of their possessions, including possessions that show their name and image, are removed or covered up. There are different explanations for this custom.⁶³

Landlord and agent responses

- 2.37 Although the Commission was told of a number of cases in which a tenant or another person was clearly identifiable in advertising images, there was a general acceptance and awareness among the agents and landlords the Commission spoke with that revealing a tenant's identity in advertising images is inappropriate.⁶⁴ Many agents were familiar with the Australian Privacy Principles and a number said they would not take or use advertising images that showed a person's name or image.⁶⁵
- 2.38 There was little support among agents and landlords for prohibiting images of tenants' possessions because of tenants' general privacy concerns. In relation to tenant requests not to take images of their children's bedrooms, one landlord said she did not understand it, noting that 'A bed with a pink doona could be any girl's room.'⁶⁶
- 2.39 However, one landlord told the Commission:
- Tenants do have a right to privacy. Any photos should NOT be of the tenants' possessions ... The landlord signs a lease committing to respect the tenant's privacy, taking photos of their possessions and making those public (via sign posts or internet) is a breach of that privacy. Simple as that.⁶⁷

Risk of theft

- 2.40 Theft was the second highest concern of the Commission's survey respondents, with 63 per cent stating that advertising images showing tenants' possessions may place tenants at risk of theft.⁶⁸ Online advertisements and large billboards placed in front of the home were seen as particularly risky, with one tenant describing the billboard in front of her home as an 'inventory of valuable items' waiting to be stolen.⁶⁹

Valuable items

- 2.41 Tenants were primarily concerned about televisions, computers and other electronic goods appearing in advertising images.⁷⁰ Tenants also raised concerns about artworks⁷¹ and antique furniture.⁷² An agent said she advises tenants to remove jewellery from view.⁷³
- 2.42 A real estate photographer told the Commission that approximately 50 per cent of tenants ask whether valuable or personal items will appear in images.⁷⁴ However, some agents reported never having been asked about valuable items before.⁷⁵

63 Consultation 32 (Victorian Aboriginal Legal Services). For Nellie Flagg from the Victorian Aboriginal Legal Service, it is because a failure to do so may prevent the deceased person's spirit from passing into the next world.

64 Consultations 8 (a real estate agent); 16 (Real Estate Institute of Tasmania); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management).

65 Consultations 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale); 10 (Rachel Spurgeon, sales consultant, LJ Hooker Geelong); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management). VLRC online survey. The application of the Australian Privacy Principles to advertising images containing tenants' possessions is considered at [3.26]–[3.28].

66 Consultation 28 (Gina Butera).

67 Information provided to the Commission by a landlord (27 August 2014).

68 146 of 233 respondents said that the photographs or videos could place the tenant at risk of theft.

69 Consultation 33 (a tenant).

70 Consultations 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office); 8 (a real estate agent). VLRC online survey. Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

71 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). Consultation 14 (Tenants' Union of Tasmania). VLRC online survey.

72 Consultation 17 (a real estate agent).

73 Consultation 12 (a photographer).

75 The Commission survey asked real estate agents, 'Do tenants have any concerns about the photographs or videos?' 23 of 36 real estate agents said 'no'.

Likelihood of theft

- 2.43 The Commission was informed of one tenant whose home was broken into shortly after advertising photographs showing her possessions were published online.⁷⁶ While Victoria Police has previously advised people against placing virtual tours online as doing so allows would-be-offenders to see what valuables are in the home, it does not have any data on how often properties have been targeted by burglars who first saw those properties online.⁷⁷
- 2.44 The TUV stated that it 'is aware of correlations between photographs being published and [theft] occurring but not proven causation'.⁷⁸ According to the TUV:
- ... proving the nexus between the taking of photographs specifically and goods stolen from premises is an almost impossible task, as usually this requires police investigation and a successful prosecution.⁷⁹
- 2.45 Similarly, the Peninsula Community Legal Centre observed:
- We have concerns that tenants appear to have no recourse in this type of situation, especially if the loss of the items was attributable to the publishing of photographs, which could be a possibility, but would be difficult to prove.⁸⁰
- 2.46 A case study provided by the Peninsula Community Legal Centre illustrated the difficulties tenants face when their possessions are stolen during an advertising campaign. According to the Peninsula Community Legal Centre, their client 'made every effort' to remove valuable items from view when the advertising images were taken, as well as during open house inspections. When valuable items were taken during an inspection, the tenant's insurance company refused to pay because the thief had been invited onto the property.⁸¹

Particularly vulnerable tenants

- 2.47 Shane McGrath from Housing Action for the Aged told the Commission that older tenants have heightened security concerns due to vulnerability and limited physical mobility. According to McGrath, a number of older tenants have said 'This wouldn't have bothered me 20 years ago but now I worry about security ...'⁸²
- 2.48 One tenant reported that she moved into a property that did not have proper locks so she installed her own.⁸³ The tenant said she felt particularly vulnerable to theft. She told the Commission, 'I don't want my address published saying I have two computers, a stereo and if you come through the side window you can take it.'⁸⁴
- 2.49 Another tenant said she felt vulnerable and at a heightened risk of theft because she was a young woman living by herself. Moving objects so that they did not appear in photographs was an option for some of her possessions, but others were too large.⁸⁵

Landlord and agent responses

- 2.50 While there was a general acceptance that open house inspections place tenants at risk of theft, there was a greater level of scepticism among landlords and agents that the same is true of advertising images.⁸⁶

76 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014).
 77 Information provided to the Commission by Victoria Police (12 March 2014).
 78 Submission 13 (Tenants Union of Victoria).
 79 Ibid.
 80 Submission 9 (Peninsula Community Legal Centre).
 81 Ibid.
 82 Consultation 27 (Shane McGrath, tenancy worker, Home at Last service, Housing for the Aged Action Group).
 83 Consultation 20 (a tenant).
 84 Ibid.
 85 VLRC online survey.
 86 Consultation 1 (a real estate agent). VLRC online survey.

- 2.51 One agent questioned whether advertising images posed a greater risk than floor plans, which also identify the entry and exit points.⁸⁷ Another agent observed, 'Ninety-nine per cent of homes have TV screens and computers. You're not revealing anything special.'⁸⁸ A landlord commented that if thieves were searching online for houses to rob, then ordinary people had nothing to worry about as it would make sense for these thieves to target expensive properties.⁸⁹

Risk of personal harm

- 2.52 Forty-four per cent of the Commission's survey respondents were concerned that advertising images showing tenants' possessions may place tenants at risk of personal harm.⁹⁰ Two groups of tenants were identified by stakeholders as being at risk of harm: people at risk of family violence and people whose occupation makes them vulnerable to retribution.

Family violence⁹¹

- 2.53 The Commission was informed of two tenants at risk of family violence whose addresses were revealed through advertising images showing their possessions. One tenant was found by her violent ex-partner through advertising images that contained photographs of the tenant and other family members. In the other case, the tenant was found through advertising photographs that displayed her car, including its number plate. Both women had to relocate with their children after receiving multiple threats.⁹²
- 2.54 The Commission was also informed of tenants at risk of family violence who were scared that they may be found through advertising images that showed their possessions.⁹³
- 2.55 One tenant reported asking an agent to remove an advertising image that contained a photograph of her children, explaining that she was moving away from the area because she was scared her ex-partner would find her on his imminent release from prison. The tenant informed the agent that her ex-partner was in prison for a serious assault that left her with life-threatening injuries. The agent only agreed to remove the image after the tenant sought legal advice and threatened to take legal action against the landlord.⁹⁴

Landlord and agent responses

- 2.56 A number of agents the Commission spoke with had experienced one or two cases in which they knew, or suspected, that tenants' concerns about advertising images stemmed from a risk of family violence.⁹⁵ These agents appeared sensitive to, and accommodating of, the tenants' concerns. One agent took photographs of the exterior, kitchen and bathroom and showed the photographs to the tenant to obtain her consent prior to using them in an advertising campaign.⁹⁶ Another agent only took photographs of the outside of the property.⁹⁷

87 Consultation 1 (a real estate agent). A real estate photographer (consultation 12) said that professional videos are edited so that they do not provide a 360-degree view of the entry and exit points of the property. However, a filmed walk-through of the property can display the entry and exit points of the property.

88 Consultation 1 (a real estate agent).

89 Consultation 30 (a landlord).

90 102 of 233 respondents said that the photographs or videos could place the tenant at risk of personal harm.

91 Much of the evidence below was provided by a domestic violence support worker in NSW (Consultation 13, Linda Grady) who is employed as part of a government-funded program that assists women fleeing family violence to establish stable lives, including by helping them find suitable private rental accommodation. The Commission did not find a family violence support worker in Victoria with similar expertise in residential tenancy law. However, the TUV, CAV, the Peninsula Community Legal Centre and a number of agents all said they had experience with this issue: information provided to the Commission by Consumer Affairs Victoria (26 February 2014) and the Tenants Union of Victoria (15 August 2014). Submission 9 (Peninsula Community Legal Centre). Consultations 22 (Corina Bailey, CEO, Landlord Specialists); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management); 26 (David Stewart and Leesa Stewart, Market Share Property). See also Consultations 15 (Hunter Tenants Advice and Advocacy Service); 23 (Queensland Residential Tenancies Authority).

92 Consultation 13 (Linda Grady, tenant advocate and domestic violence support worker). These cases occurred in New South Wales.

93 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014) and the Tenants Union of Victoria (15 August 2014). Consultation 13 (Linda Grady, tenant advocate and domestic violence support worker). VLRC online survey.

94 Consultation 13 (Linda Grady, tenant advocate and domestic violence support worker). This case occurred in NSW.

95 Consultations 22 (Corina Bailey, CEO, Landlord Specialists); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management); 26 (David Stewart and Leesa Stewart, Market Share Property).

96 Consultation 22 (Corina Bailey, CEO, Landlord Specialists).

97 Consultation 26 (David Stewart and Leesa Stewart, Market Share Property).

- 2.57 A family violence support worker with expertise in residential tenancy law said, ‘Some real estate agents are really good with domestic violence and others don’t care.’⁹⁸ In some cases, a problem arises because the leasing agent is aware of the family violence situation but the sales agent is not. However, in the support worker’s experience, a number of agents who know about a tenant’s history of family violence fail to take simple steps to protect the tenant, such as advising the tenant to remove possessions that might identify them before advertising images are taken.⁹⁹

Occupations at risk of retribution

- 2.58 The Commission was told about a case in which advertising images revealed that the tenant was a law enforcement officer.¹⁰⁰ Due to her occupation, the tenant felt the images heightened the risk of personal harm.¹⁰¹
- 2.59 Other tenants expressed concern that although the images did not reveal their occupation, they might reveal their identity and they were at a heightened risk of personal harm because of their occupation. These tenants worked in the armed services,¹⁰² community mental health¹⁰³ and education.¹⁰⁴
- 2.60 A high school teacher who works with difficult children told the Commission she felt a ‘heightened sense of vulnerability’ because ‘I wouldn’t want to give fuel to a fire if they wanted to take retribution.’¹⁰⁵

Inconvenience

- 2.61 Many tenants recounted the ways in which they had been inconvenienced when advertising images were taken, including by being:
- harassed into allowing images to be taken
 - required to clean to a marketable standard
 - required to take time off work in order to exercise their right to be present while images are taken
 - pressured to move their furniture or by having their furniture moved without permission
 - required to allow their furniture to be used to showcase the property.

Harassment

- 2.62 Many tenants reported feeling harassed into allowing an agent or photographer to enter to take advertising images.¹⁰⁶
- 2.63 A tenant who had served a notice on her landlord to undertake non-urgent repairs told the Commission that she successfully challenged the notice to vacate she subsequently received on the grounds that it was ‘given in response to the exercised or proposed exercise of a right under the Act’.¹⁰⁷ At the VCAT hearing, the landlord’s argument that he issued the notice because he intended to sell the property was rejected for lack of evidence.¹⁰⁸

98 Consultation 13 (Linda Grady, tenant advocate and domestic violence support worker).

99 Ibid.

100 Preliminary consultation with tenants’ advocate (28 January 2014).

101 Ibid.

102 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

103 Ibid.

104 Consultation 21 (a tenant).

105 Ibid.

106 Consultations 4 (a tenant); 11 (a tenant); 33 (a tenant).

107 Consultation 11 (a tenant).

108 Ibid.

- 2.64 Shortly after the VCAT hearing, the agent contacted the tenant to make a time for a sales appraisal that would include the taking of images. The tenant said:

I felt that I had been manipulated into giving consent because I was worried that if I didn't give my consent I would be served with a breach of duty.¹⁰⁹

- 2.65 The tenant, who has depression and is afraid of being evicted, described the impact the experience had had on her:

These people [real estate agents] have a huge amount of power over my life. All these choices they make don't impact on their life, but they have a great impact on my life. I get a barrage of coercive emails from a young and inexperienced agent who works for her father with limited managerial oversight, and this erodes my ability to function on a day-to day-level.¹¹⁰

- 2.66 Another tenant who expressed concern when asked to make a time for advertising images to be taken, said the agent threatened her with eviction 'if I "wanted to go down this path"'.¹¹¹ Yet another tenant said that the agent threatened her with a bad reference if she did not provide immediate access for advertising images to be taken.¹¹²

Cleaning

- 2.67 Some tenants expressed concern about the amount of cleaning they were expected to do to ensure the property was of a marketable standard.¹¹³ Tenants are generally expected to ensure the property is of a marketable standard in the advertising images, as well as throughout the sales campaign.¹¹⁴ As a TUV representative described it, tenants are expected to live in a showroom.¹¹⁵

- 2.68 A tenant told the Commission, 'They ... requested [a] spotless house and our disappearance.' However, the tenant also said, 'They never offered to pay for cleaning, for washing and ironing bed linens so they [could] have great presentation.'¹¹⁶

- 2.69 Another tenant told the Commission that paying full rent should ensure full enjoyment of the property for the duration of the lease. According to this tenant:

It is the little things but you pay your rent so you shouldn't feel like you are living on tenterhooks and making sure the toilet seat is down. Personally, I am a clean freak and I would never show a property which is substandard.¹¹⁷

Taking time off work

- 2.70 The TUV told the Commission that one of the main concerns of tenants is not being present when images are taken, often because they cannot get time off work.¹¹⁸

- 2.71 Even where tenants can get time off work, it may be inconvenient and costly.¹¹⁹ Although advertising images only take 30 minutes to one hour to take, tenants may have to take several hours' leave in order to be present, depending on when the images are taken.¹²⁰

109 Ibid.

110 Ibid.

111 VLRC online survey.

112 Ibid.

113 Consultations 6 (Tenants' Union of New South Wales); 21 (a tenant); 37 (Roundtable). VLRC online survey.

114 Consultations 1 (a real estate agent); 6 (Tenants' Union of New South Wales); 12 (a photographer); 26 (David Stewart and Leesa Stewart, Market Share Property); 37 (Roundtable).

115 Consultation 37 (Roundtable).

116 VLRC online survey.

117 Consultation 21 (a tenant).

118 Consultation 37 (Roundtable).

119 Information provided to the Commission by the Tenants Union of Victoria (10 July 2014).

120 Consultation 1 (a real estate agent).

- 2.72 A number of tenants reported that their agent was not flexible in organising times for images to be taken and did not try to accommodate the tenants' work schedule.¹²¹ One tenant said, 'I had no choice in what day/time the photographer was coming. I had to change my work schedule to suit them.'¹²²
- 2.73 The Commission is aware of cases in which the tenant was told by the agent that they would prefer it if the tenant were not present when advertising images were taken.¹²³ One tenant informed the Commission that although the agent had told her she had no right to be present while the photographs were being taken, the tenant took time off work to be there for her 'own peace of mind'.¹²⁴

Moving furniture

- 2.74 Some tenants expressed concern about agents moving furniture around the house without their permission.¹²⁵ A tenant told the Commission:
- The landlord rearranged my furniture without my permission, then didn't put it back. They also scratched the floor in the process and later took that out of my bond.¹²⁶
- 2.75 The TUV told the Commission that although tenants are able to seek compensation where possessions have been damaged by the landlord rearranging furniture, it is difficult to prove causation.¹²⁷
- 2.76 Another tenant reported being asked by the agent to put her furniture into storage at her own cost so the landlord could hire furniture that was less 'studenty'.¹²⁸ When the tenant refused, the agent asked her to move heavy items of furniture around the property to make the property more presentable.¹²⁹

Using furniture

- 2.77 The TUV stated it was of the opinion that the landlord's right to sell the property does not extend to obtaining a commercial benefit from using the tenant's furniture to showcase the property. If the landlord is unwilling to use images of a vacant property, the landlord should hire furniture or provide appropriate compensation to the tenant for the use of their furniture.¹³⁰
- 2.78 A number of tenants supported this view, noting that 'the property did not look as good without [my] furniture'¹³¹ or that 'possessions can window dress a property to quite a large extent.'¹³²
- 2.79 When speaking of her frustration at having her possessions included in advertising images, one tenant said:
- Yes, I was living there at the time and the furniture matched the period style house better than the owner's furniture did when he lived there but the furniture shouldn't sell the property, the features should sell the property. As a current landlord whose property has just sold we checked with the tenant before photographing their possessions and used photos of kitchens/bathrooms etc that don't include many possessions.¹³³

121 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). VLRC online survey.
 122 VLRC online survey.
 123 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). Consultation 33 (a tenant).
 124 Consultation 33 (a tenant).
 125 VLRC online survey.
 126 Ibid.
 127 Submission 13 (Tenants Union of Victoria).
 128 Consultation 33 (a tenant).
 129 Ibid.
 130 Consultation 37 (Roundtable).
 131 Consultation 4 (a tenant).
 132 VLRC online survey.
 133 Ibid.

Landlord and agent responses

- 2.80 Landlords and agents were more sympathetic to tenants inconvenienced by sales campaigns than letting campaigns.¹³⁴ As they explained it, this is because sales campaigns often run for longer and attract more visitors to the property.¹³⁵ It is also because the sale is often unexpected as far as the tenant is concerned. Letting campaigns on the other hand are seen as an inherent part of the tenancy experience, especially when it is the tenant's choice to move on at the end of the lease.¹³⁶
- 2.81 Among the types of compensation offered to tenants during sales campaigns are reduced rent,¹³⁷ a cleaner,¹³⁸ a gardener,¹³⁹ dinner vouchers,¹⁴⁰ movie tickets¹⁴¹ and beer.¹⁴² None of these were offered solely for having advertising images taken, but rather for the inconvenience caused throughout the sales campaign.
- 2.82 Several agents the Commission consulted with tried to work around the tenant's schedule when taking advertising images.¹⁴³ The Real Estate Institute of Tasmania said it advises its agents to encourage tenants to be present when images are being taken so that tenants have an opportunity to remove any identifying or valuable possessions from view.¹⁴⁴
- 2.83 Different views were expressed by agents on whether furniture improves the presentation of the property.¹⁴⁵ One agent noted that some tenants have poor quality furniture and that, where that is the case, she advises owners to wait until the end of the tenancy before taking advertising images with hired furniture.¹⁴⁶ This is because 'good photos ... will really bring the home up and get the best dollar.'¹⁴⁷ Other agents said that vacant properties make the property look bigger.¹⁴⁸ Many agents expressed the view that the landlord was in no way disadvantaged by photographs of a vacant property.¹⁴⁹

Commission's conclusions

- 2.84 There are many reasons why a landlord may advertise their property for sale or lease: the tenant may have decided to move on at the end of the lease, the tenant may have broken the lease early, the landlord may have evicted the tenant for repeatedly breaching their duties to the landlord or the landlord may have decided to sell. In each case, the tenant bears the pressure of potentially or actually relocating, and the landlord and agent bear the pressure of the costs of vacancy if the property is not quickly sold or re-leased.
- 2.85 The lack of certainty about each party's rights in relation to advertising images increases the possibility of conflict and distress. Tenants in particular can feel vulnerable and placed under undue pressure by landlords and agents who fail to respect their legitimate concerns about the implications of the advertising campaign on their privacy and security in the home. Legal clarity and certainty would assist all concerned and reduce the number of unnecessary disputes of this kind.

134 Consultations 1 (a real estate agent); 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office).
135 Consultation 1 (a real estate agent).
136 Consultations 1 (a real estate agent); 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office).
137 Consultations 1 (a real estate agent); 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office); 37 (Roundtable).
138 Consultation 22 (Corina Bailey, CEO, Landlord Specialists).
139 Ibid.
140 Ibid.
141 Consultation 25 (Michelle Evans, senior property manager, Investor's Choice Property Management).
142 Consultation 22 (Corina Bailey, CEO, Landlord Specialists).
143 Consultation 12 (a photographer). VLRC online survey.
144 Consultation 16 (Real Estate Institute of Tasmania).
145 Consultations 4 (a tenant); 12 (a photographer); 17 (a real estate agent); 26 (David Stewart and Leesa Stewart, Market Share Property).
146 Consultation 17 (a real estate agent).
147 Ibid.
148 Consultation 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale).
149 Consultations 2 (a real estate agent); 24 (Sophie Lyon, general manager, Property Management Division, PhilipWebb); 26 (David Stewart and Leesa Stewart, Market Share Property).

Right to enter

20 Introduction

20 Is there a right to enter to take advertising images that show tenants' possessions?

25 Should there be a right to enter to take advertising images that show tenants' possessions?

34 Right to use

3. Right to enter

Introduction

- 3.1 The *Residential Tenancies Act 1997* (Vic) (RTA) does not expressly refer to the practice of taking images of rental properties for advertising purposes. While some argue that the RTA establishes a right to enter for this purpose without tenant consent, others disagree.
- 3.2 The Commission considers this debate below, concluding that it is currently unlawful for a landlord or agent to enter to take advertising images that show tenants' possessions without the tenant's consent.
- 3.3 However, the Commission is also of the view that this prohibition unnecessarily undermines the capacity of landlords to sell and lease their properties, and that an express right to enter to take advertising images should be adopted.
- 3.4 As discussed in Chapter 2, some landlords and agents have unreasonably interfered with the ability of tenants to live peacefully in their homes when entering, or seeking to enter, to take advertising images. This has caused tenants varying degrees of distress and, occasionally, placed tenants at risk of harm. Accordingly, the Commission recommends limiting the scope of the express right to enter to take advertising images in line with the legitimate concerns of tenants.

Is there a right to enter to take advertising images that show tenants' possessions?

Current law

- 3.5 The central question for review is whether a landlord or agent may enter to take advertising images that show tenants' possessions without tenant consent. The Commission is not concerned with situations in which a tenant has freely consented to a landlord or agent's request to take images to advertise a property that is for sale or lease.

Legislation

- 3.6 The RTA sets out the circumstances in which a landlord or agent may enter a rental property in Victoria.¹ It is an offence to enter a property other than in accordance with the RTA, unless the landlord or agent has a reasonable excuse for doing so.²
- 3.7 A landlord or agent may enter the property for any purpose if the tenant has consented to the landlord or agent's request to enter for that purpose within the past seven days.³

1 *Residential Tenancies Act 1997* (Vic) pt 2 div 8.
2 *Ibid* s 91A.
3 *Ibid* s 85(a).

- 3.8 Without the tenant's consent, the landlord or agent may only enter on certain grounds, such as showing the property to a prospective tenant.⁴ If a landlord or agent wishes to enter on one of these grounds, they must provide the tenant with at least 24 hours written notice.⁵

Possible interpretations

- 3.9 One reading of the RTA is that it provides that a landlord or agent may only enter a rental property without the tenant's consent on the grounds set out in the RTA, and taking advertising images is not one of those grounds. The seven grounds for entry listed in the RTA are:
- showing the property to a prospective tenant
 - showing the property to a prospective buyer or lender
 - carrying out the landlord's legal duties
 - undertaking valuation activities
 - determining whether the tenant has failed to comply with their legal duties
 - conducting a routine inspection
 - conducting an inspection in order to terminate or amend the lease in cases of family violence.⁶
- 3.10 An alternative reading of the RTA is that 'to show the property' should not be restricted to physically entering the property. According to this interpretation, entering to show the property to a prospective buyer or tenant includes entering in order to show the property in a billboard or online.
- 3.11 A third reading of the RTA is that advertising a property is sufficiently incidental to, and therefore authorised by, the right to enter to show the property. That is to say, there would be few, if any, prospective tenants or buyers to show the property to if the property was not first advertised.

Tribunal findings

- 3.12 The Victorian Civil and Administrative Tribunal (VCAT) has not received an application for an order restraining a landlord or agent from taking or using advertising images that show tenants' possessions.⁷ As such, VCAT has not been asked to decide whether landlords and agents have a right to enter for that purpose.
- 3.13 However, VCAT has been asked to consider the scope of the right to enter to show the property to a prospective tenant or buyer.⁸ In deciding that landlords and agents do not have a right to enter to hold open house inspections, VCAT has found that the RTA only bestows on landlords and agents a right to conduct private inspections with a particular prospective tenant or a particular prospective buyer.⁹
- 3.14 In *Higgerson v Ricco*, Member Tyler rejected the agent's argument that collecting attendees' names on entry would mean that the house was not 'open to the world at large'.¹⁰ Member Tyler described open house inspections as 'a 'fishing' exercise and an opportunity for a wide range of parties to enter the premises for a number of reasons including those unrelated to a prospective purchase'.¹¹

4 Ibid ss 86(1)(a)–(b).

5 Ibid ss 85(b), 88.

6 Ibid s 86.

7 Information provided to the Commission by VCAT (4 March 2014).

8 Information provided to the Commission by VCAT (4 March 2014). See also *Higgerson v Ricco (Residential Tenancies)* [2014] VCAT 1214 (26 August 2014).

9 Information provided to the Commission by VCAT (4 March 2014). See also *Higgerson v Ricco (Residential Tenancies)* [2014] VCAT 1214 (26 August 2014).

10 *Higgerson v Ricco (Residential Tenancies)* [2014] VCAT 1214 (26 August 2014) [10] (Member Tyler).

11 Ibid [11].

- 3.15 In *Jones v Director of Housing*, the tenant challenged the landlord's right to take photographs inside the property in order to record the condition of the property on the ground that the photographs may inadvertently capture his possessions and thereby violate his right to privacy.¹² Member Grainger found in favour of the landlord, noting that it was reasonable for the landlord to take photographs to record the condition of the unit when entering in order to carry out the duty to maintain the property in good repair.¹³
- 3.16 In reaching this conclusion, Member Grainger observed that while the photographs the landlord intended to take of the bathroom and kitchen may capture the tenant's possessions, the tenant could easily remove his possessions from view.¹⁴ As the landlord stated that the tenant's possessions would not be captured in the photographs taken in the property's other rooms, Member Grainger did not consider whether taking images of the tenant's possessions in rooms from which they could not so easily be removed was lawful.¹⁵

Community responses

Landlords have a right to enter for this purpose

- 3.17 Consumer Affairs Victoria (CAV) advises tenants who call for assistance that landlords and agents may enter to take advertising photographs, and that tenants may ask, but cannot insist, that those photographs not include their personal possessions.¹⁶ It also advises tenants that they should contact the Office of the Australian Information Commissioner (OAIC) if they feel the photographs breach their privacy by identifying the tenant or the tenant's family members.¹⁷
- 3.18 CAV is of the opinion that the right to enter to take advertising images is authorised by the right to show the property to a prospective tenant or buyer. CAV informed the Commission:

... section 86(1)(f) of the *Residential Tenancies Act 1997* ('the Act') permits a landlord to exercise a right of entry if entry is required to enable inspection of the premises and entry for that purpose has not been made within the last six months. When exercising that right, a landlord is not precluded from taking photographs as part of the inspection, as photographs may provide evidence as to the condition of the premises if there is a bond dispute at the end of the tenancy. Whether or not the landlord's conduct, in taking such photographs, would amount to a breach of the tenant's right to quiet enjoyment will depend on the facts.

Where photographs are required for advertising purposes, sections 86(1)(a) and 86(1)(b) of the Act permit the landlord to exercise a right of entry if entry is required to show the premises to a prospective tenant, buyer or lender. These provisions encompass showing the premises by means of photographs, noting that in some instances a prospective tenant, buyer or lender may not be able to physically attend the premises and that photographs are generally considered necessary in order for a property to be marketed competitively. Safeguards as to the manner in which a right of entry is exercised are provided in section 87 of the Act.¹⁸

12 *Jones v Director of Housing (Residential Tenancies)* [2013] VCAT 2184 (31 December 2013) [21]–[22].

13 *Ibid* [24]–[29]. Section 68 of the RTA places a duty on landlords to maintain the property in good repair. Section 86 grants landlords a right of entry to carry out a duty under the Act. Section 87 states that landlords must exercise a right of entry in a reasonable manner.

14 *Ibid* [27].

15 *Jones v Director of Housing (Residential Tenancies)* [2013] VCAT 2184 (31 December 2013).

16 Information provided by Consumer Affairs Victoria (26 February 2014).

17 *Ibid*. The Freedom of Information Amendment (New Arrangements) Bill 2014 was introduced into Commonwealth Parliament on 2 October 2014. The Bill provided for the abolition of the Office of the Australian Information Commissioner from 1 January 2015. Office of the Australian Information Commissioner, 'New Bill introduced to amend FOI and privacy laws' (media release, 2 October 2014) <<http://www.oaic.gov.au/news-and-events/statements>>. As the Bill was not considered by the Senate before the summer recess, the Office of the Australian Information Commissioner remains open until further notice. Office of the Australian Information Commissioner, 'OAIC to remain operational until further notice' (media release, 8 December 2014) <<http://www.oaic.gov.au/news-and-events/statements>>.

18 Information provided by Consumer Affairs Victoria (19 December 2014).

- 3.19 The Real Estate Institute of Victoria (REIV) shares the view that landlords and agents have a right to enter to take advertising images showing tenants' possessions.¹⁹
- 3.20 Many agents and landlords also asserted that they had a right to enter for this purpose.²⁰ This was most commonly based on the argument that landlords have a right to sell or lease their property, and that they need to advertise their property in order to do so.²¹ This is consistent with the third interpretation of the RTA set out above, although none of the agents or landlords who held this view referred to the legislation.

Landlords do not have a right to enter for this purpose

- 3.21 The Tenants Union of Victoria (TUV) is of the opinion that 'the landlord has no right of entry for the purpose of taking photographs of the premises for advertising.'²² This view is supported by the tenants' unions of the Australian Capital Territory, New South Wales, Queensland and Tasmania in relation to legislation operating in their respective jurisdictions.²³
- 3.22 The TUV set out the legal basis for its position in its submission:
- The RTA creates specific conditions under which the landlord is entitled to access the rented premises by notice of entry. These conditions can, and should, be narrowly understood and interpreted to protect the tenant's right to exclusive possession and their subsequent right to quiet enjoyment of the rented premises.²⁴
- 3.23 According to the TUV, a narrow interpretation is consistent with the right to privacy in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.²⁵
- 3.24 At the Commission's roundtable, the TUV stated that this interpretation of the RTA would not prevent landlords from selling their properties, it would simply prevent landlords from using tenants' possessions in advertising material without the tenant's permission when selling their properties.²⁶ The TUV is of the view that many tenants would freely provide consent, while others might give their consent on the condition that certain possessions not be photographed or that they receive a rent reduction for the duration of the advertising campaign.²⁷ In cases where tenants withheld consent, the TUV identified alternative options, such as using old images of the property or waiting until the property was vacant before taking images.²⁸
- 3.25 If advertising images identify the tenant or a family member, the TUV, like CAV, advises tenants to contact the OAIC.

Australian Privacy Principles

- 3.26 The OAIC's website asserts that state-based tenancy laws determine when a real estate agent can take photographs in a tenant's home.²⁹ However, if the photograph captures personal information, such as the tenant's name or image, it states that the agent must handle it in accordance with the *Privacy Act 1998 (Cth)* (Commonwealth Privacy Act).³⁰

19 Submission 10 (Real Estate Institute of Victoria); Consultation 37 (Roundtable).

20 Submission 7 (Matthew Pearce). Consultations 16 (Real Estate Institute of Tasmania); 37 (Roundtable).

21 Consultations 24 (Sophie Lyon, general manager, Property Management Division, PhilipWebb); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management); 28 (Gina Butera).

22 Tenants Union of Victoria, *The landlord is selling* (July 2013) <<http://www.tuv.org.au/advice/during-your-tenancy/your-landlord-is-selling/>>.

23 Submission 1 (Tenants' Union ACT). Consultations 3 (Tenants Queensland); 6 (Tenants' Union of New South Wales); 14 (Tenants' Union of Tasmania).

24 Submission 13 (Tenants Union of Victoria).

25 Submission 13 (Tenants Union of Victoria). Consultation 37 (Roundtable).

26 Consultation 37 (Roundtable).

27 Ibid.

28 Ibid.

29 Office of the Australian Information Commissioner, *Is my real estate agent allowed to take photos in my house?* <<http://www.oaic.gov.au/privacy/privacy-topics/tenancy-and-real-estate/>>.

30 Ibid.

- 3.27 The Commonwealth Privacy Act applies to a limited range of agencies. This includes large real estate agencies, but not small or medium-sized agencies unless they are carrying out specific functions, such as operating a residential tenancy database.³¹ The Commonwealth Privacy Act does not apply to individual landlords.
- 3.28 If the tenant has been told in advance that images of their possessions will be taken,³² whether the Commonwealth Privacy Act prevents the collection of personal information by those to whom it applies depends on whether it is reasonably necessary for the landlord or agent to collect the information in order to sell or lease the property.³³

Commission's conclusions

- 3.29 The conclusions expressed by CAV and cited at [3.18] certainly are arguable. However, the Commission considers that primacy should be given to the terms of the RTA. The RTA sets out with specificity the rights of entry of landlords. Entry for the contended purpose (to take images for advertising purposes) is not one of the specified rights. The Commission concludes that, as the RTA clearly sets out the grounds on which landlords and agents can enter the property without first obtaining tenant consent and as taking advertising images is not listed as a ground for entry, landlords and agents have no right to enter for that purpose. It follows that landlords and agents may only enter a property to take advertising images that show the tenant's possessions after obtaining the tenant's consent.
- 3.30 The Commission does not agree that the meaning of 'to show' extends to showing a property to the world at large in advertising material. The Commission's view is consistent with previous VCAT decisions in which the right to enter to show a property has been interpreted to establish a right to enter only in relation to a particular prospective tenant or a particular prospective buyer.³⁴
- 3.31 Further, the Commission does not agree that there is an implied right to enter to take advertising images of tenants' possessions because advertising is sufficiently incidental to the act of entering to show the property in person. Even if one accepted the proposition that there was an implied right to enter to take advertising images of the property, this proposition does not authorise the taking of advertising images showing tenants' possessions.
- 3.32 Although stakeholders disagreed about the level of privacy that ought to be afforded to different areas of the property, most appreciated the varying degree of intrusion associated with those areas.³⁵ Images taken of the outside of the property are less intrusive than images taken of rooms that do not show tenants' possessions (or rooms from which tenants' possessions can easily be removed), which are, in turn, less intrusive than images that do show tenants' possessions.³⁶
- 3.33 In the Commission's view, the level of intrusiveness associated with advertising images that show tenants' possessions is such that the authority to take such images without tenant consent requires clear legislative intent and proper regard for the consequences for tenants.

31 The Australian Privacy Principles apply to government agencies and businesses with a turnover of more than \$3 million: 6C–6EA *Privacy Act 1988* (Cth). Regulation 7(1) of *Privacy Regulation 2013* (Cth) stipulates that the Australian Privacy Principles also apply to small business operators that operate a residential tenancy database.

32 Australian Privacy Principle 5 states that, before or at the time of collecting personal information, an organisation must advise the individual whose information is being collected about certain matters where it is reasonable in the circumstances to do so. Those matters include the fact that the information is being collected as well as the purpose for its collection. See *Privacy Act 1988* (Cth) sch 1, Principles 5.1, 5.2(b), (d).

33 Australian Privacy Principle 3 prohibits organisations from collecting personal information unless the information is reasonably necessary for carrying out their activities. See *Privacy Act 1988* (Cth) sch 1, Principle 3.2.

34 Information provided to the Commission by VCAT (4 March 2014). *Higgerson v Ricco (Residential Tenancies)* [2014] VCAT 1214 (26 August 2014).

35 Preliminary consultation with a real estate agent (3 February 2014). Information provided to the Commission by the Tenants Union of Victoria (15 August 2014). VLRC online survey.

36 Consultations 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale); 29 (Stephen Raff, CEO, Ace Body Corporate Management, Australia & Singapore). See also *Jones v Director of Housing (Residential Tenancies)* [2013] VCAT 2184 (31 December 2013).

- 3.34 In view of the differing conclusions, expressed above, on the pivotal matter of the right to enter to take advertising images, the Commission concludes that it is desirable that legislation be amended to remove the uncertainty surrounding this matter. This course is preferable to leaving the situation as one involving disputed statutory interpretation.

Should there be a right to enter to take advertising images that show tenants' possessions?

- 3.35 While all stakeholders agreed that landlords have a right to sell or lease their properties, and that tenants have a right to exclusive possession and quiet enjoyment of their properties, there is disagreement on where the balance should lie between these competing interests when it comes to taking advertising images that show tenants' possessions.³⁷
- 3.36 Underlying many of the following comments is an assumption that landlords and agents currently have a right to enter to take advertising images without tenant permission. As already noted, the Commission is of the opinion that those who hold this view are mistaken.

Community responses

- 3.37 Most agents and landlords were in favour of a right to enter to take advertising images without tenant consent, and most tenants were not. These arguments are set out in more detail below.
- 3.38 However, more than one agent said they would never take advertising images of a tenant's possessions without first obtaining the tenant's permission.³⁸ Similarly, a landlord stated that after carefully considering whether '[I would] like my possessions used by others for their own purposes and possibly exposing me to damage as a result', her answer was '[a] resounding no'.³⁹
- 3.39 On the other hand, a tenant said she thought that prohibiting landlords from taking advertising images without first obtaining the tenant's written consent might 'create more problems than it solves'.⁴⁰ The landlord might, for example, evict the tenant and show the property empty rather than negotiate with the tenant to obtain consent.⁴¹

Agents and landlords

- 3.40 The REIV and its members are in favour of a right to enter to take advertising images that show tenants' possessions.⁴² The REIV's submission stated:
- 100% of members surveyed supported the right of landlords and agents to take photographs and videos containing tenants' possessions where tenants were informed in writing and given the opportunity to remove their possessions from view.⁴³

Importance of advertising

- 3.41 A number of agents pointed out that, in this day and age, advertising is a crucial component of selling or leasing a property.⁴⁴ The Real Estate Institute of Queensland told the Commission that 'the majority of buyers start their search on the internet and this applies equally for renters'.⁴⁵

37 Consultation 37 (Roundtable). The right to quiet enjoyment is discussed in more detail in Chapter 5.

38 Submission 17 (Wendy Abrahmsen). VLRC online survey.

39 Information provided to the Commission by a landlord (27 August 2014).

40 Consultation 33 (a tenant).

41 Ibid.

42 Submission 10 (Real Estate Institute of Victoria).

43 Ibid.

44 Consultations 25 (Michelle Evans, senior property manager, Investor's Choice Property Management); 29 (Stephen Raff, CEO, Ace Body Corporate Management, Australia & Singapore); 34 (Real Estate Institute of Queensland).

45 Consultation 34 (Real Estate Institute of Queensland).

- 3.42 According to one agent, not having photographs of the property would 'severely compromise the agent's ability to sell the property'.⁴⁶ Another agent informed the Commission that having 'no photos of the main rooms in a dwelling gives buyers the impression that there is something that the buyer should not see'.⁴⁷
- 3.43 One agent knew of a situation in which the tenants refused entry for both the taking of advertising images and open house inspections. At the auction, the tenants were the only bidders and, according to the agent, they bought the property for a very low price.⁴⁸
- 3.44 A landlord told the Commission that prospective tenants often have a check list of requirements relating to features such as bedroom size or storage capacity.⁴⁹ She expressed concern that if those tenants were not able to determine whether a property met their requirements by looking at the images in an advertisement, they would simply skip to the next advertisement which contained the information they needed.⁵⁰

Disgruntled tenants

- 3.45 Many agents were worried that if tenant consent were required before advertising images of tenants' possessions could be taken or used, disgruntled tenants could withhold consent and hamper the sale.⁵¹
- 3.46 As a Real Estate Institute of Tasmania representative explained:
- If [the tenants] are leaving the property and moving to another but there is a breakdown of communication between tenant and landlord for whatever reason ... they might not give their consent. When people enter into these agreements, the relationship is good, but when the agreement comes to an end, the relationship may not be so good.⁵²
- 3.47 According to the representative, this would create problems for agents: 'You can't market a property to the best of your ability in the shortest time possible if you can't take photos.'⁵³

Financial implications

- 3.48 A number of agents pointed out that landlords sometimes have to sell their properties unexpectedly because of financial hardship, and it would be unfair if the landlord could not sell the property quickly and/or at market value because they were denied the opportunity to showcase the property in advertising material.⁵⁴
- 3.49 A landlord informed the Commission that it was a misconception that landlords could afford to absorb the costs associated with not being able to showcase the property in advertising material in a timely manner. In her case, she and her husband have lived frugally in order to buy four investment properties, which they hope will bring them long-term financial security. The landlord, who works three jobs, noted that 'The bank owns all these houses.'⁵⁵

46 Consultation 25 (Michelle Evans, senior property manager, Investor's Choice Property Management).

47 Submission 3 (confidential).

48 Consultation 17 (a real estate agent).

49 Consultation 30 (a landlord).

50 Ibid.

51 Consultations 8 (a real estate agent); 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale); 16 (Real Estate Institute of Tasmania); 24 (Sophie Lyon, general manager, Property Management Division, PhilipWebb); 26 (David Stewart and Leesa Stewart, Market Share Property).

52 Consultation 16 (Real Estate Institute of Tasmania).

53 Ibid.

54 Consultations 10 (Rachel Spurgeon, sales consultant, LJ Hooker Geelong); 22 (Corina Bailey, CEO, Landlord Specialists); 25 (Michelle Evans, senior property manager, Investor's Choice Property Management).

55 Consultation 30 (a landlord).

Tenants

- 3.50 The TUV is not in favour of vesting landlords and agents with a right to enter to take advertising images, arguing that ‘as far as possible a tenant should have the same control over their home environment as an owner occupier’.⁵⁶ According to the TUV:
- Renting should be a legitimate, appropriate and long term housing option for those who choose it. The notion that somebody’s personal space can be photographed against their will ... is unacceptable ...⁵⁷
- 3.51 A number of tenants echoed these sentiments. As one tenant put it:
- Using someone else’s belongings in advertising material for a property is tremendously rude. Many people rent a home, not just a property and images of their home are a gross invasion of privacy.⁵⁸
- 3.52 Similarly, Assistant Professor Bruce Arnold stated:
- Public policy should not enshrine the convenience of real-estate agents ahead of the right of tenants to enjoy ‘quiet possession’ and enjoy a private sphere, a quiet that involves a freedom from unwanted physical visitation and virtual visitation (ie the image-making and the publication).⁵⁹
- 3.53 As noted above, the TUV expressed the view that denying landlords the opportunity to take advertising images of tenants’ possessions without tenant consent does not deny landlords the opportunity to sell their properties. It means that they have to obtain tenant consent or, where consent is not given, adopt an alternative strategy for advertising the property. That might involve using old images or waiting until the property is vacant.

Other states and territories

- 3.54 With the exception of South Australia, Queensland and Tasmania, the debate about the right to enter to take advertising images is similar in Australia’s other jurisdictions to the one in Victoria.
- 3.55 In South Australia, landlords have a right to enter for a genuine purpose, which may include taking advertising images of the property.⁶⁰
- 3.56 In Queensland and Tasmania, residential tenancy law regulates the use, as opposed to the taking, of advertising images that show tenants’ possessions.⁶¹ This has implications for the debate about the implied right to enter to take advertising images, as conduct prohibited when using advertising images is likely to be prohibited when taking advertising images.

South Australia

- 3.57 The *Residential Tenancies Act 1995 (SA)* stipulates that landlords or agents may enter for a genuine purpose without obtaining the tenant’s consent. If they wish to enter on that ground, they must provide written notice to the tenant between seven and 14 days before entering the property.⁶²

56 Submission 13 (Tenants Union of Victoria).

57 Ibid.

58 VLRC online survey.

59 Submission 11 (Assistant Professor Bruce Arnold).

60 *Residential Tenancies Act 1995 (SA)* s 72(1)(i).

61 *Residential Tenancies and Rooming Accommodation Act 2013 (Qld)* s 203; *Residential Tenancy Amendment Act 2013 (Tas)* s 26 inserting s 55A into the *Residential Tenancy Act 1997 (Tas)*.

62 *Residential Tenancies Act 1995 (SA)* s 72(1)(i).

- 3.58 The South Australian Government website says landlords may enter to take advertising images of their property, but not of tenants' possessions.⁶³ According to the website, 'A photograph of an area not identifying the tenant's possessions is acceptable e.g. [the] bathroom.'⁶⁴
- 3.59 The legal basis for this advice is not clear. It may be that the genuine purpose provision establishes a right to enter to take advertising images of the property.⁶⁵ It may also be that, when exercising that right, South Australia's expansive right to quiet enjoyment prevents landlords from taking advertising images of tenants' possessions without tenant consent.⁶⁶

Queensland

- 3.60 Section 203 of the *Residential Tenancies and Rooming Accommodation Act 2013* (Qld) prohibits the use of advertising images that show tenants' possessions without the written consent of the tenant.⁶⁷ Violating this provision is an offence that may attract a fine of up to \$2,277.⁶⁸
- 3.61 The prohibition on using advertising images of tenants' possessions without their consent suggests that landlords cannot take advertising images of tenants' possessions without their consent. If it were otherwise, that is, if landlords had an implied right to enter to take advertising images of tenants' possessions but needed tenant consent to use those images, this would create a situation in which landlords were entitled to enter to take images of tenants' possessions that they may then not be allowed to use.
- 3.62 It could be argued that the prohibition implies a right to enter to take advertising images that do not show tenants' possessions. Tenants Queensland is of the opinion that it does not.⁶⁹
- 3.63 The Queensland Residential Tenancies Authority has received a number of complaints since the prohibition was introduced. However, it has not deemed any of them serious enough to warrant prosecution.⁷⁰ In part, this is because the offence is often committed by agency sales staff who use photographs already stored in the agency's property management records without realising they need to obtain tenant consent before publishing them.⁷¹
- 3.64 The Authority advised that it has received complaints about advertising images that showed family photographs and electronic items, as well as complaints from tenants at risk of family violence.⁷² In addition, it has received complaints that appear to be of a trivial nature, including a complaint about an image of the backyard that showed a soccer ball and about an image that showed a pot plant.⁷³

63 Government of South Australia, *Selling or purchasing a private rental property* (11 December 2014) <<https://www.sa.gov.au/topics/housing-property-and-land/>>.

64 Ibid.

65 *Residential Tenancies Act 1995* (SA) s 72(1)(i).

66 Unlike in Victoria, the statutory right to quiet enjoyment in South Australia includes the right to reasonable privacy. This is discussed in detail in Chapter 5.

67 *Residential Tenancies and Rooming Accommodation Act 2013* (Qld) s 203.

68 Ibid. The maximum penalty is 20 penalty units. One penalty unit is currently \$113.85 (from 1 July 2014). Queensland Government, *Sentencing fines and penalties for offences* (4 November 2014) <<https://www.qld.gov.au/law/crime-and-police/types-of-crime/>>.

69 Consultation 3 (Tenants Queensland).

70 Preliminary consultation with David Breen, executive manager, Policy and Education Services, Queensland Residential Tenancies Authority (2 October 2013 and 9 May 2014).

71 Consultation 23 (Queensland Residential Tenancies Authority).

72 Preliminary consultation with David Breen, executive manager, Policy and Education Services, Queensland Residential Tenancies Authority (2 October 2013 and 9 May 2014). Consultation 23 (Queensland Residential Tenancies Authority).

73 Consultation 23 (Queensland Residential Tenancies Authority).

Tasmania

- 3.65 On proclamation, section 26 of the *Residential Tenancy Amendment Act 2013* (Tas) would have required landlords and agents to obtain the written consent of the tenant before showing advertising images that display 'any object in the premises that may identify the tenant or another person or that belongs to the tenant'.⁷⁴ While most of that Act commenced on 1 October 2014, a number of sections did not, including section 26.⁷⁵ The Tasmanian Consumer Affairs and Fair Trading website says that amendments to the uncommenced sections are currently being considered.⁷⁶
- 3.66 The Real Estate Institute of Tasmania was of the opinion that agents in Tasmania have a right to enter to take advertising images and that it was only fair that they did so. Its CEO said that while he was not in favour of the broad consent requirement that had been enacted, agents neither needed nor wanted to use images of possessions that would identify the tenant.⁷⁷

Commission's conclusions

- 3.67 In seeking to clarify and update the law relating to the taking of advertising images when a property is for sale or lease, the Commission is mindful of the need to uphold the right of landlords to sell and lease their properties, while at the same time protecting the legitimate concerns of tenants.
- 3.68 Although it is clear that some landlords and agents have treated tenants poorly when taking advertising images, it is equally clear that landlords, agents and tenants successfully negotiate their way through this process all the time. In reaching its conclusions, the Commission has been guided by examples of industry best practices, as espoused by landlords, agents and tenants.
- 3.69 The Commission has not considered the operation of South Australia's genuine purpose provision in the Victorian context, as its application is so broad as to place it beyond the scope of the Commission's terms of reference.

Right of landlords to sell and lease their properties at market value

- 3.70 Prohibiting landlords and agents from showcasing their properties in advertising by granting tenants an unfettered right to withhold their permission for the taking or use of advertising images would likely have a significant negative impact on rental and sales activities. Modern advertising practices are such that any landlord who was restricted to showing only the outside of the house, and perhaps rooms from which possessions could easily be removed, would be at a disadvantage compared with other property owners and may suffer a significant financial loss.
- 3.71 The Commission understands that the primary purpose of the consent requirement in Queensland is not to prevent advertising images from being taken but rather to enhance the bargaining power of tenants when landlords wish to advertise their properties. That is to say, the consent provision is designed to encourage landlords and agents to address the concerns of tenants with respect to advertising images as they will not be able to obtain the tenants' consent unless they do so.
- 3.72 However, the provision also allows disgruntled tenants to prevent landlords from showcasing the inside of their properties in advertising material for the duration of the tenancy.⁷⁸ While there may be adequate alternatives available to landlords in some situations, this will not always be the case.

⁷⁴ *Residential Tenancy Amendment Act* (Tas) s 26 inserting s 55A into the *Residential Tenancy Act 1997* (Tas).
⁷⁵ Consumer Affairs and Fair Trading Tasmania advises that changes to the provision relating to photographs, along with other minor changes, are currently being drafted: Consumer Affairs and Fair Trading Tasmania, *Renting in Tasmania* (9 October 2014) <<http://www.consumer.tas.gov.au/renting>>.

⁷⁶ Ibid.

⁷⁷ Consultation 16 (Real Estate Institute of Tasmania).

⁷⁸ Consultations 23 (Queensland Residential Tenancies Authority); 34 (Real Estate Institute of Queensland).

- 3.73 It may be, for example, that the images last used to sell or lease the property are of insufficient quality or are too old to accurately reflect the current condition of the property. Or it may be that the landlord cannot afford to wait until the property is vacant before advertising it. Several stakeholders told the Commission that one way of addressing this problem would be for landlords to ask tenants to vacate earlier than they otherwise would have which, as they pointed out, is not particularly desirable for anyone.⁷⁹
- 3.74 The Commission is of the opinion that, subject to the legitimate concerns of tenants, landlords in Victoria should have a right to enter to take advertising images, which includes images that show tenants' possessions.

Recommendation

- 1 The landlord and landlord's agent should have an express right to enter to take advertising images.**

Legitimate concerns of tenants

- 3.75 Having regard to the experiences of tenants discussed throughout this paper, the Commission is of the view that tenants' general privacy concerns about their homes and possessions should not restrict the right of landlords to take advertising images.
- 3.76 However, the distress and harm associated with the display of certain possessions is such that tenants should have the capacity to prevent advertising images of those possessions being taken where it would be unreasonable to expect the tenant to remove or conceal them. These possessions are possessions that directly identify the tenant, reveal sensitive information about the tenant, or place the tenant at a heightened risk of theft.
- 3.77 Similarly, the distress and harm associated with possibly revealing the identity and location of tenants at risk of family or personal violence by displaying their possessions in advertising images is such that they should have the capacity to prevent advertising images of their possessions being taken.

Possessions that directly identify the tenant

- 3.78 Possessions may identify tenants directly or indirectly. Possessions that directly identify the tenant are possessions that allow the viewer to distinguish that person from all others without recourse to other information. Examples include possessions that display a person's name or image.⁸⁰
- 3.79 Possessions that indirectly identify the tenant are possessions that would enable someone with prior knowledge of the tenant, or with access to other material, to work out the identity of the person on viewing the possessions. Examples include distinctive furniture or a particular combination of belongings that would enable anyone who had previously visited the tenant in any other home to identify the tenant through advertising images.
- 3.80 The reason for excluding possessions that indirectly identify the tenant from this category of protected information is clear. It would be hard to find a tenant whose possessions, when viewed together, did not reveal their identity to a single person, and preventing landlords from showcasing their properties in advertising material on this basis cannot be justified.

⁷⁹ Consultations 1 (a real estate agent); 33 (a tenant).

⁸⁰ Office of the Australian Information Commissioner, *Privacy fact sheet 8: Ten steps to protect your personal information* <<http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/>>.

Possessions that reveal sensitive information

- 3.81 Sensitive information is information the disclosure of which would cause offence to a reasonable person of ordinary sensibilities.⁸¹ Obvious examples include medical or financial information.
- 3.82 The categories of sensitive information in the Australian Privacy Principles (APP) provide useful guidance on the kinds of information a tenant may object to. These include information about an individual's:
- racial or ethnic origin
 - political opinions
 - religious beliefs or affiliations
 - sexual orientation
 - criminal record.⁸²
- 3.83 In an important departure from the Australian Privacy Principles, however, it should not be necessary that the images also reveal the tenant's identity for it to fall within this category of protected information. Tenants told the Commission that family members, friends and colleagues often look up online property advertisements in order to see images of the tenants' homes and were sometimes stumbling across sensitive information.⁸³
- 3.84 For example, a tenant expressed concern that advertising images displayed a poster on her wall that revealed her sexuality.⁸⁴ If someone she knew looked up the advertising images online, her sexuality would be revealed to that person even if the images themselves did not inform the viewer of her identity.

Valuable possessions at a heightened risk of theft

- 3.85 Stakeholders most often identified televisions, computers and other electronic goods as being at a heightened risk of theft when displayed in advertising images.⁸⁵ Other items included original artworks, antique furniture and jewellery.⁸⁶
- 3.86 The NSW Bureau of Crime Statistics and Research reports that the 10 most commonly stolen items from households are money, laptops, jewellery, cameras, mobile phones, wallets, identification documents, televisions, video game equipment and watches.⁸⁷
- 3.87 The Commission is satisfied that these possessions can properly be described as valuable and that their display could place the tenant at a heightened risk of theft.

Unreasonable to remove or conceal

- 3.88 In many instances, possessions that would fall within the categories of protected information set out above could easily be removed or concealed by the tenant. Examples include a degree with the tenant's name on it, family photos, medication or an expensive painting.
- 3.89 For this reason, landlords and agents should only be prohibited from taking images where it would be unreasonable to expect the tenant to remove or conceal the possession concerned.

81 See, eg, Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No. 18 (2010) 152; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Final Report No.108 (2008) 128; *Australian Broadcasting Corporation v Lenah Game Meats Pty* (2001) 208 CLR 199, 226 [42] (Gleeson CJ).

82 *Privacy Act 1988* (Cth) s 6(1) (definition of 'sensitive information'). Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic) reproduces a similar definition of sensitive information, with the exception that in Victoria, health information is not included in the definition of sensitive information because it is covered separately by the *Health Records Act 2001* (Vic).

83 See [2.31]–[2.32].

84 VLRC online survey.

85 See [2.41].

86 *Ibid.*

87 Jacqueline Fitzgerald and Suzanne Poynton, 'The Changing Nature of Objects Stolen in Household Burglaries' (Issue Paper No. 62, NSW Bureau of Crime Statistics and Research, May 2011) 2.

- 3.90 In addition to the ease with which a possession can be removed or concealed, any sensitivities associated with the possession's removal or concealment may go to determining whether it would be 'unreasonable' to expect the tenant to remove or conceal it. It may be unreasonable, for example, to expect a tenant to remove or conceal a shrine to a person who had recently died.

Family or personal violence

- 3.91 As stated above, the Commission is of the view that tenants who have experienced family or personal violence should not be placed at risk of harm by having their home address revealed to the perpetrator through advertising images. The fear of being found may itself cause great distress to the tenant and, if the tenant were found, the consequences may be extreme.
- 3.92 In situations of family or personal violence, the Commission is satisfied that all possessions that could identify the tenant, whether directly or indirectly, should be protected at the tenant's request because of the level of harm associated with revealing the tenant's identity to the person posing the risk.
- 3.93 For example, an agent told the Commission that a tenant had expressed concern about her ex-partner finding her through advertising photographs that displayed a unique bed setting. The agent suspected the woman was at risk of family violence, and chose not to take photographs of the bedroom or of other distinctive possessions throughout the house.⁸⁸
- 3.94 As this example demonstrates, the very nature of family violence means that it is likely that a perpetrator could identify their victim through the possessions they have in their home. This is less likely in situations of personal violence, where the perpetrator and victim are unrelated. However, where a tenant at risk of personal violence could be identified directly or indirectly by a perpetrator, their possessions should also be protected from publication at the tenant's request.
- 3.95 Although there are provisions in the RTA dealing with situations in which tenants are escaping family violence, the RTA does not define family violence.⁸⁹ Family violence is defined in the *Family Violence Protection Act 2008* (Vic) as behaviour towards a family member that:
- is physically or sexually abusive
 - is emotionally or psychologically abusive
 - is economically abusive
 - is threatening
 - is coercive
 - in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.⁹⁰
- 3.96 The *Personal Safety Intervention Orders Act 2010* (Vic) provides useful guidance on the behaviours that constitute personal violence. These are assault, sexual assault, harassment, property damage, making a serious threat and stalking, when the victim and perpetrator are not family members.⁹¹

88 Consultation 25 (Michelle Evans, senior property manager, Investor's Choice Property Management).

89 Section 233A(3) of the *Residential Tenancies Act 1997* (Vic) authorises VCAT to terminate an existing tenancy agreement and require a landlord to enter a new tenancy agreement with a tenant where that tenant is a protected person under a final family violence intervention order.

90 *Family Violence Protection Act 2008* (Vic) s 5.

91 *Personal Safety Intervention Orders Act 2010* (Vic) ss 5–10.

Other occupants

- 3.97 A tenant is defined in the RTA as a person to whom premises are leased, or to whom premises are to be leased, under a tenancy agreement.⁹²
- 3.98 However, other people often live in a rental property in addition to the person or people who signed the tenancy agreement.
- 3.99 As discussed in Chapter 2, many tenants were concerned about photographs of their children being displayed in advertising images. One can also imagine a situation in which a person escaping family violence moves into a home rented by a family member or friend. Although not the tenant, these other occupants should be afforded protection under the law.

Recommendation

- 2** When exercising the express right to enter to take advertising images:
- (a) The landlord or landlord's agent must not take, or permit to be taken, an advertising image where the tenant has objected in writing to the image being taken because it would show:
- (i) a possession that directly identifies the tenant or another occupant,
 - (ii) a possession that reveals sensitive information about the tenant or another occupant, regardless of whether that occupant's identity is also revealed, or
 - (iii) a valuable possession which places the tenant at a heightened risk of theft
- and it would be unreasonable to expect the tenant to remove or conceal the possession.
- (b) The landlord or landlord's agent must not take, or permit to be taken, an advertising image showing a tenant's possessions where the tenant has objected in writing to the image being taken because:
- (i) the tenant or other occupant is at risk of family or personal violence, and
 - (ii) the image would show possessions that may reveal the identity of that occupant to the person posing the risk.

92

Section 3(1) of the *Residential Tenancies Act 1997* (Vic) defines a tenant as the person to whom premises are let, or proposed to be let, under a tenancy agreement.

Right to use

- 3.100 The focus of this chapter is the practice of entering a property to take advertising images that show tenants' possessions. Tenants also raised concerns about the right of landlords and agents to use images that have already been taken.

Time limit

- 3.101 Stakeholders informed the Commission that it is not uncommon for agents and landlords to re-use advertising images showing former tenants' possessions a number of years after they have been taken.
- 3.102 A real estate photographer told the Commission that he receives two to three requests from agents each month asking to re-use old advertising images.⁹³ A tenant expressed concern after seeing advertising images of her possessions in an article in a newspaper two years after she had consented to having the images taken for advertising purposes.⁹⁴

Commission's conclusions

- 3.103 The Commission is of the view that there should be a time limit on the use of images of tenants' possessions that are taken for advertising purposes.
- 3.104 While landlords and agents should be able to use images showing tenants' possessions for the duration of the campaign they were taken for, they should not be able to use them years into the future without first obtaining the tenants' consent.
- 3.105 The length of time it takes to sell or lease a property depends on a range of factors, including the location of the property and the nature of the housing market. Allowing landlords and agents to use advertising images of a tenant's possessions for up to 12 months after being taken ensures they will be able to use the images for the duration of the campaign for which they were initially taken.

Recommendation

- 3** Where a landlord or landlord's agent wishes to use an advertising image showing a tenant's possessions more than 12 months after the image was taken, the landlord or landlord's agent should be required to obtain the written consent of the tenant or former tenant before using the image.

Images taken for other purposes

3.106 The Commission was told of a number of cases in which advertising material contained images that had been taken for another purpose.⁹⁵ The Queensland Residential Tenancies Authority described the use in advertising material of images taken during routine inspections as a recurring theme among the complaints they receive from tenants.⁹⁶

Commission's conclusions

- 3.107 As discussed above, the Commission is of the opinion that tenants should have an opportunity to object to the taking of images in certain circumstances. In the next chapter, the Commission proposes a range of notification requirements that would assist tenants to prevent the taking of images that show possessions they do not want seen, including by affording them the opportunity to remove possessions from view or be present when the images are taken.
- 3.108 Using images that were taken for another purpose denies tenants the chance to avail themselves of these opportunities. It follows that these images should only be published with the written consent of the tenant.

Recommendation

- 4** Where an image showing a tenant's possessions was taken for a purpose other than advertising, the landlord or landlord's agent should be required to obtain the tenant's written consent before using the image for advertising purposes.

Notice of entry

38 **Introduction**

38 **Current law**

38 **Proposed reforms**

4. Notice of entry

Introduction

- 4.1 When exercising their statutorily enshrined right to enter without tenant consent, landlords and agents must provide a notice of entry in accordance with the requirements set out in the *Residential Tenancies Act 1997* (Vic) (RTA).
- 4.2 As stated in Chapter 3, the Commission is of the view that entering to take advertising images should be included in the grounds of entry listed in the RTA. The Commission is also of the view that, in the event that this change occurs, the notice of entry requirements in the RTA should be enhanced to improve the tenant's understanding of the manner in which the landlord or agent intends to exercise their right of entry, as well as the ability of all parties to address any concerns the tenant might have.

Current law

- 4.3 Under the RTA, a landlord may enter a property to take advertising images at any time and for any purpose agreed to by the tenant, provided that entry takes place within seven days of obtaining the tenant's consent.¹ If a landlord or agent enters to take advertising images after obtaining the tenant's consent, they do not need to provide the tenant with written notice of the entry.
- 4.4 Alternatively, a landlord or agent may enter the property without the tenant's consent at any time between 8 am and 6 pm (except on public holidays) on certain grounds listed in the RTA, as long as the landlord or agent provides written notice of the entry at least 24 hours in advance.² The notice of entry must state the purpose for entry and be delivered by post or in person to the tenant.³

Proposed reforms

- 4.5 A number of stakeholders made suggestions as to how the notice of entry provisions in the RTA could be improved in relation to the taking of advertising images that show tenants' possessions.

1 *Residential Tenancies Act 1997* (Vic) s 85(a).

2 *Ibid* ss 85(b), 88.

3 *Ibid* s 88. Delivery in person must occur between the hours of 8am and 6pm.

Amount of notice

Community responses

- 4.6 A number of stakeholders observed that the 24-hour notice period may not give the tenant enough time to prepare a property for advertising images to be taken.⁴
- 4.7 An REIV representative said that, in practice, many agents give more notice if they wish to enter for that purpose, as it is in everyone's interests to ensure the property is presentable.⁵
- 4.8 However, several tenants reported receiving less than 24 hours notice.⁶ A teacher who contacted the Commission said that she arrived home from a school function at 10 o'clock at night to find a notice in her mailbox saying the agent would be entering to show the property to a prospective buyer the next morning.⁷
- 4.9 Three, five and seven days were the alternative periods variously suggested by tenants, agents and landlords.⁸ REIV representatives expressed tentative support for three days notice.⁹

Commission's conclusions

- 4.10 It is reasonable for tenants to be given an opportunity to remove from view possessions they do not want captured in advertising images. It is also reasonable for the landlord or agent to ask a tenant to do their best to ensure the property is presentable. Twenty-four hours notice will not always be sufficient to carry out these activities.
- 4.11 The Commission considers a minimum of seven days notice appropriate where advertising images are to be taken. This would ensure most tenants had one or two non-work days to address any issues they may have.
- 4.12 Seven days notice is needed in other states and territories for entry to conduct a routine inspection,¹⁰ entry for a genuine purpose¹¹ and entry to value the premises.¹²
- 4.13 The Commission notes that the provision of the RTA that stipulates that a landlord or agent must give a tenant at least 24 hours notice also stipulates that entry must take place between 8 am and 6 pm on any day except a public holiday.¹³
- 4.14 The Commission recommends that the same time provision be reproduced in the legislation providing for seven days notice, with an additional allowance for tenants to consent to a time of entry outside those hours. For example, a tenant who wishes to be present when advertising images are taken may prefer the images to be taken after 6 pm.¹⁴

4 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014). Consultations 21 (a tenant); 22 (Corina Bailey, CEO, Landlord Specialists); 37 (Roundtable).

5 Consultation 37 (Roundtable).

6 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014).

7 Consultation 21 (a tenant).

8 Submission 12 (name withheld); Consultations 22 (Corina Bailey, CEO, Landlord Specialists); 29 (Stephen Raff, CEO, Ace Body Corporate Management, Australia & Singapore).

9 Consultation 38 (Real Estate Institute of Victoria).

10 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 192(1)(a), 193(1)(c)(i); *Residential Tenancies Act 1995* (SA) ss 72(1)(c), 72(1)(c)(ii); *Residential Tenancies Act 1987* (WA) s 46(2)(b); *Residential Tenancies Act 2010* (NSW) s 55(2)(a); *Residential Tenancies Act 1999* (NT) ss 70(1)–(2)(a); *Residential Tenancies Act 1997* (ACT) sch 1, cl 79(1).

11 *Residential Tenancies Act 1995* (SA) s 72(1)(i).

12 *Residential Tenancies Act 2010* (NSW) s 55(2)(d).

13 *Residential Tenancies Act 1997* (Vic) s 85(b).

14 See Recommendation 9 at [4.44]–[4.46].

Recommendation

- 5** When relying on the grounds of entry in the *Residential Tenancies Act 1997* (Vic) to enter to take advertising images, the landlord or landlord's agent should be required to:
- (a) provide the tenant with at least seven days notice; and
 - (b) enter between 8 am and 6 pm except on public holidays, unless the tenant consents to a time of entry outside those hours.

Content of notice

Purpose of entry

- 4.15 The RTA provides that the notice of entry must 'state why the landlord or the landlord's agent wishes to enter'.¹⁵
- 4.16 While some tenants received written notice of entry when advertising images were to be taken, the notice did not always state that the purpose of the entry was to take advertising images.¹⁶ Typically, the notice advised the tenant that the landlord or agent was entering to show the property to a prospective tenant, buyer or lender;¹⁷ to have the premises valued;¹⁸ or to conduct a routine inspection.¹⁹

Community responses

- 4.17 The REIV supported the notion that tenants should be advised that advertising images will be taken before agents enter for that purpose. Its submission stated:
- Agents should be required to inform tenants prior to an inspection that photographs or videos for advertising purposes may be taken and allow tenants to raise concerns at that time.²⁰
- 4.18 Tenants and tenant advocates noted that the range of devices on which images can now be taken means that it is not always clear when photographs or videos are being taken or why they are being taken.²¹ It is thus not sufficient to assume that because the landlord or agent is present with a device that is capable of capturing images, a tenant knows that a landlord or agent is taking advertising images.
- 4.19 For example, a tenant told the Commission that two agents entered her home after telling her they were entering to check what maintenance needed to be undertaken and to conduct a sales appraisal. The agents, one of whom had a laptop, walked through the house separately. The tenant had been told images would be taken but she did not know if the agents were in fact taking photographs or videos and, if they were, for what purpose. The tenant said she had been harassed into consenting to their entry, and she was too fearful of a confrontation to ask them what they were doing.²²

15 *Residential Tenancies Act 1997* (Vic) s 88(b).
16 Consultation 23 (Queensland Residential Tenancies Authority). VLRC online survey.
17 As permitted by ss 86(1)(a)–(b) of the *Residential Tenancies Act 1997* (Vic).
18 As permitted by 86(1)(d) of the *Residential Tenancies Act 1997* (Vic).
19 As permitted by 86(1)(f) of the *Residential Tenancies Act 1997* (Vic).
20 Submission 10 (Real Estate Institute of Victoria).
21 Consultations 3 (Tenants Queensland); 11 (a tenant). VLRC online survey.
22 Consultation 11 (a tenant).

Commission's conclusions

- 4.20 The RTA stipulates that when exercising a right of entry the landlord or agent must do so in a reasonable manner and not stay longer than is necessary to carry out the purpose of entry.²³ A landlord or agent who sought to rely on a notice of entry that did not stipulate that advertising images would be taken would fail to comply with these provisions.
- 4.21 Establishing an express right to enter to take advertising images would address this problem. If landlords or agents sought to rely on that ground when entering, it would be clear to tenants that images would be taken.

Time of entry

- 4.22 The RTA does not require the notice of entry to state the date or time of entry,²⁴ although entry must occur between 8 am and 6 pm on any day except a public holiday.²⁵
- 4.23 The notice of entry template produced by Consumer Affairs Victoria suggests that the landlord or agent include the date and time.²⁶

Community responses

- 4.24 Landlords and agents often inform the tenant of the date that entry will take place, if not the precise time. However, the Commission is aware of cases in which written notice was provided without either.²⁷
- 4.25 In a government review of the RTA, the TUV argued:
- Given that privacy is one of the most contentious issues under the Act, it is not unreasonable that a landlord or agent is required to specify the day and time entry is required.²⁸

Commission's conclusions

- 4.26 The Commission recommends that, when advertising images are going to be taken, the date and time of entry be included in the notice of entry. This would allow tenants to organise their schedule, including taking time off work if they wish to be present when the images are taken.

Additional information to enable parties to address tenant concerns

Community responses

- 4.27 The REIV suggested that the notice should include the agent's contact details so the tenant can easily contact the agent with any concerns.²⁹
- 4.28 Industry practice varies in relation to advising tenants in the notice of entry to put away possessions they do not want seen. Some agents said that this should be done as a matter of courtesy, while others were of the opinion that such advice would unnecessarily alarm tenants.³⁰ Thirty-one of the 83 tenants who answered the Commission's survey question on whether they had been given an opportunity to remove personal possessions from view prior to images being taken, said that they had not.³¹

23 *Residential Tenancies Act 1997* (Vic) s 87.

24 Section 88 of the *Residential Tenancies Act 1997* (Vic) simply says that the notice must state the purpose for entry.

25 *Residential Tenancies Act 1997* (Vic) s 85(b).

26 Consumer Affairs Victoria, *Notice to tenant/s of rented premises* <<http://www.consumer.vic.gov.au/library/forms/housing-and-accommodation/renting/>>.

27 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

28 Tenants Union of Victoria, Submission to the Office of Fair Trading Victoria, Review of the *Residential Tenancies Act 1997*, May 2001, 67.

29 Submission 10 (Real Estate Institute of Victoria).

30 Consultations 8 (a real estate agent); 17 (a real estate agent); 19 (Loretta Rossborough, learning and development coordinator, Little Real Estate).

31 VLRC online survey Q5.

- 4.29 There was some support among stakeholders for the notice of entry to state where the images will be used, such as on billboards or in online advertising.³² One tenant said they were surprised to find images online, as they had assumed the images would only appear in print.³³ Another tenant was surprised to see the images in an article in the property section of her local newspaper.³⁴

Commission's conclusions

- 4.30 The Commission is in favour of enhancing the notice of entry requirements in the RTA to advise tenants of the way in which landlords and agents intend to exercise their right of entry, and the action they can take if they have concerns.

Recommendation

- 6** The landlord or landlord's agent should be required to include the following information in a notice of entry to take advertising images:
- (a) the purpose of entry;
 - (b) the date and time of entry;
 - (c) the name and contact details of the landlord/agent;
 - (d) the tenant's opportunity to remove possessions from view;
 - (e) the tenant's right to object to images being taken in certain circumstances; and
 - (f) the tenant's right to be present when images are taken.

Delivery of notice

- 4.31 There was uncertainty among stakeholders as to whether it is lawful for a landlord or agent to deliver a notice of entry via email or any other form of electronic communication.³⁵
- 4.32 *The Electronic Transactions Act 2000 (Vic)* states that where 'a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of electronic communication' and the recipient has consented to electronic delivery.³⁶
- 4.33 The RTA stipulates that a notice of entry must be in writing.³⁷ However, it also stipulates that a notice of entry must be delivered by post or in person to the tenant.³⁸
- 4.34 Where an Act requires a document to be delivered by post, the *Interpretation of Legislation Act 1984 (Vic)* states that, unless the contrary intention appears, the delivery shall be deemed to be effected 'by properly addressing, prepaying and posting the document'.³⁹

32 Consultations 19 (Loretta Rossborough, learning and development coordinator, Little Real Estate); 31 (a tenant). VLRC online survey.

33 VLRC online survey.

34 Information provided to the Commission by the Tenants Union of Victoria (15 August 2014).

35 Consultation 37 (Roundtable).

36 *Electronic Transactions Act 2000 (Vic)* s 8(1)(b).

37 *Residential Tenancies Act 1997 (Vic)* s 88(a).

38 *Ibid* s 88(c).

39 *Interpretation of Legislation Act 1984 (Vic)* s 49(1)(a).

Community responses

- 4.35 A number of stakeholders were in favour of being able to deliver notices of entry via email.⁴⁰ Some said it would make delivery easier, and others noted that it would address the problem of tenants being unaware a notice had been delivered if they were away or failed to check their mailbox.⁴¹
- 4.36 A TUV representative expressed concern that, although useful in some respects, electronic delivery could create uncertainty, especially in relation to receipt of notice.⁴²
- 4.37 The *Electronic Transactions Act 2000* (Vic) states that if the recipient agrees to receive an electronic communication at a particular electronic address, the time of receipt is when it reaches that address.⁴³

Commission's conclusions

- 4.38 The requirement to deliver a notice of entry by post or in person cannot be satisfied by delivering the notice via email or any other form of electronic communication.
- 4.39 The Commission considers that the RTA should be amended to enable the electronic delivery of notices of entry. The advent of electronic forms of communication has led to a decline in the use of paper-based mail, particularly among young people. Concerns about the reliability of electronic communication are no greater than concerns about the reliability of paper-based mail, and deeming provisions have been enacted to clarify the time of receipt for both.
- 4.40 Queensland's standard tenancy agreement invites all parties to nominate whether they will receive notices via email or facsimile and, if so, to state the address or number.⁴⁴ Similarly, South Australia's standard tenancy agreement invites agents and tenants to write their email address for the service of notice or other documents.⁴⁵ The Commission is of the opinion that Victoria's standard tenancy agreement should enable tenants to consent to the electronic delivery of notices of entry.

Recommendations

- 7** It should be lawful for the landlord and landlord's agent to deliver a notice of entry via electronic communication where the tenant has consented.
- 8** The standard tenancy agreement should make provision for parties to consent to the delivery of a notice of entry via electronic communication.

Where a tenant states they wish to be present

Community responses

- 4.41 Many tenants expressed a desire to be present when advertising images were taken.⁴⁶ The Real Estate Institute of Tasmania said it advises agents to encourage tenants to be present to avoid complaints at a later date.⁴⁷

40 Consultations 37 (Roundtable); 38 (Real Estate Institute of Victoria).

41 Consultations 37 (Roundtable); 38 (Real Estate Institute of Victoria).

42 Consultation 37 (Roundtable).

43 *Electronic Transactions Act 2000* (Vic) s 13A(1).

44 Queensland Residential Tenancies Authority, *General tenancy agreement (Form 18a)* (April 2013) <<http://www.rta.qld.gov.au/Resources/Forms/Forms-for-general-tenancies/>>.

45 Government of South Australia, *Forms and fact sheets for private rental tenancies* (22 January 2015) <<https://www.sa.gov.au/topics/housing-property-and-land/>>.

46 Information provided to the Commission by the Tenants Union of Victoria (10 July 2014). Consultation 33 (a tenant). VLRC online survey.

47 Consultation 16 (Real Estate Institute of Tasmania).

- 4.42 However, as discussed in Chapter 2, some tenants reported that agents had been inflexible when it came to arranging a time for advertising images to be taken.⁴⁸ Others reported that agents had discouraged their attendance.⁴⁹
- 4.43 A number of complaints relating to possessions that tenants did not want seen in advertising images may have been avoided if the tenant had been present when the images were taken.

Commission's conclusions

- 4.44 The Commission is in favour of enhancing the capacity of tenants to be present when advertising images are taken by requiring landlords and agents to negotiate a time that is suitable for the people involved.
- 4.45 The Commission was advised of a range of flexible practices landlords and agents had undertaken in Queensland, where tenant consent is needed for the use of advertising images that show tenants' possessions.⁵⁰ In one case, a photographer took external images during the day, and internal images during the evening after the tenant had returned from work.⁵¹
- 4.46 In South Australia, where a tenant indicates they wish to be present when a landlord or agent enters for certain purposes, the landlord or agent is required to make a reasonable effort to ensure the tenant is present during the landlord or agent's visit.⁵² The Commission is of the opinion that Victorian tenants should enjoy the same flexibility when it comes to entry to take advertising images.

Recommendation

- 9** If a tenant states that they wish to be present when advertising images are taken, the landlord or landlord's agent should be required to make a reasonable effort to arrange for the visit to occur at a time when it is convenient for the tenant to be present (having regard to the work and other commitments of both the tenant and the person entering).

48 See [2.72].

49 See [2.73].

50 Consultation 22 (Corina Bailey, CEO, Landlord Specialists).

51 Ibid.

52 *Residential Tenancies Act 1995 (SA)* s 72(2).

Right to quiet enjoyment

- 46 Introduction
- 46 Current law
- 50 Commission's conclusions

5. Right to quiet enjoyment

Introduction

- 5.1 The *Residential Tenancies Act 1997* (Vic) (RTA) enshrines the tenant's common law right to quiet enjoyment.¹
- 5.2 The Commission is of the view that taking and using advertising images that show tenants' possessions without tenant consent would not ordinarily amount to a breach of this right. However, a breach may be found in cases of persistent harassment or significant harm.
- 5.3 The legislation of every other state and territory in Australia has redefined the right to quiet enjoyment so that it also includes the right to reasonable peace, comfort and privacy.² Though relevant to advertising images, granting tenants an express right to reasonable privacy may have ramifications that extend well beyond the taking and use of advertising images. Considering such a reform is thus outside the scope of the Commission's terms of reference.
- 5.4 The Commission is of the view that the reforms it has proposed in Chapters 3 and 4 appropriately and adequately address the privacy concerns of tenants in relation to advertising images.

Current law

Victoria

- 5.5 Under the RTA, 'a landlord must take all reasonable steps to ensure the tenant has quiet enjoyment of the rented premises.'³
- 5.6 The common law right to quiet enjoyment encompasses a right to possess the property and to enjoy it for all usual purposes.⁴ A breach of quiet enjoyment will be found where the landlord or people claiming under the landlord have substantially interfered with the ordinary and lawful enjoyment of the property.⁵ Substantial interference is conduct that renders the premises 'unfit from a reasonable point of view for the purpose for which' the lease was granted.⁶

1 *Residential Tenancies Act 1997* (Vic) s 67.

2 *Residential Tenancies Act 2010* (NSW) s 50(2); *Residential Tenancies Act 1997* (ACT) sch 1 cl 52; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 183(2); *Residential Tenancies Act 1999* (NT) ss 65(b), 66(1); *Residential Tenancies Act 1987* (WA) s 44(2)(b); *Residential Tenancies Act 1995* (SA) s 65(b); *Residential Tenancy Act 1997* (TAS) s 55(2).

3 *Residential Tenancies Act 1997* (Vic) s 67.

4 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23.

5 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23; *Sanderson v The Mayor of Berwick-upon-Tweed* (1884) 13 QBD 547, 551.

6 *Gordon v Lidcombe Developments Pty Ltd* [1966] 2 NSWLR 9 at 15; *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1.

- 5.7 Historically, only direct physical interference could amount to a breach of quiet enjoyment. Thus, in *Browne v Flower*, building an external staircase that passed the tenant's bedroom and interfered with the tenant's privacy was deemed not to be a breach.⁷ Justice Parker said that a breach of quiet enjoyment will not be found by 'mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise'.⁸
- 5.8 However, case law has evolved so that non-physical interference may also amount to a breach.⁹ In *Kenny v Preen*, the Court held that a landlord's deliberate and persistent attempt to drive the tenant out of the property through persecution and intimidation breached the tenant's right to quiet enjoyment.¹⁰ Lord Justice Pearson observed that:
- conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession and tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of the covenant, even if there were no direct physical interference with the tenant's possession and enjoyment.¹¹
- 5.9 In *McCall v Abelesz*, Lord Denning stated that the covenant for quiet enjoyment 'is not confined to direct physical interference by the landlord'.¹² Lord Denning explained that the covenant:
- extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant ... It covers, therefore, any acts calculated to interfere with the peace or comfort of the tenant ...¹³
- 5.10 While the notion that non-physical acts may amount to a breach is reflected in Australian common law,¹⁴ Lord Denning's broad statement of the scope of the right to quiet enjoyment is not.¹⁵

Taking images inside the property

- 5.11 In *Jones v Director of Housing*, the Victorian Civil and Administrative Tribunal (VCAT) was asked to consider whether taking photographs of the inside of the property in order to record its condition amounted to a breach of the tenant's right to quiet enjoyment.¹⁶ Member Grainger held that neither taking the photographs nor requiring the tenant to remove their belongings from the rooms before they were photographed amounted to a breach.¹⁷
- 5.12 In reaching this conclusion, Member Grainger observed that the landlord had a right to enter in accordance with the duty to maintain the property in good repair, and that it was reasonable for the landlord to take images to record the condition of the property when doing so. He also noted that 'there was no evidence that the removal of the belongings would be onerous or time consuming for him'.¹⁸
- 5.13 According to Member Grainger, VCAT will generally only find that a landlord has breached a tenant's right to quiet enjoyment if the landlord or agent has entered, or has attempted to enter, other than in accordance with the RTA.¹⁹

7 [1911] 1 Ch 219, 228.

8 Ibid.

9 *Kenny v Preen* [1963] 1 QB 499, 513 (Pearson LJ); *Southwark London Borough Council v Mills* [1999] 3 WLR 939, 945 (Lord Hoffmann), 957 (Lord Millett).

10 [1963] 1 QB 499.

11 Ibid 513.

12 [1976] QB 585, 594.

13 Ibid.

14 *Spathis v Hanave Investment Co Pty Ltd* [2002] NSWSC 304 (10 May 2002); *Battik Pty Ltd v Hawkesbury Nominees Pty Ltd* [1999] ACTSC 55 (8 June 1999).

15 See [5.6] for a brief overview of the law on quiet enjoyment in Australia.

16 [2013] VCAT 2184 (31 December 2013).

17 Ibid [30].

18 Ibid [27]. The rooms from which the tenant may have had to move his possessions were the bathroom and kitchen. Member Grainger did not consider whether it was reasonable to take images of rooms from which the tenants' possessions could not so easily be removed.

19 Ibid [31].

- 5.14 However, the Federal Court has held that a landlord's conduct, though lawful and necessary, may nonetheless amount to a breach of the tenant's right to quiet enjoyment.²⁰

Privacy

- 5.15 Victorian tenants do not currently enjoy an express right to privacy, although they have an obligation not to interfere with the reasonable peace, comfort and privacy of their neighbours.²¹ Rooming house residents, caravan park residents and site tenants have a right to privacy, peace and quiet.²²
- 5.16 According to Professor Bradbrook, the right of tenants to reasonable peace, comfort and privacy was removed from a 1978 draft of the *Residential Tenancies Act 1980 (Vic)*.²³
- 5.17 However, a right to privacy for tenants is implicit in at least one provision of the RTA. Section 87 states that landlords and agents must exercise their right of entry in a reasonable manner. In *Jones v Director of Housing*, Member Grainger held that 'if a landlord ... significantly disregards the privacy of a tenant when exercising a right of entry, the landlord may not be exercising the right of entry in a reasonable manner.'²⁴

Other states and territories

- 5.18 With the exception of Victoria, the residential tenancy legislation of every state and territory in Australia incorporates an express right to reasonable peace, comfort and privacy within the statutory right to quiet enjoyment.²⁵
- 5.19 In New South Wales for example, the *Residential Tenancies Act 2010 (NSW)* states:
50. Tenant's right to quiet enjoyment
 - (1) A tenant is entitled to quiet enjoyment of the residential premises without interruption by the landlord ...
 - (2) A landlord or landlord's agent must not interfere with, or cause or permit any interference with, the reasonable peace, comfort and privacy of the tenant in using the residential premises ...²⁶
- 5.20 In *Ingram v Department of Housing (Tenancy)* the NSW Consumer, Trader and Tenancy Tribunal found that the words 'reasonable peace, comfort and privacy' 'import a wider duty than is contained in the common law formulation of quiet enjoyment' and that 'those words clearly have their natural meaning.'²⁷

Taking images inside the property

- 5.21 In *Zia v Bechara*, the NSW Consumer, Trader and Tenancy Tribunal held that the act of the agent 'in remaining in the premises taking photographs once it was clear that the tenant did not consent to this amounts to a breach of the tenant's right to quiet enjoyment'. Member Rosser ordered the landlord to pay \$400 in compensation to the tenant as the breach was deemed a 'serious' one.²⁸

20 *Worrall v Commissioner for Housing for the Australian Capital Territory* [2002] FCAFC 127 (15 May 2002) [76] (Miles, Ryan and Higgins JJ).

21 *Residential Tenancies Act 1997 (Vic)* s 60(2).

22 *Ibid* ss 122(1), 177, 206ZU(1).

23 Adrian Bradbrook, 'The Rights and Duties of Landlords and Tenants under the Victorian Residential Tenancies Act' (1981) 13 *Melbourne University Law Review* 159, 187.

24 *Jones v Director of Housing (Residential Tenancies)* [2013] VCAT 2184 (31 December 2013) [25].

25 *Residential Tenancies Act 2010 (NSW)* s 50(2); *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* s 183(2); *Residential Tenancies Act 1999 (NT)* s 65(b); *Residential Tenancies Act 1987 (WA)* ss 44, 59E; *Residential Tenancies Act 1995 (SA)* s 65(b); *Residential Tenancy Act 1997 (Tas)* s 55(2). The *Residential Tenancies Act 1997 (ACT)* does not expressly refer to quiet enjoyment. However, schedule 1 clause 52 of the Act sets out the tenant's right to 'reasonable peace, comfort or privacy'.

26 *Residential Tenancies Act 2010 (NSW)* s 50.

27 [2002] NSWCTTT 84 (8 May 2002).

28 *Zia v Bechara* (Unreported, NSW Consumer, Trader & Tenancy Tribunal, Member Rosser, 13 August 2007) 1.

- 5.22 However, the purpose for which the images were taken and the agent's conduct when taking the images is not known. The extent to which the tenant's express right to reasonable privacy impacted on the Tribunal's decision is also not known.

Community responses

- 5.23 The Commission asked stakeholders about the scope of the right to quiet enjoyment in Victoria and whether taking and using advertising images would amount to a breach of that right.

Scope of the right

- 5.24 At the Commission's roundtable, the Tenants Union of Victoria expressed the view that many tenants struggle to understand the common law notion of quiet enjoyment and what it includes and what it excludes.²⁹ It was of the opinion that expanding the right to quiet enjoyment to include reasonable peace, comfort and privacy would bring the concept into the modern era.³⁰
- 5.25 The Tenants' Union of New South Wales was of the view that the right to peace, comfort and privacy clearly extends beyond the scope of the common law right to quiet enjoyment. It informed the Commission that:
- Quiet enjoyment goes to possession and tenure; and peace, comfort and privacy take on their natural meaning, which is clear.³¹
- 5.26 It follows, the Tenants' Union of New South Wales argued, that the threshold for a breach of reasonable privacy is lower than for a breach of the common law right to quiet enjoyment.³²
- 5.27 Some suggested that the right to reasonable peace, comfort and privacy could simply be a modern interpretation of the common law right to quiet enjoyment, and that the two could be read consistently.³³ This interpretation suggests that reasonable privacy may fall within the scope of the common law right currently enjoyed by Victorians.

Would advertising images amount to a breach?

- 5.28 The Tenants' Unions of Tasmania and the Australian Capital Territory expressed the view that taking or using advertising images of a tenant's possessions without the tenant's consent may amount to a breach of the tenant's right to quiet enjoyment.³⁴ However, as stated above, the right to quiet enjoyment in these states includes an express right to reasonable privacy.
- 5.29 As the Tenants' Union ACT explained, the landlord's right to enter is limited by the tenant's right to reasonable privacy, and the dissemination of images that showed tenants' possessions without their consent would interfere with their reasonable privacy.³⁵
- 5.30 The Queensland Residential Tenancies Authority expressed the view that using advertising images of tenants' possessions without the tenants' consent would not ordinarily amount to a breach of quiet enjoyment.³⁶

29 Consultation 37 (Roundtable).

30 Ibid.

31 Consultation 6 (Tenants' Union of New South Wales).

32 Ibid.

33 Consultation 14 (Tenants' Union of Tasmania).

34 Submission 1 (Tenants' Union ACT). Consultation 14 (Tenants' Union of Tasmania).

35 Submission 1 (Tenants' Union ACT).

36 Consultation 23 (Queensland Residential Tenancies Authority).

- 5.31 According to the Authority, only one of the 14 complaints it received about this issue in the last financial year may have amounted to a breach of the right to quiet enjoyment.³⁷ In that case, the landlord persistently harassed the tenant at the property over several weeks in order to obtain the tenant's consent to take advertising images that included the tenant's possessions. The 13 other complaints mostly concerned the display of innocuous household items in advertising images.³⁸

Commission's conclusions

- 5.32 The Commission is of the view that the right to reasonable peace, comfort and privacy extends beyond the scope of the common law right to quiet enjoyment.
- 5.33 A breach of quiet enjoyment requires a substantial interference with the tenant's right to possess the property or to enjoy it for all usual purposes. The Commission is of the opinion that neither taking nor using advertising images of tenants' possessions without their consent would ordinarily amount to a breach of this right.
- 5.34 It is beyond the scope of the Commission's terms of reference to consider bestowing on Victorian tenants a right to reasonable privacy.

Communication

- 52** Introduction
- 52** Demonstrating respect for the tenant's home
- 53** Advising tenants about advertising images
- 54** Negotiating with the tenant

6. Communication

Introduction

- 6.1 The importance of good communication was raised throughout the Commission's consultations.
- 6.2 Although the absence of an express provision about advertising images in the *Residential Tenancies Act 1997* (Vic) (RTA) has undoubtedly contributed to the confusion between the parties involved, a number of agents and landlords highlighted the importance of negotiating with tenants who have concerns about advertising images without resort to the law. As one agent informed the Commission, 'If we have to rely on the law and apply to VCAT, we have already lost the battle and gone too far. We need that cooperation from the outset.'¹
- 6.3 Demonstrating respect for the tenant's home, properly informing the tenant that images will be taken and working with the tenant to address their concerns were identified by stakeholders as the key factors common to finding a solution that all parties are happy with.

Demonstrating respect for the tenant's home

- 6.4 A number of stakeholders expressed the view that good communication requires common courtesy and respect for the tenant's home.²
- 6.5 One agent said that 'even though this is a business transaction, it is a very emotional transaction' for the tenant.³ As an agent, 'you cannot have the attitude that the tenant is lower down the ladder than the vendor ... we try not to order people around in their homes.'⁴
- 6.6 Another agent told the Commission, 'We try to treat everyone, [whether] ... landlord or tenant, equally. This is our philosophy—we try very hard to follow that through in all our dealings.'⁵
- 6.7 Similarly, a landlord said, 'It is my house but it is their home and I respect that. I always put myself in their shoes.'⁶
- 6.8 Several agents commented that they would never enter to take advertising images without tenant consent, and the tenants of these agents had never withheld consent.⁷

1 Consultation 26 (David Stewart and Leesa Stewart, Market Share Property).

2 Consultations 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office); 8 (a real estate agent); 22 (Corina Bailey, CEO, Landlord Specialists).

3 Consultation 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale).

4 Ibid.

5 Consultation 1 (a real estate agent).

6 Consultation 28 (Gina Butera).

7 VLRC online survey.

Advising tenants about advertising images

- 6.9 Agents said that approaching tenants in a respectful manner about the end of the tenancy and their desire to advertise helps to reduce unnecessary problems when it comes to taking or using advertising images.⁸
- 6.10 One agent said that she calls the tenant to let them know that the property will go on the market, which she then follows with a letter confirming the conversation. The agent personally advises the tenant to remove family photographs and valuables before any advertising images are taken.⁹
- 6.11 Another agent informed the Commission that when a property is to be sold, even if it is not his listing, he meets with the tenant to explain the process to minimise ‘conflict between rent and sales’.¹⁰ A property manager said she helped to mediate a dispute in relation to advertising images where the sales agent worked for a different company by negotiating a rent reduction.¹¹
- 6.12 Another agent said he knew of an agency that gave tenants a standard one-page form about advertising images at the end of every lease.¹²
- 6.13 Some agents inform tenants about advertising images at the beginning of every lease by inserting a term about them into the tenancy agreement.¹³ One agent noted that even though a term of this kind is unenforceable, it is ‘common sense to alert people to the fact that photos will be taken’.¹⁴
- 6.14 The Commission agrees that it is helpful to advise tenants at the beginning of the lease that the landlord may wish to take advertising images if the property is going to be sold or re-leased. However, it is also concerned that an unenforceable term about advertising images in a tenancy agreement is open to misuse.
- 6.15 A landlord told the Commission that he instructs his agents not to lease his property to tenants who do not agree to the term authorising the landlord to take advertising images of the property at any time in the future if the property is to be sold or re-leased.¹⁵ Any term that seeks to modify the statutorily enshrined rights of tenants, as that one does, is invalid.¹⁶
- 6.16 As such, a term of this kind should clearly set out the rights of each party under the RTA, including the fact that, at present, entry for this purpose must occur within seven days of obtaining the tenant’s consent. Alternatively, the landlord or agent could provide information about advertising images in the information pack that is provided to tenants at the beginning of a lease, rather than in the tenancy agreement.

8 Consultations 1 (a real estate agent); 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale); 26 (David Stewart and Leesa Stewart, Market Share Property).

9 Consultation 9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale).

10 Consultation 26 (David Stewart and Leesa Stewart, Market Share Property).

11 Consultation 25 (Michelle Evans, senior property manager, Investor’s Choice Property Management).

12 Preliminary consultation with members of the Real Estate Institute Victoria (6 March 2014).

13 Consultation 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office). VLRC online survey.

14 Consultation 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office).

15 VLRC online survey.

16 Section 27 of the *Residential Tenancies Act 1997* (Vic) states that a term of the tenancy agreement is invalid if it purports to exclude, restrict or modify the exercise of a right conferred by the Act.

Negotiating with the tenant

- 6.17 Agents the Commission consulted with said that where a tenant raises concerns about advertising images that show their possessions, agents should be willing to compromise.¹⁷
- 6.18 The Real Estate Institute of Victoria submitted that 'Where a tenant concern was identified, agents reported they were able to negotiate a compromise solution between the tenant and the landlord.'¹⁸ Examples noted in their submission included using old photographs, waiting until the property was vacant and allowing tenants to review the images before use.¹⁹
- 6.19 An agent told the Commission that 'You can just announce that you are coming in [to take advertising images] but that doesn't get you very far' as an agent cannot force a tenant to tidy up.²⁰
- 6.20 One agent described the 'consultative approach' she uses, which includes negotiating consent to take advertising images on a room-by-room basis. The agent said, 'Concessions need to be made when negotiating and you need to be prepared to be flexible.' According to this agent, poor communication about advertising images has a 'flow-on effect', which causes a 'chain of negativity' throughout the sales process.²¹
- 6.21 Another agent expressed the view that tenant concerns often relate to other circumstances in the tenant's life, such as a relationship breakdown or work stress, and that understanding the underlying reason for a tenant's concerns may help find a solution that works for everyone.²²
- 6.22 Methods used by agents to encourage tenant cooperation include providing a rent reduction, offering to help the tenant find somewhere else to live and offering to support the tenant to stay on if the buyer is an investor.²³
- 6.23 One agent reassures her tenants when a property is being sold that she is there to support them. The agent told the Commission, 'It is a business, but it is a personalised one, so tenants feel genuine trust.'²⁴

17 Submission 10 (Real Estate Institute of Victoria). Consultations 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office); 26 (David Stewart and Leesa Stewart, Market Share Property).

18 Submission 10 (Real Estate Institute of Victoria).

19 Ibid.

20 Consultation 26 (David Stewart and Leesa Stewart, Market Share Property).

21 Consultation 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office).

22 Consultation 8 (a real estate agent).

23 Consultations 1 (a real estate agent); 7 (Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office);

9 (Caroline Rickard, sales consultant, LJ Hooker Drysdale); 26 (David Stewart and Leesa Stewart, Market Share Property).

24 Consultation 17 (a real estate agent).

Conclusion

7. Conclusion

- 7.1 The *Residential Tenancies Act 1997* (Vic) does not explicitly address the practice of entering a property to take advertising images that show tenants' possessions. While some hold the view that a right to enter for this purpose is implicit in the RTA, others—including the Commission—disagree, arguing that landlords and agents can only enter for this purpose after obtaining tenant consent.
- 7.2 The need for legislative reform is clear. The absence of an express provision on this issue has enabled a range of practices to emerge, some of which have caused tenants distress and harm. The law has failed to keep pace with technology, including online advertising, the advent of which largely explains the prevalence of tenants' concerns about privacy, risk of theft and risk of personal harm.
- 7.3 The reforms put forward by the Commission are designed to bring the law into line with the digital age while striking the right balance between the interests of landlords and tenants in relation to advertising images.
- 7.4 If implemented, the reforms would provide certainty for landlords by establishing a right to enter to take advertising images, as this right is fundamental to their capacity to sell or lease a property.
- 7.5 The reforms would also strengthen protections for tenants who have legitimate concerns about images that identify or reveal sensitive information about them, or that place them at risk of theft. Tenants at risk of family or personal violence should also be afforded protection, and the Commission recommends granting these tenants a broad right of objection to images that would reveal their identity, and thus their location, to those who pose the risk.
- 7.6 In addition to the formal protection afforded by the reforms, the Commission hopes they would encourage landlords, agents and tenants to negotiate mutually agreeable outcomes that address the needs of all concerned.



Appendices

58 **Appendix A: Submissions**

59 **Appendix B: Consultations**

61 **Appendix C: Online survey**

Appendix A: Submissions

1	Tenants' Union ACT
2	Tenants' Union of New South Wales
3	Confidential
4	Donna Buckingham
5	Confidential
6	Housing Justice
7	Matthew Pearce
8	Little Real Estate
9	Peninsula Community Legal Centre
10	Real Estate Institute of Victoria
11	Assistant Professor Bruce Arnold
12	Name withheld
13	Tenants Union of Victoria
14	Privacy Victoria
15	Name withheld
16	Name withheld
17	Wendy Abrahmsen
18	Name withheld
19	Victor Mangion
20	Sarah Mclean

Appendix B: Consultations

Discussions about the questions raised in the consultation paper were held with the people and organisations listed below in chronological order.

1	A real estate agent
2	A real estate agent
3	Tenants Queensland
4	A tenant
5	Privacy Victoria
6	Tenants' Union of New South Wales
7	Emma Gordon, property management operations manager, Harcourts Victoria Corporate Office
8	A real estate agent
9	Caroline Rickard, sales consultant, LJ Hooker Drysdale
10	Rachel Spurgeon, sales consultant, LJ Hooker Geelong
11	A tenant
12	A photographer
13	Linda Grady, tenant advocate and domestic violence support worker
14	Tenants' Union of Tasmania
15	Hunter Tenants Advice and Advocacy Service
16	Real Estate Institute of Tasmania
17	A real estate agent
18	Jacky Welgus, a tenant
19	Loretta Rossborough, learning and development coordinator, Little Real Estate
20	A tenant
21	A tenant
22	Corina Bailey, CEO, Landlord Specialists
23	Queensland Residential Tenancies Authority
24	Sophie Lyon, general manager, Property Management Division, PhilipWebb

25	Michelle Evans, senior property manager, Investor's Choice Property Management
26	David Stewart and Leesa Stewart, Market Share Property
27	Shane McGrath, tenancy worker, Home at Last service, Housing for the Aged Action Group
28	Gina Butera, a landlord
29	Stephen Raff, CEO, Ace Body Corporate Management, Australia & Singapore
30	A landlord
31	A tenant
32	Victorian Aboriginal Legal Service
33	A tenant
34	Real Estate Institute of Queensland
35	A tenant
36	Paul Gordon, general counsel of REA Group
37	Roundtable with participants from the Real Estate Institute of Victoria, the Tenants Union of Victoria and the Victorian Civil and Administrative Tribunal. Attended by Consumer Affairs Victoria.
38	Real Estate Institute of Victoria

Appendix C: Online survey

The Victorian Law Reform Commission used an online survey to capture the views and experiences of tenants, tenant advocates, landlords and real estate agents in relation to advertising images of tenants' possessions. Two hundred and seventy-nine people participated in the survey.

The Commission is grateful to participants for taking the time to respond and thanks them for their contribution.

Survey

Question 1 (mandatory question)

Are you a:

- Tenant
- Tenants' advocate → Go to Q11
- Landlord → Go to Q16
- Real estate agent or someone who works in the real estate industry → Go to Q25
- Other (please specify) → Go to Q33

Questions for tenants

Question 2 (mandatory question)

Has a landlord or real estate agent taken photographs or videos that contain your possessions to advertise a property you were renting?

- No → Go to Q4
- Yes

Question 3

Did the landlord or real estate agent tell you in advance that they would be coming to your house to take photographs or videos?

- No → Go to Q5
- Yes, they asked me if they could come and I gave them permission to come → Go to Q5
- Yes, they told me they were coming and provided written notice → Go to Q5
- I don't know → Go to Q5
- Other → Go to Q5

If you have any comments, write them here.

Question 4

Have you ever prevented a landlord or real estate agent from taking or using images of your possessions for advertising purposes?

- No → Go to Q33
- Yes → Go to Q10

If you have any comments, write them here.

Question 5

Did you remove any valuable or personal items before the photographs or videos were taken?

- No, I wasn't given the opportunity
- No, I didn't feel the need to
- Yes
- Other

If you have any comments, write them here.

Question 6 (mandatory question)

Did you have any concerns about the photographs or videos? (Select all that apply)

- No → Go to Q9
- Yes, I was concerned about the notice that was provided by the landlord or real estate agent (eg. I did not receive enough notice)
- Yes, I was concerned about my personal possessions appearing in the photographs or videos (eg. the images contained valuable or identifying items)
- None of the above
- Other (please specify)

Question 7

Did you tell the landlord or real estate agent about your concerns? (Only one answer)

- No → Go to Q9
- Yes

If you have any comments, write them here.

Question 8

How did the landlord or real estate agent respond to your concerns?

- Not well
- Well
- Very well
- Other

If you have any comments, write them here.

Question 9

Did you feel that the landlord or real estate agent respected your right to privacy while they were advertising the property?

- No, not at all
- Yes generally, but some improvements could be made
- Yes, very much so

If you have any comments, write them here.

Question 10 (mandatory question)

To reduce or compensate for any inconvenience caused to you while the owner was looking for a new tenant or buyer, did the landlord or real estate agent offer to...(Select all that apply)

- Reduce your rent or provide compensation → Go to Q33
- Only photograph or film rooms that did not contain personal possessions (eg. bathroom) Go to Q33
- Hire furniture to use in the advertising photographs or videos → Go to Q33
- Wait until you had left the property to take the advertising photographs or videos → Go to Q33
- None of the above → Go to Q33
- I don't know → Go to Q33

Questions for tenants' advocates

Question 11 (mandatory question)

Do you know of a situation in which a tenant was concerned about photographs or videos of their possessions being taken or used to advertise a property for sale or lease?

- No → Go to Q33
- Yes

Question 12 (mandatory question)

Did the concerns of the tenant/s relate to: (select all that apply)

- The notice that was provided by the landlord or real estate agent (eg the tenant did not receive enough notice)
- Personal possessions appearing in the photographs or videos (eg. the images contained valuable or identifying items)
- Other (please specify)

Question 13

Did the tenant/s tell their landlord or real estate agent about their concerns?

- No → Go to Q15
- It depends
- Yes
- I don't know → Go to Q15

Question 14

How did the landlord/s or real estate agent/s respond?

- Not well
- Well
- Very well
- I don't know
- Other

If you have any comments, write them here.

Question 15 (mandatory question)

Generally speaking, do you think landlords and real estate agents respect the tenant's right to quiet enjoyment and privacy when they take photographs or videos of properties that contain tenants' personal possessions?

- No, not at all → Go to Q33
- Generally yes, but improvements could be made → Go to Q33
- Yes, very much so → Go to Q33
- I don't know → Go to Q33

If you have any comments, write them here.

Questions for landlords

Question 16 (mandatory question)

Have you or your real estate agent taken photographs or videos that contained tenants' possessions to advertise your property for sale or lease?

- No → Go to Q21
- Yes

Question 17

Did you or your real estate agent advise the tenant beforehand that you would be taking photographs or video? (Select all that apply)

- No
- Yes, I/we gave the tenant written notice
- Yes, I/we asked for the tenant's permission to take photographs or video
- I don't know
- Other

If you have any comments, write them here.

Question 18

Before the photographs or videos were taken, did you or your real estate agent advise the tenant to remove any valuable or personal items?

- No
- Yes
- I don't know

Question 19

On the day the photographs or videos were taken, did you or your real estate move any furniture or personal possessions?

- No
- Yes
- I don't know

Question 20 (mandatory question)

Did the tenant have any concerns about the photographs or videos? (select all that apply)

- No → Go to Q24
- Yes, they were concerned about the notice that I/real estate agent provided (eg the tenant felt that they did not receive enough notice) → Go to Q23
- Yes, they were concerned about their personal possessions appearing in the photographs or videos (eg the images contained valuable or identifying items) → Go to Q23
- Other → Go to Q23

If you have any comments, write them here.

Question 21

Have you ever come across a tenant who unreasonably withheld consent or made it difficult for you to take photographs or videos of your property?

- No → Go to Q33
- Yes

If you have any comments, write them here.

Question 22

Did your inability to use photographs or videos of tenants' possessions to advertise the property inconvenience you in any way?

- No → Go to Q33
- Yes → Go to Q33

If you have any comments, write them here.

Question 23

How did you respond to their concerns?

Question 24 (mandatory question)

To reduce or compensate for any inconvenience caused to the tenant while you were looking for a new tenant or buyer, did you or your real estate agent offer to ... (Select all that apply)

- Reduce the rent or provide compensation → Go to Q33
- Only photograph or film rooms that did not contain personal possessions (eg bathroom) → Go to Q33
- Hire furniture to use in advertising photographs or videos → Go to Q33
- Wait until the tenant had left the property to take the advertising photos or videos → Go to Q33
- None of the above → Go to Q33
- I don't know → Go to Q33

If you have any comments, write them here.

Questions for real estate agents

Question 25 (mandatory question)

Have you taken or used photographs or videos that contained tenants' possessions to advertise a property for sale or lease?

- No → Go to Q33
- Yes

Question 26

How often do you use videos or virtual tours to market residential properties for sale or lease?

- Never
- Sometimes
- Often
- Always

If you have any comments, write them here.

Question 27

Do you advise tenants beforehand that you will be taking photographs or videos?
(Select all that apply)

- No
- Yes, I give the tenant written notice
- Yes, I ask the tenant for permission to enter to take the photographs or videos
- Other

If you have any comments, write them here.

Question 28

Do you have a standard practice you use when telling tenants that advertising photographs or videos will be taken inside their homes?

- No
- Yes

If yes, could you please elaborate on your response?

Question 29

Do you advise tenants to remove any valuable or personal items before photographs or videos are taken?

- No
- Sometimes
- Yes

Question 30 (mandatory question)

Do tenants have any concerns about the photographs or videos? (Select all that apply)

- No → Go to Q32
- Yes, they have been concerned about the notice provided (eg. the tenant felt that they did not receive enough notice)
- Yes, they have been concerned about their personal possessions appearing in the photographs or videos (eg. the images contained valuable or identifying items)
- Other

If you have any comments, write them here.

Question 31

How did you respond to the tenants' concerns about the photographs or videos?

Question 32 (mandatory question)

To reduce or compensate for any inconvenience caused to the tenant while the owner was looking for a new tenant or buyer, did you offer to ... (Select all that apply)

- Reduce the rent or provide compensation → Go to Q33
- Only photograph or film rooms that did not contain personal possessions (eg bathroom) → Go to Q33
- Hire furniture to use in the advertising photographs or videos → Go to Q33
- Wait until the tenant had left the property to take the advertising photos or videos → Go to Q33
- None of the above → Go to Q33
- I don't know → Go to Q33

If you have any comments, write them here.

General questions for everyone

Question 33 (mandatory question)

We want to know your general views and whether you have any concerns about advertising photographs or videos that contain tenants' possessions? (Select all that apply)

- I don't have any
- Having the photographs or videos taken could inconvenience the tenant
- The photographs or videos could violate the tenant's privacy
- The photographs or videos could place the tenant at risk of theft
- The photographs or videos could place the tenant at risk of personal harm
- Other (please specify)

Question 34

Is there anything else you want to tell us?

Question 35 (mandatory question)

Can we contact you in relation to your response?

- No
- Yes

If yes, please provide your email address and phone number.

Question 36 (mandatory question)

Which state or territory do you live in?

Bibliography

Bibliography

Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Final Report No. 108 (2008)

Bradbrook, Adrian J, 'The Rights and Duties of Landlords and Tenants Under the Victorian Residential Tenancies Act' (1981) 13 *Melbourne University Law Review* 159

Consumer Affairs and Fair Trading, Department of Justice (Tasmania), *Renting in Tasmania*, Amendment Fact Sheet (9 October 2014)

Consumer Affairs Victoria, *Notice to Tenant/s of Rented Premises* (26 November, 2014) <www.consumer.vic.gov.au/library/forms/housing-and-accommodation/renting/notice-to-tenants-of-rented-premises.doc>

Fitzgerald, Jacqueline and Suzanne Poynton, *The Changing Nature of Objects Stolen in Household Burglaries*, Crime and Justice Statistics Issues Paper No. 62 (NSW Bureau of Crime Statistics and Research, 2011)

Office of the Australian Information Commissioner, *Is My Real Estate Agent Allowed to Take Photos in My House?* <www.oaic.gov.au/privacy/privacy-topics/tenancy-and-real-estate/is-my-real-estate-agent-allowed-to-take-photos-in-my-house>

Office of the Australian Information Commissioner, *Privacy Fact Sheet 8: Ten Steps to Protect Your Personal Information* (April 2012) <www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/other/privacy-fact-sheet-8-ten-steps-to-protect-your-personal-information>

Tenants Union of Victoria, *The Landlord is Selling* (July 2013) <www.tuv.org.au/advice/during-your-tenancy/your-landlord-is-selling>

Tenants Union of Victoria, *Key Housing and Tenancy Statistics* (February 2014) <www.tuv.org.au/wp-content/uploads.2014/04/Housing-and-tenancy-stats.pdf>

Victorian Law Reform Commission, *Photographing and Filming Tenants' Possessions for Advertising Purposes*, Consultation Paper No. 22 (2014)

Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No. 18 (2010)

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