



Victorian
Law Reform
Commission

Photographing and Filming Tenants' Possessions for Advertising Purposes

CONSULTATION PAPER

JUNE 2014

A COMMUNITY LAW REFORM PROJECT



Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* (Vic) as a central agency for developing law reform in Victoria.

© Victorian Law Reform Commission 2014.

This work is protected by the laws of copyright. Except for any uses permitted under the *Copyright Act 1968* (Cth) or equivalent overseas legislation, no part of this work may be reproduced, in any matter or in any medium, without the written permission of the publisher. All rights reserved.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (3rd ed., 2010).

This report reflects the law as at 26 May 2014.

National Library of Australia Cataloguing-in-Publication data

Photographing and Filming Tenants' Possessions for Advertising Purposes / Victorian Law Reform Commission

ISBN 9780992273798 (paperback)

Series: Consultation paper
(Victorian Law Reform Commission) 22

Subjects:

Victoria. Residential Tenancies Act 1997.
Landlord and tenant—Victoria.
Advertising—Real estate business—Victoria.
Privacy, Right of—Victoria.
Law reform—Victoria.

Other Authors/Contributors:

Victorian Law Reform Commission, issuing body.

Dewey Number: 346.9450434

CHAIR

The Hon. Philip Cummins AM*

COMMISSIONERS

Bruce Gardner PSM
Dr Ian Hardingham QC
Saul Holt SC
The Hon. David Jones AM
Eamonn Moran PSM QC*
Alison O'Brien*
The Hon. Frank Vincent AO QC
**Commissioners working on this reference*

CHIEF EXECUTIVE OFFICER

Merrin Mason

PROJECT TEAM

Eve Gallagher (community law reform manager)
Si Qi Wen

COVER DESIGN

Letterbox

TEXT LAYOUT

GH2 Design



Photographing and Filming Tenants' Possessions for Advertising Purposes

CONSULTATION PAPER

JUNE 2014

A COMMUNITY LAW REFORM PROJECT



Victorian
Law Reform
Commission

Victorian Law
Reform Commission
GPO Box 4637
Melbourne
Victoria 3001
Australia
DX 144, Melbourne

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800
Freecall
1300 666 555
(within Victoria)
Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

Contents

Preface	iv
Call for submissions	v
Terms of reference	vii
1. Introduction	2
The issue	2
Origin of this project	3
Background	4
Scope of the problem	4
Our process.....	5
Structure of this paper.....	6
2. Current practice	8
Tenants' concerns about photographs.....	8
Notice	8
Content	9
Landlords' concerns about photographs	11
Advising tenants about photographs	12
3. Right to enter	14
Victoria	14
An overview.....	14
To show the property.....	15
Other states and territories.....	16
To show the property in person	16
For a genuine purpose	17
4. Right to quiet enjoyment	20
Victoria	20
Common law.....	20
Other states and territories.....	22
Right to reasonable peace, comfort and privacy	22

5. Right to privacy	26
Australian Privacy Principles.....	27
6. Consent and notification requirements	30
Consent.....	30
Queensland	30
Tasmania.....	31
Notification	32
7. Remedies	34
Victorian Civil and Administrative Tribunal	34
Restraining order.....	34
Breach of duty notice	35
Office of the Australian Information Commissioner.....	35
8. Conclusion	38
Appendices	40
Appendix A – Right to enter	40
Appendix B – Quiet enjoyment	42
Appendix C – Use of photographs and videos for advertising purposes	44
Questions	48

Preface

Over 400,000 Victorian households privately rent the premises in which they live. It has become common practice for landlords and agents to use photographs and videos when advertising these premises for sale or lease. The photographs and videos often show possessions of the tenant. Victorian law is unclear about whether landlords can take or use these photographs and videos without tenants' consent.


The Victorian Law Reform Commission is looking into the laws that regulate the taking and use of advertising photographs and videos that contain tenants' possessions. This review forms part of the Commission's community law reform program, which enables members of the community to contribute their ideas on how to improve Victorian law. Under the *Victorian Law Reform Commission Act 2000* (Vic), the Commission may initiate inquiries into issues of limited legal scope but of general community concern.

The Victorian Law Reform Commission has undertaken this project following discussions with the Tenants Union of Victoria. The Commission was told that tenants were not always given adequate notice that advertising photographs would be taken, and that some tenants felt the photographs violated their privacy and placed them at risk of theft or personal harm. The Commission's preliminary investigation uncovered a number of tenants with concerns of this kind.

Equally, the concerns of landlords and agents relate to their capacity to advertise their properties effectively. The use of photographs and videos is considered an important advertising tool.

The digital age has brought benefits to landlords, who can more readily showcase their properties, and to prospective tenants and buyers, who can more easily search for suitable properties to rent or buy. These benefits, however, bring with them new and significant issues, including a lack of control over the publication and distribution of the photographs and videos and the length of time the photographs and videos are available online. The Commission will consider whether modern technology has rendered existing law inadequate and in need of amendment.

I encourage tenants, landlords, real estate agents and people with expertise in residential tenancy law to make a submission by 11 August 2014.



The Hon. Philip Cummins AM

Chair, Victorian Law Reform Commission

June 2014

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page 48, that seek to guide submissions. You do not have to address all or any of the questions to make a submission.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or orally to one of the Commission staff, if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on page 48.

Submissions can be made by:

Email: law.reform@lawreform.vic.gov.au

Online submissions form at www.lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you require an interpreter or need assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published, but the name of the submitter is published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a project. A community law reform project is complete on the date the final report is presented to the Attorney-General. Hard copies of submissions will be archived and sent to the Public Records Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide whether you want your submission to be public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously. More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline: 11 August 2014

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 and videos 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 and film 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) (section 67).
- Determine the source, scope and adequacy of the legal basis on which landlords and their agents rely when photographing, filming 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.

Introduction

- 2** **The issue**
- 3** **Origin of this project**
- 4** **Background**
- 4** **Scope of the problem**
- 5** **Our process**
- 6** **Structure of this paper**

1. Introduction

The issue

- 1.1 Victorian tenants have expressed concern about photographs of their possessions being used in advertising campaigns when landlords are selling or re-leasing their properties. Tenants' concerns relate to the failure to provide adequate notice that photographs will be taken, as well as to the content of the photographs. Some tenants were not told in advance that photographs would be taken and thus were not given the opportunity to move any valuables or personal items out of sight. Others say the use of the photographs in advertising material violates their right to privacy, places them at risk of theft and, in some instances, places them at risk of personal harm.
- 1.2 The Commission's review also includes videos of tenants' possessions, as tenants' concerns about photographs equally apply to videos used to advertise properties for sale or lease. For some, videos may be even more intrusive, as they allow the public to see rooms in their entirety, which in turn might assist potential intruders to identify entry and exit points. In addition, videos may become increasingly common with changes in technology and market expectations.
- 1.3 Despite the frequency with which photographs and videos containing tenants' possessions are taken and used when landlords advertise their properties for sale or lease, the rights and obligations of landlords and tenants in this situation are not clear under Victorian law. The *Residential Tenancies Act 1997* (Vic) does not expressly refer to the practice of taking or using photographs or videos of rental properties for advertising purposes. It does, however, set out the grounds upon which landlords may enter a rental property, and the notification and behavioural requirements landlords must adhere to when entering.¹ The Act also enshrines the tenant's right to quiet enjoyment.² Opinion is divided on the extent to which these provisions allow landlords to take and use advertising photographs and videos that contain tenants' possessions without the tenants' consent.
- 1.4 With the widespread use of online advertising, the issues of privacy, intrusion and risk in relation to advertising photographs and videos that contain tenants' possessions are exacerbated. Between November 2012 and January 2013, Australia's most viewed real estate website received an average of 18.6 million visits per month.³ In this environment, it is in the interests of tenants, landlords and agents that the law and their respective rights are clear.

1 *Residential Tenancies Act 1997* (Vic) ss 85–89.

2 *Ibid* s 67.

3 [realestate.com.au, About realestate.com.au](http://www.rs.realestate.com.au/doc/about_us/About.htm) <http://www.rs.realestate.com.au/doc/about_us/About.htm>, citing Nielson Online Marketing Intelligence.

- 1.5 The minister responsible for introducing the *Residential Tenancies Act 1997* (Vic) into Parliament in 1997 said that ‘residential tenancies legislation is vital in striking a balance between the interests, rights and responsibilities’ of those who own rental properties and those who ‘make such accommodation an appropriate home for themselves and their families.’⁴ This paper provides guidance on what this balance currently is in relation to photographs and videos of tenants’ possessions. In the course of its inquiry, the Commission will consult with interested individuals, groups and organisations to determine what that balance ought to be.
- 1.6 Lawmakers in Queensland and Tasmania recently reviewed their residential tenancy legislation. In 2008, Queensland adopted legislation prohibiting the use of images of tenants’ possessions in advertising material without the tenants’ consent.⁵ Last year, Tasmania followed suit.⁶
- 1.7 The purpose of this inquiry is to recommend legislative reform that accords with the needs and priorities of tenants and landlords in Victoria, and we welcome public feedback in this regard.

Origin of this project

- 1.8 As well as investigating issues given to it by the Victorian Attorney-General, the Commission initiates its own investigations into ‘relatively minor legal issues that are of general community concern.’⁷ ‘Relatively minor’ means of limited size or scope. The Commission refers to these inquiries as community law reform projects as the topics of inquiry are proposed by community members and groups.
- 1.9 This project arose out of discussions with the Tenants Union of Victoria (TUV). The TUV informed the Commission that:
- It had received a number of complaints about photographs of tenants’ possessions being included in advertising material without the tenants’ consent.
 - The law was unclear with respect to the rights of landlords and tenants in this situation.
 - Tenants often sought assistance from advice and complaint-handling bodies that were not able to help them prevent the photographs being taken or, if already published, have the photographs removed.⁸
- 1.10 After consulting with several advice and complaint-handling bodies, the Commission was satisfied that a significant number of tenants, landlords and agents had made inquiries about the law relating to advertising photographs that contained tenant’s possessions, and that legal clarity and certainty in this area would be helpful for all concerned.

4 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 869 (Marie Tehan, Minister for Conservation and Land). See also Marcia Neave, ‘Australia: Recent Developments in Australian Residential Tenancies Laws’ in Susan Bright (ed), *Landlord and Tenant Law: Past Present and Future* (Hart Publishing, 2006) 233, 234–236.

5 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 203.

6 *Residential Tenancy Amendment Act 2013* (Tas) s 26 inserting s 55A into the *Residential Tenancy Act 1997* (Tas). Unlike the Queensland legislation, the Tasmanian legislation only expressly prohibits photographs, not all images.

7 *Victorian Law Reform Commission Act 2000* (Vic) s 5(1)(b).

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

Background

- 1.11 A little under a quarter of Victoria's 1.95 million households privately rent the premises in which they live (24.3 per cent)⁹ and are subject to Victoria's residential tenancy legislation. According to the TUV, the average length of a tenancy is 18 months.¹⁰ It is thus likely that private tenant households will have their homes photographed or filmed for advertising purposes at some stage. In many instances, these images will contain tenants' possessions.
- 1.12 During the Commission's preliminary consultations, a real estate agent informed the Commission that although any legal obligation an agent has to a property owner is ultimately paramount, professional agents treat both tenants and landlords as clients.¹¹ In part, this is because it is in everyone's interests to take into account the concerns and needs of both parties throughout the life of a tenancy agreement and, in the event of a disagreement, to find a solution that works for everyone.¹²
- 1.13 Moreover, there is an increasing number of relatively affluent renters with high expectations, and many tenants are, or one day will be, landlords as well.¹³ These tenants are in a relatively strong negotiating position because they may be more aware of their rights, and may have greater commercial value to an agent.
- 1.14 The TUV has noted that whereas renting a property was once a transitional step on the way to property ownership or the housing of last resort for a small minority, it is now a long-term, or even permanent, arrangement for many tenants.¹⁴ While this may be a choice for relatively wealthy renters, for many of those who rent for long periods it is a necessity.¹⁵
- 1.15 The TUV has stated that an increase in poverty combined with a decrease in housing affordability over the past three decades has created a large pool of people who struggle to find affordable housing in areas where they can also find work and access services.¹⁶ In this environment, tenants may be less able to negotiate with their landlords and agents.

Scope of the problem

- 1.16 Consumer Affairs Victoria (CAV) provides advice to tenants and landlords about their rights and obligations under the *Residential Tenancies Act 1997* (Vic). Data supplied by CAV shows that in the three years to June 2013, it received 68 inquiries about advertising photographs containing tenants' possessions. The majority of these were from tenants, but several were from landlords and agents.¹⁷
- 1.17 Over that same period, CAV received another 247 more general inquiries about photographs taken by landlords or agents at rental properties.¹⁸ Without more information, it is not possible to ascertain whether those instances referred to photographs taken for advertising purposes, routine inspections or any other purpose. Presumably, however, at least some of those incidents concerned photographs for advertising purposes.

9 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>>.

10 Preliminary consultation with the Tenants Union of Victoria (30 August 2013).

11 Preliminary consultation with real estate agent (3 February 2014).

12 Ibid.

13 Ibid.

14 Michelle Marven, *Social Change Agenda* (February 2002) Tenants Union of Victoria, 4 <http://www.tuv.org.au/articles/files/future/02_Social_Change_Agenda.pdf>.

15 Ibid.

16 Ibid.

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

18 Ibid.

- 1.18 The Victorian Civil and Administrative Tribunal (VCAT) does not have any record of an application for an order restraining a landlord or agent from using advertising photographs that contain tenants' possessions.¹⁹ This may in part be attributable to the fact that CAV advises callers that landlords or agents may take photographs of the inside of the house, and that tenants may ask, but cannot insist, that their belongings or bedrooms be excluded from the photographs.²⁰ The TUV says that in the face of this official advice, and with limited resources available to it and many of the tenants who call for advice, it has been reluctant to pursue, or encourage others to pursue, the matter through VCAT.²¹ In addition, tenants may be concerned about retaliation or that a complaint may affect their current or future tenancies.²²
- 1.19 Privacy Victoria regulates how government agencies and local councils deal with personal information. While Privacy Victoria has authority over the Office of Housing, it does not have authority over private individuals or businesses. Nonetheless, it has received a number of calls about photographs and videos of tenants' possessions in recent years. Privacy Victoria's *Annual Report 2012-13* states:
- Enquiries relating to the privacy of property were at their highest recorded level for the past five years at 95 (4% of total enquiries). This rise appears to be attributed in part to the increasing practice of real estate agents photographing or filming rental properties for the purpose of sale and rental inspections.²³
- 1.20 Real Estate Institute of Victoria representatives told the Commission that although tenants sometimes express concerns about photographs being taken, agents work with tenants to allay their fears by, for example, suggesting they remove any valuables from view. None of the representatives could recall a situation in which this issue had turned into a dispute. One agent noted that even if disputes do arise in relation to this issue, the number of disputes would be small as a proportion of the total number of occasions on which advertising photographs with tenants' possessions in them are published.²⁴

Our process

- 1.21 The Commission would like your views on the questions raised throughout this paper. A complete list of questions can be found on page 48. While you are welcome to share any views or experiences in relation to the topic under consideration, the Commission will limit the scope of its inquiry to the terms of reference on page vii. The Commission will not review the issue of open house inspections or routine inspections, except in so far as they relate to advertising photographs or videos that contain tenants' possessions. An in-depth analysis of the right of Victorians to privacy is also beyond the scope of this review.

19 Information provided to the Commission by the Victorian Civil and Administrative Tribunal (4 March 2014).
 20 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014).
 21 Preliminary consultation with the Tenants Union of Victoria (30 August 2013).
 22 Ibid.
 23 Privacy Victoria, *Annual Report 2012-2013* (2013) 16.
 24 Preliminary consultation with the Real Estate Institute of Victoria (7 March 2014).

- 1.22 The Commission invites written submissions by 11 August 2014. Instructions on how to make a submission are on page v. In addition, the Commission will meet with individuals and groups that have particular knowledge or experience in this area in accordance with the Commission's principles of being balanced and even-handed. Individuals or groups should contact the Commission if they wish to meet with us in person. The Commission's contact details are on page v.
- 1.23 After holding consultation meetings and considering written submissions, the Commission will produce a final report, including recommendations, which will be presented to the Attorney-General.

Structure of this paper

- 1.24 This consultation paper is divided into eight chapters.
- 1.25 Chapter 1 introduces the paper and provides background to this project and the issues raised. It includes information on how to participate in the Commission's inquiry.
- 1.26 Chapter 2 examines current practice in Victoria. It explores the experiences of tenants, landlords and agents in relation to taking and publishing photographs and videos of tenants' possessions for advertising purposes.
- 1.27 Chapter 3 examines the legal rights of landlords and agents to enter a rental property in Victoria and the other states and territories of Australia. In all states and territories, the right to enter to show the property to prospective tenants and buyers appears to be the ground relied upon by landlords and agents to enter a rental property to take advertising photographs and videos. In South Australia, landlords and agents may also rely on the right to enter for a genuine purpose.
- 1.28 Chapter 4 examines the tenant's right to quiet enjoyment in Victoria and the other states and territories of Australia. While the scope of this right is confined to the common law in Victoria, all other Australian jurisdictions have expanded its scope to include the right to reasonable peace, comfort and privacy.
- 1.29 Chapter 5 reviews the right of tenants to privacy in Victoria conferred by the *Information Privacy Act 2000* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Privacy Act 1998* (Cth).
- 1.30 Chapter 6 examines recent legislative reforms in Queensland and Tasmania that prohibit the use of certain images that contain tenants' possessions in advertising material without the tenant's consent.
- 1.31 Chapter 7 lists the remedies available to Victorian tenants who are concerned about advertising photographs or videos that contain their possessions.
- 1.32 Chapter 8 briefly concludes this paper.

Current practice

- 8** Tenants' concerns about photographs and videos
- 11** Landlords' concerns about photographs and videos
- 12** Advising tenants about photographs and videos

2. Current practice

- 2.1 To find out about current practice relating to photographing and filming tenants' possessions, the Commission held informal consultations with the Tenants Union of Victoria (TUV) and several real estate agents, including representatives of the Real Estate Institute of Victoria (REIV). The Commission asked a number of advice and complaint-handling bodies for anecdotal and statistical evidence on complaints received about this issue. Consumer Affairs Victoria (CAV), the Victorian Civil and Administrative Tribunal (VCAT) and Privacy Victoria responded. Along with a review of online literature, the information received from these individuals and organisations forms the basis of this chapter.

Tenants' concerns about photographs and videos

- 2.2 The TUV advised that tenants are concerned about the lack of prior or adequate notice that photographs will be taken and used for advertising purposes, and about the content of the photographs.

Notice

- 2.3 The TUV informed the Commission about a case in which a couple found photographs of their home online, including photographs that showed their furniture and valuable original artworks. In that instance, the agent through whom the tenants had rented the property had also been engaged to sell the property. The agent had earlier asked if he could photograph the couple's furniture and paintings to advertise the property; however, the couple had said no. When the tenants asked for the photographs to be removed, the agent refused and threatened to become 'nasty'.¹
- 2.4 Data supplied by CAV includes complaints of this kind. Like the couple that contacted the TUV, the tenants who contacted CAV only became aware of the photographs when they found them online.²
- 2.5 In another incident related to notice, a tenant told CAV that she received a phone call from a photographer on a Friday saying he would be taking advertising photographs inside her home on Tuesday. According to the tenant, when she told the photographer that she would not let him in unless she was first given written notice from her landlord or agent explaining who he was, the photographer said that he already had keys and would let himself in.³

1 Information provided to the Commission by the Tenants Union of Victoria (7 October 2013).
2 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014).
3 Ibid.

Content

- 2.6 In relation to the content of photographs, the TUV advised that tenants are primarily concerned about photographs that contain valuable items, and those that identify the people living there, particularly children. Possessions that may identify tenants include family portraits and items with the tenant's name on them, such as a degree or trophy. In addition, many tenants feel that it is an invasion of their privacy to use photographs of the inside of their home and their belongings in advertising material, regardless of any risk of theft or whether the photographs contain personal information.⁴

Privacy

- 2.7 A real estate agent told the Commission that privacy concerns relating to advertising photographs often concern tenants' children. In a situation she had recently been involved in, the tenants did not want photographs taken of anything relating to their child, including the child's bedroom. The agent contacted CAV, who told her that she could take photographs of the child's bedroom, but not objects containing personal information about the child, which in this instance included the child's name in wooden letters on the bedroom door. On that occasion, the agent chose not to take photographs of the child's bedroom at all.⁵
- 2.8 A tenant who contacted CAV for advice said that people attending an open house inspection for the home she was previously living in had offered to buy her furniture after seeing it in the advertising photographs online. The new home she was renting was now also for sale, and she was concerned about the impact the loss of privacy would have on her health. The tenant told CAV:
- I have been [in my current home] just 5 months. This [problem] came after a very stressful event of the last house I was renting being sold. And now it's going to happen again. I received a letter of advance notice from the owner yesterday. I value my privacy and [am] gutted this is going to happen again so soon. I have depression and the loss of privacy and the stress of moving last time almost robbed me of being able to cope.⁶
- 2.9 Another tenant who contacted CAV to ask if the landlord or agent was allowed to take advertising photographs with her family's belongings in it said, 'I am 35 weeks pregnant ... and have a one and three-year-old. We obviously want some privacy for the coming months but we are not sure what we are entitled to do.'⁷
- 2.10 CAV also recounted an experience of a tenant who asked the landlord to remove the 'for sale' board in front of his home because it contained photographs of his private property. The tenant reported that the landlord refused to remove the board unless the tenant paid \$300 for a new one.⁸

4 Preliminary consultation with the Tenants Union of Victoria (3 February 2014).

5 Preliminary consultation with real estate agent (3 February 2014).

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

7 Ibid.

8 Ibid.

Theft

- 2.11 In addition to general privacy concerns, the abovementioned couple whose furniture and artwork were displayed in online advertising photographs were worried the photographs placed them at risk of theft.⁹
- 2.12 A number of tenants who contacted CAV for advice about advertising photographs appeared to be worried about their possessions being stolen. One tenant said advertising photographs had been taken and used without her permission and she was concerned as she had 'valuable items on display.'¹⁰ Another said, 'I am not comfortable having my personal belongings photographed and put on a website with the property address.'¹¹ The tenant asked whether the landlord or agent was allowed to take photographs of personal belongings such as computers and televisions.¹²
- 2.13 Another tenant who contacted CAV said her home had been broken into after advertising photographs containing her possessions were displayed online. When agreeing to have the photographs taken, the tenant had assumed they would only be used on the noticeboard in front of the real estate agency.¹³
- 2.14 The Commission has found warnings online about thieves potentially targeting properties after seeing photographs or videos with the tenant's valuables in them.¹⁴ An article on the Real Estate Institute of NSW's website says that agents should 'consider the risk to the tenant of photographing any expensive items belonging to the tenants, since this could lead to compensation claims if the property is subsequently broken into.'¹⁵ Victoria Police informed the Commission that it has advised people against placing virtual tours online, as doing so allows would-be-offenders to see what valuables are in the home and to familiarise themselves with entry points without even going to the property.¹⁶

Personal harm

- 2.15 In relation to concerns about personal safety, the Commission was told about a case in which a tenant and her place of work could be identified in online marketing photographs.¹⁷
- 2.16 Complaints data supplied by CAV includes a case involving a tenant who had taken out an intervention order. The tenant was concerned that the person against whom she had taken out the intervention order might recognise her possessions in photographs advertising the property in which she lived.¹⁸
- 2.17 A TUV fact sheet for tenants whose landlords are selling their properties advises tenants to apply to VCAT for a restraining order if they do not want their possessions photographed. It then states, 'If the photographs put you at risk because you have fled domestic violence, you will have a better chance of getting the Restraining Order.'¹⁹
- 2.18 The Commission does not know of any case in which a person has been identified and threatened or physically harmed as a result of having possessions photographed for advertising purposes.

9 Information provided to the Commission by the Tenants Union of Victoria (7 October 2013).

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

11 Ibid.

12 Ibid.

13 Ibid.

14 Jo-Anne Hamilton, *Residential tenancy laws: a practical guide for sales agents*, REINSW <<https://www.reinsw.com.au/Residential-tenancy-laws-a-practical-guide-for-sales-agents-Journal-December-2011-/default.aspx>>; Sonja Koremans, 'Open homes can attract thieves', *News.com.au* (online), 25 July 2013 <<http://www.news.com.au/finance/real-estate/open-homes-can-attract-thieves/story-fncq3era-1226684947232>>; My Property Guide, *Using Property Websites to Plan the Perfect Burglary* <<http://www.mypropertyguide.co.uk/articles/display/10098/using-property-websites-to-plan-the-perfect-burglary.htm>>; Juliet Robinson, *Privacy around inspection photos* (17 May 2013) Landlords <<http://www.landlords.co.nz/ask-an-expert/privacy-around-inspection-photos-2044>>.

15 Hamilton, above n 14.

16 Information provided to the Commission by Victoria Police (12 March 2014).

17 Preliminary consultation with tenants' advocate (28 January 2014).

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

19 Tenants Union of Victoria, *The landlord is selling* (July 2013) <<http://www.tuv.org.au/publications/fact-sheets>>.

Questions

1. Are you aware of an instance in which a landlord or agent failed to adequately notify a tenant that advertising photographs or videos containing their possessions would be taken inside their home? If so, describe the incident and outcome.
2. Do you know of an instance in which a tenant was concerned that their possessions could be seen in advertising photographs or videos? If so, why was the tenant concerned?
3. Do you know of an instance in which a tenant has been robbed or physically harmed following the publication of advertising photographs or videos that contained their possessions? If so, describe the incident.
4. The Commission's preliminary investigation revealed that tenants are concerned about privacy, risk of theft and risk of personal harm. Do you know of other concerns tenants might have in relation to advertising photographs or videos that contain their possessions?

Landlords' concerns about photographs and videos

- 2.19 The lack of legal certainty around what landlords and tenants can and cannot do in this situation may disadvantage landlords. When tenants refuse to have photographs or videos taken of their possessions, landlords who do not know what they are legally entitled to do, or are reluctant to press their case, may suffer financial loss.
- 2.20 The Commission has been informed of a case in which a tenant placed sheets over all of his furniture when photographers arrived to take photographs of the property, which was for sale. The agent who told the Commission about this case was of the opinion that the tenant covered the furniture because he was upset that his home was being sold, not because the furniture was valuable or because he held any particular concerns about his privacy. The agent noted that the owner paid a considerable amount of money to have the photographs taken, the photographs were unattractive, and the property may not have attracted the buyers or bids it would have attracted if the owner had been able to showcase the property properly.²⁰

Question

5. Do you know of an instance in which a tenant has refused to have photographs or videos of their possessions used in an advertising campaign? If so, what was the outcome of the dispute, and did it impact negatively on the landlord?

Advising tenants about photographs and videos

- 2.21 Real estate agents have different procedures for informing tenants that advertising photographs and videos will be taken when a property is for sale or lease.
- 2.22 One agent informed the Commission that their practice was to advise tenants in the vacating letter and the notice of entry when photographs will be taken for advertising purposes.²¹
- 2.23 Another agent said he knew of an agency that gave tenants a standard one-page form about advertising photographs at the end of a lease.²²
- 2.24 Another real estate agent described a more informal and incremental process whereby a number of telephone and email conversations take place at the end of a tenancy about the range of marketing activities that will occur. According to that agent, it is not uncommon for landlords to offer a rent reduction in recognition of the inconvenience tenants experience when a property is being advertised for sale. The agent pointed out that it is in everyone's interests to keep tenants happy throughout marketing campaigns, and to work with tenants to develop a plan for photographs and inspections.²³
- 2.25 All the real estate agents the Commission spoke to said they gave tenants between one and seven days notice of the visit at which photographs and videos will be taken.²⁴

Question

6. Can you suggest a workable, standard practice that could be adopted by landlords and agents advising tenants that advertising photographs and videos will be taken inside their homes?

21 Ibid.

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

23 Ibid.

24 Ibid and preliminary consultation with real estate agent (3 February 2014). If they are relying upon the tenant's consent for entry, landlords and agents must enter the property within seven days of obtaining consent. If they are relying on the right of entry provisions that require written notice (without consent), landlords and agents must give at least one day's notice: *Residential Tenancies Act 1997* (Vic) ss 85(a)–(b), 88.

Right to enter

14 Victoria

16 Other states and territories

3. Right to enter

- 3.1 At common law, a tenant's right to exclusive possession allows the tenant to exclude the landlord as well as strangers from the property.¹ However, a limited right of entry can be granted to the landlord by contract or statute and is not inconsistent with the grant of exclusive possession.²
- 3.2 Limited rights of entry have been granted to landlords and agents in the residential tenancy legislation of all Australian states and territories. In a very narrow set of circumstances, such as an emergency, landlords and agents may enter without notifying tenants or obtaining their consent.³ In a broader set of circumstances, such as when conducting a routine inspection, landlords and agents may enter after providing tenants with adequate (written) notice.⁴ In these circumstances, tenant consent is not required. Landlords or agents must obtain a tenant's consent if they wish to enter for any other purpose.
- 3.3 No state or territory has enacted an express provision authorising entry to take advertising photographs or videos.

Victoria

An overview

- 3.4 The *Residential Tenancies Act 1997* (Vic) ('the Act') sets out the circumstances in which a landlord or agent may enter a rental property in Victoria.⁵ It is an offence for a landlord or agent to enter other than in accordance with the Act, unless they have a reasonable excuse for doing so.⁶

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

2 *Ibid.*

3 The residential tenancy legislation of Victoria, the ACT and Tasmania does not contain an express provision permitting entry by landlords or agents without the tenant's consent in the event of an emergency. However, section 91A of the *Residential Tenancies Act 1997* (Vic) states that landlords must not, without reasonable excuse, enter rented premises other than in accordance with the entry provisions in the Act. Entry for an emergency is likely to constitute a reasonable excuse. Schedule 1 clause 76(d) of the *Residential Tenancies Act 1997* (ACT) states that the lessor must not have access to the premises other than for the purpose of carrying out urgent repairs or for health or safety reasons in relation to the premises. It is likely that entry for an emergency will fall within the confines of this provision. The *Residential Tenancy Act 1997* (Tas) s 56(2)(a) lists the grounds on which a landlord or agent can enter the premises without the tenant's consent. These grounds include where there is a risk to the tenant or another person present on the premises. New South Wales, Queensland, Northern Territory, Western Australia and South Australia all contain express provisions relating to the entry of landlords in the event of an emergency. These provisions can be found in the *Residential Tenancies Act 2010* (NSW) s 55(1)(a), the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 192(1)(k)–(l), the *Residential Tenancies Act 1999* (NT) ss 72(a)–(b), the *Residential Tenancies Act 1987* (WA) s 46(2)(a) and the *Residential Tenancies Act 1995* (SA) s 72(1)(a), respectively.

4 *Residential Tenancies Act 1997* (Vic) s 86; *Residential Tenancies Act 2010* (NSW) s 55(2); *Residential Tenancies Act 1997* (ACT) sch 1 cls 77–82; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 192(1)(a)–(i); *Residential Tenancies Act 1999* (NT) ss 69–71; *Residential Tenancies Act 1987* (WA) ss 46(2)(b), (e)–(g); *Residential Tenancies Act 1995* (SA) s 72(b)–(h); *Residential Tenancy Act 1997* (TAS) ss 56(3), (4), (4B).

5 *Residential Tenancies Act 1997* (Vic) pt 2 div 8.

6 *Ibid* s 91A.

- 3.5 Under the Act, a landlord or agent may enter a property at any time agreed to by the tenant, as long as the entry takes place within seven days of obtaining the tenant's consent.⁷ A landlord or agent may also enter the property without the tenant's consent at any time between 8am or 6pm (except on public holidays) in order to:
- show the property to a prospective tenant, buyer or lender
 - carry out a duty under the Act, the tenancy agreement or any other Act
 - obtain an evaluation
 - verify a reasonable belief that the tenant has failed to comply with his or her duties under the Act or the tenancy agreement
 - inspect the premises.⁸
- 3.6 If a landlord or agent wishes to enter for one of these reasons without first obtaining the tenant's consent, the landlord or agent must:
- give at least 24 hours notice to the tenant
 - provide written notice stating the reason for entry
 - deliver the notice via mail or in person between the hours of 8am and 6pm.⁹
- 3.7 A person entering the property in accordance with the Act must do so in a reasonable manner and, unless they obtain the tenant's consent, cannot stay longer than is necessary to fulfil the purpose of their visit.¹⁰
- 3.8 A tenancy agreement must be in a standard form.¹¹ Extra terms may be added. However, these terms cannot take away the rights and duties of landlords and tenants contained in the Act. If a tenancy agreement term sought to grant landlords and agents the right to take or use photographs or videos that contained tenants' possessions for advertising purposes, the term would be invalid to the extent that it sought to modify the statutorily protected rights and duties of the tenant.

To show the property

- 3.9 The Act does not specifically permit entry in order to take photographs or videos for advertising purposes. It appears from current practice that the majority of landlords and agents hold the view that permission can be implied. According to this view, the Act authorises a landlord or agent to enter on the grounds that publishing the photographs or videos amounts to, or is sufficiently incidental to, showing the property to a prospective tenant or buyer.
- 3.10 Based on this view, when publishing photographs or videos of the inside of the rented property as they are lawfully entitled to do, a landlord or agent may publish images that contain tenants' possessions unless the image violates a right of the tenant.

7 Ibid s 85.
 8 Ibid s 86.
 9 Ibid ss 85, 88.
 10 Ibid s 87.
 11 Ibid s 26.

- 3.11 This interpretation is consistent with the advice given by Consumer Affairs Victoria (CAV). CAV informs tenants that they should put their valuables away if they are concerned about their possessions being shown in advertising photographs, and that although tenants can ask an agent not to take photographs of their possessions, 'this is not legislated and is only a negotiation point.'¹² If the photographs clearly identify the tenant or a family member, CAV advises tenants to contact the Office of the Australian Information Commissioner. CAV also tells people who contact it in relation to this matter that landlords and agents must comply with the notification and behaviour requirements in the Act,¹³ not cause any damage to the tenant's goods upon entry, and take all reasonable steps to ensure that the tenant has quiet enjoyment of the property.¹⁴
- 3.12 An alternative reading of the Act is that landlords and agents do not have a right to enter for the purpose of taking photographs or videos for advertising purposes. That is to say, the Act should be read narrowly, only allowing a landlord or agent to bring a person who has displayed a genuine interest in leasing or buying the property to inspect it in person.
- 3.13 This reading is consistent with the findings of the Victorian Civil and Administrative Tribunal (VCAT) in relation to open house inspections. VCAT has interpreted the right to enter to show the property to mean that the landlord may 'conduct private inspections of the premises in respect of particular prospective buyers or tenants.'¹⁵ The provision was found not to authorise open house inspections without the tenant's consent.¹⁶

Other states and territories

To show the property in person

- 3.14 In Victoria, the Act simply states that a right of entry may be exercised if 'entry is required to show the premises to a prospective tenant...[or buyer]'.¹⁷
- 3.15 The corresponding legislative provision of all other states and territories refers to an 'inspection' of the premises or the number of occasions upon which prospective tenants and buyers may visit. In Western Australia, for example, the *Residential Tenancies Act 1997* (WA) says that the landlord may enter the premises:
- for the purpose of showing the premises to prospective tenants, at any reasonable time and on a reasonable number of occasions during the period of 21 days preceding the termination of the agreement.¹⁸
- 3.16 These provisions appear to relate only to an inspection of the property in person and not to entering in order to show the property in advertising material.

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

13 See [3.6] and [3.7] for more on the notification and behavioural requirements.

14 Information provided to the Commission by Consumer Affairs Victoria (26 February 2014). See also Consumer Affairs Victoria, *Landlord or owner entry to the property* (28 April 2014) <<http://www.consumer.vic.gov.au/housing-and-accommodation/renting/standards-repairs-and-entry-rights/landlord-or-owner-entry-to-the-property>>.

15 Information provided to the Commission by the Victorian Civil and Administrative Tribunal (4 March 2014).

16 Ibid.

17 *Residential Tenancies Act 1997* (Vic) ss 86(1)(a)–(b).

18 *Residential Tenancies Act 1987* (WA) s 46(2)(f). See **Appendix A**: Right to enter for the provisions of all of Australia's states and territories.

- 3.17 The Tenants' Union of NSW advises tenants that entering to take photographs without consent is not permitted. After listing the circumstances in which landlords and agents may enter a rental property in accordance with the *Residential Tenancies Act 2010* (NSW),¹⁹ the Tenants' Union advises that:

no provision is made for access for the purposes of taking photographs of the premises for use in advertisements, erecting 'for sale' signs, conducting an 'open house' or conducting an auction. You may refuse access for these purposes.²⁰

For a genuine purpose

- 3.18 In South Australia, landlords and agents may enter a rental property for a genuine purpose. If they do so without obtaining the tenant's consent, they must provide written notice to the tenant no fewer than seven and no more than 14 days before entering. The written notice must state the purpose for entry and the date and time that entry will occur.²¹
- 3.19 In relation to photographs and videos of tenants' possessions, the South Australian Government website provides the following advice to landlords:
- You may take photographs or video footage to advertise a property for sale. The tenant can refuse to have their personal possessions photographed or videoed. A photograph of an area not identifying the tenant's possessions is acceptable e.g. [the] bathroom.²²
- 3.20 The legal basis for this advice is not clear. It may be based on the view that landlords and their agents can enter to take advertising photographs and videos because it is sufficiently incidental to the right to show the property in person and/or because it amounts to a genuine purpose for entry. However, any right of landlords to take advertising images that contain tenants' possessions, and to subsequently use such images, may also be limited by the tenant's statutory right to quiet enjoyment.²³

Question

7. Does the law in relation to the right to enter to show the property to a prospective tenant or buyer need clarification? Should landlords and agents have a right to enter to take photographs and videos for advertising purposes, or should the right be restricted to visits in person?

¹⁹ *Residential Tenancies Act 2010* (NSW) ss 55–56.

²⁰ Tenants' Union of NSW, *Tenants' Rights Manual: A practical guide to renting in NSW* <http://www.legalanswers.sl.nsw.gov.au/guides/tenants_rights_manual/during_tenancy/access_privacy.html>.

²¹ *Residential Tenancies Act 1995* (SA) s 72(1)(i).

²² Government of South Australia, *Selling or purchasing a private rental property* (1 May 2014) <<http://www.sa.gov.au/topics/housing-property-and-land/buying-and-selling/finding-a-house-to-buy/rental-property>>.

²³ *Residential Tenancies Act 1995* (SA) s 65(1)(b).

Right to quiet enjoyment

20 **Victoria**

22 **Other states and territories**

4. Right to quiet enjoyment

- 4.1 The residential tenancy legislation of every state and territory enshrines the right of tenants to quiet enjoyment.¹ Unlike every other Australian jurisdiction, the right to quiet enjoyment in Victoria is confined to its common law meaning. In all other jurisdictions, the residential tenancy legislation expands the right to quiet enjoyment so that it also includes the right to reasonable peace, comfort and privacy.²
- 4.2 In relation to advertising photographs and videos that contain tenants' possessions, the question is whether taking or publishing such images without a tenant's consent breaches their right to quiet enjoyment.

Victoria

- 4.3 Section 67 of the *Residential Tenancies Act 1997* (Vic) states that a 'landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.' The content of this right is found in common law.

Common law

- 4.4 The right to quiet enjoyment encompasses the tenant's right to possess the property and to enjoy it for all usual purposes.³ A breach of quiet enjoyment will be found where the landlord, or people lawfully claiming under the landlord, have substantially interfered with the ordinary and lawful enjoyment of the property.⁴ This is so even if neither the title to the land nor the possession of the land are otherwise affected.⁵
- 4.5 Whether the landlord's interference is substantial is a question of fact and degree.⁶ Breaches typically involve physical interference, such as removing doors and windows⁷ or disconnecting the electricity supply.⁸ However, non-physical acts that detract from the quality of possession may also amount to a breach of the right to quiet enjoyment.⁹ Examples of this include regular excessive noise;¹⁰ reduced visibility and light from a hoarding erected in front of a shop;¹¹ and billowing smoke from a defective exhaust and air conditioning system.¹²

1 *Residential Tenancies Act 1997* (Vic) s 67; *Residential Tenancies Act 2010* (NSW) s 50; *Residential Tenancies Act 1997* (ACT) s 71(1)(c), sch 1 cl 52; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 183; *Residential Tenancies Act 1999* (NT) s 65; *Residential Tenancies Act 1987* (WA) ss 44(2)(a)–(c), 59E(1); *Residential Tenancies Act 1995* (SA) s 65(1)(a)–(b); *Residential Tenancy Act 1997* (Tas) s 55. See **Appendix B**: Quiet enjoyment.

2 See **Appendix B**: Quiet enjoyment.

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

4 *Ibid*; *Sanderson v The Mayor of Berwick-Upon-Tweed* (1884) 13 QBD 547, 551.

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

6 *Sanderson v The Mayor of Berwick-Upon-Tweed* (1884) 13 QBD 547, 551; *Southwark London Borough Council v Mills* [1999] 3 WLR 939, 945 (Lord Hoffmann).

7 *Lavender v Betts* [1942] 2 All ER 72.

8 *Perera v Vaniyar* [1953] 1 WLR 672.

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 *Southwark London Borough Council v Mills* [1999] 3 WLR 939, 945 (Lord Hoffmann).

11 *Spathis v Hanave Investment Co Pty Ltd* [2002] NSWSC 304 (10 May 2002).

12 *Battick Pty Ltd v Hawkesbury Nominees Pty Ltd* [1999] ACTSC 55 (8 June 1999).

- 4.6 Building an external staircase that passed the tenant's bedroom and interfered with the tenant's privacy was not deemed a breach in *Browne v Flower*.¹³ Justice Parker stated that a breach of the right to quiet enjoyment requires physical interference and that 'a mere interference with the comfort of persons using the demised premises by the creation of personal annoyance such as might arise from noise, invasion of privacy or otherwise is not enough.'¹⁴ However, the legal reasoning underlying that decision has not been followed in more recent cases.¹⁵ As already noted, it has since been held that non-physical interference, including regular excessive noise, can amount to a breach.
- 4.7 Rendering a rental property less secure from thieves may constitute a breach of the right to quiet enjoyment. In *Lend Lease Development Pty Ltd v Zemlicka* ('*Lend Lease*'), the tenant was entitled to recover damages from the landlord after a thief gained access to the tenant's property as a result of demolition works undertaken by the landlord in an adjoining property.¹⁶
- 4.8 A landlord's deliberate and persistent attempt to drive the tenant out of the property through persecution and intimidation, including threats of physical eviction and the removal of her belongings, was found to be a breach of quiet enjoyment.¹⁷ In that case, Lord Justice Pearson observed:
- that course of 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 ...¹⁸
- 4.9 In 2013 in *Jones v Director of Housing*, the Victorian Civil and Administrative Tribunal (VCAT) was asked to consider whether taking photographs inside a property in order to create a record of the property's condition was a breach of the tenant's right to quiet enjoyment. VCAT held that neither taking the photographs nor requiring the tenant to move his belongings out of view before the photographs were taken amounted to a breach. In that case, the landlord's agent was found to have entered in accordance with the landlord's duty to maintain the property in good repair. VCAT noted that the purpose of the photographs was to accurately record the condition of the property, the tenant's belongings would not feature in the photographs, and that, to the extent the tenant's belongings were visible in the bathroom and kitchen, the tenant could easily remove them.¹⁹
- 4.10 Notwithstanding the development of the common law on the right to quiet enjoyment, the cases referred to above suggest that there is limited scope to argue that the taking or use of advertising photographs and videos that contain tenants' possessions would amount to a breach of that right.

13 *Browne v Flower* [1911] 1 Ch 219, 228.

14 *Ibid.*

15 *Kenny v Preen* [1963] 1 QB 499; *Spathis v Hanave Investment* [2002] NSWSC 304 (10 May 2002).

16 *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207. In this case, the landlord was found to have breached the obligation not to derogate from the grant. However, it has since been held that: 'there seems to be little if any difference between the scope of the covenant [for quiet enjoyment] and that of the obligation which lies upon any grantor not to derogate from his grant. The principle is the same in each case: a man may not give with one hand and take away with the other': *Spathis v Hanave Investment* [2002] NSWSC 304 (10 May 2002) [152]. See also Peter Butt, *Land Law* (Thomson Reuters, 6th ed, 2010): 'The precise limits of the non-derogation principle are unclear...[f]requently it overlaps with the covenant for quiet enjoyment – although the two covenants do not always overlap' (at 323–324).

17 *Kenny v Preen* [1963] 1 QB 499, 513 (Pearson LJ).

18 *Ibid.*

19 *Jones v Director of Housing (Residential Tenancies)* [2013] VCAT 2184 (31 December 2013) [27] (Member Grainger).

Other states and territories

Right to reasonable peace, comfort and privacy

4.11 With the exception of Victoria, every state and territory in Australia enshrines the right of tenants to reasonable peace, comfort and privacy.²⁰ In NSW, 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 or privacy of the tenant in using the residential premises...²¹

4.12 Although the Commission has not found a definitive statement of the meaning of 'reasonable peace, comfort and privacy', it is undoubtedly broader than the common law concept of quiet enjoyment. In *Ingram v Department of Housing (Tenancy)*, counsel for the tenant argued that the words 'reasonable peace, comfort and privacy' appear to be 'an expansion of the quiet enjoyment protection as a breach of "comfort and privacy" may not necessarily also constitute a breach of quiet enjoyment.'²² The NSW Consumer, Trader and Tenancy Tribunal agreed that the words 'import a wider duty than is contained in the common law formulation of quiet enjoyment' and that 'those words clearly have their natural meaning.'²³

4.13 In *South Australian Housing Trust v B*, the South Australian Residential Tenancies Tribunal held that the 'requirement for peace, comfort or privacy is to be judged objectively by an external standard, and that external standard is the standard of reasonableness.'²⁴ Member Rymill went on to describe 'privacy' as 'an inanimate thing that can be breached by prying or eavesdropping, or similar.'²⁵ In relation to 'comfort', Member Rymill noted that 'it applies to more than the physical ease of a person, and it may well apply to a person's mental faculty. A person may feel uncomfortable because of fear, or apprehension of an imposition.'²⁶

4.14 In 2007, the NSW Consumer, Trader and Tenancy Tribunal held that the act of an agent 'remaining in the premises taking photographs once it was clear that the tenant did not consent ... amounts to a breach of the tenant's right to quiet enjoyment.'²⁷ The member described the breach as 'a serious one,' noting that the agent should have been aware of his statutory obligations.²⁸ However, the Notice of Order does not provide the facts of the case, nor does it indicate how the member came to that decision.²⁹ Without more information, including, importantly, the reason the photographs were being taken, it is not possible to comment on the extent to which the reasonable peace, comfort and privacy component of the right to quiet enjoyment impacted upon the decision in that case.³⁰

20 *Residential Tenancies Act 2010* (NSW) s 50; *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) s 65(b); *Residential Tenancies Act 1987* (WA) ss 44, 59E; *Residential Tenancies Act 1995* (SA) s 65; *Residential Tenancy Act 1997* (TAS) s 55.

21 See **Appendix A**: Right to enter.

22 *Ingram v Department of Housing (Tenancy)* [2002] NSWCTTT 84 (8 May 2002) (citing C Ronalds of counsel).

23 *Ibid* (Member Sheehan).

24 *South Australian Housing Trust v B* [2005] SARTT 5 (14 January 2005) (Member Rymill).

25 *Ibid*.

26 *Ibid*.

27 Notice of Order RT 07/28086, Consumer, Trader & Tenancy Tribunal (Member Rosser) 1.

28 *Ibid*.

29 The NSW Civil and Administrative Tribunal informed the Commission on 14 March 2014 that no further information on this case is available.

30 Notice of Order RT 07/28086 was a case concerned with the *Residential Tenancies Act 1987* (NSW). Although this Act has since been superseded by the *Residential Tenancies Act 2010* (NSW), the provisions relating to quiet enjoyment are similar.

- 4.15 Although tenants in Victoria do not enjoy an explicit right to privacy in the *Residential Tenancies Act 1997 (Vic)*, the right is implicit in at least one provision of the Act. In *Jones v Director of Housing*,³¹ the tenant argued before VCAT that taking photographs when exercising the right to enter to maintain the property in good order was unreasonable because it breached his right to privacy in his home. Member Grainger noted that, while the Act does not give a tenant a right to privacy in and of itself, 'if a landlord or landlord's agent 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.'³² Opening drawers in a tenant's bedroom during a routine inspection was an example of behaviour that could be deemed unreasonable.³³
- 4.16 While Victorian tenants do not have a right to reasonable peace, comfort and privacy, they have an obligation not to interfere with the reasonable peace, comfort and privacy of their neighbours. Section 60(2) of the *Residential Tenancies Act 1997 (Vic)* states:
- A tenant must not—
- (a) use the rented premises or common areas; or
 - (b) permit his or her visitors to use the rented premises or common areas; or
 - (c) otherwise permit the use of the rented premises—
- in any manner that causes an interference with the reasonable peace, comfort and privacy of any occupier of neighbouring premises.

31
32
33

Jones v Director of Housing (Residential Tenancies) [2013] VCAT 2184 (31 December 2013) [17]–[18].
Ibid [25].
Ibid.

Right to privacy

27 Australian Privacy Principles

5. Right to privacy

- 5.1 Privacy means different things to different people. According to Privacy Victoria:
- [Privacy] can mean protecting your personal space by not having others observe you when you are at home or in your backyard. It may be expecting not to be subject to video surveillance when you are at work ... Any number of activities in a range of circumstances can be seen as 'private'.¹
- 5.2 Conceptually, privacy can be divided into three categories—physical privacy, freedom from excessive surveillance and information privacy.² When a landlord enters a tenant's home to take advertising photographs or videos without their consent, the tenant may feel this constitutes a breach of their physical privacy and that they have been subjected to excessive surveillance. If the advertising photographs or videos contain personal information, such as a photograph of the tenant's children, the tenant may feel their information privacy has also been breached. However, the fact that a tenant feels that their privacy has been violated does not necessarily mean that the conduct complained of is prohibited by law.³
- 5.3 Victorians enjoy a right to information privacy under the *Information Privacy Act 2000* (Vic) ('Privacy Act') and a right to privacy and reputation under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter').⁴ However, as this legislation only applies to government agencies, local councils and people delivering services on behalf of the government,⁵ and as the Office of Housing only advertises vacant properties for sale,⁶ there do not appear to be any circumstances in which the Privacy Act or the Charter would be applicable to tenants who are concerned about advertising photographs or videos.
- 5.4 The Australian Privacy Principles ('the Principles') are applicable to photographs and videos of tenants' possessions in certain circumstances.

1 Privacy Victoria, *Privacy Laws* (16 August 2012) <[http://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/pages/privacy-laws#What is](http://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/pages/privacy-laws#What%20is%20)>.

2 Information and Privacy Commission NSW, *What is privacy?* (19 July 2013) <http://www.ipc.nsw.gov.au/privacy/privacy_forgovernment/govt_privacy/privacy_faqqprivacy.html>.

3 For more on the invasion of privacy experienced by tenants see [2.7]–[2.10].

4 *Information Privacy Act 2000* (Vic) sch 1; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

5 *Information Privacy Act 2000* (Vic) ss 9(a)–(d); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 6(2)(b)–(c).

6 Information provided to the Commission by the Department of Human Services (29 April 2014).

Australian Privacy Principles

- 5.5 The Principles apply to government agencies, large businesses with a turnover of more than \$3 million and small businesses in limited, specific circumstances.⁷ The Principles are set out in the *Privacy Act 1998* (Cth)⁸ and concern the collection and use of personal and sensitive information.⁹
- 5.6 Personal information includes information about an identified individual or an individual who is reasonably identifiable.¹⁰ The Office of the Australian Information Commissioner's website states that a person's name, signature, address, telephone number, date of birth, medical records and bank account details are all examples of personal information.¹¹ A photograph that contains a person's image or name may constitute personal information.
- 5.7 Australian Privacy Principle 3 prohibits organisations from collecting personal information unless the information is reasonably necessary for carrying out their activities.¹² 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.¹³ Those matters include the fact that the information is being collected as well as the purpose for its collection.¹⁴
- 5.8 Where a landlord or real estate agency is a private business that earns more than \$3 million per year, Australian Privacy Principles 3 and 5 would apply if the tenant's personal information was shown in advertising photographs or videos. If the tenant had been notified in advance that the photographs or videos would be taken for advertising purposes, whether or not they contravened the Principles would appear to turn on whether it was reasonably necessary for the landlord or agent to collect the information in the course of selling or leasing the property.
- 5.9 Australian Privacy Principle 6 prohibits organisations that hold personal information for a particular purpose from using that information for another purpose, except in certain circumstances, including after obtaining the individual's consent.¹⁵ If images containing a tenant's personal information were taken for a purpose other than advertising, such as to record the condition of the property during a routine inspection, Australian Privacy Principle 6 appears to prohibit landlords and agents who are subject to the Principles from using those photographs or videos for advertising purposes without obtaining the tenant's consent.

Questions

8. Do you consider that it is an invasion of the tenant's privacy to take or use advertising photographs or videos of tenants' possessions without their consent?
9. How should the law protect tenants' privacy in relation to photographs or videos that contain tenants' possessions?

7 *Privacy Act 1998* (Cth) ss 6C–6EA.

8 *Ibid* sch 1.

9 *Ibid* s 6 (definition of 'personal information').

10 *Ibid*.

11 Office of the Australian Information Commissioner, *What is covered by privacy* <<http://www.oaic.gov.au/privacy/what-is-covered-by-privacy>>.

12 *Privacy Act 1998* (Cth) sch 1, Principle 3.2.

13 *Ibid* sch 1, Principle 5.1.

14 *Ibid* sch 1, Principles 5.2(b), (d).

15 *Ibid* sch 1, Principle 6. See Principles 6.2 and 6.3 for exceptions to this rule.

Consent and notification requirements

30 Consent

32 Notification

6. Consent and notification requirements

Consent

- 6.1 Queensland recently enacted legislation prohibiting the use of advertising images containing tenants' belongings without the consent of the tenant.¹ Tasmania has also enacted legislation prohibiting the use of photographs containing tenants' possessions without the tenants' consent.² However, the Tasmanian legislation is not yet in force (at May 2014) as the amending legislation has not yet been proclaimed by the relevant minister.³
- 6.2 Both acts require *written* consent. One of the problems with disputes between landlords and tenants is that negotiations often take place in person or over the phone, in which case there is no written record of whether consent was given and, if consent was given, what it was given to.⁴ Requiring written consent addresses this issue.

Queensland

- 6.3 Section 203 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) states that unless the landlord or agent:
- has the tenant's written consent, the [landlord] or agent must not use a photo or other image of the premises in an advertisement if the photo or image shows something belonging to the tenant.
- 6.4 Using images of tenants' belongings without first obtaining the tenant's consent is an offence that could result in a fine of up to \$2,200.⁵
- 6.5 The Queensland Residential Tenancies Authority informed the Commission that the Queensland Minister for Housing received complaints about advertising photographs that contained tenants' possessions during a review of Queensland's residential tenancy legislation in 2007. The consent requirement for images of tenants' possessions formed part of a broader conversation about tenants' rights in relation to sales campaigns.⁶

1 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 203. See **Appendix C**: Use of photographs and videos for advertising purposes.

2 *Residential Tenancy Amendment Act 2013* (Tas) s 26. See **Appendix C**: Use of photographs and videos for advertising purposes.

3 *Residential Tenancy Amendment Act 2013* (Tas) s 2.

4 Information provided to the Commission by the Victorian Civil and Administrative Tribunal (20 March 2014).

5 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 203 states that the maximum penalty is 20 penalty units. One penalty unit is currently \$110: Queensland Government, *Sentencing fines and penalties for offences* (2 December 2013) <<https://www.qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences/>>.

6 Preliminary consultation with David Breen, Executive Manager, Policy and Education Services, Residential Tenancies Authority (2 October 2013 and 9 May 2014).

- 6.6 The Tenants' Union of Queensland told the Commission that although the conversation about the impact of marketing campaigns on tenants centred around open house inspections, a number of tenants contacted the Tenants' Union about advertising photographs. The tenants were concerned that their valuables could be seen online by thieves, and that their possessions were being used to showcase landlords' properties at the expense of their privacy.⁷
- 6.7 The Tenants' Union noted that although the prohibition on the use of photographs that contain tenants' possessions means landlords and agents can use photographs that do not contain tenants' possessions in advertisements, it does not mean that landlords or agents have a right to enter to take those photographs. Like the Tenants' Union of NSW, the Tenants' Union of Queensland does not believe a right to enter to take advertising photographs can be implied under its residential tenancy legislation.⁸
- 6.8 Although the Queensland Residential Tenancies Authority has received a number of complaints since the prohibition was introduced, it is of the opinion that none of the allegations has been serious enough to warrant prosecution. Instead, they have been dealt with through education. In most instances, the photographs complained of were not regarded as infringing on the tenants' privacy as they related to innocuous items, such as furniture or outside ornaments. However, some complaints have related to detailed internal photographs, including tenants' electronic items such as flat screen televisions and stereos. Even fewer instances have involved family photographs displayed in the background.⁹
- 6.9 It is the Authority's experience that the offence is usually committed because real estate agency sales staff access photographs from the agency's property management records, which contain photographs that were taken for routine rental property inspections.¹⁰

Tasmania

- 6.10 The *Residential Tenancy Amendment Act 2013* (Tas) (not yet proclaimed)¹¹ will insert the following section into the *Residential Tenancy Act 1997* (Tas):
- An owner of residential premises must not, without the written consent of a tenant, display to the public a photograph of the premises that displays any object in the premises that may identify the tenant or another person or that belongs to the tenant.¹²
- 6.11 The clause notes for the amending legislation explain that this provision was included because 'Photos of personal possessions have the potential to create a security risk by identifying goods or the identity of the tenant.'¹³ Landlords or agents who fail to comply with the new section may receive a fine of up to \$6,500.¹⁴
- 6.12 The Tenants' Union of Tasmania informed the Commission that this change came about following several years of community consultation by the Tasmanian Government. The Government's initial consultation paper focused on clarifying the relationship between tenants and landlords and on minimum standards for rental accommodation. During the course of the Government's negotiations with stakeholders, the Tenants' Union raised the issue of photographs of tenants' possessions being used in advertising and the consent provision was then included.¹⁵

7 Preliminary consultation with the Tenants' Union of Queensland (12 May 2014).

8 Ibid.

9 Preliminary consultation with David Breen, Executive Manager, Policy and Education Services, Residential Tenancies Authority (2 October 2013 and 9 May 2014).

10 Ibid.

11 Tasmania, *Tasmanian Government Gazette*, No 21 378, 30 October 2013, 1737.

12 *Residential Tenancy Amendment Act 2013* (Tas) s 26 inserting s 55A into the *Residential Tenancy Act 1997* (Tas).

13 Clause Notes, *Residential Tenancy Amendment Bill 2013* (Tas) cl 24.

14 Section 26 of the *Residential Tenancy Amendment Act 2013* (Tas) states that the penalty for contravention is a fine not exceeding 50 penalty units. A penalty unit in Tasmania is currently \$130: Tasmanian Department of Justice, *Value of Indexed Amounts in Legislation* (23 April 2014) <http://www.justice.tas.gov.au/legislationreview/value_of_indexed_units_in_legislation>.

15 Preliminary consultation with Tenants' Union of Tasmania (20 March 2014).

- 6.13 Real Estate Institute of Victoria representatives expressed an initial view that enshrining a tenant consent requirement in Victoria's residential tenancy legislation could harm prospective tenants and buyers, as well as landlords and agents. One agent noted that prospective buyers and tenants who look online expect to be able to obtain an accurate and detailed understanding of the current condition and amenity of the properties advertised. If landlords were not able to use photographs to provide this information because tenants objected to their belongings being photographed, this would be disadvantageous to both landlords and prospective buyers and tenants.¹⁶

Notification

- 6.14 An alternative to a consent requirement could be requiring landlords to notify tenants in writing that advertising photographs will be taken and give tenants the opportunity to remove any possessions from view.

Questions

10. Should Victorian law require tenant consent before photographs or videos of tenants' possessions are used for advertising purposes?
11. Should Victorian law allow landlords and agents to take photographs and videos containing tenants' possessions for advertising purposes provided that they first inform the tenant in writing that they will be taking the images and give tenants the opportunity to remove any items from view?
12. Can you suggest any other reforms that might strike the right balance between the desire of landlords to advertise their properties and the concerns of tenants in relation to photographs and videos that contain their possessions?

Remedies

- 34** **Victorian Civil and Administrative Tribunal**
- 35** **Office of the Australian Information Commissioner**

7. Remedies

- 7.1 Depending on the circumstances surrounding the taking or use of advertising photographs and videos that contain their possessions, tenants may be able to seek relief from the Victorian Civil and Administrative Tribunal (VCAT) or the Office of the Australian Information Commissioner.

Victorian Civil and Administrative Tribunal

- 7.2 The aim of VCAT is to provide Victorians with 'a low cost, accessible, efficient and independent tribunal' in which they can resolve their civil and administrative disputes.¹ A VCAT application is currently \$44.90.² However, an applicant may ask to have the fee waived if they cannot afford it.³ Most tenants represent themselves, although they may be entitled to legal representation in certain circumstances.⁴
- 7.3 A recent amendment to the *Victorian Civil and Administrative Tribunal Amendment Act 1998* (Vic) establishes the presumption that, in disputes involving tenants and landlords, VCAT will order the losing party to pay the winning party's fees.⁵ These changes will come into effect by 1 February 2015, if they are not proclaimed earlier.⁶

Restraining order

- 7.4 If a landlord or agent fails to exercise a right of entry in accordance with the *Residential Tenancies Act 1997* (Vic) ('the Act'),⁷ a tenant may apply to VCAT for an order restraining the landlord or agent from exercising their right of entry for a specified period.⁸ Failure to enter in accordance with the Act refers to the circumstances in which landlords and agents are allowed to enter, as well as to the notification and behavioural requirements landlords and agents are obliged to observe.⁹ VCAT may issue a restraining order if 'it is satisfied it is reasonable to do so.'¹⁰

1 Victorian Civil and Administrative Tribunal, *Annual Report 2011/2012* (2012) 2.

2 Victorian Civil and Administrative Tribunal, *VCAT fees effective from 1 July 2013* (24 May 2013) <<https://www.vcat.vic.gov.au/news/vcat-fees-effective-1-june-2013>>.

3 Tenants Union of Victoria, *Going to the Tribunal* (May 2010) <https://www.tuv.org.au/articles/files/resources/Step-by-step_guide_to_going_to_Tribunal_AG_RT_052010.pdf>.

4 Ibid.

5 *Victorian Civil and Administrative Tribunal Amendment Act 2014* (Vic) s 14 inserting div 8A in pt 4 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

6 *Victorian Civil and Administrative Tribunal Amendment Act 2014* (Vic) s 2.

7 See [3.4]–[3.8] for an overview of the rights of landlords and agents to enter their property in Victoria.

8 *Residential Tenancies Act 1997* (Vic) s 91(1).

9 Ibid s 91.

10 Ibid s 91(2)(a).

Breach of duty notice

- 7.5 As discussed in Chapter 4, there appears to be limited scope to argue that the taking or use of photographs or videos that contain tenants' possessions for advertising purposes constitutes a breach of the right to quiet enjoyment. However, if a tenant believed that the particular circumstances of their case amounted to a breach, the tenant could issue their landlord or agent with a breach of duty notice.¹¹
- 7.6 As well as identifying the particular breach and the loss or damage caused, the breach of duty notice must require the landlord to remedy the breach within 14 days (if possible),¹² pay compensation and refrain from committing a similar breach again.¹³ It must also state that if the notice is not complied with, the tenant may apply to VCAT for an order for compensation or compliance.¹⁴
- 7.7 If VCAT is satisfied that the person was entitled to give the notice and that the landlord or agent failed to comply with the notice, it may make an order for the landlord or agent to remedy the breach, pay compensation, and/or refrain from repeating the breach.¹⁵

Office of the Australian Information Commissioner

- 7.8 Before lodging a privacy complaint with the Office of the Australian Information Commissioner (OAIC), a tenant must complain directly to the landlord or agency involved in the dispute. If no response is received or the tenant is dissatisfied with the response, the tenant may then lodge a complaint in writing to the OAIC.¹⁶
- 7.9 Upon receiving a tenant's complaint, the OAIC first ensures the behaviour and organisation concerned fall within the *Privacy Act 1988* (Cth) ('Privacy Act'). If a tenant's complaint concerns personal information and the landlord or agent is subject to the Australian Privacy Principles, the OAIC may decide to investigate the complaint.¹⁷
- 7.10 The OAIC first attempts to facilitate conciliation in order to reach a mutually acceptable outcome. If an agreement is not reached and the OAIC believes the issue has not been adequately dealt with by the organisation involved, the Privacy Commissioner may make a formal decision stating what the organisation must do.¹⁸
- 7.11 Among the steps the organisation may need to take are apologising, changing business practices, training staff and providing compensation. If an organisation undertakes not to repeat the behaviour that breached the Privacy Act, and then repeats the behaviour, the Commissioner can ask for the undertaking to be enforced by a court. The Commissioner may also seek a civil penalty if the privacy breach is sufficiently serious.¹⁹

11 *Residential Tenancies Act 1997* (Vic) s 208.

12 *Ibid* s 207 defines 'required time'. Pursuant to section 207, 14 days applies to the circumstances under consideration. In other circumstances, it may be three days.

13 *Ibid* ss 208(2)(c)(ii)–(d).

14 *Ibid* s 208(2)(e)(i).

15 *Ibid* s 212(1).

16 Office of the Australian Information Commissioner, *Making a privacy complaint* <<http://www.oaic.gov.au/privacy/making-a-privacy-complaint>>.

17 Office of the Australian Information Commissioner, *What happens to your privacy complaint* <<http://www.oaic.gov.au/privacy/what-happens-to-your-privacy-complaint>>.

18 *Ibid*.

19 *Ibid*.

- 7.12 The Office of the Australian Information Commissioner will be disbanded by 1 January 2015. However, the Privacy Commissioner will continue to administer the Privacy Act.²⁰

Question

13. If you have been involved in a dispute about advertising photographs or videos that contained tenants' possessions, how did you resolve the situation? Did you contact an organisation to ask for help and, if so, what happened?

Conclusion

8. Conclusion

- 8.1 This consultation paper sets out the law and practice in Victoria in relation to photographs and videos of tenants' possessions that are used to advertise properties for sale or lease. It also reviews the corresponding legislation of Australia's other states and territories.
- 8.2 The Commission welcomes submissions from all areas of the community, in particular from tenants, landlords, agents and their advocates, as well as anyone with specialist knowledge of residential tenancy law.
- 8.3 You can provide input into the Commission's review of the law governing the taking and use of photographs and videos that contain tenants' possessions for advertising purposes by responding to the questions throughout the paper. These questions are also listed on page 48. Information on how to provide the Commission with a submission is on page v. To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 11 August 2014.**
- 8.4 Your responses to these questions will assist the Commission to determine whether changes are needed to improve the operation of this area of law.

Appendices

- 40** **Appendix A: Right to enter**
- 42** **Appendix B: Quiet enjoyment**
- 44** **Appendix C: Use of photographs and videos for advertising purposes**

Appendix A: Right to enter¹

Jurisdiction	Victoria	New South Wales	Australian Capital Territory	
Act	<i>Residential Tenancies Act 1997</i> (Vic)	<i>Residential Tenancies Act 2010</i> (NSW)	<i>Residential Tenancies Act 1997</i> (ACT)	
To show the property	<p>A right of entry may be exercised if a notice to vacate or a notice of intention to vacate has been given and entry is required to show the premises to a prospective tenant: s 86(1)(a)</p> <p>A right of entry for the purpose above may only be exercised in the period of 14 days before the termination date specified in the notice to vacate or notice of intention to vacate: s 86(2)</p> <p>A right of entry may be exercised if the premises are to be sold or used as a security for a loan, and entry is required to show the premises to a prospective buyer or lender: s 86(1)(b)</p> <p>The tenant has a duty to permit a person exercising a right of entry in accordance with the Act to enter the rented premises: s 89</p>	<p>A landlord or agent may enter to show the premises to prospective tenants, without the consent of the tenant, a reasonable number of times during the period of 14 days preceding the termination of the agreement: s 55(2)(e)</p> <p>If the landlord and tenant fail to agree to show the premises to prospective purchasers, a landlord or agent may enter to show the premises to prospective purchasers not more than twice in a week: s 55(2)(f)</p> <p>A landlord or agent for the sale of the residential premises must make all reasonable efforts to agree with the tenant as to the days and times when the residential premises are to be periodically available for inspection by prospective purchasers: s 53(2)</p> <p>A tenant must not unreasonably refuse to agree to days and times when the residential premises are to be periodically available for inspection by prospective purchasers: s 53(3)</p> <p>A tenant is not required to agree to the premises being available for inspection by prospective purchasers more than twice a week: s 53(4)</p>	<p>The tenant must permit reasonable access to the premises during the period of 3 weeks before the end of the tenancy to allow the inspection of the premises by prospective tenants: sch 1 cl 80</p> <p>The tenant must permit reasonable access to the premises to allow inspection of the premises by prospective purchasers of the premises provided the lessor intends to sell the premises: sch 1 cl 81</p>	
For a genuine purpose	N/A	N/A	N/A	
Manner of entry	A person exercising a right of entry under the Act must do so in a reasonable manner and must not stay or permit others to stay on the rented premises longer than is necessary to achieve the purpose of the entry without the tenant's consent: s 87	A landlord or agent must not stay on the residential premises longer than is necessary to achieve the purpose of the entry to the residential premises: s 57(1)(c)	N/A	

1

All states and territories require the landlord or agent to provide notice of entry in the approved manner to the tenant. The notification requirements vary between the states and territories. These requirements have not been reproduced in the table.

	Queensland	Northern Territory	Western Australia	South Australia	Tasmania
	<i>Residential Tenancies and Rooming Accommodation Act 2008</i> (Qld)	<i>Residential Tenancies Act</i> (NT)	<i>Residential Tenancies Act 1987</i> (WA)	<i>Residential Tenancies Act 1995</i> (SA)	<i>Residential Tenancy Act 1997</i> (Tas)
	<p>The landlord may enter the premises to show the premises to a prospective purchaser or tenant: s 192(1)(f)</p> <p>The lessor or agent may enter the premises to show it to a prospective purchaser or tenant only if a reasonable time has elapsed since a previous entry by the lessor or agent: s 195(4)</p> <p>The lessor or agent must not allow a prospective tenant to enter the premises unless accompanied by the lessor or agent, unless the tenant agrees: ss 197(2)–(3)</p> <p>The lessor or agent must not allow a prospective buyer to enter the premises unless accompanied by the lessor or agent, unless the tenant agrees: ss 198(3)–(4)</p> <p>The lessor or agent must not conduct open house inspections without the tenant's written consent: s 204(1)(b)</p>	<p>The landlord may enter the premises for the purpose of showing the premises to prospective tenants or purchasers if the entry is made during the 28 days before the termination of the agreement: s 74(1)(b)</p> <p>The landlord may enter the premises to show the premises to prospective tenants or purchasers on no more than a reasonable number of occasions: s 74(3)</p> <p>An entry into the premises under this Part must be carried out in the presence of the tenant, unless the tenant has waived this right in writing, has unreasonably refused to be present or fails to attend at the agreed time: s 76(1)</p>	<p>The lessor may enter the premises for the purpose of showing the premises to prospective tenants, at any reasonable time and on a reasonable number of occasions during the period of 21 days preceding the termination of the agreement: s 46(2)(f)</p> <p>The lessor may enter the premises for the purpose of showing the premises to prospective purchasers, at any reasonable time and on a reasonable number of occasions: s 46(2)(g)</p> <p>If the lessor exercises a right of entry to show the premises to prospective tenants or purchasers, the tenant is entitled to be on the premises during the entry: s 46(6)</p>	<p>The landlord or agent may enter the premises to show the premises to prospective tenants during the period of 28 days preceding the termination of the agreement but only on a reasonable number of occasions: s 72(1)(f)</p> <p>The landlord or agent may enter the premises to show the premises to prospective purchasers, on not more than 2 occasions in any 7-day period, but only at a time previously arranged with the tenant or, if agreement cannot be reached, a time within normal hours after giving the tenant reasonable notice: s 72(1)(g)</p> <p>If the tenant has indicated to the landlord that he or she wishes to be present during the period when the landlord or agent is at the premises, the landlord or agent may not enter the premises unless a reasonable effort has been made 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 persons entering the premises): s 72(2)</p>	<p>An owner of residential premises may enter the premises without the approval of the tenant to show the premises to one prospective tenant or purchaser only and any persons accompanying the prospective tenant if a notice to terminate or notice to vacate has been given or within 28 days of the expiry of the residential tenancy agreement. In both cases entry must take place on not more than 1 occasion on any day and on not more than 5 days in any week: ss 56(4), (4B)</p> <p>An owner who wishes to let or sell residential premises may, with the prior written approval of the tenant, by notice to the public, invite prospective purchasers or tenants to inspect premises in the presence of the owner: ss 56(4A), (4C)</p>
	N/A	N/A	N/A	The landlord or agent may enter the premises for some other genuine purpose: s 72(1)(h)(i)	N/A
	N/A	N/A	The lessor exercising a right of entry under the Act must do so in a reasonable manner and must not, without the tenant's consent, stay or permit others to stay on the premises longer than is necessary to achieve the purpose of the entry: ss 46(7)(a)–(b)	N/A	N/A

Appendix B: Quiet enjoyment²

Jurisdiction	Victoria	New South Wales	Australian Capital Territory
Act	<i>Residential Tenancies Act 1997 (Vic)</i>	<i>Residential Tenancies Act 2010 (NSW)</i>	<i>Residential Tenancies Act 1997 (ACT)</i>
Relevant provisions	<p><i>Section 67—Quiet enjoyment</i></p> <p>A landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement: s 67</p>	<p><i>Section 50—Tenant’s right to quiet enjoyment</i></p> <p>A tenant is entitled to quiet enjoyment of the residential premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title to that of the landlord: s 50(1)</p> <p>A landlord or landlord’s agent must not interfere with, or cause or permit any interference with, the reasonable peace, comfort or privacy of the tenant in using the residential premises: s 50(2)</p>	<p><i>Tenant’s use of the premises without interference</i></p> <p>The lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises: sch 1 cl 52</p> <p>Unless otherwise agreed in writing, the tenant has exclusive possession of the premises, as described in the agreement, from the date of commencement of the tenancy agreement provided for in the agreement: sch 1 cl 53</p> <p><i>Section 71—Reduction of existing rent</i></p> <p>ACAT must order a rent reduction if the tenant’s use or enjoyment of the premises has diminished significantly as a result of interference with the tenant’s quiet enjoyment of the premises or the tenant’s ability to use the premises in reasonable peace, comfort and privacy by the lessor: s 71(1)(c)</p>

	Queensland	Northern Territory	Western Australia	South Australia	Tasmania
	<i>Residential Tenancies and Rooming Accommodation Act 2008</i> (Qld)	<i>Residential Tenancies Act</i> (NT)	<i>Residential Tenancies Act 1987</i> (WA)	<i>Residential Tenancies Act 1995</i> (SA)	<i>Residential Tenancy Act 1997</i> (Tas)
	<p><i>Section 183—Quiet enjoyment</i></p> <p>The lessor must take reasonable steps to ensure the tenant has quiet enjoyment of the premises: s 183(1)</p> <p>The lessor or lessor's agent must not interfere with the reasonable peace, comfort or privacy of the tenant in using the premises: s 183(2)</p>	<p><i>Section 65—Tenant to be able to use and enjoy property</i></p> <p>The tenant is entitled to quiet enjoyment of the premises without interruption by the landlord or a person claiming under the landlord or with superior title to the landlord's title: s 65(a)</p> <p>The landlord will not cause an interference with the reasonable peace or privacy of a tenant in the tenant's use of the premises: s 65(b)</p>	<p><i>Section 44—Quiet enjoyment</i></p> <p>The tenant is to have quiet enjoyment of the premises without interruption by the lessor or any person claiming by, through or under the lessor or having superior title to that of the lessor: s 44(2)(a)</p> <p>The lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises: s 44(2)(b)</p> <p><i>Section 59E—Interference with quiet enjoyment</i></p> <p>A lessor who causes or permits interference with the reasonable peace, comfort or privacy of the tenant in the tenant's use of the premises commits an offence: s 59E(1)</p>	<p><i>Section 65—Quiet enjoyment</i></p> <p>The tenant is entitled to quiet enjoyment without interruption by the landlord or a person claiming under the landlord or with superior title to the landlord's title: s 65(1)(a)</p> <p>The landlord will not cause or permit an interference with the reasonable peace, comfort or privacy of the tenant in the tenant's use of the premises: s 65(1)(b)</p> <p>If the landlord causes or permits interference with the reasonable peace, comfort and privacy of the tenant in the tenant's use of the premises in circumstances that amount to harassment of the tenant, the landlord is guilty of an offence: s 65(2)</p>	<p><i>Section 55—Quiet enjoyment</i></p> <p>A tenant has the right of quiet enjoyment without interference by the owner of the premises: s 55(1)</p> <p>An owner of residential premises must not interfere with the reasonable peace, comfort and privacy of the tenant in using those premises: s 55(2)</p>

Appendix C: Use of photographs and videos for advertising purposes

Jurisdiction	Victoria	New South Wales	Australian Capital Territory	
Act	No legislation governing this circumstance	No legislation governing this circumstance	No legislation governing this circumstance	
Relevant provisions	N/A	N/A	N/A	

	Queensland	Northern Territory	Western Australia	South Australia	Tasmania
	<i>Residential Tenancies and Rooming Accommodation Act 2008</i> (Qld)	No legislation governing this circumstance	No legislation governing this circumstance	No legislation governing this circumstance	<i>Residential Tenancy Amendment Act 2013</i> (Tas) (not yet proclaimed)
	Unless the lessor or agent has the tenant's written consent, the lessor or agent must not use a photo or other image of the premises in an advertisement if the photo or image shows something belonging to the tenant: s 203	N/A	N/A	N/A	An owner of residential premises must not, without the written consent of a tenant, display to the public a photograph of the premises that displays any object that may identify the tenant or another person or that belongs to the tenant: <i>Residential Tenancy Amendment Act 2013</i> (Tas) s 26 inserting section 55A to <i>Residential Tenancy Act 1997</i> (Tas)

Questions

Questions

Current practice

1. Are you aware of an instance in which a landlord or agent failed to adequately notify a tenant that advertising photographs or videos containing their possessions would be taken inside their home? If so, describe the incident and outcome.
2. Do you know of an instance in which a tenant was concerned that their possessions could be seen in advertising photographs or videos? If so, why was the tenant concerned?
3. Do you know of an instance in which a tenant has been robbed or physically harmed following the publication of advertising photographs or videos that contained their possessions? If so, describe the incident.
4. The Commission's preliminary investigation revealed that tenants are concerned about privacy, risk of theft and risk of personal harm. Do you know of other concerns tenants might have in relation to advertising photographs or videos that contain their possessions?
5. Do you know of an instance in which a tenant has refused to have photographs or videos of their possessions used in an advertising campaign? If so, what was the outcome of the dispute, and did it impact negatively on the landlord?
6. Can you suggest a workable, standard practice that could be adopted by landlords and agents advising tenants that advertising photographs and videos will be taken inside their homes?

Right to enter

7. Does the law in relation to the right to enter to show the property to a prospective tenant or buyer need clarification? Should landlords and agents have a right to enter to take photographs and videos for advertising purposes, or should the right be restricted to visits in person?

Privacy

8. Do you consider that it is an invasion of the tenant's privacy to take or use advertising photographs or videos of tenants' possessions without their consent?
9. How should the law protect tenants' privacy in relation to photographs or videos that contain tenants' possessions?

Consent and notification requirements

10. Should Victorian law require tenant consent before photographs or videos of tenants' possessions are used for advertising purposes?
11. Should Victorian law allow landlords and agents to take photographs and videos containing tenants' possessions for advertising purposes provided that they first inform the tenant in writing that they will be taking the images and give tenants the opportunity to remove any items from view?
12. Can you suggest any other reforms that might strike the right balance between the desire of landlords to advertise their properties and the concerns of tenants in relation to photographs and videos that contain their possessions?

Remedies

13. If you have been involved in a dispute about advertising photographs or videos that contained tenants' possessions, how did you resolve the situation? Did you contact an organisation to ask for help and, if so, what happened?



Victorian
Law Reform
Commission

**Photographing and Filming
Tenants' Possessions for
Advertising Purposes**

CONSULTATION PAPER

GPO Box 4637
Melbourne
Victoria 3001
Australia

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone

+61 3 8608 7800

Freecall

1300 666 555 (*within Victoria*)

Fax

+61 3 8608 7888

Email

law.reform@lawreform.vic.gov.au

www.lawreform.vic.gov.au

Printed on 100% recycled paper