

Challenging Terms of a Tenancy Agreement

Background

Tenants may seek advice on whether certain terms of their (proposed) Tenancy Agreement are valid or enforceable. Often tenants will seek advice on a term of a Tenancy Agreement that they are considering signing, but more commonly the issue will arise when tenants are attempting to avoid liability for non-compliance with the term by challenging its validity.

What is the issue?

When entering into a Tenancy Agreement, tenants may be asked to sign a written contract which contains terms and conditions that impose obligations beyond those provided in the *Residential Tenancies Act 1997*(Vic) (the 'RT Act'). Examples include forbidding a tenant to keep a pet at the premises, requiring a tenant to steam clean carpets prior to vacating, or seeking to force a tenant to continue paying rent until the end of a fixed term Agreement in the event of lease breaking.

Additionally, some clauses may be challenged on the basis that they are 'unjust' or 'unfair' even though they do not curtail rights provided under the RT Act. Many tenants have entered into agreements containing such terms, but do not wish to be bound by them and may have breached the terms during the tenancy.

The particular circumstances of each case will vary, as will the possible grounds to challenge the term in question. It may be that the tenant wishes to challenge a term of the agreement at various times, including:-

- Before entering into the Tenancy Agreement;
- After signing the agreement but before the issue arises as a substantial dispute;
- At the time when the tenant intends to act in breach of the term or has already breached the term; or
- At the time that the landlord takes action in an attempt to enforce the term.

For example, in the case of a 'no pets clause' included as a term in the Tenancy Agreement, a tenant may seek to have this term declared void on the basis of it being invalid, harsh, unfair or unjust either:-

- As soon as the agreement is signed;
- At the time when the tenant is considering acquiring a pet or has acquired a pet; or
- After the landlord takes action to require the tenant to remove the pet.



What should you do?

There are a number of provisions in the RT Act attempting to redress the power imbalance between a landlord and tenant when entering into a contract. Additionally, the 2002 VCAT decision of Director of Housing v



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Young held that the provision of rental housing is a 'service' within the meaning of the Fair Trading Act (1999) (Vic) (the 'FT Act'). Since this time tenants have enjoyed the added consumer protections offered in relation to 'unjust' or 'unfair' terms in a Tenancy Agreement.

The following paragraphs offer a starting point for determining if there may be a basis for challenging a particular term of a Tenancy Agreement.

1. Invalid Terms: Section 27 RT Act

Section 27 states that a term of a Tenancy Agreement is invalid if it has the effect of, or purports to exclude, restrict or modify any rights provided under the RT Act. An example of this would be if a lease included a term stating that a tenant cannot, under any circumstances, sublet the property.

This is a very important section as it specifically prevents landlords from 'contracting out' of rights provided to tenants under the RT Act. A tenant need not apply to have the term declared invalid, but rather can wait until the landlord attempts to seek a remedy under that provision, which will not be granted should it curtail a tenant's rights under the RT Act.

Standard form Tenancy Agreements often contain terms which would be invalid pursuant to section 27. An example is the requirement to steam clean carpets prior to vacating. The RT Act only provides that premises must be left 'reasonably clean'. If carpets are brought to a 'reasonably clean' standard by merely vacuuming, then that is all that is required by a tenant. If a landlord attempts to rely on the provision in the lease requiring steam cleaning, a tenant may challenge that provision and ask the Tribunal to declare it invalid as it places a more onerous obligation on the tenant than does the RT Act.

2. Harsh and Unconscionable Terms: Section 28 RT Act

Section 28 permits a tenant to apply to the Tribunal for an Order declaring invalid (or varying) a term of a Tenancy Agreement that is harsh or unconscionable. Unlike section 27, a tenant must be proactive in challenging such a term by applying to the Tribunal prior to or at the time the landlord is attempting to rely on it.

It is not sufficient that the term places a difficult requirement on the tenant. Rather, the tenant must have agreed to the term due to an abuse of power or an undue advantage by the landlord. An unconscionable term commonly requires the existence of a special disadvantage such as illness, old age, impaired faculties, drunkenness or illiteracy, which is then taken advantage of by the landlord.

3. Prohibited Charges: Sections 51 and 84 RT Act

Section 51 prohibits various charges, regardless of whether they were demanded or merely received by the landlord. The prohibited charges include receiving money for:

- Making, continuing or renewing a Tenancy Agreement;
- Permitting a tenant to inspect proposed rented premises; or
- Issuing a rent card or establishing direct debit facilities for payment of rent.

The purpose of this section is to prohibit practices which would impose financial burdens upon a tenant beyond payment of rent.

Section 84 prohibits a landlord from demanding or receiving payment in order to consent to a proposed assignment or sub-letting of the premises. However section 84(3) permits a landlord to recover any costs incurred by creating a written assignment of a Tenancy Agreement. Care should be taken with this distinction. The landlord must not make their consent conditional upon payment. However, if a receipt is provided demonstrating that a landlord paid an estate agent to prepare a new Tenancy Agreement or a written assignment as a result of the request by the tenant, then a tenant may be compelled to reimburse the landlord for that amount.

4. Unjust Terms: Section 109 FT Act

The Tribunal has a very wide power under the FT Act as well as the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (the 'VCAT Act') to declare any term of a Tenancy Agreement void or otherwise vary a term of the contract to avoid injustice.

Section 109 of the FT Act specifically empowers the Tribunal to invalidate a term of the Tenancy Agreement on the basis that it is 'unjust'. If a tenant is seeking to avoid liability under a term of their Tenancy Agreement which they believe is 'unjust', the Tribunal must have regard to factors enumerated at s109(2) FT Act. The factors include whether the term was accurately explained to and agreed to by the tenant, the relative bargaining power of the landlord and tenant, whether the term is usually found in the type of Tenancy Agreement, the justification of the term as well as the consequences and relative hardships to the parties if the term is enforced.

An example might be where a tenant signs a Tenancy Agreement only to find at a later date that a landlord is attempting to rely on a provision permitting the landlord to increase the rent during the fixed term. Such a term is permitted under the RT Act, however if the tenant did not understand what they were signing, and all other factors at s109(2) FT Act are considered, then the tenant may be able to argue that the term is unjust and should be declared invalid.

5. Unfair Terms: Part 2B FT Act

As a Tenancy Agreement is a 'consumer contract', the terms of the Agreement are subject to Part 2B of the FT Act which empowers Consumer Affairs Victoria to seek a declaration that a particular contractual term is void (and invalid) on the basis that it is 'unfair'.

If a tenant believes a landlord is attempting to rely on an unfair term of the Tenancy Agreement, they must complain to Consumer Affairs, and request that Consumer Affairs apply to the Tribunal for an injunction preventing the landlord from relying on the term, or a declaration that the term is unfair and cannot be enforced.

A term of a contract will be considered unfair if causes a significant imbalance in the parties' rights and obligations, to the detriment of the tenant. There are many considerations listed under s32X which should be considered if a tenant believes a term may be unfair. Essentially, the term will be unfair if it empowers the landlord to exercise rights which are denied to the tenant. An example may be a term stating a tenant is prohibited from claiming compensation, or permitting the landlord but not the tenant from renewing the Agreement.

There is overlap with s27 RT Act in this area. Given the necessary involvement with Consumer Affairs to enact Part 2B FT Act, it will often be easier for a tenant to use s27 RT

Act if possible. Part 2B FT Act may have more of an overarching power as the Tribunal may declare systemically unfair terms invalid in all Tenancy Agreements.

If applicable, submissions should be made to the Tribunal using alternative arguments of both the RT and FT Acts, seeking an Order that a particular term of a Tenancy Agreement be rendered invalid and therefore unenforceable.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific matter, you should contact the Tenants Union on (03) 9411 1444.

Tenants Union Legal Team

References:

RT Act 1997, ss. 27, 28, 51, 84.

FT Act 1999, ss. 32U – 32ZD, 109

VCAT Act 1998, s. 124