

Tenancy agreements in rooming houses

Background

The *Residential Tenancies Act 1997* (the Act) provides that a rooming house resident and rooming house owner may enter a tenancy agreement in relation to the room occupied by the resident.

While the tenancy agreement continues the rooming house provisions of the Act do not apply to the resident's occupation of the room, rather the residential tenancy provisions apply. The rooming house provisions may still apply to the common areas of the rooming house.

However, the Act also provides that a rooming house resident and a rooming house owner may enter into another kind of agreement (not being a tenancy agreement) specifying the terms and conditions of a residents use and enjoyment of the rooming house.

Whether the rooming house provisions or the tenancy provisions apply to a resident will determine important matters such as the minimum period of notice required when the resident intends to vacate. In many cases it may be difficult to determine whether the rooming house provisions or the tenancy provisions apply to a particular resident.

What are the issues?

When a rooming house resident has signed a written agreement it is important to determine whether the tenancy provisions apply (in which case the person is a tenant), or the rooming house provisions (in which case the person is a resident).

On general principles the rooming house provisions apply when a person with the agreement of the rooming house owner occupies a room in a rooming house as their only or main residence. This means that four or more people may occupy rooms in the building, and people occupy these rooms and share facilities with others living in the house (such as a kitchen, laundry or toilet/bathroom). No written agreement is required and a resident has a right under the Act to reside in the room and to use the facilities in the rooming house.

The Act [s94 (1A)] allows a rooming house resident and rooming house owner to enter a tenancy agreement in relation to the room occupied by the resident. This has the effect of excluding the rooming house provisions in relation to that room while the tenancy agreement continues.

The Act [s3] defines a tenancy agreement as:

...an agreement, whether or not in writing and whether express or implied, under which a person lets premises as a residence.

Ordinarily a grant of **exclusive possession** would be required to establish a lease. See *Radaich v Smith [1959] HCA 45; (1959) 101 CLR 209 (7 September 1959)*



Alternatively, a rooming house resident and rooming house owner may enter;

...an agreement (not being a tenancy agreement) specifying the terms and conditions of the resident's use and enjoyment of the rooming house.

The main differences between the rooming house and tenancy provisions are outlined in the table (below).

| | Resident | Tenant |
|---|---|---|
| Notices (including Notice to Vacate) | Must be addressed to a 'resident'. | Must be addressed to a 'tenant'. |
| Minimum period of notice of intention to vacate | 2 days (may be oral) | 28 days if periodic tenancy, tenant generally liable for lease breaking if they terminate before end of fixed term. |
| Minimum rent arrears before Notice to Vacate may be given | 7 days | 14 days |
| Assignment | Residency right cannot be assigned | Tenancy agreement may be assigned with written consent or if VCAT determines that consent is not required |
| Postponement of warrant of possession | No power for Tribunal to postpone warrant | Tribunal may postpone warrant for up to 30 days based on hardship |
| Eviction | May be given a Notice to Vacate at any time | Generally cannot be evicted during a fixed term tenancy |

The Victorian Civil and Administrative Tribunal (the Tribunal) and its predecessor the Residential Tenancies Tribunal, have determined there to be a tenancy agreement in many different circumstances. There has been no clear guidance about what distinguishes a tenancy agreement from a residency agreement in a rooming house.



What should you do?

1. If the person has signed a written agreement, determine whether it is a tenancy agreement. If it is a tenancy agreement the rooming house provisions do not apply to the room occupied by the person but do apply to the shared facilities and the rest of the rooming house.
2. The essential requirement for a valid tenancy agreement is that the tenant has **exclusive possession** of the premises in exchange for rent. Where the room, for example, can only be accessed through shared areas there is an argument that the resident does not have exclusive possession of the room and therefore there cannot be a valid tenancy agreement.
3. Where an agreement has a **fixed term** a resident may argue that they are still entitled to give 2 days notice to vacate [s274] irrespective of the fixed term. Under the Act a person who meets the definition of rooming house resident is entitled to give 2 days notice to vacate [s274]. A term of a residency agreement that purports to exclude, modify or restrict the exercise of a right conferred by the Act is invalid under s94(2) of

the Act. This argument is stronger if the property is treated as a rooming house, for example, if it is registered with local council, if house rules are displayed and the owner has given notices addressed to the 'resident'.

4. If the Tribunal finds that the agreement is a valid tenancy agreement then the tenant may be liable to pay compensation for lease breaking. The tenant should ensure that the landlord has mitigated their loss by re-tenancing the room as soon as possible. Most rooming houses do not have an agent so a re-letting fee may not apply.
5. Therefore the basic advice is:
 - a) The person may be bound by the fixed term of a term of a tenancy agreement, in which case they would be liable for lost rent if they leave before the end of the fixed term.
 - b) Based on the arguments above the person may argue that they are not bound by the fixed term of the agreement.
 - c) If the person decides to vacate during a fixed term, they should give 2 days notice (which may be oral) and not pay rent after they vacate. If the rooming house owner claims compensation for lease breaking the person could argue the points outlined above.
 - d) Alternatively, before vacating the resident could make a general application to the Tribunal for declaration that they are not bound by the fixed term of the agreement for the reasons outlined above.
6. In other circumstances it may be in the resident's interests to argue that they are a tenant rather than a resident. For example, the resident may want to argue that a Notice to Vacate addressed to them as a resident, or that any notice alleging breach of their duties as a resident, is not valid.

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 case and you require advice, then you should contact us on **(03) 9411 1444**

Tenants Union Legal Team

References

Residential Tenancies Act 1997 ss3, 27, 92, 94, 274

Radaich v Smith [1959] HCA 45; (1959) 101 CLR 209 (7 September 1959)