

Rescinding a tenancy agreement due to misrepresentation

Background

According to s 216 of the RTA, a tenancy agreement must terminate in accordance with the Act. However, the RTA has concurrent jurisdiction with the Australian Consumer Law and Fair Trading Act 2012 (ACLFTA). The ACLFTA empowers VCAT make a range of orders including **rescission**, which is distinct from termination.

This Practice Note discusses misrepresentation, and misleading and deceptive conduct and the circumstances in which **rescission** may be available to a tenant. Whether **restitution** is available as a remedy for a misrepresentation or misleading and deceptive conduct will depend on the all circumstances and ultimately VCAT's discretion.

Misrepresentation and misleading and deceptive conduct are complex doctrines of law and are regulated by relatively new legislation. Thus, if a serious misrepresentation or misleading or deceptive conduct has occurred and a tenant is seeking to terminate the contract, legal advice should be sought immediately.

Alternatively, if a party is seeking to break their lease due to a misrepresentation and has no other alternative, then there is little harm in attempting to rescind in preference to terminating which may give rise to a claim for lease break.

Rescission as an alternative to termination

One of the most common applications of the doctrine of rescission is to bring a contract to an end due to a misrepresentation. This is known as an actionable misrepresentation with the remedy of rescission.

Rescission is provided for specifically in s184(2)(g) of the ACLFTA and enables VCAT to make orders rescinding a contract.

In a residential tenancy context, the main benefit of rescission is that it precludes the landlord from claiming lease breaking costs. Effectively, rescission totally discharges the parties from the duty to perform their contractual obligations.

Further, the consequences of a misrepresentation may include the remedy of *rescission ab initio*. In this case the parties are treated as if the agreement never existed and they may be entitled to *restitution* (to be put back into the position prior to entering into the agreement).

A remedy of rescission and subsequent claim for restitution may entitle the tenant claim reasonable compensation, such as moving costs, interim accommodation costs, utility connection and disconnection fees where applicable, and other losses caused by the misrepresentation. It may also include rent paid under the agreement until the rescission. These considerations will vary from case to case.

When can you rescind a tenancy agreement?

Parties can generally rescind a contract where there has been a fraudulent misrepresentation, and possibly a reckless/negligent misrepresentation. It is important to note that the latter has largely been replaced by the Australian Consumer Law's prohibition on misleading and deceptive conduct, which can impose no fault liability (the conduct does not have to be fraudulent or intentional to establish liability). There may be exceptions due to agency and issues of knowledge.

For the purposes of this practice note, the parties are identified as the tenant and landlord and assume a misrepresentation has been made by a landlord, or their agent, to a tenant.

It is important to note the same principles of misrepresentation and misleading and deceptive conduct may apply to community housing, the Director of Housing, rooming houses, caravan parks and part 4A dwellings.

When rescinding an agreement because of a misrepresentation, the burden of proof vests with the tenant to show that there has been a clear and unequivocal communication of their decision to rescind and to evidence that a misrepresentation sufficient to merit the rescission has occurred.

The tenant's conduct must be consistent with the decision to rescind the agreement. If the tenant continues to act as if bound by the contract or gain benefit from contract then the landlord can increasingly engage the defence of *affirmation* and argue that the tenant has affirmed the contract. If affirmation occurs then the tenant may be rendered liable to a claim for lease break if they later return the keys on the basis of an alleged rescission. Please note, while affirmation may diminish the prospects of rescission and restitution, it does not preclude an application for seeking other remedies such as rectification or damages.

Quality of the misrepresentation

Firstly, the landlord will be liable for the representation by their agents. If the landlord suffers loss because of the misrepresentation, then this is matter for the landlord to take remedial action against their agent.

Secondly, if the tenancy agreement is in the course of trade or commerce, then it may be possible to engage the misleading and deceptive prohibitions of the ACL via the ACLFTA to establish misleading and deceptive conduct, which arguably imposes a higher threshold than the common law principles of misrepresentation.

Where possible, arguments are best framed through the misleading and deceptive provisions of the ACL as compared to citing the ACLFTA and relying on common law misrepresentation. For a fuller discussion refer to our previous Practice Note 1302 .

The following are important principles to observe with respect to misrepresentation and it is important to note the statutory provisions in Part 3.1 of the ACLFTA, as this also contemplates innocent misrepresentation.

1. The decision to rescind must be communicated

While not required, it is highly recommended that parties communicate their rescission in writing (see the What should you do? section below).

2. A false statement, whether innocent or fraudulent does not by itself give rise to a right to rescind.

The Tribunal must examine the relevant legislation and apply the plain wording of the section and determine whether the relevant conduct is, in all the circumstances, constitutes misleading and deceptive, or a misrepresentation.

It may be *possible*, that silence or a failure to disclose can amount to a misrepresentation. However, at this time this principle has not been tested in the context of a tenancy. Please note, deceptive conduct for a failure to disclose is distinct from a change of mind, altering of position or inadvertent non-disclosure.

The silence must be able to constitute conduct by way of omission. For example, the landlord has made all relevant preparations to commence selling a property prior to signing and fails to disclose, as compare to a landlord that chooses to sell his property at some time after the signing of the tenancy agreement.

Similarly, it may be possible to rescind a contract where the tenant makes a unilateral mistake. In this context a unilateral mistake is where the tenant makes a statement about a material fact which is incorrect and a landlord or agent, who has knowledge to the contrary, fails to correct the mistake after becoming aware of the tenants misapprehension. This omission then creates an advantage in favour of the landlord.

3. The misrepresentation must be about a critical aspect of the agreement or premises

It is important that the reason for the misrepresentation is not trivial or ancillary. It generally should form part of what could reasonably be identified as a *condition* of the agreement; A central or critical aspect of the contract. As a principle of contract law generally, a breach of condition will entitle a party to rescind, where as a breach of warranty will only entitle a party to compensation or damages. What constitutes a condition and a warranty will vary from case to case.

The Tribunal will have discretion in exercising its power and may rescind in whole or in part the agreement. It may elect to award damages in preference allow rescission, and this may be off set against a claim for lease break. The tribunal will most likely look to balance the hardship of parties in light of the gravity and effect of the error caused or likely to be caused by the misrepresentation.

Under the current application of misleading and deceptive conduct provisions and common law, the misrepresentation does not need to be proportionate to the detriment of rescinding the contract. However, the Tribunal's discretion can be examined and tempered in the context of the inducement, and the reasonableness of a tenant's conduct in relying on the statements and RTA principles to for an applicant to mitigate loss.

4. The representation must have induced the tenant to enter into the agreement

It does not have to be the dominant or principle reason the tenant entered into the contract, but it must be identified as being at least a causative factor that induced the party to enter into the agreement.

5. It is reasonable to rely on the representation

The Tribunal will take into account all the circumstances to determine if it was reasonable for the tenant to rely on the representations; whether the reasonable person would have been roused to some suspicion, whether the misrepresentation had later been corrected, and myriad of other factors about the veracity and content of the statement.

6. Right of Inspection – just because inspected, does not preclude misrepresentation

If a tenant checks a representation by the landlord or agent and the falsity is not discovered, then a party may still be entitled to rescind agreement if the falsity would not be apparent to the reasonable person in the circumstances.

7. The representation must relate to material facts

It is not sufficient that a representation be a matter of opinion, it must be of some material fact. The material fact may not only be about the physical structure and properties of the building, it may also be about substantive rights, such as car parking, the ability to have a pet or other rights critical to people's quiet enjoyment which contributed to the inducement.

Statements of predictions, intentions, future promises or offers should generally be treated as non-binding, and caution exercised in acting in reliance of such statements.

It is also important to distinguish a misrepresentation or misleading conduct, from a mutual mistake where the tenant misunderstands a factual representation made by a landlord.

8. Must the misrepresentation be fraudulent or at least reckless in nature?

Misleading conduct has traditionally been considered as objective conduct (conduct reasonably likely to mislead), and deceptive has been interpreted more subjectively (conduct intentionally made to mislead) and therefore fraudulent.

However, thanks to the ACTFTA the focus on establishing liability is more on how the tenant could have reasonably been assumed to have responded to the conduct.

The effect of misleading and deceptive conduct, as distinct from mere common law misrepresentation is that it imposes an absolute obligation not to lead others into error. Certainly, this is the case when deal directly with a landlord if they are acting in trade and commerce. However, the limited knowledge of the real estate agent invite ameliorating considerations regarding the intentionality of the conduct. Thus negligent misstatement, or reckless misrepresentations issues may arise under misrepresentation rather than misleading and deceptive conduct.

These are still issues that require more testing at VCAT.

In circumstances where there is a private landlord, it will be more important to establish the jurisdiction of the ACLFTA as acting in trade or commerce to be able to engage the prohibitions of misleading and deceptive conduct.

In circumstances, where there is a real estate agent, then the conduct and standard to which they can be held to account is reasonable standard expected of their profession as described by *Estate Agent Act 1980* and common law principles of agencies which may include fiduciary duties to their principal.

9. The misrepresentation led the party into error

As the misrepresentation has to have been about a material fact, it follows the conduct must lead them into error, and that as a result of this error, the tenant suffers loss. Accordingly, the normal principles of causation and various contemporary interpretations of remoteness still apply.

In summary, the question the Tribunal consider two complementing questions

- > What is the loss caused by the error for the tenant acting in reasonable reliance of the misrepresentation?
- > Because of the error, is it reasonable for tenant, upon discovery of the truth to be returned to their position prior to entering into the contract?

The fact that the party may wish to terminate for reasons other than the misrepresentation is essentially a windfall for the tenant and reflects the prophylactic nature of the ACLFTA. But it is essential that the party can still show the significance, effect and detriment of the error caused by the misrepresentation.

10. Continuing effect of the Representation

A representation is presumed to continue in operation until the landlord or agent indicates that the misrepresentation no longer holds true.

Defences to Misrepresentation

If a tenant fails to demonstrate the above elements, it is likely to substantially weaken their ability to successfully rescind a contract.

The following are relevant factors to consider with respect to possible defences or weakness in an application or effort to rescind a contract:

1. Affirmation

With the passage of time, it is implicit that a contract is taken to be increasingly affirmed. Thus the time of discovering the truth to a misrepresentation will be relevant. A secondary time limit may also occur with respect to the tenant's actual knowledge of the right to rescind. The effect of this will vary from case to case.

Fundamentally, it is important that a tenant does not waiver in their decision to rescind, to do so would leave the landlord in an indefinite and uncertain position, not knowing whether the tenancy has or is expected to end. There is no specific time limit to this, but it should be treated as a matter of urgency.

2. Prior Termination

A tenant cannot terminate an agreement and then later seek to retrospectively rescind the same agreement upon later discovering the falsity of a representation.

3. Exclusion clauses

The tenancy agreement may include exclusion clauses seeking to render void any statement made save for the contents of the agreement. These clauses should be read subject to the Unfair Contract provisions of the ACLFTA, and legal advice sought.

4. Contributory conduct

For example, statements by builders, to warrant that premises are compliant with the Building Code, which are in fact not compliant. The effect of these types of precursor misstatement will vary and will be examined in the light of all of the relevant circumstances

How do you rescind a tenancy agreement?

Rescission can be used both as a cause of action (generally to claim compensation by way of restitution) and as a defence (not typically, but in the context of the landlord making a lease break claim, it operates as a tenable counter claim – as a matter of best practice, the tenant should file a counter claim under ACLFTA).

1. Notice to Landlord stating that you are rescinding the agreement

An order for rescission is not required to rescind a contract, but caution should be exercised where a tenant simply wishes to give a notice to landlord in this manner. This action is most appropriate where a tenant has not yet moved in but has become aware of a misrepresentation after signing an agreement.

It is also important to note similar RTA provisions in section 226. Please note, misrepresentation does not raise the same as s226 with respect to whether or not the tenant has taken possession or commenced occupation.

Generally, a notice to landlord should be given stating the precise reason (the misrepresentation) they are seeking to rescind and the fact they are rescinding the agreement. It is also highly desirable to provide evidence of the misrepresentation with the notice. If a party does not have evidence of the misrepresentation, then it is desirable to first apply to VCAT to have the matter adjudicated or risk lease breaking costs.

If a notice to landlord is given stating the tenant is rescinding the agreement, the notice is used as a defence against lease breaking. It is highly recommended in the giving of the Notice to Landlord to state alternative grounds in addition to the misrepresentation where available. This is done simply stating that the tenant is rescinding and describing the misrepresentation and then using the phrase “in the alternate”, and stating thereafter in the same notice the alternative reasons for termination.

2. Tenants may apply to the Tribunal seeking a declaration pursuant to section 452, and the ACLFTA, that the tenant has a right to rescind the agreement

Generally, it is of less financial risk with respect to a misrepresentation to seek a declaration of the right to rescind, or an order that actually rescinds the agreement.

However, parties must turn their mind to the fact that with the passing of time, the ability to rescind the agreement successfully decreases.

Save for section 501 of the RTA, which makes it an offence to misrepresent a right under the Act or the tenancy agreement, the Act does not specifically contemplate misrepresentation as a basis for ending a tenancy.

When seeking to rescind a tenancy agreement via VCAT, a tenant should complete the general application form and cite both the RTA and ACLFTA (or FTA) so that both jurisdictions are invoked. The application should cite section 452 of the RTA and 184 of the ACLFTA. The orders sought should either be for an order declaring that the Tenant is entitled to rescind or an order of rescission to terminate the agreement. The Member may consider relevant the continued possession of keys in the circumstances. It may be desirable if the keys have not already or cannot be surrendered at the hearing to obtain a declaration.

Time is of the essence when seeking to rescind an agreement. While there is a high risk of lease breaking using method 1 above, the doctrine of rescission provides that the longer the party remain in the contract with an awareness of their right to rescind the more likely; this conduct will be taken to affirm the agreement despite the misrepresentation.

What if I am unsuccessful in my attempt to rescind my tenancy agreement?

If a party is unsuccessful in attempting to rescind their agreement it will depend on whether they have adopted method 1 or 2 above.

If they are still in possession of the keys, the tenancy can remain on foot, and the tenant may seek alternative redress such as assignment, repairs, compensation, reduction of fixed term tenancy if possible or affirm the contract.

If the party served a notice to landlord at the time of returning the keys, then it is likely the tenant will be treated as lease breaking. Hence, a tenant should consider viable RTA termination methods as a matter of priority or at least as an additional alternative to rescission in the notice.

The RTA alternatives may include termination before taking possession, notice of unfit for habitation. Generally, non compliance with an order or successive breaches would suggest the tenancy has progressed substantially through the period and this may reduce the prospect of rescinding the agreement.

Fees

It is important to note that as of 1 July 2013, the application fee for a residential Tenancies application to VCAT with concurrent ACLFTA claims for sums greater than \$500 and less than \$10,000 is \$132.30.

However, an application for a declaration that the T may or has rescinded remains \$44.90. Fee waivers are possible for all VCAT application fees.



What should you do?

1. If a misrepresentation or misleading and deceptive conduct by the landlord or real estate agent is identified then you need to consider and advise whether rescission may be an option for the tenant to pursue.
2. To prevent misrepresentations a tenant should gather evidence and make detailed and genuine enquiries. This may include bringing a witness at inspection or at the time of representations, or using a smart phone to record conversations.
3. Confirm any representations via email prior to signing or as soon on as possible after signing.
4. At the time of signing the agreement, place any representations or promises in writing in the additional terms or schedule of the agreement prior to signing.
5. Rescission should generally be used where the party would break the lease anyway due to the range of factors and unpredictable nature of the Tribunal decision with respect such a complex doctrine of law.
6. Once a party is aware of rescission they must not waiver in their decision or they risk affirming the contract. Despite this requirement, it is always prudent to seek urgent legal advice to review the strength of the case and possible lease break implications.
7. Where the tenant has other grounds to give a notice of termination under the RTA in addition to the ACLFTA right of rescission, it is best to include on the notice both the ACLFTA and basis for termination "*in the alternate*" the RTA grounds for termination.
8. Decisive action must be taken to either give a notice to landlord rescinding the agreement and the tenant(s) move out accordingly, or applying immediately to VCAT for an order of rescission or declaration

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 you want advice about then you should contact us on **(03) 9411 1444**

Regards,
Tenants Union Legal Service