

Residential Tenancies Practice Note #14-01

Third Party Rent Collectors

Background

Some real estate agents are transferring or outsourcing the collection of rent to a third party, known as a “rent collection” company, also known as a payment gateway service. This arrangement may be set up at the commencement of or during a tenancy. Paying rent by this method usually requires a tenant to enter into a contract directly with the rent collection company, in addition to any terms contained in the tenancy agreement. Rent collection companies charge various fees for their service.

While the *Residential Tenancies Act 1997* (Vic) (“RT Act”) is clear that a fee cannot be charged for setting up a direct debit, the act does not deal clearly with rent collection services. Tenants have had some success in challenging the fees charged by a rent collection company at the Victorian Civil and Administrative Tribunal (VCAT).

Terminology

‘Rent Collector’ is a generic term used to describe the private companies that provide the service of the collection of rent from a tenant and transfer of these funds to the real estate agent’s trust account. A card may be issued to the tenant by the company, but it isn’t necessarily needed for the purpose of making a payment; the most common payment method being an automatic ‘set and forget’ direct debit from the tenant’s bank or credit card account.

Some companies also accept payment via post office bill pay and Bpay. The main purpose of the card appears to be to provide the tenant with a reference number to use when they are altering details online. It may also be required when making payments other than by direct debit or other electronic funds transfer.

Tenants are not always provided with a receipt for payments made via a rent collection service and if they are provided, they often do not comply with s43(3) of the RT act. This section requires that a receipt must state the name of the tenant and the rented premises, the date of payment, the period for which payment is made and the amount paid for rent.

A tenant can ask for a record of payment from their landlord or agent directly if the receipt provided by the rent collection service does not comply with s43(3) of the RT Act and this record of payment should be provided within 5 business days of making the request, in accordance with section s43(2A) of the RT Act. Please note that under s43(2) of the RT act landlords are only required to provide a record of this payment for 12 months.

It is not clear whether the cards used by “rent collectors” can be distinguished from “rent payment cards” as referred to in s51(3)(a) of the RT Act. Although there is no definition of “rent payment card” in the RT Act such cards have previously been issued by real estate agents for use when payments are made at banks and post offices directly to the agents trust account.

What is the issue?

Tenants often object to the inconvenience that is associated with a change in payment method, and do not want to have to pay fees on top of their rent or into a contract with the third party rent collector.

It is also important to remember that there is a specific definition of rent in the RT Act and that a payment to a third party rent collector may not meet the definition of a rent payment under the Act, and could amount to a fee. Furthermore, third party rent collectors may issue fees to tenants for late payments of rent or bank dishonour charges.

It is prohibited to demand or accept from a tenant a payment for a failure to pay in accordance with their agreement unless it is otherwise set out in the RT act. This constitutes an offence under section 505 of the RT act and a party found in contravention of this section can be issued with infringements or prosecuted by Consumer Affairs Victoria.

What should you do?



Depending on the actual circumstances of the rent collection method one or more of the following could apply.

1. Illegal charges

Section 51(3) RT Act prohibits a person from demanding or receiving a charge in relation to the first issue of a rent payment card or the establishment or use of “direct debit” facilities for the payment of rent.

Rent collectors charge a transaction or ‘convenience’ fee. Other miscellaneous charges apply; these include fees for cancellation, administration and reactivation.

Requiring a tenant to pay fees to use direct debit facilities for rental payments can offend s51 of the RT Act, and any terms in a tenancy agreement that require payment through such a service that incurs a fee may be found to be invalid under s27 of the RT Act. In the VCAT case of [Palmer v Hutchinson](#) (Residential Tenancies) [2013] VCAT 873 tenant successfully argued that the fees extracted by a payment gateway service offended s51 of the RT Act and the landlord was ordered to compensate the tenant for the transaction fees paid.

This argument may not be successful if the tenancy agreement provides a rent payment option that will not incur a fee (such as a cash payment at the office). Previously this argument was run in a VCAT case [Kapke v Blair](#) (Residential 17 November 2008 and it was found that there was no breach of s 51(3) (b) because there had been no demand or receipt of a charge. This is because the letter advising the tenant of the change in payments included a statement that he could also pay by cheque, bank cheque or money order. Therefore, the Member concluded that this was an offer rather than a demand. Also the fact that the tenant had not taken up the offer meant that there was no receipt of a charge.

2. Unilateral change of contract

Section 42 (2) RT Act provides that the rent payable under a tenancy agreement is payable in the manner (if any) specified in the agreement. If the method of payment is specified in the tenancy agreement it is arguable that it should only be varied by consent. A requirement to change this method during the term of the agreement would be a unilateral variation of a term of the contract.

It could be difficult to prove that there is a method of payment agreed upon if it is not specified in the agreement. Depending on the facts of the situation, you may be able to argue that the contract is partly written and partly oral. It is common for these arrangements to be made at the same time as the lease is signed. Proof of this can be a direct debit authority or bank deposit book. A discussion about the method of payment could also constitute an oral elucidation of a term in the contract.

The construction of a contract can be complex and usually only determined by a court or tribunal.

3. Exclusive dealing (third-line forcing)

[Section 47](#) of the *Competition and Consumer Act 2010* (Cw'th) ("CAC") prohibits the practice of exclusive dealing, which is also known as third-line forcing.

This section applies to residential tenancies, as this relationship can also be described as a consumer-trader dispute. Exclusive dealing involves a supplier of particular goods or services, in this case a landlord/agent, "selling" those goods or services on condition that the consumer also deals with a third party. If a landlord/agent refuses to accept any other method of payment, besides payment via a third party company, they may be engaging in third line forcing.

The CAC can be invoked in a residential tenancies matter by citing *Australian Consumer Law and Fair Trading Act 2012* (Vic) ("ACLFTA") in a dispute. For more information about the ACLFTA and the RT Act, please see our practice note #13-02.

4. False or Misleading Representations

In February 2008, Consumer Affairs Victoria (CAV) obtained an enforceable undertaking from Stockdale and Leggo in relation to a letter to tenants advising them that they would "no longer be accepting rent payments directly from tenants" and that TransCard was now the "standard method of receiving payments". Stockdale and Leggo undertook to write to their tenants advising them that, if they chose to, they could cancel their agreement with Transcard without penalty. CAV argued that this conduct contravened section 51(1) and (3) of the *Residential Tenancies Act 1997*.

This conduct could also be a breach of s 29 of CAC, which provides that a person must not make false or misleading representations concerning the need for any services, the existence or effect of a right or remedy, or any material particular.

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