

# Sub-letting

## What is the issue?



Considerations of sub-letting will be necessary in two common scenarios. Either a tenant will be accused by their landlord of sub-letting without consent, or a person will be seeking advice in relation to who they believe to be a head-tenant who is not respecting their sub-tenancy agreement. We will also consider what happens when a head-tenancy terminates, but a sub-tenancy does not.

## Preliminary Considerations

### a. What is sub-letting

Sub-letting occurs when a tenant transfers *part* of their interest in a tenancy agreement to another person. This may be a separate letting of the whole of the premises, or a part of the premises, but must be for duration of time that is less than the head-lease. A purported sub-lease for a period equal to or in excess of the balance of the term is at law an assignment of the lease, regardless of the description by the parties.

The second essential element of a sub-lease is that the sub-tenant is granted exclusive possession of all or part of the premises. Exclusive possession means that the sub-tenant has the right to exclude the rest of the world, including the head-tenant. This endows the sub-tenant with a proprietary, rather than personal, interest. Courts will place greater weight on the intentions of the parties (to grant exclusive possession to the sub-tenant) than the actual language used in the transfer. There is a factual presumption that exclusive possession has *not* been granted where it is over a room only (see below).

In return for being given exclusive possession of (part of) the property, the sub-tenant must pay rent to the head-tenant.

### b. Sub-tenant or licensee

Deciding whether a person is a sub-tenant or a licensee is pivotal. Sub-tenancies are tenancy agreements and therefore carry the protection (and responsibilities) of the *Residential Tenancies Act 1997 (Vic) (RTA)*, whereas a license is a personal interest that may be revoked at will and is not protected by the RTA.

The common law test for determining that a lease has been created (as opposed to a licence) is to find the intention of the parties through examining objective factual circumstances. Do the circumstances demonstrate that the landlord intended to provide the tenant with exclusive possession over part of the premises in return for payment of rent?

Complications arise when parties intend to provide exclusive possession over a room. Historically the common law has held that it is not possible to provide exclusive possession over a room only, even where the parties may have intended it.

### **Presumption of license where occupying a room only**

Where an individual (who is not a rooming house resident or co-tenant) has the right to occupy a bedroom but shares the common areas of the house with others, there is a presumption that the person is a licensee. The licensor is generally considered to retain 'general control' over the common areas of the premises, which negates the giving of exclusive possession.

The presumption of a license in such circumstances is difficult to rebut when the licensor resides at the premises. If the licensor owns the premises and resides there, it will be extremely difficult to rebut the presumption of a mere license, and the RTA is unlikely to apply.

Despite the above, VCAT has shown a willingness to find that the presumption of a license may be rebutted where the person giving the interest is also a tenant (a head-tenant). The Tribunal will require very clear evidence that that the head-tenant intends to provide exclusive possession over the room to the sub-tenant. This can be evidenced by a signed tenancy agreement explicitly providing for exclusive possession of the room, combined with a lock on the door. An application to VCAT by a tenant for permission to sub-let a room under s 82 RTA will also be very strong evidence of that intention. This is because the landlord retaining 'general control' over the remainder of the house is only one factual consideration when attempting to determine legal intent. It is possible therefore, with the existence of the above considerations (signed tenancy agreement, locks on doors) that the presumption may be overcome when read within a statutory right to sub-let under the RTA.

If the room is self-contained in some way (for example, a bungalow or a separate entrance) then it will be far easier to rebut the presumption of a licence.

### **Statutory modification to presumption of license – Rooming Houses and the RTA**

Sections 94(1) and (1A) of the RTA permit a rooming house owner and resident to enter into a tenancy agreement over a room in a rooming house. In that situation the tenancy provisions of the RTA apply to that room, whilst the rooming house provisions will apply to the common areas of the premises. Section 94 therefore provides a statutory exception to the general rule that an agreement of a non self-contained room will be a licence rather than a tenancy agreement.

#### **c. Requirement of consent from landlord to sub-let**

Section 81 of the RTA provides that a tenant must not (purport to) assign or sub-let the whole or any part of the rented premises without the landlord's written consent. An attempt to sub-let the whole or part of the premises without the landlord's consent is invalid (s 81(3)).

If a tenant believes a landlord is unreasonably withholding consent they may apply to the Tribunal for a determination that consent is being withheld unreasonably and accordingly that the proposed sub-letting may go ahead without the landlord's consent (s 82). Such an application cannot be made retrospectively after the sub-letting has commenced.

If a tenant purports to sub-let without consent, they expose themselves to potentially receiving a Notice to Vacate under s 253 of the RTA, which carries a mere 14 day notice period. If a tenant receives such a notice then the starting point will be to consider if they are meeting the test of sub-letting, or merely providing a personal license.

## **Common sub-letting problems**

### **a. Notice to vacate for sub-letting without consent – s 253 RTA**

A landlord may serve on a tenant a Notice to Vacate pursuant to s 253 RTA if the tenant has sub-let or purported to sub-let the whole or any part of the premises without the landlord's written consent. At the Possession Order hearing the landlord would have the onus of proving on the balance of probabilities (more likely than not) that the head-tenant intended to give the sub-tenant exclusive possession of all or part of the premises in return for rent.

Often the situation arises when a landlord or agent undertakes an inspection and finds that a bedroom is occupied by a person not on the lease. This in itself is insufficient to justify possession being granted pursuant to s 253. The landlord needs to prove that the head-tenant has given the sub-tenant control of the space, and the ability to exclude the head-tenant. A tenant is entitled to have guests stay at their property. What they cannot do is relinquish control over part (or all) of their property in return for rent, without the consent of the landlord.

For certainty, a person considering sub-letting a room (or an entire house) should ask the head-tenant to provide a copy of the written consent from the landlord or Order from the Tribunal permitting the sub-tenancy to proceed.

### **b. Head-tenant asking sub-tenant or Licensor asking licensee to vacate**

We are commonly contacted by individuals claiming to be sub-tenants who have fallen into a dispute with the alleged head-tenant. It will be essential to determine if they are a sub-tenant or merely a licensee on the above analysis, before providing any advice. If it appears they are a licensee, that licence can be revoked at the will of the licensor, rendering the licensee a trespasser.

If there is doubt as to whether an occupier is a sub-tenant or licensee, the individual may apply to the Tribunal for an interim Restraining Order preventing the 'head-tenant' from breaching the RTA, or seek a declaration of rights if the matter is not as urgent.

### **c. Creating direct tenancy between sub-tenant and landlord when head-tenancy ends**

Where a sub-tenant is in occupation of the premises under a valid sub-tenancy agreement, and a head-tenancy agreement terminates, section 231 of the RTA provides that the sub-tenant is automatically deemed to be a tenant of the actual landlord. The tenancy agreement created pursuant to section 231 is deemed to be on the same terms, as far as applicable, to the terms of the sub-tenancy agreement.

Section 231 of the RTA is therefore a significant departure from the common law rule that a sub-tenancy agreement cannot survive the termination of the head-tenancy. This section does not apply to rooming house agreements when the head-tenancy is terminated.

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

**Tenants Union Legal Team**

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