



Fairer, Safer Housing – *Residential Tenancies Act* Review

Issues Paper: Rights and Responsibilities of Landlords and Tenants

Flatmates.com.au Pty Ltd Submission

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Flatmates.com.au consents to this submission being publicly available

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1. Executive Summary

The *Residential Tenancies Act 1997* (Vic) provides a comprehensive regulatory framework for residential rental agreements in Victoria. However, by failing to account for the rapid growth of share accommodation it is not fulfilling its purposes of providing clear regulation for all landlords and tenants, giving every landlord certainty in their investment, and allowing all tenants to make informed choices about their rental options. This means hundreds of thousands of Victorian residents using share accommodation, especially young people, are currently denied the certainty, protection, and regulated flexibility they need, while the rental market does not operate as effectively as it could. This submission aims to highlight the growth of share accommodation in the Victorian rental market and the challenges it poses to the *Residential Tenancies Act*.

‘Share accommodation’ refers to a range of occupancy arrangements that involve the sharing of housing resources between multiple individuals for the purpose of residential accommodation. It includes occupancy arrangements such as co-tenancies, sub-tenancies, ‘rooming’ accommodation, and boarding or lodging. Share accommodation is changing the way the Victorian rental market operates, with more renters willing to share residential accommodation to benefit from the affordability and flexibility of renting part of a premises, rather than an entire home. In the last 12 months, 479, 240 people searched for or offered share accommodation in Victoria on Flatmates.com.au, with Melbourne accounting for 134, 331 of these individuals.¹ Over the same period, the Victorian share accommodation market has grown 48.3%.² Given that these numbers only represent the amount of people looking to live in share accommodation, it is safe to assume a significantly larger number are currently living in such occupancy arrangements.

Although share accommodation has always existed, its rapid growth in the last ten years is largely due to the proliferation of internet access, declining housing affordability for renters, and changing social norms. Regardless, it is now a critical low-cost housing options for both ‘marginal renters’ and the mainstream private rental market, including professionals, students, young couples, and small families.

The growth of share accommodation challenges the regulatory framework in Victoria which must adapt to better reflect the ways that individuals are choosing to live. This submission demonstrates how the current legislation is inadequate in providing the protection, certainty, and flexibility that all renters and landlords, regardless of their circumstances, need. Presently, the way the *Residential Tenancies Act* interacts with the common law creates ambiguity for landlords and occupants about which type of agreement applies to their circumstances. Specifically, those in small-scale boarding or lodging premises exist in a legal ‘grey-area’ outside the *Residential Tenancies Act* with no protections or guarantees other than the common law. The nature of share accommodation is such that many of its users are likely to fall into this ‘grey-area,’ meaning they do not get the benefit of the protections offered to landlords and tenants under the *Residential Tenancies Act*. This submission briefly explains why these problems exist with a view to reforming the *Residential Tenancies Act*.

Regulation of residential rental accommodation is complex and multi-dimensional issue. It requires the measured consideration of multiple, often competing, stakeholder interests to strike a balance between certainty, protection (for both landlords and tenants), and flexibility. In every type of occupancy arrangement, the balance between certainty, protection, and flexibility will be different due to the varying demands and expectations of tenants and landlords.

¹ Flatmates.com.au internal data. Given that Flatmates.com.au has 60% market share, there would be approximately 227, 600 individuals searching for or offering share accommodation across Victoria.

² Flatmates.com.au internal data. Measured by increase in number of accommodation searches in April 2016 versus April 2015.

Landlords want regulation to help protect their investments and lend legal legitimacy to the accommodation they provide. Tenants want regulation to guarantee their rights in law. Most importantly, balanced regulation is needed to encourage existing landlords to continue to provide affordable accommodation while also giving an incentive to more home owners (and head-tenants) to embrace share accommodation.

One of the primary attractions of share accommodation is its flexibility, however this should not be at the total expense of any certainty or protection, as is currently the case in many situations. As such, this submission advocates solutions that recognise the key differences between types of occupancy arrangements and provide specific measures to account for those differences.

1.1. About Flatmates.com.au

Flatmates.com.au is an Australian company that allows individuals to list, search for, and arrange share accommodation throughout Australia. The website allows people to list their spare rooms, find accommodation, or team up with others to start a share house. Flatmates.com.au has 60% market share, making it the number one share accommodation site in Australia (independently measured by number of visits by Experian.com) and the third most popular real estate site in Australia (behind Realestate.com.au and Domain.com.au, measured by Alexa.com).³

As Australia's largest share accommodation service, we favour neither landlord or tenant. Instead, all parties' interests would be best served by balanced and fair regulation that reflects the reality of modern share accommodation. At present, the absence of a clear and specially designed regulatory framework is a problem for both landlords and tenants. Moreover, it stymies the growth of share accommodation as an affordable housing option due to the legal uncertainties it entails. Indeed, many potential landlords are discouraged from entering the share accommodation market due to the absence of a clear legal framework. We want to see the *Residential Tenancies Act*—and the wider scheme of residential rental law—reformed to better account for share accommodation so that all aspects of the Victorian rental market are afforded the protection, certainty and flexibility they need to operate effectively.

To raise awareness amongst share accommodation users of their rights under the status quo, Flatmates.com.au has undertaken a community legal education campaign. Amongst our efforts to better inform users of their rights and obligations, we have created an online 'Legal Guide to Share Accommodation,' which covers all Australian jurisdictions and combines residential tenancy law with more practical advice about share accommodation.

³ Figures correct as of April 2016.

2. 'Questions for Consideration' addressed by submission

This submission will specifically address six of the 'Questions for Consideration' raised by the Issues Paper:

- (14) How should the current statutory duties for both landlords and tenants be reformed to meet their contemporary needs?
- (22) What entry to premises arrangements strike the right balance between the rights of tenants to quiet enjoyment and the rights of landlords to enter premises and what, if any, reforms are required?
- (24) Does the Act require amendment to accommodate the growth of short term accommodation platforms? If so, what amendments should be considered?
- (25) What other reforms, if any, are required to balance the interests of landlords and tenants in respect of sub-letting and lease agreements?
- (28) For what reasons should a landlord be permitted to end a tenancy, and what notice periods should a tenant be given?
- (29) For what reasons should a tenant be permitted to end a tenancy, and what notice periods should a landlord be given?

The questions listed above will be addressed in light of the shifting profile of the rental market due to the rapid growth of share accommodation. The Issues Paper states the following: "Given that the rental market and community expectations change over time, there is a need to ensure that the provisions in the Act remain relevant and suitable to the issues that arise in the course of a residential tenancy." It continues: "...striking a fair balance between the rights and responsibilities of tenants and landlords is also essential to ensuring that conditions support landlords to continue to provide accommodation in the rental market."⁴ Share accommodation has grown to become a significant element of the Victorian rental market and a critical affordable housing option. This shift in the profile of the rental market, due to changing economic imperatives and social preferences, must be met with reform that reflects the particular nature of shared occupancy arrangements. In addressing the questions, this submission will demonstrate how the highly flexible and social nature of share accommodation demands a different regulatory approach. Specifically, it will look at how aspects of the law, like the right to quiet enjoyment, landlord entry rights, sub-letting, and notice periods, could be better adapted to better account for share accommodation.

⁴ Fairer, Safer Housing, 'Rights and Responsibilities of Landlords and Tenants: Issues Paper,' 23 March 2016, 8.

3. About share accommodation

3.1. What is 'share accommodation'?

'Share accommodation' is a socio-economic term describing a variety of occupancy arrangements that involve the sharing of housing resources between multiple parties for the purpose of residential accommodation. Share accommodation refers to long-term residential agreements for premises used as a permanent, principal residence. It does *not* refer to short-term or holiday accommodation in any way.

Share accommodation can cover a range of occupancy arrangements, including:

- Multiple individuals renting an entire premises together
- Home owners renting out a part of their own home (i.e. a bedroom) to an individual or couple, who also have shared access to facilities
- Live-out landlords renting separate parts of one premises to different tenants
- Head-tenants who sub-let a room (i.e. a bedroom) to an individual or couple, who also have shared access to facilities
- Rooming and boarding houses – large and small-scale, commercial and non-commercial
- Shared rooms rented by two people on separate agreements

These occupancy arrangements can fit into a number of legally recognised agreement types, depending on the exact circumstances, including:

- Tenancies – under the *Residential Tenancies Act*
- Co-tenancies – under the *Residential Tenancies Act*
- Sub-tenancies – under the *Residential Tenancies Act*
- Common law licences
- Common law boarding or lodging agreements
- Agreements for a 'Residency Right' in a Rooming House – under the *Residential Tenancies Act*

Share accommodation is an important aspect of the Victorian housing market, providing a number of key benefits to a range of stakeholders. These include:

- **More efficient use of housing resources** – share accommodation promotes a more efficient utilisation of housing resources, with under-utilised facilities (i.e. spare rooms) in existing homes being made available. It is a low-cost, high-yield way of increasing the supply of affordable housing, especially compared to building new housing stock.
- **Solution to housing affordability problems** – share accommodation is a low-cost private rental option for people of all backgrounds. It provides an accessible and affordable accommodation option in convenient locations that relieves stress on private rentals for whole premises and social housing. It is also an important way for owner-occupiers to meet the costs of their mortgage.
- **Community integration** – the long term, residential nature of share accommodation means new residents are integrated as valued and valuable members of the local community.

3.2. How does share accommodation differ from other tenancy arrangements?

The essential feature of share accommodation that differentiates it from traditional tenancies arrangements is its social character. A 'traditional tenancy' refers to a standard occupancy arrangement where a tenant (or co-tenants) rent an entire premises from a landlord who does not also live at the premises. Individuals in share accommodation have purposefully sought

out a highly flexible and social occupancy arrangement where the roles of landlord and tenant are less rigid and defined than traditional tenancies because both parties will often share space and facilities.

The Issues Paper (page 10) states: “This relationship between landlord and tenant is defined by the needs and expectations of the two parties which reflect their differing interests in the rented premises: the landlord owns the premises and makes it available as accommodation on a leasehold for their commercial benefit, and the tenant desires access to the premises as somewhere to live.”⁵ Although this description remains correct for most traditional tenancy arrangements, it is submitted that this is too simplistic and rigid an understanding to encompass the more socially-oriented nature of many shared households. The relationship between the provider and user in share accommodation is less oppositional and more cooperative and flexible. Individuals who rent out a room in a premises they also live at are simultaneously in the positions of landlord or head-tenant (legally) and flatmate or co-resident (socially) in relation to the person paying rent. The concurrent operation of these legal and social roles for ‘landlords’ and ‘tenants’ creates a fundamental difference between share accommodation and traditional tenancy arrangements. Recognising these differences has important implications for how the rights and responsibilities of ‘landlord’ and ‘tenant’ should be balanced in law.

Although co-tenancies are a major element of share accommodation and constitute many typical share houses, they are currently, on the whole, well regulated by the *Residential Tenancies Act*. It is, however, shared occupancy arrangements where the landlord and residents both live at the same premises that create the most difficulty. Most occupancy arrangements of this type occur when a homeowner rents out a room in their own home or when a head-tenant sub-lets a room. The *Residential Tenancies Act* is poorly adapted to providing relevant regulation in such circumstances because its provisions continue to assume that agreements are for traditional tenancy arrangements. As will be explained further in section 4, presuming all tenancy agreements confer a right of exclusive occupation for an entire premises means many people in share accommodation are potentially using an inappropriate agreement for their circumstances. Alternatively, because tenancy agreements are poorly adapted for many shared occupancy arrangements, individuals will use (written or oral) common law agreements that lack the certainty, detail, and protection that tenancy agreements provide. This situation demands reform so that all sectors of the rental market have the benefit of a legislated agreement.

3.3. What is the role of share accommodation in the Victorian rental market?

Recognising the existence and prevalence of share accommodation occupancy arrangements is critical to understanding the changing way in which the rental market operates, and how the *Residential Tenancies Act* needs to adapt to provide certainty and flexibility to more individuals.

Share accommodation is not a new phenomenon. However, the reason it is growing so rapidly—and is therefore becoming a greater issue for regulation—is that shared occupancy arrangements have recently become a more mainstream accommodation option. This is primarily due to the confluence of four factors:

- proliferation of online platforms such as Flatmates.com.au which facilitate share accommodation
- deteriorating housing affordability for renters and homeowners
- shifting demographics – e.g. people are more likely to remain single for longer, meaning they can or must live in share accommodation for a longer period
- changing social norms and perceptions of share accommodation

⁵ Fairer, Safer Housing, ‘Rights and Responsibilities of Landlords and Tenants: Issues Paper,’ 23 March 2016, 10.

While share accommodation was once almost exclusively the domain of ‘marginal renters’ in need of very low-cost, short-term accommodation, it is now used by a wider cross-section of the community. This wider cross-section refers to both those looking for and providing accommodation. Share accommodation is now used by an older and wealthier demographic, comprised of professionals, couples, young families, and students. It is also empowering less wealthy and younger people to generate rental income by renting out part of their own home rather than waiting for an investment property. Share accommodation is therefore a ‘mainstream’ rental option for the majority of Australians. This is shown by the 53.6% growth in the share accommodation market in last 12 months.⁶ Indeed, the average share accommodation household in Melbourne, based on Flatmates.com.au data, has 2.8 bedrooms, 3.4 residents, and is located in an inner city suburb like Brunswick, Fitzroy, Richmond, Melbourne CBD, and St Kilda Road Central.⁷

The growth of share accommodation is shown by the following data:

Share Accommodation Statistics – Flatmates.com.au (data from last 12 months)			
	Melbourne	Victoria	Australia
Number of members	134, 331	136, 583	479, 240
Numer of members offering rooms	35, 208	36, 444	139, 614
Market growth in 12 months (increase in number of accommodation searches Apr 16 v Apr 15)	49.2%	48.3%	53.6%
Average room price	\$214 pw	\$212 pw	\$220 pw
Average age of users	26.6	26.7	27.1

The figures above are sourced from the Flatmates.com.au internal database. Given that Flatmates.com.au holds 60% market share of the share accommodation market (independently measured by Experian.com), these figures constitute a representative sample. Figures for the entire share accommodation market would naturally be larger. Moreover, this data only represents individuals seeking share accommodation over the last 12 months. It does not account for those already living in shared occupancy arrangements.

3.4. Question 24: ‘Short term accommodation platforms’ and the position of share accommodation in the ‘share economy’

The Issues Paper (page 27) mentions problems around ‘short term accommodation platforms’ and sub-letting. Given that the precise meaning of ‘short term accommodation’ is not apparent, it is useful to clarify how share accommodation differs significantly from the type of arrangement that the Issues Paper seems to refer to.

Presumably, ‘short term accommodation’ refers to the kind of short-term holiday-letting facilitated by sites such as Airbnb. Although short-term holiday-letting and share accommodation both exist in the ‘share economy’ they are qualitatively different in a number of respects, most notably the long-term, residential nature of share accommodation versus the transitory quality of holiday-letting. These differences mean any regulation designed for short-term holiday-letting must not also cover share accommodation.

⁶ Flatmates.com.au internal data. Measured by increase in number of accommodation searches in April 2016 versus April 2015.

⁷ Flatmates.com.au, ‘Share Accommodation Survey 2015,’ Victoria data.

It is of course important that landlords are able to maintain a degree of control over a premises during a lease, including how that premises is used. If it is deemed necessary for there to be new regulation of how tenants can use services like Airbnb, that regulation should not treat share accommodation in the same way. See section 4.3 for further discussion of this issue.

Some of the key differences between share accommodation and short-term holiday-letting are:

- **Pricing** – Share accommodation involves long-term residential accommodation at an affordable rate. Short-term holiday-letting involves temporary accommodation at a premium price.
- **Purpose of Letting** – Share accommodation provides residential accommodation, which is a necessity and basic human right. Short-term holiday-letting is a luxury item.
- **Effect on Housing Affordability** – Share accommodation is one of the most affordable housing options, and is a critical tool to relieving housing affordability problems. Short-term holiday-letting removes housing stock from the residential market.
- **Impact on Local Community** – Share accommodation integrates new residents as permanent members of the local community. Short-term holiday-letting is highly transitory and potential disruptive for local communities.
- **Role in the Share Economy** – Short-term holiday-letting has caused ‘disruption’ in the hotel and holiday accommodation sector, whereas platforms like Flatmates.com.au have merely facilitated an expansion of the existing share accommodation to a wider cross-section of society. Share accommodation has always been part of the rental market, but has experienced rapid growth due to technological advancements (for instance, Flatmates.com.au has been operating in its current form since 1997). In contrast, short-term holiday-letting in private residences is entirely the consequence of technological advancements.

As will be discussed further in section 4.3 (sub-letting), these key differences must be recognised and given effect in any proposed regulation of short-term holiday-letting. It is critical that share accommodation is not incidentally regulated under the same provisions that would apply to short-term holiday-letting as this would likely be to the detriment of share accommodation.

4. Landlord and Tenant Rights in Share Accommodation

4.1. Question 14: Reforming landlord and tenant rights and duties to reflect contemporary needs

To address question 14, it is first necessary to explain some of underlying problems with regulation of rental agreements. The key issue for proper regulation of share accommodation is the complex system of rental agreements that currently exists under Victorian law. Although the problems surrounding this system will be elaborated upon in greater detail in subsequent submissions, it is useful to briefly outline the types of agreement that can be used under the current system, why they exist, and how they affect share accommodation.

The three types of agreement are:

- **Tenancy Agreement** – the Residential Tenancies Act 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.”⁸ This definition takes the common law definition for a tenancy which requires that the tenant be transferred exclusive possession of the rented premises.⁹ This means that the agreement must give the renter exclusive possession of the premises (or part of the premises) in order for the agreement to be a tenancy.
- **Rooming House Agreement conferring a ‘residency right’** – the Act defines a ‘rooming house’ as a “building in which there is one or more rooms available for occupancy on payment of rent...in which the total number of people who may occupy those rooms is not less than 4.”¹⁰ This means that only renters living in large, commercial scale rooming houses for 4 or more people have a ‘residency right’ guaranteed in law.¹¹ Although an agreement granting a residency right may be used in smaller premises, there is no obligation to do so at law.
- **Contractual licence (boarding and lodging)** – agreements that do not fall within the definition of ‘tenancy agreement’ or ‘rooming house,’ are not covered by any form of legislated agreement. Such agreements, giving a non-exclusive right to occupy, are contractual licences.¹² In most instances, these would be regarded as common law boarding or lodging agreements, which are a sub-type of contractual licence.¹³

Many share accommodation arrangements fall into this intermediary ‘contractual licence’ category as they do not confer a right of exclusive possession and are in small-scale, non-commercial premises, usually a room being rented in a house occupied by a landlord. How renters and landlords in this occupancy arrangement could be better served by regulation will be dealt with in subsequent submissions. The important point, however, from the brief explanation above is that tenancy agreements, and the rights and obligations they confer, assume that the tenant has a right of exclusive possession. Moreover, they assume that the tenant has a right of exclusive possession for an entire premises. As will be demonstrated below, even when a tenant does have exclusive possession over part of a premises (e.g. a bedroom), the rights and duties of the Act do not reflect or account for the actual nature of the occupancy arrangement. This is especially the case for the right to quiet enjoyment, the landlord’s entry rights, sub-letting, and notice periods for termination.

⁸ Residential Tenancies Act 1997 (Vic), s 3.

⁹ Allan Anforth, Peter Christensen, and Sophie Bentwood, *Residential Tenancies Law and Practice* (The Federation Press, 6th ed, 2014) 27-8.

¹⁰ Residential Tenancies Act 1997 (Vic), s 3.

¹¹ Residential Tenancies Act 1997 (Vic), ss 3, 92, 92A.

¹² Anforth, Christensen, and Bentwood, above n 6, 28.

¹³ Anforth, Christensen, and Bentwood, above n 6, 29.

4.2. Question 22: Tenant’s right to quiet enjoyment and the landlord’s entry rights in share accommodation

The tenant’s right to quiet enjoyment and the landlord’s right to enter the rented premises are two fundamental elements of tenancies. However, the nature and purpose of these rights necessarily brings the interests of the landlord and the tenant into conflict. As such, the Act attempts to balance these rights by giving the tenant a general right to quiet enjoyment while providing a limited set of defined circumstances where the landlord can enter the premises.¹⁴ The circumstances when the landlord can enter the premises are listed on pages 23-5 of the Issues Paper. It is useful to set out s 67 of the Act which provides the right to quiet enjoyment:

Section 67 — Quiet Enjoyment

A landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.

The landlord and tenant’s respective rights are critical to maintaining a fair and safe tenancy. The current legislative scheme, on the whole, balances these rights well between the landlord and tenant for agreements to rent an entire premises. This is because the right to quiet enjoyment and landlord entry rights assume an occupancy arrangement where a tenant (or co-tenants) rent an entire premises, such as a house or apartment, from a landlord who does not also live at the premises. Obviously, this does not accord well with shared occupancy arrangements where the tenant and landlord both live at the same premises and regularly interact.

Quiet enjoyment is an important right. However, the rights and obligations it creates for the tenant and landlord are unlikely to be appropriate for share accommodation given its flexible nature. The right to quiet enjoyment in a traditional tenancy assumes that the relationship between the landlord and tenant is purely transactional and that the parties will only interact when necessary to fulfil an obligation under the agreement. In share accommodation, however, the landlord and tenant will interact on a daily basis, with their relationship extending beyond the transaction and fulfilling a more social purpose of co-resident, housemate, or flatmate. The existing right to quiet enjoyment therefore assumes an exclusionary and very limited relationship between landlord and tenant that is increasingly irrelevant for shared occupancy arrangements.

Similarly, the entry rights of landlords are poorly adapted for shared occupancy arrangements. Given the tenant will only have exclusive occupation of their room, most of the provisions, such as s 86(1)(b)-(g), are largely redundant. Moreover, because the landlord and tenant are both living at the same premises, there will likely be a wider variety of circumstances where the landlord will need to enter the tenant’s room, for example for cleaning, conduct regular maintenance, and in urgent situations. Also, due to the highly social and flexible nature of share accommodation, the particular understanding of exclusivity of space in the premises will likely not be as strict as in a traditional tenancy. As landlord and tenant have a social relationship as co-residents or housemates, entry to parts of the premises by different parties will often be highly flexible as a reflection of the parties’ intention. This may include a more fluid understanding of which parts of the premises are occupied or controlled by particular parties and under what circumstances they can be entered. In these instances, the rigid circumstances defining when the landlord can gain access are largely redundant.

Some solutions to this issue will be suggested in section 5, including establishing a set of parallel provisions in the Act which apply specifically to shared occupancy arrangements by altering rights such as quiet enjoyment to reflect the flexible and social nature of share accommodation.

¹⁴ Residential Tenancies Act 1997 (Vic), ss 85(a), 86(1).

4.3. Questions 24 and 25: Sub-letting and share accommodation

The current system for sub-letting requiring the landlord's consent, which cannot be unreasonably withheld, largely balances the interests of head-tenant and sub-tenant well.¹⁵ Sub-letting should be encouraged where possible and is an important facility for all parties concerned:

- **Head-tenants** – sub-letting allows head-tenants to meet their rental costs while retaining control over the premises. This makes sub-letting an important alternative to adding a new resident to the existing agreement as a co-tenant. This is especially the case for head-tenants holding long-term leases who want the flexibility to rent out part of their premises for short periods of, for instance, 6 months as their circumstances change.
- **Sub-tenants** – renting part of a premises obviously comes at a lower cost to sub-tenants than renting an entire house or apartment. This is especially important for individuals entering the rental market for the first time, such as students and young people. Sub-letting is also a valuable option for individuals who desire flexibility and a social home life.
- **Landlords** – the capacity for a head-tenant to sub-let is also important for landlords. Given landlords generally prefer long-term leases and the regular payment of rent, sub-letting is a critical means by which tenants can continue to meet the ongoing costs associated with their tenancy agreement. Although landlords do retain the right to determine who has exclusive possession of the premises, it will generally be in the landlord's interest to adopt a flexible approach that allows the head-tenant to generate their own rental income.
- **Housing market** – sub-letting is also a crucial option for increasing supply in the rental market. Sub-letting part of a premises allows currently unused housing resources, for example empty bedrooms, to be put to use. This reduces underutilisation in the housing market and is an important means to increase supply and improve housing affordability.

The Issues Paper (page 27) discusses the confusion caused by the current sub-letting system due to 'short-term accommodation.' As mentioned in section 3.4, the different types of sub-letting need to be recognised. Renting a room on a short-term holiday-letting service like Airbnb differs significantly from a long-term sub-tenancy (and other types of permanent residential accommodation for a room or part of a premises). Landlords will have legitimate concerns about short-term holiday-letting that do not apply to long-term, permanent share accommodation. These concerns include:

- commercialisation of the premises
- highly transitory nature of the guests
- relative anonymity of the guests meaning attributing responsibility and liability can be difficult
- disruption caused to the community that the landlord may bear responsibility for
- breaches to local government planning restrictions and strata by-laws where applicable

These concerns are particular to short-term holiday-letting given its very high turnover rate in residents of the premises. Such concerns do not apply to sub-tenancies, including many share accommodation situations, because they are permanent, long-term occupancy arrangements. Moreover, a sub-tenant becomes a member of the local community and uses the premises as their home, unlike short-term holiday guests.

¹⁵ Residential Tenancies Act 1997 (Vic), s 81, 253.

4.3.1. Legal Status of Short-Term Holiday-Letting Agreements

In *Swan v Uecker*, the Victorian Civil and Administrative Tribunal recently considered the legal status of agreements for short-term holiday-letting (i.e. Airbnb), and especially whether such agreements constitute a lease.¹⁶ In that case, the landlord gave a Notice to Vacate under s 253 of the *Residential Tenancies Act* alleging that the tenants had sub-let the rented premises through Airbnb without her consent.¹⁷ The critical question was whether the agreements between the tenants and the Airbnb guests constituted a lease, in which case s 253 would apply, or a licence, meaning that the Notice to Vacate was invalid. In deciding that the agreements with the Airbnb guests were licenses, not leases, Member Campana cited four reasons:

- (i) Express words in the Airbnb agreement classified the agreement as a licence.
- (ii) The short-term nature, payment platform, and terms of arrival, departure, and use of the premises by the guests.
- (iii) Retention of the premises as their principal residence by the tenants before, during, and after each stay by an Airbnb guest.
- (iv) Right of tenants to access the premises during each Airbnb stay and make a guest who has overstayed leave the premises.

Given that this case is likely typical of most short-term holiday-letting situations, especially through Airbnb, the Tribunal's decision indicates that such agreements will be classified as licences. This means that they are beyond the scope of ss 81 and 253 meaning that no consent is required from the landlord. Although this decision is subject to an appeal to the Supreme Court, the Tribunal's reasoning is an important consideration in suggesting how reform should be conducted.

4.3.2. Solutions and Reform

The key differences between short-term holiday-letting and share accommodation (including sub-letting), as detailed in section 3.4, must be taken into account if any reforms to the laws regarding sub-letting are considered. It is especially important that any reforms targeted at regulating short-term holiday-letting do not also incidentally capture share accommodation. Considering that many residential shared occupancy arrangements may be classified as a licence (e.g. agreements to rent a room), it is critical that any regulation of short-term holiday-letting agreements (which are also classified as licences under *Swan v Uecker*) is well defined in a highly specific way to differentiate it from share accommodation.

A potential solution to the problems raised in the Issues Paper is to apply a different system or standard of landlord consent for short-term holiday-letting as opposed to sub-tenancies (and other residential shared occupancy arrangements). Because of the greater concerns for landlords about short-term holiday-letting than for sub-tenancies, a potential solution may be to grant landlords greater discretion to refuse consent for short-term holiday-letting. Whereas landlords cannot unreasonably refuse consent for sub-tenancies, the 'unreasonableness' requirement could be removed for short-term holiday-letting. This would mean that it is at the landlord's absolute discretion to refuse consent for short-term holiday-letting without needing a particular justification. Such a system would recognise the crucial differences in nature and purpose between long-term sub-tenancies and short-term holiday-letting.

The effectiveness of a new and separate standard of landlord consent for short-term holiday-letting would depend on how short-term holiday-letting is defined. The *Swan v Uecker* decision would be a useful starting point. However, the mere fact that an agreement is a licence

¹⁶ *Swan v Uecker (Residential Tenancies)* [2016] VCAT 483 (Member Campana).

¹⁷ *Swan v Uecker* [2016] VCAT 483 at [26]-[28] (Member Campana).

would be insufficient. Instead, additional factors would be necessary to ensure that regulation only applied to short-term holiday-letting. Such factors could include:

- length of stay
- purpose of the agreement (i.e. holiday / travel vs residential)
- terms of the arrival, stay, and departure of guests
- rights to the premises retained by the tenant while the guests are present

In summary, share accommodation and short-term holiday-letting are fundamentally different phenomena. Any regulation of short-term holiday-letting must be done in a manner cognisant of such differences to ensure that residential shared occupancy arrangements are not incidentally regulated to their detriment.

4.4. Questions 28 and 29: Notice periods for termination in share accommodation

Minimum notice periods for termination of a tenancy agreement are an important way of balancing the parties' rights to security of tenure with the need to end agreements in a timely manner. The length of minimum notice periods varies as a reflection of the different positions of the landlord and tenant, and also the circumstances giving rise to the need to terminate. For example, if a landlord gives a notice to vacate for no specified reason, the minimum notice period is 120 days. Conversely, a tenant who gives the landlord a notice of intention to vacate because the landlord has breached a VCAT compliance order will only need to give 14 days notice.

As with other rights and obligations, as discussed above, the minimum notice periods have been set under the assumption that all tenancy agreements are for situations where a tenant (or co-tenants) rents an entire premises from a landlord who does not also live at the premises. In share accommodation arrangements where the landlord and tenant live at the same premises, however, many of the minimum notice periods are unrealistic and inappropriately long. It is important to understand that when a landlord and tenant share a premises and their agreement comes to an end, whether it be amicably or otherwise, both parties will generally want flexibility for the tenant to move out within a short period. When there has been some kind of conflict between the landlord and tenant, the imperative to move out quickly will be even greater.

In our experience as the leading share accommodation platform, we have found that most individuals, whether landlord or tenant, have the courtesy of giving at least 14 days notice of termination. Notice periods of 60-120 days for landlords, and 28 days for tenants, as required for many of the most common reasons for termination are too inflexible and unnecessarily long for share accommodation. This is especially the case for terminating an agreement at the end of a fixed term. The rationale for such long periods in traditional tenancy arrangements is to give the landlord or tenant reasonable security of tenure and enough time to find another tenant or new accommodation. In share accommodation, however, the higher turnover rate and greater ease with which accommodation can be found means that long notice periods are not necessary. Indeed, the length of notice periods may be an active deterrent to many share accommodation users, both landlords and tenants, using tenancy agreements given the flexibility that parties want in choosing to provide or live in share accommodation.

A solution to this issue will be suggested in section 5.

5. Potential Solutions

5.1. Modifying the Act to better account for shared occupancy arrangements

An effective solution to many of the problems outlined above regarding the particular demands of share accommodation would be to adapt the *Residential Tenancies Act* in key areas. Using tenancy law as the basis for regulation of share accommodation reflects two facts. Firstly, that the tenancy part of the Act is currently the most comprehensive and well-balanced legislation for residential rental accommodation. And secondly, that most share accommodation arrangements closely resemble a tenancy in the expectations of the parties and the type of accommodation provided. This is because the landlord and resident consider themselves peers as members of the same household and the accommodation is usually on a small, non-commercial scale for one to two people.

Specifically, the Act could be amended to provide a set of parallel rules for shared occupancy arrangements in key areas such as the landlord's right to access the premises and minimum notice periods. This solution recognises the key differences between traditional tenancy agreements and share accommodation by providing separate and specifically designed regulation for both. Parts of the Act that could be reformed to better reflect the needs of share accommodation include:

- Removing assumptions of exclusive possession and occupancy given the likelihood of landlord and tenant interacting on a daily basis. Rights like 'quiet enjoyment' should still be afforded to tenants, but in a way more cognisant of shared occupancy arrangements. For example, the right to quiet enjoyment could be limited to the area of the premises (e.g. bedroom) that the tenant has exclusive occupancy of. Alternatively, the right could be defined more specifically for share accommodation by listing a set of minimum rights and obligations, such as banning unlawful evictions and giving the tenant a right to privacy while using certain parts of the house including bathrooms and bedrooms.
- Tailoring the landlord's access rights to situations where the tenant only has exclusive occupation of a room and shared access to facilities. Importantly, access rights in share accommodation should give the landlord and tenant the flexibility to define in the agreement which parts of the premises the tenant has exclusive use and shared use of.
- Shorter notice periods for landlords and tenants to better account for the higher turnover rate in share accommodation. The precise length of shortened notice periods would have to be determined after a consultation process with share accommodation users to perceive their expectations. As mentioned above, common practice in share accommodation is to give at least two weeks' notice of termination.
- Providing a clear legislative distinction between short-term holiday-letting, and long-term permanent share accommodation for the purpose of sub-letting. The distinction could be based on multiple indicating factors, including the length of the agreement, frequency with which residents move in and out, and the purpose for which the premises is rented. See section 4.3.2.

5.2. Establish a new category of regulated agreement for share accommodation

In the subsequent submission regarding 'alternative forms of tenure,' we will suggest a more comprehensive solution to regulation of share accommodation that involves establishing a new category of legislated agreement. This agreement would be tailored to reflect the particular nature of share accommodation and would cover all occupancy arrangements that presently fall between tenancy agreements and rooming house agreements.

6. Further submissions and consultation

Flatmates.com.au intends to make submissions on subsequent Issues Papers, especially regarding 'alternative forms of tenure.' Subject to the terms of reference of the Issues Paper, that submission will more specifically explain why the existing regulatory scheme fails to properly account for share accommodation.

In addition, Flatmates.com.au is very open to any further consultation process relating to this stage of review of the *Residential Tenancies Act*. We have already engaged in similar law reform processes in NSW and would be eager to share our perspective of the Victorian rental market either in person or through further written submissions addressing key points. As the largest share accommodation website in Australia, with a market share of 60%, Flatmates.com.au can offer a unique and highly experienced perspective on this rapidly growing sector of the rental market.

As the peak representative of share accommodation users, Flatmates.com.au also has direct access to a majority of individuals using this sector of the rental market. Our website collects data on the amount of people searching for, providing, and finding share accommodation around Australia, which can be narrowed to Victoria or Melbourne. In addition, we collect data on the type and cost of accommodation offered, giving an exceptionally comprehensive snapshot of share accommodation in Victoria.

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