VCAT | victorian civil & administrative tribunal

Tribunal Response - Alternate Forms of Tenure: Parks, Rooming Houses and Other Shared Living Rental Arrangements Issues Paper

The Tribunal interprets and applies the *Residential Tenancies Act 1997* (the Act) and does not hold or express an opinion of the Act.

Introductory Comments

The responses of the Tribunal reflect the issues that arise in hearings conducted by the Tribunal and in feedback from the parties.

Landlord and tenant law is derived from common law. In contrast, the law relating to residency in caravan parks and rooming houses is a creature of statute.

Caravan parks: On 31 May 1988 the *Caravan Parks and Movable Dwellings Act 1988* was enacted to regulate caravan parks and confer tenancy rights on people living in caravan parks who are permanent residents.

Rooming houses: On 13 June 1990 the *Rooming Houses Act 1990* was enacted to define the rights and obligations of rooming house owners and residents and provide for the resolution of disputes between the parties. A rooming house is defined in s 3 of the Act to include a building where there are one or more rooms for rent in which the total number of people who may occupy those rooms is not less than four. The definition of a rooming house has remained unchanged since 1990.

Part 4A site agreements

On 1 September 2011 the Act was amended to insert a new Part 4A to provide for the regulation of site agreements. There have been relatively few cases in the Tribunal under Part 4A.

The Tribunal makes submissions with respect to questions 3-5, 7, 11, 17-18, 21-25, 27-28, 32, 36, 38, 41, 43, 45, 49-52 and 54.

Question 3 – What issues arise for residents in rental villages and independent living units, and what form of regulation would best suit these accommodation models?

The Act does not deal effectively with rental villages and independent living units. These types of accommodation are typically expensive to own and operate. The residents may have spent much of their savings to move into the village. Disputes before the Tribunal, while not common, often involve many residents (with some on opposing sides of the dispute), management and owners. Proceedings are protracted and can create disharmony within a village.

Question 4 – Under what circumstances should a caravan park occupant be considered a 'resident' for the purposes of the Act, and when should the Act not apply?'

Residents fall into two categories. First, there are residents that own their own caravan and rent a site. Secondly, there are residents that rent or hire a caravan or cabin on site.

Given the expense of moving a caravan or movable dwelling into a park and connecting it to utilities, an owner occupant is at considerable financial risk without a prior written occupancy agreement. The 60 day component of the 'resident' definition in relation to a caravan park was included as a compromise between stakeholders. Park owners successfully contended that they should have the right to ensure that a potential permanent resident acted consistently with the peace and harmony of the park. The 60 days was considered to be a trial period.

Question 5 – Do any of the definitions in the Act relating to caravans, movable dwellings or caravan parks require clarification, and if so, what aspects of the definitions require clarification?

The definition of movable dwelling in s 3 of the Act requires that:-

1. The dwelling must be designed to be movable; and

2. The dwelling must be capable of being situated at and removed from a place within 24 hours.

There has been considerable argument between parties at the Tribunal regarding the interpretation of the second component of the definition. The uncertainties associated with the second component are significant. A clearer definition would be helpful.

It would be helpful to all stakeholders if the definition of a caravan park in the Act was consistent with the definition used in local government legislation and for planning and Parks Victoria purposes.

Question 7 – What obligations should caravan park residents who own their own dwelling have under the Act in relation to the appearance or condition of their dwelling?

A caravan and a caravan annex will deteriorate more quickly and require more maintenance than a house or flat.

Section 171(2) of the Act requires a resident to maintain the site and caravan in a manner and condition that does not detract from the general standard of the caravan park. Consideration could be given to amending ss 185(1) and 185(2) to include 'the appearance or condition of a dwelling in the caravan park', as a matter upon which a caravan park owner may make rules.

Question 11 – What are the advantages and disadvantages of standalone legislation for residential parks, and what other form of tenancy should be included in that legislation?

In disputes before the Tribunal, parties have had difficulty understanding the Part 4A provisions of the Act and the provisions are difficult to apply.

Standalone legislation for residential parks would be easier for parties and stakeholders to navigate and access.

The disadvantages of standalone legislation are:-

- It could be seen to weaken the nexus between the Act and its emphasis on security of tenure.
- There may also be a need to cross-reference the standalone legislation with numerous sections of the Act.

Question 17 – What, if any, changes to a site tenant's liability for breaking a site agreement should there be in the Act?

There is no comparable provision in Part 4A of the Act to the power of the Tribunal in s 234 to reduce a fixed term tenancy agreement.

The cost to remove a manufactured dwelling from the site is generally financially prohibitive and can jeopardise the structure. A lease break by a site tenant would likely lead to a sale of the dwelling by the site tenant or his or her personal representative, otherwise considerable financial loss would be incurred.

In comparable cases under Part 4 of the Act, the issues before the Tribunal have included:-

- Actual or a perceived lack of cooperation from the park owner towards a potential purchaser.
- A park owner's preference to sell their own units.
- Limiting the choice of selling agent and/or the requirement to pay a commission to the park owner.
- Restrictions placed on signage, advertising or viewing.
- The park is to be redeveloped for tourism or sold for housing.
- A deterioration of the amenities in the park or in its overall appearance.

Question 18 – If a rent increase is disclosed in a site agreement, what processes should be available to a site tenant to request a rent assessment?

Sub-sections 206S(1)(d) and 206S(1)(e) of the Act provide that a site agreement must include the basis on which rent is calculated and adjusted and the circumstances in which the rent may

be reviewed, respectively. From time to time park owners have specified in the site agreement rent increases in line with pension increases or the Consumer Price Index (CPI). It is unclear whether specifying rent increases in the site agreement is permissible, as ss.206V- 206Y replicate the excessive rent provisions in Division 3 of Part 2 of the Act.

Question 21 – How should the Act address circumstances where a residential park closes, or is to be sold and the land used for another purpose?

The Tribunal has not dealt with a case under Part 4A of the Act where a residential park closes, or is to be sold. Consideration may need to be given to whether there should be any differentiation in the way these matters are to be addressed based upon the circumstances giving rise to a residential park closing or being sold. That is, a site owner who decides to sell for profit, compared with a site owner who is insolvent or bankrupt and forced to sell.

As to the comment on page 25 of the issues paper that site agreements are not binding on a new site owner if the park is sold, s 23A needs to be taken into account. The Tribunal is yet to finally determine the effect of s 23A.

Question 22 – What are the appropriate arrangements that should apply where a sole site tenant dies during the term of their site agreement?

Consideration could be given to developing a framework whereby the site owner is given the first option to buy-back the dwelling at an agreed price within a particular timeframe, prior to it being placed on the market. Rent loss could also be capped.

Question 23 – What would be an appropriate balance of responsibilities for maintenance and repairs in relation to Part 4A sites, site fixtures and dwellings?

Under s 206ZM(2) of the Act, the site tenant is responsible for the maintenance of the site. It is unclear whether maintenance extends beyond lawn mowing and weeding. The Act is silent as to responsibility for items like fences, retaining walls, concreted areas, paths and trees. Appropriately qualified people may be required to carry out maintenance and repairs on these types of items. A site owner typically employs maintenance staff. Further clarity in the Act is required.

Question 24 – What issues arise for site owners and site tenants in relation to a site tenant's use of their site and the park facilities?

The Tribunal has heard a few disputes under Part 4 of the Act relating to a resident's small business operations, for example, prospecting. The issues have included signage on the caravan, increased visitor numbers and vehicle access.

If a blanket prohibition against use of the site for a business purpose is inappropriate, the Act could include provision for consent to the operation of a business from the site to not be unreasonably withheld by the site owner. Where a site owner unreasonably withholds consent, the site tenant could make application to the Tribunal for approval. Home-based businesses can be conducted online without any signage advertising the business or the attendance of customers at the residence.

Question 25 – Should the Act regulate the management practices of park operators, and if so, what reforms would address this?

The Tribunal has heard disputes under Part 4 of the Act concerning park operators and/or managers, particularly employee managers.

It is common for residents to allege that managers give unfair preferential treatment to certain residents at the expense of others. Some residents have alleged mismanagement while other residents have appeared as witnesses in support of the manager. Consideration should be given to prescribing in the Act, a park operator's duties, similar to the duties outlined in s 122 of the *Owners Corporations Act 2006*.

Question 27 – What reforms, if any, are necessary to strengthen the existing provisions in the Act in relation to the application and enforcement of park rules?

For the benefit of the park owner and the residents, it is important that park rules are clear, comprehensive (covering foreseeable day to day operating requirements), reasonable and applied fairly.

Question 28 – What reforms, if any, are needed in relation to how the Act regulates the rights associated with communal park facilities for permanent residents?

Communal facilities must be cleaned and maintained by the park owner (ss 178-179) and the site owner (ss 206ZV -206ZW).

The Tribunal has dealt with disputes relating to the closure, deterioration or non-maintenance of communal facilities and the restrictions placed on permanent residents regarding their use of communal facilities when tourist sites are full.

Question 32 – What reforms, if any, are required to ensure that liability under the Act for utilities in parks aligns with current marketplace practices?

The Tribunal has made decisions in relation to the connection and installation of utilities and as to whether a utility is separately metered where a park proprietor has negotiated a bulk or commercial rate. See *Andrea v. Lealow Pty Ltd* [2015] VCAT1894 and *Healy v. Dmvw Nominees Pty Ltd* [2015] VCAT1720.

Consideration should be given as to how liability for electronic communication such as wireless and internet connections (including future technological advances in this area) should be apportioned under the Act.

Question 36 – What are the particular needs of park residents in relation to park and dwelling modifications, and how would these be best addressed in the Act?

The Tribunal expresses no opinion in relation to this question save to refer to s 497 of the Act. A provision similar to s 497 could provide a loan to a park owner where a modification is required to accommodate a resident with a disability.

Question 38 – Should the definition of a rooming house be changed to include emerging accommodation models, and if so, how should it be changed?

Question 41 – What other measures might strengthen protections for residents from unscrupulous rooming house operators, and enforcement against unregistered rooming houses?

Some rooming houses are well run and provide excellent facilities. Other rooming houses are overcrowded; bedrooms may be shared by individuals who do not know one another; and sleeping areas may consist of a curtained off living area or a garage. Under s 120A of the Act, a rooming house owner has an obligation to ensure a room provided to a resident; a facility or service provided to a resident; and a common area provided for access by a resident, complies with any applicable rooming house standard. Where there is non-compliance with these standards, the only realistic recourse for a resident is to apply to the Tribunal for a compensation order.

The Tribunal notes that the *Rooming House Operators Act 2016* (yet to commence) will establish a licensing scheme for rooming house operators; is intended to address unscrupulous practices by rooming house operators; and protect the rights of rooming house residents.

Under the current definition of a rooming house, in order to determine whether the Act applies, the Tribunal may be required to decide whether the operator has granted a lease or a licence. This involves interpretation of common law in relation to these concepts. To promote clarity and consistency, the Act should include definitions of a lease and a licence.

An accommodation model not currently included under the Act is one that houses people and also provides them with social and health services such as medication, drug testing or therapy, similar to a halfway house.

Question 43 – What are the risks, if any, of limiting the type of agreement a resident can enter into with a rooming house operator?

The Tribunal shares the concerns expressed in section 7.4 of the issues paper. The provisions of the Act that require fixed term agreements to be subject to the tenancy provisions under Part 2 are difficult and confusing to interpret and apply and can have unexpected consequences for the parties. In cases before the Tribunal, tenancy agreements of premises let to students often have fixed terms which do not align with the academic year. As a result, a student departing Australia in early December is charged rent until March of the following year.

Question 45 – What reforms, if any, are necessary to strengthen the existing provisions in the Act in relation to the application and enforcement of rooming house rules?

Where a resident does not comply with a rooming house rule, a rooming house owner may serve a breach of duty notice under s 208 of the Act. Where there is non-compliance with the breach of duty notice, an application may be made to the Tribunal for a compliance order. Where there is non-compliance with the Tribunal order, a rooming house owner may give a resident a notice to vacate under s 282. Alternatively, an owner can give a notice to vacate under s 283 without first serving a breach of duty notice, if there have been successive breaches.

The process can be protracted and expensive, but does protect a resident's rights. The owner may have difficulty proving the breach. Residents can be reluctant to report a breach or appear as witnesses in the Tribunal proceeding. Where the alleged breach involves a common area, it may be difficult to establish which resident is responsible. A resident may also be at risk of being blamed for the actions of another resident.

Question 49 – What are the advantages and disadvantages of making the timely payment of rent a duty owed under the Act by rooming house residents?

Under s 281 of the Act a rooming house owner may give a resident a two day notice to vacate where the resident owes at least seven days rent. This process provides a rooming house owner with a quick resolution. In comparison, where a rooming house owner serves a notice for breach of duty to pay rent under s 112, the process outlined under question 45 applies in order to obtain a possession order.

Question 50 – How should the Act address damage caused by a rooming house resident?

The Tribunal does not interpret the damage provisions differently between tenants (ss 61 and 62) and rooming house residents (s 116). Arguably, s 116 is clearer as it is expressly provides for damage other than fair wear and tear and includes damage caused by visitors.

Question 51 – What obligations should a rooming house resident owe under the Act in relation to the quiet enjoyment of other residents in the rooming house?

The issues raised in paragraph 7.5.7 of the issues paper could be addressed by defining in s 113(1) of the Act what the terms 'near the rooming house' and 'visitors to the rooming house' encompass. It is arguable that for a person to be considered a visitor to the rooming house, that person would need to be within the boundary of the rooming house and not merely on the street nearby.

Addressing the behaviour of guests in house rules rather than under a provision of the Act may not produce a different outcome at the Tribunal.

Question 52 – How should the Act regulate liability for utilities in rooming houses?

Under s 108 of the Act a rooming house owner pays for electricity and gas not separately metered. Section 108 should be amended to include water.

Question 54 – Are there any housing models not currently regulated by the Act that should be covered by the Act, and what are the key considerations that need to be addressed?

The Tribunal is regularly required to determine disputes between parties to agreements as referred to in chapter 8 of the issues paper. In recent years, tenants and owners of houses and flats have been placing advertisements offering accommodation on internet sites such as Airbnb and Gumtree.

For the provisions of the Act to apply, the agreement must confer a lease, not a licence. For ease of reference; to avoid confusion; and to promote clarity and consistency, the Act should redefine the term 'tenancy agreement' with reference to the common law principles, so that it is clear which accommodation arrangements fall within the scope of the Act.

Agreements which fall outside the scope of the Act are subject to the *Australian Consumer Law and Fair Trading Act 2012* (ACLFT Act). The Tribunal has jurisdiction to determine disputes under the ACLFT Act and these matters are heard in the Civil Claims List. Proceedings can be transferred from the Residential Tenancies List to the Civil Claims List, however this may result in delay and inconvenience to the parties. The preferable position is for there to be clarity from the outset regarding the legislation under which certain disputes are to be determined, to avoid unnecessary delay, cost and inconvenience to parties.

Where an agreement confers a licence, the police may be reluctant to evict the occupier from the premises. Since the commencement of the *Residential Tenancies Act 1980* in 1981, police generally require a warrant for possession before they will act to evict an occupier.

If the Act is to be expanded to include new accommodation models, care should be taken not to unnecessarily catch arrangements such as, the billeting of students by schools in private homes.

Where a person initially occupies premises as a holidaymaker or backpacker and subsequently decides to make the home, flat or room their only or main residence, consideration needs to be given to if, and when, that person becomes a tenant or resident, for the purposes of the Act.