

Redfern Legal Centre



Statutory Review of Residential Tenancies Act 2010
Policy and Legislation
NSW Fair Trading
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PARRAMATTA NSW 2124

Via email: policy@finance.nsw.gov.au

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To the Policy and Legislation Department,

As discussed, please find attached an addendum to our submission in response to the Department of Fair Trading's Discussion Paper: Statutory Review of the *Residential Tenancies Act 2010* regarding share housing laws specifically.

We would welcome the opportunity to meet with you to further discuss our submission.

Yours faithfully,
REDFERN LEGAL CENTRE

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Addendum to Submission to Fair Trading NSW discussion paper on Review of the Residential Tenancy Act: Share Housing Laws

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1. Introduction

Without replicating our submission to the Fair Trading NSW discussion paper on the review of the Residential Tenancies Act (which can be read [here](#)), the following are additional comments and suggestions with regards to a proposed change to the laws surrounding share housing.

Currently, section 10 of the *Residential Tenancies Act* (RTA) excludes sub-tenants from the operation of the Act if they do not have a written *Residential Tenancy Agreement* with a resident head-tenant. As outlined in our submission, this section makes it easy for head-tenants to deny occupants basic tenancy rights, evict them without notice, withhold money they are owed and set up overcrowded premises with no recourse to the Tribunal.

Further, while the purpose of section 10 was to provide certainty and therefore reduce jurisdictional disputes in the Tribunal, it has not had this effect. Determining whether someone is exempt from the RTA is rarely easy and can lead to tenants needing to make alternative jurisdictional arguments about whether they are a tenant, boarder or consumer, often ending up as none of the above.

2. Current proposal - wording of suggested s 10

10 Application of Act to occupants in shared households

(1) A person who occupies residential premises, that are subject to a residential tenancy agreement and who is not named as a tenant under the agreement, is a tenant for the purposes of the Act.

(2) This section applies despite the provisions of section 8(1)(c), but does not apply if the premises or agreement are otherwise excluded under section 7 or section 8 of the Act or Part 4 of the *Residential Tenancies Regulations 2010*.

(3) However, this section does not apply if the residential premises are registered as a boarding house in accordance with section 9 of the *Boarding Houses Act 2012*.

3. Explanation of proposed s 10

Rather than repealing s 10, which would put share housing back to the same level of uncertainty as in the 1987 RTA, it is our view that all residents in share housing should be covered by the RTA. The proposed wording of a new s 10 above would deem residents of share housing into the RTA, and provide certainty and clarity for all parties involved. However it would not deem in residents of boarding houses. This following is a brief explanation of our reasoning and how we believe this s 10 would apply.

S 10(1)

- Section 10 would only apply to premises that are already subject to a residential tenancy agreement and not other types of premises or residences.
- It sets the same bar for a residential tenancy agreement as any other tenancy, ie that it can be written, oral or partly written and partly oral, as dictated by s 13 of the RTA.

- Anyone in a shared house is covered under the RTA. You would then look to the arrangement and definitions in s 3 to decide if a party was a head-tenant, sub-tenant or co-tenant.

S 10(2)

- This subsection provides clarity that, within a share house (or a premises covered by a residential tenancy agreement), this section applies and an occupant is not excluded by the RTA due to s 8(1)(c).
- However any other exclusion still applies, such as crisis accommodation, short-term holiday accommodation, or student accommodation.

S 10(3)

- This subsection provides that where the premises is a *registered* boarding house (not *registrable*) under s 9 of the Boarding Houses Act, section 10 does not apply.
- This is to ensure that where there is a boarding house that is subject to a residential tenancy agreement (for example a caretaker lives on site who has a residential tenancy agreement) it does not deem all residents into the RTA.
- This would not deem those residents in or out of the Act but would go back to tests under s 8(1)(c) of the RTA.
- Using the term registered rather than registrable avoids uncertainty where there are share houses with more than 4 beds. It also provides an incentive for boarding house proprietors to register their premises with Fair Trading.

We also note that the wording of the proposed s 10 follows the wording of s 9 of the RTA. While we are not tied to any particular wording of s 10 we hope to achieve the meaning as outlined above.

4. Particular provisions

We are aware that there is some concern about how particular provisions of the RTA would work within share housing and between tenants. The proposed section 10 would not create a new type of legal arrangement. Both the 1987 and 2010 RTAs contain definitions in s 3 of head-tenants (under *landlord*) and sub-tenants (under *tenants*).

The following are some views on how particular provisions work between head and sub tenants.

a. Access

While a head-tenant can provide a notice of access to the premises to their sub-tenant when they receive one from a landlord, even where they don't their landlord retains the right to access the entire premises for reasons as allowed under RTA. If a head-tenant fails to provide notice to the sub-tenant they may be in breach of their agreement with that sub-tenant (and be subject to a claim of compensation), but this does not preclude the landlord gaining access to the premises.

For clarity, a provision could also be added to require the head-tenant to pass on any notice as soon as is practicable.

b. Repairs

While a head-tenant does not have the power to undertake repairs for a sub-tenant, they would need to take all reasonable steps possible to get repairs done to be in compliance with their agreement with their sub-tenant. This would mean taking steps to require the landlord to undertake those repairs (and apply for a rent abatement if applicable).

A similar scenario occurs where a tenant is requesting repairs that are the obligation of the owners corporation in a strata premises. As the contract is between the tenant and the landlord, the landlord is required to take all reasonable steps to require the owners corporation to undertake repairs to be in compliance with their agreement with their tenant.

In addition, where a sub-tenant takes a head-tenant to NCAT for repairs, NCAT could join the landlord to the proceedings.

c. Bonds

As is currently the position between head-tenants and sub-tenants, head-tenants are required to lodge bonds with the Rental Bond Board for their sub-tenants.

This can be done by using a RBB *Change of Shared Tenancy* form which can put a bond into all tenants names regardless of the legal arrangement between those tenants.

d. Termination

Notice periods for terminations between head-tenants and sub-tenants are currently the same as for landlords and tenants. It is our view that this should remain as is. It is also the case that parties can agree to end a tenancy by consent but having these provisions would give sub-tenants some negotiating power.

Due to the principles of superior title and s 84(1)(a), a termination of a head-tenancy wipes out a sub-tenancy beneath it which allows the landlord to take possession of the property in the usual manner, regardless of the sub-tenant vacating. While a head-tenant may be in breach of their agreement with their sub-tenant and subject to a compensation claim, by not providing adequate notice, this would not prevent the landlord from taking possession. Alternatively, a landlord can use s 95 in this scenario.

When a head-tenant receives a notice of termination from a landlord they are required to pass a notice on to their sub-tenant. A provision could also be added to require the head-tenant to pass on any notice as soon as is practicable.

In eviction proceedings at NCAT between a landlord and a head-tenant, a sub-tenant also has the ability to ask NCAT to be joined to the proceedings.

5. How the proposed s 10 would affect various stakeholders

a. Landlords / owners / owners corporations

No change. The amendment only affects the rights and obligations that exist between head-tenants and sub-tenants. It would not affect the rights or obligations of the ultimate owner / head-landlord who retain the right to withhold consent to sublet. There may be an indirect benefit to landlords and owners corporations in that improved protections for sub-tenants could discourage head-tenants from allowing a property to fall into disrepair or become overcrowded.

b. Boarding house proprietors

No change. Provided the boarding house in question is registered, the laws that currently apply would remain unchanged.

c. Head-tenants

Head-tenants would no longer be able to rely on the fact that a written agreement wasn't prepared in order to evict a sub-tenant without notice or unreasonably withhold their bond. The amendment would put head-tenants on par with those that use written agreements and are already covered by the Act.

d. Sub-tenants

Sub-tenants would have a forum in which to resolve disputes with their head-tenants. They would also have some bargaining power when it comes to resolving disputes outside of the Tribunal and we expect that we would see a significant reduction in exploitative practices like 'bond-harvesting'. In our experience of advising people living in sharehousing, the disputes likely to end up before the Tribunal would be those concerning unreturned bonds and unfair evictions.

Again, the amendment would do nothing more than place sub-tenants on par with those sub-tenants that have a written agreement and are already covered by the Act.

e. NCAT

The proposed provisions would provide clarity and certainty for NCAT regarding jurisdiction within share housing.

6. Summary

The current wording of s 10 provides for an opt-in / opt-out situation for people living in share housing. With unequal bargaining power there is currently little prospect of a sub-tenant having the capacity to insist on a written agreement, which is the only way for them to be covered by the Act. The limited bargaining position of

a sub-tenant also allows no realistic opportunity to negotiate regarding the amount of bond paid, nor does it provide capacity to insist on it being lodged with the Rental Bond Board. Sub-tenants should have access to the same protections whether or not they have a written agreement.

In circumstances where a sub-tenant without a written agreement is facing a threat of eviction with little or no notice, there is currently no option for intervention to prevent the threatened action. This makes a sub-tenancy a highly precarious arrangement.

With housing affordability being at crisis point more and more people are living in share housing, the Act needs to be amended urgently to provide people living in share housing with certainty and the same tenancy rights as every other tenant.