

CHAPTER 1

LEGISLATION AND CREATION OF RESIDENTIAL TENANCY AGREEMENTS

Introduction

In Australia residential tenancies are big business. Results of the *Australian Bureau of Statistics 2016 Census* reveal approximately one third of Australian households rent their homes. The law that governs residential tenancies lays down the rights, duties and obligations of landlords and tenants. Although the legislation in each state and territory varies, it is possible to identify many common features. This book will examine the legislation in each jurisdiction, highlight the similarities and differences and provide a practical guide to residential tenancies law throughout Australia. In addition, the topic of how disputes arise and how they may be resolved is discussed in detail.

Residential tenancy agreement

The Queensland Act provides a useful definition of a residential tenancy agreement. The *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) defines a residential tenancy as, the 'right to occupy residential premises under a residential tenancy agreement'. It then defines a residential tenancy agreement as 'an agreement under which a person gives someone else a right to occupy residential premises as a residence'. The Act defines a **tenant** as, 'the person to whom the right to occupy residential premises under a residential tenancy agreement is given'. Historically, the term **lessee** was used to refer to a person who had a right to occupy premises from a **landlord**.

History of residential tenancies legislation

Residential tenancies legislation emerged in Australia in the 1970's. Prior to this, the common law of landlord and tenant governed the residential landlord/tenant relationship. The same law governed residential and commercial

tenancies. The origins of specific residential tenancy legislation can be traced to a report of the *Commonwealth Commission of Inquiry into Poverty* published in 1975. This inquiry recognised the law should draw a distinction between commercial and residential tenancies. In commercial tenancies both parties have similar bargaining strengths, but this is not the case for residential tenancies, where the tenant is often at a significant disadvantage. Therefore, residential tenancies legislation seeks to redress this imbalance. In some quarters, some would argue the balance is now too much in favour of the tenant.

Since 1975 residential tenancies legislation has been enacted in each state and territory and in many jurisdictions the legislation has been amended a number of times. Recently the Victorian parliament passed an amendment Act that includes significant and wide-ranging changes to the state's residential tenancy laws. These changes will come into effect progressively by 2020. Similarly, New South Wales has introduced significant reforms to their laws. The changes introduced by these states recognise the reality that many Australians will never own their own home and that tenants need increased protection and security. The amendments also seek to balance the requirement for landlords to protect their investment and effectively manage their properties.

Specialist commercial and administrative tribunals have been established in many jurisdictions with power to resolve residential tenancy disputes. In each jurisdiction an administrative body is responsible for administering the legislation. Table 1.1 lists the residential tenancy legislation enacted in each jurisdiction and the relevant administrative and dispute resolution body.

Table 1.1 Residential Tenancies Legislation and dispute resolution bodies

State/Territory	Legislation	Admin Department	Dispute body
ACT	<i>Residential Tenancies Act 1997</i> <i>Residential Tenancies Regulation 1998</i>	Commissioner for Fair Trading	ACT Civil and Administrative Tribunal
New South Wales	<i>Residential Tenancies Act 2010</i> <i>Residential Tenancies Regulation 2010</i>	NSW Fair Trading	NSW Civil and Administrative Tribunal
Northern Territory	<i>Residential Tenancies Act 1999</i> <i>Residential Tenancies Regulations</i>	Northern Territory Consumer and Business Affairs and Northern Territory Department of Justice	Northern Territory Civil and Administrative Tribunal

Queensland	<i>Residential Tenancies and Rooming Accommodation Act 2008</i> <i>Residential Tenancies and Rooming Accommodation Regulation 2009</i>	Residential Tenancy Authority	Queensland Civil and Administrative Tribunal Magistrates Court (regional areas)
South Australia	<i>Residential Tenancies Act 1995</i> <i>Residential Tenancies Regulations 2010</i>	Consumer and Business Services	South Australian Civil and Administrative Tribunal
Tasmania	<i>Residential Tenancy Act 1997</i> <i>Residential Tenancy Regulations 2015</i>	Consumer Affairs and Fair Trading	The Residential Tenancy Commissioner Magistrates Court
Victoria	<i>Residential Tenancies Act 1997</i> <i>Residential Tenancies Regulations 2019</i>	Consumer Affairs Victoria	Victoria Civil & Administrative Tribunal
Western Australia	<i>Residential Tenancies Act 1987</i> <i>Residential Tenancies Regulations 1989</i>	Western Australia Department of Consumer and Employment Protection	Magistrates Court (minor case category)

Scope of residential tenancies legislation

Residential tenancies legislation differs in each state and territory in terms of the scope of the legislation i.e. the types of premises that are covered. The Queensland legislation is very wide ranging, covering general tenancies, moveable dwellings and rooming accommodation agreements. Legislation in each jurisdiction will specifically exclude certain types of accommodation from the application of the Act. Check your state and territory for exclusions.



Examples of exclusions

Common exclusions from residential tenancies legislation include hotels, motels, nursing home accommodation, educational institutions that provide accommodation, hospitals, retirement villages, aged care and holiday rental accommodation. Although, in some jurisdictions the length of a holiday rental may determine if it is subject to the provisions of residential tenancies legislation. This is the case in Queensland.

Also excluded from the legislation are rental agreements that are entered into in conjunction with the sale or purchase of a property.

Boarders and lodgers

Legislation draws a distinction between a tenant and a **boarder** or **lodger**. In general terms, in order for a person to be tenant under a residential tenancy, that person must have exclusive occupation of the part of the property being rented to them. If an owner of residential property retains possession and control over the property, and provides residential accommodation to another person in return for payment, the presumption is that the occupant is a lodger and not a tenant. Specific legislation has been enacted providing protection for people who rent rooming houses and moveable dwellings.

This book will confine its discussion to general residential tenancies for the rental of a house, a unit, a townhouse, an apartment or flat. It will not cover rooming house accommodation or moveable dwellings.

Exclusive occupation

As stated above, in order to be a tenant under a residential tenancy, that person must have exclusive occupation of the part of the property being rented to them. In some cases it may be a difficult question to determine if exclusive occupation has been granted and therefore whether the occupant is a 'tenant' and receives the protections provided by residential tenancies legislation.

Case Example



Hier v Hier 2017/SHO010474 SACAT

In this case a daughter agreed to rent a granny flat from her father that was positioned at the back of premises owned by the father, in return for the payment of rent. The granny flat was secure, self-contained and had its own separate entry. For these reasons the South Australian Civil and Administrative Tribunal (SACAT) decided that the daughter had exclusive possession of the flat and that the agreement entered was a residential tenancy agreement pursuant to the South Australian Residential Tenancies Act.

Objects of residential tenancies legislation

Legislation in some jurisdictions specifically details the objects or purpose of the legislation. This is the case in Queensland, Victoria and the Northern Territory. For example, s. 5 of the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* provides:

- 5 (1) The main objects of this Act are to state the rights and obligations of—
- (a) tenants, lessors and agents for residential tenancies; and
 - (b) residents, providers and agents for rooming accommodation.

Section 5(2) then elaborates how these objectives will be achieved.

In Victoria, s. 1 of the *Residential Tenancies Act 1997* (a) – (h) details the main purposes of the Act. Proposed amendments to this Act amend the list of purposes.

Residential tenancies legislation in the Australian Capital Territory, New South Wales, South Australia and Tasmania do not specifically detail the objects of the legislation. However, the long title of the Acts indicates the purpose of the legislation. For example, the long title of the *Residential Tenancies Act 1995 (SA)* provides:

- An Act to regulate the relationship of landlord and tenant under residential tenancy agreements; and for other purposes.

Definitions

In each jurisdiction the relevant Act contains an interpretation or definition section. This will usually appear within the first ten sections of the Act and is important, as it defines key words and phrases in the Act. Not every state and territory define terms in the same way, so it is important to ascertain which Act applies to you and to locate the relevant definitions for your state or territory.

Key terms defined by most Acts include, 'agent', 'landlord', 'notice to vacate', 'rental bond', 'residential premises', 'residential tenancy agreement', 'tenant', 'tribunal', 'rent', 'tenancy dispute' and 'termination order'.

Proposed amendments to the Victorian legislation will move away from the traditional language of 'landlord and tenant' and be replaced with 'residential rental provider and renter'.

See pages 203 - 210 for a glossary of key residential tenancy terms and phrases.

Key features of legislation

Residential tenancies legislation lays down the rights, duties and obligations of parties to a residential tenancy agreement that cannot be varied by the parties. Specific provisions differ between jurisdictions, but common features of the legislation include:

- protection of a tenant's right to enjoy quiet possession of residential premises
- regulation of the taking of a security bond and rent increases including a right for a tenant to claim that rental increases are excessive
- government agencies are responsible for administering the legislation and holding security bonds
- an obligation on the landlord to provide premises in a reasonable condition at the beginning of the tenancy and to maintain premises in a reasonable state of repair throughout the tenancy
- an obligation on the tenant to pay rent, take reasonable care of premises and to keep premises reasonably clean and to not use the premises for an unlawful or illegal purpose
- dispute resolution processes established, including the establishment of specialist civil and administrative tribunals in some jurisdictions to hear disputes
- regulation of the right of entry onto premises by a landlord during a tenancy agreement
- requirement for written notice to be sent to a tenant to remedy default
- regulation of the right for a landlord to terminate a residential tenancy and to recover possession of premises.

What is a residential tenancy?

Residential tenancies legislation covers tenancies on which 'residential' premises are located. There cannot be a residential tenancy over vacant land or land on which there are no residential premises. 'Premises' may relate to a whole or part of premises and the premises must be used or intended to be used as a residence. In some states and territories requirements are in place regarding a minimum level of facilities in the premises and premises must be fit for human habitation. See page 89 for a more detailed discussion of this requirement.

To check if premises are to be used as a residence, identify the purpose for which premises are being used or intended to be used. If the purpose is to use the premises as a place of residence, the premises will generally be regarded as 'residential' in nature. However, if the purpose is to use the premises for another purpose then this will not answer this definition.



Example

If premises are to be used to operate a business, as opposed to living in the premises as a home, the premises would not be regarded as 'residential' premises.

Sometimes it will be a difficult question to answer, particularly if premises are used for more than one purpose. For example, a shop with a house at the back of the premises or a house with two bedrooms and one bedroom is used to run an online business.

If premises have multiple purposes, the dominant purpose should be considered in answering the question as to whether the premises are 'residential' in nature.

Residential tenancies legislation does not require residential premises to be the tenant's principal place of residence and does not require the tenant to reside in the premises. A tenant might enter a residential tenancy agreement to provide a residence for another person e.g. their child or parents.



Case Example

Fiegel and Associates Pty Ltd v St George Community Housing Co-op Ltd
[2014] NSWCTTT 196.

The tribunal found that the *Residential Tenancy Act* applied if premises were to be used primarily for residential purposes, irrespective of whether a tenant or sub-tenant uses the premises for that purpose.

Agents/property managers

Often a landlord will appoint an agent to manage their property. See Chapter 2 for a detailed discussion of property managers, including the requirement to be licensed and the role these people play in creating residential tenancy agreements and managing a property during a tenancy. This book will use the term **landlord/agent** to reflect the fact that an agent (property manager) often acts on behalf of a landlord.

Creation of a residential tenancy agreement

A residential tenancy agreement is a legally binding contract whereby the landlord/agent agrees to grant a tenant the right to occupy a property to use as a home, in return for the payment of rent. It will also confer an interest in land on the tenant. Some landlords/agents will ask prospective tenants to complete

a *Residential Tenancy Application Form* to determine if they will accept the tenant. This form provides details of the prospective tenant's name, address, phone number and the details of previous rental history and references. The references might be from a previous landlord/agent or an employer or someone who knows the tenant well and can vouch for his or her character. Using such a form is good business practice and a risk management tool for property managers. However, residential tenancies legislation does not require such a form to be completed and there is no prescribed format for such a form. An agency is free to create their own form but must ensure it does not breach relevant equal opportunity, anti-discrimination and privacy legislation. Real Estate Institutes, the peak professional body for real estate agents and property managers in each state and territory, will often create best practice templates including a template for a *Residential Tenancy Application Form*. See Chapter 2 for a detailed discussion of the role property managers play in the preparation of residential tenancy agreements.

Contract

A contract involves an agreement but not all agreements are contracts. In order to create a valid contract including a contract to rent residential premises, the law requires six essential elements to be present. They are:

- an intention to create legal relations
- an offer and an acceptance
- form and/or consideration
- capacity of parties
- reality of consent
- legality of object.

Intention to create legal relations

In order for a valid contract to be created it must be established that the parties intend to create legal relations i.e. to create a legally binding agreement. This element will be relatively easily satisfied with respect to residential tenancy agreements. The transaction entered into by the landlord/agent and the tenant is a commercial agreement most often evidenced by a written residential tenancy agreement that sets out the rights, obligations and duties of both parties. One party agrees to lease premises in return for the payment of rent by the other party. This is not an agreement of a social or domestic nature i.e. it is not an agreement made between friends and family. It is an agreement that is intended to be binding on both parties i.e. an agreement where there is an intention to create legal relations.

If an agreement is made between family members the law will generally presume that the agreement is of a domestic nature and there is no intention to create legal relations. However, this presumption can be rebutted by presenting evidence to the contrary, as illustrated by the following case example.

Case Example

Hier v Hier 2017/SH010474

An agreement was made between a father and daughter regarding the renting of a self-contained granny flat by the daughter on premises owned by her father. The Tribunal (SACAT) stated that where the parties are related, the presumption is that they do not generally intend to create a legal relationship. In this case however, SACAT found that the presumption had been rebutted because the parties had attempted to document their agreement in writing, the tenant agreed to pay rent and for some part of the agreement, she had paid rent.

Offer and acceptance

In order for a residential tenancy agreement (a contract) to be created, there must be an 'offer' for the premises to be rented and an 'acceptance' of that offer. An advertisement advertising a property for rent (whether print or online) is not regarded by the law as an 'offer' but as an 'invitation to treat'. It is inviting prospective tenants to express their interest in renting the property. The completion of a *Residential Tenancies Application Form* would be regarded as an 'offer' to rent premises. This offer can be accepted or rejected by the landlord/agent. This will occur after the landlord/agent has conducted their due diligence to determine if this person(s) is the most suitable tenant. This will involve checking the references of the potential applicant(s) and ensuring financial capacity to pay the rent and capacity to care for the premises. See Chapter 2, pages 49 - 51 for a more detailed discussion of the steps taken to qualify a prospective tenant including the checking of Residential Tenancy Databases (blacklists).

If a prospective tenant's application (offer) is accepted, then subject to the other five essential elements of a contract being present, a contract will exist between the tenant and the landlord/agent. This contract can be formalised by the creation of a written residential tenancy agreement.

Multiple applications?

What is the situation if a person looking for residential accommodation completes a number of applications for a number of different premises? Each application would be regarded by the law as an 'offer' to rent the relevant premise. Therefore, if more than one application was accepted, it is arguable the person has more than one residential tenancy agreement. In practice, this will usually not be a great problem as the landlord/tenant will often have other suitable persons who have also made an application (offer) to rent the property and will not seek to enforce the contract. However, prospective tenants

should be careful. If more than one *Residential Tenancy Application Form* has been completed and one application has been accepted, he or she should immediately withdraw other applications. This should be done by contacting the landlord/agent orally, followed by confirmation in writing (email would suffice). This is appropriate given that the law provides an offer may be withdrawn at any time before acceptance.

Form and/or consideration

In order to create a valid contract, the agreement must possess consideration or be in a particular form. Consideration can be defined as 'mutual promises.' In the residential tenancies' context, a landlord/agent promises to rent residential premises to a tenant for a period of time and the tenant promises to pay a certain amount of rent per week. In the absence of consideration, a contract may still be valid if it is put in a particular form. A deed is a contract that is valid because of its form alone. A deed is a contract that is in writing, signed by the parties but does not need consideration.

Example



Anna and Catherine are sisters. Anna agrees to rent Catherine a house she owns for 12 months for no consideration (rent free). A deed is prepared reflecting this agreement and is signed and dated by both parties. The agreement is valid and enforceable, despite the lack of consideration. This is because the agreement is in the form of a deed.

In the following case it was decided that it is possible for the consideration for a residential tenancy agreement to be something other than the payment of rent. What is critical is that something of 'value' is provided by the tenant. The following case example illustrates this point.

Case example



King v Cursten Pty Ltd [2012] QCATA 127

A landlord allowed his father to reside in premises on a rent-free basis. The landlord then allowed his brother to move in to care for the father. When the father died, the landlord sought to remove the brother. The Queensland Civil and Administrative Tribunal determined there was a valid residential tenancy agreement, deciding that the agreement to care for the father amounted to 'value'.

In contrast, is the decision of the South Australian Civil and Administrative Tribunal (SACAT) in the following case example, interpreting s. 5(1) of the *Residential Tenancies Act 1995* (SA). This section excludes certain agreements from SACAT's jurisdiction, including 'an agreement conferring a right to occupy premises for the purpose of residence but under which no rent is payable'.

Case Example



McColl v Hearse [2016] SACAT 38

The Tribunal found that s. 5(1) of the Act excludes agreements where no rent is payable from the application of the Act. In its reasons for decision the Tribunal distinguished the common law concepts of 'valuable consideration' and 'rent' and found the meaning of the term 'rent' had been narrowed by the South Australian Act.

The Tribunal found that the fact no rent was payable in the agreement made between the parties, had the result that the Act did not apply and SACAT had no power to hear the matter.

Capacity of parties

In order for a valid contract to be created the law requires that the parties to the contract have legal capacity to contract. The law regards certain persons as having limited capacity or ability to make a contract. Such persons include minors (persons under the age of 18 years), bankrupts, intoxicated persons or the mentally insane.

Minors

In the residential tenancies' context, minors are the category that requires the most discussion. Can a person under the age of 18 years enter into a binding residential tenancy agreement? Legislation in all jurisdictions provides that a person under the age of 18 years may enter into a residential tenancy agreement if it is for their benefit. A residential tenancy could be regarded as beneficial as it provides a necessary service i.e. residential accommodation. Obviously, we are not talking of someone five years of age renting premises. For instance, an apprentice of 16 or 17 years of age, earning income could enter a binding residential tenancy agreement.

A landlord/agent may be reluctant to rent premises to a minor but cannot positively discriminate against a prospective tenant on the basis of age. The minor should provide appropriate documentation that will support a claim that he or she can pay the rent and care for the premises. For example, copies of payslips, tax returns, bank account details and character references.

Reality of consent

The next element required for a valid contract to be created is that the consent of the parties to the contract must be given genuinely – it must be a 'real' consent. There are a number of situations in which reality of consent may be absent. For example, if the agreement has been entered into as a result of a mistake, misrepresentation, duress, undue influence or because of unconscionable (excessively unreasonable) conduct.

Residential tenancy agreements can be classified as a contract for 'services' and as a result the provisions of the Australian Consumer Law (ACL) will apply. The ACL is part of the *Competition and Consumer Act 2010* (Cwlth) and contains a general prohibition on misleading and/or deceptive conduct (s. 18) and specific prohibitions on making false statements (representations) with respect to goods and services (s. 29), prohibitions on unfair contract terms and on unconscionable conduct in trade and commerce. See Chapter 2, pages 35 - 45 for a detailed discussion of these provisions and how a landlord/agent may fall foul of these provisions when marketing, advertising, promoting or showing residential premises.

Legality of object

The final element required to create a valid contract is legality of object. The purpose or object of the contract must be legal. In the residential tenancy context, if the purpose of a residential tenancy agreement is to conduct an illegal activity on the premises, the element of legality of object will not be satisfied.

Example



Renting premises for the purposes of operating a drug lab would be an illegal contract. The element of legality of object would not be satisfied as such an agreement is an agreement to commit a crime.

Is a written agreement required?

Interestingly, residential tenancies legislation does not require an agreement to be in writing, it may be written, oral, implied or a combination. However, to provide written evidence of the agreement, most jurisdictions have established a written standard form residential tenancy agreement that can be completed and signed by the parties that contains standard terms and conditions. It is very difficult to enforce oral agreements because often a party's recollection of what has been agreed, will differ. Disputes are more likely to arise from an oral as opposed to a written agreement.

A written residential tenancy agreement will detail the names and addresses of the landlord/agent and tenant, the property location, length of tenancy, rent and bond payable and outline the landlord's/agent's and tenant's rights, duties and responsibilities. The agreement will include standard terms but in addition, may include special terms. These terms are negotiated by the parties and should be negotiated before the tenant signs the tenancy agreement.

Examples



A special condition that permits the keeping of pets, requires a tenant to undertake garden and/or swimming pool maintenance or prevents a tenant from doing something e.g. from using a garage located on the premises.

Terms inconsistent with residential tenancies legislation

Special terms cannot be inconsistent with the relevant residential tenancy Act. If such a term is included in an agreement, the term will not be binding on the parties and in some jurisdictions a penalty applies for the inclusion of such a term in an agreement.

Consumer and Business Services SA in its publication, *Lease Agreement Terms Inconsistent with the Residential Tenancies Act 1995 (SA)* provides examples of terms that would be regarded as inconsistent, including the following:

- 'All carpets shall be professionally cleaned by the tenant at the termination of the tenancy'. This clause would not be enforceable. It states carpets **must** be cleaned at the end of tenancy. This term would require the carpets to be cleaned even if they were not dirty, Section 69 of the South Australian Act requires the tenant to return the premises and ancillary property back to the landlord in 'a reasonable condition and a reasonable state of cleanliness'. The important thing is that at the end of the tenancy the carpets are in a *reasonable* state of cleanliness, not that they have been professionally cleaned.
- 'The tenant is responsible for pruning all fruit trees, vines, shrubs and to dispose of all clippings'. This condition could not be enforced. A tenant is responsible for maintaining the property and garden in a reasonable condition but not for carrying out specialist pruning work.
- 'The tenant agrees to allow entry to the premises for the purpose of routine inspections. Inspections are carried out between 9 am and 5 pm Monday to Friday'. This clause is inconsistent with the South Australian Act that requires a tenant to receive appropriate notice before any inspection takes place. Before each and every inspection, notice requirements set down in the Act must be satisfied.

Australian Capital Territory endorsed terms

A unique feature of the *Residential Tenancies Act 1997* (ACT) is the capacity for the ACT Civil and Administrative Tribunal (ACAT) to endorse terms of a residential tenancy agreement that are inconsistent with standard terms. Endorsement applications may be made to the Tribunal with the written consent of both parties. With respect to some inconsistent terms, if such terms have been endorsed by the Tribunal previously, these terms will not need to be formally endorsed if both parties agree the term should be included in the agreement.



Example

A term that provides there shall be no smoking on the premises.

A 'fair clause for posted people' can be added to standard terms in the ACT without endorsement from the tribunal, provided the landlord and tenant agree. The term must be as stated in s. 8 of the Act:

Termination because of posting

(1) The tenancy agreement may be terminated—

(a) if the lessor is posted to Canberra in the course of the lessor's employment—by the lessor giving the tenant at least 8 weeks written notice; or

(b) if the tenant is posted away from Canberra in the course of the tenant's employment—by the tenant giving the lessor at least 8 weeks written notice.

(2) A notice under subclause (1) must be accompanied by evidence of the posting (for example, a letter from the employer of the lessor or tenant confirming the details of the posting).

(3) The tenancy ends—

(a) 8 weeks after the day a notice is received under subclause (1); or

(b) if a later date is stated in the notice—on the stated date.

Cost of preparing a written agreement

The cost of preparing a residential tenancy agreement must be borne by the landlord/agent and it must be written in a clear fashion. Standard form contracts have made this task much easier. The tenant must sign a copy of the agreement and return this to the landlord/agent. In most jurisdictions the landlord/agent is also required to provide other information and documentation to a tenant. See pages 25 - 30 for details of the information and documentation that must be provided.

Types of tenancies – fixed and periodic

Two main types of residential tenancies are recognised by the law; fixed term and periodic tenancies. A fixed term tenancy involves a tenant agreeing to rent premises for a specific period of time. The tenancy has an end date.

Example

John agrees to rent an apartment from Adrienne for a period of twelve months. The agreement will have a start date and a finish date. For example, a twelve-month tenancy that commences on 1 July 2019 will conclude on 1 July 2020.

Note, that some property managers set all tenancy agreements to expire on a particular day of the week. For example, a property manager may decide that all agreements will end on a Monday. Therefore, in the above example the term of the agreement may not be exactly twelve months.

In comparison, a periodic tenancy involves a tenant agreeing to rent residential property for an unspecified period of time. The agreement will have a start date but no finish date. Often such a tenancy will arise when a tenant continues to rent premises after the conclusion of a fixed term tenancy. The length of a periodic tenancy will generally be determined by how often rent is paid. If rent is paid weekly this will be regarded as a weekly periodic tenancy whereas payment of rent fortnightly will mean it is a fortnightly periodic tenancy.

Example

If in the example provided above, the fixed term tenancy concluded on 1 July 2020 but John, the tenant remained in possession paying rent every two weeks.

This tenancy would become a fortnightly periodic tenancy.

Option fees/holding deposits

Some jurisdictions permit a landlord/agent to collect an option fee or holding deposit. For example, in Western Australia a landlord/agent can request an option fee from a prospective tenant which will be held while references are checked and a decision made whether the property will be offered to that person. The amount that can be charged depends on the proposed weekly rent of the property and the location of the property.

If the landlord/agent does not offer the prospective tenant the property, the option fee must be refunded within seven days. If the prospective tenant is offered the tenancy then the option fee may be refunded or credited towards the first rent payment.

Holding deposits are allowed in Queensland, Victoria and Tasmania but the taking of such deposits is strictly controlled by legislation. For example, s. 25 (1) – (3) of the *Residential Tenancies Act 1997 (Tas)* provides:

25 (1) Except in the case of boarding premises, an owner may require that an amount be paid by or on behalf of the prospective tenant as security for the performance of obligations under a residential tenancy agreement.

(2) A person paying a security deposit under subsection (1) must pay the deposit –

(a) to the Authority; or

(b) if the residential premises are managed on the owner's behalf by a property agent, within the meaning of the Property Agents and Land Transactions Act 2016, to the Authority or that property agent.

Penalty:

Fine not exceeding 50 penalty units.

(3) A property agent who receives a security deposit from a tenant under subsection (2) (b) must deposit that money with the Authority within 3 working days after receiving it.

Penalty:

Fine not exceeding 50 penalty units.

Standard terms and conditions

Standard form residential tenancy agreements in each jurisdiction contain very similar terms and conditions. Specific requirements peculiar to some jurisdictions are discussed later in this chapter. See pages 25 - 30. The following list summarises common standard terms and conditions. They include:

- a requirement for the landlord/agent to give the tenant a copy of the residential tenancy agreement, general information specific to the jurisdiction (see Table 1.2 below), a copy of body corporate rules (if relevant), a bond lodgement form and a receipt for payment of bond money
- a requirement for the landlord/agent to inform prospective tenants if they are using tenancy databases ('blacklists') and a requirement to inform a prospective tenant if they are listed on a database, how they can get a copy of the content, and how to remove the information if they disagree with the content. See pages 50 - 52 for a detailed discussion of these databases
- a requirement for the landlord/agent together with the tenant to complete an *Entry Condition Report* at the commencement of the tenancy, recording the condition of the property and for both parties to sign the report and retain a copy
- provision for the landlord/agent to request a rental bond (security deposit) from the tenant at the commencement of a tenancy. The landlord/agent must pay this bond to the relevant authority in their jurisdiction who holds it until it is paid back to the tenant after the tenant vacates the property, provided no money is owed to the landlord for rent, damage or costs

- restriction on the amount of rental bond that can be requested – generally an amount not in excess of four weeks rent but if the rent is over a specific amount, there may be no limit to the amount of the bond
- provisions with respect to rent and how rent may be paid. The way rent will be paid should be included in the residential tenancy agreement and the tenant should be advised of any extra costs a particular method of payment attracts. Payment options may include cash, cheque, credit or debit card, via EFTPOS or direct debit
- a requirement for the landlord/agent to provide the tenant with receipts for payment of rent and to maintain accurate records (ledger) of rent paid. Records must be retained for a certain period of time and a tenant can request a copy of the rent record at any time with appropriate notice
- provisions for requesting the tenant to pay rent in advance, for increasing and decreasing rent are strictly controlled and there is a prohibition on excessive rent increases with capacity for a tenant to seek an order declaring a rent increase excessive
- procedures in the event of a tenant failing to pay rent including both ending and continuing the tenancy
- rights and procedures for the landlord/agent to enter premises during a tenancy, including provision of relevant notice and a requirement for entry to occur at a reasonable time. Penalties apply for unlawful entry
- requirement for the landlord/agent to provide premises in a reasonable condition at the commencement of a tenancy and to reasonably maintain premises and to conduct routine repairs during a tenancy. Provisions apply with respect to emergency repairs and may include a requirement to reimburse a tenant for expense incurred in paying for emergency repairs
- requirement that the tenant not add a fixture or structure to residential premises without consent of the landlord/agent and not to conduct unlawful activities on the premises
- provisions regarding breach of the tenancy agreement including breaches by the tenant and the landlord, repeated breaches, notices that may be issued to remedy breach, how to calculate notice periods and how to serve notices on the tenant
- provisions with respect to selling a tenanted property and a prohibition on selling during a fixed term tenancy. Terms include those relating to providing a tenant with notice of intention to sell and providing written notice of advertising the property for sale
- provisions with respect to reletting a tenanted property
- provision for the continuation of a tenancy after a periodic tenancy has concluded

- methods by which a landlord/agent or tenant may end a tenancy whether a fixed term or periodic tenancy, including the requirement to issue the tenant with a *Notice to Leave*. Different lengths of notice apply depending on the reason for ending a tenancy. If the tenant instigates the departure, he or she must serve notice of intention to leave on the landlord/agent
- provisions in the event that the tenant has breached the tenancy agreement including costs the tenant may be responsible for (advertising, reletting, loss of rent) and provisions regarding abandonment of premises by a tenant
- provisions with respect to completion of an Exit Condition Report, refunding bond money and signing relevant paper work
- provisions regarding goods and documents left behind when a tenant moves out including how and when goods may be returned or disposed
- provisions with respect to resolution of disputes and the services available to assist parties, including referral of disputes to a court or a commercial and administrative tribunal
- prohibition on the eviction of a tenant for enforcing their legal rights
- provisions for applying to a relevant court or commercial and administrative tribunal for a termination order and for the issue of a warrant of possession of residential premises (gives a right to recover premises)
- requirement that at the end of a tenancy a landlord/agent retain for a certain period of time, a copy of the tenancy agreement, entry and exit condition reports, rent payments records and receipts.

Table 1.2 below provides a list of the standard form residential tenancy agreements used throughout Australia.

Table 1.2 Standard Form Residential Tenancy Agreements in Australia.

State/Territory	Form Required by Legislation	Type of Agreement
Australia Capital Territory	None	Standard Tenancy Agreement
New South Wales	<i>Residential Tenancies Regulation 2010</i> Schedule 1 Standard Form Agreement (Clause 4(1))	Standard Form Residential Tenancy Agreement
Northern Territory	<i>Residential Tenancies Regulations</i> Schedule 2, Regulation 10	Residential Tenancy Agreement
Queensland	Form 18a	General Tenancy Agreement
South Australia	None	Fixed Term – Residential Tenancy agreement Periodic – Residential Tenancy Agreement
Tasmania	None	Residential Tenancy Agreement Tasmania

Victoria	<i>Residential Tenancies Regulations 2008</i> Schedule 1 Form 1	Residential Tenancy Agreement
Western Australia	Form 1AA	Residential Tenancy Agreement

Major obligations of the landlord and tenant

It is important that both the landlord/agent and the tenant understand their obligations pursuant to a residential tenancy agreement. This may avoid disputes occurring. The relevant Act will impose key obligations on both the landlord/agent and the tenant.

Obligations of a landlord

The major obligations of a landlord/agent with respect to a residential tenancy agreement are to:

- ensure premises are habitable, functional and in a reasonable state of repair and cleanliness at the commencement of the tenancy
- advise the tenant of the landlord's name and address (agent's address if there is one)
- allow the tenant quiet possession of the property without undue interference
- comply with entry notice requirements
- lodge the rental bond with the relevant administrative body
- carry out repairs and maintenance of the property.

Obligations of the tenant

The major obligations of the tenant are to:

- pay the rent on time
- keep the premises in a reasonable state of cleanliness and repair
- notify the landlord/agent if repairs are required
- not engage in activities that may be disruptive to neighbours
- not engage in unlawful activities on the premises.

Specific requirements for establishing an agreement by jurisdiction

Australian Capital Territory

The landlord/agent must give a prospective tenant a copy of the proposed residential tenancy agreement. If the tenant is not included in a copy of the agreement, he or she must be provided with the standard residential tenancy terms and be allowed a reasonable time to consider the proposed agreement.

If a copy of the residential tenancy agreement provided to a tenant, contains a provision that is inconsistent with a standard residential tenancy term, this must be annotated in a way that draws the attention of the tenant to the provision and the fact that it is inconsistent with a standard residential term.

In addition, the tenant must be provided with details of the landlord's full name and an address for service on the landlord, and at which the landlord can be contacted by the tenant.

A tenant must receive a copy of *The Renting Book* published by Revenue ACT (current edition at time of writing – November 2018). In addition, the tenant must be given a copy of any relevant *Energy Efficiency Rating Statement* that relates to the habitable part of the premises. If there is no such statement, the tenant needs to be advised of this.

New South Wales

Within seven days of signing an agreement the landlord/agent must give the tenant:

- a copy of the NSW Fair Trading *New Tenants Checklist* plus the *Addendum to New Tenants Checklist*
- a copy of the strata by-laws (if relevant)
- the name and address of the landlord and the name, address and contact details of an agent. If no agent has been appointed, the tenant must be given the business address of the landlord and a contact phone number for the landlord.

If a rental bond is requested, the landlord/agent must invite the tenant to lodge their rental bond online. See page 57 for a more detailed discussion of the online system operating in NSW.

The landlord/agent has an obligation to notify tenants if the property being leased is on a register of properties that contain loose fill asbestos. If this is the case, an addendum must be included in the agreement to this effect.

From 29 April 2016 residential premises that are leased with a swimming pool must have a *Certificate of Compliance* or an *Occupation Certificate* and a *Certificate of Registration*. The changes were introduced to protect children under the age of five around backyard swimming pools.

A property owner who has a pool must register the pool and the pool is inspected by a local council inspector or an accredited certifier who issues a *Certificate of Compliance*.

The landlord/agent should provide the relevant certificates to the tenant at the time the residential tenancy agreement is entered. The laws do not apply to properties with more than two lots and a shared pool. For example, units in a

strata complex or community scheme. The owner's corporation or association is responsible for ensuring there is a valid certificate of compliance with respect to pools on common property.

Northern Territory

The tenant must be provided with a signed copy of the residential tenancy agreement by the landlord/agent within three days of taking possession of premises plus a signed copy of the *Entry Condition Report*.

A feature peculiar to the Northern Territory, is the recognition of a *Prescribed Agreement*. This agreement specifies the terms and conditions of a residential tenancy which will apply whenever there is no written tenancy agreement or where the written tenancy agreement is not signed by both parties. This applies if a landlord enters an oral agreement with the tenant and no written agreement exists. Regulation 10, Schedule 2 of the *Residential Tenancies Regulations* contains the *Prescribed Agreement*.

If premises have a pool or spa, a landlord must have a *Compliance Certificate* or *Acknowledgement Notice* for the pool safety barrier in their name. This requirement applies to residential premises, smaller than 1.8 hectares, including units and townhouses. A tenant should be provided with a copy of the certificate at the commencement of the tenancy.

Queensland

In Queensland rental premises must not be advertised or offered for rent unless a fixed amount of rental payable is stated in the advertisement.

The landlord/agent must give a prospective tenant a copy of the proposed tenancy agreement including standard and special terms before the prospective tenant commits to enter the tenancy. Once a tenant has signed a tenancy agreement the landlord/agent must give the tenant the following documents:

- a copy of the *General Tenancy Agreement* (Form 18a) including any special conditions
- a copy of the *Pocket Guide for Tenants* (Form 17a)
- a copy of any relevant body corporate rules and applicable by-laws
- a *Bond Lodgement* (Form 2) if a bond is requested
- an *Entry Condition Report* (Form 1a).

If a property has a pool, a tenant should obtain a *Pool Safety Certificate* before entering a tenancy agreement. Similar to NSW, there is a requirement in Queensland for all residential pools in Queensland to be registered with the Queensland Building and Construction Commission (QBCC). Different rules apply depending on whether the pool is a shared or non-shared pool. If a pool

is only accessible to the residents of one dwelling it is a non-shared pool. Before entering into a new lease or renewed lease for such premises, the landlord/agent must ensure a *Pool Safety Certificate* is issued by a pool safety inspector certifying that the pool is compliant with current regulations.

If two or more dwellings can use a pool such as a body corporate pool, it is a shared pool. The landlord/agent must give the tenant a copy of the *Pool Safety Certificate* if one is in effect. If no certificate is in effect, the landlord/agent must give the tenant, body corporate (if relevant) and the Department of Infrastructure and Planning a *Notice of No Pool Safety Certificate (Form 36)* before the lease is entered. The Form 36 will advise that the pool may not comply and the steps that must be taken to comply.

South Australia

The South Australian Act requires the landlord/agent to give the tenant a notice pursuant to s. 48(1) at the time a residential tenancy agreement is entered into. This notice contains details of the landlord/agent, the tenant, the property, the amount of rent payable plus an Information Brochure that contains a summary of the provisions of the Act and sets out the rights, duties and obligations of the landlord/agent and tenant. This Information Brochure is published by Consumer and Business Services and a landlord/agent faces a monetary penalty if this brochure is not given to a tenant prior to signing a residential tenancy agreement.

A tenant must also be given two copies of the ingoing inspection sheet, and if applicable a copy of strata corporation Articles or community title by-laws.

Before entering a residential tenancy agreement in South Australia, a landlord/agent must inform a tenant if they have advertised, or intend to advertise the property for sale and of any existing sales agency agreement. If this is not done, and the landlord/agent sells the property in the first two months of the agreement, the tenant can give the landlord/agent a *Notice of Termination due to Sale of Property (Form 4A)*.

Tasmania

Legislation in Tasmania requires the landlord/agent to give a tenant a copy of a residential tenancy agreement within 14 days of the beginning of the tenancy if the agreement is in writing. There is no prescribed form, for the agreement but Services Tasmania provides a template. Additionally, the landlord/agent is required to give a tenant a copy of the publication *The Rental Guide – A Guide for Property Owners, Property Managers, Tenants and Tenant Advocates in Tasmania*, published by Consumer Building and Occupational Services, Department of Justice, Tasmania.

If the property is strata titled, the landlord/agent must give the tenant a copy of rules the tenant must comply with.

A unique feature of residential tenancy law in Tasmania relates to minimum standards with respect to premises being rented. Since August 2015 Tasmanian residential tenancies legislation imposes minimum standards for residential rental premises. Legislation requires residential rental premises must:

- be weatherproof and structurally sound
- be clean and in good repair
- be adequately ventilated
- be connected to a sewer, on site waste management or another approved toilet system
- have hot and cold running water
- be connected to an electricity system
- contain a separate bathroom and/or toilet
- have cooking facilities
- have window coverings in any room likely to be used as a bedroom
- have heating installed in the main living area that must be a fixed electric or gas heater, a heat pump or a wood heater.

It is possible for the Residential Tenancy Commissioner in Tasmania to grant exemptions to the minimum standards for premises or to a class of premises.

Victoria

The landlord/agent must provide the tenant with a copy of the *Statement of Rights and Duties* published by Consumer Affairs Victoria, no later than the day the tenants starts to occupy residential premises.

The landlord/agent must give a prospective tenant a copy of the unsigned residential tenancy agreement and within 14 days of entering an agreement, a copy of the signed agreement. Names and addresses, plus an emergency phone number for emergency repairs for the landlord, must be provided. If an agent has been engaged, a fax number of the agent must be provided and the agent must provide the tenant with written details as to whether or not the agent can authorise urgent repairs, and if so, the maximum amount that can be authorised.

If relevant, the tenant must also be provided with a copy of the body corporate by-laws.

Amendments to be implemented progressively by 2020, will require Victorian landlords/agents to tell a prospective tenant certain information before a residential tenancy agreement is signed. For example, if the landlord plans to sell the property during the tenancy agreement or if the landlord/agent knows

that asbestos has been found in the property. In addition, a landlord/agent will be prevented from telling the tenant any incorrect information or neglect to tell them something about the property to encourage them to sign a residential tenancy agreement. If the landlord does this, the tenant will have the right to apply to the Victorian Civil and Administrative Tribunal (VCAT) for compensation or for an order to end the tenancy.

Western Australia

The landlord/agent is required to give the tenant a copy of the residential tenancy agreement (Form 1AA) at the time the tenant signs it and a copy of the agreement signed by both parties within 14 days of the tenant returning the signed agreement to the landlord/agent. The landlord/agent must also provide either an *Information for Tenants* (Form 1AC) or an *Information for Tenant with Non-Written Tenancy Agreement* (Form 1AD) at the start of the tenancy. The forms alert the tenant of the safety concerns associated with pool barriers, blinds and curtain cords.

Chapter summary

In this chapter we have defined a residential tenancy agreement and the legislation that governs such agreements in every state and territory. The relevant administrative and dispute resolution bodies for each state and territory were identified. The scope, objects and key definitions of residential tenancies legislation were identified as were the key features of legislation.

How a residential tenancy is created was considered, including the elements required to create a valid residential tenancy contract. Standard form residential tenancy agreements were identified for each jurisdiction and standard terms and conditions for such agreements were discussed. The major obligations of the landlord and the tenant arising from such agreements were listed. Specific requirements for establishing residential tenancy agreements in each state and territory were highlighted.

In the next chapter the focus turns to property managers and the role they play with respect to residential tenancy agreements. Topics discussed include the requirement to be licensed, advertising and marketing rental properties, holding open inspections, qualifying tenants and the obligations of a property manager during the currency of a tenancy agreement.