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Occupancy principles

A part of the 'occupancy agreements' model of law reform

This briefing paper is about the Australian Capital Territory's 'occupancy principles.' The principles are part of recent reforms to the Australian Capital Territory's Residential Tenancies Act 1997 (ACT) that make provision for 'occupancy agreements'. The TU believes that the ACT's provisions relating to occupancy agreements are a sound model of law reform for New South Wales.

Occupancy agreements are agreements that are not residential tenancy agreements and that would not otherwise be subject to residential tenancies legislation. Occupancy agreements include agreements for boarding and lodging, student accommodation and supported accommodation.

This discussion paper presents the occupancy principles, along with notations by the TU. For an introduction to the occupancy agreements model of law reform, see the TU's discussion paper 'Occupancy agreements: a new model of law reform for boarders, lodgers and other renters excluded from the Residential Tenancies Act 1987.'

The difference between residential tenancy agreements and occupancy agreements

Like New South Wales, the Australian Capital Territory has a Residential Tenancies Act. Each Act takes a similar approach to dealing with residential tenancy agreements. The approach is prescriptive: a standard form of residential tenancy agreement is prescribed, as are most of the terms of residential tenancy agreements. The way in which rent may be increased is prescribed, including the amount of notice required and the way in which it is given. The ways in which residential tenancy agreements may be terminated are also prescribed, including the amount of notice required for grounds of termination, and a prescribed process of obtaining possession.

Unlike New South Wales, the Australian Capital Territory also has provisions relating to occupancy agreements. These provisions include the *occupancy principles*, which are very different from the provisions relating to residential tenancy agreements. The occupancy principles are more modest and less prescriptive than the provisions relating to residential tenancy agreements.

As a consequence, occupancy agreements are very different from residential tenancy agreements. Occupancy agreements are allowed much more variation than residential tenancy agreements. This is important, because there is greater variation between the sorts of housing services provided under occupancy agreements (for example, a students' residential college is very different from a domestic violence refuge).

The occupancy principles

There are nine occupancy principles set out at section 71E (1)(a)-(i) of the *Residential Tenancies Act 1997* (ACT). A person who agrees to occupy premises is called an 'occupant'; the person or corporation who grants them the right to occupy is called a 'grantor'. The TU's notes on the principles are highlighted.

- (a) an occupant is entitled to live in premises that are—
- (i) reasonably clean; and
 - (ii) in a reasonable state of repair; and
 - (iii) reasonably secure;

This is a basic entitlement. The use of the word 'reasonable' is consistent with the less prescriptive approach taken in the occupancy principles generally, because 'reasonable' does not imply an absolute standard. Instead, what is 'reasonable' will vary according to the circumstances in each case (*Bankstown Foundry v Braistina* (1986) 160 CLR 301). In relation to occupancy agreements, what is reasonable would vary according to the sort of housing service provided at the premises, the amount of rent paid, and other considerations. This principle is complemented by principle (e), which deals with a grantor's right to enter the premises in order to do repairs.

- (b) an occupant is entitled to know the rules of the premises before moving in;

This principle acknowledges that many premises subject to occupancy agreements have 'house rules.' The principle does not prescribe what the rules may be – this is left to each grantor. All that is required is that the rules are consistent with the other occupancy principles and that the rules are known upfront. The principle is fair to both parties and helps avoid disputes.

- (c) an occupant is entitled to the certainty of having the occupancy agreement in writing if the occupancy continues for longer than 6 weeks;

This principle tries to balance two interests. On the one hand, written occupancy agreements are beneficial both to occupants and to grantors, because they make clear the terms of the agreement and help avoid disputes. On the other hand, providing a written occupancy agreement may appear to be inconvenient where the housing service provided is short-term. The principle strikes a balance between these two interests by providing that an occupant is entitled to a written agreement after six weeks (this a little unusual in that it prescribes a particular time period). The TU suggests that the inconvenience of providing a written agreement is really very slight, and the benefits are such that it may be more appropriate to provide that an occupant is entitled to a written occupancy agreement at the commencement of the occupancy.

- (d) an occupant is entitled to quiet enjoyment of the premises;

This is a basic entitlement. 'Quiet enjoyment' means that an occupant is entitled to reside at the premises free from interference and harassment from the grantor (it does not require that the premises should be free from noise). The TU suggests that 'quiet enjoyment' in relation to occupancy agreements is probably less strong than it is in relation to residential tenancy agreements, because here it is qualified by principle (b), which expressly allows for house rules. It is also qualified by principle (e), which deals with the grantor's right to enter and inspect the premises.

- (e) a grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes;

This principle confirms a grantor's right to enter premises. The right is broad – the qualifications are that the purpose of entry is 'reasonable', and that the grantor may enter at a 'reasonable' time. As with principle (a), the TU suggests that what is 'reasonable' will depend on the sort of housing service provided at the premises, and other considerations. For example, it might be reasonable to enter at night to effect an urgent repair, and to enter only during the day to effect a non-urgent repair. The principle does not prescribe that an amount of notice should be given before the entry. It also qualifies the occupant's entitlement at principles (a) and (d).

- (f) an occupant is entitled to 8 weeks notice before the grantor increases the amount to be paid for the right to occupy the premises;

It is appropriate that increases in rents or agreement fees should be addressed in the occupancy principles. This principle, however, is unusual because it specifies the amount of notice required – a departure from the non-prescriptive approach of the occupancy agreements model. The TU suggests that it may be appropriate for the principle to instead state that an occupant is entitled to know, before moving in, how the rent under an occupancy agreement may be increased, including the amount of notice that is to be given, and that the amount of notice must be reasonable.

- (g) an occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction;

This is a basic, and minimal, entitlement. The principle does not prescribe grounds for termination, nor does it prescribe the amount of notice required – this is left up to each grantor. Significantly, the principle does not require that the grantor apply to the Tribunal for orders to terminate the occupancy agreement. An occupant who disputes the termination of their occupancy, however, may be able to use the dispute resolution provisions (see principle (i) and 'The occupancy principles and dispute resolution', below) to determine whether the occupancy agreement should end. The principle is also qualified by principle (h), below.

- (h) an occupant must not be evicted without reasonable notice;

This principle does not prescribe the amount of notice required. As with other uses of the word 'reasonable', what is reasonable notice of eviction will vary according to the circumstances, including the sort of housing service provided at the premises, and the reasons for eviction.

- (i) a grantor and occupant should try to resolve disputes using reasonable dispute resolution processes.

This principle encourages occupants and grantors to use reasonable dispute resolution processes, rather than entering into threats and self-help remedies that often end unhappily for both parties. The ACT Residential Tenancies Tribunal is available to resolve disputes arising from occupancy agreements (see below). Some grantors might also establish their own dispute resolution processes, though either party always has the option of taking their dispute to the Tribunal.

The occupancy principles and dispute resolution

Under the ACT's *Residential Tenancies Act 1997* (ACT), persons who are party to an occupancy agreement can apply to the ACT Residential Tenancies Tribunal to have a dispute about their occupancy agreement resolved (section 71I). The Tribunal must consider the occupancy principles in resolving the dispute, and can make a wide variety of orders to resolve a dispute (section 104).

The TU suggests that the Consumer, Trader and Tenancy Tribunal should have the same role in relation to occupancy agreements in New South Wales.

Summary – a sound model of law reform

The occupancy principles work by shaping the contents of occupancy agreements, the way in which occupancy agreements may be terminated, and the way disputes about occupancy agreements are resolved. The occupancy principles do so in a modest and generally non-prescriptive way. They are part of a sound model of law reform for New South Wales.

For further information, contact:

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