
MEMORANDUM

FROM: TENANCY WA
SUBJECT: ABANDONMENT
DATE: OCTOBER 29, 2015

"Where the tenant abandons the premises" – the right to unilateral termination of a fixed term residential tenancy agreement by tenants.

1. Section 60 of the Residential Tenancies Act 1987 ("the Act") sets out the only circumstances in which residential tenancy agreements shall be terminated, under the heading, **60. How residential tenancy agreements are terminated.**
2. Section 60 is derived from subsection 61(1) of the Residential Tenancies Act, 1978 (South Australia).
3. Subsection 61(1)(d) of the RTA (S.A.) readⁱ as follows:

61. (1) Notwithstanding any Act or law to the contrary a residential tenancy agreement shall not terminate or be terminated, except –

[...]

(d) where the tenant abandons the premises.

[...]
4. Subsection 60(f) of the Act was identical with the corresponding subsection of the RTA (SA) until the Residential Tenancies Amendment Bill 2011, by which the chapeau was amended to substitute "Notwithstanding" with "Despite", and add the words "in one of the following circumstances".ⁱⁱ
5. There was no relevant discussion of section 60 by either the Legislative Council or the Legislative Assembly, at the time it was passed.ⁱⁱⁱ
6. Tenancy WA are not aware of any textbook that covers the Act. The leading text on Residential Tenancy Law in South Australia at the time of the enactment of the Act was *Residential Tenancy Law and Practice, Victoria and South Australia*, Law Book Company Limited, Sydney, 1983. That book remains the leading text on the Act, particularly so with regard to abandonment.^{iv}
7. Another relevant text is *Residential Tenancies Law and Practice New South Wales (6th Ed.)*, Federation Press, 2014.
8. Because Residential Tenancy matters at first instance are not reported in W.A., and the avenues for appeal are severely restricted by s.26 of the Act, there is no case law in W.A., that we are aware of, that sheds any light on the meaning of subsection 60(f).

9. Our position is that, where a tenant abandons the premises that they are renting, the residential tenancy agreement terminates at that time, by operation of law pursuant to s 60(f). The tenant therefore has the ability to unilaterally terminate their residential tenancy agreement, regardless of the wishes of the lessor, and without any requirement for a court order.
10. That position is based on the following:
- (a) the natural and ordinary meaning of the words of 60(f);
 - (b) the views of the authors of *Residential Tenancy Law and Practice, Victoria and South Australia* on the identical provision in the RTA (SA), as it was then;
 - (c) the views of the authors of *Residential Tenancies Law and Practice New South Wales* concerning very similar provisions in the RT Acts of other states and territories;
 - (d) reported decisions of the Residential Tenancies Courts and Tribunals of other States and Territories, concerning analogous provisions in their respective legislation, which are consistent with that position;
 - (e) the lack of any relevant extrinsic materials to shed any light on the intention of the legislature; and
 - (f) the position of the Department of Consumer and Employment Protection as stated in the Review of the *Residential Tenancies Act 1987* (WA) – Policy Position Paper (January 2008).

11. **The natural and ordinary meaning of the words of 60(f)**

Section 60(f) reads as follows:

60. How residential tenancies are terminated

Despite any Act or law to the contrary, a residential tenancy agreement shall not terminate or be terminated except in one of the following circumstances:

[...]

(f) where the tenant abandons the premises;

[...]

The clear intent of this section is to list exhaustively the only ways in which residential tenancy agreements can be terminated. It is clear that, where the exception does apply (the exception here being "where the tenant abandons the premises"), then the agreement is terminated. The heading of the section, "How residential tenancies are terminated", further supports that interpretation.

The existence of sections 76A and 78A does not affect that interpretation in any way. Those sections are only relevant, in our opinion, where it is unclear whether or not the premises have in fact been abandoned. In such a case, a lessor **may** give a written notice under s76A, and should the tenant not respond, then "the tenant is to be taken to have abandoned the premises"; alternatively the lessor **may** apply for an order declaring that the tenant has abandoned the premises. If the premises have in fact been abandoned, then neither of these procedures have to be followed; indeed, as a matter of law, they can't, because the tenancy has already terminated by operation of s. 60(f).^v

12. The views of the authors of *Residential Tenancy Law and Practice, Victoria and South Australia* on the identical provision in the RTA (SA), as it was then (emphasis in bold added)^{vi}:

(a) A clear statement is found at p.647:

*The recognition of **abandonment does however give the tenant a unilateral ability to bring the tenancy agreement to an end** though he will then be subject to liability for compensation.*

*In any of the situations listed **the happening of the defined circumstances terminates the agreement. The circumstances of themselves have the consequence of termination – no further action is required from any one or both of the parties.***

(b) Even clearer is this, at p.650:

4. Abandonment

*[2258] **Abandonment of possession by the tenant terminates a residential tenancy agreement in Victoria by virtue of s. 109(1)(f) and in South Australia by virtue of s. 61(1)(d). Termination occurs as a result of and at the time of abandonment. Abandonment was not a means whereby a periodic tenancy could be terminated at common law. If accepted by the landlord abandonment would result in surrender: but abandonment without acceptance by the other party did not terminate a common law tenancy. Under the Residential Tenancies Acts by contrast abandonment without acceptance causes the agreement to come to an end.***

*In the absence of termination a landlord at common law could continue to claim the rent payable by the tenant even after the time of abandonment. **The Residential Tenancies Acts prevent such a course of action by terminating the agreement.***

(c) Another statement is found at p.672:

The landlord's common law ability to allow the tenancy to run despite abandonment and claim the rent is taken away by statutory termination by s. 109(1)(f) in Victoria and by s. 61(1)(d) in South Australia of the tenancy agreement on abandonment. This termination occurs whether or not the landlord wishes to accept the tenant's acts as termination.

13. The view of the authors of *Residential Tenancies Law and Practice New South Wales*, cited with approval in a large number of interstate tenancy tribunal and court decisions:

(a) At p.245, the authors make the point that the tenancy is terminated at the point the tenants abandon the premises:

[2.106.4] Termination for abandonment (s 106(1) and (3))

If the tenant in fact vacates and there are no boarders left in occupation then the landlord can take possession without order of the Tribunal. The tenancy is terminated by force of s 81(4)(d) of the RTA.^{vii}

(b) Also at page 245:

[2.106.1] Abandonment

See the commentary at [2.81.9] for the meaning of "abandonment". An abandonment occurs when a tenant unlawfully departs the premises with no

intention of returning and no intention of honouring his or her obligation under the lease.

14. Reported decisions of the Residential Tenancies Courts and Tribunals of other States and Territories, which are consistent with the position:

- (a) *Darren and Julia Patterson v David Dawson* [2015] NSWCATAP 31 (4 March 2015)

This case specifically dealt with an argument that the Tribunal "could not make a finding that the tenants had terminated the tenancy by removing their possessions and vacating the premises in the absence of a s 106 application by the landlord seeking a declaration that the tenants had abandoned the premises."^{viii} [S 106 is equivalent to s 78A of the Act]. The Tribunal rejected that submission, stating,

The purpose of s 106 of the RTA is not to determine whether an "abandonment" has occurred, but to make a declaration to that effect so that a landlord may take possession of the premises without running the risk of a finding that such re-entry may be found to be unlawful if, as a matter of fact, the premises have not been abandoned. If, as a matter of fact, the tenants have abandoned the premises, then by operation of s 81(4)(d) the tenancy is terminated and there is no need or requirement for a s 106 application to determine that question – except for the reason just given, for the protection of the landlord from a claim of wrongful re-entry and wrongful termination.

Note this is entirely consistent with what is set out in *Residential Tenancies Law and Practice New South Wales* at [2.106.4].

The Tribunal go on to state,

The undisputed facts in this case, have the meaning, as a matter of law, that the appellants abandoned the premises and in doing so terminated the tenancy. A declaration to that effect is not required, once the facts are ascertained.

- (b) For a case to the same effect from South Australia, see *Abraham & Abraham (by Raine & Horne – Burnside & Norwood) v Hanson & Hanson* [2009] SARTT11. In this case the tenancy terminated by operation of the current South Australian equivalent of our s 60(f) notwithstanding that the tenants had retained the keys and had been served with a notice of termination by the landlord. The Tribunal pointed out that, if the agents had not "been so certain that the tenants had abandoned they could always have sought an order of the Tribunal under s94 to that effect" [s94 being the current SA equivalent to our 78A].
- (c) For a case to the same effect from the Australian Capital Territory, see *Andrea Hookway v Melinda and Ian Boxsell* [2008] ACTRTT 19, paragraphs 33 – 35:

The issue of when the tenancy terminated, the keys and the tradesmen on the property:

33. *One of the tenants [sic] complaints concerns the advice they received from the landlord's agent to the effect that the tenants should retain the keys until a new tenants [sic] was found and that the tenants were responsible for the maintenance of the premises until that time. In essence the landlord was indicating an intention to hold the tenants to the tenancy agreement and not to treat the tenancy agreement as having been terminated by reason of the tenants [sic] abandonment pursuant to section 36(e) of the Act, which reads:*

Despite anything to the contrary in any territory law, a residential tenancy agreement must not terminate or be terminated other than in the following circumstances:

...

(e) if the tenant abandons the premises that are the subject of the agreement;

34. *As indicated to the parties at the hearing, this does not accord with the Tribunal's understanding of the law. Once the tenants declare their intention to abandon the property within the fixed term for no lawful reason, such as in the present case, and actually vacate the premises and ceases [sic] paying rent, an abandonment has occurred within the meaning of section 36(e) of the Act and the tenancy is terminated^x. At this point the keys should have been returned and the right to possession of the property rests with the landlord again who is then responsible for maintenance.*

15. The lack of any relevant extrinsic materials to shed any light on the intention of the legislature:

There is nothing in Hansard which sheds any light on the intention of the legislature regarding s.60(f) itself. There was some discussion in the Legislative Council, on 21 December 1987, of s.77, which was deleted and replaced with sections, 78A and 78B, and new section 77, by the Residential Tenancies Amendment Bill 2011. That is at p.8282, and merely confirms that original section 77 was intended to cover situations where it was "not clear that tenants actually have flown the coop [...] where there is an inconclusive situation and it may not always be clear, although there might be grounds for reasonable belief, that the tenants have gone [...]". That is entirely consistent with our position that, where, in fact, the premises have been abandoned, the tenancy terminates by operation of law pursuant to s. 60(f). There is nothing in that section to suggest that there was any intention that a lessor had to obtain a termination order under s.77 before the tenancy could be terminated for abandonment. In our opinion, the use of the word "may", rather than "shall" in original s.77, new s.77, and sections 76A and 78A conclusively supports our position (and see *Darren and Julia Patterson v David Dawson* [2015] NSWCATAP 31 which we refer to above).

16. The position of the Department of Consumer and Employment Protection as stated in the Review of the *Residential Tenancies Act 1987* (WA) – Policy Position Paper (January 2008):

At page 152 (emphasis added):

Background Discussion

Under section 60(1)(f) of the RT Act, a tenancy agreement is terminated where a tenant abandons the property. When this occurs, an owner is entitled to compensation from the tenant for any loss (including loss of rent) caused by the abandonment, but is to take reasonable steps [sic]^x to minimise their loss. An owner may apply to the Magistrates Court for an order declaring that the tenant has abandoned the property on a particular day, and that the tenant pay compensation to the owner. It is not compulsory, however, for an owner to make such an application to the Magistrates Court.

ⁱ Note I say "read" because the S.A. legislation has been repealed and replaced with the Residential Tenancies Act 1995.

ⁱⁱ According to the Explanatory memorandum – Residential Tenancies Amendment Bill 2011, this amendment was made for the "purpose of plain language drafting."

ⁱⁱⁱ Hansard for 21 December 1987, p.8275, records merely "Postponed clauses 57 to 61 put and passed." Hansard for 8 December 1987 records that "Clause 64: How residential tenancy agreements are terminated" was put and passed with one amendment which is irrelevant to this paper.

^{iv} An admittedly curious state of affairs which exists because so many sections of the Act have not been amended since it was passed. Its similarities to its South Australian progenitor are still far greater than its differences.

^v See paragraph 14 below, where the corresponding provisions under NSW legislation was considered by the Tribunal, for a decision which supports our position.

^{vi} The corresponding provision in the Victorian legislation at the time was also virtually identical, differing only by its substitution of "where the tenant abandons the premises" with "where the tenant abandons the rented premises".

^{vii} S 81(4)(d) of the Residential Tenancies Act 2010 (NSW): **Other legal reasons for termination** A residential tenancy agreement terminates if any of the following occurs: [...] (d) the tenant abandons the residential premises.

^{viii} At paragraph 54.

^{ix} Although it is not referred to in the decision, the ACT Residential Tenancies Act 1997 contained at the relevant time (as it still does today) s.61 – **Effect of Abandonment** - If a tenant abandons premises that the tenant occupies under a residential tenancy agreement, the agreement terminates on the day of abandonment.

^x Section 78 requires that the lessor take "all reasonable steps".

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