

Should Landlords Add a Special Condition into Residential Tenancy Agreements to Prohibit Tenants from ‘Licensing’ Apartments on Airbnb?



As Airbnb’s popularity increases, so do the number of tenants in Melbourne listing their rented apartments on Airbnb for their own commercial gain. Landlords of those apartments are often unaware of their tenants’ Airbnb arrangements and upon becoming aware, may wish to take steps to terminate their tenants’ residential tenancy agreement. However, a recent Victorian Civil and Administrative Tribunal decision suggests that Landlords may not be able to use their termination rights under section 253 of the Residential Tenancies Act 1997.

- In a recent VCAT Residential Tenancies case, a landlord became aware that its tenants had listed their rented apartment on Airbnb for use by travellers. The landlord issued the tenants with a Notice to Vacate under section 253 of the *Residential Tenancies Act 1997* on the basis that the tenants had assigned or sub-let the rented premises without the landlord’s consent.
- The Tenants failed to comply with the Notice to Vacate. The landlord applied to VCAT for a possession order. The Tenants defended the landlord’s application on the basis that the Notice to Vacate was invalid because hiring out the apartment on Airbnb was ‘licensing’ and therefore not covered by section 253 which only covers ‘assignment’ or ‘sub-letting’.

- The legal question was whether the tenant's use of the rented premises for Airbnb was considered an 'assignment' or 'sub-letting' of the rented premises. Ultimately, VCAT found that the Tenant's legal use of the rented apartment through Airbnb was a 'licence arrangement' rather than an assignment or sub-letting arrangement. Therefore, VCAT decided that the landlord did not have the right under section 253 to issue with Tenant with a Notice to Vacate. There were a number of factors relevant to the VCAT's finding that the arrangement in that case was a 'licence' arrangement including the Airbnb online agreement's description of the arrangement as a 'licence, the fact the Airbnb customers only stayed for about five days, the Tenant's right to make Airbnb customers leave and the Tenant's retention of the apartment as their principal residents before, during and after each Airbnb customer's stay.
- It is not known at this stage whether the landlord applicant in this case intends to appeal this decision.
- Landlords who wish to have certainty about the use of their apartments may wish to consider inserting a special condition into their residential tenancy agreements expressly prohibiting the tenant from 'licensing' the apartment to others for commercial gain on websites such as Airbnb. This is obviously subject to the terms of the lease which would need to be firstly reviewed.

Case Reference: *Swan v Uecker* (Residential Tenancies) [2016] VCAT 483 (24 March 2016)

For more information regarding Owners Corporation advice or assistance please contact [Simon Abraham](#) or [Nicole Wilde](#) from the [Owners Corporation](#) Legal Division of Tisher Liner FC Law.

Nicole Wilde | Associate

Tisher Liner FC Law Pty Ltd

Level 2, 333 Queen Street, Melbourne, Victoria, 3000 | DX 181 Melbourne | Ph: +61 3 8600 9333
| Fax: +61 3 9670 6359 | Email: nicolewilde@tlfc.com.au | Web: www.tlfc.com.au

NOTICE: This blog is for information purposes only and the material appearing on this blog is not intended to be nor should it be relied on as legal advice or a substitute for legal or other professional advice. Liability limited by a Scheme approved under Professional Standards Legislation. Published 12 April 2016.