

Who pays the tenancy transfer fee in a co-tenancy?

As with many aspects of a co-tenancy, this is not legislated, and is up to the co-tenants to negotiate. We recommend, where possible, that renters in co-tenancies decide how this will be handled when they start their tenancy together. It is common that the renter who is leaving will be asked by the other members of the house to pay the fee, but some sharehouses will choose to ask the new person joining the house to pay, or will decide on a split. VCAT does not hear disputes between co-tenants, but co-tenants can apply to the Dispute Settlement Centre of Victoria to access free dispute resolution services.

If you need help, RAHU is here

If you require assistance with negotiating a tenancy transfer fee or another aspect of your tenancy agreement, reach out to us at RAHU and we can connect you with one of our casework volunteers who can guide you through the process.

To request assistance, email organise@rahu.org.au with an overview of your situation. A friendly RAHU caseworker will be in touch as soon as possible.

If you are experiencing financial hardship and feeling pressured to transfer your lease, you may want to consider other options such as requesting a rent reduction or applying for a rent relief grant or other financial assistance. The moratorium on evictions in Victoria means you cannot be evicted from 29 March 2020 to March 28 2021 for rent arrears caused by the impacts of Covid-19. If you need help negotiating a rent reduction or you are concerned you are at risk of being evicted, get in touch.

www.rahu.org.au/join

Together we can

Educate and share information with each other about our rights as renters

Support and defend each other from exploitation and eviction

Build a long-term community of renters to self represent our rights as renters for safe and secure housing for all.

The Renters And Housing Union (VIC) is a member-run union of renters and people in precarious housing, formed through the Rentstrike as a response to COVID19.

We collectively organise for the right to safe and secure housing through self-advocacy, education, and frontline eviction defence.

organise@rahu.org.au

www.rahu.org.au

Insta: [@rahunionvic](https://www.instagram.com/rahunionvic)

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The RAHU Guide To Tenancy Transfer

RAHU believes our members are stronger when we have access to useful and practical information about our rights. However, this is general information only, not legal advice. If you need legal advice, please contact a community legal centre.

What is a tenancy transfer?

Tenant transfers are common in sharehouses - where one housemate is leaving and wants to get off the lease and another new housemate wants to be added. At other times, tenants who need to end before the end of a fixed term may transfer their leases to new tenants to avoid paying lease-breaking fees.

A tenancy transfer (also known by the legal term 'assignment') occurs when a renter or group of renters seek to move out of a rental property, and transfer the whole of their interest in the tenancy to a new renter or group of renters. The original tenancy doesn't end, rather, it is transferred to the new person(s). It is common for real estate agents to request that tenants pay a fee to process the tenancy transfer.

Tenancy transfers often occur when a renter in a co-tenancy finds someone new to fill their room and replace them on the lease. They also occur when a renter or group of renters find someone new to entirely take over their fixed term lease, to avoid breaking the lease and the costs that can come with this*. Because the original tenancy isn't ending, the lease is not broken; the new tenant inherits the remaining fixed term period.

Tenancy transfers (and subletting) must be done with the landlord's written consent, however the landlord cannot unreasonably withhold consent (section 81, Residential Tenancies Act 1997 (Vic)).

A tenancy transfer is different from subletting, which is when a tenant transfers only part of their interest in the tenancy agreement to another person, and maintains their original agreement with the landlord. This could involve a head-tenant subletting a room in the house they are renting, or temporarily renting their unit or single room out to another person.

**Note: There are temporary changes in place to Victoria's laws on renting, due to COVID-19. Until March 29th 2021, renters can give 14 days' notice to vacate to end their lease early if they are suffering severe hardship, without having to pay lease break fees. Renters can also apply to VCAT for an order reducing the length of their lease without lease break fees.*

What does the law say about tenancy transfer fees?

Section 84 of the Residential Tenancies Act 1997 (Vic) states:

84 Landlord cannot ask for fee for giving consent

(1) A landlord must not—

(a) demand or receive a fee or payment for giving consent to the assignment or sub-letting of rented premises; or

(b) refuse to consent to an assignment or sub-letting of rented premises on the ground that the tenant has refused to pay a fee or amount for the consent.

Penalty: 10 penalty units.

(2) If the tenant has paid the landlord a fee or amount for the consent to an assignment or sub-letting, the tenant may apply to the Tribunal for an order that the landlord refund to the tenant the amount of the payment.

(3) This section does not prevent a landlord from requiring the tenant to bear any fees, costs or charges incurred by the landlord in connection with the preparation of a written assignment of a tenancy agreement.

What this means

Renters can be asked to reimburse the landlord for costs their agent charged them to process the tenancy transfer, including to amend the lease, but with several important limitations.

The landlord must have actually been charged the fee the tenant is being asked to pay. A private landlord who is not having their rental property managed by a real estate agency cannot charge

a tenancy transfer fee as they have not incurred the fee. Renters can ask for proof that the landlord has paid the fee.

The fee needs to be reasonable for the work associated with the tenancy transfer. In the VCAT case *Jupp v Chambers (Residential Tenancies)* [2010] VCAT 36, the tribunal found that the work covered by the tenancy transfer fee could include discussing the transfer with the outgoing tenant and landlord, reference checking a proposed tenant and preparing required documentation. However, in this case the tribunal also found that the \$335.50 the tenant was charged was unreasonable, as it was estimated only 1 or 2 hours of work were necessary for the transfer, and this was not seen to be reasonable compensation for such work. The tribunal decided in this case that \$88 was instead reasonable to charge, and they ordered that the tenant be refunded the difference.

It is important to note that in *Jupp v Chambers* the member did not intend for this rate of \$88 to be applied to all cases. VCAT is also not bound by precedent, so they do not have to follow past decisions. However, past cases can guide VCAT's decision making. The

decision in *Jupp v Chambers* has also had influence on the rates some agencies have set their tenancy transfer fees at, and the case has been used by some renters as a reference when negotiating a lower rate. When adjusting for inflation given *Jupp v Chambers* is now 10 years old, \$110 may be considered a reasonable tenancy transfer fee.

RAHU is aware renters are often asked to pay fees in excess of \$200 and \$300, and we believe fees of this level could be found to be unreasonable. We would also dispute that the fees charged to agents for checking a tenancy database (as part of reviewing a prospective tenant) could legitimately be passed on to a renter.

Negotiating a tenancy transfer fee

RAHU encourages renters to remember it is always their right to negotiate elements of a tenancy agreement. Renters may wish to ask for a tenancy transfer fee to be reduced, or to be waived completely, especially if they are experiencing financial hardship.

This is especially relevant in Covid-19 times, where a renter may be transferring their lease as they cannot afford to continue to pay rent. It is likely that it is in the landlord's interest that the tenancy transfer takes place, as opposed to the property becoming vacant or rent arrears accruing. The landlord may stand to lose significantly more money if they do not allow the tenancy transfer to take place. The landlord (or their agent) also cannot ask for a fee in exchange for consenting to the transfer, so it would be fair to expect that the fee could be paid at a later date.

Renters who have already paid a tenancy transfer fee that they feel may be excessive, or who believe they have been charged a fee for consent to a tenancy transfer, can apply to VCAT to request a refund.

Tenancy transfer fee clauses in lease agreements

Many renters will have signed lease agreements which state they agree to pay a fee of x amount if they seek a tenancy transfer. This does not necessarily mean they must pay these fees.

Section 27 of the Residential Tenancies Act states that a term in a tenancy agreement is invalid if it excludes, restricts or modifies (or purports to) any rights provided by the Residential Tenancies Act. This means that landlords cannot 'contract out' of the Act, and must follow the Act even if their tenant has signed a lease that states otherwise. Additionally, section 28 of the Act states that tenants can apply to VCAT to have a term in their tenancy agreement declared invalid if it is "harsh or unconscionable".

This means that a landlord or their agent still cannot charge a fee for giving consent to a tenancy transfer, even if your lease states they can, as per section 84 of the Act. It also means a renter could seek a determination from VCAT that a large tenancy transfer fee stipulated by their lease is harsh or unconscionable.