



Eastern Area Tenants Service

local tenancy information resource

number 1E

Break lease penalties: mitigating losses



If the other party has broken the lease, landlords and tenants have to take reasonable steps to minimise their losses



Keep all communications with landlords and real estate agents in writing


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The law says that a party cannot simply allow a breach of contract by another party and do nothing to protect their own interests. Instead, they must take reasonable steps to reduce the loss arising from the breach.

Tenants who have broken their lease need to know how and when a landlord should act to mitigate their own loss. Tenants who don't check that a landlord is taking all reasonable steps to get new tenants can often find themselves losing serious money.

What does a landlord have to do

If you tell the landlord or agent that you want to break your lease early (legally called *abandonment*), the landlord does not have to do anything to get a new tenant until you have given vacant possession of the property.

Once the tenant has vacated, the landlord or agent must advertise the property appropriately and for the same rent as the former tenant was paying. Advertising should be at least at the same level and in the same media as was done when the original tenant moved in. Landlords/agents have to organise inspections of the property by potential tenants, take applications and select new tenants. They should do this in a timely manner.

Landlords DO NOT have to accept potential tenants found by the outgoing tenant.

If a tenant has broken the lease, landlords should not:

- Limit advertising; inspections or applications;
- Advertise the property at a higher rent;
- Leave the property vacant while they attend to repairs or renovations, or claim compensation from the former tenant for periods that they are carrying out repairs or renovations.

What tenants should do

A tenant who breaks a fixed term lease should also seek to minimise the landlord's potential loss. This may include giving notice before they hand back the keys, and agreeing to allow potential new tenants to inspect the property before they leave.

Tenants should be wary about any suggestions that they sublet the property, (see *Breaking your lease because the landlord has broken the agreement*).

If there is an agreement with the agent or landlord allowing the tenant to break the lease early, this should be written down, signed by both parties, and a copy kept by the tenant.

Tenants who break a lease early without agreement should not keep paying rent to the old landlord once they have left the property. The tenant will have to compensate the landlord for rent until a new tenant is found, but paying up front gives the landlord no incentive to find new tenants. It is better for tenants

◆
Evidence that confirms all of your key points and addresses the requirements of the Act is vital to success in the NCAT

◆
If you are considering breaking your lease during a fixed term, ALWAYS talk to a tenants advice service before you act



to put the money aside and only pay it when ordered to do so by the NSW Civil and Administrative Tribunal.

Keeping the landlord honest

Tenants who decide to `abandon' a property should make sure that the landlord is trying to minimise their loss. These could include:

- Monitoring and keeping copies of advertisements for the property;
- Making sure that the property is being advertised at the same rent as they were paying;
- Driving past the property regularly, or keeping in touch with former neighbours, to check that the landlord is not keeping the property vacant while attending to repairs or renovations, or using the property for private or family purposes;
- Make enquiries about the property, to make sure that it is being shown to potential tenants for the advertised rent; and
- Arranging for people to attend showings of the property for the same reason.

Evidence

If the tenant finds that the landlord is not trying to minimise their loss, the tenant should try to get evidence. Useful evidence would include copies of advertisements asking for higher rent, photographs of builders' vehicles at the property, or statements from people who have enquired about the property or attended a showing.

Such evidence can help a tenant argue that they should not have to compensate the landlord for breaking the lease early.

Limiting exposure: asking the landlord to rent it for less

If a landlord is doing everything necessary to re-let a property,

but it remains vacant, the vacating tenant may consider limiting their loss by asking the landlord to advertise the property for a lower rent. The tenant will be liable for the difference between the higher old rent and the new rent, but such an approach could limit the tenant's losses in a sluggish market. A request to advertise for a lower rent should be in writing, with additional evidence of market rents for similar properties.

There is probably an easier way

The above points show how a tenant can limit their loss when they break a lease. In most cases a tenant will still have to pay the landlord something. See the other resources in this series for alternatives to *abandoning* a property, which are much less risky for tenants. A tenant should only consider abandoning in exceptional circumstances, and then only after seeking advice from a tenancy advocacy and advice service.