



Eastern Area Tenants Service

local tenancy information resource

number 1A



Tenants who leave before the end of the fixed term without considering the consequences can be ordered to pay the landlord thousands of dollars



The NCAT is more likely to order that a lease be complied with than it is to terminate it.



Keep all communications with landlords and real estate agents in writing



## Breaking your lease because the landlord has broken the agreement

Many tenants want to leave a property before the end of the fixed term because they are fed up with the landlord breaking the lease in some way, such as by not carrying out repairs. However, too many people act before they seek advice and end up having to pay the landlord compensation.

If you are experiencing difficulties with a landlord over repairs, or any other issue, bear the following in mind:

- The NSW Civil and Administrative Tribunal, (NCAT) is much more likely to order that a landlord repair a property than it is to terminate the lease because a landlord did not carry out repairs.
- If a landlord is breaking an agreement, tenants are best advised to do everything they reasonably can to make the landlord fix the problem. In the case of repairs, for example, this would include writing letters, applying to the Tribunal for orders and seeking compensation from the landlord.
- In some cases, landlords will allow a tenant to leave without penalty rather than bear the costs of fixing the problem and paying compensation.

The factsheets and sample letters at [www.tenants.org.au](http://www.tenants.org.au) show how tenants can make landlords carry out their obligations under the lease. Key points include:

- Make sure that all communications with landlords or real estate agents are in writing. If you have a conversation confirm it in writing straight away.
- If the landlord, agent or strata is not addressing a repairs issue correctly, it may be a good idea for a tenant to arrange for, or even pay for, an expert opinion on what the problem is and how it needs to be resolved. Paying for a written report may seem like a big expense. However such a report could make excellent evidence and is relatively inexpensive compared to break lease penalties.
- At each step of the way set realistic time limits for things to be done. If the landlord does not meet a time limit, for example to arrange for a repair to be done, move on to the next step, which may be making an application to the NCAT.
- ALWAYS seek advice, from a tenancy advice and advocacy service, before you act. Accessing sound advice and correct information could save you thousands of dollars.

### When is it reasonable to terminate the lease because the landlord has broken it?

If a landlord is consistently breaking the agreement – by refusing to carry out necessary repairs, or accessing the property without proper notice, a tenant may be able to get



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



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



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



out of a fixed term lease. There are risks however.

In most cases EATS recommends that tenants in this situation apply to the NCAT for an order terminating the agreement *because the landlord has broken the terms of the agreement* (section 103 of the Residential Tenancies Act 2010), **before** leaving the property. Beware that NCAT can still order the tenant pay compensation to the landlord.

A tenant needs to have extensive evidence to back up his or her case.

For example, if the tenant wants to leave because the landlord has not repaired the property, the tenant would have evidence to show:

1. Repairs were needed;
2. The tenant asked the landlord (preferably in writing) to do the repairs;
3. The landlord has not done the repairs;
4. The landlord's breach was serious enough to warrant termination of the agreement; and
5. That other options available to the tenant, such as compensation or a rent reduction, would not adequately address the breach.

Tenants should consider the preparation time and potential costs involved in making an application. Section 103 of the Act is reproduced at right.

### What sort of evidence do you need?

Some things that could be used as evidence in an application to end a lease include:

- Copies of correspondence asking the landlord to remedy the breach – to do repairs etc.
- Photographs of items that need repair or have other problems

### 103 Breach of agreement—termination by Tribunal

(1) The Tribunal may, on application by a tenant, make a termination order if it is satisfied that:

- (a) the landlord has breached the residential tenancy agreement, and
- (b) the breach is, in the circumstances of the case, sufficient to justify termination of the agreement.

(2) In considering the circumstances of the case, the Tribunal may consider (but is not limited to considering) the following:

- (a) the nature of the breach,
- (b) any previous breaches,
- (c) any steps taken by the landlord to remedy the breach,
- (d) any steps taken by the tenant about the breach,
- (e) the previous history of the tenancy.

(3) The Tribunal may refuse to make a termination order if it is satisfied that the landlord has remedied the breach.

(4) A tenant may make an application under this section without giving the landlord a termination notice.

(5) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.

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Most tenants who leave during the fixed term of their lease end up having to pay the landlord compensation

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

- ❑ Reports by independent and qualified people on the nature of the problem, its causes and what is required to fix it
- ❑ Statutory declarations by witnesses
- ❑ Receipts, invoices and quotes for things that the tenant has had to pay for to remedy the problem or its effects

### The subletting trap

Some real estate agents suggest and some tenants consider subletting as a way of getting out of a property before the end of a fixed term. Others think that they may be able to break the lease if they find a new tenant for the landlord.

Either of these courses of action could lead to serious consequences for the tenant. Consider the following points:

- While a tenant may spend time and money finding a suitable new tenant to take over the lease, the landlord is not obliged to accept anybody that the tenant finds.
- If the tenant sublets to another for the rest of the fixed term, the tenant remains legally responsible and financially exposed for any breaches of the lease by the subtenant.
- The tenant subletting a premises *stands in the shoes* of the landlord for that subtenant, and could be held liable by the subtenant (and the NCAT) for the landlord's failure to carry out repairs.
- Remember that if you wanted to leave the property because of a failure to repair, you are unlikely to find somebody else to put up with the problems you want to leave for. As a *head tenant* you could be held responsible for those problems.

As with everything connected with breaking a lease, the most important thing is to get good advice and evidence and consider the consequences BEFORE you act.

### Giving a termination notice because the landlord has broken the agreement

It is possible for a tenant to give a landlord a written 14 day notice of termination of an agreement because the landlord has broken it. This is very risky, can be expensive for tenants, and should not be undertaken lightly.

A landlord can challenge such a notice in the NCAT. NCAT could find that termination was not justified in the circumstances. The tenant would then be held to have abandoned the property and ordered to pay the range of break lease penalties. At this stage, there will be little the tenant could do, because they would have already left.

It is less risky for tenants to apply to NCAT for orders terminating the agreement BEFORE they leave the property (see previous page).