



Eastern Area Tenants Service

local tenancy information resource

number 1C



An agreement is frustrated when the premises can no longer be used as your home



An agreement cannot be frustrated if the property is unlivable because the landlord or the tenant caused the problem.



Keep all communications with landlords and real estate agents in writing



## Breaking your lease because the agreement is frustrated

Sometimes a circumstance can arise where it is not possible to stay in a tenancy through no fault of either the landlord or the tenant. In these situations it can be said that the tenancy agreement has been “frustrated”. In these circumstances either the tenant or the landlord can legally end the tenancy, providing they comply with the provisions set out in the Residential Tenancies Act 2010.

There are a number of ways in which a tenancy agreement can be frustrated. These are detailed below:

### When the property is destroyed

You can terminate your tenancy agreement on the basis that the agreement has been frustrated if the property has been destroyed, for example, it burns down in a bushfire. These circumstances are sometimes called “Acts of God”, that is, there is no reasonable way that the landlord could have prevented the property from being destroyed.

### When the property becomes wholly or partially uninhabitable

Another way in which an agreement can become frustrated is where the property becomes either wholly or partially uninhabitable and it can be shown that:

- The uninhabitability was not caused as a result of a breach

of the agreement and was not due to the actions or inactions of either the landlord or tenant,

- If the tenant is claiming that the property is wholly uninhabitable, they have to be unable to live there (because continuing to live at the premises defeats the argument that the tenant can’t live there!)

Whether or not a property is habitable or uninhabitable generally depends on whether it can be used for the purpose in which it was intended to be used for, for example, a person should reasonably expect to be able to sleep in a bedroom, or cook in a kitchen. There are many other considerations however which go into determining whether a property is wholly or partially uninhabitable and if it is safe to remain. There is significant case law on this subject, so tenants looking to terminate on this basis should contact their local Tenants’ Advice and Advocacy Service (TAAS) for advice on their individual situation.

### The property ceases to be lawfully usable as a residence

If there is a legal reason which stops you from being able to use a property, for example, if a property is not usable as a residential premises under the *Environmental Planning and Assessment Act 1979*, or local council health or building regulations, it is possible for either a tenant or a landlord to

◆  
If you believe your tenancy agreement has been frustrated you should serve a Notice of Termination on the landlord or agent and make an application to NCAT

◆  
Evidence that confirms frustration and addresses the requirements of the Act is vital to success at NCAT

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

  
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terminate the tenancy agreement for frustration. It should be noted that a landlord has a legal obligation under the Residential Tenancy Agreement (clause 13.2) to take all reasonable steps to ensure that there is no legal reason why the property cannot be used as a residential premises during the term of the tenancy. (The tenant could seek compensation in circumstances where this has not happened).

### **Where the property is appropriated or acquired by any authority by compulsory process**

An example would be if the state government compulsorily acquired a property to be demolished to make way for a new motorway.

### **How to terminate for frustration of the agreement**

Caution should be exercised when issuing a termination notice on the basis of frustration because if the landlord argues that the termination notice is invalid, the NSW Civil and Administrative Tribunal (NCAT) may rule that the tenancy was abandoned and that the tenant should compensate the landlord for breaking the lease. For this reason it is best to speak with your local Tenants Advice Service who can help you to determine whether you have the grounds to claim frustration.

Unless the termination is by agreement of both the landlord and the tenant it is advisable to apply to NCAT as well as issuing a termination notice, to get an order confirming that the tenancy agreement is frustrated. Both fixed term and periodic agreements can be terminated on the basis that the agreement has been frustrated.

The tenant or the landlord must issue the other party with a termination notice which sets out the address of the premises, the reason for terminating (frustration of the agreement, e.g. the house has burnt down), and the date that the tenant will give vacant possession. There is no specified notice period and

the law specifically states that a tenant can move out of the premises the same day that a termination notice is issued. If the termination notice is valid, the tenant is not liable to pay any further money to the landlord after the date that they hand back the keys. Examples of how to draft a termination notice for frustration of the agreement can be found in the 'Sample Letters' section of the Tenants' NSW website - <http://www.tenants.org.au>

An application to NCAT for a termination order for frustration of the agreement is provided for under s.109 of the *Residential Tenancies Act 2010*. The Tribunal will need to establish that a valid termination notice has been served and that the circumstances of the case fit one of the frustration categories. Detailed evidence will need to be submitted to the NCAT to support the application and it is recommended that you contact your local Tenants Advice Service for guidance on how best to prepare your case.