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Tenants can give written notice and leave during the fixed term of an agreement if the landlord has broken the agreement.

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In practice, tenants who do not have a good case and supporting evidence could find themselves paying substantial financial penalties.



## Ending your agreement because your landlord has broken it – BE CAREFUL!

Section 98 of the *Residential Tenancies Act* 2010 allows a tenant to end their lease because the landlord has broken the tenancy agreement, by giving written notice and vacating the property. This section can apply if the agreement is continuing or within a fixed term.

However, s. 98 allows the NSW Civil and Administrative Tribunal to determine that a tenancy should continue, despite the tenant's Notice of Termination. This could leave tenants paying double rent and the penalties that apply when the premises are abandoned.

If a tenant issues a Notice of Termination under s. 98 they cannot be sure of what NCAT will do or what penalties could be applied to them. Most tenants won't know what the NCAT will do until after they sign a lease for a new place. It can be a very risky and possibly expensive proposition.

Tenants who are in a fixed term agreement and do not want to take this risk should consider instead:

- Trying to get the landlord to fix the problems that they are experiencing. See Tenants NSW factsheet on repairs - at [www.tenants.org.au](http://www.tenants.org.au) or click [here](#).

Asking NCAT to terminate the agreement because the landlord has broken it (s. 103, see EATS factsheet Breaklease 1A-Breach at <http://www.tenantsrights.org.au>

Asking NCAT to terminate the agreement because the tenant is

experiencing hardship (s.104, see EATS factsheet Breaklease1F-Hardship at <http://www.tenantsrights.org.au>)

- Reaching a written agreement with the landlord which would allow them to end their tenancy agreement without financial penalty (see EATS factsheet Breaklease1D-Consent at [www.tenantsrights.org.au](http://www.tenantsrights.org.au) .

### How it works:

S. 98 says:

A tenant may give a termination notice on the ground that the landlord has breached the residential tenancy agreement.

The termination notice must specify a termination date that is not earlier than 14 days after the day on which the notice is given.

The termination notice may specify a termination date that is before the end of the fixed term of the residential tenancy agreement if it is a fixed term agreement.

The Tribunal may, on application by a landlord made before the termination date and within the period prescribed by the regulations, revoke a termination notice by a tenant if satisfied that the landlord has remedied the breach and that it is appropriate, in the circumstances of the case, to continue the tenancy.

**Note:** The tenant may apply directly to the Tribunal on the ground of breach by the landlord for a termination order without first giving notice (see section 103).

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Section 98 gives a landlord seven days, after receiving a tenant's Termination Notice, to remedy a breach of the agreement and apply to NCAT for orders that the tenancy continue.

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It is likely that most NCAT hearings dealing with Section 98 applications by a landlord will be held after the tenant has left the property and handed back the keys.



### **1. The landlord must have broken the agreement. The breach could be:**

- Failure to maintain the premises (s. 63). This could be taken by the NCAT as a repairs issue;
- Failure to repair the premises (s. 63). For the landlord to have broken the agreement the tenant should have:
  - Told the landlord in writing that the repair was necessary;
  - Allowed a reasonable time to carry out the repair
  - Given the landlord a reasonable opportunity to do the repairs
- The landlord's breach of access provisions of the residential tenancy agreement (s. 55);
- Disruption of the tenants peace, comfort and privacy by the landlord (s. 50);
- Failure of the landlord to take reasonable steps to stop disruption to the tenant's peace, comfort or privacy by the landlord's agents (s. 50)

### **2. The tenant serves a notice of termination on the landlord containing the following details:**

- The address of the premises;
- The alleged breach of the tenancy agreement by the landlord;
- A termination date that is at least 14 days after the letter is served (if being posted allow an extra 4 working days)

The termination notice can be served by:

- Hand delivery to the mailbox of the landlord or agent;
- Fax;
- Post;
- Personally delivering it to a person over 16 years at the real estate agency or landlord's address

### **3. The landlord after receiving the notice of termination, has seven days to:**

- Remedy the breach – eg carry out the repair etc, AND
- Apply to the NCAT to have the tenant's termination notice

overturned and for the tenancy to continue

### **Practical Effects**

In practice this means the following:

- 7 days is not a lot of time for a breach to be rectified;
- If a landlord applies to NCAT for the tenancy to continue within 7 days, the matter is not likely to be heard for some weeks depending on the workload of NCAT;
- If the landlord's application is heard after the tenant has left (most likely) NCAT really cannot find that the tenancy is continuing, but in some matters the NCAT has found that the notice was not valid and that the tenant actually abandoned the premises;
- A tenant who is found to have abandoned the premises could be liable for:
  - A break fee of 6-4 weeks rent; OR
  - A reletting fee of 1-2 weeks rent, advertising costs PLUS rent until the landlord finds a new tenant

These charges are on top of the rent the tenant would be paying for their new place

### **Other considerations**

Under s. 98 NCAT may, after considering the circumstances of the case, determine that a tenancy should not be ended and make other orders.

It does not provide specifically for orders for compensation payable to the landlord, nor does it specify the nature of the landlord's breach that is required for s.98 to be successfully relied on.

The Tribunal has sometimes considered that the 'circumstances of the case' concern the nature and severity of the landlord's breach over the suffering of the tenant. They have considered that a breach by the landlord must be fundamental to the contract before termination could be ordered. Such a conclusion appears to go further than what is suggested by the words of the section.

If NCAT finds that the tenancy agreement should continue after a landlord's application under s. 98 and the tenant has already

◆  
Tenants who leave a property using Section 98 should have back up evidence and arguments to show 'abandonment' penalties should not apply.

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Tenants in fixed term agreements should always seek advice from a Tenants Advice Service before issuing a notice of termination under this section.

handed the keys back, the tenant will be held to have abandoned the premises and could be ordered to pay the penalties outlined above. Technically, NCAT would have to order the penalties under a separate application by the landlord for compensation.

It may be possible for a tenant, when faced with the possibility of such orders, to argue that the landlord, through their failure to remedy the breach during the course of the tenancy failed to protect their interest in retaining the tenant. This would be particularly relevant if the tenant could provide evidence that they contacted the landlord to remedy the breach many times over a substantial period of time and that the landlord either ignored the requests or refused to remedy the breach. An argument of this type might persuade NCAT to lessen the penalties payable by the tenant.

#### **When is s. 98 useful?**

If a landlord has broken the lease and refuses to fix the problem, a tenant could consider using s. 98 of the Act to get out of a fixed term agreement. For the best chance of success a tenant should:

- Talk to a Tenants Advice and Advocacy Service;
- Ensure that they have evidence that a serious breach

occurred;

- Ensure that they have evidence that the landlord had an opportunity to fix the problem and did not do so

If NCAT continues to award compensation based on the landlord's applications made under s.98 tenants will need to collect evidence that the landlord did not act to lessen their own losses. This could include evidence that the landlord did not:

- Repair,
- Seek to negotiate with the tenant;
- Fix the problem before showing the property, or that they
- Claimed compensation from the tenant for the time that they were carrying out the repair work to the property, and did not advertise or show the property as soon as they got the keys back;
- Advertised the property at a higher rent;
- Did not advertise the property widely;
- Refused reasonable applications by potential tenants etc.