Ending a Tenancy and Breaking a Lease

Ending a tenancy in the ACT is subject to detailed regulation by the Residential Tenancies Act 1997 (RTA).

Tenants need to know both their rights and their responsibilities.

A tenant who breaks a tenancy agreement before the end of its term could face substantial liability.

Read on for some basic rules about how to reduce this risk!

The terms of your tenancy agreement are set out in the RTA, and are known as the Standard Terms – they are often provided as your lease or ‘tenancy agreement’. They are in the Standard Lease. Clauses (cl) referred to below are from the Standard Terms.

A tenancy may only be terminated in accordance with the RTA. Section 36 of the RTA lists the various circumstances in which a tenancy may be terminated.

TERMINATION BY MUTUAL AGREEMENT

A tenancy may be terminated at any time by mutual agreement, that is: where the tenant and the landlord agree together to end the tenancy without further liability.

The agreement must be in writing and signed by both parties, specifying the date when all liabilities end, and the tenant must vacate on the agreed date for the mutual termination to be valid (RTA s36(g)).

TERMINATION BY THE LANDLORD

A landlord, or their agent, may only terminate a tenancy agreement in accordance with the provisions of the RTA. In particular, the landlord must have one of the lawful grounds for termination, and must obtain a termination and possession order from the ACT Civil and Administrative Tribunal (ACAT) if the tenant does not move out.

For details on termination by a landlord see Tenancy Factsheet: Eviction in the ACT.

TERMINATION IF THE PREMISES ARE NOT FIT FOR HABITATION

Under clause 86 of the Standard Terms either party may give written notice to terminate the tenancy if the premises become unfit for habitation, or are not available due to government action. The tenant must give 2 days notice, and the landlord at least 1 week (cl 87).

Rent is not payable from the date the premises become uninhabitable. If neither party chooses to terminate the tenancy, rent is not payable during the period from when the property becomes uninhabitable to when it becomes habitable again.

If there is a dispute as to whether the premises are uninhabitable either party may seek an order from ACAT declaring the premises to be uninhabitable.

TERMINATION BY THE TENANT

Some common misconceptions

The following misconceptions may turn out to have expensive consequences.

I can terminate a fixed term tenancy agreement by giving four weeks’ notice to the landlord.

False!

If I find someone else to move into the house after I leave, my problems are over.

False!

As long as I keep paying my share of the rent, it doesn’t matter if my co-tenant gets behind or walks out.

False!

In each of these circumstances, the tenant has ongoing legal responsibilities which, in worst case scenarios, could end up costing thousands of dollars.
**Fixed term or periodic tenancy?**

Except where there has been a breach of the tenancy agreement, a tenant's legal position in relation to the termination of a tenancy depends on whether the tenancy is periodic or in a fixed term.

A fixed term tenancy is where the tenancy agreement states that the tenancy commences on a certain date and continues for a specified period, usually 6 months or 12 months, and expires on a certain date. At the end of the fixed term (unless both parties choose to sign a new fixed term tenancy agreement) the tenancy automatically becomes a periodic tenancy. A periodic tenancy agreement may also exist where the parties create a tenancy but don't specify a fixed term.

Generally, the most difficult problems arise when a tenant or tenants require an early termination of a fixed term tenancy.

**TERMINATING A PERIODIC TENANCY**

Under the Standard Terms (cl 88) a tenant may terminate a periodic tenancy agreement by giving written notice of intention to vacate to the landlord or agent (always keep a copy). The notice period must be at least 3 weeks, and specify the date you will be leaving the premises.

If you vacate without notice during a periodic tenancy, you will be liable for up to 3 weeks’ rent in lieu of notice (RTA s 63), but not for any of the costs involved in reletting the premises.

**TERMINATING A FIXED TERM TENANCY**

**At the end of the fixed term**

If a tenant wishes to end the tenancy at or after the end of the fixed term, they are able to do so by giving 3 weeks notice in writing (cl 89).

**NOTE:** a landlord cannot terminate the tenancy in this way - they must have grounds (see Factsheet: **Eviction in the ACT**).

**During the fixed term**

The tenant can terminate the tenancy agreement during the fixed term with or without grounds.

**Terminating a fixed term tenancy with grounds**

If the tenant has a reason — and it is one of the grounds for termination under the RTA — they can make an application to ACAT to have the tenancy agreement terminated.

**Grounds for Termination**

The RTA provides several grounds upon which a tenant can terminate a tenancy agreement.

A tenant may terminate his/her tenancy agreement in any of the following situations:

- There has been a **serious breach** of the tenancy agreement by the landlord (s 43);
- The premises have become **uninhabitable** (cl 86: see previous page);
- The tenant would suffer significant **hardship** if the agreement were to continue (s 44);
- The landlord has caused or threatened serious **damage or injury to the tenant, a member of the tenant’s family, or the tenant’s property** (s 45);
- The tenancy agreement was induced by a **false or misleading statement by the landlord or their agent** (s 46); or
- The tenant is being posted away from Canberra and there is an additional clause in the lease providing this ground (s 8).

**WARNING!**

If you need to terminate during a fixed term tenancy on any of the above grounds you must apply to the ACAT for an order to terminate your lease. You cannot just terminate the agreement, because you still have contractual obligations to the landlord until the ACAT orders otherwise. Unless you and the landlord/agent can reach a mutual agreement, you will need a termination order from the ACAT. If you reach an agreement, be sure to get it in writing, signed and dated.

**Termination where the Landlord has breached the Tenancy Agreement**

A tenant has a right to claim compensation for any breach of the tenancy agreement by the landlord. In certain circumstances the tenant may also elect to terminate the tenancy if the breach is serious enough. The breach must be fundamental to the tenancy agreement.

The Standard Terms (cl 90) provide two options for termination if the landlord has breached the tenancy agreement.

1. **ACAT Order Terminating the Tenancy**

   The tenant may make an application on the grounds listed above. If ACAT agrees that the breach justifies termination, it may order that the tenancy terminate within a specific notice period (detailed in each Section).

   This period may be waived if ACAT is convinced the tenant would suffer significant hardship unless the agreement terminated immediately, and that the hardship would exceed that of the landlord.
2. Tenant’s Notice of Intention to Vacate

The Standard Terms set out procedures (cl 91):

a) The tenant must give written notice that the landlord/agent has 14 days to remedy the breach if it is capable of remedy (sign, date, and keep a copy of this notice).

b) If the landlord remedies the breach within that 14 day period, the tenancy will continue.

c) If the landlord does not remedy the breach within the time specified, or if the breach is not capable of remedy, the tenant can give 14 days notice of intention to vacate (sign, date and keep a copy).

d) The tenancy agreement then terminates on the date specified by the tenant.

e) Rent is payable to the date in the notice or the date the tenant vacates, whichever is later.

f) If the landlord remedies the breach during the notice period, the tenant may withdraw the notice or terminate the tenancy on the date specified in the notice by vacating the premises on that date.

Once the landlord has received the Notice of Intention to Vacate, cl 84 gives them two options:

a) Accept the notice and accept that the tenancy shall end on the date nominated in the notice; or

b) Apply to ACAT for confirmation of the tenancy agreement, an order for compensation, or both.

A notice of intention to vacate may not protect the tenant from liability if ACAT decides the breach did not justify termination, or that the breach did not occur.

Terminating a Fixed Term Tenancy Without Grounds (Breaking the Lease)

Terminating the tenancy agreement before the end of the fixed term without any of the grounds listed above will be a breach of the lease agreement. There are no penalties for this but the landlord may be entitled to limited compensation.

Notice

If you know you need to end the tenancy early, you should start by giving written notice to the landlord or agent of your intention to vacate on a specified date. Once you have served this notice, providing you vacate and return the keys on or by the date you propose, your tenancy terminates on this date (cl 84). This brings to an end your ongoing liability to pay rent and care for the premises, however you may still be liable for compensation, as follows.

Compensation

Where a tenant terminates a fixed term early, the landlord is entitled to compensation for losses incurred as a result of the early termination. What the law seeks to do here is to ensure that the landlord doesn't suffer financial loss as a result of the early termination, but not to allow the landlord to profit from the situation. In other words, the object of the compensation is to put the landlord in the same position as he or she would have been had the tenant not terminated the lease early.

The RTA does not provide for a “break lease fee” or penalty. Many landlords and agents try to get a full week’s rent as a ‘break lease fee’ irrespective of their genuine advertising costs.

Under RTA Section 84 the landlord is entitled to compensation for:

- The loss of the rent, that they would otherwise have received had the tenancy continued to the end of its fixed term; and
- The reasonable costs involved in reletting the premises (e.g. advertising, reimbursement of legitimate agent’s costs).

Note, however, that the landlord's ability to recover compensation is limited in several ways.

First, the amount ACAT may award for loss of rent is limited to 25 weeks rent, or until the agreement was to end anyway, whichever is less.

Second, the amount relating to reletting costs is limited to the genuine cost and capped at a maximum of one week’s rent. This is the absolute limit, there is no option to add on GST or advertising costs. Also, if the cost is less than one weeks’ rent then that is all they are entitled to. You can ask for an itemised bill detailing the costs.

Third, since the landlord would incur reletting and advertising costs at the end of the fixed term tenancy anyway, there is a good argument that compensation for those costs should be calculated on a pro-rata basis, because they are not new costs but costs brought forward. Section 84(4) requires the Tribunal to consider when the tenancy would have ended and the landlord would have incurred advertising costs.

Finally, RTA s 38 provides that any party to a tenancy agreement seeking compensation has a general duty to mitigate (reduce or avoid) their losses. According to this rule, a person cannot recover compensation for a loss which could have been reasonably avoided.

This means that the landlord has to ensure that reasonable steps are taken to find and accept a new tenant. Failure to do so may mean that the landlord is barred from recovering compensation for all or part of the loss from the tenant.
Examples to watch for are a landlord failing to advertise the premises quickly and effectively or; refusing reasonable applications.

Advertising at a higher rent may be a failure to mitigate depending on the circumstances. Where the higher rent is unrealistic and acts as a deterrent to prospective renters, then arguably it would be a failure to mitigate. However, the closer to the end of a 12 month fixed term tenancy an agreement is broken, the less likely a reasonable increase is likely to be a failure to mitigate, because the landlord is entitled to increase the rent every 12 months.

Keep a copy of any comparable premises being advertised at the same time in the same suburb (listings such as on www.allhomes.com.au).

Reducing loss from breaking the lease

If an early termination is unavoidable, you can take some steps to reduce your potential liability, by:

- Giving the landlord/agent as much notice as possible of the proposed date of vacation, so that efforts can be made to find new tenants;
- Cooperating with the landlord/agent in the reletting of the premises by making yourself available to show people through the property;
- Keeping the premises tidy so that they are attractive to prospective tenants;
- Introducing prospective tenants to the landlord /agent.

Cooperation can work: you are able to end the tenancy agreement, and the landlord suffers little or no disruption to their rental income.

Things, however, may not always turn out for the best. To protect your interests, tenants are well advised to keep several precautions in mind:

- Check whether the landlord is making genuine efforts to relet the premises. Have they advertised and how? Are they offering it to prospective tenants? Are they listing it for a realistic rent? Keep a record of any interest shown in the property that you are aware of.
- Are reasonable offers being considered? Have prospective tenants been discouraged or refused on unacceptable grounds, e.g. unlawful discrimination, requests for higher rent, etc?
- Once you have vacated the premises, it is generally unwise to pay any further money to the landlord/agent, except in final settlement of the problem. In other words, once you move out, and the tenancy has terminated, stop paying rent up-front. Payment without a guarantee that this is an end to the matter may result in money being spent but the premises remaining empty, at the tenants' cost. Once the rental income stops, the landlord's mind usually becomes very focused on finding a new tenant. This doesn't mean you don't accept your liability but that you will compensate for actual losses once they are incurred, rather than anticipated losses.
- Check the property to see if a new tenant has moved in and whether the premises are still on the market. It isn't unknown for a landlord to take the opportunity to do renovations, effectively taking the property off the market. If this occurs the tenant should be relieved of liability (due to the duty to mitigate).

If you are having difficulties in your fixed-term tenancy or are not sure how to end it, the safest option may be to apply to ACAT. If you are considering this option, seek advice from TAS.

And Finally

Try to negotiate to find a mutually agreeable solution to the problem.

NEVER abandon the premises, by leaving without giving written notice. This may increase your liability.

Vacate the premises in good order, ensuring that they are clean and that the keys have been returned (preferably with a receipt).

Also read our Tenancy Factsheets: Access and Privacy, and Bond.

This is a summary of your rights and responsibilities. If you have a specific problem, you should seek detailed advice.