Circle Green Community Legal

Break Lease

As a tenant you have rights and responsibilities under the *Residential Tenancies Act 1987* (the Act). If you need to break lease in a family violence situation, see our Family Violence fact sheets. This break lease fact sheet covers the general laws and doesn't go into detail about the family violence provisions.

When you sign a lease agreement with a fixed end date (a 'fixed term agreement'), you are signing a legal contract under which you agree to rent the place for an agreed minimum time period. Leaving your agreement early is usually a breach of the agreement, and you may be liable to pay compensation to the lessor for breach of the contract.

*In the **Residential Tenancies Act** the **landlord** is referred to as the **lessor.***

If you have a lease agreement with no fixed end date (a 'periodic lease'), then to terminate your agreement, all you need to do is provide at **least 21 days' written notice** to your lessor to terminate the agreement. The notice must be signed, identify the rental premises and specify the day which you will move out. The rest of this fact sheet is about breaking a fixed term tenancy.

WHAT IF THE LESSOR IS BREACHING THE AGREEMENT?

You don't have a right to unilaterally terminate the agreement because the lessor is breaching the agreement.

If your lessor is breaching the agreement (e.g. by failing to do repairs or attending the property without notice or any other reason), you may wish to issue the lessor with a breach notice requiring the breach to be rectified. You may consider applying to the Magistrates Court for orders. The Court can make specific performance orders, as well as orders for compensation and rent reduction. The Court can also make orders terminating the agreement, but only if they are satisfied that the breach justifies termination. See our Maintenance and Repairs fact sheet for more information about repair issues.

If you 'break lease' because of a breach by the lessor, you may still be liable to pay compensation to the lessor.

UNDUE HARDSHIP?

If staying in the tenancy will cause you undue hardship, you can apply to the Magistrates Court for orders terminating your agreement on the grounds of "undue hardship".

You can apply to Court lodging a Form 12: Application for Court Order on the e-courts portal.

Whilst "undue hardship" is not defined in the *Residential Tenancies Act 1987* (WA), interstate

case law suggests that “undue hardship” is a high standard. Examples where the Court may terminate include where there are serious health or safety issues.

If the Court does terminate the tenancy for undue hardship, the Court may order some compensation to the lessor for the early termination of the lease. The compensation ordered could be similar to break lease compensation. You can argue for the compensation to the lessor to be reduced if the lessor has not taken all reasonable steps to mitigate their loss (e.g. appropriately advertising the property to find a new tenant). It is only in very rare cases that the Court will terminate a tenancy for undue hardship without ordering any compensation to the lessor.

If you are experiencing hardship and want to end your tenancy, the first step is to negotiate with your lessor to reach an agreement in writing to terminate the tenancy (see below for further details on termination by agreement in writing). If you can’t reach any agreement with your lessor, you may consider terminating the agreement by abandonment (see further details below).

FAMILY VIOLENCE?

If your tenancy is affected by family violence, there are alternative processes that you may follow to terminate your tenancy.

See our Family Violence fact sheets for more information.

CAN YOU FIND SOMEONE ELSE TO MOVE IN AND TAKE OVER THE LEASE?

Your lease may permit you to assign your interest under the lease or sub-let the premises.

If your lease permits you to assign/sub-let your interest, then you may find another tenant to move in and assign your interest under the lease to them. However, as the “original” tenant, **you may remain liable** for any breach of the lease by the “new” tenant until the end of its term.

If your lease allows you to assign/sublet with written consent of the lessor, then that consent must not be unreasonably withheld, and the lessor can only charge you reasonable expenses that they might incur as a result of giving you consent (e.g. tenancy database checks).

If the lease is silent on the issue, then it is taken to have a term that the lease may only be assigned or sub-let with the consent of the lessor, which shall not be unreasonably withheld.

If the lease prohibits you from assigning or sub-letting, then you cannot assign/sub-let your interest. This term is most common, because lessors generally want to retain the right to choose their tenants.

Assigning a tenancy can be risky for both the “new” tenant and the “original” tenant. If you chose to assign/sublet your interest, you should seek further legal advice as the issues and risks are not fully covered in this fact sheet.

WHAT IF YOU AND THE LESSOR AGREE TO TERMINATE THE AGREEMENT EARLY?

If you wish to terminate your lease early, the best option is to make an agreement in writing with your lessor and move out of the property in accordance with that written agreement.

This involves you and the lessor negotiating and eventually reaching an agreement about what date the tenancy will terminate. The lessor does not have to agree to a mutual agreement to terminate. If you and the lessor do reach an agreement about what date the tenancy will terminate, this agreement **must be put in writing.** The written agreement should also include:

- the termination date agreed by the parties;
- the names of the parties;
- the address of the premises; and
- a signature from all parties.

The lessor may expect you to pay some compensation for the early termination of the agreement. Any agreed sum of compensation to be paid to the lessor for early termination can be included in the written agreement.

If you move out in accordance with the mutual agreement in writing, the tenancy terminates on the day you move out and hand the keys back, or the day that the written agreement specifies as the termination date, whichever is later.

The advantages of a mutual agreement in writing are:

- Signing a mutual agreement to terminate is not a breach of your agreement;
- The uncertainty and stress that accompanies other options can be avoided;
- The matter will generally be finalised, without the need for Court proceedings to determine how much compensation the lessor is entitled to;
- You cannot be listed on a Residential Tenancy Database (see our Residential Tenancy Databases fact sheet for more information on this) for breaking the lease.

If your tenancy is affected by family violence, terminating the agreement through a mutual agreement rather than using one of the family violence termination options will mean you can't use the family violence provisions to get a Court order to determine liability between tenants. See our Family Violence fact sheets for more information, or seek advice if you are in this situation.

WHAT IF THE LESSOR REFUSES TO TERMINATE EARLY BY AGREEMENT?

If you can't reach an agreement with the lessor, then you have a couple of other options:

- Move out but continue with the agreement, and all your responsibilities under it, until the lessor relets the property, or the agreement ends, whichever is the earlier; or
- Abandon the premises, at which point the agreement ends, and the lessor becomes entitled to compensation for any loss caused as a result.

Each option has advantages and disadvantages.

MOVE OUT BUT CONTINUE WITH THE AGREEMENT UNTIL THE LESSOR RELETS THE PROPERTY OR THE AGREEMENT ENDS

When you tell the lessor that you want to break a fixed term agreement, the lessor may ask you to continue with the agreement until they find a new tenant.

If you are renting through a real estate agent, the agent may ask you to sign an agreement to formalise this. These are sometimes referred to as 'break lease forms'. REIWA has produced a 'break lease form' titled "Request for consent to termination by tenant during fixed term Agreement". You should seek advice from a tenant advocate or lawyer before you sign any such agreement. In the majority of cases, a break lease form is not an agreement to terminate the lease. In effect, it is an agreement to continue on with the lease until a new tenant moves in or the fixed term agreement ends, whichever occurs first.

Some advantages of this course of action are:

- You do not breach the agreement. In effect you agree to continue with it, on the understanding that the lessor will try to minimise your loss by re-letting as soon as possible.
- The lessor cannot list you on a Residential Tenancy Database for breaking the lease (note that they cannot do this in any event unless you owe more than the security bond as a result of a breach, or a Court terminates the lease because of your breach).

Some disadvantages are:

- The lessor is under no legal obligation to do anything to reduce your losses; you must rely on the goodwill of the lessor to make every effort to re-let the premises.
- All your responsibilities under the lease continue. This includes cleaning and maintenance (which will usually include the garden, if any), and continuing to pay rent as and when it falls due. If you have already moved into a new rental property, you will be paying rent for two properties until the old one is relet.
- There is no real incentive for the lessor to re-let the property while the agreement is still on foot. This means that in a 'worst case scenario', you could be liable for rent all the way until the end of the fixed term.
- If the property is managed by a Real Estate Agent, the lessor will usually seek compensation from you for re-letting expenses. These are sometimes referred to as "break lease costs".

BREAKING THE LEASE BY ABANDONING THE PREMISES

If you stop paying rent, return the keys and leave the premises for good, then the agreement terminates by abandonment.

If you choose to unilaterally terminate the lease in this way, you should also give the lessor as much advance notice in writing as possible that you are abandoning the premises, and state the date on which you will leave.

The lessor cannot refuse the early termination of the lease and cannot continue to claim rent from you after it has terminated. However, if you abandon the tenancy, the lessor is entitled to claim compensation from you for their losses as a result of the early termination, including loss of rent (subject to some limitations – see below). The lessor can apply to court for a compensation order.

If you do not, the lessor may not become aware for some time that the premises are vacant and will not be able to take steps to secure them. If the premises are damaged by third parties as a

result, you may be liable for that damage. In addition, the losses caused to the lessor by your abandonment might increase if they are not aware of your abandonment. The increase in losses might result in you having to pay extra compensation to the lessor.

Some advantages of abandoning the premises are:

- The lease terminates automatically at the time that you leave the premises for good. No court order is required to end it and the lessor cannot refuse to accept abandonment.
- All your responsibilities under the lease end when it is terminated, so you don't have to keep paying rent, cleaning or maintaining the property **but the lessor can claim compensation from you for their losses (including loss of rent) as a result of the early termination**.
- The lessor has a real incentive to find a new tenant as soon as possible, in circumstances where they are not receiving any rent for their vacant property.
- The lessor has a legal obligation under the Act (s.78) to take all reasonable steps to reduce its losses as a result of your breaking the lease, and that will usually include re-letting the premises as soon as possible.

Some disadvantages are:

- You risk being listed on a Residential Tenancy Database if, as a result of breaking the lease, you owe more than the security bond (see our Residential Database fact sheet for more details).
- You are still liable to compensate the lessor for their losses which result from breaking the lease (including loss of rent). **So, you are likely to have to pay an amount equal to the rent until the premises is relet, or the end date of the fixed term lease, in addition to compensation for any other losses**.

WHAT ARE THE COSTS OF BREAKING THE LEASE?

Breaking a fixed term lease can be expensive so it is best to only do this if you have compelling reasons and have factored in the possible cost of that decision. It is usually best to have an initial conversation with your lessor before making any decision.

A residential tenancy agreement is a legal contract and the lessor is entitled to ensure that their financial position is no worse off as a result of a tenant breaking their tenancy agreement before it is supposed to end.

Break lease costs may include, but are not necessarily limited to:

- Compensation for loss of rent;
- Advertising costs, and the cost of tenant database checks;
- Final vacate (Inspection/property condition report) fee; **and**
- Reimbursement of unused portion of the re-letting fee.

Depending on the rental market at the time that you abandon the premises, these expenses and any loss of rent incurred by the lessor could be the equivalent of several months' rent. If you refuse to pay, it would be reasonable to assume that the lessor would seek to recover these costs from you through the Magistrates Court.

LIMITATIONS ON THE COMPENSATION THE LESSOR IS ENTITLED TO

Where a tenant abandons the premises, the lessor is entitled to compensation from the tenant for any loss (including loss of rent) caused as a result of the tenant abandoning. Importantly, the lessor **must take all reasonable steps to mitigate that loss and is not entitled to any loss that could have been avoided by taking all reasonable steps.**

The fixed costs (advertising, re-letting fee, final inspection and property condition report) should be calculated pro-rata based on how long is left on the lease when the new tenant commences their agreement. For example, if you were in a 12-month fixed term agreement and the property is re-let 9 months into the agreement, you are only liable for 25% of the fixed costs. That is because those are not new costs, but costs that the lessor would have incurred at the end of the lease in any event, which have merely been brought forward as a result of the break lease.

The lessor is only entitled to compensation for losses that are caused by the early termination. If, for example, the lessor re-lets the premises without advertising, you will not be liable for advertising costs. Similarly, if the lessor decides not to re-let the premises, the lessor is not entitled to compensation for advertising, the letting fee, or a tenant database check.

REASONABLE STEPS TO MITIGATE LOSS

Reasonable steps to mitigate loss might include:

- Lessor advertising property as soon as you have abandoned the premises;
- Advertising the property at a reasonable market rate;
- Conducting regular inspections/home opens;
- Not unreasonably rejecting applications.

REDUCING LOSS FROM BREAKING THE LEASE

To reduce the cost of breaking your agreement early you could:

- Give the lessor as much notice as possible of the proposed date of vacation.
- Co-operate with the lessor in the reletting of the premises – make yourself available to show people through the property, keep the property tidy, and introduce prospective tenants to your lessor.
- Advertise the property yourself and put forward any applications to the lessor or agent.
- Negotiate a written mutual termination agreement with your lessor.
- Apply to the Magistrates Court for a termination order, however, this will only be awarded in limited circumstances.

Keep an eye on what the lessor is doing:

- Check whether the lessor is genuinely attempting to re-let the property. Have they advertised and how? Are they offering it to prospective tenants? Are they listing it for realistic rent?
- Keep a record of any interest shown in the property.
- Are reasonable offers being considered? Have prospective tenants been discouraged or refused on unacceptable grounds, e.g. unlawful discrimination, requests for higher rent?
- Check if the lessor is using the opportunity to do renovations (seek advice in this

situation).

The best way to protect yourself is to give notice in writing. If you leave without giving notice you will usually have to pay more compensation than if you had given notice.

FURTHER INFORMATION ABOUT BREAKING THE LEASE

You must notify the lessor in writing of your new address or forwarding address.

You can be fined up to $5000 if you do not do so. If the lessor applies to Court, and you have not left your new address, the Court may deal with an application in your absence. This means your bond may be given to the lessor without you knowing about it, and the Court may order that you pay compensation to the lessor, without hearing from you.

NOTE: If the lessor is required to re-let the property at a lower rent because of a change in the rental market, you may be liable for the difference between the rent you were paying and the new rent. So long as the lower rent is reasonable, the lessor has probably mitigated loss.

For Example:

You rented the property for $500 per week, the rental vacancy rate has increased so it is difficult to find new tenants so the lessor drops the rent to $450. In this case, you may be liable for the $50 difference for the remainder of the agreement.

FURTHER HELP – TENANTS ADVICE AND ADVOCACY

Circle Green Community Legal
(08) 6148 3636
www.circlegreen.org.au

Consumer Protection for consumer and tenancy related matters
commerce.wa.gov.au/consumer-protection | 1300 304 054

To find a tenant advocate in your area, visit our website or use the QR code →

https://circlegreen.org.au/resource/find-a-tenant-advocate

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