

Lease breaking and the alternatives

This practice note seeks to set out various avenues, strategies, considerations and legal submissions in relation to a tenant seeking to end a tenancy.

This practice note does not deal with situations when the landlord breaks the lease.

This practice note assumes the unanimous consent of tenants when electing to engage the mechanisms as provided by the [Residential Tenancies Act 1997](#) (RTA).

Disputes between tenants

TUV and this practice note do not deal with inter-tenant disputes. This includes questions such as “How do I remove myself from the lease while other tenants remain in possession?”. Inter-tenant disputes are referred to Disputes Settlement Services, Community Legal Centre willing to engage these issues, or private practitioners for advice.

Family violence

If the matter involves Family Violence, see the [Family Violence Protection Tenancy Kit](#) and contact TUV for advice.

Background

When a tenant signs a contract for a fixed-term period, it creates a promise that is relied upon by the landlord that certain amounts of income will be generated in accordance with the fixed-term period.

When a tenant seeks to break a fixed-term lease prior to the end of the fixed term, this is colloquially referred to as “lease breaking,” though the phrase does not formally appear within the RTA.

Most commonly landlords offer a fixed-term lease for a period of twelve months, it may be longer or shorter but the principles of lease-break remain the same.

The rights of a tenant seeking to break their lease will vary according to the reasons for the tenant leaving. It is therefore critical for a tenant to get full and proper instructions well prior to breaking their lease to reduce their economic liabilities. Generally, lease breaking is considered to be the worst case scenario.

While in theory, a tenant is liable until the end of a fixed-term period, it is uncommon for lease breaking liabilities to exceed several months of rent.

Tenants Union Legal Service

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case and you require advice, then you should contact us on **(03) 9411 1444**. All information is correct at the time of publication but may not be correct at the time of reading this document.

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Why do tenants break their lease and what are potential alternatives?

The first fundamental question to answer in relation to a potential lease-break scenario is: "Does the tenant really want to leave, or would they stay if a particular issue was resolved?"

The evidence the tenant has, the reasons for wanting to leave, and the consequence of a prospective lease-break claim will likely influence their decision to stay or leave.

Below are some common examples of the reasons why tenants seek to break their lease and some suggested remedies:

- Loss of job or reduction of work hours meaning the tenancy is not financially sustainable (s234).
- Premises were seriously not in good repair at the start of it (s226 if not started to sleep there, thereafter, s209 and 239)
- Sickness, sick family member or needing to provide care to another person (s234).
- Relationship break down (s234)
- Having a baby (s234 (!))
- Intervention Orders between tenants or stalking by third party (see Family violence kit and seek advice; note protected person intervention orders are recognized by the same framework)
- Job offer interstate or internationally (s234)
- The landlord or agent told me if I don't like it I can leave (s217 & s218)
- Purchase of new home (s234 but Members will not always accept this)
- Offer of public housing or community house (s234)
- Neighbourhood dispute (s234 if there is a significant incident, otherwise likely lease break)
- Noise pollution or sound proof qualities of premises – (talk to local council about local by laws and the course and time of the noise, potentially discuss with community lawyer about private civil disputes in relation to nuisance and noise, if this is unresolvable, and the tenant wishes to leave, 234 may be attempted, but it will be up to the Tribunal to determine the relative hardships between the parties).
- Obtaining or inheriting a pet (you may be able to challenge this issue. See advice. If wanting to leave and the pet was inherited 234)
- Lack of maintenance, repairs, acknowledgement or harassment by landlord or agent (ss239, or 240)
- There has been a serious flood or fire in the premises (seek advice urgently)
- Fight amongst members of share household (ss81, 82 requires consent of all parties)
- Council issues building notices such as an emergency order under the [BUILDING ACT 1993](#) (seek advice, s234).



- The premises does not have the services the tenant expects. I.e. Internet or phone line (always include important guarantees in the lease agreement at the time of signing, seek advice, s234.).
- Anticipated breach of mortgage agreement by landlord (seek advice, 234).
- Found a better rental or don't like the area (Likely just a lease break).
- Accordingly, the instances of lease-break should be relatively low given the mechanisms available in the Act. Unfortunately, most tenants are simply not aware of their rights until after they have surrendered the keys. It is therefore critical tenants are aware of their rights and options prior to surrendering their keys to the rented premises.



A. Lease breaking

What is lease breaking?

The principles of lease breaking, compensation, loss of profits and loss of expected income are drawn from commercial contract law. In the statutory context of the RTA, the applicable provisions are [section 210, RTA](#) and [section 211, RTA](#), and are described as “loss or damage suffered” because of a breach of the terms of the tenancy agreement.

The customary losses claimed are not specifically listed in the Act and are therefore contestable in light of the considerations set out in section 211, the principles of contract law in relation to quantification of damages.

The major problem of defending a lease-break claim as compared to a reduction of fixed-term tenancy (see below), is that the reasons for the tenant breaking a lease are seemingly given little or no weight with respect to exonerating or reducing the tenants liability.

Typical fees if breaking the lease in the *first* fixed-term tenancy

Generally, costs awarded for a breach of the *first* fixed-term lease are:

- **Rent until a new tenant moves in:** The primary costs of concern in a lease-break is the liability for compensation/damages at the same or similar rate as rent until the date a new lease begins.
- **Re-letting fees:** calculated on *pro-rata* basis. Example: If you have a 12 months fixed-term lease and leave at the end of 9 months, you are only liable for the remaining 3 out of 12 months which is 20% of the costs of the reletting fee. *Be aware that the landlord is only entitled to costs incurred.* For example: If it is a private landlord who does not use an agent, you can argue that there was no loss to the landlord.
- **Advertising costs:** also considered to be on a *pro rata* basis, and proof of the expenditure in the initial advertisement should be shown. Example: If the landlord lists the property on free forums such as gumtree, you can argue that there are no listing costs incurred for advertising.

Fees chargeable when breaking a renewed lease

Until recently, the same principles of lease-breaking have been applied to renewed leases and initial leases. However, in the recent decision of *Craig v Mitchell (Residential Tenancies) [2015] VCAT 597 (27 April 2015)* the Tribunal has considered that the benefit of the tenant remaining for the first fixed-term period is sufficient to discharge the expected profits from the initial investment costs for when the tenant moved in in the first 12-month period. If the tenant voluntarily chooses to resign the offer of the landlord, this is the landlord decision to make the offer, and there is no costs incurred (ie. no advertising costs were incurred, and no reletting costs were incurred).

In *Craig*, the Tribunal states at:

“[13] “No reletting fee or advertising had been paid by the landlord to secure the further lease with the tenant. On 21 January 2015, a letting agent was engaged to secure a new tenant, after the keys had been returned. They had charged a reletting fee and advertising for this service. All the landlord wanted was for the tenant to comply with the tenancy agreement.”



The tenant felt the landlord was the cause for the early termination and she was therefore not liable to pay anything.

*[24] The landlord seeks compensation for fees incurred in securing the next tenant. **This is incorrect.** The landlord may choose to incur fees to secure new tenants, however the exiting tenant is only responsible to pay for fees that were incurred to secure her tenancy, not the one that succeeds it. Fees were paid to secure the tenant for her initial 12 months, but, as no letting fee or advertising was paid to secure the tenant for her second term of her lease, there is no loss to the landlord when she terminated that lease early, and no compensation for reletting fees or advertising is payable.”*

On this basis, if tenants are breaking a renewed lease, the only cost that should be recoverable is the liability for rent until a new tenants is found.

Tips if you are going to break your lease

Lease breaking is usually your worst case scenario. Therefore, ensure you have exhausted or obtained advice in relation to all other options and considerations.

Thereafter, tenants should:

1. Pay rent up to the date that they move out. Take note that rent accrues daily (s39). Do not pay any rent until you are directed by VCAT, or are of the opinion the amount charged and the conduct of the agent has been reasonable.*
2. Not sign any agreement that they will continue to pay rent beyond the termination date.
3. Even if they have signed any document that obliges them to continue to pay rent, do not continue to pay rent.*
4. Place the landlord on notice of their obligations under section 211(e) of the Act to mitigate loss. (An example letter is included).

* *The rationale of not paying rent beyond the date you move out, is that most tenant properties are negatively geared. This means if there is no income to offset the mortgage costs, the pressure on the landlord requisite a more substantial effort in finding a new tenant. If money remains being paid, there is no pressure and there is a real risk the landlord may reject applicants capable of fulfilling the terms of the lease.*

Stop paying rent after you move out

If you have already moved out, stop paying rent as you do not have to continue to make payments once you return your keys.

It will then be open to the landlord to seek compensation from you and this amount will accrue until a new tenant is found, you should only have to pay once a new tenant has been secured for the property. This is because the landlord must also take all reasonable steps to mitigate any loss.

Set the money aside

This money however, should be set aside to discharge the possible liability that may be ordered by VCAT.

Failure to efficiently discharge the debt may result in a tenancy database listing and could potentially affect crediting rating. For basic financial advice, parties may contact Money Help 1800 007 007.



Should tenants continue to pay rent until a new tenant has been found?

It appears to be a systemic practice for landlords or agents to insist on you continuing to pay rent until a new tenant is found despite the tenant having surrendered the possession and the keys to the property.

Strictly speaking as the tenancy has terminated, what is actually being sought is compensation. Rent, like duties, can no longer be owed where the tenancy agreement has terminated.

So while the tenant remains liable to the landlord at the rate of rent, the liability is not the responsibility to pay rent. The obligation to pay this is as a debt and as such can only be compelled with by Order of the Court or a Tribunal.

In many cases, tenants are told to sign a subsequent agreement as a prerequisite to “allowing” a tenant to break their lease. Alternatively, tenants are referred to terms in their lease that compel the tenant to continue to pay rent on an ongoing basis even after moving out.

In this respect, tenants do not have to, nor should they sign such an agreement in order to break their lease.

Such agreement usually contain the following terms:

1. *The tenant must signed the agreement to acknowledge liability or the premises will not be advertised to rent.*
2. *The tenant will continue to pay rent until a new tenant is found.*
3. *The tenant will pay a reletting fee of \$X*
4. *The tenant will pay an advertising fee of \$X.*

It is TUV's opinion that such agreements, are a breach of section 501 of the RTA, and as such may be reported to [Consumer Affairs Victoria](#) (CAV).

In this context, despite having signed a contract, the landlord must still prove their entitlement to any such loss because such contract should be treated as of no effect. Payments made under such contract may be unconscionable and represent a failure of consideration, and accordingly, if the fees cannot be justified a tenant may be entitled to a refund of monies paid under such an agreement.

What about the lease-break terms in a contract?

A party cannot create a contract that is in conflict with statute. The legislation will prevail over any written contract. This means that even though the landlord can claim for a breach of a tenancy agreement, there is not an automatic right to the costs set out in the tenancy agreement.

Section 26 of the Act states the following:

(1) If a tenancy agreement is in writing, it must be in the prescribed standard form.

(2) A landlord or tenant must not prepare or authorise the preparation of a tenancy agreement in writing in a form that is not in the prescribed standard form.

Penalty: 10 penalty units.

(3) A failure to comply with this section does not make the tenancy agreement illegal, invalid or unenforceable.



The prescribed form does not provide for lease breaking terms penalties or fees. Penalties are prohibited under [s505](#). The operation of section 26(3) should operate not operate to permit unlawful or terms inconsistent with actual and reasonable losses suffered by the landlord.

TUV is of the opinion that the profits of an estate agent billing their client, should be considered in a market context noting the high champerty of the real estate agency in supporting lease-break claims. This market consideration should include consideration of free services such as Gumtree.

Notably, section [27](#) and [28](#) of the Act, provides for any additional terms that exceed the requirements of the act to be invalid (or of no effect). In this regard, the statutory provisions will prevail and militate against an absolute entitlement to the requirement to pay on-going rent, and lease-break without due consideration to the landlord's obligation to mitigate loss, and consideration of the factors set out in section 211 of the RTA.

To lease break, or not to lease break...

Lease-break can be exceptionally expensive in some circumstances and relatively nominal in other circumstances. The cost of a lease-break depends on how long it takes to attract a new tenant to sign a lease for the property. Factors likely include the current state of the market, if rent cheap or expensive, or the state of repair of the premises, amongst other factors.

The most desirable option is to have the new tenant already signed up to take on a new lease, or that the tenant is to be assigned (s81). In such situations the lease-break may be more economically efficient than waiting for the 2 weeks for the reduction of fixed-term. However, this rarely occurs.

In most situations, where the tenant has good reasons for breaking the lease, the decision before them is to trade-off between breaking the lease immediately and waiting and applying for the reduction of fixed-term lease.

A lease-break may mean that someone could be found relatively quickly, but in many cases this may be anywhere from 2 weeks up to 6 weeks on average, and in worst case scenarios until the end of the lease, though this is very uncommon.

In a lease-break, once the keys are returned, the tenant is no longer in control of the premises. The tenant has little power other than to wait until a new tenant is found. This can be a highly stressful period of watching their economic liability grow over time. Parties should consider the value of certainty of a reduction of fixed-term tenancy order (if it is available), and the stress of a lease-break situation.

It is therefore suggested wherever possible tenants diligently and make haste to apply for a reduction of fixed-term tenancy or engage their other avenues if it is available, in preference to breaking their lease and defending the claim.

Lease-breaking may be desirable where the rented premises is clearly going to be in demand. It is not desirable if the tenant has been paying high rent, or the property is being sold, or if the property has previously been vacant for long periods of time.

The benefit of a reduction of fixed-term tenancy is that prior to the end of the tenancy, the tenant knows their liability and the Tribunal can give clear consideration to weigh the reasons the tenant is leaving and temper the prospective losses on a hypothetical basis.

Further, if the Tribunal Orders compensation for 4 weeks worth of rent as compensation and the landlord obtains a tenant in 1 week. The tenant can apply under section 452 of the RTA, and [123](#) of the VCAT Act to prevent the landlord from being unjustly enriched.

Rules against unjust enrichment

In some cases, the Tribunal may make Orders for compensation in favour of the landlord on a predictive basis. However, should the landlord relet the premises and subsequently gain a windfall, then the tenant may have a claim for restitution unjust, or unjust enrichment.

The lead decision in relation to unjust enrichment is [Equuscop Pty Ltd v Haxton; Equuscop Pty Ltd v Bassat; Equuscop Pty Ltd v Cunningham's Warehouse Sales Pty Ltd \[2012\] HCA 7 \(8 March 2012\)](#), [at 28] the court states “unjust enrichment so identified gives rise to a prima facie obligation to make restitution”.

See also: [Ecables \(Fire\) Pty Ltd v AMP Electrical Solutions Pty Ltd \(Civil Claims\) \[2016\] VCAT 388 \(15 March 2016\)](#)

Breaking a lease: The typical process

If the tenant elects to break their lease, the following is the common process that occurs in getting the matter determined.

1. A lease is broken when a tenant surrenders the keys and delivers vacant possession to the landlord. Some tenants will give a notice of intention to vacate. This is not required but generally, the more notice in writing, the better.
2. Nothing immediately happens when the keys are returned. The bond is not automatically released from the RTBA and generally, the landlord will oppose the bond being released upon application.
3. TAKE NOTE: The tenant should not pay rent beyond the date they hand the keys back as indicated above. The money should however be set aside to ensure the debt can be discharged.
4. A tenant can apply for the bond to be released under [s416](#).
 - a. It is often a useful proceeding to apply approximately 2 weeks after the key are returned. If no new tenants have been found, the tribunal may make preliminary examination of the efforts to date to find new tenants, and could in light of obvious failures to mitigate loss under section 211(e), release the bond in light of section of the principles set out in [s414](#).
5. Assuming the bond is not released, the landlord must bring a General Application usually pursuant to section 210 and 417-419 for compensation for “lease-break claim”. This is commonly done when their losses have crystallised or become finite because a new tenant has been found and signed the lease for the rented premises.
 - a. Rule [7A.10](#) of the VCAT Regulations provide the relevant content that is required to be included in such an application including the allegation of breach, the date when the tenant delivered vacant possession and the quantum of compensation that is sought.
6. The application must be served on the tenant. It is important to therefore ensure tenants provide a forwarding address is provided.
7. A *notice of hearing* will be sent by VCAT to alert parties to when and where the hearing is to take place. If a tenant misses a hearing, and was not aware of it, they



should immediately apply for a review. See [Application for review of an order made by the tribunal](#).

8. It is in the best interests of a tenant to attend a hearing, to challenge and adduce the relevant information to ensure the quantum of the landlord's claim is reasonable and justified as an actual loss. If the tenant does not attend, Orders will be made in their absence unopposed.
9. It is important to note; that the claim will be confined to the substance of the application. In many cases, it is strongly recommended that if the tenant left due to breaches by the landlord, that the tenant makes a counter claim, for the purposes of off-setting any liability.
10. If both parties attend, the Tribunal will hear the submissions, and determine the reasonable amount of compensation to be paid by the tenants to the landlord.
11. If there is a counterclaim, the Tribunal will often encourage the parties to settle their disputes by agreement rather than having the matter adjudicated. Offers of compromise in this context may influence the Tribunal final decision if the matter is contested. Tenants may also wish to see section [112](#) – [115](#) of the VCAT Act in relation to strengthen settlement offers.
12. Orders should be complied with in a timely manner to avoid any tenancy database issues and credit rating issues.

Common arguments, questions and strategies to reduce liability on a lease

Firstly, see the *example lease-break letter* at the end of this practice note.

If a tenant has returned their keys and broken their lease, the following includes some relevant enquiries that may aid to identify if the lease-break costs claimed are reasonable.

Questions:

1. When did the landlord become aware that the tenants were leaving?
2. What were the reasons the tenant was leaving?
3. After becoming aware that the tenants were leaving, when was the premises advertised? If there was any delay in advertising, what was the cause?
4. Was the advertisement accurate?
5. Has the landlord increased or decreased the rent?
6. Were there any outstanding repairs, or obvious defects in the property that would detract from other tenants wanting to enter into a lease?
7. Has there been any offers of compromise, settlement offers, or works to done to to improve the property?
8. How frequently were open inspections conducted?
9. How many applications for were received?
10. Were any of these application been rejected and if so why?

Note: For privacy reasons many estate agencies will destroy tenancy applications that the landlord has rejected. This evidence is directly relevant to the obligation to mitigate loss



and the destruction of an application casts serious doubts as to landlord's entitlement to lease-break beyond the time of these applications.

Strategies

1. Get friends to call and express interests in the property and identify if there has been interest. Any information provided may be reproduced by those friends by way of attending as a witness, or providing a statutory declaration.
2. Advertise or refer people to the advertisement and identify if anyone has applied and confirm if they have been rejected.
3. Attend open inspections to determine the number of people who are interested in the premises.
4. Regularly email the estate agent to determine when open inspections have been conducted and the number of people who have attended.
5. Make a counter claim for breaches by the landlord to offset any loss under a lease-break claim. See practice note [Claiming compensation](#).
6. Parties facing large lease-break claims may wish to consider witness summons for specific document that would require records to be produced. See practice note [Witness and Documents Summons](#).

Theory of lease breaking

The following examines some of the legal theory behind each of the costs incurred when breaking a lease.

Claim for damages or compensation

Lease-break is essentially expectation and reliance damages for termination of a contract. The basic principles of compensation for a breach of contract can be found in *Robinson v. Harman* [\[1848\] EngR 135](#); (1848) 1 Ex 850, at p 855 (154 ER 363, at p 365), namely:

"...where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".

In the context of tenancies, these are business ventures that inherently make a profit and it is a relatively simple exercise to predict the losses based contract and rental amount.

Generally, it is not appropriate for the Tribunal to award compensation until their loss has crystallized (i.e. a new tenant has actually been found), and the relevant cost such as advertising and reletting fees have actually been paid.

In relation to the meaning of "loss and damages" under section 210, see [Murphy v Overton Investments Pty Ltd \[2004\] HCA 3; 216 CLR 388; 204 ALR 26; 78 ALJR 324 \(5 February 2004\)](#). As outlined in this case, claims which are found to be baseless or not genuine estimates of loss may amount to unconscionable conduct.

Lease-breaking – Justice between the parties

In some circumstances, tenants may simply choose to break their lease, in other circumstances, tenants have not properly engaged the legislative mechanisms to help themselves (breach of duty notice, compliance orders etc). It is important to remind the Tribunal, of the overall justice between the parties:



From [Re Geoffrey Wayne Goldberg and Deidre Goldberg v the Shell Oil Company of Australia Ltd \[1989\] FCA 321 \(17 August 1989\)](#); citation:

"Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

Lease-break : Fault and Non-Fault of the Landlord

Many tenants will feel doubly punished when they realise that if they break the lease because the landlord was not doing repairs they also face further liability for breaking the lease.

Ordinarily in contract law, there are two sorts of terms within a contract; warranties and conditions. The difference between these types of terms dictate the remedies that are available.

1. Warranties – a breach of a warranty will entitle you to claim compensation but not to terminate
2. Conditions – a breach of a condition will entitle you to damages and to terminate the agreement.

VCAT is a creature of statute. This means that it cannot automatically take into account the landlord breaches as being breaches of a condition to give rise to a right to terminate. This is because Section [216](#) requires that a residential tenancy agreement must terminate in accordance with the RTA.

However, while the tenant may not have an absolute right to terminate because of breaches of conditions of the contract, the Tribunal is it is bound to apply the law as set out in the RTA.

In this regard, it is peculiar that there is not a parallel provision to section 211(a) & (b) which states:

"(a) whether or not the person from whom compensation is claimed has taken all reasonable steps to comply with the duties under this Act or under the [tenancy agreement](#) or [site](#) agreement in respect of which the claim is made; and

(b) in the case of a breach of a [tenancy agreement](#), whether or not the applicant has consented to the failure to comply with the duties in respect of which the claim is made; and"

There is no clear precedent to limit how these provisions should be construed. That is to say, it is possible that the applicant (landlord) may be argued to consent to a lease-break by overtly refusing to perform essential conditions of lease. This may extend to repairs, or to serial harassment of a serious nature.

In the context of an application for compensation, tenants should argue that the breaches by the landlord are have a direct bearing on the tenants ability to perform their duties. For example, if a landlord removes a heater instead of replacing it, this may make the tenancy unviable for the tenant for health reasons, or due to having to pay addition costs for heating making the tenancy unviable.

For this reason, it should be assumed that the Tribunal will prefer to keep the landlord's compensation claim separate from the tenant's claim. It is therefore highly recommended to make a counter claim against a lease-break claim, rather than relying on section 211 as a defence against a lease-break claim, where the landlord's breach are a contributory reason for the lease break.



Similarly, the Tribunal may consider the circumstances of the tenant objectively and whether they have taken all reasonable steps to comply with those duties under the Act or under the agreement. In this regard, there is an opportunity for the Tribunal to ameliorate a lease break, which would seem justified though not formally complying with the legislated mechanisms.

Written submissions in relation to whether the tenancy could be ended via alternative means may accordingly be made.

Because of the scope and limited precedent about these specific provisions, tenant can expect a wide variation in how such submissions may be received. Such submissions may also seek to challenge the basis of a claim for expected income as if the contract were performed. This is especially the case where the tenancy could have been terminated for repetitive breaches or a clear and over unwilling to comply with orders of the Tribunal similar to anticipatory breach principles (ie. Repairs orders that have been disregarded).

See:

[Australian Dream Homes Pty Ltd v Stojanovski & Anor \[2016\] VSCA 133 \(10 June 2016\)](#)

In [Strong v Eco Smart Concept Builders Pty Ltd \(Building and Property\) \[2016\] VCAT 391 \(15 March 2016\)](#), the Tribunal observes the following in relation to anticipatory breach:

"Another statement of this principle is to be found in Lord Wright's judgment in Heyman v Darwin's Ltd, [1942] 1 All ER 337 here he said:

But perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract where the party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission but only as far as concerns future performance. It remains alive for the awarding of damages either for previous breaches or for the breach which constitutes the repudiation."

Notably, a tenant may terminate for repudiation according to [s225](#). However, where the contract is part performed, and all that is substantially performed, the act of moving out remains subject to section 211(b) as an issue of implicit consent.

Seldom has there been an examination of these issues in the Residential Tenancies List.

Loss of Rent - expectation loss

The leading case in relation to expectation losses is [Commonwealth v Amann Aviation Pty Ltd \[1991\] HCA 54; \(1992\) 174 CLR 64 \(12 December 1991\)](#)

See also: [Marks v GIO Australia Holdings Limited \[1998\] HCA 69](#); [McRae v. Commonwealth Disposals Commission \[1951\] HCA 79](#)); [Re Geoffrey Wayne Goldberg and Deidre Goldberg v the Shell Oil Company of Australia Ltd \[1989\] FCA 321 \(17 August 1989\)](#)

In the decision of [Marks v GIO](#), the court delineates between expectation and reliance losses. The court identified at [38] inquiry is one that seeks to identify a causal connection between the loss or damage that is alleged has been or is likely to be suffered and the contravening conduct'

In [Amann](#), the court makes a thorough statement of the principles of expectation losses. Notably, these losses are framed in the context of loss of profits, and not necessarily loss of gross income. However, the decision does recognise the recoupment of expenditures "justifiably incurred" in the course of business. The court states:

"This statement of principle has been accepted and applied in Australia: see Wenham v. Ella [1972] HCA 43; (1972) 127 CLR 454, per Gibbs J. at p 471.



24. The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as "expectation damages". The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation.

25. In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as **damages for loss of profits**. Damages recoverable as lost profits are constituted by the combination of **expenses justifiably incurred** by a plaintiff in the discharge of contractual obligations and **any amount by which gross receipts would have exceeded those expenses**. This second amount is the net profit.

26. The expression "damages for loss of profits" should not be understood as carrying with it the implication that no damages are recoverable either in the case of a contract in which no net profit would have been generated or in the case of a contract in which the amount of profit cannot be demonstrated. It would be an invitation to the repudiation of contractual obligations if the law were to deny to an innocent plaintiff the right to recoupment by an award of damages of expenditure justifiably incurred for the purpose of discharging contractual obligations simply on the ground that the contract breached would not have been or could not be shown to have been profitable.

If the performance of a contract would have resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, **then that plaintiff is entitled to recover damages in an amount equal to those costs in accordance with *Robinson v. Harman***, as those costs would have been recovered had the contract been fully performed. Similarly, where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have resulted in a profit for the plaintiff, it will be open to a plaintiff to seek to recoup expenses incurred, damages in such a case being described as reliance damages or damages for wasted expenditure."

Burden of Proof: Would the tenancy have terminated for other reasons rather than run the full remainder of the tenancy

The landlord bears the burden of proof to prove their losses. If they fail to prove their losses, their claim will be dismissed.

In [*Gates v City Mutual Life Assurance Society Ltd \[1986\] HCA 3; \(1986\) 160 CLR 1 \(20 February 1986\)*](#)

[19] This conclusion involves no element of injustice to a plaintiff who is entitled to damages reflecting the loss of benefits he would have obtained under a contract which he could and would have entered into but for his reliance on the contravening conduct of the defendant. Of course he must prove such loss but there is nothing unfair in requiring him to do so.

[20] The appellant's failure to prove this loss is fatal also to his claim for other consequential losses which arose out of additional expenses and losses which he sustained as a result of the respondent's non-payment of the benefits under the insurance policies.

Further in the decision of *Amman*, the court goes on to describe how future hypothetical losses are to be treated as a burden of proof:

"When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. **If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain**; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. **Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach.**

But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high - 99.9 per cent - or very low - 0.1 per cent. But unless the chance is so low as to be regarded as speculative - say less than 1 per cent - or so high as to be practically certain - say over 99 per cent - **the court will take that chance into account in assessing the damages.**"



In this regard, tenants should submit, there is a gross pattern of non-compliance, that the hypothetical loss of a lease-break conduct should be considered in light of the previous breaches that may imperil the tenancy.

Mitigating loss – Section [211\(e\)](#)

As general principle of contract law, parties are entitled to damages where the loss is compensable, measurable and have has been caused by a breach, is not too remote and could not have been avoided by reasonable mitigation action (appearing in section 211 (e), of the RTA.

In many respects, tenants are highly disarmed unless taking a very active role in effectively keeping the premises under surveillance.

In Amann, the courts states:

*“Because reliance damages and expectation damages are reflections of a general principle, there is no warrant for singling out one (in this case reliance damages) and, in that instance, placing the burden of proof on the defendant. **Indeed, as the relevant information is likely to be in the hands of the plaintiff rather than the defendant, such a burden may be an almost impossible one for the defendant to discharge.**”*

Further, in [Hungerfords v Walker \[1989\] HCA 8; \(1989\) 171 CLR 125 \(9 February 1989\)](#) at [25]:

“Indeed, such a policy would be at odds with the fundamental principle that a plaintiff is entitled to restitutio in integrum. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence.”

It is then incumbent on the tenant to argue any of the factors that appear in section 211. There is a body of law to support the legal considerations in section 211, and attentive research is likely beneficial. In a lease-break scenario, the most notable provisions are section 211 (a), (b), (e), (f).

Ultimately, the quantum of compensation will be determined by the Tribunal in light of the relevant efforts and offers of the parties. It is seldom going to be an error of law in relation to such findings with respect to quantum.

Good Example of Lease breaking – Correct holistic approach

[Mercuri v Jefferis \(Residential Tenancies\) \[2013\] VCAT 2141 \(22 November 2013\)](#) See [27]-[32].

Tax rulings and loss

The following has not been tested, but is contemplated as relevant with respect to demonstrable losses and the principles of unjust enrichment. Feed back in this regard is welcome.

Many of the costs in running a tenancy as a landlord are a tax deductions for which the landlord is able to claim against the rental income. There has been no published Residential Tenancy decision that has examines the question of losses between the financial year of the landlord deduction been fully claimed as a deduction and the enrichment that a landlord may obtaining compensation orders in the subsequent financial year.

The residential tenancies list that identify the prospect of a landlord having claimed their full deduction as a business expense, in the previous financial year, and then seeking remuneration for a lease-break in the subsequent financial year in relation to negatively geared properties.

It is submitted, that either the landlord must acknowledge that there has been no net loss if the time between the contract being formed and the lease-break crosses a financial year where the advertising and reletting fees were tax deductible.

TUV does not have tax expertise, but submits such considerations are relevant to whether the landlord has actually suffers a loss, being the advertising and reletting fees were in fact deductions and not genuine expenditures for which they suffered a loss.

Ultimately, this is a matter for the Tribunal to determine if this is relevant to discharging the burden of proof.

See:

[Rent Property Tax Deductions](#)

[Guide to depreciating assets 2016 \(NAT 1996, PDF 623KB\)](#)



B. FAQs on lease breaking

Here are some common questions asked by tenants in relation to lease breaking. These FAQs should operate only as a guide only. Each situation has unique circumstances that may alter the advice.

1. ***Do I have a right to break my lease?***

You have a right to hand your keys back at any time. The act of surrendering your keys and giving back vacant possession of the premises, is an act that terminates the tenancy. No one can compel you to remain in possession of a premises. However, the act of termination does give rise to liability to the landlord. Take note, that as long any party to the tenancy remain in possession of the keys, the tenancy is generally considered to be on-going.

Note: TUV does not advise in relation to inter-tenant disputes.

2. ***Can I be listed on a tenancy database for breaking my lease?***

There is no automatic right of a landlord to list or threaten to list you on a tenancy database merely because you have broken your lease. However, under section [439E.\(1\)\(c\)\(i\), RTA](#), you may be listed if you have a compensation claim Ordered against you that is greater than the bond. However, if this is paid off within three months of the Order then the listing must be removed (see [s439G, RTA](#)). For more information see [Tenant databases or "blacklists" \(TUV website\)](#).

3. ***Can I break my lease when the landlord is selling?***

This is one of the more challenging circumstances, about action that preceded the termination of the lease. It is unlikely that a tenant is going to want to move into the premises that is being rented, and be offered a shorter lease. The landlord has an obligation to mitigate loss. In such circumstances, it is likely up to the Tribunal to consider what they believe the reasonable conduct is.

4. ***I've been given an "end of fixed-term" notice to vacate (section 261), can I leave before the end of the fixed term?***

Unfortunately, under section 237, once you have been given a notice to vacate, you can give a not less than 14 days - Notice of Intention to Vacate. However, if the termination date is before the end of the fixed term you will still be breaking your lease.

It is important to note, that if you stay beyond the termination date, the landlord must then apply to VCAT. Under section 322(2), the landlord cannot apply to VCAT until after the termination date has lapsed. Even hereafter, the Tribunal still has the power under section 352 of the Act to provide up to a maximum of 30 days to postpone the landlord's ability to purchase a warrant to evict.

5. ***I felt constantly harassed and wanted to leave. So I did. Now I'm being charged for lease break. Is there is anything that can be done?***

Human behaviour is very hard to characterize as lawful, or a breach of a duty. Section 67 of the RTA is relatively broad, but generally the Tribunal will not be interested in people's emotional engagement or distress. The RTA does not have jurisdiction to deal with personal injuries claims ([s447](#)).



So it is unlikely to be grounds to prevent a lease break. However, it will be relevant to section 211(a), (b) and (e) of the RTA. To further bolster this position, section 60 the Australian Consumer Law provides a guarantee with respect to the render of services with due skill and diligence.

In most cases, unless there is a demonstrable series of serious of breaches of section 61 of the ACL, which can be couched in section 67 of the RTA, it is likely the behaviour aspects leading up to the breach, are unlikely to be considered relevant.

For more information see:

- Practice Note: [Residential Tenancies and the Australian Consumer Law](#),
- [The Australian Consumer Law](#), s61
- [ESTATE AGENTS \(PROFESSIONAL CONDUCT\) REGULATIONS 2008](#), s13(a)
- [Jarvis v swan tours \[1972\] 3WLR 954; Baltic Shipping Company v Dillon \[1993\] HCA 4; \(1993\) 176 CLR 344; \(1993\) 111 ALR 289; \(1993\) 67 ALJR 228 \(10 February 1993\); Walter Vignoli v Sydney Harbour Casino \[1999\] NSWSC 1113 \(22 November 1999\)](#)

6. *I left because the landlord never repaired anything, and now I am being charged for lease break?*

Your right to claim compensation remains intact. If there are known problems with the property, which the landlord refuses to attend to, and that this is likely to detract from prospective tenants, then it is well within the remit of the Tribunal to consider that this is a failure to mitigate loss under section 211(e) of the Act.

You have up to 6 years to make a claim for compensation, you may either make it at the same time to offset the claim for lease breaking. Alternatively, you may bring the action late. For more information, see Practice note – claiming compensation.

7. *Can I fall into rent arrears deliberately?*

Sagacious tenants may identify that they can intentionally fall into rent arrears, to compel a landlord to serve a notice to vacate. Traditionally, the act of serving a notice to vacate, is an act of termination that is brought about by the landlord, rather than the tenant. Thus, rendering a lease-break claim unviable.

However, should the tribunal be of the opinion that the lack of performance has been deliberate with regard to the financial circumstances of the parties, it may be open to the tribunal to entertain a lease breaking claim as well. Any Possession Order under section 246 may also result in a tenancy database listing under Part 10A of the Act.

It is therefore advisable to avoid such actions.

8. *I have paid rent or overpaid rent until the new tenant was found, but I believe the landlord failed to mitigate loss. Can I seek a refund?*

According to section 210(1)(b), a tenant may be able to make a claim if they can prove that they have paid more than required in accordance with the Act.

9. *I paid a full month's rent in advance and a tenant was found in the first week. The estate agent is refusing to refund the month's rent. Can I recover the 3 weeks rent?*



There is a principal in law against unjust enrichment. This means that while the landlord is entitled to recover the hypothetical losses for the breach of contract, they cannot make a profit.

Retaining money despite when the new tenants move in earlier may have serious consequences including unconscionable conduct under the Australian Consumer Law.

10. *I have paid 6 months rent in advance and want to break my lease*

This is a very difficult position to be in, parties may apply to the Tribunal to recover the monies, but it is open to the Tribunal to retain this money as a security. Arguments with respect to the utility of obtaining those monies and the reinvesting them may be compelling to the Tribunal, but it is therefore desirable to consider other options other than lease breaking.

11. *Can I stay in the property on the basis that they landlord or the agents will find new tenants and then I will move out?*

Parties can reach any agreement between them as they see fit. Ensure that this is in writing and clear and unambiguous. It has however, been our general observation, that there is little incentive or effort made by landlord or estate agents, when a tenant remain in possession of the property and seeking to leave.

12. *Should I assign or break my lease if I find someone?*

See the Assignment part of this practice note. Generally, if assignment occurs, the tenure is limited to the remaining period of the lease, but there is a guarantee once approved by either the landlord or the Tribunal, that they person can take occupation. The existing tenants liability is generally considered to have ended with respect to claims by the landlord (see s5). However, it is possible that a tenant assigned into the lease may seek indemnity by way of private civil action for any losses they suffered as a result of being assigned into the premises.

On an assignment, the bond is also not released so this money must be exchanged privately between tenants. But the landlord has no right of claim against the bond for damages because the tenancy has not ended.

Alternatively, if the lease is ended and someone is immediately ready to move in, there may be some time required for the landlord to do cleaning, to assess the premises. However, the bond will be released, and there agreements will be treated as discrete and independent (i.e. no risk of private civil indemnity claims). Further, a new condition report is provided.

There is a risk the person may be rejected by the landlord, but rejecting a party capable of performing a tenancy, is a severe failure to mitigate loss that will undermine any lease-break claim.

13. *The landlord has reduced the rent, am I liable to pay the gap?*

There is no specific rules on this decision. Usually, if the premises has been on the market for some time, it may be open to landlord to reduce the rent in order to attract new tenants. Liability for the gap in rent should only be for the remaining period of the lease. Ultimately, it is up to the Member in light of all of the circumstances to determine if this is reasonable.

14. *Can I ask the landlord to reduce the rent and offer to pay the gap?*



Offers of compensation are a direct consideration for the Tribunal, with respect to awarding compensation under section 211 (f) of the Act. So you can while you can make an offer, you cannot compel a landlord to reduce the rent. The offer itself, will be a relevant consideration that may reduce the tenant's liability. In some circumstances, this is significantly useful if the tenant has been paying relatively high rent, or the market is in a slump.

15. Can I advertise the property for lease?

There is no specific rule to prevent you from advertising the property for lease, providing the advertisement is accurate and not misleading about your rights and authority.

Specifically, it is would be important to communicate that you are seeking to break your lease, and that it is conditional upon the landlord consenting to either entering into a new lease or an assignment. In the case of assignment, a current tenant, may apply under section 82 to compel the landlord to take the new tenants on.

If the landlord refuses or objects to you accurately advertising your position, this is likely to be a relevant factor that can be raised with the Tribunal pursuant section 211 (e).

16. The Real Estate Agent have told me that I have to let people in and run the open inspections. Is this true?

Absolutely not! It is not your legal responsibility to re-let the premises, or be at the behest of an agent seeking to relet the premises. However it is in your best financial interest.

If the agent sends people around to your premises it is not your responsibility to be available. If you actively refused or frustrated attempts to show the premises to prospective tenants, then it is likely the tribunal will consider the landlord's compensation claim more generously.

17. Am I liable for the costs of tenancy database searches for new tenants?

There is nothing in the act about the costs associated with these services. In many cases, estate agents use subscription services, rather than discrete fees. However, the relevant reference point for considering the losses, is the costs incurred by the landlord.

In section 81, the law supposes that the landlord cannot unreasonably withhold consent. Upon assignment, a tenant is not responsible for the charges for any risk checking in this circumstances. The onus of showing that an applicable tenant is not suitable is on the landlord. Accordingly, it is TUV's opinion that the costs for tenancy database checks are not considered to be a liability of tenant in any circumstance

Section [51](#)(1) states:

(1) A person must not demand or receive from a tenant a charge or indemnity for a charge in relation to the making, continuation or renewal of a [tenancy agreement](#) that is a premium, bonus, commission or key money.

Penalty: 20 penalty units.

18. I am breaking my lease, do I have to give 28 days notice of intention to vacate?

No. There is no minimum requirement. You are breaking your contract, the 28 days is a valid termination in relation to a periodic tenancy. It is in your interest to give more time, but there is no formal notice period required.

19. I've just been offered public housing or community housing can I break my lease without suffering financial loss?



There is no specific mechanism that provides for an exemption against lease-break if you are offered social housing. In this regard, as soon as you are given an offer that you are intending to accept, immediately you should apply for a reduction of fixed-term tenancy. Section 237 provides that a 14 day notice of intention to vacate can be given if you are given an offer with the Director of Housing, NOT with the community housing. In either situation, a terminate date that is prior to the end of your fixed term will be a lease-break unless one of the lease-break alternatives is successfully engaged.

20. *I have been contacted by the mortgagee (bank) and told that the bank is wanting to sell the premises. The landlord has told me that everything is going to be fine and to stay. What should I do? Can I break my lease?*

Firstly, seek advice. A bank usually needs to obtain a judgement debt order from the County or Supreme Court. If you are living in the rented premises, it is important to contact the Court, and given your name and address and explain your situation and try and obtain the relevant judgement Orders.

A bank can give a notice to vacate under section [268](#) of the RTA. If you leave in response to this notice then it is unlikely that you will be considered to be breaking your lease.

In fact, the cause of the tenancy falling over (the bank having issued the notice to vacate), is the default of the landlord. In such situations, the landlord has breached the agreement and you will likely be entitled to make a claim for compensation claim.

See Practice Note [Eviction by mortgagee](#)

21. *I'm a rooming house resident under fixed-term lease, but I have discovered the rooming house is unregistered. Can I break the lease?*

Advice should be sought. This is a highly complex area of contract law. See [unjust enrichment section above]. Under section 61 of the Australian Consumer Law, there is a consumer guarantee that the rented premises should be fit for purposes. Further, a tenancy agreement should be in the prescribed terms in accordance with section 26 of the RTA.

A rooming house is unregistered may be shut down by Council. However, improvement notices may also be issued which can cure the lack of registered. So it should not always be assumed that the fact a rooming house is unregistered is going to absolve the nature of a fixed-term contract.

Many unregistered rooming house operators will release a tenant from contract by agreement under the threat of being dragged to VCAT to make them accountable. For more information about lease breaking in a rooming house, see:

See Practice Note: [Tenancy Agreements in Rooming Houses](#)

22. *I live in student housing and have broken my lease. I wanted a 6 month tenancy but was compelled to sign a 12 month tenancy. The landlord states that they will only offer a fixed-term tenancy to future tenants, and only to students?*

Many student housing providers (not affiliated with a particular educational institution (see [s21](#))), are subject to requirements that the housing only be provided to students. See [ss142 & 173](#) of Planning and Environment Act 1987). While there is no formal requirement to disclose this to students, the failure to disclose this condition may be a relevant factor for the Tribunal to consider in a lease break.

While the landlord must make reasonable endeavours to comply with these regulations, refusing to offer accommodation other than a fixed-term tenancy because the institution

wish to cover financial gaps between education semesters, may amount to a failure to mitigate loss. This is also likely to be relevant, if the original tenant had sought a tenant other than a fixed-term tenancy. (see 234 and subsequent parts of this practice note about variation of contracts).



C. Alternatives to lease breaking

Am I bound by the tenancy agreement? Lease formation and holding deposits

It is critical to identify at what stage of negotiations an agreement crystallises. Unfortunately, sometimes people are bated to pay bond and rent before even signing a tenancy agreement. This is an ambiguous area of law. Once tenants sign the lease they will be bound by it, even if it commences sometime in the future.

In an ideal world, signing lease should involve the following steps:

1. The tenant inspects the property.
2. The tenant applies for the property.
3. The agents communicate that the tenant's application is successful.
4. The tenant then pays a "holding deposit" in good faith and as an exclusive option that prevents other people being offer the lease. (s50)
5. The tenant is provided with a copy of the lease agreement (including a copy of any owners corporation rules s136 Owners Corporation Act 2006) to take away and consider. (s29) .
6. The tenant returns to the estate agent with the agreement signed.
7. The tenant has made any amendments to the lease, or include special clauses that the wish to ensure are warranted such as; provision of active phone line that can carry ADSL, or existence of car park, or any propose works that are undertaken to be done post the tenancy commencing, the correct number of keys are provided etc.
8. The real estate agent then signs the agreement on behalf of the landlord.
9. The holding deposit is returned.
10. A copy of the agreement is immediately provided to the tenant (cf. See section 29)
11. The bond and first month's rent is paid in advance by the tenant and receipts are issued. A copy of the prescribed information is also provided. This satisfies section 43, 66 and 406.
12. The keys are then collected at 9am on the date of commencement of the lease. The premises is in good repair, is reasonably clear and a copy of the condition report is awaiting. (Section 35 and 65)

Unfortunately, the common practice that is observed is as follows:

1. The tenant inspects the property.
2. The tenant applies for the property.
3. The tenant is then told their application is successful.
4. The tenant is then requested to pay the bond and first month's rent to secure the rented premises.
5. The tenant is then provided with a copy of the agreement.
6. The tenant then signs the agreement and gives it to the estate agent.
7. The tenant is not given a copy of the agreement signed by the landlord.



8. The tenant then takes possession of the keys.
9. The tenant at this point enters the rented premises and completes the condition report.
10. The tenant must chase up a copy of the lease signed by the landlord.

Comparison of Contract Processes

In the first scenario, there is a clear point of a security deposit and then of the subsequent agreement. Up to the point of the agreement being signed by the landlord, the tenant has the ability to withdraw. The legislative intent of section 50 however, is often distorted by the sequence of engagement as described in the second scenario.

In the second scenario, the tenant's ability to withdraw is rendered confused because the estate agents often hold out that, because rent and the bond has been paid, a binding agreement has been entered into. In this regard, the passing of money prior to the signing of a lease agreement renders a tension between two principles of contract law. Firstly, that an oral contract can be made, and the court will cure any ambiguity of terms. Secondly, you cannot have an agreement until there is a clear offer of the terms, unilateral acceptance by the other part and this acceptance is communicated.

The critique of the second scenario supports that a contract still does not form, until the tenant signs the agreement, regardless of the monies passing between the parties. It is however a matter for the Tribunal to ultimately consider regarding all the circumstances.

A tenant who has paid a bond and the first month's rent, is still entitled to confirm that they are electing not to continue to proceed with the agreement, on the basis that the terms have not been communicated (ie. The lease could obtain unacceptable terms unknown to the tenant).

This is a matter of statutory construction in light of section 50, and again, ultimately up to the Tribunal to consider all the circumstances.

In such cases, it may be possible for the tenant to withdraw their consent to proceed with the agreement on the basis that the acceptance of the offer (the signed agreement being provided to the landlord), has not been communicated.

Similarly, in many cases, where tenants have signed an agreement and paid the rent and bond, they may still not have received a signed copy of the acceptance by the landlord. While a tenant that takes possession is clearly bound, but an active refusal to produce or affirm the fixed term, may be a mitigating factor under section 211(b).

See:

[Masters v Cameron \[1954\] HCA 72; \(1954\) 91 CLR 353 \(30 November 1954\); see also Re Geoffrey Wayne Goldberg and Deidre Goldberg v the Shell Oil Company of Australia Ltd \[1989\] FCA 321 \(17 August 1989\)](#)

Once a tenant has taken possession of the keys, this act is an act that accepts the tenancy, and the Tribunal must determine any subsequent disputes in terms of an ambiguous contract. (See [Codelfa Construction Pty Ltd v State Rail Authority of NSW \[1982\] HCA 24; \(1982\) 149 CLR 337 \(11 May 1982\)](#)).

See also:



Breaches of the tenancy may still entitle the tenant to end the lease via alternative mechanisms described below, but taking possession of keys undeniably brings the tenancy into existence as an act of taking exclusive possession of the premises.

1. Terminating before taking possession (s226.)

Section 226 of the RTA provides information for terminating a lease before “entering into possession”. The utility of this provision can be troublesome because of the meaning of the phrase “entering into possession”, when taking the keys is a discrete action. In common law terms that act of taking possession of the keys is the act of “having exclusive possession.” However, principles of interpretation suggest that no word should be ignored or render out its meaning and that this meaning should also be determined in the context of the Act as a whole. (See [Project Blue Sky v ABA \[1998\] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 \(28 April 1998\)](#) at [69]-[71])

Interferences may subsequently be based on the significance of the process required to enter into possession. Ergo, entering into possession is a process and less discrete than “having and exercising exclusive possession) and as a matter or process and of exercising dominion. (See [Frieze v Unger \[1960\] VicRp 38; \[1960\] VR 230 \(28 July 1959\); Swan v Uecker \[2016\] VSC 313 \(10 June 2016\)](#)).

In this regard, the provision of the RTA must be interpreted with a good deal of common sense, practicality and justice between the parties.

Typically, this provision is interpreted as being determined upon whether or not the tenants have commenced sleeping in the rented premises, though there is no clear legal basis for this interpretation.

Various thresholds should be considered by the Tribunal in light of the purpose of this section, sections 13 and 32(1) of the Charter and the meaning of the words of the provision.

Relevant factors in relation to whether section 226 is still available to terminate the tenancy:

- It is common for people to move their personal goods into the rented premises as a matter of necessity.
- Whether the persons have commenced sleeping in the rented premises.
- The reasonable time within which the person communicates the notice.
- The degree with which the tenant can satisfy one of the relevant grounds below set out in section 226.

Grounds for terminating before taking Possession

Premises are;

- a) not in good repair
- b) unfit for human habitation
- c) totally destroyed or to such an extent as to be rendered unsafe
- d) not vacant
- e) not legally available for use as a residence
- f) for any other reason unavailable for occupation.



Statutory interpretation of “Good Repair” ground for termination (s226(a))

Principles of statutory interpretation suggest that provisions should be read in order of priority of importance. Furthermore, the principle of harmonization suggest that the meaning with section 68 should be consistent with the meaning of this provision.

The meaning of this good repair ground therefore, is that it is unusual to be placed as the first subsection and ambiguous. Further interpretation principles suggest both a purposive and holistic approach, which connotes a degree of proportionality.

In some circumstances, there may be an overlap between a state of lack of cleanliness and good repair. I.e. A large amount of scrap metal in a garden. However, tenants should be clear not to confuse a lack of good repair, with the provision under section 65. A tenant does not ordinarily have a right to terminate because premises are not reasonable.

By way of summary, tenants should be careful not to assume that they can terminate because of a broken cupboard door. While it may be open to the Tribunal, the consequence of being found not to have validly terminated under section 226 is a lease-break situation.

For the above reasons, the tenant may either immediately give a notice of intention to vacate on the basis of section 226 specify the relevant ground and detailing the issues, and assume the risk of lease-break if this is found to be insufficient.

Example: Successful termination under section 226 (faulty oven and locks)

[Wajing v Gilardelli \(Residential Tenancies\) \[2015\] VCAT 570 \(14 April 2015\)](#)

Termination unfit for human habitation (s 226 & s238)

“Unfit for habitation” is a ground under section 226 and 238. The right under section 238 exist at any time during a tenancy. The meaning of unfit for habitation is highly dependent on the evidence and the opinion of the Tribunal Member. Again, this notice may be given without any attendance to VCAT, and the notice operates as a defence to a lease-break claim.

It should be noted if works are done that alter the state of the premises prior to the hearing, the tenant may lose the ability to terminate under this provision. However, once a notice of intention to vacate is served, this should be binding regardless of the attention to any repairs in the interim prior to vacating or a hearing.

Example: Termination 238 for mould effecting children's health:

[Eskander v Catanchin \(Residential Tenancies\) \[2014\] VCAT 381 \(4 April 2014\)](#) at [26]

“If the landlord is to succeed in his loss of rent claim, the onus of proof is, in my opinion, on the landlord to establish that the Notice of Intention to Vacate dated 13 June 2012 was not valid. I am satisfied that the tenant sincerely believed that her children's health was compromised by mould affecting the premises. Based on the reports from Dr Cameron Jones and Dr Ka Earl Tan and the building report dated 22 June 2012 of Mark Schlueter, I am satisfied that the tenant's sincere belief was reasonably based on the evidence she had. What is less clear is whether the condition of the premises would adversely affect only the tenant's family or whether another family would suffer from illness due to the (presumably low) concentration of mould. Each person has a different threshold to adverse environmental factors. Indeed some landlords claim extreme allergic reaction to pet hair or the pollutants from cigarette smoke. However the doubt expressed here is my own. It was not put to me by the landlord that the tenant's children were unusually susceptible to mould. As stated, the onus of proof is on the landlord as applicant. I do not find that onus discharged. The landlord has not proved that the tenant's Notice of Intention to Vacate was invalid. The landlord's claim for loss arising from breach of fixed term is dismissed.”

See also:

[Kyriakou v Northcote Developments Pty Ltd \(Residential Tenancies\) \[2016\] VCAT 85 \(20 January 2016\)](#)



[Jones v Bartlett \[2000\] HCA 56; 205 CLR 166; 176 ALR 137; 75 ALJR 1 \(16 November 2000\)](#) at [23].

[Eskander v Catanchin \(Residential Tenancies\) \[2014\] VCAT 381 \(4 April 2014\)](#) at [15]-[16]

Termination by Notice of Intention to Vacate versus Declarations

With respect to section 226 and 238, a tenant may elect to obtain a declaration (legal affirmation of rights) by Order of the Tribunal before actually giving a notice of intention to vacate (immediate or a longer period).

A tenant may apply to the Tribunal for a declaration under section 452 using the General Application prior to returning the keys. This provides again, certainty of the entitlement to terminate under the relevant provision, with the trade-off being the time taken to have the matter heard (2-3 weeks).

If a notice of intention to vacate is served, there is a risk, if the Tribunal is not satisfied that the relevant threshold has not been met, or that they consider the tenant has taken possession of the property in the case of section 226, then this application may fail.

Ultimately, it is up to the tenant to assess what they believe to be the strength of their evidence, and the inevitability of them leaving the premises, choosing to remain and compel repairs, or seek to terminate the lease on another basis.

Expert Reports

Parties may engage professional services, or local Councils to provide professional opinions, certified reports or qualified assessments. Council on rare occasion may do this for free as part of their obligations under the Building Act, Planning and Environment Act, and other relevant legislation.

These reports may be used to independently substantiate and bolster a case to prove to the Tribunal that the premises is (or was at the time of the notice of intention to vacate) unfit for habitation or cannot be legally occupied for any reason in the case of section 226.

Tenants may want to seek advice before spending financial resources that may or may not be able to recover.

For example: A tenant with a mould issue may spend \$600 to obtain a report. If the report is clear that the premises that is ambiguous as to the issue of habitation, the tenant should not assume that they will be able to recover the costs on the basis of section 211, ie the Tribunal may consider it so obvious as to not be necessary.

However, the Tribunal may consider the expenditure reasonable if the landlord refuses to accept that the premises is uninhabitable. When in doubt, if report costs have been incurred, and the landlord has been placed on notice of the issues, tenants should at least attempt to recover these costs.

Unfortunately, in the case of report may say the premises is habitable. In many cases tenants will not know the result of a report until they have incurred the cost.

In relation to unfit for habitation matters that pertain to health hazards, the Tribunal can hear evidence relating to safety and hazards in a rented premises, they cannot however award any damages for personal injuries.

EXAMPLE OF NOTICE OF INTENTION TO VACATE section 226

Dot signs a contract for a fixed-term tenancy with Dawn. Dot collects the keys on the date the tenancy is due to commence, when she got to the rented premises, there was extensive mould in the bathroom, the oven was not working and the backdoor did not appear to lock correctly. Dot gets a friend Alan to come and observe the issues. Alan gives a statutory declaration of what he has seen and Dot uses her smartphone to take photos and videos. Dot takes extensive photos and determines she does not wish to proceed with the tenancy. She gives this notice of intention to vacate accordingly under section 226. [Both section 226 and 238 matters are highly subjective depending on the facts and the Tribunal Member]

Notice to landlord of rented premises		Landlord's copy
From the tenant		
Landlord details		
1. This notice is given to (landlord/s names):		
Dawn Johnson		
2. Landlord's address (can be an agent's):		
8 Flathouse Lane, Canton 3000		
Tenant details		
3. Tenant/s name/s:		
Dot Dickson		
4. Regarding the rented premises at (write address):		
1 Whalley Court, Frampton 3000		
5. Address for serving documents (if the same as in 4, write "as above"):		
As above		
6. Contact telephone numbers		
Business hours:	{ 0411 111 111 }	
After hours:	{ as above }	
Service details		
7. This notice is given: (mark one method only and if posted note the delivery speed)		
by hand:	<input checked="" type="checkbox"/>	
by registered post:	<input type="checkbox"/>	
by ordinary post:	<input type="checkbox"/>	
on (date):	1 / 04 / 2016	
8. Signature of tenant:		
Dot Dickson		
9. Name of tenant signing this notice:		
Dot Dickson		
Reason for notice		
10. (write the section number and reason, using the words from the page opposite):		
<p>I am terminating the lease pursuant to section 226 of the Residential Tenancies Act 1997 (RTA), because the premises are not available for occupation, not in habitable, or are not in good repair in accordance with meaning contained in section 226 and 68 of the RTA.</p> <p>I have had to move my goods into the premises because I had nowhere else to store my property. However, I have not commence occupation and entering into possession to treat the premises as my home.</p> <p>Specifically, I am terminating because:</p> <ol style="list-style-type: none"> 1. There is extensive mould in the bathroom (see attached photos). 2. The Oven does not work (See attach Statutory declaration from Alan, and video available upon request) 3. The rear door does not lock. (See attach Statutory declaration from Alan, and video available upon request) <p>Accordingly, I now give Notice of Intention to Vacate immediately.</p> <p>I confirm that I will be vacating on <u>3 April 2016</u>. I will be returning the keys and vacating my goods accordingly.</p> <p>Please provide instructions as to how I may return the keys to the premises.</p> <p>I wish to reserve my right to claim compensation for inconvenience caused if you are at fault.</p>		
11. Details are attached to this notice (e.g. receipts, other evidence)		
yes:	<input checked="" type="checkbox"/> X – described above	
no:	<input type="checkbox"/>	
Landlord please note		
If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting		

2. Assignment (ss81, 82 & 84)

Assignment is one of the most economically sensible options to transfer the lease. It is also the most difficult, in that it is the tenant who must find the substituting parties.

This is also a viable option for shared households that have broken down where parties are mature enough to recognise that some negotiations are necessary to formally resolve which parties will remain as tenants and which parties shall cease to be tenants. Rather than having parties remaining as jointly and severally liable and future bond transfer being frustrated.

Assignment is essential where other tenants step in, or are in addition to, other tenants.

Assignment can occur in a number of contexts (these are not defined in the RTA as such, but as descriptions for the types of transfers):

- Total substitution - Tenant A leaves and tenant B takes over the lease.
- Addition – Tenant A and B have an additional tenant, A, B and C (this is not relevant to lease breaking, but may resolve inter-tenant disputes).
- Partial Substitution – Tenant are A and B. Tenant C replaces tenant A, who leaves.

All that is required is that the written consent of the landlord is obtained. Typically, this is done via the bond transfer form, which can be obtained from the RTBA.

Assignment cannot be retrospectively done on matters of total substitution. This runs a risk of receiving a notice to vacate under section 253.

A party may occupy as a licensee until consent is obtained.

Section 81 states the landlord cannot withhold consent to an assignment unreasonably. If they do, tenants can apply to the Tribunal under section 82.

Generally, assignment is seen to end a tenants liability if they are assigned of the tenancy (See s5 of the RTA and [Equuscorp Pty Ltd v Haxton; Equuscorp Pty Ltd v Bassat; Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd \[2012\] HCA 7 \(8 March 2012\)](#))

For more information please see TUV – Assignment Kit (to be published soon).

EXAMPLE OF ASSIGNMENT

Mark decided that he doesn't like living in the suburb of Marlon any more. Mark has found Bianca to take over his lease, but the landlord is refusing, stating that he doesn't like the look of her.

Claim details - What do you want VCAT to do?
<p>This section tells the Tribunal and other parties what orders you are wanting the Tribunal to make. The correct wording is provided in the Application Guide for your assistance. Please refer to the claim details section in the Guide. *</p> <p>Section 82 - Assignment without the landlord's consent Section 452 - General Dispute</p>
<p>You must give complete details about your claim so that the respondent is able to understand why you have made the application. If compensation is sought you must set out each amount that is claimed. If you do not provide enough information, your case may be dismissed or adjourned. If you need more space, print clearly on a separate piece of paper and attach to this application. *</p> <p>The tenant commenced on 1 October 2015 for a 12 month period, ending on 2 October 2016.</p> <p>The tenant is seeking assignment to a Ms. Bianca Roberts.</p> <p>On 20 June 2016, the tenant has provided the landlord the relevant references and income statements to demonstrate the tenant capacity to sustain the tenancy.</p> <p>Now attached is the relevant materials to demonstrate, the landlord cannot have a reasonable excuse to refuse to assign the tenancy.</p> <p>The landlord has remained silent and is has consented to the transfer.</p> <p>The tenant now seeks that the Tribunal Orders that the tenancy is transfer into the name of Bianca Roberts to take effect as of the 1 July 2016.</p> <p>Accordingly, the tenant also seek to restrain the landlord from claiming compensation under section 84(3) of the Residential Tenancies Act 1997, because there has been no preparation by the landlord in using the prescribed tenant transfer form.</p>

3. Reduction of Fixed-term Tenancy due to *unforeseen circumstances* (s234)

The most challenging aspect section 234 is that so few tenants are aware of this provision. Real estate agents have no obligations to inform tenants of this right when they are seeking to end their lease.

Section 234 of the RTA provides for a tenant to apply to the tribunal to reduce the fixed-term tenancy. This process must go through the Tribunal.

It is a common practice of the Tribunal to not only convert the fixed-term tenancy to a periodic tenancy, but also to end the tenancy entirely. The specific power that appears in section 234(1)(b) is actually to make “any variations to the terms of the agreement that are necessary because of the reduction of the term”

This provides the Tribunal significant latitude to address the issues in the tenancy.

Three elements to prove

The tenant must prove:

1. They have experienced an unforeseen change in the applicant’s circumstances
2. This event causes severe hardship
3. The hardship of the tenant remaining, exceeds the hardship to the landlord of the tenant breaking the lease

Two ESSENTIAL things to know

1. **Keep the keys until the matter is determined.** If the keys are surrendered the hearing is rendered futile and the Tribunal will no longer have power to make the orders sought. The matter will be treated as a lease break. The tenant will remain liable for rent, but in many circumstances, it will be worth it.

As a matter of interpretation, section 234 is commonly interpreted that a tenancy cannot be retrospectively reduced after the keys have been given back. That is the act of surrendering keys, terminates the tenancy, and it is no longer possible for the Tribunal to consider the matter pursuant to section 234

2. **The tenant will be required to pay a reasonable amount of compensation to the landlord in recognition of the contract being broken.**

Specifically, there is a discretion under section 234(3) which provides of compensation to be paid to the landlord. It is significant to note the addition of “(if any)” in this section. This tends to emphasize the importance and recognition that there will be circumstances, where no compensation is payable.

If the tenant is able to demonstrate the requisite hardship to reduce the fixed term, but wants to stay in possession on a periodic basis, the Tribunal has no comparator with which to determine the amount of compensation that should be paid, and the normal 28 day notice of intention to vacate could validly be given without incurring liability.

EXAMPLE:

Purchasing a first home with a short settlement, sick family member where tenant may need to leave before the end of the fixed term but the period is either uncertain or distant.

Example of a good decision:



In [Mercuri v Jefferis \(Residential Tenancies\) \[2013\] VCAT 2141 \(22 November 2013\)](#) at [27]-[28], the court determined:

[27] On the basis of the evidence set out above I decided that whilst the landlord was entitled to some compensation as a result of the reduction of the fixed-term tenancy agreement, that should be confined to rent owed to the date the tenancy was reduced to end and a part re letting fee.

I consider that the tone and content of the correspondence sent to the tenant at the time she advised the agent that she would need to break the lease (referred to above) is at least in part incorrect and misleading. It is clearly intended to intimidate tenants into agreeing to conditions and costs that they may not be liable to pay."

Practical Tips:

1. Give as much notice as possible. I.e. you can apply months in advance if you know you will need to leave due to unforeseen circumstances.
2. Typically it takes between 2-3 weeks for a matter to be listed.
3. In exceptional circumstances, it may be appropriate to request the matter be listed urgently.
4. Specify the date the tenants are seeking to have the tenancy reduced to in the application. This may be the date of the hearing.
5. Tenants may effectively move out and retain keys to the rented premises, provided they clearly explain what they are intending. This can be subsequent to filing the 234 application to VCAT.

FAQ

Can the Tribunal consider relevant, the reasons for termination in a normal lease break?

I.e. The client was not aware of section 234 of the RTA.

Generally not, or at least not in any formal sense. The rationale of this is the Tribunal can make an Order of effect in relation to events that have already occurred in the past and resulted in the termination of the tenancy. Consideration of the principle contained in section 234 may be of guidance but any consideration of the overall justice of the matter, must be considered in the context of section 211. Generous Tribunal Members, or exceptional circumstances, may merit considerations about the question of losses as outlined in the above commentary in relation to the theory of lease breaking.



EXAMPLE OF REDUCTION OF FIXED-TERM LEASE

Bob has a fixed-term tenancy with his landlord Charlie which ends on 1 October 2016.

On 1 March 2016, Bob loses his job, and he is unable to continue to sustain the tenancy.

Bob has a small amount of savings and doesn't want to pay two rents.

Accordingly, Bob immediately makes an application to reduce his tenancy to end in two months, 1 May 2016.

- Note the terms and evidence that may be tendered in these application varies immensely and advice should be sought to consider the best strategy for each tenant. Action should be taken quickly.

Claim details - What do you want VCAT to do?
<p>This section tells the Tribunal and other parties what orders you are wanting the Tribunal to make. The correct wording is provided in the Application Guide for your assistance. Please refer to the claim details section in the Guide. *</p> <p style="background-color: #e6f2ff; padding: 5px;">Section 234 - Reduction of Fixed Term Tenancy</p>
<p>You must give complete details about your claim so that the respondent is able to understand why you have made the application. If compensation is sought you must set out each amount that is claimed. If you do not provide enough information, your case may be dismissed or adjourned. If you need more space, print clearly on a separate piece of paper and attach to this application. *</p>
<p>The tenant commences on 1 October 2015 for a 12 month period, ending on 2 October 2016.</p> <p>1. Unforeseen Event On 1 March 2016, I have lost my job. Attached is my notice of termination. This was unforeseen when I signed the lease.</p> <p>2. Severe Hardship I no longer have the financial capacity to sustain the tenancy.</p> <p>If the tenancy was to continue I would inevitably fall into rent arrears which would result in financial loss to the landlord, and potentially cause me to be listed on a tenancy database for a period of 3 years.</p> <p>3. Relative hardship I believe my hardship is greater than that of the landlord because I am need to look for a more affordable house for me and my family, and if the a notice to vacate is served I do not believe I can obtain work in the near future given the employment market.</p> <p>Accordingly, I request the tenancy to be reduced to a date in the future (rather than to terminate as at the date of the hearing, which I considered). The date I seek the Tribunal to reduce the tenancy to end is 1 May 2016. I now give my notice of intention to vacate on 1 May 2016 if the Tribunal Orders sought in this application.</p> <p>I submit that 60 days notice is a reasonable amount of time for the landlord to mitigate their loss under section 211(e) of the Residential Tenancies Act 1997, and find new tenants in a timely manner. Accordingly, I request the Tribunal make no Orders for compensation in favour of the landlord on the basis of section 234(3) because of the fixed term being reduced.</p>

ORDER

Ref: 2016/xxxxxx/xx

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST
REGISTER OF PROCEEDINGS****APPLICANT(S):**

Tenant Bob Brown

RESPONDENT(S):

Landlord Charlie Pickles

RENTED PREMISES:

4 Clover Street, MIDTOWN 3000

Application under *Residential Tenancies Act 1997* application for reduction of fixed term tenancy Section 234

The Tribunal finds that:

1. The tenant that the parties Bob Brown and Charlies Pickles are parties to a fixed term tenancy agreement which commence on 1 October 2015, and is due to end on 2 October 2016.
2. The tenant has applied to the Tribunal pursuant to section 234 of the *Residential Tenancies Act 1997* ("the Act"), and retained possession of the premises.
3. The Tribunal is satisfied that there has been unforeseen change in the tenant's circumstances of the Applicant so that if the term of the tenancy agreement were not reduced, the severe hardship which the Applicant would suffer would be greater than the hardship which the landlord would suffer if the term were reduced.
4. The tenant has elected to reduce the fixed term tenancy to 1 May 2016, in preference to ending the tenancy immediately. Further, the tenant has served a notice of intention to vacate accordingly. The notice may cannot be withdrawn other than in accordance with section 321 of the Act.
5. The notice period of 60 says is sufficient time for the landlord to find new tenants. However, the Tribunal is satisfied the landlord has suffer a loss in relation to

expenditures of advertising and reletting fees on a pro rata basis. The Tribunal accepts the landlord's evidence that he has paid this fee to the agent today.

The Tribunal orders:

1. The fixed term tenancy is reduced to end on 1 May 2016.
2. The tenant is to pay the sum of \$350 to the landlord by way of compensation for the pro rata advertising and reletting fees.
3. The landlord is not entitled to seek compensation under section 234(3) of the Act as a result of the reduction of fixed term tenancy.
4. In all other respects, the tenancy agreement continues on the same terms as the fixed term agreement and parties shall continue to comply with the Act.

TAKE NOTE: If the tenant does not vacate by 1 May 2016, the Landlord may apply to the Tribunal for a Possession Order on the basis of section 322(2) of the Act.

Name, Member

Order Date: 3 March 2016

CONVERTING YOUR TENANCY- FORESEEN LEASE BREAK

When you know you are going to break your lease in advance

Section 234 applies when there is an unforeseen event. Unfortunately, due to market practice sometimes, tenant seeking short leases such as 6-8 months because they are building a house, or undergoing renovations. These are generally not accessible.

TUV has not been able to run such cases, but under the ACLFTA, it would appear a viable alternative to lease breaking in light of not being able to satisfy the unforeseen circumstances elements of 234 of the RTA.

In most cases, the initial lease is for a period of 12 months. However, it is important to contemplate that if a person knows they are necessarily going to have to break a lease, they should give as much notice as possible, or even further, seek to vary the terms of the agreement on the basis of the Australian Consumer Law.

Section 26 of the RTA requires a lease to be in the prescribed form, it does not however, designate the period for which a fixed-term lease is to last. In this respect, parties may apply to the Tribunal for variation of the contract. It is unclear with section 185 of the ACLFTA will strictly apply. However, it is likely a factor that could assist in compelling the landlord to mitigate loss, and reduce any compensation claim that the landlord may seek to recover.

Example: Aaron is building a house, and knows he only needs a 7 months tenancy, but he cannot obtain a 7 month tenancy anywhere. He signs a 12 months tenancy knowing that he is going to break his lease.

Advice:

1. Prior to signing the lease you may wish to indicate that you are seeking a seven month lease, but if you have to sign a 12 months that you will as a matter of necessity.
2. Many people may struggle to obtain tenancies, so this is not required, but may enhance the position in relation to illustrating the imbalance of power between the parties in negotiating the terms of the contract.
3. Once the agreement has been signed, you then have two options:
 - a. You can immediately give a notice of intention to vacate, nominating the date you are going to leave is in 7 months.

TAKE NOTE: According to section 235, 321 and 322 of the Act, once you have given a notice of intention to vacate, it cannot be withdrawn without the landlord's written agreement. If you do not move out on this date, the landlord then has a right to apply for VCAT for a possession order and potentially a claim for compensation, if they have acted in reasonable reliance of this notice. I.e. if the delay is substantial, it is unreasonable to expect back-to-back tenancies without some gap for cleaning, and maintaining a premise between tenancies.

- b. Alternatively, you may apply under section 452 of the Act and 184 and 185 of the ACLFTA for an application to vary the contract for a shorter period (see [184\(2\)\(c\)](#) of ACLFTA)

TAKE NOTE: Even if the application is unsuccessful, it clearly asserts and identifies the landlord is aware that you are seeking to move in approximately seven months, and once the build date is complete, you may give a more specific notice of intention to vacate.



- c. Parties could attempt to apply for a reduction of fixed-term tenancy, however, the major issue in this regard, is that the breach is foreseeable at the time of signing the lease. In this context, if the Tribunal accepts the prospect that you had intended to assign, and you had been unable to locate anyone to take over the tenancy that this unforeseeable event, would justify the tenancy being converted to a periodic tenancy.

TAKE NOTE: Section 234 is typically used to reduce the fixed-term tenancy and simultaneously end the tenancy. This is not necessarily the case. It is possible to end the fixed term, and remain in occupation on a periodic basis. If a tenant remains in occupation this should negate a compensation claim being awarded under 234(3).

Also note, once a tenancy becomes periodic, the landlord may give various notices to vacate. (See s255-263)

Further, section [185](#) of the ACFLTA provides for a variation of terms with respect to a number of factors in a standard for contract, this includes but is not limited to:

- the relative bargaining power of the parties to the contract;
- the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
- whether or not it was reasonably practicable for the relevant party to reject, or negotiate for a change in, the term before it was agreed to;
- whether the term is usually found in contracts of that kind;
- the justification for the term;

1. Mutual Agreement or Consent

What is the difference between ending by mutual consent and agreement?

217. Termination by agreement

Agreement requires offer and acceptance and the passing of valuable consideration between the parties.

Termination by agreement may include forbearance (a promise not to do something, or a giving up of rights), or a lump sum payment.

When seeking to terminate by agreement, take a holistic approach to the problem. In some circumstances, if there are clear, obvious and significant repairs issues, a prudent tenant may foreshadow their intention to assert all possible rights to compel repairs via VCAT for the remainder of the fixed-term lease. If a tenant can demonstrate a credible working knowledge of VCAT, and in some cases file the necessary application, this is likely to substantially aid negotiations to end the tenancy by agreement or consent.

Off-setting lease-break by making a tenant compensation claim

It does not apply in all circumstances but tenants often seek to end a tenancy because of the breaches that they are experiencing. If the tenant has broken their lease and is seeking to defend a lease-break claim the tenant can file a counter application for compensation.

It is important to note that unless a tenant actually files an application, the Tribunal will not consider relevant any of the breaches committed by the landlord.

It is therefore advisable that if a tenant has broken a lease they make a claim for bond and compensation pursuant to section 210 and 416. [For more information – see the claiming compensation fact sheet].

218. Termination by consent

Consent does not require an offer of terms (although consent can be qualified conditionally), and no valuable consideration needs to be passed between the parties.

In the case of consent, the statutory provision is generous in making it clear that once consent to terminate the agreement has been given, it cannot be revoked.

This is incredibly helpful in circumstances where the landlord or agent has said “if you don't like it you can leave.” Though evidence of such statements is paramount to defend against a lease-break claim.

Case for Estoppel

The position of leaving because you were told to is strongly supported by the doctrine of estoppel, if it was in the Tribunal's opinion reasonable to rely on the representations of the landlord or the estate agent.

For similar reasons, the consent to leave is not only an act of termination, but estoppel also operates as a shield that renders it unconscionable for the landlord or agent to tell you that you can leave, and then attempt to seek lease breaking or similar associated costs against you.

Basic Estoppel Cases: See *Musumeci v Winadell Pty Ltd* [\(1994\) 34 NSWLR 723](#); *Waltons Stores (Interstate) Ltd v Maher* [\[1988\] HCA 7](#); [\(1988\) 164 CLR 387 \(19 February 1988\)](#); *Central London Property Trust Ltd v High Trees House Ltd* [\[1947\] 1 KB 130](#)



ESTOPPEL

While not formally appearing in the RTA, there is argument that the principles of estoppel may apply in circumstances such as render of consent, or a verbal exchange which reasonably allows a party to believe that they are able to leave the tenancy without suffering any lease-break costs.

Estoppel is made of 4 main elements:

1. A representation was made
2. The representation was reasonable enough for a person to rely upon.
3. The representation was relied upon.
4. Because of the reliance on the representation, the relying party suffered detriment.

EXAMPLE:

The landlord gives a Notice to Vacate for 14 day rent arrears. The tenant then leaves on the terminate date. The landlord then pursues the tenant for lease breaking.

See also - sections 211(b) & 217 of the RTA

[See [Timbercorp Finance Pty Ltd v Collins and Tomes \[2016\] VSCA 128 \(1 June 2016\)](#)]

PAROLE EVIDENCE RULE

In some situations, representations about what circumstances a tenant may leave in are made prior to an agreement being made. Generally, as a principle of contract, extraneous verbal evidence should be incorporated into a contract. However, as a consumer dispute, the court should be open to the grounds of estoppel and make an exception to that is known as the parole evidence rule.

In [Wright v Wilson \(Residential Tenancies\) \[2014\] VCAT 670 \(22 May 2014\)](#), the Tribunal states:

"[15] " Applying the parole evidence rule - simply stated is that when parties put an agreement in writing, oral evidence is not admissible to vary the terms of the agreement."

However, [CB Cold Storage Pty Ltd v Morgan Street Investments Pty Ltd \(Retail Tenancies\) \[2014\] VCAT 773 \(25 June 2014\)](#)

[30] "Although I accept that the parole evidence rule may exclude evidence of pre-contractual negotiations, there are exceptions to that rule, as described by Mason J in [Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales](#):

Prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable.[\[14\]](#)

This principle was re-stated by Heydon JA in [Brambles Holdings Ltd v Bathurst City Council](#):

Pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous and if the pre-contractual conduct casts light on the genesis of the contract, its objective aim, or the meaning of any descriptive term.[\[15\]](#)"

Post contract conduct may also appear to be able to modify the terms of a contract based on performance. (See [Swan v Uecker \[2016\] VSC 313 \(10 June 2016\)](#) at [32]).



Termination for breach of a compliance order

A tenant is legally entitled to terminate a lease (including a fixed-term lease) by giving a 14 day notice of intention to vacate pursuant to section [239](#). A lease terminated on this basis is a valid termination and not subject to a compensation claim for lease breaking.

This section states:

Failure of landlord to comply with Tribunal order

(1) A [tenant](#) may give a [landlord](#) a notice of intention to vacate [rented premises](#) if the [landlord](#) fails to comply with an order of the [Tribunal](#) under [section 212](#).

(2) The notice must specify a termination date that is not less than 14 days after the date on which the notice is given.

Many tenants experience breaches and obtain repair orders. However, few tenants utilize breaches of the landlord to put themselves in a position to terminate validly against a potential lease break.

The lack of utilization of this provision stems from the failure of tenants to obtain compliance orders generally and the discretionary power of the Tribunal to potentially resist giving a compliance order.

In other words it is possible to apply both for repair orders and for compliance orders under section 212 concurrently. Such Orders would entitle tenants to terminate a lease for non-compliance with repair orders.

If for any reason, the Tribunal is resistant to making a repairs order that is also a compliance order, then parties should make submissions with respect to section 32(1) of the Charter of Human Rights and Responsibilities Act 2006. Parties should respectfully request written reasons as to why the Tribunal is refusing to make the compliance order and deprive the tenant the ability to terminate the lease pursuant to section 239, in the event the landlord fails to comply with the Order.

It is however, important to note the wording of section 212 which states:

“A compliance order may be made if the Tribunal is satisfied that the person was entitled to give the notice and that it was not complied with it may make any or all of the following orders.

There is no formal compulsion for the Tribunal in all circumstances to make compliance orders. This is matter that must be argued before the Tribunal with respect to the seriousness of the breach.

As a tenancy may be terminated for a breach of a compliance order. The critical question is how to get a compliance order?

A compliance order can be obtained in three steps:

1. Serve a valid breach of duty notice under section [207](#) and [208](#).

[Ensure the breach of duty notice contains both the relevant provisions and enough detail to identify the breach. It is also best practice to attach evidence of the breach to the landlord].

2. Apply to VCAT under section 209 of the RTA

[Ensure the breach of duty notice is attached to the application and that the relevant time period has lapsed].

3. Prove on the balance of probabilities that the landlord has breached their duty and that a compliance order is appropriate.



[It is recommended that the Orders be specific and measurable and include dates by which performance is required. This enhances the clarity with which a notice can be given under section 239 of the RTA.]

5. Terminating for breach of a Compliance Order

Once a compliance order has been obtained, all the tenant is required to do is serve a written notice specifying a date of not less than 14 days' notice to vacate.

It is recommended as good practice to specify the reasons for the notice pursuant to section 239, attach a copy of the compliance order, and provide the evidence or make statement as to the specific non-compliance.

If the landlord complies with the Compliance Order between the time of giving the notice of intention to vacate and the tenant vacating, the tenant is still entitled to proceed with the termination as having met with the statutory prerequisites of a valid termination.

TIP WHEN APPLYING FOR REPAIRS

Tenants typically apply for repairs only on the basis of section [73](#) and [75](#) of the RTA. Accordingly, they only obtain a repairs order. If these Orders are not complied with, there is no immediate consequence to the landlord. The tenant is usually given a right to renew proceedings and may apply for a running rate of compensation. It is concurrently a breach of section [480](#). It does not entitle them to terminate the lease and provide a defence to a lease-break claim.

However, when the rented premises are not maintained in good repair, this is typically going to be a concurrent breach of section [68](#) of the RTA, meaning a breach of duty notice can be served and, more importantly, the repairs order can also be requested to be a compliance order.

Pursuant to Rule [7A.07](#), an application for a compliance order is made pursuant to section 209 and the breach of duty notice must be attached to the application.

Compliance Orders obtained by landlord can be identified because at the footer of the Orders, there is a mandatory caution. This is not, however, required with compliance orders against the landlord.

In the case of urgent repairs as concurrent compliance orders, repairs section 208(2)(e)(i) states that if the matter is not complied with, then a compliance order may be sought. In this respect, it is considered that the full 14 days must lapse before a compliance order may be sought.

Under section [53](#) of the Interpretation of Legislation Act 1984, strict compliance with prescribed forms is not required unless contrary intention appears in the statute.

An example of the relative requirement of strictness between landlords and tenants can be observed in a comparison between section 318 and 319.

In this respect, there is a difference between the wording of section [318](#) which requires the notice of intention to be in writing (not in the prescribed form), and section [319](#), which specifically requires a notice to vacate to be in the prescribed form in 319(a).

EXAMPLE OF TERMINATING FOR BREACH OF COMPLIANCE ORDER (REPAIRS)

John rents a house from Bill under a 12 month fixed-term lease. John's stove breaks in the 8th month. John emails to Bill and asks for the repairs to be made. Bill states he is not going to fix anything because he is going to demolish the house at the end of the tenancy.

Step 1. John completes a breach of duty notice under section 68, and waits 14 days. Bill ignores John. [see the attached breach of duty notice below].

Step 2. John then applies to the VCAT under section 209, and attaches the breach of duty notice. [see the attached General VCAT Application excerpts]

Step 3. The Tribunal makes a factual finding the oven is not in good repair, and make a compliance Order accordingly.

Step 4. Two weeks have lapsed and Bill has still not complied with the compliance Order.

Step 5. John then gives a 14 day notice of intention to vacate on the basis of section 239 of the RTA. John also takes some video footage on his smartphone as evidence of the stove not being in good repair.

Step 6. John then returns his keys on the date nominated in his notice of intention to vacate.

Step 7. Bill alleges that John has broken his lease, and make an application to VCAT for all of the rent due under the fixed term stating that no one wants a lease for 4 months, and that John has broken the contract.

Step 8. Both parties attend VCAT. Bill is heard first in relation to the allegation of lease break. The Tribunal then turns to John. John is able to provide the compliance order and he provides the video footage to the Tribunal to prove the oven was never fixed. Bill is also unable to provide any evidence that he attended to the repairs. The Tribunal finds that John had validly terminated the lease pursuant to section 239, Bill's lease-break claim is struck out and the bond is returned to John.

Notice for breach of duty to landlord of rented premises

Landlord's copy

Landlord details

1. This notice is given to: *(landlord/s names)*

Bill Turner

2. Landlord's address: *(can be an agent's)*

7 Dawsons Road, Smallville 3000

Tenant details

3. Tenant name/s:

John Smith

4. Regarding the rented premises at: *(write address)*

9 Main Road, Smallville 3000

5. Address for serving documents:

(if the same as in 4, write 'as above')

As above

6. Contact telephone numbers:

Business hours: (0411 111 111)

After hours: (as above)

Service details

7. This notice is given: *(mark one method only and if posted note the delivery speed)*

by hand:	
by registered post:	X (express registered)
by ordinary post:	
on (date):	1 / 02 / 2016

8. Signature of tenant

J Smith

9. Name of tenant signing this notice

J Smith

Reason for breach of duty notice

10. I believe you have breached your duty as a landlord because: *(write the section number and words from the section 'Reasons to use in question 10')*

Section 68 – you have not maintain the premises in good repairs.

Specifically, stove is not igniting and I cannot cook.

11. The loss or damage caused is:

I have not use of the stove and unable to cook in the rented premises. I now need to eat out which is very inconvenient and expensive.]

12. Compensation or compliance required

I require you to remedy the breach within 14 days after receiving this notice by:

Get a qualified trades person or technician to attend and fix the stove. I require proper notice for entry under the Act.

Compensation sought is to be advised.

or pay me compensation of: (\$)

13. You must not commit a similar breach again.

If you do not comply with this notice:

- the tenant may apply to VCAT for a compensation or compliance order, or
- if \$240 applies, the tenant may give you notice of intention to vacate.

14. Details are attached to this notice

(e.g. receipts, other evidence)

yes: X – attach a photo and I have sent you video footage to you email at bturner@landlord.com

no:

Landlord please note

If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting.

Example attachment to [General VCAT Application \(VCAT website\)](#).

Claim details - What do you want VCAT to do?

This section tells the Tribunal and other parties what orders you are wanting the Tribunal to make. The correct wording is provided in the Application Guide for your assistance. Please refer to the claim details section in the Guide. *

Section 209 - Compliance Order

Section 73 - Urgent Appeals

You must give complete details about your claim so that the respondent is able to understand why you have made the application. If compensation is sought you must set out each amount that is claimed. If you do not provide enough information, your case may be dismissed or adjourned. If you need more space, print clearly on a separate piece of paper and attach to this application. *

The stove has broken and is not operating.

The tenant served a breach of duty notice on 1 February 2016, for a breach of section 68 of the RTA. 20 days have lapsed since the breach of duty notice was served.

I now attach this breach of duty notice to this application, including the attached photos.

I also have video footage that I have provided to the landlord, and intend to present at the hearing.

I now seek that the Tribunal compel the landlord to hire a qualified trades person to fix the stove immediately.

I seek these Orders by way of a compliance Order pursuant to section 209, in addition to section 73 of the RTA.

Example Notice of Intention to Vacate

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST**

REGISTER OF PROCEEDINGS

APPLICANT(S):

Tenant

John Smith

RESPONDENT(S):

Landlord

Bill Turner

RENTED PREMISES:

9 Main Road, SMALLVILLE 3000

Application under *Residential Tenancies Act 1997* repairs and compliance Section 209

The Tribunal finds that:

1. The landlord and tenant are parties to a fixed term tenancy agreement which commenced on 4 April 2015 and is due to end on 5 April 2016.
2. The tenant was entitled to serve a breach of duty notice on the landlord for a failure to maintain the premises in good repair, pursuant to section 68 of the Act.
3. The Tribunal finds that that landlord is in breach of this duty by failing to maintain the stove in the kitchen in good repair.

The Tribunal orders:

1. The landlord must engage a qualified trades person and put the stove into a state of good repair; or if the appliance cannot be repaired, purchase and install an appliance of an equivalent nature.
2. The landlord must comply with this order be close of business on 7 March 2016 (within 7 days).
3. The tenant shall make the rented premises reasonably available to the landlord and the landlord's agent for the purpose of complying with this Order.
4. If the landlord fails to comply with this order, the tenant may serve a notice of intention to vacate pursuant to section 239 of the *Residential Tenancies Act 1997*.

Name, Member

Order Date: 29 February 2016

Notice to landlord of rented premises

Landlord's copy

From the tenant

Landlord details

1. This notice is given to (landlord/s names):

Bill Turner

2. Landlord's address (can be an agent's):

7 Dawson Road, Smallville 3000

Tenant details

3. Tenant/s name/s:

John Smith

4. Regarding the rented premises at (write address):

9 Main Road, Smallville 3000

5. Address for serving documents
(if the same as in 4, write "as above"):

As above

6. Contact telephone numbers

Business hours: { 0411 111 111 }

After hours: { as above }

Service details

7. This notice is given: (mark one method only and if posted note the delivery speed)

by hand:	
by registered post:	X (express registered)
by ordinary post:	
on (date):	8 / 03 / 2016

8. Signature of tenant:

J Smith

9. Name of tenant signing this notice:

J Smith

Reason for notice

10. (write the section number and reason, using the words from the page opposite):

I am terminating the lease pursuant to section 239 of the Residential Tenancies Act 1997, because you have failed to comply with the Orders of the Tribunal made on 29 February 2016 (R2016/xxxx/xx).

I now **attach** a copy of the Orders to this notice.

Specifically, you have not fixed or replaced the stove in the kitchen.

Please see: the Attached photos take on 8 March 2016.

I have also taken video footage on 8 March 2016 to prove that you have not complied with the Orders by VCAT.

Demonstrating the stove has not been working. I have accordingly forwarded this footage to this to you email at bturner@landlord.com.

I now give my notice of intention to vacate (being a period of not less than 14 day), and confirm that I will be vacating on **26 March 2016**. I will be returning the keys accordingly.

Please provide instructions as to how I may return the keys to the premises.

I wish to reserve my right to claim compensation for the period with which I have been without a stove during the tenancy.

11. Details are attached to this notice
(e.g. receipts, other evidence)

yes:	X - attach photos.
no:	

Landlord please note

If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting

Should the landlord allege lease break, these are the orders that will likely result in such circumstances.

ORDER		Ref: 2016/xxxxx/xx
VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL RESIDENTIAL TENANCIES LIST REGISTER OF PROCEEDINGS		
APPLICANT(S): Landlord	Bill Turner	
RESPONDENT(S): Tenant	John Smith	
RENTED PREMISES:	9 Main Road, SMALLVILLE 3000	
<hr/> <i>Application under Residential Tenancies Act 1997 Sections 210, 417 - 419</i>		
The Tribunal finds and declares that:		
<ol style="list-style-type: none">1. The tenant was entitled to serve a notice of intention to vacate under section 239 of the <i>Residential Tenancies Act 1997</i>.2. The tenant vacated the rented premises on 26 March 2016.3. The landlord failed to comply with the Orders made by the Tribunal on 29 February 2016 (R2016/xxxxx/xx)		
The Tribunal orders:		
<ol style="list-style-type: none">1. The landlord's application for compensation (<u>leasebreak</u>) is dismissed.2. The Residential Tenancy Bond Authority is directed to refund the full bond of \$1,000 to the tenant.		
Name, Member		
Order Date: 13 April 2016		

6. Termination for Successive Breach (section 240)

Section 240 of the RTA is seldom used by tenants because it is a relatively technical provision and easy to apply in error. If used incorrectly, or the tenant is found wanting of evidence, then the tenant has not validly terminated the lease and is likely to be subject to lease breaking principles. Again, noting that a series of persistent non-compliance, or evidence to support anticipatory breach (ie. Letters that the landlord will not fix these issue because they are going to demolish the property), may significantly reduce any entitlement of lease breaking.

Essentially, Section 240 entitles a tenant to terminate the lease for 3 successive breaches.

In terms of procedure, the tenant does not need to even apply to the Tribunal to engage this right of termination. However, usually the tenant will purport to terminate under a notice pursuant to section 240, and the landlord will allege the lease break. The tenant must then prove on the balance of probabilities that:

1. On each occasion there was a clear breach of same duty provision (noting that section 66 is not a duty provision for the purposes of section 208).
2. The breach of duty notice was valid and provided sufficient detail of the breach.
3. That the breach of duty notice was validly serviced in accordance with section 506 (see also section 141 of VCAT Act)
4. Provide a full and clear notice period between the successive breach.*

*It is important to note there is some ambiguity about continuous breaches and discrete breaches. I.e. A comparison between a constant states of disrepair of an oven, as compared to 3 discrete unlawful entries in a short period of time.

Service Times

In relation to both 239 and 240 terminations, it is paramount that the notices are timed correctly. This is regulated by section [506](#) of the RTA and [141](#) of VCAT Act. It is best to add a couple of

extra days to reduce any chance of technical defect which could be fatal to an attempted termination.

See [VCAT Tables for Deemed services](#) times using various methods of post.

It is possible if parties regularly communicate via email, to email these notices to the landlord.

See: [ELECTRONIC TRANSACTIONS \(VICTORIA\) ACT 2000](#)

Do 2 or 3 notices to vacate have to be served?

Essentially, if you serve a third breach of duty notice, you must wait for this to expire, before giving your notice of intention to vacate.

Therefore, under this provision, the most efficient method of termination is to give:

1. Serve the first Breach of Duty Notice for a duty provision, attach the supporting evidence and allow the period to lapse.
2. Give the second Breach of Duty Notice for the same provision, attach the supporting evidence and allow the period to lapse.



3. Upon the breach either being persistent, or a third breach of the same duty provision occurring, do NOT give a breach of duty notice, but rather service a notice of intention to vacate of not less than 14 days specifying the details of the third breach.

Under section 240(1A), if a tenant gives a third breach of duty notice, they must wait for the 14 days to lapse before they are entitled to give the 14 day notice of intention to vacate.

Which duty provision?

In this respect given that quiet enjoyment is an immensely broad concept, this is usually a safe provision to rely upon to satisfy the breach is part of a successive breach of duty notice.

The breach does not have to relate to the same factual matrix. For example, it may be an unlawful entry, it may then include not repairing a stove and then relate to a threat for illegal eviction.

The trade-off of relying upon section 67 as compared to section 68 for example, is that each duty provides the measure with which the Tribunal may conclude there has or has not been a breach. If any of the three notices fail to provide a sufficient breach, the tenant may be subject to lease breaking, noting the relevance of how long the tenancy may have continued in the circumstances.

FAQ - Should I use successive breach termination or a compliance order?

Compliance orders are far more measurable, in that once you have obtained one, it is reasonably easy to deduce and factually assess the strength of a defence against a lease-break claim. ie. You only have to prove non-compliance with the compliance order. The trade-off is that you must obtain the compliance order through the Tribunal.

A successive breach notice of termination, may seem more attractive to some tenants because there is no VCAT attendance is required. It also does not rely on the discretionary power or efforts of the Tribunal in providing a compliance order. This is however a process that is easier to make in error.

It is however important to note that the options contained within section 239 and 240 are not exclusive. In many respects, tenants are best placed by giving breach of duty notices. Having a catalogue of clear breaches is likely to support the tenant being in stronger position to negotiate termination by consent, or choosing to proceed via section 239 and 240.

It is recommended before giving a notice of intention to vacate in either circumstances, parties seek advice with respect to assessing the strength of their case.



FULL EXAMPLE OF TERMINATION FOR SUCCESSIVE BREACHES

Alice is on a fixed-term lease. Her landlord Emma has frequently attended the property without notice and been found gardening, or in the house while Alice is away.

1. Alice serves a breach of duty notice under section 67. Alice contacts her neighbour and gets a statutory declaration to corroborate that Emma had attended without notice or the consent of Alice. [See breach of duty notice 1].
2. A month later, Alice notices that there is a severe mould problem in the bathroom. Alice reports this. Emma states, "Sorry Alice it must be your fault." Alice serves a breach of duty notice under section 67, with photos of mould. [See breach of duty notice 2].
3. 18 days later, Emma has still not responded to the breach of duty notice. Alice then completes a not less than 14 days' Notice of Intention to Vacate specifying the date she is going to move out. The notice contains the details of the same breach under section 67, and she attaches takes further evidence of the mould.
4. Emma then moves out on her nominated date and take photos of her final condition on exit.
5. Emma immediately claims her bond back under section 416 via a General VCAT Application. Alice alleges that Emma has broken the lease and objects to the bond being released.
6. The Tribunal examines the evidence of each breach.
 - The first breach is accepted based on the neighbour's statutory declaration.
 - The second breach is examined, and upon examination, it appears the rented premises has had a history of mould in the bathroom. On balance, the Tribunal determines that the landlord had failed to act, and not done all they reasonably could in response to the breach of duty notice.
 - Accordingly, the notice of intention to vacate is accepted to be a valid termination pursuant to section 240 of the RTA.
 - The bond is released to the tenant accordingly. As a factual determination the Tribunal determines the lease has terminated under section 67 and accordingly, no compensation for a lease-break claim may be made by Emma.

BREACH OF DUTY NOTICE 1

Notice for breach of duty to landlord of rented premises		Landlord's copy				
Landlord details		Reason for breach of duty notice				
1. This notice is given to: <i>(landlord/s names)</i>		10. I believe you have breached your duty as a landlord because: <i>(write the section number and words from the section 'Reasons to use in question 10')</i>				
<input type="text" value="Emma Rhodes"/>		<p>You have breached my right to take all reasonable steps to ensure my quiet enjoyment under section 67 of the Residential Tenancies Act 1997.</p> <p>On 1 February 2016, at approximately 6pm, I returned home to find you on the rented premises in the rear garden, undertaking gardening. I did not consent to your entry, nor did you give me proper notice under the Residential Tenancies Act 1997.</p> <p>Please see the attached statutory declaration by the neighbour who saw you enter the premises using your key to enter the rear garden.</p>				
2. Landlord's address: <i>(can be an agent's)</i>						
<input type="text" value="6 Nicholson Street, Bigtown 3000"/>		11. The loss or damage caused is:				
Tenant details		<p>I believe my privacy and home has been arbitrarily interfered with and that you have trespassed on this property.</p> <p>I know I cannot get compensation under the Residential Tenancies Act 1997 for distress, but this has caused a serious violation of my home, and it has impacted on my quiet enjoyment of the premises.</p>				
3. Tenant name/s:						
<input type="text" value="Alice Meyer"/>		12. Compensation or compliance required				
4. Regarding the rented premises at: <i>(write address)</i>		I require you to remedy the breach within 14 days after receiving this notice by:				
<input type="text" value="4 Kent Road, Bigtown 3000"/>		<input type="text" value="Do not enter the rented premises without proper notice in accordance with the Act."/>				
5. Address for serving documents: <i>(if the same as in 4, write 'as above')</i>						
<input type="text" value="As above"/>		or pay me compensation of: (\$) <input type="text"/>				
6. Contact telephone numbers:		13. You must not commit a similar breach again.				
Business hours:	{ 0411 111 111 }	If you do not comply with this notice:				
After hours:	{ as above }	<ul style="list-style-type: none"> the tenant may apply to VCAT for a compensation or compliance order, or if S240 applies, the tenant may give you notice of intention to vacate. 				
Service details		14. Details are attached to this notice <i>(e.g. receipts, other evidence)</i>				
7. This notice is given: <i>(mark one method only and if posted note the delivery speed)</i>		<table border="1"> <tr> <td>yes:</td> <td><input type="text" value="Attached Statutory declaration attesting to entry without consent."/></td> </tr> <tr> <td>no:</td> <td><input type="text"/></td> </tr> </table>	yes:	<input type="text" value="Attached Statutory declaration attesting to entry without consent."/>	no:	<input type="text"/>
yes:	<input type="text" value="Attached Statutory declaration attesting to entry without consent."/>					
no:	<input type="text"/>					
by hand:	<input type="text"/>	Landlord please note				
by registered post:	<input checked="" type="checkbox"/>					
by ordinary post:	<input type="checkbox"/>	If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting .				
on (date):	<input type="text" value="2 / 02 / 2016"/>					
8. Signature of tenant						
<input type="text" value="Alice Meyer"/>						
9. Name of tenant signing this notice						
<input type="text" value="Alice Meyer"/>						

Notice for breach of duty to landlord of rented premises

Landlord's copy

Landlord details

1. This notice is given to: *(landlord/s names)*

Emma Rhodes

2. Landlord's address: *(can be an agent's)*

6 Nicholson Street, Bigtown 3000

Tenant details

3. Tenant name/s:

Alice Meyer

4. Regarding the rented premises at: *(write address)*

4 Kent Road, Bigtown 3000

5. Address for serving documents:
(if the same as in 4, write 'as above')

As above

6. Contact telephone numbers:

Business hours: { 0411 111 111 }

After hours: { as above }

Service details

7. This notice is given: *(mark one method only and if posted note the delivery speed)*

by hand:	
by registered post:	X
by ordinary post:	
on (date):	4 / 03 / 2016

8. Signature of tenant

Alice Meyer

9. Name of tenant signing this notice

Alice Meyer

Reason for breach of duty notice

10. I believe you have breached your duty as a landlord because: *(write the section number and words from the section 'Reasons to use in question 10')*

You have breach my quiet enjoyment by failed to clean the bathroom from what appears to be a pre-existing mould problem. I have made reasonable efforts to clean the premises since I have moved in, but the mould remains.

I confirm I told you of this issue in an email on 1 March 2016, to which you replied, it was my fault and my problem. I now attach photos of the mould.

11. The loss or damage caused is:

I am not able to use the bathroom for prolonged periods of time. The house smells and there appears to be rising damp and my kids appear to have respiratory issues which may be related to the persistent mould.

12. Compensation or compliance required

I require you to remedy the breach within 14 days after receiving this notice by:

Send a qualified person to remove and clean the mould. I require proper notice to be given under the Act in relation to any entry.

Compensation to be advised.

or pay me compensation of: (\$)

13. You must not commit a similar breach again.

If you do not comply with this notice:

- the tenant may apply to VCAT for a compensation or compliance order, or
- if §5240 applies, the tenant may give you notice of intention to vacate.

14. Details are attached to this notice
(e.g. receipts, other evidence)

yes: Attached Photos, and GP Report

no:

Landlord please note

If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting.

Notice to landlord of rented premises

Landlord's copy

From the tenant

Landlord details

1. This notice is given to (landlord/s names):

Emma Rhodes

2. Landlord's address (can be an agent's):

6 Nicholson Street, Bigtown 3000

Tenant details

3. Tenant/s name/s:

Alice Meyer

4. Regarding the rented premises at (write address):

4 Kent Road, Bigtown 30005. Address for serving documents
(if the same as in 4, write "as above"):

As above

6. Contact telephone numbers

Business hours: { 0411 111 111 }

After hours: { as above }

Service details

7. This notice is given: (mark one method only and if posted note the delivery speed)

by hand:

by registered post: X (express registered)

by ordinary post:

on (date): 1 / 04 / 2016

8. Signature of tenant:

Alice Meyer

9. Name of tenant signing this notice:

Alice Meyer

Reason for notice

10. (write the section number and reason, using the words from the page opposite):

I am terminating the lease pursuant to section 240 of the Residential Tenancies Act 1997 (RTA), because you have breached my right to quiet enjoyment (s67) on two previous occasions, and have now breached my right for quiet enjoyment on a third occasion.

The third breach you have committed is the persistent state of mould as outlined in my second breach of duty notice service on you on 4 March 2016.

The mould remains uncleaned and I continue to be unable to utilize the bathroom and the house is seriously affected by smell and mould spores. I am now starting to suffer property damage.

I now attach the previous breach of duty notices, for the breach of the same duty provision, being section 67 of the RTA.

Accordingly, I now give Notice of Intention to Vacate (not less than 14 days).

I confirm that I will be vacating on 20 April 2016. I will be returning the keys accordingly.

Please provide instructions as to how I may return the keys to the premises.

I wish to reserve my right to claim compensation for the period with which my quiet enjoyment has been interfered with, without lawful excuse.

11. Details are attached to this notice
(e.g. receipts, other evidence)yes: X - attach photos.

no:

Landlord please note

If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit consumer.vic.gov.au/renting

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST
REGISTER OF PROCEEDINGS**

APPLICANT(S):
Landlord Emma Rhodes

RESPONDENT(S):
Tenant Alice Meyer

RENTED PREMISES: 4 Kent Road, BIGTOWN 3000

Application under Residential Tenancies Act 1997 Sections 210, 417 - 419

The Tribunal finds and declares that:

1. The tenant was entitled to serve a notice of intention to vacate under section 240 of the *Residential Tenancies Act 1997* ("the Act").
2. On two occasions the landlord has breached the same duty provision.
 - a. Firstly, on 1 February 2016, the Tribunal finds that the landlord did enter and remain in occupation of the rented premises without lawful excuse or notice under the Act.
 - b. Secondly, on 4 March 2016, the tenant reported the presence of substantial and extensive mould in the rented premises and failed to render services to ensure quiet enjoyment. The landlord made no proper enquiry and without lawful excuse or basis, determined it was the tenant's fault.
3. The Tribunal is satisfied that the Tenant did not contribute to the breach, and that the tenant has used of the bathroom in a fair, reasonable and ordinary way. The Tribunal is satisfied the landlord has not taken all reasonable steps to ensure the tenants quiet enjoyment, as a bathroom use in such a manner should not give rise to extensive and unsafe mould proliferation.

4. On 1 April 2016 the tenant services a valid notice under section 240 of the Act and provided sufficient evidence that the second breach was persistent, and remained unattended, giving rise to a third an successive breach, entitling the tenant to validly terminate the tenant in accordance with the Act
5. The tenancy terminated on 20 April 2016.
6. The tenant has not hindered or inhibited the landlord's ability to comply with the served breach of duty notices.

The Tribunal orders:

1. The landlord's application for compensation (leasebreak) is dismissed.
2. The Residential Tenancy Bond Authority is directed to refund the full bond of \$1,000 to the tenant.

Name, Member

Order Date: 3 May 2016

7. EXAMPLE – Intention to lease-break letter

[date]

[Realty]

[address]

Dear [Realty]

Tenant: Mr. John Doe and [other tenants where applicable]

Rented Premises: 1 Smith Street, Madeupville

Re: Ending our lease before the fixed term

We write in relation to the above premises and wish to formally give our notice of intention to vacate prior to the end of the fixed term.

We confirm we are leaving on _____ [date].

Please provide us with instructions as to the time and place where upon keys can be returned, not less than ____ days prior to me vacating.

Lease Breaking Costs

We note that your lease agreement may require us to pay reletting and advertising fees should we break out lease. We note that a lease agreement is required to be in the standard form according to section 26 of the Residential Tenancies Act 1997 (RTA).

In this regard that you are not automatically entitled advertising and reletting fees.

In relation to advertising, I note that sites such as Gum Tree and Facebook are free, and with respect to the landlord's choice of exposure to advertise the premises, sites such as Domain and RealEstate.com are choices made by the landlord.

In relation to the reletting fee,

It is submitted that both of these fees are pro rata, based on the benefit of the landlord has already had when we initially moved into the premise.

[If a renewed lease]

You will note that the decision of [Craig v Mitchell \(Residential Tenancies\) \[2015\] VCAT 597 \(27 April 2015\)](#). You will note at [24] that the landlord is clearly not entitled to lease breaking costs for tenancies that succeed the original tenancy agreement. Accordingly, as the currently fixed-term lease.



On this basis, it is very clear there is not entitlement for advertising or reletting fees in relation to a lease-break of a renewed lease.

Request of documents

We note that the rights to claim a loss under section 210 of the RTA, is a right vested with the landlord.

Accordingly, we request that the Realty provide copies of the invoices paid by landlord for when we moved into the rented premises. We further wish to request whether or not these invoices were tax deducted in the previous financial year. As this goes to the issue of whether the land has actually suffered a loss.

If you do not provide this evidence to us in a timely manner we will contest that you have not proved evidence of the landlord's loss and will dispute any entitlement to such a claim. Further, if you fail to provide this evidence and it causes an adjournment, this letter may be produced for the purposes of section 109 of the VCAT Act.

Records of Inspections and Applicants

Further with respect to finding new tenant, we request that you provide notice of the day upon which you hold open inspection and let us know the number of people that attend the rented premises.

Please note from time to time, we may request friends to make enquiry of the premises and identify interest in the rented premises.

Failure to mitigate loss

As I am leaving the premises prior to the end of the fixed term, I am not required to give you a not less than 28 days' notice of intention to vacate. We have however given you the most amount of time possible in the circumstances.

In this regard, we note any inaccuracies in the advertisement, or increases of rent, or refusal to accept any reasonable applicants will be raised before the Tribunal as a failure to mitigate loss section 211(e).

Offence to misrepresent rights under the RTA

We wish to place you on notice that it is an offence to misrepresent my rights as a tenant under the RTA. It is our position that from the time that we return our keys, we are no longer tenants of the property and rent is not due accordingly.

We acknowledge that there may be liability for ending a tenancy prior to the date in our lease agreement, and this may be an equivalent to the rate of rent. It is our opinion that this is compensation and not rent.

Accordingly, unless we consent or agree to the costs as being reasonable, we will not be paying rent beyond the date that we have vacated the property until Ordered by the Victorian Civil and Administrative Tribunal.

We are open to negotiating a reasonable amount if we are satisfied the landlord and estate agent have acted reasonably in the circumstances.



Counter Claim (where applicable) Issue during the Tenancy

We note during the tenancy, we experienced many issues throughout the tenancy.

Accordingly, we believe we have a right to compensation for a reasonable amount. This may also entail us summoning or requesting documentation to be provided to us under section 81 of the VCAT Act.

Further, we also note that during the tenancy, we felt that we were treated [well/poorly]. A residential tenancy is a consumer trader relationship for services. This includes repairs, correspondence and due diligence as required by the Estate Agent (Professional Conduct Regulations) 2008.

In this regard, you will note that the failure to render services with due skill and diligence may give rise to liability under section 60 of the Australian Consumer Law and *Jarvis v Swan Tours* [1972] 3WLR 954.

Possible Settlement

Rather than pursue this matter through the Tribunal, we would like to amicably settle this matter by way of agreement.

TAKE NOTE: This letter may be produced to any court or Tribunal for the purposes of section 211(e) of the RTA and your obligation to mitigate loss.

Please respond in writing via [method]

Yours Sincerely,

Tenant:

Date:

Enc. [any attached copies of evidence that supports the reasons for seeking to break the lease]