

COVID-19 and residential tenancies – what landlords and tenants need to know

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With the rapid outbreak of COVID-19 in Australia and the mandatory business closures implemented last week by the state and territory governments, a lot of residential tenants suddenly find themselves out of work and facing financial hardship. Many are locked into fixed term tenancy agreements and, without any income or other financial assistance, will not be able to continue paying rent to their landlords. Some may also be required to self-isolate in their properties because of COVID-19. Equally, landlords will have to face non-rent paying tenants and requests from tenants for rent-free periods, reduced rents or even the breaking of their existing tenancy agreements. Many of these landlords themselves will not be able to make their own mortgage repayments because they are not receiving rent from their tenants.

The federal government has already announced this week that there will be a moratorium on evictions for 6 months and new emergency legislation to temporarily protect tenants is expected to commence in Tasmania (the *COVID-19 Disease (Emergency Provisions) Act 2020*). It is also likely that further measures will be introduced by the state and territory governments to support struggling landlords and tenants (e.g. the postponement of mortgage repayments)). But what are their options in the meantime?

Residential tenancies are mostly governed by the relevant residential tenancies legislation in each jurisdiction. If a tenant can no longer pay the rent under the tenant's residential tenancy agreement, it cannot just give the keys back to the landlord and walk away. The tenant will be in breach of the tenancy agreement (which is a legally binding agreement). Equally, a landlord cannot just evict a non-rent paying tenant. Each party has rights and obligations under the relevant legislation. There are also legislative procedures which must be followed and consequences if they are not followed.

Here, we will look at some of the options going forward for landlords and tenants under the existing legislation.

Termination of tenancy agreements generally

Tenancy agreements may only be terminated in accordance with the relevant state or territory legislation:

- NSW: s81 *Residential Tenancies Act 2010* (NSW)
- VIC: s216 *Residential Tenancies Act 1997* (VIC)
- SA: s79 *Residential Tenancies Act 1995* (SA)
- WA: s60 *Residential Tenancies Act 1987* (WA)
- TAS: Part 4 *Residential Tenancy Act 1997* (TAS)
- ACT: s36 *Residential Tenancies Act 1997* (ACT)
- NT: Part 11 *Residential Tenancies Act 1999* (NT)

Tenants

Terminating a fixed term tenancy agreement

Other than for certain specific grounds (see below), a tenant cannot terminate a fixed term tenancy before the end of the fixed term. A tenant can only give a termination notice which takes effect on or

after the end of the fixed term. The relevant state or territory legislation sets out the requirements for fixed term termination notices (e.g. minimum notice periods, etc):

- NSW: s96 *Residential Tenancies Act 2010* (NSW)
- VIC: ss 235-236 *Residential Tenancies Act 1997* (VIC)
- QLD: s308 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s86A *Residential Tenancies Act 1995* (SA)
- WA: s70A *Residential Tenancies Act 1987* (WA)
- TAS: s39 *Residential Tenancy Act 1997* (TAS)
- ACT: Sch 1, *Residential Tenancies Act 1997* (ACT)
- NT: s95 *Residential Tenancies Act 1999* (NT)

Specific grounds for early termination of a fixed term tenancy agreement without penalty

In some jurisdictions, there are certain limited grounds under which a tenant or the appropriate tribunal or court can terminate a fixed term tenancy agreement or reduce the term before its expiry date without compensation having to be paid to the landlord:

- NSW: s100 *Residential Tenancies Act 2010* (NSW) (e.g. if the tenant has been offered (and accepted) accommodation in a social housing premises)
- QLD: s305 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)(e.g. if the property is no longer habitable)
- WA: s69 *Residential Tenancies Act 1987* (WA)(e.g. if the agreement is frustrated because the property is rendered inhabitable)
- TAS: s41 *Residential Tenancy Act 1997* (TAS)(e.g. after serious damage to the property or its contents)
- ACT: s8(1), s64AA – s64AB and Sch 1, *Residential Tenancies Act 1997* (ACT)(e.g. if the property is not fit for habitation, if the property contains loose-fill asbestos or if the lease contains a break clause)

Terminating a periodic tenancy

Periodic tenancies are tenancy agreements which do not have a fixed expiry date (a fixed term tenancy can become a periodic tenancy if it continues after the end of the fixed term on the same terms without being terminated). A tenant can terminate a periodic tenancy at any time by giving the landlord a termination notice with the required notice period. For example:

- NSW: 21 days (s18 *Residential Tenancies Act 2010* (NSW))
- SA: 21 days (s86 *Residential Tenancies Act 1995* (SA))
- WA: 21 days (s68 *Residential Tenancies Act 1987* (WA))
- ACT: 3 weeks (Sch 1, *Residential Tenancies Act 1997* (ACT))
- NT: 14 days (s95 *Residential Tenancies Act 1999* (NT))

Breaking a fixed term tenancy agreement early

A tenant who enters into a fixed term residential tenancy agreement enters into a binding agreement to occupy the property for the full term and to pay the rent on time in accordance with the agreement. Accordingly, a tenant who terminates a fixed term tenancy agreement and vacates the property before the end of that fixed term (other than for one of the above specified grounds or if the landlord is in breach) may have to pay compensation to the landlord for the loss reasonably incurred by the landlord as a result of the tenant ending the tenancy early, e.g. loss of rent, advertising costs, reletting fees, etc. The agreement or the relevant legislation may prescribe the payment of a break fee or the landlord may claim against the rental bond or seek a compensation order from the relevant tribunal or court. The amount will usually depend on when the tenant vacates relative to the term remaining. Any compensation order from a tribunal or court for compensation will also usually consider all reasonable steps taken by the landlord to mitigate loss (e.g. the steps taken to try and find a replacement tenant as soon as possible).

In NSW, for example, a tenant who breaks a residential tenancy agreement entered into from 23 March 2020 (for a fixed term of 3 years or less) must pay a set break fee to the landlord, calculated as follows:

- 4 weeks rent — if less than 25% of the fixed term has expired.
- 3 weeks rent — if 25% or more but less than 50% of the fixed term has expired.
- 2 weeks rent — if 50% or more but less than 75% of the fixed term has expired.
- 1 weeks rent — if 75% or more of the fixed term has expired.

For an agreement entered into before 23 March 2020, the following rules apply (for fixed term agreements of 3 years or less):

- If a break fee is specified in the tenancy agreement, the break fee is calculated as follows: 6 weeks rent if the tenant leaves in the first half of the fixed term or 4 weeks rent if the tenant leaves in the second half of the fixed term.
- If no break fee is specified and the tenant fails to negotiate an agreed amount with the landlord, the landlord can seek compensation (for loss of rent, advertising and reletting fees, etc.) by applying to NCAT for an order under s107 *Residential Tenancies Act 2010* (NSW).

Even if a break fee is prescribed by legislation or provided for in the tenancy agreement, a tenant can still negotiate and agree a lower amount with the landlord. Any agreement should be in writing and signed by both parties.

If a tenant needs to end a fixed term residency tenancy agreement early, the tenant should try and give the landlord as much notice as possible so that the landlord can take steps to try and find a replacement tenant as soon as possible and avoid further loss.

Seeking a rent-free period or a rent reduction under a fixed term tenancy agreement

If a tenant is struggling financially, then it is better to be proactive than to ignore the problem and hope that it goes away. As an alternative to ending a fixed term tenancy agreement and possibly having to pay compensation to the landlord, a tenant could instead consider approaching the landlord and requesting a rent-free period or a rent reduction due to the impact of the COVID-19 pandemic. A tenant could suggest that, once the crisis is over or the tenant receives some financial relief from the government, it you could return to paying the original rent. Although there is no legal obligation on a landlord to agree to a reduced rent or a rent-free period, a landlord might consider it to be a better option than having a vacant property. It is also likely to be very difficult and expensive for a landlord to try and find a replacement tenant in the current circumstances, with the social distancing advice from government and the recent prohibition on open house inspections (other than by private appointment). There is therefore nothing to prevent a landlord and a tenant from agreeing to a rent-free period or a rent reduction by mutual agreement. Any agreement should be in writing and signed by both parties.

Most of the states and territories do allow tenants to apply to landlords or to the appropriate tribunals or courts for rent reductions under certain specific circumstances (e.g. if the rent is excessively increased or the property becomes unusable as a premises) but they don't generally tend to cover circumstances relating to an inability to pay rent due to the consequences of a worldwide pandemic:

- NSW: s43 *Residential Tenancies Act 2010* (NSW)
- QLD: s94 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s55 *Residential Tenancies Act 1995* (SA)
- WA: s32 *Residential Tenancies Act 1987* (WA)
- TAS: s23 *Residential Tenancy Act 1997* (TAS)
- ACT: s71 *Residential Tenancies Act 1997* (ACT)
- NT: s46 *Residential Tenancies Act 1999* (NT)

Terminating a fixed term tenancy agreement by agreement

There is also nothing to prevent a fixed term residential tenancy agreement being terminated at any time by mutual agreement between the parties. Accordingly, a tenant could consider approaching the landlord to simply agree a termination of the agreement. If the agreement provides for a break fee upon early termination, a tenant could try and negotiate a lower amount with the landlord or, if not, try and negotiate an agreed amount to compensate the landlord for any loss rather than the landlord later applying for an order for compensation from the relevant tribunal or court (e.g. s107 *Residential Tenancies Act 2010* (NSW)). Any such agreement should be in writing and signed by both parties. It should clearly state the date the tenancy ends and what has been agreed regarding the rental bond and the payment of any compensation (if applicable).

Ending a tenancy due to hardship

A tenant may be able to consider the “hardship” option. In all jurisdictions except Tasmania (although this is about to change on the expected commencement of the *COVID-19 Disease (Emergency Provisions) Act 2020* (TAS)), a fixed term tenant may apply to the relevant tribunal or court (before the end of the fixed term) for an order to terminate or to reduce the term of a fixed tenancy on hardship grounds. Urgent hearings can usually be requested. The tribunal may make an order if it is satisfied that a tenant will suffer undue, excessive or significant hardship if the existing tenancy continues. Unfortunately, these “hardship” terms are not always defined in the legislation so it may be difficult to determine what the relevant tribunal will consider to be “hardship” if a tenant decides to make an application. Each case will be assessed on its own individual circumstances, but a tenant will usually be required to provide evidence of hardship. If a such a termination order is made, the tenant will usually be required to pay the rent up to the date of the order. In some cases, the tenant may be required to pay compensation to the landlord (up to the maximum break fee amount in the agreement or in the relevant legislation) but a landlord is usually obliged to take reasonable steps to mitigate loss.

- NSW: s104 *Residential Tenancies Act 2010* (NSW)
- VIC: s234 *Residential Tenancies Act 1997* (VIC)
- QLD: s310 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s89 *Residential Tenancies Act 1995* (SA)
- WA: s74 *Residential Tenancies Act 1987* (WA)
- ACT: s44 *Residential Tenancies Act 1997* (ACT)
- NT: s99 *Residential Tenancies Act 1999* (NT)

Can a tenant be evicted by a landlord?

If a tenant has a fixed term tenancy, a landlord cannot terminate the tenancy without grounds before the last day of the fixed term. If a tenant has a periodic tenancy, a landlord can terminate the tenancy without grounds by giving the required period of notice. If a tenant is in breach of a tenancy agreement (e.g. by not paying the rent) and the landlord wants to end the tenancy, the landlord must serve a notice on the tenant; however, if a tenant refuses to vacate, the tenant cannot be evicted without an order from the relevant tribunal or court. In any case:

- the federal government has announced this week that there will be a moratorium placed on all evictions for 6 months; and
- in Tasmania, on the expected commencement of the *COVID-19 Disease (Emergency Provisions) Act 2020*, landlords will not be able to issue notice to vacate for rent arrears for a period of 120 days which means that all evictions due to rent arrears will be suspended (including those presently before the courts).

Can a landlord conduct inspections?

New orders enacted this week by the state and territory governments (effective from 26 March 2020 for a period of at least 3 months) prohibit open inspections for the purpose of selling or leasing a property excluding a single party inspection by appointment. Normal routine inspections by landlords are

still permitted (except in Tasmania where, on the expected commencement of the *COVID-19 Disease (Emergency Provisions) Act 2020*, property inspections will be limited to urgent/emergency repairs and other limited circumstances). Single party inspections by appointment are therefore permitted for the purpose of selling or leasing a property; however, if a tenant is self-isolating, has contracted COVID-19 or is concerned about the risk of COVID-19 infection from other persons entering the property, a tenant could consider requesting the landlord to instead accept photographs or an inspection by video call. If a tenant has not contracted COVID-19 but is concerned about the risk of COVID-19 infection from other persons entering the property, the tenant could consider requesting the landlord:

- to confirm that any person intending to enter the property:
 - has not returned to Australia from an affected country nor from another jurisdiction within Australia within the preceding 14 days;
 - has not been in close contact with a person who has tested positive for COVID-19; and
 - is not experiencing any of the main COVID-19 symptoms.

If this cannot be confirmed for a person, then the person should not be permitted to enter the property until the person has completed a 14-day self-isolation period or tested negative for COVID-19;

- to provide a mask to any person entering the property;
- to ensure that any person entering does not touch any door handle, surface or tap;
- to provide hand sanitiser to be provided on site and to ensure that every person uses it; and
- to arrange a cleaning contractor to carry out a professional, deep clean afterwards.

If a tenant refuses access, a landlord could consider applying to the relevant tribunal or court for an order that authorises the landlord (or any other person) to enter the property although it probably unlikely that a tribunal or court would grant such an order in the current circumstances.

Landlords

Insurance cover

A landlord should carefully review its existing insurance policies (or seek the advice of its insurer) to find out if they provide loss of rent cover. If so, the landlord should find out if the cover extends to the consequences of pandemics such as the worldwide outbreak of COVID-19.

Agree to a rent-free period or a rent reduction under a fixed term tenancy agreement

If requested by a tenant, a landlord could consider negotiating a rent-free period or a rent reduction with the tenant. An existing tenancy can be varied at any time by agreement and the federal government is now asking landlords and tenants to work together on these issues in the current climate. Although there is no legal obligation on a landlord to agree to a reduced rent or a rent-free period, a landlord may consider it to be a better option in the current climate to allow a rent-free period or a rent reduction than having a vacant property or incurring costs in trying to secure a replacement tenant. It is also likely to be very difficult and expensive to find a replacement tenant at the moment. As noted above, new orders enacted last week by the state and territory governments (effective from 26 March 2020 for at least 3 months) have prohibited open inspections for the purpose of leasing a property excluding a single party inspection by appointment. Any agreement should be writing and signed by both parties.

Terminate a fixed term tenancy agreement for breach

If a tenant is in breach of its fixed term tenancy agreement (e.g. by not paying the rent), a landlord can terminate it and require the tenant to vacate the property before the end of the fixed term. If a landlord decides to do so, then it should ensure that it adheres strictly to the relevant procedure set out in the applicable legislation. A landlord may also be able to apply for an order from the relevant tribunal or court although this is unlikely to be granted in the current circumstances. It should also be noted that the federal government has announced this week that there will be a moratorium on evictions for 6 months and, in Tasmania, on the expected commencement of the *COVID-19 Disease (Emergency Provisions) Act 2020*, any notice to vacate issued by a landlord will have no effect until 30 June 2020

(this period may be extended). Further measures are also likely to be introduced to protect struggling tenants.

- NSW: s87 and s88 *Residential Tenancies Act 2010* (NSW)
- VIC: s246 and s249 *Residential Tenancies Act 1997* (VIC)
- QLD: s325, s328 and s329 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s80 *Residential Tenancies Act 1995* (SA)
- WA: s62 *Residential Tenancies Act 1987* (WA)
- ACT: s48 and s49 *Residential Tenancies Act 1997* (ACT)
- TAS: s42 and s43 *Residential Tenancy Act 1997* (TAS)
- NT: s96A and s96B *Residential Tenancies Act 1999* (NT)

Claim against the rental bond

If a landlord is owed money by a tenant, the landlord could consider making a claim against the rental bond.

- NSW: s163 and s166 *Residential Tenancies Act 2010* (NSW)
- VIC: s411-s419 *Residential Tenancies Act 1997* (VIC)
- QLD: s128 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s63 *Residential Tenancies Act 1995* (SA)
- WA: sch1, cl8 *Residential Tenancies Act 1987* (WA)
- ACT: s33 *Residential Tenancies Act 1997* (ACT)
- TAS: s28 *Residential Tenancy Act 1997* (TAS)
- NT: s112 *Residential Tenancies Act 1999* (NT)

Seek break fee/compensation for early termination of fixed term tenancy

If a tenant breaks a fixed term tenancy agreement early:

- a break fee may be payable by the tenant to the landlord (it may be provided for in the tenancy agreement or prescribed by legislation); or
- the landlord may apply to the relevant tribunal or court for an order requiring the tenant to pay compensation to the landlord for the loss that the landlord has suffered as a result of the tenant breaking the fixed term tenancy early (e.g. loss of rent, advertising costs, re-letting fees, etc).

Landlords usually only apply for compensation if the amount that they are seeking is more than the amount of the rental bond.

The amount will usually depend on when the tenant vacates relative to the term remaining. Any order from a tribunal or court for compensation will also usually consider all reasonable steps taken by the landlord to mitigate loss (e.g. the reasonable steps taken to try and find a replacement tenant as soon as possible).

- NSW: s107 *Residential Tenancies Act 2010* (NSW)
- VIC: s213B *Residential Tenancies Act 1997* (VIC)
- QLD: s360 *Residential Tenancies and Rooming Accommodation Act 2008* (QLD)
- SA: s94 *Residential Tenancies Act 1995* (SA)
- WA: s78 *Residential Tenancies Act 1987* (WA)
- ACT: s62 *Residential Tenancies Act 1997* (ACT)
- TAS: s47B *Residential Tenancy Act 1997* (TAS)
- NT: s122 *Residential Tenancies Act 1999* (NT)

Despite the above, a landlord can still negotiate and agree an amount with the tenant, and this is now being encouraged by the federal government in the current circumstances. Any agreement should be in writing and signed by both parties.

Mitigating loss

As noted above, a landlord should take all reasonable steps to mitigate its loss (e.g. advertising for a replacement tenant as soon as possible). If the landlord is awarded compensation for its loss by a tribunal or a court, it will not be compensated for any loss which could have been reasonably avoided. For example, see s104(3) and s107(2) *Residential Tenancies Act 2010* (NSW).

Can a landlord conduct inspections?

New orders enacted last week by the state and territory governments (effective from 26 March 2020 for at least 3 months) prohibit open inspections for the purpose of selling or leasing a property excluding a single party inspection by appointment. Normal routine inspections by landlords are still permitted (except in Tasmania where, on the expected commencement of the *COVID-19 Disease (Emergency Provisions) Act 2020*, *property inspections will be limited to urgent/emergency repairs and other limited circumstances*). Single party inspections by appointment are therefore permitted for the purpose of selling or leasing a property; however, to avoid the risk of someone being infected with COVID-19 and to contain the spread of the virus, it would be prudent for a landlord to avoid inspections of the property. If an inspection by a new prospective tenant is required and the tenant informs the landlord that the landlord is self-isolating, has contracted COVID-19 or is just concerned about the risk of COVID-19 infection from other persons entering the property, then a landlord could consider requesting the tenant to instead send photographs or allow an inspection by video call. If the tenant informs the landlord that the tenant is not self-isolating and has not contracted COVID-19 but is genuinely concerned about the risk of COVID-19 infection, then the landlord could take steps to re-assure the tenant by:

- confirming that any person intending to enter the property:
 - has not returned to Australia from an affected country nor from another jurisdiction within Australia within the preceding 14 days;
 - has not been in close contact with a person who has tested positive for COVID-19; and
 - is not experiencing any of the main COVID-19 symptoms.

If this is not the case, then the landlord should inform the prospective tenant that he/she cannot enter the property until he/she has completed a 14-day self-isolation period or tested negative for COVID-19;

- providing a mask to any person entering the property;
- ensuring that any person entering does not touch any door handle, surface or tap;
- providing hand sanitiser on site and ensure that every person uses it; and
- arranging a cleaning contractor to carry out a professional and deep clean afterwards.

A landlord should not arrange any inspection unless the tenant agrees to it (informing the tenant of all of the above information). If the tenant still refuses access, a landlord could consider applying for an order from the relevant tribunal or court, but it is unlikely that any tribunal or court would grant such an order in the current circumstances.

Takeaway

How a landlord or tenant decides to proceed in this COVID-19 pandemic will really depend on:

- the type of residential tenancy agreement in place;
- the terms of that agreement;
- a party's individual circumstances; and
- the applicable residential tenancies legislation.

The good news for tenants is that the federal government has already announced that there will be a moratorium on evictions for 6 months (if they are unable to meet their commitments as a result of

financial stress) and it is likely that further measures will be introduced by the state and territory government to support struggling landlords and tenants (e.g. the postponement of mortgage repayments). For the moment, the federal government is recommending that landlords and tenants work together to try and come to mutual arrangements to get them through this difficult period.

Accordingly, if you are a residential landlord or tenant experiencing difficulties in meeting your financial obligations due to the impact of COVID-19, then you should follow these steps:

Step 1. Carefully read your tenancy agreement and the applicable residential tenancies legislation to understand your legal rights and obligations (seek independent legal advice if required).

Step 2. Review your insurance policy to check if you have appropriate cover (e.g. loss of rent cover for landlords) and if it extends to the consequences of pandemics such as the outbreak of COVID-19.

Step 3. Try to resolve the issue with the other party and come to a mutual agreement. For example, if a tenant is experiencing difficulties in paying the rent, then the tenant should inform the landlord as soon as possible. The parties should discuss their options and try and reach an agreement between themselves about how to manage the situation, e.g. a rent-free period, a rent reduction or a mutual agreement to terminate the lease without penalty. Any agreement should be in writing and signed by both parties. You should also keep a record of all correspondence in case the matter later comes before a tribunal or court.

Step 4. If you can't come to a mutual agreement with the other party, you could contact the relevant government agencies who can provide relevant information and assist in resolving residential tenancy disputes:

- NSW: [NSW Fair Trading](#)
- VIC: [Consumer Affairs Victoria](#)
- QLD: [Residential Tenancies Authority](#)
- SA: [Consumer and Business Services \(Tenancies Branch\)](#)
- WA: [Consumer Protection](#)
- TAS: [Consumer Building and Occupational Services](#)
- ACT: [Access Canberra](#)
- NT: [Northern Territory Consumer Affairs](#)

There are also independent support services which provide information and advice to tenants:

- NSW: [Tenants' Union of NSW](#)
- VIC: [Tenants Victoria](#)
- QLD: [Tenants Queensland](#)
- SA: [Tenants Information and Advocacy Services](#)
- WA: [Tenancy WA](#)
- TAS: [Tenants' Union of Tasmania](#)
- ACT: [Tenancy Advice Service \(Legal Aid ACT\)](#):
- NT: [Tenant's Advice Service](#)

If you cannot come to a mutual agreement, then a tenancy can only be terminated in accordance with the formal requirements of the relevant residential tenancies legislation (subject to any moratoriums introduced by the state and territory governments).

Step 5. If the issue still cannot be resolved, you could consider lodging an application with the relevant tribunal or court (which will decide on applications for orders lodged by landlords or tenants):

- NSW: [NSW Civil and Administrative Tribunal \(NCAT\)](#)
- VIC: [Victorian Civil and Administrative Tribunal \(NCAT\)](#)
- QLD: [Queensland Civil and Administrative Tribunal \(NCAT\)](#)
- SA: [South Australian Civil and Administrative Tribunal \(SACAT\)](#)()

- WA: [Magistrates Court of Western Australia](#)
- TAS: [Magistrates Court of Tasmania](#)
- ACT: [ACT Civil & Administrative Tribunal \(ACAT\)](#)
- NT: [Northern Territory Civil and Administrative Tribunal](#)