

RESIDENTIAL TENANCIES AMENDMENT ACT 2019

Break Fees

BACKGROUND

Rental laws in the ACT are changing from 1 November 2019. The changes will ensure that the the *Residential Tenancies Act 1997* (the RTA) operates effectively and strikes a fair balance between the rights of tenants and landlords. The RTA is the key piece of legislation setting out the rights and obligations of landlords and tenants in the ACT.

This Fact Sheet is designed to help you understand the changes. The information in this fact sheet is not legal advice. You should seek legal advice if in doubt about your individual circumstances.

The rights and obligations of the landlord and tenant depend on the RTA and on the individual residential tenancy agreement (including whether it is for a fixed term or periodic). You should always check your agreement.

WILL EXISTING RESIDENTIAL TENANCY AGREEMENTS BE AFFECTED?

The terms of existing agreements will not change, but the way those terms operate might be affected by changes to the RTA. Residential tenancy agreements made after the new laws have commenced will include the new standard terms. If in doubt, seek legal advice about your individual circumstances.

WHAT IS A BREAK FEE?

A residential tenancy agreement may include a special clause, 'a break lease clause', that requires the tenant to pay a fee (the 'break fee') if they want to end the tenancy early.

The break fee varies depending upon the term of the tenancy agreement and how much time is left on the agreement. It is also reduced if the

landlord finds a new tenant within a set period of time after the tenancy is terminated by the original tenant. This fact sheet deals with agreements of three years or less. If your residential tenancy agreement is for a period of more than three years, consult the RTA and seek legal advice as necessary.

As a default, the break lease fee will be either six weeks or four weeks rent, depending on when the tenancy was terminated.

| | Less than half way through | Half way through or more |
|----------------------------------|----------------------------|--------------------------|
| Agreement of three years or less | Six weeks rent | Four weeks rent |

Table: Calculating the default break fee

For example, if the fixed term is twelve months beginning on 1 January and the tenant ends the agreement in the last week of June, then the tenant owes six weeks rent. If the same tenant ended the agreement in the first week of July, then the tenant owes only four weeks rent.

HOW DOES THE BREAK FEE CHANGE IF THE LANDLORD FINDS A NEW TENANT?

The break fee will be lower if the landlord enters into a residential tenancy agreement with a new tenant within a 'defined period' after the tenant ends the tenancy agreement under the break lease clause. The 'defined period' is six weeks if the agreement is less than half way through, or four weeks if the agreement is half way through or more.

If the landlord gets a new tenant within this defined period, the break fee will be limited to the combined total of:

1. the usual amount of the break fee, minus the amount of rent payable by

the new tenant for the defined period;
and

2. the landlord's reasonable costs of advertising and reletting the property up to the 'defined cost limit'.

The defined cost limit will depend on whether or not the tenancy is more than half way through the term before it was ended.

| | Less than half way through | Half way through or more |
|---|----------------------------|-----------------------------|
| All fixed term leases, regardless of length | One week rent | Two-thirds of one week rent |

Table: Calculating the defined cost limit

It is important to note that this is just the cap. If the actual cost to the landlord is less than the cap, the full capped amount cannot be charged.

COULD YOU PLEASE PROVIDE SOME EXAMPLES?

Laura and Trevor

Laura is the landlord and Trevor is the tenant. Trevor wants the security of a fixed term tenancy but he works as a consultant contractor and is worried that he might need to move away to find work at the end of his current contract. He explains this to Laura and they agree to a 12 month fixed term tenancy and they agree to include the break lease clause. The tenancy begins on 1 January. The rent is \$580 per week, payable fortnightly.

In May, Trevor accepts a permanent job in Norway, requiring him to move. He gives notice to Laura that he intends to leave the property on 20 June.

Laura places an advertisement on a commercial website and it costs her \$399. Laura finds a new tenant, Nova, to commence a tenancy 16 days following 20 June (6 July). Laura does not increase the rent, so Nova will pay the same rent as Trevor did.

Did Laura enter into the tenancy agreement with Nova during the 'defined period'?

Yes. Trevor's fixed term was for less than three years, and he ended the tenancy less than half way through the agreement. This means that the 'defined period' was six weeks, beginning on 21 June and ending on 1 August. Nova's agreement commenced 16 days after the end of Trevor's tenancy, which is within the defined period.

What fee is payable by Trevor?

Trevor will pay six weeks rent minus the rent paid by Nova within the defined period. He will also pay the reasonable cost of advertising and reletting the property, up to the defined cost limit.

What is the defined cost limit for reasonable costs of advertising and reletting?

The defined cost limit is one week's rent. It does not matter how long Trevor's fixed term was. He ended the tenancy less than halfway through the agreement, so the defined cost limit is equal to one week of rent: \$580. But Laura only spent \$399, so Trevor will pay \$399 and not the full limited amount of \$580.

How much is Trevor's break fee?

\$1,642.

$\$3,480$ (six weeks rent) - $\$2,237$ (rent incoming tenant, Nova, paid during the defined period) = $\$1,243$ + $\$399$ (reasonable costs of advertising and reletting) = $\$1,642$ as the break fee.

Method: As Trevor ended his tenancy less than half way through the agreement, the starting point for working out the break fee is six weeks rent (that is, \$3,480).

Trevor will pay this amount minus any rent paid by Nova during the six week defined period (between when Trevor left the property on 21 June and 1 August).

As Nova commenced her tenancy on 6 July, Nova has relevantly paid three full weeks plus six days in rent during the defined period to 1 August: $\$2,237$ (3 x \$580 (Nova's weekly rent) +

6/7 of \$580). Subtracting this from \$3,480 equals \$1,243 payable by Trevor.

Trevor also owes Laura the reasonable costs of advertising and reletting the property up to the defined cost limit. Laura spent \$399. This is less than the defined cost limit of one week's rent, so Trevor owes Laura an additional \$399.

The sum of \$1,243 and \$399 is \$1,642. Therefore, Trevor owes Laura \$1,642 as the break fee.

Can Laura charge Trevor one week's rent for advertisement and reletting costs even though the actual cost was less than this?

No. She can only charge reasonable costs that she actually incurred up to the capped amount.

Lavinia and Troy

Lavinia is the landlord and Troy is the tenant. Troy and Lavinia agree to a 12 month fixed term tenancy and they agree to include the break lease clause. The tenancy begins on 1 January. The rent is \$580 per week, payable fortnightly.

In September, Troy decides to give Lavinia notice that he will end the tenancy on 14 September.

It takes Lavinia a few weeks to get the advertisement online. It also costs her \$399. She enters into a new tenancy agreement with Norman, with a commencement date of 13 October. Lavinia does not increase the rent for Norman.

Did Lavinia enter into the tenancy agreement with Norman during the 'defined period'?

No. Troy's agreement was for less than three years and he ended the agreement more than halfway through the term. This means that the 'defined period' is four weeks, beginning on 15 September and ending on 12 October. Norman's agreement commenced on 13 October, after the defined period.

What fee is payable by Troy?

Troy will pay four weeks rent as the break fee: \$2,320.

Can Lavinia charge Troy for the reasonable costs of advertisement and reletting?

No. Because Norman did not commence his tenancy within the defined period, Lavinia cannot charge Troy for the cost of advertisement or reletting the property.

Liz and Toby

Liz is the landlord and Toby is the tenant. Toby and Liz agree to a 12 month fixed term tenancy and they agree to include the break lease clause. The tenancy begins on 1 January. The rent is \$580 per week, payable fortnightly.

In May, Toby gives Liz notice that he will end the tenancy on 20 June.

Liz advertises the property online the day she receives the notice from Toby. She enters into a new tenancy agreement with Nicole to commence on 23 June. She also increases the rent to \$600 per week.

Did Liz enter into the tenancy agreement with Nicole during the 'defined period'?

Yes. Toby's fixed term was for less than three years, and he ended the tenancy less than half way through the agreement. This means that the 'defined period' was six weeks, beginning on 21 June and ending on 1 August. Nicole's agreement commenced 3 days after the end of Trevor's tenancy, which is within the defined period.

What fee is payable by Toby?

Toby will pay six weeks rent minus the rent paid by Nicole within the defined period. He will also pay the reasonable cost of advertising and reletting the property, up to the defined cost limit.

What is the defined cost limit for reasonable costs of advertising and reletting?

The defined cost limit is one week's rent. It does not matter how long Toby's fixed term was. He ended the tenancy less than halfway through the agreement, so the defined cost limit is equal to one week of rent: \$580. But Liz only spent

\$399, so Toby will pay \$399 and not the full limited amount of \$580.

How much is Toby's break fee?

\$536.

\$3,480 (six weeks rent) - \$3,343 (rent incoming tenant, Nicole, paid during the defined period) = \$137 + \$399 (reasonable costs of advertising and re-letting) = \$536 as the break fee.

Method: Six weeks rent is equal to \$3,480. The defined period ends on 1 August and Nicole commenced her tenancy on 24 June. The rent that Nicole paid during the defined period is subtracted from \$3,480. This is five full weeks plus four days rent: \$3,343 (5 x \$600 (Nicole's weekly rent) + 4/7 of \$600). \$3,480 minus \$3,343 is equal to \$137 payable by Toby.

Toby also owes Liz the reasonable costs of advertising and reletting the property up to the defined cost limit. Laura spent \$399. This is less than the defined cost limit, so Toby owes Liz an additional \$399.

The sum of \$137 and \$399 is \$536. Therefore, Toby owes Liz \$536 as the break fee.

Can Liz charge Toby the pro-rata amount of his rate for the 'gap'?

No. Toby only pays the ordinary break lease minus the rent paid by the new tenant. On top of the \$399 for advertising and reletting, Toby's break fee is equal to the value of his rent for six weeks minus Nicole's rent during the defined period; he does not owe the value of his rent pro-rata for the period where the property is empty.

That is why he owes the sum of \$137 and \$399 and not the sum of \$250 (three-sevenths of \$580) and \$399.

Can Liz charge Nicole more rent than she charged Toby?

Yes. The agreement with Nicole is an entirely new agreement with a new tenant. The rules about increasing the rent within an agreement or with existing tenants do not apply.

CAN A LANDLORD CHARGE THE TENANT THE CAPPED AMOUNT REGARDLESS OF THE ACTUAL COST?

No. A landlord can only charge the reasonable costs of advertising the property and the cost of entering into a new lease with another person. If this is less than the capped amount, it cannot be charged.

CAN A LANDLORD CHARGE THE TENANT AN ADVERTISEMENT AND RELETTING FEE AS WELL AS THE BREAK FEE?

No. If a landlord enters into a residential tenancy agreement with a new tenant during the defined period, the break fee is limited to the sum of two amounts: the amount the break fee would have been if a new tenant hadn't been found minus the rent paid by the new tenant, and an amount equal to the landlord's reasonable costs for advertising and reletting up to the capped amount.

If the tenant ends the tenancy and the landlord does not find a tenant within the 'defined period', the tenant is not required to pay an additional amount for advertisement and reletting.

MORE INFORMATION?

You can access the RTA on the ACT Legislation Register at www.legislation.act.gov.au.

You can access information about the ACT Civil and Administrative Tribunal and contact details for the Tribunal at www.acat.act.gov.au. Please note that the Tribunal can assist with questions about its procedures but it cannot give legal advice on individual situations.

Tenants can access the Tenants' Advice Service on (02) 6247 2011 between 10:00am and 1:30pm to leave a voice message on their advice line. The Tenant's Union ACT website also includes a range of information and factsheets about rental issues: <http://www.tenantsact.org.au/services/tenants-advice-service/>.

The Legal Advice Bureau at the Law Society is a free service and can provide advice to both tenants and landlords. It can be contacted on (02) 6274 0300.