

Tips: Renting after a disaster

Short Answers to Common Tenancy Questions

Living through a disaster such as a flood or fire is difficult enough without having to worry about your tenancy. So the Tenants' Union of NSW has prepared these short(ish) answers to common questions to assist renters to decide what to do after a disaster event.

The time after a disaster is stressful. Probably the last thing you want to do is write an email to your landlord or go to the NSW Civil and Administrative Tribunal (NCAT). But it's a good idea to try to get a consent agreement from your landlord to resolve any issues as soon as possible. Communicate as much as you can in writing, email or follow up phone calls with an email in order to avoid disputes later on.

In the days after a disaster event, there might be some issues with accessing your local Tenants' Advice and Advocacy Service (for contact details, see the end of this information sheet, or tenants.org.au/get-advice). While this information sheet is no substitute for specific legal advice about your situation it is our hope that the following goes some way to help you understand what you can ask for and expect.

See also:

- Factsheet 22: *Disaster Damage*
tenants.org.au/factsheet-22-disaster-damage
- Land lease community factsheet: *Natural Disasters*
tenants.org.au/thenoticeboard/factsheet/natural-disasters
- Podcasts: *Tenants' rights and obligations after a disaster & Residential Land Lease Communities following a disaster*
tenants.org.au/resource/renting-matters
- Tips: *Negotiating with the landlord*
tenants.org.au/resource/negotiation-tips

1. Can I return home after a disaster?

A disaster itself does not end your tenancy agreement. **If it is safe and you are not prevented by Council orders or Emergency Services, it is your home and your tenancy has not legally ended, so you can return.** Residential tenancies only end by the process set out in the *Residential Tenancies Act 2010*. The landlord needs Tribunal or Court orders, or your consent, to end your tenancy, and there is a process that needs to be applied. The landlord cannot prevent you from returning home in these circumstances.

- See Factsheet 10: *Landlord Ends Agreement*
tenants.org.au/factsheet-10-landlord-ends-agreement

2. Can the landlord go into my home after a disaster?

Your residential tenancy agreement is still current. **If the landlord or real estate agent wants to go into your home they need to follow the correct legal process.**

The landlord can access the property without notice (or your consent) in an emergency or to carry out urgent repairs. The landlord cannot put your belongings on the street. There is no doubt that disasters can generally be considered an emergency but it is important to consider whether or not the emergency is still current after the disaster has occurred. The landlord does not decide this; you can disagree with them and ask them not to enter.

- See Factsheet 8: *Privacy and Access*
tenants.org.au/factsheet-08-access-and-privacy

3. Who is responsible for the clean up?

You have a responsibility to maintain the reasonable cleanliness of the property. The key word here is 'reasonable.' **You are only responsible for reasonable cleanliness and damage done to the property deliberately or negligently.** The cleanup required is neither your or the landlord's fault.

Arguably the cleanup after a disaster is beyond the 'reasonable' standard of cleanliness required of you and will more likely to fit into the category of repair – and therefore it is the landlord's responsibility. For practical reasons you might do some cleaning to access your belongings and the property, but in most cases the cleanup will fit within the landlords' statutory responsibility to maintain the property in a reasonable state of repair.

- See Factsheet 6: *Repairs and maintenance*
tenants.org.au/factsheet-06-repairs-and-maintenance

4. If I receive a notice of termination because the property is 'uninhabitable' do I have to leave?

The short answer is 'no.' Like most legal jargon, termination on the grounds that the property 'has become wholly or partially uninhabitable' has a very specific meaning and purpose under tenancy law. This type of termination is sometimes called a 'notice of termination for frustration.' There is no need to complicate things by trying to understand this terminology but the most important characteristic of this type of termination is that the property or part of it is 'uninhabitable' and this uninhabitability is not as a result of breach by you or the landlord.

These types of termination notices are very common after a disaster event but **issuing a notice of termination does not end a tenancy. The landlord does not decide what 'uninhabitability' means and how it applies to your tenancy; only the Tribunal can do that.** The landlord has to apply proper process to recover possession of the property – this means that the landlord cannot end your tenancy without a Court or Tribunal order or your consent. It is possible that the damage to the property is not a result of the disaster or the damage does not mean the property is uninhabitable. **You are not doing anything illegal by staying in the property after the date in the termination notice.**

If you agree to the termination notice you can move out and hand the keys back. If you don't agree that the property is uninhabitable or that the cause is nobody's fault you can write to the landlord outlining why you believe the notice is invalid. If the landlord still applies to the Tribunal to terminate the tenancy on these grounds you will need to provide evidence that the property is habitable or that the cause of the uninhabitability is the fault of the landlord (i.e. failure to repair) and the landlord's application should be dismissed.

- See Factsheet 10: *Landlord Ends Agreement*
tenants.org.au/factsheet-10-landlord-ends-agreement

5. Can I leave if the property is uninhabitable?

The process is a bit different if you want to end the tenancy because the property 'has become wholly or partially uninhabitable' because of a disaster event. **You have to issue a notice of termination and include the reason that the property is 'destroyed or has become wholly or partly unlivable.'** (See Tenants' Union Factsheet 9: *You want to leave* for other characteristics that notices of termination need to have to be valid.) There is no notice period for this type of notice – it can be immediate. Arrange to hand back the keys and claim your bond with NSW Fair Trading.

It is possible that the landlord will not agree that the property is uninhabitable. If this is the case and the landlord

wants you to pay out the notice period or a break lease fee it will most likely become part of a bond claim before the Tribunal. You will need to provide evidence that the property was uninhabitable and the Tribunal will make a decision about the validity of the notice based on evidence.

- See Factsheet 9: *You want to leave*
tenants.org.au/factsheet-09-you-want-to-leave

6. Surely these repairs are urgent?

There is very likely to be extensive and serious repairs needed to be done at the property after a disaster and it is understandable that you would consider these repairs as urgent. However, like most legal jargon, there are specific phrases in residential tenancies law that don't mean exactly what we might think they mean. Defining 'urgent repairs' under residential tenancy law has a very specific meaning and purpose.

The 'urgent repairs' process set out in the legislation is like a self help remedy for tenants. The list of urgent repairs included in the legislation is so that tenants can pay to get these types of repairs done and then be reimbursed by the landlord. This option is limited in a number of ways, the type of repair has to be included in the list, the reimbursement is capped at \$1,000 and there is a very specific process that has to be followed for a tenant to be reimbursed by the landlord. **This remedy is unlikely to be useful for disaster impacted properties where the repairs would most likely be much more costly.**

You can still ask a landlord to do repairs urgently or make an application to the Tribunal and ask for it to be heard urgently (see questions 7 and 8 below). The landlord has a responsibility to maintain the property in a reasonable state of repair and you can ask the landlord to do repairs. However, it is important to distinguish between using the 'urgent repairs' process set out in the legislation and the normal process of getting repairs done and asking the Tribunal to make orders quicker than usual.

- See Factsheet 6: *Repairs and maintenance*
tenants.org.au/factsheet-06-repairs-and-maintenance

7. Can I stay and get repairs done?

There are likely to be many repairs needed after a disaster event. The landlord is responsible for maintaining the property in a reasonable state of repair and you have a responsibility to report the repairs needed. Reporting repairs is a really important step in the process of getting repairs done. **We suggest writing an email about the repair/s – give a short timeframe for them to respond (e.g. one week) and outline that you will be making a Tribunal claim if no agreement is reached.** Whenever possible try to get a commitment from the landlord to do the repairs in writing (email is fine). Try to communicate as much as you

can in writing or follow up phone calls in writing in order to avoid disputes at the Tribunal later on.

Once you have reported the repairs the landlord must act with reasonable diligence to have the repairs carried out within a reasonable timeframe. What 'reasonable' means is going to vary depending on the circumstances. In determining reasonableness the Tribunal would weigh up evidence of the seriousness or urgency of the repair against evidence that contractors are in high demand after a disaster event.

If the landlord is not responding to your requests for repairs or doing them in a timely manner the next step is to make a Tribunal application for orders that the landlord undertake the repairs. The time limit to make that sort of application is 3 months from when you asked the landlord to do the repairs.

- **See Factsheet 6: *Repairs and maintenance***
tenants.org.au/factsheet-06-repairs-and-maintenance

8. What if my repairs need to be done as soon as possible?

If repairs need to be done as soon as possible and the landlord is not doing them, it is possible to ask the Tribunal to make a decision about the repairs urgently. The Tribunal defines urgent issues as 'immediate risk of harm to person or property' (among others). The Tribunal website provides details on how to make a paper application for an urgent hearing and there is no box to tick in the online application form for an urgent hearing. Having said this, you can make a Tribunal application online and when you have a matter number, write an email to the Tribunal asking for the matter to be heard urgently. When you apply online you will receive a hearing date and time immediately, then you need to write an email to the Tribunal asking for a closer date. Put the matter number and 'request for urgent hearing' in the subject line and provide brief reasons in the body of the email and attach supporting documents. It is a good idea to call the Tribunal registry and confirm that they have received your request.

- **See Factsheet 11: *NSW Civil and Administrative Tribunal***
tenants.org.au/factsheet-11-nsw-civil-and-administrative-tribunal

9. Is mould that occurs after a flood a repair?

You are only responsible for mould if you deliberately or negligently contributed to it. Mould that occurs after a flood usually falls outside of your general responsibility to maintain the reasonable cleanliness of the property. **Because the mould issue following a flood is not a result of you breaching your obligations under the agreement, you can approach it like a repair.** Most likely mould is going

to be as a result of an underlying repair issue like a leak and water ingress into the structure of the property. See questions above regarding repairs.

- **See Factsheet 24: *Mould***
tenants.org.au/factsheet-24-mould

10. Do I have to pay rent if I can't live at the property or if there are parts of the property I can't use?

It is important to understand that you have to pay rent unless there is an agreement between you and the landlord that the rent payment has changed or there are orders from the Tribunal in place.

However there are two ways rent can be decreased if you can't live in the property or use parts of it: rent abatement or rent reduction. The main difference between them is whether or not the landlord can be seen as responsible for the uninhabitability of the property. A **rent abatement** claim is when the property becomes fully or partially uninhabitable **but it is not anybody's fault**. However a **rent reduction** claim requires the landlord to have done something or failed to do something and as a result services and facilities of the property have been withdrawn.

Rent abatement: At first glance rent abatement seems like a better fit for why you shouldn't have to pay rent for a property that you can't live in after a disaster event. Neither you nor the landlord are responsible for the disaster and its impact on the property. In reality the period of time after a disaster and how much rent you should have to pay is more likely to be a combination of both rent abatement and rent reduction because at some point after a disaster the landlords' statutory responsibility to maintain the property in a reasonable state of repair kicks in and rent reduction applies.

Rent reduction: When you sign a contract at the beginning of a tenancy you agree to pay a certain amount of rent for all of the services and facilities of the property. So when all or part of the facility or service of the property has been withdrawn by an action or inaction of the landlord you could argue you are paying too much rent because you are not getting what you agreed to pay for.

It is a good idea to **put your request for rent reduction or abatement in writing as soon as you can. Be clear about the percentage of rent that you think should be reduced and for how long** (this can be back-dated). It is a good idea to include a short timeframe for the landlord to respond (for example one week) because if you can't reach an agreement then the next step would be to make a Tribunal application for orders that the rent be abated or reduced.

The time limit to make an application to the Tribunal for orders in relation to rent abatement is 28 days from the problem arising. You must lodge an application for rent reduction during the tenancy.

The Tribunal does not have a prescribed formula for how much rent should be abated or reduced but it is a good idea to try to quantify the amount and give the Tribunal a calculation and include the calculation in the initial request as well.

- **See Tips: Negotiating with the landlord**
tenants.org.au/resource/negotiation-tips
- **See Factsheet 11: NSW Civil and Administrative Tribunal**
tenants.org.au/factsheet-11-nsw-civil-and-administrative-tribunal

11. What about my bond?

As far as a bond goes, generally you have a responsibility to return the property in the condition it was at the beginning of the tenancy minus fair wear and tear. But the condition of a property after a disaster event is not your everyday bond situation.

If a landlord argues that you are responsible for the condition of the property after a disaster event, you can point out that the disaster event is outside of your control and you did not cause or contribute to the damage. You are only responsible for damage if you deliberately or negligently contributed to it.

The bond should have been lodged with NSW Fair Trading at the beginning of the tenancy. If there is a dispute about how the bond is paid out once the tenancy agreement ends, the landlord or real estate agent does not decide how the bond is paid out. If you can't agree then it is a good idea for you to make a claim for the return of your bond by yourself with NSW Fair Trading. Then if the landlord disagrees they will have to make a Tribunal application and prove their claim against your bond with evidence. Only the Tribunal can decide how the bond is paid out.

- **See Factsheet 3: Bond**
tenants.org.au/factsheet-03-bond

More information

- **Factsheet 22: Disaster Damage**
tenants.org.au/factsheet-22-disaster-damage
- **Land lease community factsheet: Natural Disasters**
tenants.org.au/thenoticeboard/factsheet/natural-disasters
- **Podcasts: Tenants' rights and obligations after a disaster & Residential Land Lease Communities following a disaster**
tenants.org.au/resource/renting-matters
- **Tips: Negotiating with the landlord**
tenants.org.au/resource/negotiation-tips

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For free tenancy advice, call your local Tenants Advice and Advocacy Service:

SYDNEY:

• Eastern	9386 9147
• Inner	9698 5975
• Inner West	9559 2899
• Northern	9559 2899
• Southern	9787 4679
• South West	4628 1678
• Western	8833 0933

REGIONAL:

• Blue Mountains	4704 0201
• Central Coast	4353 5515
• Hunter	4969 7666
• Illawarra Sth Coast	4274 3475
• Mid Coast	6583 9866
• Northern Rivers	6621 1022
• Northwest NSW	1800 836 268
• Southwest NSW	1300 483 786

ABORIGINAL:

• Sydney	9833 3314
• West NSW	6881 5700
• South NSW	1800 672 185
• North NSW	1800 248 913

WEBSITE: tenants.org.au

NSW FAIR TRADING: 13 32 20

This factsheet is intended as a guide to the law and should not be used as a substitute for legal advice. It applies to people who live in, or are affected by, the law as it applies in New South Wales, Australia. ©Tenants' Union of NSW