

Break fees: a broken system

Grant Arbuthnot
Principal Legal Officer

A tenant who ends their tenancy agreement during the fixed term can be liable to pay the landlord a break fee as compensation. The legally prescribed break fees can exceed the actual losses that landlords may bear.

Break fees are limited to amounts calculated on when the tenant ended the tenancy agreement. If the tenant ends the agreement in the first half of the fixed term, the fee is limited to six times the weekly rent. For the second half of the fixed term, the amount is limited to four times the weekly rent.

During consultation before the making of the *Residential Tenancies Act 2010*, the TU argued that fees of six and four weeks rent were too high.

Earlier this year, we noticed that section 107(2) of the



Emergency exit © ntr23 (flickr.com/ntr23)

Act said that break fees were subject to mitigation. That is, where a tenant ended the agreement prematurely, the landlord had to avoid unnecessary loss and was not entitled to payment for loss that they could have avoided.

This turns out to have been poor drafting. Parliament always intended that a tenant would pay the whole amount – four or six weeks rent – upon ending a tenancy early. So, in June this year, Parliament amended section 107 to

ensure that mitigation is not necessary for break fees. This is a backward step.

Break fees do not apply in all tenancies. The break-fee term of the standard tenancy agreement can be deleted or struck through to have an agreement without a break fee.

Where there is no break-fee term, a tenant ending a fixed term agreement early will be liable to pay the landlord compensation for the landlord's losses subject to mitigation. Losses suffered by landlords are usually:

- the loss of rent until a new tenant moves in
- a re-letting fee to an agent
- advertising costs.

In the NSW rental market, landlords usually offer tenancy

Case study

Edith rented premises in postcode 2010 for 12 months at \$600 per week. Due to family reasons, Edith ended the tenancy after four months. She paid a break fee of \$3,600.

The premises were re-let in 10 days. Edith knows this because the agent said so. On the assumption that:

- the agent's re-letting fee was equal to two weeks rent or less
- advertising costs were no more than \$500 per week

the windfall to the landlord was at least \$1042.

agreements on a take-it-or-leave-it basis, as they have a choice of tenants. Landlords and tenants negotiating terms as equal contract parties is very rare. This means that it is the landlord's choice whether to include the break-fee term in the agreement.

We consider the present break-fee system to be unfair. Where vacancy rates are low, such as in Sydney, this unfairness is compounded by rents being higher and premises being re-let sooner. So a tenant ending the agreement early will pay more money to the landlord for less actual loss.

Where vacancy rates are higher, landlords can choose

to not include a break-fee term in the agreement so that if it takes a long time for a new tenant to be found, the former tenant will have to pay an amount more than the specified break fee.

Tenants do not break fixed-term agreements lightly. Often it is for reasons of family obligation, employment or hardship.

A fairer system would be compulsory and have either:

- lower break fees than the current system, or
- capped break fees (expressed as a dollar amount).

Share your story

We would like to hear your stories to present as evidence that the current system is unfair.

If you have paid a break fee, please tell us about it. We may contact you to verify details. We will not publish any information of yours without permission.

With good evidence, we can convince government to reconsider the system.

Contact Grant Arbuthnot, Principal Legal Officer:

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Census 2011: what the statistics show

In New South Wales, 1.88 million people live in 743,000 rented dwellings. That's just over 30 percent of dwellings! The last time the percentage was this high was in 1954. For the first half of the twentieth century, renters made up nearly half the NSW population.

Since 2006, the population of New South Wales has increased by 5.6 percent. The increase in the number of renters was 12.8 percent!



Canargo Shire: only seven percent rentals
Conargo pub © bparo2003 ([flickr.com/bparo2003](https://www.flickr.com/photos/bparo2003/))

The median age of people living in rented accommodation is 30.

Forty-six percent of dwellings in the City of Sydney local government area are rented while Conargo Shire in the Riverina has only seven percent rentals.

More than 40 percent of social housing tenants are without an internet connection at home whereas just 13 percent of other renters are without one.

Most rented premises are separate houses – only 29 percent are in apartment blocks.

Just three percent of homeowners have no vehicles in their household in contrast to more than 15 percent of renters. At the other end of the scale, 25 percent of owner-occupied households own more than three cars whereas less than 10 percent of renters do.

Leo Patterson Ross

(Source: Australian Bureau of Statistics, *Census of Population and Housing, 2006 and 2011*)

Comment on draft boarding houses Bill

Chris Martin, Senior Policy Officer

The NSW Government released for comment a draft Boarding Houses Bill 2012 in June. This followed a commitment to reform the boarding house sector in New South Wales. The TU welcomes the draft Bill.

The draft Bill contains the following provisions:

- revised provisions of the *Youth and Community Services Act 1973*, which relates to licensed boarding houses, plus amendments to those provisions
- the introduction of a centralised register for all NSW boarding houses
- principles-based occupancy rights to govern the relationship between residents and boarding house proprietors
- enhanced accommodation standards for smaller boarding houses
- enhanced powers of entry and associated inspection regimes
- increased penalties for non-compliance.

After consulting residents, advocates and other community organisations, the TU made a submission on the draft Bill. Our submission was



Student halls of residence are excluded from the draft Bill
© University of Saskatchewan (flickr.com/usak)

directed to making the Bill a strong, fair and effective reform for boarding house residents and other marginal renters.

The TU strongly supports occupancy agreements, which reflect certain occupancy principles, for boarding house residents and other marginal renters. We generally support the draft Bill's provision for occupancy agreements, subject to the following concerns.

Coverage

The draft Bill's occupancy agreements provisions would apply only to unlicensed boarding houses for five or more residents ('Tier 1' boarding houses) and licensed residential centres ('Tier 2' boarding houses for 'vulnerable persons').

This would leave many marginal renters excluded, such as lodgers in private

homes, students in halls of residence, persons in refuge or crisis accommodation, persons in share houses without a written tenancy agreement.

These marginal renters should be covered by the occupancy agreements provisions (if not the other provisions of the draft Bill).

Compensation

The draft Bill provides that the Consumer, Trader and Tenancy Tribunal may resolve disputes about occupancy principles, and would give the tribunal power to make orders to remedy a breach.

However, the draft Bill would not allow the tribunal to order the payment of compensation for a breach of the occupancy principles. This is contrary to fundamental principles of contract law, and removes

much-needed 'teeth' from the occupancy principles. The tribunal should be able to order compensation where a party suffers loss because of a breach.

Bonds

The draft Bill makes no provision about resident's bonds. From our experience,

many boarding house residents experience problems with bonds – in particular, getting them back at the end of their occupancy.

The draft Bill should provide that any bond paid to a boarding house operator must be lodged with Renting Services, like any other rental bond.

Further information

Download our full submission from www.tenantsunion.org.au/boarding-houses-bill-submission or phone 02 8117 3700 for a copy.

See our blog for further comment on the draft Bill: tunswblog.blogspot.com.au

Tenancy services: good value at 3 cents a day

The ABC used to remind us of the good value it represented by saying that it cost each Australian just eight cents a day. Here's more good value: Tenants Advice and Advocacy Services cost each renter household just three cents a day.

That's for New South Wales, and for Queensland too, where the state government announced that the services were to be discontinued. (The Australian Government has since undertaken to fund the services until June 2013.)

Not every renter household uses a Tenants Advice and Advocacy Service every year, though a lot do – about 35,000 in New South Wales. But you never know when a tenancy problem will arise, and when you'll need some independent information and advice – and three cents a day for access to a Tenants Advice and Advocacy Service is good insurance.

The good value gets even better. The bill (tiny as it is) is not paid by the taxpayer. Tenants Advice and Advocacy Services, both in New South Wales and Queensland, are funded by tenants' money.

In New South Wales, half the funds come from interest earned on tenants' bonds lodged with Renting Services. The other half comes from interest earned on monies in real estate agents' statutory accounts (and, really, that's money that's been put in by tenants too). Mind you, just a tiny fraction of the interest



Value for money © fairbrand (flickr.com/fairbrand)

gets spent this way; more goes to funding the Consumer, Trader and Tenancy Tribunal.

The NSW Government has twice reviewed the Tenants Advice and Advocacy Services and twice found them to be good-value services for tenants. However, that funding has not kept up with the growth of the rental housing sector and the demand for service.

The reviewers recommended increased funding for the services – particularly to improve tenants' access to duty advocates at the tribunal, and to ease the stretch on the four Aboriginal services that between them cover the whole state – to a bit under five cents a day per renter household.

Five cents a day for even better Tenants Advice and Advocacy Services. Better value, and still tenants' money.

Chris Martin

Negotiating 'open house' inspections



The place I rent is up for sale. The agent says that the new tenancy law allows 'open house' inspections and I don't have a say in it.

Is this right? What can I do about it?



We don't think it is right, and there are things you can do about it.

The *Residential Tenancies Act 2010* does not directly deal with 'open house' inspections. Nor did the old Act (of 1987). The rules for access are terms of your tenancy agreement that are required by the Act.

There are some legal limits on the landlord/agent having access to the premises you rent. With your genuine consent, entry will be fine. Otherwise, notice, purpose and time are relevant. Generally, entry should not be before 8am or after 8pm and not on Sunday or a public holiday.

Some purposes do not need notice or your consent for access (e.g. for urgent repairs or according to an order of the Consumer, Trader and Tenancy Tribunal).

For some other purposes notice is required but not your consent. This is the category for showing the premises to prospective buyers. If you and the landlord/agent cannot agree about this access, then they may have access up to twice a week if they give

you 48 hours notice of each occasion. This notice does not have to be in writing.

The Act and your agreement say that this sort of access is "to show the premises to prospective purchasers". This is how 'open house' inspections are controversial.

At 'open house' inspections, people other than prospective purchasers may also enter the premises. They can be passers-by, other real estate agents, neighbours – any old stickybeak – or, a burglar casing the joint.

The TU's view is that 'open house' inspection without your consent breaches your

agreement, and the Act. This is because the entry of the stickybeaks and the like goes beyond the purpose for which access is allowed. (The same argument applies to on-site auctions.)

What to do about it

First, you can state your objection to 'open house' inspection and negotiate about access. The Act encourages landlord/agents and tenants to negotiate. Consider whether you will allow 'open house' inspections or access more than twice a week in return for acceptable conditions.

For example, you might allow 'open house' inspection on



DSC05698.JPG © Mizra Nurkic (flickr.com/tiefighter)

one of the two occasions per week if:

- it is at a time when you are at home
- the agent identifies all those who enter
- the agent records all their names
- the landlord waives a day's rent per week.

If the agent springs an 'open house' on you, photographing all those who enter will at least give you a photo file to hand to police if things go missing during the inspection or you are burgled shortly thereafter.

Landlords, agents or tenants can apply to the Consumer, Trader and Tenancy Tribunal for orders about access. The tribunal may order:

- what access will take place, when and for how long
- compensation to you for damage to, or loss of, your goods in an inspection
- compensation to the landlord for loss caused by a breach by you.

Disputes about access can become quite heated. So, deal with the landlord or agent in writing. If in doubt, get advice from your local Tenants Advice and Advocacy Service (see the back page).

Grant Arbuthnot

Tenants' Rights Manual fourth edition now available

Minister for Fair Trading, the Hon. Anthony Roberts MP, launched the fourth edition of the *Tenants' Rights Manual* at the State Library of NSW on 15 October 2012.

The *Tenants' Rights Manual* answers questions such as: What can you do if your rent is going up? Who is responsible for repairs? When can you be evicted?

Practical and easy to use, it explains tenants' legal rights and obligations and how to resolve problems before they become major disputes. It includes 44 sample letters for corresponding with landlords and real estate agents.

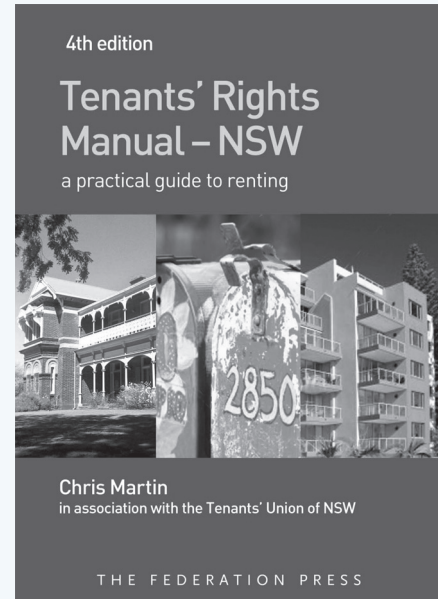
This edition has been updated for the *Residential Tenancies Act 2010* including new provisions about rent arrears, sales of premises, share housing and tenant databases.

It has an expanded chapter on social housing – including eligibility, rent rebates and public housing policies – and a new chapter on marginal renting – with information for boarders and lodgers on the new *Australian Consumer Law*.

The *Tenants' Rights Manual* is available:

- for purchase in print from Federation Press
02 9552 2200, www.federationpress.com.au
- on the 'Legal Books Online' website (from late November)
www.legalanswers.sl.nsw.gov.au/guides/.

Funding for the manual was gratefully received from NSW Fair Trading and Law and Justice Foundation of NSW.



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Policy and law reform update

Our strategic plan for 2010–2013 sets out the following priority areas for policy and law reform:

- **Aboriginal housing**
- **marginal renters**
- **community housing**
- **low-income private renters**
- **Housing NSW policy and practice**
- **safety and sustainability of rental property**
- **tax and housing**

This is a summary of the work we undertook in the first four of these from July 2011 to June 2012. We will report on our work in the other areas in a future issue.

Aboriginal housing

- We made submissions to the Minister for Aboriginal Affairs, NSW Aboriginal Land Council and MPs about amendments to the *Aboriginal Land Rights Act 1983*.
- We hosted an Aboriginal housing roundtable, which was attended by 15 representatives from non-Aboriginal peak bodies and Aboriginal organisations. Recommendations to support Aboriginal tenants are now being carried forward by an alliance of Aboriginal organisations.
- We visited Aboriginal communities in Bourke and Brewarrina to discuss and observe the effects of current Aboriginal housing policies.
- Policy staff attended the annual Koori Network Conference of Aboriginal Tenants Advice and Advocacy Services and began regular meetings with this network.

Marginal renters

- We circulated two 'Reforming Marginal Rental' campaign updates.
- We consulted with Clover Moore MP on her private member's bill for occupancy agreements, briefed NSW Fair Trading

policy officers on proposals for occupancy agreements and registration schemes for residential services. We commented on the Residential Tenancies Amendment (Occupancy Agreements) Bill and briefed the minister and other MPs.

- We made a submission and gave evidence to the NSW Parliamentary Inquiry into International Student Accommodation, and posted on our blog about the NSW Government's response to the Inquiry's findings and recommendations.
- We blogged about the NSW State Coroner's inquest into deaths at a boarding house.
- We commented in media reports and posted on our blog about the NSW Government's announcement that it would reform the boarding house sector, including law reform for occupancy agreements.

Community housing

- We liaised with the Community Housing Division of Housing NSW about water charges and with the NSW Federation of Community Housing Associations about head-lease issues. We had ongoing discussions with both organisations about housing provider policies and 'no cause' termination of tenancies, and posted on our blog about these issues.
- We regularly participated in the Registrar of Community Housing's Advisory Forum.
- We attended a consultation forum on the National Regulatory System for Community Housing (on behalf of the National Association of Tenant Organisations).

Low-income private renters

- With Shelter NSW, we convened a seminar on rent assistance policy.
- We supported the Australians for Affordable Housing campaign by commenting on its priorities and publicising its materials and budget statement.

JOIN THE TENANTS' UNION

Support us in our work for safe, secure and affordable rental housing for people in New South Wales

Membership application

(Tax invoice ABN 88 984 223 164)

I apply for membership of the Tenants' Union of NSW Cooperative Limited as:

- ☐ individual tenant ☐ individual (non-tenant)
☐ tenant organisation ☐ organisation (non-tenant)

Name

Address

Suburb

State Postcode

Phone

Email

Fees (GST included)

Annual fee covers 1 January–31 December

- individual low wage / pension / benefit \$ 8.00
- individual waged worker \$16.00
- organisation \$32.00

Payment

Membership fee \$

Donation \$

TOTAL \$

Signed

Date

Payment method: Please tick

- ☐ Enclosed cheque or money order made out to Tenants' Union of NSW
- ☐ Deposit into our bank account:

Account name Tenants' Union of NSW
BSB 062-004 Account No. 802624

For online deposits, please give the reference "MEM" plus your surname

Please post this form to:

Tenants' Union of NSW
201/55 Holt St
Surry Hills NSW 2010

CONTACTS

NSW Tenants Advice and Advocacy Services



Inner Sydney	9698 5975
Inner Western Sydney	9559 2899
Southern Sydney	9787 4679
South Western Sydney	1800 631 993 4628 1678
Eastern Sydney	9386 9147
Western Sydney	8833 0911
Northern Sydney	9884 9605
North Western Sydney	1800 625 956 9413 2677
Blue Mountains	4782 4155
Central Coast	4353 5515
Hunter	1800 654 504 4969 7666
Illawarra South Coast	1800 807 225 4274 3475
Mid North Coast	1800 777 722 6583 9866
Northern Rivers	1800 649 135 6621 1022
North Western NSW	1800 836 268 6772 4698
South Western NSW	1800 642 609

Specialist services

<i>Aboriginal services</i>	
Greater Sydney	9569 0222
Western NSW	1800 810 233
Southern NSW	1800 672 185 4472 9363
Northern NSW	1800 248 913 6643 4426
<i>Older persons (statewide)</i>	1800 131 310 9566 1120



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are affected by, the law as it applies in New South Wales, Australia.

Tenants' Union of NSW

- A community legal centre specialising in NSW residential tenancies law.
- Peak resourcing body for the NSW Tenants Advice and Advocacy Program.

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