

Landlords and tenants - Notice to Remedy Overview

What?

1. It is one method by which a landlord may demand that a tenant remedy any breach of a Lease, including a failure to pay rental charges.
2. If the tenant fails to remedy the breach in the notice to remedy breach of covenant (**notice**), the landlord may terminate the lease.
3. In Queensland, a notice is required by the Section 124 of the *Property Law Act 1974*. A similar notice is required in New South Wales pursuant to the Section 129 of the *Conveyancing Act 1919* (except in the case of unpaid rent) and in Victoria pursuant to Section 146 of the *Property Law Act*.
4. A landlord (in most cases) may not lawfully terminate a lease without first serving a notice and allowing the tenant a reasonable time to remedy the breach (except in NSW, where a landlord may terminate a lease at any time without notice where the breach is a failure to pay rent).

Why?

5. The notice, if properly prepared and served, gives the landlord the power to terminate the lease, remove the offending tenant from their premises and change the locks.
6. Therefore, it is a persuasive tool for recovering outstanding rental charges or compelling rectification of other breaches.

When?

7. A landlord may serve a notice at any time the tenant is in breach of the lease.
8. Common breaches are:
 - (a) failing to pay rental charges on time;
 - (b) failing to provide a bank guarantee or replenish a bank guarantee drawn upon by the landlord;
 - (c) failing to maintain adequate insurance and/or failing to provide the landlord with a certificate of currency of insurance;
 - (d) failing to remain in occupation of, and trade from, the premises; or
 - (e) failing to comply with a reasonable direction of the landlord under the lease.
9. It is submitted that landlords should use these notices sparingly if they do not intend to terminate the lease, because regularly not following through will dilute the effectiveness of the notice as a debt recovery or dispute resolution tool.

How?

10. There are different processes to be followed across the different states in Australia, but each notice to Remedy must contain the same basic information:
 - (a) the name and details of the tenant;
 - (b) details of the lease (including any assignments or variations) and the terms that the landlord says are being breached;
 - (c) the quantum of the debt and particulars of how it has been calculated, or the nature of the tenant's breach;
 - (d) what the landlord requires the tenant to do in respect of the breach (in the case of unpaid rental charges, this requirement will be - **pay them!**)
11. The notice must allow a reasonable period of time for the tenant to rectify the breach specified in it. The notice itself should not specify an actual timeframe for remedy of the breach; it should merely specify that the breach must be remedied in a reasonable time.
12. What is or is not a reasonable period of time will depend on the peculiar facts of each case; however, the courts have generally regarded a period of 14 days to pay outstanding rental arrears to be reasonable.
13. This 14 day period ought to commence only on the date that the tenant receives the notice in the ordinary course of post and not on the date of the correspondence serving it. This is due largely to the vagaries of Australia Post. Generally, a notice served intra-state will be received two business days after postage by express post, and a notice served interstate will be received four business days after postage by express post. Postage by normal post is not recommended, simply because the tenant may not receive the notice for seven days or more.
14. In order to be effective, the notice must be served on the tenant at the address or addresses specified in the lease and by the mode of service expressly stated in the lease. The major exception to this requirement exists where the tenant is a company. In this case, service may be effected by posting the notice to the company's registered office.

Common issues

15. Where the notice gives the landlord the power to terminate the lease, change the locks, and re-enter and retake possession of the premises, tenants will often threaten an application to the Supreme Court for relief against forfeiture. This basically means that the tenant will prevail upon the court to ignore the failure to remedy the breach in the notice and allow the tenant to return to occupation of the premises.
16. Even if the landlord does everything right with its notice to remedy and subsequent termination of the lease, the tenant will probably convince the court that it is entitled to relief against forfeiture, as long as the breach in the notice is remedied and the tenant can show that it is reasonably capable of discharging its ongoing obligations under the lease.
17. If the court does allow relief against forfeiture of a lawfully terminated lease, the court will usually order that the tenant pay the landlord's costs of any application by the tenant for relief.
18. If the tenant contests the breach complained of (for example, the tenant might argue that the alleged rental charges are not properly due and payable), the landlord should carefully examine its position

before proceeding to terminate the lease. If the court finds that the termination was unlawful, it may order that:

- (a) the landlord reinstate the lease and allow the tenant back into possession;
 - (b) the landlord pay the tenant compensation for any loss of profit while it was unable to trade;
 - (c) the landlord pay the tenant's legal costs;
 - (d) the lease ended on the date of the landlord's termination and the landlord is therefore not entitled to claim damages for lost rental charges after that date;
 - (e) the lease ended on the date of the landlord's termination and the landlord is no longer entitled to require the tenant to make good the premises.
19. A landlord can terminate a lease if the tenant has repudiated the lease. This means that the tenant has clearly shown an intention to no longer be bound by the lease. For the landlord to successfully terminate without notice (except in NSW with unpaid rental charges), it must show a clear and unambiguous intention by the tenant to no longer be bound by the lease.
20. Legal authority shows that the following breaches may not be regarded as repudiations of a lease:
- (a) failing to pay rental charges for more than one year;
 - (b) failing to trade from the premises for an extended time; or
 - (c) deducting amounts from the rental charges due and refusing to pay them.
21. It is recommended that, before a landlord takes any action to terminate a lease, it should always serve a notice and allow a reasonable time for the breach to be remedied. If it does not, it might find itself with an empty tenancy and no entitlement to recover the lost rental charges till a new tenant is found.



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