

DEFENDING AN EVICTION

How will I know I'm being evicted?

(see **Eviction from your Home** — Housing ACT fact sheet Number 15)

If Housing ACT has decided to evict you, for whatever reason, they must first send you a Notice to Remedy (if a breach of the tenancy agreement is the reason for eviction) and then a Notice to Vacate.

If you do not move out in accordance with the Notice to Vacate, Housing ACT must then apply "to the Residential Tenancies Tribunal for an order ending your tenancy and giving them possession of the property.

The Tribunal will send you a copy of Housing ACT's application for a Termination and Possession Order. The documents from the Tribunal will include a Notice to Respondent (that's you) telling you the date of the hearing and the date by which you should lodge any defence you want to make.

Deciding whether to defend the eviction

It is not always easy to get a tenancy, especially one where the rent is rebated on the basis of your income and you have security of tenure, so in most cases a tenant will want to keep their Housing ACT tenancy if they can. If you want to keep your home, you will need to defend the eviction.

However, if the reason for the eviction is rent arrears and you have no intention of making up the arrears or paying rent on time in future, there is little point in defending. As long as you remain in the property, the rent arrears are growing and

eventually the Tribunal will order you to pay the rent debt, as it stands at the time the orders are made. This debt may also affect a future allocation to you by Housing ACT (see **Debts From A Previous Tenancy** — Housing ACT fact sheet Number 9).

If you decide to vacate without defending, you should pay whatever you can towards the arrears, advise Housing you are leaving, leave the house clean and undamaged as far as possible, be present at a final inspection, and return the keys. In this way you can ensure that the tenancy has ended and you do not owe rent beyond the day it ended. You may also be able to avoid a further debt for "tenant responsible maintenance".

On the other hand, if you intend to remedy the breach or you have already remedied the breach (whether it be rent arrears or some other breach of the tenancy agreement) or you do not believe there was a breach, you have a basis to defend the eviction.

If Housing ACT is seeking to evict you for a reason other than a breach of the tenancy agreement, this is relatively unusual and you should seek legal advice about your particular situation.

What is the basis of a defence against eviction?

If you believe you have not breached the tenancy agreement in the way Housing ACT thinks you have, you simply need to show the Tribunal there is no breach and therefore no basis to end your tenancy.

- For example, you have not failed to make a rent payment and Housing's calculations are incorrect; or the noise being complained about does not come from your place but from somewhere else.

If you have breached the agreement, your defence may be that you have remedied the breach.

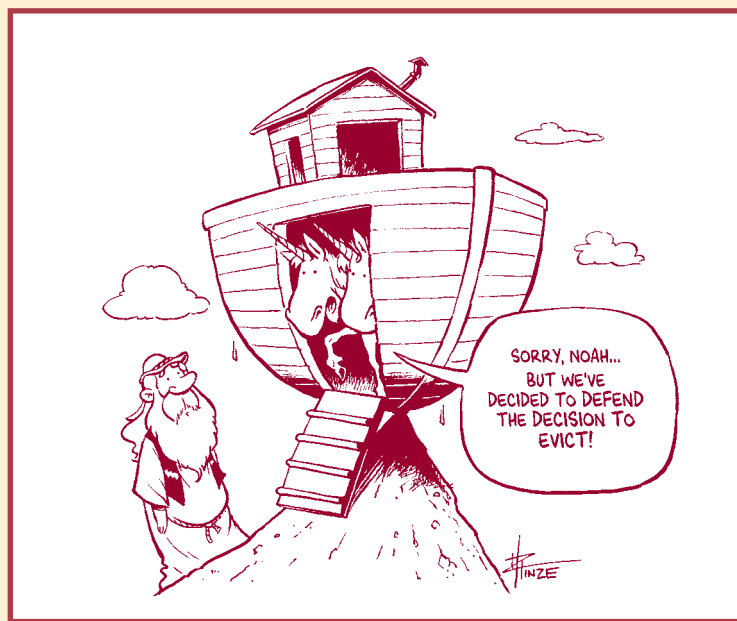
- For example, you missed a rent payment but you have now made that up; or you have mowed the lawn and removed the rubbish.

If you have breached the agreement but have not yet been able to remedy the breach, your defence may be that you have a proposal for a method and a time frame in which to remedy the breach.

- For example, you will pay off the rent arrears of \$300 by paying an extra \$30 per fortnight for the next 10 fortnights; or you will mow the lawn within 2 week and remove the rubbish within 3 weeks.

Welfare Rights & Legal Centre

Advice line
6247 2177



If you have breached the agreement but believe that it is a very minor breach (and is not rent arrears), your defence may be that the breach does not justify eviction.

For example, you have installed a garden shed without the written consent of Housing ACT, but this does not undermine the tenancy in any way and you undertake to remove the shed and make good any damage to the lawn when you vacate.

Lodging a defence

The documents from the Tribunal registry will include a form headed "Statement Contesting/Defending Application". You can either write on this form or you can write or type your own statement, as long as it has this heading. If you hand-write your statement of defence, make sure it is neat and easy to read.

The job of this statement is to give a clear and accurate account of your position — that is, why you should not be evicted. The statement should include the key facts on which you will rely. Writing these in numbered points is a good way of making them clear and brief.

The statement of defence should be sent to or handed in at the Tribunal registry by or before the date stated on the Notice to Respondent. It helps if the Tribunal Member and the representative for Housing ACT have both had a chance to read your defence. If you don't lodge a defence, the hearing begins with the Member knowing only one side of the story. If you have not lodged a defence you can still appear at the hearing and put your defence there. It may make no difference to the outcome, but advance notice of your position is likely to give the Tribunal Member a better and more sympathetic understanding of your circumstances.

Defence in the case of rent arrears

If you are behind in the rent, no matter what the reason, you are at serious risk of losing your home. In fact, the only basis on which the Tribunal can decide not to end your tenancy is if the Member is satisfied of the following:

- ▶ That the tenant is reasonably likely to repay the rent owing, as well as pay rent that becomes due; and
- ▶ That the tenant agrees to repay the rent owing and undertakes to pay rent as it becomes due.

So, while it is important for the Tribunal Member to know why you fell behind in the rent, it is even more important for the Member to see that you can and will pay the arrears and pay future rent. Making whatever payments you can in the lead up to the hearing not only reduces the arrears but indicates that you can and will pay in future.

Before the hearing

There are some other things you can do to prepare:

- ▶ Hearings are open to the public and it can be very helpful to attend other hearings before your own to see what the processes are. The registry officers can tell you when there are hearings in the week before your own, and which are eviction matters.
- ▶ Organise all your documents into a folder, put them in chronological order and label them so you can find them easily during the hearing.
- ▶ If you have any witnesses, make sure they are able to attend on the day and know where to go. On the day, witnesses need to remain outside the Hearing Room until called to give their evidence.

- ▶ Assemble your evidence. The Tribunal is not a court and is not bound by the Rules of Evidence, but in order to convince the Tribunal Member that you should not be evicted, you need to have reliable evidence to support the statements you make in your defence. For example, a receipt is evidence that a payment has been made; a dated photograph is evidence of the condition of the property; a statement from a neighbour that there has been no loud music for the last 2 weeks is evidence that you have remedied the breach.

- ▶ There are usually a number of matters listed in the Tribunal for the same time. It's important to be at the Hearing Room on time, but you also need to be prepared to wait while other matters are heard before yours.

What if I can't attend the hearing?

It is possible to get the hearing date changed by seeking an adjournment, but you need to have a good reason for requesting this. For example, illness, a death in the family, a court appearance on the same day.

If you need an adjournment, contact Housing ACT first to see whether they will agree to this and, if so, then fax or hand in a letter to the Tribunal registry saying that the parties have agreed to an adjournment and why. The Tribunal may also order an adjournment even if Housing ACT opposes it. You would need to provide the Tribunal with a medical certificate or other evidence of incapacity to attend.

What if the hearing goes ahead without me?

If you do not turn up to a hearing, and the Tribunal Member has only Housing

ACT's application to go on, the Member is not likely to adjourn the matter, unless Housing ACT suggests or agrees to an adjournment in your absence. If Housing ACT opposes an adjournment and the Member is satisfied that the grounds for eviction exist, it is likely that orders ending your tenancy will be made *ex parte* (without one of the parties).

If you do not agree with these orders when you receive notice of them, you can apply to have them set aside. The Tribunal will only hear the matter again, set aside the *ex parte* orders and make different orders if he/she was satisfied on 2 matters:

- ▶ you had a reasonable excuse for not turning up to the first hearing; and
- ▶ there was a basis for not evicting you.

The hearing

When your matter is called, you take a seat at the tables in the Hearing Room. The Housing ACT representative sits on one side, you on the other side and the Member sits in the middle. The Member usually introduces him/herself and invites the 2 parties to introduce themselves. The proceedings are taped so you should position yourself close to one of the microphones and speak clearly.

It is intended that the hearing process be fairly informal and that the parties understand what is going on. If you find the language unfamiliar and confusing, you should ask the Tribunal Member to explain anything you don't understand.

Generally the Housing ACT representative will speak first, presenting their reasons for seeking your eviction. You should take notes of any statements you don't agree with or want to comment on, so you don't forget when it's your turn to speak. The Member may

also ask questions of you. The important thing is that you have the opportunity to say everything you want to say and, as long as you don't interrupt either the Member or the Housing ACT representative while they are speaking, there is no strict order as to who speaks when.

Sometimes either the Member or the Housing ACT representative will suggest that the outcome of the hearing could be worked out by agreement or 'by consent'. If that is the case the Member may adjourn the hearing and send the parties outside the hearing room to work out 'Orders by Consent'. This is often a good outcome for a tenant, if Housing ACT is agreeing that the eviction will not proceed, but it is very important to know exactly what you are agreeing to and what will be required by the consent orders. There is a 2 day 'cooling off' period after consent orders are made, during which either party can withdraw.

What orders can the Tribunal make?

The Tribunal can decide to do any of the following:

- ▶ refuse to make an eviction order, and allow the tenancy to continue;
- ▶ order that the tenancy terminates immediately;
- ▶ order that the tenancy is to terminate but allow a period of time (up to 21 days) for the tenant to vacate;
- ▶ order that Housing ACT be compensated for any loss arising from the tenant's breach of the tenancy agreement. For example, any rent owing.

In addition, where rent arrears is the reason Housing ACT is seeking an eviction, the Tribunal can make conditional termination orders.

Conditional Termination Orders

If the Tribunal Member is of the opinion that the tenant is reasonably likely to repay rent due, and pay future rent as it falls due, and agrees to do so, the Member can make conditional termination orders. This means that the tenancy will continue as long as the tenant complies with certain conditions (for example, that future rent is paid on time and that any rent arrears are paid off by instalments in addition to rent).

Conditional termination orders last the life of the tenancy (unless at some stage an application is made to the Tribunal and the orders are changed or revoked). So, even when the arrears are paid off, you are still required to make every rent payment on time. If you fail to do so, you are in breach of the orders and Housing ACT can then apply to the Tribunal for a warrant for your eviction. The Tribunal would send you a notice telling you that Housing ACT has applied for a warrant and giving you 2 days in which to apply for a stay (to prevent the warrant from being issued). The Tribunal has the power to stay the warrant if the member is satisfied that the tenant has complied with the conditional orders. In practice, the Tribunal may also stay the warrant if the Member is satisfied that circumstances beyond the control of the tenant caused a breach of the conditional orders.

Warrants of Eviction

A warrant is issued by the Tribunal registry and it authorizes the police to ensure that Housing ACT gains vacant possession of the property. The warrant will specify the day and time the eviction will take place, and that the police must give the tenant at least 2 days notice of that day.

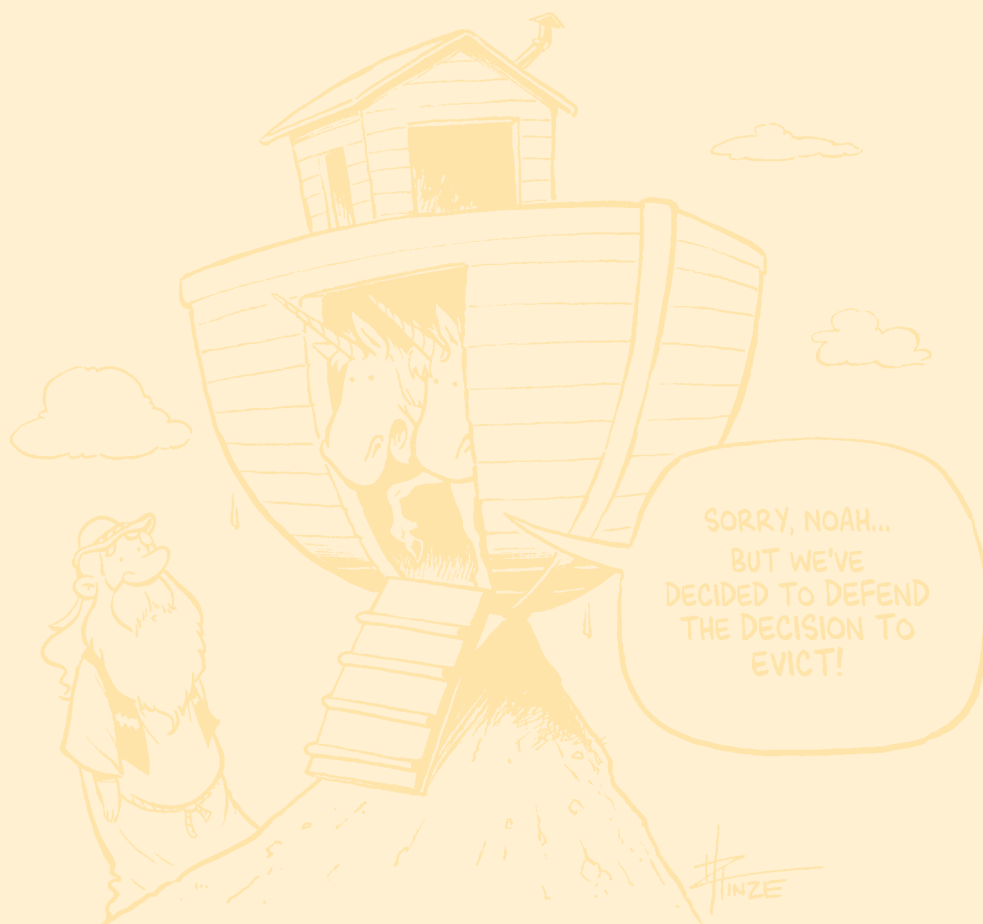
What if I disagree with the Tribunal's Orders?

The only avenue of appeal from the Residential Tenancies Tribunal is to the Supreme Court. The law allows 28 days (from the date the Tribunal notified you in writing of the decision) to lodge the appeal, but in practice you would need to act very quickly in order to stop the eviction from going ahead. An appeal must be based on a question of law. It is not enough that the Tribunal's decision seems very harsh, it must be wrong at law. You should seek expert legal advice — and do this immediately — before lodging an

appeal because the Supreme Court could order you to pay Housing ACT's costs if you lose the appeal.

Variation of orders

You can seek a variation of the Tribunal's orders, but this would need to be on the basis that there has been some change in your circumstances since the orders were made. For example, you could ask the Tribunal to reduce the rate of repayment of arrears because your income has reduced.



Disclaimer

This fact sheet contains general information available at the time of printing. It does not constitute legal advice. If you have a specific legal problem, please contact the Welfare Rights and Legal Centre's advice line on 6247 2177. The Welfare Rights and Legal Centre is entirely independent of Housing ACT. All assistance is free.

June 2004