

6.05 Court action when moving interstate or overseas

What should I do before I leave?

At the end of the tenancy you may be moving a long way away, to another state or even overseas. If you are going to be moving a long distance you should take a few simple steps to try and protect yourself.

- Do a Property Condition Report before you leave and get a witness to sign it. See chapter [2.10 The Property Condition Report](#), for more information about this process
- Try to arrange with the owner/agent for a final inspection to be carried out before you leave the area
- Try to be there when the final inspection is carried out. If you can't be there, arrange for a friend to be at the final inspection
- Ask the owner/agent for a written inspection report
- Arrange for a friend or relative to be a local contact or representative for you for any issues that may come up after you move away

The most common problem that can happen at the end of the tenancy is a disagreement about your bond, see chapter [5.01 Getting the Bond Money Back](#) for more information.

As with any dispute, first try to negotiate with the owner/agent to come to an agreement and always get the arrangement in writing, even if you have to write to the owner/agent yourself. If you cannot agree, either you or the owner/agent will eventually have to apply to the court to get the issue resolved. The court will listen to both sides of the story and decide what is fair in the circumstances, see chapter [6.04 Going to Court](#) for more information.

Always try and negotiate an agreement in writing

What happens if I cannot get to Court?

You may have problems if your case is going to be heard in court and you can't be there. Arrangements may be made for you to participate in the hearing by a telephone or video link.

NOTE: Different courts have different facilities so contact the particular Magistrates Court where your hearing will be held to discuss the facilities that are available and the costs involved.

Once you know the date of your hearing you will need to complete and lodge a Form 23 application to use the phone or video link service and attach an affidavit which outlines the reasons why you are not able to attend the hearing in person. You should lodge the application and affidavit as soon as you are informed of the hearing date so that the court has time to process the application and make the arrangements if your application is approved. A booking fee and an hourly charge may be payable to the court to use the service.

A sample copy of the Form 23 and affidavit are available to download from the TAS website (www.taswa.org). The forms are available at the Magistrates Court or can be downloaded from the Magistrates Court website (www.magistratescourt.wa.gov.au). Another option you can take if you are not able to attend the hearing is to make arrangements for someone to be there on your behalf.

If you can't get to the court hearing because you have moved away, you may need to organise for someone to be there on your behalf

How do I get someone to represent me at court?

The *Residential Tenancies Act (1987) (WA)* ("*Residential Tenancies Act*") says that if you can't be there yourself you may be represented by another person as long as the owner won't be unfairly disadvantaged (section 22(2)). The person you ask to represent you should be someone you trust and who is willing to give his or her time to get ready for the hearing and go to court on the day

If you want someone to represent you it is very important that you give your written permission (see the sample letter that follows). This letter can be sent to the court before the day of the hearing, or you can give it to your representative to give to the court staff before the start of the hearing.

Sample Letter

(Your Name)
(Your Current Address)
(Your Telephone Number)

(Date)

Dear Sir / Madam

My name is (your name) and I was the tenant of (the address of the rented premises) from (date tenancy started) until (date you vacated the property).

Since the end of the tenancy I have relocated to (place where you now live) and I am unable to return to (place where the court hearing is) at this time.

I have asked (name of person representing you) to represent me in this matter. I am appointing this person as my agent under section 22 (2) of the Residential Tenancies Act 1987 (WA).

Yours sincerely,

(Your Name)

How do I give my evidence to the Court?

The purpose of the court hearing is to let the person hearing the case, usually a Magistrate, listen to the evidence given by the tenant and the owner/agent and make a decision based on the law.

If you will not be at the hearing you will need to make a “sworn statement” called an affidavit. Blank affidavit forms are available at the Magistrates Court or can be downloaded from the Magistrates Court website (www.magistratescourt.wa.gov.au). You need to write your evidence down, including an explanation of why you can’t be at the hearing, details of your side of the story and details of any proof that you may have. You must also swear that what you are saying is the truth. You must sign the statement in front of a Registrar, or Justice of the Peace (or another authorised witness) who will witness your signature. You can find one of these people by looking in the telephone book.

Do the normal “rules of evidence” apply?

The *Residential Tenancies Act* states that the Court “shall not be bound by the rules of evidence but may inform itself upon any matter relating to the proceedings in such manner as it thinks fit” (section 21). This means that a magistrate can take into account types of evidence that they wouldn’t in other courts.

The “rules of evidence” are a complicated set of legal rules that say what evidence may be given in Court, and how the evidence must be given. One part of this is that there are rules about giving documents into evidence. For example, if a photograph is to be used, the person who took the photo should be there to prove they took it and when. In residential tenancy matters, even though the rules of evidence don’t apply as they normally would, it is likely that the evidence will be given more weight if the creator of the document, the photographer in this case, is at the hearing.

The normal “rules of evidence” do not necessarily apply

Tested and Untested Evidence

It is always best to have the witness, or yourself, appear in court at the hearing to give the evidence about your dispute. This allows the owner/agent to ask questions about the evidence and allows the magistrate to hear the answers. This is called “tested” evidence, and is always given more weight, by the magistrate, than “untested” evidence. “Untested” evidence is where the witness is not at the hearing to be questioned about their story.

You can help your representative by preparing questions you would like them to ask the witnesses in cross-examination. Your representative can use these questions to try and challenge (“test”) the owner/agent’s evidence. The magistrate may also ask questions to “test” the evidence. A written statement **cannot** be questioned so the evidence is “untested”. Your affidavit will also be “untested”.

When there are two different stories the court will usually prefer the tested evidence when it is different to untested evidence (e.g. if the owner/agent is at the hearing and gives evidence that can be “tested” then the court will probably prefer the owner/agent’s evidence). This is the problem for tenants who can’t be at the hearing.

When there are two different stories the court will usually go with the tested evidence when it is different to untested evidence

However, it is always worth trying to defend yourself against unreasonable claims. If you are the one taking the action the only cost involved is the cost of the application and your time. If the owner/agent applies to Court and you don't argue their unfair claims, they may not even have to prove their case. If you are not there and you don't send a representative, an order can just be made to give the owner what he or she is asking for.

It is always worth trying to defend yourself against unreasonable claims

Can my representative make an agreement with the owner/agent?

Your representative may be able to negotiate a solution to the problem for you in a "conciliation conference". This is where both parties try and negotiate an agreement outside the court room, often immediately before the hearing is about to start. The court can then write the agreement up as a court order which gives the agreement more legal power. You will need to give your representative written permission to negotiate on your behalf. You should say in writing to your representative, the limits to which they can negotiate. In other words, tell them what your "bottom line" is.

Owner or Agent?

It is important to know that whilst you may be dealing directly with the real estate agent about your tenancy, it is the owner who takes on all the landlord responsibilities under the Residential Tenancies Act (1987). If the agent or owner does something wrong and you have to fill out a breach notice or go to court, it is the owner you will list on the forms and notices.

List of Tenants' Rights Manual chapters referred to in this info sheet:

- [2.10 The Property Condition Report](#)
- [5.01 Getting the Bond Money Back](#)
- [6.04 Going to Court](#)