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Rent increases following a break-lease situation

A recent court case has prompted the Department of Commerce to remind real estate agents of when it is allowable to increase the rent on a tenancy agreement (replacement lease) after a 'break lease' situation. Section 30 of *the Residential Tenancies Act 1987* (the Act) states the rent on a residential tenancy cannot be increased less than six months after a tenancy has commenced.

In the court case, the original tenant moved into the rental property on 5 August 2009. The original tenant broke the lease and was subsequently replaced with new tenants on 22 October 2009. The agent added a special condition to the new tenant's residential tenancy agreement advising:

The tenants are aware that, as this is a replacement lease for the current tenant who is breaking their lease, the rent will increase to \$350 per week from 5/2/10".

The proposed rent increase on 5 February 2010 was approximately three-and-a-half-months after the new tenancy commenced. It appears the special condition was drawn up to increase the rent six months from the commencement of the original tenant's lease (ie on 5 August 2009).

The replacement tenants lodged a complaint with Consumer Protection about the rent increase; however an attempt to conciliate the matter with the property manager and agent licensee was unsuccessful. The tenants then lodged a claim in the Magistrates Court, which was heard in March 2010. The Magistrate found in the tenants' favour, with an order that the rent remain the same, and the illegal increase be paid back to the tenants.

The Department subsequently commenced legal actions against the agent in December 2011, with the Magistrate finding the agent guilty of breaching s.82 of the Act (ie illegally contracting out of s.30). The agent appealed this decision to the Supreme Court. Although the appeal was successful on the grounds the agent had not intentionally breached the Act, the Court agreed with the Magistrate's decision that **the agent's special condition was unlawful given it provided for a rent increase less than six months after the lease commenced.**

It appears there may be a belief in the industry that in break-lease situations the six-month rent increase period on the new lease can be 'back dated' to when the original lease was signed. **The Supreme Court decision has now confirmed this view is incorrect.**

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Although the replacement tenants may have willingly entered into the contract, the Act does not permit any contracting out of section 30 – “Variation of rent”. **Even if it is included as a special condition, any rent increase that is intended to be applied less than six months after the commencement of the replacement lease is unlawful.**

If the agent/owner did not want to wait six months, they could have increased the rent to market level at the commencement of the replacement lease. However, should the original tenant believe that by doing so the owner was not taking reasonable steps to mitigate their losses as per s.78 of the Act (ie the higher rent was deterring new tenants), the original tenant may take the matter to the Magistrates Court for a determination.