

Taking Children Overseas and Recovering Them



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Jessica Raffal, Lawyer, Women's Legal Service NSW on 9 June 2016

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- **What is the law covering Housing NSW?**
- **NSW Civil and Administrative Tribunal (NCAT)**
- **The Housing The Appeals Committee (HAC)**
- **How to appeal a Housing NSW decision**
- **Where to go for help**

Housing New South Wales (HNSW)

- Housing NSW is an agency of NSW Department of Family and Community Services.
- Housing NSW services include:
 - Public housing
 - Community housing
 - Aboriginal housing
 - Private rental assistance and subsidies
 - Policy and other services
- Community Housing providers exist as well as Housing NSW

Tenancy Law & Policy

- Residential Tenancies Act 2010 (NSW) (RTA)
- Housing Act 2001 (NSW)
- Housing NSW Policies (and community housing provider policies)

Residential Tenancies Act 2010 (RTA)

Covers nearly all Residential Tenancy Agreements (RTAs) in NSW – including agreements with private and public landlords.

Some premises **not covered** such as hotels, aged care facilities, serviced apartments and others.

Some agreements **not covered** such as boarding/lodging agreements, occupation agreements in holiday parks, refuge/crisis accommodation agreements, agreements less than 3 months or more than 99 years and others.

→ These premises and agreements are covered by different laws, not covered here

Residential Tenancies Act includes things like:

- Terms of RTAs
- Landlord and Tenant rights and obligations
- Repairs
- Terminations
- Bonds
- Special social housing provisions



Housing Act 2001

Establishes the NSW Land and Housing Corporation (Housing NSW)

Sets out functions, requirements, administration, processes and powers of Housing NSW

A “**big picture**” law – it **does not** set out details of how Housing NSW manages tenancies.

Housing NSW Policies

Developed by the Department of Family and Community Services

Outline the detail of how HNSW runs ie. Manages tenancies and other matters

Eg. Eligibility for Social Housing Policy, Ending a Tenancy Policy, Water Usage Charges Policy etc.

Find policies here: <http://www.housing.nsw.gov.au/forms,-policies-and-fact-sheets/policies>

And here: <http://www.housingpathways.nsw.gov.au/additional-information/policies>

Policy vs Law

Policy and law exist and operate together. Policy gives effect to law, often going into greater detail about **how** the law will be applied

If a policy is inconsistent with the law, it is **unlawful policy** and the law will apply (including where the policy *fetters* a discretion in the law)

A policy **can** be disregarded even if it is not inconsistent with the law if it is appropriate to do so in the circumstances (this is rare in practice unless on appeal to independent body)

NSW Civil and Administrative Tribunal (NCAT)

An amalgamation of what was several NSW Tribunals, now in four divisions of NCAT:

- Administrative and Equal Opportunity Division
- Consumer and Commercial Division
- Guardianship Division
- Occupational Division

Tenancy matters hear in **Consumer and Commercial Division**

NCAT Consumer and Commercial Division has jurisdiction to hear disputes between tenants and landlords (both private and public) and make decisions, so far as they are empowered to do so by the RTA and the NCAT Act, that are binding on the parties. Eg. Terminations, repairs, bonds.

: If Housing NSW, or another Landlord, issues a Notice of Termination, **that does not oblige** a tenant to vacate the premises - only NCAT can terminate the tenancy unless the parties agree. NCAT will look at the NOT, and decide whether it is possible and appropriate under the RTA to terminate the tenancy in the circumstances

Eg. A NOT for rent arrears, NCAT may decide more appropriate to make an order that the tenant pay all rent on time plus arrears than terminate the tenancy

In some circumstances NCAT **must** terminate the tenancy provided the NOT met requirements of form eg. s 85

A dispute with HNSW as the landlord of some premises is **not** the same as challenging a decision of HNSW as a government agency.



NCAT has no jurisdiction to undertake what is called **administrative review** of HNSW decisions ie. To *remake* the decision, checking that it the decision is **the correct and preferable** decision.

→ *Exception*: when Housing NSW makes a decision about an application under the Government Information (Public Access) Act – the NSW equivalent of FOI law. These decisions are reviewable by the Administrative and Equal Opportunity Division of NCAT (formerly the AD) not the Consumer and Commercial Division (formerly CTTT).

Challenging a Housing NSW Decision

Level 1: Internal Review

In order to challenge a Housing NSW decision the first step is to apply for **internal review** of the decision. The review should be conducted by a delegated person or Committee, senior to and separate from the one making the original decision.

Complete this form to request review of a decision:

http://www.housing.nsw.gov.au/_data/assets/pdf_file/0017/330380/DH0173.pdf

Level 2: Housing Appeals Committee

If you are unhappy with the result of internal review, you can appeal to the **Housing Appeals Committee (HAC)** – you must get internal review first.

HAC is an independent agency that reviews decisions of social housing providers (HNSW and CHP).

HAC hearings are informal, you can represent yourself or have an advocate/support person and the SHP will not be represented.

HAC has recommendatory powers only – this means it cannot change the decision of the SHP, only make recommendations to the SHP *except where the decision is about whether to issue a first or second strike against a tenant for anti-social behaviour*

Changes recommended in 35% of cases. Of those recommendations, 92% are adopted
Ie. Relatively effective but not as good as a genuine review process by a body that can change the decision

How to win on appeal

At both levels of review, a decision will only be changed if it was made contrary to law or policy. So the best strategy on appeal is to rely on the law or policy and show how the decision failed to comply with it → **policy** will be much more useful.

- Ask HNSW which policy they have applied
- Look through the policies for any other which you think may be relevant → **only** raise relevant policies, more is not better
- Be clear on what you want to get out of the appeal. An appeal is **not a complaint**. You should be appealing in order to get a different outcome eg. A transfer, listed on priority waiting list etc → be clear on what that outcome is



- Prepare answers to any questions or problems raised by the policy – don't just ignore things that aren't in your favour
- Point out how HNSW has failed to apply the policy properly - be clear on how the policy supports your position
- Show how the outcome is unfair for you

Where to from HAC?

If you disagree with the decision you get from HAC, there are **limited options only**

1. Complain to NSW Ombudsman
2. Appeal to Supreme Court

NSW Ombudsman

Ombudsman is a watchdog aimed at eliminating conduct that is illegal, unreasonable, unjust or oppressive, improperly discriminatory, based on improper or irrelevant grounds, based on a mistake of law or fact, or otherwise wrong. www.ombo.nsw.gov.au

Ombo will decide whether to take on complaint or not. If it does take the complaint on, it will contact agency, can ask to inspect files, conduct interviews, get written report.

Ombo can also formally investigate.

As with HAC, the Ombo cannot force action but only make recommendations

Ombo suggestions are implemented 94% of time, investigation recommendations implemented 50% of time.

Supreme Court

NSW Supreme Court has jurisdiction to review administrative decisions of NSW government agencies including Housing NSW.

Supreme Court can only conduct what is called "judicial review" – a narrower range of grounds than just deciding whether the decision was the correct or preferable one. It cannot re-decide questions of fact *eg. Was the tenant really selling drugs from the premises?* It is limited to considering questions of law *eg. Was the tenant's behaviour unlawful?*

Essentially, a decision can only be changed if it was made contrary to law in some way or is unreasonable in that it is arbitrary and lacks an evident and intelligible justification.

Supreme Court review is complicated and costly and not a viable option for the vast majority of HNSW decisions.

Case Study 1

*Karen lives in a HNSW property. After a period of heavy rain last year her roof was damaged and now it leaks regularly, and there is a large area of mould on the ceiling. She asked Housing NSW to fix it but they have not done so.
Can she appeal? To where?*



*Yes. She can apply to NCAT asking for an order for repairs under s 63 of RTA
Depending on the severity of the damage and leak, it may count as an “urgent repair” under s62 –
meaning she can pay for the repairs herself and get reimbursed for reasonable costs under s 64.
She may also ask NCAT for a rent reduction as a result of the reduced value of the premises due to
damage under s 43 – can be difficult given HNSW rent rebates but possible.*

Get advice from a TAAS

Case Study 2

Megan has applied for social housing. She is currently living with her partner and 2 children. Her partner is violent towards her and the children but she has nowhere else to go. Her application for social housing has been accepted but she has been told to expect to wait for around 5 years, because Housing NSW has declined her request for priority housing.

Can she appeal? To where?

Yes. She can apply for internal review, and then go the Housing Appeals Committee if that is unsuccessful. She can rely on the “Social Housing Eligibility and Allocations Policy Supplement” which includes domestic violence and child abuse as risk factors making a client eligible for priority housing.

Get advice from a TAAS.

Case Study 3

Anh lives in HNSW premises with her three children. HNSW believes her income now exceeds the eligibility limits and has issued her with a termination notice. She says that HNSW is wrong about her income and believes she is still eligible.

Can she appeal? To where?

Yes. She should not comply with the NOT.

This is a RTA dispute and so she can appeal to NCAT/wait for HNSW to apply to NCAT seeking an order to terminate.

However, NCAT has limited power in this situation. Once HNSW has conducted an assessment and determined that a tenant is not eligible NCAT must terminate the tenancy. NCAT cannot look at Anh’s income and make a decision about whether she really is eligible.

Get advice from a TAAS.

Useful resources

- Tenants Advice and Advocacy Services across NSW as well as factsheets, sample letters and other resources: www.tenants.org.au
- Women’s Legal Service NSW can provide tenancy advice when it relates to domestic violence: www.wlsnsw.org.au
- NSW Fair Trading Info Centre: 133 220
- LawAccess NSW: 1300 888 529