Tenants' construction nightmares

If your landlord or Owners Corporation (strata) is carrying out building work in or around your home you do not just have to put up with it. Under NSW Residential Tenancies law you have some rights. You could even have options if disruptive building work is going on in a neighbouring property.

As a tenant, you should not have to pay someone for something that you are not getting, (for example, a liveable home). Work undertaken by the landlord or strata will increase the value of the property, but that benefit goes exclusively to the landlord(s), not the tenant. Landlords could even benefit from work on neighbouring properties, over time. Unfortunately, the legal position is complex.

The key issues in cases like this are:

- Who is carrying out the work – your landlord (whether on your premises or not); strata or a neighbouring owner
- To what extent does the work make your premises less liveable or even unliveable (you will need strong evidence to assert either of these). This must be based on your use of the premises. For example, you would be unlikely to win a claim for reduced rent for noise, if all the noise happens when you are usually away at work.
- Do you want to resolve the issue by seeking a rent reduction, or leaving, or both. Leaving in a fixed term agreement is more difficult. In a periodic agreement, you only have to give 21 days notice.
- How long has the work has been going on, how long it is likely to continue

The position of Strata

Strata building works can present complex legal issues for tenants.

Tenants have a legal relationship with their landlord, not strata. In the past, the Tribunal has said that a landlord cannot hide behind strata to avoid their obligations to tenants. A landlord has a legal obligation to provide and maintain premises that are habitable, and to not interfere or allow interference with tenants' peace, comfort and privacy. If a landlord doesn't observe these obligations they have breached the residential tenancy agreement, and could face claims for rent reduction (a breach is not strictly necessarily for this) or compensation, which requires a breach of the agreement.

One problem is that landlords cannot carry out many repairs in areas where strata has responsibility. A tenant is obliged to allow the landlord

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access to carry out repairs, (not renovations); it is not clear if they have to do so for repairs that are undertaken by strata. It may be arguable that if Strata carries out repairs to meet the landlord's obligations, the landlord is in turn liable for disruption suffered by tenants.

If the NSW Civil and Administrative Tribunal finds that the landlord has breached the residential tenancy agreement, tenants could have more favourable remedies open to them. If NCAT found that the landlord was not in breach, tenants' options could include termination and rent abatement or reduction, but not compensation.

In many cases, tenant advocates will advise tenants to initiate actions that could apply in either case (the disruption is the responsibility of the landlord, or not).

What is uninhabitability

When NCAT deals with cases about the effect of building work on tenants, the question of "habitability" often comes up. A landlord must provide premises that are fit for habitation by and maintain the premises, (section 52 *Residential Tenancies Act 2010*).

Tribunal and Court decisions have come to differing legal interpretations of what constitutes habitability of residential premises.

In Grey v Queensland Housing Commission [2004] QSC 276 the court said: *"The test approved by the House of Lords may be paraphrased: if the state of repair is such that injury is to be expected, or will naturally occur, from the ordinary use of the premises they cannot be regarded as fit for human habitation".*

In McLeish v FT Eastment & Sons [1970] 2 NSWR 282, 91 WN (NSW) 268, the court said the Court cited Proudfoot and Hart (1890): *"Much import as to repair that the premises might be used and dwelt in, not only for safety, but for reasonable comfort by the class of persons by whom and for the sort of premises for which, they were to be occupied…"*

Somewhere in the middle is Hampel v South Australian Housing Trust [2007 SADC 64 : *"In my opinion a house is unfit for human habitation if an occupier could be expected to suffer physical injury or injury to health from the ordinary*

use of the premises. It may be so unfit for any reason. The risk to health or safety may arise because the premises are in a state of disrepair or dilapidation, or because of a lack of facilities such as the provision of adequate water, light, ventilation or so on".

If a tenant issues a notice of termination (under section 98 (breach) or s.109 "frustration" of the *Residential Tenancies Act 2010*) and leaves a premises, the Tribunal could find that the premises were not uninhabitable. The tenant could be liable for break fees or other penalties.

LEAVING OR ASKING THE TRIBUNAL TO END AN AGREEMENT

In many cases where tenants' lives are disrupted by building works, to the point where they feel they cannot continue to live in the premises, they have to consider whether to issue a Notice of Termination and leave, or ask the Tribunal to end the agreement, and seek a rent reduction or abatement for the time they have to stay in the premises.

As noted above, there could be serious financial risks associated with issuing a notice and leaving. **(NOTE: applications to the Tribunal for rent reductions must be made during the life of the tenancy.)** There could also be, in extreme cases, health effects that tenants could face if they stayed. Damage to a tenant's health could rarely be the subject of a compensation claim in the Tribunal, due to the effect of the *Civil Liability Act 2002*.

Claims for compensation, such as for alternative accommodation for the period of uninhabitability, for other losses such as damage to goods, or costs incurred by the tenant in dealing with the situation, would usually only succeed if the tenant could show that the landlord breached the residential tenancies agreement (see above).

It is safest for a tenant to ask the Tribunal to end an agreement and ask for a rent reduction or abatement for the period they must stay. The Tribunal can be asked to end the agreement under Section 103, (breach by landlord) or Section 104 (hardship to tenant) S.104 could apply in the case of landlord breach or where no breach of the agreement has occurred. If the problem is found to not be the result of a breach by the landlord, the tenant can also ask the Tribunal to end the agreement under section 109, AFTER issuing a Notice of Termination. For NCAT to end the agreement it must be heard BEFORE the tenant has left and returned the keys. The Tribunal cannot end an agreement after it has already ended by Notice and Vacant Possession.

These considerations are not easy to navigate. Often, there will be no definitive answer until the matter is heard by the Tribunal.

Tenants are strongly advised to try to reach agreement with their landlord about ending the agreement, and if rent reductions or or compensation apply. Tenants should seek advice from a Tenants Advice Service, keep records of attempts to negotiate with landlords or their agents, and ensure agreements are in writing.

DID THE LANDLORD OR AGENT KNOW THE BUILDING WORKS WERE GOING TO HAPPEN?

Many tenants become justifiably angry if they realise that their landlord or agent knew, or should have known that building works were going to happen before the tenant entered the Residential Tenancy Agreement.

Section 26 of the *Residential Tenancies Act 2010* provides that a landlord or agent must not deceptively or misleadingly induce a tenant to enter a tenancy agreement. It also provides that a landlord or agent must provide information set out in the Residential Tenancy Regulations. An agent or landlord who is misleading or deceptive, or did not provide the required information would be in breach of the Act, but not of the tenancy agreement.

In our experience, "deceptive or misleading" conduct is taken as making untrue statements. It does not mean, as far as the Tribunal or courts are concerned, failing to divulge information that is not specifically asked for. Some material facts must be divulged – but NOT information about upcoming building work.

It may be useful to collect evidence that shows that the landlord knew or should have known about upcoming renovations. This could include council correspondence or Strata decisions. This may help a tenant suggest a breach of the agreement occurred or that a landlord should reasonably have expected that building work would have had a negative impact on the tenant .

EVIDENCE

If a tenant takes any action that could end up in NCAT they will need evidence. Evidence can include videos, (which will need to be copied for NCAT), photographs, (printed), witness statements, expert reports, copies of official documents and correspondence. Without good evidence, action in NCAT will probably fail.

Losses claimed from the landlord need to be verified. If you are claiming that the premises are partly or wholly unusable, the tenant will need to show that they would ordinarily use that part of the premises.