CANBERRA COMMUNITY LAW

Overview of Public Housing in the ACT

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1. Introduction

The history of public housing in the ACT is markedly different from that elsewhere in Australia in that public housing was a fundamental part of the development of the National Capital. The construction of housing by government was essential to accommodate public servants, business people and community workers who were willing to make Canberra their home.

By the late 1950s 84% of Canberra houses had been built by the government. It was not until 1972 that the number of privately built dwellings in the ACT was greater than the number of government-built dwellings. It remained part of the vision for Canberra that its public housing would be spread fairly evenly throughout the city and its suburbs.

Living in public housing was the norm in the 1950s and 60s for workers and their families in all walks of life. Restricting eligibility for public housing to people on low incomes came much later in the ACT than in other jurisdictions. Now, in the ACT as in other jurisdictions, the majority of public housing tenants are in receipt of Centrelink benefits and the vast majority pay a rebated rent.

In recent years some public housing stock has been transferred to community housing providers to set up and manage tenancies based on similar eligibility criteria and the same principle of income-based rent. "Social Housing" is the umbrella term for both public and community housing.

Public housing in the ACT is provided and managed by Housing and Community Services ACT (colloquially known as Housing ACT), a branch of the Community Services Directorate which is responsible for a wide range of service delivery and policy functions in the ACT.

All tenancies in the ACT are governed by the *Residential Tenancies Act 1997* (the RTA). This Act applies to both public housing tenancies and private tenancies and includes a standard form of residential tenancy agreement containing prescribed terms.

Public housing tenancies are also governed by the *Housing Assistance Public Rental Housing Assistance Program 2013* (the Program). This is a Disallowable Instrument made under the *Housing Assistance Act 2007.*

This discussion of public housing law is structured in the following sections:

[2] The Application of the *Residential Tenancies Act 1997* (The RTA) And the *Housing Assistance Public Rental Housing Assistance Program 2013* (No 1) (The Program).

This section briefly outlines the application of the RTA and focuses on the Program which determines the administrative processes governing Housing ACT tenancies and applications for housing.

[3] Applying to Housing ACT

This section examines the administrative processes governing applications to Housing ACT for housing and transfer, and the effect of debt from a previous tenancy.

[4] During the Tenancy

This section discusses the application of the Program during the tenancy to matters of rent and rent rebate, changes in the household, market rent increases, and transfer.

[5] The Appeals Process

This section deals with internal and external review processes in relation to decisions made under the Program, including refusal of application, waiting list category, cancellation of application, refusal of rebate or review of rebate. It deals with applications to the ACT Civil and Administrative Tribunal (ACAT) in respect of both administrative decisions and tenancy decisions of Housing ACT.

[6] Termination of Tenancy

This section examines the matters particular to Housing ACT tenancies in relation to termination of tenancy by the lessor, including security of tenure, reasons for termination, and appeals.

2. The application of the *Residential Tenancies Act 1997* and the *Housing Assistance Public Rental Housing Assistance Program 2013*

The *Residential Tenancies Act* (the RTA) applies to all tenancies in the ACT and governs all contractual matters in relation to public housing tenancies. The Standard Terms, of which there are currently 100 comprising the Schedule to the RTA, set out the obligations of lessor and tenant in respect of maintenance of the premises, rent and other costs, rent increases, access and termination. Some of the terms currently have no application to public tenancies – for example, payment of a bond is not required by Housing ACT.

The obligations of Housing ACT as lessor and the obligations of Housing ACT tenants are the same as for private lessors and tenants, but for 3 exceptions.

The first exception is in relation to the imposition of the first rent increase in a public tenancy. Clause 36 of the standard terms allows the titular head of Housing ACT, the Commissioner for Social Housing, to increase the rent less than 12 months into the tenancy, providing 12 months has elapsed since the last rent increase for the premises. This provision is to enable Housing ACT to standardise the timing of rent increases across all their tenancies.

The second exception arises at section 15 (5) of the Act which enables "the housing commissioner" to make the repayment of a debt from a previous tenancy a condition of a new tenancy. This provision is dealt with more fully at [4.1] below.

The third exception in section 127A of the RTA enables a public housing tenancy agreement to include a term that the tenant must not give the tenant's rights under the agreement by will to another person who is not an occupant of the premises. Also, section 127A(2) gives Housing ACT the right to apply to ACAT to adjust the rent or terminate the agreement when a person takes possession of a public housing property under a will. In considering such an application, the ACAT must have regard to the eligibility criteria under the relevant approved housing assistance programs under the Housing Assistance Act 2007.

Housing ACT's obligations to maintain the premises and conduct repairs are precisely the same as for a private or community lessor, and the tenant's obligations to take reasonable care of the premises and pay the rent on time are the same as for any other tenant.

What differentiates a public tenancy is the regulatory framework for the administration of public housing, which sits alongside the RTA and, to an extent, interacts with it.

2.1. The scope of the *Housing Assistance Public Rental Housing Assistance Program 2013* (the Program)

Housing assistance in the form of a long term tenancy is provided to those who meet the eligibility criteria and, in general, it is provided sooner or later on the basis of an assessment of need, in conjunction with the availability of suitable dwellings.

The current program comprises 34 clauses setting out the requirements of applications for housing, the provision of housing, the provision of rent rebate, and review of decisions. There are also a number of Determinations and Operation Guidelines which are Notifiable Instruments made under the *Housing Assistance Act 2007*. These detail the procedures in relation to such matters as assessment of category of need, transfers, and the calculation and reassessment of rent rebate. In addition, there are internal policy documents for the guidance of Housing ACT officers.

The legislation is available at http://www.legislation.act.gov.au. Policies are available from the Community Services Directorate website at http://www.communityservices.act.gov.au.

3. Applying for housing

A standard Registration form is used for all applications for housing assistance, including transfer applications. Housing ACT has produced a kit which includes the form, a checklist of documents required, some fact sheets and other useful information including a map of Canberra showing the 4 areas into which the ACT is divided for the purposes of the applicant's nomination of preferred area(s) of residence.

Since September 2010 there has been a common registration form for all applicants for Social Housing that is both public housing and community housing. The application kit now includes fact sheets about registered community housing providers which provide long term housing and report to the ACT Government. There are currently 5 providers. These are:

- Argyle Community Housing,
- Environmental Collective Housing Organisation (ECHO),
- Havelock Housing Association,
- Salvos Housing, and
- Tamil Senior Citizens Association.

Some other community organisations, which offer a range of support services, are also registered as community housing providers. Community Housing providers provide long term rental housing for people on low to moderate incomes. Unlike public housing they may require a tenant to pay a bond. If eligible, some community housing providers may also require tenants to pay an amount equivalent to 100% of any Commonwealth Rent Assistance (CRA) entitlement. Public housing tenants are not eligible for CRA payments.

Affordable Housing, in the context of rental housing, is a branch of community housing but has different entry criteria and a different rental subsidy basis from other kinds of social housing. Currently the primary provider of affordable rental housing in the ACT is Community Housing Canberra (T/A CHC Affordable Housing). Affordable rental housing caters essentially for people whose incomes are higher than Centrelink income support payments but not high enough to afford rent on the current private rental market. Affordable housing renters pay 74.99% of the market rent. More information regarding the eligibility criteria for particular community housing providers is contained in the *Housing Assistance Public Rental Housing Assistance Program (Community Rental Housing Assistance – Modified Eligibility Criteria) Determination 2012*.

An application for social housing may be posted to or lodged by hand at the Applicant Services Centre in Housing ACT's Belconnen office. An assessment interview will then be arranged with the applicant(s) to check that all necessary documentation has been provided and to give the assessing officer a fuller understanding of the applicant's needs. An assessing officer will also clarify whether the applicant wishes to register for public housing or community housing or both. If an applicant does not meet the criteria for public housing, but does meet the criteria for affordable rental housing, the application will be placed on the Social Housing Register accordingly, effective from the date the application was received.

Thereafter the management of public housing applications is different from that of community housing applications. The difference is clearly articulated in clause 3 of the Program:

The object of the program is –

a. to provide assistance to eligible people in the Territory who are most in need; and

b. to facilitate the provision of community rental housing assistance (including affordable housing assistance) by housing providers through the administration of a register that includes community applicants.

In effect, all the processes of public housing applications, from assessment to allocation, are managed by the Applicant Services Centre of Housing ACT. Community housing applications, on the other hand, are held by Housing ACT but the process of allocation is a decision of the community housing provider. The provider will notify Housing ACT when they have a vacancy. Housing ACT will supply the provider with a list of eligible community housing applicants from the Register, having regard to the date of the applications, the particular needs of the applicants, and the size and location of the available dwelling. More information about Housing ACT's facilitation role is contained in the *Housing Assistance Public Rental Housing Assistance Program (Facilitation of Community Rental Housing Assistance) Operation Guideline 2010 (No 1).*

In relation to public housing applications, which are the focus of this chapter, the first step in the assessment process is whether the applicant meets all the Eligibility Criteria. The second step is an assessment of need for the purposes of determining into which category of waiting list the application will be placed.

3.1. Eligibility Criteria

Clause 9 of the Program sets out the eligibility criteria as follows:

(1) An applicant is eligible for rental housing assistance if the applicant satisfies each of the following criteria –

a. each applicant is in Australia lawfully;

b. each applicant's presence in Australia is not subject to any time limit imposed by law;

c. each applicant is resident in the Territory and has been so resident for a period of six months immediately before the assessment date;

d. each of the applicants is at least 16 years of age;

e. none of the applicants has any interest in residential real property in Australia;

f. the combined value of assets of the applicants is not more than the asset eligibility limit;

g. if the household is 1 person only, the person's weekly income is not more than 60% of AAWE;

h. if the household is made up of 2 persons only, their combined weekly income is not more than 75% of AAWE;

i. if the household is made up of more than 2 people, the weekly income of the applicants plus 10% of the combined weekly income of all other independent people in the household is not more than 75 % of AAWE plus 10% of AAWE for each person in the household in excess of 2 people.

(1A) However, if the household is made up of only a sole applicant and one or more dependent children, the following criteria are substituted for subclauses (1) (h) and (i)—

a. their combined weekly income is not more than 75% of AAWE plus 10% of AAWE for each dependent child; and

b. for paragraph (a), unless the housing commissioner decides otherwise in particular circumstances, "dependent child" means a child under 18 years of age who is part of the household of a sole applicant and in relation to whom the applicant receives or is entitled to receive dependent child payments as defined in clause 25; and

c. for paragraph (a), "combined weekly income" is the weekly income of the applicant plus 10% of the combined weekly income of all other independent people in the household (if any).

For the purposes of clauses 9(1)(h) and 9(1A), Housing ACT periodically publishes updated Housing Income Barriers setting out the income ceilings for applicants in the single and family categories. As at 24 August 2018 the income ceilings are:

- $724 gross per week for a single applicant;
- $905 gross per week for a family of 2 or joint applicants;
- $905 plus $121 for each additional person in a family of 3 or more.

What constitutes income is set out at clause 11 in terms that largely mirror the definition of income under the *Social Security Act 1991.* It should be noted that clause 11(2) provides for the exemption of income "that the housing commissioner determines is not income for the person for this program". Exempt income is set out in the *Housing Assistance Public Rental Housing Assistance Program (Exempt Income and Assets) Determination 2012 (No.1).* For example, Family Tax Benefit (Part B) is exempt income, as is a resident's Youth Allowance where this is the young person's sole income.

Clause 12 sets out the process for determining weekly income. This is generally the higher of 2 figures: the average gross weekly income of the applicant for the 26-week period prior to the assessment date, or the person's gross income for the week immediately before the assessment date. There is some discretion to disregard both figures depending on the circumstances of the case (for example, a significant change in income which would not be reflected using either of the above methods of calculation).

For the purposes of clause 9(1)(f) the asset eligibility limit is set at $40,000 in the absence of any Determination.

The Housing Commissioner has discretion to disregard any of the eligibility criteria apart from the minimum age requirement at clause 9(1)(d). The exercise of the discretion is tied quite specifically to certain circumstances. Regarding a time limit on an applicant's presence in Australia [cl 9(1)(b)], the housing commissioner may decide "that a

certain time limit imposed by law is not relevant to eligibility". The exercise of this discretion has enabled refugees on Temporary Protection Visas to qualify for housing assistance.

Similarly, an interest in residential real property [cl 9(1)(e)] does not apply to property in which an applicant has an interest if "the housing commissioner decides it is not reasonable for the applicant to live in the property" on certain specified grounds, including pending action under the *Family Law Act 1975*, and is satisfied that the applicant has made or is making reasonable efforts to dispose of the applicant's interest in the property.

Clause 10 provides a more general discretion under the heading HARDSHIP:

If the housing commissioner is satisfied that, relative to the circumstances of eligible applicants generally, an applicant is suffering severe hardship that cannot be alleviated by any other means, the housing commissioner may, in his or her absolute discretion, disregard any criteria mentioned in clause 9 (other than paragraph 9 (1) (d)) in deciding whether the applicant is eligible for assistance.

The inclusion of the phrase "relative to the circumstances of eligible applicants generally" has the effect of limiting the exercise of this discretion. A decision under clause 10 is not reviewable.

3.2. Needs Categories

The Needs Categories and the criteria for allocating an application to a particular category are set out in the *Housing Assistance Public Rental Housing Assistance Program (Housing Needs Categories) Determination 2011 (No 2).*

There are 3 categories: Standard, High Needs and Priority. An approved application will be placed on the waiting list in the Standard category, unless the applicant is able to demonstrate a more urgent need.

To be placed on the High Needs waiting list an applicant must demonstrate "significant needs that cannot be resolved by any reasonable means other than the provision of public housing within a reasonable time frame".

To be placed on the Priority list an applicant must demonstrate "exceptional, urgent and critical needs that cannot be resolved by any reasonable means other than the early provision of social housing".

Allocation to the Standard or High Needs categories is made by the assessment officer and team leader. Allocation to the Priority category is a decision of a committee called the Multi-Disciplinary Panel (MDP), following a recommendation by the assessment team. It is necessary to satisfy the MDP that:

- the applicant has a range of complex needs with significant risk factors (or a single, extremely critical risk factor) that will be substantially alleviated by the provision of housing;
- the private rental market is unaffordable for the applicant because rent would be more that 50% of the household income; and
- the applicant has a capacity to live independently and sustain a tenancy.

For those on the Priority Needs list an offer of housing is made on a needs basis rather than in the chronological order of assessment date used for the other 2 categories.

Initially a time frame of 90 days was set for allocating applicants in the Priority category, but Housing ACT no longer offer any time frame because economic conditions have led to a large increase in Priority applications without a corresponding increase in housing stock.

3.3. Other applicant entitlements

Remaining registered

Whether the applicant is anticipating a long wait to be offered housing (the Standard list) or a shorter wait (the Priority list), the applicant must meet the eligibility criteria throughout the waiting period. An applicant's eligibility and needs category may be reassessed at any time by way of a written request for information to be provided by a stated date [clause 14]. The applicant's name may be removed from the register if he/she fails to respond to the request for information or fails to accept an offer of housing [clause 17].

2 offers

Irrespective of the category, an applicant is entitled to 2 offers. When a property becomes available and is identified as appropriate for a particular applicant, it is deemed to be an offer when the applicant is invited to view the property. If it is established the property did not meet the identified needs of the applicant, the offer may be withdrawn and 2 offers remain available to the applicant.

Type of accommodation and bedroom entitlement

A single applicant is entitled to a bedsit or 1-bedroom dwelling. For a single person with a child the entitlement is 2 bedrooms. A couple is entitled to a 1- or 2-bedroom dwelling and a couple with one child is entitled to a 2- or 3-bedroom dwelling. Generally, no more than two (2) children are expected to share a bedroom and children of different genders are generally not expected to share a bedroom. Also, where there is a large age gap, e.g. 7 years between children of the same gender, they would generally not be expected to share a bedroom. The bedroom entitlement criteria are fairly rigidly applied, though there is a discretion to allocate an extra bedroom in certain demonstrated circumstances; for example, a disability which makes it imperative for a child to have her/his own bedroom, or an extra bedroom is needed to accommodate a regular carer or a child/children on regular overnight contact visits.

Some public housing is designated for particular groups of people; for example, Aged Persons Units for applicants aged 65 and over, Older Persons Flats for applicants aged over 50, and some modified dwellings for people with disabilities.

Otherwise, the need for a particular type of dwelling (for example, low density complex, or no stairs, or an enclosed outdoor space) is determined by the provision of medical or other evidence as to the particular needs of the applicant.

Initial Rent

When an offer of housing is made, and the applicant signs a tenancy agreement, the requirement to pay initial rent is waived under clause 27 of the Program. Initial rent is rent for the remaining part of the week in which the tenancy agreement is signed, plus 1 full fortnight.

This provision does not apply where the applicant is transferring from one Housing ACT tenancy to another or a new tenancy has been created by the addition or vacation of a tenant.

Rent only is payable in respect of Housing ACT tenancies; bond is not a requirement of these tenancies.

The effect of debt from a previous tenancy

Clause 19 (8) of the Program allows Housing ACT to refuse assistance to an applicant if that applicant owes a debt or has breached a term of a previous tenancy agreement with Housing ACT. This provision only comes into effect at the point the assistance is to be provided and does not affect the right to apply for housing and be registered on a waiting list. In practice, debts owed or past breaches are raised at the time of application in order to give the applicant an opportunity to repay a debt and/or demonstrate their capacity to sustain a new tenancy well before the point of allocation.

The housing commissioner has a discretion to make an offer of housing despite a debt or past breach. The discretion is more likely to be exercised in cases where there is a history of regular repayments towards the debt and/or the impact of refusal would cause significant hardship e.g. homelessness.

Where a debt is statute-barred or expunged by bankruptcy, the power to refuse assistance will be invoked on the basis of a breach of a previous tenancy agreement and the applicant will be encouraged to enter into a "voluntary" repayment plan. This may have the effect of reactivating a statute-barred debt and an applicant should seek legal advice prior to entering into any repayment arrangement.

At any stage a person may seek review of a debt arising from a previous tenancy – see 5.2 below.

In some circumstances it is appropriate to seek waiver of a debt. Whilst an application for debt waiver goes initially to Housing ACT, the decision-making power rests with the ACT Treasury Directorate. There is no transparent policy in relation to waiver and decision-making has tended to be very slow.

Another method used by Housing ACT to recover debt is to make the repayment of the debt a condition of a new tenancy agreement – see 4.1 below: Endorsed Terms.

3.4. Transfers

An application by an existing Housing ACT tenant for transfer to a different dwelling is subject to the same processes and considerations as any other application for housing assistance. However, there are some additional provisions in the Program governing transfers.

Management-initiated transfer

Clause 28 of the Program empowers Housing ACT to require a tenant to transfer to an alternative dwelling in situation where:

a. "The physical condition … of the dwelling occupied by the tenant is likely to cause serious harm to the health and safety of the household or the public; or

b. A member of the household should be transferred in the interests of community harmony".

The power is broad, but infrequently used.

Transfer may also be required for the purpose of repair, renovation, disposal or redevelopment. These are grounds for termination of a periodic tenancy under the Standard Terms of the RTA, but Housing ACT will transfer rather than evict a tenant in these circumstances.

Transfer to a dwelling with fewer bedrooms

Where a tenant applies to transfer to a smaller dwelling, the eligibility criteria set out in clause 9 and the provisions relating to needs categories and waiting lists do not apply, on the basis that such transfer promotes the efficient use of housing stock [clause 20].

Mutual Exchange

Where 2 tenants wish to swap dwellings an exchange of tenancies can be approved by Housing ACT, providing that both households remain eligible for housing assistance and both are entitled to the house size to which they wish to swap. The exchange will also be subject to an inspection of each property and the requirement that neither tenant is in rent arrears. Housing ACT holds a register of applicants seeking to exchange dwellings. This is updated on a fairly regular basis, but no other assistance is provided to promote mutual exchange.

4. During the tenancy

4.1. Standard Terms

A Housing ACT tenancy is subject to the same Standard Terms of the RTA as all ACT tenancies. These terms regulate the rights and obligations of lessor and tenant in respect of quiet enjoyment, including the care, repair and maintenance of the premises, payment of rent, inspection, and how and when the tenancy may be terminated. In this chapter discussion will focus on those aspects of tenancy which are particular to public housing.

Endorsed Terms

Additional terms may be added to the Standard Terms but if an additional term is inconsistent with the Standard Terms, the inclusion of the term must be endorsed by the ACAT through a joint application by lessor and tenant. An example of an endorsed term that may be sought by Housing ACT is a requirement that the tenant make payments towards a past debt. Ordinarily, section 15 of the RTA provides that only rent and bond shall be consideration for granting a tenancy, but section 15 (5) allows the housing commissioner to require payment of an outstanding amount from a previous tenancy, provided this term is endorsed by the ACAT under section 10 of the Act.

While ACAT may refuse to endorse a particular inconsistent term, in practice endorsement is done in chambers, not by hearing, and there may be little examination of whether the term is unreasonably onerous or whether the debt to be repaid has been proven.

A Housing ACT Tenancy Agreement incorporates an attachment called "Housing Commissioner's Additional Terms". Some of these terms may be inconsistent with the Standard Terms and, if they are not endorsed terms, they may not be valid.

4.2. Calculation of rent

The rent for every Housing ACT rental property is set on the basis of "market rent" which is periodically reassessed (generally once a year). Most tenants do not pay market or "full" rent because they have an entitlement to rebated rent. Under the rent rebate system, rent is generally based on 25% of household income, irrespective of the size or quality of the dwelling itself. For example, the market rent may be $360 per week but for a tenant whose sole income is a Centrelink benefit of $540 per fortnight, or $270 per week, the rent payable will be $67.50 per week. Tenants generally pay rent fortnightly. Many Housing ACT tenants elect to pay rent by way of Centrelink direct deduction so that there is an automatic and regular pattern of correct payment on the tenant's fortnightly payday.

Clearly for tenants on such a low-income rebated rent is essential for survival in the current rental market. For other tenants – for example, a family which includes 2 adults in employment – 25% of household income may equal or be greater than the market rent in which case no rebate is payable. An obvious but important benefit of the rent rebate system for tenants is that a decrease in income generally results in a decrease in rent.

What is income for the purposes of rent rebate?

Income is defined in clause 11 of the Program in terms that largely mirror the definition in social security law: essentially "personal earnings, valuable consideration, profits or any other amounts … earned, derived, received or become entitled to …". Some classes of income are, however, exempt for the purposes of eligibility for housing assistance and rent calculation and these are set out in a Housing Assistance Public Rental Housing Assistance Program (Exempt Income and Assets Determination 2012 (No 1). They include Carer Allowance, Pensioner Education Supplement, Large Family Supplement, Family Tax Benefit Part B, and Youth Allowance payable at the single, at-home rate to residents in the premises who have no other form of income.

Conditions of rent rebate

The conditions of rent rebate are set out in clauses 25 and 26 of the Program. Rebate is usually granted for a period of 6 months (though in some cases the period is 12 months). In order to conduct a rebate assessment Housing ACT generally requires the completion of a Rebate Application form and a statement of income for the preceding 26 weeks. For tenants whose sole income is Centrelink benefits, it is sufficient to provide an authority for Housing ACT to obtain an income statement directly from Centrelink.

The rebate ceases at the expiry of the designated period unless the requisite information is provided and a new grant of rebate is approved. If the rebate expires or is cancelled, market rent is charged to the tenant's account and in many cases rent arrears accrue as a result. The housing commissioner has the power to backdate a grant of rebate in certain circumstances, allowing market rent charges to be replaced by rebated rent charges where, for example, a tenant has failed to apply for rebate by the due date because of illness. Conversely the commissioner has the power to disallow a grant of rebate where, for example, a tenant fails to declare a source of income for a period.

In addition, entitlement to rebate ceases where a tenant sublets the premises, stops living there or is absent without the consent of the commissioner, or is absent for more than 3 months. The commissioner has a discretion to consider the circumstances of each case.

Changes in household composition or income

Tenants are required to notify Housing ACT when an additional resident and/or income comes into the household. Providing the tenant notifies at the time of an increase in income (for example, a pay rise) Housing ACT's policy is to allow the current rebate to run its term before factoring the increase into the rent calculation. If, however, the tenant experiences a significant reduction in income during the rebate period, an immediate reassessment can be done to prevent financial hardship. Where an additional resident brings an income into the household or an existing resident gains an income, the policy is to reassess the rebate with effect from the date of that change.

Visitor or resident?

As for private tenants, Housing ACT tenants have a right of quiet enjoyment and exclusive use of their homes, including the right to have guests. At the point at which a guest becomes a resident, that person's income affects the tenant's rebate entitlement and Housing ACT must be notified. In considering whether a person is a visitor, Housing ACT will consider whether they normally reside at another address and the reason for their stay. Under Housing ACT policy, persons on Newstart Allowance seeking work and persons waiting for other accommodation are not regarded as visitors. According to Housing ACT policy, where a person is accepted as a visitor 'a period of grace' of 4 weeks which can be extended to 6 weeks is allowed before they are regarded as members of the household and tenants have to declare their income on the rental rebate application.

Gaining employment after a period of unemployment

Where a tenant gains employment after a period of unemployment, the existing rebate is extended for a further 6 months from the date the employment started. This policy takes account of the additional expenses of commencing employment.

No income

There is a minimum rent charge of $5 per week even in circumstances where a tenant has no income. If the loss of income is the result of incarceration or entering a residential rehabilitation or mental health facility for an extended period, rebate is generally approved for the payment of minimum rent for a period of up to 6 months. There is a discretion to extend the grant of rebate on this basis in certain circumstances.

Not claiming Centrelink

Where a tenant chooses not to claim Centrelink benefits and has either no income or an income less than the relevant Centrelink benefit, Housing ACT is enabled by clause 11 (3) of the Program to deem the tenant to be in receipt of the relevant Centrelink income on the basis that this income is reasonably available to the tenant. The rebated rent is then 25% of the deemed income.

4.3. Market rent increases

The law governing market rent increases is covered by the RTA. 8 weeks' notice of a rent increase must be given in writing and rent increases may not be at intervals of less than 12 months. There is, however, specific provision in the Act allowing Housing ACT to do a rent review in a new tenancy within less than 12 months, in order that Housing ACT may conduct rent review of all its properties at the same time each year. Reviews generally result in an increase in the market rent. This may not affect most tenants who are in receipt of a rebate, and for some tenants the increase will mean that they now have a small rebate entitlement.

Seeking review of rent increase

A tenant who is affected by a market rent increase, or may be in the future, and believes the increase is excessive may write to Housing ACT advising why the increase is excessive and asking that it be lowered or withdrawn. If there is no satisfactory response, the tenant may apply to ACAT to have the increase reviewed. If the tenant wants to retain this option, they must lodge an application with ACAT at least 14 days before the rent income is due to come into effect. There are some special circumstances where

ACAT will accept applications up until the day before the increase is due to come into effect but a tenant shouldn't count on this. ACAT does not have the power to hear an application disputing a rent increase once the rent increase has come into effect.

ACAT may disallow part or all the increase if they find it to be excessive based on a formula provided under Section 68 of the RTA. If the increase is more than 20% greater than the relevant increase in the Consumer Price Index, as it relates to housing in the ACT, Housing ACT must satisfy ACT that the increase is justified. If the increase is less than 20% but the tenant believes it is excessive, the onus is on the tenant to satisfy ACAT of this.

Under section 68 of the RTA, in deciding whether an increase is excessive, ACAT will consider:

a. The rent before the proposed increase;

b. Whether it has been increased previously, the amount of that increase, and the period since that increase;

c. Housing ACT costs in relation to the dwelling;

d. Services provided by Housing ACT to the tenant;

e. The value of fixtures and goods supplied as part of the tenancy;

f. The state of repair of the dwelling;

g. Rental rates for comparable dwellings;

h. The value of any work performed or improvements made by the tenant with Housing ACT's consent; and

i. Any other matter that ACAT considers relevant.

In considering these matters, no one factor carries more weight than another. The weight to be attached to each factor may vary depending on the circumstances of each case.

Whilst in the past, Housing ACT's market rents have been somewhat below the level of rents commanded in the private rental market, in recent years substantial rent increases have been introduced on most properties. A good deal of Housing ACT's stock is quite old and deteriorating. A Housing ACT tenant may be of the view that the condition of the dwelling does not justify the rent increase sought. Maintenance and repair of Housing ACT properties has long been a bone of contention.

4.4. Tenancy Breakdown

"Tenancy breakdown" is the term given at clause 19 of the Program to the circumstances in which a tenant is no longer living at the dwelling but 1 or more occupants remain in the dwelling. The circumstances include where the tenant dies, is physically or legally unable to occupy the dwelling or wishes to give up the tenancy in order to live elsewhere. In such circumstances Housing ACT may transfer the tenancy to the remaining occupant(s). The exercise of this discretionary power is set out in the *Housing Assistance Public Rental Housing Assistance Program (Exceptions and Miscellaneous Matters – tenancy breakdown) Operation Guideline 2008 (No 1)* and will depend on a number of factors, including the length of time the dwelling has been the occupant's home. In general Housing ACT will be reluctant to grant tenancy of the dwelling to the remaining occupant(s) if the size of the dwelling is beyond the entitlement of the occupant(s). In those circumstances, "some other available dwelling" may be provided to the remaining occupant(s).

5. The appeals process

5.1. Administrative review

Most administrative decisions of Housing ACT may be appealed. Reviewable decisions [clause 30] include:

- Refusal of application for housing assistance or transfer;
- Removal of applicant's name from the Applicants Register or refusal to restore the applicant's name to the Register;
- Refusal of a particular category of Housing Needs;
- Refusal of rebate or other decision related to rebate entitlement.

The non-reviewable decisions all relate to applications. They are:

- Decisions made by the housing commissioner "in his or her absolute discretion":
- waiver of eligibility criteria on the grounds of hardship (clause 10);
- the provision of early housing assistance in extreme circumstances outside of the normal assessment processes, including the provision of a tenancy to an occupant following a tenancy breakdown;
- the provision of a "specified dwelling" (a dwelling which may be difficult to let);
- the provision of a "special needs dwelling" to a special needs applicant (clause 19);
- Decisions in which transfer is required by Housing ACT on the grounds of the physical condition of the dwelling, or in the interests of community harmony, or for the purpose of renovation or disposal of the dwelling (clause 28); and
- A decision under clause 20(4) that the eligibility criteria and the normal assessment processes do not apply to transfer applications which will result in transfer to a dwelling with fewer bedrooms.

Reviewable Housing ACT decisions are subject to an internal review process in the first instance and may then be appealed to the external review body which is the ACAT (incorporating the former ACT Administrative Appeals Tribunal). The time limit for both internal and external review is 28 days from the date of receipt of the decision, though both Housing ACT and the ACAT may allow an extension of time in certain circumstances.

Internal Review

Under clause 31 (4) of the Program:

"If the housing commissioner receives a request, the housing commissioner may-

a. review the decision; or

b. refer it to an advisory committee established by the housing commissioner for recommendation and accept, vary or reject the recommendation."

At present, there continues to be a 2-tier internal review process. In the first tier the request for review is considered by a senior manager who may vary or affirm the decision. If dissatisfied with the outcome, the appellant may request that the decision be referred for second level review. The decision may then be considered by a body called the Housing Assistance Tenancy Review Panel (HATRP) comprised of senior Housing ACT officers. The HATRP makes a recommendation that is contained in a more detailed written report. The decision is then made by the Director of Housing who may affirm or reject the recommendation of the HATRP.

Decisions from both tiers must be given to the appellant within 28 days of the making of the decision, but no time frame is given for the decision-making process.

External Review: the ACT Civil and Administrative Tribunal (ACAT)

There is an application form for review of decision by the ACAT. This may be obtained from the Registry or online at www.acat.act.gov.au. There is a filing fee of $351 for applications for review of Housing ACT administrative decisions, though applicants may seek waiver of the fee and this will generally be granted to a person on a low income.

The Tribunal's powers and procedures are set out in the *ACT Civil and Administrative Act 2008* (the ACAT Act).

The ACAT will notify Housing ACT of the application for review of decision and Housing ACT will have a period of time, generally 28 days, in which to provide the documents relating to the application, including the reasons for the decision. These documents are sent to the applicant and a Directions Hearing date is set down. This is a relatively informal process to discuss the best way

to proceed with the matter depending on the issues involved. Generally, at the Directions Hearing, ACAT will set down a timetable for the matter. This will usually include setting a date for the preliminary conference, setting dates for the filing of witness statements, witness list and a statement of facts and contentions and a second directions hearing in the event that the matter is not settled. A preliminary conference is a relatively informal opportunity for the parties to come together to discuss the appeal in the presence of an ACAT Member. The Member's role at this conference is to help the parties identify the issues in dispute and explore options for resolving the dispute by agreement without the need for a hearing.

If the matter is not settled, a second Directions Hearing will be held to check that all the material has been filed and the matter is now ready to proceed to hearing.

The hearing is relatively informal, and the Tribunal Member will generally assist to guide unrepresented applicants through the process. The proceedings are generally open to the public and are tape-recorded, though a hearing may be held in private and publication of evidence may be restricted if the Member is satisfied there is sufficient reason for this.

The Tribunal may give the decision orally at the end of hearing but will more often reserve the decision and issue it in writing at a later date.

Appealing an ACAT decision

An appeal may be made against an ACAT decision within the ACAT itself and the appeal may be made on a question of fact or law. The ACAT has an appeal president who may dismiss the appeal or may appoint an appeal tribunal to review the decision. The appeal tribunal must include a presidential member and must not include the tribunal member who made the original decision.

Appeal to the Supreme Court

A decision of the appeal tribunal, including a decision to dismiss an appeal, may be appealed to the Supreme Court. This appeal too may be made on a question of fact or law, but the Supreme Court must grant leave to appeal before the appeal can be heard. An appeal to the Supreme Court must be lodged within 28 days of the decision of the appeal tribunal. Unlike the ACAT, the Supreme Court is a jurisdiction in which costs are usually awarded against an unsuccessful party.

5.2. Review of tenancy matters

Resolution of tenancy disputes is achieved by application to the ACAT, but some tenancy matters may be reviewed first by Housing ACT's internal processes. Examples of these are market rent increases (discussed at [4.3] above), termination of the tenancy by the lessor (discussed at [6.6] below), and "tenant-responsible maintenance" debts.

Tenant-Responsible Maintenance (TRM) debts

Under the RTA tenants are liable for the cost of restoring damage caused intentionally or negligently by themselves, other occupants or visitors. They are not liable for the cost of restoring damage caused by those on the property without the tenant's permission.

It is Housing ACT's practice, if not policy, to raise as debts the costs of a great many repairs that may be lessor-responsible maintenance where the deterioration has arisen from normal usage by the tenant and the passage of time – fair wear and tear. It is also common for the tenant to be charged for repairing a lock that has been broken during a burglary or a window broken by vandals. When a tenancy ends, a debt (sometimes very large) may be raised on the basis of the work that needs to be done prior to re-letting the premises, with insufficient consideration of whether the vacating tenant caused damage.

All such charges may be reviewed. If the tenant or former tenant is not satisfied with the outcome of the internal review, the matter may be determined in the ACAT. Either party may make the application to ACAT. In practice, it is not common for an application to be made unless the alleged debt is very large, in which case Housing ACT may apply, or the alleged debt is a barrier to future housing assistance and the tenant applies on the basis the ACAT may resolve the dispute in her/his favour.

An application for resolution of a tenancy dispute attracts a fee. Currently fees range from $74 (for an application in which the amount in dispute is less than $3000), $156 (where the amount in dispute is between $3001 to $15 000) to $559 (where the amount in dispute is more than $15,000). People on low incomes may seek waiver of the application fee.

6. Termination of tenancy

The termination of a Housing ACT tenancy by either party is governed by the Standard Terms of the Act and the powers of the ACAT at Part 4 of the Act. In addition, there are certain processes and considerations particular to the termination of Housing ACT tenancies.

6.1. Termination by the tenant

As all Housing ACT tenancies are periodic, a tenant may terminate the tenancy by giving 3 weeks' notice. Housing ACT has its own Notice of Intention to Vacate form for this purpose. The tenant is required to leave the premises in substantially the same condition and substantially as clean as at the commencement of the tenancy, subject to fair wear and tear. Housing ACT will generally conduct a pre-vacation inspection once the tenant has given notice, and always when the tenancy is ending because of transfer. The Housing Manager will identify cleaning and repairs they believe need to be done before the tenant returns the property to Housing ACT. As many Housing ACT tenancies last many years, in some cases upward of 40 years, there may be no record of the property's original condition and limited records of the tenant's request for repairs and lessor's maintenance. In these circumstances the objective requirements may be difficult to determine, and dispute is common.

A final inspection is generally conducted on the last day of the tenancy. It is important for the tenant to return the keys to Housing ACT to mark clearly that the tenant no longer has possession of the property from that day and time.

6.2. Termination by Housing ACT

The principal of security of tenure still underpins Housing ACT tenancies to a large extent. It is relatively rare for Housing ACT to use the "no cause" provision in the Standard Terms (clause 94). It is generally used in only three circumstances. The first is in relation to clause 28 of the Program which requires the tenant to move to another dwelling for reasons of safety or community harmony. If the tenant refuses to move, Housing ACT may issue a 26 week Notice to Vacate. The second circumstance is a more recent development in which a 26 week notice may be given to a tenant whose annual household income has exceeded $94,855.70 in 2 consecutive years. A tenant can seek internal review of the decision to terminate the tenancy and consideration is given to a range of individual circumstances.

The third situation in which the 26 week notice provision may be used is where the tenant is incarcerated for a period of more than 6 months. These notices have also been given to tenants who are unable to occupy their home because of bail conditions or because they are in long term residential rehabilitation.

Apart from these three situations, the reasons for termination by Housing ACT will be an alleged breach of the tenancy agreement by the tenant. In some instances, the breach will be evident: failure to pay rent, for example. In other cases, whether there is a breach by the tenant is very much a question to be determined by reference to evidence.

Non-payment of rent

In accordance with the Standard Terms, if a tenant is 7 days or more in arrears of rent, Housing ACT may issue a Notice to Remedy giving 7 days for the arrears to be paid. If the tenant fails to pay the arrears, on or after the 8th day Housing ACT may issue a Notice to Vacate giving 14 days, and, if the tenant fails to vacate, Housing ACT may apply to the ACAT for a Termination and Possession Order (TPO).

In practice the Housing Manager will endeavour to establish the cause of non-payment or underpayment of rent and will encourage the tenant to enter into an arrears repayment arrangement. Given the low incomes of most tenants, repayment of rent arrears can only be by instalments. A Notice to Vacate on the grounds of rent arrears is not usually issued if the tenant is making regular payments of rent plus an arrears component.

Generally, Housing ACT will seek to recover outstanding rent without seeking eviction. Under section 49A of the RTA, ACAT has the power to make a Payment Order which allows the tenancy to continue on condition of payment of rent and arrears in accordance with the orders. If the tenant fails to comply with a payment Order, Housing ACT may apply to ACAT for a termination and possession order. If the termination and possession order is granted, ACAT must direct the registrar to issue a warrant for eviction.

The current policy of Housing ACT in relation to rent arrears is that eviction is the last resort. If the tenancy manager is of the view that it may be appropriate for Housing ACT to seek eviction, the matter will generally be referred to the review body, the Housing Assistance Tenancy Review Panel (HATRP) for a recommendation of whether or not to seek an Unconditional Termination and Possession Order. Underlying problems experienced by the tenant may be picked up at the HATRP review: for example, arrears arising from loss of rebate, which may be addressed administratively, or a health issue affecting capacity to pay, addressed by referral to support services.

ACAT has tended to be reluctant to evict Housing ACT tenants, particularly where there are children involved, because of the detrimental effects of homelessness for people on low incomes who may have no other housing options. This concern is balanced by consideration of the public purse and eviction may be the final outcome for persistent non-payment of rent. This is more likely to be the case where the tenant does not attend the hearing or provide ACAT with any account of the cause of the rent arrears.

Breach other than non-payment of rent

If Housing ACT wishes to seek ACAT orders under section 48 of the RTA, in respect of a breach other than non-payment of rent, they must issue a Notice to Remedy giving the tenant 14 days to remedy the breach. If after 14 days there is no remedy, or the breach is not capable of remedy, a Notice to Vacate giving 14 days may be issued. The kinds of breaches for which Housing ACT seeks ACAT orders include:

- Failure to provide access for inspection
- Failure to take reasonable care of the premises
- Making an unauthorized alteration to the dwelling
- Causing or permitting nuisance and/or interfering or permitting interference with the quiet enjoyment of neighbours.

It is important to note that before making a Termination and Possession Order under section 48, ACAT must be satisfied that there is a breach of the tenancy and the breach justifies eviction.

"Nuisance" applications are particularly problematic because there may be little or no evidence of the alleged breach. Since mid-2008 an amendment to section 48 has empowered the ACAT to make a TPO if the ACAT has previously made an order for performance of the tenancy agreement – that is, an order requiring the tenant to comply with the terms of his/her agreement – and the ACAT is subsequently satisfied that the tenant has breached that order. It has become the practice of Housing ACT, in response to a complaint about a tenant's behaviour, to issue a Notice to Remedy and then apply to the ACAT for a "General Order" requiring the tenant to remedy the breach, and an order for compliance with the tenancy agreement. In some cases, such orders may be sought and obtained, often *ex parte*, with little or no evidence presented to ACAT. ACAT may set the matter down for full hearing or invite the parties to settle the matter by consent. It is not uncommon for ACAT to make orders that the tenant is to comply with the tenancy agreement. It is a relatively small step from such an order to an application for termination and possession based on an alleged breach of that order. It should be noted that the Tribunal must be satisfied not only that a breach has occurred but that the breach justifies the termination of the tenancy.

Having regard to the challenges facing some public housing tenants – including limited literacy or education, non-English speaking backgrounds, cultural alienation, poverty, mental health issues, other disabilities, and a preponderance of tenants with some or all of these problems in high density complexes – it is not difficult to see how a neighbourhood dispute may be a slippery slope to eviction.

Housing ACT has made some investment in policies and staffing to find alternative approaches to eviction action in relation to disputes between neighbours, but this remains a vexed area for both lessor and tenants.

7. Contacts and links

Canberra Community Law (formerly Welfare Rights and Legal Centre)	Telephone advice service: 6218 7977 Website: www.canberracommunitylaw.org.au
ACT Civil & Administrative Tribunal (ACAT)	Telephone: 6207 1740 Website: www.acat.act.gov.au
Housing ACT	Gateway Services: 6207 1150/133 427 Maintenance: 6207 1500 Website: www.communityservices.act.gov.au

8. Disclaimer

This chapter contains general information available at time of publication. It does not constitute legal advice. If you have a specific legal problem, please contact Canberra Community Law on (02) 6218 7977.

Canberra Community Law is entirely independent of Housing ACT. All assistance is free.

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