

**Submission  
No 17**

**INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE  
TRIBUNALS IN NSW**

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The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
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To the Chair

Please find enclosed my submission regarding your committee's inquiry into opportunities to consolidate Tribunals in NSW.

Housing NSW continues to work closely with government and others in providing clients access to affordable and secure housing products. Your inquiry gives me a unique opportunity to work with your committee in the development of future structures of which Housing NSW remains a key player.

Housing NSW has a wide and diverse client base. Many of our clients could be categorised as having complex life needs, and limited access to private housing. During my time with Housing NSW I have recognised that many of my clients have significant impediments in dealing with their day to day challenges. In response to these pressures Housing NSW has developed a range of polices that assist clients sustain housing. The use of the Consumer Trading and Tenancy Tribunal has an important role as it can assist Housing NSW with an early intervention mechanism.

The purpose of this submission is to provide the committee some insight into the challenges our clients face as well as identify risks and opportunities that I have identified after reflecting on the committee Terms of Reference.

I welcome the opportunity to present this submission to the Law and Justice Committee. I along with the staff of Housing NSW are committed to delivering housing products to assist those people in greatest need, many of whom have limited housing options. My role as a middle manager for Housing is to ensure that these services are delivered in a consistent and cost effective manner. The amalgamation of various tribunals across NSW has the potential to deliver further efficiencies for my clients and organisation.

If the committee wishes to seek clarification on any of the matters raised please do not hesitate to contact me.

Timothy Flynn

SUBMISSION TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND  
JUSTICE  
INQUIRY INTO OPPURTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

1. Introduction

Housing NSW (HNSW) is the largest provider of social housing in Australia. Tenants of properties managed by Housing NSW are typically those on low to moderate income households who often have complex life circumstances. Many tenants have a history of homelessness, unstable housing or have difficulty in accessing tenancies in the private rental market. HNSW understands these complexities and has implemented a series of early intervention policies that include linking clients to services, intensive management and seeking Consumer Tenancy and Trading Tribunal (CTTT) Orders in order to rectify tenancy breaches before they escalate to a point where the continuation of the tenancy is jeopardised.

My role in HNSW as an operational manager gives me a 'front line' view of the difficulties HNSW staff, clients and managers have in dealing with the complexities of tenants and the CTTT.

There has been a marked increase in the number of applications received by the CTTT relating to social housing tenants. The CTTT application cost to HNSW for 2010 totalled \$317,415.00 an average of \$26451.25 per month. In 2011 this cost has risen to \$297,407.00 to September. An average cost of \$33045.22 per month. Total expenditure costs for HNSW for this year are expected to exceed \$396,500.00. Application fees have not risen during this time and remain at \$36.00 per application. In March 2011 1,432 social housing applications were lodged with the CTTT Liverpool Registry. This registry handles approximately 12% of the total workload of the CTTT.

Increases in cost have occurred despite a key objective of the Tribunals that they be quicker, cheaper and more effective. This cost increase to the organisation is reflective of Housing NSW's strategic role as an early interventionist for tenancies considered at risk.

This review gives HNSW the opportunity to present to the Law and Justice Committee its view on how the amalgamation of tribunals in NSW will affect the business operations of HNSW and indirectly social housing tenants.

2. Background

In preparation of this paper a number of strategies were used in the information gathering exercise. Opinions were sought from Housing NSW tenancy staff, Legal Services, operational managers and staff who work directly with the CTTT. A search of the Australasian Legal Information Institute case data base was also completed to assist with case review data.

The research identified a number of issues and risks for HNSW pre amalgamation and it is these concerns that form the basis of this submission to the Committee.

3. Paper Rationale

The Standing Committee on Law and Justice has a Terms of Reference (ToR) paper that outlines what issues that the Committee is seeking comment on. The ToR outlines a number of options that are under consideration and the purpose of this paper is to offer comment on and too address these options within the context of HNSW priorities.

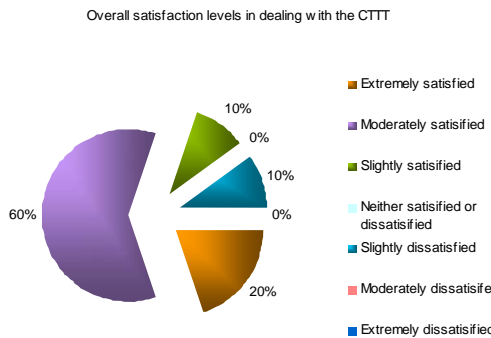
4. Research Findings

The Consumer, Trader and Tenancy Tribunal's primary objective is to provide an accessible Tribunal that resolves disputes and issues that are brought before it. Housing NSW staff's interaction with the CTTT is limited to its role as a social housing Landlord. The Tribunal defines its objectives to ensure that:

- Is accessible

- Is efficient and effective
- Proceedings are informal, expeditious and inexpensive
- Decisions are fair and consistent

Findings from Housing NSW have raised questions as to the success of the Tribunal in meeting these objectives. A number of commonalities regarding HNSW staff experience in their dealing with the CTTT arose as a result of this research.



“The explanations that Members can provide to tenants detailing the severity of their situations and breaches in their tenancy agreements, it is often useful in successfully salvaging a tenancy”

“The flexibility shown by most of the members.”

“Ease of use - Applications, Hearings, Decisions”

“The professionalism and manner which most Members now deal with HNSW matters. Some Members in the past have been difficult and have treated HNSW reps differently to other landlords.”

*Survey Commentary 2011*

Feedback from HNSW staff was generally positive. Of particular note was the introduction of the electronic application lodgement system with many staff seeing this as an effective and efficient use of resources. The introduction of the electronic lodgement system has given the CTTT cost efficiencies due to the introduction of a simpler and more efficient application process for users. Previous manual systems are recognised as being less efficient and more staff intensive. Data provided by the CTTT Liverpool Registry indicates that during March 2011 HNSW made 1432 applications. 90% of those applications were made using the electronic application system. This compares favourably to other users where electronic application rates for the same period were only 55%.

#### HNSW Experiences with the CTTT -“Is Housing NSW treated differently?”

Positive View	Negative View	Neither Positive or Negative
In my experience I think HNSW is treated better than some of the Estate Agents and Private Landlords. Members are often telling them off for lack of paperwork etc.	YES. Housing NSW are made to jump through MANY more hoops than private landlords. Housing NSW are expected to provide more assistance. SOME CTTT Members are loathe to terminate Housing NSW tenancies despite the continual breach of the agreements. I personally have been told by a CTTT Member that "Housing NSW are the last line of defence for these people, where else do you expect them to live". Housing NSW would not take a termination matter to the CTTT unless they had attempted to rectify the issue before hand.	Yes, but in some cases this is necessary. We deal with tenants with a variety of complex issues and this needs to be taken into account. The view of HNSW as a landlord of last resort is not necessarily true anymore and it is an outdated concept that needs to change.
It varies - it would appear that sometimes the CTTT member requires a higher burden of proof from HNSW and gives more leniency to HNSW tenants (although this is not a bad thing given the vulnerability of our clients and the serious implications of losing a HNSW	Definitely! My experience has been that members expect HNSW to remedy all problems for a tenant especially in relation to poor property care issues.	Not often. I do have experience with one particular member who is reluctant to give terminations, this includes cases under Section 89 (5). However overall I feel I am treated fairly.

property).		
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HNSW has been a primary driver in the implementation of systems that deliver simpler and more efficient administrative Tribunal processes. It is difficult to comprehend why these efficiencies have not been realised in either reduction of costs to the organisation or preferential consideration in management of hearing allocations. CTTT registrars delegate hearing times to HNSW. It has been confirmed by various Deputy Registrars that, the "Unavailable date option" will not be considered by the Tribunal when listing the application for a first hearing". This option is available on all electronic applications but is ignored by the CTTT regardless HNSW availability. It is not known if the same policy is implemented for Private Landlords. Feedback from HNSW staff is that this directive is not limited to 'first' hearing applications. The unintended consequence of this policy is that HNSW staff are often required to attend multiple hearings in different rooms. Avoidable delays occur due to number of adjournments due to staff availability issues or that HNSW are expected to present a large number of matters on one occasion. This is a serious workload issue for HNSW and points to a greater concern that the current Tribunal structure is inflexible and unresponsive to the business requirements of its largest client, HNSW.

Tribunal amalgamation provides an opportunity for improving client relations with key users. Improvements in service provision can deliver improved outcomes for Tribunal clients. Improvements in I.T administrative systems, Tribunal support of the use of Section 34 Paper hearings, increased use of telephone and video conferencing will deliver a more cost effective and flexible dispute resolution process.

In 2002 the Ombudsman and Police integrity Commission undertook a review of NSW tribunals and as a result a number of recommendations were made regarding consolidation. Since this initial review there has been the introduction of the Consumer, Trader and Tenancy Tribunal Amendment Bill in 2008. Feedback from HNSW staff has been that there has been a growing concern over the operations of the CTTT.

Concerns are:

- Quality and consistency of decisions
- Knowledge of the Member regarding the Residential Tenancy Act
- HNSW is treated differently by the CTTT
- Tribunal environment becoming more combative
- Inflexible in its day to day operations

CTTT Case Study:

Question of CTTT equity of determinations –Termination Not granted –Drug House  
NSW Land and Housing Corporation V Firkbank SH08/53433

Case Outline:

The property was used for the cultivation of cannabis plants and included modifications to at least two rooms for improved lighting and larger growing areas for plants. Tenant pleaded guilty in Criminal Court to charges of cultivation and was proved guilty to charges of 'supply'.

Orders made:

- The tenant shall not use, or cause, permit the premises to be used for any illegal purposes.
- If orders are breached then the landlord may apply for a re-listing of the matter at any time before 5 November 2009.

Member Notes:

The member in his notes has stated that despite his findings that there had been a serious breach of the tenancy and the fact that the property had been found to of been used for the growing and cultivation of illicit drugs and that the tenant had actively and

knowingly engaged in this activity (as per criminal charges) that additional the weighting of his considerations and his subsequent determinations should be given to:

- Tenant finding private accommodation
- Medical history
- Likelihood to re-offend

The Member noted, "in my view, it would be harsh and oppressive, indeed crushing, to terminate the tenancy in this particular case and despite having concerns when any of these types of breaches of this nature come before the Tribunal".

Operational Manager Concerns:

- Member's view has far exceeded the legal requirement for social housing considerations, including consideration of Swain.
- That the failure of the member to terminate this tenancy, despite his findings of a serious breach:
  - Sends the wrong message to the tenant
  - Community perceive outcome as a failure and are less willing to engage with Police or HNSW in the future
  - Impacts on the capacity of HNSW staff to act in similar matters
  - Reinforces the view that Members of the CTTT are loath to evict tenants under any circumstances
  - Supports the ideology that HNSW is viewed as last resort housing and this impacts on Members decision making capacity despite evidence and legal precedence
  - Members are inconsistent and considerations often exceed what would be normally considered if application was made by a private landlord

Case Study Two Comparison:

Neems V Hogan & Anderson S92 Termination due to assault

NSW Land and Housing Corporation V Johns Termination due to assault

In both matter allegation of a serious assault had been alleged. Findings from Members:

- There was a breach of Tenancy agreement
- Breach was of a serious nature
- Neems V Hogan –Termination Orders Granted
- Housing V Johns –Discretion should be used not to terminate tenancy

There were many matters identified where Tribunal members expressed views that would not be considered for private landlords in the Tenancy Division. My professional experience has been that Members often bring value judgements to the Tribunal and therefore staff find it extremely difficult to argue from a legal position. Concerns and points of difference were many and difficulties seeking Termination Orders being declined and a Specific Performance Order be determined in place of, vacant possession times (often much longer), and re-list timeframes (often much shorter).

In my experience HNSW has always been held to a much higher level of proof when compared to private landlords. Neems V Hogan & Anderson, S92 Termination due to assault is prime example of the differences in consideration used and the notations made by differing Tribunal Divisions.

It is incumbent on the Tribunal to facilitate determinations within the given legal framework and in consideration on the rights and responsibilities accorded to HNSW.

The recent matter NSW Land & Housing Corporation V Brennan has highlighted a particular concern that HNSW has raised previously and remains unresolved. That is the most appropriate jurisdiction regarding appeals regarding HNSW matters. In this case the matter was heard across two jurisdictions. District and Supreme Courts. This proved costly and time consuming for all parties. A clearer process for tribunal appeal matters should be considered and the nomination of a single court that should have carriage of these matters is a key component of our recommendation.

The purpose of my submission is to bring to the attention of the Committee the risks associated for an organisation where these inequities are present, where as a consequence of structural changes there remains an increasing risk of loss of 'subject' matter expertise and subsequently a growing view that there will be increasingly poor or inconsistent determinations made by Tribunal Members. That this will lead to a lack of flexibility in the manner in which members operate and that this will lead to a more complex and combative working environment leading to higher costs, increased delays, hearing times and loss of previously gained operating efficiencies.

This is contrary to the purpose and objectives of the Committee considerations.

#### 5. Business Imperatives

The Terms of Reference paper details four amalgamation options. Each having advantages and disadvantages. HNSW recognises that it must be an operational imperative regardless of future structure and that any future amalgamated body deliver:

- Consistent and transparent decision making
- Consolidation of expert matter knowledge
- Outcomes conform with legislative requirements of the Residential Tenancy act
- HNSW receive fair and equitable treatment as a client
- Cost efficiencies across all of government
- Greater flexibility for the organisation
- Capacity to deliver 'best practice' and flexibility in decisions in operations and determinations
- Simpler business process allowing for speedier and cost effective delivery for clients
- Encourage easier access for applicants and respondents to resolve matter by way of conciliation rather than formal hearing
- No reduction of service provision to HNSW and its clients by loss of hearing rooms or difficulties in accessing professional legal services for respondents such as tenancy advocate services

#### 6. Options Preference Rationale

Research findings show that when asked HNSW staff had a strong preference for Option 3 as outlined in the ToR. It was understood that this would be a more costly option, at least in the short term, however any costs could be offset by introducing the NCAT over a slightly longer timeframe.

Advantages as seen by HNSW staff were many and included, cost efficiencies that could be gained by 'scale'. A single point of entry for clients was also seen as highly desirable. Regional HNSW staff were concerned that there would be a reduction of access points however did accept that amalgamation also gave the NCAT opportunities to expand its capacity by improving I.T systems, remote access offices and conferencing facilities.

Concern remained with HNSW staff was that regardless of any structure a key issue was to ensure that Members knowledge of the Residential Tenancy Act was to the required standard. Whilst there may be some adjustment initially it was felt that with a broader and more experienced knowledge base this would allow for better decision making, more consistent decisions and a wider variety and understanding of issues facing social housing clients from a wider section of the general populace. The proposal that the Tribunal would comprise of members with a wide diversity of skills and opinion was generally seen as a positive.

HNSW primary aim continues to be to sustain tenancies. The effective use of the NCAT is seen by HNSW as an opportunity to grow our assistance and support for our staff and clients during this inquiry and any future changes.

HNSW is keen to be part of these discussions and as a key client of the Consumer Trading and Tenancy Tribunal wants to be engaged and be a driver of for any future amalgamation.