

Mould in a Residential Tenancy

Why is Mould an issue of repair?

Mould in a residential tenancy is a matter of disrepair. In *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [113], the Appeal Panel of the NSW Civil and Administration Tribunal held that “[t]he obligation to repair includes an obligation to make good and maintain internal surfaces affected by mould which is caused by defects in the exterior of the premises”. A landlord who fails to comply with this strict duty can be liable for damages for loss suffered by their tenant.

Under the residential tenancy agreement, a landlord has a strict duty to provide and maintain the residential premises in a state of good repair and is fit for habitation. It is a legal duty.

Tenants’ Rights and Obligations

The landlord has a covenant to ensure that tenant has quiet enjoyment of the residential premises. Section 50 of the Residential Tenancies Act 2010 provides:

- (1) *A tenant is entitled to quiet enjoyment of the residential premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title (such as a head landlord) to that of the landlord.*
- (2) *A landlord or landlord’s agent must not interfere with, or cause or permit any interference with, the reasonable peace, comfort or privacy of the tenant in using the residential premises.*

Mould and general repair and maintenance issues interfere with the tenant’s rights to quiet enjoyment of the residential premises. The tenant can commence proceedings at the NSW Civil and Administration Tribunal (NCAT) if that right is compromised. NCAT will make orders binding the landlords to specifically perform their legal duty and to ensure that rights and privileges of the tenant under the law are respected.

Additionally, where the tenant has suffered loss of personal belongings because of mould, they may seek damages at NCAT. They must demonstrate to NCAT that the loss or damage suffered was a direct consequence of the landlord’s failure to “provide or maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises” required under section 63 of the Residential Tenancies Act 2010. Section 63 of the Residential Tenancies Act 2010 is the general obligation of the landlord. More information on the landlord’s obligation can be found in our article [Repairs and Maintenance Issues in Residential Tenancies](#).

Tenants also have obligations under the residential tenancy agreement. They must ensure that the residential premises are kept clean at all times. Importantly, they are required to notify the landlord of any damage to the residential premises whether they are responsible or not. Tenants are liable for any damage they caused or their visitors caused. Tenant damage may be subject to valid claims by landlord on their rental bond. More information can be found in our article [Rental Bond Disputes](#).

Damages for loss

The Residential Tenancies Act 2010 has given general powers to NCAT to make orders for compensation or payment of money for loss suffered by tenants and landlords arising from a breach of the residential tenancy agreement. In order to determine loss for breach, NCAT will give considerations to obligations of both landlord and tenant arising from the residential tenancy agreement.

In the case of *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 (*Roberts v NSW Aboriginal Housing Office*), the Appellant tenant sought orders to set aside NCAT's initial decision dismissing their application for reducing the rent because of mould and other repair and maintenance issues. The Appeal Panel found that mould in the residential premises had sufficiently diminished the property's rental value payable under the residential tenancy agreement. Although the occurrence of mould was not ongoing, the defects and water ingress were largely responsible for the reoccurrences of mould throughout the tenancy. The Appeal Panel set aside initial orders of NCAT. Furthermore, it capped the weekly rent payable at \$280 for a retrospective period of 12 months finding that rent paid above that amount was excessive because there was a withdrawal of service in the residential premises for the duration of that period. The landlord was also directed to reimburse any rent money paid above the \$280 capped amount.

The tenant can also seek other remedies under breach of general obligations. For further information please refer to our article [Repairs and Maintenance Issues in Residential Tenancies](#).

Liabilities of the Owners Corporation

Issues of mould in strata schemes can be complex when common property is concerned. While the landlord has a strict liability on repairs and maintenance of the residential premises, they may have a valid argument that they exercise no control over common property. In recent times, the Appeal Panel appears to have taken that view too.

Unlike *Roberts v NSW Aboriginal Housing Office*, the Appeal Panel in the case of *Pan v Malveholm* [2021] NSWCATAP 101 (*Pan v Malveholm*), completely set aside the Tribunal's decision of rent reduction for withdrawal of service by the failure of the owners corporation. They formed the view the body corporate [sic] was a different entity. Following an earlier decision of McClellan J in *Eliezer v Residential Tribunal* (2001) 53 NSWLR 657; [2001] NSWSC 1092, the Appeal Panel agreed with His Honour in that reimbursement of rent for withdrawal of service under section 47 of the Residential Tenancies Act 2010 should only apply for actions [or inaction] of the landlord, not other people.



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The Appeal Panel in *Pan v Malveholm*, however, viewed that although rent reduction may not be a suitable remedy for the tenants in respect of an owners corporation's failure to maintain common property, other remedies may be available to them. More information on mould in strata schemes can be found in our article [Growth in Mould Claims](#).

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