The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

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Housing

Grant Arbuthnot – Tenants' Union of NSW

Alex Irving – Solicitor

Julie Lee – Tenants' Union of NSW

Robert Mowbray – Tenants' Union of NSW

Paul Smyth – Tenants' Union of NSW

Rita Wilkinson – Southern Sydney Tenants Advice & Advocacy Service

The law on renting is changing. The NSW Government is proposing to commence the new provisions on 2 December 2019, but this date is not definite. Check Tenants Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provisions are identified in the following text, in the main, by being placed in a box.

RENTING AND TENANCY

The law on renting is changing. There also will be a new *Residential Tenancies Regulation*. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced.

[27.10] A tenancy exists when one person (the tenant) pays another person (the landlord) for the right to occupy the landlord's premises for an agreed period. Payment usually is by way of "rent", but it may be by way of work or "other value". The basic rights and responsibilities of tenants and landlords are set out in the *Residential Tenancies Act 2010* (NSW) (*2010 Act*).

Tenancies under the Residential Tenancies Act

[27.20] Tenants NSW website

The Tenants NSW website is provided by the Tenants' Union of NSW and the Tenants Advice and Advocacy Services as an information service for tenants of NSW. For lots of useful information, go to www.tenants.org.au.

[27.30] What the Act covers

The *Residential Tenancies Act* covers most tenants in private rental and social housing.

Social housing

Social housing is a general term covering public housing (Department of Communities and Justice and the Aboriginal Housing Office) and community housing (see [27.610]).

Public housing

From 1 July 2019, the Department of Family and Community Services (FACS) and Department of Justice became a single department, named the Department of Communities and Justice (DCJ). At 24 September 2019 branding of its programs was waiting finalisation. It has previously been known as FACS Housing, Housing NSW, the Department of Housing and the Housing Commission.

DCJ manages tenancies on behalf of the NSW Land and Housing Corporation (LAHC). LAHC is a statutory corporation and the legal entity that owns residential properties on behalf of the NSW Government. It is part of the Department of Planning, Industry and Environment. It is the largest landlord in New South Wales with a portfolio of around 110,000 residential properties. It contracts with other organisations such as the DCJ and community housing providers to manage tenancies on its behalf. In most cases, it retains responsibility for repairs and maintenance. Aboriginal Housing Office (AHO) also is a statutory body and part of the Department of Planning, Industry and Environment.

For the remainder of this chapter we will refer to 'DCJ Housing' when referring to all public housing excluding the AHO.

[27.40] What the Act does

The *Residential Tenancies Act* prescribes a form of residential tenancy agreement, which must include standard terms that cannot be varied.

Additional terms may be included as long as they do not conflict with:

- the *Residential Tenancies Act*, its regulations; or
- any other Act; or
- the terms set out in the standard form agreement.

All tenancies under the Act are covered by these terms, even if there is no written agreement.

Some residents of retirement villages who sign an agreement with a clause that states that the *Retirement Village Act 1999* (NSW) does not apply are covered under the Act.

Some occupants in shared households also are covered under the Act (see [27.350]).

[27.50] Who is not covered

People who board or lodge with another person (including those who are covered by the *Boarding Houses Act 2012* (NSW)) or rent serviced apartments are not covered by the Act (see [27.440]).

Those who pay "rent" in backpackers' hostels, hotels, motels, clubs used as temporary accommodation, hostels, hospitals, nursing homes, premises providing respite care and most residents of retirement villages and holiday houses do not have the protection of the Act.

Refuge and crisis accommodation, except where parties agree in writing that the Act does apply, are not covered by the Act.

Accommodation where the premises are predominantly used for the purposes of a trade, profession, business or agriculture are not covered by the Act.

The *Residential Tenancies Act* does not apply, where both the landlord and the tenant are social housing providers, and a written term of the residential tenancy agreement says that the Act does not apply.

The *Residential Tenancies Act* does not apply to residential premises that comprise or are part of a "heritage item" if the landlord is the Crown, a public authority or a council (other than the New South Wales Land and Housing Corporation or the Aboriginal Housing Office), except where parties to the agreement agree in writing that the residential premises are not to be exempted. A "heritage item" means premises that are listed on the State Heritage Register, subject of an interim heritage order or heritage agreement under the relevant Act, identified as items of State or local heritage significance under an environmental planning instrument, or premises that are vested in, or controlled or managed by the Historic Houses Trust of New South Wales.

An agreement having a fixed term (together with further fixed terms) that equals or exceeds 99 years is not covered under the Act. Permanent resident home owners of residential parks are covered by the *Residential (Land Lease) Communities Act 2013* (NSW).

Residents of residential parks who are referred there for temporary refuge or crisis accommodation by a public authority, council or an organisation receiving government funding are not covered by the Act for 30 days or 60 days if extended by the authority who made the referral (*Residential Tenancies Regulation 2010* (NSW), cl 14).

Long-term casual occupants of residential parks are not covered under the Act.

A residential tenancy agreement where the fixed term runs for the life of the tenant (as well as life estates) are not to be covered by the Act (*Residential Tenancies Regulation 2010*, cl 19).

There are a small number of "protected tenants" in New South Wales and their premises are not covered under the main part of the *Residential Tenancies Act*. Rather, they are covered under the repealed *Landlord and Tenant (Amendment) Act 1948* (NSW) (*1948 Act*), which has become Sch 2 (Savings, transitional and other provisions) of Pt 7 (Provisions consequent on enactment of *Fair Trading Legislation Amendment (Miscellaneous) Act 2018* (NSW)) of the *Residential Tenancies Act* (see Who is a protected tenant at [27.50]).

Tenants who are not covered by the *Residential Tenancies Act* (including Sch 2, Pt 7) may be covered by the *Landlord and Tenant Act 1899* (NSW) (*1899 Act*). The eviction provisions in the *1899 Act* are very different to the other Acts. The *1899 Act* is to be repealed by s 1D of this *Act* on 29 June 2020. However, the NSW Government released a consultation paper in late 2018, which acknowledged that the repeal of this Act poses a number of problems. It foreshadowed the option of placing parts of this Act, which are still relevant today into Sch 2 (Savings, transitional and other provisions) of the *Residential Tenancies Act*. You might check if these changes have been enacted.

Section 71 of the *Sydney Harbour Federation Trust Act 2001* (Cth) excludes the operation of NSW tenancy law for property and transactions of the Trust.

Who is a protected tenant?

"Protected tenant" is a colloquial term for a tenant who lives in "prescribed premises" *and* enjoys the full provisions of the relevant legislation. A "statutory protected tenant" is a colloquial term for a person who has "like-rights" to a protected tenant, usually a surviving spouse or child.

"Prescribed premises" means prescribed premises to which the *Landlord and Tenant (Amendment) Act* applied immediately before its repeal by the *Fair Trading Legislation Amendment (Miscellaneous) Act 2018*.

The *Landlord and Tenant (Amendment) Act* was repealed on 1 July 2019 at the commencement of Sch 2.3 of the *Fair Trading Legislation Amendment (Miscellaneous) Act 2018*. It places the bulk of the *1948 Act* into the *Residential Tenancies Act* as part of Sch 2 (Savings, transitional and other provisions). Here, cl 24 reads "24 Savings provision – *1948 Act* continues to apply to certain premises".

The provisions of the repealed *1948 Act* give these tenants greater protection against increased rents and eviction than other tenants in NSW. However, a major shortcoming of this Act is that it is silent on the issue of repairs.

No new protected tenancies have been created since 1 January 1986. Indeed, the tenant must have been living in the place since before 1986, and it must have been built before 16 December 1954. Consequently, there now are very few protected tenancies in NSW. The remaining protected tenants are generally elderly people who have been living in the same premises for many years.

From 1 July 2019, the death of a protected tenant or their spouse (whichever occurs last) removes the premises from the provisions of the repealed *1948 Act* and places then under the main part of the *Residential Tenancies Act*. Prior to the commencement of Sch 2 of Pt 7, a child of a protected tenant who was on the pension at the time of their parent's death enjoyed "succession rights", that is they took on "like rights" to the tenant who died. It is highly likely that the status of existing "statutory protected tenants" at 1 July 2019 – those who are children of a deceased protected tenant – has not changed, that is, their situation is "grandfathered".

Anyone who thinks they may be a "protected tenant" or "statutory protected tenant" should contact the Rent Control Officer at NSW Fair Trading to ask if a s 5A *lease* has ever been registered on the property. Normally, premises are only protected if no lease has ever been registered. (It is too late for a landlord to register a s 5A lease now.)

Rent increase

A landlord is only able to increase rent if the tenant agrees to this. A tenant does this by signing a "17A Agreement" that is registered with NSW Fair Trading. If the tenant does not agree to the rent increase, the landlord may apply to the Fair Rents Board for a rent increase. If a rent has never been set on the premises by one of these two methods, then the rent which the tenant is paying is the legal rent.

A landlord can apply to the Fair Rents Board to have the rent set at "current rental value" (like market rent) if the net annual income of the tenant exceeds the "prescribed amount". This is calculated by multiplying the maximum fortnightly age pension (single rate) by 65. At 20 September 2019, this was $55,276 per annum.

A rent that satisfies the provisions of the *1948 Act* is called a "fair rent". If the tenant has paid rent exceeding the fair rent, he or she may apply to the Local Court for an order recovering from the landlord any excess rent for the last six years.

Repairs

The *1948 Act* does not require a landlord to do repairs. Nevertheless, if the Fair Rents Board recently increased the rent and allowed a figure for repairs that were never done, the tenant may apply to the Fair Rents Board for a reduction in rent by the same amount.

A tenant may also complain to their local government council, who have powers under the *Local Government Act 1993* (NSW) and *Environmental Planning and Assessment Act 1979* (NSW) to place an order on the owner to do certain types of repairs. A tenant should seek advice before contacting their council, as the council also has the power to ask a tenant to leave if the premises have deteriorated to a point, where it poses a danger to their health and/or safety.

Eviction

If the landlord wants to evict a tenant, he or she must serve a "Notice to Quit" specifying one of the grounds that are spelt out in the Act. In most situations, the minimum period of notice is 30 days or 14 days if the ground for eviction alleges a fault of omission by the tenant. The most common grounds are "(m) The premises are reasonably required by the landlord for reconstruction or

demolition" and "(w) The tenant's means – together with the means of anyone ordinarily residing in the premises ... are such that it is reasonable that the tenant and any other person would acquire or lease other premises". Sale of the house is not one of those grounds.

A protected tenant may negotiate a settlement and enter into a deed to vacate premises with the approval of the Fair Rents Board, as permitted under s 36(1)(a) of the *1948 Act*.

Sale of dwelling house

A dwelling-house which is occupied by a tenant and being the only premises comprised in the sale or agreement for sale is not to be sold unless, first, the tenant is given opportunity to purchase.

You will find more information about "protected tenancies" in the infosheet produced by the Tenants' Union of NSW (go to https://www.tenants.org.au/resource/protected-tenants-infosheet).

For advice

The Combined Pensioners and Superannuants Association of NSW (CPSA) has produced a publication called *A Guide to Protected Tenants in New South Wales* (4th ed, 2014). For advice about protected tenancies, including where to view the above publication, contact your local tenants' advice and advocacy service (see [27.1040]).

Interstate landlords

This issue is referred to as the "Federal diversity jurisdiction". In *Attorney General for New South Wales v Gatsby* (2018) NSECS 254, the NSW Court of Appeal held that the NSW Civil and Administrative Tribunal is not a court of a State and therefore does not have jurisdiction to determine matters between residents of different States by reason of s 39(2) of the *Judiciary Act 1903* (Cth) and s 77(iii) of the *Constitution*. Accordingly, natural persons who live in different States (but not Territories) of Australia are unable to use the NSW Civil and Administrative Tribunal to resolve disputes. If they try, then their applications will be dismissed for lack of jurisdiction, but they can recommence proceeding in the Local Court or District Court, depending on the amount in dispute. The procedure is set out in Pt 3A (Federal proceedings) of the *Civil and Administrative Tribunal Act 2013* (NSW) which you may view at https://www.legislation.nsw.gov.au/#/view/act/2013/2/part3a.

You will find a discussion of the NSW Court of Appeal decision at https://www.holdingredlich.com/13-november-2018-nsw-government.

This issue also is discussed in some detail in D Cassidy and B Ralson, *Australian Tenancy Law and Practice* (LexisNexis, 2017) at [4.2.320] (Service 160). You will find an expanded discussion in *Australian Tenancy Law and Practice Bulletins 113* (June 2018), 2–10 and *117* (January 2019), 6–9.

Australian Tenancy Law and Practice Bulletin 118 refers to Senior Member Aitken's statements of principle that apply generally to all disputes before Civil and Administrative Tribunals between residents of different states (*Shuttleworth v Pearson* [2018] WASAT 102; BC201810782; *Sharma v Carlino* [2019] WASAT 1; BC201900055). These are:

- only a "natural person" can be a resident;
- a person can only be a resident of one state at any time;
- a person can be a resident of a state after residing there for a brief time;
- for the original jurisdiction of the High Court to be invoked in "matters … between residents of different states", the parties must not be residents of the same state "on both sides of the record". For example, in *Watson and Godfrey v Cameron*, it was held that the High Court had no jurisdiction where, although Watson, one of the plaintiffs was a resident of Victoria, and the defendant, Cameron was a resident of NSW, Watson's co-plaintiff, Godfrey was also a resident of New South Wales;
- s 75(iv) cannot apply, where a corporation is a party, even though natural persons who are residents of different states are also parties;
- the relevant date is when the proceeding is commenced, not the date of the conduct in question in the matter;
- a proceeding may become a "matter between residents of different states" after it has commenced and before it is determined.

You will find a history of this issue at https://www.tenants.org.au/resource/gap-ncats-jurisdiction-and-what-it-means-tenancy.

Federal tenancies in New South Wales

The Commonwealth can be involved in residential tenancies in New South Wales in three different ways:

1. Commonwealth places, as provided for in s 52 of the *Constitution*;

2. Commonwealth tenancy disputes;
3. residential tenancies that interact with Commonwealth laws.

Here, a landmark case is *Sydney Harbour Trust v McCluskey* [2012] NSWSC 253 in which NSW law did not apply to the Trust's land. The court held that it was open to the Commonwealth to contractually adopt the standard NSW tenancy agreement and to modify it but, in doing so, the Commonwealth has not purported to apply the NSW legislation in contradiction to the *Sydney Harbour Federation Trust Act 2001* (Cth).

In early 2015, the Commonwealth Government enacted the *Federal Circuit Court (Commonwealth Tenancy Disputes) Instrument 2015* (Cth) primarily to deal with resumption of land for Sydney's second airport at Badgerys Creek. Coverage was expanded in 2016 to include land in the Jervis Bay Territory. The Federal Circuit Court's powers now include the powers of the NSW Tribunal under applicable state law to the extent that are relevant to determining a dispute.

This above issue is discussed in some detail in D Cassidy and B Ralson, *Australian Tenancy Law and Practice* (LexisNexis, 2017) at [4.2.324] on 4766–4767 (*Service 160*, February 2019).

For a comprehensive discussion of the issues around Commonwealth involvement, see A Anforth, P Christensen and C Adkins, *Residential Tenancies: Law and Practice New South Wales* (7th ed, The Federation Press, 2017) Ch 4. Subsequent to the publication of this book, in relation to [4.2.2], two applications to the High Court for leave to appeal the validity of s 10AA were rejected, inter alia, for lack of prospects of success. Accordingly, s 10AA has not been found to be invalid.

[27.60] Types of agreements

There are two types of agreements under the *Residential Tenancies Act – fixed term* and *periodic*.

A fixed-term agreement is a tenancy for a period of time stated in the residential tenancy agreement. Tenancies usually start as fixed term, and then automatically become periodic if the tenancy is not terminated at the end of the term.

Some aspects of tenancy law vary based on the length of the fixed term. For example:

- an agreement of a fixed term of 99 years or more is not subject to the *Residential Tenancies Act*;
- some mandatory terms of the agreement may be varied if the term is 20 years or more (see [27.160]);
- break fees are not limited by the legislation for terms of greater than three years (see Abandonment and break fees at [27.250]);
- express terms are not required for rent increases in the fixed term if the term is two years or more (see Rent increases at [27.240]); and
- tenants may choose to terminate an agreement upon rent increase in the fixed term if the term is two years or more (see Rent increases at [27.240]).

During a fixed-term agreement

Ordinarily, during the term, neither party can terminate the tenancy early, unless the NSW Civil and Administrative Tribunal makes an order allowing them to do so. A tenant who breaks the agreement during the term generally must pay the landlord's costs as compensation or a break fee. When new provisions commence in 2019, the break fee will be calculated on the basis of how far through the fixed term the tenant is (see Abandonment and break fees at [27.250]).

During a periodic agreement

In a periodic agreement, the rent can be increased or the tenancy terminated at any time, as long as the landlord gives 60 days' written notice or 90 days' written notice, respectively. The tenant has to give the landlord 21 days' written notice of an intention to end the tenancy.

Before an agreement is signed

[27.70] Inspection of property for rent

A real estate agent letting a property must:

- accompany a prospective tenant on an inspection of the property;
- not give the keys to a prospective tenant, even for a short time.

Neither of these requirements applies where (1) the landlord has authorised otherwise in writing, and (2) if the property is currently let, the tenant has authorised otherwise in writing (*Property, Stock*

and Business Agents Regulation 2014 (NSW), Sch 2, cl 11).

Real estate agents

Many properties are rented through real estate agents. These agents represent and stand in for the landlord. They are capable of making agreements to which the landlord will be bound. Their duty is to serve the best interests of the landlord.

An agent must give the tenant a copy of any document that they have been asked to sign immediately after they have done so (*Property, Stock and Business Agents Regulation*, Sch 1, cl 17).

The conduct of real estate agents is regulated by the *Property, Stock and Business Agents Act 2002* (NSW).

[27.80] Holding fee

Prospective tenants can be asked to pay a holding fee equal to one week's rent, where the tenant's application for tenancy of the residential premises has been approved by the landlord. The landlord or agent must not enter into a residential tenancy agreement with any other person within seven days (or further time as may be agreed by the parties) unless the tenant notifies the landlord that the tenant no longer wishes to enter into the residential tenancy agreement.

The landlord or agent must provide a receipt showing:

- the names of the landlord and the tenant;
- the address of the premises;
- the amount paid and the date on which it was paid.

When the fee must be repaid

The full amount of the fee must be repaid if the landlord does not enter into a residential tenancy agreement and, also, where the tenant refuses to enter into the residential tenancy agreement because of misrepresentation or failure to disclose a material fact by the landlord or the landlord's agent.

[27.90] If there are problems

Tenants who have problems recovering the holding fee can apply to the NSW Civil and Administrative Tribunal for an order requiring the landlord to refund the fee. The time limit for application is 28 days from the landlord's refusal to refund the fee. One of the community-based Tenants Advice and Advocacy Services may also be contacted for advice.

Information available to agents

Agents can ask people to fill in an application for tenancy form when they find a place they want to rent. This can ask for details of the person's finances (bank and building society account numbers) and some personal information (such as the number of children).

It is illegal for real estate agents to check a prospective tenant's credit record through credit reporting agencies such as Equifax (previously Veda). However, a number of private companies run tenant databases, which collect hold and give out information about tenants whom real estate agents say are "bad tenants".

The Commonwealth *Privacy Act 1988* requires businesses to operate according to the national privacy principles, which includes telling a tenant why they have been listed and requiring correction of any information that is not correct, complete nor up to date.

A tenant who believes that an agent or database operator has breached the privacy principles should contact the Office of the Australian Information Commissioner on 1300 363 992, or go to its website at www.oaic.gov.au. The commissioner may investigate the complaint and may take court action to stop the database operator from breaching the *Privacy Act*. However, any redress may be slow.

Rules about tenant databases

The *Residential Tenancies Act* regulates conduct of landlords and real estate agents in relation to residential tenancy databases. The Act deals with matters such as the circumstances in which a person may be listed by an agent, quality of the listing, the length of time a tenant may be listed and access to information in a listing. It provides for disputes to be heard by the NSW Civil and Administrative Tribunal. For more information on residential tenancy databases, see [27.110].

[27.100] Basic costs

Before signing a residential tenancy agreement, the tenant should ask the agent or landlord for an itemised statement of payments due.

Tenants should make sure that they are aware of all the costs involved before they rent a house or flat. If possible, they should aim to pay no more than 25% of their after-tax income on rent.

Unfortunately, low-income families with children often have to pay more than this. Commonwealth Rent Assistance for tenants (other than those of Housing NSW) may be available from Centrelink.

Rents

The Tenants' Union provides an online tool to help tenants understand rent prices in NSW. The tool uses data released by NSW Fair Trading each month from the Rental Bond Board. Using the Rent Tracker Postcode Tool, you can check what the latest rent prices are for different property sizes and types in any postcode in NSW. You will find this tool at the following link at https://www.tenants.org.au/resource/rent-tracker-postcode-tool.

Initial expenses

Typical initial expenses on a six-month agreement for a two-bedroom unfurnished unit in the Bayside local government area of Sydney in March 2019 were around $3,720, made up as follows:

- rent in advance (two weeks at $620 per week) – $1,240;
- rental bond (equivalent to the first four weeks' rent) – $2,480.

What payments can landlords demand?

Landlords and agents cannot demand any payment other than:

- rent;
- bond money;
- any costs prescribed by regulation.

Deposits for the connection of phone, electricity and gas services are paid by the tenant directly to the relevant authorities.

Electricity and gas connections

Suppliers no longer charge deposits when services are connected. Check with your supplier about other charges at the start of a tenancy. For example, at 1 June 2019, Ausgrid charges $11.96 for an initial meter reading fee for electricity; Jemena charges $16.28 for an initial meter reading fee for gas. If you read the metre yourself and telephone through this reading and the metre number to Jemena at phone 1300 137 078, they will place this information into their system without the need to send someone out to do the initial metre reading.

Exemptions and concessions

Pensioners (and some others) can claim a Low Income Household Rebate of $285 per year (at 1 June 2019), which comes off their bill. Those who are long-term residents of land lease communities (residential parks), retirement villages and strata schemes who receive electricity bills from their community operators, receive $313.50 per year.

Pensioners (and some others) can claim a Gas Rebate of $110 per year (at 1 June 2019), which comes off their bill. Those who have on-supplied LPG or natural gas and living in residential communities, retirement villages and strata schemes; or that use delivered LPG (bottled gas) for basic household needs such as cooking, heating or hot water receive $121 per year.

To qualify, a person must have a current pension concession card. Always check with the supplier about your entitlements. Also, you may obtain information about your entitlements at any office of Service NSW (or phone 137 788).

Telephone connections

With telecommunications deregulation, people have a choice of supplier. The following applies to Telstra's Home Phone Budget service. Charges will differ for home phones on the NBN network. Other telephone companies should be contacted directly for information about their charges.

If there is a telephone in the premises and all cables and sockets are in place and a technician is not required to visit, the reconnection fee is a standard $59.

If there was a previous service and a technician must attend, the connection fee is $125.

If there was no previous service, the connection fee is $299 for a line and cabling work. If a trench must be dug to lay a cable from the street, a private contractor will do this and charge separately.

If you receive a pension, you may ask for a concession on the above fees.

Line rental is from $25.95 per month (for Telstra Home Phone Budget plan). From 1 February 2019, you will no longer be able to rent a handset. If you already have a rental phone, you don't need to return it.

If a former tenant did not pay

Telstra does a credit check on its own records for new customers. If there is a bad debt at the premises and the phone has not been disconnected, a new applicant may have to go to a Telstra shop or fax

relevant documents to Telstra to show proof of both identity and occupancy.

For further information on Telstra charges and other details, phone 132 200.

Rental assistance

DCJ Housing provides assistance through its "Rentstart Assistance Policy" to help eligible renters establish or maintain private tenancies.

Establishing a tenancy

DCJ Housing gives references to current or former public housing tenants who are applying for housing in the private rental market. It assists people with complex needs and their support agencies to help set up a tenancy in the private rental market (called "Private rental brokerage service"). It provides extra cover for rental arrears or property damage on top of a rental bond, as an incentive for landlords to offer a lease (called "Tenancy Guarantee"). It provides an interest-free loan to help eligible people pay a rental bond (called "Rentstart Bond Loan"). It may provide a grant to assist with Advance Rent, but only if the client is also receiving a Rentstart Bond Loan or is moving into accommodation, where this is not applicable. It will usually provide Advance Rent once only in a 12-month period.

Maintaining a tenancy

DCJ Housing provides financial assistance in the form of a grant of up to the equivalent of four weeks' rent for tenants in a private rental property who are in rent and/or water arrears (called "Tenancy Assistance"). This will only be provided once in a 12-month period and the client must have an agreement with the agent or landlord to continue the tenancy for up to 12 months. A tenant may be approved for tenancy assistance twice in a two-year period but, generally, at a lesser amount.

Making an application

To access any of the Rentstart Assistance options, clients must meet the relevant eligibility criteria, which varies for each product. In general, clients must meet both the eligibility criteria for social housing and a cash assets limit. However, there are some circumstances, where consideration will be given to providing assistance to a client who does not meet these criteria.

Clients who wish to access Rentstart will need to complete an application form. Clients are able to complete an application online or download a paper application from the DCJ Housing website. Under Housing Pathways, participating community housing providers facilitate access or deliver Rentstart products on behalf of DCJ Housing.

Insurance

It is the tenant's responsibility to insure their goods against loss by fire, theft and other damage. Some policies cover temporary accommodation costs if the building is damaged and becomes unliveable. Generally, such cover is included in a Home Contents Insurance policy.

As the tenant has exclusive possession of the premises, they may be liable, as occupier, for injuries or loss that occur on the premises. Tenants also should consider taking out legal liability insurance to cover situations, where someone is injured on the premises and takes legal action. Generally, such cover is included in a Home Contents Insurance policy (see also Chapter 29, Insurance).

[27.110] Tenant databases

Tenant databases collect, hold and give out information about tenants. Many real estate agents and landlords subscribe to them for the purposes of checking the tenancy history of a person who applies for a house or flat to rent. A database must not hold personal information for more than three years.

A real estate agent or landlord can only list information in a tenant database if:

- the person was a tenant under a residential tenancy agreement that has terminated (or their co-tenancy was terminated); *and*
- they breached the agreement; *and*
- because of the breach, they owe an amount more than the rental bond, or the NSW Civil and Administrative Tribunal has made a termination order; *and*
- the information identifies the nature of the breach and is accurate, complete and unambiguous.

Before making a listing a real estate agent or landlord must:

- give the tenant a copy of the information they want to list on the database (or take other reasonable steps to disclose this information to the tenant); *and*

- give the tenant not less than 14 days to review the information and respond; *and*
- consider any response by the tenant.

A database operator must not list personal information about a person in a database except at the request of a landlord or a landlord's agent and in accordance with the restrictions outlined above.

Finding out about a listing

If the landlord or the landlord's agent uses a tenancy database when assessing an application for a residential tenancy agreement, then within seven days they must give the prospective tenant a written notice stating:

- personal information about them is in the database;
- particulars of the landlord or agent who listed them;
- information about the right to seek a copy of the information from that person;
- how to contact the database operator to find out what information they hold; and
- how and in what circumstances the applicant can have the information removed or amended.

Ensuring quality of listings

If the landlord or landlord's agent becomes aware that the information in the database is inaccurate, incomplete or ambiguous, they must write to the database operator within seven days requiring it to be amended. If the information is out of date, they must write to the database operator within seven days requiring it to be amended or removed.

Disputes about listings

A person may apply to the NSW Civil and Administrative Tribunal for an order that information is inaccurate, incomplete, ambiguous or out of date, or unjust because of the circumstances around the listing. The Tribunal can order that information about a person be wholly or partly removed, amended in a stated way, or not listed in a database.

Residential tenancy agreements

[27.120] A residential tenancy agreement is an agreement under which a person grants to another person *for value* a right of occupation of residential premises for the purposes of use as a residence. "For value" usually is rent, but may be providing some kind of service. A residential tenancy agreement may be oral or in writing or both.

Residential tenancy agreements outline the basic rights and responsibilities of tenant and landlord.

[27.130] Standard terms

The *Residential Tenancies Act* states that residential tenancy agreements must include standard terms, and that those terms cannot be varied. The standard terms cover:

- right to occupy the premises;
- the agreement;
- rent (including rent increases and rent reductions);
- rates and taxes (council, land tax, water, and other charges);
- possession of the premises;
- the tenant's right to quiet enjoyment;
- the tenant's use of the premises;
- the landlord's general obligations for residential premises;
- urgent repairs;
- sale of premises;
- the landlord's access to premises;
- alterations and additions;
- locks and security devices;
- transfer of tenancy or sub-letting by tenant;
- the right to assign or sublet;
- change in details of landlord or landlord's agent;
- strata title information;
- rental bond disputes;
- smoke alarms;
- swimming pools;
- "break fee" (where tenant ends the residential tenancy agreement before the end of the fixed term);
- pets.

The tenant should read the agreement carefully and question any term they do not understand.

The standard form requires the completion of a condition report by or on behalf of a landlord before or when the agreement is signed.

Where to get standard forms

The standard form of residential tenancy agreement is the form set out in Sch 1 of the *Residential Tenancies Regulation 2010*. A condition report is to be in the form set out in Sch 2 of the same regulation. The regulation can be obtained from www.austlii.edu.au. The standard form agreement and condition report can be downloaded from the NSW Fair Trading website at www.fairtrading.nsw.gov.au. The Real Estate Institute of NSW publishes a form of agreement with additional terms, available from their head office.

[27.140] Agreement to be in writing

The landlord under a residential tenancy agreement must ensure that the agreement is *in writing* at the commencement of the agreement.

If the landlord fails to comply with this requirement then, during the first six months of the tenancy, the rent may not be increased and the landlord is not entitled to terminate the agreement without grounds.

A tenant may apply to the NSW Civil and Administrative Tribunal for an order that the landlord prepare and enter into a written residential tenancy agreement.

[27.150] Additional terms

Landlords sometimes write additional terms into an agreement. Additional terms can be added, but they must not conflict with the Act, the regulation or any other Act, nor be inconsistent with the terms set out in the standard form. For example, a blanket provision that tenants steam clean carpets is inconsistent with the standard agreement and therefore ineffective.

Tenants unsure about any terms included in an agreement should check the validity of the terms with the NSW Fair Trading or a Tenants Advice and Advocacy Service.

If the tenant objects to the terms

A tenant who is not satisfied with any additional term is free to ask the landlord or agent to change or remove it. It is also possible to apply to the NSW Civil and Administrative Tribunal for an order that an additional term is void.

[27.160] Long-term leases

Where a residential tenancy agreement has a fixed term of 20 years or more, mandatory terms may be varied and otherwise prohibited terms may be included. However, there are some mandatory terms that may not be excluded or modified (eg, payment of rates, taxes and charges by the landlord, no more than one rent increase a year, the right to make an application to the NSW Civil and Administrative Tribunal, and the grounds on which a landlord may terminate an agreement).

A tenant may apply to the NSW Civil and Administrative Tribunal for an order declaring that a mandatory term does form part of the agreement, a prohibited term is not included in the agreement, or varying the wording of a mandatory or prohibited term included in the agreement.

[27.170] Disclosures

A landlord or landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that they know to be false, misleading or deceptive.

Before entering into a residential tenancy agreement, the landlord or landlord's agent must disclose:

- any proposal to sell the residential premises, if the landlord has prepared a contract for sale;
- that a mortgagee is taking action for possession of the residential premises, if the mortgagee has commenced proceedings in a court to enforce a mortgage over the premises.

A landlord or landlord's agent must not knowingly conceal any of the following material facts:

- the residential premises have been subject to flooding or bush fire in the preceding five years;
- the residential premises are subject to significant health and safety risks that are not apparent to a reasonable person on inspection of the premises;
- the residential premises are listed on the Loose Fill Asbestos Insulation Register (*Home Building Act 1989* (NSW), s 119B);
- the residential premises have been the scene of a serious violent crime in the preceding five years;

- council waste services will be provided on a different basis than is generally applicable within the area;
- the tenant will not be able to obtain a residential parking permit (in an area where only paid parking is provided); or
- other persons share a driveway or a walkway that is part of the residential premises.

The law on disclosures is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. Where the residential tenancy agreement relates to residential premises in a strata scheme, a landlord or landlord's agent must, before the tenant enters into the residential tenancy agreement:

- give the tenant a copy of the by-laws for the strata scheme; and
- if a strata renewal committee is currently established in relation to the strata scheme under the *Strata Schemes Development Act 2015* (NSW), disclose that fact to the tenant.

Since 29 April 2016, the landlord has been required to provide documentary evidence of the compliance of the swimming pool of the premises with the *Swimming Pools Act 1992* (NSW) (*Residential Tenancies Regulation 2010*, Sch 1, cl 40).

[27.180] Verbal undertakings

Verbal promises made at the time of signing the agreement by the landlord or agent to carry out repairs and improvements or to vary conditions should be put in writing, so that there is proof that the promises were made.

The condition report (see [27.200]) has a section at the end, where such undertakings and their expected completion date should be recorded.

The agent's conduct can bind the landlord

An agent has authority to create legal relations between landlords and tenants. Get every promise in writing, so that it is clear what is happening.

[27.190] Signing the agreement

The agreement should be signed by both parties when it has been completed. A tenant must not be asked, by an agent, to sign a document unless all material particulars have been inserted in the document (*Property, Stock and Business Agents Regulation*, Sch 1, cl 16).

Changes to the agreement

Any changes to the agreement should be initialed or signed by the tenant and the landlord.

What the tenant must be given

The tenant should be given copies of all documents, including the agreement, immediately after they are signed. An agent must not ask a tenant to sign incomplete documents.

It is an offence under the *Residential Tenancies Act* for the landlord or agent not to give the tenant a written copy of the residential tenancy agreement. If necessary, a tenant can apply to the NSW Civil and Administrative Tribunal for an order that they be given a copy.

Tenants must also be given a copy of NSW Fair Trading's publication, *New tenant checklist* at or before the time of signing the agreement.

Complaints can be made to NSW Fair Trading.

[27.200] Condition reports

The landlord or agent must provide a *condition report* covering:

- the state of repair and cleanliness of the property;
- details of any fixtures, fittings and appliances.

The report should be checked thoroughly by the tenant before signing. The report must be returned to the landlord or agent within seven days of receiving it (or taking possession of the residential premises, when new provisions commence in 2019). The tenant should keep a copy of the report. The landlord must also keep a copy.

If the tenant disagrees

If the tenant disagrees with what the landlord has written, make notes to this effect on the report. Where possible, take photographs and get these signed, witnessed and dated. This becomes important if there is a dispute at the end of the tenancy over the condition of the premises and the return of the bond money.

A tenant may apply to the NSW Civil and Administrative Tribunal for an order that the condition report be amended.

If the landlord does not provide a report

If the landlord fails to provide a condition report, the tenant should prepare their own and have it signed by a witness. A copy should then be sent to the landlord or agent.

Where to get blank condition forms

Blank condition reports can be downloaded from the NSW Fair Trading website at www.fairtrading.nsw.gov.au. They also are available from Tenants Advice and Advocacy Services.

Australian Consumer Law

The *Australian Consumer Law* became the law of New South Wales on 1 January 2011 when it was incorporated into the NSW *Fair Trading Act 1987* (s 28). It has immediate relevance to residential tenancies law, particularly cll 18, 20, 21, 23–25, 30 and 61. For example, a landlord or real estate agent who offers a service in the course of trade or commerce and who misrepresents the property or completes a condition report with little or no regard to its accuracy may be in breach of cl 18 for "misleading or deceptive conduct". Or a landlord who offers a service in the course of trade or commerce and rents premises that are unliveable may be in breach of cl 61, which "guarantees fitness for a particular purpose".

In the case of (*Doran v Lia*, GEN 10/57830, 20 April 2011) the Consumer, Trader and Tenancy Tribunal found "that the accommodation was not reasonably fit for the purposes of (a boarding house) and thus the money outlaid by the applicant (being $600) should be returned by way of compensation".

[27.210] Rates, taxes and charges

Water charges

With water charges, the landlord pays the service charges. A tenant, though, is required to pay for water usage under the user-pays system that operates in many areas (including the Sydney–Blue Mountains–Illawarra area covered by Sydney Water, and the Hunter region covered by Hunter Water). However, the tenant can only be required to pay for water usage if:

- the premises are metered separately or the premises are not connected to a water supply service and the water is delivered to the premises by vehicle; and
- the premises contain water efficiency measures – defined as shower heads and internal cold water taps and single mixer taps for kitchen sinks or bathroom hand basins with a maximum flow rate of nine litres per minute – *and* no leaking taps at the commencement of the agreement or when water efficiency measures are installed, whichever is the latter.

In these situations, the tenant has 21 days to pay the water usage charges.

The tenant is not required to pay the water usage charges:

- unless the landlord gives the tenant a copy of the part of the water supply authority's bill setting out the charges, or other evidence of the cost of the water used by the tenant; or
- where the landlord fails to request payment from the tenant within three months of the issue of the bill by the water supply authority.

In areas where the user-pays system does not apply, tenants can only be required to pay excess water charges.

Provisions relating to the payment of water usage charges are different for social housing tenants (see [27.610]).

Unpaid charges

If the landlord does not pay the water bill, the water may be cut off. Tenants in some areas can negotiate with the water provider to pay the amount and deduct it from the rent. This applies where the water authority is Sydney Water, Hunter Water or the local council. The Energy and Water Ombudsman (EWON) can help with negotiations with some water providers.

Where rates or charges remain unpaid on land, a local council may require the tenant to pay the rent to it as rent falls due.

It is worth contacting the owner first and trying to negotiate payment of the bill.

If the landlord won't pay

If the landlord refuses to pay water or land rates, the tenant should apply to the NSW Civil and Administrative Tribunal for an urgent hearing. An order can be made for the landlord to pay the bill or reimburse the tenant if they have paid it.

Electricity charges

Tenants usually contract with the electricity supplier and pay according to the metered use. The Energy and Water Ombudsman can help with negotiations with electricity providers.

Where premises are not individually metered, the *Residential Tenancies Act* requires that electricity is paid for by the landlord, for example, in an old house divided into flats that do not have individual meters.

A landlord may charge tenants for electricity use if the premises are individually metered. There are now 23 conditions under the more recent exempt seller guidelines (version 5 of March 2018). They include timely billing and restrictions on price. The guideline is available at https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-exempt-selling-guideline-march-2018.

A tenant who thinks that there are problems with the electricity charges can contact the electricity provider or a tenants' advice service for advice.

[27.220] Bond money

Tenants are usually asked to pay a *rental bond* when they start a tenancy. This is a sum of money paid by the tenant before moving into a house or flat. The money is lodged with NSW Fair Trading to cover the landlord for any costs resulting from the tenant breaking some term of the agreement; for example, by not paying rent or by damaging the premises.

Amount of bond

The bond cannot be more than the equivalent of the first four weeks' rent.

Lodging the bond

Where there is no agent, the landlord must forward the money to NSW Fair Trading within 10 working days of the tenant paying it.

The landlord's agent must forward the money to NSW Fair Trading within 10 working days after the end of the month in which the tenant pays it.

Where the bond is paid in instalments, the deposit periods are:

- if the total amount of the bond is paid within three months of the first instalment being paid, then within 10 working days after the total bond is paid;
- if the total amount of the bond is not paid within three months of the first instalment being paid, for any instalments paid within the period, then three months after the first instalment is paid or 10 working days after each instalment is paid (whichever occurs later);
- if one or more instalments are paid after three months of the first instalment being paid, then every three months until the bond is fully paid.

NSW Fair Trading will send details of the rental bond money – an advice slip and a rental bond number – to the tenant. If the tenant does not receive this advice, they should contact NSW Fair Trading.

You may lodge a residential rental bond online, see Rental Bonds Online at [27.220].

If the bond is not lodged

The landlord or agent can be fined for not lodging the bond with NSW Fair Trading. The fine is $440 if paid on notice, but up to $2,200 if the matter goes to court.

Offences

It is illegal for a landlord to ask a friend or family member of the tenant to act as guarantor for the tenant. Also, putting the name of a friend or family member on the agreement as a co-tenant when they have no intention of residing in the premises, in order to make them liable for the tenant's debts, is an offence (*Residential Tenancies Act*, s 160(1)).

One rental bond for each agreement

The landlord or agent must not require or receive more than one rental bond for a residential tenancy agreement or successive residential tenancy agreements. This includes the "topping up" of rental bonds following a rent increase (or even where the initial rental bond sought was less than the maximum amount payable).

Reclaiming bond money

At the end of the tenancy, the tenant can claim the bond money back, plus interest earned over the period it has been with the NSW Fair Trading. (Interest is paid at the same rate as the Commonwealth Bank of Australia Everyday Access Account on a balance of $1,000.)

How to claim

A *claim for refund of claim form* is available on NSW Fair Trading's website – see [27.1040].

The quickest way for a tenant to get back their bond money is to have the landlord or agent and themselves sign a completed claim form – *but this only applies if there is no dispute*. Then email the completed form to bondclaims@finance.nsw.gov.au. Completed claim forms may also be posted to Locked Bag 9000, Grafton NSW 2460 or lodged at any Service NSW Centre. (These contact details are on the form.) NSW Fair Trading will deposit the money in a nominated account by electronic transfer.

Alternatively, the tenant fills in the claim form and lodges it with NSW Fair Trading by email, fax or post at the same address as above. Make sure that NSW Fair Trading has a correct forwarding address. See Dispute over return of rental bond at [27.220], where the tenant and the landlord can't agree on return of bond money.

You may claim a residential rental bond online, see Rental Bonds Online at [27.220].

When the tenant can get the bond back

Tenants are entitled to get back bond money at the end of the agreement if they:

- are up to date in rent payments;
- have given proper notice that they are leaving;
- leave the premises in a similar or better condition than when they moved in (other than fair wear and tear);
- have not broken the agreement in any way that costs the landlord money.

To avoid losing bond money, the tenant should give the landlord or agent the required notice *in writing* (see [27.250]), and should keep a copy of the letter.

Where to get claim for refund of bond forms

Forms are available from NSW Fair Trading (www.fairtrading.nsw.gov.au), Tenants Advice and Advocacy Services, and real estate agents. Some bond transactions can be done online at https://www.fairtrading.nsw.gov.au/housing-and-property/renting/rental-bonds-online.

Rental Bonds Online

Rental Bonds Online is a service helping tenants, agents and self-managing landlords lodge and refund bond money securely and easily. It is a fast and convenient way to:

- lodge, view and claim residential rental bonds online without having to send cheques and paper forms;
- receive email and SMS phone notifications confirming what is happening to a rental bond;
- view notifications and key tasks that require action within Rental Bonds Online.

Tenants can find out more about Rental Bonds Online at https://www.fairtrading.nsw.gov.au/housing-and-property/renting/rental-bonds-online/faq-for-tenants.

Inspection of premises

The landlord or agent must inspect the property and complete a condition report in the tenant's presence at, or as soon as reasonably practicable after, the termination of the agreement.

If the landlord or agent refuses to do the inspection at a mutually agreed time, the tenant should complete a condition report in the presence of a witness. The witness should be willing to sign a statutory declaration or give evidence before the NSW Civil and Administrative Tribunal on the state of the premises at the end of the tenancy if the landlord disputes return of the bond.

If possible, photographs should be taken. These should be signed, witnessed and dated.

Dispute over return of rental bond

If agreement about the return of the bond is not reached quickly, tenants should apply to NSW Fair Trading for return of the bond without the signature of the landlord or agent. NSW Fair Trading will then notify the landlord of the application and if the landlord does not apply to the NSW Civil and Administrative Tribunal within 14 days, the bond will be paid to the tenant.

If the landlord or agent makes a claim to NSW Fair Trading before the tenant does, then the tenant will have to apply to the NSW Civil and Administrative Tribunal for return of the rental bond. In order for their rental bond to remain frozen, they will have to let NSW Fair Trading know that they are disputing the claim by the landlord or agent within 14 days of receiving a letter from NSW Fair Trading. Regardless, they will have six months to lodge this application. At the hearing, the onus still will be on the landlord or agent to prove their claim.

If the landlord never lodged a rental bond in the first place, then the tenant has 28 days after the

tenancy is terminated to make an application for return of rental bond.

Transfer of bond

Transfer between tenancies

Bond money can be transferred from one tenancy to another, except in cases where the tenant received part or all of the bond from DCJ Housing, or the landlord is claiming part of the bond.

The tenant must complete a *transfer of bond* form, ensure that it is signed by all parties to the previous bond, attach it to the lodgement form for the new bond and provide a cheque for the difference if the new bond is more than the bond being transferred.

Transfer between tenants

Bonds can also be transferred between members of a household in shared accommodation.

Tenants who leave should fill in a *change of shared tenancy arrangement form*, and include their signature and that of the person moving in. The landlord should also sign the form, confirming that they agree to the change. This form is about the bond only. It does not transfer (or assign) the residential tenancy agreement.

[27.230] Landlords' rights and responsibilities

Landlord's general obligations

The law on landlord's general obligations for residential premises is changing. Originally the NSW Government proposed to commence this new provisions on 2 June 2020 (six months after other reforms commence). However, the commencement date for other reforms will be in the first half of 2020. This may result in a later commencement date for this provision. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provisions provide a description of what is meant by fit for habitation at s 52(1A) of the *Residential Tenancies Act* and what is meant by structurally sound at s 52(1B).

Occupation

The landlord must ensure that, at the time of entering into the residential tenancy agreement, there is no legal impediment to the occupation of the residential premises as a residence for the period of the tenancy.

Further, the landlord must ensure that the tenant has vacant possession of any part of the residential premises to which the tenant has a right to exclusive possession on the day on which the tenant is entitled to occupy those premises under the residential tenancy agreement.

Tenant's right to quiet enjoyment

A tenant is entitled to quiet enjoyment of the residential premises. 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. Further, the landlord or landlord's agent must take all reasonable steps to ensure that the landlord's other neighbouring tenants do not interfere with the reasonable peace, comfort or privacy of the tenant in using the residential premises.

Entering premises

A landlord, landlord's agent or any other person authorised by the landlord can enter a tenant's premises with the tenant's consent or with an order from the NSW Civil and Administrative Tribunal.

A landlord, landlord's agent or any other person authorised by the landlord can enter a tenant's premises without the tenant's consent and without notice:

- in an emergency (including reasonable cause for serious concern about the health or safety of the tenant or any other person on the premises);
- to carry out urgent repairs (see Urgent repairs at [27.230]);
- if they reasonably believe that the premises have been abandoned.

Notice requirements

The landlord can enter the premises for other purposes if the following notice is given:

- to inspect the premises – seven days written notice. The landlord may do no more than four inspections in 12 months;
- to do repairs and maintenance (other than urgent repairs) – two days;
- to carry out, inspect or assess the need for work in order to comply with the landlord's obligations relating to the health or safety of the premises – two days;
- to value the property – seven days. The landlord may do no more than one inspection for this purpose in 12 months;

- to show the premises to prospective tenants during the period of 14 days preceding the termination of the agreement – with "reasonable" notice. Only a "reasonable" number of showings can be arranged;
- to show the premises to potential buyers, where parties have not agreed to the days and times when the premises are to be periodically available for inspection by prospective purchasers – 48 hours' notice and no more than twice in any period of a week.

Notice for access need not be in writing (except for notice of inspection).

Photos or video images

Landlords or agents may breach the term of the residential tenancy agreement relating to "reasonable peace, comfort or privacy" by taking or publishing photos or video images of the interior of the premises without the tenant's consent.

The law on landlord's rights of access is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provisions make an exception when the premises are for sale or re-letting (but not during a periodic inspection), as follows. They:

1. allow for access by the landlord without the consent of the tenant to take photos or make a visual recording of the interior of the premises for the purposes of advertising the residential premises for sale or lease not more than once in the period of 28 days preceding the commencement of marketing the residential premises for sale or lease or the termination of the agreement, but subject to certain conditions set out in s 55(2)(d) of the *Residential Tenancies Act*;
2. restrict the publication of any photograph taken or visual recording made of the interior of residential premises in which any of the tenant's possessions are visible set out in s 55A of the *Residential Tenancies Act*.

Showing the premises to prospective buyers

A landlord must give the tenant written notice of the landlord's intention to sell the premises not later than 14 days before the premises are first made available for inspection by prospective purchasers.

A landlord or selling agent must make all reasonable efforts to agree with the tenant as to days and times when the premises are reasonably available for inspection. A tenant may not unreasonably refuse to agree to days and times, but is not required to agree to this being more than twice a week.

"Open house" probably is not permitted under the *Residential Tenancies Act*. In July 2014, the Victorian Civil and Administrative Tribunal ruled that "open house" is not permitted under Victoria's *Residential Tenancies Act*, except with the tenant's consent. At the time of writing (November 2019), this has not been tested in NSW. Nevertheless, a tenant may definitely refuse access to persons who clearly are not prospective buyers. If an "open house" is held, a tenant can ask friends to be present in order to safeguard the security of their possessions.

An auction can only be held on the premises if the tenant agrees to it.

If a rented property is for sale

If an agent managing a rental property becomes aware that the property is listed for sale or that a real estate agent has been appointed to act on the sale, they must immediately give the tenant written notice of the intended sale of the property, or the name and contact details of the selling agent (*Property, Stock and Business Agents Regulation*, Sch 2, cl 15).

When the landlord should not come

The landlord should not come around before 8 am or after 8 pm on any day of the week, or at any time on a Sunday or public holiday, unless the tenant has consented. They must not stay on the premises longer than is necessary to achieve the purpose of the entry.

Access on the landlord's behalf

Anyone else wanting to enter the premises on behalf of the landlord must show the tenant written permission from the landlord or agent.

Where someone else is exercising a power of the landlord or landlord's agent – for example, a tradesperson or a prospective buyer – enters the premises and goods are damaged or disappear, then the tenant may apply to the NSW Civil and Administrative Tribunal for compensation from the landlord.

Providing security

The landlord must provide locks on windows and doors to make the premises reasonably secure.

What is "reasonably secure"?

Section 191(2) of the *Residential Tenancies Act* provides for matters to be considered by the Tribunal when determining what is "reasonably secure". These include:

1. the physical characteristics of the premises and adjoining areas;
2. the requirements of insurance companies for the property of the tenant; and
3. the likelihood of break-ins or unlawful entry or risks to the tenant's personal safety.

The Tribunal is not limited to these three matters.

Insurance requirements

If a tenant's insurance company requires a certain standard of locks, this should be explained to the landlord, who may be willing to provide the locks.

If the tenant wants more security

If the tenant wants more security, it may be necessary to negotiate a compromise arrangement; for example, the landlord might pay for the locks and the tenant could install them. Alternatively, the landlord may agree to go halves in the cost of buying and installing the locks. Whatever arrangement is reached, the details should be in writing.

If the tenant installed the locks at their own cost, they are able to remove them before moving out, but must repair any damage or compensate the landlord for the same (see Alterations to premises at [27.240]).

If the tenant believes security is inadequate

If the landlord doesn't cooperate and the tenant feels their possessions are at risk from burglary, they should apply to the NSW Civil and Administrative Tribunal for an order that security be improved.

If the Tribunal agrees with the tenant

If the Tribunal considers security to be inadequate, it can order the landlord to carry out the terms of the agreement – that is, provide reasonable security.

There have been cases, where landlords have ignored tenants' requests for improved security, and the Tribunal has ordered them to pay compensation after the tenants were burgled. Tenants should take other steps to safeguard portable valuables when they are aware the premises are not secure.

Doing repairs

The landlord must make sure that the premises are fit to live in when the tenant moves in – that is, clean, secure and safe. The landlord must also keep the premises in a reasonable state of repair.

Non-urgent repairs

When non-urgent repairs are required (such as fixing a broken shed door), the landlord or agent should be advised in writing. This letter should include a deadline for a positive response. The tenant should keep a copy.

If there is no response, the tenant has three months from the deadline to apply to the NSW Civil and Administrative Tribunal for repair orders.

If an agent ignores complaints

If an agent is involved and they continually ignore the tenant's complaints, the tenant may try going to the owner directly, although this may not work with landlords who prefer to leave everything to their agent.

Contacting the owner

In an emergency, the tenant may get the owner's address by doing a search at the rates section of the local council (first speak to a member of the Customer Service team). If the local council is not prepared to allow this, the tenant should contact their local Tenants Advice and Advocacy Services who will be able to provide information about other searches that may yield this information. These include searches with the NSW Land Registry Services and the Australian Electoral Commission.

If the problem cannot be resolved, the tenant can apply to the NSW Civil and Administrative Tribunal for an order that repairs be carried out.

Urgent repairs

Urgent repairs are defined in the Act and spelt out in the agreement. They include problems such as blocked toilets and serious storm damage which should be seen to immediately by the landlord.

If urgent repairs are needed, the tenant should contact the landlord, preferably in writing, and keep a copy of the letter.

If the landlord cannot be contacted or will not make the repairs in a reasonable time, the tenant can arrange to have them done by a qualified tradesperson, keeping a record of what was done and what it cost, and any receipts. Copies should be sent to the landlord as soon as possible.

The landlord must repay the tenant within 14 days for reasonable costs up to $1,000. Tenants should refer to the conditions for getting the money back in the agreement. The tenant must strictly comply with them and retain evidence of compliance.

Some residential tenancy agreements state that the tenant is to use nominated tradespeople – the tenant should check the agreement for this.

If the landlord can't be contacted or won't pay, a tenant who cannot afford urgent repairs can apply to the Tribunal for an urgent hearing.

The law on smoke alarms is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provision clarifies who is responsible for repairs to smoke alarms and a tenant's entitlement to reimbursement of costs.

The law on repairs is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced.. The new provision allows either a tenant or a landlord to apply to NSW Fair Trading for an investigation of repair issues and the making of a rectification order requiring repairs to be carried out by the other party. Either party may make an application to the Tribunal in respect of the matter giving rise to the making of a rectification order.

What the Tribunal can do

In matters relating to repairs, the Tribunal can order that:

- the landlord do the repairs;
- rent be paid to the Tribunal, rather than the landlord, until repairs are done;
- a reduced rent be paid until repairs are done;
- the landlord pays compensation for losses caused because the repairs were not done (such as damage to rugs from a burst water pipe).

Instructions to an agent not to make repairs

Where a landlord has instructed an agent not to carry out a repair (non-urgent or urgent), the agent must inform the landlord whether this would constitute a breach of the agreement (*Property, Stock and Business Agents Regulation*, Sch 2, cl 13).

If the tenant decides to leave

Where repairs are not done, the tenant may decide to give notice of termination for the landlord's breach. Only 14 days' notice is required, where the landlord has breached the agreement. This approach is risky, however, because the landlord may accuse the tenant of abandoning the premises. If the NSW Civil and Administrative Tribunal finds that the tenant has abandoned the premises, it will order the tenant to pay compensation to the landlord.

A better approach is for the tenant to apply directly to the Tribunal under s 103 of the *Residential Tenancies Act* for an order to terminate the agreement. The tenant should check with the Tenants Advice and Advocacy Services about their rights in this situation.

[27.240] Tenants' rights and responsibilities

Condition of premises

The tenant agrees under the residential tenancy agreement to keep the premises reasonably clean and to notify the landlord of any damage, other than fair wear and tear, as soon as practicable after becoming aware of the damage. The tenant is responsible for any damage intentionally or negligently caused by them or by people who are on the premises with their consent.

When the agreement ends, the tenant should:

- remove all the tenant's goods from the premises;
- leave the premises in the same condition (except for normal wear and tear) as described in the original condition report;
- remove or arrange for the removal of all rubbish, having regard to the condition of the premises at the commencement of the tenancy; and
- return to the landlord all keys and other opening devices or similar devices provided by the landlord to the tenant.

Use of premises

The tenant must also ensure that the premises are not used for illegal purposes and that there is no interference with the peace, comfort and privacy of neighbours.

The tenant must also ensure that the number of persons who reside in the residential premises does not exceed the number specified in the residential tenancy agreement.

Giving access to the landlord

The residential tenancy agreement sets out the tenant's rights and responsibilities with regard to giving the landlord access and allowing buyers to inspect the premises, with reasonable notice (see Entering premises at [27.230]).

Alterations to premises

The residential tenancy agreement sets out the tenant's rights and responsibilities in relation to adding fixtures, or making any renovation, alteration or addition to the residential premises.

A fixture is something like a built-in bookcase or air-conditioning unit, which is attached to the land or building and does not function independently.

If a tenant wants to add a fixture or make changes to the residential premises

A tenant requires either the prior written consent of the landlord, or should ensure that this is covered by an additional term in the residential tenancy agreement. A landlord must not unreasonably withhold consent to a fixture, or to an alteration, addition or renovation that is of a minor nature. The tenant bears the cost of such improvements, unless the landlord agrees to cover the cost themselves.

The law on alterations is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provisions spell out the kinds of alterations that are of a minor nature in relation to which it would be unreasonable for a landlord to withhold consent and similar matters. Examples include: installing fly screens on windows, installing window safety devices for child safety; installing hand-held shower heads or lever-style taps for the purpose of assisting elderly or disabled people; installing or replacing hooks, nails or screws for hanging paintings and other; planting vegetables, flowers, herbs or shrubs if existing vegetation or plants do not need to be removed, and for shrubs – the shrubs will not grow to more than two metres in height.

If a tenant wants to remove a fixture

A tenant may, at their own cost and before they give vacant possession, remove any fixture that was installed in accordance with the Act or the residential tenancy agreement.

A tenant must notify the landlord of any damage caused by removing a fixture and must repair the damage, or compensate the landlord for the landlord's reasonable expenses of repairing the damage.

A tenant may not remove a fixture without the consent of the landlord if the fixture was installed at the landlord's expense or the landlord provided the tenant with a benefit equivalent to the cost of the fixture.

If there is a dispute over fixture and changes

If the landlord refuses to let a tenant install a fixture or make a renovation, alteration or addition, or remove a fixture installed by the tenant as provided for in the Act, then the tenant can apply to the NSW Civil and Administrative Tribunal for the appropriate order.

A landlord can also apply to the Tribunal for an order prohibiting the tenant from removing a fixture, or compensation for the cost of rectifying work done, regardless of whether the landlord consented to the carrying out of that work.

Co-tenants, subtenants and boarders and lodgers

Many tenants renting a house or flat have other people living on the premises. Often there is no express agreement about the terms on which they stay there, except for their contributions to rent and other expenses. Whether they are co-tenants, subtenants, or boarders or lodgers depends on the circumstances and the Act treats each of these statuses differently (see [27.350]).

Every tenant is entitled to sublet or transfer (hand over to another person) their interest in the agreement, provided the landlord agrees.

The landlord must not charge for giving consent, other than reasonable expenses for giving consent.

A landlord may refuse a request to sublet or transfer the whole of the residential premises and need not have a good reason.

However, a landlord must not unreasonably withhold consent to a partial subletting or transfer of less than the whole agreement. If the landlord does unreasonably refuse consent, a tenant may apply to the NSW Civil and Administrative Tribunal for an order that they sublet or assign.

If the premises are sublet or assigned without the landlord's consent or not in accordance with the Act, the tenant has breached the agreement. This means that the landlord may issue a notice

of termination and/or apply to the NSW Civil and Administrative Tribunal.

Paying rent

The tenant must pay the correct rent, in advance, as set out in the residential tenancy agreement.

Manner of paying rent

A landlord or landlord's agent must permit a tenant to pay the rent by at least one means for which the tenant does not incur a cost (other than bank fees or account fees usually payable for the tenant's transaction) *and* that is reasonably available to the tenant.

Rent receipts

If rent is paid in person other than by cheque, the landlord must give the tenant a receipt.

If rent is paid in person by cheque, the person who receives the payment must make the receipt available for collection by the tenant or post it to the residential premises (or send it by email to an email address specified by the tenant for the service of documents of that kind, when new provisions commence in 2019).

A rent receipt must show:

- the name of the person who receives the rent or on whose behalf it is received;
- the name of the person paying the rent or on whose behalf it is paid;
- the address of the premises for which the rent is paid;
- the period for which the rent is paid;
- the date the rent is received;
- the amount of rent paid.

Landlords who do not issue rent receipts may not be declaring the rent as income on their tax return, which they are legally obliged to do. DCJ Housing and the Aboriginal Housing Office do not have to issue rent receipts.

Landlord must provide particulars of rent records if requested by the tenant

The landlord or landlord's agent must maintain a record showing all rent received under a residential tenancy agreement. They must, within seven days of a written request by the tenant, provide a written statement setting out the particulars of the rent record for a specified period. The tenant is unable to demand a record more than once for the same period.

If rent is in arrears

The landlord can issue a 14-day notice of termination once the rent is 14 days behind. A tenant who does fall behind with the rent should contact the landlord and try to negotiate a way of paying the amount owed. If there is good reason for the delay and it is not likely to happen again, the landlord may prefer to negotiate, rather than go to the trouble and expense of seeking to evict the tenant and finding a new tenant.

A non-payment termination notice must inform the tenant that the tenant is not required to vacate the residential premises if the tenant pays all the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord.

A landlord may apply to the NSW Civil and Administrative Tribunal for a termination order before the termination date specified in the non-payment termination notice.

A landlord may not seize a tenant's possessions and hold them pending payment of rent (*Conveyancing Act 1919* (NSW), s 177A).

Rent increases

The landlord cannot increase the rent during a fixed term of *less than two years* unless this is allowed for in the agreement (ie, the agreement specifies the increased rent or the method of calculating the increase) *and* 60 days' written notice is given. There is no limit on how often the rent can be increased.

The landlord cannot increase the rent during a fixed term of *two years or more* unless 60 days' written notice is given. Rent may not be increased more than once in any period of 12 months.

Where the fixed term is *two years or more*, a tenant may give a 21-day termination notice on the grounds that the rent has been increased. The termination notice may specify a date that is before the end of the fixed term, and the tenant is not liable to pay any compensation or additional amount for the early termination of the agreement (see [27.250]).

If the agreement becomes a periodic tenancy, the rent can be increased at any time with 60 days' written notice. If this notice is not given, the increase is not binding and the tenant should be reimbursed for any increase paid.

The law on rent increases is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it

is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. Changes are: (1) the date on which the rent may be increased within a fixed term of less than two years must be specified. It no longer requires 60 days' written notice of the rent increase; (2) the rent payable under a periodic agreement may not be increased more than once in any period of 12 months.

If the rent has been increased illegally, the tenant can apply to the NSW Civil and Administrative Tribunal for an order for a refund of overpaid rent up to 12 months after notice of the increase was given. If the tenant does not pursue the matter of an illegal rent increase within a 12-month period of that rent increase then, *in any matter brought before the tribunal by the tenant after 12 months*, the rent increase will be treated as valid. However, the tenant can take action in the Local Court for a refund of overpaid rent up to six years later (*Limitation Act 1969* (NSW), s 14).

Excessive rent increases

If a tenant thinks a rent increase is too much, they should try to negotiate.

If the landlord is not prepared to compromise and the tenant thinks the amount asked is well in excess of current rentals in the area, they can, within 30 days of receiving notice of the increase, apply to the Tribunal for an order that the rent is excessive.

The Tribunal may make an order that the rent is excessive and that it must not exceed a specified amount. The order can have effect for up to a year, and applies to the tenants who signed the residential tenancy agreement, rather than to the premises.

If the tenant is not successful in renegotiating the rent increase (preferably in writing) or appealing it, they become liable to pay the new rent after 60 days.

Rent reductions

A tenant may make a written request to the landlord at any time for a rent reduction if the landlord reduces or withdraws any goods, services or facilities provided with the residential premises.

A landlord and a tenant may agree to reduce the rent payable during periods when access to the residential premises is required for prospective purchasers to view the premises.

A tenant may at any time before the end of a tenancy make an application to the Tribunal that rent is excessive, having regard to the reduction or withdrawal of any goods, services or facilities provided with the residential premises. This provision applies to all residential premises, including social housing premises.

Rent abatement

Rent abates if the premises become wholly or partly uninhabitable or unusable through no fault of either landlord or tenant (eg, through flood damage), or cease to be lawfully usable as a residence, or are appropriated or acquired by an authority by compulsory process.

If the parties choose to continue the tenancy, they may agree to a rent reduction until repairs are made. Where they cannot reach agreement, either may apply to the NSW Civil and Administrative Tribunal for a determination of the rent abatement or give immediate notice to end the tenancy.

Rent-free period

A tenant is not required to pay rent from the date on which they were served with a notice called "*Writ of Possession – Notice to Vacate*" from the Sheriff of New South Wales for a period of 30 days (see Mortgagee demands at [27.250]).

Receipts from council or water authority when services threatened

A tenant may offer to pay their rent to a local government council if they receive a letter from the council stating that rates are outstanding on the property, until such time as the outstanding rates are paid in full (*Local Government Act 1993*, s 569(4)).

A tenant may offer to pay their rent to Sydney Water if they receive a letter from this water authority threatening to disconnect services because of unpaid water charges until such time as the outstanding water charges are paid in full (*Sydney Water Act 1994* (NSW), s 62).

Receipts from a council or the water authority are treated as rent receipts.

Recovering overpaid rent

A tenant may make a written request to the landlord for repayment of overpaid rent or other amounts paid by the tenant that were not required to be paid under the Act or residential tenancy agreement. This request may be made during or after termination of the residential tenancy agreement. A landlord must, within 14 days of such a written request, repay to

the tenant these amounts. If the landlord fails to comply with this request at the end of 14 days, the tenant may apply to the Tribunal for an appropriate order within 28 days.

Living in strata

A new strata titles legislative regime commenced in New South Wales on 30 November 2016. *Tenants Rights Factsheet* Number 13 called "Strata scheme tenants", produced by the Tenants Union of NSW, sets out the basic rights of a tenant in a strata scheme. You may view this factsheet at https://www.tenants.org.au/factsheet-13-strata-scheme-tenants.

Additional rights have been conferred on tenants. This includes tenants' participation in general meetings, although this is limited, and tenant representation on strata committees, but only in strata schemes where tenants live in at least half of the number of lots in the scheme and only if their landlords have provided a tenancy notice to the owners' corporation. The tenant representative does not have a vote, cannot count towards the quorum and can be asked to leave the meeting when matters such as financial issues or collective sales are discussed.

The new legislation provides for the "collective sale" of strata units if owners want to sell or end their scheme. The collective sale may be proposed for a number of reasons, but commonly in circumstances where a developer wishes to demolish the building and build one with more units. The building may be ageing, and owners would prefer to sell their scheme instead of having to pay the costs of extensive repairs. To protect the rights and interests of all lot owners, there is a set process that applies. Ultimately, for a collective sale to go ahead, owners of at least 75% of the lots in the scheme must agree to the scheme being sold for redevelopment, and the Land and Environment Court must be satisfied that the sale is just and equitable. A tenant may find that their tenancy faces being terminated before the expiry of either the fixed term of their residential tenancy agreement, or the date of a valid notice of termination.

For more information as to where a tenant stands in relation to strata title, get advice from Local Tenants Advice and Advocacy Service (see "Contact points") or Strata Collective Sales Advocacy Services:

- Strata Collective Sales Advocacy Service (Older Persons) at Seniors Rights Service, phone (02) 9281 3600 or free call 1800 424 079;
- Strata Collective Sales Advocacy Service (General) at Marrickville Legal Centre, phone (02) 9559 2899.

Complaints about utility services

The Energy and Water Ombudsman NSW provides an independent way of resolving complaints for customers of electricity, gas and some water providers. The Energy and Water Ombudsman will investigate disputed accounts and actions of a provider that affect a person's property.

Tenants may contact the Ombudsman at 1800 246 545 (toll free) or visit their website at www.ewon.com.au.

Ending a tenancy

[27.250] Termination by the tenant

After the fixed term

If a tenant wants to leave at the end of the fixed term, they must give 14 days' written notice to the landlord on or before the last day of the fixed term. Otherwise, the tenancy becomes a periodic tenancy, for which the tenant must give 21 days' notice to end. Individual co-tenants can end their part of a periodic agreement by giving 21 days' written notice (see [27.350]).

If the landlord has breached the agreement

If a tenant wants to leave because the landlord has breached the agreement they must either give 14 days' notice, and specify the breaches, or (preferably) apply directly to the NSW Civil and Administrative Tribunal for an order allowing them to end the tenancy, identifying how the breach is serious enough to make termination appropriate. The latter also applies, where the landlord has contravened information disclosure provisions, as set out in s 26 of the *Residential*

Tenancies Act (when new provisions commence in 2019).

Before the end of the fixed term

A tenant who is facing hardship may apply to the NSW Civil and Administrative Tribunal for an order allowing them to terminate the tenancy before the end of the fixed term. If the Tribunal makes such an order, it may require the tenant to pay the landlord compensation for loss of the tenancy.

It is also possible for the Tribunal to terminate co-tenancies, wholly or in part, in special circumstances. Compensation to the landlord may be ordered (see [27.350]).

Abandonment and break fees

A tenant who moves out early without obtaining a Tribunal order is liable for the costs of breaking the agreement, although the landlord must try to find another tenant as soon as possible after the first tenant vacates the premises in order to minimise those costs.

Residential tenancy agreements can include terms that require payment of "break fees", where a tenant abandons the premises during a fixed term.

A break fee is a fixed compensation amount. The break fee amounts in the Act are for fixed terms of three years or less. At the time of reviewing this section, they are six weeks' rent during the first half of the fixed term and four weeks' rent thereafter. For fixed terms greater than three years, there is no limit on the amount of the break fee. The break fee term of the standard agreement (*Residential Tenancies Regulation 2010*, Sch 1) fixes the break fee.

The law on break fees is changing. Originally the NSW Government proposed to commence the new provisions on 2 December 2019. However, it is probable that the commencement date will be in the first half of 2020. Check Tenants' Advice and Advocacy Services in "Contact points" to see if the new provisions have commenced. The new provisions follow.

A break fee is a fixed compensation amount. The break fee amounts in the Act are for fixed terms of three years or less. They are:

1. if less than 25% of the fixed term had expired when the premises were abandoned – an amount equal to four weeks' rent; or
2. if 25% or more but less than 50% of the fixed term had expired when the premises were abandoned – an amount equal to three weeks' rent; or
3. if 50% or more but less than 75% of the fixed term had expired when the premises were abandoned – an amount equal to two weeks' rent; or
4. if 75% or more of the fixed term had expired when the premises were abandoned – an amount equal to one week's rent.

For fixed terms greater than three years, there is no limit on the amount of the break fee.

Early termination without owing compensation to the landlord

The landlord is not entitled to compensation if a tenant gives 14 days' notice of termination for any of the following reasons:

- the tenant has accepted an offer of social housing;
- the tenant is going into aged care;
- the residential premises are listed on the LFAI Register (see *Residential Tenancies Act*, s 100(5)), either during the term of the agreement or prior to the agreement being entered into and that fact not being disclosed to the tenant (when new provisions commence in 2019);
- the landlord gives notice of an intention to sell the premises, having not informed the tenant of any proposal to sell before commencement of the tenancy; or
- a person who was occupying the premises with the tenant has been excluded from the premises by a final Apprehended Violence Order.

The landlord is not entitled to compensation if a tenant gives 21 days' notice of termination, where the fixed term is two years or more *and* the landlord has issued a notice of rent increase.

A tenant who is in circumstances of domestic violence may give a *domestic violence termination notice* and is not liable to pay any compensation or other additional amount for the early termination of a fixed-term agreement. Circumstances of domestic violence are defined in s 105B(2) of the *Residential Tenancies Act* (see Domestic violence at [27.310] and see [27.350]).

Mortgagee demands

If the landlord fails to pay home loan instalments, the mortgagee (bank or other financier) may write and

demand possession of the premises from the tenant. Eviction by a mortgagee is not legally possible without the Sheriff giving tenants 30 days' notice in writing. Rent is not payable during the 30 days' notice. Tenants should immediately get advice from Tenants Advice and Advocacy Services in these circumstances. Basic information on this issue is available in *Fact sheet 21: Mortgagees and tenants* at www.tenants.org.au.

[27.260] Termination by the landlord

After the fixed term

If the landlord wants to end the tenancy at the end of the fixed term, they must give at least 30 days' notice before the term finishes. If this notice is not given, the tenancy automatically becomes a periodic tenancy, and generally the landlord must then give 90 days' notice to end the tenancy (or, in the case of an employee or caretaker residential tenancy agreement, a smaller notice period is required and this is set out in s 85(2A) of the *Residential Tenancies Act*, when new provisions commence in 2019).

Where 90 days' notice is given, the landlord does not have to give a reason. And, the Tribunal must end the tenancy, unless the notice of termination was given in retaliation for the tenant having taken or proposed an action to enforce a legal right in relation to the landlord. Seek advice if you think this is happening. Tenants can apply for Tribunal orders that the notice of termination is void for this reason. Time limits apply.

If the premises have been sold after the fixed term

If the premises have been sold and the exchanged contracts state that there must be vacant possession, only 30 days' written notice is required. The termination date must be in a periodic agreement, but the notice can be given during a fixed term.

If the tenant has breached the agreement

If a landlord wants to end the tenancy because the tenant has breached the agreement, they must give 14 days' notice, and specify the breaches.

When a landlord gives 90 days' notice, the tenant may give possession before the 90 days has expired and without further notice. Liability to pay rent ends upon giving possession to the landlord. It is polite and reasonable to give the landlord some notice of when possession will be given.

Termination by the Tribunal without notice of termination

For "long-term tenancies" (20 years or more continual occupation), the landlord is not required to give notice of termination and the Tribunal has discretion to not evict, having considered the circumstances of the case. If termination orders are made, the date for possession must be at least 90 days hence or in the case of social housing tenants, no more than 28 days, unless there are "exceptional circumstances justifying a later day". At law, the words "exceptional circumstances" create a very high bar.

Also, the landlord may apply to the tribunal for termination of a tenancy without giving a notice of termination in the following circumstances:

- damage/injury;
- illegal use;
- threat, abuse, etc.

For eviction of non-tenant occupants, see [27.350].

Notice required to end a tenancy

The tenant must give the following written notice of termination:

- 14 days before the end of a fixed-term agreement if they want the agreement to end at the expiry of the fixed term;
- 14 days if the landlord has breached the agreement;
- 21 days in a periodic tenancy if there are no grounds for termination.

The landlord must give the following written notice of termination:

- 30 days before the end of a fixed-term agreement if they want the agreement to end at the expiry of the fixed term;
- 14 days if the tenant has breached the agreement (if the breach involves rent arrears, the rent must be 14 days overdue – the same applies to water usage and utility charges when new provisions commence in 2019);
- 30 days in a periodic tenancy if the premises are being sold with vacant possession;
- 90 days in a periodic tenancy if there are no grounds for termination.

[27.270] How notice must be given

Notice from either tenant or landlord must be in writing, and can be given to the other party:

- by hand (in person);
- in an envelope, in the mailbox of the addressee;
- by post; or
- by email (Note there is a need for the email address to have been provided for the purpose of service of notices under the Act.).

The date of service

The date of service is the day on which the notice is received. If it was posted, this is the seventh working day after posting, unless shown to be otherwise.

[27.280] Immediate notice of termination

Either party can serve immediate notice of termination if the place becomes unfit to live in (eg, through major damage not caused by landlord or tenant).

[27.290] Returning the keys

The keys should be returned the day the tenant moves out.

The landlord can require payment of reasonable compensation for any losses incurred if the keys are returned late. This does not necessarily mean the amount of the rent.

[27.300] Goods left on premises

The *Residential Tenancies Act* sets out the procedure for dealing with goods left by a tenant. There are three classes of goods left behind: perishable goods, non-perishable goods and personal documents. The landlord may dispose of perishable goods. The landlord must give the tenant notice of intent to dispose of other goods. Notice may be given by affixing a notice to the premises if there is not another known address for the tenant. Personal documents must be kept for 90 days, after notice, before disposal. Non-perishable goods must be kept for 14 days, after notice, before disposal.

The landlord must deliver to the tenant (or the person who owns them), if requested, all goods left on the premises, subject to that person paying an occupation fee up to the amount of 14 days' rent.

If the landlord refuses to return goods, the person can apply to the NSW Civil and Administrative Tribunal for an order that they do so.

The application should be made within three months of the person becoming aware of the landlord having possession of the goods.

The Tribunal can also order the landlord to pay the owner of goods compensation for loss by unlawful disposal. Time limits apply.

[27.310] Eviction

If the landlord locks the tenant out

It is illegal for a landlord to lock out a tenant. Landlords who lock out tenants can face fines of up to $22,000 and be required to pay compensation.

If the tenant does not move

Before a landlord can evict a tenant, certain procedures must be followed. First, the landlord must give proper notice (see Notice required to end a tenancy at [27.260]).

If the tenant does not move out according to the notice, the landlord has 30 days to apply to the Tribunal for an *order of termination* and an *order of possession*. The matter will normally be listed for hearing in seven to 14 days.

The tenant will receive a notice of the hearing.

Defending eviction proceedings

A tenant can defend eviction proceedings on a number of grounds, such as denying there was any breach of the agreement or challenging the termination notice. Notices can be challenged for being retaliatory or not being given in accordance with Pt 5 of the *Act* (Termination of Residential Tenancy Agreements).

The tenant must, of course, have some evidence to prove their case.

The Tribunal's decision

The Tribunal makes decisions based on the law and the evidence put to it. If it decides to make an order of termination, it usually gives from seven to 14 days before the order of possession takes effect. If the tenant is at the hearing and can show that this will cause hardship, the period may be extended.

If the tenant does not turn up, the Tribunal usually gives a shorter notice period, and may order immediate possession to the landlord.

Tenants should seek advice if they are subject to eviction proceedings.

Eviction for rent arrears: a special case

If a landlord gives a termination notice for rent arrears only, it must state that there are two ways in which the tenant may render the notice of no effect.

They are:

1. pay all the rent owing according to the tenancy agreement; or
2. enter an agreement for payment of the arrears and fully comply with that agreement.

The Tribunal will not make a termination order if (1) or (2) above has been done. Further, termination and possession orders will be avoided if the tenant does (1) or (2) above. There is an exception: if the Tribunal finds that the tenant has frequently failed to pay rent on time, it can make orders that withstand the rules about payment (or agreement) avoiding termination and eviction processes.

Payment of all rent arrears avoids a termination notice or a termination order, including where a warrant is issued (but not yet executed), except where the Tribunal finds that the tenant has frequently failed to pay rent on time.

The onus is on the landlord to tell the Tribunal and/or the Sheriff that the tenant has avoided eviction by payment (or agreement). There is a maximum penalty of $2,200 for failing to do so. If the landlord does not inform the Tribunal or Sheriff appropriately, the tenant should inform them in writing and urgently contact their local Tenants Advice and Advocacy Services. A complaint to NSW Fair Trading can also be made.

Eviction by social housing providers

The *Residential Tenancies Act* has provisions (Pt 7) to facilitate social housing policies, particularly to make eviction of DCJ Housing tenants easier (see [27.610]). Social housing tenancies are more complex than private tenancies because of the interaction of government policy and tenancy law.

Enforcement of order of possession and physical removal of the tenant

Only a Sheriff with a *warrant of possession* from either a court or the NSW Civil and Administrative Tribunal can enforce an order of possession.

Only a Sheriff may physically remove a tenant from premises. The Sheriff may be assisted by police if people resist.

A tenant should remove all their goods (especially their personal documents) to storage if the Sheriff is coming and alternative premises have not yet been found. This protects the tenant's goods from both lawful and unlawful harm or disposal.

Domestic violence

Tenancy law can help in situations of domestic violence. The law changed on 28 February 2019. The following summary comes from *Tenants Rights Factsheet 12* "Domestic violence and tenancy" available from the Tenants' Union of NSW and online at https://files.tenants.org.au/factsheets/fs12.pdf.

In circumstances of DV, NSW tenancy law can provide some help to victim-survivors and other innocent parties. It depends on various things:

- whether your agreement is fixed-term (eg, six months) or periodic (ongoing);
- your tenancy status, for example, head-tenant, sub-tenant, co-tenant;
- the tenancy status of the perpetrator;
- whether you want to leave or stay;
- whether you want the perpetrator to leave;
- whether you have an Apprehended Violence Order (AVO);
- what sort of AVO you have, for example, interim, provisional, final, exclusion;
- whether you have other documentary evidence of DV.

The help might be one or more of the following:

- ending the perpetrator's tenancy;
- ending your tenancy;
- transfer of your tenancy (rarely);
- protection of the victim-survivor from breach fees and costs for property damage in some circumstances;
- a landlord or agent will not be allowed to list information about a tenant in a tenancy database when the tenant has terminated the agreement in circumstances of domestic violence.

You might need to:

- apply to the NSW Civil and Administrative Tribunal (NCAT);
- give a termination notice;
- apply for an AVO.

For more information, check the link at the top of this box.

The NSW Civil and Administrative Tribunal

[27.320] What the Tribunal does

The NSW Civil and Administrative Tribunal can hear disputes about most aspects of residential tenancy agreements.

Who can apply?

Both tenants and landlords can apply to the Tribunal for orders. This includes social housing, residential land lease communities and some lodging/boarding accommodation. Landlords make more applications than tenants.

The Tribunal cannot hear matters about protected tenants (see Who is a protected tenant at [27.50]).

Some tenancy disputes where the Commonwealth of Australia is the landlord must go to the Federal Circuit Court. This arose by amendment of Federal Courts legislation in early 2015 (see *Federal Circuit Court of Australia Act 1999* (Cth), s 10AA). Defence Housing Authority tenancies are thought to not be affected by the amendment.

What the Tribunal can hear

The Tribunal can make orders on matters such as:

- holding fee;
- locks and security;
- termination and eviction;
- retaliatory notice of termination;
- bond money;
- repairs;
- breaches of agreements;
- rent increases;
- goods left on premises;
- payment of compensation for both economic and non-economic loss.

[27.330] Making an application

Fees

Lodging an application with the Tribunal normally costs $51 (at 1 July 2019). It costs $13 for full-time students getting government assistance and people on government pensions or benefits. Higher fees apply for challenging existing decisions of the Tribunal.

When applications are heard

Applications regarding termination of tenancy are generally heard within 21 days in most areas of NSW, and within 28 days for all other matters.

Urgent hearings

Urgent hearings can be arranged within a few days. If your matter is urgent, attach a letter to the Registrar to your application, explaining why an urgent listing is needed and including evidence if available.

How to apply

Where to get forms

Application forms are available from the NSW Civil and Administrative Tribunal and its website.

Internet applications

A person can apply online on www.ncat.nsw.gov.au. The fee must be paid over the internet. Applications for urgent hearings cannot be made online.

Time limits

Time limits apply. It is 28 days from becoming entitled to make the application unless the enabling legislation specifies another time limit. Tenants should contact Tenants Advice and Advocacy Services for advice about making an application as soon as they have a problem.

[27.340] Tribunal hearings

Representation

Tenants usually represent themselves at Tribunal hearings. This can be a problem when the landlord is represented by an experienced agent. The Tribunal can allow parties to be represented, but good reason is required. In most tenancy cases, lawyers do not represent parties unless the tribunal is convinced it is appropriate.

Doing research and getting help

If a tenant plans to go to the Tribunal, they should do some research about the Tribunal and how it works, and prepare their case carefully. Tenancy workers at Tenants Advice and Advocacy Services may be able to help prepare a case and, in some circumstances, may be granted approval to represent a tenant.

Shared housing

[27.350] People who share premises need to know their tenancy status, responsibilities and rights. Some people in shared housing are covered by the *Residential Tenancies Act*, but others have few legal rights.

[27.360] Subtenant, boarder or lodger?

Some people who live in shared housing are boarders or lodgers. Others are subtenants. A boarder is a lodger who receives meals from the landlord.

It can be difficult to decide whether someone is a subtenant or a lodger. The test applied is whether or not the occupant has "exclusive possession" of their part of the premises (making the occupant a subtenant), or whether the owner or head-tenant retains "mastery" over the whole premises (making the occupant a lodger).

This means that the original agreement between the owner or head-tenant and the occupant needs to be examined. Generally, it is oral and not clear.

This is a grey area of the law, and it can be difficult to apply the test with any certainty. People in shared housing who are unsure about their status and rights can contact one of the Tenants Advice and Advocacy Services listed at [27.1040] for advice.

Subletting, or taking in a boarder or lodger

If tenants want to sublet part of premises, they should have the landlord's prior written consent. The landlord cannot unreasonably refuse consent to sublet part of the premises. Subletting without consent is a breach of the agreement, for which the landlord may issue a notice of termination and/or apply to the NSW Civil and Administrative Tribunal.

However, if the tenants take in a person as a lodger, they don't need the landlord's permission, as long as the number of people living in the house does not exceed the maximum number shown on the agreement.

Ways of sharing

Co-tenants

Lee, Maria and Paul share a house. All their names are on the residential tenancy agreement as tenants. They are co-tenants, with tenants' rights.

Subtenants

Lee's name is on the residential tenancy agreement with the owner of the house. He sublets part of the premises to Maria and Paul. They have a written subtenancy agreement with Lee. Lee is the head-tenant, and Maria and Paul are subtenants. As head-tenant, Lee has all the responsibilities of a landlord, and Maria and Paul have the same rights as other tenants under the *Residential Tenancies Act*. Without the written agreement, Maria and Paul would not be covered by the Act.

Lodgers

Lee's name is on the residential tenancy agreement (or he owns the premises). Maria and Paul occupy rooms, but Lee keeps control over the whole premises. Maria and Paul are lodgers and do not have rights as tenants.

[27.370] Eviction from shared housing

Co-tenants

Co-tenants can apply to the Tribunal to end their part of the tenancy or the part of another co-tenant. Such application needs special circumstances. "He never does the washing-up" will not suffice. Special circumstances need not be unique, but must be out of the ordinary.

Subtenants

A subtenant with a written agreement can be asked to leave by the head-tenant, who must, however, follow the procedures set out for landlords in the *Residential Tenancies Act*. Subtenants without written agreements, though not covered by the Act, have more rights than lodgers, but enforcing those rights is often impractical. For example, Supreme Court action may be needed. Such actions are difficult, expensive and usually not recommended.

Lodgers

A lodger must only be given reasonable notice by the landlord (whether owner or head-tenant), and has no rights under the *Residential Tenancies Act*.

What is reasonable notice for lodgers?

Generally, the rent payment period would be considered reasonable notice (if, eg, rent is paid

every week then one week's notice would be considered reasonable). However, if the person has lived in the premises for a long time, more time should be given.

It is difficult to enforce this. The landlord and the boarder or lodger should try to negotiate a date to leave.

Sometimes non-tenant occupants remain in premises after termination of the tenancy and departure of the tenant(s). In this situation, the landlord can give those occupants 14 days' notice requiring vacation. If the occupants do not leave, the landlord can apply to the Tribunal for an order for possession of the premises. Such an order can be enforced by the Sheriff.

[27.380] Leaving shared housing

Co-tenants

During a periodic agreement, a co-tenant can give 21 days' written notice of termination to the landlord and the other co-tenants. Upon giving possession to the other co-tenants, the liability of the departing co-tenant for rent and damage ends.

Departed co-tenants can demand payment of an amount of money equal to their share of the bond from the remaining co-tenants and apply to the tribunal if it is not paid.

During the fixed term, a co-tenant who wishes to leave should transfer their interest in the residential tenancy agreement to an existing or new co-tenant, otherwise, they will continue to be liable as a tenant until the agreement is terminated.

Transfer requires the consent of the other co-tenants. It also requires the agreement of the landlord, and the tenants must pay for any reasonable expenses involved. All parties should sign the transfer document. The landlord cannot unreasonably refuse consent to transfer of part of the agreement. Tenants should seek advice if they think the landlord has unreasonably refused. A tribunal application to sort out the problem may be possible.

Subtenants

A subtenant with a written agreement who wishes to leave must follow the procedures for tenants set out in the *Residential Tenancies Act*. The head-tenant is the relevant landlord. It is not clear what a subtenant without a written agreement needs to do. As a guide, a reasonable notice period might be what was agreed to or the rent payment period.

Lodgers

A lodger who wishes to leave should give reasonable notice. Generally, the rental period would be considered reasonable notice. For example, if rent is paid every week, then one week's notice would be considered reasonable.

[27.390] Vacancies in a shared house

If a room in a shared house is vacant, the tenants whose names are on the agreement will be liable to pay the rent. A co-tenant who moves out without transferring their interest in the agreement (see [27.380]) can be held liable for the rent with the other co-tenants.

If the fixed term has ended, the tenants may decide together or individually to end their tenancy by giving 21 days' notice of termination and vacating according to the notice.

[27.400] Bond

The names of all the tenants who have paid bond money should be on the bond form.

When a new tenant takes over the bond

If one of the tenants in a shared house leaves and a new tenant moves in, both should fill in a *Change of shared tenancy arrangement* form available from NSW Fair Trading and Tenants Advice and Advocacy Services.

The person leaving, the person moving in, and the landlord or agent must all sign the form. The form does not effect a transfer of the tenancy; it is only about the bond.

Transferring the bond to a new tenancy

A bond can be transferred from one tenancy to another, but only if the group of tenants is moving together. The tenants all need to fill in a transfer of bond form. Ensure that it is signed by all parties to the previous bond. Attach it to a lodgement form for the new bond and provide a cheque for the difference if the new bond is more than the bond being transferred.

If the tenants did not fill in a *Change of shared tenancy arrangement* form when they moved in to

the first premises and the original tenants have gone, they should sign a statutory declaration stating what has happened and ask the agent or landlord to write a letter supporting it. Receipts for those payments should be attached if possible.

Subtenants

For a subtenant living in shared housing under a written sub-tenancy agreement, the head-tenant must forward their bond money to NSW Fair Trading. Claims from subtenants for refunds of bond money are handled as ordinary bond claims by NSW Fair Trading and the NSW Civil and Administrative Tribunal.

[27.410] Rent receipts

All occupants of shared housing, whatever their status, should be given rent receipts for payments in person. If an occupant is not given receipts, they should keep a diary showing each payment made, and ask the person collecting the rent to sign against each entry.

[27.420] Liabilities to service providers

Service providers such as a telephone company and an electricity supplier will hold the person whose name is on the bill responsible for the amount due. This can cause problems if one of the co-tenants in a shared house won't pay their portion of the bill. Subtenants and boarders or lodgers are not liable to pay electricity bills unless their use is metered separately.

If a co-tenant leaves without paying bills

If a co-tenant leaves without paying their share of the bills, the other tenants may have to take legal action in the Local Court to get the money back as a debt (see Chapter 15, Debt).

[27.430] Disputes between people in shared housing

Community justice centres can mediate in disputes between people in shared housing (see Chapter 4, Assistance With Legal Problems, for information on community justice centre mediation services and the locations of community justice centres throughout NSW).

The Share Housing Survival Guide

The *Share Housing Survival Guide (NSW)* is available online at www.sharehousing.org.

Boarding houses

[27.440] A boarding house resident may be:

- a tenant with a residential tenancy agreement under the *Residential Tenancies Act*;
- a resident with an occupancy agreement under the *Boarding Houses Act*;
- a boarder or lodger with a common law lodging licence.

This section discusses the *Boarding Houses Act*.

[27.450] Coverage

The *Boarding Houses Act* applies to "registrable boarding houses". There are two classes: "general boarding houses" and "assisted boarding houses". The large majority are general boarding houses. The same rules on registration and occupancy rights apply to each class; assisted boarding houses are subject to additional rules and monitoring by NSW Department of Communities and Justice.

What is a registrable boarding house?

The premises must be the principal place of residence for one or more lodgers. In additional, the premises must be either:

- a *general boarding house* that provides beds for a fee or reward for five or more residents (not counting the proprietor, manager or any relatives of the proprietor or manager if they also reside at the premises);
- an *assisted boarding house* that provides beds for a fee or reward for two or more residents with disabilities who need high levels of care.

Boarding premises that fit the above definitions but are operating unlawfully (eg, without the required consent of the local council) are still

registrable boarding houses and covered by the *Boarding Houses Act*.

If premises are leased to a tenant and the tenant sublets them to lodgers in a way that fits the definition, the premises are a registrable boarding house and covered by the *Boarding Houses Act*. The tenant is the proprietor.

All registrable boarding houses are required to be registered by their proprietors on the Boarding Houses Register maintained by NSW Fair Trading. This register may be viewed at parkspr.fairtrading.nsw.gov.au/BoardingHouse.aspx.

[27.460] What is not covered?

The following premises are not registrable boarding houses:

- premises used as a hotel, motel, bed and breakfast or backpackers' hostel;
- serviced apartments;
- accommodation for workers in connection with their employment;
- accommodation used by an educational body for its students;
- premises subject to a social housing tenancy agreement;
- retirement villages;
- public hospitals, mental health facilities, nursing homes and aged care facilities;
- premises used for refuge or crisis accommodation provided by public authorities and other organisations and funded by the Commonwealth or State governments.

[27.470] Role of local government council

After a registrable boarding house is registered, the local government council is required, in most cases, to conduct an inspection of the premises. The council must give notice of the inspection to the proprietor (it need not notify residents), and can access any part of the premises. The purpose of the inspection is to check for compliance with building and fire safety regulations, and the standards for places of shared accommodation.

The standards for places of shared accommodation, set out at Pt 1 of Sch 2 of the *Local Government (General) Regulation 2005* (NSW), apply to all registrable boarding houses and allow the local council to set a maximum number of residents and enforce basic standards of cleanliness and amenity.

[27.480] Types of agreements

The agreement between a resident and proprietor of a registrable boarding house may be either:

- a "rental agreement" (*Boarding Houses Act*, s 27) – that is, a residential tenancy agreement under the *Residential Tenancies Act*; or
- an occupancy agreement under the *Boarding Houses Act*.

Occupancy agreements

An occupancy agreement is an agreement under which the proprietor of a registrable boarding house grants a resident the right to occupy, for a fee or reward, one or more rooms in the boarding house.

The occupancy agreement will set out:

- the occupation fee (rent);
- when payment is due; and
- terms that expand on and comply with the "occupancy principles" set out in the *Boarding Houses Act* (see below).

An occupancy agreement may have other terms that are not required to be included by the occupancy principles. Such terms are valid, so long as they are consistent with the occupancy principles.

The occupancy agreement must be in writing. If it is not, it is still a valid occupancy agreement and a resident can apply to the NSW Civil and Administrative Tribunal (Tribunal) for an order that the proprietor put the agreement in writing. A standard form of occupancy agreement may be viewed on NSW Fair Trading's website.

[27.490] Occupancy principles

The occupancy principles are a list of broad, basic rules set out in Sch 1 of the *Boarding Houses Act*. The accommodation must comply with the occupancy principles.

[27.500] Disputes

Residents and the proprietor should try and resolve a dispute using a reasonable dispute resolution process. If this doesn't work, or if it is a serious or urgent problem, either party can apply to the Tribunal to resolve the dispute.

The occupancy principles

Occupancy principle	*Extract*
State of premises	A resident is entitled to live in premises that are: (a) reasonably clean, and (b) in a reasonable state of repair, and (c) reasonably secure.
Rules	A resident is entitled to know the rules of the registrable boarding house before moving into the boarding house.
Penalties prohibited	A resident may not be required to pay a penalty for a breach of the occupancy agreement or the rules of the registrable boarding house.
Quiet enjoyment of the premises	A resident is entitled to quiet enjoyment of the premises.
Inspections and repairs	A proprietor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes.
Notice of increase of occupancy fee	A resident is entitled to 4 weeks written notice before the proprietor increases the occupancy fee.
Utility charges	(1) The proprietor is entitled to charge a resident an additional amount for the use of a utility if: (a) the resident has been notified before or at the time of entering the occupancy agreement of the use of utilities in respect of which the resident will be charged, and (b) the amount charged is based on the cost to the proprietor of providing the utility and a reasonable measure or estimate of the resident's use of that utility.
	"Utility" means supply of electricity, gas, oil, water or any other service prescribed by the regulations.
Payment of security deposits	(1) The proprietor may require and receive a security deposit from the resident or the resident's authorised representative only if: (a) the amount of the deposit does not exceed 2 weeks of occupancy fee under the occupancy agreement, and (b) the amount is payable on or after the day on which the resident (or the resident's authorised representative) enters the agreement. (2) Within 14 days after the end of the occupancy agreement, the proprietor must repay to the resident (or the resident's authorised representative) the amount of the security deposit *less* reasonable costs.
	"Reasonable costs" cover: repairs to premises or goods as a result of damage; any occupation fees or charges owing and payable under the occupancy agreement; cleaning the resident's part of the premises, having regard to its condition at the commencement of the occupancy; replacing locks altered, removed or added by the resident without the consent of the proprietor; and any other amounts prescribed by the regulations.
Information about termination	A resident is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction.

Occupancy principle	*Extract*
Notice of eviction	(1) A resident must not be evicted without reasonable written notice. (2) In determining what is reasonable notice, the proprietor may take into account the safety of other residents, the proprietor and the manager of the registrable boarding house and any other relevant circumstances.
Use of alternative dispute resolution	A proprietor and resident should try to resolve disputes using reasonable dispute resolution processes.
Written receipts	A resident must be given a written receipt for any money paid to the proprietor or a person on behalf of the proprietor.

If the dispute relates to something covered by an occupancy principle, it is called an "occupancy principles dispute" and the Tribunal can make a range of orders.

Applications to the Tribunal should be made within 28 days of the commencement of the dispute (*Civil and Administrative Tribunal Rules 2014* (NSW), r 23(3)(b)).

If the dispute is about whether you or the proprietor is in breach of a term of an occupancy agreement to which an occupancy principle does not apply (eg, the term that requires you to pay an occupation fee, or a term that states that you will be provided with meals), it appears that the dispute is not an occupancy principles dispute, and cannot be dealt with by the Tribunal. However, you may be able to apply to the Tribunal to have a dispute dealt with as a consumer claim under the *Fair Trading Act 1987* (NSW) (Pt 6A), which provides for a similarly wide range of orders. A proprietor cannot make a consumer claim under this Act, because they are not the "consumer" in the relationship.

[27.510] Ending an occupancy agreement

If a resident wants to end the occupancy

The occupancy agreement should set out the amount of notice a resident is required to give before ending the occupancy agreement and moving out.

If it does not, the resident should give notice equivalent to the period of the occupancy fee (eg, if you pay weekly, you would give one week's notice). Where the proprietor has seriously breached the agreement, the resident might give less notice. There are no occupancy principles about the termination of occupancy agreements by the resident.

If the proprietor wants to end the occupancy

The occupancy agreement should set out the grounds for termination and the period of notice for each ground. The period of the notice may vary depending on the ground, and may vary between occupancy agreements, but in any case must be "reasonable". The proprietor's termination notice must be in writing.

If a resident receives a termination notice from the proprietor and does not want to leave, the resident may apply to the Tribunal. The resident should do this straight away and attach a covering letter to their application form asking for an urgent hearing by the Tribunal. They also should get advice from a tenants' advice and advocacy service. At the hearing, the resident will need to show that the termination notice does not comply with the provisions relating to "occupancy disputes" in the Act.

If a resident is still at the premises when the notice period ends, the resident may be evicted by the proprietor. The proprietor does not need to apply to the Tribunal or court to evict a resident; they can do it themselves and, if the resident resists, the proprietor may use reasonable force to evict the resident. The proprietor can also ask the police to evict the resident; if the resident refuses, the resident may be guilty of an offence under the *Inclosed Lands Protection Act 1901* (NSW).

Security deposit

Where a resident has paid a security deposit, the proprietor must return it to the resident after termination of the agreement. The proprietor may deduct from it any debts the resident owes for unpaid occupancy fees and utility charges, and any damage the resident may have caused. If the security deposit is not returned within 14 days of

the termination of occupancy, or if the resident disputes any deductions made from it by the proprietor, the resident can apply to the Tribunal for its return.

Boarding Houses and the Law: A legal guide for people living in boarding houses in NSW (2018) is available online at https://rlc.org.au/publication/boarding-houses-and-law-legal-guide-for-people-nsw

Lodgers not covered under the Residential Tenancies Act 2010 or the Boarding Houses Act 2012

Nearly all such persons have only a common law lodging licence. They have few rights. There is no standard form of agreement setting out rights and responsibilities, and no requirement for landlords to give notice of a rent increase or termination. There is little such boarders and lodgers can do to protect themselves against eviction.

Nevertheless, they should insist on being given rent receipts, or keep a diary showing each payment initialled by the person collecting the rent.

Some remedies may be available in the NSW Civil and Administrative Tribunal under the Consumer Claims provisions (Pt 6A) of the *Fair Trading Act 1987* if the landlord is in business. Examples include recovering monies; to do work, provide services, fix or replace faulty goods; an order that a term of the agreement is unfair and therefore not enforceable; and, in some circumstances, compensation under the Australian Consumer Law if the premises are not fit for the purposes of boarding or lodging. (There is a time limit of three years to apply for most matters.)

A small number of residents of boarding houses may be covered under the *Landlord and Tenant (Amendment) Act*. For this reason, operators of boarding houses should obtain advice before taking steps to evict a resident.

Anyone who is unsure about their status should get advice from a tenants' advice and advocacy service or community legal centre.

Squatters

A squatter is a person who lives in premises without the owner's consent. They are not legally recognised as tenants and have no legal protection against eviction.

Trespass

Squatters can be charged with trespass under s 4 of the *Inclosed Lands Protection Act 1901*, which makes it an offence to, without lawful excuse:

- enter "inclosed lands" without the consent of the owner, occupier or person apparently in charge; or
- remain on inclosed lands after being requested to leave by that person.

The maximum penalty is $1,100. *Inclosed lands* can be either public or private property.

Offensive behaviour on inclosed lands

Anyone who behaves in an offensive manner when asked to leave is guilty of a further offence, with a maximum penalty of $2,200. A squatter could also be sued by the owner for any damage caused by the trespass.

What is a lawful excuse?

It is up to the squatter to prove lawful excuse. Homelessness is not generally regarded as a lawful excuse.

Getting legal advice

A squatter threatened with eviction should get legal advice as soon as possible from a community legal centre (see Contact points for Chapter 4, Assistance With Legal Problems). They should also try to negotiate with the owner, who may be willing to let them occupy the premises if satisfied that no damage is being caused.

It might also help to contact Link2Home on 1800 152 152 for help with finding other accommodation.

Adverse possession

A person who occupies a parcel of land (as a squatter or otherwise) may make an application for title to that land on the basis of adverse possession, so long as they have occupied that land with the full knowledge of the owner who has not sought to eject them.

Adverse possession must be "open not secret; peaceful, not by force; and adverse, not by consent of the true owner" (*Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464).

In NSW, Torrens title land cannot be claimed by adverse possession unless the land claimed constitutes the entirety of the title (see *Real Property Act 1900* (NSW), s 45D). The claimant must have openly occupied the property exclusively, keeping out others, and used it as if it were his own *and* in NSW must have been in continuous possession for a period of at least 12 years in the case of private ownership and 30 years in the case of the Crown (*Limitation Act 1969*, s 27).

TENANCIES IN LAND LEASE COMMUNITIES (RESIDENTIAL PARKS)

The Residential (Land Lease) Communities Act 2013

[27.520] What is a land lease community?

Land lease communities consist of an area of land divided into residential sites and common areas. The land is owned by the owner or operator of the community. Homes in land lease communities can be owned by "home owners" or by the operator of the community.

[27.530] What does the Act do?

The *Residential (Land Lease) Communities Act* sets out the rights and responsibilities of operators and home owners, and some of the rights and responsibilities of land lease community tenants.

A resident of a land lease community may be a tenant or a home owner.

A home owner is a person who owns a home on a residential site that is the subject of a site agreement. A home owner can also be a person who obtains an interest in a site agreement eg, as the personal representative or beneficiary of a deceased estate.

[27.540] Tenancy agreements

A site agreement is an agreement under which the operator grants a right of occupation of a residential site in return for value (usually site fees). A site agreement must be in writing and in the standard form. Additional terms can be added if they do not conflict with the Act, or any other Act. The home owner is entitled to receive a copy of the site agreement free of charge.

Tenants of land lease communities may rent a home from the operator or a home owner. Tenants are entitled to a residential tenancy agreement under the *Residential Tenancies Act 2010* unless the arrangement is for refuge or crisis accommodation. In this case, the Act may not apply for either 30 or 60 days.

[27.550] Rights and responsibilities

Section 36 of the RLLC *Act* covers the majority of a home owner's responsibilities. These include:

- to use the site only as a place of residence and not for any illegal purpose;
- not to interfere with the reasonable peace, comfort or privacy of other residents;
- to use the common areas only for a valid purpose and not intentionally or recklessly damage or destroy them;
- to keep their home in reasonable repair and keep the residential site tidy;
- not to harass or intimidate the operator or employees;
- to comply with the site agreement and community rules.

A home owners rights include:

- to have privacy, peace and quiet enjoyment of the site and common areas;
- to choose their own tradespeople and service providers;
- have their spouse, de-facto partner or carer live with them even if they are not named or referred to in the site agreement.

The operator's main responsibilities are found at s 37 and include:

- ensuring that the community is reasonably safe and secure;
- ensuring that home owners have access to their sites and common areas;
- taking reasonable steps to ensure that tradespeople, service providers and emergency services have access to the community;
- to maintain the community's common areas;
- to pay all rates, taxes and other charges payable by the owner or operator;
- to comply with all statutory obligations relating to the community.

[27.560] Community rules

Community rules are about the use, enjoyment, control and management of the community. They must be fair and reasonable and clearly expressed. A rule cannot invalidate anything that has already occurred.

A community rule cannot be inconsistent with the Act, any other law or the terms of the agreement. A term of a site or tenancy agreement prevails over a provision of the community rules if there is an inconsistency.

All residents, the owner and operator of a community must comply with the rules.

[27.570] Residents committees

Residents of a community are entitled to establish a residents committee. Both home owners and tenants over the age of 18 years can be members of the committee. The operator or a close associate of the operator (even if they are a resident) cannot be a member.

The functions of a residents committee are to represent the interests of residents and to consult with residents and the operator about the day to day running of the community.

A community can only have one residents committee.

[27.580] Site fee increases

The *Residential (Land Lease) Communities Act* provides for two methods of site fee increases – fixed and by notice. A fixed method is written into the site agreement and the method may apply for a specified period or for the duration of the site agreement. The operator must provide at least 14 days notice of an increase. A fixed method increase cannot be challenged as being excessive.

An increase by notice is limited to one per year and 60 days notice must be given to all home owners (other than those on a fixed method) in the community at the same time.

To challenge an increase by notice as excessive at least 25% of home owners who received the notice must sign an application for compulsory mediation. The application must be made within 30 days of receiving the notice of increase. The procedure for mediation is set out in s 151 of the *Act*.

If mediation fails, home owners can make an application to the Tribunal for an order that the increase is excessive. The Tribunal may have regard to a number of factors when considering the increase and cannot award an amount lower than that needed to cover the actual or projected increase in the outgoings and operating expenses for the community.

Utility charges

In land lease communities, the operator is often the supplier of utilities. Site agreements can require home owners to pay charges for electricity, gas, water and sewerage. A home owner cannot be charged unless the use is separately metered or measured and the operator provides an itemised account and at least 21 days to pay.

Usage charges for home owners cannot be higher than the amount charged to the operator by the operator's utility service provider.

Service Availability Charges (SAC) for electricity must be discounted according to cl 13 of the *Residential (Land Lease) Communities Regulation 2015* (NSW) if the supply to the site is less than 60 amps.

The combined SAC for water and sewerage cannot be more than $50 per year.

[27.590] Sale of dwellings

All home owners have the right to sell their home on site. Any terms of a site agreement that restrict or prohibit sales on site are invalid terms since the commencement of the *Residential (Land Lease) Communities Act* on 1 November 2015.

Operators must not cause or permit interference with a home owner's right to sell their home. Home owners can make an application to the Tribunal for compensation if an operator does interfere with the sale.

[27.600] Termination of site agreements

In most cases, a termination notice must be issued as the first step in terminating a site agreement.

Termination by home owner

Home owners can give the operator a termination notice without providing a reason for termination. The notice must give the operator at least 30 days notice of the intended date of termination and vacant possession of the residential site must be provided on or before the stated day.

Termination by operator

An operator can issue a home owner with a termination notice on the following grounds:

- the home owner has seriously or persistently breached the site agreement (90 days notice);
- the operator requires the site in order to comply with an obligation imposed by an Act to carry out works (90 days);
- the community is to be closed and used for a different purpose (12 months or the day after the fixed term ends);
- there is to be a change of use of the site (12 months or the day after the fixed term ends);
- compulsory acquisition (90 days);
- the site is not lawfully useable as a residential site (90 days);
- the site has not been used for at least three years as a place of residence (180 days).

An operator can apply to the Tribunal for a termination order on the ground of serious misconduct without first giving a termination notice

For more information and resources about the *Residential (Land Lease) Communities Act*, visit thenoticeboard.org.au.

SOCIAL HOUSING TENANCIES

[27.610] Social housing is rental housing provided to very low income and low-income households at affordable rents. The main forms of social housing are public housing, community housing and Aboriginal housing.

All social housing tenancies operate in a similar legislative and procedural framework; however, when advising a tenant it is always necessary to confirm who is the landlord, what parts of the *Residential Tenancies Act* apply, and the landlord's policies.

From 1 July 2019, the FACS and Department of Justice became a single department, named the DCJ. On 24 September 2019 branding of its programs was waiting finalisation. It has previously been known as FACS Housing, Housing NSW, the Department of Housing and the Housing Commission.

DCJ manages tenancies on behalf of the NSW LAHC. LAHC is a statutory corporation and the legal entity that owns residential properties on behalf of the NSW Government. It is part of the Department of Planning, Industry and Environment. It is the largest landlord in New South Wales with a portfolio of around 110,000 residential properties. It contracts with other organisations such as the DCJ and community housing providers to manage tenancies on its behalf. In most cases, it retains responsibility for repairs and maintenance. AHO also is a statutory body and part of the Department of Planning, Industry and Environment.

This chapter variously refers to Housing NSW, FACS Housing and DCJ Housing. This should be read as DCJ Housing.

Housing NSW is the biggest landlord in New South Wales. It also is responsible for strategic policy, housing assistance planning and resource allocation, and funds another form of social housing called "community housing", which is provided by a number of not-for-profit non-government organisations.

About half of the State's Aboriginal housing is owned by the Office of Aboriginal Housing, another state government agency. The other half is owned by independent Aboriginal community organisations, some of whom arrange for their dwellings to be managed by the Aboriginal Housing Office.

The sections below apply to Housing NSW or public housing tenancies. If assisting someone in community housing, check the policies of the Community Housing provider or seek additional information from the Registrar of Community Housing. If assisting someone in Aboriginal Housing, check the policies of the Aboriginal Housing Office.

Aboriginal housing

Aboriginal people participate in the tenancy market in all of the same ways as other tenants, but there are a few features of the Aboriginal housing context that are distinctive.

First, there are some housing providers that provide housing specifically for Aboriginal tenants. For example, Local Aboriginal Land Councils usually provide houses exclusively to members, who must be

Aboriginal. Such housing is often managed in ways that recognise common community practices in a way that is different from other housing providers.

This difference can be important because different types of housing providers must follow specific rules. For instance, an Aboriginal corporation cannot conduct its affairs in a way that is oppressive to members; or an Aboriginal land council must have a vote of the membership if it wants to enter into a tenancy longer than three years.

Some of the different organisations that provide housing specifically for Aboriginal people include:

- Aboriginal Land Councils;
- Aboriginal Corporations; and
- Aboriginal Housing Office.

Second, the provision of social housing for Aboriginal people is subject to different (and generally more complex) administrative and funding arrangements. For example, Aboriginal community housing providers will generally be registered through the Aboriginal Housing Office, rather than Housing NSW. The requirements for registration are different for each system (and are still being worked out at the time of publication). This is mostly because of the particular circumstances of many Aboriginal housing providers and the history of housing provision for Aboriginal people in New South Wales.

Third, discrimination issues arise more often in the Aboriginal housing context. State and federal laws specifically ban racial discrimination in the provision of accommodation (see also Chapter 17, Discrimination).

Legislation and policy

[27.620] The Residential Tenancies Act

Social housing tenants have the same rights as other tenants under the *Residential Tenancies Act*, although there are some important exemptions and additions.

The Act is not consistent in how these exemptions and additions are applied. In some cases, the Act refers to a social housing provider, Housing NSW or a social housing agreement. Other provisions apply to a public housing tenant but not to a community housing tenant.

Exemptions

Under the *Residential Tenancies Act*, the specific exemptions are:

- s 36: rent receipts. The Housing and Property Group and Aboriginal Housing Office are specifically exempted;
- s 39: water usage charges. Tenants under social housing agreements may be subject to different provisions in relation to payment of water usage (see *Residential Tenancies Act*, Pt 7, Div 3);
- s 44: excessive rent. Tenants under a social housing agreement may apply for an order that rent is excessive if their rent rebate is cancelled (see s 141(1));
- s 77: recognition of person as a tenant. Does not apply if the landlord is a social housing provider;
- s 87: breach. This section is linked to s 167 if the residential tenancy agreement is a social housing tenancy agreement.

If a rent rebate is cancelled

Under s 141(1) of the *Residential Tenancies Act*, a social housing tenant who has their rent rebate cancelled can apply to NCAT within 30 days of the cancellation for an order declaring that the market rent payable is excessive.

Additional obligations

Some provisions of the Act apply only to social housing tenants, and these are set out in Pt 7 of the *Act*:

- s 136: provides the definitions for a social housing provider;
- s 138: acceptable housing agreements. This section applies to Housing and Property Group only. Housing NSW can ask tenants to sign an acceptable behaviour agreement, and can terminate the tenancy agreement if the tenant refuses or breaches the agreement. Anti-social behaviour refers to emission of excessive noise, littering, dumping of cars, vandalism and defacing of property. Sections 153 and 154 of the *Act* are the provisions for terminating under this section;
- s 139: water usage. Tenants under a social housing agreement are liable for water usage.

This section does not apply if the tenancy agreement specifies that s 139 is to apply. Section 139 refers to Ministerial Guidelines, and these apply to tenancy agreements with Housing NSW. At the time of writing, the Registrar of Community Housing is yet to release guidelines for community housing providers.

Housing NSW has two forms of payment: actual water usage and percentage. If the premises are metered separately, the tenant is charged the actual water usage. If the premises are not metered separately, the tenant is charged 5% of the actual rent paid. Where a percentage charge is paid, there is a minimum charge of $1 per week and a maximum charge of $8.50 per week. Housing NSW may grant the following allowances to tenants who pay actual water usage charges: kidney dialysis; health and disability; and large family.

- s 140: payment of debts by social housing tenants. A social housing landlord can ask a tenant under a social housing agreement to enter into an arrangement to repay a debt arising under a current tenancy or a prior tenancy;
- s 141: cancellation or reduction of rent rebate. If the rent rebate for a social housing tenant is cancelled, the tenant may apply to the Tribunal for an order that the rent payable is excessive. The application must be lodged within 30 days after the cancellation of the rent rebate;
- s 142: extension of social housing tenancies. Allows for the fixed terms of social housing tenancies with Housing NSW or the Aboriginal Housing Office to be extended;
- ss 143–148: social housing landlords can terminate a social housing tenancy because the tenant is no longer eligible for social housing. Social housing providers can review the eligibility of existing social housing tenants as to their continued eligibility for social housing. The income criteria used to assess continued eligibility for social housing is different from the income criteria used to assess eligibility for public housing. The current income eligibility at December 2011 is:
  - single adult: add $944 per week;
  - each additional adult (18 years and over): add $250 per week;
  - first child (under 18 years): add $188 per week;
  - each additional child (under 18 years): add $131 per week;
  - disability allowance (per person): add $95 per week;
  - exceptional Disability Allowance (per person): add $250 per week.

The process for terminating a tenancy on grounds, the tenant is no longer eligible is:

- s 143: the landlord must issue a notice to terminate on grounds that the landlord has carried out an assessment and determined that the tenant is no longer eligible;
- s 144: provides for the criteria by which the assessment is made;
- s 145: provides for the process by which the review is to be made;
- s 146: provides for the time limits in applications where the tenant is no longer eligible;
- s 147: requires that the Tribunal must terminate the tenancy if the assessment of eligibility has been carried out in accordance with the above provisions. The Tribunal cannot review the eligibility of the tenant;
- ss 148–151: a social housing landlord can seek to terminate a social housing agreement if the tenant has failed to accept an offer of alternative accommodation. This most commonly occurs where the social housing landlord is seeking to move a tenant for management reasons, such as redevelopment of premises;
- s 148: provides that a social housing landlord can issue a notice to terminate;
- s 149: provides for the process by which reviews of offers of alternate premises are to be made. The tenant has the right to be advised of the reasons why they are to be relocated and make representations as to why the existing tenancy should not be terminated. The tenant has the right to two offers, both of which can be reviewed;
- s 150: provides for time limits;
- s 151: requires that the Tribunal must terminate the tenancy if the above processes have been followed. The Tribunal cannot review the landlord's reasons for making the offer;
- s 152: provides for what matters the Tribunal should consider where a social housing landlord is seeking to terminate a tenancy on grounds of a breach. These include any serious adverse effects the tenancy has had on neighbouring residents or other persons; whether the breach was serious; the landlord's responsibility to its other tenants; and the history of the tenancy including any prior tenancy under a social housing agreement.

In 2016, the *Residential Tenancies Act* was amended and ss 154A–154G and s 154 were introduced to deal with a three strikes policy introduced by DCJ. The policy provides for three categories of anti-social behaviour:

- severe illegal behaviour;
- serious anti-social behaviour;
- minor and moderate anti-social behaviour;
- ss 154A–154G apply to any tenant under a social housing agreement, and this means the sections apply to Housing NSW tenants and other social housing landlords such as community housing providers;
- under the policy DCJ will investigate complaints against a tenant, and if satisfied the complaint is justified DCJ will issue a tenant a strike notice. The tenant can appeal the first two strike notices, but must lodge the appeal within 28 days. If a tenant receives three strikes within 12 months DCJ may lodge an application to NCAT to terminate the tenancy agreement. If a tenant is with a community housing provider, check the policies of the relevant community housing provider;
- these provisions also include failure to report income or additional household members. Section 154A refers to termination notices for arrears accrued due to cancellation of a rental subsidy;
- s 154B requires that the Tribunal must have regard to breaches of prior social housing agreements and series of breaches;
- s 154G requires that if a tenancy is to be terminated under these provisions then no more than 28 days should be given from the date of termination.

This is a new policy area and advise should be sought from a Tenants Advice and Advocacy Service or from NSW Tenants' Union.

- ss 153–154: relate to terminations by Housing NSW, where a tenant has breached or refused to enter into an acceptable behaviour agreement;
- s 153: provides for notices of termination for breaches of acceptable behaviour agreements;
- s 154: provides that the Tribunal may terminate a social housing agreement if a breach has been found;
- s 156: provides for headleases involving social housing providers.

[27.630] The Housing Act

Under Pt 7 of the *Housing Act 2001* (NSW), the Minister for Housing can:

- determine eligibility for public housing; and
- grant rental rebates to public housing tenants.

Under s 69, DCJ Housing can investigate whether false statements or representations have been made in relation to an application for public housing or a rental rebate, and take action in the Local Court. A person found to have made a false or misleading statement or representation can be fined up to 20 penalty units for each offence.

Community housing tenancies

Community housing is growing as a social housing provider. In 2011, there were 380 community housing providers managing 17,000 properties. In 2016, there are over 140 community housing organisations registered with the Registrar of Community Housing. The Registrar provides for four classes of community housing organisations, and details about the standards required for each class are available on the Registrar's website. Some community housing organisations are registered with the National Community Housing Registrar.

It should be noted that in some regions HNSW has transferred or is transferring all stock to community housing organisations. Checks should be made to confirm if a tenancy is with HNSW or a community housing organization.

The *Housing Act* has been amended to create a statutory position of Registrar of Community Housing, and the functions are administered through the Office of Community Housing. The Office is responsible for developing and implementing a regulatory code; developing classifications of community housing for registration; and overseeing the registration of community housing, which includes investigating complaints about community housing providers.

Community housing providers are classified into four classes:

- growth provider: manage a large portfolio of properties; 400 or more. These undertake housing development projects that utilise private sector funds and investment, and are subject to the highest level of regulation;
- housing provider: manages 200 or more properties, and undertakes small-scale projects to develop community housing;

- housing manager: manages 30 or more properties with a focus on tenancy management;
- small housing manager: manages one or more properties with a focus on tenancy management.

The classification of the housing provider relates to the regulation of the provider. The larger the housing provider, the tighter the regulations.

Social housing tenancies are similar to social housing tenancies managed by DCJ Housing. The most important considerations are:

- to be eligible for community housing, applicants and tenants must be on the DCJ Housing Pathways register register for public housing. This does not apply to tenants in affordable housing;
- tenants in community housing can appeal decisions about the administration of their tenancies to the Housing Appeals Committee. DCJ Housing policies do not apply to community housing providers. Each community housing provider will develop its own policies. Some are displayed on the housing provider's website. If not, the housing provider should provide a copy on written request. If no policy is provided, then a complaint should be lodged with the Registrar of Community Housing.

The most significant difference to tenants under DCJ Housing is in the calculation of rental subsidies. Tenants in community housing are eligible to receive the Commonwealth Rent Assistance payment. In the past, community housing tenants did receive rent assistance and 25% of the amount received was paid as part of the rental subsidy. This payment is no longer paid to the tenant. Instead, it is paid to the community housing provider. Full details of the change are outlined on the Office of Community Housing website.

Where to find the legislation and policies

The Acts, Regulations and policies can be found on the internet: the law on the AustLII website at www.austlii.edu.au; and policy on the Department's website at www.housing.nsw.gov.au.

Applying for public housing

[27.640] Applications for public housing and community housing are now processed by Housing Pathways. If a community housing provider offers affordable housing, the waiting list for affordable housing is separate from the Housing Register and is maintained by that community housing provider.

On 27 April 2005, the NSW Government announced significant changes to eligibility for public housing. The Department has stated that people who applied for public housing before that date will be considered according to the pre-27 April eligibility criteria. Income criteria for public and community housing is adjusted annually and details can be found on the Housing Pathways website.

Eligible applicants are admitted to the Department's Housing Register. Once admitted to the register, an applicant must advise within 28 days of any changes to the household income or complement, so that their application can be reassessed.

An applicant can be removed from the Housing Register if they seriously threaten or are violent towards departmental staff.

Former public housing tenants may be required to meet additional criteria.

Social housing waiting list

An applicant for social housing may view on the *Housing Pathways* website information on the expected wait times for general applicants on the NSW Housing Register. Go to the website and click "Social Housing Waiting List".

[27.650] Getting on the housing register

Information required

The housing register form asks applicants to state, among other things:

- who is to be housed;
- their gross income (ie, income before tax);
- their assets and liabilities (including current and past property ownership);
- citizenship details;
- the area in which they wish to be housed.

Eligibility

Applicants must live in NSW and be at least 18.

Visa holders

Must have:

- arrived on their parents' passport; or
- come to Australia on the assisted Migrants Passage (1945–1973);
- have been granted Onshore Permanent Protection Visas; or
- are a Protected New Zealand Special Category Visa Holder (providing they are not under a sponsorship arrangement).

Former tenants

There are special requirements in relation to former unsatisfactory tenants of the Department.

Prisoners

People in prison can apply for public housing.

Income and need

The key eligibility criterion is income. People who apply for public housing after 27 April 2005 may have to meet "housing need" as well as income criteria.

Household income

Weekly household income limits (including family tax benefits) for public housing applicants vary according to household type as discussed below.

There are now two sets of eligibility income limits.

Applications on or after 1 July 2008

For people applying on or after 1 July 2008, income limits are adjusted annually. The limits effective at October 2019 are listed below. Check the DCJ Housing Pathways NSW website for limits in previous years:

- single adult – add $640 per week;
- adult plus one child – add $945 per week;
- each additional adult (18 or over) – add $240 per week;
- first child (under 18) – add $315 per week;
- each additional child (under 18) – add $105 per week;
- disability allowance (see below) – add $105 per week;
- exceptional disability allowance (see below) – add $240 per week.

Disability allowance

The disability allowance can be added for each child or adult who can demonstrate that they have incurred expenses as a result of a medical condition, disability or permanent injury. A person receiving the disability support pension does not have to provide documentation.

Exceptional disability allowance

This allowance applies where it can be demonstrated that a household member has incurred expenses due to a medical condition, disability or permanent injury that exceed $70. Proof must be provided.

Applications before 27 April 2005

For people who applied before 27 April 2005, income limits are:

- one person – $395;
- two people – $500;
- three people – $580;
- four people – $665;
- five people – $720;
- six people – $775;
- each additional person – add $55;
- disability allowance – add $55.

If the applicant requires a live-in carer

If an applicant who meets all of the eligibility criteria requires a live-in carer, the carer's income is not assessed in determining eligibility. If approved, the applicant is entitled to an additional bedroom for the carer.

The carer's income is, however, included for the purposes of calculating eligibility for, and the amount of, the rental subsidy.

If the carer is receiving a carer's pension or carer's allowance from Centrelink, no further documentation is required.

The carer cannot:

- sign the tenancy agreement (they have no tenancy rights);
- apply to succeed to the tenancy if the tenant vacates or dies.

Asset limits

If an applicant owns or has a share in a property, they will not be eligible if they are able to:

- live in the property; or
- sell their equity in it.

The asset rule can be waived if the applicant:

- is in the process of negotiating a property settlement as a result of a relationship breakdown;

- needs to move to NSW for specialist long-term medical treatment that is not available in their state;
- is escaping domestic violence.

Provisional eligibility will be granted in these circumstances. The applicant must advise Housing NSW once the property is sold, so that eligibility may be reassessed.

If a tenancy is granted before a property is sold, the tenant will be given a fixed-term tenancy agreement and their eligibility will be reassessed at the end of the term. If they are no longer eligible, their tenancy will not be continued.

If the application is approved

Applicants will be informed in writing if their application is approved. If an applicant does not receive a reply within a month, they should follow up the matter with Housing NSW.

Keep records!

The applicant should keep copies of the application, and of any documents given to Housing NSW.

If the application is rejected

If the application is rejected, an appeal can be made to the Housing Appeals Committee.

[27.660] After admission to the housing register

An application admitted to the housing register is classified into one of the following categories:

- priority housing;
- housing assistance for elderly clients;
- wait-turn housing.

Priority housing

To be considered for priority housing, an applicant must be able to demonstrate that:

- they have an urgent need for housing; and
- they are experiencing one or more of:
  - unstable housing circumstances;
  - "at risk" factors;
  - accommodation that is inappropriate for their basic housing requirements.

At risk factors

"At risk" factors include domestic violence, sexual assault, child abuse, threatening behaviour, torture and trauma. Supporting documentation can include police reports; AVOs; medical assessment forms; reports from a health professional, social worker or community support agency; or a letter from STARTTS (Service for the Treatment and Rehabilitation of Torture and Trauma Survivors).

If the applicant has supporting documentation from STARTTS, or a request for assistance from the Department of Family and Community Services or a treating psychiatrist, no further documentation is needed.

For refugee women with a visa subclass 204, additional documentation may still be needed.

Inappropriate existing accommodation

This consideration may apply where an applicant's current living conditions are extremely unsatisfactory due to severe overcrowding, extreme substandard property conditions, lack of essential facilities, or a need for secure accommodation to take a child out of care.

Shared facilities (in caravan parks, boarding houses, hostels and shared housing, for example) do not constitute a lack of essential facilities.

Living in poor accommodation is not sufficient. The applicant must be able to demonstrate that the premises are having a serious effect on their health or disability, and that they cannot solve the problem through the private rental market or by taking action against the landlord.

Personal debts will not be taken into account in determining an applicant's ability to meet their housing needs in the private rental market.

Housing assistance for elderly clients

An eligible applicant who is over 80, or over 55 for an Aboriginal or Torres Strait Islander, automatically qualifies for accelerated progression on the Housing Register.

Wait-turn applicants

Applicants in this category are housed after applicants approved for priority housing or housing assistance for elderly clients, and after transfer clients approved as a priority (see Priority transfers at [27.710]).

Applicants must remain eligible for public housing while they are on the list, and must advise the Department of any changes to their household within 28 days of the change occurring.

Locational need

An applicant seeking priority housing approval for an area designated as high demand must

demonstrate an ongoing medical condition or disability that requires, for example, continuing weekly access to that location, or, in the case of attendance at a special school, a need extending for more than one year. They must provide appropriate documentation.

Locational needs assessment does not apply to:

- wait-turn applicants and wait-turn transfers;
- applicants approved as housing assistance for elderly clients;
- tenants who are being relocated for management purposes.

Offers of accommodation

DCJ Housing applies a policy of "matching clients and properties". It will make two offers of accommodation. If the second offer is rejected, the applicant's name will be removed from the Housing Register.

The applicant has 28 days to advise in writing their reasons for rejecting a particular offer. If their name is removed from the Housing Register, they can appeal to the Housing Appeals Committee.

Becoming a public housing tenant

[27.670] Recent changes in public housing tenancies

From 1 July 2005, new public housing tenants are offered fixed-term tenancies, with the term depending on the applicant's circumstances.

Public housing tenancies are now subject to eligibility reviews; that is, a tenant can lose their public housing if they no longer meet the eligibility criteria. Before the end of the fixed term, the tenant's circumstances are reassessed. If they still meet both the income test and the needs test, they are offered a new fixed term, with the length of the term again depending on the tenant's circumstances.

The changes were introduced as follows:

- existing public tenants at 1 July 2005 are not affected;
- tenants who signed agreements from 1 July 2005 were offered 18-month fixed-term agreements, to be reviewed in late 2006;
- tenants who signed agreements from 1 July 2006 were offered fixed terms of two, five or 10 years.

[27.680] Rental subsidies

Public and social housing tenants do not have to pay market rent if they receive a household income below a specified level. The difference between the market rent and the payable rent is called a *rental subsidy*.

Housing NSW introduced a new rental subsidy policy in 2006. Entitlement to the subsidy is now determined by a twofold test:

- *rental subsidy eligibility* determines what percentage of household income is payable as rent, or whether the household should pay market rent;
- *rental subsidy assessment* refers to the actual calculation of rent payable, and what forms of income can be included in the assessment.

The pensioner rent concession

Housing NSW's rental subsidy policy will not apply to pensioners paying the 18% *pensioner rent concession* until October 2015.

Tenants who were on the age, invalid, widow's or war service pension and were housed before February 1990 paid a concessional rate of 18%. Since 2009, Housing NSW has been phasing out the concessional rate by increasing rent assessment by 1% every year. The concessional rate was fully phased out by October 2015.

Eligibility

Eligibility is determined by household composition and gross weekly income. Households are

classified according to the following table: Eligibility rates as at October 2019

Household member	*Moderate income limit*	*30% limit*	*Subsidy eligibility limit*
First adult	$815	$1019	$1520
Additional adult (18 or over)	Add $215	Add $269	Add $405
First child (under 18)	Add $160	Add $200	Add $305
Second and subsequent children (under 18)	Add $110	Add $138	Add $200

Rent payable

- households at the moderate income limit or below pay 25% of their gross weekly income in rent;
- households between the moderate income limit and the 30% limit pay from 25% to 30% of their gross weekly income on a sliding scale;
- households between the 30% limit and the subsidy eligibility limit pay 30% of their gross weekly income;
- households at the subsidy eligibility limit pay market rent.

The maximum rent payable is the market rent. The minimum rent payable is $5.

HNSW has also introduced the Start Work Bonus. If a HNSW tenant obtains employment the increase to the rental subsidy charged can be offset for a short period. The tenant must notify HNSW of starting employment within 28 days. This bonus does not apply to all changes to employment. Anyone seeking to use this bonus should read the HNSW policy carefully.

Rental subsidy assessment can be complex. Contact DCJ Housing or see its website www.housing.nsw.gov.au for detailed information about what is considered income for rental subsidy purposes, and what concessions apply.

Vacant bedroom charge

This is a new charge introduced by DCJ Housing. It does not apply to tenants in community housing or Aboriginal Housing.

If a tenant is occupying premises with more bedrooms than they are allowed under the Department's bedroom entitlement policy, the Department will impose an additional charge. The additional charge is:

- $20 a week per household if there is one person aged 16 years and over; or
- $30 a week per household with two people or more aged 16 years and over.

The vacant bedroom charge will be applied when:

- a tenant requests a transfer due to under-occupancy and refuses two reasonable offers of alternate accommodation;
- Housing NSW asks a tenant to relocate due to under-occupancy and they refuse outright to move or refuse two reasonable offers of alternative accommodation.

A tenant can apply to HNSW to be allowed to live in a property with additional bedrooms due to medical reasons such as the need to store specialist medical equipment.

A tenant cannot appeal to the Housing Appeal Committee if HNSW imposes the vacant bedroom charge. However, the tenant can apply to the Housing Appeals Committee for a decision that they be allowed an additional bedroom under the bedroom entitlement policy.

Rental subsidy fraud

Rental subsidy fraud occurs when a tenant deliberately makes a false, incomplete or misleading statement about the income or assets of any member of their household, or fails to declare all persons residing in the premises.

A public or community housing tenant must advise the Department within 28 days of any change to their household complement or the income of any member. If Housing NSW suspects fraud, it can investigate (*Housing Act*, ss 57, 58). It can make enquiries of employers or alleged employers, neighbours, utility and communication providers, real estate agents and the police.

If Housing NSW is satisfied, there has been rental subsidy fraud it can:

- cancel the rental subsidy and backdate the cancellation to the date it believes the fraud commenced;

- where the cancellation results in substantial arrears, issue a notice to terminate the tenancy in the NSW Civil and Administrative Tribunal;
- take action in the Local Court for fraud and seek to recover any debt arising from the subsidy cancellation.

If fraud is alleged

The tenant can appeal the decision to cancel the rental subsidy. The tenant should:

- apply for a copy of their file under freedom of information legislation;
- submit a new application for a rental subsidy (so that further arrears do not accrue);
- submit an internal appeal application for the Department to review the decision to cancel the subsidy.

If NCAT hears the matter before the Housing Appeals Committee has reviewed it, the tenant should request an adjournment until a decision has been made in relation to the cancellation of the subsidy.

The Tribunal cannot consider or look into why the subsidy was cancelled.

[27.690] Payment of rent

Rent is payable in advance.

Most public housing tenants now pay through Centrepay, an automatic deduction facility of Centrelink. Rent can also be paid at Australia Post.

[27.700] Repairs and maintenance

Condition of premises

New public housing tenants should make sure they complete the ingoing property condition report. The Department pursues claims for damage to properties at the end of tenancies.

Repairs

DCJ Housing is not exempted from the repairs provisions of the *Residential Tenancies Act*. A tenant who requires repairs to their premises should call the Department's DCJ Housing 24-hour maintenance line (Housing Contact Centre on ph: 1300 468 746). Always ask for a reference number for the repair/s reported. If the repairs are not carried out within a reasonable time, the tenant should put the request in writing to their local office, dating the letter and keeping a copy.

DCJ Housing has a maintenance policy. Under that policy, the following are identified as urgent repairs:

- immediate threat of danger due to health, safety or security risks;
- threat to the safety or security of the tenant;
- essential items are not working.

Check the DCJ Housing website for details at www.housing.nsw.gov.au. DCJ Housing has a fact sheet on how requests for repairs are to be undertaken: maintenance and repairs to your home.

If the repairs are still not carried out, the tenant can seek orders from NCAT that:

- repairs be carried out;
- the tenant be compensated if they have incurred any losses;
- rent be paid to the Tribunal until repairs are done;
- rent held by the Tribunal be used to pay for repairs.

The Repair Kit

The Repair Kit: Getting Housing NSW to repair your home. A handy guide for public tenants is available online at www.rlc.org.au/publications. Click on the publication by the same name.

Cyclical maintenance

DCJ Housing undertakes cyclical maintenance such as repainting and updating kitchens. For information specific to a particular premises, contact the local office of DCJ Housing.

Modifications

DCJ Housing will modify an existing property, where the tenant is elderly or disabled, or has the care of a disabled person.

Minor modifications

Minor modifications include such alterations as adding grip rails, installing a hand-held shower or changing to lever style taps.

Major modifications

Major modifications include widening door-ways, providing ramp access, or modifying the kitchen, bathroom or laundry. Documentation from a physiotherapist or occupational therapist may be required.

If major modifications are needed, Housing NSW will consider either doing the modification or transferring the tenant to more suitable premises.

If the tenant is not satisfied with the response from Housing NSW, an appeal can be lodged with the Housing Appeals Committee. The issue cannot be considered by the NSW Consumer and Administrative Tribunal.

Charging repairs to the tenant

If Housing NSW demands payment from a tenant or former tenant for work on a property, the tenant should:

- confirm that the debt is due to an order obtained at the Tribunal and not just a claim from the department;
- apply for a copy of their file under the right to information legislation to confirm what repairs were effected and to see copies of any invoices from tradespeople.

If no orders were obtained, the tenant or former tenant should write to Housing NSW and inform them that they do not accept liability for the alleged debt. If Housing NSW did not seek orders from the Tribunal before pursuing the tenant for the money, they can complain to the NSW Ombudsman.

[27.710] Transfers

Housing NSW will consider transferring a tenant to alternative premises if their existing dwelling is no longer suitable for their needs. Housing Pathways is responsible for transfers.

Priority transfers

A tenant seeking a priority transfer must demonstrate the same urgent housing needs as applicants seeking priority housing, and show that alternative premises will address those needs while current premises cannot. The tenant should demonstrate:

- a medical condition or disability;
- an "at-risk" situation;
- family breakup;
- extreme and ongoing harassment;
- changes in employment;
- compassionate reasons;
- severe overcrowding.

The tenant must provide documentation.

A tenant seeking a transfer to a high demand zone must satisfy a locational needs assessment, unless the tenant is seeking relocation in the same zone, or the relocation is for management purposes.

Wait-turn transfers

A tenant can apply for a wait-turn transfer on the following grounds:

- moderate overcrowding; for example, three children sharing one room; or
- underoccupancy.

Tenants may also be relocated for management purposes such as under-occupancy, or because Housing NSW intends to demolish and rebuild.

The tenant must continue to meet the income eligibility guidelines for public housing (tenants registered for a transfer before 27 April 2005 must meet the previous eligibility guidelines).

A tenant seeking a transfer because of employment must demonstrate that:

- it is impractical to commute between their existing home and their workplace; and
- the employment is long-term and for at least three days per week (two days if there are medical or care-of-dependant issues).

Types of tenancy that may be offered

Where a transfer is approved and an offer of alternative accommodation is made:

- a tenant on a continuous agreement will be offered a continuous agreement;
- a tenant on a renewable tenancy agreement under Housing NSW's Renewable Tenancy Policy who is rehoused on or after 1 July 2005 will be offered a continuous agreement;
- a tenant on an 18-month agreement signed on or after 1 July 2005 who transferred before October 2006 will be offered an 18-month agreement;
- a tenant on an 18-month agreement who transferred after October 2006 will be offered a two-, five- or 10-year fixed-term agreement.

Terminations

[27.720] If Housing NSW believes that a tenant has breached the agreement, it may issue a notice to terminate, and seek either a specific performance order or termination and possession orders from

the Tribunal. If Housing NSW is seeking a specific performance order only, consideration should be given to what period remains of the fixed term of the tenancy agreement, and whether agreeing to a specific performance order will influence any assessment when the Department considers renewal of the fixed term.

[27.730] Reasons for seeking termination

Housing NSW's most common reasons for seeking termination are:

- rental arrears;
- anti-social behaviour;
- possession of drugs;
- making unapproved alterations to premises;
- absence from dwelling;
- illegal use of premises.

In the future, Housing NSW will be seeking to terminate on grounds that the tenant is no longer eligible for public housing.

Rental arrears

If rent is unpaid for 14 days or more, or Housing NSW cancels a rental subsidy and the cancellation creates arrears of 14 days or more, Housing NSW can issue a notice to terminate, then proceed to the Tribunal.

What to do

If the tenant has stopped paying the rent because of financial hardship due to illness or some other cause, they should immediately write to Housing NSW, explain the situation and commence making repayments. It may be useful for the tenant to see a financial counsellor, or a medical or other health professional.

If the arrears are due to a cancellation of the rental subsidy, the tenant should, if appropriate, take immediate steps to commence the appeal process. The same procedure applies Housing NSW tenants as for private tenants. The Tribunal will consider:

- the reasons for the arrears;
- any hardship to the tenant;
- the ability of the tenant to remedy the arrears and maintain regular rental payments.

Nuisance, annoyance and damage

Social housing tenants have additional obligations in relation to causing noise and nuisance to other tenants (*Residential Tenancies Act*, s 51). A social housing tenant will also be in breach of their agreement if they or anyone occupying the premises with them causes or permits damage to an adjoining or adjacent property.

If Housing NSW wishes to terminate a tenancy on these grounds, it will issue a 14-day notice to terminate, and proceed to the Tribunal for termination and possession orders.

In determining whether orders should be made, the Tribunal will give consideration to:

- any serious adverse effects the tenancy has had on neighbours;
- whether the breach was serious;
- whether failure to terminate the tenancy would subject a person or property to unreasonable risk;
- Housing NSW's responsibility to its other tenants;
- whether the tenant has been in breach of an order of the Tribunal;
- the history of the tenancy.

If drugs are involved

Section 91 of the *Residential Tenancies Act* deals with the use of premises for illegal purposes. Any landlord, including social housing landlords, can apply to the Tribunal for termination orders if a tenant is using adjoining or adjacent premises for the purpose of manufacturing or selling prohibited drugs, or allowing other persons legally on the premises to do so. The landlord does not have to issue a notice to terminate. The landlord can apply immediately to the Tribunal.

Acceptable behaviour agreements

Under s 138 of the *Residential Tenancies Act*, Housing NSW can request a tenant who it considers to be engaging in anti-social behaviour to enter into an *acceptable behaviour agreement*. Anti-social behaviour can include making excessive noise, littering, dumping cars and defacing property. Under s 153, the Department can issue a notice to terminate if the tenant refuses or fails to enter into an acceptable behaviour agreement, or seriously or persistently breaches the agreement.

Alterations to premises

If the termination notice relates to unauthorised alterations, the tenant should check their residential tenancy agreement. Housing NSW has

changed the form of agreement used a number of times since 1988, and it is possible that the tenant's agreement does not refer to improvements and additions, or Housing NSW's policy on them.

The tenant should then write to Housing NSW and request permission for the changes. They should also make enquiries of the local council. If local council approval is not needed, or the work meets the specified standards, the tenant should state that in the letter.

If permission is not granted, the tenant can appeal to the Housing Appeals Committee.

If alterations are not approved by the local council and the tenant refuses to restore the premises, Housing NSW will seek termination of the tenancy.

Absence from dwelling

If a tenant intends being away for more than six weeks, approval should be sought from the Department. The Department will consider the following as acceptable reasons for being away:

- caring for sick or frail family members;
- hospitalisation, institutional care, nursing home care or rehabilitation;
- escaping domestic violence, harassment or threats of violence;
- assisting with immigration matters in the country of origin;
- holidays;
- employment, education or training.

A tenant intending an extended absence during their tenancy must be able to demonstrate that:

- the rent will paid;
- the property will be looked after;
- they have a good reason for going away.

Generally, absences of no more than 12 months in total over a five-year period can be approved. Extended absences will be considered and approved on the merits of the application. Housing NSW will not approve repeat absences relating to holidays, assisting with immigration matters in the country of origin or employment/training.

If a tenant is absent without approval or for longer than approved, Housing NSW may:

- cancel the rental subsidy;
- commence action to terminate the tenancy, even if rent is paid and the property looked after;
- if the fixed term expires during the absence, refuse to grant a new fixed term.

[27.740] Recognition as a tenant

Housing NSW is exempt from s 75(4) of the *Residential Tenancies Act* in relation to transfer of tenancies and s 77, which allows a person who is occupying premises to apply to be recognised as a tenant on the death of the current tenant. Instead, Housing NSW may grant succession of tenancy recognition as a tenant to existing members of a household, where the tenant:

- has died; or
- is absent for an extended period of time, for example, for treatment in hospital, nursing home care, rehabilitation or imprisonment; and

the applicant is:

- a spouse or de facto partner over 55 years of age;
- a custodian or legal guardian of children in the household;
- a client who relinquished a Housing NSW tenancy to act as a live-in carer to the tenant or other household member;
- other household members who are assessed as meeting priority housing criteria.

To receive recognition as a tenant you must be eligible for social housing and be an approved additional occupant of the property with a satisfactory history of occupation for at least two years. There are exceptions and these can be located at www.housingpathways.nsw.gov.au.

You must apply for recognition as a tenant within six weeks of the tenant leaving.

In Aboriginal Housing recognition as a tenant can be granted to:

- a spouse or de facto partner;
- a custodian or legal guardian of children in the household;
- other household members.

You must be eligible for social housing and be an approved additional occupant.

If it is known that the tenant is leaving, an application should be lodged four weeks beforehand. Housing NSW will not consider applications lodged more than six weeks after the tenant has died or left.

If you are not entitled to seek recognition as a tenant, Housing NSW will consider offering a six-month provisional lease. A person can apply for a six-month provisional lease if:

- the tenancy has been handed back or has ended under the *Residential Tenancies Act 2010*;

- you are a member of the household and/or custodian of the children;
- you are an Australian citizen or permanent resident;
- you have lodged your application within six weeks of the tenant going to prison; or leaving due to health reasons or going into a nursing home or other care facility; or if the tenant has died.

If you apply after six weeks, Housing NSW may consider a three-month lease.

[27.750] Former tenants

At the end of a tenancy, Housing NSW will classify the performance of tenants. The classification depends on the tenant's history in relation to rent payments, maintaining the property or damage to the property, and any history of noise, nuisance or anti-social behaviour.

The classification is important because it determines whether and how the former tenant will be eligible for public housing in the future.

Classification of former tenant		
Classification	***Criteria for classification***	***Eligibility if reapplying for public housing***
Satisfactory	• no breaches of tenancy agreement; • after vacating premises owed less than $500.	• eligible for public housing; • if any money owing regular repayments must be made.
Less than satisfactory	Left of own accord with no current notice to terminate or Tribunal orders, but: • owed more than $500 for rent, repairs or water; or • abandoned the property; or • left the property in an unsatisfactory state; or • had substantiated complaints of serious noise and annoyance during tenancy.	Eligible to be readmitted to the Housing Register, but: • must make repayments (no offer will be made until the debt is paid). Failure to make payments can result in removal from the Housing Register; • if there were substantiated claims of noise and annoyance in the previous tenancy, will be offered a six-month fixed-term agreement; • if tenant has a psychiatric or intellectual disability and there were substantiated noise and annoyance claims, must be able to demonstrate a support plan with a relevant support agency.
Unsatisfactory	• evicted from previous tenancy; or • vacated before an order of possession was enforced; or • vacated before an order of possession was obtained for noise and annoyance; or • are repeat less than satisfactory tenants.	• not eligible for public housing unless able to demonstrate that they have sustained a tenancy in the private sector for six months; • if approved to be admitted to the Housing Register, will be offered a six-month fixed-term tenancy. If a breach occurs during that term, the tenancy will be terminated.
	Also includes tenants under the Renewable Tenancies Policy whose tenancy was categorised as having an unsatisfactory standard of breaches.	

	Classification of former tenant	
Ineligible	• evicted because of an extreme breach; or • left before an order of possession could be enforced; or • left before an order of possession could be obtained and there was written verification from the police under the Memorandum of Understanding.	• only general managers can determine whether a person is ineligible for public housing because of a serious breach. A general manager may approve an ineligible former tenant for public housing at their discretion; • tenant must have sustained a six-month tenancy in the private sector to be considered, and will be given a six-month fixed-term tenancy if approved.
	Extreme breaches include illegal activities carried out on premises, conviction for arson or deliberate damage, physical attacks or serious verbal threats directed at neighbours or department staff.	

Other Housing NSW services

[27.760] Rentstart Bond Loans

Tenants seeking bond assistance to secure residential tenancies on the private market can seek assistance from Housing NSW.

To be eligible applicants must:

- be eligible for social housing;
- have cash assets of less than $3,000;
- the rent on the intended premises must be no more than 50% of the household income. Housing NSW includes 100% of Commonwealth Rent Assistance as part of calculating 50% of household income.

A Rentstart Bond Loan can be used in shared accommodation.

The bond assistance is in the form of a no interest loan. If approved Housing NSW will provide 75% of the bond to the real estate or landlord; and the tenant will make payments to Housing NSW over 12 or 18 months.

Loan repayments are set at the following rates:

- if the rent is less than 45% of household income, the loan is repaid over 12 months;
- if the rent is 45%–50% of the household income, the loan is repaid over 18 months.

Applications for Rentstart can be made over the telephone to Housing NSW Contact Centre, and some offices of Housing NSW and community housing organisations.

At the end of the tenancy:

- whatever amount the tenant has paid to Housing NSW is the amount of the rental bond that is in the tenant's name. If all of the bond has been repaid, the rental bond should be in the tenant's name;
- if the tenant has repaid only part of the bond, then the tenant is entitled to that part;
- if the landlord is claiming rental arrears or damage at the end of the tenancy, and that amount is greater than the amount repaid by the tenant but less than the whole of the bond, the tenant will have a debt with Housing NSW.

A tenant can have up to two rental bonds with Housing NSW at any one time.

If the tenant is not up to date with their bond loan payment, it will affect their access to other Rentstart products such as a second bond loan, advance rent and help with rental or water arrears. It will not affect access to tenancy

facilitation, private rental brokerage, temporary accommodation or the position on the NSW Housing Register.

Rentstart provides a range of services other than bond loans. See the Housing Pathways website for a list of options for assistance.

[27.770] Special assistance subsidies

These are rental subsidies made available by Housing NSW to certain approved applicants to rent suitable premises in the private rental market while paying the same rent as if they were housed by Housing NSW. HNSW now offers two forms of private rental subsidy.

Private rental subsidy

From 12 June 2012, to be eligible the person must:

- meet social housing eligibility criteria;
- be approved for priority status on the NSW Housing Register;
- have a disability;
- be at risk in their current accommodation.

The residential tenancy agreement is taken in the name of the tenant. The tenant will pay rent at 25% of their income, but must also apply for the Commonwealth Rent Assistance. All of the CRA is to be paid to the rent.

The tenant can apply for a Rentstart Bond for the rental bond payment.

If the tenant rejects a reasonable offer of social housing, the private rental subsidy will be stopped.

Private rental subsidy: Start Safely

This subsidy is available to anyone who has experienced domestic or family violence so they can secure private rental accommodation and do not have to return to the violent situation.

Start Safely is a time limit subsidy. When the subsidy is stopped, the person is responsible for the full market rent of the property.

To be eligible for a Start Safely subsidy, the tenant should:

- be escaping domestic or family violence;
- be homeless or at risk of being homeless;
- be eligible for social housing;
- be able to demonstrate that they will be able to afford the private market rent after the subsidy ends;
- be willing to receive support services, where relevant.

The StartSafely subsidy provides approved applicants with a subsidy equivalent to HNSW tenants in the first year. From the second year onwards it is reduced by 25%; so that in the second year the tenant pays 50% of their rent; and in the third year they pay 75%. Start Safely is a time limited subsidy and approved applicants are expected to assume responsibility for the full rent after the subsidy is withdrawn.

The following two schemes operated before 6 June 2012. Where the subsidy was approved prior to 6 June 2012, the tenant will have their entitlements protected.

Special assistance subsidy – disability

This subsidy is for applicants who have been approved for priority housing or who have reached their turn for a housing offer, where there is a household member with a disability and the Department does not have suitable stock.

Special assistance subsidy – special

This subsidy is for applicants who are HIV/AIDS positive, are eligible for public housing, and meet the priority housing assistance criteria.

Features

In both schemes:

- the tenancy agreement is in the name of the tenant, not Housing NSW;
- the tenant pays the amount of a rental subsidy calculated as for public tenants;
- the tenant is entitled to receive Commonwealth rent assistance, and the Department expects the tenant to apply for it and contribute 100% of it towards the rent;
- the Department makes up the balance of the rent owing after the tenant contributes their rental subsidy plus 100% of rent assistance.

The Department will continue the subsidy until an offer of suitable public housing is made. The tenant will receive two offers. If the tenant declines a suitable offer of public housing and their name is removed from the Housing Register, the Department will withdraw the subsidy payment. In this case, the tenant will be responsible for all the rent payable under the tenancy agreement.

Housing NSW also offers two other services – Private Rental Brokerage Service and Tenancy Guarantee. Neither of these services provides financial assistance to a tenant paying market rent. Instead, they provide assistance in locating and finding private rental accommodation; or provide to a landlord an additional rental bond of up to $1,500 for a specific period.

Application of policies

With both headleasing and special rental subsidy programs, tenants should be aware that a number of departmental policies do not apply to their tenancies; for example, policies on pets and minor modifications do not apply to tenancies under headleasing or special rental subsidies.

Complaints and appeals

[27.780] The Housing Appeals Committee

The Housing Appeals Committee is an independent agency that can review administrative decisions of social housing providers. It aims to provide a fair, informal and quick dispute resolution mechanism for applicants and tenants of public housing and community housing organisations. An applicant or tenant can seek a review when they believe the housing provider has not made the correct decision in accordance with the housing provider's policies.

How the committee operates

The committee usually consists of three members who may have a welfare, community, housing or legal background. It currently has several Aboriginal members.

The committee aims to hear appeals within four weeks of lodgment. Appeals concerning Rentstart applications can be heard within 48 hours. The committee's report is generally completed within two weeks of the hearing, depending on the complexity of the matter.

The interview with the committee can be conducted by telephone or in person. Interpreters are available where needed. A tenant or applicant can nominate someone else to speak on their behalf as long as they provide something in writing before their matter is heard.

Legal representation is not permitted.

The role of the committee

The committee acts as an advisory body, and its decisions are not binding on Housing NSW or the community housing provider. It can make recommendations only. These are made in writing to the relevant area manager or manager of the community housing provider.

After receiving the recommendations, Housing NSW or a community housing provider reports back to the committee on its decision.

How to appeal to the committee

When an applicant or tenant receives a decision that is not satisfactory, they can request an internal review by an area manager or a more senior officer. The request must be made in writing, and within three months of receiving the original decision. This is called a *first level review*.

If the original decision is not changed the applicant or tenant can apply to the Housing Appeals Committee. The application must be made within three months of the first level review. This part of the process is referred to as a *second level review*.

Time limits

Housing NSW has introduced different time limits for applications to the Housing Appeals Committee, depending on the reason for the appeal.

Reason for appeal	*Time limit*
Offer of alternative premises (*Residential Tenancies Act*, s 63G)	Within 14 days after the notice is given
Type and length of lease offered when a client enters public housing	Within 30 days after: • notice of the offer; or • sign up; or • notice following the review of additional information.
Type and length of lease offered after a review of your current lease	If you are on a two-, five- or 10-year lease, within 30 days after notification of the length of your lease
	If you are on a three- or six-month lease, within seven days after notification of the length of your new lease
Eligibility to continue living in public housing (*Residential Tenancies Act*, s 63D). A client can request a review of a decision that they are no longer eligible to continue living in public housing.	If you are on a two-, five- or 10-year lease, within 30 days after the notice is given
Change of circumstances following a lease review. This applies when a client disagrees with a decision not to offer an extension of the lease based on a change of circumstances following a lease review.	Within 14 days of the notification of the decision
All other appealable matters	Clients must lodge an appeal within three months of the original decision. In some circumstances, this timeframe may be extended; for example, where the client would be significantly disadvantaged if they could not lodge their appeal.
Decision concerning an application for a Rentstart Bond Loan or other service provided under Rentstart	Within 48 hours of decision to decline Rentstart application
Application for recognition as a tenant	Within seven days of notice of decision to decline recognition
Ending private rental subsidy following a periodic review or refusal of a reasonable offer of accommodation	Within seven days of the notice of decision

What can be appealed?

Applicants

Applicants for housing can appeal to the committee about:

- non-admission to the housing register;
- denial of immediate housing assistance or other assistance, including Rentstart;
- cancellation of approval of any form of assistance;
- removal from the waiting list;
- the location of housing offered.

Tenants

Tenants can appeal to the committee about:

- rental subsidies;
- rejection of rehousing applications;
- rejection of an application for mutual exchange;
- rejection of requests for modifications for disability or medical reasons only (not repairs or maintenance);
- absence from a dwelling;
- refusal to grant succession of a tenancy;
- fixed-term leases;

- tenure categories and tenure review;
- tenant charges at vacation of dwelling;
- headleasing;
- joint tenancies.

What the committee cannot review

The committee cannot review:

- decisions not directly related to the person or household;
- matters that are the responsibility of other Tribunals;
- housing providers' policies (ie, the committee will consider whether a policy has been properly applied in a particular case, but will not review a policy generally);
- matters for which clients cannot make an application to housing providers;
- internal administrative and funding matters of the housing provider;
- complaints about the way a service is provided;
- programs not related to the provision of a service;
- decisions about providing more than the maximum service or benefit available under a housing providers' policy;
- decisions to provide services on an "out-of-guidelines" basis;
- decisions about home purchase assistance services.

[27.790] Other complaints options

A tenant or an applicant can also complain to:

- the *client feedback unit* of the Department;
- if the matter is about the tenancy, NCAT;
- the Minister for Housing;
- the client's local Member of Parliament;
- the NSW Ombudsman.

The tenant's file

Housing NSW maintains files on all its applicants and tenants.

What should be on the file

A tenant's file should only contain matters concerning their application and tenancy, and will generally contain the following:

- the application;
- support letters if seeking priority housing;
- transfer applications;
- rental history;
- advice by the tenant of any changes to household members or income;
- maintenance requests.

Accessing files

A Housing NSW tenant has two options in relation to viewing their file:

- A tenant can view their file by completing the appropriate form at any HNSW office. The file should be made available within 21 days, after being reviewed by any HNSW officer. There is no fee payable to view a file. This is known as an informal request. Permission to view the file only entitles the tenant to look at the file and take handwritten notes. It is not possible to take photocopies and, while viewing the file, the tenant may not ask questions or change information on it. If the tenant has any queries, they must make an appointment with the appropriate housing officer.

  If information is being withheld, the tenant must be told why, and under which exemption clauses. A tenant who wishes to see this information or make photocopies of anything in the file must make a formal application known as a GIPA application.
- An applicant or tenant can apply for access to their file under the Right to Information policy (*Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*)). The request should be sent to the Manager, Right to Information Unit, at the Department's head office. This is known as a formal request. A fee is payable for each GIPA application. For most applicants and tenants, the cost is $30 per application or request for an internal review. There is no fee if the applicant or tenant is requesting an amendment of records. An applicant who holds a valid Pensioner Concession Card, HealthCare Card, is a full-time student or is from a non-profit organisation may be eligible for a 50% discount of the total estimated processing charge.

BUYING A HOME

[27.800] Buying a home is one of the largest and most important investments most people make.

Conveyancing

[27.810] Using a lawyer or conveyancer

Conveyancing is the legal term for transferring title from one owner to another. It has traditionally been carried out by solicitors, but since 1993 it has also been done by licensed conveyancers. Anyone doing conveyancing for a fee who is not a practising lawyer or a licensed conveyancer is liable to prosecution.

Indemnity insurance

Lawyers and licensed conveyancers are covered by professional indemnity insurance. A buyer who loses money because of their lawyer or conveyancer's negligence is protected to the extent that these professionals are compulsorily insured. Solicitors have had a code of conveyancing practice for residential conveyancing since 1990.

Fees

Because legal fees are deregulated in NSW and there is fee competition, the fees for buying and selling property are not particularly high. Most solicitors and conveyancers when engaged by a client will agree on a fixed fee for professional services and give an estimate of out-of-pocket expenses for the job.

[27.830] Costs and expenses

Apart from the price of the home, buyers have many other expenses, including:

- government stamp duty on the purchase price. The stamp duty – a state tax – is a major cost;
- charges made by lending institutions for such services as establishing a mortgage or doing a valuation, and, in some cases, the lender's legal fees;
- home insurance (usually a replacement and reinstatement policy);
- government registration fees at Land and Property Information NSW;
- legal and search fees for the conveyance;
- adjustments of such charges as rates, water rates and strata levies;
- electricity, gas and phone connection fees, and removal expenses;
- fees for a survey report and a building certificate;
- quality inspections such as strata inspection, building inspection and pest inspection.

Ways to own property

[27.840] Houses

Apart from Crown leases, residences in NSW are owned under either old system or Torrens title.

Old system title

Old system title has its roots in old English land law, and it was introduced to NSW by the first British settlers. Under old system title, after the original Crown grant of land, title is transferred to each successive owner by a deed (usually a conveyance or mortgage). Each document must contain a description of the land, and must be properly signed and attested, and stamped. Together, the documents form the chain of title. If one document is ineffective, there will be a defect in title. An old system title is only as strong as the weakest document in the chain of title.

Unlike the owner of Torrens title land, an owner of old system land does not hold a title deed to that land – merely a series of documents.

Under s 53 of the *Conveyancing Act 1919*, a lawyer or conveyancer need only search back to a good root of title (ie, a starting point to the chain of title) to begin with, that is at least 30 years old.

In practice, finding a good root of title often means going back well beyond 30 years. Old system conveyancing is complex, time-consuming and expensive, and it is wise to have a lawyer carry out these conveyances.

Torrens title

The vast majority of residential properties in NSW are held under Torrens title.

Torrens title land comes under the *Real Property Act*. Under the Act, the State guarantees the title to be good. Once a buyer registers a transfer at Land and Property Information NSW, they receive a perfect title, which is said to be indefeasible.

Torrens title searching and conveyancing is far simpler than old system, and is therefore cheaper.

Buying old system title land

While old system title land is thus a less attractive purchase than land under the *Real Property Act*, this should not deter buyers, provided they are prepared to pay the higher legal costs. The old system title is automatically converted to "qualified" Torrens title (see below) when a change of ownership occurs. This conversion occurs without charge to either buyer or seller.

Qualified Torrens title

The *Real Property Act* allows the automatic conversion of old system title to Torrens title when title is transferred.

A certificate of title is issued with the qualification that the title is not state guaranteed. The qualification is removed and the title becomes absolute six years after the certificate has been issued if there has been a sale to a subsequent buyer. Otherwise, the title becomes absolute after 12 years.

[27.850] Home units

Units are usually owned under company title or strata title. Strata title is by far the most common.

Company title

Company title is the older form of unit ownership. Under company title, the land and buildings are owned by a company. The company's shareholding structure is such that ownership of a stated group of shares entitles the shareholder to exclusive possession of a part of the building (eg, a flat and, perhaps, a garage).

The flat owner does not own land, only shares in the company. Instead of holding a title deed, they have a share certificate as evidence of ownership. A person's right to sell or transfer the shareholding is subject to company approval, which can be withheld. This can be an advantage to other shareholders, as it gives them some say in who their neighbours will be. It can, however, disadvantage prospective buyers if other shareholders decide to keep them out, and make it more difficult for the prospective vendor to find a buyer.

Rules concerning the occupation of, and the right to lease, the flat may be made by a majority vote of the company's shareholders.

Obtaining finance

It can be difficult to borrow money to buy a company title unit. Lending institutions have been reluctant to lend money for share purchases, as distinct from a mortgage over real estate (although some banks have recently been more approachable).

Strata title

A more popular way of owning a unit (or townhouse) is under the *Strata Schemes Management Act 2015* (NSW).

According to English property law, an owner of land owns the airspace above it to infinity. The *Strata Schemes Management Act* allows the horizontal subdivision of the airspace above the surface of the land. Once a plan of subdivision of this nature, called a strata plan, is registered at Land and Property Information NSW, separate titles for each lot in the plan can be issued.

Each lot owner can sell, mortgage, lease or otherwise deal with it as an ordinary owner of land. Each lot has its own separate title guaranteed by the state to be good title.

How a strata scheme works

An executive committee representing the owners' corporation (made up of all unit owners) is set up to manage the common affairs of the lot owners. Each owner must contribute to a sinking fund to meet capital expenditures, such as painting buildings and replacing fixtures, and an administrative fund to meet recurrent ongoing common costs, such as insurance, cleaning and maintenance of common areas (eg, stairwells and driveways).

Prospective buyers of strata units should check the executive committee's minutes for evidence of any special levies that may be made for major repairs. Unsuspecting purchasers may otherwise be in for a nasty surprise.

A buyer should obtain the owners corporation's s 184 certificate, which indicates current and outstanding levies on the lot.

The *Strata Schemes Management Act* also provides for the management of owners corporations and the resolution of disputes.

Community title

This is a form of ownership similar in some respects to strata title. It is not common. It falls under the Community Titles legislation enacted in 1989 and is designed to bridge the gap between traditional land (ground surface) subdivision and strata (air space) subdivision.

Essentially, it allows the common property concept to be incorporated into a land subdivision, which can include amenities such as a children's playground or a tennis court.

Community, precinct and neighbourhood associations

Community title also allows for staged or progressive development of an area of land. In this case, a number of associations are formed to administer the developed areas of the project as these occur.

The highest tier is the community association (the umbrella association to which all the others belong, on a proportional lot entitlement basis).

The lowest tier is the neighbourhood scheme, usually established when the developer is ready to resubdivide and sell lots, and usually relating to the area set aside for resubdivision. Each lot owner also becomes a proportional member of the community association, replacing the previous owner of the resubdivided area.

If the development is very large and the developer wants to register a precinct plan, creating development lots and precinct (common) property, a precinct association may be formed as the middle tier between the community and neighbourhood associations. It operates like a neighbourhood association, but on a larger scale.

The object of these associations is to ensure that owners' interests are represented at all stages.

What should be in the contract

Contracts for the purchase of a community title property from a developer should contain, among other things, details of:

- the development and building approvals, including the development contract and management statement, and any document disclosing a change to either;
- amenities to be provided (eg, a tennis court, pool or common barbecue area);
- the basic architectural design and landscaping of the development;
- any theme on which the development is based (eg, a retirement village, or a sporting theme). The legislation allows themes to be established and preserved;
- a diagram or artist's impression showing the intended appearance of the development.

[27.860] Co-ownership

When more than one person buys a property, they may buy as either joint tenants or tenants in common. The choice should be stated in the contract.

Joint tenants

Joint tenancy is mostly favoured by people in a close relationship. Joint tenants are all entitled to ownership and possession of the whole property, and when one dies, the survivors automatically inherit the deceased's share of the property – the property does not form part of any estate devolving under the deceased person's will.

Tenants in common

Tenants in common own separate fractional shares in a property, which don't have to be equal. Each tenant in common can sell, mortgage and otherwise deal with their share of the property, and can leave it to anyone in their will.

The contract

[27.870] The contract is the most important part of the transaction. An agreement for a sale of land must be in writing, with a note or memorandum signed by the seller (or their agent). It should contain the four Ps – price, parties, property and promise.

[27.880] Parts of a contract

The most common form of contract is that published by the Real Estate Institute and the Law Society, which is designed to be even-handed between sellers and buyers. Page one of the contract is a particulars page that identifies:

- the selling agent, if any;
- the parties (buyer and seller);
- the price;
- the deposit;
- a full description of the property by address;
- the nature of any improvements;
- particulars of title;
- any furnishings and chattels sold.

The cooling-off period

Every contract of sale for residential land must include a statement in a prescribed form about the cooling-off period (see Private treaty contracts at [27.910]). If the statement is not there, the buyer may withdraw at any time before the sale is finalised.

[27.890] What should be in the contract

Buyers should take care that any improvements to the property are described, and that anything excluded from the sale is also clearly shown. A settlement time (normally 42 days) is also provided in the contract.

On completion of the particulars page and incorporation of some essential documents (see Disclosure documents at [27.900]), the contract is ready to be used.

Buyers should check to see that there have been no changes to the standard provisions. These routinely call for vacant possession and adjustment of rates on settlement.

Special conditions

A buyer should be aware of and negotiate changes to any special conditions which involve:

- time of the essence conditions (ie, conditions that impose penalties or invalidate the contract if something is not done by a certain time);
- the release of the deposit to the seller before settlement rather than its retention in trust or investment;
- payment of interest for delays in settlement;
- clauses favouring the seller, thus altering the even-handedness of the contract.

Special conditions included in a draft contract available at the point of sale (see Private treaty contracts at [27.910]) do not have to be accepted. Buyers should note carefully whether there have been any changes by deletion or inter-lined addition to the printed form of the contract.

[27.900] Vendor disclosure requirements

The *Conveyancing Act 1919* (s 52A), together with the *Conveyancing (Sale of Land) Regulation 2017* (NSW), requires vendors to disclose important matters about the property up front. The Regulation aims to simplify conveyancing and reduce delays by:

- requiring certain disclosure documents to be attached to contracts;
- imposing a system of warranties (essential promises) by the seller. These apply unless there is written disclosure in the contract informing otherwise;
- obliging a seller to disclose and clearly describe any serious defect in the title of the property that the buyer must accept.

Disclosure documents

Documents to be attached to the contract are:

- a zoning or planning certificate under s 10.7 of the *Environmental Planning and Assessment Act 1979*, issued by the local council;
- a plan or plans showing the position of sewer lines in relation to the land, obtained from the relevant water supply authority;
- a copy of the property certificate (the search of the title deed from the Lands Department);

- a copy of the official plan of the land, for example, the deposited (subdivision) plan and, in the case of a strata title sale, a copy of the whole strata plan;
- a copy of all documents creating easements (such as rights of way), covenants and restrictions on use shown on the property certificate;
- a notice, with regulated wording and print size, drawing a buyer's attention to their rights. This is in addition to the "cooling off" notice;
- for dwellings approved after January 2015, a certificate of home warranty insurance must be attached to the contract by the owner/builder or developer;
- if the improvements were constructed by an owner/builder disclose that fact.

Other disclosure documents are required for the less common titles (such as Crown lands and community titles).

The disclosure documents give a picture of the planning provisions and title relating to a particular property. If the contract does not contain the appropriate documents, the buyer has the right to cancel the contract within 14 days of its making.

Warranties (essential promises)

Unless the contract contains a written statement disclosing something different, the seller warrants at the date of the contract that:

- the land does not contain any part of a sewer belonging to a recognised authority;
- the s 10.7 certificate specifies the true status (planning, zoning) of the land;
- the land is not subject to adverse affectation.

Affectations

An adverse affectation is, typically, a proposal by a public authority to acquire part or all of the land for such purposes as road works or electricity transmission or distribution purposes. Scheduled affectations (ie, affectations listed in the *Conveyancing (Sale of Land) Regulation 2017*, Sch 3) include notices and claims concerning boundary irregularities and encroachments, and notices issued under various statutes, concerning, for example, unhealthy building land, heritage status or the location of pipelines (see *Conveyancing (Sale of Land) Regulation 2017*, Pt 3, Sch 3 for details).

Fire safety

A vendor must now affix a warning to the contract to the effect that dwellings must have smoke alarms installed.

Swimming pools

If the land has a swimming pool to which the *Swimming Pools Act 1992* (NSW) applies then either:

- a valid certificate of compliance issued under the Act; or
- an occupation certificate with evidence of registration of the pool under Pt 3A of the *Act*;

must be attached to the contract; or

- a valid certificate of non-compliance under cl 22 of the *Swimming Pool Regulation 2018* (NSW).

A contract can be rescinded by the buyer any time before settlement for breach of a warranty, but only if:

- the seller failed to disclose the matter; and
- the buyer was unaware of its existence; and
- it is such that the buyer would not have entered into the contract if they had known about it.

[27.910] Entering into the contract

Public auction

At a public auction, intending buyers compete in bidding to purchase property. The contract is made when a bid has been accepted.

Purchase at auction is usually regarded as being for the more experienced home buyer or investor. Auctions achieve certainty of price for both buyer and seller, and a quick sale, but unsuccessful bidders may find that expenses they have incurred for valuation and quality inspection reports are wasted.

Examine the contract

It is essential that the buyer or their solicitor or licensed conveyancer examine the contract before the auction to make sure that it is in order and there are no objectionable terms.

Inspections and finance

It is also important that the buyer has arranged finance and made all necessary quality inspections (see [27.940] and [27.970]).

The reserve price

At or before the auction, the seller will fix a reserve price (ie, the minimum price they will accept for the property). Once the bidding reaches the reserve price, the auctioneer will tell the buyers that "the property is on the market". The property is sold "under the hammer" to the highest bidder at or above the reserve price.

The buyer must then immediately sign the contract and pay the deposit.

Property "passed in"

If the reserve is not reached, the property is said to have been passed in.

At this point, the seller may reduce the price to meet the highest bid. In this case, the property is still sold under the hammer, and an immediate exchange of contracts can take place. However, it is more usual for negotiations to continue privately with the highest bidder after the auction.

It is important to remember that if contracts are exchanged on the day of the auction, the cooling-off period does not apply (see Private treaty contracts at [27.910]).

Dummy bidders

The *Property, Stock and Business Agents Act* requires the auctioneer to complete a bidders' record of all persons intending to bid. This, together with a prohibition on the vendor making more than one bid, is designed to prevent the practice of "dummy bidding" to force up the price.

Private treaty contracts

Private treaty contracts are sales by means other than auction.

The cooling-off period

In a private treaty sale, buyers have what is known as a cooling-off period – a five-day period after the contract is signed in which the buyer is allowed to pull out. If the buyer pulls out in this time, they will lose 0.25% of the purchase price.

The cooling-off period can be extended with the written agreement of the seller, or shortened or waived with a s 66W certificate under the *Conveyancing Act 1919*. The lawyer or conveyancer should explain to the client what is involved before signing a s 66W certificate.

What the cooling-off period is for

The cooling-off period was introduced to prevent, or minimise, gazumping. Gazumping is a sharp practice in which the vendor sells to someone else at a higher price after a verbal bargain has been made with an intending buyer, but before there is a binding contract.

Essentially, buyers can exchange or make a contract, committing vendors to sell at the agreed price, and then have five working days to arrange or confirm finance and obtain reports (building, pest, strata inspection, and so on). The contract will automatically become unconditional unless the buyer, by written notice, rescinds it within the cooling-off period, or the cooling-off period is extended by agreement.

[27.920] Exchanging contracts

The *Property, Stock and Business Agents Act* (s 64) permits estate agents to complete and exchange contracts only if they have express authority to do so from the parties to the contract.

Many contracts are exchanged by the agent at the point of sale. The buyer should take the contract, signed by the vendor, to their solicitor or conveyancer immediately to allow maximum time for the work that needs to be done in the five-day cooling-off period. Buyers often require the advice of their solicitor or conveyancer before signing, particularly if there are special conditions that need negotiation or explanation.

Where the buyer is selling one house and buying another, a series of contracts may interlock and exchange at the same time may be required. In such cases, exchange at point of sale is not appropriate.

[27.930] The goods and services tax

The federal legislation *A New Tax System (Goods and Services Tax) Act 1999* (Cth) may apply to some residential conveyances. Whether goods and services tax (GST) attaches to the sale of real estate depends on:

- whether the premises are new; and
- whether they are residential or commercial.

Sales of existing houses are generally not affected, as most vendors would not be registered for GST purposes. The sale of new residential premises will, if the vendor is registered for GST, be subject to GST.

GST and the standard contract

The 2018 Standard Contract for the Sale of Land contains a provision on the front page for the disclosure of the amount of GST in the price. Disclosure of GST in this clause is optional. A prospective purchaser should very carefully peruse the contract to ensure that there is no additional GST liability.

[27.940] Quality inspections

Buyers should arrange to have all necessary quality inspections completed before the contract becomes unconditional. They may want expert building reports on the structural soundness, condition of repair and suitability of structures. They may also need a pest inspection to discover whether there is termite or borer infestation.

Consideration should also be given to:

- obtaining an identification survey (see [27.950]) or a building certificate under the *Environmental Planning and Assessment Act 1979*;
- arranging tests for illegal sewer connections.

[27.950] Survey

When you buy real estate, you buy what is fixed to the land. An identification survey shows the improvements as they are sited on the land. It will reveal any encroachments by or upon the land, and the observance or otherwise of ordinances (eg, about the distance of the buildings from the boundaries).

[27.960] Building certificates

The buyer may require a building certificate from council. This should be obtained prior to exchange, as any order issued after exchange of the contracts becomes the responsibility of the purchaser.

[27.970] Finance

Buyers should make sure that they have a firm commitment from their prospective mortgage lender before entering into a contract. There is a great deal of competition among lenders, such as banks, secondary mortgage market lenders and other loan providers, for domestic mortgages. Lenders will take into account the prospective borrower's credit rating and ability to repay a loan.

Variable interest loans

Most home buyers prefer long-term reducible loans, but such loans are usually at interest rates that vary according to market rates. Helpful articles and comparisons appear in the newspapers, and buyers should shop around for the best deal.

They should also consider any non-interest charges made by lenders.

Fixed rate loans

Lenders also offer loans with interest rates fixed for a set period. These can be very attractive if fixed when rates are low.

Between exchange and settlement

[27.980] Test the contract

After the contracts are exchanged, the buyer has to wait from four to eight weeks until the sale is finalised (completion). In this time, they should search the title to verify the seller's warranties and compliance with the promises of the contract.

Other inquiries

Inquiries should be made of various government and local government authorities to test the seller's contract warranties; for example, an inquiry to check there is no proposal for road widening.

These searches and inquiries cost between $200 and $300. They should be made promptly. If the property is affected other than as disclosed, the buyer has a right to pull out of the contract.

Don't delay

Any requisitions, objections or claims for compensation arising out of searches, surveys or inquiries, or council inspections, should be made promptly. The buyer cannot normally rescind the contract merely because of a defect in quality.

[27.990] Insurance

Buyers should arrange for insurance to be effective from settlement or earlier possession, noting the interest of any mortgagee (lender) in the new policy. As buyers have an insurable interest from the moment the contract is exchanged, they may prefer to insure at that stage. The lender usually requires the original policy (for authenticity) for settlement.

In the case of strata titles, the body corporate insures the building for replacement and reinstatement value, and will also insure public risk and workers' compensation.

[27.995] Electronic Conveyancing

The Federal and State governments have worked with the finance industry and property conveyancers to introduce a system of electronic conveyancing. Settlements, being the transfer of title and the discharge and registration of mortgages, and the financial aspects, being the payment of vendors and loan advances and payouts, are now effected by electronic platforms called Electronic Lodgment Network Operators.

Only one ELNO operates at this time, being PEXA, with other ELNO developing platforms.

To effect settlements in an ELNO lenders and property conveyancers need to register and undertake steps to identify clients to limit fraud.

[27.1000] Stamp duty

Stamp duty is a state government tax. The contract must be stamped, and stamp duty paid in full, within three months of making the contract, or penalties in the form of extra duty apply.

Home buyers who are exempt

Under the First Home Buyers Assistance Scheme, an exemption or discount on duty for first home buyers will only apply to a new home, a substantially renovated home or a vacant lot of residential land. Transactions will be exempt for houses under $650,000, with discounts on duty up to $800,000 for residences, and up to $350,000 for vacant land with discounts between $350,000 and $450,000.

Under the First Home Owner Grant (New Homes) scheme, eligible first home owners may be entitled to a grant of $10,000.

Rates of stamp duty

Stamp duty is charged on a sliding scale according to the value of the property. Current rates of stamp duty are:

- for property values up to $14,000 – $1.25 per $100;
- $14,000–$30,000 – $175 plus $1.50 per $100 (or part thereof) over $14,000;
- $30,000–$80,000 – $415 plus $1.75 per $100 (or part thereof) over $30,000;
- $80,000–$300,000 – $1290 plus $3.50 per $100 (or part thereof) over $80,000;
- $300,000–$1,000,000 – $8990 plus $4.50 for every $100 (or part thereof) over $300,000;
- over $1,000,000 – $40,490 plus $5.50 for every $100 (or part thereof) in excess of $1,000,000.

Thus, the stamp duty payable on a contract where the purchase price is $140,000:

= $1,290 + $(140,000−80,000)/100 × 3.5
= $1,290 + $60,000/100 × 3.5
= $1,290 + $600 × 3.5
= $1,290 + $2,100
= $3,390.

[27.1010] Caveats

A buyer may consider registering a caveat on the seller's title at Land and Property Information, after contracts are exchanged and until completion occurs.

A caveat is a public notice that states that the caveator (the person lodging the caveat) has an interest in the seller's title. Once a caveat is lodged, it prevents registration of dealings inconsistent with the caveat, and secures the buyer's interest in the title until settlement takes place. Land and Property Information NSW will notify the existing owner that a caveat has been lodged.

[27.1020] Priority notices

Within the electronic conveyancing platform, it is possible to register following exchange of contracts a priority notice. A priority notice will protect the interest of the party lodging the notice by reserving priority for the dealing identified in the notice – such as a transfer.

[27.1030] Completion

Completion may take place when the buyer has received satisfactory answers to searches and enquiries and met the requirements of the mortgagee (the lending institution).

Usually, the solicitors for the buyer and for the seller arrange this, and there is no need for buyer and seller to be present.

Paper settlement

On payment of the balance of the purchase price (usually 90%: 10% having already been paid as a deposit), with adjustments for rates and outgoings up to and including the date of settlement, the buyer will receive a signed transfer or conveyance of the title from the seller, and the title deed or deeds.

Normally, these are given to the buyer's lender, who attends to registration of the transfer (or conveyance) and mortgage (and any discharge of the seller's mortgage) at Land and Property Information NSW. The lender keeps the title deed until the loan is repaid.

Electronic settlement

Loan advances, loan discharges, payments to parties, payment of stamp duty, payment of rates, and the transfer of title and registration of mortgage documents all occur simultaneously on line.

Vacant possession will be given to the buyer on completion of the transfer. Vacant possession means that the previous occupants have left and all goods and chattels have been removed, other than those stated in the contract as remaining, such as carpet and blinds.

Tax considerations

Purchasers of real estate may assume responsibilities to account for tax liabilities of the vendor to the Australian Taxation Office:

Australian Resident Clearance Certificate

A purchaser of real estate where the price exceeds $750,000 must withhold 12.5% of the purchase price and account for it to the ATO unless the vendor provides a clearance certificate from the ATO.

The purpose behind this requirement was to prevent persons realising capital gains and then leaving the country without paying their tax liabilities.

Residential Withholding Payments

Certain residential sales (usually by developers) require a purchaser to pay to the ATO a percentage of the sale price on or before completion.

For both the Australian Resident Clearance Certificate and the Residential Withholding Payment, the purchaser is required to determine whether a payment is required. If in doubt, seek legal advice.

The final inspection

Finally, it is a good idea to arrange a final inspection of the property either on the day of, or the day before, settlement, to ensure that the property is in good order and that no inclusions listed in the contract, such as light fittings, have been removed or replaced with unacceptable alternatives.

If there are any problems that become apparent on inspection of the property, buyers should contact their solicitor before they settle. People doing their own conveyancing should insist that problems be rectified before they settle.

Contact points

[27.1040] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

General

Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Housing Pathways
www.housingpathways.nsw.gov.au
ph: 1300 HOUSING (1300 468 746)

Department of Communities and Justice, previously Department of Family and Community Services (FACS) and Housing NSW
www.facs.nsw.gov.au/housing
ph: 8753 8000
Housing Contact Centre
ph: 1800 422 322
For a list of offices, please see the website.

NSW Fair Trading
www.fairtrading.nsw.gov.au
ph: 13 32 20
For a list of locations that provide counter services for Fair Trading, visit the Service NSW website at www.service.nsw.gov.au/service-centre.
Aboriginal enquiry officer
ph: 1800 500 330
Residential tenancy complaint service
ph: 13 32 20

NSW Aboriginal Tenancy Advice Service
www.nswats.com.au

NSW Civil and Administrative Tribunal
www.ncat.nsw.gov.au
ph: 1300 00 NCAT (1300 006 228)

Rental Bond Board
See Rental bond information, including "Rental Bonds Online", under NSW Fair Trading above.

Retail Tenancy Unit (Service NSW)
www.smallbusiness.nsw.gov.au/solving-problems/retail-tenancy
ph: 1300 795 534

Tenants' Union of NSW
See under Tenancy advice and advocacy services below.

Aged and retired persons

Aged Care Complaints Commissioner (My Aged Care)
www.myagedcare.gov.au
ph: 1800 550 552

Council on the Ageing, NSW (COTA)
www.cotansw.com.au
ph: 1800 449 102 or 9286 3860

Retirement Village Residents Association (RVRA)
www.rvra.org.au
ph: 1300 787 213

Seniors Information Service NSW
www.facs.nsw.gov.au/inclusion

Senior Rights Service (formerly TARS)
www.seniorsrightsservice.org.au
ph: 1800 424 079

Tenants Advice and Advocacy Services

Resourcing
Tenants' Union of NSW
www.tenants.org.au
NSW Aboriginal Tenancy Advice Service
www.nswats.com.au

Aboriginal
Greater Sydney Aboriginal Tenants Service
ph: 9833 3314
Northern NSW Aboriginal Tenants Advice Service
ph: 6643 4426 free call 1800 248 913
Southern NSW Aboriginal Tenants Advice and Advocacy Service – Murra Mia
ph: 4472 9363 free call 1800 672 185
Western NSW Aboriginal Tenants Advice and Advocacy Service
ph: 6881 5700 free call 1800 810 233

Metropolitan
Blue Mountains Tenants Advice and Advocacy Service
www.eeclc.org.au
ph: 4704 0201
Eastern Area Tenants Service
www.tenantsrights.org.au
ph: 9386 9147

Inner Sydney Tenants Advice and Advocacy Service
www.rlc.org.au
ph: 9698 7277
Inner West Tenants Service
www.mlc.org.au
ph: 9559 2899
Northern Sydney Area Tenants Service (NSATS)
www.nsats.org
ph: 9559 2899
Southern Sydney Tenants Advice and Advocacy Service
ph: 9787 4679
South West Sydney Tenants Service
www.maclegal.net.au/
ph: 1800 631 993 or 4628 1678
Western Sydney Tenants Service
www.wsclc.org.au/
ph: 8833 0933

Regional

Central Coast Tenants Advice and Advocacy Service
www.cctaas.com.au
ph: 4353 5515
Hunter Tenants Advice and Advocacy Service
ph: 1800 654 504 or 4969 7666
Illawarra and South Coast Tenants Service
www.illawarralegalcentre.org.au
ph: 1800 807 225 or 4274 3475
Mid Coast Tenants Advice Service
ph: 1800 777 722 or 6583 9866
New England and Western (NSW) Tenants Advice and Advocacy Service
ph: 1800 836 268 or 6772 4698
Northern Rivers Tenants Advice and Advocacy Service
www.northernriversclc.org.au
ph: 1800 649 135 or 6621 1022
South Western Tenants Advice Service
www.verto.org.au/tenantsadvice
ph: 1300 4 VERTO (1300 483 786)

Home purchase

Fair Trading Centres

See NSW Fair Trading.

NSW Civil and Administrative Tribunal

See NSW Fair Trading.

NSW Land Registry Services
www.six.nsw.gov.au
www.nswlrs.com.au
ph: 8776 3575

Law Consumers
www.lawconsumers.org
ph: 9564 6933

Law Society of NSW
www.lawsociety.com.au
ph: 9926 0333

Local Government, Office of
www.olg.nsw.gov.au
ph: 4428 4100

Real Estate Institute of NSW
www.reinsw.com.au
ph: 9264 2343

Revenue NSW
www.revenue.nsw.gov.au
ph: 9689 6200
First Home Owner Grant scheme
ph: 1300 130 624
First Home Buyers Assistance scheme
ph: 1300 130 624
Duties
ph: 1300 139 814
Land Tax
ph: 1300 139 816