Guide to Protected Tenancies in NSW

4th Edition

Older Persons Tenants' Service

a program of

CPSA

COMBINED PENSIONERS & SUPERANNUANTS ASSOCIATION OF NSW INC

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OPTS
OLDER PERSONS TENANTS SERVICE
ADVICE & ADVOCACY FOR OLDER TENANTS

Older Persons Tenants' Service

(a program of Combined Pensioners & Superannuants Association of NSW Inc.)

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Disclaimer

While every effort has been made to ensure information in this Guide is up to date and accurate, the Guide is intended as an introduction to the law and practice only and should not be used as a substitute for specific legal research and advice.

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Guide to Protected Tenancies in NSW 4th Edition

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TENANTS ADVICE AND ADVOCACY SERVICES

Case studies

All names used in case studies have been changed.

Permission to use

Contents

Glossary

Attornment	Notice and acknowledgement of the transfer of ownership of property by paying rent to the new owner.
Clerk of the Fair Rents Board	An officer within the Rental Bond Board, NSW Fair Trading who has been designated this role.
Controlled premises	Premises covered by the *Landlord and Tenant (Amendment) Act 1948.* Also referred to as 'prescribed premises'.
CPSA	Combined Pensioners & Superannuants Association of NSW Inc.
Director-General	The Commissioner for Fair Trading, NSW Fair Trading, NSW Department of Finance and Services, or if there is no such position in that Department, the Director-General of that Department.
Fair Rents Board	Statutory body constituted by the *Landlord and Tenant (Amendment) Act 1948*, presided over by a Magistrate.
Leave and license	In a 'leave and licence' agreement, the owner remains in legal possession of the premises and the licensee has 'constructive' possession of the premises: the right to use and occupy premises for a temporary period, with no transfer of interest in the property.
Lessee	Tenant.
Lessor	Landlord.
NCAT	NSW Civil & Administrative Tribunal.
Notice to Quit	Termination notice.
OPTS	Older Persons Tenants' Service is a program of Combined Pensioners & Superannuants Association of NSW Inc. Previously, with funding provided by NSW Fair Trading, OPTS was a tenants' advice and advocacy service as part of the NSW Tenants Advice and Advocacy Program.
Regulation	*Landlord and Tenant Regulation 2009.*
Rent Controller	Statutory role which was abolished on 4 July 2002 and is now exercised by the Director-General.
TAAP	NSW Tenants Advice and Advocacy Program.
1948 Act	*Landlord and Tenant (Amendment) Act 1948.*
2010 Act	*Residential Tenancies Act 2010.*

Referencing

References to relevant sections of the Act occur within the text as follows:

[*s5A(1)(c)*]	Refers to Section 5A, subsection 1, paragraph (c) of the *Landlord and Tenant (Amendment) Act 1948.*
[*cl5*]	Refers to Clause 5 of the *Landlord and Tenant Regulation 2009.*

Introduction

'Protected tenants' are tenants living in premises which are covered by the provisions of the *Landlord and Tenant (Amendment) Act 1948* ('1948 Act'). While most residential tenancies in New South Wales are now regulated by the *Residential Tenancies Act 2010* ('2010 Act'), the 1948 Act may apply for:

- tenancies which commenced before 1 January 1986; in
- premises that were built before 16 December 1954 (and, if converted into units, the conversion was before 1 January 1969); where
- a 5A lease has not been registered.

The rights and obligations of parties under the 1948 Act are significantly different from those in the 2010 Act, particularly in the areas of rent-setting, evictions and repairs.

Protected tenants are generally vulnerable occupants, due to their age or disability. This vulnerability, combined with issues involving potential profits from decontrolling premises[1] and the complexity of the 1948 Act, makes this area of advice and advocacy very challenging for tenancy workers.

This Guide aims to assist in identifying protected tenancies, to introduce tenancy workers to the issues for protected tenants and to support initial general advice. Further casework should always be undertaken with the support of expert legal advice. Individuals and service providers should not rely solely on the general information in this guide.

Historical Background

Australia has not always had the high levels of home ownership which apply today. In the early part of the twentieth century, Australians were as likely to be renters as home buyers. The census of 1911 reported that 48% of the population were renting.

Landlord and tenant legislation is a state responsibility in Australia[2]. A *Landlord and Tenant Act* was introduced in New South Wales as early as 1847. Tenants had only a small measure of protection under this law, which simply prevented landlords from pursuing extreme measures in their recovery of unpaid rents and prescribed the procedure to evict tenants. By the end of the nineteenth century, many tenants were living in poor standard, insanitary housing and the NSW Parliament responded first in 1896 by passing a *Public Health Act* (which gave local government councils the responsibility for its enforcement) and introducing a new *Landlord and Tenant Act* in 1899, which remains on the statutes today.[3]

During World War I, there were desperate housing shortages, and wives of soldiers were actively discriminated against when seeking rented accommodation. Public disquiet over

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[1] Until recent times, premises covered by the 1948 Act traded at a significant discount compared to premises covered by the 2010 Act. This created a potential windfall for investors if they could decontrol the premises and re-let or sell them without the restrictions of the 1948 Act. Large price differences may no longer be the case.

[2] Mowbray, R.C., *Towards a better understanding of private renting in New South Wales – an exploratory study*, University of Sydney, 1987, pp.55-58.

[3] Older Persons Tenants' Service, *Proposed repeals of the Landlord and Tenant (Amendment) Act 1948 and the Landlord and Tenant Act 1899*, submission to the Commissioner for Fair Trading, 14 October 2011.

housing issues led to the introduction of the *Fair Rents Act* (NSW) into Parliament in 1913, in an attempt to reduce rents. Rental regulation was controversial and this Act was not passed until 1915. Thereafter it was frequently amended in response to vocal opposition from landlords and investors.

Most legislative activity on landlords and tenants in the twentieth century (until the late 1980s) revolved around the implementation or removal of rent control.[4]

In the late 1920s and early 1930s demands for housing relief resurfaced with the onset of the Depression and increased unemployment.

In 1928, the NSW Labor government legislated to phase out rent controls by 1933, presumably to satisfy investor complaints and promote greater housing provision. However, this led to an increase in evictions and unemployed people responded by organising anti-eviction committees. During May and June 1931 there were a number of riots at Redfern, Leichhardt, Bankstown and Newtown in response to attempted evictions by landlords. Anti-eviction committees spread across the Sydney metropolitan area and in regional areas such as Tighes Hill in Newcastle. In response to these actions, the Lang government enacted the *Fair Rents and Lessees Relief Bill* and the *Ejectments Postponement Bill*. Under these measures all rents were reduced by 22.5%, and evictions were delayed for up to three months.

With the declaration of World War II on 3 September 1939, the Commonwealth Government took over many of the states' powers, including housing. National rent control regulations were proclaimed on 27 September 1939 and further legislation was introduced in 1941.

With the conclusion of the war and after a second referendum, the Commonwealth Government returned housing responsibilities to the states in 1948, and the *Landlord and Tenant (Amendment) Act 1948* (NSW) came into effect in New South Wales on 16 August 1948.

New South Wales was the only state to retain the war-time rent control regulations in their original form. Between 1939 and 1954 all residential premises in New South Wales were subject to control, in terms of both rent and the conditions of tenancy. New dwellings built after 1954 became exempt from control and, through subsequent amendments, the provisions of the Act have been gradually whittled away.

While always resisted by investors, rent control was not always controversial. Between 1949 and 1957 eight public opinion polls came out in support of rent control. However, a Royal Commission to investigate the 1948 Act was established in 1961. The Commission found that there was a housing shortage for people on low incomes, and particularly emphasised the hardship to pensioner tenants. The Commission also found that owners of rent controlled premises received a substantially lower return than owners of non-controlled premises. The report further highlighted that rent controls were benefiting some people who had no need for them. The Commission recommended that rent control be abolished for all controlled premises commanding rents of more than five pounds per week, and all controlled rents be increased by 60%. These recommendations were not acted upon, but the history of amendment to the 1948 Act represents an incremental reduction of tenant protections.

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[4] For a history of rent control in New South Wales up to 1948, see *Report of the Royal Commission of Inquiry on Landlord and Tenant (Amendment) Act, 1948 as amended (1962)*, Government Printer, October 1961, pp. 78-83.

Summary of amendments to the 1948 Act

Since the 1948 Act was proclaimed, there have been periods of strong opposition to rent control, and successive governments have amended the legislation in response to that pressure.

The first amendment in 1949 strengthened the protections for tenants: as landlords were required to find alternate accommodation for any tenant they sought to evict. However, the direction of all subsequent amendments has been in favour of the landlord:

1954:	All buildings constructed on or after 16 December 1954 were exempted from the Act.
1956:	Premises could be decontrolled when vacated and a lease registered under [*s5A*], (called '5A lease').
1964:	Rents could be fixed by '17A' Agreements, which are negotiated agreements between landlords and tenants and do not require hearings by the Fair Rents Board.
1968:	Rent control legislation was repealed for all non-residential premises; The 1948 Act would only apply to buildings that had been converted to flats before 1 January 1969; 'Fair rent' was no longer restricted to the existing (1939) method and, once a 17A Agreement had been registered, that became the fair rent for all future rent increases; 'Wealthy tenant' provisions were introduced that allowed rents more comparable to prevailing market rents; and tenants could be evicted if the landlord could show they could afford alternative accommodation; A simplified method of decontrolling premises, by registering a 5A lease, was introduced.
1985:	No new protected tenancies could be created from 1 January 1986, except where the protected tenancy is inherited under *s83* and *s83A* of the 1948 Act.

In 1989 there was a further inquiry into rent controlled premises, stemming from an earlier report of the *Ministerial Inquiry into Homelessness and Affordable Accommodation*. This inquiry recommended a gradual phase out of the 1948 Act by systematically allocating public housing to registered protected tenants. A register was established for this purpose and operated from October 1989 until June 1990, but there was a very poor response, with fewer than 750 tenants coming forward. The 1989 recommendations were not implemented.

By the early 1970s, rent control legislation had been repealed in all states other than Victoria (repealed on 28 September 2010), and New South Wales. In New South Wales, the legislation still applies, but no new protected tenancies have been created since 1 January 1986.[5]

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[5] In very limited circumstances a tenancy might have commenced after 1986 where a dependant of a protected tenant remained in occupation following the death of the original tenant. See Special classes of tenants; Statutory tenants.

The number of protected tenants

In 1961 the then Royal Commission concluded that 207,000 houses and flats (approximately 20% of all NSW residential dwellings and 68% of all privately rented NSW accommodation) were under rent control. In 1966 the Rent Control Office estimated there were 54,660 dwellings under rent control. In 1985 (when the last amendment was introduced), the second reading speech estimated that only 20,000 premises were still under rent control.

This dramatic decline in the number of dwellings under rent control since the early 1960s has not been recorded in a systematic manner. Decontrolling has been achieved by eviction, registration of leases, death of tenants and informal agreement between landlords and tenants. The general resistance of landlords to complying with the requirements of the legislation means that the records of NSW Fair Trading and its predecessors are not reliable.

The poor response to the Liberal / Country Party Government's efforts to create a definitive register in 1989 reflects both the lack of publicity and any incentive to register, rather than any accuracy of measurement of the remaining tenancies. Consequently, it is not possible to estimate how many premises are under rent control.

Protected tenants are now mainly found in older suburbs where there was lots of rental housing in the 1950s and the 1960s (before gentrification), or in country areas (often old farm houses) where no-one worried about paperwork. In 2011, CPSA's Older Persons Tenants' Service (OPTS) estimated that the number of protected tenants in New South Wales was between 600 and 1,400[6].

Effects of rent control

The 1948 Act has left an indelible mark on the history of tenancy law in New South Wales.

The administrative and legal work created by the Act was significant. Between 1961 and 1975 more than 20,000 leases were registered each year, with the peak being 69,000 in 1968. In 1948 there were 130 staff of the Rent Control Office and this grew to over 400 in 1969. Today there is part of one position only.

At its peak, the Fair Rents Board consisted of 5 magistrates working full-time for five days per week. In its busiest year (1953), it made 48,796 fair rent determinations. In addition there were the judges, magistrates, barristers, solicitors and advocates who were engaged, many of them full-time, on tenancy matters in the 1950s and 1960s. Today magistrates hear a very small number of cases. There were only two sittings of the Fair Rent Board in 2011, one in May in 2012 and one in June 2014.

Landlord groups, such as the Property Owners' Association, have always blamed rent control for the loss of private rental stock. However, in a study of government housing policy, Troy[7] concluded that over the period 1921 to 1947, when New South Wales experienced rent control legislation, 'the prima facie evidence is that private investors were not discouraged by rent control legislation from investing in rental accommodation'.

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[6] Combined Pensioners & Superannuants Association of NSW Inc., *Proposed repeals of the Landlord and Tenant (Amendment) Act 1948 and the Landlord and Tenant Act 1899*, submission to the Commissioner for Fair Trading, 14 October 2011, p. 9 and Appendix 2.

[7] Troy, P.N., 'The Evolution of Government Housing Policy: The Case of New South Wales 1901-41', *Housing Studies*, Vol.7 No.3, July 1992, pp. 220, 229.

If there was a reduced incentive to invest in rental housing, it was only at the margins. Landlord groups have reacted in a similar vein to contemporary residential tenancy law reform.[8]

For tenants, the 1948 Act provided secure, affordable housing. Tenants were protected from evictions and excessive rent increases. However, today these tenants are often living in rundown dwellings through lack of repairs and maintenance over the years.[9]

In the words of one protected tenant,

> *"Home is so much more than just the four walls. Home is our friends, families and neighbours, our connections with others in the street, the local shopping centres, the local services that we get support from and also those we contribute to. The law has given us the right to treat these places as our homes ."*

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[8] Mowbray, R., 'Disinvestment and the big lie', *Around the House*, Issue No. 80, March 2010, pp. 3-5.

[9] Case studies that highlight the vulnerabilities of 'protected tenants', especially in relation to repairs, are discussed in Mowbray, R. and Boulton, A., 'Don't grow old as a protected tenant', *Around the House*, no. 73, July 2008, pp. 16–17; Mowbray, R., 'The law is an ass', *Around the House*, no. 78, September 2009, pp. 24-25; Mowbray, R. and Boulton, A., 'An oral history of protected tenants', *Around the House*, no. 83, December 2010, pp. 11–13.

Structure of the Act

The *Landlord and Tenant (Amendment) Act 1948* is structured in five parts. In brief, these parts are:

Parts	Contents
Part 1 Preliminary	• exemptions for Commonwealth and state governments and the NSW Land and Housing Corporation and others • no new protected tenancies from 1 January 1986 • tests to determine prescribed premises • powers for the Governor to extend coverage or exempt premises by declaration • definitions (*specific definitions also appear in each other Part*)
Part 2 Fair Rents	• constitution, powers and administration of the Fair Rents Board (FRB) • matters to be considered by the FRB in setting a fair rent • requirement for premises to be in fair and tenantable repair otherwise the FRB cannot consider landlord's estimated annual cost of repairs and maintenance • appeals of FRB determination • procedures for setting of rents by 17A Agreement • procedures and definitions for setting rents for 'wealthy tenants' • recoverability of rents paid in excess of the fair rent • requirements for rent receipts and records • information on fair rent held by the Rent Controller
Part 3 Recovery of possession of prescribed premises	• restrictions on eviction • prescribed grounds for eviction • period of notice to quit • service of notice to quit • matters court consider in determining to recover possession of prescribed premises • protections of use and enjoyment of premises • 'inheritance' of tenancies • procedures and powers in relation to recovery of premises
Part 4 Miscellaneous	• prohibition of threats and boycotts • restrictions on sale of premises • access to premises • prohibitions on contracting out of the Act • powers of the Director-General to require information or to enter and inspect premises • offences and penalties • premises deemed to be prescribed premises unless the contrary is shown
Part 5 Protected persons	• further protections for returned servicemen and their dependants • protections do not apply where lessor is a protected person or recipient of the Age Pension

Resources

Copies of the consolidated 1948 Act and Regulations are available from the Australasian Legal Information Institute website at:

The Act: http://www.austlii.edu.au/au/legis/nsw/consol_act/lata1948257/
The Regulations: http://www.austlii.edu.au/au/legis/nsw/consol_reg/latr2009268/

More detailed guides to the law and practice in NSW are available in:

Clyne, Peter Practical Guide to Tenancy Law, Rydge Publications, Sydney, 1970

Mackerras, N. R. M. and Dunford. J. R. Landlord and tenant practice and procedure in New South Wales, 7th ed, Law Book Company, Sydney, 1971

Lang, A.G. Leases and Tenancies in New South Wales, Law Book Company, Sydney, 1976

Lang, A.G. The Recovery and Possession and the Determination of Rent on Premises, Practice Paper RE12, College of Law, Sydney, 1986

Lang, A.G. Residential Tenancies Handbook, Law Book Company, Sydney, 1986

OPTS produced a set of *Protected Tenant Factsheets* available at http://www.cpsa.org.au/factsheets

1. Are you a protected tenant?
2. General Rights and Responsibilities
3. Fair Rents
4. Notice to Quit
5. Grounds for Eviction

CPSA also produces 'Useful searches' that gives information on research techniques and available search tools to determine the age of the premises, the owner of the premises etc. This is available at http://www.cpsa.org.au/resources.

Tenancy workers

Tenancy workers in the Tenants Advice and Advocacy Program (TAAP) are often the first to identify that a tenancy is covered by the 1948 Act when providing advice on general tenancy inquiries. These workers can give initial advice, assistance in negotiating with landlords and their representatives, and referral to experts in difficult matters.

Local TAAP services can be contacted through the Tenants' Union NSW website, by doing a postcode search at: www.tenants.org.au/need-advice.

NSW Legal Aid

The Civil Litigation Section of NSW Legal Aid has expertise and may provide back-up advice to tenancy workers. NSW Legal Aid lawyers may be able to organise a grant of legal aid in difficult matters and referral to expert barristers where required. In some cases, they may take on cases directly. Legal Aid can be contacted through the CLCNSW website by doing a postcode search at: www.clcnsw.org.au/postcode_search.php.

Chapter 1

Are premises controlled?

A flow chart in Appendix 1 can be followed to determine if the premises in question are covered by the 1948 Act, commonly referred to as 'controlled premises'.

It is important to identify which Act (1948 or 2010) covers a residential tenancy, because the two Acts provide very different rights and obligations and are administered in different jurisdictions.

Section 7(a) of the 2010 Act specifically excludes protected tenancies from its jurisdiction, and the NCAT cannot make orders in relation to protected tenancies. Original jurisdiction for the 1948 Act rests with the Fair Rents Board and local courts.

Many protected tenancies are identified when a long-term tenant gets either a 60-day notice of rent increase or a notice of termination. If a tenant has been in premises continuously from before 1986, advisers always need to check if the premises are controlled. Any long-term tenancy, especially of an adult with disability or a person on very low rent, should also prompt further questions.

Part 1 (Preliminary) of the 1948 Act sets out the means by which premises are controlled and the process for decontrolling them. In most cases where the premises have been 'decontrolled' in accordance with Part 1 of the Act, the tenancy will be covered by the 2010 Act.

When applying Part 1 of the Act, there are key issues around:

- The age of the building;
- When the tenancy commenced;
- If the premises are excluded or exempted; and
- Whether the premises have been decontrolled.

Critical dates

Successive amendments to the 1948 Act have left a legacy of hurdles and dates that must be adhered to. The critical dates are:

- Premises must have been wholly constructed and able to be used as a residence[10] on or before 16 December 1954; [*s5A (1)(a)*]; and
- Any conversion of the premises into flats must have occurred before 1 January 1969; [*s5A(1)(b)*]
- Premises subject to a lease before 1 January 1969 must have had that lease registered with the Rent Controller before that date; [*s5A(1)(c)&(e)*]; and
- Premises subject to a lease on or after 1 January 1969 must have had this lease registered before 1 January 1989 [*s5A(1)(d); s5A(9A), (9B) and (9C)*]; and

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[10] In *Hills v Cox* (RT 94/5510) the Residential Tribunal found the tenancy was not protected. The tenants had lived in the premises since 1950 but in 1962 the cottage was relocated to an alternate site. The Tribunal referred to the Oxford Dictionary as to the meaning of 'erect' and concluded that a building is erected when it is 'set-up' on vacant land.

- The tenancy must have commenced before 1 January 1986 [*s5AA*]; and
- Premises were decontrolled if the landlord or his/her predecessor in title personally occupied them on or after 1 January 1969 and a 5A lease has been registered [*s5A (1)(d)(i)(a)*].

The date the premises were constructed, converted and/or occupied and the dates of leases are questions of fact. The onus of proof is with the tenant in any proceedings, including jurisdictional arguments if the matter is before the NCAT under the 2010 Act.

It is not necessary that a conversion to flats was legal or had Council approval prior to the conversion. What is important is whether premises were transformed into something different from what formerly existed and the date on which that transformation took place[11].

Are the premises prescribed?

To be prescribed, and therefore covered by the 1948 Act, premises must meet the definition in s8 1948 Act. They must not be exempt or excluded from the Act. Premises must be leased for the purposes of a residence. This can include any premises within a lodging or boarding house, or any part of a premises that is leased separately, including share accommodation [*s8(1A)*].

Section 6 of the 1948 Act confers on the relevant Minister the power to extend coverage of the Act to any specific premises or a class of premises [*s6(1)*] or to exclude any specific premises or a class of premises [*s6(2)*] by publication in the Government Gazette. If premises have been excluded under [*s6*], a certificate will be held with the Rent Controller.

Section 98A of the 1948 Act states that in any civil or criminal proceedings arising out of or taken under the 1948 Act, the premises are deemed to be prescribed premises unless the contrary is shown, see Chapter 1, Premises deemed prescribed premises unless contrary shown.

Exemptions

The 1948 Act grants specific exemption to the Crown [*s5*] and specifically shall not bind:

a) The Crown in the right of the Commonwealth or of the State; and
b) The Housing Commission of NSW (now called 'Housing NSW').

Section 13A *Interpretation Act* (NSW) commenced on 12 June 2008. This amendment redefines the Crown to include all NSW Government agencies, such as Roads and Maritime Services (previously known as Roads and Traffic Authority).

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[11] One example of this is *Petovski v Bares* (RT 91/151). The landlord gave evidence that what then constituted Unit 4 did not exist in 1971, that in 1971 it was a storage area and hallway. The tenant was unable to present evidence about the form of Unit 4 prior to 1971. The Tribunal found that 'there has been an addition or alteration "to transform the subject premises into something different"', and the premises were not protected.

The Crown

The 1948 Act does not apply to the Crown including NSW Government agencies.

The exemption to the Crown extends to corporations, servants and agents of the Crown, or to a branch of a government department. The Crown is only exempt where there is a tenant and landlord relationship. The exemption does not extend to premises where the Crown is merely the owner.[12]

Local government Councils [s220(3) *Local Government Act 1993*] and community housing providers are not the Crown and are treated as 'private landlords' for the purposes of this Act.

This can be a complex area of the law. Where a tenant is renting from a government authority or agency, competent legal advice and/or supervision should be sought.

Housing NSW and the NSW Land and Housing Corporation

Any tenant of Housing NSW, regardless of when they commenced their tenancy, is not covered by the Act.

Housing NSW was previously called the Housing Commission of NSW and the Department of Housing. It now is a division of the Department of Family and Community Services and is responsible for the management of most social housing tenancies in New South Wales. Public housing is provided in dwellings mostly owned by another government agency, the NSW Land and Housing Corporation, which became part of the Department of Finance and Services on 1 October 2011.

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[12] In *Aborigines Welfare Board v Saunders* [1961] NSWR 917, the Supreme Court of NSW found that the Aboriginal Welfare Board was not the Crown. In reaching that decision the Court emphasised that the relevant Minister of the Crown did not have extensive powers, authorities and duties over the Board. For example, general provisions were not exercised under the direction or control of the Governor or Minister and there was no provision for dismissal of members of the Board by the Governor. Further the Board became a corporation in 1940 and any direct links to the Minister were further diluted. In that decision Walsh J contrasted the Aboriginal Welfare Board with other government authorities, such as in section 32 of the Housing Act 1941 and section 7 of the Electricity Commission Act 1950, both of which provided for the powers and duties of the Board to be exercised under the direction or control of the Governor or Minister.

Exclusions

Apart from exemptions and premises decontrolled by a '5A lease' or vacant possession, some otherwise eligible buildings are excluded from the act by specific reference:

- Holiday accommodation [*s7 & s8(1B)(b)(iii)*]
- Premises licensed for the sale of 'spirituous or fermented' liquors [*s8(1A)] & s5A(12)*]
- Premises, even where partly used as a dwelling-house, that fit the definition in the *Factories, Shops and Industries Act 1962* [*s8(lB)(b)(i)*]
- Premises used, or partly used, for business or commercial purposes on or after 1 January 1969 [*s8(lB)(b)(ii)*]
- Premises where the tenant is a bona-fide boarder, and receives the meals as specified and the value of meals is a substantial part of the agreement [*s6A(3)(d)*]
- Any premises or class of premises excluded from the operation of Parts 2 – 5 by the Minister [*s6 & s8(lB)(b)(iv)*]

Tenant is a company

The premises are decontrolled where the owner had vacant possession of the premises and then let them to a company under a lease in the period 1 January 1969 to 1 January 1986 [*s5A(1)(d)(ii)*].

Premises leased partly as a shop

The exclusion under s8(1B)(b)(i) covers premises used on or after 1 January 1969 used partly as a dwelling house and partly as a shop, where both uses are covered under a single lease.

'Shop' is defined in s3 *Retail Trading Act 2008* as premises used wholly or predominantly for the retail sale of goods.

Premises leased partly for commercial purposes

The exclusion under s8(1B)(b)(ii) covers premises used on or after 1 January 1969 partly as a dwelling house and partly for business or commercial purposes where those purposes comprise the substantial use of the premises.

There is no definition for 'substantial use' in the 1948 Act, but in *Calleja v Malli* [2001] NSWADT 20 the Administrative Decisions Tribunal used a commercial valuation of the rental value of the commercial part and the residential part to determine the substantial use of the premises.

In *Greater Union Organisation Pty Ltd v Pappas* (1967) 116 CLR 475 the High Court held that the premises are a dwelling house where premises are commercial and a dwelling house, but leased and used as a dwelling house. Where the premises are

commercial and a dwelling house covered by a single lease, but physically separated and some distance apart, the dwelling house could be prescribed premises. [13]

5A leases

A copy of a registered 5A lease is provided in Appendix 2 to assist with comprehension of the legal terminology and legal processes of this section.

Section 5A of the 1948 Act allows prescribed premises to be 'decontrolled' if the landlord gets the tenant to sign a lease before occupying the premises and registers it consistent with section 5A.

Section 5A was introduced to the Act in 1954 and has been amended on many occasions. The section was last amended in 1968 and this Guide deals only with section 5A as a result of the 1968 amendments.

The 1968 amendments recognise two classes of 5A leases: those registered before 1 January 1969 [*s5A(l)(c)*] and those registered on or after 1 January 1969 [*s5A(l)(d)*]. The effect of a 5A lease is to exclude the subject premises from the operations of Parts 2 to 5 of the 1948 Act.

The 1985 amendments to the Act stopped the creation of any new protected tenancy from 1 January 1986[14]. A lease cannot be registered after 1 January 1986 unless the lease was executed before 1 January 1986 and the application for registration was made by 30 June 1986 or, where the application for registration is made between 30 June 1986 and 1 January 1989, the Fair Rents Board assesses the reasonableness of the delay and makes a decision to register it *[s5A(9A)]*.

All 5A leases seeking to decontrol premises were registered with the Rent Controller (now within NSW Fair Trading). To confirm a 5A lease has been registered, a search is requested at NSW Fair Trading, see Chapter 2, Searching the history of the tenancy.

Pre-1969 leases

Pre-1969 leases have to conform to the previous amendments to the Act that were in force at the time of their registration. Expert advice is needed to assess older leases.

If the only registered lease on the property was registered before 1 January 1969 and that tenancy was current on 1 January 1969, then the premises have been decontrolled. For that tenancy to be current on 1 January 1969, the person whose name appeared on the lease needs to have been living in the premises on 1 January 1969 and have been paying the same rent as specified on the lease.

If the lease included a holding over clause and that same tenant was living there on 1 January 1969 but after the fixed term had expired, then the rent paid is of no

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[13] Mackerras, N.R. and Dunford, J.R., *Landlord and tenant practice and procedure in New South Wales*, 7th edition, The Law Book Company Ltd, 1971, p. 36.

[14] In very limited circumstances a tenancy might have commenced after 1986 where a dependant of a protected tenant remained in occupation following the death of the original tenant. See Special classes of tenants; Statutory tenants.

consequence and the premises are decontrolled. The first page of the lease will state whether there was a holding over clause.

If the tenant had vacated the premises, then returned and began a new unregistered lease before 1 January 1969, the premises were not decontrolled. However, the premises could still be decontrolled if a 5A lease was registered after 1 January 1969 in accordance with the requirements set out below.

Mrs Smith is 87 years of age. She had lived in her Eastern Suburbs flat for almost 40 years. She received a 60-day notice of rent increase. The real estate agent advised that a 5A lease was registered on the premises. To establish that she was a protected tenant, OPTS had to prove that the previous tenant moved out before 1 January 1969. OPTS located the former tenant who provided a statutory declaration stating that she moved out at Christmas 1968. OPTS also contacted a friend of Mrs Smith. From his home in Germany, he provided a statutory declaration that he helped Mrs Smith paint her premises between Christmas 1968 and New Year 1969. This evidence showed that Mrs Smith indeed was a protected tenant. The rent increase did not occur.

Post-1969 leases

To effectively decontrol premises, any section 5A lease registered after 1 January 1969 must meet ***all*** of the following criteria:

- The landlord must have had vacant possession (legal possession is not sufficient[15]) or the landlord or predecessor-in-title must have personally occupied the premises[16]; and
- A tenant prior to occupation and prior to signing any lease must have had the lease explained to them before signing it, by either a clerk of the local court or a solicitor employed and instructed independently of the landlord; and
- Where independent advice was provided, the 5A lease must also bear a certificate to that effect. The solicitor or clerk of the court must witness the tenant's signing of the lease and signature of the provider; and
- The 5A lease must have been registered with the Rent Controller.

Leases that did not, on the face of them, satisfy the witnessing requirements were not accepted for registration. It is only possible to challenge the registration on these grounds if the tenant has some special knowledge, for example, one of two tenants

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[15] In *Barilla v Jones* [1964-5] NSWR 741 'Vacant possession' is where a tenant has given vacant physical possession by moving themselves, their furniture and all belongings and possessions out of the premises. The premises must have been vacant or the landlord has occupied the premises themselves.

[16] If the landlord or his/her predecessor-in-title personally occupied the premises on or after 1 January 1969, the lease of the next tenant is still required to be registered [s5A(1)(d)(i)(a)].

was in hospital at the time the lease was signed and that signature was not actually witnessed by the solicitor.

Onus of proof

The onus of proof is on the tenant to prove that he or she is a protected tenant. Tenants will need factual evidence if they are disputing whether there was prior vacant possession, independent advice received, signing or registration of the lease. Contemporary records are best, but such evidence may now be difficult to obtain. In such a situation, statutory declarations from previous tenants, neighbours or others with relevant evidence may be the best evidence available. There must also be evidence of non-compliance with relevant sections [*s5A(1), (2) & (3)*].

Jim moved into half a house in Drummoyne in 1984. Jim recalls that, at that time, his friend Tom had been living there for three years since 1981. Tom moved out, Jim's new wife moved in and Jim has remained there since. He has now received a 90-day termination notice. A search found a registered 5A lease between Tom and the landlord dated 1983. To counter that 5A lease, Jim would need to find his friend Tom to verify Tom's signature on the 5A lease, confirm when Tom commenced the tenancy and when he signed the 5A lease. It will not be sufficient for Jim merely to say at the Tribunal that Tom was already in the premises when the 5A lease was signed.

Mrs K. has lived in a two bedroom unit in Coogee since 1977. In 1980 a 5A lease in her name was registered. A copy of the lease was obtained from the Rent Controller. Mrs K's signature was witnessed by a solicitor and she was given independent legal advice when signing the lease. To counter the 5A lease Mrs K. would need evidence that the landlord did not have vacant possession before she signed the 5A lease.

A fibro cottage in Bankstown was converted into two self-contained units (conversion date unknown). The current owner became the registered proprietor in 1971. A flat was leased to a former tenant on 1 July 1983 for 3 months and that 5A lease was registered. That lease satisfied all the formalities, but it was for the whole premises and not Flat 1. The former tenant vacated and shortly after Ms A. commenced her tenancy and remained. When the owner died in 2013, his children inherited and sought to sell the premises, and served a termination notice on Ms A. Ms A. stated verbally and in writing, '*I'm in Flat 1 front, the 2 part of the house was never rented out. The landlord kept it locked for himself and he stayed there on holidays. Then his son lived there and then his wife remained there.*' It is obvious that the lessor's intention in the 5A lease was to lease Flat 1 only and the registration decontrolled Flat 1.

Premises deemed prescribed premises unless contrary shown

Section 98A(a) of the 1948 Act states that in any civil or criminal proceedings arising out of or taken under the provisions of this Act in respect of any premises, those premises shall be deemed to be prescribed premises, unless the contrary is shown.

This section was inserted following the decision in *Roddy v. Perry* (No. 2) [l958] S.R. 41 where either party to proceedings under the Act has a presumption that the premises are prescribed premises, distinct from premises excluded by the exception categories. Section 98A does not apply to ejectment proceedings in the Supreme Court.[17] Section 98A cannot be used in NCAT proceedings. For example a tenant who does not have formal evidence to prove her/his protected tenancy cannot use *s98A* that the premises are deemed prescribed premises. Section 28 of the *Civil and Administrative Tribunal Act 2013* gives NCAT jurisdiction if the enabling legislation refers to the Tribunal, for example the 2010 Act refers to the Tribunal as the original jurisdiction. The 1948 Act refers to the Fair Rents Board and the Local Court as the original jurisdictions under that Act and excludes applications to NCAT.

OPTS has also received advice from solicitors and barristers specialising in the 1948 Act that they have never applied section 98A in proceedings at the Fair Rents Board or the Local Court.

Protected tenant signs a residential tenancy agreement

If a tenant has been living in prescribed premises before 1 January 1986, but has signed a post-1987 residential tenancy agreement, that agreement alone cannot decontrol the premises. On occasion, however, Members of the Tribunal have found otherwise, basing their reasoning on:

> The tenant is not a protected tenant because 'the tenant signed a residential tenancy lease on 8/12/00, pursuant to the later Act of Parliament, being the Residential Tenancies Act which would over-ride the earlier Act.' [18]

This is a gross error of law. If a protected tenant subsequently signed a residential tenancy agreement this agreement has no force because the original tenancy is still in operation. The 2010 Act is quite clear that premises covered by the 1948 Act are excluded from the 2010 Act [*s7(a)*]. The 1948 Act is also clear that no covenant or agreement entered into before or after the commencement of that Act has any force or effect to deprive any lessee of any right, power, privilege or benefit provided by that Act [*s89*].

It could be argued that by signing a residential tenancy agreement, the tenant surrendered the tenancy. Surrender of tenancy at common law involves the agreement between the landlord and tenant, ending by the delivery of vacant

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[17] Mackerras, N.R., and Dunford, J.R., *Landlord and tenant practice and procedure in New South Wales*, 7th edition, The Law Book Company Ltd, 1971, pp. 239-240.

[18] *Onsvest Pty Ltd v Ilse Huber (Tenancy)* [2008], NSW CTTT 15837 (3 April 2008) – unreported.

possession.[19] *Hayes v. Holland* [1965] NSWR 1414 and *Galaxy Motors Pty Limited v. Carroll & Weeks* (1964) 82 WN (Pt 1) 40 details the procedure of a concluded surrender. 'A lessee of prescribed premises gave notice of intention to surrender, vacated and returned the key to the lessor, and the lessor accepted the key.' Surrender of tenancy by the operation of law in the 1948 Act is detailed in *ss62 to 69*[20], see Chapter 5, Evictions. In *195 Crown Street Pty Limited v. Hoare* [1969] 1 NSWR 193 at 200 per Apsley J summarised the principles to surrender by operation of law, 'A mere parol agreement [anything done by word or mouth] is insufficient to effect a surrender by operation of law, as there must be some act done by one of the parties to the lease, which is inconsistent with the continuance of the lease'.

Lang describes another method to surrender a tenancy is by express surrender. The tenancy will be terminated on execution of a deed as required under section 23B(1) of the *Conveyancing Act 1919*. If the lessee fails to vacate, possession can be secured by proceedings for specific performance and possession in the Supreme Court. In *Zorbas v McNamara* (1962) NSWR 53 (FC) at 53 per McLelland CJ Equity, Evatt CJ & Wallace J, all agreed that surrenders must be by deed, even a surrender of an oral tenancy, and any form of words showing an intention to surrender the lease is sufficient.

Should this issue arise, a brief submission should be prepared and presented to the Tribunal if required. The above can be used as the basis for that submission.

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[19] Anforth, A. and Christensen, P., *Residential Tenancies Law and Practice NSW*, The Federation Press, 2008, p.146

[20] Mackerras, N.R., and Freeman, A., *Landlord and Tenant Practice and Procedure in New South Wales*, The Law Book Company, 1971, pp.136 to 138 and Lang, A.G., *Leases and Tenancies in New South Wales*, The Law Book Company, 1976, pp. 245 to 252.

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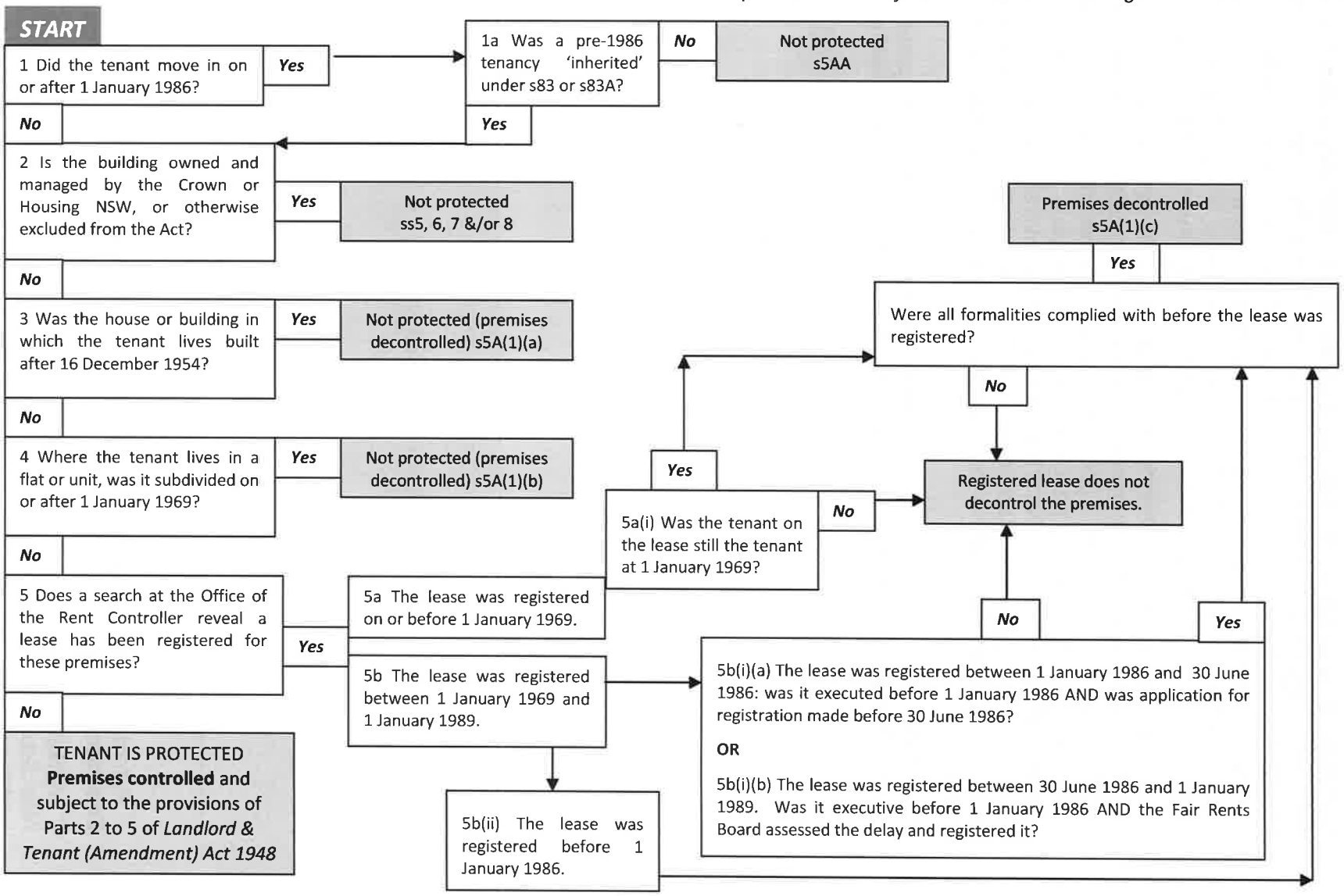
Flowchart

Are the premises controlled?

Adapted from work by Des Sheehan for the Legal Aid Commission of NSW



Chapter 2
Information and searches

Helping protected tenants access their rights requires collating good documentary evidence. Often, the ability to accurately advise a potential protected tenant, and to successfully advocate on their behalf, relies on obtaining accurate information about the age of their dwelling, the owner of the dwelling and the history of their tenancy. The tenant who keeps everything relating to their tenancy (even if 'in the bottom drawer' or in a 50 year-old shopping bag or shoe box) is often in a stronger position than their landlord when it comes to establishing relevant facts.

Where there are gaps or issues of contention, there are a range of research techniques and search tools which can help. This section introduces the reader to some of the relevant resources.

Specific references to website addresses, business offices or departmental names may become outdated over time but can be updated through online searches.

Detailed information on searches covered in this chapter and further research techniques and available search tools can be found under 'Useful Searches' at http://www.cpsa.org.au/resources.

Finding the age of a dwelling

Local Council records may show the date building approval was granted or the date the building was constructed. Local government boundaries have changed since the 1950's, so the first step may need to be identifying the relevant Council to search. Information may be accessible digitally or stored in Council archives so you may need to apply by the Government Information Public Access (previously Freedom of Information) application available from the Council. Searches may incur a fee. Finding a staff member who is knowledgeable about access to the Council's archives is a great help. The age of a dwelling can also be inferred from plans, photographs, town planning instruments and applications for development consent or building approvals.

Land valuation records are valuable in that they document changes in the land usage such as capital improvements or the date services were made available. The Valuer-General values all land on behalf of the state government and maintains a *Register of Land Values* containing information on land ownership, location, occupation, value and other information as required by the *Valuation of Land Act 1916.* Land & Property Information, a division of the Department of Finance and Services, now manages land valuation records in NSW. Land valuation search inquiries should be directed to the valuation customer service centre in the office of the Valuer-General on 1800 110 038, or online at http://www.lpi.nsw.gov.au/valuation.

Land & Property Information manages the Torrens Title register, Old System Title register, dealings, plans, deeds and other land information products and services. Enquiries can be made:

- at the Client Service Counter, Ground floor, Land and Property Information, Queens Square, Sydney; or
- at their other offices; or
- by phone (1300 052 637); or
- by fax (02 9221 44050; or

- online at www.lpi.nsw.gov.au; or
- by email to GeneralEnquiry@lpma.nsw.gov.au; or
- the Land & Property Information online shop provides a free street address inquiry that gives the property title reference number, which is needed for other searches (https://shop.lpi.nsw.gov.au/wps/portal/lpma/lpi-shop and follow the links).

Sometimes information may be available from utility companies showing when utilities were first connected. For these searches, you will need to make a written application and fees may be payable.

Local libraries and historical societies are very useful in establishing the age of a dwelling, through their documentary and pictorial archives and general knowledge of development in their area. Librarians and historical society members are usually very helpful in assisting with searches and access to documents. Any copy of a document should be witnessed and certified as a true and accurate copy by the archivist.

Experienced builders and building inspectors may be able to date premises by the type of materials or fittings used, the style of construction or the presence/absence of particular features required by building standards at different times. For this evidence to be useful, the report should be detailed and in writing and cite the author's credentials and expertise. Fees will usually be charged for the report and any attendance as an expert witness to give evidence.

The tenant may have been resident before critical dates, or know of another person who lives/d in the area who knows when the dwelling was built or subdivided into flats. Statements from witnesses can be valuable if presented in a properly witnessed statutory declaration (and better if it is supported by other evidence).

Finding the owner of a dwelling

The owner of the dwelling should be listed on the front of the 5A lease. Alternatively, rent receipts may show the owner's name or the owner's real estate agent may provide the information. If there have been changes in ownership, each change should have been accompanied by a letter of attornment[21] to the tenant, with the new owner's contact and rent payment details.

Searches of Land & Property Information, council and utilities records discussed above will also help identify the owner of a property. A land title search (for a fee) at Land & Property Information will give you the name of the current owner.

With a name, you can get correspondence details from:

- A name search at www.whitepages.com.au
- An online search engine search
- An electoral roll search at the Australian Electoral Commission. (A national electronic version of the electoral roll is available for viewing at every AEC Office. Go to http://www.aec.gov.au/About_Aec/Contact_the_AEC/ for a list of their offices.)

If the owner is a publicly trading private company, white pages and web searches may provide you with some contact information. An Australian Securities and Investments

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[21] See Glossary in the front of the book.

Commission company name search may also show limited information. You can search the registers at http://www.asic.gov.au/asic/asic.nsf/byheadline/registers.

Searching the history of the tenancy

NSW Department of Fair Trading, Rental Bond Board maintains the card index system that records all registrable instruments (5A leases, 17A agreements and fair rent determinations) since 1948 and gives free access to these records for tenants and Tenants Advice And Advocacy Services.[22]

The 327 Index card drawers consist of:

- 229 index card drawers for City premises;
- 60 index card drawers for Country premises;
- 19 index card drawers for Newcastle premises;
- 8 index card drawers for Wollongong premises;
- 7 index card drawers for Central Coast premises; and
- 4 index card drawers for Blue Mountains premises.

The bound registers consist of:

- 101, 5A lease registers (last volume 101 contains registrations until October 1988;
- 13, 17A agreement registers; and
- 3 Fair Rents Board registers.

[22] NSW Fair Trading, Rental Bond Board provided the photographs and information relating to the photographs

The Index Cards are filed by address and contain brief information for each premise and cross-reference with file numbers in the Registers that contain detailed information.

To make an inquiry, ring 133 220 and ask to be put through to the Senior Customer Service Officer within the Rental Bond Board who acts in the capacity of Fair Rents Clerk. (At the time of writing, a Senior Customer Officer within the Rental Bond Board advised that the Rental Bond Board would be operating from Coffs Harbour commencing on 1 July 2014. All protected tenant records will also be moved to Coffs Harbour.) It is unknown who will be responsible for acting as the Fair Rents Clerk. Until the Rental Bond Board establishes processes it may be preferable to contact the Project Officer Tenancy and Older Persons, Tenants' Union of NSW on (02) 8117 3700 who can follow up your specific request with the Rental Bond Board.

Searches will show if:

- there has been a 5A lease registered on the premises;
- there has been a 17A agreement registered on the premises; or
- there has been a Fair Rents Board rent determination for the premises.

If a 5A lease has been registered, the search results shows:

- the name of the landlord;
- the name of the tenant at the time of registration;
- the term of the lease;
- the amount of rent; and
- the registration date and number.

A 5A lease registered after 1 January 1969 is likely to decontrol the premises. A pre-1969 lease needs further investigation.

It is important to request a copy of the registered 5A lease in order to determine if it has been correctly executed, see Chapter 1, 5A leases.

If the search shows there is no registered 5A lease, the premises may still be decontrolled if the premises meet the exemptions and exclusions outlined in chapter 1.

If a fair rent has been set, there will be a record of either:

- a fair rent determined by the Fair Rents Board or;
- a registered 17A agreement.

The legal rent payable is the amount on the latest of either a rent determination by the Fair Rents Board or rent agreed to in the registered 17A agreement.

It may be hard to know when a tenancy commenced if there is no written lease between the existing tenant and a landlord or former landlord. A historical Commonwealth electoral roll search, historical telephone book search or contacting friends and neighbours may be good starting points.

Chapter 3
General rights and obligations

Unlike modern tenancy legislation, which has a consumer rights focus, the 1948 Act says very little about general rights and obligations and has no dispute resolution mechanisms other than through the Local Court.

The 1948 Act does, however, have stronger protections than the current law around rent setting and evictions. (Rent and eviction are discussed in Chapters 4 and 5 respectively of this Guide.) The 1948 Act contains some provisions around use and enjoyment of the premises and places limits on the landlord's rights of access, but has very limited provisions for repairs and maintenance.

Use and enjoyment

Landlords and their agents are prohibited from doing or causing any act or omission that interferes with or restricts the ordinary use or enjoyment of the premises or any goods, conveniences or service usually available to the lessee [*s81(1)*].

Any breach by the landlord is potentially a serious offence. In arbitrating offences under this section, courts can, in addition to awarding penalties, order actions to remedy the breach. Failure to comply with these orders is also an offence with daily penalties [*s81(2)*].

Where breach of a tenant's use and enjoyment leads to the loss of the tenancy and the landlord is prosecuted for the breach, courts can order compensation in any amount sufficient to compensate for damage or loss to the tenant [*s81(3A)*].

The most serious breach of tenant rights is where a landlord locks a tenant out, by either changing the locks or by disconnecting or restricting services. To do so is a serious offence under the 1948 Act and the landlord can be prosecuted and face a gaol term.

Access

It is an implied term of every lease of prescribed premises that the landlord has the right to enter the premises:

- Twice a year to view the state of repair, as long as this is between 8am and 8pm on a week day (not a public holiday), when the tenant is normally at home and not at work and after giving the tenant 7 days' notice in writing [*s88D(1)(a)*]; and
- To do repairs after reasonable notice has been given [*s88D(l)(b)*].

There is no requirement that the tenant allow other access for other purposes, such as impromptu landlord visits or to show the premises to prospective buyers.

Access may be sought by the landlord and granted by the tenant in other cases, but only voluntarily or through negotiation.

The Director-General or an authorised officer may, for the purposes of this Act, enter and inspect any land or premises at a reasonable time of day with reasonable notice. [*s93(1)*]

Repairs

While the 1948 Act states that premises are not to be let unless in fair and tenantable repair at the start of the tenancy [*s39*], there are no other provisions on obligations on the landlord for repairs or upkeep to the premises. Rather, there is an implied obligation *on the tenant* to reasonably maintain the property. Failure by the tenant to take reasonable care of the premises or of any included goods or the act of committing 'waste'[23] are grounds for eviction [*s 62(5)(c)*], see Chapter 5.

However, there are things that a tenant can do to get repairs done, including negotiating repairs at the time of rent variations or making use of provisions covering 'use and enjoyment'. These are discussed in turn.

One option to have repairs done is for the tenant to agree to a rent variation in return for the landlord agreeing to specific repairs. Where this option is used, care needs to be taken to specify the repairs needed and agreed to and this agreement should be in writing and attached to and form part of a 17A agreement.

Similarly, if rent is determined by the Fair Rents Board, including the estimated cost of repairs by the landlord, the actual repairs should be noted in that determination [*s21(1)(c)*]. If the repairs are not done, the rent can be reduced by means of an application for a further rent variation [*s 32(2)*].

Where the repairs:

- relate to a service provided with the premises; and
- that service has been discontinued or restricted; and
- the landlord has control over the cessation and restoration of the service

the tenant can write to the landlord requesting that the supply or service be restored. If the landlord fails to do the necessary repairs within fourteen days of service of the written request, the tenant can apply to the Fair Rents Board have the rent reduced by an amount up to half of the fair rent [*s81(4)(a)*].

Alternatively, the right to use and enjoyment discussed above may give grounds to seek repairs. A failure to do repairs may be a breach of section 81 of the Act because this failure is detrimental to the tenant's use or enjoyment of the premises: it '*omits or causes to be omitted, any act whereby the ordinary use or enjoyment by the lessee ... [including goods, conveniences and services] ... is interfered with or restricted.*' This would require a successful prosecution in the Local Court. The party which normally would initiate such prosecution is NSW Fair Trading. A tenant who wishes to initiate a private prosecution should get legal advice beforehand about the viability of taking such action.[24]

A tenant may also complain to their local Council, which has powers under the *Local Government Act 1993* or *Environmental Planning and Assessment Act 1979* to place

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[23] Waste is permanent harm done (or allowed) to real property by a person in legal possession of that property such that the property's value to its actual owner or future inheritor is diminished. Compensation can include the cost of restoring the property to its original condition after any changes have been made, even if these changes were intended as improvements.

[24] Mackerras, N.R, and Dunford, J.R., *Landlord and tenant practice and procedure in New South Wales*, 7th edition, The Law Book Company Ltd, 1971, pp. 207-209.

an order on the owner to do certain types of repairs. Nevertheless, tenants should seek advice before contacting their Council, because Council also has the power to force tenants to leave if the premises are a danger to health and/or safety.

Chapter 4
Fair rents

Part 2 of the 1948 Act sets out what is a fair rent, the ways rents can be increased, and the administrative processes for those increases to be effective.

The 1948 Act provides protected tenants with enhanced rights and protections around rent, when compared with current tenancy legislation. Under the 1948 Act, protected tenants have the right to a fair rent [*s35(1)*] and limitations on the frequency, method and amount of rent increases [*s17A(4) & s32(2)*]. Landlords who breach these provisions face penalties, including fines and prison terms, see Chapter 7.

Fair rent

Protected tenants are legally entitled to pay a 'fair rent', which may be significantly lower than the market rent for similar premises. A fair rent may be set by:

- the Fair Rents Board, or
- a registered 17A agreement between the landlord and tenant.

If there has never been a fair rent set for a particular property, the legal rent is the rent the tenant has been paying, until a fair rent is set.

General requirements for all fair rents

A landlord must issue the tenant a rent receipt, and that receipt should specify the date of payment, the amount paid, and the period the rent covers [*s56*].

The landlord or the managing agent is required to keep a record of all rent payments. The tenant or an authorised officer can ask, orally or in writing, to inspect the records, which should be made available within fourteen days [*s55*].

Tenants can enforce their right to pay no more than the fair rent by seeking recovery of the overpaid rent in a local court [*s35(2)*]. Recovery is limited to overpayment over the last six years and is recoverable from the person to whom the rent was paid [*s35(3)*]. This may be a previous landlord if there has been a change in ownership.

Rent determinations cannot be varied within twelve months of their effective date, except on the following grounds [*s32(2)*]:

a) error or omission in the determination;
b) increased outgoings or losses by new uses made by the lessee of the premises;
c) determination based on a clerical error or an incorrect estimate of the value of the premises, goods leased or services supplied by the lessor;
d) substantial alteration in the terms by which the premises are leased;
e) substantial alterations to the premises, goods leased, or services supplied by the lessor;
f) material change in the value of the goods leased, or services supplied with the premises;
g) the rent payable by the lessor in respect of the premises has increased or decreased by reason of a determination or a variation of a determination, not being a determination or a variation of a determination made under Division 4AA;

h) a party to the determination was prevented by absence, illness, or other sufficient cause, from attending or making representations at the determination proceedings;
i) an entitled person did not receive notice of the time, date and place fixed for the making of the determination; or
j) change in land tax payable.

An application for a fair rent determination is made to the Fair Rents Board. However, the Fair Rents Board and the Director-General have authority to vary a determination on their own motion [*s32(1)(b)*]. A request to the Director-General may not be used as a form of appeal.

Rent can be reduced if agreed repairs are not done by the landlord [*s32(2)(d)*].

Costs are not allowed in any proceedings under this Part of the Act [*s42*].

Varying the rent

Rent can only be varied by:

- a Fair Rents Board rent determination [*s18 & Ors*];
- registration of a 17A agreement [*s17A(3)*]; or
- current market values, where the tenant is declared 'wealthy' [*s31MCA & Ors*]

Rent Determination by the Fair Rents Board

The 1948 Act has different provisions for non-shared premises [*ss18 – 26*] and shared premises outside the Metropolitan Area [*ss26A - 26D*] or within the Metropolitan Area [*ss26E – 31*]. The provisions for non-shared accommodation (described below) generally apply. Variations for shared accommodation are noted at the end of this section.

Either the landlord or the tenant can lodge an application for a rent determination with the Fair Rents Board [*s18(1)*]. Application forms are available from NSW Fair Trading, Rental Bond Board, see Chapter 2, Searching the history of the tenancy.

This method for calculating a rent is based on a set formula, where the rent is varied in line with increases in the costs of managing and maintaining the property. The very first rent determination is often called the '1939 Rent Determination' because the baseline date for the calculations is 1 August 1939 or the date when the premises were constructed, whichever is the latter [*s20(4)*]. Rents calculated in accordance with this method will be significantly less than current market rents. The Fair Rents Board has difficulty in setting a fair rent based on the 1939 formula, because it is difficult to obtain the capital value as at 1 August 1939.

The applicant must give the other party at least seven days' notice in writing of the time, date and place fixed for the hearing [*s19*]. The applicant also bears the onus of providing the evidence to support their application. If it is the very first determination, the Fair Rents Board should determine whether it has jurisdiction, even if the NCAT has determined that the premises are prescribed premises. The tenant should be advised to apply for 'written reasons for decision' from the Tribunal hearing and take this to the Fair Rent Board hearing to avoid prolonged proceedings to establish that the premises are prescribed premises.

Matters considered

Section 21(1) of the 1948 Act specifies that the following matters be considered in determining the fair rent:

a) the capital value of the premises at the prescribed date;
b) the cost of annual rates and insurance premiums for the premises and fixtures thereon;
c) the estimated annual cost of repairs, maintenance and renewals of the premises and fixtures thereon;
d) the estimated annual depreciation;
e) comparable rents for other premises where rent has been determined by the Fair Rents Board;
f) interest rate on overdrafts;
g) any services provided by the lessor or lessee in connection with the lease or the value of any goods leased with the premises;
h) costs of improvements to the premises as undertaken by the landlord;
i) conduct of the parties; and
j) costs expended by the landlord in respect of improvement or structural alteration.

Matters not considered

The cost of the landlord's mortgage cannot be included in determining the fair rent, even if the landlord's mortgage is greater than the rent determination [*s21(1)*].

The Board cannot take into account any increase in the capital value of the premises after the prescribed date (either 1 August 1939 or the date when the building was completed) [*s21(IE)*].

Limitations to increases

Where the tenant could not reasonably pay the increased fair rent, the Fair Rents Board shall have regard to the financial circumstances of the landlord and tenant [*s21(1C)*]. The Fair Rents Board must be alerted of this section in a hearing. To prove the tenant's financial circumstances, evidence (such as Centrelink income statements, bank account balances, investments etc covering the previous three months) must be submitted.

Once a rent determination has been made, the rent cannot be varied for twelve months except as outlined in *'General requirements for all fair rents'*.

Right of review

A landlord can seek a periodic revision of a rent determination to take account of inflation, without the necessity of a hearing. The landlord must lodge documentation with the Director-General or the Fair Rents Board, showing an actual increase in costs, usually relating to Council rates, insurance or interest. The Director-General will issue a notice of assessment to the tenant. The tenant has 28 days to lodge an objection and, if no objection is lodged, the increased rent becomes the fair rent [*s24(A)*].

Date of effect

New prescribed rents come into force on a date fixed by the Fair Rents Board, but that date cannot be earlier than the date the application was received by the clerk of the Fair Rents Board [*ss22(1) & 26B(7) & 27(6)*].

Shared accommodation

The main differences for shared premises are the need for the Fair Rents Board to allocate proportionality for the occupants [*ss26B(6) & 27(5)*], obligations to notify the Fair Rents Board of any changes in shared accommodation arrangements [*ss26C & 28*], and rents on shared premises within the metropolitan area can be determined by the Director-General alone [*s27(1)*].

Appeals

Section 41 provides that there is no appeal of the determination of a Fair Rents Board, except that:

- a resident of shared premises within the metropolitan area can appeal a decision of the Director-General to a Fair Rents Board [*s30(1)*]; and
- determinations of a Fair Rents Board or of the Director-General can be appealed, on questions of law only, to the Supreme Court in the manner provided by Part 5 of the *Crimes (Appeal and Review) Act 2001*[25] [*s41(2)*].

Calculating fair rent

Table 1 shows how a fair rent is calculated when there has been a *previous* fair rent determination.

In the past, the Fair Rents Board set amounts for repairs, bank interest and depreciation from time to time. This does not occur any more and creates problems when applying the formula. Today, the same rigour is not applied when setting amounts for repairs, bank interest and depreciation and magistrates may be arbitrary in how they determine the various amounts.

If the landlord's mortgage is greater than the rent determination it is not grounds for the landlord to seek a higher rent.

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[25] The 1948 Act refers to the *Crimes (Local Courts Appeal and Review) Act 2001*, but that Act's name was changed to the *Crimes (Appeal and Review) Act 2001* in 2006.

Table 1

Calculating 'fair rent'

	Previous Determination 1981 ($)	Current Determination 2007 ($)
Council rates	172.99	1290.00
Water rates	172.17	710.00
Insurance (estimates only)	80.00	300.00
Repairs and Maintenance	250.00	5000.00
Bank Interest	40.50	
Land Tax		500.00
Depreciation	128.00	
Sub-total	843.66	7800.00
less		843.66
Sub-total		6956.34
Management fee		486.94
Sub-total		7443.28
Divide by 52 weeks		143.14
Fair rent (weekly)	19.00	162.14

Obtaining the figures

It is useful to view the fair rent file held at NSW Fair Trading, especially if a determination occurred within the previous 12 months. This will be a reasonable comparison of the landlord's costs in that determination, to be compared with the costs sought in the application for the new fair rent determination. Any major difference should be raised at the Fair Rents Board hearing and the landlord should be requested to provide evidence of the current costs, for example the Council rate notice. The Fair Rents Clerk can be contacted to view the fair rent file, see Chapter 2, Searching the history of the tenancy.

The current figures for Council rates, water rates and land tax may be difficult for a tenant to obtain from the appropriate authorities, but it is not impossible. A landlord is entitled to payment of a concessional land tax for controlled premises, but may not pursue this. The Fair Rents Board will determine amounts for repairs and

maintenance, based on evidence tendered by both the landlord and the tenant. At the time of writing, the management fee is set at 7% if there is a real estate agent.

Additional allowance for repairs

If, the landlord and tenant agree to a specific repair, it is first necessary to obtain a quote/s. If the tenant agrees to repay the cost of that improvement over time, the weekly rent would be adjusted accordingly. For example, for the provision of a new stove costing $700, the tenant may agree to pay an extra $20 per week over a period of 35 weeks.

Dorothy had been living in the Blue Mountains for many years. Her long-time landlord had tried to increase her rent, but he always failed to follow the correct procedures. Finally Dorothy received a notice to attend the Fair Rents Board in Sydney to have her fair rent determined. (Sittings of the Fair Rents Board are now few and far between.) CPSA's OPTS engaged a private solicitor familiar with the 1948 Act, and provided him a detailed submission. At the Fair Rents Board hearing it was obvious the Magistrate was not familiar with the 1948 Act, did not read the written submission and would not accept legal or technical points raised by the solicitor. Dorothy was not interested in appealing the Magistrate's decision at the Supreme Court, despite the administrative error of the Magistrate not following the matters listed in section 21. It was therefore decided that conciliation was the best way forward and the matter was finalised after a lengthy process. In a deed Dorothy received a tenancy for life, her rent was increased by $20 per week with an annual increase by a further $10 per week.

Rent varied by a '17A Agreement'

The landlord and tenant can mutually agree to a less formal method of rent increase under section 17A of the 1948 Act, called '17A agreements'.

Voluntary agreements were first introduced in 1964, with amendments in 1968. They provide for an agreement in writing between the landlord and the tenant to set the fair rent, without involving the Fair Rents Board. Agreements must specify the amount of rent to be paid and on what date it becomes payable. The date should not be earlier than the date on which the agreement has been executed [*s17A(3)*]. A blank '17A agreement' is reproduced as Appendix 3.

17A agreements are only valid if:

- the tenant is advised by and received a certificate of verification from an independent solicitor or a Registrar of the local court before entering into the agreement; and
- the agreement with certification is registered with NSW Fair Trading within three months of being executed [*s17A(6)*].

If a landlord or their solicitor or agent fails to register the 17A agreement within three months of it being executed, the new rent is not binding and the tenant should ask to be credited for any overpayment of rent.

If a landlord otherwise seeks to raise the rent, the tenant is not obliged to pay the increase. A 17A agreement requires the tenant to obtain advice before agreeing to anything, so there is room for protected tenants to effectively negotiate any rent increases. Section 17A(6)(b) refers to the Registrar of a local court, however the Chief Magistrate has advised that Registrars cannot provide advice. To avoid inconvenience, protected tenants should obtain such advice from an independent solicitor, NSW Legal Aid, or a community legal centre.

The tenant's negotiating position is enhanced if they can assess the likely outcome under a Fair Rents Board determination and can show the value of work or improvements they have done. The tenant under a 17A agreement can negotiate repairs to be completed by the landlord as part of the rent increase. However, the tenant cannot seek a rent reduction if the landlord did not complete the repairs after the 17A agreement has been executed. To ensure the landlord complies and completes repairs, the 17A agreement can specify the rent will increase to a certain amount on a date after the repairs are due to be completed.

Before executing a 17A agreement, It may be preferable to execute a separate deed of agreement specifying that the repairs be completed by a certain date and that is the date the rent increase is effective pursuant to executing and registering a 17A agreement.

The 1948 Act limits rent increases to once every twelve months [*s32(2)*].

A registered 17A agreement becomes the fair rent

Once a 17A agreement has been registered, that becomes the fair rent. Any future fair rent determination will be based on that amount as the fair rent, whether by the Fair Rents Board or through another 17A agreement.

The tenant should always request a copy of the 17A agreement immediately after they sign it, even though the landlord may not have signed it. Under section 17A, an application to register a 17A agreement is made by the landlord, their solicitor or their agent and it must be accompanied by the original agreement, a certified copy of the original agreement and $16 fee [*Reg 6(2)*]. The original is returned to the person who made the application and the Rent Controller retains the certified copy. NSW Fair Trading will now accept applications to register 17A agreements from both tenants and landlords, or their solicitor(s) or agent(s), in which case NSW Fair Trading requires the original and two copies. The three agreements are stamped and signed by the delegate of the Rent Controller (who is also the Fair Rents Clerk) and the two copies are returned to the applicant. A file is created for the original, which is allocated a number on the current electronic register and details are updated on the appropriate Index Card.

Challenging the rent increase

The tenant can only challenge a 17A agreement if they can establish that the amount specified was harsh or unconscionable at the time of execution of the agreement, or obtained by fraud, duress, intimidation or improper means [*s17A(12)*]. If a tenant wishes to challenge a rent increase on these grounds, they should obtain legal advice.

Dora is an elderly tenant of a boarding house. She received a notice of rent increase of $50 per week from her landlord. The notice was issued under the *Residential Tenancies Act 2010*. However, Dora maintained that she was a protected tenant. OPTS only had a fortnight remaining of the 30-day period to challenge the rent increase in order to gather evidence supporting her claim to be a protected tenant. A search of registered 5A leases with NSW Fair Trading showed nothing relating to her premises. Title searches and historical searches with Land and Property NSW were not helpful. A visit to the Family History Section of the State Library NSW showed Dora's listing on the 1975, 1976, 1977, 1979 and 1984 electoral rolls. The premises were listed in the 1910, 1921 and 1930 Sands Directories. A search of telephone books at the Telstra Museum showed Dora was first listed in the Sydney White pages in 1985. All the evidence indicated that Dora was indeed a protected tenant. OPTS contested the landlord's rent increase on that basis. A lesser rent increase was negotiated and formalised in a 17A agreement and registered at NSW Fair Trading. OPTS then assisted Dora to obtain the maximum amount of Rent Assistance from Centrelink, leaving her only $7.50 a week worse off.

Market rent applied when the tenant is declared 'wealthy'

A 'wealthy tenant' is a protected tenant whose tenancy is covered by the provisions of Division 4AA 1948 Act. This provision was inserted as part of the 1968 amendments and enables a landlord to seek a higher rent, closer to the prevailing market rent, if they believe the household income of the tenant is greater than the '*prescribed amount*'. This '*prescribed amount*' is determined by a household's income over a twelve month period. It is set at the maximum fortnightly single Age Pension rate multiplied by 65 [*s31MAA(1) & Regs.cl5(1)*]. To 30 June 2014 this was $49,790 per year (excluding Pension Supplement) or $51,786.80 per year (including Pension Supplement and Clean Energy Supplement).[26]

By notice in writing, the landlord can require the tenant to provide a statutory declaration within 28 days of receiving the notice; detailing their net income for the previous financial year, the names of all residents of the premises and the number of boarders and lodgers ordinarily resident [*s31MBA(1)*]. The notice is not served, unless accompanied by a copy of the prescribed form of statutory declaration, including the explanatory notes [*s31MBA(5)*].[27]

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[26] To 30 June 2014 the Pension Supplement is $62.90 per fortnight and the Clean Energy Supplement is $13.90 per fortnight. The Fair Rents Board would decide which of these two figures is correct. The single Age Pension rate and amount for supplementary payments can be found at http://www.humanservices.gov.au/customer/themes/older-australians?from=theme-bar, 'Payments for Older Australians' and follow the links.

There is an argument that if the *Landlord and Tenant Regulation 2009* refers to 'maximum fortnightly rate at which the Age Pension is paid', then they are referring to the 'overall amount' *including the supplements*.

[27] The tenant's income is defined in accordance with the *Income Tax Assessment Act 1936* (as amended by subsequent Acts) [*s31MMA(1)*] and advice should be obtained from

The definition of 'resident' for this section means any person ordinarily residing in the premises (other than the lessee), a sub-lessee[28], a relative of a sub-lessee ordinarily residing with that sub-lessee, a person under the age of sixteen years or a boarder or lodger[29] [*s31MAA(1)"resident"*].

Income

Income is defined differently for individual tenants and for partnerships, companies or tenants sub-letting as part of their ordinary business.

For an individual tenant or family, attributable earnings in dollars (A) is defined according to the following formula [*s31MAA(1)*]:

A = B + C – D – E + F, where

B = Total income[30] of the tenant, derived from all sources whether in or out of Australia.
C = Total income of any resident of the prescribed premises, derived from all sources whether in or out of Australia, less any losses or outgoings incurred by that resident in gaining or producing that income that are allowable tax deductions.
D = Amount paid for board or lodging by any boarder or lodger ordinarily residing in the premises.
E = Losses or outgoings incurred by the tenant in gaining or producing that income that are allowable deductions
F = $208 in respect of a boarder or lodger ordinarily residing in the premises.

For tenants sub-letting the premises as part of their ordinary business, or who are leasing as a partnership or company, attributable earnings are the total income as above, less allowable tax deductions for themselves, their partnership or company plus the total income, less deductions, of any resident of the premises.

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an expert in taxation law. What income to include and what to exclude is very complex. A copy of the Notice to Lessee Form 20, and Statutory Declaration Form 3 is reproduced in N.R.M MacKerras and J.R Dunford, Landlord and tenant practice and procedure in New South Wales, 7th Edition, The Law Book Company Ltd, 1971, pp 256 – 257 and 357.

[28] A reference to sub-letting includes permitting the use of prescribed premises under an agreement or arrangement whether oral or in writing of leave and licence for the use thereof, and to a person who has the use of prescribed premises under such an agreement or arrangement [*s31MAA(5)*].

[29] 'boarder' or 'lodger' does not include relatives [*s31MAA 'boarder or lodger'*].

[30] Includes any income that is exempt income as defined in the Income Tax Assessment Act 1936 (as amended by subsequent Acts) [*s31MAA(1) 'income'*].

Protected tenants are typically single Age Pensioners living on their own. To 30 June 2014, the amount of their attributable earnings solely from their Centrelink payment is a combination of their basic rate of Age Pension ($766.00 per fortnight), Pension Supplement ($62.90 per fortnight), Clean Energy Supplement ($13.90 per fortnight) and maximum Rent Assistance, if applicable ($126.40 per fortnight) which totals $969.20 per fortnight[31]. Depending if the conservative figure or the liberal figure is accepted will determine if attributable earnings are below or above the prescribed amount for a wealthy tenant, see '*Market rent applied when the tenant is declared wealthy*'.

There may be a carer, also on Centrelink payments, living at the premises. A full-time carer may receive a Carer Payment ($766.00 per fortnight), Carer Supplement ($600 annually), Carer Allowance ($118.20 per fortnight), Pension Supplement ($62.90 per fortnight), Clean Energy Supplement ($13.90 per fortnight) or any combination of these, a maximum total of which translates to $984.00 per fortnight).[32]

In this case, the total attributable earnings for the household would be $1,953.20 per fortnight. This amount is $38.20 per fortnight over the prescribed amount if one adopts the conservative figure for a wealthy tenant. However, it would fall $38.60 per fortnight below the prescribed amount, using the liberal figure, for a wealthy tenant.

If the household income comprises solely of Centrelink payments and the total household income is above the prescribed amount, then the tenant is vulnerable to being deemed a wealthy tenant. It should be argued to both the landlord and the Fair Rents Board that, should the conservative figure for a wealthy tenant be used, then the household income should exclude Pension Supplement payments and only include the basic rate of pension payments.

A landlord can apply in writing to the Fair Rents Board for a determination under this division [*s31MCA*].

The Board will determine the rent on 'current rental value' where it is satisfied:

- that a 31MBA notice served in the previous three months has been ignored or otherwise not complied with and the attributable earnings of the tenant in the last financial year were greater than the prescribed amount [*s31MDA(1)*],
- whether or not any 31MBA notices have been served, that the attributable earnings of the tenant in the last financial year were greater than the prescribed amount [*s31MDA(2)*].

The Fair Rents Board may order costs for actions under this division [*s31MEA*].

Current value rental

The current value rental is calculated by a formula based on the assessed annual value, as determined by the Valuer-General, but also allows for a reasonable allowance for any goods or services provided by the landlord, which is determined by the Fair Rents Board [*s31MAA(1)*].

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[31] http://www.humanservices.gov.au/customer/themes/older-australians?from=theme-bar, Payments for Older Australians and follow the links.

[32] http://www.humanservices.gov.au/customer/themes/carers, Payments for Carers and follow the links.

The formula[33] is:

Annual current rental value	=	1/9 of Assessed annual value	+	Value of goods or services provided
Weekly rent	=	Annual current rental value	/	52 (being number of rent periods)

Impact for the tenant

Once a tenant is declared a wealthy tenant they are always deemed to be a wealthy tenant from that point onwards, until the tenancy ends. This status remains even if there are changes to the household composition and the household income is reduced.

The near-market rents paid by the tenant may cause hardship and, if the tenant falls into rent arrears, this may give the landlord grounds to evict.

A tenant's attributable earnings will include the total income of all residents of the household at the time of determination. This does not include boarders, or the income derived from boarders, who are represented as a flat inclusion of $208 per boarder. It does include, but is not limited to, relatives[34] over the age of 16 and sub-tenants. The income of these residents is only counted if they ordinarily reside in the premises at the date of the determination. However, in *Wilson v. Softley* 91 W.N. 182 a "resident" of the premises on 30 June 1968, moved out before application was made before 30 June 1969. Under Div. 4AA it was held that, nevertheless, for the purposes of assessing the lessee's relevant 'attributable earnings' that former resident's 'net income' for the year ended 30 June 1968, was to be added to the lessee's 'net income' for that year.

If the tenant's household income is under the prescribed amount it is in the tenant's interest to complete the declaration, as the landlord is not likely to take further action.

If the tenant's household income is above the prescribed amount, it is not necessary to comply with a section 31 MBA notice. It may not be in the tenant's interest to complete the form, because a sufficiently high income may also give the landlord grounds to evict.

Negotiating a 17A agreement may be the best option for a 'wealthy tenant'. This should be executed and lodged with the Clerk of the Fair Rents Board before the landlord lodges an application for a 'wealthy tenant' determination. This will stop any other action to further raise rents for twelve months and may limit the increase.

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[33] This usually results in an amount that approximates the market rent. In recent times the Fair Rents Board disregards this formula and applies 90% of the market rent for similar premises in the same locality.

[34] Section 31MAA defines 'relative' as 'a person related to the lessee in the first or second degree, ascertained by reference either to consanguinity or affinity or to both'.

Chapter 5
Evictions

One of the objectives of the 1948 Act is to provide tenants with security of tenure. The controls on rents and evictions together have delivered tenants long-term sustainable tenancies. Unlike current the *Residential Tenancies Act 2010* (and its predecessor, the *Residential Tenancies Act 1987*), the 1948 Act does not allow for evictions without grounds.

Grounds for eviction

Landlord may seek vacant possession of premises but only with a notice to quit which complies with the grounds specified in section 62(5) of the 1948 Act. Appendix 4 reproduces CPSA's OPTS's Protected Tenancies Factsheet 5, which outlines all grounds for eviction specified in the Act. Most of these grounds are unlikely to be used today.

Where a landlord is seeking eviction, the specific wording of the relevant ground becomes very important. The landlord must satisfy all conditions in the ground and can be challenged for not specifying the ground relied on or for failing to give particulars [*s66*]. Advisers should also check whether the 1948 Act provides relevant constraints and limitations on eviction action for a particular ground.

Most common grounds used today

Ground (c): The tenant has failed to take reasonable care of the dwelling or has committed waste.

Landlords may seek to use this ground as tenants age, become frail and have more difficulty maintaining their premises.

This ground does not refer to premises falling into disrepair because the dwelling is old and has not been maintained. It refers to failure by the tenant to take care of the premises, such as failing to adequately keep the premises clean or not maintaining the yard in a reasonable manner.

Since many controlled premises are not well maintained by their owners, it is important to identify the cause of poor maintenance. If the tenant is having trouble caring for the premises, they should be referred to local community and volunteer agencies for programs such as Home and Community Care for cleaning and other help that may include gardening. This may provide a solution and undermine the ground cited.

Ground (g): The dwelling is reasonably required by the landlord for personal use as a residence, or by someone who ordinarily resides with the landlord and is wholly or partly dependent upon the landlord.

Ground (i): The landlord is a trustee and the premises are reasonably required as a residence by a trust beneficiary, or by someone who resides with and is dependent upon that beneficiary.

Ground (l): The landlord has agreed to sell the dwelling under an agreement where the purchaser pays at least 25% of the price within twelve months, is entitled to vacant possession, and reasonably requires the premises for personal use as a residence or for someone who resides with and is dependent upon them.

Grounds (g), (i) and (l) use the term 'reasonably required[35] for personal occupation'. If one of these grounds is cited it is useful to check if the landlord or intended purchaser has other property holdings or a history of property development. This information can be found through land title searches but requires address(es) of premises, see Chapter 2.

Ground (m): The premises are reasonably required for reconstruction or demolition.

To establish this ground the landlord must prove that intended work involves structural changes or transformation, and that the work or reconstruction cannot be done whilst the premises are occupied. Section 70(2A)(b) of the 1948 Act requires the court to be satisfied that the local Council has given development consent. The local Council concerned should be consulted to determine if development consent is required for the specific development. A tenant may argue that development consent is required pursuant to the relevant State Environmental Planning Policy, Local Environmental Plans and Local Development Control Plans. If development consent has been approved, the tenant may be able to argue that the intended work can be done without the need for vacant possession [s*70(2A)(c)*].

If a landlord cites this ground, an independent builder's report should be sought for an opinion on whether the work could be done whilst the tenant continues to occupy the premises.

> Maria and her late husband raised their family in an inner west Sydney house. She had lived there for over 50 years and did her own repairs, including laying a concrete slab as flooring throughout the house. However she was getting on in years and when the front door became loose, she asked the landlord to repair it. The landlord undertook an inspection and promptly issued Maria with a Notice to Quit. He claimed timbers in the house had become riddled with white ants. OPTS referred Maria to a solicitor and also engaged a builder to undertake a property inspection. The builder reported that repairs could be done without the tenant having to leave the property. The landlord sought an eviction order from the Local Court under Ground (m), but before the local Council had approved any Development Application. The landlord realised that he'd have to start all over again.

Ground (p) (ii): The tenant still has possession of the premises, but has not lived at the premises for more than six months.

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[35] As with other grounds, 'required' means demanded.

Typically this occurs where frail aged tenants are relocated to an aged care facility by their family or by a hospital. Generally, a tenant is assessed by an Aged Care Assessment Team and determined to be unable to look after themselves due to immobility or dementia, despite any live-in carer and/or Home Care Package[36]. Some elderly people may be temporarily accommodated in an aged care facility in respite care until their condition improves.

If a landlord issues a notice to quit on this ground, the status of a tenant in a facility should be checked, for example to determine whether they are a resident or merely in respite? If the former, the grounds have been met. As the eviction proceeds, any other occupant residing at the premises can be heard in any court proceedings, see Chapter 6. If the tenant is in respite, there may be grounds to defend the eviction. The issue of legal competence and substitute decision-makers may also arise.

> Dorothy inherited a protected tenancy when her father died in 1965 (his wife had pre-deceased him). She has lived in the same premises from when she was born in 1929. Dorothy married Reginald and their son Greg was born in 1953. Greg moved out but in 1979 after his father died, he returned to look after his mother. In early 2010, Dorothy's dementia progressed: requiring constant supervision, she was placed as a permanent resident in an aged care facility. The premises were sold in October 2010 and shortly afterwards, the new owner's solicitor served a notice to quit. The notice cited s62(5)(p)(ii) and gave 31 days to vacate the premises. Under the 1948 Act, Greg's legal position is tenuous: he is living in the premises on a license and he cannot inherit the tenancy because Dorothy already has (and if he could inherit the tenancy Dorothy has not died). He is not a boarder as defined by the Act (because he is a relative of the lessee) and he is not a sub-lessee because that requires the lessor's written consent and there is no consent. If the eviction resulted in proceedings at the local Court, the only ground Greg has is section 70(4) that 'any person in occupation of the premises is entitled to be heard'. Greg may receive additional time, but he will still be required to vacate the premises.

Ground (w): The means of the tenant and any person ordinarily residing in the premises are such that it is reasonable they acquire or lease other dwellings.[37]

Under this ground the landlord must establish the 'means' of the tenant including their income, capital, assets or property of any description, and show that those means are reasonable for the tenant to acquire other premises. 'Acquire' does not mean purchase and does include the tenant leasing other premises.

Ground (w) and wealthy tenant action under Division 4AA were inserted into the 1948 Act in the 1968 amendments and complement each other, see Chapter 4, Market rent applied when the tenant is declared wealthy.

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[36] http://www.myagedcare.gov.au/help-home/help-home-how-services-are-delivered provides further information on Home Care Packages and levels of care.

[37] Any 'person residing in the premises' excludes people under sixteen years of age, sub-tenants, boarders and lodgers.

If this ground is cited, the tenant should consider the availability of other accommodation, its cost and the ability of the tenant to pay that cost. The onus rests with the landlord to provide the evidence as to the means and ability of the tenant to acquire other premises. This evidence is provided by the tenant complying with the landlord's notice to provide a statutory declaration of the household's net income, see Chapter 4. The law is unclear whether the landlord must supply evidence that the other available housing is reasonable based on the tenant's financial situation. The safe course for the tenant is to provide evidence to the Fair Rents Board of rents for similar premises that the tenant cannot afford.

The eviction process

Landlords can seek voluntary recovery of the premises from tenants at any time. If the tenant does not want to go, or if an agreement to vacate cannot be reached, the landlord cannot enforce recovery, except as provided in Part 3 of the Act [*s62(1)*].

The landlord may issue a 'Notice to Quit'. Appendix 5 reproduces OPTS's Protected Tenancies Factsheet 4 including a sample 'Notice to Quit'. If a tenant does not vacate in response to a Notice to Quit, the landlord can seek recovery of possession through the Local Court, but only if they have correctly served the valid notice according to the Act [*s62(3)*].

To be valid, a notice must:

- specify one or more grounds listed in section 62(5) and give the relevant particulars[38] and,
- give adequate notice, depending on the grounds cited. The applicable periods of notice are:
    - Generally, seven (7) days plus an additional seven days for each completed period of six months' tenancy, up to a limit of 30 days [*s63(1) & (2)(a)(ii)*].
    - Fourteen (14) days if relying on grounds (c), (d), (e) or (f) [*s63(2)(a)(i)*].
    - Fourteen (14) days where premises are shared accommodation [*s63(2)(a)(iii)*].
    - Seven (7) days where the grounds involve prostitution and/or soliciting [*s63(2)(a)(iv)*].

Service of the notice

A notice to quit is effectively served by any of the following:

- delivery to a person apparently residing in or occupying the premises, who is over the age of 16;
- delivery to the person who usually pays the rent [*s62(4)(i)*];
- with the leave of the Court, by affixing the notice to the door of the premises and sending copies by prepaid post: addressed to the tenant at the premises and the address last known to the landlord [*s62(4)(ii)*]; or

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[38] In court proceedings, the landlord can only rely on the ground(s) and particulars specified in the notice, unless leave of the Court is granted to do otherwise [*s66*].

- where the tenant is deceased, by affixing the notice to the door of the premises, delivering the notice to any person apparently residing in or occupying the premises and if no-one is resident or occupying, publishing the notice twice in a local daily newspaper [*s62(4A)(a)*].

What the court considers

The Local Court has original jurisdiction for hearing recovery of premises [*s69*]. Recovery matters can be heard in chambers, with the consent of all the parties [*s73*].

Apart from the formalities of Part 3 of the Act, including periods and form of notice and establishing the grounds relied on, the Court must consider hardship and may place conditions on an order of possession or refuse to make an order, even if one or more of the prescribed grounds are established [*s70*].

In considering hardship, the court must consider:

- the hardship that would be caused to the tenant or any other person if the order is made [*s70(1)(a)*]; and
- the hardship to the landlord or any other person if the order is not made [*s70(1)(b)*].

Where possession is sought on grounds (g), (h), (i), (j), (l), (m), (s), (t) and/or (v), the Court also considers whether reasonably suitable alternative accommodation[39] is available for the tenant to occupy [*s70(1)(c)*].

Where possession is sought on ground (m) and it is necessary under any Act to obtain the approval of any body for the carrying out of the work referred to in the Notice to Quit, the Court also considers whether that approval has been obtained [*s70(2A)(b)*] and whether the work can be undertaken without unduly interfering with the tenant's use of the premises [*s70(2A)(c)*].

Where possession is sought on grounds (t) and/or (x), the Court must not issue an order unless satisfied that the premises have been offered for sale to the tenant upon terms and conditions which, having regard to all relevant circumstances, are fair and reasonable.

Where possession is sought on grounds (b), (n), (o), (p) and/or (q), any assignee, sub-tenant or person in occupation of the premises has the right to be heard by the Court [*s70(4)*].

Where possession is sought on any ground, any sub-tenant has the right to be heard by the Court [*s82(4)*].

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[39] In assessing if alternative accommodation is 'reasonably suitable' the Court shall have regard to the terms and conditions of any proposed lease and the ability of the tenant to pay the rent of that proposed lease [*s70(6)*].

Limitations to seeking eviction

The Act places some limitations on when notices of eviction may be served. These are:

- Where a tenant has made application for a rent determination, an eviction notice cannot be served citing grounds (f), (g), (h), (l), (j), (k), (s) or (w) for six months. This limitation will not apply where there has been an application but no determination within 6 months [*s64*].
- Where a person has become the landlord through purchase, assignment or transfer, they cannot serve a notice to quit citing grounds (g) or (m) for twelve months. However, the landlord may apply for leave of the Court to serve such a notice citing ground (m) [*s65(1) & (1A)*].
- Where a person has become the landlord through a purchase agreement, they cannot serve a notice to quit citing grounds (l) for six months from the date of that agreement [*s65(2)*].
- Where a landlord has failed in eviction proceedings at Court, no further notice to quit may be served for 12 months, except where leave of the Court is granted [*s68*].
- Where premises are shared under separate leases, the notice to quit is only effective for the lessee named in the notice [*s62(1B)*].

Only eviction orders made under this Act are enforceable. An order for termination and possession granted by the NCAT will not be enforceable against a tenancy covered by the 1948 Act [*s75*].

Other limitations

In addition to restricting eviction action to the prescribed grounds, the Act also places further constraints and restrictions on some of those grounds.

Where vacant possession has been gained on grounds (h), (l), (j), (k) and/or (s), the landlord cannot re-lease, sell, or otherwise dispose of the premises (except by will or intestacy) for 12 months, without the consent of the Court[40] [*s77(1)(a)*].

Where vacant possession has been gained on grounds (t) and/or (x), the landlord who gained the vacant possession cannot re-lease or sell the premises, without the consent of the Court [*s77(1)(a1)*].

Where vacant possession has been gained on ground (g), the landlord cannot re-lease, sell, or otherwise dispose of the premises (except by will or intestacy) for 3 years, without the consent of the Court [*s77(1)(b)*].

Where vacant possession has been gained on ground (m), the landlord cannot re-lease, sell, or otherwise dispose of the premises (except by will or intestacy) until the reconstruction or demolition has been carried out [*s77(1)(c)*].

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[40] Except for letting of the premises to the person or institution cited in the relevant ground [*s77(2)*].

Appeals

Appeals on decisions under this part are limited to questions of law only and will be heard by the Supreme Court [*s74*].

Costs

In any proceedings under Part 3 of the Act (except offence prosecutions), courts may order the landlord to pay the tenant an amount to cover their reasonable costs [*s84*].

Rights after vacant possession has been given

Where a landlord has gained possession of premises by means of fraud, misrepresentation or concealment of material facts, the Court that made the original order may make a further order that the landlord pay the tenant monetary compensation for damage or loss arising from the order [*s76*].

Chapter 6

Special classes of protected tenants

Protected persons

Part 5 of the Act provides further protections for former servicemen (who served in the Second World War, in Malaya after 28 June 1950 [*cl7*], or in certain actions on behalf of the United Nations), and to their spouse or dependant parents.

A 'protected person' is a former serviceman of the Australian armed forces or the United Nations Forces, or a widow or parent of a former serviceman, who had to move from their residential premises they reside in to perform their war service:

1. immediately prior to their discharge;
2. for a continuous period of not less than three months during the six months immediately prior to their discharge; or
3. for a total period of not less than twelve months during their period of war service.

The full definition in section 99 includes considerations of the receipt of pensions or medical treatment that precludes the person's ordinary work and definitions of dependence. This definition is complicated and legal advice should be sought.

Under Section 100, where the landlord is seeking possession of the premises in section 62(5) under the grounds (g), (h), (i), (j), (l) or (s), the landlord must specify the required grounds, but must also satisfy to the court that:

1. reasonably suitable alternative accommodation is available;
2. the protected person has sub-let the premises and actually resides elsewhere; or
3. the landlord is the occupant of a dwelling house subject to an order of recovery of possession in favour of a protected person and reasonably suitable alternative accommodation is not available to the landlord or other persons.

Section 100 will not apply where the landlord is themselves a protected person or in receipt of an Age Pension [*s102*].

A landlord may serve a notice on a tenant requiring them to inform the landlord, within fourteen days, whether they are a protected person [*s113(1)*]. The notice may be served in person or by registered post to the tenant's last known address [*s113(2)*].

If the tenant does not respond within fourteen days confirming protected person status, the protections of Part 5 will not be available, even if the person is subsequently shown to have been a protected person, provided the landlord acts within three weeks of the expiration of the fourteen day notice period [*s113(3)*].

If a tenant does receive such a notice, immediate action should be taken, including obtaining expert legal advice.

Statutory protected tenants

Brendan's parents purchased their house but not the land in the 1950's (see *'Own the house but not the land'*). Following the death of his mother, Brendan became a 'statutory protected tenant'. Nevertheless, the landlord served him a termination notice under the 2010 Act, citing the death of the tenant. OPTS sought advice from a barrister who specialises in the 1948 Act and then represented Brendan in three hearings of the Consumer & Trader Tenancy Tribunal.

The questions before the Tribunal were:

(i) whether the premises are covered by the 1948 Act; and

(ii) has Brendan's right to continuing possession ceased because probate has been granted under s83A(1).

The decision in (i) follows the decision in *May v Ceedive* (see *'Own the house but not the land'*). The decision in (ii) proved Brendan is protected by s83A (as if his mother had not died) until the grant of probate. After probate has been granted, the Act continues to protect Brendan's statutory tenancy unless the landlord is successful in regaining possession under s62 of the 1948 Act.

D. Sheehan, Member CTTT in *Ceedive Pty Ltd v Connell* (Tenancy) [2013] NSWCTTT 467 (17 September 2013) provides a detailed interpretation and application of sections 83, 83A, 83B and 83C where a child of a deceased tenant (where probate has been granted) inherits the tenancy and becomes a statutory protected tenant. That decision should be consulted to understand how the sections are applied because interpretation of the sections is complicated by amendments prompted by judicial decisions. This also applies where probate has not been granted or the estate has not been administered.

The following is a summary of sections 83, 83A, 83B and 83C[41].

Sections 83-83C regulate the rights of the estate and successors of the protected tenant in respect of the landlord's rights to determine the lease or take proceedings for possession. In 1960 the NSW Government established a Royal Commission to report on the operation of the 1948 Act. The Royal Commission concluded that the means for obtaining possession operated unfairly against the landlord, who could not obtain possession of premises unless he or she could establish one of the grounds in section 62. In 1964 and 1968 the Government inserted provisions to remove what the Commission described as the "anomalous" situation in the death of a tenant of controlled premises. Parliament's intention of these provisions was to ensure that the deceased tenant's immediate family continued to be housed on the death of the breadwinner tenant.

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[41] The summary is based on advice received from Patricia Lane, Barrister, St James Hall Chambers, 2013.

Section 83 applies where the tenant dies immediately before the termination of the tenancy. If, immediately before the tenant's death, a category of family members (the same s83A categories) is actually in possession of the premises, they have the "like right to continue in possession as the deceased tenant would have had if he or she had not died". The landlord can take recovery proceedings against the person who is given the right to continue in possession, "as if he or she were a tenant of the premises" [*s83(1)*]. A protected tenancy can be 'inherited' only once [*s83*].

Section 83A provides limited rights for some family members to remain in occupation following the death of the tenant. The occupier is called a 'statutory protected tenant' but they are not protected tenants as such. The order of priority for family members is:

1. the wife or husband of the tenant, if they were residing in and in possession of the premises when the tenant died [*s83A(1)(a)*]; then
2. a child of the tenant, if over 21 years old and in receipt of a Commonwealth Government pension, who was residing in, and in possession of, the premises when the tenant died [*s83A(1)(b)*]; then
3. a parent of the tenant who was residing in, and in possession of, the premises when the tenant died [*s83A(1)(c)*].

Where there is more than one person in any of these categories, the right to 'inherit' the tenancy goes to the oldest person entitled [*s83A(1A)*].

The person inheriting the tenancy shall "subject to subsection (2) and until probate or letters of administration of the estate of the deceased are granted" have the "like right to continue in possession of the premises as the deceased lessee would have had if he or she had not died". Subsection (2) provides that proceedings may be taken to recover possession as if the inheritor were a tenant, and subsection (3) provides that nothing in the section "affects any right which the person having the right ... to continue in possession of the premises may have upon the grant of probate or letters of administration to continue in possession of the premises."

Section 83A operates where there has been no termination of the tenancy at the date of the tenant's death, but the landlord can rely on the grounds under section 62 to obtain possession. Before probate, the landlord can bring proceedings for recovery against the person entitled to remain in possession. After probate is granted, the family of the deceased tenant is entitled to remain in possession if none of the grounds for a landlord to serve a notice to quit [*s62*] has arisen. A protected tenancy can be 'inherited' only once [*s83A*].

Section 83B provides that where a lessee of prescribed premises dies, a person will not be able to raise a defence that the lessee's interest is vested in the NSW Trustee and Guardian if they were in possession of the premises during the period after death and before the grant of probate or letters of administration, and recovery proceedings have been brought against them. The section was inserted following *Andrews v Hogan* (1952) 86 CLR 223: the High Court unanimously held that a notice to quit could be validly served on the Public Trustee. The rights and powers of the NSW Trustee may be limited to a passive role of receiving notices, with the exception of the right to terminate a tenancy vested in the Office of the NSW Trustee and Guardian, but it is under no obligation to pay rent or carry out any of the covenants under a lease. Fullagher J at [22] stated, 'In my opinion the Public Trustee in NSW is legally capable of surrendering a lease vested in him.'

Section 83C provides that deceased tenants are precluded from disposing their periodic lease by will or by intestacy, except for the balance of the current periodic

term at the date of death, but nothing in this section affects section 83A or section 61 of the *Probate Administration Act 1898*.

If the tenancy of the protected tenant was a periodic tenancy at the date of death, section 83C prevents the periodic tenancy passing under the will of the deceased tenant, other than the unexpired portion of the periodic term. The section is explicitly subject to section 83A and the absence of any right to succeed the protected tenancy does not affect any right to remain in possession conferred by section 83A.

Sub-tenants

Sub-tenants are included within the definition of lessee as a party to a lease [*s8(1)*]. The common law definition applies in the case of sub-tenants, because they are not fully defined under the 1948 Act. A sub-lease is the creation of a lease out of a lease. A new interest is created by transferring less than the whole of the tenant's interest in the lease.[42] This can be the transfer of the entire premises for the term of the lease less one day, or the transfer of less than the whole premises for the duration of the lease.

The only reference to lessees sub-letting during a continuing agreement is from Peter Clyne:

> Dwelling sub-tenants usually occupy one room, and rooms are much easier to get. Consequently they rarely cause much trouble to the owner.[43]

Sections 62(5)(n) and (o) refer to a lessor giving a notice to quit to a lessee acting as a sub-lessor who has not received assent or approval from a lessor to sub-let the whole or part of the premises. There is no reference that specifies the form of consent required (e.g. in writing) or when consent has to be given for a sub-tenant to be covered by the 1948 Act.

Section 70(4) states that any sub-tenant is entitled to be heard in any Court proceedings brought by the landlord for recovery of the premises.

Shared accommodation

Shared accommodation is defined as prescribed premises leased as a residence but not as a complete residence in themselves [*s8(1)*]. This is elaborated in *Olife v Ryan* [1949] VLR 314 per O'Bryan J, 'what was leased was a room but his tenancy agreement entitled him to the use, which he shared with others [of] a bathroom, a lavatory and a laundry'.[44]

Boarders and lodgers

A dwelling house is defined in section 8 of the 1948 Act to include any lodging or boarding house.

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[42] Butt, P., *Land Law*, 6th Edition, Law Book Company, 2010, pp. 359-360

[43] Clyne, P., *Practical Guide to Tenancy Law*, Rydge Publications, 1970, Chapter 22.

[44] N.R. Mackerras and J.R. Dunford, *Landlord and tenant practice and procedure in New South Wales*, 7th edition, The Law Book Company Ltd, 1971, p. 51.

In section 6A(3)(d) a bona-fide boarder has an oral or written 'leave and license agreement' where that person is supplied by the licensor with accommodation and two cooked two-course meals a day and the value of the meals makes up a substantial portion of the amount paid by the licensee under the agreement. Meals must consist of:

- one meal before midday consisting of at least two courses, one of which comprises cereal or porridge and the other of which comprises cooked meat, eggs or a like dish, together with bread (or toast), butter, jam and tea or coffee; and
- one meal after midday consisting of at least two courses, one of which comprises fish or meat (other than in sandwich form) and cooked vegetables.

It can be argued that a boarder who has resided in a boarding house since prior to 1 January 1986 because they have rarely, if at all, been provided with the above meals is a protected tenant in their own right.

In *Josezinga De Brito Galego v Leichhardt Council* (2000) LEC NSW 10386 and 10387, the NSW Land and Environment Court considered the case of a 21-room boarding house in Glebe which had an on-site caretaker and a resident who had lived in the same room since 1969. It held that the resident was a protected tenant, rather than being a licensee of an unprotected boarding house. The owner's application to renovate the premises, requiring the relocation of protected tenant, was dismissed by the Court.

Occupants remaining in premises after tenant vacates

Typically this occurs when the elderly tenant vacates the premises to reside in an aged care facility and occupants (usually family members) remain. The landlord may issue a notice to quit if the tenant has not lived at the premises for more than six months [*s.62(5)(p)(ii)*], see Chapter 5, Ground (p) (ii). If the landlord commences proceedings at the local Court to recover possession of the premises, the remaining occupants can be heard in the proceedings [*ss70(1)(a) and 70(4)*] and they should be given reasonable time to vacate. It is not known if the actual protected tenant is required to attend such proceedings and would likely depend on the circumstances of each case. The remaining occupant(s) should seek legal advice and assess if they are eligible for assistance from NSW Legal Aid.

Family members seeking assignment of the lease

When a tenant has vacated the premises but has not died, see '*Occupants remaining in premises after tenant vacates*'. Family members who have lived in the premises for a long time with the tenant often ask if they should seek to have the lease assigned to them if the original tenant vacates. This is more likely to be the case where they are the tenant's enduring Power of Attorney and they pay the rent on behalf of the tenant.

Assignment is similar to sub-letting. When a tenant assigns his or her lease to another person (called the 'assignee'), the assignee takes on all the benefits and the obligations under the lease but the former tenant continues to be liable to the landlord for any breach of the lease. An absolute covenant against assignment may be found in a lease or in legislation and would therefore bar the right to assign.

Assignment of lease is not defined in the 1948 Act. The only reference to assignment in the Act is s62(5)(n), where the landlord can issue a 'notice to quit' because no

consent or approval was given to a tenant who has assigned or transferred the tenancy. 5A leases contain a clause prohibiting a tenant from transferring a lease, or sub-letting, or part with possession of the premises without the landlord's written consent, see cl20 of the 5A lease in Appendix 2. Section 133B of the *Conveyancing Act 1919* (NSW) refers to leases containing a covenant, condition or agreement on assignment. Therefore, if a 5A lease exists and is signed by the current tenant and they assign their lease without their landlord's written consent, they can be issued with a 'notice to quit' under ground s62(5)(n).

The law is uncertain for a tenant who assigns a lease which was created by an oral agreement. Where there is an oral agreement, it is prudent that a tenant approach their landlord to assign their lease and request this be given in writing.

Own the house but not the land

In *May v Ceedive Pty Ltd* [2006] NSWCA 369 (15 December 2006), Lithgow Valley Colliery Company allowed its workers to build houses on land it owned. These houses were subsequently transferred to relatives or sold to others by the occupants of the houses (who regarded themselves as owner/occupiers). In 2000 the Colliery sold the land to developer Ceedive which charged rent on the land (referred to as 'ground rent agreements') and sought to evict residents.

The Court of Appeal unanimously held that residents who brought their houses prior to 1 January 1986, believed they owned their houses but not the land, and paid 'ground rent' may be tenants covered under the provisions of the 1948 Act. The Court used the definition of fixture at common law, 'the house is an in-severable part of the land and cannot be brought and sold separately from the land to which it is affixed. It is leased with the land and it becomes part of the freehold'. The Court held that the ground rent agreements were agreements for the lease of premises.

OPTS is aware of tenants in two parts of Lithgow a who have come under the 1948 Act because of this ruling.

Chapter 7
Offences and penalties

The 1948 Act provides for offences and penalties. These take the form of both general provisions and specifically identified prohibitions.

Offences

Any person who contravenes or fails to comply with any provision of the Act is guilty of an offence [*s95(1)*] and may be prosecuted with the consent of the Minister [*s95(2)*]. Prosecutions for offences under the Act are disposed of in a summary manner before the Local Court [*s98*].

However, most of the offences listed in the Act are unlikely to be pursued today.[45] The most likely offences to be pursued are:

- getting a tenant to enter into a 17A agreement by fraud, duress, intimidation or improper means [*s17A(15)*];
- letting premises at a rent exceeding the fair rent for the premises (see Chapter 4) [*s35*];
- entering into any contract or arrangement (oral or in writing) under which the tenant will receive money or something else of value for either (i) an increase in the fair rent, or (ii) vacant possession [*s90A(1)*];
- offering money to the tenant to do any of the following (except with the consent of the Fair Rents Board in most cases): (i) renew or extend their lease, (ii) assign, transfer or surrender their lease, (iii) vacate the premises, and (iv) consent to sub-letting or assigning their lease [*s36(1)(a)*];
- doing anything that interferes with the tenant's ordinary use or enjoyment of the premises and goods and services that go with the premises [*s81(1)*];
- intimidating a landlord or a tenant who is seeking to exercise their rights under this Act [*s88(1)*];
- penalising in any way a landlord or a tenant because they had made an application under this Act [*s88(4)*];
- selling or agreeing to sell premises without first offering in writing to sell the premises to the sitting tenant [*s88A(1)*]; or
- refusing to allow or obstruct an authorised officer of NSW Fair Trading from entering or inspecting the premises at a reasonable time of the day after reasonable notice has been given [*s93(2)*].

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[45] Although unlikely to be relevant today, the Act had strong provisions to discourage discrimination against children: *s38(1)* made it an offence to refuse to let a dwelling-house to any person on the ground that it is intended that a child shall live in the dwelling-house; *s38(4)* made it an offence to inquire of any prospective tenant of the premises whether they have, or intend to reside with, children.

Penalties

Section 95 of the Act outlines the general penalties that apply for offences against the Act. Section 95(3) provides that any person who is guilty of an offence against this Act shall be liable:

> *(a) if a body corporate--to a penalty not exceeding 10 penalty units*[46]*,*
> *(b) if any other person--to a penalty not exceeding 5 penalty units, or to imprisonment for a term not exceeding six months, or to both such penalty and imprisonment.*

Where the offender is a body corporate, every person who at the time of the commission of the offence was a director or officer of the body corporate shall be deemed to have committed the like offence, and be liable to the pecuniary penalty or imprisonment or both provided by this section in the case of such an offence by a person other than a body corporate accordingly, unless he or she proves that the offence was committed without his or her knowledge, or that he or she used all due diligence to prevent the commission of the offence [*s95(4)*].

Under section 95(5) where a person is guilty of an offence against section 77 (*Premises not to be sold or re-let in certain cases*) the following further penalties apply:

> *(a) by reason that premises are or are agreed to be leased or are or are agreed to be made the subject of an agreement or arrangement referred to in that section shall, in addition to any other penalty provided by this section, be liable to a penalty not exceeding 1 penalty unit for each day on which the premises are the subject of such a lease, agreement or arrangement, or*
> *(b) by reason that premises are sold or otherwise disposed of or agreed to be sold or otherwise disposed of shall, instead of the penalty provided by subsection (3), be liable:*
> > *(i) if a body corporate--to a penalty not exceeding 20 penalty units, or*
> > *(ii) if any other person--to a penalty not exceeding 10 penalty units, or to imprisonment for a term not exceeding twelve months, or to both such penalty and imprisonment [s95(5)].*

In addition to the provisions of section 95, where a person has paid money in contravention of section 36 (*Certain payments prohibited*) they can recover that money from the person they paid it to through the local Court, or if they are still the tenant, by deducting that amount from any rent payable within six months after the date of payment [*s36(2)*]. Where a person has bought or sold any goods or goodwill in contravention of section 36, they can recover the difference between what they paid or received and the fair value of the goods or goodwill through the local Court [*s36(3) & (4)*].

Where a person is convicted of an offence against section 36, the Court, in addition to imposing a penalty for the offence, may order that the amount which in its opinion would be the amount recoverable in civil proceedings pursuant to subsection 36(2), 36(3) or 36(4) shall be paid by the offender to the Clerk of the Court within a time to be

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[46] A penalty unit is defined in section 17 of the *Crimes (Sentencing Procedure) Act 1999* and at time of writing is $110.00.

specified in the order. Any amount so paid shall be paid by the Clerk to the person by whom the amount would have been recoverable in civil proceedings [*s36(5)(a)*].

Where a person is convicted of an offence against Part 2 of the Act (*Fair Rents*) the Court may, in addition to any penalty, order that any amount which has been received by or paid to that person in contravention of this Part be refunded to the person by whom the payment was made [*s61(1)*]. Where a Court has made an order under this section, a certificate under the hand of the appropriate Officer of the Court, specifying the amount ordered and the persons by whom and to whom the amount is payable, may be filed in any Court having civil jurisdiction to the extent of that amount, and shall be enforceable as a final judgment of that Court [*s61(3)*].

Where a person is guilty of an offence against section 81 (*Persons not to interfere with use or enjoyment of premises*) the Court may order the landlord to do such things as are necessary to enable the lessee to resume the ordinary use or enjoyment of the premises, goods, conveniences or service. Where the landlord fails to comply with the provisions of the order he or she shall be guilty of an offence against this Act and in addition to any other penalty prescribed, he or she shall be liable to a penalty not exceeding 0.1 penalty unit for each day during which such non-compliance continues [*s81(2)*].

Where a person is guilty of an offence against section 81 and the Court is of the opinion that the acts or omissions constituting the offence were done with the intent that the tenant would vacate the premises (and that person has vacated the premises), the Court may, in addition to the penalty prescribed by the Act, order the landlord to pay to the tenant such sum as appears to the Court to be sufficient as compensation for damage or loss sustained by the tenant [*s81(3A)*].

Chapter 8
Settlement

Landlords inducing tenants to vacate

Because it is difficult to terminate a protected tenancy, some landlords may offer their tenant money to move out, which effectively decontrols the premises.

If offered money to move out, tenants should seek legal advice and weigh up the short-term gain (the money) against the long-term consequences (the higher cost of buying a house or renting privately, or waiting for social housing). In the past, a settlement has been paid as compensation to offset costs that protected tenants may incur (such as relocation expenses or higher weekly rental costs) by giving up the benefits of their tenancy. However there is no fixed formula to determine compensation and ultimately the amount of compensation paid will depend on the merits and circumstances of the individual case.

Four cases illustrate the effect that the tenant's position has on negotiations of settlements:

A woman in her 60's lived with her adult child who was in receipt of the Disability Support Pension due to an intellectual disability. The adult child could inherit the tenancy. The landlord was a developer, and did not have strong grounds to seek termination but the loss the developer would suffer if the development did not proceed was far greater than the compensation offered to the tenant. Final settlement was a cash payment plus the landlord purchasing a new property with rent tied to the tenant's pension, and the terms of the tenancy to pass on to the child.

Maria and her late husband raised their family in an inner west house. Maria had lived there for over 50 years and did her own repairs, including laying a concrete slab as flooring throughout the house. However, as she got older, she found the repairs more difficult and when the front door became loose, she asked the landlord to repair it. The landlord undertook an inspection and promptly issued Maria with a Notice to Quit. He claimed timbers in the house had become riddled with white ants. OPTS referred Maria to a solicitor and also engaged a builder to undertake a property inspection. The builder reported that repairs could be done without the tenant having to leave the property. The landlord sought an eviction order from the Local Court under Ground (m) before the local Council had approved any Development Application. The landlord realised that he'd have to start the eviction proceedings all over again so offered the tenant $50,000 to vacate (which the tenant accepted).

Morris's inner city house, in which he has been the tenant for 40 years, was very dilapidated. OPTS obtained an order from the local Council for the landlord to repair a hole in the roof over the front hallway to stop water pouring in whenever it rained. OPTS sought Council to view this hole only (not inspect the whole house), and Council agreed. However, the landlord strongly threatened to have the Council inspect the whole premises to issue an order to demolish the building (because it was so dilapidated as to be unsafe to its occupants). The tenant accepted the landlord's payment of $15,000 to vacate.

A frail woman was in her late 80's and her anticipated life expectancy was less than 10 years. The landlord was in his 70's and required to sell the premises with vacant possession. Final settlement was approximately $20,000.

If a settlement is offered, section 36(1)(a) requires the consent of the Rent Controller (for prescribed premises that are shared accommodation) or the Fair Rents Board nearest to the premises (for any other prescribed premises).

Some landlords, on the other hand, resort to threats and harassment to try to drive a tenant out. If a tenant is threatened or harassed, they should seek legal advice and consider a complaint to the police and/or an application for an Apprehended Violence Order and/or action under the use and enjoyment provisions of the Act.

Other methods have been used by landlords to avoid coverage by the 1948 Act. For example, a landlord might offer to repaint the premises, and ask the tenant to move out while they do the work. If the tenant does vacate, the landlord might then claim that they've been given vacant possession and that has ended the protected tenancy. Similarly, for tenants in a boarding house, the landlord may offer another (perhaps nicer) room, however, moving out of the old room will mean that the protected tenancy is ended.

If a tenant receives any offer or request to leave the premises, even if only temporarily, they should get advice from a tenant advocate or lawyer.

Tenant seeks to voluntarily vacate

A tenant may serve their landlord with a notice of intention to vacate[47]. The notice may be informal but must comply with *s23C(1)(a)* of the *Conveyancing Act 1919*, such that 'no interest in land can be disposed of except by writing signed by the person, or by the person's agent lawfully authorised in writing'. The intention to surrender is complete when the tenant vacates, returns the key and the landlord accepts the key, see Chapter 1, Protected tenant signs a residential tenancy agreement.

The 1948 Act is silent on the period of notice that a tenant should give if they wish to

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[47] Mackerras, N.R., and Dunford, J.R., *Landlord and tenant practice and procedure in New South Wales*, 7th edition, The Law Book Company Ltd, 1971, p.139.

vacate voluntarily. If the fixed term of a written lease has expired and it is now a periodic tenancy, the notice period is generally specified in the lease. If no written lease was executed, the common law applies and the notice period equates with the period rent is paid (weekly, fortnightly, monthly, annually)[48].

However, where rent is paid annually for a periodic tenancy section 127(1) of the *Conveyancing Act 1919* applies such that 'No tenancy from year to year shall be implied by payment of rent; if there is a tenancy and no agreement to its duration, it is deemed a tenancy at the will of either party by one month's notice in writing expiring at any time.'[49]

If a landlord has has agreed to sell or let the premises as a result of the tenant serving a notice of intention to vacate, and the tenant fails to vacate, the 1948 Act provides that the landlord can issue a notice to quit [*s65(5)(f)*].

Chapter 11 in *Practical Guide to Tenancy Law* is dedicated to the issue of a tenant who gives notice to vacate and fails to do so.[50]

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[48] Butt, P., *Land Law*, 6th Edition, Law Book Company, 2010, p.296.

[49] Butt, P., *Land Law*, 6th Edition, Law Book Company, Sydney, p.294.

[50] Clyne, P., *Practical Guide to Tenancy Law*, Rydge Publications Pty Ltd, 1970.

Appendices

1. Table of cases
2. Registered 5A lease
3. Blank 17A Agreement
4. Protected Tenancies Factsheet 5, 'Grounds for eviction'
5. Protected Tenancies Factsheet 4, 'Notice to quit'

Appendix 1
Table of cases

195 Crown Street Pty Ltd v Hoare [1969] 1 NSWR 193	Principles to surrender a tenancy for prescribed premises by the operation of law.
Aborigines Welfare Board v Saunders [1961] NSWR 917	The Aborigines Welfare Board was not the Crown because the powers and duties of the Board had to be exercised under the direct control of the Governor or Minister.
Adavale Realty Pty Ltd v Williams, Glenn & Ors [1996] NSWRT 190	Application for termination – Registered 5A lease – no orders made.
Andrews v Hogan (1952) 86 CLR 223	The death of a protected tenant and no application made for probate or administration, and the estate vesting in the Public Trustee. Sections 83A to 83C inserted into the 1948 Act that the Public Trustee cannot be used as a defence to stop landlords taking possession of the premises.
Barilla v Jones [1964-5] NSWR 741	The premises must be vacant or the landlord personally occupied the premises prior to the execution of a 5A lease.
Bonnington Co Pty Ltd v Lynch (1952) 86 CLR 259	The definition of prescribed premises does not include vacant land.
Ceedive Pty Ltd v Connell (Tenancy) [2013] NSWCTTT 467 (17 September 2013)	Residing child in prescribed premises (after death of remaining joint tenant) has a right to continuing possession as a statutory tenant even after probate has been granted.
Ceedive Pty Ltd v May, Timms, McFadden and Mudway [2005] NSWSC 222	Tenants under the assumption they owned their dwelling and rented the land. Vacant possession ordered, because the Act does not apply to vacant land. This decision was overturned in May v Ceedive Pty Ltd.
Economopoulos, Theos, and Economopoulos, Zoe (Landlords) v Mokdessi, Kamil (Tenant) [1997] NSWRT 196 and [1997] NSWRT 253	Registered 5A lease and tenancy commenced after 1 September 1986.
Galaxy Motors Pty Limited v Carroll & Weeks (1964) 82 WN (Pt 1) 40	Surrender of a tenancy by the operation of law requires lessee to give notice of surrender, vacate and return key to lessor.
Greater Union Organisation Pty Ltd v	Where premises are commercial and a

Pappas (1967) 116 CLR 475	dwelling house covered by a single lease, but physically separated and some distance apart, the dwelling house could be prescribed premises.
Havenham Pty Ltd (Landlord) v Tough, Peter (Tenant) [1994] NSWRT 152	Registered 5A lease.
Hayes v Holland [1965] NSWR 1414	Surrender of a tenancy by the operation of law.
Hill, Edward and Zillah (Tenant) v Cox, Evonne (Landlord) [1994] NSWRT 51	Not prescribed premises. The tenants lived in the premises since 1950 and in 1962 the premises were relocated. The Tribunal concluded a building is erected when set-up on vacant land.
Josezinga De Brito Galego v Leichhardt Council (2000) LEC NSW 10386 and 10387	The Land and Environment Court held that a resident of a boarding house who lived in the same room since 1969 was a protected tenant rather than a licensee.
Karpathakis, Fortini (Tenant) v Cox, Michael (Landlord) [1994] NSWRT 139	Tenant declared a protected tenant, but a very brief decision.
May v Ceedive Pty Ltd (2006) NSWCA 369	Residents who believed they owned their houses (they purchased their houses but not the land before 1 January 1986) and paid ground rent may be protected tenants.
McNamara (McGrath) v Consumer Trader and Tenancy Tribunal (2005) HCA 55	Roads & Traffic Authority (now Roads and Maritime Services) is not the Crown and is not exempt from the 1948 Act. Section 13A inserted into the *Interpretation Act 1987* in 2008 to override that decision and NSW Government agencies like the RTA have the status of the Crown.
Melia v Smith (Tenancy) [2005] NSWCTTT 393 (2 May 2005)	5A lease registered.
Metropolitan Trade Finance Co Pty Ltd v Coumbis (1973) 131 CLR 396	Tenancy excluded from the Act.
Murray v Gibson (Tenancy) [2013] NSWCTTT 470 (19 September 2013)	Application for termination under s.94 *Residential Tenancies Act 2010* dismissed. Premises found to be prescribed premises despite current tenant commencing tenancy unbeknown to landlord, date premises converted into units unknown and reduction in size of unit did not constitute new premises.

Nairobi Finance Development Pty Ltd (Landlord) v Witt, Catherine (Tenant) [1997] NSWRT 80	5A lease registered without vacant possession prior to executing 5A lease.
Petrovski (Tenant) v Bares (Landlord) [1991] NSWRT 151	The unit was not prescribed premises because it had been substantially altered to be new premises erected after 16 December 1954.
Robert Virgona (Landlord) v Inkship, Anthony (Tenant) [1999] NSWRT 54	5A lease registered.
Roddy v Perry (No. 2) [1958] SR 41	Section 98A inserted into the Act following this decision. In any proceedings under the Act it is presumed the premises are prescribed premises unless the contrary is shown.
Rosenstrauss, A, executor of the Estate of the Late R.L. Cooper (Landlord) v Marsal, Simon (Tenant) [1996] NSWRT 50	5A lease registered.
Skepper & Skepper v Smith [2001] NSWRT 39	Premises found to be prescribed premises.
Williams, Alice (Tenant) v Onerwal Local Aboriginal Land Council (Landlord), NSW Aboriginal Land Council (Landlord), Merritt, Susan (Landlord), and Ngunnawal ACT District Indigenous People's Aboriginal Corporation (Landlord) [1997] NSWRT 137	Premises not found to be prescribed premises. Aboriginal Land Councils given vacant possession unless tenant resumes or terminates the lease within 10 days.
Wilson v Softley 91 W.N. 182	Resident's net income for financial year ending 30th June 1968, who moved out before landlord's application to the Fair Rent Board in 1969 must be added to the lessee's net income for that year.

Appendix 2

Registered 5A lease

5A 9784 84

NEW SOUTH WALES $ =00.50 STAMP DUTY

RESIDENTIAL LEASE

SUITABLE FOR HOUSES UNITS AND FLATS, FURNISHED OR UNFURNISHED AND FOR REGISTRATION UNDER SECTION 5A OF LANDLORD AND TENANT (AMENDMENT) ACT, 1948.

PUBLISHED BY THE REAL ESTATE INSTITUTE OF N.S.W

THIS LEASE is made in duplicate on the 8 day of June 1984 at in the State of New South Wales

PARTIES BETWEEN _____ (Name and address) LANDLORD

71 Hastings Parade, North Bondi

whose estate agent is _____ (Name and business address) AGENT

AND _____ (Name and address) TENANT

PREMISES The landlord leases to the tenant the premises described herein as a residence for not more than _____ persons together with such furniture and furnishings as are described in any inventory forming part of this lease (attached hereto).

DESCRIPTION OF PREMISES and any separate car parking space, storeroom, etc:

72 Warners Avenue, North Bondi

RENT The rent shall be $ 110.00 per week commencing on the 11 day of June, 19 84, and payable in advance by the tenant on the Mon day of every week to the landlord/agent at his above address or at any other reasonable place as he notifies in writing.

TERM The term of the lease shall be Six Months commencing on the 11 day of June, 19 84, and ending on the 10 day of December, 19 84. PROVIDED HOWEVER that if either party wishes to terminate the lease on that date then at least one month's written notice of such intention shall be given to the other party.

HOLDING OVER If the landlord permits the tenant to continue in occupation of the premises after the expiration of the term then the lease shall continue as a periodic lease from month to month, terminable as provided in Condition 19 (a) (ii), at the same rent or at a rent to which both parties may agree but otherwise on the same terms and conditions.

SECURITY DEPOSIT A security deposit of $ 440.00 shall be paid by the tenant to the landlord/agent on the signing of the lease.

CONDITIONS The parties agree to the conditions set out above and on the following pages.

X-C

THE LANDLORD AGREES

Possession
1. To give possession of the premises to the tenant on the day on which the term of the lease commences.

Condition of Premises
2. To ensure that the premises are in a reasonably fit condition for use as a residence at the commencement of the lease.

Security
3. To ensure that the external doors and windows contain locks and catches in working order at the commencement of the lease.

Use of Premises
4. To allow the tenant to use and occupy the premises without unreasonable interference by the landlord or his agent.

Rates
5. To pay council, water and sewerage rates and land tax promptly.

Copy Lease
6. To provide the tenant with a copy of the lease when he is given possession of the premises, and with a stamped copy of the lease signed by both parties as soon as practicable.

Receipts
7. To issue rent receipts showing the tenant's name, the address of the premises, the amount received, the date of payment and the period for which the payment was made.

THE TENANT AGREES

Rent
8. To pay the rent promptly and in advance.

Residence
9. To ensure that the premises are used only as a residence.

Care of Premises
10. To take care of the premises and to keep them in a clean condition, and in particular:
(a) To clean the premises regularly with special attention to the kitchen, bathroom and appliances.
(b) To put nothing down any sink, toilet or drain likely to cause obstruction or damage.
(c) To wrap up and place garbage in a suitable container.
(d) To keep the grounds and gardens tidy and free from rubbish.
(e) To take special care of the items leased with the premises including the furniture, furnishings and appliances.
(f) To make no alterations or additions to the premises including locks and to erect no sign or antenna, without the written consent of the landlord.
(g) To do no decorating that involves painting, marking or defacing any part of the premises or fixing posters, without the written consent of the landlord.
(h) To keep no animals or birds at the premises, without the written consent of the landlord.
(i) To ensure that nothing is done that might prejudice any insurance which the landlord has in relation to the premises.
(j) To notify the landlord promptly of any loss, damage or defect in the premises.
(k) To notify the landlord promptly of any infectious disease, or the presence of rats, cockroaches or similar pests.

Nuisance
11. To avoid any disturbance, nuisance or annoyance to neighbours whether by noise, behaviour, obstruction or other actions on the part either of the tenant or of persons on the premises with his consent.

Charges
12. To pay all charges for fuel, gas, electricity and telephone and excess water, garbage or sanitary charges, relating to the tenant's use of the premises.

Telephone
13. To leave any telephone service already installed at the commencement of the lease, and to sign and deliver a transfer of the service to the landlord or as he may direct on termination of the lease.

Indemnity
14. To compensate or meet all claims of
(i) the landlord for the loss of or damage to part or whole of the premises,
(ii) any person for the loss of or damage to his personal property, and
(iii) any person for personal injury
as a result of neglect or a deliberate or careless act on the premises or a breach of any condition of the lease, by the tenant or any person on the premises with his consent. In these circumstances, the tenant shall meet all claims whether they are made directly against him or against the landlord.

BOTH PARTIES AGREE THAT

Inspection Record
15. (a) Prior to the commencement of the lease the landlord or his agent shall inspect the premises and make a record of their condition, noting their cleanliness and state of repair and the working order of appliances. The landlord or his agent shall immediately sign and deliver two copies of the inspection record to the tenant. The tenant shall check the record, noting any discrepancy, and sign and return one copy to the landlord or his agent within seven days.
(b) On the termination of the lease the premises shall again be inspected and each party shall note their condition by way of comparison with the record of the earlier inspection. Any deterioration caused by time or reasonable use shall be taken into account.

Security Deposit
16. (a) The security deposit is to secure the landlord against any failure by the tenant to comply with those conditions of the lease relating to the care or repair of the premises or the payment of rent or charges. In the event of such failure the landlord is entitled to apply the security deposit wholly or in part to any loss or damage sustained and to claim payment accordingly.
(b) The landlord or his agent shall lodge the security deposit with the Rental Bond Board in accordance with the Landlord and Tenant (Rental Bonds) Act, 1977.
(c) The landlord or his agent and the tenant may apply individually or jointly to the Board for repayment of the whole or part of the security deposit. Where the landlord or his agent applies for repayment to himself, he shall provide the tenant with details of the amount claimed and copies of relevant quotations, accounts, and receipts.
(d) The tenant shall not apply the security deposit as part of the rent, without the prior written consent of the landlord.

Repairs
17. (a) The tenant shall have repaired in a proper way any damage to the premises resulting from neglect or a deliberate or careless act or a breach of any condition of the lease, by the tenant or any person on the premises with his consent.
(b) Except as in Condition 17 (a), the landlord shall carry out without delay all reasonable repairs relating to the tenant's ordinary use and occupation of the premises, having regard to the condition of the premises at the commencement of the lease.

Access
18. (a) The landlord shall respect the tenant's right to privacy.
(b) The tenant shall allow access to the landlord and his agent:
(i) when it is reasonable that they should view the condition of the premises or carry out repairs, or
(ii) to erect 'to let' signs and to show the premises to intending tenants, after notice terminating the lease has been given, or
(iii) to erect 'for sale' signs and to show the premises to intending purchasers, after the landlord has given the tenant notice of his wish to sell.
(c) The landlord shall give the tenant reasonable notice of the time and date for such access. As far as possible it shall be convenient for both parties. It shall be between 8 am and 8 pm on any day except Sunday or a public holiday.
(d) The landlord may have access at any time with the consent of the tenant or in the case of an emergency.

Termination

19. (a) (i) Either party may terminate the lease by giving one month's written notice at any time during the final month of the term.
(ii) Where the lease has become a periodic lease from month to month, either party may terminate it by giving one month's written notice.
(b) The landlord shall have the right to re-enter the premises peacefully or to continue the lease as a periodic lease from week to week where:
(i) the tenant has failed to pay rent for a period in excess of fourteen days, whether formally demanded or not, or
(ii) the tenant has seriously or persistently breached any of the conditions of the lease.
(c) If the landlord intends to exercise his right to re-enter, he shall serve the tenant with a written notice stating the reason and demanding immediate possession.
(d) If the landlord intends to exercise his right to continue the lease as a periodic lease from week to week, he shall serve the tenant with a written notice stating the reason and informing the tenant of the variation to the lease. Upon service of the notice, the lease shall continue with all its conditions, except for the Term and Holding Over conditions, as a periodic lease from week to week which may be terminated by one week's written notice from either party.
(e) The landlord shall have the right to re-enter the premises if they have been abandoned without giving notice.
(f) The tenant shall have the right to terminate the lease if the landlord has seriously or persistently breached any of its conditions. He shall give the landlord fourteen days' written notice, indicating at the same time the nature of the breach.
(g) Any action by the landlord or tenant in accordance with conditions 19 (b), (c), (d), (e), or (f), shall not affect any claim for damages in respect of a breach of a condition of the lease.
(h) Upon the termination of the lease the tenant shall promptly and peacefully give vacant possession of the premises in the condition and state of repair required by conditions 10 and 17 (a) of the lease, and at the same time hand over all keys, and notify the landlord or his agent of his forwarding address.

Parting with Possession

20. (a) The tenant shall not transfer his lease or sublet or part with possession of the premises, except with the written consent of the landlord.
(b) The landlord shall not withhold his consent unreasonably, provided that the tenant gives him fourteen days' notice and the tenant pays any reasonable expenses involved in the landlord giving consent.

Occupants

21. (a) The tenant shall have the right to permit other persons to reside in the premises, provided that the number of persons does not exceed the number allowed by the lease and that the tenant retains possession of the premises.
(b) The tenant shall ensure that occupants and other persons who come into the premises with his consent do not breach any of the conditions of the lease.

Unforeseen Event

22. If something happens to the premises so that the whole or a substantial part can no longer be occupied, and the parties are in no way responsible, then either party shall have the right to terminate the lease, provided written notice is given within fourteen days of the event.

Mitigation

23. Where there has been a breach of any of the conditions of the lease by either party, the other party shall take all reasonable steps to minimise any resultant loss or damage.

Notices

24. Any written notice required or authorised by the lease:
(a) Shall be served on the tenant personally, or by pre-paid post to the premises, or by being left there in the post box.
(b) Shall be served on the landlord by personal service on him or his agent, or by pre-paid post to his or his agent's address as shown in the lease or as notified in writing, or by being left in the post box at that address.
(c) Shall be deemed to be served on the second week day after posting, where it is sent by pre-paid post.
(d) May take effect on any day of the month if it relates to the termination of a lease within one month of the end of the term or the termination of a periodic lease, provided it gives the required length of notice.

Payment after Notice

25. (a) After a notice terminating the lease or demanding immediate possession has been given, any acceptance of or demand for rent or money by the landlord shall not of itself be evidence of a new lease with the tenant or alter the legal effect of the notice.
(b) Where the tenant unlawfully remains in possession after the termination of the lease, the landlord is entitled, in addition to any other claim, to payments equal to the rent as compensation for the use and occupation of the premises.

Disputes

26. In any dispute or proceeding between the parties, both parties shall act reasonably and without delay and make all admissions necessary to enable the real issues to be decided.

Costs

27. (a) The tenant shall pay all reasonable costs relating to the lease, including the stamp duty.
(b) The landlord shall pay all other costs relating to his management of the premises.

Statutes

28. (a) Each party shall observe all relevant statutes, statutory regulations and by-laws relating to health, safety, noise and other housing standards with respect to the premises.
(b) The provisions of Parts II to V inclusive of the Landlord and Tenant (Amendment) Act, 1948, which deal in part with fair rents and the recovery of possession of prescribed premises, do not apply to the premises covered by this lease.

Flats and Strata Units

29. (a) Where the premises are a strata unit (being a lot the subject of a strata scheme);
(i) the landlord shall, within seven days of the commencement of the lease, provide the tenant with a copy of the by-laws for the time being in force in respect of that strata scheme, and
(ii) the tenant (being the occupier of a lot) shall accordingly comply with those by-laws.
(b) Where the premises are a flat (not the subject of a strata scheme), the tenant shall comply with the special conditions for flats forming part of this lease (attached hereto).

Interpretation

30. (a) The word 'agent' includes the landlord's estate agent or managing agent and any other person authorised to act on behalf of the landlord.
(b) The word 'landlord' includes the heirs, executors, administrators and assigns of the landlord, and where the context permits includes the landlord's agent.
(c) The word 'tenant' includes the executors, administrators and permitted assigns of the tenant.
(d) The word 'premises' includes any fixtures, fittings, and appliances installed in the premises, and where the context permits includes any part of the premises.
(e) The word 'month' shall mean calendar month.
(f) Where the context permits, words expressed in the singular include the plural and vice versa, words expressed in the masculine gender include the feminine, and words referring to a person include a company.
(g) Where two or more tenants or landlords are parties, the conditions of the lease shall bind them jointly and individually.
(h) When this lease is signed by both parties and witnessed, it is a deed at law from that time.
(i) Headings in the margin have been inserted to assist the parties but they do not form a legal part of the lease.

J1443

5A | 9784 | 84

No. 5A/ . Registered pursuant to Section 5A of the Landlord and Tenant (Amendment) Act 1948, as amended by subsequent Acts, in the office of the Rent Controller, this 17th day of October 19 84.

(DELEGATE OF THE) RENT CONTROLLER

PLEASE READ THIS LEASE THROUGH CAREFULLY BEFORE AND AFTER SIGNATURE

We hereby enter into this lease and agree to all its conditions

SIGNED BY THE LANDLORD

in the presence of.....
Name of Witness

.....
Signature of Witness

.....
Signature of Landlord

SIGNED BY THE TENANT

in the presence of.....
Name of Witness

.....
Signature of Witness

.....
Signature of Tenant

CERTIFICATES UNDER SECTION 5A OF THE LANDLORD AND TENANT (AMENDMENT) ACT, 1948, AS AMENDED

I, ...

a Clerk of Petty Sessions/a ~~Solicitor~~ of Court House Paddington instructed and employed independently of the landlord, hereby certify that I explained this lease to the tenant before he executed it in my presence and I witnessed his signature.

Dated this eighth day of June 19 84

I, ...

~~the Agent~~/the Solicitor for the landlord hereby certify that this document is a true copy of the original lease.

Dated this 9 day of October 19 84.

.....

NOTE

A. Where the premises were erected before 16th December 1954, and have not been the subject of a lease effectively registered with the Rent Controller on or since 1st January 1969, it may be necessary for the above certificates to be signed and this lease registered with the Rent Controller — see Section 5A of the Landlord and Tenant (Amendment) Act, 1948, as amended.

B. It is advisable for the landlord to take out a comprehensive policy of insurance covering his interest in the premises.

C. It is advisable for the tenant to insure his own possessions and insure against his liability for public risk as the occupier.

D. The tenant should make necessary arrangements with the appropriate authorities concerning the supply of services.

E. The amount of the security deposit is limited by law to be not more than the rent for the first four weeks of the lease where the premises are unfurnished, and not more than the rent for the first six weeks of the lease where the premises are furnished.

R.T. Kelly Pty. Ltd. 470 Elizabeth St., Surry Hills Sydney. AUTHORISED PRINTERS FOR THE REAL ESTATE INSTITUTE OF N.S.W COPYRIGHT FORM.

Appendix 3
Blank 17A Agreement

17A AGREEMENT

TENANCY SERVICE - RENTAL CONTROL

LANDLORD AND TENANT (AMENDMENT) ACT, 1948
AGREEMENT UNDER SECTION 17A

This Agreement made between the ***Lessor*** _____

of _____

and the ***Lessee*** _____

of _____

concerning the ***Rented Premises*** _____

_____

*hereby agree that the rental shall be $*_____ *per* _____

*to be leased * Unfurnished or furnished*

commencing on the _____ *day of* _____ *19*____

** Delete whichever is not applicable*

Signature of Lessor _____

Dated this _____ *day of* _____ *19*____

in the presence of _____

Signature of Lessee _____

Dated this _____ *day of* _____ *19*____

in the presence of _____

Landlord & Tenant (Amendment) Act 1948
CERTIFICATE UNDER SECTION 17A (6)

Name _____
solicitor or clerk

of _____
Practice

of address _____

I hereby certify in my capacity as Solicitor of the Supreme Court of NSW instructed and employed independently of the Lessor Or a Clerk of the Local Court of NSW that the execution of the agreement by the Lessee was witnessed by me and that I explained the agreement to the Lessee before it was executed by him/her.

Signature of Solicitor or Clerk _____

Dated this _____ *day of* _____ *19*____

Name _____
solicitor or agent

of _____
business name

address of _____

I hereby certify in my capacity of Solicitor or Agent for and on behalf of the Lessor certify that this document is a true copy of the original agreement herein.

Signature of Solicitor or Agent _____

Dated this _____ *day of* _____ *19*____

It is noted that the Rental Bond Board will be operating from Coffs Harbour from 1 July 2014. It is unknown who will be responsible for acting as the Fair Rents Clerk to register 17A agreements. See Chapter 2, Searching the history of the tenancy for details on where and who to send the 17A agreement to for it to be registered.

Appendix 4

Protected Tenancies Factsheet 5, 'Grounds for eviction'

OPTS
OLDER PERSONS TENANCY SERVICE
ADVICE & ADVOCACY FOR OLDER TENANTS

Protected Tenancies FACT SHEET

Grounds for Eviction

Find out about grounds for eviction. This factsheet is for tenants housed under the *Landlord and Tenant (Amendment) Act 1948*

Tenants covered by the *Landlord and Tenant (Amendment) Act 1948* are protected tenants who cannot be evicted without cause. There is a right of appeal to the Supreme Court against the decision of a magistrate in a Local Court in eviction proceedings, but only if the magistrate has made an error of law. An appeal must be lodged within 28 days of the original decision of the magistrate.

Section 62(5) of the 1948 Act sets out the grounds for issuing a notice, which include:

(a)(i) Failing to pay rent for at least 14 days, if you are a tenant of less than 12 months.

(a)(ii) Failing to pay rent for at least 28 days, if you are a tenant of more than 12 months.

(b) Failing to perform or observe a term of the lease.

(c) Failing to take reasonable care of the premises, or any goods leased with the premises.

(d) Conduct that is a nuisance or annoyance to adjoining or neighbouring occupiers.

(d)(1) Using the premises for prostitution or soliciting for prostitution.

(e) The tenant or any other person is convicted, during the currency of the lease, of any offence arising out of the use of the premises for any illegal purpose, or a court finds or declares that the premises have been used for an illegal purpose during the currency of the lease.

(f) The tenant has given notice in writing of intention to vacate the premises and the landlord agrees to sell or let the premises and would be seriously prejudiced if possession of the premises was not obtained.

(g) If the premises are a dwelling house, the landlord reasonably requires the premises for personal occupation as a residence either for the landlord or for someone dependent on the landlord who ordinarily resides with the landlord.

(h) The premises are used as, or have been acquired for use as, a parsonage, vicarage, presbytery or other like premises and are reasonably required for the personal occupation as a residence of a minister of religion or an unordained person who performs all the duties of a minister for religion.

(i) The landlord is a trustee and the premises are reasonably required by a beneficiary under the trust for the beneficiary's personal occupation as a residence or for a dependent who ordinarily resides with the beneficiary.

(j) The landlord carries on a hospital or nursing service or is a trustee for a person, body or authority who carries on such a service and the premises is reasonably required by the hospital or nursing service, including the accommodation of staff.

(k) The tenant occupies the premises as a term of employment and the landlord reasonably requires the premises for another employee, or prospective employee.

(l) The landlord has agreed to sell the premises but only if the agreement requires the purchaser to pay at least one fourth of the whole purchase price within 12 months of the date of the agreement, entitles the purchaser to vacant possession of the premises, and the purchaser reasonably requires the premises for personal occupation as a residence for the purchaser or for a dependent who ordinarily resides with the purchaser.

(m) The premises are reasonably required by the landlord for reconstruction or demolition.

(n) The tenant became the tenant by virtue of an assignment or transfer that the landlord did not consent to or approve of.

(o) The tenant has sublet the premises, or a part of the premises, without the consent or approval of the landlord.

(p)(i) The tenant has parted with possession of the premises without the landlord's consent or approval.

Factsheet 5

(p)(ii) The tenant has ceased to be a bona fide occupant of the premises for more than 6 months without the consent of the landlord.

(q) The tenant is, by subletting or parting with possession of the premises, receiving rents or profits of 120 per cent or more of the rent the tenant pays.

(s) The landlord is a person, body or authority carrying on a school or education establishment, or a trustee for such a person, body or authority and the premises is reasonably required for the school or education establishment, including accommodation of the staff or students.

(t) The landlord owns the premises, is a male aged 65 years or more or a female aged 60 years or more, owns no more than two other houses in addition to the house the landlord resides in, has a household income not exceeding the National basic wage, and the premises are required for sale with vacant possession.

(u) The tenant has reasonably suitable accommodation available and has an interest in the land on which that accommodation is situated.

(v) For shared accommodation, the landlord requires the premises and is aged 65 years or more and, for three years up to and including the date the notice to quit was given, there as only one lease of shared accommodation in force at any one time.

(w) The tenant's means - together with the means of anyone ordinarily residing in the premises other than a child under the age of 16 years or a subtenant, boarder or lodger who is not a relative are such that it is reasonable that the tenant and any such person would acquire or lease other premises.

(x) The landlord is a personal representative or trustee of the estate of a deceased person and holds the premises subject to a trust for sale, and the value of the premises determined for the purposes of the Stamp Duties Act 1920 is at least one-half the dutiable estate.

(y) The landlord has available for the tenant's occupation as a residence reasonably suitable alternative accommodation erected with assistance provided under the Commonwealth Aged Persons Homes Act 1954 (as amended) which does not exceed the rental being paid by the tenant.

Appendix 5

Protected Tenancies Factsheet 4, 'Notice to quit'

OPTS
OLDER PERSONS TENANCY SERVICE
ADVICE & ADVOCACY FOR OLDER TENANTS

Protected Tenancies

FACT SHEET

Notice to Quit

What is a valid 'Notice to Quit'? This factsheet is for tenants housed under the Landlord and Tenant (Amendment) Act 1948.

Ending a Tenancy

To end the tenancy of a prescribed dwelling, the landlord must first serve a valid written Notice to Quit. Contact your local tenants service or OPTS for advice if you are served a Notice to Quit.

If the tenant disputes the Notice to Quit, an eviction cannot take place unless the landlord obtains an eviction order from the Local Court. The Consumer, Trader and Tenancy Tribunal does not have jurisdiction if the dwelling is a prescribed dwelling.

Unless a ground can be proved, the Local Court will not grant an eviction order, and the landlord cannot evict the tenant. Unlike the Residential Tenancies Act 1987, the 1948 Act does not include provisions for a 'no grounds' notice.

The magistrate has the power to refuse eviction if the tenant will suffer hardship if evicted.

This may not be difficult to demonstrate if the tenant is an older person on a low income, and is dependent on an environment with which the tenant has grown familiar over many years.

'Notice to Quit'

The Notice to Quit must be signed by the landlord or someone authorised by the landlord and must be addressed to the tenant and clearly identify the dwelling.

The notice does not have to be served personally on the tenant. It may be served by post, or handed to another resident of the dwelling who is over 16 years of age apparently residing in or in occupation of the premises. If the notice is not served personally and the tenant denies receiving it, the landlord must prove that it came to the tenant's attention.

Period of 'Notice to Quit'

In most situations, the minimum period of a Notice to Quit is 7 days, plus an additional 7 days for each 6 months of occupation up to a maximum of 30 days. For shared accommodation, only 14 days' notice is required.

The landlord can give 14 days' notice if the ground for eviction alleges a fault or omission by the tenant, for example failure to take reasonable care of the dwelling or the tenant has given notice to vacate and the landlord has sold or leased the premises after receiving the notice. Only 7 days' notice is required if the landlord alleges the premises are being used for prostitution, or soliciting for prostitution.

The Notice to Quit must include the ground or grounds being used by the landlord and must list the particulars (details). See 'Factsheet 5: Grounds for Eviction'. A Notice to Quit cannot be given within 6 months of a Fair Rents determination following an application by the tenant, except on limited grounds.

If the Local Court refuses to make an eviction order, the landlord cannot give a Notice to Quit within 12 months of the Court's decision.

Appeals

The tenant can appeal to the Supreme Court against an eviction order, but only if the magistrate has made an error of law. An appeal must be lodged within 28 days of the original decision of the magistrate.

Factsheet 4

Example of Notice to Quit

NOTICE TO QUIT

Lessor: <Name 1>
Lessee: <Name 2>
Premises: <Address>

TAKE NOTICE that you are served by me <Name 1> your lessor or the duly authorised agent for <Name 1> your lessor TO QUIT AND DELIVER UP POSSESSION of all those prescribed premises you hold as tenant at <Address> at the expiration of thirty one (31) days from the date on which this notice to quit is served (not including the date of such service).

THIS NOTICE is given pursuant to section 62 (5) of the Landlord and Tenant (Amendment) Act 1948-87 on the following grounds:

1. '(m) that the premises are reasonably required by the lessor for reconstruction or demolition'.

PARTICULARS

It is proposed to reconstruct the premises as follows:

(i) Demolish defective ceilngs and floor throughout and build new ceilings and floors
(ii) Demolish roof and defective roof timbers and build new tiled roof
(iii) Generally take all steps necessary to put premises into good repair.

YOU ARE HEREBY REQUIRED to inform me, within fourteen (14) days after receipt of this notice, whether or not you are a protected person wthin the meaning of Part V of the Act

Date this .... day of ...

Signed
(<Name 1>, Lessor)