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**Tenants' Rights in NSW**

by

**Rachel Simpson**

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# **Tenants' Rights in NSW**

**by**

Rachel Simpson

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## EXECUTIVE SUMMARY

Almost 30% of occupied private dwellings in NSW are rented. The residential rental sector consists of public rental accommodation, private rental accommodation, caravan parks and manufactured home estates, boarding houses and community housing. The private rental market is the largest, comprising 21.7% of dwellings. Public housing accounts for 5.6% of dwellings and community housing for 0.4%. A statistical profile of residential tenants in NSW is contained in Part 2, pages 1 to 6.

A history of the development of residential tenants' rights is contained in Part 3, pages 6 to 11. Landlord and tenant legislation was first introduced into NSW in 1847. The first recorded tenants' organisation, the NSW Rent Payers Association, existed from 1910 to 1916. A period of rent control began with the *Fair Rents Act 1915* and lasted in NSW into the 1950s (NSW was the last State to relax rent control). Throughout the Depression years, anti-eviction campaigns were conducted by the Unemployed Workers Movement, and the Lang government passed ejection postponement legislation in an attempt to alleviate some of the problems faced by tenants. Rent control was the dominant policy throughout World War II, during which time some states adopted the Commonwealth's *National Security (Fair Rents) Regulations*, agreed upon by a Premiers' Conference in September 1939. New South Wales did not adopt these initial regulations, although the 1941 *National Security (Landlord and Tenant) Regulations* did apply in NSW. The 1970s to 1980s was a significant period for the development of tenants' rights. The Tenants Union of NSW had its formation meeting in 1976 and at about the same time the Department of Fair Trading established a section to deal with tenants' problems. A committee was established by the Minister for Consumer Affairs in 1978 to look at changing the 1899 landlord and tenant legislation. This in fact happened in 1987 with the passage of the *Residential Tenancies Act*. The rental bond scheme and the Residential Tenancies Tribunal were also established during this period.

The main piece of legislation in this area is the *Residential Tenancies Act 1987* (NSW). The scope and operation of this Act is discussed in Part 4.1, pages 12 to 16. The discussion focuses on landlord obligations to the tenant, tenant obligations to the landlord, tenant rights with respect to the property and the termination of tenancy. The rental bond scheme is discussed in Part 4.2, pages 16 to 18 and the Residential Tribunal, which replaced the Residential Tenancies Tribunal from 1 March 1999, in Part 4.4, pages 20 to 21. Following the commencement of the *Residential Parks Act 1998*, residential tenancy agreements between landlords and residents of caravan parks and manufactured home estates have been removed from the *Residential Tenancies Act 1987* in order to better reflect the particular needs of those residents. The operation of the *Residential Parks Act 1998* is discussed in Part 4.3, pages 18 to 20.

The effect on rental prices and the availability of rental accommodation of the 2000 Olympics, land tax and the proposed GST are issues of concern to tenants and landlords in NSW. These issues are examined in Parts 5.1 to 5.3, pages 21 to 26. The position of boarders and lodgers, currently excluded from the operation of the *Residential Tenancies Act 1987* is discussed in Part 5.4, page 26. Similarly, residents of retirement villages are regulated separately from the *Residential Tenancies Act 1987*, by a mandatory code of practice, the appropriateness of which is discussed in Part 5.5, pages 27 to 28.

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## 1.0 INTRODUCTION

In late 1998 the Government passed three major pieces of legislation which affect tenants' rights in NSW: the *Residential Tenancies Amendment (Social Housing) Act 1998* which was passed with the aim of facilitating the removal of so-called "problem tenants" from public or community housing; the *Residential Park Act 1998* which codifies the law in relation to caravan parks and relocatable home parks, and the *Residential Tribunal Act 1998* which was part of a rationalisation and re-organisation of all the tribunals under the Fair Trading portfolio into two tribunals - the Fair Trading Tribunal and the Residential Tribunal. These statutory changes followed a number of reviews undertaken by the Department of Fair Trading into various matters of concern to tenants in NSW, including residents of caravan parks and relocatable homes<sup>1</sup>, residents of retirements villages<sup>2</sup> and those who might be negatively affected by the 2000 Olympics.<sup>3</sup>

This paper examines the legal framework of tenants' rights in NSW. It begins by statistically describing the characteristics of residential tenants in NSW, and provides a brief history of tenants' rights in this State. The main legislative instruments are examined in some detail in Part 4 of the paper, and issues of concern to tenants and landlords in NSW, including the impact of the Olympic Games, the GST and special problems facing boarders and lodgers and retirement village residents are examined in Part 5.

## 2.0 A PROFILE OF RESIDENTIAL TENANTS IN NSW

This section presents a statistical portrait of housing in Australia and NSW, the number of dwellings rented and the nature of the rental. It will then look more closely at some of the characteristics of public and private renters in NSW and caravan park and manufactured home estate residents.

In New South Wales, there was a total of 651,068 rented private dwellings (not including rent-free dwellings) at the 1996 Census date. This represents 28.5% of all occupied private dwellings in this State. The table on the following page illustrates the nature of occupation of private dwellings in NSW at the 1996 Census.

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<sup>1</sup> NSW Department of Fair Trading, *Report by the Tenancy Commissioner: review of tenancy issues of concern to residents of NSW Caravan Parks and Manufactured Home Estates*, February 1998.

<sup>2</sup> NSW Department of Fair Trading, *Review of Regulation of the NSW Retirement Village Industry - Final Report*, August 1998.

<sup>3</sup> G Cox et al, *2000 Olympics and the Residential Tenancy Market*, NSW Department of Fair Trading, February 1998.

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**Occupied Private Dwellings - dwelling structure by tenure type<sup>4</sup>**

	Separate house	Semi-detached, row or townhouse etc	Flat, unit or apartment	Other dwelling (caravan, tent, houseboat etc)	Not stated
Fully owned	770 038	51 514	68 145	18 980	15 404
Being purchased	412 337	27 894	30 537	2 501	7 996
Under a rent/buy scheme	6 153	574	1 182	200	164
Rented	275 895	84 998	233 124	14 752	12 213
Occupied rent free	21 841	1 705	4 352	8 996	619
Occupied under a life tenure	3 397	2 115	3 541	80	477
Other/not stated	54 668	8 996	25 486	4 565	6 905

The table below represents proportionately the household tenure type in Sydney and in NSW generally. This information is taken from the Department of Social Security's *Housing Assistance Act 1989 Annual Report 1995-96* and is based on unpublished data from the 1996 Census. As illustrated by these figures, NSW does not differ substantially from the national situation.

	Home Owners	Private Rental	State Housing Authority	Community Housing	Total Dwellings
Sydney	66.7%	23.5%	5.8%	0.3%	1 328 378
Rest of NSW	69.2%	19.0%	5.4%	0.6%	846 540
NSW average	67.7%	21.7%	5.6%	0.4%	2 174 918
Australia	69.0%	20.3%	5.3%	0.5%	6 496 047

## 2.1 Public tenants

Eligibility for public housing is based on gross weekly household income from all sources including wages, pensions and allowances and interest on investments. A single person must earn less than \$395 per week to be eligible. This amount increases to \$500 for a household of two people; \$580 for three people; \$665 for four people and so on.<sup>5</sup> Some

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<sup>4</sup> Australian Bureau of Statistics, *Census of Population and housing - Selected Social and Housing Characteristics for Statistical Local Areas - New South Wales and Jervis Bay*, ABS Catalogue Number 2015.1, p. 50.

<sup>5</sup> NSW Department of Housing, *Public Rental Housing: information for applicants*, <http://housing.nsw.gov.au/prpubl.html>, 22/03/99.



statistical facts relating to public renters follow:

- At 30 June 1996, there were 132,275 dwellings managed by the NSW Department of Housing.<sup>6</sup>
- Public rental properties represented 6.5% of the total occupied private dwellings in NSW at 30 June 1996.<sup>7</sup>
- There were 125,043 tenancies in public housing at June 30, 1996 and 93,174 applicant households on the waiting list.<sup>8</sup>
- Single parents with dependent children constituted the greatest group of public renters nationally in 1995-96, as the following table illustrates ('Reference person' in the table is the person in a household who is the point of reference for family structures in the household, and is usually the person who completes the Census form, eg husband or wife in a couple household, parent in a single-parent household or the person in a lone person household):<sup>9</sup>

Life Cycle Group	Percentage
Lone person only under 35	6.33%
Couple only, reference person under 35	2.12%
Couple with dependent children	22.67%
One parent with dependent children	32.35%
Couple with non-dependent children (and dependent children, if any)	5.17%
Couple only, reference person over 55	8.72%
Lone person only over 65	22.64%

- In 1996, the mean weekly rent paid by a public tenant in NSW was \$61, which was comparable to the national average of \$62 per week.<sup>10</sup> The mean weekly rent paid

<sup>6</sup> NSW Department of Housing, *Annual Report 1996-97*, p. 10.

<sup>7</sup> Australian Bureau of Statistics, *Australian Social Trends 1998*, Catalogue Number 4102.0, p. 145.

<sup>8</sup> Dept Housing, n 6, p. 7. It is not the purpose of this paper to discuss strategies for public housing. See further Briefing Paper No 8/96, *Housing for Low-Income Earners in New South Wales: A Survey of Federal State Policy* by John Wilkinson.

<sup>9</sup> Australian Bureau of Statistics, *Housing Occupancy and Costs Australia, 1996-96*, Catalogue Number 4130.0, pp. 24-25.

<sup>10</sup> ABS, n 7, p. 145.

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for public housing in Sydney was \$60.<sup>11</sup>

- As a proportion of income, mean housing costs (rent) represented 17% nationally for public tenants.<sup>12</sup>
- The mean weekly income for public renters nationally in 1995-96 was \$360.<sup>13</sup>
- 91% of public renters in NSW received some sort of government benefit in 1996-97.<sup>14</sup> Government pensions and allowances were the principle source of income for 77.6% of public renters, Australia-wide in 1996-97. The principle source of income was wage or salary for 19.4% of public renters in the same period. Government pensions and allowances contributed less than 1% to gross income for only 10.4% of public renters.<sup>15</sup>

### **2.1.1 Community housing tenants**

Community housing is funded by the Commonwealth and State Governments and managed by non-profit housing associations and housing co-operatives. In order to be eligible for community housing, tenants must usually be eligible for public housing. Community housing generally works using a "head lease" arrangement, where the organisation leases the premises and then sub-leases to a tenant at a reduced rent. The following statistics regarding community housing are taken from the Office of Community Housing publication *1997/98 in review*:<sup>16</sup>

- Approximately 6,000 dwellings were managed by non-profit community housing organisations during 1997-98. This represents approximately 0.3% of total dwellings in NSW, and was an increase of almost 25% from the previous year.
- Single persons and sole parents constitute over 75% of community housing tenants.
- Over 10% of residents have a disability of some kind.
- 76% of residents receive an income of less than \$300 per week. Just over 12% of residents receive income from wages. The median income of all households in

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<sup>11</sup> 'Mean housing costs' refers to the total weekly housing costs paid by a group (public renters) and divided by the number of households in that group. ABS, n 9, p. 33, 63.

<sup>12</sup> Ibid, p. 43.

<sup>13</sup> Ibid, p. 22.

<sup>14</sup> NSW Department of Housing, n 6, p. 7.

<sup>15</sup> Australian Bureau of Statistics, *Income Distribution Australia*, 1996-97, Catalogue Number 6523.0, p. 23.

<sup>16</sup> Dept Urban Affairs and Planning, Office of Community Housing *1997/98 in review*, p. 4.

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community housing is approximately \$14,000 per annum. More than 90% of community housing tenants pay 25% or less of their income in rent.<sup>17</sup>

- The median length of tenancy for community housing tenants is less than two years. This compares to just under eight years for public housing tenants.<sup>18</sup>
- Approximately 18,700 people were waiting to be housed by community housing. Just over half these people had been waiting for more than 12 months.

## 2.2 Private tenants

The majority of renters in Australia do so privately (21.7% of privately occupied dwellings in NSW are rented privately). The Government, in addition to providing public housing for low-income tenants, also provides rental assistance for low-income renters in the private rental market. Some statistical facts relating to private tenants follow:

- At 30 June 1998, there were 479, 872 rental bonds lodged with the Rental Bond Board, an increase of 12,931 from the previous year.<sup>19</sup>
- The mean weekly private rent in NSW in 1996 was \$172. This was the highest in Australia (ACT was second highest at \$170, followed by the Northern Territory at \$169) and significantly higher than the national average of \$148.<sup>20</sup>
- The mean weekly income for private renters nationally in 1995-96 was \$726.
- As a proportion of income, mean housing costs (rent) represented 20% nationally for private tenants.<sup>21</sup> This compares favourably to owners with a mortgage whose mean housing costs represent 19% of their income. By way of comparison, mean weekly housing costs for an owner without a mortgage pays represent 3% of income.
- The vacancy rate for private residential properties in Sydney at June 30, 1996 was less than 2%.<sup>22</sup>
- The principle source of income was wage or salary for 23.5% of private renters in

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<sup>17</sup> Ministerial Taskforce on Affordable Housing, *Affordable housing in New South Wales - the need for action*, May 1998, p. 16.

<sup>18</sup> Ibid.

<sup>19</sup> NSW Department of Fair Trading, *Annual Report 1997-1998*, volume 1, p. 14.

<sup>20</sup> ABS, n 7, p. 145.

<sup>21</sup> ABS, n 9, p. 43.

<sup>22</sup> Department of Social Security, *Housing Assistance Act 1989 Annual Report 1995-96*, p. 5.

1995-96; for 15.5% it was own business or partnership income; 11.3% private income and 17.5% government pensions and allowances.<sup>23</sup>

- Couples with dependent children constituted the largest proportion of private renters nationally in 1995-96, as the following table shows ('Reference person' in the table is the person in a household who is the point of reference for family structures in the household, and is usually the person who completes the Census form, eg husband or wife in a couple household, parent in a single-parent household or the person in a lone person household).<sup>24</sup>

Life Cycle Group	Percentage
Lone person only under 35	23.09%
Couple only, reference person under 35	17.78%
Couple with dependent children	30.78%
One parent with dependent children	13.37%
Couple with non-dependent children (and dependent children, if any)	5.19%
Couple only, reference person over 55	4.10%
Lone person only over 65	5.68%

- 367,600 persons received private rental assistance in 1996-97.<sup>25</sup>

### 2.3 Caravan park and manufactured home estate residents

Caravan park and home estate residents are unique insofar as they usually own their dwelling but rent the space upon which it sits, although the actual dwelling may also be rented (21.5% of caravan park residents rented their dwelling according to the 1996 Census). Some statistics relating to caravan park and manufactured home residents follow:

- There are 942 caravan parks and manufactured home estates in NSW which provide sites for long term occupation.<sup>26</sup> The highest number of caravan parks offering long-term accommodation is in the Mid-North Coast statistical region (65). Other regions with high number of long-term caravan parks are Sydney, which includes Gosford and Wyong areas (44), and Richmond/Tweed (40).<sup>27</sup>

<sup>23</sup> ABS, n 9, p. 23.

<sup>24</sup> ABS, n 9, pp. 24-25.

<sup>25</sup> ABS, n 3, p. 145.

<sup>26</sup> Dept Fair Trading, n1, p. 74.

<sup>27</sup> Australian Bureau of Statistics, *Tourist Accommodation New South Wales*, ABS Catalogue Number 8635.1, tables 10 and 11.

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- There were a total of 26,835 occupied private dwellings in NSW in the “caravan, cabin, houseboat” category in the 1996 Census, with a total of 45, 930 residents. This represents 1.2% of all occupied private dwellings in NSW and 0.8% of the State’s population.<sup>28</sup>
  - 82.8% of residents in the category live in a caravan park or manufactured home estate. The remaining 17.2% live in a marina, accommodation for the retired or aged or some other location.<sup>29</sup>
  - Only 22.4% of residents are employed - the majority of residents are not in the labour force (63.0%) or unemployed (10.3%).<sup>30</sup>
  - 17.4% of residents have a household income of \$500 per week or over; 27.4% have a household income of less than \$200; 26.3% of between \$300 and \$399 and 10.7% between \$400 and \$499.<sup>31</sup>
  - The majority of residents are over the age of 50 (58%). Only 29.8% of residents are under 40 years of age, the remaining 12.2% being between 40 and 49 years of age.<sup>32</sup>
  - Since 1988 there has been an increase of 21% in approved long-term sites provided in caravan parks and manufactured home estates. This compares to an increase of only 1% in tourist sites.<sup>33</sup>

### 3.0 HISTORY OF TENANTS’ RIGHTS IN NSW

#### *Pre-World War I*

Landlord and tenant legislation was first introduced in NSW in 1847. However, this Act did little more than stop landlords from pursuing extreme measures in seeking to recover unpaid rent, and prescribe procedures which were to be followed when evicting tenants. The 1850s Gold Rush saw a shortage of accommodation and subsequent steep increases in rent prices and prompted the *Tenements Recovery Act 1853* which contained only marginal improvements for tenants, and failed to improve the quality of rental housing. Many older

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<sup>28</sup> ABS, n 4, p. 51.

<sup>29</sup> Ibid, p. 52.

<sup>30</sup> Tenancy Commissioner, n 1, p. 74.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> P Crittenden, MP, Residential Parks Bill, second reading speech, NSWPD, 28 October 1998, p. 9172.

tenements were described in 1860 as “unfit for the occupation of human beings”.<sup>34</sup> In response to such concerns, a public health act was passed in 1896, which set out minimum building and health standards. The Act compelled landlords to provide housing which was fit for human habitation.<sup>35</sup>

The first *Landlord and Tenant Act* was passed in 1899. This Act, which remained the basis of residential tenancies until 1987 (although it is still in force) consolidated the various tenancy laws then in existence and was based on a feudal system of land tenure. In relation to tenants' rights, the Act was limited to prescribing eviction procedures landlords must follow. The Act laid down a judicial process for the eviction of tenants, and also allowed for “distress for rent” whereby a landlord could enter premises to seize and sell goods to recover the unpaid rent. This practice was in force until abolished by the *Landlord and Tenant Amendment (Distress Abolition) Act 1930*.<sup>36</sup>

### **World War I**

The first recorded tenants' organisation in NSW was the NSW Rent Payers Association. This organisation existed from 1910 to 1916 and was instrumental in securing the passage of the *Fair Rents Act 1915*. This Act was Australia's first experience with rent control, and applied to leases of less than three years' duration and where the rent payable was less than £3 per week. The operation of the Act was restricted to Sydney. The Act established a complicated formula for determining rents, but stated that any rent determined under this formula was not to exceed the rent payable at 1 January 1914, except in exceptional circumstances. Under the Act a landlord had to show reasonable cause for evicting a tenant.<sup>37</sup> The Rent Payers Association also represented tenants before the Fair Rents Court, established under the Act. Amendments to the *Fair Rents Act 1915* included: the *Fair Rents (Amendment) Act 1920* which outlawed side payments such as ‘key money’ and prohibited discrimination against tenants with children; the *Fair Rents (Amendment) Act 1926* which specifically set out a series of grounds upon which an eviction could be made, including failure to pay rent, being a nuisance to neighbours, using the premises for immoral or illegal purposes and a reasonable requirement by the owner for personal occupancy of the premises, and the *Fair Rents (Amendment) Act 1928*, which repealed the *Fair Rents Act 1915*, effective from 1 July 1933. The 1915 rent standard was dropped, and the duration of rent determinations was reduced to one year. Fair rents legislation was removed from the statute books completely in 1937.<sup>38</sup>

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<sup>34</sup> Sir Henry Parkes, quoted in P Mortimer, *Unfinished Business - the story of the Tenants' Union of NSW 1976-1996*, 1996, p. 5.

<sup>35</sup> P Mortimer, n 34, p. 5.

<sup>36</sup> Department of Fair Trading, *Review of Residential Tenancy Legislation Issues Paper*, March 1998, p. 6.

<sup>37</sup> R Albon, ‘Australia: History and Overview’, in R Albon (ed), *Rent Control: Costs and Consequences*, Sydney, 1980, p. 87.

<sup>38</sup> *Ibid*, pp. 88-89.

### ***Depression Years***

The Depression saw many tenants evicted for failing to pay their rents. During the Anti-Eviction Campaign of 1930-31, action was taken by the Unemployed Workers Movement in Sydney, culminating in sieges which came to be known as “eviction riots”. Major confrontations occurred between police and tenants in Bankstown and Newtown. Action was also taken in Newcastle and Cessnock, where unions declared houses “black” where an eviction had taken place. No one would rent these houses, leaving them to rot.<sup>39</sup> Two Acts were passed by the Lang government in response to this economic hardship: the ***Ejectments Postponement Act 1931*** which prohibited eviction from a dwelling house without an order of the court, in which case the landlord could not evict the tenant for a period of three months from the date of application for the order. If the courts could be shown that the rent could not be paid, the period could be extended indefinitely. The ***Reduction of Rent Act 1931*** reduced rents by 22.5% and made leases that did not acknowledge this reduction illegal. The landlord could apply to the Courts for permission to charge a higher rent in exceptional circumstances. A change in government saw the passage of the ***Landlord and Tenant (Amendment) Act 1932*** which repealed the ***Ejectments Postponement Act 1931*** and was more favourable to landlords. Under this Act, an owner could not take possession of any premises without the express or implied consent of the occupier or order of the court. A stay postponement of eviction may be granted by the courts for non-payment of rents, after which time a further one month’s stay of grace may also be granted in exceptional circumstances, following which time the landlords could remove the tenants. Additionally, landlords were given the right under this Act to have the rent payable under a lease made according to the ***Reduction of Rent Act 1931*** redetermined, on the basis of “fairness”, as decided by the court.

### ***World War II***

To alleviate the effects of the War on rents, the Premiers’ Conference agreed to the ***National Security (Fair Rents) Regulations*** in September 1939. The regulations, relying on the defence power in the Commonwealth Constitution, gave control of rents to the Commonwealth so that rents might remain stable during the War. The regulations applied to all tenancies, to sub-tenants and to members of the family of a deceased tenant, to both residential and commercial tenants, and in all states except Western Australia and South Australia which had their own rent control measures, and New South Wales where it was decided not to adopt the regulations.<sup>40</sup> Under the federal regulation, rents were frozen at the August 31, 1939 level, and rents could only be determined by the service of a notice to quit, not at the end of a contractual term. The grounds upon which a notice to quit could be served were restricted under the regulations. Even where a ground for a notice to quit was

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<sup>39</sup> P Mortimer, n 34, pp. 7-8.

<sup>40</sup> ***Increase of Rent (War Restrictions) Act 1939*** (WA) which pegged rents at the August 31, 1939 level and allowed increases only by appeal to the Supreme Court for premises with values in excess of £2,000, and the ***Increase of Rent (War Restrictions) Act 1939*** (SA) which pegged rents at the 1 September 1939 level and allowed rent increases only where there were improvements or structural alterations: Albon, n 37, p. 90. This meant that three states, Victoria, Tasmania and Queensland adopted the federal regulations at this initial date.

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proven, a magistrate retained a discretion to evict the tenant or not.<sup>41</sup> The regulations also established fair rents boards to make determinations at the request of either landlords or tenants. The rent freeze ended at the end of 1939 and only those who had sought a determination had protection under the regulations (as “protected tenants”). NSW did not decide to adopt the regulations, and passed instead the *Fair Rents Act 1939*. This Act applied to dwellings which attracted a rent of less than £3.10.0 per week. The Act prescribed the factors which must be taken into account when setting rents, and the way in which those factors were to be considered. The 1939 regulations were gradually superseded by the *National Security (Landlord and Tenant) Regulations* which were issued in November 1941. These regulations replaced the *Fair Rents Act 1939* in regard to the determination of fair rents insofar as the two were inconsistent. Fair Rents Boards were constituted under the Regulations in each of the Courts of Petty Sessions in NSW. The initial jurisdiction of the Fair Rents Boards was in respect of dwelling houses which were let at 31 August 1941 at rentals not exceeding £4 4s per week, and was extended to include shops in March 1942. In June 1944 the jurisdiction was extended further to include all prescribed premises irrespective of rent. The operation of the landlord and tenants regulations was extended in 1946 and 1947, however a referendum to permanently empower the Commonwealth to legislate with respect to rents was lost in 1948, and the power to legislate in this area was restored to the States from September that year.<sup>42</sup>

### ***Post-WWII***

The NSW Act which replaced the Commonwealth regulations was the *Landlord and Tenant Act 1948*, and began by almost mirroring the provisions contained within the regulations. NSW was the last State to relax rent control in the 1950s, persisting with the 1939 capital value as the basis for rent determination well into the 1960s. However, in 1954 the NSW Government exempted all **new** lettings and leases which had not been previously let from the strict regulation, and in 1956 decontrol was allowed of dwellings where vacant possession had been obtained through voluntary quitting by the tenant or where eviction had occurred on certain grounds. In 1958, the Act was again amended to allow further ground for eviction, that the tenant had available reasonably suitable alternative accommodation. In 1960, there were still 207,000 controlled dwellings in NSW, which represented about two-thirds of all private rentals.<sup>43</sup> The Labor Government of the time established a Royal Commission to inquire into the *Landlord and Tenant Act*, which reported in 1961 and made the following recommendations: 1) that rent control be abolished for luxury premises; 2) that a milder form of rent control be applied to premises under control, and 3) a 60% rise in rents for controlled premises. The recommendations were not accepted, despite pressure from estate agents and landlords.<sup>44</sup> In 1968 the new Coalition Government made major amendments to the law so that rent could be increased to the ‘market rent’ unless the tenants proved they could not afford to pay the market rent.

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<sup>41</sup> M Redfern & D Cassidy, *Australian Tenancy Practice and Precedents*, vol 1, 1987, ¶13-15.

<sup>42</sup> *The official Year Book of New South Wales*, No 50, 1945-46, pp. 734-736.

<sup>43</sup> R Albon, n 37, pp. 96-97.

<sup>44</sup> *Ibid*, p. 97.



A 'wealthy' tenant was defined as one whose income was more than \$80 per week, and the 'market rent' was defined as ten-ninth's of the assessed annual value. A tenant could also, under these amendments, be served a notice to quit if the tenant's means were such that it was reasonable he or she should acquire or lease other premises.<sup>45</sup> Protected tenants decreased in numbers during this period, as more new tenancies were created under the *Residential Tenancies Act 1899* which offered less protection of tenants' rights.

### ***1970s to 80s***

The 1970s were a significant period in the development of tenants' rights. By this period, most tenants were not protected by rent control, and problems such as substandard housing, landlords refusing to do repairs, real estate agents entering premises unannounced, and discrimination against indigenous and migrant tenants were commonplace.<sup>46</sup> However, changes began to occur following the Poverty Royal Commission Report into law and poverty, which found that the States' tenancy laws left tenants vulnerable, and recommended reform of these laws, and increasing social awareness of the need for services to assist tenants. The Tenants' Union of NSW had its formation meeting in August 1976, and was influenced by the Victorian Tenants' Union which was formed in 1974. At around the same time, the Department of Consumer Affairs established a section to deal with tenants' problems, from a consumer rights perspective.<sup>47</sup> In 1978 the Minister for Consumer Affairs established a Landlord and Tenants Act Reform Committee to look at changing the 1899 Landlord and Tenant Act. In the same year, the Report of the Joint Committee of the Legislative Assembly on Mobile Homes and Caravans was tabled. In 1985 the ***Landlord and Tenant (Protected Tenancies) Amendment Act 1985*** was passed by which all new leases from 1 January 1986 were excluded from the protective tenancy provisions. There were a number of complicated provisions relating to premises which had been built but not occupied before that date, however, the effect was to reduce the number of protected tenancies even further.

Three major pieces of legislation were passed during this period:

- *Landlord and Tenant (Rental Bonds) Act 1977*. This Act was prompted by concerns that tenants had difficulty in getting access to bonds at the completion of the tenancy, and the considerable costs associated with disputes between landlords and tenants over bonds. The Act claims to equalise the bargaining power between tenants and landlords, particularly in relation to the amount of the bond and the process for refunding the bond.<sup>48</sup>
- *Residential Tenancies Tribunal Act 1986*. This Act established a specialist disputes forum for tenants and landlords, taking over the jurisdiction of the Fair Rents

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<sup>45</sup> Redfern, n 41, ¶3-30.

<sup>46</sup> P Mortimer, n 34, p. 10.

<sup>47</sup> Ibid, pp. 14-16.

<sup>48</sup> Dept Fair Trading, n 36, p. 7.

Board. The Residential Tenancies Tribunal (“the Tribunal”) was originally restricted to adjudicating complaints about excessive rent increases. However, over time the role of the Tribunal has been extended to cover all areas of tenancy disputes. This Tribunal was meant as a stop-gap measure to answer some of the inadequacies of the 1899 legislation until a new regime was established, and was consequently repealed with the passage of the *Residential Tenancies Act 1987* which incorporated many of the provisions relating to the tribunal in Part VI. In late 1998, legislation was passed which renamed the Residential Tenancies Tribunal the Residential Tribunal. The operation of the Tribunal is discussed further in Part 4.4 below.

- *Residential Tenancies Act 1987* (“the RTA”). This Act was originally approved by Cabinet in 1986, was passed in April 1987 but did not commence until October 1989, before which time the new Government of the day had passed a number of amending Acts. The main purposes of the Act are to balance the rights of providers of accommodation with renters, to prescribe a standard agreement between the parties which informs both tenants and landlords of their rights and obligations under the Act, and to establish the Residential Tenancies Tribunal as a fast, inexpensive and informal dispute resolution mechanism with a wide jurisdiction.<sup>49</sup> Two sets of regulations have been made under the RTA: the Residential Tenancies Regulation and the Residential Tenancies Tribunal Regulation. The operation of the Act is discussed below in Part 4.1.

### **1990s**

In 1994, the Minister for Housing launched the Tenants' Advice and Advocacy Program (TAAP) and funded the Tenants' Union to be the ‘researching body’ to establish and coordinate the new services and provide them with training and resources. In March 1995, tenancy matters, including TAAP, were transferred to the Department of Fair Trading, where they remain.<sup>50</sup> The lack of rights afforded to residents of caravan parks and home estates was raised as a problem when the 1987 Act was being mooted. However, under the RTA, permanent caravan park residents were given legal rights as tenants. With the passage of the *Residential Tenancies (Caravan Parks and Manufactured Home Estates) Amendment Act 1994* a new Schedule to the RTA was added, which addressed the situations in which a landlord can terminate residential tenancy agreements with their tenants, including the upgrading of the park or estate, or the dilapidated state of the dwelling.<sup>51</sup> In 1998 the *Residential Parks Act 1998* was passed, in response to a report by the Tenancy Commissioner into issues of concern to residents of caravan parks and manufactured home estates. See Part 4.3 below for a more detailed discussion of this Act. Other initiatives in the 1990s include the August 1995 requirement that landlord and real estate agents provide tenants with a copy of the free booklet *The Renting Guide* at the beginning of a tenancy.

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<sup>49</sup> Ibid, p. 7.

<sup>50</sup> P Mortimer, n 34, pp. 57-58.

<sup>51</sup> See further Briefing Note No 32/94, *Residential Tenancies in Caravan Parks and Manufactured Home Estates*, by Gareth Griffith.

## 4.0 REGULATION OF TENANTS' RIGHTS IN NSW

In NSW, there is little in the area of tenants rights which remains subject to the common law. Legislation has been introduced over the last century with the effect that all areas of the relationship between landlords and tenants are covered by some form of statutory regulation. The major areas of regulation of tenants rights examined in this part fall under the *Residential Tenancies Act 1987*, which is the major piece of legislation controlling the relationship between landlords and tenants in NSW, the *Residential Parks Act 1998*, which is concerned with residents of caravan park and manufactured home estates, the *Residential Tribunal Act 1998* by which the Residential Tribunal is constituted, and the *Landlord and Tenant (Rental Bonds) Act 1977* which provides a statutory framework for the centralised collection and management of rental bonds.

### 4.1 The *Residential Tenancies Act 1987*<sup>52</sup>

#### *Scope of the Act*

Tenants' rights in NSW are regulated primarily by the *Residential Tenancies Act 1987*, as amended. There are still a number of tenancies which are regulated by the 1948 Act, although the number of these "protected" tenancies is diminishing and all new tenancies are covered by the RTA. The Act applies to all premises or part of premises, including land occupied with those premises, used or intended to be used as a place of residence. It applies to caravans and the land upon which they are to be situated. This means for example that the land in a caravan park which is intended to be occupied by permanent residents comes under the ambit of the Act, whereas that land intended to be occupied by casual or holiday residents does not. The Act applies to all dwelling types - self-contained such as cottages, semi-detached villas, terrace houses and flats, units and caravans. The premises may be furnished or unfurnished. 'Tenancy' is defined in section 3(1) of the Act as the right to occupy residential premises under a residential tenancy agreement. A 'tenant' is the person who has that right, and the 'landlord' is the person who grants the right. The Act does not apply to a number of specific premises:

- any premises used for holiday purposes;
- any part of a hotel or motel;
- any part of an educational institution (eg boarding houses or residential colleges);
- any part of a hospital or nursing home;
- any part of a club,<sup>53</sup> and
- any premises used as an approved home for aged or disabled persons, self-care or hostel accommodation for the aged, or non-profit resident funded accommodation

<sup>52</sup> This section relies heavily on Redfern & Cassidy, n 41, ¶3-80 to ¶3-115.

<sup>53</sup> The amount of residential occupation in clubs is not known. Some city clubs have accommodation for members, however, it is believed to be most often in the form of caretaker accommodation, which is covered by the *Residential Tenancies Act 1987*: Dept of Fair Trading, n 36, p. 13.

for disabled persons (this is because such accommodation is regulated by other NSW and Commonwealth legislation - see Part 5.5 below).

A 'residential tenancy agreement' is any agreement under which a person grants to another person, for a value, the right of occupation of residential premises for use as a residence. Both parties must intend that the premises will be occupied as a residence, although a premises which will be used for both business and residence will be included. Although the grant must be for a 'value' this does not necessarily mean rent as commonly understood: it could be sufficient that the tenant pay water and council rates for example. There must be an agreement (a squatter, for example, would not be covered by a residential tenancy agreement) but this agreement may be oral or in writing, or express or implied. The Act expressly does not apply to boarders and lodgers.

### ***Rights and obligations of landlords and tenants under the Act***

The rights, obligations and powers of landlords and tenants under the RTA, which are incorporated into any residential tenancy agreement are defined in Part III of the Act:

#### **a. landlord obligations to the tenant**

- pay all rates, taxes and charges other than for electricity, gas, water usage, pumping a septic tank, and excess garbage or sanitary charges where applicable;
- ensure tenant's entitlement to vacant possession on which date he or she is entitled, by the agreement, to occupation of the residence;
- ensure the tenant enjoys the quiet enjoyment of the residence without interruption by the landlord, and that neither the landlord or his agent will interfere with the reasonable peace, comfort or privacy of the tenant in using the residence. There are a number of exceptions to this rule, which enables the landlord to enter the premises for the following purposes:
  - to carry out necessary repairs (on two days notice)
  - to carry out emergency repairs (not between 8pm and 8am or on Sunday or a public holiday)
  - to inspect the premises, up to four times a year, on seven days' notice (with the same time restrictions as above)
  - to show the premises to prospective purchasers on a reasonable number of occasions and with reasonable notice, or to prospective tenants on reasonable occasions during the last fortnight of the tenancy (with the same time restrictions as above)
  - where the landlord believes, on reasonable grounds, that the premises have been abandoned, or
  - with the tenant's consent at any time, or in accordance with an order from the Tribunal.

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- provide the premises in a reasonable state of cleanliness and fit for habitation, and to maintain the premises in a reasonable state of repair having regard to their age, the rent and the prospective life of the premises;
  - maintain the locks and security devices of the residence and must not, without reasonable cause or the tenant's consent, alter, remove or add to them. If any of these are done, a copy of the key must be given to the tenant;

**b. tenant obligations to the landlord**

- pay the rent before the day specified. At the beginning of a tenancy tenants must pay: the rental bond; half the cost of purchasing and preparing the lease (\$15);<sup>54</sup> connection fees and two weeks rent in advance if the rent is less than \$300 per week and up to four weeks if the rent is more than \$300 per week. This threshold has not been changed to take account of inflation, which is particularly problematic in the Sydney rental market where a large proportion of rents are in excess of \$300 per week.
- to not use or cause or permit to be used, the premises for an illegal purpose;
- not to cause or permit a nuisance;
- not to interfere, or cause or permit interference, with the reasonable peace, comfort of privacy of any neighbour;
- to keep the premises in a reasonable state of cleanliness having regard to their condition at the commencement of the lease;
- to notify the landlord as soon as practicable, of any damage to the premises and to not intentionally or negligently cause or permit any damage to the premises;
- to have the premises, as nearly as possible, at the termination of the lease, in the condition set out in the condition report, fair wear and tear taken into consideration. It is a requirement that a residential tenancy agreement contain a condition report.
- not to affix any fixture or make any renovation, alteration or addition to the premises without the written consent of the landlord, and not to remove any fixture that has been affixed by the tenant without the landlord's consent. Where a landlord refuses to consent to the removal of any fixture, he or she must compensate the tenant.
- not remove or add to the locks or security devices. If the tenant does so, he or she must give the landlord a copy of the key;

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<sup>54</sup> The Department of Housing does not charge its tenants for the preparation of agreements, so this charge falls only on private renters.

### **c. Tenant rights with respect to the property**

The RTA also confers upon the tenant some specific rights, which may stem from the obligations of the landlord, but which also may be independent of any obligation imposed upon the landlord:

- The tenant has a right to have urgent repairs performed and recoup costs from the landlord in certain situations, where the tenant has given or attempted to give the landlord notice of the need for repairs. Where the tenant receives permission from the landlord to carry out other repairs personally, he or she is entitled to be reimbursed by the landlord for the cost of those repairs. 'Urgent repairs' include the following: a burst water service; a blocked or broken lavatory system; a serious roof leak; a gas leak or dangerous electrical fault; serious storm, fire or flood damage, or any essential service of the premises for hot water, cooking, heating or laundry.
- The tenant has the right to sub-let the premises with the consent of the landlord.
- The tenant is given protection with regard to rent increases such that the rent payable under an agreement can not be increased except by notice in writing and with not less than 60 days notice.<sup>55</sup> This is the only restriction placed on landlords with respect to rental increases. There are those who argue that there should be a limit on the number of rental increases allowed, for example a maximum of two in a year. However others argue that this might in fact result in entrenching rental increases so that in the above example, two rent increases per year would become the norm.<sup>56</sup> The tenant has the right to apply to the Tribunal for a declaration that the rent increase is excessive. Similarly, the tenant can apply at any time to the Tribunal for a declaration that the rent payable is excessive having regard to a reduction or withdrawal by the landlord of any goods, services or facilities provided with the premises.

### ***Termination of tenancy***

The Act lists 12 methods of terminating a tenancy. These are the only means by which a tenancy may be terminated, and are, generally, available to both the landlord and the tenant. Many are technical in nature, based on common law principles such as abandonment, merger, disclaimer or abandonment. If either the tenant or the landlord breaches a term of the tenancy agreement, then the Tribunal may determine the agreement terminated. The

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<sup>55</sup> This provision does not apply to Department of Housing tenants because the tenants' contribution to rent is set as a percentage of income and a rebate is usually provided. It does, however, apply to community housing tenants despite the fact that they also generally receive rent rebates.

<sup>56</sup> Dept Fair Trading, n 36, p. 18.

most common method of termination not involving a breach of the agreement is giving notice of termination. If the landlord gives notice to the tenant, the tenant has the right to refuse to vacate. If the tenant does vacate, the tenancy is brought to an end. If the tenant refuses to vacate, the landlord must apply to the Tribunal for an order for possession. Notice is required to terminate both a fixed-term tenancy when it expires or during its duration, and also a periodic tenancy. If the tenant does not choose to do this, the landlord must apply to the Tribunal. However, there are grounds upon which a notice may be given even during a current fixed term tenancy: that the landlord has entered into a contract for sale of the property with vacant possession; that the tenant has broken a term of the agreement (the lease); or for no reason specified, either at the end of a fixed term agreement, or where there is no fixed term agreement in place in which case 60 days notice must be given by the landlord and 21 days by the tenant.

In 1998 there were two amendments to the RTA which affect termination of tenancy:

- *Residential Tenancies Amendment (Social Housing) Act 1998*. This Act was passed in response to a perceived problems with public housing tenants, dubbed “tenants from hell” by the Minister for Housing.<sup>57</sup> As a result of the amendments, ‘social housing’ tenants (tenants in public or community housing) are deemed to have breached their residential tenancy agreement if the tenant “intentionally or negligently causes or permits to cause damage to any property adjoining or adjacent to the premises”, or uses any such property “for the purposes of the manufacture or sale of any prohibited drug”.<sup>58</sup>
- Under amendments contained within the *Residential Tenancies Amendment Act 1998*, which came into force on 1 September 1988, tenants can apply to the Tribunal to end a residential lease if they have a serious family illness, lose their job or suffer financial hardship.<sup>59</sup> This provision has been available previously in some cases to landlords who terminate a lease on hardship grounds including where they needed to sell or move into the property urgently.

## 4.2 Rental bonds

The payment of rental bonds in NSW is regulated by the *Landlord and Tenant (Rental Bonds) Act 1977* (“the Rental Bonds Act”).<sup>60</sup> This Act was first introduced to answer criticisms that landlords or their agents were holding the bond in their own bank accounts,

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<sup>57</sup> Craig Knowles, *New tenancy laws crack down on tenants from hell*, Media Release, March 7, 1999.

<sup>58</sup> *Residential Tenancies Amendment (Social Housing) Act 1998*, sch 1(2), amending section 23 of the RTA.

<sup>59</sup> *Residential Tenancies Amendment Act 1988*, which inserts section 69A into the RTA.

<sup>60</sup> Tasmania, Western Australia and the Northern Territory do not operate a central bond scheme. In these states, bonds may be deposited in an approved account, authorised financial institution of Statutory Bond Administrator: Dept Fair Trading, n 36, p. 15.

which meant that the landlord retained the interest earned on the deposit and that the tenant had little or no control over the landlord when the time came to return the money. Landlords were known to contrive damage to the property, and consequently retain the bond money. If the landlord was declared bankrupt the tenant also lost his or her bond money. The only way the tenant could recover the money was to sue the landlord. Since the amount of money was often small, many tenants did not bother to do this.<sup>61</sup>

The Rental Bonds Act applies to all premises which are used solely for residential purposes. The Act requires all bonds to be in money (section 9), and to be paid to the landlord or his or her agent 'to secure ... the landlord against failure by the tenant to comply with the terms or conditions of the lease irrespective of whether those terms are related to the payment of rent or not'.<sup>62</sup> The amount of bond that a tenant may be required to lodge has been prescribed by regulation: in the case of furnished premises rented at up to \$250 per week, the maximum bond payable is six week's rent, and in the case of unfurnished premises, four week's rent. There is no limit in the case of furnished premises rented at more than \$250 per week.<sup>63</sup> When this provision was made, in 1977, \$250 per week was a very high rent and only applied to luxury rental accommodation. However, the amount specified in the regulations has not increased with inflation since 1977 and so the number of properties for which there is no maximum bond has increased. Problems may be encountered in defining what constitutes "furnished" as there is no definition in the Act. It has been said that some landlords place the minimum amount of furniture in the premises simply to achieve a higher bond. However, this could only occur in a very small minority of cases, with approximately 98% of premises being rented unfurnished.<sup>64</sup> There is also disagreement over whether four weeks' rent is a sufficient bond with landlords arguing that it is insufficient protection for when a tenant falls behind with their rent, or causes serious damage to the premises. Tenant groups, on the other hand, argue that entry costs are already very high as tenants must pay relocation costs as well as service connection costs, often before the bond is released from a previous premises. It is argued that any increase in the bond limit may cause financial hardship for low income earners and will inconvenience the majority of tenants who do not fall behind in their rent or damage the property.<sup>65</sup> The recipient is required by the Rental Bonds Act and regulations to give the tenant a receipt.

The Rental Bonds Act established the Rental Bond Board (RBB), and requires landlords to deposit a tenant's bond money with the board within seven days of receiving it. If the landlord does not lodge the bond within this time he or she is guilty of an offence with a maximum penalty of \$2,200. Prior to 1990, bond money lodged with the RBB did not attract interest for the tenant. However, under section 11A, added to the Rental Bond Act by an amendment in 1989, interest, at the rate prescribed by regulation, is added to the

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<sup>61</sup> Redfern & Cassidy, n 41, ¶25-295.

<sup>62</sup> *Landlord and Tenant (Rental Bonds) Act 1977*, section 4, definition of "rental bond".

<sup>63</sup> *Landlord and Tenant (Rental Bonds) Regulations 1993*, regulation 6.

<sup>64</sup> Dept Fair Trading, n 36, p. 16.

<sup>65</sup> *Ibid.*



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principle of any bond paid out after 1 January 1990.<sup>66</sup> The current rate of interest is that paid by the Colonial State Bank on deposits of \$1,000. The interest payable on a rental bond is compounded on 30 June and 31 December in each year (reg 9).<sup>67</sup> The difference between the money earned on deposits and that paid to tenants accumulates in the Rental Bond Interest Account. At 30 June 1998, the amount in this account was \$2,791,000.<sup>68</sup> This money is used to fund the operating cost of the rental bond custodial and information services, tenancy advice services and part funding of the Residential Tenancies Tribunal (with the Department of Fair Trading).<sup>69</sup>

Either the landlord or the tenant can apply to have the bond paid out. There is a form which must be filled out (the “claim for refund of bond” form), and if the other party agrees in writing (usually by signing the form) then the bond money is paid out. If consent in writing can not be obtained, then the RBB will send the other party notice that a claim has been lodged for repayment of the bond. That party will have 14 days in which to commence proceedings before a court or the Residential Tenancies Tribunal. If proceedings are not commenced, the bond will be returned in full to the party claiming it. If proceedings are commenced, the bond will be held by the RBB until a decision is made and distributed accordingly.<sup>70</sup>

### 4.3 Residential Parks

The *Residential Parks Act 1998* (“the RPA”) followed a review by the Tenancy Commissioner into matters of concern to residents of caravan parks and manufactured Home Estates in NSW, “regarding rental matters, the Residential Tenancies Tribunal dispute resolution process, water and electricity charges and the alleged oppressive behaviour by some park owners and managers”.<sup>71</sup> Since March 1992, there has been a mandatory *Caravan and Relocatable Home Park Industry Code of Practice* for all parks. This Code is one of two arising under the *Fair Trading Act 1987* (the other is the *Retirement Village Industry Code*). However, it has been shown to be ineffective and in

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<sup>66</sup> Redfern & Cassidy, n 41, ¶25-295.

<sup>67</sup> At 21 April, 1999 the Colonial State Bank “All in One” account and “Viridian” account interest rate for \$1,000 was 0.15% (information taken from Colonial State Bank website at [www.sbns.com.au](http://www.sbns.com.au)). There has been controversy over the amount of interest paid to tenants in recent years. According to the Auditor-General, the RBB earned between 4% and 16.1% on bond money lodged with the Board in 1996-97 but only paid 0.4% to tenants. See, for example, K Gosman, ‘Cashing in on tenants’, *The Sunday Telegraph*, 28 September 1998, p. 27. The 1998 Department of Fair Trading *Annual Report* stated that, at 30 June 1998, the effective interest rate being earned on Board investments was 4.98% (vol 2, p. 9).

<sup>68</sup> Dept Fair Trading, n 19, vol 2, p. 13.

<sup>69</sup> Dept Fair Trading, n 36?, p. 16.

<sup>70</sup> Redfern & Cassidy, n 41, ¶25-295.

<sup>71</sup> Tenancy Commissioner, n 1, Terms of Reference, (p. 63).

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some cases, completely ignored.<sup>72</sup> There were no direct penalties for breaches of the Code, and any action for enforcement must be taken before the Commercial Tribunal. It was agreed in the review that provisions of the Code be brought within the ambit of the RTA (later the provisions were to form part of the RPA) with direct penalties for non-compliance.

With the inclusion of caravan park and manufactured home estate tenants under the RTA, it was believed that the special nature of the tenancy (ie that the resident generally owns the dwelling and only rents the land upon which it is placed) had been neglected. Tenants were instead subject to the same regulation as 'conventional' tenants. Although the RPA follows a similar structure to the RTA, setting out a standard form of tenancy agreement, the rights and obligations of landlords and tenants, provisions relating to rents, rent increases and excessive rents, and the termination of a residential tenancy agreement, it also contains provisions specific to park residents, relating to park rules for residential parks, payment of water and electricity charges, community aspects of residential parks, mail facilities, the sale of moveable dwellings and manufactured homes, and dispute resolution.

The review identified cost and frequency of rent increases as the biggest issue of concern for park residents, primarily because a majority of such residents are on fixed incomes, and the manner in which disputes over rent increases were dealt with by the Residential Tenancies Tribunal.<sup>73</sup> The high cost of moving a home from site to site (up to \$15,000) is a related issue, and is a characteristic of residential park tenants which sets them apart from other tenants.<sup>74</sup> One of the main effects of the *Residential Parks Act 1998* ("the RPA") is to ensure that the Residential Tribunal takes into account CPI rises and frequency of previous rent increases as well as general market rent when considering whether a rent increase is excessive. Previously, the main factor which required to be taken into consideration was the general market rent for comparable premises (Part 5 division 2). This was problematic since in many instances there was not a comparable park within a reasonable distance which could be used to determine whether a rent was excessive. The RPA also states, in Part 12, the grounds upon which a landlord can terminate a residential tenancy agreement. Grounds which are unique to residential park tenancies include the dilapidated condition of a dwelling or for urgent and essential repairs and upgrading of park facilities.

Dispute resolution was another area of concern identified in the Review. There was consensus between park owners and residents that a more flexible and informal method of dispute resolution was desirable. The Residential Tenancies Tribunal, it was felt, should be used only for the most serious and difficult disputes, as an avenue of last resort.<sup>75</sup> In

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<sup>72</sup> Ibid, p. 48.

<sup>73</sup> Ibid, pp. 17-18.

<sup>74</sup> P Crittenden, MP, Residential Parks Bill second reading speech, NSWPD, 28 October 1998, p. 9173.

<sup>75</sup> Tenancy Commissioner, n 1, p. 25.

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response to these concerns, the role of Park Disputes Committees (“the PDC”) is formalised in the RPA. Where the dispute is over park rules, or where the parties to a dispute agree, a PDC must be convened by the park owner. The Residential Tenancies Tribunal can also refer matters to a PDC under the RPA. A PDC must consist of a person chosen by the park residents, a person appointed by the park owner and a person agreed to by both the resident representative and the owner’s representative. The Residential Tenancies Tribunal is further empowered under the RPA to, with the consent of the parties, refer a matter before it to alternative dispute resolution. It may refer the matter to a PDC, a Park Liaison Committee, the Department of Fair Trading’s Mediation Unit, a community justice centre or any other person with experience in dispute resolution (section 91).

#### **4.4 The Residential Tribunal**

The Residential Tenancies Tribunal was the subject of an independent review commissioned by the Department of Fair Trading in 1997. The review examined the jurisdiction and operation of all the tribunals in the fair trading portfolio - the Commercial Tribunal, Consumer Claims Tribunal, Building Disputes Tribunal, Motor Vehicle Repair Disputes Committee and the Residential Tenancies Tribunal. The review concluded that all the tribunals be amalgamated into a single Fair Trading Tribunal, with the exception of the Residential Tenancies Tribunal. It was recommended that the Residential Tenancies Tribunal be restructured and renamed the Residential Tribunal, partly to take into account the increased jurisdiction of the Residential Tenancies Tribunal since its inception in 1987. Since 1987 the jurisdiction of the Residential Tenancies Tribunal expanded from dealing primarily with residential tenancy disputes to disputes in relation to retirement villages and caravan parks and relocatable homes. Members of the Tribunal also sit on the Strata Schemes Board and the Community Schemes Board. On March 1, 1999 the new organisational structure came into effect with the Residential Tribunal and the Fair Trading Tribunal commencing operation. All matters lodged after March 1 are heard by the new tribunals, with matters lodged prior to that date being heard by the old tribunals.

The role and jurisdiction of the Residential Tribunal is similar to that of the Residential Tenancies Tribunal. The Tribunal is not bound by the rules of evidence and is required to conduct proceedings with minimum formality. In fact, the Tribunal is empowered under the Act to determine its own procedure (section 27(1)). Parties to the proceedings are, generally, to represent themselves although a landlord may be represented by his or her agent and the Tribunal may allow other representation where it is considered appropriate. In determining appropriateness, the Tribunal may have regard to the value of the matter in dispute, its complexity and the capacity of the parties to represent themselves (section 33). Similarly parties to proceedings before the Tribunal are to bear their own costs except in exceptional circumstances decided by the Tribunal, most notably with respect to the cost of legal representation (section 48). Interpreters are to be provided on request unless the Tribunal believes the person sufficiently proficient in English to preclude the need for an interpreter. The Tribunal is required to take such measures as is practicable to ensure that the parties to the proceedings before it are fully aware of the nature of the assertions made and the legal implications of those assertions, and the procedure of the Tribunal, particularly any decisions relating to procedure which may effect the proceedings to which

they are a party.

Major changes relate mainly to procedure, for example alternative dispute resolution and appeals. The Residential Tribunal has expanded alternative dispute resolution tools available to it. Previously, the only means of alternative dispute resolution available to the Residential Tenancies Tribunal was conciliation prior to formal hearings. Part 5 of the *Residential Tribunal Act 1998* imposes a duty on the Tribunal to attempt to bring the parties to a dispute to a settlement without the need for further, formal proceedings. Mediation and neutral evaluation are two methods of alternative dispute resolution specifically provided for in Part 5 of the *Residential Tribunal Act 1998*. In section 52, mediation is defined to be a negotiation process presided over by the mediator in which parties are encouraged to come to a resolution of their dispute. Neutral evaluation is defined to be a process whereby the evaluator attempts to simplify the issues, isolate the relevant principles that will determine the outcome of the dispute and evaluate each party's chance of success, offering an opinion as to the likely outcome of proceedings.

The right to appeal a decision of the Residential Tribunal on the basis of a question of law has been retained. In the original bill, appeal was to the District Court, however after amendments in the Legislative Council the right to appeal to the Supreme Court was retained (as it was in relation to appeals from the Residential Tenancies Tribunal). Interest groups including the Tenants Union opposed the change for reasons including the fact that appeals on tenancy matters usually involve implications which are broader than in the individual case; that Supreme Court decisions are recorded and are readily accessible whereas District Court decisions are not, and that there is little difference in the cost of bringing an appeal before the Supreme Court compared with the District Court (which was the primary motivation for moving appeals to the District Court under the new legislation).<sup>76</sup> In addition to the appeal on a question of law, the Tribunal has the authority to conduct internal rehearings. A rehearing may occur, on the application of one of the parties to a proceedings, on the ground that the applicant may have suffered a substantial injustice because the decision of the Tribunal was not fair and equitable or was against the weight of evidence or because evidence now available was not available at the time of the hearing. There is a limitation on the availability of rehearing, namely that the Chairperson of the Tribunal must be convinced, on the face of the application, that the applicant may have suffered a substantial injustice.

## **5.0 ISSUES OF CONCERN TO TENANTS AND LANDLORDS IN NSW**

### **5.1 2000 Olympic Games and effect on rental prices**

Cities which have hosted events similar to the Olympic Games (Olympics, Expos etc) in

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<sup>76</sup> Hon R Jones, MLC, NSWPD, 1 December 1998, p. 10885.

the past have found that the staging of such events has had a negative housing impact. Atlanta, for example, is reported to have lost 9,500 low-cost residential units in the lead up to the 1996 Games, and homeless people are reported to have been bussed out of the city, arrested on minor charges and detained in a new city gaol in an effort to make the city look “pristine”. Of more concern is the claim that Sydney lost up to 3,500 low-income units in the lead up to the Bicentennial celebrations.<sup>77</sup> In response to such claims, the Department of Fair Trading commissioned a study “to determine the likelihood and scale of any potential housing impacts on Sydney resulting from the 2000 Games”.<sup>78</sup> The study identified a number of potential negative housing impacts:

- **investor behaviour:** if landlords decide the Olympics offer the chance of making a “quick dollar”, existing tenants may face increased evictions and increased rents. However, a survey of landlords conducted as a part of the study found that not one of the landlords would consider removing a long-term tenant and replacing them with an Olympic visitor. About two-thirds said that they would consider renting their property to an Olympic visitor if the property became vacant prior to the Olympics. Only about ten per cent of landlords indicated that they were considering investing in the Olympic corridor because they considered the Olympic infrastructure would increase the capital gain in that area. A number of landlords indicated that they would be interested in renting out their own homes through the Homestay programme.<sup>79</sup>
- **eviction of tenants:** the study found that evictions in host cities have been related to direct displacement of tenants for the construction of Olympic facilities. This has not occurred in Sydney. There were no reports of displacement of tenants for the Homestay program in Atlanta, and the official Homestay programme in Sydney is limited to owner-occupied premises which would limit further any negative affects.<sup>80</sup>
- **rent increases:** rent increases have been shown to have occurred in relation to the Brisbane Expo, America’s Cup in Fremantle; Vancouver Expo, Barcelona and Atlanta Olympics. This is because at least one or more of the following has taken place: a direct spill-over of event visitors into leased accommodation (not boarding houses) due to a shortage of tourist accommodation (Fremantle); accelerated urban

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<sup>77</sup> A Horin, ‘Olympics can push poor into ‘slavery’’, *The Sydney Morning Herald*, 4 August 1998, p. 4.

<sup>78</sup> Cox et al, n 3, p. 1.

<sup>79</sup> Ibid, pp. 80-81. Note that holiday accommodation is not covered by the *Residential Tenancies Act 1987*. However, commercial accommodation arrangements for visitors will be subject to other regulation including the *Fair Trading Act 1987*, public health legislation and licencing legislation: see pp. 62-74 for a discussion of legislative provisions relevant to the 2000 Olympics.

<sup>80</sup> Ibid, p. 86. There were evictions in Fremantle, due to an undersupply of visitor accommodation.

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change and gentrification (Fremantle, Brisbane, Barcelona); speculative accommodation ventures (Fremantle, Barcelona, Atlanta), and loss of boarding houses (Vancouver). The study found in relation to Sydney, however, that there is no evidence that the Olympics is having any impact which can be distinguished from existing trends generated by demographic changes and investment patterns consistent with those changes. Evidence does suggest, however, that hallmark events hasten existing trends in urban development, which means that the existing upward pressure on rent levels and house prices associated with gentrification, particularly in inner ring LGAs, could be exacerbated by the Olympics.<sup>81</sup>

- **boarding houses:** boarding house/low-cost hotel losses occurred in relation to the Brisbane Expo, Sydney Bicentennial, Fremantle America's Cup and Vancouver Expo. The loss of boarding houses in Sydney is a part of a long-term trend because financial returns are greater for other uses such as tourist accommodation. The study found that Sydney is likely to see an acceleration of this trend in the years leading up to the Olympics due to a perceived increased demand for tourist accommodation during the Olympics, or in the longer term as a result of interest generated by the Olympics. This will result in the displacement of boarding house residents through eviction to allow for conversion or redevelopment. This could, in turn, lead to an increase in homelessness, given that most of the residents of boarding houses are low-income earners with little capacity to afford alternative private accommodation. There may be a flow-on effect to emergency accommodation with increased demand for emergency accommodation as a result of boarding home closures.<sup>82</sup>
- **public and community housing:** The main impacts on public or community housing are likely to arise from any exacerbation of upward movements in rents and land prices. The Department of Housing may find it even more difficult to afford construction of new accommodation in inner ring LGAs, and there may be an increased demand for public housing due to the closure of boarding houses. Because community housing groups rent houses from the private rental market and sub-lease to tenants at a subsidised rate, increases in rent levels reduces their capacity to subsidise rents which may lead to a reduction in the number of properties available under community housing schemes.<sup>83</sup>
- **construction costs/labour shortages:** there are indications that construction cost inflation is running ahead of the underlying inflation rate. This may have negative impacts on the private rental market, including an increase in maintenance and upgrading costs for landlords which may place upward pressure on rents, and increases in construction costs of new housing which may have a flow-on effect on

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<sup>81</sup> Ibid, pp. 83-87.

<sup>82</sup> Ibid, p. 86. Note that boarding house residents are not covered by the *Residential Tenancies Act 1987*. For further discussion, see Part 5.4 below.

<sup>83</sup> Ibid, p. 87.

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rents.<sup>84</sup>

Despite the possible negative impacts on the rental market, the overall findings of that report are that

... negative impacts were not inevitable. The occurrence and scale of negative impacts not only varied according to local conditions but could be mitigated by appropriate strategies such as ensuring adequate visitor accommodation ... on the currently available data there appears to be an adequate supply of commercial accommodation although there may be shortages in some sub-markets if visitor numbers reach the upper estimate. The data and previous experience suggests, however, that there will be little, if any, spillover of visitor demand into leased accommodation.

The review of Sydney's private rental market found that the existing upward movement in rental prices is consistent with trends that have been in evidence for several years. The factors relevant to these upward trends are not related to the Olympics but to demographic changes and investment patterns consistent with those changes. Current rent increases occurring in the Olympic corridor are not dissimilar from other inner and middle ring LGAs. Despite promotion of proximity to Olympic venues in residential sales campaigns, the data does not provide any evidence that, at this stage, the Olympics is having any impact which can be distinguished from existing trends.<sup>85</sup>

## 5.2 Land Tax and effect on rental prices

Land tax is payable on investment properties with a land value of over \$176,000. The value of land tax imposed is at a flat rate of 1.85% of the value over \$176,000 for the land tax years beginning 1 January 1998 and 1 January 1999, after which time it will fall to 1.7%.<sup>86</sup> The Real Estate Institute of NSW has repeatedly claimed that the cost of land tax will be passed onto renters in the form of rent increases, whether immediately or at the expiration of a lease. The Real Estate Institute in January 1999 that there was 115,000 investment properties in NSW with a land value over the land-tax threshold.<sup>87</sup> It must be noted, however, that much of the cost of land tax may be 'negatively geared', or claimed as a tax deduction on the income earned from the property, which would effectively reduce the amount of tax payable by up to 47% (being the highest marginal rate of tax). It has also been argued that general market forces will contain any excessive rent increases,

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<sup>84</sup> Ibid, pp. 87-88.

<sup>85</sup> Ibid, p. 2.

<sup>86</sup> See further Briefing Paper No 6/98, *Land Tax in New South Wales*, by Rachel Simpson and Honor Figgis.

<sup>87</sup> 'Tenants stung with the bill for land tax', *The Sydney Morning Herald*, 23 January 1999.

particularly since not all rental properties are subject to land tax. This is particularly true of areas where the property values (and, one would presume, rents) are relatively low. In contrast, in areas with high property values which are likely to be subject to the tax, rents are likely to increase as a result of the tax, and it has been suggested that even those properties with no land tax liability will follow suit and increase rents.<sup>88</sup>

### 5.3 GST and effect on rental prices

The Federal Government estimated that there would be a 2.3% price increase for consumers of housing services (renters and owner occupiers) as a result of the GST. Other groups have put this figure much higher - the NSW Federation of Housing Associations estimated increases of up to 11 per cent, for example, and other industry groups have predicted rises of up to 8%.<sup>89</sup> The National Association of Tenants Organisations estimated that the impact on rents of the proposed tax would be to increase rents by between \$5 and \$30 per week.<sup>90</sup> It has also been noted that rents are more likely to be raised in \$5 steps, so that a \$3 increase in costs would translate into a \$5 increase in rent.<sup>91</sup> The Senate Community Affairs Reference Committee which prepared a report on the impact of the new taxation system concluded that "the housing sector will be seriously affected as a result of the introduction of the GST and the new tax arrangements", and continued that "the overwhelming weight of evidence was that all sectors of the community, be they public housing tenants or boarding house residents, or private homeowners, will be disadvantaged by the proposed changes particularly in terms of access and affordability".<sup>92</sup> Note that the Government Senators did not put their names to this report, primarily on the basis that evidence relied upon by the Committee was, in their opinion "littered with assertion rather than analysis ... without any analysis of whether the claims are accurate".<sup>93</sup>

Under the proposed tax system, residential rents will be GST free, although they will be input taxed. This means that the inputs, or goods and services used to build, maintain or repair a house, are taxed at 10%, and no input credits will be allowed to be claimed by landlords. 'Inputs' include management fees and other recurrent costs. The cost of new properties will also attract a GST, which some argue will provide less incentive for

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<sup>88</sup> Parliament of New South Wales Legislative Council General Purpose Standing Committee No 1, *Report on the inquiry into changes in land tax in New South Wales*, Report No 3, July 1998, pp 47-48.

<sup>89</sup> Senate Community Affairs References Committee, *The Lucky Country Goes Begging*, Report on the GST and a new tax system, March 1999, ¶4-6.

<sup>90</sup> *Ibid*, ¶4.63. The wide variation in this estimate reflects the number of sub-markets operating in the rental market.

<sup>91</sup> *Ibid*, ¶4.67.

<sup>92</sup> *Ibid*, ¶4.94 and ¶4.96.

<sup>93</sup> *Ibid*, p. 180, dissenting report by Government Senators. The Dissenting Report did not, however, specifically address the area of housing, except in relation to nursing homes and retirement villages in Part 6, 'Aged care and disability services', pages 192-195.



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investment in private rental stock.<sup>94</sup> The additional costs will be either absorbed by the landlords or passed on the tenants in the form of higher rents. This system will apply to both public and private housing providers.<sup>95</sup>

The Government has taken steps to ensure that nursing home residents, who pay a fixed proportion of their income in accommodation charges, are not faced with any increase in costs. The means by which this is achieved is ensuring that the 4% pension increase, which is part of the overall tax package, is quarantined from the formula that calculates the amount of rent paid by residents of nursing homes.<sup>96</sup> Note that the same protection is not extended to public or community housing residents. There are additional problems for community housing providers who provide housing under headlease arrangements, because leasing this form of housing will be treated as another 'input' and will attract GST. The leases will attract GST but the rent paid by the tenant will be GST exempt. The cost to community housing authorities will therefore increase as they will have to bear the GST cost of the headlease. The effect of this could be a decline in the availability of community housing.<sup>97</sup>

Under the proposed reforms, accommodation in boarding houses, hostels and caravan parks supplied for a period of 27 days or less, classified as 'short term', are subject to the full GST of 10%. If the premises are used predominantly for short stays, the proprietor is entitled to charge GST of 10% for the first 27 days and 5% thereafter. Proprietors will have the option to charge the concessional rate (5%) for long stays, or apply the input tax rules for residential rents (not charge GST but not claim input tax credits either).<sup>98</sup> Either way, the cost of accommodation in boarding houses, hostels and caravan parks will rise.

#### 5.4 Boarders and lodgers

Boarders and lodgers are currently excluded from the application of the RTA. Similarly, people in share housing arrangements have varying rights under the RTA, depending on whether or not they are party to a lease. This exclusion also means that boarders and lodgers do not come within the jurisdiction of the Residential Tribunal. Nor do boarders and lodgers fall within the ambit of the rental bond scheme since this applies only to "lessees" or those under a lease (tenants). Boarders and lodgers are found in many types of residences, for example boarding houses, group homes and private homes. A review of the position of boarders and lodgers is currently being undertaken by the Department of Fair Trading to determine whether or not legislative coverage should be extended to residents of boarding houses and if so, whether different provisions to other forms of tenancy should

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<sup>94</sup> Ibid, ¶4.58.

<sup>95</sup> Ibid, ¶4-11. Part of the Government's compensation package will be a 4% increase in the maximum rate of social security payments.

<sup>96</sup> Ibid, ¶4.13.

<sup>97</sup> Ibid, ¶4.40.

<sup>98</sup> Ibid, ¶4.44-¶4.45.

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apply.<sup>99</sup>

### 5.5 Retirement village residents

Retirement villages are currently regulated by the *Retirement Village Act 1989*, regulations under that Act and a mandatory code of practice under the *Fair Trading Act 1987* - the *Retirement Village Industry Code of Practice*.<sup>100</sup> The main aim of the legislation is to clarify the rights and obligations of residents and operators and in doing so promote fair trading practices in the industry. Nursing homes are regulated separately, under the *Nursing Homes Act 1988* and the *Nursing Home Regulation 1996*, both of which are administered by the NSW Department of Health. Additionally, both aged care hostels and nursing homes (now known as residential aged care facilities) are regulated at the federal level by the *Aged Care Act 1997*. This Act does not distinguish between hostels and nursing homes as does the NSW legislation. A review of legislation and policies for retirement villages, in order to ensure that residents' rights are adequately protected was announced in the Government's Social Justice Directions Statement in October 1996.<sup>101</sup> The final report was released in August 1998.

There are approximately 900 retirement villages operating in NSW, catering for close to 50,000 residents. The industry is dominated by non-profit providers, with approximately 90% of retirement villages in NSW being operated by church groups, community groups and charitable organisations. Most residents live in self-care units, although an increasing proportion receive some form of personal care services from the operators. Approximately 80% of residents are women, and most residents are over 70 years of age. More than one-third are over 80 years of age. Most residents occupy their premises under a licence arrangement (77%) where ownership of the unit remains with the operator. Other forms of ownership, such as strata or company title and lifetime leasehold, are primarily available within the private sector of the industry. It generally cost an existing resident of a self-care unit \$100,000 to gain entry and \$45 per week in recurrent fees. Residents receiving personal care services will have paid an average of \$75,000 to gain entry but pay about \$100 more per week in ongoing fees.<sup>102</sup>

The review concluded that the code of practice which currently forms the basis for the regulation of the retirement village industry is not the most appropriate regulatory mechanism. This is despite general levels of satisfaction with the code of practice within the industry, thought to be the result of widespread industry consultation in the development of the code, and the need for industry input and agreement to any changes to the code. Problems with using a code of practice as the primary regulatory mechanism include its overall ineffectiveness, lack of certainty, high level of non-compliance and lack

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<sup>99</sup> Dept Fair Trading, n 36, p. 4.

<sup>100</sup> This model is also used in Western Australia and the Northern Territory and is proposed to be introduced in the Australian Capital Territory.

<sup>101</sup> Dept Fair Trading, n 2, p. 17, p. 19.

<sup>102</sup> Ibid, p. 18.

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of direct penalties for breach.<sup>103</sup> Other areas of concern, particularly for residents, include the security of residents' investments, the complexity of contracts, and anti-competitive practices surrounding the sale of a resident's unit.<sup>104</sup> As long as consensus between industry and residents remains necessary for the development of the Code it is unlikely that these areas will see any real changes. The review recommended that the code of practice be replaced with a consolidated retirement villages act and regulation. This would have the benefit of certainty and would ensure the rights and obligations of residents and operators would be clearer and easier to understand. It is believed that this in turn would facilitate resolution of disputes and enforcement of compliance.<sup>105</sup>

## 6.0 CONCLUSION

Landlord and tenant legislation has existed in NSW since 1847, however it was in 1899 with the *Landlord and Tenant Act* that residential tenancies really began to be regulated. The primary aim of the modern landlord and tenant act, the *Residential Tenancies Act 1987* and other legislation regulating the relationship between landlords and tenants is to balance the rights and obligations of the providers of accommodation with those of renters. This is achieved by prescribing a standard agreement between the parties and informing both tenants and landlords of their rights and obligations under the Act. The Residential Tribunal has been established to provide a fast, inexpensive and accessible mechanism for the resolution of disputes between landlords.

There have been a number of recent reviews into various aspects of the relationship between landlord and tenants. Some of these reviews have resulted in changes to the law - the *Residential Tribunal Act 1998* and the *Residential Parks Act 1998* are examples where this has occurred. Others, such as the review into boarders and lodgers and another into residents of retirement villages have yet to be evaluated and implemented, and it remains to be seen what impact, if any, the 2000 Olympics and the proposed GST will have on residential renters, leaving wide scope for possible further changes to this area of the law.

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<sup>103</sup> Ibid, pp. 25-26.

<sup>104</sup> Ibid, p. 30.

<sup>105</sup> Ibid, p. 26.