



Property Law

By Zohra Arbabzada

Residential tenancies

What is a residential tenancy?

- **Statute**
 - A right of occupation of residential premises for the purpose of use as a residence (s 3, Residential Tenancies Act 1987 NSW)
- **Exceptions**
 - Not all residential agreements will be covered as each piece of legislation contains a list of exempted agreements

Landlord's right of entry and tenant's ability to perform urgent repairs

- **Landlord's right of entry**
 - The landlord has the statutory right to enter the premises for matters specified in the legislation of each jurisdiction (s. 24, Residential Tenancies Act 1987 NSW)
- 'Urgent' repairs: the tenant can effect urgent repairs as defined by the legislation. Otherwise the tenant has a statutory obligation not to damage the premises (s 28, Residential Tenancies Act 1987 NSW)

Security bonds

- **Security bonds**
 - The legislation regulates the landlord's ability to require a security bond setting the maximum amount:
 - Four weeks' rent for unfurnished premises, six weeks' rent for furnished premises (s 9(2), Landlord and Tenant (Rental Bonds) Act)
 - **Holder**
 - The legislation regulates who can hold the security bond
 - NSW Rental Bonds Board

Breach of agreement

- **Breach**
 - A notice of breach specifying the appropriate remedy must be given to the defaulting party (s 53, Residential Tenancies Act 1987 NSW)

Recovery of premises

- **Termination**
 - Agreement is terminated by the landlord. Recovery of the premises must be by Tribunal order (ss 64-76, Residential Tenancies Act 1987 NSW)

Rental increases

- **Increases of rent**
 - Rent can increase if the agreement between landlord and tenant provides. Notice must be given to the tenant and rent should not increase until 60 days (s 45, Residential Tenancies Act 1987 NSW)

Quiet enjoyment

- **Quiet enjoyment**
 - The tenant has a right to have quiet enjoyment of the premises (s 22, Residential Tenancies Act 1987 NSW)

Retail shop leases

Retail shop means...

- **Application**
 - Different definition in each state but generally premises in a shopping centre and specified retail business
- **Exceptions**
 - Not all retail shop leases will be covered as each piece of legislation has list of exempted leases/businesses

Disputes

- **Dispute resolution**
 - The dispute resolution process to be undertaken is detailed in the relevant legislation but includes alternate dispute resolution prior to formal adjudication

Outgoings, other costs and rent and rent review

- **Outgoings and other costs**
 - The relevant legislation seeks to regulate the outgoings and other costs that a tenant can be made liable for
- **Rent review**
 - The mechanisms by which rent can be reviewed is governed by the legislation operative in each state

Disclosure statement requirements

- **Disclosure statement**
 - A disclosure statement containing the information specified in the legislation and at the required time must be provided to the lessee
- **Failure to disclose**
 - If a lessor fails to provide the disclosure statement or it contains false or misleading information the legislation provides the lessee with a cause of action

Leases: determination and remedies

Determination

- **Methods of determination**
 - **Expiration of the term**
 - Lease term ends
 - **Notice to quit**
 - Notice given by one party to other to determine the lease
 - **Forfeiture**

- Non-payment of rent: lessor has statutory right of termination and re-entry
- Other breaches
 - Notice of breach to be issued with opportunity to remedy breach/pay compensation
- Lessee has the ability to claim relief against forfeiture (*Sparta Nominees v Orchard Holdings*)
- **Surrender**
 - Lessee returns the leasehold interest to the lessor
- **Frustration**
 - Where the lease, as a contract, cannot be performed in the way contemplated originally by the parties (*City of Subiaco v Haytesbury Properties*)

Remedies: Lessee

- **Remedies**
 - Forfeiture
 - Frustration
 - Damages
 - Injunction
 - Repudiation
 - Set-off

Remedies: Lessor

- **Remedies**
 - **Damages**
 - Whether a lessor can claim for damages where the lease has been terminated for a breach of obligation will depend upon the classification and circumstances of the breach (*Shevill v Builders Licencing Board; Progressive Mailing House v Tabali*)
 - Forfeiture
 - Frustration
 - Repudiation by lessee
 - Injunction

Mortgages and the rights of the mortgagee

Mortgage

- **Mortgage**
 - Mortgagee loans money to mortgagor, mortgagor offers their land as security for repayment
- **Relationship**
 - Contractual between mortgagor and mortgagee but the mortgagee has an interest in the land upon default
- **General law mortgage**
 - Required transfer of the mortgagor's land into the name of the mortgagee for duration of the mortgage
- **Torrens system mortgage**
 - Mortgage takes effect as a charge on the land, mortgagor retains title

Rights of the mortgagee

- **Foreclosure**
 - Mortgagee applies to hold the land free from the redemptory right of the mortgagor. Foreclosure is exercised in full and final satisfaction of the mortgage debt
- **Process**
 - Regulated by statute

Discharge

- **Right of redemption**
 - Where the mortgage is repaid the mortgagor is entitled to redeem their title
- **Clog on equity of redemption**
 - A mortgagee cannot place conditions upon the discharge of the mortgage once the advance has been repaid (*Toohey v Gunther*)
- **Discharge**
 - The Torrens system will require a discharge document to be registered to remove the charge from the title

Formalities

- **Torrens system**
 - Mortgage should be evidenced in writing and registered
- **Consumer credit code**
 - Will apply to mortgages in which the advance will be used by a person for personal, domestic or household purposes. The code regulates the relationship between the mortgagor and mortgagee
- **Mortgagee to act fairly**
 - The mortgagee should not act unconscionably (*Commercial Bank of Australia v Amadio*)
- **Equitable mortgage**
 - Lack of formalities may give rise to an equitable mortgage, intention relevant (*Gurfinkel v Bentley; Theodore v Mistford*)
- **Priority dispute**
 - Where this is a dispute between legal/equitable mortgages the priority rules will apply

Mortgages and the rights of mortgagees

- **Power of sale**
 - Mortgagee sells the land to discharge the mortgage debt. Contractual rights subsist in event of shortfall
- **Process**
 - Regulated by statute
- **Mortgagee's duty**
 - To act in good faith with respect to the sale of the property (*Upton v Tasmanian Perpetual Trustees*)
- **Innocent purchaser – pre-settlement**
 - Mortgagee acts improperly mortgagor can seek an injunction
- **Innocent purchaser – post-settlement**
 - Purchaser's right may be protected by statute but see (*Forsyth v Blundell*)

Easements and restrictive covenants

Characteristics