

**REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES**  
**INQUIRY – 23 OCTOBER & 14 NOVEMBER 2002**

This is a determination of an application dated 30 August 2002 by the tenants, seeking an order for return of their security deposit pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 16/55 Sayer Road, McMinns Lagoon in the Northern Territory of Australia.

This is also a determination, with the tenants’ consent, of an application dated 14 November 2002 by the landlord for compensation in accordance with sections 121 and 122 of the Act.

A Notice of Inquiry dated 18 October 2002 was posted to the parties. The Inquiry was conducted on 23 October 2002 during which evidence was taken from one of the tenants, (“the Tenant”) and the landlord’s, (“the Landlords”).

The Inquiry was adjourned to 14 November 2002 so that the second tenant could attend and give evidence for the purpose of the Inquiry. However, the second tenant did not attend with the first tenant once again appearing on behalf of both Tenants. Both Landlords were appearing on behalf of the Landlords.

On the basis of the documentary and oral evidence before the Inquiry, I find there is a tenancy agreement within the meaning of and subject to the provisions of the Act on the following terms:

Premises:	16/55 Sayer Road, McMinns Lagoon
Commencement Date:	27 October 2001
Period:	12 Months
Rent:	\$250.00 per week
Security Deposit	\$1,000.00

I note the parties had been governed by a fixed term written tenancy agreement dated 15 October 2001. The agreement was for a term of 12 months commencing on 27 October 2001 and expiring on 26 October 2002. During the course of the Inquiry, neither party was able to locate a copy of the written tenancy agreement. However, I note, since the Inquiry, the Landlord had found a copy of the report and has submitted a copy to the Commissioner. This written tenancy agreement has been signed by Elder’s Ltd and essentially confirms the oral evidence given by the parties during the course of the Inquiry.

I note the written tenancy agreement names Elders Limited as the Tenant, however it was accepted by both parties that although Elders were named as the Tenant, Ms Tenant and Mr Tenant were the people granted the right of occupancy for the premises. Accordingly for the purposes of this Inquiry I am satisfied that the Tenant can be taken as being Mr and Ms Tenant.

## **Vacation of the premises**

The oral and documentary evidence from the parties in relation to the vacation of the premises was as follows:

- Although the Tenants were in a fixed term arrangement until 26 October 2002 one of the Tenants, had to leave Darwin to go to Queensland. The parties had discussions to the effect that the tenancy agreement would continue until the end of June 2002. However, on 11 March 2002 the Tenants advised that they would be vacating the premises on 13 March 2002.
- It appears the parties had negotiated that the Tenant would pay rent up to and including 25 March 2002. Although there appeared to be some dispute over the unpaid rent it seems that the parties have resolved this issue.
- On Thursday, 12 March 2002 the Landlord says they arranged to meet with the Tenant at the premises at 5.00pm on Tuesday afternoon. The purpose of the meeting was to do the final inspection as well as to get the keys.
- The Landlord says on that afternoon they had arrived early however, the Tenant did not show up at the pre-arranged time. The Landlord says there was no contact from the Tenant to say that he was not turning up and they tried to ring his mobile phone however, it was switched off.
- The Landlord says they completed the outgoing on 12 March 2002 as well as took photographs which they submitted to the Inquiry on 13 March 2002. These photographs depict the various state of the gardens the shed and damage alleged by the Landlord.
- The Landlord's have submitted to the Inquiry a copy of their outgoing condition report which is entitled "Tenancy Report Mr Tenant and Ms Tenant commenced 27 October 2001". They have also submitted to the inquiry a number of statutory declarations in support of the condition of the premises upon the Tenants vacation.
- The Tenant says he was at the premises until Wednesday 13 March 2002 because he left early that morning. The Tenant says he was at the premises at the arranged time of 5.00pm however, the Landlord's did not show up so he left the keys in the door. The Tenant says that his mobile phone was on and he was contactable during the period.

The evidence from both parties was conflicting. On balance, I prefer the evidence of the Landlord and do not accept the Tenant's version of events. I find that the Tenant was not at the premises at the prearranged time on 12 March 2002. When the Landlords arrived at the premises I find that the premises was vacant and the keys were left in the door. Accordingly, I find the Landlords had vacant possession of the premises as at 5pm on 12 March 2002.

## **THE SECURITY DEPOSIT**

The Tenant has brought an application for the return of his security deposit. I note the Landlord has sought to retain part of the Tenant's \$1,000.00 security deposit in the amount of \$906.40. This money was to be applied by the Landlord for the purposes of making good damage as well as cleaning the premises left in an unreasonably dirty condition.

In summary, the evidence of the Tenant during the course of the Inquiry in relation to this issue is as follows:

- The Tenant says he has received a cheque from the Landlord in the amount of \$93.60 however disputes the retention of the balance of his security deposit in the amount of \$906.40.
- The Tenant disputes the retention on the basis that no condition report was completed at the beginning or at the end of the tenancy.
- In addition, the Tenant says they have never received from the Landlord a Notice of Intention to Retain their Security Deposit.

In summary, the evidence of the Landlord in relation to this issue was that:

- They did not have any forwarding address for the Tenant, they attempted to ring the Tenant however, these attempts were unsuccessful. Accordingly, the Landlord says they did not post a Notice of Intention to Retain Security Deposit in accordance with section 112(5) of the Act.
- The Landlords say even if they had have done this and sent the Notice to the last known address, being the address of the premises, as the premises is situated in the rural area, the letter would have just sat there and been returned to sender. The Landlords say that the earliest contact they had with the Tenant was in early July 2002. They knew the Tenant worked at the Howard Springs Vet, however, they did not have any comment as to why the Notice was not sent there.
- The Landlord says that they did not send the outgoing condition report to the Tenant either. The Landlord says had the Tenant attended the final inspection on 12 March 2002 he would have received a copy of the outgoing condition report then.

In order for the Landlords to retain a Tenant's security deposit, section 112 of the Act provides, my emphasis:

Section 112. When landlord may keep security deposit

- (1) Subject to this section, **a tenant is entitled to have his or her security deposit reimbursed at the end of the tenancy agreement.**
- (2) The landlord must, **within 7 business days after** the tenant gave up vacant possession of the premises or has, **in the opinion of the landlord, apparently abandoned the premises, reimburse to the tenant the amount of the security deposit, other than an amount that the landlord is entitled to retain, or to continue to hold, under this section.**

Penalty 20 penalty units.

- (3) **At the end of a tenancy agreement the landlord is entitled to retain so much of the security deposit paid by the tenant as is necessary to –**
  - (a) **make good damage** (other than reasonable wear and tear) to the premises or to ancillary property that occurred during the tenancy and that was caused by a tenant or a person for whose actions a tenant is liable under section 12;

- (b) **replace ancillary property** lost or destroyed by the tenant or by a person for whose actions the tenant is liable under section 12;
  - (c) **clean the premises** or ancillary property **left unreasonably dirty by the tenant** or by a person for whose actions the tenant is liable under section 12;
  - (d) **replace locks altered, removed or added** by the tenant without the consent of the landlord;
  - (e) **pay for unpaid rent** or for unpaid charges for electricity, gas or water payable by the tenant under section 118;
  - (f) **pay an amount required to be paid under section 121**; or
  - (g) **pay money ordered by the Commissioner or a court** to be paid by a tenant but not paid.
- (4) **The landlord is not entitled to retain some or all of the amount of a security deposit for a purpose referred to in subsection (3)(a), (b) or (c) unless –**
- (a) **a condition report in relation to the premises was accepted by the tenant under Part 5**; and
  - (b) **if the tenant –**
    - (i) has given up vacant possession of the premises – a condition report has been provided to the tenant under section 110; or
    - (ii) **has, in the opinion of the landlord, apparently abandoned the premises – notice has been given to the tenant in accordance with section 110(3)** and, if the tenant demanded copies of the condition report within 7 days after notice was given to the tenant under that section, those copies have been given to the tenant.
- (5) Subject to section 113(2), **the landlord is not entitled to retain, or to continue to hold under subsection (6), part or all of a security deposit unless, within 7 business days after the tenant gave up vacant possession of the premises or has, in the opinion of the landlord, apparently abandoned the premises, the landlord has –**
- (a) **given written notice** in the prescribed form, if any, **of his or her intention to retain or continue holding so much of the security deposit as is specified in the notice** for the purpose specified in the notice;
  - (b) **attached a copy of a statutory declaration** in the prescribed form, if any, **attesting to the truth of the claim that the retention or continued holding of the security deposit is required for the purpose specified** in the notice;
  - (c) **attached a copy of a statutory declaration attesting that the receipts, invoices or other documents attached to the declaration relate to –**
    - (i) **the matters in respect of which part or all of the security deposit is being withheld from the tenant**; or

- (ii) **the amount of unpaid** rent owing under the agreement or money owing under section 121;
- (d) **in the case of damage or unreasonably dirty premises** or ancillary property – **attached copies of receipts, invoices or other documents**, including orders of the Commissioner or a court, **specifying the amount required to make good the damage or clean the premises** or ancillary property; and
- (e) **returned to the tenant the proportion of security not claimed by the landlord** or not to be held under subsection (6).

The Landlords are not entitled to retain the Tenant's security deposit, unless within 7 business days of the Tenant vacating the premises, they given the Tenant a Notice of Intention to Retain the Tenant's Security Deposit in accordance with section 112(5) of the Act. In order to give notices under the Act, section 154 provides:

Unless otherwise provided by or under this Act, a notice required by or under this Act to be given to a person may be delivered personally to the person or sent by post addressed –

- (a) in the case of a natural person – to the person's last-known place of business or residence.

It was incumbent on the Landlords to serve the Notice in accordance with the Act and they clearly, based on the evidence before the Inquiry, have not complied with this requirement. In addition, I note there was no evidence before the Inquiry that the other requirements of section 112(5) had been met.

In addition, section 112(4) of the Act provides the Landlords are not entitled to retain any part of the security deposit to make good damage or to clean the premises unless a condition report has been accepted by the Tenant under Part 5 of the Act and the requirements of section 110 of the Act have been met.

Section 110 provides, my emphasis:

- (1) A landlord may, **within 3 business days after a tenant has given up vacant possession of premises** to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report** and give both copies to the Tenant.
- (2) The **landlord is to fill out the condition report under subsection (1) in the presence of the tenant or a representative of the tenant** (who is not the landlord or the landlord's agent) **unless it is not practical to do so** or the tenant or the tenant's representative does not appear at the agreed time.
- (4) **A condition report is to –**
  - (a) **specify the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates;**
  - (b) **itemise, and specify the condition of, any fixture or chattel that is ancillary property; and**
  - (c) contain other prescribed information, if any.

- (5) **A tenant or tenant's representatives may –**
- (a) **accept a condition report given to him or her under subsection (1) or (3) by signing both copies of the report and returning one to the landlord; or**
  - (b) if the parties are unable to agree as to the contents of the condition report – refuse to accept the condition report.
- (6) If, within 7 business days after 2 copies of the condition report have been given to a tenant under subsection (3), both parties have not accepted the report, the landlord or the tenant may apply to the Commissioner to prepare a condition report in respect of the premises.

In my view, section 110(4) of the Act clearly requires that a condition report must specifically itemise the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates. In addition, the condition report must itemise and specify the condition of all fixtures, chattels that amount to ancillary property within the premises. The outgoing condition report submitted by the Landlords does not in my view, comply with this requirement. The outgoing condition report submitted by the Landlords merely summarises the deficiencies that were in the premises upon the Tenants vacation. This provides no assistance to the Commissioner in the event that a dispute as to the condition of the premises arises. Just because the Landlords are of the view that certain aspects of the premises require cleaning and repairs does not mean the Tenant has left the premises in an “unreasonable dirty condition” or in an “unreasonable state of repair” for the purpose of his obligations under the Act.

The Landlords evidence was also to the effect that two copies of the outgoing condition report were not given to the Tenant at his last known address (which may be the address of the premises) within three business days of the Tenant vacating the premises.

On the basis of the evidence from both parties before the Inquiry, I find that:

- The Landlords did not give the Tenant two copies of an outgoing condition report in accordance with section 110(3) of the Act within three business days of the Tenant vacating the premises on 12 March 2002.
- The outgoing condition report submitted by the Landlords does not comply with section 110(4) of the Act which requires that the condition of walls, floors and ceilings in each room in the premises to which the tenancy agreement relates be specified as well as the itemisation.
- The Landlords did not give Notice of Intention to Retain the Tenant’s Security Deposit as required by section 112(5) of the Act.

I am not satisfied that the Landlords have complied with the requirements of sections 110 and 112 of the Act. Therefore the Landlords are not entitled to retain the Tenant’s security deposit and must return it to the Tenants forthwith. The Tenant has received a cheque from the Landlord in the amount of \$93.60 being for partial refund of his security deposit. The balance of the Tenant’s security deposit that must be returned to the Tenant amounts to (\$1,000.00 – \$93.60 =) \$906.40.

Accordingly, I order that the Landlords return to the Tenants the balance of the security deposit in the amount of \$906.40 forthwith.

## COMPENSATION CLAIM

The Landlords foreshadowed during the inquiry they would be bringing a compensation claim in relation to the repairs and cleaning. The Tenant indicated during the course of the Inquiry that he was happy to consent to the compensation application being heard so that all the disputes between the parties could be dealt with.

In the interests of resolving the dispute between the parties and given the Tenant was consenting to such course, I exercised my power under section 141 of the Act to hear the Landlords' application notwithstanding, the Landlord had not made a written application for compensation. I note on 14 November 2002, I received a written application from the Landlords dated 10 November 2002 to this effect, claiming compensation under sections 121 and 122 of the Act.

Section 121 only applies if the Tenant has failed to provide vacant possession of the premises after he is required to do so by or under the Act. This clearly does not apply to these circumstances of this matter as the parties had negotiated a vacation date, and if anything the Tenant vacated earlier than the date agreed. Section 122 would be the relevant provision for the purpose of the Landlords' application.

The Landlords claims compensation for the following:

- returning the gardens to a reasonable condition in the amount of \$330.00;
- repairs to the tack shed, repairing a leaking tap, cleaning the rubbish from the shed and replacing sheets of iron on shed two wall as well as repairs to an iron gate in the amount of \$576.40.

In support of the claim, the Landlords have submitted copies of invoices from EAM Industries, Tax Invoice dated 23 March 2002 in the amount of \$576.40 as well as an invoice from Henry Burgess, Tax Invoice number 48 dated 24 March 2002 in the amount of \$330.00. In addition, the Landlords have submitted photos of the premises taken 13 March 2002 and various statutory declarations from people who were present at the premises at the time of the Tenants possession and vacation of the premises. Statutory declarations were received from several people: 1<sup>st</sup> declared 17 October 2002; 2<sup>nd</sup> declared 17 October 2002; 3<sup>rd</sup> declared 17 October 2002 (two different declarations submitted from the 3<sup>rd</sup> person regarding the observations of the premises at or about the time of the Tenant's possession and vacation of the premises); and a 4<sup>th</sup> person declared 17 October 2002.

In considering the Landlords' application for compensation, the onus is on the Landlords to prove on the balance of probabilities that any loss or damage suffered by them is a result of the Tenant's breach of his obligations under the tenancy agreement.

In relation to the cleanliness and damage of the premises, section 51 of the Act provides, my emphasis:

Section 51      Cleanliness and damage

- (1) It is a **term of a tenancy agreement that a tenant –**
  - (a) will **not maintain the premises** and ancillary property **in an unreasonably dirty condition, allowing for reasonable wear and tear;**
  - (b) must **notify the landlord of any damage or apparent potential damage to the premises** or ancillary property, other than damage of a negligible kind;

- (c) **must not intentionally or negligently cause or permit damage to the premises** or ancillary property;
  - (d) if the premises are a unit within the meaning of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of the Act;
  - (e) if the premises are a building lot within the meaning of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of that Act; and
  - (f) if the premises are a lot within the meaning of Part IVB of the *Unit Titles Act* – must not intentionally or negligently cause or permit damage to the common property within the meaning of that Act.
- (2) **It is a term of a tenancy agreement that at the end of the tenancy the tenant must give the premises and ancillary property back to the landlord –**
- (a) **in reasonable state of repair; and**
  - (b) **in a reasonably clean condition,**
- allowing for reasonable wear and tear.**
- (3) **A tenant is not in breach of the term of the agreement specified in subsection (1) or (2) if –**
- (a) **the breach is caused by the landlord’s failure to repair or maintain the premises or ancillary property; and**
  - (b) **the landlord had notice that the repairs or maintenance were required.**
- (4) **In deciding whether premises or ancillary property are in reasonable condition or in a reasonably clean condition, a landlord, the Commissioner or a court must take into account –**
- (a) **the condition of the premises or ancillary property when the tenant took possession of them as determined by a condition report, if any, accepted under Part 5** by the landlord and the tenant;
  - (b) **if the tenancy agreement has terminated or the tenant has, in the opinion of the landlord, apparently abandoned the premises – the condition of the premises or ancillary property as determined by a condition report, if any, accepted under Part 12** by the landlord and the tenant; **and**
  - (c) **the effect of reasonable wear and tear** during the tenancy.
- (5) **If a condition report was not accepted by the landlord and the tenant in relation to the premises or ancillary property under Part 5 –**
- (a) **the tenant is to be taken to have complied with the term of the agreement specified in subsection (1); and**

- (b) **if the tenancy agreement has terminated** or the tenant has, in the opinion of the Landlord, apparently abandoned the premises – **the premises or ancillary property are to be taken to have been at the time when the tenant took possession of the premises under the tenancy agreement, in the condition they are at the end of the tenancy agreement.**

Significantly, if an ingoing condition report has not been accepted by the Landlords in accordance with Part 5 of the Act, section 51(5) provides the Tenant is taken to have complied with his obligations under section 51(1) to *inter alia* maintain the premises and ancillary property in a reasonably clean condition, allowing for reasonable wear and tear. In addition, upon termination of the tenancy, the condition of the premises and/or ancillary property is taken at the end of the tenancy to have been the condition of the premises when the Tenant took possession of it.

Part 5 of the Act governs security deposits and condition reports. Section 25 provides, my emphasis:

Section 25      Landlord may provide condition report

- (1) A landlord may, **within 3 business days after a tenant takes possession** of premises to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report and give both copies to the tenant.**
- (2) **A condition report is to –**
  - (a) **specify the condition of walls**, floors and ceilings in each room in the premises to which the tenancy agreement relates;
  - (b) **itemise, and specify the condition of, any fixture or chattel** that is ancillary property; and
  - (c) contain other prescribed information, if any.
- (3) **The landlord is to fill out the condition report** under subsection (1) **in the presence of the tenant or a representative of the tenant** (who is not the Landlord or the Landlord's agent) **unless it is not practical to do so or the tenant or the tenant's representative does not appear at the agreed time.**

Upon receipt of an ingoing condition report in accordance with section 25, tenants can alter or accept the condition report in accordance with section 26 which provides, my emphasis:

Section 26      Alteration or acceptance of condition report

- (1) **Within 5 business days after receiving the copies of the condition report under section 25, the tenant may –**
  - (a) **accept the report by signing both copies and returning one of the copies to the landlord;** or
  - (b) **mark the modifications the tenant thinks fit** on both copies of the condition report, **initial the modifications and return both copies to the landlord.**
- (2) **If a tenant does not take action under subsection (1) within the time specified in that subsection, the tenant is to be taken to have accepted the condition report.**

- (3) Within 5 business days after receiving the copies of the condition report modified by the tenant under subsection (1)(b), the landlord may –
  - (a) accept the report as modified by the tenant by initialling the modifications made by the tenant and returning both copies, without making modifications, to the tenant; or
  - (b) mark the modifications the landlord thinks fit on both copies of the condition report, initial the modifications and any modifications that the tenant has made under subsection (1)(b) that the landlord accepts and return both copies to the tenant.
- (4) If a landlord does not take action under subsection (3) within the time specified in that subsection, the landlord is to be taken to have accepted the condition report as modified by the tenant.
- (5) After receiving the copies of the condition report from the landlord under subsection (3) –
  - (a) if the landlord accepted the tenant’s modifications under subsection (3)(a), the tenant may, within 5 business days, accept the condition report by signing both copies and returning one of the copies to the landlord;
  - (b) if the landlord made modifications under subsection (3)(b), the tenant may, within 5 business days, accept the condition report by initialling the modifications made by the landlord under subsection (3)(b), signing both copies of the condition report and returning one copy to the landlord; or
  - (c) in either case, the tenant or the landlord may –
    - (i) attempt to reach agreement as to the contents of the condition report and accept the condition report by having both parties initial all modifications to the report by having both parties initial all modifications to the report that are accepted by them and having the tenant sign both copies of the report and return one to the landlord; or
    - (ii) apply to the Commissioner under section 27.

In the event a condition report dispute arises then the matter can be referred to the Commissioner in accordance with section 27. If a condition report is accepted by the tenant or is taken to have been accepted by the tenant because of his or her failure to return the condition report within 5 business days of receiving it from the landlord then section 28 provides, my emphasis:

Section 28      Condition report conclusive of condition at beginning of tenancy

If a condition report is or is to be taken to have been accepted under this Division by the landlord and the tenant, **the condition report is (insofar as it relates to the beginning of the tenancy) conclusive evidence of the condition of the premises and of the provision of and the condition of any ancillary property referred to in the condition report at the beginning of the tenancy, unless the Commissioner determines otherwise in a particular case.**

A similar provision applies to the outgoing report under section 111 if a condition report has been completed in accordance with section 110 of the Act.

Condition reports are very significant documents for the purposes of the tenancy agreement as, if they comply with the requirements of the Act, they provide conclusive evidence of the state of the premises when a tenant takes possession of and vacates the premises.

The Act does not require landlords to do a condition report, however, failure to complete a condition report in accordance with the Act has particular consequences for the landlord and the tenancy agreement governing the parties. For instance, as was apparent from the reasons above, a landlord's ability to retain a security deposit for cleaning and damage to the premises will be governed by whether an ingoing and outgoing condition report has been completed in accordance with Part 5 and Part 12 of the Act.

If a landlord chooses to complete an ingoing and outgoing condition report in accordance with the Act, the Act effectively sets out a statutory procedure under which such reports can be accepted or are taken to be accepted under the Act. These requirements are clear in its terms and in my view, are mandatory requirements insofar as they determine whether a valid condition report has been accepted or is to be taken to have been accepted under Part 5 or Part 12 of the Act.

The ingoing condition report is a particularly significant document. If a landlord and tenant have not accepted an ingoing condition report in accordance with Part 5 of the Act, section 51(5) essentially operates as a deeming provision. By virtue of the Act, the tenant is taken to have complied with the terms of the tenancy agreement under section 51(1) and (2). These provisions require a tenant *inter alia* to return the premises in a reasonable state of cleanliness and returning the premises in a reasonable state of repair.

One of the fundamental principles of statutory interpretation is that legislation is to be interpreted literally, giving effect to the ordinary and natural meaning of the words used by the legislature consistent with the purpose of the legislation in the event of any ambiguity.

In my view the purpose of condition reports and the consequences for the failure to comply with the requirements of such reports built into the Act is to ensure that disputes over cleanliness and damage to the premises are resolved as efficiently as possible. These disputes are often strongly contended by both parties and the evidence required by the parties to establish the condition of the premises is often long and involved. In the absence of such condition reports it makes it very difficult to prove (and indeed for the Commissioner and/or the Court's to determine), the condition of the premises at the start and at the end of the tenancy.

### **The ingoing condition report**

The evidence from both parties in relation to the ingoing condition report for the premises was directly contradictory. On the one hand the Tenant asserts that he has never received an ingoing condition report from the Landlords and on the other hand the Landlords say a copy of the ingoing condition report was given to the Tenant. Accordingly, I found it necessary during the course of the Inquiry to take evidence on oath from each of the parties in relation to the completion of the ingoing.

The evidence of the Tenant, Mr Tenant on oath was as follows:

- He is not in receipt of the written fixed term tenancy agreement entered into in November 2001.
- Ms Tenant was an employee of Elders and they had agreed to pay her rent in Darwin.
- His partner, inspected the property during October 2001 in Darwin.
- The Tenant's agreed to rent the premises however Ms Tenant was responsible for negotiating with the Landlords. Mr Tenant was not involved in the negotiations.

- Mr Tenant did not see the property until they moved in on 28 October 2001.
- When they moved in, the Landlords were in the process of doing the final cleaning up and they were also moving out of the premises. Present on the day were three or four of the Landlords friends as well as their next door neighbour John.
- Upon their arrival at the premises, Ms Tenant introduced Mr Tenant to the Landlords. They said 'hello' and made small talk. The Tenant says there were no direct negotiations with respect to the property other than going around with the Landlords so that they could show them a few of the features such as how to use the bore and turning on the taps for the purposes of running the property.
- Mr Tenant says there was nothing said about the tenancy agreement. The tenancy agreement had been signed by the office of Elders Limited and Ms Tenant had negotiated with the Landlords before the signing of the agreement. Mr Tenant says he recalls seeing the initial tenancy agreement however at no time has he ever seen an ingoing condition report.
- Mr Tenant says that he is sure that no ingoing condition report has ever been received by the Tenants, he has spoken to Ms Tenant and she does not recall seeing an ingoing condition report either.

I note the Inquiry was adjourned on 23 October 2002 to 14 November 2002 in order for Ms Tenant to give evidence regarding the negotiations for the tenancy agreement and the ingoing condition report. However, Ms Tenant was unable to attend the Inquiry due to University commitments.

The evidence on oath from one of the Landlords, in relation to the completion of the ingoing condition report was as follows:

- Ms Tenant had been recommended as a potential tenant through John and she had rung and asked to have a look at the property in mid October 2001. She was specifically after a property that had sufficient facilities for her horses.
- An initial inspection occurred during October 2001, Ms Tenant inspected the property with her friend, Linda and agreed to take up rental of the premises.
- Accordingly, the Landlord's got a copy of the REINT tenancy agreement and filled out the particulars as well as opened a bank account so that the rent could be deposited.
- The Landlord signed the agreement and this was faxed through to Elders in Katherine who put in place the payment of the bond and the rent. This was faxed between the parties and it was arranged that the Tenants would move in on 27 October 2001. The Landlord says that the fax correspondence between the parties only involved the tenancy agreement. The ingoing condition report was attached to the agreement for the purposes of signing the tenancy, however, this was not faxed through.
- The Landlord says she filled out the ingoing condition report on the morning of 27 October 2001. The report was a standard REINT report, which specifically listed all the various parts of the premises. The Landlord says that the carpets at the premises had just been steamed cleaned and were still damp, their gardens had been professionally done two days earlier and they were also in the process of moving everything out.

- The Landlord says she completed the ingoing condition report and she was rushing around trying to do all of these things prior to the Tenant's arrival.
- When the Tenants arrived they unloaded their horses and showed them how to function the bore, the water tank and the lights to the area as well as reticulation system.
- Ms Tenant went to the car and obtained a cheque from Elders in the amount of \$2,083.33 being for the bond and one months rent.
- The Landlord says she gave to the Tenant a whole copy of the REINT agreement, which had the signed tenancy agreement (that had been previously faxed between the parties) as well as the original of the ingoing condition report. This was stapled together and was placed in a plastic sleeve.
- The Landlord says she definitely recalls giving the ingoing condition report to the Tenant on the morning of 27 October 2001. The Landlord says she only gave the Tenants one copy of the ingoing report and gave them the original copy she had filled in that morning. The Landlord did not retain a copy of this ingoing condition report for her records.
- The Landlord says she remembers filling out the ingoing condition report as she was leaning on the bench trying to fill it out whilst everyone else was in the process of moving. She would have done it at about 10.30 in the morning and it took her three quarters of an hour however, she got interrupted as the Tenant's had arranged for new sand to be put in the stables. The Landlord says she definitely signed the ingoing condition report upon completion.
- The Landlord says that when she gave the copy of the tenancy agreement and the ingoing condition report to the Tenant, nothing was said in that regard. However, she remembers speaking to the Tenants about why the cheque was for an odd amount.
- The Landlord says that there was so much happening at the time that she did not get a chance to speak to the Tenants about the ingoing condition report and had no conversations with them in that regard.
- The Landlord says she did not comply with her obligations under section 25 of the Act in that she did not give two copies of the condition report. The Landlord says so much was happening that morning and there was a lot of confusion because she was just trying to get everything done.

I note evidence on oath was also taken by the other Landlord, in relation to the condition of the premises however, he was not involved in the negotiations of the tenancy agreement as that was left to his wife. Says he remembers co-signing the tenancy agreement after his wife had signed it however, does not know anything about the ingoing condition report.

In so far as I am required to choose between the evidence of the parties, on balance, I prefer the evidence of the Landlord. In my view, the evidence of the Landlords during the course of the inquiry was generally, a more credible and frank account of what had occurred during the tenancy agreement.

Accordingly, on the basis of all the evidence before the Inquiry, I find:

- The Landlord completed a copy of the ingoing condition report on the morning of 27 October 2001.

- This ingoing condition report was signed by the Landlords and specified the condition of the premises in accordance with section 25(2) of the Act.
- The Landlords did not provide the opportunity to the Tenants to attend the ingoing condition report and says that it was not practical to do so as they were also in the process of moving out of the premises on that day.
- Only one copy of the ingoing condition report was given to the Tenants, namely, Ms Tenant. This copy was stapled to a copy of the tenancy agreement and was placed by the Landlords in a plastic sleeve.
- The Landlords did not retain a copy of the ingoing condition report for their records.

Section 25 of the Act requires the Landlord to give the Tenant two copies of the ingoing condition report. Two copies are required so that the Tenant has an opportunity to alter or accept the condition report received from the Landlord in accordance with section 26. The Landlords, by her own admission has not complied with this requirement. In addition, the Landlords did not provide the Tenant with an opportunity to attend the ingoing condition report in accordance with section 25(3). The Landlords say it was not practical to do so because she was in the process of moving out of the premises. In my view, this is not a valid reason. The obligation is on the Landlord to provide the Tenant with an opportunity to attend the ingoing condition report. The Landlord did not necessarily have to do the ingoing condition report on the morning of 27 October 2001, however, had within 3 business days of 27 October 2001 to attend to the same.

I find that the Landlords have not complied with section 25(1) and (3) of the Act. Accordingly, for the purposes of this tenancy agreement I am not satisfied that an ingoing condition report has been accepted or can be taken as being accepted by the parties under Part 5 of the Act.

Accordingly, by virtue of section 51(5), the Act essentially deems that the Tenants have complied with their obligation under section 51(1). Namely, to maintain the premises in a reasonable state of repair and also deems the condition of the property at the end of the tenancy agreement to be the condition of the property at the beginning of the tenancy.

The Commissioner, in deciding whether premises are in a reasonable condition, must take into account the condition of the premises at the beginning and end of the tenancy. Given section 51(5) of the Act, I have no alternative but to find that Tenant has left the premises in a reasonably clean condition and in a reasonable state of repair. Therefore it follows, that I must disallow the Landlord's claims of compensation for cleaning premises left in an unreasonably dirty condition and for damage to premises left in an unreasonable state of repair, save for any concessions made by the Tenant during the course of the inquiry.

I note it is with great reluctance that I make such a finding. As is apparent from the reasons herein, on balance I preferred the evidence of the Landlords during the course of the Inquiry. I had difficulty accepting a great deal of the Tenant's evidence regarding the condition of the premises. In my view, on the basis of the evidence from both parties in relation to these issues, the premises was probably left in an unreasonable state of repair and in an unreasonably dirty condition. The only claim of compensation I would have disallowed is the repairs to the leaking taps in the amount of \$54.00, as in my view that would have amounted to reasonable wear and tear. If I had of been empowered under the Act, I would have allowed the rest.

That being said, as I have indicated, the requirements of section 25 are unambiguous, mandatory requirements and the legislature has seen fit to prescribe the procedure that must be followed in order for condition reports to be accepted or taken to be accepted by the parties under the Act. The Landlord has not complied with some of these requirements. The Commissioner has not been given any discretion to allow the acceptance of a condition report for compliance with some, but not all the requirements of section 25. The consequences of not complying with section 25 are clearly set out in section 51(5) of the Act.

The only concession made by the Tenant during the Inquiry was in relation to the replacement of the sheet of iron on shed two wall. The Tenant conceded during the inquiry, (after I indicated I was going to obtain his evidence on oath and in contradiction to his earlier evidence) that he did not obtain the Landlord's permission to place a hole in the wall for the purposes of irrigation. By consent, the parties agreed that \$85.00 of the \$245.00 figure on the EAM Industries invoice can be attributed to the replacement of the iron sheet. By consent of the parties I order that the Tenant pay the Landlord \$85.00 being for the replacement of the sheet of iron to shed two wall. I dismiss the balance of the rest of the Landlord's claim for compensation.

### **Summary of orders**

I note at the end of the Inquiry on 14 November 2002, the Tenant indicated that should I make any orders for compensation the Landlord could retain that amount from his security deposit.

On the basis of the above, I order that:

1. The Landlords return to the Tenants the balance of the security deposit being retained by the Landlords in the amount of \$906.40 to the Tenants forthwith.
2. By consent of the parties, the Tenants are to pay the Landlords the amount of \$85.00 being for the replacement of an iron sheet to shed two wall.
3. By consent of the Tenants, the Landlords are entitled to retain order 2 from order 1 and must effectively return ( $\$906.40 - \$85.00 =$ ) \$821.40 to the Tenants forthwith.
4. The balance of the Landlords' claim for compensation, in the amount of \$821.40 is dismissed.

Dated this 16th day of December 2002

Penny Turner  
Delegate of the  
Commissioner of Tenancies