

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES
INQUIRY – 22 JULY 2003

This is a determination of an application dated 26 May 2003 by the Landlord seeking an order for compensation pursuant to section 122 of the *Residential Tenancies Act* (NT) (“the Act”) in order to resolve a dispute between the parties over the retention of the Tenant’s security deposit. The application is made in respect of premises being 9 Carpentier Crescent, Wagaman in the Northern Territory of Australia.

A Notice of Inquiry dated 7 July 2003 was posted to the parties. The inquiry was conducted on 22 July 2003 during which evidence was taken from the Landlord’s agent (“the Landlord”). Evidence was also taken from the tenant over the telephone (“the Tenant”).

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:	9 Carpentier Crescent, Wagaman
Commencement Date:	27 August 2002
Period:	52 weeks
Rent:	\$480.00 per fortnight
Security Deposit	\$960.00

I note the parties had attempted to conciliate their dispute. At the commencement of the Inquiry, both parties consented to the information given during the conciliation forming part of the Inquiry. Accordingly, the Inquiry was adjourned so I could consider the information given by the parties during the course of the conciliation.

It was apparent that the Tenant had agreed the following amounts could be retained from her security deposit:

- \$50.00 towards cleaning;
- \$137.20 towards unpaid rent;
- \$94.75 towards reletting/administration fees.

Upon resumption of the Inquiry the Tenant confirmed she would consent to orders for these amounts to be retained from her security deposit.

The Landlord maintained its application for compensation and implicitly a determination on whether it could retain the Tenant’s security deposit for the following:

- tick and flea spraying as well as checking for snakes in the amount of \$115.00; and
- the balance of the cleaning being for disinfecting the premises as a result of the presence of snakes in the premises in the amount of \$75.00.

The Landlord indicated that \$488.05 of the Tenant’s \$960.00 security deposit had been returned to the Tenant and the remainder was being held on trust following a determination from this Inquiry.

The documentary evidence of the parties submitted to the Inquiry was as follows:

- Letter, from the Agent to Tenant dated 21 May 2003;

- Notice of Landlord's Intention to Retain Security Deposit undated;
- Statutory declaration of Agent declared 21 May 2003;
- Affidavit of service, by Agent sworn 21 May 2003;
- Ingoing/Outgoing condition report dated 30 August 2002 and 28 August 2003 respectively;
- Tenancy agreement governing the parties dated 27 August 2002;
- Murray Pest Control tax invoice dated 21 May 2003 in the amount of \$115.00;
- Tax invoice/statement from Rita's Cleaning dated 21 May 2003 in the amount of \$125.00;
- Agent's document entitled "Tax Invoice – Security Deposit Disbursement" dated 26 May 2003;
- Email, Mrs Landlord to Agent and Consumer Affairs dated 29 May 2003;
- Emails, Mrs Landlord to Tenancy Officer (Residential Tenancies Unit, Consumer Affairs) dated 16 June 2003;
- Email, Mrs Landlord to Tenancy Officer dated 19 June 2003;
- Email, Tenancy Officer to Agent dated 19 June 2003;
- Email, Agent to Tenancy Officer dated 20 June 2003;
- Letter, Murray Pest Control to Agent dated 20 June 2003;
- Letter, Agent to the Tenant dated 20 May 2003;
- Email, Tenancy to Agent dated 26 June 2003;
- Letter, Agent to whom it may concern undated;
- Letter, Tenant to Agent dated 22 April or June (undecipherable) 2004;
- Statutory declaration, Mr Person declared 23 June 2003;
- Letter, Tenant to Tenancy Officer dated 23 June 2003;
- Letter, Agent to Tenant dated 24 April 2003;
- Agent's document entitled "Agreement to Assignment" with hand written notations of the Tenant down the right hand side of the document;
- Undated letter, Agent to Tenant regarding inspection of the premises;
- Agent's trust account receipt number 254213 and receipt number 254214;
- Letter, Tenant to whom it may concern undated.

The evidence of the Landlord during the course of the Inquiry can be summarised as follows:

- The Landlord says two copies of the outgoing condition report were sent to the Tenant sent on 20 May 2003. The Landlord does not know what time she sent it however she recalls taking a photocopy of the covering letter which is also dated that date as well as the outgoing condition report and placing the correspondence in her office mail tray to be posted.

- The Landlord says the Notice of Intention to Retain the Tenant's security deposit was posted on or about 21 May 2003 ("the Notice"). Attached to this Notice was her covering letter dated the same date; an undated letter of Natalie Feehan to whom it may concern; a statutory declaration; and an affidavit of service dated 21 May 2003.
- The Landlord says the tick and flea spraying was necessary because the Tenant had a little dog in the premises. One of the obligations in the tenancy agreement is that upon moving out of the premises the Tenant's would need to have the place sprayed. The Landlord says that as new tenants were moving into the premises straight after the Tenant moved out, it was necessary for them to action this straight away. The Landlord also relies upon the letter from Murray's Pest Control dated 20 June 2003 that indicated that there were fleas at the premises.
- The Landlord also claims the costs associated with looking for snakes on the premises.
- During the inquiry, I asked the Landlord why there was no mention of ticks or fleas as well as the need to check for snakes on the outgoing condition report, the Landlord's response was that she did not notice fleas when she was conducting the outgoing inspection. She also says that she did not notice any fleabites or marks on her whilst she was there conducting the outgoing inspection. In relation to the snakes the Landlord says she is merely acting on instructions from the owner who indicated that he wanted a pest controller to also check for snakes given that the Tenant's had snakes at the premises.
- In relation to the disinfecting of the premises, the Landlord says she was acting on instructions from the owner who told her that the house would need to be disinfected. The Landlord relied upon an email from the owner to herself and Consumer Affairs dated 29 May 2003 which basically asserts that the disinfecting was necessary because of the diseases that the snakes carry.
- The Tenant vacated the premises on 17 May 2003 by agreement.
- In relation to the ingoing condition report, this was provided to the Tenant within 3 business days of her moving into the premises and the Landlord did not have any issues with the amendments made by the Tenant.

The evidence of the Tenant during the course of the Inquiry can be summarised as follows:

- The Tenant says she spoke to the Landlord regarding early vacation of the premises as she was fighting with the owners (one of whom, Mary, was her foster mother). The Landlord did not have a problem with that and they agreed that she would vacate on 19 January 2003.
- The Tenant in fact moved out of the premises on 17 May 2003.
- The Tenant says she met with one of the owners, on 16 May 2003. He apologised for his wife's behaviour as they were having a number of issues at the time and the Tenant's handed over the keys on that date. The Tenant says she was still able to secure the doors as she could just merely close them.
- The Tenant says that on 16 May 2003 she went through the premises with the Landlord, who indicated that he was happy with everything except some minor issues with the cleaning. The Tenant also indicated that she had spoken to the Landlord and they had agreed that she would pay for the minor cleaning. They agreed that this would amount to \$50.00.

- The Tenant thought that was the end of it, until she received the Notice of Landlord's Intention to Retain the Tenant's security deposit on or about 29 May 2003.
- The Tenant says that it was not until 27 May 2003 that she gave the Landlord's agent the forwarding address. She received all the documents mentioned by the Landlord, which were attached to the Notice.
- The Tenant says she has never received a copy of the outgoing condition report from the Landlord.
- The Tenant says that in relation to the outgoing condition report at the time that it was sent, on or about 20 May 2003, there was no way the Landlord could have had her forwarding address as this was not given to the Landlord until 27 May 2003. She is not asserting that Landlord is "lying" however, she knows that she has never received a copy of the documents.
- In relation to the ingoing condition report, this was provided within three business days of entering into possession of the premises, the Tenant made amendments and returned a copy of her amended report to the Landlord. She does not have any issues with the ingoing condition report.
- In relation to the ticks and flea spraying and the need to look for snakes the Tenant says that she stayed with the Landlord for approximately 12 weeks prior to them buying the house. She was concerned at having to sign a written fixed agreement that imposed all these extra conditions and when she spoke to the owners, Mrs Landlord said it was "my house, don't worry about it I won't expect you to do it" or words to that effect. Apparently the written tenancy agreement was a requirement of the real estate agents being engaged for the property. The Tenant says she wrote down the right hand side of the agreement when they first moved in indicating that this was the case. In particular she was concerned that the gas bottle which had not been filled when they moved in as well as the tick and flea spraying, which had also not been done when they moved into the premises. Despite these oral assertions the Tenant says that she signed the tenancy agreement anyway.
- The Tenant says that she did have snakes on the premises. She does not know how many snakes there were however the snakes were always kept in cages. Because of all the issues she was having with the owner of the property she got an officer from the Parks and Wildlife to come out and conduct a full inspection of the snakes. In that statutory declaration, the officer declares that her snakes were kept in an extremely clean condition, the cages were of a high standard and they were well looked after. The Tenant says that when they left the premises all their snakes had been accounted for. The Tenant says she does not know how many snakes they have as it is her partner's hobby however she does know that she is not missing any.
- In relation to the tick and flea spraying, the evidence of the Tenant is that her dog does not have ticks. She remembers while she was living at the premises remarking to her work colleagues that she was extremely lucky because her dog did not have any ticks and fleas. The Tenant says that she never noticed that her dog had any fleas prior to moving out of the premises.
- In relation to the need to disinfect the premises, the Tenant did not have a copy of the email dated 29 May 2003 from the Landlord to the Agent ("the email"). Accordingly, during the Inquiry I read out the email to her.

In response, the Tenant says all the information contained in the email would have been knowledge acquired by the Landlord from them over the course of their familial history. They have two wild snakes, which they have had for about seven years. They are the only wild snakes they have and it is only on one occasion that one of these snakes had to be treated for Cankar. The snake had been put into a bag and had rubbed its nose on the corner of the bag. The snake had a sore as a result, which got infected and required treatment. There was also another incident where they did have to remove ticks from a snake but that had occurred only on one occasion.

The Tenant says the snakes are not 'pets they do not sit them on the lounge room and give them a cuddle and allow them to roam freely around the house'. The Tenant says she aware that snakes do carry some diseases however she has two small children and the snakes are not allowed to roam freely around the house. The snakes are kept in cages and they are only removed and handled when the cage had to be cleaned. When this occurred the snake would be put into a garbage bin. The Tenant says that when the snakes are handled their hands must be disinfected with methylated spirits however this is more to prevent cross contamination of diseases between the snakes themselves rather than preventing humans from getting diseases.

The Tenant says that she has a seven year old and eight year old daughter and during the seven years that they have had the snakes at no stage have they gotten ill from it. The Tenant says that her snakes were always kept in an extremely clean environment, initially they were kept downstairs of the premises. However as they heard that animals were being stolen from that area they moved the snakes into the house but they were always kept in cages save for the times when they were being cleaned.

During the course of the Inquiry, I indicated to the parties that I would be contacting the Institute of Medical and Veterinary Science, Royal Darwin Hospital and Communicable Diseases Unit referred to in the email to clarify the likelihood of the snakes carrying disease and contaminating the premises. Both parties during the course of the Inquiry consented to me contacting the relevant expert to determine how contagious these diseases can be and whether or not the disinfecting of the premises is reasonable. The parties both indicated that they did not want another opportunity to provide submissions on the outcome of my conversation with the relevant snake expert. The only proviso from the Tenant being that I would indicate to the expert the evidence that was before me namely, the statutory declaration from the Parks and Wildlife Officer indicating that the snakes were well looked after.

On or about 23 July 2003 I contacted the switch of the Royal Darwin Hospital and was told that there was the Institute of Medical and Veterinary Science (as referred to in the email) did not exist. I was then put through to the Communicable Diseases Unit and was told that Professor Bart Curry would be the relevant person who would be able to assist me with snake diseases.

On 24 July 2003 I spoke to Professor Bart Curry who indicated in summary that:

- He is a specialist physician in infectious diseases with expertise in toxicology, diseases from animals.
- If the snakes are kept in a good condition and have the relevant licences, then it is unlikely that any residual bacteria would be left behind in the premises.
- If the snakes were allowed to roam on the bench tops etc, then there is a small chance that disease would occur.

- There have been cases where disease has occurred in humans, particularly children, however this is more often where there is direct contact with the snakes or the faeces, as opposed to indirect contact.
- Professor Curry opined that if:
 - the premises was left in a reasonably clean condition;
 - a Parks and Wildlife officer had inspected the premises and were of the opinion that the snakes were kept in a good condition;
 - the snakes were licensed; and
 - the snakes were kept in cages with minimal handling and no direct contact with snakes or faeces;

then he would consider it unnecessary to disinfect the premises.

Retention of the security deposit

Prior to considering the merits of the Landlord's ability to retain the Tenant's security deposit it is necessary to consider whether or not the Landlord has complied with the procedural requirements required under section 112 of the Act.

Based on the evidence before the Inquiry I am satisfied that there is an accepted ingoing condition report under Part 5 of the Act.

In relation to the outgoing condition report I note that the Tenant's evidence was that she had never received a copy of this report. Although I accept the Tenant's evidence in this regard I also accept that the Landlord did post two copies of the outgoing condition report to the Tenant on or about 20 May 2003.

Section 154 of the Act provides that notices that must be given under the Act can be served personally or by post. The Landlord has elected to serve the Notice by post and in order to resolve this issue, I rely on section 25 of the *Interpretation Act* which provides, my emphasis:

Section 25 Service by Post

Where an Act authorises or requires a document, parcel or other thing to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, service shall be deemed to be effected by properly addressing and posting it by prepaid post, and service is deemed to have been effected at the time at which the package would be delivered in the ordinary course of post.

I am satisfied that the Landlord posted the Notice to the Tenant on or about 20 May 2003. Accordingly, I find that in the ordinary course of post the letter dated 20 May 2003 with two copies of the outgoing condition report should have been received by the Tenant in Adelaide within two business days from that date. Therefore I find that service is deemed to be effected on or about 22 May 2003. In the circumstances, I am satisfied that the Landlord has complied with the requirements of section 110 of the Act.

Based on the evidence before the Inquiry, I am also satisfied that the Landlord has complied with section 112 in particular, subsection (5) of the Act in relation to the Notice of Landlord's Intention to Retain the Tenant's Security Deposit.

I find that the Landlord is entitled to retain the Tenant's security deposit for the various items specified therein subject to my consideration of the merits of the Landlord's claim for compensation for the tick and flea spraying and the disinfecting of the premises. In any event, I also note by consent that Tenant has also consented to the Landlord retaining certain amounts from her security deposit.

Tick and flea spraying

In considering the merits of the Landlord's application for compensation under section 122 of the Act it is necessary to have regard to section 51 of the Act which 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 that 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 in 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 a reasonable state of repair;** and
 - (b) **in a reasonably clean condition,**
allowing for reasonable wear and tear.

...

In assessing whether or not the Landlord is entitled to retain a part the Tenant's security deposit monies for the purpose of tick and flea spraying and disinfecting, the Landlord is essentially asserting that the Tenant has breached section 51 of the Act in particular subsection (2). Namely that the Tenant did not return the premises to the Landlord in a reasonably clean condition.

In relation to the tick and flea spraying I note the evidence from both parties is that when the Tenant vacated the premises and when the Landlord went to conduct the outgoing condition report there were no signs of fleas within the premises. The Landlord admitted that she did not specifically look for fleas however while she was there she did not notice any fleabites or marks. I note that the Landlord has submitted a letter from Murray's Pest Control which indicated that when he went to the premises on 21 May 2003 there were signs of fleas. I note the Tenant's vacated the premises on 16 May 2003. There is no evidence before me to indicate that these fleas would have been the result of the Tenant's occupation of the premises. I do not know how the fleas got there, whether it is reasonable to expect the fleas were there when the Tenant's vacated the premises or that the fleas could have been the result of a dog wandering through the premises.

On balance, I am not satisfied that the Landlord has discharged its onus of proving on the balance of probabilities that the Tenant left the premises in an unreasonably clean condition so as to require the premises to be sprayed for ticks and fleas. I find that the Landlord is not entitled to retain the Tenant's security deposit for this purpose.

I note that the parties have agreed in their tenancy agreement that upon vacating the premises the Tenant would have it sprayed for ticks and fleas (clause 2(r) of the tenancy agreement). In my view, this requirement is an attempt to alter and or contract out of the obligations of the Act. Section 20 of the Act provides, my emphasis:

Section 20. Contract to avoid Act prohibited

- (1) An **agreement or arrangement that is inconsistent with this Act** or the Regulations or **purports to exclude, modify or restrict the operation of this Act** or the Regulations, **is void to the extent of the inconsistency.**
- (2) Subsection (1) does not apply in relation to an inconsistency, exclusion, modification or restriction expressly permitted by or under this Act.
- (3) A purported waiver of a right under this Act is void.
- (4) A landlord must not enter into an agreement or arrangement –
 - (a) to exclude, modify or restrict the operation of this Act (directly or indirectly); or
 - (b) that purports to exclude, modify or restrict the operation of this Act (directly or indirectly).

Penalty: 100 penalty units.

As indicated herein, I am not satisfied that the Tenant had breached her obligations under section 51 of the Act. In these circumstances, it follows that the Landlord's attempts to require tick and flea spraying of the premises upon vacation of the premises is an attempt to modify the obligations of the Act and accordingly, I find it is void to the extent of the inconsistency.

Part of this claim was also attributed to the Landlord having the premises searched for lost snakes. There is no evidence from the Landlord to indicate that they were aware that any snakes were missing. There was also no evidence as to the basis of the claim other than the Landlord was carrying out the owner's instructions and the fact that snakes were present in the premises. I accept the Tenant's evidence that when she vacated the premises that there were no snakes missing from her cages. In any event, I note that the statutory declaration of Mr David Scammell indicates that when he inspected the premises on 12 May 2003 there was "no discrepancies between the number of snakes recorded in the record book and the number physically sighted". I am not satisfied any snakes were missing and that there was any other basis for the Landlord's requirement to have the premises searched. Accordingly, I find that the Landlord is not entitled to retain the Tenant's security deposit for this purpose.

The only obligation of the Tenant is to return the premises in a reasonably clean condition. Based on the information before the Inquiry, I am not satisfied that the Tenant had breached this obligation in relation to the ticks and fleas, nor am I satisfied that looking for the snakes was reasonably necessary. Accordingly, I find that the Landlord is not entitled to an order for compensation and is not entitled to retain the Tenant's security deposit in the amount of \$115.00 for this purpose and must return it to the Tenant forthwith.

Disinfecting the premises

Both parties agreed that of the \$125.00 cleaning bill, \$75.00 could be attributed to the disinfecting of the premises.

As is apparent from the outgoing condition report, save for some minor deficiencies, which were rectified, I find that the Tenant left the premises in a reasonably clean condition. I accept the Tenant's evidence that the only time the snakes were handled was when the cages were cleaned and even then the handling of the snakes was minimal as they were placed in bins. I also accept the statutory declaration of the Parks and Wildlife Officer, Mr David Scammell declared 23 June 2003 which indicates that the snakes were well kept and that the cages were kept to a high standard. Based on my conversation with Professor Bart Curry on 24 July 2003 I accept that the risk of contracting a disease from the presence of the snake cages being within the premises is minimal in these circumstances.

Accordingly, I find that the Tenant has not breached her obligation to return the premises back to the Landlord in a reasonably clean condition and it is unreasonable to expect the Tenant to disinfect the whole premises. Accordingly, I dismiss the Landlord's claim for compensation for this amount and order that the Landlord is not entitled to retain the amount of \$75.00 from the Tenant's security deposit for the purpose of disinfecting the premises.

Orders

On the basis of the above, I order:

1. By consent of the Tenant, the Landlord is entitled to retain \$281.95 from the Tenant's security deposit being for the following:
 - cleaning (\$50.00);
 - unpaid rent (\$137.20);
 - reletting and administration fees (\$94.75).
2. The Landlord's claim for compensation for tick and flea spraying, looking for snakes in the premises and disinfecting the premises is dismissed.
3. The Landlord must return to the Tenant the amount of \$190.00 forthwith that is being withheld from the Tenant's security deposit for the purpose of tick and flea spraying as well as looking for snakes (\$115.00) and disinfecting the premises (\$75.00).

Dated this 31st day of July 2003

Penny Turner
Delegate of the
Commissioner of Tenancies