REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 9 DECEMBER 2003

This is a determination of an application dated 12 November 2003 by the "Tenant", seeking an order pursuant to section 113 of the *Residential Tenancies Act* (NT) ("the Act") for the return of some or all of the money paid as a security deposit. The application is made in respect of premises being 23 Adcock Crescent, Nakara in the Northern Territory of Australia.

Although the evidence before me was minimal in relation to the identity of the Landlord/Owner of the premises, I assume from some of the documentation on the file that the owner was one Ms Landlord and her agents can be described as the Landlord of the premises (hereinafter referred to as the "Landlord").

A Notice of Inquiry dated 1 December 2003 was sent to the parties. The inquiry was conducted on 9 December 2003 during which evidence was taken from the Tenant, ("the Tenant"), the Landlord and one Mr Witness.

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:	23 Adcock Crescent, Nakara
Commencement Date:	2 November 2002 until 1 May 2003 and extended
	from 2 May 2003 until 1 November 2003
Period:	as above
Rent:	$205.00 per week
Security Deposit	$820.00

Consideration of this matter has been made difficult for a number of a reasons, some of which I shall refer to in these reasons, but that does not excuse the delay and I apologise to the parties for that delay in providing these reasons and order.

The application by the Tenant dated 12 November 2003 refers to a fixed term tenancy commencing 2 November 2002 and ending 1 November 2003. In evidence before the inquiry it emerged that there were in fact two fixed tenancy terms, the first being from November 2002 until 1 May 2003 and thereafter extended from 2 May 2003 to 1 November 2003. The discrepancy, in the overall picture of things, is not significant.

It is not disputed that the Tenant paid a security deposit in the sum of $820.00 at or about the time the tenancy commenced.

One of the difficulties in determining this application is that the Agent did not have management of the premises at the time that the tenancy commenced. At that time the property was managed by another Agency. I have on file two copies of a document headed “Property Condition Report”. The first copy of that document is undated and not signed by anybody. It is clear however that the document was sent to the Tenant under cover of a letter dated 13 November 2002 from the 2nd Agency. In his evidence the Tenant stated that Agent did not give him a copy of the ingoing report but the first property condition report contains some annotations or comments which would appear to have been made by the Tenant.

The second property condition report is identical to the first, has been signed by the Tenant apparently on 6 December 2002 and signed by the Property Manager on 16 December 2002. The second report is identical to the first except that it does not have on it any of the annotations or comments that are contained, and apparently made by the Tenant, in the first property condition report.

It is difficult to reconcile the evidence of the Tenant that he was not given a copy of the initial ingoing report with the fact that the second report contains his signature and is dated 6 December 2002.

The second property condition report contains only the signature of Ms Agent in 2003 and the signature of the Tenant only appears in the document that was signed by the Tenant and by the then Agent in December 2002. The Tenant has not signed the document in November 2003 and as I indicated earlier the only signature is by Ms Agent and the document is dated 3 November 2003.

This second report apparently prepared by Ms Agent, does not contain the comments apparently made by the Tenant in the earlier document as I indicated above and makes a number of criticisms of the condition of the premises as at the date the Tenant vacated.

On 16 October 2003 Ms Agent wrote to the Tenant advising that upon vacation of the property on 1 November 2003 the garden would have to be returned to the condition it was prior to the lease beginning in November 2003. She advised that the Landlord had received some quotes to replace plants and the letter enclosed a quotation in the sum of $284.45 in that regard.

The premises were finally inspected by a Ms Agent on 3 November 2003 and she signed the final condition report on that date. It was not signed by the Tenant and the Tenant was not present at the time that Ms Agent conducted that inspection and the Tenant was not invited to be present at the inspection.

Sometime prior to November 2003 the Tenant found alternative premises and it was Ms Agent of the Property Agency that found that accommodation for the Tenant and his family. There was an informal arrangement that in relation to the security deposit for these new premises at 6/3 Tabletop Place, Malak and Ms Agent collected the keys to the Nakara premises from that address in Malak on the 2 November 2003 prior to carrying out further inspection the following day being 3 November 2003.

At the inquiry the Tenant conceded that two of the louvres in the premises were spoilt by his children and that he was responsible for the cost of replacement or repair to the venetian blinds. The Tenant disputes any liability in respect of damage to any other venetian blinds in the premises throughout the period of the tenancy.

In a notice being a Notice of Landlord's Intention to Retain Security Deposit dated and signed by Ms Agent on 5 November 2003 the Tenant was advised that some amounts were to be retained from the security deposit at the premises at 23 Adcock Crescent, Nakara for a number of purposes.

These purposes were described as – "replace dead plants $222.55" – "organic fertilizer $28.50" – "replace/repair Venetians at cost" – "vacate/clean at cost" – "remove rubbish garden $35.00".

The total amount specified in that notice did not exceed the security deposit of $820.00 and in the notice the Tenant was advised that the balance of the security deposit for Nakara would be transferred to the Tabletop premises at Malak thereby confirming the arrangement to use some of the security deposit at Nakara to pay the security deposit at Malak. The notice was accompanied by a statutory declaration of Ms Agent signed and dated 5 November 2003. In accordance with the *Residential Tenancies Act 1999* the statutory declaration stated in paragraph 6 as follows – "the following receipts, invoices or other documents supporting my retention of the security deposit are attached to the notice;

(a) replace dead plants

(b) organic fertilizer

(c) replace/repair venetians – at cost

(d) spotlight to quote of 11.11.2003

(e) replace gas bottle - at cost

(f) vacate/clean – at cost

At the bottom of the statutory declaration is a further notation as follows – "remove rubbish from garden - $35.00. Other invoices will be forwarded to you for your records."

In a letter dated 12 November 2003 Ms Agent wrote to the Tenant referring to the following items to be subtracted from the security deposit – "replace dead plants $222.55", "organic fertilizer $28.50", "rubbish removal $35.00", "replace five venetian blinds $204.75", "vacate/clean $343.75". That total led the sum of $834.55 and Ms Agent advised the Tenant that the entire amount of security deposit in respect of Nakara had been absorbed and requested payment of the amount of $620.00 for the security deposit for the new premises at Unit 6/3 Tabletop Place, MalakThe Tenant responded to that correspondence by letter dated 16 November 2003 rejecting much of the comments made by Ms Agent in earlier correspondence and discussions. In view of the decision that I have arrived at in this matter I do not need to canvas the contents of the Tenant's letter of 16 November 2003 in any great detail except that he again agrees that he is responsible for the replacement of two Venetian blinds that were damaged by his family.

Under the provisions of the *Residential Tenancies Act* (section 25) it is provided that a Landlord may provide a condition report within three business days after a tenant takes possession of premises to which a tenancy agreement relates, fill out and sign two copies of the condition report and give both copies to the Tenant. The ingoing condition report is required to be in relation to specified conditions of the premises. The Landlord is to fill out the condition report 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 practicable to do so or the Tenant's representative does not appear at the agreed time.

Section 26 of the Act provides that within five business days after receiving the copies of the condition report under section 25 the Tenant may accept the report or make alterations to the report and section 26 thereafter goes on to provide certain steps that both the Landlord and the Tenant can take in relation to finally producing an ingoing condition report which is acceptable to both the Landlord and the Tenant. If an ingoing condition report is not acceptable to both, and the Landlord and the Tenant can not be agreed upon pursuant to the provisions of section 26 of the Act, the condition report dispute may be referred to the Commissioner and the Commissioner may prepare a condition report which is taken to be accepted by both the Landlord and the Tenant.

Whilst it is clear from the provisions of the Act that it is not mandatory that the Landlord provide an ingoing condition report pursuant to sections 25 of the Act, it is very much in the interests of the Landlord to have such a report prepared and accepted by the Landlord and the Tenant because of the provisions of section 51(5) of the Act.

That subsection provides that if a condition report was not accepted by the Landlord and the Tenant in relation to the premises or ancillary property under part 5 of the Act (which deals with ingoing condition reports) then the Tenant is to be taken to have complied with the term of the tenancy agreement specified in subsection (1) of the Act (which relates to cleanliness and damage to the premises and sets out the Tenant's responsibilities in relation to maintaining the premises in a clean condition and not cause damage to the premises amongst other responsibilities).

Section 51(5)(b) provides that if a condition report was not accepted by the Landlord and the Tenant under Part 5 and the tenancy agreement has terminated 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.

In other words, if there is no ingoing condition report accepted by both the Landlord and the Tenant under part 5 of the Act, then the Landlord can not point to alleged deficiencies in the condition of the premises at the termination of the tenancy and cannot retain any of the security deposit in respect of the premises nor ask the tenant to make any other financial contribution to any alleged cleaning or other repair work that might need to be done at the termination of the tenancy. In the absence of a proper ingoing condition report under part 5 of the Act the premises are deemed to be left by the Tenant in the same condition as they were when the Tenant first entered into occupation.

Section 112 of the Act provides in subsection (1) that subject to this section a Tenant is entitled to have his or her security deposit reimbursed at the end of the tenancy agreement. Subsection (2) of the section 112 provides that the Landlord must within seven business days after the Tenant gave up vacant possession of 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.

I find that in relation to any tenancy agreement the onus of proof, on the balance of probabilities, is on the Landlord to provide evidence to the inquiry as to why the Tenant should not be entitled to the security deposit as provided for in section 112 of the Act. Further it is my opinion that it is incumbent upon the Landlord to produce positive and credible evidence such as will allow the Landlord to rely on the provisions entitling that Landlord to retain part or all of the security deposit. Having regard to the overall provisions of the legislation, and the previous legislation, and previous decisions in relation to tenancy agreements it is my view that the Landlord, to be entitled pursuant to the provisions of subsection (3) of 112 of the Act must prove, on the balance of probabilities, compliance with all of the matters set out in relation to the ingoing report.

This is a vexed matter and requires some clarification but I find that if the Landlord has not complied strictly with the requirements in respect of an ingoing condition report as set out in section 25 of the Act then any purported in going report is invalid. In that case, under section 55(1)(5) of the Act the condition report can not be accepted by the Landlord and the Tenant as required by that subsection.

As I referred to earlier in these reasons, this matter is made more difficult by the fact that the current manager, was not managing the premises at the time that the Tenant entered into occupation of the premises. Accordingly the evidence in relation to what occurred at the time of the ingoing report was prepared and completed is incomplete and unsatisfactory.

Under the provisions of section 25(3) of the Act, the Landlord is required to fill out the ingoing condition report in the presence of the Tenant or a representative of the Tenant unless it is not practicable to do so or the Tenant or the Tenant's representative does not appear at the agreed time.

Section 25 also provides that any ingoing condition report is to be provided within three business days after a Tenant takes possession of the premises.

That section also provides that the Landlord may fill out and sign two copies of a condition report and give both copies to the Tenant.

There is no evidence to support a finding that any of those conditions under section 25 of the Act were complied with at the time that the tenancy commenced. On the evidence I find that the fixed term tenancy commenced on the 2 November 2002. By letter dated 13 November 2002 the Agent provided a property condition report to the Tenant. This is in breach of section 25(1) of the Act which requires such a condition report to be provided within three business days after the Tenant takes possession of the premises.

There is no evidence in support of a suggestion that the agent, at the commencement of the tenancy, filled out and signed two copies of the condition report and gave both copies to the tenant. The evidence in relation to the ingoing condition report is incomplete and unsatisfactory and fails to comply with the requirements as set out in section 25 of the Act.

There is no evidence to support a suggestion that the ingoing condition report was completed in the presence of the Tenant or a representative of the Tenant as required under section 25(3) of the Act.

It is my view that compliance with section 25 of the Act is paramount in relation to the Landlord being entitled to retain part or portion of the security deposit on the grounds as set out in section 112(3) of the Act.

In those circumstances I find that the purported ingoing condition report does not comply with the provisions of the legislation and is ineffective. Accordingly there was no ingoing condition report that the Landlord and the Tenant could have agreed to pursuant to section 51 of the Act and that section applies and the premises are to be taken to be in the same condition as at the termination of the tenancy as at they were at the commencement of the tenancy.

In my opinion it is of importance that sections 25 and 110 of the Act are complied with strictly in the terms of the legislation. The number of matters that have come before the Commissioner in the last twelve months or so shows that the condition of the premises at the commencement of the tenancy and at the conclusion often provides disputes between the Landlord and his or her agent and the Tenants.

There were numerous other breaches of the Act by the Landlord in relation to the outgoing report. This is not particularly relevant to my reasons for deciding this matter but it illustrates the need for strict compliance with the provisions of the legislation.

In particular I note that the Tenant was not invited to be present at the final inspection of the premises. When questioned the Landlord's agent was not able to proffer any reason as to why the Tenant was not invited to attend at the final inspection.

The notice of Landlord's intention to retain security deposit and the statutory declarations accompanying that notice do not comply with the provisions of the legislation. In particular the reference to "at cost" and "other invoices will be forwarded to you for your records" are unsatisfactory and do not comply with the provisions of the legislation.

In all of the circumstances of this case, having considered the documentary and oral evidence, I find that the Landlord was not entitled, under the provisions of the Act, to retain any of the security deposit paid by the tenant at the commencement of the tenancy agreement. The Landlord has not complied with the provisions of the legislation and can not rely upon the provisions of the Act entitling the Landlord to retain part or all of the security deposit for various reasons.

In those circumstances I order that the Landlord is to refund to the Tenant the sum of $820.00 being the security deposit in respect of 23 Adcock Crescent, Nakara within fourteen days of the date of this Order. It will be a matter for the Tenant, the Agent and the Landlord of the premises at 6/3 Tabletop Place, Malak to come to some agreement in relation to the transfer of the security deposit in Nakara to the premises in Malak. I do not know the current situation in relation to those matters but I would certainly be available to assist any of the parties if it was required to try and sort those matters out.

Those are the reasons for my decision.

Dated this day of March 2004

Garry Schneider
Delegate of the
Commissioner of Tenancies