

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES INQUIRY – 4 AND 12 MARCH 2003

This is a determination of an application dated 21 February 2003 by the tenants seeking declarations and an order for compensation pursuant to sections 89, 41 and 122 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 319/81 Cavanagh Street, Darwin in the Northern Territory of Australia (“the premises”).

A Notice of Inquiry dated 24 February 2003 was posted to the parties. The inquiry was conducted on 4 and 12 March 2003 during which the Landlord (“the Landlord”) appeared. Tenants also appeared on behalf of the Tenants (“the Tenants”).

LEGAL REPRESENTATION

At the outset of the Inquiry, the Landlord sought to be represented by his legal practitioner, pursuant to section 148(1) of the Act. The Lawyer submitted that both Tenants are legal practitioners and/or have a law degree, whereas the Landlord is a property developer with minimal understanding of the Act and could not fairly represent himself. In addition, The Lawyer submitted that his client was “volatile” and would be disadvantaged if leave was not given for him to be represented. I note that during the course of his solicitor’s submissions, the Landlord interjected indicating that he required legal representation because he had only completed schooling up until the age of 10.

The Tenants would not consent to the Landlord being represented by a legal practitioner. The Tenants submitted that the Landlord had been before the Commissioner of Tenancies on a number of occasions, he knows the procedure, he owns numerous properties and has been in this forum before under the old and current tenancy legislation. The Tenants submitted that the object of section 148 of the Act is to restrict legal practitioners, which also includes articulated clerks, from representing parties before the Commissioner.

In response, the Lawyer indicated that the Landlord had never been before the Commissioner before.

Section 148(1) of the Act places limits on legal representation, which provides:

A person is not to be represented before the Commissioner by a legal practitioner within the meaning of the *Legal Practitioners Act*, an articulated clerk or a person who holds or has held legal qualifications under the law of the Territory or another place, except –

- (a) with the **agreement of the other party to the tenancy agreement to which the proceeding relates; and**
- (b) if the **Commissioner is of the opinion that neither party will be disadvantaged by permitting such representation.**

...

In my view, it is clear that section 148 of the Act limits the ability of a party before the Commissioner to be represented by a legal practitioner. Legal representation is only possible in circumstances where the other party to the proceeding agrees **and** the Commissioner forms the requisite opinion. In the absence of the Tenants’ agreement to the legal representation it does not appear to me that that Landlord could utilise section 148(1) of the Act.

The Landlord's solicitor submitted that even if the Tenants would not consent to such representation, I could grant leave for such representation on the basis that his client will be disadvantaged if the representation was not permitted. I do not accept such a submission, the use of "and" in section 148(1) is in my view conjunctive, it indicates to me that leave can only be granted if both conditions as provided by subsections (a) and (b) are satisfied. In addition, section 148(1) clearly exhibits the intention of the legislature to restrict representation by legal practitioners with the underlying purpose to establish an informal and efficient dispute resolution processes as an alternative to the Court system. In addition, the Tenants are not appearing before the Commissioner in their capacity as legal practitioners but are appearing before the Commissioner in their capacity as tenants.

On this basis, I determined that the Landlord was not to be represented by his solicitor and declined his application for leave.

The Lawyer then sought leave to represent the Landlord on a jurisdictional issue based on section 6(a) of the Act. The Landlord essentially wanted to submit that the premises are a hotel and the Commissioner did not have jurisdiction to entertain the application. I asked the Tenant whether he was willing to agree to the legal representation for the purposes of hearing submissions on the jurisdictional issue. The Tenant indicated that he would not consent to such a course as it would be apparent, when the Inquiry delved into the issues, that there was a tenancy agreement governing the parties and that agreement would not fall within the exemption provided by section 6(a) of the Act. In the absence of the Tenant's agreement to this representation and in view of section 148(1) of the Act, I find it is not open for me to allow this representation. In these circumstances, I indicated to the Lawyer I would not allow him to represent the Landlord, however, he was more than welcome to stay and observe the proceedings. In these circumstances, the Lawyer sought to be excused.

GENERAL

I note during the course of the Inquiry, the Tenants sought to adduce evidence regarding numerous breaches by the Landlord of his obligations under the Act and the offences contained therein. The Tenants submitted that as part of the Inquiry I could consider whether the Landlord has breached his obligations under the Act and impose the penalties as provided by the Act. The Tenant sought to rely on his letter of 18 February 2003 and in particular emphasised that the Landlord has breached their right to quiet enjoyment.

I indicated to the Tenant that the inquiry was not the appropriate forum in which to ventilate these issues as I have no jurisdiction to impose the penalties provided and that jurisdiction rested with the Court of Summary Jurisdiction. The Tenant must provide the information forming the basis of his allegations to the office of the Commissioner of Tenancies, who will conduct an investigation and form a view as to whether a prosecution is warranted.

The substance of the Tenant's application to the Commissioner of Tenancies seemed to me to be a declaration that the tenancy agreement had not been validly terminated and that the purported increase in rent was defective. In addition the Tenants are also seeking to claim compensation under section 122 of the Act, however it appeared to me that the Tenant did not really understand the effect of this provision and were seeking the penalties for the offence provisions as being compensation. The nature of the compensation contemplated by section 122 of the Act was explained to the parties.

I note during the course of the Inquiry on 4 March 2003, the Tenants called two witnesses being Chris Sevastis and Neil Tsang to give evidence regarding an incident that occurred on 22 December 2002. The Tenants initially wanted to call these witnesses for the purposes of proving that the Landlord had breached his obligations under the Act and seeking the imposition of the applicable penalty. However, once it was explained to them that the jurisdiction to impose the penalties rested with the Court of Summary Jurisdiction, they indicated that the witnesses were called to impeach the Landlord's credibility. The incident of 22 December 2002 is of concern however for the purposes of this Inquiry they are not really relevant. That being said, following the inquiry, I will refer the Tenants' allegations regarding the Landlord's breaches of the Act, to the office of the Commissioner for Tenancies for investigation.

THE TENANCY AGREEMENT

The first issue to consider is what is the nature of the agreement governing the parties.

Evidence was taken from the parties at the Inquiry of 4 and 12 March 2003. As will be apparent, there were some internal inconsistencies in relation to the evidence of the Tenant and the Landlord between the two Inquiries.

At the Inquiry of 4 March 2003 the evidence of the Tenant can be summarised as follows:

- The tenancy agreement came about as a result of a number of negotiations with the Landlord. He says they had "a lot of discussions" with the Landlord.
- He indicated he responded to an advertisement in the newspaper, which said, "place in city, close to shops". He rang the Landlord and arranged a time to meet. He attended the premises for an inspection with Timothy Bradley and decided that he would rent the unit.
- The Tenant says the Landlord offered him a two-month tenancy agreement with an option for two years at rent of \$800.00 per fortnight.
- In relation to the security deposit it was agreed they would move in and this would be discussed after they moved in.
- Accordingly, he liaised with the other Tenants to meet the Landlord.
- The Tenant says the terms of the tenancy agreement were agreed as a result of a number of discussions with the Landlord, including in the presence of the other Tenants when they went to meet the Landlord and as a result of each of the Tenant's own dealings with the Landlord. In this regard, the Tenant relies on the statement given by Mr Ross Hart dated 23 February 2003.

The evidence from the Tenant, both taken on oath and in general during the inquiry of 12 March 2003 can be summarised as follows:

The first meeting

- He responded to an advertisement in the newspaper in or about February 2002. The advertisement indicated that there was a place in the city, close to the shops, listed a phone number and indicated that it was at 81 Cavanagh Street. The Tenant phoned the number and spoke to the Landlord and arranged to go and meet him.
- The following Thursday after this phone call, the Tenant accompanied by Timothy Bradley met the Landlord at 81 Cavanagh Street. At this meeting it was discussed with the Landlord that the rent would be \$800.00 per fortnight. In relation to the security deposit, it was agreed that once he moved in they would discuss this later on. As the premises was a four-bedroom unit he indicated to the Landlord that he would have to find three other people to rent it with him. He told the Landlord that he was interested and they agreed that if he could find other people to share with him they would discuss it further.
- At the time, the Landlord appeared friendly and had indicated to him at some stage during this meeting that the term of the agreement would be “two months or two years”. The Tenant says the Landlord flippantly said “two months or two years”. He understood this to mean that if he did not like the place in two months then they could go, however if they liked it then they had the option to remain in the premises for two years.

The second meeting

- The Tenant subsequently spoke to 3 other people who agreed that they would share the premises. They all attended at a meeting at the premises with the Landlord to discuss the tenancy agreement later in February 2002. He then said in contradiction to his evidence of 4 March 2003 that the “two months or two years” was discussed at this second meeting with all the Tenants present. Upon being questioned as to this inconsistency, the Tenant says the “two months or two years” was first discussed when he went and inspected the premises with Timothy Bradley. However, the “two months or two years” was discussed further when they attended for the second meeting with the Landlord. It was agreed that they could stay for two months and if they liked it they could stay for two years.
- The Tenant says all the occupants of the premises were professional people and they needed certainty regarding the term. The Tenant says that they did not specifically indicate or discuss at any time to the Landlord that they would exercise the two-year option, however assumed that if they did not move out before the two months then they had a fixed term tenancy agreement for two years.
- In relation to the premises being a hotel or holiday accommodation, the Landlord had indicated that he owned the particular unit and rented it privately separate to the running of the hotel. There was a distinguishing feature between permanent residents and hotel guests in that the green doors within the building indicated hotel guests whereas brown doors indicated permanent residents. The Tenant says that they were known among the hotel staff as being permanent residents. The premises is fully furnished and if they had any queries or wanted to discuss anything with respect to the premises they dealt with the Landlord, not the hotel management. The Landlord offered that they could have a cleaning service however this, after some negotiation, was declined. The Tenant says that he has never used room service.

- The Tenants submitted in support of their application an affidavit of Ross Andrew Hart dated 23 February 2003. Mr Hart says in this statement “The Tenant told me that he had agreed a 2 year fixed term lease with the Landlord. I know this to be true due to subsequent conversations with the Landlord.” When this inconsistency was put to the Tenant his response was that Mr Hart was referring to the subsequent conversation with the Landlord when all tenants were present and two-year term for the tenancy agreement was agreed.

I note this assertion is inconsistent with the Tenant’s oral testimony during the inquiry of 4 March 2003 as well as his earlier testimony during the Inquiry on 12 March 2003, where he indicates the term of the agreement was “two months or two years”, namely two months with an option for two years.

- Initially, the Tenants to the premises were Christopher, Robert, Ross and Brendan.
- Ross left in or about June 2002 as a result of an altercation with the Landlord. The three Tenants discussed the issue and it was agreed that it would be best if he left, as there was an incident where Police were called regarding his behaviour.
- Brendan left some time in September 2002 as a result of his moving to Sydney for a new job. The Tenant does not know if the Landlord was advised of this.
- In or about July 2002, Tendai moved in to the premises. The Landlord was advised that Tendai was replacing Ross on the rent payment day after Ross left the premises. The Tenant says he spoke to the Landlord in this regard in or about July 2002 and said something along the lines of that they no longer had ‘a vacuum in rent’. The Landlord’s response to this was along the lines of “good thank God you got rid of Ross as Ross caused a lot of problems”. In addition the Landlord has remarked on a number of occasions that Tendai was the ‘best’ tenant in the premises.
- In response to the Landlord’s questioning as to the location of their first meeting, the Tenant says he initially went to reception, they met on the ground floor at the lift where the Landlord explained to him that he had a number of units available. The Landlord had taken him to a one-bedroom unit on the second floor which was going for \$200.00 per week. They then looked at the subject premises. The Tenant says that the discussion regarding the agreement between the parties occurred whilst they were inspecting the various premises and denies that the discussion took place at the table on the ground floor as alleged by the Landlord.
- The Tenant says that at the second meeting the Landlord’s wife may also have been present or ‘popping in and out’ as they were trying to organise a microwave. When they were discussing the terms of the tenancy agreement the Landlord had indicated that if they needed any furniture such as a bed, couch, in house movies and a microwave that could all be arranged for them. This occurred at this first meeting with the Landlord.

Robert’s evidence at the inquiry of 4 March 2003 can be summarised as follows:

- When they attended at the premises to meet the Landlord, he was there with his wife. There was discussion regarding obtaining a microwave as well as the fact that the tenants had to arrange for the power to be put on.

- Robert says the Landlord mentioned “two months or two years”.
- The Landlord had told them it was “his hotel that the unit is his and we were to deal with him only”. The units with green doors were for hotel guests who were on a daily rate whereas; brown doors within the premises were for permanent residents. In addition, in the car park the spaces for hotel guests and permanent residents were delineated and the Tenants were allocated 3 car parks.
- The premises was a four-bedroom furnished unit with three bathrooms.
- Rent was always paid to the Landlord personally, they were cash rent payments and they were generally paid every Thursday. Robert says that the money would be collect from everyone and then one of the Tenants would chase down the Landlord, who lives next door, either by knocking on his door or getting him at his office. The receipts were always issued in the name of the Landlord and this receipt book was kept at his house.
- Robert says although there was no express notice given by the Tenants to the Landlord regarding exercising the option it was an understanding between the parties that if they were staying for two months then they could stay for two years.

The evidence on oath from Robert during the inquiry of 12 March 2003 can be summarised as follows:

- Robert says he was party to the phone conversation Christopher had with the Landlord where they arranged for a time to inspect the premises. He is aware that Christopher went with Timothy to see the Landlord. He is aware of this as he is a friend of Christopher and he was studying a Masters Degree at the time and spent quite abit of time at his house. Robert says he spoke to Christopher shortly after that meeting and asked him how he went to which Christopher’s response was “really great”. He also spoke to Timothy (who he knows from university) who also indicated that the premises was “great”.
- Robert says that as he was moving in with Christopher he “cross-examined him” more and Christopher had told him that the premises was great, it was for a term of two months or two years with no bond payable. Robert says that Christopher told him “if we could last two months then we could last two years” however they needed four people to share the premises. Robert said that he understood this to mean that they were on probation for two months and if they stayed for two months then they had an option to stay for two years. Nothing was said regarding how they were to exercise this option.
- On a Friday in late February 2002, Robert accompanied by Christopher, Brendan and Ross met with the Landlord and his wife who was there for part of the meeting at the premises. Part of the agreement was that the Landlord would provide a microwave so the Landlord and his wife came and went throughout the course of their attendance at the premises. Robert says he met the Landlord in the car park although he cannot recall whether it was before or after they had inspected the premises. Robert says the car park signs were explained to them regarding the areas for permanent residents and the tow away area. The Landlord indicated to them where they could park and was also telling them about how his wife had a lot of problems with the car park.

- They went up to the premises via the lifts and the Landlord and his wife went away on a number of occasions. Whilst he was alone with Christopher and Ross he remembers indicating that “this is good” and he was pleased with the place. Up in the premises he helped install the microwave as they had a lot of problems finding a power point. The Landlord was telling them about the premises how he had built the place and wanted tenants in. Robert recalls the Landlord saying “two months or two years”, however this was not discussed in any detail as he was already aware of that through his discussions with Christopher. Although he remembers shaking the Landlord’s hand after this was said. Whilst they were at the premises the Landlord indicated the place had been empty and he wanted them to move in so he did not insist on payment of a bond.
- Mr Welfare says he went about connecting the power and phone, which was put in his name. The Landlord also told him where he was living, which was next door to the premises, so that he could arrange to pay the rent. Robert says that he communicated with the Landlord and he generally paid the rent most of the time. Robert says that he had trouble getting money from one of the Tenants, Ross, and remembers complaining to the Landlord to whom the Landlord’s response was that “you’re running around because you are the oldest”. Robert says that most of the time he paid the rent and he would either chase the Landlord down at home or at his office. Initially they were paying weekly however to coincide with their paydays, this changed to fortnightly.
- When they met with the Landlord and inspected the premises the Landlord indicated that the premises was his, and this was separate from the hotel. Although they had could have some of the benefits of the hotel. This included access to satellite TV, in house movies, had a laundry located at the end of their floor (which they had to use as the washing machine in the premises had broken down). However, they have never used room service and did their own cleaning.
- Robert says that he has no recollection of there being any discussions with the Landlord regarding the “two months or two years” or exercising the option during the course of the tenancy agreement. He just assumed that if they had stayed for two months, they would be able to stay for two years.
- About 10 months ago (in or about May 2002), the Landlord had requested that Ross leave and indicated to them that would not have any problems finding someone else. The Tenant’s discussed whether or not Ross should go. They also talked to the Landlord and as he wanted Ross to move out they effectively agreed.
- Within two weeks of Ross moving out Tendai moved in, as they were worried about meeting their rent commitments to the Landlord. Robert cannot recall when Tendai moved in, however, he knows that when he paid the rent to the Landlord he would have mentioned that Tendai had moved in and that they could now afford to pay the rent. Robert says that the Landlord’s response was that he was pleased and nothing further was said. Robert says all the Landlord was concerned about was whether or not he would get the rent payments.

At the Inquiry of 4 March 2003 the Landlord's evidence can be summarised as follows:

- The Landlord indicated that he had told the Tenants he would charge him \$400.00 a week for unit 319 temporarily for "a few months until such time as when the dry season comes the Tenants would need to look for other accommodation".
- The Landlord says he told the Tenants if they had any other tenants that were going to share the unit they had to bring them to him and register it on the books.
- The Landlord said he had requested a two-week bond however, every time he approached the Tenants about this they "never said yes or no".
- In relation to the rental receipts, the Landlord indicated that he issued receipts as the money was received. The Tenants were meant to be paying their rent weekly and this occurred up to 12 May 2002. On 13 May 2002 the Tenants commenced paying \$800.00 per fortnight and have never paid any security deposit.
- The Landlord says that the Tenants were meant to stay in the premises for only six months as it was his "slow season" and he had indicated to the Tenants that he would let them know when they needed the unit for the dry season.
- Christopher had asked him in August 2002 if they could stay for an extra few months however he denies ever indicating to the Tenant that he said that they could stay for "two months or two years". He had told Christopher on a number of occasions that they could stay until he had given them notice to leave.
- The Landlord says he told the Tenants "I'm running a hotel, I only rent for a temporary basis and will rent while the tourist season is slow". This occurred in about February 2002 and he denies ever meeting the other Tenants in the premises at or about that time. The Tenant had indicated that he would bring the other Tenants to meet him however this never occurred. The Landlord also denies indicating to the Tenants that there were different coloured doors within the building which distinguished between permanent residents and hotel guests.
- The Landlord says that he runs a hotel and submitted a copy of his liquor licence and a pamphlet for the hotel to the Inquiry. The Landlord says during the "slack season" he rents units from September till about the end of April to "domestic residents" to help to pay his bills. When the dry season comes he looks at his options to see if he requires all rooms depending on the hotel bookings. He decides at that time which units he can continue to rent and which ones he needs to give notice to get the property back. The Landlord says in the 'off season' he has about 29 units for which these arrangements occur.
- The Landlord says he first met Christopher in February 2002. He told him "I'll rent this temporarily subject to the seasons bookings, this year looks like a poor year, I may let you stay a bit longer, but next year we have Arafura Games and I must have all the apartments for the season".

- The Landlord says he is the director of a company and it is the company that owns the premises. When he met Christopher in February 2002, he told him “I own the company that owns the place”.
- The Landlord also says that initially he was issuing receipts to the Tenants in his own name, however, he realised he had to do it “properly”, as it “became more official” for “GST purposes”. Accordingly, since 25 February 2003 he has issued receipts in the name of his company. I note that since February 2002, copies of the Landlord’s receipts indicate that the Landlord personally has issued the receipts with no indication on any of the receipts that they were being issued on behalf of the company. It is only since 25 February 2003 that a receipt was issued by the company.

In response to this, Christopher denied that the Landlord at any time mentioned that the accommodation was “temporary” and did not at any time mention the Arafura Games or that the Landlord’s company owned the premises. At all times, they contracted with the Landlord personally and not his company.

The evidence of the Landlord during the Inquiry of 12 March 2003 can be summarised as follows:

- The Landlord submitted three statements from James, Wendy and Carlos all dated 11 March 2003. The Landlord says he requested these people to make statements, he did not tell them what to say, all he told them was to go and see his lawyer.
- In relation to the statement by Carlos, the Landlord says he employed him to do maintenance at the hotel in about February or April 2002. James has on occasion been employed by the Landlord to do painting work. It is noted that the statement of James has not been witnessed by the Landlord’s solicitor, whereas the other two statements have. The Landlord says he does not know why this has not been witnessed, he asked these people to go and see his lawyer and to make a statement.
- The Landlord says he first met the Christopher on 25 February 2002. Christopher came to ask him about the premises. He has never met the other tenants and he was not introduced to them.
- The Landlord denies that the first time he met Christopher, Timothy accompanied him. He has never met the other tenants in the premises and the only person he dealt with was Christopher. The Landlord denies ever offering Christopher an option for 2 years, denies saying the term was for “two months or two years” and says he has never had any discussions at all with any of the occupants regarding the alleged option.
- The Landlord says that the agreement with Christopher came about as a result of him putting an advertisement in the paper, which indicated he had apartments to let. The advertisement provided his phone number and the address of the premises.
- Christopher attended at the foyer of his hotel and asked for the Landlord on or about 25 February 2002. At that time the Landlord was sitting with Carlos and Jamie who was engaged to do painting work for him, at the table on the ground floor. The Landlord then said that he does not recall whether or not he employed Jamie and Carlos at that time or at all.

- Christopher came by himself looking for accommodation, however the unit he had advertised in the paper had already been taken. Christopher had told him “he was a lawyer” and he was impressed with that and in these circumstances he said to Christopher he had another unit available and “I will give it cheap for few months until such time as you find other accommodation”.
- The Landlord says he then took the Tenant up and showed him unit 319, following which they then went back downstairs, where he indicated that he would charge him \$400.00 per week as a “cheap rate” for the unit. The Tenant indicated that he liked the unit and said words to the following effect “Can I take it? I’m a lawyer and at \$400.00 I can look after it and I will do the right thing”. The Landlord then says he asked the Tenant about paying two weeks bond of \$800.00 to which the Tenant replied “I’ll give it to you later” and the Landlord agreed.
- The Tenant indicated to the Landlord that he would look for a few friends to share the premises. The Landlord’s reply was “okay you can have a couple more friends as the hotel is quiet this year you can have it for a few months until such time as I need it”. The Landlord says the Tenant’s reply to that was “that would be good, that will be fantastic”. The Tenant also asked the Landlord for the keys to which the Landlord went upstairs and then gave him a receipt for \$400.00 in rent which was paid on that day. The Landlord says it is clear from his receipt book that he left the first page of the book blank because he was awaiting a bond from Christopher. Christopher’s assertion that he said there was no bond payable is not correct.
- The Landlord says when he said “a few months” he meant that it was for between four to six months subject to the hotel bookings. The Landlord denies ever indicating to the Tenant that they could stay for “two months or two years”. The Landlord says that after this time he had no other dealings with Christopher or with any of the other occupants. Christopher never went to see him again and never introduced him to the other tenants. The Landlord says that he has a number of units within the complex and he has told each of the tenants in those units that they could stay subject to the hotel bookings. The Landlord says that with the Arafura Games they normally have quite a number of bookings and need the rooms.
- In response to the Tenants’ questioning, the Landlord indicated that at all times he only dealt with Christopher. The only time he met the other tenants was when they came to pay him the rent. The Landlord denies ever indicating that the accommodation was permanent and says that he is not “Father Christmas”. Implying that he has a business to run and would never have agreed to a two-year term.
- Once again in response to the Tenants’ questions, the Landlord indicated that he never met Timothy. Christopher attended at the premises by himself and the Landlord indicated him that he could have the unit until “such time as I need it”. The Landlord said that this meant he would give the appropriate notice to Christopher and then they would have to move out.

- The Tenants queried the Landlord as to why they would have the power put on on 25 February 2003, if the Landlord's allegations were correct that he had only agreed to rent the unit to Christopher on 25 February 2003? The Landlord's response to this was that the power could be put on at any time, he does not know why the power was put on that day, however, the Tenant's could have arranged for the power to be connected after hours. The Landlord says this meeting occurred at about 6.00pm that afternoon and the power had been installed prior to that meeting at approximately 9.00am.
- The Tenants put it to the Landlord that the incidents as described by him on 25 February 2003 did not occur to which the Landlord's response was "it is your word against mine".
- The Tenants also put to the Landlord that the statements were unreliable given both of the statements regarding the incidents of 25 March have been given by his employees. The Landlord's response to that was that they people are no longer employed by him; they were employed on a limited basis to do a refit of his hotel in February as well as in the second week of April 2002. The Landlord says all he asked these people to do was to go and see a lawyer and tell him about what happened on that day.
- The Landlord then indicated that the meeting did not happen on 6.00pm but occurred at about 4 to 5.00pm.
- I note there were marked differences between the Landlord's evidence of 12 March 2003 as compared to his evidence of 4 March 2003.

The documentary evidence of the Tenant's submitted to the inquiry was as follows:

- The Notice of termination dated 19 February 2003;
- Letter from the Landlord to Christopher and other occupants dated 19 February 2003;
- Email to the Commissioner of Tenancies dated 20 February 2003;
- Letter from the Tenants to the Landlord dated 18 February 2003;
- Statement of Ross dated 23 February 2003;
- Letter from the Landlord to the Tenants dated 17 February 2003;
- Statement from Tony dated 2 March 2003;
- The company Tax Invoices No. 086 dated 24 February 2003;
- Statement from Ross dated 23 February 2003; and
- Power and Water Statement of Account issued 28 March 2003; and
- PAWA – Customer Information System Service Details dated 12 March 2003.

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

- Hotel pamphlet;
- Copy of his receipt book for the premises, receipts no. 886228-886260;
- Certificate of the Registration of a Business Name registered 11 September 2000;
- Hotel Liquor Licence No. 80215630;
- The company Tax Invoices No. 086 dated 24 February 2003;
- Statement from Tony dated 2 March 2003;
- Statement from James dated 11 March 2003;
- Statement from Wendy dated 11 March 2003;
- Statement from Carlos dated 11 March 2003.

As is apparent from the summary of the parties' evidence there are a number of inconsistencies arising from both parties.

On balance, I do not accept that the Landlord's evidence was credible. The Landlord gave a number of differing versions of the events leading to and regarding the agreement between the parties. That being said, the Landlord's only consistent assertions was that he never said "two months or two years" and would never have agreed to a two year fixed term agreement. In particular, I do not accept the Landlord's evidence regarding the alleged events of 25 February 2002. In my view, given the Landlord's evidence during the inquiry, without anything further, little weight can be given to the statements of Carlos and Jamie.

I also had difficulty accepting the evidence of one of the Tenants, Christopher in relation to the term of the tenancy agreement. I found the evidence of Christopher to be generally vague and inconsistent in this regard. At the inquiry of 4 March 2003, Christopher's evidence was that the Landlord offered a two-month term with an option for two years. His evidence on oath on 12 March was inconsistent in that he said the Landlord "flippantly" said the term of the tenancy agreement would be "two months or two years". He said he understood this to mean they could stay for two months, and if they liked it they could stay for two years. He says this was further agreed in the presence of all the Tenants when they went to meet with the Landlord. In response to an inconsistency that was put to him regarding a statement of Ross gave evidence, Christopher then said that at the second meeting with the Landlord the Tenants' agreed to a two year fixed term.

I found the evidence of Robert was the most credible of the two Tenants, however, it is apparent from Robert's evidence that he was not a party to the discussions regarding the term of the tenancy agreement and really was not involved with the negotiations of the term. Robert's evidence was largely dependent on his understanding of what Christopher had told him in relation to the "two months or two years".

It should also be noted, that during the Inquiry I observed that the Tenants, Christopher in particular, had some difficulty understanding what the Landlord was saying or meant. The Landlord has an accent and it would appear that English is his second language, which may have led to the confusion regarding what was actually agreed between the parties. The evidence of Christopher and the Landlord is central to the circumstances of the tenancy agreement, particularly in relation to its term. In light of my observations regarding their evidence before the Inquiry, it is extremely difficult for me to discern objectively the intention of the parties in this regard.

The Tenants contend they had agreed a fixed term tenancy agreement, which was essentially two months, with an option for two years. The Tenants submit they have remained in the premises for longer than two months, so it can be assumed that they have a fixed term tenancy agreement for two years. On the other hand the Landlord quite vehemently denies that he ever said “two months or two years” and that he would ever have offered the Tenant’s a two year term. He says he is a business man, not ‘Father Christmas’. The Tenants who are asserting a two year fixed term agreement, bears the onus of establishing on the balance of probabilities that objectively, this was agreed and/or it was intended by the parties. The Tenants rely on the Landlord’s statement of “two months or two years” to say that they the agreement was for two months, if they liked it then they had an option for two years.

I do not accept the Landlord’s assertions that he did not ever say “two months or two years” during the course of negotiating the agreement. However, I accept his assertions that he would never have agreed to or offered a two year term. I have considered all the evidence before the Inquiry, and I am not satisfied that there was objective intention by the parties that the Landlord’s statement of “two months or two years” meant a term for two months following which the Tenants would have an option for two years. I am also not satisfied that there was in fact any agreement between the parties in this regard. In particular, I note there was no agreement by the parties as to how this option was to be exercised. I do not accept the Tenants’ assertion that this was implied by their conduct without any indication required to be given to the Landlord to indicate that they were exercising the option.

On balance, in my view, the Landlord’s “flippant” (using the description of Christopher) statement regarding “two months or two years” was merely an “off the cuff” remark by the Landlord during the course of negotiations regarding the tenancy agreement. Without further details, I am not satisfied this statement was an offer of two month fixed term agreement with an option for two years. In my view, this statement is so vague and uncertain that it cannot be said that there was any agreement between the parties regarding the term of the tenancy. Accordingly, I find there was no agreement between the parties as to the terms of the tenancy agreement. In these circumstances, with no agreement by the parties for a fixed term, it can be implied that the parties are under a periodical tenancy for the purpose of the Act.

I am satisfied rent was agreed between the parties to be \$400.00 per week, with a security deposit to be discussed. The Tenants were meant to be paying their rent weekly in advance, with the rent payment day being every Monday. However, the parties by their conduct have since about May 2002, agreed that rent would be payable fortnightly every Thursday to coincide with the Tenants’ pay periods. The discussions regarding the security deposit did not ensue between the parties, and the Tenants have not paid any security deposit to the Landlord.

I find that the parties contracted with the Landlord personally. I accept the Tenant's evidence that at no time has the Landlord ever indicated that he was acting on behalf of his company and that the agreement was with his company. The many receipts that the Landlord has issued in his own name support this. I note it was not until 24 February 2003 that the Landlord has issued a receipt for \$3,850.00 on his company letterhead. The Landlord's evidence during the Inquiry was that he decided to issue invoices on his company letterhead due to finding out about GST requirements, however I have difficulty accepting this and do not accept this as being the case.

I find that the parties to the agreement were the Landlord with the Tenants being Christopher, Robert, Ross and Brendan. This occurred until such time as two of the Tenant's being Brendan and Ross left the premises and was replaced with Tendai. The Tenants at no time specifically complied with their obligation to advise the Landlord of the change in the tenancy agreement. But I am satisfied the Landlord was aware that Tendai has been residing in the premises.

JURISDICTION OF THE COMMISSIONER

Section 6(a) of the Act provides, my emphasis:

This Act does **not apply to an agreement** –

- (a) **under which a person occupies, or it is intended a person will occupy, premises provided for the purposes of holiday accommodation;**

...

The issue for me to determine is whether the agreement governing the parties is an agreement under which the Tenants occupy or was intended that they occupy the premises provided for the purposes of holiday accommodation so as to be covered by section 6(a) of the Act. In my view, this must be considered objectively having regard to the circumstances of the agreement as to whether the Tenants in fact occupy or it was intended that they would occupy the premises for the purpose of holiday accommodation.

I note "holiday" is defined in the Australian Concise Oxford Dictionary (2nd ed) as being:

an extended period of recreation, esp. away from home or in travelling; a break from work

There is no doubt that the Landlord runs a hotel from the same building. This is a relevant factor, however it is not in itself determinative. The Landlord knew that the Tenants were professional working people and were not on "holidays" per se. In the Landlord's own words they were "domestic residents". In addition, I accept the Tenants evidence that there were two ways of distinguishing between hotel guests, being people who were provided with premises for holiday purposes, as compared to permanent residents by the colour of the doors. Namely, green doors indicating hotel guest and brown doors indicating permanent residents. I also accept that the hotel staff referred to the Tenants as permanent residents.

The Tenants did not, save for the in house movies which presumably was already connected to the premises, utilise any of the services provided by the hotel. The Tenants also had the electricity and phone connected in their own name, which is inconsistent with using the premises for the purposes of holiday accommodation. It should also be noted that the Tenants have been in occupation of the premises for over 12 months, which is generally inconsistent with using the premises for the purposes of holiday accommodation.

I am satisfied that during the course of negotiating the tenancy agreement, the Landlord had clearly represented to the Tenants that the unit was his personally and had nothing to do with the hotel. I am satisfied that the Tenants dealt with the Landlord personally in relation to the tenancy and did not ever deal with the hotel management.

On balance, I am satisfied on the evidence before the Inquiry that there was no intention between the parties that the premises was provided for the purpose of holiday accommodation and neither did the Tenant's in fact occupy the premises for the purpose of holiday accommodation.

I find that the agreement governing the parties is not an exempt agreement for the purposes of section 6(a) of the Act.

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:	319/81 Cavanagh Street
Commencement Date:	25 February 2002
Period:	Periodical Tenancy
Rent:	\$400.00 per week payable fortnightly in advance.
Security Deposit	Nil

THE NOTICE OF TERMINATION

The Landlord has given the Tenants a Notice of Termination dated 19 February 2003 ("the Notice"). A copy of the Notice was submitted to the Inquiry. It is apparent that Sousa Nominees Pty Ltd has issued the Notice. The Notice seeks to terminate the periodic tenancy by giving 42 days notice in accordance with section 89 of the Act.

The Tenants submit that the Notice does not comply with the requirements of the Act because they were in a two-year fixed term agreement. In addition, the Landlord was the Landlord personally not his company. The Tenants say that the Landlord had purported to give a prior notice under the repealed *Tenancy Act* (NT), signed by the Landlord personally, which was also legally deficient and resulted in him writing to the Landlord by letter dated 18 February 2003.

In response, the Landlord indicated that he was not aware that the *Residential Tenancies Act* has commenced. He gave notice under the old *Tenancy Act* and considered that that was invalid and subsequently gave them a valid notice of 19 February 2003. The Landlord says that his tenancy agreement has always been 'week to week' because of his involvement in the tourism industry and at all times he intended that the accommodation was temporary. The Landlord says that when he negotiated the tenancy agreement he had indicated to the Tenants that "I own the company that owns this place".

Given the findings I have made herein as to the terms of the tenancy agreement, in particular my finding that the parties are governed by a periodical tenancy, I am satisfied that it was open to the Landlord to utilise section 89 of the Act. However, the Notice was issued by the company and not by the Landlord personally. The Landlord has signed the notice in his capacity as a director of the company. In order to issue the Notice, the Landlord, for the purposes of the Act, is taken as being the person who grants the right of occupancy under the tenancy agreement. As is apparent from my findings herein, the person who granted the Tenants the right to occupy the premises was in fact the Landlord, not his company. The Notice is in my view invalid, it is only the Landlord who can utilise section 89 of the Act to terminate the tenancy agreement. In addition, section 101 of the Act clearly requires that the landlord must sign the Notice and this has not occurred.

Accordingly, I declare that the tenancy agreement has not been validly terminated in accordance with section 89 and 101 of the Act. I declare that the purported termination by the Landlord is of no effect.

PURPORTED INCREASE IN RENT

The Landlord, by letter dated 19 February 2003 gave notice that as from 24 February 2003 the new rent for the above premises would be \$3,500.00 per fortnight calculated at a daily rent of \$250.00 which applies to other penthouses at 81 Cavanagh Street, Darwin.

The Tenants submits that this letter was from the company and they contracted with the Landlord accordingly, the letter was of no effect. In addition, section 41 provides the circumstances in which a landlord can increase the rent payable under a tenancy agreement and the landlord has not complied with this section as the legislation requires 30 days notice which the Landlord has only given five days notice. In addition, section 41 of the Act provides that the Landlord can only increase rent if the method of calculating or the right to increase the rent has been agreed and any proposal to increase would be of no effect. The Tenant says there was never any agreement with the Landlord that the Landlord could increase the rent as under their fixed term tenancy agreement the increase in rent had never been discussed. The Tenant also submits that the Landlords purported increase is an attempt to impose accelerated or liquidated damages on them.

In response, the Landlord submitted that he had the right to increase rent, as it was his property. He acknowledges that nothing was said regarding the increase in rent under the agreement with the Tenant's. However, he says he has given six weeks notice. I indicated to the Landlord that his letter did not in fact give six weeks notice of the increase but five days. In addition the Landlord says that the company is the real owner of the building and he could not issue any instructions on his own because he is always acting on behalf of the company. The Landlord then indicated that he never told the Tenants that the Landlord is the company as up until now everything was "in the air". However, he has now "seen the light" and will ensure that everything is signed in accordance with a tenancy agreement that he has obtained from the Real Estate Institute of the Northern Territory.

Section 41 clearly prescribes the circumstances in which a landlord may increase the rent payable under a tenancy agreement. I am satisfied that the Landlord did not have a right to increase the rent and the tenancy agreement governing the parties did not specify the method of calculating the increase in rent. In these circumstances I am not satisfied that under the tenancy agreement the Landlord has a right to increase the rent. Even if he did, the Landlord has clearly not provided the 30 days written notice as required by the Act. In any event, I also note that the parties are governed by a periodical tenancy.

At the end of each period the tenancy agreement ends and it is assumed that the terms of the tenancy agreement, subject to any contrary intention or agreement by the parties, will continue to apply to the next period.

I declare that the Landlord has not complied with the requirements of section 41 and is not entitled to increase the rent. Therefore the letter dated 19 February 2003 is of no effect.

COMPENSATION

The Tenants have also made an application for compensation under section 122 of the Act. As is apparent from my earlier indication, the Tenants were under some misconception as to the sort of compensation contemplated by section 122 of the Act. In order to order compensation under section 122 of the Act, the Tenant's must satisfy the Commissioner on the balance of probabilities, that any loss or damage suffered by the Tenants has been a result of the Landlord's failure to comply with the tenancy agreement or an obligation under the Act governing the agreement.

The Tenant's are seemingly attempting to rely on the fact that the Landlord has breached his obligations regarding quiet enjoyment and other breaches which has led to them not being able to rent out the fourth room to the premises. I have my doubts as to whether they Tenants would be entitled to such compensation as by the Tenants' own admission they had "put everything on hold" because of all the issues they were having with the Landlord. That being said, during the Inquiry, it was apparent that the Tenants were not in a position to articulate or satisfy me on the balance of probabilities how and when the Landlord had breached his obligations under the Act, other than to rely on general broad assertions in relation to the same.

Given the issues that have arisen regarding the terms of the tenancy agreement and the application of the Act, as well as the parties' indication that they will be appealing to the Local Court, it seemed to me that if the Tenants still wanted to pursue their claim for compensation it would be prudent if they obtained the findings in relation to the tenancy agreement and any appeal was heard before their claim for compensation is considered. The parties agreed with this course. Accordingly, by consent of the parties I adjourned the Tenants' application for compensation sine die with liberty for either party to apply.

SUMMARY

On the basis of the above, I order:

1. The Landlord's purported termination of the tenancy agreement by Notice of Termination dated 19 February 2003 is of no effect.
2. The Landlord's purported increase in rent by letter dated 19 February 2003 is invalid and of no effect.
3. The Tenant's application for compensation pursuant to section 122 of the Act is adjourned sine die with liberty for either party to apply.

Dated this 31st day of March 2003.

Penny Turner
Delegate of the
Commissioner of Tenancies