

REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

INQUIRY – 19 SEPTEMBER 2002

1. This is a determination of an application dated 4 July 2002 by the tenant, seeking the return of their security deposit pursuant to section 113 of the *Residential Tenancies Act* (NT) (“the Act”). The application is made in respect of premises being 102 East Point Road, Fannie Bay in the Northern Territory of Australia.
2. A Notice of Inquiry dated 13 August 2002 was posted to the parties. The inquiry was conducted on 19 September 2002 during which evidence was taken from the landlord, and her agent, (“the Landlord”). The tenants, (“the Tenant”) also appeared at the Inquiry. I note an Inquiry was originally scheduled to occur on 16 August 2002, however, at the request of the Tenant who was going overseas and interstate the matter was rescheduled to occur on 19 September 2002.
3. 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: 102 East Point Road, Fannie Bay

Commencement Date: 3 March 2001

Period: Two years

Rent: \$3,485.71 per month

Security Deposit \$3,200.00

4. At the commencement of the Inquiry I went through all the documentation in the file to ensure both parties had copies of all the documentation that was before me. The hearing went for a full day.
5. The Tenant seeks the return of their \$3,200.00 security deposit on the basis that the majority of the claims made by the Landlord are unreasonable.
6. The Landlord issued a Notice of Intention to Retain Security Deposit dated 11 June 2002 (“the Notice”). The Notice indicates the following amounts were to be retained from the Tenant’s security deposit: \$2,300.00 for making good damage to premises, \$200.00 for replacing ancillary property lost or destroyed, \$400.00 for cleaning premises left in an unreasonably dirty condition, \$100.00 for replacing locks altered, removed or added by the Tenant without approval, and \$200.00 for unpaid rent. Attached to the Notice was a Statutory Declaration by the Agent dated 11 June 2002 which indicates the Tenant vacated the premises on 6 June 2002 and attached various invoices in support of the retention of the security deposit. Of these invoices, it is clear that the sum of the invoices exceeds the amount of the Tenant’s security deposit. Accordingly, at the inquiry, the Landlord indicated the purpose and amounts to be retained from the security deposit on an undated document as follows:

6.1 For making good damage to the premises or ancillary property:

6.1.1	Repairing the slate	\$ 154.00
6.1.2	Repairing the vanity	\$ 110.00
6.1.3	Repairing the kitchen bench	\$ 380.00
6.1.4	Repairing the second ensuite top	\$ 90.00
6.1.5	Repairing the Tasmanian Oak Floors	\$1,496.00
6.1.6	Part payment of painting (Still owing \$494.00)	\$ 70.00
	Total	<hr/> \$2,300.00

6.2 For replacing ancillary property lost or destroyed:

6.2.1	Part payment of replacing antique lamp (still owing approximately \$650.00)	\$ 200.00
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6.3 In relation to clean premises or ancillary property left in an unreasonably dirty condition:

6.3.1	Part payment of cleaning bill (still owing \$460.00)	\$ 200.00
6.3.2	Part payment of servicing the mowers (still owing \$102.80)	\$ 200.00

6.4 In relation to the unpaid rent:

6.4.1	Part payment of rent being 3 days @ \$114.00 per day (still owing \$142.00)	\$ 200.00
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6.5 In relation to replacing locks, lock or key not returned \$ 100.00
The Notice indicates \$100.00 was retained by the Landlord however, it appears from the Landlord's reference to "now okay" that the Landlord is not pursuing this amount.

7. Prior to considering the Tenant's claims of unreasonableness in relation to the retention of his security deposit, it is necessary to consider whether or not the Act has been complied with. Section 112 provides, my emphasis:

Section 112 When Landlord may keep security deposit

- (1) Subject to this section, a **Tenant is entitled to have his or her security deposit reimbursed** at the end of the tenancy agreement.

- (2) The Landlord must, **within 7 business days after the Tenant gave up vacant possession** of the premises or has, in the opinion of the Landlord, apparently abandoned the premises, **reimburse to the Tenant the amount of the security deposit, other than an amount that the Landlord is entitled to retain**, or to continue to hold, under this section.

Penalty: 20 penalty units.

- (3) At the **end of a tenancy agreement the Landlord is entitled to retain so much of the security deposit** paid by the Tenant **as is necessary to –**
- (a) **make good** damage (other than reasonable wear and tear) to the premises or to ancillary property that occurred during the tenancy and that was caused by a Tenant or a person for whose actions a Tenant is liable under section 12;
 - (b) **replace ancillary property lost or destroyed** by the Tenant or by a person for whose actions the Tenant is liable under section 12;
 - (c) **clean the premises** or ancillary property **left unreasonably dirty** by the Tenant or by a person for whose actions the Tenant is liable under section 12;
 - (d) **replace locks altered, removed or added by the Tenant without the consent of the Landlord;**
 - (e) **pay for unpaid rent** or for unpaid charges for electricity, gas or water payable by the Tenant under section 118;
 - (f) pay an amount required to be paid under section 121' or
 - (g) pay money ordered by the Commissioner or a court to be paid by a Tenant but not paid.
- (4) **the Landlord is not entitled to retain some or all o the amount of a security deposit** for a purpose **referred to in subsection (3)(a), (b) or (c)** unless –
- (a) **a condition report** in relation to the premises **was accepted by the Tenant under Part 5; and**
 - (b) **if the Tenant –**
 - (i) **has given up vacant possession** of the premises – **a condition report has been provided to the Tenant under section 110;** or
 - (ii) has, in the opinion of the Landlord, apparently abandoned the premises – notice has been given to the Tenant in accordance with section 110(3) and, if the Tenant demanded copies of the condition report within 7 days after notice was given to the Tenant under that section, those copies have been given to the Tenant.
- (5) **Subject to section 113(2), the Landlord is not entitled to retain**, or to continue to hold under subsection (6), **part or all of a security deposit unless, within 7 business days after the Tenant gave up vacant possession of the premises** or has, in the opinion of the Landlord, apparently abandoned the premises, **the Landlord has –**
- (a) **given written notice** in the prescribed form, if any, **of his or her intention to retain** or continue holding **so much of the security deposit as is specified** in the notice for the purpose specified in the notice;

- (b) **attached a copy of a statutory declaration** in the prescribed for, if any, **attesting to the truth of the claim that the retention or continued holding of the security deposit is required** for the purpose specified in the notice;
- (c) **attached a copy of a statutory declaration attesting that the receipts, invoices or other documents** attached to the declaration **relate to –**
 - (i) **the matters in respect of which part or all of the security deposit is being withheld** from the Tenant; or
 - (ii) **the amount of unpaid rent owing under the agreement or money owing under section 121;**
- (d) **in the case of damage or unreasonably dirty premises** or ancillary property – **attached copies of receipts, invoices or other documents**, including orders of the Commissioner or a court, **specifying the amount required to make good the damage or clean the premises or ancillary property;** and
- (e) returned to the Tenant the proportion of security not claimed by the Landlord or not to be held under subsection (6).

8. It is clear section 112(4) of the Act provides the Landlord is not entitled to retain any part of the security deposit to make good damage, replace ancillary property or clean the premises unless a condition report was accepted by the Tenant under Part 5 and the Tenant has been given a condition report upon vacating the premises in accordance with section 110.
9. It is significant to note that the only application before me is for the Tenant's return of their security deposit. The Landlord, during the Inquiry, foreshadowed they will be making a compensation application in due course however, are awaiting quantification of their claim.

Vacant possession

10. It appears the parties negotiated an early termination of their tenancy agreement. This agreement is encompassed in a letter from the Agent to the Tenant dated 9 May 2002. The evidence of the Tenant is that they vacated the premises on 3 June 2002 and returned the keys to the Landlord on that date. The Tenant concedes that they retained one key to a bedroom which they handed in some time after 3 June 2002 as they had to get this key from their son. The Tenant says that they negotiated an early termination of their tenancy agreement on the basis that if the property were to remain vacant the Tenant would pay two months full rent.
11. The Landlord says the Tenant moved out on 3 June 2002 and did not return the keys to the premises that day. The Landlord had given notice to the Tenant to rectify certain issues with the premises. The Landlord has submitted a letter dated 4 June 2002 from the Agent to the Tenant. In that letter, the AGent says:

“they (the Landlord) have indicated to me that they are not taking possession of the house in its present condition and that they consider you liable for rent until the property is restored to the condition acceptable to themselves.”

12. The Landlord says that they did not want to take possession of the property as they had given the Tenant a list of things that had to be rectified at the premises. The agreement in relation to the early termination of the lease was that the agreement would not come into force until the Tenant had addressed those issues and vacant possession had been given. The Landlord says the agreement with the Tenant was that they had arranged for trade people to come into the premises on Monday 11 June 2002 and the Tenant would rectify any problems with the premises on the weekend. This was not done. The Landlord says it would be unreasonable for them to take back vacant possession of the premises in circumstances where there are a number of faults that had to be rectified and the Tenant was not given an opportunity to rectify those faults. Essentially, the Landlord thinks that the Tenant would remain in possession of the premises until all the work was completed on or about 21 June 2002 by a maintenance person and NT Blinds. In addition, the Landlord says that she could not get vacant possession until such time as the mowers had come back from their service in accordance with the Tenant's obligation to have it serviced under the tenancy agreement.
13. I note the Landlord's evidence differed to that of the agent's. The Agent indicated in his view, possession had been given back to the Landlord on or about 6 June 2002 when he had gone back to the premises to double check and finalise the initial outgoing condition report which was conducted on 3 June 2002. The Agent indicated that he thought vacant possession was given on 6 June 2002 because the outgoing inspection had been conducted and it was a reasonable and sensible date for vacant possession to have been given.
14. In response to this the Tenant says that they handed the keys back the premises on 3 June 2002. They had made arrangements with the Landlord that they would fix a number of things however, they did that prior to vacating the premises. The only thing that required addressing was the garden pond for which they did not need access to the premises as it was outside in the garden. The Tenant says he did not have access to the house and could not enter it even if he wanted to. The only key that they retained was a key to their bedroom which was with one of their sons. They found the key in their son's car and it was returned as soon as it was found.
15. It must be considered, when the Tenant gave "vacant possession" of the premises. The Tenant says vacant possession was given when they moved out of the premises and handed back the keys on 3 June 2002. The agent for the Landlord says that vacant possession was given back on 6 June 2002 when he was able to finalise the outgoing condition report. On the other hand, the Landlord says vacant possession is not given back to the Landlord until such time as the Tenant has returned the premises to her in a reasonably clean condition. The Butterworths Australian Legal Dictionary defines "vacant possession" as:

"That which is conferred on a purchaser of real property where that property is free from occupation by the vendor or a third party (such as lessee or licensee). Where a person takes vacant possession of property, the property is both unoccupied and free from any claim to a right to possession from anyone else."

There is no definition of vacant possession in the Act. In my view, there are a number of factors to be taken into account in considering whether or not a Tenant has given back vacant possession of the property. These factors include, but are not limited to whether the keys have been returned, who has control of the premises insofar as that person was able to enter and exit the premises as they wished, and whether the Tenant has delivered the property in accordance with his obligations under the tenancy agreement. I note although compliance with obligations is one of the indicia it is not in itself determinative. The Tenant could still provide the Landlord with vacant possession of the premises notwithstanding his breach of his obligations under the agreement and it would be open for the Landlord to claim compensation for any damage suffered as a result of that breach.

16. In this instance, the Tenant says he moved out on 2 June 2002 and returned the keys on 3 June 2002. Granted that the Landlord says that there was additional work that had to be done with the premises and that the Tenant did not comply with his obligations to return it in a reasonable state of repair and in a reasonable state of cleanliness. However, as I have already indicated, this is not in itself determinative as it is open to the Landlord to make a compensation application for any loss suffered as a result of these breaches, including a claim of loss of rent. I note on the outgoing condition report submitted by the Landlord it is apparent that on 3 June 2002 the Landlord by her agents had attempted to complete the outgoing condition report. The outgoing condition report was completed initially in the presence of the Tenant. The fact that the Landlord has attempted to do the outgoing condition report appears to imply that the Landlord did consider it had vacant possession at that time. In addition, I note that the Tenant had returned all of the keys to the premises to the Landlord on this date save for one key to the bedroom. The Landlord had also following this date conceded during the inquiry that she had arranged for trade people to come in from 3 June 2002 to address the deficiencies in the premises.
17. On balance, I am of the view that the Landlord has acted consistent with having vacant possession of the premises as at 3 June 2002. The Tenant, even if he wanted to, could not enter the premises and for all intents and purposes as at 3 June 2002 the Landlord had total control over the premises. Accordingly, I find that the Tenant has given the Landlord vacant possession as at 3 June 2002. The fact that the Landlord had to go back to the premises on 6 June 2002 to check work that had been agreed between him and the Tenant and that there was outstanding deficiencies in the premises to be addressed does not, in my view, take away from the fact that the Landlord had considered they had vacant possession of the premises prior to that time.

The ingoing condition report

18. Part 5 of the Act governs bonds and condition reports. Section 25 provides, my emphasis;

Section 25 Landlord may provide condition report

- (1) A Landlord may, **within 3 business days after a Tenant takes possession** of premises to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report and give both copies to the Tenant.**
- (2) **A condition report is to –**
 - (a) **specify the condition of walls**, floors and ceilings in each room in the premises to which the tenancy agreement relates;
 - (b) **itemise, and specify the condition of, any fixture or chattel** that is ancillary property; and

- (c) contain other prescribed information, if any.
- (3) **The Landlord is to fill out the condition report** under subsection (1) **in the presence of the Tenant or a representative of the Tenant** (who is not the Landlord or the Landlord's agent) **unless it is not practical to do so or the Tenant or the Tenant's representative does not appear at the agreed time.**

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

Section 26 Alteration or acceptance of condition report

- (1) **Within 5 business days after receiving the copies of the condition report under section 25, the Tenant may –**
 - (a) **accept the report by signing both copies and returning one of the copies to the Landlord;** or
 - (b) **mark the modifications the Tenant thinks fit** on both copies of the condition report, **initial the modifications and return both copies to the Landlord.**
- (2) **If a Tenant does not take action under subsection (1) within the time specified in that subsection, the Tenant is to be taken to have accepted the condition report.**
- (3) Within 5 business days after receiving the copies of the condition report modified by the Tenant under subsection (1)(b), the Landlord may –
 - (a) accept the report as modified by the Tenant by initialling the modifications made by the Tenant and returning both copies, without making modifications, to the Tenant; or
 - (b) mark the modifications the Landlord thinks fit on both copies of the condition report, initial the modifications and any modifications that the Tenant has made under subsection (1)(b) that the Landlord accepts and return both copies to the Tenant.
- (4) If a Landlord does not take action under subsection (3) within the time specified in that subsection, the Landlord is to be taken to have accepted the condition report as modified by the Tenant.
- (5) After receiving the copies of the condition report from the Landlord under subsection (3) –
 - (a) if the Landlord accepted the Tenant's modifications under subsection (3)(a), the Tenant may, within 5 business days, accept the condition report by signing both copies and returning one of the copies to the Landlord;
 - (b) if the Landlord made modifications under subsection (3)(b), the Tenant may, within 5 business days, accept the condition report by initialling the modifications made by the Landlord under subsection (3)(b), signing both copies of the condition report and returning one copy to the Landlord; or
 - (c) in either case, the Tenant or the landlord may –
 - (i) attempt to reach agreement as to the contents of the condition report and accept the condition report by having both parties initial all modifications to the report by having both parties initial all modifications to the report that are accepted by them and having the Tenant sign both copies of the report and return one to the Landlord; or
 - (ii) apply to the Commissioner under section 27.

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

Section 28 Condition report conclusive of condition at beginning of tenancy

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

21. Given the directly inconsistent evidence from both parties, I found it necessary during the course of the Inquiry to take evidence on oath from each of the parties in relation to the completion of the ingoing condition report. The evidence , on behalf of the Landlord is that:

- 21.1 The Tenant had never completed an ingoing condition report before as they had come from their own home in Victoria. The property condition report was explained to him and the Tenant over the telephone. The Tenant was asked if he would like to attend on Thursday or Friday 1 or 2 March 2001 prior to moving into the premises. During the course of the telephone conversation the Landlord had a conversation with the Tenant who said that he was too busy to attend the ingoing inspection. Accordingly, the Landlord offered to produce the ingoing condition report for him.
- 21.2 The Landlord cannot recall exactly the words that had been used however, she did indicate that the purpose of the condition report was to list the state of the premises such as the walls etc. which needed to be checked. The Landlord says they took extra care with the Tenant because of the fact that he was coming from his own property in Victoria and had never rented before so they made sure they explained the purpose of the ingoing condition report to him.
- 21.3 The Landlord says this conversation occurred at their office or over the telephone. She cannot recall exactly where the conversation had occurred although she recalls checking with the tenant several times over the telephone but says that she did not take any file notes of these conversations.
- 21.4 On Saturday 3 March 2001 the Tenant's went into the agent's office. At their attendance at the office the Landlord gave them two copies of the tenancy agreement, two copies of the ingoing condition report, storm warning information, a welcome note which explained the ingoing property condition report, office hours, emergency phone numbers. In addition, the Landlord had given the Tenant a letter regarding the general care and maintenance of the home, receipts and full set of keys. The Landlord says this occurred early on Saturday morning.

- 21.5 The Landlord says that she definitely gave two copies of the condition report to the Tenant at that time, she thought she gave it to the Tenant and it was handed to him. All the documents referred to at paragraph 21.4 herein were handed to the Tenant in a manilla folder.
- 21.6 The Landlord says in handing over these documents she explained to the Tenant what they were and they also went through the tenancy agreement clause by clause. The Landlord says that they did not discuss the ingoing condition report however, it was there for them to view and they had discussed it on the welcome sheet which was included with all that information.
- 21.7 The Landlord says they did not get the property condition report back from the Tenant. The Landlord says although they are entitled to take the ingoing condition report as being accepted under the Act, because of the value of the property, they again contacted the Tenant and asked him to return their copy of the ingoing condition report. The Landlord says her husband, phoned the Tenant some time after the ingoing condition report was given to the Tenant on 3 June 2001. The Landlord says she overheard her husband telephone the Tenant. The Landlord is not sure but believes that a copy was faxed from their office to the Tenant on that day however, the Landlord says that a copy was definitely given to the Tenant on 28 March 2001. The Landlord says she knows this because she recognises her husband's handwriting on the ingoing condition report which states "handed to Tenants 28/3/01" and which is initialled "PB". The Landlord says she does not recall whether or not this document was given or faxed to the Tenant although from the hand written notations it appears that it was handed to them.
22. In response to this, the Tenant says that the only copy of the tenancy agreement that they have is dated 9 February 2001. The tenancy agreement was definitely not signed on 3 March 2001 as the copy the Tenants have is dated and signed 9 February 2001. The Tenant says that a copy of the tenancy agreement had been given to them before signing. They needed to clarify a number of issues and says that he signed the tenancy agreement on 9 February 2001. The Tenant says that he does not recall where this agreement was signed but presumes it was signed at his place of work given that the document had been witnessed by one his work colleagues.
23. Evidence on oath taken from Mrs Tenant, one of the Tenant's, in relation to the ingoing condition report was as follows:
- 23.1 Mrs Tenant does not recall getting any other copy of the ingoing condition report other than that given by the Landlord husband on or about 28 March 2001. Mrs Tenant cannot recall precisely when this was given but is going by the hand written notation on the ingoing condition report. She says that it was definitely a couple of weeks after moving into the premises. She recalls this copy as her husband had brought the copy home and they both had a look at it that night.
- 23.2 Mrs Tenant says she had no involvement in negotiating the tenancy agreement as at the time of its negotiation she was still in Bendigo.
- 23.3 Mrs Tenant said that on 3 March 2001 they attended at the Agent's office where they paid a cheque for the bond and two months rent in advance. She

remembers the keys were handed over at that point. She says she met the Landlord at the office early in the morning. The Landlord's husband, was not present. At the office, the Landlord had given her an envelope. She does not recall what was in it but does recall there being emergency procedures and the like in it. She does not recall if anything was said in relation to the ingoing condition report at that time and does not recall what was in the envelope as she did not open it whilst they were at the office. When the Landlord gave the envelope to her she says nothing was said to her about its contents.

23.4 She says she opened the envelope at home and had a look through it, she recalls there being a welcome letter, information from PAWA although does not remember what else was in it. She has no recollection regarding whether or not a copy of the tenancy agreement and the ingoing condition report was in that envelope.

24. The evidence on oath from the other tenant, in relation to the ingoing condition report was as follows:

24.1 Negotiations with the Landlords in relation to the tenancy agreement began two-thirds the way through in January 2001. Mr Landlord had shown them a few houses including their own home which he had told them was soon to come up for rental. Mr Tenant had flown up to Darwin one week before he started his business operations. These operations commenced on 1 February 2001.

24.2 Tenant remembers the ingoing condition report, he acknowledges that he has a copy of the ingoing condition report in his possession but he does not know how or when it was delivered. He says that the copy he has in his file has a hand written note from the Landlord which indicates that it was handed to the Tenants on 28 March 2001. He does not recall when in fact he received that document.

24.3 On 3 March 2001 the Tenant says he went to the Agent's office. He recalls having a conversation with the Landlord about the home however he does not recall exactly what was said. He does recall that the Landlords were very kind and helpful and really made attempts to welcome them into the Darwin community. He recalls seeing an information sheet regarding plumbers etc. on the day they attended at the office however, he does not recall how that information was given to him. The Tenant does not remember ever receiving an envelope and does not really recall what happened at that time. He thought that they might have been there to pick up the keys to the premises and think that they did in fact collect them on that day.

24.4 After attending at the office on 3 March 2001, The Tenant says he and the Landlord went to the premises to show them how to operate the pool and the alarms.

24.5 He has no recollection of the ingoing condition report or the tenancy agreement being given to them that day.

- 24.6 He does recall speaking to the Landlord about the ingoing condition report. He says the Landlord rang him and asked him to give him back one of the copies of the ingoing condition report. This occurred some weeks after moving into the premises although he does not remember exactly when.
- 24.7 The Tenant does not recall when he first discussed the ingoing condition report with the Landlord. He says he had several conversations with the Landlord although does not remember if they discussed the ingoing condition report at that time. Tenant says if the Landlord had of given him an opportunity to attend the ingoing condition report he would have because that was the type of person he is.
- 24.8 He says at no stage was he given any opportunity to attend the ingoing condition report. He says prior to that conversation with the Landlord a couple of weeks after they moved into the premises he does not remember anything about an ingoing condition report and does not recall when he received it.
- 24.9 He says he signed the tenancy agreement at his place of work on or about 9 February 2001. He says the Landlord had gone to his work place and he signed it then.
- 24.10 The Tenant says that he has been a Tenant before and does know what an ingoing condition report is. Admittedly it was over 20 years ago however, he did have rental properties in Victoria for which an agent conducts his affairs.
25. The evidence from both parties in relation to the acceptance of the ingoing condition report and whether or not section 25 of the Act has been complied with is directly contradictory. It is difficult to choose between the different version of events and insofar as I am required to, on balance, I prefer the evidence of the Landlord in relation to this issue. The evidence from the Tenants was at best “sketchy” there a number of issues and significant details which they both admit during their evidence on oath that they could not recall. Accordingly, doing the best that I can with the evidence from both parties on balance, I find:
- 25.1 The Tenant entered into possession of the premises on 3 March 2001.
- 25.2 The Landlord gave the Tenant an opportunity to attend the ingoing inspection report during a telephone conversation on 1 or 2 March 2001. The Tenant declined this opportunity and accordingly the Landlord completed the ingoing condition report on her own.
- 25.3 Whilst in attendance at the Agent’s office to collect the keys on 3 March 2001, the Landlord gave the Tenants an envelope or manilla folder of documentation. Included in this documentation was a welcome letter that is done by the Agents which contained storm water warnings, power warnings as well as documentation regarding emergency numbers for plumbers, and the like. Significantly however, I find that two copies of the ingoing condition report were provided to the Tenant at this time.

- 25.4 As the Landlord had not heard from the Tenant following the ingoing condition report being given to them on 3 March 2001, the Landlord hand delivered a second copy of the ingoing report to the Tenant on or about 28 March 2001.
- 25.5 The Tenant had within five business days of 3 March 2001 to return the ingoing condition report to the Landlord. As they did not do this, pursuant to section 26(2) of the Act the Tenant is taken to have accepted the condition report.
- 25.6 Accordingly, I find that the ingoing condition report submitted by the Landlord with a hand written notation in the top left hand corner saying “handed to Tenants 28/3/01” has been accepted by the Tenant in accordance with Part 5 of the Act and is conclusive evidence of the condition of the premises at the beginning of the tenancy in accordance with section 28 of the Act.

The outgoing condition report

26. Section 112(4) provides that the Landlord is not entitled to retain any of the Tenant’s security deposit for the purposes of making good damage, replacing ancillary property or cleaning the premises unless a condition report has been provided to the Tenant under section 110 of the Act. Section 110 provides, my emphasis:

Section 110 Condition Reports

- (1) **A Landlord may, within 3 business days after a Tenant has given up vacant possession** of premises to which a tenancy agreement relates, **fill out and sign 2 copies of a condition report and give both copies to the Tenant.**
- (2) **The Landlord is to fill out the condition report** under subsection (1) **in the presence of the Tenant** or a representative of the Tenant (who is not the Landlord or the Landlord’s agent) **unless it is not practical to do so** or the Tenant or the Tenant’s representative does not appear at the agreed time.
- (3) A Landlord may, within 3 business days after forming the opinion that a Tenant has apparently abandoned the premises to which a tenancy agreement relates –
 - (a) fill out and sign 2 copies of a condition report;
 - (b) give notice to the Tenant at the last known address of the Tenant (which may be the residential premises) specifying the place where the copies may be obtained; and
 - (c) at the request of a Tenant made within 7 business days after giving notice under paragraph (b), give both copies to the Tenant.
- (4) **A condition report is to –**
 - (a) **specify the condition of** walls, floors and ceilings in each room in the premises to which the tenancy agreement relates;
 - (b) **itemise, and specify the condition of, any fixture or chattel** that is ancillary property; and
 - (c) contain other prescribed information, if any.

- (5) **A Tenant or Tenant’s representatives may -**
- (a) **accept a condition report** given to him or her under subsection (1) or (3) by signing both copies of the report and returning one to the Landlord; or
 - (b) **if the parties are unable to agree as to the contents of the condition report – refuse to accept the condition report.**
- (6) If, within 7 business days after 2 copies of the condition report have been given to a Tenant under subsection (3), both parties have not accepted the report, the Landlord or the Tenant may apply to the Commissioner to prepare a condition report in respect of the premises.
- (7) The Commissioner may, on receipt of any application under subsection (6) prepare a condition report in respect of the premises and the ancillary property to which a tenancy agreement relates.
- (8) The Landlord and the Tenant are, for the purposes of this Act, to be taken to have accepted a condition report prepared by the Commissioner under subsection (7).

If the outgoing condition report is accepted/taken to have been accepted by the Tenant, section 111 provides, my emphasis:

Section 111 Condition report conclusive of condition of premises at end of tenancy

If a **condition report is accepted or is to be taken to have been accepted** under this Division **by the Landlord and a Tenant, the condition report is (insofar as it relates to the end of the tenancy) conclusive evidence of –**

- (a) **the condition of the premises to which the tenancy agreement relates; and**
- (b) **the condition of any ancillary property** referred to in the condition report at the end of the tenancy,

unless the Commissioner determines otherwise in a particular case.

27. The evidence of the Landlord in relation to the completion of the outgoing condition report is as follows:

- 27.1 The Agents completed the outgoing condition report on 6 June 2002. Two other Agents from the agency had previously completed it on 3 June 2002.
- 27.2 On 3 June 2002 the Tenant were present for the start of the outgoing condition report however left before it was completed and whilst the Landlord was in the process of doing it. The Landlord says two agents were used at the time because it was a big house and they wanted the ingoing condition report done thoroughly.
- 27.3 On 6 June 2002 the agent went back to the premises to double check the ingoing condition report completed by the two previous agents given the nature of the premises being an “executive” premises.
- 27.4 The ingoing condition report was sent to the Tenant on Tuesday 11 June 2002, as Monday was a public holiday. Two copies were sent to the Tenant. In fact the agent says he hand delivered two copies of the outgoing condition report along with the Notice of Intention to Retain Security Deposit dated 11 June 2002 to the Tenant at their place of work at Berrimah.

28. In relation to the outgoing condition report, the evidence of the Tenant is as follows:
- 28.1 The Tenant, attended at the premises on 3 June 2002 for part of the process however, he left during it as he was somewhat “annoyed”. Three agents from the agency attended on behalf of the Landlord,.
 - 28.2 Prior to vacating the premises the Tenant had some concerns regarding the ability for them to get their bond back because of some stories that they had heard about the Landlord. They wanted to leave the place in a reasonably clean condition and to hand it back to the Landlord so that they could ensure they would get their bond returned. Accordingly, prior to vacating the premises the Tenant rang the agent and asked him to come out to the premises so that they would have some idea of what sort of issues need addressing before they vacated the premises.
 - 28.3 On 28 May 2002 he and the agent discussed with another agent what was required to be done to the premises before they vacated. From that conversation he formed the impression that it was going to be “tough” to get their security deposit back from the Landlord. Agent appeared intimidated by the process and pressure that had been exerted by the Landlord. The Tenant says that at all times they were trying to demonstrate good faith.
 - 28.4 In relation to the outgoing condition report on 3 June 2002 the tenant says he was present for about an hour of that report however, then got a bit annoyed because he thought there was a lot of “white gloving” occurring. The premises was overly examined and everything was looked at with “a fine toothcomb”. He knew that the outgoing condition report would become an issue and rather than waste his time he decided to leave.
 - 28.5 The Tenant says that on Tuesday 11 June 2002 the agent went to his place of work and gave him a copy of the Notice of Intention to Retain Security Deposit and a copy of the outgoing condition report. He only got one copy of the condition report although he says he doesn’t remember how many copies were given to him. The Tenant says he got as far as the bottom of the first page but decided that he was wasting his time. He had a “flick” through the rest of it and says that there were references to drill holes when the Tenant says he does not own a drill. Most of the issues he identified were with respect to cleanliness. The tenant says he remembers saying to the agent that this would end up as a dispute and to “go ahead and do his worst”.
 - 28.6 The Tenant says he does not agree with the outgoing condition report at all.
29. It appears to be common ground between the parties that the outgoing condition report was given to the Tenant on or about 11 June 2002. I note at paragraph 17 herein I have found that the Tenant had given vacant possession of the premises to the Landlord on 3 June 2002. Section 110 requires two copies of a completed outgoing condition report are to be given to the Tenant within three business days after the Tenant has given up vacant possession of the premises. Three business days would have lapsed on 6 June 2002. Therefore, by giving the outgoing condition report to the Tenant on 11 June 2002, I find that the Landlord has failed to comply with section 110 of the Act.

Accordingly, pursuant to section 112(4) of the Act the Landlord is not entitled to retain any amount of the security deposit for the purpose of making good damage, replacing ancillary property and cleaning the premises left in an unreasonably dirty condition. Therefore, the Landlord is not entitled to retain the following: \$2,300.00 retained for making good damage, \$200.00 for replacing ancillary property, lost or destroyed by the Tenant, and \$400.00 retained for cleaning the premises or ancillary property left in an unreasonably dirty condition.

30. As the Landlord's Notice has also sought to retain money for unpaid rent and changing locks it is necessary for me to determine whether or not section 112(5) has been complied with.
31. In relation to the Notice the evidence of the Landlord is that the Notice and outgoing condition report was given to the Tenant as per the attachments submitted to me for the purpose of this application. I note attached to the Notice is a Statutory Declaration by the agent declared on 11 June 2002, a tax invoice from The Big Mower with hand written notations approximating the costs of a normal service of a ride on and Honda mower, tax invoice number 66 from Scott Warmans Painting outlining a number of repairs, tax invoice number 67 from Scott Warman Painting for resealing the lounge room floor, quote from Gordon White, Dealer in Antiques being for the supply of an antique etch glass float lamp, quote from Regina Cleaning Service dated 4 June 2002, quote number 5468 from Pilkington for the fitting of a frame and quote from Alternative Floors in relation to the re-sanding and coating of Tasmanian Oak floors in the amount of \$1,496.00.
32. The Tenant agrees that he received the Notice with the attached documents on or about 11 June 2002. In addition, the Tenant says a document entitled "Bond Disbursement" was delivered to his office which he says indicates the Landlord's intention to retain his security deposit. The Landlord says in relation to this document that it was an attempt to negotiate a settlement and was given to the Tenant before 11 June 2002. This document gave the Tenant an indication of what their bond would be used for however, it was not meant to be a Notice of the Landlord's Intention to Retain the Security Deposit. That Notice was not given to the Tenant until 11 June 2002 and the other document was merely an attempt at resolving the matter. The Tenant indicated that he was of the view that the bond disbursement document was an indication of how his bond was to be disbursed and he did not realise that it was an attempt by the Landlord to resolve the matter. The Tenant says this is supported by statements in bold within that document to the following effect "withheld from bond" followed by an amount. The Tenant says if you add up all these individual amounts they total \$3,200.00, which is the amount of his security deposit. In response to this the Landlord says at that time they did not have the quotes and were merely giving the Tenant an indication of the matters that required addressing and how they were to be addressed.
33. I note the bond disbursement document is undated and I accept the Landlord's indication that this document was sent to the Tenant in a purported attempt at resolving the dispute between the parties. That being said, I agree with the Tenant that the document certainly gives the impression that the bond was to be utilised for the things stated. However, a closer look at the bond disbursement document indicates that a lot of the views expressed within that document appear to be along the lines of concessions made by the Landlord's agent on her behalf.

Notwithstanding the confusion created by giving this document to the Tenant, I am satisfied that the Notice of the Landlord's Intention to Retain Security Deposit was given to the Tenant by the document dated 11 June 2002 and the attachments therein. As I have already indicated, I am of the view that the Landlord, pursuant to section 112(4), is not entitled to retain the amounts from the Tenant's security deposit being for damage to premises, replacing ancillary property as well as cleaning premises left unreasonably dirty because they have failed to comply with section 110 of the Act. That being said, I am satisfied based on the Notice submitted by the Landlord and the attachments therein that the Landlord has complied with section 112(5) of the Act in relation to these issues.

34. In relation to whether the Landlord has complied with the Act for replacing locks and paying unpaid rent, I am not satisfied that the Landlord has complied with section 112(5). Section 112(5)(c) requires that the Statutory Declaration attached to the Notice attests to the fact that the receipts, invoices or other documents attached to the Declaration relate to the matters in respect of which part or all of the security deposit is being withheld or the amount of unpaid rent owing under the agreement or money owing under section 121. I note in the attachments submitted by the Landlord there is no invoice, receipts or other documents which indicate why \$100.00 of the Tenant's security deposit was to be retained for the purpose of replacing locks or keys. In addition, there is no documentation attached to the Notice, which indicates why \$200.00 of the Tenant's security deposit was retained for the purposes of unpaid rent. The Notice itself does not indicate how the amounts indicated and retained for these issues were calculated by the Landlord.
35. Landlords can only withhold part or all of a Tenant's security deposit if the conditions of section 112(5) of the Act are met. The conditions are clear in its terms and are in my view, mandatory requirements. Section 112(5) requires the Notice of Landlord's Intention to Retain Security Deposit have a Statutory Declaration attached to it. This Statutory Declaration must attach invoices, or documents that support the retention of the amount indicated in the Notice. The purpose of the Notice is to give the Tenant an understanding of why their security deposit is being withheld and what it is being withheld for. I note that more often than not the Landlord will not have receipts or invoices supporting their claim however, in my view, file notes and other documentation would suffice. In doing up the Notice the Landlord goes through the process of working out what amounts are to be retained from the security deposit and for what purpose. This needs to be reflected in the Statutory Declaration given to the Tenant. Merely specifying the amount does not reasonably notify the Tenant why the amounts specified in the Notice are being withheld and does not comply with section 112(5) of the Act. I acknowledge that agents/landlords at the time of issuing Notices of Intention to Retain Security Deposit would not have all the quotes and invoices in at that stage however, it was incumbent on the agent to substantiate, for example by way of file notes, how he arrived at the various figures specified in the Notice.
36. The Landlord says that he calculated the rent on the basis of the agreement for the termination of the tenancy not coming into play until the Landlord had completed the work that needed to be rectified on or about 6 June 2002. Accordingly, the rent for the premises was for 4, 5 and 6 June 2002. The agreement with respect to the early termination of the tenancy was to be effective from the time the Tenant vacated and he deemed rent payable until 6 June 2002. It is clear, the agent had calculated this amount and all that was required that he document this in an attachment to or within his Statutory Declaration.

As this did not occur in relation to the unpaid rent and also did not occur in relation to the changing of the locks I find the Landlord has not complied with section 112(5), in particular subsection (c) of the Act and is not entitled to retain the Tenant's security deposits for these amounts.

37. On balance, I find that the Landlord is not entitled to retain the Tenant's \$3,200.00 security deposit as they have not complied with section 112 of the Act. Accordingly, the Landlord must return the full amount of the security deposit to the Tenant forthwith.

The claim of unreasonableness

38. The Tenant's objection to the retention of the security deposit was on the basis of unreasonableness. Therefore it was incumbent on me to hear the parties on the reasonableness of these claims. I note during the course of the Inquiry, the Tenant also made some concessions in relation to the amounts sought to be retained by the Landlord from his security deposit. I also note the Tenant offered to resolve the security deposit dispute by agreeing to a partial retention of his security deposit. This offer was rejected by the Landlord on the basis that her bills are greater than the \$3,200.00 security deposit.
39. In light of the finding I have made at paragraph 37 herein, it is not strictly necessary for me to consider whether or not the claims made by the Landlord in support of the retention of the Tenant's security deposit are reasonable. However, given that the retention of the security deposit was initially disputed by the Tenant on the basis of unreasonableness and the fact that the Landlord has foreshadowed that they will be bringing an application for compensation. I am of the view that it may be beneficial for the parties to get an indication of some of my views of the amounts claimed for the purposes of assisting the parties come to a resolution of their dispute on their own.

In addition, a consideration of these issues is necessary in the event that I am wrong with my finding that the Landlord has failed to comply with section 112 of the Act.

40. In order to do this, it was necessary for the Landlord to particularise what the individual amounts for making good damage, replacing ancillary property and cleaning the premises or ancillary property left in an unreasonably dirty condition. This particularisation was necessary because the amount claimed by the Landlord and the invoices submitted by the Landlord in support of their claim is greater than the Tenant's security deposit. I note during the course of the Inquiry the matter was adjourned so that the Landlord could have an opportunity of doing this. Upon resumption of the Inquiry later that day, the Landlord indicated the various amounts being sought to be retained from the security deposit is as indicated at paragraph 6 of my reasons herein.

The Tenant's obligation and the onus of proof

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

Section 51 Cleanliness and damage

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

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

42. As I have indicated at paragraph 25 herein, I am satisfied that the parties have accepted an ingoing condition report under Part 5 of the Act. That being said, I am not satisfied that an outgoing condition report has been accepted under Part 12. The Tenant has expressly disputed the outgoing condition report and in these circumstances, the weight I will give the outgoing condition report will depend on the evidence of the parties under each of the items claimed.

Generally speaking however, I am concerned about the objectivity of the outgoing condition report given that three different agents completed it. The obligation of the Tenant under the tenancy agreement is to return the premises at the end of the tenancy in a reasonably clean condition and a reasonable state of repair. This standard is an objective standard which takes into account a number of different issues. The fact that the Landlord required three different agents to make this assessment appears to indicate to me that the Tenant's assertion of the premises getting "white glove treatment" is not without warrant.

43. As the Landlord is essentially claiming that the Tenant has breached this term of the tenancy agreement, the onus is on the Landlord to establish on the balance of probabilities that the Tenant has breached his obligations under the tenancy agreement. Namely, at the end of the tenancy, the premises was not returned in a reasonable state of repair and/or in a reasonably clean condition allowing for reasonable wear and tear. The starting position is that the Tenant's security deposit is in fact the Tenant's money and the Landlord must establish that the claims essentially amounted to a breach of the Tenant's obligations under the tenancy agreement.

The claim for slate of \$154.00

44. The Landlord claims the costs associated with having the lounge room floor resealed with two coats of remote gloss. In support of this claim, the Landlord has submitted a tax invoice number 67 dated 4 June 2002 from Scott Warman Painting. The Landlord says the marks were not there at the beginning of the tenancy and there was damage to other parts of the floor which are not included in the invoice number 67. The Landlord says the downstairs living area required patching, however given the nature of the floor it was impossible to patch repair the floor and they had to do all of it. The Landlord says \$154.00 was the cost associated with resealing that part of the floor that was scratched. The Landlord says the scratches were in the centre of the floor and were not noticeable until the furniture was removed. The Landlord says they used 5 drums of Chemcoat at a cost of \$50.00 each. They had the whole floor resealed at a cost well in excess of \$154.00. The Landlord says there were certainly indents from a rug that had been on the floor for a while however the amount claimed were in relation to scratches under the lounge.
45. The evidence of the Tenant is that he agrees there were some scratches on the floor when they vacated the premises. He says some of the scratches were pre-existing. That being said he concedes to the cost of half of the scratches on the floor and that his concession is made on two grounds. Namely that some of the scratches are a result of reasonable wear and tear and secondly some of the scratches were due to the presence of a rug on the floor. The Tenant says that he does not own a rug and did not have a rug on the premises.

The Tenant says that the scratches are reasonable wear and tear as they were the result of the couch being moved when you sat on it. He says that the scratches were small. The Tenant says that prior to them vacating the agent had come through and indicated that they would be held liable for this activity. The Tenant also points to a concession made by the agent when he attended the premises prior to them vacating. The Tenant says the agent conceded that some of the scratches were present prior to the Tenant moving into the premises. The Tenant also says that if you look at the ingoing condition report, the ingoing condition report describes the floor in the lounge room as being “high gloss slate ceramic tiles in as new condition, clean grout, no chips or marks in good condition”.

46. I note in the undated bond disbursement document done by the Landlord in relation to the slate floors, the Landlord says “the intrinsic “soft” nature of slate has resulted in scratching and marking from robust family usage in the living room. Again, taking into account the age of the floor, the fact that a family of 5 with teenage boys uses this room some wear and tear must be expected. I think the marking however, exceeds fair wear and tear here and some contribution should be met by the Tenant”.
47. The term reasonable wear and tear must be considered objectively in all the circumstances of the case. In *Taylor v Webb* (1937) 2 KB 282 in considering an interpretation of “wear and tear”, the English Court of Appeal held:

The phrase “wear and tear” is a very old English idiom and the clause “fair wear and tear accepted” has been common in leases and tenancy agreements for two or three centuries. It is, like many idiomatic expressions, complex in meaning; it implicitly refers to both cause and effect, and in each aspect it covers two classes of disrepair:

- (a) that brought about by the normal or ordinary operations of natural causes, such as wind and weather, in contra distinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake;
- (b) that brought about by the Tenant or other person present on the premises with the consent of the Tenant, either unintentionally or as a normal incident of the Tenant’s occupation in the course of the “fair”... use of the premises for any purpose for which they were let...”

48. In my view, in determining what is fair wear and tear or in this instance “reasonable wear and tear”, it is necessary to objectively consider:
- (a) The nature of the use which gave rise to the damage concerned, in particular whether or not that damage was intentionally caused by the Tenant; and
 - (b) The extent of the damage caused.
49. The scratch marks on the floor appear to have been caused by the couch in the living room. The bond disbursement document submitted by the Landlord certainly supports the fact that the scratches on the floor could be attributed to reasonable wear and tear. On balance, the Landlord has failed to establish that these scratches were the result of the Tenant’s breach of his obligations under the Act.

In my view, if the scratches were caused by the couches then that would certainly point to the fact that it amounted to reasonable wear and tear for the purpose of the Act. Accordingly, I find that these scratches did amount to reasonable wear and tear and therefore the Tenant has not breached his obligations under section 51 of the Act. This is particularly the case when you consider that the Tenant's had been in occupation of the premises for well over 12 months and the premises was occupied by the Tenant with their three teenage sons. It is reasonable to expect that there would be some scratches on the floor as a result of people traversing or sitting on the couch.

50. That being said, I note the Tenant has conceded half of the \$154.00 claimed by the Landlord in the amount of \$77.00. Accordingly, by consent I find the Landlord is entitled to retain \$77.00 from the Tenant's security deposit being for the scratching the slate floors.

The upstairs vanity, part payment of \$90.00 (full amount \$160.00)

51. The evidence of the Landlord in relation to this claim is that:

51.1 The vanity is made from Tasmanian Oak which had been sealed correctly. They have lived in the premises themselves and did not have any problems with the watermarks that were left on the vanity. The Landlord says that all that was required was that the Tenant exercise reasonable care in that if water was lying around the vanity they would wipe it over. The Landlord says that this would not need to occur every time the vanity was used, however, certainly on a regular basis.

51.2 The Landlord says this particular vanity was being used by the Tenant's son as the bathroom and had obviously happened during the course of the tenancy. However, at no time did the Tenant's report the water damage was occurring during the course of their tenancy. The Landlord also denies that the damage to the vanity was the result of mould. She says that if it was mould the repairman would not have been able to reseal it but would have had to replace it.

52. The evidence of the Tenant in relation to this claim is that:

52.1 He rejects it outright. The Tenant says that the vanity had watermarks on it and he could not be held responsible for poor design in the vanity. The Landlord had submitted photographs in support of her claim which clearly indicate that there was quite substantial water damage to the upstairs vanity. The Tenant agrees that the photographs are an accurate indication of the state of the vanity at the time that they vacated the premises. However, the Tenant says it was not an implied term of their tenancy agreement to expect them to know how to treat and clean Tasmanian Oak wood. The Tenant says that the vanity was used to wash their hands. If there was water sitting on it then that would indicate that the vanity was not reasonably fit for its purpose. The Tenant said that they tried to clean the watermarks with no result.

- 52.2 The Tenant says that the vanity was in their upstairs second bathroom which was used by their son. It was unreasonable to expect that design flaws in this vanity and that the Tenant would know how to clean and treat these sought of expensive fittings. The Tenant says that had these sort of fittings required special care they should have been told about this at the commencement of the tenancy agreement.
- 52.3 The Tenant says that they had a cleaner in to the premises weekly who was responsible for cleaning the bathroom, floors and kitchen. The Tenant says that they undertook regular maintenance and cleaning of the premises however, the watermarks were still there.
- 52.4 The Tenant says the damage would have become apparent during their agent's inspections of the premises however no one told them about it. The Tenant also indicated that it was not mentioned in the ingoing condition report that the vanities were made out of Tasmanian and Silky Oak wood. In response, the Landlord says that the damage goes beyond fair wear and tear and she expected it to be returned in a similar condition.
- 52.5 The Tenant acknowledges that the vanity probably would need to be sanded back however attributes the damage to mould as well as to the water marks.
53. On balance, it is difficult for me to determine whether or not the Tenant had complied with his obligation to return the premises in a reasonable state of repair. The photographs certainly indicate that there are quite extensive water marks on the bathroom vanity. That being said, given the vanity was to be used for the purposes of washing hands and was located in a wet area, it seems to me that the damage really is quite extensive and certainly may support the Tenant's contentions that the vanity was not reasonably fit for its purpose. That being said, I note the evidence of the Tenant was that they had the bathroom cleaned weekly. It seems to me that a weekly clean of the premises would have reduced the amount of water marks on it. In addition, these water marks would certainly have accrued over a period of time and the Tenant had an obligation to notify the Landlord of this damage in accordance with section 51(1)(b) of the Act. The Tenant has not complied with this obligation, and I am of the view that had this been done the damage to the premises could have been addressed at an earlier stage and may have avoided the need for re-sanding and resealing.
54. On balance, I am of the view that the Tenant did not return the vanity in a reasonable state of repair and that the \$90.00 claimed by the Landlord for the second ensuite is reasonable.

The downstairs vanity, \$110.00

55. The Landlord claims \$110.00 being for the sanding back and resealing of the downstairs vanity. The Landlord says this vanity was made out of Silky Oak which is a hardwood that was sealed properly. The Landlord says that the downstairs vanity was used by the Tenant's son and in support of her claim submitted two photographs.

The photographs of the downstairs vanity are certainly not as clear as the upstairs vanity and it appears from that photographs that the damage was probably not as extensive, although there are certainly water marks apparent. The Landlord says compared to the upstairs vanity, the downstairs one is larger. I note the outgoing condition report describes the damage as being scratches and watermarks.

56. The evidence of the Tenant was that he essentially repeated his submissions made with respect to the upstairs vanity (at paragraph 52 herein). The Tenant also says that the bathroom downstairs was used as a common bathroom. He does not dispute that that is how the vanity looked at the time of their vacating the premises. Once again the Tenant is essentially saying that the vanity was a result of fair wear and tear.
57. For the reasons I detailed above in relation to the upstairs vanity, I am of the view that the damage certainly exceeded reasonable wear and tear and was the result of the Tenant's failure to comply with his obligations under the tenancy agreement. Had the Tenant notified the Landlord of this damage as it was occurring it may have been possible that the damage could have been reduced or avoided.
58. Accordingly, I am satisfied that \$110.00 to re-sand and re-seal this amount is reasonable and is the result of the Tenant's breach of the tenancy agreement.

The kitchen bench, \$380.00

59. The Landlord claims \$380.00 as indicated on tax invoice number 66 from Scott Warmans Painting dated 4 June 2002. This invoice indicates that the kitchen island bench top required sanding back and repolishing due to deep gouges. The evidence from the Landlord in relation to this issue is as follows:
 - 59.1 The kitchen bench was dented and marked. It looked like beer caps had been pressed into it. The markings were noticed on 11 June 2002. The Landlord does not know why no mention is made of these marks in the outgoing condition report.
 - 59.2 The Landlord says that these marks were not present at the time the Tenant moved into the premises and in order to get it back to the same condition they had to get it re-sanded back.
 - 59.3 The Landlord has submitted a photograph in support of her contentions. Although the photographs are a little unclear it does indicate that there is a circular mark on the kitchen bench. The Landlord says that the kitchen bench is made of hardwood and is certainly sustainable for normal kitchen use.
 - 59.4 I note in the bond disbursement document it indicates that the bench is made from Tasmanian Oak which "looks very nice but is not a particularly robust timber for a work bench. With light fastidious usage from a professional couple it would remain in good condition. With usage appropriate to service the Tenant's family needs some marking is inevitable and as with timber floors it would be unreasonable to expect a Tenant to restore the tops to as new condition after paying \$800.00 a week rent for their usage. However, more care should have been taken and a fair contribution to restoration would be around 30% at cost".

60. The evidence of the Tenant is that they dispute the amount in full based on fair wear and tear. In addition the Tenant says that the outgoing condition report indicates that the kitchen bench was dirty but makes no reference to the marks. The Tenant says that what is a kitchen bench if you cannot cook on it. The Tenant however agrees that the kitchen bench was not dented when they moved into the premises.
61. I would have to agree with the comments made by the Landlord's agent at paragraph 59.4 herein. It appears to me that the marks are certainly consistent with reasonable wear and tear taking into account the Tenant consist of a family of five including three boys. I also find it curious given the amount of detail that was entered into the outgoing condition report that the Tasmanian Oak bench was ticked perfect and the only notation was that it was dirty. No reference was made to it being damaged.
62. On balance, based on the evidence before the inquiry, I am of the view that the Landlord has failed to establish that the damage to the kitchen bench was a result of the Tenant's breach of its obligations under the Tenancy Act. Accordingly, I would dismiss this aspect of the Landlords claim.

Claim for Tasmanian Oak floors, \$1,496.00

63. The Landlord claims \$1,496.00 being for damage to Tasmanian Oak floors in the main bedroom and in bedroom two. The evidence of the Landlord in relation to this issue is that:
 - 63.1 The damage was caused by the bed legs and although it was noticeable it was not substantial. The Tenant would not have noticed the scratches whilst in occupation of the premises as the damage was not noticeable until the bed was removed. The Landlord says that the ingoing required castors to be used on their beds under their furniture. The Landlord says their definition of a castor is a flat thing under the leg of the bed which is to be used to share the weight of the bed so that the floor would not be marked.
 - 63.2 The Landlord says there are about six to eight indents on the floor where the bed legs were about two to three millimetres in depth. The indents were about 20 centimetres wide and it was probably easier to feel the scratches than to see them.
 - 63.3 The Landlord says that in order to fix this damage the floor had to be sealed which had been done by Alternative Floors. The Landlord says that the floor being made from Tasmanian Oak required extra care and when the Tenant had entered into possession of the premises on or about 3 June 2002 they included in the welcome back notes on how to care for the premises. The Landlord says their claim is indicated by the notations on page four and six of the outgoing condition report which indicates that there are dents and scratches on the floors.
 - 63.4 I note in the bond disbursement document issued by the Landlord to the Tenant it indicates that although the two bedroom floors show substantial damage, the floors are made of a soft timber being Tasmanian Oak and require special care so as not to suffer the damage evident.

The Landlord says “a more sensitive and aware Tenant would have noted bed movement that has led to the excessive marking.

During normal cleaning it is surprising no damage was noted however a prudent Landlord would have been aware that damage was likely if no protection was provided and as no castors or floor protection were provided and no special directives were issued to the Tenant upon taking up the tenancy nor subsequently after inspections by the Landlord it is unreasonable to expect a Tenant to pay the full amount of restoration. A fair proportion of cost to be picked by the Tenant therefore should not exceed 30% of quote.”

64. The evidence of the Tenant in relation to this issue is that:

64.1 They dispute the amount. All that was in the bedrooms were beds. They were not aware of the markings to the floor until on or about 3 June 2002 when they went through the house before vacating. The Tenant says the marks were not noticeable until they had removed all the furniture from the house. The Tenant says at no time during the outgoing condition report were the marks to the floors brought up and it was not until he received the bond disbursement document from the Landlord that he was aware that he would be held liable by the Landlord for this damage.

64.2 The Tenant says that the bed was on castors, it was not a hard-legged bed but was on rollable castors. The Tenant says that a castor is a wheel and their beds had such castors affixed to them. The Tenant says that if the Landlord required special castors to be used they should have provided them or told them about then when they entered into possession of the premises.

64.3 The Tenant says he is not an expert in Tasmanian Oak. At no time were they given any information with respect to the care of this sort of wood.

64.4 The Tenant essentially says this damage was caused by reasonable wear and tear as all they did was sleep on the bed and that must have caused the markings.

65. On balance, I am of the view that the markings on the floor, which presumably were due to the movement of the bed, amount to reasonable wear and tear. I note there was some dispute between the parties as to what a castor amounted to. The Landlord says that it was something to put under the foot of the bed in order to share it's weight however, a review of the Australian Concise Oxford Dictionary defines castor as being “a small swivelled wheel (often one of a set) fixed to a leg (or the underside) of a piece of furniture.” This definition is consistent with the Tenant's evidence of the castors that were present on the underside of his bed. It seems to me that castors were certainly used and if the floor was damaged as a result of merely sleeping on the bed and bed movement caused by normal usage it would be unreasonable to expect the Tenant's to be liable for this.

66. Accordingly, I would dismiss this aspect of the Landlords claim. I also note in relation to this that at no time did the Landlord indicate that the damage had been intentionally caused by the Tenant, they seemed to accept that the damage was a result of the movement of the bed however, took issue with the fact that the castors that they were referring to were not used.

I agree that if the Landlord required special castors to be used these should have been provided or at least notified to the Tenant. In any event, I am not satisfied that scratching on the floor due to the movements of the bed in circumstances where the Tenant had a castor on it. I am also not satisfied that the scratches can reasonably be attributed to a breach of the Tenant's obligation under section 51 of the Act.

Concessions made by the Tenant with respect to painting claim of \$70.00 (still owing \$494.00)

67. The Landlord claimed a part payment of \$70.00 being for painting to the walls with \$494.00 still owing. This was substantiated by tax invoice number 66 dated 4 June 2002 by Scott Warmans Painting. During the course of the Inquiry, the Tenant conceded the full amount for the painting required to a feature wall in bedroom 4 notwithstanding that only \$70.00 was being sought to be retained by the Landlord from the Tenant's security deposit. The Tenant says that one of their sons had stuck the remote control which had an adhesive backing directly onto the wall. The Tenant accepts that he is liable for this amount and says it is reasonable that he should concede it.
68. Accordingly, by consent I order that the Landlord is entitled to retain \$160.00 from the Tenant's security deposit, being for the painting in bedroom four of a feature wall due to a large hole caused by an air conditioning remote control.

Claim of part payment for an antique lamp in the amount of \$200.00 (estimated cost \$900.00)

69. The Landlord claimed the cost of damage to an antique storm lantern, which had been made in the 1860's from hand blown, etched floral design banded glass. The Landlord says she bought this in Adelaide and has been quoted a replacement cost of \$950.00 which does not include freight. The evidence of the Landlord in relation to this issue is that:
- 69.1 Because the lamp is very rare she has looked at the cost of a reproduction which has been quoted at \$350.00 not including freight. She is not aware whether or not the original is available however, if she cannot get hold of the original then she has to be satisfied with a reproduction to replace it.
- 69.2 The Landlord says the lamp was consistent with the house of a certain style and presentation. The pieces in the premises were executive pieces and befitting of an executive home.
- 69.3 The Landlord says that the antique lamp was broken and that the Tenant's should replace it. She presumes that the Tenant's children did this damage.
- 69.4 The Landlord says that it is reasonable that the lamp needs to be replaced.
- 69.5 The Landlord says \$950.00 for an antique lamp of this sort is reasonable for a person going into a "mansion".
- 69.6 The Landlord says \$950.00 for a lamp of this sort is not an expensive fitting in a luxury home of this nature.

70. The evidence of the Tenant in relation to this issue was that:

- 70.1 The lamp was a hanging light shade which hung from the ceiling above the pool table. There was a hole in the crystal of the lampshade which they discovered upon vacating the premises. The Tenant says they discovered this hole two or three weeks before moving out. The hole was about the size of a fist.
- 70.2 The Tenant does not know how the hole got there. They say they questioned the cleaner and their boys about it but all of them denied any knowledge of the damage.
- 70.3 The Tenant says it is unreasonable to expect them to replace the value of the fitting. They say they were never told the value of the goods and lamps that were in there. He says that there was a chandelier in the bathroom which the Landlord has just indicated cost her \$10,000.00 and he is shocked given that he used to knock that chandelier in the bathroom all the time after a shower.
- 70.4 The Tenant says they chose the home because of the tennis court as they thought it would help their sons with the relocation. The Tenant did not choose the house because of the fittings and says he should have been told about the value of the things in there.
- 70.5 The Tenant says he concedes that although he does not know how it happened he expects that he would be liable for some amount. The Tenant indicated he was prepared to concede \$200.00 for this to be retained from his security deposit.

71. The Tenant admits that he does not know how the damage occurred. However, I am of the view that as the lamp was not damaged at the commencement of the tenancy and is now damaged at the end, it is likely, on the balance of probability, that the damage occurred whilst the property was in the possession of the Tenant. The issue arises as to whether or not the Landlord is entitled to replacement or repair value. Given the concession made by the Tenant it is unnecessary for me to determine this issue however, I note that insofar as is practical when damage like this occurs, the Landlord must be put in the same position as they were in had the damage not occurred. That being said, the onus is certainly on the Landlord to prove that the damage can be attributed to the Tenant. Accordingly, by consent, I order the Landlord be entitled to retain \$200.00 from the Tenant's security deposit, being for the damage to the antique lamp.

Cleaning in the amount of \$200.00 (\$460.00 still owing)

72. The Tenant during the course of the inquiry indicated that he was prepared to concede this amount to be retained from his security deposit. Accordingly, by consent, I order the Landlord be entitled to retain \$200.00 from the Tenant's security deposit, being for cleaning.

Claim for part payment of servicing the mower \$200.00 (\$102.80 still owing)

73. The Landlord says she had left a ride on mower for the Tenant. In addition as part of the premises a hand mower was also left. The Landlord says as part of the tenancy agreement both mowers were to be serviced before the end of the tenancy.

The Landlord says they took the mower to the Big Mower who had to change filters as well as oil the blades. The Landlord says they made no assessment of whether or not the mower needed service they just asked the Big Mower to come and collect it and to assess what needed to be done. It was obvious that the mower needed a service otherwise the Big Mower would not have conducted the repairs. The Landlord says it is not unreasonable to require a service before the end of the tenancy. The mower had to be maintained to a certain standard. She says there is no suggestion that the mower was damaged, it just required a service.

74. The Tenant in relation to this issue disputes the amount on the basis of the whole dispute. He says that during the course of the tenancy he had both mowers serviced. He believes the amount claimed is certainly reasonable for the service of a ride on and hand mower however, he says that he left both mowers in a "good, clean, working order". The Tenant says he personally spent time cleaning the mower prior to vacating.
75. I note a perusal of the outgoing condition report completed on 3 June 2002 indicates that the hand held mower needed cleaning however there are no comments regarding the deficiencies of the ride on mower. I note also in different hand written there are indications that "proof of service" of the mowers is required. In addition, I note that there was no evidence from the Landlord that there were any deficiencies in the mower. The only evidence from the Landlord is that they asked the Big Mower to come and pick it up and if the mower did not require servicing they would not have done it.
76. On balance, I am not satisfied that the Tenant did not return the mower in a reasonable state of repair. Even though the tenancy agreement may provide that the mower was to be serviced prior to the tenancy coming to an end, I note section 20 provides that any attempt to contract out of the provisions of the Act is null and void to the extent of the inconsistency. The only obligation on the Tenant is to return the premises and ancillary property back to the Landlord in a reasonable state of repair. What amounts to a reasonable state of repair is an objective test and the onus is on the Landlord to prove on the balance of probabilities that the Tenant did not return the mower in compliance with this obligation. In my view, in light of the evidence from the Landlord, this onus has not been discharged. Accordingly, I would dismiss this aspect of the Landlord's claim.

Claim of unpaid rent in the amount of \$200.00 (still owing \$142.00)

77. The Landlord says he is able to charge rent until the keys were returned or until the work done was completed to get it to a reasonable state of repair. The Landlord says in her view vacant possession was not handed over until at least 21 June 2002 when the work to the premises was completed. I note the Landlord's evidence differs to her agent, who indicates that he had arranged with the Tenants for them to go and fix the pond and this was done on the evening of 5 June 2002. Essentially the matter was closed on 6 June 2002 when he went back and checked the outgoing done by two other agents on 3 June 2002.
78. The Tenant disputes this amount in total. They say they handed over the keys on 3 June 2002. He remembers shaking hands with the Landlord and assuming that everything was finalised. He says although he did organise a fishpond pump to be replaced that was done on 5 June 2002 and he did not require access to the premises to do this.

79. I note the parties had agreed to an early termination of the lease. This agreement was canvassed in a letter dated 9 May 2002 from the Landlord to the Tenant. The agreement says at clause two “the Landlord has agreed to your request for an early termination of lease subject to payment of two calendar months rent past vacating date. (ie. the equivalent of rent for June and July). It appears this agreement was subsequently amended and the parties agreed the Tenant would vacate the premises on 2 June 2002. As I have indicated, the Tenant did vacate the premises on this day and returned the keys on 3 June 2002.

In my view, the Tenant had given back vacant possession to the Landlord as at 3 June 2002. After this date in accordance with clause two of the early termination agreement the Tenant had to pay two calendar months rent for the balance of June and July.

80. Based on the evidence given by the Landlord in relation to this issue, I am not satisfied that they have established that the rent payable after the termination/vacation of the Tenant from the premises can be attributable to the Tenant’s breach of the tenancy agreement. The Landlord certainly alluded to this in that she said that it was reasonable for them to charge rent for the premises until such time as it was in a reasonable state of repair. Further information is required as to why it took until 21 June 2002 for the premises to be returned to the Landlord in compliance with the Tenant’s obligations under section 51 of the Act. In addition, evidence is also required from the Landlord as to the damage they have suffered in lost rent as a consequence of these alleged breaches by the Tenant and any attempts they have made to mitigate the loss during this period.

General comments

81. In closing the Tenant acknowledges that at the commencement of the tenancy agreement the Landlord treated them with courtesy. He says as a matter of fairness they did a great deal of “baby sitting” on the house. They paid \$800.00 per week in rent and maintained the premises in a good condition. They even mowed the neighbour’s lawns and let the East Point Gentlemen’s Tennis Club use the tennis court. They believe they acted in good faith and maintained the courts and paid for the power for these gentlemen to use their court. He says throughout the tenancy he did act in good faith, he had asked the agent prior to vacating the matters he had to address before doing so. Most of the issues raised now were not discussed with the agent. He says that he has had a number of things fixed which were not mentioned today. Upon the Landlord’s return it was apparent that they were not their “favourite tenants”. In these circumstances the Tenant did not want to live there and negotiated an escape arrangement. They believe this escape arrangement has more than compensated the Landlord. The Tenant says that most of the issues raised are reasonable wear and tear he is disappointed at the way things have turned out but believes that he has always acted reasonably.
82. In closing by the Landlord’s agent, he acknowledges that the Tenant did act in good faith however the gulf between the parties was about the standards.
83. The Landlord in closing, says that in relation to the East Point Gentleman’s Club she had explained to the Tenant who the respectable gentlemen were and had talked to him about it. The Landlord says the house commanded a rent of \$1,200.00 per week but given they thought at that time that the Tenants were ideal people for their home and the concession that they had made with the use of the tennis court they agreed to rent at \$800.00.

They say that throughout the lease they did a great deal of things for Mrs Tenant and had the premises cleaned whilst she was ill so that they could get a valuer into the premises. They think they have been a good Landlord, however, the condition that the premises was left in was not reasonable. At this point the Landlord made reference to numerous photographs she had which she says indicates that the premises was not left in a reasonable condition. She also brought in tennis rackets which had been left at the premises and those tennis rackets were visibly damaged. The Landlord says they are reasonable people, they have been in the business for 13 years and they have tried to stand aside from the fact that the premises is their personal property.

They feel they have made extra attempts and when the Tenant indicated they wanted to get out of the lease they tried to accommodate that. The Landlord indicated she would never have rented the property to the Tenant if he had not agreed to let the East Point Gentleman's Club use the courts as they have been playing there for years.

84. In reply, the Tenant says that Landlord had specifically said to him "you don't have to have them here if you don't want them here" in reference to the use of the tennis courts by the East Point Gentleman's Club. In terms of the premises being an ideal home for them the Tenant says that they had no idea that the values of the fittings were as expensive as they were. He says he would never have rented a home with a \$10,000.00 chandelier in the bathroom had he known about it. In relation to the tennis rackets, the Tenant says that the kids next door had access to the court and this was reported to one of the Landlord's agents. As for the photographs the Tenant says that with the toilets there was a flaw in the enamel which indicated that the enamel had been stained. They tried cleaning the toilets but this was unsuccessful.
85. The comments are largely irrelevant to any determination of the Tenant's application. However, it is pretty clear that although there is a dispute between the parties, both parties during the course of the tenancy were trying to be reasonable. I do agree with the Landlord's agent's comments that there seems to be a great divide between them with respect to the standard of the premises. In my view, the Landlord must bear in mind that although she is of the view that the premises is an executive premises the only obligation on the Tenant with respect to cleaning and damage is a reasonable standard. Naturally the value of the property will be taken into account but so will other issues such as the fact that the Landlord knew at the commencement of the tenancy that a family would occupy the premises with three teenage boys. Accordingly, the standard of reasonableness is a lesser standard than if say the Tenant had of been an executive couple with no children. I commend the parties on their attendance, frankness and cooperation at this difficult Inquiry.

Orders

86. As I have indicated at paragraph 37 herein, the Landlord must return the security deposit to the Tenant, forthwith. The comments made at paragraphs 41-82 are not strictly necessary in light of this finding, save for the concessions made by the Tenant at paragraphs 50, 68, 70.5 and 72 herein.

87. On the basis of the above, I order that:

- (1) The Landlord is to return the Tenant's security deposit in the amount of \$3,200.00 to the Tenant forthwith.
- (2) By consent of the Tenant, the Landlord is entitled to retain from order (1) the amount of \$637.00, being for:
 - (a) Repair of the slate at \$77.00;
 - (b) Painting of a feature wall in fourth bedroom at \$160.00;
 - (c) Damage to antique lamp at \$200.00; and
 - (d) Cleaning of premises at \$200.00.

Dated this day of October 2002

Penny Turner
Delegate of the
Commissioner of Tenancies