SOUTH AUSTRALIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PRESENTATION TO THE LANDLORDS' ASSOCIATION

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Presented by:

Barbara Johns Executive Senior Member, SACAT

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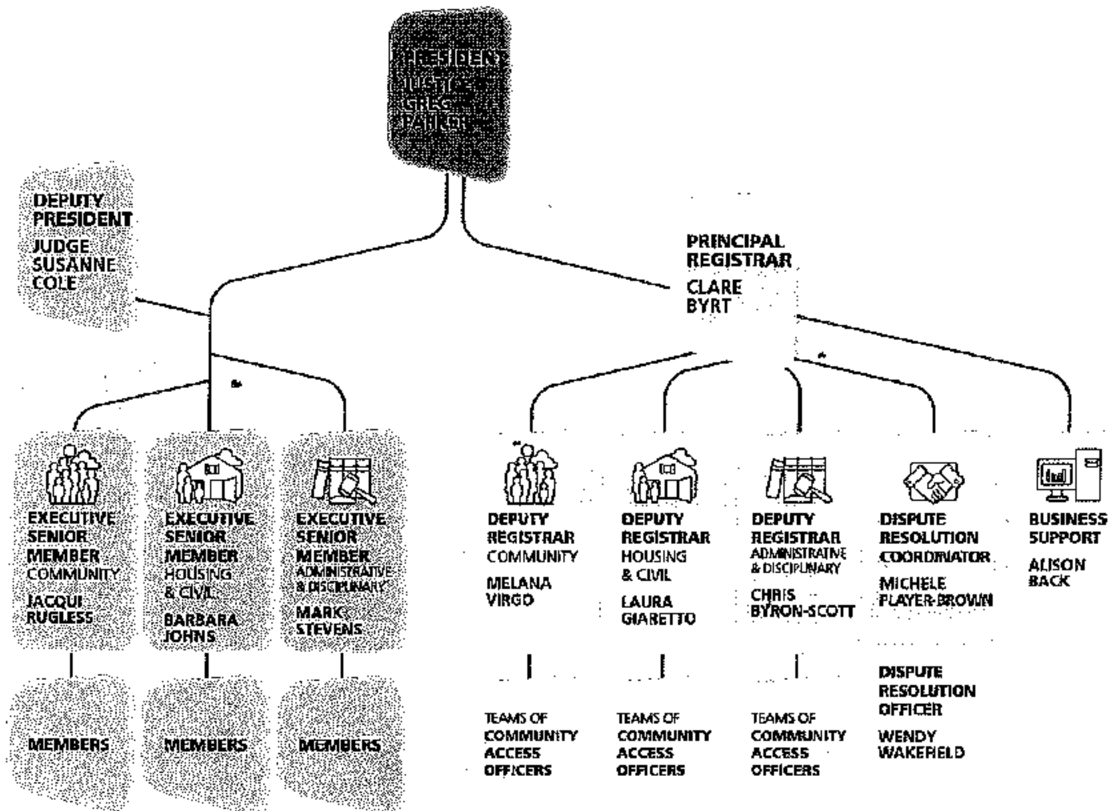
SACAT STRUCTURE



SACAT – THE WORK OF THE HOUSING AND CIVIL STREAM.

SACAT's work is divided into three streams. The work which was previously done by the Residential Tenancies Tribunal is now performed by the *Housing and Civil* stream of SACAT.

For the period 1 July 2015 – 30 June 2016 the *Housing and Civil* stream of SACAT received 9,977 new applications – by far the highest volume of each of the streams (accounting for about 70% of SACAT's work).

For the same period, the *Housing and Civil* stream conducted > 13,000 hearings and conferences.

<u>Housing and Civil Generally</u>

Residential tenancy applications 1 July 2015 – 30 June 2016 – analysis

Tenancy disputes are the most common types of applications - (99.7% of our work).

The work in *Housing & Civil* is organised into three lists:

1. Vacant possession applications;

2. Bond/compensation applications; and

3. Other urgent/complex matters.

The *vacant possession list* (ie applications seeking an order for possession where the tenant has been served with a notice of termination but remains in the property) is the biggest accounting for 53% of the work in the *Housing & Civil* stream and about 38% of the Tribunal's work overall.

The second list is comprised of applications relating to bond refunds and claims for compensation as well as bond disputes referred by the Commissioner for Consumer Affairs under section 63 of the *Residential Tenancies Act*, and comprises 31% of the work of the *Housing & Civil* stream.

The third list covers many diverse application types and decisions, including retirement village and retirement park disputes, applications to vary or set aside a previous Tribunal order, and applications to terminate a tenancy based on:

- hardship;
- domestic abuse;
- tenant's unacceptable conduct;
- the agreement having been frustrated (eg property destroyed by fire).

The number of retirement village and residential parks disputes continues to remain about the same. The number of rooming house applications is gradually increasing – for the last financial year, we received 116 *rooming house* applications.

possession) and will be listed usually within 48 hours of receipt – it is in the interests of both parties for this to happen.

Alternative Dispute Resolution in Housing and Civil

In addition to hearings, the Stream uses alternative dispute resolution processes (compulsory conferences) to resolve specific types of applications and, in particular, bond/compensation matters.

Eighty percent of matters that go to compulsory conference are resolved without being referred to a full hearing.

Listing times in Housing and Civil

The *SACAT Act* requires the Tribunal to decide applications "as quickly as possible". In the *Housing & Civil* Stream, orders are generally issued within one day of the close of all evidence and submissions. In more complex matters, orders are expected to be made within 21 days of the close of all evidence and submissions.

Listing times and targets are measured from the time that all documents have been filed and the application fee paid. *Vacant possession applications* were generally listed within three to four weeks, *bond/compensation applications* within four to six weeks, and more urgent applications were listed more quickly.

Orders on vacant possession applications are generally made on the day of the hearing. This means that for the 2015/2016 financial year, in *Housing & Civil*, more than 5,000 applications (or about 100 per week), were finalised within three to four weeks.

Complex matters are triaged according to urgency. Very urgent matters may be listed within 24 – 48 hours.

Matters are *never* listed according to who is the applicant.

Common applications – tips and traps

Applications for Vacant possession

These applications rely on Sections 80 and 93 of the RTA.

Section 80 creates a quick and straightforward process by which a landlord can issue a notice to the tenant which identifies the breach and allows the tenant an opportunity to remedy the breach. This process allows matters involving a simple breach to be dealt with quickly and easily by the parties which should prevent issues such as an escalating rent debt which a tenant is unable to pay and which the landlord is therefore unable to recover.

Note: Although far less common, the RTA does specify *a procedure by which a tenant can serve a notice of termination on a landlord.*[1] If the landlord fails to remedy the breach within the permitted time, then the tenancy is terminated.

When to issue a Form 2 and when not to issue a Form 2

The most common breaches for which the Section 80 procedure is used are: failure to pay rent and/or outstanding water invoices and failure to provide access. The procedure can be used for other breaches as well (such as failure to maintain the property in a reasonably clean and reasonable condition, failure to provide access, unauthorised persons living in the house), but a Section 80 notice of breach should only be used for a breach which is capable of being remedied within the time permitted.

A Form 2 is not suitable in cases of disruptive conduct.

Get your Form 2 right

The notice of breach process is this:-

- the notice must identify a breach by the tenant at the date of issue of the notice;
- the notice must permit the tenant 7 days within which to remedy the breach;
- the notice will then require the tenant to vacate if the breach is not remedied – if the breach is for rent, that may be on the day following the expiry of the 7 days[2] and in the case of any other breach, that will be at the expiry of a further 7 days.[3]

When determining whether or not a notice of breach is valid the Tribunal considers 2 issues – first, has the breach been correctly identified at the time the notice of breach was issued and second, was the tenant permitted the correct amount of time to vacate if the breach was not remedied.

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[1] Section 85 of the Act
[2] Section 80(2)(a) of the RTA
[3] Section 80((1)(b)(ii) RTA

Calculating the time permitted to remedy a breach of rent: If the notice of termination was placed in the tenant's letterbox, served by email or personally served then service is taken to have occurred on that day and the 7 day period for the remedy of the breach commences from the next day. If the notice of termination was served by pre-paid post to the correct address then the notice will be taken to have been served on the next business day[4]. The 7 day period commences the following day. The notice must not require the tenant to vacate until the day following the expiry of the 7 day period. (ie if the notice was sent by post on a Monday, assume it will reach the tenant on Tuesday and start counting the 7 days from the Wednesday. If the notice was posted on a Friday then assume it will reach the tenant on the following Monday and start counting the 7 days from the Tuesday).

If the breach is for anything other than rent, then the tenant must have been permitted a further 7 days to vacate after the expiry of the first 7.

Tip: wait until the second date of unpaid fortnightly rent has passed and then issue the Form 2.

2 breaches in one Form 2 This is permissible but you must allow a period of 7 days for the breaches to be remedied and then a further 7 days for the tenant to vacate.

Tip: Stale Form 2 Section 92A now states that if a landlord has not made an application to the Tribunal within 1 month of the day when the tenant was required to give up possession under the Form 2, then the notice is ineffectual.

Consequences of an ineffectual or invalid Form 2, notice of breach

If a notice of termination Form 2 for failure to pay rent is ineffectual because the rent was not at least 14 days in arrears when the notice of termination was issued then the application is likely to be dismissed unless the parties consent to an order for a payment plan.

If the notice of termination Form 2 is invalid either because the amount of the claim for rent stated in the notice exceeded the amount which should have been claimed[5] or the tenant has been given insufficient time to vacate the property, then the Tribunal will sometimes proceed with the application[6] in any event. However, in those circumstances, the Tribunal is likely to be cautious about making any order for possession.

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[4] Note: even though Australia Post now states on its website that deliveries occur within the metropolitan area within 2 – 3 business days, the time frames under Section 80 have not been amended accordingly.

[5] This will often happen if the agent fails to take into account a rent credit

[6] Note: the Tribunal's power under Section 83 of the SACAT Act to cure irregularities in proceedings if that would result in the just and expeditious resolution of the dispute.

Be aware of the orders generally made by the Tribunal

The role of the Tribunal If a tenant fails to remedy the breach within the time permitted and the Form 2 is valid, then the legal effect of the non-compliance is that the tenancy is terminated.

The role of the Tribunal is to decide whether or not to reinstate the tenancy and if so on what conditions. These powers are contained in *Section 93* of the RTA.

The overriding function of the Tribunal in all matters is to make a decision which is fair and equitable in all the circumstances. The factors generally taken into account are:-

- do the rent arrears exceed the bond;
- how long has it been since the tenant's last rent payment;
- is this the first application or has the tenant failed to comply with a previous order;
- has the tenant attended or contacted the Tribunal and offered a payment plan;
- what is the income of the tenant – is any offer realistic or not?

Where arrears exceed the bond: then an order for possession or with self executing payments may be appropriate.

Where the arrears are under the bond but still high: then an order allowing the landlord/agent to contact the Tribunal in writing and request an urgent hearing for any of the first 6 missed payments may be appropriate.

Where there is a mild breach, eg the tenant is 1 – 2 weeks in arrears or not in advance: an order with a "payment plan only" is likely to be appropriate. Consider a consent order.

Orders for possession: Section 93 requires that any order for possession is for a date no longer than 7 days after the day of the hearing. However, Section 93 also allows the Tribunal to suspend an order for possession on the basis of hardship. This might be for example, where a tenant is ill, elderly, has been in the property for a long time or is a single parent with children. In these cases the Tribunal would often make self-executing payments of at least rent in the meantime.

Tip : Release of a cash bond This can be a useful device if you think the tenant may be able to get a SAHT bond.

Tip : if a tenant has ***abandoned*** *the property then you do not need an order for possession but may enter the property immediately and start preparing to re-let. Once you have issued a Form 2 you should be checking the property regularly to see if the tenant has left. The landlord is under a duty to mitigate their loss and that includes taking possession as soon as possible.*

If you just want the bond for rent and water then you can still go ahead with your VP hearing to do that.

Note section 94 about abandoned goods.

End of lease applications

These applications are relatively common, and are dealt with under Section 93(2) of the RTA. The general approach of the Tribunal is that once a tenancy is expired, the landlord is entitled to have their property returned to them, the tenant should have been aware that the expiry of the tenancy is imminent and so the Tribunal is reluctant for the tenant to remain for any significant length of time unless there are extraordinary circumstances.

The law before 1 March 2014 For tenancy agreements which commenced before 1 March 2014, no notice is required, and so if a lease has expired and the tenant has not vacated, then the landlord may simply lodge an application under Section 93 of the Act and seek an order for possession.

The law after 1 March 2014 For tenancies which commenced after 1 March 2014 the landlord is required to give 28 days' written notice of termination of a fixed term tenancy.[7] Although there is no mandatory obligation on a landlord to give such notice, the consequence of failing to provide such notice is that the landlord cannot then apply to the Tribunal for an order for possession.

If a landlord does not give the notice required by Section 83A at the end of a fixed term tenancy then the tenancy becomes periodic and the provisions about terminating a periodic tenancy apply.

Consent orders

For some time, Housing and Civil has permitted parties to apply for an order to be made by consent, without requiring a hearing, subject to the application and all relevant documents being reviewed by a Tribunal Member and the Member deciding that an order in the terms sought is appropriate. Although there is information on the SACAT website, the process is under-utilised. This may be because it is not well understood and not widely known about.

There are a number of benefits to this process: it is quicker than the usual listing times, it is more efficient for the parties and the Tribunal as no hearing is required and it means that the parties can "take ownership" of the outcome by forming their own agreement.

Housing and Civil has sent an email to agents to remind them of the process, and I will be reminding stakeholders on occasions such as this.

[7] Section 83A RTA

The bailiff procedure

Section 99 of the Residential Tenancies Act states that a person in whose favour the Tribunal has made an order for possession may contact the Tribunal within 14 days of the date at which the tenant was required to vacate the property, and the Tribunal bailiff will enforce the order for possession.

The Tribunal bailiff is the only person who can enforce an order for possession. The only role of the Tribunal bailiff is to evict any person remaining at the premises (if there is no-one present then the landlord may take possession and change the locks even if the tenant has left possessions at the property).

The Tribunal may allow a slightly longer period than 14 days for enforcement of the order but there needs to be good reasons to do so (eg; the tenant is long term or had an accident which meant they were unable to move out.

The difference between a self-executing order and a straight-forward order for possession

Sometimes the Tribunal may make "self-executing" orders. These orders can be made either for a tenancy which is continuing or where the Tribunal has decided to terminate a tenancy but suspend the order for possession on the grounds of hardship.

If the Tribunal makes an order with self-executing payments, the following wording will be used:-

"The tenant must pay $....... by 5.00pm on Monday 1 March 2017. If the tenant does not pay then the tenant must vacate by midday on Thursday 2 March 2017.

If the tenant does not make the payment and does not vacate by the specified time then the landlord may lodge a statutory declaration and an up-to-date rent record. If the Tribunal is satisfied that payment was not made the Tribunal may send a bailiff to evict the tenant.

The form of statutory declaration is on the SACAT website.

A straight-forward order for possession has no conditions attached and simply requires the tenant to vacate –

The tenant must move out of the premises by midday on ....

If the tenant does not move out this order may be enforced by the Tribunal bailiff.

What happens if the tenant stays after the bailiff has evicted him/her?

What happens if the tenant offers to pay cash at the eviction?

Bond and compensation disputes

Bond and compensation disputes are about 30% of the work in H&C.

These applications rely on Sections 69 and 94 of the RTA.

Section 69 states that a tenant must return a property in a reasonable condition and reasonably clean subject to the condition of the property at the commencement of the tenancy and fair wear and tear (for repairs).

Any rent or amounts for water use and supply which are outstanding at the end of the tenancy become immediately due and payable.

Section 94 states that where a tenant abandons a property (before the expiry of a fixed term tenancy) then the landlord may recover losses incurred (eg break lease costs) but is under a duty to mitigate their losses (eg by advertising for a new tenant as quickly as possible).

If the amount of the claim exceeds the bond then the landlord/agent must apply for compensation and payment of the bond.

Documents in support of these claims are critical. Always lodge:

- a statement of claim (this can be in the application form – or see Fact sheet 1);
- Ingoing and outgoing inspection sheets or photos;
- Invoices or quotes;
- SA Water invoices;
- Evidence of the final meter reading;
- Any break lease calculations – re-letting fee and advertising costs

<u>Claims for rent</u>

A tenant must pay for rent up until the date they leave the property.

If a tenant has abandoned the property, then they may also be responsible for rent loss.

The general rule is that the tenant must pay for rent until the first to occur of the landlord finding a new tenant, or the expiry of the tenancy. However, the landlord must take steps to mitigate their loss.

This means that from the date the tenant vacates, the landlord must take appropriate steps to find a new tenant. Those steps would be -

- advertising (internet only in the city is ok, but in regional areas, probably still should be in print media);
- open inspections - at least weekly and then also on request;
- advertising at no more than the rent of the vacating tenant, and subject to regular review if a new tenant is not found within 2 - 3 weeks.

If the new tenant pays a lower rent, then the landlord is entitled to recover from the outgoing tenant the difference between the rent that would have been paid by the

outgoing tenant and the rent that is to be paid by the incoming tenant for the balance of the outgoing tenant's tenancy.

If the new tenant pays a higher rent, then the outgoing tenant is entitled to a credit for the difference between the rent that would have been paid by the outgoing tenant and the rent that is to be paid by the incoming tenant for the balance of the outgoing tenant's tenancy.

Water

The starting point for all claims in relation to water is the tenancy agreement. If the agreement contains no provision about water then Section 73 of the Act applies.

For agreements entered into before 1 March 2014, Section 73 states that the landlord has to be responsible for all water supply and the tenant must pay for water use but after an annual allowance of 136kls.

For agreements entered into after 1 March 2014, provided there is a separate water meter, the tenant must pay for all water supply and use but the landlord must have requested payment within 3 months and if requested to do so, must have sent an invoice to the tenant.

The landlord may not recover levies such as the River Murray levy from the tenant.

In relation to the SA Water rebate, that rebate was paid in the first quarter of 2013 and applies only for the last quarter of 2012 and so whoever was the tenant during that quarter is entitled to the rebate (however, if there was more than one then it will have to be allocated pro rata).

Claims for breach of Section 69

These are generally claims for -

- cleaning;
- gardening;
- repairs;
- rubbish removal.

The starting point for all of these claims is - what was the condition of the property at the commencement of the tenancy and should any allowance be made for fair wear and tear (relevant to claims for repairs). The agent/landlord will generally rely on inspection sheets or photos to establish that the property was in reasonable condition and reasonably clean at the commencement of the tenancy.

Final inspection Some tenants expect that they will be present at the final inspection and will oppose any claim for cleaning etc if this has not occurred. There is no legal requirement for the tenant to be given an opportunity to be present at a final inspection. It is common so that the parties can discuss any outstanding issues, but it is not legally necessary.

Allowing the tenant back into the property to do further cleaning, repairs etc at the end of a tenancy Some tenants also have an expectation that they will be

permitted back into the property after the end of the tenancy to carry out any further cleaning, repairs etc. This is not the case. The obligation under Section 69 is for the tenant to return the property reasonably clean and in a reasonable condition at the end of the tenancy. The landlord is under no obligation to provide the tenant with a further chance to clean/garden etc after the tenancy has come to an end.

Removal of rubbish from the property Tenants are often mistaken about rubbish and think it is ok to leave rubbish at the property either in bins which will be emptied shortly after they move out or hard rubbish which will be collected after they move out. This does not discharge their legal obligation which is to leave the property entirely free of all rubbish when they move out (bins emptied).

Rates charge for cleaning, gardening and rubbish removal Landlords should not use a related company/entity to do any cleaning, gardening etc at the end of the tenancy. If the landlord does the work himself/herself then the rate they can charge is the rate set under this award. Currently that is roughly $22.50 per hour. If the landlord has taken rubbish to the dump then they should produce receipts.

Gardening The general obligation to leave the property reasonably clean and in a reasonable condition extends to the garden. A landlord should not be making claims for work such as chopping down trees or other significant work in the garden. The only responsibility of the tenant is to maintain the garden which extends to reasonable pruning, weeding, mowing etc - not major landscaping!

Carpet cleaning Sometimes a tenancy agreement contains a requirement for the tenant to have the carpet professionally cleaned at the end of a tenancy. This is not enforceable[8]. The standard under Section 69 of the Act is that the carpets have to be returned in a reasonably clean condition at the end of a tenancy. It is not reasonable for example, to expect carpets to be professionally cleaned after a 6 month tenancy. In most cases it probably would be reasonable to expect them to be cleaned after a 12 month tenancy.

Changing the locks

Claims for changing the locks are common. They will not necessarily be allowed. The test is whether on an objective assessment, it was necessary to change the locks for the security of the property or future tenants. This would be the case where, for example, it was clear that drugs had been sold from the property, the property had been used for prostitution or the tenants had to be evicted by the bailiff.

Repairs

The test under Section 69 is whether the tenant has left the property in a reasonable condition subject to the condition of the property at the commencement of the tenancy and fair wear and tear.

The landlord must satisfy the Tribunal on the balance of probabilities that any damage to the property has been caused by the negligent or intentional acts of the tenant or someone the tenant has permitted to be at the property. For example, if

[8] See Section 115 of the Act

there is damage caused by a break in to the property, and the break in has nothing to do with the tenant then the tenant is not responsible for the damage. On the other hand, if the inspection sheets show that the property was in reasonable condition at the commencement of the tenancy and at the end, there were holes in doors etc then the tenant is responsible for repairs to that damage.

The tenant is not responsible for structural damage such as salt damp or damage caused by flooding through no fault of the tenant's.

Fair wear and tear will cover things like minor damage to fly screens, a few marks on the walls etc.

Claims about *floor boards* are difficult. It is a good idea for the tenant to be given specific instructions about the care of floorboards. Minor scratching or damage is fair wear and tear. Gouges and large marks are not fair wear and tear and the tenant is likely to be required to pay something towards the cost of those repairs.

Repainting Generally a tenanted property probably should be repainted about every 5 - 6 years. Any claim for painting will take into account specific damage caused by tenants.

Carpet replacement The Tribunal generally takes the approach that carpet has a life of 10 years. Therefore, for any claim for carpet replacement[9] the first question will be about the condition of the carpet at the commencement of the tenancy.

Break lease costs

Re-letting fee

The general approach taken by the Tribunal is that if the landlord employs an agent, then the landlord can recover a re-letting fee to which the following formula has been applied:-

Re-letting fee (max 2 weeks' rent) + GST x weeks remaining from re-letting to end of tenancy

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¾ of weeks of total agreed tenancy period (for a 12 month period this is 39 weeks)

The formula is aimed at striking a balance between the amount of the tenancy yet to expire, for which the tenant should be responsible, and the amount of the tenancy which has already occurred for which the tenant should not be responsible.

The landlord can only claim the fee if it is actually charged. If a tenant abandons during the first quarter of the tenancy, then the general approach is that the tenant must pay for all of the reletting fee.

[9] Note: It is acceptable if a landlord claims for carpet cleaning and then for a contribution towards carpet replacement - often they will try to clean it first, provided that is reasonable then it is ok for the landlord to then claim the cost of replacement (or money towards replacement) if the cleaning didn't work

Advertising costs

If the landlord incurs costs because a tenant has abandoned a tenancy, then the landlord is entitled to recover compensation for some of those costs. Again, the Tribunal applies a formula to strike a balance between the amount of the tenancy yet to expire, for which the tenant should be responsible, and the amount of the tenancy which has already occurred for which the tenant should not be responsible.

The formula is:-

<u>Advertising costs x weeks from abandonment to end of agreed term</u>

¾ of weeks of total agreed tenancy period (for a 12 month period this is 39 weeks)

Note the difference in the numerator between the formula for advertising as opposed to the formula for re-letting. Many agents/landlords apply the same formula which is not correct.

With claims for advertising, the landlord/agent should provide a statement/invoice of the cost incurred. Most agents will charge a fixed amount for advertising on the internet. Anything up to about $300.00 is generally regarded as reasonable.

<u>Conciliation conferences</u>

Be aware that these matters will almost always be referred to a conciliation conference initially.

When you go to the conference be prepared to negotiate – consider all of the claims beforehand and discuss with the landlord whether they may be prepared to consider reducing some of them – eg older carpet, older paint work etc

<u>Tips to avoid delays with the bond/compensation dispute process.</u>

We understand the frustration parties feel about the bond dispute process and in particular the requirement for them to lodge the same documents with three different government agencies in relation to the same dispute.

We have been involved in projects trying to identify better ways to deal with this process but to date there have been no easy answers.

For the time being we suggest that: you lodge all documents as an attachment to an email (which can then be easily forwarded to CBS, SAHT and SACAT), and that if you are making a claim which is larger than the bond, and there is no prospect of settling for the bond only, then you should consider avoiding the CBS process altogether and make SACAT your first port of call.

Note: over 50% of all applications made for payment of the bond and compensation do not have the necessary documents in support of the application. Some of these applications will be referred to a directions hearing at which the Deputy Registrar or

a member will issue directions for documents to be lodged. If the documents are not lodged within the time permitted, the application may be dismissed without being referred to a full hearing.

Complex applications

By tenants: the toxic tenant

Applications for repairs – Section 68

Section 68 of the Act states that a landlord must provide premises in a reasonable state of repair taking into account their age, character and prospective life, and must maintain them in that condition. Section 68(2) states that a landlord will not be regarded as being in breach of the obligations under that section if once notified of a defect, the landlord uses reasonable diligence to carry out repairs.

In circumstances where the landlord's actions are in breach of the obligations in Section 68 of the Act, and as a consequence of those actions the tenant has suffered loss, been inconvenienced or has suffered loss of enjoyment of the property then the Tribunal may make an order for compensation in favour of the tenant. This right is a common law right of the tenant.

There is no set scale for determining compensation. Judge Lunn made the following comments concerning an application of such a nature in the case of Lee Doherty v Justin Keen Sully & Heidi Suens[10]

"In law the proper measure of damage for such a breach of contract is the amount which properly compensates the respondents
...there is no set formula or scale by which the amount of compensation is to be assessed. It is merely a question of what amount of money is proper compensation in the circumstances. ...The damages should...[be] assessed at a global figure ...[taking]...into account all of the variables and the relevant circumstances.."

It is clear that a tenant cannot be compensated by SACAT for personal injury or "distress" (see S 11012) of the Act and Tronnolone v Bryan & Edwards).

It is no defence to any claim for breach of Section 68 that the repairs are substantial and/or expensive unless the repairs sought are more structural than repair-like in nature.

Changes introduced to this section by the March 2014 amendments
Section 68(3)(d) and (e) together provide that if a tenant has notified a landlord of a defect which requires repair or has made reasonable attempts to do so and the landlord has failed to carry out repairs, then the tenant is entitled to be compensated

[10] (1998) DCSA D3858

for damage to belongings as a result of that failure (provided the tenant has taken reasonable steps to mitigate their loss)[11]. I consider that these rights are in addition to the tenant's common law rights for compensation referred to above.
If the tenant has notified the landlord of the defect and the landlord fails to carry out the repairs then the tenant may have the repairs carried out by a qualified tradesperson and then recover the costs from the landlord provided the tenant provides a report to the landlord of the repairs and the cause of the repairs.

In Knueppel v Zarpas[i] the District Court made it clear that a landlord will be regarded as having notice of defects requiring repair which would reasonably have been discovered upon an inspection carried out by or on behalf of the landlord at the beginning of the tenancy. This approach was recently confirmed by the South Australian Supreme Court in Varrichio v Wentzel (2016) SASC 86.

Latent defects In Pantazi v Urban[12] Judge Lunn found that a landlord cannot be liable for latent defects (eg a leaking water pipe) until the point at which the landlord becomes aware of the defect.

Tip: in these matters the Tribunal will be concerned with : when were the defects reported and what action has been taken by the landlord/agent to remedy the defects.

Applications for breach of a tenant's right to quiet enjoyment – Section 65

Section 65 of the Act provides that the tenant is entitled to quiet enjoyment of the premises, that the landlord will not cause or permit an interference with the tenant's reasonable peace, comfort or privacy and that the landlord will take reasonable steps to prevent other tenants of the landlord in adjacent premises from interfering with the tenant's reasonable peace, comfort or privacy. The Tribunal is empowered by Section 110 of the Act to award compensation for breach of the Act or tenancy agreement.

Examples of applications under this provision include:-

- a landlord attending at the property without giving notice and that occurring on a regular basis;
- a landlord engaging in "peeping tom" behaviour;
- a landlord letting themselves into the property without the consent or knowledge of the tenant when the tenant was there;
- a landlord refusing to provide an option for payment of rent except in cash to be collected by the landlord;
- a landlord arranging for multiple attendances by tradespersons.

[11] An obvious example of a situation where compensation would be appropriate in this case would be where possessions have been damaged by mould
[12] (2001) SADC 163

Applications to terminate a tenancy on the grounds of undue hardship – Section 89

Section 89 of the Act states:

> *(1) If the continuation of a residential tenancy would result in undue hardship to the landlord or the tenant, the Tribunal may, on application by the landlord or the tenant, terminate the agreement from a date specified in the Tribunal's order and make an order for possession of the premises as from that day.*
>
> *(2) The Tribunal may also make an order compensating a landlord or tenant for loss and inconvenience resulting, or likely to result, from the early termination of the tenancy.*

Note: although these applications are commonly made by tenants, a landlord can also make an application to terminate a tenancy under Section 89.

The general principle of contract law is that contracts are enforceable. Accordingly, any decision to terminate a tenancy agreement should not be taken lightly. The purpose of Section 89 is to empower the Tribunal to terminate a tenancy agreement on the application of either the landlord or the tenant where the Tribunal is satisfied that the continuation of the tenancy would result in undue hardship to the applicant.

A tenant can always leave a tenancy. The question is whether the tenant should compensate the landlord for the losses flowing from early termination of the agreement. That may be the case for example, where there is a significant and unpredictable change in the tenant's circumstances (eg a major health issue), stalking or a threat to safety.

In Broadby & Broadby v Aware Properties Pty Ltd[13] His Honour Judge Rice said "*..the expression 'undue hardship' should be interpreted as meaning hardship that is unwarranted, excessive or too great…the degree of hardship will depend on the factual circumstances…*"

Factors which the Tribunal will take into account in considering such an application include:-

- The tenant should not benefit from his or her own wrong;
- Whether or not any change of circumstances leading to the application was unforseen;
- The seriousness of the situation – for example, stalking or serious threats to the safety of the tenant or long-standing defects which have not been fixed by the landlord;
- The premises have become unfit for human habitation;
- Unpredicted poverty or illness of the tenant or landlord.

[13] Unreported decision of the District Court delivered on 21 November 2007

Tip: sometimes a practical solution in these matters can be to "convert" a tenancy into a periodic tenancy.

Note: applications on the basis of ordinary repairs, or because a tenant has bought a house are unlikely to be successful. Applications where a tenant can no longer afford the tenancy for good reason (eg a relationship breakdown or a redundancy) are more likely to be successful.

Complex applications

By landlords - Termination and possession

For conduct, illegal use or nuisance – Section 90

Section 90 RTA provides:-

(1) The Tribunal may, on application by an interested person, terminate a residential tenancy and make an order for possession of the premises if it is satisfied that the tenant has—

(a) used the premises, or caused or permitted the premises to be used, for an illegal purpose; or

(b) caused or permitted a nuisance; or

(c) caused or permitted an interference with the reasonable peace, comfort or privacy of another person who resides in the immediate vicinity of the premises.

....

(2a) However—

(a) the Tribunal must not make an order under this section unless the landlord has been given a reasonable opportunity to be heard in relation to the matter; and

(b) if the landlord objects to the making of an order under this section, the Tribunal must not make an order unless the Tribunal is satisfied that exceptional circumstances exist justifying the making of the order in any event.

(3) In this section—

interested person *means—*

(a) the landlord; or

(b) a person who has been adversely affected by the conduct of the tenant on which the application is based; or

(c) a strata corporation or community corporation representing the interests of persons who have been adversely affected by the conduct of the tenant on which the application is based; or

(d) a police officer; or

(e) an authorised officer within the meaning of the Fair Trading Act 1987....

Section 90(1)(a) deals with the use of the premises for an illegal purpose (eg the manufacture of drugs or as a brothel).

Section 90(1)(b) deals with nuisance – it is rarely relied upon in these matters.

Applications under Section 90(1)(c) are most common and they require an assessment of whether the tenant's conduct has interfered with the neighbours' reasonable peace, comfort or privacy. There must be a consideration of what is reasonable in the circumstances – not by the standards of either party, but by an objective and independent assessment.

With applications under Section 90(1)(c), the question comes down to balancing the competing interests of neighbours in an urban community who have different expectations of the behaviour of one another. The following statement is a useful guide:-

> "*Those living in towns may be irritated by their neighbours' noisy radios or incompetent playing of musical instruments; and they in turn may be inconvenience by the noise caused by guests slamming car doors and chattering after a late party…The question is whether the neighbour is using his property reasonably, having regard to the fact that he has a neighbour. The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of give and take, live and let live.*"[14]

The Tribunal will generally deal with these applications in 2 stages:-

- First whether or not the applicant has made out grounds to terminate the tenancy under Section 90;
- If so, should the tenancy be terminated taking into account all of the circumstances.

Note: if the Tribunal considers this is more of a neighbourhood dispute, then the application may be adjourned for 3 months and the applicant allowed to make a request for another hearing if there are further disruptive incidents in the meantime.

Tip: sometimes those matters can be dealt with by mediation (in the Tribunal at no additional cost).

Tip: there is an information sheet on the CBS website about making applications to the Tribunal under Section 90.

Tip: SAPOL now has power to make an application under Section 90. If SAPOL has been heavily involved in a matter then they may initiate an application.

For serious property damage or personal injury – Section 87(2)

Section 87(2) RTA provides

(2) The Tribunal may, on application by a landlord, terminate a tenancy and make an order for immediate possession of the premises if the tenant or a person permitted on the premises with the consent of the tenant has, intentionally or recklessly, caused or permitted, or is likely to cause or permit-

(a) serious damage to the premises; or

(b) personal injury to-

[14] Kennaway v Thompson (1981) QB 88, 94

(i) the landlord or the landlord's agent; or

(ii) a person in the vicinity of the premises".

The grounds for these applications will be either that the tenant has intentionally or recklessly caused or permitted serious damage to the property or is likely to do so if s/he is to remain there or that the tenant has intentionally caused personal injury to another person in the vicinity of the premises and is likely to cause further personal injury to another person in the vicinity of the premises if s/he is to remain there.

For other serious breaches (Section 87(1))

Section 87(1) of the RTA allows an application to be made to the Tribunal to terminate a tenancy on the basis that the tenant is in serious breach of their tenancy.

This could be for example, where rent arrears are very high or the tenant has committed multiple breaches of the tenancy.

The "3 strikes and you are out provision" (Section 87(1a))

On 1 March 2014 Section 87 was amended to include sub-section (1a) which allows a landlord/agent to apply to the Tribunal for an order for possession:-

- Where the tenant is in breach of the obligation to pay rent;
- Because of a failure to pay rent the tenant has been served with 2 notice of breach Form 2 notices within the last 12 months under the agreement[15];
- Neither of the Form 2 notices was ineffectual (ie rent must have been unpaid for at least 14 days before each notice was issued).

In other words, Section 87(1a) of the RTA allows a landlord/agent to apply "direct" to the Tribunal for an order for possession where the tenant is currently in breach of their obligation to pay rent but without issuing a form 2 notice of breach where the tenant has been issued with 2 notices of breach for failure to pay rent within the preceding 12 months.

[15] Regulation 21(d) states that this provision may only be applied where the Form 2s were served after 1 March 2014.

Recent Significant Decisions

Section 68 Residential Tenancies Act - the landlord's duty to repair

In summary, Section 68 states that a landlord is required to provide premises in a reasonable condition at the commencement of the tenancy and to use reasonable diligence to repair defects of which the landlord is aware during the tenancy (and which are not attributable to the fault of the tenant). If the Tribunal finds that the landlord is in breach of this obligation, then under Section 110 of the RTA, the Tribunal has power to award compensation in favour of the tenant.

General principles confirmed

In the case of Varricchio v Wentzel (2016) SASC 86, Justice Doyle (of the South Australian Supreme Court) confirmed the long-standing approach of the Tribunal that the landlord is not only obliged to use reasonable diligence to remedy defects of which the tenant has notified the landlord, but is also obliged to use reasonable diligence to remedy defects of which a reasonable inspection at the commencement of the tenancy should have put the landlord on notice about the defect. (This principle was stated by the District Court in Knueppel v Zarpas (2004) SADC 162).

That case also confirmed the long-standing practice of the Tribunal that any compensation awarded by the Tribunal should be a "global" amount and not calculated by reference to some kind of formula or precise arithmetic calculation. (This confirms the approach taken by the District Court in the matter of Doherty v Sully & Suens (1998) DCSA).

The extent of compensation which may be awarded to a tenant

The decision of Justice Parker in Tronnolone (by L J Hooker Glynde) v Bryan & Edwards (2016/SIR000014) clarifies the Tribunal does not have power to award compensation for any physical or mental injury suffered by a tenant, however, a tenant may be awarded compensation for loss of enjoyment of the property and inconvenience.

Mould, mould and more mould

In the decision of Lockett & Victory v People's Choice Management (as agent for Chatsway Pty Ltd), the following general principles were stated arising for a claim by the tenants seeking compensation of > $20,000 arising from mould:-

- Taking into account the age, character and prospective life of the particular property it was reasonable to expect there would be some mould in the bathroom;
- The test to be applied to determine whether or not a landlord has used reasonable diligence to remedy defects is an objective one and is therefore not expected to take into account particular requirements specific to special (pre-existing) medical conditions of the tenants;

- Factors such as a tenant agreeing to extend a tenancy after the defects are known and failing to accept an offer to move out with no break lease costs, are likely to be taken into account by the Tribunal in assessing compensation as they indicate that the tenants have probably failed to mitigate their loss;
- The Tribunal will not make any order for reimbursement of medical expenses.

Decisions concerning the internet and other services

Who is responsible for the NBN locked box?

In Sanssoni v Community Housing Ltd (2016/SH007691) the tenant sought compensation because she had no reception for her television and no internet for 4 months. Ultimately it was found that the problem was attributable to a faulty power supply contained in a locked box installed on the side of the house when the national broadband network was connected to the property. Neither the landlord nor the tenant had a key to the locked box and ultimately the installer had to attend at the property to fix the power supply. The landlord argued that this was the tenant's responsibility. The Tribunal rejected the argument on the basis that it was not something for which I considered the tenant should be responsible. The tenant had made many reports to the landlord and the landlord had taken an unreasonable length of time to address the issue. Consequently the landlord was required to pay compensation to the tenant.

Inadequacy of internet services

In the matter of Grant v Leichsenring v Pope Nitschke First National Real Estate (2016) SH001767) the tenants sought to be released from their obligations under a tenancy agreement on the basis that upon making enquiries they found that the property had no landline connected and the internet capability in the area would have been insufficient for their purposes anyway. The Tribunal refused to make the order sought on the basis that there was a binding agreement between the parties and the tenants had not made their specific internet requirements sufficiently clear to the landlord's agent prior to accepting the offer of the tenancy.

In the matter of Cher v Magin (by his agent TIPS) (2015/SH006283) the tenant moved into a newly constructed property having negotiated the tenancy from Singapore before arriving in Adelaide to live with her family. The tenant claimed numerous problems arising from the fact that the property was newly constructed and insufficient time had been allowed for the provision of services. The tenant claimed that the address for the property was incorrect. She also claimed that the property had no landline or internet connection. She had made it clear to the landlord's agent before entering into the agreement that these were essential requirements for her family. The Tribunal accepted the tenant's claims in that regard and ordered compensation for the consequential losses incurred by the tenant.

The duty to mitigate loss

There is a general principle of contract law that any party to a contract claiming compensation from another party to a contract must take reasonable steps to mitigate their loss. This is specifically provided for in relation to tenancy disputes by Section 78 of the RTA and Section 94 of that Act (in relation to break lease cases).

Tenants commonly misunderstand the obligation of a landlord which arises in a break lease situation. The decision of Eastern Property Rentals as agent for Kassapis v John McPhail (2016/SH009677) makes it clear that the landlord's obligation to advertise a property for a new tenant only commences once the landlord has possession of the property.