

## REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

### INQUIRY – 26 NOVEMBER 2002

This is a determination of an application dated 14 November 2002 by the landlord, seeking an order for possession pursuant to section 104 and for compensation pursuant to sections 121 and 122 of the *Residential Tenancies Act* (NT) (“the Act”). The application in respect of premises being 4/240 Trower Road, Wagaman in the Northern Territory of Australia.

A Notice of Inquiry dated 19 November 2002 was posted to the parties. The inquiry was conducted on 26 November 2002 during which evidence was taken from the Landlord’s agent, (“the Landlord”). There was no appearance by the tenants, (“the Tenant”).

On the basis of the documentary and oral evidence before the Inquiry, I find there is a tenancy agreement within the meaning of and subject to the provisions of the Act on the following terms:

Premises:	4/240 Trower Road, Wagaman NT 0810
Commencement Date:	8 June 2002
Period:	Monthly periodical
Rent:	\$145.00 per week payable fortnightly in advance.
Security Deposit	\$580.00

I note the parties had previously been governed by a fixed term tenancy agreement dated 4 March 2002 commencing on 8 March 2002 and expiring on 7 June 2002. That agreement specifies that in the event the Tenant continues in occupation of the property at the expiration of the agreement, the parties shall continue in a monthly periodical tenancy. During the course of the inquiry, I asked the Landlord how rent was to be paid under the periodical tenancy agreement. The Landlord indicated she did not know and did not have any discussions with the Tenant in this regard as “you could not discuss anything with him”. Based on the information before the inquiry, on balance, I presume the rent was payable at \$145.00 per week paid fortnightly in advance for the purposes of the periodical tenancy agreement.

The Landlord by his Agent issued a Notice to Remedy Unpaid Rental and Notice of Termination dated 31 October 2002 in accordance with section 87(1) of the Act (“the Notice”).

The Landlord has submitted a copy of her mail register which indicates the Notice was sent to the Tenant by post on 28 October 2002. I asked the Landlord how the Notice could be sent on 28 October 2002, when it was issued on 31 October 2002. The Landlord’s response was “I do not know”. The Landlord says she would have done up the notice on 31 October 2002 and sent it out on that day. I note at the top of the Notice the Landlord has also indicated the Notice was sent to the Tenant on 28 October 2002. The Landlord indicated that her mailing register is filled out as mail is placed in the mail tray and cannot recall when she posted the Notice. In these circumstances, based on the evidence before the inquiry, I am not satisfied the Notice has been given to the Tenant in accordance with section 154 of the Act.

I would dismiss the Landlord's application on this basis.

In addition, I note the Landlord's Notice specifies the amount of rent outstanding as being \$485.71 and the period for which it has been outstanding is specified as being 12 October to 8 November 2002. According to my calculations, which are based on the Landlord's rental ledger, the amount of rent outstanding is correct, however the period for which rent has been outstanding should have been from 16 October to 8 November 2002. Alternatively, the Landlord could have indicated on the Notice she was holding \$94.29 on account (namely, a credit) for the Tenant being for the period from 12 October to 8 November 2002.

I gave the Landlord and opportunity to indicate how she had calculated the amount and period of rent outstanding. As I understand it, the submissions of the Landlord during the course of the inquiry was that:

- They had not asked for more money than they were entitled to.
- They had specified the period of rent outstanding and did not show the credit amount as there is no provision in the Act that says they need to show the credit in the Notice.
- They keep getting told by the Residential Tenancies Unit differing ways to fill out these notices. In this instance the Residential Tenancies Unit had rung the Landlord prior to the inquiry indicating that her notice was fine.
- The Landlord has tried three times to get this Tenant out.

In considering an application for possession, I must be satisfied that the tenancy agreement has been terminated in accordance with the Act (section 104(2)). Section 87 is the relevant provision which provides, my emphasis:

- (1) If a tenant breaches a tenancy agreement by failing to pay rent and the rent has been in arrears for not less than 14 days, the landlord may give the tenant a notice in accordance with subsection (2).
- (2) A notice is to be signed by the landlord and **is to specify** –
  - (a) the address of the premises to which the notice relates;
  - (b) the **amount of rent that is outstanding and the period for which it has been outstanding**; and
  - (c) that is the amount is not paid before a day specified in the notice (in this section called the "rent payment day") that is more than 7 days after the date the notice is given –
    - (i) the tenancy is terminated on the day, later than rent payment day, specified in the notice as the day on which the tenancy terminates (in this section called "termination day"); and
    - (ii) the tenant is to give up vacant possession of the premises to the landlord on termination day.
- (3) If the rent is not paid by the rent payment day, the tenancy is terminated on the termination day.

Section 87 creates a statutory procedure under which, landlord's can by notice terminate a tenancy agreement for a tenant's failure to pay rent. In my view, the purpose of notices issued under section 87 ("section 87 notice") is to give the tenant an opportunity to remedy the unpaid rent by telling them how much they owe and the period for which it is owed. If the rent is not remedied by the specified rent payment day, than by virtue of the Act, the tenancy agreement is terminated. Accordingly, a section 87 notice also operates as the substantive mechanism by which the tenancy agreement is terminated in the event that rent is not paid by the rent payment day.

The legislature has seen fit to prescribe the information that must be contained in a section 87 notice. In my view, the requirements of section 87 are clear in its terms and are mandatory requirements, which must be interpreted strictly consistent with the intent and operation of the Act. I note, the Act does not provide any ability for the Commissioner to amend notices of termination for substantial compliance with some, but not all of the requirements of section 87 of the Act.

One of the fundamental principles of statutory interpretation is that the legislation is to be interpreted literally, giving effect to the ordinary and natural meaning of the words used by the legislature, adopting an interpretation consistent with the purpose of the legislation in the event of any ambiguity.

It is clear section 87(2)(b) of the Act requires the amount of rent outstanding **and** the period for which such rent has been outstanding to be specified. Implicit in this is that both the amount and period of rent outstanding is correctly specified. Just because landlords specify the amount of rent outstanding correctly, does not mean the period of rent outstanding can be incorrectly specified.

Section 40 of the Act provides:

"The rent payable under a tenancy agreement accrues from day to day"

The *Butterworths Australian Legal Dictionary* (1997) defines "outstanding":

That which remains undischarged or unpaid, such as an outstanding debt.

The Act requires "the amount of rent outstanding **and the period for which it has been outstanding**" to be specified. As I have indicated, the Landlord has correctly specified the amount of \$485.71 rent outstanding. Rent payable is charged at \$145.00 per week under the tenancy agreement, which is accruing at a daily rate of ( $\$145.00/7=$ ) \$20.71. If the amount of rent outstanding is \$485.71, than the period for which it, being this amount has been outstanding equals ( $\$485.71/\$20.71 =$  ) 23.45 days, which works out to be a period from 16 October to 8 November 2002 (inclusive). The Landlord has specified on her Notice a period from 12 October to 8 November 2002 which equates to 28 days. This is clearly not correct and does not comply with the requirements of section 87(2)(b) of the Act.

Alternatively, given that the majority of landlord's run a rental ledger in weekly periods, depending on the negotiated rental payment period specified in their tenancy agreement. In my view, it would be acceptable to indicate to the tenant the period of rent outstanding in such weekly periods provided the landlord indicates to the tenant on the section 87 notice that they hold money on account for the tenant and the amount of that money.

In this case, the Landlord should have indicated the period of rent outstanding was from 12 October to 8 November 2002 with \$94.29 on account. I am aware, decisions of delegates of the Commissioner of Tenancies before me have also adopted this interpretation of section 87.

Irrelevant to this determination, but addressing one of the submissions of the Landlord, I am also aware the Residential Tenancies Unit in this case had contacted the Landlord and indicated there may be an issue with the Notice given the Landlord had not indicated the money they were holding on account. The Landlord during this conversation on 19 November 2002 elected to continue with her application as she was entitled to do. In addition, I am aware, the Residential Tenancies Unit has and continues to actively educate landlords about section 87 notices consistent with this interpretation.

The Notice issued by the Landlord did not specify credit amount or money being held on account. As it stands, the Notice tells the Tenant that he has paid rent up to and including 11 October 2002 and owes rent from 12 October 2002 onwards. This is clearly incorrect as based on the information before the inquiry, I find the Tenant has in fact rent up to and including 15 October 2002 and only owes rent from 16 October 2002 onward. I find the period of rent outstanding specified in the Notice should have been from 16 October to 8 November 2002.

I find the Landlord has incorrectly specified the period of rent outstanding and I am not satisfied the Notice complies with section 87(2)(b) of the Act. It follows, I am not satisfied the tenancy agreement has been validly terminated.

On the basis of the above, I order that the Landlord's application dated 14 November 2002 be dismissed.

Dated this 26 day of November 2002

Penny Turner  
Delegate of the  
Commissioner of Tenancies