

RESIDENTIAL TENANCY COMMISSIONER

Guidelines for residential tenancy disputes

Draft



Version 1.1 – 16 June 2010

Guidelines for determining residential tenancy disputes

Background

The Residential Tenancy Commissioner

The *Residential Tenancy Act 1997* (the Act) establishes the statutory position of Residential Tenancy Commissioner (the Commissioner). The Commissioner is appointed by the Minister under section 7(1) of the Act. The role of the Commissioner is to make decisions about bond disputes.

Purpose of the guidelines

The purpose of these guidelines is to help tenants and property owners¹ understand how decisions are made by the Residential Commissioner when there is a dispute about a bond.

These guidelines will help to give certainty to tenants and owners and help to make the Commissioner's decisions consistent.

The guidelines should not be used instead of legal advice. If legal advice is needed, tenants and owners should seek independent legal advice.

The Bond

Owners often ask a tenant to pay a bond before renting a property. The Act² allows an owner to ask a tenant to pay a bond as long as the amount of the bond is not more than the equivalent of 4 weeks rent for that property.

Before 1 July 2009, a tenant would pay the bond to the owner. Since 1 July 2009, it has been unlawful for an owner to personally receive a bond. If a bond is required, the tenant must pay the bond to the Rental Deposit Authority (RDA) at a Service Tasmania Shopfront or to a real estate agent.³

When is a bond in dispute?

Pre-RDA bonds (bonds paid to owners or agents before 1 July 2009)

If the bond was paid to an owner before 1 July 2009, only a tenant can lodge a dispute with the Commissioner. An application form can be obtained from <http://www.consumer.tas.gov.au/forms>

RDA bonds (bond paid to the RDA after 1 July 2009)

A bond is in dispute when:

- either the tenant or the owner has made a claim to the RDA for the return of the bond, and the other parties disagree with the claim; or

¹ Owners means 'property owners' and includes 'property managers'.

² Section 25 of the Act.

³ Most real estate agents are registered agents of the RDA. Section 25(3) of the Act allows a real estate agent to accept a bond but requires the bond to be sent to the RDA within 3 days. If the agent is registered with the RDA, a longer time is allowed under the terms of their agency contract.

- an owner has made a claim to the RDA for a share of the bond and the tenant has not responded within 10 days.

The RDA automatically notifies the Commissioner when there is a dispute, so there is no need to make a special application.

The process

When notified of a dispute, the Commissioner writes to the other parties asking for information that will help in making a decision. The Commissioner asks the owner for information to support their claim. The Commissioner asks the tenant to provide any information that is relevant to their argument. The Commissioner also writes to deposit contributors who may also provide information.

If a tenant is unable to be located or does not respond to the Commissioner, the Commissioner can make a decision based only on the information provided by the owner. In this case, any claim made by the owner must be supported by appropriate documentation. The owner must provide sufficient evidence to support their claim.

What does the Commissioner need to support a claim?

The following information is important and will help the Commissioner make a decision:

- a copy of residential tenancy agreement;
- a copy of the condition report that was signed by all parties at the beginning of the tenancy;
- a copy of the condition report that was completed at the end of the tenancy;
- a copy of the rental ledger (and if a private property owner a copy of bank statements); and
- any other relevant documents including photographs.

The Determination

The Commissioner will make a decision when there is sufficient information. Delays can occur when owners do not provide information in a timely manner.

All of the parties will be formally notified of this decision in writing. The decision is called a determination. The determination will specify the amount that is to be paid to each party and the reasons for the decision.

Appeal against the Commissioner's decision

If any of the relevant parties (tenant, owner or deposit contributor) to a dispute disagree with the Commissioner's decision, they can appeal to the Magistrates Court. The Commissioner's determination will specify the date on which the appeal will expire.

The date on which the appeal will expire is calculated as follows:

- The date of postage will be counted as day 1. If the address is located in Tasmania, delivery will be presumed at close of business on the next day – day 2. If the address is outside of Tasmania, delivery will be presumed at close of business on day 3.
- The appeal period starts at the beginning of the day after delivery is made. Seven consecutive days will be allowed before the expiry of the appeal period so that an appeal period will end at close of business on the seventh day.
- Where the final day of the appeal period falls on a weekend or on a public holiday, the appeal period will be extended so that the last day falls on the next which is a business day. This ensures that the office of the Court is open and is able to receive an application for appeal.

Further information can be obtained from the Magistrates Court website at: www.magistratescourt.tas.gov.au/. The Magistrates Court can also be contacted by phone on (03) 6233 3634 or by email at civil@justice.tas.gov.au.

General principles that will apply to Commissioner's decisions

Relevant law

The main law that applies to residential tenancy agreement and disputes about bond is the Residential Tenancy Act. However, the Commissioner will have regard to other laws where these also apply.

The purpose of a bond

The purpose of a bond is made clear in the Act.⁴ A bond is '*an amount paid by a tenant as security for the performance of obligations under the residential tenancy agreement.*' This means that if a tenant fails to comply with the agreement, the owner may claim damages⁵ from the bond.

The residential tenancy agreement details the obligations of the owner and the tenant during the term of the agreement.

The limits of the residential tenancy agreement

The provisions of the Act automatically form part of a residential agreement⁶. However, the content of the residential tenancy agreement is not otherwise prescribed by the Act. As a result, there is some flexibility for owners and tenants as to what terms can be in an agreement.

The Act also states that any term of an agreement that, '*...purports to modify any provision of the Act has no effect.*'⁷

This means that an agreement cannot impose an obligation that reduces or limits a right or obligation that exists in the Act. For example, a term of an agreement cannot require a tenant to perform maintenance that is an obligation of the owner under the Act. It also means that an agreement cannot say that any part of the Act does not apply.

Financial loss

A claim against the bond must relate to a financial loss. For a claim to be successful, any damages owed by the tenant must have resulted or will result in the owner paying an amount of money to another person.

This also means that the Commissioner will not support a claim where an owner performs their own work, as the owner has not suffered a monetary loss. If for example, an owner performs cleaning or gardening, then the owner has not had to pay an amount of money to another person. If the owner employs a business to perform the cleaning, then the amount paid to a cleaning firm can be claimed.

⁴ Section 25 of the Act.

⁵ In simple terms, compensation for a loss suffered as a result of a breach of contract. The underlying principle is that the insured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured.

⁶ Section 10(3).

⁷ Section 64(1).

However, if they have purchased cleaning materials such as bleach and brushes, then the cost of those items is an amount that can be claimed.

Evidence of loss

To support a claim an owner must provide appropriate evidence. Where work is performed by another party, a tax invoice should be given to the Commissioner as evidence that the work has been performed.

The Commissioner will also require that for an invoice to be valid it must contain certain features. Firstly, the invoice must contain either or both an Australian Business Number (ABN) and a business name. An ABN can be verified on the following site <http://www.abr.business.gov.au>. In some cases an ABN will not be required or is not available for a certain business. In this case, the business name should be registered on the business names register. A registered business name can be found on ASIC's National Names Index at: <http://www.search.asic.gov.au/gns001.html>.

In some cases a quote will be acceptable. A quote must also contain the ABN and/or the registered business name (see invoice or quote below).

An invoice is not automatically evidence that work needs to be performed. This will depend on the circumstances and whether there is a dispute about the need for such work. In some cases the Commissioner may make further enquiries with the business to determine the validity of a claim.

Invoice or quote

As a general rule, the Commissioner requires that work is completed first and damages will be paid only on the basis of work actually performed. However, there are clearly circumstances where this is not practical. The key reasons for allowing a quote rather than an invoice are that:

- the work is substantial and may take some time to complete; or
- the owner may need to wait for materials or parts to be delivered.

As a general guide, the Commissioner will require that work is completed first and an invoice provided where:

- the work requires the performance of simple tasks such as cleaning or gardening;
- the work does not require substantial materials to complete; or
- the total value of work is less than \$400.00.

The Commissioner will approve a claim on the basis of a quote where:

- the work requires the substantial use of materials; and
- the value of the work is greater than \$400.00; or
- the work will take some time to complete which would delay finalising the dispute.

Loss arising from property damage

Where there is damage to a property the property will either need to be replaced or repaired. If property is to be replaced the amount of compensation is determined by the value of the property at the time of damage. If property can be repaired, the amount of compensation is determined by the cost of the repair and any loss of value.

Value of the damaged property

If, for example, carpet is damaged, the value of the damage is determined by the value of the carpet at the time of replacement, not the cost of replacing the item with a new product. This applies for bench tops, furniture or similar fixtures.

Photographs and information about the age of damaged property will assist the Commissioner in determining the value of the property.

The cost of repair

Where it is possible to repair damage caused by the tenant, liability is limited to the cost of repair plus loss of value, if applicable.

Loss of value

Loss of value is difficult to assess but means a reduction in the value of an item arising from damage. Although the item may have been repaired, the value of the item may still have been reduced. For example, carpet may be damaged by being burnt with an iron. The damage is clearly the responsibility of the tenant but is not sufficient to require replacement of the carpet. The loss of value is the amount by which the value of the property is reduced because of the damage and despite the repair.

The importance of condition reports

An owner is required under section 26 of the Act to give a condition report to a prospective tenant if they require a bond. The condition report is the most important document of evidence that can be provided to support a claim. The absence of a condition report signed in accordance with the Act will significantly disadvantage an owner's claim.

The owner should provide both the condition report completed at the beginning of the tenancy and the condition report completed at the end of the agreement.

However, while the condition report is important, it is not the only evidence that the Commissioner will accept. Other evidence such as photographs can be useful in supporting a claim.

Procedural fairness

When making a decision about a dispute, the Commissioner will make it in accordance with the rules of procedural fairness. In general terms the rules of procedural fairness are: the rule against bias and the right to be heard.

The rules of procedural fairness mean that any decision made by the Commissioner will not be prejudged or formed in a way that might lead a reasonable person to apprehend that the Commissioner may have prejudged the matter.

The Commissioner will also ensure that notice is given to the affected parties and that an opportunity is provided to respond to any allegations. The Commissioner is not obliged, but reserves the discretion to hear the response of either party in person.

Jurisdiction

The Commissioner may only make a decision on the amount of the bond. If the amount in dispute is greater than the bond, then the matter can be pursued in the appropriate court which would usually be the Magistrates Court.

However, an owner can ensure that the Commissioner can consider a dispute by limiting the amount of their claim to the value of the bond. This will keep the claim within the Commissioner's jurisdiction. Limiting the claim can be done by either reducing the amount of the claim or limiting the claim to only one matter which is less than the value of the bond. Any further claims can be separately pursued in the appropriate Court.

If the owner decides to have the matter dealt with by a Court, the Commissioner will keep the bond until the Court makes a decision about the matter.

Specific issues

Outstanding rent

Section 61 of the Act provides that the owner of residential premises is to keep a record of all rent received for the property for the period that a residential tenancy agreement is in force.

While the Act does not specify the type of record, a written record completed on the receipt of each payment will be the best form of evidence. If an electronic record is maintained, a copy of the electronic record is better than a print-out from a spreadsheet.

If the owner claims money from the bond because of unpaid rent, the Commissioner will require a copy of the owner's rent record. The Commissioner may also require copies of any bank statements that support the statements in the record.

If an owner cannot produce these documents, a claim for unpaid rent is unlikely to be successful.

Early vacation and abandonment

Rental loss due to early vacation or abandonment

Section 47B of the Act provides that a claim for loss of rent can be made from the bond where a tenant leaves before expiry of an agreement. The claim is the same whether the property is vacated early or abandoned.

The owner can claim the rent that would have been due if the tenant had stayed until the end of the agreement but cannot claim after a new tenant is found. Further, the owner is required to limit their loss by finding a new tenant as soon as possible. The owner is also required to limit other losses (see mitigation of loss below).

The Commissioner may ask the owner to give an explanation where the reletting of a property takes a long time. The Commissioner may require, for example, evidence that the property was advertised in a reasonable manner.

Mitigation of loss

Section 64A of the Act requires an owner to take all reasonable steps to mitigate any loss arising from the failure of the tenant to comply with the terms of the agreement. This means that as soon as an owner becomes aware of an event such as the abandonment of the property, the owner must take steps to avoid any further damage.

Pro-rata assessment of reletting costs for early vacation or abandonment

Some loss or damage has no relationship to the length of the tenancy. For example, where carpet is damaged, the tenant is liable for the whole of the damage even if the agreement is terminated early (subject to the value of damaged property as discussed above).

However, where the loss arises solely from the early vacation of the agreement either through 'early vacation or abandonment,'⁸ this loss may be apportioned on a pro-rata basis.

The reason for this approach is that the cost of reletting will be incurred by an owner, in any event, at the end of a tenancy. If a tenant enters into an agreement for a 12 month period but leaves after 6 months, the costs will be payable by the owner earlier than anticipated. In this case the owner is entitled to be compensated for any costs that are additional to those that would normally occur. In this case the additional cost would be 50% of the reletting costs and not the full costs of reletting.

The Commissioner will make an assessment on financial loss at the point of the non-performance of the residential tenancy agreement and make a pro-rata determination. The pro-rata costs will be determined by the following formula:

Cost x ratio of remaining term

Where:

'Cost' means the total cost of the activity; and

'Ratio of remaining term' means the number of weeks of the agreement left until the expiry of the agreement divided by the total number of weeks in the agreement.

Break lease fee – reletting fees – pre-determined estimate of loss

Real estate agent businesses often charge a standard lease break fee. The lease break fee is a pre-determined estimate of the loss that arises from early vacation or abandonment.

The Commissioner will allow a claim based on a lease break fee, only if the fee does not exceed actual costs incurred. For example, if a tenant finds another tenant and no advertising is required, the lease break fee must be discounted to take into account the actual charges for an individual case. Further, in accordance with principles detailed above the pro-rata formula must be applied to lease break fees.

Limit to damages arising from early vacation

Apart from rent and the pro-rata costs of the finding a new tenant, the general obligations of the tenant cease at the time that the residential tenancy agreement ends. The agreement ends when the tenant vacates or when the owner becomes aware that the property has been abandoned.

The tenant's obligation for cleanliness and to maintain the gardens end at the point of vacation and do not continue until the end of the term of the agreement. The departing tenant is responsible for the costs of cleaning and gardening up until the vacation point. However, if the property needs cleaning or gardening is needed while the property is listed for rental, these costs cannot be claimed from the bond.

⁸ Early vacation means leaving the property before the expiry of the lease and notifying the owner. Abandonment means leaving the property before the expiry of the lease but without notifying the owner.

Carpet Cleaning

A residential tenancy agreement will often specify that the carpet must be cleaned on vacation by a professional carpet cleaner. This practice has become a standard in the industry and most tenants would prefer that a property is rented in as clean a condition as possible.

Nevertheless, section 53 of the Act provides that a tenant is to keep the premises in a reasonable state of cleanliness having regard to the condition of the premises at the beginning of the tenancy. The section also provides that at the end of the tenancy, the tenant is to leave the premises as nearly as possible in the same condition as set out in the condition report or as the premises was at the start of the tenancy.

It is the Commissioner's view that there is some tension between a term in an agreement that requires carpet cleaning by professional cleaner and the provisions of the Act. However, the Commissioner also understands that the use of do it yourself carpet cleaners may cause damage to carpet and may result in carpet being left in a damp condition.

It is the Commissioner's view that an owner can only enforce carpet cleaning by professional cleaner if there is a specific term in the agreement. If there is no specific term in an agreement, the method of cleaning will be a matter for the tenant to determine.

A term in an agreement that requires cleaning by a professional cleaner can only be enforced if the carpet was also professionally cleaned immediately before the commencement of the tenancy. Where this is in doubt, the Commissioner may require evidence of that fact.

Finally, where an agreement is terminated after a very short period, the need for carpet cleaning will be determined on the basis of evidence, not on the basis of the term in an agreement. From time to time, tenancies end within weeks for reasons that are outside of a tenant's control. In these circumstances, carpet cleaning may not be needed.

Cleaning of the property

The Commissioner will be guided by the ingoing and outgoing condition reports as to whether cleaning is required at the end of a tenancy. As previously mentioned, the absence of a condition report will significantly disadvantage an owner's claim.

Although a slightly different view is held with respect to carpet cleaning, it is the Commissioner's view that a tenant is not required to clean to the standard of a professional cleaner. A tenant's obligation for cleanliness at the end of the tenancy is spelt out in section 53 of the Act. This section of the Act means that the appropriate standard is that which a normal person would achieve and not the standard that a professional cleaner would achieve.

Where cleaning is performed after vacation, the Commissioner will require evidence to substantiate a claim that the property was not left in the condition that is required by section 53 of the Act.

Repairs to the property

The Commissioner will be guided by the ingoing and outgoing condition reports as to whether repairs are required at the end of a tenancy. As previously mentioned, the absence of a condition report will significantly disadvantage an owner's claim.

The Commissioner requires evidence to substantiate a claim that the property was not left in the same condition apart from reasonable wear and tear. The evidence may include photographs or reports that show that the property was not in the same condition as reflected by an ingoing property condition report.

Gardening

A tenant's obligation for gardening at the end of the tenancy is also spelt out in section 53 of the Act. This section of the Act means that the appropriate standard is that which a normal person would achieve and not the standard that a professional gardener would achieve.

This means that a tenant is responsible for general weeding and lawn mowing but not pruning or any specialist treatment of the garden that would ordinarily require expertise that only a gardener would possess.

A term in a contract that creates an obligation that exceeds an obligation for normal maintenance is likely to be in conflict with the Act.

Metered water consumption

Section 17 of the Act provides that an owner may claim from the bond a water consumption charge. A water consumption charge is a charge for excess water not for the fixed component of the water charges.

However, the owner may claim only where there is a water meter that measures the usage for a particular property. If, for example, there is only one meter for a number of properties, it is not permissible to divide the charge among a number of properties.

Where a claim is made, the meter must have been read both at the beginning and at the end of the tenancy. It is prudent to include the initial reading in the condition report and have the tenant agree to the reading. If it is not possible for the tenant to agree to the reading at the end of the tenancy, the owner should obtain independent verification of the reading.

Cleaning of chimneys and heater flue

It is common practice for residential tenancy agreements to require a tenant to clean chimneys and heater flues. However, it is the Commissioner's view that this is a maintenance task associated with the ongoing use of a fireplace or heater and is not a general cleaning obligation as detailed by section 53 of the Act.

Further, if a flue or chimney requires cleaning in order to permit the safe functioning of the fireplace or the heater, then this would be an urgent repair within the meaning of section 33 of the Act.

Fumigation

A lease may specifically require the fumigation of carpets in cases where tenants are permitted to have pets. In such cases, the Commissioner will require a copy of the residential tenancy agreement to substantiate that a claim for fumigation is required by the Act and is appropriate in the circumstances.

Light bulbs and tap washers

The Commissioner considers that the repair of a tap washer is the owner's responsibility in the absence of any evidence to suggest that the deterioration of a tap washer arose as a result of any fault of the tenant. It is the Commissioner's view that the deterioration of a tap washer is normal wear and tear and repair should be affected by the owner in accordance with the obligations under section 32 of the Act.

It is generally held that the replacement of light bulbs is the responsibility of the tenant. However, the law in relation to this matter is unclear.

The owner's obligation for maintenance and repair do not appear to apply, as light bulbs and tubes simply cease to function and cannot be repaired. Similarly, the failure of a light bulb is normal wear and tear and does not arise from any fault of the tenant.

This is an area where the Act might be usefully amended to give some clarity and certainty. Although this creates some uncertainty, the Commissioner is unable to form a view without some legal basis for doing so.

From a practical point of view, if a light bulb or tube needs to be replaced, the tenant will do it themselves. However, if globes or tubes are worn out at the end of the tenancy, a claim from the bond for replacement will not be supported.

Management fees

It is common practise for real estate agents to charge fees to owners for the management of their property. It is also common that agents charge an additional fee for each time that a tenancy is rented.

A decision to have an agent manage a property is an owner's choice. These fees are tax deductible. While a cost associated with early vacation and abandonment may be a cost incurred by the tenant and therefore recoverable, the decision to have a property managed is not a cost directly attributed to the failure of the tenant to comply with their obligations under the residential tenancy agreement. The Commissioner will not allow a claim for management fees.

Legal Costs

The engagement of a legal practitioner to give advice or to perform functions on behalf of an owner is a cost of managing the property and is a choice by an owner. Legal costs are not costs that are directly attributable to the failure of a tenant to comply with their obligations under the residential tenancy agreement. The Commissioner will not allow a claim for legal costs.

New guidelines

These guidelines are a guide to decision making. The guidelines may change from time to time as a result of new legal advice and experience.

Any person can ask the Commissioner to amend the guidelines to include a new issue or propose changes to the existing guidelines. In the event the Commissioner will develop a draft amendment and will provide a copy of the draft to the stakeholder reference group or to any other persons with an interest.

The final guidelines will take into account, where possible, the comments of reference group members and other parties.

A request for a new guideline should be addressed to:

The Residential Tenancy Commissioner

GPO Box 1244

HOBART 7001; or

By email to rtc@justice.tas.gov.au

Version 1.1 – 16 June 2010

Copies of this guideline can be downloaded from www.consumer.tas.gov.au/renting/rtc