A Guide to the Residential Tenancy Commissioner

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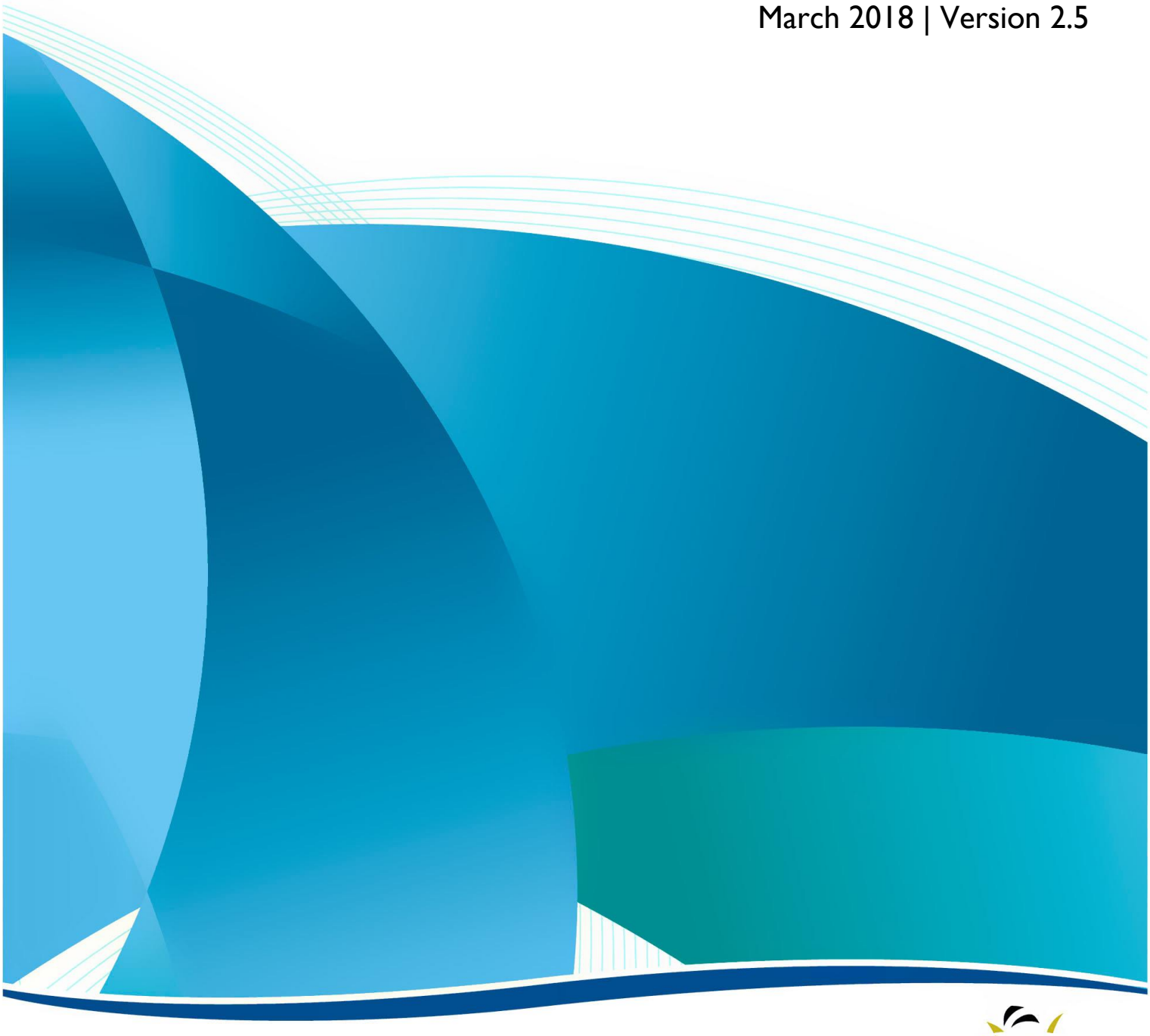

Consumer, Building and Occupational Services
Department of Justice

Tasmanian Government

Contents

Aim

The purpose of this Guide is to help tenants, property owners[1] and any other interested parties by summarising the law on these issues and outlining the basis for decisions by the Commissioner. The Commissioner aims to balance the unique circumstances of each case with a need for predictable and equitable decision making.

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 Commissioner has the authority to:

- Determine disputes regarding the disbursement of bonds[2] (Division 3 of the Act)
- Assess whether a rent increase is "unreasonable" and issue an order as appropriate, (Division 2 of the Act)
- Issue orders relating to repairs (Division 4 of the Act)
- Issue orders in relation to smoke alarms (Part 3A of the Act)
- Issue exemptions from the application of standards for certain properties (section 36P)
- Make orders in relation to boarding premises (section 48I)
- Issue orders in relation to residential tenancy databases (section 48ZF)

This Guide is divided into seven sections, one for each of the areas of authority listed above.

For further information on residential tenancies in Tasmania, refer to our Rental Guide, which is free online or a hard copy can be found at Service Tasmania. Phone assistance can also be found on 1300 654 499 for further information.

[1] "Owner" means 'property owner' and includes 'property manager/agent'.

[2] the Act uses the term "security deposit". However, to be consistent with common usage, the term "bond" will be used throughout this document.

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.

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 will attempt to ensure 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.

If legal advice is needed, tenants and owners should seek independent legal advice. This Guide is intended to provide information only and should not take the place of tailored advice from a qualified legal professional.

Bond Claims

What is a Bond Claim?

At the end of a tenancy, the security deposit (bond) can be released. The parties to a lease must complete a **Rental Deposit Authority** (RDA) 'Bond Claim Form' requesting the return of funds.

The tenant can lodge a claim to recover their bond where:

- the residential tenancy agreement has ended; and
- the tenant has received a Bond Claim Form from the owner; or
- the owner has failed to provide a Bond Claim Form (section 29B).

An owner may submit a claim against the bond if:

- the tenancy has ended; and
- the owner has given the tenant a Bond Claim Form and the tenant has failed to lodge it with the RDA within 10 days; or
- the owner was unable to give a claim form to at least one of the tenants.

An owner can only establish a claim against the bond if the tenancy has ended and they can show that:

- they have suffered an *actual financial loss*[3] due directly to the actions of the tenant or someone on the property with the tenant's permission (sections 53 and 59); and
- their loss relates to a failure by the tenant to comply with the terms of their residential tenancy agreement or the Act (section 25).

A deposit contributor can lodge a claim if neither the owner nor the tenant has lodged a claim.

[3] Refers to money leaving hands in payment to a qualified professional for remedying the tenant's breach.

Bond Disputes

If the Bond Claim Forms are not signed by all parties, or the parties do not agree on how the bond is to be paid out, the Rental Deposit Authority will refer the matter to the **Residential Tenancy Commissioner** (the Commissioner).

When notified of a dispute, the Commissioner writes to all parties asking for information ('evidence') that will help in making a decision.

The Commissioner will assess the evidence and issue a 'Determination', stating how much of the Bond is to be disbursed to which party/ies. Money not due to the owner is paid first to any bond contributor, and then to the tenant(s).

Specifically, a 'dispute' will be referred to the Commissioner when:

- either the tenant or the owner has made a claim to the RDA for the return of the bond, and the other party/ies disagree with the claim; or
- the signatures on the Bond Claim Form do not match those from the Bond Lodgement Form or Transfer Form; or
- an owner has provided a claim form to the tenant but the tenant has not submitted this to the RDA. The owner may then submit their own Bond Claim Form to the RDA. The bond is in dispute if the tenant does not respond within 10 days; or
- a non-government organisation (NGO), such as Anglicare or Colony 47 (collectively known as Housing Connect) or a third party contributed to the bond but has not signed a Bond Claim Form to agree to the claim.

If a tenant is unable to be located or does not respond, the Commissioner can make a decision based only on the information provided by the owner. The claim made by the owner must still be supported by appropriate documentation and the Commissioner can still deem the owner's claim as partly or not at all supported.

Parties should ensure that their contact details, particularly their postal address, are up to date with the RDA to ensure they receive all notifications.

Types of Bond Claims/Disputes

A security deposit is an amount paid as security for the performance of obligations under a lease/the Act. The Commissioner has power to determine the payment of the bond based on the non/performance of those obligations and the *actual financial loss* that has been incurred as a *direct* result.

Where there is a discrepancy between the obligations of a lease and those under the Act, the Act prevails. This means that parties cannot agree to something that the Act prohibits.

The most common claims/disputes are discussed below. All claims should be accompanied by an appropriate cover form – the *Summary of Evidence* form – or a cover letter itemising the claims and providing a brief explanation of each claim.

Rent

Outstanding rent/Arrears

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/ledger completed on the receipt of each payment will be the best form of evidence. This record must be submitted to the Commissioner if making a claim for rental arrears, together with a copy of the lease. The Commissioner may also require copies of any bank statements that support the statements in the record.

Rental loss due to early vacation or abandonment

Section 47B of the Act provides that, where a tenant vacates before the expiry of the agreement with or without notifying the owner, the tenant is liable for rent until the end of their agreement or until a replacement tenant is found, whichever occurs first.

The owner can claim the rent to date that would have been due if the tenant had stayed until the end of the agreement (up to the amount of the bond) but cannot claim after a new tenant is found. The owner is required to limit their loss by finding a new tenant as soon as possible *(see 'mitigation of loss'* below*)*.

Re-letting costs

Where a tenant vacates a property before the end of the lease, an owner can claim for the professional third party costs incurred in reletting the property, such as advertising. This will need to be appropriately evidenced and the length of time remaining on the lease will be considered.

An owner cannot claim for their own time spent reletting the property as this is not an *actual financial loss;* or for the cost of their agent to do so as this is not considered to be a cost directly related to a tenant's obligations under the Act. Break lease fees are also in contravention of section 17 of the Act.

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 intention of the tenant to vacate the lease early, or the abandonment of the property, the owner must take steps to avoid any further damage/loss and to do all things reasonably necessary to enter into a new tenancy agreement to start as soon as possible after the early vacation, such as advertising for new tenants and processing applications.

Carpet cleaning

A lease will often specify that the carpet must be cleaned at the end of the tenancy by a professional carpet cleaner. This practice has become a standard in the industry.

Nevertheless, section 53 of the Act provides that a tenant is to, at the end of the tenancy, 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, save for reasonable wear and tear.

This means that an owner can only enforce carpet cleaning by a professional cleaner if:

- there is a specific term in the agreement requiring the tenant to do so; and
- the carpet was professionally cleaned immediately before the commencement of the tenancy; and
- the condition of the carpet at the end of the tenancy was such that professional carpet cleaning was required to restore the carpet to its pre-tenancy condition.

This means that a claim for carpet cleaning must be supported by the agreement, the ingoing and outgoing condition reports and a professional third party invoice.

General cleaning

A tenant is obligated under section 53 of the Act to leave the property as it was at the beginning of the tenancy, save for reasonable wear and tear. This means that a tenant must leave a property as clean as it was at the beginning. If an item was not cleaned at the beginning, it does not mean that the tenant may leave a different item unclean.

The Commissioner will need to be supplied with the ingoing condition reports/photographs and compare them with the outgoing condition report/photographs. The Commissioner will also refer to the work undertaken by the service provider to ensure the costs billed are only those incurred in rectifying the tenant's breach. The cleaning must be undertaken by a professional third party, preferably itemised. An owner may claim the cost of cleaning products where evidenced, but not their own time spent cleaning.

To support a claim for cleaning costs, an owner will need to supply the tenancy agreement; the ingoing and outgoing condition reports; photographs and a professional third party invoice.

Repairs

A tenant is obligated under section 53 of the Act to leave the property as it was at the beginning of the tenancy, save for reasonable wear and tear (see 'reasonable wear and tear' below). An owner is obligated to maintain the premises in the same condition as at the beginning of the tenancy, save for reasonable wear and tear (section 32). Where a claim relates to an item at the property that has been damaged by the tenant, the owner will need to evidence to the Commissioner that:

- damage to the property was caused by the tenant during the tenancy; and
- it is more than a matter of maintenance for the owner;
- the damage exceeds reasonable wear and tear; and
- the repairs were reasonable and necessary.

The Commissioner will consider all of the above, together with the extent and cause of the damage; and the condition/age of the item pre-tenancy; the necessity for the repair and the impact of the damage on future tenancies compared with cost or repair; and whether the owner is unduly benefitting from the repair.

The owner should supply the lease, the ingoing and outgoing condition reports and photographs, expert reports, and evidence of the cost to rectify the damage by way of professional third party invoice.

The Commissioner must be satisfied that the work has been or definitely will be undertaken and that the work is necessary and the costs are comparable and reasonable considering the damage caused.

Where the costs to repair are disproportionate to the damage caused, the Commissioner may award a portion of the claim.

Mould

It is common for owners to claim for the cleaning or repainting of walls/ceilings, resealing of showers, cleaning or replacement of window coverings, or replacement of carpet due to mould. The owner will need to provide evidence to the Commissioner that the mould was the fault of the tenant. The parties should provide evidence such as:

- whether the mould was pre-existing and the extent of the mould;
- the communication between the parties to deal with the mould, such as whether the tenant has reported a mould issue at the property during the tenancy;
- the steps taken by the tenant to minimise mould growth, such as the ventilation and heating available and used;
- the nature of the property itself – the aspect, dampness issues, quality of paint in wet areas, etc.

It is preferable that a local Council Environmental Health Officer or Building Surveyor report, or similar, be obtained to show the Commissioner that the mould was an issue inherent in the property and not caused by the tenant's actions.

If a tenant relies on mould as a reason to vacate the property, the proper steps for terminating the agreement must be followed (that is, a request for repairs then a valid Notice to Terminate).

Gardening

A tenant's obligation for gardening at the end of the tenancy is also inferred from section 53 of the Act, in that a tenant must leave a garden in the same condition as it was at the beginning of the tenancy save for reasonable wear and tear.

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. This also safeguards owners from tenants attempting to prune or cut back shrubs, trees or hedges. Blackberry bushes and creeper vines are also considered to be outside a tenant's obligation.

The Commissioner will need to be provided with the lease, the ingoing and outgoing condition reports/photographs and a professional third party invoice to be satisfied of the claim.

Cleaning of wood heater flue

It is common practice for residential tenancy agreements to require a tenant to clean wood heater flues. However, this is viewed as a maintenance task associated with the ongoing use of a fireplace or heater, not a general cleaning obligation required by section 53 of the Act. The cleaning of the firebox itself, however, is a cleaning obligation of the tenant.

If a heater 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.

The Commissioner will need to be provided with the lease, the ingoing and outgoing condition reports/photographs and professional third party invoices. Claims for cleaning the firebox should be itemised on the invoice separately from the flue.

Light bulbs and tap washers

Section 3 of the Act includes tap washers and light bulbs or light tubes that are 'inaccessible' as an 'essential service', which means they are the responsibility of the owner to replace.

Inaccessible is assessed on a case-by-case basis. The Commissioner will consider the height and type of the globe and the particular circumstances of the tenant.

If *accessible* globes or tubes cease to function during a tenancy, the tenant is responsible for their replacement *during the tenancy* for their own use and enjoyment. Where a globe or tube has failed during the tenancy, a tenant is liable for the cost of replacement bulbs/tubes at the end of the tenancy only if it is evidenced that the tenant caused them to fail and that the cause of their failure exceeded reasonable wear and tear.

Claims from the bond for replacement of blown bulbs such as oven lights, security lights, heat lamps and down lights will not be supported as these are considered the responsibility of the owner.

If bulbs were present at the start of the tenancy, they should be present at the end.

Fumigation

A lease may specifically require the fumigation of a property 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; together with the reason for the fumigation, such as a statement that 'the tenant kept a dog/cat inside the premises during the tenancy,' or 'fleas were found at the property'.

Water consumption charges

Section 17 of the Act provides that an owner may pass on to the tenant any water consumption charges that were incurred during the tenancy. 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 possible to divide the charge among a number of properties with any certainty; therefore, water consumption claims against tenancies at properties without an individual meter will not be supported.

Claims must be demonstrated by either the service provider (TasWater) invoice for the unpaid period, or a calculation of the charge showing the meter readings at the beginning and end of the relevant period, the number of days in the relevant period and the charge per kL. Claims without either of this supporting evidence cannot be supported.

Pests

Pests are considered on a case-by-case basis. The Commissioner will consider:

- the type of pest
- prevalence throughout the property
- the cause of their existence
- the actions of the tenant to prevent/remove the pests

The Commissioner's view is that a tenant has a general obligation to attempt to control the presence of pests themselves. If all reasonable efforts are failing, the owner has an obligation to assist the tenant with the removal of the pests.

Other considerations

Evidence of actual financial loss – invoice or quotation

For a claim to be successful, the Commissioner must be satisfied that any damages owed by the tenant have resulted or will definitely result in the owner paying an amount of money to a professional, qualified person/entity. The third party 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 Organisations and Business Names search at: http://asic.gov.au/online-services/search-asics-registers/organisations-and-business-names/

In some cases a quotation will be acceptable, such as when the works are substantial or will take some time to complete. The same rules for invoices apply for quotations. It is at the Commissioner's discretion as to when a quotation is acceptable.

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.

The Commissioner must be satisfied that the works are necessary and the works will indeed be carried out, and that the cost of rectification is comparable with the level of damage caused. Where the costs to repair are disproportionate to the damage caused, the Commissioner may award a portion of the claim.

Reasonable wear and tear

A tenant is obligated under section 53 of the Act to return the property in the same condition as it was at the beginning of the tenancy, apart from '*reasonable wear and tear*'. Where an owner makes a claim against the bond for damage, the Commissioner will assess each claim on its individual merits.

Ultimately, 'reasonable wear and tear' infers the reasonable use of the property by the tenant and the wear and tear imposed due to the operation of natural forces.

By contrast, if the deterioration is caused by an act of the tenant within their control and outside the normal functioning of a household, the damage will be considered to be unreasonable. For example, cracks in glass caused by the tenant, significant carpet stains, sticker marks/hooks on doors/walls, and severe or excessive scuff marks or chips to walls, all exceed reasonable wear tear in most cases.

However, the Commissioner will consider several factors when a claim for damages beyond reasonable wear and tear has been made, including but not limited to:

- the condition of the item at the beginning of the tenancy;
- the quality of the item at the beginning of the tenancy;
- the overall state of the property at the commencement of the tenancy;
- the length of the tenancy;
- the size/extent and noticeability of the damage;
- the cause of the damage;
- the impact of the damage on future tenancies.

Ultimately, it is unreasonable to think that properties will stay in the exact condition as they were in when they were let - a certain level of wear is to be expected which will increase over the length of the tenancy and with the number of occupants.

What cannot be claimed

a. Costs greater than bond amount	The Commissioner may only make a decision on the amount of the bond. If the amount claimed is greater than the bond, the Commissioner can only disburse the value of the bond. Any claimed amounts exceeding the bond can be pursued in the appropriate court.
b. Owner's labour or no appropriate ABN for tradesperson	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, the owner employs a business to perform the cleaning, then the amount paid to a cleaning firm can be claimed. However, if the owner performs cleaning or gardening, then the owner has not had to pay an amount of money to another person. The Commissioner cannot award money for an owner's own time. However, if an owner has purchased materials to undertake the works, then the cost of those items can be claimed. Where work is performed by another party, a tax invoice must be given to the Commissioner to evidence the work and cost. For an invoice to be valid it must contain either or both an Australian Business Number (ABN) and a business name. The nature of the business must be specific to the works undertaken. The business should not be owned by the owner. In cases where the cost of works to be undertaken is substantial, a quotation may be acceptable. The same rules apply for quotes.
c. Claims after 'vacant possession' - **cleaning/gardening**	**Vacant possession** is where the bulk of the tenant's items have been removed and/or the tenant has ceased residing at the property, and the keys have been returned. A tenant is responsible for the costs of cleaning and gardening up until they deliver vacant possession. This means that an owner should undertake the final bond inspection at this point. Where a property needs cleaning or gardening while it is listed for rental, these costs cannot be claimed from the bond. This is because the tenancy has ceased as per section 37 of the Act. It also safeguards owners from enabling a tenant to retain the keys (or give them to someone else) and have continued access to the property to undertake cleaning/gardening.

- **reletting fees**	An owner cannot claim for their own time spent reletting the property as this is not an *actual financial loss;* or for the cost of their agent to do so as this is not considered to be a cost directly related to a tenant's obligations under the Act (rather, it is an owner's choice to have the property professionally managed). Break lease fees are also in contravention of section 17 of the Act. Costs that the agent or owner has paid to a professional third party need to be evidenced.
- **additional inspection fees**	Some agents will claim an additional fee where they have had to re-attend the property after a final inspection, and where that final inspection has resulted in requiring the tenant to undertake further cleaning/gardening. The agent is claiming for their additional time to reinspect the property. Such claims will not be awarded.
- **rent between tenancies**	Where a tenancy has ended but issues as to cleanliness and damages remain, the Commissioner will not award loss of rent for any time taken to rectify these issues before the property can be relet. (This does not include where tenants vacate early and the property has not yet been relet).
- **costs following death of tenant**	If a tenant dies during a tenancy, section 49B of the Act states that: 'Despite any other law to the contrary, on the death of a tenant, the tenancy does not vest in the heirs or successors of the tenant.' Section 37 also states that a tenancy is terminated upon the death of a sole tenant. This means that when a tenant dies and there are no remaining tenants, the lease is terminated. This is consistent with the Commissioner's application in disputes of the legal Doctrine of Frustration, whereby the death of the tenant legally frustrates the contract and brings it to an end. At law, the end of the agreement is the date of death of the tenant; however, the Commissioner will allow claims for rental arrears to the date at which **vacant possession** is delivered or a reasonable period of time following the death for the tenant's belongings to be sorted, and any claims for cleaning, gardening or repairs. Claims for reletting, advertising and ongoing rental loss will not be awarded.
d. 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, including process server fees. The filing fee on a Court application for vacant possession, however, may be considered.

e. Smoke alarm testing	These costs cannot be passed on to the tenant as it is not an obligation under the Act that a tenant have an alarm professionally tested.
f. Insurance claims	If an owner is making an insurance claim, they will need to provide details of the insurer and an invoice for the excess. The excess amount **can** be claimed from the bond. If there are matters that the insurance policy does not cover that the owner wishes to claim against the bond, details of the reasons for those matters not being covered by the policy need to be provided to the Commissioner.
g. Compensation for tenant actions	A tenant's counter claim that they undertook works at the property is not related to obligations under the Act and will not be assessed.
h. Electricity	An owner is prohibited from passing on electricity costs to a tenant under section 17 of the Act. An electricity connection must be established in the tenant/s name/s at the commencement of the lease.

Appeal against a Determination

If any of the parties to a dispute disagree with the Commissioner's decision, they can appeal to the Magistrates Court. The determination will specify the date on which the appeal period will expire.

An appeal should be lodged at the Court closest to the property address, by filing with the Court a Notice of Appeal and a copy of the determination and paying the prescribed fee. Once referred to the Court, the Commissioner's office has no further deals with the matter until the Court issues an Order as to how the funds are to be paid.

Further information can be obtained from the Magistrates Court website at: www.magistratescourt.tas.gov.au; or by phone:

Hobart: (03) 6165 7136

Launceston: (03) 6777 2945

Devonport: (03) 6478 4353

Burnie: (03) 6477 7140

Rent Increases

Section 20 of the Act states that the owner of a property may increase the rent if the written residential tenancy agreement allows for an increase (or if there is no written agreement) and provided the following conditions are met (if they are not met, the increase is invalid):

- a written notice is provided to the tenant stating the amount of the rent as increased and the date the increase takes effect; and
- notice is given at least 60 days prior to the increase taking effect; and
- it has been at least 12 months since the start of the agreement, a previous increase or a previous order of the Commissioner or Magistrate. *

The rules concerning rent increases were to allow a tenant to know their rental obligation for a 12 month period. Therefore, in most cases, rent cannot be increased mid-lesae – it an only be increased:

At the beginning of the lease, or

At the lease renewal or extension.

If the lease is longer than 12 months (for example 18 months), rent can be increased 12 months after the start of the lease.

If the lease is less than 12 months (for example 6 months), rent can only be increased 12 months after the tenancy (not the lease) started, even if the initial 6 month lease is extended/renewed.

The Residential Tenancy Commissioner also has jurisdiction under section 23 of the Act to consider applications regarding unreasonable rent increases. A tenant can make an application to the Commissioner that, although the owner may be acting lawfully in increasing the rent, the amount of the increase is unreasonable.

The Commissioner will put the tenant's application to the owner and request evidence from both parties. The onus is on the tenant is to show that the increase is unreasonable.

Considerations in making an Order

- the advertised rental prices of comparable properties in comparable locations (according to publicly available advertising – ie real estate websites or publications)
- characteristics of the property in question that may increase its rental value. This may include facilities such as a garage or workshop, pool or spa or a newly renovated kitchen/bathroom, etc.
- characteristics of the property in question that may decrease its rental value. This may include factors such as the quality and state of carpets and fittings, the lack of fences, proximity to noisy roads or industry, etc.

If the Commissioner determines that the increase is unreasonable, an order can be made limiting the increase to an amount specified. The Commissioner cannot reduce the current rent.

The Commissioner's decision will be provided in writing to both parties and will include dates for the commencement of any change in rent.

Either party may appeal the decision to the Magistrate's Court within 60 days of being notified of the Commissioner's decision. If the rent increase is due to start prior to the appeal being heard, the tenant is obliged to pay the increased rent pending the appeal.**

If the Commissioner or a Magistrate makes an order in relation to rent, the rent under the Residential Tenancy Agreement cannot be increased by the Owner for at least 12 months from the date of the Order.

*If you are in Social Housing, your tenant contribution may increase more often than 12 months however the full rent of the property cannot increase more than once a year. For more information, contact Housing Tas.

** For appeals, 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 or by email at Hobart, Launceston, Devonport or Burnie registries.

Minimum Standards

Summary of Standards

The Act sets out minimum standards for rental properties. For more information and for information as to when a minimum standard becomes relevant to your lease, see the Rental Guide, the Residential Tenancy Commissioner's office website, or contact 1300 654 499.

A brief summary of the standards are:

- General cleanliness and good repair (weather proof and structurally sound);
- Flushable toilet with adequate ventilation;
- Adequate cooking facilities, including a functioning sink with hot and cold water; an adequate stovetop for the size of the premises (at least four cooking elements for premises with three or more bedrooms and at least two if the premises has fewer bedrooms); and a functioning oven (being convention, convection or microwave);
- An adequate mains electrical supply;
- A fixed heater (that is not an open fireplace unless specific approval is granted by the Commissioner, see 'Exemptions' below);
- Window coverings in any room that the owner knows is likely to be a bedroom or living area (except for social housing properties); and
- Adequate ventilation (ie through opening windows, vents or exhaust fans).

Minimum standards in practice

The effect of an owner's breach of a minimum standard

Many of the Minimum Standards state that an owner must not enter a lease agreement unless the standard is met. **This does not mean that the lease is invalid.** If a lease is entered into that does not meet a minimum standard, the owner could be liable for a fine and the tenant has a right to demand repair, or to terminate the lease with fourteen days' notice.

A breach of a minimum standard is a breach of a lease agreement. Where a tenant believes their rental property is not meeting the minimum standards, they should:

- attempt to have the issue rectified with the owner; or
- issue the owner with a Notice to Terminate, citing the breach, and serve it on the owner. The minimum notice period is 14 days.

During that notice period, an owner can "remedy the breach" (by fixing the issue).

Where a breach has not been remedied (ie the item has not been fixed, or a resolution has not been agreed between the parties within the notice period), a tenant should move out, hand in the keys by the

date specified and ensure the property was otherwise as it was at the beginning of the lease. The tenant is not responsible for rent after that date.

If the owner "remedies the breach" (fixes the issue, or it is deemed by the Residential Tenancy Commissioner at dispute that the owner was not in breach) but the tenant leaves, the tenant is considered to have 'vacated early' (or 'broken the lease'). In this case, a tenant is responsible for rental payments until the end of the lease or until a new tenant is found for the property, whichever happens first.

NOTE: Terminating a lease is different for breach of: a minimum standard; and non-repair.

Terminating for breach of minimum standard vs Terminating for non-repair

Repairs are set out in Part 3 of the Act. Minimum standards are set out in Part 3B of the Act.

Items falling under Part 3 refer to items that have ceased to function during the course of the tenancy. In these cases, a tenant must notify the owner of any repairs needed within 7 days of the need arising. An owner then has 28 days to fix the repair (for general repairs; this is less for 'urgent repairs' which refers to 'essential services' being electricity, water, sewerage, heating).

If the repairs are not carried out within the prescribed timeframe, a tenant can then issue a Notice to Terminate. This must be served on the owner at least 14 days before it takes effect. A Notice to Terminate for an owner's failure to repair an item during the course of a tenancy cannot be remedied during the notice period (i.e an owner attending to repairs within the 14 day notice period does not void the Notice as the owner failed to fulfil their obligations, previously). An owner may, however, be able to negotiate with a tenant for a longer notice period, or convince the tenant of their reasons why the item does not require repair.

Termination for breach - must it be 'reasonable'?

One of the purposes of the *Residential Tenancy Act 1997* is to regulate the provision of properties for lease. In order to reduce vexatious claims of breach on which a notice to terminate relies, **a tenant's use of the property must be affected by issues of non-compliance**.

The consideration of 'reasonableness' is a means to establishing a balance between the interests of an owner and the interests of a tenant.

In determining whether the Tenant's termination is valid, the Commissioner will consider the reasonableness of the Tenant's reliance on the breach.

Some Minimum Standards defined

The standard of cleanliness under section 36J(1)

Issues of cleanliness are inherently subjective. That is, there is no clear-cut objective definition of what is 'clean'. In establishing whether a property is clean, therefore, it is necessary to look at the purpose of the legislation.

The standard of cleanliness required by section 36J is a *minimum* standard. It is the intention of the Act to raise the standard of sub-standard properties to a *minimum* level and provide tenants with basic levels of amenity and hygiene. This means that the standard of cleanliness in section 36J is about having a property clean and hygienic prior to a tenant taking occupancy. As broad examples, the standard of cleanliness is an absence of:

- animals
- vermin
- animal faeces
- serious mould/rising damp issues
- large quantities of obvious marks of removable dirt and grime
- rubbish/belongings of others
- significant smell

Where a property achieves, overall, a minimum level of cleanliness but some isolated cleanliness issues remain, these are matters for a condition report rather than for action for breach of section 36J.

Broad examples of these are: some window tracks have been missed; dust exists in some areas; some surfaces require further wiping; some marks remain on some windows/walls; small amounts of residue from cleaning products remain; small amounts of mould exist; the garden has uncut grass, untrimmed bushes, and/or weeds.

For a tenant:

If a property is in an overall clean condition with some isolated cleanliness issues, report the isolated issue/s in the condition report and clean them up yourself. However, if you believe that the property does not meet a minimum standard, you can either:

- ask the owner to rectify (if they do not oblige, you can apply to the Commissioner for an Order for Repairs); or
- issue the owner with a notice to terminate, stating the reason for the notice in detail, at least 14 days before you intend to vacate. If they fix the issue before the date you vacate, the Notice is no longer valid and you moving out will be considered 'early vacation'.

The standard of 'good repair' under section 36J(2) (and section 36I)

Issues of good repair are inherently subjective. That is, there is no clear-cut objective definition of what is 'good repair'. In establishing whether a property is in good repair, therefore, it is necessary to look at the purpose of the legislation.

The standard of good repair required by section 36J is a *minimum* standard. It is the intention of the Act to raise the standard of sub-standard properties to a *minimum* level and provide tenants with basic levels of amenity, hygiene and safety.

In assessing good repair, it should be asked:

Is the property in such a state that there are issues with safety, sanitation, or significant impact on a tenant's ability to utilise the property as it was intended?

Broad examples include but are not limited to:

- threadbare carpet no longer serving its purpose
- compromised plaster board or brick work
- compromised window or door frames
- non-secured light fittings/power points
- significant mould infestation

The operation of section 36J(3)

Section 36J(3) requires an owner to, as soon as practicable after becoming aware that the premises have ceased to be in good repair, take all reasonable steps to return the premises to good repair.

'As soon as practicable' is taken to mean 'as soon as possible', or 'at the next reasonably available opportunity'.

Some issues requiring repair under this section may cross over with the operation of the general repairs obligations under section 32 of the Act. These matters will be assessed on a case-by-case basis and will require different considerations, such as the severity of the issue, the impact on the tenant and the costs to repair.

Orders for Repairs

Division 4 of the Act outlines the rights and obligations of parties regarding repairs.

There are three types of repairs:

- **Urgent repairs** are repairs of 'essential services' as defined in the Act (section 3).
- **Emergency repairs** are required where damage, if not repaired, would result in further damage, or deterioration of the property.
- **General repairs** are any repairs required under the Act that is neither an urgent or emergency repair.

A more extensive discussion of repairs is contained in the Rental Guide.

The Residential Tenancy Commissioner has the jurisdiction under the Act to issue orders for repairs in relation to any repairs (section 36A).

An owner has obligations under the Act whether or not an order is in place. An order is an enforceable tool to resolve any conflict regarding an obligation and ensure repairs are carried out within a certain timeframe.

In determining whether an order should be made, the Commissioner will consider:

Considerations in making an Order

Whether the owner is required by the Act to carry out the repairs

- An owner is only required to maintain the property as nearly as possible to the same standard it was in at the start of the tenancy. An owner therefore need not repair or replace an aspect of the property that was in that condition at the beginning of the tenancy (unless it is a matter falling under Part 3B – Minimum Standards).
- An exception to this is where a tenant made a reasonable assumption that something was operational/functional at the beginning of the tenancy and it was not. For example, if a tenant inspects a property prior to signing an agreement and there are hard wired heaters installed, it is reasonable to assume that these heaters work without the prospective tenant having to test each individual unit.

Whether the repairs are reasonable

Reasonableness is considered on a case by case basis; however, factors that might be considered are:

- how the need for repair impacts on the tenant;
- the cost of the repair;
- the length of time since the owner was notified of the need for repair;
- the remaining term of the lease, etc;

- whether the repairs are required because of any fault of the tenant. (A tenant is required to pay to repair any damage they cause apart from general wear and tear.)

Under section 32 of the Act, an owner has 28 days to carry out general repairs. There is no requirement under section 36A that this period have lapsed prior to an application for an order being made. However, the Commissioner will consider whether an owner has had an opportunity to undertake the repairs prior to issuing an order.

If a tenant wishes to apply for an order, they need to have taken steps to notify the owner of the repair and made attempts to resolve the issue prior to completing the Order for Repairs Application Form. The aim of this form is to gather all the relevant information in relation to the request and will minimise delays in resolving the issue. The Commissioner will ensure the applicant has requested the repair from the owner prior to investigating the matter. It is encouraged that requests for repairs are in writing.

The Commissioner will work with both parties to mediate an outcome that will best suit all involved and will have the least detrimental effect on the relationship between the tenant and owner. This may be able to be achieved without a formal order being issued.

If an Order for Repairs is not adhered to, a fine may be issued.

Smoke Alarms

Owners are required to install smoke alarms in all tenanted properties. These smoke alarms must comply with AS3786 or AS 1670.1, and must be functional and within their expiry date at the time of the beginning of the tenancy.

Smoke alarms may be either battery or mains powered until 1 May 2016; however, after that date, all smoke alarms must be either mains powered or powered by a 10- year non-removable lithium battery.

Tenants are required to ensure the smoke alarm is functioning for the duration of the tenancy. If the smoke alarm has a removable battery, it is the tenant's responsibility to replace this battery if it ceases to function. The tenant is obliged to ensure the alarms are not tampered with and are kept free from dust and debris.

If the smoke alarm is mains powered or has a non-removable battery, the tenant must advise the owner if the smoke alarm ceases to function. The owner must then repair or replace the alarm as soon as practicable.

The Residential Tenancy (Smoke Alarms) Regulations 2012 outline the requirements for smoke alarms in residential tenancies. It includes provisions relating to the location of smoke alarms. These requirements align with the requirements for new or significantly renovated homes under the *Building Code of Australia.*

In summary, in houses, flats and units, smoke alarms are required in the area, hall or corridor outside a bedroom. At least one smoke alarm is also required in any storey that does not contain a bedroom.

In a boarding house, smoke alarms are required inside every bedroom as well as in the hallways or thoroughfares outside bedrooms.

Further information on smoke alarms can be found on the Tasmania Fire Service Website www.fire.tas.gov.au

If a tenant has been unable to get an owner to install or maintain smoke alarms in accordance with the Act and Regulations, the tenant can apply to the Commissioner to issue an order. The Residential Tenancy Commissioner is able to issue an order requiring an owner comply with the requirements of the Act in relation to Smoke Alarms. An application for such an order can be made using the Consumer Affairs Complaint Form.

Boarding Premises

If a boarding house tenant and owner are unable to resolve a complaint or dispute, the Residential Tenancy Commissioner can help both parties to resolve the issue.

If an agreement cannot be resolved, the Commissioner can make the following orders:

- that the owner or tenant comply with the tenancy agreement;
- that the owner or tenant comply with a section of the *Residential Tenancy Act 1997;*
- that a section of a tenancy agreement be changed or removed;
- that an increase in the rent is unreasonable and cannot be more than a particular amount;
- that the tenant be refunded the cost of fixing something when the owner has not carried out the repair and the tenant has organised the repair themselves;
- that the owner carry out any reasonable repairs that the tenant has not caused;
- that the premises has been abandoned; and
- allow for the sale of abandoned goods with a value of $300 or more.

Orders are enforced by a Magistrate. This means you can be fined for not complying with an order.

For more information contact 1300 654 499.

Residential Tenancy Databases

Tenancy databases are privately owned and commercially operated databases that are used by real estate agents to screen prospective tenants. These databases contain information about tenants and are used to screen tenants applying for rental accommodation.

In October 2011 the Residential Tenancy Act 1997 was amended to regulate the use of tenancy databases. The amendments came into effect on 1 January 2012 and contain requirements for the collection, use and disclosure of information in tenancy databases.

Information in tenancy databases has the potential to severely impact on tenants' ability to secure housing. For this reason, there is national agreement that tenancy databases should be regulated to ensure that:

- only appropriate and accurate information is listed;
- tenants are informed where a listing occurs;
- information is able to be corrected;
- information is only held for an appropriate period; and
- listings do not occur for trivial or vindictive reasons.

Under the model provisions, a listing can only occur where there has been a breach of a residential tenancy agreement and because of that breach, either:

- the tenant owes an amount that is more than the security deposit; or
- there is a court order terminating the tenancy as a result of the breach.

Information stored in a database can only relate to the breach and can be stored for up to three years.

When you apply to rent a property, the property owner or agent must provide you with details of any tenancy database they use. If the database contains information about you, the owner or agent must also notify you of this, including who listed the information and how you can have the information amended or removed.

Where information is added to a database, the property owner or agent or the database operator must give the person, who is the subject of the listing, a copy of the information listed or take reasonable steps to do so. The person must be given 14 days to respond to the listing and any response must be considered.

If a property owner or agent becomes aware that information is inaccurate, incomplete, ambiguous or out of date, they must, within seven days, advise the database operator that it needs to be corrected or removed. The database operator must amend or remove the information accordingly.

Information that is 'inaccurate' includes information that indicates that a person owes an amount that is more than the security deposit but they have repaid the amount more than three months after it became due.

Where information is inaccurate, incomplete or ambiguous it must be amended so that it is no longer inaccurate, incomplete or ambiguous.

Information is 'out of date' if it indicates that a person owes an amount that is more than the security deposit but the amount has been repaid within 3 months of becoming due. It is also 'out of date' if the listing was made on the basis that there is a court order terminating the tenancy but this order has been revoked.

Where information is out of date it must be removed from the database.

Where information about a person is listed, the person can request that the owner or agent who made the listing or the database operator provide a copy of the information.

A property owner or agent or a database operator may charge a fee for providing a copy of information listed as long as it is not excessive. However, a fee cannot be charged for making an application for information.

A person affected by a listing can apply to the Residential Tenancy Commissioner for an order enforcing compliance with the tenant database provisions. Where the Commissioner considers that information in a database is inaccurate, incomplete, ambiguous or out of date, the Commissioner can make such order as deemed appropriate.

New Guidelines

This Guide is a guide to the Residential Tenancy Commissioner's powers and decision making. The Guide may change from time to time as a result of new legal advice and experience or policy or legislative changes. The Commissioner reserves the right to consider an application or dispute considering the unique circumstances of that case.

Further information and case studies relating to unreasonable rent increases, orders for repair or minimum standards may be added to these Guidelines as cases are heard.

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

Contact Details

Rental Deposit Authority
PO Box 56, ROSNY PARK TAS 7018
Phone: 1300 654 499
Email (Bond queries): RDA@justice.tas.gov.au
Email (Bond disputes): RTC@justice.tas.gov.au
Fax (Bond claims only): 1300 737 487
Lodgement in person: Any Service Tasmania shop

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