AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: Phillip Cao v Vaneet Grover [2008] ACTRTT (22)

RT 489 of 2008

Catchwords: Water abstraction charges

Tribunal: A. Anforth, Member

Date: **21 October 2008**

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 489 of 2008

PHILLIP CAO
(Applicant/Lessor)

AND:

VANEET GROVER
(Respondent/Tenant)

DECISION

Tribunal **:A. Anforth**, Member

Date **:21 October 2008**

Decision **:**

1. The Respondent/tenant is to pay the Applicant/lessor the sum of $413.26.

2. The Office of Rental Bond is to deduct this sum from the bond held and pay the sum to the Applicant/lessor with the balance to be paid to the Respondent/tenant.

3. The Respondent/tenant is not required to pay any of the outstanding water abstraction charge or network facilities tax.

.....
Member

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 489 of 2008

PHILLIP CAO
(Applicant/Lessor)

AND

VANEET GROVER
(Respondent/Tenant)

REASONS FOR DECISION

1. This matter concerned residential premises at 61 Matina Street, Narrabundah in the ACT. The tenancy commenced on 16 August 2007 for a period of 12 months at a rent of $340 per week. A bond of $1360 was paid and lodged with the Office of Rental Bond. This tenancy followed immediately from a prior tenancy of 12 months between the same parties on the same terms.

2. The lease contained a clause which provided:

> 10. The tenant need to pay the expenditure of the house, such as electricity, gas and phone bill, also the water bill. Landlord to pay the sewerage fee.

3. On 12 June 2008 the Applicant/lessor filed an application with the Tribunal. The particulars of the complaint were in the following terms:

> **Summary of Particulars Issues in dispute**
>
> 1. Failure to pay water bills on 3 separate occasions.
>
> 2. Damage to the rear security door - failure to rectify and written repudiation of responsibility.
>
> 3. Failure to vacate despite formal written notice.
>
> **Nature of relief sought**
>
> 1. Warrant for eviction.
>
> 2. Replacement of rear security door including installation
>
> 3. Payment of unpaid water bills before vacating.
>
> **History of dispute**
>
> 1. Tenancy agreement between Tenant and Lessor's agents
>
> 1.1 The Tenant signed a lease agreement on the 16th of August 2007 for a lease from the 11th of August 2007 to 10th of August 2008 for the amount of $340.00 per week.
>
> 1.2 This was a renewal of a previous lease agreement which was under similar conditions. The Lessor (Phillip Cao) was represented by Andrew Yan (who in conjunction with Ling Ling Cao has acted for the Lessor during both leases).

1.3 The Lease agreement includes a clause (no. 11) whereby either party can terminate the lease at any time with two weeks notice.

1.4 Neither Andrew Yan nor the Lessor is available, the Lessor is currently represented by Jason Yan and Ling Ling Cao under a power of attorney.

2. 1st Violation of tenancy agreement - unpaid water bill

2.1 Clause 10 of the Lease agreement states that the tenant will pay for electricity, gas, phone and water and states that the Lessor will pay sewerage fees. The water bill consisted of sewerage and water consumption and supply fees and was paid in whole by the Lessor who would then invoice the tenant for consumption related water charges.

2.2 This arrangement had been the accepted practice by the tenant until the end of 2007 when the tenant began ignoring the agents written and oral requests for payment of water consumption bills. The first such case was an invoice issued towards the end of November 2007 for $151.92. This original invoice was confirmed to have been received by the tenants during subsequent conversations with the agents in January where the tenant and his wife were asked why the bill was not paid.

2.3 This began a series of written correspondence during which the tenants initially failed to address the matter of the unpaid water bill which was brought to their attention - and was the original cause of the communications by the agents; and which also involved a dispute over property damage (the rear security door of the property, discussed in paragraph 3).

2.4 During the correspondence, the tenants were offered the opportunity to jointly terminate the tenancy due to their failure to rectify damage to property and the issue of unpaid bills in conjunction to the continual decline of the relationship, with the offer of a positive reference if the dispute could be resolved quickly.

2.5 Our bank records show that the outstanding bill was paid shortly after our request to rectify: on the 16th January 2008, nearly 6 weeks after the original request for payment.

3 2nd Violation of tenancy agreement - Damage to the rear security door, failure to rectify & failure to vacate when given notice

3.1 In late 2007, the tenant requested the agents (Andrew Yan & Ling Ling Cao) to view damage to the backdoor, they noticed that three screws were missing, which they believed could be rectified with a screw-driver, and which did not impact on the functioning or integrity of the door.

3.2 About a fortnight later when they returned to the property again they discovered the back door was on the ground with its steel hinges twisted, preventing re-attachment since it had appeared to have been pulled down.

3.3 Both Andrew Yan & Ling Ling Cao immediately informed the tenants of their view at this inspection of the damage, that given the state of the door, the damage was clearly a result of unwarranted force and showed signs deliberate damage; and it was therefore the tenants responsibility to repair the damage. The tenant's responded that they were not damaging the house but did not offer an explanation as to the cause of the significant damage when asked.

3.4 Approximately 2 weeks later the Tenants contacted the Agents by phone at approximately 7am demanding that damage to the rear door be fixed. The agents responded by reiterating that the damage showed signs of unreasonable force being applied to the door and it was therefore the responsibility of the tenant to repair it.

3.5 When the tenant's demands were rebuffed, the tenant then repudiated the agent's authority to act - by claiming that Ling Ling Cao had no right to talk or reject his requests since they were not the owner of the property - and became very loud and abusive towards the agent.

3.6 Shortly afterwards the agents began written correspondence with the tenants in early January 2008 during which time the tenants responded to the requests for payment of the water bill and

repairs to the back door by obfuscating their responsibility (described below in para 3.7). After several requests for the tenants to repair the damage, the back door was then raised as being a result of Lessor neglect.

3.7 During the correspondence they continually declined responsibility for repairs to the rear door by citing alternating reasons between the Lessor's obligation to keep the premises secure; and the inconvenience of not being able to ventilate the house through the back door while ignoring the original issue of the tenant's culpability for the damage.

3.8 The tenants were informed that even if they reasonably believed the damage to the door was not directly their fault, they had a duty to prevent negligent damage including from their guests as well as a duty to mitigate any existing damage that did occur. However given the twisting and the type of damage to the heavy steel frame that was witnessed by the agents and the fact that the door was on the ground, they were unequivocally informed that the damage was the tenant's responsibility.

3.9 An offer to voluntary terminate the lease were made by the Lessor's agents due to the continuing failure of the tenants to accept responsibility for damage to the rear security door in conjunction with the failure to pay their water bill in a reasonable timeframe; combined with the clear deterioration of the relationship between the parties.

3.10 They responded with demonstrably false claims about the promptness with which they paid their bills. Bank statement show that six weeks had elapsed before payment of the requested amount. This was accompanied by their view that they were not obliged to pay certain metered amounts on the water bill which related to their consumption of water. This is addressed later at paragraph 4.

3.11 A formal request to vacate was made due to their repeated written and oral repudiation of the requests to rectify damage to the property (by letter of 23 January 2008). This was done twice, with the second request made under the standard legally proscribed form. The tenant contacted us by phone to tell us that there was no alternate accommodation available - though the Tenant admitted they had not begun searching.

3.12 They were informed both in the original letters and over the phone in a conversation with Jason Yan (who would later assume Andrew Yan's role in the coming months as an agent for the Lessor) that the period to vacate was flexible and could be extended to assist them in finding alternate accommodation. They responded that they would require it extended until the end of the lease and refused to negotiate an alternate time frame.

3.13 The tenants have never disputed in correspondence that the door was in good condition and could be closed when the property was delivered nearly 2 years ago under their first lease and at the beginning of the second lease.

4 History of tenancy

4.1 During the course of the tenancy, numerous repairs have been made including the replacement of a new toilet and a new oven (which was then rapidly damaged requiring professional warranty repairs).

4.2 Throughout the tenancy the Lessor's agents have tolerated a great deal of damage to the property and have paid for repairs which they have not always believed to have been reasonable.

4.3 The agents have also found the tenants to be less than forthcoming in their communications including making demonstrably false and misleading statements regarding their payment of bills or their knowledge of property damage heretofore mentioned as well as the dire difficulty in finding alternate accommodation despite little evidence of any genuine attempt being made.

4.4 The Lessor's agents also suspect that the tenant is subletting rooms in the property to acquaintances without approval due to repeated comments about the tenants guests and the continual presence of the tenants adult relative.

4.5 The tenant was phoned by Ling Ling Cao, on the 20th of March 2008, to enquire if they had found alternate accommodation. The tenant's wife responded that they had not begun searching and were not vacating. They also demanded that we provide them with alternate accommodation if we wanted them to move out and then made a point of ridiculing Ling Ling Cao's English skills as poor.

4.6 Two days later the tenants organised plumbing repairs without initially contacting the Lessor's agents, although the repairs were paid by the Lessor. When they were eventually contacted before the repairs commenced, they were unwilling to turn off the water supply while this water was being wasted failed to give an adequate reason. They have since failed to pay their water bill for this period.

4.7 It is our belief a key reason for the failure of the tenant to vacate is not their legitimate belief that they have acted properly or difficulty in seeking alternate accommodation but a reluctance to relinquish the convenience of living in the next suburb to the tenant's work (Fyshwick).

5 3rd & 4th Violation of tenancy agreement - Failure to pay water bill x 2.

5.1 Although the original disputed water bill were eventually paid 6 weeks late, the next water bill for $166.32 which was invoiced on the 27th of February, has remained unpaid after more than 4 months.

5.2 The tenant has definitely received the invoice since it was enclosed with another letter which specified Jason Yan as taking over the responsibilities of Andrew Yan along with a contact number. This number has subsequently been used by the tenant to inform the agent of the plumbing repairs mentioned in paragraph 4.6.
5.3 This has been followed by another unpaid water bill which was invoiced for $ 177.87 on the 29th which remains unpaid despite the expiry of the two weeks notice to pay.

5.4 Previously the tenant has raised the issue that water network tax and abstraction fees are not the responsibility of the tenant since they are fees and rates. It is the agents belief that these are the tenants responsibility for the following reasons:

i. The ACT government has declared in subordinate legislation that that the abstraction fee and water network tax are consumption fees which *"may be passed on in full to consumers of utility services"*(Independent Competition and Regulatory Commission (Water Abstraction Charge) Declaration 2003 (No 1); Independent Competition and Regulatory Commission (Utilities (Network Facilities Tax)) Declaration 2006 (No 1))

ii. Both the abstraction fee and water network tax are metered amounts and are charged pro-rata on water consumption at the rate of $0.55 per kL and $0.09 per kL respectively. This would make it a metered fee directly proportional to the consumption of water as a good/service by the tenant rather than a tax on the premises.

Under clause 46 of the standard residential tenancy terms the tenant is responsible for *"all charges associated with the consumption of services"*.

Although clause 42 (a) of the standard residential tenancy terms states that the lessor is responsible for *"rates and taxes relating to the premises"*, this does not describe the aforementioned fees which are levied pro-rata on tenant consumption of goods and services rather than on the premises itself.

The RTT case of *Baird v Campbell & Ors 2005* states that the abstraction charge is a Lessor responsibility - however the actual reasoning at paragraph 57 and 70 is very limited and makes no reference to the aforementioned subordinate legislation which directly declares the contrary. It appears that the reasoning in this case is invalid since it was made in the absence of applicable law.

The case also fails to make any distinction between fees & taxes on the un-metered supply fees which *are* the Lessor's responsibility and those associated with metered consumption which would normally be paid by the tenant.

iii. The explanatory notes to the aforementioned regulations as well as the ACTEWAGL web site explains the abstraction fee as part of A.C.T. governments water management policy in response to the scarcity and environmental impact of water usage.

If the impact of these fees were to be on a party other than the final consumer, then the financial disincentive imposed by the Government's water policy would be removed since Lessors have limited means of influencing tenant water consumption during a lease other than by passing on these charges.

iv. The same network taxes are also levied pro-rata upon electricity consumption which, similar to water consumption, is a tenant responsibility. This tax on water is identical, and should be treated in the same way - as the tenant's responsibility.

For these reasons the water abstraction fees and the water network supply tax are in fact the tenant's responsibility.

5.5 The overdue water bills also include the base usage fees which have never been contested by the tenant as being a tenant responsibility.

5.6 The failure to pay would constitute the third & forth violation of the tenancy agreement (the fifth if the tenant is in fact subletting the property as is suspected). This is in addition to the two notice's to vacate served after the second violation which has been ignored.

Since the tenant has repeatedly refused to vacate the property despite our numerous requests and written notices - the earliest being 16th February 2008 the latest being 29th May 2008 - we are therefore requesting a warrant of eviction in addition to payment of the water bills in full and repair of damage.

4. Annexed to the application was a copy of the lessor's letter of 10 January 2008 to the tenant which read:

I am writing in response to your letters dated 7 January 2008. With regard to our visit, we were in Matina street after shopping and only stopped in the driveway after noticing that the premises unexpectedly appeared inhabited despite our conversation in which you explained you would be away from your home and that no-one would be available to discuss with us any matters.

My wife and I had not alighted from our vehicle when your wife greeted us in our car and spoke with us for less than 5 minutes, during which time we expressed our concern that the water bill, which she confirmed to have received, has remained unpaid. We did not enter the premises nor did we have any intention of doing so. We do not consider this brief conversation unreasonable interference - any more so than a phone call- as you state, and we have no intention of interfering in any such manner.

At this point I would like to draw your attention to the matter of the unpaid water bill for $151.92 for consumption related water charges, which we drew to your attention in late November 2007 and which remains unaddressed and unpaid.

We have given ample opportunity to comply and have made numerous phone calls in addition to our written request. The latest request being our conversation with your wife while we were in our car. It is concerning to us that it was only after we raised this issue with your wife that she began to request repairs as a response, including matters such as the mowing of the grass and trimming of foliage - matters which would be normally considered part of the upkeep of the property by the tenant, we have even loaned to you a weed trimmer to assist in this end.

On this issue we also consider that the matter of the toilet tissue paper hanger to be a minor matters which is part of the normal upkeep of the property. Clause 55(3) of the agreement does not require the notification of the land lord for anything that an ordinary tenant would reasonably be expected to do, for example, changing a light globe or a fuse. We consider that the toilet tissue paper hanger in the laundry to fall within this category.

With regard to the back yard screen door, we would also like to draw to your attention the general duty upon tenants on discovering damage, whether at fault or not, to mitigate the repairs required under the Residential Tenancies Act.

However our responsibility to repair on this matter is limited since at the commencement of the lease the screen door was in good condition and did not require any such repairs. We consider the initial damage, and total removal of the door from its hinges to be unreasonable especially given clear the signs of force on the door, the rapid deterioration of the door until the type of damage we observed.

That is, the initial condition of the door on commencement of the lease compared to the type of damage subsequently occurring under your tenancy is highly indicative of unreasonable damage and outside any fair usage of the door.

Under Clause 63(a) of the agreement - during the tenancy, the tenant must not intentionally or negligently damage the premises or permit such damage.

Consequently we consider the repair to be the total responsibility of the tenant and expect the tenant to make necessary repairs, since we are not responsible for such deliberate/negligent damage. We remind you that we have made this view clear on previous occasions regarding this damage.

We re-iterate our concern that our requests for payment of agreed bills under the signed agreement such as water consumption are met with evasion and unexpected requests for repairs including many minor matters that are the responsibility of the tenant.

Over the course of your tenancy, I have already made several major repairs and have replaced a toilet, an oven and a wardrobe door, not all of which I believed was fair and reasonable.

Given your repeated failure to accept responsibility for property damage that is your responsibility, the failure to mitigate damage when it does occur and the failure to pay the outstanding bills despite numerous requests; and given our joint disquiet over this lease we believe it would be best if we were to agree to voluntarily terminate the tenancy. We suggest the property to be vacated no later than the 8th February 2008, particularly since December - January offers the best opportunity to find alternate rental accommodation in Canberra due to the expiry of many leases for students and out of state professionals.

Under the Residential Tenancies Act, such damage as we have observed to the property in addition to the failure to pay the water consumption bill - despite ample notice and opportunity to remedy - is grounds for an application to the residential tenancy tribunal *for forcible* termination.

Before the release of your bond we expect that the outstanding amount for water to be paid, rent to paid up and the screen door and any other damage to be fixed and restored and the property to be left clean.

5. Annexed to the application were the following documents:

   (a) A water bill for the period 14/8/07-20/11/07 for the premises in the sum of $278 composed of $102.64 for consumption; $122.19 for sewerage supply charge and water supply charge; $4.50 for sewer network tax; $6.93 for water network tax; $42.35 for water abstraction charge.
   (b) A water bill for the period 31/12/07-31/3/08 for the premises in the sum of $293 composed of $120.24 for consumption; $122.19 for sewerage and water supply charge; $4.50 for sewer network tax; $6.48 for water network tax; $39.60 for water abstraction charges.

(c) A letter from the lessor to the tenant dated 27 February 2008 attaching the water bill immediately above and asking for payment of $166.32 being the consumption, water network tax and the water abstraction charge.
(d) A water bill for the period 13/2/08-14/05/08 for the premises in the sum of $304 being $128.59 for consumption; $122.19 for sewer and water supply charge; $4.50 for sewer network tax, $6.93 for water network tax; and $42.35 for the water abstraction charge.
(e) A letter of 29 May 2008 from the lessor to the tenant asking for payment of the above water bill in the amount of $177.87.

6. The application annexed a copy of a notice of termination from the lessor to the tenant dated 23 January 2008 requiring possession on or before 16 Febraury 2008 on the ground that the tenants failed to rectify the damage to the back door and the lessors "genuine belief that the tenant will recklessly cause or permit further damage to the property". Attached to the notice of termination was an Australian Post registered post receipt indicating postage on 10 January 2008.

7. The application and annexures were served on the tenant by the Registrar with a notice listing the matter for 15 July 2008.

8. On 30 June 2008 the tenant filed his response to the lessors claim which included a range of counter claims against the lessor. The tenant's response read:

> This is in reference to the notice reference no RT489 of 2008 issued to us on 20th June 2008 for termination of tenancy agreement for my rental place 61 - Matina Street, Narrabundah.
>
> Our Landlord has accused us of violating few rental agreements. I would like to draw your attention on each of the following but before that I would like to tell you how it all started.
>
> **Our landlord has violated a very basic agreement in the rental tenancy agreement of visiting the premises without the permission.**
>
> In 1st week of January our landlord showed desire to visit the premises on the phone but as we had some guest visiting us from overseas and it was Sunday that day so we were going out to show them around. We told our tenant that today is not a good day to come but he is more than welcome to come and visit the premises any other day.
>
> We also advised our landlord that we will be leaving the house around 1530 hrs but we got late for some reason and for our surprise our landlord came to our house at 1600 hrs. As he was already informed that no one will be at home so should we conclude that he was going to visit the premises in our absence?
>
> We sent a letter to him on 7th January 2008 reminding him of the Clause 52 imposes an obligation on the landlord to guarantee that they shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant.
>
> **Our landlord has violated rental agreement by not providing the rental place in the vacant position.**
>
> When we rented the house in August 2006 there were pile of rubbish including 2 mattresses were sitting in the backyard which was the leftover from the previous tenants. Also half of the Garage is filled with landlords stuff or the stuff left by previous tenants. Our landlord promised us that he will arrange something to get rid of the rubbish in backyard and to clean the garage as well. From last 2 years we have been made hundreds of promises that he will get it clean. He didn't care to get rid of that stuff so we had to clean his rubbish from the back yard as our kids couldn't play in the backyard because of that rubbish. His stuff is still lying in the garage. At first place only we

shouldn't have paid full rent as we were not provided with the vacant house. We didn't want to create any issue and we have been paying the full rent since beginning.

Now I would like to draw you attentions on other matters 1st Violation of tenancy agreement - unpaid water bill

We have been living at 61 - Matina Street, Narrabundah from August 2006 and all the bills have been paid without any delay. The situation in which we failed to pay the water bills arose when our rear security door was came out of the frame. We advised the same to the landlord and he blamed us for forcefully bringing the door to the ground. At that time also we were paying all the bills without any delay. Then, he accused us of not paying the last water bill, which we never received. But, as he mentioned about that bill in his letter and also sent us that bill, we paid it straight way.

As the door matter was not resolved so we went to the Tenant Advice Services to seek advice. We told them about the situation and also showed them our water bills. The consultant had look into our water bills also the bill in question. As per the consultant at the rental Tenant Advice Services, our landlord was charging us the water network tax and water abstraction amount as well which he is not supposed to charge us. We have been advised by the consultant that it's the landlord responsibility to pay the water network tax and water abstraction charges.

We were not aware of that before so we contacted the landlord and advised them of the same and requested them to send us all the previous bills so we can calculate how much we paid extra so far. We sent a letter to the landlord on 21st January and requested the landlord to pay the access amount back which we have paid earlier for water network tax and water abstraction charges and he failed to do so. In fact we contacted the ActewAGL enquiring about the basis of those taxes and we were informed that they charge these taxes for maintenance of dams etc. and is generally paid by Landlord. We informed our landlord the same on phone and told him again that if he can bring any document saying that tenant has to pay those taxes, we are ready to pay those as we were paying before. But he never came back.

Regarding notice to vacate — 2nd Violation of Agreement.

Regarding his notice to vacate, we informed him by our later dated 7 February telling him that his notice to vacate is invalid as we haven't damaged his property. There is no valid reason for vacating the house till end of lease.

2nd Violation of tenancy agreement - Damage to the rear security door, failure to

The house in which we are living is very old. All the doors in the house have become loosen from the hinges as the wooden frame of the door are getting rusted. Our landlord visited us in early November; at that time we showed him all the doors and he accepted that doors are getting loosen from the hinges. He fixed the door of bedroom 2 but he couldn't fix the back door. He tried to fix it by hammering the screws in the screw holes but the screws didn't fix as the screw holes gone bigger in size due to the rust. He promised us that he will get the door fixed within a week's time. In spite of our repeated requests he never fixed the back door and one day it broke down itself. Now he has blamed us for forcefully bringing the door down. I don't think any sensible person will bring his house door down. We had to face a lot of trouble because of that broken door. We had 2 small kids in the house and we always kept the house in clean and in hygienic state. It was summers at that time and we couldn't leave the wooden back door open during the day as flies and ants come into the house. There is no provision to let the air pass through house as the rear back door was broken and that was the only door which has fly screen on it.

As per the Rental Tenancies - The Renting book, there is a clause for urgent repairs. As per that clause it is the tenant's responsibility to advice the landlord of any urgent repairs and it is the landlord's responsibility to carry out the repairs, hi Our case our landlord already knew about it but he failed to fix the problem.

History of tenancy

Our tenant has written that **"During the course of tenancy, numerous repairs have been made including the replacement of a new toilet and a new oven (which was then rapidly damaged requiring professional warranty repairs)"** also he has mentioned **"Throughout the tenancy the Lessor's agent have tolerated a great deal of damage to the property and have paid for the repairs which then have not always believed to have been reasonable"**
I would like to tell you that when we rented this place Toilet flush tank and gas oven was not in working state. So to put the house on rent I think it was the landlord responsibility only to get the oven and toilet tank fixed. No tenant will get those things fixed to get the house on rent. About the rapidly damaging the property, anyone is welcome to the house to have a look and see if any damage has been done. We did require a repair to the gas oven once because one of the hot plate wasn't turning off as there was a fault in its knob. Why would we break the knob and then bear the trouble of turning the gas line off from the main switch every time as we cant leave the hot plate on all the time.

In April we had a problem with our hot water tap in the bathroom as it wasn't shutting off. We tried to fix it but we couldn't. We informed our landlord's agent about the same and advised him that we are calling Plumbing Doctor to come and fix the tap as we can't let the water get wasted. Plumber fixed the Tap and after that Jason told us that we are supposed to take his permission before carrying out any repairs. **We did advise him of the problem before calling the plumber and he even told us to wait for 15 minutes and he will try to arrange someone who won't charge much. As it was Easter weekend no one was available except the Plumbing Doctor.** Even if I wasn't able to get in touch with Jason I would have called the plumber anyways to get the tap fixed as the repair was of urgent nature and I think anyone would have done the same.

I would be really happy to know what other numerous repairs landlord have carried out in last 2 years. I would really appreciate if Landlord can provide me a list of repairs which they have carried out on the premises.

Regarding subletting rooms in the property without approval, I would like to say that all the persons living on the persons have signed the lease agreement with the landlord and they are authorized to live their as per the Lease Agreement.

Our Landlord thinks that my job is in Fyshwick that's why we are not vacating the premises. I would like to let the tenant know that my brother who is living at the same premises works in Belconnen. How can this reason be justified that I work in Fyshwick that's why we are not vacating the property.

3rd and 4th Violation of tenancy agreement - Failure to pay water bill X 2

About this Tenancy agreement Violation, I have mentioned everything above in 1st Violation of tenancy agreement - unpaid water bill

9. Annexed to the tenant's response were copies of three letter from the tenant to the lessor dated 7 January 2008 and a letter from the tenant to the lessor of 21 January 2008 which read:

(First letter of 7 January 2008)

This is in reference to your visit to our rented premises at 61, Matina Street, Narrabundah on Sunday, January 6'2008 late afternoon (about 1600 Mrs).

I would like your attention to the telephonic conversation around 1.5 hours (about 1400 Mrs) before your visit on same day during which you showed your desire to visit the place. I told you clearly that I have some overseas guests in my place and I am leaving home in 20-30 minutes times and it would be better if you come some other day for which you said ok.

In spite of above, You visited our place around 1600 hrs and it was by chance that our program was delayed and we saw you coming to our house and my wife has to cancel her program and she stayed

home to attend you as you arrived without our consent. If we had left in time, then you would have visited the premises without our presence since you hold the second keys.

I would like to remind you that as per ACT Residential Tenancies Act,

Clause 52 imposes an obligation on the landlord to guarantee that they shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant

Your visits without our mutual agreement are totally unjustified and we have taken it as very serious thereby affecting our privacy as you visited the place even I told you that we are going out. This is a serious breach of Tenancy Act.
You are requested to please not repeat this in future, failing which I have no option left other than taking the matter to Tribunal.

(Second letter of 7 January 2008)

Please refer to your letter and notice to vacate dated 23rd January'08, we would like to inform you that we will not be vacating the premises because your notice to vacate is not valid as advised by Tenants Advice Services, Canberra.
As already discussed with you, we have not damaged your door and premises at all.

(The third letter of 7 January 2008)

This is in regards to the repairs to be done in your house which we are renting since August'2006 at 61, Matina Street, Narrabundah.

There are certain repairs, which had to be carried out since we moved in and for which you have not done anything in spite of our repeated requests. Also there are some repairs which have come in last few months because they were not corrected at first place and for them again you have not done anything. In fact you have refused to get them done as conveyed by you to my wife during you recent unauthorised visit on Sunday, January 6'2008.

The repairs, which require immediate attendance, are as follows:

1. Rubbish (including mattresses) leftover by last tenants lying at the backyard should be removed immediately as it has and is creating unhygienic living conditions, especially we having small kids playing in the backyard. We are telling you to arrange to remove the rubbish since beginning of leave but you have never acted upon our request.

2. Toilet Tissue Paper hanger in the laundry/ second toilet to be fixed immediately as you have left that hanger around a year before and never bothered to arrange to fix that.

3. The back door, which came down since it was not, attended right from the beginning. The holes in the hinges have gone big and that has led to falling of door. This was shown to you during your visit to house 2 months before. After having a careful look at other doors and noticing the same problem with other doors as well, you fixed them temporarily by hammering the screws. For this door, you agreed that you will arrange to get it fixed in a week's time but that week never came. As it is summer time and we require that door in order to have air crossing in the house, this is a serious problem in view of small kids at home as we can't leave that space open. Also, the spring/hydraulic arrangement for auto closure of this door is not working since beginning of lease.

Apart from above, there are some minor repairs, which are to be done and conveyed to you.

Please refer to the Clause 55, which states that you as landlord have to maintain the premises in reasonable state of repair and since all the above repairs are of urgent nature and as per Clause 60, landlord is required to arrange to get these repairs done in short time.

In above of above, I request you to please arrange to get above mentioned repairs done in 2 weeks time considering them of urgent nature.

(The letter of 21 January 2008)

This is in response to your letter on 10th January. I would like to draw you attention as follows:

1. In regards to your proposal for mutual termination of the lease agreement, I would like to let you know that we don't accept your offer for mutual termination of the lease agreement.

2. I would also like to draw your attention on the repairs, which need to be done in the house and few other things as well. As far as the door is concerned, when we rented the premises all the doors was not in the good condition. When we requested you to get the door fixed you visited our premises and fixed the door in Bedroom no 2 as that door was also going to come out soon and you told us that you will get the back door fixed ASAP. As per the ACT Residential Tenancies Act, it is the landlord's responsibility to provide secure premises and to fix the urgent repairs. Wooden door at the back not secure enough as it's lock is also loose, we fixed it before but it still remains the same. In that scenario anyone can break into the house, as the Iron door is not there which provides main protection.

3. I would also like to draw your attention on the rubbish sitting in the backyard and also in the garage. It has been sitting there since the day we rented the premises and you told us that you'll get rid of it soon. We can't utilise the full space of garage because of that and because of the rubbish sitting in the backyard our kids can't play in the backyard. It is the Landlord's responsibility to provide a totally vacant premises to the tenant.

4. Also regarding the Water charges, I would like to let you know that we have always paid the Water Charges as advised by you. This time also, we have paid the amount of $ 152.92 on receipt of Bill attached with your letter dated January 10'2008. Although, I have always paid the bill as per you advice, but we have realised that you have over charged us for the Water rates and Taxes as well. As per the Clause 42 and 46 we are only supposed to pay the Water Consumption Charges not the Rates and Taxes. It is the Landlord's responsibility to pay the Taxes and rates. So if you could please credit us with extra amount which you have was charged equal to amount of $49.28 (Charged as Water Network Tax & Water Abstraction Charge in last bill). My account details are as follows:

Account Name: Vaneet Graver
Account Bank: Commonwealth Bank.
BSB NO: 063011
Account No: 10298003

Also, it will be highly appreciated if you can provide us the copies of previous water bills also, so that we can check for the Water Charges paid and seek back claim in case we have paid anything extra before too.

5. About the grass mowing, we do grass mowing regularly and my wife asked you to remove that large tree which is in front of the main door, which is there since beginning of the lease as it has never been removed from the roots and it cause interference to the entry into the house.

I think you didn't understand what my wife was referring to you that day. You are requested to please arrange to remove that growing tree from the roots permanently.

Also, in regards to the lawn mower left by you at the premises, we have never used that mower as it has got a very short electrical lead and it doesn't reach the lawn even at short distances. As told to you before also, you can take back your lawn mower as it has never been used and not needed.

6. Also, as discussed in my last letter too, there are certain minor repairs (like toilet tissue hanger, window screens etc), that are required to be done in order to have the premises in reasonable state of repair. You are requested to arrange to get those repairs done at the earliest.

Concluding above, We request you to please get the points no 2, 3, 4 & 5 in 2 weeks time, otherwise we have no option other than to seek order from the ACT Rental Tribunal for the same.

You can contact me if want to discuss anything to resolve the issues amicably.

Hoping that you will respond positively to our requests.

10. the tenant annexed a series of photographs showing:

(a) bedding and furniture in a shed and outside a shed
(b) paling falling off a fence

11. On 11 July 2008 the lessor filed a further reply to the tenants response which read:

In response to the submissions by the aforementioned case, I would like to respond to some new ancillary issues which were raised which we have not had the opportunity to address in our previous submission.

On the matter of the full garage, at the beginning of the first tenancy in 2006 the landlord's agents offered to remove the chairs and the wardrobe in the garage (which was originally in the house). This was in addition to a sofa which was removed. However the tenants specifically did not want these chairs or the wardrobe removed -claiming at the time they could use the chairs outdoors and they could use the wardrobe. In 2006 during their first tenancy, the agents organised for a person to come with a trailer to remove any items they did not want.

We are therefore surprised at their recent claim of removing any garbage from the garage when this is the first time we have heard of this since their letter only references a mattress in the garden which they did not have removed when given the opportunity.

Though the tenants have claimed they "did not want to create any issue" as a reason for not bringing this up earlier, from our experience the tenants have not been shy about asserting their demands such as those detailed in previous submissions [The tenants were even able to extract a rent reduction for the first two weeks of the second lease by delaying a rent increase on the second lease (which is clear on the lease document) before the lease was even finalised, however we do not consider this last issue itself to be material to the current dispute.].

In addition we have never before heard of or seen the two mattresses which are pictured in the photos nor have we seen other items in the garage such as the silver tubes. Nor have we been aware of the damage to the fence or missing palings before.

We would like to highlight that among the many photographs included by the tenant, the damage to the rear door has not been photographed, though the appearance and nature of damage this is a key matter which we have raised.

In relation to the plumbing repairs over Easter, clause 59 of the proscribed terms requires the tenant to inform the lessor of any urgent repairs and requires the Lessor to organise them. The tenant informed us by SMS at first instance that he had already booked a plumber. I believed this was improper, since there was no impediment to phoning us first at either our home or mobile phone which would have been less haphazard and more effective than SMS at the first instance. I informed him of these points by phone and then afterwards again by SMS [This sequence of events did not delay the repairs. Since the repairs were still scheduled from the first phone call by the tenant and the plumber arrived more than 90 minutes later].

The tenant has claimed that the current dispute arises from our visit in the first week of January. The original agents - Andrew Yan & Ling Ling Cao - were returning from the Fyshwick markets when they found the tenants in the front yard contrary to their original claim that they would be away from the house. They did not make any offer to allow the agents to visit as they claimed. They had previously been unwilling to discuss the matter of the outstanding water bill over the phone. The agents spoke to the tenants from the rolled down window of their car when they saw them and did not leave the car at any stage. This sequence of event was re-iterated to the tenants in a letter dated 10th of January 2008. This sequence of actual events has not been disputed by the tenants although they have

characterised the nature of the visit differently and have made inferences about the intentions of the agents.

However, with regard to the actual issues in dispute which we have made the application on, our view has not changed from our previous submission:
• The tenant is illegally subletting the property and his brother is not on the lease as he claims.
• The tenant is liable to pay consumption related amounts for water for the reasons detailed previously has failed to pay these amounts on multiple occasions and has even to failed to pay amounts which are uncontested by the tenant.
• The tenant has caused or allowed the backdoor to be damaged and is liable for said damage for the reasons detailed in the last submission. The door has not been left in a state of unreasonable disrepair by the Lessor.

Attached is a letter originally sent to the tenant dated 23rd January 2008 in response to the letter the tenant included dated the 21st of January 2008.

(letter of 23 January from lessor to the tenants)

In response to your letter dated, 21st of January 2008, I would like to re-iterate the statements in our previous letter, that is, the damage to the door is your responsibility and we require it to be fixed. The door shows sign of twisting and severe force which makes the door un-attachable to the frame whereas you have previously claimed that the problem related to loose screws.

The landlord is not responsible for such damage where it is deliberate or negligent irrespective of whether or not it relates to the securing the premises, we re-iterate that notwithstanding this you also neglected your duty to mitigate damage as required by the residential tenancies act.

Under Clause 63(a) of the agreement - during the tenancy, the tenant must not intentionally or negligently damage the premises or permit such damage. As such you are liable for this damage.

We also note that payment for the last water bill from November was only received on 16th of January 2008, after our last letter.

In regard to the claim of an overcharged water bill; although clause 42(a) of the agreement states the landlord is responsible for rates and taxes, this does not describe the water charges which you mention. Water abstraction and network tax - are charged on a pro-rata basis, if you review the last bill we sent you, you will find that the cost is charged at 77kL x $0.55 (for abstraction) and 77kL x $0.09 (for water network). These fees are not related to the premises (like land tax or supply charges) but to metered water consumption which is the responsibility of the tenant.

Clause 42(c) of the agreement states that the lessor is responsible for services where there is not an accurate metering device, but this consumption *is* metered and charged according to actual usage and therefore not the responsibility of the landlord. I have paid the water supply and sewerage charges which are the responsibility of the landlord. We remind you that we have previously supplied statements to you.

Moreover under clause 46 of the agreement: The tenant is responsible for all charges associated with the consumption of services supplied to the premises, including electricity, gas, water and telephone. These pro-rata fees are your responsibility and you have not been overcharged. These fees are measures which the A.C.T. government has taken to reduce water consumption by the end user.

We will not be removing the tree, this is part of the property and is an entirely unreasonable request.

We do not consider your objection to the length of the mowers cord valid, it could have been easily fixed with an extension cord. Though we do not consider this issue to be of any consequence.

As we stated in our last letter repairs as minor as the toilet paper hanger to be of a routine nature. Clause 55(3) of the agreement does not require the notification of the land lord for anything that an ordinary

tenant would reasonably be expected to do, for example, changing a light globe or a fuse. We consider that the toilet tissue paper hanger in the laundry to fall within this category.

Once again we are concerned that our requests to rectify the situation have been met with evasion and requests for new repairs. As I have described above I consider most of these requests disingenuous and a delaying tactic and retaliatory to avoid responsibility. We note for example that your statement regarding the security aspects of the broken door are new and different to your original claim of the need for ventilation.

I have been most offended by the rudeness you have exhibited to my wife over the phone in suddenly failing to recognise her right to act in spite of our previous history indicating otherwise and the failure to recognise our requests coupled with your repeated evasion which I have detailed in this and my previous letter.

We do not wish to continue the lease, we believe the best means of resolving this amicably is for us to assist you in finding alternate property by providing a reference and offering a flexible period to vacate.

I am exercising our term in our signed contract to provide at least two weeks notice to end the lease by either party - at point 11, however we are willing to provide 3 weeks. In the alternative I am also exercising our right to end the lease based on your failure to rectify the damage to the back door despite notice.

However as I mention I am willing to assist you by negotiating on the time needed by yourself to find other property if you require it to prevent unnecessary hardship. Unless we hear from you to extend this period please consider this 3 weeks notice. We believe this is more than fair, however please contact us quickly if you wish to extend this time.

Please note that we will require the property to be available for viewing by prospective tenants in the final weeks as per the Residential Tenancies Act[1], we will arrange suitable times with yourself as that period approaches.

Before the release of your bond we expect that the rent to paid up and the screen door and any other damage to be fixed and restored and the property to be left clean including a vacuum of the house. However we will not ask you to dispose of the mattress propped against the side of the garage at the property if this is a matter of contention.

Once the property is restored to our satisfaction then we will release your bond and further assist you by providing a reference to assist you in finding a new property.

12. At the hearing on 15 July 2008 Mr Jason Yan appeared for the lessor and Mr Sumit Anand appeared for the tenant. Mr Yan tendered a General Power of Attorney from Mr Cao in this favour. Mr Anand tendered a letter of authority from the lessor to act on his behalf.

13. After hearing the parties the Tribunal issued an order for termination of the tenancy on 10 August 2008 and adjourned the balance of the claim for monies allegedly owing until 15 August 2008. the Tribunal made the following procedural orders:

…

9 That the matter is adjourned for further hearing on Friday the 15th of August, 2008 at 10.00am.

10. That the Lessor is to file and serve a copy of all water accounts since the commencement of the lease by the 22nd of July, 2008.

11. That the Lessor is to tabulate the consumption charges, extractions and connection charges for each water account and total all accounts.

12 That the Lessor is to advise the amount of payments made by the Tenant for water to date.

13. That the Tenant is to file and serve by the 29th of July, 2008 his reply, indicating the amount paid by the Tenant to date for water.

14. That the issue of the extraction charges remains to be determined.

14. On 23 July 2008 the lessor filed the following tabulation of the water bills which were the same three water bills filed with the original application:

In compliance with orders 10,11 & 12 of the residential tenancies tribunal the following are tabulated amounts for the quarterly consumption related fees: The supply fees, abstraction fee, network tax and consumption fee for the current lease for 61 Matina street, Narrabundah from the beginning of the Lease in August 2007.

Attached are the bills for the first 3 quarters of the year long lease, the bill for the final quarter has not yet been issued.
Consumption charges

Period	Bill Due	Abstraction	Network tax	Consumption	Total	Paid by tenant
08/2007 - 11/2008	13-Dec-O/	42.35	6.93	102.64	151.92	151.92
11/2007- 02/2008	x-^ 7-Mar-08	39.6	6.48	120.24	166.32	0
02/2008 - 05/2008	X 6-Jun-08	42.35	6.93	128.59	177.87	0
	Total	124.3	20.34	351.47	496.11	151.92

Amount outstanding $ 344.19

Supply charges (no supply charges have been invoiced to the tenant)

Supply period	Bill Due	Sewerage supply	Water supply	Sewer network tax	total
10/2007- 12/2007	13-Dec-07	103.44	18.75	4.5	126.69
1/2008- 03/2008	7-Mar-08	103.44	18.75	4.5	126.69
04/2008 - 06/2008	6-Jun-08	103.44	18.75	4.5	126.69
Total		310.32	56.25	13.5	380.07

15. The tenant responded by letter of 24 July 2008 asking for copies of all water bills since August 2006 which the tenant claimed was the commencement of the lease.

16. On 13 Augsut 2008 the landlord filed a tabulation of the water bills for what is described as "the previous lease" of the premises. Copies of the actual water bills were annexed:

The supply fees, abstraction fee, network tax and consumption fee for the **previous** lease for 61 Matina street, Narrabundah starting in August 2006.

Attached are the bills.

Consumption charges

Period	Abstraction	Water network tax	Consumption	Total	Paid by tenant
08/2006 -11/2006	23.65	0	34.69	58.34	58.34
11/2006-02/2007	17.6	0	41.28	58.88	58.88
02/2007 - 5/2007	37.95	0	37.95	75.9	75.9
05/2007 - 8/2007	39.05	3.15	50.89	93.09	93.09
Total	118.25	3.15	164.81	286.21	:>86.:>1

Supply charges (no supply charges have been invoiced to the tenant)

Date	Water supply	Sewerage supply	Sewerage network tax	Total	Paid by tenant	Paid by landlord
9/2006-12/2006	18.75	99.7	0	118.45	0	118.45
12/2006-3/2007	18.75	99.7	0	118.45	0	^_ 118.45
3/2007 - 6/2007	18.75	99.7	0	118.45	0	118.45
6/2007-9/2007	18.75	103.44	4.5	126.69	0	126.69
Total	75	402.54	4.5	482.04	0	482.04

17. The landlord tabulated the total charges for the period of present tenancy as follows:

	Abstraction Fee	Network fee	Consumption	Total
Total including final metre	254.1	25.38	578.67	858.15
Paid	— 160.6	10.08	267.45	438.13
Owing	93.5	15.3	311.22	420.02

18. The landlord filed a copy of the Independent Competition and Regulatory Commission (ICRC) (Water Abstraction Charge) Revocation 2008 (No1) Declaration which commenced on 1 July 2008 and which read:

> **Independent Competition and Regulatory Commission (Water Abstraction Charge) Revocation 2008 (No 1)**
> **Disallowable instrument DI2008—119**
> made under the ***Independent Competition and Regulatory Commission Act 1997*, section 4C**
> **(Declared fees to be passed on to consumers)**
>
> **EXPLANATORY STATEMENT**
>
> The Water Abstraction Charge (WAC) is a statutory fee payable by the holder of a licence to take water, determined under the *Water Resources Act 2007.*
>
> Previous price determinations by the Independent Competition and Regulatory Commission (ICRC) in relation to water services did not take into account the WAC paid by the licence holder. Instead, the *Independent Competition and Regulatory Commission (Water Abstraction Charge) Declaration 2003 (No 1)* Dl 2003-332 declared the WAC to be a statutory fee affecting the cost of providing water services that may be passed on in full to consumers of the service.
>
> In April 2008 the ICRC Final Report for the water and wastewater price review determined that the WAC is a standard business cost. As such the WAC has been taken into account by the ICRC in the price direction for the provision of water services to operate from 1 July 2008 to 30 June 2013.

As a consequence, the *Independent Competition and Regulatory Commission (Water Abstraction Charge) Declaration 2003 (No 1)* DI2003-332 is revoked from the date of commencement of the price direction.

19. The landlord filed a copy of the ICRC (Utilities (Network Facilities Tax) Declaration 2006 (No1) which commenced on 1 January 2007 and ceased effect on 30 June 2008, which read:

> **Independent Competition and Regulatory Commission (Utilities (Network Facilities Tax)) Declaration 2006 (No 1)**
> **Disallowable instrument DI2006—272** made under the ***Independent Competition and Regulatory Commission Act 1997,*** s4C(l)(a) **(Declared fees to be passed on to consumers)**
>
> **EXPLANATORY STATEMENT**
>
> The *Utilities (Network Facilities Tax) Act 2006* imposes a tax on a network facility on land in the ACT. The rate of tax is determined by the Treasurer under section 139 of the *Taxation Administration Act 1999.*
>
> A network facility is any part of the infrastructure of a utility network not fixed to land subject to a lease, a license granted by the Territory or any right prescribed by regulation.
>
> Utility networks include networks for transmitting and distributing electricity, gas, sewerage, water and telecommunications.
>
> Examples of a network facility include powerlines or pipes over or under land, and telecommunications cabling.
>
> This Declaration is made under section 4C(l)(a) of the *Independent Competition and Regulatory Commission Act 1997,* which provides that a statutory fee that affects the cost of providing a utility service may be passed on in full to consumers of the service.
>
> This Declaration provides that the statutory fee affecting the cost of utility services under the *Utilities (Network Facilities Tax) Act 2006,* the rate of which is determined by the Treasurer under section 139 of the *Taxation Administration Act 1999,* may be passed on in full to consumers by owners of network facilities.

20. On 15 August Mr Yan appeared for the lessor and the tenant appeared in person. The lessor sought to amend his claim to include a claim for cleaning and repairs following the termination of the tenancy. The matter was further adjourned to 29 September 2008 with the following procedural orders:

> Upon hearing Phillip Cao the Applicant, and Vaneet Grover the Respondent, the Tribunal made the following **ORDERS:**
>
> 1. That the application is adjourned until **Monday the 29th day of September, 2008, at 2.00pm.**
>
> 2. That the parties are to file and serve further submissions on the law relating to the abstraction charge and network fee within 7 days.
>
> 3. That the application is amended to include a claim for cleaning and repairs by the Lessor.
>
> 4. That the Lessor is to file and serve within 14 days of the claim made together with
> (a) relevant reports
> (b) photos
> (c) invoices
> (d) condition reports

5. That the Tenant is to file and serve within further 14 days its response to the claim together with any quotes, photos or other evidence.

21. On 22 August 2008 the lessor filed the following submissions:

6. Liability of the water abstraction fee and the network fee (the fees)

In addition to paragraph 5.4 of the originating application on this matter, The Lessor makes the following additional submissions:

6.1. he lessor has paid all supply charges and has not invoiced the tenant for these.

6.2. Clause 46 of the standard residential tenancy terms imposes liability on the tenant for the abstraction and network fees stating that:

> *"The tenant is responsible for all charges associated with the consumption of services supplied to the premises, including electricity, gas, water and telephone, "*

The broad obligation imposed on the tenant by the language of this clause is in contrast to the narrow obligations imposed on the lessor by clause 42 of the standard terms:

> *42 The lessor is responsible for the cost of the following:*
> *(a) rates and taxes relating to the premises:*
> *(b) services for which the lessor agrees to be responsible;*
> *(c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;*

6.3. Clause 42(a) is addressed in paragraph 5.4 of the previous submissions mentioned earlier.

6.4. Clause 42(b) does not apply to the lessor in this situation since clause 10 of the signed lease agreement states that the tenant is liable for water bills.

6.5. Clause 42(c) does not apply to the lessor in this situation since there is a water metering device which is reflected in the water bills.

6.6. The disallowable regulation enabling the water abstraction fee[1] has since been revoked from the date of commencement of the original regulation [Commissioner for ACT Revenue v Kithock Pty Ltd (2001) 181 ALR 609]. The explanatory statement of the revoking regulation indicates that the abstraction fee has actually been "a standard business cost" all along. In addition to the reasons mentioned in paragraph 5.4, for this reason it is part of the consumption price structure.

6.7. The disallowable regulation for **both** the abstraction fee and water network fee state that it is to be passed onto the end consumer. Since the fees are charged per kilolitre of water consumption - the end consumer is the tenant.

6.8. The disallowable regulation enabling the water network fee expired on the 30[£] June 2008.

6.9. In the alternative if the network fee is a tax then it is not a tax when passed on by ACTEW AGL. The fee is imposed on consumers after being passed on by ACTEW AGL. It is billed by ACTEW AGL on statements as *"Recovery* ACT Govt utilities water network tax" and can be viewed on previously submitted bills. This recovery arrangement means that it is not a tax in the hands of the consumer, since it is levied on the utility as owners of water network facilities, and then passed onto subsequent consumers with the recovery charge. [Independent Competition and Regulatory Commission (Water Abstraction Charge) Declaration 2003 (No 1) DT 2003-332 Explanatory note; Harper v Minister for Sea Fisheries (1989) 168 CLR 314] Taxes passed on in this manner are not taxes in the hands of the final consumer.[4] They are therefore part of the cost structure of water consumption and part of the fee for service which makes this the liability of the tenant.

6.10. Similarly the abstraction charge is also a fee imposed on the utility for catchment management services and the associated environmental burden (in the explanatory note) which is then subsequently passed onto end consumers by regulation and therefore the liability of the tenant.

6.11. In the alternative the water abstraction fee is not a tax at all because it is a pro-rata charge for water as a scarce natural resource.[5] This makes it a fee for the consumption of a resource.

6.12. In the alternative both fees are an excise imposed by a body other than the Federal government, therefore the laws were invalidly enacted [Section 90 Commonwealth Constitution.]

22. On 29 August 2008 the landlord filed further written submissions which read:

Outstanding fees and damage to 61 Matina Street, Narrabundah during the tenancy of Vaneet Grover

1. The following is a summary of the repairs and outstanding fees, that we have subsequently discovered on the tenants vacating the premises:

1.1. The dead lock installed by the tenant (which we do not have keys for) without lessor consent on the backdoor is broken. The lock on the letterbox also does not work with any keys we have or returned to us - Replacement of locks by a locksmith: **$285.00**

1 2. Outstanding rent for the 8th and 9th of August 2008 at $48.57/day (previously set by the tribunal in the last order): **$97.14**
a) Clause 7 of the lease states that rent is paid on a Friday, the tenants moved out on Sunday morning - the rent is for the Friday and Saturday following from the last rent payment.
b) The last rent payment was for only $1 360.00 - for 28 days exactly.

1 3. Outstanding water bills previously notified: **$344.10**

1.4. Final water bill from meter reading: $75.83

1.5. Steam clean for dirty carpets, which the tenant accepted responsibility for on the 10th of August 2008 during our meeting. **$162.00**

1.6. Holes in the wall including between the living room and bedroom & painting over damage (quotation): $400 - $450

1.7. Repair of damaged back security door & hole carved in the bedroom door: **$303.80**

1.8. Refit of kitchen cabinet door which is damaged and now can not be closed (quotation): **$429.00**

1.9. Bedroom flyscreen, Kitchen flyscreen & front door flyscreen - each have substantial holes: **Quote to be delivered at a later date.**

1.10. Missing fence palings: **Quote to be delivered at a later date.**

1.11. **Total (so far): $2146.87**

2. Although the tenant did not clean the house despite our written notice to do so (see attached photos), we have forgone the cost of general cleaning from the bill which we have carried out by ourselves (not including the steam cleaning which was been agreed to by the tenant).

3. We are also not claiming the replacement of the backdoor despite the damage caused by the bad installation of the lock - only the cost of replacing the badly installed and broken lock which could not be opened from the inside.

4. Although the evaluation of damage may have tax depreciation consequences for the asset being replaced - for our requested repairs in paragraph 1, we have generally not sought new for old replacement but rather repairs to bring the fixture to a good usable state had the damage not occurred.

5. Clause 64 of the standard terms also requires the tenant leave the premises *"in substantially the same condition as the premises were in at the commencement of the Tenancy Agreement"*. Any consideration of depreciation should also not contravene this explicit proscribed term as part of the 1997 Residential Tenancies Act.

6. Most of the repaired items we have requested are also items more commonly part of the house and not commonly depreciated due to wear and tear.

7. The hole in the wall and the hole carved in the door in paragraphs 1.6 & 1.7-doors and walls are part of the house and usually do not require repair or replacement in the manner done so due to normal wear and tear nor are they normally depreciated.

8. For example the damage to the back security door in paragraph 1.7, was repaired not replaced. This door was delivered in good working condition in mid 2006 (this assertion has not been disputed). The steel bottom hinge was heavily twisted and ripped off it's hinges. See Picture E.

9. This damage correlates a pattern of undue damage we have discovered throughout the house on the inside.

10. We are requesting payment of the entirety of the amounts outstanding having already considered the write downs involved and the nature of the repairs in restoring the damaged items to a usable state given the damage sustained.

11. Currently this amounts to **$2146.87.** We are requesting the bond **($1360.00)** and the additional shortfall of $786.87, noting that this includes amounts of unpaid rent, water bills, and carpet cleaning; and not just property damage.

12. Attached are the relevant receipts and quotes with the exception of the water bill from paragraph 3 which we have previously supplied the receipts for.

23. The landlord's submissions annexed a range of photographs taken after the end of the tenancy showing:

(a) the front door and the back door hinge
(b) a hole carved in the bedroom door
(c) the kitchen
(d) the back door showing a deadlock
(e) a bedroom wall showing a hole drilled through it
(f) a series of 28 further photographs showing various aspects of the premises before and after the tenancy
(g) an invoice for new locks in the sum of $285.00
(h) an invoice from Morgan's Group for carpet cleaning in the sum of $162.00
(i) an invoice from Weber M&B in the sum of $303.80 for the supply and fitting of two doors and a security door.
(j) an ACTEWAGL statement for water for the period 1 July 2008-30 September 2008 showing consumption of $62.39; sewer supply charge of $110.95; water supply charge of $21.25; water net work tax of $1.89; water abstraction charge of $11.55.

24. The tenant filed submissions on 10 September 2008 which read:

This is in reference to the notice reference no RT489 of 2008 issued to us on 28th August 2008.

In regards to the Charges on Water Network Tax & Abstraction Charges, pi find attached info as Annexure-I, which clearly states that tenant only pays Water Consumption Charges & other charges have to be paid by landlord. But, in our case, our landlord has overcharged us by charging these taxes, which are never meant to be paid by us.

I would like to advice you that we don't take any responsibility of the damages mentioned by our landlord as mentioned in points 1.6, 1.7, 1.8, 1.9 & 1.10 on his letter. We have returned the house in the same condition in which house was given to us in August 2006. We are attaching the photographs taken by us at the time of vacating the house as Annexure-II.

In last 2 years no money was spent at all on renovating the house and now our landlord is totally lying and wants to renovate his property at our cost. If he thinks that place was damaged by us then he should have told us at the time when we returned the house keys. We were not shown any damage and no picture was taken in our presence.

We have stayed at that place for 2 years and if our landlord had a doubt that we are damaging the property then why didn't he take any initiative to inspect the property. I would like to pay your attention that landlord never inspected the house during our 2 years of tenancy at his place.

In fact, he visited the house only at our many requests when we asked him to get the fly screen door fixed. He never considered his responsibility to look at other things in terms of inspection. This can be seen from the condition of the fence which was visible even when one passes through. But he never bothered to look into the things.

We do take the responsibility of getting the carpets steam cleaned and we agreed to that with the landlord that they can get it done and we will pay the bill. At the time of handover of keys on 10th august our landlord didn't object to anything or had any problem in the condition house was returned.

When we rented the house in August 2006, it was not provided to us in the vacant condition. He always kept on making false promises that he will get his stuff removed which was never done till the end of lease. In fact, we request Tribunal to advise our landlord to compensate us for not giving us the premises in vacant condition.

Also, our landlady has harassed us by making phone calls to our office during day time by threatening us to vacate the house and also she has called many times during the night time at home threatening the same. This clearly shows how far these guys can go in order to get their false motives served.

In view of above, I request you to please consider us and give fair justice to the case.

25. The tenant annexed a series of 12 pages of photographs.

26. On 29 September 2008 Mr Yan appeared for the lessor and the tenant appeared in person. The Applicant tendered a revised list of the claims made:

Revised quotation

Paragraph	Description	Amount	Notes
1. 1	Lock replacement	$285. 00	Not disputed
1.2	Outstanding rent	$97. 14	Set by tribunal on
1.3	Outstanding water bills	$344. 10	
1.4	Final water bill	$75.83	

1.5	Steam clean for dirty carpets	$162.00	Not disputed
1.6	Hole in the wall	$200. 00	Painting not being
1.7	Repair back security door & bedroom door	$303. 80	
1.8	Damage of kitchen cabinet	$250. 00	Alternate tradesmen quote
1.9	Flyscreen	$22.91	
1. 10	Fence paling	$0.00	Approx. 2. 50 each :
	Total	$1,740.78	

27. The above revised claim by the lessor did not include many issues raised in the above correspondence and submissions. The Tribunal informed the Lessor that it only intended to address the claims actually made and if the revised claim accurately reflected the Lessor's claim then this is all that would be addressed. The lessor had ample opportunity to put in issue everything he chose to. In fact most of the lessor's claims relating to the alleged damage to the property were only raised for the first time by the lessor in his submissions of 29 August 2008. Notwithstanding the lateness of these claims the Tribunal still permitted them to be pressed.

28. The tenant maintained his counter claim for:
    (a) the lessor's alleged failure to fix the back door and fence
    (b) the lessors failure to deliver vacant possession in that the lessor's possession occupied half of the two car garage.

29. The tenant also raised as range of matters going beyond the scope of the above counter claim. The Tribunal informed the tenant that it would only consider those claims the tenant had made. The tenant also had ample opportunity to put in issue everything he chose to.

30. The Tribunal took the parties through each of the revised claims and allowed them to summarise the evidence and submissions on the law, that they wished to put.

31. The tenant admitted responsibility for the rent of $97.14 (item 1.2); the carpet cleaning of $162.00 (item 1.5); and damage to the kitchen cabinet of $250.00 (item 1.8). The lessor dropped the claim for the fence (item 1.10).

32. The tenant denied liability for the locks (item 1.1); the hole in the wall (item 1.6); the damage to the back security door and bedroom door (item 1.7); and the damage to the flyscreen (item 1.9).

33. The tenant admitted the water consumption charges in the sum of $311.22 but denied responsibility for the abstraction charges ($93.50) and the net work taxes ($15.3) which the tenant contended were lessor costs.

34. The lessor resisted the counter claim on the bases that:

(a) at not time was the lessor on notice of the need to fix the back door or fence
(b) the tenant consented to the lessor leaving his goods in the garage and the lessor would have removed them had the tenant so requested.

35. At the end of the hearing the Tribunal informed the parties that the matter would be reserved for a written decision on the lessor's claim and the tenant's counter claim.

Findings of fact:

36. The Tribunal is satisfied that the tenant's admissions of liability at paragraphs 31 and 33 were correctly made and finds for the lessor in the sum of $820.14.

37. The remaining issues are those items of the lessor's claim denied by the tenant at paragraph 32 above; the issue of responsibility for the water abstraction charges and network taxes, and the tenant's counter claim per paragraph 28 above.

The locks

38. The claim by the Lessor for the dead locks was raised for the first time in the submissions of 29 August 2008. The Lessor asserted that the tenant had replaced the dead locks without consent and did a poor job. The photographs revealed what appeared to be a poor job at affixing deadlocks which would need to be redone. Apart from a simple denial of the claim the tenant did not address the issue of whether he had in fact replaced the deadlock or not. In these circumstances the Tribunal accepts the Lessor's evidence and quotations for rectification in the sum of $285.00.

The hole in the wall

39. The hole is between the living room and bedroom. The photographs show a large drilled circular hole. Again the tenant did not enter into anything other than a general denial. It was not asserted by the tenant that the hole was there at the start of the tenancy. In these circumstances the Tribunal is satisfied that the tenant, or someone upon the premises with the tenant's consent, drilled the hole. The Tribunal allows $200.00 in rectification costs.

The bedroom door

40. The photographs showed a sizeable drilled hole through the bedroom door. Again the tenant did not enter into anything other than a general denial. It was not asserted by the tenant that the hole was there at the start of the tenancy. In these circumstances the Tribunal is satisfied that the tenant, or someone upon the premises with the tenant's consent, drilled the hole.

The back security door

41. This item features in both the lessor's claim against the tenant and in the tenant's counter claim against the lessor. The outcome depends on how the door came to

be damaged. If the tenant damaged it then he is responsible for replacing it. If the tenant did not damage it then the lessor is liable for having failed to repair it during the tenancy.

42. The photographs of the door tend to support the lessor's contentions that it had been forcible removed from the hinges. Of itself this does not mean that the door was not already in disrepair as alleged by the tenant. The tenant has consistently maintained that the hinges to the door had come away from the door jam and had requested repair. The Tribunal accepts the tenant's evidence that the lessor actually attended and attempted to refix the hinges to door jam without success. Nevertheless the fact that the screen door needed repair is not a ground for forcefully ripping it from its hinges as appears to have been done.

43. The Tribunal is satisfied that the tenant, or someone upon the premises with the tenant's consent, has ripped the door from its hinges. The Tribunal allows the rectification cost of the screen door and bedroom door at $303.80.

The flyscreen

44. The photographs of the flyscreen shows ageing without evidence suggestive of a tear or other malicious damage. The lessor did not advance any thesis about the cause of the damage consistent with the tenant's intentional or negligent actions and the Tribunal is satisfied that the damage is just ageing.

The lessors partial occupation of the garage

45. There is no dispute between the parties that the lessor had personal property in the back yard and garage. The photographs confirm this. The issue is whether the tenant consented to the presence of the property or not. In his letter of 21 Jan 08 to the lessor the tenant affirmed his position that he wanted the lessor to remove the property. Even then the lessor did not remove the property. What ever might have been the lessor's understanding on the issue prior to this date, the lessor could have had no doubt after 21 January 2008 but still did nothing to remove the property.

46. The Tribunal accepts the tenant's contention that he neither wanted the lessor's property in the garage and did not consent to its presence. Accordingly the lessor is in breach of his duty to deliver vacant possession at the commencement of the tenancy.

47. The Tribunal allows compensation to the tenant calculated as the equivalent of a rent reduction of $20pw over the terms of the tenancy for the loss of use of half the garage and the inconvenience caused. The tenancy commenced on 16 August and was terminated on 10 August 2008, being 51 weeks @ $20 pw = $1020.00.

The water abstraction charge and the water net work taxes

48. The claim made by the lessor for the unpaid abstraction charge amounts to $93.50 and for the unpaid water net work tax amounts to $15.30 per paragraph 17 above. According to the lessor's tabulation at paragraph 17 above, the tenant have in fact

paid $160.60 in previously abstraction charges and $10.08 in previous network facilities taxes.

49. The relevant contractual and statutory provisions regulating the issue of the abstraction charge and net work tax as between the lessor and the tenant are prescribed terms 42-46 of the *Residential Tenancies Act 1997:*

> 42 The lessor is responsible for the cost of the following:
> (a) rates and taxes relating to the premises;
> (b) services for which the lessor agrees to be responsible;
> (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;
> (d) all services up to the time of measurement or reading at the beginning of the tenancy;
> (e) all services after reading or measurement at the end of the tenancy providing the tenant has not made any use of the service after the reading.
>
> 43(1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).
> (2) The tenant is responsible for the connection of all services that will be supplied in the tenant's name.
>
> 44 The lessor must pay the annual supply charge associated with the supply of water or sewerage.
>
> 46 The tenant is responsible for all charges associated with the consumption of services supplied to the premises, including electricity, gas, water and telephone.

50. Before turning to the above prescribed terms it is necessary to look at the statutory background in which the abstraction charges and network taxes arise. Sections 29 and 107 *Water Resources Act 2007* provide for the grant of a license to "take" water from water resources in the ACT and for the levying of a "fee" for the license. But section 11(2) provides that:

> (2) However, a person does not ***take*** water if the person uses water taken by someone else under a license to take water.
> **Example—s (2)**
> using water provided by a water utility

51. It is sufficiently clear that ActewAGL is required to possess a license to take water for commercial supply and may thereby be subject to a license fee under the *Water Resources Act 2007*. But it does not appear to the Tribunal that the owner or tenant of a suburban house who contracts with ActewAGL for the supply of water is "taking" water within the meaning of section 29 and 107 and is thereby directly liable for a fee imposed under section 107.

52. Section 4C *ICRC Act 1997 provides:*

> (1) The Minister may declare in writing, that-
> (a) a statutory fee affects the cost of providing a utility service and may be passed on in full to the consumer of the service: or
> (b) a fee for a regulated service is to be passed on in full to the consumer of the service.

53. For present purposes nothing appears to turn on whether section 4C(1)(a) or (b) is apposite to the water supplied by ActewAGL. The statutory fee referred to in section 4C(1)(a) or (b)is presumably the fee payable by ActewAGL under the

Water Resources Act 2007 and the Minister's declaration pursuant to section 4C permits ActewAGL to pass on this statutory fee in full to the "consumer".

54. This then raises the issue of who is the "consumer" for the purposes of section 4C for which there is no definition in the ICRC Act. The contractual relations between ActewAGL and the consumer of its water services is determined by the *Utilities Act 2000*. For suburban premises the water is supplied under a standard customer contract (Part 6 Div 6.2).

55. Section 84 *Utilities Act 2000* defines who may apply for a water supply under a standard customer contract and includes both the owner and the tenant of a property:

> 84(1) A water supplier must, on application by a person, and in accordance with the supplier's standard customer contract, supply water to premises owned or occupied by the person.

56. Section 92 then provides that the standard customer contract forms "an enforceable contract" between ActewAGL and the owner or occupier who applied for the water service. The terms of the contract are fixed by a process outlined in the *Utilities Act 2000* and are the same for all customers.

57. A "customer" is defined in section 17 *Utilities Act 2000* to include "a person for whom the service is provided" as well as the person who made the application for the service. Thus the standard customer contract can apply to a tenant living in the premises and using water even if that tenant did not personally apply to ActewAGL for the supply. Prima facie, this appears to be inconsistent with section 92 which only deems the binding contract between ActewAGL and the person who actually applied for the water service. Thus if a lessor applied for the water service albeit that the water was supplied for the benefit of a tenant, then the binding contract is with the lessor only but the tenant has the status of a "customer".

58. Section 94(1) *Utilities Act 2000* governs who must pay provides that the "owner of the land where water is supplied under a standard customer contract is liable for the amount payable under the contract".

59. Section 94(6) defines the "owner" of the property to which water is supplied:

> (6) In this section "owner means:
>
> (a) for land held in fee simple-the person in whom the fee simple is vested for the time being: or
> (b) for land held under a lease-the lessee for the time being; or
> (c) for land occupied under a tenancy granted by the Territory-the tenant for the time being; or
> (d) for other land occupied by a person with the consent of the Territory-that person

60. On its face section 94(6)(b) governs cases where there is a "lease" in existence for the property and imposes the duty to pay the abstraction charge on the lessee. There is no definition of a "lease" in the *Utilities Act 2000* nor in the *Legislation Act 2001* nor in any other legislation that is relevant for present purposes. This means that the term "lease" must take its meaning at common law.

61. At common law the definition of a "lease" turns on the exclusive right of possession to the premises (*Radaich v. Smith* (1959) 101 CLR 209; *The Wik Peoples v. Queensland* (1996) 71 ALJR 173; *Bruton v. London and Quadrant Housing Trust* 1999 3 AER 481). Although the definition of a "residential tenancy agreement" in section 6A(3) *Residential Tenancies Act 1997* expressly does not require an exclusive right of possession, prescribed term 53 *Residential Tenancies Act 1997* expressly confers an exclusive right of occupancy on a tenant under a residential tenancy agreement, and for that reason a residential tenancy agreement is also a "lease" at common law (*Estate of Tanya Humphries v. Commissioner for Housing* 2003 ACTSC 40; *Cohen-Hallaleh v. Cyril Rosenbaum Synagogue* [2003] NSWSC 395).

62. It may be that the legislature did not intend the word "lease" as it appears in section 94(6)(b) to include residential tenancy agreements. But the *Leases (Commercial and Retail) Act 2001* does use the term "lease" and hence presumably section 94(6)(b) was intended to apply to commercial and retail leases. In this event the tenants of commercial and retail lease would inherit the obligation under section 94(6)(b) to pay the abstraction charge. Assuming this to be the case, it is not immediately obvious to the Tribunal why the legislature would choose to impose the duty to pay the abstraction charge on a small commercial and retail tenants but not on a residential tenant.

63. There is an alternative interpretation to section 94(6)(b) which assumes that the drafts person has omitted to include the word "Crown" before the word "lease". The superficial attraction of this approach is that it relieves tenants in general from responsibility for the water abstraction charge, and putting para 94(6)(a) to one side, it provides a form of coherency in that the remaining paragraphs of s94(6) each deal with estates in land held from the Territory.

64. The problems with this approach are threefold:

    (a) It does require an assumption that there has been a drafting error and the reading into the statute of specific words:
    (b) As section 94(6) currently stands there is a coherence in the sense the "owner" is defined as being the party with the right to possession of the property as opposed to the party holding the legal title to the property. In the case of para (a) the party holding the fee simple has the right to possession subject to any lease. Para (b) then provides that if a lease exists pursuant to which the tenant takes the exclusive right to possession, then the charge for the water abstraction attached to them. The use of the term "lease" in para (b) is apt to catch both residential and commercial leases. Paras (c) and (d) then deal with tenancies and occupation agreement granted from the Territory which again confer on the tenant and the occupant the right to possession of the property.
    (c) If paragraph (b) is read as being limited to Crown leases only, then the seemingly anomalous situation arises in that the Territory in its capacity as a landlord is not responsible for the water abstraction charge, but a private landlord is responsible for the charge. Conversely, a tenant of the Territory is responsible for the charge but a tenant of a private landlord is not. It

> does not seem likely that the legislature intended to introduce such a bias into the market and to create horizontal inequity in this form.

65. The Tribunal understands that ActewAGL has a practice that all water accounts must be in the name of the lessor and not the tenant. Be this as it may, there does not appear to anything in the *Utilities Act 2000* to support this practice. To the contrary sections 17, 84, 92 and 94 lead to the conclusion that a tenant may apply for the supply of water and may be a customer under a standard customer contract. Not only does this appear to be the case but the effect of section 94 appears to impose on the tenant the responsibility of paying all charges raised under the standard customer contract.

66. The standard customer contract itself at clause 3.1 specifically envisages that a tenant may be the party to the standard contract and clause 6.2 of the standard contract imposes the obligation to pay the abstraction charge on the party to the standard customer contract.

67. The Tribunal finds it difficult to arrive at any consistent understanding of the above statutory provisions. What is clear is that either a lessor or a tenant can apply to ActewAGL for a water supply under a standard customer contract. Whoever makes this application is then a party to the standard customer contract and will thus inherit responsibility for all the charges lawfully levied for the water supply, including the abstraction charge.

68. What is not clear is the identity of the "consumer" referred to in section 4C *ICRC Act* and whether this consumer is synonymous with the customer who is the party to the standard customer contract with ActewAGL. It is also not clear how this all applies in the present circumstances where the lessor made the application for the water supply and as such is the party to the standard customer contract albeit the tenant has the status of a "customer" as well. In particular section 94 then raises the spectre that the lessor is the party to the standard contract but the tenant has a statutory obligation to pay for the charges under the standard contract.

69. There does not appear to be anything in the *Utilities Act 2000* that expressly permits the lessor to pass on this cost to the tenant as the ultimate "consumer".

70. The state of the above legislative scheme is so unclear as to warrant the attention of the Legislative Assembly to make clear to the community who is responsible for what charges.

71. If a proper reading of the above legislative scheme produces the result that only the lessor is the party to the standard contract, and is the only party directly responsible to ActewAGL for the payment of the abstraction charge, then the issue becomes which of prescribed terms 44 and 46 *Residential Tenancies Act 1997* applies. If prescribed term 44 applies then the lessor is left with responsibility for the abstraction charge. If prescribed term 46 applies then the tenant is responsible for the abstraction charge.

72. If a proper reading of the above legislative scheme produces the result that the tenant is directly responsible for the payment of the abstraction charge pursuant to

section 94 then it is not necessary to find any provision of the *Residential Tenancies Act 1997* which governs the imposition of liability or the right of the landlord to recover the abstraction charge from the tenant. In fact, in this case it seems that ActewAGL has no right to include the abstraction charge on the lessors account in the first instance and lessor's generally should may have paid the charge to ActewAGL under both a mistake of fact and law that would permit lessor's generally to recover the charges paid from ActewAGL. This just further highlights the need for legislative reform on the point.

73. Whilst the matter is far from clear, the Tribunal favours the approach most consistent with the common law of contract, namely that the party who applied to ActewAGL for the water service to the premises is the only true party to the standard customer contract and is therefore responsible for all charges levied under that contract. If the lessor applies for the water service then notwithstanding the terms of section 94, the obligation to pay those charges to ActewAGL under the contract rests on the lessor and not the tenant.

74. In this event the abstraction charge is a charge levied by ActewAGL as part of the cost of supplying the water albeit the charge is estimated in part by reference to consumption with a minimum amount payable even where no consumption occurs.

75. Turning to the issue raised at paragraph 69 above, namely which of prescribed terms 44 or 46 applies in the present case. Prescribed term 44 speaks of charges "associated with the supply" of water; whereas prescribed term 46 speaks of charges "associated with the consumption" of water. The terms "associated with" are vague and broad in nature. It could fairly be said that the abstraction charge is "associated with" both the supply and consumption of water. Obviously it is not possible to consume water that is not first supplied.

76. How does the Tribunal reconcile this second level of ambiguity now arising from the *Residential Tenancies Act 1997*. In terms of public policy considerations, it is not apparent that the public interest is better serve by imposing the abstraction charge on either the lessor or the tenant. There are considerations which favour both possibilities. The lessor may be better able to bear the cost and may be able to seek some tax deductibility for the cost. On the other hand it is tenant who is responsible for the environmental effects of consumption and to whom the environmental price signal is best addressed.

77. In short the Tribunal simply does not know what the legislature intended in the present context when it created the abstraction charge. Frankly the Tribunal suspects that the legislature also had no clear idea of its implications in the context of the present legislative schemes in the *Utilities Act 2000* and the *Residential Tenancies Act 1997*.

78. As the Tribunal is forced to come to some decision on the point, then the Tribunal falls back upon the principle of statutory interpretation that the *Residential Tenancies Act 1997* is a species of beneficial legislation designed to regulate the relationship between lessors and tenants, and further designed to provide a measure of security and protection to tenants from exploitation; and as such any

ambiguity should be resolved in favour of an interpretation that is most beneficial to the tenant.

79. Accordingly the Tribunal determines that prescribed term 44 applies and the abstraction charge is one for the lessor.

80. The issue of the network facilities tax is much clearer. Section 8 *Utilities (Network Facilities Tax) Act 2006* imposes on ActewAGL a "tax". The ICRC Declaration No 1 of 2006 made pursuant to section *4C ICRC Act* describes the network tax as being "a tax on a network facility on land in the ACT" and permits ActewAGL to pass on this cost to "consumers" of utility services. This then raises the same issue as above concerning who is the "consumer".

81. However, unlike the case of the abstraction charge, it is sufficiently clear to the Tribunal that the water network facility tax is a "tax" and accordingly prescribed term 42(a) applies and the lessor cannot pass on this tax to the tenant.

Conclusion:

82. The tenant is to pay the lessor the sum of $1609.16 being:
    (a) $97.14 for rent
    (b) $162.00 for carpet cleaning
    (c) $250.00 for damage to the kitchen cabinet
    (d) $311.22 for water consumption
    (e) $285.00 for repairs to locks
    (f) $200.00 for repair to the hole in the living room wall
    (g) $303.80 for repairs to the back door and bedroom door

83. The lessor is to pay the tenant the sum of $1195.90 being:
    (a) $160.60 of abstraction charges previously paid by the tenant
    (b) $15.30 for network facilities tax previously paid by the tenant
    (c) $1020.00 for breach of the duty to provide an exclusive right of occupancy

84. The tenant is not required to pay the outstanding water abstraction charge or the network facilities tax.

A. Anforth