

RENT ARREARS: Second chance

The Residential Tenancies Act 2010, which came into force last year, has changed the way that the Consumer, Trader and Tenancy Tribunal deals with rent arrears termination applications.

Previously there was nothing in the law to save a tenancy when rent arrears were paid after the Tribunal had made orders for termination. It was up to the landlord to decide whether they would allow the tenant to stay.

Now there are two types of termination orders for rent arrears. The new orders depend on whether the tenant has a history of rent arrears or not.

Now under s. 89(2) of the Act if a tenant pays the full amount of rent owing or enters into a payment plan which the landlord agrees to, at any time up until the sheriff comes, the termination order ceases to have effect. This only applies in cases where the tenant does not have a history of rent arrears.

If the tenant has a history of rent arrears, a landlord can apply for a termination order under s. 89(5). If a history of arrears is established the tenant may not be able to pay to stay.

If the landlord made the application under s.89(5), and they can show that the tenant has a history of frequently failing to pay their rent the Tribunal has no choice but to order termination, regardless of whether the tenant pays all of the rent owing or enters into a payment plan.

When s. 89 (5) first came into effect, there was a lot of discussion amongst tenant advocates about how the section would be applied by the Tribunal. We did not know how “frequently failed to pay rent” would be defined. There are now a number of cases available on the AUSTLII website (www.austlii.edu.au) which shows that the “pay to stay” provisions are not being interpreted consistently.

In *Bugden v Forayman* the landlord ticked the 89 (5) box on the application and the Member declined consider whether there had been frequent rent arrears and simply terminated the tenancy.

In *Dayal v Smith* the Member declined to activate 89 (5) despite finding that the tenant frequently failed to pay rent. The tenancy was not terminated and instead the parties were ordered to enter into a payment plan.

In *NSW Land and Housing Corporation v Ahmad* the tenancy was terminated under 89 (5). In this case the tenant was 15 weeks in arrears and had failed to comply with previous orders.

AND

In *Dang v Pham* the tenancy was terminated under 89 (5). The tenant was in arrears of 12 weeks. The member referred to the rent ledger to determine whether the tenant had frequently failed to pay rent.

NOTE: For more information on Terminations and Rent Arrears, refer to Tenants’ Union Factsheets numbers 5 and 10 available through our website www.tenantsrights.org.au or the Tenants Union website tenants.org.au.