

# **Housing Evictions in South Australia**

A Study of Bailiff-Assisted Evictions

by  
**Michele Slatter & Andrew Beer**

A study funded jointly by  
Flinders University, Adelaide  
and  
The South Australian Housing Trust



**FLINDERS  
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AUSTRALIA



**SOUTH AUSTRALIAN  
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## Foreword

I am pleased to write a foreword for this research paper: pleased because the paper contributes to the Ten Year Housing Plan, a process of policy development which it is my pleasure to Chair, and pleased because it is a notably clear and useful paper.

The first part of the paper contains an exceptionally clear description of the current private rental sector. Housing is a complex area so a clear exposition of one of its parts is particularly welcome. I, personally, found it enlightening and convincing.

The research was jointly sponsored by the Housing Trust and Flinders University. Both organisations should be pleased with the result. The University because this is clearly good and useful research and the Trust because its role is well described. The extent of the Trust's support of the private rental sector may not be widely understood but is detailed here.

The latter part of the paper describes the research and recommends change as a result of its findings. It is full of interest. Evictions, particularly forced evictions, are thoroughly distressing. By stepping back, the authors provide a cool look at the process, its legal workings and those involved in it. Sensible suggestions follow as to how the process might be improved, for instance, by encouraging private tenants to attend hearings with representation.

I strongly recommend this paper. It is an important contribution to understanding the housing sector at the present time - a time in which the sector is being re-examined, and a time when shortcomings in the sector are readily apparent.



Dr Judith Brine  
Chair of the Steering Group for the Ten-Year Housing Plan  
For the South Australian Government

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## **Introduction and Acknowledgments**

This study of bailiff-assisted evictions in South Australia looks at the way in which the South Australian law regulates eviction in the residential rental market. It presents a 'snapshot' of the 240 cases where bailiffs were called out during a three-month period in 2002. Using de-identified records complemented by selected interviews, it profiles the tenancies and outlines the realities of the current legal process. It also looks at the different roles played in the rental market by the South Australian Housing Trust and outlines the changing relationship between the public and private rental sectors.

The Study was funded jointly by the Flinders University, Adelaide and the South Australian Housing Trust through a University Industry Collaborative Research Grant, Grant Number 2001-0490.

In presenting this Report, we wish to acknowledge the major contribution of our Research Assistant, Ms Maria Scheffer, who was primarily responsible for collecting and collating the file data on which the study is based.

We are also most grateful to Mr Mark Bodycoat, Commissioner for Consumer Affairs; Ms Pat Patrick, Presiding Member of the Residential Tenancies Tribunal; Mr Brian Scholz, Manager, Tenancies Branch, Office of Consumer and Business Affairs and Ms Sharon Callaghan, Registrar of the Residential Tenancies Tribunal for their generous help and assistance. The staff of the Tribunal Support Section, Office of Consumer and Business Affairs were patient, helpful and very accommodating. Ms Mary Crearie, Director, Regional Services (Metro) of the South Australian Housing Trust was an excellent guide through Trust policies and procedures. She facilitated a constructive and rewarding dialogue between the research team and the Project Reference Group, whose contribution throughout the course of the Study we found especially valuable. Our colleague, Associate Professor Mark Israel, chaired the Stakeholder Workshop with characteristic energy and acumen. He and the participants at that session brought new insights to the closing stages of the Study and we much appreciate their help. A list of Reference Group members and Stakeholder Workshop participants appears as Appendix 1.

*M. S., A. B.*  
*Flinders University*  
*February 2003*

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## THE CONTEXT

### 1. A Time of Changes

#### 1.1 This Study

This *Study of Bailiff-Assisted Evictions in South Australia* looks at the way in which the South Australian law regulates eviction across the residential rental market. Using de-identified records complemented by selected interviews, it profiles the 240 tenancies that ended with bailiff-assisted eviction during a three-month period in 2002. It charts their location, duration, rent, dispute history and reason for ending and then compares the profiles of different market sectors. It outlines the realities and costs of the current legal process and points to changes in policy, practice and legislation which could promote further efficiencies for the State's rental market.

Bailiff-assisted eviction is the 'worst case scenario' for landlords, property managers and tenants. It is used in only two per cent of terminating tenancies. However, the law must provide for worst case scenarios and, for risk-management purposes, landlords and property managers need to be aware of the practicalities of worst cases. They need to appreciate accurately the costs that *may* be incurred. They benefit from information allowing them to predict the risk and manage their business accordingly. They also benefit from effective regulation. At a time when the private rental market is 'home' to more precarious tenancies than ever before, it is especially important that the regulation of the rental sector efficiently balances the legitimate needs of both parties, landlords and tenants. This Study is designed to throw some light on the practicalities of current regulation and their implications for the dynamic of the market.

The Study also looks at the roles played in the market by the South Australian Housing Trust (the Trust). The Trust is a major landlord in its own right but as this Report clearly shows, it also has a major role as gatekeeper to, and underwriter of, the private rental market in South Australia. The Study outlines the changing relationship between the public and private rental sectors and explores areas of common interest between them.

#### 1.2 Bailiff-Assisted Evictions

More and more Australian families rent their homes. In South Australia, a quarter of all households now rent. Because the public housing stock is decreasing, more low-income households than ever before are renting in the private rental market. Unlike homeownership, renting is inherently insecure. Either party can lawfully terminate the tenancy in certain circumstances if they observe the prescribed procedures. Eviction of the tenant is an inherent possibility in all tenancies.

'Eviction' means ousting a tenant from the rented premises. It reflects the landlord's decision: an eviction does not take place at the tenant's initiative. Under South Australian law, direct 'self-help' by the landlord is outlawed by the *Residential Tenancies Act 1995* (the Act). A landlord who wishes to lawfully evict a tenant from residential premises, in other words a landlord who wishes to make the tenant move out against their

will, must obtain an Order for possession from the Residential Tenancies Tribunal (the Tribunal). The Act details the circumstances in which such an Order may be available and prescribes the process which applicants must follow. Most applications are based on an allegation that the tenant has failed to fulfil their responsibilities under the lease, for example by not paying rent. The Act permits applications in other situations, including cases where there is no breach by the tenant, simply a desire of the landlord to retake control of the premises. However, these are comparatively rarely used.

If the Tribunal grants an Order for possession, it may be drafted to take effect immediately, without any conditions. Alternatively, it may be a 'conditional' or 'delayed' Order. These Orders include conditions that the tenant must satisfy to keep the tenancy alive, such as following a schedule of specified payments of rent and arrears on specified dates. If the tenant fails to do this, and the Order is a 'conditional' Order, the landlord will have an immediate right to possession without further reference to the Tribunal. If the Order is a 'delayed' Order and the tenant defaults, the landlord must apply again to the Tribunal before enforcing the tenant's departure.

A tenant who moves out in response to an Order for possession has been evicted. In most cases, once an Order for immediate possession is obtained, or a 'conditional' Order has been breached, the tenant will leave the premises without further formality. In a minority of cases, however, the tenant does not do this. In such cases, the landlord or manager can seek the assistance of a Tribunal-appointed bailiff to secure vacant possession by enforcing the Order. The bailiff goes to the rental property and ensures that the tenant moves out. Such 'bailiff-assisted evictions' are the very end of the Tribunal process. They are the focus of this Study.

### 1.3 Housing Policy: Changing Direction

Housing policy and practice in Australia in the period immediately after the Second World War had a dual focus: encouraging home purchase and providing public rental housing for working class men and their families (Paris, Stimson and Williams, 1985). Private rental housing became relatively less important after 1945 (Beer, 1993), and by the 1970s it had become a 'tenure of transition' (Kendig, 1981), generally for newly married couples saving a deposit for their first home and for waves of arriving immigrants.

Over the last two decades a variety of factors including economic restructuring, demographic change and developments within government policy and the labour market made access to home ownership and public rental housing more difficult (Badcock and Beer, 2000). During this period, both public and private rental sectors have been transformed. Wulff and Maher (1998) reported that 40 per cent of tenants in the private rental sector could be considered long-term tenants. They had been renting privately for a decade or more. At the same time, access to the public rental sector has contracted. The number of public rental dwellings has declined. Segmented waiting lists have been introduced, limiting access to State housing to those in greatest need. Significantly, Federal Government policy from the early 1990s onwards (National Housing Strategy, (NHS) 1992) placed greater emphasis on meeting the needs of low-income tenants through the private rental sector. This can be seen most clearly from shifts in funding.

Federal Government assistance to the private rental market through Commonwealth Rent Assistance now stands at approximately \$1.6 billion per annum, some \$700 million more than Federal finance for public rental housing through the Commonwealth State Housing Agreement (CSHA).

These changes have had profound implications for the management of State housing and private rental. There is now a greater proportion of vulnerable households within the private rental market. Increasing numbers of tenants are in 'housing stress': low-income households spending more than 25 per cent of their income on housing costs (NHS, 1992). The financial strain of housing stress coupled with other needs makes these tenancies very precarious. State Housing Authorities now have to focus on developing early intervention and coordinated service delivery to their own tenants to support and sustain successful tenancies among extremely vulnerable groups. They are also under greater pressure to assist low-income tenants living in private rental.

#### 1.4 The Trust: Changing Roles

For over a decade now Federal policy has trended away from the provision of housing by State Housing Authorities and towards the assistance of renters into the private rental market. The most conspicuous support for this trend has been the provision of Commonwealth Rent Assistance. It has been complemented by the Private Rental Assistance programs of the State Housing Authorities. These programs are funded under the CSHA and, like public housing, are designed to facilitate 'access to affordable, appropriate and secure housing for those on low incomes and those with special needs'.

Like all other State Housing Authorities, the Trust now has two roles: not only landlord of public housing but also underwriter of the private rental market. The Trust's significant role in assisting customers into private rental, and paying their debts as they leave, reflects the major shift that Federal policy has taken to prioritise the private rental market in recent years.

The other major change for the Trust has been its inclusion, since 1995, within the jurisdiction of the Residential Tenancies Tribunal, at a time when termination of tenancies generally has become much more contested.

#### 1.5 Regulation: Changing Law

South Australia was the first State to introduce residential tenancy legislation, doing so in 1978. Trust tenancies were not subject to the *Residential Tenancies Act* 1978. However, when the law was revised in 1995, some matters relating to Trust tenancies were brought within the jurisdiction of the Tribunal. Many problems in public tenancies that had previously been dealt with internally by the Housing Trust are now subject to public adjudication in the Tribunal under the *Residential Tenancies Act* 1995. This primarily affects the termination of tenancies, including evictions, which are now treated identically by the law in public housing and private rental.

## 1.6 Evictions: A Changing Trend

The Residential Tenancies Tribunal has exclusive jurisdiction in South Australia over residential tenancy disputes. In the period 1995-1999 the Tribunal's caseload almost doubled (Slatter *et al.*, 2000).

Currently, the Residential Tenancies Tribunal hears approximately 10,000 matters each year, of which about half relate to the termination of tenancies. The number of bailiff-assisted evictions has also been increasing dramatically. Bailiffs are called out about 1,000 times each year to enforce Tribunal Orders granting vacant possession. Thus, on average 20 times each week, or four times each working day, landlords, managers or the Trust contact the Tribunal and ask for the assistance of a bailiff in securing vacant possession of a house, flat or unit. In many instances an eviction will result in new demands on government-provided housing supports.

It should be emphasised that most tenancies do *not* end this way. The vast majority of tenancies run smoothly and do not require external intervention. The lease ends when its pre-arranged term expires or by agreement between the parties. The tenant moves out; the security bond is allocated as appropriate and the parties separate without dispute and without any need to approach the Tribunal.

In a small percentage of tenancies, however, both public and private, difficulties arise which are not amenable to negotiation or remedy. The Act is deployed to regain vacant possession for the landlord. Even in these cases, the tenants usually move out without needing the enforcement presence of a bailiff. However, in a very small minority of possessions the statutory process has to be pursued right through to the bitter end: eviction of the tenant with the assistance of a bailiff. For all parties, this is a 'worst case' scenario.

Evictions are not popular with either landlords or tenants. Some tenants dread the uncertainty of forced moves beyond their control. Others are vulnerable because they are in breach of their obligations. Some will see no alternative to seeking emergency accommodation followed by public rental. Landlords and property managers dislike evictions. They reflect failure. They are time-consuming and bothersome to achieve. They imply cost: from tenant default, periods of vacancy and the expenses of reletting. They are generally bad for business.

However, they are a predictable feature of the rental market. This is especially so in a tight market where a significant proportion of renters are in housing stress and may also have other social, health or welfare issues. While an increase in provision of low-cost housing is needed and strategies to secure this must be pursued, strategies to assist precarious renters successfully sustain their vulnerable tenancies, and avoid eviction, would also clearly benefit all parties, including the State.

## 2. South Australia's Rental Market

A quarter of South Australia's housing is rental accommodation. During the twelve months July 2000-June 2001 approximately 47,000 private and community tenancies ended (Office of Consumer and Business Affairs, (OCBA) 2001) and approximately 8,000 Trust tenancies (Trust, 2001a) ended. Of these 55,000 tenancies that came to an end in that twelve-month period, most ended without problem. The parties to them had no need to approach the South Australian Residential Tenancies Tribunal, whose jurisdiction includes evictions and the disputed termination of residential tenancies. However, 1,000 of the 55,000 tenancies ended with a bailiff-assisted eviction after litigation in the Tribunal. This Chapter describes the rental housing sector in South Australia and sketches the context for those 1,000 evictions.

### 2.1 Size and Composition of the Rental Market

The 2001 Census shows 145,689 rented dwellings in South Australia, constituting 24.9 per cent of all occupied private dwellings in the State (Australian Bureau of Statistics (ABS), 2002).

The three main providers of rental accommodation in the State may be broadly identified as: *private* landlords, whether individuals, companies or trusts; *community* landlords such as housing associations and housing co-operatives and, lastly, the *public* landlords, the South Australian Housing Trust and the Aboriginal Housing Authority. From publicly-available data (Trust, 2001a; South Australian Community Housing Authority, 2001), the rental sector at 30 June 2001 appeared to be shared predominantly between private landlords and the public landlords, with a very small percentage of accommodation being provided by community landlords. Table 2.1 indicates relative shares, as calculated from the sources identified above.

**Table 2.1 Landlord Type, South Australia, 2001**

<b>Landlord type</b>	<b>Properties</b>	<b>Per Cent of Sector</b>
<b>Private</b>	91,134	62.5
<b>Trust/Aboriginal Housing Authority</b>	51,251	35.2
<b>Community Housing</b>	3,304	2.3
<b>Total</b>	145,689	100.0

## 2.2 A Tight Market

South Australia, and in particular Adelaide, has experienced tight conditions within its rental market for some time. A 3 per cent vacancy rate is generally considered to reflect a market in balance. The vacancy rate locally has been under 3 per cent for most of the time since 1995. O'Dwyer (2002, pers comm) has suggested 6,000 new tenancies need to be generated per annum in order to sustain the supply of rental dwellings in Adelaide alone. Her research indicates that supply has fallen short of this target since the mid-1990s, and only Sydney, Melbourne and Brisbane have been able to attract sufficient rental investment to maintain the sector. A tight housing market clearly has implications for the incidence and characteristics of evictions. In a tight market:

- tenants may be less willing to leave their home once they fall into arrears, staying in occupation until obliged to leave by bailiff-assisted eviction, rather than leaving at, or in anticipation of, a Tribunal Order;
- evictees will find it more difficult to secure accommodation post-eviction, and will be more likely to call upon other sources of support – including, but not limited to, the government sector;
- landlords/property managers may be less forgiving of arrears of rent or other tenant defaults and may be quicker to move towards termination of the tenancy.

## 2.3 A Sketch of the Sector

### *2.3.1 Private Landlords*

Australia's residential rental market has been described as a 'disparate and fragmented "cottage industry"', dominated by small, non-professional landlords (Berry and Hall, 2001). Institutional investors do not play a perceptible role in the market. A 1997 survey by the Australian Bureau of Statistics showed most landlords in Australia to be couples or individuals, 76 per cent of whom had only one rental property, while another 16 per cent had only two properties (ABS, 1998). Almost 70 per cent of investors had a mortgage or loan held against their investment property. A substantial proportion (about 30 per cent) were 'accidental landlords': owners who, for example, were renting out their own former residence or an inherited property. Landlords' reasons for investing in rental property were diverse. Most stated that they were concerned to have a secure long-term investment and were looking primarily for capital gains. Some used negative gearing to reduce tax. Some intended to use the rental property as their own home in the future. Older landlords were more likely to see regular rental income as a priority. Berry and Hall emphasised that 'non-economic concerns with "bricks and mortar security" or the emotional attachment to their dwellings' could override a purely economic/efficient approach to managing properties for small-scale private landlords. They also remarked on the 'low barriers to entry and frequent movement – of investors and dwellings – into and out of the market' (Berry and Hall, 2001). The most-quoted reason for selling rental properties, mentioned by 23 per cent of landlords, was to produce funds for family or business needs. However, the work and worry involved in rental investment were identified by 16 per cent of sellers as the reason for selling; this group tended to have lower median weekly incomes than their peers (ABS, 1998).

The South Australian market reflects these broad patterns. Institutional investment plays no significant role locally. Statistics provided to the researchers by the Department of Human Services using data from the Office of Consumer and Business Affairs show that landlords are predominantly small investors, 73 per cent of whom own only one rental property with a further 14 per cent owning two properties.

South Australian landlords have expressed concerns regarding the risks of their investment. Of particular relevance to this study are concerns about the need for more expeditious ways of resolving disputes with tenants (Kupke, pers.comm 2002; Hugo *et al.*, 2000). South Australian landlords have also remarked on changes in the tenant group in recent years, especially the increase in tenants with multiple and/or complex needs and the additional property management demands that these changes bring (Hugo *et al.*, 2000). The Landlords' Association of South Australia Inc is the principal industry body for private landlords. It has approximately 500 members. It provides a point of contact with other agencies and is a source of peer advice and professional development for its members.

The supply side of the private rental market locally therefore appears to be fragmented and individualistic. It comprises numerous small investors. Beyond the minority who are members of the Landlords' Association, they are hard to address as a group. Their motivations and concerns are diverse and their involvement with their properties may be similarly varied. As discussed below, they appear increasingly to be turning to professional property managers to look after their rental properties. Decisions about entering and leaving the market, investing and disinvesting in residential property in South Australia, may therefore continue to be 'amateur' or even 'accidental' decisions. The day-to-day management of most tenancies in the State, however, is no longer the hands-on task of the owners but has become the responsibility of their professional agents.

### *2.3.2 Property Managers*

Over 73 per cent of private rental tenancies in South Australia are currently managed by professional property managers. Statistics supplied to the researchers by the Research and Analysis Unit of the Department of Human Services, based on Office of Consumer and Business Affairs data, indicate a steady rise in the proportion of bonds lodged by agents since 1995 to the current level of 70 per cent. The extensive use of property managers by private landlords should be borne in mind when discussing the supply side of the market. Despite the 'cottage industry' tag, it is not an 'amateur' enterprise in practice.

Most property management is undertaken by real estate agents. Traditionally, residential rental management seems not to have been a large or prestige area of work for most firms and this was reflected by the pragmatic delegation of the work within offices. However, there are clear signs of increased professionalism in recent years. Two developments in particular highlight this.

First, although there is no formal licensing regime for property managers, employers have increasingly begun to require employees who work in this area to undergo relevant professional training. The Real Estate Institute of South Australia has responded by developing courses on property management that are heavily subscribed. It also

facilitates local participation in a nationally-based property management traineeship program (Harding, pers. comm., 2002).

A parallel development, that also emphasises the need for professional competence, is being encouraged by insurers' increased presence in the sector. Some landlords' insurance products introduced quite recently onto the South Australian market are only available to landlords who employ a professional property manager. This not only encourages the employment of property managers. It will also impact positively on professional standards. Failure to act promptly and competently could result in landlords' claims being declined by the insurers. This in turn could expose the manager and their firm to the risk of litigation from their client, the landlord. The incentive to acquire and maintain professional standards is obvious!

### *2.3.3 Insurers*

Landlords' insurance is not new: lenders and brokers have long marketed policies that offered building and contents cover. However, in the last five years other, more comprehensive, products have been developed and energetically marketed. Some are only available to landlords who employ a property manager. These are very attractive products. The cover includes loss of rent, as well as building, contents and public liability cover; the limits are generous and the premiums low (and, like managers' fees, are tax deductible for the landlord). All managers involved with these policies are individually trained by the insurers in the practicalities of the policies and, in particular, the need to observe the forms and processes of the *Residential Tenancies Act 1995*. Failure to act promptly and/or properly could be grounds for the insurers to refuse a claim (Scheer & Co., pers. comm., 2002). One company has been quoted as estimating that it covers 'almost 75 per cent of the South Australian market' (Scheer, 2002). If this is so, several trends can be anticipated:

- increasing professional management of private rental tenancies;
- rising standards of professional management;
- lower tolerance of tenants' breaches of tenancy, with prompt formal action taken;
- increasingly punctilious pursuit of lost rent and possibly of other expenses such as damage and cleaning costs in the Tribunal, over and above the limits of the security bond;
- ever-higher rates of representation of landlords by agents in the Tribunal.

### *2.3.4 The Trust: Gatekeeper and Underwriter of the Private Rental Market*

For over a decade now Federal policy has trended away from the provision of housing by State Housing Authorities and towards the assistance of renters into the private rental market. The most conspicuous evidence of the trend has been the decreased funding of State housing provision under successive CSHAs and the increased funding of Commonwealth Rent Assistance. Less conspicuous but no less significant has been the complementary spending of CSHA monies on Private Rental Assistance programs by the State Housing Authorities.

Through its Private Rental Assistance program, the Trust has been building a subtle role as an underwriter of the private rental market. Material provided to the researchers by the Trust shows that between 1995 and 2002 the Trust issued \$45.99 million in rental bond guarantees. This helped 106,306 low-income households rent homes in the private rental market. 82,853 of those tenancies had ended by June 2002, resulting in the release of bonds worth \$34.78 million. Almost half this sum, \$15.83 million, was paid out to private landlords who were awarded payments from the bonds as they were released. In the same period (1995-2002) the Trust also paid \$11.08 million in exceptional grants to customers for rent in arrears and rent in advance. Like the bond funding, this money is sourced from CSHA funds, designed to facilitate 'access to affordable, appropriate and secure housing for those on low incomes and those with special needs'. This significant exposure (\$46 million) and expenditure (\$27 million) illustrates the extent of the Trust's role in the private rental market. The fact that the Trust guarantees provided 27 per cent of all South Australian bonds during the year 2000-2001 (discussed in Chapter 4) further highlights the Trust's importance to the functioning of that market.

As Trust stocks reduce and Trust accommodation is targeted closely to those in 'greatest need', Trust customers have increasingly been forced to rely on the private rental market for housing for the medium or long-term. Trust assistance by means of bond guarantees can open the door to the private rental market for customers who would otherwise find it unaffordable. To be eligible for a bond guarantee, customers need to show that the rent will not exceed 65 per cent of income for singles or 55 per cent for couples. ('Housing stress' it may be recalled is present when more than 25 per cent of income is spent on basic housing costs (NHS, 1992)). Exceptional payments by the Trust for rent in advance or in arrears can 'rescue' faltering tenancies. These exceptional payments are technically grants: repayment is not required. Bond guarantees, however, are 'loans'. They ensure that private landlords have the same security from Trust customers as from other prospective tenants in case the tenancy fails (the equivalent of four weeks' rent towards arrears/damage/cleaning) so that Trust customers can compete for accommodation in the market. Where a bond is 'lost', paid, in whole or in part to the landlord at the end of the tenancy, the Trust customer accrues an equivalent debt to the Trust and, in principle, is not eligible for other Trust services until this is repaid. The Private Rental Assistance program thus casts the Trust in the facilitative role of gatekeeper to, and underwriter of, the State's private rental market. In later Chapters, the extent of Trust involvement and the vulnerabilities of Trust-assisted tenancies are considered.

### *2.3.5 The Trust as Landlord*

The South Australian Housing Trust has a long history of innovation in the provision of public housing (Marsden, 1986). It is currently operating within two major constraints: decreasing stock and declining income (from rents and from CSHA funds). In recent years, as the 2001 Triennial Review pointed out, social rental housing has increasingly been 'focused towards providing accessible and affordable social housing to households who would otherwise not readily be able to secure or maintain adequate and affordable accommodation' (Trust, 2001b).

The Trust's housing provision is highly targeted towards low-income households. For example, over half the customers allocated Trust housing in the period March 2000-March 2001 had weekly incomes of less than \$300 per week. Trust rents are pegged at 25

per cent of gross assessable household income, with rent rebates used to maintain the rent cap. At 30 June 2001, 84 per cent of all Trust tenants received a rent rebate, up from 74 per cent over the decade 1991-2001. Of new tenants provided with Trust housing in 2000-2001, 93 per cent were eligible for rebates (Trust, 2001b).

However, most Trust allocations are now made to customers with other issues in addition to affordability. The introduction of the housing reforms of March 2000 brought in the segmented waiting list, under which customers seeking Trust accommodation are classified into one of four categories of housing need, with Categories 1 and 2 being the most urgent and/or most needy 'priority' classes. Comparing allocations across the different systems, there has been a dramatic rise in 'priority' allocations. In 1995-96, 16 per cent of new allocations were 'priority' allocations. By 2000-2001, this figure had risen to 70 per cent of new allocations (Trust, 2001b).

The Triennial Review indicated that customers in Category 1 would probably be allocated Trust accommodation within 12 months. Category 2 customers' chances were less predictable but a majority could be housed by the Trust within 3-4 years. Category 3 accounted for 31 per cent of applicants but 84 per cent of the Trust's waiting list. Category 3 customers seeking housing in metropolitan Adelaide were likely to face extended waiting times. These are customers who have low incomes and few assets but who have not demonstrated any special needs. Category 4 comprises existing Trust tenants seeking a transfer.

In the management of its own tenancies, the Trust has now explicitly moved away from eviction wherever possible in favour of measures to promote sustainable tenancies. Instead of waiting until the tenancy situation is terminal, the Trust has actively focussed on early intervention and service coordination measures, strengthening linkages with support services to enable its tenants to maintain their tenancy and remain in their homes wherever possible. Where successful, this approach avoids the financial, social and personal costs to all parties that result from eviction.

#### *2.3.6 Trust Customers*

'Trust customers' include not only Trust tenants but also those on Trust waiting lists and those customers receiving other housing assistance from the Trust, such as bond guarantees to facilitate their accommodation in the private rental market.

The tighter focusing of Trust accommodation necessarily impacts on the private rental market. At June 2001, there were 25,000 customers on the Trust waiting list. Most of these customers will 'wait' in private rental, many for extended periods. Customers in Category 3 are most likely to spend extended periods in the private rental market, with some Category 2 applicants also renting privately for quite a while. Obviously, reclassification may occur as personal circumstances change. Trust figures show that 94 per cent of these customers were individuals and families on low incomes. The Trust waiting list at June 2001 also included: 26 per cent young people; 15 per cent people from a culturally and linguistically diverse background; 13 per cent people with a disability and smaller groups (under 10 per cent of the list in each case) of aged, homeless, people with mental health issues, survivors of domestic violence and indigenous people (Trust, 2001a). The Trust's Private Rental Assistance program may

assist these customers into the private rental market. However, it is highly probable that they will be in housing stress and may find their tenancies extremely difficult to sustain.

### 2.3.7 Private Rental Tenants

The increasing polarisation of income in Australia is evident in the private rental sector as elsewhere. If the public rental sector is becoming more tightly focused onto tenants with multiple and complex needs, as outlined above, the nature of the private rental sector is also changing. Commentators have remarked that it

is really two distinct sub-markets, a largish and relatively successful sector of choice for those who have adequate incomes and a sizeable low cost low income sector for those who cannot access anything more affordable or appropriate. (Hulse and Burke, 2000)

The first of these sub-markets is implicitly assumed in the existing legislation: capable, autonomous tenants seeking the flexibility and locational advantages that renting may offer them over purchasing. There is some evidence that this part of the market is growing: the abundance of inner-Adelaide apartments would suggest so. These tenants do not share the traditional stigma of tenancy and are seen by landlords as successful, fashionable, desirable tenants (Hugo *et al.*, 2000).

However, the lower end of the private rental market is under growing pressure, exacerbated by the reduction of Trust stock and a very tight market. Many will be Trust customers, as described above. Many private tenants are on low incomes and have relatively high housing costs. For example, at the 2001 Census there were 100,240 tenant households (public and private) in the Adelaide Statistical Division, and of these, just under 15,000 (14.9 per cent) experienced housing stress. That is, they were households in the bottom 40 per cent of the income distribution paying more than 25 per cent of household income on rent. Given the targeting of Trust accommodation and the policy of 'care in the community' for previously institutionalised patients, these households may well have other special needs or vulnerabilities in addition to meagre financial resources. They are a tenant group that is relatively new to private rental. Landlords and property managers have remarked on this change and on the tenancy management quandaries they face in attempting to strike a balance between their own legitimate business concerns and the tenants' legitimate needs (Hugo *et al.*, 2000). Inevitably, many of these tenants will have been assisted into the private rental market by means of a Trust bond guarantee.

### 2.3.8 The Legislation

South Australia was the first Australian jurisdiction to introduce residential tenancy legislation, with the *Residential Tenancies Act* 1978. It was introduced in response to a perceived 'urgent and pressing need to upgrade, modernise, consolidate and make accessible in one piece of legislation' the law governing residential tenancies (Duncan, 1977). The Act aimed primarily to protect the consumer (the tenant). All States and Territories now have such legislation. Although they differ in scope and in detail, the fundamental aims of all the Acts are similar.

The first South Australian Act was replaced by the current *Residential Tenancies Act* 1995. This extended the jurisdiction of the Tribunal to include some matters relating to Trust tenancies, in particular termination and eviction, which had not been subject to the

earlier Act. Other changes were relatively minor and the current Act broadly retains the original 1978 design.

Its principal features are:

- dispute resolution: a Residential Tenancies Tribunal, with provision for the ‘informal’ hearing of disputes without lawyers;
- education, research and information: the Commissioner for Consumer Affairs has responsibility for these functions with funds available, in principle, from interest on security bonds;
- security bonds: limited in amount and deposited with the Commissioner for the duration of the tenancy;
- repairs: a limited but clear landlord’s responsibility;
- excessive rents: can be challenged;
- termination and eviction: made subject to statutory process through the Residential Tenancies Tribunal;
- landlords retain the right to terminate ‘without cause’.

The intention of the legislation is that both parties should benefit from clear law, an appropriate balance of rights and an effective hearing and enforcement process.

#### *2.3.9 The Residential Tenancies Tribunal*

The Residential Tenancies Tribunal is a small claims court dedicated to tenancies, over which it has an exclusive jurisdiction. It is an independent quasi-judicial body, established outside the main body of South Australian courts. Tribunal Members are appointed for fixed terms by the Governor. Apart from the Presiding Member and Deputy Presiding Member, Tribunal Members are not required to be legally qualified, although in fact most current Members are. The Office of Consumer and Business Affairs provides Registry services for the Tribunal.

The Procedures of the Tribunal were intended to avoid cost and unnecessary formality and thus make the Tribunal accessible to parties. Settlement, rather than litigation of disputes, is encouraged by the Act. The Tribunal is empowered to hear applications ‘in such manner as (it) considers best suited to that purpose’ and is not bound by the rules of evidence but can inform itself about any matter relating to the proceedings ‘in such manner as it thinks fit’. In lawyers’ terms, this allows considerable flexibility and possible informality of process to the Tribunal. In principle, lawyers cannot be used by parties in Tribunal hearings. There is a similar ban on other professional representation. However, there is one major exception to this: landlords can, as of right, use a real estate agent to present their case. If one party uses a lawyer or agent, the other is entitled to use a lawyer.

The Tribunal is encouraged to hear and determine proceedings ‘wherever practicable within fourteen days after they are instituted and, where this is not practicable, as expeditiously as possible’. No filing fee is charged to any party.

The Tribunal has always been intended to provide landlords and tenants with a forum that is speedy, cheap, expert and ‘accessible’ in the broadest sense to all parties.

## THE STUDY

### 3. Purpose and Conduct of the Study

The private rental sector accommodates a growing number of Australian households and it is anticipated that the importance of this sector will continue to increase (Badcock and Beer, 2000). A number of commentators have argued that the growth of this sector has resulted in increasing stress, both for renting households and the legal-administrative system that supports and regulates private tenancies. Previous work by the researchers (Slatter *et al.*, 2000) found a rapid escalation in the number of tenancies in dispute (with cases before the Residential Tenancies Tribunal rising from 5,000 to over 10,000 per annum in five years) and a growing number of evictions. This earlier work found evidence to suggest that low-income tenants whose bonds had been paid by the South Australian Housing Trust appeared more likely to be evicted than other tenants in the private rental market. In many instances evicted tenants will then be forced to seek government housing assistance because they have been rendered homeless.

Bailiff-assisted eviction is the final possible stage of a possession action in the Residential Tenancies Tribunal. It is conspicuous. It is well and clearly documented. The file records of cases that end this way are easily retrieved and analysed, rendering information about the tenancy and about the Tribunal process. From a landlord or property manager's point of view, needing to pursue a case right through to bailiff-assisted eviction is the worst case scenario: the longest process; the greatest disruption; considerable work and expense; inevitable loss. For all these reasons, the researchers considered it an excellent focus of study.

#### 3.1 Aims of the Research

This research set out to answer a number of key questions:

- What are the characteristics of tenancies that end in bailiff-assisted eviction? Are tenancies that end in bailiff-assisted eviction more likely to be short or long-term tenancies? Are bailiff-assisted evictions concentrated in particular sections of the rental market? What are the triggers for eviction, and what are the respective roles of tenant, landlord and property manager?
- Are tenancies supported by a Trust bond guarantee disproportionately vulnerable to termination by bailiff-assisted eviction?
- How does each of the parties commonly involved in tenancies – tenant, landlord, real estate agent – interact with statutory regulation?
- How do the processes set out in the *Residential Tenancies Act* 1995 affect landlords and their likely participation in the private rental market?
- What are the implications for housing assistance providers of current eviction policies, with respect both to the cost of evictions and forward demand for public housing and rent assistance?

The research used the analysis of administrative data collected from the Tenancies Branch, Office of Consumer and Business Affairs, as well as the case records of evictions

held by the Residential Tenancies Tribunal, to consider these issues. The research constitutes the first step toward developing a more robust understanding of the causes, consequences and dynamics of rental evictions in South Australia.

### 3.2 Methodology

This research has included a number of elements. A literature review was undertaken focussing on: the private rental sector in Australia; mechanisms for the regulation of residential tenancies; and eviction processes. The literature review built upon work already completed by the researchers and informed the data collection phase of the research.

The collection of data from the Residential Tenancies Tribunal was the central component of the research project. For a three-month period – April to June 2002 – all requests for bailiff-assistance at evictions were logged and the relevant Tribunal files retrieved. The file for each bailiff-assisted eviction was reviewed. There were 240 bailiff-assisted evictions during this period. From the file, a confidentialised record was generated that traced: the history of each tenancy, the reasons an action was initiated in the Tribunal, amounts owed to both tenant and landlord, the likely disposition of the bond, the location of the tenancy and participation in the Tribunal process by all parties. Specifically, data were collected on:

- Postcode
- Tenancy type (periodic, fixed term etc)
- Bond
- Trust Bond Guarantee
- Weekly Rent
- Type of Landlord
- Date Tenancy Commenced
- Which Party was the Applicant
- History of Previous Actions
- Landlord Present at Hearing
- Landlord Contacted Tribunal
- Manager/agent at Hearing
- Manager/agent Contacted Tribunal
- Tenant at Hearing
- Tenant Contacted Tribunal
- Tenant Advocate at Hearing
- Tenant Advocate Contacted Tribunal
- Interpreter at Hearing
- Notice to Remedy
- Debt at Notice to Remedy
- Number of Days, Notice to Remedy to Lodgement
- Location of Hearing
- Order Sought
- Order Granted

- Number of Days, Order to Possession
- Number of Days' Grace, Hearing to Possession
- Number of Days, Notice to Possession
- Length of Tenancy (Months)
- Date for Bailiff Assistance
- Number of Days' Grace, Possession to Bailiff
- Apparent Value of Bond to Landlord
- Apparent Value of Bond to Tenant
- Outstanding Debt on Order
- Additional Amounts Owing.

Each file for the autumn 2002 quarter was inspected and the fields of information outlined above were recorded. In some instances – such as length of tenancy – the values were calculated using the data within the file. A narrative was also recorded where there was significant history evident within the files. Once recorded, the data were input into an Excel spreadsheet and then imported into SPSS for analysis.

The third phase of the research involved interviews with key actors/stakeholders. This included officers within the Trust who handle evictions, as well as those who assist persons seeking emergency accommodation. Officers of the Tribunal were interviewed, as were representatives of non-government organisations who provide emergency accommodation and/or support for those on low incomes. The research included interviews with landlords and landlord organisations.

The methods employed through this research were developed to provide robust evidence of the eviction process in South Australia, its impacts and policy implications. However, it is important to recognise the limitations within this methodology. The research did not include contact with evictees, nor did we interview the bailiffs who undertake these evictions.

## THE FINDINGS

### 4. The Tenancies

#### 4.1 Bonds Lodged

On 30 June 2001 the Tenancies Branch of the Office of Consumer and Business Affairs held 83,539 residential security bonds, pursuant to Sections 61 and 62 of the *Residential Tenancies Act* 1995 (OCBA, 2001). The Act limits the amount of bond that can be demanded and requires that any bond taken is lodged with the Tenancies Branch of the Office of Consumer and Business Affairs. Security bonds are not taken by the Trust. The number of bonds recorded therefore indicates the number of non-Trust, largely private rental, tenancies operating under the Act on the specified date. Earlier research found a high degree of convergence between Census counts of non-Trust tenancies and bond data enumerations (Beer and O'Dwyer, 2000).

South Australia's tenancies can be further disaggregated into bonds provided by tenants on the one hand and bond guarantees provided by the Trust on the other (Table 4.1).

**Table 4.1 Source of Bond, South Australia, 2001**

<b>Total Bonds</b>	<b>Tenant Provided</b>	<b>%</b>	<b>Trust Provided</b>	<b>%</b>
83,539	60,730	72.7	22,809	27.3

The Trust provides just over 27 per cent of all bonds within the private rental market. More significantly, the public sector supported 77,364 tenancies in South Australia in 2001, either via direct provision of accommodation through the Trust or community housing, or through the provision of bonds. This figure exceeds the 60,730 tenancies where the public sector had no role, thereby highlighting the critical importance of government support in meeting the accommodation needs of low-income households.

It is also important to note that the number of private rental households assisted by the Trust is 45 per cent of the number of households assisted through conventional public rental housing.

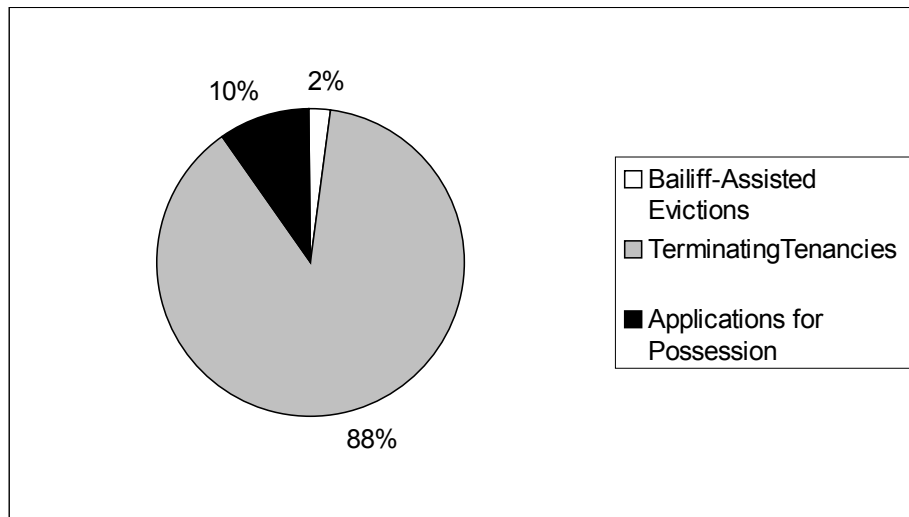
#### 4.2 Residential Tenancies Tribunal Caseload

In the year to 30 June 2001, there were 7,593 hearings in the Residential Tenancies Tribunal, of which 5,546 appear to be applications for possession (OCBA, 2001). In the same year there were approximately 1,000 bailiff-assisted evictions.

During the same period, Office of Consumer and Business Affairs records indicate that 47,000 private tenancies ended (OCBA, 2001) and Trust records show that approximately 8,000 Trust tenancies ended (Trust, 2001a), giving an overall total of 55,000 tenancies that ended during the year.

Hearings for possession Orders therefore occur in just 10 per cent of tenancy terminations. Bailiff-assisted evictions occur at the end less than two per cent of tenancies (Fig 4.1). The data suggests an effectively functioning rental market and regulatory system.

**Figure 4.1 Tenancy Terminations**



The picture, which emerges from these statistics, approximate as it must be because of problems of chronology, is that approximately 90 per cent of tenancies end without significant dispute and do not approach the Tribunal. Bailiff-assisted evictions appear to result from approximately 18 per cent of all possession actions heard, that is, from approximately two per cent of tenancy terminations overall.

#### 4.3 Bailiff-Assisted Evictions

Data provided to the researchers by the Office of Consumer and Business Affairs shows that numbers of bailiff-assisted evictions have been increasing in recent years to an apparent peak in 2000-01. However, despite this, in 2000-2001 they resulted from only 2.2 per cent of the 47,100 private rental tenancies that ended. During the same period, approximately 8,000 Trust tenancies ended: a bailiff was required in only 167 cases, or 2.1 per cent (Table 4.2).

**Table 4.2 Bailiff-Assisted Evictions, 1998-99 to 2000-01**

	<b>Total</b>	<b>Private Landlord</b>	<b>%</b>	<b>Trust</b>	<b>%</b>
1997-8	551	380	68.9	171	31.1
1998-9	790	546	69.1	244	30.9
1999-0	918	687	74.8	231	25.2
2000-01	1075	893	83.0	182	17.0
2001-02	1049	882	84.1	167	15.9

#### 4.4 Tenancies that End with Bailiff-Assisted Evictions

What are the characteristics of tenancies that end in bailiff-assisted eviction? Do any features seem to distinguish them as a group? This section examines some of the key attributes of the 240 tenancies that terminated in bailiff-assisted eviction between April and June 2002.

**Origin of Bond** Of the 240 tenancies in the Study, 42 were Trust tenancies, for which no bond is lodged. Of the remaining 198 tenancies, bonds were lodged for 179 and of those, 103 had Trust bond guarantees. Fully 58 per cent of the bonds in this study were provided by Trust bond guarantee. This is far in excess of the 27 per cent overall proportion of Trust bond guarantees suggested by the 2001 bond data (discussed in 4.1 above) and indicates that tenancies supported by Trust bond guarantees are disproportionately vulnerable to end in bailiff-assisted eviction. In addition to the trust tenancies, 19 other tenancies apparently had no bond lodged. The reasons for this are not explained but could simply be a failure to take or to lodge a bond at all.

**Table 4.3 Source of Bond, Study Evictions**

<b>Total Bonds</b>	<b>Trust Bonds</b>	<b>%</b>	<b>Private Bonds</b>	<b>%</b>
179	103	58.0	76	42.0

**Location** is a key factor within housing markets. Fully 89 per cent of evictions in this Study occurred in Adelaide (although only 75 per cent of the State's population live within the metropolitan area). Disaggregating the result according to Trust involvement, it is noticeable that the percentage was slightly higher (94 per cent) for evictees in receipt of a Trust guarantee, and lower for those evicted from a Trust property (81 per cent).

Within metropolitan Adelaide, bailiff-assisted evictions were concentrated within a handful of postcodes. Postcode 5113 (Elizabeth) accounted for 14 per cent of the total pool of evictions (34 cases), while 5.8 per cent of cases occurred in postcode 5108 (Salisbury North), 4.2 per cent in 5112 (Salisbury), and 3.3 per cent in 5114 (Elizabeth East). In total these four postcodes accounted for 27.5 per cent of all evictions in South Australia during the study period. It is also worth noting that these are areas that traditionally have had a strong Trust presence and where a substantial proportion of the public housing stock has now been sold. (Appendix 2)

**The landlords** of the tenancies under included all major landlord groups. Table 4.4 presents data on landlord type for all tenancies included within the study and shows those tenancies where the Trust had provided a bond guarantee and those tenancies where the Trust had not provided the bond. The data show that, for the total population included within the study, private individuals comprised 73 per cent of landlords, the Trust 17.5 per cent, companies 5.4 per cent, Co-operatives 1.4 per cent and Housing Associations 1.7 per cent. This pattern of ownership is consistent with the broader dimensions of the rental sector in South Australia. The Trust is somewhat under-represented amongst bailiff-assisted evictions, and this probably reflects its recent policy (in place since 2000) of minimising evictions in favour of adopting early intervention strategies to preserve

tenancies. Companies represent approximately 5 per cent of landlords in South Australia (O'Dwyer, 2002, pers. comm.) while Housing Associations and Charities are minor elements within the rental market.

**Table 4.4 Landlord Type**

	All Cases		Trust Bond		Private Bond	
	N	%	N	%	N	%
<b>Trust</b>	42	17.5				
<b>Private Individual</b>	175	72.9	92	89.3	83	87.4
<b>Company</b>	13	5.4	8	7.8	5	5.3
<b>Co-operative Housing</b>	3	1.3	2	1.9	3	3.2
<b>Housing Association</b>	4	1.7			2	2.1
<b>Other Charity</b>	3	1.3	1	1	2	2.1
<b>Total</b>	240	100.0	103	100.0	95	100.0

*Low rents* are a feature of these tenancies. Tenancies that ended in bailiff-assisted eviction were concentrated in the lower end of the rental market. Fully 81 per cent of tenancies ending in bailiff-assisted eviction had weekly rents of less than \$151 per week. There was even greater concentration in the low end of the market where the Trust had provided a bond: fully 85.4 per cent paid less than \$151 per week in rent. Rents were very low where the Trust was the landlord, with 47.4 per cent paying under \$100 per week in rent. In only two instances was a bailiff-assisted Trust tenant paying more than \$150 per week.

**Table 4.4 Weekly Rent in Categories by Bond Arrangement**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
<b>&gt;\$50</b>	6	2.5					6	15.8
<b>\$51-75</b>	13	5.5	2	1.9	6	6.3	5	13.2
<b>\$76-100</b>	39	16.5	17	16.5	15	15.8	7	18.4
<b>\$101-125</b>	66	28.0	37	35.9	18	18.9	11	28.9
<b>\$126-150</b>	68	28.8	32	31.1	29	30.5	7	18.4
<b>\$151-175</b>	25	10.8	11	10.7	13	13.7	1	2.6
<b>\$176-200</b>	14	5.9	3	2.9	10	10.5	1	2.6
<b>\$201-250</b>	3	1.3	1	1.0	2	2.1		
<b>&lt;\$250</b>	2	0.8			2	2.1		
<b>Total</b>	236	100.0	103	100.0	95	100.0	38	100.0

**Table 4.5 Median Bond, Rent and Length of Tenancy by Bond Arrangement**

	All Cases	Trust Bond	Private Bond	Trust Tenancy
Bond \$	520	500	550	
Rent \$	125	125	140	105
Length of Tenancy – Months	8	6	8	26

*The length of the tenancies* in this study was remarkably short. Table 4.5 presents data on the median bond, rent and length of tenancy. The first two rows again highlight the low rents amongst tenancies ending in bailiff-assisted eviction. The data on the average length of tenancy reveals an interesting pattern, with a median for all cases of eight months masking significant internal variation. The median length of a Trust tenancy ending in eviction was 26 months. Tenancies that did not involve the Trust as either landlord or bond-guarantor had a median of eight months while the median period to eviction for a tenancy supported by a Trust bond guarantee was just six months.

Each of these sub-groups deserves further consideration. It seems probable that Trust lettings had the longest average length of tenancy because a) the Trust is reluctant to evict tenants and provides opportunities for tenants to repay accrued debts; b) tenants would appreciate the low rents and security within a Trust tenancy and would go to some effort to preserve their tenancy.

Where the Trust neither provided the bond nor acted as the landlord, the median length of tenancy of eight months, at first sight, suggests that some tenants may simply not pay the final months' rent on a six month fixed-term tenancy in order to secure a rent-free period. However, our review of the time taken to process a claim through to bailiff-assisted eviction (discussed later in Chapter 6) makes this improbable.

Tenancies where the Trust had provided the bond lasted just under six months. This is a remarkably short period and suggests the Trust-backed tenancy is particularly vulnerable within the rental market. One explanation may be that tenants do not give the guarantee due regard because a public sector agency, rather than the tenants themselves, is carrying the risk. Alternatively, it may simply indicate that some very vulnerable tenants are now finding themselves in the private rental market while lacking the skills, abilities or finances to sustain a tenancy. Given the eligibility criteria for Trust bond guarantees, this is not surprising. The applicant must show, *inter alia*, that the rent in prospect will amount to between 40 per cent and 65 per cent of their income. Since housing stress is generally reckoned to exist if rental housing costs are more than 25 per cent of the income of low-income people (NHS, 1992), these applicants are, by definition, in extreme housing stress. This difficulty could be compounded by other issues for many Trust bond customers. For example, very young tenants, who constitute a significant proportion of the Trust's waiting list (Trust, 2001a) may have extremely limited life skills (Roland, 2000). Such tenants can fall out of the rental market and into eviction very quickly and easily. It is possible that many of these households could achieve successful tenancies if they had some preparation for tenancy before taking the lease and were then guided through the early months of their tenancy. Assisting them to succeed would not only reduce their housing problems; it would also minimise costs to private landlords and reduce calls on Trust accommodation.

## 5. The Tribunal Process: Who Participates?

‘Eviction’ is variously defined in legal reference works. In essence it is the permanent exclusion of the occupier by the landlord, who retakes possession of the premises. The exclusion is final and permanent. It is not initiated by the tenant. In South Australia, eviction from a residential tenancy is lawful only when an Order for possession has been obtained from the Residential Tenancies Tribunal. This applies equally to private landlords and to the Trust. ‘Direct action’ or ‘self help’ remedies by landlords are thus outlawed in favour of due process of law. In many cases the tenant will move out without more prompting when an Order is obtained by the landlord, or if an application is made to the Tribunal. In some cases, however, the Order may need to be enforced by a bailiff, who is an officer of the Tribunal. This is a ‘bailiff-assisted eviction’, the focus of this study.

When the Tribunal was established by the *Residential Tenancies Act 1978* it was hailed as a major improvement for landlords and tenants. Instead of a complex web of competing court jurisdictions that regulated residential tenancies, each one formal, costly, intimidating and slow, the Tribunal was designed to provide a forum that had exclusive jurisdiction over residential tenancy disputes and was speedy, cheap, expert and user-friendly. It was intended that both parties should be confident in approaching the Tribunal to enforce or defend their rights. The 1978 Act included provisions to encourage relatively informal and flexible procedures. It also encouraged the prompt dispatch of business. It ensured that lawyers would normally be barred from appearing. It did, however, permit professional property managers to appear as of right for landlords. There was no parallel provision in favour of tenants. When the opportunity was taken to revise the legislation, the Tribunal and its procedures were left substantially unchanged in the *Residential Tenancies Act 1995*.

This section reviews participation in the Tribunal process as evidenced in the Study. It raises questions about engagement with the Tribunal process and implicitly queries how far the original hopes for the Tribunal are being fulfilled.

### 5.1 Applicants: Landlords and Agents

As would be anticipated in a study of evictions, the 240 applications to the Tribunal were almost all initiated by or for landlords. Either the landlord or an agent on their behalf would have to appear for the hearing. The interesting issue is who precisely appears in Tribunal hearings to present the applicant’s case? Under the *Residential Tenancies Act 1995* Tribunal procedure is intended to be informal and not legalistic and professional assistance is generally not allowed in an attempt to avoid cost. Legal representation is barred. However, the Act does provide that landlords may be represented as of right in hearings by a real estate agent.

The overall findings on this point show that landlords in person appeared at the Tribunal in 32.5 per cent of cases and real estate agents appeared on their behalf at 67.1 per cent of hearings.

However, to obtain a full appreciation of the more complex reality, it is necessary to consider the findings in more detail. When the data are reviewed to show Trust tenancies separately, tenancies where the Trust provided a bond guarantee and tenancies where there was no involvement of the Trust (Table 5.1), the true extent of professional presentation of the landlord's case becomes apparent.

**Table 5.1 Landlord at Hearing by Bond Type**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
<b>Yes</b>	78	32.5	16	16.5	21	22.1	40	95.2
<b>No</b>	162	67.5	87	83.5	75	77.9	2	4.8
<b>Total</b>	240	100.0	103	100.0	95	100.0	42	100.0

*The Trust* always appears in its Tribunal actions through professional officers who can acquire experience and expertise through repeated appearances in the tribunal. They become experienced in Tribunal procedure, familiar with the Tribunal environment and practiced in presenting cases in that forum. This is reflected in the data. The two cases of Trust tenancies where the Trust did not appear as Applicant are s.90 applications against Trust tenants, where the Applicant was a third party 'interested person'.

*Private landlords* appeared in person in approximately 20 per cent of their cases, slightly fewer where there was a Trust bond guarantee and slightly more where there was a private bond. However, where the landlord did not appear in person, their application was professionally presented by their real estate agent/property manager (Table 5.2).

**Table 5.2 Agent at Hearing**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
<b>Yes</b>	161	67.1	86	83.5	74	77.9	-	-
<b>No</b>	79	32.9	16	16.5	21	22.1	-	-

*Agents* appeared in 83.5 per cent of cases where a Trust bond guarantee was in issue and in 77.9 per cent of cases supported by a private bond.

An analysis of bond data made available to the researchers by the Department of Human Services, indicates that real estate agents managed 73 per cent of all private tenancies known to the Office of Consumer and Business Affairs in the year to June 2001. Agents are, therefore, very slightly over-represented in the Study cases, particularly when a Trust guarantee is involved. It may be that agents are used more frequently for low and medium cost properties. Alternatively, they may pursue more intransigent policies on arrears. Whatever the cause, they too, like the Trust representatives, are professionals,

‘repeat players’ (Galanter, 1974) who appear frequently in the Tribunal process and are familiar with its requirements and with the Tribunal environment.

The picture from the data is of an overwhelmingly professional presentation of the landlords’ case in Tribunal hearings. Trust professionals appear for the Trust in all actions that it initiates. Professional property managers appear for approximately 80 per cent of private landlord applicants.

The role of agents in the residential tenancy market has been appreciated by the Office of Consumer and Business Affairs, who work regularly with the Real Estate Institute of South Australia on professional development exercises. This high degree of professionalisation should be borne in mind by policy makers too. It significantly modifies the ‘cottage industry’ stereotype of ‘amateur’ investor-landlords personally managing their one or two rental properties (ABS, 1998; Hugo *et al.*, 2000; Berry and Hall, 2001). Only about a quarter of South Australia’s private tenancies are managed by the landlord directly.

## 5.2 Tenants

If the tenant does not appear to defend the matter the Tribunal hearing will nevertheless go ahead.

Tenants appeared in only 25 per cent of cases overall.

**Table 5.3 Tenant at Hearing**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
<b>Yes</b>	60	25.0	22	23.2	24	23.3	14	33.3
<b>No</b>	180	75.0	73	76.8	79	76.7	28	66.7
<b>Total</b>	240	100.0	95	100.0	103	100.0	42	100.0

*Private rental tenants* appeared in 23 per cent of their cases, irrespective of the origin of their bond.

*Trust tenants* however appeared more frequently, participating in 33 per cent of their hearings. This may be attributable to the nature of the Trust’s pre-eviction process, which engages the tenant more effectively than process in the private sector. Alternatively it may result from increased knowledge and confidence engendered by exchanges of information and experience among Trust tenants; it may reflect longer and more settled tenancies or it may reflect desperation at the prospect of losing Trust housing.

Some 17.9 per cent of tenants made contact with the Tribunal outside the hearings, mostly to request an adjournment or to offer payment. This included a number of tenants who did not ultimately appear at the hearings.

This low degree of engagement with the process is disturbing, even if it echoes the experience of other jurisdictions (Tenants Union of Victoria, 1988; Ramsay, 2000). Given that tenants are faced with the imminent loss of their home, their failure to engage with the formal process can prejudice them further. In some cases landlords or agents, in the absence of the tenant, submit a repayment schedule that will preserve the tenancy if the payments are met and this is endorsed by the Tribunal by a ‘conditional’ or ‘delayed’ Order (discussed below in Chapter 6). In other cases, the landlord or agent may agree to an arrangement proposed by the Tribunal. Such strategies effect a reprieve for the tenant and delay the landlord’s repossession. In some cases, a conditional Order may have been the applicant’s desire all along, as it presents an immediately enforceable schedule of payments and keeps the tenancy under way. Without the tenant’s presence, however, it seems difficult to ensure that the arrangement is sustainable. In other cases, in the absence of any representations from or for the tenant, the Tribunal clearly has little choice other than to order immediate possession. Research in Victoria in 1988 indicated that the tenants’ chance of remaining in the premises increased ninefold if they appeared.

Reasons for tenants’ non-participation are beyond this study. However, it is surprising that in a State where over 150 languages other than English were recorded as being spoken at home (ABS, 2002) only three *interpreters* appeared in the study cases and all were acting for landlords. The Office of Consumer and Business Affairs presents introductory information about residential tenancies in a range of 11 languages other than English via its web site, with indications of how to find more information. However, all Tribunal documentation is in English.

It is also noticeable that a *tenant advocate* appeared in only one hearing. HASSA (Housing Advice and Support South Australia), is the only tenancy-specific agency in the State. Its remit does not include working with tenants in the private rental market. Its assistance is available to Trust and Community sector tenants only. It aims to support and empower public and community sector tenants so that they can avoid the need for a Tribunal hearing or can effectively present their own case. In exceptional situations HASSA will represent a tenant at the Tribunal. Since Trust and Community tenancies were at stake in 22 per cent of the cases recorded, further information on this aspect of tenant support is deserving of attention. These tenants include some of the most vulnerable people in the community and their need for assistance, including representation, seems highly likely. The professionalisation of the landlords’ appearance in the Tribunal evidenced above merely exacerbates the situation. The disequilibrium in capacity between the professional presentation of applicants’ cases and tenants’ absence or unaided presentation reflects a very real disparity between the parties. Representation by a person who is not a lawyer is permitted in certain circumstances by s.113 (3) of the *Residential Tenancies Act* 1995. Representation by a lawyer is permitted if the other party is represented by a lawyer or agent. The reality is, however, that the tenant is 75 per cent unlikely to attend at all. If they do, the expense of paying for a lawyer’s assistance will make this an impractical option. Lawyers in private practice correctly understand that residential tenancy work is unusual and likely to be for landlords. South Australia, alone among the States and Territories, has no tenants’ advisory and support service available to all tenants that might supply legal, para-legal or expert tenancy assistance in presenting their cases at no cost or low cost. In Victoria, tenants have a right to representation in any possession action.

Research elsewhere has demonstrated that a variety of factors may contribute to poor engagement by tenants with the eviction process. They include: the design of paperwork connected with hearings; tenants' poor coping skills; absence of clear directions to sources of support and assistance; inconvenient times and places for hearings and the failure of documents to arrive (Tenants Union of Victoria, 1988; Chamberlain and Johnson, 2000; Ramsay, 2000). These reflect shortcomings in the 'accessibility' of the Tribunal and the Tribunal process to its diverse client group. Many of these matters can be easily and cheaply modified to promote engagement. A recent report by Anglicare SA on poverty in South Australia highlighted the disempowering impact of poverty, draining energy and coping capacity from the poor (Metters, 2002). It also emphasised that written information alone is unlikely to equip people to protect or pursue their rights: face-to-face support and explanation is also necessary. While some tenants may have a cavalier attitude to eviction, there are indications that they are not the majority (Cossar *et al.*, 1977). Given the shelter and non-shelter impacts of eviction and of frequent enforced moves (Chamberlain and Johnson, 2000; McBrearty and Bradley, 2000; Crane and Warnes, 2000; Phibbs, 2001) the process needs to engage tenants more. Failure to do so will incur personal, social and financial costs to the people involved and across government.

### 5.3 Sites and Times of Hearings

Fully 90 per cent of the Residential Tenancies Tribunal hearings took place at the Pirie Street offices of the Tribunal in Adelaide. The remainder were heard in non-metropolitan centres.

All hearings were arranged during normal business hours, Monday to Friday, according to Tribunal practice.

The Tribunal conducts regular hearings at a number of regional centres around the State. It also uses video links for remote cases. However, apart from a period when hearings were held in Elizabeth, the Tribunal has not used other centres in the metropolitan area nor has it experimented with hearings outside normal office hours or at weekends.

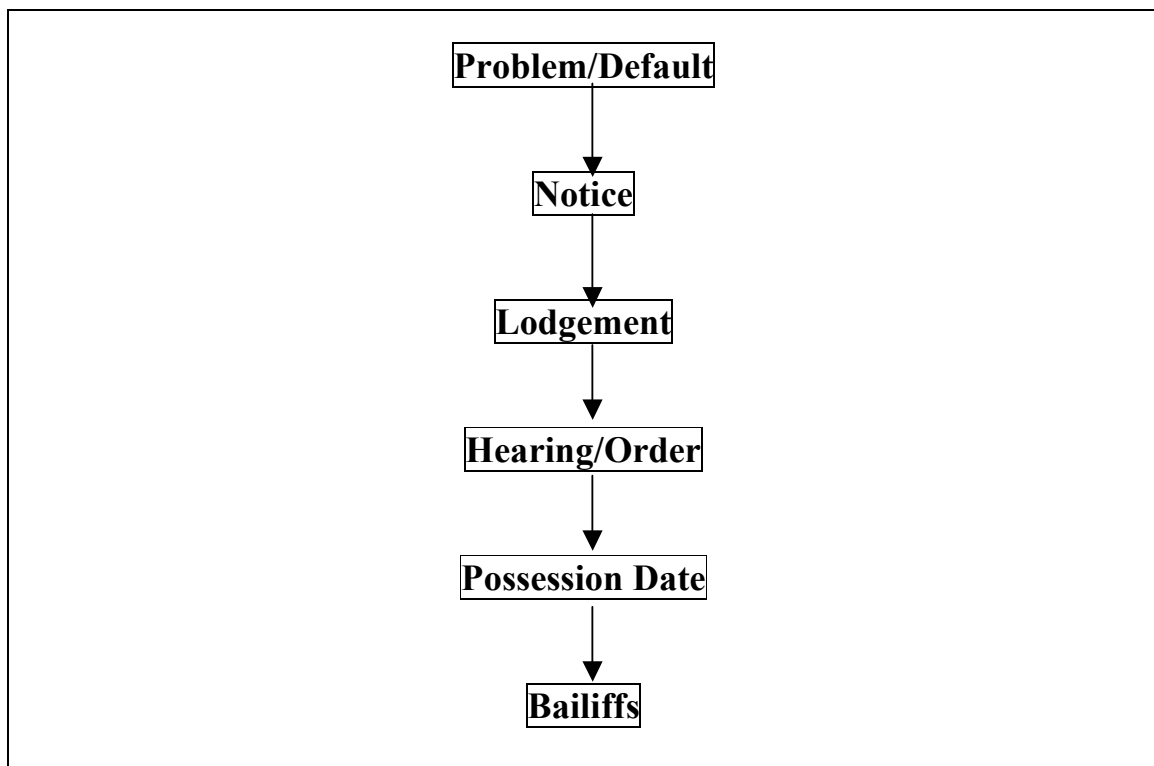
## 6. The Tribunal Process: Claims, Time and Cost

This section discusses the nature and causes of the disputes resulting in bailiff-assisted evictions; the history of disputes associated with these tenancies; the time taken by the Tribunal process and the costs that result. Process questions are an important part of the development of a robust evidence base around evictions, as the effectiveness of the process and the relative vulnerability of public sector tenancies determine the rate and potential impact of housing market regulation via the Residential Tenancies Tribunal.

### 6.1 The Process of Possession

The linear *aide memoire* (Fig. 6.1) below serves to highlight the main points of progress through a typical possession application.

**Figure 6.1 Linear Aide Memoire of the Eviction Process**



If *problems* arise in a residential tenancy, the advised good practice is for the parties to attempt to resolve them by discussion, negotiation or mediation. If these techniques fail, or are for some reason inappropriate, the landlord may institute formal proceedings in the Tribunal.

Usually, this requires *notice* to the tenant with an opportunity to remedy the problem before Tribunal process can begin.

If the default is not remedied, the landlord/property manager will *lodge* an application for vacant possession with the Tribunal.

A date for *hearing* will be set.

If the landlord's case is successful, an *Order* for possession will be granted. This may be immediate and unconditional, stating a date on which it will take effect. It will become operative on the given date and the landlord will then be entitled to vacant possession. Alternatively, the Order for possession may be subject to conditions: the landlord will only be entitled to vacant possession if the tenant fails to fulfil the conditions specified, such as making payments of arrears of rent in specified amounts on specified dates. In some cases, failure by the tenant will render the Order immediately enforceable without need for further Tribunal involvement (known technically as a 'conditional' Order). In other cases, ('delayed' Orders) the landlord will need to return to the Tribunal for an immediate possession date.

If the *possession date* arrives and the tenant has not moved out, the landlord/property manager is entitled to contact the Tribunal and ask for the assistance of a *bailiff* in enforcing the Tribunal's Order and securing vacant possession.

Bailiff-assisted evictions are the final possible stage of the Tribunal process. For private landlords, the cost of approximately \$125 each time is paid from the interest on tenants' security bond monies deposited with the Commissioner for Consumer Affairs. Evictions of Trust tenants are billed directly to the Trust.

## 6.2 The Claims

### 6.2.1 *Nature of the Dispute*

Around 90 per cent of disputes resulting in a bailiff-assisted eviction arose out of arrears of rent (Table 6.1). A further 4.3 per cent, or 10 cases, were based on 'behaviour' ('difficult and disruptive' tenants: s.90 *Residential Tenancies Act* 1995). These appear more frequently among Trust tenancies (16.7 per cent of Trust evictions) in this Study than among private rental tenancies. Other 'difficult and disruptive' cases were found in the private bond group, which is also where the 'emergency' cases were found, requiring urgent action because of damage or anticipated injury to the tenant themselves or to the premises or to other parties: s.87(2) *Residential Tenancies Act* 1995.

It is notable that 'arrears of rent' was the cause of 98 per cent of the Trust Bond tenancies in this Study coming to the Tribunal, and ultimately resulting in bailiff-assisted eviction.

**Table 6.1 Nature of Dispute by Bond Arrangement**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
<b>Arrears of rent</b>	215	90.9	99	98.0	83	91.6	29	69.0
<b>Pets</b>	1	.4	1	1.0				
<b>Safety</b>	3	1.31			3	3.2		
<b>Inappropriate Behaviour</b>	7	3.0			7	5.1	7	16.7
<b>Mixed</b>	2	.8			2	1.5	2	4.8
<b>Other</b>	9	3.8	1	1.0	4	4.2	4	9.5
<b>Total</b>	237	100.0		100.0	95	100.0	42	100.0

Experience in other jurisdictions shows that most possession actions are framed as arrears of rent claims (Tenants Union of Victoria, 1988; Ramsay, 2000). However, it may be misleading to take this at face value. Arrears claims are relatively straightforward to prove. Presentation as an arrears case may mask other problems arising in the tenancy.

#### *6.2.2 Existing Arrears when Application Lodged*

As most cases were based on arrears of rent, the files were examined to see how quickly formal action was begun in the Tribunal. How much in arrears was the tenant when action was begun? How patient were the landlords/agents? Notice may be served when the tenant is fourteen days in arrears. In most cases, action was formally begun when an amount more or less equal to the bond (approximately four weeks' rent) was in arrears. In other words, when twice the minimum amount of arrears had accrued on which action could be based. This period presumably saw discussion and negotiation between the parties, or possibly a period of silent hope.

#### *6.2.3 Orders Sought and Orders Granted*

In 87 per cent of the cases in this study (209 instances), the landlord or manager applied for an Order for immediate vacant possession of the premises. Orders for immediate vacant possession were granted in 109 cases, or 45 per cent of the total.

'Conditional' Orders were requested in 3.8 per cent of the applications lodged (9 cases), and granted 116 cases, or 48 per cent. 'Conditional' Orders include a schedule of conditions, usually stipulating the amount and date of payments to be made by the tenant. If the tenant misses any payment, the landlord will immediately have the right to possession and may call for a bailiff if required without needing to return for a further Tribunal Order. These Orders are an effective means of enforcing agreed arrangements between landlords and tenants and the Tribunal's experience is that landlords or agents who have formally applied for immediate possession may, in practice, suggest or accept a conditional Order as preferable. Where there is a chance of repayment, the conditional

Order is a means of keeping the tenancy under way and, at least temporarily, avoiding eviction and the costs of vacancy.

‘Delayed’ possession Orders were sought in 7 per cent of the study cases and granted in 4 per cent. These Orders resemble conditional Orders because they include a schedule of payments. However, failure to satisfy their conditions will not automatically and immediately entitle the landlord to possession. To lawfully regain possession a further Tribunal Order will be required, resulting in further delay and possible loss to the landlord.

The prevalence of conditional Orders means that many tenancies are ‘rescued’, at least temporarily, and tenants are given an opportunity to restore order to their rent payments. It is beyond the scope of this Study to investigate the ultimate destiny of tenancies in which conditional Orders were granted. As discussed below, a proportion of tenancies in the Study had been subject to such Orders prior to the case resulting in eviction. However, it is not possible in this Report to comment on their effectiveness. Nor is there clear data on the acceptability of conditional Orders to landlords or agents who have applied for immediate possession. It is possible that they are disappointed by the delay in possession that results. When so few tenants appear for hearings, some at least of the arrangements endorsed in conditional Orders may be precarious as the tenant’s circumstances will be uncertain. Strategically, however, an applicant may apply for immediate possession knowing that this will allow some room for manoeuvre and negotiation whereas applications for conditional Orders, although possible, are more tactically restrictive. For this reason landlords and agents may prefer (and may be advised) to keep their options open by asking for immediate possession. They can then negotiate an arrangement during or before the Tribunal hearing that is embodied in an Order and consequently easy to enforce.

#### *6.2.4 Previous Actions on these Tenancies*

The files were examined to disclose the histories of the tenancies in the Study, to see what proportion had been subject to previous Tribunal claims. Just over one-third (35.4 per cent) had been the subject of previous actions in the Tribunal. Of these, the vast majority (88.2 per cent) had been the subject of one or two hearings and those had also been for arrears of rent. Others had been before the Tribunal more frequently.

Over one-third of these cases, therefore, had a history of precarious rent payment. Given the short duration of many tenancies in the study (discussed above in Chapter 4) it seems that a substantial proportion of them were chronically unstable from an early stage.

### 6.3 How Long Did Cases Take?

#### *6.3.1 The Timetable in the Act*

The *Residential Tenancies Act 1995* provides a process for managing defaulting tenancies while maintaining due process of law. It establishes the maximum bond that a landlord may demand to cover loss. Larger bonds may be accepted if offered but cannot be required. For all the tenancies featured in this Study the maximum permissible bond was 4 weeks’ rent: s.61.

The Act also prescribes a timetable for action in the Residential Tenancies Tribunal. In cases of arrears of rent, the landlord may serve notice of termination when the rent is 14 days in arrears: s.80 (2). The notice must give the tenant at least seven days to remedy the default: s.80 (1). The tenancy may terminate after that time if the arrears have not been paid. If the tenant does not move out voluntarily as a result of these developments, the landlord may then lodge an application in the Tribunal for an Order for possession to authorise retaking possession of the premises: s.93. This is the only lawful means of regaining possession of properties covered by the Act; other means such as direct action are forbidden: s.95.

Once proceedings have been begun, the Act imposes a rhetorical duty on the Tribunal to 'hear and determine proceedings within 14 days ... and, if that is not practicable, as expeditiously as possible': s.21.

Outlined in this way, the timetable of the Act reveals a fundamental problem. Assuming the tenant pays no rent having once fallen into arrears, three weeks' bond has already been accounted for before lodgement of proceedings. Only one weeks' bond is left to cover losses during the remaining period of process. If the permitted bond is to cover the rent lost, let alone any other claims such as cleaning or water charges, the Tribunal must hear and determine the case and make an Order for possession which will have effect within seven days of lodgement.

This is clearly not the expectation of the Act. Not only is 14 days 'allowed' from lodgement to hearing (which is usually the date of the Order too), but there is also power in s.93 (2) for the Tribunal to order possession up to seven days after the date of the Order. The statutory framework appears, on this reading, to contain a designed dislocation of at least two weeks between the permitted bond of four weeks' rent and the timetable for the formal process of termination and possession which seems to be based on six weeks.

### 6.3.2 How Many 'Days' in a 'Week'?

Further difficulties arise from the wording and interpretation of the Act, which measures time variously in 'weeks' (bond) and 'days' (notice periods; arrears of rent; hearing timetable; delay for possession date). An assumption that one week equals seven days would allow for translation from one scale to the other. This seems to be used for notice periods. When checking that a landlord's notice of termination is valid, all days are counted: 14 days arrears and at least seven days to remedy. No allowance is made, or expected, for weekends or public holidays. 'Day' is given its normal and natural meaning in everyday English. This fits with measurement of the bond amount: 'four weeks' rent' is 28 days' rent.

However, Tribunal practice for its own process has been to treat 'day' as 'business day', following the approach of s. 27 of the *Acts Interpretation Act 1915* (SA). For example, aiming to meet the statutory expectation of hearings 'within 14 days' of lodgement, the Tribunal looks to 14 *business* days (that is: 18 'natural' days) as its benchmark (OCBA, 2001). This dislocates Tribunal process even further from the bond provisions.

Landlords have regularly complained of difficulties with the residential tenancies legislation (Hugo *et al.*, 2000; Kemeny, 2001; Gore, 2001). They claim that inherent

drafting anomalies ensure that they will suffer net loss if a tenant defaults on rent and remains in possession throughout the statutory process. The landlords arguments appear to be correct and are supported by our analysis of the eviction process and eviction outcomes.

### *6.3.3 Days of Grace and Non-working Days*

Although cases going right through to bailiff-assisted eviction are a small percentage of all termination cases and a tiny proportion of all tenancies that end, the statutory scheme is designed to address them. In this section we examine the time it takes to follow the statutory process through to eviction. In calculating the duration of cases, we looked to see how the skeletal statutory framework was extended by non-working days and by what we have termed ‘days of grace’: delays of the landlord/agent or the Tribunal in moving to the next stage of the process. These can occur at any point. The more days of grace or non-working days that accumulate in the process, the further it is from completion in ‘four weeks’ and the greater the landlord’s loss as a result.

In the account below, ‘day’ is given its normal and natural meaning, with seven ‘days’ to a ‘week’.

### *6.3.4 From Default to Notice*

As mentioned above, most actions are formally initiated when the arrears are already equal to the bond. This is two weeks after the statutory ‘trigger’ point of 14 days arrears. This could be because of attempted negotiation, pure optimism or simple inefficiency. Whatever the cause, it will increase the landlord’s loss on the tenancy if the tenant does not move out before the bailiff is called.

### *6.3.5 Lodgement*

There were delays in lodging in 71.3 per cent of cases. Generally landlords and agents moved fairly promptly. Over half the cases were lodged with the Tribunal within five days of the first possible day. In most of these cases (58.3 per cent of the total) the delay was at least partly attributable to ‘non-working days’, a weekend or holiday intervening, which made it impossible to lodge at the Tribunal. Some 95 per cent of cases had been formally lodged within 18 days of the first opportunity.

### *6.3.6 Lodgement to Hearing*

Some 63 per cent of cases were heard within seven days of lodgement; 78.2 per cent were heard within 14 days of lodgement; 90.3 per cent were heard within 18 days of lodgement. Again, most cases, 96.3 per cent, were extended at this point by the intrusion of non-working days. It may be noted that the Trust tenancies in this Study took noticeably longer to reach a hearing than did private tenancies although there is no obvious explanation for this.

### *6.3.7 Hearing to Possession*

In 47.5 per cent of cases, there was a delay ordered between the date of the hearing and the date for which possession was granted. Fourteen per cent of these delays were of five days or less; 95.6 per cent were of eight days or less, as would be expected from s. 93 (3), permitting a seven day delay. Non-working days were a feature of 111 out of the 114 cases in question.

The final amount owing between the parties cannot necessarily be ascertained from the possession case details. Where an Applicant seeks a possession Order only, the Tribunal usually drafts its Order accordingly, not least to ensure that the tenant has had due notice of all claims. Issues relating to the precise amount of rent finally owed are addressed in separate proceedings later, together with claims relating to cleaning or damage costs, water charges and any other outstanding debt. At this later stage all evidence as to costs and alleged debt can be brought forward. While landlords may simply claim the bond and write off other losses, those who are insured may need to pursue the outstanding amount before claiming against their policy. If landlords' insurance continues to be successfully marketed across the sector the Tribunal should anticipate more actions of this sort.

#### *6.3.8 Possession to Eviction*

In 91 cases, 37.9 per cent of the total, the bailiffs were called after the date of possession in the Order. In half of these cases the delay was of three days or less; in 90 per cent of them the delay was nine days or less. The Tribunal will question any request for bailiff-assistance made after 'undue' delay. The remaining ten per cent of cases, where the delay from possession date to bailiff attendance exceeded nine days, included cases where there were appeals to the District Court and cases of hardship, where an extended period had been allowed to the tenant to remain before eviction.

#### 6.4 Effect of Days of Grace

As discussed above, almost all cases were extended by 'days of grace'. Most actions were not formally initiated until the debt equalled the amount of the bond. Relatively small delays then arose in most cases from the failure by landlord/agent/Tribunal to work through the statutory timetable with punctilious and literal promptness.

Some 'days of grace' resulted from 'non-working days': weekends and public holidays. Under current practice no progress can be made in the Tribunal during such periods, although they are not factored into the calculation of notices in South Australia, unlike, for example, Victoria. Study data indicate that in the cases in the Study, 223 of the 227 cases dealing with matters other than 'behaviour' were extended by non-working days and almost half the cases (46 per cent) included up to 13 non-working days. 'Behaviour' cases were dealt with as 'urgent' or 'emergency' cases and processed extremely promptly.

Delay, whatever its origin, will result in cost to the landlord. The bond is limited to a maximum of 'four weeks' rent'. This is the only security permitted by the Act to cover any costs arising from the tenancy, such as arrears of rent, cleaning, repairs or water charges.

It appears that however the statutory timetable is interpreted, cases requiring the bailiff will result in loss to the landlord, unless they can move through the Tribunal from lodgement to possession in seven (real) days: possible for emergency cases but not statutorily encouraged in other cases. Service of notice of hearing, the exhortation to hear 'within fourteen days' and the possibility of granting up to seven days grace before possession all indicate a longer process. Some loss may be inevitable and may be seen as a business cost, to be managed through insurance or otherwise. Bailiff-assisted evictions

affect, after all, only a very small proportion of tenancies. It is timely however, to consider how the Act's provision on bonds and process should relate to each other.

The loss is regularly increased by any delay or departure from the Act's timetable by the landlord or agent; by the restriction of Tribunal process to normal business days and by the inclusion of 'humane' delay between Order and possession to allow the tenants time to move out.

Trust tenancies seem to accumulate more days of grace at each point in the process.

Table 6.2 captures key elements of the process issues showing the link between time and cost for landlords.

It would be possible for cases to progress more quickly through the Tribunal, especially if the understanding of '14 days' in the Act was changed to 14 'natural' days. Issues of notice to the tenant of the hearing and the matters raised need to be addressed: how long is required for due preparations to be made? Prompt action on behalf of the landlord or manager is obviously needed too. Without comprehensive revision however, the bond and the process will still not match so the review of the *Residential Tenancies Act 1995* provides a most opportune occasion to address this problem.

**Table 6.2 Process: Median Time and Cost by Bond Arrangement**

	<b>All Cases</b>	<b>Trust Bond</b>	<b>Private Bond</b>	<b>Trust Tenancy</b>
Days Lodgement to Hearing	11	11	10	16
Days of Grace, Possession to Bailiff	3	3	1	4
Outstanding Debt Minus Bond to Landlord	-153	-155	-145	
Bond Divided by Rent	4	4	4	4.11
Outstanding Debt Divided by Bond to Landlord	0.7	0.68	0.72	8.18
Bond Divided by Debt Outstanding	1.0	1.0	1.0	

### 6.5 The Cost

Data from this Study indicate that in 219 of the 240 cases the bond would not have been sufficient to cover the amount owing at the date the Order was granted. Virtually double the bond would have been needed to cover the loss on arrears of rent alone.

In at least 40 per cent of all cases a further sum in addition to this would have been necessary to recompense the loss of rent from the date of the Order to the date of possession.

None of the cases in the Study included claims for cleaning, water or damage. As explained above, such claims would be made in separate Tribunal applications after possession had been secured. All estimates of cost, or loss, to landlords should therefore be treated as conservative estimates. It should, however, be mentioned that interrogation of the case files disclosed no evidence in this sample of major damage claims additional to the arrears of rent on which most applications were based.

Table 6.3 shows the amount of loss differentiated by landlord type. This is the net loss to the landlord after the bond has been notionally repaid. The Table shows Trust tenancies resulted in the largest losses. Some 84 per cent of Trust tenancies in the Study resulted in a loss to the Trust of over \$1000. This relatively high level of debt reflects the longer duration of Trust tenancies in the Study compared with private tenancies. It also reflects the reluctance of the Trust to pursue eviction, preferring in recent years a policy of early intervention strategies and using eviction only where all other alternatives have been exhausted. It may be exacerbated by the impact of fraud, or at least apparent fraud, in some cases.

By contrast, only four per cent of private tenancies with a Trust bond and 20 per cent of private tenancies with private bonds resulted in losses of this magnitude. Private tenancies backed by Trust bonds resulted in generally lower losses to landlords: 47 per cent left with an outstanding debt of \$300 or less, compared with 33 per cent of tenancies with private bonds. This seems likely to be linked to their much shorter duration: lasting only six months on average they failed even more quickly than private tenancies with private bonds. Trust tenancies, on the other hand, lasted considerably longer with 26 months the median.

The relationship between Trust tenancy management practices, the amount of arrears outstanding after eviction and the housing career of tenants involved in these cases would repay further investigation by the Trust.

**Table 6.3 Outstanding Debt at Possession by Bond Arrangement**

	All Cases		Trust Bond		Private Bond		Trust as Landlord	
	N	%	N	%	N	%	N	%
\$100	18	8.2	10	10.2	8	9.0		
\$101-200	29	13.2	20	20.4	9	10.1		
\$201-300	26	11.9	16	16.3	10	11.2		
\$301-400	32	14.6	15	15.3	17	19.1		
\$401-500	29	13.2	15	15.3	14	15.7		
\$501-1,000	41	18.7	18	18.4	18	20.2	5	15.6
\$1,001-\$2,000	22	10.0	4	4.1	11	12.4	7	21.9
<\$2,000	22	10.0	-	-	2	2.2	20	62.5
Total	219	100.0	98	100.0	89	100.0	32	100.0

This Study has made extremely clear some structural problems in the *Residential Tenancies Act 1995* that face landlord and agents. The Act limits them in most cases to a maximum of four weeks' rent for their security bond. It is difficult to see how this amount could be increased, given the costs faced by tenants when establishing a tenancy and the extensive calls on the resources of the Trust. However, even if applicants pursue the statutory possession process with absolute, almost superhuman, promptness, the bond they have lodged will not cover the losses they will incur if bailiff-assisted eviction becomes necessary. In cases of rent arrears, which account for the vast majority of possession actions in the experience of the Tribunal, it is impossible to complete the statutory possession process within four weeks.

The issue is further complicated by the confusion over meaning: are all 'days' equal or are some 'days' more equal than others? Are non-working days to be ignored in calculations? At present the answer appears to be: 'sometimes but not always'. How many 'days' in a 'week'? It depends which section of the Act is in issue: sometimes seven, sometimes five, or fewer if there is a public holiday as well as a weekend. When some time limits are expressed in 'weeks' and others in 'days' this technical ambiguity is extraordinarily unhelpful (and costly). Given the absence of lawyers from Tribunal business generally, this is surely a context where the 'normal and natural meaning of the words' should prevail?

In this Study, private rental tenancies ending in bailiff-assisted eviction resulted in a net loss to the landlord (after repayment of the bond) more or less equivalent to the bond taken. This will be a conservative calculation, but it is a clear indication of the extent and nature of the problem.

The review of the *Residential Tenancies Act 1995* currently under way provides an ideal opportunity to examine further the various components of this problem and then take steps to correct them.

## 7. Tenancies and Evictions: Where to Now?

*The Local Impact of Federal Policy:* This Report has raised many issues in relation to the problems encountered when low income tenants come to rely upon the private rental market for their accommodation. It has demonstrated that Trust clients, helped by a Trust bond guarantee, enter into precarious tenancies in the private rental market. Tenants often stumble in meeting their rent and other commitments and tenancies may end in eviction in a very short time. When this happens, the tenants, the landlord and the people of South Australia – through the Trust - are all casualties.

Evictions are, in large measure, a consequence of current policy settings, especially at the national level. Federal policy has reduced funding under the Commonwealth State Housing Agreement with a consequent reduction in the stock of public rental dwellings in South Australia. Federal policy has also given pre-eminence to the private rental market. Current policies partly reflect an argument that it is better to give some, albeit limited, assistance to all tenants rather than favour a few within the public rental sector (NHS 1992). Reduced funding for the public housing sector, in combination with the reform of other human services such as psychiatric support, has removed an important safety net for the most vulnerable within Australian society. State Governments and State instrumentalities have been left to predict and address the consequences of an absence of affordable housing as best they can. They have attempted to meet this need with diminished resources. The very low incomes of many households, especially the recipients of statutory benefits, is part of the problem. The shortage of low-cost housing is a second challenge. Debate is flourishing around means of increasing the supply within (and outside) current policy settings. Until some practical solution to that fundamental problem is designed and implemented, many of the problems outlined here will remain. Strategies are needed, therefore, for the medium term to promote the more successful operation of the private rental market to reduce the damage to tenants, landlords and the Trust caused when tenancies fail.

Current South Australian initiatives such as the development of the State Housing Plan, the review of the *Residential Tenancies Act 1995* and the work of the Social Inclusion Board present opportunities to address the fundamental and the pragmatic issues.

*The changing role of State Housing Authorities.* There is a need to reconsider our understanding of the role of State Housing Authorities, such as the Trust. The Trust's growing role in facilitating access to the private rental market, made clear by this Study, must call for new skills, abilities and program focii.

Government policy more generally needs to focus on boosting the supply of affordable housing and ensuring that low-income households can enter and sustain tenancies within the rental stock. This might include a re-examination of income support levels, addressing policy traps and rewarding and reinforcing successful tenancies. There is also a role for further review of planning legislation and policies, as well as examining a direct role for local governments.

Additional research on the housing pathways of low-income tenants is needed to refine and develop effective responses for the new environment. The State Housing Plan –

currently in formulation and due for completion in mid 2003 – is an appropriate avenue for the consideration of these issues.

*The Trust.* In the seven financial years July 1995–June 2002, the Private Rental Assistance program of the Trust paid off customer debt to private landlords to the value of \$27 million. This was through bond guarantees paid out to landlords and exceptional needs payments to customers for rent in advance and rent in arrears.

Considered against the private rental sector as a whole, Trust-backed tenancies are particularly vulnerable to failure. Fully 58 per cent of the bonds in this Study were Trust guarantees, well in excess of the 27 per cent of Trust guarantees in the market as a whole. While the origin of this problem may lie with Federal policy, it is the Trust as State Housing Authority, that is faced with the need to develop efficient models of locally-appropriate response.

Bond guarantees are intended to ensure that private landlords have the same security from Trust customers as from other prospective tenants in case the tenancy fails (the equivalent of four weeks' rent towards arrears/damage/cleaning) so that Trust customers can compete for accommodation in the market. However, there is anecdotal evidence from the industry that for many landlords and property managers, a Trust bond guarantee is seen as a contra-indicator for eligibility, a sign of high risk. Since bond guarantees support over a quarter of South Australia's private rental tenancies, this is a very 'broad brush' indicator. The line between discrimination on the grounds of low income and necessary risk-assessment is a very fine one. However, developing support strategies for vulnerable tenancies could go some way to modifying the apparent stigma of the bond guarantee.

Given the close and significant involvement of the Trust with the State's private rental market, it is in the Trust's own interest as well as that of its customers and that of private landlords that customers' private rental tenancies are successful and sustainable.

At present, almost \$4 million per year is spent by the Trust on tenancy debts of its customers in the private rental market. The tenancies with bond guarantees in this Study were exceptionally short, with a median of just six months from beginning to eviction. CSHA money is thus being spent on ushering customers *in and out* of the private rental market. This does not 'solve' their accommodation problem; instead, it risks the non-shelter outcomes of frequent forced moves, which can instead exacerbate existing problems and create new difficulties for the tenants. In the short term, it can result in claims on emergency housing resources. In due course, the customers may return to the Trust, possibly now in greater housing need, seeking further assistance through another guarantee or housing provision. Their need may well be such that usual policies, which deny assistance to customers indebted to the Trust, are overridden. It is difficult to see how this sequence can be avoided without pro-active support to help tenants sustain the tenancies.

The Trust is already working to develop early intervention strategies for its own tenants to ensure 'Successful Tenancies'. Parallel support for customers in private rental should be explored in considering the efficiencies of the Private Rental Assistance Program.

Mentoring programs may be appropriate and support programs and independent living skills training linked to bond guarantee eligibility could be explored. Effective and timely linkages are being established between appropriate agencies and their benefits need to be made accessible to customers so that they can achieve successful tenancies. The Trust as referral agency, not provider, of support services is a role worth exploring further.

Increasingly it seems clear that customer-support is becoming as important as asset management to Trust business. This in turn highlights the need for training and development to ensure that professional personnel have appropriate knowledge, skills and expertise for this rapidly-evolving area of work. Housing management studies with a tenant support focus are still relatively rare in Australia. The Trust might look at working in partnership with other bodies, professional, community or educational, to consider how such training programs could be developed and delivered, capitalising on and expanding the existing pool of expertise.

*The Landlords.* At present the *Residential Tenancies Act 1995* is drafted and operates in such a way that it seems impossible for a landlord to pursue an arrears case through to eviction and not be out of pocket. The four weeks' bond permitted by the Act will not cover the initial arrears and further losses during the Tribunal process.

Although most tenancies do not require such action, this nevertheless indicates one area that should be addressed in the current review of the Act. Clearly, now that Federal policy has focused on the private rental market to house low-income Australians, it is vital that both parties, landlord and tenant, have confidence that rights and duties can be effectively enforced.

Practical considerations would seem to restrict increases in the amount of bond that can be taken. This Study has repeatedly emphasised the high degree of housing stress now found in the private rental market. To further increase establishment costs for those households that provide their own bond would merely compound their precarious state. To increase the exposure of the Trust by increasing the amount of each guarantee will merely result in fewer tenants accessing private rental. If the bond remains at four weeks' rent, it is the Tribunal process that must receive attention. This Report has commented at length in Chapter 6 on the timetable for Tribunal process. In redrafting the timetable, care must be taken to balance the interests of the parties and the requirements of due process.

The Study has thrown light on the extensive use of property managers by residential landlords in South Australia. Over 73 per cent of residential tenancies are managed professionally. This modifies considerably the 'amateur' image frequently attached to the sector. Opportunities for developing increasingly constructive management strategies could be explored with the professional bodies. If the nature of the private rental market has changed for the long-term, the management of low-cost private rental may need to be reconsidered. In the future it might be appropriate to consider how far property managers' professional responsibility does, or should, extend to the prevention of eviction.

The Study has also commented on the increase in landlords' insurance seen in the State in recent years. Some products are only available if a property manager is employed; others

are available to landlords who manage their own property. The role of insurance in this sector has not been explored at any length and would repay further investigation. Insurers have the capacity to improve and change standards of practice, especially among professionals.

*The Tenants:* Tenants and their experience of eviction lie mostly outside this study. Further research is clearly needed on their experience if the dynamics of the market are to be understood. Nevertheless, this Study has shown that they are not engaging with the Tribunal process. If early intervention strategies were deployed, involvement of the Tribunal could be reduced. It will not be eliminated. Tenant engagement must be improved. In other studies, active advocacy, redesign of paperwork, emphatic education campaigns and the efforts of one or more tenants' support and advocacy groups have been seen to improve engagement, promote sustainable tenancies, foster efficient dispute resolution and reduce evictions. South Australia is currently the only State or Territory not to have such a group established under the broad umbrella of Consumer Affairs. All these matters need attention and, again, the current review of the *Residential Tenancies Act 1995* provides an appropriate opportunity to address them.

*The Residential Tenancies Tribunal, Consumer Affairs and the Residential Tenancies Act 1995.* The current Review of the Act also presents an excellent opportunity to address some matters that this Study has been able to highlight.

Bailiff-assisted evictions, as reported in this Study, constitute only two per cent of tenancy terminations. The actual cost of bailiff attendance, approximately \$125.00 per call out, is paid from the interest on tenants' security bond money and is not charged to private landlords. This Study can only indicate the loss from arrears of rent to the date of the bailiff's arrival, and this may be conservative; other claims may be raised at a later point. However, landlords have a legitimate expectation that disputes are resolved as economically as possible and the review of the Act allows reform to be explored.

The Study has pointed to the absence of tenants from the Tribunal process. The changing nature of the private rental market needs to be actively borne in mind. This is not a problem unique to this State, nor to tenancy tribunals. The situation can be improved by following experience elsewhere and by more pro-actively recognising the diversity and needs of the most precarious groups within the sector. Appropriate information, advice and support from a tenant-focussed organisation is needed, as in all other States and Territories, if the market dysfunction which evictions represent is to be reduced. Tribunals in Victoria and New South Wales have established User Groups for consultation purposes, comprising members from all major stakeholders including landlords, managers and public and private sector tenants. This has facilitated direct discussion of matters and ensured that all points of view have been heard. The tribunals have reported positively on the contribution such groups can make. A similar step should be considered here.

The Study shows professional agents pleading the landlord's case in 80 per cent of applications with almost no tenant representation. Originally, small claims courts and tenancy tribunals were designed on the premise that avoiding lawyers and engaging both parties in person to present their own cases would promote access to justice and result in more satisfactory outcomes. Even if that premise were sound, circumstances have

changed for the Tribunal. The rental market has changed. The use of agents by landlords has increased steadily. Tenants are entitled to lawyer representation where an agent is used by the landlord but, as they are unlikely to be able to afford lawyers to assist them, this is an illusory right. The help of a tenant advocate/para professional supporter in preparing and presenting their case is appropriate to establish an equilibrium. As in other States, a tenants advice, support and advocacy organisation would be an obvious source of expertise for such help. It would also provide referral to inter-agency early intervention to encourage successful tenancies. Avoiding evictions is in the interests of the whole market.

Finally we need to restate that evictions are an outcome of the convergence of a number of processes. Shifts in Federal housing policy, changes in the nature of the labour market, developments within income support policy and movements within the housing market have all contributed to the growing reliance of low-income households on the private rental market and the rise in the number of evictions. Evictions are likely to remain an inescapable feature of South Australia's housing scene for the foreseeable future. It is not useful to blame one participant within the housing market or another: it would be simplistic to attempt to 'blame' evictions on 'irresponsible' tenants, 'greedy' landlords or on the policies of the South Australian Housing Trust. The challenge is to develop and implement policies that can best manage the negative impacts of evictions. What we need are policies that will reduce costs to landlords; support tenants in their housing; encourage the efficient operation of the private rental market; help residents be good tenants; and, policies that define a sustainable role for public agencies such as the Trust. Some of the steps that can be taken are outlined above, but others will only emerge from further research and further innovation in policy. The task facing governments is to recognise the importance of managing housing markets. Through the first decade of the 21<sup>st</sup> Century part of the remit of governments must be to generate appropriate mechanisms for intervening in, and regulating, those processes. Properly functioning housing markets are essential for an efficient economy, an inclusive society, and a fair and equitable future for all.

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## **Appendix 1**

### **Members of the Project Reference Group and Participants at the Stakeholder Workshop, 30 January 2003.**

#### **Project Reference Group**

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**Members:**

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#### **Participants at the Stakeholder Workshop**

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## **Appendix 2**