

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	Amy Martin
Agency	South Australian Civil and Administrative Tribunal (SACAT)
Ombudsman reference	2017/00211
Date complaint received	7 January 2017
Issue	Whether SACAT conducted a full and proper investigation of the complaint

#### Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*. The complaint concerns an administrative act namely the conduct of a complaint investigation by SACAT pursuant to a complaints policy and not an act done in the discharge of SACAT's judicial authority. SACAT is an agency to which the Ombudsman Act applies<sup>1</sup> since SACAT is a body established under the *South Australian Civil and Administrative Tribunal Act 2013* for a public purpose.

#### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from SACAT
- seeking further information from SACAT
- considering the SACAT Complaints Policy (**the complaints policy**), the SACAT Bailiffs' Manual and the *Residential Tenancies Act 1995*
- conducting telephone interviews with two named witnesses
- providing SACAT and the complainant with my provisional report for comment and considering their responses
- preparing this report.

#### Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in

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<sup>1</sup> Section 3(1) of the *Ombudsman Act 1972*.

some cases.<sup>2</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>3</sup>

### Response to my provisional report

In response to my provisional report SACAT responded that in the circumstances as outlined in the report it would conduct a fresh investigation of the complaint and further, it would have another Officer conduct the investigation. SACAT also stated that it would make changes to its complaints policy and the Bailiffs' Manual consistent with the recommendations foreshadowed. In addition SACAT will hold an information session with all available bailiffs to discuss the Bailiffs' Manual and SACAT's expectations.

The complainant responded that she did not have any comment to make.

### Background

1. The complainant is the owner of a rental property at 4/55 Alfred Street, Largs Bay (**the premises**).
2. The premises were the subject of an order for vacant possession (**the order**) issued by SACAT.
3. On 24 November 2016 a bailiff attended at the premises to enforce the order on the tenant. The complainant also attended at the premises and was accompanied by her father, a friend and the locksmith who was engaged to change the locks at the premises.
4. The bailiff provided the tenant and the complainant with a copy of a document from SACAT informing the tenant of their rights following the enforcement of the order. The document stated as follows:

#### To the Tenant

This property has been entered and the locks changed in accordance with an Order of the South Australian Civil and Administrative Tribunal (SACAT) dated \_\_\_\_\_.

You are not permitted to re-enter the property without the landlord/agent's consent.

You have 48 hours after the locks have been changed to remove your belongings from the premises. You will need to arrange a mutually convenient time with your former landlord/agent to attend and collect your belongings within those 48 hours. Please contact the landlord/agent on \_\_\_\_\_ to arrange a suitable time.

<sup>2</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>3</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

The landlord/agent may remove perishable goods from the property immediately after taking possession and will then need to determine the estimated value of the remaining property.

If the estimated value of the property is less than a fair estimate of the cost of removal, storage and sale of the property, the landlord/agent may dispose of the goods after 2 days from taking possession of the premises.

If the estimated value of the property is greater than this fair estimate, the landlord/agent is required to notify you that valuable property has been found on the premises and must take reasonable steps to keep the property, as well as any personal documents found, safe for at least 28 days. You may reclaim the goods within this period after paying the reasonable costs incurred by the landlord in dealing with the abandoned property.

Please read carefully the attached fact sheet prepared by SACAT which set out in more detail the obligations of the landlord in relation to dealing with abandoned goods under the *Residential Tenancies Act 1995*.

5. There was a conversation between the complainant, her friend and the bailiff in response to the advice the bailiff had given to the tenant relating to the removal of the tenant's property from the premises.
6. On 29 November 2016 the complainant made a complaint to SACAT about the bailiff and in particular it was alleged that:
  - wrong advice was given to the tenant in terms of his capacity to have access to the premises to retrieve his property
  - the bailiff was 'yelling at [her]' when she expressed concern that the bailiff's advice would result in the premises being unsecured and vulnerable to being broken into
  - the bailiff said 'That never happens. Do you walk around thinking someone will put a gun to your head? That's ridiculous. What's wrong with you?' Later in the discussion it is alleged that he also said 'I've been doing this for 30 years. You don't know what you are talking about'.
  - the behaviour of the bailiff increased the level of conflict between the complainant and the tenant
  - when conducting the property inspection on 25 November 2016 the complainant became aware that the dish washer at the premises had been stolen. She reported the theft to the police.

The complaint also identified that there were witnesses to the complainant's interactions with the bailiff.

7. On receipt of the complaint SACAT applied the complaints policy.
8. On 29 November 2016 a Team Leader telephoned the bailiff and informed him of the complaint and spoke about the allegations made. The Team Leader concluded that a copy of the complaint should be forwarded to the bailiff to enable him to provide an informed response.
9. Later on 29 November 2016 the bailiff provided the following response to SACAT:

On Thursday 24/11/16 at 9am at 4/55 Alfred Street Largs Bay I carried out a [sic] eviction. Possession Order (SACAT)Ref. 2016/SH011670.

I arrived at the property before the landlord and as I normally do checked to see if anyone was home. The tenant [ ]<sup>4</sup> answered the door. I spoke to him explaining the situation that I was the SACAT bailiff and I was meeting the landlord here to carry out an eviction and hand over possession of the property to the landlord. I then handed the tenant documentation telling him he had 48 hours to arrange with landlord a mutually convenient [sic] time to remove his property. I explained to him he could not stay overnight.

At this time the landlord and two other adults arrived. The landlord Amy Martin upon me introducing myself to her, became very aggressive in her attitude and approach to the tenant. She started saying to the tenant that he would have no time to remove his property and that she and the two other adults would move his property outside into the backyard. I could see that the tenant was becoming agitated. As it is my job to make sure things run smoothly and no one gets hurt I explained to the landlord in a calm manner as I always do that the tenant has a right to remove his property in the next 48 hours and that she can arrange times with the tenant. I did say thru experience that land agents normally give hours approx.. 9am to 5am. I did not yell at the landlord at anytime I don't do that. The landlord arranged her times of access with the tenant and I left the address on friendly terms with the landlord and two other adults. I find some of the criticism [sic] levelled at me very unfair as I always carry out my job with the utmost professionalism.

10. The matter was referred to the Principal Registrar for consideration. On 20 December 2016 the Principal Registrar sent an email to the complainant. The email informed the complainant as follows:
- the allegations that wrong advice was given to the tenant was put to the bailiff and the allegations were denied by him
  - the bailiff considered that the complainant was the party displaying aggression
  - the bailiff is experienced and skilled in managing potentially volatile situations as can be the case when enforcing orders for the vacant possession of premises
  - the bailiff denied raising his voice in discussion with the complainant and that he spoke in a calm manner at all times
  - the bailiff could not be held responsible for the theft of the dish washer.
11. Later on 20 December 2016 the complainant responded by email to the Principal Registrar. The complainant stated:
- she did not accept the version of events put forward by the bailiff
  - it was disappointing that SACAT simply accepted the version put by the bailiff without speaking with any of the adult witnesses present at the time.

### Relevant law/policies

12. The complaints policy applies to:

All SACAT members, registrars, staff, bailiffs and contractors...

The complaints policy also provides for an eight step process and steps 5 and 6 are relevant to this complaint. It provides as follows:

#### **Step 5 Investigate complaint**

The person investigating the complaint may:

- review relevant documents.
- speak to relevant officer(s) from SACAT or the Attorney-General's Department.

<sup>4</sup> I have removed the name of the tenant as it is not necessary for the purpose of this report.

- request additional information from the complainant.

The investigation process should be documented and, if applicable, provided to the decision maker for consideration.

### **Step 6 Determine complaint and advise complainant of outcome**

The decision maker should determine the complaint and provide a response to the complainant within **10 business days** of the complaint being made (unless resolved earlier or not reasonably practicable).

If the complaint cannot be resolved within this timeframe, the complainant should be advised of SACAT's suggested course of action and timeframe and a contact person for any further queries.

As a general rule, SACAT will respond by email unless advised otherwise (or impractical).

### **Whether SACAT conducted a full and proper investigation of the complaint**

13. The thrust of the allegations against the bailiff was that he provided inaccurate or inconsistent advice to the tenant and further, he conducted himself unprofessionally and in an inappropriate manner when engaging with the complainant.
14. The complaints policy applies to bailiffs as well as staff and other members of SACAT.
15. The complaints policy recognises 'Objectivity' as one of five guidelines in the handling of a complaint. This requires that complaints be 'addressed in an equitable, objective and impartial manner'.
16. Although the complaints policy identifies what the investigator may do, I do not consider the list to be exhaustive. In my view, the complaints policy is written having regard to the type of complaint ordinarily made about persons working in a court style environment. I do not consider that it prevents the investigator from seeking information from witnesses if it is considered necessary to do so. In my view, the complaints policy should make that clear.
17. The SACAT Bailiffs' Manual is a guide to bailiffs in the performance of their functions. It quite properly comments on issues such as the legal authority exercised by bailiffs, the reporting of services for billing purposes and personal safety when performing functions. It does not, however, recognise that a complaint may be made against a bailiff and what would then follow. I consider that it should.
18. In my view it was appropriate for the bailiff to be provided with a copy of the complaint containing the allegations against him. Procedural fairness requires that this occur as it informs him of the context and detail of the allegations.
19. The Residential Tenancies Act provides for the enforcement of an order for possession by a bailiff and only by a bailiff. In my view, his role is quite clear and that is to enforce the order made by SACAT. He is not to represent the interest of the landlord or the tenant.
20. The complainant is critical of the failure by the Principal Registrar to seek the views of various witnesses who were present. I consider that this required the exercise of a judgement by the Principal Registrar and that the Principal Registrar should have at the very least made some enquiries of the complainant as to witness details.

21. The Principal Registrar has informed me that when considering the complaint she had regard to the powers of the bailiff under the Residential Tenancies Act. She also considered the SACAT records which included the complainant's criticisms of SACAT's acceptance of an application from the tenant for a stay of proceedings. The complainant threatened to make a claim for compensation.
22. While this information does not relate to the allegations made against the bailiff, it does in my view, suggest the potential for a heightening of tension in the complainant's relationship with the tenant and her wish to take possession of the property. Whether this played out on 24 November 2016 is impossible to say, but in objectively assessing the situation, I consider it should not be excluded.
23. In my view, the bailiff was afforded procedural fairness by SACAT. His refuting of the allegations presumably related to all of the allegations against him. I have considered that even if there was evidence to support the allegation that the bailiff raised his voice in his discussion with the complainant, consideration would need to be given to the context in which that occurred and whether, in the circumstances, it was necessary in order to assist the bailiff enforcing the SACAT order. A bailiff is required to use their best endeavours to enforce the order and to remove the tenant or occupant from the premises but not that person's belongings.
24. In this matter, however, there were allegations about statements that were inappropriate and not in keeping with the performance of a bailiff in such circumstances. In my view, the Principal Registrar did not consider or alternatively, did not appreciate the gravity of the allegations when considering the complaint under the complaint policy and whether the witnesses should be interviewed. Although the complainant did not identify the witnesses by name or provide contact details it was clear there were witnesses and that information would have been easily obtained.
25. My investigation involved telephone interviews with two of the witnesses. In my view, the witness, Ms Karen Merrick was compelling in her recounting of the events of 24 November 2016 and her account was consistent with the allegations made by the complainant. Of particular relevance is her discussion with the bailiff at the premises prior to the arrival of the complainant. The second witness, the locksmith, had no direct engagement with the complainant and the bailiff as his presence was required to change the locks on the premises. I considered it was not necessary for the purpose of my investigation, to interview the complainant's father who was also identified as a witness.
26. In my view, having regard to the nature of the allegations made, the blanket rejection of them by the bailiff without providing specific reference or context, and the failure to seek information from the witnesses, there was a failure by SACAT to conduct a full and proper investigation of the complaint.

## Opinion

In light of the above, I consider that SACAT in not interviewing the witnesses as part of the investigation of the complaint, acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that:

1. SACAT conduct a fresh investigation of the complaint

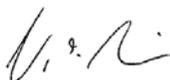
2. the SACAT complaints policy be amended at Step 5 to make explicit that a person investigating a complaint should consider speaking to any person who may assist in the investigation of the complaint
3. the Bailiffs' Manual be amended to include reference to how complaints against a bailiff will be processed and the application of the SACAT Complaints Policy to any complaint made against a bailiff.

#### **Final comment**

In accordance with section 25(4) of the Ombudsman Act SACAT should report to the Ombudsman by **13 April 2017** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines  
**SA OMBUDSMAN**

22 March 2017