



ATTENDING THE MAGISTRATES COURT

The following is an extract from REIT Training which maybe ideal reference material for property management personnel in Tasmania.

Unit descriptor This unit of competency specifies the outcomes required to appear effectively before a Court.

It includes:

- Preparation of Notices to Vacate and other documentation
- Notice time period required by The Residential Tenancy Act
- Services of Notices
- Preparation of Court documentation
- Hearing dates
- Preparing for the Court Hearing
- Using appropriate Court etiquette
- Presenting a case
- Magistrates Decision
- Taking possession of premises under a Court Order
- Disposal of items left at a property.

Employability Skills The required outcomes described in this unit of competency contain applicable facets of employability skills. The employability Skills summary of the qualification in which the unit of competency is packaged, will assist in identifying employability skills requirements.

Application of the unit This unit of competency supports the work of licensed real estate agents involved in preparing and presenting cases at Courts relating to real estate operations.

Competency field Real Estate

Unit Sector Real estate property managers and assistant property managers

PERFORMANCE CRITERIA

1. Preparation of Notices To Vacate

Reference Section 44 of The Residential Tenancy Act 1997 “Form of notice to vacate” and Section 42 “Notice to vacate by owner”

Section 44 Form of Notice to vacate A notice to vacate is to state the following:

- (a) the date of serving the notice
- (b) the name of the tenant/s
- (c) the name of the owner/s
- (d) the residential premises to which the notice relates
- (e) details of the reason for which the notice is served

A notice to vacate needs to be prepared with the knowledge that it is a legal document and must stand up to the scrutiny of a Court. The data contained within the notice must be correct in every respect and the reason for which the notice is served must be precise and provide all relevant information.

Section 42 Notice to vacate by owner

An owner of residential premises may serve on a tenant of the premises a notice requiring the tenant to deliver vacant possession of the premises to the owner for any of the following reasons:

- (a) that the tenant has failed to comply with any provision of the Residential tenancy agreement;
- (b) that a residential tenancy agreement expired less than 28 days before the service of the notice;
- (c) that the residential tenancy agreement is not for a fixed period and the premises are to be sold renovated or used for another purpose;
- (d) that a residential tenancy agreement is due to expire at least 28 days after service of the notice
- (e) that an order has been made under section 86 of the Land Titles Act 1980 for foreclosure of the premises;
- (f) that the premises are to be sold pursuant of section 78 of The Land titles Act 1980
- (g) that the tenant has caused a nuisance at the premises which is substantial

2. Notice time periods required by The Residential Tenancy Act 1997

Reference section 43 of The Residential Tenancy Act 1997

Effect of notice to vacate

43 (1) A notice takes effect on a date specified in the notice that is a date-

- (a) at least 14 days after the notice is served, if the notice is for the reason referred to in section 42 (1) (a) or (b) or (g)
- (b) at least 28 days after the notice is served, if the notice is for a reason referred to in section 42 (1) (c) or (d) or (e) or (f)

(2) A notice to vacate on the grounds of failure to pay rent is of no effect if a tenant pays all arrears in rent before that notice takes effect unless 2 or more notices to vacate on that ground have been served on the tenant during the immediate preceding 12 months.

(3) A notice to vacate on the ground that the tenant has failed to comply with a provision of the residential tenancy agreement is of no effect if the tenant complies with that provision before the period referred to in subsection (1) (a) expires

(4) A notice to vacate expires after the period of 28 days from the day on which it took effect

Note Be aware that the date of service nor the date of expiry count as days within the notice period given an extra 2 days need to be allowed within the notice to vacate.

3 Service of Notices

Service of notices and other documents needs to be in accordance with Sect 29AB of the Acts Interpretation Act 1931.

- (1) If an Act authorises, requires or permits a notice or other documents to be served on a person, whether the expression “serve”, “deliver”, “give” or “send” or any other expression is used, without directing it to be served in a particular manner, the notice or document may be served –
 - (a) on a natural person –
 - (i) by giving it to the person; or
 - (ii) by leaving it at , or sending it by post to, the person’s residential or postal address or place or address of business or employment whichever is last known to the server of the notice or other document; or
 - (b) on any other person by leaving it at, or sending it by post to, the person’s principal or registered office or principal place of business.
- (2) Nothing in subsection (1) –
 - (a) affects the operation of any other law that authorises or requires the service of a notice or document otherwise than as provided by that subsection; or
 - (b) affects the power of a court or person acting judicially to authorise service of a notice or document otherwise than as provided in that subsection

Note: An affidavit of service needs to be completed showing the date, time, and manner of service and signed by person affecting service.

It is recommended that service of notices or documents be served on a tenant either personally or by leaving the notice in the front door and a copy in the letter box at the property. It may also be prudent to photograph the document in the door as proof of service. Service by mail is not recommended.

Note Under Rule 18 of The Supreme Court Rules and notice to vacate served between 24th December and 7th January inclusive will be invalid.

4 Preparation of Court Documents

Documentation for submission to the court may be down loaded from the Magistrates Court web site [www.magistratescourt.tas.gov.au\(civildivision\)](http://www.magistratescourt.tas.gov.au(civildivision)).

The relevant sections of the application must be completed accurately and signed and dated by the applicant. Page 4 of the Application “Particulars of Claim” needs to details full particulars of the claim including particulars of the lease agreement relating to the manner in which, it is claimed, that the lease has been breached. If there is other documented evidence to be submitted such as photographs, tenancy rental schedules etc. each document should be numbers and detailed in chronological order as to what the documents represents, include times dates and the people involved.

The Application in triplicate is submitted to the court along with the prescribed fee.

5 Hearing dates

The court staff will allocate a hearing date. A copy of the “Application” must be served on the respondent (the tenant) as soon as practical and at least four days prior to the hearing date. The Application is to be served on the respondent personally. (If service is unable to be effected see “Presenting a Case”)

At the time and date of the hearing you are required to attend the court and present the case on behalf of your client the property owner.

6 Preparing for the Court Hearing

Proper preparation will contribute greatly to a successful outcome of the hearing. It has to be presumed that the respondent will attend the court and defend the claim. Therefore it is essential that you have all the facts and evidence concerning the matter you intend to present. If documentation such as a rental payment schedule is to be presented as evidence it is recommended that copies is taken to enable a copy to be given to the respondent to confirm it authenticity as well as a copy for the court. Photographs, condition reports and other evidence need to be correlated in proper order.

Ensure that all persons who can be a witness for you is available to attend Court on the hearing date

Any witnesses that you intend to call to give evidence need to summon to attend and a summary of their evidence correlated to enable questions to be asked of the witness.

7 Using proper Court Etiquette

Visitors to the Court are required to comply with the Courts security arrangements. This could involve passing through a metal detector upon entry. Fewer bags and metal objects assist in faster completion of security screening.

Visitors must obey the instructions of all Court officers and security guards whilst on the premises

Tape recorders and cameras are not permitted in any Court building without specific approval. Special rules apply the representatives of the media.

Weapons are not permitted in any Court building. Although special rules apply to Police Officers, they are not permitted to take firearms into a Court room.

Radio receivers or transmitters (including mobile phones) and pagers must be switched “off” when in any Court room, unless the presiding judicial officer permits otherwise.

Food or drink must not be taken into a Court room

Visitors must comply with the presiding judicial officer’s directions

Conversation in Court rooms must be restricted to that which is reasonably necessary and, in any event, it must not interfere with the proper conduct of Court proceedings.

Some Court proceedings such as, Children’s Court, are closed to the public. A “Closed Court” sign will be displayed. Unless you are authorised by law to be present, you must not enter these Courts and must leave the Court room immediately upon being requested by a Court officer to do so.

8 On the day

Get to the Court on time

Make sure your witnesses are there

Go through the papers you need to show to the Court

Make sure you know the facts thoroughly

Keep in mind what you want to prove and what Court Orders you are requesting. Be prepared to negotiate with the other party in hope of settling the matter before the Magistrate hears your case.

9 In Court

The presiding Magistrate is referred to as “Your Honour” and must be addressed in a respectful manner to which the position demands.

If the defendant is not present you will be required to provide evidence that the Court papers have been served on the defendant. This would be in the form of an Affidavit of Service”. The Magistrate may hear the case “ex parte”

The Claimant is usually asked to present their opening summary and evidence first.

The Magistrate will ask you to provide details of the case and proper preparation will ensure that all relevant facts are given in a precise manner. Speak clearly – If you feel more comfortable you may read your presentation

Refer to your witnesses as you go through the facts – they will give their evidence in due course.

You are entitled to put submit certain items as evidence, photographs, documents etc. Make sure all other parties are aware of your wish to tender items and have copies available for them and the Magistrate.

Once you have completed giving your evidence the defendant may ask any questions and present their evidence.

The Magistrate may ask questions at any time

On completion of the defendant’s evidence you have an opportunity to ask any relevant questions.

10 The Magistrate’s Decision

The Magistrate usually gives a decision verbally after hearing from all parties. This decision takes the form of a Judgement.

If deemed appropriate the Magistrate may adjourn the decision to a later date.

A copy of the final order of the Magistrate will normally be forwarded to each party. If the defendant is was not present in the Court it will be necessary for the order to be served on the defendant.

The Decision of the Magistrate is final

Either party may appeal the Magistrate’s decision to The Supreme Court. In this event it would be necessary to consult a solicitor.

11 Taking Possession of premises under a Court Order

The “Court Order” handed down by the Magistrate needs to be served on the defendant if he/she was not present in Court. In the event that the Court Order is for vacant possession and the defendant fails to deliver vacant possession a Warrant of Possession needs to be completed and executed.

The warrant may be downloaded from Magistrates Court web site, completed and presented to the Court House along with the prescribed fee.

A bailiff is then appointed to execute the warrant, take possession of the property and hand possession to the property owner.

12 Disposal of goods left at a property

The Residential Tenancy Act details the procedures in disposing of goods left on a property following delivery of vacant possession by the tenant.

Section 48 (1) If a residential tenancy agreement is terminated and goods on the premises to which the agreement relates appear to be abandoned by the tenant, the owner may –

(a) dispose of the goods if they appear to the owner to have no value; or

(b) sell the goods if they appear to have a value less than prescribed amount; or

© apply to a magistrate for an order permitting the sale of the goods for the best price reasonably obtainable if they appear to have a value equal to or more than the prescribed amount.

(2) The owner is to verify by statutory declaration the means of disposal of any goods under subsection (1) (a)

(3) The proceeds of the sale are to be dealt with as follows:

(a) firstly, in the payment of any debt owed by the tenant to the owner;

(b) secondly, in the payment of the reasonable costs of the sale;

© thirdly, any balance to be kept in an interest bearing account for the tenant for a period of 6 months

(4) If the tenant does not claim any proceeds of the sale of the goods kept under subsection 3 © within 6 months the proceeds become the property of the Commissioner.

Note: At this time the prescribed amount is at \$300.00