Northern Territory of Australia
*Agents Licensing Act*

# In matter of a Disciplinary Inquirypursuant to the *Agents Licensing Act*

**Stephen Gray and Michelle Lee**
Applicants

And

**Warren Andrews**
First Respondent

And

**Great Northern Real Estate Company Pty Ltd**
Second Respondent

## Reasons for Decisions made by the Agents Licensing Board

Following applications for disciplinary action by the Applicants against the First and Second Respondents, dated 16 March 2012 and 27 June 2012, the Board determined to conduct an inquiry in relation to the following four grounds for disciplinary action that were referred to it:

1. Contrary to s 67(1)(a) of the Act, the Respondents, in breach of s 35 of the Act, engaged an agent’s representative, Mr John Watson, when Mr Watson was not a registered agent’s representative;
2. Contrary to s 67(1)(c) of the Act, Respondents breached a rule of conduct for agents by failing to perform his duties to his principal. In particular, the agent failed to collect $8785 rent on behalf of the Applicants;
3. Contrary to s 67(1)(c) of the Act, the agent breached a rule of conduct for agents by failing to perform his duties to his principal or to carry out the lawful instructions of his principal. In particular, the agent failed to ensure tenancy conditions were complied with in relation to the number of people living at the property; and
4. Contrary to s 67(1)(c) of the Act, the agent breached a rule of conduct for agents by provided false information to the Applicants in relation to the number of tenants that were to live on the property and the identity of those tenants.

In considering grounds 2, 3 and 4, the Board took into account s 65(4) of the Act, a deeming provision, which provides that where an employee of a company or a firm engages in conduct that is a breach of the Act, that conduct is deemed to be a breach by the company or firm, and further that if that conduct is a breach of the rules of conduct, it is then a breach by the company or firm.

The Respondents, represented by Ms Teresa Hall, made admissions relevant to grounds 1 & 2, i.e. that the agent was in breach of s 35 of the Act by employing Mr John Watson, who was not a registered agent’s representative; and two, that the agent failed to perform his duties to his principal by failing to collect the $8785 on behalf of the owner.

Counsel assisting, Mr Carl O’Connor, focused the inquiry on grounds 3 & 4, i.e. that the agent failed, contrary to the duties contained in s 65(1)(c) of the Act, to ensure that the conditions of the tenancy were complied with, and also provided false information to the landlord in relation to the tenants. Accordingly, if proved, there would be grounds for disciplinary action under s67(1)(c) of the Act.

The Inquiry Book was admitted as Exhibit 1, and the supplementary inquiry book was admitted as Exhibit 2 in the Inquiry. All documents relevant to the decision to commence disciplinary action are in those exhibits.

### The Issue

The only issue was whether either or both of the First and Second Respondents had breached the rules of conduct set out in Section 65 of the Act and in particular paragraph 65(1)(c) which is expressed as:

“(c) fails to perform his duties to his principal or to carry out the lawful instructions of his principal;”

### The Evidence

Counsel assisting the Board called three witnesses, Stephen Grey, John Watson and Warren Andrews. The background to the dispute and the terms of the dispute between the Applicants and the Respondents appears from the evidence, some of which is set out in these reasons.

#### The evidence of Stephen Gray

Mr Gray and his partner Michelle Lee (the Applicants) owned the subject property at 39 Kurrajong Crescent, Nightcliff (the property). Mr Gray described the property in his evidence, taken by video link, as:

 *“…a three bedroom brick house. It’s a brick house with a tiled floor, it has a very nice backyard pool; I think it’s about 800 square metres. It’s in a very nice street in Nightcliff, Kurrajong Crescent, right near the beach, a short walk from the beach. It’s a very attractive property, we always thought. We bought it in – initially, my partner and I bought it in 2003, I think and lived there for just over – bit under two years, I think, before we moved down to Melbourne. So we think – I think it’s a very nice property.”[[1]](#footnote-1)*

Mr John Watson became manager of the property in February 2011. As far as Mr Gray and Ms Lee were aware, he had responsibility for the entire management of the property. It was his responsibility to find new tenants and to deal with all issues arising from the tenancy. His name appeared on rent statements as the property manager, and he was the person that Mr Gray and Ms Lee dealt with in relation to that property.

A tenancy application was made by Mr Kingey and Ms Cubillo and was received by Mr Watson. Mr Gray expressed concerns to Mr Watson that there was no rental or employment history on the application. In short, Mr Gray said that he and Ms Lee was concerned that they were leaving their house in charge of a “*…26-year old with no employment or rental history and his 20-year old girlfriend*”.[[2]](#footnote-2)

And later..

*“Mr Watson was telling us that these people are steady and reliable and conscientious: ‘I’ve got a very good impression of them. You really need to let them move in.’ If you look at his email he says – you know, well he says, ‘I strongly recommend that you accept this application; it’s a very good one.”[[3]](#footnote-3)*

Mr Gray gave evidence that he relied upon the views of Mr Watson:

*“Yes, well I mean I had no reason to doubt Mr Watson’s judgment and reliability at this point. I assumed, of course, that he was a senior person with considerable experience in the property industry as he told us – well he – collated(?) everything that he said that he was. You can see that in that email on 16 June: ‘I’ve relied very much on your assessment of their character, particularly that you’ve assured me that you consider Inez and Ti to be steady and reliable and you consider them to be very good tenants.’”[[4]](#footnote-4)*

The Board was satisfied that Mr Watson had represented himself as a competent agent’s representative, and if the owners had any concerns that they should defer to Mr Watson’s purported experience.

Mr Gray’s former neighbours first alerted him to problems with the new tenants. There were behavioural complaints and noise issues. Mr Gray spoke to Mr Watson and asked him to informally approach the tenants to get them to “settle down”.

The owners flew to Darwin on 3 August 2011 and inspected the property on 4 August 2011, with Mr Watson. During that inspection the owners discovered that there were more people living at the property (up to 8 in all) than were authorised by the lease and that the general condition of the property was poor.

Mr Watson told the Applicants that children don’t count as tenants for the purposes of a residential tenancy agreement, and further that attempting to terminate the tenancy would be a troublesome process that he did not recommend as they would not, in Mr Watson’s opinion, have a chance of success.

Counsel assisting the Board asked Mr Gray:

*“Do you know why he felt – did you have an impression why he formed that view, that you would have no chance?---Well he didn’t give any specific reason. I guess, to my mind, he was resting on his experience as a property manager and saying, you know – I don’t recall he specifically said, ‘I’ve appeared in numerous residential tribunal hearings,’ or anything like that, but you know, we assume that if he’s talking about what chance you have for residential tribunal, that he’s resting on his experience as a property manager and he’s saying that, you know, if you complain to the Residential Tenancies, you will have no chance. Once they’re in, they’re in; there’s nothing you can do about it. He did say also – again, I do recall raising, during that conversation on 4 August, the issue of the references. And he said that no landlord, in his experience, has ever asked for copies of references. So again, these are the sorts of statements that – to me, it’s the kind of thing of somebody of marked experience would say. You know, he’s putting himself forward as someone with significant experience in the property industry and in this role….Any instruction that I gave would have been contrary to Mr Watson’s advice, so if I could just add to what I just said, that he said that if we were to take up this issue in any form – and I very clearly remember him telling me this – ‘all your worst fears would come to pass.’”[[5]](#footnote-5)*

Mr Gray said that he and Ms Lee discussed their options in light of Mr Watson’s opinion and took the chance that the situation might improve with the help of Mr Watson. Rather than terminate the tenancy for rent arrears they decided that a notice under s.96B Residential Tenancies Act, to remedy breaches other than non-payment of rent, should issue to the tenants as an expression of the owner’s disquiet as to the state of the property.

On 5 September 2011, Mr Gray discovered that Mr Watson was not a registered agents representative under the provisions of the Agents Licensing Act. Great Northern Reals Estate Company Pty Ltd commenced eviction proceedings in the Residential Tenancies Tribunal, which the Board were informed had been heard on 18 May 2012. The tenants vacated the property on 28 May 2012.

Warren Andrews had moved to Darwin in April 2012 to exercise more control over the Second Respondent, who was instructed to recover the unpaid rent. It was not recovered, as Mr Andrews gave evidence that he was not interested in the role of a debt collector.

At the time that the tenants vacated the property it had suffered damage. Including the rent arrears, airfares and damage to the property, Mr Gray estimates that the Applicants’ total losses were in the order of $30,000.00. He referred to an affidavit in relation to the condition of the property at page 14 of exhibit 2. The affidavit revealed, according to Mr Gray, that:

*“Everything was filthy, the walls and floors were covered in dirt and other filth, in children’s paint or spray paint. There was spray paint in the small bathroom. One of the walls had been painted by a child. The kitchen and stove were in an extremely dirty state. There was a large rat living in the back of the stove, actually, which would run around the house at night when we were sleeping in there. Rubbish had been left everywhere, both inside and outside the house. Plastic bags, cigarette butts, soft drink and beer cans and bottles, cardboard and plastic takeaway food containers, children’s toys strewn throughout the garden, dirty and unwanted bits of clothing inside and outside the house, newspapers. There seemed to have been a dog living in the place, pooing in the – what appeared to be dog excrement on newspaper in the house. Lights and fans were not working. We spent days organising to fix the various vans that weren’t working. Almost every fan in the whole house had been – fans don’t just stop working just like that. Certainly – well, one might but not all of them at once. And when we start taking the thing apart, quantities of water pour out of the fan, and the roof’s not leaking. It’s clear that if there’s water up in the fan it’s been sprayed up there by somebody. Light hangings are hanging all over the place. Insect screens are hanging off doors. It’s just – you know, it was really an appalling condition for our house to have been really left in. All the curtains had been removed. The curtain fittings had to go replace all of the fittings for all of the – you know those little nobs and things that you screw in; all of those had to be replaced. Walls and doors had been damaged. There were large holes in three of the walls. It looked as though there had been holes punched in doors. The door handles had to be replaced in several of the bedrooms and there’d been some of the – one of them was completely missing, you know, the lock. Others had obviously been forced. I almost shudder to think what must have been going on inside that house because there had been a screwdriver or something that had been forced through the door to the main bedroom to open a door that had obviously been locked by somebody.”[[6]](#footnote-6)*

Mr Gray gave evidence of the emotional trauma suffered by both of the Applicants concerning the state of their house when the tenants vacated it.

#### The evidence of John Watson

Mr Watson conceded that there was a conversation concerning the conditions of the lease with the Applicants either on 4 August 2011 or at some other proximate time. He said:

*“One definitely did occur at some stage. My point in that conversation of when it occurred was that if we did attempt to do that and if the rest of the lease was in order, it would be unlikely that the tenancy commissioner would give an order for eviction, especially counting the number of people appeared to be (inaudible) children…I recall that conversation because I said that if we took them to the tenancies tribunal to evict them and the commissioner did not do so, that would place us in an adversarial relationship with the tenant and that may lead to the realisation of seeing your worst fears…That I think he had some fear that they would (inaudible) with people or in some way act adversely against the property, which ultimately, I think came to pass in the year 2012. At the time, my suggestion was as they’re paying the rent and as they’re looking after the property, I suggested we manage the situation and try and make sure they do not cause any adverse consequences.”[[7]](#footnote-7)*

Counsel assisting asked Mr Watson:

*“Mr Watson, if you had have been satisfied there were more tenants than should have been in the property at that time, would have you commenced eviction proceedings?---Yes, on two conditions: Firstly, I would need a written instructions (inaudible) from Stephen and Michelene to do so; and secondly, I would need to be reasonably confident the evidence I had would be sufficient for the tenancy commissioner to give us an order for possession of the property. Anything that fell short of that would leave us in a worse position.*

*Okay and - - -? And my – sorry, go on.*

*Sorry, you go on? My estimate of the situation there was that the evidence was not strong enough for us to apply to the commissioner successfully.”[[8]](#footnote-8)*

Mr Watson’s evidence was that he was instructed to serve a S96B notice, which he did. Melissa Wiltshire, an employee of the Second Respondent, signed the notice for him to serve.

At the relevant time Mr Watson was personally managing between 80-100 properties for the Second Respondent.

*“So is it your evidence you were managing between 80 and 100 properties?---Only estimate, yes. I don’t have any figures to rely on in that regard but - - -*

*And were you licensed during that period?---Absolutely not. I have no bones about saying that I was.”[[9]](#footnote-9)*

In relation to supervision of Mr Watson the following evidence given:

*“What sort of supervision did you receive whilst managing those properties?---I was constantly on the phone to Warren Andrews. I suggested to him that we needed more staff. In June or July I said to him I wanted to extract myself from property management and move into commercial industrial sales, and I said at the time that I needed the time off to complete the (inaudible) registration course prior to doing anything of that nature.*

*But again, if you could just describe the sort of supervision you received?---I’m sorry.*

*Was Mr Andrews or any other director of the company there with you during the relevant period? Were they overseeing your work?---Warren Andrews was there probably one week out of three. He will be able to indicate from his diary, no doubt. I have no record of his actual attendance dates.”[[10]](#footnote-10)*

The Board notes that the uncontested evidence of Mr Wtson was that he did a TICA check of the proposed new tenants, he spoke to Ms Cubillo’s employer, he spoke to Mr Kingey’s past and present employers, and satisfied himself that the proposed leaseholders were in fact employed.[[11]](#footnote-11) Mr Watson e-mailed Mr Gray with the results of his checks. Counsel assisting asked Mr Watson:

*“Did you provide any false information to Mr Gray?---I did not. I did not,”[[12]](#footnote-12)*

#### The evidence of Warren Andrews

Mr Andrews and Neil Murphy purchased an agency known as Claridges on 1 June 2010. Mr Murphy was to run the Darwin business which was called Great Nothern Real Estate Company Pty Ltd. The rent roll at the time of purchase was 260 dwellings. John Watson commenced employment with that firm on 1 or 2 December 2010.

Mr Andrews deposed that:

*“Neil Murphy and myself interviewed him jointly in the office at Nightcliff. He did express at that point in time that he hadn’t yet been licensed. We were interviewing him as a property manager for a property management role. That was on a Friday and I left Darwin late that day and had discussions with Neil Murphy, my partner, at that point in time because we owned the business for some six months and agreed that he would be employed but needed to finish his licence activities… It was our intention as a residential property manager for him to gain that qualification, yes.*

*Were you aware that he managed properties while he was unlicensed?---Not initially, but later in his employment, yes.*

*And how many properties do you suggest he may have been managing at that time?---Look, I couldn’t answer that question, to be quite frank with you, because I’d given him no direct authority to take on a portfolio.*

*How many other property managers were in the business at that time in the Nightcliff office?---In the Nightcliff office at that point in time there would have been two other licensed property managers pus two administration support people.*

*And were there any other property managers based elsewhere in your other offices that he could also seek to supervision from?---Look, we – and I don’t say it from a pedestal point of view – run five real estate offices across South Australia and Northern Territory. My corporate head office, for want of a better term, is based in Renmark where I reside and I have a management team there, trust account administrators, my PA is there and sale administrator as well. Our property manager assistant, Marlena Watkins, is a highly experienced property manager from South Australia and Victoria. She was there as guidance and help and coaching for my property management team, but I had other very experienced property managers throughout my group.”[[13]](#footnote-13)*

In relation to the property owned by the Applicants, Mr Andrews first considered it’s position when he received a lengthy e-mail from Mr Gray in September 2011.

Responsive to questioning, Mr Andrews gave evidence in relation to his involvement in the management of the property:

*“And what did you do at that point in time to try and resolve those issues?---Okay. That email would have been spoken to with My PA at the time, Wendy Toole. And I said, ‘Wendy, can you look into this further and come back to me for further comments and as complaints from an existing client?’*

*And that’s your recollection of what happened. There seems to be further emails from September onwards that you’re also included in. Did you have any direct involvement then?---A lot of the emails were sent to other people as well and with due respect to Mr Gray, clients, and any other clients, if I’m simply being copied in or there is somebody else in my management team and they see my name involved with it as well, it is our mandate that they pick up these areas, try and deal with them and then escalate them to me if they’re unable to.*

*Is it fair to say that the file was somewhat mismanaged by the team that was based in Nightcliff?---It was mismanaged, yes.”[[14]](#footnote-14)*

Mr Andrews moved to Darwin on 18-20 April 2012 to take control of the Second Respondent. He gave the following evidence:

*“And the purpose of that move?---My office was not in control and it was nowhere near the platform of the operation of our other offices. It was causing a lot of stresses for my management team and myself and, clearly, some of our clients as well. We saw no other way but to move and relocate to Darwin and spend a significant time in the office to get that control of the office. There had been correspondence that had highlighted this with this particular property, and as soon as I arrived into Darwin I took the property under my control, or the file, to liaise with the owner and also get back control of the property which included termination of the tenancy.*

*So can you take us through the process from when you took control of the process, what applications you made from that point?---Just prior to myself taking control of the property, we had an RTO3 that had been sent to the tenant which had expired and when my property manager, Melissa Wiltshire at the time lodged an RTO1 with the tribunal for a hearing, it was discovered that that initial RTO3 was technically invalid and we were advised by the Consumer Affairs office that it’s a waste of our time in pursuing it and even going for a hearing and that we should withdraw our application. That’s what the instructions were at the time from me to the rest of the team, to Ms Wiltshire. I had an RTO, a new RTO3 served, a valid one, took it through to the RTO1. I actually attended myself, personally, the first hearing. At that time, the tenants did not attend the hearing but there was a letter tendered on their behalf saying that there was significant funds in transfer via the internet, which they couldn’t give evidence of and I’d been pressuring them for evidence previously, anyway. And the tribunal allowed an adjournment of approximately one week I re-attended at the second hearing. The tenant, Ti, appeared, and said that he had made an application for a personal loan through an Indigenous affairs group and the tribunal held the hearing over for two or three days on the – and I pressed the issue at that time – because we were looking at number 3 hearing at that point – and it was on the proviso that there would be no more excuses when we come back. There was no personal loan and there was no evidence. They didn’t even turn up; and termination was granted.”[[15]](#footnote-15)*

Exhibit 3, Notice of Inquiry and Order under the Residential Tenancy Act was tendered by Ms Hall, who also tendered the Second Respondent’s file documents including the information sought and gained by prospective tenants.

In relation to the alleged failure to collect arrears in rent Mr Andrews deposed:

*“In my experience, in running property management teams and property managers, once we’ve received an order from a tribunal for any injury, financial injury to a landlord, and the tribunal or a tribunal makes an order for that; if the landlord decides to pursue that debt, then I have spent 20 years advising my clients that I am not a debt collector and I do not run a debt collection agency and it gets referred to the landlord for them to take further action at their discretion, at their desire and at their risk, by way of legal representation.*

*And is that what you advised him on 18 June?---Absolutely.”[[16]](#footnote-16)*

### Reasons for Decision

Mr Watson was not the subject of the applications for disciplinary action. As an employee of the Second Respondent at the relevant times, the Board examined the evidence of Mr Watson on the basis that his failing, if proved to the satisfaction of the Board, would be the failings of the Second Respondent due to the application of s65(4) of the Act.

#### Complaint 3

The Board, having considered the oral evidence, found that the Applicants had been misled as to the qualifications and experience of Mr Watson. The Board finds that Mr Watson was unwittingly assisted by the lack of adequate supervision of Mr Watson since the departure through illness of Mr Murphy from the management of the second respondent. Whilst the lack of direct supervision of Mr Watson was regrettable, the Board notes that it does not form part of the specific complaints against the Respondents.

The Board finds that on or about 4 August 2011, the Applicants, having satisfied themselves as to the condition and persons occupying the property, made an informed decision as to the future management of the property and communicated that decision to Mr Watson, who implemented it by the service of the S.96B notice in September 2011. The critical decision of the Applicants was the decision not to commence eviction proceedings at that stage. Accordingly, Mr Watson’s actions, which are deemed as the actions of the Second Respondent pursuant to s 65(4) of the Act, were in accordance with the instructions from the principal, i.e., the Applicants.

Mr Watson conducted an inspection of the premises 14 days after the service of the S.96B notice and concluded that the number of tenants was not sufficient to justify eviction proceedings. Whilst the quality of Mr Watson’s opinion may be viewed as questionable by the Applicants, it did not seem to generate any further specific instructions from the Applicants as to the management of the property. Melissa Wiltshire conducted a further inspection of the property in March 2012, and there is no evidence of further instructions being given by the Applicants that required further action by the Second Respondent.

The Board finds that when Mr Andrews moved to Darwin to take control of the Second Respondent, he acted with due haste to terminate the tenancy through eviction proceedings, as the Applicants were suffering loss in addition to arrears of rent at that time. The record of written communications between the Applicants and the Second Respondent, through Mr Watson, is contained in Exhibits 1 and 2. Exhibit 3 relates to the termination of the tenancy and the Second Respondent’s documents relating to the inquiries made by Mr Watson of the prospective tenants are at Exhibit 4.

The Board considers that there are no grounds for disciplinary action arising from this complaint.

#### Complaint 4

The Board has concluded that there is no evidence that the Second Respondent or Mr Watson had given any false information to the Applicants. There is no evidence to contradict the correspondence and other documentary evidence which displays the relationship between the Applicants and the First and Second Respondents.

The Board accepts the evidence that Mr Watson made all relevant enquiries of the prospective tenants that the Real Estate industry accepts as normal commercial practice in Darwin. There was no failure by Mr Watson to communicate the results of his inquiries in relation to the tenants to the Applicants. There is no evidence that he lied to the Applicants.

On the contrary, the Board finds that Mr Watson persuaded the Applicants to accept the tenants in the ordinary course of the business of the Second Respondent. The Applicants clearly relied on Mr Watson’s apparent age and experience in the belief that he was an experienced real estate agent. Notwithstanding that misconception, the Applicants were free to contract with the tenants or to refuse to contract with them. There is no evidence before the Board of any fraudulent or misleading conduct by Mr Watson.

The Board considers that there are no grounds for disciplinary action arising from this complaint.

Accordingly, the Board dismisses the complaints against the Second Respondent contained in grounds 3 & 4 of the grounds for disciplinary action referred to the Board.

The Board considers that the First Respondent has not breached the terms of the Act, or the code of conduct expressed in the Act, in relation to any of the grounds for disciplinary action referred for the consideration of the Board.

### Penalty

In assessing the appropriate penalties to impose in relation to complaints 1 and 2 the Board took into account:

1. the oral and written submissions by Mr O’Connor, Counsel Assisting the Board and Ms Hall, counsel for the respondents;
2. the relevant facts as the Board found them to be, as expressed in the evidence referred to in these reasons;
3. the aims and purposes of the Act in relation to the requirement to only employ properly qualified persons to be agent’s representatives;
4. the need to protect the public from harm occasioned through breaches of the Act;
5. the principles of sentencing as set out in the Sentencing Act and the considerations relevant to this inquiry.

The Board considers that that most weight is to be given to the principles of general deterrence amongst licensed real estate agents from deviating from the principles and provisions of the Act, and the protection of the community from inefficient management at the hands of unqualified agents representatives.

The Board imposes the following penalties:

Ground 1. Fine of $5,000.00

Ground 2. Fine of $500.00

For the Board

Tom Berkley
Alternate Chairperson

 October 2013

1. T6.9 [↑](#footnote-ref-1)
2. T8.9 [↑](#footnote-ref-2)
3. T9.5 [↑](#footnote-ref-3)
4. T9.9 [↑](#footnote-ref-4)
5. T13.7-13.9 [↑](#footnote-ref-5)
6. T20.9-21.5 [↑](#footnote-ref-6)
7. T45.4 [↑](#footnote-ref-7)
8. T45.9-46.1 [↑](#footnote-ref-8)
9. T47.3 [↑](#footnote-ref-9)
10. T47.5 [↑](#footnote-ref-10)
11. T36 [↑](#footnote-ref-11)
12. [↑](#footnote-ref-12)
13. T58 [↑](#footnote-ref-13)
14. T59.8 [↑](#footnote-ref-14)
15. T60 [↑](#footnote-ref-15)
16. T64.10-65.2 [↑](#footnote-ref-16)