SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Meyers v Commissioner for Social Housing**
Citation:	**[2018] ACTSC 193**
Hearing Dates:	8, 12-15, 21-22, 25 June 2018
Decision Date:	13 August 2018
Before:	Mossop J
Decision:	See [304]
Catchwords:	**TORTS** – NEGLIGENCE – Negligence and nuisance – essentials of action for negligence – duty of care – public housing tenant mauled by dogs – dogs owned by visitor of another tenant – whether Commissioner for Social Housing owed a duty of care to the plaintiff – whether presence of dogs formed part of the “state of the premises under s 168 of the *Civil Law (Wrongs) Act 2002* (ACT) – no breach of duty established – whether Commissioner breached common law duty of care or duty under s 168 – whether breach of duty of care caused the harm suffered by the plaintiff – no causal link between any breach of duty and the injuries suffered by the plaintiff – whether the Territory owed a duty of care to the plaintiff – no duty of care established – plaintiff’s claims dismissed **LANDLORD AND TENANT** – TENANCY AGREEMENT - Standard residential tenancy terms under *Residential Tenancies Act 1997* (ACT) – complaints by tenants about dogs owned by visitors of another tenant – steps taken by Commissioner for Social Housing in response to complaints – tenant subsequently attacked by dogs – whether Commissioner breached cl 52 of plaintiff’s tenancy agreement by permitting interference with peace, comfort or privacy of the tenant – no breach of tenancy agreement – whether breach of the tenancy agreement caused harm suffered by the plaintiff – breach did not cause harm suffered by the plaintiff
Legislation Cited:	*Animal Nuisance Control Act 1975* (ACT) *Civil Law (Wrongs) Act 2002* (ACT), ss 43, 45, 45(1)(b), 110, 112, 168 *Civil Liability Act 2002* (NSW), ss 44, 168 *Companion Animals Act 1998* (NSW) *Court Procedures Act 2004* (ACT), s 21 *Dog Control Act 1975* (ACT) *Domestic Animals Act 2000* (ACT), ss 14, 22, 22(1), 22(2), 23, 49, 49A, 50, 50A, 53, 54, 55, 55(6)(b), 57, 59, 61, 62-65, 66, 70, 110, 111, 112, 114, 114A, 114B, 121, 123, 128, 129, 130, 132, 133 *Housing Assistance Act 2007* (ACT) *Residential Tenancies Act 1997* (ACT), ss 48, 51, 51(d), 83, 83(a), 83(b), 86

Cases Cited:	*Adelaide City Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 *Australian Capital Territory v Crowley* [2012] ACTCA 52; 7 ACTLR 142 *Bankstown City Council v Zraika* [2016] NSWCA 51; 94 NSWLR 159 *Brodie v Singleton Shire* Council [2001] HCA 29; 206 CLR 512 *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 *Cran v State of New South Wales* [2004] NSWCA 92; 62 NSWLR 95 *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 *Department of Housing v Consumer, Trader and Tenancy Tribunal* [2003] NSWSC 150 *Duncan bhnf Duncan v Ryan and The Australian Capital Territory* [2002] ACTSC 47 *Harris v Commissioner for Social Housing* [2013] ACTSC 186; 8 ACTLR 98 *Hartigan v Commissioner for Social Housing* [2017] ACTSC 100; 319 FLR 158 *Kuehne v Warren Shire Council* [2011] NSWDC 30 *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280 *Lipohar v The Queen* [1999] HCA 65; 200 CLR 485 *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; 2 WLR 595 *Smith v Leurs* (1945) 70 CLR 256 *Stovin v Wise* [1996] AC 923; 3 WLR 388 *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 *Warren Shire Council v Kuehne & Anor* [2012] NSWCA 81
Texts Cited:	Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) Explanatory Memorandum, Domestic Animals Bill 2000 (ACT) Explanatory Statement, Civil Law (Wrongs) Amendment Bill 2003 (ACT) Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44
Parties:	Daniel Patrick Meyers (Plaintiff) The Commissioner for Social Housing (First Defendant) Australian Capital Territory (Second Defendant)
Representation:	**Counsel** J Purnell SC and P Tierney (Plaintiff) V Thomas and N Oram (Defendants) **Solicitors** Ken Cush and Associates (Plaintiff)

ACT Government Solicitor (Defendants)

File Number: SC 459 of 2016

MOSSOP J:

Introduction

1. On 15 March 2016 the plaintiff, a resident of public housing in Spence provided by the Commissioner for Social Housing (the Commissioner), was savagely mauled by two pitbull terriers kept by visitors of a tenant of an adjoining unit. He has sued the Commissioner for damages claiming a breach of his lease and negligence. He has also sued the Australian Capital Territory (the Territory) claiming that he was owed a duty of care by the Territory to exercise the statutory powers under the *Domestic Animals Act 2000* (ACT) so as to prevent him suffering injuries from the dogs.

2. Liability was in issue. If liability was established, damages were agreed at $525,000.

3. The trial occurred over eight days between 8 and 25 June 2018.

4. For the reasons which follow, I have found that the Commissioner did not breach its lease with the plaintiff and that it did not owe the plaintiff a duty of care which extended to protecting him from attack by dogs owned by other people. Further, I have found that the Territory did not owe to the plaintiff a duty in relation to the manner in which the statutory powers available to authorised persons under the *Domestic Animals Act* were exercised. I have therefore dismissed the plaintiff's claim and ordered that judgment be entered for the defendants.

Persons and entities involved in this case

The plaintiff

5. The plaintiff, Daniel Meyers, was born in 1976 and at the time of trial was almost 42 years old. He suffers from bipolar disorder as well as from Type 1 diabetes. He takes medication for both conditions. He completed Year 9 at school. He has some difficulty reading. He has some other medical conditions which create particular housing needs.

6. The plaintiff lived in a property owned by the Commissioner in 2008 and 2009. He felt isolated there and feared those around him who abused alcohol and drugs. As a result, he moved to Tuross Head in February 2009 to live with his father. That arrangement did not last for long and he returned to Canberra in September 2009. He then lived for a period at Samaritan House, a facility providing short term housing for homeless men and a similar residence called "Tony's Place". He applied for housing with the Commissioner in November 2009. He received support for his application for housing from a number of non-government organisations and from the psychiatrist employed by ACT Health who treated him.

Residents at Warrock Court

7. Warrock Court is the public housing complex where the plaintiff lived. It is located close to the Spence Shops and comprises four buildings spread across the site. Each of those buildings contains four units. Each of the units has an allocated carport. The

downstairs units each have a small courtyard area and the upper-level units each have access to a balcony.

8. The plaintiff lived in an upstairs unit in one of the buildings (unit 12).

9. The tenant of the other upstairs unit in this building (unit 11) was Michael Rezo. He had moved into the accommodation in April 2011. He had a very significant problem at that point with alcohol dependency. Prior to obtaining accommodation, he had on two occasions undergone a one-week program of alcohol detoxification at The Canberra Hospital. He also suffered an "anxiety depressive disorder" for which he was on medication. Significant for the purposes of this case are two people who were residing in Mr Rezo's unit, Alan Matas and Jodie Skinner.

10. Roberta Manley was the lessee of unit 10, a downstairs unit, opposite unit 9 and below that of the plaintiff. She was retired.

11. Kim Lahiff was the lessee of unit 9, a downstairs unit, opposite unit 10 and below Mr Rezo's unit. She suffered a variety of mental health conditions. Michael Lahiff is her father. He did not live in the complex.

The Commissioner

12. The Commissioner is a statutory corporation with functions set out in the *Housing Assistance Act 2007* (ACT). The Commissioner does not have the power to employ staff but may delegate the Commissioner's functions under the Act, or another Territory law, to a public servant. Housing ACT is a sub unit of the Community Services Directorate. The public servants working there are responsible for public housing in the Territory. Housing ACT does the work associated with the statutory functions of the Commissioner.

Public servants working at Housing ACT

13. Jayne Diehm was a public servant employed within Housing ACT. She was a Housing Manager responsible for Mr Meyers, Mr Rezo, Ms Lahiff and later for Ms Manley. She had commenced working as a Housing Manager in May 2015. In approximately October 2015, she took over responsibility for tenancies in the Melba, Spence and McKellar area which included Warrock Court. She was responsible for approximately 288 tenancies. Margaret Singh was another Housing Manager within Housing ACT with whom Ms Manley had some dealings.

14. Llewella Grillo was the Regional Manager for the area encompassing Warrock Court. She was senior to Ms Diehm.

15. Radmila Stosic was the Team Leader of Tenancy Operations. She was senior to Ms Grillo.

16. Christopher Adkins was the Senior Manager of Operational Services for Housing ACT.

The Australian Capital Territory

17. The Australian Capital Territory is the Crown in right of the Australian Capital Territory: *Court Procedures Act 2004* (ACT), s 21. One of the directorates in which the public service was organised was the Territory and Municipal Services Directorate.

Public servants working at Domestic Animal Services

18. Domestic Animal Services (DAS) was a business unit within the Territory and Municipal Services Directorate. The staff within DAS were responsible for administering the *Domestic Animals Act*. Rangers within DAS were authorised persons for the purposes of the *Domestic Animals Act* as well as having powers under various other Acts. As at the beginning of 2016, there were eight ranger positions.

19. Jason Ritzen was a ranger within DAS. So too was Nicholas Morris.

20. Eva Cawthorne was the "Manager Ranger Services" within DAS. She was responsible for the management of the rangers.

21. Fleur Flanery was a public servant employed within DAS and was the public servant appointed by the Director-General as the registrar under the *Domestic Animals Act.*

Assessment of witnesses

22. Eight witnesses gave oral evidence. In making the findings of fact below, I have taken into account my assessment of the witnesses who gave evidence which is summarised as follows. The assessment takes into account my impression of the demeanour of the witnesses when they gave their evidence as well as the substance of their evidence.

23. I formed the view that each of the witnesses who gave evidence did so honestly. The degree to which the evidence was also reliable varied. In this case, there is a good contemporaneous documentary record of events and I have placed principal reliance upon that record in making findings of fact.

24. There were limited areas of factual contest. The most significant areas of contest were what was said by Mr Ritzen to Mr Lahiff and to the tenants of units 9, 10 and 12. On those issues, I found that although the relevant witnesses were giving evidence honestly, their recollections were influenced by their respective states of knowledge at the time and their knowledge of the terrible attack that ultimately occurred on the plaintiff.

25. I accepted the plaintiff's evidence as honest and, to the extent to which he had a recollection, reliable. He gave evidence of the attack. He had a very limited recollection of events before and after the attack. This was explained by his sister, Rebecca Meyers, who gave evidence that the attack had affected the plaintiff's memory and intellectual functioning. The evidence of Ms Meyers was not contentious.

26. I formed the view that the evidence of Ms Manley was influenced by her frustration and anger at what occurred subsequently. In a number of respects, the evidence that she gave was inconsistent with the documentary records and that led me to treat some of her evidence with caution. One example of that inconsistency was her denial of a conversation with an employee of Housing ACT, namely Ms Singh, on 9 February 2016, in circumstances where there was a record of that conversation in the documentary records. I formed the impression that although quite definite in her evidence, the definitive nature of the evidence she gave did not necessarily reflect its reliability.

27. I formed the view that Mr Lahiff's evidence was generally reliable. His understanding of events was influenced by his (accurate) perception of the gravity of the incident upon him on 8 January 2016 and his perception that he was being given a bureaucratic run-around when he sought government action in response to the incident. He did not

have any awareness of the resource limitations affecting Mr Ritzen or the legal framework within which Mr Ritzen operated. He therefore more readily perceived there to be an inadequate response to his complaint than he might have if he had a greater understanding of those matters. I have assessed his evidence in light of the content of his contemporaneous documents which in some respects differed in emphasis from his oral evidence.

28. Only very limited evidence of David Wright, a dog behaviour expert, was admitted. I accepted that evidence, although it is of little significance in the case.

29. In my view, notwithstanding that his evidence was attacked in cross-examination, I generally accepted the evidence of Mr Ritzen. On most matters, it was consistent with and corroborated by contemporaneous documentary records. While I generally accepted his evidence on matters of fact, his evidence about requesting and requiring a written statement from Mr Lahiff involved an element of defensive reconstruction. While I consider that he may have made reference to a statement in his conversations with Mr Lahiff, he did not do so in a manner that indicated to Mr Lahiff that the availability of such a statement was of critical importance in terms of taking further steps to control the dogs involved in the 8 January incident.

30. I found the evidence of Ms Diehm to be reliable. Once again, her evidence was generally consistent with and corroborated by the documentary record. Even though the documentary record shows that she devoted significant effort to documenting her actions, she frankly accepted that she had not made file notes of all her actions when dealing with the dogs in unit 11. Where she was unable to recall matters, she said so. Where she had limited recall of events, she frankly accepted the limitations upon her recall and explained the basis for that recollection.

31. I found the evidence of Mr Adkins to be reliable. His evidence about the processes involved in responding to breaches of tenancy agreements by tenants was detailed, fair and obviously given with the benefit of significant experience.

Events prior to 8 January 2016

32. Prior to December 2015, there is no evidence of any significant problems with Mr Rezo's tenancy. Inspection reports indicated that the premises were well maintained. There was a complaint made about his property in March 2015, but after that complaint was investigated, it was found to be unsubstantiated.

33. In early December 2015, Ms Manley contacted Access Canberra (see [47] below) because she was concerned about excessive barking coming from unit 11. She was advised that she would have to fill out a 14 day diary noting barking times. She did not pursue the matter further.

34. In her oral evidence Ms Manley described that there were initially three pitbull terriers accommodated in unit 11, but at a subsequent point there were only two. She described them as growling and barking when on the balcony, defecating or urinating there so that the faeces or urine would fall into the courtyard below, attempting to break down the barrier between Mr Rezo's balcony and the plaintiff's, and occasions when they would be let out to run through the complex. She described an occasion where the male dog, Diesel, was tied up at the bottom of the stairs on a long lead.

35. She gave evidence that she had complained about the dogs to her Housing Manager, Ms Singh, prior to making a written complaint in December 2015. She said that Ms

Singh had told her to "Lock yourself in your home". There was no record of such an interaction in the Housing ACT "Homenet" database which recorded interactions with her in relation to her tenancy. There was no reference to such an interaction in the written complaint that Ms Manley subsequently made on 13 December 2015. There was, however, a record in the Homenet database of an interaction between Ms Manley and Ms Singh on 9 February 2016. Notwithstanding that Ms Manley denied that the 9 February 2016 conversation occurred, I am satisfied that it did. On the issue as to her conversation with Ms Singh prior to her written complaint in December 2015, I do not consider that Ms Manley's evidence is reliable. While she may have mentioned the dogs to Ms Singh prior to her complaint in December 2015, I cannot be satisfied on the balance of probabilities that she did so other than in passing and am not satisfied that the only response that Ms Singh gave was to advise her to lock herself in her unit.

36. Late in the evening of 13 December 2015, Ms Manley made a written complaint to Housing ACT. This was sent by email to the "Housing Customer Service" address. The body of the complaint provided:

> I am lodging a formal complaint against the tenant in 11/25 O'Neill st Spence.
>
> This tennant [sic], Michael I think, has recently had someone move into his flat with him. This person has bought [sic] with thom [sic] 2 pitbull dogs. These dogs bark incesantly [sic]. Every time I go into my yard they are on his balcony barking. Whenever the postman comes, or someone walks by they bark.
>
> It is 9pm tonight and I was talking to my upstairs neighbour and the 2 dogs started again. We had to go inside because we couldn't hear what we were saying. He never tells them to stop, infact [sic] he encourages this behaviour.
>
> Since I moved in at the end of July I have had to call the police 3 times on this person. And I have had enough, all I want is a quiet life and if it wasn't for him it would be.

37. The receipt of her complaint was acknowledged by an email sent on 14 December 2015.

38. Having regard to the terms of the complaint, it is clear that the principal concern, at that point, was the noise generated by the dogs. There is no reference to any concerns relating to them roaming the complex, being tied up in a public area or presenting any threat to persons or animals.

39. On 22 December 2015, Ms Diehm and a trainee Housing Manager attended the property in response to the complaint about the dog nuisance. At that point, Ms Diehm had some awareness of the personal circumstances of Mr Rezo, having reviewed his file. When she was at the property, the barking from the dogs was "very loud and incessant". Mr Rezo told her that he was minding the dogs and they would be gone in four or five days. Ms Diehm told him that the dogs were not suited to the property, that they must be removed and that it was contrary to the tenancy agreement to keep dogs at the property. The tenant said that he understood. (I do not accept Ms Manley's evidence that two male employees visited the complex in response to her complaint because that evidence is inconsistent with the documentary evidence and the evidence of Ms Diehm.)

40. The same day, Ms Diehm wrote a letter to Mr Rezo following up upon the conversation. The letter identified that sub-cls 70(b) and (c) were the relevant provisions of the residential tenancy agreement. Those clauses provided that a tenant must not cause or permit a nuisance or interference with the quiet enjoyment of the occupiers of nearby premises. The letter included:

> Thank you for discussing this issue with me during my visit. I appreciate your cooperation and reinforce our agreement that the dogs will be removed from the property no later than 27 December 2015. As discussed the noise the dogs are making is in breach of your tenancy agreement.

41. The letter concluded:

> Please ensure… that you comply with the Tenancy Agreement. Should Housing ACT receive any further complaints which can be substantiated, your tenancy may be referred through to the ACT Civil and Administrative Tribunal.

42. Ms Diehm planned to make a visit to the property on 5 January 2016. She did not propose to advise the tenant of the date of the visit. The reason that the visit was proposed for 5 January 2016 and not earlier was because of the public service shutdown period after Christmas.

43. Ms Diehm also sent a letter to the complainant, Ms Manley, on 23 December 2015. The body of the letter was as follows:

> I am writing in regards to the complaint you lodged on 14th December 2015 relating to the noise disturbances and animal welfare currently occurring at 11 Warrock Court, 25 O'Neill St, Spence ATCT [sic] 2615.
>
> Housing ACT has an obligation to work in accordance with the *Residential Tenancies Act.* Housing ACT has limitations in taking actions outside the Residential Tenancies Act, however we have a commitment to working closely with tenants to ensure they adhere to the terms of their Tenancy Agreement and that they are appropriately supported in the community.
>
> Whilst I am limited in what information I can provide you, I can advise that Housing ACT has been working with the tenants to resolve the issues you have raised in your complaint. As you can appreciate, resolution to complaints can take time to resolve and we appreciate your patience in allowing Housing ACT the time to undertake our investigation. At this point we are expecting the dogs to have left the property by 27th December 2015. We will be following up on this to ensure this is the case, but please if you can provide further information to us surrounding this matter I encourage you to do so.
>
> I encourage you to contact the EPA if you believe a breach of noise is occurring as they have the authority to take noise readings and determine if a breach has occurred. Also in regards to the animal welfare please contact Domestic Animal Services and the RSPCA. I also advise you to contact the Australian Federal Police if you are threatened on 131444 or in the case of an emergency please call 000.
>
> If you are dissatisfied with this outcome you may ask for a review by a Senior Manager of Housing ACT. Your request must be made in writing within 28 days of the date of this letter …

44. Following this, an internal working document was prepared showing how Ms Manley's complaint had been dealt with. The document was completed by Ms Grillo. It indicated that the property visit had been conducted, that the subject of the complaint had been spoken to, that a file note had been prepared, that the dogs would be removed by 27 December 2015 and a reminder letter had been sent. The document recorded that the investigation was not conclusive but was sufficient to suggest that the complaint was justified. It was signed by Ms Grillo on 24 December 2015 and by another officer from the Complaints and Information Unit indicating that the complaint had been closed on that date. The complaint was dealt with earlier than the target date for dealing with the complaint which was 8 January 2016.

45. The dogs did in fact leave the premises over the Christmas period. When they returned to the premises was the subject of some differences in the evidence. Ms Manley

thought the dogs had returned just before or at about the New Year. On the other hand, Ms Diehm gave evidence that she did not visit the premises on 5 January 2016 because she spoke to a neighbour to see whether the dogs were still there and was told that they were not there. She remembered feeling relieved at that information. It is not necessary to resolve this issue because it is clear that Ms Diehm was told on 7 January 2016 by one of the neighbours that the dogs were still at the property. As a consequence, she planned a property visit for the next day, 8 January 2016. She attempted to call Mr Rezo four times but without success.

The attack on Mr Lahiff

46. On the 8 January 2016, before Ms Diehm could conduct her planned visit, Mr Lahiff, Ms Lahiff's father, was visiting his daughter who lived in unit 9, one of the ground floor units. He approached the pathway to her front door. He observed two people on the landing outside the units above. At about the time that he knocked on his daughter's front door, two dogs came charging down the stairs, barking loudly and ran towards him barking in a ferocious manner. As they approached him, he prepared for their attack. They came at him one at a time. He kicked the first dog in the head and it retreated a little to near the bottom of the stairs. The next one then came at him and he also kicked it in the head. By this time, his daughter had opened the door and he was able to escape into her unit. Had he not responded so forcefully and then escaped, he would have been mauled by the dogs. As he entered her unit, he saw the dogs being grabbed by their owners at the bottom of the stairs. He was, understandably, badly shaken, upset and angry about what had occurred.

47. He then attempted to have the danger posed by these dogs addressed by various government authorities. First, he rang the Australian Federal Police (AFP). He was told to ring Canberra Connect. Canberra Connect is a call centre operating as a single point of contact for ACT government services. (It was also referred to in the evidence as Access Canberra. Any distinction between the services is not significant for the purposes of this case.) He explained the situation to the telephone operator at Canberra Connect and gave the details of the incident. The operator attempted to contact DAS and at 9:53am sent an electronic "Smart Form" to DAS, requesting assistance. He then hung up and waited to be contacted by DAS. After about an hour, he was concerned that nothing happened and so he rang Canberra Connect again, stated the serious nature of the incident and asked for a direct number for DAS. He then rang DAS and explained to Mr Ritzen, a ranger with DAS, the circumstances of the attack and that it was very serious.

48. Although there were eight ranger positions within DAS, they worked on a roster. According to that roster, six of those ranger positions were rostered on that day, but two of those positions were vacant during that period. Of the four remaining rangers rostered on that day, one was sick and two were on leave. That meant that the only ranger that was available to perform the duties of rangers within DAS was Mr Ritzen. Those duties included serving on the counter at the DAS pound, answering phone calls and email enquiries, manning the till, selling dogs, collecting stray animals from vets or people's houses as well as investigating allegations of dogs harassing or attacking people or animals.

49. Mr Ritzen recorded the complaint that was made to him on a form headed "Domestic Animal Services Complaint Details" as follows:

2 DOGS HAVE HARASSED MICHAEL IN THE STAIRWELL OF HIS DAUGHTER'S FLAT. THE COMP SAID HE WENT TO HIS DAUGHTER'S LAP [sic] THIS MORNING AT 09:40 AND WAS ATTACKED BY TWO DOGS WHICH HAD COME OUT OF FLAT 11, 25 O'NEILL STREET SPENCE ACT. AFTER FIGHTING THEM OFF I RANG TH [sic]

50. Consistently with it being a working document completed at the time, the description of what occurred stopped mid sentence and was not completed. Mr Ritzen also filled in a box on the form which under the heading "Action" described "Action Required" and "Action Taken". So far as "Action Required" was concerned, the document said:

SPEAK WITH OWNERS ABOUT CONTAINING THEIR DOGS. NO DOGS REGISTERED AT PROPERTY.

51. Mr Lahiff's evidence was that during the telephone conversation with Mr Ritzen, he was told that DAS could not act because he had not been bitten by the dog and that therefore DAS had no power to intervene. He said he was told it was a matter for Housing ACT. He was told to report the problem to Housing ACT. As there are other documentary records which reflect upon the content of this conversation, it is a matter which I will return to at [70] below.

52. Mr Lahiff then rang Housing ACT. He spoke to somebody who was identified as the relevant Housing Manager for that block of units. It was, in fact, Ms Diehm. He explained to her that the attack was vicious, that he was fearful and that action needed to be taken. He was told that nobody from Housing ACT could come out until the "Dog Control people" had been. Mr Lahiff expressed his amazement at the situation, although he could not recall the exact words he used.

53. At 10:32am Ms Diehm had also contacted Access Canberra so as to request assistance with removing the dogs so that Housing ACT could attend the premises. Another Smart Form was generated and sent to DAS. It recorded:

The dogs have broken out of the property & chased a visitor. Caller is from Housing ACT & needs dogs removed before she can attend. Housing ACT have already asked for these dogs to be removed.

54. Following his telephone call to Ms Diehm, Mr Lahiff then rang the AFP again. He told the police that he was fearful of a further attack. He was told by the police that they could not come and that it was a matter that should be addressed by Housing ACT.

55. At some point after having spoken to Mr Lahiff, Mr Ritzen spoke to Ms Diehm by telephone. The inference available from the documentary records (in particular, the email from Ms Cawthorne of 3:57/3:58pm referred to below at [60]) is that Mr Ritzen told her that he would be issuing a Warning Notice and that Housing ACT should take steps available to them under the lease to have the dogs removed. He did so without any particular understanding of the content of the lease or the steps required to be taken under the *Residential Tenancies Act 1997* (ACT). They agreed that Ms Diehm would attend the DAS facility in Symonston and collect the Warning Notice that he would prepare and that she would deliver it to the premises.

The ministerial email

56. As a consequence of being given what he considered to be the bureaucratic run-around, Mr Lahiff wrote directly to Simon Corbell who was at the time the Deputy Chief Minister, ACT Attorney-General, Minister for Health, Minister for the Environment, and Minister for Capital Metro. That email was in the following terms:

> Dear Minister
>
> I'm writing to ask if you could intervene in a dangerous situation regarding savage dogs.
>
> I went to my daughter's flat this morning at 09:40 and was attacked by two dogs which had come out of flat 11, 25 O'Neill Str Spence ACT.
>
> After fighting them off I rang the police who said they would not deal with dogs and to get in touch with Canberra Connect.
>
> I contacted Canberra Connect at 09:46 and made a report which they passed on to Dog Control. At 11:00 Canberra Connect advised they had been unable to connect with Dog Control.
>
> At 11:11 I contacted Dog Control direct who advised that they would look into the matter.
>
> Later I spoke to ACT Housing who advised they had been in touch with Dog Control also and that Dog Control could not respond. ACT Housing also were unable to visit the flat in question until Dog Control had attended.
>
> I reported the situation to the AFP again at 12:05 and explained to them the dangerous situation. They said they had no powers to enter premises to apprehend dangerous dogs.
>
> The situation as I write is that at least 2 people are unable to come out of their flats (numbers 9 and 10) due to fearing attack from the dogs.
>
> Could you please intervene in this situation and request police attendance.

57. It should be noted that insofar as the email records the conversation with "Dog Control", it records a positive response ("they would look into the matter") even though it was not an immediate response. It is only at the subsequent point of speaking to ACT Housing that he records being advised that "Dog Control" could not respond.

58. This email did prompt some response. Within 22 minutes, an adviser to Mr Corbell had spoken to a Gerard Hodshon (whose position is not disclosed by the evidence) about the issue and sent a copy of Mr Lahiff's complaint to him (at 3:07pm). Mr Hodshon, in turn, sent a further email (at 3:10pm) to a Samantha Turner (whose position is not disclosed by the evidence) saying that he needed to get back to the Minister's office detailing the response as soon as possible. Twelve minutes after that (at 3:22pm) Ms Turner sent the email chain to Ms Cawthorne, whose position is described as "Manager Ranger Services".

59. Ms Cawthorne then had a conversation with Mr Ritzen about the complaint and obtained information from him.

60. Just over an hour after the email was sent to the Minister, Ms Cawthorne responded to Ms Turner by email (at 3:57/3:58pm) which included the following:

> A smart form was also received from Housing at 10:32 requesting assistance from DAS to remove the dogs from the premises so the officer could attend the premises. The ranger advised the Housing officer that DAS are not authorised to remove dogs from private premises (includes stairwell and curtilage) and that he would issue a formal warning to the owner of the dog under section 49A of the Domestic Animals Act 2000 (harass). He has done so. He gave a warning to an officer from ACT Housing who was going to deliver it along with notices from that agency.
>
> The ranger advised the officer from ACT Housing to obtain a warrant for the removal of the dogs (which are allegedly in breach of tenancy agreement).
>
> The complainant has been advised that he can attend DAS and make a formal witness statement regarding the incident.

61. Two points should be noted about the terms of this email. First, Mr Ritzen denied saying words to the effect of the bracketed expression "(includes stairwell and curtilage)" and said that the expression would not correspond with his understanding of the *Domestic Animals Act* at the time. Neither party could explain how the expression would make legal sense having regard to the terms of the Act. I am not satisfied that he said words to the effect of the bracketed expression. Therefore, it must have been added by the author of the email. It is possible that it was written in contemplation of a situation not uncommon in unit title developments (but not relevant to Warrock Court) where there is an enclosed common stairwell to which only residents have access.

62. The second point is that the last quoted sentence of the email is a contemporaneous record of Mr Lahiff being told that he could attend DAS and make a formal witness statement.

63. This response then appears to have worked its way back up the chain. It appears to have been sent by Ms Cawthorne to Ms Flanery (registrar under the *Domestic Animals Act*). At 4:03pm Ms Flanery responded to Ms Cawthorne (carbon copied to three other people, namely, Ms Turner, Phillip Perram, Executive Director Parks and Territory Services, and Mr Ritzen) saying:

> Thanks. Please do not provide this information to the media. There is already a matter before the court regarding a serious dog attack in a community housing facility.
>
> We need to follow up with Housing and legal

64. The reference to the matter which was already before the Court appears to be a reference to the case which resulted in the decision of Penfold J in *Hartigan v Commissioner for Social Housing* [2017] ACTSC 100; 319 FLR 158.

65. So far as the email records an intention to follow up with both ACT Housing and "legal", the evidence did not disclose who or what was "legal".

66. Following the sending of her first response, Ms Cawthorne discussed the matter further with Mr Ritzen. It was agreed between them that Mr Ritzen would attend the premises in the company of police after he had closed the DAS pound. (This reflected a more definite plan to attend the property than had existed at the time of the discussion with Ms Diehm and may have been the result of the prompting by the ministerial email.) At 4:08pm Ms Cawthorne emailed Ms Flanery saying that a ranger (Mr Ritzen) would attend the property that afternoon with an officer from ACT Housing and the AFP if necessary.

67. The 3:57/3:58pm email from Ms Cawthorne was also sent by Ms Turner to a Jane Carder, described as a "Manager" in "Place Management, City Services, Parks and Territory Services" (at 3:59pm). It is not clear precisely what Ms Carder's responsibilities were or the relationship between her position and that of Ms Cawthorne. In her email of 4:13pm to Ms Cawthorne, Ms Carder said:

> Hi Eva
>
> Thank you for arranging for a DAS Officer to attend the site to determine if there is a further threat, as residents are scared to leave their flats for fear of attack. If there are any further threats, the DAS Officer can call the police to attend and take appropriate action.
>
> It would be good to know if ACT Housing has issued their notice before the weekend.

68. By 4:23pm the information had made its way back up to Minister Corbell's adviser, Kathryn Conroy, who emailed Mr Lahiff saying:

> I understand action has been taken and a representative from Territory and Municipal Services has or will be in touch soon.

69. This response appears to assume that the attendance of the DAS ranger at the site would involve contact with Mr Lahiff. That was not necessarily the case and in fact there was no contact with Mr Lahiff that afternoon or evening.

The content of the conversation between Mr Lahiff and Mr Ritzen on 8 January 2016

70. The substance of the report that was made by Mr Lahiff to Mr Ritzen is set out at [51] above. The controversial aspects of the conversation are whether he said that he would not attend and what he said about the scope of his powers in the circumstances.

71. Mr Ritzen gave evidence that his practice was to ask certain questions of a complainant. They included when and where the attack occurred, how many dogs had been involved and whether or not the complainant had been bitten or otherwise injured. I am satisfied that he asked those questions on this occasion. Mr Ritzen gave evidence that, as a result of the answers given to him, he categorised the incident as one involving harassment rather than an attack. He told Mr Lahiff that he could not respond at that time. That is consistent with what is recorded in Mr Lahiff's email to the Minister ("they would look into the matter" referred to at [57] above). I am not satisfied that Mr Lahiff was told that because he "hadn't been bitten they didn't have powers to remove the dogs". I am satisfied that having asked Mr Lahiff questions about the circumstances of the incident, Mr Ritzen told him that he could not attend the premises at that time but would look into the matter. It may be that there was some discussion of the potential to seize the dogs or the likely course that might be taken in relation to the dogs having regard to the "Action Required" entry referred to at [50] above, but that was not sufficient at that point to convince Mr Lahiff that DAS would not take any action. I am also satisfied, having regard to Mr Ritzen's evidence and the contemporaneous record in the email set out at [60] that he did tell Mr Lahiff that he could, if he wished, make a statement about the attack. However, that was not done in a manner which conveyed to Mr Lahiff the significance that Mr Ritzen placed upon the making of the statement in terms of empowering him to take more drastic action in relation to the dogs than he then contemplated, namely, a visit and a warning. I accept that had the potential significance of a written statement been explained to him then Mr Lahiff, as he said in his evidence, "would have been there like a flash" to make such a statement.

72. It was only after speaking to Ms Diehm that Mr Lahiff came to the view that nothing was going to be done and it was this that provoked his email to the Minister.

73. It is quite understandable that Mr Lahiff was provoked into action by the lack of an immediate response. Mr Lahiff was, quite reasonably, very upset at being subject to the attack by the two dogs. He had an expectation that decisive action would be taken immediately in relation to the dogs, particularly given his knowledge of his daughter's vulnerable situation. He was not aware of the resource constraints facing Mr Ritzen or the existence of a usual course in relation to first time incidents of "harassment". His expectation of immediate decisive action was therefore disappointed and he, understandably, formed the view that the responses from the agencies that he contacted were completely inadequate.

Actions of Mr Ritzen and Ms Diehm following the 8 January 2016 incident

74. After having spoken to Ms Diehm, Mr Ritzen prepared a Warning Notice. This was prepared on a standard form which indicated that the recipient was required to take immediate action to ensure ongoing compliance with the *Domestic Animals Act* and that "infringements may be issued if you have received a previous warning". The form was filled out by hand. The handwritten additions give the appearance of being somewhat haphazard involving circling, underlining, crossing out and interlineation. However, the notice was intended to indicate that the complaint involved allegations that dogs may be unregistered and that the dog had breached the Act: "s 49A Dog harass person/animal when not with keeper/carer at 25 O'Neill Street Spence." This Warning Notice indicates that at the time, as a result of his discussions with Mr Lahiff, Mr Ritzen considered that the appropriate characterisation of the incident was one involving harassment rather than an attack. Had Mr Ritzen characterised the incident as an attack then the usual course identified in DAS internal working documents would have been to seize the dog until investigation of the incident was complete.

75. As arranged in her conversation with Mr Ritzen earlier that day, Ms Diehm attended the DAS premises in Symonston and collected the Warning Notice from Mr Ritzen. She attended the premises that afternoon and delivered the notice to Mr Rezo's letterbox.

76. Ms Diehm also prepared a file note summarising the actions in relation to the complaint received on 14 December 2015 and the events that occurred on 8 January 2016. This records her actions prior to Christmas, as well as her actions in response to the report by Mr Lahiff. It indicates that in addition to reporting the matter via Canberra Connect, she had called the Mr Rezo two times and then phoned his emergency contact to gain a new phone number for Mr Rezo. She then called that new contact number four times leaving two messages. In relation to the future, the file note records:

> HM [Housing Manager] will continue to monitor the situation. HM will attend the property once the dogs are no longer a threat.
>
> HM will call neighbours to check on their safety.
>
> HM will complete NTR [Notice to Remedy]

77. Ms Manley also contacted DAS following the attack on Michael Lahiff.

78. As agreed with his manager, Ms Cawthorne, Mr Ritzen did in fact attend the premises in the company of police at about 6:10pm on 8 January 2016. He attended with a catching pole and walked loudly up the stairs and banged on the screen door so as to provoke a response from any dogs that were present. His actions were recorded in the "Action Taken" portion of the DAS complaint form referred to at [50] above as follows:

> AS THERE WAS NO STAFF EXCEPT MYSELF I ATTENDED THE PROPERTY AFTER I CLOSED THE POUND AND ATTENDED THE SPENCE PROPERTY WITH THE ASSISTANCE OF THE AFP. I KNOCKED ON THE DOOR SHORTLY AFTER 6PM WITH NO RESPONSE AND DID NOT HEAR ANY SIGNS OF ANY DOGS WITHIN THE PROPERTY AND THEY WEREN'T ON THE BALCONY OF THE PROPERTY. LEFT NOTICE TO CALL THE POUND ASAP REGARDING THEIR DOGS. JASON

79. Consistent with the contemporaneous note, I find that Mr Ritzen did leave a calling card or a "tick and flick box" card. The document was different to the Warning Notice that he had given to Ms Diehm and, as his note indicates, requested the owner to make contact with DAS.

Events on subsequent days

80. On Saturday 9 January 2016, Ms Manley took a photo of the male dog known as Diesel at the bottom of the stairs outside the units. The dog can be seen to be tied up with some form of rope or cord. The picture shows it looking down the alleyway towards Ms Manley and effectively blocking the way out of her unit.

81. At 10:38am on Saturday, 9 January 2016, Ms Cawthorne reported to Ms Flanery and others that Mr Ritzen had attended the property and attempted to make contact with the resident or owner of the dogs. There was no response and the ranger left a calling card.

82. At 11:20am and 11:45am on Saturday, 9 January 2016, Ms Flanery and Mr Perram respectively acknowledged receipt of the email from Ms Cawthorne sent at 10:38am.

83. At 10:36am on Sunday, 10 January 2016, Mr Lahiff responded to Ms Conroy's email of 4:23pm on 8 January 2016, saying that he had not heard from Territory and Municipal Services yet.

84. On Monday, 11 January 2016, Ms Conroy raised the lack of contact with Mr Lahiff with Mr Hodshon, who in turn raised it with Ms Cawthorne, who in turn raised it with Mr Ritzen. This then seemed to prompt further action on Mr Ritzen's part. His actions are recorded in his email of 11:02am of that day to Ms Cawthorne as follows:

    > At 10:54 on the 11/01/2016 I spoke with Michael [Lahiff] regarding the dog mentioned and informed him that I've left a noticed [sic] at the property with the assistance of the AFP on Friday around 6 pm on Friday.
    >
    > Michael will make some inquires [sic] to see if the dogs have been returned to the property and inform me of his information. I gave Michael my direct phone number …

85. Mr Lahiff denied that there was any discussion of him making further enquiries to see if the dogs returned to the property. However, having regard to the contemporaneous record in the form of this email and the subsequent provision of information by Ms Lahiff referred to at [89] below, I find that this issue was discussed and that Mr Ritzen gave Mr Lahiff his phone number for that purpose.

86. The information provided by Mr Ritzen about having spoken to Mr Lahiff was then passed by Ms Cawthorne at 12:56pm on Monday, 11 January 2016, back up to Mr Hodshon and, I infer, to the ministerial adviser Ms Conroy. The email from Ms Cawthorne to Mr Hodshon included that: "Michael [Lahiff] will make some inquires [sic] to see if the dogs have been returned to the property and inform Jason [Ritzen] of his information."

The Notice to Remedy

87. On 11 January 2016, Ms Diehm at Housing ACT prepared and signed a Notice to Remedy which alleged a breach of cl 70 of the prescribed terms of Mr Rezo's residential tenancy agreement. As noted above (at [40]), that clause provided that the tenant shall not cause or permit nuisance or interfere, or permit interference, with the quiet enjoyment of occupiers of nearby premises. The notice gave him 14 days to remedy the breach by removing the dogs from his property. Included with the notice was a copy of the Warning Notice prepared by Mr Ritzen which Ms Diehm had previously delivered to his mailbox on 8 January 2016. The notices were served by Ms Diehm on Mr Rezo by leaving them in his letter box on 11 January 2016 at 2pm in

the afternoon. Although Ms Diehm could not specifically recall whether prior to leaving these notices in the letterbox she had visited the unit and knocked on the front door, it is likely, having regard to the nature of the documents and her previous contact with Mr Rezo, that she did. Because the service of a Notice to Remedy was a formal step required by the provisions of the *Residential Tenancies Act*, Ms Diehm prepared a statement of service that could be subsequently used in Australian Capital Territory Civil and Administrative Tribunal (ACAT) proceedings.

88. On 13 January 2016, Mr Ritzen attended the property again. A note added to his earlier database entry said:

> ATTENDED ADDRESS 13/1/15 [sic] NO ONE HOME SPOKE TO COMP, KIM AND 2 NEIGHBOURS HAVE DETAILS NOTE BOOK [sic] PAGE 20 ON FILE DOG ATTACK FILE WARNING NUMBER NOTICE 3809

89. On 13 January 2016, Ms Lahiff contacted Access Canberra at 7:32am indicating that the dogs were now at the property. A ranger called Ms Lahiff and told her rangers would attend that day. She said that the dogs had not attacked or harassed any person at the time of the call in the morning.

90. Mr Lahiff spoke to his daughter following her conversation with the ranger. As a result of the conversation with his daughter, he wrote a further email to Ms Conroy in Minister Corbell's office. He said:

> This morning My daughter informed me that the dogs had returned to flat 11, 25 O'Neill St Spence. My daughter contacted Dog Control (via Canberra Connect). She was told by the ranger that he was unable to respond and that because I hadn't been bitten by the dogs it was really a Housing matter. Could you please determine whose responsibility it is to remove the dogs which seem to be placed in the flat only during non-business hours.
>
> I wish to restate the vicious nature of the dog attack against me last Friday. If my daughter had been unable to let me into her flat quickly or if I had been visiting my daughter with my grandchildren (age 3 and 6) the result of the attack could have been horrific.
>
> I believe my daughter and the other residents at these flats are owed a duty of care by the Territory Authorities.
>
> I sincerely hope that the duty of care will not be one that will have to be determined by the courts if these two dogs attack again.

91. Having regard to the fact that Ms Lahiff was told that rangers would attend the premises, the statement in the email that "She was told by the ranger that he was unable to respond and that because I hadn't been bitten by the dogs it was really a Housing matter" was not an accurate statement of what Ms Lahiff had been told in the telephone call. The statement is likely to reflect the frustration of Mr Lahiff and his daughter that no ranger had said that as a result of his complaint the dogs would be seized.

92. Mr Lahiff's email was sent by Minister Corbell's office to Minister Rattenbury's office on 13 January 2016 and Mr Lahiff was told that this had occurred. Logan McLennan, who appears to be on the staff of Minister Rattenbury, sent the letter to Helen Wilson, who appears to have been somebody in the office of the Director-General of Territory and Municipal Services Directorate, who in turn sent the document to the registrar (Ms Flanery), and Ms Cawthorne. Ms Cawthorne then reported by email to Ms Wilson that Ms Lahiff had been spoken to by a ranger that morning and told that rangers would attend the premises that day. The ranger had also confirmed that the dogs had not attacked or harassed any person at the time of the call that morning. Ms Cawthorne

said that two rangers were attending the address and that she would let Ms Wilson know the outcome of the visit.

93. At 3pm that afternoon, Mr Ritzen attended the address. He did so in the company of the only other ranger on duty that day, Mr Morris. Mr Morris recorded in his notebook that he spoke to Ms Lahiff, Ms Manley and the plaintiff. Mr Morris was told "all 3 tenants have lodged complaints with housing and Police and the tenant from 12/25 has been threatened with a knife reported to police". Mr Morris recorded contact details for the three tenants and for the Housing Manager, Ms Diehm.

94. Mr Morris recorded what occurred during the visit in an email to Ms Cawthorne on 18 January 2016:

> On the 13/1/16 at 15:00pm ranger Ritzen and myself attended 11/25 O'Neill St Spence.
>
> We were attending the address as there had been a harass on person occur in the stair well on the 8/1/15. The 2 dogs that were in the stair well are owned by 2 people that are squatting at the address and are not on the tenancy agreement.
>
> We knocked on the door and no one answered.
>
> We spoke to 3 neighbours, Ms Manley from 10/15 Daniel from 12/25 and Kim from 9/25 the 3 neighbours told Jason and myself that the [D]epartment of [H]ousing [knew] about the 2 people and their dogs squatting at the address and had given these people and the dogs a notice to vacate by the 27th December 2015.
>
> We explained to the 3 neighbours that normally with dogs harassing we would talk to the owner and give warning and explain legislation that they must have effective control of dogs whilst in public (dogs on lead)
>
> The 3 neighbours did say even if they were home they would not answer the door as they were aware that they squatting there.
>
> Ms Manley provided Jason and myself with a letter from housing we left calling card in letterbox and left. This is the second time that we have been to the address without being able to talk to the owner of the 2 dogs.

95. Ms Manley's evidence as to what occurred on that occasion was as follows:

> Okay, did they say anything to you about the dogs?---Yes, they said they couldn't do anything about the dogs, because they'd not hurt anybody.
>
> And did you respond to that?---Yes, I did. I said, "Are you fucking serious?"
>
> What if anything did they say?---They said yes, they are. They said that's the law.

96. So far as what occurred on that day, insofar as there is a conflict between the evidence, I prefer the evidence in the email prepared shortly after the meeting to the oral evidence given by Ms Manley. The course of conduct described in the email ("We explained to the 3 neighbours…") is consistent with the course of conduct proposed by Mr Ritzen at the time of the initial complaint and consistent with the practice of DAS. It is unlikely that the rangers would have expressed a position inconsistent with both the *Domestic Animals Act* and Mr Ritzen's understanding of the *Domestic Animals Act* that there was no power to take any further action because the dogs had not hurt anybody. Rather, it is likely that the officers explained the distinction that existed between an attack and harassment and the usual course that DAS would follow in relation to a first instance of harassment. It does appear that Mr Ritzen had in his earlier conversation with Ms Lahiff placed some emphasis on it being "a Housing matter". That is consistent with not all of the complaints about the dogs being directed at the actual

attack on Mr Lahiff but extending to the presence of the dogs in the unit complex and their barking.

97. Given the lack of familiarity of Ms Manley (and the other tenants) with the subtleties of the *Domestic Animals Act* and their frustration in relation to the ongoing presence of the dogs, it is likely that the nuances of the explanation given to Ms Manley have not been accurately recalled. It may be that Ms Manley used the words that she said she did but I do not accept her evidence that the position adopted by the officers was that the law *prevented* them from taking any further action. Rather, it is more likely that they explained the situation in the manner recorded in the substantially contemporaneous email.

98. After delivering the Notice to Remedy on 11 January 2016, Ms Diehm did not receive any complaints in relation to the dogs for some time. She continued to attempt to get in contact with Mr Rezo by regularly calling him on the telephone. He did not answer her calls or otherwise respond.

99. On 21 January 2016, Ms Diehm recorded in a file note two pieces of information obtained in relation to the use of premises at 25 O'Neill Street. The first was information received on 19 January 2016 that the owner of the dogs (Mr Matas) had been evicted from his mother's property in Florey being an undeclared occupant "after a police raid found firearms, drugs, and weapons on the property". The other information was obtained from Ms Lahiff on 21 January 2016 that the dogs and the visitors were still residing at the premises and that a video surveillance camera in the premises was aimed at the stairwell into the block.

100. The file note was provided by Ms Diehm to Ms Grillo. Although Ms Diehm had contemplated visiting the unit with Ms Grillo on 21 January 2016, it appears that the decision was made by Ms Grillo to contact police and ask for their assistance with any such visit because of concerns for the safety of Housing ACT staff.

101. On 9 February 2016, Ms Manley phoned her Housing Manager, Ms Singh, about the two pitbull dogs that were staying in the neighbouring property. Ms Singh recorded that the tenant was "very distressed regarding two pitbull dogs that stay in a neighbouring property" and that the tenant had called DAS and previously lodged a complaint. She encouraged Ms Manley to "engage with DAS".

102. On 15 February 2016, Ms Manley left a telephone message for Ms Diehm. Ms Lahiff also called, asking if she had received an email from Ms Manley. Ms Diehm indicated that she had but it had no content and asked Ms Lahiff to resend it which she did on 16 February 2016 at 2:55pm. The email contained a complaint about the occupants of unit 11. It appears that the email had been sent earlier to Ms Manley in draft form and then sent in an amended draft form to Ms Diehm. That complaint raised a number of matters about the young couple who were living with Mr Rezo in unit 11 (that is, Mr Matas and Ms Skinner). Ms Lahiff identified the young couple as Alan and a young lady whose name she did not know. The email included:

> They own two pitbull-cross dogs named Noah [sic] and Diesel. Number 11 is a one-bedroom unit with a very small veranda to the back of the property. While they have been living here the dogs bark often when someone makes a noise like opening their front or back door or someone is in their yard. The owners (young couple) let their dogs out of the property to roam the complex without a lead. The man and lady usually yell at the dogs to come back to them while they are outside.

> The young couple frequently argue between themselves and the girl often opens their door and slammed it shut and walks or runs to the carport. I have heard the young man Alan say to her "You will do what I say". I have been informed that the police have been out to them at least twice for domestic abuse calls since moving into no 11.

103. The email then proceeded to describe a series of events:

    a) an apparent theft of a parcel that was being delivered to Ms Lahiff;

    b) the dumping of glass in her yard near her gate;

    c) dogs urinating from the balcony above;

    d) the attack on Mr Lahiff in relation to which the email said "This has been reported to you. Also on this day my courtyard concrete was covered in dog urine again."

    e) Mr Matas entering her back yard, climbing onto the fence and then up onto the balcony of number 11 then smashing a window to get in.

    f) The carport being full of furniture and rubbish;

    g) The installation of a camera pointing at the stairs from the bedroom to number 11.

104. The request was "Please deal with these people and their dogs ASAP". What is notable about this email of complaint is that it covers a wide range of matters and does not emphasise the threat posed by the dogs. Rather it focuses upon both the dogs and the undesirable conduct of their owners.

105. At 1:02pm on 16 February 2016, Ms Diehm sent an email to Mr Ritzen which included:

> I came into your office on 8/1/2016 in regards to the dogs at the above address.
>
> We will need you to meet us at the property but we will need to arrange it at a time that is suitable for you and also tee it up with ACT policing. So let me know when suits you.
>
> Secondly what are your powers in regards to the dogs? Are you able to take them or anything?
>
> I will wait to hear from you.
>
> Thanks Jason.

106. Following her email, Ms Diehm did have a conversation with Mr Ritzen. She had a discussion about the powers available to him. There was a discussion about the possibility of obtaining a warrant to get access to the property but Mr Ritzen was negative about the prospects of that being possible. He told her that he could assist her to conduct a property inspection by attending and assisting to secure the dogs but that they would not be seized and removed. While Ms Diehm had little recollection of the conversation, she did recall that at the end of it she felt frustrated.

107. The same day the plaintiff, Mr Meyers, called Ms Diehm requesting "instant eviction" of Mr Rezo and his visitors. He was upset and angry. He said that "he would take matters into his own hands". Ms Diehm encouraged him not to do so and explained to him that Housing ACT was working on the matter. Mr Meyers said that "he was going to consumer affairs and the media in regards to the situation". Ms Diehm notified a Regional Manager within Housing ACT, Alexandra Groves, of what she had been told by Mr Meyers.

108. As a consequence of talking to Ms Diehm, at 4:48pm the same day, Ms Groves sent an email to AFP Communications (copied to three people including Ms Diehm) recording a complaint from the plaintiff and the following terms:

> Housing ACT received a telephone call this afternoon from Mr Daniel Meyers regarding the occupants of 11 Warwick Court, 25 O'Neill Street in Spence.
>
> Housing ACT is aware of ongoing neighbourhood concerns/complaints regarding this address due to undeclared residents and dogs.
>
> Mr Daniel Meyers informed how housing manager that he was prepared to take "matters into his own hands" and do "what he had to do".
>
> Should you have any questions or queries in relation to this matter, please feel free to contact me on [phone numbers set out].

109. Ms Diehm received a telephone call from "one of the neighbours" on 17 February 2016. She reported this to Ms Grillo in the following terms:

> I know this is a pain and there is so many other tenants but I have had the neighbour on the phone saying the dogs get left tied up at the bottom of the stairs making access difficult… Just another thing to add to the growing list…
>
> Do we have a game plan yet?

110. As a result of these further complaints and the absence of any proposal by DAS to take further action, Ms Diehm embarked upon a course designed to compel Mr Rezo to engage with Housing ACT in relation to his troublesome guests and their dogs. On 19 February 2016, Ms Diehm wrote to Mr Rezo noting that Housing ACT had information that Mr Matas and his partner, Ms Skinner, had moved into the property. It then requested him to complete an enclosed rental rebate application and lodge it with Housing ACT for reassessment of his rental rebate entitlement. The letter indicated that the effect of the request was that if the application was not returned then the rental rebate in relation to the property would be cancelled and full weekly rent of $290 per week would be required. While this letter made no reference to the problem of dogs, it was sent in order to compel Mr Rezo to address the presence of Mr Matas and Ms Skinner and thereby deal with the issue of the dogs.

111. The evidence of Ms Diehm and Mr Adkins established that when there were unauthorised occupants in premises leased from the Commissioner, a letter from Housing ACT suggesting the possibility of the cancellation of the rental rebate was a standard method of compelling tenants to properly address the issue. That is because if the lessee did not address the issue then market rent, as opposed to subsidised rent, would be deducted from their social security payments and that this would be perceived as an undesirable outcome so far as the tenant was concerned because it would usually leave the tenant with very little money after the payment of rent. If the tenant did make an application to permit the additional occupants in the premises then that would not only permit the Commissioner to permit or refuse permission for those persons to reside in the premises, but the making of the application would also assist the Commissioner if the issue could not be satisfactorily resolved and the Commissioner ultimately sought an order terminating the tenancy from the ACAT.

112. The sending of the letter did have the desired effect and on 1 March 2016. Mr Rezo called Ms Diehm from a neighbour's telephone and agreed to come in to the office the next day to discuss his "[v]isitors" to the property. This was the first occasion upon which Ms Diehm had been able to speak to him since seeing him on 22 December 2015. However, he did not come to that appointment.

113. There were no other complaints or further action in relation to the dogs at the premises for another 14 days.

114. At 8:21pm, 14 March 2016, Ms Manley wrote an email to Ms Diehm with the subject line "Squatters upstairs". The email was as follows:

> I have spoken to Dan [Meyers] and Kim [Lahiff] about the squatters in 11/25 O'Neill st. They have informed me that you can't do anything about them, it seems that they have more rights than us. Dan and Kim are talking about leaving and I think that is discussting [sic] and wrong.
>
> I am letting you know that tomorrow I will be seeking advice from the tenants [sic] union and will be asking them to give contact details for a Human Rights lawyer. Also I will not be paying any more rent from this week on. You see if these people can drive a rent paying tenant from his own flat and squat their and completely get away with it I don't see why I can't as well.
>
> Please get back to me anytime you like.

115. At 9:30am on 15 March 2016, Ms Diehm telephoned Mr Rezo but there was no answer and a message was left.

The attack on the plaintiff

116. The plaintiff was attacked by the two dogs late in the evening of 15 March 2016.

117. The plaintiff had come out of his house to go for a walk. When he was down the bottom of the stairs, there was a dog on a lead which was barking. He went to a friend's house. When he came back, the dog was off its lead and attacked him by biting his left hand. He fended it off for a while and then the dog continued biting his left hand and then his right hand. He fell to the ground. He thought he was going to die and called out. Two people came out from unit 11 as well as another dog. The other dog came down and started biting his right shoulder. Mr Matas was trying to get the dogs off by beating them with sticks. The plaintiff managed to get up and swing his arms so as to dislodge the dogs. Ms Lahiff let the plaintiff into her unit.

118. The circumstances following the attack were described in a Statement of Facts prepared by Constable Ben O'Brien, one of the police officers who had attended the scene shortly afterwards. Relevantly, it provided:

> About 10:50pm, Tuesday 15 March 2016 Police receive multiple 000 calls regarding a disturbance at 25 O'Neill Street Spence ACT involving a dog.
>
> About 10:55pm Police arrived and observed a large dog standing outside the … unit block containing numbers 9-12 of 25 O'Neill Street Spence. The dog barked at Police as they approached. Police observed a number of pieces of timber and a tree branch near the dog, as well as blood on the dogs [sic] mouth and on the concrete.
>
> The dog retreated up the stairs that [led] to units 11-12. Police spoke to a person through the window of unit number 9. The female stated there was someone inside that was badly injured.
>
> A female, now known to be Kim LAHIFF, opened the door and a male walked towards Police. The male, now known to be Daniel MEYERS, had significant injuries to both arms and hands. Mr MEYERS had blood on his face and neck that appeared to be from an injury sustained to his left ear. Mr MEYERS' shirt and pants also appeared … to have significant amount of blood on them.
>
> Police sat Mr MEYERS down and assisted Ms LAHIFF putting towels around his injured arms.

Ms LAHIFF stated she heard noises coming from outside her apartment, and when she went to look she saw a dog on top of Mr MEYERS, who was on the ground. Ms LAHIFF stated someone was hitting the dog and trying to get it off Mr MEYERS. Ms LAHIFF brought Mr MEYERS into her apartment after he was able to get free from the dog.

Mr MEYERS stated he was coming home to his unit at number 12, when a female "Pitbull" dog attacked him. He stated while he was being attacked another "Pitbull" dog, this one a male named "Diesel", came running down the stairs from number 11 and also started attacking him. Mr MEYERS stated both dogs were owned by the people living at number 11, Alan and Jodie.

About 11:05pm that evening ACT Ambulance Service (ACTAS) members arrived and began treating Mr MEYERS. Mr MEYERS appeared to be in a significant amount of pain as he was being treated. ACTAS members took several photographs of Mr MEYERS' injuries before they bandaged his arms.

ACTAS members cut Mr MEYERS' shirt off, which revealed numerous puncture wounds to both of his upper arms, and flesh missing from his right bicep.

About 11:42pm that evening Domestic Animal Services (DAS) member Andrew HARROLD attended the scene to seize the male dog.

Mr MEYERS was conveyed to The Canberra Hospital (TCH) by ACTAS. Upon arrival at TCH Mr MEYERS' injuries were photographed. Mr MEYERS' injuries were as follows:

Significant punctures and tears to the right hand and wrist-bone and tendons visible

Puncture wounds to the left hand and wrist

Puncture wounds to the right upper arm, and flesh missing from the right bicep

Puncture wounds to the left upper arm

Puncture wounds to the left ear

TCH staff indicated Mr MEYERS would be taken in for surgery.

About 2:20 am, Wednesday, 16 March 2016 DAS seized the second dog from 11/25 O'Neill Street, Spence with assistance from Police.

DAS to take carriage of investigation.

119. Photographs of the injuries inflicted upon Mr Meyers by the dogs illustrate wounds that can reasonably be described as horrific. He was fortunate not to be killed. Had he been a child or a frailer person, it is likely that he would have been killed.

120. The basis for seizing the animals was recorded in seizure notices prepared at the time of their seizure. In relation to each animal, the basis was identified as first, the "dog was in a public place without a carer", and second, that "It is alleged that your dog has harassed or attacked a person or another animal, or exhibited behaviour giving reasonable belief or fear that it may attack another person or animal". At the time that the DAS ranger, Andrew Harrold, took possession of the dogs, Mr Matas surrendered the dog "Diesel". However, he claimed the dog "Nala" and hence the rangers seized it under the statutory authority of the *Domestic Animals Act*.

Events following the attack

121. The day after the attack, 16 March 2016, Ms Diehm sent an email at 9:42am to Mr Ritzen in relation to the removal of the dogs and asking for "a rundown on what happened". She asked him to call or email. She subsequently spoke to someone at DAS who indicated that the dogs had been impounded and had been classified as dangerous dogs. The person at DAS told her that it was doubtful that the requirements

for owning a dangerous dog would be complied with and that the most likely outcome was that the dogs would be euthanased.

122. Ms Manley spoke to Ms Grillo on the morning of 16 March 2016 and Ms Diehm in the afternoon. Ms Manley indicated that she would provide a written account of the events that had occurred and she did so on 17 March 2016.

123. On the afternoon of 16 March 2016, there was a discussion between Ms Lahiff and Tony Tisdell who is described as the FOI Officer in the Complaints and Information Unit. She complained that nobody from Housing ACT had rung her to find out if she was okay. The issue of blood contamination of her property from Mr Meyers' wounds was discussed and Mr Tisdell told her that she could contact Spotless (the maintenance contractor for Housing ACT) "who may be able to organise to clean the property due to blood contamination but she may be charged". She requested that somebody from Housing ACT call her. Subsequently, Ms Diehm called her and organised for the blood in her unit to be cleaned at no cost to her.

124. Ms Diehm attempted to call Mr Rezo on the morning of 16 March 2016 but received no answer.

125. At some stage on 16 March 2016, the senior executives of Housing ACT (referred to in evidence as "the Executive") had told Mr Adkins, Senior Manager of Operational Services for Housing ACT, that they wished to seek immediate eviction of Mr Rezo under s 51 of the *Residential Tenancies Act*. Mr Adkins advised there was no realistic chance of successfully obtaining eviction under s 51 in circumstances where the dogs had been removed. He gave advice that the more common process for termination of a tenancy available under s 48 of the *Residential Tenancies Act* should be followed. The Executive took his advice and determined to proceed down that path. Because the Executive had given a direction to apply for termination it was not necessary to follow the usual process in relation to termination which would have involved a referral to the Housing and Tenancy Review Panel (HATRP).

126. As a consequence, Ms Diehm was directed to proceed down the path towards termination of the tenancy under s 48. She prepared, and Ms Grillo signed off on, a document entitled "Housing Manager - Notice To Vacate (NTV) Request". That was a form necessary as part of the internal processes of Housing ACT to be completed and approved prior to the issue of a Notice to Vacate. The document recorded previous attempts to contact the tenant since the Notice to Remedy. The form required the Housing Manager's supervisor to sign under the following statement:

> I believe the Housing Manager has explored all appropriate options in assisting the tenant to comply with the Tenancy Agreement. Consistent with the relevant legislation, policies and procedures. I agree to issue an NTV to the tenant.

127. As a result of this approval, a termination notice was prepared requiring Mr Rezo to vacate the premises on or before 5 April 2016. That was served, along with a covering letter, by sending it by post on 16 March 2016 to Mr Rezo's address in Spence.

128. On 18 March 2016, Matt Potter, a licensing officer within Territory and Municipal Services Directorate, prepared an email outlining the status of the investigation into the attack. That email indicated that Ms Cawthorne was to be provided with a full update on Monday, 21 March 2016. There is no evidence as to whether or not any person was prosecuted as a result of the attack by the dogs on the plaintiff. Having regard to

the terms of s 49A of the *Domestic Animals Act*, Mr Matas would have been an obvious target for such a prosecution.

129. On 21 March 2016, Ms Diehm emailed Mr Ritzen seeking further information about whether the dogs were still in the possession of DAS and whether there had been any progress on a dangerous dog licence for the owner of the dogs.

130. On the morning of 21 March 2016, Ms Grillo telephoned Mr Rezo. Mr Rezo agreed to come in to the office that afternoon to discuss the situation. Later that day, a support worker and Mr Rezo contacted Ms Diehm by telephone and arranged a meeting for later that day.

131. Ms Diehm and another officer from Housing ACT went to the premises and had a meeting with Mr Rezo and the support worker to discuss what was going to happen in relation to his apartment. During that discussion Mr Rezo was given the opportunity of surrendering the apartment immediately or doing so in accordance with the Notice to Vacate. Mr Rezo admitted that he was very frightened of Mr Matas, the owner of the dogs. Ms Diehm said that she could help him find another property after vacating his current property.

132. The same afternoon, Ms Diehm spoke to Ms Lahiff about the dog attack. Ms Lahiff said that she and her neighbours required an urgent transfer to different accommodation. She was curious as to why the Housing Manager had not pressed this issue further. She said that she had previously told Ms Diehm that the dogs had been tied up at the front of the property, asserted that this was animal cruelty and was curious as to why Ms Diehm had not taken this further. She said that she and her neighbours' rights had been violated by the dogs and the undeclared residents at unit 11. Ms Diehm explained that Housing ACT had taken the necessary steps in the legal process required by the *Residential Tenancies Act*. She explained that Housing ACT was bound by the Act and had to work within the confines of the Act. She suggested that if Ms Lahiff and her neighbours wished to transfer then they should put in the appropriate forms.

133. Ms Diehm also spoke to Ms Manley to check on her well-being after the dog attack. On 21 March 2016, she recorded that: "Tenant was engaging and happy to discuss issues with [the Housing Manager]. No further action required".

134. On 21 March 2016, the Team Leader, Ms Stosic, and the Regional Manager, Ms Grillo, requested from the "Operational Services" part of Housing ACT that orders be sought from the ACAT removing the "trespassers" from the property.

135. On 22 March 2016, a visitor to the DAS premises in Symonston sought to see the dog "Nala". He described himself as the father of the owner of the dog. His request was refused. That evening Ms Cawthorne advised rangers to take particular care with locking the facility that night as she had a concern that someone may attempt to retrieve the dog. That evening both dogs were sedated and checked for microchips. A microchip was located in "Diesel" and the owner details were then recovered from an ownership database. That process indicated an owner other than Mr Matas or Ms Skinner, although Mr Matas was recorded as an "alternate contact" for the dog.

136. On 22 March 2016, proceedings were commenced in the ACAT by the Commissioner against Mr Rezo seeking termination of his tenancy and, if that order was refused, an order preventing him from having or keeping a dog at the premises. The application

also sought that it be listed for hearing as soon as possible after the expiration of the Notice to Vacate on 5 April 2016.

137. Also on 22 March 2016, there was a meeting between Ms Meyers, the plaintiff's sister, and representatives of Housing ACT in relation to Mr Meyers' future needs. A detailed file note was kept. There was also a meeting between Mr Rezo, his support worker and Ms Stosic, Ms Grillo and Ms Diehm. Mr Rezo's support worker indicated that he would be making an application to the ACAT to permit him to stay in the premises. Mr Rezo said that he was not willing to apply for a protection order against Mr Matas.

138. A further attempt was made on 23 March 2016, by a person identifying himself as "Allen John" to see the dog "Nala" at the DAS premises. He said, "the dog was his and it hadn't done anything wrong so he wanted to come to DAS and get the dog." He was told to bring identification and proof of ownership if he wished to see the dog.

139. On 24 March 2016, there was communication between a Tribunal Advocate at Housing ACT and Ms Meyers about Mr Meyers being a witness in the ACAT proceedings. Ms Meyers indicated that the plaintiff had just come out of his fourth surgery at that stage. He had his little finger amputated and his hand attached to his leg to maintain its blood flow.

140. On Saturday, 26 March 2016, Ms Manley sent an email to Ms Diehm saying that the visitors to Mr Rezo's unit were back again and that until Mr Rezo was removed they would keep coming back. On 29 March 2016, Ms Diehm met with Ms Manley and also conducted a visit at Mr Rezo's property.

141. On 29 March 2016, the ACAT set a hearing date of 7 April 2016 in relation to the Commissioner's application. This listing of the matter shortly after the expiry of the Notice to Vacate was consistent with the request that had been made at the time the proceedings were commenced.

142. Because Mr Rezo had not effectively addressed the allegation that Mr Matas and Ms Skinner were living in his unit in breach of the terms of his lease, full rent was deducted from his Centrelink payment. On 24 March 2016, he had submitted an application for a refund of some of the rent paid. He went in to Housing ACT on 30 March 2016 in order to see how his application for a rebate was progressing. That afternoon Ms Diehm and Ms Grillo went to see him at his premises. He was advised to get a personal protection order against Mr Matas to help get him out of the property. He said that he would move and if Mr Matas attempted to move with him, then, at that stage, he would obtain such an order. He said that he had asked Mr Matas and his partner to leave but they were taking a long time to do so. Ms Diehm and Ms Grillo explained to him that the visitors were required to leave the property immediately and if the situation continued, then Mr Rezo may lose his tenancy and become homeless. He was encouraged to attend Canberra Community Law (a community legal centre that may have been able to provide him with advice and assistance).

143. Ms Diehm and other officers of Housing ACT decided that, because the Notice to Vacate would expire shortly, the application for a rental rebate would not be actioned. A follow up letter was sent to Mr Rezo indicating that Housing ACT did not approve the additional residents, namely, Mr Matas and his partner, Ms Skinner, to reside at the property.

144. On 1 April 2016, Mr Matas and Ms Skinner attended DAS and asked to see the dogs. They were declined permission and asked to put their request in writing. A further internal communication on 4 April 2016 from Ms Cawthorne directed her staff that no one could see the dog "Nala" until the owner was determined.

145. On 4 April 2016, a recommendation was made by Bernadette Maher, "Senior Manager, Tenancy Services" at Housing ACT, to approve Mr Meyers' out of turn transfer to other premises. That was approved by the Executive Director of "Housing and Community Services" on 14 April 2016.

146. On 4 April 2016, Ms Diehm telephoned Mr Rezo who said that Mr Matas had been "moving his stuff out all weekend". He was asked whether he was moving out today and he replied "Kind of".

147. On 5 April 2016, Ms Diehm attended the property with another officer and found that it was in disarray with clothes and furniture crowding the unit. Mr Rezo said that Mr Matas was "moving all his stuff out" and that he was going to load it in the carport for collection. Mr Rezo was encouraged to contact Canberra Community Law.

148. On 6 April 2016, Mr Rezo told Ms Diehm that he would be coming in to surrender his keys the next day. He did not do so. A hearing of the Commissioner's application to the ACAT was conducted on 7 April 2016. Mr Rezo did not appear. Ms Grillo gave evidence at the hearing. Senior Member J Lennard of the ACAT made a termination and possession order requiring vacation of the property by 2pm on Thursday 7 April 2016. The order had effect as a warrant for eviction and authorised members of the AFP to evict the tenant.

149. At some point on or after 6 April 2016, Mr Adkins, acting on behalf of the Commissioner, made an application to the Magistrates Court for a workplace protection order designed to keep Mr Matas away from the premises when officers of Housing ACT were present.

150. On 12 April 2016, Ms Manley sent an email to Ms Diehm complaining about items blocking the access path and people parking in her parking space. She enquired when the residents would be gone.

151. On 15 April 2016, Ms Manley sent an email to Ms Diehm in very strong terms complaining about the failure to provide a date by which the tenants would be removed and her frustration at the answers she had been given which, it appears, emphasised the need for Housing ACT to follow due process. Ms Diehm responded indicating that she was also "incredibly frustrated" by the process but expressing hope that next week would bring some action.

152. On 15 April 2016, Mr Meyers attended DAS with his sister to provide a statement in relation to the dog attack.

153. On 19 April 2016, a further complaint was received by Ms Diehm from Ms Manley about wire and doors being left on the path near the carports.

154. On 21 April 2016, arrangements were made for the execution of the warrant for eviction. In relation to the issue of safety, the document records:

> Mr Alan Matas is thought to be a resident or visitor to the complex. Housing ACT has obtained an interim workplace restraining order against Mr Matas. He should not be within 100 m of the complex. Housing ACT has been warned that Mr Matas has a history of

violence. AFP have been notified. Constable Towers is attempting to arrange multiple Police officer to be in attendance.

155. The warrant was in fact successfully executed on 21 April 2016. The Housing Manager, Ms Diehm, was present along with two police officers. Mr Rezo was present at the time of the eviction.

156. The plaintiff did not bring any claim for damages against Mr Rezo, Mr Matas or Ms Skinner.

Provisions of the *Domestic Animals Act*

157. The *Domestic Animals Act* amalgamated the requirements of the *Dog Control Act 1975* (ACT) and the *Animal Nuisance Control Act 1975* (ACT). The relevant version of the Act is that which was in force between October 2015 and May 2016 (republication 29).

158. The Act gives powers and responsibilities to a "registrar" who is a public servant appointed by the relevant Director-General as such under s 121 of the Act. The Act also permits the appointment of persons as an "authorised person" for the Act (s 123) and gives to authorised persons various statutory powers.

159. The Act provides a scheme for the registration of dogs and makes it an offence to keep an unregistered dog: s 14. It also provides for the declaration of dogs to be "dangerous dogs": s 22. There is an *obligation* to declare a dog to be dangerous if it is trained or kept as a guard dog for guarding premises other than residential premises or a decision has been made under the law of a State equivalent to a declaration under s 22(1). There is a *discretion* to declare a dog to be a dangerous dog "if the dog has attacked or harassed a person or animal": s 22(2). "Harass" is a defined term. Where a dog is declared to be a dangerous dog, there are increased penalties for failing to have a dangerous dog licence: s 23. There is a process for making and consideration of applications for dangerous dog licences.

160. Division 2.5 relates to the control of dogs and includes restrictions on where dogs may be taken and whether or not they must be kept on a lead.

161. Division 2.6 is entitled "Attacking or harassing dogs". Section 49 defines what is meant by the word "harass". It provides:

> 49 Harassment of people and animals by dogs
>
> (1) A dog is taken to ***harass*** a person if, because of its behaviour, the person reasonably fears that the dog is about to attack the person without provocation.
>
> (2) A dog is taken to ***harass*** an animal if the dog hunts or torments the animal.

162. Section 49A makes it an offence for a person to be either the keeper or carer of a dog which attacks or harasses another person or animal. "Keeper" is defined as the registered keeper of the dog or the owner of the animal. "Carer" is the person who is in charge of the animal at a particular time. Specific defences are provided.

163. Section 50 makes it an offence for a person to be a keeper or carer of a dog if that dog attacks another person *and* the attack causes serious injury. It is necessary to show that the person intended the attack to cause, or was reckless about the attack causing, serious injury. A specific defence is provided.

164. Section 50A makes it an offence for the person to be a keeper of a dangerous dog if that dog attacks or harasses another person or if serious injury is caused intentionally or recklessly.

165. Section 53 of the Act permits the destruction of a dog if it is necessary to bring an attack on a person or animal to an end.

166. Section 54 permits an authorised person or a police officer to ask a keeper or carer of a dog to produce the dog for inspection if the authorised person or police officer reasonably believes that the dog has attacked or harassed a person or animal and makes it an offence to not comply with that request without a reasonable excuse.

167. Section 55 of the Act makes the keeper of a dog liable to compensate a person for any loss or expense because of personal injury or property damage done to a person or the death or injury of an animal. Such compensation may be recovered whether or not a prosecution for an offence against the Act has been brought and may be recovered even if the keeper has been acquitted of any charge. The section provides a defence to the keeper in certain circumstances. The section does not affect any right that a person has to recover damages or compensation apart from the section: s 55(6).

168. Section 56 permits an authorised officer to seize a dog in a number of circumstances. Those circumstances include if it is unrestrained in certain public places where it is required to be restrained or where it is unrestrained on private premises without the consent of the occupier of the premises: s 56(b). There is an additional power that permits the seizure of dangerous dogs in additional circumstances: s 57.

169. Section 59 provides:

> 59 Seizure-attacking and harassing dogs
>
> An authorised person may seize a dog if the authorised person suspects on reasonable grounds that the dog has attacked or harassed a person or an animal.

170. Having regard to the terms of this section, it is obviously an empowering section which provides a discretion and not an obligation to seize an attacking or harassing dog.

171. Where a dog is seized, then there are obligations to notify the dog's keeper: s 61, and an obligation to release the dog in certain circumstances: ss 62-65. The sale or destruction of the dogs seized is also authorised in certain circumstances: s 66. There is also a general discretion to return dogs that have been seized: s 70.

172. Part 6 of the Act relates to animal nuisance. An animal nuisance exists, inter alia: "if the keeping or behaviour of an animal causes a condition, state or activity that constitutes excessive disturbance to a person other than the keeper because of noise": s 109. Allowing an animal nuisance is an offence: s 110. There is a statutory entitlement to make a complaint in writing to the registrar about an animal nuisance: s 111 and a power for the registrar to issue a "nuisance notice" which it is an offence to contravene: s 112. There are powers to seize animals the subject of proceedings relating to an animal nuisance: s 114. Where "a proceeding is begun for an offence under s 110(1) (Offence of animal nuisance)", there is a power to enter premises in order to seize the relevant animal: ss 114A, 114B.

173. Among the powers of an authorised person is a power to enter premises with the consent of the occupier: ss 128, 132 and a power to enter pursuant to a search warrant granted by a magistrate: ss 129, 133. There is also a power under s 130 to enter

premises where an authorised officer reasonably believes a specified dog attack or harassment offence “has been, is being or will be” committed and the authorised officer:

(b) reasonably believes that it is necessary to take action as quickly as possible-

(i) to prevent, minimise or stop an offence; or

(ii) to give assistance to any animal on the premises; or

(iii) to seize a dog.

The plaintiff’s claims

174. The plaintiff has brought a claim against the Commissioner for breach of the terms of his tenancy agreement. He has also brought claims in negligence against the Commissioner and the Territory.

175. The plaintiff claims against the Commissioner that the failure to adequately address the presence of the dogs at the premises constituted a breach of cl 52 of the tenancy agreement between the Commissioner and himself, as well as a breach of rule 6 of the Rules of the Complex which formed part of that agreement.

176. The plaintiff also claims that both defendants owed a duty of care to the plaintiff and that the failure to take steps that would have led to the removal of the dogs from the premises prior to the attack on the plaintiff amounted to a breach of that duty. It will be necessary to examine in more detail the precise scope of the duty which is alleged against each defendant and the acts or omissions which are said to constitute the breach of that duty.

177. The defence has put in issue whether there was any breach of the lease in relation to unit 12, whether any liability arose in the circumstances under s 168 of the *Civil Law (Wrongs) Act 2002* (ACT) as well as the existence of the pleaded duties of care, breach of those duties and the causal relationship between any such breach and the harm caused to the plaintiff.

178. The issues that need to be determined in order to resolve these claims are as follows:

1. Did the Commissioner breach cl 52 or rule 6 of the plaintiff’s tenancy agreement?
2. If so, did the breach cause the harm suffered by the plaintiff?
3. Did the Commissioner owe to the plaintiff any pleaded duty of care?
4. Did the Commissioner breach any such duty of care?
5. If there was a breach of the duty of care, did that cause the harm suffered by the plaintiff?
6. Did the Territory owe the plaintiff the pleaded duty of care?
7. If so, was that duty breached?
8. If the duty was breached, did it cause the harm suffered by the plaintiff?

Issue 1: Did the Commissioner breach cl 52 or rule 6 of the plaintiff's tenancy agreement?

179. The plaintiff's tenancy agreement was dated 17 September 2010. It incorporated the standard residential tenancy terms prescribed by the *Residential Tenancies Act*. Clause 52 provided:

> 52. The lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.

180. The agreement also incorporated, as Attachment C, certain "Rules of the Complex". Rule 6 provided:

> 6. Pets must not be kept without written permission from the Housing Commissioner.

181. The plaintiff has alleged that certain acts or omissions by the first or second defendant constituted a breach of cl 52 or rule 6. Paragraph 33 of the Further Amended Statement of Claim (FASC) provides:

> 33. The failure of the first defendant and the second defendant to either:
>
> 33.1. remove the Dogs from the Complex;
>
> 33.2. remove the Trespassers from the Complex;
>
> 33.3. adequately investigate the Dangerous Dog Arrangement;
>
> 33.4. adequately investigate the Trespass Arrangement;
>
> 33.5. take reasonable steps to ensure that the Dogs did not pose a risk to the plaintiff; or
>
> 33.6. warn the plaintiff that it had not and would not take action to address the risk posed by the Dogs;
>
> constituted a breach of the Tenancy Agreement.

182. The Dangerous Dog Arrangement was defined in the pleadings to be the arrangement between Mr Rezo and Mr Matas and Ms Skinner, permitting them to keep the dogs at Warrock Court. The Trespass Arrangement was defined in the pleadings to be the arrangement between Mr Rezo and Mr Matos and Ms Skinner permitting them to occupy his unit.

183. The plaintiff submitted that the capacity of the Commissioner to control pets in the lease "provides content to" the obligation upon the Commissioner in cl 52 of the lease. I am not satisfied that the content of rule 6 adds anything to the allegation of a breach of cl 52. Assuming that the Rules of the Complex had been included in each other lease granted in Warrock Court the Commissioner had power to control pets in the complex. However, that does not add to or modify the terms of cl 52. Therefore, the substantial issue is whether or not cl 52 has been breached.

184. The operation of cl 52 in the context of an allegation by one tenant of a breach by the Commissioner arising from the conduct of other tenants of the Commissioner was considered in *Harris v Commissioner for Social Housing* [2013] ACTSC 186; 8 ACTLR 98. In that case, one tenant who had very significant problems with alcohol behaved in a manner which was very disruptive to the three other tenants who lived around him. While he was sober he was a "nice bloke". When he was drunk, he behaved very badly. He did things like break a glass panel in order to get into the units without a key, throw raw sausage meat throughout the common stairwell, drill a hole through the floor

so that he could look into the unit below, have undeclared residents living in his unit, drop a bowling ball onto the floor and yell and scream so that his neighbours could not sleep. In that case, a breach of cl 52 was alleged against the Commissioner. It was alleged that the Commissioner had breached this clause by "permitting" the interference with the plaintiffs' peace, comfort or privacy or had also breached the implied covenant to provide quiet enjoyment of the premises.

185. At [202]-[207], I examined the authorities that were relevant to the meaning of the word "permit" in cl 52. They included the decision of Shaw J in *Department of Housing v Consumer, Trader and Tenancy Tribunal* [2003] NSWSC 150 and *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1. I was not satisfied that the Commissioner had permitted, authorised or adopted the tenant's nuisance.

186. The plaintiff in his final submissions did not challenge the correctness of the decision in *Harris*. He relies upon the reasoning in *Department of Housing*, referred to in *Harris*, and submitted that the facts demonstrated that the Commissioner had "permitted" the breach in the sense described by Shaw J in his judgment at [29] as follows:

> 29. On the ordinary meaning of the word 'permit', to allow or tolerate a breach of statutory rights seems to properly ground an action to enforce those rights. It has been held that the concept of permission may, in some contexts, include the absence of appropriate steps to influence or control conduct, for example, in antidiscrimination law: *Elliott v Nanda* (2001) 111 FCR 240 per Moore J.

187. Later in his Honour's reasons at [30], [33], Shaw J recognised that the concept of permission can include indifference or omission and that taking no active step to remedy the situation, after recognising the likelihood of further breaches, left open a finding that the breaches had been "permitted". That approach was consistent with the decision in *Adelaide City Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 to which his Honour referred.

188. In *Harris*, I was not satisfied that the Commissioner had "permitted" the breaches. That was because I had found (at [191]-[198]) that when each complaint of adverse conduct had been received, the defendant had taken steps to address the problems raised and that when the disruptive behaviour continued, the defendant had set about gathering evidence to support a contested termination of the tenancy. I also found that the steps taken by the Commissioner were reasonable having regard to what the Commissioner had done and the quite appropriate emphasis of the Commissioner on maintaining the tenancy by trying to get the tenant to behave appropriately.

189. The situation was the same in the present case. When the complaint was made on 13 December 2015, proper steps were taken to address it. The relevant Housing Manager, Ms Diehm, met with Mr Rezo on 22 December 2015 and told him that the dogs could not stay there and that he needed to get rid of them. Mr Rezo agreed that they would be removed. She followed that up with the letter on 23 December 2015. That letter reinforced the agreement between Mr Rezo and Ms Diehm that the dogs would be removed no later than 27 December 2015. It made clear that any further complaints may lead to the matter being referred to the ACAT. Following the attack on Mr Lahiff on 8 January 2016, the Notice to Remedy was issued. That asserted that Mr Rezo's failure to have the dogs removed from the property amounted to a breach of cl 70 of the standard residential tenancy terms and was a formal step necessary under the lease prior to termination of the tenancy for breach. After that, persistent attempts were made by Ms Diehm to contact and "engage with" Mr Rezo by telephone in an attempt to resolve the issue of his guests and their dogs. When, following the expiry of

the period in the Notice to Remedy, further complaints were made on 16 February 2016, Ms Diehm set in train the process for removing Mr Rezo's rebate in an attempt to have him prevent Mr Matas and Ms Skinner from using his premises. When Mr Rezo contacted Ms Diehm, she arranged for him to come in and talk to her but he did not do so. The steps that were taken were not successful in having the dogs permanently removed from the property prior to the attack on the plaintiff, but the failure of the measures is not sufficient to prove that the Commissioner permitted the interference with the reasonable peace, comfort or privacy of the other tenants.

190. While, with the benefit of hindsight, it is possible to say that more aggressive steps could conceivably have been taken, that does not mean that the interference with the quiet enjoyment of Mr Meyers was "permitted" by the Commissioner. The Commissioner always asserted that the dogs were not permitted without permission and took steps to solve the problem created by their presence. This case is clearly distinguishable from that in *Aussie Traveller* where the landlord expressly stated that it would not address the nuisance unless the tenant agreed to pay additional rent. Further, it is not a case in which the Commissioner could have been said to have omitted to take any action (or any effective action) for such a period or in relation to issues of such significance as to be permitting the conduct in the sense contemplated by Shaw J in *Department of Housing*, based on the decision in *Elliott v Nanda* (2001) 111 FCR 240 at [160].

Issue 2: If so, did the breach cause the harm suffered by the plaintiff?

191. In light of the conclusion stated above, it is not necessary to address this issue. However, having regard to the evidence about the process that would have been followed had the Commissioner at an earlier stage sought orders from the ACAT to remove Mr Rezo, Mr Matas and Ms Skinner or the dogs, the plaintiff has not established on the balance of probabilities that any breach caused the plaintiff's damage. That is because on no view would it have been appropriate to commence proceedings in the ACAT prior to the expiry of a Notice to Vacate issued immediately after the expiry of the Notice to Remedy. The evidence referred to at [214]-[241] below demonstrates that the usual internal process of Housing ACT and the ACAT were such that no eviction would have been achieved prior to the attack on the plaintiff. Further, the evidence does not establish that the following of those usual processes (because of the delay that they entailed) would have involved a breach of cl 52 or that the earlier invocation of the termination and eviction process could have led to voluntary compliance on the part of Mr Rezo.

Issue 3: Did the Commissioner owe to the plaintiff any pleaded duty of care?

192. The plaintiff has asserted that the first defendant owed him a duty of care in the following terms:

> 37. The first defendant owed a duty of care to the plaintiff:
>
> 37.1. in accordance with section 168 of the *Civil Law (Wrongs) Act 2002*;
>
> 37.2. to take reasonable steps to ensure the plaintiff would not suffer injury loss and damage while residing in the Complex;
>
> 37.3. to take reasonable steps to ensure the plaintiff would not suffer injury, loss and damage because of the state of the Complex;

37.4. to prevent the unlawful, unregulated and dangerous use of the Complex by the Trespassers;

37.5. to enforce the Rules so as to preserve the safety and amenity of the Complex for its residents;

37.6. to comply with clause 52 of the Terms; and

37.7. to remove and/or contain the danger posed by the Dogs.

193. The plaintiff submitted that the duty operated in relation to three different subject matters. The first related to the presence of the dogs in the complex (as opposed to any particular unit). The second related to the presence of Mr Matas and Ms Skinner in unit 11. The third related to addressing the conduct of Mr Rezo, the tenant of unit 11.

194. The damage was inflicted upon the plaintiff not in any of the units in the complex but in the common area of the complex. This clearly engages the first subject matter identified by the plaintiff. The second and third subject matters do not directly address the circumstances in which the damage arose, but if there was a relevant duty and it was breached, then the plaintiff submitted that the necessary causal connection between breach and damage could be established.

195. Section 168 of the *Civil Law (Wrongs) Act* provides that an occupier of a premises owes a duty to take reasonable care to ensure that anyone on the premises does no suffer injury or damage because of "the state of the premises" or "things done or omitted to be done about the state of the premises". I set out the terms for the section in full and discussed its lack of utility in *Harris* at [141]-[146].

196. The potential for the operation of s 168 varies as between the three different subject matters. Section 168 may have some operation in relation to the first subject matter because this relates to the state of the common areas where the attack on the plaintiff occurred. The common area of the property is an area where the Commissioner had direct responsibilities because it was not leased to any particular tenant. In my view, the presence of animals on a property may at least in some circumstances be part of "the state of the premises". That was recognised in the obiter dictum of Penfold J in *Hartigan v Commissioner for Social Housing in the ACT* at [233]. Given the limited submissions of the parties on this issue and the lack of utility in determining the issue in light of the non-exclusive nature of s 168 (see [198]), I will assume without deciding that the presence of the tenant's dogs (or the dogs of his guests) on the common area of Warrock Court was part of the "state of the premises" for the purposes of s 168. Upon that assumption, the question in relation to such a duty then becomes whether the Commissioner has taken "all care that is reasonable in the circumstances to ensure that anyone in the premises does not suffer injury or damage" because of the presence of animals on the property.

197. That leaves the question of whether or not a duty of care outside the scope of s 168 existed in relation to the three subject matters identified by the plaintiff.

198. In relation to the first subject matter, even if I did not assume that "the state of the premises" in s 168 extended to the presence of dogs in the common areas of Warrock Court, there would exist a duty that extended to the presence of animals on the property. The relationship between occupier and entrant in relation to a foreseeable risk of injury is an established one: *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. There was a foreseeable risk of injury in the common areas of Warrock

Court from animals resident in the units of the property. I concluded in *Harris* that s 168 "was not intended to limit in any significant way the rights of entrants against occupiers" and it is therefore possible for there to be a duty of care that exists beyond the scope of s 168. As a result, "it does not really matter whether the "state of the premises" extends beyond physical features of the premises because s 168 does not limit the causes of action that may be brought against an occupier" and the "test to be applied under s 168 and under the common law is, in substance, the same": *Harris* at [146].

199. The other subject matters asserted by the plaintiff are more problematic. That is because they assert a duty which does not arise from the relationship between the Commissioner as an occupier of land and an entrant upon that land but instead are said to arise as a duty which exists between the Commissioner as lessor and one tenant in relation to the conduct of another tenant and the invitees of that tenant. This is not an established category of relationship which gives rise to a duty of care.

200. I considered this issue in *Harris* at [149]. In that case, although the matter had not been properly pleaded, the duty which I was considering was described as one "to ensure the physical state of the premises are safe" and extended to:

> 149. …using the contractual powers of the defendant and possibly also the residual powers of the defendant as owner of the land to protect tenants from:
>
> (a) behaviour of a tenant which amounts to a breach of the tenant's lease which is detrimental to other tenants; and probably also
>
> (b) behaviour of a tenant which does not amount to a breach of the lease but which is detrimental to other tenants.

201. I considered the relevant authorities, as well as the following factors, which might be argued to give rise to a duty of care: vulnerability, control, assumption of responsibility, reliance, the statutory context and s 110 of the *Civil Law (Wrongs) Act*. I concluded:

> 184. Having regard to the state of the authorities in the United Kingdom and the factors, derived from the Australian authorities referred to above, I do not consider that the defendant owed to the plaintiffs a duty of care to protect them from the disruptive conduct of [the other tenant]. As a consequence, it owed them no duty of care to terminate his lease or seek to obtain a termination and possession order for his premises.

202. The formulation of the non-s 168 duty in the present case is somewhat different from that considered in *Harris*. That is necessarily because of the slightly different factual circumstances of this case involving, as it does, both dogs and unauthorised non-tenant residents of the premises. The plaintiff has put forward a variety of matters which are said to distinguish the circumstances in this case. They are largely contentions about the factual differences between the cases. The only legal contention is that the United Kingdom authorities relied upon in *Harris* needed to be reassessed in light of *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; 2 WLR 595. That submission was not elaborated upon. Having regard to what was said in that decision at [33]-[41], [114]-[115], I do not consider that the decision requires any reconsideration of the authorities referred to in *Harris*.

203. In the present case, I do not consider that there was any duty of care owed by the Commissioner to the plaintiff in relation to the Commissioner's management of

Mr Matas and Ms Skinner as residents of unit 11. Similarly, there was no duty of care owed in relation to the management of Mr Rezo's lease.

Issue 4: Did the Commissioner breach any such duty of care?

204. Having regard to my conclusion above, it is only necessary to consider whether the Commissioner breached the duty of care owed to the plaintiff in relation to the common areas of the premises. As indicated above, that arises either under s 168 or at common law.

205. The breaches alleged by the plaintiff are pleaded in a lengthy and unhelpful way. Paragraph 39 of the FASC provides:

> 39. The first defendant and the second defendant was negligent by:
>
> 39.1 Failing to ensure the Complex was safe;
>
> 39.2 Failing to remove the Trespassers from the Complex;
>
> 39.3 Failing to remove the Dogs from the Complex;
>
> 39.4 Failing to contain or restrain the Dogs whilst in the Complex;
>
> 39.5 Failing to enforce the Rules;
>
> 39.6 Failing to investigate, assess and/or manage the risk posed by the Dogs;
>
> 39.7 Failing to enforce the Terms against Mr Michael Rezo so as to terminate the Trespass Arrangement and/or the Dangerous Dog Arrangement so as to remove the Dogs from the Complex;
>
> 39.8 Failing to heed and/or act on its knowledge of the dangers of the Dogs;
>
> 39.9 Failing to manage, supervise or control the Dogs adequately or at all whilst they remained at the Complex;
>
> 39.10 Permitting the Dogs to be left in the common areas of the Complex;
>
> 39.11 Permitting the Dogs to be un-muzzled, uncontained and/or unrestrained at the Complex;
>
> 39.12 Failing to ensure the safety of the residents at the Complex;
>
> 39.13 Failing to exercise its statutory powers reasonably;
>
> 39.14 Permitting Pit Bull dogs and/or the Trespassers to be at the Complex at all;
>
> 39.15 Having no, or no adequate, guidelines, policies and procedures for the keeping of pets that would ensure a safe environment for residents and visitors at the Complex;
>
> 39.16 Publishing and adopting a sham pet policy for the Complex;
>
> 39.17 Failing to implement or manage any guidelines, policies and procedures for the keeping of pets at the Complex; and
>
> 39.18 Each failing to take action to address the failures of the other defendant, as pleaded above.

206. The reference to the second defendant in the pleading is because the staff of the Commissioner were in fact public servants for whom the Territory would be vicariously liable. As no point was taken about this, I will treat the claim as being one that is directed to the first defendant and for ease of reference simply refer to the Commissioner rather than both defendants.

207. So far as the plaintiff asserted a breach by the Commissioner in relation to the management of the common areas of the apartment complex, the written submissions of the plaintiff were as follows:

> 55. The first level of focus involves the use of [sic] engagement of a range of statutory powers in both the Tenancy Act and the Housing Act capable of being applied to effect the physical removal of the dogs from the complex such as obtaining a performance order from ACT against Mr Rezo pursuant to section 83 of the Tenancy Act and then engaging the powers of the Animals Act to have the dogs removed from the property.

208. The submissions do not provide any detail about what should have occurred and when. The plaintiff's submissions in reply contended that the failure to take the following steps amounted to a breach of the Commissioner's duty of care:

a) actually ask Mr Matas to remove the dogs or to attend at Unit 11 at any time after 23 December 2015 to ask Mr Rezo to remove the dogs;

b) call DAS at times when the dogs were reported to be at the complex to attend *immediately* to remove the dogs;

c) seek an order under section 83 of the Tenancy Act in January 2016 (in the face of non-compliance by Mr Rezo with the Notice to Remedy);

d) seek the issue of a Notice to Vacate to Mr Rezo on and from 27 January 2016 and pursue, if necessary, an expeditious path to his eviction;

e) provide information to DAS (to the extent that it said that it required it) to assist with it being able to take action to remove the dogs; and

f) actually arrange the attendance at the complex with DAS on or after 16 February 2016.

209. It is axiomatic that the allegations of breach must be assessed prospectively and not through the lens of serious injury suffered by the plaintiff: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [128]; *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42; 234 CLR 330 at [65]. The question of breach must be considered in the context of the whole of the activities of the Commissioner who has a responsibility for a large number of tenancies and properties: *Civil Law (Wrongs) Act*, s 110.

210. The first occasion upon which the Commissioner had notice that the dogs were, on occasion, unrestrained in the common area of the property was when notified of the attack on Mr Lahiff. Prior to that, the complaint made in relation to the dogs and hence the knowledge of the Commissioner was only in relation to their barking and making a nuisance when on the balcony. Following the attack, the Commissioner took proper steps to have the animals removed from the premises by giving Mr Rezo the Notice to Remedy. The Commissioner also sought action in relation to the dogs from the DAS under the *Domestic Animals Act.* Attempts were made to contact Mr Rezo, both before and after the expiry of the Notice to Remedy, without success. Following the expiry of the period of the Notice to Remedy on 27 January 2016, the Commissioner did not take further steps to address the presence of the dogs until the complaints received on 16 February 2016. At that point, further steps were taken to have DAS deal with the dogs and the rental rebate strategy put in place (see [110]-[111] above).

211. There were significant constraints upon the action that the Commissioner could take in relation to the common areas of Warrock Court. First, the common areas of the

premises were open to the public. Given that the risk was one which arose from the bringing into the complex of the dogs by an occupier of a unit within the complex, the only means of controlling the foreseeable risk that one of the dogs may cause an injury to a person on the premises was through the exercise of its powers as landlord. While the Commissioner took steps to have DAS take action in relation to the dogs, the Commissioner and staff of Housing ACT had no power to seize and detain the dogs as against Mr Matas or Ms Skinner. Second, the action of the Commissioner was consistent with the framework provided for relations between landlord and tenant provided in the *Residential Tenancies Act.* Because that Act provides significant protections for tenants, it imposed significant constraints upon the Commissioner when dealing with the dogs in Mr Rezo's unit.

212. Having regard to the nature of the complex and the limits imposed by leases and statute upon the manner in which the Commissioner could address issues arising in relation to the common areas, I do not consider that when considered by reference to the factors in s 168(2) or ch 4 of the *Civil Law (Wrongs) Act* (most obviously s 43(1)(c) and 43(2)) that the Commissioner breached its duty to the plaintiff. That is because the plaintiff has not established that the conduct was not reasonable for the purposes of s 168(1) or s 43(1)(c).

213. If contrary to what I have said above at [203], there was a duty of care upon the Commissioner relating to the Commissioner's management of the presence of Mr Matas and Ms Skinner and its duty in relation to the management of Mr Rezo's tenancy (the second and third subject matters for the duty of care contended for by the plaintiff), then I would nevertheless have concluded that that duty was not breached. Even more clearly than in relation to the common areas, the scope of action available to the Commissioner was limited by the terms of the lease to Mr Rezo and the statutory regime under the *Residential Tenancies Act* within which it operated. The Commissioner had no general power to seize the dogs and hold them as against their owner and no general power to enter Mr Rezo's premises in order to get access to them. The Commissioner was limited to steps which could be taken under or in relation to the lease to Mr Rezo. As pointed out above, on each occasion when a complaint was made to the Commissioner about the presence or barking of the dogs, the Commissioner's staff took action to address the issue. In doing so, the staff were significantly constrained by the provisions of the *Residential Tenancies Act* which regulated the relationship between landlord and tenant. The actions of the staff were also significantly constrained by the policy of the Commissioner to attempt to maintain the tenancies of its tenants. Clearly that policy was not an absolute obligation. However, even if, contrary to my conclusion above, a duty of care existed, it must have been one in relation to which the laudable social policy goal of maintaining the tenancies of the Commissioner's tenants was to be taken into account in the assessment of reasonableness of the Commissioner's conduct.

Issue 5: If there was a breach of the duty of care, did that cause the harm suffered by the plaintiff?

214. Had there been a breach of duty, then the next issue that would have arisen would be whether that breach caused the harm suffered by the plaintiff. Given that the asserted breaches involved a failure on the part of the Commissioner to take steps to remove or have removed the dogs from the premises, the issue that arises in relation to causation is whether, even if reasonable steps had been taken, the plaintiff has proved on the

balance of probabilities that the dogs would not have been present and able to attack the plaintiff on 15 March 2016. This issues arises under s 45 of the *Civil Law (Wrongs) Act* and, if s 168 of the *Civil Law (Wrongs) Act* does not pick up s 45, the common law. Section 45(1)(b) would not present a barrier to recovery in this case.

215. In order to determine this issue it is necessary to consider the counterfactual situation that the Commissioner had taken additional steps and determine, on the balance of probabilities, whether those steps would have led to the removal of the dogs from the premises prior to 15 March 2016. The submissions of the plaintiff did not address this issue in any detail. However, having regard to the manner in which the complaint made in December 2015 was dealt with and the prompt action taken by Ms Diehm to have a Notice to Remedy issued on 11 January 2016, it could not reasonably be contended that there was any breach of duty prior to the expiry of the period in the Notice to Remedy which the evidence indicated was 27 January 2016. It was at that point that, as I understand it, the plaintiff asserted that additional measures should have been taken by the Commissioner. The most dramatic of those would have been the giving of a Notice to Vacate. That notice, also referred to as a termination notice, was a notice asserting the termination of the lease by reason of a failure to remedy the breach referred to in the Notice to Remedy. Such a notice was required by cl 93 of the standard residential tenancy terms to allow a period of two weeks after the date of service of the notice for the tenant to vacate the premises. If the tenant failed to comply with that notice then, under s 48 of the *Residential Tenancies Act*, the landlord was entitled to apply to the ACAT for a termination and possession order. The ACAT was then required under s 48(1)(a)(v) to determine whether or not the breach justified the termination and had a discretionary power to grant or refuse to grant a termination and possession order. In particular, it could refuse to make a termination and possession order if the tenant had remedied the relevant breach or if the tenant undertook to remedy the breach within a reasonable specified period and was reasonably likely to do so: s 48(2)(a). The other alternative available to the landlord was to apply to the ACAT for orders under s 83 of the *Residential Tenancies Act.* That section permitted the ACAT to make, inter alia, orders of the following kind in relation to a tenancy dispute:

> (a) an order restraining any action in breach of a residential tenancy agreement or occupancy agreement;
>
> (b) an order requiring performance of a residential tenancy agreement or occupancy agreement;

216. In the event that an order under s 83(b) was made, a breach of that order could provide a basis under s 48(1)(b) for the termination of the tenancy if the ACAT decided that the breach justified the termination of the tenancy. There was no such link between an order made under s 83(a) and s 48 (see [239] below) and, as a consequence, enforcement of such an order by way of termination of the lease would then require the issue of at least a Notice to Vacate and possibly also a Notice to Remedy prior to that.

217. The plaintiff also pointed to the possibility that the Commissioner could have applied for a termination and possession order under s 51 of the *Residential Tenancies Act*. That section permits the ACAT:

> to make a termination and possession order effective immediately if satisfied that the tenant has intentionally or recklessly caused or allowed, or is likely to cause or allow-
>
> …

(d) serious or continuous interference with the quiet enjoyment of nearby premises by an occupier of the premises.

218. In order to assess what might have happened had one or other of these courses been followed, it is necessary to have regard to the evidence of Mr Adkins. As mentioned above, Mr Adkins is the Senior Manager of Operational Services for Housing ACT. He joined Housing ACT in 2008 and prior to that he had experience with "New South Wales Housing". He has tertiary qualifications in law from a university in the United Kingdom. He is a coauthor of a textbook on residential tenancy law in New South Wales.

219. "Operational Services" is the in-house legal arm of Housing ACT. It provides advocacy services for the Commissioner in the ACAT and does some appearance work in the Magistrates Court. On other matters, he instructs the ACT Government Solicitor's office. He also deals with compensation claims made against the Commissioner which involve dealing with the ACT Insurance Agency and the ACT Government Solicitor's office. The section also manages the HATRP which is an in-house review panel of certain administrative decisions made within Housing ACT and reviews the majority of the requests by officers of Housing ACT to seek evictions. He also usually sat as a member of the HATRP. His evidence was relevant because it disclosed what was likely to have occurred had steps been taken earlier to terminate the tenancy or seek other orders from the ACAT in relation to the tenancy, and the likely timeframe in relation to those alternative courses of action.

220. I found Mr Adkins to be an impressive witness. In both his evidence-in-chief and cross-examination, he clearly gave honest and impartial answers as to the processes of the Commissioner and the timeframes in which those processes would have occurred. During the course of cross-examination, a large number of complicated hypothetical questions were put to him as to what advice he might have given to officers of Housing ACT in particular circumstances. In somewhat trying circumstances, he clearly endeavoured to engage fairly with those hypothetical situations and gave what I considered to be thoughtful and reliable answers as to what he would have done. The findings that I make below as to the processes that would have been followed in the likely timeframes are based upon his evidence.

221. Operational Services usually became involved with tenancies at the point where a Notice to Remedy and Notice to Vacate had already been issued and the relevant officer of Housing ACT wished to proceed with the eviction of the tenant. At that point, a form entitled "Referral to Operational Services" would be completed. As pointed out above at [134], one of these was actually completed in relation to Mr Rezo's tenancy on 21 March 2016. The referral form and the file are then taken to one of the Tribunal Advocates within Operational Services. A check is made that a Notice to Remedy and Notice to Vacate have been properly issued. If the referral is rejected by Operational Services, then the reasons for its rejection are recorded on the form and the file is passed back to Tenancy Operations with some guidance as to how to proceed. If the referral is accepted, then the matter is reviewed by the HATRP. Operational Services acts as the secretariat for the HATRP and sends a letter to the tenant explaining that a request for termination of the tenancy has been made and offers the tenant the chance to make a submission or provide further information to the HATRP. This provides another opportunity for the tenant to address the issues giving rise to the proposed termination and hence maintain the tenancy. The letter is intended to bring home to

the tenant the seriousness of the circumstances. The tenant is given a period of two weeks in which to provide that submission or information.

222. At the conclusion of that period, the request is then scheduled for the next available meeting of the HATRP. The HATRP sits around 40 times per year. Therefore, the request will be considered by the HATRP within the first or second week after the end of the period in which the tenant was permitted to respond. Matters before the HATRP are prioritised according to their urgency. If it is assumed that the referral was given some priority and it was a week during which the HATRP was convened, then it is likely to have been dealt with by the end of the week following the expiry of the submission period.

223. When considering the matter, the HATRP would consider whether there was a possible way of sustaining the tenancy. Mr Adkins explained the considerations as follows: "… the panel when it's considering a matter is considering whether there is a possible way of sustaining the tenancy and also considering - so we come to it from very much the social housing responsibility plus giving the human rights consideration to whether we should go forward with the termination of the tenancy… As a result, moving forward for a termination is something that we try to do very much as a last resort".

224. If the HATRP does not agree that the matter should proceed to an application for termination then the matter is referred back to Tenancy Operations for further work and there is an explanation of the reasons why the HATRP has not agreed. If the recommendation from the HATRP is for termination, then that decision is written up and all of the information that the HATRP considered is passed to the Executive for the delegate of the Commissioner to make a decision. The delegate for termination of these tenancies is normally the Executive Director of Housing ACT, although in her absence the Senior Director also has a delegation. The HATRP recommendation goes first to the Senior Director for his comments and then to the Executive Director. Following the HATRP meeting, it takes one to two weeks to get a response to the HATRP recommendation depending upon the availability of the Senior Director and Executive Director. Once again, assuming that the matter was prioritised it would have been turned around within the week. If the delegate has agreed with the recommendation of the HATRP, then a letter is sent to the tenant informing the tenant of the decision of the Executive and the file is passed back to the Tribunal Advocates within Operational Services for an application to be made to the ACAT. How much work is required, prior to the making of that application, depends upon the nature of the breach. In a case involving a complaint from neighbours, the Tribunal Advocate in Operational Services would try to take formal statements from them in order to support the application. The Tribunal Advocate would also check whether those neighbours were prepared to be witnesses in the proceedings. Mr Adkins did not say how long this would take but assuming, somewhat unrealistically, that statements were easily and quickly obtained, an application might be filed within a week of the decision of the delegate.

225. Once the application to the ACAT was filed, it would be two to three weeks before the matter was listed for either an initial conference or a hearing. In the case of nuisance and noise matters it is more common for the matter to be listed for directions or for a conference at the first return date. How long the matter then takes to get to a hearing will depend upon the approach taken by the ACAT which in turn will be influenced by whether or not the tenant is legally represented. It is not uncommon for the tenant to be legally represented by Canberra Community Law, the community legal centre which

Ms Diehm in fact encouraged Mr Rezo to obtain assistance from. If submissions are required, then it would commonly obtain a hearing date 10 to 12 weeks after the first return date. If it was more straightforward, then it might receive a hearing date two weeks after the first return date.

226. Mr Adkins said that the ACAT would consider the matter in much the same way as the HATRP did, considering: What is going to happen to the person if the order is made? What is the impact on that person? What are human rights considerations in relation to that person? Is there any feasible way in which the matter can be resolved without the necessitation of the termination of the tenancy?

227. Where a termination and possession order is made under s 48(2), the *Residential Tenancies Act* allows an order to be suspended for up to 21 days and the ACAT will frequently exercise that power and suspend the order for a period of 21 days so as to permit the tenant to arrange his or her affairs including alternative accommodation. It is rare for the ACAT to make the termination and possession order that has effect immediately as a warrant for eviction (see s 39(1)(c)(ii)).

228. Where a termination and possession order is made and stated under s 39(1)(c)(ii) to have effect as a warrant for eviction, then it authorises police to assist with the eviction of the tenant.

229. Assuming that this process was followed, then, adopting the shorter period in any range for a period of time gives, in summary, the following timeframe from the expiry of the Notice to Vacate until actual eviction.

Action	**Time for action (weeks)**	**Cumulative weeks**
Expiry of Notice to Vacate Acceptance of Referral to Operational Services Letter sent to tenant	0	0
Period for tenant submission	2	2
Decision by HATRP	1	3
Approval by delegate	1	4
Filing of application to the ACAT	1	5
Conference/directions hearing in the ACAT	2	7
Hearing in the ACAT/termination and possession order made	2	9
Warrant for eviction executed	3	12

230. Therefore, if a referral to Operational Services was made on 16 February 2016 (the date of expiry of a hypothetical Notice to Vacate issued after 27 January 2016), then if the usual course was followed and all assumptions made so as to make the usual

course as short as possible, then an eviction would have been enforced some 12 weeks after that date, namely, 10 May 2016. There were a significant number of matters which generated a possibility that the process would not proceed as quickly as this estimate has assumed, namely:

a) a possible delay in having the matter considered by the HATRP;

b) a possible delay in having the Senior Director or Executive Director consider the recommendation of the HATRP;

c) a longer period being needed to identify and take statements from witnesses to support a claim of nuisance; or

d) a longer period being required prior to the substantive hearing in the ACAT, arising from the tenant being legally represented or the need for written submissions to be exchanged in advance of the hearing.

231. All of these created, at the very least, a significant possibility that the process would be longer than the minimum time periods outlined above.

232. However, this whole process of estimating the likely time until eviction assumes that proceeding to a termination would have been recommended by the HATRP and approved by the delegate of the Commissioner. That is not likely to have been the case. That is because, at the point where HATRP would have considered the matter, Mr Adkins' evidence was that the HATRP would likely have had information about, and been concerned about, the relationship between Mr Matas and Mr Rezo. The HATRP would have been conscious that Mr Rezo was a vulnerable person who may have no control over Mr Matas. Therefore, the panel would probably have recommended Tenancy Operations to engage further with Mr Rezo and obtain further information from the AFP and DAS. If that was not successful, then he, as a member of the HATRP, would have recommended that Tenancy Operations consider action in relation to Mr Rezo's rental rebate. That was an option that had been adopted by Housing ACT on a number of occasions. (As the chronology makes clear, this is in fact what Ms Diehm did do in any event but had not done by the time of the hypothetical referral to Operational Services.) Once further information had been obtained about those issues, then the matter would be referred back to the HATRP secretariat and the matter listed for the next HATRP meeting that was constituted by the same members.

233. It should also be noted that even if for some reason the HATRP did not reject the request for commencement of ACAT proceedings and an application was made, there was still a very real prospect that the ACAT itself would have refused to make an order or adjourned the proceedings if convinced that Mr Rezo would achieve the removal of Mr Matas and Ms Skinner within a reasonable period (see the *Residential Tenancies Act*: s 48(2)(a)(ii)). If the period permitted for Mr Rezo to achieve the removal of Mr Matas, Ms Skinner and the dogs from the unit is assumed to be a period of about three weeks, then the overall length of the process is still around 12 weeks.

234. Because of this, the plaintiff has not proved that had there been a referral on 16 February 2016 for the purposes of commencing proceedings for eviction in the ACAT, such a referral would have removed Mr Rezo along with Mr Matas and Ms Skinner, from the premises prior to the date of the attack. That is because either a referral at such an early stage would not have led to the delegate approving the commencement of ACAT proceedings or, if such proceedings were commenced and

were successful, an eviction would not have been effected prior to the date of the attack.

235. There were a variety of other hypotheticals put by counsel for the plaintiff to Mr Adkins based upon other possible applications to the ACAT. The purpose of this was to seek to demonstrate that there were alternative courses of action available to the Commissioner under the *Residential Tenancies Act* which might have achieved the removal of Mr Matas, Ms Skinner and the dogs prior to 15 March 2016. The hypotheticals involved either an application for an immediate eviction under s 51 of the *Residential Tenancies Act* or an application for orders under either s 83(a) or s 83(b) of the Act.

236. So far as an application under s 51 was concerned, Mr Adkins evidence was that he in fact considered and gave advice in relation to the possibility of a s 51 application because the Executive wished to make such an application in the immediate aftermath of the attack. He was of the opinion that "it had no realistic chance of getting up". He considered that the ACAT wouldn't see the urgency of the application in circumstances where the dogs had been removed and where the section had the effect of bypassing the normal process. As a consequence, he recommended that it was more appropriate to proceed in the manner permitted by s 48 and issue a Notice to Vacate. He was requested in cross-examination to consider a large number of additional hypothetical situations. In none of these circumstances did he consider that he would have supported an application under s 51. In those circumstances, in my view, such an application would not have been made. I should add that in my view, on the basis of the facts as I have found them, the opinion expressed by Mr Adkins was plainly correct. It would be extremely unlikely that in the circumstances that existed as at any time after 8 January 2016 and prior to the attack on the plaintiff on 15 March 2016, the ACAT would have been satisfied that it was appropriate to make a termination and possession order effective immediately under s 51. That is because, leaving aside the question of whether or not the specific requirements in s 51 could be satisfied, it is very unlikely that the ACAT would have been satisfied that it was appropriate to evict a tenant such as Mr Rezo because of the conduct of an occupant of his premises such as Mr Matas. Unless Mr Rezo was unrepresented and the Commissioner deliberately withheld relevant information about his personal circumstances (and hence his vulnerability) as well as withheld information about Mr Matas, then there was no reasonable prospect of the ACAT making the order terminating the tenancy.

237. The alternative was the making of an application for orders under s 83. Such orders could be made without a referral to the HATRP. If an order under s 83 was made then that could probably be achieved (on a best case scenario) within a period of four weeks, being a two week period before the first listing/directions hearing and a further two week period until the hearing on the making of the orders. It is possible that once the ACAT order was made, it would be complied with. That would have resulted in the removal of Mr Matas, Ms Skinner and the dogs within a four to six week period after the making of an application to the ACAT.

238. However, the other possibility was that an order under s 83(a) or s 83(b) would not be complied with.

239. If the order was made under s 83(a), then that order could theoretically be enforced by the making of an application for a penalty under s 86 of the *Residential Tenancies Act.* That possibility was not the subject of any evidence in this case and neither party

suggested that it was a realistic option. The other alternative in relation to non-compliance with an order under s 83(a) was that following the non-compliance, the Notice to Remedy and Notice to Vacate process be undertaken so as to enliven the power of the ACAT to terminate the tenancy pursuant to s 48. That would be necessary because s 48 itself does not refer to a failure to comply with an order of the ACAT under s 83(a) as providing a basis in itself for the making of an order under the section. The breach of such an order did not therefore provide a direct path to termination under s 48. It will readily be noticed that where the tenant does not comply with the s 83(a) order, then applying for such an order will end up being a more lengthy route to the ultimate eviction than going through the Notice to Remedy and Notice to Vacate process in the first instance.

240. If the application was made for an order under s 83(b) and if a subsequent order was made for failing to comply with the s 83(b) order, then this is a circumstance which under s 48 could provide a basis for a termination of the tenancy. However, at the point where the Commissioner was to make an application under s 48(1)(b), then that would be a trigger for a referral to the HATRP. Therefore, the (at minimum) 12 week process would need to be gone through after the breach of the orders made under s 83(b). As with s 83(a), it will readily be noticed that where the tenant does not comply with the s 83(b) order, applying for such an order would be a more lengthy route to ultimate eviction than going through the Notice to Remedy and Notice to Vacate process.

241. Thus, the description of the processes available under s 83(a) and s 83(b) only provide a route to the departure of Mr Matas, Ms Skinner and the dogs that is faster than the 12 week period if Mr Rezo would have complied with the order of the ACAT. There is a possibility that he would have. However, in the circumstances that actually occurred, he was only ultimately evicted when the termination and possession order was enforced as a warrant for eviction in the presence of police on 21 April 2016. Having regard to that fact and the fact that the evidence discloses that Mr Rezo was in fear of Mr Matas, the plaintiff has not established on the balance of probabilities that Mr Rezo would have complied with an order under s 83 if it had been applied for.

242. The result is, therefore, that the plaintiff has failed to establish the necessary causal link between any breach of duty on the part of the Commissioner and the injuries that he suffered.

Issue 6: Did the Territory owe the plaintiff the pleaded duty of care?

243. The plaintiff has pleaded that the Territory owed to the plaintiff a duty of care "to exercise the statutory powers available under the Housing Act, the *Residential Tenancies Act 1997* and the [*Domestic Animals Act 2000*] in a reasonable manner so as to prevent the plaintiff from suffering injuries and damages".

244. In support of the contention that the Territory owed a duty of care in the terms pleaded, the plaintiff placed significant reliance upon the decision of the New South Wales Court of Appeal in *Warren Shire Council v Kuehne & Anor* [2012] NSWCA 81. That was a decision on an appeal from Elkaim DCJ (as his Honour then was): *Kuehne v Warren Shire Council* [2011] NSWDC 30. The plaintiff also made submissions based upon the "salient features" approach outlined by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258; 75 NSWLR 649 at [103]. The plaintiff placed emphasis upon the existence of an extensive range of statutory powers in the *Domestic Animals*

Act, the vulnerability of the plaintiff and his reliance upon those with statutory authority to protect his interests, and the absence of any conflicting duty in the statute.

245. The decision in *Duncan bhnf Duncan v Ryan and The Australian Capital Territory* [2002] ACTSC 47 is inconsistent with the plaintiff's submission. In that case, the plaintiff successfully sued the owner of two dogs which had savagely attacked her when, at the age of nine, she was walking to school. The defendant had issued a third-party notice claiming that the Australian Capital Territory was a joint tortfeasor because the Territory owed to the plaintiff a duty of care arising from the operation of the *Dog Control Act* and that duty had been breached because of the failure on the part of dog control officers to properly respond to earlier attacks and misbehaviour by the dogs.

246. The manner in which the question arose in *Duncan* made it an unattractive one because the owner of the dogs, who had irresponsibly allowed those dogs to wander, was seeking a financial contribution from the Territory because the Territory should have stopped him from acting in that irresponsible manner: *Duncan* at [7]. However, notwithstanding the unattractive circumstances in which the issue arose in that case, it is substantially the same issue as arises in this case. That is because the defendant could only have succeeded on its third-party claim if the situation was such that the plaintiff, being the injured party, could have directly sued the Territory. That is what is alleged by the plaintiff in this case.

247. Connolly M referred to the joint judgment of Gaudron, McHugh and Gummow JJ in *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 at [103] where their Honours said that it is often the case that a statutory body alleged to have been negligent by reason of a failure to exercise its statutory powers has no control over the source of the risk of harm to those who suffer injury. Their Honours drew a distinction between that situation and the situation where, for example, a highway authority has physical control over the object or structure which is the source of the risk of harm.

248. The Master characterised the dog control unit as being in the former category, being charged with responsibilities which were more appropriately compared with those of the police: at [6]. His Honour concluded that the reasoning that has led courts to reject the imposition of a duty of care actionable by a citizen against police or prosecuting authorities for failing to prosecute a criminal who goes on to injure another person applied equally to the situation in that case and concluded that there was no duty of care imposed by the common law on the Territory which was breached by the dog control officers.

249. Clearly enough, the factual circumstances of the plaintiff in this case evoke much more sympathy than the factual circumstances of the dog owner in *Duncan*. The plaintiff was a vulnerable person who has been severely injured. That injury occurred in circumstances where he, his neighbours and Mr Lahiff had made significant efforts to get government authorities to address the risk posed by the presence of the dogs. Nevertheless, the issue is the same as that in *Duncan*. The only relevant difference is that the *Dog Control Act has* been repealed and replaced by the *Domestic Animals Act*. However, the powers to seize dogs and to declare dogs to be dangerous dogs under the *Dog Control Act* were similar to those under the *Domestic Animals Act.*

250. I consider the decision of Connolly M to be correct and hence that this is a case in which a duty of care on the part of the Territory relating to the exercise of statutory

powers under the *Domestic Animals Act* should not be recognised. My reasons are as follows.

251. It is true to say that the officers of the Territory with powers under the *Domestic Animals Act* do have significant powers that enable them to control the risks posed by dogs. However, when control is discussed in this context, the most significant distinction is between control over risks caused by the statutory authority and risks caused by the actions of third parties. As Dixon J said in *Smith v Leurs* (1945) 70 CLR 256 at 262, "It is… exceptional to find in the law a duty to control another's actions to prevent harm to strangers". The present case involves regulatory powers available under a statute. That is to be contrasted with a situation where the exercise of the statutory power itself creates the risk which manifests itself. The powers in question in the present case do not incorporate an express duty that they be exercised to ensure the safety of residents of the Territory: cf *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; 200 CLR 1 at [17]. Nor did they extend to the degree of control analogous to that which existed in *Crimmins* which included the power to determine where stevedores worked: *Crimmins* at [37]-[38], [44] and [104]. Rather, they were powers which Connolly M accurately characterised as "more compared with police type powers": *Duncan* at [6].

252. It is well-established that police do not owe a duty of care to protect members of the public from criminal activity, even when the risk of that criminal activity is known by the police: *Australian Capital Territory v Crowley* [2012] ACTCA 52; 7 ACTLR 142 at [270]-[313].

253. I accept that in one sense the plaintiff was a vulnerable person. He clearly had medical and mental health difficulties which affected him. However, in relation to the risks posed by the dogs, he was only relevantly vulnerable because of his proximity to them and hence, the likelihood of encountering them if they were not properly managed. The nature of the powers exercised by the officers of the Territory did not render him vulnerable.

254. Further, there can be said to have been a degree of reliance in the sense that officers acting under the *Domestic Animals Act* have powers which ordinary citizens do not. Citizens are, therefore, in a practical sense reliant, for protection against otherwise uncontrolled dogs, upon the exercise of those statutory powers. However, the extent of reliance is no different to the reliance that citizens place upon police officers to exercise their statutory powers in order to control criminal activity. Police have powers that ordinary citizens do not and ordinary citizens rely upon police to take action to prevent or reduce crime.

255. Some reference in the plaintiff's submissions was made to a possible assumption of responsibility. The assumption of responsibility exception in a police or analogous case is a narrow one where a duty is imposed notwithstanding the policy factors against its recognition: *Cran v State of New South Wales* [2004] NSWCA 92; 62 NSWLR 95 at [52]. In the present case, there was no assumption of responsibility for the plaintiff's safety by any officer of DAS. Indeed, one of the grounds of frustration on the part of the residents of units 9, 10 and 12 was that they were aware of the limited action proposed to be taken and were not happy about the fact that the DAS officers had not assumed responsibility for their protection.

256. I do not consider that the statutory regime which exists under the *Domestic Animals Act* is a factor which favours the imposition of a duty of care. As pointed out above, the

statutory regime was a regulatory regime rather than a regime empowering the undertaking of activities which created a risk. The obiter dicta of Whealy JA in *Kuehne* in relation to the existence of a duty of care, placed significant reliance upon provisions of the *Companion Animals Act 1998* (NSW). It was thus a case in which the operation of the common law was affected by the existence of a State statute and hence may vary from the operation of the common law in the Territory: *Lipohar v The Queen* [1999] HCA 65; 200 CLR 485 at [57]. His Honour was prepared to accept that the statutory regime contained significant and special measures which were properly regarded as directed towards the risk of harm to a class of persons or property. Significantly, s 6A of the *Companion Animals Act* imposed a positive obligation upon the Council "to ensure that it is notified or otherwise made aware of the existence of all dangerous and restricted dogs… that are ordinarily kept within its area." His Honour reviewed the provisions of the Act and concluded that the legislation provided the Council "with the power to control the source of the risk of harm that would likely flow to people and the vulnerable position of the respondents and other nearby residents": at [146]. His Honour also said that "the respondents belonged to a class which, of necessity, relied upon the Council as the principal repository of powers under the *Companion Animals Act* to protect them by controlling" the relevant dogs and dog owners: at [146].

257. In addition to there being no duty in the *Domestic Animals Act* similar to that in s 6A of the *Companion Animals Act* that would underpin the imposition of a duty, there are two points to make about the statutory scheme.

258. In *Kuehne*, no consideration was given to those provisions of the *Companion Animals Act* equivalent to s 55 of the *Domestic Animals Act* which allocated liability for dog attacks to the owner of the dog. The *Domestic Animals Act* explicitly allocates liability for attacks by dogs to the owners of the dogs. The legislature has considered the issue of where liability should fall and has determined that it should fall upon the owners. That decision by the legislature does not give rise to a necessary implication that would preclude the common law imposing a duty of care and hence liability for breach upon a different party. That is because the statute was intended to operate within "the milieu of the common law" and any duty that it might impose: *Crimmins* at [26]. That is made clear by the terms of s 55(6) (see [167] above). However, the explicit allocation of liability is part of the statutory environment which may be considered in determining whether a duty of care should be imposed in a novel case. That is particularly so where it is in the statutory powers granted by the *Domestic Animals Act* which are relied upon as the foundation for the erection of the duty of care. There would be an element of incoherence in the law if the legislature enacted a scheme of regulation which included a statutory allocation of liability to the owner of the dog that caused harm yet the common law imposed a duty on the regulator to protect against that same harm and compensate where that protection was not given.

259. The second point is that the duty is formulated as a duty to exercise the statutory powers under "the [Domestic] Animals Act in a reasonable manner so as to prevent the plaintiff from suffering injuries and damages". The duty is alleged to be one to achieve an outcome. If it was so intended or even if it was only intended to involve the taking of reasonable steps towards that outcome, the imposition of such a duty in relation to the exercise of a statutory power would significantly alter the operation of the statutory discretion given to officers. That is because it would compel them, in a practical sense, to act defensively in the exercise of statutory powers so as to avoid the imposition of

liability in circumstances where an injury occurred. The existence of a statutory discretion not constrained by any legislative direction as to the outcome to be achieved by the exercise of that power is a factor which tells strongly against the imposition of a duty of care which would significantly alter that discretion. When the legislature was addressing, through the *Domestic Animals Act*, the issue of the regulation of dogs and dog ownership, it was addressing a substantial and widespread issue. The information provided to the ACT Legislative Assembly was that there was a dog population of 55,000 in the Territory (just under 50 per cent of which were registered): Explanatory Memorandum, Domestic Animals Bill 2000 (ACT), 2. The duty contended for would necessarily extend to any circumstances where there had been threatening conduct by a dog anywhere in the Territory and to a class of persons who may suffer harm in future from the misbehaviour of the dog. In my view, it would be inappropriate in a novel case such as this to impose a common law duty which would substantially affect the statutory scheme in the *Domestic Animals Act*.

260. For the above reasons, I reach the same conclusion as Connolly M did in *Duncan* that no duty of care was owed by the Territory in relation to a failure to exercise powers under the *Domestic Animals Act*. To the extent that they might, notwithstanding the different statutory context, reflect upon the common law position in the Territory, I decline to follow the obiter dicta remarks of Whealy J in *Kuehne*.

261. Before leaving this topic, it is necessary to touch upon three other matters.

262. First, I have addressed the claim of a duty of care at the level of generality at which it was put by the plaintiff. It is, however, important to note that the powers available under the *Domestic Animals Act* are powers available to individual officeholders, either the registrar (s 22) or an authorised officer (ss 54, 56, 57, 59). The pleaded complaint was that some combination of these powers were not exercised. The general principle is that a public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty, is alone responsible for tortious acts that he or she may commit in the course of his or her office and the government which the officer serves has no vicarious liability: *Enever v The King* (1906) 3 CLR 969; *Little v The Commonwealth* (1947) 75 CLR 94 at 114; *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 637-638, 663-664, 681; *Cubillo v Commonwealth of Australia* [2000] FCA 1084; 174 ALR 197 at [1089]-[1122]; *Lissner v Commonwealth of Australia* [2002] ACTSC 53 at [11]. The powers of authorised persons and the registrar under the *Domestic Animals* Act appear to be analogous to those considered in *Cubillo,* namely, that while guidelines and policies as to the exercise of powers could be laid down, in the final analysis, the decision about the exercise of the statutory powers was that of the officer concerned: cf *Cubillo* at [1122]. In those circumstances, it is difficult to see how the Territory could be liable for the failure on the part of the registrar or an authorised person to exercise one of the relevant statutory powers available under the *Domestic Animals Act*. Rather, in the absence of a statutory provision accepting liability for the tortious conduct of statutory officers, proceedings asserting negligence would need to be brought against the individual officeholders.

263. Second, the fact that the powers available under the *Domestic Animals Act* are powers available to individual statutory officeholders and not to the Territory undermines the contention that the Territory per se had any relevant control for the purposes of establishing a duty of care. If statute did not empower the Territory per se to take action in relation to dogs, then that statute could not provide the foundation upon which

to erect a duty of care. Rather, the salient features of the relationship would need to be found elsewhere. While the plaintiff complained about systemic failures in the administration of the *Domestic Animals Act*, any such systemic failure would only be relevant once a relevant duty had been established.

264. Third, to the extent to which the plaintiff relied upon the overlapping knowledge of Housing officers as well as the *Domestic Animals Act* officers, I do not consider that the combination enhances the claims against either the Commissioner or the Territory. That is because in each case, the asserted duty is said to arise from the particular source of powers of control, landlord or regulatory body, and hence the relevant enquiry is as to the knowledge relevant to the exercise of those powers.

Issue 7: If so, was that duty breached?

265. The plaintiff alleged that the Territory breached its duty of care as follows:

> 43. The second defendant, through the acts and omissions of the officials, agents and/or servants of the Animal Authority, was negligent by:
>
> 43.1 Failing to take appropriate action in response to the Notification;
>
> 43.2 Failing to remove the Dogs from the Complex on 8 January 2016, or at any time thereafter until the Attack occurred;
>
> 43.3 Failing to exercise the statutory powers available under the [Domestic] Animals Act at an appropriate time and/or in an appropriate manner to:
>
> (a) investigate the registration, ownership and control of the Dogs;
>
> (b) gain access to Unit 11 in the Complex;
>
> (b) [sic] seize the Dogs; and
>
> (c) destroy the Dogs.
>
> 43.4 Advising officials of the Housing Authority on or about 8 January 2016 that no power was available to enable officials, agents and/or servants of the second defendant to seize the Dogs when it knew, or ought to have known, that was not the case;
>
> 43.5 Failing to advise residents at the Complex that the second defendant and officials, agents and/or servants of the Animal Authority were:
>
> (a) disinclined to exercise statutory powers to protect residents of the Complex from the Dogs;
>
> (b) prepared to leave the Dogs at the Complex in an unmuzzled, uncontained and/or unrestrained state; and
>
> (c) relying on someone answering its "calling cards" as the only action it was taking to protect visitors and residents of the Complex;
>
> 43.6 Failing to warn the residents of the Complex that the Dogs were not to be removed from the Complex; and
>
> 43.6 [sic] Failing to warn the residents of the Complex that the Dogs were not to be destroyed; and
>
> 43.7 Failing to ensure that as and from 8 January 2016 the second defendant and the Animal Authority had a system in place for the assessment, control and/or management of the Dogs whilst they remained at the Complex

266. As will be apparent, paragraphs 43.1-43.3 and 43.7 allege a failure to take action. Paragraphs 43.5-43.6 allege a failure to give advice or warning.

267. It will also be apparent that, notwithstanding the formulation of the duty of care as one involving a particular outcome (see [259] above), the particulars of breach are more consistent with a lesser duty to take reasonable steps towards that outcome.

268. The plaintiff did not expressly abandon any of the alleged breaches of duty. The written submissions did not address the different components of alleged breach individually. Rather the submissions said: "Once a duty on the part of the second defendant is found in relation to the actions of DAS, a finding of breach (measured against the criteria in section 43 of the Wrongs Act) is obvious, given the nature and likelihood of the risk." The principal submission appeared to be that there was a breach of duty because Mr Ritzen had misapprehended his powers, believing he could not take action without an official statement and had failed to consider or apply the protocol put in place within DAS in relation to a dog attack.

Paragraph 43.1

269. Paragraph 43.1 was particularised in a manner which resulted in it not adding anything to the other allegations of breach.

Paragraph 43.2

270. Paragraph 43.2 squarely raised the failure to remove the dogs from the complex on 8 January 2016 or at any time up until the plaintiff was attacked.

271. DAS received a complaint about the incident on 8 January 2016 through Mr Lahiff's telephone call to Mr Ritzen, Ms Diehm's conversation with Mr Ritzen on 8 January 2016, the email sent to Minister Corbell on 8 January 2016 and the follow up email on 13 January 2016. DAS also received the request for information about the statutory powers available from Ms Diehm on 16 February 2016.

272. On both 8 and 13 January 2016, rangers from DAS attended the premises with a view to locating the dogs. On neither occasion were the dogs able to be located. Had they been able to be located, then seizure of the dogs under s 59 of the *Domestic Animals Act* would have been an available option because, at that point, Mr Ritzen suspected on reasonable grounds that the dogs had attacked or harassed Mr Lahiff. No occasion for the exercise of discretion under s 59 arose because the dogs could not be located. In those circumstances, the failure to exercise a discretion to seize the dogs under s 59 could not amount to a breach of the pleaded duty. It is only if the duty compelled further action to locate the dogs that there might have been a breach.

273. Had Mr Ritzen been able to find the dogs, it is unlikely that he would have in fact seized them. That is because the routine practice within the DAS was that on the first occasion where a dog harassed a person, the authorised officer would generally issue a Warning Notice and speak to the owners about containing their dogs. That is consistent with the intention that he had as recorded on the DAS complaint form. As pointed out above (at [74]), had the incident been characterised as an attack then the usual course would have been to seize the dog pending full investigation of the incident.

274. Can it be said that this course was unreasonable? The answer to this question illustrates some of the difficulties that would exist if a duty of care in relation to the exercise of statutory powers was imposed. It essentially asks whether the discretionary decision as to the regulatory approach to be taken adopted by the person

authorised under statute was robust enough. Would a decision to issue a Warning Notice constitute a breach of duty? This issue obviously involves a balance between the competing interests of the members of the public who may be affected in the future if the owner fails to comply with the owner's obligations, the interests of the owner and the dog and the time and resources available to be devoted to the issue having regard to competing claims upon those resources. The vigour with which a regulatory officer pursues enforcement of the relevant statute is clearly a matter where public policy and political considerations become relevant.

275. If the hypothesised duty did in fact exist, then that in turn may inform what was reasonable. That is because a reasonable statutory officer, having regard to potential personal liability or the liability of the Territory, would exercise the officer's discretion in a more interventionist manner because of that potential liability. If the necessity to act defensively is taken into account, then that would tend to make intervention more reasonable and non-intervention less so. This fact illustrates the distorting effect that the imposition of a duty of care would have upon the exercise of a statutory discretion.

276. Leaving these potential complications aside, can it be said that in the circumstances it would not have been reasonable for Mr Ritzen, had he found the dogs, to have merely issued the Warning Notice and had a discussion with the owner? Assuming the pleaded duty to be to take reasonable steps towards the outcome, in my view, it is not possible to say that such a course would have been unreasonable. First, the reasonableness of the course would need to be assessed in light of any interaction with the owner of the dogs that had occurred. Given that no interaction did occur, it is not possible to reach a concluded view on reasonableness. Second, leaving that difficulty aside, in many cases, such a course would completely solve the problem and in those circumstances it could not be characterised in light of the matters in s 43 of the *Civil Law (Wrongs) Act* as an unreasonable course. In any event, given that Mr Ritzen never found the dogs, a possible failure to have acted reasonably if he had done so would not be causally related to the damage suffered.

Paragraph 43.3

277. This paragraph alleges a number of different failures. The first is a failure to investigate the registration ownership and control of the dogs. The plaintiff directed no submissions to this failure. The factual basis for this allegation is not made out. Mr Ritzen did investigate the registration and ownership of the dogs shortly after he received the complaint from Mr Lahiff. In any event, it is not clear what, if any, causal relationship this alleged failure had to the damage suffered.

278. The second alleged failure is the failure to gain access to unit 11 in the complex. The plaintiff directed no specific submissions to this alleged failure. On both occasions when the rangers attended, there was nobody present at unit 11 who could give consent to enter the premises. The powers under s 130 of the *Domestic Animals Act* which were available in certain specified emergency situations to permit the seizure of a dog, were not enlivened in the circumstances. Section 129 of the *Domestic Animals Act* provided for entry onto premises in accordance with a search warrant obtained from a magistrate pursuant to s 133 of the Act. In the absence of any specific submissions explaining why a warrant should have been obtained when the rangers were responding to a first instance of harassment, where no injuries resulted from that attack or harassment, where no contact had been made by the officers with the dogs or the owners so as to permit them to assess their willingness to comply with their

obligations in future, I would not have been prepared to find that the failure to obtain (or attempt to obtain) a warrant to enter the premises was in breach of the asserted duty.

279. The third alleged failure is failing to seize the dogs. This repeats paragraph 43.2 which has been dealt with above.

280. The fourth alleged failure is failing to destroy the dogs. Once again, this was not the subject of any submissions by the plaintiff. There are various statutory powers which permit the destruction of dogs in certain circumstances: ss 53, 66, 68. In the absence of any submissions explaining this contention (or how it could succeed if there was no breach of duty in relation to the failure to seize the dogs), I am not satisfied that there would have been any breach of the asserted duty.

Paragraphs 43.4-43.6

281. The allegations in paragraphs 43.4-43.6 relate to advice or warnings given or not given to either Housing ACT or the residents of the complex. None of these were subject to specific submissions made by the plaintiff. None of them could constitute a breach of the pleaded duty because the pleaded duty was a duty to exercise statutory powers and none of the statutory powers relate to advice or warnings to either Housing ACT or members of the public such as the residents of Warrock Court. Further, no causal relationship has been established between the advice or warnings given or not given and the suffering of harm by the plaintiff as a result of the attack. For example, it has not been established on the balance of probabilities that the plaintiff would have acted any differently had he been given the advice referred to in paragraphs 43.5, 43.6 or 43.6 (second appearing).

Paragraph 43.7

282. This paragraph pleads a failure to have a system in place for the assessment, control and/or management of the dogs whilst they remained at the complex. A request for particulars of this allegation was objected to, but some information was provided in any event. That information was that actions that could have been taken included ensuring that the dogs were not left in common areas, ensuring the dogs were muzzled and not left unsupervised and warning residents of the danger posed by the dogs. As a result of the failure to particularise what was alleged, it is not clear what statutory powers the plaintiff says should have been exercised but were not. That is significant because the duty pleaded is limited to the exercise of statutory powers. Having regard to the absence of particularisation and the absence of submissions on the point, I am not satisfied that this breach would have been established.

283. Had such measures been proven to be a breach of duty, then an assessment would need to be made as to whether or not damage to the plaintiff was caused by that breach. That would depend precisely upon the measures that ought reasonably to have been taken. It is not possible to undertake that assessment in the absence of those measures being identified.

Civil Law (Wrongs) Act, Part 4.2

284. In reaching the conclusion set out above, I have had regard to the provisions in pt 4.2 of the *Civil Law (Wrongs) Act*. I have not individually addressed the matters in s 43(1) or the considerations in s 43(2) because of the number of individual allegations of

negligence and the difficulties with those allegations mean that it would not have been a useful exercise.

Civil Law (Wrongs) Act, Section 112

285. In the event that breaches were otherwise made out, it would have been necessary to consider the operation of s 112 of the *Civil Law (Wrongs) Act.* Section 112 provides:

> 112. When public or other authority not liable for failure to exercise regulatory functions
>
> (1) A public or other authority is not liable in a proceeding so far as the claim in the proceeding is based on the failure of the authority to exercise, or to consider exercising, a function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in a proceeding begun by the claimant.
>
> (2) Without limiting what is a function to regulate an activity for this section, a function to issue a licence, permit or other authority in relation to an activity, or to register or otherwise authorise a person in relation to an activity, is a function to regulate the activity.

286. The provision is in almost identical terms to s 44 of the *Civil Liability Act 2002* (NSW). It was based upon the New South Wales provision: Civil Law (Wrongs) Amendment Bill 2003 Explanatory Statement at 16-17.

287. Section 44 of the New South Wales Act was considered by Beech-Jones J in *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280. His Honour said (at [391]-[400]):

> 391. The origins of s 44 appear to be something of a mystery. Chapter 10 of the *Review of the Law of Negligence* (the "Ipp Report") (Law of Negligence Review Panel, Parliament of Australia, *Review of the Law of Negligence Final Report* (September 2002) 151-163) recommends various principles as the basis for law reform, including four concerning the liability of public authorities. None of them remotely resembled s 44. Instead s 44 in its enacted form first appeared as s 46 in the "Consultation Draft" of the *Civil Liability Amendment (Personal Responsibility) Bill 2002* that was released on 3 September 2002. The notes accompanying that draft simply stated:
>
> > "(f) ... (iii) a public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function."
>
> 392. The Consultation Draft led to the tabling of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) (No 92 of 2002) which introduced the second wave of reforms which commenced with the passage of the CLA on 20 March 2002. Section 46 was reproduced as s 44 of that Bill. It passed through both houses unamended. Both the Premier's second reading speech to the House of Assembly and the Treasurer's second reading speech to the Legislative Council stated as follows in relation to s 44:
>
> > "An authority that has not exercised a regulatory power - such as a power to close a fishery - will also not be liable unless it could have been compelled by a court to exercise that power."
>
> 393. The explanatory note to the Bill made the same statement in relation to this provision as the notes accompanying the Consultation Draft extracted above.

288. In light of there being nothing useful in the New South Wales or ACT explanatory material that might elucidate the policy rationale for this provision, the policy rationale and intention behind it is very hard to discern. Professor Aronson has speculated that “Perhaps the drafters were inspired by Lord Hoffman’s ill-fated and misconceived

attempt in *Stovin v Wise* [1996] AC 923; 3 WLR 388 at 952-953 to build a common law duty to take positive action out of the breach of a duty to validly consider whether to exercise a power": Mark Aronson, 'Government Liability in Negligence' (2008) 32 *Melbourne University Law Review* 44 at 75. That was possible because the Review of the Law of Negligence: Final Report ('Ipp Report') had recommended that Lord Hoffman's reasoning be adopted in statutory form: Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002), 157.

289. Apart from that possibility, the words of the provision that must be construed with no useful input from extrinsic materials. In *Lee* (at [394] ff), Beech-Jones J explained s 44 of the New South Wales Act as follows:

> 394. Section 44 has been referred to in a number of cases, but it appears to have so far successfully evaded interpretation and application (see for example *Makawe* and *Kuehne*).
>
> 395. Three issues appear to be raised by s 44. The first is to determine "the extent [that a public or other authority's] liability is based on the failure of the authority to exercise or to consider exercising any function ... to prohibit or regulate an activity". The second is whether the relevant authority could have been required to exercise the function. The third is whether it could have been required to exercise the function "in proceedings instituted by the plaintiff".
>
> 396. In relation to the first issue, it seems clear that s 44 is meant to encompass a true non-feasance case at common law. However, what about a case in which part of the complaint concerns the failure to exercise an "interconnected statutory power [from one which] has already occurred" (*Pyrenees Shire Council* at [177] per Gummow J)?

290. His Honour then went on to consider the circumstances of the case before him relating to a Council which was involved in detailed consideration of the exercise of its statutory powers by undertaking inspections and issuing statutory certificates but failed to exercise a statutory power to prohibit the use or occupation of the car park under a particular statutory section. His Honour found in the circumstances of that case, that the Council was liable for issuing one of the certificates that it did and hence, it made no difference that it might also have been liable for failure to prohibit the use or occupation of the car park. That was sufficient to conclude that s 44 was not engaged in the circumstances of that case. His Honour continued:

> 399. More generally I suspect, but need not decide, that the correct position is that any case that is truly characterised as a misfeasance case at common law is not one that engages s 44. Such a case will be properly characterised as one "based on" the relevant power or act that was negligently performed. The fact that, had it not been performed in a negligent manner, it would or perhaps even should have resulted in the exercise of a further power will not necessarily mean that the case was "based on" the failure to exercise that power.
>
> 400. In light of this conclusion, it is not necessary to resolve the second and third issues noted in [395] above, but I will briefly comment. In his book, *Annotated Civil Liability Act 2002 (NSW)*, Mr Villa states that s 44 reflects the passage from the judgment of Brennan CJ in *Pyrenees Shire Council* at [24] to [28] (Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Thomson Reuters, 2nd Ed, 2013) at [5.44.030]). Presumably the basis for this assertion is that that judgment is the only judicial discussion in this country that invokes public law principles in this context. For present purposes, two matters should be noted about Brennan CJ's judgment in *Pyrenees Shire Council*. The first is that his Honour observed that, notwithstanding that only a discretionary power may be conferred, circumstances may be such that the public authority can be compelled to exercise it (at [23]). His Honour found that Pyrenees Shire Council was under such a duty in that case (at [28]). The findings I have made warrant that conclusion in relation to s 316 in this case. Second, Brennan CJ repeatedly described

> the type of powers that were so amenable as those which were directed towards protecting the person or property of a distinct class of people, as opposed to a power which is "to be exercised for the benefit of the public generally" (at [26]). His Honour considered that any person who was within that class had, inter alia, "locus standi to seek a public law remedy" (at [25]).

291. The section was also discussed in *Bankstown City Council v Zraika* [2016] NSWCA 51; 94 NSWLR 159 at [79] ff. In that case Leeming JA explained (at [90]) that because the exemption is from liability "based on" the failure of the authority to exercise or consider exercising the function, this naturally directs attention to the way in which the plaintiff's case has been formulated. While that formulation is not necessarily determinative and the distinction between nonfeasance arising from a failure to exercise or consider exercising the function and misfeasance may well be contestable, it is at the core of the operation of the section.

292. Although the submissions of the defendant treated the section as only raising a question of standing, I accept that s 112 raises the three issues identified by Beech-Jones J (at [395]), namely:

a) to what extent is the liability "based on the failure of the authority to exercise or to consider exercising a function ... to prohibit or regulate an activity";

whether the relevant authority could have been required to exercise the function; and

whether the authority could have been required to exercise the function "in proceedings begun by the claimant".

293. This analysis appears to me to be more consistent with the language of the provision, than the conclusion reached by Whealy J in *Kuehne* that the provision is limited to issues of standing: *Kuehne* at [148]-[151].

294. As far as the first issue is concerned, the formulation in the plaintiff's claim is for breach of a duty of care which is limited to the exercise of statutory powers. The statutory powers are powers to seize the dogs, destroy the dogs, obtain entry into private premises or to declare the dogs to be dangerous dogs: FASC, at [42.2]. The Oxford English Dictionary defines "regulate" to mean "[t]o control, govern, or direct, esp by means of regulations or restrictions." The Macquarie Dictionary defines it as "to control or direct by rule, principle, method, etc." In my view, each of the statutory powers in relation to the dogs involved a power to "regulate" an activity, namely, the keeping of dogs. This is not a case, such as *Lee* or *Zraika*, where the failure to exercise the power occurred during the course of other statutory activities. Rather, any activities of the rangers were non-statutory - attending premises, seeking to talk to the owner of the dogs, issuing a warning. Therefore, had it been necessary to decide the issue, I would have inclined of the view that the plaintiff's claim was a claim asserting liability based upon "the failure… to exercise… a function… to… regulate an activity".

295. So far as the second issue is concerned, it is unlikely that the plaintiff would have been able to require the exercise of the function. That is because each of the identified statutory functions, seizing a dog, obtaining entry into private premises, destroying the dogs or declaring the dogs to be dangerous involved a statutory discretion on the part of either an authorised person or the registrar. In the case of obtaining entry into premises, depending on the circumstances it may also require the favourable exercise of discretion by a magistrate. There was no statutory duty to take these actions which would be compelled by an order of mandamus.

296. The third requirement, that of standing, is likely to have been satisfied if there had been a duty compellable by mandamus. That is because the plaintiff was a person who, having regard to the proximity to the residents at which the dogs were being kept, had a special interest in the subject matter of any claim for mandamus.

297. Because any conclusion that I reach on this issue is, having regard to my conclusion in relation to the existence of a duty of care, not essential to determine the proceedings and because the submissions made upon this issue were less than complete, I consider it inappropriate to express a final conclusion on this issue.

298. Finally, I observe that while s 112 may have been enacted merely because it had been enacted in New South Wales and there may be some useful policy underlying its enactment, that policy is not apparent from the words of the section or the available extrinsic materials. Courts will endeavour to give its words some sensible operation, but if its purpose remains a mystery that may well be difficult. In those circumstances, the terms and utility of the section may be a subject worthy of consideration by the legislature.

Issue 8: If the duty was breached, did it cause the harm suffered by the plaintiff?

299. Having regard to the conclusion that if a duty existed that duty had not been breached, it is not necessary to determine this issue. Further, it is not possible to make contingent findings in relation to the issue because the variety of breaches that are alleged are such that each would require specific findings on causation that would be sensitive to the factual findings as to what constituted the breach of duty. I only observe that any consideration of causation would need to have regard to the evidence considered in relation to issue 5.

Summary and conclusion

300. In summary, the issues identified at [178] above have been resolved as follows:

1. Did the Commissioner breach cl 52 or rule 6 of the plaintiff's tenancy agreement? No.
2. If so, did the breach cause the harm suffered by the plaintiff? No.
3. Did the Commissioner owe to the plaintiff any pleaded duty of care? Yes.
4. Did the Commissioner breach any such duty of care? No.
5. If there was a breach of the duty of care, did that cause the harm suffered by the plaintiff? No.
6. Did the Territory owe the plaintiff the pleaded duty of care? No.
7. If so, was that duty breached? No.
8. If the duty was breached, did it cause the harm suffered by the plaintiff? Not determined.

301. In light of those conclusions:

a) The plaintiff's claim against the Commissioner under his lease must fail.

b) The plaintiff's claim of breach of duty under s 168 of the *Civil Law (Wrongs) Act* or at common law against the Commissioner must fail.

c) The plaintiff's claim against the Territory arising from the conduct of officers of DAS must fail.

302. As a consequence, the plaintiff's claims must be dismissed and judgment entered for the defendants.

303. The dismissal of the plaintiff's claims does not indicate that it is appropriate that a citizen can get savagely mauled by dogs whilst lawfully going about his business. In an urban community where crime rates are low, there is no reason why citizens need dogs that are of such a temperament as to represent a threat to the lives of other citizens. In this case, the plaintiff suffered a severe attack to his hands and shoulder, and lost a finger. He was very lucky not to be killed. Neither the difficulties of designing an appropriate legislative scheme, nor the importance of the respect for private property or the autonomy of dog owners, require a legislative regime which permits residents of Canberra to be put at risk by aggressive dogs owned by others.

Order

304. The orders of the Court are:

1. Judgment be entered for the first and second defendants against the plaintiff.
2. The plaintiff is to pay the defendants' costs of the proceedings.
3. Order 2 may not be entered for a period of 14 days from the date of these orders.

I certify that the preceding three hundred and four [304] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: