JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CITATION	:	CHRISTOPHER PELL V MANGURI CORPORATION (INC)
CORAM	:	Deputy President: B DHARMANANDA Deputy Members: Z PAL and A WILLIS
HEARD	:	14 AUGUST 2001 & 6 DECEMBER 2001
DELIVERED	:	6 DECEMBER 2001
FILE NO/S	:	EOT 4 of 2000
BETWEEN	:	CHRISTOPHER PELL Complainant AND MANGURI CORPORATION (INC) Respondent

---

Catchwords:

Equal Opportunity - alleged discrimination on ground of race in area of employment - dismissal under s125

Legislation:

Equal Opportunity Act 1984 (WA), ss36, 37 & 125

Result:

Complaint dismissed

Representation:

Counsel:

Complainant	:	In person
Respondent	:	Mr G Bull

Solicitors:

Complainant	:	No appearance
Respondent	:	Chamber of Commerce and Industry

Case(s) referred to in judgment(s):

Hill v University of New England (1990) EOC 92-291
KLK Investments Pty Ltd v Riley (1993) 10 WAR 523
Langley v Niland [1981] 2 NSWLR 104
Yarran v Westpac Banking Corporation (1992) EOC 92-440

Case(s) also cited:

Adlam v Orlando Wyndham Group Pty Ltd, unreported, [1998] HREOCA 17 (1 June 1998)
Bear v Norwood Private Nursing Home (1984) EOC 92-019

JUDGMENT OF THE TRIBUNAL:

1 On 6 December 2001, the Tribunal dismissed the complainant's complaint under s125 of the *Equal Opportunity Act 1984* (WA) (**Act**), being satisfied that the complaint was "*frivolous, vexatious, misconceived or lacking in substance, or for any other reason the complaint should not be entertained*". The Tribunal said that it would publish reasons for the dismissal, in due course. These are the Tribunal's reasons for dismissing the complaint. Unless otherwise indicated, a reference to a section is a reference to a section of the Act.

2 The Commissioner for Equal Opportunity referred to the Tribunal the complainant's complaint that he was discriminated against on the ground of race in his employment by the respondent. Section 36(1) provides that a person (**discriminator**) discriminates against another person (**aggrieved person**) on the ground of race if, on the ground of the race; a characteristic that appertains generally to persons of the race of the aggrieved person; or a characteristic that is generally imputed to persons of the race of the aggrieved person, the discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race.

3 Section 37(2) provides that it is unlawful for an employer to discriminate against an employee on the ground of the race of the employee by, among other things, dismissing the employee or subjecting the employee to any "*other detriment*".

4 The complainant is a person of Aboriginal descent. He claims that he was discriminated against essentially because he was treated differently

a) in respect of the treatment he received with the processing of his claim for worker's compensation for stress leave when compared to the treatment received by another employee, Ron Mitchell;

b) in respect of the treatment he received when he was made to return the respondent's car and telephone, when compared to the treatment received by Mr Mitchell.

5 A number of other matters were raised at the hearing by the complainant but, in cross examination, he conceded that the force of his complaint for racial discrimination was based on the above two matters. For example, the complainant accepted, in cross examination, that there was no real connection with his argument that he had allegedly not been given

sufficient financial resources, whilst employed by the respondent, to do his job properly. It is unnecessary for the Tribunal to summarise those other extraneous matters in these reasons.

6 Although the complainant asserted that he had been the subject of racial discrimination in relation to the above two matters, in his evidence, he simply did not point to any sound basis on which it can be concluded, on a balance of probability, that the respondent discriminated against the complainant by dismissing him or subjecting him to any other detriment because of, or on the ground of, his race, a characteristic that appertains generally to persons of his race or a characteristic that is generally imputed to persons of his race.

7 From the complainant's own evidence, the position, on a balance of probability was that:

- on or about 19 November 1998, there was a heated discussion between the complainant and Mr Mitchell, in which the complainant told Mr Mitchell to "*f**k off before I knock you out, you f**king c**t*";
- after the matter was investigated by the respondent, the complainant was asked to provide an apology to Mr Mitchell but refused to do so;
- in about December 1998, the complainant was informed by the respondent that there had been a restructure of the organisation and that he would not be able to remain in his position as Manager;
- on or about 26 January 1999, the complainant told a director of the respondent, Dean Collard, that he had decided not to take up a position offered to him of Employment Officer, and would give a month's notice and leave;
- the complainant was also offered another job at the Indigenous Land Trust which he did not accept;
- in early February 1999, the complainant took two weeks annual leave and was to return on or about 16 February 1999 but did not do so because he had become stressed and took stress leave;
- the complainant obtained medical certificates with respect to his stress leave;

- in the event, the complainant did not return to work after he went on annual leave in early February 1999;

- in or about April or May 1999, the complainant wrote to the respondent and said that he was putting "*in writing my formal resignation of four weeks from 27-4-99 of Manguri Corporation as manager of Employment Services*";

- in or about March 1999, the complainant was asked by the respondent to return the motor vehicle he had been allowed by the respondent to use and, on or about 24 March 1999, the motor vehicle was picked up from the complainant's home - the complainant was entitled to a motor vehicle "*whilst employed*";

- in or about May 1999, the complainant settled his worker's compensation claim and received a cheque in payment of the claim;

- the complainant was told that Mr Mitchell's worker's compensation claim had been paid in error, before that claim was approved.

8 It is necessary to refer to some authority on s 125 before returning to the evidence. Referring to **Langley v Niland** [1981] 2 NSWLR 104 and **Hill v University of New England** (1990) EOC 92-291, Hasluck P said in **Yarran v Westpac Banking Corporation** (1992) EOC 92-440 at 79,114:

> "*the Tribunal considers that Section 125 should be regarded as a means whereby the Tribunal can control and if necessary terminate summarily proceedings which do not have any reasonable prospects of success or are otherwise lacking in substance or merit.*"

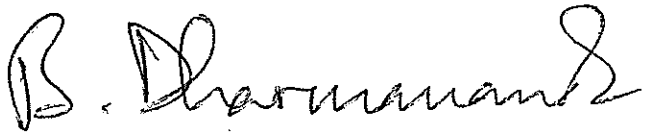
9 In **Yarran**, Hasluck P also said at 79,115:

> "*in a complaint of racial discrimination the Complainant bears the onus of establishing that he or she has been the victim of unlawful discrimination. The case must be proven on the balance of probabilities, but, in the absence of direct evidence, the Complainant may use in support inferences drawn from the primary facts, although discrimination cannot be inferred when more probable and innocent explanations are available on the evidence. ...*

In weighing up the sufficiency of evidence one must take account of the view expressed in ***Chamberlain v R*** *(1983) 153 CLR 521 at 536 that in determining whether inferences may be drawn the Tribunal was constrained to act on the basis that there can be no inferences unless there are objective facts from which to which infer the other facts which it is sought to establish."*

10 Only the complainant gave evidence. The application under s125 was made after he had closed his case and before the respondent went into evidence. From that evidence, it was not possible to even remotely conclude that the complainant had been treated less favourably "*on the ground of*" or because of his race or any relevant characteristic appertaining or generally imputed to his race. As explained in **Yarran**, the onus was on the complainant to make out his claim of racism: see also **KLK Investments Pty Ltd v Riley** (1993) 10 WAR 523. Instead of satisfying that onus, and despite repeated explanations by the Tribunal as to the importance of this in terms of meeting the requirements of the Act, the complainant continued to make unsubstantiated allegations that he was treated differently on the ground of race but did not adduce any evidence that showed this occurred, or from which this inference could be drawn.

11 For all of the above reasons, the Tribunal dismissed the complaint under s 125.



JURISDICTION	:	EQUAL OPPORTUNITY TRIBUNAL OF WESTERN AUSTRALIA
LOCATION	:	PERTH
CITATION	:	PENNY v STATE HOUSING COMMISSION
CORAM	:	MRS N JOHNSON QC, PRESIDENT DR C GILLGREN and MS L MCGRATH, MEMBERS
HEARD	:	10, 11, 12 OCTOBER 2001 and 17, 18 DECEMBER 2001
DELIVERED	:	2 MAY 2003
FILE NO/S	:	ET/2001-000009
BETWEEN	:	KATHLEEN PENNY Complainant
		and
	:	STATE HOUSING COMMISSION Respondent

Catchwords:

Equal Opportunity – direct and indirect discrimination on the ground of race in the area of accommodation – burden of proof

Legislation:

Equal Opportunity Act 1984, s 4, s 47, s 36; *Interpretation Act 1984*, s 18.

Result:

Application dismissed.

Representation:

Counsel:

Applicant:		Mr I MacFarlane, Tenants Advice Service Inc. WA
Respondent	:	Mr A Derrick, Crown Solicitor's Office

Case(s) referred to in determination:

Alone v State Housing Commission (1992) EOC 92-392
Australian Iron and Steel Pty Ltd v Banovic & Anor (1989) 168 CLR 165
Birmingham City Council v Equal Opportunities Commission [1989] AC 1155
Booehringer Ingelheim Pty Ltd v Reddrop (1984) EOC 92-108
Director General of Education and Ano v Breen & Ors (1984) EOC 92-015
Haines v Leves (1987) 8 NSWLR 442
IW v City of Perth (1997) 146 ALR 697
Jamal v Secretary Department of Health and Anor (1988) EOC 92-234
Martin v State Housing Commission [ET No 17 & 18 of 1997]
State Housing Commission v Martin (1999) EOC 92-975
Waterhouse v Bell (1991) 25 NSWLR 99
Waters v Public Transport Corporation of Victoria (1991) 103 ALR 513
West v AGC (Advances) Ltd (1986) 5 NSWLR 610
Zinni v Coventry Group Ltd [ET No 2 of 2001] delivered 21 March 2002.

JUDGMENT OF THE TRIBUNAL

1 The complainant, Mrs Kathleen Penny, claims that the Respondent, the State Housing Commission (for ease of reference referred to hereafter as "Homeswest", the Respondent's current trading name), unlawfully discriminated against her, on the ground of race in the area of accommodation, contrary to s 47 of the *Equal Opportunity Act 1984* ("the Act"). Homeswest denies that it has unlawfully discriminated against Mrs Penny as alleged.

2 Mrs Penny is an Aboriginal woman who has been a tenant of Homeswest over an extended period of time. The following chronology of relevant events consists primarily of facts which were not in dispute and were supported by documentation tendered into evidence. Where the chronology refers to a fact which was disputed by the parties, it is included in the chronology on the basis that the Tribunal is satisfied of the fact to the requisite standard of proof:

(1) Since the early 1970's Mrs Penny has been a tenant of 11 Homeswest properties. The addresses of those properties and the circumstances of the determination of the tenancies are as follows:

(a) Mentone Road, Balga: Evicted for antisocial behaviour.
(b) Gretham Road, Balga: Vacated.
(c) Lefroy Street, Willagee: Transferred at tenant's request because of distance from grandchildren's sporting commitments.
(d) Arnold Place, Balga: Transferred to different unit in same complex.
(e) Arnold Place, Balga: Transferred.
(f) Darlington Place, Balga: Evicted for antisocial behaviour.
(g) Newcourt Way, Balga: Evicted for antisocial behaviour.
(h) Irvine Street, Bayswater ("Irvine Street property"): Transferred at tenant's request because of distance from amenities.
(i) Hyland Street, Balga ("Hyland Street property"): Evicted for failure to keep the property in a reasonable state of cleanliness.
(j) Wiseborough Crescent, Balga ("Wiseborough Crescent property"): Transferred at tenant's request for a smaller property.
(k) Heyshott Road, Balga: Current.

(2) On 13 April 1992 Mrs Penny signed a tenancy agreement with respect to the Hyland Street property and the tenancy commenced on 20 April 1992.

(3) On 25 November 1992 Mrs Penny and Homeswest entered into an agreement concluded under the auspices of the Homeswest Independent Appeals Tribunal. The agreement acknowledged the important role performed by Mrs Penny in raising and caring for her extended family, her past involvement in providing crisis accommodation for young homeless Aboriginal people, the difficulties which had occurred in past tenancies of Mrs Penny and the need for Mrs Penny to be housed in accommodation more suited to her role as the head of a large Aboriginal family.

It was a term of the agreement that that Mrs Penny or her advocates would, within 7 days, write to all relevant agencies repeating her earlier directive that her house is no longer available as crisis accommodation for homeless Aboriginal people. A further term was an acknowledgment by Mrs Penny of her legal responsibility for the behaviour of all people on the property, both residents and visitors, and an undertaking that she would use her best endeavours to prevent any nuisance to neighbours, including requesting the assistance of the police. Mrs Penny also agreed to discuss the terms of the agreement with the older children in her care and make them aware of their responsibility to allow neighbours the quiet enjoyment of their homes.

(4) On 2 August 1996 Homeswest issued to Mrs Penny, then residing in the Hyland Street property, a Notice of Breach of Agreement under the *Residential Tenancies Act 1987*. The breaches were identified as (i) failure to pay water consumption charges and repairs, (ii) failure to keep the premises in a reasonable state of cleanliness and (iii) failure to allow inspection of the premises by the owner.

(5) On 3 September 1996 Homeswest issued to Mrs Penny a Notice of Termination under the *Residential Tenancies Act 1987* particularising the breach as a failure to keep the premises in a reasonable state of cleanliness.

(6) On 23 September 1996 Mrs Penny lodged a complaint with the Equal Opportunity Commission ("the Commission") alleging that Homeswest had discriminated against her on the grounds of race by refusing her application to transfer to other Homeswest premises.

(7) On 8 October 1996 Local Court orders were made for the termination of the Hyland Street tenancy and possession within 28 days.

(8) On 1 November 1996 Mrs Penny filed with the Equal Opportunity Tribunal an application pursuant to s 126 of the Act for an interim order restraining the Homeswest from evicting her from the Hyland Street property until her complaint to the Commission had been resolved.

(9) On 5 November 1996 Mrs Penny filed an amended complaint to the Commission making further allegations of discrimination. Included in her complaint were allegations concerning Homeswest's response to her requests for maintenance and repairs to the Hyland Street property which led to an increased tenant liability, the propriety of her eviction and the condition of the Irvine Street and Hyland Street properties. The complaint was ultimately dismissed and Mrs Penny did not exercise her right under s 90 (1) of the Act to require the Commissioner to refer the complaint to the Tribunal.

(10) The Complainant's application for an interim order was heard by the Deputy President of the Tribunal on 6 November 1996. The application was dismissed on 11 November 1996.

(11) Mrs Penny was evicted from the Hyland Street property on 15 November 1996. Approximately two weeks after Mrs Penny's eviction, her granddaughter who had resided with her in Hyland Street was provided with a Homeswest property in Koman Way, Balga. Mrs Penny then went to live with her granddaughter at the Koman Way property and remained there until she was ultimately re-housed in the Wiseborough Crescent property.

(12) Following a verbal agreement with Mrs Penny that she would commence paying off her debt to Homeswest by instalments of $100 per fortnight made by direct debit, on 6 January 1997 instructions were given to a Homeswest officer to attempt to locate an isolated property for Mrs Penny and her family. Mrs Penny was advised in writing by Homeswest that this action was being taken.

(13) By letter dated 10 February 1997 Homeswest made a claim of debt arising from the tenancy in the sum of $7321.70 ("the vacated debt"). Mrs Penny was advised that if she felt the decision to be wrong and not in line with Homeswest policy she could appeal. A pamphlet explaining the appeals process was enclosed together with an Appeals Mechanism Form.

(14) By letter dated 5 March 1997 the Tenant's Advice Service ("TAS") wrote to Homeswest on behalf of Mrs Penny indicating that it had been provided with the letter of 10 February 1997. The TAS letter contained a request for further information in relation to some

components of the debt and raised issues in relation to other components of the debt. The TAS also sought an extension of time to deal with the claim for payment. By letter dated 10 March 1997 Homeswest wrote to the TAS advising that it was unable to release the information sought until Mrs Penny signed an authority. The TAS was also advised that if Mrs Penny wished to appeal any of the charges she could do so by completing the appeal forms which were enclosed with the letter.

(15) On 13 March 1997 Homeswest received from the TAS a facsimile letter of even date advising that the signed authority had been provided to a Homeswest officer and that Mrs Penny intended to lodge an appeal against some of the charges levied against her. It was again made clear that the TAS required the further information sought in its letter of 5 March 1997 in order to determine *"exactly what is to be appealed"*.

(16) By letter dated 14 March 1997 Homeswest advised the TAS that it was unable to obtain detailed information on Mrs Penny's account as her personal files were then with the State Ombudsmen for enquiries.

(17) On 21 March 1997 the TAS wrote to Homeswest requesting "printouts of water, rent and damage charges and payments, and any job orders against the premises over the last twelve months" on the basis that such information was available on computer.

(18) By letter dated 1 April 1997 Mrs Penny was advised that Homeswest were attempting find her a property on the following conditions:

(a) Mrs Penny would continue paying her vacated debt.

(b) Mrs Penny's tenancy would be pursuant to a head lease arrangement between Homeswest and Manguri Aboriginal Corporation ("Manguri") whereby Manguri managed the tenancy.

(c) The property would be specifically selected to ensure minimum impact on neighbours.

(19) The head lease arrangement referred to in par 2(18) above is a Head Lease Agreement in effect at the relevant time pursuant to which Homeswest granted a head lease to Manguri for a peppercorn rental. The terms and conditions of the Agreement covered all premises listed in Schedule 3B which could be amended from time to time. The purpose of the Agreement was to manage for the provision of housing for Aboriginal people who require essential

support services to enable them to live independently in the community. Under clause 4.1 of the Agreement allowed for Manguri to sub-let the premises to persons eligible for houses under the Homeswest Eligibility Guidelines. Clause 4.3 provided for Manguri to charge sub-tenants a rent commensurate with Homeswest rental charges. Clause 5.1 required Manguri to return to Homeswest any surplus income accrued by Manguri from the operations of the premises. Under clauses 8 and 9 of the Agreement Homeswest was responsible for all building insurance charges, rates and taxes. Clause 10 provided that Manguri was to indemnify Homeswest against all claims arising from any cause relating to the premises, including the negligent use or neglect of the services, facilities or fixture on the premises. Manguri was also responsible for all day to day maintenance and was obliged to repair at its own expense or compensate Homeswest for the cost of repairing any damage to the premises resulting from neglect or any deliberate or careless act or any breach of the agreement by Manguri or the sub-tenant: clauses 11 and 12. Homeswest was responsible for replacement of essential fixtures and any structural repairs to the premises: clause 12.

(20) By letter dated 8 April 1997 Homeswest wrote to the TAS advising that it had been able to obtain one of the necessary files regarding Mrs Penny's vacated debt and enclosing *"all the necessary accounts"*. The TAS was also advised that when an appeal was lodged itemizing all the charges being disputed a hearing date would be set *"when all queries can be discussed"*.

(21) On 18 April 1997 an officer of the TAS contacted Homeswest by phone as a result of which a file note was created which is in the following terms:

> *"Joanne Walsh from TAS called to advise, Mrs Penny still wishes to appeal however she is still waiting on documentation from FOI. Joanne spoke to FOI and was advised it could take at least a further 4 weeks. Joanne expressed concerns that appeal may not be lodged with the 12-month time frame due to HW holdup. I advised I would make a File note stating situation and there shouldn't be any problem as it was FOI causing the delay."*

(22) On 24 April 1997 Homeswest wrote to Mrs Penny advising that she had missed two instalments and that unless arrears were paid and

regular payment made, Homeswest would advise Manguri that it would not be providing accommodation to Mrs Penny.

(23) On 5 May 1997 Homeswest wrote to Mrs Penny acknowledging that she had re-commenced making her fortnightly payments and re-confirming that she would only be housed *"in a specially selected property where it is likely there will be less pressure on you from neighbours and in this regard, it is still likely to take some time for a property to be found."*

(24) On 10 February 1998 Homeswest wrote to Mrs Penny briefly referring to its activities since 1 April 1997 in attempting to obtain a suitable property for Mrs Penny and re-confirming the conditions upon which Mrs Penny would be re-housed.

(25) It was not until 13 March 1998 that the Mrs Penny was re-housed by Homeswest in the Wiseborough Crescent property as a sub-tenant of Manguri.

(26) On 13 July 1998, some 15 months later and shortly after Mrs Penny had been re-housed, the TAS wrote to Homeswest seeking *"a comprehensive review of Homeswest's claim of debt against Mrs Penny"*. The request is elaborated on in the following terms: On 3 August 1998 the TAS made a written request of Homeswest to advise of its intentions in regard to Mrs Penny's case. By letter dated 10 August 1998 Homeswest advised that it was *"currently reviewing Ms Penny's debt and other tenancy related matters"* and would respond in the future.

(27) Homeswest replied to the TAS' letter of 13 July 1998 by letter dated 14 December 1998. The letter contains an apology for the delay in responding with an explanation that the issues raised were complex and wide ranging requiring intensive investigation and resourcing. The letter refers to the 12-month appeal period and notes that Mrs Penny failed to lodge an appeal with the necessary time frame. The letter states that, consequently, Homeswest was entitled to decline any request for a review but adds, *"in consideration of the complexity of this case, Homeswest agreed to undertake a review giving full consideration to Mrs Penny's claims"*. The result of the review was that Homeswest agreed to waive approximately $1,000 of the claimed debt.

(28) By letter in reply dated 21 December 1998 the TAS referred to the fact that, although the debt was raised on 10 February 1997, the supporting documentation sought was not provided until 2 July 1997 and hence the application to review made on 13 July 1998 was

made a mere 6 working days outside the 12 month time frame for appeal. The letter also emphasized Mrs Penny's desire to attend an appeal hearing and discuss the issues raised.

(29) By letter dated 5 February 1999 Homeswest responded to the issue of whether Mrs Penny was entitled to an appeal in the following terms:

"As you are aware the Homeswest Appeals Process is limited to the review of "current" decisions. The thorough internal review that was undertaken by Homeswest in response to all matters raised in your original letter, and including all Mrs Penny's debts was therefore more comprehensive than would have been permissible under the (HAM) formal appeals process."

The claim

3 The claim against the Respondent, as pleaded in the Points of Claim, includes allegations of both direct and indirect discrimination which can be summarized as follows:

(1) The Respondent directly discriminated against the Complainant by its delay in responding to the Complainant's request for a review of debts raised against the Complainant in relation to the Hyland Street property.

("the debt review allegation": Paragraph 6 of the Points of Claim)

(2) The Respondent indirectly discriminated against the Complainant in the application of its policies in determining the complainant's debt arising from the tenancy of the Hyland Street property.

("the debt determination allegation": Paragraph 7 of the Points of Claim)

(3) The Respondent directly discriminated against the Complainant by the delay in re-housing her after her eviction from the Hyland Street property.

("The re-housing delay allegation": Paragraph 8 of the Points of Claim)

(4) The Respondent directly discriminated against the Complainant by:

(i) re-housing her in sub-standard accommodation; and

(ii) requiring a head lease from an Aboriginal corporation as a condition of re-housing her ("the re-housing allegation": Paragraph 9 of the Points of Claim)

4 Some of these allegations are particularized in a way which effectively identify further specific complaints of either direct or indirect discrimination and have been dealt with individually both in the course of the evidence and in these Reasons.

5 In his opening submissions, counsel for the Complainant submitted that all four allegations constituted both direct and indirect discrimination. The Tribunal considers that proposition to be untenable as, in most instances, the description of the allegedly discriminatory conduct simply does not meet the definitions for both direct and indirect discrimination. For example, the allegation made in par 6 of the Points of Claim can only be one of direct discrimination.

6 Counsel for the Complainant also emphasized in opening that, in order to fully appreciate Mrs Penny's circumstances and the case presented on her behalf, it would be necessary for the Tribunal to take into account various systemic factors within Homeswest which are said to have contributed to the way in which that organization dealt with Mrs Penny. Consequently, in order to afford Mrs Penny the opportunity to adduce evidence of systemic discriminatory attitudes and practices within Homeswest, counsel for Mrs Penny was given substantial latitude in cross-examining Homeswest officers with respect to matters not specifically pleaded in the Points of Claim, including matters not actually referred to this Tribunal and hence not properly within its jurisdiction.

Legal principles

7 It is essential to emphasis that it is the Complainant who bears the onus of proving her case and must do so on the balance of probabilities: ***Alone v State Housing Commission*** (1992) EOC 92-392 at 78,788. Notwithstanding that Homeswest undertook from the outset to go into evidence and to produce to the Tribunal all relevant correspondence and file documentation relating to this claim, it was at all times Mrs Penny's obligation to establish each essential component of a claim of racial discrimination under the Act.

8 In considering and construing the relevant legislative framework it is also important for the Tribunal to remain mindful that the Act is beneficial legislation and must be construed so as to promote its object or purpose:

s 18 *Interpretation Act 1984;* ***West v AGC (Advances) Ltd*** (1986) 5 NSWLR 610 at 631; ***IW v City of Perth*** (1997) 146 ALR 697 at 702; ***Waters v Public Transport Corporation of Victoria*** (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron J and at 546-7 per Dawson and Toohey JJ. The objects of the Act include the elimination of discrimination against persons on the ground of race in the area of accommodation and the promotion of recognition and acceptance within the community of the equality of persons of all races: s 3(a) and (d) of the Act.

9 Part III of the Act prohibits discrimination on the ground of race. Race is defined in s 4 of the Act to include colour, descent, ethnic or national origin or nationality. Division 3 of Part III addresses, inter alia, discrimination in accommodation. Relevantly, s 47 of the Act provides:

> *"(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's race –*
>
> *(a) by refusing the other person's application for accommodation;*
>
> *(b) in the terms or conditions on which accommodation is offered to the other person; or*
>
> *(c) ...*
>
> *(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's race –*
>
> *(a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;*
>
> *(b) ...*
>
> *(c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person."*

10 Discrimination on the ground of race is relevantly defined in s 36(1) to include treating the aggrieved person, on the ground of race, less favourably than in the same circumstances, or in circumstances that are

not materially different, the discriminator treats or would treat a person of a different race. This section is usually understood to refer to direct discrimination or acts involving different treatment.

11 It can be seen that, relevant to the circumstances of this case, in order to succeed in a complaint of direct discrimination on the basis of race, a Complainant has to prove the following matters:

(a) that the Complainant was treated less favourably by the Respondent than, in the same circumstances or in circumstances which are not materially different, the Respondent treated or would treat a person of another race;

(b) that the less favourable treatment was on the grounds of the Complainant's race, a characteristic that appertains generally to persons of that race, or a characteristic that is generally imputed to persons of that race; and

(c) that the Complainant suffered a detriment as a result of the less favourable treatment.

12 The expression "less favourably" requires that there be two sets of circumstances, the actual and the hypothesized, so that it can be determined by a comparison whether the treatment in the former is "less favourable" than in the latter: ***Booehringer Ingelheim Pty Ltd v Reddrop*** (1984) EOC 92-108 per Mahoney J at 76,052.

13 The discriminatory act, that is, the less favourable treatment, must be "on the ground of race". The race of the person must therefore have a causally operative effect on the decision to commit the discriminatory act although the ground of race need not be the dominant or substantial reason for the doing of the relevant discriminatory act: ***Director General of Education and Ano v Breen & Ors*** (1984) EOC 92-015 at 75,429 per Street CJ; ***Haines v Leves*** (1987) 8 NSWLR 442 at 471 per Kirby P; s 5 of the Act.

14 Section 36(2) addresses, in the following terms, circumstances most commonly referred to as constituting indirect discrimination or acts having a disparate impact:

> *"For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as "aggrieved person") on the ground of race if the discriminator requires the aggrieved person to comply with a requirement or condition –*

(a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply."

15 The definition of indirect discrimination contains four elements:

(1) the discriminator must require the aggrieved person to comply with a requirement or condition;

(2) a substantially higher proportion of persons of a different status than the aggrieved person must be able to comply with the requirement or condition than persons of the same status as the aggrieved person;

(3) the aggrieved person must not be able to comply with the requirement or condition;

(4) the requirement or condition is unreasonable in the circumstances.

16 As to the first element, the courts have generally taken a liberal approach to the interpretation of the words "requirement or condition" where they appear in provisions equivalent to s 36(2). Nevertheless it remains necessary in each particular instance to formulate the actual requirement or condition with some precision: ***Australian Iron and Steel Pty Ltd v Banovic & Anor*** (1989) 168 CLR 165 at 185 per Dawson J.

17 As to the second element, the Act demands that a comparison be made between the compliance rates between the two groups in order to determine whether *"a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply"*: ***Australian Iron and Steel Pty Ltd v Banovic & Anor*** (1989) 168 CLR 165 at 185 per Dawson J.

18 As to the third element, the reference in s 36(2) of the Act to a requirement or condition with which the aggrieved *"person does not...comply"* must be construed to mean "does not comply by reason of the cultural imperatives or other attributes of that person's race": ***State Housing Commission v Martin*** (1999) EOC 92-975 at 79212 per White J, Kennedy and Steytler JJ agreeing. A decision not to comply for reasons unconnected with aggrieved person's race would not fall within the

definition. As White J observed in ***State Housing Commission v Martin*** (at 79, 212):

> *"The subsection applies, in my view, to the situation where the aggrieved person is physically able to but does not comply with the requirement or condition in question, because to do so would be inconsistent with some cultural attribute of that person's race or is physically not able to comply with the requirement or condition by reason of an actual inability which is attributable to that person's race. To adopt, mutatis mutandis, the words used....in Mandla v Dowell Lee (supra), the aggrieved person does not comply with the requirement or condition because she cannot do so unless she is willing to give up her distinctive customs and cultural rules or, alternatively, she is unable to comply therewith by reason of some inherited and unalterable racial characteristic."*

19 As to the fourth element, the meaning of "reasonable" must be ascertained by reference to the notion of "discrimination" and by reference to the scope and purpose of the Act: ***Waters v Public Transport Corporation of Victoria*** (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron J and at 523.

20 In determining a complaint of discrimination it is not necessary to show that the alleged discriminator intended to discriminate. However, the act which amounts to discrimination must be deliberate; that is, advertent and done with the knowledge of the characteristic of the Complainant said to be the ground on which the discriminatory act is performed: ***Jamal v Secretary Department of Health and Anor*** (1988) EOC 92-234 at 77 196 per Kirby P, at 77 200 per Samuels JA; ***Australian Iron and Steel Pty Ltd v Banovic and Anor*** (1989) 168 CLR 165 at 176-7 per Gaudron and Deanne JJ; ***Waters and Ors v Public Transport Corporation*** (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron JJ, Deane J agreeing; ***Birmingham City Council v Equal Opportunities Commission*** [1989] AC 1155 at 1194 per Lord Goff; ***Waterhouse v Bell*** (1991) 25 NSWLR 99 at 107 per Clarke JA.

21 In the circumstances of this case it should also be noted that an employer or principal is liable for the discriminatory acts of its employees or agents where those acts occur in connection with the employment of the employee or with the duties of the agent as an agent: s 161 of the Act.

The Evidence

The Complainant's evidence

22 Two witnesses were called in support of the Complainant's case: Mrs Penny and Giancarlo Mazzella, a community health nurse with the Derbarl Yerrigan Health Service ("Derbarl Yerrigan"). Certain documentary evidence was also adduced, either through Mr Mazzella or Homeswest witnesses. Further, the Homeswest witnesses were cross-examined at length, with more of an emphasis on establishing attitudes within the organization than on their specific dealings with Mrs Penny.

23 In relation to the issue of Mrs Penny's cultural obligations, an attempt was made to tender into evidence, pursuant to s 119 of the Act, affidavit evidence and a transcript of evidence received by the Tribunal at the hearing of the matter of ***Martin v State Housing Commission*** [ET No 17 & 18 of 1997] on the issue of the cultural obligations of an Aboriginal person to house homeless relatives. It was submitted that the Tribunal in this case was bound, by virtue of the decision of the single judge of the Supreme Court before whom the initial appeal in the ***Martin*** matter was heard, to accept the evidence adduced on behalf of the Complainant in that hearing on this issue. That submission was made despite the fact that the decision of the single judge was successfully appealed to the Full Court of the Supreme Court: ***State Housing Commission v Martin*** (1999) EOC 92-975 at 79212. The Tribunal declined to receive the evidence and rejected the submission for the reasons given during the course of the trial. An invitation to call direct expert evidence as to Mrs Penny's cultural obligations was declined on her behalf by counsel.

24 Mrs Penny stated that she was born in 1934 on Mulladown Station in the Murchison. She was placed in a mission at the age of six or seven when her parents separated. She lived there for a time before moving to the Moore River native settlement . At the age of 15 or 16 she left the Moore River settlement to work on a station at Meekatharra for twelve months. She then went to live for six months at the East Perth Girls' Home, also known as Bennett House. Mrs Penny then worked on a farm in Boyup Brook for more than 12 months but became homesick and ran away back to Bennett House. In approximately 1950 she met her husband and married in 1953. There were three children of the marriage, a girl and two boys. The family lived in Borden for many years in extremely basic accommodation and thereafter in a house in Wilson.

25 Mrs Penny stated that in the early 1970's she made a request to Homeswest for public housing and was provided with a house in Mentone Road, Balga which she described as being *"in a terrible state"*. She lived there until approximately 1975. She was evicted from that property following complaints from neighbours. She was then provided with a house in Gretham Road, Balga where she lived until approximately 1978. According to Mrs Penny, she was again evicted from that property following complaints from neighbours although, in her evidence, she maintained that her family was not responsible for the conduct of which complaint was made. Curiously, Homeswest has no record of her being evicted from the Gretham Road property and it may well be the case that Mrs Penny is confusing the circumstances of her departure from this property with another of the Homeswest properties in which she resided over the years.

26 When she moved from the Gretham Road property Mrs Penny spent six months in a refuge until she was housed by Homeswest in a property in Lefroy Street, Willagee. Mrs Penny stated that she requested a transfer from that property because her grandchildren were involved in sporting activities in the Balga area and Willagee was too far away. A Homeswest flat was found for her at Arnold Place in Balga and, at a later point in time, another flat in the same complex.

27 In 1979 Mrs Penny moved to Darlington Place in Balga where she lived for five to six years. She was evicted from that property but again denied responsibility for the conduct which led to her eviction. She then moved to Newcourt Way, Balga but was evicted from that property also. According to Mrs Penny, Homeswest held her responsible when some other Aboriginal families smashed the property.

28 Mrs Penny then spent some time at hostels before being housed by Homeswest in the Irvine Street property, the condition of which she described as shocking. Mrs Penny stated that she requested a transfer from the Irvine Street property because it was located in an industrial area and was distant from amenities including medical services. It was then that she moved to the Hyland Street property. Mrs Penny acknowledged that, at the time of the transfer to the Hyland Street property, she was told by Homeswest that this would be the last house they would provide to her.

29 Mrs Penny was ultimately also evicted from the Hyland Street property. She stated in her evidence that the circumstances which gave rise to her eviction were complaints from non-Aboriginal neighbours of anti-social behaviour. Mrs Penny denied any anti-social behaviour on the

part of her family and maintained that she did not know why she was evicted. The Tribunal understood her evidence on this point to mean that she did not accept that there was justification to evict her, not that she was unaware of the reasons given for her eviction. Mrs Penny asserted that she had no problems with the neighbours. Notwithstanding her admission under cross-examination that she knew that Homeswest had no obligation to re-house her after she was evicted from the Hyland Street property, Mrs Penny expressed the firm belief that the failure to immediately re-house her was because she was Aboriginal.

30 Mrs Penny did concede that Homeswest were continually looking for somewhere for her to live following her eviction and despite having warned her that the Hyland Street property was her final chance at public housing. Mrs Penny agreed that, prior to being re-housed in the Wiseborough Crescent property, she was shown a number of properties by Homeswest staff including one in Muchea which she declined because it was well out of the metropolitan area. She was offered another property in Pinjar Road, Wannaroo which she also declined because it was too far away. She declined a further property in Herne Hill on the basis that it was *"too far up in the hills"*. She was shown another property in Wanneroo which she declined on the basis that the lake behind it would be too dangerous in view of her husband's dementia. She agreed that from October 1997 to about February 1998 Homeswest was still looking for a suitable property for her, although without success. However, she denied that Homeswest was trying to find her alternative accommodation even before the eviction took effect. She refuted the suggestion that she was offered housing in Gnangara, in the Cullacabardee Aboriginal community or the Kanani Aboriginal Centre in Midvale prior to her eviction.

31 During the period between her eviction and being re-housed Mrs Penny did have accommodation with her granddaughter in Koman Way, Girrawheen. She also agreed under cross-examination that Homeswest had tried to arrange for Mrs Penny to become the tenant of the Koman Way property and for her granddaughter to move to another property. This proposal failed when the granddaughter refused to move.

32 Notwithstanding her tenancy history, including warnings that she would not be re-housed, Mrs Penny stated that she didn't know why Homeswest said that they were not going to re-house her. Notwithstanding the number of alternative properties offered to Mrs Penny but rejected by her, Mrs Penny considered the period of 15 months taken to re-house her to be too long. It is of interest to note Mrs Penny's reaction to the proposition that finding her a house had been

delayed by the need for the house to be isolated. She said: *"Why should it be?.....But why was Homeswest trying to put me out in an isolated area so they must - - but finding it that I was an Aboriginal and they wanted me out in no man's land?"*, Mrs Penny repeatedly asserted that she had been treated unfairly and discriminated against because she was Aboriginal.

33 Mrs Penny gave evidence in relation to the issue of her vacated debt including the review by Homeswest of the vacated debt. In considering Mrs Penny's evidence on this issue it is necessary to draw a distinction between arrears of rent owed to Homeswest arising from the tenancy and that component of the vacated debt which related to charges arising from damage to the property and water consumption. Scant attention was paid in the evidence of Mrs Penny to the latter component. She denied that there was much damage done to the property but did not deal with each component of the vacated debt. She said: *"I thought I didn't owe that because the people - - after Hyland Street I was out of there and I drove around after to see who was in that property. We went past and they had non-Aboriginal people in there so I don't think I done that much damage to the property."*

34 In cross-examination she again disputed the extent of the damage and insisted that the Respondent treated her unfairly because she was Aboriginal without elaborating on the basis for that belief. When questioned on her statement that she had been treated unfairly because she was Aboriginal when Homeswest applied its policies in working out the amount of the debt owed, Mrs Penny asserted she had said it because it was true. When asked to explain the basis of that view she stated that it was because when she asked for the review of her debt they didn't give it to her directly. When pressed further she declined to answer the questions.

35 As to the rental arrears component of the vacated debt, Mrs Penny agreed that she began to fall behind in her rent when Homeswest commenced charging full market rent because her grandchildren were living with her and that that had occurred on 2 September 1996, shortly before she was evicted. At one point in her evidence she suggested that she was not warned of the rent increase and that she first became aware that her rent had been raised when she went to the bank and found out that $280 had been removed from her pension. She denied that in November 1995, a year before she was evicted from Hyland Street, an officer from Homeswest called Dana Radovanovich told her that if she didn't provide a subsidy form for all the adults living in her house, she would be charged full market rent. She did, however, admit that on 31 May 1996 she was told this by another Homeswest officer, Mr Bowker. She stated that she

did not provide the subsidy form. She denied that in July 1996 Mr Bowker sent her a letter advising that she must provide a rent subsidy form for the people named in the letter who were then residing in the Hyland Street property. When shown the letter Mrs Penny stated that she did not remember it. She said that she did remember an occasion when Mr Bowker and Ms Radovanovich attended her property and against asked for the rent subsidy forms. She said that she told them that it had been provided to another Homeswest officer, Mr Maguire.

36 Ultimately, Mrs Penny admitted that she knew that Homeswest intended to charge her rent at a higher rate because her family and others were staying at the house. In her evidence, Mrs Penny insisted that the form provided to Mr Maguire included the income information for all the people nominated by the Respondent in the correspondence and that she was present when the information was provided to him. She also stated that her granddaughter, Kathy Penny and one of the other nominated persons, Candy Dickinson, signed the forms for Mr Maguire to "take the money out". When questioned further on this point Mrs Penny agreed that neither woman signed a social security form, simply the Homeswest form, Mrs Penny said that Mr Maguire told her that he would *"fix it up"*.

37 Mrs Penny's primary complaint related to the failure to advise in a timely fashion of the amount of the debt although it was at times unclear whether that complaint related to the time taken to advise of the outcome of the review of the debt or the time taken to advise of the existence of the debt.

38 Mrs Penny said in her evidence that she believed she was being treated very unfairly "because if it was non-Aboriginal or someone else they would have been able to let them know about it, you know, notify them and say, 'This is how much you owe Homeswest, Mrs Penny,' but I've never been told that." However, it was clear on the documentary evidence that Mrs Penny was advised in writing of the amount of the vacated debt by February 1997. There is also evidence, which this Tribunal accepts, that Mrs Penny was verbally advised at an earlier date of the existence of a debt to Homeswest, although possibly not of the exact amount. Mrs Penny did confirm being advised in writing of the vacated debt and stated that she made payments of $108 per fortnight in reduction of the debt so that she would be re-housed. At the time of the hearing she was continuing to repay this debt.

39 It is also clear on the documentary evidence that the TAS, then acting on behalf of Mrs Penny, was advised by Homeswest in writing on

14 December 1998 of the outcome of the "review" of the vacated debt requested by the TAS service on 13 July 1998. This five month delay was said by Mrs Penny to cause her to become depressed and is the basis of a claim of racial discrimination.

40 In cross-examination it was pointed out to the Complainant that the TAS had all the information it needed to request a review of the debt on 2 July 1997 and yet didn't write to Homeswest requesting a review until 13 July 1998, more than a year later. When asked why in those circumstances Mrs Penny asserted that Homeswest, in taking five months to review her debt, treated her unfairly because she was Aboriginal, she simply responded: *"Well, its true."* Her response to further questions along this line was to repeat her assertion that it was true.

41 Mrs Penny also expressed the view that she never received a response from Homeswest to the request for a review. She considered this to be unfair. It became apparent that she did not consider that the reply to the TAS, even though it had been communicated to her by the TAS, constituted a response to her. Although Mrs Penny agreed that she went to the TAS to deal with Homeswest on her behalf and that they kept her advised she considered it was appropriate for Homeswest to write to her also. That was her expectation and she considered that it would be the *"right thing for them to do"* notwithstanding that she never requested them to do so and, indeed, on her evidence, never gave it a thought.

42 With respect to the allegation that Mrs Penny was discriminated against by the imposition of conditions on the agreement to re-house her, Mrs Penny's principle area of concern was with the condition that there be a head lease with Manguri. She considered this requirement to be very unfair. When asked how she felt she had been treated by Homeswest with regards to the Wiseborough Crescent property Mrs Penny stated:

> *"Well, Homeswest - - every time we rang them to do a job they said we had to do it through Manguri, it wasn't their property, and this is an answer we'd get back from Homeswest."*

43 When pressed about why she considered it unfair that the Respondent imposed a condition of a head lease with Manguri, Mrs Penny became agitated and referred to complaints made against her grandchildren and asserted that Homeswest were very unfair to her and prejudiced against her and that every house they gave her was unfit to live in. When she had composed herself Mrs Penny stated:

"Well, I think it's unfair because - - why should they ask me to be head leased through Manguri where I should have been - - I could have went through Homeswest, direct through Homeswest?"

44 She said it was *"wrong"* for Homeswest to insist on a head lease with Manguri. She did agree that Manguri had helped her in many ways which she appreciated although she made an oblique reference to having some difficulty with the arrangement because she was an elder. She did not elaborate on that and was not asked to by her counsel.

45 Mrs Penny made no complaint in her evidence concerning the condition that she continue to repay her vacated debt before being re-housed. Indeed she gave no evidence that such a condition was imposed upon her by Homeswest but did state that she was continuing to repay that debt. As indicated above, Mrs Penny considered that there was no basis for any requirement that she be housed in an isolated property.

46 Mrs Penny also gave evidence on the issue of her cultural obligations as an Aboriginal elder. In the context of being asked about the term of the written agreement with Homeswest that she write to all relevant agencies informing them that her house was no longer available as crisis accommodation for homeless Aboriginal people, Mrs Penny explained her cultural obligations to house others in the following terms:

"Well, the culture of Aboriginal people or myself - - I wouldn't - - you know, they asked me to - - about my grand children and I am not going to, you know, hunt them away because I love my grand kids and this is what Aboriginal people are about, is to love their families, and they cannot - - well, I say myself. I would never turn an Aboriginal person away from my door. If they need a bed for the night, I would take them in and this is what Homeswest had on me all the time. They say that I'm taking in people off the street and I'm over crowding but you cannot leave Aboriginal people out on the street if you're a relative of those families.

And by 'relative' what do you mean?---If a cousin came to me and said, 'Could I stay the night?' or my sister, I would take them in and this is what Homeswest says I'm over crowding and I had that all the time with me - - that Homeswest always said to me.

Is there an obligation on you to take in these people?---Well, I like to take - - I take them in - - well, I can't do anything else. I'm the elder, you know, an Aboriginal elder and I don't like to turn my family away from - - if I've got a room in the house for them to lay or stay for the day or night I will take them in. This is my culture.

What would your culture say to you - - the other people within your culture say to you if you refused to take people in?---Well, they come up to me and they say to me, 'Why are you taking these people in?' I said, 'They've got nowhere else to stay.'

What would happen within your culture if you refused to take them in?---Well, I never, ever refused an Aboriginal person or any of my families and this is where it all falls back to me through Homeswest and this is what they say to me, 'You've got a house full of people.'

Is that any Aboriginal person?---Well, family what I know.

Family that you know?---Yeah.

What do you mean by 'family'?---Well, relatives, you know, like my - -

Uncles, aunties, cousins, nephews, nieces?---Yes.

And if they turned up on your doorstep you would take them in?---Yes, when I had the three-bedroom but not now that I've got the two-bedroom. I've only got my grand children there.

47 Mrs Penny was also asked about her capacity to control the behaviour of people who came on to her property. She said:

"I told the people when they used to come if they made a nuisance of themself they had to move on. They would only go up the road and then they'd come back."

48 It is apparent from this statement that Mrs Penny had the capacity to require people to leave the property but was unable or unwilling to prevent them from returning.

49 Mrs Penny was specifically asked about Candy Dickinson and the circumstances by which she came to be living at the Hyland Street property. Mrs Penny stated that Candy Dickinson used to live in a

de-facto relationship with Mrs Penny's son who was then living with her. Ms Dickinson had nowhere else to stay after the son left so she stayed with Mrs Penny. Mrs Penny said that she took her in because *"she was left there with me after my son left her".*

50 She was asked:

"Was there an obligation on you to take her in?---She had no place to live and she just came there and stay with me. She asked if she could stop there until she gets a home of her own.

You've give evidence earlier of your Aboriginal culture?---Yeah.

Did that have any bearing - - ?---Yeah. I wasn't going to turn her away. I said that she could stay on and stay with me until she gets a property from Homeswest and which she did. Then she left."

51 It can be seen from the foregoing summary of Mrs Penny's evidence that she directly addressed only some of the allegations made by her against Homeswest in her Points of Claim.

52 Mr Mazzella gave evidence on behalf of the Complainant. He is a registered general nurse and has a tertiary qualification in social sciences. He works in the Armadale to Midland area, predominantly with the Noongah community, dealing with housing, health and homelessness issues. Although he is not Aboriginal, Mr Mazzella stated that he is accepted within the Aboriginal community and has worked within the community with various language groups for approximately 11 years. He is also involved in cultural matters with law men from different language groups in the Kimberleys.

53 Mr Mazella had no direct knowledge of any of the specific allegations made by Mrs Penny. The primary purpose of his evidence, as stated by counsel for Mrs Penny, was to try and establish a pattern of systemic discriminatory conduct within Homeswest. Three specific documents provided the basis of Mr Mazzella's evidence. The first was a document entitled "Noongah Housing Summit 2001 Briefing Papers" ("briefing paper"). The second was a transcript of a speech given by Mr Greg Joyce, Homeswest's Chief Executive Officer, at the Derbarl Yerrigan Health Service Housing Summit in 2001. The third was a document entitled "Homeswest Housing Issues Indigenous Survey Year 2000" ("the survey").

54 These documents, and the evidence given by Mr Mazzella with respect to them, addressed the issue of the standard of accommodation provided by Homeswest to Aboriginal people with a view to establishing that Homeswest provide sub-standard accommodation to Aboriginal people as opposed to non-Aboriginal people. This pattern of behaviour on the part of Homeswest was to be established by adducing evidence of the provision of sub-standard accommodation to Aboriginal people in country areas from which the Tribunal would be invited to draw the inference that this practice also occurred in the metropolitan area and, in particular, that sub-standard accommodation was provided to Mrs Penny.

55 Initially it was suggested by counsel that this evidence was relevant to the issue of whether the vacated debt was in fact owed by Mrs Penny because the charges did not arise from damage to property but were repairs or maintenance costs to bring a sub-standard property up to a reasonable standard. However, no such claim is to be found in the Points of Claim. Further, Mrs Penny's complaint to the Commission of 3 September 1996 included a claim that Homeswest had discriminated against her by failing to comply with its obligation to provide and maintain the premises in Hyland Street in a reasonable state of repair. That complaint was dismissed and Mrs Penny did not exercise her right of referral to the Tribunal. The Tribunal, therefore, has no jurisdiction to determine any allegations concerning the condition of the Hyland Street property or whether the claim for payment of the repairs component of the vacated debt is justified: See ***Zinni v Coventry Group Ltd*** [ET No 2 of 2001] delivered 21 March 2002 at [21].

56 However, the claim before the Tribunal does include an allegation that the Wiseborough Crescent property was sub-standard and Mr Mazzella's evidence was received as being relevant to that issue and also as part of the material from which the Tribunal might be invited to draw inferences as to Homeswest's attitude and conduct generally with respect to Aboriginal tenants and to Mrs Penny specifically.

57 Mr Mazzella stated that the briefing paper was prepared by him and Aboriginal health worker colleagues and submitted by the Derbarl Yerrigan Health Service to the Noongah Housing Summit which evolved out of a concern over the poor state of indigenous health. The briefing paper refers to statistics and contains information, allegations and anecdotal accounts of discrimination suffered by Aboriginal people with respect to housing. Mr Mazzella was cross-examined as to the source of the information contained in the briefing paper. He stated that he did not

write all of the material and that some of the information was supplied by the Mental Health Unit of Derbarl Yerrigan.

58 Other information in the report came from a TAS report which Mr Mazzella did not prepare and which was not produced into evidence. An example of a statement in the briefing paper sourced from the TAS was the following:

> *"Homeswest does not enforce it's domestic violence policy with Aboriginal people...The policy says if damage is caused by a perpetrator, the tenant will not be charged if the incident was reported to the police. However, even where the police have been called to attend to family feuding incidents in Aboriginal families, the tenants are charged for the damage".*

It was Mr Mazzella's understanding that the information in the TAS report came from one Aboriginal client.

59 Another statement in the briefing paper upon which Mr Mazzella was cross-examined was the following:

> *"Homeswest publicly state that evictions only occur as a last resort. However, evidence belies these statements and indicates indirect discrimination against indigenous families."*

60 Mr Mazzella said that he wrote this statement based on the statistics which show that there is a high eviction rate for Aboriginal people considering that they are only 2.1 per cent of the population. Mr Mazella considered that this statistical over-representation evidenced bias against Aboriginal people in relation to evictions. When asked why he said there was a bias, Mr Mazzella referred back to the provision of sub-standard accommodation. The Tribunal notes in passing that the appropriate comparative percentage would not be the percentage of the Aboriginal population but the percentage of Aboriginal people in public housing although on either figure there remains a statistical over-representation.

61 Mr Mazzella was cross-examined as to potential explanations for the over-representation other than discrimination. Mr Mazzella agreed that most evictions were for anti-social behaviour which he attributed to overcrowding. However, he could name only two cases where a family had been evicted for overcrowding although in that case the grounds were both overcrowding and anti-social behaviour. Mr Mazella also expressed the opinion that the overcrowding was primarily due to the lack of public housing stock for Aboriginal people. However, the evidence before this

Tribunal would indicate that at least one of the acknowledged reasons for overcrowding was eviction and that the consequent overcrowding had more to do with being disentitled to further public housing rather than a lack of it. It also became apparent in cross-examination that the term "homelessness" as used in the briefing papers referred to not having a secure tenancy rather than not actually having accommodation although the term would include people who were literally homeless.

62 The transcript of Mr Joyce's speech was tendered on the basis that it contained an acknowledgment that Homeswest was failing the Aboriginal community. The Tribunal was directed to Mr Joyce's comment that:

> *"one of the things I haven't been strong on since I've been CEO to recognize that we have sub-standard properties, to recognize that we have public housing estates that no-one will live in...."*

63 Mr Mazzella's interpretation of that statement was that it was a direct reference to properties in which Aboriginal people lived. His explanation for that interpretation was that the statement was made in the context of being presented with evidence about the sub-standard condition of houses being lived in by Noongah people. However, in the following paragraph Mr Joyce refers to maintenance generally and the fact that Homeswest spends approximately twice as much as the private sector on maintenance and states:

> *"All I can say is that we need to find more money and we need to do more work on our properties, it is really as simple as that."*

64 In that context, the Tribunal is unable to draw the conclusion that Mr Joyce is conceding that Aboriginal people are provided with housing of a lesser standard than non-Aboriginal people or that Homeswest spends less on maintenance on houses occupied by Aboriginal people.

65 With respect to the survey, Mr Mazzella said that it had been noted that a lot people who were Homeswest tenants, especially children, were accessing the Derbarl Yerrigan Health Service with multiple medical problems including a high rate of ear, nose and throat problems, respiratory problems and bronchial problems. As a response to that the director of Derbarl Yerrigan, Ted Wilkes, decided to do a survey of the condition of houses provided by Homeswest in Noongah country areas to see whether there was a correlation between sub-standard accommodation and poor health and social outcomes. Mr Mazzella's explanation for conducting the survey in country areas was that *"we knew what was*

happening in the metropolitan area". The survey included taking photographs and video footage of the properties.

66 Eighty houses in 36 country towns were surveyed and it was noted that most were in need of repairs; 95 per cent of the houses were asbestos and only 5 per cent brick. The asbestos houses were said to be cold in the winter and hot in the summer. According to Mr Mazzella a lot of the houses were overcrowded and the occupants were suffering from health problems. From the photos which were tendered into evidence Mr Mazzella identified, by way of example, a number of problems with a house including rubbish under the house, white ants in the boards on the outside of the house, rubble up the side of the house and the fact that the gas bottle, required for cooking, heating and washing, wasn't connected. He also noted that there was no tap handle on the tap in the backyard and that the inside walls were replaced with fibro rather than gyprock and there were cracks at the top where the walls meet the ceiling. Mr Mazzella also stated that he saw a lot of the Homeswest houses which had mould through the ceilings. This was of considerable significance to Mr Mazzella as there is a direct correlation between mould in the ceilings and respiratory problem.

67 Under cross-examination Mr Mazzella stated that only one of the houses surveyed was a new tenancy. All others were viewed after they had been lived in by the tenant for a number of years. There was, therefore no objective means of identifying the condition of the house at the time the tenancy commenced. He stated that some problems with the houses in the surveys were due to the age of the house, some to failure to make repairs and some to the behaviour of the tenants.

68 Mr Mazella did express an opinion on whether Homeswest treats Aboriginal people less favourably than non-Aboriginal people. He was asked about his observations as to the housing given to Aboriginal people. He said:

> *"I must say that there are some houses which are appropriate but in relation to the clientele that I deal with who have medical and health problems and family groups have medical health problems, there is an observation by me that there is sub-standard housing that is given to Aboriginal people, a lot older stock for example."*

69 Mr Mazella stated that he attends numerous Homeswest houses tenanted by Aboriginal people in the course of his employment. However,

the comparison group of Homeswest houses tenanted by non-Aboriginal people on which he bases his observations is extremely narrow, a mere three houses. He stated that he has a number of non-Aboriginal friends in Homeswest housing in the metropolitan area but none in the country. However, he added that while driving around in the country areas Aboriginal community leaders would point out houses said to be Homeswest houses occupied by non-Aboriginal people which Mr Mazzella considered to be of a higher standard, at least on external viewing. He said that they were similarly constructed but in a better state of repair.

70 The other issue upon which Mr Mazzella was invited to comment was the cultural obligations of Aboriginal people to house others. He stated:

> *"My observation is that there is an understanding there within extended families and kinship systems that if someone is, for example, homeless or in a - - are homeless, that they do tend to be looked after by other families. Rather like the matriarch, for example, in Mrs Penny's case, she is seen as the Nyoongar elder within that clan group and that she would have an obligation to other members of her family and extended family that if they have any problems and troubles that - - For example, if they - - not have any housing, she would be obliged to take them in and provide shelter for them.*
>
> *Could you define as best you can the words 'extended families'?---Extended families are relatives who are cousins, second cousins. Also there is connections through skin groups or totems. It depends which language group you are really talking about in the extent to those links. From my observations within the Nyoongar community, for example, there is a recognition of family links in relation to cousins, second cousins. They are regarded as family and their perception is that they are a family group or family clan. You might be a second cousin, for example, to someone but if they're older they would be referred to as uncle as in respect. They would be treated not like, I suppose, in a western sense, a second cousin but in their terms, as an uncle or an aunt because of their elder status...*
>
> *Could you describe your concept within the cultural meaning that we're talking about of the word 'shaming' to the tribunal please?---Shame is a concept where not doing the right thing. Not the right thing being done. It's a feeling that - - because of*

the cultural differences between men and women's business there is, I suppose, levels of shame within those two groups. The perception is, for example, if I was a Nyoongar person and I was homeless and I went to my auntie and said, 'I've got no home.' the obligations for my auntie would be that she takes me in, but if the auntie said, no, there would be a feeling of shame by myself and also there would be a feeling of shame for the auntie for not exercising those cultural obligations of bringing you in."

71 In response to a question from the Tribunal, Mr Mazzella acknowledged that the cultural consequences of being a matriarch are two-sided and, at least in theory if not in practice, include an obligation to have respect for and comply with the directions of the matriarch.

The Respondent's Evidence

72 Five Homeswest employees were called to give evidence on its behalf. Each of them has had some dealings with Mrs Penny during her time as a tenant of Homeswest. Some gave direct evidence in relation to specific issues of which Mrs Penny has made complaint. Each relied upon Homeswest internal documentation to refresh their memory and to supplement their evidence as to what had occurred. At the relevant time, Shane Edmonds was the Regional Manager of the North Metropolitan Region and was the Homeswest officer responsible for the debt "review" although he did not actually conduct it himself. Robert Thomas has been Homeswest's General Manager since July 1999 and had some direct involvement with Mrs Penny's case at the time of her eviction from Hyland Street and with respect to the decision to re-house her. William Bowker was the Area Manager for Midland at the time Mrs Penny resided in the Hyland Street property. He was directly involved with the attempt to obtain income verification from the residents of the property to support Mrs Penny's continued entitlement to a rent subsidy. Between 6 May 1994 and 30 November 1997 Graeme Jones was employed as the Regional Manager of the South East Metropolitan Region. He was involved in the re-housing of Mrs Penny following her eviction from the Hyland Street property and in explaining to her the conditions upon which she would be re-housed. John Pines has been one of Homeswest's Managers, Rental Services, since 8 June 1994. He was not involved in the selection of the Wiseborough Crescent property but inspected it before it was occupied by Mrs Penny and was responsible for its management during Mrs Penny's tenancy.

73 Mr Edmonds gave evidence in relation to the debt review allegation. He was asked to explain the Homeswest review system in relation to vacated debts. Mr Edmonds stated that, because of the controversy regarding tenant liability, it is Homeswest policy to have any vacated debt assessment automatically reviewed before notification of the debt is sent to the tenant. Mr Edmonds referred to this process as a first tier review.

74 Within 12 months of the date of the letter advising of the debt, the tenant is entitled to lodge an appeal which is heard by an appeal panel constituted by a Homeswest officer and a community representative ("formal appeal"). The tenant is entitled to attend and make submissions disputing the debt to the panel. Mr Edmonds described this process as a second tier review although it is, in fact, an appeal. According to Mr Edmonds the 12 months time period applied to everyone and was fairly strictly enforced. However, Homeswest retained a discretion in appropriate cases to *"look at an appeal or try and address the grievance of the complainant"* outside that time frame. If the tenant is dissatisfied with the decision of the panel the matter can be referred to the third tier. The third tier panel members are appointed by the Minister and they are totally independent from Homeswest.

75 However, Mr Edmonds also explained that, at any time, a tenant is entitled to simply dispute the debt and request Homeswest to look at the matter again ("internal review"). It would seem that it is this practice of reconsidering debts at the request of tenants which is commonly referred to as a "review" and which Mrs Penny received in relation to the vacated debt from the Hyland Street property following the request of the TAS on 13 July 1998.

76 It was apparent from Mr Edwards' evidence that he uses the terms "review" and "appeal" interchangeably. It is, however, equally apparent from the evidence outlined above that, in the context of a vacated tenancy debt, a review and an appeal are distinct processes.

77 Irrespective of whether a formal appeal or an internal review is sought, Mr Edmonds said that Homeswest encourages all tenants to lodge their applications as soon as possible because it ensures that the people who are most familiar with the relevant events can respond. However, it is clear that a prompt application is not always possible and was not possible in Ms Penny's case because of the unavailability of the relevant documentation. Mrs Penny's matter was no longer current when time to appeal commenced to run.

78 Mr Edmonds' evidence of the "review" conducted by Homeswest of the vacated debt falls to be considered in the context of the correspondence and telephone communications between Homeswest and the TAS from the time Mrs Penny was first advised of the vacated debt on 10 February 1997 and when the TAS was advised by Homeswest on 14 December 1998 of the outcome of the review undertaken.

79 In its letter of 13 March 1997 the TAS advised that Mrs Penny intended to lodge an "appeal". However, documentation was needed to determine the nature and scope of the appeal and that documentation was not ultimately provided until 2 July 1997. In the interim, on 18 April 1997 Joanne Walsh from TAS called Ms Barbara Skevington from Homeswest advising that Mrs Penny wished to "appeal" but was waiting on the necessary documentation. She expressed concern that the appeal would not be lodged within the 12-month time frame. Ms Walsh was advised that a file note of the conversation would be made and that *"there shouldn't be any problem as it was FOI causing the delay"*. It is apparent from the reference to the 12 month time frame that the intention was for Mrs Penny to avail herself of the formal appeal process and not some internal review.

80 In accordance with the assurance given by Ms Skevington and in view of the fact that the necessary documentation was not provided until 2 July 1997, time did not commence to run on the 12 month appeal period until approximately 2 July 1998. This was conceded by Mr Edmonds in his evidence. On 13 July 1998, 11 days later and a mere 5 working days after the appeal period had expired, the TAS wrote to Homeswest requesting what was variously expressed as a "review" or an "appeal". Although the terms were used interchangeably, and the request forms for a formal appeal were not included, in the Tribunal's view, the specific reference to the 12 month limitation period and the proffering of an explanation for non-compliance with the period, should have alerted Homeswest to the fact that it was indeed a formal appeal which was being requested. At the very least, the content of the letter should have alerted Homeswest to the need to clarify exactly what was being sought on behalf of Mrs Penny, a formal appeal or an internal review. Indeed the reference in Homeswest's letter in reply of 14 December 1998 to the 12 month appeal period and its entitlement to decline "any request for a review" clearly indicates that Homeswest, and Mr Edmonds whose signature appears on that letter, were well aware that it was a formal appeal which had been requested. What Mrs Penny received was an internal review carried out by three senior Homeswest officers and approved by Mr Edmonds.

81 Mr Edmonds was cross-examined extensively on the decision to conduct a review rather than allow an appeal. Even taking into account the significant time delay between the event and him giving evidence, the Tribunal found Mr Edmond's evidence on this issue to be contradictory and defensive in tone. At times Mr Edmonds denied that a decision had been made to conduct a review rather than an appeal, rejecting the proposition that Mrs Penny had been denied an appeal. At other points in his evidence he accepted responsibility for the decision and attempted to justify it.

82 Mr Edmonds was unjustifiably unwilling to acknowledge what the Tribunal considers to be the obvious fact that Mrs Penny had desired an appeal but was, without any consultation with her, given a review because she was slightly outside the 12 month appeal period. At times Mr Edmonds was even unwilling to acknowledge that a review and an appeal are not the same thing. For example, he was asked:

> *"And the ultimate conclusion to it all is Mrs Penny's appeal was denied because she was out of time?---I refute that. The appeal was never denied. In fact, a review occurred.....the 12-month point was raised by my staff and they said - - it was put to me that the 12 months has passed, technically, and as I recall, my response was - - and I, in fact, recall a conversation with Joanne Walsh prior to that, is that, yes, an appeal will go ahead. We will appeal it, we will review the [tenant liability] we will review the matter when it comes. "*

83 Later in his evidence, Mr Edmonds said:

> *"There was never ever any time either in the affidavit of Mr Thomas or in my affidavit or in statements made to either Joanne Walsh that I am aware of or to Mrs Penny that I am aware of, that there would never be an appeal, and in fact, an appeal occurred."*

84 Mr Edmonds also stated that:

> *"[t]he way I looked at it, it was an appeal, and my officers who conducted the review and all the other officers and myself only ever looked at this matter as being a full formal review."*

85 It is apparent from that nonsensical statement alone that, either Mr Edmonds was being deliberately evasive or he had no clear idea of the meaning of the terms "review" and "appeal" or the difference between

them in the context of Homeswest policy. It is one thing for a member of the public to use incorrect terminology, it is entirely another for Mr Edmonds not to have a sound understanding of the terminology relevant to a significant aspect of his agency's operation.

86 In contrast to the proposition that Mrs Penny was indeed granted an appeal, elsewhere in his evidence Mr Edmonds asserted that he understood the request contained in the TAS letter of 13 July 1998 to be a request for a review rather than an appeal. He said: *"I took it as a review, and that's how I approached. I made a conscious decision to ensure there would be a full review."* In conflict with this statement, Mr Edmonds goes on to acknowledge that his officers had drawn to his attention that the request was outside the 12 month period, something which would only have been of significance if it were a formal appeal which had been requested.

87 This version of events was repeated a number of times by Mr Edmonds when questioned by the Tribunal. He said: *"I didn't connect it as TAS wanting it explicitly to go to the second tier"* but again acknowledged that his staff were connecting it to an appeal and referring to the 12 month appeal period. Ultimately he conceded that an appeal *"must have come across my thinking when my staff were talking about the 12-month review"* and that *"[w]ith hindsight it's probably a mistake that I made."*

88 At another point in his evidence Mr Edmonds said that he did not recall whether he made a positive decision that Mrs Penny's request for a "review" should not be submitted to Homeswest's Regional Appeals Committee. However, he did recall that, in view of Mrs Penny's circumstances, he decided, in the exercise of his discretion, to arrange for a full review of the debt to be carried out notwithstanding the period of time which had elapsed since the dates on which the charges comprising the debt had been incurred.

89 The explanation offered by Mr Edmonds in his affidavit evidence for adopting a review was that, in view of the nature, extent and complexity of the investigation which needed to be carried out and the time which had elapsed since the charges were incurred:

> *"it would be exceptionally difficult for the Regional Appeals Committee to carry out, within a reasonable time frame, a review which was as thorough as the one which was carried out by the 3 senior officers."*

90 In cross-examination he described his decision to conduct a review as *"a judgment call on his part"* and further stated that one of the reasons for making that judgment call was the breadth of the documentation sent by the TAS and the complexity of the review. He considered that it would probably have been extremely difficult for the community representative on a formal appeal to obtain an understanding of the information. Another reason was the fact that he would in any event have to resource the officers to extract the information in a form that the third tier could then review. In re-examination Mr Edmonds expressly stated that he determined that an internal review would be a better process to answer the very specific yet wide-ranging queries of the TAS. That statement contains a clear acknowledgement that there were two options open to Mr Edmonds, an internal review or a formal appeal and he chose the internal review for a specific reason. He therefore denied Mrs Penny the opportunity for a formal appeal. It seems to the Tribunal that the essence of Mr Edmonds' evidence was that, at least in his view, what Mrs Penny received was far better for her than what she had in fact requested and therefore it cannot fairly be said that she was denied anything. The Tribunal rejects that proposition.

91 Of considerable concern to the Tribunal is the fact that the decision to deny Mrs Penny an appeal but allow her an internal review would appear to have been made without access to all the documentation which would be relevant to such a decision. Mr Edmonds said:

> *"The reality is no one is sure whether that documentation from Miss Skevington was given enough credence or was even on the relevant file or was at the right place in the file and may have been missed."In re-examination Mr Edmonds stated: "In making the decision I may have gone through the file but can't recall seeing Ms Skevington's letter." He said that the letter could have been on a part file "because all the files were all over the place at various time".*

92 When questioned as to why Homeswest strictly adhered to a non-statutory limitation period when the request was a mere 11 days out of time, Mr Edmonds stated:

> *"...the department, as a course of action, was being fairly rigid on these matters and we were trying to bring appeals into the 12-month period.....Whether I actually in fact understood at that time when I received that letter that it was only 11 days outside the period I'm not sure. Perhaps I should have read the files a lot better."*

93 Mr Edmonds said that at the time he received the request from the TAS he probably didn't have access to the whole file, particularly the correspondence with Barbara Skevington.

94 It is clear to the Tribunal that, knowing that he had the discretion to allow Mrs Penny to avail herself of either the formal appeal process or an internal review, Mr Edmonds did not give Mrs Penny the option of deciding which of those two options she preferred. That he failed to do so is, in the Tribunal's view, entirely unacceptable, particularly in view of the fact that there is a fundamental difference between the two processes; one of the people determining the formal appeal is independent of Homeswest, a factor which may well have been considered by Mrs Penny to be particularly compelling. Indeed, it should have occurred to Mr Edmonds that as a younger, non-Aboriginal male he might not be in the best position to determine the preferences of an elderly Aboriginal female.

95 There can be no doubt that Homeswest is entitled to strictly adhere to the 12 month limitation period. Provided Homeswest does not, in exercising its discretion to waive the requirement, take into account race or other circumstances prohibited by the Act, no breach of the Act occurs by refusing to allow a person to appeal out of time. Mr Edmonds denied that his decision to conduct a review rather than allow a formal appeal had anything to do with Mrs Penny's race. There is no evidence to suggest otherwise and no evidence from which such an inference can be drawn. Having observed Mr Edmonds given evidence, the Tribunal considers that the decision to conduct a review rather than refer the matter to a formal appeal was driven by bureaucratic arrogance.

96 In any event, despite hearing considerable evidence on this issue, no complaint is made concerning the fact that Mrs Penny was granted an internal review rather than an appeal. The only allegation made in par 6 of the Points of Claim is as to the delay in responding to her request. Particular (d) of par 6 alleges simply that Mrs Penny was denied access to the Homeswest appeal mechanism by reason of the delay. As to the alleged delay, Mr Edmonds stated that it was the sheer extent of the investigation that caused the delay in responding. He denied that the delay, or any aspect of the review, was influenced by Mrs Penny's race. In this regard it should be noted that no evidence of comparable time frames for reviews of this type for non-Aboriginal tenant debtors was put before the Tribunal.

97 Mr Edmonds also gave evidence in relation to other allegations of discrimination. As to the debt determination allegation, Mr Edmonds

expressed the opinion, based on his involvement in carrying out the review, that Homeswest's officers endeavoured to fairly and correctly apply Homeswest's policies in determining tenant liability. He rejected the suggestion that in the application of its policies Homeswest discriminated against Mrs Penny on the ground of her race by treating her less favourably or by failing to take into account her matriarchal cultural obligations to accommodate and care for a large group of relatives.

98 With respect to particular (a) of the debt determination allegation which alleges that water consumption was increased by water wastage caused by the failure of Homeswest to attend to necessary repairs, Mr Edmonds denied that Homeswest failed to attend to carrying out plumbing repairs at the property. He stated that the only occasion on which there was a delay in carrying out repairs was due to an administrative oversight. Further, any charges which were initially mistakenly levied in respect of water consumption were reversed. He again denied the allegation that the conduct of Homeswest in this context was in any way influenced by Mrs Penny's race.

99 Mr Bowker gave evidence specifically in relation to particulars (b) and (c) of the debt determination allegation. Those particulars concern the failure of Mrs Penny to provide income verification for the occupants of the Hyland Street property as a result of which she was charged full market rent, thereby increasing the vacated debt.

100 Mr Bowker stated in his affidavit that on 31 May 1996 he attended at the Hyland Street property at which time Mrs Penny gave him a rent subsidy form which had previously been provided to her by another Homeswest officer. The rent subsidy form declared the residents at the property to be Mrs Penny, her husband, and two granddaughters. Mr Bowker said that he was aware that at the time another of Mrs Penny's granddaughters was living in the premises with her children. He was informed by Mrs Penny that the arrangement was temporary because the granddaughter was awaiting a priority transfer from her own tenancy on the grounds of domestic violence and harassment.

101 On 31 May Mr Bowker sent Mrs Penny a letter requesting that she obtain a statement of her husband's income from the Department of Social Security ("DSS") and that he would collect the statement at a property inspection schedule for 21 June 1996. The inspection was postponed until 10 July 1996 but Mrs Penny did not provide the statement of her husband's income on that occasion.

102 On 12 July 1996 Mr Bowker sent Mrs Penny a letter together with another rent subsidy form on which he had written the names of the people residing at the property and had highlighted those for whom Mrs Penny was required to provide a DSS verification of income statement. The names of Kathy Penny and Candy Dickerson were included in the list. The letter advised that Mr Bowker would collect the completed rent subsidy form and verification of income statements on 22 July 1996, the date of the next inspection. He also stated in his letter that should the form and statements not be available at that time Mrs Penny's rent would be increased to $147.40 per week.

103 When questioned as to how he knew Kathy Penny and Candy Dickerson were living at the property, Mr Bowker stated that Mrs Penny had told him that they were living there. At the time of writing the letter dated the 12th of July 1996 he believed that Kathy Penny and Candy Dickerson had been living in the property for more than 8 weeks, a view based on discussions with the accommodation manager and his own observations of Kathy Penny being at the premises over a lengthy period of time. It should also be noted that their names are included in a form signed by Mrs Penny on 13 September 1996 and provided to Homeswest. Indeed, at the time the rent was increased they were still living at the Hyland Street property.

104 The 22 July inspection was postponed at the request of Mrs Penny until 2 August 1996. On 2 August 1996 Mrs Penny refused entry to Mr Bowker and Ms Radavanovic stating that she had been too ill to clean the property. She was requested to provide the completed rent subsidy form and the DSS verification statements. Mrs Penny became agitated stating that Homeswest should provide housing for the people living with her and that she would then not need to submit a rent subsidy form. She said that she had raised with her relatives the issue of them paying some money towards the rent and that they had refused.

105 Mr Bowker stated and the records confirm that on 2 August 1996 he wrote to Mrs Penny stating that Homeswest expected her to provide all required DSS verification statements and that a failure to do so would leave Homeswest with no option but to cancel her rent subsidy.

106 The property was again inspected on 12 August 1996. During the carrying out of the inspection Mrs Penny advised Mr Bowker that the extra people staying at her property would not supply verification of income statements to her as they considered that they were only temporary visitors until Homeswest housed them.

107 On 20 August 1996 Mr Bowker wrote to Manguri advising of Mrs Penny's failure to provide an updated rent subsidy form and the necessary DSS verification statements. Manguri were further advised that as a result Mrs Penny's existing rental subsidy would be cancelled from 26 August 1996. On the same date Mr Bowker also wrote to Mrs Penny advising her that it was prepared to allow her until 26 August 1996 to lodge the required forms and that if the forms were not received by that date her rent would be increased. The date for the provision of the completed forms was subsequently extended to 2 September 1996 but were not received.

108 On 3 September 1996 Mr Bowker advised Mrs Penny in writing that as a result of her failure to return the completed rent subsidy form and the required DD verification statements her rent had been increased effective from 2 September 1996.

109 On or about 17 September 1996 Mr Bowker received from its Aboriginal Housing Directorate officer, Mr Maguire, a rent subsidy form filled out for the Complainant. However, it was not accompanied with any verification statements for the other occupants of the property. Mr Bowker said that he send a memorandum to Mr Maguire in the following terms:

> *"Attached is the completed Rent Subsidy Application you filled out for Mrs Penny. Unfortunately it cannot be processed as there is no verification of income for the people in the tenancy who receive an income. The past reluctance to supply VOI for this tenancy has been the reason for the cancellation of the rent subsidy. Please arrange for the documents to be attached prior to submitting for assessment."*

110 Mr Bowker stated in his affidavit that at all material times he was aware that Mrs Penny was an elder in the Aboriginal community and was often called upon to provide support and assistance to Aboriginal people. He therefore only required Mrs Penny to provide verification of income statements for those people who he believed to be living in the property on a long term basis. Mr Bowker said that if he had believed that the individuals in question were only living in the property for a short term, say eight weeks, he would not have required Mrs Penny to provide verification of income statements for them.

111 By way of explanation for not requesting the verification information directly from the other occupants of the property, Mr Bowker stated that the other occupants were at time quite abusive towards him. His belief

was that if he had requested them to provide him with authorities to obtain verification of income statements, they would have seen his behaviour as provocative and as a result his safety would have been endangered. Mr Bowker did not believe that there was anything more he could have done to obtain the verification of income without putting himself in danger. In any event, as Mr Bowker pointed out, responsibility for obtaining and providing the verification of income statements lay with Mrs Penny and not with him or Homeswest.

112 In his affidavit evidence Mr Bowker expressly addressed the assertion contained in particular (c) of the debt determination allegation that Mrs Penny, as an Aboriginal woman, was less likely to be able to comply with the requirement to supply an income verification statement than a non-Aboriginal person. Mr Bowker stated that during his period of employment with Homeswest he has managed numerous properties, many of which have been occupied by Aboriginal tenants. On occasions he has required tenants, both Aboriginal and non-Aboriginal to provide him with a rent subsidy form and verification of income statements in respect of other people living at the property leased to the tenant. He has not found it to be more difficult to obtain those forms and statements from the Aboriginal tenants than from the non-Aboriginal tenants. Nor has it ever come to his attention that Aboriginal tenants have more difficulty than non-Aboriginal tenants in obtaining rental contributions from people living in the property leased to the tenant. He disputed that Mrs Penny was, because of her race, less likely than a non-Aboriginal person to be able to comply with the requirement.

113 According to Mr Bowker, Mrs Penny was charged full market rent, in accordance with Homeswest's then applicable Rent to Income Policy, because of her failure to provide a completed rent subsidy form and the necessary DSS verification of income statements. Her race had nothing to do with the decision to charge her full market rent.

114 As to the vacated debt, Mr Bowker also stated in his evidence that at no time did Mrs Penny contact him or, to his knowledge. any other Homeswest officer and advise that an item of damage to the property the subject of the vacated debt was caused by an incident of domestic violence. Neither was he advised that any item of damage to the property was the result of the actions of a trespasser.

115 Mr Bowker said that Mrs Penny often had a large number of people staying at the Hyland Street property. However, stated that he did not accept that this absolved her from the responsibility of ensuring that the

property was maintained to a reasonable condition and that the people residing at the property did not damage it as a result of neglect, misuse or wilful behaviour. Mr Bowker observed that Homeswest has many Aboriginal tenants who, for whatever reasons, have a relatively large number of people staying with them and who, unlike Mrs Penny, manage to maintain their tenancies to a reasonable standard. Mr Bowker disputed that any overcrowding of the property was the cause of the damage component of the vacated debt.

116 Mr Bowker denied that in applying Homeswest policies to determine what tenant liability charges should be levied he discriminated against Mrs Penny on the ground of her race. He said that he endeavoured to fairly and correctly apply Homeswest policies in determining what items of damage should be charged to Mrs Penny as tenant liability. In Mr Bowker's view, he treated Mrs Penny more leniently in this regard than most tenants would generally be treated by Homeswest.

117 In his evidence before the Tribunal Mr Bowker was taken to an email dated 15 August 1996 written following an inspection. It contains the following statement:

> *"Regarding the rent subsidy, Mrs Penny advised that the extra people would not supply VOI as the consider that they are only temporary visitors until Homeswest houses them, specifically Kathy Penny. This leaves me no option but to increase the rent maximum, which is $147.40 per week. In doing this, $294.80 will automatically be deducted from Mrs Penny's pension to cover the rent and another $20 for other debt[2], a total of $314.80. Criticism could be leveled at Homeswest for taking so much with the knowledge that others in the house, including Maitland Penny, offer little to nothing towards the household expenses."*

118 When asked why, in light of those concerns, he proceeded to authorise the increase of the rent to full market value Mr Bowker responded by saying that under the terms of the Commonwealth State Housing Agreement public housing tenants may apply for a rent subsidy but must provide verification of income to substantiate the level of subsidy to which they are entitled. Mr Bowker also expressed the view that Mrs Penny could have obtained the verifications from the other occupants if she so wished. He described her as *"a strong character who ruled that house"*. She was the matriarch of the family and Mr Bowker

believed that had she asked for it she would have been able to get the others to comply.

119 In cross-examination Mr Bowker was asked general questions regarding Mrs Penny's tenancy of the Hyland Street property. He was specifically questioned about a term of the agreement between Mrs Penny and Homeswest referred to in par 2(3) hereof which came into existence during the Hyland Street tenancy. Clause 12 of the agreement is in the following terms: *"Homeswest shall cease recording matters on the Penny file that are not relevant to the tenancy."* Mr Bowker believed that clause 12 referred to a newspaper article placed on Mrs Penny's file which, to his recollection, had something to do with a resident of the property being involved in some criminal activity. Mr Bowker could offer no explanation for keeping such material on the file and stated that he had not done so. He disputed that Homeswest did not honour the agreement and continued to put irrelevant material on the file.

120 Mr Bowker was taken to a file note prepared by him which referred to the occasion on 31 May 1996 on which Mr Bowker attended the Hyland Street property and observed *"a number of adult males who appeared to be drinking near the tenancy."* He was questioned about this entry and it was suggested to Mr Bowker that it was irrelevant material. Mr Bowker disagreed on the basis that it was relevant in the context of the history of antisocial behaviour in the tenancy. He said:

> *"... there were ongoing problems around this time associated with alleged drunkenness, anti-social behaviour, and to observe that there were a number of people at the tenancy and to observe that they may have been drinking beer is, I believe, totally relevant to have on the file."*

121 Mr Bowker was also questioned about Mrs Penny's eviction from Hyland Street. He agreed with the proposition that there were problems within the first twelve months of the tenancy but denied that Mrs Penny was constantly threatened with eviction or that he wished to evict her. Mr Bowker stated that he was merely following correct procedure and made a recommendation that the tenancy be terminated on 60 days notice.

122 Mr Bowker also stated in his evidence that all complaints made against Mrs Penny were fully investigated. He didn't personally investigate them, as that was the role of the accommodation manager who he supervised, but he was involved in a number of investigations. The process was that information would be taken from the complainant,

Mrs Penny would be asked to respond to the allegations and in some cases there was follow-up with the police. When Mrs Penny was asked to respond she would make counter allegations against the neighbours. Mr Bowker said that none of the neighbours were willing to stand up in court because they were fearful of doing so.

123 It was suggested to Mr Bowker that when Mrs Penny lodged a complaint nothing would happen. He responded to the criticism in the following manner:

> *"I would suggest it would be very difficult for the department to take action against a private owner. It's Mrs Penny's right to do that, to take civil action, whereas we had an obligation under the Residential Tenancies Act to take action or to decide not to take action against the public housing tenant."*

124 The Tribunal considers that Mr Bowker's statement accurately reflects the obligations of, and the limitations on, Homeswest as a landlord in the circumstances of a complaint against a tenant.

125 In cross-examination Mr Bowker was also asked to respond to the proposition that the Valuer General's assessment of rents for properties of the type occupied by Mrs Penny was lower than that assessed by Homeswest. Mr Bowker stated that he had no role to play in the rent-setting side of Homeswest's operations but explained that the Valuer-General will give an indication of the average rent for a particular type of property in the suburb rather than for a specific property.

126 It was also suggested to Mr Bowker that there was a lot of political involvement in the Hyland Street tenancy. He recalled some involvement at various states of a local member of Parliament and a local councillor on behalf of the neighbours in Hyland Street.

127 Mr Bowker was also asked about the condition imposed to re-house Mrs Penny pursuant to a Head Lease agreement with Manguri. He stated that the Manguri condition was placed upon Mrs Penny because of difficulties within her tenancy history at a number of properties. In that context he was asked about the Supported Housing Assistance Program, known as SHAP. Mr Bowker described SHAP as a Homeswest initiative developed to provide Homeswest tenants with access to appropriate skills, development and support to enable them to fulfil their obligations and responsibilities as tenants. However he said that there are no Aboriginal agencies under the SHAP umbrella in the Metropolitan area. Although he was not heavily involved in the Manguri model he understands it to be

another model of a SHAP type situation which was being provided by an Aboriginal organisation and operating predominantly out of the Cannington region. There had been criticisms of the three metropolitan SHAP programme deliverers on the basis that they weren't Aboriginal. The Manguri model was an attempt to address that criticism.

128 Mr Jones gave evidence in relation to the re-housing delay allegation. He stated that after Mrs Penny had been evicted form the Hyland Street property she did not qualify for priority assistance and Homeswest had no intention of re-housing her. However, following several approaches from Mrs Penny and discussions at the executive level Homeswest agreed to give her one final opportunity to live in public housing provided that a number of conditions were met. The conditions are set out in par 2(22) above. The purpose of the first condition was to introduce into any leasing arrangement with Mrs Penny an independent Aboriginal agency which, unlike Homeswest, had the resources available to provide the intensive support to Mrs Penny which past experience had revealed would need to be given to her if she was to be able to comply with the terms of a tenancy. The third condition that the property be isolated was imposed because of Mrs Penny's tenancy history. Mr Jones gave evidence, based predominantly on Homeswest's records, that all of Mrs Penny's tenancies with Homeswest over approximately a 20 year period were marked by, among other things, a poor history of anti-social behaviour and poor property standards. Throughout her tenancy history Mrs Penny and her family had demonstrated that they were unable to reside in a suburban environment without disturbing their neighbours on an ongoing basis.

129 Mr Pynes was called to give evidence in relation to the particular of the re-housing allegation which stated that Mrs Penny was re-housed in sub-standard accommodation. Mr Pynes stated that he was not involved in the selection of the Wiseborough Crescent property but was responsible for its management whilst Mrs Penny was occupying it. He said that, together with a representative of Manguri, he inspected the inside and outside of the property after it had been vacated by the previous tenant and shortly before Mrs Penny commenced to occupy it. According to Mr Pynes, on inspection the property was found to be structurally sound and not in a sub-standard condition. Further, prior to occupying the property Mrs Penny inspected and accepted it. Mr Pynes recalled receiving advice from Manguri that Mrs Penny had accepted the Wiseborough Crescent property and had raised no issues about it. It is necessary to be cautious in attributing any significance to the fact that a woman without a home makes little or no complaint about the condition

of a property when being offered a roof over her head. However, the Tribunal's impression of Mrs Penny is that she is a very assertive person. Certainly she experienced no difficulty in telling Homeswest officers when properties offered to her were not suitable to her because of their location. She had no difficulty telling Homeswest's counsel that she was not going to answer any more of his questions on a particular issue. Mr Pynes who has personally dealt with Ms Penny made the following observation: *"Well, knowing Ms Penny as I do, I would be very surprised that she wouldn't come forward and raise those issues with Homeswest, as she has done in the past."* The Tribunal shares that view.

130 According to the affidavit of Mr Pynes which was received into evidence, he inspected the property on 13 December 1999 at which time he found the property to be structurally sound. He did not notice any wall at the front of the house subsiding or in danger of collapsing. However, a number of photographs of the property were received into evidence. It was not disputed that they were taken on 21 December 1999. Those photos show distinct cracks in the wall of the house. In re-examination Mr Pynes said that he had no recollection of whether he saw cracking in the brickwork but stated that if he had seen it, and thought there was a structural problem that needed attention, he would have done something about it. The usual practice is to commission a report.

131 It is the case that the impression gained from the material in Mr Pynes' affidavit is that nothing of the nature of the cracking which can be seen in the photographs was observed by him when he inspected the property. Mr Pynes rejected the proposition that he was lying and that he knew about the subsidence well before the 13 December inspection. He stated that there was no reason for Homeswest not to carry out the work. He expressly denied failing to take action because Mrs Penny was Aboriginal or discriminating against her in any way.

132 Mr Pynes stated that some time after the December inspection he was contacted by a representative of Manguri who asked him to meet her at the property to discuss some cracking which was occurring in the outside front wall of the house. On inspection he observed some fissures in the brickwork at the front of the house. Mr Pynes disputed the proposition put to him that the cracked brickwork was a major problem in the sense of having an effect on the tenant. A structural investigation report was commissioned by Homeswest and the inspection for the purposes of that report took place on 5 August 2000. Based on the report and following discussions with Manguri it was felt that there was no immediate danger but, as the condition of the brickwork could deteriorate

and obviously had done so since the property was originally let to Mrs Penny, it should be repaired.

133 Mr Pynes then arranged for the necessary repair work to be carried out. At a subsequent inspection on 29 March 2001 the property was found to still be structurally sound and not to require any major structural repairs.

134 Mr Pynes stated that he was aware that Mrs Penny had reported a number of maintenance problems to Manguri but observed that under the Head Lease agreement it was Manguri's responsibility to attend to such maintenance matters. However, after a complaint was first received from Manguri on 29 October 1998, Homeswest arranged for the property to be connected to sewerage in December 1998. He also acknowledged that on 4 April 2001 Manguri wrote to Homeswest advising that despite plumbing repairs, the pipes and taps in the bathroom continued to leak causing damage. It was further noted that bathroom panels which had been removed by plumbers engaged by Homeswest had not been replaced.

135 In his affidavit relied upon as his evidence in chief, Mr Pynes stated that while Mrs Penny resided at the Wiseborough Crescent property Manguri did not report any structural problems to Homeswest for action. However, he agreed in cross-examination that this was not entirely accurate as the complaints concerning the septic system would constitute a structural problem under the Head Lease Agreement. Neither had he referred to the complaints concerning the water pipes which had been made by Manguri on 4 April 2001.

136 Mr Pynes was asked a number of questions concerning the condition of the Wiseborough Crescent property other than with respect to the cracking of the front wall. Mr Pynes made the general observation that Homeswest housing ranged in age from 40 to 50 years old to brand new. He acknowledged that there were inevitably going to be different amenity levels and standards in those properties, although he emphasised that there was a minimum standard which was required of all housing. He referred to Homeswest's maintenance policy which gives guidelines as to maintenance expectations on properties.

137 Mr Thomas gave evidence of Mrs Penny's tenancy history, about which he had some first hand knowledge, and also gave evidence concerning a number of the allegations made by Mrs Penny.

138 Mr Thomas disputed Mrs Penny's description of the house in Mentone Street, Balga, as being in a terrible state. Although he had no

personal knowledge of the house, he stated that the evidence on the file did not support her claims and indicates that all repairs were carried out on the property. The file also revealed that the grounds for eviction were antisocial behaviour, a term said by Mr Thomas to cover conduct such as foul language, abuse, threats, assaults and intimidation of neighbours. As to the property in Gretham Rd, Balga, the Homeswest file contains no reference to Mrs Penny's being evicted from this property as she stated. Mr Thomas's recollection was that she vacated the property. Mr Thomas confirmed Mrs Penny's evidence that she asked for a transfer from the property in Lefroy St, Willagee, because it was too far from where her grandchildren played sport in Balga.

139 Mr Thomas also confirmed that Mrs Penny was evicted from the property in Darlington Place, Balga, for antisocial behaviour but disputed Mrs Penny's evidence that this arose out of a single incident. Mr Thomas stated that he was the regional manager at Mirrabooka at that time and Mrs Penny's tenancy was a major issue to the residents. There were complaints including one of a particular incident involving a large number of people fighting in the street, swearing and throwing bottles to the extent that a neighbour came out with a rifle and fired gun shots because residents were fearful for their lives.

140 Mr Thomas said that the property in Newcourt Way, Balga, was specifically bought for Mrs Penny. However there were problems with the way she was looking after the property including rubbish being left around the property. There were also ongoing complaints from neighbours of antisocial behaviour which ultimately led to Mrs Penny's eviction. Mr Thomas was involved in purchasing Mrs Penny's next property in Irvine Street, Balga. Following her eviction, Homeswest were not prepared to re-house her unless it could find a reasonably isolated property that would ease the pressure on neighbours. He said that the Irvine Street property was certainly a very old timber frame property on a fairly small block but could be described as sub-standard when Mrs Penny occupied it. It was clean, all the appliances worked and there was no damage to the property. However, during Mr Thomas' visits to the property while Mrs Penny was a tenant there was certainly evidence of damage caused by people living in the property and hence it was Mrs Penny's responsibility to repair that damage. Following Mrs Penny's eviction the property was condemned and demolished.

141 With respect to the debt review allegation, Mr Thomas stated that the review carried out by Homeswest was thorough and endeavoured to address all of the issues raised on behalf of Mrs Penny. He said that it was

the sheer extent of the investigation that caused the delay in responding and had nothing whatsoever to do with Mrs Penny's race.

142 In his affidavit evidence, Mr Thomas gave a slightly different. but certainly clearer explanation than that of Mr Edmonds, for the decision to conduct an internal review rather than consent to an appeal out of time. Mr Thomas stated:

> *"Accordingly, the complainant's request for a review was made outside the time limit within which the respondent's appeals mechanism required appeals against charges levied by the respondent be lodged. The respondent was therefore entitled to decline the complainant's request for a review of her debt.*
>
> *Nonetheless, in view of the complainant's circumstances, the respondent agreed to review the debt, however given the nature, extent and complexity of the required investigation, as well as the amount of time which had elapsed between the occurring of a number of the charges and the request for the review, the respondent decided that it was neither practical nor appropriate to submit the request to the respondent's regional appeals committee.*
>
> *It was for this reason that the respondent arranged for the review to be carried out by three of its senior officers. Any assertion that the conduct result in the complainant being denied access to the respondent's appeals mechanism is without foundation."*

143 The Tribunal does not accept the last statement. Mrs Penny may have been granted a review but it is clear from the evidence that she was most certainly denied access to an appeal. Again, as with the evidence of Mr Edmonds, either Mr Thomas does not understand Homeswest's own processes or he shares the view that, as the review conducted was considered to be equivalent or superior to an appeal, it cannot be said that an appeal was denied.

144 Mr Thomas's account was said by him to be based on a reading of the papers on the file. He was not directly involved but did recall a conversation with Ms Walsh from the TAS who expressed concern about the delay. Mr Thomas said that he recalled ringing the regional office and being advised that the matter was very involved which was why it was going to an internal review rather that to the appeals committee. He could

not recall whether this information was provided to him by Mr Edmonds or a Mrs Watling.

145 Mr Thomas did state that he considered the internal review to be the exception rather than the rule. His instructions to the regional managers are that "they should be putting as many of these through the formal process as possible". According to Mr Thomas, all regional managers are made aware that they are not to be too inflexible with the 12 month period. He said: "I don't recall giving a formal instruction as such but the regional managers meet on a quarterly basis and just through those processes over time I've generally made my view known that we do have a good appeal system and we should adhere to them that whilst there's some reasons for that 12-month time frame, that we shouldn't be too inflexible about sticking to it." It should be noted that this evidence is in direct conflict with that of Mr Edmonds who suggested in his evidence that Homeswest strictly applied this policy.

146 Mr Thomas even considered that a request for an appeal out of time even after an internal review had been conducted would be considered sympathetically. However, in its letter of 21 December 1998 the TAS requested an appeal following the internal review in the following terms: "We believe Mrs Penny should be availed of the right to an appeal hearing where she may discuss the issues face to face, as all other appellants have the right to do". This request was refused by the Acting Regional Manager by letter dated 5 February 1999.

147 Mr Thomas also gave evidence concerning the debt determination allegation. In relation to the particulars of that allegation dealing with the circumstances by which Mrs Penny came to pay full market rent for the property, Mr Thomas, evidence as to the factual circumstances consisted primarily of reference to Homeswest records as he was not directly involved in the process by which Mrs Penny was required to pay full market rent. However, Mr Thomas was familiar with and gave evidence as to the relevant Homeswest policy.

148 According to Mr Thomas, Homeswest's Rent to Income Policy ("Rent Policy") in force at the relevant time was developed so as to accord with the provisions of the Commonwealth State Housing Agreement. The relevant clause of the version of the Commonwealth State Housing Agreement in force at the relevant time specifically stated that subsidies are designed to provide greatest assistance to those in need and further provided that, in determining rent subsidies, account was to be taken of the level of income or assets (or both) of the recipient of the subsidy, the

income of other household members, and the number of dependents. Mr Thomas stated that this issue was, and is, closely monitored by the Auditor General's office and Homeswest has previously been criticized for not being sufficiently vigilant in this area. Mr Thomas stated that it was therefore essential for full income details of all adult residents of the property be provided if Mrs Penny was to receive any assistance by way of a subsidy.

149 Clause 9 of the Rent Policy provides that tenants are required to immediately advise Homeswest of any change in household composition or in the event that household income increases or decreases by $10 per week or more. Clause 14 of the Rent Policy requires applicants to furnish documentary proof of income. In the case of a DSS recipient, a statement of benefit not more than a fortnight old is required. According to Mr Thomas, notwithstanding the terms of the Rent Policy, in practice Homeswest only required tenants to provide information about the incomes of other occupants of a property when those occupants were residing at the property on a long term basis.

150 On Mr Thomas' evidence, Mrs Penny was charged full market rent, in accordance with the Rent Policy, because of her failure to provide a completed rent subsidy form and the necessary DSS verification of income statements. Her race had nothing to with that decision. Mr Thomas expressed the view that, to the best of his knowledge, information and belief, Homeswest's Aboriginal tenants do not generally have more difficulty than non-Aboriginal tenants when it comes to providing rent subsidy forms and verification of income statements in respect of other people living at the property for which they are the tenant. Nor to the best of his knowledge, information or belief do Aboriginal tenants have more difficulty than non-Aboriginal tenants in obtaining rental contributions from other people living at the property. He refuted the proposition that Mrs Penny was, because of her race, much less likely than a non-Aboriginal person to be able to comply with the requirement to provide a rent subsidy form and the DSS verification of income statements. He further denied that it was unreasonable in all the circumstances for Homeswest to require Mrs Penny to provide a rent subsidy form together with the DSS verification of income statements. Mr Thomas also denied that Homeswest discriminated against Mrs Penny by insisting on compliance with the Rent Policy and charging Mrs Penny full market rent from 2 September 1996.

151 Under clause 1 of the Tenancy Agreement in relation to the Hyland Street property, the tenancy is stated to be at a rental "to be determined

from time to time by Homeswest and until otherwise determined at a rental of $110.80. Under clause 5.1 of the Tenancy Agreement Homeswest is entitled to at any time re-assess the rental payable by the Tenant upon written notice of the amount of such re-assessed rent. Clearly there was an entitlement under the tenancy agreement to increase Mrs Penny's rent by removal of the rent subsidy or otherwise.

152 It should be noted that the Rent Policy provides that no household need pay more than a specific percentage of gross assessable income in rent up to a maximum cost rent, such percentage varying depending upon when the tenancy commenced. The percentage applying to Mrs Penny under the Rent Policy at the relevant was in the region of 25 per cent. A letter from DSS to its Bill Paying Service indicates that as at 16 August 1996 Mrs Penny's fortnightly income was $348.00 and that the rent payable to Homeswest to be automatically deducted was $128.00 per fortnight, although this latter figure might also include payments in reduction of past debts. Irrespective of how the deduction is characterised, the balance payable to Mrs Penny after other unidentified deductions is stated to be $130.20 per fortnight.

153 At first glance the figures relevant to Mrs Penny alone which were referred to in the evidence appear to exceed the 25 per cent to referred in the policy and left her with a very small amount of money on which to live. However, an assumption that Mr Penny was receiving at least the same amount in fortnightly benefits and was known to be a permanent member of the household puts the ratio of rent to income at well below the level set by the policy. Consequently, no comment adverse to Homeswest with respect to the impact of its policies can be drawn by this Tribunal in the absence of credible evidence of the gross assessable income for the entire household. The Tribunal was told by Mr Thomas that more recently Homeswest has changed its policy and doesn't take any more than 30 per cent of anyone's income in rent. In any event, Homeswest requires authorization from the tenant before it can deduct monies from DSS payment and the tenant can cancel the authorization at any time. Although consequences would flow from failing to make the payments, should the amount deducted not be sufficient for the tenant to live on without contribution from other household members, the payment can be stopped.

154 In cross-examination, Mr Thomas was taken to Recital (E) of the Commonwealth State Housing Agreement which expressly provides that, in the provision of assistance under the Agreement, such assistance is to be provided on a non-discriminatory basis. Attention was also drawn to

Recital (F) which states that "...the terms and conditions in which the grant of financial assistance will be made are those set out in this agreement, and any subsidiary agreement giving effect to this agreement made pursuant to section 6(3) of the Housing Assistance Act of 1996." Mr Thomas was questioned as to whether tenants are shown a copy of the relevant policies. Mr Thomas didn't believe that they were but said that they would be provided on request and are available at the public counters of Homeswest offices. No submission was subsequently made which would identify the relevance of this line of questioning to Mrs Penny's case.

155 In cross-examination Mr Thomas disputed the proposition put to him that Mrs Penny had only had her rent re-assessed on one occasion. Mr Thomas stated that over the period of time in which Mrs Penny had been a tenant of Homeswest she would have had her rent assessed every year. As Mrs Penny gave no evidence on this issue Mr Thomas' evidence on this point is uncontroverted and accepted by the Tribunal. Mr Thomas also refuted any suggestion that the material provided by Mrs Penny to Mr Maguire was sufficient to justify a continuation of her rent subsidy. As Mr Thomas pointed out, Homeswest were aware of the income it was formal verification of that income that was required under the relevant policy.

156 Mr Thomas also gave evidence in relation to particulars (d) and (e) of the debt determination allegation. He stated that between 11 November 1993 and 5 September 1996 there were a series of letters and discussions between Homeswest and Mrs Penny regarding Mrs Penny's outstanding tenant liability and the reduction of that liability by periodic payments. According to Mr Thomas, payments of $20 per week in reduction of the debt were made, later cancelled and then re-instated by Mrs Penny. Mr Thomas maintained that Homeswest acted in accordance with its policies in dealing with Mrs Penny.

157 Mr Thomas stated that Homeswest has extensive policies for the majority of its dealings with its clients, including a Tenant Liability Policy. The policies are intended as a guide to assist Homeswest's officers in their assessment of a particular case. Mr Thomas expressed the view that Homeswest's policies are appropriate and give due recognition to the diverse needs of Homeswest's client base including Aboriginal people. That expression of opinion was not tested in cross-examination and while there is no other evidence to support the assertion, there is certainly no evidence which would allow the Tribunal to draw a contrary conclusion.

158 Mr Thomas was cross-examined with a view to establishing a causal link between eviction, consequent overcrowding and further eviction. Mr Thomas acknowledged that Mrs Penny often accommodated a large number of people at the Hyland Street property. According to Mr Thomas, at least half of Mrs Penny's tenancies have been overcrowded but Homeswest only takes action in relation to overcrowding where there is an adverse impact on neighbours or damage to the property. Mr Thomas stated that Homeswest did not accept that overcrowding absolved Mrs Penny from her responsibility to ensure that the property was maintained in a reasonable condition and that the people residing at the property did not damage the property as a result of neglect, misuse or wilful behaviour. Mr Thomas further stated that the Respondent has many Aboriginal tenants who, for whatever reason, have a relatively large number of people staying with them and who, unlike the complainant, manage to maintain their tenancy to a reasonable standard. Mr Thomas, on behalf of Homeswest, refuted the proposition that Mrs Penny was, due to the number of people at the property, unable to maintain the property in a reasonable condition and to ensure that damage was not done to the property. He also denied that, in the application of its policies and in determining what tenant liability charges were to be levied against Mrs Penny, Homeswest discriminated against her on the ground of her race.

159 As to the re-housing delay allegation, Mr Thomas stated that at the time Mrs Penny commenced her tenancy at the Hyland Street property she was advised by Homeswest that the tenancy would be her final chance and she would not be re-housed if the tenancy were unsuccessful. Despite that warning, during the course of the tenancy damage was done to the property, anti-social behaviour was engaged in at the property and Mrs Penny was ultimately evicted.

160 Mr Thomas explained the circumstances which culminate in eviction. He said that if there are continued substantiated complaints about behaviour from a tenancy and there is no effort on behalf of the tenant to rectify that behaviour, Homeswest proceeds down the track of eviction. In the case of Hyland Street there were complaints from the neighbours of behaviour such as street fighting, threats, foul language, rock throwing and generally disturbing and aggravating some of the private owners, particularly an elderly couple who lived close by.

161 After the Complainant had been evicted form the Hyland Street property she did not qualify for priority assistance and the Respondent had no intention of re-housing her. Nevertheless, Homeswest attempted to

secure interim housing for Mrs Penny. According to Mr Thomas she was offered housing in Gnangara, in the Cullacabardee Aboriginal Community and through the Karnany Aboriginal Centre in Midvale. Mrs Penny declined to take up residence in any of these premises. Following several approaches by Mrs Penny and discussions with senior Homeswest staff, Homeswest then agreed to again give Mrs Penny one final opportunity to live in public housing provided that the conditions set out in par 2(18) above were met. Mr Thomas described the conditions as non-negotiable. They were put to Mrs Penny and she accepted by them by continuing to pay her debt and taking possession of the property under the head-lease.

162 According to Mr Thomas, the purpose of the first condition was to introduce into any leasing arrangement with Mrs Penny an independent Aboriginal agency which, unlike the Respondent, had the resources available to provide the intensive support to the Complainant which past experience had revealed would need to be given to her if she was to be able to comply with the terms of a tenancy. It was also the case that, under the head lease arrangement, Homeswest would have no involvement in the assessment or payment of rent.

163 Mr Thomas explained that there have been non-Aboriginal tenants who, because of their previous history, have had the requirement for a head lease arrangement imposed as a condition of re-housing. In those cases the properties are usually leased through organizations such as Anglicare or Centrecare. Unfortunately, Homeswest keeps no comparative statistics as to the occasions upon which it requires head leases from non-Aboriginal tenants as opposed to Aboriginal. On Mr Thomas' evidence, it is not a requirement imposed only on Aboriginal people.

164 Mr Thomas stated in his affidavit evidence that the condition that Mrs Penny be housed in an isolated property was based on Mrs Penny's demonstrated tenancy history with Homeswest. Mr Thomas referred to the fact that, over a period of approximately 20 years, Mrs Penny had had ten tenancies with Homeswest, all of which were marked, among other things, by a history of anti-social behaviour and poor property standards. Mr Thomas stated that, throughout her tenancy history Mrs Penny and her family had demonstrated that they were unable to reside in a suburban environment without disturbing their neighbours on an ongoing basis. It was for this reason that it was considered appropriate for some room to be placed between Mrs Penny and her neighbours. Mr Thomas denied that Mrs Penny's race was a factor.

165 In order to achieve the condition that there be minimum impact on neighbours, Homeswest's initial aim was to locate a property for Mrs Penny which was isolated from any other residences. On 21 July Mr Thomas spoke to Mrs Penny and offered her two properties, one in Muchea and the other in Pinjar Rd, Wanneroo. Mrs Penny declined to move into either property because she wanted to live in Girrawheen or Redcliffe and considered that the properties were too isolated. She was again advised that she would only be considered for an isolated property in view of her past history. According to Mr Thomas, Mrs Penny was also shown a house in Wells Street, Bellevue, one in Beckenham and another in Herne Hill. All were declined by Mrs Penny.

166 Homeswest decided to search the Wanneroo Road area to see if an isolated property could be found for the Complainant within the reach of the bus route to the Girrawheen High School which Mrs Penny's grandchildren attended. On 15 August 1997 a Homeswest officer took Mrs Penny to two properties, one in Wanneroo Road and the other in River Road, Bayswater. Mrs Penny was interested in both properties but neither property was ultimately purchased by Homeswest because the asking price for each property was too high to make the purchase economically feasible. Homeswest also considered purchasing a property in Lenore Road, Wanneroo, for Mrs Penny but the acquisition was not proceeded with as the purchase price was too high. In response to a request from Mrs Penny to consider re-housing her in one of a number of Homeswest properties she knew to be vacant, it was again emphasised to Mrs Penny that she would only be re-housed in an isolated property.

167 By October 1997 Homeswest had been unable to find a suitable property for Mrs Penny and explored the possibility of allowing her to remain in the Koman Way property and finding an alternative house for her granddaughter to live in. However, the granddaughter declined to move out of the Koman Way property.

168 The Wiseborough Crescent property was not particularly isolated but was offered to Mrs Penny by Homeswest due to the length of time that it was taking to locate an otherwise suitable property for her to live in. The property was, however, reasonably well placed to reduce the impact of anti-social problems on neighbours. The property was actually allocated to Mrs Penny for herself, her husband and one other family member. Subsequently her granddaughter moved in together with her children bringing the total number of occupants of the property to 12.

169 Mr Thomas stated that the Wiseborough Crescent property, which was selected by Homeswest and Manguri, was structurally sound and was not in a sub-standard condition when it was offered to Mrs Penny. Mr Thomas referred to a property condition report of an inspection carried out on or about 9 March 1998 and the various photographs of the property which were tendered into evidence. The property condition report describes all items as being in fair or good condition but notes that there is no fly wire on the back door to the kitchen, that a phone plug needs to be adjusted and sealed and that support rails need to be fitted in the bathroom.

170 Mr Thomas' evidence on the issue was predominantly based on Homeswest records and was mostly consistent with that of Mr Pynes. The exception was Mr Thomas's statement in his affidavit that "Manguri did not report any structural problems to the respondent for action. Indeed inspections of the Balga property carried out by officers of the respondent on 13 December 1999 and 29 March 2001 found that the Balga property was structurally sound with no need for major repairs." This statement was in direct conflict with Mr Pynes' evidence that he had been asked by a Manguri representative to attend at the Wiseborough Crescent property to discuss some cracking of the front wall and on attending noticed some fissures in the brickwork.

171 Mr Thomas' explanation for the discrepancy was that he was not directly involved in the matter and, on reading the file, found no reference to any cracking brickwork at the property. He readily conceded that Mr Pynes' account was correct. This error on Mr Thomas' part illustrates the need for caution in accepting as fact the account of a witness whose evidence is based solely on the records of an organisation rather than personal recollection.

172 Some time into the tenancy of the Wiseborough Crescent property, Mrs Penny requested a smaller home. Homeswest agreed to give Mrs Penny a transfer to a smaller property on the basis that her granddaughter would take over the Wiseborough Crescent tenancy. According to Mr Thomas, when Mrs Penny moved out her grand daughter followed her and used the excuse that the Wiseborough Crescent property had damage to it and she couldn't live in it. Mr Thomas stated that Homeswest would not carry out the repairs to the property because the damage was tenant caused, was not such as to make the property uninhabitable and because, under the head leasing arrangement, Manguri was responsible for maintenance and repairs.

173 In cross-examination it was put to Mr Thomas that the properties shown to Mrs Penny pending the commencement of the Wiseborough Crescent tenancy "were never ever going to go to my client." Mr Thomas rejected the suggestion explaining that they were shown to Mrs Penny because there would have been no point in buying them if she didn't want them but that ultimately Homeswest could not get the vendor to drop the prices below valuation. Mr Thomas explained that Homeswest is not entitled to buy above valuation. Curiously, in view of the fact that the decision was to Mrs Penny's benefit, Mr Thomas was cross-examined as to why Mrs Penny was given a further chance when she had been repeatedly evicted. Mr Thomas explained that Homeswest appreciated that it was the "houser of last resort" and, although Mrs Penny had been evicted, they were still concerned for her and her family. Homeswest were receiving numerous phone calls from Mrs Penny asking to be re-housed and the decision was made to re-house her subject to conditions.

174 In response to questions from the Tribunal, Mr Thomas readily agreed that Mrs Penny declined the various properties offered to her because she felt they were too far from transport and health facilities. However, Mr Thomas stated that Mrs Penny was well aware that the only circumstances in which she would be re-housed by Homeswest was in an isolated property and isolated properties are necessarily distant from such facilities. As Mr Thomas observed, Mrs Penny had brought the situation on herself. If she had abided by the terms of her tenancy agreement she would not have been evicted from the Hyland Street property and would not require re-housing. Mr Thomas accepted that housing is a basic human right but insisted that "people have to take on the responsibility that goes with that housing".

175 Mr Thomas was also questioned about a note that he sent to Mr Bowker on 20 November 1996 following Mrs Penny's eviction from the Hyland Street property. In the note Mr Thomas commented that he was under pressure to sell the property but would "prefer to relet to a non-Aboriginal". He stated that he made this comment in light of a number of meetings that he had had with nearby residents, as a result of which he became aware that the residents were strongly opposed to the property being occupied by another Aboriginal family and wanted the property to be sold. Mr Thomas formed the view that if he did put another Aboriginal family in the property that family might have difficulties with the local residents. In those circumstances he decided that it would be best for all concerned if a non-Aboriginal family occupied the property. Mr Thomas stated in his affidavit that he did not mean to convey by the

particular tenancy because of problems that have happened there. He emphasised that Homeswest was looking for a solution for all.

179 There was some conflict in Mr Thomas' evidence as to whether the neighbours had expressed the view that they did not want an Aboriginal family in the house. At one point in his evidence Mr Thomas stated that the primary attitude of the neighbours was that they didn't want public housing in the street and that he didn't recall the issue of race coming up in the discussions. However, on being shown his affidavit where he said that as a result of meeting with local residents he was aware that they were strongly opposed to the property being occupied by another Aboriginal family, Mr Thomas admitted his error and explained that he had not read his affidavit prior to giving his evidence. Mr Thomas made it clear in his evidence that the neighbours in Hyland Street were extremely distressed, scared and reluctant to go out their front doors as a result of the anti-social behaviour arising from Mrs Penny's tenancy. Mr Thomas noted: "All I can say is the complaints that they made were justified and were not racially motivated."

180 It was also suggested to Mr Thomas that the decision not to re-let the Hyland Street property to an Aboriginal family meant that an Aboriginal family would not be housed. Mr Thomas rejected this proposition. He explained that Homeswest receives $90M per year from the Commonwealth government and a further $16M per year for Aboriginal housing which is referred to as "Fund 6". Certain properties which are acquired with Commonwealth funds are categorised in Homeswest books as Fund 6. However, it does not mean that individual houses are specifically purchased with Fund 6 monies and hence must always be tenanted by Aboriginal families. Mr Thomas stated that the Aboriginal family who would otherwise have gone into the Hyland Street property would go into the property that would have been allocated to the non-Aboriginal family.

181 Mr Thomas was questioned on the Derbarl Yerrigan survey of which he first became aware at a housing seminar conducted by Shelter WA. Having looked at the photographs Mr Thomas formed the view that most of the damage was tenant caused. He conveyed that view to Mr Mazzella but did advise him that if he provided Mr Thomas with the necessary information he was happy to have all the properties inspected and to correct any maintenance issues. According to Mr Thomas, he was advised by Mr Mazzella that approval would have to be obtained from Mr Wilkes. He heard no further from him. Mr Thomas endeavoured to ring Mr Wilkes and left messages for him to the same effect but still received

comment that either he or Homeswest held the view that characteristics of Aboriginal people rendered them either unsuitable or less suitable for housing in some of Homeswest's properties.

176 Mr Thomas was cross-examined extensively on the 20 November note. Indeed, it was relied upon as a central part of the Complainant's case, said to evidence a discriminatory attitude on the part of Mr Thomas and hence Homeswest and to provide the basis for the drawing of an inference that Homeswest's conduct towards Mrs Penny was based on her race.

177 Mr Thomas said that he made a direction that given the circumstances of Mrs Penny's particular tenancy and the complaints from neighbours and the pressure he was under from neighbours to actually sell the property, that the next tenant should be a non-Aboriginal family. However, there was no direction to say that the property should never be used for Aboriginal housing. It was pointed out to Mr Thomas that his directive does not say that the property could be used for an Aboriginal family in the future. Mr Thomas's response was to concede that to be the case but maintained that his intention was merely for the next allocation to be to a non-Aboriginal family. Certainly there is nothing in the statement inconsistent with Mr Thomas' stated intention.

178 Mr Thomas explained that there had been problems with Mrs Penny's tenancy. The argument from a lot of the neighbours was that the property was in a well-established area with a lot of older people there and that they didn't want public housing in that area. The neighbours wanted Homeswest to sell the property but were informed by Mr Thomas that sale was not an acceptable option as it was a good property in an area where Homeswest had a high demand. Mr Thomas explained that he was under pressure from the local Member of Parliament so he agreed that, rather than sell the property, Homeswest would put a non-Aboriginal family in for the next tenancy. The other factor that Mr Thomas took into account was that, given the problems at that tenancy, it might well have been difficult for another Aboriginal family, given the resentment that was in the community. Mr Thomas explained that Homeswest has had situations in the past where an Aboriginal family has gone into a tenancy where there has been previous anti-social behaviour "and they haven't been given a fair go". He said he made the judgment at the time that to put another Aboriginal family in the property would not help that family nor would it help the community. Mr Thomas explained that this was not the first time Homeswest had made a decision not to put an Aboriginal family in a

no response. The next time he saw the photos was at the Derbarl Yerrigan seminar. He again approached Mr Wilkes and asked him for the details of the properties but the information wasn't forthcoming. At a subsequently held workshop Mr Thomas again asked Mr Wilkes for the addresses of the properties so that they could be inspected. Ultimately, of the 85 properties included in the survey, addresses were provided for approximately 40. Of those properties, five were found not to belong to Homeswest and seven others couldn't be identified from the addresses provided. Some properties had been replaced between the time the survey was conducted and the addresses were supplied to Homeswest. Of the remaining properties, all were inspected and Homeswest found that many of the problems were tenant caused. Maintenance work was carried out with some of the costs charged to the tenant. Subsequent requests were made to Derbarl Yerrigan to provide addresses for the remainder of the properties surveyed and accurate addresses for the seven properties Homeswest were unable to locate. That information has never been supplied.

182 Mr Thomas explained in his evidence that tenants are required to pay for any damage above fair wear and tear. Discussions take place with tenants before repairs are carried out. If the damage creates health, safety or security issues then the work is carried out. However, if the damage results from deliberate conduct such as punching holes in walls or doors or cupboard doors being pulled off the hinges Homeswest's approach is not to carry out the work unless the tenant pays some money in advance. As Mr Thomas explained, Homeswest "doesn't have an endless bucket of money for maintenance" and spends twice as much as the private sector on maintenance and three times as much on Aboriginal tenancies than on non-Aboriginal tenancies.

183 Mr Thomas was also cross-examined on a report entitled "Allocation of Priority Housing by Homeswest to Aboriginal and Non-Aboriginal People Relating to Two Complaints" and published in November 2000. Mr Thomas explained that the report was commissioned by the Equal Opportunity Commissioner following two complaints by Aboriginal women about the length of time taken to house them after they were approved for priority transfers from their Homeswest properties.

184 The following results of the investigation are set out in the report:

(1) In relation to the time taken for approval of priority housing and the time taken to house people after approval, there was little difference in the experiences of Aboriginal and non-Aboriginal applicants.

(2) For people seeking a transfer there was, overall, no significant difference between Aboriginal and non-Aboriginal applicants.

(3) Aboriginal applicants seeking priority approval for transfers based on medical reasons waited on average 13 weeks to obtain approval whereas non-Aboriginal applicants waited an average of 6 weeks. Aboriginal applicants were more likely to be asked to show that they were not able to access homes in the private rental market.

(4) Aboriginal applicants seeking priority approval for transfers due to threats of violence waited on average 12 weeks to obtain priority approval whereas non-Aboriginal applicants waited 3 weeks.

(5) Aboriginal applicants waited on average 6 months to obtain a transfer due to threats of violence, while non-Aboriginal applicants were housed within a month.

(6) The age of houses allocated to Aboriginal applicants appears to be considerably greater than for non-Aboriginal people.

(7) The average age of houses allocated to Aboriginal applicants was 23 years in contrast with the average of houses allocated to non-Aboriginal applicants which was 16 years.

185 The report acknowledges that the sample surveyed was small and that the data was not subjected to rigorous statistical analysis. However, in the summary of findings the Commissioner expresses the view that the findings offer markers or indicators to stages in processes or the delivery of services where discrimination on the basis of race may be occurring and concludes that there are some areas that warrant further exploration and detailed analysis. Mr Thomas stated that the issues raised were very useful to Homeswest and had been taken on board in managing applications. For example, tighter guidelines have been set on when people are to be housed within the priority list and there is now a requirement for a monthly report to be provided to the regional director identifying applicants and waiting periods.

186 With respect to the relevance of the report and its findings to Mrs Penny's case, the first point which should be noted is that the report relates solely to priority transfers; where a tenant is transferred ahead of another because of their current circumstances. Following her eviction from Hyland Street, Mrs Penny was neither on the priority transfer list nor the transfer list. She was not to be re-housed. Under Homeswest policy, at the time of her eviction Mrs Penny had no entitlement to be placed on the priority transfer list.

187 Mr Thomas agreed in cross-examination that the estimated age of the Homeswest houses provided to Mrs Penny averaged out to approximately the figure for Aboriginal families in the investigation. However, Mr Thomas emphasized that the figures were estimates only and no accurate figures could be provided without an opportunity to review the files. In the Tribunal's view, in the absence of some verification from the files, the evidence is of limited assistance.

188 Mr Thomas also proffered some explanations for the results of the Commissioner's investigation. One was that the sample studied was small. In relation to the difference in timing of providing priority housing, Mr Thomas explained that Homeswest often had difficulty in cases involving Aboriginal families in getting the medical evidence in to support their request for a priority transfer. An explanation provided for the disparity in the age of the housing was that the newer houses are in the suburban fringes where Aboriginal people are somewhat reluctant to go to while the older accommodation is closer to the city. In relation to the disparity in waiting periods for transfer due to threats of violence, Mr Thomas stated that family violence in the Aboriginal community is a major issue and Homeswest finds that Aboriginal families "are very restricted in where they can go and there are then delays in trying to find suitable accommodation". When asked to explain this comment Mr Thomas said that most Aboriginal families want to move quite a distance away from where they had been housed and quite often will pick areas where Homeswest has limited stock which causes some delay in finding a suitable property. When asked how that position differed from the situation confronting non-Aboriginal victims of domestic violence Mr Thomas stated that it was not uncommon for Homeswest to allocate a property to an Aboriginal family some distance away only to be told that it was not acceptable because a relative of the perpetrator of the domestic violence lives nearby. Mr Thomas maintained that, at least from his observations, this problem seemed to occur more often than with non-Aboriginal tenants.

189 Mr Thomas also made it plain that some Aboriginal tenants took longer to house because of their tenancy history as a result of which Homeswest had to be careful where they were placed. Mr Thomas gave Mrs Penny as an example of just such a situation.

190 Counsel for Mrs Penny sought to tender into evidence a review prepared by the Equal Opportunity Commissioner entitled "Aboriginal Participation within the Complaints Process". It was received into evidence on the basis that it indicates that there is a perception in the Aboriginal community that Homeswest discriminates against them. It

states: "...the results of this report which have caused considerable concern is the continuing high rate of claims of discrimination in relation to Aboriginal housing...the results show a widespread perception among Aboriginal people that Homeswest applies its status as a landlord unfairly to Aboriginal people when applying eviction notices and giving consideration to housing needs.

191 Eviction statistics kept by Homeswest in relation to all regions reveal that Aboriginal tenants account for approximately 40 per cent of termination notices and represent only 18 per cent of the total number of Homeswest tenants. Mr Thomas readily conceded that there was a clear statistical over-representation of Aboriginal people in the eviction statistics. Mr Thomas gave evidence of a number of ways in which the Respondent is working towards reducing the figures. However, while Mr Thomas considered that there was no doubt that Aboriginal people perceived that there was discrimination within Homeswest, he rejected the accuracy of that perception.

192 Mr Thomas was also criticised for speaking to documents of which he had no first hand knowledge. It is certainly the case that Homeswest witnesses relied on file records, not all of which were created by them. One person who could have given relevant evidence was Ms Skevington. However, the Tribunal was informed that she is deceased. Mr Radovanovich, whose name appears in the files was not called and neither was Mr Maguire, who is no longer employed by Homeswest. No explanation was given for not calling him. Ultimately, however, the Tribunal does not consider that any adverse inference can be drawn from the failure to call them and their evidence is not essential to the resolution of the claim.

Conclusions

193 On behalf of Mrs Penny it was submitted that the Tribunal should take "a global approach" and look at all the surrounding circumstances in determining whether Homeswest has discriminated against Mrs Penny. Counsel for Mrs Penny highlighted the following factors which are said to evidence a discriminatory attitude:

(1) The immediacy of complaints by neighbours following Mrs Penny's move to the Hyland Street property and the recommendation by Mr Bowker that Mrs Penny be evicted.

(2) The expressed desire of the Hyland Street neighbours for Homeswest not to put another Aboriginal family in the property.

(3) The direction from Mr Thomas that, following Mrs Penny's eviction, the Hyland Street property be leased to a non-Aboriginal family.

(4) The imposition of conditions on re-housing Mrs Penny after her eviction from the Hyland Street property, in particular, the condition that any tenancy be pursuant to a head lease arrangement with Manguri.

(5) Homeswest was negotiating with Manguri to take over the lease before Mrs Penny was evicted from the Hyland Street property.

194 The submission put on behalf of Mrs Penny is that this combination of factors is sufficient for the Tribunal to draw the inference that any decision made by Homeswest which was to the detriment of Mrs Penny was racially motivated. There are a number of difficulties with that submission. There is an abundance of evidence, both oral and documentary, which is accepted by the Tribunal that Mrs Penny's tenancies were marked by anti-social behaviour and that the Hyland Street tenancy was the subject of fully investigated complaints of anti-social behaviour including street fighting, threats, foul language and rock throwing.

195 Whilst it is regrettable that Mrs Penny's neighbours considered the conduct of her and her family as representative of the conduct of Aboriginal people generally, the fact that Homeswest acted on the neighbours' requests not to let the Hyland Street property to an Aboriginal family is not necessarily indicative of a discriminatory attitude. The Tribunal accepts the explanation of Mr Thomas that he simply formed the view that to put another Aboriginal family in the property would not help that family nor would it help the community and, as a result, the most appropriate solution was for the next tenant to be non-Aboriginal. The Tribunal further accepts that no Aboriginal family was left without housing as a result and that there was no intention to preclude Aboriginal families from subsequent tenancies of the Hyland Street property. However, in the Tribunal's view, the decision not to re-let the property to an Aboriginal family had the unfortunate, if unintended, consequence of reinforcing negative stereotypes.

196 Further, in view of the significant number of serious complaints made early in Mrs Penny's tenancy of the Hyland Street property it is hardly surprising that steps were being taken by Homeswest at an early

stage, and well prior to eviction, to find a solution to the problems which Mrs Penny's tenancy was creating. Investigating the possibility of the provision of support services to Mrs Penny by an Aboriginal agency through a head- lease arrangement was a reasonable course of action for Homeswest to take. In the Tribunal's view, it cannot be said that investigating this option is consistent only with a discriminatory attitude by Homeswest.

197 Finally, the Tribunal considers that neither the fact nor the nature of the conditions imposed on Mrs Penny can be said to evidence a discriminatory attitude on the part of Homeswest. It is unquestionably the fact that, at the time of Mrs Penny's eviction from the Hyland Street property, Homeswest was under no obligation to re-house her, conditionally or unconditionally. That Mrs Penny required re-housing was a situation of her own making. She had failed to meet her obligations as a tenant of the Hyland Street property despite having previously been given a warning that she would not be re-housed if she failed to meet those obligations. That Homeswest elected to re-house Mrs Penny is to its credit and it cannot reasonably be criticized for imposing conditions on any subsequent tenancy which would facilitate compliance with the reasonable responsibilities of a tenant in public housing and minimize the potential for any adverse impact on neighbours. In any event, the uncontroverted evidence was that the requirement for a head lease is not a requirement imposed only on Aboriginal tenants.

198 In the Tribunal's view, the factors identified do not evidence a discriminatory attitude on the part of Homeswest whether taken individually or collectively.

199 Counsel for Mrs Penny also attempted to establish through various documents and statistics that Homeswest discriminates against Aboriginal people generally in various aspects of public housing. The purpose of the exercise was to invite the Tribunal to infer that Homeswest therefore discriminated against Mrs Penny in the specific instances alleged in her claim

200 The documents relied upon were the following:

- Noongah Housing Summit 2001 Briefing Papers.
- Transcript of comments made by Mr Greg Joyce, CEO, Homeswest, at the Derbarl Yerrigan Health Service Housing Summit 2001.

- Homeswest Housing Issues Indigenous Survey Year 2000 conducted by Derbarl Yerrigan.
- Report entitled "Allocation of Priority Housing by Homeswest to Aboriginal and Non-Aboriginal People Relating to Two Complaints" November 2000.
- Equal Opportunity Commission Review entitled "Aboriginal Participation within the Complaints Process".

201 The Tribunal has in these reasons already referred to and commented upon the evidence given by the various witness with respect to these documents. As to the Housing Summit briefing paper, although the briefing paper was received into evidence the Tribunal considers that little weight should be attached to it. It certainly identifies a concern, even a belief, as to the existence of discrimination in public housing, but it does not evidence it. It is apparent from the content of the document and Mr Mazzella's evidence in relation to it, that those involved in the preparation of the briefing paper were adopting a position on the issue of discrimination in housing. In the absence of any real opportunity to test the information and material upon which the authors rely, the Tribunal is unable to conclude on the basis of the report alone that the position is justified.

202 As to the comments made by Mr Joyce, contrary to the interpretation placed on them by Mr Mazzella, the Tribunal is unable to draw the conclusion that Mr Joyce conceded that Aboriginal people are provided with housing of a lesser standard than non-Aboriginal people or that Homeswest spends less on maintenance on houses occupied by Aboriginal people. The latter interpretation is completely inconsistent with the evidence of Mr Thomas that Homeswest spends triple the amount on maintenance for Aboriginal tenancies than for non-Aboriginal tenancies. The Tribunal considers that when Mr Joyce's comments are put in context the more probable interpretation is that his reference to sub-standard housing is to a proportion of Homeswest housing made available to both Aboriginal and non-Aboriginal tenants.

203 In relation to the Aboriginal Housing Survey conducted by Mr Mazzella, the survey certainly provides evidence of the type of houses provided by Homeswest in country areas and the condition of certain houses at a specific point in time. However the information in the survey does not allow the Tribunal to attribute to Homeswest responsibility for the problems identified to the point where it can be concluded that they have provided sub-standard housing. Further, in the context of a claim of

racial discrimination, it does not, in the Tribunal's view, establish that Homeswest treat Aboriginal people less favourably than non-Aboriginal people. The Tribunal considers the evidence of Mr Mazzella's knowledge of the standard of housing provided by Homeswest to non-Aboriginal tenants to be an inadequate basis for the opinion expressed by him that a higher standard of housing is provided to non-Aboriginal tenants.

204 The report on the allocation of priority housing by Homeswest to Aboriginal and non-Aboriginal people does raise some concerns about the possibility of disparate treatment based on race, notwithstanding the small size of the survey sample and the fact that the data was not subjected to rigorous statistical analysis. Mr Thomas provided some plausible explanations for the results of the report. Without additional information and evidence it is not possible for the Tribunal to determine whether those explanations justify the discrepancies identified or to rely on the report as evidencing systemic discrimination against Aboriginal people with respect to priority housing in particular or public housing generally.

205 Mr Thomas explained that Homeswest had not in the past kept the sort of statistical information which was identified in the report and, indeed, still didn't. His explanation for this omission was that it was a very extensive exercise and Homeswest made the decision that its resources were better spent on responses such as tighter guidelines and reporting. However, even Mr Thomas conceded that this approach did not allow for a comparative analysis of the treatment of Aboriginal and non-Aboriginal tenants. The only comparative data which Homeswest collects relates to evictions and that was as a result of a request from the Equal Opportunity Commissioner. Homeswest does keep some rough data on the number of Aboriginal tenancies, however, that data is imperfect because Homeswest, quite properly, does not insist that Aboriginal families designate on their application that they are Aboriginal.

206 The Tribunal appreciates that Homeswest does not have unlimited resources and must determine whether its resources are best spent accumulating comparative statistical information. However, much of the material provided to the Tribunal in this case indicates that there is a firmly held perception amongst members of the Aboriginal community and amongst Aboriginal organizations that Homeswest discriminates against Aboriginal people. Rebutting such allegations at all levels up to and including this Tribunal must be resource intensive. In those circumstances, maintaining comparative and explanatory data is a first and significant step in determining whether such allegations have merit. The absence of the necessary statistical information makes it extremely

difficult to determine whether Homeswest in fact discriminates against Aboriginal people or whether the perception held by the Aboriginal community is a myth. However, the Tribunal notes that, in this case, Homeswest was criticized in cross-examination for maintaining statistics on evictions based on race. It seems obvious that those representing Aboriginal litigants cannot criticise Homeswest for failing to keep the necessary records which would identify systemic discrimination but then accuse them of discrimination for maintaining comparative data based on race. In the Tribunal's view, if statistical information is to be maintained it is essential to address all of the significant aspects of Homeswest's activities and not simply evictions. In that way, a more complete picture of the operation of Homewest as an organization can be obtained.

207 Finally, it is necessary to consider the effect of the report of the Equal Opportunity Commissioner on Aboriginal participation in the complaints process and the conclusion that there is a perception in the Aboriginal community that Homeswest discriminates against them. Again, the absence of appropriate and detailed statistical and explanatory information precludes the Tribunal from determining the validity of that perception. As indicated in relation to the priority housing report, the Tribunal is in no position to determine whether a statistical disparity can be justified by other factors. The over-representation of Aboriginal people in eviction statistics raises a legitimate concern which requires consideration by relevant agencies but it does not, of itself, evidence discrimination. If the evictions were wholly justified and not a result of discriminatory practices then an over-representation of Aboriginal people in the eviction statistics is not the responsibility of Homeswest.

208 The Tribunal appreciates the difficulties confronting any party attempting to establish the existence of discriminatory practices within an organization. However, the content of the various surveys and reports identified above, taken individually or collectively, are an insufficient basis upon which to conclude that there exists in Homeswest systemic discrimination against Aboriginal people. They cannot therefore provide a basis from which to conclude that Homeswest discriminated against Mrs Penny as alleged in her Points of Claim. In order to determine whether Mrs Penny's claims of discrimination can be substantiated it is necessary to look at the evidence in relation to each allegation.

209 Before turning to address the specific allegations, it is appropriate to make some observations on the evidence of the various witnesses. It is apparent from Mrs Penny's own account of her tenancy history that she had been evicted from at least four Homeswest properties and that quite a

number of her tenancies had been associated with complaints of serious antisocial behaviour, damage to property and outstanding debts. However, it is also apparent that Mrs Penny rejects those complaints and accepts no responsibility for the circumstances which culminated in the series of evictions. She does not accept that there was at any time a need to protect her neighbours by providing her with relatively isolated premises. It is also apparent that Mrs Penny believes that she should be housed upon request without conditions, irrespective of her tenancy history. While Mrs Penny may well hold these views, the Tribunal does not accept that they are reasonable in all the circumstances. Those circumstances include the fact that Mrs Penny was subject to court ordered evictions requiring proof of a breach of the tenancy agreement. It is also apparent that Mrs Penny has an unreasonably held view that any conduct of Homeswest which is not to her satisfaction is unfair and can only be explained by the fact that she is Aboriginal.

210 With respect to the evidence of Mr Mazzella, for the reasons already expressed, the Tribunal considers itself unable to draw from the material presented to it the conclusions reached by Mr Mazzella that Homeswest discriminates against Aboriginal people. That the paucity of supporting evidence and the burden of proof compel such a result does not adversely impact on Mr Mazzella's veracity. The Tribunal does accept his initial premise that there is a link between sub-standard housing and health problems but to do so does not assist in determining the issues before the Tribunal in this matter.

211 As to Homeswest's witnesses, the Tribunal accepts the submissions made on behalf of Mrs Penny that some caution needs to be exercised in accepting as fact the account of witnesses whose evidence is based solely on the records of Homeswest rather than personal recollection. That is particularly so where, as in this case, statements have been made, based on Homeswest records, which have proved to be inaccurate. Further, it is necessarily the case that the Tribunal must look at the whole of the evidence before accepting assertions made by the Homeswest witnesses that their decisions and actions were not racially based. The same principle applies to Mrs Penny's repeated assertions that the only reason for the treatment she received from Homeswest was her Aboriginality.

212 The Tribunal has already in the summary of the evidence commented on various aspects of the evidence of each of the Homeswest witnesses. Both Mr Bowker and Mr Jones gave evidence in a clear and concise manner and there was nothing about their demeanour, nor was there any matter raised in cross-examination, which gave rise to a concern on the

part of the Tribunal as to their credibility. In relation to the decision by Homeswest to conduct a review of Mrs Penny's debt rather than allow an appeal, the Tribunal found Mr Edmonds' evidence to be defensive and contradictory. Whilst the Tribunal is concerned about that aspect of Mr Edmond's evidence it does not consider that this concern is sufficient to taint his evidence as a whole. Much of Mr Edmonds' account of events is amply supported by documentation and the evidence of other witnesses. As to Mr Pynes, notwithstanding the deficiencies in his affidavit, the Tribunal considered Mr Pynes to be a truthful witness who gave an accurate account of his recollections of the Wiseborough Crescent property and his dealings with Mrs Penny.

213 There are three aspects of the evidence of Mr Thomas which warrant consideration in assessing his credibility. The first is the rejection by the Tribunal of the statement in his affidavit that the assertion that Mrs Penny was denied access to an appeal was without foundation. That statement is in conflict with the objective facts. The second is the discrepancy between Mr Thomas's statement in his affidavit that inspections prior to 29 March 2001 found the Wiseborough Crescent property to be structurally sound and with no need for major repairs. That statement was in conflict with the evidence of Mr Pynes as to the cracking brickwork and was, in the Tribunal's view, adequately explained by the absence on the Homeswest file of any reference to damage to the brickwork. The third aspect was the conflict in Mr Thomas's evidence as to whether the neighbours to the Hyland Street property expressed the view that they did not want an Aboriginal family in that property. In relation to the last two aspects, in the Tribunal's view, when the conflicts were pointed out to him, Mr Thomas conceded his error. Taking these factors into account, the overall impression gained by the Tribunal was that Mr Thomas was a credible witness.

The Debt Review Allegation (Paragraph 6)

214 This is an allegation that Mrs Penny was directly discriminated against by Homeswest by its delay in responding to her request for a review of the vacated debt from the Hyland Street property. A particular of the allegation states that, by reason of the delay, Mrs Penny was denied access to the Homeswest appeal mechanism.

215 In her evidence, Mrs Penny said that the delay by Homeswest in responding to her request for a review of the vacated debt made her feel depressed because she did not know how much money she owed and she

thought that constituted unfair treatment because a non-Aboriginal person would have been notified of how much money he or she owed.

216 It is apparent from the facts set out in par 2 hereof that on 10 February 1997 Homeswest advised Mrs Penny of the amount of her vacated debt. Because of difficulties in obtaining the information necessary for an appeal, time within which to appeal did not commence to run until 2 July 1997. Notwithstanding being in possession of the relevant information, a request for an appeal was not made by the TAS on behalf of Mrs Penny until 13 July 1998, some 15 months later. By that time, the request for an appeal was 11 days outside the relevant appeal period and Homeswest was under no obligation to allow either an appeal or a review of the vacated debt.

217 Having decided to conduct a review of the vacated debt, the result of that review was communicated to Mrs Penny in writing on 14 December 1998, approximately 5 months later. The letter contains an apology for the delay in responding and attributes the delay to the fact that the issues raised were complex and wide ranging requiring intensive investigation and resourcing. In their evidence, both Mr Edmonds and Mr Thomas confirmed that the time taken to conduct the review was a result of the extensive and complex nature of the review. The Tribunal considers that the correspondence between the TAS and Homeswest, highlighting as it does various components of the vacated debt and the issues raised with respect to those components, supports the explanation given by Homeswest. In all the circumstances, it has not been established that the delay was unreasonable. Moreover, there is no evidence to suggest that the length of time taken to conduct the review was in any way related to the fact that Mrs Penny is Aboriginal. There was no evidence put before the Tribunal to suggest that Homeswest handles the review of debts incurred by non-Aboriginals in a more timely fashion. Neither do the facts support the assertion that, by reason of the delay, Mrs Penny was denied access to the Homeswest appeal mechanism. Mrs Penny's application for an appeal was out of time. The time taken to conduct the review granted by Homeswest had no impact on the decision not to allow an appeal. That decision had already been made. For these reasons, this part of the claim will be dismissed.

218 Elsewhere in these reasons the Tribunal has addressed its concerns regarding the fact that Homeswest exercised its discretion to allow Mrs Penny a review of her debt but not the appeal requested, and made that decision without consultation with her. The Tribunal considers the way in which that decision was made to be flawed for the reasons already

given. In particular, it is of concern to the Tribunal that the relevant Homeswest officers did not have an adequate understanding of Homeswest's own practices in this area of its operations. However, there was no evidence put before the Tribunal that the exercise of the discretion was based on race and no evidence from which such an inference could be drawn. Further, it has never been contended by Mrs Penny either in the Points of Claim or in her evidence that she was discriminated against by reason of the fact that the debt was reviewed rather than treated as an appeal.

219 In her evidence, Mrs Penny also expressed her concern about the fact that she had never received a response from Homeswest to her request for a "review". She did not consider that Homeswest's letter to the TAS, even though she had been advised of its contents, constituted a response to her. Having observed Mrs Penny give her evidence, it was apparent to the Tribunal that this issue was one of significance to her. However, it was not pleaded as part of her claim and no application was made for it to be treated as a specific allegation of discrimination upon which this Tribunal was obliged to rule. It is only open for the Tribunal to suggest that Homeswest gives consideration to determining whether a party who acts through an agent would prefer to also personally receive communications from Homeswest. At the very least, Mrs Penny has now made her position clear on this issue and should be dealt with accordingly.

The Debt Determination Allegation (Paragraph 7)

220 This is an allegation that Homeswest indirectly discriminated against Mrs Penny in the application of its policies in determining Mrs Penny's debt arising from the Hyland Street property tenancy. It contains five particulars, each of which makes a specific further allegation:

Paragraph 7(a)

221 In this particular it is alleged that, because of Mrs Penny's Aboriginality, Homeswest failed to attend to necessary repairs which led to water wastage and increased water consumption.

222 This allegation was part of Mrs Penny's original complaint to the Equal Opportunity Commission dated 23 September 1996. That complaint was dismissed and Mrs Penny did not exercise her right under s 90(2) of the Act to have her complaint referred to the Tribunal. That part of Mrs Penny's claim is, therefore, not within the jurisdiction of the Tribunal and will be dismissed under s 125(1) of the Act.

223 The Tribunal further notes that Mrs Penny gave no evidence concerning this allegation and the evidence of the Homeswest witnesses was neither tested under cross-examination nor disputed at any stage. In these circumstances, it is difficult to see why the allegation was not withdrawn at the earliest opportunity.

Paragraph 7(b)

224 This particular alleges that Mrs Penny was required to pay full market rent in circumstances where a non-Aboriginal person would not be required to pay full market rent.

225 That Mrs Penny was required to pay full market rent is not in dispute. The Tribunal accepts that the decision resulted from an application of Homeswest's Rent Policy developed so as to accord with the provisions of the Commonwealth State Housing Agreement and monitored by the Auditor General's office. The effect of the relevant provisions of the Rent Policy is that, in the absence of verification of income of all household members, the tenant is not entitled to a rent subsidy and must pay full market rent. The Tribunal finds that at the relevant time there resided in the Hyland Street property other persons whose income should properly have been taken into account in determining whether Mrs Penny remained entitled to the existing rent subsidy. The Tribunal accepts the evidence of Mr Bowker and finds that Mrs Penny was given ample opportunity to provide verification of income for other household members, as required by Homeswest policy. The Tribunal does not accept Mrs Penny's attempts to suggest that she provided the verification or understood that she had provided all necessary information. Further, there was no evidence to suggest that any different decision would have been reached in relation to a non-Aboriginal person. The Tribunal accepts the evidence of the Homeswest witnesses that Mrs Penny's race was not a factor in the decision making process.

226 For these reasons, this part of the claim will be dismissed.

Paragraph 7(c)

227 This particular alleges that Mrs Penny was required to pay full market rent because she failed to supply verification of income for all occupants of the property when Homeswest knew that she was unable to do so and was much less likely to be able to do so than a non-Aboriginal person. The allegation is one of indirect discrimination and the

Complainant is therefore required to establish the four elements set out in paragraph 15 above. It is not in dispute that Mrs Penny was required to comply with a requirement which was that she provide verification of income for other members of her household. It is the balance of the elements of the claim that she was indirectly discriminated against which present difficulties for the Complainant.

228 Mrs Penny is required to establish that she is not able to comply with the requirement and that a higher proportion of non-Aboriginal people are able to comply. Mrs Penny did not give evidence that she was unable to comply with the requirement by reason of the cultural imperatives or other attributes of her race or for any other reason. The thrust of Mrs Penny's evidence was that she understood that the information provided to Mr Maguire was sufficient. There was also evidence from Mr Bowker that Mrs Penny asserted to him that the other residents of the property were only temporary visitors and hence would not supply verification. The Tribunal does not accept the proposition that the residents were mere temporary visitors. The only evidence that Mrs Penny was unable to provide the necessary verification comes from a file note made by Mr Bowker and referred to by him in his evidence. It was to the effect that Mrs Penny said that she had asked her family members for the verification but they refused to provide it. In the course of giving her evidence, the Tribunal had the opportunity to observe Mrs Penny. The Tribunal shares the view of Mr Bowker that, if Mrs Penny had chosen to do so, she could have ensured that her family members provided the verification required.

229 There was no evidence adduced on behalf of the Complainant that Aboriginal people are less likely to be able to comply with the requirement. Indeed, the only evidence before the Tribunal on this issue was entirely to the contrary. Mr Bowker stated in his affidavit that during his period of employment with Homeswest he has managed numerous properties, many of which have been occupied by Aboriginal tenants. On occasions he has required tenants, both Aboriginal and non-Aboriginal, to provide him with a rent subsidy form and verification of income statements in respect of other people living at the property leased to the tenant. He has not found it to be more difficult to obtain those forms and statements from the Aboriginal tenants than from the non-Aboriginal tenants. Nor has it ever come to his attention that Aboriginal tenants have more difficulty than non-Aboriginal tenants in obtaining rental contributions from people living in the property leased to the tenant. Mr Bowker was not cross-examined on this issue. It can be seen that the evidence simply does not support a finding that the requirement is one with which Aboriginal people are less likely to be able to comply.

230 The Tribunal considers that the Complainant has also failed to establish that the requirement was unreasonable in the circumstances. The rent subsidy to which the requirement relates is effectively paid out of public funds. It is entirely proper that those who seek the benefit of such a subsidy should justify their entitlement to it. Neither is the type of verification of income required under the policy difficult to obtain or to provide.

231 For these reasons, this part of the claim will also be dismissed.

Paragraph 7(d)

232 There are two allegations contained in this particular. The first is that in assessing the vacated debt Homeswest failed to apply its policies in as favourable a manner as it would have to a non-Aboriginal person. Alternatively it is alleged that Homeswest imposed conditions with which, because of Mrs Penny's cultural obligations, she was much less likely to be able to comply. It can be seen that the former allegation is one of direct discrimination and the latter an allegation of indirect discrimination.

233 It is the case that the only evidence of Mrs Penny with respect to this issue was her assertion that, in assessing her vacated debt, Homeswest had treated her unfairly because she was an Aboriginal. She was unable to explain the basis of her belief and was resistant to being questioned on the issue.

234 The evidence of Mr Edmonds and other Homeswest witnesses was that at all times Homeswest endeavoured to fairly and correctly apply its policies in determining the vacated debt and Mrs Penny's race played no part in that determination. The fact that some components of the vacated debt were later varied does not, of itself, allow the Tribunal to draw a contrary conclusion. The Tribunal is not satisfied that Homeswest discriminated against Mrs Penny in the application of its policies when determining the vacated debt.

235 In relation to the claim of indirect discrimination, Mrs Penny gave evidence that at the time she commenced the tenancy to which the vacated debt relates, the conditions referred to in par 2(3) above and set out below were imposed on her by Homeswest:

(1) That she or her advocate write to all relevant agencies repeating her earlier directive that her house was no longer available as crisis accommodation for homeless Aboriginal people, and that a copy of

her letter and a list of the agencies to which it was addressed be provided to the Homeswest Independent Appeals Tribunal.

(2) that she assume legal responsibility for the behaviour of all people on the property, both as residents and visitors and use her best endeavours to prevent any nuisance to neighbours, including requesting the assistance of the police.

(3) That she, with the assistance of her advocates, make the older children in her care aware of their responsibility to allow neighbours to quiet enjoyment of their home.

236 It should be noted that these conditions address issues of nuisance or anti-social behaviour and not damage to property. The allegation of indirect discrimination relates to the determination of the vacated debt and hence it is only conditions which have some connection with preventing or minimizing damage to property which would have some relevance to the amount of the debt.

237 The Tribunal does not accept the submission made on behalf of Homeswest that it is only the second of these conditions which could possibly fall within the scope of a condition with which the Complainant was less likely to be able to comply by reason of her cultural and family obligations as an Aboriginal woman. However, the reference in the first condition that Mrs Penny repeat her earlier directive indicates that this condition was one with which she was able to comply and had complied in the past. On that basis, one essential element of a claim of indirect discrimination based on that condition is not met.

238 It is necessary at this point to consider the evidence of Mrs Penny's cultural obligations as an Aboriginal matriarch. Mr Mazzella gave evidence as to the cultural obligations of Aboriginal people to house others. Although he used Mrs Penny as an example he was speaking generally and did not give any direct evidence with respect to her personally. Mr Mazzella stated that, on his observation, there is an understanding within extended Aboriginal families and kinship systems that if a member of the family is homeless then an elder within that family would be obliged to take them in and provide shelter for them. A failure to do so would lead to a feeling of shame for the elder and also for the family member who had been refused shelter. Mr Mazzella acknowledged that the cultural consequences of being a matriarch included an obligation to have respect for and comply with the directions of the matriarch.

239 Mrs Penny explained her cultural obligations to house members of her family. She said she would never turn an Aboriginal person away

from her door if they were a relative. When asked whether there was an obligation on her to take relatives in Mrs Penny said: "Well I like to take – I take them in – well, I can't do anything else. I'm the elder, you know, an Aboriginal elder and I don't like to turn my family away from – if I've got a room in the house for them to lay or stay for the day or night I will take them in. This is my culture."

240 Taken alone, there is in this account support for the conclusion that Mrs Penny is under a cultural obligation to house her relatives. However, it is apparent, even on Mrs Penny's account of her cultural obligations, that there are limitations on the obligation to provide accommodation. In the evidence quoted above Mrs Penny qualifies her obligation by stating "if I've got a room in the house for them to lay or stay". The following exchange also supports the conclusion that the obligation has limits:

> *"And if they turned up on your doorstep you would take then in?---Yes, when I had the three-bedroom but now that I've got the two bedroom. I've only got my grand children there."*

241 Based on this evidence, the Tribunal concludes that there is no cultural imperative on Mrs Penny to house any relative who presents at her door. She has the ability to limit any obligation she may have to house her relatives, according to her circumstances at the relevant time

242 In considering this allegation it is important to keep in mind that neither the second or third condition preclude Mrs Penny from housing her relatives, they simply require her to assume responsibility for the people residing in her home, to use her best endeavours to prevent any nuisance to neighbours and to make the older children in her care aware of their responsibility to allow neighbours quiet enjoyment of their homes. The evidence of Mrs Penny's cultural obligations was not in conflict with requirements of that type. Indeed, at no stage did Mrs Penny suggest that she did not, or could not, comply with the conditions because of her cultural obligations.

243 On behalf of Mrs Penny it was submitted that the need to accommodate her relatives was directly attributable to the actions of Homeswest in evicting her relatives from their homes. In the Tribunal's view, even if it were to accept that proposition, to do so does not assist in the resolution of the allegation. As was observed in ***State Housing Commission v Martin*** (1999) EOC 92-975 at 79,211, there is a distinction to be drawn between overcrowding and complaints of nuisance; the latter is not necessarily a consequence of the former. Similarly, in the context of

a claim for a vacated debt, there is a distinction to be drawn between overcrowding and damage to property.

244 Further, even Mrs Penny acknowledged in cross-examination that it was not unreasonable for Homeswest to require her to be responsible for damage caused by residents of, or lawful visitors to, her house. The Tribunal concurs with that view.

245 For these reasons the Tribunal is not satisfied that Mrs Penny was, by reason of any cultural imperative, unable or less likely than a non-Aboriginal person to comply with the conditions imposed on her.

246 This part of the claim will also be dismissed.

Paragraph 7(e)

247 As with paragraph 7(d), there are two alternative allegations contained in this particular. The first is that Homeswest treated Mrs Penny less favourably in relation to the vacated debt than it would have treated a non-Aboriginal person by failing to take into account Mrs Penny's matriarchal cultural obligations to accommodate and care for a large group of relative. Alternatively, Homeswest imposed conditions with which, because of Mrs Penny's cultural obligations, she was much less likely to be able to comply.

248 In relation to the first alternative, the Tribunal accepts the submission made by counsel for Homeswest that this allegation of direct discrimination is fundamentally flawed in that it is illogical to contend that Homeswest treated Mrs Penny less favourably than a non-Aboriginal person by failing to take into account matriarchal cultural obligations which are said to be peculiar to Aboriginal women. There is in any event no evidence upon which to base a conclusion that, in assessing the vacated debt, Mrs Penny was treated less favourably than a non-Aboriginal tenant.

249 The second alternative can properly be disposed of for the reasons given in relation to the second allegation made in par 7(d).

250 This part of the claim will also be dismissed.

The Re-Housing Delay Allegation (Paragraph 8)

251 This is an allegation that the Respondent directly discriminated against Mrs Penny by the delay in re-housing her after her eviction form the Hyland Street property. It is pleaded in the particulars that Mrs Penny

qualified for priority housing assistance and, therefore, should have been re-housed within eight weeks.

252 Mrs Penny was evicted from the Hyland Street property on 15 November 1996. On 13 March 1998 Mrs Penny was re-housed in the Wiseborough Crescent property. For most of the intervening period she had been living in her granddaughter's Homeswest home. The Tribunal accepts the evidence of the Homeswest witnesses that, in accordance with Homeswest policy, Mrs Penny did not qualify for priority housing assistance.

253 The Tribunal considers that Mrs Penny's assertion that the only reason for her treatment was her Aboriginality is unfounded. Putting to one side the Tribunal's view that there was no obligation on Homeswest to re-house Mrs Penny at all in view of her exceedingly poor tenancy history, there is a wealth of reasonable explanations for the time taken to identify a suitable property.

254 Homeswest's decision to re-house Mrs Penny was conditional on the property being isolated so as to minimize the impact of her tenancy on her neighbours. The Tribunal has no doubt that Homeswest was justified in imposing such a condition in view of Mrs Penny's tenancy history. As Mr Jones observed, throughout her tenancy history, Mrs Penny and her family had demonstrated that they were unable to reside in a suburban environment without disturbing their neighbours on an ongoing basis. The fact that the eviction from the Hyland Street property was based on damage to property does not undermine a conclusion that Mrs Penny's tenancies were marked with anti-social behaviour nor that she should only be re-housed in isolated accommodation.

255 The Tribunal also accepts the evidence of Mr Thomas that, having made the decision to re-house Mrs Penny, instructions were given for a suitable property to be located and those instructions were acted upon. Difficulty arose in finding a property which was both isolated and acceptable to Mrs Penny. In the Tribunal's view the difficulty in finding a property which was suitable to Mrs Penny and to Homeswest adequately explains the time lapse between eviction and being re-housed.

256 It is apparent from the evidence of Mr Thomas, supported to a large extent by the evidence of Mrs Penny herself, and which is accepted by the Tribunal, that Mrs Penny was offered 5 properties which she declined and shown two which Homeswest were unable to purchase because the cost of the properties exceeded valuation. There was a further property which

Homeswest considered purchasing for Mrs Penny but the price was too high. There was no evidence that in the same or similar circumstances, a non-Aboriginal person would have been treated differently or that non-Aboriginal people are housed more promptly.

257 In the Tribunal's view the evidence does not support a conclusion that the time between eviction and re-housing constituted a delay, nor that Mrs Penny was dealt with less favourably than a non-Aboriginal person would have been in the same circumstances. Accordingly, this part of the claim will be dismissed

The Re-Housing Allegation (paragraph 9)

258 The particulars in par 9(a) and par 9(e) of this allegation effectively operate to create two allegations of direct discrimination in relation to the Wiseborough Crescent tenancy.

Paragraph 9(a)

259 The allegation is that Homeswest discriminated against Mrs Penny by requiring a head lease from an Aboriginal corporation as a condition of re-housing her.

260 Mrs Penny's evidence on this issue was that she considered the condition to be unfair. She had difficulty in identifying exactly what was unfair about it. It was apparent to the Tribunal that Mrs Penny simply did not accept that there was any reason why she should not be able to deal directly with Homeswest. This view is consistent with Mrs Penny's refusal to accept that there were any problems with her tenancies attributable to her or her family and her belief that she should be re-housed on request and without any conditions. As stated above, the Tribunal does not consider Mrs Penny's beliefs in this regard to be reasonably based.

261 Mr Thomas and Mr Bowker both gave evidence that the requirement for a head-lease is not a condition imposed only on Aboriginal tenants, although in relation to non-Aboriginal tenants with a similar tenancy history the lessee is usually an organization such as Anglicare or Centrecare. In fact, the development of the agreement with Manguri was an attempt to address criticisms that the existing programme did not properly cater for Aboriginal tenants. There was no evidence to contradict the evidence of Mr Thomas and Mr Bowker that the practice of imposing a condition for a head-lease is applied to both Aboriginal and non-Aboriginal tenants. In fact, when counsel for Mrs Penny was referred

to the evidence of Mr Thomas he conceded that "it appears as if it would have been applied to another person who is non-Aboriginal."

262 The evidence simply does not support this allegation and this part of the claim will be dismissed.

Paragraph 9(e)

263 The allegation is that Homeswest discriminated against Mrs Penny by re-housing her in sub-standard accommodation. The primary impediment to establishing this allegation is that Mrs Penny gave no evidence that the Wiseborough Crescent property was in any way sub-standard when she commenced to occupy it. She simply described it as old and said that Homeswest were doing it up for her daughter. Neither does Homeswest have any record of a complaint being made by Mrs Penny that the property was sub-standard.

264 The Tribunal accepts that it should view the evidence of Homeswest's witnesses on this issue with some caution because of the discrepancies in their evidence which have already been referred to in these Reasons. However, in the absence of any evidence on the issue from Mrs Penny, there is no evidence before the Tribunal other than the documentary evidence and that of the Homeswest officers, in particular that of Mr Pynes, upon which to base a decision on these issues. There is nothing in that evidence, including the presence of the cracks in the front wall, which would allow the Tribunal to conclude that the Wiseborough Crescent property was sub-standard at the time it was provided to Mrs Penny. Even if it is accepted that there were maintenance issues raised by Manguri during the tenancy and repairs carried out by Homeswest to the property, it does not follow that the property was sub-standard. This allegation therefore fails at the first hurdle and it becomes unnecessary to address the issue of whether the decision to provide Mrs Penny with the Wiseborough Crescent property was influenced by Mrs Penny's race. For these reasons this part of the claim should also be dismissed.

265 In accordance with the foregoing reasons in relation to each allegation of discrimination, the complaint against the Respondent will be dismissed.

General Observations

266 The Tribunal wishes to express its concern at the fact that claims proceed to trial before this Tribunal where complainants fail to adduce cogent evidence of each essential requirement of the Act. This claim falls into that category. The Tribunal appreciates that it is often exceedingly difficult to establish discrimination even where it exists but the answer does not lie with proceeding with claims where there is no evidence in support of essential elements of the claim. Many complainants have a firmly held belief that they have been discriminated against. In almost all cases the existence of such a belief, without more, will not suffice to establish a claim in this Tribunal.

267 In cases of direct discrimination it is not enough to establish that the conduct of the Respondent has caused a detriment and that the complainant has one of the characteristics protected from discrimination by the Act. It is also necessary to prove, either by direct evidence or evidence from which an inference can properly be drawn, that the complainant was treated less favourably than a person who does not share that characteristic and that the less favourable treatment was because of that characteristic and not for some other reason.

268 In cases of indirect discrimination it is essential for the complainant to establish, by direct evidence or evidence from which an inference can properly be drawn, that a substantially higher proportion of people who do not share the relevant characteristic would be able to comply with the conditions of which complaint is made and with which the complainant cannot comply.

269 It is only where such evidence has been identified and can be presented to the Tribunal that the decision should be made to proceed with the claim.