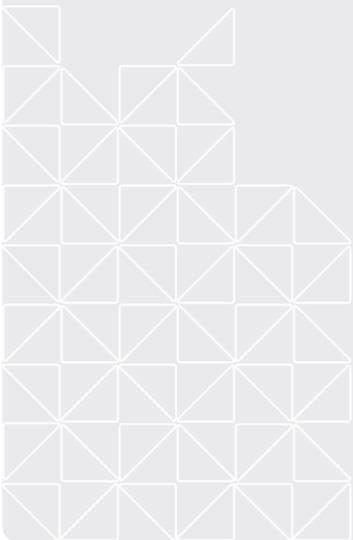


There's No Place Like Home: Submission on the Dispute Resolution Issues Paper

July 2016



About Justice Connect Homeless Law

Justice Connect Homeless Law (**Homeless Law**) is a specialist legal service for people experiencing or at risk of homelessness.

Homeless Law staff work closely with pro bono lawyers to provide legal advice and representation to over 400 people experiencing or at risk of homelessness each year. Our services are outreach based and client centred, and our two staff social workers allow us to respond to clients' legal and non-legal needs.

In 2014–15 Homeless Law prevented the eviction of 139 clients and their families through legal representation and social work support. Homeless Law also runs a specialist women's program, the Women's Homelessness Prevention Project (**WHPP**). After two years of operation, the WHPP provided 102 women with 153 children in their care with a combination of legal representation and social work support. Of these 102 women, 88% have experienced family violence in the past 10 years. Of the completed matters, 83% resulted in women maintaining safe and secure housing or resolving a tenancy legal issue (eg a housing debt) that was a barrier to accessing housing.

In the 12 months from August 2014, Homeless Law provided legal assistance to 96 prisoners through the Debt and Tenancy Legal Help for Prisoners Project. Through the provision of legal representation, Homeless Law has assisted 25 Victorian prisoners to avoid eviction. Through this work we have built a stronger, better informed understanding of the common reasons that prisoners lose their tenancies while in prison and the barriers to finding housing upon release.

Homeless Law uses the evidence from our direct casework to inform systemic change aimed at preventing homelessness and reducing the negative impact of the law on people who are homeless or at risk of homelessness.

Acknowledgements

In contributing to the Residential Tenancies Act Review, Homeless Law conducted detailed interviews with five people who had faced eviction and, in some cases, been evicted. We sincerely thank these people for their time in sharing their stories and insights with us. Their names and identifying details have been changed.

We would also like to thank Simone Kaser, Chadwick Wong, Yan-Lin Lee, Nicholas Allingham, Tom Bland, Natasha Dixon, Patrick Easton, Kanana Fujimori, Alex Lee, Rachel Macleod, Stuart Packham and Lisette Stevens from our partner firm, Allens, for their detailed comparative research, which helped inform our recommendations.

Finally, thank you to our pro bono lawyers whose casework continues to generate positive outcomes for our clients and to inform our recommendations for a safer, fairer residential tenancies system.

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1. Executive summary and key recommendations

Homeless Law welcomes the opportunity to contribute to the Victorian Government's Residential Tenancies Act Review (**Review**) and to respond to the Dispute Resolution Issues Paper (**Issues Paper**). This submission is the fifth of Homeless Law's submissions to the Review.

An accessible, effective and fair dispute resolution system in residential tenancy matters is vital to ensure secure, safe and sustainable housing for all Victorians. As the Issues Paper recognises, there can be imbalances in bargaining power between landlords and tenants which gives rise to particular difficulties for vulnerable tenants in resolving tenancy disputes. This inequality can deter tenants from exercising their rights. Given the long term nature of the relationship between landlords and tenants and the particular vulnerabilities tenants face in the current housing market, dispute resolution mechanisms need to provide a framework for resolving disputes as early as possible and ensuring that tenants are adequately protected.

Through Homeless Law's casework, we see the high volume of tenancy disputes that can be resolved prior to a Victorian Civil and Administrative Tribunal (**VCAT**) hearing. However the existing mechanisms do not provide a framework for early intervention and resolution, leading to unnecessary evictions and an overburdening of the VCAT system. Vulnerable tenants are often left without appropriate access to information and advocacy services that would provide support for early resolution, and the existing legal framework does not adequately encourage landlords to resolve matters prior to applying to VCAT.

For matters that do proceed to VCAT, there are ongoing issues around accessibility for tenants, lack of accountability in decision-making and difficulties in enforcing VCAT orders. By providing more robust accountability measures such as an internal appeals mechanism, coupled with more effective and accessible enforcement processes, there is significant potential to reduce unnecessary evictions into homelessness and provide better access to justice for vulnerable Victorians.

Reform of the existing dispute resolution mechanisms is an essential component in creating a more equitable, secure and sustainable rental market for tenants. Informed by the evidence-base gathered from running 304 tenancy matters in 2014-15, including 219 eviction matters, as well as the insights of five consumers who have experienced barriers to affordable housing, Homeless Law makes the following eight recommendations for changes that will provide for a fairer and more effective dispute resolution system in residential tenancy matters.

8 RECOMMENDATIONS FOR A FAIRER AND MORE EFFECTIVE DISPUTE RESOLUTION SYSTEM

A framework for early dispute resolution

1. **Amend the existing notice to vacate and VCAT notice of hearing to better engage with tenants and encourage early resolution of tenancy disputes.**
 - a. Amend the current prescribed form for notices to vacate to include referral information for relevant advocacy and legal services that may be able to assist tenants.
 - b. Change the information provided in VCAT notices of hearing for Residential Tenancy List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.
2. **Provide better access and resourcing to advocacy services for vulnerable tenants.** Information and advocacy services for tenants encourage early intervention in tenancy disputes, particularly for vulnerable and disadvantaged tenants.
 - a. Resource specialised information and advocacy services to adequately meet the needs of tenants who are unable to advocate for themselves.
3. **Create a framework for early dispute resolution of tenancy matters.** A focus on early resolution of disputes would reduce the burden on VCAT and has significant potential to achieve better outcomes for both tenants and landlords.
 - a. Landlords should be required to attempt to negotiate:
 - i. A repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears through a mechanism such as a 'pre rental arrears application checklist' for landlords; and
 - ii. Resolution of compliance-based disputes prior to making an application for a compliance order or a possession order on the basis of non-compliance.
 - b. Amend breach of duty notices to include referral information for relevant advocacy and legal services that may be able to assist tenants.
 - c. Amend the *Residential Tenancies Act 1997* (Vic) (**RTA**) to provide that VCAT can adjourn compliance order/possession order matters in certain circumstances where the landlord has failed to make reasonable attempts to negotiate where it would be appropriate to do so.

An expanded role for Consumer Affairs Victoria

4. **Expand Consumer Affairs Victoria's role in the valuation of goods left behind.** Homeless Law supports an expansion of Consumer Affairs Victoria's (**CAV**) inspection activities to include greater engagement with tenants, in particular when valuing goods left behind.
 - a. Landlords seeking CAV valuation of goods left behind should be obliged to give CAV the most up-to-date contact details for the respective tenant or tenants.
 - b. CAV inspectors must attempt to notify a tenant when an application for inspection is received, as well as when a report has been provided to the landlord, a copy of which should be given to the tenant.
 - c. Landlords must provide previous tenants with additional reasonable time (up to a maximum period of seven days) for removal of goods from the premises where a CAV inspector has recommended that additional time be provided. Landlords must also attempt to contact a tenant where directed by the CAV inspectors.
 - d. CAV should train staff to facilitate referrals for tenants to local homelessness access points that can assist with removal and storage of belongings. These access points should receive additional funding to meet this demand.

Expanding VCAT's role in dispute resolution

5. **Amend the VCAT notice of hearing to better engage with tenants and improve attendance rates at VCAT hearings.**
 - a. Change the physical form of the VCAT notice of hearing to ensure the information provided is reaching as many tenants as possible.
 - b. Change the information provided in VCAT notices of hearing for Residential Tenancy List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.
6. **Provide better access to alternative dispute resolution processes prior to a VCAT hearing for residential tenancies matters with appropriate safeguards.** Formal alternative dispute resolution (ADR) processes should be expanded in Residential Tenancies matters subject to the following safeguards:
 - there should be clear communication to both parties regarding the ADR process;
 - ADR should be an opt-in process;
 - ADR should be conducted by accredited mediators;
 - parties should be advised as to the effect of any agreement; and
 - parties should have access to a hearing on the same day if the matter cannot be resolved through mediation.
7. **Allow internal appeal of residential tenancies decisions.** Creating an internal appeal mechanism for decisions made in the Residential Tenancies List would create an accessible mechanism of oversight, improve the consistency, predictability and quality of decision-making and strengthen protections for tenants against evictions that should be avoided.
8. **Provide better enforcement options for non-monetary orders.**
 - a. Provide clear direction Victoria Police regarding their power to enforce a non-monetary VCAT order under s.480 of the RTA when sending out VCAT orders.
 - b. Provide training to Victoria Police regarding their powers to enforce VCAT orders under the Act.
 - c. Allow parties to renew proceedings where a VCAT non-monetary order has not been complied with.
 - d. Amend s.122 of the VCAT Act to provide that non-monetary orders are taken to have been filed in the Magistrates Court for enforcement, without the requirement for a certificate from VCAT that the matter is appropriate for filing.

2. Access to information and advocacy services

The tenant-landlord relationship is relatively long term compared to other interactions between providers of services and clients. This reliance on long-term housing, especially for low income tenants, creates significant inequality in the relationship between the tenant and the landlord.

The Issues Paper recognises that there can be imbalances in the bargaining power between the parties, creating challenges for vulnerable and disadvantaged tenants. Homeless Law often sees this power imbalance and inequality at play, especially in the current environment where low income tenants have extremely limited options for securing alternative housing.

In the context of a highly competitive and unaffordable housing market, including the costs and personal disruption of relocation, the risk of eviction can deter tenants from exercising their rights. Similarly, vulnerable tenants can be reluctant to seek out services, or are often too overwhelmed to navigate the maze of services to find ones that can assist them to understand and assert their rights.

This part identifies two reforms that would effectively provide tools for vulnerable tenants to manage this inequality through:

- Recognising the importance of advocacy services in early resolution of tenancy disputes through provision of information and advocacy to tenants; and
- Requiring landlords to negotiate with tenants prior to seeking a VCAT order.

2.1 The importance of advocacy services in early resolution of tenancy disputes

Dispute resolution in the context of the issues paper encompasses 'tools for independent resolution between parties such as information and advice, independent third party assistance, and court and tribunal hearings'.

In this part, we will be focusing solely on information and advice services that currently exist to support vulnerable tenants, looking at the effectiveness of these mechanisms in relation to Homeless Law's clients and how mechanisms can be improved to benefit vulnerable tenants.

Information and advice services that currently exist provide a range of levels of support and services to tenants, from providing information over the telephone and email, to advocating on behalf of vulnerable or hard to engage tenants. In an effective dispute resolution system, tenants should be able to access information and support depending on their needs, the time frame they need to act in, and available at the point in the dispute that the tenant has decided to engage.

2.1.1 Improved information provision to tenants

As previously documented in our original submission, *Laying the Groundwork*,¹ notices provided to tenant represent an important opportunity to provide information to tenants regarding their rights and referral for legal advice, representation and advocacy.

Currently, the lack of any referral information for tenants on the notice to vacate represents a missed opportunity to encourage tenants to engage with their rights and attempt early resolution of their tenancy dispute. Currently, the prescribed form of a notice to vacate set out in the regulations does not require any referral information to be included with a notice to vacate, other than a notation that a tenant can contact VCAT if they wish to challenge the validity of a notice to vacate.² In practice, most notices to vacate that Homeless Law sees do not contain this notation, and instead refer tenants to Consumer Affairs Victoria (**CAV**) for assistance. This is true of notices to vacate issued by private landlords, real estate agents, and the Director of Housing in relation to public housing properties. While representatives of both VCAT and CAV may be able to provide initial assistance to tenants who have received a notice to vacate, neither of these organisations will be able to provide legal advice or ongoing casework to tenants, and would need to refer tenants elsewhere for that type of assistance. In Homeless Law's view, the prescribed form of a notice to vacate rented premises could easily be amended so that contact details and websites of relevant legal services (eg Victoria Legal Aid, Tenants Union Victoria, Homeless Law and local community legal centres) are instead included on these notices.

These changes would increase tenants' ability to understand their options and to obtain legal advice and representation at the earliest stage in the eviction process. This has significant potential to increase the number of negotiated outcomes and potentially avoid the need for a VCAT hearing. It would also reduce the need for urgent review applications to be lodged where tenants have missed VCAT hearings and are seeking legal advice in the final stages of the eviction process when they are at imminent risk of forced removal from the rented premises.

Likewise, the information contained on VCAT's notice of hearing does little to assist people to understand their rights in relation to an upcoming VCAT hearing, and where they might seek legal assistance in relation to it. As outlined above in relation to the current prescribed form for a notice to vacate, inclusion of this information would be straightforward and could lead to a significant increase in tenant attendance, as well as a reduction in matters proceeding to VCAT, and an increase in matters that do proceed to hearing being resolved by consent.

Recommendation 1: Amend the existing notice to vacate and VCAT notice of hearing to better engage with tenants and encourage early resolution of tenancy disputes

- Amend the current prescribed form for notices to vacate to include referral information for relevant advocacy and legal services that may be able to assist tenants.
- Change the information provided in VCAT notices of hearing for Residential Tenancy List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.

2.1.2 Increasing access to advocacy services for vulnerable tenants

While all of the services on the information and advice spectrum are necessary, the role advocacy services play in dispute resolution is essential for vulnerable clients due to the inequality between tenants and landlords.

Through Homeless Law's work as tenant advocates, we see that disadvantaged tenants are less likely to actively engage with existing services such as CAV's independent third-party assistance (Frontline Resolution and

¹ See Justice Connect Homeless Law's submission, *Laying the Groundwork*, August 2015.

² Residential Tenancies Regulations schedule 1 sets out form of the notice to vacate.

conciliation service) and the Dispute Settlement Centre Victoria (**DSCV**). There are many social, health or financial factors that prevent vulnerable tenants from engaging with the dispute resolution process, whether it be speaking to the landlord, attending negotiation meetings, mediation or attending VCAT hearings. We note in particular that the CAV and DSCV services are clearly underutilised by tenants. For vulnerable tenants, such services can be difficult to access due to the serious power imbalances in the tenant/landlord relationship, the fact that tenants are not aware of their rights and that tenants are reluctant to assert rights where it may leave them at risk of eviction. Furthermore, such services are non-binding and voluntary, which means that a landlord may not be willing to engage in the process and may also not comply with the terms of any agreement reached, leaving tenants in a precarious position. This is where the role of advocacy services is imperative for tenants.

Advocacy services are unique to other information and advice services because they can provide ongoing advice and advocacy for clients who have difficulties accessing or engaging with other dispute resolution services, as well as ensuring that tenants are informed regarding their legal rights.

Advocacy services such as the Tenants Advice and Advocacy Program (**TAAP**), Victoria Legal Aid, the Tenants Union of Victoria and Justice Connect Homeless Law are vital to supporting vulnerable tenants to be an active part of their housing issue, whether through negotiating on behalf of the tenant, attending mediation with the tenant, or providing support at VCAT hearings. However, TAAP and other similar advocacy services are limited in reach due to high demand, and lack of adequate funding to assist all the tenants who need access to advocacy and casework support.

Such specialised advocacy services are crucial to levelling out the inequality between landlords and tenants, even prior to attending a VCAT hearing. We often see that our clients are intimidated at the prospect of negotiating with the landlord without having an advocate who can strongly protect the client's interests during discussions with the landlord. It is important to resource these services so that vulnerable tenants can be provided with a representative who can advocate on their behalf in mediation or other dispute resolution forums and promote early resolution of tenancy disputes.

Similarly, in our experience, landlords are often unwilling to enter into negotiations with the tenant or the relationship between the landlord and tenant is so strained that neither party to a dispute can enter into negotiations with a clear vision or adequate tools for resolution. In these situations, access to a tenant advocate or legal service is beneficial for both the tenant and landlord, as it allows for a far greater chance of negotiated resolution and avoids the need for any VCAT proceedings.

Recommendation 2: Provide better access and resourcing to advocacy services for vulnerable tenants

Information and advocacy services for tenants encourage early intervention in tenancy disputes, particularly for vulnerable and disadvantaged tenants.

Resource specialised information and advocacy services to adequately meet the needs of tenants who are unable to advocate for themselves.

2.2 Creating a framework for early dispute resolution: reducing reliance on VCAT and generating negotiated outcomes

In the current system for dealing with residential tenancies disputes, there is no requirement for negotiation prior to an application being made at VCAT. However in many circumstances, creating a framework for early negotiation and dispute resolution has the potential to resolve matters prior to any VCAT proceedings. The benefits of early dispute resolution are articulated by Zac, a client who was facing eviction for breach of a compliance order:

I was given the option of doing mediation [by the landlord] with the other tenant, which I did and ... it was an amicable meeting. We were both present with case managers and the people at the actual mediation made sure that both parties were given fair chance to get their points across. It was done

really respectfully. I think we both sort of saw things from a different point of view ... For the time being we ended on a handshake and everything has gone back to pleasant.

Compliance proceedings are a key area in which tenants, landlords and VCAT could benefit from mediation and its potential to resolve matters to the satisfaction of both parties before escalation and without the need for a VCAT hearing.

Homeless Law also identifies rental arrears matters as an area in which mediation has significant potential to reduce unnecessary reliance on VCAT and to improve outcomes for both landlords and tenants. Of the 62 clients Homeless Law has represented through the WHPP last year, 42 women (68%) were facing eviction due to rent arrears. At the 12 month mark, 33 of these 42 matters had finalised, with 76% of women able to maintain their tenancy through the negotiation of payment plans, including lump sum payments from Homeless Law's brokerage fund. Of this group, however, all of the women were still required to attend a VCAT hearing prior to their matter being finalised. These figures indicate that landlords are often too quick to resort to VCAT to resolve disputes over rent arrears, rather than negotiating with tenants and their representatives before commencing proceedings. This reliance on the Tribunal places an unnecessary resource burden on VCAT, in circumstances where the parties are able to resolve the matter to their mutual satisfaction at an earlier point.

2.2.1 Requirement for landlords to negotiate with tenants prior to applying to VCAT

A framework for mandatory dispute resolution prior to seeking to evict a tenant is a tool that has been used in other jurisdictions, such as Scotland, to encourage early resolution of a tenancy dispute outside of the court or tribunal hearing.

The Scottish model³ shows that there are alternative tools that can be used to avoid matters between tenants and landlords escalating, and encourage voluntary dispute resolution. This model puts the onus on the landlord to engage in negotiations at first instance to resolve the dispute with a tenant, which is a proactive step that we rarely see landlords taking during our work with vulnerable clients.

The Scottish Model: rental arrears 'checklist'

Scotland is an example of a jurisdiction with a demonstrated commitment to preventing homelessness, including through its residential tenancy laws. Particularly relevant to this issues paper, the Scottish Government amended the *Housing (Scotland) Act 2001* to insert a new section containing a list of 'pre-action requirements for rental arrears'.⁴

Before a landlord serves a tenant in social housing with a notice that the landlord is considering court action to recover possession where the tenant is in arrears, a landlord must comply with the following pre-action requirements:

- give clear information about the tenancy agreement and the unpaid rent or other financial obligations;
- make reasonable efforts to give help and advice on eligibility for housing benefits and other types of financial assistance;
- give information about sources of help and advice with the management of debt;
- make reasonable efforts to agree with the tenant a reasonable plan for future payments;
- consider the likely result of any application for housing benefits that has not yet been decided;
- consider other steps the tenant is taking which are likely to result in payment within a reasonable time;
- consider whether the tenant is complying with the terms of an agreed plan for future payments; and
- encourage the tenant to contact their local authority (where the local authority is not the landlord).⁵

On a practical level, these pre-action requirements are reflected in a 'checklist' that the landlord must provide to the tenant.⁶ When proceedings are commenced, the landlord must confirm to the court that the pre-action

³ See Homeless Law, *There's no place like home: Submission to the Residential Tenancies Act Review* (August 2015), 45-46, for more information on the Scottish Model.

⁴ Scottish Government, *Housing (Scotland) Act 2001 and 2010: Guidance for Social Landlords on Pre-Action Requirements and Seeking Repossession of Social Housing* (June 2012) 3 (**Guidance on Pre-Action Requirements**).

⁵ *Housing (Scotland) Act 2001* s 14A; Guidance on Pre-Action Requirements, above n 4, 2.

⁶ Guidance on Pre-Action Requirements, above n 4, 19, Annex C.

requirements have been met. The pre-action requirements do not replace the court's consideration of whether it is 'reasonable' to make an order for possession.⁷

According to a report on evictions by social landlords in Scotland, in 2010, following the implementation of the pre-action requirements for rental arrears matters, evictions had fallen by 33% and court orders for possession had fallen by 20%.⁸ Implementing a similar framework would encourage early resolution of rental arrears disputes without resorting to VCAT.

2.2.2 Creating a framework for early resolution of behavioural disputes

Homeless Law provides advice and representation to clients who often, due to their personal, social, and/or health circumstances, have behavioural issues which have become an issue at some point during their tenancies and places their tenancy at risk.

The RTA has a mechanism that allows landlords to seek a remedy for behavioural issues by issuing a breach of duty notice, and seeking a compliance order from VCAT if the breach is not remedied by the tenant.⁹ Under section 248 of the RTA, the landlord may then give the tenant a notice to vacate if the tenant fails to comply with a compliance order and, if the tenant fails to vacate, the landlord may apply to VCAT for a possession order.¹⁰ VCAT *must* make the order if it is satisfied that the landlord was entitled to give the notice to vacate.¹¹ VCAT *must not* make an order if it is satisfied that:

- The failure to comply with the order was trivial or has been remedied as far as possible; and
- There will not be any further breach of duty; and
- The breach of duty is not a recurrence of a previous breach of duty.¹²

In Homeless Law's experience, compliance orders are commonly used by landlords to regulate tenant behaviour by requiring them to refrain from breaching one of the following duty provisions:

- A tenant must not cause nuisance or interference;¹³ or
- A tenant must keep rented premises clean.¹⁴

Homeless Law sees that the use of compliance orders under the current legislation places a significant burden on tenants, because of the often indefinite risk of eviction once a compliance order is made. This is particularly the case for tenants who are more likely to be alleged to have breached their duties, including tenants: living in close proximity to neighbours, with children, experiencing family violence, or dealing with mental health or substance dependence issues. In addition to being more likely to be the subject of a compliance order, these tenants are also at greater risk of homelessness in the event of eviction.

The two key features of the compliance process under the current legislation which place tenants at risk are:

- There is no requirement for VCAT to specify a timeframe on a compliance order, or to state that it lapses after a period of compliance. Tenants can be indefinitely subject to these orders, which can place tenants at perpetual and ongoing risk of eviction and reduce their stability and security in their homes; and
- Compliance orders are a stepping stone in the eviction process. When making a decision to evict a tenant based on breach of a compliance order, VCAT has limited discretion to consider the tenant's circumstances and vulnerabilities, and no discretion to consider whether the eviction is a reasonable option and justified given the circumstances of the breach.

Currently there are no formal steps that landlords or tenants are required to take to resolve or mediate any issues that have led to compliance proceedings, despite there often being the possibility of a negotiated outcome without recourse to VCAT. This means that often, the tenant will not have had any opportunity to discuss the

⁷ Lynne Kosky, Member for Altona, *Hansard*, Residential Tenancies Bill Second Reading Speech (18 November 1997) 1180.

⁸ See Chris Povey, *Investigating Tenancy Sustainment Programs and Approaches in relation to Clients at Risk of Homelessness* (The Winston Churchill Memorial Trust of Australia) (September 2011), 34, citing Shelter, *Research Report: Evictions by Social Landlords in Scotland 2009–10* (December 2010) 8.

⁹ *Residential Tenancies Act 1997* (Vic) ss 208 and 210.

¹⁰ *Residential Tenancies Act 1997* (Vic) s 322.

¹¹ *Residential Tenancies Act 1997* (Vic) s 330.

¹² *Residential Tenancies Act 1997* (Vic) s 332(1).

¹³ *Residential Tenancies Act 1997* (Vic) s 60.

¹⁴ *Residential Tenancies Act 1997* (Vic) s 63.

behaviour or concerns which may have led to the complaints, breach notices, and subsequent compliance order proceedings. The process at VCAT can be daunting for tenants, particularly where they have not had an opportunity to discuss the circumstances and context which lead to the breach allegations. Given that the consequences of compliance proceedings can lead to eviction of a vulnerable tenant, the availability of early dispute resolution mechanisms is vital.

Hoarding, mental health and imminent eviction for breach of compliance order

Jessica contacted Homeless Law and instructed that her landlord, a community housing provider, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. Jessica's landlord was concerned about the condition of the premises, and in particular, the accumulation and cluttering of personal items at the property which had become an issue for several neighbours. Jessica was being evicted for breaching a compliance order.

Jessica had previously told her landlord that clutter was a symptom of her mental illness and that she was continuing to see medical professionals to assist with this. Jessica instructed that her previous housing manager was aware of her mental health issues and had not sought to evict her as a result of the clutter. Her new housing manager, however, had decided to take legal action against Jessica for breach of a compliance order. Without local family supports or other long-term accommodation options, Jessica was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.

Homeless Law assisted Jessica by negotiating with her landlord not to purchase a warrant to remove her from the property. Homeless Law's negotiation encouraged the social housing provider to explore other options that might help to address their concerns. Homeless Law asserted that, as a provider of low-cost housing to vulnerable tenants on behalf of the government, the community housing provider was a functional public authority under the Charter. Under section 38 of the Charter, the housing provider was required to give proper consideration to Jessica's Charter rights, particularly the right to privacy, and to act compatibly with those rights.

As a result of the negotiations, a detailed agreement was entered into between Jessica and her landlord. The agreement allows Jessica to remain in the premises provided that she continues to engage with relevant support services, and to make efforts to address her landlord's concerns in relation to the premises.

Jessica has kept her housing and this stability has allowed her to continue engaging with relevant support workers to improve her health and address the clutter that had accumulated at her property.

In this case, there was no attempt at negotiation with the tenant prior to an application for possession being sought at VCAT. It was only through the involvement and advocacy of Homeless Law that a negotiated outcome was possible, however it would clearly have been preferable for such a negotiated outcome to take place prior to any VCAT proceedings, saving both the cost, time and stress for both tenant and landlord in attending VCAT.

There are a number of changes that would encourage early dispute resolution in compliance matters.

Firstly, breach of duty notices and notices to vacate for breach of compliance should include a referral to an advocacy service for tenants. This enables vulnerable tenants to access appropriate advocacy services to assist in the early resolution of behavioural disputes with the landlord, and any other parties involved, prior to any VCAT proceedings.

Secondly, the RTA should be amended to directly stipulate that VCAT can adjourn compliance order/possession order matters in certain circumstances where the landlord has failed to make reasonable attempts to negotiate where it would be appropriate to do so. This provision, similar to the discretionary section for possession order based on rental arrears,¹⁵ would encourage early resolution of compliance matters prior to a VCAT application, as

¹⁵ *Residential Tenancies Act 1997 (Vic)* s 331.

well as ensuring that if a matter proceeds to VCAT, it can be still be referred for mediation where it would be appropriate to do so.

Finally, as detailed in our first submission to the review, there is no overarching requirement in the RTA that a landlord's eviction of a tenant must be reasonable in the circumstances. In Homeless Law's view, this is an area where the legislation could be improved to give VCAT greater powers to prevent evictions where the Tribunal cannot be satisfied that the eviction is reasonable given the circumstances and background of the matter. This would also encourage landlords to attempt to negotiate with tenants prior to making an application to VCAT.

Recommendation 3: Create a framework for early dispute resolution of tenancy matters

A focus on early resolution of disputes would reduce the burden on VCAT and has significant potential to achieve better outcomes for both tenants and landlords.

3.1 Landlords should be required to attempt to negotiate:

- A repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears through a mechanism such as a 'pre rental arrears application checklist' for landlords; and.
- Resolution of compliance-based disputes prior to making an application for a compliance order or a possession order on the basis of non-compliance.

3.2 Amend breach of duty notices to include referral information for relevant advocacy and legal services that may be able to assist tenants.

3.3 Amend the RTA to provide that VCAT can adjourn compliance order/possession order matters in certain circumstances where the landlord has failed to make reasonable attempts to negotiate where it would be appropriate to do so.

3. Consumer Affairs Victoria inspections: goods left behind

Under the current legal framework, once a tenancy agreement has terminated a landlord is required to store any documents left behind for up to 90 days, and any goods of monetary value for up to 28 days, provided that their sale value at auction exceeds the costs of removal and storage for that period.¹⁶

CAV inspectors play a crucial role within this framework, as landlords are entitled to apply for a CAV inspector to attend the premises to assess the value of any goods left behind and provide an opinion as to whether they should be placed in storage or disposed of.¹⁷ Whilst landlords are not legally required to arrange a CAV inspection before disposing of goods left behind, in Homeless Law's experience they frequently do, with CAV reporting the provision of 3,885 goods left behind reports in 2014-2015.¹⁸ Under section 395 of the RTA, landlords are then able to rely on these reports in deciding whether to dispose of goods rather than store them. As it stands, the valuation function of CAV currently acts more as a shield for landlords to enable them to deal with tenants goods without risking a subsequent compensation claim rather than protecting the tenants' property rights.

3.1 Increasing CAV's role in recovering goods left behind

In a number of cases Homeless Law has assisted clients who were eager to retake possession of their belongings. This also saves the landlord and agent the effort and expense of arranging a CAV report and storage or disposal of the goods. However, the existing legal framework does not compel or encourage either CAV or a landlord to explore this outcome. Instead, the tenant is responsible for attempting to negotiate with landlords in these situations, which is often difficult where the relationship has broken down or where they are unaware a valuation is being conducted. The case study below illustrates how the current approach misses opportunities to better serve landlords and tenants:

Valuation neglects a mutually beneficial option

Diane is a single mother of two daughters, both of whom were living with her in an Office of Housing property in Melbourne's eastern suburbs. Diane lost her property due to rental arrears when she was incarcerated. While she was in prison, the Office of Housing changed the locks at her property, which left both her daughters homeless, and requested a CAV report which found that the goods could be disposed of. Diane and her daughters were prevented from removing personal belongings after the locks were changed, and were never contacted by CAV or the Office of Housing to arrange a time to collect property. Diane sought assistance from Homeless Law, who were able to put her daughters in touch with the relevant employees at the Office of Housing. The Office of Housing then allowed the daughters to attend the property and remove the goods as it saved them time, effort, expense and the risk of liability for improperly disposing of property.

In Diane's case and many others, both the tenant and the landlord wanted the same outcome: to have the goods removed from the property at a minimal cost to the landlord and agent, without the risk of valuable goods and documents being incorrectly disposed of. However, this outcome was only made possible after Diane engaged with advocacy services, and may not be an option with private rental properties where landlords normally act far more swiftly to re-let vacant premises following termination of a tenancy agreement.

Homeless Law has helped a number of clients such as Diane who have needed advice to understand landlords' obligations with respect to goods left behind, and CAV's role in performing valuations. Often these clients require help from Homeless Law to negotiate a better outcome, including arranging for goods to be removed and stored rather than disposed of. In particular, WHPP has assisted 8 clients since June 2014 who required brokerage

¹⁶ Part 9, *Residential Tenancies Act 1997* (Vic).

¹⁷ Section 385, *Residential Tenancies Act 1997* (Vic).

¹⁸ Consumer Affairs Victoria, *Report on Operations 2014-2015* (2015).

assistance from WHPP with a combined total of \$5,223.67 to help with removal and storage costs to prevent disposal of their belongings. These clients were vulnerable and, in some cases, victims of family violence fleeing premises for their own safety. The prospect of losing an entire household's worth of belongings was financially and emotionally devastating for them.

Many of our clients are eager to retain and store their property and minimize the burden on the landlord, but find it difficult to participate in the process. Vulnerable clients such as women fleeing family violence or those experiencing mental illness, financial stress and homelessness are often not able to prioritise removal and storage of goods above other needs. The following case study illustrates the difficulties such clients can face:

Victim of family violence loses goods despite efforts to relocate them

Linda had recently fled a violent ex-partner to live in private rental accommodation with her two children. She received a 120-day 'no reason' notice to vacate, was unable to find alternative housing, and was removed by police. While living in crisis accommodation, a CAV inspector contacted her to give a day's notice that her goods would be valued. She was subsequently told that the goods were evaluated as being of no value.

Linda was devastated and asked the CAV worker and Homeless Law to get her more time from the landlord. Despite Homeless Law offering to arrange a removalist the next day, the landlord instead arranged for immediate removal of the goods. Through the WHPP, Linda was able to recover some of the belongings that had been taken to a local Salvation Army depot, and place these in storage. One month later she obtained a new private rental property with financial assistance from the WHPP, and was able to move the stored items into her new premises.

Notably, the CAV inspector in Linda's case was not legally required to notify her of the upcoming inspection, or that her goods had been deemed suitable for disposal, but the fact that he did meant some of her goods were able to be retrieved. If CAV inspectors were required to notify tenants of upcoming inspections sooner, and were empowered to negotiate additional reasonable time from landlords to arrange removal and storage of goods, many women in Linda's situation could avoid having to start from scratch each time an episode of homelessness occurred. This would also save many landlords significant removal and disposal costs that they may have difficulty recovering from a tenant.

CAV inspectors could also engage with tenants after an inspection if the goods are deemed of insufficient value to be stored. Notifying tenants of the outcome of the valuation would not only provide greater transparency and give tenants crucial information about their belongings, it would also provide an opportunity for goods to be picked up in a short window if they would otherwise be disposed of.

In Homeless Law's experience, landlords who request CAV valuations typically wait around seven days for the valuation, so an opportunity for tenants to retrieve belongings before the valuation would not cause any delay. Further, after the valuation landlords must then arrange for disposal or storage, which gives rise to another potential window for tenants to retrieve goods without disadvantaging the landlord. Where tenants retrieve some or all of their belongings in either of these time periods, the landlord is saved the expense of disposing of or storing those goods, and then claiming these costs from a tenant's bond.

Currently, the CAV inspection process is missing a valuable opportunity to provide a more pro-active role in dealing with goods left behind. Creating a positive obligation on CAV to make contact and arrange opportunities to remove belongings not only ensure tenants are not unnecessarily losing valuable personal possessions, but would also ensure landlords are not incurring unnecessary expenses in disposing of goods left behind.

Recommendation 4: Expand CAV's role in the valuation of goods left behind

Homeless Law supports an expansion of CAV's inspection activities to include greater engagement with tenants, in particular when valuing goods left behind.

- Landlords seeking CAV valuation of goods left behind should be obliged to give CAV the most up-to-date contact details for the respective tenant or tenants.
- CAV inspectors must attempt to notify a tenant when an application for inspection is received, as well as when a report has been provided to the landlord, a copy of which should be given to the tenant.
- Landlords must provide previous tenants with additional reasonable time (up to a maximum period of seven days) for removal of goods from the premises where a CAV inspector has recommended that additional time be provided. Landlords must also attempt to contact a tenant where directed by the CAV inspectors.
- CAV should train staff to facilitate referrals for tenants to local homelessness access points that can assist with removal and storage of belongings. These access points should receive additional funding to meet this demand.

4. The role of VCAT

4.1 Improving engagement and attendance at VCAT hearings

VCAT plays a central role in the regulation of residential tenancies as the primary statutory body responsible for determining disputes between landlords and tenants, including eviction proceedings and applications for compliance, compensation or repairs orders. However, available evidence suggests that many tenants are not attending their VCAT hearings or engaging with VCAT's processes, including where important issues affecting their housing rights are being determined. The most recent available information about the rates of tenant attendance at VCAT indicates that in 2010, up to 80% of hearings were unattended by tenants.¹⁹

As a service targeted at people experiencing or at risk of homelessness, Homeless Law frequently assists tenants who have had a VCAT possession order made against them in their absence. In many instances, Homeless Law clients were either unaware that a hearing was taking place, or were otherwise unable to attend the hearing due to a range of circumstances outside their control (eg incarceration, illness or caring obligations).

Based on our casework and the experiences of our client group, Homeless Law recommends a range of measures to improve tenant attendance at VCAT, including changing the form and information provided with VCAT's notices of hearing for residential tenancies matters. These measures would go a significant way towards increasing tenant attendance rates at VCAT, which will result in more efficient resolution of disputes and associated resourcing benefits for VCAT. In addition to playing a critical role in avoiding unnecessary evictions into homelessness, from VCAT's perspective, ensuring tenants can access appropriate legal advice and assistance as early as possible when eviction proceedings are commenced is likely to result in fewer VCAT hearings being required, because:

- There is an increased likelihood that matters will resolve by consent, which may obviate the need for a VCAT hearing; and
- There is a decreased likelihood that tenants will fail to appear at their initial hearings and subsequently submit applications for review after obtaining information about their legal options after the hearing.

Once a party has made an application to VCAT and a hearing date has been set by the Tribunal, a notice of hearing must be sent to all parties, notifying them of the time, date and location of hearing, along with other information deemed relevant by VCAT.²⁰ Notices of hearing for matters in the Residential Tenancies List (both initial hearings and hearings to determine an application for review under s 120 of the VCAT Act) are presented as a double-sided folded and sealed document that, until opened, provides a recipient with no indication that details of an upcoming VCAT hearing are contained inside.

¹⁹ The Hon Justice Iain Ross, *Transforming VCAT* (Discussion Paper, VCAT 2010) 9.

²⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 122.

Recommendation 5: Amend the existing notice to vacate and VCAT notice of hearing to better engage with tenants and improve attendance rates at VCAT hearings

1. Change the physical form of the VCAT notice of hearing to ensure the information provided is reaching as many tenants as possible.
2. Change the information provided in VCAT notices of hearing for Residential Tenancy List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.

4.2 VCAT Alternative Dispute Resolution processes: the benefits of mediation and negotiation

ADR, including mediation and compulsory conferences, has been used by VCAT since 1998.²¹ VCAT has the power to order a proceeding, or any part of a proceeding, for mediation, with or without the consent of the parties.²² However there is currently no mechanism requiring ADR in the RTA. As the Issues Paper identified, proceedings may be referred to ADR at VCAT's discretion, most often during the course of a hearing.²³

Early access to mediation before the matter proceeds to a hearing could ease the burden and cost of tenancy matters at VCAT, and give landlords and tenants a quicker and more informal solution, in particular for rental arrears matters and compliance matters. The benefits of mediation from a tenant perspective were identified by a client Olivia, who was facing eviction for rental arrears, but was not offered the opportunity to participate in a mediation prior to her VCAT hearing for arrears:

I didn't receive the VCAT notice and I found out through the support services when I was trying to sort out the issue, there was no other avenue to go back ... before proceeding to VCAT... [to] have an opportunity to see if we can sit down and work out an arrangement ... I think a mediation and finding other support avenues or to be able to take the issues rather than leaving us homeless and having a timeframe to move out with no support. This should come before [the] VCAT [hearing] ... [having] an opportunity to sit down and maybe even a support worker there that can educate both, or work out an arrangement that can work for both parties before it goes to VCAT.

However in order for ADR to be effective, it must have appropriate safeguards and processes to ensure that the rights of vulnerable tenants are not eroded. Landlords are generally more aware of the law and VCAT processes, whereas tenants are often unclear regarding their rights and are more likely to feel pressured to reach an agreement in order not to lose a tenancy.

As such, Homeless Law recommends that dispute resolution is firstly built in to the Residential Tenancies Act prior to a VCAT application through the framework described in part one. Secondly, vulnerable tenants should be provided with an advocate where possible to ensure that there is equal bargaining power when participating in ADR. Finally, any ADR process should provide the following safeguards:

- there should be clear communication to both parties regarding the ADR process;
- ADR should be an opt-in process;
- ADR should be conducted by accredited mediators;
- parties should be advised as to the effect of any agreement;
- parties should have access to a hearing on the same day if the matter cannot be resolved through mediation.

²¹ Victorian Civil and Administrative Tribunal, *2013-2014 Annual Report* (2014), 14.

²² *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88.

²³ Victorian Government, *Dispute Resolution Issues Paper: Residential Tenancies Act Review* (May 2016), 19.

Recommendation 6: Provide better access to ADR processes prior to a VCAT hearing for residential tenancies matters with appropriate safeguards

Formal ADR processes should be expanded in Residential Tenancies matters subject to the following safeguards:

- there should be clear communication to both parties regarding the ADR process;
- ADR should be an opt-in process;
- ADR should be conducted by accredited mediators;
- parties should be advised as to the effect of any agreement;
- parties should have access to a hearing on the same day if the matter cannot be resolved through mediation.

4.3 Create an internal appeals system within VCAT

There is currently no provision under the VCAT Act or the RTA for internal review of decisions made in the Residential Tenancies List. The absence of a mechanism for a matter to be reconsidered or re-opened by VCAT once an order has been made limits the consistency and quality of VCAT decisions, as well as leaving parties in a position where they will often accept unlawful or unjust decisions because the prospect of a Supreme Court appeal is inaccessible.

The only option for parties to a tenancy proceeding is to apply for leave to appeal to the Supreme Court of Victoria on a question of law.²⁴ The Supreme Court is not an accessible forum for tenants or, in many cases, landlords. Even where an appeal to the Supreme Court has reasonable prospects of success, it is a daunting jurisdiction which is unaffordable and inaccessible. For most tenants, it is simply not an option to pursue their appeal in this forum despite having a meritorious appeal.

As the following case study illustrates, even where an appeal to the Supreme Court has reasonable prospects of success, it is a daunting jurisdiction for clients, which carries a risk of adverse costs and protracted proceedings. For many tenants, it is simply not an option to pursue their appeal in this forum.

²⁴ *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* s 148.

Client unable to appeal potentially flawed VCAT decision because too disheartened by the result at VCAT

Mabel is a public housing tenant who received a number of breach of duty notices over the past few years. More recently, she had been issued a breach notice for causing a nuisance to her neighbours.

Mabel sought Homeless Law's assistance after learning that, in her absence, the Office of Housing had obtained a compliance order from VCAT, based on allegations she had caused a further nuisance after receiving the recent breach notice. Mabel hadn't known about the VCAT hearing due to issues with receiving her mail. Homeless Law helped Mabel to apply for a review, and obtained a copy of the Office of Housing's application to VCAT, which had included only a copy of the recent breach notice Mabel had been given.

At the VCAT review hearing, however, the Office of Housing sought to lead evidence about all the previous breach notices Mabel had been given over the years. When Homeless Law's lawyers objected to this on the basis that it was procedurally unfair because the application to VCAT had not referred to any of this historical evidence, the VCAT member disagreed and allowed this evidence to be led. Ultimately, the VCAT member confirmed the previous compliance order. When the Homeless Law lawyers requested written reasons for the member's decision, this request was denied.

Mabel was disappointed with the VCAT member's decision, and Homeless Law obtained an opinion from a barrister who confirmed it was likely that the decision could be successfully appealed to the Supreme Court as a number of errors of law could be identified. Homeless Law offered to assist Mabel with an appeal, but she was so discouraged by what had occurred that she became disengaged and did not return calls before the 28 day period to lodge an appeal had expired.

For Mabel, the availability of an easily accessible review mechanism within VCAT might have provided her with a more appropriate forum for clarifying the VCAT member's decision, without placing additional strain and pressures on an already struggling tenant.

Then-VCAT president Justice Bell found in his 2009 review of VCAT that the lack of an internal review:

1. Contradicted the intended function of VCAT as a quick, accessible 'one-stop shop'²⁵
2. Removed 'quality control mechanisms' to ensure its decisions are consistent, accurate, and accountable to review; and
3. Prevented VCAT from having its decisions 'build up a body of jurisprudence' to aid members, parties, and VCAT itself.²⁶

Creating an internal appeal mechanism at VCAT would also bring Victoria in line with most other Australian jurisdictions, where civil tribunals have built in internal appeals.²⁷ Models that provide guidance include:

- **Queensland:** the Queensland Civil and Administrative Tribunal (**QCAT**), which hears a range of disputes, including residential tenancy disputes brought under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), has an internal appeals process, including for tenancy disputes. If the original QCAT decision was made by a non-judicial member (a senior member or ordinary member who is not a judge, or an adjudicator),²⁸ a party wishing to appeal the decision may appeal to QCAT's Internal Appeal Tribunal.²⁹ Parties do not require leave to appeal a question of law.³⁰ Leave of the Internal

²⁵ Hon. Justice Kevin Bell, *One VCAT: President's Review of VCAT* (30 November 2009), 58.

²⁶ *Ibid.*, 58-59.

²⁷ See appendix 1 for further detail on other jurisdictions.

²⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Schedule 3.

²⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Part 8 Division 1.

³⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(1).

Appeal Tribunal is required to appeal a decision of fact, or a decision of mixed law and fact.³¹ A hearing by the Internal Appeal Tribunal involves a reconsideration of the original evidence. If a party is dissatisfied with a decision made by the Internal Appeal Tribunal, the party can apply for leave to appeal to the Court of Appeal on a question of law.³²

- **New South Wales:** the *Civil and Administrative Tribunal Act 2013 (NSW) (C&A Act)* provides a limited 'internal appeal' right for certain decisions made by NCAT in certain circumstances.³³ Parties generally have a right to appeal a question of law without needing to seek leave. Parties can seek leave to bring an internal appeal on 'any other grounds' (other than a question of law) to the Appeal Panel.³⁴ The Appeal Panel may 'permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance', to be given in the new hearing as it considers appropriate in the circumstances.³⁵ Parties need to seek and obtain leave before bringing fresh evidence before NCAT in an internal appeal.
- **ACT:** a decision made by ACAT may be appealed on a question of either fact or law.³⁶ For an appeal to be heard, an application must be made to ACAT demonstrating that an error was made in the original decision in fact or in law, as leave from the ACAT Appeal President is required in order for an appeal to be heard. The ACAT Appeal President may decide that the appeal be dealt with either as a new application or as a review of all or part of the original decision.³⁷ The appeal tribunal can confirm, amend or set aside an order or make any other order that it considers appropriate in the circumstances.
- **South Australia:** the *South Australian Civil and Administrative Tribunal Act 2013 (SA)* provides for internal merits review of a decision at first instance of a Member or (with leave of a Presidential Member) a Registrar of the Tribunal. The Tribunal may determine applications for review.³⁸ The Tribunal is to reach the 'correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the Tribunal at first instance'. Upon review, the Tribunal will consider the material put before it at first instance, but it has the discretion to admit further evidence.

In response to potential concerns about the costs or complexities associated with introducing an internal appeal mechanism, Homeless Law reiterates the comments of Justice Bell:

*That more parties might appeal is not a persuasive reason not to have an appeal tribunal at VCAT. The present system is less accessible than it should be. I am concerned that some parties with legitimate grounds are not pursuing an appeal because of these restrictions. This is not consistent with the principle of equal access to justice, which should embrace an appropriate appeal system.*³⁹

Furthermore, in civil and administrative tribunals in other jurisdictions in Australia, internal appeals constituted between 0.9% and 2% of overall caseloads in 2014-2015, with a clearance rate of between 85.9% and 100%.⁴⁰ By requiring applicants to seek leave to appeal, and setting thresholds for time to lodge applications and what kinds of errors may be appealed, other jurisdictions have created an appeal system that has a minimal impact on overall caseload with a high clearance rate and an improvement of the tribunal's function through a quick, effective and accessible process. By way of example, the Queensland Civil and Administrative Tribunal had 395 tenancy appeals lodged in the 2014-2015 financial year with a 100% clearance rate in the same year.⁴¹

Homeless Law recommends legislative amendment to allow for internal appeal of VCAT decisions. A process for internal appeal would ensure that parties had an affordable and accessible right of appeal and that the quality of VCAT decision-making is monitored and maintained. Given the gravity of the consequences for tenants of

³¹ *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 142(1), (3)(b).

³² *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* s 150.

³³ *Civil and Administrative Tribunal Act 2013 (NSW)* s 32.

³⁴ *Civil and Administrative Tribunal Act 2013 (NSW)* s 80(2)(b).

³⁵ *Civil and Administrative Tribunal Act 2013 (NSW)* s 80(3)(b).

³⁶ *ACT Civil and Administrative Tribunal Act 2008 (ACT)*, s 79(3).

³⁷ *ACT Civil and Administrative Tribunal Act 2008 (ACT)*, s 82.

³⁸ *South Australian Civil and Administrative Tribunal Act 2013 (SA)*, s 70.

³⁹ One VCAT Review, above n 25, 58.

⁴⁰ Queensland Civil and Administrative Tribunal, *Annual Report 2014-2015 (2015)*, 5, South Australia Civil and Administrative Tribunal, *Annual Report 2014/15 (2015)*, 22-23, New South Wales Civil and Administrative Tribunal, *Annual Report 2014-2015*, 7, 27, ACT Civil and Administrative Tribunal, *Annual Report 2014-2015*, 9-11.

⁴¹ Queensland Civil and Administrative Tribunal, *Annual Report 2014-2015 (2015)*, 41.

decisions made in the Residential Tenancies List, such an avenue for appeal has significant potential to reduce arbitrary evictions and to build trust and confidence in the decisions of the Tribunal.

Homeless Law propose that the internal appeals system adopt the following characteristics:

- A party to the original order, or any person directly affected by it, may file a written request to review the order or decision;
- The written request must be filed within 28 days of the date on which the original order or decision was made, although VCAT should allow an extension where just and reasonable;
- Internal appeal should be automatically available on questions of law, however parties should obtain leave to appeal on errors of fact or errors of fact and law.
- The threshold requirements for obtaining leave on errors of fact or errors of fact and law should be clear and unambiguous.⁴²
- The appeal must be heard by a legal member of VCAT who is not the same Member who made the original order or decision;
- VCAT may permit fresh evidence, although applicants must seek and obtain leave before bringing fresh evidence.
- Any refusal of leave for an internal review should be appealable to the Supreme Court of Victoria.
- An internal review should be exhausted prior to any application to the Supreme Court of Victoria.⁴³

Recommendation 7: Allow internal appeal of residential tenancies decisions

Creating an internal appeal mechanism for decisions made in the Residential Tenancies List would create an accessible mechanism of oversight, improve the consistency, predictability and quality of decision-making and strengthen protections for tenants against evictions that should be avoided.

4.4 Effective enforcement of non-monetary VCAT orders

4.4.1 Current barriers to enforcement of non-monetary orders

The RTA provides for VCAT to make a range of orders in relation to tenancy disputes, both monetary and non-monetary orders. Non-monetary orders, such as restraining orders, can have significant consequences for vulnerable tenants in preventing any action in breach of the RTA, including preventing a landlord from unlawfully evicting a tenant. However whilst monetary orders have relatively simple enforcement procedures built in through the VCAT Act which allow a VCAT order to be filed in the appropriate court (usually the Magistrates' Court), enforcement of non-monetary orders is ineffective and unclear.

Where a landlord does not comply with a non-monetary VCAT order, tenants must turn to one of three methods to seek enforcement:

1. Tenants may request that police enforce a VCAT order

When VCAT makes a restraining order, it is ordinary practice to provide a copy to the closest police station to the property. The RTA creates a number of summary offences, and the police are empowered to prosecute those offences under s.508 of the RTA. Furthermore, under section 458 of the *Crimes Act 1958* (Vic) (**Crimes Act**) police are authorised to arrest any person committing an offence, including offences under the RT Act. However, police are often unwilling to enforce such orders on behalf of tenants on the basis that the matter is a 'civil matter' and therefore they claim they are not empowered to act. The following case study illustrates the difficulty tenants face in having non-monetary VCAT orders enforced by Victoria Police.

⁴² We note that NSW provides that the applicant must demonstrate that there was a 'substantial miscarriage of justice', which we believe is too high a bar and too ambiguous.

⁴³ If internal appeals is considered as recommendation in the public options paper, Homeless Law would seek to be involved in any consultation in order to provide more detailed submissions on the procedural and technical elements of the model.

Delay and confusion force a victim of family violence into homelessness

Eva was a victim of family violence from her ex-partner who sought crisis accommodation from a women's housing centre. She was placed in a rooming house due to a lack of housing availability. Shortly afterwards the rooming house landlord changed the locks on her room without having served a notice to vacate or obtaining a possession order. Eva's possessions were in her room and she was forced to begin sleeping in her car. She sought representation from Homeless Law, and was granted a non-monetary order under s. 472 of the RTA to be restored access and services for the room, as well as all her property.

The landlord refused to comply when given the notice the day after the hearing. When Eva attended her local police station she was told it was a civil matter which they could not assist with. Homeless Law had to correspond with police at the station and clarify that they were authorised to prosecute the offence and arrest the landlord if found to be committing an offence. Police only attended the property three days after the order was made, in response to further calls, and were told that the room was re-let and Eva could not be restored access to it. Eva had to return to VCAT, where she settled the matter in order to be allowed access to her property as soon as possible.

2. Tenants may commence enforcement proceedings in the Supreme Court

Under section 122 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act)*, a person may enforce a non-monetary order by filing in the Supreme Court:

- a. a copy of the order, certified by a presidential member or principal registrar to be a true copy;
- b. an affidavit as to non-compliance; and
- c. a certificate from a judicial member or principal registrar stating that the order is appropriate for filing in the Supreme Court.

This creates a significant barrier to tenants, firstly due to the intimidating nature of filing in an imposing jurisdiction such as the Supreme Court. Secondly, the process through which a tenant must file involves seeking a certificate from VCAT and a certified copy of the order, however there is no clear process for how such an application can be made, and there is no information about this process on the VCAT website. VCAT's proposed purpose of offering 'inexpensive and quick resolution of disputes' is redundant if enforcement and practical resolution requires another court, another application, and another period of delay.

3. Tenants may commence contempt proceedings

Tenants may seek to have a non-compliant landlord found to be in contempt under section 137 of the VCAT Act if they do any act that would constitute contempt of the Supreme Court, including wilful failure to comply with an order. However this process presents a number of barriers, including that:

- a. the tenant would be required to file further paperwork, including additional applications, affidavits, and draft charges, and expose themselves to the risk of an order for costs against themselves because of the complexity of the matters;
- b. the matter would have to be listed before a judicial member, which creates further delays; and
- c. as a matter of fairness VCAT would consider contempt and jail time as a 'last resort' as less punitive sections exist which would carry a fine.

This procedure adds yet more delay and complication with no real effect on enforcement, apart from creating financial penalties for non-compliance that do not remedy the underlying breach.

4.4.2 Amendments to improve enforcement of non-monetary orders

A number of changes to VCAT's enforcement mechanisms would streamline and improve the enforcement of non-monetary orders at VCAT to give effect to VCAT orders and ensure that the rights of tenants are better respected and acted upon.

Victoria Police should be better educated and directed to enforce VCAT orders. Police are immediately empowered under the Crimes Act to arrest those who are committing an offence, which extends to summary offences under the Act. In particular, orders made under section 472 of the Act are orders in relation to which failure to comply is an offence, which members of the police force are authorised to prosecute. A standard-form covering letter accompanying copies of restraining orders sent to police would clarify the police's position and give tenants a clear, immediate means by which to ensure orders are enforced.

We note that in a number of other jurisdictions, non-monetary orders can be enforced in the Magistrates' Court without the requirement for a certificate that such an order is appropriate to file.⁴⁴ Such a process is far more accessible and efficient. In line with procedures in the *ACT Civil and Administrative Tribunal Act 2008*, non-monetary orders of VCAT should be taken to have been filed in the Magistrates' Court without any filing fee.⁴⁵ Further, parties should have the right to seek renewal of proceedings where non-monetary orders have not been complied with, as in New South Wales. This provides an easier, faster means to create real disincentives for non-compliance, without requiring tenants to make a number of complex applications for a similar result.

Recommendation 8: Provide better enforcement options for non-monetary orders

1. Provide clear direction to Victoria Police regarding their power to enforce a non-monetary VCAT order under s 480 of the RTA when sending out VCAT orders.
2. Provide training to Victoria Police regarding their powers to enforce VCAT orders under the Act.
3. Allow parties to renew proceedings where a VCAT non-monetary order has not been complied with.
4. Amend s 122 of the VCAT Act to provide that non-monetary orders are taken to have been filed in the Magistrates' Court for enforcement without the requirement for a certificate from VCAT that the matter is appropriate for filing.

⁴⁴ In the Queensland Civil and Administrative Tribunal (details available at <http://www.qcat.qld.gov.au/qcat-decisions/enforcing-a-qcat-decision>), and Northern Territory Civil and Administrative Tribunal, section 84A, *Northern Territory Civil and Administrative Tribunal Act 2014*.

⁴⁵ Section 71, *ACT Civil and Administrative Tribunal Act 2008*.

Appendix 1: Internal Review Mechanisms in Other Jurisdictions

Jurisdiction	Internal review mechanism	Resource-intensiveness
<p>Queensland</p> <p>Queensland Civil and Administrative Tribunal Act 2009</p>	<p><u>Availability of internal review</u> QCAT has an extensive internal appeals process, including for tenancy disputes.</p> <p><u>Grounds for internal review</u> In some circumstances, a party can appeal a decision made by QCAT if they can show evidence that when QCAT decided the matter, there was an error in fact, an error in law, or an error in law and fact. <i>Procedural requirements:</i> The process for appealing a decision differs depending on whether the original decision was made by a judicial or non-judicial member of QCAT, whether the decision was an interim or final decision, and the amount of costs awarded in the original decision, if any.</p> <p><u>Restrictions on internal review</u> <i>Reviews of decisions made by non-judicial members</i> If the original QCAT decision was made by a non-judicial member,⁴⁶ a party wishing to appeal the decision may appeal to QCAT's Internal Appeal Tribunal (<i>IAT</i>).⁴⁷ Leave of the IAT is <i>always</i> required to appeal a decision of fact, or a decision of mixed law and fact.⁴⁸ A hearing by the IAT involves a reconsideration of the original evidence. If a party is dissatisfied with a decision made by the IAT, the party can apply for leave to appeal to the Court of Appeal on a question of law.⁴⁹ <i>Review of decisions made by judicial members</i> If the original QCAT decision was made by a judicial member, a party seeking to challenge that decision may only appeal to the Court of Appeal on a question of law, a question of fact, or a question of mixed law and fact. The party cannot appeal the decision to the Internal Appeal Tribunal of QCAT.</p>	<p><u>Relevant data</u> In the 2014-15 financial year, 540 appeals were lodged with the IAT, which was slightly less than the 586 appeals lodged in the 2013-14 financial year.⁵⁰ This represented less than 2 per cent of total QCAT lodgements.⁵¹ (<i>Note that according to page 41 of the Annual report, there were 395 tenancy appeals. Of the 10,219 residential tenancy matters finalised, this is only</i> In the 2014-15 financial year the IAT had a clearance rate of 100 per cent, which was slightly higher than the clearance rate of 94 per cent in the 2013-14 financial year. The clearance rate is calculated by dividing the total number of matters finalised by the number of total number of lodgements.</p> <p><u>Conclusions</u> In light of the above, we infer that:</p> <ul style="list-style-type: none"> the IAT does not have a large backlog of cases; a relatively small number of decisions are appealed to the IAT; and parties are unlikely to experience long delays when appealing to the IAT.
<p>South Australia</p> <p>South Australian Civil and Administrative Tribunal Act 2013</p>	<p><u>Availability of internal review</u> The <i>South Australian Civil and Administrative Tribunal Act 2013</i> (SA) provides for internal merits review of a decision at first instance of a Member or (with leave of a Presidential Member) a Registrar of the Tribunal. The Tribunal may determine applications for review.⁵² <i>Procedural requirements:</i> Applications must be instituted within 1 month of the original decision,</p>	<p><u>Relevant data (30 March – 30 June 2015)</u> In the period from 30 March 2015 (when SACAT commenced operations) to 30 June 2015, there were 44 applications for review out of 2694 total applications.⁵⁵ This represented approximately 2 per cent of applications. SACAT had a clearance rate of 90 per cent of</p>

⁴⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), Schedule 3.

⁴⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), Part 8 Division 1.

⁴⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(1), (3)(b).

⁴⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 150.

⁵⁰ QCAT Annual Report 2014-15, p 16.

⁵¹ QCAT Annual Report 2014-15, p 43.

⁵² *South Australian Civil and Administrative Tribunal Act 2013* (SA), s 70.

⁵⁵ SACAT Annual Report 2014/15, p 22.

	<p>but this can be extended if the Tribunal is satisfied that it is just and reasonable to do so. In residential tenancies matters, time runs from the delivery of a statement of reasons.⁵³</p> <p><u>Grounds for internal review</u> The Tribunal is to reach the 'correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the Tribunal at first instance'. Upon review, the Tribunal will consider the material put before it at first instance, but it has the discretion to admit further evidence.</p> <p><u>Relationship with judicial review mechanism</u> The SACAT Act also provides for appeals to the Supreme Court.⁵⁴ Subject to prescribed or statutory exceptions, a review under section 70 of the SACAT Act must be conducted before an appeal can be brought in the Court. On appeal, the Supreme Court carries out a rehearing. Its jurisdiction is not limited to considering questions of law and its powers are not limited to setting aside decisions affected by legal error.</p>	<p>applications it inherited at commencement. The clearance rate is calculated by dividing the total number of matters finalised by the total number of lodgements. The average listing time for review applications was lower than for applications in general: 6 days compared to 18 days.⁵⁶</p> <p><u>Conclusions</u> The clearance rate together with the small number of review applications, and comparatively short listing time, indicate that the review mechanism did not place a significant burden on the operations of SACAT.</p>
<p>New South Wales</p> <p>Civil and Administrative Tribunal Act 2013</p>	<p><u>Availability of internal review</u> NCAT hears a range of different disputes, including eviction proceedings. The <i>Civil and Administrative Tribunal Act 2013</i> (NSW) provides a limited 'internal appeal' right for certain decisions made by NCAT in certain circumstances.⁵⁷</p> <p><u>Grounds for internal review</u> Parties can seek leave to bring an internal appeal on 'any other grounds' (other than a question of law) to the Appeal Panel.⁵⁸ The Appeal Panel may 'permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance', to be given in the new hearing as it considers appropriate in the circumstances.⁵⁹ Parties need to seek and obtain leave before bringing fresh evidence before NCAT in an internal appeal.</p> <p><u>Restrictions on internal review</u> <i>Review only available for certain classes of decision:</i> Reviews of some decisions are expressly limited to questions of law. For example, an appeal against a decision of NCAT to grant a termination order where a warrant of possession has been granted in relation to that order can only be brought in relation to a</p>	<p><u>Relevant data</u> In the 2014-15 financial year there were a total of 608 internal review applications, equivalent to 0.9 per cent of total applications heard by NCAT.⁶⁴ Of the 608 appeals lodged with NCAT, 1,132 appeal panel hearings had been held, and 522 appeals finalised.⁶⁵ The clearance rate for internal appeals was 85.9 per cent. The 'clearance rate' indicates the capacity of the Tribunal to manage its workload.⁶⁶</p> <p><u>Conclusions</u> The clearance rate for internal appeals was significantly lower than for the other NCAT Divisions.⁶⁷ The difference in clearance rates may suggest that the Internal Appeals Division has less capacity to manage its current workload relative to other Divisions.</p> <p><u>Commentary</u> In <i>The NSW Civil & Administrative Tribunal (NCAT) – Appeal Process &</i></p>

⁵³ Residential Tenancies Act 1995 (SA), s 39A.

⁵⁴ South Australian Civil and Administrative Tribunal Act 2013 (SA), s 71.

⁵⁶ SACAT Annual Report 2014/15, p 23.

⁵⁷ Civil and Administrative Tribunal Act 2013 (NSW), s 32.

⁵⁸ Civil and Administrative Tribunal Act 2013 (NSW), s 80(2)(b).

⁵⁹ Civil and Administrative Tribunal Act 2013 (NSW), s 80(3)(b).

⁶⁴ NCAT Annual Report 2014–15, p 7.

⁶⁵ NCAT Annual Report 2014–15, p 16.

⁶⁶ NCAT Annual Report 2014–15, p 27.

⁶⁷ Administrative and Equal Opportunity (105.1 per cent), Consumer and Commercial (101.8 per cent), Guardianship (102.3 per cent), Occupational (121.2 per cent).

	<p>question of law, and not any other grounds, even with leave of the Appeal Panel.⁶⁰</p> <p><i>Requirement of 'substantial miscarriage of justice':</i> Applications for leave to appeal in the Consumer and Commercial Division can only be granted if the Appeal Panel is satisfied that the appellant may have suffered a 'substantial miscarriage of justice'.⁶¹</p> <p><u>Relationship with judicial review mechanism</u> NCAT does not have jurisdiction to hear a further merits appeal of a decision made by the Appeal Panel, however parties can apply for leave to appeal to the NSW Supreme Court on a question of law.⁶²</p> <p>On an application for judicial review of an 'administratively reviewable decision', the Supreme Court may refuse to hear the matter if it is satisfied that adequate provision has been made for an internal review of the decision.⁶³</p>	<p><i>Operation</i> (February 2014), Simon McMahon argues that there are cost and time benefits to the parties as a result of having an internal review mechanism. According to McMahon, the benefit of the internal appeals process is that it allows the matter to stay within the realm of NCAT to be heard on appeal so there is no need to transfer the matter to the separate court system. This means matters can be determined in a timely manner without imposing excessive extra costs on those involved.</p>
<p>Australian Capital Territory</p> <p>ACT Civil and Administrative Tribunal Act 2008</p>	<p><u>Availability of internal review</u> ACAT has an internal review system, which applies to tenancy disputes.</p> <p><i>Procedural and threshold requirements:</i> A decision made by ACAT may be appealed on a question of either fact or law.⁶⁸ For an appeal to be heard, an application must be made to ACAT demonstrating that an error was made in the original decision in fact or in law, as leave from the ACAT Appeal President is required in order for an appeal to be heard.</p> <p><u>Procedure and remedies</u> Upon receipt of an application for an appeal, the ACAT Appeal President must either request further information from the applicant, dismiss the application, decide to hear the appeal or decide to remove the appeal to the Supreme Court.⁶⁹</p> <p>The ACAT Appeal President may decide that the appeal be dealt with either as a new application or as a review of all or part of the original decision.⁷⁰ The appeal tribunal can confirm, amend or set aside an order or make any other order that it considers appropriate in the circumstances.</p> <p><u>Relationship with judicial review mechanism</u> If the ACAT Appeal President dismisses the application, or if a party is not satisfied with a decision of the appeal tribunal, a party can request leave to appeal to the Supreme Court on a question of either fact or law.⁷¹</p>	<p><u>Relevant data</u> In the 2014-15 financial year, 56 applications were lodged for an internal appeal, which was slightly more than the 55 appeals lodged in the 2013-14 financial year.⁷² This represented just over 1 per cent of total ACAT lodgements.⁷³ Of the 56 applications lodged for an internal appeal, 19 of these applications were residential tenancy appeals.</p> <p>In the 2014-15 financial year, 58 applications for internal appeals of an ACAT decision were finalised, which was slightly higher than the 46 applications that were finalised in the 2013-14 financial year.</p> <p><u>Conclusions</u> In light of the above information, we can infer that:</p> <ul style="list-style-type: none"> the appeals process in the ACAT does not have a large backlog of cases; a relatively small number of decisions are appealed from ACAT; and parties are unlikely to experience long delays when appealing an ACAT decision.

⁶⁰ *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 4 cl 12(2)(b).

⁶¹ *Civil and Administrative Tribunal Act 2013* (NSW), Schedule 4 cl 12(1)(a), (b), (c).

⁶² *Civil and Administrative Tribunal Act 2013* (NSW), s 83(1).

⁶³ *Civil and Administrative Tribunal Act 2013* (NSW), s 34.

⁶⁸ *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 79(3).

⁶⁹ *ACT Civil and Administrative Tribunal Act 2008* (ACT), Part 8.

⁷⁰ *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 82.

⁷¹ *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 86.

⁷² ACAT Annual Report 2014-15, p 11.

⁷³ ACAT Annual Report 2014-15, pp 9 - 11.