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11 July 2016

Mr Simon Cohen
Deputy Secretary, Regulation &
Director, Consumer Affairs Victoria
Level 17, 121 Exhibition Street
MELBOURNE VIC 3000
Via email: Simon.Cohen@justice.vic.gov.au

Dear Simon,

Review of the Residential Tenancies Act 1997 – Dispute Resolution Issues Paper – Tribunal submission

I refer to your letter dated 24 May 2016.

Thank you for the opportunity to respond to the fourth issues paper, *Dispute Resolution* (the Issues Paper).

I enclose *Tribunal Response to Dispute Resolution Issues Paper*. It addresses questions 12, 16-20, 23 and 25-28 in the Issues Paper, as these questions raised jurisdictional, procedural and/or substantive issues affecting VCAT. Where appropriate, the Tribunal has grouped questions together in the response.

Yours faithfully,

Justice Greg Garde AO RFD
President

Attachment: Tribunal response to Dispute Resolution Issues Paper

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Tribunal Response - Dispute Resolution Issues Paper

The Tribunal interprets and applies the *Residential Tenancies Act 1997* (the Act) and does not hold or express an opinion of the Act.

Introductory Comments

The responses of the Tribunal reflect the issues that arise in hearings conducted by the Tribunal and feedback from the parties.

The Tribunal makes submissions with respect to questions 12, 16 – 20, 23 and 25 – 28.

The terms 'informal ADR' and 'formal ADR' are used periodically throughout this response to distinguish between two different ADR processes used by VCAT in residential tenancy (RT) matters.

Informal ADR is used by Tribunal members during RT hearings and is effective and integral to resolving disputes. Informal ADR occurs after the hearing commences and involves the member exploring with the parties, the options for resolving all or part of the issues in dispute by consent. If there is no resolution, the member proceeds to hear and determine the matter. The Tribunal's ability to undertake informal ADR is limited by time constraints. Utilising informal ADR as part of the hearing process is an efficient method of resolving matters quickly.

Formal ADR refers to the process whereby the Tribunal separately lists RT matters for a mediation or compulsory conference. Formal ADR is only used in complex or highly contentious RT matters. If the matter is not settled at a mediation or compulsory conference, it is listed for hearing on a separate day (two-step resolution process). The two-step resolution process is appropriate for complex or highly contentious matters, but if it were to be applied in all RT matters, it would cause delay; added costs to the parties and hamper the resolution of disputes by the Tribunal. A two-step resolution process is not suitable for urgent matters as the delay between conducting formal ADR and having a hearing would be counter - productive. Mediations and compulsory conferences are generally held in Melbourne, as members sitting at suburban and regional venues have limited time to conduct formal ADR. Hearing rooms in the Magistrates' Court are in high demand, so they are often unavailable for ADR.

Question 12: How effective are CAV's inspections activities in facilitating both independent resolution of disputes and resolution of disputes at VCAT?

Comparisons between the data provided on pages 17 and 18 of the issues paper for the financial year 2014/15 and VCAT data for the same period, reflect that only a small proportion of matters arising from CAV's inspections and reports result in an application to VCAT.

Of the 1115 rental reports provided by CAV, VCAT received 48 applications (4.3%) for an order declaring that the proposed rent was excessive and three applications for an order declaring the proposed residential charge to be excessive.

Of the 936 non-urgent repair reports provided by CAV, VCAT received 143 applications (15.3%). The procedure for bringing a claim before the Tribunal for non-urgent repairs to be undertaken is complicated and time-consuming. In contrast, applications for urgent repairs must be heard within two business days (s 73(2)) and a party does not require a report from CAV before making an application to VCAT.

CAV provided 3885 goods left behind reports and the Tribunal received 12 applications (0.3%) comprising seven applications for return of goods, four applications for compensation or return of goods or personal documents and one application for compensation after disposal of personal documents.

Question 16: How effective are the ADR, hearings and other services provided by VCAT?

Question 17: How could VCAT's services be improved?

Where an RT application is defended, the member will typically attempt in the hearing, to resolve the dispute through informal ADR. For example, in an application for a possession order based on rent arrears, the member will use informal ADR to discuss the issues with the landlord and tenant to determine whether a resolution can be achieved. The discussion will involve a review of household income and expenditure; consideration of the amount of the arrears, the time it will take to repay the monies owed and any other relevant circumstances. If there is agreement on a payment plan, the Tribunal will make orders by consent. Informal ADR is very effective in resolving disputes.

Compulsory conferences and mediations conducted by VCAT members are effective in resolving complex and highly contentious RT matters, but are costly. Additional resources would enable VCAT to:-

- Schedule more sitting days in suburban and country venues to hear more applications. More time and access to hearing rooms would give VCAT greater flexibility when determining the appropriateness of informal or formal ADR for particular matters.
- List complicated and contentious residential tenancy disputes for longer periods of time at the most appropriate venue.
- Allocate more time for the member to undertake informal ADR and formal ADR.

Question 18: What are the obstacles (if any) to tenants or landlords in taking appropriate matters to VCAT?

Question 20: What particular or additional barriers or obstacles are there for vulnerable and disadvantaged tenants in accessing or utilising VCAT's services, or defending cases that have been brought to VCAT against them, and how can these be addressed?

Question 23: What are the problems, issues and gaps (if any) that impact the effectiveness (comprehensiveness, coherence and efficiency) of the overall system for dispute resolution in residential tenancies?

Question 25: What changes or improvements to the residential tenancies dispute resolution system would better enable vulnerable and disadvantaged tenants to engage in the processes and have their disputes resolved?

A lack of awareness of a tenant's rights under the Act and/or a reluctance to complain may impede tenants from applying to VCAT. Tenants have remarked in hearings that they were unaware of their right to apply for repair orders or compensation or were concerned that a complaint may result in service of a notice to vacate. It is generally within the context of the landlord bringing a compensation claim at the end of the tenancy that the tenant becomes aware of their right to pursue a claim that could have been made during the tenancy. For example, a claim that heating failed the previous winter and was not repaired in a timely manner.

Common reasons given by tenants to VCAT when requesting adjournments, which may provide some insight into why many applications brought by landlords are undefended, are:-

- loss of a day's wage
- unable to take leave
- lack of transport
- illness or a medical condition
- delay in accessing legal advice
- lack of childcare
- need to take children to and from school

After a tenancy is ended, if an application is made by the landlord for bond and/or compensation, it is essential that the tenant receive the notice of hearing from VCAT if the tenant is to attend the hearing. Disadvantaged tenants are unlikely to have their mail redirected due to cost and may not advise the landlord or agent of their forwarding address, particularly where a tenant is the victim of family violence. While VCAT does provide notification via SMS, it can only do so if the applicant provides a mobile phone number for the tenant.

There have been suggestions that the notice of hearing in RT matters should contain more information, but this needs to be balanced against the need for the notice to be easy to understand. Though VCAT's notice of hearing is easy to understand, it is in English, which may be a barrier or obstacle for tenants from non-English speaking backgrounds who do not have someone to translate the content.

Court Network volunteers provide invaluable non-legal support to unrepresented parties attending VCAT hearings. Legal assistance services and advocacy groups assist vulnerable and disadvantaged tenants to resolve of their residential tenancy disputes at VCAT, but they are not usually available at all of the 39 venues where VCAT sits or on all of the days that VCAT sits at those venues.

What would be of benefit to vulnerable and disadvantaged tenants who are unrepresented is the establishment of community hubs based in suburban and regional areas close to the

venues where VCAT sits, with a focus and understanding of residential tenancy issues. The hub could provide the following:-

- Legal support services at court and away from court. This would include acting as an advocate for the tenant in a hearing.
- Enhanced social support services.
- On-site practical information and guidance regarding a tenant's rights and the available options for resolving disputes.
- Appropriate referral services, for example, financial advice, drug counselling.

The service could be modelled along the lines of that adopted by the Neighbourhood Justice Centre (the NJC) in Collingwood. The NJC offers community and legal support services to unrepresented parties, including appropriate referrals, but can only provide these services to tenants residing in the area. Various advocacy groups, such as those that provide services to people living in Frankston and Ballarat (Frankston and Ballarat services), provide tenants with offsite legal services and in some cases will attend as an advocate at the VCAT hearing. On particular days the Frankston and Ballarat services will provide onsite legal services (like the duty lawyer service provided by Victoria Legal Aid (VLA)) to tenants attending the Frankston Magistrates' Court or Ballarat Law Courts. VLA provides a similar service to tenants attending VCAT in Melbourne.

The Director of Housing (the DoH) provides homes to many vulnerable and disadvantaged tenants. When the DoH serves an application on a tenant, the tenant is provided with information regarding funded advice services and the tenant is invited to meet with DoH to discuss the application prior to the VCAT hearing. Where possible, officers at the DoH will try and assist the tenant, including consenting to a tenant's request for an adjournment if the tenant requires further time to prepare. The assistance and information provided by the DoH enables vulnerable and disadvantaged tenants to more effectively engage in the dispute resolution process. Features of the DoH model could be considered for adoption in a community hub model.

Question 19: What barriers or obstacles are there to enforcing VCAT orders, and how can these be improved to achieve compliance with orders?

The Tribunal does not have the power under the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) to enforce its own orders. Sections 121 and 122 of the VCAT Act prescribe the process for enforcing monetary and non-monetary orders respectively. A common complaint is that the enforcement of an order involves a separate process and procedure in a court, which may be difficult for a party to access. Unlike the Magistrates' Court, the Tribunal does not have the power to financially examine a judgement debtor. Consideration should be given to the capacity to vest in the Tribunal the power to enforce its own orders, including amending the VCAT Act to confer additional powers. This would be more efficient as it would free up the courts' resources and parties would only need to deal with VCAT. The Tribunal has the expertise in residential tenancy matters and understands the circumstances which gave rise to the order in the first instance.

Where a landlord appoints a real estate agent to act on their behalf, enforcement of an order against the landlord may be more difficult for the tenant. For the purposes of enforcement, the tenant will require the full details of the landlord, including their address.

It is common for the real estate agent's address (in lieu of the landlord's) to be provided in the tenancy agreement.

Question 26: What alternative or additional mechanisms used by other jurisdictions or sectors (or aspects thereof) would be suitable for residential tenancies dispute resolution in Victoria?

Question 27: What would be the advantages and disadvantages of adopting any of the dispute resolution models or mechanisms described in this section for residential tenancies disputes resolution in Victoria?

Having regard to the need for a residential tenancies dispute system that is fair, fast, low-cost and accessible, modern technology should be utilised where appropriate. For example, video conferencing, teleconferencing and Skype. Online dispute resolution has potential benefits worth further consideration and exploration.

A residential tenancies dispute resolution model or mechanism should aim to encourage greater engagement by parties in the process. A high proportion of landlord applications at VCAT are undefended by tenants.

As noted under the introductory comments, a dispute resolution model or mechanism that involves the application of a two-step resolution process in all RT matters would adversely affect the efficiency of VCAT by increasing delay and cost. Further, the loss of possibly two days' wages from work may discourage a party from attending, particularly a vulnerable and disadvantaged tenant. A two-step process is suitable for complex and contentious RT matters, but should not be applied to all RT matters. The Tribunal uses informal ADR very effectively in RT hearings to quickly resolve disputes.

Question 28: What features and considerations would be important for a compulsory mediation or conciliation step to be effective in resolving residential tenancy disputes?

A mediation or compulsory conference at VCAT occurs under the VCAT Act. Mediation and compulsory conferencing are different processes. A mediator's role is limited to that of a neutral facilitator. The mediator may be a Tribunal member or a VCAT mediator. The mediator cannot advise parties of their respective rights and duties under the Act or advise on prospective outcomes if the matter proceeds to a hearing. It is difficult in this forum to address any power imbalances between the parties, which may lead to inequitable outcomes.

Compulsory conferencing is effectively a form of conciliation. Compulsory conferencing is not subject to the same limitations as a mediation. The member takes a more proactive role, for example, identifying and clarifying the issues in dispute and the matters for determination by the Tribunal. The knowledge and member is able to test the parties' proposals for resolution to ensure that from a legal and practical standpoint it is appropriate in the circumstances. Part of this process involves addressing any power imbalance between the parties to ensure a fair outcome.

Where a party fails to attend a mediation or a compulsory conference, a member may:-

(a) make an order against the absent party;

(b) strike out the application made by the absent party, or strike out the absent party as a party in the proceeding; or

(c) make an order for costs against the absent party the application if it was made by the absent party.

It is essential that a member have the power to make an order to determine a matter if a party does not attend formal ADR. If there are no adverse consequences for non-attendance by a party, a two-step resolution process could be used to delay the proceeding.