Dispute Resolution
Issues Paper

Residential Tenancies Act Review
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The Review of the Residential Tenancies Act

Since the Residential Tenancies Act 1997 (the Act) was introduced, the rental market has changed. More Victorians are renting for longer, the renting population has become more diverse, and the numbers of property managers and landlords have increased.

The government is reviewing Victoria’s rental laws to ensure a modern and dynamic rental market, in which tenants are safe and secure, and which will meet the current and future needs and expectations of tenants and landlords.

This paper, regarding dispute resolution, is one of a series of issues papers released as part of the Review of the Act (the Review), which encompass a broad range of issues relating to the operation of the Act:

- security of tenure
- rent, bonds and other charges
- rights and responsibilities of landlords and tenants
- dispute resolution
- property conditions and standards, and
- alternative forms of tenure.

Consultation with stakeholders and members of the public will capture a wide range of views and experiences that will enhance the Government’s understanding of the Victorian rental market.

In the second half of 2016, an Options Paper will outline proposals for both legislative and non-legislative reforms drawing on the findings of the Review and public consultation.

You can access this issues paper, along with further information about the Review, from the Fairer Safer Housing website at fairersaferhousing.vic.gov.au.

Getting involved and having your say

We invite your views and comments, as well as your responses to the series of preliminary questions posed throughout each issues paper as a guide for writing your submission.

We also welcome your suggestions for other questions or issues that should be considered leading up to the release of the Options Paper.

Until 24 June 2016 you can make a submission:

**Online, by registering at:**
fairersaferhousing.vic.gov.au/renting  

**By email:**
yoursay@fairersaferhousing.vic.gov.au

**Or by mail:**
Residential Tenancies Act Review  
Consumer Affairs Victoria  
GPO Box 123  
MELBOURNE VIC 3001

Note: Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process. Submissions may be subject to Freedom of Information and other laws. Consumer Affairs Victoria reserves the right to not publish information that could be seen to be defamatory or discriminatory.
The stages of the Review

Material will be released in three stages in the course of the Review, to which you will be invited to respond. All papers will be available via the Fairer Safer Housing website at fairersaferhousing.vic.gov.au/renting.

Note that Stage 1 is complete and the Review is now in Stage 2.

<table>
<thead>
<tr>
<th>Stage</th>
<th>Title</th>
<th>Date</th>
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<tbody>
<tr>
<td>Stage 1</td>
<td>Laying the Groundwork Consultation Paper identifying the changing characteristics and trends in the Victorian rental market</td>
<td>June to August 2015 (complete)</td>
</tr>
<tr>
<td>Stage 2</td>
<td>Issues Papers</td>
<td>Late 2015 to mid 2016</td>
</tr>
<tr>
<td>Stage 3</td>
<td>Public Options Paper setting out legislative and non-legislative proposals for reforming the Residential Tenancies Act 1997</td>
<td>Late 2016</td>
</tr>
</tbody>
</table>

Glossary

- ADR: Alternative Dispute Resolution
- CAV: Consumer Affairs Victoria
- DSCV: Dispute Settlement Centre Victoria
- FLR: Frontline Resolution
- PRTB: Private Residential Tenancies Board (Republic of Ireland)
- TAAP: Tenancy Advice and Advocacy Program
- VCAT: Victorian Civil and Administrative Tribunal
- VSBC: Victorian Small Business Commissioner

Acknowledgments

This paper has been drafted in consultation with:

- Consumer Affairs Victoria
- Department of Environment, Land, Water and Planning (Forward Policy and Business Strategy Planning)
- Department of Health and Human Services
- Department of Premier and Cabinet
- Department of Treasury and Finance

Submissions made to the Review during Stage 1 have been taken into consideration in the drafting of this issues paper.
Questions for consideration

Policy goals
1. What characteristics of the residential tenancies sector (if any) are relevant to its dispute resolution system?
2. What are the key outcomes that a residential tenancies dispute resolution system should aim to provide for?
3. What features do you consider important for effective residential tenancies dispute resolution mechanisms?
4. How would you rank the importance of these features?

Information and advice services
5. How effective are the information and advice services provided by CAV, DSCV, TAAP and other agencies as tools for parties to independently resolve disputes?
6. How could the existing services be improved?
7. What alternative or additional tools or initiatives could assist parties, including vulnerable and disadvantaged tenants to independently resolve disputes?

Independent third-party assistance
8. How effective are the third-party assistance mechanisms provided by CAV, TAAP agencies and DSCV in dealing with residential tenancies issues?
9. What other relevant services of this kind are available to assist with residential tenancies disputes?
10. What aspects of the third party assistance mechanisms work well?
11. What alternative or additional tools could assist parties, including vulnerable and disadvantaged tenants, to resolve disputes quickly and informally, and to prevent their escalation?

CAV inspections
12. How effective are CAV’s inspections activities in facilitating both independent resolution of disputes and resolution of disputes at VCAT?
13. How could CAV’s inspections activities be improved?
14. How could CAV’s inspections activities be of greater benefit to vulnerable and disadvantaged tenants?
15. What (if any) alternative or additional areas of dispute would be appropriate for the Director of CAV (or another agency) to have powers to intervene?

Victorian Civil and Administrative Tribunal
16. How effective are the ADR, hearings and other services provided by VCAT?
17. How could VCAT’s services be improved?
18. What are the obstacles (if any) to tenants or landlords in taking appropriate matters to VCAT?
19. What barriers or obstacles are there to enforcing VCAT orders, and how can these be improved to achieve compliance with orders?
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?
Sector-wide compliance and enforcement

21 How effective are the compliance and enforcement functions provided by CAV?
22 How could CAV’s compliance and enforcement functions be improved?

How effective is the current system for residential tenancies dispute resolution?

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?
24 What additional information or data would assist in evaluating the effectiveness of the residential tenancies dispute resolution mechanisms and the system as a whole?
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?

Other dispute resolution models and mechanisms

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?
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?
28 What features and considerations would be important for a compulsory mediation or conciliation step to be effective in resolving residential tenancies disputes?
Executive Summary

This issues paper is about dispute resolution as it applies to disputes between tenants and landlords that arise under the Residential Tenancies Act. For the purposes of this paper, dispute resolution encompasses tools for independent resolution between the parties (such as information and advice), assistance from independent third parties, court and tribunal hearings, and compliance and enforcement tools and activities (section 1.1).

There are certain aspects of the residential tenancies sector that bring about particular needs for dispute resolution. Unlike in markets where providers and clients engage in one-off transactions, which often conclude with the delivery of an agreed product or service, the tenant-landlord relationship is comparatively long term. Either or both parties may be seeking an ongoing arrangement. In addition, there can be imbalances in bargaining power between the parties, creating challenges for vulnerable and disadvantaged tenants (section 1.2.1).

In order for a system to deliver fair and equitable outcomes consistent with the law; accommodate constructive resolution; bring about compliance in the sector; and provide certainty and confidence to participate in the market, mechanisms should be fair, fast, low-cost, fit for purpose, accessible and provide certainty (sections 1.2.2 and 1.2.3).

Stakeholders are invited to consider the available dispute resolution mechanisms in the context of these desired outcomes and characteristics. The existing mechanisms include: information and advice services; independent third party assistance; inspections and advice from the regulator; and the tribunal and courts. In addition, the regulator plays a role in compliance and enforcement, which is focused on bringing about voluntary compliance at a sector-wide level (section 2.1).

The way these mechanisms complement each other, and the extent to which they address the full range of dispute resolution needs are relevant to the system’s overall effectiveness. Stakeholders are invited also to consider how well the mechanisms work together, whether all the required options are available and how well the system directs the right cases to the right mechanisms at the right time (section 2.2).

Alternative models and mechanisms used in other jurisdictions and industry sectors can offer ideas, and help to clarify what is appropriate to the residential tenancies sector in Victoria. These include facilitated self-resolution; compulsory mediation; ombudsmen and complaints services; online dispute resolution; and binding administrative determinations (section 3).

On the basis of the features for effective dispute resolution systems and mechanisms proposed in this paper, in addition to any other information considered relevant, stakeholders are invited to submit their views regarding the strengths, weaknesses and any gaps in the existing residential tenancies dispute resolution system in Victoria. Responses to this paper will enable the Victorian Government to identify issues and the areas for reform.
1 Background

1.1 Scope and purpose

This issues paper is about dispute resolution in the residential tenancies sector. It concerns disputes between tenants and landlords that arise under the Residential Tenancies Act. A dispute occurs when parties to a tenancy or residency arrangement have opposing positions about a right or obligation, and seek to exercise or enforce that right or obligation. Tenancy and residency arrangements, in this case, include those for general residential tenancies, rooming houses, caravan parks and residential parks that are covered by the Act.

For the purposes of the Review, dispute resolution encompasses tools for independent resolution between the parties, independent third party assistance, and court and tribunal hearings. In addition, compliance and enforcement tools and activities are relevant in that they aim to bring about voluntary compliance in the sector.

This paper seeks stakeholders’ views on the effectiveness of the dispute resolution mechanisms currently available in the residential tenancies sector. The Victorian Government is also undertaking a broader review concerning access to justice, and all relevant input made to either review will be considered by both.

1.2 Policy goals

1.2.1 What are the unique characteristics of the residential tenancies sector?

Certain features distinguish the residential rental market from markets for other goods and services. The nature of the participants (predominantly private individuals), and the nature of what is provided (an essential commodity), bring about particular dispute resolution needs.

Unlike other markets in which providers and clients engage in one-off transactions, which often conclude with the delivery of an agreed product or service, the tenant-landlord relationship is comparatively long term. In addition, either or both parties may be seeking an ongoing arrangement.

Housing is something a tenant requires in continuation, moving is costly, and rental housing is often in short supply. These factors can contribute to an imbalance of bargaining power between the parties and this can influence the way in which both parties choose to handle disputes. The extent to which the provisions of the Act adequately and appropriately address these imbalances is being considered as part of this Review.

With regards to the dispute resolution process itself, an imbalance of power can arise between the parties in some instances because:

- landlords can benefit from being represented by property managers, who are familiar with formal dispute resolution processes
- vulnerable and disadvantaged tenants are less able to effectively defend a case against them, or pursue their desired outcomes through dispute resolution processes.

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2 Of the approximately 500,000 tenancies in Victoria, 85 per cent are provided by the private sector. The remaining 15 per cent are provided by the social housing sector, which comprises tenancies provided by the Director of Housing and community housing organisations.
In particular, vulnerable and disadvantaged tenants can face difficulties in seeking assistance, exercising their rights and accessing dispute resolution services because:

- they may not be aware of their rights or options, or of assistance available to them
- they may not be empowered to exercise their rights or access dispute resolution services, and
- they may be fearful of losing their tenancy, or being discriminated against in their current and future tenancies, if they exercise their rights.

The challenges for tenants who experience financial constraints can be exacerbated if they have problems keeping up with rent payments, and if they rent properties that require frequent repairs and maintenance. These circumstances can increase the likelihood of them being involved in disputes.

For landlords, quick and final resolution of disputes can be important, particularly where they are reliant on rental payments, including to service loan repayments or because it is their sole source of income.

The features and processes of the dispute resolution mechanisms in this sector should be considered in light of its unique needs, including the essential character of housing, the diversity of the population it serves, and the challenges for some tenants in navigating the issues that can arise in relation to their housing arrangements.

1.2.2 What are the desired outcomes from an effective residential tenancies dispute resolution system?

Consideration of the desired outcomes from an effective dispute resolution system is a useful starting point from which to identify issues relating to each of the individual mechanisms, and the way in which they work together. Ideally, a dispute resolution system for this sector will:

- deliver fast, fair and equitable outcomes consistent with the law
- accommodate constructive resolution and outcomes
- bring about compliance with the law and contractual obligations, and
- provide certainty and confidence in the market.

Attributes in addition to the effectiveness of any particular mechanism, include that the system is:

- comprehensive
- coherent, and
- efficient.

These attributes are discussed in more detail in section 2.2.

1.2.3 What are the desired features of residential tenancies dispute resolution mechanisms?

Stakeholders have identified many issues in submissions to the Review to date regarding various aspects of the dispute resolution system and mechanisms, which have been taken into account in the drafting of this issues paper. The information provided by stakeholders has been used to formulate a framework of features required for a dispute resolution mechanism to be effective, and to deliver the desired outcomes. These features are summarised in table 1.1. Stakeholders are invited to refer to this framework, and any other features considered relevant, when responding to the questions for consideration throughout this paper.

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3 Submissions to the Review can be accessed via fairersaferhousing.vic.gov.au.
Table 1.1: Features required for effective dispute resolution mechanisms

<table>
<thead>
<tr>
<th>Feature</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair</td>
<td>Dispute resolution processes and decisions should be fair, and be seen as fair. Steps should be taken to address any significant power imbalances between disputants.</td>
</tr>
<tr>
<td>Fast</td>
<td>Speed of resolution is important given the potential impacts of housing related disputes on the parties, including financial hardship for either, the impact of an unresolved dispute on the tenant-landlord relationship, and the related risks of homelessness for some tenants and loan defaults for some landlords.</td>
</tr>
<tr>
<td>Low-cost</td>
<td>Cost should not be a barrier to resolving disputes, particularly in a sector supplying an essential commodity such as housing, and where the parties are predominantly private individuals.</td>
</tr>
<tr>
<td>Accessible</td>
<td>Information about the dispute resolution options should be well publicised, and easy to find and understand.</td>
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<tr>
<td></td>
<td>Processes should be informal, easy to understand and accessible to a diverse population.</td>
</tr>
<tr>
<td></td>
<td>In addition, the tools, services or mechanisms should be easy for parties to access, in terms of delivery method (telephone, internet, post, on-site/in person).</td>
</tr>
<tr>
<td>Fit for purpose</td>
<td>The method of dispute resolution should be appropriate for the matter in question, and the outcome sought.</td>
</tr>
<tr>
<td></td>
<td>Processes should be economical and take advantage of technological innovations.</td>
</tr>
<tr>
<td>Certain</td>
<td>Binding decisions made according to legislation should be transparent and consistent, offering certainty such that parties can be confident in the operation of the market generally, and in the outcomes of any dispute resolution processes they pursue.</td>
</tr>
</tbody>
</table>

Questions

1. What characteristics of the residential tenancies sector (if any) are relevant to its dispute resolution system?

2. What are the key outcomes that a residential tenancies dispute resolution system should aim to provide for?

3. What features do you consider important for effective residential tenancies dispute resolution mechanisms?

4. How would you rank the importance of these features?
2 Victoria’s residential tenancies dispute resolution arrangements

2.1 What are the existing mechanisms for resolution of disputes in the residential tenancies sector?

The Residential Tenancies Act prescribes duties that parties to a residential tenancies agreement have to each other and generally, as well as actions that are deemed to be offences. The Act also provides the framework for the resolution of disputes. It sets out the scope of consequences for breaches of duty; the remedies available to the aggrieved party in each case; and the ways in which those remedies can be pursued. Depending on the nature and gravity of the breach, an aggrieved party can seek compliance, compensation and/or an end to the tenancy agreement. In addition, the Act gives the Director of Consumer Affairs Victoria (CAV) certain powers to undertake compliance and enforcement activities.

There are a number of avenues available to participants in the residential tenancies sector to facilitate the resolution of disputes, and support the framework of rights and obligations prescribed by the Act. These are described in turn below, and include:

- information and advice services (section 2.1.1)
- independent third-party assisted resolution (section 2.1.2)
- inspections and advice from CAV (for rent increases, non-urgent repairs and goods left behind) (section 2.1.3)
- tribunal dispute resolution services (section 2.1.4), and
- compliance and enforcement tools and activities (section 2.1.6).

The dedicated dispute resolution avenues available to public and community housing tenants are outlined in section 2.1.5 for completeness, however they are not within the scope of the Act or this Review.

2.1.1 Information and advice services

Information and advice services offer tenants, landlords and property managers the tools to resolve disputes independently. These tools are provided free of charge by a number of different organisations, including CAV, tenant advocacy organisations, and the Dispute Settlement Centre Victoria (DSCV). There may also be other industry or member organisations that provide similar services.

Consumer Affairs Victoria

As the regulator for the sector, CAV has a role to provide education and information to the public about the legislation. CAV’s information and advice service aims to assist parties to comply with their legal obligations, understand and exercise their legal rights, resolve disputes independently, and avoid future disputes of a similar nature. CAV provides this service to tenants, landlords and property managers at no charge.

In addition to a real time (telephone and email) service, enquirers receive further assistance through forms and publications, referrals to digital channels such as the CAV website and RentRight App, and referrals to other agencies such as the Victorian Civil and Administrative Tribunal (VCAT), the Department of Health and Human Services’ website, tenants’ advocates and community legal centres.

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4 While property managers can be an important source of information and advice, as an agent of the landlord they are considered to be part of the tenant-landlord relationship. Resolution of disputes with the assistance of a property manager is for the purposes of this paper the same as independent resolution between the parties.

5 As prescribed by Part 12 of the Act.

6 RentRight is a smartphone application with information and tools for tenants and landlords (accessible via consumer.vic.gov.au).
The information provided via the CAV website is available in a number of different languages, and in various accessible formats such as video and audio. A telephone interpreter service is also offered.

In 2014-15, CAV responded to 73,791 enquiries regarding a range of residential tenancies matters (table 2.1). In addition there were:

- 16,591 downloads of the RentRight App\(^7\)
- 1,236,289 visits to the relevant webpages\(^8\), and
- 6340 downloads of the renting guides for general tenancies, rooming houses, caravan parks and moveable dwellings.\(^9\)

| Table 2.1: Residential tenancies information and advice services, top 5 issues, 2014-15 |
|-----------------------------------------------|-----------------------------------------------|
| **Issue**                                       | **Residential tenancies inquiries (no.)** | **% of residential tenancies inquiries** |
| Termination rights                              | 13,311                                      | 23                                         |
| Repairs and maintenance                         | 8,521                                       | 14                                         |
| Bonds                                          | 3,930                                       | 7                                          |
| Tribunal hearings & applications                | 3,681                                       | 6                                          |
| Right of entry                                  | 2,477                                       | 4                                          |

Source: Consumer Affairs Victoria Data Set – 2014-15 FY.

**Tenancy Advice and Advocacy Program**

In addition, CAV provides funding for 11 tenant advocacy agencies and community organisations as part of its Tenancy Advice and Advocacy Program (TAAP) to support vulnerable and disadvantaged tenants. In 2014-15, TAAP agencies assisted 6,267 tenants and residents, providing information and advice, conciliation, and preparation and assistance for tribunal hearings.\(^10\) The services of the TAAP agencies are tailored to their client base, which is dispersed throughout Victoria and includes Aboriginal and Torres Strait Islander people, people who speak languages other than English, and people who experience disability, violence and adverse life events.

**Dispute Settlement Centre Victoria**

DSCV also plays a role in assisting parties to independently resolve disputes through its resolution advice and conflict coaching services. DSCV is a free dispute resolution service funded by the Victorian Government to assist people with all kinds of common disputes.\(^11\) People can contact the DSCV directly and services are offered via 14 offices throughout Victoria. DSCV also offers interpreter services for telephone intake and in-person mediation.

In the context of residential tenancies, the services can be accessed by tenants and landlords, neighbours, co-tenants and co-residents (for example, of rooming houses or caravan and residential parks). In 2014-15, DSCV handled 442 advisory service calls for residential tenancies disputes.\(^12\)

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\(^8\) Consumer Affairs Victoria Data Set – 2014-15 FY.

\(^9\) Consumer Affairs Victoria Data Set – 2014-15 FY.


\(^12\) DSCV, Dispute type data, 2014-15. Tenant-landlord disputes (155) and share houses (287) out of a total of 19 984 advisory service calls for all dispute types.
<table>
<thead>
<tr>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>5  How effective are the information and advice services provided by CAV, DSCV, TAAP and other agencies as tools for parties to independently resolve disputes?</td>
</tr>
<tr>
<td>6  How could the existing services be improved?</td>
</tr>
<tr>
<td>7  What alternative or additional tools or initiatives could assist parties, including vulnerable and disadvantaged tenants, to independently resolve disputes?</td>
</tr>
</tbody>
</table>
2.1.2 Independent third-party assistance

If the parties are unable to resolve a dispute between themselves, they may seek assistance from an independent third party. The primary services that provide assistance of this nature for residential tenancies matters are Frontline Resolution (FLR) (via CAV), conciliation (via CAV), mediation (via DSCV), and negotiation (via TAAP agencies).

These services are provided with the voluntary participation of both parties. They are free of charge and interpreters are available for either party where required. The services are available to tenants and residents, with the exception of DSCV, which can also be accessed by landlords.

**Frontline Resolution (FLR)**

FLR is a service that is offered to consumers across a range of business areas for which CAV is responsible, including residential tenancies. It is not offered to traders (or landlords in this case), as its focus is on consumer protection.

FLR aims to assist parties to reach a resolution that accords with the objectives of the legislation, as quickly and simply as possible. FLR officers do this by contacting both parties, usually by telephone, within a short timeframe to advise each of their rights, obligations and options. They may also provide information about other dispute resolution options such as making an application to VCAT. Neither of the parties can be compelled to participate.

A tenant or resident is typically referred to FLR via CAV’s information and advice service, without the need for a written application or supporting documentation, and in accordance with the FLR guidelines (box 2.1).

Disputes resolved in this way are done so on the basis of a verbal agreement, which is non-binding. That is, neither party is bound to comply with the agreement.

**Box 2.1: FLR guidelines**

<table>
<thead>
<tr>
<th>FLR may be offered to tenants and residents where:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• there is potential non-compliance with the legislation on the part of the landlord</td>
</tr>
<tr>
<td>• there is significant potential for harm</td>
</tr>
<tr>
<td>• there may be a broader impact on tenants</td>
</tr>
<tr>
<td>• the dispute raises issues that may have implications for risk management, resourcing or be of strategic significance</td>
</tr>
<tr>
<td>• the tenant has made a reasonable attempt to resolve the dispute themselves</td>
</tr>
<tr>
<td>• the tenant may be vulnerable or disadvantaged</td>
</tr>
<tr>
<td>• the parties are willing to participate</td>
</tr>
<tr>
<td>• the dispute is reasonably likely to be resolved with CAV’s assistance</td>
</tr>
<tr>
<td>• CAV is the most appropriate agency to handle the dispute, and</td>
</tr>
<tr>
<td>• the matter has not been decided or pending a court or tribunal decision.</td>
</tr>
</tbody>
</table>

In 2014-15, 1,930 FLR cases were handled across a range of residential tenancies matters, with repairs and maintenance issues accounting for almost 70 per cent of these (table 2.2).\(^{13}\) An agreement was reached in

\(^{13}\) Residential tenancies FLR cases accounted for 29 per cent of the total number of FLR cases handled by CAV. (Consumer Affairs Victoria, Data Set – 2014-15 FY).
87.5 per cent of the total residential tenancies cases. However, as this is a non-binding voluntary process, subsequent compliance is not monitored. If the agreement is not adhered to the parties may choose to pursue an outcome via another avenue.

**Table 2.2: FLR services for residential tenancies matters, top 5 issues, 2014-15**

<table>
<thead>
<tr>
<th>Issue</th>
<th>Residential tenancies FLR cases</th>
<th>% of (residential tenancies) FLR cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repairs and maintenance</td>
<td>1,332</td>
<td>69</td>
</tr>
<tr>
<td>Bonds</td>
<td>203</td>
<td>11</td>
</tr>
<tr>
<td>Rent and receipts</td>
<td>103</td>
<td>6</td>
</tr>
<tr>
<td>Termination</td>
<td>91</td>
<td>5</td>
</tr>
<tr>
<td>Deposits/upfront fees</td>
<td>28</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: Consumer Affairs Victoria, Data Set – 2014-15 FY.

**Conciliation**

Where FLR is deemed inappropriate, or where a tenant or resident has made a written complaint, the case may be referred to CAV’s conciliation service. The service is provided in relation to matters across a range of industry sectors for which CAV is responsible, including residential tenancies, in accordance with CAV’s conciliation guidelines (box 2.2).

**Box 2.2: CAV conciliation guidelines**

CAV’s conciliation services may be offered to tenants and residents where:

- circumstances give rise to an allegation that the conduct appears to be a breach of legislation
- conduct complained of relates to areas CAV believes warrants its involvement in the interests of consumer protection or the promotion of an informed and responsible marketplace
- the tenant has made a reasonable attempt to resolve the dispute with the landlord
- the complaint does not relate to a breach of contract by the tenant
- the complaint appears reasonably likely to be settled, and
- VCAT or the courts have not already determined the matter, or there is no case pending.

As part of this service CAV may request copies of relevant documents such as contracts and correspondence. It employs a variety of conciliation methods including telephone calls to the parties, correspondence, and where appropriate, face to face meetings.

The conciliation process is voluntary, and therefore a landlord cannot be compelled to participate, or agree to or comply with, any negotiated outcome. Where the dispute is not resolved, or an agreement is not fulfilled, complainants have the option to seek civil remedies in VCAT or the courts.

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In 2014-15, 43 residential tenancies matters were formally conciliated, and disputes were either resolved or withdrawn in 40 of those cases.\(^{15}\)

### Mediation

A free mediation service is provided through DSCV to assist people with a wide range of common disputes. As part of this service, a Dispute Assessment Officer from DSCV may invite the other party/ies to participate in the process. During a mediation session, the mediator’s role is to assist the parties to reach an agreement that is acceptable to them. Unlike other sector-specific services, which are mostly targeted at tenants and residents, DSCV has the scope to assist landlords. In addition, co-tenants and co-residents can access the service.\(^{16}\) The average time frame for the handling of a case from the initial contact with the party seeking assistance to closure is 40 calendar days.

In 2014-15, DSCV referred 90 residential tenancies-related matters to mediation. The outcomes of these cases are shown in table 2.2. Unlike the other services mentioned here, DSCV is not a dedicated residential tenancies dispute resolution service. It is a free service to assist people in the community with disputes generally, and therefore residential tenancies or housing related disputes make up only a small part of their service.

**Table 2.2: Mediation services provided by DSCV for ‘Tenancy’ dispute type, 2014-15**

<table>
<thead>
<tr>
<th>Category (by dispute type)</th>
<th>Referred for mediation</th>
<th>DSCV Assist(^{a})</th>
<th>Mediation held</th>
<th>Mediation successful</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenancy – landlord/tenant</td>
<td>35</td>
<td>10</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Tenancy – share house</td>
<td>55</td>
<td>11</td>
<td>6</td>
<td>6</td>
</tr>
</tbody>
</table>

\(^{a}\) DSCV Assist refers to a dispute resolved via in-depth intake, assessment and conflict coaching between a Dispute Assessment Officer and both parties, without the need for a formal mediation session.

Source: DSCV Dispute type data 2014-15 FY.

### Negotiation services for vulnerable and disadvantaged tenants

As described in section 2.1.1 above, CAV provides funding for 11 tenant advocacy agencies and community organisations to provide specialised support services to vulnerable and disadvantaged tenants through TAAP. The services the TAAP agencies provide range from information and advice through to preparation for and assistance at tribunal hearings. In 2014-15, TAAP agencies provided assistance to 6,267 tenants and residents.\(^{17}\)

The services of the TAAP agencies are tailored to their client base, which is dispersed throughout Victoria and includes Aboriginal and Torres Strait Islander people, people who speak languages other than English, and people who experience disability, violence and adverse life events. Tenants can access the services directly, but may also be referred by CAV or another agency. Their eligibility for assistance is determined by the individual agency.

Negotiation is one of the services TAAP agencies use to prevent a dispute escalating to a VCAT hearing. Negotiation may involve responding to documents received by the tenant, negotiating with the other party, and bringing parties together to reach a resolution.

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\(^{15}\) Source: Consumer Affairs Victoria, 2014-15 Financial Year. These do not include matters handled through FLR, and exclude inspection requests.

\(^{16}\) Co-tenant agreements and transactions are outside the scope of the Residential Tenancies Act so disputes between co-tenants are outside the scope of this paper, however data has been included in this instance for completeness.

In 2014-15, 3960 negotiations were conducted by nine of the 11 TAAP agencies and almost a third of these were resolved in this way. 18

Where a resolution is not reached, the TAAP agency can provide assistance in completing paperwork and preparing a tenant to represent themselves at VCAT. Alternatively, a TAAP worker may attend and advocate for a tenant where needed.

<table>
<thead>
<tr>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>8  How effective are the third-party assistance mechanisms provided by CAV, TAAP agencies and DSCV in dealing with residential tenancies issues?</td>
</tr>
<tr>
<td>9  What other relevant services of this kind are available to assist with residential tenancies disputes?</td>
</tr>
<tr>
<td>10  What aspects of the third party assistance mechanisms work well?</td>
</tr>
<tr>
<td>11  What alternative or additional tools could assist parties, including vulnerable and disadvantaged tenants, to resolve disputes quickly and informally, and to prevent their escalation?</td>
</tr>
</tbody>
</table>

### 2.1.3 CAV inspections and advice

The Act provides for parties to apply to the Director of CAV to investigate and report on the following:

- rent increases (tenants)
- non-urgent repairs (tenants), and
- goods left behind (landlords).

These services are not dispute resolution mechanisms in themselves, but their outcomes can be used to support (or defend) further claims in VCAT and the courts. In some cases, disputes can be resolved at the inspection and reporting stage.

In 2014-15, CAV delivered 5,936 inspections and reports in total. 19

#### Rent increases

If a tenant receives notice of a rent increase and they believe that the amount of the increase is excessive, they can complain to the Director of CAV, who must investigate and provide a report to the tenant and landlord as soon as practicable following the request. 20 CAV aims to complete rent assessments at least two weeks prior to the rent increase commencing, but must make allowance for delays where the tenant cannot be contacted or is not available to attend inspections.

After receiving CAV’s rent assessment, the tenant may apply to VCAT, which can dismiss the application or otherwise make an order declaring the rent to be excessive. In the latter case, the order will specify the maximum amount of rent that the landlord can charge for the next 12 months.

In 2014-15, CAV provided 1,115 rental reports. 21

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20 Division 3 each of Parts 2, 3, 4 and 4a of the Act for general tenancies, rooming houses, caravan parks and moveable dwellings respectively.
Non-urgent repairs

If a tenant has issued a landlord with a request for non-urgent repairs to a property, and the landlord has not responded within 14 days, the tenant may apply to the Director of CAV to investigate whether the landlord has breached their duty to ensure the premises are maintained in good repair. CAV must investigate and provide a written report, and may also negotiate arrangements for carrying out the repairs if satisfied that the landlord is in breach of this duty.

If the tenant is not satisfied that the appropriate steps have been taken to carry out the repairs, they can apply to VCAT for an order for the repairs to be carried out.

CAV aims to perform the inspection as soon as practicable, making allowance for delays in contacting and arranging a suitable time with the tenant.

In 2014-15, CAV provided 936 non-urgent repairs reports.

Goods left behind

Sometimes tenants leave possessions at a property after they have vacated, which the landlord must handle in accordance with the provisions in Part 9 of the Act. Under section 385 of the Act, a landlord can request written advice from the Director of CAV about whether they can remove, destroy or dispose of goods left behind by a tenant. A CAV report on goods left behind is a precaution that a landlord can choose to take when dealing with goods left on their property. They may rely on this advice if the tenant subsequently seeks compensation from them for possessions that have been removed, destroyed or disposed of, for example. A landlord is not required to seek this advice before taking action.

In 2014-15, CAV provided 3,885 goods left behind reports.

Questions

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

13 How could CAV’s inspections activities be improved?

14 How could CAV’s inspections activities be of greater benefit to vulnerable and disadvantaged tenants?

15 What (if any) alternative or additional areas of dispute would be appropriate for the Director of CAV (or another agency) to have powers to intervene?

2.1.4 Victorian Civil and Administrative Tribunal (VCAT)

VCAT is an independent judicially-governed tribunal that has powers to hear matters, make binding determinations and orders, and issue infringements. It fulfils many of the same functions as a court. However, VCAT operates with shorter timeframes, lower costs and less formality than courts. This is done by managing caseloads and seeking the most appropriate method of resolution, limiting legal representation and providing assistance to self-represented parties.

VCAT handles various kinds of (mainly) relatively low-value civil disputes and all administrative review matters. VCAT hears matters between parties to agreements regulated by the Act, which are tenants and landlords; rooming house owners and rooming house residents; and caravan park owners and residents.

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22 Division 6 each of Parts 2, 3, 4 and 4a of the Act for general tenancies, rooming houses, caravan parks and moveable dwellings respectively.


25 Part 11 of the Residential Tenancies Act extends these powers to VCAT. VCAT’s jurisdictional limits are prescribed by section 447 Act. The specific rules and procedures employed by VCAT are determined according to the VCAT Act.
Tenant to tenant transactions and agreements are not within the scope of the Act, and disputes between them are therefore not handled under VCAT’s Residential Tenancies List.

A party to a tenancy or residency agreement may access VCAT in accordance with the Act. Parties may also apply directly to VCAT in the first instance for any tenancy related matter.26 The Act also provides for third-parties to make applications regarding a tenancy agreement, provided leave has been granted.27

Hearings provide the opportunity to call or give evidence, ask questions of witnesses and make submissions. The VCAT member either delivers a decision at the end of the hearing, or otherwise delivers a written decision as soon as possible afterwards. Hearings are public, and selected decisions are published.28

VCAT is required to act fairly and according to the substantial merits of the case, and is bound by the rules of natural justice.29 VCAT decisions can be appealed only on a question of law, and parties may seek leave to appeal a decision in the Supreme Court of Victoria. VCAT cannot create binding precedents, or apply criminal penalties.

**Alternative Dispute Resolution**

VCAT provides mediation and compulsory conferences in relation to an application, at no additional charge to the parties. These forms of dispute resolution fall within the broad category of Alternative Dispute Resolution (ADR).30 A proceeding or part of a proceeding can be referred to ADR at VCAT’s initiative or at the request of one of the parties. VCAT decides whether ADR is appropriate for the dispute.

During mediation, the mediator, who may or may not be a VCAT member, assists parties to reach an agreement. Compulsory conferences are similar to mediation, except that they are only conducted by VCAT members, who can make orders to adjourn or dispose of the case where a settlement is reached. In both cases, the sessions are generally private and confidential.

According to VCAT, its members often use ADR during the course of a scheduled hearing. VCAT members have discretion under the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) to mediate and adjudicate.31 In the first instance and where appropriate, VCAT members will encourage parties to settle or reduce the issues before proceeding with the hearing. Resolution of disputes in this way can take less time than a hearing, and produce outcomes that both parties consider acceptable. However, the cases must be defended (both parties must be present) for this model to be used. When a case is resolved in this way, VCAT makes a consent order, which reflects the agreement reached by the parties.

It is difficult to estimate the number of cases that are resolved using ADR during the course of a hearing because this information is not recorded. VCAT has advised that for the purposes of data collection, only those cases that are booked in for ADR are recorded as such.32

**Features, processes and access**

While VCAT is designed to operate with less formality than the courts, it is the most formal mechanism for resolving residential tenancies disputes.33

Application for a hearing must be made in writing (by submitting a completed form) and accompanied by any relevant documentation. Applications can be lodged online, in person or by mail. Information and forms

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26 Section 452 provides a catch-all provision for parties to apply to VCAT for any dispute that has arisen under the Act or breach of the tenancy agreement or provisions of the Act relating to the tenancy agreement has occurred.

27 Under subsections 452(5) – (7). Under subsection 452(7), VCAT must not grant leave unless it is satisfied that the applicant has a sufficient interest or personal involvement in the tenancy agreement.


29 Sections 97-98 of the VCAT Act.

30 In this paper ADR refers to VCAT mediation and compulsory conferences.

31 Section 93A.

32 For example, the Productivity Commission reported that 85 of 58,436 residential tenancies matters were referred to compulsory conference or mediation in 2012-13. (Access to Justice Arrangements: Inquiry Report, no. 72, 5 September 2014, p.366.)

33 VCAT services are subsidised, so the fees paid by applicants do not reflect the full costs of their provision.
are available in languages other than English, and an interpreter service is available at no additional charge to both parties. As at 1 July 2015, the fee for most residential tenancies matters was $59.80, and fee waivers are available for eligible applicants. There is no additional charge if the case is referred to ADR.

Hearings are held in 39 locations around Victoria, and cases are heard approximately five weeks from the time of application. Various prescribed waiting periods for progressing a case can add to the length of time taken to resolve a dispute. For example, a defendant may be given 14 days to comply with an order before the complainant can take further action.

Limitations on representation are intended to reduce the formality, time requirements and costs associated with bringing a matter to VCAT. Representation at a hearing is permitted for specified persons, and under certain circumstances under the VCAT Act. Broadly these circumstances apply:

- where the other party is permitted to be represented under section 62(2)
- the other party is a professional advocate, or
- all parties agree.

VCAT will also ordinarily permit a party to be represented by a professional advocate who is not a legal practitioner, where they have relevant professional experience, such as a real estate agent in a residential tenancies matter. More generally, VCAT has the discretion to permit any party to be represented, and to appoint an advocate for any party. Further, representation is permitted for any party to a proceeding for possession under the Residential Tenancies Act.

The parties may agree to settle the dispute at any time, even once the case has proceeded to a hearing.

**Remedies and enforcement**

Parties can seek orders from VCAT for compensation, compliance and/or ending a tenancy agreement. In response to the matters brought before it, VCAT has powers to:

- issue orders to undertake or not to undertake certain actions (injunctions)
- issue penalties for orders not complied with
- authorise rent to be paid to the Rent Special Account where repairs have been ordered but have not been carried out
- direct how a bond is to be distributed amongst the parties to the tenancy, and
- authorise landlords to purchase a warrant for possession where a tenant has not complied with a valid notice to vacate.

Where VCAT orders are not complied with, or compensation is not paid, applicants must apply to either the Supreme Court for the enforcement of non-monetary orders, or the Magistrate’s Court for monetary orders up to $100,000. Data is not available on the incidence of non-compliance with VCAT orders.

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34 There is no charge for bond matters.
36 Section 62.
38 Clause 67 of Schedule 1 of the VCAT Act.
39 The Rent Special Account is an account established under the Act into which a tenant, having received authorisation from VCAT, can pay rent into for a specified period or until such time as the repairs have been carried out (section 77 of the Act).
40 Part 7 of the Act contains provisions for regaining possession (possession orders and warrants).
Who uses VCAT?

In 2014-15, VCAT received 59,184 residential tenancies applications (table 2.4).

Table 2.4: VCAT Applications by case type, 2014-15

<table>
<thead>
<tr>
<th>Case Type</th>
<th>No.</th>
<th>%a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possession and rent</td>
<td>12,586</td>
<td>21.3</td>
</tr>
<tr>
<td>Bond – unpaid rent and loss or damage or both (Landlord)</td>
<td>9,973</td>
<td>16.9</td>
</tr>
<tr>
<td>Bond and compensation (Landlord)</td>
<td>6,696</td>
<td>11.3</td>
</tr>
<tr>
<td>Possession, rent and bond (Landlord)</td>
<td>5,873</td>
<td>10</td>
</tr>
<tr>
<td>Others</td>
<td>24,056</td>
<td>40</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>59,184</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

a Percentage column has been added.

b Does not add to 100 due to rounding


Most of the matters were brought by landlords (table 2.5).

Table 2.5: VCAT Applications by applicant type, 2014-15

<table>
<thead>
<tr>
<th>Applicant Type</th>
<th>No.</th>
<th>%a</th>
</tr>
</thead>
<tbody>
<tr>
<td>Landlords represented by estate agents or property managers</td>
<td>38,794</td>
<td>65.5</td>
</tr>
<tr>
<td>Director of Housing</td>
<td>12,936</td>
<td>21.9</td>
</tr>
<tr>
<td>Tenants or residents</td>
<td>3,931</td>
<td>6.6</td>
</tr>
<tr>
<td>Private Landlords</td>
<td>2,537</td>
<td>4.3</td>
</tr>
<tr>
<td>Others</td>
<td>986</td>
<td>1.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>59,184</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

a Percentage column has been added.


It is not possible to determine whether the level of VCAT usage by either tenants or landlords is appropriate or otherwise because the total number of disputes that occur across the sector is unknown, as is the proportion of those disputes that would appropriately be handled by VCAT. However, it is expected that landlords’ reliance on VCAT would be high compared to that of tenants given that:

- landlords may be more likely to seek binding orders and determinations in the first instance in order to mitigate financial loss through rent arrears or property damage
- in many cases, a quasi-judicial decision is required for a landlord to legally regain possession of their property or claim funds as compensation from a tenant as a result of loss or damage (which is a reflection of the operation of checks and balances in the Act, and reflected in the data by case type in table 2.4)
- while landlords have access to information and advice, and goods left behind reports provided by CAV and the general advice and mediation services provided by DSCV, they do not have access to other forms of interim assistance such as FLR and conciliation.
It is nonetheless relevant to consider, given the proportionately low use of VCAT by tenants, whether they choose not to use VCAT even where it may be the most appropriate mechanism to achieve the outcome they seek. Some of the factors both tenants and landlords might consider when deciding whether VCAT is the appropriate mechanism for their disputes are:

- whether previous attempts to resolve the dispute have been made
- what alternative options are available
- whether the cost, level of formality and engagement is proportionate for the matter in question
- how quickly a resolution is required and whether a binding decision is required in the first instance, and
- what impact the process and outcome could have on the relationship between the parties and the tenancy.

In addition, an important issue raised by VCAT and other stakeholders, is that tenant attendance at hearings is low, despite the fact that attendance would improve the likelihood of a favourable outcome for the tenant.

Stakeholders such as the Victorian Council of Social Service and the Victorian Aboriginal Legal Service have noted a range of factors that could contribute to low usage and attendance including fees, waiting times, complexity of the application process, the formal nature of the proceedings, and the lack of adequate notice of hearings.

Stakeholders are invited to comment on any obstacles or barriers to tenants as a group in accessing and utilising VCAT’s services, and in particular, challenges that vulnerable and disadvantaged tenants face.

### Questions

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

17. How could VCAT’s services be improved?

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

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

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?

### 2.1.5 Assistance and appeals processes for social housing tenants

In addition to the dispute resolution mechanisms that are described in the previous sections, there are several other mechanisms that public and community housing tenants can access. While these are outside of the scope of the Review, their inclusion here is intended to provide a greater understanding of co-existing mechanisms that are available to this cohort of tenants. These include:

- an internal appeals process is available to all public housing tenants, who believe decisions made relating to the provision of housing services do not follow the Department of Health and Human

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41 For example, submission to Security of Tenure Issues Paper from Victorian Council of Social Service (p.22); submissions to Laying the Groundwork from Inner Melbourne Legal Service (p.9) and Victorian Aboriginal Legal Service (p.15).

42 Submission to Security of Tenure Issues Paper from Victorian Council of Social Service (p.22); submission to Laying the Groundwork from Victorian Aboriginal Legal Service (p.15).
Services’ policy guidelines (provided that those decisions do not fall within the jurisdiction of a statutory body such as VCAT)

- the Housing Registrar can review and investigate complaints against registered housing agencies by community housing tenants and prospective tenants regarding rental housing matters that could not be resolved by the agency, and
- where a public housing tenant is not satisfied with the outcome of their review they can appeal through the Victorian Ombudsman.

The Social Housing Advocacy and Support Program (SHASP) provides tailored case management and support to public housing tenants who have lost their tenancy or are at risk of losing their tenancy.

2.1.6 Sector-wide compliance and enforcement mechanisms and activities

The Director of CAV has powers to take action against parties who do not comply with their duties and obligations under the Act, do not comply with a VCAT determination, or who commit an offence.

Offences are listed in Division 1 of Part 13 and throughout the Act. For example, under the Act it is an offence to:

- make false representations in relation to tenancy agreements or residency rights
- persuade someone not to exercise rights or take proceedings
- aid, abet, counsel or procure the commission of an offence
- give false information, and
- demand or accept payment of certain penalties

These are in addition to the general duties and obligations of the parties, which are also dispersed throughout the Act. Part 12 describes the role of the Director of CAV in relation to jurisdiction, functions and administration of the Act in the enforcement of the relevant provisions.

Rather than being a dispute resolution mechanism of last resort, CAV’s compliance and enforcement activities focus on matters where there is adequate evidence to support a successful action, and where conduct:

- presents serious or extensive detriment to the community (and particularly vulnerable groups)
- is systematic and deliberate, and
- is likely to continue.

Matters are considered on a case-by-case basis. The criteria that are applied to case selection are described in CAV’s compliance and enforcement policy.43

One of the aims of CAV’s compliance and enforcement activities is to bring about voluntary compliance at a sector-wide level, and resources are directed to where intervention can have the greatest impact on behaviour in the sector (table 2.6). The tools used by CAV include:

- education and information, such as campaigns directed at increasing awareness among landlords and rooming house operators about their duties and obligations, and also via the day-to-day delivery of information and advice, FLR and conciliation services
- proactive compliance initiatives, such as visits to rooming house operators and landlords as part of ongoing compliance audits
- data collection and analysis, such as identification of systemic trends to target compliance and enforcement activities, and
- enforcement tools such as compliance letters, enforceable undertakings, prosecutions and injunctions.

In relation to court proceedings, the focus has included prosecutions and civil actions relating to:

- failure to lodge bonds with the Residential Tenancies Bonds Authority, and
- failure to comply with minimum standards in the rooming house sector.

### Table 2.6: Compliance and enforcement activities: residential tenancies, 2014-15

<table>
<thead>
<tr>
<th>Activity</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliance inspections</td>
<td>679 (Rooming houses)</td>
</tr>
<tr>
<td>Investigations</td>
<td>14 (Rooming houses)</td>
</tr>
<tr>
<td></td>
<td>10 (Other residential tenancies)</td>
</tr>
<tr>
<td>Prosecutions (commenced)</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: Consumer Affairs Victoria, Data Set – 2014-15 FY.

### Questions

21 How effective are the compliance and enforcement functions provided by CAV?

22 How could CAV’s compliance and enforcement functions be improved?

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45 Including intelligence collected in the course of providing services such as information and advice, FLR, conciliation and inspections.
2.2 How effective is the current system for residential tenancies dispute resolution?

The dispute resolution system is made up of all of the available options and mechanisms that parties can access for assistance in resolving their disputes (figure 2.1). Each of the mechanisms represented in figure 2.1 refer to those described in section 2.1 above.

*Figures are per annum estimates, and are indicative only.

An effective system is more than the sum of its parts. Together with the features for effective individual mechanisms described in section 1.2.3, system-wide features such as comprehensiveness, coherence and efficiency are also relevant.

A comprehensive system is one that is equipped to address the full range of needs for dispute resolution in residential tenancies. In addition to dedicated dispute resolution mechanisms, it will feature supporting ‘infrastructure’ in the form of appropriately detailed and workable regulation, non-regulatory initiatives (such as tenant advocacy and early intervention support programs) and relevant educational and guidance materials.

A coherent system is one in which individual dispute resolution mechanisms complement each other, and there is a clear path of escalation, and ultimately enforcement. It is consistent in the application of the law and transparent in decision-making across the system.

An efficient system is one that delivers the most appropriate services at the least cost. The way in which the volume of disputes are managed, and whether they are handled by the most appropriate mechanism in a way that minimises cost and time, and delivers the greatest benefit to the community are factors that will influence the level of efficiency of the system.

Regular review and evaluation of the system will provide an understanding of the needs of the sector and of any gaps in service provision. An important part of this is continuous improvement in strategic data collection and dissemination on the sources of disputes, what services are in demand, who is using the services, and their costs and outcomes.

Stakeholders’ views are sought regarding the effectiveness of the system as a whole, including its comprehensiveness, coherence and efficiency, as well as any other features considered relevant.

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46 Except for the assistance and appeals processes for social housing tenants (section 2.1.5).

Questions

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?

24 What additional information or data would assist in evaluating the effectiveness of the residential tenancies dispute resolution mechanisms and the system as a whole?

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?
3 Other dispute resolution models and mechanisms

This section highlights some of the alternative models and mechanisms utilised in other jurisdictions and sectors. Stakeholders are invited to comment on these or any other models and mechanisms, or aspects thereof, which may be relevant to Victoria’s residential tenancies sector.

3.1 Australian jurisdictions

The arrangements for dispute resolution for residential tenancies in other Australian jurisdictions are similar to those in Victoria. There are typically interim steps and options for resolving a dispute prior to a tribunal hearing. Orders made in the tribunals are enforceable via the courts.

Some differences in the models and mechanisms in selected jurisdictions are as follows:

- In the Australian Capital Territory and South Australia, the informal channels for dispute resolution as well as the tribunal hearings are provided via the tribunal rather than at the level of an administrative agency (such as CAV). These include conciliation conferences, settlement conferences or mediation. Agreements are formalised and lodged with the relevant tribunal in each case.

- In Queensland, applications to the Queensland Civil and Administrative Tribunal must be accompanied by a Notice of Unresolved Dispute, demonstrating that conciliation has been attempted (except for a prescribed range of case types that are considered unsuitable for conciliation). The Residential Tenancies Authority (a statutory government agency) provides the conciliation service, and agreements reached via this channel are reflected in amendments to the tenancy agreement.

- The conciliation service provided by the New South Wales Office of Fair Trading is offered to both parties, not just the tenant or resident. Complaints must be in writing and are subsequently dealt with within 30 days. In addition, guidance material is provided via case studies on the New South Wales Civil and Administrative Tribunal’s website, which include tribunal members’ decisions and reasoning on a variety of common disputes based on actual cases.

3.2 Alternative models and mechanisms

3.2.1 Facilitated self-resolution

New Zealand

Parties to a residential tenancies dispute in New Zealand can formalise an agreement they have reached independently, via the ‘FastTrack Resolution’ process. To illustrate, if a tenant is in rent arrears, the tenant and landlord first reach an agreement about repayment, and the landlord then makes an application to the tenancy tribunal for FastTrack Resolution. The application must contain certain prescribed information, such as the amount of money owed, the repayment plan, the date payments will begin, and the consequences if the agreement is not adhered to. A mediator will then contact the tenant to ensure they understand and agree with the conditions of the agreement. If there is a problem at this stage of the process, the mediator can conciliate between the parties to resolve any issues. The agreement then becomes formalised as a mediator’s order and can be sealed by the Tribunal if required. This process can be completed within two days. There is a fee of approximately $20.00. The agreement may also become legally binding in court. 48

48 See www.tenancy.govt.nz/.
3.2.2 Compulsory mediation

Compulsory pre-action requirements can be imposed to encourage early resolution of disputes and manage volumes of cases flowing through the system to the courts and tribunals. These can be imposed at different stages of a dispute, from the least formal requirement for attempted self-resolution to more formal requirement such as compulsory mediation or conference.

There are costs and benefits of pre-action requirements depending on the matter and the parties. Compulsory steps can expedite a resolution, reduce costs, be less adversarial in nature, give parties greater control over the outcome and help preserve relationships. However, there are risks that power imbalances between the parties can detract from fair and equitable outcomes, and also that they can lead to delays and thus add to costs.

**Victoria (Retail Tenancies)**

Mediation is a compulsory step for disputes in the Victorian retail tenancies sector under the *Retail Leases Act 2003*. Under this system, most disputes are able to be resolved without proceeding to VCAT. Where parties do wish to proceed to VCAT, a certificate of mediation is required as evidence of having completed this step. Certain cases are exempt, for example, where the matter is urgent.

Mediation services, including initial information and preliminary assistance service, are provided by the Victorian Small Business Commissioner (VSBC). The VSBC is able to publish the names of parties who unreasonably refuse to participate in mediation in its Annual Report, providing an additional incentive to take part in the process.

Around 30 per cent of disputes are resolved at the preliminary assistance phase, and of those that go on to mediation, the reported success rate is over 80 per cent (table 3.1).

The retail tenancies sector shares some of the characteristics of the residential tenancies sector in that the parties to a dispute have a tenant-landlord relationship, and the commodity in question is the tenant’s business premises, and the landlord’s property. Many of the disputes deal with similar matters to residential tenancies including rent, repairs and maintenance, outgoings, leases and bonds (security deposits).

**Table 3.1: Mediation outcomes for retail leases, 2014-15**

<table>
<thead>
<tr>
<th>Total</th>
<th>Successful</th>
<th>Unsuccessful</th>
<th>Success rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>704</td>
<td>575</td>
<td>129</td>
<td>81.7%</td>
</tr>
</tbody>
</table>


---

3.2.3 Ombudsmen and complaints services

An ombudsman is a type of complaints service, which receives complaints, assists with resolution, and conducts inquiries into individual or systemic cases based on those complaints. Other types of complaints services, although not technically ombudsmen, perform similar functions.\(^{50}\)

An ombudsman or complaints service has the benefits of selecting the most appropriate way to approach a dispute. It is free of charge to the complainant and is intended to be faster than taking action in the courts. Some aspects of ombudsmen and complaints services are suited to residential tenancies disputes, and others less so. Broadly, ombudsmen are suited to sectors where:

- essential goods or services are being provided
- the market is characterised by large firms and limited competition, thus creating a significant power imbalance
- there is significant asymmetry of information, such that consumers would have difficulty asserting their rights, and
- individual suppliers each attract a large number of disputes.\(^{51}\)

In most cases, industry ombudsmen are funded, at least in part, by suppliers. Ombudsmen are likely to be supported by suppliers who see value in such a service in the context of their respective business models.

Public housing tenants in Victoria are able to appeal decisions regarding their housing arrangements via the Victorian Ombudsman, consistent with its power to investigate complaints about State and local government authorities.

**United Kingdom**

The United Kingdom’s Housing Ombudsman assists tenants to resolve certain disputes with landlord members of the scheme. Membership is mandatory for social and institutional landlords, while membership by private individual landlords and letting agents is voluntary.\(^{52}\)

The Ombudsman receives complaints from tenants. To utilise the service the tenant must first make a formal complaint directly to the landlord. If the problem is not resolved, the tenant contacts a ‘designated person’, such as a local Member of Parliament or councillor. The designated person can assist with resolution or refer the matter to the Ombudsman. Tenants can apply directly to the Ombudsman, however, a longer waiting period is imposed.

The Ombudsman decides on the best way to handle the complaint, which could be through conciliation, providing suggestions to either of the parties about resolution options, carrying out an investigation where appropriate, or referring the case to another organisation if they are unable to make a decision.

3.2.4 Online dispute resolution

**British Columbia (Canada)**

The Civil Resolution Tribunal (CRT) in British Columbia has been recently developed as an online tribunal to handle small claims and owners’ corporations disputes and is expected to commence operation in 2016.

Using the online system, parties can engage in a process that provides information, problem diagnosis and relevant information about the application of the law, as well as facilitated monitored party-to-party negotiation. If parties are not able to resolve their dispute at this stage, they may access assistance from a


\(^{52}\) See [www.housing-ombudsman.org.uk/](http://www.housing-ombudsman.org.uk/).
mediator, and if necessary can subsequently gain a binding decision from an adjudicator. The CRT enables people to control the process, accessing dispute resolution at a time and location that is convenient to them, and tailoring the timelines and steps to their needs. Telephone assistance is available at each stage, as are mail and face to face options in the mediation and adjudication phases. The conventional (non-online) avenues will remain available.

3.2.5 Non-tribunal administrative determinations

Republic of Ireland

The Private Residential Tenancies Board (PRTB) in Ireland is a statutory agency that provides policy and regulatory support to the private rental market, as well as dispute resolution services. Specifically, the PRTB makes administrative determinations in relation to rental tenancy disputes, which can be appealed at the relevant tribunal. 53

When parties wish to bring a dispute for formal resolution, they apply to the PRTB, which offers mediation in the first instance, or adjudication when the parties do not agree to mediation. In either case, if parties reach an agreement at mediation, or accept the adjudicator’s decision, the PRTB makes a Determination Order, which can be enforced by the courts. If an agreement is not reached at mediation, or the adjudicator’s decision is rejected by one or both parties, an appeal to the tribunal can be made within 21 days for a de novo hearing (a complete re-hearing of the case).

The PRTB also has the powers to respond to serious or urgent matters such as threat to life and illegal evictions. For example, it can impose an interim or interlocutory injunction to restrain a landlord or reinstate a tenant pending its determination, or can refer a matter directly to the tribunal.

Questions

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?

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?

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

53 See http://prtb.continuous.ie/dispute-resolution/disputes.
4 Conclusion

It is important that both tenants and landlords have confidence to enter agreements in the residential tenancies sector, given that they are consumers and providers of an essential commodity. It is also imperative that the system provides for disputes to be resolved effectively given the potential for hardship that unresolved disputes can have for either party.

This paper asks stakeholders to consider the effectiveness of the existing arrangements for the resolution of residential tenancies disputes, taking account of the unique requirements of participants in this market, and the desired outcomes from such a system.

On the basis of the features for effective dispute resolution systems and mechanisms proposed in this paper, in addition to any other information considered relevant, stakeholders are invited to submit their views regarding the strengths, weaknesses and any gaps in the existing residential tenancies dispute resolution system in Victoria. Responses to this paper will assist the Victorian Government to identify the issues and areas for reform.