



Tenants Union of Victoria
response to

Access to Justice Review

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Yes, what else but home?

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Tenants Union of Victoria

The Tenants Union of Victoria (TUV) welcomes the opportunity to provide feedback to the Access to Justice Review.

The TUV was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 16,000 private and public renters in Victoria each year. Our purpose is to improve the status, rights and conditions of all tenants in Victoria.

During 2014/15, the TUV handled more than 19,200 enquiries. TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, undertook 350 outreach visits to 250 rooming houses, caravan parks and services.

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Summary of Recommendations

- R1.** The *Residential Tenancies Act 1997* (RTA) should be amended to provide for the CAV Director to have determinative powers for dispute resolution in relation to some specific provisions of the Act.
- R2.** The *Residential Tenancies Act 1997* should be amended to empower VCAT to award civil penalties for prescribed breaches of the Act.
- R3.** The *VCAT Act 1998* should be amended to provide a right to merits review by the President or a Senior Member of the Tribunal in limited circumstances.
- R4.** VCAT should enhance its internal complaints process and readily display its complaints protocol and publish the type, number and outcomes of the complaints it receives.
- R5.** A mandatory annual training program should be developed for tribunal members to increase awareness of issues surrounding housing, cultural and other diversity, mental health, disability and drug and alcohol issues.
- R6.** VCAT should employ case managers to arrange hearings flexibly with tenants and link them in with appropriate services.
- R7.** VCAT should publicise detailed data about its operations.
- R8.** Tenants should not be required to pay VCAT application fees.
- R9.** VCAT should develop strategies that encourage tenants to defend their matters in appropriate circumstances and ascertain whether a matter will be contested.
- R10.** Notice of hearing forms should be redesigned to be more user-friendly.
- R11.** S140 of the *VCAT Act 1998* should be amended to enforce that the VCAT applicant must make reasonable enquiries as to the respondent's address for service.
- R12.** Hearings for notices to leave under s374 of the RTA should be sent through multiple means of contact.
- R13.** The time period of 10 business days for applications for the tenants bond should be strictly enforced by amending the *Residential Tenancies Act 1997* to provide that the bond must be refunded to the tenant if the landlord does not make a claim within the 10 business day time limit.
- R14.** Estate agents should be explicitly defined as "professional advocates" by the *VCAT Act 1998*.

Introduction

Equal access to justice is one of the key contributors to a fair and just society. It is a fundamental human right recognised in international law and the Victorian Charter of Human Rights. VCAT's own past president has highlighted that 'there are serious deficiencies in the accessibility of justice to the Victorian community'¹

For tenants the main pathway for dispute resolution is through the Victoria Civil and Administrative Tribunal (VCAT). The intention is that VCAT acts as an impartial mediator between the landlord and tenant, and that both parties have equal access to seek resolution for their issues.

Unfortunately there is a staggering inequity with which VCAT is accessed by landlords and tenants. Of the 59,184 applications to the Residential Tenancies List in 2015/16 less than 7% were lodged by tenants². We also know that only a small portion of tenants are attending VCAT hearings. The most current figures are unknown; however in 2009 only 20% of tenants attended hearings³.

Despite the low level of engagement with VCAT by tenants we know that tenants frequently experience problems in their tenancies, many of which require third party assistance. In 2014/15 Consumer Affairs Victoria (CAV) received almost 74,000 enquires about residential tenancy issues⁴, and TUV received almost 20,000 enquiries⁵

This major deficiency was recognised in the VCAT ten year review in 2009, 'the tribunal has been very successful in delivering access to justice to landlords, but tenants are not exercising their rights to the same extent.'⁶

The current review's aim 'to ensure the most disadvantaged and vulnerable in our community receive the support they need when engaging with the law and the justice system' is highly commended. This is of utmost importance to tenants who currently do not have access to equal and fair dispute resolution.

¹ Bell, Hon JK, *One VCAT Presidents Review of VCAT*, 2009, p2.

² VCAT *Annual Report 2014-15* p39 https://www.vcat.vic.gov.au/system/files/2014-2015_vcat_annual_report.pdf.

³ Bell, Hon JK, *One VCAT Presidents Review of VCAT*, 2009, p25.

⁴ Consumer Affairs Victoria Report on Operations 2014-15, *Making markets fair*, p15 <https://www.consumer.vic.gov.au/annual-report/our-performance/annual-report-on-operations-2014-15>.

⁵ Tenants Union of Victoria *Annual Report 2015-16*.

⁶ Bell, Hon JK, *One VCAT Presidents Review of VCAT*, 2009, p25.

Moving towards an Ombudsman model

R1. The *Residential Tenancies Act 1997* should be amended to provide for the CAV Director to have determinative powers for dispute resolution in relation to some specific provisions of the Act.

The Residential Tenancies List is by far the busiest list at VCAT, with 70% of all VCAT cases heard in this list alone. A key focus of VCAT is on efficiency of hearing, this can be seen with the high number of listings each day. Despite this very few tenants are engaging in the process.

The reason why tenants do not engage with VCAT is fundamentally because tenants are afraid of retaliation both within their current tenancy and afterwards. We support a greater role for resolution in accordance with the law at the earliest stage in any dispute.

This means shifting the dispute resolution process in an “ombudsman-like” direction where disputes are resolved by Consumer Affairs Victoria consistent with law and proper industry practice. This would require the Director to have clear determinative powers; however, based on the experience of many Ombudsman schemes, these powers would rarely be used.

Ultimately, we believe it would be better that there was an independent dispute resolution scheme as CAV may be conflicted with multiple other compliance and policy making responsibilities. This would reduce VCAT’s role to only hearing orders for possession under the Act which they are mainly doing now. All other issues, including general disputes, should be resolved through simpler and less legalistic processes.

Consumers are now very familiar with independent dispute resolution schemes. Ombudsman schemes in particular have experienced significant increases in demand for both enquiries and actual disputes. Most of these schemes have found very effective ways to reach out to consumers and build confidence in their processes. Importantly, the schemes provide impartial, timely and effective resolution.

Tenant issues with VCAT

Enforcement of orders

R2. The Residential Tenancies Act 1997 (RTA) should be amended to empower VCAT to award civil penalties for prescribed breaches of the Act.

The lack of enforcement measures available in the Residential Tenancies list at VCAT is a major issue for delivered outcomes as it can be difficult to ensure compliance even after VCAT has made an order.

The most common orders relating to tenants are for possession of the property or for compensation through the tenant's bond or otherwise. Tenants are likely to be compelled to comply with these orders as there are additional enforcement measures associated with each of these, police in the case of possession orders and the Residential Tenancies Bond Authority in the case of bond claims.

Data is not known of the most common reasons tenants apply to VCAT, however the most common reason tenants contact TUV is about urgent and non-urgent repairs, in these cases there is nothing that compels a landlord to undertake the repairs even if VCAT makes an order to do so. This is similar for compensation; there is nothing that compels a landlord to pay. Even urgent restraining orders have no compulsion for compliance, and landlords frequently continue with their unlawful behaviour.

A tenants' home, bond or future access to a home is at stake and so they are much more inclined to comply with a VCAT order.

Landlords however have no such compulsion, they do not have money tied up in a bond, their home is not at stake and they have no risk of being locked out of the market by getting placed on a database as tenants do. The rental market is highly competitive and arguably there are always new tenants to fill their property.

This lack of compliance greatly impacts tenants in receiving money that they are owed or services that they are entitled to. This presumably contributes to the lack of engagement with VCAT by tenants and impinges on tenants' access to justice.

We believe that the civil penalty power of VCAT under the *Owners Corporation Act 2006 (OCA)* should be extended to residential tenancies. The OCA provides:

S166. Penalty for breach of rules

If VCAT determines that a person has failed to comply with a rule of the owners corporation that imposes an obligation that is binding on the person, VCAT may make an order imposing a civil penalty not exceeding \$250.

Note: The penalties imposed under this section will be paid into the Victorian Property Fund

This change would enable, or in some instances, require, VCAT to award a civil penalty against a landlord where there is a finding of fact that an offence has been committed. We think this would be a much more efficient and effective means of encouraging and enforcing compliance with the requirements of the Act.

More serious breaches would still be prosecuted through the Magistrates Court and these would continue to be focussed on systemic problems with widespread reach or impact. It is right that serious offences should be subject to criminal test and sanction.

Internal appeals process

R3. The VCAT Act 1998 should be amended to provide a right to merits review by the President or a Senior Member of the Tribunal in limited circumstances.

VCAT currently provides no avenue for decisions to be reviewed on merit. The method to seek review of a VCAT decision is outlined in s148 of the VCAT Act, which provides that there is a right to appeal a decision on a 'question of law' at the Supreme Court of Victoria. The Supreme Court appeal process is an onerous, intimidating and cost prohibitive option, and for most tenants it is simply not accessible.

An internal review process would greatly improve tenants' ability to access fair and consistent decisions. It would provide parties a more accessible and affordable right of appeal, as well as increasing the consistency, predictability and quality of tribunal decision-making⁷.

We propose a model where appellants would require leave to appeal, and where the decisions would be published to increase transparency. Such a model would provide tenants (and landlords) with a cost effective and appropriate means of re-hearing on issues of fact or law. A merits review process is likely to lead to greater legal clarity for prospective parties and to improve the quality of decision making.

Member conduct

R4. VCAT should enhance its internal complaints process and readily display its complaints protocol and publish the type, number and outcomes of the complaints it receives.

The manner in which VCAT members conduct themselves is important in determining fair and equal access to justice, as they are the frontline delivery of service. The way in which members interact with the parties can greatly impact on the result of the hearing.

TUV is aware of repeated incidences where TUV staff and clients have been subjected to poor treatment by VCAT members. This behaviour includes actions such as bullying, rudeness, and inappropriate and misleading comments. We believe this is an impediment to tenant's ability to access justice.

The 2009 ten year review of VCAT raised a number of issues relating to member conduct and decision, including: 'inappropriate behaviour by some members, clubby atmosphere in some hearings, and inconsistency in procedure and result'⁸.

⁷ Bell, Hon JK, *One VCAT Presidents Review of VCAT*, 2009, p57.

⁸ Bell, Hon JK, *One VCAT Presidents Review of VCAT*, 2009, p21.

To provide greater accountability of VCAT members there needs to be a more transparent process for customer feedback and resolution of issues. This is recognised by VCAT as an area of priority through the Strategic Plan 2014-2017. It is unclear how VCAT manages user complaints against Tribunal Members and staff as it does not currently make any of this information available. One way to tackle this would be to publish information about complaints and their resolution in VCAT's annual reports. This will enhance confidence in VCAT's ability to respond to complaints about its members and improve members' conduct.

The perception of bias undermines the Tribunal's accessibility and function as an impartial administrative tribunal because individuals hear anecdotal reports of others' experience and decide that the tribunal will not assist them to resolve their matter. Given the extremely low levels of engagement with VCAT by tenants this is an issue that should be prioritised.

Unpredictable decision making

R5. A mandatory annual training program should be developed for tribunal members to increase awareness of issues surrounding housing, cultural and other diversity, mental health, disability and drug and alcohol issues.

VCAT members are dealing with clients from disadvantaged populations on a day to day basis, many of whom have complex needs. It is absolutely vital that members have a proper understanding of the issues faced by presenting parties. All Residential Tenancy List members should attend mandatory and regular training sessions to ensure that they are making appropriate, fair decisions.

Minimal access by tenants

R6. VCAT should employ case managers to arrange hearings flexibly with tenants and link them in with appropriate services.

The number of tenants accessing VCAT is staggeringly low. In order to create a better balance between landlord and tenant attendance more support services should be available to tenants.

This is particularly important in matters where a possession application is based upon an allegation of tenant rent arrears or other breaches. To improve tenant access to VCAT there should be greater flexibility in arrangement of hearings including permitting other modes of tenant attendance (e.g. by telephone) and potentially introducing evening hearings.

R7. VCAT should publicise detailed data about its operations.

The absence of detailed, published statistics on the VCAT Residential Tenancies List creates difficulties in ascertaining the extent of access and outcomes. Despite poor attendance rates by tenants there is little data available on the types of tenants accessing the Tribunal, as both applicants and respondents; the number of tenants who are represented and nature of representation; the type of matters tenants are initiating as applicants; and the type of matters which are proceeding undefended.

The availability of this type of data would make the Tribunal more accountable to the community and would enable a greater understanding of the access to justice issues at VCAT and provide data to indicate where resources are best placed to improve upon this issue.

VCAT Fees

R8. Tenants should not be required to pay VCAT application fees.

The Residential Tenancies List at VCAT is largely funded through interest on tenants' bonds held by the Residential Tenancies Bond Authority; consequently the TUV and other organisations believe tenants should not be required to pay fees to access VCAT as an applicant or respondent. When a tenant pays a VCAT application fee they are essentially paying twice, through foregone interest on their bond and again through the fee.

Currently, landlords overwhelmingly are the party whom benefit from VCAT; tenants however are the group who funds it. To improve fairness the Victorian Property Fund should make a continuing contribution to the costs of providing dispute resolution services provided by the Residential Tenancies List of VCAT.

Administration

Scheduling of hearing

R9. VCAT should develop strategies that encourage tenants to defend their matters in appropriate circumstances and ascertain whether a matter will be contested.

VCAT prides itself on its efficiency and high turnover of hearings that it processes. To achieve this, multiple hearings are listed concurrently. As tenants are unlikely to attend, this method works with few hiccups. The problem arises when a tenant does show up, either accompanied by an advocate, or unrepresented. This often leads to adjournment as adequate time has not been factored in to hear the matter.

In this way VCAT is operating on the presumption that one party will not be engaging in the justice process, rather than working to ensure both parties receive a successful outcome.

Many disadvantaged tenants find it exceedingly difficult to attend VCAT. If a matter that is otherwise ready to proceed is adjourned, this adjournment can cause excessive stress and cost to litigants. Sometimes, clients opt to abandon their matter or settle on terms potentially less favourable than had the hearing taken place. This poses serious access to justice issues for tenants in particular, given that the majority of applications are initiated by landlords.

Improved procedures could be included in reforms to the VCAT Rules. One suggestion is that VCAT run a pilot project, under which a sample of tenants are telephoned by VCAT to check whether they have received a notice of hearing and whether they intend to defend the claim. The study should measure how many pilot tenants would not have heard about the hearing but for the telephone reminder. The findings could be compared to the attendance rate of tenants outside the pilot sample.

This pilot could be of particular use to tenants who may not have received a copy of the landlord's application or who may not have understood the significance of an application or notice of hearing. Arguably, this could be more cost effective than the current costs generated by unnecessary adjournments for both parties and the Tribunal. At the same time, it may have a noticeable effect on the number of tenants who are able to access the Tribunal.

Notice of hearing

R10. Notice of hearing forms should be redesigned to be more user-friendly.

To ensure improved access to justice it is recommended that changes are made to the notice of hearing document. The notice of hearing in its current form is difficult to understand by many recipients, it is intimidating as it is overly formal and it does not provide adequate information.

Notices would be improved by being sent in an ordinary envelope together with a VCAT customer service charter, map, directions and referral information. Notices should also include information about feedback and complaints.

Service issues

R11. S140 of the VCAT Act 1998 should be amended to enforce that the VCAT applicant must make reasonable enquiries as to the respondent's address for service.

Estate agents and landlords often fail to adequately serve VCAT applications on tenants, particularly in cases where the tenant has already vacated the property in question, for example bond and compensation matters.

Section 140(1)(ii) of the VCAT Act requires service by post to be directed to "the person at his or her usual or last know residential address".

It is common practice for landlords to post applications for bond to the vacated property, even in situations where an agent or landlord has been in recent telephone or face-to-face contact with the outgoing tenant.

Inadequate service presents a considerable access to justice issue, as a respondent to an application loses the opportunity to defend a claim. Although tenants are entitled to apply for a review of a decision if they were not present at the hearing, by that stage it is likely that their bond will have been transferred to the landlord and the likelihood of recovering the money is diminished. The return of bond money is vital to low income tenants and can be the difference between being able to secure another tenancy and homelessness.

Service of notices to leave

R12. Hearings for notices to leave under s374 of the RTA should be sent through multiple means of contact.

In matters under Part 8 of the *Residential Tenancies Act 1997*, if a resident is given a notice to leave, s371 of the RTA requires the matter be heard by the Tribunal within 2 business days or the residency will be reinstated. The problem is that the service of the notice of hearing is directed to the address that the resident has been ordered to leave. This causes considerable disadvantage to residents as they are excluded from the property and will not be able to access information about their hearing to determine whether they are entitled to remain.

VCAT should consider amending the procedures to ensure that a resident is not disadvantaged through the failure to receive a notice of hearing. Multiple means of contact should be used when notifying of a hearing for a notice to leave.

Applications out of time

R13. The time period of 10 business days for applications for the tenants bond should be strictly enforced by amending the *Residential Tenancies Act 1997* to provide that the bond must be refunded to the tenant if the landlord does not make a claim within the 10 business day time limit.

Under the s417(2) of the RTA an application for the tenant's bond must be made within 10 business days after the tenant delivers up vacant possession of the property. This however frequently does not occur with landlords lodging claims well over the 10 business day period, as it is understood that there will be no practical consequence of a late application. We would welcome VCAT making publicly available the average time after the end of the tenancy when these applications are actually heard.

It is recognised that VCAT is required to act with minimal formality and has the power to dispense with procedural requirements, including time limitations. This however is aimed at achieving fairer outcomes, whereas delaying bond claims can greatly disadvantage tenants who often rely on the refund of their bond to pay their bond at their next property.

Professional advocates

R14. Estate agents should be explicitly defined as “professional advocates” by the *VCAT Act 1998*.

There is an inconsistency in how landlord and tenant representatives are handled at VCAT. Almost 95% of private landlords applying to VCAT are represented by agents or property managers, most of who appear regularly at VCAT. A further 22% of tenancy matters are brought by public landlords and are represented by workers who attend hearings as part of their role with the Department of Health and Human Services.

There is no available data depicting how many tenants are represented at VCAT hearings. What we do know however is that many unrepresented tenants face significant disadvantage because of a lack of understanding about hearing procedure or a limited ability to advocate on their own behalf. Many tenants do not attend VCAT hearings because they are fearful about attending alone.

Estate agents and property managers have an advantage in VCAT proceedings due to the frequency of their attendance. Additionally estate agents receive training on how to ‘Present at Tribunals’⁹ as a part of their course to become an agent. Arguably estate agents should be covered under the definition of ‘professional advocate’ in s 62(8)(d) of the VCAT Act due to their “substantial experience as an advocate”.

Despite the current legislative requirement that leave be sought for a professional advocate to appear, Members generally do not require estate agents to formally seek leave.

Where a landlord is represented by either an estate agent or an officer of the Director of Housing, a tenant should have an automatic right to representation as is outlined in 62(1)(iii) of the VCAT Act. Furthermore, estate agents must be

⁹ REIV, *Unit Synopsis: Certificate IV in Property Services*, [http://www.reiv.com.au/learning/training-files/unit-synopsis-\(cpp40307\)-2015-1.aspx](http://www.reiv.com.au/learning/training-files/unit-synopsis-(cpp40307)-2015-1.aspx).

required to seek formal leave to appear, and the Tribunal should be cautious to permit an estate agent to appear where a tenant is self-represented. More broadly, it is vital that VCAT implement strategies to provide maximum support for self-represented litigants given the extremely high levels of representation available to landlords.

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