

## Dispute Resolution

### Submission to the Residential Tenancies Act Review

8 July 2016

## Civil Justice Program – Victoria Legal Aid

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**Disclaimer.** This submission includes case examples based on the stories of our clients. For some case examples VLA obtained the consent of the client and de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.



## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. We prioritise tenants who are homeless or at risk of eviction, living with disability (including mental illness), or who are otherwise socially and economically disadvantaged. We provide duty lawyer services daily in the residential tenancies list at the Victorian Civil and Administrative Tribunal (VCAT) in Melbourne and if able to do so on an as needs basis around the state. We also provide limited casework services for eligible tenants with ongoing hearings at VCAT and occasionally assist people seeking judicial review in the Supreme Court. VLA is represented on the VCAT Residential Tenancies User Group and the Federation of Community Legal Centre's Tenancy Working Group.

In the 2014/15 financial year we received approximately 3,184 enquiries through our Legal Help telephone line in relation to landlord/tenant disputes and other real estate matters. We provided advice in relation to landlord/tenant disputes and other real estate matters on 2,230 occasions. On 827 occasions the person we provided advice to was born outside of Australia and in just under 28% of these occasions, the person we assisted had arrived in Australia within the last 5 years. On 390 occasions we provided representation to tenants, and in just over 33% of these occasions the person we represented disclosed having a disability.

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## 1. Executive summary

VLA supports reforms to the *Residential Tenancies Act 1997* (RT Act) to ensure more sustainable, secure and safer housing for Victorians. This submission focuses on reforms targeted towards refining landlord-tenant dispute resolution mechanisms, improving VCAT decision-making and accountability and strengthening enforcement processes. This submission is structured in accordance with the topics raised in the Issues Paper.

In particular, VLA recommends that the RT Act be amended to provide for internal appeals of residential tenancies decisions within VCAT. This would bring Victoria into line with other Australian jurisdictions that have recognized the necessity of accessible internal appeals when constructing amalgamated tribunals. Ensuring VCAT resolves proceedings in accordance with law is necessary to preserve the status and integrity of the Tribunal, improve overall decision-making and to give proper effect to the legal rights and obligations imposed by the RT Act.

VLA also recommends initiatives to ensure early intervention and resolution of landlord-tenant disputes prior to escalation to VCAT. In particular, VLA supports broadening the powers of Consumer Affairs Victoria (CAV) to mediate and resolve disputes relating to rental arrears, prior to an application for possession being made to VCAT. This has the capacity to minimise unnecessary evictions, avoid financial loss to landlords and reduce the burden on VCAT's residential tenancies list.

In addition to this submission, we refer to our four previous submissions to this review which support amendments to the RT Act to ensure that tenancies are managed sustainably and evictions occur only as a last resort. These reforms are central to achieving safe and sustainable housing, particularly for tenants experiencing social and economic disadvantage and marginalisation.

## 2. Summary of recommendations

### Dispute resolution mechanisms

#### **Recommendation 1: Improve dispute resolution mechanisms in residential tenancies matters.**

Dispute resolution mechanisms should address power imbalances, recognise human rights, be flexible and responsive and protect consumers.

#### **Recommendation 2: Improve access to the provision of legal information, advice and representation for tenants.**

Provide referral information to VLA's Legal Help phone line on Notices of Hearing in possession order matters. Develop more effectively targeted strategies to reach lower-capability users as well as to divert higher-capability users from more intensive services.

#### **Recommendation 3: Broaden CAV's powers and capacity to mediate and resolve disputes involving rent arrears.**

**3.1** Require landlords to lodge a 'rent arrears dispute' with CAV before applying to VCAT for a possession order.

**3.2** Ensure CAV staff are appropriately trained with sufficient knowledge of tenancy law and support services to enable satisfactory arrangements to be negotiated with the aim of sustaining tenancies.

**3.3** Explore the potential of technology such as the Rechtwijzer platform to increase access to low cost early resolution of tenancy disputes in appropriate matters.

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**Recommendation 4: Strengthen the CAV inspection process in the following ways:**

- 4.1 Improve tenant access to CAV inspections for non-urgent repairs and rent increases.
- 4.2 Enable access to interpreters for CAV inspections.
- 4.3 Impose a time limit for the provision of CAV investigation reports.
- 4.4 Providing a discretion for CAV to extend the 30-day time limit to request an inspection relating to proposed rent increases.

## **Victorian Civil and Administrative Tribunal**

**Recommendation 5: Improve VCAT ADR processes to provide better protection to tenants.**

5.1 Mediation must be conducted by recognised, accredited mediators who engage in an assessment of the appropriateness of ADR in each case.

5.2 ADR should be conducted pursuant to the procedures outlined in Division 4 of Part 5 of the VCAT Act.

5.2.1 There must be clear guidelines around the process for referring matters for mediation, including the issuing of a notice that the matter is being referred to mediation;

5.2.2 There must be rules about the admissibility of evidence that is disclosed in the process of mediation;

5.2.3 Where a VCAT Member is also a mediator, parties should be able to object to that Member subsequently adjudicating the matter; and

5.2.4 VCAT should collect and publish statistics on the number and outcome of mediations in matters before the Residential Tenancies List.

**Recommendation 6: Record and report on tenant attendance rates in the Residential Tenancies List at VCAT**

This should be aggregated by matter type and locality to provide an evidence base from which to monitor tenant attendance and initiate efforts to improve this.

**Recommendation 7: Increase access to telephone attendance at VCAT**

VLA recommends amending the RT Act to provide that the provision of a tenant's telephone number is mandatory when filing an application. A landlord may seek leave to continue without the telephone number if they are able to demonstrate that they do not know it and have made all reasonable inquiries.

VLA recommends that VCAT amends its practice direction on attendance at hearings by telephone to provide for greater access. Further, VLA recommends that, in eviction proceedings, a Member attempts to contact a tenant by telephone when that tenant has failed to attend the hearing in person.

**Recommendation 8: Improve the format and content of VCAT's Notices of Hearing, including referral details for legal assistance.**

**Recommendation 9: VCAT Registry staff should contact tenants prior to possession order hearings to provide basic information and referrals to legal and non-legal support services.**

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**Recommendation 10: VCAT facilitate urgent restraining order hearings for tenants in regional areas to prevent illegal evictions.**

VCAT assist applicants who are at risk of eviction, or who have been illegally evicted, to apply for and have heard urgent restraining order applications on the day of application. This could be done by phone call to VCAT in King Street.

**Recommendation 11: Increase use of telephone and other technology to improve access to the Residential Tenancies List for tenants living in regional areas.**

**Improve VCAT decision-making and enforcement**

**Recommendation 12: Improve enforcement of non-monetary orders.**

**12.1** Provide training for Victoria Police members to educate them about their role in enforcing non-monetary VCAT orders.

**12.2** Amend the VCAT Act to allow parties to seek renewal of proceedings if non-monetary orders are not complied with.

**12.3** Amend s 122 of the VCAT Act to allow non-monetary orders to be enforced by filing in the Magistrates' Court instead of the Supreme Court. Remove the requirement that the party seeking enforcement obtain a certificate from VCAT that the matter is appropriate for filing.

**Recommendation 13: Enable tenants to recover some or all of the enforcement costs of monetary orders made by VCAT from the Residential Tenancies Fund.**

Any funds recouped by the Sheriff should be repaid directly to the Fund.

**Recommendation 14: Improve accountability of VCAT decision-making.**

**14.1** Permit tenants to request written reasons within 7 days of a decision being made.

**14.2** Provide that the provision of written reasons is a relevant consideration when determining an application to stay an order.

**14.3** Reduce delays in the provision of audio recordings.

**Recommendation 15: Institute internal appeals of residential tenancy matters in VCAT.**

Internal appeals should be available as of right on questions of law, and with leave on other grounds. VLA generally supports the 'other grounds' provided for at the NSW Civil and Administrative Tribunal which include that:

- The decision of the Tribunal was not fair and equitable
- The decision of the Tribunal was made against the weight of evidence, or
- Significant new evidence has arisen (being evidence that was not reasonably available at the time of the original decision).<sup>1</sup>

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<sup>1</sup> VLA is concerned that the requirement that a party in NSW must additionally prove that there has been a 'substantial miscarriage of justice' creates uncertainty for unrepresented litigants, and is unnecessary given leave is discretionary.

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**Recommendation 16:** VLA recommends that CAV adopt a more prominent role in investigating offences under the RT Act. This can be achieved by amending CAV's compliance and enforcement guidelines to include matters where:

- There has been a serious, intentional breach of the Act
- There has been a breach by the person on more than one occasion; and
- A tenant or resident is prepared to provide evidence of the breach.

CAV must be properly resourced to ensure it is capable of fulfilling its obligation as the regulator of residential tenancies disputes.

### **3. Residential tenancies dispute resolution mechanisms**

#### **Desired features**

As identified in the Issues Paper, dispute resolution mechanisms should be fair, fast, low-cost, accessible, fit-for-purpose and certain.<sup>2</sup> However, in the context of residential tenancies – where there is often a recognised power imbalance between the parties – recognition of these principles alone will not always lead to just outcomes. VLA supports dispute resolution mechanisms that include the following key elements:

#### **1. Address power imbalances**

Landlords hold significantly more power in the dispute resolution system. As identified by the Issues Paper, landlords are frequently represented by property managers who are familiar with formal dispute resolution processes. Of the applications commenced by landlords in the Residential Tenancies List in 2014-2015 (other than by the Director of Housing), 94 per cent of the landlords were represented by an estate agent or property manager.<sup>3</sup> Landlords as rental investors typically also have higher incomes than tenants and other residents and are much more likely to be working than their non-investor counterparts.<sup>4</sup>

As a result, landlords are often better resourced to exercise their rights under the RT Act and have a good understanding of the dispute resolution process. In contrast, many tenants are reluctant to assert their rights for fear of risking their tenancy. This risk is intensified for marginalised and disadvantaged tenants for whom eviction would likely lead to homelessness. This submission explores these issues in further detail below and makes recommendations aimed at minimising this power imbalance and assisting tenants to participate in effective dispute resolution.

#### **2. Recognise human rights**

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VLA would seek to make more detailed submissions on the technical aspects of an internal appeals process if that forms one of the recommendations in the public options paper considering reform proposals.

<sup>2</sup> Fairer, Safer, Housing Review, *Dispute Resolution Issues Paper*, page 10.

<sup>3</sup> VCAT Annual Report 2014–15, page 39.

<sup>4</sup> Reserve Bank of Australia Bulletin, 'Residential Property Investors in Australia', May 2004, pp 52-56.

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The RT Act provides a framework for determining the lawfulness of an interference by one person with the home of another. Traditionally, the RT Act has dealt with residential tenancies in terms of contract and property rights. That is, to protect the property interests of the landlord as owner and the tenant as the person entitled to temporary exclusive possession. However, for tenants a home is more than just a property interest for which they have temporary possession – it is a place that provides security, a sense of belonging and is often intrinsically connected with family. Stable and secure housing is essential, particularly for marginalised and disadvantaged tenants. The loss of the home can be catastrophic for families and the community more broadly. As Justice Bell has recognised, forced eviction has a greater effect than simply terminating a temporary interest in property – it disrupts individual, family and community life, the health and schooling of children and the capacity of people to work and attend important appointments.<sup>5</sup>

The operation of the RT Act, particularly in relation to determining the legality of eviction and other interferences with the home, is central to the protection of the human rights of tenants and other residents under section 17 of the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Charter). At present however the RT Act is silent on this and VCAT does not have jurisdiction to consider Charter rights when determining an application made by a public authority for an order for possession against a public tenant.<sup>6</sup>

The dispute resolution system must reflect the importance of home as the foundation of financial, social and emotional security for tenants. VLA supports amendments to the RT Act and VCAT Act to explicitly recognise and allow for consideration of Charter rights in tenancy matters.

### **3. Be flexible and responsive**

Dispute resolution procedures in tenancy matters must be flexible and responsive to the needs of VCAT users. Personal circumstances, including disability, mental health, financial issues, language and cultural barriers, unfamiliarity with legal processes, location, family commitments and employment all impact on a person's ability to effectively engage with VCAT processes. They are also factors that can significantly exacerbate the consequences of any decision made by VCAT. Given the vast majority of applications are initiated by landlords,<sup>7</sup> tenants and residents are generally responding to an application in a process they are unfamiliar with within reasonably tight timelines. Tenants regularly present in a very distressed state, and may find it difficult to focus on the discrete legal matters at issue.

VLA provides a daily duty lawyer service at VCAT in King Street and our lawyers appear in approximately 300 hearings on behalf of tenants each year. In 2014/15, 33 per cent of the tenants we assisted disclosed having a disability, with a majority of those experiencing mental illness, and 22 per cent of all clients spoke a language other than English. VCAT Members should be empowered to take these factors into account when determining both procedural and substantive questions in proceedings before them. This should extend to Members inquiring as to whether a tenant has received legal assistance, when appropriate, and standing the matter down or adjourning

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<sup>5</sup> Justice Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home', Monash University Faculty of Law, Costello Lecture 2012, 18 September 2012.

<sup>6</sup> *Director of Housing v Sudi* (2011) 33 VR 559, at 569 per Warren CJ, 580 per Maxwell P and 607 per Weinberg JA.

<sup>7</sup> 92 per cent of applications were initiated by the Director of Housing, real estate agents or property managers on behalf of landlords and private landlords in the year from 2014-2015: VCAT Annual Report 2014-15, page 39.

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proceedings to facilitate the provision of legal advice. The provision of legal advice is particularly important in eviction proceedings. Facilitating just outcomes is preferable to speedy resolutions that are inflexible and unresponsive to the needs of users.

#### **4. Protect consumers**

A key function of the RT Act is to regulate tenancies and other types of long-term accommodation. In this way, the RT Act can provide essential protection to tenants and residents otherwise vulnerable to exploitation in the market. The RT Act is included as a “Consumer Act” under Schedule 1 of the *Australian Consumer Law and Fair Trading Act 2012* (ACLFT Act). The capacity of the RT Act to protect the rights of tenants and residents as consumers should be explicitly acknowledged in the legislation so that proper weight can be given to this purpose when interpreting and applying its provisions.<sup>8</sup>

**Recommendation 1: Improve dispute resolution mechanisms in residential tenancies matters to address power imbalances, recognise human rights, be flexible and responsive and protect consumers.**

### **Existing mechanisms for dispute resolution**

#### **Information and advice services**

Access to legal advice and information can be critical in landlord-tenant disputes, particularly for tenants facing eviction proceedings. As discussed above, landlords are often represented by professional agents familiar with the law and experienced in Tribunal advocacy. Provision of legal information, advice and representation to tenants can assist to address this power imbalance.

Despite printed and online material and the RentRight mobile phone application, many tenants continue to attend VCAT with minimal understanding of the law and their rights. VLA supports initiatives to improve access to the provision of legal information, advice and representation. In particular, Notices of Hearing should include referral details to Victoria Legal Aid’s Legal Help phone line. Legal Help provides effective information, advice and triage and is a main entry point to the Victorian legal assistance sector. Listing practices should also be improved to enable duty lawyer services to more effectively assist people at risk of eviction and homelessness and cater to the needs of specific groups.<sup>9</sup>

In addition to this, further initiatives are needed to both divert higher-capability users from more intensive services, as well as to more effectively reach lower-capability users who are currently slipping under the radar. This includes provision of better and targeted information and smarter delivery mechanisms to connect to existing services where people are already engaged, such as health services etc.

**Recommendation 2: Improve access to the provision of legal information, advice and representation for tenants**

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<sup>8</sup> Section 35 of *Interpretation of Legislation Act 1984* (Vic). Note other acts specifically include in their purpose provision the importance of protecting the rights of consumers. See for example, section 1 of the *Motor Car Traders Act 1986* (Vic); section 1 of the *Conveyancing Act 2006* (Vic); section 1 of the *Retirement Villages Act 1986* (Vic); and section 1 of the *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic).

<sup>9</sup> See Victoria Legal Aid, Submission to the Access to Justice Review (March 2016) page 75.

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Provide referral information to VLA's Legal Help phone line on Notices of Hearing in possession order matters. Develop more effectively targeted strategies to reach lower-capability users as well as to divert higher-capability users from more intensive services.

### **Independent third party assistance**

In 2014-15 possession order applications for rent arrears represented 31 per cent of all applications to the Residential Tenancies List at VCAT. In our experience there is often little to no negotiation between tenants and landlords prior to possession order hearings based on rental arrears. Once at VCAT however many of these matters are often swiftly settled or resolved on the basis that satisfactory arrangements can be made to avoid financial loss to the landlord. This is an inefficient use of public resources.

VLA supports an increased role CAV in mediating disputes involving rent arrears, prior to applications being brought to VCAT. Ideally this process would also provide appropriate referrals to financial counsellors and other support services to assist tenants to address the underlying causes of rental arrears. Notably CAV already have an established conciliation service so is well-placed to manage rental arrears disputes.

Early intervention including increasing the use of ADR has the capacity to keep more tenants housed, avoid financial loss to landlords, reduce the burden on VCAT tenancy lists and remove the costs involved in parties having to attend hearings.

VLA also notes with interest the increasing capacity for online dispute resolution services using artificial intelligence and digital technology to eliminate conflict and fill the 'justice gap'. For example, internationally acclaimed Dutch platform (Rechwijzer) has had strong results resolving family law disputes and has also been adopted in the UK and Canada.

#### **Camille's experience**

Camille works casually as a registered nurse. Although her income fluctuates she set up a direct debit to ensure her rent is automatically deducted from her bank account on pay day.

Camille received a call from her agent advising her that she had fallen behind in rent and that they had sent her a notice to vacate. Camille was surprised to hear this because of her direct debit arrangements. Camille advised her agent that she would look into the problem and asked if she could negotiate more time to sort out the reason for the rent arrears. The agent refused and advised that the landlord had instructed to proceed with an application to VCAT for possession.

Camille checked with her work and realised she had not been paid for many pay periods and that the direct debit had been eating into her savings. Her work quickly fixed the issue and transferred her all of the money she was due the following pay period. Camille immediately transferred the amount of rent arrears into the agent's trust account. Camille did not attend the VCAT hearing as she was unable to take time off work and thought the dispute was now resolved.

The agent went to the VCAT hearing and was granted a possession order despite the arrears having been paid.

### **Recommendation 3: Broaden CAV's powers and capacity to mediate and resolve disputes involving rent arrears.**

**3.1** Require landlords to lodge a 'rent arrears dispute' with CAV before applying to VCAT for a possession order.

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**3.2** Ensure CAV staff are appropriately trained with sufficient knowledge of tenancy law and support services to enable satisfactory arrangements to be negotiated with the aim of sustaining tenancies.

**3.3** Explore the potential of technology such as the Rechtwijzer platform to increase access to low cost early resolution of tenancy disputes in appropriate matters.

## **CAV inspections and advice**

VLA supports CAV's role in investigating and reporting on non-urgent repairs issues. The availability of an independent third-party investigator can ensure prompt resolution of repairs disputes without parties needing to access formal legal processes. Having an expert attend the property minimises the likelihood of factual conflicts and reduces the need for evidence gathering and legal argument. The inspection process could be further strengthened in the following ways.

### **1) Increased tenant uptake**

More than 50 per cent of rented properties in Victoria require repairs.<sup>10</sup> Despite this high figure, less than 1 per cent of all rented properties in Victoria obtained a CAV non-urgent repairs report in 2014-15. In 2014-15 CAV provided 936 non-urgent reports to tenants, compared to 3,885 goods left behind reports.<sup>11</sup> Goods left behind reports are not compulsory under the RT Act before a landlord is able to take action, whereas a non-urgent repairs report is a prerequisite under s 75 of the RT Act for a tenant to apply for non-urgent repairs at VCAT.

These numbers indicate that CAV's service is not accessed by a significant proportion of tenants living in properties requiring repairs. VLA supports initiatives to better promote and improve access to this service. Currently, CAV's website advises that tenants can apply for a repairs or rent increase report by sending CAV a completed request for repairs inspection or rent assessment, or by sending CAV a letter requesting an inspector to visit the property. The completed form can be emailed, posted, faxed or delivered in person to CAV. This requires a tenant to download and print the form, and then scan it should they wish to submit it electronically. There is no ability in the RentRight application to request a repair or rent increase report through the RentRight application.

Uptake of repair and rent increase reports by tenants could be increased in the following ways:

- Creation of an online application process, similar to VCAT online, for tenants to request repair and rent increase reports from CAV.
- RentRight should include an ability to lodge a request for a repair or rent increase report through the application, with the ability to attach a copy of the notice to landlord in that request.
- Allowing tenants to initiate a request for repairs over the phone and then provide the necessary supporting documents to CAV once the request has been made.
- Including a blank request for a repair report and rent increase report with the Notice to Landlord used to request non-urgent repairs, so that the forms are in one easily accessible location.

### **2) Use of interpreters by CAV inspectors**

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<sup>10</sup> ABS 2009, Housing Mobility and Condition 2007/08, cat. No. 4130.0.55.002, Table 14 and Table 15.

<sup>11</sup> Consumer Affairs Victoria, Report on Operations 2014-15.

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Several tenants have reported difficulty accessing interpreters during CAV inspections. There is no section in the *Request for Repairs Inspection or Rent Assessment* form to request an interpreter. To ensure that CAV's services are able to be accessed by all tenants VLA recommends that:

- The *Request for Repairs Inspection or Rent Assessment* form be amended to enable a tenant to indicate if they require an interpreter; and
- CAV ensure that interpreters (whether by phone or in-person) are available for CAV inspectors at the time of inspection.

### **3) Introduce a timeframe for preparation of inspection reports**

The current process for requesting non-urgent repairs in accordance with ss 74 and 75 of the RT Act can create delays and increase stress for tenants. In accordance with s 74 of the RT Act, if a landlord has not completed repairs within 14 days after receiving a request for repairs, a tenant can apply to CAV to request inspection of the property and provision of a written report. There is no time limit imposed on CAV for inspection of the property or provision of the written report. However, the CAV report is required before a tenant can apply to VCAT for an order.<sup>12</sup> Delays by CAV in undertaking the inspection or providing a report can mean a tenant may wait for weeks or even months before they receive the report and/or apply to VCAT. Although tenants can apply to VCAT for an order for repairs if 90 days have passed since they requested the CAV report,<sup>13</sup> this is unnecessarily long and burdensome for tenants. The RT Act should be amended to require CAV to prepare a written report within 14 days of undertaking an inspection and to enable a tenant to apply to VCAT once this period has elapsed.

### **Improve access to rent increase inspections**

The RT Act provides a framework for tenants seeking to challenge rent increases. VLA supports an independent investigation process to determine whether rent increases are excessive. As previously submitted, the framework could be improved by ensuring the assessment process is more transparent, and that data from the Residential Tenancies Bond Authority (RTBA) is regularly published to provide an objective comparator.<sup>14</sup>

Tenants are currently required to apply to CAV within 30 days after a notice of rent increase is given.<sup>15</sup> The time limit is followed strictly by CAV, who have stated to our clients that they do not have any discretion to extend. This can cause issues for tenants who are experiencing disadvantage. VLA recommends that the RT Act be amended to enable CAV to exercise discretion to extend the 30-day time limit in the interests of justice.

### **Recommendation 4: Strengthen the CAV inspection process in the following ways:**

- 4.1** Improve tenant access to CAV inspections for non-urgent repairs and rent increases.
- 4.2** Enable access to interpreters for CAV inspections.
- 4.3** Impose a time limit for the provision of CAV investigation reports.

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<sup>12</sup> Section 75(1) of the RT Act.

<sup>13</sup> Section 75(5) of the RT Act.

<sup>14</sup> Victoria Legal Aid, Submission to the Safer, Fairer Housing Review – Rents, bond and other charges, Recommendation 6.

<sup>15</sup> Section 45(2) of the RT Act.

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4.4 Providing a discretion for CAV to extend the 30-day time limit to request an inspection relating to proposed rent increases.

## 4. Victorian Civil and Administrative Tribunal

### Alternative Dispute Resolution at VCAT

Alternative Dispute Resolution in VCAT's Residential Tenancies List takes two main forms:

1. **Formal mediation or case conferencing** - These methods of ADR are regulated by Division 5 of Part 4 of the VCAT Act. The VCAT Act sets out the process for referring a matter for case conferencing or mediation, the rules about attendance by parties, and the rules about the admissibility of evidence that is disclosed during the process of ADR.
2. **Informal mediation by the presiding VCAT Member conducted during the course of the hearing** - In our experience, this practice involves VCAT Members encouraging both parties to put forward an offer of settlement and trying to assist them to come to some form of agreement during the hearing. For example, in relation to an eviction proceeding, a Member may ask the tenant and landlord whether they are willing to negotiate a timeframe to end the tenancy, prior to fully considering whether there is a basis for the landlord to evict the tenant. This practice is not regulated by the VCAT Act.

VLA supports the appropriate use of formal mediation and case conferencing at VCAT, especially when conducted by accredited ADR practitioners. When used appropriately, ADR can be a quicker, more flexible and more cost effective alternative to traditional adversarial tribunal hearings. It also encourages mutually beneficial outcomes, and may be more likely to preserve co-operative relationships between the parties.

The use of informal in-hearing mediation by VCAT Members should be avoided for the following reasons. There appears to be nothing in the VCAT Act or the RT Act that empowers VCAT Members to conduct in-hearing mediation.<sup>16</sup> While section 88 of the VCAT Act allows the Tribunal to refer matters to mediation, this involves a formal process whereby the parties are notified that the matter is being mediated, and a notice of mediation is issued to the parties. The only other guidance comes from section 98(1)(d) of the VCAT Act, which requires the Tribunal to determine matters speedily, and with as little formality and technicality as proper consideration permits.

The lack of regulation means that there is no requirement that the Member advise the parties that the matter is being mediated. As such, there is often no clear distinction between the formal hearing and mediation. There are no rules about the processes that must be followed, and practice varies greatly between different VCAT Members. Further, there are no safeguards around the admissibility of evidence presented during in-hearing mediation if the matter subsequently proceeds to determination, and it is unclear whether parties can object to the same Member proceeding to determine the matter if the in-hearing mediation is unsuccessful. This may make it more likely that

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<sup>16</sup> While the issues paper states that section 93A of the VCAT Act empowers VCAT Members to mediate during the hearing, section 93A allows parties to object to a mediator who is a VCAT Member from hearing the remainder of the hearing. This section relates to matters where the proceeding has been formally referred to mediation under section 88 of the RT Act.

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the Tribunal will fail to afford parties procedural fairness by hearing, and being seen to consider, irrelevant considerations in coming to its decision.

### **Rosetta's experience**

Rosetta's landlord had applied to VCAT for a possession order on the basis of rent arrears. Rosetta was behind in her rent at the time that the notice to vacate was issued, but she had since caught up. Rosetta therefore asked the VCAT Member to adjourn the proceedings on the basis that arrangements had been made to avoid financial loss to the landlord (s 331 of the RTA). Had CAV been enabled to conduct pre-VCAT dispute resolution in relation to rental arrears, this matter could have already been resolved without coming before the Tribunal.

The VCAT Member initially agreed that the matter should be adjourned. However, the Member then said that she thought it was important that each party had an opportunity to air their grievances and resolve the matter by agreement. During the 'mediation', the landlord raised a number of concerns about Rosetta that did not relate to rent arrears. For example, the landlord raised a dispute that Rosetta had had with her neighbour. As Rosetta would not agree to move out of the property, the Member concluded that the matter could not be successfully mediated. The Member went on to hear the matter and evicted Rosetta.

Rosetta found the process stressful and upsetting. She also felt that the hearing was unfair. She could not see how the issues with her neighbours related to her rent arrears matter, but she believed that the Member must have considered that information in coming to her decision.

A further issue relates to the use of informal mediation processes in the context of the power imbalance that usually exists between landlords and tenants. There is a wealth of published material that addresses the appropriateness of mediation where there is a significant power imbalance. In a process that requires negotiation and agreement, power imbalances can produce unjust settlements in the following ways:

- Landlords are more likely to be repeat users of the VCAT system and accordingly often possess greater knowledge of the law. This provides them with an advantage in the bargaining process;
- Lack of knowledge of the law and VCAT procedures may create an additional incentive for tenants to settle; and
- As the VCAT hearings may result in homelessness for tenants, they are more likely to be pressured into agreement in order to save their tenancy.

The conclusion of the published material is that the primary method of addressing imbalances of power in mediation is the use of appropriate safeguards and procedures, and the presence of a skilled and knowledgeable mediator.<sup>17</sup> As discussed above, the use of informal mediation in the Residential Tenancies List is extremely problematic as it lacks these safeguards, exposing tenants to unjust outcomes and erosion of their rights.

The inclusion of Part 4 of Division 5 of the VCAT Act indicates an intention from Parliament for ADR to be used in a way that is regulated to ensure that appropriate safeguards exist around its use. As

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<sup>17</sup> See for example David Spencer and Michael Brogan, *Mediation Law and Practice* (2006) page 114.

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such, VLA cautions against the use of informal in-hearing mediation at VCAT. Instead, best practice in relation to ADR involves:

- Employing recognised, accredited mediators;
- Specialist assessment of a party's capacity and willingness to participate in mediation;
- Sufficient background knowledge on the part of the mediator of the dispute and legal issues;
- Clear communication to the parties about the process, its aims, ground rules, confidentiality requirements and the effect of any agreements; and
- Ensuring that any rules, obligations or rights under the relevant legislation should be preserved. Parties should have the option of a hearing on the same day if mediation does not result in agreement.

### **Abdul's experience**

Abdul was represented by a VLA duty lawyer in his possession order hearing. Abdul had recently been hospitalised for mental health issues, and was very nervous about the hearing. VLA advised Abdul that his landlord had incorrectly served the notice to vacate and as such his risk of eviction was negligible.

In the hearing, the Tribunal member agreed that the notice to vacate had not been correctly served. The Member asserted, however, that it appeared that the tenancy was unsustainable because the parties were in dispute and suggested that it would be appropriate for her to mediate the matter. The duty lawyer argued that it was inappropriate for the Member to mediate in a matter that had no legal basis to proceed. The Member disagreed, and said that a practical outcome would be for the parties to think about an appropriate timeframe for ending the tenancy, despite the fact that the fixed-term tenancy did not end for ten months. She then ordered the lawyers from both sides out of the room so that the parties could discuss the issues in person.

### **Recommendation 5: Improve VCAT ADR processes to provide better protection to tenants.**

**5.1** Mediation must be conducted by recognised, accredited mediators who engage in an assessment of the appropriateness of ADR in each case.

**5.2** ADR should be conducted pursuant to the procedures outlined in Division 4 of Part 5 of the VCAT Act.

**5.2.1** There must be clear guidelines around the process for referring matters for mediation, including the issuing of a notice that the matter is being referred to mediation;

**5.2.2** There must be rules about the admissibility of evidence that is disclosed in the process of mediation;

**5.2.3** Where a VCAT Member is also a mediator, parties should be able to object to that Member subsequently adjudicating the matter; and

**5.2.4** VCAT should collect and publish statistics on the number and outcome of mediations in matters before the Residential Tenancies List.

### **Improve access to VCAT**

VCAT does not publish tenant attendance rates at hearings. In a 2010 discussion paper, *Transforming VCAT*, Justice Ross reported that tenants only attended 20 per cent of all VCAT

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hearings.<sup>18</sup> The experience of the VLA duty lawyer service at King Street in Melbourne is that tenant non-attendance remains high.

VCAT has in the past recognised that the low rate of tenant attendance is concerning, and undertaken to trial initiatives to increase this. This is motivated by both the impact on tenants, as well as the additional cost imposed on the Tribunal in receiving review applications and scheduling rehearings. VCAT's annual report publishes data on the number of applications received and finalised, but fails to indicate the number of matters that proceed uncontested. VLA recommends that VCAT publish tenant attendance rate data aggregated by matter type and locality. This would provide an evidence base from which to more satisfactorily monitor tenant attendance and initiate efforts to improve this.

### **Recommendation 6: Record and report on tenant attendance rates in the Residential Tenancies List at VCAT**

This should be aggregated by matter type and locality to provide an evidence base from which to monitor tenant attendance and initiate efforts to improve this.

### **Enable telephone attendance at VCAT**

Tenants are frequently unable to attend hearings due to a range of reasons including illness, family and work commitments, lack of access to a car or living in an area with irregular public transport. Section 100 of the VCAT Act allows the Tribunal to conduct all or part of a proceeding through the use of telephones. In practice VCAT requires tenants to use a request form to apply for leave to appear by telephone. The request must be made 2 business days before the hearing and must be accompanied with an explanation as to why it is not possible or practicable for the applicant to appear in person. In our experience duty Members frequently refuse the request, unless an applicant has a serious illness or is absent from the jurisdiction.

Low tenant attendance at hearings could be partially offset by relaxing the strict policy on telephone attendance in the Residential Tenancies List. This is particularly so for people with disabilities, financially disadvantaged tenants, tenants with children and those in regional areas.

The main disadvantage to telephone attendance at hearings is a party's inability to view documents. However, the Residential Tenancies Regulations already provide that a party must file and serve all material upon which they intend to rely, which, if properly enforced, can address that concern. Telephone attendance is commonplace in other jurisdictions that VLA practices in, such as the Administrative Appeals Tribunal, and it is our experience that hearings continue to be managed efficiently.

#### **Emily's experience**

Emily is a single mother living with her son, Dean. Dean has multiple disabilities. Emily has been suffering severe depression since her co-tenant and Dean's father, Brendon, moved out several months ago. Emily has been struggling and has continued to rely on Brendon to purchase food for her and Dean. Emily is often unable to leave the house and spends most days in bed crying.

During this period Emily's real estate agent has been complaining that Emily's front yard has too much rubbish and that the grass is not being cut regularly. Emily's agent applied to VCAT for a Compliance

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<sup>18</sup> The Hon Justice Ian Ross, *Transforming VCAT* (Discussion Paper, VCAT 2010) 9.

Order, which was granted. Emily did not attend the hearing because she is unwell and also needs to be at home to care for Dean.

Several weeks later Emily's best friend Aiden was tragically killed in a car accident. Around this time the landlord applied to VCAT for a Possession Order. The hearing was listed on the day of Aiden's funeral so Emily was unable to attend. A possession order was made.

Emily contacted VCAT and was advised to apply for a review. At the review hearing the Member refused to believe Emily that she did not attend because of a funeral and insisted that she provide evidence of Aiden's death or the funeral to be granted the review. Emily had not brought any documentary evidence with her on the day and so the Member ultimately refused the review and affirmed the possession order.

After being contacted by the Police several days later, Emily called VLA's Legal Help line. Emily was advised that she could have requested to attend the hearing by Telephone. Emily expressed her dismay that the VCAT Member refused to believe her about Aiden's funeral and that no one told her that telephone attendance was possible. While the VLA lawyer was on the phone to Emily police arrived at the property and executed the warrant. At this point the VLA lawyer was unable to prevent the eviction and could only provide Emily and her son an 1800 phone number for crisis accommodation and advice about recovering her goods left in the property.

#### **Recommendation 7: Increase access to telephone attendance at VCAT**

VLA recommends amending the RT Act to provide that the provision of a tenant's telephone number is mandatory when filing an application. A landlord may seek leave to continue without the telephone number if they are able to demonstrate that they do not know it and have made all reasonable inquiries.

VLA recommends that VCAT amends its practice direction on attendance at hearings by telephone to provide for greater access. Further, VLA recommends that, in eviction proceedings, a Member attempts to contact a tenant by telephone when that tenant has failed to attend the hearing in person.

#### **Improve Notices of Hearing**

Notices of Hearing have the capacity to convey the seriousness of the proceedings, and refer tenants to services which may assist. However, the current format of the notice has several deficiencies. It fails to provide a referral to Victoria Legal Aid; it is physically difficult to open, as it arrives glued together at the sides; and it does not convey that serious orders may be made that impact on a tenant's home.

While the Notice of Hearing provides the telephone number for the Residential Tenancies Registry, the Registry staff are unable to provide legal advice. As recommended above, VLA recommends that Notices of Hearing be amended to include VLA's Legal Help telephone number. Given the power imbalance inherent in landlord-tenant disputes and the fact that tenants do not have professional estate agents acting for them, it is appropriate for VCAT to provide further information to encourage tenants to seek advice and attend their hearing. Given the high rate of issues involving rent arrears it is also appropriate to provide details of financial counsellors and agencies that access Housing Establishment Fund monies.

#### **Recommendation 8: Improve the format and content of VCAT's Notices of Hearing, including referral details for legal assistance.**

#### **Javid's experience**

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Javid was living in a rooming house in West Meadows. One evening he had an argument with the rooming house operator over rent arrears. Javid had been withholding rent as the rooming house operator was not attending to urgent repairs.

Javid heard no more about the dispute until several weeks later when a police officer came to the rooming house and told Javid that he must leave the property by 11:30am the following day or he would be evicted. Javid was confused and asked the police officer why he was being evicted. The officer responded that Javid should call VCAT. Javid's housemates overheard the conversation and remembered that there was a letter from VCAT on top of a communal fridge.

Javid did not know who VCAT was but he phoned the Registry who explained what VCAT was and that a possession order had been made against him because of rent arrears. Javid was advised that as he was not at the hearing he could apply for a review. Javid was emailed out the application for review by VCAT, which he completed and emailed back to VCAT.

As the review hearing was listed at Broadmeadows, Javid did not have access to a duty lawyer. At the hearing Javid tried to explain to the Member why he had been withholding rent and why he did not attend the original hearing. The VCAT Member was not pleased that Javid had intentionally withheld rent and found that he did not have a reasonable excuse for not attending the VCAT hearing.

Javid contacted the Registry again who told him to go to King Street and see the VLA duty lawyer. The VLA duty lawyer advised Javid that as he attended the review hearing and it was refused he could not apply for a further review and could only appeal on an error of law.

Javid expressed frustration as he did not know that the rent arrears and repairs would be treated as separate issues and felt that as he did not receive the letter he had a reasonable explanation for not attending. Despite speaking to police and the registry and after eventually reading the notice of hearing, Javid did not receive legal advice or a referral to legal assistance, until after the hearing had concluded.

## **VCAT registry staff**

Tenants fail to attend hearings for numerous reasons. In addition to personal circumstances preventing their attendance, tenants may be intimidated by the Tribunal venue or process or fail to appreciate the seriousness of the orders that may be made. Many of these issues can be addressed through the provision of basic legal information and procedural advice. Many of these concerns can be addressed by having VCAT Registry staff telephone a tenant in possession order proceedings to explain what VCAT is, what will be decided at the hearing, and provide referral details for legal and non-legal assistance.

Other jurisdictions with substantial caseloads have successfully managed to implement similar strategies including the Assessment and Referral Court List, Special Circumstances List and Court Integrated Services Program at the Magistrates' Court. VLA's experience in providing a duty lawyer service at the Special Circumstances List is that many clients report attending due to being contacted by the Registry staff in the days before the scheduled hearing, and the attendance rate by parties is increased as a result. Applicants in that list are also advised of VLA's duty lawyer service and other services that can assist prior to the hearing.

VLA commends VCAT on introducing notification of hearing dates by text message. This can be improved by including a plain English description of what to expect at the hearing, together with referral information for services that can assist.

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**Recommendation 9: VCAT Registry staff should contact tenants prior to possession order hearings to provide basic information and referrals to legal and non-legal support services.**

### **Urgent restraining order applications**

VLA regularly provides assistance to people who have been evicted from their premises in breach of the RT Act or who have been threatened with unlawful eviction. We also receive referrals from Justice Connect Homeless Law, the Tenants Union of Victoria and other Community Legal Centres for this purpose. In our experience, urgent injunctive relief to preserve a tenancy, or to have it reinstated, is the most effective way of preventing illegal evictions and is the most common remedy to prevent homelessness caused by illegal evictions. It is also the only tool available to tenants to preserve their rights against unlawful interference with their home and deprivation of their property, in accordance with section 13 of the Charter.

The process for making these applications involves the completion of a VCAT application under s 452 of the RT Act seeking an urgent order restraining a breach of the RT Act, or requiring the rectification of a breach. These are orders made under s 472 of the RT Act. These applications are filed with the registry and a hearing is normally listed within 30 to 90 minutes. The matter is heard ex-parte, due to its urgent nature, and returns for a full hearing at a later date. Interim orders are regularly made, with a copy provided to the local police station to assist the applicant should there be a dispute in relation to the requirements set out in the order. The VCAT orders are often all that is needed to clarify the landlord's obligations under the RT Act.

This is an essential remedy that cannot be accessed urgently in regional Victoria. We are often contacted by tenants and rooming house residents where there is an imminent threat of eviction. An application listed at the next sitting date is likely to require a wait of at least a few days and sometimes more than a week. For a tenant who has been unlawfully evicted, or is about to be, this is inadequate.

The new Residential Tenancies Hub available on the VCAT website makes it easier for tenants to lodge applications online, however it does not provide a process for urgent ex-parte applications. Ideally tenants and/or their advocates would be able to assist with lodging urgent applications for those in regional areas, and also be able to arrange urgent hearings by telephone to obtain the orders necessary to preserve the tenancy.

**Recommendation 10: VCAT facilitate urgent restraining order hearings for tenants in regional areas to prevent illegal evictions.**

VCAT assist applicants who are at risk of eviction, or who have been illegally evicted, to apply for and have heard urgent restraining order applications on the day of application. This could be done by phone call to VCAT in King Street.

### **Improved access for tenants in regional locations**

Accessing VCAT proceedings can be difficult for tenants in remote and regional locations. Sometimes this is not just a matter of inconvenience. For example, tenants in some regional areas may be dependent on public transport that only runs two or three days each week. Other tenants with disability are not confident travelling at all.

To ensure tenant attendance and just outcomes in landlord-tenant disputes, VCAT should facilitate remote access to hearings for tenants on request. The current criteria on when video conference facilities will be made available are unclear, and still requires that a tenant attend a Magistrates' Court with the technological requirements. VLA recommends that VCAT trial attendance at hearings

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by Skype, or through other similar technology. Telephone and other remote access processes are used in similar jurisdictions to improve access for people unable to attend in person. The example below highlights the effectiveness of telephone access in hearings before the Administrative Appeals Tribunal (AAT).

### **Administrative Appeals Tribunal hearings in the Social Security and Child Support Division**

The AAT hears multiple social security matters a day in its Social Security and Child Support Division. The hearings take between 30 minutes and 90 minutes and in Victoria, the division only sits in Melbourne. Applicants, who often have a disability and reside in regional Victoria, are contacted within a day or two of their application to the AAT and asked whether they wish to appear by telephone. Applicants regularly prefer to do so, and are contacted on their mobile phones at the time of the hearing. Hearings normally involve obtaining detailed evidence from the applicant, and other participants. Relevant documents are prepared by Centrelink prior to the hearing, and are distributed to the relevant parties prior to the hearing. Applicants are sometimes represented, and the representative can either attend in person, or also appear by telephone. Whilst Centrelink does not appear as a party in these proceedings, in some matters there can be conflicting evidence from witnesses. These procedures guarantee access across Victoria to anyone with a telephone connection in matters that are often complex.

**Recommendation 11: Increase use of telephone and other technology to improve access to the Residential Tenancies List for tenants living in regional areas.**

## **Improve enforcement of VCAT orders**

### **Enforcement of non-monetary orders at VCAT**

The RT Act provides that tenants may apply to VCAT for a range of non-monetary orders. Such orders include that landlords carry out repairs, and restraining orders either preventing actions in breach of, or requiring the performance of, terms of the lease or provisions of the RT Act. Issues with enforcement commonly arise in relation to restraining orders made by the Tribunal to prevent breaches of the Act.<sup>19</sup> For instance, VLA regularly assists tenants to obtain restraining orders to prevent landlords from unlawfully evicting them, or to require a landlord to cease disconnecting electricity at the rented premises.

In order to achieve its purpose of establishing rights and obligations between the parties, both landlords and tenants must be able to enforce orders made by VCAT under the RT Act. This is recognised by the existence of penalty provisions, which make it a summary criminal offence to fail to comply with a determination of the Tribunal.<sup>20</sup> In 2010, Parliament recognised that “at current levels, penalties for breaches of the Act do not provide an adequate deterrent to illegal action”, and increased the maximum penalty for failing to comply with a determination of the Tribunal from 20 to 60 penalty units (currently \$9,327.60), plus 5 penalty units for each day the non-compliance continues.<sup>21</sup> It is an offence for a party to fail to comply with a determination of the Tribunal and prosecution can be brought by Consumer Affairs Victoria or a member of the police force.<sup>22</sup>

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<sup>19</sup> RT Act section 472.

<sup>20</sup> RT Act section 480.

<sup>21</sup> *Hansard*, 12 August 2010, Victorian Parliament Legislative Assembly, page 3316.

<sup>22</sup> RT Act s 508(1).

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If a landlord does not comply with a non-monetary order of the Tribunal, tenants have three main options for enforcing the order:

1. Request Victoria Police to enforce the order;
2. Institute VCAT proceedings for contempt; or
3. Commence enforcement proceedings in the Supreme Court.

While tenancy law is traditionally considered to be within the realm of civil law, a number of provisions of the RT Act create summary criminal offences. In addition to the prosecution powers discussed above, section 458 of the *Crimes Act 1958* (Vic) authorises any person, including a member of the police, to arrest a person without a warrant if they are found to be committing an offence, including an offence under the RT Act. This means, for instance, that police have the power to arrest a landlord who is disobeying a VCAT restraining order by forcing entry to the rented premises.

In light of the police powers to enforce VCAT orders, VCAT's standard practice when making a restraining order is to direct the Principal Registrar to send a copy of the order to the police station closest to the rented premises. However, tenants routinely report that the police are unwilling to assist in the investigation or enforcement of VCAT orders, and that police often advise tenants that their matter is a "civil issue" and that the police have no role to play in the enforcement of the RT Act. This can be contrasted with the fact that police routinely play a key role in the enforcement of possession orders on behalf of landlords by carrying out forced evictions and facilitating the changing of locks.

#### **Tamer's experience**

Tamer lived in a unit in rural Victoria with wife and their newborn baby. The unit was located next to his landlord's business. Tamer and his landlord had a number of disputes about the landlord blocking the common driveway by parking cars and trucks there. Tamer's landlord subsequently threatened to unlawfully evict Tamer, telling him that he had to be out of the apartment within 24 hours or the locks would be changed.

Tamer went to VCAT and an urgent restraining order was issued by the Tribunal. The order required Tamer's landlord to not enter the property or change the locks. Two days after the VCAT order was made, Tamer came home and found his landlord in his apartment, removing all of his family's possessions and dumping them on the footpath.

Tamer took some photos and a video on his phone, and then went to his local police station with a copy of VCAT's restraining order. However, the police refused to act on the breach of the restraining order, telling Tamer that his dispute with his landlord was a civil issue, and that the police had no power to act. They told Tamer that he should go to back to VCAT.

Tamer was scared of his landlord, and felt like the system would not protect him. He and his family felt like their only option was moving out of the property. They are currently living in emergency accommodation and trying to find a new place to live.

#### **Contempt proceedings**

Under section 137 of the VCAT Act, the Tribunal may find a person guilty of contempt if they do any act that would constitute contempt of the Supreme Court,<sup>23</sup> which includes a wilful failure to comply

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<sup>23</sup> VCAT Act s 137 (1)(f)

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with an order.<sup>24</sup> There are a number of issues with contempt proceedings as a way of securing a landlord's compliance with a VCAT order.

First, VCAT directs that it does not encourage the use of contempt proceedings as a first step in enforcing non-monetary orders, and that the process should be used only as a last resort.<sup>25</sup> Second, where a tenant believes that their landlord has failed to comply with a non-monetary order, they need to apply to the Tribunal under section 137 of the VCAT Act to have the landlord convicted of contempt. The tenant will need to file an application, a supporting affidavit and a draft charge.<sup>26</sup> The onus is also on the tenant to prove beyond reasonable doubt that the other person has failed to comply with a non-monetary order.<sup>27</sup> Given the serious and complex nature of such an application, unsuccessful applicants may be at risk of a costs order being made against them. This represents a significant disincentive to tenants who want to enforce their orders through contempt proceedings. Moreover, there is no guidance within VCAT on how to have such matters listed, and the process is not sufficiently timely to assist a tenant whose landlord is evicting them in breach of the RTA. The requirement that a judicial member hears contempt matters only adds to the delay. Finally, the result of a successful contempt charge may be a significant fine or a term of imprisonment. While these may be of a generally deterrent effect, they do not directly benefit the tenant and may not result in immediate compliance.<sup>28</sup>

## Enforcing VCAT orders in the Supreme Court

The final option for enforcing non-monetary orders is for tenants to commence enforcement proceedings in the Supreme Court.<sup>29</sup> Pursuant to 122 of the VCAT Act, enforcement in the Supreme Court requires the tenant to take the following steps:

1. Obtain a copy of the order that is certified by a presidential member or the principal registrar to be a true copy;
2. Prepare and file an affidavit setting out the details of the non-compliance with the VCAT order; and
3. Obtain a certificate from a judicial member or the principal registrar stating that the order is appropriate for filing in the Supreme Court.

The first barrier for tenants seeking to enforce a VCAT order in the Supreme Court is that the requirement to file in that jurisdiction may itself act as a disincentive to enforcement. While there is no charge for filing, simply elevating the matter to that jurisdiction is intimidating to some tenants.

Further, the requirement that the tenant obtain a copy of a certified order and a certificate from a judicial member stating that the order is appropriate for filing in the Supreme Court creates significant obstacles to enforcement, particularly in relation to urgent matters. Specifically, there is

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<sup>24</sup> See *Bradford v Dimopoulos* [2007] VCAT 1409.

<sup>25</sup> Guidelines for Contempt Proceedings, VCAT Website, [https://www.vcat.vic.gov.au/sites/default/files/guidelines\\_for\\_contempt\\_proceedings.pdf](https://www.vcat.vic.gov.au/sites/default/files/guidelines_for_contempt_proceedings.pdf).

<sup>26</sup> Guidelines for Contempt Proceedings, VCAT Website, [https://www.vcat.vic.gov.au/sites/default/files/guidelines\\_for\\_contempt\\_proceedings.pdf](https://www.vcat.vic.gov.au/sites/default/files/guidelines_for_contempt_proceedings.pdf).

<sup>27</sup> *Frugtniet v Law Institute of Victoria* [2012] VSCA 178 at [33].

<sup>28</sup> If a person is found guilty of contempt, the Tribunal may impose a term of imprisonment of up to 5 years, or a fine that is up to 1000 penalty units under section 137(5) of the VCAT Act.

<sup>29</sup> VCAT Act, section 122.

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confusion about the appropriate process for obtaining the certified order and certificate. While VCAT has held that the applicant should make an application in the proceeding in which the order was originally made, rather than through issuing new proceedings, there is no application form or clear renewal process available to make such an application. Orders commonly do not provide for a 'right of renewal', and registry staff commonly reject attempts by a party to reopen proceedings.

The requirement that the order be certified by a presidential member or the principal registrar, and the requirement that the tenant obtain a certificate that the order is appropriate for filing creates significant delays. It is VLA's experience that the process is largely administrative, and that there is no guidance about time periods for making decisions or providing the tenant with the relevant orders.

Finally, there is no published criteria or clarification in case law about what the judicial member or principal registrar must consider in determining whether to issue a certificate that the order is appropriate for filing under section 122(1)(c). Previous attempts by VLA to clarify the criteria have been unsuccessful.

### **Leslie's experience**

Leslie was living in a bungalow behind his landlord's house. Leslie had numerous issues with his landlord turning off the power to his bungalow, and had been to VCAT to get an urgent ex-parte restraining order that ordered the landlord to stop switching off the power. The matter subsequently returned to VCAT to enable the landlord to attend. At that hearing Leslie gave evidence that the landlord had repeatedly breached the interim order. A final ongoing restraining order was made and Leslie's landlord was ordered to pay compensation. Despite this further order, Leslie's landlord continued to switch off the power for days at a time. At the time that Leslie approached VLA, his power had been off for four days.

VLA assisted Leslie to complete a lengthy affidavit detailing the continued breaches of the restraining order, and requested the certified order and certificate from VCAT. We advised VCAT that the matter was urgent due to the fact that Leslie's power was switched off.

Throughout the next two days, VLA made numerous phone calls to VCAT but we were told that registry staff could not advise us when we might receive the documents we had requested. The Tribunal then refused to issue the certificate under section 122(1)(c) on the basis that the landlord had commenced unrelated eviction proceedings that would be heard in four days (almost one week after Leslie's initial request for the documents).

Leslie subsequently decided that the tenancy was unsustainable and moved out of the property.

There is no right to have the matter reinstated in VCAT for resolution of non-compliance issues. The current process of applying in the Supreme Court is unnecessarily onerous, complex and time-consuming. In this regard, it is noteworthy that the requirement that non-monetary orders be enforced in the Supreme Court with appropriate certification is found only in Western Australia and Victoria.<sup>30</sup> We consider that the process in New South Wales currently represents the best model for enforcement of non-monetary orders. In New South Wales tenants have the option to:

- Renew proceedings if an order is not complied with. At this hearing, the Tribunal may order compensation be paid to the tenant; and

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<sup>30</sup> *State Administrative Tribunal Act 2004 (WA)* s 86.

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- Enforcement of non-monetary orders requires filing a form and a copy of the Tribunal order in the Local Court (the equivalent of the Magistrates' Court).

The New South Wales process is efficient and accessible and should be adopted in Victoria.

### **Recommendation 12: Improve enforcement of non-monetary orders.**

**12.1** Provide training for Victoria Police members to educate them about their role in enforcing non-monetary VCAT orders;

**12.2** Amend the VCAT Act to allow parties to seek renewal of proceedings if non-monetary orders are not complied with;

**12.3** Amend s 122 of the VCAT Act to allow non-monetary orders to be enforced by filing in the Magistrates' Court instead of the Supreme Court. Remove the requirement that the party seeking enforcement obtain a certificate from VCAT that the matter is appropriate for filing.

## **Enforcement of monetary orders at VCAT**

It can be very difficult and expensive for tenants and other residents under the RT Act to obtain the benefit of VCAT orders for compensation that are made in their favour. Tenants who obtain successful compensation orders against landlords cannot reduce their rental payments without obtaining an order to this effect from VCAT. Tenants obtaining compensation after a tenancy has terminated are not able to be compensated via a rent reduction as they no longer have a payment obligation.

Tenants seeking to enforce compensation orders need to pay fees to the Magistrates Court. The total amount of the order may well be less than the enforcement fees and there is no guarantee that enforcement will be successful in which case the costs associated with enforcement will not be recouped. There is a significant inequity in the position of the parties in this respect, as landlords have the benefit of the bond, whereas tenants must follow the complex and expensive enforcement process.

This is most commonly an issue for tenants obtaining orders for compensation arising from their unlawful eviction, where tenants and residents are more likely to be of limited financial means, and where the compensation can assist them to secure new housing. We also see this issue arise often where landlords or rooming house operators have refused to lodge the bond, and refuse to return it at the end of the tenancy. Tenants and other residents are able to obtain a VCAT order in their favour, but are reluctant or unable to expend further money pursuing debt amounts that are often low.

It would increase the accessibility of effective remedies for tenants to allow applications to the Residential Tenancies Fund to pay some or all of the costs associated with enforcement. Arrangements could be considered whereby the successful execution of a Warrant to Seize Goods could result in the sheriff directly paying the Residential Tenancies Fund its proportion of any funds obtained from the debtor. This would also assist with correcting the current imbalance where landlords have the protection of a bond.

### **Recommendation 13: Enable tenants to recover some or all of the enforcement costs of monetary orders made by VCAT from the Residential Tenancies Fund.**

Any funds recouped by the Sheriff should be repaid directly to the Fund

## **Improve VCAT decision-making and accountability**

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VCAT is required to provide written reasons within 45 days of a request being made,<sup>31</sup> and, in the Residential Tenancies List, a tenant is required to make that request before or at the time the decision is handed down.<sup>32</sup> There are two issues with this process. Firstly, tenants are generally unaware of their obligation to request reasons at the time of the hearing. Secondly, even if a request is made during the hearing, written reasons may not be provided until after a warrant of possession has been executed, rendering appeal rights nugatory and decreasing the accountability of decision-making in the Residential Tenancies List.

VLA is regularly contacted by tenants alleging a legal error in proceedings at which the tenant was unrepresented. If the tenant failed to request reasons during the hearing, none will be issued. Commonly a tenant will then apply for the audio CD recording of the hearing, for which a fee applies. It is our experience that the recording can take up to two weeks to be released.

Section 149 of the VCAT Act provides that a Tribunal may stay any of its own orders pending an appeal that may be instituted. It is VLA's experience that VCAT does not consider the provision of written reasons to be a relevant consideration when hearing such a stay application. VLA lawyers are often tasked with needing to demonstrate an arguable error of law, one of the relevant factors in a stay application, without having access to either written reasons or a copy of the audio recording of the hearing. Moreover, the lack of timely written reasons places a significant obstacle in the path of a tenant seeking legal advice and obtaining representation within the 28 days in which to apply to the Supreme Court for leave to appeal.

The Residential Tenancies List at VCAT is structured to facilitate parties to represent themselves. This ought to increase access to appropriate accountability measures, particularly the ability to request written reasons following a hearing, and for those reasons to be provided in a timely fashion. The alternative - requiring a party to initiate proceedings in the Supreme Court with inadequate proof of the alleged error - in order to prevent eviction prior to accessing appeal rights, is poor public policy.

The current delay in issuing audio recordings of hearings further places a significant impediment to access to justice for tenants, and reduces the accountability of VCAT. VLA recommends steps be taken to reduce the time for release of the recording to a party.

### **Michael's experience**

Michael had been renting a property in South Morang for more than 2 years. The landlord gave him a notice to vacate under section 258 of the RT Act and advised that a family member needed to occupy the property immediately after the 60-day notice period. Despite the notice being sent by registered post, Michael only found out about it 3 days before the termination date when the Agent contacted him to arrange an outgoing inspection. Michael was surprised as he never received the notice to vacate.

Michael contacted VLA who spoke to Australia Post on his behalf. Australia Post confirmed in writing that their system indicated that although the letter was registered in their system at the local post office, there was no record of it being delivered, nor that any attempts at delivery had been made. Australia Post indicated that it is likely that something happened to the letter in transit and that it was never delivered.

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<sup>31</sup> *Victorian Civil and Administrative Tribunal Act 1998*, s. 17(3)

<sup>32</sup> *Ibid*, cl. 76 of schedule 1

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As VLA was unable to provide a lawyer at the hearing, written submissions were prepared for Michael to tender himself. The submissions concerned the rebuttable nature of the presumption under section 49(2) of the *Interpretation of Legislation Act 1984* that something sent by registered post had been served. The submissions explicitly requested written reasons for the Tribunal's decision.

At the hearing the VCAT Member found that the landlord had issued the notice to vacate by registered post, and refused to consider the submissions seeking to rebut the presumption of service that had been provided. As advised, Michael orally requested written reasons for the decision.

The landlord purchased a warrant of possession. VLA contacted VCAT to inquire about the written reasons, and was advised that the request was still with the Member. VLA therefore applied under s 149 of the VCAT Act seeking a stay of the possession order until at least the written reasons had been provided, in order for Michael to be advised on his appeal rights.

The Tribunal was very cautious about staying the effect of another Member's order, particularly as there was no written reasons evidencing the error. Ultimately a stay of two weeks was granted. At the end of the two week stay period the written reasons had not been provided. Michael was advised that, if the Member had ignored the submissions on the question of service, there was likely an error of law that could be appealed. However, VLA required either the written reasons or an audio recording to verify that before advising on whether it could provide assistance with an appeal.

Michael was advised that, despite the Tribunal on the stay application finding that the absence of written reasons was not a relevant consideration, a further stay application could be made. Michael was facing pressure from the landlord who made it clear they would direct the police to execute the warrant at the earliest opportunity. Faced with this uncertainty Michael decided to use his energy in trying to find alternative housing. Ultimately Michael had to move his goods into storage, and seek assistance from crisis accommodation services.

#### **Recommendation 14: Improve accountability of VCAT decision-making.**

**14.1** Permit tenants to request written reasons within 7 days of a decision being made.

**14.2** Provide that the provision of written reasons is a relevant consideration when determining an application to stay an order.

**14.3** Reduce delays in the provision of audio recordings.

### **Enable internal appeals**

VLA recommends that the RT Act be amended to provide for internal appeals of residential tenancies decisions within VCAT. This would bring Victoria into line with other Australian jurisdictions that have recognized the necessity of accessible internal appeals when constructing amalgamated tribunals.

Ensuring VCAT resolves proceedings in accordance with law is necessary to preserve the status and integrity of the Tribunal, and to give proper effect to the legal rights and obligations imposed by the RT Act. In our experience the current mechanism for ensuring accountability – requiring an aggrieved party to appeal to the Supreme Court on an error of law – is inaccessible and unaffordable, and has the effect of preventing parties with legitimate grounds for appeal from pursuing those rights. An inaccessible appeals jurisdiction can cause parties to accept arbitrary, unjust or unlawful decisions, and is contrary to the principle of equal access to justice.

**Lucy and Steve**

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Lucy and her partner Steve had been renting a semi-detached house in Broadmeadows. The agent managing the property also managed the house next door, and had visited on a number of occasions to show prospective tenants through the neighboring property. Lucy and Steve raised repair issues with the agent, and the agent remarked that Lucy and Steve had been excessively noisy on occasion. Their relationship deteriorated.

Steve was employed sporadically as a laborer and contractor. About eight months into the tenancy Steve suffered a lull in work and the couple fell into rent arrears. The agent issued a notice to vacate, and applied for a possession order. At the VCAT hearing Steve attempted to give evidence that he had recently secured new employment, and that the couple were able to pay off their \$1,758 rental arrears within three weeks. On the basis that satisfactory arrangements could be made to avoid financial loss to the landlord, Steve and Lucy submitted that the Tribunal ought to exercise the discretion reposed by s 331 of the RT Act to adjourn the possession order, subject to a payment plan.

When asked for her response to the proposal, the agent informed the Tribunal Member about the acrimonious relationship between her and the tenants, which she said was caused by the tenants damaging a fence between the houses, and being abusive when she attended the neighboring property. The agent stated that the tenants were not good people and should be evicted.

The Tribunal Member commented that it was clear that 'the tenants were unhappy with the property manager, and vice versa' and that 'it had been a relatively short tenancy, with no family members'. The Member concluded that 'for the sake of everybody I think it is best if the relationship came to an end' and made a possession order in favour of the landlord, with a postponement of the issuing of the warrant for seven days.

Lucy and Steve sought advice from VLA on prospects for appeal. From speaking with the tenants it appeared the Tribunal had committed errors of law by taking into account irrelevant considerations, misconstruing s 331 and failing to make findings as to whether satisfactory arrangements could be made to avoid financial loss to the landlord.

The tenants were concerned about elevating the matter to the Supreme Court, in part due to the significant costs consequences if they were unsuccessful. We advised Lucy and Steve that they needed to pay for an audio recording of the hearing so that proper advice could be given about the potential errors, and an application for funding was prepared under VLA's Public Interest and Strategic Litigation guideline.

The landlord applied for a warrant of possession at the earliest opportunity, being seven days after the hearing. Lucy and Steve were still waiting on the audio recording, and VLA was unable to advise on whether a grant of assistance would be provided until this was received. An application was made under s 149 of the VCAT Act, seeking a stay of the order pending an appeal that may be instituted. This was reluctantly granted by VCAT for a period of two weeks, with a direction that no further stay would be granted unless ordered by the Supreme Court. The Member hearing the stay application was firmly of the view that only the Supreme Court should be staying VCAT orders. Lucy and Steve were reluctant to file the appeal without being advised as to the prospects of success, which VLA had advised were good if the hearing reflected their recollection, but neither that nor ongoing assistance could be confirmed until the audio recording was received.

The audio recording was received prior to VCAT's stay being lifted, and VLA hurried to advise and draw the documents for appeal. However, with eviction looming in the alternative, Lucy and Steve had grown increasingly anxious and determined to use their limited resources to hurriedly pack and leave the property. They advised VLA that the prospect of appealing to the Supreme Court was too stressful

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when compared to trying to find another house, even if advised that the application had strong prospects of success.

We frequently receive instructions not to pursue an appeal where a potential legal error exists, on the basis that the Supreme Court is considered too intimidating, uncertain and expensive. By definition tenancies will end at some point, and tenants often choose to spend their energy hurriedly sourcing alternative accommodation as opposed to pursuing an intimidating and potentially costly appeal in the Supreme Court. This leaves tenants feeling aggrieved at not having access to justice, and makes VCAT effectively unaccountable.

In 2009 then President of VCAT, Justice Bell, articulated the inadequacies of the current appeals process in his 'One VCAT' review<sup>33</sup>. His Honour explained that, as a justice institution, VCAT has a strong interest in the consistency, predictability and quality of its decisions. Without a realizable method of accountability, VCAT runs the risk of appearing to make decisions too subjectively which can have the effect of undermining the legitimacy of the institution as a whole. As the final decision maker for disputes under the RT Act, the lack of effective and accessible accountability can impact the legitimacy of residential tenancies legislation as a whole.

Providing for internal appeals would:

- Give parties a more accessible and affordable right of appeal;
- Increase the consistency, predictability and quality of Tribunal decision-making; and
- Encourage the Tribunal to build a bank of jurisprudence.

In May 2010 the newly appointed President of VCAT, Justice Ross, conducted a further review of VCAT entitled 'Transforming VCAT' that responded to many of the recommendations of 'One VCAT'. Justice Ross held reservations about the creation of an internal appeals body, specifically that it may have 'substantial resource implications' and carried a 'significant risk of cost and delay'. Justice Ross undertook to consult with stakeholders further, and review the practical operation and resource implications of other tribunals.

In May 2010 the only other amalgamated tribunals were the relatively recently created Australian Capital Territory Civil and Administrative Tribunal (which commenced on 2 February 2009) and the Queensland Civil and Administrative Tribunal (1 December 2009). Since that date they have been joined by the New South Wales Civil and Administrative Tribunal (1 January 2014) and the South Australian Civil and Administrative Tribunal (30 March 2015). With the exception of the Northern Territory Civil and Administrative Tribunal (6 October 2014), all amalgamated tribunals created in Australia have included a form of internal appeals jurisdiction in residential tenancies matters. At the Federal level the Administrative Appeals Tribunal provides for layers of merits review.

The various jurisdictions address the potential cost and delay implications through appropriate constraints on a party's ability to seek internal appeal, such as strict time limits and/or a requirement to seek leave. Decision-makers on internal appeal may have discretion to consider new evidence. A table summarizing some of the internal appeal mechanisms of NCAT, QCAT, ACAT and SACAT is attached at **Appendix 1**. Also contained within that table is a brief examination of data from annual reports which demonstrates that internal appeals make up a very small proportion of the total matters heard (between 0.9 and 2 per cent for NCAT, QCAT, ACAT and SACAT), and that there has

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<sup>33</sup> *One VCAT*, Recommendation 39, page 55.

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been minimal impact on clearance rates and management of cases. The data reveals that concerns about resource implications have not eventuated.

Internal appeals would also provide for increased consistency and predictability of decisions. This would have cost and time benefits for tenants and landlords, as well as VCAT itself. The published decisions by QCAT's internal appeals body are an example of thorough decisions written with one eye to future problems while resolving the dispute at hand.<sup>34</sup> VLA has previously provided examples of inconsistent interpretation of the RT Act by VCAT, resulting in difficulty in advising tenants of their rights and obligations, and eroding confidence in the legal system. First instance decision-making would also likely become more consistent and considered by the very existence of a review jurisdiction. As quality and consistency improved, the number of applications for internal review would likely decrease.

"Transforming VCAT" proposed the adoption of guideline judgements and internal referrals of questions of law, as a method of increasing the consistency and standard of decision-making. The VCAT Act was not amended to provide for internal appeals, and it is our understanding that no referrals of law have been made to the Supreme Court since VCAT's inception. Such bifurcation of proceedings goes against VCAT being a 'one stop shop' and resolving disputes in a speedy fashion. Neither have any guideline judgements been issued. Even if guideline judgements were issued, they are not an adequate safeguard to errors occurring in individual proceedings for which there is no accessible redress.

In recognition of the serious imposition on a person's liberty, decisions made in the Guardianship List at VCAT are subject to internal rehearing by a Senior Member. The rehearing facility is provided for in the enabling enactment rather than the VCAT Act. VLA submits that decisions in the Residential Tenancies List can have an equally harmful impact on the rights of tenants, which can lead to the eviction of a tenant and their family, without an accessible means of reviewing erroneous decisions.

**Recommendation 15: Institute internal appeals of residential tenancy matters in VCAT.**

Internal appeals should be available as of right on questions of law, and with leave on other grounds. VLA generally supports the 'other grounds' provided for at the NSW Civil and Administrative Tribunal which include that:

- The decision of the Tribunal was not fair and equitable
- The decision of the Tribunal was made against the weight of evidence, or
- Significant new evidence has arisen (being evidence that was not reasonably available at the time of the original decision).<sup>35</sup>

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<sup>34</sup> See <http://www.sclqld.org.au/caselaw/QCAT>.

<sup>35</sup> VLA is concerned that the requirement that a party in NSW must additionally prove that there has been a 'substantial miscarriage of justice' creates uncertainty for unrepresented litigants, and is unnecessary given leave is discretionary.

VLA would seek to make more detailed submissions on the technical aspects of an internal appeals process if that forms one of the recommendations in the public options paper considering reform proposals.

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## Improve sector-wide compliance and enforcement

As discussed above, there are a number of offences outlined in the RT Act that relate to landlord behaviour. The penalties for the offences differ based on the seriousness of the conduct, with court imposed fines of up to 60 penalty units (currently over \$9,000) prescribed for some offences. People who have committed an offence may also be issued with an infringement notice.<sup>36</sup> These offences exist to discourage certain types of undesirable behavior by landlords. For example, it is an offence under the RT Act for a landlord to enter a rental property except in accordance with the Act.<sup>37</sup> It is also an offence to issue a rooming house resident a notice to leave without reasonable grounds.<sup>38</sup>

Offences under the RT Act cannot, however, be prosecuted by tenants. In accordance with the RT Act only the Director of CAV or a member of the police force are able to initiate these prosecutions and issue infringement notices.<sup>39</sup> While there is no specific data on the number of offences committed or reported, VLA is concerned that offences under the RT Act are not being sufficiently investigated or prosecuted by CAV. In this regard, it is noteworthy that while CAV took almost 74,000 tenancy related calls in 2014-15, only two prosecutions resulted.<sup>40</sup>

The extremely low rate of prosecution has resulted in a culture of landlords disregarding their obligations under the RT Act. This undermines the existence of RT Act offences, and creates a façade of regulation that fails to have a normative effect on the behavior of landlords.

VLA's experience is that tenants approach us on an almost daily basis for assistance with serious breaches of the RT Act that are also offences. Three of the most significant breaches are discussed further below.

### 1. Failure to lodge the bond with the Residential Tenancies Bond Authority

The lodging of bonds with an independent authority is one of the most basic and fundamental protections provided by the RT Act. Failure to lodge the bond most commonly occurs on the margins of the rental market, such as with international students and in private rooming houses and rentals. While a tenant can be evicted for not paying a bond, if the bond is not lodged with the RTBA it is often very difficult for a tenant to recoup the amount paid at the end of the tenancy. As identified by VCAT, landlord failures to lodge bonds is a persistent problem.<sup>41</sup>

### 2. Illegal evictions

It is an offence under the RT Act to evict or attempt to evict a tenant, except in compliance with the Act.<sup>42</sup> Providing an incentive for landlords to only evict pursuant to the RT Act is of fundamental importance to the security of tenants.

VLA regularly assists tenants who are facing unlawful eviction. While these tenants may be able to obtain an urgent restraining order under the RT Act, self-enforcement alone in relation to such serious breaches of the Act is insufficient. In addition to allowing tenants to take reactive action to

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<sup>36</sup> RT Act s 510C.

<sup>37</sup> RT Act s 91A.

<sup>38</sup> RT Act s 368A.

<sup>39</sup> RT Act ss 508(1), 510B, 510C.

<sup>40</sup> Consumer Affairs Victoria Annual Report 2014-15.

<sup>41</sup> VCAT submission in relation to rent, bond and other charges, p.4.

<sup>42</sup> RT Act ss 229, 273 and 317.

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unlawful evictions, there is significant public interest in providing a disincentive to landlords in the form of prosecution of unlawful eviction offences under the RT Act.

### 3. Failure to comply with a tribunal order

As discussed above, it is an offence under the RT Act to fail to comply with a VCAT order.<sup>43</sup> Despite this, VLA assists a significant number of tenants whose landlords refuse to abide by VCAT orders. For example, tenants may seek to enforce a restraining order requiring a landlord to provide access to the property, or an order that the landlord carry out urgent repairs. In addition to increasing the capacity of tenants to self-enforce orders of the Tribunal, there are significant public policy reasons to increase prosecutions relating to failure to comply with a VCAT order.

As demonstrated by the examples above, RT Act offence provisions exist to protect fundamental housing rights. As the regulator of the RT Act, CAV policy on investigation and enforcement must ensure that there is a systemic disincentive for landlords to breach the offence provisions of the Act. For the reasons set out elsewhere in this submission, tenants are often at a significant disadvantage and cannot easily enforce their own rights. Parliament has determined that it is appropriate to underpin the traditionally civil area of residential tenancies with criminal offences in recognition of the power imbalance between the parties, and the importance of securing a tenant's home. It is important the CAV's enforcement policy reflect these principles.

#### **Sally's experience**

Sally's son Craig lives in a rooming house. Craig has a number of issues with his health, and Sally has been dealing with Craig's rooming house owner on his behalf. Two weeks ago, the owner issued a notice to vacate because he said that Craig had breached the house rules. Sally and Craig did not believe that the rules had been breached, and Sally was trying to negotiate with the owner to have the notice withdrawn.

A couple of days later, the owner gave Sally a 'notice to leave' which said that she must not go to the property for two days. When Sally asked the rooming house operator why the notice was issued, he said that he thought Sally was causing trouble.

It is an offence under section 368A of the RT Act to issue a notice to leave without having reasonable grounds for believing that a serious act of violence has occurred or that someone's safety is in danger. As such, Sally called CAV to report the offence. CAV told Sally that they were not able to investigate the offence. They said that Sally should make an application to VCAT to challenge the notice to leave. The notice to leave expired two days after it was issued, and Sally could not see any point in applying to have a case heard at VCAT. However, she is worried that the owner will keep issuing her notices to leave.

The low levels of prosecutions in RT Act matters can be contrasted with a number of other offences under Victorian statute. A review of other prosecutions in the Magistrates Court from July 2011 to June 2014 shows that prosecution of public policy offences is common for offences where the maximum penalty amount has been set significantly lower. For example:

- 3,315 people were found guilty of having a dog at large between sunrise and sunset (s24(1) of the Domestic Animals Act 1994);

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<sup>43</sup> RT Act s 480.

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- 135 people were found guilty of possession of fish that are less than minimum size specified (s68A(3)(a) of the Fisheries Act 1995);
  - 54 people were found guilty of entering a casino while subject to an exclusion order (s77(1), Casino Control Act 1991);
  - 171 people were found guilty of refusing or failing to comply with a notice under the Construction Industry Long Service Leave Act 1997 (s10(3)(a));
  - 3,445 people were found guilty of failing to apply to register a dog or cat (s10(1) of the Domestic Animals Act 1994); and
  - 530 people were found guilty of depositing litter (s45E(1) of the Environment Protection Act 1970).

The comparatively low levels of prosecutions in RT Act matters is particularly important given that over one quarter of Victorian households are renting.<sup>44</sup> In addition to activities designed to ensure voluntary compliance, a significant increase in enforcement is necessary to better protect tenants and other residents. CAV's enforcement guidelines could be simplified by ensuring that RT Act matters are investigated and prosecuted where:

- There has been a serious, intentional breach of the Act;
- There has been a breach by the person on more than one occasion; and
- A tenant or resident is prepared to provide evidence of the breach.

In this regard, VLA notes the reference in the prosecution policy to the proportionality of enforcement conduct, which refers to the consumer detriment and seriousness of the offences.<sup>45</sup> The three examples of RT Act offences discussed above are of primary importance. Failure to lodge the bond undermines a fundamental regulatory mechanism in the RT Act. Unlawful eviction is the most extreme of interferences with a person's right to a home under the Charter, and renders the RT Act's key provisions in relation to termination of tenancies nugatory. Failure to comply with a VCAT order removes the security and order provided by the resolution of disputes via an independent umpire, and leaves those with an order being left to consider self-enforcement, or the use of private enforcement agencies. It is our view that these issues not only satisfy the requirement of proportionality of enforcement, but should also be defined as 'strategic enforcement priorities' as defined in CAV's Compliance and Enforcement Policy.

Finally, an element of the Consumer Affairs Victoria prosecution policy is that there must be a prima facie case. VLA notes that in each of these cases enforcement action could follow a final VCAT order. VCAT is well placed to make findings that a bond has not been lodged, or that a person was evicted in breach of the Act. A VCAT order in combination with an affidavit as to non-compliance should all be sufficient to meet the prima facie criteria. VLA would welcome the opportunity to refer clients with final orders to CAV, primarily because clients are often concerned to see further action taken for these particular types of offences.

**Recommendation 16:** VLA recommends that CAV adopt a more prominent role in investigating offences under the RT Act. This can be achieved by amending CAV's compliance and enforcement guidelines to include matters where:

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<sup>44</sup> Laying the Groundwork consultation paper, page 16.

<sup>45</sup> CAV Case Selection Criteria, <https://www.consumer.vic.gov.au/about-us/who-we-are-and-what-we-do/our-role-scope-and-policies/compliance-and-enforcement-policy/case-selection-criteria>.

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- There has been a serious, intentional breach of the Act
  - There has been a breach by the person on more than one occasion; and
  - A tenant or resident is prepared to provide evidence of the breach.

CAV must be properly resourced to ensure it is capable of fulfilling its obligation as the regulator of residential tenancies disputes.