practice note

Residential Tenancies Practice Note 2017# 01

Electronic service of notices

Contents:

TENANTS VICTORIA

1. Introduction

Parties can now be served by email if they give their consent. Service requirements in VCAT are usually simple. However, the validity of a notice to vacate can depend on proper service which provides for the appropriate time. Notices that fail to satisfy these requirements should be dismissed. Accordingly, this practice note goes into significant detail about the meaning of service and what the proposed changes may mean.

2. What are the changes?

On 30 September 2016, the *Consumer Acts and Other Acts Amendment Act 2016* (**the Amendment Act**) will come into effect. The Amendment Act will change the *Residential Tenancies Act* 1997 (Vic) (**the RT Act**) by altering the available methods for service of notices and other documents.

Section 24 of the Amendment Act modifies section 506 of the RT Act by inserting 506(1)(da) and 506(3)(ba), which allows for communication in accordance with the *Electronic Transactions (Victoria) Act* 2000 (**the ET Act**).

This will have significant impact for tenants who use electronic means to communicate with their landlords/agents. It will also affect how tenants may consent (or withhold consent) to electronic service. This may be more convenient for some tenants, but it may be detrimental to other tenants who do not regularly use electronic means of communication or simply do not see the communication.

The *Residential Tenancies Regulations 2008* (Vic) (**RT Regulations**) also changed on 30 September 2016. The RT Regulations contain most of the prescribed forms, including notices to vacate and the Standard Form Tenancy Agreement. Written tenancy agreements must be in standard form, in accordance with section 26 of the RT Act.

NOTE: Many of the implications and complex issues that may arise from this amendment have yet to be tested. The following provides a consideration of the issues to the best of our knowledge, and our opinions are expressed herein.

It is likely that decisions from VCAT will bring greater clarity to these issues. If there is doubt or concern it is prudent to seek tailored advice.

CAUTION:

For agreements that predate 30 September 2016, if a tenant does not qualify or, withdraw their consent to electronic service explicitly, the regular exchange of emails or other electronic communication may be sufficient to permit a notice to vacate or other notices under the Act to be served via electronic means.

For agreements made post 30 September 2016, parties should read this practice note and consider making their position clear as to whether they will accept electronic service and if so, on what terms.

3. Why was the Amendment Act passed?

The RT List is one of the busiest consumer trader lists in Victoria. The efficiency, certainty and access to justice is in the interest of all parties.

Prior to the Amendment there was an ambiguous foot note within section 506 that formed part of the statute. This note hinted that a notice to vacate may be served electronically in certain circumstances. It was however observed that there were issues of consent in serving via electronic means.

Now, in order to expedite and make more accountable the communications between parties, electronic service is increasingly being included as a valid form of service under legislation.

It is also likely with the advent of court services such as VCAT Online, that there will be an increasing tendency to automate and centralize accountability in the tenancy space. In other words, VCAT will retain concurrent copies of breach of duty notices or other prescribed forms that are relevant to the proceedings.

While this offers security in some contexts, consent to be served electronically also carries significant risks if the parties are not vigilant or savvy with modern technologies.

The time required for manual or registered post (assuming hand post is burdensome for agents or landlords) may also provide additional time for parties seeking to lodge counter claims, or lodge injunctions or restraining orders against anticipated notices or actions.

In some contexts, the correct service of notices is a necessary prerequisite to obtaining compliance orders, having valid notices to vacate and serving valid notices of intention to vacate. In other context, non-compliance may not be as critical, such as compensation claims.

4. Why does service matter so much?

Service has a direct bearing on time limits set by statute. Hence, service is more important in some circumstances than others.

For example, if it is a simple communication between the parties, there are no time limits set by the Act. However the time of service may be relevant as evidence of when the parties are presumed to become aware of an issue.

In other circumstances, such as a notice to vacate, the notice must stipulate the clear minimum number of days' notice before the terminate date. If a party is "short served" (meaning they could not have possible received the notice within the minimum number of service days), then the notice is invalid because it fails to comply with the legislation and must be dismissed.

The further significance of this is that there is absolutely no power for VCAT to fix or amend the notice to vacate that is short served.

The rationale behind this is that in order for VCAT to entertain the issues of possession, the statutory precursor (or condition precedent) is a notice that *must* comply with the minimum number of days. This is known as a *jurisdictional fact*.

If the notice does not comply with the service time frame it must be dismissed, VCAT does not have the power to amend the notice because the notice predates the proceeding.

Therefore, service is paramount. Historically, many notices to vacate were dismissed due to being short served. However, as a result of VCAT Online assisting to produce notices with the relevant adjustments for postage and registered post, this has become far less frequent and has increased the efficiency of evictions.

Tenants should therefore be aware of when and how they may be served documents. If service is *deemed* to have taken place, this may mean the difference between someone have a week to prepare to vacate rather than the 4 months.

For example:

If a no-reason Notice to Vacate (120-days' notice) is served by email, but the tenant does not check their email, they might not find out about this notice until immediately prior to a possession order hearing. If a notice to vacate is deemed to have been validly served, there may be very limited time to prepare and locate alternative housing.

Generally, the issue of service (whether documents have been received) is a factual finding of the Tribunal. This is regulated by 506 of the RTA and 140 of the VCAT Act.

In the context of electronic service, the critical facts are:

1. whether there was consent (see meaning of consent below)
2. whether it went to the right email address
3. whether it was given providing for the right period of time as required by the notice.

It is generally not relevant whether the tenant *knew* the email was there.

When the Tribunal is *deeming* service, it is not a finding of when the tenant actually collected the mail or accessed the email, it is the issue of when it first become available to be collected or accessed. While the Tribunal may grant an adjournment as a matter of procedural fairness, the lack of collection or failure to access the email once served does not infect the *jurisdictional fact* that service has been validly affected.

Accordingly, it is supposed that it will be irrelevant whether the tenant had subjective knowledge of the communication as long as there was consent and it was served within the relevant time frame.

5. What does the RT Amendment Act say:

Section 506

(1) Subject to this section, a notice or other document to be served on or given to a person under this Act must be served or given—

…

(da) by electronic communication in accordance with the Electronic Transactions (Victoria) Act 2000; or

…

(3) A notice to vacate given under Part 6 must be given—

…

(ba) by electronic communication in accordance with the Electronic Transactions (Victoria) Act 2000; or

…

It is important to note that section 506 applies to *both* parties to a dispute, and refers to "notice or other document to be served." This means that any document may effectively be given by electronic communication if there has been consent. How strict the tribunal will be or how liberally the Tribunal will apply section 126 of the VCAT Act will remain to be seen.

Consideration of consent should include if parties are happy to accept breach of duty notices, notices of rent increase, and notice to vacate by these means.

There *may* be some exception to Notice of Entry, but merit to this argument will likely be determined by the Tribunal at some time in the future. (Part 18 of this Practice Note)

6. New prescribed lease and effect of new standard form tenancy agreement (Amendment).

The prescribed Tenancy Agreement has been amended to enable parties to explicitly consent or not consent to service of documents and notices by electronic means under clause 4A.

This should mean that a party *cannot* infer consent to receive notices by electronic transaction and that electronic service should only be sent to the nominated email address if consent is given.

Clause 4A(2) states:

"*Inferred Consent*

If the TENANT or the LANDLORD (as the case may be) has not consented to electronic service under subclause (1), the TENANT or the LANDLORD must not infer consent to electronic service from the receipt or response to emails or other electronic communications."

This clause in the prescribed form is part of the regulations, and may be used to alter a strict reading of section 506 and what the meaning of consent is per section 3 of the ET Act.

Even non-compliant agreements may, as a matter of constructing a tenancy contract, infer that consent to be served electronically cannot be inferred by consent despite an ordinary reading of section 3.

Unfortunately, because there is lack of a prescribed residency agreement (Part 3 for rooming houses), the protections against electronic service under clause 4A represent some degree of uncertainty for rooming house residents

who do not have tenancy agreements for the purposes of section 94 of the RT Act.

For certainty, tenants (and occupants covered by the RT Act) should make clear their withdrawal of consent or make their consent subject to the conditions **they see fit.**

See examples of withdrawal of consent in Schedule 1 and 2 to this practice note.

7. What if consent to be served electronically is withdrawn?

Under clause 4A of the new prescribed tenancy agreement, both the landlord and tenant can give or refuse to give consent to be served electronically to a nominated email.

If the landlord or agent refuses consent electronically, or withdraws, you may be able to apply to VCAT to compel the landlord to accept electronic service **(see example draft application in Schedule 3 to this practice note)**. Best practice would dictate you should accordingly send via mail and date notices and include the presumed times depending on postage method, or service in person.

There is nothing that prevents you from serving an email or confirmation copy of what has been posted in the mail, so the content of the letter can have a digital record of some form that is time stamped.

> TAKE NOTE: The prescribed form only provides for a single email for the tenants. If there are multiple tenants, you may wish to include this and indicate that all parties must be served for service to be effective. Otherwise, having only one tenant may cause obvious issues of access and knowledge about the security and status of the tenancy in some households.
>
> There is an argument to suggest that service cannot be affected unless the serving party has complied with any qualifications set out when giving consent, as per the definition of consent in section 3 and the requirements set out in 8 EA Act.

8. Standard form Notices to Vacate have also been amended

Effectively, all Notice to Vacate and similar forms include the following amendment:

"In Form [X] in Schedule 1 to the Principal Regulations, after "registered post" insert—
" □ By email

Insert email address....."."

Accordingly, this means that if a notice to vacate is to be valid and served electronically, the notice to vacate *itself* must identify the correct email address. This would seem to be supported by section 319(b) of the RTA, which requires that the notice to vacate must be "addressed" to the tenant.

If the email address written does not match the email address to which the tenant has consented, this may be invalid service according to the ET Act, and subsequently fail to comply with section 506 of the RTA for the purpose of service, leading to the application being dismissed for lack of validity.

Any finding to the contrary by VCAT should be met respectfully with a request for written reasons pursuant to section 117 of the VCAT Act. This must be done in the hearing in the residential tenancies list.

The use of old prescribed notices to vacate

A notice must be served in the prescribed form. If an old notice to vacate is served by registered post but does not include this amendment, it will be an issue for the Tribunal to determine in light of section 53 of the *Interpretation of Legislation Act 1984*.

Strictly speaking, any notice to vacate served on or after 30 September 2016 should be in the proper prescribed form. However, this is unlikely to render the notice to vacate served by registered post invalid because there is a lack of detriment. (see *Rowson v McClure and VCAT [2013] VSC 140 (27 March 2013)*)

9. What does the *Electronic Transaction (Victoria) Act 2000* say?

The ET Act deals both with the issues of consent to exchange electronically and with the question of when documents are considered to be received. The main relevant sections of the ET Act are 1, 3, 8, 9, 13 and 13A.

Ordinarily, **electronic communication** is not limited to email alone. The definition of electronic communication goes beyond email service. It can include

data, text, images and in some circumstances, sound, which is sent by "means of guided or unguided electromagnetic energy"[1].

This raises serious questions as to what other modes of electronic communication could be found to be a valid means of service between landlords and tenants (e.g. fax, sms, mms, or any other forms of data transmission, even VOIP).

10. Electronic communication – only by email?

The definition of 'electronic communication' in this context is anticipated to be a core issue in disputes relating to service.

It is the Tenants Victoria opinion that service electronically is only intended to be by email based on the prescribed forms.

When section 506 of the RTA is read in conjunction with the definition of consent in section 3 of ET Act, it appears that consent is required, and that this consent *if qualified,* must be complied with in order for service to be deemed valid.

As both the new prescribed tenancy agreement *and* the new prescribed notices to vacate *only* provide for email electronic service, it is highly persuasive that the regulations (as subordinate instruments) are clearly intended to limit electronic service to be via email unless there is explicit consent of the other party, or an order by the Tribunal to permit service by other modes as provided in section 506.

If in doubt, parties can simply qualify their consent to limit service by email only.

The main provision of the ET Act that is of importance is section 8.

[1] Section 3, Electronic Transactions (Victoria) Act 2000.

11. Electronic Service

When is service effective under the ET Act?
Section 8(2) essentially states that if legislation requires information or documents to be provided in writing, it will be deemed to be served if:

1. *at the time the information was given, it was **reasonable to expect that the information would be readily accessible** so as to be **useable** for subsequent reference; AND*

2. *the person to whom the information is required to be given **consents** to the information **being given by means of an electronic communication**.*

4 Elements of Electronic Service
Accordingly, there are 4 elements under section 8 that must be met to permit electronic services:

At the time was it reasonable (in all the circumstances) for the landlord or agent to believe the information sent would be readily accessible?

Element 1. Reasonable expectations

This is likely to be an objective test based on what the landlord or agent knew about the person and their use and access to technology at a given time.

Element 2. Readily accessible

The phrase "readily accessible" emphasizes a high threshold of accessibility.

For the purpose of section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the meaning of "readily accessible" will likely be debated in some borderline cases in the future.

Parties that regularly do not have credit on their phones, do not have a data plan, or lack access to their own personal computer may be able to argue that notices served were not 'readily accessible'. Disclosure by tenants of going on holiday (out of coverage) or other absences or life disruptions that may hinder accessibility may also be relevant.

Element 3. "…so as to be *useable for subsequent reference*"

The useability of information provided will also be a relevant consideration and the subject of some unguided debate.

This may include the format of the information, i.e. various versions of adobe acrobat, or other non-standard image or data formats including photos and the size of the file.

Some email filters will entirely reject emails that are oversized. Others will permit the email but reject the attachment.

The phrase "*so as to be*", implies that the reasonable expectation test is also connected to the expectation that the file and its content will be able to be processed as information. The requirement is service of information and not just data (uninterpreted information/raw binary data).

For example:

If an item is scanned and the contrast of the image means that a reasonable person could not deduce the wording, then this may also render the notice invalid.

Similarly, if the allegations and reasons or particulars of the reasons for a notice are unclear, then this may affect the validity of the notice both for lack of useability and noncompliance with section 319.

In contrast, if the name on a notice to vacate is not correct, but sent to the nominated email, this is unlikely to render it invalid.

If a party can show it was *not* reasonable to expect that the data was in a readily useable format, then this *may* invalidate service.

Element 4. Consent (most important)

*The person to whom the information is required to be given **consents** to the information being given by **means** of an electronic communication.*

Section 3 of the ET Act states*:*

> ***consent** includes consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent **given subject to conditions unless the conditions are complied with**;*

If parties are in the custom of exchanging emails, then it is possible in the absence of a specific conditional consent that a notice to vacate may be served by email. This is more so the case in non-prescribed forms (often used by Real Estate Agencies).

Tenancy agreements must be in the prescribed form (see s26 RTA). It is very significant to note that if your Real Estate Agent uses a form other than the prescribed form they may be committing an offence that can be reported to Consumer Affairs Victoria.

> *(2) A landlord or tenant must not prepare or authorise the preparation of a tenancy agreement in writing in a form that is not in the prescribed standard form.*
>
> *Penalty: 10 penalty units. (approximate $150 per penalty unit)*

This does not mean the agreement is unlawful, but any terms not contained in the prescribed form may be challengeable under section 27 and 28 of the RTA.

Any terms which purport to prohibit a tenant's ability to withdraw consent to electronic service are likely unlawful. Equally if the option not to withdraw is not apparent, there is good cause to challenge the consent as being genuine. Whether such a term or omission in a tenancy agreement would invalidate service by electronic means entirely is yet to be seen.

12. ET Act: When will a document or notice be deemed to be served by the Tribunal?

Section 49 of the *Interpretation of Legislation Act 1984* deals with deemed service provision relating to post only. Nonetheless, it is important to recognize that the ET Act principles of deemed service, so far as possible in accordance with the ordinary cannon of interpreting legislation, should be interpreted consistently.

Determining when a document has been served is set out in section 13 and 13A of the ET Act.

Under section 13 of the ET Act, the time of dispatch is either the time that the document leaves an information system under the control of the sender, or the time it is received if it does not leave the same information system.

Section 13A of the ET Act sets out the two tests for receiving an electronic transmission.

The primary test is contained in section 13A(1)(a):

"the time of receipt of the electronic communication is the time when the electronic communication ***becomes capable of being retrieved by the addressee*** *at an electronic address designated by the addressee".*

The alternative test is contained in section 13A(1)(b):

"the time of receipt of the electronic communication at another electronic address of the addressee is the time when ***both—***

(i) the electronic communication has become capable of being retrieved by the address at that address; ***and***

(ii) the addressee has ***become aware*** *that the electronic communication has been sent to that address.*

Section 13A of the ET Act **assumes** that the electronic communication is received once it reaches the addressee's electronic address.

The alternative test under section 13A(1)(b) is to be applicable unless there is an agreement to require the one party to make the other person aware the document had been sent (see FAQ before regarding 13A(1)(b)).

In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd v Anor [2009] VSC 156 (24 April 2009)* at [133], the court concluded that an email was deemed served "*at the time when it arrived at the server*."

However, as per the test set out in section 8 of the ET Act it may be argued that despite a communication reaching a server, if an electronic communication cannot be 'retrieved' this may prevent it from being deemed as valid service.

The reasonable expectations test makes it incumbent on the tenant to disclose as many particulars about their email as possible, and ideally to test the emails with attachments when giving consent to ensure everything works as expected.

Filters, size of attachments, and the maximum number of documents that can be received (rather than sent) should all be relevant considerations.

There is an inherent competition between section 13, the reasonable expectation provisions, and elements in section 8 of the ET Act.

Consent & Signature – case law

Consent is discussed in the case of Russell Solicitors v McCardel [2014] VSC 287 (23 June 2014) at paragraph 57- 60:

> *57 There are three general conditions in **s 9(1)** of the **Electronic Transactions (Victoria) Act**: (a) the electronic communication must use a method to identify the person and indicate their relevant intention; (b) the method must be as reliable as appropriate in the circumstances and be proved to have fulfilled the functions of identifying the person and indicating their intention; and (c) the person to whom the signature must be given consent to the method used for doing so. The onus of proving that these conditions were satisfied rests upon the party seeking to establish that a signature was supplied by an electronic communication. Here that is Russells.*
>
> *58 In the present case, I would accept Russells' submissions that the conditions in paras (b)(i) and (c) of **s 9(1)** were satisfied. As to para (b)(i), the method relied upon by Russells was 'signing' the agreement by an email which bore, at the end, the printed first name of Mr McCardel ('Sam'). In the circumstances of the present case, in my view this was as reliable as appropriate for the purpose of signing the agreement.*
>
> *59 As to para (c), the consent of the person might be explicit or implicit. In an appropriate case, the existence of the consent might be inferred as a fact from the totality of the circumstances. In the totality of the circumstances in the present case, I think the inference is irresistible that Russells would have consented to the respondents signing the agreement by means of Mr McCardel's email if the respondents had actually indicated their intention to use this method for doing so.*
>
> *60 In finding that Russells did not consent to such an electronic signing, I think that the associate judge clearly mistook the facts. I accept the submissions made for Russells in this respect. While the evidence shows that Russells wanted to have the agreement itself signed and returned, this is not inconsistent with consent being given by Russells to other legally available means of signing. The real issue with respect to the signing of the agreement is whether the content of Mr McCardel's email satisfied the condition in para (a).*

This case notes that the onus of proof is on the party who is seeking to establish a signature. This same onus should also be apply to proof of consent.

13. What does the VCAT Act say?

Section 141 of the VCAT Act states, *inter alia*, that service is effective when:

> *(1) **For the purposes of this Act**, a notice or other document must be taken to have been served on, or given to, a person or an unincorporated association—*
>
> *(c) in the case of facsimile or other electronic transmission—at the time the facsimile or transmission is received.*
>
> *(4) If a facsimile or **other electronic transmission is received after 4.00 p.m. on any day, it must be taken to have been received on the next business day***

"business day" means a day other than—

(a) a Saturday or Sunday; or

(b) a public holiday or public half-holiday in the place to where the notice is sent or delivered.

There is clearly an interaction between the VCAT Act, the ET Act and RTA.

Under section 141, the phrase "***for the purpose of this Act***" is a complex question with regard to whether a notice to vacate is a notice that is served in accordance with the RTA as the empowering act, or must also be compliant with the service with rules of the VCAT Act.

The other part of the provision clearly contemplates that "**a document is given to a [another] person"** suggests it is not just about a party's engagement with VCAT.

Nonetheless, the core problem in establishing or enforcing section 141 is that a notice to vacate is a document that *predates* the existence of a proceeding that may be held before VCAT. So the question of whether a notice to vacate engages section 141 is unclear.

Given that a notice to vacate has no other place to be of practical effect and can only really be "spent" (cf. *Burgess & Anor v Director of Housing & Anor [2014] VSC 648 (17 December 2014)*) in VCAT (being the most appropriate forum for RT disputes), then it would seem proper that section 141 of the VCAT Act does apply to electronic communications. This is an issue that remains to be resolved in future litigation.

In *Jennings v Hobsons Bay CC (includes Summary) (Red Dot) [2009] VCAT 2350 (5 November 2009)*, the Tribunal states:

> *"To ensure consistency and certainty when calculating time limits for the lodging of applications for review, the Tribunal's practice is to apply section 141 of the Victorian Civil and Administrative Tribunal Act 1998."*

It is the Tenants Victoria opinion that in the absence of any other regulation, that this is a fair, consistent and reasonable approach unless the empowering legislation otherwise provides.

Jason Pizer QC and Emrys Nekvapil, *Pizer's Annotated VCAT Act 5th Edition,* Thomson Reuters, 2015 makes reference to the following decisions which are of significance on this point.

In *Lord v Austexx Developments Pty Ltd [2003] VCAT 773 (3 July 2003)* at [4] the exchange between parties was treated as been effective within business hours, because section 141 as a whole refers to business days, and therefore service will only be effective during business hours.

In *Burns v Victorian WorkCover Authority [2003] VCAT 958 (12 August 2003)*, the Tribunal did not consider that s141 was relevant to the documents transmitted between the parties "for the purpose of satisfying the arrangements made for the release of documents" under the FOI Act.

However, in *Mathison & Anor v Melbourne CC [2011] VCAT 1297 (7 July 2011) at [12 - 13],* the Tribunal states:

> *I acknowledge that other divisions of the Tribunal have from time to time adopted the provisions of section 141 in respect of the lodgement of applications by analogy with a view to increased certainty[4]. However, I consider that it would be inappropriate to curtail the time otherwise available to an applicant for lodgement of a proceeding by adoption of a legislative provision that does not strictly apply.*

As there appears to be no superior court precedent on this point. There are accordingly 3 possible approaches which may be adopted in future:

1. You can serve and receive at 11:59pm [and it is valid to have been served on that day] (section 141 has no bearing whatsoever, and weekends are irrelevant).

2. You can serve, but it must be before 5pm (because 141 suggest business day, and tenancies are a commercial practice, and weekends may be considered excluded).

3. You must serve before 4pm, because section 141 strictly applies because the notice to vacate is inherently part of a proceeding, analogous with the treatment of review applications, per *Jennings* (see also *Knoop v Frankston CC & Or [2010] VCAT 1394 (18 August 2010)* at [10]).

In most cases, it is envisaged that option 3 is the most desirable outcome, with the exception relating to notices of intention to vacate. No doubt in the scheme of any disputes, consent or a clear agreement will likely resolve much of the above issues.

The implications of section 141 are very significant especially in the case of Notices to Vacate, breach of duty notices and compliance order hearings.

For example:

> If a 14-day Notice to Vacate is served at 3:30pm Friday 6 January 2017, and it arrives at the tenants email and is retrievable at 3:32pm. the 14 clear days will be from Saturday 7 January 2017 through until 20 January 2016, with the first available termination date being 21 January 2016.
>
> If a 14-day Notice to Vacate is served at 4:30pm Friday 6 January 2017, and it arrives at the tenants email and is retrievable at 4:32pm, under section 141(3), the day it is taken to be served will be Monday 9 January 2017, and the clear 14 days be from Tuesday 10 January 2017 through until 23 January 2016, with the first available termination date being 24 January 2016.

14. Can non-compliant service be cured by VCAT?

VCAT's approach to time limits is also set out in Rule 4.27.(1). Under section 126 of the VCAT Act non-compliance with rules in the course of a proceeding can be remedied through the awarding of costs if appropriate. Rules are subordinate to the empowering legislation and the VCAT Act. Section 126 however, may go further as to allow other time limits under an enabling enactment to be affected.

The scope of section 126 of the VCAT Act is wide and can represent a serious issue on points of jurisdiction as a well as procedural fairness. There is no precedent to suggest that the Tribunal has used s126 to grant an extension of statutory time limits (for example a waiver of the time limit requiring at least 14 days' notice to vacate for rent arrears under section 246 of the RTA). It is our opinion that such use of section 126 would be inconsistent with the intention of the enabling legislation (in this example, being the RTA). For example, VCAT cannot extend or waiver a six years limitation to actions under contract as set by section 5 of the *Limitation of Action Act 1958* by engaging section 126 of the VCAT Act.

So while VCAT can and readily does allow non-compliance with the rules. Section 126 is not unlimited and any extension (especially in the context of notices to vacate) must not be arbitrary or an unfettered discretion in light of the enabling enactment.

See, 126 VCAT Act and *Hunter Valley Developments Pty Limited; Anthony Neary Walker [1984] FCA 176*.

15. Existing VCAT Rules and VCAT Electronic Applications

The amendment means that all correspondence and notices can be served by electronic communication if parties consent.

Service of VCAT documents (such as the VCAT application) will still need to comply with section 140 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) (**the VCAT Act**). Electronic transmission is also allowed in some

circumstances under these provisions. It is important to note that original documents will need to be able to be produced to the Tribunal at the hearing.

For example, VCAT service rules in relation to an application:

Standard Rules
- 4.06. Lodgement of other documents by electronic transmission
- 4.07. Notification of commencement and service of documents
- 4.08. Address for service of documents

RT specific Rules

- 7A.03. Mode of service
- 7A.04. Service before lodgement
- 7A.05. Accompanying documents for electronic lodgement
- 7A.06. Applications
- 7A.07. Documents required to be included with certain applications
- 7A.08. Particulars to be provided with certain applications
- 7A.09. Additional particulars for certain applications
- 7A.10. Documents and particulars required for certain applications

According to Reg 7A.05(2), *any document* which is to form part of the material to be provided to the Tribunal in accordance with Rule 7A.08 and 7A.10 must be served on the respondent(s) *at the time of service of the application.*

This is a very important rule with respect to service of applications electronically (and service generally).

The rules effectively require **all the materials** to be relied upon to be served **at the time of the application.** While VCAT is not strict about this approach, it is a fundamental aspect of procedural fairness that a party not be ambushed by evidence. Evidence that ought not reasonably be considered to be in a person's possession, or has not been flagged as evidence that is to be relied upon, may raise issues of procedural fairness. (see s97 and 98 VCAT Act)

Careful attention should be made by both sides so as to keep record of any rejected emails or mailer daemons to indicate why certain documents have been rejected.

16. How is consent withdrawn or made conditional?

The new prescribed form tenancy agreement under section 26 of the RTA provides that consent may be withdrawn. The withdrawal of this consent must be done in writing.

The prescribed form states under clause 4A:

Withdrawal of Consent

(a) The TENANT or the LANDLORD may withdraw their consent under subclause (1) to electronic service of notices and other documents only by giving notice in writing to the other party.

(b) Following the giving of notice under paragraph (a), no further notices or other documents are to be served by electronic communication."

The withdrawal of consent is effectively immediately.

It is almost impossible for communications to be sent simultaneously. If a notice is given immediately after the consent is withdrawn, then it will be invalid. If it is given immediately prior to the notice being served, it will likely be ineffective against a finding of service.

For an example of a withdrawal of consent, please see Schedule 1 to this Practice Note.

17. Disputed receipt and time limits

Tenants may need to dispute receipt of served documented in circumstances that are time sensitive. As in all matters, the onus will be on the party who served a document to prove the method of service was affected on the balance of probabilities. It may be difficult to dispute service if a party produces an electronic communication that meets the requirements of section 13 of the ET Act.

In the VCAT planning and environment matter of *Jennings v Hobsons Bay CC [2009] VCAT 2350 (5 November 2009)* Jennings sought a review of decision outside of the prescribed timeframe. This review was on the basis that they did not receive an email notifying them of Council's decision. Council produced a copy of the email to Jennings but Jennings did not produce any evidence to show that the email was not received.

VCAT was satisfied that the document was served and that the time limit started from the time that it reached Jennings server, *not* the time it was read.

At paragraph 4 Deputy President Gibson noted that:

> *"In a number of decisions, such as Vitesnik v Macedon Ranges SC and Archerduck Pty Ltd v Ballarat CC, the Tribunal has considered the calculation of the 21 day period within which an objector may lodge an application for review under section 82 of the Planning and Environment Act 1987. Under Regulation 34 of the Planning and Environment Regulations*

> *2005, the 21 days must be calculated from the time when the responsible authority* ***gave notice*** *to the objector under section 64 of the Act.*
>
> *Both these cases deal with the service of notice by post. Both also make the point that the relevant date for calculating the 21 day time limit should be the date upon which the notice is "received". This means when it is received at the address to which it is sent, not when it may be physically collected or opened by the recipient."*

It is likely that VCAT will take this approach with notices and documents served electronically, which would be consistent with its approach to service by registered post. i.e. a document will be deemed served at the time it hits the email inbox, not the time it was read by the receiver.

18. Notices of Entry – an exception to the rule?

A potential exception to the amendment allowing electronic service may be in relation to notices of entry. This is an untested aspect of the law.

A landlord has a right to enter if (assuming the tenant does not otherwise consent):

- it is for the purposes set out in section 86; and
- entry occurs at any time between 8 a.m. and 6 p.m. on any day (except a public holiday); and
- at least 24 hours' notice has been given to the tenant in accordance with section 88.

The amend section 506 of the RTA provides:

" (1) Subject to this section, a notice or other document to be served on or given to a person under this Act must be served or given—"

The word must in this context be followed by several options to service, which now includes electronic service.

However, section 88 of the RTA states:

"A notice requiring entry must—
(a) be in writing; and
(b) state why the landlord or landlord's agent wishes to enter; and
(c) be given—
(i) by post; or
(ii) by delivering it personally to the tenant between the hours of 8 a.m. and 6 p.m.; …"

In this context, "must" does not provide for means of electronic service. There is a principal of interpreting legislation which is referred to as *Generalia Specialibus Non Derogant.*

This is a legislative approach that must be observed by decision makers when there is an apparent internal conflict between sections within an Act. (See *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation [1948] HCA 24; (1948) 77 CLR 1 (22 September 1948)* at [29].

Under this doctrine, where an act has provision of general nature and also contains provisions relating to the same subject matter, it is considered common sense that the drafter will have intended the general provisions to yield to provision that deals with the same subject matter more specifically. In *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corporation (1980) 29 ALR 333 at 347*, Deane J observes:

> As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative . . ." (per Romilly M.R., Pretty v. Solly [1859] EngR 249; (1859) 26 Beav. 606 at p. 610).
>
> Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter. A more fundamental example of such repugnancy is where the particular provisions prescribe or encourage conduct which the general provisions would render prima facie, though not irremediably, unlawful or where the particular provisions assume to be lawful conduct which the general provisions would render prima facie unlawful. I have already indicated my view that the latter, more fundamental, example of repugnancy is present in the instant matter. I consider that the former example of repugnancy is likewise present.

Accordingly, section 88 is clearly a more specific provision that mandates notice of entry by using the word "**must"** be given by post or by delivering it personally to the tenant.

Accordingly, even if a tenant has consented to electronic service, there is doubt in the absence of explicit consent by the tenant to a particular entry, that electronic communications of any nature can be used to compel entry.

Should the legislature have intended to amend section 88, it could have easily done so, but it elected not to. As a proper principle of statutory interpretation if must be inferred that notice of entry remain the exception to the electronic communication rule in order to preserve the right of quiet enjoyment and prevent arbitrary interference with exceptionally short notice.

For more information about entry see Privacy as a tenant (Tenants Victoria website)

19. TIPS

Practice tips on challenging service

As the interaction between 141 of the VCAT Act, and the 506 of the RTA and 13 of the ET Act, are not yet clear, parties should treat the above as a submission rather than an absolute statement of law until the matter is tested and a decision is rendered from the Supreme Court.

Parties raising issues on this point should consider requesting written reasons for the decision and where possible make pre-emptive challenges to reduce potential detriment in the event of an adverse outcome.

Tips on starting a tenancy

While the prescribed Tenancy Agreement provides some protections for tenants, Tenants Victoria is of the opinion that it may not go far enough to protect tenants from some of the uncertainties presented by the Amendments.

Tenants should be advised to consent **and** include an email on the standard form tenancy agreement **only if** they regularly check their email and are technologically proficient to receive emails in this manner.

1. **Be clear about consent**

If a tenant wishes to do so, they can give **consent subject to conditions** as defined in section 3 of the ET Act. Examples of these conditions may be:

- That the tenant only consents to receive electronic communication by the email specified in the standard form tenancy agreement;
- If there are several co-tenants, it is recommended that all parties be served a copy of the notice,
- That the landlord/agent telephones to advise that notices have been served by email (see section 13A(1)(b), and section 13A(2);
- That notices may only be served by email when the tenant notifies the landlord/agent that they are away from the rented premises;
- That no attachments are included with electronic transmissions;
- That the size of electronic transmissions do not exceed (x)Mb:
- The maximum number of files (attachments) that can be sent as an email.
- Identify any formats that are preferable or not acceptable.
- That emails only come from a specified email address;

It would be advisable to include these conditions in the tenancy agreement for clarity. For an example, see Schedule 2 to this practice note. Such a letter

could be attached to a tenancy agreement at the time of signing or immediately after signing.

2. Ensure that electronic communications can be received

There is a risk that spam and size restrictions may prevent a party from becoming aware that an email has been received.

Set up an email filter and set alerts on your smart phone or computer to ensure these emails are flagged or brought to your attention as soon as they come into your inbox.

Ensure any firewall or filter will allow the nominated landlord email and attachments through to the email.

Ask for the agent to send a test email to ensure your filter is set up and reduce the chances of the email being diverted to junk mail.

Tenants should proactively ensure that their settings allow emails from their landlord/agent.

3. Retain your documents and records

Print key emails or notices, or send to a secondary email address to ensure that you have retained key documents that may be relevant later.

4. Assignment – (do it properly)

If you are being assigned in or out of the tenancy, ensure that the written consent of the landlord has been obtained for the assignment, that all email addresses for service are immediately updated and that a record of this notification is retained.

5. Withdrawal of Consent

There is nothing in the ET Act or the RT Act that prohibits a party from withdrawing their consent to electronic service. Withdrawal of consent must be done in writing and should identify the parties and the property in question.

Relevant Cases:

Russell Solicitors v McCardel [2014] VSC 287 (23 June 2014) this case mostly focuses on satisfying the signature requirements of section 9 of the ET Act. It also raises examples of consent and the importance of looking at the conduct as a whole if consent is implied.

Legal Services Board v Foster [2010] VSC 102 (31 March 2010) Justice Emerton considers whether the consent of the receiver is required for electronic signatures.

Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd v Anor [2009] VSC 156 (24 April 2009) This case considers whether it was open to a party to electronically file a document and when a document was deemed to arrive. It considers any disadvantage to the parties as part of its determination.

20. FAQ

What if I signed a lease before 30 September 2016, and it didn't include any terms about electronic service?

There is a risk that consent may be inferred from your use of electronic communications. Accordingly, you should make it clear as to whether you are prepared to accept electronic service and if so, on what basis, or if you wish to explicitly revoke consent. Either should be done in writing and a safe record retained.

Do I have to give my consent to be served electronically?

No. Consent is voluntary and a tenant should not be pressured into giving consent when it is not appropriate for them.

If you are concerned that you will be prejudiced for not consenting to electronic service at the time of entering the tenancy agreement, you can give consent in the agreement and then revoke it in writing any time after the agreement has been made.

It should not affect the validity of the tenancy agreement.

Can a notice or document be served electronically on only one tenant when there are two or more tenants on the lease?

Yes. If all tenants agree and sign the lease with a single email address in the section that gives consent for electronic service.

Note: There is a risk that if one tenant has provided their email address other tenants may not receive notices sent to that address.

So if there is more than one tenant, we do not recommend giving consent to electronic service to only one email address.

Can a notice or document be served to more than one email address?

Yes. You can give consent to electronic service with conditions such as: all notices and documents sent electronically must be sent to more than one email address.

Even though the prescribed tenancy agreement only has space for a single email address – you can provide conditions and additional email addresses in a separate letter or preferably as an annexed document at the time of signing the lease. See the example letter in Schedule 2 of this practice note.

Please note Tenants Victoria does not engage in inter-tenant disputes, and there is a risk that service to a single nominated email address by consent may constitute valid service. Seek advice from Consumer Affairs Victoria or your local community legal centre if this becomes an issue.

What if I change email address?

The new prescribed tenancy agreement states:

"*(3) Change of Electronic Address*

The TENANT or the LANDLORD must immediately give notice in writing to the other party if the email address for electronic service under subclause (1) changes."

Can I force the landlord to only serve me notices or documents via email?

Section 506 provides for options for parties to serve notices to vacate on each other. Electronic is only one option of service. Therefore, you cannot (in the absence of any Order by the Tribunal to the contrary), compel the landlord to serve you only by electronic means.

I checked the box on the lease that I do not consent to electronic service. The Estate Agent is now stating that I have implicitly consented to service electronically because I sent them an email.

The prescribed form is quite clear, either you do or do not give consent. Therefore if you have ticked the box that you do not consent, this means that you do not consent. The meaning of consent under section 3 of the ET Act in relation to implied consent, only operates where you do not have a specific position under the previous legislation. Even then there may be some arguments.

If this becomes an issue in relation to a notice to vacate in particular, you should seek legal advice.

What if I don't check my email?

Under section 8 of the ET Act, if an email is served to your *nominated* or consented email address, the notice is taken to be served under agreement providing it satisfies the criteria set out in this practice note.

In terms of service (as with other service such as registered post) it is likely to be deemed served by the Tribunal based on "*when it is capable of being retrieved by the person to whom it is addressed*". Section (s13A) includes the phrase "*when it reaches the addressee's electronic address*".

In most cases, emails are close to instantaneous. However, if there is a dispute, the relative time of when it is deemed served is based on when the email has been received into the email inbox.

If there is a substantial delay in between the time it has been sent and the time it has been received, the relevant time is the time stamp based on the time it is *received*. Most emails contain the time the email has come into the server that hosts the email.

Is there a standard "subject heading" require for a Notice to Vacate sent by email?

Unfortunately not. So, a tenant could in fact get a Notice to Vacate with the subject heading "Hello…". While it is in all parties' best interests to be clear about the contents of an email, parties should pay attention to the content and open attached documents

Ensure you have good virus protections to prevent any malware or cyberattack. Suspect email or attachments should only be opened if you know the sender *and* the email address. If in doubt, call the sender to confirm the content of the attachment or email. Sometimes an email may mimic a name but is from a different email address, this is known as *spoofing* – consult your email provider if this occurs.

What if I cannot read the format of the email?

This will be a subject matter for the Tribunal in relation to the test set out in section 8 of the ET Act about "*useable for subsequent reference*". See the ET Act part of this practice note. Unusual formats or inaccessible formats may jeopardize effective service.

What if the Notice to Vacate is not signed?

Section 319(c) requires that a notice to vacate has to be signed by the person giving the notice or by that person's agent. However, Section 9 of the ET Act provides that this may be a legally challengeable issue by both parties depending on the interpretation of this section and on the particular facts in relation to the credibility and ability of parties to confirm the email.

This is a legal test for which parties may wish to defer to the decision of *Russell Solicitors v McCardel [2014] VSC 287 (23 June 2014)* on page 5 of this practice note.

Generally, if it originates from the email to which parties have consented, it is likely that the unique identifier of the email and requirements to log in as this user, will be sufficient to discharge the obligations of signature if consent has

been given for electronic service. Parties may still dispute this point as a matter of law.

Can I be served a notice to vacate via SMS or MMS?

"See electronic communication – only by email? Above in this practice note.

The ET Act does not contemplate SMS specifically but this is likely to be covered within the meaning of electronic communications. Currently, there is no clear guidance on whether this would be sufficient in the RT context because of the prescribed forms.

As notices must be given in the prescribed form for the purposes of section 319 of the *Residential Tenancies Act* 1997 (Vic) and section 53 of the *Interpretation of Legislation Act* 1984, it is unlikely a mere text message would be sufficient.

It is the Tenants Victoria opinion that in the context of the subordinate instruments (such as the RT Regulations) which at this stage refer only to 'email' electronic notice, it may be argued that the use of MMS or SMS would not be a valid service method of notices to vacate.

The contention to argue against MMS notice to vacate is as follows:

The RT Regulations provide on the prescribed forms that electronic service can be permitted via an email. There is no space on the form for alternative electronic service. The ET Act provides that if consent is given, it is not valid unless it complies with these conditions.

Accordingly, there are two barriers to militate against MMS or SMS service.

Firstly, the conditions of the consent have not been met where the tenant has given consent to email.

Secondly, it is the manifest intention of parliament in light of the drafting of the subordinate instruments (being the majority of the prescribed forms for notices to vacate) that the regulations only provide for service electronically via email.

However, the wording of section 506 is problematic in this regard because of notice of rent increase, and that the lack of prescribed tenancy agreements for Part 3, 4 and 4A of the RTA. (i.e. the amend for consent only operated with reference to Part 2 of the RTA).

Can I be sent a notice of rent increase electronically?

Form 16 in Schedule 1 of the *Residential Tenancies Regulations 2008* provides for an email address for rent increases. If consent has been given to be served electronically, a notice of rent increase can be validly be served by email.

Does the Landlord or Agent have a duty to alert me to the fact they have served a notice on me electronically?

Unfortunately not.

This is one of the major dangers of consenting to electronic service if you are concerned about your ability to properly use technology or ensure that your email service will not "junk" important emails or attachments.

You may wish to seek advice if the matter pertains to prolonged rent arrears without notice, to consider issues of estoppel.

Section 13A (1)(b) states service occurs "when I become aware of the electronic service". What does this mean?

There is an awareness test set out in section 13A(1(b) of the EA Act.

Section 13(2) sets out a presumption ("assumed") that it is received when it is capable of being retrieved section 13(1)(a).

However, section 13(1)(b) states that service is once it reaches the electronic address is capable of being received AND when the addressee has become aware that the electronic communication has been sent.

The circumstances in which the presumption in section 13A(2) might be displaced and the requirements in section 13A(1)(b) become engaged are unclear. It appears that this only occurs if parties have agreed to this form of service being the basis of service. This is unlikely to be the case, and parties should similarly assume that service will be deemed to occur when it is just *capable* of being received, not when they become *aware* that it has been sent unless specifically agreed.

Accordingly, the issue of consent and the meaning of agreement under the ET Act will be subject to future adjudication.

For example:

John had consented to use his home email. John@home.com.au. John uses his work email john@work.com.au to state his plumbing had burst on 12 May 2017. On 25 May 2016. The landlord service a notice to vacate under section 255 to john@work.com.au .

It is the Tenants Victoria opinion that if the email is sent an email that has not been agreed or consented to accept should be treated as invalid by the Tribunal. This will likely be the subject of future disputes, and parties may wish to seek further legal advice.

Service from international or interstate landlords with different time lines

The *Interpretation of Legislation Act 1984*, deals with time (see Section 44.).

The relative time for service between jurisdictions will likely be dealt with as being clear and full days of notice (not by hours).
See also Rule 4.27.(1) of VCAT Regulations.

I am in rent arrears because I missed a notice of rent increase served on me electronically. What can I do?

It is best practice to make clear your consent, as outlined in Schedule 1 or 2 of this practice notice.

Unfortunately, if you consented to electronic service, then you should refer to Avoiding Eviction For Rent Arrears (Tenants Victoria website).

It may be possible to apply to VCAT pursuant to section 126 of the VCAT Act, and seek leave to still get consumer affairs to do a rent assessment under section 46, and apply to VCAT to fix the rent at the recommended rate if you believe the rent increase is excessive. However, the increase will otherwise be effective unless you can prove an absence of consent or that it was short served. See also Rent Increases.

Can I revoke consent electronically?

Clearly, under term 4A of clause (3) of the new prescribed tenancy agreement permits withdrawal. Essentially this means giving a notice under the RTA as it pertains to the agreement.

If you have consent from the other party to serve electronically, then arguably yes you can withdraw your own consent electronically. However, if you don't, the regulations now require this to be done in writing. Accordingly, parties would be best placed to do this via registered post, and potentially a secondary method if there are concerns.

Can I revoke my consent via SMS?

In our opinion it would seem that parties can use email, or potentially SMS, as a means of notification or communication to revoke consent. Service of formal documents as prerequisites to various actions is usually where service becomes more important.

Accordingly, revocation of consent may be as simple as an SMS to the REA-provided mobile number to state "I do not accept any Residential Tenancies Act notices sent electronically".

The requirement to revoke consent only states that it needs to be in writing. Whether this is a "notice" for the purposes of the act itself, will remain to be seen as there are obvious circular arguments about knowledge of the communication and the validity of service at a technical level.

How much time do I need to allow before my withdrawal of consent is effective?

As indicated in the question above, notice will be effective when it has been served. According to the postage estimates set by Australia Post, parties should allow sufficient time for registered post to be sent including consideration of public holidays, priority registered post, express registered post, and ordinary mail. Consent is effect immediately once deemed served. Hence, an SMS may be desirable in some circumstances as a matter of preference and record.

Notices to Vacate or Breach of Duty with attachments [same email vs multiple emails]

S7 ET ACT Validity of electronic transactions

(1) For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

(2) The general rule in subsection (1) does not apply in relation to the validity of a transaction to the extent to which another, more specific, provision of this part deals with the validity of the transaction.

If I have withdrawn my consent to be served electronically, can I still serve notices on the landlord electronically?

Arguably, yes. Each party is in control of their own consent. It is envisioned that this issue of consent to be served electronically may become challenging in relationships that are unprofessional or have deteriorated. In such cases, ordinary registered post, registered post, or service by hand may be appropriate as permitted by section 506.

Again, it is important to distinguish the contexts of the communication. The Tribunal can still find that someone had knowledge of the information communicated, it is only on points where formal, deemed service is required for the tribunal to have jurisdiction, or to be technically compliant with the enabling enactment of the RT Act.

The landlord has refused to accept consent via electronic service. What can I do?

For the purposes of communication, it appears there is nothing in the RTA or the VCAT Act that prohibits parties from communicating with each other via SMS for the purposes of ordinary communications.

Term 4A, clause 4B of the prescribed tenancy agreement states:

"Following the giving of notice under paragraph (a), no further notices or other documents are to be served by electronic communication."

The meaning of "notices or other documents" tends to render ambiguous what a basic SMS about a repairs might be considered. Such means should be interpreted in light of the purpose and object of the ET Act and the RTA.

As there is effectively no penalty for this, parties should communicate and retain their records as they see fit until otherwise directed to by the Tribunal.

Firstly, request an explanation as to why the landlord or agent is refusing to accept or provide electronic service. If you are not satisfied you may apply to the Tribunal. See Schedule 3 of this practice note for a draft example application. The tribunal will likely want to preserve a balance of communication between the parties.

Persistent and unreasonable refusal to accept any electronic communications may be met with a restraining order or injunctive relief provide for formal service or communication by electronic means, or by other expeditious means as the Tribunal sees fit.

Take note: Practical and demonstrable knowledge of an issue will *still* be directly relevant to issues such as repairs, reporting damage, or other aspects of a tenancy to demonstrate communication and awareness, and subsequent compensation claims.

Parties should still communicate by the most expeditious means for the purposes of claiming compensation but serve prescribed or required notice validly under section 506.

The regulations under section 506 are mostly targeted towards those notices which must formally be used and complied with as a prerequisite to the Tribunal exercising power (breach of duty notices, notices to vacate, notice of rent increase).

What if I get a notice of entry via email at 8pm the night before they propose to enter?

See "*Notice of entry – an exception to the rule*" in this practice note. Notices served electronically after 4pm may delay deemed service.

It is also not yet clear is section 141 of the VCAT Act applies, or whether service will be deemed on the day if served at 11:55pm, with the next day been an included day in any prescribed notice period. i.e. The first of the 14 days' notice to vacate.

What if my email has been hacked?

Change your email and notify immediately that you either withdraw consent, or provide a new alternate email.

If this relates to a notice which is alleged to have already been served, then you are vulnerable with respect to evidence, and should seek advice.

The production of an email that shows the correct email address, is likely to displace the burden of proof onto the receiving party to demonstrate that the email was *not* actually received.

"But the email bounced"…. Or Mailer Daemon?

If a filter or server rejects an email, it is not capable of being accessed. However, a party may or may not have evidence of this. Mailer Daemon's will be received by the sender, and not the recipient.

This means that it is possible for a party to produce an email that indicates that it has been sent, and the evidence of the rejection of this email, is only contained in another separate email. Accordingly, this may render some tenants very vulnerable unless they can ensure there is no reason the email will bounce, or that this possibility is thoroughly explored and cross examined.

Accordingly, parties should have a good knowledge of the limits of their email, and ensure test emails have been exchanged to prevent any issues of rejection.

It is unlikely the Tribunal will want to make extensive examinations of the raw data and meta-data between email servers.

What if I believe that a printed email has been fraudulently altered, printed and provided to the Tribunal?

As with any other material provided to the Tribunal, parties are under oath and must not commit perjury, or knowingly mislead the Tribunal (see ss 136-137 of VCAT Act).

Committing perjury is a serious allegation. In this context, the difficulty of proving that something has not been sent (as compared to deleted or otherwise removed, or even in some circumstance retracted) is challenging.

Given the serious gravity of detriment to the tenant, the Tribunal should entertain proper investigation into questions of service beyond paper print outs. However, allegations of perjury should only be made where there is a proper basis.

It is likely that the Tribunal will be loath to touch people's personal technology such as phones. However, primary sources such as logging in on a laptop or tablet may be better forms of proof. If parties have access to such technologies to present in the hearing, this may be appropriate if there are reasonable grounds to doubt that a printed email is true and correct.

It is yet to be seen whether the Tribunal will entertain requests by respondents challenging electronic service, specifically where a respondent is requesting the application to log into the relevant email account and show the actual digital email communication and contents on server in preference to a paper print out.

(i.e. log into the server and check the sent box and the address details of the addresser and the addressee).

(Provisions to support such a request are 97, 98, 102, 104 VCAT Act; *Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)*

What if the notice is sent to a different email from the one that is identified in the notice to vacate?

It is recommended that you seek legal advice. This should be determined to be invalid, but tailored advice is likely appropriate given the gravity of detriment.

Tenants Victoria Legal Team

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case and you require advice, you should contact us on **(03) 9411 1444**. *All information is correct at the time of publication but may not be correct at the time of reading this document.*

SCHEDULE 1 – Withdrawal of consent

An example of a letter withdrawing consent to electronic service may be:

[date]

[address]

[via email [address] and/or post]

Dear [Landlord/Agent]

Withdrawal of consent to be served under the *Electronic Transactions Act (Victoria)* 2000 [tenants] and [landlord]
[address of the rented premises]

We withdraw our consent, both express and implied, to receive any electronic communications (including but not limited to notices under the RTA)(delete as applicable) in respect of our tenancy at [rented premises].

The withdrawal and revocation of our consent includes any and all consent set out in our tenancy agreement or other former written communication.

Any electronic communication from us to you subsequent to this letter is not to be construed as consent for the purpose of being served notice electronically under the RTA.

Please note a copy of this letter may be produced on any question of service of documents sent to us electronically.

Yours sincerely,

[signed by the tenants]

SCHEDULE 2 – Making consent conditional or qualifying consent

Disclaimer: Because of the lack of clarity about how VCAT will response to such issues, this is a suggestion and may not be binding against an alternative finding by VCAT. An example of a letter making consent conditional may be as follows:

[date]

[address]

[via email [address] and/or post]

Dear [Landlord/Agent]

Limited consent to be served under the *Electronic Transactions Act (Victoria)* 2000 [tenants] and [landlord]
[address of the rented premises]

We inform you that we will only accept service of the following documents (checked) via email to our email address [_____ insert email].

□ Notice of Entry [specify if for particular reasons only _____]

□ Notice of Rent Increase

□ Breach of Duty Notice

□ Notice to Tenant

□ Notice to Vacate

[If applicable]

There are [number of tenants] on this tenancy agreement, accordingly we will only accept a notice served electronically if it is served on *ALL* of the following emails addresses:

[email 1] – Tenant 1 [name]

[email 2] – Tenant 2 [name]

[email 3] – Tenant 3 [name]

Take note:

The maximum file size that my email can receive is _____ Mb.

The maximum number of files that may be attached to a single email is [example 10].

Emails containing attachments or being larger than [this size] will not be accepted.

We will only accept [example jpg] and [pdf files/version x].

We will only accept emails from you from your email address [_____ *insert email address of landlord or agent – ideally you have set a filter or alert for this email].*

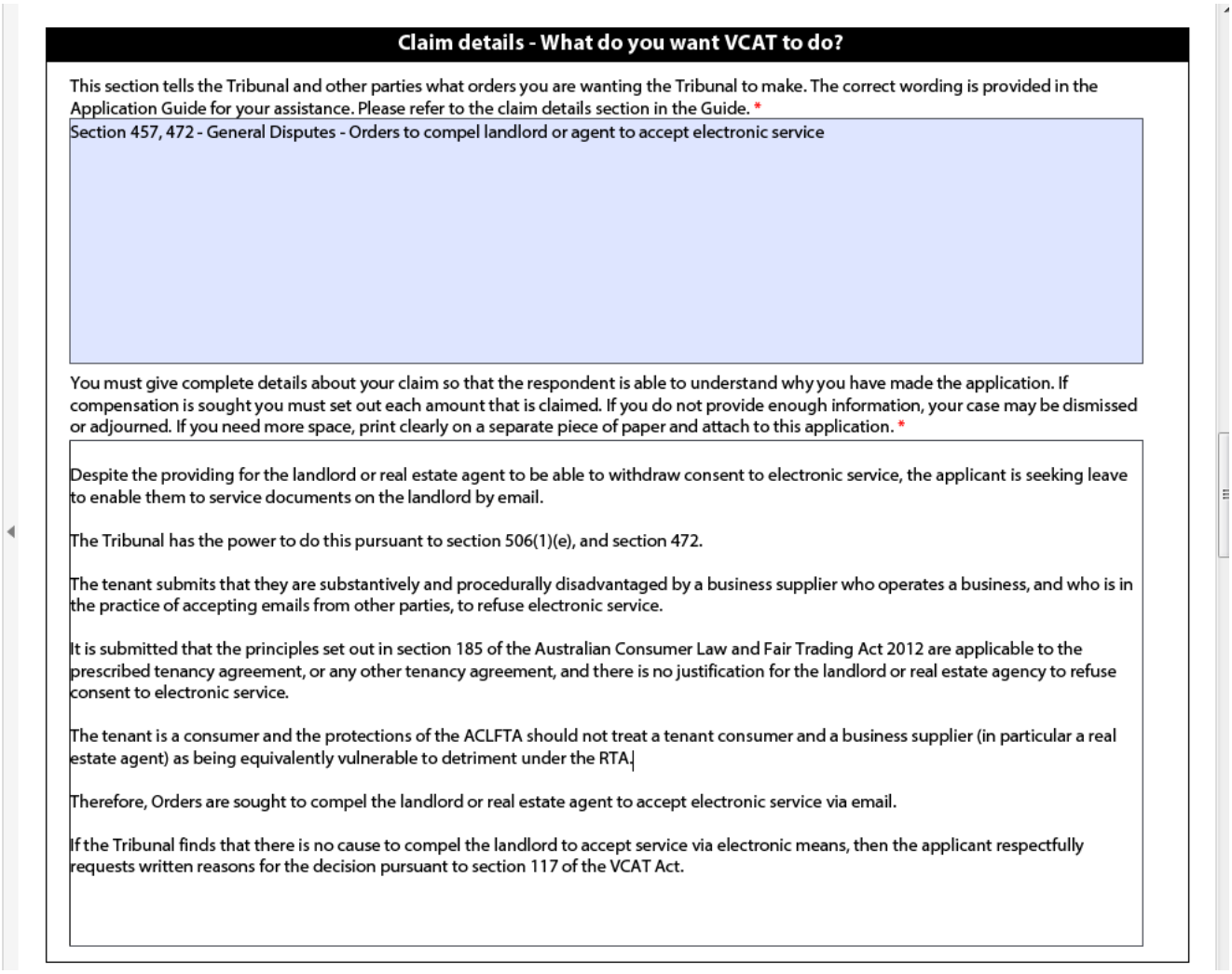
We will only accept electronic service between the hours of 9am and 5pm (AEST) [Monday to Friday if elected] otherwise you are required to serve by *other* means as set out in the *Residential Tenancies Act 1997*.

Please note a copy of this letter may be produced on any question of service of documents sent to us electronically.

Yours sincerely,

[signed by the tenants]

SCHEDULE 3 – Example application to compel Estate Agent to be served electronically



Claim details - What do you want VCAT to do?

This section tells the Tribunal and other parties what orders you are wanting the Tribunal to make. The correct wording is provided in the Application Guide for your assistance. Please refer to the claim details section in the Guide. *

Section 457, 472 - General Disputes - Orders to compel landlord or agent to accept electronic service

You must give complete details about your claim so that the respondent is able to understand why you have made the application. If compensation is sought you must set out each amount that is claimed. If you do not provide enough information, your case may be dismissed or adjourned. If you need more space, print clearly on a separate piece of paper and attach to this application. *

Despite the providing for the landlord or real estate agent to be able to withdraw consent to electronic service, the applicant is seeking leave to enable them to service documents on the landlord by email.

The Tribunal has the power to do this pursuant to section 506(1)(e), and section 472.

The tenant submits that they are substantively and procedurally disadvantaged by a business supplier who operates a business, and who is in the practice of accepting emails from other parties, to refuse electronic service.

It is submitted that the principles set out in section 185 of the Australian Consumer Law and Fair Trading Act 2012 are applicable to the prescribed tenancy agreement, or any other tenancy agreement, and there is no justification for the landlord or real estate agency to refuse consent to electronic service.

The tenant is a consumer and the protections of the ACLFTA should not treat a tenant consumer and a business supplier (in particular a real estate agent) as being equivalently vulnerable to detriment under the RTA.

Therefore, Orders are sought to compel the landlord or real estate agent to accept electronic service via email.

If the Tribunal finds that there is no cause to compel the landlord to accept service via electronic means, then the applicant respectfully requests written reasons for the decision pursuant to section 117 of the VCAT Act.

Applications

General application form - Residential Tenancies List (VCAT website)
Tenant application guide (VCAT website)

Fee and Costs

Fees and costs for a VCAT hearing (Tenants Victoria website)
Victorian Civil and Administrative Tribunal (Tenants Victoria website)
Fee relief form (VCAT website)

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