

## Residential Tenancies Practice Note 2017#02

# Telephone lines and internet services in residential tenancies

### Background

The *Residential Tenancies Act 1997 (RTA)* is silent on the issue of telecommunications (including phone, internet, broadband and cable). This lack of clarity leaves tenants, landlords, and often real estate agents in the dark when trying to resolve disputes. Wired connection to telecommunications is not a minimum standard in rented premises. With the rise of mobile phones, most complaints about phone lines pertain to access to affordable internet.

To date, there has not been a successful case which argued that a phone line is a minimum standard in rental premises in Victoria, or that a phone line is a reasonable expectation of a premise being reasonably fit for purpose as a residential dwelling (See section [61](#) of the Australian Consumer Law).

### Family Violence & phone numbers

New phone numbers are listed by default, so be careful. While not covered specifically in this practice note, it is paramount that victims of family violence ensure that whenever a new phone line or number is being connected in their name, that the number and name is not listed in a phone book, [whitepages.com.au](http://whitepages.com.au) etc., as this may disclose the address or other contact details. In some cases, a silent number may be necessary. This may be a consideration as well for any NBN cross overs.

If you have an IVO and are seeking to have a phone line put in your number, ensure your Telco and landlord are aware of your safety concerns.

For more information, see [here](#).

### Disclaimer

Tenants Victoria are not experts in telecommunications or the associated laws or contracts relating to telecommunications and ISPs. This document is intended as a guide only with respect to service provision, and is focused on the legal issue of what to do in relation to your lease when you have no phone line or internet, or if it is not in a state of good repair.

Some of the submissions and arguments in this guide have not been extensively tested because many matters settle before proceeding to the Victorian Civil & Administrative Tribunal (**VCAT**).

Tenants Victoria welcomes feedback to assist other tenants and to address this systemic issue faced by tenants.

## **CONTENTS:**

1. Best Practice – Prevention is better than cure
2. Common issues with telecommunication lines and renting
3. Is there a minimum standard requiring that internet be provided in rented premises?
4. What can a tenant do where there is no phone line installed?
5. What can the Tribunal Order?
6. Who is responsible for costs associated with a phone line?
7. Who is responsible for what?
8. FAQs
9. Glossary of Terms
10. References
11. Draft Sample Resources

## Part 1: BEST PRACTICE – Prevention is better than a cure

In the context of the RTA, it is critical that tenants ask and confirm in writing that all the relevant services are provided as part of the tenancy *prior* to signing a lease. Any representations that are intended to be relied upon should be written into the lease so they become enforceable rights.

The best practice is simply to include a term in the lease prior to signing that clearly identifies the telecommunications services that are connected to the rented premises. This may be inserted in the schedule of the lease. For example:

*“The landlord guarantees that the premises has a telephone line that is connected from the rented premises to the phone exchange. The landlord guarantees that the phone line is capable of carrying at least ADSL2+ internet service and that there is more than one ISP that can provide internet service to the rented premises.”*

Tenants Victoria recommends that a tenant contact the telephone service provider to determine if there is an active phone line already connected to the property.

Parties should also contact the proposed or current ISP to determine if they provide broadband or the relevant service to the property.

Tenants Victoria recommends this action is taken **before you sign the lease** (paying particular attention if there are multiple dwellings on a property such as recent subdivisions).

If the advertisement for the property indicates there is internet, we recommend you save a copy of the advertisement and email it to yourself for safe keeping.

**TIP:** Generally, Members of the Victorian Civil and Administrative Tribunal (VCAT) do not have expertise and detailed knowledge in relation to phone lines and TELCO infrastructure.

As the applicant, make sure you bring all the relevant information to prove your specific circumstances as things such as the NBN roll out are complicated and vary from place to place. If you are having trouble getting written reports

or information confirmed in writing from a Telco, you may wish to contact the TIO.

## **Part 2: Common issues associated with telecommunication lines and renting**

### **2.1 RTA is silent on telephones and internet**

There are no minimum standards in the RTA that require a phone line service.

Accordingly, if a lease agreement does not incorporate specific terms that confirm the existence of a phone line and access to relevant ADSL services, or similar broadband in the lease, the tenant may struggle to compel the installation of the phone line.

For some tenants, not having a phone line can mean the tenancy is not viable because of study, business, or various other reasons.

Generally, the installation of a phone line can be done if the landlord consents. However, a tenant must negotiate for the consent to install the line, and there is little legal leverage to compel the installation unless the tenant includes a term in the lease. Most reasonable parties negotiate what they believe to be fair contributions depending on the costs. Installation costs can vary immensely, from a couple of hundred to several thousand dollars in some cases.

The alternative is often that the tenant uses a large 4G data plan, but the costs of such plans (especially if data limits are exceeded) can be extremely expensive, inaccessible and not practical for most day to day needs over a long period of time.

If a tenant is considering to end the tenancy early, the tenant should see our practice note [Lease breaking and the alternatives](#).

### **2.2 People should not assume that because it is a new building or has phone sockets the phone line is connected to the telephone exchange**

Unfortunately, it is commonplace in new buildings and developments that the physical phone line has not been installed between the street cabling and the juncture point to the house, or in some cases from the street to the MDF, or the MDF to the apartment (noting the latter may involve an owner's corporation).

Under the RTA, there is no general obligation to disclose the state of the premises but it must be fit for habitation and it should be safe. There are disclosure requirements of future intended conduct by the landlord that may affect the consumer, under the Australian Consumer Law, but it appear unlikely to apply in this context.

Nonetheless, a residential tenancy is a consumer trader contract that attracts the jurisdiction of the Australian Consumer law, and there is no clear reason to suggest that a tenancy should be different from any other contract for services. In this regard, a premises should be fit for the purpose of which they are intended. This point has been relatively untested in the resident tenancies context.

In the context of phone lines specifically, if there is a phone socket in the premises, but unbeknownst to the tenant the phone line is not connected to the exchange, there may be grounds for a tenant to argue that the presence of phone sockets in the rented premises amounts to a representation that there is a service associated with the relevant port, outlet or inlet is available in the premises. Rent is defined in section 3 to be a payment “to occupy rented premises and use facilities and services.”

Take note, there appears very limited cases on this point and it remains relatively unclear about how the Tribunal will consistently approach this matter.

In the decision of [Young v Zhou \(Residential Tenancies\) \[2017\] VCAT 815 \(5 June 2017\)](#), a tenant sought to recover costs of installation of NBN. It is important to distinguish the nature of NBN.

In this matter, while not explicitly stated, the Tribunal makes the connection between the representation of the phone plate as the representation of the phone (and therefore internet services), and the costs of the NBN being installed as being a separate service line other than the phone line.

However, what is not clear in this matter is the fact that if the phone line is not connected, the NBN must be installed. For more information see NBN publication [“What services will be switched off?”](#).

In *Young*, the condition report noted that there was a phone plate that was “present and in good condition” and NBN service operated letter indicated there appeared to be the relevant paper work for the subdivision to have phone lines.

The Tribunal identified that any such claim would benefit from the following evidence in relation to a phone line:

- photos of an unconnected phone plate
- technician’s report
- any document produced that supported the assertion that phone lines were not installed.

It is unclear on the publishing of this decision whether NBN was the only means to get the phone line, or whether the tenant elected to get NBN as a matter of preference, or whether the suburb has been switched off and all new installations required NBN.

It is important to note, this decision does not state “*even if I was satisfied, there was no phone line connect, I would dismiss the application anyway.*”

The inference from this matter is that in *some* cases the presence of certain infrastructure such as a phone socket or NBN box may give rise to a legitimate expectations that certain services are available. Similarly, misrepresentations which can be substantiated, may be also sufficient to seek compensation, or specific performance from the Tribunal.

An analogous argument could be made with respect to the presence of electrical sockets and connection to mains line power.

Parties wishing to bring action on this basis should refer to practice notes:

- [Residential Tenancies and the Australian Consumer Law](#)
- [Rescinding a Tenancy Agreement](#)

### **2.3 Tenant’s cannot compel the landlord to consent to install fixtures**

Section [64](#) of the RT Act provides that a tenant must obtain the landlord’s consent to install a fixture in the premises. This section does not provide a legal mechanism to compel a landlord to consent to the installation of fixtures. A fixture may include a juncture to a house or laying cables beneath the earth of the rented premises.

There may be some exceptions to the RTA where the need for the phone line or installation is covered by the *Equal Opportunities Act 2010 (EO Act)*. In particular, sections [55](#) and [56](#) of the EO Act set out circumstances where it would be considered discrimination to refuse the alteration.

The costs of installation will likely be at the cost of the tenant. There are also obligations to restore the premises at the end of the tenancy that are subject to the RTA and EO Act.

For more information, see the Equal Opportunity Act and Tenancy Law Practice Note

### **Part 3: Is there a minimum standard requiring internet to be provided in rented premises?**

Currently, there are no minimum standards requiring a phone line to be installed or requiring a premises to be capable of having wiring that connects to the internet. However, it should always be possible to have some form of telecommunication line connected to a premises if the landlord is willing to consent to the installation and the necessary costs can be paid.

In the matter of [Aboutaleb v Wang \(Residential Tenancies\) \[2016\] VCAT 129 \(1 February 2016\)](#) the Tribunal states at [23]:

*“The Residential Tenancies Act 1997 does not cast upon a landlord a duty to provide access to a telephone or internet service, they are not essential services. Although I accept that the tenant was both inconvenienced and financially disadvantaged by the lack of access to a landline telephone and internet service she has not satisfied me that the landlord has breached a duty under the Residential Tenancies Act 1997 or the tenancy agreement. The claim is dismissed.”*

In this matter, the tenant lead evidence that the agency has made positive representations there was “no difficulty with connections”, the agency simply denied the conversation took place, and this evidence was accepted, causing the claim to be dismissed as there was insufficient evidence of the representation.

While section [67](#) of the RTA requires the landlord to take all reasonable steps to ensure a tenant’s quiet enjoyment of the Premises, this duty does not extend to require the landlord to provide facilities that may be desirable.

There is however a Universal Service Obligation incumbent on Telstra which means all residential premises should have access to be connected. So there should never be a premises where it is not possible to have a phone line connected where the landlord is willing to consent.

According to the Australian Communication and Media Authority:

*You are entitled to have reasonable and equitable access to a standard telephone service and payphones, regardless of where you live or carry on business. The legislated obligation to provide this guaranteed access to service is known as the universal service obligation (USO).*

*The USO exists even where telephone companies other than Telstra offer local call services. You can choose whichever telephone company you prefer. However, Telstra, as the*

*primary universal service provider (PUSP), is currently the only company obliged to provide you with a standard telephone service wherever you live or work.*

For more information, see [here](#).

## **Part 4: What can a tenant do where there is no physical phone line installed?**

The absence of a phone line between the exchange and the juncture of the house appears to be most common issue in *new buildings or rurally located premises* where the relevant application forms for phones service connections have never completed.

If there is no phone line in place and no term in a lease agreement to compel the provision of a service, tenants must:

1. Negotiate an agreement with the landlord to obtain consent.
2. Make an application to VCAT based on the Australian Consumer Law to demonstrate some misleading conduct.
3. Consider your alternatives to move out without breaking your lease. See [Lease breaking and the alternatives](#)
4. Source alternate unfixed wifi services at their own expense.

In cases, where there is an Owners Corporation or common area, the relevant consent of the Owners Corporation may also be required before installation of connection through an existing MDF or IDF.

### **4.1 Agreements**

Parties seeking to make agreements should ensure that the terms and conditions are recorded in writing. An agreement should have clear and unambiguous terms, specify any time limits, and that parties will provide and make available proof of any costs (for example, payments and invoices).

It is also important for parties to consider what will happen at the end of the tenancy, such as which party will own the assets or fixtures, and whether it will need to be removed and who bears such costs.

### **4.2 Misleading conduct**

Even where there is a phone socket in a premises, there is no guarantee that a phone service must be provided. There is some case law to suggest that, where there is a phone socket in the premises, it may be reasonable for a person to expect that there is an active phone line and/or the ability to connect to the internet. This is similar to the presence of power sockets in rented premises, as

this can create a legitimate expectation that electricity is connected (or can be connected) to the premises.

*Comparative example:*

*If a fireplace is present in a rented premises and is the only source of heating, a tenant might sign up to the agreement with a reasonable and legitimate expectation based on the presence of the fire place and the silence of the agent that the fire place is operable and in good repair.*

*If upon trying to use the fire place, it turns out the flue is not connected and the fire place is “ornamental”, this would make a mockery of the premises being both fit for purposes, as well as being in a state of good repair (cf. [Shields v Deliopoulos \[2016\] VSC 500 \(7 September 2016\)](#)).*

### **Fit for purpose**

Section [61](#) of the *Australian Consumer Law* sets out a consumer guarantee that services provided will be reasonably fit for the purpose they are provided. . In some cases, it may be possible to argue the premises is not “**fit for purpose**” if there is no active phone line in the premises or the inability to install the appropriate infrastructure.

For example:

Tenant email to Estate Agent:

*“We are looking for a place to live in and run an online business from home. Is the landlord going to be ok with that?”*

Estate Agent:

*“The landlord thinks that will be fine. Thanks.”*

- If it then turns out that there is no phone line at the rented premises, the tenant may have grounds to argue the premises is not fit for the purposes for which it was sought. For more information, seek advice and see [Residential Tenancies and the Australian Consumer Law](#).

## Part 5: What can the Tribunal Order?

Subject to the remedy the Tenant seeks in their application, the following options are generally available:

- The Tribunal can facilitate parties to reach consent orders by agreement.
- If there has been a serious misrepresentation, the Tribunal can permit a tenant to rescind or otherwise terminate the agreement on the basis of a misrepresentation. For more information see [Rescinding a Tenancy Agreement](#).
- The Tribunal can award compensation in favour of the tenant. This can be done in 3 main ways:
  - Section [45](#) of the RTA - a “withdrawal” of a service can give a tenant a right to seek compensation (being a quantum of rent) for the withdrawal of the service.
  - The tenant can demonstrate their losses to date, and if the Tribunal considers it reasonable, an award can be made in favour of the tenant.
  - The Tribunal has power to vary the terms of the contract if an application is made and includes seeking orders under the ACLFTA. Section [184\(2\)\(c\)](#) of the ACLFTA provides the Tribunal with powers to vary the terms of a contract.
- The Tribunal can determine the landlord is not in breach and there are no obligations at law and dismiss the matter.
- The Tribunal could order compliance with the agreement, which may include or extend requiring the landlord to do something (such as installation or provision of specific services).
- Specific performance is rare, and generally courts and the Tribunal prefer to award compensation, unless specific performance is necessary. An Order to compel the installation of internet may not always be possible because of the relevant permits, Telco regulations

and infrastructure limitations but given the Universal Service Obligation this should not be an issue.

- It is a breach of section [480](#) of the RTA for a landlord to fail to comply with an Order.
- Orders may be registered with the Supreme Court. See section [122](#) of the VCAT Act. Registration of the Order is free, but any renewal in this jurisdiction may attract significant costs if unsuccessful for any reason. We therefore recommend that you seek advice before pursuing this option.

### **How much compensation can I claim?**

Compensation may be difficult to quantify. There is no fixed or prescribed rate. Generally, courts will not award items for loss of opportunity, or losses than cannot be quantified in some way. General inconvenience may be recognized in some matters.

Firstly, a tenant must prove the loss has been caused by the landlord. Secondly, the tenant must prove and identify the loss. Thirdly, the tenant must prove that the losses were reasonable in the circumstances.

For more information see [Claiming compensation](#).

**Part 6: Who is responsible for costs associated with a phone line?**

If a tenant connects telephone utilities or contracts with an ISP, the tenant is responsible for all charges related to the supply and use of a telephone and internet services at the rented premises.

This includes all service fees, call charges, equipment rental charges and connection fees (account connect fees) unless otherwise agreed with the landlord in writing.

The tenant is not responsible for the installation costs and initial connection costs for the physical line that connects to the exchange unless otherwise agreed.

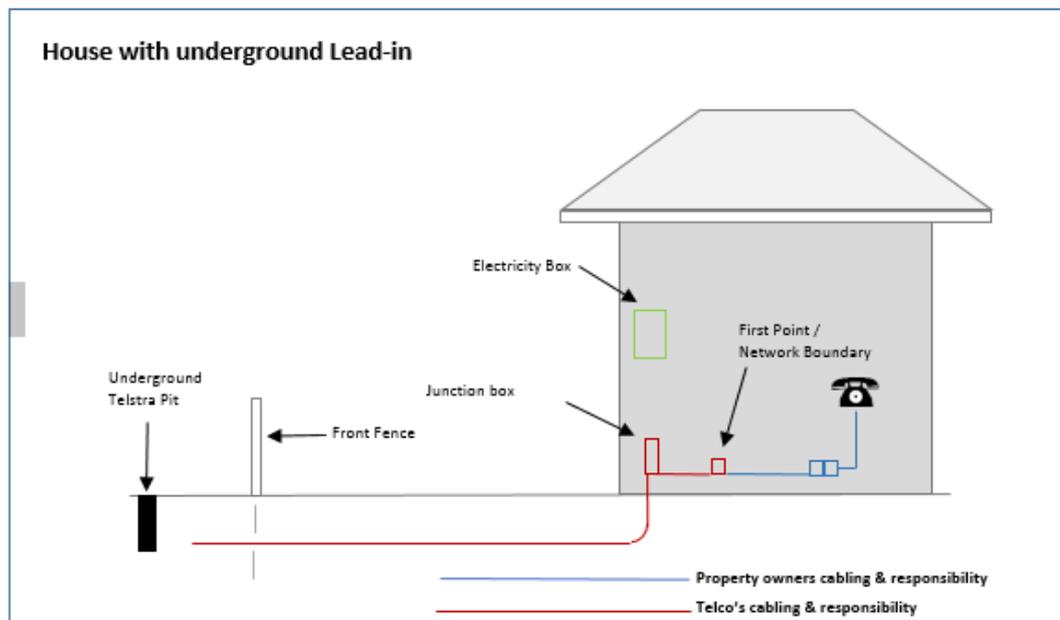
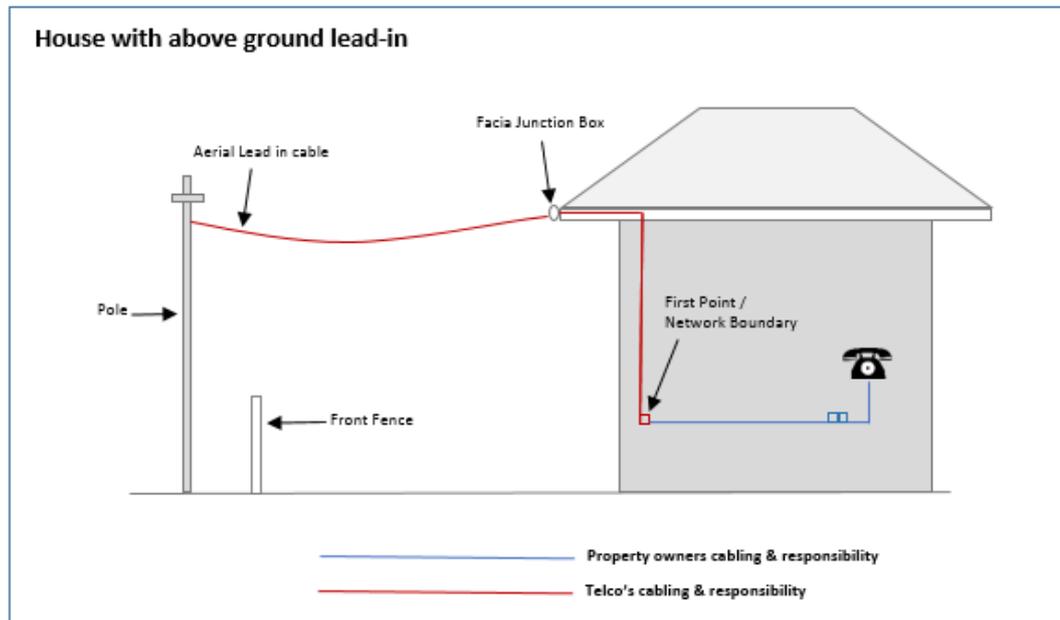
If you are moving into a property that has been newly built, and has no existing line between the telephone exchange and the property, a phone line may need to be laid (see above in relation to negotiations and alternatives).

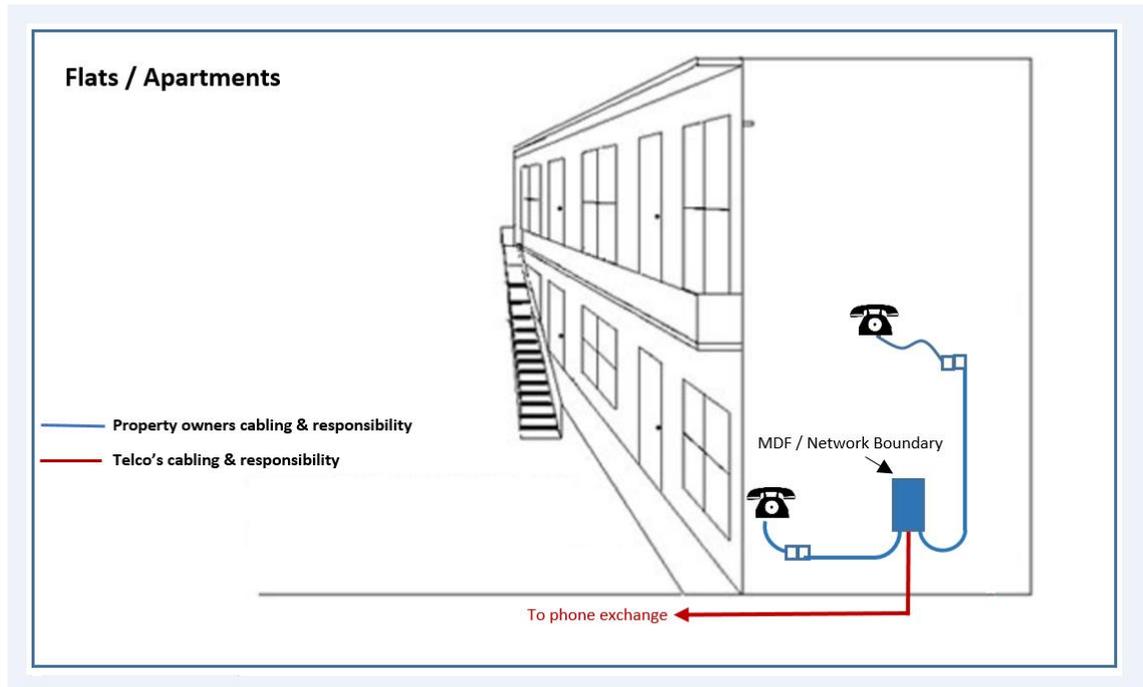
### Part 7 - Who is responsible for what?

Locating where the issue is in a phone line dispute is often half the battle.

There are about 4-5 points where the phone lines may have issues. Each one has a different party who is responsible for it. The following is an approximate summary of the points of issues:

#### Residential houses





Location	Who is responsible	Comments
The device itself (computer), mobile, tablet etc.	Tenant unless landlord provided	Try alternative device
ADSL splitter/filter	Tenant unless landlord provided	Borrow or test one on a point or friend's house you know is working
The Router or cable Modem	Tenant unless landlord provided	Some cheaper routers may be faulty or have intermittent faults such as faulty capacitors where the service will connect at poor speed. Consider borrowing a friend's to test if it is the router.
Internal wiring in the house	Landlord	This can usually be ping tested by a qualified technician.
Main Frame Distribution	Owners Corporation	Tenants can have disputes directly with OCs. (See FAQ below)
Junction Point to first internal socket where there is no MDF	Telco	This may vary based on the agreement for the individual service provision but is general the case.
Wiring from junction point or MDF to main lines	Telco	This will usually be Telstra
The Exchange	Telco or ISP	Best to contact TIO if initial complaints don't resolve the issue
Physical issues with exchange	Telco or ISP	Best to contact TIO if initial complaints don't resolve the issue
Permits for the lines to be laid	Contact local counsel as an interested party	Sometimes lines cannot be laid or installed because the appropriate permits have not been processed and provided to the Telco.

Note: Unqualified persons should **not** interfere with their phone lines because of the risk of damage by shorting the telephone exchange. To do so is an offence under the *Criminal Code Act 1995*. (For more information see [TIO website](#))

## TROUBLE SHOOTING REPAIRS:

### Identifying whether the problem with the line is a repair obligation of the landlord or Telco

It can be complicated for a tenant to establish if a fault preventing an active and unimpeded phone line falls within the responsibility of the landlord or the Telco (or in some cases an owner's corporation).

The landlord has an obligation to ensure premises are maintained in good repair ([s68](#) RT Act). This includes the physical condition of the phone lines in the rented premises up to the first socket in the house.

The Telco is responsible for the phone lines "out on the street", to the junction point on the house and usually up to the first socket in the house (also known as the "network boundary"). Where there is the Main Frame Distribution Box (MDF) on the apartment complex or similar structure, the Telco will be generally responsible up to the MDF rather than the first socket. These may vary depending on the particular agreement reached between the Telco and the owner.

To resolve these matters parties can either:

- Go through the non-urgent repairs under the RTA and seek recommendations and orders through the Tribunal
- Hire their own qualified technician and *try* and recover costs. If you are attempting to do this, you should notify the landlord, and the outcome of the investigation into local wiring will dictate if you can recover or not, i.e. if it is not in good repair and the landlord was responsible, and refuses to do the work, then you should be able to recover costs in the Tribunal.
- Contact the Telco and ask them to fix it if you think it is their wiring, but if you are unsuccessful because the fault is in the house, you may bear the cost of the Telco's call out fee. If it is the Telco's fault, they will usually fix it for free as it is their responsibility.

In some cases, the quality of the services may be poor but not necessarily unlawful or an issue of being in good repair. Screen shots of line attenuation

from your modem/router etc. should be of assistance if a line is consistently dropping out, but another variable is the ISP's infrastructure, making it again hard to prove who is at fault.

A qualified technician can do tests within the premises to determine the quality of the lines in the premises and whether the lines within the house need to be repaired.

Any reports or written statements by such technicians would be useful, but as it is likely to be a non-urgent repair, recovery of costs may be challenging, and the CAV inspectors, as part of the non-urgent repairs, will only be able to recommend the test be done.

### **Fixing a phone line:**

#### **Where there is a phone line present but it is not working**

The options available to a tenant where the existent phone line is not working will depend on the location of the fault or disrepair.

It is often challenging to identify what the cause of a dead, or faulty phone line might be.

#### ***Is there a phone line?***

It is important to first of all establish whether there is a physical phone line in the ground or at least to the junction point. You should be able to verify if the necessary cabling has been installed by contacting Telstra and providing the address for the premises.

The Telco will usually have a history or records and other information to support the existence of an active, or previously active line. This is a good place to start. They can also usually run a "ping" test to identify the line and determine the quality of the signal as well.

Make sure if it is a new development you are clear on the number of premises on the lot, and the number of phones lines you would ordinarily expect. For example there may be two houses on a subdivision, with unit 50A and 50, and only one phone line is registered for both premises. This indicates that it is likely no cabling has ever been installed.

In some premises, the phone lines run from the electricity pole. This is called aerial cabling, in others (which is now more common), it will run from pits underground to the house.

### ***Fault between exchange and first socket (network boundary)***

If there is a fault in the line between the exchange and the juncture of the house, then the Telco will usually fix this for free. However, if a call out is arranged and they test the line, the person who requested the call out may incur a substantial fee if there is no fault found in the line between the exchange and the network boundary.

Ensure with any call out from a Telco that you are informed about the costs risks. If there is a failure to advise of such costs risks, you may wish to talk to the TIO.

### ***Fault in the house wiring***

The house wiring means the wiring from the first socket (or junction point where there is an MDF) and the rest of the phone wiring throughout the house.

As the landlord has a duty to ensure any service or facility is in good repair, any broken wiring can be treated in accordance with the normal urgent and non-urgent repair mechanisms within the RT Act.

Similar to the Telco, if a technician is called and the phone line is ok, there may be a risk of the landlord trying to recover costs incurred unless it is established there was reasonable grounds to believe it was not in good repair.

For example if the ISP is slow and you allege it is the wiring, if no physical fault is found, you may need to defend a compensation claim.

### ***Urgent or non-urgent Repair under RTA***

Traditionally, a phone line would be treated as a non-urgent repair under the RT Act. See ss [74](#) and [75](#). This is a three step process:

(Step 1) [Notice to landlord of rented premises \(Word, 1.8MB\)](#)

(Step 2) If you get no response after 14 days, complete and send this form to Consumer Affairs Victoria: [Request for repairs inspection or rent assessment \(Word, 115KB\)](#). They provide a free report about the recommended actions for repair.

Step 3 - [Application to VCAT](#)

Persons with a disabilities such as epilepsy, special health needs, or IVO and safety concerns may wish to argue that a reliable phone line is an urgent repair as a matter of safety. While this may not strictly be true in an objective sense, the Tribunal usually take a sensible and practical approach with respect to the needs of parties if there is sufficient evidence.

For more information see [Repairs](#)

### **Complaints about Telco Conduct – including delay**

#### **Telecommunication Industry Ombudsman (TIO)**

When you are having issues with a telecommunication provider you can contact the TIO who oversees the operation and delivery of services by Telcos to the community. In order to engage the TIO, you must first raise the complaint with the Telco directly, preferably in writing. You can then engage the TIO to conciliate and intervene in relation to the matter.

TIO also has jurisdictions in relation to ISPs as they are considered to be a form of Telco.

They have jurisdiction to deal with any matter that relates up to the first socket (network boundary point), or MDF that is the responsibility of the Telco.

For more information see [TIO website](#).

## Part 8: FAQ

### 1. We have reached an agreement to get the line installed. But what do we need to actually do?

Parties should contact the local Telco, usually Telstra, and seek to have the relevant cabling done. Usually in a standalone premises, this is known as an application to have the “lead cable” installed.

To get lead cabling installed you can:

- a. Visit your local Telstra shop or go to <https://www.telstra.com.au/contact-us>
- b. Application forms can be found [here](#). This an older form but should be sufficient to alert Telstra to the desired product.

### 2. What form should a builder have used to get the phone line connected at the time of construction?

There are no published pdf forms available to request a phone line installation. It appears it must be done over the phone or on the internet. While they are not legally obligated to install them, this is the application necessary for the responsible Telco to install the line.

Owners, builders or developers seeking to get a phone line installed should have registered and completed the relevant documentation here:

<https://www.telstra.com.au/smart-community>

For technical requirements see [here](#).

It is possible that the systemic issue of builders failing to get phone lines installed is because this information is not easily accessible.

### 3. Is it a misrepresentation if the landlord or agent fails to disclose that the phone line was not connected?

There is no clear obligation to make a disclosure about all aspects of the premises.

It may be possible to argue that there is a misrepresentation where a party fails to correct a known assumption, i.e. *unilateral mistake*. This occurs where one party makes an assumption prior to entering into an agreement and the other party is aware of the assumption, and fails to correct the assumption. See [Taylor v Johnson \[1983\] HCA 5; \(1983\) 151 CLR 422 \(23 February 1983\)](#) at [10]-[12].

There are no clear decisions from the Tribunal to indicate whether this argument would be successful.

For more information about the principles of Mistake, see [Commonwealth of Australia v Davis Samuel Pty Ltd and Ors \(No 7\) \[2013\] ACTSC 146 \(1 August 2013\)](#) at [1677-1682].

*[1679] The right of a person who has paid money under a mistake of fact to recover the money is of longstanding. See Bilbie v Lumley [1802] EngR 245; (1802) 2 East 469; Kelly v Solari [1841] EngR 1087; (1841) 9 M & W 54. The limitation that the mistake must be a mistake of fact and not of law has, however, been abolished in Australia by the High Court in David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48 ; (1992) 175 CLR 353.*

*It appears that, at the very least, the action requires the payer to prove that, without the mistake on his her or its part, the payment would not have been made: Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1988) 164 CLR 662 at 671-2.*

*The action for recovery of the money so paid rests not on any notion of an implied contract but on restitution, based on principles of unjust enrichment: Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516.*

*While recovery for mistake is primarily a common law principle, an operative unilateral mistake may give rise to an equitable remedy: Solle v Butcher [1950] 1 KB 671 at 692; Taylor v Johnson [1983] HCA 5 ; (1983) 151 CLR 422.*

#### **4. Is not having the internet or a phone line a repair issue?**

Yes, if there is existing wiring. In order for something to be subject to the repairs obligations set out in section 68 of the RTA, it must exist as an aspect of the rented premises.

If there is wiring in the rented premises and there is a line at the exchange allocated to the rental address, this may be treated as a repair.

A landlord is responsible for the juncture point to the wiring in the house.

The Telco will be responsible for all wiring to the juncture point, or in the case of an Owners Corporation, up to the MDF.

If there is an Owners Corporation, it is responsible for the MDF and the wiring to the rented premises.

## **5. How do I tell if and where there is a fault with the phone line?**

This is one of the harder issues to resolve because both the Telco and the landlord may try to bill you their costs if the call out is made and it is not their fault.

If you call the Telco, they will often indicate that they will come out and fix it for *free*. However, if the fault is the internal wiring, then they will likely charge you a fee for the call out. Costs may be in excess of \$150. Call your local Telco to find out in what circumstances they charge, and how much.

If you call the landlord, the landlord should not test the wiring themselves as there is a risk of damaging the line or the exchange. Usually, a suitable electrician or similar qualified technician can run a “ping” test. This will look at the continuity between the points of wiring in the house, as well as the quality of the connections in the house. If the lines have high levels of noise and poor attenuation this may negatively affect the speed of your internet.

## **6. Can I force repairs?**

Yes. If you believe there is wiring in the premises that exists and should be connected to the exchange, then you can apply to VCAT and treat this matter as a repair.

Whether the repair is an *urgent* or *non-urgent repair* will be subject to the definition that appears within the Act. See section [3](#) of the RTA.

The definition of urgent repairs includes “*any fault or damage that make the premises unsafe or insecure.*”

If in doubt as to whether the repair is urgent, they may apply to the VCAT under section 73 of the RTA. If Tribunal determines that the matter is non-urgent, the Tribunal may either adjourn the matter or dismiss it. This should not preclude you from going through the non-urgent repairs processes. There is a likelihood of the application fee being lost if it is dismissed.

See: Repairs (Tenants Victoria website).

## **7. Is the quality of the internet a repairs issue?**

This is a highly technical question and may include considerations of the length and quality of wiring and difference in noise and attenuation at different locations in a rented premise. As with any other repair issues, there is no clear standard in relation to a specific item. If you made an application to the VCAT, you would be required to satisfy the Tribunal (on the balance of probabilities) that the item is not in good repair.

### **8. My internet is too slow. Can I do anything about this?**

Proving that this issue is a result of the phone line or responsibility of the landlord is likely onerous. Factors such as the distance from the exchange, the allocations by the ISP and the load on their network may affect the internet speed. VPN's may also have a bearing on various speed tests. Generally, Tenants Victoria is of the view that it may be difficult to show that the speed of the internet is a repair issue and responsibility of the landlord.

Unless you can prove there is a defect with the public infrastructure or the private wiring in the property, it is unlikely that slow internet speed can be resolved by order of VCAT or the TIO. It is important to know that TIO has jurisdiction

### **9. What if there are phone sockets in the premises but they have not been connected to the exchange?**

There is no clear precedent on whether the mere presence of phone sockets can amount to a facility that is not in good repair for the reason that it is not attached to the exchange. It is possible to make this argument in an application to VCAT. VCAT may consider the present of phone sockets as analogous to a power point that does not operate but has been installed in the rented premises.

### **10. How can I get out of my lease because the internet is not available at the premises?**

There may be options available to a tenant who wishes to end their lease early.

If you are seeking to end your lease early without costs, the strength of your options will likely depend upon whether there is cause to argue your landlord is at fault, or whether you have simply failed to make adequate enquiries in relation to whether the services you want are offered.

For more information on options to end a lease early, please see the practice note on [Lease breaking and the alternatives](#).

**11. When is the National Broadband Network (NBN) being rolled out in my area?**

If you are concerned about when the NBN transition will change over, [Check your address](#) to find out about the rollout in your area.

**12. For information about the NBN, see [here](#). Any information should be confirmed via the official NBN website as information may change over time. Does the NBN cost anything to transition to?**

Generally not. It is generally free unless you are altering the wiring path or asking for the NBN utility box to be installed in a non-standard location.

You should however discuss this matter with your current ISP to determine if a suitable plan is available for you.

**13. Does the landlord have to switch to the NBN?**

The NBN is being rolled out across the country. The timing and availability of such services has varied immensely. The landlord does not have to switch to NBN but some copper wire services will be disconnected. For more information see [“What services will be switched off?”](#).

Essentially, the landlord must opt in for the service to be provided. If you have a loss of service, a tenant may have legal redress for the effective withdrawal of a service by not having access to that service. See below.

**14. I have been told that my existing cabling for phones or ADSL is about to get turned off, and my landlord is not taking any action – what can be done?**

If a landlord fails to facilitate the transition to NBN services and pay relevant fees, it is the Tenants Victoria opinion that this is tantamount to a withdrawal of services under section 45 of the RTA. This provision states:

***“Tenant may complain to Director about excessive rent***

(1) A [tenant](#) may apply to the [Director](#) to investigate and report if the [tenant](#)—

(a) considers that the [rent](#) under a [tenancy agreement](#) is excessive having regard to the fact that the [landlord](#) has reduced or withdrawn [services](#), facilities or other items provided with the [rented premises](#);

...”

The prescribed form for rent increases does not specifically include the withdrawal of services (See [Request for repairs inspection or rent assessment](#)). Where the landlord refuses to enter into a contract for NBN services, the conduct of the landlord failing to facilitate the transition to NBN (and therefore leading to the loss of services for the tenant) may be difficult for CAV to consider (in this context).

Accordingly, if CAV refuses to investigate and provide a report, parties may wish to apply to VCAT as a General dispute under section 452 of the RTA, and also refer to section 184 and 185 of the *Australian Consumer Law and Fair Trading Act 2012*- which provide for general powers and the ability of VCAT to vary a contract. VCAT has powers to make orders to vary the amount of rent payable, facilitate the tenancy to end, or establish a clear pathway to ensure the Landlord facilitates the transition to NBN.

For more information about when phone or internet services may be switched off call 1800 687 626.

**15. Can I be responsible for damage or unauthorized installation of fixtures where the NBN has been physically installed in the rented premises?**

NBN requires the installation of a small electronic device called an “NBN utility box”. It is usually installed outside the rented premises, but sometimes it will be required to be installed inside the rented premises. Essentially, this becomes a “fixture” of the rented premises. Under section 64, a tenant cannot consent to the installation of a fixture. However, under the NBN scheme, consent must be obtained before it may be installed.

If you are contacted by the NBN installer, you should ensure that you make reasonable efforts to contact the landlord or agent prior to, or at the time, the box is being installed.

Make sure you always cite and write down someone’s identification who is purporting to be an official officer. If you have any doubt, you should contact the relevant agency to confirm the person attending is an employee and it is a scheduled job.

There are certain regulations about where and how high the NBN device can be installed.

**16. I cannot get copper wiring installed and have to wait for NBN to be installed and this may take months. What can I do?**

Your options will depend on whether there were any representation by the landlord or their agent before or at the time the lease was signed, and whether any enquiries were made prior to signing the lease.

You may wish to consider the alternatives to end your lease early, or waiting and using alternative services for internet access.

The issue with waiting is that the landlord is in no greater position to force the Telco to roll out the NBN than the tenant. This assumes that the landlord has completed all the necessary paper work. Complaints may be made to the TIO, but unless there is unlawful compliance, the matter could drag on for a substantial period of time, and if the landlord is not at fault, then your financial redress may be very limited.

### **17. Can I claim compensation for when the internet *should* have been available?**

If the phone line was present but not in good repair, then this follows the principles of any other compensation claim.

Losses may include compensation for expenditure to use alternate internet services that are *necessary* for normal operations. For example, it may not be advisable to watch movies on Netflix, as you may not recover these as reasonable losses.

Under section 211(e) of the RTA, you have an obligation to mitigate loss.

If you are a student and there has been serious inconvenience to your studies, you may be able to try and claim a loss for additional inconvenience, see *Jarvis v Swans Tours Ltd* [1972] EWCA 8. Quantifying your loss in this regard must be measurable in monetary terms. It may be onerous to try and apportion fault with examination results because of inconvenience, with any real or substantive redress.

In the case of loss of income from businesses, this may entail more complex claims including considerations of pure economic loss and expectant income. In such circumstances, it may be recommended to seek legal advice.

For more information about claiming compensation, see Tenants Victoria practice note [Claiming compensation](#).

### **18. I obtained consent to get the phone lines installed, can I obtain compensation from the landlord for this?**

Whether a tenant can claim compensation may depend on the terms of the agreement between the parties. Consent is not necessary the same as an agreement. Therefore, it is best that, at the time the line is installed, the parties

resolve what is to happen at the end of the lease and document the agreement in writing (for example, whether compensation is to be paid and whether the line must be removed by the tenant).

To obtain compensation, you are usually required to show that the landlord has either entered into an agreement to make a contribution or that there has been some form of misrepresentation. This will likely depend upon the facts of the matter.

If you have obtained the landlord's consent and elected to have the services connected and installed, there should be clear terms in relation to who is responsible for what costs and what happens at the end of the tenancy.

If not, in view of the wording and obligation under section 64 of the RTA, the tenant could potentially be liable to restore the services and premises to its original condition.

### **19. Am I liable for initial connection fees?**

There are two sorts of costs associated get the phone line working. Firstly, physical installation of the infrastructure which should be the landlord's expense if they are installing it.

Secondly, there connection or account activation fee. This is for brand new connection fees for a line that has never been activated before. This is usually around \$300.

If Section 53 provides that, the "initial connection costs" of the electricity, gas and water are the landlord' responsibility. As a matter of interpretation and principals of harmonisation, it is the Tenants Victoria opinion that the initial connection costs should be paid by the landlord if the landlord is installing the internet.

"Connection activation" fees are usually charged around \$125. This is where there is an existing line. It is our opinion, a tenant will be liable for this fee.

For more information on fees charged by Telstra, see [here](#). Other competitor fees not relating to initial connection costs may be considered.

It is important to bear in mind that a landlord is not necessarily required to install the infrastructure required to access the internet in the first place. Therefore, it is often the case that the fees associated with installing infrastructure is a matter of negotiation between the parties (in the absence of clear law or other relevant circumstances). The main exception to this will be where it is a new build and the tenant has put a term in the contract about the warranty of phone services being available.

**20. I am getting bounced between the Owners Corporation and the landlord in relation to the phone line not working properly. What can I do?**

It is a common issue for a landlord to blame the Owners Corporations and vice versa. In order to eliminate this issue, it is possible for tenants to file an application either under the Residential Tenancies List or the Owners Corporation List at VCAT and seek to “join” the respective parties to the proceeding. This will enable all parties (including the tenant applicant, landlord and owners corporation) to be in the same room in order to seek that VCAT resolves the matters between the parties.

“Joinder” is facilitated by section [60](#) of the VCAT Act and can be included in the application to VCAT. An additional application should be served on the respective party being joined.

For more information, see practice note [Owners corporations and tenancy](#)

**21. Am I liable for porting fees?**

Porting your ISP or phone number between services is a cost associated with the supply of phone services. Accordingly, these fees are payable by the tenant.

**22. What if my ISP cannot port my services to the new phone line because they don't have coverage in the area?**

Unfortunately, this is again is a “consumer beware” issue. It is not the landlord's fault or responsibility of whether or not an ISP provides service. Accordingly, it is recommended that tenants check with their existing ISP to see if they deliver services to the specific address. This should be done prior to signing the contract.

**23. What if I am having trouble with my ISP?**

The TIO has jurisdiction in relation to ISPs. However, if your issue relates to your ISP contract, this is a consumer contract (and is not considered a tenancy issue). You may wish to contact Consumer Action Law Centre or a community legal centre for advice if the TIO is unable to resolve the matter.

**24. Is a phone line an essential service?**

While there is an [essential services commissioner](#) for gas and electricity, phone lines are not included within the jurisdiction of this regulatory body.

**25. Does the building code require a phone line to be installed?**

While there is a building code, this code applies at the time of the construction or in the event of major renovations. However, in relation to residential dwellings, the law does not require that the phone line is provided, only that it can be accessible. For more information see, [Victorian Building Authority](#).

### What should you do?



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 you require advice about, then you should contact us on **(03) 9411 1444**.

**Tenants Victoria Legal Team**

## Part 9: Glossary

**ACMA** – Australian Communications and Media Authority

**ADSL Splitter (or also referred to as ADSL filter)** – this is a small box sometimes external or sometimes internal in newer buildings. ADSL communicate using high frequency signals that cannot be heard. A filter is needed to ensure that the signal is split so that the use of the phone does not interfere with the ADSL signal. Broken ADSL filters can be an issue.

**Exchange** – This is the physical infrastructure that connects all phone lines through central servers. Generally, the closer to an exchange, the better your speed.

**General Connection Fee (ISP)** – This is the fee for activating an ISP contract that allocates or connects your Internet Service between their allocated server and the telecommunication line that connects to the property.

**ISP** – Internet Services Provider – These companies have a portion of the lines which they use at the exchange to connect to servers and deliver the internet (either concurrently over the same line as a telephone line or a dedicated line).

**Installation** – Installation in the context of this practice note refers to the physical laying of cable

**Initial Connection Charge (also known as Line Connection Fee)** – This is the fee for the physical connection of the phone line from the Junction point or MDF to the public infrastructure and the phone or internet exchange.

**Junction Point** – The junction point is where the telecommunication infrastructure meets the residential or private part of the phone line. i.e. Telstra's wire joins to the house's private infrastructure.

**Line Attenuation** – This refers to the strength of the signal over the line and can be identified through your router.

**MDF** – Main Distribution Framework – this is usually a box that is attached to buildings that form part of the Owners Corporation or building with multiple lots, all phones lines are allocated from this point to individual units. **From the point of the MDF** – the wiring from this point becomes the responsibility of either the Owners Corporation, or the landlord

**MDU** – Multiple Dwelling Units

**NBN Utility box** – this is a small box that is often installed outside the rented premises. In some circumstances, the box will be located in the existing

infrastructure. In some circumstances, it may be necessary to install the box inside, and people should investigate if this is necessary as part of the proposed installation. Accordingly, the technician will install the box in a particular location at particular heights etc.

**Noise (dB)** – this refers to the amount of noise or interference on the line. A noisy line will often be disrupted. Frequent noise may also slow down the connection speed.

**NBN** – National Broadband Network

**Naked ADSL** – This does not require a phone line service to also be activated in order to have internet. An active phone line is still required.

**Porting Fee** – This is a fee charged by an existing ISP, when you carry your internet service or contract from one premises to another premises.

**“Ping”** – This is a test to check both continuity and the quality of the signal in a communication line.

**Primary Universal Service Provider** –

**Router** – This device interprets the digital signal for your computer so you can get the internet. It is important to note that it is also a useful tool to identify some of the characteristics of your phone line if there are issues. Parties can usually log into their router by entering 192.168.0.1 or 192.168.1.1 into an internet browser, and entering your relevant password.

**RSP** – Retail Service Provider

**SDU** – Single Dwelling Units

**Qualified technician** – people who may work on phone lines and similar cabling must be compliant with the cabling rules in the [Telecommunications Cabling Provider Rules 2014](#) as set by the ACMA.

**Telco** – Telecommunication Company

**TIO** – Telecommunications Industry Ombudsman – The TIO can deal with ISPs and Telcos, but they generally will not assist past the Junction Point, or the private infrastructure. They will deal with complaints and conduct by ISPs. Generally, to engage the TIO, you must complain directly to the relevant body first.

**VPN** – Virtual Private Network

## Part 10: References

<http://www.nbnco.com.au/>

<http://www.acma.gov.au/>

<http://www.titab.com.au/faqs/nbn-frequently-asked-questions>

<https://www.communications.gov.au/what-we-do/phone/phone-services/consumer-protection>

[Telecommunications Universal Service Obligation \(Standard Telephone Service—Requirements and Circumstances\) Determination \(No.1\) 2011.](#)

<https://www.communications.gov.au/policy/policy-listing/telecommunications-new-developments>

### Other Relevant Legislation:

- [EQUAL OPPORTUNITY ACT 2010](#)
- [TELECOMMUNICATIONS \(CONSUMER PROTECTION AND SERVICE STANDARDS\) ACT 1999](#)
- [TELECOMMUNICATIONS ACT 1997](#)

**Example Scenario:**

*Joe is a student looking to move into a room for rent.*

*In January 2017, Joe finds an advertisement which he saves on his phone. The ad states his room comes with internet. Before he signs the contract, he sends an email to the landlord asking if it was a shared wifi or it was his own private phone line. The landlord replies in email and states, "you will need to set up your own account." Rent is \$240 a week.*

*When Joe moves in, he discovers there is only shared wifi and this is what the landlord argues this is what he meant by set up an account. The premise has very slow speeds on his internet because everyone else is using it all the time. Joe cannot watch his lectures online because of the speed. Joe has to use a 4G wifi dongle at \$50 a month, but cannot watch any Netflix and other activities as he intended.*

**Application**

Joe immediately applies to VCAT once he realizes the wifi issue. Joe applies as follows:

- Section 210 RT Act– Compensation
- Section 452 RT Act – General dispute
- Section 234 RT Act – Reduction of Fixed term tenancy
- Section 184 ACLFTA – To vary terms of contract to reduce rent.

Joe applies to VCAT for compensation for \$50 a month for his dongle and a further rent reduction of \$80 a week because he could not use online services as he wanted, and a reduction of the fixed term tenancy to end mid year in June 2017. The total claimed is \$2380.

**Likely Decision**

The Tribunal determines that the conduct of the agent was misleading and awards \$300 for the dongle, but reduces the claims to be \$1040 (being \$40 a week rent reduction).

As Joe has not suffered the loss yet (assuming the VCAT Orders are made mid March 2017), the Tribunal elects to vary the contract, and set rent to from \$240 to \$200 per week. The Tribunal accepts the wifi is necessary for the remainder the semester.

The Tribunal does not accept that there has been an unforeseen change in the tenant's circumstances, but elects to vary the contract and reduce the fixed term to 6 months under the ACFLTA.

Parties have an obligation to mitigate their loss (section 211(e) of the RTA).

In view of this, the ability to watch streaming videos for entertainment, was not deemed valued as Joe would like, but the loss was recognized as a loss of quiet enjoyment. This will be subjective between Members of the Tribunal.

The quality of the time and enjoyment of the tenancy, should be relevant as a form of loss. (cf [\*Baltic Shipping Company v Dillon\* \[1993\] HCA 4; \(1993\) 176 CLR 344; \(1993\) 111 ALR 289; \(1993\) 67 ALJR 228 \(10 February 1993\)](#) at [39]).

Parties may wish to consider seeking alternate legal advice if they have lost substantial amounts of income as part of any home business. Tenants Victoria does not generally advise in relation to commercial matters.

## Part 11: Draft Sample Resources

### Sample 1: Request Letter to Landlord

[date]

[Landlord Name]

[address c/- of real estate agent address]

[post code]

Dear [landlord],

#### **Re: Phone line and Internet availability**

**Tenant(s):** [names]

**Landlord:** [name if known, check lease]

**Rented Premises:** [address]

I write in relation to the above premises.

I entered into a lease with you on [date].

[delete as applicable or modify as appropriate]\*

1. Immediately prior to entering into the lease I enquired from your agent as to whether the premises had the internet and I was informed that the premises has the phone lines connected.
2. I had attended the premises on date and inspected the above rented premises with the real estate agent.

Upon the inspection I noted that there were phone sockets present in the premises. I had therefore assumed that these phone sockets, like the electrical sockets, were in good repair and capable of delivering the services for which they are intended.

I note that your agent had failed to disclose that the services were not connected to the phone exchange and the rented premises phones had not been connected.

**Sample 2: Request to consent and confirm location of NBN device**

[date]

[Landlord Name]

[address c/- of real estate agent address]

[post code]

Dear [landlord],

**Re: NBN Installation**

**Tenant(s):** [names]

**Landlord:** [name if known, check lease]

**Rented Premises:** [address]

I have been contacted by an authorised officer to install the NBN at the rented premises. This requires your consent. It is possible that in the near future, the copper service is going to be turned off.

Accordingly, I seek that you consent to the NBN Utility Box and services being installed in the rented premises. This is a free service unless you wish to have the utility box installed in a non-standard area, which differs from the position proposed by the NBN officer.

If you do not consent, I will consider this to be a withdrawal of a service as outlined in section 45 of the *Residential Tenancies Act 1997 (RTA)*.

Accordingly, please contact me and the NBN on: [details] to confirm your consent.

Please also advise the NBN Officer where you wish the NBN Utility Box or other aspects of the installation - you may wish to contact the NBN Officer directly.

I assume that it is in both parties' interest that the NBN be installed and request that you please respond promptly. If I do not hear from you, I believe the NBN Officer will install the NBN Utility Box in the location closest to the original telecommunications junction to the house.

For more information about the NBN, you may wish to go to:

<http://www.nbnco.com.au/>

Sincerely,

[Name & Address]

### Sample 3: Draft Application for declaration for orders to install phone line.

#### 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 452,472 - Residential Tenancies Act 1997 (RTA)

Section 184, 185 - Australian Consumer Law and Fair Trading Act 2012 (ACLFTA)

This section tells the Tribunal and other parties 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 (Mandatory)

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. \*

The Applicant is seeking an Order that the landlord be compelled to provide a telephone line that is connected to the telephone exchange.

The power to compel a landlord is found in section 472(1)(b), which states:

"(b) to require any action in the performance of a tenancy agreement or of duties under this Act relating to the tenancy agreement;"

It is submitted that that rented premises contains phone sockets in the rented premises and they are not in good repair because they are not connected to the phone exchange. It is submitted that this is akin to having no electricity and that unless prescribed tenancy agreement does not contain a schedule clause to disclose the electricity, the tenant would not be entitled to have a legitimate expectation that the existence of power outlets in the rented premises would give rise to a legitimate expectation the rented premises is connect to the power grid.

To required such additional term in light of the presence of a phone socket would be absurd and is contrary to the principles set out in the ACLFTA in relation to consumer protection. At no point upon inspection or inquiry did the landlord or their agent disclose the phone line was not connected.

Accordingly, the Applicant seeks that the landlord be compelled to pay for, and take all necessary steps, to ensure access for the tenant to receive a hardwired phone line service as soon as practicable and that in the interim the Applicant's rent is reduce by \$X per month until such time that it is installed and available for a phone line to be activated.

In the alternate, should the landlord not be able to expedite the installation of an active phone line for any reason (within [1] month), the tenant seek a declaration and orders, that the tenant is entitled to rescind the agreement on the basis of the premises not being fit for purpose, unconscionable conduct, and a tacit misrepresentation failing to identify the phone line was not in good repair.

- **Note:** Parties may also wish to include 234 of the RTA as an alternate ground for termination in the event that no misleading or misrepresentation is found. Ultimately, it will be up to the Tribunal. For more information about this type of application – see lease breaking and alternatives practice note for requirements.