practice note

Residential Tenancies Practice Note 2017#03

VCAT reviews (re-opening an Order)

CONTENTS

1. What is a review?

Generally speaking, an application for review is made when someone has missed their hearing, and orders have been made in their absence. This application allows the matter to be heard again and the absent party can turn up and have their say.

The right of review (now commonly referred to as an application for "reopening an Order") is regulated by section 120 of the *Victorian Civil and Administrative Tribunal Act 1998*. The terms can be used interchangeably.

The application for review can be found here.

When lodging a review, you should send a copy of the review application to the other party as well so they are aware of the review being lodged. (r7A.15(2)).

It is important to note that the legal requirements to obtain permission to reopen a matter have been made more onerous since 2014. However, generally an applicant will need to satisfy the VCAT of three things:

1. That they had a reasonable excuse for not attending the hearing; and
2. That they have a reasonable case to argue about the subject matter of the hearing; and
3. Rehearing the matter would not cause undue prejudice to the other party.

This practice note will explore each of these elements in more detail. A full example of a review application and subsequent orders can also be found in this document.

2. Don't miss your hearing – Request Telephone Appearance if possible

Before considering a review application, it is always best practice that parties to a VCAT Hearing make every effort to attend the hearing. It is never good practice to deliberately miss a hearing as no one can guarantee if a review will be granted. Many people miss hearings because they believe it was not possible for them to attend the hearing. This must be measured in light of the consequence of non-attendance. Orders will be made in their absence.

If the person has reasonable grounds, and is aware of an upcoming hearing, it

may be appropriate to lodge an application for leave to appear by the telephone.

The application can be found here.

Supporting evidence to justify leave to appear on the phone should be attached, or there is a real likelihood the application will be refused.

Ensure phones are fully charged when attending via phone and in an area of very clear reception. Documents to be referred to during a phone attendance should be lodge with VCAT and served on the other party. Each page should be clearly marked for ease of reference.

Parties should also consider seeking an adjournment in accordance with the Practices Notes for the Residential Tenancies list if they are aware of a hearing that they may not be able to attend. Ensure supporting documents are attached and reasonable efforts are made to seek consent to the adjournment. For more information about adjournments see here and here.

3. What is the difference between a Review (reopening an Order) and an Appeal?

A review is very different to an appeal.

Reviews

Generally speaking, reviews are for when someone has missed their hearing.

A review can *only* be sought in limited circumstances. The effect of the review is often to stay (or pause) the effect of an Order of the Tribunal (the substantive order) which has been made in the absence of a party to the proceeding.

If a party applies for a review, the Tribunal will list the matter to be heard again. At the review hearing, it allows an opportunity for the absent party to turn up and explain why they did not participate in the hearing in the first instance, and why they should be granted a review.

If the Tribunal permits (grants leave) the review, the substantive order will be set aside and the substantive application will be heard again. *Both* parties can then put evidence and submissions for the Tribunal to make a decision. This usually happens all in a single hearing.

The right to reopen an order will not be available where both parties

attended the first hearing.

Appeals

Generally speaking, appeals are for when both parties attended the hearing, and they think the final decision of the Tribunal is one that could not have been lawfully made by the Tribunal.

Appeals are made pursuant to section 148 of the VCAT Act, and are made to the Supreme Court. This is a cost jurisdiction, and is not the subject of this practice note. People seeking procedural guidance on appeals may contact the Self Litigant Coordinator of the Supreme Court 9603 9240.

4. When can I apply for a review?

To apply and successfully get leave to have the matter reopened, there are 5 main criteria to address:

a) The party did not appear or was not represented at the hearing

b) The application must be made within 14 days. This time limit is specified in rule 4.19.

c) The applicant for the review had a reasonable excuse for not attending or being represented at the hearing; and

d) The applicant has a reasonable case to argue in relation to the subject-matter of the order; and

e) There is no prejudice caused to another party if the application is heard and determined that could not be remedied by way of costs. (i.e. The Tribunal has discretion if it sees fit to address prejudice by way of costs. This is uncommon as a matter of practice in the Residential Tenancies List.)

5. General attitude towards review applications

In *Alesci v Salisbury* [2002] VSC 475 at [6] Bongiorno, J. said that section 120 should be "*construed liberally*" and that "*It would be difficult, …to put forward a case where a blameless non attending defendant would not be entitled to a review …*"

6. Elements of a review application

a. Did not appear and was not represented in the hearing

Generally, a party will have a right to apply for a review if they have missed a VCAT Hearing, and apply within the required time frame. Your client can give instructions as to whether they attended a particular hearing. If a client instructs that they have, or might have, missed a hearing, it is good practice to email VCAT and request a copy of the relevant orders.

For information about requesting copies of documents from VCAT see here:

Access to documents for renting cases

When reviewing an order it is important to look at the footer of the orders. If a party to the proceeding did not attend it will look like this:

"H Smith, Member
6 March 2017

No appearance by or on behalf of the tenant at the hearing scheduled at 10:30am on 6 March 2017"

This is not conclusive, and from time to time a Member may neglect to include this. The audio recording from the original hearing can be used as secondary evidence to confirm if a party attended a hearing if not.

b. 14 day time limit

An applicant for review must apply within 14 days of becoming aware of the Order. This is simple in most contexts, but can be complicated depending on the client's circumstances and history of the matter.

Interaction between section 126 VCAT and Rule 4.19: Can I extend the 14-day time limit?

In most circumstances the 14-day time limit will be treated quite strictly from the date of becoming aware of the Order.

However, it may be possible to apply for an extension of this time limit under section 126 of the VCAT Act. This appears to be provided for under Rule 4.20 of the VCAT Rules.

For more information about the application of section 126 in the context of the enabling enact, or in the context of the Rules see. see *Re Hunter Valley*

Developments Pty Limited; Anthony Neary Walker; Mende Brown v the Honourable Barry Cohen Minister of Home Affairs and Enviroment [1984] FCA 176; (1984) Admn 96-034 /; 3 FCR 344 (5 July 1984)

An application must be made within 14 days of the applicant becoming aware of the order. However VCAT has the power under s126 of the VCAT Act to extend various time limits set by the enabling enactment or the VCAT Rules. A request for an extension of time should be included in the application for review and must address the factors set out in the *Hunter Valley* decisions.

c. Reasonable excuse for not attending

This is usually the main focus of a review application. The applicant will need to provide evidence that they had a reasonable excuse for not attending the initial hearing.

While the threshold should be low, there are certain common excuses that have a real risk of being insufficient to justify a review being granted.

Examples of reasons where a review application may be rejected include:

1. I had to go to work and I couldn't afford the time off.
2. I had to pick up the kids from school.
3. I have a persistent mental health condition.

The issue with many of the above examples is that they are foreseeable, and represent a persistent circumstance. A persistent circumstance cannot be used as an indefinite defence to non-participation in a hearing.

If parties provide additional evidence to substantiate the gravity and circumstances as being an exceptional issue, this will likely increase the chances of successfully obtaining a review. For example:

1. I had to go to work and I couldn't afford the time off.
   Employer authors a letter stating that the employee couldn't be granted the requested time off on the particular date to short notice, or lack of other staff to deploy.

2. I had to pick up the kids from school.
   A letter from a social worker that supports circumstances around the welfare of the children, and that no other reasonable means of collecting the children and arranging for the safe care and welfare of the children on this occasion. Arrangements have now been made.

3. I have a persistent mental health condition.
   A medical letter indicating the condition is persistent, but on the particular dates in question, the severity of the condition made it impracticable and inappropriate for the person to attend.

Ironically, a statement to indicate that the person simply was not aware of the hearing may be more justifiable than some of the above issues.

If the applicant has taken steps to seek an adjournment or otherwise prior to the initial hearing (i.e. the hearing they missed), this will likely make it untenable to lead evidence that the person was not aware of the impending hearing.

It is paramount that parties always tell the truth in the course of proceedings. If not they run the risk of perjury, offences under section 136 and 137 of the VCAT Act, or adverse findings with respect to credibility which would likely lead to their application for a review being refused.

i. Examples of reasonable excuses[1]

- *Human Error*
  MWT Group v The Open Door Coaching Group (Civil Claims) [2007] VCAT 2228 (23 November 2007) at [5] a reasonable excuse does *not* exclude "human error". In *Afrasiabi v Manningham CC [2009] VCAT 1746 (25 August 2009)*, the tenant went into the wrong hearing room and missed the hearing.

- *Irresponsibility in checking mail, non-English speaking backgrounds, disorganization of mail in large household.*
  Panwell Pty Ltd & Anor v Zekiri (Retail Tenancies) [2010] VCAT 417 (9 April 2010) at [24] "irresponsibility does not of itself mean that he did not have a reasonable excuse for not attending the hearing."

- *Note receiving the notice of hearing*
  Dwyer v Housing Industry Association Ltd (Anti-Discrimination) [2009] VCAT 411 (13 March 2009) at [24]. *"His sworn evidence was to the effect that he did not receive the notification from the Tribunal."*

- *Notice of hearing sent to wrong address*
  Samlidis v Hepburn SC [2010] VCAT 1921 (29 November 2010)at [3]

[1] Examples take from Pizer's Annotated Act (5th Ed) Jason Pizer QC and Emrys Nekvapil, p752-753. Extensive examples can be found here.

"I am satisfied that the applicant had a reasonable excuse for not attending or being represented at the hearing on… because a hearing notice was not sent to his correct address"

- *Reasonable reliance*
  Tisdall v Colac-Otway SC [2010] VCAT 265 (22 February 2010)
  Making reasonable investigation into probable hearing time and not receiving notice (for example going on holiday or interstate trip), as well as legitimate expectation that review application would not be opposed.

- *Ill health of party to proceeding*
  South Gippsland SC v Dimopoulos [2009] VCAT 33 (13 January 2009)

- *Related third party in urgent need of support that is "reasonable and understandable"*
  Filer v Yarra Ranges SC [2009] VCAT 1804 (31 August 2009). *The elderly mother of a party to proceeding fell and called to them for assistance despite a lack of specific medical evidence to substantiate.*

ii. VCAT informing itself

In determining if a tenant has a reasonable excuse in stating they were simply not aware of the hearing, VCAT may inform itself. Under section 98 of the VCAT Act, VCAT retains records of correspondence and documents being sent to parties. VCAT may refer to its own records to infer whether documents ought reasonably to be expected to have been delivered. This may assist the VCAT to make a decision whether a party ought to have known about the hearing that they are alleging they didn't know about.

Evidence such as registered post, despite being uncollected may make a review more challenging in the absence of any contrary evidence that the document was deemed served. See *Clark v Hirst & Anor (Domestic Building) [2013] VCAT 232 (28 February 2013)* at [5].

d. Meaning of reasonable case to argue:

The second element that a party applying for a review must prove is that they have a reasonable case to argue in relation to the initial Order (see s120(4A)(a).

A reasonable case to argue is essentially an argument to show that the outcome of the initial hearing would have been substantially different from the one already made, had the applicant attended the hearing. In this regard, when the Tribunal determines whether the matter should be reopened, it essentially peers behind the review threshold to assess the likely order that it might make if it grants the review.

There is no longer a clear silo between the review application and the substantive remaking of an Order.
In *Allesch v Maunz [2000] HCA 40; 203 CLR 172; 173 ALR 648; 74 ALJR 1206 (3 August 2000)*, *Kirby J states:*

> *"Similarly, there will be no miscarriage of justice if the party affected by the impugned order cannot demonstrate an arguable case that reopening the matter might reasonably produce a materially different result which is more favourable to that party. If the process by which that order is made is flawed, but it is not shown that the outcome might reasonably be materially different, the party offended by the process may be upset by a sense of procedural injustice. However, upon analysis, that feeling will not find reflection in the ultimate disposition of the rights and duties of the parties with which the law is finally concerned. Correction concentrates on any supposed error in the ultimate judicial orders and not exclusively on the procedures leading to, or reasons given for, those orders."*

Nonetheless, it is entirely possible that a review may be granted, and the order is nonetheless affirmed.

i. Reasonable case to argue in the context of Rent Arrears – All evidence to the date of the review hearing is relevant

In cases that relate to rent arrears, the Tribunal will often consider relevant whether the tenant has continued to make payment of rent even since the possession order and up until the review application being heard.

This represents a dilemma for many tenants who are considering whether to conserve their money for relocation purposes and deal with the debt later, or whether to demonstrate their best and genuine efforts to obtain a payment plan.

Another argument that can be made to justify a possession order being reopened is the tenant seeks not necessarily to have the possession order set

aside, but to at least ask for the warrant to be delayed (see 352 of the RT Act). This is available for all possession orders, except for damage danger, and premises that are unfit for habitation. See also s 333 RT Act.)

e. Meaning of any prejudice:

The third element that the VCAT must consider when determining a review application is whether hearing and determining the application would cause prejudice to another party (see s120(2A)(b)).

Generally, the yardstick of "justice and convenience" is weighed against the nature of the interests in disputes. For example, a tenant may seek a review of a possession order that would render them homeless may be granted a review, despite the landlord arguing that the prejudice to them of attending another VCAT Hearing be considered.

In most cases, the decision to grant leave will weigh the nature of what is in dispute, and whether any prejudice can be remedied by a cost orders or damages, should they be considered necessary after the final determination.

While under section 120(4C) costs and security are possible to be ordered as a condition of the review being granted, this is seldom required under the residential tenancies list.

See also: *Mendonca v Mason [2013] VSCA 280 (4 October 2013)*

i. Costs Risks or Security on a Review

(4B) The Tribunal may hear and determine an application under this section despite subsection (4A)(b) if the Tribunal is satisfied that any prejudice that may be caused to a party may be addressed by an order for costs under section 109 or an order for reimbursement of fees under section 115B or both.

7. Effect of passing of time

The Tribunal can take into account the circumstances at the time of the review; a change in circumstances could render it more or less appropriate to revoke, vary or affirm an existing order and the possible impact on the parties. (See *Tomasevic v Victoria* [2005] VCAT 1525 at [13])

8. The review application – general comments

The review application has become more complex because it is used across multiple lists of VCAT.

While it is best to use the prescribed form where possible, it does not need to be used in order for a review to be sought. Provided the request substantially complies with rule 4.19, the request should be accepted and processed by VCAT as a review application.

Any deficiency such as knowledge of the VCAT matter reference number or the exact date of the order will not generally be fatal to an application. Provided the Order and the applying party is identifiable for VCAT, and that the context of the document is clearly seeking a review, this should be sufficient to stay any warrant.

Any defects or deficiency in a review application may be cured under section 126 of the VCAT Act and consideration should be given to section 53 of the *Interpretation of Legislation Act 1984*.

9. How detailed does the review application have to be?

Rule 4.19 regulates what should be in an application. However, where the review is time critical it is more important to lodge the document, rather than to wait and gather all the relevant evidence if the reasons for the review are complex.

The completion of the review application can be by way of summary and do not have to be extensive. The two keys fields to address:

- *Reasonable excuse for not attending*
- *Reasonable case to argue*

In relation to a reasonable case to argue, this can be kept relatively simple and does not need to be extensive or pleading about the whole argument.
It is however, beneficial to attach any primary evidence if this is available.

In relation to completing the field for reasonable case to argue, it may be as simple as:

"I wish to have the opportunity to respond to the

> *allegations made in my absence and have a procedural fair opportunity to provide evidence, make submissions to the Tribunal to mitigate my loss or have the application dismissed or struck out."*

Unless the registry otherwise requires it on the review application, the content, veracity and submissions of a reasonable case to argue are really matters to be determined at the review hearing.

Once the review is filed, parties may file subsequent information or documents to increase the merits of the review application. As per general practice, any document intended to be relied upon should be provided to all other parties at least 2 business days prior to the hearing where possible.

While the VCAT registrar has powers to request further evidence, the main issue upon filing the review is that the application for review is accepted by registry and the matter is listed for the review hearing.

10. What powers do the Tribunal have on a review being granted?

- There are only two possible outcomes to a review application. Either the review is granted and the matter is reopened, or the review is refused, and the original orders will be affirmed.

- In some contexts, it may be necessary for VCAT to make ancillary orders from the review application to bring the original VCAT Order up to date with items such as warrants dates etc.

- If the review is granted there are four outcomes that are possible:
  - Affirm – the order may be affirmed and remain unchanged
  - Vary – the Tribunal may substantially change the order
  - They may totally revoke the order and either dismiss or strike out the application.
    - Dismissal – means the application is unsuccessful and there is no right to reinstate in the future.
    - Strike out – is when there *may* be a right of reinstatement depending on the reasons for the strike out.

- Upon a review being granted, it is still possible for the applicant to withdraw their application under section 74 of the VCAT Act (take note

of any potential costs issues in doing this).

11. Second review applications:

What if you missed your review hearing? Can you apply for another review?

A person cannot make more than one application to reopen an order in respect of the same matter without leave of the Tribunal. (4.19 generally & 7A.15. Re-opening an order of the *VCAT Rules 2008*).

According to this rule, the advocate or the individual in respect of whom the orders were made must attend the VCAT in person between 9:30am and 12:00noon or 2:00pm and 4:00pm on any day on which the Tribunal sits. Essentially, the person must go before the Tribunal to explain why they missed the review hearing.

When the application is lodged for the reopening of the missed review application, the applicant must give notice of the application to all other parties. In other words, while the application is still ex parte, a copy of the application should be forwarded to all interested parties.

Under section 71 of the VCAT Act, if the registry refuses any application they must advise the applicant they have a right to refer the application to the Tribunal for a review of the rejection. In most cases, this is unlikely but important to be aware of if there is a complex review history.

At the review hearing the Tribunal considers whether the applicant has a reasonable excuse for nonattendance and if so whether the original order should be revoked or varied.

12. Opposing a Review

Reviews are general granted, but as part of the review hearing, parties are given the opportunity to challenge whether the matter should be reopened. This can be addressed by challenging each of the grounds set out in section 120.

For this reason, it is good practice to contact the other party well prior to the

hearing and make them aware of the hearing. Use of registered post and other evidence of communication such as email or sms can be helpful.

In some cases, if the party provides a credible, legitimate and reasonable excuse, and it is foreseeable the review will be granted. It may be efficient for parties to consent to the review being granted on the papers and have the Tribunal adjourn the matter off to a time that is convenient for both parties. (see s100(2) VCAT Act)

13. Summary

Reviews comprise a small percentage of applications to VCAT but this right is of great importance and significance with respect to reopening debts that have been unchallenged, preventing unnecessary evictions, and ensuring there are no surprise evictions.

FAQs

1. **How can I lodge a review application?**

Review applications can be made in person in paper, by email, fax or ordinary mail. Caution should be used with registered post because of the time delay. Preference should be given to fax and email with a follow up call to VCAT to confirm receipt.

2. **I sought an adjournment and this was rejected. If I miss the hearing will I be barred from seeking a review?**

There is no automatic barring from being able to *apply* for a review. However, if a party applies for an adjournment and it is refused, it may make it difficult for the party where there is clear evidence that they knew about the hearing. If the party then applies for a review, the Tribunal will need to be satisfied the reasons for the adjournment request are also acceptable as a reasonable excuse for not attending.

Accordingly, it may be more challenging to get the review, but certainly not impossible. The Tribunal determines each matter on a case by case basis.

In many cases, when parties seek an adjournment, they have failed to provide sufficient evidence to justify the adjournment. While parties should never rely on a right of review, it may be possible to successfully obtain leave to reopen a matter despite an adjournment being refused.

3. **I didn't attend because I wanted representation at VCAT. Is this a reasonable excuse?**

Parties do not have a right to representation at VCAT. Only in circumstances of a possession order and notice to vacate does a tenant have a right to representation under clause 67 of Schedule 1 of the VCAT Act. The seeking of legal advice or representation is much better framed around seeking an adjournment as a matter of procedural fairness, rather than being used as a reasonable excuse for non-attendance.

Notably, real estate agent fees for representation of a landlord at the Tribunal are generally tax deductable. This remains a systemic issue for tenants in accessing VCAT where there is a loss of wages or annual leave. Accordingly, unrepresented tenants may wish to object to estate agents appearing on behalf of landlord under section 62 of the VCAT Act, as an

estate agent should satisfy the definition of a professional advocate. There is little precedent of such objections by tenants which require the landlords to personally attend.

4. Can I still ask for a review even if my adjournment request was refused and I did not attend the hearing?

Yes. But the evidence that you knew about the hearing will be demonstrable on the documents for your adjournment, and it will make satisfying VCAT that you had a reasonable excuse for not attending the first hearing more challenging. It is certainly important to try even if the adjournment was refused. This is especially the case if there is a strong case to argue.

It is usually best practice to seek a proper adjournment (use proper form, demonstrate efforts to seek consent), and supply the relevant evidence to substantiate why you are not able to attend. This must be made at least two clear business days before the hearing.

A "duty Member" of the Tribunal will essentially make a decision on the documents in the absence of both parties. If you do not serve a copy of your adjournment request to the other party or demonstrate your efforts to obtain consent, it is unlikely an adjournment will be granted.

For more information about adjournments, please see VCAT's practice note here.

The Tribunal will not generally be sympathetic if you are seeking an adjournment on the basis of a condition or circumstance that is unlikely to change in the near future.

Accordingly, if a person is unable to attend for good reasons, it may be more appropriate to seek leave to appear on the telephone at the earliest time possible once the hearing is listed, or with the application.

Telephone attendance request form

5. DHHS – Maintenance Claims Against Tenants (MCATS). I have an MCAT from 8 years ago that I didn't know about. Can I reopen this matter?

The 14 day time limit runs from the time the person becomes aware of the

Order.

Usually, such a massive delay occurs when a tenant exits a Director of Housing premises and does not provide a forwarding address. They then sustain a private tenancy for some time, and then later apply for a Director of Housing Bond loan or to be listed on the Director of Housing's waiting list, at this point they learn of the existence of a compensation claim against the tenants through VCAT.

Accordingly, the 14 days runs from when the tenant becomes aware of the existence of the order. The reopening of such orders may be opposed, but the same principles set out in this practice note apply.

Evidence of engaging with the Director about the existence of the Order may be pernicious. See: *Director of Housing v Johnson (Residential Tenancies) [2017] VCAT 285 (24 February 2017)*

However, there is little harm in applying for the review and seeking to negotiate on the matter in the interim. In some cases the Director will have evidence to substantiate the claim, in other cases there may be a lack of evidence, in particular on the point of fault.

In this regard, the burden of proof is on the tenant to show a reasonable case to argue, but upon the review, the burden to re-establish the basis to affirm the order should remain on the landlord as being the applicant in first instance.

It is important to review an MCAT clearly to distinguish maintenance to the property, fair wear and tear, damage and appropriate depreciation of items.

The reason it is important to review an MCAT is that despite many clients being "judgement proof" (their Centrelink income cannot be garnished), the Director can require payment as a pre-requisite to being listed on the Director of Housing's waiting list. It may therefore be necessary to apply for a review to reduce the economic burden and the duration of a payment plan to the Director during a tenancy. See policies:

Introduction and conditions of public housing offers
Policy Statement – Tenant Property Damage
Operational Guideline – Tenant Property Damage

Particular attention should be paid to the Director of Housing's policy if the tenant fled in circumstances of family violence as this may significantly reduce

liabilities under an MCAT if the policy can be satisfied. It is usually best to apply for the review of the MCAT, seek an adjournment by agreement and then provide evidence of the family violence for the purposes of an internal appeal to the director. If the matter is still not resolved, the review and challenge to the MCAT can be adjudicated by VCAT.

For more information about internal appeals see:
http://www.housing.vic.gov.au/appeal-social-housing-decision

6. I attended the first hearing of my matter, but I missed the second one. Can I still apply for a review?

The right to review applies to each separate hearing, not each VCAT matter. So if the matter is part heard, the fact that you attended one of the hearings and missed a subsequent one does not preclude you from reopening an order if the matter has been determined.

Usually, if a party does not turn up, a decision will be made in favour of the attending party if there is sufficient evidence.

See: *Lockwood v Ecoliv Buildings Pty Ltd [2017] VSC 109 (6 April 2017)* at [143]; VCAT Act s 120 (4) requires the Tribunal to be convinced that a person had a 'reasonable excuse' each and every time that that person fails to attend or is not represented at a hearing.

7. My landlord has sought a review. Can I oppose the review being granted and can I seek costs?

Generally costs are not ordered under the RT list because of the domestic nature of the dispute. However, you can certainly oppose the granting of the review on the same basis as outlined in this practice note. Costs may be sought where the review is made and it is found there was clearly no case for the landlord to argue, or a demonstrable lack of an excuse for attending the hearing in first instance.

8. When does the 14 day time limit to apply for a review start to run?

The right to apply for a review will run for 14 days from the day that a person became aware of the existence of the Order. It is unclear whether a person needs to know the actual content and details of the Order, or whether it is sufficient that the person knew about the existence of an Order in relation to a particular dispute.

Generally, the Tribunal is (within reason) understanding of long term homelessness, mental health and other factors affecting capacity which may affect a person's genuine understanding of an order being made in their absence. So it may be possible for a review about an Order that was made several years ago, if you can show the genuine awareness and meaning of the Order was only recently apprehended.

Efforts to respond or negotiate the effects of the order shortly after an Order, and without any review application being lodged at that time, may be fatal to a review claim made several years later on the basis of homeless or other dispositions affecting capacity, health and awareness of legal proceedings or serviceable address.

See: *Director of Housing v Johnson (Residential Tenancies) [2017] VCAT 285 (24 February 2017)*

9. Are there two separate hearings when I apply for a review?

No. Generally, once a review application is made, the review hearing will be listed and if the review is granted, the Tribunal will immediately re-hear the substantive matter as part of the same proceeding.

10. What evidence should I take to the hearing?

Parties should always bring all of their evidence in a well-structured and organized manner. Parties should always be prepared that the matter will be heard. Both to seek leave and have the matter heard, substantive and material evidence should be provided and brought to the hearing.

11. How can I tell if the matter is a review hearing?

Usually, people already know. But VCAT uses an identification number system R[year]/xxxxxx/01. The last two digits indicate the matter has gone back and had a review involved somewhere in the course of proceedings.

The absence of any party to proceeding is noted on the footer of the Orders.

12. Will the review go before the same Member as the original Order?

A review application does not necessarily have to go before the same Member, in some cases this may be advantageous and disadvantageous in others.

13. Is a review hearing a *de novo*?

De novo means a new hearing as if the Tribunal has never heard anything about the matter. In this regard, the hearings are not strictly de novo. However, if a new Member has heard the matter it is likely to be treated afresh.

If the Member hearing the reopening application also presided over the matter where the original orders were made, there is unfortunately no basis under the VCAT Act to seek that the Member is replaced. However, the applicant should be afforded the same right to procedural fairness as if the hearing has started afresh. This means that the applicant should be afforded the right to make submissions, examine witnesses and put their arguments forward as is their right under sections 97, 98. And 102 of the VCAT Act.

14. What if the Member hearing my review application also heard the original hearing in my absence?; Reconstitution and Apprehended Bias

There have been some matters where the Member that heard the original matter have insisted their conclusions have been correct, and appear to lack an impartiality that may be present with a new Member. An apprehension of bias is a serious allegation and should not be made lightly. It is however, possible under section 108 of the VCAT Act.

See: *Snowden v Halpern (Residential Tenancies) [2017] VCAT 687 (15 May 2017)*

15. How quickly will my review hearing be listed?

Depending on the types of application and how busy the list is, review applications can be listed as quickly as two or three days, or it may be a couple of weeks.

It is best practice if you are the applicant for the review, to call VCAT to confirm the review and continue to call VCAT every day or so to check if the matter has been allocated a hearing time.

You can call VCAT on (03) 9628 9800.

16. Can I apply for a review of a possession order after the warrant

has been executed?

You can still apply for a review even after a possession order is made. This may be relevant where factual findings of the Order may be sought to be challenged. i.e. A Possession may find the tenant owed $2000, and in fact the tenants wish to dispute this factual finding on the basis that only $500 is owed.

Generally, it is held that the execution of the warrant validly terminates a lease and that there are no clear powers in the enabling enactment (RT Act) to allow a court or tribunal to reinstate the tenancy.

While theoretically possible if the premises remains empty and there has be reprehensible and misleading conduct in an ex parte application for possession, there *may* be grounds under s123 of the VCAT Act, and section 184(2)(j) of the ACLFTA. But there is *no* case law to support this proposition.

If the premises has been relet, such wrongs (if any) are best redressed by way of compensation as it is impossible to reinstate the tenancy.

17. What if the police are at the door?

Best practice is to contact the police and ask them to come back in a few days if provided for under the warrant. The police practice guidelines suggest that the police should make reasonable efforts to contact the tenant a few days prior to the eviction to make them aware of the actual date the warrant will be executed. It is in all parties' interest that no one is evicted by surprise. This is an autonomous administrative decision by the police, and it is up to the police when the warrant is to be executed.

18. I paid my rent arrears off after the possession order, and the landlord said don't worry about applying for a review. What should I do?

It is very dangerous to have a live possession order as they are generally valid for 6 months. Without a review, there is little to stop the landlord from purchasing a warrant to evict, even if the rent is up to date. It is therefore best practice to apply for the review and get a payment plan or seek for the application to be withdrawn if the landlord is agreeable to this.

It may be possible if there is a written agreement between parties to apply to VCAT for an injunction under s452 of the RT Act, and s123 of the VCAT Act to prevent the landlord from breaching their agreement not to evict you. Such an agreement lacks consideration from the tenant, and may be best framed technically as a deed, or founded in an action of estoppel.

19. Can a review set aside the effect of a warrant being executed?

Generally speaking once a warrant has been executed by the police, the Tribunal appears to lack a clear power to reinstate a tenancy that has been lawfully executed under the Act.

This is limited clear authority on this point. Parties may wish to seek advice in relation to their circumstances.

It is therefore best practice to get the review application off before the warrant is executed. If the warrant has not yet been executed, the VCAT will generally put a stay on the right for the police to execute the warrant until the review application has been heard and determined.

20. What do I do if I missed my review hearing?

If you miss your review hearing, an applicant for a review will need to seek this review application in person before the Tribunal and explain what has happened.

It is sometimes common that the review hearing will come up before the notice of hearing for the review is delivered. Hence evidence of post stamps, or collection of mail can be highly relevant in the context of a second review application.

21. What if they refuse the review?

If leave to reopen the matter is refused, that is the end of the matter unless the party wishes to appeal the decision to the Supreme Court under s148 of the VCAT Act. Typically, appeals pursuant to section 120 of the VCAT Act are made when the Tribunal has *unlawfully* (as compared to unreasonably) refused to grant leave to reopen the matter.

In other words, it must generally be shown that the decision to refuse to reopen the matter was a decision that the Tribunal could not have lawfully made; Either the tribunal has not acted with the requisite level of procedural fairness; it took into account, or failed to take into account relevant consideration which would have altered the outcome of the decision; or that it reached a conclusion to which it could otherwise not have reached in accordance with the law and evidence before the tribunal. Parties seek to appeal a decision should seek advice.

22. My client is CALD, who can help with a review? Registry obligation to assist in review application.

Under section 67(4) of the VCAT Act, "*the principal registrar must give reasonable assistance on request to a person in formulating an application.*"

This does not mean the registrar can give any legal advice. However, substantial procedural guidance in completing forms to achieve the ends that are sought by the application can be sought. This is of particular assistance for people of culturally and linguistically diverse backgrounds.

CALD Applicants can also request that an interpreter attend their review hearing to enable them to present their application. (see s63 of VCAT Act)

23. Can I make a counter claim and request it to be listed at the same time as the review application?

It is possible to make a review application and also make a new fresh application that is heard alongside the matter that is the subject of the review. This will specifically be done where the matters relate to the same factual situation.

For example:
A tenant may miss a possession order for rent arrears, and seek to lodge an application for compensation for an unlawful rent increase. This relates to the same facts (what is the correct amount of rent), and requires the tenant to make an application to be compensated.

Similarly, a compensation claim for a lack of repairs may be lodged concurrently with the review and a cover letter be included to request the rent arrears review and hearing be listed concurrently with the tenant compensation claim for the purposes of an offset of any claim.

24. Does a review application have to go back to the same Member?

Generally not. A review application is an application to reopen the matter. The evidence, which is sworn, should be consistent from the initial attending party. While the hearing is not strictly *de novo,* if a new member is hearing the matter this may be beneficial as there is not assumed information or prior evidence which has been put to the Member in your absence.

If there is a perceived interest in the Member protecting the Order made in

your absence, parties may seek reconstitution under section 108 of the VCAT Act. But there needs to be real grounds of apprehended bias for a Member to find that it is appropriate for them to set themselves aside.

25. Can landlords seek reviews of a decision made in their absence?

The right to reopen an order exists for any party to a proceeding. The same principles as set out in section 120 of the VCAT Act, apply to landlords in the same way that they apply to tenants.

26. I was not a party to the proceeding, but I think I need to reopen the order as an "interested party"?

If you are an interested party, you may still have a right to reopen the order if there is a substantial effect on you, and upon the review you have a reasonable case to argue that would alter the outcome of the hearing. This may be by way of injunctive relief, or the direction of a monetary sum.

There is a combination of sections that can facilitate such an application.

Under section 120 of the VCAT Act, the section commences "*A person in respect of whom an order is made*...". This phrase is construed broadly and has often been seen to be grounds for a non-party to a proceeding to apply for a review to rehear the matter, and essentially have them joined as a party to the proceeding. This is bolstered by the following two provisions.

Under section 452 of the RT Act, a person who is not a landlord or tenant may make an application to the Tribunal on the basis that "the person has an interest and personal involvement in the agreement", sufficiently to justify the leave to apply.

Under section 60 of the VCAT Act, if a person's interests are affected by the proceeding they may be joined (this may be a question of benefit or detriment).

27. My bond has already been released. Can I still apply for a review to get my bond back?

Yes. The Tribunal has broad powers to affect the rights under the RTA. If the

bond has already been released, the interest in the amount of the bond is still traceable to the landlord. Accordingly, an application for review can still be granted.

28. Decisions on the documents (time saver when parties agree for consent orders)

If parties agree to a decision, parties can always consent to a review being granted and substitute orders by consent (providing the Tribunal considers it has jurisdiction to make the proposed orders).

This can be done under section 100(2) of the *Victorian Civil and Administrative Tribunal Act 1998*. Parties can email their respective consent to the orders on the basis of the documents and the ascent to any draft minutes of consent (draft orders).

It is important to note the Tribunal may make appropriate alteration or ancillary orders if they see necessary.

29. I cannot get to the hearing, can I still put information on the VCAT file?

There is no rule that prohibits people from asking for documents to be placed on the file for the Member to consider. VCAT as a matter of practice does not however want voluminous documentation to be lumped on a file. VCAT is quasi-inquisitorial, and may inform itself of anything it sees fit, but this does not absolve people from a need to self-advocate.

So, critical documents may be placed on file, but it is always preferable to attend a hearing or at least appear on the phone.

30. Co-tenant A attended and Co-tenant B did not. Does each tenant have a right of review?

Technically yes. But the right to apply for a review is not the same as being granted leave to successfully reopen a matter. There has been inconsistency in approach by the tribunal in this regard.

It is not uncommon for the Tribunal to ask if an advocate or tenant is representing all the tenants. This is because each tenant affected by the Order may have a right if one tenant is considered not to be "representing" the other. In this regard there is an unclear interaction between agency and the

principles of joint and several liability under the lease agreement.

Practically speaking it is unlikely that each tenant has a real prospect to successfully open an Order unless they could show a demonstrable case to argue and their interests have been perniciously affected by the conduct or lack of conduct in the original hearing.

The Tribunal will of course not indulge a perceived abuse of the right of review, but in some circumstances an application for review may be relevant where there has been a family violence, breakdown in relationship, a severe inter-tenant dispute (i.e. one tenant may be judgement proof and disregard the economic interests of another), or complex issues of sub-tenants, rooming houses, or a cohort of interested parties that may dispute whether or not they are tenants for the purposes of liability under an order.

31. When you attended, you were not in a clear state mind. Can you seek a review?

It appears unlikely.

While it is becoming more important of decision makers to ensure that the parties appearing before them are competent and capable of understanding what is going on in a hearing, there still remain circumstances where the meaning of "appear" may be adverse with respect people with very poor capacity.

Particular attention to parties with chronically poor mental health or other capacity issues may be raised but this appears more an issue of procedural fairness and is more likely to be the subject of appeal about what ought to have been apparent to the decision maker in the circumstances.

To date, there is no clear decision that has enabled a party to deny they were present in the hearing but did not appear due to lack of capacity.

In *Goddard Elliott (a firm) v Fritsch [2012] VSC 87 (14 March 2012)*, Bell J observes at [566]:

> *"So also a person who is mentally ill but able to be physically present has a strong claim to an adjournment. As was held by Handley JA in Murphy v Doman, [154] in both cases there is a serious risk that the continuation of the proceeding by the court would be a denial of natural justice."*

Accordingly, it is far better for a person to seek an adjournment on the basis of mental health to enable them time to access support, or at a time where the person may be more lucid than not turn up. Considerations may also be necessary to factors of confidentiality as described in s19 of the Open Courts Act if using medical reports to support a case for an adjournment.

32. Warrants to Evict by Sheriff of the Supreme Court. Can I seek a review?

If you are approached by a Sheriff of the Supreme Court because the landlord has defaulted on their mortgage you should seek advice immediately. These are complex matters and an application as an interested party may be possible to VCAT or the Supreme Court but costs implication may be possible in the latter.

In many cases, it may be a question of compensation and whether the landlord is impecunious subsequent to the mortgage default.

33. I am an advocate and the client hasn't turned up. Should I enter the appearance?

It is a very dangerous action for an advocate to attend a hearing without a client. There may be some exceptions for matters which are strictly procedural or an agreement has been reached and is being formalized by court order.

As a general principle, the attendance or representation at a hearing can effectively prevent the matter from being reopened, and is pernicious to the client's best interests should they wish to later apply for the review.

It is recommended that the client's attendance is a necessary condition of the advocate making the appearance. If client does not attend, the advocate should not enter the hearing for the purposes of a formal appearance.

If it is necessary to communicate a client is running late or otherwise indisposed, this may be communicated to the Member via the registry, or in dire circumstances inform the Member in the hearing, and be very specific stating that you are not appearing on their behalf unless they are in attendance based on the retainer. Again, there should be some caution about communicating the reason for the client absence, as this may be relevant to the review application.

If the appearance is entered the advocate generally should not and cannot lead evidence unless they have personal knowledge of the matter. Statements

to the effect of "I am instructed that…" are possible, but this is not good practice and extinguish the right of review.

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.*

Example of Scenario:

Tony Smith lives at 4 Hobsons Road, Footscray 3011. Tony rents his house privately from Larry Landlord.

Tony's rent is $1200 per calendar month, and he is about $1600 in arrears because he lost his job.

On 10 February 2017, Tony got a notice to vacate as he owes $1600 in rent arrears.

Tony recently found a new job with his first pay day coming up in a week.

On 14 March 2017, the police knock on Tony's door and tell him that they have a warrant to evict him and that they will be around in 2 days to evict him.

Tony instructs that he never got any notice of hearing, and never received a copy of the application from the landlord.

Tony seeks assistance.

ORDER Ref No: R2017/12345/01

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST
RESGISTER OF PROCEEDINGS

APPLICANT(S):
Landlord Larry and Lana Landlord

RESPONDENT(S):
Tenant Tony Smith

RENTED PREMISES: 4 Hobsons Road, FOOTSCRAY 3011

BOND NUMBER(S): 347421

Application under *Residential Tenancies Act 1997* possession s322, 246

The Tribunal finds that:

1. The landlord gave the tenant not less than 14 days' notice to vacate when the tenant owed at least 14 days' of rent.

2. The rent which is $1200 per calendar month, is paid to 17 February 2017, the rented owed today is $1183.56.

3. The bond is $1200.

The Tribunal orders and directs that:

1. The landlord is entitled to possession.

2. The tenant must vacate the rented premises by 10 March 2017.

3. The principal registrar, at the request of the person who obtained the possession order and on the payment of the prescribed fee, shall issue a warrant of possession to be executed within 14 days after the date of issue. (Any request must be made no later than 10 September 2017).

   Warning to tenant: If you fail to vacate the rented premises by the date stated in this order you be forcibly vacated by a member of the police force or an authorised person carrying out a warrant of possession.

H Jones, Member
10 March 2017
No appearance by or on behalf of the tenant at the hearing scheduled at 10:30am on 6 March 2017"

HJ 20/03/2017 10:30am
T Smith

SAMPLE

Step 1 (optional)

If a tenant knows or thinks they have missed a hearing, you can contact VCAT and request the documents, reference number and a copy of the Order.

If the matter relates to an eviction, it is also good to check if the warrant has been purchased and directed to the police.

If the Orders contain the footer indicating no appearance was made by on behalf of a tenant. It is appropriate to lodge the application as soon as practicable. You can see this in the Orders above.

If matter is urgent, you may need to skip this step rather than wait on the results from a request for documents from VCAT.

Step 2. – Lodge the application for review

Complete the application for review. This can be lodged by email or faxed.

Applications for review can be sent:

Email: renting@vcat.vic.gov.au
Fax: (03) 9628 9822

Once the application has been lodged, you should call VCAT to confirm receipt of the review application and the warrant has been stayed.

Ordinarily VCAT will contact the police to ensure they are aware the warrant has been suspended until further order by VCAT. However, it is good practice to call the local police station and ask for the officer who is responsible for residential tenancies warrants. Ensure they are aware of the application for review.

It is good practice to also have a copy of the email printed, or the fax receipt should an officer turn up with the intention to evict after the review application has been lodged.

Example Application for Review

APPLICATION TO REOPEN AN ORDER

I, Tony Smith
[Full name]

of 4 Hobsons Road, Footscray 3011
[address]

make this application under section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998.

My telephone/mobile number is 401111222 My email address is tsmith@email.com

The VCAT reference number for the case is Unknown

I first became aware of the order on 14 March 2017 [dd/mm/yyyy] in this way:

I had the police knock on the door on 14 March 2017, and they told me they would be evicting me in 2 days time under a warrant.

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APPLICATION TO REOPEN AN ORDER (continued)

The reason I did not attend and I was not represented at the original hearing is:

I did not know about the hearing.

I have a reasonable case to argue about the subject matter of the original order because:

I would like to seek a payment plan, and even if this is not accepted I'd like to ask for more time before the warrant is executed. I understand I may have a right to request that the warrant can be postponed for up to 30 days under section 352 of the Residential Tenancies Act 1997 (RTA). The order must be reopened to allow me to raise these matters.

CERTIFICATION

I certify that:

- the facts given on this form are true to the best of my knowledge, information and belief
- I am aware that it is an offence under section 136 of the *Victorian Civil and Administrative Act* 1998 to knowingly give false or misleading information relating to this application

Signed: _____

Date: 14/03/2017
[dd/mm/yyyy]

Step 3. New Notice of Hearing

Once the review application has been received by VCAT, the former order is usually suspended by the registrar or a "duty Member". Duty Members are ordinary Members of the Tribunal that sit and make procedural orders in the absence of both parties to facilitate the proper hearing of matters.

A new notice of hearing will be sent out the parties to the proceeding telling them when and where to turn up.

In some cases, review hearings may come up in only a few days and in orders cases it may be 2 or more weeks.

In cases to do with possession orders, it is strongly recommended to regularly call VCAT until a hearing date is set down. It has been known on a rare occasion that registered or express mail may only arrives after the hearing

date causing a further delay and frustration for all parties.

Step 4. Return Hearing

When trying to reopen an order, the Tribunal will first consider the nature of granting leave for Order to be reopened. If the tribunal is satisfied that the order should be reopened on the basis of the grounds set out in section 120 of the VCAT, they will in most cases *immediately* proceed to hear the substantive matter.

If the issue is complex or likely to take a further 20-30 minutes, it is likely the matter will be adjourned before another Member.

The Tribunal will usually produce two separate but related orders; One order will address the issue of the granting of the review and any other ancillary orders that are necessary in the interim. The second Order will be the substantive order in substitution of the original order. The second order may vary, affirm or set aside the original Order.

Examples of the Orders for Tony are as follows.

On leading evidence Tony was able to reopen the order and have a new order that he comply with an affordable payment plan instead.

Example Review Order

ORDER Ref No: R2017/12345/00

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST
RESGISTER OF PROCEEDINGS

APPLICANT(S):
Landlord Larry and Lana Landlord

RESPONDENT(S):
Tenant Tony Smith

RENTED PREMISES: 4 Hobsons Road, FOOTSCRAY 3011

BOND NUMBER(S): 347421

Application under the Victorian Civil and Administrative Tribunal Act 1998 review of tribunal order and if granted immediate re-open Section 120

On hearing the evidence of the tenant –

The Tribunal finds that:

1. The tenant applied for a review within 14 days after become aware of the Tribunal's Orders dated 8 March 2017 (R2017/12345/00) and had a reasonable excuse for not attending or being represented at the hearing.

2. There is a reasonable case to argue and that there is sufficient grounds to justify the reopening of the matter.

The Tribunal orders and directs that:

3. The application for review is granted and the order dated 8 March 2017 is suspended pending a further hearing on the proceeding by the Tribunal now.

M Gregory, Member
20 March 2017

MG 20/03/2017 10:30am
Tony Smith

SAMPLE

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ORDER Ref No: R2017/12345/01

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST
RESGISTER OF PROCEEDINGS

APPLICANT(S):
Landlord Larry and Lana Landlord

RESPONDENT(S):
Tenant Tony Smith

RENTED PREMISES: 4 Hobsons Road, FOOTSCRAY 3011

BOND NUMBER(S): 347421

Application under *Residential Tenancies Act 1997* s322, 246

The Tribunal finds that:

1. The landlord gave the tenants not less than 14 days notice to vacate when the tenant owed at least 14 days' of rent.

2. The rent which is $1200 per calendar month, is paid to 17 February 2017, the rented owed today is $1183.56.

3. The bond is $1200.

The Tribunal orders and directs that:

1. The tenant shall pay the landlord rent together with a total of $1600 per calendar month (being rent of $1200 per calendar month plus an additional $400 per calendar month) commencing on 1 April 2017 until the rent owed is fully paid and rented is paid in advance.

2. The application is adjourned to a date no later than 1 October 2017 to be heard by any Member of the Victorian Civil and Administrative Tribunal. The application may be renewed by the landlord giving the principal registrar notice in writing but if the application is not renewed on or before this date it shall be considered withdrawn.

M Gregory, Member
20 March 2017

MG 20/03/2017 10:30am
Tony Smith

SAMPLE

TENANTS VICTORIA