

Residential Tenancies Practice Note 14-03

Mould

Background

Mould can be a significant problem for tenants and residents, especially during the cooler months of the year. It can have detrimental health effects and can also damage the rented premises and personal property.

It is a systemic problem in substandard housing and should be taken seriously as an environmental and public health issue.

There are a variety of ways that mould can be dealt with under the *Residential Tenancies Act 1997 (Vic)* ("RTA"), depending on the severity of the mould and its impacts on the tenant. The RTA however does not specifically address mould.

The practice note below primarily refers to tenants and the relevant provisions of the RTA. There are similar provisions that apply for rooming house and caravan park residents. Please contact the Tenants Union of Victoria if you require assistance determining which sections of the RTA are relevant to you.

Common causes of mould

Mould can be a consequence of poor building design or poorly maintained services. It is useful to gather evidence in relation to the history of mould at the rented premises. A tenant might consider:

- talking to the neighbours about the property; and/or
- locating previous tenants; and/or
- talking to VCAT about previous orders in relation to the property that may indicate that the landlord had knowledge of mould; and/or
- Issue a summons on the real estate agent to provide any correspondence in relation to the property and the presence of mould in relation to past or present tenancies

Mould may persist after the tenant has cleaned an affected area. If so, the tenant should consider whether there are any repairs required to be made to the premises which would prevent the mould returning. The tenant may need to seek expert opinion about this. This may incur costs, so quotes and the free non-urgent repair inspection service of Consumer Affairs should be considered.

In many cases, mould is the result of bathrooms with no, or inadequate, ventilation fans. A tenant cannot compel the installations of fixtures; however, it may be appropriate for a tenant to negotiate with the landlord to have ventilation installed or to seek orders to from VCAT for an appropriate remedy. This can be framed as a general dispute under section 452 and 507A as a consumer law matter. It will be up to VCAT to assess if such a remedy is appropriate with respect to ensure the premises are safe.

It is also possible that the mould is a structural issue with the rented premises. A tenant can ask the landlord to repair these structural issues once they have been identified.

There are many household items that can contribute to mould in a rented premises. Tenants should be vigilant to ensure that they are not contributing to the cause of mould. Examples of these items include:

- atmospheric nebulizers; or
- fish or reptiles enclosures with heaters; or
- laundry or bathroom habits.

Determining the cause of the mould will provide a tenant with guidance as to what option is most suitable for them in relation to rectifying the issue or vacating the premises. See: [When you want to leave](#).

What are the issues?

Damage to property

Mould can spread from one surface to another by contact or it can be air borne. This can lead to damage to the rented premises, to personal property and health complications.

Section 62 of the RTA obligates tenants to report damage to the rented premises to the landlord as they become aware of the damage and as soon as practicable. It is recommended that a tenant reports the damage in writing and attach photos to avoid any misunderstanding. *Note: You cannot get a breach of duty for failing in section 62 but it can be highly relevant to any compensation claims by either party.*

Tenants may wish to use the Rent Right App produced by Consumer Affairs.

A tenant may be able to seek compensation from the landlord if mould damages personal property, and the landlord has failed to take reasonable steps with respect to their liabilities.

To claim compensation, a tenant must establish that the landlord has breached the RTA and as a result of that breach, the tenant has suffered a loss.

An example of a breach by a landlord is that the landlord has failed to maintain the premises in good repair. This could include windows nailed shut, leaking pipes in wall cavities, broken exhaust fans, and any other fitting not operating as it was intended.

A tenant should keep receipts for any costs incurred and should take photographs of any goods that need to be thrown away.

Compensation for damaged goods due to mould is generally the second hand market value at the time the goods were damaged, rather than the new replacement value. It may be worth considering the costs of cleaning any affected goods rather than disposing of the goods and seeking compensation. This is an economic decision that will need to be considered on a case by case basis. For more information refer to Practice Note 14-04 Claiming Compensation.

Health

The presence of mould can make a rented premise an unhealthy living environment. It can also exacerbate existing health issues and can in extreme cases, make the house unfit for habitation, and result in injury.

Advocates should enquire to establish whether there are any health conditions that may render a tenant or their family more sensitive to the effects of mould. Mould can be of particular concern for people with weakened immune systems or respiratory conditions¹.

Tenants can seek confirmation about the type of mould present in the premises by:

- Obtaining a mould specialist report (at the tenant's cost). Recovery of such costs will be at the discretion of the Tribunal.
- Getting medical tests to determine if the mould is negatively affecting a person's health.

Tenant's responsibilities

Under section 63 of RTA the tenant has a responsibility to keep the rented premises reasonably clean. The tenant should perform normal cleaning duties.

A tenant also has a duty to report damage to the premises to the landlord.

Depending on the severity of the mould, this may not be sufficient to control the proliferation of mould. This is especially true in cases such a leaking pipes or flood damage. The standard required of a tenant to keep a premises reasonably clean will be a factual finding by the tribunal.

If the tenant has discharged their duty to keep the premises reasonably clean, then the tenant should consider the repairs pathways available to them under the RTA.

A tenant's health is paramount, and if routine cleaning or contact with mould is having any adverse effects on health, tenants should make application to the tribunal as soon as possible and also see their doctor.

A tenant should also take photographs of the mould to use as evidence if any dispute arises with the landlord about the mould. These should be done before and after cleaning, so that it can be demonstrated if the mould is recurrent.

¹ Department of Health Victoria "Mould and Your Health" Factsheet January 2014.

Get the Mould Fixed

Mould can be challenging to fix. While it is generally not the tenant's responsibility (unless the landlord can show that the tenant is at fault), it is important to consider the options and methods available to tenants to ensure that it is fixed properly

Note: It is important that the *origin and causes* of the mould are treated and not just the surface mould.

- Act collaboratively with the landlord to work out what works need to be done to remedy the issues, and make a clear written agreement which may include contributions from each party. In some cases, this may require additional works such as an installation of a ventilation fan. Note: the statutory obligation to put the premises in good repair and take all reasonable steps to *maintain* that good repair is incumbent on the landlord under section 68.
- Tenants may engage a cleaning company who offer free quotes for cleaning, and provide this to the landlord with a breach of duty notice request the work be done immediately.
- Tenants should also note that a tenant cannot install or make modifications such as the installation of fans without the landlord consent or Orders from the Tribunal (see section 64 RTA).
- Apply to VCAT for urgent or no urgent repairs depending on the circumstances.
 - TIP: Any orders from the Tribunal or in an agreement should consider specifying the use of anti-mould paint where repainting is required.
- Write a letter to the landlord to place them on notice that if any personal injury is suffered as a result of their failure to act, that this letter may be produced in any court or tribunal as evidence that the landlord was aware of the mould in the premises. (Legal advice should be sought from a personal injuries lawyer with respect to such claims).

Repairs and Delays Caused by Landlord's Insurance Claims

Often tenants are left waiting for the landlord or owner's corporations insurance to rectify the mould issue. In such situation, the tenant can still apply to VCAT to put a timeline in which time the repairs must be completed. If the landlord is compelled to fix the issue before the insurance is able to, the landlord will need to seek indemnity from their insurer.

Under many insurance policies, insured parties must also act to mitigate loss. So if a tenant can produce to an insurer prolonger reports of over a long period of time that have been ignored by the insured, the insurance policy may become void.

For this reasons, tenant may wish to write a letter to the landlord indicating if the issue is not swiftly resolved, any repair issues or delays will be reported to their insurer should this information be obtained at some time in the future.

Mould caused by Owners Corporations

Under section 46 and 47 of the *Owners Corporation Act 2006 OC Act*, owners' corporations have duties to main common property and services in good repair. Often, mould or moisture build up can occur in roof spaces, balconies or other common areas. These spaces are often under the control of the owners' corporations. In such cases, it may be appropriate to join the owners' corporation as an interested party to the dispute along with the landlord at VCAT (see section 60 of the *VCAT Act*).

For more detailed advice in relation to complex leaks or mould issues between structures, tenants should attend TUV's drop in service.

Rooming houses

The *Public Health and Wellbeing Regulations 2009* ("PHWR") apply to residencies in rooming houses. They generally do not apply to tenancies under Part 2 of the RTA. The regulations can be relevant if a resident reports mould in a rooming house, especially if it is a reoccurring issue.

Relevant regulations of the PHWR to consider include:

- [R. 18 – Maintenance of the prescribed accommodation](#)
- [R. 19 – Cleanliness of the prescribed accommodation](#)
- [R. 28 – Condition of registered premises.](#)

The above regulations can be used in support of an application to VCAT for repairs or compliance, or can be the basis for infringement notices and prosecution by Consumer Affairs Victoria.

What should you do?



1. Repairs

Mould can be treated as a repair issue under the RTA.

Under section 68, the landlord has a duty to maintain the premises in good repair.

Under section 67, a landlord has a positive duty to take all reasonable steps to ensure their tenant's has quiet enjoyment of the rent premises.

TUV is of the opinion that if a house cannot be maintain mould free without modifications, despite the tenant performing reasonable cleaning, then the house is neither in a state of good repair nor "fit for purpose" according to the Australian Consumer Law (see section 61 of the *Australian Consumer Law*).

[See also commentary under Practice Note Claiming Compensation – the definition of Good Repair].

Urgent or non-urgent repair?

Generally, mould is considered a non-urgent repair, as it does not generally meet the definition of urgent repairs in section 3 of the RTA.

Strategically, a party may make an application for urgent repairs under section 73 of the Act especially if there are real health risks. The worst likely outcome is that matter will be dismissed or adjourned so the tenant may follow the non-urgent repair process.

Urgent Repair

Urgent repairs are defined include any repair or damage that makes the premises unsafe or insecure². This may extend to severe mould, or safety issues relating to a tenant or child's health, or other health dispositions that are exacerbated by the presence of mould.

To obtain repair orders, a tenant should notify the landlord of the mould, preferably in writing with photos using a Notice to Landlord or Breach of Duty Notice. The request should also communicate that the tenant considers this an urgent repair if applicable.

If the landlord fails to carry out the repairs or refuses to do so, a tenant can apply to VCAT under section 73 of the RTA for an urgent repair order.

There is no prescribed time in which urgent repairs must be done. It is therefore advised to apply as soon as possible and only withdraw once the works have been completed. If a hearing is withdrawn VCAT and the landlord should be notified as soon as possible.

Urgent repairs are done by completing the General VCAT Application under the Residential Tenancies List and file pursuant to section 73 of the RTA.

For Example:

Claim details - What do you want VCAT to do?
<p>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.*</p> <p>Section 73 - Urgent Repairs - Severe Mould Proliferation - it is unsafe and affecting the health of occupants</p> <p>Section 452 - General Dispute - Any other Orders the Tribunal sees fit to ensure the mould does not recur</p>

Alternatively, if the matter is urgent and the repair has been reported in writing, the tenant can pay for the repairs (if the cost of the repairs is under \$1,800.00) and seek reasonable reimbursement from the landlord.

If reimbursement is sought, the onus will be on the tenant to establish that the mould repairs meet the definition of "urgent" as defined in the RTA.

For this reason, it is generally not recommended that tenants pay for the mould repairs because of the ability for the tribunal to make a factual finding that the mould was is a non-urgent repair, and subsequently reimbursement may not be possible.

² Section 3 (1) (definition of 'urgent repairs') (k) *Residential Tenancies Act 1997* (Vic)

Non-urgent repairs

A tenant should first serve their landlord with written notice requesting the repairs, i.e. mould removal. A “Notice to Landlord” form (which is available from Consumer Affairs Victoria) can be used for this purpose.

Notices located here:

[Notice to landlord of rented premises \(Word, 2 MB\)](#)

[Notice for breach of duty to tenant/s of rented premises \(Word, 468 KB\)](#)

Parties can also use the Rent Right App.

It is recommend that a breach of duty notice is given at the same time to increase the strength of the tenant’s position again any lease breaking should they be frustrated and eventually wish to leave.

This notice should specify what repairs are required and allow the landlord 14 days to carry out the repairs. The tenant must make the rented premises available for the repairs to be carried out. Proper notice in relation to entry must still be given according to the Act unless the tenant consents otherwise.

If there is a repair issue that is exacerbating the mould, such as a roof leak, the tenant should note this and request that this issue is also repaired.

If the landlord fails to repair the mould within 14 days, Consumer Affairs Victoria can inspect the premises and prepare a repairs inspection report. The tenant must request the inspection in writing and enclose a copy of the written notice to landlord.

Notices located here:

[Request for repairs inspection or rent assessment \(Word, 118 KB\)](#)

Consumer Affairs Victoria will then render a report regarding the works needing to be done to both the tenant and landlord. The tenant may then apply to the Victorian Civil and Administrative Tribunal (VCAT) under section 75 of the RTA for an order that the repairs be carried out and compensation paid to the tenant, if applicable.

Claim details - What do you want VCAT to do?
<p>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.*</p> <p>Section 75 - Non-Urgent Repairs - Mould and all other associate words as indicated by the CAV Repairs Inspection Report dated (dd/mm/yy)</p> <p>Section 452 - General Dispute - Any other Orders the Tribunal sees fit to ensure the mould does not recur</p> <p>[optional*]</p> <p>Section 209 - a compliance order to ensure that the works are performed in accordance with the order made under section 73 and the breach of duty notice. See attached breach of duty notice in accordance with Rule 7A.07(5) of the VCAT Rules</p> <p>Section 77 - Rent special account - all rent be paid on trust to VCAT until the necessary works are performed.]</p>

- * There is no reason at law, if a breach of duty notice has been given, why the Tribunal cannot also give a compliance order pursuant to section 209 and 212 of the RTA. For more information see 3 (below).

Rent Special Account

Tenants with persistent mould problems that remain unrectified may also wish to make an application pursuant to section 77 seeking an order that the tenant pay rent into the rent special account until the mould is rectified.

- *Parties may also apply in relation to the rent special account under section 77 once a notice has been given, where there is concern the work will not be performed, or performed in a timely manner. This is high discretionary.

2. Breach of duty

Failure to fix mould can be a breach of duty by the landlord under the RTA, if the landlord can be shown to be at fault.

Potential breaches include:

- Section 65 - that the property was not provided in a reasonably clean condition as required by section 65 of the RTA. This section is only available before and at the time of taking possession of the property. A tenancy cannot terminate on the grounds that it is not reasonably clean.
- Section 67 - that the landlord has breached the tenant's quiet enjoyment.
- Section 68 - the rented premises have not been maintained in good repair.

A breach of duty notice can be used by a tenant to either claim compensation or obtain a compliance order or potentially terminate a lease.

3. Termination for Non-Compliance with a Compliance Order

A breach of duty notice must be served in accordance with section 208 of the RTA. A breach of duty notice can be obtained from the Consumer Affairs Victoria website or use the Rent Right App.

If the landlord has not satisfactorily complied with the breach of duty notice within fourteen days, a tenant can then apply to VCAT for a compliance order pursuant to section 209.

Claim details - What do you want VCAT to do?
<p>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.*</p> <p>Section 209 - the tenant seeks a compliance order that the landlord will put the premises in good repair by dd/mm/yy, specifically that the landlord [insert actions required and any prohibitions that may be relevant].</p> <p>The compliance order to is sought to ensure the works are performed in a timely manner and address properly.</p> <p>See attached breach of duty notice in accordance with Rule 7A.07(5) of the VCAT Rules</p>

If a compliance order is obtained from VCAT, if the landlord breaches the compliance order, the tenant is entitled to give a 14 day Notice of Intention to Vacate pursuant to 239 of the RTA. A valid compliance order must contain the caution state in section 212 (4) at the bottom of the compliance order.

In It is paramount the tenant has quite incontrovertible evidence that at the time the Notice of Intention to Vacate is given, the compliance order has been breached. While section 319 does not strictly apply, the notice ideally should contain the evidence intended to rely on to prove the non-compliance with the compliance order. It must be in writing and state the date upon which the tenant is to vacate (being not less than 14 days from the time of the giving of the notice.

4. Successive Breach Notice of Intention to Vacate

This is a challenging provision for tenants to utilize. It required 2 clear breaches of duty to be given for breaches in relation to the *same* duty provision (section 67 or 68 most commonly), and then upon the third breach of the same provision, 14 day notice of intention to vacate in accordance with section 240.

Again there is no requirement to give details under section 318 of the RTA for there to be a valid Notice of Intention to Vacate. However, for the same reasons list in 3 (above) reasons should be provided and evidence attached of the third breach.

Note: if a third breach is given (which it is advised not to), the tenant must wait the full 14 days before giving their notice of intention to vacate.

The risk if either 3 or 4 is unsuccessful the tenant will likely be placed into a lease break situation. However, the failure to perform statutory and contractual obligations under the tenancy will still be highly relevant for the purposes of section 211 and reducing liabilities for an alleged lease break claim.

5. Unfit for habitation – Ending the Tenancy

If mould is the result of a structural defect and is presenting a real risk to a tenant's health or safety, a tenant can terminate their tenancy agreement on the basis that the rented

premises are unfit for human habitation. Termination can be effective from the day that the notice is given or a later date.

A tenant can terminate either by seeking a declaration at VCAT that the property is unfit for human habitation or by serving the landlord with a notice to landlord of rented premises terminating their agreement under section 238 of the RTA.

It is important to caution a tenant that terminating on these grounds carries a high evidentiary burden, and if the Tribunal determines the premise were habitable at the time the notice was given, there is a risk of substantial economic liability because the tenant may be deemed to have broken the lease: see our practice note #10-04 for further information on unfit for human habitation.

6. When you get a mouldy house – Termination Before Taking Possession

If a tenant obtains keys for the rented premises and attend the premises to find that there is a substantial mould issue, a tenant may seek to terminate if they have not commenced sleeping in the premises. This can be done by giving a notice to landlord pursuant to section 266 and outline that the tenant is of the opinion that it is not in good repair or not legally available for use as a premises.

This issue will be determined by the tribunal. If it fails, the tenant will likely be subject to lease break principles.

In the alternate, tenants may apply to the Tribunal for a determination that the premises are unfit for habitation prior to giving the notice. In the case of section 226 notices, tenants cannot commence living in the premises prior to the giving of the notice or the hearing being determined if such a declaration is sought.

Claim details - What do you want VCAT to do?
<p>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. *</p>
<p>Example:</p> <p>(5. above) TERMINATION FOR UNFIT FOR HABITATION Section 452 - Declaration premises is unfit for human habitation and that the tenant is entitled to give a notice of intention to vacate pursuant to section 238</p> <p>(6 above. TERMINATION FOR TERMINATION BEFORE TAKING POSSESSION Section 452 - Declaration that the tenant is entitled to terminate pursuant to section 226 , on the basis that the rented premises is not in good repair, not legally available for use as a premises, been rendered unsafe or unavailable for occupation.</p>

Claims for compensation

A tenant may wish to seek compensation as a result of a mould infestation. Generally, compensation should be sought either at the end of the tenancy or once the mould has been rectified so that a tenant can fully quantify their loss.

The onus will be on the tenant to establish that they reported the mould infestation to the landlord and that they followed one of the above processes to attempt to have the mould fixed, or their tenancy terminated.

If the mould issue has been rectified and the tenancy is continuing, a tenant should first serve a breach of duty notice upon the landlord nominating the amount of compensation sought. If there is no response or satisfactory agreement reached, tenants should proceed to seek compensation by applying to VCAT pursuant to section 209 of the RTA.

If the tenancy has come to an end a tenant can make an application under section 210 of the RTA for compensation on other grounds.

Section 211 of the RTA sets out what matters VCAT may take into consideration when considering a compensation application.

For more details see our “*Claiming Compensation Practice Note*”

Relevant Case Law

Below are some examples of cases where mould has been considered by VCAT and similar tribunals around Australia. While these decisions are not binding upon VCAT, they can be persuasive:

- *Eskander v Catanchin (Residential Tenancies)* [2014] VCAT 381 (4 April 2014), where a tenant alleged unfitness for habitation due to mould and gave notice of intention to vacate. The landlord attempted to claim the bond and lost rent as a result of the tenant breaching the fixed term tenancy.
- *Versus (Aus) Pty Ltd v A.N.H. Nominees Pty Ltd (No2) (REVISED) (Retail Tenancies)* [2014] VCAT 454 (22 April 2014), retail lease matter in relation to the existence of air borne mould being a natural phenomenon, and issue of thresholds as to safety upon reletting and abatement.
- *Timms & Simpson v Adams (Tenancy)* [2012] NSWCTTT 53 (7 Feb 2012) where applicants were successful in obtaining compensation for loss of goods and economic loss due to mould and also the resulting inconvenience and loss of amenity.
- *Whitcher & Ors v Leyshan (Tenancy)* [2011] NSWCTTT 351 (5 August 2011), where compensation in form of a rent reduction was awarded where the premises were found to be partly uninhabitable due to mould.
- *Wellman v Hick* [2013] VCAT 1437 (16 August 2013), applicant was found to be entitled to terminate tenancy and to compensation due to breach of landlords duty.

- In *Boyd v Finweb Pty Ltd* [2013] VCAT 1319 (20 February 2013) tenants were awarded \$2,500, a small proportion of the compensation claimed for mould.
- *Berman v Hegarty* [2009] NSWCTTT 452 (18 August 2009) “... many cases involving mould proliferation have come before the Tribunal. Each has been decided on its specific facts, and there is no consistent indication of approach to quantum assessment running through the cases. In the matter of *Filipos & Anor -v- de Burros* [1998] NSWRT 171:51, the Tribunal considered a claim for non-economic loss damages resulting from a chest infection that lasted for about one month caused through dampness. In the present case, whereas there is a similar period, I find that the symptoms experienced by the tenant were of greater physical severity and impact upon his life and ability to carry out his business activities, and provide a home for his daughter. Damages must also be awarded by reference to the present value of money. Having regard to all the circumstances of this matter I award an amount of \$2,000.00 by way of non-economic loss.” Tenants also received an award for rent paid, removal costs, etc.

Other relevant considerations

The Tenants Union of Victoria has been successful in claiming “General Inconvenience” in past cases. This can be useful in circumstances where it is difficult to establish where an actual factual loss has been incurred. Please see our practice note #11-03, Claiming compensation for general inconvenience, for further information.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the Charter”) is useful to consider in tenancy matters. The Charter can be raised to support a cause of action that is before VCAT. For further information, please see our practice note #08-03, The Charter of Human Rights and Responsibilities and the Residential Tenancies Act.

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 can contact us on **(03) 9411 1444**.

[Please report any broken links]

Tenants Union Legal Team