

## Residential Tenancies Practice Note (14-04)

# Claiming Compensation

### Background

A tenant has the right to claim compensation from their landlord if they can establish that there has been a breach of law or contract. The appropriate forum to hear a compensation claim by a tenant is generally the Victorian Civil and Administrative Tribunal ("VCAT").

To do this, a tenant firstly needs to establish that the landlord has breached one of their duties under the *Residential Tenancies Act 1997 (Vic)* ("RTA") or the tenancy agreement, and secondly as a result of that breach, the tenant has suffered a loss, damage or a substantial inconvenience.

A tenant can also claim compensation from a landlord for the overpayment of rent (s39), the return of holding deposits (s50), and claim back a bond not lodged with the RTBA. Strictly speaking these are more appropriately considered refunds rather than compensation.

The onus of showing that there has been a breach of the RTA or the agreement is on the applicant who is seeking compensation. This means that the applicant for compensation must produce the evidence of both the breach and the loss that has resulted from the breach.

Any claim made needs to be *reasonable*. What is reasonable will vary *immensely* in each situation and in accordance with the view formed by presiding Member of the Tribunal.

Compensation claims can also be brought using the concurrent jurisdiction of the *Australian Consumer Law and Fair Trading Act 2012* ("ACLFTA") and s507A of the RTA. [See Practice Notes RTA and ACL, and the jurisdiction options in the General VCAT Application form].

If a compensation claim is pending or awarded, there is no automatic offset against rent due in the future or existing rent arrears. Parties must seek specific orders from the Tribunal. They must be claims heard concurrently to be offset. If monetary orders have already been obtained by the Tribunal, refer to *Enforcing a Tribunal Orders fact sheet* and [VCAT Web site](#).

#### PLEASE NOTE:

This practice note primarily refers to tenants and the applicable provisions of the RTA. There are similar (but not identical) 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.

## Jurisdictional limit under the RTA Compensation Claims

Claims are subject to the jurisdictional limits of the RTA which are provided for in *Part 11* of RTA.

Under the RTA, a tenant cannot claim more than \$9,999. If a party needs to claim more than this, they can invoke the ACLFTA under section 507A of the RTA. This can be done by checking both the RTA and the ACLFTA boxes in the General VCAT Application Form.

NOTE: ACLFTA above \$10,000 claims will attract a higher application fee. (Refer to Costs Fact Sheet of TUV and the Fee Schedule on the VCAT website)

Alternatively, the parties can consent in writing to authorize the Tribunal to determine a matter that is greater than \$10,000. Once the consent is given it is irrevocable and a lawful determination will be binding.

If the ACLFTA is not cited and parties have not consented, the Tribunal should not hear a claim for more than \$10,000, unless the party reduces their claim, or consent to the maximum award being under \$10,000.

The Tribunal can hear medical evidence around the seriousness of an issue for the purpose of determining a matter. However, the under the RTA tribunal cannot award *any* monetary damages in relation a compensation claim for death, physical injury or pain and suffering, including stress and emotional challenges caused by breaches of the RTA or the VCAT proceeding.

## Limitation of Actions

According to the section 5(1) of the *Limitations of Actions Act 1958 (LAA)*, a party to a contract must file a claim within 6 years from the date when the cause of action accrued under the contract. Personal injuries have different time limits and advice should be sought from a personal injury specialist as soon as possible. TUV does not have expertise in personal injuries.

In many cases, a breach may be persistent, or relate to events longer than 6 years ago, such as invalid notices of increase. These are complex issues and advice should be soon as soon as practicable with respect to the effect of section 5(1) of the LAA.

## “Tenant Insurance” - If the tenant has insurance for their person goods

If a tenant has insurance for their personal goods, they should discuss any proposed action for compensation in relation to the tenancy with their insurer first. A payment under the insurance policy may be more beneficial than if the matter proceeds through VCAT.

Any rights which cannot pass to the insurer under the insurance policy via subrogation (a legal doctrine) can be freely taken up and utilized by the tenant. For example the loss of the use of a room from a leaking roof where no personal good were damaged.

However, if the tenant utilizes their rights to obtain compensation under the insurance policy, they will like void their ability to claim on insurance policy if they obtain an unsatisfactory outcome at VCAT. This is because the rights the insurer could take up against the landlord have already been used and are subsequently extinguished.

## **Claiming Compensation under the Residential Tenancies Act 1997**

The strength and merit of most compensation claims will heavily depend upon the proof of communication and the evidence that can be produced to demonstrate the breach of duty, the RTA, or the tenancy agreement, and the proof of the loss that has been incurred.

For this reason, we strongly encourage people to use the prescribed forms available on the Consumer Affairs of Victoria Website in preference to any internal Real Estate Agent Forms.

Alternatively, download **Rent Right App** on your smart phone or tablet.

### **Comments on evidence**

#### **1. Safe storage of evidence**

It is strongly advised that any photos or evidence is retained, scanned and/or copied into the “cloud” or emailed to oneself. It is very common over time that phones or paper documents are lost or disposed of inadvertently, such losses can be dire the compensation claim.

#### **2. Communicate in writing**

If you are dealing with a particularly challenging landlord or real estate agent, you may request all communication to be in writing to keep things civil and have clear records of matters. If matters escalate a restraining order may be sought to enforce communication in this manner.

In these cases, due consideration should be given with respect to which communications are “*without prejudice*” (cannot generally be admitted to court) and which communication is intended to be open or with prejudice (can be admitted to court). Settlement negotiations are generally without prejudice, but it is best to specify.

#### **3. Gather and catalogue evidence as you go**

By the time many people feel they need to make a compensation claim, the matter has not be clearly documented, and it is an intimidating task to compile a full and proper compensation claim (especially if it relates to multiple issues). In many cases, once the matter has escalated neighbours or other parties are aware of the extent of the dispute and may not want to be involved. It is therefore, advised, that if an incident takes place, try and get witnesses or other parties to depose statutory declaration or other statements at the time it occurs.

Use a book of plastic pockets to date and insert evidence or correspondence as you go.

#### **4. Dealing with trades people**

It is not uncommon for a tenant to be approached by tradespeople to do work on behalf of the landlord. It is important to note that many real estate agents use regular tradespeople and for this reason, any reports, assessments or work done may be affected by the bias of a regular client and steady stream of work.

It is also important to identify the type of work that is to be done, and that the tradesperson is suitably qualified. For example, a tradesperson who is not a plumber should never work with or make alteration to gas piping.

You may also wish to record with a smart phone any works that are done such as unblocking of drains, or if electrical gas components are inspected or replaced.

Some trades people are very professional and clean up after themselves, others do not. For this reason it is also recommended to take photos of the area where work is proposed to be done both before and after.

Tenants should always ask to see the licence of the tradesperson and identify what sort of work is proposed. If they refuse to show you a licence when doing plumbing or electrical work, you should call Energy Safe Victoria immediately (03) 9203 9700 or visit [www.esv.vic.gov.au](http://www.esv.vic.gov.au)

If the tradesperson is willing, it is good to get them to write a quick note as to their opinion of what likely to have caused the issue. This is very important to protect against bias reports, or invoices.

Qualified tradesperson will often be required to render compliance certificates and non-prescribed certificates for the works that they have done depending on the nature and type of work.

If you have doubts about the qualification or compliance, you may wish to contact the Victoria Building Authority ([www.vba.vic.gov.au](http://www.vba.vic.gov.au) or T 1300 815 127) or Energy Safe Victoria above.

### **Basis of a Compensation Claim**

#### **Is there a difference between applying under section 209 and 210?**

There are two technical provisions for which compensation claims can section 209 and 210, and the general dispute provision under 452.

Section 209 specifically relates to duty provision and requires a *Breach of Duty Notice* (“**BODN**”) to be given as prerequisite to apply for compensation or a compliance order where a tenant *still* resides in the premises. (VCAT Rule 7A.07)

If the tenant wishes to claim compensation while the tenancy is still on foot, they *must* first serve a breach of duty notice. It is not clear, if the 14 day time limit on the breach must lapse. This will likely depend on the circumstances of whether it is a discrete incident or an on-going loss. As the tenancy is still on foot the duty is still owed.

Section 210 – By comparison, section 210 specifically relates compensation on “other grounds”, meaning other losses caused by breaches other than duty provisions.

This provision can apply in two different contexts.

- Firstly, section 210 can be used once the tenancy has ended because the duties under the RTA are no longer owed.

- Secondly, section 210 can be used to claim compensation for losses other than breaches of duty. This may relate to charges the landlord was not entitled to charge or failure to fulfil terms of the contract, or are contested as excessive such as over paid rent or excessive assignment fees.

It is also encouraged to invoke section 452 in addition to section 209 or 210 as required. Section 452 enables wider consideration and remedies that may be appropriate or ancillary to the main compensation claim. This may include restraining orders, and lawfully offsetting counter claims.

The Tribunal seldom draws a technical distinction between these two provisions. However, the Tribunal is generally interested in whether the parties have communicated and made reasonable efforts to resolve the matter before applying the Tribunal. The breach also serves as a clear indication of when breach was first communicated in writing, although any evidence of the communication can be presented to show that the landlord was not ignorant of the breach or issue.

## Breach of duty

A tenant can claim compensation from the landlord if they can establish that the landlord has breached the duty provisions of the RTA. The duties of tenants and landlords are set out in Part 5 of RTA and defined in section 207. In particular, the duty provisions for landlords are set out in sections 65 – 71 of the RTA. (Section 66 is however excluded for the purposes of a breach of duty, noting that a failure to comply may still be highly relevant to a compensation claim and the factors set out in section 211).

These include:

- [65](#). Landlord's duty in relation to provision of premises
- [66](#). Landlord must give tenant certain information
- [67](#). Quiet enjoyment
- [68](#). Landlord's duty to maintain premises
- [69](#). Landlord must ensure rating compliance for replacement water appliances
- [70](#). Locks

## Making a Claim

### Step 1. Serving a breach of duty, if necessary

When a tenant is still in possession of the rented premises, a claim should first be made by serving a BODN upon the landlord in accordance with section 208 of the RTA. Again noting, a tenant is not required to first serve a BODN if the tenancy has already terminated.

A [BODN](#) pro forma can be found on the Consumer Affairs Victoria website.

#### *Content of the Breach of Duty Notice*

A BODN must be in writing, addressed to the landlord and signed by tenant. Ideally, a BODN should allow 14 days for the landlord to comply or compensate tenant before making an application for compensation pursuant to section 209 if the tenant is still in the premises. (Note: The period of the time under a Rooming House BODN is a significant shorter 3 days).

A BODN must give details of the alleged breach and specify the relevant breach sections, give details of the loss or damage suffered by the tenant, the action required by the landlord to remedy the breach (if possible) and/or compensate the person to whom the duty is owed, and state that they must not commit a similar breach again.

In many cases, where it requires a remedy or a sum on money to be stated, tenants may indicate the specific performance of work or prohibition they are seek in addition to a compensation claim that is to be advised in future. This is because in many cases the breach will persist beyond the date of the notice.

#### *Sufficient Detail in the Breach of Duty Notice*

A BODN should give as much factual and material detail about as breach as is reasonably possible to support the allegation. This is particularly important if the breach notice is intended to be used for alternative purposes such as compliance orders, or termination for successive breaches. If there is insufficient detail or evidence to prove the breach, these other procedures will likely fail and render the tenant liable to lease breaking.

It is recommended as a matter of good practice to attach photographic evidence of the breach to the BODN, and if necessary email any video to the landlord as some issues are no demonstrably obvious from a photograph.

### **Step 2. Making an the application for Compensation**

To make the application, parties simply need to go to the VCAT home page, and locate the “General Application” under the residential tenancies.

- [General Application Form](#)
- [Tenant application guide](#)

The basis of the claim should generally be made under section 209 and 210 and 452 to cover all the relevant bases and avoid any unnecessary technical arguments.

[See the examples application below].

### **Details in the Application**

Rule 7A.10(1) of the VCAT Rules, requires an application pursuant to section 210 to specify:

- The date on which the tenant vacated or abandoned the rented premises;
- The breach of duty alleged;
- The loss or damage caused by the breach; and
- The amount of compensation claimed

### **Completing the Application - Unknown Landlord Details**

Often, a tenant will not know a landlord’s address. If a real estate agent is engaged to manage the rented premises, a BODN can be served upon the landlord care of the agent’s

address. The application may also be amended at the hearing, if it is not correct the relevant agents have attended.

It is important to note, the contract should provide the full name at least of the landlord. If property real estate managers have changed throughout the tenancy, the *landlord* must give notes of any changes and if no real estate agent is involved any longer, they must disclose their full name and address under section 66. It is an offence to fail to do so.

Further, if a tenant does not know the name of the landlord of a property, this can usually be obtained by performing a title search on the address of the rented premises. This costs about \$15-\$30 depending on the documents sought, and can be done from the following site by clicking on Titles and Property Certificates

<http://www.landata.vic.gov.au/>

### **Negotiating (Statutory “Calderbank” type of letter)**

If parties want to enhance their negotiating position they may want to make an open offer in accordance with section 112-115 of the VCAT Act, this can reverse the presumption of costs under section 109 of the VCAT Act. It is still highly discretionary by the Member whether to consider such an award.

### **Private Settlement Agreements**

One of the best ways to promote settlement is to file a VCAT application. A matter can settle at any time prior to the matter being determined by the tribunal and it being considered *functus officio*.

The uncertainty and unpredictability of VCAT will generally drive both parties to consider legitimate offers and negotiations. It is therefore worth exploring the totality of both parties' rights under the tenancy agreement to determine if any settlement arrangement can be made.

Settlement offers are best reviewed by a lawyer. However, as a general guide settlement agreements should:

- Clearly identify the parties
- Clearly identify the rented premises
- Clearly date the agreement
- Contains some recitals or background about how the agreement was to be reached and why
- Clearly state the terms and obligations of the landlord
- Clearly state the terms and obligations of the tenant
- Specifically preserve or destroy any rights which are intended to be extinguished or protected
- Consider any condition precedents (issues of performance or events that need to happen before the other party will be required to perform their obligation).
- Consider any dispute resolutions processes if the agreement becomes frustrated
- Confidential Clauses or Good References to be provided
- Consider the consequences or rights of performance does not occur by a particular date

- Provide relevant account details and dates if payments are to be made
- Be conditional upon signing by both parties and both parties being provided a copy of the signed agreement.
- If the agreement is not executed by a particular date the offer is considered withdrawn.

As a general rule, if a VCAT application is on foot, it should not be withdrawn until the agreement is signed and executed. If the hearing is imminent then parties can simple seek an adjournment.

### **Consent Orders without Attendance Required**

If parties wish to obtain enforceable monetary orders by consent or any other orders by consent, with a right to renewals, both parties may consent to VCAT using “Draft Minutes of Consent” which the Member can make by way of orders without either party attending pursuant to section 100(2) of the VCAT Act. Both parties must consent to the orders being made pursuant to section 100(2). This can save time and be desirable for both parties and the Tribunal.

It is always important to call prior to the scheduled hearing to ensure to minutes of consent are on the file, and are before the Member and then call the following day to ensure the Orders have been made.

### **Comment on Compensation Claims for breaches of section - 68 Good Repair**

There are no minimum standards when renting a private tenancy.

Traditionally, the definition of good repairs has been taken from *Proudfoot v Hart* (1890)25 QBD 42 at 50-53 per Lord Esher. Unfortunately, what is being observed is a significant attrition of the definition of good repair in the following examples:

#### *T v Director of Housing (Residential Tenancies) [2013] VCAT 2195 (11 December 2013)*

The standard of rented premises in the RTA is “good repair”. In *Cooke v Cholmondeley* [1858] EngR 994; (1858) 4 Drew 326 at 327 -328 Kindersley V-C said a building in good repair must be “in such a state that they may be fit for use and enjoyment. They must be put in such a state of repair as will satisfy a respectable occupant using them fairly” and a similar term “in good tenantable repair” was referred to in *Proudfoot v Hart* (1890)25 QBD 42 at 50-53 per Lord Esher who said “The age and character of the house is relevant ...the house need not be put into perfect repair.: it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant ...” and “the age of the house.. the character of the house... and the locality of the house must be taken into account”. While these decisions were made a long time ago (and today I would replace “respectable” with “reasonable”) they clearly set out the standard required by a landlord when maintaining a rented premises.

#### *Vienna v Le (Residential Tenancies) [2015] VCAT 806 (29 April 2015)*

“... was made absolutely clear that the heating vents were not connected and, in particular, the comment in the Hallway section of the condition report that “Vulcan Central Heating is not connected” means that the vents and heating are not functional. I therefore find that the landlord has not breached its duty to maintain the premises in good repair. It may be a very different matter if the premises had been advertised with central heating or if heating vents were in the premises without the comments concerning their functionality disclosed to the tenant in the condition report, but that was not what happened here.”

In relation to *Vienna* above, a condition report under section 35 can be provided after bond is paid *and* after signing the agreement, but before taking occupation. If such exemptions are permitted, then good repair is rendered of little affect save for a standard of safety and any statutory minimum standards as defined by the Building Act, Local Council of other standards for works when premises require repair.

The decision of *Sheilds v Deliopoulos (Residential Tenancies) [2014] VCAT 1556 (26 November 2014)* may fall into error in our opinion, as it appears to inferring or imply an agreement between the parties that the landlord had forbore from rent increases in exchange for a tenant accepting a reduced standard of good repair. The lack of rent increase during the period is, in the view of TUV, is an irrelevant consideration with respect to the definition of good repair.

*In the decision of Jones v Bartlett [2000] HCA 56; 205 CLR 166; 176 ALR 137; 75 ALJR 1 (16 November 2000) Gleeson CJ in states at 23:*

*“There is no such thing as absolute safety. All residential premises contain hazards to their occupants and to visitors. Most dwelling houses could be made safer, if safety were the only consideration. The fact that a house could be made safer does not mean it is dangerous or defective. Safety standards imposed by legislation or regulation recognise a need to balance safety with other factors, including cost, convenience, aesthetics and practicality. The standards in force at the time of the lease reflect this. They did not require thicker or tougher glass to be put into the door that caused the injury unless, for some reason, the glass had to be replaced. That, it is true, is merely the way the standards were framed, and it does not pre-empt the common law. But it reflects common sense.”*

Unfortunately, there are very few clear safety standards with respect private tenancies that are easily accessible to the reasonable person. These safety standards often become apparent when trades persons are replacing items such as windows, or major plumbing or electrical work.

## **Comments**

### ***Safety as a minimum standard***

It is however important to note that the comment in *Jones v Bartlett* relate to occupier liability and personal injuries, and do not necessarily bind the definition of good repair in the RTA. Parties may contend that if the legislation had wanted to draft the wording “safe repair” it could have done so. This may involve argument in relation to the *Interpretation of Legislation Act 1958*.

### ***Proudfoot***

The reliance on *Proudfoot* should not that the meaning of good repair interpreted in this context was decided in 1890 under a scheme upon which the tenant had control of the premises, and the obligation to restore the premises to “good repair” was at the conclusion tenancy. That is the equivalent section 68 obligation was incumbent on the tenant rather than that of the landlord.

Further, the provision as a whole places a *positive and ongoing obligation* on the landlord. The landlord “*must ensure*” as a positive ongoing obligation that the premises are

“maintained” in “good repair”. The adoption of good repair as a threshold appears to be traditionally identified with some degree of proportionality to rent. The objectivity or independence, as compared to proportionality, of the meaning of good repair has not yet been fully examined in the context of the provision as a whole, and whether it is in fact distinguishable in someone from *Proudfoot*.

### **Claiming compensation on other grounds**

Generally, if a tenant is no longer in possession of the rented premises or wishes claim compensation on grounds other than for a breach of duty provision, an application for compensation can immediately be made under section 210 of the RTA, as no breach of duty is required before filing an application with VCAT. There are a few exceptions.

### **Failure to Comply with Terms of the Lease**

As a general principle of contract law, the written terms of the agreement are taken to be the conclusive bargain and oral terms of representations made in the course of negotiations will general not be considered.

If additional terms are placed in the lease, or can additionally be proven to be terms that were relied upon by the parties in entering the agreement. Parties may then apply for either specific performance (the terms in the contract be performed), or for compensation based on the loss of that term not being performed.

The critical aspect of such a claim for compensation is to establish on the balance of probabilities that the matter is question formed a term of the agreement.

### **Acts of God (Force Majeure)**

Force majeure is a defence to a contract terminating – an act of god or frustrating event beyond the control of the parties. In many cases, where there is a natural disaster or event that causes damage to the premises, the landlord may not initially be at fault. A tenancy does not automatically termination. Therefore, if the landlord unreasonably delays, or parties do not terminate in accordance with 238 and 243 to end the tenancy (these are statutory recognition of Force Majeure), an issue of fault may arise for a breach of duty. While there is an obligation to mitigate loss (which may include termination), the Member will have to consider the options and an objective consideration of conduct of parties.

Force majeure does not formally exist as a cause for termination under the RTA, but it is important to recognize the duties under the RTA continue until termination occurs in accordance with the Act (s216), is usually in circumstances where the landlord is not capable of making good the tenancy agreement.

- Example 1. if there is a large storm, and a tin sheet is dislodged despite comply with the relevant Australian Standards for vertical wind forces, the landlord will be unlikely be liable for any immediate damage if water leaks through the roof and damages the tenants goods while they are away.

However, if the landlord does not repair the roof within a reasonable period of time (likely immediately) after the issue has been reported, then subsequent water damage to the tenants goods or loss of use of the property may attract liability for breaches of section 67 and 68.

- Example 2. If the premises burns down, and the tenant moves out into a hotel. The tenant will not have a guaranteed right to recover the full amount of their hotel expenses *ad infinitum* if the issue is prolonged by the landlord waiting on his insurer to do assessments with respect the large number of works. The tenancy does not automatically terminate upon premises being severely damaged.

See:

*GARDINER v AGRICULTURAL AND RURAL FINANCE PTY LTD [2007] NSWCA 235 (6 September 2007)*

### **Is knowledge of the landlord necessary?**

This is one of the most controversial issues in relation to compensation. There are no minimum standards for private tenancies (there are *some* minimum standards for rooming houses).

Generally speaking, a landlord cannot be held liable for repair items for which they are not aware. Hence, it is paramount as soon as tenant *becomes aware* (see section 62) of damage or a defect in the property it should be reported (preferably in writing via email if available and a follow up call).

When completing condition reports, it is important to tests all items in the house to ensure they function correctly even if it is not seasonably appropriate. Heaters, windows, doors, dishwashers, toilets, showers etc. Not discovering issues on the condition report will not be critical but it is exceptionally helpful in progress the issues.

According to section 65 and section 226 of the RTA, rented premises should be in good repair at the commencement of the tenancy. Further, according to section 61 of the Australian Consumer Law there is a guarantee as to fit for purpose (this relates to both services and products).

This aspect of responsibility has seldom been tested at VCAT but is open for interpretation. That is, that the statutory guarantee may extend to issue such as spontaneous rupture of pipes of hot water systems that have not being maintain in accordance with manufacturers standards of manuals, or expected life spans. Again, the results from these disputes will vary and are generally unpredictable.

### **Causation and Remoteness**

Causation relates to who has caused the damage, and essentially follows similar principles to negligence as to whether or not the person who has caused the damage can be held liable.

Example:

- If a tenant reports that the heater in the bathroom is not working correctly, and then the premises subsequently burns down due to a fault in the bathroom heater. It could be argued it has been caused by the landlord's failure to respond and ensure the premises are in good repair.

The issue of remoteness will address the issue of whether it was so far-fetched and fanciful that the house would catch on fire that the landlord could not be held responsible. In this case, there is likely liability.

See:

*Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313; (1997) 146 ALR 572; (1997) 71 ALJR 1428 (14 August 1997) (also see *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7; 162 CLR 479 )

In *Northern Sandblasting*, the court endorses a Canadian decision to hold balance between the duties of the landlord, and the foreseeability of injury or loss to the tenant.

*"While it can be argued that the mandatory language of the Act does impose strict liability, I think the appropriate test to apply under our Residential Tenancies Act [nb. Not Victorian RTA] is the common duty of care. I do not think that the Legislature intended to impose liability without proving lack of care or diligence on the part of the person on whom the duty is imposed. In my opinion the landlord has a duty to see that the premises are as safe as reasonable care and skill can make them. This is not an absolute liability and does not cover defects, such as latent defects, which could not be discovered by the exercise of reasonable care and skill. As the landlord is responsible under the Act to keep the premises in good repair he will be liable for defects which are discoverable by the exercise of reasonable care and skill.*

*In concluding that the appropriate standard is reasonable care, I concur with the view expressed by the Ontario Court of Appeal in McQuestion that an interpretation of strict liability would place too heavy a burden on the lessor. ... I think the test of reasonable care is the one which is most consistent with the provisions of our Act. ... This will not impose an undue hardship on the landlord and will afford a reasonable measure of protection to the tenant."*

### **Reimbursement of Utilities**

One such exception relates to a claim for compensation for utility charges that have been incorrectly paid by one party, when the statute renders the other party liable.

Section 55 of the RTA states that a tenant should first give a notice to landlord with the relevant utility bills attached. Once given the landlord must repay then tenant within 28 days. If the tenancy has ended, or payment not been made after 28 days of service of the notice, the tenant may then apply to VCAT to be reimbursed.

This does not apply for excessive bills caused due to a lack of good repair such as a burst water pipe, or malfunctioning hot water service. Such claims may also wish to include the ACLFTA in relation to services supplied by the landlord being fit for purpose but there have been varied results in such applications.

### **Reimbursement of Repairs**

Like utility reimbursement, repair reimbursement under section 72 applies only for urgent repairs. A tenant may recover reasonable costs (up to \$1800 GST inclusive) for urgent repairs on the basis, the tenant had first attempted to take reasonable (proportional) steps to communicate with emergency contact details furnished under section 66 by the landlord or landlord' agents and the repairs have not been done.

Section 72 requires that if a tenant has paid for urgent repairs, that they must first serve a notice to landlord and attached a copy of the invoice for the repairs. If this is not paid, tenant may apply for reimbursement by way of compensation and attach a copy of the notice to the landlord and the invoice to the application.

General, reimburse particularly, should be authenticated for the purpose of enforcement.

## How to estimate a Compensation Claim

### Method of Estimating Compensation for Loss of Quiet Enjoyment

While there is no prescribed methodology of estimating a compensation claim, TUV often uses the following table as a means of demonstrate how the quantum of compensation has been estimated with respect to a loss of quiet enjoyment, and related breaches such as a breach to maintain in good repair.

#### Basic formula:

$$A \times B \times C = \$ \text{ compensation for the loss of benefit of the service}$$

$$A = [\text{total number of days without the benefit}]$$

$$B = [\text{daily rent}] = \$ \text{ monthly rent times 12 divided by 365}$$

$$= \$ \text{ fortnightly rent divided by 14}$$

$$= \$ \text{ weekly rent divided by 7}$$

$$C^* = [\% \text{ estimate of loss}] =$$

\*It is critical that the tenant clearly identifies the severity of the loss in *their* opinion.

Ultimately, the award is highly subjective will determined by Tribunal. Thus, a tenant should always be prepared for a wide variation of decision in relation to the loss.

Strategically, this uncertainty may promote a landlord to settle if there are other disputes on foot.

It is our view that the claim should be generous to allow the Member to consider the maximum compensation that tenant is eligible to obtain in the circumstances. But it should not be so generous as to raise questions as to credibility. The tradeoff is that if the tenant is unlikely to be “substantially successful” within the meaning of 115C of the VCAT Act and therefore not recover their application fee.

### Appeals

Once fault is established, quantum is general a finding of fact and is almost never able to form the basis of an appeal. If someone disagrees with the quantum of compensation they are awarded there is generally no recourse to reopen the matter at VCAT. If a tenant has concerns legal advice should be sought. [See practice note VCAT Appeals 12-01]

## Relevant Considerations by the Tribunal when determining a Compensation Claim

Factors affecting a claim for compensation may include:

- The cause of the loss (intentional, not maintained, force majeure (act of god))
- The delay in attending to the repair or breach, once the landlord becomes aware of the issue.
- The physical structure of the house; number of rooms, bathrooms, in the house.
- Alternative or secondary systems serving the similar function
- The common uses and frequency of uses of the facility within the household
- Possible indirect losses such as fees or service charges that have had no benefit (?)
- The severity of the conduct

## Mitigating Loss – Conduct of the Reasonable Persons

In a recent decision of *Fabre v Lui* [2015] NSWCA 157 (10 June 2015) in a joint decision, Meagher J states:

As a general rule, a defendant's individual attributes are not imputed to the reasonable person (see *Glasgow Corporation v Muir* [1943] UKHL 2; [1943] AC 448 at 457; *Joslyn v Berryman*; *Wentworth Shire Council v Berryman* [2003] HCA 34; 214 CLR 552 at [32] per McHugh J). However, it is unnecessary to examine the ambit of this principle here because the present case should be determined on the basis that the ordinary householder, being the relevant reasonable person, would not ordinarily have experience in installing rangehoods. The respondent therefore had no relevant characteristics different from those of the ordinary householder.

## Common Examples of Compensation Claims

Common Issues for Which Compensation May be Brought;

- Loss of quiet Enjoyment
- Inconvenience
- Illegal Eviction (terminate of a tenancy without a warrant being executed)
- Illegal Entry

- Being displaced due natural disaster, fire or other major interference with property that may rendered it uninhabitable (parties should consider rights under 452 and 238 at the earliest possible time in relation to staying at hotel or motels for extended periods of time).
- Compensation For Sales Campaigns, Open Inspections and reduce amenity while extensive repairs are undertaken
- Reduction of Services or Restrictions of Uses of the land (see also section 44)
- Failure to comply with additional terms of the lease, such as later installation of air conditioning
- Misrepresentations as to services present in the property (advertise with secured car parking) and a no car park is provided at all
- Utility Bills which have resulted from defective services, faulty appliances or reported leaks
- Premises not being separately metered
- Lease Breaking by the Landlord - Costs associated with having to move because the landlord conduct or omissions legal required the tenancy to terminate (such as incorrect zoning usage or fires caused by reported electrical wiring)
- Lease breaking by the Landlord – Costs associated with the landlord defaulting on the Mortgage of the property.
- Unlawful disposal of goods or personal documents left behind
- Overpaid Rent (s39) or invalid notice of rent increase (s44(5))
- Cleaning or similar work a Premises that was not provided reasonably clean, or other works lawfully performed by the applicant that are the statutory duties of the respondent. (note generally tenants should first give an opportunity for the LL to redress the issue, if it is refused or ignored parties may seek this as *quantum meruit* this general does not apply to improvements to the property that have been undertaken in breach of section 64 of the RTA)
- Recovery of security deposits where tenancy agreements have not been entered into, but monies have been paid; i.e. bond and rent paid, prior to citing or signing a written agreement and taking possession of the rented premises. (pursuant to section 50 of the RTA)
- Contributory Liability in relation to a burglary – locks reported as faulted and a subsequent robbery. (This is often very complex and difficult to establish, and heavy weight is given to the tenant's ability to take actions themselves to mitigate loss – refer to factsheet on urgent repairs).

**NOTE:**

The Tribunal varies immensely with respect compensation claims, principles and conclusions. Legal research may be done to address principles of compensation but the novelty of each situation will make decision easily distinguishable.

**Loss**

If claiming compensation, a tenant must also establish that they have suffered a loss or inconvenience as a result of a breach of duty or tenancy agreement. This loss must be a quantifiable sum and be supported by evidence.

As the tenant is bringing the claim, they will bear the burden of establishing their case on the *balance of probabilities*. This burden extends to proving that the claimed losses are also reasonable amounts. For example if a tenant is claim a % loss of their daily rent, and the aggregate claim exceeds 100%, then logically the claim is flawed and unreasonable with respect to the loss of quiet enjoyment of the premises.

Quantifying the cost of damage to the belongings of a tenant can often be difficult. Generally, a tenant can only claim for the second hand or depreciated value of any goods that need to be replaced as a result of the landlord's breach. This is because a claim from a tenant should be reasonable and should only claim the actual loss that they have suffered.

A tenant could also claim the cost of repairs to their personal belongings if the goods can be repaired for a reasonable cost.

Unfortunately, unlike landlords who can claim losses as tax deductions, the tenant's losses for depreciation are direct and not recoverable. For this reasons tenants, may wish to consider tenant insurance for their personal goods.

Argument may be made in relation to the actual loss and requirement to replace certain novel items where the market value is not the only consideration; i.e. a second hand bed contains a risk of bed bugs, as compared to a second hand bed owned by the purchaser.

There are not clear rules or statute indicating that market value if the determinative value that can be claimed. It is however the most common practice.

Losses may be demonstrated by:

1. Proof of ownership (statutory declarations by third parties, persuasive photos etc.)
2. Receipts of purchasers
3. Valuation certificates
4. Auctioneer opinions
5. Used buy now items on eBay or other similar sources

For this reason, it is again recommended people photograph their personal property in some manner that demonstrates that they belong to the tenant and then email them to their own email account.

## Statutory Rights and Loss

Some Tribunal Members believe there is no loss because the Landlord is exercising a statutory right. Other Tribunal Members agree with TUV, that the exercise of this statutory right still infringes upon the ordinary quiet enjoyment of the home that would otherwise be unhindered. Example may include sales campaign because the landlord has chosen to sell the premises.

## Inconvenience

In certain circumstances, a tenant can also claim compensation for a “general inconvenience” when it is difficult to establish that an actual financial loss has been suffered by the tenant. Inconvenience compensation is discussed in detail in our practice note 11-03, “claiming compensation for general inconvenience”.

While stress, pain, suffering and personal injury are not issues that VCAT can award compensation for, the inability to have quiet enjoyment may provide some latitude for compensation that goes to the reduce ability to enjoy the property.

For example:

Where a landlord persistently tells the tenant that there is no problem in relation to the mortgage over the rental property, may be liable for compensation if the tenant continues to be approached by mortgagee (bank) who tells a tenant they are going are trying to serve the landlord a notice of default for a mortgage. This obviously causes concerns around the stability of the tenancy, and reduces the ability of the tenant to enjoy the property under such circumstances.

This may therefore give rise to a claim for compensation for a loss of quiet enjoyment during the period of uncertainty, in addition to possible claim for compensation by the tenant for the landlord failing to fulfil their obligations under the mortgage agreement if the tenancy ends pursuant to section 268 and a possession order.

## Evidence

A tenant claiming compensation will need to establish, on the balance of probabilities that a breach has occurred and that loss, damage or inconvenience has resulted. To do this, they will need to provide evidence to VCAT to establish their claim.

Not all evidence has to be attached to the General Application at the time of making the application.

As a general principle, all evidence that is intended to be relied upon in the hearing, save for oral evidence should be exchange between the parties at least 48 hours prior to the hearing. Failing to do so may result in an adjournment, and potentially increase the risk of costs under section 109 of the VCAT Act.

Section 98 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (“VCAT Act”) establishes that VCAT is bound by the rules of natural justice, but not bound by the rules of evidence, which apply in Victoria’s courts. The implication of section 98 means that VCAT may consider any evidence that it is provided with and inform itself on any matter as it sees fit.

It is important to have strong and credible evidence to support any claim at VCAT. For example, all evidence provided by witnesses should be either on oath or affirmation or sworn, such as a statutory declaration or affidavit, where possible.

VCAT must allow a tenant a reasonable opportunity to call or give evidence and consider evidence that is put before VCAT under section 102 of the VCAT Act. However, if a member considers that there is sufficient evidence relating to a matter before VCAT they may refuse a tenant to call more evidence.

If this is refused, clarity from the Member should be sought:

*“Member, are you refusing to allow me to call further evidence which has not been presented and is directly relevant to the matter?”*

Procedural fairness is a difficult error or law to determine, but it is possible if the Tribunal has erred.

### **Witness Summons**

It is important to identify the parties may file a summons once an application has been filed. This usually costs about \$20, and allows a party to compel the other party to bring documents to the hearing to be admitted as evidence and examined. For more information about summons refer to Practice Note 15-01 Witness and Documents Summons.

### **Matters which may be considered by the Tribunal**

Section 211 of the RTA sets out matters that VCAT may consider when a compensation claim is made under section 209, 210, 210A or 210B. These matters include:

- Whether or not the landlord has taken all reasonable steps to comply with their duties under the act or the tenancy agreement;
- Whether or not a tenant has consented to a breach of a tenancy agreement;
- Whether or not money has been paid to or recovered by the tenant by way of compensation;
- Whether there has been any offers of compensation made;
- Whether the landlord has made any reduction in rent or other allowance to the tenant;
- Whether or not the tenant has taken action to mitigate their losses; and
- Whether the landlord has attempted to repair any damage to property at their own expense.

Mitigation of loss is particularly relevant to tenants who are seeking compensation for loss. For example, if a tenant was claiming for damage to a television when there was a leak in the roof above the television for some time, VCAT would consider whether the tenant could have taken steps to prevent the damage occurring by removing the television from the affected area.

## Claiming under the ACLFTA

Section 507A of the RTA opens a significant avenue for tenants to consider their disputes in light of the ACLFTA. Section 507A invites the tribunal to consider that the ACLFTA extends and applies as if it were part of the RTA (refer to section specific for exemptions). It means that a tenant who suffers a loss as a result of a provision contained in the ACLFTA can claim compensation through the RTA, as if that section was written in the RTA. It also means that VCAT can make different orders than what would otherwise be available to the members if they were considering the RTA alone.

For example, if a tenant entered into a tenancy agreement because they were misled about the premises by the real estate agent and wished to terminate their agreement because of this, they may wish to rescind their tenancy agreement and seek restitution of any monies paid to the landlord.

Another provision of the ACLFTA is exemplary damages, which can be claimed under section 184 (2)(b)(ii). A tenant may wish to consider claiming exemplary damages if the landlord has acted in a manner that is particularly poor.

For a more detailed consideration of the RTA and the ACLFTA, refer to practice note #1302 RTA and ACL.

## Claiming compensation against an Owner's Corporation

Often tenants living in premises that are part of an Owners Corporation will have issues with property that may be common property such as a shared roof which leaks.

Example:

*There is known and reported roof leak that has resulted in internal damage to areas of the rent premises for which the landlord is responsible, but the cause of leak is due to the roof which is common property, which is a repairs obligation of the Owners Corporation under section 46 of the Owner's Corporation Act 2006 (OC Act).*

In the circumstances, it may be appropriate to file a claim against the landlord, and seek to join the Owners Corporation pursuant to section 60 of the VCAT Act. This names the Owner's Corporation as a co-respondent to the claim, and rather than having two separate proceedings which is timely and costly, and may give rise to inconsistent decisions. It is sometimes appropriate to bring all parties into the same hearing to reduce the deferral of responsibility, and ambiguity of evidence.

It is important to note the pursuant to section 163 of the OC Act. This is relevant to a tenant's obligation to mitigate loss as an applicant for compensation (s211 RTA). However, the landlord also a concurrent obligation to fulfil their duty to take all reasonable steps to ensure the tenants quiet enjoyment, which may extend to engaging with the OC in a reasonable manner.

Refer to Practice Notice #10-05.

## Strategic Litigation – Counter Claim and “Set off Defence”, and Anshun Estoppel

Tenants may wish to consider using a genuine compensation claim as leverage to settle a matter or reduce their liability where the landlord has brought a claim.

Generally, a tenant should lodge a counter claim by way of formal application. The General VCAT Application Form provides for related hearings to be reference. Where parties are seeking to have matter concurrently listed because it relates to the same material fact, or may be beneficial to allow the member to automatically offset

At VCAT, in order for VCAT to be able to make an order for compensation there must be an application on foot (s67 VCAT Act). Parties cannot merely raise a potential claim during a hearing without an application being made unless the other party consents and the tribunal consider it fair and reasonable.

For example:

A tenant cannot seek to make a verbal application on the day or at the hearing of a possession order for rent arrears in an attempt to “set off” the alleged rent arrears.

There is an equitable defence to a claim of compensation call a “set off defence”. But this is unlikely to be applicable under the RTA. Parties should make counter claims, in preference to trying to raise the “set off” defence.

See: *Clambake Pty Ltd v Tipperary Projects Pty Ltd* [2009] WASC 52 at [152]

### Claims Relating to the Same Facts

If both landlord and tenant have made claims that relate to the same or related substantive facts, parties should request that the matter to be head together. In some cases, if an application has not been lodged a request for an adjournment should be made to enable both parties to make their correspondingly claims.

When bringing a claim for compensation, parties should bring their full claim. That is to say, if the material fact will have a bearing on another compensation claim, parties may have difficulty in bringing further claims, if they are pleading inconsistent evidence or it would be prejudicial in some way. This is known as Anshun estoppel.

Parties who have been estopped from bringing a claim should request written reasons.

See Anshun Estoppel:

- *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589
- [Navaratne v Asian Pacific Property Investment Pty Ltd \(Residential Tenancies\) \[2014\] VCAT 900 \(25 July 2014\)](#) ; [Corigliano v Wogan \(Residential Tenancies\) \[2013\] VCAT 2045 \(29 November 2013\)](#)

## EXAMPLE 1: SIMPLE COMPENSATION CLAIM

John reported that his heater was not working on 1 May 2014 in an email. On 1 June 2014, John sends breach of duty notice citing section 67 and 68 stating that he wants the heater to be fixed immediately, and compensation claim to be advised. John takes no further action, but has been very cold throughout the winter months.

Eventually, the landlord sent out a tradesperson and the heater was fixed on 1 July 2014.

John now wants compensation. As John has previously served a breach of duty notice, he can simply apply under section 209 for compensation.

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 - Compensation for breach of section 67 and 68 - heater not in good repair</p> <p>Section 452 - General Dispute</p>

<p>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. *</p> <p>The claim is for compensation for a heater that was not in good repair for approximately 2 months.</p> <p><b>Basic Information</b>            The tenancy commenced on 1 January 2014.            Current rent and for the relevant period is \$1600 per calendar month.            Daily Rent is \$52.60</p> <p><b>Chronology</b>            On 1 May 2014, the tenant notified the landlord via email in relation to the heater in the rented premises not working.            On 1 June 2014, the tenant served a the attach Breach of Duty Notice in relation to section 67 and 68.            On 1 July 2014, the landlord sent a plumber who repairs the heater.</p> <p><b>Sum Claimed</b>            The tenant now claims the sum of \$741.72.</p> <p><b>Attachments</b>            See the attached Breach of Duty Notice            See the attached Table of the estimate of claim.            Electricity invoices for equivalent period 2013 compared to 2014 (winter usage),</p>
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Table of Estimates of Claim

Item	Date Reported	Date Fixed or Tenancy Terminated	Total Number of Days	Daily Rent	% Estimate Loss of Quiet Enjoyment	Action to Mitigate Loss	Related Costs Or Inconvenience	Total
Heater	1 May 2015	1 July 2015	61	\$52.60	20%*	Used oil bar heater in 1 room only and electric blankets	Increase electricity bill being \$100 more than prior electricity invoice same time last year	\$641.72, plus \$100
<b>TOTAL CLAIMED</b>								\$741.72

- \* The percentage estimate is the most difficult aspect of tenants determining how much to claim. There are not stringent rules about what is reasonable. It is essentially made up. Examples of an unreasonable claim may be 50% of rent for one bedroom out of 4 bedrooms of a house.
- It is strongly advised to let individual tenants to estimate the %, opinions may be given, but due to the unpredictable nature of the Tribunal, it is best practice to let the tenant estimate these percentage estimates.

**EXAMPLE OF BREACH OF DUTY NOTICE****Notice for breach of duty to landlord of rented premises**

Landlord's copy

**Landlord details**

1. This notice is given to:
- (landlord/s names)*

Bob Jones

2. Landlord's address:
- (can be an agent's)*

c/- Fictitious Realty Pty Ltd

20 Bonum Street, Truthtown 3000

**Tenant details**

3. Tenant name/s:

John Smith

4. Regarding the rented premises at:
- (write address)*

8 Delap Street, Truthtown 3000

5. Address for serving documents:
- 
- (if the same as in 4, write 'as above')*

As above

6. Contact telephone numbers:

**Business hours:**

( ) 0400 111 222

**After hours:**

( )

**Service details**

7. This notice is given:

**by hand:****by registered post:****by ordinary post:**

X (and also email)

**on (date):**

//

8. Signature of tenant

X [ signature by hand ]

9. Name of tenant signing this notice

John Smith

**Reason for breach of duty notice**

10. I believe you have breached your duty as a landlord because:
- (write the section number and words from the section 'Reasons to use in question 10')*

Section 67 – Quiet Enjoyment

Section 68 – Not in Good repair

The gas heater in the lounge is not staying alight for more than 10 minutes without going out. I have attached a video to the email I have sent with this notice.

11. The loss or damage caused is:

We first reported this issue on 1 May 2014 via email. We have also called on 4 and 10 of May 2014 and we have had no response.

Our family has been extremely cold during the winter months and not been able to enjoy the entire premises.

We have had to use alternate heating methods.

12. Compensation or compliance required

**I require you to remedy the breach within 14 days after receiving this notice by:**

Fix the heater and put it in good repair.

A compensation claim may be sought in the future for an amount to be advised once the heater has been repaired.

**or pay me compensation of: (\$)**

13. You must not commit a similar breach again.

**If you do not comply with this notice:**

- the tenant may apply to VCAT for a compensation or compliance order, or
- if S240 applies, the tenant may give you notice of intention to vacate.

14. Details are attached to this notice
- 
- (e.g. receipts, other evidence)*

**yes:** Video via email

**no:**

**Landlord please note**

If you need help with this notice, call the Consumer Affairs Victoria Helpline on 1300 55 81 81 or visit [consumer.vic.gov.au/renting](http://consumer.vic.gov.au/renting).

**EXAMPLE OF A COMPENSATION ORDER**

<b>ORDER</b>	Ref No: R20157
<b>VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL RESIDENTIAL TENANCIES LIST REGISTER OF PROCEEDINGS</b>	
APPLICANT(S): Resident	
RESPONDENT(S): Rooming House Owner	
RENTED PREMISES:	
Application under <i>Residential Tenancies Act 1997</i> general dispute Section 452	
<hr/>	
The Tribunal finds that:	
1.	The tenant paid a total of _____ for electricity for which the landlord was liable under section 53 and section 54 of the Residential Tenancies Act 1997.
2.	The owner did not give the resident a notice of rent increase in accordance with the provisions of section 101 of the Residential Tenancies Act 1997 by reason that it was not in the proper form and did not give the required 60 days notice.
3.	The increased rent charged of _____ from 21 March 2014 to 20 November 2014 was invalid.
The Tribunal orders that:	
1.	The landlord shall pay the tenant the sum of \$ _____



**EXAMPLE 2: COMPLEX COMPENSATION CLAIM**

Below includes a more complex example of a compensation claim table. But the principles are essentially the same as in the simple example above. The critical aspect of most complex compensation claims is a clear factual chronology this is consistent and well supported by primary evidence and witness statements.

If the matter relies on complex issues of causation, it may be appropriate to draft submissions based on those fact as to why and how the landlord is liable for the amount claimed.

Item	Date Reported	Date Fixed or Tenancy Terminated	Total Number of Days	Daily Rent	% Estimate Loss of Quiet Enjoyment	Action to Mitigate Loss	Related Costs Or Inconvenience	Total
Broken Oven	2 June 2014  [see email marked <b>A</b> ]	6 August 2014  [see plumber receipt marked <b>B</b> ]	66	\$55  [monthly rent*12/365]	15%	Reasonable take out prices;  Eventually purchased Electric Fry pan \$70  [see Receipt marked <b>D</b> ]	Normal food bill - \$400 for 66 days  Total cost for period due to eating out \$700  Claim - \$300  [see receipts marked <b>E</b> ]	\$544.50  +\$300  +\$70
Leak in Study Roof	2 June 2014  [see email marked <b>A</b> ]	6 August 2014  [see plumber receipt marked <b>B</b> ]	66	\$55	10%	Removed other Electronics from Room and placed buckets at leakage sites. Reported again immediately to LL  [see email Mark <b>F</b> ]	Loss of lap top computer  [see purchase receipt marked <b>G</b> , and eBay second hand value quote \$400 marked <b>H</b> ]	\$363  Laptop  + \$400
Entry without property Notice	1 July 2014	1 July 2014  [See BODNs marked <b>C</b> ]	1	\$55	80%	Told Tradesperson to leave and they refused	LL sent tradesperson without consent, and entry occurred without notice, works commences	\$44
<b>TOTAL</b>								\$1721.50

\*Emails and correspondence are not attached to this email. It is just a suggested method of clearly setting out documentation.

## What should you do?



1. **Establish jurisdiction** – before proceeding with a compensation claim, a tenant should establish the appropriate jurisdiction. Generally, VCAT is the most appropriate jurisdiction and sections 446 and 447 RTA sets out VCAT's jurisdiction and limits.

Section 507A can be cited to invoke the ACLFTA, and ACL

Sections 509 and sections 510 also extends jurisdiction to the Supreme, County and Magistrates' Court, where appropriate.

2. **BODN** – serve a BODN upon the landlord, if compensation is being sought under section 209 of the RTA. If the landlord complies with the BODN, then the matter does not need to progress further.

3. **Apply to VCAT-** A tenant can apply to VCAT for compensation, as discussed above. A copy of this application and any supporting evidence should be served upon the landlord as soon as possible. VCAT will then list the matter for the next available hearing date.

4. **Prepare a "Court Book"** – This is not a formal requirement. But often a triplicate copy of the book, with a clear index, page numbering, and evidence identification labels can make the hearing more efficient, and your evidence more coherent and therefore credible.

5. **Exchange all relevant documents between parties to ensure there are "no surprises"** If you require evidence from the other party, put a clear email or letter outlining the evidence you expect them to bring to the hearing or to produce, and that if they fail to do so, your request to provide will be shown to the tribunal. Alternative you may wish to file summons prior to the hearing.

6. **Ensure Orders for Compensation are authenticated if you intend to be able to enforce** These Orders can be stamped by the VCAT registry and will contained the following stamp *"I hereby certify that this document is a true and original document of which it purports to be a copy Name of VCAT Registrar and dated."*

## EXAMPLES

### RELEVANT CASE LAW

Below are some examples of cases where compensation 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* [2014] VCAT 381 (4 April 2014) is a recent decision that considers whether a landlord breached a duty under the RTA. The tenant also claimed bond and rent in advance. The landlord also made a claim for compensation. The tenant was successful in claiming the rent in advance and the bond from the landlord.
- *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 a landlord's duty.
- *Mcalindon v Maddock* [2014] VCAT 96 (28 January 2014) the tenant made a claim for compensation based on the landlord breaching duties under the RTA and also under the ACLFTA. The landlord also had a counterclaim for compensation. Both claims were dismissed and the bond was released to the tenant.
- *Pham v Di Genova* [2013] VCAT 2193 (30 December 2014). The tenant claimed compensation for damage to her property, reimbursement for utility bills, reimbursement of bond, compensation for a breach of duty and exemplary damages. The tenant was partially successful in her claim.
- *Tortorella v Brookfield Village Management Pty Ltd (Residential Tenancies)* [2012] VCAT 705 (29 May 2012) Refund of rent increases not given in accordance with the RTA.
- *Towler v Centred Housing Group (Residential Tenancies)* [2014] VCAT 139 (12 February 2014) Compensation claim by rooming house resident for lack of security and failure to maintain in good repair.

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, then you should contact us on **(03) 9411 1444**

### Tenants Union Legal Team

#### Resources

Victoria Building Authority

[www.vba.vic.gov.au](http://www.vba.vic.gov.au)

T 1300 815 127)

Energy Safe Victoria

[www.esv.vic.gov.au](http://www.esv.vic.gov.au)

1800 800 158

Australian Tax Office Depreciation Guide (Non- binding but indicative)

[www.ato.gov.au](http://www.ato.gov.au) [Guide to depreciating assets 2014](#)

[Please report any broken links]