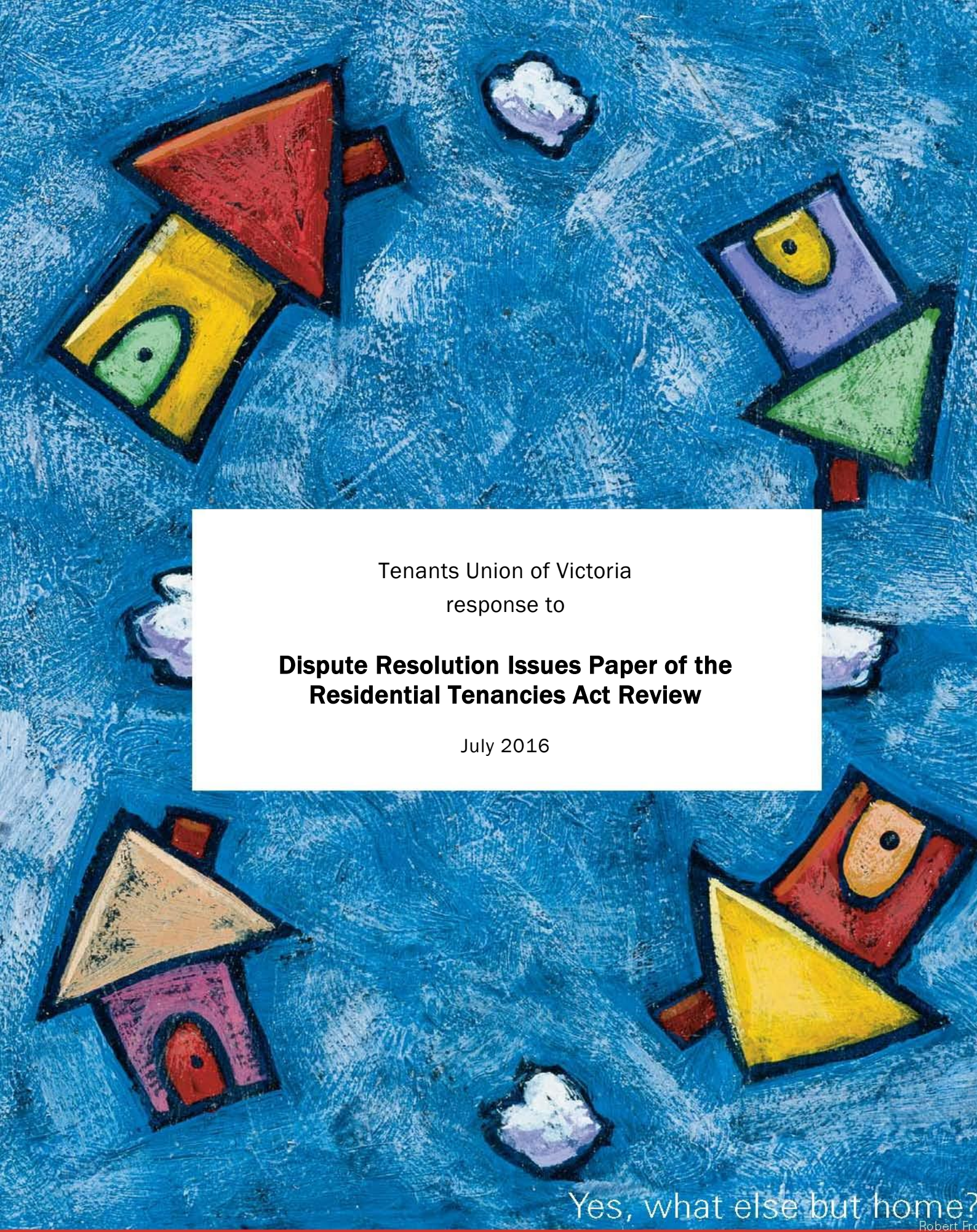

Tenants Union of Victoria
response to

Dispute Resolution Issues Paper of the Residential Tenancies Act Review

July 2016

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TENANTS UNION of Victoria Ltd

About Us

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state.

Our aim is to promote and protect the rights and interests of residential tenants in Victoria.

We operate an integrated service model that combines our three main areas of activity:

- client services (advice and advocacy),
- community education, and
- social change

1. Client Services (advice & advocacy)

The purpose of our client service is to provide accessible and effective assistance to residential tenants across Victoria. Advice is provided by telephone, in person, by email and through secondary consultations with other services.

During 2014/15, the TUV handled more than 19,200 enquiries. The TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, and attended 350 outreach visits to 250 rooming house, caravan parks and services.

2. Community Education

The TUV produces a wide range of publications and practical resources for tenants, rooming house and caravan park residents, and community service workers to assist tenants to understand their rights and responsibilities and to resolve their own tenancy problems. We have about 150,000 unique users accessing resources through our website each year.

The TUV also runs a training program for community sector workers to provide basic training in tenancy rights and responsibilities. During 2014/15 we did 29 training sessions and other community education presentations.

3. Social Change

The TUV undertakes a broad range of social change activities to represent the interests of tenants and to highlight the impact of living in the rental sector. This work includes research, policy formulation, lobbying and media liaison.

Across these three areas of activity our strategic goals can be summarised as:

- Better tenants' rights
- Better tenant resources
- Betters tenant services

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R20. Tenants should not be required to pay VCAT application fees.

R21. VCAT should develop strategies that encourage tenants to defend their matters in appropriate circumstances and ascertain whether a matter will be contested.

R22. Estate agents should be explicitly defined as “professional advocates” by the *VCAT Act 1998*.

R23. The Act should be amended to include infringement penalties for Landlord non-compliance with VCAT monetary and non-monetary orders.

R24. The Act should be amended to empower VCAT to award civil penalties for prescribed breaches of the Act.

Sector-wide compliance and enforcement mechanisms and activities

R25. Penalties for offences under the residential tenancies and caravan parks parts of the Act should be at least doubled immediately and all penalties should be better aligned with penalties for comparative detriment in other consumer protection legislation over time.

R26. CAV should issue infringement notices for offences under the RTA to encourage greater compliance in the industry.

R27. There should be an increase in allocations towards CAV enforcement and compliance measures for residential tenancies.

Introduction

The Tenants Union of Victoria welcomes the opportunity to contribute to the *Dispute Resolution Issues Paper* as part of the Residential Tenancies Act Review.

Characteristics of the residential tenancy market

Housing is an essential human need. In the private rental market rented housing is provided largely by individual landlords, often characterised as 'mum and dad' investors. The tenant landlord relationship is relatively long-term, and holds an undeniably important role in the lives of both tenants and landlords.

Despite the small-scale nature of most landlords in Australia, an inherent imbalance of power influences this relationship and impacts the lives of the parties in different ways. This imbalance has been recognised formally since 1980 when the Residential Tenancies Act was first introduced to improve protections for residential tenants.[1]

Characteristics of the dispute resolution system

The current system for dispute resolution in residential tenancies does not work well for tenants because it does not recognise the power imbalance between the parties. Tenants do not have adequate protection as consumers of rented housing, and the importance that housing plays in people's lives is not well recognised.

Of the 59,184 applications to the Residential Tenancies List (RT List) at VCAT in 2015/16 less than 7per cent were lodged by tenants[2]. We also know that only a relatively small proportion of tenants are attending VCAT hearings, in 2009 only 20per cent of tenants attended hearings[3].

This major deficiency was recognised in the VCAT ten year review in 2009, where it was described that whilst VCAT has been very successful in delivering access to justice to landlords, tenants have not been able to exercise their rights to the same extent.[4]

Despite the low level of engagement with VCAT by tenants we know that tenants frequently experience problems in their tenancies, many of which require third-party assistance. In 2014/15 Consumer Affairs Victoria (CAV) received almost 74,000 enquires about residential tenancy issues[5], and TUV received almost 20,000 enquiries.[6] Despite this high number of enquiries, generally disputes, tenants are mostly not following through to VCAT to have their disputes resolved.

[1] CAV 2015 Laying the Groundwork – Consultation Paper Residential Tenancies Act Review, Fairer Safer Housing
[2] Victorian Civil and Administrative Tribunal, Annual Report 2014-15, p39, at https://www.vcat.vic.gov.au/system/files/2014-2015_vcat_annual_report.pdf.
[3] Bell, Hon JK, *One VCAT Presidents Review of VCAT,* 2009, p25.
[4] Ibid, p25.
[5] Consumer Affairs Victoria Report on Operations 2014-15, *Making markets fair*, p15
[6] Tenants Union of Victoria *Annual Report* 2015-16, p19.

Policy goals: greater tenancy protection

Residential tenancies Ombudsman scheme

R1. Introduce a compulsory residential tenancies Ombudsman scheme.

We want to see a fair and accessible dispute resolution system that recognises the vital role that housing plays in people's lives. The dispute resolution system in the residential tenancies sector must work to protect tenants' rights as consumers of rented housing.

Tenants are reluctant to engage in the dispute resolution process because of the possible negative consequences to their current and future living arrangements. The dispute resolution system needs to improve the balance of power between tenants and landlords and enforce compliance in the sector. Tenants need to be able to access assistance for disputes without having their security of tenure threatened.

A major cultural shift is needed so that tenants are able to access the rights that are legally available to them. This shift will only occur if there is strengthened consumer protection available.

The most effective model for consumer protection is industry or government Ombudsman schemes. This is why we recommend the introduction of an Ombudsman-like scheme in the residential tenancies sector. This would see a number of areas being taken out of the hands of VCAT and put to an Ombudsman-like service, through CAV or through an independent statutory body.

The residential tenancies sector is highly suitable to an Ombudsman model, one where there are 'a large number of consumers who cannot easily 'shop elsewhere''.[7] The characteristics that lend themselves to an Ombudsman scheme have been described as where:

1. essential services are involved
2. the market is characterised by large firms and limited competition, thus creating significant power imbalance
3. there is significant asymmetry of information, such that consumers would have difficulty asserting their rights
4. there are a large number of disputes[8].

Indeed the residential tenancies sector is characterised by the provision of an essential good, an asymmetry of power, high volumes of disputes, and limited supply resulting in restricted competition.

[7] Productivity Commission, *Access to Justice Arrangements: Inquiry Report*, no. 72, 5 September 2014, p 334.
[8] Ibid, p334.

Given the known issues with access to justice in the current dispute resolution system, establishing an industry Ombudsman scheme would help to promote an accessible option that tenants could navigate independently to have their disputes resolved.

Ombudsman schemes are known to be more accessible than other dispute resolution methods such as tribunals or courts, and are considered effective in promoting access to justice and overcoming power imbalances.[9] There is also a critical difference in culture within such schemes, where they are directed at resolving consumer complaints, generally consistent with good industry practice and the law. This is exactly what the residential tenancy sector is in desperate need of.

As well as resolving individual disputes, Ombudsman schemes are able to address systemic issues, which over time would lead to a reduction in the number of disputes between tenants and landlords and the identification of repeat offenders.

A residential tenancy Ombudsman scheme would be a great step forward in upholding consumer rights and industry accountability.

The success of an Ombudsman scheme would depend largely on whether membership was compulsory or not. A voluntary scheme would have little to no effect as non-compliant landlords would simply avoid the scheme. The introduction of the scheme must include legislation to ensure the Ombudsman has jurisdiction over all private residential landlords.

Reforming the residential tenancy dispute system

As a practical step towards this larger goal we recommend certain changes to the jurisdictions that deal with tenancy matters.

In many instances an Ombudsman-like scheme could assist matters to be resolved earlier than if they had gone to VCAT. For example, if a tenant believes they have received a retaliatory notice to vacate they could contact the Ombudsman body to resolve the matter. Matters that are more complex in nature would remain with VCAT.

As has been previously recommended the repairs process needs to be taken out of the hands of VCAT. Repair issues are by far the most common problem tenants' face and a lack of compliance by landlords continues to plague the industry. Tenants do not seek to have their rights upheld through VCAT due to a general lack of security in rental housing. The lack of utilisation of the Rent Special Account means that landlords are not compelled to undertake repairs. The recommended changes would create a system that is simpler and easier to access by tenants. It would also ensure greater compliance by landlords.

Tenants should also be able to access the Ombudsman scheme to investigate alleged excessive rent increases, retaliatory eviction notices, and the provision of compliance orders and restraining orders should also be given to the Ombudsman body.

The following issues would remain under VCAT's jurisdiction:

- Possession orders
- Bond disputes
- Disputed compensation claims

Funding

R2. The residential tenancies Ombudsman scheme should be funded by the Residential Tenancies Fund.

[9] Ibid, p315.

Ombudsman schemes are generally paid for by industry members whilst remaining free of charge to consumers. There are a number of different methods for calculating fees including a 'fee per complaint' model. This model is often used to send a signal to industry for behaviour change. This could be an interesting model to consider for the residential tenancies Ombudsman scheme, whereby landlords would be penalised for poor behaviour. This could work as an incentive for greater compliance in the industry.

Whilst standard practice is for industry members to fund Ombudsman schemes, the residential tenancies sector is unique due to the large proportion of small-scale landlords. It is recognised that funding through an alternative source could be more suited to avoid a resource intensive mechanism for fee collection. An alternative funding arrangement would also prevent individual landlords from passing on the fee to tenants through an increase in rent.

The RT List at VCAT is funded through the Residential Tenancies Fund (RT Fund). The RT Fund is made up of the accumulation of interest generated from tenants' bonds held by the Residential Tenancies Bond Authority. The RT Fund spends over $12 million each year on the RT List at VCAT. As mentioned previously tenants are not accessing the benefits of VCAT, although they continue to fund it through the interest generated from their bonds.

The RT Fund would be better placed to fund the residential tenancies Ombudsman scheme instead of funding VCAT. Funding for VCAT should instead come from application fees and the Victorian Property Fund. This would be a fairer system as VCAT would be primarily paid for by those who access it most – landlords.

According to the Productivity Commission an average cost for an Ombudsman scheme to resolve a dispute was $656 in 2012-2013.[10] Whilst this is higher than the current cost at VCAT it is unknown whether a residential tenancies Ombudsman scheme would run at a similar cost level.

However the Ombudsman is to be funded it is essential that it receives adequate resourcing to ensure the service is able to respond to all relevant enquiries in a timely and appropriate manner.

[10] Ibid, 325.

Victoria's residential tenancies dispute resolution arrangements

Information and advice services

When reviewing the information and advice services it is important to properly distinguish between "information" and "advice".

Information is general in nature and is delivered through a number of different channels, with or without direct contact by the tenant. There is a large amount of existing information available for tenants to understand their rights and responsibilities. Both CAV and the TUV have significant web based resources that are relatively easily accessible. TUV resources are translated into twelve non-English languages.

Importantly, almost all tenants are given the statement of rights and duties as a condition of entering into every tenancy agreement.

Despite this array of information;

- many tenants still do not understand their basic rights and responsibilities and are often mislead by real estate agents and landlords
- there are gaps in the information provision, particularly for some emerging language groups
- the information currently available does not appear to have had any demonstrable effect in reducing disputes in key areas
- the information currently available has not reassured or encouraged tenants to engage in the current dispute resolution processes

Whilst there are some tenants who can self-help, the power imbalance in the residential tenancies market means that most tenants cannot. The TUV does not believe that providing more information will overcome this fundamental power imbalance unless rights are significantly enhanced to minimise adverse consequences for tenants seeking to assert them.

Advice is more specific in nature and relates to the actual circumstances of a problem or dispute and the situation of the person involved. There are clearly a significant number of tenants who are seeking advice to resolve problems with their tenancies. Our view is that the vast majority of enquiries received by CAV, TUV and other agencies are from people seeking advice (not just information).

It is also important to distinguish between different styles of advice. The TUV advice service (and similar services provided by TAAP agencies) is provided ONLY for tenants to advise them of the best means to resolve their specific problem and the legal remedies that they can use to enable this resolution. This includes advising tenants where the law may not work for them in their individual situation. This is very important for vulnerable or disadvantaged tenants who will generally feel more reluctant to exercise legal rights if there might be adverse consequences.

Our general experience is that services provided by CAV, where they do stray into advice do not usually engage in any detail with the specific circumstances of the tenant. A good example of this difference in the style of advice is in relation to the

advice provided about lease breaking. The TUV (and in our experience most TAAP services) do not hesitate to advise tenants that they should cease paying rent once they have returned the keys irrespective of the lease end date. We understand that CAV is reluctant to advise tenants to do the same.

The value of good advice is that it enables tenants to make properly informed decisions and empowers them in relation to their housing choices.

It is also our longstanding experience that most tenants, particularly those that are vulnerable and disadvantaged, having received advice will require further assistance to resolve any problem or dispute. This further assistance is generally advocacy of one form or another and may include negotiation, representation and referral to complimentary community services. The referral pathway often creates a loop back to advocacy services for other clients in need.

Contrary to assumptions that may apply in other areas, vulnerability and disadvantage for tenants extends up the income scale to households on moderate incomes due to the high transaction costs associated with residential tenancies. If the dispute or problem is not effectively resolved or the tenant is evicted then relocation will be expensive, time consuming and may have other significant consequences, such as requiring children to move schools. By contrast, the landlord will generally suffer none of these consequences. This level of vulnerability and disadvantage is in addition to the blunt categories of disadvantage often cited.

The consequence of both of the above is that real demand for tenant advocacy services is very high. We believe that tenant advice and advocacy services should be properly funded to meet this demand. In our view, this is a fairer use of the interest on tenants' bonds than simply subsidising landlords' use of VCAT for evictions.

However, as was identified in the review of the TAAP, there is a very significant interrelationship between the effectiveness of advocacy services and the rights available to tenants to exercise. In the end, tenant advocates can only seek to achieve the legal rights that a tenant is entitled to and their service effectiveness is limited accordingly. Many very vulnerable and disadvantaged tenants are reluctant to go beyond receiving advice unless they have nothing left to lose, typically in relation to evictions. Ironically, strengthened tenants' rights will be likely to increase demand for advocacy services whilst theoretically making it less necessary.

Independent third-party assistance

Independent third-party assistance is generally not a valuable tool for tenants in residential tenancies. This is due to a number of reasons including the voluntary nature and non-binding decisions. In our experience landlords are unlikely to engage in a voluntary dispute resolution process if they have already declined to engage with the tenant over a dispute.

In our experience, the mediation services provided by DSCV are not often used in landlord-tenant disputes but may be of value in inter-tenant or co-tenant disputes if both sides to the dispute are willing.

Additionally, and perhaps more importantly, alternative dispute resolution (ADR) such as mediation or conciliation does not commonly lead to favourable outcomes for tenants who are in a weaker bargaining position and will often settle for less than the law entitles.

Mediation is not an appropriate tool where the two parties hold unequal bargaining power, an inherent characteristic of landlord-tenant relationships. This is particularly true for vulnerable and disadvantaged tenants.

Mediation is not appropriate where:

- there is an imbalance of power between parties because of socioeconomic disadvantage
- there is an unwillingness of parties to engage in constructive ADR, or to acknowledge that there is a problem
- participation would result in personal or financial hardship[11]

Residential tenancy disputes are characterised by all three of these elements. Whilst the tenant is not always in a position of socioeconomic disadvantage they are much more likely to be in this position than the landlord. Even if a tenant is not marginalised they will always have less bargaining power than the landlord as it is the tenant's home that is at stake and they are constrained by the limited supply of rented housing, particularly housing that is affordable.

Whilst we support increasing the authority of CAV to resolve some disputes, services such as Frontline Resolution and other CAV conciliation services do not always provide the support that tenants need to ensure their rights are upheld. It is unclear whether tenants utilising these services received favourable outcomes or ended up accepting something less than the law provides.

Negotiation services provided through the TAAP agencies are a much more effective mechanism for resolving residential tenancy disputes as they provide additional assistance to ensure that tenants are adequately protected.

CAV inspections and advice

Rent and repair reports

R3. The Act should be amended to provide for the CAV Director to have determinative powers for dispute resolution in relation to some specific provisions of the Act.

R4. A tenant should be entitled to rely on the report of the CAV Director for the completion of any repairs and to create an offence for a landlord not to comply with the report.

R5. A tenant should be able to pay rent into the rent special account at the time a CAV repairs report is issued.

R6. Improve the tenants' ability to dispute a rent increase by legislating that the CAV Director's rent report should be binding.

R7. Improve the tenants' ability to dispute a rent increase by legislating that all factors under s47(3) must be considered when determining whether a rent increase is excessive.

TUV has highlighted in previous submissions that CAV reports for rent increases and non-urgent repairs should be binding to improve access to justice for tenants. Additionally the method by which rent assessments are undertaken by CAV should be reviewed.

Goods left behind

R8. The Act should be amended to provide that goods of monetary value must be stored if the value of all or part of the goods left behind exceeds the cost of removal and storage of those goods.

R9. CAV's procedure for valuing goods left behind should be publically available.

[11] Ibid, p.289.

There are many reasons why tenants may leave their goods behind at the end of a tenancy, generally this will be the result of a crisis of some kind. In our first submission to the *Laying the Groundwork* paper we outlined that goods of high value are sometimes unfairly disposed of due to the valuation test being based on the removal and storage costs of ALL of the goods. We reiterate that the process should allow for the storage of certain goods of high value where appropriate.

Given the invaluable nature of a tenant's personal items, CAV's procedure for valuing goods must be thorough, systematic and transparent. The valuation report must be kept and be made available to the tenant if they request to see it.

Victorian Civil and Administrative Tribunal

Tenants generally do not engage in the VCAT process. Less than 7 per cent of applications are made by tenants, and only around 20per cent of tenants attend even if they are defending their home or their own money through a bond dispute.

Whilst there are many ways in which VCAT could be improved, the larger issues of tenant participation remain a pervasive and overarching issue.

We advocate that much of VCAT's functions should be diverted away from VCAT to avenues more easily accessible to tenants; however we also recognise the need to address current issues present in the VCAT system.

Alternative Dispute Resolution at VCAT

In our experience compulsory conferences are particularly harmful for tenants. As previously outlined ADR is not an appropriate mechanism where a power imbalance exists between the parties. Arguably tenants will always have less bargaining power in residential tenancy disputes and so compulsory conferences are never an appropriate mechanism for VCAT members to impose.

In our experience, VCAT members routinely engage in bullying behaviour and force tenants into accepting a lesser outcome than they would have received through a formal hearing. In compulsory conferences the mediation role is undertaken by the VCAT member, who arguably is not an appropriate party to fulfil this role. ADR is thought to be beneficial where it can seek early resolution of an issue and avoid more formal litigation. Mediation and compulsory conferences at VCAT have little benefit in this way as the matter has already been brought before the Tribunal and any strain on the relationship has already occurred.

According to VCAT residential tenancy matters are not generally amenable to resolution through ADR due to legislative limitations on how matters can be settled.[12] Despite this the practice continues.

In our experience, VCAT members will often instruct the parties to seek a resolution amongst themselves before going ahead with a hearing. This practice again disadvantages tenants as they must engage in negotiation from a weaker position. As a result tenants will often agree to outcomes less favourable than would have been provided had the matter been heard before the member. This is particularly a problem for vulnerable and disadvantaged tenants who are not equipped to negotiate a fair outcome for themselves. This also serves as a deterrent to tenant participation at VCAT.

[12] Ibid, 366.

Decision making

R10. The *VCAT Act 1998* should be amended to provide a right to merits review by the President or a Senior Member of the Tribunal.

VCAT provides no avenue for decisions under the RT List to be reviewed on merit. The method to seek review of a VCAT decision is outlined in s148 of the VCAT Act, which provides that there is a right to appeal a decision on a 'question of law' at the Supreme Court of Victoria. The Supreme Court appeal process is an onerous, intimidating and cost prohibitive option, and for most tenants it is simply not accessible.

An internal review process would greatly improve tenants' access to fair and consistent decisions. It would provide parties a more accessible and affordable right of appeal, as well as increasing the consistency, predictability and quality of tribunal decision-making[13].

Other jurisdictions including New South Wales, South Australia and Queensland provide access to internal appeals for residential tenancy matters.

We propose a model where appellants would require leave to appeal, and where the decisions would be published to increase transparency. Such a model would provide tenants (and landlords) with a cost effective and appropriate means of re-hearing on issues of fact or law. A merits review process is likely to lead to greater legal clarity for prospective parties and to improve the quality of decision making.

Considerations must be given to the provision of training to the review members (to increase awareness of issues surrounding housing, cultural and other diversity, mental health, disability and drug and alcohol issues) and that scheduling provides adequate time for a thorough review hearing to take place.

R11. VCAT should publish all of its decisions on the Australasian Legal Information Institute website.

As a measure to improve consistency and accountability of decision making, all VCAT decisions should be given written reasons and should be made publically available.

Member conduct

R12. VCAT should enhance its internal complaints process and readily display its complaints protocol and publish the type, number and outcomes of the complaints it receives.

The manner in which VCAT members conduct themselves is important in determining fair and equal access to justice. The way in which members interact with the parties can greatly impact on the result of the hearing.

TUV is aware of repeated incidences where TUV staff and clients have been subjected to poor treatment by VCAT members. This behaviour includes actions such as bullying, rudeness, and inappropriate and misleading comments.

The 2009 ten year review of VCAT raised a number of issues relating to member conduct and decisions, including: 'inappropriate behaviour by some members, clubby atmosphere in some hearings, and inconsistency in procedure and result'[14].

[13] Bell, Hon JK, *One VCAT Presidents Review of VCAT,* 2009, p57.
[14] Ibid, p21.

To provide greater accountability of VCAT members there needs to be a more transparent process for customer feedback and resolution of issues. This is recognised by VCAT as an area of priority through the Strategic Plan 2014-2017[15].

It is unclear how VCAT manages user complaints against Tribunal Members and staff as it does not currently make any of this information available. One way to tackle this would be to publish information about complaints and their resolution in VCAT's annual reports. This will enhance confidence in VCAT's ability to respond to complaints about its members and improve members' conduct.

SACAT provides a section in their annual report to list the number and nature of enquiries, this could be adopted by VCAT.

The perception of bias undermines the Tribunal's accessibility and function as an impartial administrative tribunal because individuals hear anecdotal reports of others' experience and decide that the tribunal will not assist them to resolve their matter. Given the extremely low levels of engagement with VCAT by tenants this is an issue that should be prioritised.

R13. A mandatory annual training program should be developed for tribunal members to increase awareness of issues surrounding housing, cultural and other diversity, mental health, disability and drug and alcohol issues.

VCAT members are dealing with clients from disadvantaged populations on a day to day basis, many of whom have complex needs. It is absolutely vital that members have a proper understanding of the issues faced by presenting parties. All Residential Tenancy List members should attend mandatory and regular training sessions to ensure that they are making appropriate, fair decisions.

Tenant access

R14. VCAT should employ case managers to arrange hearings flexibly with tenants and link them in with appropriate services.

R15. Phone and Skype access should be made available in all VCAT hearings.

The number of tenants accessing VCAT is staggeringly low. In order to create a better balance between landlord and tenant attendance more support services should be available to tenants.

This is particularly important in matters where a possession application is based upon an allegation of tenant rent arrears or other breaches. To improve tenant access to VCAT there should be greater flexibility in arrangement of hearings including permitting other modes of tenant attendance (e.g. by telephone) and potentially introducing evening hearings.

R16. VCAT should publicise detailed data about its operations.

The absence of detailed, published statistics on the VCAT Residential Tenancies List creates difficulties in ascertaining the extent of access and outcomes. Despite poor attendance rates by tenants there is little data available on the types of tenants accessing the Tribunal, as both applicants and respondents; the number of tenants who are represented and nature of representation; the type of matters tenants are initiating as applicants; and the type of matters which are proceeding undefended.

[15] Victorian Civil and Administrative Tribunal, *Building a Better VCAT Strategic Plan 2014*-17, p8, at https://www.vcat.vic.gov.au/system/files/vcat_strategic_plan_2014-17-building_a_better_vcat.pdf.

The availability of this type of data would make the Tribunal more accountable to the community and would enable a greater understanding of the access to justice issues at VCAT and provide data to indicate where resources are best placed to improve upon this issue.

R17. Notice of hearing forms should be redesigned to be more user-friendly.

To ensure improved access to justice it is recommended that changes are made to the notice of hearing document. The notice of hearing in its current form is difficult to understand, it is intimidating as it is overly formal and it does not provide adequate information.

Notices would be improved by being sent in an ordinary envelope together with the VCAT customer service charter, map, directions and referral information. Notices should also include information about feedback and complaints.

The TUV has previously provided VCAT with an example of how the Application Form and the Notice of Hearing could be made more user-friendly.

R18. S140 of the *VCAT Act 1998* should be amended to enforce that the VCAT applicant must make reasonable enquiries as to the respondent's address for service.

Estate agents and landlords often fail to adequately serve VCAT applications on tenants, particularly in cases where the tenant has already vacated the property in question, for example bond and compensation matters.

Section 140(1)(ii) of the VCAT Act requires service by post to be directed to “the person at his or her usual or last know residential address”.

It is common practice for landlords to post applications for bond to the vacated property, even in situations where an agent or landlord has been in recent telephone or face-to-face contact with the outgoing tenant.

Inadequate service presents a considerable issue, as a respondent to an application loses the opportunity to defend a claim. Although tenants are entitled to apply for a review of a decision if they were not present at the hearing, by that stage it is likely that their bond will have been transferred to the landlord and the likelihood of recovering the money is diminished. The return of bond money is vital to low income tenants and can be the difference between being able to secure another tenancy and homelessness.

R19. Hearings for notices to leave under s374 of the RTA should be sent through multiple means of contact.

In matters under Part 8 of the *Residential Tenancies Act 1997*, if a resident is given a notice to leave, s371 of the RTA requires the matter be heard by the Tribunal within two business days or the residency will be reinstated. The problem is that the service of the notice of hearing is directed to the address that the resident has been ordered to leave. This causes considerable disadvantage to residents as they are excluded from the property and will not be able to access information about their hearing to determine whether they are entitled to remain.

VCAT should consider amending the procedures to ensure that a resident is not disadvantaged through the failure to receive a notice of hearing. Multiple means of contact should be used when notifying of a hearing for a notice to leave.

VCAT fees

R20. Tenants should not be required to pay VCAT application fees.

The Residential Tenancies List at VCAT is largely funded through interest on tenants' bonds held by the Residential Tenancies Bond Authority; consequently the TUV and other organisations believe tenants should not be required to pay fees to access VCAT as an applicant or respondent. When a tenant pays a VCAT application fee they are essentially paying twice, through foregone interest on their bond and again through the fee.

Listing issues

R21. VCAT should develop strategies that encourage tenants to defend their matters in appropriate circumstances and ascertain whether a matter will be contested.

VCAT prides itself on its efficiency and high turnover of hearings that it processes. To achieve this, multiple hearings are listed concurrently. As tenants are unlikely to attend, this method works with few hiccups. The problem arises when a tenant does show up, either accompanied by an advocate, or unrepresented. This often leads to adjournment as adequate time has not been factored in to hear the matter.

In this way VCAT is operating on the presumption that one party will not be engaging in the justice process, rather than working to ensure both parties receive a successful outcome.

Many disadvantaged tenants find it exceedingly difficult to attend VCAT. If a matter that is otherwise ready to proceed is adjourned, this adjournment can cause excessive stress and cost to litigants. Sometimes, clients opt to abandon their matter or settle on terms potentially less favourable than had the hearing taken place. This poses serious issues for tenants in particular, given that the majority of applications are initiated by landlords.

Improved procedures could be included in reforms to the VCAT Rules. One suggestion is that VCAT run a pilot project, under which a sample of tenants are telephoned by VCAT to check whether they have received a notice of hearing and whether they intend to defend the claim. The study should measure how many pilot tenants would not have heard about the hearing but for the telephone reminder. The findings could be compared to the attendance rate of tenants outside the pilot sample.

This pilot could be of particular use to tenants who may not have received a copy of the landlord’s application or who may not have understood the significance of an application or notice of hearing. Arguably, this could be more cost effective than the current costs generated by unnecessary adjournments for both parties and the Tribunal. At the same time, it may have a noticeable effect on the number of tenants who are able to access the Tribunal.

Professional advocates

R22. Estate agents should be explicitly defined as “professional advocates” by the *VCAT Act 1998*.

There is an inconsistency in how landlord and tenant representatives are handled at VCAT. Almost 95per cent of private landlords applying to VCAT are represented by agents or property managers, most of whom appear regularly at VCAT. A further 22per cent of tenancy matters are brought by public landlords and are represented by workers who attend hearings as part of their role with the Department of Health and Human Services.

There is no available data depicting how many tenants are represented at VCAT hearings. What we do know however is that many unrepresented tenants face significant disadvantage because of a lack of understanding about hearing procedure

or a limited ability to advocate on their own behalf. Many tenants do not attend VCAT hearings because they are fearful about attending alone.

Estate agents and property managers have an advantage in VCAT proceedings due to the frequency of their attendance. Additionally estate agents receive training on how to 'Present at Tribunals'[16] as a part of their course to become an agent. Arguably estate agents should be covered under the definition of 'professional advocate' in s 62(8)(d) of the VCAT Act due to their "substantial experience as an advocate".

Despite the current legislative requirement that leave be sought for a professional advocate to appear, VCAT Members generally do not require estate agents to formally seek leave.

Where a landlord is represented by either an estate agent or an officer of the Director of Housing, a tenant should have an automatic right to representation as is outlined in 62(1)(iii) of the VCAT Act. Furthermore, estate agents must be required to seek formal leave to appear, and the Tribunal should be cautious to permit an estate agent to appear where a tenant is self-represented.

More broadly, it is vital that VCAT implement strategies to provide maximum support for self-represented litigants given the extremely high levels of representation available to landlords.

Compliance with VCAT orders

R23. The Act should be amended to include infringement penalties for Landlord non-compliance with VCAT monetary and non-monetary orders.

R24. The Act should be amended to empower VCAT to Award civil penalties for prescribed breaches of the Act.

The lack of enforcement measures available in the Residential Tenancies list at VCAT is a major issue for delivered outcomes as it can be difficult to ensure compliance even after VCAT has made an order. To enforce a monetary VCAT order that is under $100,000 an application must be made to the Magistrates Court. For a non-monetary order the party must apply to the Supreme Court. These avenues are costly and time consuming and are not easily accessible to tenants.

The most common orders relating to tenants are for possession of the property or for compensation through the tenant's bond or otherwise. Tenants are likely to be compelled to comply with these orders as there are additional enforcement measures associated with each of these, police in the case of possession orders and the Residential Tenancies Bond Authority in the case of bond claims.

Data is not available to show why tenants apply to VCAT most often, however the most common reason tenants contact TUV is urgent and non-urgent repairs. In these cases there is nothing that compels a landlord to undertake the repairs even if VCAT makes an order to do so. This is similar for compensation; there is nothing that compels a landlord to pay. Even urgent restraining orders have no compulsion for compliance, and landlords frequently continue with their unlawful behaviour.

A tenants' home, bond or future access to a home is at stake and so they are much more inclined to comply with a VCAT order.

Landlords however have no such compulsion, they do not have money tied up in a bond, their home is not at stake and they have no risk of being locked out of the

[16] REIV, *Unit Synopsis: Certificate IV in Property Services*, http://www.reiv.com.au/learning/training-files/unit-synopisis-(cpp40307)-2015-1.aspx.

market by getting placed on a database as tenants do. The rental market is highly competitive and arguably there are always new tenants to fill their property.

This lack of compliance greatly impacts tenants' ability to access money that they are owed or vital services that they are entitled to. This presumably contributes to the lack of engagement with VCAT by tenants and impinges on tenants' access to justice.

Compliance could be greatly increased if VCAT orders were enforced through infringements that could be issued by CAV or by the tribunal itself.

The civil penalty power of VCAT under the *Owners Corporation Act 2006 (OCA)* should be extended to residential tenancies. This change would enable, or in some instances, require, VCAT to award a civil penalty against a landlord where there is a finding of fact that an offence has been committed. We think this would be a much more efficient and effective means of encouraging and enforcing compliance with the requirements of the Act.

More serious breaches would still be prosecuted through the Magistrates Court and these would continue to be focussed on systemic problems with widespread reach or impact. It is right that serious offences should be subject to criminal test and sanction.

Sector-wide compliance and enforcement mechanisms and activities

R25. Penalties for offences under the residential tenancies and caravan parks parts of the RTA should be at least doubled immediately and all penalties should be better aligned with penalties for comparative detriment in other consumer protection legislation over time.

R26. CAV should issue infringement notices for offences under the RTA to encourage greater compliance in the industry.

R27. There should be an increase in allocations towards CAV enforcement and compliance measures for residential tenancies.

A lack of compliance in the residential tenancies sector is a major inhibitor of effective dispute resolution. Tenants are often left frustrated by their lack of power to hold landlords accountable for offences that are committed under the RTA.

TUV have previously commented on the inadequately low penalties provided for serious breaches under the RTA. We again reiterate that these need to be made substantially higher to be brought in line with other consumer protection legislation.

There is a systemic and significant underutilisation of compliance measures in the residential tenancies sector. This lack of enforcement undermines the legislative framework provided through the RTA. Whilst penalties exist under the RTA, they are rarely utilised as an enforcement measure.

This is in large part due to the fact that there is no formal pathway for an affected party to inform CAV of a breach. The following examples should all incur penalties under the RTA if they are breached, despite this these provisions are frequently not complied with, without any ramification;

- S26(2) A tenancy agreement must be in the prescribed form (10 penalty units)
- S66(2) Landlord must provide full name, address and (where there is no agent) emergency telephone number in writing (20 penalty units)
- S84(1) A landlord must not demand or receive a fee for giving consent to the assignment or sub-letting of premises (20 penalty units)

In situations where there is a breach tenants rarely report it to CAV. This is because tenants are often unaware of their rights, but also are unaware that CAV is able to

issue infringement notices. We encourage the development of a formal pathway for tenants to inform CAV where a breach occurs, and for CAV to respond by issuing infringements as a deterrent to poor conduct in the residential tenancies sector.

The current hands-off approach disproportionately affects tenants. Non-compliance by a tenant will ultimately result in significant negative consequence; they may lose their tenancy, their bond, or their ability to gain access to a new property if they are placed on a tenancy database. A landlord however who fails to undertake their responsibilities under the Act may be ordered to rectify their breach, however they are highly unlikely to receive any further consequences.

The number of CAV investigations is shockingly low with only 24 investigations across residential tenancies and rooming houses, and only 2 prosecutions commenced over the entire year[17].

Rooming houses

Lack of enforcement is an issue across all forms of tenure, but none as prevalent as in the rooming house sector. TUV outreach workers regularly report multiple breaches to the rooming house standards detailed in the RTA, the *Building Act 1993*, Building Regulations 2006, the Building Code of Australia, and the *Public Health and Wellbeing Act 2008*.

Issues such as vermin, leaking showers, mould, lack of security including broken doors and windows, overcrowding, faulty smoke detectors, dangerous gas heaters, asbestos, inadequate egress, dangerous wiring, absence of light globes, general filth, dilapidation and rubbish are commonly reported in both registered and unregistered rooming houses.

Rooming house residents are amongst the state's most vulnerable population, making it difficult for residents to uphold their rights. This issue was recognised in 2010 with the introduction of s131A *Director may investigate rooming house without application by resident* to the RTA.

TUV recognises the excellent work undertaken by CAV in the development of the *Rooming House Operators Act 2016*. We are hopeful that the licensing scheme under this Act will contribute to greater compliance in the sector, but also encourage CAV to dedicate greater resources to enforcement and prosecution to ensure that the scheme captures operators who continually breach the law.

Local councils also play a large role in monitoring compliance in the rooming house sector. Compliance measures under local councils vary widely across the municipalities. Standardisation of how councils approach rooming house regulation would greatly enhance sector compliance.

A rooming house is defined under s3 of the RTA as:

"A building in which there is one or more rooms available for occupancy on payment of rent –

(a) In which the total number of people who may occupy those rooms is not less than 4; or

(b) In respect of which a declaration under section 19(2) or (3) is in force."

The interpretation that there must be four or more residents in a rooming house poses a great impediment to local councils' ability to enforce registration. Non-compliant operators are able to avoid registration by shuffling residents around so that they never

[17] Consumer Affairs Victoria, 2015, Dispute Resolution Issues Paper of the Residential Tenancies Act Review, p24.

have four or more residents housed at the time of an inspection. We see this repeatedly used as a tactic against council registration.

Other dispute resolution models and mechanisms

As discussed in detail at the beginning of this submission, the model of alternative dispute resolution TUV believes to be the most appropriate and effective mechanism for handling residential tenancy disputes is the creation of an Ombudsman. The Issues Paper provides the example of Housing Ombudsman in the United Kingdom, a scheme which is mandatory for social and institutional landlords and voluntary for private landlords. Similar schemes can be found in Finland and the Flanders region of Belgium.

Alternative models

TUV does not consider mediation to be a fair and effective mechanism for resolving tenancy matters because of the inherent power imbalance between landlords and tenants.

Given this situation, enforcing compulsory mediation such as the path followed for Victorian retail tenancies, facilitated by the Victorian Small Business Commissioner, would not be an appropriate model for dispute resolution. This is because tenants could be put in situations where they feel pressured to accept a suboptimal outcome in the process.

It is acknowledged that the parties to a dispute could, if unhappy with the outcome from mediation, have recourse to the tribunal but this seems counter to the main goal of seeking alternative forms of dispute resolution – i.e. that it saves time, costs and lightens the load on VCAT. Instead, compulsory mediation might have the unintended consequence of simply adding another layer to the process, increasing both the time and costs of the process.

The FastTrack Resolution system in New Zealand might speed up the resolution of tenancy matters, sometimes as quickly as two days; however it fails to address the significant power imbalance that exists between landlords and tenants. While notionally open to both tenants and landlords, figures from the system trial shows landlords composed the overwhelming majority of applications (91 per cent) and these applications were predominantly concerning rent arrears (76 per cent). Further, 90 per cent of cases were processed within 48 hours and the amount of rent was rarely disputed.[18]

The FastTrack Resolution system effectively reduces the time tenants had to dispute rent issues and may result in tenants feeling pressured accept the demands of the landlord for fear of losing their housing.

Finally, the creation of an online dispute resolution system similar to the Civil Resolution Tribunal (CRT) in British Columbia is an interesting proposal and has a number of potentially good and harmful elements. CRT is an online-only tribunal used to resolve strata and small claims disputes, and will move from a voluntary tribunal to mandatory in 2017.

[18] Gibson, A, 'Concern over rent system changes', *NZ Herald*, 30 January 2014, at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11194395

The CRT attempts to first encourage a resolution between the parties before going to mediation. If mediation fails, lawyers appointed as adjudicators will hear the matter and evidence will be given online. Adjudicated decisions operate similar to a court order.

It is certainly the case that the online accessibility of this system could be of significant benefit. An online dispute resolution system can be flexible to the schedules of parties and reduce the need for tenants to take time off work or travel a long distance to submit documents or attend a hearing, for example.

However, it is also the case that this accessibility is predicated on a number of assumptions. There is serious potential to overlook segments of society who may face reduced access and/or capacity to use such a technology.

First, forced use of technology may erect unintended barriers for tenants with disabilities, such as those with mobility, hearing, vision and learning impairments. Second, tenants with limited English proficiency may struggle to navigate the often dense and inaccessible language of court documents. There are significant challenges to providing clear and accurate translation in a timely and cost-effective manner. Third, while it might greatly improve the accessibility of geographically isolated tenants, in remote and rural areas, reducing the costs and time associated with travel. Rural tenants are far less likely to have reliable access to high speed internet and often face poorer mobile reception.[19]

These three examples, in combination with a potentially reduced internet access and/or proficiency of seniors and low-income renters more generally, has the potential to create a digital divide which unfairly disadvantages more vulnerable tenants.

The premise of the CRT is to bring the parties together as equals; however, tenants and landlords are not created equal and without appropriate legal representation, the process could expose tenants to significant claims without full legal representation.

It remains to be seen how matters would be decided fairly and efficiently where contradictory evidence may be given online. Residential tenancy matters are largely composed of such contradictory statements and if these are simply provided in written form online, these disputes may prove difficult to adjudicate. Videoconferencing and in-person hearings are allowed, but are an exception.

Again, making CRT mandatory yet allowing an automatic appeal process has the potential, like compulsory mediation, to simply add another level in the process of resolving tenancy matters, increasing the associated costs and time, and not reducing the pressure on VCAT.

Ultimately dispute resolution mechanisms are only as good as the founding rights allow them to be. The best way to avoid disputes is to have robust legislation that sets in place strong consumer protection from the outset. We hope that the current review of the RTA will provide strengthened safeguards that recognise the needs of tenants in changing rental market.

[19] Hough, BR 2012, 'Let's not make it worse: issues to consider in adopting new technology' in JE Cabral, A Chavan, TM Clarke, J Greacen, BR Hough, L Rexer, J Ribadeneyra & R Zorza 2012, 'Using technology to enhance access to justice', *Harvard Journal of Law & Technology,* vol. 26, no. 1, pp. 256-66, at http://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf

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