

Friday, 15th May, 2009



Ms Serena Beresford-Wylie
Director NADRAC Secretariat

Via email: nadrac@ag.gov.au

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Dear Ms Beresford-Wylie,

ADR IN THE CIVIL JUSTICE SYSTEM

The Tenants Union of Victoria (TUV) welcomes the opportunity to respond to the ADR in the Civil Justice System Issues Paper. We also endorse submissions made to you by the Federation of Community Legal Centres (Vic).

The Tenants Union of Victoria 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. We assist about 18,000 private and public renters in Victoria each year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria.

Tenants depend on secure and stable housing for shelter, safety and peace of mind. Tenants in Victoria have no guarantee of secure housing. They may be evicted after notice for almost any reason.¹ A tenant raising a complaint with a Landlord has almost no protection against victimisation.² Tenants may be subjected to a range of retaliatory behaviour including eviction or being listed on a tenancy database.³ In this context disputes can undermine the very security of tenure which protects tenants against the harm and risk of homelessness.

We acknowledge that in many cases it will be unrealistic to expect a dispute resolution process to improve the relationship between disputing parties. However early dispute resolution processes are better equipped at maintaining relationships between tenants, landlords and estate agents than adversarial litigation. We support the use of ADR processes which enhance early dispute

¹ There is only limited protection against retaliatory eviction and discriminatory eviction: ss 263, 266(2) *Residential Tenancies Act 1997* (RTA).

² In contrast to protections against victimisation that occur in employment and anti-discrimination law.

³ Tenants listed on tenancy databases may have limited recourse under Commonwealth privacy law.

continued...

resolution, based on the principles of therapeutic justice and which avoid the need for recourse to complex legal action.

It is clear that because of the vulnerability that tenants face to retaliatory action in a tight rental market they are oftentimes reluctant to assert their rights at all. In this context it is especially important that ADR, court and tribunal processes work effectively when tenants do seek to assert their rights.

As stated we endorse submissions made to you by the Federation of Community Legal Centres (Vic) and in particular share the following concerns:

- Mandatory mediation may have a ‘chilling effect’ on litigation by our clients.
- Unrepresented disputants appearing at mediations may be at a greater disadvantage and their compromise of a claim may reflect their vulnerability, susceptibility to pressure or ignorance of their legal rights.
- Low-income disputants should not be subjected to compulsory ADR unless it is cost free and they have access to free or low cost legal advice (and advocacy).
- Culturally and linguistically diverse (CALD) disputants who are subjected to compulsory ADR should have access to free and accredited interpreter services.
- Mediation is inappropriate where a disputant suffers from a significant power-imbalance with the other party.
- Mandatory ADR is inappropriate where there has been violence.

Many, but not all, tenancy disputes are presently resolved under State rather than Commonwealth law. Changes canvassed in the issues paper, for example the adoption of mandatory ADR clauses in model contracts, could nevertheless have an impact on tenancy matters. Below we provide responses to some of the questions raised in the issues paper:

2. Terminology

To avoid confusion there is a need for clarification in the use of ADR terms. Whilst the diversity of terms for ADR processes is likely to promote a degree of ingenuity in dispute resolution, the lack of consistency and breadth of terms causes confusion for consumers and professionals alike.

3. The need to improve community understanding of ADR

Tenants are often not aware of ADR options available to them and would benefit from measures adopted to improve their understanding of ADR.

We recommend that relevant agencies improve their existing publications which provide information to tenants on how to resolve disputes. For example landlords are required to provide new tenants with a statement of Rights and Duties which is a publication produced by Consumer Affairs Victoria (CAV). The statement refers tenants with a dispute to the Victorian Civil and Administrative Tribunal (VCAT) however it does not inform them of their right to seek conciliation from CAV if they wish prior to lodging an application.

Model contracts may also be used to inform tenants of ADR options.

Application forms to VCAT could also inform tenants of their right to seek ADR services prior to lodging an application. This may be of particular assistance where the availability of the ADR is conditional upon there being no current proceeding on foot.

4(a). The provision of tribunal-based ADR

VCAT is able to undertake both compulsory conferences and mediations.⁴ These ADR processes have commonly been used in tenancy matters in which the claim has exceeded \$10 000. Recently there appears to have been greater use of mediations, though use of tribunal-based ADR is more the exception rather than the rule.

In our experience ADR services offered by VCAT have been reasonably effective. However problems do occur where members see their role as both mediator and adjudicator. These are incompatible and in practice there is a greater need for clearer delineation between the respective roles.

It is more difficult to comment on the effectiveness of ADR where the TUV have not participated in the mediation and it is particularly in cases where a tenant is unrepresented that we are concerned that they may yield to a compromise of their claim that is reflective of their vulnerability rather than the strength of their claim.

⁴ Division 5, Part 4, *Victorian Civil & Administrative Tribunal Act 1998* (VCAT Act)

In our view benefits to tribunal based ADR include:

1. Cost effective, efficient and prompt outcomes.
2. The process is able to accommodate broader considerations in the dispute resolution process than narrower legal principles. For example greater regard may be given to the needs of the parties, the realities of the rental market and hardship type considerations.
3. The parties to the dispute can be empowered to create a resolution that is of greater benefit to the parties than if the parties insisted on adherence to their strict legal rights.

On the other hand drawbacks to tribunal based ADR include:

1. Laws regulating tenancies prescribe certain mandatory obligations and processes. It would be an unacceptable outcome if less emphasis on legal principles resulted in tenants waiving their legislatively protected entitlements. The housing market already places tenants in a difficult bargaining position and ADR should not operate to entrench that disadvantage.
2. ADR could form a barrier to the effective exercise of a tenant's rights. This is particularly the case where urgent or prompt action is required to protect a tenant's health, safety, tenure or privacy.
3. Whilst ADR may lead to cost effective, efficient and prompt outcomes where ADR is unsuccessful it can lead to greater expense, less efficient and delayed outcomes.
4. Tribunal members conducting a mediation may make evaluative comments with access only to limited information and without receiving submissions on the law. Tenants may lose confidence in asserting their rights.

We would support tribunals providing specialised ADR services by persons who are not necessarily legally qualified but who instead have an expertise in ADR and a strong background and understanding of the realities both of the private rental market and social housing system.

4(b). The provision of private, community and government based ADR

All private, community and government based ADR should be subject to uniform benchmarks based on principles of accessibility, independence, fairness, accountability, efficiency and effectiveness.⁵ They should be subject to external

⁵ See eg Department of Industry Science and Tourism (1997) Benchmarks for Industry Based Customer Dispute Resolution Scheme, *Australian Government: The Treasury*, retrieved 14 May 2009, http://www.treasury.gov.au/documents/1124/HTML/docshell.asp?URL=02_preface.asp .

review to ensure that dispute resolution processes operate to a high standard and disputes do not become protracted and costly.

5. Referral and assessment of matters suitable for ADR

In the housing sector a range of professionals refer tenancy matters for dispute resolution; these include lawyers and estate agents. To enable these professions to make appropriate referrals students in both areas should undertake compulsory study in ADR prior to qualification. We also support mandatory continuing legal education in ADR for both professions.

Tribunal staff and members should receive training and ongoing professional development in ADR. In particular referral and assessments for ADR should be considered as an alternative where tribunals are otherwise contemplating eviction or other orders limiting a tenant's human rights.

6. Barriers and incentives to the use of ADR before and during civil proceedings.

One of the statutory purposes of the *Residential Tenancies Act* 1997 is to provide for the inexpensive and quick resolution of disputes arising under the Act.⁶ Additionally the VCAT Act mandates that the tribunal in conducting proceedings should act 'with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.'⁷ In tenancy matters VCAT is generally a costs free jurisdiction and legal representatives do not generally have a right of audience.⁸

Tenancy disputes which proceed to adjudication in VCAT range in their level of complexity. Many are relatively straightforward and can be dealt with by the presiding tribunal member informally, efficiently and quickly. In these cases parties will often justifiably prefer going direct to the tribunal for adjudication rather than experiencing potential delays through an ADR process. In our experience, however, less straightforward matters at VCAT can become too legalistic and formalised.

⁶ s 1(d) RTA

⁷ s 98(1)(d) VCAT Act

⁸ Division 8 & s 62 VCAT Act

Consumer Affairs Victoria's conciliation services are provided under the power to conciliate or mediate conferred upon it by the *Fair Trading Act 1999*.⁹ This service is free and CAV practice is not to require physical attendance or other conferencing by the disputants. The service is no longer available once court or tribunal proceedings have been initiated.

In our view the greatest incentive for disputants to seek conciliation by CAV will be by maintaining an informal, free and accessible ADR process which gives participants the opportunity to avoid the stress and inconvenience of preparing and appearing in a VCAT hearing.

Given that VCAT is generally a costs free jurisdiction in tenancy matters, altering VCAT's cost structures to encourage the use of ADR would impair rather than improve access to justice.

We do not support the adoption of the model mediation clause¹⁰ in tenancy or residency agreements covered by the Residential Tenancies Act. Such a clause would be contrary to the existing procedurally based dispute resolution regime in tenancy matters.

The model clause is particularly concerning given that the fees associated with a mediation conducted under its terms could be far in excess of the minimal costs associated with a CAV conciliation or a VCAT application. Such fees would serve to impede access to a just resolution of the dispute.

We believe that voluntary, free and early ADR is the best complement to the existing processes for adjudication in tenancy matters.

We welcome the opportunity to discuss any of the issues raised in the submission further. I can be contacted on 9411 1444 or by email lhansen@tuv.org.au .

Yours sincerely,

Lee Hansen
Policy Solicitor
Tenants Union of Victoria

⁹ s 104

¹⁰ At attachment D of the issues paper.