

Friday, 12 June, 2009



President's Review  
VCAT  
Level 1/ 55 King Street  
Melbourne VIC 3000

**Registered Office**  
55 Johnston Street  
Fitzroy VIC Australia  
**Mail** P O Box 234  
Fitzroy VIC 3065  
**Phone** (03) 9411 1444  
**Fax** (03) 9416 051  
**Web** [www.tuv.org.au](http://www.tuv.org.au)

**Via email: [review@vcatreview.com.au](mailto:review@vcatreview.com.au)**

Dear President,

### **PRESIDENT'S REVIEW OF VCAT**

The Tenants Union of Victoria welcomes the opportunity to comment on the consultation paper, 'The role of VCAT in a changing world'.

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. 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.

The dispute resolution functions that have been conferred on VCAT by the *Residential Tenancies Act* (RTA) are hugely significant to tenants in Victoria. Housing not only provides shelter but it is integral to a person's health, wellbeing and connection to the community.

The RTA offers fundamental safeguards for tenants, these include:

- the protection of privacy and quiet enjoyment
- the landlord's duty to repair including keeping the premises safe and secure
- restrictions against excessive rent increases, and
- strict procedural rules for landlords seeking to evict a tenant.

*continued...*

Where there has not been adherence to these and other requirements set out in the RTA, tenants are entitled to access VCAT to resolve their dispute.

Many disputes between tenants and landlords or tenants and estate agents involve an intrusion into a tenant's private space, their home. Many disputes can result in tenants, including blameless tenants, being evicted. All disputes can undermine a tenant's sense of safety and security in their home; for themselves and their family. For these reasons VCAT's approach to dispute resolution in tenancy matters takes on a special significance and a heightened responsibility.

Statistics confirm that tenant access to the tribunal is extremely low. Ninety-three per cent of applications to the tribunal are made by landlords or their representatives compared to seven per cent by tenants.<sup>1</sup> Moreover tenants only attend twenty-two per cent of matters that were initiated by landlords.<sup>2</sup>

To a large degree the causes of low tenant access are structural. Low income and disadvantaged people face great barriers to accessing the private rental market and these barriers will often continue throughout their life making many tenants afraid to assert their rights. Many tenants who contact us to receive advice on their rights are reluctant or decline to exercise their rights for fear of being evicted or default listed on unregulated tenancy databases.<sup>3</sup> It is unfortunate to confirm that in our experience such reluctance may be warranted. We see many tenants who are being evicted because they have asked for repairs to be completed.

### **Protection against retaliation**

Tenants have minimal legal protection against retaliatory eviction and default listings on unregulated tenancy databases.<sup>4</sup> This fact makes the rights set out in tenancy legislation more illusory than real. Tenants would be more likely to assert their rights at VCAT if they were guaranteed protection against retaliatory

---

<sup>1</sup> Victorian Civil & Administrative Tribunal *Annual Report 2007 - 2008*

<sup>2</sup> <http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Listing-Home+Page+News-VCAT+SMS+pilot+project> [accessed 10 June 2009]

<sup>3</sup> For further information on the impact of tenancy databases see Victorian Law Reform Commission, *Residential Tenancy Databases Report* (2006) available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Community+Law+Reform/LAWREFORM++Residential+Tenancy+Databases++Report> [accessed 11 June 2009]

<sup>4</sup> s 266(2) RTA

eviction and victimisation. Similar protections exist in employment and anti-discrimination law and in tenancy or similar legislation inter-state.<sup>5</sup>

#### **RECOMMENDATION 1**

**Tenants who access VCAT or assert their rights need legislative protection against retaliatory conduct such as eviction, unfavourable treatment and victimisation.**

The low attendance rate for tenants responding to landlord applications is deeply concerning.

We welcome the SMS pilot that VCAT has recently commenced which is aimed at improving tenant attendance. We consider that further action is required. Tenant attendance is doubly important in possession hearings because not only does a possession order lead to eviction but also it can result in homelessness. Moreover a possession order based on tenant default, such as rent arrears, has severe consequences because it usually leads to a default listing on a tenancy database and the tenant is thereafter locked out of the private market for an indefinite period.

#### **Notices of hearing**

The notice of hearing should be reviewed and redesigned. Its form, design and content are confusing to tenants. The matter description is often inadequate or misleading. The redesign should incorporate principles of accessibility for persons from a CALD background or with a disability. Notices should be sent in a ordinary envelope, apart from being easier to open this would enable the tribunal to send other important information including a tribunal customer service charter, a map with public transport directions and services that tenants can contact for help.

#### **RECOMMENDATION 2**

**The notice of hearing should be redesigned in accordance with principles of accessibility. Notices should be sent in an ordinary envelope together with a tribunal customer service charter, a map, directions and referral information.**

---

<sup>5</sup> ss 6(ca) & s 96 *Equal Opportunity Act 1995* (Vic); s 57 *Residential Tenancies Act 1997* (ACT); s 88 *Residential Parks Act 2007* (SA)

Tenants often complain that they have not received a notice of hearing. Indeed we understand that a large number of notices are returned to the tribunal unopened. Notices to vacate that have been sent by registered post are generally deemed served on a tenant whether or not they have in fact received the notice. Tenants are sometimes alerted to a pending eviction for the first time by police officers that are about to execute the warrant.

### **Case management**

We have commented on the severe impact eviction can have particularly where it is a result of tenant default. More intensive measures are required to improve tenant attendance at possession hearings. VCAT should introduce a case management system and ensure that in all possession applications based on an allegation of tenant default (eg rent arrears) the matter is assigned to a VCAT case manager.

The principal role of the case manager should be to contact the tenant, initially by telephone and then by any available method to advise of the application and to flexibly arrange a mutually convenient time for hearing. Where in-person attendance is impossible or impracticable the case manager should investigate alternative modes of attendance (eg. telephone attendance). Currently tenants can find it difficult to persuade the Tribunal to grant a telephone hearing.

With respect to the allocation of hearing times, it is our view that the Tribunal should be able to hear some tenancy matters in the evening. This would be of particular assistance in rent arrears matters where it is counter productive to require a tenant to take leave without pay from work to attend a hearing.

Where a tenant is reluctant to attend the hearing the case manager should communicate the importance of attending and refer them further for independent advice. A case manager is also able to ensure that the landlord has supplied required documentation before the matter is listed for hearing. He or she could also link tenants in with appropriate services including financial counsellors, advice and advocacy services. Financial counsellors could provide crucial assistance before a rent arrears hearing.

The case management process that we have identified would lead to savings in the form of fewer review hearings and adjournments. Further it would decrease delays to the resolution of eviction disputes.

The Social Security Appeals Tribunal successfully adopts a similar case management approach to all applications despite receiving almost 14,000 applications per year.<sup>6</sup> The employment by VCAT of a family violence support worker is an example of case management processes improving tenant access to the tribunal.

### **RECOMMENDATION 3**

**VCAT should employ case managers to:**

- **Flexibly arrange hearings with tenants,**
- **Ensure that applications are ready for hearing, and**
- **Link tenants in with appropriate services.**

**The need for such a system arises particularly in cases where a possession application is founded upon an allegation of tenant default.**

### **RECOMMENDATION 4**

**VCAT should be flexible in permitting other modes of tenant attendance using telephones and other technological means.**

### **RECOMMENDATION 5**

**VCAT should introduce evening hearings, especially for rent arrears matters.**

## **Application forms**

Whilst most applications lodged by estate agents and the Office of Housing are made via VCAT online, tenants overwhelmingly rely on the paper application forms to bring their matters to VCAT. The residential tenancies list application

---

<sup>6</sup> Social Security Appeals Tribunal, *Annual Report* (2007-08)

form needs to be updated. The civil claims list application form would provide a good model for any redesign.

The form should incorporate the following:

- Express reference to fee waiver
- Provision for credit card payment so that a separate form is not required
- The ability to list parties other than the landlord (eg. owner's corporation)
- The ability to expressly invoke other relevant legislation (eg. *Charter of Human Rights and Responsibilities, FTA, Owner's Corporation Act*)
- A tick-a-box set out similar to the civil claims application
- A section for tenants to disclose that they would like to discuss a disability-related need (eg. wheelchair access, sign interpreter)

#### **RECOMMENDATION 6**

**The tenant application form to the residential tenancies list is in need of a comprehensive update and redesign.**

### **Waiver of application fees**

The Residential Tenancies List is funded by tenants' money that is, the interest on bonds held by the Residential Tenancies Fund. Charging tenants an application fee is akin to charging them twice for accessing the tribunal. We therefore recommend that all tenants be exempted from VCAT application fees.

The process for applying for a fee waiver needs to be streamlined. As it stands the process can impede access to VCAT. Applicants must presently complete a statutory declaration containing details of their financial position. Completing the form effectively requires personal attendance at the tribunal or before another qualified witness.

We support the position in relation to fee waiver jointly advocated by the Law Institute of Victoria, Federation of Community Legal Centres (Vic) and PILCH.<sup>7</sup> In our view all tribunals and courts in Victoria including VCAT should simply their approach to the waiver of application fees by uniform and express categories of exemption. The categories of exemption should include holding a health care or

---

<sup>7</sup> Burke, de Krestler and Tinkler, *Letter to Chief Justice Marilyn Warren*, 17/12/08 [https://www.liv.asn.au/members/sections/submissions/20081217\\_178/20081217\\_Waiver%20of%20Court%20fees.pdf](https://www.liv.asn.au/members/sections/submissions/20081217_178/20081217_Waiver%20of%20Court%20fees.pdf) [accessed 11 June 2009].

pensioner card as well as the other categories adopted in the Family and Federal Courts.

Additionally there should be provision for CLCs and pro bono providers to certify that their clients are unable to afford the applicable fees.

We support the retention of a broad discretion to waive fees on the grounds of financial hardship where the applicant does not otherwise fit within the express categories of exemption.

#### **RECOMMENDATION 7**

**All residential tenants should be exempted from VCAT application fees. Additionally pursuant to s 132(1)(a) of the VCAT Act the regulations should be amended to prescribe express grounds for exemption from VCAT fees, these should be modelled on the express grounds for exemption used in the Family and Federal Courts. In addition provision should be made for CLCs and pro bono providers to certify in favour of fee waiver.**

#### **Front counter staff**

As gatekeepers to VCAT, the front counter staff at King Street should be exceedingly cautious not to reject applications that are validly made. We have received complaints from tenants who have attempted to make an application but have been turned away and told that they could not apply. On closer examination it has been clear that these tenants were entitled to apply and should have had their application accepted.

#### **RECOMMENDATION 8**

**Counter staff should only have the authority to reject VCAT applications on the spot if they have appropriate experience and training. In any case that an application is rejected it should be logged and a reference number provided.**

#### **Quality, Consistency and Accountability**

As a member of the tribunal has put it, 'if tenant advocates can say to a tenant, "if you go to the hearing and have your say, you will be treated fairly", surely the

tenant is more likely to go.’<sup>8</sup> We suspect that tenant advocates would be the first to give this advice if they could.

There needs to be a marked improvement in the quality and consistency of VCAT’s decision making and its accountability mechanisms. Tenants are in a highly vulnerable position and where they do decide to assert their rights they should be served by a dispute resolution body that is both respectful and competent.

In the following section we set out seven proposals that are aimed to improve VCAT’s quality, consistency and accountability, namely:

- A customer service charter
- A member conduct and complaints system
- Extension of recording facilities to all proceedings
- Informing parties of the right to written reasons
- Guidelines for self-represented parties
- Improved technical knowledge
- Improved review mechanisms

### **Customer service charter**

VCAT’s customer service charter is hidden towards the end of its annual report. The charter should be reviewed in consultation with tribunal users. It should be drafted to achieve the following purposes:

- Inform tribunal users what they can expect before, during and after the hearing
- Set performance standards
- Provide details of the tribunal’s complaints handling policy

The UK Civil Court’s Charter is an excellent example of a court charter that achieves these purposes.<sup>9</sup>

---

<sup>8</sup> Member Ian Proctor, Residential Tenancies Tribunals – Delivering the Goods? Australasian Residential Tenancies Conference 2007, p 9 <http://www.restenconf.com/images/stories/artc2007/Proctor.pdf> [accessed 11 June 2009]

<sup>9</sup> [http://www.hmcourts-service.gov.uk/docs/infoabout/courtcharters/civilcourt\\_aj20\\_web\\_1106.pdf](http://www.hmcourts-service.gov.uk/docs/infoabout/courtcharters/civilcourt_aj20_web_1106.pdf) [accessed 11 June 2009]

The charter should place greater emphasis on the standards of behaviour expected of its members.

To ensure public awareness of VCAT's charter, it should also be distributed or published:

- With notices of hearing
- On the VCAT website
- In a poster format in all hearing rooms
- At VCAT service counters

#### **RECOMMENDATION 9**

**VCAT's customer service charter should be reviewed in consultation with tribunal users. The document should be widely distributed and published.**

### **Member conduct and complaints system**

We are aware that the Residential Tenancies List of VCAT has an informal complaints system. However, we have been unable to locate any information on the system on the VCAT website or within its annual report. We believe that there is a great and pressing need for a clear and transparent complaints mechanism relating to member behaviour

In 2001 the Attorney-General commissioned a report on the Judicial Conduct and Complaints System in Victoria by Crown Counsel, Professor Peter Sallmann which was published in December 2003. The report made recommendations in relation to VCAT's complaints system however it appears that these have not been implemented.

We support these recommendations which were firstly, that VCAT should publish a booklet clearly and simply setting out basic information on how VCAT, its members and in particular its complaint system operates.<sup>10</sup> And secondly:

“That VCAT consider publishing in its annual report general information about its complaint handling activities in the year under report. Including the number and types of complaints receive and general information about their outcomes.”<sup>11</sup>

---

<sup>10</sup> Professor Peter Sallmann, *Judicial Conduct and Complaints System in Victoria* (2003) p 9

<sup>11</sup> *Ibid*

#### **RECOMMENDATION 10**

**VCAT should publish and make widely available a ‘How do I complain?’ booklet which details its members conduct and complaints system. VCAT should publish in its annual report general information about its complaint handing activities for the year including the number and type of complaints received and general information about their outcomes.**

#### **Extension of recording to all proceedings**

VCAT currently records proceedings at its King Street venue which means that transcripts of these proceedings are available for a fee. Meanwhile VCAT does not record proceedings held at the metropolitan and regional courts.

Without access to a transcript of proceedings it can be difficult to subject a VCAT decision or member behaviour to an appropriate level of scrutiny and it is exceedingly difficult to appeal a VCAT decision to the Supreme Court of Victoria.

We understand that VLA has made enquiries on the subject and that self-contained units are available at a cost of \$1500. These units record all voices in the hearing room and permit hearings to be transcribed. They are used as a back-up system in the Supreme Court of Victoria.

We recommend that VCAT record all proceedings. We note that this proposal has broad support amongst many VCAT users. The position is consistent with the human rights to a fair hearing and to equality before the law, rights which the Victorian parliament has sought to promote and protect under the *Charter of Human Rights and Responsibilities* (Charter).

#### **RECOMMENDATION 11**

**That VCAT ensure all hearings including those in metropolitan and regional courts are recorded to allow for the proceeding to be transcribed.**

## **Informing parties of the right to written reasons**

Generally parties at VCAT have the right to seek written reasons up to 14 days after oral reasons have been delivered.<sup>12</sup> In matters heard under the RTA, Schedule 1 to the VCAT Act modifies this position and requires a person seeking written reasons to make the request at or prior to the time that the decision is given or notified.

We understand that this modification may be necessary for a large list such as the Residential Tenancies List. Unfortunately self-represented tenants are often unaware of the right to seek written reasons. If the hearing is not recorded then without written reasons it is all but impossible to subject the decision to scrutiny.

We recommend that all self-represented parties in tenancy matters be informed by the presiding member at the commencement of the proceeding of their right to seek written reasons. Where the presiding member fails to do this the time for seeking written reasons should be extended by 14 days. Notices of hearing, the tribunal charter and posters in the hearing room could also alert parties to this right.

### **RECOMMENDATION 12**

**The presiding member should inform parties at the commencement of the hearing of the right to seek written reasons and of the time for so doing. Where the presiding member fails to do this the time for seeking written reasons should be extended by 14 days. VCAT should also use other methods to ensure that parties are aware of the right to seek written reasons.**

## **Guidelines for member assistance to self-represented parties**

VCAT's treatment of self-represented parties often does not appear to be based on a consistent body of principles.

---

<sup>12</sup> s 117(2) VCAT Act

Tenants are at a significant disadvantage where they appear self-represented against an experienced estate agent.<sup>13</sup> In these circumstances the tribunal has a duty to assist the self-represented party whilst retaining its neutrality.<sup>14</sup>

Given the lack of a level-playing field in so many tenancy matters the tribunal should adopt *guidelines for member assistance to self-represented parties*. These should be broadly based on the litigants in person guidelines of the Family Court of Australia but may need to be tailored to the needs of tribunal users and may potentially be enhanced by reference to the *Charter of Human Rights and Responsibilities*.<sup>15</sup> The guidelines should be published on the VCAT website and potentially incorporated into the tribunal users charter. The tribunal should monitor and report on its compliance with the guidelines from time to time.

---

<sup>13</sup> See eg Justice Morris, [http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/Media/\\$file/speech\\_fairness\\_in\\_advocacy%20\\_80\\_407.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/Media/$file/speech_fairness_in_advocacy%20_80_407.pdf) speech on 18 April 2007. [accessed on 11 June 2009]

<sup>14</sup> *Tomasevic v Travaglini & Anor* [2007] VSC 337 (13 September 2007)

<sup>15</sup> *Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001)

For completeness the guidelines are replicated here: A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;

11. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
12. A judge should explain to the litigant in person any procedures relevant to the litigation;
13. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;
14. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
15. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
16. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;
17. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott* (1994) 121 ALR 148 at 150);
18. Where the interests of justice and the circumstances of the case require it, a judge may:
  - draw attention to the law applied by the Court in determining issues before it;
  - question witnesses;
  - identify applications or submissions which ought to be put to the Court;
  - suggest procedural steps that may be taken by a party;
  - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

### **RECOMMENDATION 13**

**The tribunal should adopt and publish guidelines for member assistance to self-represented parties. The guidelines should be broadly based on the Family Court’s litigants in person guidelines.**

#### **Improve technical knowledge**

An understanding of the social context in which the RTA operates is critically important for decision makers who under the Act and other legislation are conferred with broad and important discretions. The private rental market and housing system are complex subjects requiring continuing technical training which all members in the Residential Tenancies List should receive.

### **RECOMMENDATION 14**

**Tribunal members should receive continuing technical training in the private rental market and housing system.**

#### **Improved review mechanisms**

Appeals against decisions of the Residential Tenancies List of VCAT are limited to questions of law and may only be taken to the Supreme Court of Victoria. Appeals to the Supreme Court of Victoria are complex and expensive, not only can appellants face exorbitant legal costs but if they lose they are likely to have costs awarded against them.

We recommend an amendment to the VCAT Act modelled on s 60A of the *Guardianship and Administration Act 1986* which allows a party to a tenancy matter to apply for a hearing *de novo* before a senior member of the tribunal. Upon rehearing the matter the senior member may affirm, vary or set aside and substitute the original order.

We consider that such a right to merits review should be available in all tenancy matters but is especially necessary in possession cases. The listing of some types of re-hearings would need to be expedited such as in danger and rent arrears matters. Where the original matter arises under multiple enactments (eg RTA & the Charter) then the whole of the matter should be subject to a right of rehearing.

## RECOMMENDATION 15

**The VCAT Act should be amended to allow for a party to a tenancy dispute to apply for a rehearing de novo to be heard and determined by a senior or presidential member of the tribunal.**

Existing appeal rights to the Supreme Court of Victoria should be retained but simplified. During the second reading speech to the VCAT Act the Attorney-General said at [250]:

“The president – a Supreme Court judge – and the vice-presidents – County Court judges – will, while full-time Members of VCAT, be able to exercise the powers of the Supreme and County courts respectively. This will reduce delays for parties who wish to appeal to the Supreme Court against a tribunal decision...”

And then repeated at [310]:

“This will reduce delays for parties who appeal to the Supreme Court as the president of VCAT will be able to exercise the powers of a Supreme Court judge.”

We are not aware of any appeals that have proceeded in the way that was envisioned above. Having the President of VCAT hearing Supreme Court Appeals from VCAT may not only reduce delays but would allow the President to offer judicial oversight and guidance to the membership.

The past President has commented that owing to the responsibilities of the position it would be undesirable for the President to be tied-up in large scale appeals.<sup>16</sup> However he contemplated a solution involving a delegation of his powers under s 33 of the VCAT Act to other Supreme Court Justices who may be appointed as acting members under s 29 of the VCAT Act.<sup>17</sup>

We would support legislative amendment or amendment to the Supreme Court Rules to permit VCAT appeals to be lodged at and proceed in the VCAT building. The Supreme Court of Victoria should come to VCAT rather than the reverse. In addition a simplification and relaxation of the procedures for appeal is warranted.

---

<sup>16</sup> *Premier Building & Consulting Pty Ltd v Spotless Group Ltd* [2004] VCAT 1364

<sup>17</sup> *Ibid.*

#### **RECOMMENDATION 16**

**That through legislative amendment or amendment to the Supreme Court Rules the venue for all aspects of a Supreme Court Appeal should be VCAT (excluding appeals to the Court of Appeal). In addition there is a need for simplification and relaxation of the procedures for appeal.**

Dissatisfied participants are on occasion given walking directions to the Supreme Court of Victoria by the presiding member. This can leave the person concerned confused and with the feeling that they have not been accorded their due respect.

#### **RECOMMENDATION 17**

**VCAT should publish an ‘I want to appeal’ brochure setting out a parties’ appeal rights and referring them to services that may be able to assist.**

### **Cross-jurisdictional Issues**

Tenants may have issues arising under a variety of enactments, including:

- *Equal Opportunity Act 1995*
- *Residential Tenancies Act 1997 (RTA)*
- *Fair Trading Act 1999 (FTA)*
- *Charter of Human Rights and Responsibilities 2006 (Charter)*
- *Owners Corporations Act 2006*

Whilst there are variety of rights and obligations arising under these Acts, applicants to the Residential Tenancies List will often have their dispute examined through the prism of the RTA in a manner that does not give full effect to the rights and obligations arising in other enactments.

By way of example there seems to be sparse recognition that by virtue of s507A(2) of the RTA tenants are able to access the range of remedies contained in the FTA.

These issues appear to arise as a consequence of the list and divisional structure of the Tribunal.

The fragmentation of disputes is particularly concerning in matters that cross between the Residential Tenancies Act and Equal Opportunity Act. The options for a tenant whose landlord is seeking to evict them on discriminatory grounds and who wishes to prevent the eviction appear to be lost in the lacunae between the two Acts and the two lists of VCAT.

In *Etheridge v Alamanas* (1999) a decision of Deputy President Mackenzie of the Anti-Discrimination List, it was commented as follows:

[I]t is clear that under Victorian Legislation, a landlord is entitled to apply for an order for possession in certain specified circumstances and VCAT in its Residential Tenancies List is permitted to grant that order, again in certain specified circumstances. In my view, I doubt that VCAT, in its anti-discrimination jurisdiction and under the Equal Opportunity Act, can challenge an order made by or interfere with a hearing in another part of VCAT...

It seems to me that to question the ability to apply for and obtain an order for possession through the Residential Tenancies List would involve really the review of a decision made or proceedings arising in that list and that is not a function expressly conferred in the Equal Opportunity Act and certainly there is nothing expressed in the order making powers in that Act to permit the quashing or reviewing of proceedings or orders made in the Residential Tenancies List.

This has left tenants who are seeking to defend possession proceedings on the basis of an allegation of discrimination in a difficult and unclear situation. It would be beneficial if VCAT could clarify its procedures in the form of a practice note and if eventually all members in the Residential Tenancies List were conferred with Anti-Discrimination List jurisdiction. If upon review there is indeed a gap in the legislation that prevents a tenant from defending possession proceedings on the basis of an allegation of discrimination then legislative amendment is required.

#### **RECOMMENDATION 18**

**VCAT should review its divisional and list structure to ensure that it does not create a barrier to tenants accessing any aspect of their rights or entitlements under law.**

## **Funding of the Residential Tenancies List**

The Residential Tenancies List is funded by allocations from the Residential Tenancies Fund (RTF). The RTF is established under the Residential Tenancies Act and is comprised of interest earned on bonds held by the Residential Tenancies Bond Authority. It is inequitable that the list provides a large-scale service to landlords and estate agents and yet it is funded exclusively by tenant's money. We recommend that allocations be made to the Residential Tenancies List from the Victorian Property Fund. Savings to the RTF should be redirected to advocacy services and ultimately returned to tenants.

### **RECOMMENDATION 19**

**Allocations be made to the Residential Tenancies List of VCAT from the Victorian Property Fund. Savings to the Residential Tenancies Fund should be directed to advocacy services and ultimately returned to tenants.**

We welcome any further opportunity to discuss issues relating to the President's Review of VCAT. If you have any further questions or would like to discuss these issues further please contact **Lee Hansen**, Policy Solicitor on 03 9411 1444 to arrange a meeting.

Yours sincerely,



Mark O'Brien  
**Chief Executive Officer**  
Tenants Union of Victoria

## RECOMMENDATIONS

To improve tenant access to VCAT the Tenants Union of Victoria recommends:

1. Tenants who access VCAT or assert their rights need legislative protection against retaliatory conduct such as eviction, unfavourable treatment and victimisation.
2. The notice of hearing should be redesigned in accordance with principles of accessibility. Notices should be sent in an ordinary envelope together with a tribunal customer service charter, a map, directions and referral information.
3. VCAT should employ case managers to:
  - Flexibly arrange hearings with tenants,
  - Ensure that applications are ready for hearing, and
  - Link tenants in with appropriate services.

The need for such a system arises particularly in cases where a possession application is founded upon an allegation of tenant default.

4. VCAT should be flexible in permitting other modes of tenant attendance using telephones and other technological means.
5. VCAT should introduce evening hearings, especially for rent arrears matters.
6. The tenant application form to the residential tenancies list is in need of a comprehensive update and redesign.
7. All residential tenants should be exempted from VCAT application fees. Additionally pursuant to s 132(1)(a) of the VCAT Act the regulations should be amended to prescribe express grounds for exemption from VCAT fees, these should be modelled on the express grounds for exemption used in the Family and Federal Courts. In addition provision should be made for CLCs and pro bono providers to certify in favour of fee waiver.
8. Counter staff should only have the authority to reject VCAT applications on the spot if they have appropriate experience and

training. In any case that an application is rejected it should be logged and a reference number provided.

9. VCAT's customer service charter should be reviewed in consultation with tribunal users. The document should be widely distributed and published.
10. VCAT should publish and make widely available a 'How do I complain?' booklet which details its members conduct and complaints system. VCAT should publish in its annual report general information about its complaint handing activities for the year including the number and type of complaints received and general information about their outcomes.
11. That VCAT ensure all hearings including those in metropolitan and regional courts are recorded to allow for the proceeding to be transcribed.
12. The presiding member should inform parties at the commencement of the hearing of the right to seek written reasons and of the time for so doing. Where the presiding member fails to do this the time for seeking written reasons should be extended by 14 days. VCAT should also use other methods to ensure that parties are aware of the right to seek written reasons.
13. The tribunal should adopt and publish guidelines for member assistance to self-represented parties. The guidelines should be broadly based on the Family Court's litigants in person guidelines.
14. Tribunal members should receive continuing technical training in the private rental market and housing system.
15. The VCAT Act should be amended to allow for a party to a tenancy dispute to apply for a rehearing de novo to be heard and determined by a senior or presidential member of the tribunal.
16. That through legislative amendment or amendment to the Supreme Court Rules the venue for all aspects of a Supreme Court Appeal should be VCAT (excluding appeals to the Court of Appeal). In addition there is a need for simplification and relaxation of the procedures for appeal.

17. VCAT should publish an 'I want to appeal' brochure setting out a parties' appeal rights and referring them to services that may be able to assist.
18. VCAT should review its divisional and list structure to ensure that it does not create a barrier to tenants accessing any aspect of their rights or entitlements under law.
19. Allocations be made to the Residential Tenancies List of VCAT from the Victorian Property Fund. Savings to the Residential Tenancies Fund should be directed to advocacy services and ultimately returned to tenants.