

## Tenancy Working Group

### Submission to the VCAT Legislation Reform Project (September 2012)

#### The Tenancy Working Group

The Federation of Community Legal Centre’s Tenancy Working Group (‘Tenancy Working Group’) is comprised of community and Victoria Legal Aid lawyers who assist some of our most vulnerable community members with housing related legal issues. The Tenancy Working Group meets every two months to discuss law reform opportunities, new developments in tenancy case work and to exchange knowledge.

The members of this group are frequent users of the Victorian Civil and Administrative Tribunal (‘VCAT’) and welcome the opportunity to make a submission regarding the VCAT Legislation Reform Project.

This submission is based on the casework of Tenancy Working Group members. Some of their recent work has been documented in the following publications:

- *Better Tenancies Policy Platform* (November 2009, Tenants Union of Victoria).
- *Making it Home: Refugee Housing in Melbourne’s West* (March 2012, Footscray Community Legal Centre);
- *Repairing a Broken System: Hurdles for Victorian Public Housing Tenants Seeking Repairs to their Properties* (June 2012, West Heidelberg Legal Service);

Members of the Tenancy Working Group assist a broad cross section of marginalised tenants who reside in private rental, community and public housing. Our client base includes people facing multiple sources of disadvantage such as homelessness, mental illness, disability and financial hardship. The most recent government review of CLCs noted that 58% of community legal sector clients received some form of income support, 82% of clients earned less than \$26,000 per annum, and almost 9% of clients had some form of disability.

The Tenancy Working Group aims to empower our client base to understand their legal rights and voice their concerns directly to law and policy makers.



## **Summary of our concerns**

The VCAT Residential Tenancies List is the primary forum for the determination of tenancy disputes arising under the *Residential Tenancies Act 1997* (Vic) (“RTA”) in Victoria. VCAT is required to operate as informally as possible in order to determine disputes fairly, efficiently and according to the substantial merits of the case.<sup>1</sup> The aim of these informal processes is to allow the Tribunal to operate effectively whilst minimising the resources spent by government and parties appearing before the Tribunal. However, it is important that fair outcomes and access for marginalised groups is not compromised.

The Tenancy Working Group agrees that there are improvements that could be made to VCAT legislation, rules and processes that would improve outcomes for vulnerable tenants. We have made submissions on the following points:

1. Application fees
2. Application forms
3. Notice of hearing
4. Service and notices to leave
5. Procedural issues in bond disputes
6. Directions to Consumer Affairs Victoria
7. Professional advocates
8. Correspondence
9. Written reasons
10. Anonymised reports
11. Member training
12. Transparency
13. Complaints
14. Merits review of VCAT decisions
15. Applications for review
16. Urgent repairs
17. Difficulties obtaining adjournments
18. Listing practices and adjournments

The Tenancy Working Group has read the submission of the Homeless Persons Legal Clinic and supports their recommendations.

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<sup>1</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97-98.



## **Submissions**

### **1. Application fees**

The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (“the VCAT Act”) should be amended to create an automatic fee waiver for all tenants. VCAT receives funding from the interest on tenants’ bonds and thus tenants should not have to pay to apply for a hearing. While the Registrar has a power to waive fees under s 132 of the VCAT Act on grounds of financial hardship, many tenants may be unaware they are entitled to consideration of a fee waiver. An explicit legislative waiver of fees would remove one of the several barriers to tenants asserting their legal rights in the tribunal. If an automatic waiver is not possible, we recommend that certain groups of applicants be exempted from the fee, namely, individuals who are entitled to a health care or pension card and that greater work is done to publicize to tenants that a fee waiver is possible. We are particularly keen to see fees waived for tenants who are applying to the Tribunal to determine the issue of repairs to their dwelling.

### **2. Application forms**

Form 11 in Schedule 2 of the VCAT Rules contains the particulars required for making an application to the Residential Tenancies List. The standard application form for the VCAT Residential Tenancies List was recently changed from a one page document to a 5-10 page form that can be completed and submitted online or printed and posted. The new application form contains the same basic information required by Form 11. However, the length and layout of the application form is potentially daunting for self represented litigants who have limited literacy skills or are from a non-English speaking background. While this is not an issue requiring legislative change, it is notable that in practical terms the application form is overly complicated in contrast to the form contained in the VCAT Rules. We submit that a simplified form should be made available as an alternative.

### **3. Notice of hearing**

The Registrar’s powers under s 99 of the Act to issue a notice of hearing should be applied consistently with VCAT’s commitment to enhancing accessibility. Notices should be sent in an ordinary envelope together with a VCAT customer service charter, a map, directions and referral information. Such notices should also include information about feedback and complaints, which



could be inserted into the VCAT service charter. Given the long-standing problem of low tenancy participation in VCAT hearings, we believe that, in addition to the notice of hearing, the Registrar should trial different methods of informing tenants about a hearing (see item 4 below).

#### 4. Service and notices to leave

In matters under Part 8 of the *Residential Tenancies Act 1997* (Vic), if a resident is given a notice to leave, s 371 of the RTA requires the matter be heard by the Tribunal within 2 business days or the residency is reinstated. However, service of any notice of hearing will usually go to the address that the resident has been directed to leave. This causes considerable disadvantage to residents who will not be aware of any hearing to determine their entitlement to remain. VCAT should consider amending the procedures to ensure that a resident is not disadvantaged through a failure to receive a notice of hearing (see also item 5 below). Where there is uncertainty about the resident knowing of the hearing, the registry should make every effort to ensure that the resident is informed.

#### 5. Procedural issues in bond disputes

##### Massa's story

*Massa, a Liberian client who arrived in Australia in 2010, sought our assistance because she had moved out of a property a month earlier and her bond had not been returned. She had spoken to the real estate agent the week before, who had told her she would need to pay for the replacement of carpet. Massa had conceded damage to the carpet and agreed to pay \$350, but was confused because the real estate agent had given her a copy of a quotation with other damages totalling \$1,100.*

*Upon making enquiries, Footscray CLC discovered that the landlord had made an application for Massa's bond. The application had been made out of time and had not been served on Massa, although she had been in frequent contact with the agent. Massa had not paid the bond at her new property and her new real estate agent had told her if she did not pay the bond by the end of the week she would be evicted.*

## *Service*

We have identified a repeated practice amongst estate agents and landlords of failing to effect adequate service of applications on tenants by post, particularly in relation to applications for bond and compensation.<sup>2</sup> 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 known residential or business address”.

We believe s 140 of the VCAT Act should oblige a VCAT applicant to make reasonable enquiries as to the respondent’s address for service. Accordingly, the Tribunal would need to be satisfied that reasonable steps had been taken to ascertain the respondent’s address before an application was heard. This is currently not commonplace.

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 and could easily have ascertained their new address. Clients sought our assistance because their bonds had not been returned weeks and even months after vacating. Enquiries frequently revealed that VCAT had already made a determination requiring the tenant to pay their bond to the landlord.

Inadequate service presents a considerable access to justice issue, as a respondent to an application loses the opportunity to defend a claim. In the case of bond disputes, it appears to be a systemic issue. Although tenants are entitled to apply for 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 moneys is diminished. The return of bond money is vital to low income tenants, as not having enough money to pay the bond poses an enormous obstacle to securing another rental property.

## *Particulars and supporting documentation*

Applications by landlords for bond and compensation are often poorly particularised and lacking supporting documentation<sup>3</sup>. Sometimes, tenants have requested supporting documentation and been refused. When a client is represented, advocates are generally able to obtain particulars and copies of

<sup>2</sup> See Laura Berta, *Making it Home: Refugee Housing in Melbourne’s West* (Footscray Community Legal Centre, March 2012) 40.

<sup>3</sup> See Laura Berta, *Making it Home: Refugee Housing in Melbourne’s West* (Footscray Community Legal Centre, March 2012) 40-41.

supporting documentation by making a request in writing. However, many agents provide documents at late notice which places tenants at a disadvantage.

The *Victorian Civil and Administrative Tribunal Rules 2008* (Vic) (“VCAT Rules”) are contradictory in relation to the provision of supporting documentation. Rule 6.25(14) of the VCAT Rules provides that an application for bond by a landlord must include a copy of the condition report and any “quotation, account or receipt on which the landlord relies to prove the claim”. However, Rule 6.23(b) states that if an application has been lodged electronically the documents may be provided to VCAT at the hearing or at the request of the Principal Registrar before the hearing. The majority of agents make online applications and are technically not required to provide supporting documentation save at the request of the Principal Registrar.

Early exchange of information is crucial to the efficient and effective resolution of disputes. Although this is envisaged by VCAT Rule 6.25(14), it is contradictory for a broad exemption to be granted for applications made electronically by Rule 6.23(b). Tenants are more likely to attend hearings and/or seek professional advice if they understand the claim against them and should also be given a reasonable opportunity to prepare their defence. This is central to the principle of natural justice.

The exemption under 6.23(b) of the VCAT Act, which allows landlords to serve supporting documentation at the VCAT hearing, should be repealed.

### ***Bringing applications out of time***

The Tenancy Working Group has observed that landlords frequently bring applications for a tenant’s bond outside of the time limit stipulated under s 417 of the RTA, which is within 10 business days after the tenant delivers up vacant possession of the property. This is sometimes occurring where there is no reasonable excuse for bringing the application out of time.

As noted, VCAT is required to act with minimal formality and has the power to dispense with procedural requirements, including time limitations.<sup>4</sup> Although this is aimed at achieving fairer outcomes, it can create injustice for tenants who will find it more difficult to counter a landlord’s claim. There are strong policy reasons for requiring landlords to make an application for bond within a strict time limit.

<sup>4</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97-98.

## 6. Directions to Consumer Affairs Victoria

### Moo's story

*Footscray CLC assisted Moo in a bond dispute, where the tenants had been asked by the real estate agent to sign a blank bond claim form. Moo had kept a copy of the form. At the hearing, the Member indicated that the real estate agent had acted illegally and the tenant should make a complaint to CAV. Footscray CLC assisted Moo to make a complaint to CAV; they also made three similar complaints about the same real estate agent. The real estate agent was never prosecuted by CAV.*

Section 486(a)(i) of the RTA indicates that VCAT may refer matters to the Director of Consumer Affairs Victoria for investigation. This power is used infrequently, although in the course of proceedings it often becomes apparent that a landlord or real estate agent has committed an offence. In order to be penalised, the matter has to be prosecuted by Consumer Affairs Victoria (CAV). CAV prosecutes matters in a limited range of circumstances, even where multiple complaints are made against an agent. We submit that VCAT should use its power to refer matters to CAV more frequently, and that the relevant legislation should be amended to require the CAV to investigate each complaint and report the outcome to the Tribunal and parties. It is anticipated that this would result in a higher level of prosecutions by CAV, which would have a deterrent effect on poor conduct by landlords and agents.

## 7. Professional advocates

### Sui's story

*Sui, a Chin client who arrived in Australia from Burma in 2010, sought the assistance of Footscray Community Legal Centre ("FCLC") in relation to a bond dispute. Sui had not received notice of the landlord's application for her bond of \$1,300, which had been awarded to the landlord in full. FCLC assisted her to seek review of the decision. At the hearing, the landlord was represented by a real estate agent. The Tribunal Member was reticent to allow Sui to be represented, although Sui did not speak English, had been in Australia little over 12*





*months and the landlord was represented by a professional property manager who regularly appeared at VCAT. Leave for Sui's representative to appear was eventually granted. The matter was re-heard, and it was determined that the landlord was only entitled to \$300 of her bond.*

There is no right to legal or other professional representation for residential tenancies matters at VCAT, save for eviction hearings<sup>5</sup> and other matters specified in the RTA.<sup>6</sup> However, the majority of landlords are represented by estate agents, who appear regularly at VCAT. In 2009–10, 65% of landlords were represented by agents or property managers<sup>7</sup>. A further 23% of applications were made by the Director of Housing, who is represented by a public officer<sup>8</sup>. Unlike other courts, there is no available data on the number of tenants who are represented at VCAT. We submit this data should be made available and published (see item 9 below).

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.

Property managers are in an advantageous position due to their “repeat player” status. Arguably, s 62(8)(d) of the Act encompasses most real estate agents appearing before VCAT due to their “substantial experience as an advocate”. Despite the current legislative requirement that leave be sought for a professional advocate to appear, Members generally do not require real estate agents to formally seek leave.

We submit that real estate agents should be explicitly defined as “professional advocates” by the VCAT Act. Where a landlord is represented by either an agent or an officer of the Director of Housing, a tenant should have an automatic right of representation as is stipulated by s 62(1)(iii) of the Act. Furthermore, real 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.

<sup>5</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Schedule 1, Clause 67.

<sup>6</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62.

<sup>7</sup> Victorian Civil and Administrative Tribunal, *VCAT Annual Report: 2009/10* (2010), p. 29.

<sup>8</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s62(2)(c).



## 8. Correspondence

VCAT has published a Practice Note on the procedure for communications between VCAT and the parties and communications between the parties themselves. There is an obligation to copy into communications with VCAT the other party to the matter. However, in many cases landlords and estate agents do not comply with their obligation to copy into correspondence with VCAT the tenant, causing detriment when a tenant is unaware (for example) that an adjournment has been granted or relevant documents have been put before the tribunal through communications that do not include the tenant.

## 9. Written reasons

### Samuel's story

*Samuel and his landlord were in dispute over whether a tenancy had been created over the property. After hearing the parties' submissions, the VCAT member reserved their decision. However, it was three months before written reasons, and final orders, were delivered by the sitting member. This delay caused detriment to both parties because in this time, Samuel had vacated the property, causing inconvenience and extra expense. Equally, the landlord was unable to re-lease the property because the legal issue had not been determined.*

Section 117 of the VCAT Act provides that reasons be given for final orders within 60 days or in a time stipulated by the President. Written reasons inform parties how their matter was decided and keep decision makers accountable, ensuring that they make orders in accordance with the law and proper procedure. Written reasons are also extremely important to the ability of parties to invoke their rights under s 148 to appeal decisions of VCAT to the Supreme Court. However, clause 76 of schedule 1 to the VCAT Act modifies s 117 in residential tenancies matters, requiring that requests for written reasons be provided before the conclusion of a hearing. This creates an extra burden on tenants in asserting their rights because many may not know that their entitlement to reasons is so modified or, and this is especially relevant for self-represented parties who are unfamiliar with VCAT's procedures, they may simply omit to make the request at the time.

We appreciate that clause 76 attempts to strike a balance between procedural fairness and efficiency, and that the residential tenancies list is by far the Tribunal's busiest. Nonetheless, it abrogates an important right normally open to all parties in our adversarial system of justice that is difficult to

justify. It undermines both transparency and accountability in decision making, core principles to which VCAT has committed itself. We therefore recommend the repeal of clause 76 insofar as it modifies the general right to written reasons provided by s 117 of the VCAT Act. We also recommend that Members remind parties of their right to request written reasons prior to the hearing concluding and that all hearing rooms contain clear signage about the need to request written reasons until such time as clause 76 is amended.

Finally, there is no statutory timeframe for when written reasons must be delivered in cases where a decision is reserved. While VCAT has a policy that 90% of reserved decisions are delivered within 6 weeks, this is not enforceable. We recommend that a legislative time limit be imposed in such matters; otherwise parties can be waiting many months for orders in a reserved matter, causing considerable detriment.

## 10. Anonymised Reports

We recommend that the VCAT Act provide members with a clear discretionary power to anonymise the names of parties in their written decisions. The Residential Tenancies List routinely adopted such an approach informally until former President Justice Ross AO announced in 2011 that it would cease. Residential tenancy matters contain the most personal details relating to parties' mental and physical health; relationships; and employment and financial background. Extremely damaging allegations are sometimes made about parties which go uncontested in a hearing. Publication can have adverse consequences on a person's relationships and employment. Reports can also be accessed by real estate agents who informally search the AUSTLII database to screen for any "undesirable" tenants. Thus, the publication of a person's name in written reasons can create a further barrier to them accessing private rental accommodation in future.

The publication of parties' names in residential tenancies matters will rarely, if ever, be in the public interest. The Residential Tenancies List can be analogised to hearings in the Family Court of Australia, where information is mostly of a personal nature and the release of names engages no broader public interest. The public would still be free to attend Tribunal hearings and view a file relating to a matter. Furthermore, transparency and accountability in administrative tribunals is, we would argue, centrally concerned with how, based on the applicable law and procedure, a member arrived at the order that they did. This is determined through written reasons and is unaffected by the practice of making parties' names anonymous.



## 11. Member training

We urge the President to make more systematic use of his powers under s 38A of the VCAT Act to direct that members undertake training. Training provides a response to complaints from parties about poor conduct by Tribunal Members and would also enhance Members' knowledge about the profile of the parties appearing before them and the broader social context in which the RTA applies. We believe that this would result in more sophisticated application of the law and better decisions. Not only should member training be directed towards enhanced knowledge of law and procedure, but should encompass a broader range of matters including, but not limited to:

- The nature of Victoria's private rental market, its economic based aspects, barriers to entry and segmentation;
- Social housing and the profile of the tenants it accommodates;
- The role played by the real estate industry;
- Disability; mental health and drug and alcohol issues and how these impact on the ability of individuals to secure and maintain tenancies.

## 12. Transparency

The Tenancy Working Group believes that transparency should be enshrined in the objects of the VCAT Act, and that the Tribunal 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 to justice issues.<sup>9</sup> Justice Bell's review of VCAT acknowledges that tenants have poor access to VCAT.<sup>10</sup> Approximately 95% of applications to VCAT are initiated by landlords and (of those) approximately 80% proceed undefended.<sup>11</sup> However, there is little data available on the:

- types of tenants accessing the Tribunal, as both applicants and respondents;
- number of tenants who are represented and nature of representation;

<sup>9</sup> See Laura Berta, *Making it Home: Refugee Housing in Melbourne's West* (Footscray Community Legal Centre, March 2012) 25-28.

<sup>10</sup> Justice Kevin Bell, *One VCAT: President's Review of VCAT* (November 2009) Victorian Civil and Administrative Tribunal, 25; Victorian Civil and Administrative Tribunal: *VCAT Annual Report: 2009/10* (2010), 28–29.

<sup>11</sup> Justice Kevin Bell, *One VCAT: President's Review of VCAT* (November 2009) Victorian Civil and Administrative Tribunal, 25.

- types of matters tenants are initiating as applicants; and
- types of matters which are proceeding undefended.

The availability of this type of data would make the Tribunal more accountable to the community and would provide a better indication of access to justice and legal needs issues that may arise. In addition, it would enable the scarce resources allocated to tenant advocate organisations to be better targeted.

### 13. Complaints

#### Simona and Greg’s Story

*Simona and Greg were rooming house residents who were issued with a notice to leave and a notice to vacate simultaneously. The RTA provides that a notice to leave is prohibited if a notice to vacate has been served. The member ordered that the notice to leave was invalid and so the TUV submitted that the residency rights should be reinstated. The rooming house owner argued that the resident had been threatening other residents and it was not safe for them to return to the rooming house and they also said they would like to seek further advice about this. The Member said because the RTA says “the tribunal, may” reinstate the residency this meant that he could still make a decision about the residency rights despite the fact that he had dismissed the notice to leave. He said he was going to adjourn the matter so that the rooming house operator could seek legal advice about this issue. The TUV argued strongly with the Member that this was not correct, that he must reinstate the residency, and that if the matter is adjourned, the residents will suffer a significant loss as they will be homeless. Rights of natural justice were also discussed, but the Member was not prepared to listen and ordered that the matter be adjourned. The matter was not relisted for another week. By the time the matter was again heard, the residents had moved out and had to relocate to different accommodation.*

While not strictly relevant to the provisions of the Act, VCAT should provide individuals with easily accessible feedback and complaint mechanisms. For example, parties should be able to complete feedback forms upon leaving the building and be able to lodge them with the registry or in a “feedback and complaints” box in every VCAT location.

VCAT does not currently publish information relating to the handling of complaints lodged by users against Tribunal Members or staff. VCAT’s current complaints policy is unclear. Given VCAT’s stated commitment to transparency and access to justice, we strongly recommend that it displays its



complaints protocol more prominently and publishes the type, number and outcomes of the complaints it receives. As the Tenants Union of Victoria stated in a submission the Department of Justice regarding the Department’s *Judicial Conduct and Complaints Discussion Paper*, “[f]rom our collective experience and these reports of self-represented tenants we hold deep concerns about the behaviour of some individual VCAT members and we consider that there are inadequate measures in place to address the poor standard of behaviour of some individual members”. These concerns remain. That submission called for adoption of Professor Sallman’s recommendations on VCAT’s complaints system,<sup>12</sup> in particular, the proposal 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. A more transparent complaints process is important given that tenants attend hearings initiated by landlords in extremely small numbers.

We note that, while VCAT can and should enhance its own internal complaints process, Victoria still lacks an independent commission to investigate misconduct by judicial officers and tribunal members. This is necessary and something that the government should be encouraged to establish. Some tenants have reported rudeness by VCATs Members. 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.

#### 14. Merits review of VCAT decisions

There is currently no avenue for decisions to be reviewed on merit. Given the concerns about the quality of decision making noted above, we believe it is important that there be access to merits review of VCAT decisions. Section 148 of the VCAT Act provides a right to appeal the Tribunal’s orders to the Supreme Court of Victoria on a “question of law”. The Supreme Court appeal process is complex and comes with the risk of adverse cost consequences. Although the establishment of a merits review process would be costly, we believe it to be warranted in the context of the serious impact of decisions on our clients’ lives.

We recommend that the VCAT Act provide a right to merits review by the President or a Senior Member of the Tribunal in limited circumstances, where appellants would require leave to appeal and the decision could be published. A similar model is provided by the review of decisions of the Commonwealth Social Security Appeals Tribunal (SSAT) by the Administrative Appeals Tribunal

<sup>12</sup> Peter Sallmann, *Report on the Judicial Conduct and Complaints System in Victoria* (2003).



(AAT).<sup>13</sup> Such a model would provide tenants with a cost effective and appropriate means of re-hearing on issues of fact or law. Furthermore, a merits review process would potentially result in greater legal clarity for prospective parties and improve the quality of decision making.

## 15. Applications for review

Section 120 of the VCAT Act allows a person to seek review of an order if they did not appear or was not represented at a hearing. However, we submit this does not sufficiently encompass parties who may have physically appeared at a hearing but suffer from a mental illness or other impairment that seriously affected their capacity to represent themselves. For example, one client assisted by the TUV discharged himself from a psychiatric hospital in order to appear at a VCAT hearing but did not say anything at the hearing. This client was not entitled to seek review of the decision because he had physically appeared at the Tribunal. We submit that the Act should be amended to give regard to parties who may have been under a serious impairment at a hearing.

## 16. Urgent Repairs

Tenancy Working Group members are concerned that VCAT does not always comply with the statutory timeframe for hearing certain matters, such as urgent repairs. Pursuant to s 73 of the *Residential Tenancies Act 1997* (Vic), VCAT must hear the matter within two (2) days business days. We recommend that VCAT specifically report, in its annual reports, on how many cases were not heard within the timeframes specific in legislation.

## 17. Difficulties obtaining adjournments

### Alex's story

*Alex had a history of homelessness and mental health issues. Alex received a Notice of Hearing for a possession order application under s 244(1) of the RTA. Alex came to West Heidelberg Community Legal Service ("WHCLS") for legal assistance for the VCAT hearing. WHCLS spent a large amount of time with Alex preparing his case and worked on lengthy submissions to the Tribunal as to why the application should not be granted. On the*

<sup>13</sup> See Caroline Adler and Chris Povey, Seniors Rights and Public Interest Law Clearing House: *Submission to the VCAT Review: Homeless Persons' Legal Clinic and Seniors Rights Victoria* (Submission, PILCH, June 2009) 21.



*scheduled date and time of the hearing, both Alex and his legal representative from WHCLS attended VCAT. After waiting over an hour for the hearing, they were advised by registry staff that the hearing would have to be adjourned to another date because the Applicant planned to call two witnesses but had not told VCAT in advance, meaning not enough time had been scheduled by VCAT for the hearing.*

*The hearing was adjourned to the following week. Alex’s legal representative already had another VCAT hearing scheduled on this date and time and was unable to attend the new hearing. An adjournment request was submitted to VCAT a week prior to this new hearing date requesting it be adjourned so that Alex could have his legal advisor present. The argument was made that Alex was well prepared for the original hearing and had spent a large amount of time with his legal advisor preparing complex legal arguments. It was argued that Alex would be unable to secure new legal representation or undertake preparations with them in time for the next hearing. It was also argued that it was through no fault of his own that the original hearing had been adjourned and that in fact it was due to an oversight by the Applicant.*

*VCAT refused Alex’s adjournment request and the hearing went ahead as scheduled.*

Lawyers and advocates who appear for tenants frequently encounter difficulties in obtaining adjournments of hearings at VCAT. Section 98(3) of the VCAT Act states that “[s]ubject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.” The rules about fairness in section 97 and 98 apply to adjournment requests and should prevail to the extent of any inconsistency.

We are concerned that rules about fairness are not always applied consistently with adjournment requests to VCAT. We frequently work with clients who are require a substantial amount of assistance both prior to and during a VCAT hearing due to factors such as mental health, disability, language difficulties and age. In our experience, adjournment requests for these clients are often refused, despite being based on grounds that we believe comply with the rules of fairness.

The Tenancy Working Group believes the VCAT Act should be amended to allow for more flexibility in granting adjournments for tenants who suffer from some form of disadvantage and may require a longer period to prepare for a hearing and arrange legal representation.





## 18. Listing practices and adjournments

### Pa's Story

*Pa, who arrived in Australia as a Chin refugee from Burma last year, shared a house with his wife and another Burmese couple. At the end of the lease, the landlord made an application for bond to the value of \$1,000. There was little evidence to support the landlord's claim and the tenants denied all liability.*

*Pa and his three co-tenants were fearful of attending the Tribunal, but agreed to go with a representative from Footscray Community Legal Centre. Unfortunately, a Burmese language interpreter was provided instead of a Chin interpreter and the matter could not be heard. The parties were strongly encouraged to settle. Pa and his co-tenants decided to settle the dispute for \$350 as the cost of missing more paid work would have been greater than the settlement.*

Tenancy Working Group members encountered difficulties at VCAT where the Tribunal had no time to hear a contested application at the designated hearing time (see Alex's story above).<sup>14</sup> As noted, the majority of applications to the Residential Tenancies List at VCAT are initiated by landlords and approximately 80% of these proceed undefended<sup>15</sup>. Accordingly, a number of matters will be listed concurrently before a Member; the presumption is that most matters allocated the same hearing time will be finalised quickly. This becomes an issue when several matters listed for the same hearing time are contested or where a matter is complex, and will often lead to adjournments. The issue is particularly apparent at metropolitan locations. Whereas proceedings in Melbourne CBD are more flexible due to the availability of multiple Members, metropolitan locations are often serviced by only one Member.

A further issue with adjournments relates to interpreter bookings. Tenancy Group Members have experienced multiple instances of the correct language interpreter being booked through the VCAT Registry but the wrong language or dialect being provided at the hearing. This was particularly an issue for languages of emerging communities, such as Burmese dialects, where suitably qualified interpreters are scarce. Where the correct interpreter was unavailable, this resulted in an adjournment.

Many disadvantaged tenants find it exceedingly difficult to attend VCAT. If a matter that is otherwise ready to proceed is adjourned, an adjournment can cause excessive stress and cost to litigants. Sometimes, clients opt to abandon their matter or settle on terms potentially less favourable to them

<sup>14</sup> See Laura Berta, *Making it Home: Refugee Housing in Melbourne's West* (Footscray Community Legal Centre, March 2012) 27.

<sup>15</sup> Justice Kevin Bell, *One VCAT: President's Review of VCAT* (November 2009) Victorian Civil and Administrative Tribunal, 25.

than had the hearing taken place. This poses serious access to justice 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. To address these issues, it would be useful for VCAT to develop strategies that both encourage tenants to defend their matters in appropriate circumstances and ascertain whether a matter will be contested. 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.

We believe such a 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. It could also serve the purpose of ascertaining whether a respondent requires an interpreter. Effectively, this could be seen as an extension of VCAT's SMS alert service.<sup>16</sup> 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.

## **Conclusion**

The Tenancy Working Group is confident that the above recommendations would result in fairer outcomes for vulnerable tenants at VCAT. We would be pleased to discuss these issues in greater depth or provide further detail upon request.

Sincerely,

Laura Berta

On behalf of the Tenancy Working Group

Federation of Community Legal Centres

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<sup>16</sup> Victorian Civil and Administrative Tribunal, *VCAT Annual Report: 2010/11* (2011), 25.

