

Review of Tenants' and Consumers' Experience of Victorian Civil and Administrative Tribunal

Residential Tenancies List and Civil Claims List

Research Report

**Prepared for Consumer Action Law Centre, Tenants Union of
Victoria and WEstjustice Western Community Legal Centre**

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I. BACKGROUND

I.1. Purpose of report

This report has been commissioned by the Consumer Action Law Centre, Tenants Union of Victoria and WEstjustice Western Community Legal Centre for the purposes of three reviews that are currently being undertaken:

- a) The Department of Justice's Access to Justice Review – this Review's terms of reference include:
 - Term of Reference 4: potential reform to the jurisdiction, practices and procedures of the Victorian Civil and Administrative Tribunal to make the resolution of small civil claims as simple, affordable and efficient as possible; and
 - Term of Reference 9: options for providing better support to self-represented litigants throughout the Victorian justice system;
- b) Consumer Affairs Victoria's review of the Residential Tenancies Act 1997 including the resolution of disputes in VCAT's Residential Tenancies Division; and
- c) Consumer Affairs Australia and New Zealand's review of the Australian Consumer Law.

The aim is to gather information about consumers' experience of VCAT's Civil Claims List and Residential Tenancies List (the VCAT Lists) and to evaluate how well they are being served by those Lists.

I.2. Author of report

Cameronralph Navigator is a Melbourne based consultancy. Phil Khoury, the managing director, has extensive experience as a change management specialist and governance adviser. Debra Russell is a lawyer with extensive legal policy experience.

Over the past 14 years, Phil and Debra have conducted 16 independent reviews of industry-based complaints handling schemes in Australia, New Zealand and Canada including Credit and Investments Ombudsman, Financial Ombudsman Service, Public Transport Ombudsman, Energy and Water Ombudsman Victoria, Water Ombudsman Western Australia, Banking Ombudsman New Zealand, Insurance & Savings Ombudsman New Zealand and Ombudsman for Banking Services and Investments Canada.

I.3. Sponsors of research

Consumer Action Law Centre (CALC) is an independent, not-for profit consumer organisation based in Melbourne. It works to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, CALC has a national reach through its deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Tenants Union of Victoria aims to inform and educate tenants about their rights, improve conditions for tenants, improve the status of tenants and represent the collective interests of tenants in law and policy making. It provides advice, assistance and advocacy for tenants of

private and public residential properties, and residents of rooming houses and caravan parks in Victoria, Australia.

WEstjustice Western Community Legal Centre was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in Maribyrnong, Wyndham and Hobsons Bay areas. It has a particular focus on working with newly arrived communities. More than 53% of WEstjustice's clients over the last four years spoke a language other than English as their first language. Further, approximately one quarter of all its clients during that period were newly arrived, having arrived in Australia in the last five years.

1.4. Scope of research

To inform this report, the following research steps were undertaken:

- A telephone survey of 16 tenants/ consumers with disputes within the jurisdiction of the VCAT Lists who have sought advice or representation from a sponsoring organisation;
- Observation of 21 VCAT residential tenancies hearings;
- Observation of 6 VCAT civil claims hearings;
- Review of VCAT website resources designed to assist consumers;
- Analysis of the application process;
- Analysis of VCAT publicly available data about disputes;
- Comparison of VCAT's approach to residential tenancies disputes and civil claims with the approach taken by industry-based dispute resolution schemes; and
- Online survey of 22 consumer advocates with clients with disputes that fall within the jurisdiction of the VCAT Lists;
- Meeting with senior VCAT representatives.

We were provided with the Consumer Action Law Centre's submission dated 29 February 2016 to the Access to Justice Review. Our report does not purport to be all-encompassing and does not canvas all the issues raised in that submission. Rather it only canvasses the issues that emerged directly from our surveying of consumers and our observations of VCAT hearings.

2. INTRODUCTION

2.1. VCAT's purpose and work

VCAT's Service Charter states:

“VCAT's purpose is to provide Victorians with a low cost, accessible, efficient and independent Tribunal delivering high quality dispute resolution including the use of Alternative Dispute Resolution (ADR) processes. We aim for service excellence by being cost-effective, accessible, informal, timely, fair, impartial and consistent.”

VCAT handles high volumes including almost 60,000 residential tenancy matters per year and about 6,000 civil claims disputes. Decisions are by a single tribunal member. As at 23 July 2015, there were 213 tribunal members (14 judicial members, 51 employed members and 148 sessional members).

Decisions can be appealed to the Supreme Court but only on a question of law and only where leave to appeal is granted.

2.2. Achieving quality dispute resolution

To promote professional excellence, VCAT has developed a Member Competency Framework. The required competencies are:

- Knowledge and technical skills (relevant qualities are conscientiousness, commitment to high standards)
- Fair treatment of parties (relevant qualities are fairness, courtesy, tolerance and compassion)
- Communication skills (relevant qualities are firmness without arrogance, courtesy, patience, tolerance, fairness, sensitivity, compassion and self discipline)
- Conduct of hearings skills (relevant qualities are firmness without arrogance, courtesy, patience, tolerance, fairness, sensitivity, compassion and self discipline)
- Dispute resolution skills – decision making (relevant qualities are decisiveness, confidence, moral courage, independence and impartiality) and ADR (relevant qualities are confidence, creativity, impartiality and empathy)
- Efficiency (relevant qualities are commitment to servicing the public, commitment to efficient administration and self discipline)
- Professionalism and integrity (relevant qualities are capacity to handle stress and the isolation of their role in making decisions, sense of ethics, patience, honesty, tolerance, consideration for others and personal responsibility)
- Leadership and management (relevant qualities are responsibility, imagination and commitment to efficient administration)

2.3. Our lens

Both VCAT's purpose statement and VCAT's Member Competency Framework use language that is similar to the language used by industry-based external dispute resolution schemes. Like VCAT, these schemes aim to provide fair and accessible dispute resolution in an informal and timely manner.

There are important differences between VCAT and an industry based dispute resolution scheme. First, VCAT is a government body and so oversight mechanisms are quite different. Secondly, VCAT is more integrated into the Court system than is the case for industry-based dispute resolution schemes. As a result, VCAT's decision making utilises a hearings process. In comparison, industry-based dispute resolution schemes typically undertake an iterative investigative process with decisions being made on the basis of the information provided by the parties over the telephone and in writing and with the scheme responsible for ensuring that both parties are provided with the other's information and given an opportunity to make their response.

Nevertheless there are significant similarities. VCAT, like industry-based schemes, aims to provide accessible justice using a range of dispute resolution approaches. Both VCAT and industry-based schemes are committed to procedural fairness as well as substantive fairness. Where a dispute is resolved by a decision rather than a settlement between the parties, both VCAT and industry-based schemes take more of an inquisitorial than adversarial approach. It is, therefore, instructive to compare VCAT's approach with the approach that is required of industry-based dispute resolution schemes.

Accordingly, in this report, as we analyse the information we have collected about tenants' and consumers' experience of VCAT's Residential Tenancies List and Civil Claims List, we draw upon the approaches of industry-based dispute resolution schemes.

In Chapter 13, we set out in table form a comparison of VCAT's approach (to the extent that public information permits) with the approach mandated for industry-based dispute resolution schemes by the *Benchmarks for Industry-based Customer Dispute Resolution* (Dispute Resolution Benchmarks) and the *Key Practices* that support those Dispute Resolution Benchmarks.

2.4. Key themes

The following key themes emerge from our work:

a) Importance of VCAT's role

The VCAT Residential Tenancies List and Civil Claims List play a vital role in providing access to justice for tenants and consumers. We observed and were told about some excellent experiences and outcomes for tenants and consumers.

b) Accessibility issues

Despite VCAT's aspiration to be accessible and informal, there are very substantial barriers that inhibit tenants and consumers from accessing VCAT. To address these barriers, the steps that are needed include legislative reform, an easier application process and more willingness to allow representation in small civil claims.

c) Fairness issues

In the interests of fairness, VCAT needs to strive to increase the percentage of Residential Tenancies and Civil Claims List matters where the tenant or consumer respondent attends the hearing.

VCAT also needs to take steps to address the variable quality of hearings. Measures that are needed include a quality monitoring program. Legislative reform is needed to introduce an internal VCAT appeal mechanism.

d) Continuous improvement

To continuously improve its effectiveness, VCAT needs to be more open to tenant and consumer feedback about the Residential Tenancies List and Civil Claims List. Measures that are needed include a regular surveying program of tenants and consumers, a best practice complaints handling program and more effective liaison program with consumer representatives who regularly use these Lists. There should be a program of regular independent reviews of VCAT's operational performance.

e) Accountability

VCAT should enhance its public accountability by providing more detailed statistical reporting in its Annual Report with analysis of the statistics.

f) Effectiveness

VCAT should help promote compliance by landlords and businesses with its monetary orders by establishing publicly searchable registers of those fail to comply with those orders.

3. BARRIERS TO CONSUMER APPLICATIONS

3.1. Introduction

Although VCAT (and its predecessor tribunals) were conceived of as a forum to which tenants and consumers as much as businesses could bring their grievances, there are significant practical barriers that prevent tenants and consumers from instituting applications.

3.1.1. Residential Tenancies List tenant applications

The Residential Tenancies List deals with disputes between tenants and landlords or the Director of Housing, rooming house residents and owners and caravan park residents and owners. It is VCAT's busiest list, accounting in 2014/15 for 70% of new applications to VCAT¹.

VCAT's statistics show that landlords rather than tenants are instituting VCAT applications. Typically landlords are seeking a possession order or authority to retain the tenant's bond.

Figure 1 – Residential Tenancies List applications (VCAT Annual Report 2014/15 p.39)

	2012-13	2013-14	2014-15
Total no. of applications	59,455	61,126	59,184
% of applications by tenants/ residents	6.9%	6.5%	6.6%

3.1.2. Civil Claims List consumer applications

VCAT does not publish Civil Claims List data as to the number of applications commenced by consumers and the number by businesses. We understand, however, from VCAT that about three-quarters of applications are by consumers.

VCAT published data shows that the number of applications in this List have sharply declined in the last three years.

Figure 2 – Civil Claims List applications (VCAT Annual Report 2014/15 p.39)

	2012-13	2013-14	2014-15
Total no. of applications initiated	9,205	7,794	6,895
No. of small claims < \$10,000	7,660	6,384	5,772
Decline from 2012-13		17%	25%

In light of this statistical data, this part of our report analyses the barriers to tenant and consumer applications and provides recommendations to address those barriers.

¹ VCAT Annual Report 2014/15 p.39

3.2. Tenants' concern about landlord repercussions

Our survey of consumer representatives from the three sponsoring organisations established that the single greatest barrier for tenants wanting to institute VCAT proceedings against their landlord is fear of repercussions from their landlord/ estate agent. They are concerned that they will be punished by a rent increase or a notice to vacate.

This fear can be well grounded as the following case study demonstrates.

A tenant had been requesting an estate agent to organise essential repairs. With the assistance of a community legal centre, the tenant issued the landlord with a breach of duty notice.

Shortly after this, the landlord served the tenant with notice to vacate so that the property could be renovated. The tenant queried whether a permit had been obtained for the work. In response, the landlord provided a new notice to vacate on the basis that the landlord's relative wanted to move into the property.

The tenant was unable to find a new property within the specified 60 days and so did not leave the premises. The landlord applied to VCAT for a possession order.

The Member hearing the matter issued a possession order but deferred the order for 30 days given the suspiciously retaliatory nature of the notice to vacate. This gave the tenant a bit more time to find another rental home.

The Residential Tenancies Act 1997 provides some protection against retaliatory use of a 120 day notice to vacate². But this protection is difficult to enforce. Further protection does not apply for other types of notices to vacate. We support the recommendations of Legal Aid Victoria to amend the legislation to enhance protection against retaliatory conduct by landlords and to improve security of tenure for tenants³. Both steps are required so that tenants have greater confidence exercising their legal rights, including through VCAT, against a recalcitrant landlord.

Recommendation 1

The Residential Tenancies Act 1997 should be amended to improve the security of tenants' tenure and to enable a challenge to all types of notices to vacate which are given in retaliation for an exercise or proposed exercise of rights by the tenant.

3.3. Fees

In the Civil Claims List, the application fee has created a barrier to access. There has been a dramatic increase in fees over the last three years – and at the same time a dramatic decrease in the number of civil claims (see Figure 2).

On 1 July 2016, the new Civil Claims List fee framework began. We welcome the three tiered fee structure (concession fee payers, standard fee payers and corporate fee payers) and the fee

² Section 266(2) of Residential Tenancies Act 1997

³ Victorian Legal Aid, *Residential Tenancies Act Review Security of Tenure Submission*, 31 December 2015, Recommendations 1 and 5

relief arrangements for those in hardship. For claims of \$3,000 to \$10,000, the standard fee has, however, increased from \$174.10 to \$204.90.

It will be important to monitor and provide public transparency as to the impact of the new fees arrangements and in particular the access to justice implications of the increased standard fee for claims of \$3,000 to \$10,000.

Recommendation 2

VCAT should undertake analysis of Civil Claims List volume trends to understand the reasons for those trends and the impact of its new fees framework and its fee waiver practices. VCAT should include in its Annual Reports statistical data with commentary so that this analysis is made public.

3.4. Application process

Our survey of consumer representatives identified that another very significant barrier for tenant and consumer applicants is fear of what is perceived to be a very intimidating process.

The eight applicants who were interviewed for the purposes of this report each said that they had had trouble with the application process. Comments made included:

“Completing the application form was very difficult. I would not have been confident about consumer law requirements without help. Many people would have trouble navigating the system.”

“I rang VCAT for help with the application form several times. One person went through all questions with me by phone, going the extra distance to help me.”

“The paperwork was very involved and difficult for me. It was a whole new field for me. Fortunately I had a neighbour who could help me.”

“The form was very difficult. My legal service filled it in for me.”

We recognise that VCAT has been working to simplify the online application form process. We found, however, that most of the interviewed applicants either had experienced difficulties with the online process or had limited access to the internet. In any event, the following issues arise in relation to both the online and paper application forms.

(i) Residential Tenancies

The claim details section of the Residential Tenancies form implies that “correct wording” must be used and cautions “if you do not provide enough information your case may be dismissed”.

The guide to the form requires the applicant to specify the section of the legislation the claim relates to: “When selecting sections of the legislation (refer to legislation table-below) make sure you quote the correct sections. Otherwise, your application may be invalid or an adjournment may be required so it can be amended.”

The guide to the form creates the impression of a heavy burden in relation to evidence. Emphasis is placed upon in-person evidence by witnesses, often not practical where tradesperson evidence is being relied upon. There is also reference to summoning witnesses.

Some applications are also complicated by requiring a prescribed notice to be attached.

(ii) Civil Claims

The Civil Claims List form begins by requiring an applicant to specify under which Act the claim is being made. The applicant can tick “Australian Consumer Law and Fair Trading Act 2012” or specify another Act. In comparison, the NSW application form is only 6 pages (not 10 pages as for the Victorian form) and does not require the identification of the Act under which the claim is made.

For both the Residential Tenancies and Civil Claims List, the application form gives the VCAT process a very legalistic tone from the outset that discourages access, particularly by disadvantaged tenants and consumers, unless helped through the process by a consumer representation service.

In this respect, the VCAT application process is in marked contrast to the application process of industry-based external dispute resolution schemes. Those schemes have a very simple online application form that can be used. Alternatively a letter, email or even telephone call is enough to institute the dispute resolution process. Whether or not the scheme’s application form is used, the emphasis is upon the applicant simply telling their story. It is the scheme staff’s responsibility to assess whether a legal cause of action results. Further, if an applicant does not provide documents at the outset, this is not fatal for the application. Rather the scheme staff speak to the applicant and ask for the documentation that they think is relevant.

We think that VCAT should review its application procedures with a view to reducing the burden for tenant and consumer applicants. The application form should be simplified. VCAT should also enhance the support it provides to Civil Claims List unrepresented consumer applicants.

We are aware that this is on VCAT’s agenda. *Building a Better VCAT: Strategic Plan 2014-17* specifies “improved support for people who represent themselves” as a key focus point for the period of the plan. VCAT’s most recent Annual Report acknowledges that VCAT users are having difficulty navigating the dispute resolution process by web or phone. Changes being considered include one VCAT contact number (rather than the 13 numbers currently listed), a website review and online forms⁴. In addition, during the last year, Monash University Faculty of Law students have been attending VCAT’s King Street venue to help self-represented parties with tasks such as completing the application form (although the students cannot of course provide legal advice)⁵. Students also refer vulnerable and disadvantaged Victorians to consumer representative services.

This is all positive. However, we think more radical changes are needed to make VCAT’s Civil Claims List more accessible to consumers.

We suggest that VCAT evolve its current telephone helpline, from a service that merely responds to consumers’ questions, to a service that is able to also take down information, over the telephone, from an unrepresented consumer and complete a draft of the application form to be sent to the consumer to check and submit. In the same telephone call, the consumer could be given the opportunity to ask questions. There would also be an

⁴ 2014-15 Annual Report p.23

⁵ 2014-15 VCAT Annual Report p.12 states that the Monash University student program was a pilot from August – October 2015 with two students attending per day. During our VCAT observations, we saw students at King Street but presumably they are only present during the academic year.

opportunity for VCAT administrative staff to offer guidance to the applicant as to the evidence that they should collect and bring to the hearing and how to manage the hearing process. The extent of that guidance would not be different from that currently provided by VCAT's helpline. The difference would be that the service would be more proactive and so helpful to those who do not know what questions they should ask.

Of course, VCAT's staff would not be able to provide legal advice. Where the consumer's questions make it apparent that the consumer would benefit from legal advice and is within the remit for a consumer legal service, VCAT could direct the consumer to a consumer legal service. To maximise the efficiency of referrals, VCAT could discuss with the organisations to which referrals are commonly made the nature of their remit and agree the types of cases in which a referral is appropriate. (We are aware that referrals are currently made to consumer representative organisations, but our information is that referrals being made are not necessarily appropriate.)

A telephone service, of the kind we are proposing, is provided by administrative staff of industry-based dispute resolution schemes. These schemes have found that, with appropriate training of the staff, assistance can be provided, without straying into legal advice. It has, moreover, now become accepted by the schemes and their stakeholders that this assistance can be provided without compromise of the scheme's obligation to take a neutral stance when resolving disputes.

Recommendation 3

- a) VCAT should review its Residential Tenancies and Civil Claims application forms with a view to making them less legalistic and easier to complete.
- b) VCAT should evolve its Civil Claims List helpline to offer a broader range of assistance to unrepresented consumer applicants. It should examine the feasibility of its helpline staff completing a first draft of the application for an unrepresented consumer applicant to check and lodge. Staff should also be more proactive in offering guidance, for example, as to the evidence that the consumer will need to collect and bring to the hearing and how to prepare for the hearing.
- c) VCAT should enhance its arrangements for referral of people to tenant and consumer representative organisations with a view to better identification of when a referral is appropriate and to which service.

4. TENANT AND CONSUMER RESPONDENT NON-ATTENDANCE

4.1. Extent of non-attendance

VCAT does not publish data as the percentage of undefended applications in either the Residential Tenancies List or Civil Claims List.

Our survey of consumer representatives found that they regularly have clients who seek advice about VCAT orders made in hearings that the tenant or consumer failed to attend.

We observed 22 VCAT hearings where the Respondent was an individual. Of these matters, there were 17 where the Respondent did not appear at the hearing.

Figure 3 – Observed VCAT hearings where tenant or consumer respondent

	Res Tenancies List	Civil Claims List
No. of applications with individual Respondent	19	3
No. of undefended applications	15	2
No. of undefended applications that were withdrawn or adjourned at applicant's request	10	0
No. of undefended applications where the application was substantively successful (order for possession or order to pay claimed amount)	5	2

4.2. Consequences of non-attendance

As shown in the table above, we observed 7 matters that were not defended and where a substantive order was made in favour of the applicant. Two of these matters were of particular concern.

- In one residential tenancy case, the Member did not ask the estate agent representing the landlord as to whether he had succeeded in contacting the tenant nor the amount owing as at the date of the hearing. It is, therefore, possible that the tenant had made payment and did not attend the hearing thinking that he had resolved the matter.
- In another residential tenancy case, the Member made an order for possession although the tenant had reduced the amount owing to \$181. The Member commented that this was not a large sum and that an adjournment would have been granted but evidently the respondent was not overly concerned given that he did not appear at the hearing. This comment disregarded the earlier advice of the landlord's estate agent that the tenant had contacted the agent and said that he was overseas.

As these cases demonstrate, we think that the respondent's non-attendance at the hearing is a problem that can compromise the substantive fairness of the result. We recognise that VCAT does have a process to re-open a matter. But a tenant or consumer who has failed to attend in the first instance will often not have the knowledge, skills and confidence to pursue this course. It would be much better if there were higher attendance rates in the first instance.

We think that VCAT should own this problem and should monitor and strive to reduce the number of undefended applications (withdrawn or adjourned applications can be excluded from this ambit). Strategies that could assist to improve attendance include:

- The Notice of Hearing could include a bolded statement that this is important and you should either attend or seek an adjournment. Also some information could be provided about advice avenues eg Consumer Affairs Victoria, Tenants Union of Victoria etc.
- The Notice of Hearing could extract from the application form what the matter is about. The Notice should also say that full information is available from VCAT. (These statements would assist a respondent who has not in fact received the application from the applicant.)
- The Notice of Hearing could include some information in common languages about translation services.
- VCAT could email the Notice of Hearing as well as posting it⁶. To enable this to occur, the applicant should be required in the application form to specify the respondent's email address where this is known.
- The application form could also require the applicant to specify the respondent's mobile phone number. This would enable VCAT in a higher percentage of cases than at present to SMS⁷ a hearing reminder to the respondent.

Recommendation 4

VCAT should monitor and strive to reduce the number of undefended applications (withdrawn or adjourned applications can be excluded from this ambit). VCAT's Annual Reports should provide statistical information as to the numbers and percentages of undefended applications, by type of application, and their outcomes.

In addition, we recommend legislative reform to enable some re-calibration of VCAT's approach where an applicant seeks an order for possession in an undefended application.

We think that such an order should not generally be made where the tenant has made reasonable efforts to address arrears. At the moment, we think that there is an over-emphasis on landlord detriment and under-emphasis on fairness to the tenant⁸.

Whilst we would not expect that this would change results in Department of Housing applications, we think that there would be some private landlord applications where a fairer result would be achieved.

⁶ VCAT Annual Report 2014/ 2015 p.23 suggests that VCAT is giving consideration to this.

⁷ VCAT Annual Report 2014/ 2015 p.23 suggests that VCAT is exploring the possibility of greater use of SMS.

⁸ Section 352 of the Residential Tenancies Act 1997 gives the Tribunal a discretion to postpone a warrant for possession. Exercise of the discretion requires a balancing of the tenant's hardship and the landlord's hardship. Victorian Legal Aid, *Residential Tenancies Act Review Security of Tenure Submission*, 31 December 2015 Recommendations 2 and 3 sets out in some detail law reform that we think would achieve the recalibration we propose.

Recommendation 5

The Residential Tenancies Act 1997 should be amended so that VCAT must postpone a possession order if the tenant has made reasonable efforts to catch up arrears.

5. LOCATION AND ENGLISH LANGUAGE DIFFICULTIES

5.1. Attendance by tenant or consumer

Our tenant and consumer survey sought to assess how difficult it was for those with a dispute in VCAT's Residential Tenancies List or Civil Claims List to get to the specified VCAT address for the hearing. The tenants and consumers in our survey spanned VCAT's King Street location, suburban locations and regional locations.

Our survey identified that those in remote locations can find it particularly difficult to travel to the specified location as the following case study demonstrates.

One of the surveyed consumers has instituted an application against a car dealer who sold her a second hand car that broke down within two months of purchasing it. As a result, she does not have a car to make the one hour drive to Bendigo where her matter is going to be heard. Public transport will not get her to Bendigo in time for a morning hearing. Also she is a single mother and has recently moved to Victoria so does not have much support. She has no idea how she is going to be able to make arrangements to attend the hearing.

VCAT has a discretion to allow a telephone hearing – we observed one civil claims hearing where both parties participated by telephone that worked extremely well. But the Notice of Hearing does not refer to this possibility and surveyed consumer representatives indicated that telephone hearings, even for directions hearings, are not always permitted when requested.

We recommend that VCAT offer telephone hearings more freely, particularly to those who are in remote locations. This would be consistent with VCAT's stated aim of providing better access to services throughout the state⁹. Of course, this would require VCAT to have in place procedures to receive documents in advance of the telephone hearing. Members would also need to receive training to assist them to manage the process over the telephone and to be comfortable with making findings of credibility, without physically seeing the person.

Recommendation 6

VCAT should offer telephone hearings more freely particularly to those who are in remote locations. To ensure that a telephone hearing does not prejudice the person appearing at a hearing via the telephone, VCAT would need to put in place arrangements whereby documents could be sent to VCAT in advance of the hearing. In addition, Members would need to receive training to give them the skills and confidence to manage a hearing conducted by telephone.

5.2. English language difficulties

VCAT's website uses Google Translate to provide a translation of its webpages on demand. A broad range of languages are accommodated in this way.

VCAT's website also publicises the option of asking VCAT to book an interpreter for a hearing. This is at VCAT's cost.

⁹ *Building a Better VCAT: Strategic Plan 2014-17*

Despite these initiatives, our survey of consumer representatives identified concern about the quality of VCAT support for non-English language clients.

- Consumer representatives reported that VCAT does not reliably carry out a request for an interpreter for a hearing. Accordingly consumer representatives feel compelled to ring VCAT before the hearing to check that an interpreter has in fact been arranged.
- Consumer representatives also report that Members will sometimes bypass the interpreter because the interpreter slows down the hearing process. Instead of speaking through the interpreter, the Member will speak directly with a tenant or consumer with limited English, not realising that the tenant or consumer is not properly understanding the Member's questions and as a result their answers may not be appropriate. We observed this in one of the hearings we attended.

We understand that VCAT is seeking to strengthen its practices in relation to interpreters.

Recommendation 7

- a) VCAT should audit its interpreter booking service to assess whether there are process weaknesses that are resulting in interpreters failing to be arranged when booked and remedy any process weaknesses that are identified.
- b) VCAT Members should be provided with training to build their awareness of how to communicate with those with limited English and of the misunderstandings that can result from bypassing the interpreter.

6. REPRESENTATION IN SMALL CIVIL CLAIMS

6.1. Introduction

In the Residential Tenancies List, VCAT always allows the tenant to have representation, recognising that landlords otherwise have an advantage because they are often represented by someone with significant previous VCAT experience. In comparison, a consumer involved in a civil claim is expected to represent themselves if the claim is for less than \$10,000¹⁰. If the claim is for more than \$10,000, VCAT's permission has to be sought for representation to be allowed.

6.2. Problems experienced by unrepresented consumers

We found that consumers were very nervous going to a civil claims hearing without a legal representative. This is not surprising given that VCAT website information about civil claims disputes makes the process seem very legalistic. "Frequently asked questions about Civil Claim disputes" refers to directions hearings, parties being joined, points of claim, points of defence and counterclaim, discovery and injunctions. This is language that lawyers are familiar with, but is very foreign to consumers.

A number of interviewed consumers found it difficult to present their case at the hearing. Comments made included:

"I didn't expect the process to be as involved as it was. I was shocked that I couldn't get representation. It would be very difficult for someone who had English as a second language."

"It was difficult because I was very upset about what had happened."

"I was petrified on the day. The wording was all very formal. I felt alone. I felt helpless."

In a couple of these cases, the consumers' legal representative attended the hearing but was not permitted to represent their client and so had to sit behind the client during the hearing.

Interviewed consumer representatives felt that at least some of their clients achieved a poorer result because of lack of representation. In one of the cases referred to above, the consumer representative told me that their client's matter was appealed to the Supreme Court and a settlement was reached on much fairer terms than the outcome of the VCAT hearing.

By way of comparison, industry-based external dispute resolution schemes provide a more flexible approach to representation. They advise the parties that legal representation is not necessary. Because disputes are decided on the basis of information provided by the parties over the telephone and in writing and a hearing is not involved, the parties to a dispute are usually comfortable proceeding without legal representation. But legal representation is not prohibited. In fact, the Financial Ombudsman Service is even able to require a financial services provider to make a contribution to the legal costs of a consumer, although a cap of \$3,000 applies unless there are exceptional circumstances.

¹⁰ VCAT Practice Note *Preparing for a hearing* states at p.2:

"Representation for claims of \$10,000 or less

Parties are expected to present their own case and lawyers are usually not allowed to appear on behalf of parties."

We think that VCAT should recognise that an oral hearing can pose great difficulties for vulnerable and disadvantaged consumers and adopt a more flexible approach and allow disadvantaged or vulnerable consumers to be represented in civil claims of less than \$10,000. Without this reform, disadvantaged consumers will continue to experience unfair outcomes in civil claims. Moreover, whilst a claim of less than \$10,000 may represent a small claim for some Victorians, a claim of this size can significantly impact disadvantaged consumers' ability to meet basic household expenses. This reform is also essential to alleviate the stress that lack of representation is placing on disadvantaged consumers.

As a precondition to the exercise of its discretion, VCAT could, for example, require a letter from a not-for-profit legal service supporting the consumer's case for representation. In the interests of certainty for the client and the consumer representative, VCAT should decide a request for representation in advance of the hearing, rather than at the start of the hearing.

Recommendation 8

VCAT should adopt a more flexible approach and allow disadvantaged or vulnerable consumers to be represented in civil claims of less than \$10,000. A request for representation should be decided on the papers, in advance of the hearing.

7. INSUFFICIENT HEARING TIME

7.1. Introduction

Particularly in the Residential Tenancies List, VCAT often schedules multiple hearings per time slot per Member. The assumption is that there will be undefended matters that can be dispensed with quickly. This can, however, place the system under pressure.

7.2. Adjournments

We asked consumer representatives who represent clients in Residential Tenancies List matters how frequently defended matters are adjourned at VCAT's instigation, because the scheduled time was insufficient to address the issues in the dispute. They reported that this was a problem in some of the smaller VCAT locations.

Figure 4 – Consumer representative survey

When you are representing a client defending an action by a landlord, how often is the matter adjourned because VCAT has not allowed enough time to hear the matter?	Res Tenancies No. of responses
Usually not	4
Sometimes	2
Quite often	5
Almost always	2

Consumer representative services are under great pressure to meet the demand for their services. Adjournments create inefficiency in the use of consumer representatives' time. VCAT should give more priority to reducing the instance of adjournments that are necessitated by tight scheduling of matters. For example, VCAT could develop a process that allows consumer representatives to notify an intention to appear on behalf of a client and where this is done allow extra time for the hearing of the dispute. VCAT should also monitor the frequency and causes of adjournments and report publicly as to this.

Recommendation 9

- a) VCAT should aim to reduce the number of disputes that are adjourned because of lack of time to hear submissions from the consumer's representative. For example, VCAT could develop a process that allows consumer representatives to notify an intention to appear on behalf of a client so that this can be taken into account in scheduling matters and extra time allowed for such matters.
- b) VCAT should monitor the frequency and causes of adjournments and provide statistical information in its Annual Report as to this.

7.3. Rushed hearings

Even if an adjournment does not occur, there is a risk that VCAT's tight scheduling of hearings will mean that the parties are not given sufficient time to explain themselves. This is not a problem that we saw in the hearings we observed. But a couple of the interviewed tenants and consumers who appeared unrepresented at their hearing reported that they felt they had been given insufficient time to explain themselves, as the following comments demonstrate.

"I went in after 11am when the hearing should have been at 9.30. The Member went on about the fact that she was running late. She said that she could only look at the restraining order and not the other parts of my application. The Member didn't give me an opportunity to say my piece. I wasn't given an order and my landlord has been harassing me since."

"I had prepared carefully for my hearing but I wasn't given a chance to present my material. The Member was impatient with me that I wasn't presenting my arguments in a legal manner. I wasn't given a chance to correct information that the agent presented. I didn't get a chance to ask for written reasons or to ask that my identity be kept anonymous although I have family violence issues."

Whilst VCAT clearly has an obligation to use Members' time as efficiently as possible, it is important that scheduling is not so tight as to prejudice the fairness of the result or even the perception of fairness. We think that VCAT should be regularly surveying users of their service to assess a range of measures, including whether they feel that the Member rushed the hearing and failed to afford them sufficient time to explain themselves. Later in our report, we say more about surveying of users of VCAT. If it does emerge from surveying that there is concern about hearings being rushed, VCAT will need to take this into account in its scheduling of hearings.

Recommendation 10

VCAT should regularly surveying VCAT users to assess whether VCAT's scheduling of hearings means that the parties to the dispute are not provided with sufficient time in the hearing to present their evidence and explain their perspectives and for all elements of the claim to be properly canvassed. If it appears that hearings are being unduly rushed because of time pressure, VCAT should change its hearing scheduling practices to address this.

8. MEMBER CONDUCT OF HEARING

8.1. Introduction

As VCAT's Member Competency Framework recognises, it is vitally important that a Member has good communication skills, treats the parties fairly and conducts hearings well. The qualities that VCAT considers Members must possess to achieve this are fairness, courtesy, tolerance, compassion, sensitivity, patience, firmness without arrogance and self-discipline.

8.2. Tenants' and consumers' experience

Our surveying of tenants and consumers found that, whilst some tenants and consumers had a very positive VCAT hearing experience, others felt that the Member did not conduct the hearing fairly or did not deal with them with fairness, courtesy and patience. Comments made included:

"I felt he [the Member] went through me. It was an awful day."

"I thought his [the Member's] attitude was shocking. He listened to the [car] dealer. But the way he spoke to me was so degrading. I bawled my eyes out after the hearing, he made me feel awful."

"The Member was very good. He could understand what I was saying."

"The person [Member] seemed independent, neither pleasant nor unpleasant. I had no point of comparison to judge him against."

"In my first matter, the Member was very rude and arrogant, very pro the landlord. In the second matter, the Member was fair."

"I was given less time than the agent [during the hearing]."

We also surveyed consumer representatives to ascertain their sense of the fairness with which tenants and consumers are treated in a VCAT hearing. Only 5 of the 20 consumer representatives who we surveyed said that VCAT almost always provides their represented clients with fair treatment during the process of their dispute.

8.3. Hearings observed

In the hearings we observed, we saw a range of behaviours on the part of Members.

We observed a hearing where the Member's compassion was evident as she wished the tenant good luck at the close of the hearing. Compassion coupled with pragmatism was also evident in a couple of hearings where the Member counselled the tenant not to offer by way of payment plan more than they could really afford. There were hearings where the Member helpfully directed the tenant either to the Tenants Union of Victoria or to advice publications.

There were also hearings where the Member failed to listen well to the tenant or consumer, interrupting the person mid-sentence, displaying impatience and almost hostility. There were Members who did not clearly explain what orders they were making. In one hearing, the tenant at the close of the hearing had to ask the landlord's estate agent if he had been evicted or not.

To address the variable quality in the conduct of hearings, we think that VCAT needs robust processes to review how well Members conduct hearings and to ensure action is taken where problems are identified. We discuss this further in the next section.

9. FAIRNESS OF OUTCOMES

9.1. Introduction

Fairness is of course a central tenet of VCAT’s mission statement. Our surveying identified, however a lack of confidence in the fairness of VCAT’s outcomes.

Figure 5 – Consumer representatives’ confidence in VCAT fairness

	Yes	No
Do you consider that your represented clients almost always receive a fair result from VCAT?	7	13

We explore below a couple of issues that are significantly impacting confidence in VCAT’s outcomes.

9.2. Pressure on parties to settle

A number of surveyed consumer representatives expressed concern that their clients are sometimes subjected to considerable pressure by VCAT mediators and Members to settle their disputes and that this pressure can be without regard to the merits of the case.

An interviewed tenant experienced this pressure to settle. She told us that when she was waiting at VCAT for her hearing, she was approached by an assistant to the Member who told her that the Member wanted her to settle her claim against her landlord for rental compensation for delayed repairs. She was told that if she failed to settle “someone would be leaving unhappy”. The tenant felt that she had to justify her position, although the landlord’s estate agent had shown no willingness to come to terms. She felt that this was a bad start to her hearing.

We observed civil claims disputes where the Member pressed the parties to settle. At one hearing, the Member brought about a mid point settlement between a person who was disputing the quality of services provided by a micro business. The Member told the parties that they were both “reasonable people”, that a settlement saves the parties’ time so that they can get on with their lives, that otherwise he might decide that the services “were rubbish or he might not”. The client seemed very happy with the outcome, but the service provider was clearly not happy. She put to the Member that this process would be a way for her clients to obtain her services without having to pay in full. He suggested that she “changed her business model”. In the end, she succumbed to the pressure and agreed to a settlement. The merits of the matter were never discussed.

It would appear that at least some Members consider that a settlement is the best outcome. We question this. A settlement is only a good outcome if the parties settle reasonably willingly and if the outcome is in the ballpark of what is fair to the parties.

Industry-based external dispute resolution schemes are increasingly understanding that, particularly in situations where one party to the dispute has much weaker bargaining power, the scheme has a responsibility not to broker a settlement unless it is substantively fair. They are also recognising the importance of both regularly reviewing a sample of settled disputes to monitor the fairness of settlements and recalibrating their approach to settlements where monitoring identifies issues.

In the case of VCAT, it seems to us that once the hearing day is reached without the parties choosing to settle, it is fairest to the parties for the Member to hear the evidence and decide the dispute. We think that the Member should not use the hearing time to press the parties to settle. At that late stage of a dispute, the usual advantages of a settlement do not apply (early resolution of the matter, amicable rather than adversarial resolution process) leaving just the disadvantages of a settlement (the opportunity for the person with stronger bargaining power to prevail, outcome that may not be fully aligned with the weight of evidence and the law).

Recommendation 11

- a) VCAT should undertake a project directed to enhancing the substantive fairness of VCAT successfully mediated Civil Claims List disputes. The measures that could be adopted to enhance fairness include:
- mediation training to explicitly recognise mediators' responsibility not to broker a settlement unless it is substantively fair;
 - requiring mediators to form a view based on the evidence as to what outcome is fair and to document at the close of each mediation that view together with an explanation where the mediated result deviates from the fairness assessment;
 - a review each quarter of a reasonable sample of successfully mediated disputes to assess the substantive fairness of the outcomes in light of the information held by VCAT about the disputes; and
 - reporting in VCAT's Annual Reports as to the broad trends to emerge from the review process to enhance accountability and stakeholder confidence in the mediation service.
- b) Where a dispute reaches a VCAT hearing, the Member should not press the parties to settle but rather should simply proceed to hear the evidence and decide the dispute.

9.3. Procedural fairness

One interviewed tenant and one interviewed consumer felt that the fairness of their hearing had been adversely affected by the Member's willingness to accept evidence that the other party brought to the hearing but had not served on the them in advance of the hearing.

Both individuals were legally represented at their hearing. The tenant said that this meant her lawyer had to respond to the new material on the spot. The consumer was concerned about photos that were produced by the trader she was in dispute with. The consumer felt that she had been deprived of an opportunity to check whether the photos had been digitally altered.

It is of course a fundamental principle of procedural fairness that the parties should have sufficient time to consider and respond to the other party's evidence. Particularly where an unrepresented tenant or consumer is only provided by the other party to the dispute with supporting evidence either just before or during a hearing, we think that it is important that the Member acts to mitigate the prejudice to the tenant or consumer. After all, the tenant or consumer may not be aware of their right to object to late evidence. For example, it may be necessary for the Member to pause the hearing to give the tenant or consumer time to consider the evidence or to offer them an opportunity to obtain an adjournment. The

Member also needs to be particularly vigilant in scrutinising late evidence and should not automatically allow the late evidence into hearing.

Surveyed consumer representatives affirmed that this is a “big problem”.

Recommendation 12

At a hearing, VCAT should always check that the tenant or consumer has had sufficient time to consider evidence of the other party. Where evidence is served on the tenant or consumer either at the hearing or just before the hearing, Members should act to mitigate any prejudice to the tenant or consumer in these circumstances, for example, by asking the tenant or consumer if they would like an adjournment and in appropriate cases refusing to admit late evidence.

9.4. Immediate decision where complex issues

Surveyed consumer representatives have also expressed concern about the evident pressure on VCAT Members to decide complex matters at the hearing. Consumer representatives believe that, in complex matters, fairer results would be more consistently achieved if Members more regularly reserved their decision and took additional time to review the evidence and check and apply the law. The following points were made:

- Civil Claims List Practice Note PNCCLI directs that documents are to be provided at a hearing not with the application. Where these are provided in advance, consumer representatives’ experience is that these will often not have been read by the Member. Given that Members do not have a chance to prepare for a hearing, this makes immediate decisions in complex cases all the more challenging.
- Disputes between a purchaser and a motor car trader can be complex and difficult to resolve without further consideration post hearing. Often both the Motor Car Traders Act 1986 and the Australian Consumer Law need to be considered.
- The Australian Consumer Law is complex legislation that, in consumer representatives’ experience, is often applied without appropriate precision where the Member makes an immediate decision at the hearing. For example, where there is a breach of a consumer guarantee, the compensation order is not necessarily considered in the context of whether the failure is a major or minor failure. Decisions as to damages are made without necessarily considering the legislative test of reasonably foreseeable losses.

In surveying tenants and consumers and observing VCAT hearings, we identified a couple of matters where the Member made an immediate decision but would have benefited from additional time to consider and apply the law.

- There was a dispute where a Member said that a house was not a “rooming house” for the purposes of the Residential Tenancies Act 1997 on the basis that there were less than four residents. However the house had four rooms “available for occupancy” as per the Act’s definition of “rooming house”.
- There was a dispute where the Member enforced the terms of a written contract without reference to the law of mistake, notwithstanding the evidence that there was a typographical error in the contract.

We recognise that, if the Member reserves a decision, this necessitates the preparation of written reasons by way of explanation for the parties of the Member's orders. We recognise that this is more work than if orders are made at the close of the hearing. However, we think that in complex or unusual disputes a practice of reserving decisions would improve the consistency of quality of decision making and thereby both promote fairness and enhance VCAT's credibility.

By way of a comparative perspective, decisions by an industry-based external dispute resolution scheme are made with more time to research the law, consult with peers and review the evidence carefully. Furthermore, industry-based schemes usually have processes whereby written reasons are at least peer reviewed before being sent to the parties.

Recommendation 13

VCAT should establish an expectation that, in complex or unusual Residential Tenancies List or Civil Claims List disputes, Members should reserve their decision to provide more opportunity to consider the evidence and research and apply the law.

9.5. Inadequate compensation

A number of surveyed consumer representatives also expressed concern that fairness is being adversely impacted by the Member failing to provide adequate compensation where a finding is made in favour of the tenant or consumer.

Our interviews of tenants and consumers support this concern as the following case studies demonstrate.

An unrepresented disability pensioner sought compensation for a landlord's prolonged delay in essential repairs (faulty dishwasher that caused flooding, kitchen tap not working, light switches that caused electric shocks and lock problems). Tenants Union of Victoria had calculated her entitlement as \$400. But she was awarded just \$100.

A disadvantaged consumer purchased a car that had many problems from the very next day. The car went back and forth to the dealer and was towed away many times. When the car was returned, extra damage had vindictively been done. The consumer asked for a refund of the purchase price but the dealer refused.

The consumer sought advice from the Consumer Action Law Centre and made a VCAT application. He was successful in establishing the dealer's liability. The Member said that because of the animosity between parties it was better the consumer went to someone else to have the car repaired. The Member asked the dealer how much it would cost to fix the car and granted the consumer that amount of money (\$1,000). This was a completely inadequate amount.

We think that these examples are redolent of an approach that tries to offer both parties something. But one party may be entirely in the right, in which case they should receive full compensation. We think that VCAT needs to review compensation practices to ensure that Members' compensation orders are providing full compensation to applicants who are successful in establishing their claims.

Recommendation 14

VCAT should review compensation practices to ensure that Members' compensation orders provide full compensation to applicants who are successful in establishing their claims.

9.6. Appealing a VCAT decision

At the moment, there are only very limited avenues to appeal a VCAT decision. An appeal must be to the Supreme Court, can only be on a question of law and leave to appeal must be granted. The expense and difficulty means that an appeal is almost invariably not viable for a consumer or a tenant¹¹. Even if a consumer or tenant has won their dispute at VCAT, if the other party obtains leave from the Supreme Court to appeal the decision, the consumer or tenant may feel obliged to compromise their dispute, rather than risk a Supreme Court costs order made against them.

We think that this fundamentally undermines the fairness of the process for VCAT users. It also creates a systemic weakness in the VCAT decision-making process. This is because a regularly accessed appeal mechanism enables a tribunal to detect re-occurring decision-making procedural and substantive flaws and hence to take systemic action to address those flaws (training, guidance, performance management). Without a body of appeal decisions, VCAT does not have information about its decision-making weaknesses. For both reasons, we urge the establishment of a VCAT internal appeal to a more senior Tribunal member¹².

By way of comparative perspective, industry-based dispute resolution schemes invariably have an internal appeal mechanism that involves a more senior person taking a fresh look at the complaint. For example, the Telecommunications Industry Ombudsman has a senior lawyer to whom a decision can be appealed. The Financial Ombudsman Service has a two-stage decision making process. The initial decision is called a Recommendation and involves the provision of full written reasons. If either party is not willing to accept the Recommendation, they can appeal and an Ombudsman makes the final decision called a Determination.

Recommendation 15

The Victorian Civil and Administrative Tribunal Act 1998 should be amended to enable an internal appeal to a more senior Tribunal member.

9.7. Quality review process

As noted by Dueck in *Best Practices of Administrative Tribunals*¹³, a performance management system “may be a given for most jobs, but it isn’t always the case for tribunal members. It should be. Performance reviews can be the responsibility of the chair, or they can be done as peer reviews among members.”

¹¹ VCAT Annual Report 2014/ 2015 p.2 reports that in 2014-15 there were 80 requests made for leave to appeal of which 18 were successful. The Supreme Court overturned VCAT's decision in 11 cases.

¹² This is consistent with Victorian Legal Aid, *Residential Tenancies Act Review Security of Tenure Submission*, 31 December 2015 Recommendation 10. That submission notes that an appeal right exists in NSW, Queensland and South Australia.

¹³ Published in *Municipal World*, www.municipalworld.com

We understand that VCAT does not currently have a systematic review program for Member decisions. Accordingly, we thought we would offer some observations about emerging practice in industry-based external dispute resolution schemes. Increasingly they recognise the importance of the following:

- a shared understanding amongst decision makers as to what constitutes quality and the standards that will be applied to assess decision makers' dispute resolution;
- those standards need to encompass both the appropriateness of the dispute resolution outcome and the quality of the dispute resolution process including the quality of experience of the parties;
- internal assessment (ie by someone within the organisation) of a specified number of cases per decision maker per period eg 4 cases per quarter with random selection of disputes within target categories;
- case assessments are usually conducted either by a team with responsibility for quality or a more senior decision maker – with the aim perhaps of moving to a peer review process in time, once the case assessment process becomes a robust and well accepted part of the culture;
- the results of each case assessment need to be documented using a checklist derived from the quality standards - the checklist needs to focus on the essentials without being overly complex, so that assessments can be efficiently undertaken;
- case assessment results need to be used as a tool to inform the mentoring and performance appraisal of individual decision makers; and
- the general results from case assessments need to be used as tool to inform training programs and process improvements.

Industry-based schemes are also increasingly incorporating regular external assessment of decisions. This can serve to challenge internal wisdom and bring a new perspective for the benefit of decision making in relation to future disputes. If some public transparency is given to the external assessment process, this can also build stakeholder confidence and enhance the credibility of the dispute resolution service. The regular external review can include a re-review of some of the internally reviewed decisions to test the rigour of the internal review process, as well as the review of decisions that have not been internally reviewed, so as to expand the reach of the assessment process.

We recommend that VCAT institute a quality review process along these lines and publicly report as to numbers of reviewed decisions and the trends to emerge from the reviews. For the purposes of a review, the hearing tape should be reviewed (rather than the reviewer sitting in the hearing room) as well as VCAT's document file. Disputes should be randomly selected within the target category.

Recommendation 16

VCAT should institute a program whereby every quarter some decisions of all Members in the Residential Tenancies List and Civil Claims List are quality assessed. This assessment should encompass both the fairness/ legal correctness of the dispute resolution outcome, as well as the appropriateness of the conduct of the dispute resolution process. An external assessment element should also be included

in the program. VCAT should provide some public transparency to the program by reporting about it in its Annual Report.

10. ENFORCEMENT DIFFICULTIES

10.1. Introduction

Many tenants and consumers are dismayed to discover that VCAT does not enforce monetary orders. Rather a VCAT payment order has to be pursued through the Magistrate's Court.

As stated in VCAT's *Guide to enforcing a monetary order*¹⁴, the process includes obtaining a certified copy of the order, preparing and swearing an affidavit, filing this at the Magistrate's Court nearest to where the debtor resides, paying a court fee and then pursuing enforcement through the Magistrate's Court.

Clearly most tenants and consumers will need legal assistance with this process. But the problem is not just one of process. As VCAT's guide cautions, "the debtor may be bankrupt or have no property or income which can be appropriated in payment of the debt".

10.2. Tenants' and consumers' experience

Surveyed consumer representatives expressed concern that their clients often pursue a VCAT application only to find that the respondent is very slow to comply with VCAT's monetary order or even fails to do so. We interviewed two people for whom this was the case.

A consumer purchased furniture and paid \$3,000 up front, which she said was a lot of money for her.

The furniture was delivered very late and in an incomplete state. After trying for some time to resolve the matter with the vendor, the consumer made an application to VCAT. She was successful in an undefended application but the vendor failed to pay and went into administration (although he opened another company with the same catalogue as the previous company). She has not been paid.

A tenant paid a \$1300 bond for a rental house. The house proved not to be in good condition, so she moved out after just a few days and sought repayment of her bond by the landlord.

With the help of her legal centre, the tenant successfully made a VCAT application. But 9 months later, the landlord still has not complied with the order that he repay the bond of \$1300.

Consumer representatives considered that there are likely to be businesses or landlords who are repeat offenders in this conduct.

10.3. Breach register

We understand that there would be considerable challenges in VCAT adopting an enforcement role. However we do think that, at the least, VCAT should establish a publicly searchable register of businesses and a publicly searchable register of landlords who fail to comply with a VCAT monetary order¹⁵.

For both registers, there would need to be a supporting process whereby a tenant or consumer can provide VCAT with a statutory declaration if a VCAT monetary order in their

¹⁴ Created 30 April 2012, www.vcat.com.au

¹⁵ A register of delinquent landlords would be a counterpoint to residential tenancy databases under Part 10A of the Residential Tenancies Act 1997.

favour is not complied with within a defined period of time. VCAT could enter the name of the business or landlord on its register with specification of the amount outstanding. This could have a few benefits:

- This may operate as an added incentive to the business or landlord to comply with VCAT's monetary order.
- The register could be a source of information for other consumers and tenants. This might limit repeat harm by the business or landlord.
- The register may be a useful source of intelligence for regulators.

Similarly, industry-based external dispute resolution schemes make public the names of businesses who fail to comply with their decisions (although this is not the only means that they have to obtain compliance with their decisions).

Recommendation 17

VCAT should establish a publicly searchable register of businesses that fail to comply with a VCAT monetary order and a publicly searchable register of landlords who fail to comply with a VCAT monetary order. The registers would need to be supported by a process whereby consumers and tenants can notify VCAT where a VCAT monetary order is not complied with.

II. STAKEHOLDER FEEDBACK OPPORTUNITIES

II.1. Introduction

VCAT's strategic plan *Building a Better VCAT: Strategic Plan 2014-17* specifies "broadened engagement with stakeholders and the wider community" as a key focus point for the period of the plan.

We endorse the importance of this. In our work with industry-based dispute resolution schemes, we have seen that a quality dispute resolution process is not possible without a sound understanding of the experience of users of the service. A range of feedback opportunities are necessary to gather that perspective and so be able to respond to the issues of users of the service.

II.2. Complaints about VCAT's service

VCAT's website includes a page that provides information about the processes that apply to complaints about VCAT.

A complaint can be made about the quality of service received from a tribunal staff member, the conduct of Members and staff, the tribunal's processes or procedures and the provision of services by VCAT. A complaint must be in writing and may use the online complaint form. The information relied upon must be verified by statutory declaration. We query whether the statutory declaration requirement operates as an unnecessary barrier to the making of a complaint.

VCAT undertakes to acknowledge a complaint within a week. The aim is to provide a final reply within 6 weeks. If the complaint is complex or requires additional time for investigation (for example to retrieve files from archives), VCAT undertakes to keep the complainant informed of progress. VCAT says that it will log complaints to monitor the progress of these and to monitor performance trends.

In VCAT's 2014/2015 Annual Report, VCAT states: "*recognising that these feedback mechanisms have not been reviewed for some time and acknowledging their value in helping us identify areas for improvement ... , [w]e completed a review and evaluation of our complaints process*"¹⁶. The Report does not give further information about the scope or findings of that review. Nor does the Annual Report include information about complaint numbers, trends or remedial outcomes¹⁷.

We surveyed consumer representatives to ascertain their confidence in VCAT processes for handling complaints. The response suggested a poor level of confidence.

¹⁶ VCAT Annual Report 2014/ 2105 p.14

¹⁷ The Victorian Ombudsman recommends that "Information on trends or aggregated complaints data should be publicly available and preferably reported annually by agencies. There should also be regular audits of the complaints handling system and appropriate action plans formulated to address any deficiencies." *Good Practice Guide to complaint handling for Victorian Public Sector Agencies*, November 2007, p.7.

Figure 6 – Consumer representative survey

Do you have sufficient confidence in VCAT's process for handling complaints about VCAT to make a complaint to VCAT about poor conduct by VCAT of a matter?	Res Tenancies No. of responses	Civil claims No. of responses
Not at all confident	8	3
Somewhat confident	6	4
Reasonably /very confident	0	2

We think that this lack of confidence in VCAT processes for handling complaints is a significant issue for VCAT. To address this, we recommend an external consultant is engaged to assist VCAT to revise its complaints handling process (we understand that the 2014/ 2105 review was an internal review). The aim should be to make the complaints process more accessible and responsive, with regular analysis of complaints and trends and a learning approach to these. The external consultant could be asked to use the Victorian Ombudsman's *Good Practice Guide to complaints handling for Victorian Public Sector Agencies* as a benchmark for the review.

By way of comparative perspective, industry-based external dispute resolution schemes generally consider that their dispute resolution business requires them to be 'model citizens' in dealing with complaints about their own service. Their approach to complaints is less about determining whether a complaint is 'upheld' or not, and more about acknowledging the feedback and using that to improve the service. Typically the Boards of external dispute resolution schemes receive regular reports about complaints and look closely at the trends these reveal, regarding complaints as an important source of intelligence about the quality of service being provided. Complaints about the scheme are also reviewed as part of the regular (every three to five years), comprehensive, independent reviews that industry-based external dispute resolution schemes are required to commission.

We would expect that if VCAT's complaint handling process became more accessible and responsive complaint numbers would initially increase. If, however, underlying issues are addressed, we would expect over time that complaint number would then fall.

Recommendation 18

VCAT should engage an external consultant to assist it to revise its processes for complaints about its service. The aim should be to ensure that the complaints process is highly accessible – the requirement for a statutory declaration to verify information should be dispensed with. Complainants should be provided with a comprehensive, non-defensive response to their complaint. Processes should be put in place to ensure that complaint trends are regularly analysed and systemic weaknesses in VCAT's handling of disputes are addressed. VCAT's Annual Reports should report complaint numbers, categorised by issue, and the action taken to address those issues.

11.3. Surveying of VCAT's users

In VCAT's 2014/2015 Annual Report, VCAT acknowledges the need for “regular customer satisfaction surveys as there are currently limited ways for people to provide feedback”¹⁸. The Report states that the first comprehensive review of customer services found:

- the staff to be very dedicated but that systems were not as user friendly as they could be;
- there were limited mechanisms to obtain and use customer feedback; and
- VCAT processes do not allow staff to close enquiries.

The Report states that a number of strategic projects are underway to address the findings and a senior project director has been engaged to work on an implementation plan.

We agree that regular customer satisfaction surveys are very important. Surveys help to build a service-oriented culture and are a valuable source of information about improvement opportunities.

Industry-based external dispute resolution schemes continuously survey consumer users of their service. Typically they will email a survey form to a consumer user of their service (or a random selection of these) shortly after their dispute is finalised. The results of these surveys are made public with precision as to the ratings achieved and trends over time¹⁹. In addition to this continuous surveying, industry-based schemes also periodically undertake special purpose surveys to investigate a particular aspect of the scheme's performance. The Financial Ombudsman Service also uses an external marketing firm to conduct benchmark surveys every few years and closely monitors whether levels of satisfaction are increasing or declining.

We think that VCAT should develop an on-going program of surveying. This needs to capture all aspects of VCAT from the helpline service at the time of initiation of an application through to mediation and Member decision making. To promote accountability and transparency, VCAT should release the results of this surveying through statistical reporting in its Annual Report.

Recommendation 19

VCAT should develop a regular surveying program to test tenants' and consumers' satisfaction with all the key aspects of VCAT's Residential Tenancies List and Civil Claims List service including:

- a) the quality of assistance by the helpline service;
- b) for unrepresented individuals - their perception of how well they navigated the VCAT system;
- c) for consumers with civil claims that went to mediation - their satisfaction with the conduct of the mediation;
- d) their satisfaction with the conduct of the hearing including whether the Member provided them

¹⁸ VCAT Annual Report 2014/ 2015 p.14

¹⁹ Eg. Telecommunications Industry Ombudsman 2014-2015 Annual Report p.11 customer satisfaction with the handling of the conciliation process reported to be 80% and with the outcome of the complaint to be 75%, Energy and Water Ombudsman Victoria 2015 Annual Report p.14 overall customer satisfaction reported to be 79% (good or excellent rating), information also provided about customer satisfaction levels at the various stages of the dispute resolution process.

with sufficient time to explain their case;

- e) their satisfaction with the fairness of the process including whether they had sufficient time to consider the evidence of the other party; and
- f) their satisfaction with the outcome achieved.

The results of the surveying should be reported in VCAT's Annual Reports. Reporting should be statistical. In addition, analysis should be provided of the statistics and specification of the action VCAT is taking to address the feedback.

11.4. Liaison groups

In VCAT's 2014/2015 Annual Report, VCAT says that it receives feedback on its services from user group meetings and undertakes regular consultation with key representative bodies such as the Tenants Union of Victoria, Consumer Affairs Victoria, Law Institute of Victoria and the Office of the Public Advocate to ensure regular feedback on how well VCAT is supporting vulnerable groups.

Consumer representatives told us that there is a Residential Tenancies List Users Group that meets and is chaired by the Deputy President. VCAT convened a Civil Claims List Users Group in July 2014 but there have, to our knowledge, been no further meetings of that group.

In our work with industry-based dispute resolution schemes, we have found that stakeholder liaison forums require considerable energy, openness and commitment to be effective. The presentation style at forums needs to be regularly refreshed. Thought needs to be given as to how to ensure that sessions are highly interactive. Where significant issues are raised, it is important that there is reporting back on these issues at subsequent forums to demonstrate clearly that the feedback has been heard and action is being taken. Where, however, liaison is done well, the benefits can be considerable for all.

We think that VCAT should consult with consumer organisations with a view to enhancing its liaison forums with them.

Recommendation 20

VCAT should strengthen its liaison forums with consumer organisations. The Residential Tenancies List Users Group should be refreshed to be make it a more interactive, open and effective forum. The Civil Claims List Users Group should be re-established. Consultation should be undertaken with consumer organisations as to what they are looking for from these forums and how they can be most effective.

12. PUBLIC ACCOUNTABILITY

12.1. Annual Report

VCAT's primary public accountability mechanism is its Annual Report.

Its 2014-15 Annual Report included reporting about VCAT's activities and its progress against *Building a Better VCAT: Strategic Plan 2014-17*²⁰. Information was provided about:

- VCAT's governance and operating structure;
- Dispute volumes;
- The key initiatives for each of VCAT's strategic directions;
- Legislative reforms and new practice notes;
- Each of VCAT's Lists (volumes and timeframes).

This information is all useful. However, we think that more detailed information about disputes would enhance transparency and accountability. By way of comparison, the Financial Ombudsman Service Annual Reviews provide detailed information about:

- how disputes are categorised;
- the numbers of disputes by subject matter/ issues arising in the disputes and outcomes;
- common and systemic issues emerging from the disputes;
- the number of disputes where the consumer was represented with categorisation by type of representative (family or friend, legal representative, accountant, financial counsellor etc);
- the numbers of disputes resolved by the various available methods of dispute resolution eg discontinued, negotiation, conciliation or decision;
- profiling information about financial difficulty applicants including geographic distribution and age; and
- the number of applicants who required additional assistance (categorisation by mental health, literacy, hearing, physical impairment, cognitive condition, sight/ vision, text telephone and translator-need with language groups specified).

Case studies are also included in the Financial Ombudsman Service Annual Reviews to provide an indication as to how the organisation handles frequently occurring types of disputes.

We think that the wealth of data publicly released by the Financial Ombudsman Service enables the scheme to work with stakeholders to understand and address accessibility issues - what groups of people might need more support in order to access the service. Transparency also promotes accountability which in turn is a driver of effectiveness.

²⁰ VCAT also reports publicly half yearly against the strategic plan: www.vcat.vic.gov.au

We think that VCAT's Annual Reports should provide a similar level of detail about its disputes.

Recommendation 21

To enhance accountability, VCAT's Annual Report should include more detailed statistical information and commentary. This should include:

- a) Common or systemic issues to arise in the Residential Tenancies List and Civil Claims List and number of disputes in each category, sub-divided by method of dispute resolution and outcomes;
- b) Number of disputes initiated by tenant/ consumer for these Lists (with geographic location information) and number by landlord/ business;
- c) Number and percentage of undefended disputes in these Lists where a substantive order is made;
- d) Numbers of telephone hearings and outcomes;
- e) Numbers of disputes in the Civil Claims List where the consumer is represented, with separate reporting for small claims and claims of at least \$10,000;
- f) Number of disputes in these Lists where an interpreter is used;
- g) For Civil Claims List, numbers of disputes by fee category and analysis of the impact of VCAT's new fees framework and its fee waiver practices;
- h) Number of adjourned disputes categorised by reason for adjournment;
- i) Information about VCAT user surveying program and its outcomes;
- j) Information about VCAT's quality monitoring program and outcomes; and
- k) Number of complaints received about VCAT, the issues raised in those complaints and action taken to address those issues.

12.2. Regular independent review

Industry-based dispute resolution schemes are required to have their operations reviewed at set periods by an independent reviewer. The scheme has to provide full access to the reviewer. The review has to assess the accessibility, independence, fairness, accountability, efficiency and effectiveness of the scheme and stakeholder satisfaction with the scheme.

To traverse this range of issues, an independent review will typically consult broadly with stakeholders including by inviting submissions. There will also be a detailed review of the policies, procedures, processes, training, systems, monitoring and reporting mechanisms of the scheme (in each case both the design and implementation effectiveness). A sample file review will also be undertaken and data extensively examined. Typically a detailed report is prepared that is published on the scheme's website.

An independent review of this type is a key public accountability mechanism. A review of this kind also promotes continuous improvement. We think that VCAT should be similarly opening itself up to independent scrutiny on a regular basis and making the results of reviews public. The whole organisation need not be reviewed each time. It would be possible to

review Lists by rotation. Not all issues need be reviewed with the same depth. Ideally the review would build upon review work that had already been done (whether by management, internal audit or an external consultant). The reviewer would also discuss with VCAT the areas of stakeholder or management concern to identify areas of focus which would be of most value to the organisation.

Recommendation 22

VCAT should put in place a program of regular independent reviews of its operations and should release the review reports publicly in the interests of enhanced accountability.

13. ASSESSMENT AGAINST DISPUTE RESOLUTION BENCHMARKS

13.1. Introduction

There are a number of industries in Australia where a specialist dispute resolution scheme has been established in order to provide recourse for consumers. The Telecommunications Industry Ombudsman, the Energy and Water Ombudsman Victoria and the Financial Ombudsman Service are all such schemes. These schemes have to meet the *Benchmarks for Industry-based Customer Dispute Resolution*, February 2015 version released by the Minister for Small Business. The Dispute Resolution Benchmarks are Accessibility, Independence, Fairness, Accountability, Efficiency and Effectiveness.

As noted in Chapter 2, there are important differences between VCAT and an industry based dispute resolution scheme. First, VCAT is a government body and so oversight mechanisms are quite different. Secondly, VCAT is more integrated into the Court system than is the case for industry-based dispute resolution schemes. As a result, VCAT's decision making utilises a hearings process. In comparison, dispute resolution schemes typically undertake an iterative investigative process with decisions being made on the basis of the information provided by the parties over the telephone and in writing and with the scheme responsible for ensuring that both parties are provided with the other's information and given an opportunity to make their response.

Nevertheless there are significant similarities. VCAT, like industry-based schemes, aims to provide accessible justice using a range of dispute resolution approaches. Both VCAT and industry-based schemes are committed to procedural fairness as well as substantive fairness. Where a dispute is resolved by a decision rather than a settlement between the parties, both VCAT and industry-based schemes take more of an inquisitorial than adversarial approach. It is, therefore, instructive to compare VCAT's approach with the approach that is required of industry-based dispute resolution schemes. This Chapter undertakes that analysis.

13.2. Analysis

Accessibility <i>The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.</i>	
Summary of Key Practices	Extent to which VCAT meets Key Practices
<p>Awareness/ promotion</p> <p>The office seeks to ensure that those in the community who may require its services are aware of its existence</p> <p>The office promotes its services in the media or by other means.</p> <p>The office produces readily available material in simple terms explaining how to access the office, how the office works, the major areas with which the office deals and any limits on the office's powers.</p> <p>The office requires participating organisations to inform customers about the office.</p> <p>The office promotes its services in such a way as to be sensitive to and inclusive of customers with particular requirements, including those experiencing disadvantage. This includes making information available in appropriate languages, and in alternative formats such as large text and audio.</p> <p>The office focuses its promotion efforts on areas where a customer is likely</p>	<p>VCAT's website includes guidance about how to complete the application form and how hearings operate.</p> <p>Google Translate is utilised to give the option of reading VCAT's webpages in other languages.</p> <p>VCAT is referred to on Consumer Affairs Victoria's webpage "<i>Resolve a dispute</i>" – albeit not a prominent reference.</p>

<p>to seek information in the event of a dispute; for example, the websites of consumer agencies and advocacy services.</p>	
<p>Access</p> <p>The office seeks to ensure access to any person who may require its services.</p> <p>The office provides appropriate facilities and assistance to enable participation by complainants across the community, including those with particular requirements and those experiencing disadvantage. This includes allowing contact in a range of modes (in person, by telephone, telephone typewriter, fax, email or online), providing interpreter services, providing text in simplified English and/or available in large print format.</p> <p>Complainants can make initial contact with the office orally or in writing.</p> <p>There are arrangements for participating organisations to refer a complaint to the office in appropriate circumstances.</p> <p>The jurisdiction of the office is expressed clearly.</p> <p>The office seeks to minimise any 'virtual barriers' to complainants, for example, by providing 24-hour contact options such as an online complaint form.</p>	<p>VCAT utilises an interpreter service that is at no cost to the dispute parties.</p> <p>To initiate an application, the VCAT application form must be used (may be completed online or downloaded and then completed).</p> <p>An application cannot be initiated by telephone.</p> <p>VCAT's jurisdiction is defined by legislation.</p>
<p>Cost</p> <p>There is no application or other fee or charge required from a complainant before a complaint is dealt with by the office, or at any stage in the process.</p>	<p>Application fees generally apply but fee relief or waivers are available in some situations.</p>
<p>Staff Assistance</p> <p>The office's staff have the ability to handle complaints and are provided with adequate training in complaints handling.</p> <p>The office's staff explain to complainants in simple terms:</p> <ol style="list-style-type: none"> how the office works; the major areas it deals with; any limits on its powers; and the timelines applicable to each of the processes in the office. <p>The office's staff assist complainants to make a complaint, where complainants need assistance to do so.</p>	<p>VCAT has a contact number for Civil Claims and a contact number for Residential Tenancies. Phone contact can be a way, for example, to obtain assistance with completing the application form. The help is reactive (response provided to a specific question) rather than proactive.</p>
<p>Use</p> <p>The office's processes are simple to understand and easy to use.</p> <p>The office provides for a complainant's case to be presented verbally or in writing, at the discretion of the decision-maker.</p> <p>The office provides for complainants to be supported by another person at any stage in the office's processes where necessary.</p>	<p>Tenant and consumer applicants view VCAT's processes as complex. They feel that extensive documentary evidence is required. They feel that they are expected to behave like a lawyer in the hearing.</p> <p>VCAT allows a support person to attend the hearing.</p>
<p>Non-adversarial approach</p> <p>The scheme uses appropriate techniques including conciliation, mediation and negotiation to settle complaints.</p> <p>Proceedings are informal, discouraging legalism.</p>	<p>VCAT uses negotiation and mediation to settle disputes.</p> <p>Hearings are less formal than a Court but nevertheless evidence on oath, questioning by the Member, the framing of the orders etc gives hearings a legalistic, adversarial air.</p>
<p>Legal Representation</p> <p>The scheme generally discourages legal representation, but allows both parties to be legally represented where one chooses this representation and if the member chooses to be legally represented the member must pay the complainant's legal costs.</p>	<p>VCAT allows tenants to be legally represented, recognising that landlords are frequently represented by those with considerable VCAT experience ie this evens up the power imbalance.</p> <p>Representation is not generally permitted for a small claim in the Civil Claims List. Even for larger claims, Member permission is required for legal representation.</p>

Independence	
The decision-making process and administration of the office are independent from participating organisations	
Summary of Key Practices	Extent to which VCAT meets Key Practices
Decision-maker The decision-makers are independent of participating organisations.	VCAT Members are independent.
Staff The staff are independent of participating organisations.	VCAT staff are independent.
Overseeing entity There is a separate entity set up formally to oversee the independence of the office's operation.	VCAT is overseen by the Department of Justice.
Transparency The office manages any actual or perceived conflicts of interest and bias in a transparent manner.	In the Residential Tenancies List, there are frequently appearing landlord representatives eg Department of Housing representatives who become known to Members. This can create a familiarity that makes the tenant feel an outsider.
Funding The office has sufficient funding to enable its caseload and other relevant functions to be handled in accordance with the Benchmarks.	Not known
Terms of Reference Changes to jurisdiction are made in consultation with relevant stakeholders and participating organisations do not have a power of veto.	N/a

Fairness	
The procedures and decision-making of the office are fair and seen to be fair.	
Summary of Key Practices	Extent to which VCAT meets Key Practices
Final determinations The decision-maker bases final determination on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law.	VCAT's jurisdiction is confined to the law with no overarching fairness consideration.
Procedural fairness The office's staff advise complainants of their right to access other redress mechanisms. The office provides information to both parties at the same time, including timely ongoing communication on the progress of the investigation and decision. Both parties can put their case to the decision-maker. Both parties are told the arguments, and sufficient information to know the case of the other party. Both parties have the opportunity to rebut the arguments of, and information provided by the other party. Both parties are told of the reasons for any decision in writing. Both parties are told of the reasons why a complaint is outside jurisdiction or is otherwise excluded.	The parties to a dispute are meant to exchange their supporting documents in advance of the hearing. Failure to do so may be grounds for an adjournment. But commonly it seems that the hearing proceeds where new evidence is served late or brought to the hearing. Interviewed consumers complained about the unfairness of not being able to consider the other party's evidence in advance of the hearing. VCAT does not provide written reasons unless a party to a dispute requests this within 14 days. Whilst VCAT's website includes information about this right, VCAT does not

	make this right as visible as it might. For example, the notice of hearing does not refer to this right.
<p>Provision of information to decision-maker</p> <p>The decision-maker encourages, but cannot compel, complainants to provide information relevant to a complaint. The decision maker can demand a participating organisation to provide all information relevant to the complaint subject to limited exceptions.</p>	The Member does not have a responsibility to investigate the dispute. In a hearing, the Member makes a decision based on the evidence before them.
<p>Confidentiality</p> <p>The office keeps information provided to it confidential.</p>	VCAT's hearings and orders are open and available to the public.
<p>Review of decisions</p> <p>The office establishes a process to review decisions for consistency and compliance, such as selective sampling and auditing of cases.</p>	VCAT have indicated that they do not presently have such a process.

Accountability

The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.

Summary of Key Practices

Extent to which VCAT meets Key Practices

<p>Procedures</p> <p>The office makes available to participating organisations, complainants and other interested bodies its guidelines and policies for dealing with complaints.</p>	VCAT publishes guidance material on its website.
<p>Final determinations</p> <p>The office makes available written reports of final determinations and the reasons for the decision²⁵ to participating organisations and any interested bodies for purposes including:</p> <ul style="list-style-type: none"> a) educating participating organisations and the community; and b) demonstrating consistency and fairness in decision-making. <p>Public reports of final determinations do not name parties involved.</p>	In the Residential Tenancies List and Civil Claims List, VCAT decisions are usually oral. So although the decisions are public, there is not a body of written decisions that readily serve an educative purpose nor that are available to demonstrate the consistency and fairness of decision-making.
<p>Responding to complainants and participating organisations</p> <p>The office uses comments received from complainants and participating organisations to inform the continuous improvement of their internal processes and procedures, and to inform their public reporting.</p>	Not known to what extent VCAT actively seeks out stakeholder feedback and uses this to continuously improve.
<p>Annual report</p> <p>The office publishes a detailed and informative annual report containing specific statistical and other data about the performance of the office, including:</p> <ul style="list-style-type: none"> a) the number and types of complaints it receives and their outcome, including information outlining the complaints received and outcomes for each of the participating organisations; b) the time taken to resolve complaints; c) any systemic problems arising from complaints; d) examples of representative case studies and reports on investigations; and e) in appropriate cases, information about any participating organisations which do not meet their obligations. <p>The annual report is to be made public, including through distribution to participating organisations, relevant stakeholders and otherwise made available upon request.</p>	VCAT issues an Annual Report but this is not nearly as detailed as this Benchmark requires.

Efficiency	
The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and regularly reviewing its performance.	
Summary of Key Practices	Extent to which VCAT meets Key Practices
<p>Appropriate process or forum</p> <p>The office will only deal with complaints which are within its jurisdiction. The office will generally not deal with complaints that have been dealt with, or are being dealt with, by another dispute resolution forum.</p> <p>The office will generally only deal with complaints which have been directed by the complainant to the participating organisation's internal dispute resolution mechanism.</p> <p>The office has mechanisms and procedures for referring complaints that are not within its jurisdiction to other, more appropriate, forums.</p> <p>The office liaises with other forums where there is a complaint entailing a potential overlap in jurisdiction.</p> <p>The office has mechanisms and procedures for dealing with systemic problems that become apparent from complaints, including by investigating these issues or referring them to relevant participating organisations, or to regulators or policy makers.</p> <p>The office excludes vexatious and frivolous complaints, at the discretion of the decision-maker.</p>	<p>VCAT only deals with disputes within its legislative mandate.</p> <p>Where relevant, VCAT's telephone contact staff will advise consumers about their option to access an industry-based external dispute resolution scheme, such as the Telecommunications Industry Ombudsman.</p> <p>VCAT has no responsibility to identify or address systemic issues or refer these to regulators or policy makers.</p> <p>VCAT's application fees serve to discourage vexatious and frivolous complaints.</p>
<p>Timeliness</p> <p>The office considers timeliness in all of its processes and procedures, including the timeliness of acknowledging and responding to an initial complaint, time taken to investigate a complaint, and the time taken to make a decision.</p>	<p>Currently there is a delay of just a couple of weeks for a residential tenancies dispute to be heard. For a civil claim, it is an estimated 12 weeks from application to hearing.</p>
<p>Tracking of complaints</p> <p>The office has a reasonable time limit set for each of its processes which facilitate speedy resolution without compromising quality decision-making.</p> <p>The office has mechanisms to ensure compliance with time limits, as far as possible.</p> <p>The office has a system for tracking the progress of complaints.</p> <p>Office staff keep parties informed about the progress of their complaint.</p>	<p>The general practice of oral orders at the hearing provides a speedy resolution to the dispute. In complex matters, the risk is that this compromises quality decision-making.</p> <p>Not known how well VCAT's case management system promotes tracking of disputes.</p>
<p>Monitoring</p> <p>The office sets objective targets against which it can assess its performance.</p> <p>The office keeps systemic records of all complaints and enquiries, their progress and their outcome.</p> <p>The office conducts regular reviews of its performance.</p> <p>Office staff seek periodic feedback from complainants and participating organisations about their perceptions of the performance of the office.</p> <p>The office reports to the overseeing entity on the results of its monitoring and review.</p>	<p>VCAT has a registry function that maintains records of disputes.</p> <p>Not publicly known whether/ how often VCAT surveys users of its services to gain feedback.</p> <p>Not publicly known how VCAT reviews its performance or its reporting to Government.</p>
<p>Professionalism</p> <p>The office recruits staff with the requisite skills, qualifications and experience to perform the work efficiently.</p>	<p>VCAT has a Member Competency Framework.</p>

Effectiveness	
The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.	
Summary of Key Practices	Extent to which VCAT meets Key Practices
<p>Coverage</p> <p>The scope of the office and the powers of the decision-maker are clear and sufficient to deal with most complaints. If a monetary limit applies, this must be sufficient. The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.</p>	VCAT's jurisdiction is defined by its legislation.
<p>Systemic problems</p> <p>The office has mechanisms for referring systemic industry problems, based on cases brought to dispute resolution, to an appropriate regulator for action if required.</p> <p>The office has mechanisms to determine when to bring systemic problems to the attention of policy agencies or other relevant bodies, such as industry associations.</p>	VCAT has no responsibility to identify or address systemic issues or refer these to regulators or policy makers.
<p>Office performance</p> <p>The office has appropriately qualified staff to undertake its functions, and provides ongoing professional development and appropriate resources and processes to allow staff to effectively undertake their functions.</p> <p>The office has procedures in place for:</p> <ol style="list-style-type: none"> receiving complaints about the office; and where appropriate, referring complaints about the office to the overseeing entity for action. <p>The office responds to complaints and any recommendations of the overseeing entity in a timely and appropriate manner.</p>	<p>VCAT has a Member Competency Framework.</p> <p>VCAT has a procedure for receiving complaints. Consumer representatives lack confidence in this procedure.</p>
<p>Internal dispute resolution mechanisms</p> <p>The office requires participating organisations to set up internal dispute resolution mechanisms, and to inform those affected by the organisation's services about the mechanisms.</p>	N/a
<p>Compliance</p> <p>The office has mechanisms to encourage participating organisations to cooperate with the office, and to abide by the rules of the office.</p> <p>Final determinations of the decision-maker that are not recommendations are binding on the participating organisation if complainants accept the determination.</p> <p>The office has methods to mandate or improve compliance with decisions, and ensure redress for customers when a participating member is non-compliant with an office's final determination, decision or recommendation.</p>	VCAT's orders are capable of being enforced through the Magistrate's Court. VCAT itself does not have responsibility for ensuring compliance with its orders.
<p>Periodic independent review</p> <p>The operation of the office is reviewed regularly by an independent party at set periods.</p> <p>The review, undertaken in consultation with relevant stakeholders, includes:</p> <ol style="list-style-type: none"> the office's progress towards meeting the Benchmarks for Industry-based Customer Dispute Resolution; whether the scope of the office is appropriate; participating organisation and complainant satisfaction with the office; assessing whether the dispute resolution process used by 	<p>VCAT is not reviewed at set intervals by an independent reviewer.</p> <p>VCAT's 2014-15 Annual Report refers to a review of performance undertaken in February 2015 by Courts Service Victoria. It is not known how broad reaching that review was. The review report was not made publicly available. Brief information about the findings is, however, included in the Annual Report.</p>

the office are just and reasonable;
e) the degree of equitable access to the office; and
f) the effectiveness of the statute, charter, terms of reference or other document establishing the office, its jurisdiction, functions, rules and procedures.

The results of the review are made available to relevant stakeholders.

14. LIST OF RECOMMENDATIONS

Recommendation 1

The Residential Tenancies Act 1997 should be amended to improve the security of tenants' tenure and to enable a challenge to all types of notices to vacate which are given in retaliation for an exercise or proposed exercise of rights by the tenant.

Recommendation 2

VCAT should undertake analysis of Civil Claims List volume trends to understand the reasons for those trends and the impact of its new fees framework and its fee waiver practices. VCAT should include in its Annual Reports statistical data with commentary so that this analysis is made public.

Recommendation 3

- a) VCAT should review its Residential Tenancies and Civil Claims application forms with a view to making them less legalistic and easier to complete.
- b) VCAT should evolve its Civil Claims List helpline to offer a broader range of assistance to unrepresented consumer applicants. It should examine the feasibility of its helpline staff completing a first draft of the application for an unrepresented consumer applicant to check and lodge. Staff should also be more proactive in offering guidance, for example, as to the evidence that the consumer will need to collect and bring to the hearing and how to prepare for the hearing.
- c) VCAT should enhance its arrangements for referral of people to tenant and consumer representative organisations with a view to better identification of when a referral is appropriate and to which service.

Recommendation 4

VCAT should monitor and strive to reduce the number of undefended applications (withdrawn or adjourned applications can be excluded from this ambit). VCAT's Annual Reports should provide statistical information as to the numbers and percentages of undefended applications, by type of application, and their outcomes.

Recommendation 5

The Residential Tenancies Act 1997 should be amended so that VCAT must postpone a possession order if the tenant has made reasonable efforts to catch up arrears.

Recommendation 6

VCAT should offer telephone hearings more freely particularly to those who are in remote locations. To ensure that a telephone hearing does not prejudice the person appearing at a hearing via the telephone, VCAT would need to put in place arrangements whereby documents could be sent to VCAT in advance of the hearing. In addition, Members would need to receive training to give them the skills and confidence to manage a hearing conducted by telephone.

Recommendation 7

- a) VCAT should audit its interpreter booking service to assess whether there are process weaknesses that are resulting in interpreters failing to be arranged when booked and remedy any process weaknesses that are identified.
- b) VCAT Members should be provided with training to build their awareness of how to communicate with those with limited English and of the misunderstandings that can result from bypassing the interpreter.

Recommendation 8

VCAT should adopt a more flexible approach and allow disadvantaged or vulnerable consumers to be represented in civil claims of less than \$10,000. A request for representation should be decided on the papers, in advance of the hearing.

Recommendation 9

- a) VCAT should aim to reduce the number of disputes that are adjourned because of lack of time to hear submissions from the consumer's representative. For example, VCAT could develop a process that allows consumer representatives to notify an intention to appear on behalf of a client so that this can be taken into account in scheduling matters and extra time allowed for such matters.
- b) VCAT should monitor the frequency and causes of adjournments and provide statistical information in its Annual Report as to this.

Recommendation 10

VCAT should regularly surveying VCAT users to assess whether VCAT's scheduling of hearings means that the parties to the dispute are not provided with sufficient time in the hearing to present their evidence and explain their perspectives and for all elements of the claim to be properly canvassed. If it appears that hearings are being unduly rushed because of time pressure, VCAT should change its hearing scheduling practices to address this.

Recommendation 11

- a) VCAT should undertake a project directed to enhancing the substantive fairness of VCAT successfully mediated Civil Claims List disputes. The measures that could be adopted to enhance fairness include:
 - mediation training to explicitly recognise mediators' responsibility not to broker a settlement unless it is substantively fair;
 - requiring mediators to form a view based on the evidence as to what outcome is fair and to document at the close of each mediation that view together with an explanation where the mediated result deviates from the fairness assessment;
 - a review each quarter of a reasonable sample of successfully mediated disputes to assess the substantive fairness of the outcomes in light of the information held by VCAT about the disputes; and

- reporting in VCAT's Annual Reports as to the broad trends to emerge from the review process to enhance accountability and stakeholder confidence in the mediation service.

b) Where a dispute reaches a VCAT hearing, the Member should not press the parties to settle but rather should simply proceed to hear the evidence and decide the dispute.

Recommendation 12

At a hearing, VCAT should always check that the consumer or tenant has had sufficient time to consider evidence of the other party. Where evidence is served on the tenant or consumer either at the hearing or just before the hearing, Members should act to mitigate any prejudice to the tenant or consumer in these circumstances, for example, by asking the tenant or consumer if they would like an adjournment and in appropriate cases refusing to admit late evidence.

Recommendation 13

VCAT should establish an expectation that, in complex or unusual Residential Tenancies List or Civil Claims List disputes, Members should reserve their decision to provide more opportunity to consider the evidence and research and apply the law.

Recommendation 14

VCAT should review compensation practices to ensure that Members' compensation orders provide full compensation to applicants who are successful in establishing their claims.

Recommendation 15

The Victorian Civil and Administrative Tribunal Act 1998 should be amended to enable an internal appeal to a more senior Tribunal member.

Recommendation 16

VCAT should institute a program whereby every quarter some decisions of all Members in the Residential Tenancies List and Civil Claims List are quality assessed. This assessment should encompass both the fairness/ legal correctness of the dispute resolution outcome, as well as the appropriateness of the conduct of the dispute resolution process. An external assessment element should also be included in the program. VCAT should provide some public transparency to the program by reporting about it in its Annual Report.

Recommendation 17

VCAT should establish a publicly searchable register of businesses that fail to comply with a VCAT monetary order and a publicly searchable register of landlords who fail to comply with a VCAT monetary order. The registers would need to be supported by a process whereby consumers and tenants can notify VCAT where a VCAT monetary order is not complied with.

Recommendation 18

VCAT should engage an external consultant to assist it to revise its processes for complaints about its service. The aim should be to ensure that the complaints process is highly accessible – the requirement for a statutory declaration to verify information should be dispensed with. Complainants should be provided with a comprehensive, non-defensive response to their

complaint. Processes should be put in place to ensure that complaint trends are regularly analysed and systemic weaknesses in VCAT's handling of disputes are addressed. VCAT's Annual Reports should report complaint numbers, categorised by issue, and the action taken to address those issues.

Recommendation 19

VCAT should develop a regular surveying program to test tenants' and consumers' satisfaction with all the key aspects of VCAT's Residential Tenancies List and Civil Claims List service including:

- a) the quality of assistance by the helpline service;
- b) for unrepresented individuals - their perception of how well they navigated the VCAT system;
- c) for consumers with civil claims that went to mediation - their satisfaction with the conduct of the mediation;
- d) their satisfaction with the conduct of the hearing including whether the Member provided them with sufficient time to explain their case;
- e) their satisfaction with the fairness of the process including whether they had sufficient time to consider the evidence of the other party; and
- f) their satisfaction with the outcome achieved.

The results of the surveying should be reported in VCAT's Annual Reports. Reporting should be statistical. In addition, analysis should be provided of the statistics and specification of the action VCAT is taking to address the feedback.

Recommendation 20

VCAT should strengthen its liaison forums with consumer organisations. The Residential Tenancies List Users Group should be refreshed to be make it a more interactive, open and effective forum. The Civil Claims List Users Group should be re-established. Consultation should be undertaken with consumer organisations as to what they are looking for from these forums and how they can be most effective.

Recommendation 21

To enhance accountability, VCAT's Annual Report should include more detailed statistical information and commentary in the interests of enhanced accountability. This should include:

- a) Common or systemic issues to arise in the Residential Tenancies List and Civil Claims List and number of disputes in each category, sub-divided by method of dispute resolution and outcomes;
- b) Number of disputes initiated by tenant/ consumer for these Lists (with geographic location information) and number by landlord/ business;
- c) Number and percentage of undefended disputes in these Lists where a substantive order is made;

- d) Numbers of telephone hearings and outcomes;
- e) Numbers of disputes in the Civil Claims List where the consumer is represented, with separate reporting for small claims and claims of at least \$10,000;
- f) Number of disputes in these Lists where an interpreter is used;
- g) For Civil Claims List, numbers of disputes by fee category and analysis of the impact of VCAT's new fees framework and its fee waiver practices;
- h) Number of adjourned disputes categorised by reason for adjournment;
- i) Information about VCAT user surveying program and its outcomes;
- j) Information about VCAT's quality monitoring program and outcomes; and
- k) Number of complaints received about VCAT, the issues raised in those complaints and action taken to address those issues.

Recommendation 22

VCAT should put in place a program of regular independent reviews of its operations and should release the review reports publicly in the interests of enhanced accountability.