Residential Tenancies Act Review – *Fairer, Safer Housing*

Submission in response to the 'Disputes Resolution' Issues Paper

June 2016

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1. Introduction

1.1 About WEstjustice

WEstjustice 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 the Maribyrnong, Wyndham and Hobsons Bay areas.

WEstjustice has a particular focus on working with newly arrived communities. More than 53% of our clients over the last five years spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

1.2 About the WEstjustice Tenancy Program

WEstjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in the west of Melbourne. In the past five years, WEstjustice's tenancy program has assisted over 1,100 clients with almost 1,800 matters. Accordingly, we form part of the Tenancy Advice and Advocacy Program ('TAAP') agency system of independent third-party negotiation and representation outlined at page 16 of the Issues Paper.

Our catchment area includes suburbs in Melbourne's inner-west (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-west (including the fast growing areas of Werribee, Wyndham Vale, Hoppers Crossing and Melton). We also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal ('VCAT') in Werribee. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses, public and community housing.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

2. Executive Summary

Disputes between landlords and tenants are highly varied and range from simple matters of clarification to complex factual/legal situations. The tension for effective dispute resolution in this sector is in ensuring clear and fair pathways to having legal matters resolved while also acknowledging that matters are best resolved at the lowest possible level. On top of this, there are often asymmetries of power and knowledge between parties in a tenancy dispute, as well as the overlap between individual parties' outcomes and effective enforcement of the legislation.

We see fairness, accessibility and cost as the most important features of a dispute resolution process and this guides much of our thinking in this response to the Issues Paper. At the lower level, we believe that fairness and accessibility should be central to Consumer Affairs Victoria ("CAV")'s responses when offering front line resolution, conciliation, and inspection services. We make specific recommendations on the latter.

As for higher stages of dispute resolution, we see great value in a modified version of New Zealand's FastTrack system which allows telephone facilitation of arrears matters before they have to proceed to VCAT. Mediation may be appropriate for other kinds of tenancy disputes, but we believe that this assessment should be made once a matter arrives at VCAT itself.

Although we find little quarrel with VCAT's members and staff, we make a number of recommendations to streamline the application process and make fees and leave for representation fairer to tenants. To attempt to reduce the escalation of matters to either the Magistrates' Court or the Supreme Court of Victoria, we recommend that there should be an option at the end of VCAT hearings for parties to reach a payment arrangement by consent, and that an internal appeals process modelled on the Fair Work Commission allow for appeals to be determined at a lower cost to all parties.

We also make proposals on steps that could be taken (potentially at low cost) to reduce tenant non-attendance at VCAT. Lastly, we note two areas (where there are industry issues beyond the coverage of the Residential Tenancies Act 1997 ("RTA")) where the creation of ombudsman-style bodies would be welcomed.

3. Summary of Recommendations

Recommendation 1: *CAV should evaluate its front-line resolution and conciliation schemes to determine how well participants understand and comply with them, and to determine whether changes are needed.*

Recommendation 2: *Section 74 of the RTA should be amended to remove its requirements for written requests to either a landlord or the Director for non-urgent repairs.*

Recommendation 3: *The repairs inspection report form produced by CAV Inspectors be amended to highlight the presence of urgent repairs, where required.*

Recommendation 4: *Section 74 of the RTA should be amended to allow a tenant to seek a CAV inspection where they believe repairs performed are unsatisfactory.*

Recommendation 5: *The requirement to seek photos from a CAV repairs inspection by making an FOI request should be removed.*

Recommendation 6: *Challenges to Notices to Vacate and urgent repair applications should both be fee-free matters at VCAT.*

Recommendation 7: *Over-counter VCAT payment methods should be available at all venues where VCAT sits.*

Recommendation 8: *The VCAT Online portal should be modified so that fee waivers and all supporting documentation can be attached and processed.*

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Recommendation 10: *Schedule 1 of the VCAT Act should be amended to allow an automatic right to representation by a professional advocate where they are challenging a Notice to Vacate or facing a landlord's claim to compensation.*

Recommendation 11: *The review should consider the implementation of a system of landlord bonds, as discussed in WEstjustice's Rents Bonds and other Charges submission.*

Recommendation 12: *VCAT should be empowered with the ability to make payment orders by consent of affected parties at the conclusion of a hearing.*

Recommendation 13: *Where breaches of RTA penalty provisions are identified, this should be noted in VCAT orders, and these should then be sent to CAV as a matter of course.*

Recommendation 14: *The VCAT Act 1998 should be amended to allow for internal appeals within VCAT itself, conducted by one or more senior members of the Tribunal.*

Recommendation 15: *VCAT's Notice of Hearing form should be amended to better communicate the effect of the application and the consequences of non-attendance to tenants.*

Recommendation 16: *Notice of hearing for VCAT should be communicated through all contact details provided for a party.*

Recommendation 17: *On a trial basis, VCAT should ring respondent parties on the Residential Tenancies List, reminding them of their hearing date, to see whether this improves attendance.*

Recommendation 18: *A New Zealand-style fast track model, under which landlords and tenants can consent in good faith to payment plans before a formal VCAT hearing, should be considered.*

Recommendation 19: *British Columbia (and other jurisdictions') introduction of online dispute resolution should continue to be monitored, with a critical focus on its effectiveness for landlord-tenant disputes.*

Recommendation 20: *A Retirement Housing Ombudsman should be created, in part to handle those disputes particular to Part 4A site agreements.*

Recommendation 21: *Real estate and property management industry bodies should develop self-regulatory codes that meet federal benchmarks for the conduct of agents and agencies. Such a scheme should involve the establishment of an industry ombudsman which enforces that code.*

4. Disputes in the residential tenancies sector: some characteristics and outcomes

In its role as a Tenant Advice and Advocate Program (TAAP) agency, WEstjustice are funded to provide specialised support services to vulnerable and disadvantaged tenants through a combination of advice, assistance, negotiation and representation. Although this thread of vulnerability and/or disadvantage is common to all our centre's tenancy clients, the disputes they present with and the most appropriate resolutions for those disputes are diverse.

Some disputes may involve provision of advice about tenants' personal rights and obligations that resolves the matter almost immediately. Some may involve clarification through discussion with both landlord and tenant about the fairest and most equitable result for the tenancy relationship. Many will need to go to VCAT for a hearing in order to complete an administrative process or have a disagreement settled before a sitting member. A few may be of such factual or legislative complexity that multiple hearings are required and we may need to enlist the support of external lawyers on a *pro bono* basis.

Appropriate and quick mechanisms oriented toward 'self-help' should be available for minor matters and tenants who can readily take matters in their own hands, but we believe the system overall should be assessed on how it provides for those who face the most need and most potential harm.

4.1 Characteristics and desirable outcomes

The following are typical characteristics of residential tenancies disputes:

***Asymmetry of knowledge*:** The vast majority of tenancy matters our centre deals with (over 90%) involve properties managed by professional agents. These agents will generally have a good working understanding of the RTA as it pertains to VCAT procedures (i.e., possession, bond and landlord compensation claims). Unrepresented clients may have been unable to follow documentation received from the landlord or VCAT, or a VCAT proceeding itself. A misunderstanding of the tenants' own rights and obligations under the RTA may have also escalated the dispute. For example, we have often dealt with tenants who (unlawfully) withhold rent because repairs expected of the landlord have not been performed.

Asymmetry of power: Tenants may perceive that raising a dispute about a tenancy will lead to a range of adverse outcomes, including rent rises, termination of the tenancy from the landlord's end, or difficulty securing a reference for a new property. Although there are relevant legislative requirements on the basis on which rent increases and possession orders may be sought, these are not always followed (i.e., retaliatory 120-day Notices to Vacate). Unrepresented or unadvised tenants will be apprehensive of initiating such disputes.

Transient populations: Tenants who have a *prima facie* valid claim for compensation for breaches of a landlord's duties may prioritise immediate pressing needs (new accommodation, finding employment or support, the needs of children and dependants) over their legal rights. They may have moved to or from a new city or town and see making a claim or raising a dispute as too time-consuming and costly. This can also lead to situations in which bond and compensation claims made

by a landlord are not responded to by an ex-tenant. This is unfortunate, as we often see these claims reduced when contested.

Unpredictable outcomes: Broadly similar disputes may have different outcomes at VCAT, including the bases on which possession is granted and amounts of compensation that may be awarded.

An effective disputes resolution mechanism should:

- Take steps to mitigate the asymmetry of knowledge and power in a dispute;
- Facilitate faster and easier access to the forums used to resolve a dispute;
- Account for unpredictable or erroneous outcomes with appropriate rehearing or appeal mechanisms;
- Information-share where appropriate to discourage 'repeat offenders' and provide education to tenants, landlords, and agents.

4.2 Ranking priorities

We have considered the features listed at page 10 of the Discussion Paper. All are important, and our ranking would sometimes be dynamic based on the features of a dispute and its participants.

However, we would put **fairness** first and foremost, particularly given that the Discussion Paper recognises that fairness as a quality will be broader than any one decision, and will involve steps to address significant power imbalances between disputants. Other features can also be evaluated in the context of ensuring fairness.

We would rank **accessibility** and **cost** as the next features. These are features we see as essential to participation in residential tenancy disputes. For tenants who are responding in a dispute it is vital that the process they must respond to is easy to understand and engage with, and that the risks of not doing so are understood. For tenants who are initiating the dispute themselves, tools and mechanisms to help them do so easily are important.

Speed, fitness for purpose and certainty are each highly desirable, but we have grouped them last to make it clear that they should be subordinate to the three features above.

With regards to speed, we agree that a dispute should be dealt with quickly, but not hastily – that is, a dispute should not be resolved in the favour of one party without appropriate inquiry just because the other fails to attend or engage.

Fitness for purpose should be as economical as possible and take advantage of technological innovations, but this should not lose sight of fairness and accessibility. For example, we note with concern the handling of the Consumer Acts and Other Acts Amendment Act 2016, which amended section 506 of the RTA to enable service of documents in accordance with the Electronic Transactions (Victoria) Act 2000.[1] We remain concerned that this will disadvantage tenants with limited access to or familiarity with internet and email, especially if they are electronically served with Notices to Vacate.

[1] Consumer Acts and Other Acts Amendment Act 2016, s. 24.

As a feature, certainty should also be evaluated subordinate to fairness. We note the need for "parties (to be) confident in the market generally", but would add that binding and fair decisions made according to an interpretation of legislation will sometimes have the effect of changing what had previously been a standard commercial practice.[2]

[2] An example may be the decisions in *Palmer v Hutchinson* [2013] VCAT 873 and *Rosetto & Anor v Calder & Ors* [2012] VCAT 816 that established that service fees associated with third-party rental collectors could not be on-charged to tenants. Conversely, the decision in *Swan v Uecker* [2016] VSC 313 shows that significant decisions affecting interpretation of the law as it stands will be scrutinised and reversed on appeal if necessary.

5. Victoria's existing mechanisms

5.1 Information and Advice

General information and advice must strike a difficult balance between providing enough guidance to tenants over a potentially wide variety of topics, and not inundating readers with more information than they need.

Clients we see who have already sought general information and advice tend to have done so through Consumer Affairs Victoria's website, the Rent Right app or the factsheets available on the Tenants Union of Victoria (TUV) site. We have not encountered situations where clients find these unhelpful or inaccurate – rather, they may need specialist advice or advocacy beyond what the general information provides.

5.2 Independent third-party assistance

5.2.1 CAV's Front Line Resolution (FLR) and Conciliation Services

Although our organisation receives referrals directly from CAV where more support is perceived to be needed beyond the FLR service, we have not heard criticism or complaints about the FLR service from users. The limitations on what the FLR service can achieve are appropriate given that it is an early and relatively informal method of resolution. Assuming they are not included already, we suggest the following safeguards are always appropriate in an FLR service:

- Clearly conveying to both parties that the FLR or conciliation representative is not acting for either party;

- Clearly conveying to both parties that their arrangement will be non-binding and cannot necessarily be relied on later at VCAT;

- If there is an alleged breach of the legislation, that this be recorded, even if further action is not taken;

- Even where FLR has ended in apparent agreement, providing tenants with the contact details of the nearest relevant community legal centre and VCAT in case agreement breaks down in future.

We suggest that CAV consider undertaking a review of the FLR and conciliation schemes in which parties that use the scheme consent to be contacted at a later date about subsequent compliance, and what could have occurred differently to ensure subsequent compliance. These may provide the agency itself with better guidance to continue refining its systems.

Recommendation 1: *CAV should evaluate its FLR and conciliation schemes to determine how well participants understand and comply with them, and to determine whether changes are needed.*

5.2.2 Disputes Settlement Centre of Victoria

Most landlord-tenant disputes in which we negotiate or represent on a tenant's behalf are of a clearly legal nature. Even where they are factually complex, they involve rights and duties under the RTA or associated legislation and there is a strong possibility that the matter will escalate to VCAT.

Furthermore, the majority of landlords we deal with are represented by professional agents. This means that the disputes are in some ways an unusual fit for the DSCV's community-based focus on solving interpersonal disputes. Lastly, many residential tenancy matters may be resolved through VCAT or negotiation in a shorter time period than DSCV's average of 40 calendar days.

For this reason, we primarily consider referral to DSCV where:

- There is a dispute between housemates that would lack an appropriate or affordable legal forum;
- There is a dispute between neighbours that it is impractical for an individual landlord to solve (i.e., a dispute between two residents in an apartment building about noise).

We note that the DSCV is an excellent resource for these forms of dispute, which can become distressing, complex and costly if not resolved (especially share house and co-tenancy matters, which VCAT technically has no jurisdiction over). Because it is a port of last effective resort for these issues, its funding should be adequate to meet the features of fairness, speed, and fitness for purpose discussed above.

5.2.3 TAAP negotiation

As a TAAP agency, we feel that the Discussion Paper's summary of our services is apt. The relatively low level of negotiations (a trend which our centre also sees) partly reflect that:

- We will often receive cases where a dispute is ongoing without resolution and parties are reluctant to negotiate;

- We will often receive cases where an application to VCAT has already been made (generally by the landlord) and our assistance to a client takes the form of hearing preparation and representation;

- We will deal with residential tenancy law matters where there may be a legal interpretation question best considered by a VCAT member.

In our *Security of Tenure*[3] and *Rents, Bonds and Other Charges*[4] responses, we noted that we see matters, particularly with arrears possession orders, where landlords proceed to VCAT even though an order is extremely likely to be adjourned or refused and a payment plan ordered instead. These create upheaval, expense and distress for tenants.

[3] James Leckie, "Western Community Legal Centre submission in response to the 'Security of Tenure' issues paper". Accessed at http://www.footscrayclc.org.au/images/stories/Security_of_Tenure.pdf

[4] Joseph Nunweek, "Submission in response to the "Rents , bonds and other charges" issues paper". Accessed at http://www.footscrayclc.org.au/images/stories/WEstjustice_Submission_-_Rent_Bond_and_Other_Charges.pdf

As before, we suggest that landlords be required to show they have attempted good faith negotiations to resolve an arrears situation before applying for a possession order. Alternatively, we believe a version of New Zealand's 'FastTrack Resolution' process has merit for certain matters where the arrears are not in dispute and a tenant can enter into a feasible payment plan. We discuss this further below.

5.2.4 CAV Inspections

We have referred tenants to CAV's services for both rent rises and repair inspections. In our experience the inspectors are punctual and quick to carry out their inspections, and appear to pay heed to the condition of the property as well as its location and size when assessing the appropriateness of rent rises.

Rent rise inspections will generally serve as the final word on the matter for both landlord and tenant, and the relative formality of a CAV repairs inspection will in many cases cause a landlord to engage in their duties where they had not done previously. In the event that a landlord does fail to comply with their duties to repair, a CAV report is compelling evidence before VCAT.

The agency's repair inspection reports are also clear and easily understood. However, we would welcome the following changes to the process by which repair inspections are carried out:

Relax the requirements for notice to Director

In order to have a CAV inspector attend their home and conduct an inspection, a tenant must have given written notice that repairs (other than urgent repairs) are required to the rented premises. The landlord must not have carried out repairs within 14 days after being given the notice. After that time, an application must be made in writing to the Director of Consumer Affairs which includes a copy of the written notice provided to the landlord. [5]

Well-maintained rental properties are fundamental to the wellbeing, health and dignity of tenants. But many of the properties in Melbourne's West are in a dilapidated state. Coincidentally or otherwise, a great deal of such properties are rented out to clients with language barrier or literacy issues – those for whom notifying repairs in writing to either a landlord or a government agency presents a substantial barrier, especially given the intermediate-to-advanced level of vocabulary involved in writing such a complaint.

Case Study: Cecilia

Cecilia is a middle-aged refugee who has limited spoken English and no written English. Part of her kitchen bench had caved in due to age and rot, and her back door could not be unlocked from the outside (meaning it was secure, but inconvenient). During multiple inspections she would point to and identify the needed repairs in broken English to agents.

[5] Section 74, Residential Tenancies Act 1997

After nothing was done for nearly two years, she made an appointment with us using an interpreter. We explained that as she had not asked for anything in writing, we would now need to write out the requested repairs notice for her and serve it on the landlord. We also completed a CAV repairs inspection request on her behalf. Cecilia was confused by the need to provide written notice now, given that she had made the needed repairs abundantly clear in person, and given that the agents would have known she could not have put in a written request herself.

We propose that the requirement of s74 of the RTA that notice to the landlord or to the Director be done in writing be removed. Obviously, many tenants will prefer to put issues in writing, but the current model disadvantages those who cannot. We believe that landlords and agents are more than capable of documenting a repair request themselves, and CAV should be able to operate a system where tenants ring a phone number (with interpreters if necessary), outline repair issues, and book an inspector.

Clearly identify urgent repairs in report

An irony of the urgent repairs mechanism under the RTA is that tenants are required to proceed to VCAT in the first instance to get a repair order if their landlord does not act immediately. In its current form, this can be an even higher threshold than a CAV inspection request for an unaided tenant.

While we would retain the fast-track urgent repairs VCAT process under s73 of the RTA, urgent repairs that are raised under the s74 process and identified by an inspector should be highlighted and foregrounded in a repair report, preferably with a notice to the landlord that they are obliged to repair these immediately.

Right to request inspection where repairs poorly performed

Under s75 of the RTA, a tenant may apply to VCAT for a non-urgent repairs order if:

- they have received a report from the Director under s74; and

- they are of the view that satisfactory arrangements have not been made for the carrying out of repairs.

Our view is that this encompasses situations where a landlord or agent has completed slapdash repairs which are not of acceptable workmanship.

However, we have had tenants become confused when:

- they initially notify a landlord of repairs under s74(1)(a);

- the landlord completes repairs within 14 days under s74(1)(b), but they appear to be to a poor standard.

We would amend s74(1)(b) from:

"the landlord has not carried out the repairs within 14 days after being given the notice", to:

"the tenant is of the view that satisfactory arrangements have not been made for the carrying out of repairs".

Ease in obtaining further photos/documentation

It is CAV inspector practice to take photographs of areas that the tenant alleges need repair during an inspection. These photographs may be important to a tenant's claim at VCAT later on, particularly if they seek compensation for a landlord's ongoing failure to keep the property in good repair.

Currently, a tenant who seeks these photos must make a Freedom of Information request (FOI) to do so. This will have a maximum turnaround of over 40 days, and in most cases will incur a fee for the tenant applying. We believe this provides an additional and unnecessary bureaucratic hurdle – after all, photographs from an inspection of a landlord's rented premises have been taken by CAV at the invitation of the tenant.

We would suggest that section 74 of the RTA be amended to confirm that as part of a written report under section 74(3)(c), a tenant is entitled to receive any photos taken by the Director as part of their investigation.

Recommendation 2: *Section 74 of the RTA should be amended to remove its requirements for written requests to either a landlord or the Director for non-urgent repairs.*

Recommendation 3: *The repairs inspection report form produced by CAV Inspectors be amended to highlight the presence of urgent repairs, where required.*

Recommendation 4: *Section 74 of the RTA should be amended to allow a tenant to seek a CAV inspection where they believe repairs performed are unsatisfactory.*

Recommendation 5: *The requirement to seek photos from a CAV repairs inspection by making an FOI request should be removed.*

5.3 The Victorian Civil and Administrative Tribunal (VCAT)

Where appropriate, WEstjustice provides representation at VCAT to clients on both the Civil List and the Residential Tenancies List..

Our views on some current issues with VCAT follow below. We note that these criticisms do not reflect our dealings with Tribunal staff and members themselves, the overwhelming majority of which we find to be fair, helpful and considerate.

5.3.1 Fees and applications

As we were preparing this report, VCAT announced the following reforms to its fee tables:

- A new 'Concession Tier', under which holders of a current Health Care Card issued by the Federal Government will not have to pay application fees in VCAT Residential Tenancies Division matters;
- Automatic entitlement to a full fee waiver where a party in a residential tenancies case has been adversely affected by family violence;
- A minor increase in application fee for 'Standard Tier' applicants to $61.50, which will affect tenants not in receipt of Health Care Cards.

We commend the introduction of the concession tier. However, we recommend going further by adding the following two kinds of application to the list of matters on which no fees are payable.

***Challenges to Notices to Vacate*:** Used where there may be issues with the basis on which a Notice to Vacate was served, these challenges are an opportunity for a tenant to raise an issue with a proposed termination of tenancy at an earlier possible stage. We encourage tenants who may have a valid issue with the way a 60-day or 120-day Notice to Vacate was given to apply to challenge it sooner, rather than risk challenging it at a possession hearing.

Challenging a notice to vacate often comes as a tenant is faced with the costs of packing, moving and spending hours applying for and viewing new properties. If successful, an applicant derives no financial benefit and merely obtains the right to remain in their home. On the same basis that tenants do not pay to attend a possession hearing and plead their case, they should not pay to issue these challenges.

Urgent Repairs: We would argue that tenants applying under section 73 of the RTA are always in a position of hardship that justifies a fee waiver. They are being deprived of basic necessities within their home and cannot meet the cost of repairs; alternatively, they may have spent significant savings of their own on these repairs only for the landlord to refuse to reimburse them for the costs. Such applications should not attract additional cost to a tenant.

Recommendation 6: *Challenges to Notices to Vacate and urgent repair applications should both be fee-free matters at VCAT.*

We also have some administrative concerns about how VCAT receives applications. Right now, a fee-paying tenant at VCAT would face the following options:

Method of Application	Limitations/Disadvantages
Posting Application to VCAT by mail	Tenant cannot pay by cash or EFTPOS – may not have another convenient method to make payment.

Submitting Application by hand to any VCAT venue apart from 55 King St or William Cooper Justice Centre	No way for tenant to pay at counter. Will have to organise payment separately and may not have convenient method to do so.
Lodging application through VCAT online	Current VCAT Online process does not allow a tenant to add a fee waiver form or attachments to support the substance of their claim. Also not suitable for tenants with low technological literacy.
Emailing scanned application to VCAT	Tenant will need to pay separately if not entitled to waiver. VCAT does not print supporting documents if these are above a certain size, meaning that Member commences hearing without all relevant documents before them.

All these methods pose access and convenience barriers to applicants. They may also discourage the provision of full supporting documentation either to VCAT itself or to the opposing party, both of which should be done as early as possible to ensure VCAT's speed and efficiency.

We believe the following steps would maximise VCAT's user-friendliness and effectiveness to the most diverse group of applicants:

- Payment methods available for VCAT at all venues where VCAT sits;
- Modifications to VCAT Online so that fee waivers and supporting documentation can be attached;
- Email applications of 60 pages or less to be printed without a fee.

Recommendation 7: *Over-counter VCAT payment methods should be available at all venues where VCAT sits.*

Recommendation 8: *The VCAT Online portal should be modified so that fee waivers and all supporting documentation can be attached and processed.*

Recommendation 9: *The VCAT Registry should allow all email applications to be printed for the court records.*

5.3.2 Representation

WEstjustice's experience with Residential Tenancy List matters is that leave is rarely, if ever, refused to appear on behalf of a tenant. This may reflect the recognition that community legal centres overwhelmingly represent disadvantaged or vulnerable clients, and the reality that over 85% of all VCAT applications are initiated by landlords' professional agents or by public housing officers.

While members' practice in this area seems appropriate, we would build on the current exemption under clause 67 of Schedule 1 of the VCAT Act, which allows a party to a proceeding to a possession order to be represented by a professional advocate.

We would accord the automatic right to representation where:

- A tenant is seeking to challenge a Notice to Vacate;
- A tenant is facing a claim for compensation from a landlord.

Our rationale for extending the right to representation to these situations is that each involves the risk of serious disadvantage to a tenant. In the former, they are trying to pre-emptively manage the risk of homelessness, and in the latter, they may face significant debts and the risk of being placed on a tenancy database. We believe VCAT's current sound use of discretion in these matters should be formalised in policy.

Recommendation 10: *Schedule 1 of the VCAT Act should be amended to allow an automatic right to representation by a professional advocate where they are challenging a Notice to Vacate or facing a landlord's claim to compensation.*

5.3.3 Enforcement and compliance

Beyond the fairness of its decisions and the processes leading up to those decisions, we believe that there are two further elements that are important to VCAT's authority and legitimacy:

Ease of Enforcement

Tenants who are required to pay compensation as the result of a VCAT order are likely to do so first and foremost out of their bond. Where the compensation amount exceeds the bond, we are at pains to advise tenants that they must make arrangements to pay off the extra compensation. Failure to do so can mean that a debt is registered against them in the Magistrates' Court, and that they may be listed on a tenancy database.

With this in mind, we are frustrated that in the past twelve months we have had to dedicate time and resources to advising and assisting a number of tenants on commencing enforcement proceedings against ex-landlords in the Magistrates' Court. It appears that some landlords are taking a laissez-faire approach to compensation orders, confident that the time, complexity and additional costs will defer a tenant's enforcement action.

Case Study: Amir and Kajal

Amir and Kajal took their former landlord to VCAT after a tenancy had ended. On their behalf, we alleged a number of serious breaches of duty by the landlord. The tenants went over two months without a working oven after it stopped working, and a dying tree in the front yard was not pruned or removed despite the tenants bringing it to the attention of the landlord's agent. A bough eventually fell and damaged Kajal's motorbike.

At the hearing, the agent offered a statement on the landlord's behalf claiming that he was an excellent landlord that owned five investment properties and had never had a complaint. This attempt to cast doubt on our clients' credibility was unsuccessful, and they were awarded the full compensation they sought.

We then spent a number of weeks trying to get an update from the agent. He eventually responded that because the landlord was struggling financially (with five investment properties) he could only afford to pay $40.00 a month to Amir and Kajal.

We are now assisting the clients with enforcement at the Magistrate's Court. This is time and energy that will not be spent on other casework. Amir and Kajal have said that they feel like VCAT orders are 'meaningless'.

We reiterate the recommendation in our *Rents, Bonds and Other Charges* submission for the introduction of a parallel system of landlord bonds.[6] Among other advantages, it would reduce the need for enforcement action in many cases. The compensation order in the case study above would have been largely covered by a landlord's bond.

We would also suggest the implementation at VCAT level of a final stage after the substantive decision where a payment order can be agreed on by consent and made as an order. Parties could still be at liberty to refuse a costs order if they are considering an appeal or cannot reach an acceptable agreement on payment.

However, the influence and authority of a VCAT member may be more effective in determining how compensation will be paid (what kind of instalments can be afforded, and how often), and be an improvement on a situation where parties leave VCAT hurriedly with vague promises to confirm a payment arrangement at a later date.

[6] Nunweek, "Submission in response to the "Rents , bonds and other charges" issues paper", pp. 12-15

We do not anticipate that this addition to VCAT proceedings would significantly affect our advice to clients. When they are the respondents to a compensation claim, we already advise that there is a possibility they may be liable for some amount of compensation and encourage them to begin thinking of a reasonable basis on which this may be paid if they are unsuccessful or partially successful at VCAT. We would expect that agents do the same with their landlords.

Recommendation 11: *The review should consider the implementation of a system of landlord bonds, as discussed in WEstjustice's Rents Bonds and other Charges submission.*

Recommendation 12: *VCAT should be empowered with the ability to make payment orders by consent of affected parties at the conclusion of a hearing.*

Deterrence of Offending

Some Residential Tenancy List matters will involve offences under the RTA. Examples we have encountered include:

- Failure by a landlord to lodge a bond[7];
- A landlord compelling a tenant to sign a blank bond refund form[8];
- Tenancy agreements not prepared in the prescribed standard form[9];
- Failure to provide a condition report[10];
- Failure to provide receipts for rent[11];
- Additional charges for renewal of a lease agreement[12];
- Obtaining possession or attempting to obtain possession of a property in breach of the RTA[13].

Over the course of a hearing for possession, bond or compensation, VCAT may make ancillary findings about such matters. While VCAT is not empowered to hand down penalties for breaches of the RTA, we believe that the work of the Director of Consumer Affairs would be enhanced by better information-sharing from VCAT to their enforcement officers.

For example, a private landlord who fails to lodge bond in one instance is unlikely to face investigation and prosecution – but a private landlord who has been associated with multiple instances of doing so may.

VCAT has previously referred potential offences under legislation to the relevant enforcement body where it deems appropriate. For example, in *Vella v Eurotec Produkts Pty Ltd* the Tribunal identified

[7] Residential Tenancies Act 1997, s406
[8] Residential Tenancies Act 1997, s412(5A)
[9] Residential Tenancies Act 1997, s412(5A)
[10] Residential Tenancies Act 1997, s35(1)
[11] Residential Tenancies Act 1997, s43
[12] Residential Tenancies Act 1997, s51(1)
[13] Residential Tenancies Act 1997, s229

a *prima facie* breach of the Legal Profession Act 2004 by the applicant's representative, and directed that a copy of its order be sent to the Legal Services Commissioner for investigation. [14]

We suggest that where a *prima facie* breach of an RTA penalty provision is established at a VCAT hearing, VCAT should record this in its order and direct that a copy of the order be provided to CAV. CAV can keep these in its records and choose to monitor, investigate and prosecute where necessary.

Recommendation 13: *Where breaches of RTA penalty provisions are identified, this should be noted in VCAT orders, and these should then be sent to CAV as a matter of course.*

5.3.4 Appeals

Presently, an appeal of a VCAT order may only be made to the Supreme Court. Appeals are confined to a question of law, and involve significant expense in terms of hearing fees and filing fees. For tenants, there are two reasons why this model may dissuade them.

Firstly, they may be unwilling to consider appealing a decision because of the fees and costs involved in doing so – particularly if that are unsuccessful and have to pay the opposing party's costs as well.

Secondly, they may be worried by the possibility of a landlord appealing a VCAT decision, having to incur costs defending the matter at Supreme Court level, and again risking a costs order made against them.

For Residential Tenancies List decisions (at least) we see merit in a model of appeal internal to VCAT itself and similar to that for appeals of Fair Work Commission (FWC) decisions. Rather than proceeding to an external court, leave to appeal could be sought from a Tribunal Bench constituted of one or more senior VCAT members. If leave is granted, they would only intervene to vary or quash a decision on the basis of a significant error of the original decision-maker. [15]

As with appeals to the Full Bench of the FWC, we anticipate the threshold for an appeal being granted would be reasonably high. Like the FWC, many VCAT decisions involve the exercise of some level of decision-maker's discretion, and FWC appeals are only likely to be successful where there is some substantial error in exercising that discretion. Examples may include:

- A decision-maker acting on a wrong principle;
- A decision-maker being guided by irrelevant factors;
- A decision-maker mistaking the facts;
- A decision-maker failing to take some material consideration into account.

[14] *Vella v Eurotec Produckts Pty Ltd* [2010] VCAT 1499. VCAT found that the applicant's representative had repeatedly identified himself during the hearing as engaging in legal practice, despite not being an Australian legal practitioner.

[15] More information on the procedure for FWC appeals can be found in the Commission's relevant Practice Note: https://www.fwc.gov.au/at-the-commission/how-the-commission-works/practice-notes/appeal-proceedings (Accessed on 25 June 2016).

We believe that this system, provided appeal applications were considered promptly, would provide more certainty to tenants and landlords alike at lower cost.

Recommendation 14: *The VCAT Act 1998 should be amended to allow for internal appeals within VCAT itself, conducted by one or more senior members of the Tribunal.*

5.3.5 Non-attendance

WEstjustice is concerned by the low rate of tenant attendance at hearings (primarily those hearings for which they are listed as respondents). Tenants may face the loss of their home or significant debts, and forfeit the ability to dispute either due to their non-attendance. While we accept that matters may *legally* proceed in the absence of a party at VCAT, we perceive a shared *moral* obligation upon those working in the sector to investigate and improve attendance rates.

Presently, the main way that tenants will presently learn that a VCAT hearing is being held is via the Notice of Hearing sent by ordinary post. These Notices of Hearing have not changed substantially in nearly 20 years. They appear in letterboxes as small, non-descript envelopes with no indication of their origin or their effect, potentially indistinguishable from circulars and bills.

The actual process of opening a VCAT Notice of Hearing is not really much more edifying for a tenant. A small box refers to the relevant section of the RTA and describes whether the application is for possession, rent or bond. It does not set out the basis on which these applications are sought. The "Information for Parties" below is generic and does not inform a tenant of the concrete risks of non-attendance. Notices of Hearing are only in English.

We believe this form needs to be reviewed, with particular attention to the following:

- The exterior of the form before it is opened needs to specify that it is important in large, clear font, and involves an upcoming appearance before a tribunal of law.

- The description of the application needs to include a summary of the sections relied on by the applicant, and not just the sections themselves. For example, an application for possession for rent arrears will currently state the following: "Application under Residential Tenancies Act 1997 possession and rent Section 322(1), 246". As an alternative, it should say something like "This hearing is for an application by the landlord for a possession order against the tenant(s) because she/he/they owe at least 14 days of rent. (Refer to sections 246 and 322(1) of the Residential Tenancies Act 1997)"

- The interior of the form needs to include a bold, coloured warning that failure to attend may result in a tenant's eviction and/or an order being made for them to pay compensation to the landlord. An analogy is the clear warning in a summons for criminal matters that non-attendance may result in arrest. The brief warning should be supplemented with translations into other languages, like those CAV provide in their template notices.

- The form should provide the number of VLA's Legal Help line in addition to VCAT's number. We believe they are best placed to triage these matters into the most appropriate support service.

Recommendation 15: *VCAT's Notice of Hearing form should be amended to better communicate the effect of the application and the consequences of non-attendance to tenants.*

While delivery of a Notice of Hearing by post is still the most appropriate method, we believe that notification of a VCAT hearing should be conveyed by all details supplied by the applicant and respondent. Clients who we assist in VCAT matters are now receiving SMS messages about hearings where they or their landlords have provided their current mobile phone numbers. This is welcome and should continue. Where an email is provided, we believe a notice of hearing should also be sent to that address. It serves as a failsafe in case a notice sent in the post is lost or delayed.

VCAT does not ring respondents (or applicants, for that matter) to remind them of their date. We appreciate that ringing all respondents would require a significant increase in resourcing, particularly given that it is not a guarantee that this would increase tenant attendance.

However, we believe doing so with a select group of respondents on a trial basis would be a valuable way to identify whether this improves attendance. The results, in turn, could make a case for whether or not further resourcing for contacting parties by telephone has merit. We note that using a 'robocall' system to notify parties with an automated message may reduce the expense of this process, and the effectiveness of doing so could be investigated as part of this trial.

Recommendation 16: *Notice of hearing for VCAT should be communicated through all contact details provided for a party.*

Recommendation 17: *On a trial basis, VCAT should ring respondent parties on the Residential Tenancies List, reminding them of their hearing date, to see whether this improves attendance.*

6. Alternative models and mechanisms

6.1 The New Zealand FastTrack model

A recurring theme from WEstjustice's casework (and in our previous papers submitted to this review) has been that some initial hearings for possession on the basis of rent arrears are sought without good faith efforts to enter into a payment plan with a tenant. These hearings end up as a poor use of time for tenants, agents, and agents' representatives. Attendance is almost always required in person, and even if a hearing may only take 15 minutes, parties are advised to clear at least a half-day, reflecting the realities of VCAT's busy system.

We have suggested that possession for arrears at VCAT should only be sought where a landlord can demonstrate that good faith efforts have been undertaken. The FastTrack model may be a good way to formalise those steps.

Under a version of this model, landlords or agents could make an application under a prescribed form that goes onto the FastTrack system, and a facilitator could then ensure both sides understand the plan and formalise it if required. If the matter is conducted by telephone, disruption to all parties is minimised. If the order is breached, the matter may then proceed to a possession hearing at VCAT.

We believe the speed (a two-day turnaround) touted by New Zealand's Tenancy Tribunal is important to make such a process fair to landlord and tenant alike, and caution that a poorly-resourced version of the initiative could cause hardship to all parties.

Another safeguard we believe is essential under such a model is that the mediator is not simply a rubber stamp on a landlord-proposed payment plan. VCAT has a tendency to be highly pragmatic about its payment orders: landlords may not demand immediate lump sums in satisfaction of arrears, nor may tenants make nominal repayments over months or years. Those responsible for facilitating FastTrack-style resolutions may need to play an active role in managing appropriate expectations between tenant and landlord, and may even need to refuse an order and refer the matter to VCAT where they perceive serious power imbalances between parties.

We have evaluated some of the other models requiring compulsory mediation outlined in the Issues Paper. We believe that while mediation is valuable in some instances, it should not duplicate or impede dispute resolution systems designed to ensure the fast and efficient administration of justice – particularly when, as we have identified, VCAT is under-utilised by tenants in terms of high non-attendance and low application rates.

VCAT's members currently have the discretion to refer matters to compulsory mediation conferences where they consider this appropriate. In the case of disputes that don't involve arrears and/or negotiation of payment plans, we believe referral to mediation is best decided at the VCAT stage, rather than made a compulsory hurdle at the beginning of proceedings.

Recommendation 18: *A New Zealand-style fast track model, under which landlords and tenants can consent in good faith to payment plans before a formal VCAT hearing, should be considered.*

6.2 Online dispute resolution

We suggest that British Columbia's Civil Resolution Tribunal model be monitored for its development and its effectiveness before further consideration be given to implementing a similar matter for tenancy disputes (or indeed, civil disputes) at VCAT.

While we acknowledge that there will be scenarios where tenants and landlords will be equally well-placed to use such a system, there is still a significant digital divide among tenants and consumers in general. This may include factors such as age, experience with computers and other digital devices, and the fact that most official Victorian and Australian websites are primarily in the English language and may be difficult to navigate for those who are not fluent English readers.

Recommendation 19: *British Columbia (and other jurisdictions') introduction of online dispute resolution should continue to be monitored, with a critical focus on its effectiveness for landlord-tenant disputes.*

6.3 Ombudsmen and complaints services

We note that VCAT and CAV cover a large range of the possible disputes that may arise under the RTA. Improved processes and information-sharing from VCAT to CAV will empower them to continue to handle these fairly and consistently without the need for a generalised all-purpose 'Tenancy Ombudsman'.

However, we echo Consumer Law Action Centre (CALC), Residents of Retirement Villages Victoria (RRVV) and other organisations in calling for a Retirement Housing Ombudsman. VCAT currently has jurisdiction to deal with residential parks covered by Part 4A of the RTA, but these living arrangements have several differences from private tenancies and rooming houses and several similarities with retirement villages that would make a separate sector ombudsman appropriate. We have outlined this call further in our recent submission to the State Government's inquiry into the Retirement Living Sector.

Recommendation 20: *A Retirement Housing Ombudsman should be created, in part to handle those disputes particular to Part 4A site agreements.*

In our submission on *Rents, Bonds and Other Charges,* we recommended that industry bodies that are currently responsible for property management, such as the REIV, should develop self-regulatory codes that meet federal benchmarks for the conduct of agents and agencies.[16] The natural consequences of developing these codes would be an Ombudsman-style body that could investigate and resolve disputes where there is an allegation that those codes have been breached.

Beyond the industry issues identified in the previous Discussion Paper, this system would be ideal for tenants' complaints with agents and agencies that are ill-suited to VCAT RTA disputes. It may also provide a pathway for landlords who perceive there have been issues with the service and conduct of an agent or agency.

[16] Nunweek, "Submission in response to the "Rents , bonds and other charges" issues paper", pp. 26-28.

Recommendation 21: *Real estate and property management industry bodies should develop self-regulatory codes that meet federal benchmarks for the conduct of agents and agencies. Such a scheme should involve the establishment of an industry ombudsman which enforces that code.*