

HOUSING AND TENANCY

This chapter considers many of the issues faced by people experiencing homelessness and access to housing. Different types of accommodation, both public and private, are discussed as are the rights and responsibilities of both tenants and landlords.

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1. Public Housing

1.1 Overview

Public housing is available to people with low income who cannot find suitable housing in the private rental market. It is administered by the Office of Housing within the Victorian Department of Human Services.

Applications for public housing can be made by an individual, a couple or a family. A group of people can also make a group application.

You can obtain general information from the Department of Human Services on 1300 650 172 (this is a free call within Victoria, except from mobile phones).

You can also obtain detailed information at <http://www.housing.vic.gov.au> or <http://hnb.dhs.vic.gov.au/ooh/ne5ninte.nsf/Home+Page/OOH-Internet~OOH-Internet-HomePage?open>.

1.2 General eligibility criteria

In order to be considered for public housing, the applicant must:

- live in Victoria;
- be an Australian citizen or have permanent residency status;
- not own or part-own property; and
- not exceed the relevant public housing income and asset eligibility limits.

1.3 Income and assets limits

The applicant must provide proof of income and assets. **Income** refers to all income before tax and other deductions and includes Centrelink payments. **Assets** include money in the bank, shares, mobile homes, businesses and superannuation funds if the applicant has access. Cars, furniture and personal belongings are not counted.

The limits vary according to the category of housing and are updated every six months. See the income and assets information sheet at <http://www.housing.vic.gov.au> for up-to-date information.

1.4 Applying for general public housing

Applicants must fill out the 'General Application for Housing' form and provide details of the household's income and assets.

Applicants can select up to three waiting list areas in their applications. Waiting list areas are made up of a number of adjoining suburbs. Successful applicants receive two offers of housing. If the applicant rejects both offers, then they are removed from the waiting list.

Applicants with specific medical and similar needs that require them to live in a particular area or in a specific type of property may include this information on their application form.

Note that waiting times vary between areas, and are generally very long. The Waiting & Transfer List available at <http://www.housing.vic.gov.au> provides information about the number of applicants in each area.

1.5 Applying for early housing on the basis of urgent needs

People who have any of the following **urgent needs** may apply for early housing and will be given priority over applicants for general public housing:

Recurring homelessness housing

Top priority is given to people who have a history of homelessness or who are at risk of long-term homelessness. 'Recurring homelessness housing' applications must be made through an accredited housing provider who assesses the applicant's eligibility and submits the application on their behalf. The Office of Housing provides a list of accredited housing providers. It is important that applicants work with the accredited housing provider to ensure that their application contains all relevant information.

Once an application is made, there is a panel process to decide which applicants go on the priority waiting list.

Supported housing

In order to apply for supported housing, the applicant must have lodged a general application. A specific application is then made via the 'Application for Early Housing — Supported Housing' form. The applicant must be living in unsuitable housing and be looking for alternative housing (for example, in the private rental market). The applicant must also require significant personal support or require major disability modifications (usually structural) in the home.

Unsuitable housing is housing that cannot be modified to suit the applicant's needs. If the applicant has a serious medical condition that is made worse by where they live or is treatable only at a specific location that is difficult to attend from where they live, then they are also considered to be living in unsuitable housing.

Significant personal support is support that allows the applicant to manage their own tenancy or to continue living independently within the community.

The applicant is required to demonstrate why alternative accommodation to public housing is not a viable option.

Special housing needs

The applicant must have lodged a general application in order to apply under 'special housing needs'. They then need to apply specifically via the 'Application for Early Housing — Special Housing Needs' form. As well as having lodged a general application for public housing, the applicant must be living in unsuitable housing and have looked for alternative housing (and be able to demonstrate why alternative accommodation is not a viable option).

Unsuitable accommodation includes insecure, inappropriate or unsafe housing or housing that makes a serious medical condition worse or that cannot accommodate the applicant's full-time carer.

Insecure housing generally means temporary or crisis accommodation.

Inappropriate housing is housing that does not provide the applicant with their own cooking and bathroom facilities, prevents the applicant from living with their children (because of size or location), is overcrowded (that is, a household requiring an additional two bedrooms) or where there is inappropriate sharing of bedrooms by people of the opposite gender (for example, children sharing with parents).

Unsafe housing refers to the risk of physical or family violence.

Applicants for early housing who do not accept the first offer of housing they are given are taken off the early housing waiting list and placed on the general housing waiting list. If they do not accept the next offer, then they are also taken off that list.

1.6 Rent

Public tenants pay the lesser of the market rent of the property or the rebated rent on the basis of household income. Public housing rent is reviewed at least annually.

The **market rent** is related to the value of the property and appears in the tenancy agreement. Tenants may apply to pay a reduced **rebated rent** that is equivalent to 25% of the household income. To apply for rebated rent, tenants must provide details of household income and assets. If 25% of the household income is greater than the market rent, then tenants are to pay the market rent.

Public tenants must notify the Office of Housing of any changes to the household income.

1.7 Movable unit

The Office of Housing can provide self-contained movable units that can be placed at the rear of a friend's or relative's house. The units have one bedroom, an en-suite bathroom and toilet and a living room with an annex kitchen.

Movable units are available to people who are over the age of 55 years or who receive a Disability Support Pension, who satisfy the income and asset criteria and who are dependent on a resident of the existing household. Movable units are not suitable for family housing and children are not allowed to live in these units. Each occupant of a movable unit must meet the eligibility criteria.

Applications are made by the owner or tenant of the main house and require the written consent of the landowner. That applicant must undertake to provide access to the occupant of the unit for a minimum period of 12 months.

1.8 Appeals

Applicants may appeal a decision in respect of eligibility for public housing, the relocation policy and arrangements, rental rebate policy assessments and requests for special maintenance works.

The appeal comprises two levels of review. The Housing Services Manager of the office where the decision was made examines the matter and determines within 10 working days of receipt of the appeal application whether the decision was made in accordance with policy guidelines. The Housing Services Manager has the power to change the decision.

If unsuccessful at the initial stage of internal review, the appeal is referred to the Housing Appeals Office for the Manager, Housing Appeals, to determine whether housing policy and procedures were correctly applied. The appellant can usually discuss the appeal at this stage, either in person or by the telephone. The appellant is then advised of the outcome in writing.

Appeals against decisions relating to rental arrears recovery procedures, requests for emergency maintenance and tenant responsibility charges must be made to the Victorian Civil and Administrative Tribunal (**VCAT**).

Other avenues for appeal may lie with the Housing Ombudsman and the Victorian Equal Opportunity and Human Rights Commission.

2. Private Rental

2.1 Overview

Private rental is governed by the *Residential Tenancies Act 1997 (Vic)* (**the RTA**). The RTA aims to define the rights and duties of landlords and tenants of rented premises and the rights and duties of rooming house and caravan park owners and residents. In this way, the RTA seeks to protect the rights of all parties involved in residential arrangements.

The RTA provides detailed guidance to landlords (including the Office of Housing), tenants, caravan park and rooming house owners and residents in relation to their rights and obligations. This chapter summarises some of these rights and obligations.

2.2 Tenancy agreements

A **tenancy agreement**, as defined in the RTA, is an agreement under which a landlord leases premises to a tenant to be used by the tenant as a residence.

The RTA applies to most residential tenancies in Victoria. There are a number of exceptions set out in Part 1, Division 2 of the RTA. Tenancy agreements do not apply to rooming houses or caravan parks. For more information on rooming houses and caravan parks see sections 3 and 4 below.

General requirements for tenancy agreements

Part 2, Division 1 of the RTA sets out the general requirements for tenancy agreements.

For example, if a tenancy agreement is in writing, then it must be in the prescribed standard form (which is provided in the *Residential Tenancies Regulations 1998 (Vic)*). However, the fact that a tenancy agreement is not in standard form does not make it illegal, invalid or unenforceable.

Importantly, tenancy agreements must not attempt to exclude or modify the application of the RTA. Clauses that attempt to do this are invalid.

Tenancy agreements must not require either the landlord or tenant to pay the other party's costs in relation to preparing the tenancy agreement. Clauses that attempt to do this are invalid.

Under the RTA an application can be made to VCAT to invalidate or vary a harsh or unconscionable term of a tenancy agreement.¹

2.3 Bonds and guarantees

Amount of bond

Generally, the maximum bond a landlord can require is the amount of rent payable under the tenancy agreement for one month (but note the exceptions set out in sections 32 and 33 of the RTA).

Guarantees

If the tenant is not required to pay a bond under the tenancy agreement, then the landlord may instead require a guarantee. The amount of money guaranteed under a guarantee may be only one month's rent.

Condition report

If a resident or proposed resident pays a bond, then the resident must be given two copies of a condition report specifying the state of repair and general condition of the residence. That condition report is then conclusive evidence of the state of repair or general condition of the residence, subject to anything that could not reasonably have been discovered on a reasonable inspection of the residence or with which the resident disagrees under endorsement on the report. Accordingly, it is very important that the resident or tenant check the accuracy of the condition report before occupying the premises.

2.4 Bonds and the Residential Tenancies Bond Authority

Payment of bonds to the Residential Tenancies Bond Authority

A landlord who receives a bond from a tenant must complete and sign a bond lodgement form containing the prescribed information and give the form to the tenant to sign.

The landlord must give the amount of the bond and the completed bond lodgement form to the Residential Tenancies Bond Authority (**the RTBA**) within 10 business days of receiving the bond. The bond is held by the landlord on trust for the tenant until the landlord gives the bond to the RTBA.

A tenant must not refuse to pay rent on the grounds that any or all of the bond paid is to be regarded as rent.

Payment out of bonds

The RTBA must not pay out any amount of the bond except in accordance with:

¹ RTA, section 28.

- a joint application by the landlord and tenant for a refund of the bond; or
- a determination of a tribunal or an order of a court.

For further details about refunding bonds, see Part 10 of the RTA.

2.5 Rent

Payment of rent

Generally, tenants are required to pay rent no more than one month in advance (but note the exceptions set out in section 40 of the RTA).

Increases in rent

The RTA strictly governs increases in rent. A landlord must provide a tenant with at least 60 days notice of a proposed increase in rent in the prescribed form (provided for in the RTA) (section 44).

If the tenancy agreement is for a fixed term (for example, a lease for one year), then the rent cannot be increased before the term ends, unless the tenancy agreement provides for a rent increase within the fixed term.

Complaints about increases in rent

A tenant may complain to the Director of Consumer Affairs about excessive rent or excessive rent increases within 30 days of being issued with a notice of rent increase.

The tenant may also apply to VCAT for a ruling on the rent. See sections 45 to 48 of the RTA for further detail.²

Other charges

Landlords are prohibited from requiring certain payments, such as a 'bonus', 'commission' or 'key money', and payments in relation to the inspection of the premises by a tenant. See Part 2, Division 4 of the RTA for further detail.

Utility and service charges

Tenants are liable to pay for the supply or use of electricity, gas, and the cost of all water and sewerage disposal if the property is separately metered. A landlord may agree to take over liability for any of these costs or charges by an agreement in writing and signed by the landlord.

However, landlords are liable to pay installation costs associated with the initial connection of any electricity, water, and gas to the premises.

See Part 2, Division 4 of the RTA for further detail.

2.6 General duties of tenants and landlords

Part 2, Division 5 of the RTA prescribes general duties with which both the tenant and landlord must comply. For example, tenants must not use the premises (or permit the

² See RTA, s 45 for when a tenant can complain to the Director about excessive rent; s 46 – about making an application to VCAT; s 47 for the orders VCAT can make; and s 48 about whether VCAT can order a refund of rent.

premises to be used) for illegal purposes. Further, landlords must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.

2.7 Repairs and maintenance

Generally

A landlord must ensure that the rented premises (and any associated common areas) are maintained in good repair. A landlord must provide locks to secure all external doors and windows of the rented premises.

See Part 2, Division 6 of the RTA for detail.

Urgent repairs

Urgent repairs are repairs to the premises or any of the landlord's fixtures that need to be attended to urgently. They include any work necessary to repair or remedy a failure or breakdown of any essential service or appliance provided by the landlord for water, cooking, heating or laundering, and any other fault or damage that makes the premises unsafe or insecure.

In the event of urgent repairs, the tenant should take reasonable steps to arrange for the landlord or the landlord's agent to immediately carry out the repairs. If this is not possible, then the tenant may themselves arrange for urgent repairs to be carried out. In this case, the tenant must give the landlord 14 days written notice of the repairs carried out and the cost. The landlord is then liable to reimburse the tenant for the reasonable cost of the repairs up to a maximum of \$1000.

A tenant may also apply to VCAT for an order requiring the landlord or their agent to carry out specified urgent repairs if the tenant cannot afford the cost of the repairs; the repairs cost more than \$1000; or the landlord refuses to reimburse the tenant for the cost of the urgent repairs the tenant carried out.

Non-urgent repairs

A landlord should arrange for repairs of a non-urgent nature to be made to the premises within 14 days of being notified in writing by the tenant.

If the landlord does not meet this obligation, then the tenant may apply to the Director of Consumer Affairs to investigate whether the landlord is in breach of a duty to ensure that the premises are maintained in good repair. See sections 74 to 77 of the RTA for further detail.³

³ See RTA s 74 regarding an application for the Director to investigate the need for non-urgent repairs; s 75 regarding an application to VCAT for non-urgent repairs; s 76 regarding the orders VCAT can make; and s 77 which allows rent to be paid into a rent special account to cover the cost of repairs.

Tenant to undertake repairs

A landlord may give a repair notice to a tenant if damage is caused to the rented premises because the tenant failed to comply with section 61(1) of the RTA.⁴

2.8 Assignment and sub-letting

A tenant may not assign a tenancy agreement or sub-lease the premises (that is, lease the whole or part of the premises to another person) without the landlord's written consent. If the premises are assigned or sub-let without the landlord's consent, then the assignment or sub-lease will be invalid.

A landlord must not unreasonably withhold their consent to the assignment or sub-letting of the whole or any part of the rented premises.

See Part 2, Division 7 of the RTA for further detail.

2.9 Rights of entry

A landlord or real estate agent may enter rented premises at any time agreed with the tenant or, if 24 hours written notice has been given to the tenant, at any time between 8.00am and 6.00pm on any day (except a public holiday) for a valid ground of entry. Valid grounds for entry are set out in section 86 of the RTA.

A person exercising a right of entry must do so in a reasonable manner and must stay in the rented premises for only as long as is necessary to achieve the purpose of the entry. If any damage to the tenant's goods is caused during the person's entry to the premises, then the tenant may apply to VCAT for an order for compensation.

See Part 2, Division 8 of the RTA for further detail.

2.10 Termination or variations of residential tenancies

Termination of residential tenancies

A tenancy agreement may be terminated in a number of ways, including by agreement between the landlord and tenant, or if the tenant abandons the premises.

It is an offence for a landlord or a person acting on behalf of a landlord to require or compel a tenant under a tenancy agreement to vacate the premises unless the tenant is in breach of the tenancy agreement.

See Part 6, Division 1, Subdivision 1 of the RTA for detail.

See also Chapter 2 (section 2.11) of the Manual for discussion of how the Victorian Charter of Rights and Responsibilities impacts on the RTA and specifically the termination of tenancies.

Monthly or periodic tenancy

A **periodic tenancy** is created when the fixed term of the tenancy agreement ends and the tenant continues to occupy the premises. If the rental period under the fixed term agreement was more than one month, then the rental period under the periodic tenancy

⁴ RTA, s 61(1) provides that a tenant must avoid damage to premises and common areas.

is a monthly period. If the rental period under the fixed term agreement was one month or less, then the rental period under the periodic tenancy is a period equivalent to the previous rental period. All other terms of the periodic tenancy agreement remain the same as for the fixed term agreement.

See Part 6, Division 1, Subdivision 2 of the RTA for detail.

Notice by the landlord

Part 6, Division 1, Subdivision 4 of the RTA provides a detailed list of circumstances where a landlord may issue the tenant with a notice to vacate. A valid notice must be provided by the landlord in accordance with Part 6, Division 4 of the RTA.

The landlord may give a notice to vacate for the following reasons:

- the landlord is making repairs;
- the landlord is demolishing the building;
- the premises are going to be used for business;
- the premises are going to be occupied by the landlord or their family;
- the premises are going to be sold; or
- the premises are going to be used for a public purpose⁵.

The landlord may also give a 120 day 'no cause' notice to vacate, and in doing so does not need to provide any reasons.

Challenging a notice to vacate

A tenant or resident who has received a notice to vacate may apply to VCAT to challenge the validity of the notice on or before the hearing of an application for a possession order in respect of the notice.

If VCAT determines that the notice is valid, then the tenant is not entitled to bring any further applications to challenge the validity of the notice, unless VCAT is satisfied that exceptional circumstances exist.

See section 7 below for further details on challenging decisions at VCAT.

2.11 Regaining possession

Application by landlord for possession order

In order to regain possession of a property, a landlord must apply to VCAT for a possession order (see Part 7, Division 1 of the RTA). A possession order gives a landlord a legal entitlement to possession of the property. If a tenant refuses to leave the property after a possession order is granted, then the landlord may obtain a warrant and have the tenant forcibly evicted. This involves Victoria Police changing the locks on the premises. The tenant will have an opportunity to recover any of their belongings at a later stage.

⁵ RTA, ss 255-260 respectively.

The processes for obtaining these orders are outlined below.

1. Application by landlord

A landlord may apply to VCAT for a possession order if the landlord has given the tenant a notice to vacate the premises under section 261⁶ or section 263⁷ of the RTA and the tenant has not delivered up vacant possession of the premises.

2. VCAT order

VCAT must make a possession order requiring a tenant to vacate rented premises if it is satisfied that:

- the landlord was entitled to give the notice;
- the notice has not been withdrawn; and
- the tenant is still in possession of the premises after the termination date specified in the notice.

Alternative procedure for possession

1. Application for possession order where rent owing

A landlord may apply to VCAT for a possession order if the tenant owes at least 14 days rent to the landlord. In doing so, the landlord must give notice to the tenant to vacate the premises (specifying a termination date) either personally or by registered post. See Part 7, Division 2 of the RTA for detail.

2. Objecting to application for possession order

If a tenant wishes to object to the making of a possession order, then they must lodge a notice of objection with VCAT and serve the notice on the landlord. See section 338 of the RTA for further detail.

Issue of warrant for possession

A person who obtains a possession order under Part 7 of the RTA may apply to VCAT for a warrant of possession immediately or within six months after the date of the possession order if the tenant fails to comply with the order. See Part 7, Division 4 of the RTA for detail.

The warrant of possession will be directed to a member of the police force or to an authorised person and authorises that person to enter the premises and compel all people occupying the premises to vacate and give possession of the premises to the applicant. The warrant does not authorise the person to whom it is directed to remove any goods from the premises.

VCAT may cancel a warrant of possession under Part 7 of the RTA at any time.

⁶ RTA, s 261 – fixed term tenancy.

⁷ RTA, s 263 – notice to vacate with no specified reason.

2.12 Goods left behind by tenants and residents

Part 9, Divisions 2 and 3 of the RTA set out the obligations and processes in respect of any personal documents or goods that are left behind by the tenant once they have vacated the premises. Part 9 provides for the return, storage or destruction of the goods, amongst other options, depending on the circumstances.

3. Rooming Houses

3.1 Overview

Rooming houses are governed by Part 3 of the RTA.

A **rooming house** is a building in which there is one or more rooms available for occupancy on payment of rent:

- in which the total number of people who may occupy those rooms is not less than four; or
- in respect of which a declaration has been made in the *Government Gazette*.

As at the time of writing, the Minister has made a declaration in the *Government Gazette* in relation to 2027 properties in Victoria. The current listing is in *Government Gazette* G46 16 November 2006 from pages 2477 to 2543 (available online at <http://www.gazette.vic.gov.au/Gazettes2006/GG2006G046.pdf>).

A resident and a rooming house owner may choose to enter into a tenancy agreement. If they do enter into a tenancy agreement, then the rooming house provisions discussed in this section do not apply.

A rooming house owner and a resident may also enter into an agreement (that is not a tenancy agreement) that sets out the terms and conditions of the resident's use and enjoyment of the rooming house. If such an agreement contains harsh and unconscionable terms or is such that a court exercising its equitable jurisdiction would grant relief, on an application by the resident, then VCAT may declare invalid or vary a term of the agreement. For further information regarding applications to VCAT, see sections 7 and 8 below.

3.2 Rights of residents

Part 3, Divisions 1 and 1A of the RTA set out the rights of residents. These rights are summarised below.

A resident has the right to reside in the room that they occupy and to use the facilities in the rooming house as a basic right.

A residency right is either an **exclusive occupancy right** or a **shared room right**. The default position is that a residency right is an exclusive occupancy right. This means that the resident is entitled to occupy the room by themselves. However, a right will be a **shared room right** if:

- a rooming house owner gave the resident a residency notice (the details required in the residency notice are set out in section 92(c) of the RTA) specifying that the right is a shared room right before the resident commenced their occupation;

- an exclusive occupier grants their written consent to their exclusive right becoming a shared right, or
- the residency right is deemed to be a shared room right through the operation of the transitional provisions set out in Part 15 of the RTA.

To avoid doubt, an exclusive occupancy right may be given to two or more residents (for example, two domestic partners may share a room and have exclusive occupancy).

If a rooming house owner wishes to increase the room capacity of a room, then:

- the rooming house owner must give notice of the proposed increase to the existing residents of the room; and
- each resident who currently resides in the room must consent to the room capacity increase.

The same applies to an increase in room capacity for an exclusive occupancy right turning into a shared room right. The details required to be included in the notice are set out in section 94B of the RTA.

A resident may withdraw their consent to a room increase within three days of giving the consent.

Section 124 of the RTA requires a rooming house owner to display prominently in each resident's room a written statement setting out the residents rights and duties and a copy of the house rules.

3.3 Bonds

Part 3, Division 2 of the RTA sets out the rules in relation to bonds and condition reports.

Maximum bond

A rooming house owner may require a bond to be paid before the resident commences occupation. The bond may not exceed the equivalent of 14 days rent.

Condition report

See section 2.3 above (it also applies to rooming houses).

3.4 Rent

Part 3, Division 3 of the RTA sets out the rules in relation to rent. These are summarised below.

Maximum rent and hiring charges

A rooming house owner must not require a resident to pay rent more than 14 days in advance. Under section 101 of the RTA, a rooming house owner must give a resident at least 60 days notice in the prescribed form of a proposed rent increase.

Rent increases and decreases

If a resident believes the increase is excessive, then the resident may apply to the Director of Consumer Affairs under section 102 of the RTA. Such an application must be made within 30 days of notice of the rent increase.

As soon as practicable after receiving an application, the Director of Consumer Affairs must carry out an investigation and give a written report to the resident. After receiving that report, but within 30 days, the resident must then apply to VCAT under section 103 of the RTA for an order declaring that the proposed rent is excessive. VCAT may make an order declaring the proposed rent excessive and directing the rent not to exceed a certain amount, or simply dismiss the application. The relevant factors that VCAT can consider are set out in section 104 of the RTA. Pending VCAT's decision, the resident must pay the proposed increased rent or 110% of the rent immediately before the notice of the rent increase was given, whichever is the lesser amount.

The rooming house owner is not allowed to increase rent at intervals of less than six months (section 101(5) of the RTA). Notably, any rent increases that do not conform with the RTA are invalid.

If the services of the rooming house are reduced or if the room capacity is increased, then the rooming house owner must reduce the rent (sections 106 and 106A of the RTA).

A person must not take or dispose of a resident's goods on account of any rent owing by the resident of the rooming house (section 107 of the RTA).

3.5 General duties of residents

Part 3, Division 5 of the RTA outlines the general duties of residents. These include the following duties of residents to:

- use the room for residential purposes;
- refrain from using the room for illegal uses;
- pay rent when due and in agreed manner;
- not interfere with the privacy and peace and quiet of the other residents;
- keep the room clean;
- not install any fixtures without the prior written consent of the owner;
- notify the owner of, and compensate the owner for, any damage;
- not have any animals in the rooming house without the rooming house owner's consent; and
- observe all of the agreed house rules.⁸

3.6 Duties of rooming house owners

Part 3, Division 5 of the RTA outlines the general duties of rooming house owners. These include the following duties of rooming house owners to:

- ensure that the rooming house is maintained in good repair;
- provide 24-hour access to the rooming house;
- not unreasonably interfere with the residents' privacy, peace and quiet or proper use and enjoyment of the room and facilities; and

⁸ RTA, ss 110-119 respectively.

- take all reasonable steps to ensure security for the property.⁹

A rooming house owner may make house rules. If a resident thinks a house rule is unreasonable, then they may apply to VCAT under section 128 of the RTA for an order declaring a house rule to be unreasonable. VCAT may then declare the house rule invalid. For further information about applications to VCAT, see section 7 below.

3.7 Repairs

Part 3, Division 6 of the RTA sets out the rules in relation to repairs of rooming houses.

Under section 129 of the RTA, a resident is allowed to arrange urgent repairs to be carried out if:

- the resident has taken reasonable steps to arrange for the rooming house owner to carry out the repairs; and
- the resident is unable to get the rooming house owner to carry out those repairs.

However, section 129 does not apply if:

- the repairs are to fixtures, furniture or equipment supplied by the resident;
- there is no immediate danger to health or safety; or
- the resident is able to use other facilities in the rooming house.

If the resident carries out urgent repairs, then the resident must give the rooming house owner 14 days notice of the repairs carried out and their cost. The rooming house owner will be liable for the lesser of the cost of the repairs or \$1000.

If the resident cannot meet the cost of repairs, the repairs cost more than \$1000 or the rooming house owner refuses to pay the cost of the urgent repairs, then the resident may apply to VCAT. VCAT must hear the application within two business days. For further information about applications to VCAT, see sections 7 and 8 below.

A resident may apply to the Director of Consumer Affairs to investigate whether there is any need for any non-urgent repairs. The repair provisions do not apply to damage caused by the misuse or the negligence of the resident or their visitor.

3.8 Rights of entry by a rooming house owner

Part 3, Division 7 of the RTA sets out the rights of entry into rooming houses.

It is an offence for a rooming house owner to enter a room occupied by a resident without a reasonable excuse unless the owner has a right of entry (section 142A of the RTA).

Under section 136 of the RTA, a rooming house owner may enter a room if:

- the resident agrees at the time entry is sought;
- there is an emergency or immediate entry is necessary to save life or valuable property;

⁹ RTA, s 120 – ensure that the rooming house is maintained in good repair; s 121 – 24 hour access; s 122 – not unreasonably interfere with the residents privacy, peace and quiet or proper use and enjoyment of the room and facilities; and s 123 – take all reasonable steps to ensure security for the property.

- services are provided and it is necessary to enter to provide them, but only during the hours specified in the house rules; or
- any of the special circumstances listed below apply and entry is between 8.00am and 6.00pm on any day except a public holiday with 24 hours notice given to the resident.

The special circumstances of entry are if:

- it is necessary to show the room to prospective residents, buyers or lenders;
- entry is required to enable the rooming house owner to carry out their duties;
- the rooming house owner has reasonable grounds to believe that a resident of the room has failed to comply with their duties; or
- entry is required to enable inspection of a room and entry for that purpose has not been made within the last four weeks.

A person exercising such right of entry must do so in a reasonable manner and must not stay in the room longer than is necessary to achieve the purpose of the entry without the resident's consent.

4. Caravan Parks and Movable Dwellings

4.1 Overview

Caravan parks and movable dwellings are governed by Part 4 of the RTA.

The RTA defines a **caravan** as a movable dwelling, or an immovable dwelling situated in a caravan park, that is not occupied for the purpose of an employment contract. The RTA considers a **caravan park** to be an area of land on which movable dwellings such as caravans are situated and occupied for payment of consideration, whether or not immovable dwellings (for example, permanent cabins) are also situated there.

4.2 Rights of residents

Part 4, Division 1 of the RTA sets out the rights of residents living in caravan parks and movable dwellings. These are summarised below.

A resident has the right to reside on the site that they occupy and a right to occupy a caravan on that site.

A resident (or proposed resident) and a caravan park owner or caravan owner can enter into an agreement specifying the terms and conditions of:

- the resident's use and enjoyment of the caravan park;
- the resident's use and enjoyment of the caravan itself; or
- the conditions under which a caravan occupies a site.¹⁰

However, if a resident believes that a term of one of these agreements is harsh or unconscionable, then the resident can apply to VCAT to have the term of the agreement declared invalid or varied. In its decision to vary or declare an agreement invalid, VCAT

¹⁰ RTA, s 144.

must be satisfied that the term is either harsh or unconscionable, or is such that a court exercising its equitable jurisdiction would grant the relief sought.

Before a resident moves into a caravan park that they intend to be their main residence, the caravan park owner must give the resident notice that:

- they may enter into a written agreement with the caravan park owner to become a resident of the caravan park at any time; and
- if an agreement of that kind is not entered into, then the person still becomes a resident of the caravan park if they occupy any site on it as a main residence for at least 60 consecutive days.

4.3 Bonds

Part 4, Division 2 of the RTA sets out the rules in relation to bonds. They are summarised below.

Maximum bond

A caravan park owner may require a bond to be paid before a prospective resident commences occupation as a resident of a caravan or a site at the caravan park. However, a caravan park owner cannot require payment of a bond unless they have entered into an agreement with the resident to become a resident of the caravan park, as described in section 4.2 above. The bond may not exceed the equivalent of 28 days rent or 28 days hiring charge.

Condition report

See section 2.3 above.

4.4 Rent and hiring charges

Part 4, Division 3 of the RTA sets out the rules in relation to rent and hiring charges. They are summarised below.

Maximum rent and hiring charges

A caravan park owner must not require a resident to pay rent more than 14 days in advance, or a hiring charge more than 28 days in advance.

A caravan park owner must give a resident at least 60 days notice in the prescribed form of a proposed rent increase (section 152 of the RTA). Likewise, a caravan owner must give at least 60 days notice in the prescribed form of a hiring charge increase. If the caravan park owner is also the caravan owner or an agent of the caravan owner, then a notice must specify a rent increase and hiring increase (if both are applicable) separately.

Rent increases and decreases

See section 2.5 above. For caravan parks and moveable dwellings, see also sections 152 to 160 of the RTA for further detail.

A caravan park owner or caravan owner can charge a resident additional rent or an additional hiring charge (whichever is applicable) for any visitor who stays in the caravan.

However, if the additional rent or hiring charge is excessive, then the resident can apply to VCAT for an order that the additional amount be varied.

Part 4, Division 4 of the RTA sets out liability for additional charges. For example, a resident is liable to pay all charges made for supply or use of electricity, gas, water, drainage and sewerage if those services are separately metered. However, a caravan park owner is liable for installation costs associated with electricity, water or gas supply services.

4.5 General duties of residents

Part 4, Division 5 of the RTA outlines the general duties of residents.¹¹ These include the following duties of residents to:

- use the room for residential purposes;
- use the site, caravan park and facilities properly and ensure visitors do the same;
- refrain from using the site for illegal uses;
- pay rent when due and in agreed manner;
- not interfere with the privacy and peace and quiet of the other residents;
- keep the site clean;
- not erect any structure without the prior written consent of the caravan park owner;
- notify the owner of, and compensate the owner for, any damage;
- not allow more than the agreed number of people to reside on the site; and
- observe all house rules.

4.6 Duties of caravan park owners and caravan owners

Part 4, Division 5 of the RTA outlines the general duties of caravan park owners and caravan owners. In summary, these include the duties of owners to:

- provide 24-hour vehicle and toilet access and access during all reasonable hours for residents to recreational areas, laundry and communal facilities;
- not unreasonably restrict or interfere with a resident's privacy, peace and quiet or proper use and enjoyment of the site;
- keep the site and park clean and safe;
- maintain communal areas while minimising inconvenience and disruption to residents; and
- maintain in good repair a caravan hired on site by the caravan park owner to a resident.¹²

A caravan park owner may make rules relating to the use, enjoyment, control and management of the caravan park. If a resident thinks a rule is unreasonable, then they

¹¹ RTA, ss 167-175 respectively.

¹² RTA, ss 176-180 respectively.

may apply to VCAT under section 187 of the RTA for an order declaring a caravan park rule to be unreasonable. VCAT may then declare the rule invalid. For further information about applications to VCAT, see sections 7 and 8 below.

4.7 Repairs

Part 4, Division 6 of the RTA sets out the rules in relation to repairs to caravans. They are the same as the rules about repairs in rooming houses. See section 3.7 above.

4.8 Transfer of rights and sale of caravans and movable dwellings

Part 4, Division 7 of the RTA covers the transfer of rights and the sale of caravans and movable dwellings.

Residency rights can be transferred from a resident who occupies a site in a caravan that they own to a purchaser who is to occupy that site themselves, by a transfer in an approved form. A caravan park owner must not unreasonably withhold consent to such a transfer. However, if a resident believes such consent has been unreasonably withheld, then they can apply to VCAT for an order that the transfer go ahead. VCAT may make the order or dismiss the application.

A caravan park owner cannot obstruct or hinder the sale of a caravan owned by a resident (section 198 of the RTA).

4.9 Rights of entry

Division 8 of Part 4 of the RTA sets out the rights of entry into caravans and caravan parks.

It is an offence for a caravan park owner, caravan owner or the owner's agent to enter a site or caravan occupied by a resident without a reasonable excuse unless they have a right of entry (section 206A of the RTA).

Under section 199 of the RTA, a caravan park owner may enter a site or caravan if:

- the resident agrees at the time entry is sought;
- there is an emergency or immediate entry is necessary to save life or valuable property;
- VCAT has made an abandonment order; or
- there are grounds for entry (see below), but only at a time between 8.00am and 6.00pm on any day except a public holiday with 24 hours notice given to the resident.

Under section 200 of the RTA, a caravan owner may enter a caravan if:

- the resident agrees at the time entry is sought;
- VCAT has made an abandonment order; or
- there are grounds for entry (see below), but only at a time between 8.00am and 6.00pm on any day except a public holiday with 24 hours notice given to the resident.

The grounds for entry are:

- to show the caravan or site to prospective residents, buyers or lenders;

- if entry is required to enable the caravan park owner or caravan owner to carry out their duties;
- if the caravan park owner, caravan owner or the owner's agent has reasonable grounds to believe that the resident has failed to comply with their duties under the RTA; or
- if entry is required to enable inspection of a site or caravan (if that caravan is not owned by the resident) and entry for that purpose has not been made within the last six months.

A person exercising such a right of entry must do so in a reasonable manner and must not stay in the caravan or on the site longer than is necessary to achieve the purpose of the entry without the resident's consent.

5. Mortgage Sale

5.1 Overview

A mortgage creates a security interest in the land in favour of the mortgagee. The mortgagee's rights in relation to this interest are set out in the *Transfer of Land Act 1958* (Vic). The most commonly exercised right is the right to the power of sale, which can be exercised by the mortgagee in response to a default under the mortgage. The rights and obligations in relation to a mortgagee sale are largely summarised in sections 75 to 87 of the *Transfer of Land Act* and are briefly outlined below.

5.2 The power of sale

If the mortgagor is in default of payment or observance of a covenant of the mortgage for one month, then the mortgagee is entitled to serve a notice in writing on the mortgagor to remedy the default.¹³

If the mortgagor remains in default for a further month, or any other period expressly provided for in the mortgage, then the mortgagee may take possession and sell the property to satisfy the amounts due under the mortgage.

Whether the mortgagor is in default will depend upon the terms of the particular mortgage agreement.

5.3 Mortgagee's duties in exercising power

A number of recent Victorian authorities have held that the mortgagee must sell 'in good faith, and having regard to the interests of the mortgagor'. This has led to a number of common law duties being placed upon the mortgagee in the exercise of their power. These are summarised below.

Achieve best price

¹³ *Transfer of Land Act*, ss 76 and 77

The mortgagee has a duty to take reasonable steps to ensure that the best price available at the time of sale is achieved for the property.¹⁴ This involves taking reasonable steps to ascertain the value of the mortgaged property before the sale.¹⁵

Act in a timely manner

Traditionally, a mortgagee was not obliged to sell at any particular time.¹⁶ However, recent cases have indicated that the mortgagee may be obliged to act to sell the property in a timely manner.¹⁷

Advertise

A proposed mortgagee sale must be adequately advertised. Failure to adequately advertise may give the mortgagor the right to claim damages from the mortgagee.¹⁸

5.4 Rights of the mortgagor

Once the mortgagor has committed a default, their only available right is to ensure that the mortgagee fulfils the duties outlined above.

Traditionally, a mortgagor is entitled to approach the court only if the mortgagor paid the whole amount due under the mortgage into the court. However, this restriction generally does not apply if:

- the mortgagor is seeking to challenge the mortgage itself or the alleged breach leading to the sale; or
- the mortgagee has failed to satisfy a precondition of sale (for example, failing to provide adequate notice).

The mortgagor may seek interlocutory relief in anticipation of the mortgagee attempting to enforce its rights. However, in practice such relief is only given in exceptional circumstances.

5.5 Consequences of sale

A mortgagee sale is affected by a special form of transfer, known as a T3. The registration of that document transfers the interest of the mortgagor, as registered proprietor, to the purchaser.

A T3 defeats subsequently registered mortgages pursuant to section 77(4) of the *Transfer of Land Act*.

5.6 Impact on other interests in the property

Contract of sale with the mortgagor

¹⁴ *National Commercial Banking Corp v Solanowski* (1984) NSWConvR 55-194.

¹⁵ *Henry Roach Petroleum Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309.

¹⁶ *Westpac Banking Corporation Ltd v Kingsland* (1991) 26 NSWLR 700.

¹⁷ *Palk v Mortgage Services Funding Ltd* [1993] 2 WLR 415.

¹⁸ *Commercial & General Acceptance Ltd v Nixon* (1981) 152 CLR 491.

A mortgagee will not be bound by a contract of sale entered into by a mortgagor unless the mortgagee has consented to the sale.¹⁹

Tenancy

A mortgagee is not bound by a lease created after registration of the mortgage unless the mortgagee has consented to the lease.²⁰

Caveats

Section 91(2A) of the *Transfer of Land Act* states that caveats lodged subsequent to the mortgage and that protect a document intended to be security for the payment of money (for example, an unregistered mortgage) are generally not binding upon the mortgagee. Such caveats lapse upon registration of a T3 under section 91(2B) of the *Transfer of Land Act*.

Caveats claiming an interest of fee simple or that the mortgagor is holding the property on trust will not be defeated by a T3.

5.7 Proceeds of sale

Section 77(3) of the *Transfer of Land Act* sets out the order of priority in which the proceeds of any mortgagee sale are to be distributed. If there is a dispute, then the mortgagee should pay the money into court and allow the disputants to resolve the dispute.

In the event of a shortfall, the mortgagor remains personally liable to the mortgagee and other subsequent caveators for the shortfall.

6. Temporary Crisis Accommodation

6.1 Overview

Temporary crisis accommodation is defined in the RTA as accommodation provided on a non-profit basis for less than 14 days. Under section 22 of the RTA, such accommodation is expressly excluded from the operation of that Act.

6.2 Supported Accommodation Assistance Program

The Supported Accommodation Assistance Program (**SAAP**) was originally established in 1985 to bring homelessness programs funded by individual State and Territory governments and the Commonwealth under one nationally coordinated program. SAAP operates under the *Supported Accommodation Assistance Act 1994* (Cth) and a multilateral agreement between the Commonwealth and the States and Territories (the current agreement, SAAP V, is available online at [http://www.facs.gov.au/internet/facsinternet.nsf/vIA/saap3/\\$File/SAAP_V_Multilateral_Agreement.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/vIA/saap3/$File/SAAP_V_Multilateral_Agreement.pdf)).

¹⁹ *Canterbury Finance Ltd v Sagar Trust Ltd* (1997) ANZConvR 119.

²⁰ *IOOF Society v Telford* (1991) VConvR 54-419

An extensive discussion on SAAP and temporary crisis accommodation is beyond the scope of this chapter. However, more information on SAAP and temporary crisis accommodation is available at the following online resources:

- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_nav.htm;
- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_v_2005-2010.htm;
- <http://hnp.dhs.vic.gov.au/wps/portal>;
- <http://net.saap.infoxchange.net.au/>;
- <http://hnb.dhs.vic.gov.au/ooh/ne5ninte.nsf/childdocs/-DABB793C4B375F1BCA2571330009C35E-B1D06035D5217A49CA2571CC0000B662-9FADB6FEF4153174CA2571CC0001D877-02D9690CADA993CFCA2571CC00165643?open>;
- <http://www.homeless.org.au/>;
- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_v_2005-2010.htm;
- <http://www.melbourne.homeless.org.au/about-crisis-accommodation.html>; and
- <http://www.community.gov.au/Internet/MFMC/community.nsf/pages/section?opendocument&Section=Crisis%20Accommodation>.

6.3 Human rights

Some temporary crisis accommodation providers may be 'public authorities' within the meaning of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). This may be the case if they provide temporary crisis accommodation services on behalf of the Victorian Government. Relevant factors to consider when determining whether services are provided on behalf of the Victorian Government include whether the provider has a contractual relationship with, or receives public funding from, the Victorian Government to provide its services.

The consequence of a temporary crisis accommodation provider being a 'public authority' is that section 39 of the Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right specified in Part 2 of the Charter, or to make a decision without giving proper consideration to a relevant human right specified in Part 2.

Relevant human rights in the temporary crisis accommodation sector include:

- the right to equality (section 8);
- the right to privacy (section 13);
- the right of families and children to protection (section 17);
- cultural rights (section 19); and
- the right to property (section 20).

Remedial process and remedies for a breach of section 39 of the Charter include:

- complaining to the State Ombudsman;
- judicial review under the *Administrative Law Act 1978* (Vic) or Order 56 of Chapter I of the *Supreme Court Rules (General Civil Procedure) Rules 2005* (Vic);
- declaratory and/or injunctive relief.

For more information about the Charter, see Chapter 3 of this Manual. See also the Human Rights and Equal Opportunity Commission's (HREOC's) comments on homelessness and human rights at

http://www.hreoc.gov.au/human_rights/housing/homelessness_2008.html.

7. Challenging Decisions and Going to VCAT or Court

7.1 Overview

The purpose of this section is to outline the process for going to VCAT or to court in order to deal with housing and tenancy matters. A person may be summonsed to appear at VCAT or at court by a landlord or the Office of Housing. Alternatively, your clients may bring proceedings against a landlord (or a tenant).

This section outlines the procedures for either an applicant or a respondent to follow in such a matter.

7.2 Challenging decisions of the Office of Housing and private landlords

If the Office of Housing has made a decision that is adverse to your client's interests, then the first step is to write to the Office of Housing seeking a review of that decision. See the following link for more detailed information about appealing Office of Housing decisions: <http://www.housing.vic.gov.au/public-housing/appealing-a-decision>.

Internally reviewable decisions

You can appeal decisions made in relation to your client by the Office of Housing in respect of a number of issues including:

- eligibility for public housing;
- relocation and policy arrangements;
- rental rebate policy assessments;
- the Bond Assistance Scheme;
- car parking matters;
- moveable units; and
- requests for special maintenance work.

The internal review process

To make the appeal, you will need to provide written details of your client's concerns on an appeal application form (**the Application**). See

http://www.housing.vic.gov.au/data/assets/pdf_file/0018/166320/housing_appeals_application.pdf for an appeal application form.

On the form you need to outline the details of the decision you are appealing and why you are doing so. You should also attach copies of any documents supporting your case.

There are two stages to the internal review process, as follows:

1. At the **first stage of review**, the application will be considered by the Housing Services Manager of the local Housing Office where the original decision was made (that is, the housing office in the area in which your client lives). The purpose of this stage is for the Housing Services Manager to determine whether the decision was made in accordance with departmental policy guidelines. The Housing Services Manager may change the earlier decision. The local Housing Office should notify you or your client of the outcome of the review within 10 working days of receiving the application. If you haven't heard anything by this stage, then it may be worth following up the local Housing Office with a telephone call.
2. If the Housing Office review is not in your favour, then the application will be referred to the **second stage of review**. At this stage, the Manager of Housing Appeals will examine the matter to determine if housing policy and procedures were correctly applied.

Following an investigation of the matters raised in the application, you or your client will be sent a letter advising the outcome.

Appealing the decision beyond internal review

If the internal review application does not achieve the desired outcome, then there are a number of options for appealing the decision of the Office of Housing further. Your client may wish to:

- take the matter to the State Ombudsman;
- take the matter to the Victorian Equal Opportunity and Human Rights Commission; or
- seek judicial review of the decision of the Office of Housing in the Supreme Court of Victoria.

Seeking judicial review of the decision is an administrative review process (as compared to merits review). You will need to establish that there is a ground for administrative review (for example, an error of law, a denial of natural justice or a decision-maker has acted outside the scope of its power).

This area of law can be quite complex and it is therefore advisable to brief counsel if your client wants to pursue the judicial review process.

Office of Housing decisions that cannot be appealed internally

Your client cannot use the internal review process to seek a review of decisions about:

- rental arrears recovery procedures — evictions, notices to vacate, legal agreements;
- requests for emergency and responsive maintenance; and
- tenant responsibility charges.

These matters are dealt with by VCAT. VCAT is an independent tribunal that is given powers under the RTA to hear and settle disputes between a landlord and tenant. See section 7.3 below for more information about appealing decisions to VCAT.

7.3 Challenging an Office of Housing/private landlord decision at VCAT

VCAT is the first port of call for all disputes relating to housing and tenancy. VCAT has a dedicated Residential Tenancies List (**RTL**) within its Civil Division that deals exclusively with housing and tenancy matters. These include matters involving the Office of Housing and matters involving private landlords (see section 7.2 above for a list of the matters that can be appealed to VCAT (that is, the matters that cannot be internally reviewed by the Office of Housing)).

In nearly every case you will go to VCAT first. There are circumstances in which you may go to the Supreme Court. However, these cases are rare.

7.4 VCAT's jurisdiction to determine disputes between landlords and tenants

The RTA confers original jurisdiction on VCAT to receive, hear and determine certain disputes relating to matters concerning:

- landlords and tenants of rented premises;
- rooming house owners and residents of rooming houses; and
- caravan park owners, caravan owners and residents of caravan parks.

VCAT exercises this jurisdiction through the RTL. The RTL also deals with applications relating to 'protected tenancies' under the *Landlord and Tenant Act 1958* (Vic).

7.5 Initiating proceedings

An application to VCAT to have a matter heard under the RTL must be in writing. See VCAT's website <http://www.vcat.vic.gov.au> for a link to the application form to be completed on behalf of your client.

There are specific requirements for applications under particular sections of the RTA. For example, if you are applying for an order declaring that rent is excessive under section 46(1) of the RTA, then you must include with the application a copy of a report of the Director of Consumer Affairs under section 45 of the RTA.

For a list of the special requirements for applications under the RTA, see <http://www.vcat.vic.gov.au>.

The application must be lodged with the principal registrar at VCAT. This may be done in person or by fax or electronic transmission.

Fee for application and fee waiver option

RTA applications usually involve payment of a fee. The amount of the fee will depend upon the type of application that is being brought. The current fees are available at <http://www.vcat.vic.gov.au>.

Importantly for clients who are experiencing financial difficulties, in certain circumstances the fee may be waived or reduced by the principal registrar. Under section 132 of the *Victorian Civil and Administrative Act 1998* (Vic) (**the VCAT Act**) VCAT is able to waive

any application fee, hearing fee or administrative fee payable to it if payment of the fee would cause the individual responsible for its payment financial hardship. For more information relating to fee waivers and the criteria for proving financial hardship, see <http://www.vcat.vic.gov.au> for the VCAT Practice Note entitled 'Fee Waiver at the Victorian Civil and Administrative Tribunal'.

If you think your client is eligible for a fee waiver due to financial hardship, then you must complete a form requesting the fee to be waived as well as a statutory declaration and a copy of any current Commonwealth Government Benefit Card held by your client. See <http://www.vcat.vic.gov.au> for a 'Request for Fee to be Waived and Supporting Statutory Declaration' form.

Serving the application

Once the application has been filed and the applicable fee paid (if not waived), then the applicant, respondent and all other people required to be given notice of hearing are given notice by the principal registrar. The notice states that the parties are required to attend the venue where VCAT is sitting 15 minutes before the scheduled hearing time.

You must serve a copy of your client's application on each other party or person entitled to notice of the application within seven days of lodging the application. The application may be served by hand, post, fax or other electronic transmission to a person's usual or last known residential or business address. If the respondent is a company, then service can be effected by delivering the application personally to the company's registered office, or sending, posting or faxing the application to the company's registered address. For further details on service, see section 140 of the VCAT Act.

Limitation periods

Various limitation periods apply to applications under the RTL. To check the relevant limitation period for your client, refer to the section of the RTA under which your client is bringing the application.

If you cannot locate a relevant limitation period in the RTA, then you may wish to telephone the RTL at VCAT on (03) 9628 9800.

7.6 Procedure

VCAT is not bound by the rules of evidence and can inform itself of any matter as it sees fit (section 98 of the VCAT Act). Evidence may be given orally or in writing. If VCAT requires, then evidence must be given on oath or affidavit.

7.7 Preparing materials

If you are appearing on behalf of your client, then make sure that you have prepared and ordered your evidence beforehand.

You should ensure that you bring along three copies (one for you, one for VCAT and one for the other side) of all relevant documents to which you intend to refer (for example, tenancy agreements, rent payment summaries, rent receipts, bank statements, Centrelink statements, letters in support from case workers).

You should also bring along copies of any legal authorities to be relied upon in arguing your client's case.

See also section 10 below.

7.8 Appearing at VCAT

Leave to appear

See section 10.2 below for information about your client's right to representation.

Conduct of the hearing

Hearings at VCAT are conducted in an atmosphere of relaxed informality. When you are addressing the VCAT Member it is good practice to refer to them as 'Sir' or 'Madam'.

If a settlement between the parties has been reached beforehand, then you may simply be asking for leave for consent orders to be made.

If a settlement has not been reached, then you should provide an oral outline of the case to the VCAT Member and call any witnesses to give evidence in support of your case. During the witnesses' evidence, the VCAT Member and the other party may ask questions of or cross-examine the witnesses.

Once all the witnesses have given their evidence and the parties have concluded their submissions, VCAT will consider the evidence and announce its decision and reasons for decision. A written order will be given or sent to the parties as soon as possible following the hearing.

See also section 10 below.

7.9 Orders of VCAT

Section 472 of the RTA sets out the types of orders that VCAT can make. That is, VCAT may make any orders it thinks fit:

- to restrain any action in breach of a tenancy agreement or the provision of the RTA relating to a tenancy agreement or the provisions of the RTA relating to a tenancy agreement;
- to require any action in the performance of a tenancy agreement;
- to restrain any action in breach of rooming house provisions or caravan park provisions;
- to require any action in the performance of duties under the rooming house provisions or caravan park provisions;
- for the return of goods unlawfully taken or removed from:
 - rented premises by a party to the tenancy agreement;
 - a room by a rooming house owner or resident;
 - a caravan park or site by a caravan owner or resident;
- to require the payment of compensation to any person; and
- that are ancillary or incidental to any other orders that it makes.

8. Being Taken to VCAT

8.1 Being taken to VCAT by the Office of Housing/private landlord

The types of matter that might be the subject of an application to VCAT by the Office of Housing include:

- an application for a possession order if a notice to vacate has been served (section 322 RTA); or
- a compensation claim if a breach of duty notice has been served (section 209 RTA).

8.2 When will an application for a possession order be made?

An application for a possession order may be made if:

- a 14-day notice to vacate has been served as a consequence of rent arrears (section 335 of the RTA).

Note that section 338 of the RTA requires a tenant to lodge a notice of objection if they wish to object to a possession order being made due to rent arrears.

Also note that an application for a possession order for rent arrears must be served with a 14 day notice to vacate, two copies of a notice of objection and a statement setting out the tenant's rights in relation to the possession order application;

- a 60-day notice to vacate has been served where there is no fixed-term lease, or where, immediately after the 60 days, the property is going to be demolished, sold with vacant possession or repaired;
- a 120-day notice to vacate has been served (for no specified reason) and the relevant time period (120 days) has elapsed; or
- an end of fixed-term lease notice to vacate has been served.

8.3 When will an application for a compensation order be made?

An application for a compensation order may be made if:

- costs have been incurred by the Office of Housing or the private landlord as a result of a tenant ending the tenancy before the lease has expired or because a tenant moved out without giving the required notice;
- there is loss or damage to the property;
- there is unpaid rent; or
- the tenant has failed to leave the property reasonably clean.

8.4 A notice to vacate must be valid

To be valid, a notice to vacate must be in the proper form provided by Consumer Affairs Victoria. It must also be hand delivered or sent to the tenant by registered mail.

There are many other bases on which a notice to vacate can be challenged. If you think a notice to vacate may not be valid, it is important to consider this and if necessary seek advice from counsel or one of the organisations listed below in section 11.

See also sections 312A, 321B and 321C of the RTA for the procedure for challenging a notice to vacate.

8.5 Adjudgments

If your client is unable to attend VCAT on the date of the hearing, then you can request an adjournment.

Timing

A request for an adjournment must be made at least two business days before the hearing. VCAT may entertain a request for an adjournment closer to the hearing, but there is less chance of it being granted.

Supporting documentation

There must be a valid reason for the adjournment and documentation (for example, a medical certificate) that supports the reason must be attached to the request to VCAT.

There is no guarantee that VCAT will grant an adjournment.

If the reason for the adjournment is that the client has only sought legal advice very soon before the hearing, then there may not be any supporting documentation you can provide to VCAT. In that case, if time allows (that is, if it is more than two days before the hearing), if you write to VCAT and explain the circumstances, then VCAT may still grant the adjournment.

Adjournment by consent

If you are able to obtain the consent of the other side to an adjournment, then this will increase the prospects of VCAT granting the adjournment.

If you cannot seek an adjournment within the time required

If you do not have time to seek an adjournment (that is, it is less than two days before the hearing), then you will need to gather as much evidence and material as you can in the time allowed. When you attend VCAT you should explain the circumstances and indicate that your client has taken steps to defend the matter and (if appropriate) indicate that your client can produce evidence or material in support of their position (for example, a report or letter from their doctor or a report from a financial planner). VCAT may consider adjourning the matter to allow such material to be obtained. See section 8.7 below for more information about the type of information you should present to VCAT.

8.6 Procedure

See section 7.6 above and 8.8 below for more information about appearing before VCAT.

8.7 Preparing materials

See section 7.7 above and section 10 below.

The types of material you might present to oppose a possession order being sought due to rental arrears include the following:

- A report or letter from your client's doctor or psychologist that sets out:

- any health issues (including mental health, drug and alcohol issues) that your client is suffering or has suffered;
 - the way those issues have impacted upon your client's life (that is, their ability to work, look after financial matters, undertake usual day-to-day tasks);
 - the steps taken by your client to remedy or deal with those issues;
 - the impact they would expect the order sought to have on your client (for example, if the Office of Housing is seeking a possession order, then the effect that homelessness would have on your client).
- A financial plan prepared by a financial planner who has met with your client to demonstrate, for example, that your client can afford to pay \$X towards rental arrears or a compensation order. (Contact Financial and Consumer Rights Council on (03) 9663 2000 for more information about free financial planning services.)
 - Details of your client's personal background that goes to explain, for example, the rental arrears your client has accrued.
 - A letter from your client's employer or social worker.
 - Receipts for any extra expenses that your client had to pay during or before the period in which they accrued rental arrears.
 - The reasons why your client's circumstances have changed, so that no further rental arrears will be accrued or damage sustained to the property. For example, the fact that your client is seeing a doctor/psychologist and financial planner; that your client is linking in with social service providers (for example, Homeground); and/or that your client has obtained stable or regular casual employment.

Ultimately, under section 331 of the RTA, VCAT will dismiss or adjourn the application for a possession order if it can be convinced that an arrangement can be made to avoid financial loss to the landlord.

8.8 Appearing at VCAT

See section 10.2 below for information about your client's right to representation; and see section 10 generally in relation to hearings.

Leave to appear – possession order applications

If your client has been served with an application for a possession order, then they are entitled to be represented by a professional advocate regardless of section 62 (section 67 VCAT Act). In most other circumstances you will need to seek the leave of VCAT to appear on behalf of your client.

8.9 Orders of VCAT

VCAT may make any of the following orders:

- **Possession order** (section 330 of the RTA) — VCAT may make a possession order requiring your client to move out of the house immediately. Once a possession order is made, the Office of Housing or the private landlord can purchase a warrant of possession that authorises the police to evict the tenant from that day until 14 to 30

days after the possession order is made. A possession order can only be enforced by the police.

- **Legal agreement** (section 331 of the RTA) — VCAT may order that the parties enter into a legal agreement requiring the tenant to pay \$X per week/ or per fortnight towards the rental arrears.

The legal agreement will remain in force until the tenant has paid the rental arrears in full. This can sometime be a number of years.

If the tenant defaults during the period the legal agreement is in force, then the Office of Housing or the private landlord can renew their application for a possession order without further notice. If your client presents after defaulting under a legal agreement, then you should attend VCAT and (if the Office of Housing or the private landlord will not consent to another legal agreement being entered into) you should prepare the same material as described in section 8.8 above.

- **Compensation order** (section 212 of the RTA) — VCAT may order your client to pay \$X towards property damage and/or unpaid rent, and/or order that they refrain from committing a similar breach.
- **Any orders VCAT thinks fit** (section 472 of the RTA) — see section 7.9 above.

8.10 Re-opening proceedings already heard

If your client has missed a hearing, was unable to attend a hearing or did not receive a notice of hearing, then your client can apply for a review hearing.

Application under section 120 of the VCAT Act

If your client did not appear at the hearing and was not otherwise represented, then your client may apply for a review of the order made against them (section 120 of the VCAT Act). You must satisfy VCAT that your client had a reasonable excuse for not attending the hearing.

Your client must apply under section 120 within 14 days of becoming aware of the order made against them.

Whether a substantive hearing will be heard

If VCAT orders that an order be revoked, then it is likely that a re-hearing of the substantive matter will be heard. You should be prepared for this to occur, as discussed above.

Submissions

You should prepare submissions and supporting evidence going to an argument that your client has a reasonable excuse for not attending the hearing. This might include the fact that your client did not receive the notice of hearing or because your client was ill or had an important commitment that could not be avoided.

9. Challenging a Decision in the Supreme Court

9.1 Overview

There are several avenues for challenging administrative decisions. If a decision has been made against your client by VCAT, then your client may wish to challenge that decision in the Supreme Court under section 148 of the VCAT Act.

Alternatively, if a decision has been made against your client that is not reviewable by the VCAT (that is, jurisdiction is not conferred on VCAT to review a decision), then your client may wish to seek judicial review of the decision in the Supreme Court.

9.2 Judicial review

In most cases, your client will be able to seek review of a decision made by the Office of Housing or a private landlord through VCAT. However, VCAT does not have jurisdiction to review *all* administrative decisions that may affect your client.

If the RTA does not confer power on VCAT, then your client may wish to seek judicial review of the decision in the Supreme Court of Victoria.

Unlike a VCAT review, judicial review is not a review of the merits of a decision. That is, the court can consider only whether there has been some kind of error of law, or a denial of natural justice, or whether a decision-maker has acted outside the scope of their power.

You can apply to the Supreme Court for judicial review under either its common law jurisdiction (Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic)) or under its statutory jurisdiction (pursuant to the *Administrative Law Act 1978* (Vic) (**the ALA**)).

Seeking judicial review is a complicated process and, if you intend to do so, then you should brief counsel for advice.

Note that there are time limitations for applying for judicial review. In the case of judicial review sought under the ALA, an application must be made within 30 days from the date of the relevant decision. Under Order 56, an application for judicial review must be made within 60 days after the date of the decision.

9.3 Section 148 VCAT Act

Under section 148 of the VCAT Act you may seek leave to appeal on a question of law:

- to the Court of Appeal (if the order was made by a President or Vice-President); or
- in any other case, to the Trial Division of the Supreme Court.

9.4 Limitation period

Generally, an application for leave to appeal should be made within 28 days of the VCAT order. If leave to appeal is granted, then you must institute the appeal within 14 days of the day the leave was granted.

It is preferable to work within the above time limits. However, if your client has sought your assistance outside those time limits, then the Court of Appeal and the Trial Division

of the Supreme Court have the power to extend or abridge time (section 148(5) of the VCAT Act).

9.5 Briefing counsel

Advice on merits

If your client has instructed you to provide advice about reviewing or appealing a VCAT order, then you should, as soon as possible, brief counsel to advise on the merits of an appeal and the various avenues of appeal.

For example, an application for leave to appeal under section 148 of the VCAT Act must be based upon a question of law. Counsel will be able to advise whether the circumstances of the client's case are sufficient to support an application for leave to appeal.

You should also seek counsel's advice on any avenues of appeal other than section 148 of the VCAT Act and judicial review in the Supreme Court.

You can obtain counsel experienced in this area by contacting PILCH, specifically the Victorian Bar Legal Assistance Scheme.

Substantive brief

When compiling the brief to counsel, ensure that you summarise all relevant facts of your matter. You should also include all relevant VCAT documentation (for example, the application by the landlord, the notice of hearing, the notice to vacate, the VCAT orders that the client wishes to appeal, the reasons for the VCAT decision, transcript of VCAT hearing, etc).

You should also make the costs arrangement clear with counsel. That is, you should make it clear that counsel is acting on a pro bono basis. However, if the client is successful and recovers costs, then counsel will receive those costs.

9.6 Stay of VCAT orders

Lodging an appeal or application for leave to appeal does not necessarily automatically stay the operation of the VCAT orders. For example, in the case of a VCAT order for a warrant of possession to be executed by a certain date, your client may still be required to comply with the execution of the warrant.

There may be other procedures (for example, an application under section 149 of the VCAT Act) that you should consider to ensure the VCAT orders are stayed pending the application for leave to appeal.

You should seek counsel's advice about:

- whether a stay of the VCAT orders is necessary; and
- the procedures to follow if counsel considers the application for leave to appeal has sufficient merit.

See **Annexure A** below for a sample application under section 149 of the VCAT Act.

9.7 Commencing proceedings

This section about commencing proceedings and the examples annexed below are by way of general guidance only. See the most recent version of the *Supreme Court Rules* for information about commencing proceedings and the most current forms relevant to your matter.

Originating process

Rules about the originating process for leave to appeal are contained in Order 4 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998 (Vic)*. An application for leave to appeal to the Trial Division of the Supreme Court must be commenced by originating motion (Rule 4.06 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*).

The originating motion filed must be in the correct form (that is, in Form 5B, 5C, 5D or 5E). See the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* for the form relevant to your matter.

See also **Annexure B** below for a sample originating motion in Form 5C.

Under Rule 4.08 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*, within seven days after the originating motion was filed, you must prepare and file a summons on the originating motion to a Master for a directions hearing. The summons will nominate a date for a directions hearing. However, note carefully Rule 4.1.2 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*, discussed below in respect of service and filing requirements, when nominating an appropriate date for the directions hearing.

See **Annexure C** below for a sample summons on originating motion.

Affidavit in support

Under Rule 4.07 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*, an affidavit in support must be filed within seven days after the originating motion was filed.

The affidavit in support must set out the acts, facts, matters and circumstances relating to:

- the VCAT order; and
- the grounds in the proposed notice of appeal (Rule 4.07(2)).

The following must be included in exhibits to the affidavit in support:

- a copy of the order from which the appeal is to be brought;
- a copy of any reasons given for the order; and
- a copy of the proposed notice of appeal (Rule 4.07(3)).

The absence of any of the above as exhibits must be accounted for in the affidavit (Rule 4.07(3)).

See **Annexure D** below for a sample affidavit in support.

Service and filing

Order 6 of the *Supreme Court (General Civil Procedure) Rules 2005* contains the methods of service of the originating process and other documents on the other party.

A writ or an originating motion is valid for service for one year after the day it is filed (Rule 5.12 of the *Supreme Court (General Civil Procedure) Rules 2005*).

The various documents filed at the Supreme Court have different filing and service requirements. You must carefully check the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* and *Supreme Court (General Civil Procedure) Rules 2005*. For example, under Rule 4.1.2 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*, the summons, affidavit in support and any exhibits filed must be served on the other party at least 14 days before the day of the hearing contained in the summons.

9.8 Settlement options

It is important that you consider the option of your client reaching settlement with the other party before the matter is heard in the Supreme Court, especially if the other party has indicated a desire to settle.

You should discuss the advantages and disadvantages of reaching a negotiated settlement with your client and obtain instructions before giving any undertakings to the other party.

Ensure that you address the issue of costs in any settlement negotiations.

Withdrawal and consent orders

If your client does instruct you to reach a settlement with the other party, then you will need to prepare minutes of consent for the Supreme Court and VCAT. After the minutes of consent have been filed at the Supreme Court, and authenticated orders have been made, you may need to forward the authenticated orders to VCAT and prepare minutes of consent for VCAT.

If the parties have agreed to discontinue the Supreme Court proceedings, then you may need to prepare and file a notice of discontinuance of the Supreme Court proceedings. There may be costs consequences for withdrawing or discontinuing proceedings. Ensure you address the question of costs in negotiations and in any consent orders.

See the following sample documents annexed to this chapter:

- **Annexure E** — sample minutes of consent for the Supreme Court;
- **Annexure F** — sample minutes of consent for VCAT; and
- **Annexure G** — sample notice of discontinuance of proceedings at the Supreme Court.

9.9 Hearing

If the matter does not settle, then you will need to attend the Supreme Court with counsel for the hearing. You will need to prepare copies of submissions, cases relied upon and other relevant documents before attending court. You should prepare sufficient copies

for the other parties and the court. Liaise closely with counsel in order to prepare for the hearing.

Costs

You should alert your client that the Supreme Court, unlike VCAT, is a costs jurisdiction. This means that if your client were to lose their case at the Supreme Court, then they would likely be ordered to pay the other party's legal costs. The risk of a large costs award may be a significant factor discouraging a client from issuing proceedings. This is particularly relevant if the client has any assets that may ultimately be seized in order to pay a costs award.

The award of costs is discretionary. You may therefore make submissions to the court that there are public interest grounds or specific circumstances in your client's case as to why a costs award should not be made against them. However, the general rule is that the losing party pays the other party's costs.

If a costs award is made in favour of your client, then any costs recovered will go to counsel and to the legal representative, not to the client. You must make this clear to the client before issuing proceedings.

Parties

Be careful to include the correct parties on any application. The parties will usually be the client and a private landlord or the Director of Housing. However, depending on the facts of the case, it may also be necessary to add VCAT and other parties. You should discuss this with counsel.

Rules

The relevant Court rules are:

- the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* (Vic); and
- the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

10. Hearings and Appearances

10.1 Preparing for hearings

You should always prepare very carefully for any hearing at VCAT. You should do the following:

- Ensure that you have read the file thoroughly and know the facts of the case. Generally, the VCAT Member hearing the proceeding will not be familiar with it before the hearing. You may therefore need to provide the facts to VCAT.
- Ensure that you bring all relevant documents and copies of any documents you intend to hand up.
- Prepare your own outline of submissions to ensure that you cover all of the issues.
- Prepare draft orders so that you know exactly what you are seeking from VCAT.

- Understand the statutory basis for the powers being exercised by VCAT.
- Check the Daily Law List on the VCAT website <http://www.vcat.vic.gov.au> to confirm the time and hearing room.

10.2 Right to representation

Parties are not automatically entitled to legal representation at VCAT. Section 62 of the VCAT Act sets out the circumstances in which a party may be represented.

A person may be represented if the other party to the proceeding is represented by a 'professional advocate' (section 62(1)(b) VCAT Act). A **professional advocate** includes a person who has had substantial experience in proceedings of a similar nature previously (section 62(8)(d) VCAT Act). Generally, a worker representing the Office of Housing will be a professional advocate and, if so, your client may also be represented in the matter.

VCAT may also permit any person to be represented in a proceeding if leave is sought.

10.3 Addressing VCAT

You may address the Presiding Member of VCAT as 'Sir' or 'Madam'. If the Presiding Member is a Deputy President of VCAT, then you may also refer to them as 'Mr Deputy President' or 'Madam Deputy President'.

When referring to VCAT, you should refer to 'the tribunal'. For example, when consenting to VCAT orders you should use the expression 'as the tribunal pleases'.

When your matter is called, you should stand up and announce your appearance you should say something like, 'If the tribunal pleases, my name is Ms Smith and I appear on behalf of the respondent in this matter'.

You should generally stand when addressing VCAT Members. However, different Members may relax this rule from time to time.

10.4 Handing up documents

When handing up documents to VCAT Members, it is usual practice to hand them to the Presiding Member's assistant. You should not approach the Presiding Member directly.

10.5 Interpreters

Section 63 of the VCAT Act allows parties to be represented by an interpreter or another person in order to make the proceeding intelligible to another party. If it is necessary to bring an interpreter to a proceeding, then you should arrange this before the hearing. Ensure that the interpreter is qualified and avoid using family and friends to act as ad hoc interpreters.

10.6 General tips

- Be deferential to VCAT Members. Do not be pushy or talk over the Presiding Member.
- If you do not know the answer to a question, then don't bluff — tell the Member you do not know or seek instructions.

- Always act within your instructions.
- Be careful not to mislead VCAT in any way.
- Ensure you raise all relevant issues at the hearing. There are no second chances.

11. Disclaimer

This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008

12. Useful Resources and Contacts

11.1 Resources

Government Gazette

Website: <http://www.gazette.vic.gov.au/>

SAAP

Current agreement is online at:

[http://www.facs.gov.au/internet/facsinternet.nsf/vIA/saap3/\\$File/SAAP_V_Multilateral_Agreement.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/vIA/saap3/$File/SAAP_V_Multilateral_Agreement.pdf).

11.2 Contacts

Department of Human Services

Tel: 1300 650 172 (this is a free call within Victoria, except from mobile phones)

Website: <http://www.housing.vic.gov.au> or

<http://hnb.dhs.vic.gov.au/ooh/ne5ninte.nsf/Home+Page/OOH-Internet~OOH-Internet-HomePage?open>

Temporary crisis accommodation is available via the following online resources:

- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_nav.htm
- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_v_2005-2010.htm
- <http://hnp.dhs.vic.gov.au/wps/portal>
- <http://net.saap.infoxchange.net.au/>
- <http://hnb.dhs.vic.gov.au/ooh/ne5ninte.nsf/childdocs/-DABB793C4B375F1BCA2571330009C35E-B1D06035D5217A49CA2571CC0000B662->

[9FADB6FEF4153174CA2571CC0001D877-02D9690CADA993CFCA2571CC00165643?open=](http://www.homeless.org.au/)

- <http://www.homeless.org.au/>
- http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-saap_v_2005-2010.htm
- <http://www.melbourne.homeless.org.au/about-crisis-accommodation.html>
- <http://www.community.gov.au/Internet/MFMC/community.nsf/pages/section?opendocument&Section=Crisis%20Accommodation>

Consumer Affairs Victoria

121 Exhibition Street
Melbourne VIC 3000
GPO Box 123A
Melbourne VIC 3001
Tel: (03) 9627 6000
Website: <http://www.consumer.vic.gov.au>

PILCH Homeless Persons' Legal Clinic

Level 1, 550 Lonsdale Street
Melbourne VIC 3000
Tel: (03) 9225 6684 or 1800 606 313
Email: hplc@pilch.org.au
Website: <http://www.pilch.org.au>

Tenants Union of Victoria

55 Johnson Street
Fitzroy VIC 3065
PO Box 234
Fitzroy VIC 3065
Tel: (03) 9416 2577 (advice)
Email: admin@tuv.org.au
Website: <http://www.tuv.org.au>

Victorian Civil and Administrative Tribunal

55 King Street
Melbourne VIC 3000
Email: vcat@vcat.vic.gov.au
Website: <http://www.vcat.vic.gov.au>

Human Rights and Equal Opportunity Commission

Comments on homelessness and human rights at
http://www.hreoc.gov.au/human_rights/housing/homelessness_2008.html

Annexure A – Application to have Orders Stayed

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
RESIDENTIAL TENANCIES LIST

No [NUMBER]

[EG: DIRECTOR OF HOUSING]

Applicant
Landlord

[NAME]

Respondent
Tenant

APPLICATION TO HAVE ORDERS STAYED SECTION 149(1)

THE RESPONDENT applies to the Tribunal:

- 1 for the orders of [NAME], Member made on [insert] (**the Orders**) in this matter to be stayed pursuant to section 149(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**) pending the determination of an application to the Supreme Court dated [insert] seeking leave to appeal pursuant to section 148(2) of the VCAT Act and Order 4 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998*.

UPON THE GROUNDS that:

- 1 A refusal to grant a stay of the Orders may render inutile any appeal rights the Respondent has if a warrant of possession is issued and the Respondent is evicted from the premises the subject of the Orders.

Date: [DATE]
[Name]

Signed:
Solicitor for

The Principal Registrar
The Victorian Civil and Administrative Tribunal
Residential Tenancies List
55 King Street
Melbourne VIC 3000

Annexure B – Originating Motion, Form 5C
FORM 5C

RULES 5.02(2), 45.05(2)(b)

ORIGINATING MOTION BETWEEN PARTIES

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

No.

BETWEEN:

[NAME]

Plaintiff

-and-

[EG: THE DIRECTOR OF HOUSING]

Defendant

Date of document:
Filed on behalf of

[DATE]
The Plaintiff

Prepared by:

Solicitors code:

Tel:

Fax:

Melbourne VIC 3000

Ref:

TO THE DEFENDANT

TAKE NOTICE that this proceeding by originating motion has been brought against you by the Plaintiff for the relief or remedy set out below.

ALSO TAKE NOTICE that the plaintiff cannot continue with the proceeding except by order of the Court. You will be given notice by summons of any application for the order and until the summons is served you are not required to take any step in the proceeding.

FILED:

.....
Prothonotary

THIS ORIGINATING MOTION is to be served within one year from the date it is filed or within such further period as the Court orders.

RELIEF OR REMEDIES SOUGHT

1. That the Plaintiff, pursuant to section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), have leave to appeal from the orders of the Victorian Civil and Administrative Tribunal (“the Tribunal”) given in proceeding [insert] (“the VCAT Proceeding”) on [insert] (“the Orders”).
2. That the Plaintiff’s appeal against the Orders is upheld and the Orders are set aside.
3. Alternatively, that the Plaintiff’s appeal is upheld and the VCAT Proceeding is remitted to be heard and decided again, with the hearing of further evidence, by the Tribunal constituted other than by Member [NAME OF ORIGINAL VCAT DECISION MAKER].
4. That the Defendant pay the Plaintiff’s costs of the appeal.
5. Such further or other orders as the court sees fit.

1. Place of trial: Melbourne
2. This originating motion was filed for the plaintiff by [insert].
3. The address of the plaintiff is [INSERT ADDRESS].
4. The address for service of the plaintiff is [insert].
5. The address of the defendant is, [INSERT ADDRESS].

Service also to take place on the Principal Registrar of the Victorian Civil and Administrative Tribunal.

Annexure C – Summons on Originating Motion

FORM 45A

RULE 45.04(2); 45.05(6)

SUMMONS ON ORIGINATING MOTION

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

No. [NUMBER]

BETWEEN:

[NAME]

Plaintiff

-and-

(EG: THE DIRECTOR OF HOUSING)

Defendant

Date of document: **[DATE]**
Filed on behalf of: The Plaintiff

Prepared by:

Solicitor Code:
Tel:
Fax:

Melbourne Victoria 3000
AUSTRALIA

TO: THE DEFENDANT

You are summoned to attend before the Court on the hearing of an application by the Plaintiff for judgment or an order in respect of the relief or remedy sought in the originating motion as follows:

1. That the requirements of the General Rules of Procedure in Civil Proceedings in Rules 5.03(1) and 8.02 be dispensed with.
2. That the Plaintiff be authorised to commence this proceeding by Originating Motion in Form 5C of the Rules.

3. That pursuant to section 148(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), the Plaintiff have leave to appeal from the orders made by the Victorian Civil and Administrative Tribunal (“the Tribunal”) in proceeding no. [insert] on [insert] (“the Orders”).
4. That the Orders be stayed until the determination of this proceeding or until further order.
5. The costs of this summons be reserved.
6. Such further orders as the court considers fit.

The Application will be heard before the Master in Court No. _____, Supreme Court, 436 Lonsdale Street, Melbourne, on _____ 2007 at _____ a.m. or so soon afterwards as the business of the Court allows.

The Master may, as appropriate--

- (a) where he has authority to give the judgment or make the order sought by the Plaintiff, hear and determine the Application or refer it to another Master for hearing and determination;
- (b) by consent of the Defendant, give the judgment or make the order;
- (c) refer the Application to a Judge for hearing and determination;
- (d) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.

FILED: [DATE]

This summons was filed by the solicitors for the plaintiff, [insert].

**Annexure D – Affidavit in Support of Plaintiff’s Application for
Leave to Appeal**

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

No. [NUMBER]

BETWEEN:

[NAME]

Plaintiff

-and-

(EG: THE DIRECTOR OF HOUSING)

Defendant

AFFIDAVIT IN SUPPORT OF PLAINTIFF’S APPLICATION FOR LEAVE TO APPEAL

Date of document: [DATE]
Filed on behalf of: The Plaintiff
Prepared by:

Solicitor Code:
Tel:
Fax:

Melbourne Victoria 3000
AUSTRALIA

I, **[NAME]** of **[ADDRESS]** Melbourne, Victoria, solicitor, make oath and say as follows:

- 1 I am a solicitor of [insert]. I am duly authorised to make this affidavit on the plaintiff’s behalf.
- 2 I am one of the solicitors who has the conduct of this matter subject to the care and supervision of my principals.

3 I make this affidavit from my own knowledge and experience except where otherwise stated. Where I depose to information provided to me by the plaintiff, such information has been translated to me by a qualified interpreter, [NAME].

Background to the appeal

4 I am informed by the plaintiff and believe that the Plaintiff is the tenant of the premises identified as [ADDRESS] (“**the Premises**”).

Now produced and shown to me and marked “**XXX-1**” is a copy of a document entitled “Residential Tenancy Agreement” in relation to the Premises.

5 I am informed by the plaintiff and believe that [NAME] is the [insert relationship] of the plaintiff.

6 I am aware that on [insert] a warrant was executed in relation to the Premises by Victoria Police. [insert detail]

7 I am aware that [NAME] was charged and pleaded guilty to [insert].

8 I am aware that [NAME] of the Victoria Police was present during the execution of the warrant on [insert] and that he spoke with the plaintiff on that day.

9 I am aware that [insert] conducted an interview with the plaintiff on [insert] and that this interview was conducted in the presence of a representative from the [insert] but without an interpreter present.

10 I am aware that the defendant served a notice to vacate upon the plaintiff on [insert]. I am informed and believe that the basis for the notice to vacate was that the plaintiff [insert], contrary to clause 9 of the Residential Tenancy Agreement and section 250 of the *Residential Tenancies Act 1997*. Now produced and shown to me and marked “**XXX-2**” is a true and correct copy of the notice to vacate dated [insert].

11 I am informed by the plaintiff and believe that the plaintiff did not vacate the premises pursuant to the notice to vacate.

12 I am aware that the defendant made an application to the Victorian Civil and Administrative Tribunal (the “**Tribunal**”) on [insert] for a possession order in relation to the premises.

13 I am aware that, on [insert], a hearing was held before Member [NAME] in relation to the application for a possession order.

Now produced and shown to me and marked “XXX-3” is a true and correct copy of the transcript of the hearing before Member [NAME], dated [insert].

14 I am aware that at the conclusion of the hearing Member [NAME] made the following orders (the “**Tribunal Orders**”):

1. *The landlord is entitled to a possession order.*
2. *The tenant must vacate the rented premises today.*
3. *The principal registrar, at the request of the person who obtained the possession order and on payment of the prescribed fee, shall issue a warrant of possession to be executed within 30 days after the date of issue. (Any request must be made no later than [insert]).*

Now produced and shown to me and marked “XXX-4” is a true and correct copy of the Tribunal Orders dated [insert].

15 On [insert] the solicitors for the plaintiff received reasons for the decision of the Tribunal in relation to the Tribunal Orders.

Now produced and shown to me and marked “XXX-5” is a true and correct copy of the Reasons for Decision of Member [NAME], dated [insert].

16 On [insert] the plaintiff lodged an originating motion with the Court seeking leave to appeal the Tribunal Orders.

Now produced and shown to me and marked “XXX-6” is a true and correct copy of the originating motion.

17 On [insert] the plaintiff made an application to the Tribunal that the Tribunal Orders be stayed pursuant to section 149(1) of the *Victorian Civil and Administrative Tribunal Act 1998* pending the outcome of the Supreme Court appeal. Now produced and shown to me and marked “XXX-7” is a true and correct copy of this application.

Appeal

18 The plaintiff now seeks leave to appeal the orders of the tribunal as set out in the Notice of Appeal. Now produced and shown to me and marked “XXX-8” is a draft notice of appeal prepared on behalf of the plaintiff.

19 A refusal by the Court to grant leave would result in a substantial injustice against the plaintiff. [insert client’s circumstances].

20 A refusal to grant a stay of the Orders may render inutile any appeal rights the plaintiff has if a warrant of possession is issued and the plaintiff is evicted from the Premises. This only applies if the Tribunal has not already granted a stay in respect of the orders.

Adequacy of interpreter

[insert]

Plaintiff's understanding of the hearing

21 I am informed by the plaintiff and believe that the plaintiff speaks very limited English.

22 I am informed by [NAME] and the plaintiff and believe that not everything was translated at the Tribunal hearing and the plaintiff had only a very brief and limited understanding of the proceeding.

23 I am informed by the plaintiff and believe that the plaintiff felt that she did not have an opportunity to present any evidence in relation to the claims made against her.

24 I am informed by the plaintiff and believe that when the Tribunal asked if there were any further submissions the representative from [insert] assisting [NAME] replied that there were not and the plaintiff felt that she had no chance to reply.

Interview with the Director of Housing on

25 I am informed by the plaintiff and believe that there was no interpreter present at the interview conducted between [insert] and the plaintiff on [insert].

26 I am informed by the plaintiff and believe that the plaintiff stated that she required an interpreter but was told by [insert] that an interpreter was not necessary.

27 I am informed by the plaintiff and believe that the plaintiff had only a basic understanding of the conversation with [insert] and that understanding was essentially limited to the fact that she would be evicted.

Plaintiff's knowledge of activities on premises

28 I am informed by the plaintiff and believe that the plaintiff did not know that [insert] Premises.

29 I am informed by the plaintiff and believe that the plaintiff [insert details].

30 I am informed by the plaintiff and believe that it was the plaintiff's belief that [insert details].

31 I am informed by the plaintiff and believe that the plaintiff held an honest belief that [insert details].

32 I am informed by the plaintiff and believe that the plaintiff had previously told [insert details].

33 I am informed by the Plaintiff and believe that [insert details].

Access to the Premises

34 I am informed by the plaintiff and believe that [insert details].

35 I am informed by the plaintiff and believe that [insert details].

36 I am informed by the plaintiff and believe that [NAME] was not provided with a general right of access to the Premises and was only occasionally permitted to enter by the plaintiff.

37 I believe that the plaintiff did not permit [NAME] [insert details].

SWORN BY [NAME])
at Melbourne in Victoria)
on [DATE])

Before me:

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION**

No. [NUMBER]

BETWEEN:

[NAME]

Plaintiff

-and-

[EG THE DIRECTOR OF HOUSING]

Defendant

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: [DATE]
Filed on behalf of: The Plaintiff

Prepared by:

Solicitor Code
Tel:
Fax:

Melbourne Victoria 3000
AUSTRALIA

This is the exhibit marked “**XXX-1**” now produced and shown to **[NAME]** at the time of swearing her Affidavit on the day [MONTH YEAR]

Before me:-----

EXHIBIT “XXX-1”

Annexure E – Supreme Court Minutes of Proposed Consent Orders

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. [INSERT]

BETWEEN:

[INSERT]

Plaintiff

-and-

[EG THE DIRECTOR OF HOUSING]

Defendant

MINUTES OF PROPOSED CONSENT ORDERS

Date of document: [INSERT]
Filed on behalf of: The Plaintiff

Prepared by:

Melbourne Victoria 3000
AUSTRALIA

Solicitor Code
Tel:
Fax:
Ref: [INSERT]

BY CONSENT THE COURT ORDERS:

1. That the Plaintiff,
2. That the Plaintiff's appeal.
3. No order as to costs.

Dated: [INSERT]

.....
For and on behalf of the
Director of Housing
(Applicant)

.....
(Solicitors for the Respondent)

Annexure F – VCAT Minutes of Proposed Consent Orders

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
AT MELBOURNE
RESIDENTIAL TENANCIES LIST

No
[INSERT]

BETWEEN:

[EG DIRECTOR OF HOUSING]

Applicant
Landlord

-and-

[INSERT]

Respondent
Tenant

MINUTES OF PROPOSED CONSENT ORDERS

Filed on behalf of:
Date of Document:
Prepared by:

The Respondent
[INSERT]

Solicitor Code:
Tel:
Fax:
Ref: [INSERT]

Melbourne Victoria 3000

BY CONSENT the Tribunal orders that:

1. Orders 1, [insert]

Dated: [INSERT]

.....
For and on behalf of
the Director of Housing
(Applicant)
Annexure G – Notice of Discontinuance

.....
(Solicitors for the Respondent)

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE**

COMMON LAW DIVISION

No. [INSERT]

BETWEEN:

[INSERT]

Plaintiff

-and-

[EG THE DIRECTOR OF HOUSING]

Defendant

NOTICE OF DISCONTINUANCE

Date of document: [INSERT]
Filed on behalf of: The Plaintiff

Prepared by:

Melbourne Victoria 3000
AUSTRALIA

Solicitor Code
Tel:
Fax:
Ref: [INSERT]

TAKE NOTICE that the Plaintiff wholly discontinues her claim in this proceeding.

Dated: [INSERT]

.....
(Solicitors for the Respondent)