72 Bridge Street, Benalla, Vic 3672
Phone: (03) 5762 3322
Fax: (03) 5762 4334
info@benallarealestate.net.au
www.benallarealestate.net.au

During the tenancy

Charges

Taxes and rates

Unless the *tenancy* is for a fixed-term period exceeding one year, the landlord must repay the tenant for any rates or taxes payable for the premises that are recovered from the tenant by a public *statutory* authority, for example, a local council (s 58 RTA).

Utility charges

Landlord's rights and responsibilities

The landlord is liable for payment of the following utility charges:

- the initial connection *costs* of electricity, water, gas, bottled gas or oil supplies (i.e. where the service has not been connected in the past);
- all charges for the supply or use of electricity, gas (except bottled gas) or oil when the premises is not separately metered;
- all water supply and sewerage disposal charges when the water consumption is not separately metered;
- water charges that are not related to consumption (e.g. the flat-rate service fee);
- all charges for the supply of sewerage or drainage services;
- all charges for the supply or hire of gas bottles (s 53(1)).

Tenant's rights and responsibilities

A tenant is liable for payment of the following utility charges:

- all charges for the supply or use of electricity, gas or oil when the premises are separately metered, except installation and initial connection *costs* and the costs of supply or hire of gas bottles;
- all charges for the use of bottled gas; and
- all charges for water consumption and sewerage disposal charges when the property is separately metered (s 52).

The tenant cannot be made liable for any costs that should be borne by the landlord as the RTA makes no provision for this. Any agreement purporting to extend the tenants *liability* for utilities would be an attempt to modify or restrict the operation of the RTA and would, therefore, be unenforceable (s 27).

If the landlord or tenant pays a utility cost for which the other party is liable, they can request reimbursement and should do so in writing. If reimbursement is not forthcoming the party owed money may apply to VCAT for an order for reimbursement.

Telephones

The tenant is liable for all charges relating to the installation, service and use of a telephone, including any fees for the installation of a telephone line but not for repairs.

The landlord is responsible for maintaining a pre-existing facility and this can include a telephone and telephone lines. However, it can appear that telephone lines have been installed where phone connection plugs are present. It may be necessary for lines to be laid or re-installed. In that case, the tenant is liable for the full cost.

If the landlord has told the tenant that the telephone was connected, and the tenant entered into the agreement on that understanding, there may be grounds to argue that the provision of the connection was a term of the agreement.

Director of Housing service charges

The Director of Housing can impose service charges for water, central heating, laundry or utility services provided with the premises (s 57).

Landlord and tenant duties

Overview of tenant's duties

The RTA differentiates between breaches of a "duty" provision of the Act and other breaches (s 207). If the landlord believes that the tenant is in breach of a duty provision of the Act the landlord may serve the tenant with a Breach of Duty Notice. A Breach of Duty Notice can only be served if the *tenancy* has not already been terminated.

The grounds for a landlord to serve a Breach of Duty Notice are when:

- the tenant fails to permit entry when entry is sought in accordance with the RTA (s 89);
- the tenant uses or permits others to use the premises in a manner that causes a *nuisance* (s 60(1));
- the tenant uses or permits others to use the rented premises or common areas in any manner that causes an interference with the reasonable peace, comfort or privacy of any occupier of neighbouring premises (s 60(2));
- the tenant fails to take care to avoid damaging the rented premises or common areas (s 61);
- the tenant fails to keep the rented premises in a reasonably clean condition (s 63);
- the tenant has installed fixtures or has altered, renovated or added to the premises without the landlord's *consent* (s 64);
- the tenant has changed a lock in a master key system without the landlord's consent (s 70); or
- the tenant has failed to give the landlord a key to a changed lock (ss 70, 70A).

To claim compensation for breach of duty, the landlord must prove that they suffered loss caused by the breach.

Tenant's duty to avoid damage

The tenant has a duty to ensure care is taken to avoid damaging the rented premises and to take reasonable care to avoid damaging common areas such as communal laundries and car parks. The tenant is not responsible for damage that is beyond their control, for example, damage caused by a burglary (s 61).

If the tenant becomes aware of damage to the rented premises they must give notice to the landlord specifying the nature of the damage as soon as practicable (s 62). The tenant can give this notice in the form of a letter or on the *Notice to Landlord* form.

Overview of landlord's duties

The grounds for a tenant to serve a *Breach of Duty Notice* are when:

- the premises are not vacant and in a reasonably clean condition on the day the tenant is to take possession (s 65(1));
- the landlord does not take all reasonable steps to provide quiet enjoyment of the premises (s 67);
- the landlord does not ensure that the premises are maintained in good repair (s 68(1));
- the landlord does not replace a water appliance, when such an appliance needs to be replaced, with an A-rating appliance (s 69); or
- when the landlord does not provide locks, or fails to provide a key to the tenant when a lock is changed (s 70); or
- when the landlord provides a key to an excluded person for a lock that has been changed by a protected person under a *family violence intervention order* or family violence safety notice (s 70A).

Quiet enjoyment

The landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the *tenancy* agreement (s 67). This means that the tenant is entitled to enjoy the undisturbed occupation and possession of the premises without interference from the landlord or from things that are in the landlord's power to prevent.

Landlord's right of entry

The most common complaint by tenants in relation to quiet enjoyment is about excessive inspections by landlords or agents, or landlords or agents entering the premises without notice. To be entitled to enter the premises, the landlord or agent must have a reason permitted by the RTA and must give notice in accordance with the RTA (ss 85–87).

The tenant's duty to permit entry only applies when the landlord or agent seeks entry in accordance with the RTA (s 89). If the landlord or agent has not complied with the RTA the tenant does not have to let them in.

If the landlord is exercising a right of entry but fails to comply with the RTA, the tenant may apply to VCAT for an order that the landlord be restrained from entering the premises for a specified period (s 91). The tenant may also serve a *Breach of Duty Notice* claiming compensation for their loss of quiet enjoyment.

A tenant who applies for an order prohibiting entry or for compensation for loss of quiet enjoyment will need to substantiate their claim at VCAT. The tenant should keep a record of all entries by the landlord including how long they stay and any other relevant information.

Reasons for entry

The occasions when the landlord or their agent may have a right to enter the premises, together with any person necessary to achieve the purpose of the entry are limited to the following:

- a *Notice to Vacate* or a *Notice of Intention to Vacate* has been given and entry is required to show the premises to a prospective tenant during the last 14 days of the notice period (s 86(1)(a)); or
- the premises are to be sold or used as security for a loan and entry is required to show a prospective buyer or lender through the premises (s 86(1)(b)); or
- entry is necessary to enable the landlord to carry out a duty under the *tenancy* agreement, the RTA, or any other Act (s 86(1)(c)); or
- entry is required for valuation purposes (s 86(1)(d)); or
- the landlord or their agent has reasonable grounds to believe that the tenant has failed to comply with their duties under the RTA or the tenancy agreement (s 86(1)(e)); or
- entry is required for inspection of the premises and an inspection has not been made within the last six months (s 86 (1)(f)); or
- entry is required to enable inspection of the premises for the purpose of proceedings under the family violence provisions (s 86(1)(g)).

Tenant consents to entry

The landlord's right of entry will arise only if the landlord has given proper written *Notice of Entry* (see below) or the tenant has consented to entry (s 85). Where a landlord or their agent seeks the *consent* of the tenant to enter the premises and the tenant provides that consent there will be a right to entry at the time agreed between the parties (s 85 (a)). The consent must be given not more than seven days prior to entry.

Written Notice of Entry

A right of entry will arise where:

- the landlord gives a clear 24 hours written notice of the entry;
- the reason for entry stated in the notice is for one of the grounds listed at section 86; and
- the notice is given by post or in person between 8 am and 6 pm; and
- the entry is to occur at any time between 8 am and 6 pm on any day (except a public holiday).

If the notice is sent by ordinary post the landlord should allow one day for postage. If the notice is sent by registered post the landlord should allow two days for postage.

The landlord or their agent may enter the premises even if the time chosen is inconvenient to the tenant or the tenant is not home, as long as they have given the required notice and complied with the RTA.

The person exercising the right of entry must do so in a reasonable manner and must not stay any longer than is necessary to achieve the purpose of entry (s 87(a)).

Where landlord has complied with the RTA

Even if the landlord has complied with the rules regarding entry, they are still required to ensure the tenant has quiet enjoyment of the premises. A conflict between the landlord's right of entry and the tenant entitlement to quiet enjoyment may arise when inspections are occurring frequently (e.g. when the premises are being sold).

In such cases, the tenant should attempt to negotiate an agreement with the landlord or agent that strikes a balance between their right to quiet enjoyment and the landlord's right to enter the premises. Any such agreement should be written down, should specify the period of the agreement and be signed by both the tenant and landlord or agent.

An agreement can include conditions such as:

- the landlord or agent will only seek to enter if they have made a convenient appointment time with the tenant;

- the tenants will have the property open for inspection for an agreed time each week; or
- an arrangement, such as a rent reduction for the period of the inspections, to compensate the tenant for the inconvenience caused by the inspections.

Repairs

A landlord is required to ensure the rented premises are maintained in good repair. The RTA sets out three processes in relation to requesting repairs:

- urgent repairs;
- non-urgent repairs; and
- breach of duty procedure.

Urgent repairs

Urgent repairs are defined in section 3 of the RTA to mean any work necessary to repair or remedy:

- a burst water service;
- a blocked or broken lavatory system;
- a serious roof leak;
- a gas leak;
- a dangerous electrical fault;
- flooding or serious flood damage;
- serious storm or fire damage;
- a failure or breakdown of any essential service or appliance provided by a landlord for hot water, water, cooking, heating or laundering;
- a failure or breakdown of the gas, electricity or water supply to the rented premises;
- an appliance, fitting or fixture provided by a landlord, that uses or supplies water and that is malfunctioning in a way that results or will result in a substantial amount of water being wasted;
- any fault or damage that makes the rented premises unsafe or insecure; including working smoke alarm (earlier 10 yrs old
- a serious fault in a lift or staircase.

First, the tenant must take reasonable steps to arrange for the landlord to immediately carry out the repairs (s 72(1)). This will ordinarily involve attempts to advise the landlord or agent of the need for repair by telephone. At the start of the *tenancy*, the landlord should have provided the tenant with an emergency telephone number to be used in case of the need for such repairs (s 66(2)(b)).

What constitutes "reasonable" depends on the circumstances, that is, the degree of urgency of the repairs and the number of times the tenant has attempted to contact the landlord. With particularly urgent repairs, like a serious gas leak, the tenant may only need to make one or two attempts to contact the landlord before deciding to take further steps.

The tenant should keep a record of all telephone calls both answered and unanswered and any other attempts to contact the landlord or agent.

Following this, if the landlord or agent do not carry out the repairs, and the cost of the repairs is not more than $1,800, the tenant can carry out the repairs or arrange for the repairs to be attended to by a tradesperson (s 72(1), (2)). Alternatively, a tenant can make an urgent application to VCAT (s 73) (see "Advice and contacts", at end of chapter).

Where tenant pays for urgent repairs

The tenant must ensure that the cost of the repairs will not amount to more than $1,800. If the tenant arranges for urgent repairs to be done and the cost is more than $1,800, the landlord is only liable to pay the reasonable cost of repairs up to $1,800 (s 72(2)(b)).

After arranging for the repairs to be carried out, the tenant must give the landlord 14 days notice in writing of the repairs carried out and the cost of the repairs (s 72(2)(a)). The tenant should give this notice in the form of a letter or on the *Notice to Landlord* form. The tenant should attach a copy of the receipt or invoice and retain the original. If the landlord does not pay the amount within 14 days, the tenant may apply to VCAT for an order for reimbursement.

Applying to VCAT for urgent repairs

If a tenant cannot afford to pay for repairs themselves or the repairs cost more than $1,800, after attempting to arrange for the landlord to do the repairs, the tenant should make an application to VCAT **(s 73)**.

VCAT are required to hear an application for urgent repairs within two business days of receiving the application (s 73 (2)). Sometimes, in practice, applications take longer to be heard.

The tenant should provide *evidence* of the need for repairs, the urgent nature of the repairs and the attempts made to arrange for the landlord to do the repairs. VCAT has the power to make an order requiring that the landlord do the repairs within a specified time.

Non-urgent repairs

Non-urgent repairs are those repairs that are needed in order to maintain the premises and those fixtures and appliances supplied by the landlord in a state of good repair and which do not fall under the categories defined as "urgent".

Written Notice of Repair

The tenant must give the landlord 14 days written notice that non-urgent repairs are needed (s 74). The tenant should use the *Notice to Landlord* form. The RTA does not require a tenant to use the *Notice to Landlord* form, but it may be difficult to arrange an inspection with Consumer Affairs Victoria unless this notice is used.

The notice should be given to the landlord or agent personally or sent by ordinary or registered post and a copy kept by the tenant. It is recommended to send it by registered post in case of a dispute about service.

Inspection and report

If the landlord has not carried out the repairs within 14 days, or has not done so to a satisfactory standard, the tenant can apply in writing to the Director of Consumer Affairs Victoria requesting that an inspector investigate (s 74). The tenant can send a letter requesting the inspection or use the *Request for Repairs Inspection or Rent Assessment* form. In either case a copy of the *Notice to Landlord* should be attached.

After inspecting the premises, if the inspector is satisfied that the landlord is in breach of their duty to maintain the premises in good repair, they may attempt to negotiate arrangements for the carrying out of repairs. They must also give a written report of the investigation to the tenant (s 74(3)).

Application to VCAT

If the tenant has received the inspector's report, yet satisfactory arrangements cannot be made to carry out the repairs, the tenant can apply to VCAT. The application should be made under section 75(1) and a copy of the inspector's report should accompany the application (reg 6.25(2) Victorian Civil Administration Tribunal Rules 2008 (Vic) ("VCAT Rules")).

The application must be made within 60 days of receiving the report (s 75(2) RTA). If the tenant has not received a report within 90 days of making application to Consumer Affairs Victoria, the tenant may apply to VCAT without the report (s 75 (3)).

VCAT has the power to make an order requiring the landlord to carry out the repairs within a specified time.

Minimum standards

There are no minimum standards for rented premises.

Rooming houses are prescribed accommodation under the *Public Health and Wellbeing Regulations* 2009 (Vic), which provide for minimum standards (regs 17–27) regarding:

- the number of people that can be accommodated in one room;
- minimum room size;
- maintenance and cleanliness of the rooms and common areas;
- supply and quality of hot and cold water;
- the *discharge* of sewage and *waste* water;
- the provision of vermin-proof refuse receptacles; and
- the number of toilet and bathroom facilities per person.

All rooming houses must be registered with the Council in whose district the rooming house is located. Failure to comply with any of the minimum standards or to register the rooming house is an *offence*. Local government authorities, normally through their Environment Health Officers, have the power to investigate those in breach.

Rooming houses are also subject to the minimum standards set out in the *Residential Tenancies (Rooming House Standards) Regulations 2012*. A rooming house owner must ensure that rooms, services and common areas comply with

the minimum standards contained in the regulations (s 120A). The standards outline detailed minimum standards for *amenity* in rooming houses relating to privacy, security and safety.

For more information contact the Tenants Union.

Repairs and the Director of Housing

The Director of Housing's procedures for repairing and maintaining premises are contained in the "Responsive Maintenance" chapter in the Maintenance Manual, which is found within the *Public Housing Policy and Procedure Manuals*. This manual can be accessed through the Department's website listed below.

The Director of Housing is a landlord who is subject to the RTA in the same way as any other landlord. A Director of Housing Officer may try to argue at VCAT that the repairs cannot be done, or will be delayed, because of the application of the Director of Housing's policy. VCAT should not refuse a tenant's application for a repair order on that basis, although it may take the policy and procedures into account.

The Office of Housing operates a Repairs and Maintenance Call Centre. In the first instance the tenant can call 13 11 72 and report the repair. The tenant should ask for a Scheduled Contract Number (SC Order) that is a record of the phone call (see "Advice and contacts" at the end of this chapter for contact details).

Locks and security

Urgent repairs are defined to include "any fault or damage that makes the premises insecure" (s 3). Therefore, where an external window or door lock is defective it will usually be appropriate to initiate the urgent repairs process. (For further information see "Urgent repairs", above.)

A landlord must provide locks (defined as "a device for securing a door or a window or other part of the premises"), to secure all external doors and windows of the rented premises (ss 3, 70). Although section 70 does not expressly require the landlord to provide deadlocks, it is arguable that a lock that does not adequately "secure" the premises does not comply with the RTA.

If the tenant believes this is the case, they may serve a *Breach of Duty Notice*and then apply to VCAT for a Compliance Order. The tenant would require *evidence* to support their claim that the premises were not secure, such as a report from the police or a security expert.

Rent

Rent is the amount paid by the tenant to the landlord to occupy the rented premises and to use the facilities and services. Rent is payable at the place specified in the agreement or if none is specified, at the rented premises. The rent is payable in the manner, if any, specified in the agreement (s 42).

The RTA does not limit the amount of rent payable by a tenant. However, a landlord must not require a tenant to pay more than one month in advance (unless the weekly rent exceeds $350) (s 40).

Receipts

Where rent is paid in person, the person receiving the payment must issue a receipt immediately (s 43(1)(a)). Where a tenant pays rent by any other method and requests a receipt at that time, a receipt must be issued within five business days (s 43(1)(b)). The party receiving the payment must sign the receipt (s 43(3)).

If rent is not paid in person and a receipt is not requested, a record of the payment must be kept for 12 months and must be provided to the tenant within five business days of request (s 43(2),(2A)).

A tenant should never pay the rent in cash unless they are given a receipt.

Where the landlord refuses to issue a receipt the tenant can make a general application to VCAT under section 452 of the RTA, but should also request Consumer Affairs Victoria to investigate the matter (see "Advice and contacts", at the end of this chapter for contact details).

Non-payment of rent

The tenant should not refuse to pay rent on account of the landlord's failure to fulfil their duties. If the tenant does not pay their rent they will be at risk of being evicted. Refusing to pay rent may also prejudice any applications to VCAT for compensation.

The tenant is not entitled to refuse to pay rent because they intend to regard the *bond* as rent paid (s 428).

Rent arrears

For information on this topic see "Notice to Vacate – landlord wants tenant to leave", below.

Rent increases

The landlord must give at least 60 days notice in writing, in the proper form, of a proposed rent increase. The notice may only provide for one rent increase and must inform the tenant of their right to apply, within 30 days, to Consumer Affairs Victoria to investigate the rent increase (s 44(3)). Any rent increase notice that does not comply with these requirements is *invalid* and the tenant does not have to pay the increase and may seek reimbursement for any rent paid in accordance with an invalid rent increase.

Periodic agreements

During a "periodic" agreement a landlord must not increase the rent payable at intervals of less than six months (s 44 (4A)) (see "Periodic *tenancy* agreement", above).

Fixed-term agreements

The landlord cannot increase the rent during the course of a fixed-term *tenancy* unless the tenancy agreement allows for a rent increase during the fixed term (s 44) (see "Fixed-term tenancy agreement", above).

Tenants should be wary and seek advice before signing a *lease* with rent increases "built in". If there is a clause allowing rent increases during the fixed term the landlord can increase the rent in accordance with that clause and the RTA.

The *prohibition* on increasing the rent payable at intervals of less than six months still applies (s 44(4A)). The landlord is also still required to provide 60 days written notice, in the proper form, in order for any rent increases "built in" to a fixed term agreement to be *valid* (s 44(1)).

Is the increase excessive?

If the tenant believes the proposed rent is excessive they can apply to the Director of Consumer Affairs Victoria to investigate and report as to whether the increase is excessive (s 45(1)). The application to the Director must be made within 30 days of receiving a *Rent Increase Notice* (s 45(2)).

The tenant can make the application by letter or can use the *Request for Repairs Inspection or Rent Assessment* form available from Consumer Affairs Victoria. The tenant can provide reasons with the application for why they believe that the rent is excessive. Complaints may be related to the state of repair of the property or if amenities or services provided at the start of the *tenancy* have been reduced or withdrawn.

An inspector from Consumer Affairs Victoria must carry out the investigation and give a written report about the rent to the tenant and landlord as soon as practicable. The report will state whether or not in the Director's opinion the rent is excessive. The report must take into account considerations listed in (s 47(3)) of the RTA.

Application to VCAT

If the Director's report finds the increase excessive, the tenant may apply to VCAT for an Order to this effect. This application to VCAT must be made within 30 days of receiving the inspector's report (s 46). *Application by a Tenant to the Victorian Civil and Administrative Tribunal*forms are available from Consumer Affairs Victoria and VCAT (see "Advice and contacts", at the end of this chapter for contact details).

The application should request an order declaring the rent or proposed rent excessive. A copy of the Director's report must be attached to the application (reg 6.25(1) VCAT Rules). VCAT will take into account the inspector's report and the factors of the case (s 47(3)).

The tenant should obtain as much *evidence* as possible on the matters listed in (s 47(3)) before VCAT hearing.

If the rent increase comes into effect before the case is heard at VCAT, the tenant must pay the increased rent. If the application is decided in the tenant's favour, VCAT can order that the tenant be reimbursed any increased rent that has already been paid. If the tenant does not pay the increased rent they will be in *arrears* and at risk of *eviction*.

Reasons for ending a tenancy

How is a tenancy agreement terminated?

If the landlord gives a valid *Notice to Vacate* or the tenant gives a valid *Notice of Intention to Vacate*, the *tenancy* agreement ends when:

- the tenant vacates the premises; or
- the landlord obtains a Possession Order from VCAT and the tenant vacates; or
- a Warrant of Possession is executed.

For information about *Notice to Vacate* and *Intention to Vacate*, see below.

Illegal evictions

A Possession Order does not, by itself, allow the landlord to evict the tenant. The landlord must also obtain a Warrant of Possession from the Principal Registrar of VCAT. The Warrant of Possession is then executed by the police, the locks changed and the tenant evicted. The landlord may or may not be present.

It is an *offence* for a landlord or their agent to require or compel the tenant to vacate the rented premises except in accordance with the RTA. It is also an offence for the landlord or their agent to obtain possession of the rented premises by entering them, whether the entry is peaceable or not. It is a defence if the landlord can show that they had reasonable grounds to believe that the tenant had abandoned the premises (s 229).

If the landlord threatens the tenant with an illegal *eviction*, then the tenant should make an urgent application to VCAT under sections 452 and 472 of the RTA for a *restraining order*. If the landlord has threatened violence, the tenant may also have grounds for obtaining an Intervention Order from the Magistrates' Court.

If the landlord attempts to illegally evict the tenant, the tenant should call the police. The police should restrain the landlord from evicting the tenant; however, they are often reluctant to act unless the tenant has a Restraining or Intervention Order against the landlord.

If the tenant is illegally evicted, they should apply immediately (in person if possible) for an urgent hearing at VCAT at 55 King Street, Melbourne. The tenant should ask VCAT for an order restraining the landlord from further illegal actions, and an order under section 472 that requires the landlord to allow the tenant back onto the premises.

In the event of illegal eviction, the tenant should lodge a complaint with Consumer Affairs Victoria or the police and ask for the landlord to be prosecuted for a breach of section 229. The tenant can also make a compensation claim against the landlord for any loss or damage caused by the illegal eviction. The tenant should be advised to keep receipts and details of any expenditure caused by the illegal eviction (such as the cost of alternative accommodation).

For VCAT contact details, see "Advice and contacts", at the end of this chapter.

Intention to Vacate - tenant wants to leave

28-day notice of intention to vacate

If the *tenancy* agreement is periodic (see "Periodic tenancy agreements", above) and the tenant wants to leave, the tenant must give the landlord at least 28 days notice that they intend to vacate the premises (s 235). The notice must be in writing (s 318(1)) and must be signed (s 318(3)). This notice is called a *Notice of Intention to Vacate*. The tenant can give this notice in the form of a letter, or on the *Notice to Landlord* form. (A *Notice to Landlord of Rented Premises* form can be downloaded from the Consumer Affairs Victoria website at www.consumer.vic.gov.au.)

If the *lease* is for a fixed term the tenant may only give a *valid Notice of Intention to Vacate*that expires after the last day of the fixed term.

The notice should be delivered personally or sent by ordinary or registered mail (registered mail is preferable) (s 506). The tenant must make sure that the landlord receives 28 days clear notice. This means that if the notice is sent by registered mail, the tenant should allow an extra two days for delivery.

Premises unfit for human habitation

A tenant can serve a landlord with an immediate *Notice of Intention to Vacate* if the premises are unfit for human habitation or have been destroyed totally or to such an extent as to be rendered unsafe. This can be done prior to the tenant entering into possession or during the *tenancy* (ss 226, 238). This notice can be served regardless of whether the tenancy agreement is fixed-term or periodic.

Tenants should be cautious about serving a notice on these grounds. If the landlord disputes the claim that the premises are unfit for human habitation, the tenant will have to establish a proper basis for serving this notice at VCAT. Evidence such as photographs, *witness* statements or reports from trades people, engineers and council representatives should be collected.

Problems with a premises would generally need to be serious for the premises to be considered unfit for human habitation. A report from the local council or expert building surveyor should be obtained to substantiate the notice.

Breaking a fixed-term lease (lease breaking)

A tenant may want to vacate the premises before the end of a fixed-term agreement. This may involve the tenant moving out with or without notice and possibly incurring lease-break *liability*.

Once the tenant has vacated the premises the *tenancy* agreement has terminated and they are no longer liable to pay rent. However, the landlord is entitled to make a claim for compensation for any period of lost rental that has resulted from the tenant moving out before the end of the fixed term. The landlord will be required to justify to VCAT the reasonableness of the amount claimed for lost rent. If the tenant continues to pay rent once they have left the premises, the landlord may be less urgent about finding new tenants for the property. Only when the property is re-tenanted is the landlord's claim liquidated or finalised.

What can the landlord claim?

If the tenant breaks a fixed-term *tenancy* agreement, the landlord can make a claim for compensation under section 210 of the RTA for any loss or damage that results from the tenant ending their *lease* early. Such *costs* may include:

- a re-letting fee (calculated on pro-rata basis);
- advertising costs; and
- rent for a reasonable time until new tenants move in, or until the end of the fixed-term lease, whichever is less.

The landlord is not automatically entitled to have these costs met out of the *bond*.

Reasonable costs

What constitutes reasonable *costs* will be determined by VCAT, which will consider factors such as:

- the amount of notice, if any, given to the landlord by the tenant;
- whether the tenant or the landlord advertised the premises for a new tenant;
- the length of time left to run on the fixed term;
- any action taken by the landlord or their agent to find new tenants; and
- the reasonableness or otherwise of any refusal by the landlord of prospective new tenants.

Landlord should minimise loss

The landlord has a duty to keep their loss to a minimum (s 211(e)). If the landlord does anything to increase the *costs* of the lease-break (e.g. putting up the rent so that it is more difficult to find replacement tenants) then the tenant should argue that they are not liable to compensate the landlord for any lost rent.

Tenant should attempt to minimise loss

The tenant should check that the landlord or agent is prompt in advertising the property and that they do not advertise it at a higher rental than the tenant is paying. They should also keep a record of how many prospective tenants inspect the property.

The tenant should also be as co-operative as possible with the landlord or agent's attempts to find new tenants. For example, undertaking additional advertising and co-operating with inspections by prospective tenants will help to minimise the landlord's loss for which the tenant may be liable. The tenant should also apply to have their *bond* returned 10 business days after the termination of their *tenancy*. This is to avoid the landlord claiming lease-breaking *costs* from the bond (see "Recovering bond money", below).

Agreement for reduction of a fixed-term agreement

A landlord or a tenant under a fixed-term *tenancy* agreement may apply to VCAT for an order reducing the term of the agreement, and making any other variations to the agreement that are necessary as a result of that reduction (s 234). *Application by a Tenant to the Victorian Civil and Administrative Tribunal* forms are available from Consumer Affairs Victoria and VCAT. (See "Advice and contacts", at the end of this chapter for contact details.)

The tenant may apply under section 234 only while they remain in possession of the premises. Once the tenant has given up possession of the premises, the tenancy agreement is terminated and therefore cannot be varied or reduced.

VCAT may only reduce the term of an agreement if it is satisfied that:

- there has been an unforeseen change in the applicant's circumstances; and
- the applicant would suffer severe hardship if the term was not reduced; and
- the applicant's hardship would be greater than the hardship suffered by the *respondent* if the term was reduced.

The *Family Violence Protection Act 2008* (Vic) ("FVPA") amended the RTA to specify that VCAT may be satisfied that the applicant has experienced an unforeseen change in circumstances, which will cause the applicant to suffer severe hardship if the applicant:

- is excluded from the rented premises under a family violence intervention order; or
- is a protected person under a *family violence intervention order* and is seeking to reduce the term of the agreement to protect their own safety or the safety of their children.

The amendment allows for one tenant to apply to VCAT without the support of any remaining co-tenants. VCAT may order that one of several co-tenants is removed from the tenancy agreement, or it may shorten the fixed-term agreement for all of the tenants.

VCAT may determine what compensation, if any, should be paid by the applicant due to the reduction of the fixed term. In some cases but not often, the VCAT may award compensation equivalent to the tenant's *liability* for lease-breaking *costs*.

Application for creation of a tenancy agreement

A person who resides in rented premises as their principal place of residence and who is not a tenant at those premises may apply to VCAT for an order that the landlord enter into *tenancy* agreement with them (s 232). The person must satisfy VCAT that:

- the applicant could reasonably be expected to comply with the duties of a tenant under the RTA; and
- the applicant would suffer severe hardship if compelled to leave the premises; and
- the applicant's hardship would be greater than the landlord's (if the order were made).

The FVPA introduced into the RTA the power for a protected person named in a final *family violence intervention order* to apply to VCAT for an order terminating the existing tenancy agreement with a person excluded from the rented premises by the *intervention order*, and requiring the landlord to enter into a new agreement with the protected person (and other persons if the protected persons so elects) (s 233A RTA). The applicant must be a party to the tenancy agreement or have been residing in the rented premises as their principal place of residence.

In deciding whether to make such an order, VCAT must be satisfied that:

- the protected person (and others) could reasonably be expected to comply with the duties of a tenant under a tenancy agreement;
- the protected person or their children would be likely to suffer severe hardship if they were compelled to leave the premises;
- the hardship suffered by the protected person would be greater than any hardship the landlord would suffer if the order was made;
- it is reasonable to do so given the length of the exclusion under the final order and the length of the existing tenancy agreement; and
- it is reasonable to do so given the interests of any other tenants (other than the excluded tenant) (s 233B).

The new tenancy agreement must be on the same terms and conditions as the existing agreement, as far as possible. VCAT has the power to order an inspection of the premises in order to determine any liabilities under the terminated tenancy agreement (s 233C).

The FVPA also amends the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("VCAT Act")) to prohibit the excluded person from cross-examining a protected person without leave of VCAT, introduces remote *witness* facilities for hearings, and permits an applicant to have a support person or representative at the hearing. Applications to VCAT for termination and/or creation of a tenancy agreement on the basis of a family violence intervention order must be made on separate application forms to all other applications in the Residential Tenancies List. (For further information, visit VCAT's website at www.vcat.vic.gov.au).

Notice to Vacate - landlord wants tenant to leave

The RTA permits a landlord to give the tenant a *Notice to Vacate*in certain circumstances. The amount of time which the landlord must give the tenant to vacate varies depending on the type of notice given.

A tenant does not need to vacate on the termination date given in the *Notice to Vacate*. If the tenant remains in possession of the premises the *tenancy* agreement is not terminated until a Warrant of Possession is executed. If the tenant wishes to remain in the premises there may be grounds on which they can challenge a *Notice to Vacate*. (For further details, see "Procedure for ending a tenancy", below).

Below is a selection (non-exhaustive) of reasons for which a *Notice to Vacate*might be issued.

Immediate notices to vacate

Malicious damage

A landlord may give a tenant an immediate *Notice to Vacate* when the tenant or their visitor has maliciously damaged the rented premises or common areas (s 243). The tenant or their visitor must have intended to cause the damage.

Endangering safety of occupiers of neighbouring premises

The landlord may give the tenant an immediate *Notice to Vacate* when the tenant or the tenant's visitor endangers the safety of occupants of neighbouring premises (s 244).

If the landlord gives the tenant an immediate *Notice to Vacate* under section 244, they must prove that the tenant's (or visitor's) behaviour is such that the safety of neighbours is clearly endangered. It is not enough that the neighbours feel threatened by the tenant. The danger must also be continuing at the time that the *Notice to Vacate* is given.

These cases often involve quite complicated questions of law and fact.

> **Note**
>
> A person who has been given a Notice to Vacate under this section should immediately contact the Tenant's Union for advice. (See "Advice and contacts" at end of this chapter.)

14-day Notice to Vacate

Rent arrears

If a tenant owes 14 days or more rent a landlord may give them a *14-day Notice to Vacate*(s 246). VCAT has the *discretion* to *adjourn* or dismiss a landlord's application for a Possession Order on the basis of rent *arrears* if it believes satisfactory arrangements have been or can be made to avoid financial loss to a landlord (s 331). It is, therefore, important to present *evidence* showing:

- the reason the tenant fell into arrears;
- the tenant's ability to pay the rent on time in the future; and
- the tenant's ability to repay the arrears within a finite time.

The sort of evidence that should be produced by a tenant includes:

- a statement from a financial counsellor outlining their income and expenditure and how much they can afford to pay for each instalment (if they are offering to pay by instalments) (see 'MoneyHelp' in "Advice and contacts" at the end of this chapter);
- medical certificates if the tenant has been ill, injured or unable to work;
- witnesses who can give evidence about why the tenant fell into arrears, or confirming that they will be able to pay the arrears (e.g. from a new employer, social worker);
- copies of bills if the tenant has had unexpected expenses; and
- evidence of income (tax returns, pay slips, etc.).

The tenant should also ask anyone able to provide evidence in support of their case to attend VCAT hearing to give evidence in person. It is better to have a *witness* attend the hearing than give their evidence in writing or a *statutory declaration*.

At the hearing the tenant should explain how they fell into arrears and how they intend to repay them. If VCAT is convinced that the tenant had a good reason for falling behind in the rent, that the tenant intends to repay the amount owed, and that the tenant can afford to pay the rent in the future, it will generally exercise its discretion not to evict the tenant.

If VCAT does decide not to evict the tenant, it will generally order that the landlord's application be adjourned for a certain period (usually three or six months). If the tenant fails to pay the instalments, or if they fall behind in their rent again during this period, the landlord can ask VCAT to re-open the case. The landlord does not have to serve any further notices on the tenant in these circumstances.

It is vital that a tenant understands they must comply with the order of VCAT or face *eviction*. If the tenant *defaults* on a repayment agreement or accrue further arrears, it will be difficult to secure another adjournment.

If the tenant does make the repayments as ordered and has not incurred any further arrears, VCAT must dismiss the application once the period of adjournment has elapsed (s 331(3)).

Failure to pay bond

The landlord can serve the tenant with a *14-day Notice to Vacate* if the tenant fails to pay the *bond*, and the agreement says a bond must be paid (s 247).

Illegal purposes

The landlord can serve the tenant with a *14-day Notice to Vacate* if the tenant uses or permits others to use the premises for any purpose that is illegal at *common law* or under an Act (s 250).

A distinction must be drawn between an *offence* that arises out of the use of the premises (e.g. operating an unlicensed brothel) and the premises being merely the scene of an offence (e.g. an assault).

Whether the tenant has permitted the premises to be used for an illegal purpose may become an issue. It is not decided what amounts to such a "permission". It has been suggested that a notice under this section may be substantiated where:

- a tenant knows of the use of the premises for an illegal purpose; and
- fails to take steps to prevent the illegal use.

However, there may be circumstances in which the *offender* overbears the will of a tenant such that it cannot be said that the tenant voluntarily permitted the offender to remain on the premises (e.g. where the tenant is the victim of domestic violence by the offender).

It is likely that any such incident will have involved police and the existence (or otherwise) of charges will be relevant.

Note

A person who has been given a Notice to Vacate under this section should immediately contact the Tenant's Union for advice. (See "Advice and contacts" at end of this chapter.)

Assignment or sub-letting without consent

The landlord can serve the tenant with a *14-day Notice to Vacate*if the tenant assigns or sub-lets or purports to assign or sub-let the premises without the landlord's *consent* (s 253) (see "Sub-letting", above).

Successive breaches of the tenant's duties

Section 249 permits a landlord to serve a *14-day Notice to Vacate*for successive breaches of a duty provision (see "Landlord and tenant duties", above).

60-day Notice to Vacate

Premises to be occupied by landlord or landlord's family

The landlord may give the tenant a *60-day Notice to Vacate* if the premises are to be occupied by:

- the landlord, landlord's partner, son, daughter, parent or partner's parent; or
- a person who normally lives with the landlord and is substantially or wholly dependent on the landlord (s 258).

The *Notice to Vacate* should specify the relationship of the family member or dependent person. The landlord or their family member must intend to occupy the premises immediately after the termination date in the *Notice to Vacate*. The notice is likely not *valid* if a delay is planned between the termination date and the date the family member or landlord will take occupation of the premises.

If there is a fixed term *tenancy* agreement, the notice must not specify a termination date that is earlier than the last day of a fixed-term tenancy agreement (s 266).

A landlord who obtains possession of the premises after serving a notice under this section must not re-let the premises to another person within six months of giving this notice (s 264(1). This *prohibition* does not apply to the landlord renting the premises to the person referred to in the notice (s 264(2)).

Premises to be sold

The landlord may give a *60-day Notice to Vacate* if the premises are to be sold or offered for sale with vacant possession (s 259).

The landlord must intend to sell the premises or offer them for sale immediately after the termination date in the *Notice to Vacate*.

If the Contract of Sale contains conditions, which if not satisfied entitles a party to terminate a *contract*, the landlord may, within 14 days after the last of these conditions is satisfied, give the tenant a *Notice to Vacate* (s 259(2)).

If there is a fixed term *tenancy* agreement, the notice must not specify a termination date that is earlier than the last day of a fixed-term tenancy agreement (s 266).

Premises to be repaired, renovated or reconstructed

The landlord may give the tenant a *60-day Notice to Vacate* if the landlord intends to repair, renovate or reconstruct the premises and the work cannot be carried out without vacant possession (s 255)

The landlord must have obtained all necessary permits and *consents* to do the work prior to issuing the *Notice to Vacate* (s 255(1)(b)).

The tenant can challenge the notice if they believe that the renovations do not necessitate them moving out. The tenant must provide *evidence* to that effect (e.g. statements from tradespeople, photographs and *witness* statements).

The key question may be whether such work is so extensive as to require vacant possession. The landlord must also be able to demonstrate to VCAT that they have all necessary permits, if applicable.

If there is a fixed term *tenancy* agreement, the notice must not specify a termination date that is earlier than the last day of a fixed-term tenancy agreement (s 266).

The *prohibition* on re-letting premises for six months after the date on which the notice was given does not apply to notices issued under section 255.

Premises to be demolished

The landlord may give a *60-day Notice to Vacate* if they intend to demolish the premises immediately after the termination date (s 256)

The landlord must have obtained all necessary permits and *consents* to do the work prior to issuing the *Notice to Vacate* (s 256(1)(b)).

The landlord must demonstrate to VCAT that they have all the necessary permits to demolish the premises. The local council should be able to tell the tenant if a demolition permit has been granted. If the landlord cannot show they have the permits, the tenant can ask VCAT to dismiss the landlord's application for possession.

If there is a fixed term *tenancy* agreement, the notice must not specify a termination date that is earlier than the last day of a fixed-term tenancy agreement (s 266).

A landlord who obtains possession of the premises after serving a notice under this section must not re-let the premises to another person within six months of giving this notice (s 264(1)).

120-day Notice to Vacate for no specified reason

A landlord may give a tenant a *120-day Notice to Vacate* without specifying a reason (s 263). If there is a fixed term *tenancy* agreement, the notice must not specify a termination date that is earlier than the last day of a fixed-term tenancy agreement (s 266).

The landlord cannot give a *120-day Notice to Vacate* for no specified reason while an order made by VCAT relating to rent is in force (s 265).

Challenging a "no reason" Notice to Vacate

If the landlord gives a *Notice to Vacate* under section 263 in response to or retaliation for the tenant exercising or proposing to exercise a right under the RTA (e.g. requesting repairs), the notice is not *valid*.

In order for VCAT to consider whether the *Notice to Vacate* is retaliatory, the tenant must have exercised or attempted to exercise a right provided by the RTA. The notice will not be considered retaliatory if the tenant simply had an argument or a personal dispute with the landlord or made a claim under other *legislation*.

The tenant has 60 days after the day on which a 120-day notice is given to apply to VCAT to challenge the validity of the notice. If the tenant pre-emptively challenges the notice to vacate the onus is on the tenant to prove the grounds of invalidity (i.e. the connection between the tenant's exercise of a right and the service of the notice).

Other notices

Notice to Vacate to end a fixed-term agreement

If the *tenancy* is for a fixed term of six months or more, the landlord may give the tenant a *90-day Notice to Vacate* that specifies the termination date as the date that is the end of the fixed-term agreement (s 261).

When the tenancy is for a fixed term of less than six months, the landlord may give a 60-day notice that specifies the termination date as the date that is the end of the fixed term (s 261).

If the landlord gives a *Notice to Vacate* under section 261 in response to or retaliation for the tenant's exercise or proposed exercise of a right under the RTA (e.g. requesting repairs), the notice is *invalid* (s 266). The tenant has 28 days after the day on which a 90-day notice is given to apply to VCAT and challenge the validity of the notice, and 21 days in the case of a 60-day notice (s 266). If the tenant does not apply within time, they can argue that the notice is retaliatory when the landlord applies to VCAT for possession.

Notices to vacate by mortgagee

When a *mortgage* over the premises was entered into before the *tenancy* agreement was entered into, and the mortgagee becomes entitled to possession of, or the right to exercise a power of sale over the premises, the mortgagee may give the tenant a *28-day Notice to Vacate* (s 268). This notice may be given during a fixed-term or periodic tenancy agreement.

A tenant may have an action in compensation against their former landlord, however they will not be able to prevent the mortgagee from taking possession of the premises if the procedure under the RTA is complied with. However, in some cases it is possible to negotiate with the mortgagee about the time in which it makes application to VCAT for a Possession Order.

Notices to leave, offences and suspensions

The RTA contains specific provisions relating to violence on "managed premises". Managed premises are defined as rooming houses, caravan parks and "managed high density buildings" which are buildings that contain two or more rented premises and that have an onsite manager.

A *Notice to Leave* is different to a *Notice to Vacate*. The manager of the premises may give the tenant or the tenant's visitor a *Notice to Leave* the premises if they have reasonable grounds to believe that a serious act of violence by the tenant has occurred on the premises, or that the safety of any person on the premises is in danger from the tenant. A *Notice to Leave* must be in the prescribed form (s 368). A *Notice to Leave* has immediate effect. The tenant or visitor must not remain on the premises after receiving the notice (s 369). *Notice to Leave* forms are available to download from the Consumer Affairs Victoria website at www.consumer.vic.gov.au.

A *tenancy* agreement or residency right is suspended when the tenant is given notice, but the tenant must continue to pay rent (s 370). The *suspension* remains in force for two business days, or until VCAT hears any urgent application to terminate the tenancy, or residency, as the case maybe. If the landlord has not made an application to VCAT within two business days, the notice lapses and the tenant can return. During the time they are suspended the tenant must not enter the premises (ss 371, 372). The landlord must not allow any other person to occupy the premises while the suspension is in force (s 377).

It is an *offence* to give a *Notice to Leave* or purported *Notice to Leave* without reasonable grounds.

Note

A person who has been given a Notice to Leave should immediately contact the Tenant's Union for advice. (See "Advice and contacts" at end of this chapter.)

Procedure for ending a tenancy

- Notices to Vacate: form and service
- Possession application
- Possession Orders
- Warrants of Possession

The RTA at section 216 provides that:

> ***Despite any Act or law to the contrary, a tenancy agreement does not terminate and must not be terminated except in accordance with division 1 of parts 6, 7 or 8.***

A tenancy agreement is, therefore, continuing until such time as it is brought to an end in accordance with the termination provisions of the RTA. Any attempt to end a tenancy agreement other than in accordance with the termination provisions (e.g. an illegal eviction) is of no effect.

In order to legally evict the tenant, the landlord must:

- serve a valid *Notice to Vacate* (or have been served with a *Notice of Intention to Vacate* by the tenant);
- make an application to VCAT for a Possession Order;
- be granted a Possession Order by VCAT; and
- purchase a Warrant of Possession, to be executed by the police.

A landlord cannot legally evict a tenant without obtaining a Possession Order and a Warrant of Possession. A Warrant of Possession directs the police to evict the tenant from the property. Only the police may carry out the eviction; the landlord cannot evict the tenant.

The procedures for applying for a Possession Order vary according to the type of *Notice to Vacate* the landlord has served.

Notices to Vacate: form and service

Notices of intention to vacate (tenant)

The tenant's *Notice of Intention to Vacate* must be in writing and signed by the tenant or their agent (s 318). This form is available from Consumer Affairs Victoria and can be downloaded at www.consumer.vic.gov.au.

Form of notices to vacate (landlord)

A *Notice to Vacate* must comply with the five *mandatory* conditions listed at section 319. These require the notice to:

- be in the relevant prescribed form;
- be addressed to the tenant;
- be signed by the person giving the notice, or their agent;
- specify the reason for the giving of the notice (except in the case of a notice for no specified reason); and
- specify the termination date.

An application for Possession Order supported by a *Notice to Vacate* that fails to comply with the above requirements is incapable of invoking the *jurisdiction* of VCAT. Such an application should be struck out at VCAT. The *Notice to Vacate* cannot be amended so as to confer jurisdiction upon VCAT. The prescribed form is available from Consumer Affairs Victoria and can be downloaded at www.consumer.vic.gov.au.

Validity of notices to vacate

Any *Notice to Vacate*should be checked carefully to ensure that it is *valid*. Common mistakes on *Notices to Vacate*that will render them *invalid* include:

- less than the required amount of notice has been given (e.g. the landlord has not allowed two days for delivery, if it was sent by post, or has miscounted the days);

- the landlord is not entitled to serve the notice (e.g. the landlord has served a *Notice to Vacate*for demolition but has not obtained the necessary permits, see "60-day Notices to Vacate", above);
- the landlord has not specified the actual reason for the notice or has not provided sufficient details for the notice (s 319(d)); or
- the notice is not in the prescribed form.

Reason for notice to vacate

The *Notice to Vacate*must state the reason for which it was given (s 319(d)). This requirement is not satisfied by the mere repetition of the words of the *legislation*, rather the notice must be completed with a sufficient degree of detail to enable the tenant to understand the facts being *alleged* as a basis for terminating the *tenancy* (*Smith v Director of Housing [2005] VSC 46*).

An application for possession supported by a notice must specify the acts, facts, matters and circumstances, including the relevant dates being relied on in support of the application (reg 6.26(1) VCAT Rules).

Service of notices to vacate

A *Notice to Vacate* must be given to the tenant personally or sent by registered post to the rented premises, unless VCAT orders otherwise (s 506(3)).

It is not possible to frustrate service by failing to pick up a notice or delaying doing so. If the landlord is able to produce *evidence* that the notice was properly sent then service will be *deemed*. By failing to pick up a notice or delaying doing so, a tenant can effectively deprive themself of the benefit of a notice period. It is, therefore, advisable for a tenant to pick up registered post when they receive a card advising them that there is an article waiting for retrieval from the post office.

It is difficult to disprove service or obtain evidence that is sufficient to override the deeming of service. A tenant may attempt to prove that the notice was not delivered at all or not delivered within time (usually within two days).

The issue of service has been considered by the High Court in *Fancourt v Mercantile Credits Limited* [1983] 154 CLR 87 and proof to the contrary was held to consist of either:

- proof of total non-delivery; or
- proof of non-delivery in time.

It was held insufficient to prove non-receipt.

Possession application

Once a *Notice to Vacate* has been served, the next necessary step for the landlord is to make an application for a Possession Order. VCAT does not have *jurisdiction* to order possession unless the landlord has made an application for a Possession Order.

Validity of applications

Where an application for Possession Order is purported to be supported by a Notice to Vacate, it cannot be made before the *Notice to Vacate* has been given to the tenant (ss 322, 326).

Where a *Notice to Vacate* is served by registered post, the notice will usually be *deemed* to be given two business days after it is posted. Therefore, if an application to VCAT is made at the same time as a *Notice to Vacate* is sent to the tenant, it is *invalid*. That date should be compared with the date that the application was made to VCAT.

If a landlord or mortgagee applies to VCAT for a Possession Order, they must give the tenant a copy of their application within seven days.

Time to apply for a possession order

The landlord has 30 days after the termination date specified in the *Notice to Vacate*or *Notice of Intention to Vacate*in which to apply to VCAT for a Possession Order (s 326).

However, when the landlord is applying for possession on the basis of rent *arrears* or where they have served a notice under section 261 (where a fixed-term *tenancy* is coming to an end) they may use an alternative procedure for obtaining possession. In practice, the alternative procedure is not used very often. If the alternative procedure is used, the tenant should contact the Tenant's Union for further advice (see "Advice and contacts" at the end of this chapter for contact details).

Notice of hearing

After the landlord has applied for a Possession Order the tenant will receive a *Notice of Hearing* from VCAT once a hearing date has been set. The hearing cannot be listed before the termination date specified on the *Notice to Vacate* or *Notice of Intention to Vacate* (s 329).

VCAT sends out a *Notice of Hearing* to all the parties advising them of the date, time and place of the hearing. The tenant should pick up any mail as soon as possible.

Attending the hearing

If the tenant cannot attend the hearing, they should inform VCAT as soon as possible and ask for an adjournment. The tenant should not rely on a statement by the landlord or agent that they will withdraw or *adjourn* the application or, that the tenant does not have to attend the hearing.

At the hearing, the tenant or the tenant's representative should lead submissions about formal matters (e.g. matters concerning the validity of the *Notice to Vacate*) and substantial issues (whether the landlord is entitled to give the notice).

Request to postpone the warrant

If VCAT makes a Possession Order in the landlord's favour, the tenant can ask VCAT to exercise its *discretion* to also make an order postponing the time in which the landlord can request a Warrant of Possession in order to evict the tenant.

VCAT may order that the issuing of the *warrant* be postponed for up to 30 days if satisfied that the tenant would suffer greater hardship if the warrant were not postponed than the landlord (or mortgagee) would suffer on postponement (s 352).

VCAT cannot order that the warrant be postponed when the application relates to an immediate *Notice to Vacate*, or when the order was made under the alternative procedure.

If the tenant is arguing that they will experience hardship, they will need *evidence* to support their claim. Proof could take the form of letters from doctors or social workers. The tenant may also consider providing evidence to VCAT that they have made efforts to find suitable alternative accommodation but have been unsuccessful.

Possession Orders

A Possession Order must include:

- the date by which the tenant must vacate the premises (at most, 30 days after the order is made); and
- a directive that the tenant vacate the premises by this date; and
- a directive to the Principal Registrar of VCAT to issue a Warrant of Possession at the request of the applicant; and
- a warning that if the tenant fails to comply with the above directive they may be forcibly evicted from the premises by a member of the police force (or "authorised person") (s 333(1), (2)).

Review hearings

Where a Possession Order has been made and the tenant did not attend the hearing, the tenant may apply to VCAT for a review hearing. This should be done as soon as the tenant becomes aware of an order of VCAT and no later than 14 days after becoming aware of the order (s 120 VCAT Act). VCAT will consider whether the tenant had a reasonable excuse for not attending the original hearing when determining whether a review should be granted.

The tenant should apply for a review before they are evicted, as once the Warrant of Possession has been executed the *tenancy* agreement is terminated and VCAT has no *jurisdiction* to hear the review. If the possession order was based on an error in law there may be grounds for an *appeal* to the Supreme Court.

Warrants of Possession

Once a Possession Order has been made, the landlord may apply to the Principal Registrar of VCAT for a Warrant of Possession. In most cases they may apply for the *warrant* immediately; however, the landlord must apply within six months of the date the order was made (s 351).

The Warrant of Possession is in a standard form, signed by the Principal Registrar, and directed to the police. It gives brief details of the Possession Order and authorises them to enter the rented premises, by force if necessary, to remove anybody occupying the premises. It does not allow the police to remove any goods from the premises.

A warrant must not be executed before 8 am, after 6 pm, or on a Sunday or public holiday (s 355(4)).

The warrant is *valid* for a specified length of time after it is issued. This is usually 14 days, but VCAT can order that it remain valid for up to 30 days or be extended in certain circumstances (s 351(4)).

If contacted, VCAT Registry can advise the tenant or tenant's representative if and when a warrant has been requested and/or issued. If the warrant has been issued the tenant should contact their local police station to inform them of the date they will be leaving the premises and/or to seek a delay in its execution. While the police can legally act on a warrant on the day that they receive it, they may hold off until the tenant has moved out.

It is important that the tenant remove as many of their goods as they can from the premises before the locks are changed. This will minimise the real risk of loss or damage to the tenant's goods.

If a warrant is executed before a tenant is able to move out, the landlord has obligations regarding the tenant's goods. (For further information, see "Abandoned goods and documents", below.)

Recovering bond money

- Landlord and tenant in agreement
- Director of Housing bonds
- Disagreements
- Recovery of bonds not lodged with the RBTA

Landlord and tenant in agreement

At the end of the *tenancy*, if the landlord and tenant agree on the amount of *bond* to be paid to each of them, they may jointly apply to the Residential Tenancies Bond Authority (RTBA) on a *Bond Claim* form. This form allows the landlord and tenant to specify how much of the bond should be paid to each party. If part of the bond is to be paid to the landlord, the tenant must not have signed the form more than seven days before the tenancy agreement ended (s 412).

Once the RTBA receives the signed *Bond Claim* form it will usually pay the bond into the tenant's nominated bank account by the next working day.

Tenants should never sign a blank Bond Claim form.

Director of Housing bonds

If the Director of Housing paid the *bond*, the landlord and tenant can only apply together if the full amount is to be refunded to the Director. If some of the bond is to be paid to the landlord, the landlord must obtain a VCAT order.

Disagreements

Landlord's application to VCAT

If the landlord wants to retain some, or all, of the *bond* and the tenant disputes the landlord's entitlement to do so, the landlord must make a claim to VCAT against the bond. Such a claim must be made within 10 business days of the tenant vacating the premises (s 417).

If 10 days has passed, the landlord may still make a general compensation claim against the tenant, however they cannot rely on the security of the bond to ensure payment of any claim.

If the landlord makes an application against the bond out of time, the tenant should point this out to VCAT. However, the tenant should also be prepared for the possibility that VCAT may grant the landlord an extension of time under section 126 of VCAT Act and allow them to argue their case.

The sorts of things the landlord may claim against a bond are:

- rent arrears;
- damage to the premises or common areas;
- loss of goods belonging to the landlord;
- failure to keep the premises in a reasonably clean condition;
- loss caused by the abandonment of the premises by the tenant; and
- any charges payable by the tenant for which the landlord may be liable (ss 418, 419).

Where the landlord's application is for loss or damage other than rent *arrears*, the landlord must attach a copy of the *Condition Report* to the application (order 6.25(13) VCAT Rules).

The tenant is not liable for any damage that can be described as fair wear and tear, such as worn carpet or other damage caused by ordinary use of the premises.

The landlord also has a duty to mitigate loss or damage. The landlord may make an application for compensation over and above the amount of the bond.

VCAT may hear applications for bond and compensation at the same time.

Tenant's application to VCAT

If the landlord has neither applied to VCAT nor agreed to the payment of the *bond* to the tenant within 10 business days, the tenant should apply to VCAT for an order that the RTBA pay the bond to the tenant.

Recovery of bonds not lodged with the RBTA

If the tenant has paid *bond* and the landlord or real estate agent has not lodged the bond with the RTBA and is refusing to return all or part of the bond to the tenant at the end of the *tenancy*, the tenant may make an application to VCAT. An application should be made under section 452 of the RTA. The landlord's failure to lodge the bond should be reported to Consumer Affairs Victoria for investigation/prosecution (see "Advice and contacts", below for details).

Abandoned goods and documents

If goods or documents are left in the rented premises after the *tenancy* agreement has terminated, the RTA imposes obligations on the landlord regarding those goods and documents.

If the landlord disposes of, destroys or sells the tenant's goods or documents, and has not complied with the abandoned goods provisions (pt 9 RTA), the tenant or another person who has a lawful right to the goods or documents can apply for compensation (s 396) (see "Compensation", below).

Goods

Destruction and disposal

The landlord may remove and destroy or dispose of goods if they are:

- of no monetary value;
- perishable foodstuffs; or
- dangerous (s 384(1)).

The landlord may also remove and destroy or dispose of the goods if the total estimated cost of removal, storage and sale of all the goods combined is greater than the total monetary value of all the goods combined (s 384). This does not authorise the retention by the landlord of the goods for their own use.

The landlord can request an opinion from the Director of Consumer Affairs Victoria ("Director's statement") as to whether or not particular goods may be disposed of (s 385).

It is not uncommon for the Director's statement to value a tenant's goods at substantially less than what it might cost the tenant to actually replace their goods. As such, it is not uncommon for a statement to direct that the landlord may dispose of the tenant's goods in accordance with section 384. As such, it is advisable that the tenant negotiate with the landlord to retrieve any goods that have been left in the rented premises as soon as possible.

It is not *mandatory* for the landlord to obtain such a statement. However, the RTA protects landlords who dispose of goods in reliance upon a Director's statement. In those circumstances, if the landlord is found liable to compensate the owner of the goods for wrongful disposal, the landlord can apply to VCAT for compensation to be paid out of the Residential Tenancies Fund (s 402). For further information, contact Consumer Affairs Victoria (see "Advice and contacts" at the end of this chapter for contact details).

It is not uncommon for the Director's statement to value a tenant's goods at substantially less than what it might cost the tenant to replace their goods. As such, it is not uncommon for a statement to direct that a tenant's goods may be disposed of in accordance with section 384. It is advisable that the tenant negotiate with the landlord to retrieve any goods that have been left in the rented premises as soon as possible.

Storage

If goods are not to be destroyed or disposed of, the landlord must store the goods in a safe place and manner for at least 28 days (s 386(1)).

Within seven days of storing the goods, the landlord must send notice to the tenant's forwarding address advising them that the goods have been stored, and what the tenant must do to recover them. If the landlord does not have the tenant's forwarding address, they must put a notice in a newspaper circulating throughout Victoria (s 386(2)).

Claiming stored goods)

The owner of the goods may reclaim them at any time before they are sold (s 389(1)).

Before returning the goods, the landlord is permitted to require the owner of the goods to pay the reasonable *costs* of the landlord in notifying the tenant, removing and storing the goods and organising their sale. The landlord must not refuse to give the goods back once those costs have been met (s 389(2)).

Personal documents

The RTA defines personal documents as "official documents, photographs, correspondence or any other document which it would be reasonable to expect that a person would want to keep" (s 3).

An extended definition of "document" is provided at section 38 of the *Interpretation of Legislation Act 1984* (Vic). That definition is very broad and includes books, films and audio CDs.

If the tenant leaves behind personal documents, the landlord must take reasonable care of them for at least 90 days. The landlord may remove them, but must not destroy or dispose of them. Reasonable steps to notify the tenant as to how they can collect the documents must be made (s 380).

If after 90 days the owner of the documents has not reclaimed them, the landlord may dispose of them provided there is no other Act or law requiring that they be dealt with in another manner (s 381).

The owner of the documents may reclaim them at any time before they are disposed of. Before returning the document, the landlord is permitted to require the owner of the documents to pay the reasonable *costs* of the landlord in notifying the tenant, and removing and taking care of the documents (s 382).

Compensation

Compensation claims by the tenant

The tenant may claim compensation from the landlord if:

- the tenant has suffered loss or damage as a result of a breach of duty under the RTA or a *tenancy* agreement by the landlord; or
- the tenant has paid more to the landlord than required under the tenancy agreement or RTA (ss 209, 210).

Such a claim can be made at any time up to six years after the *alleged* loss or damage occurred.

The RTA makes a distinction between those compensation claims based on breaches of a "duty provision" and those based on other breaches.

Where the tenancy remains on foot, a tenant must usually serve a *Notice of Breach*on a landlord before claiming compensation for a breach of duty. *Notice of Breach*forms are available by contacting Consumer Affairs Victoria (see "Advice and contacts" at the end of this chapter for contact details) and can also be downloaded at www.consumer.vic.gov.au.

Evidence

The success or otherwise of the claim will depend on what the tenant is able to establish at VCAT. If the tenant makes a claim, the tenant has the onus of producing *evidence* that established that:

- the landlord breached the *tenancy* agreement or the RTA; and
- the breach caused loss or damage (or occasionally, substantial quantifiable inconvenience); and
- that the amount the tenant is claiming as compensation is reasonable.

VCAT has *jurisdiction* to hear claims of up to $10,000, or a higher amount if the parties agree. As a result of a decision in 2002, VCAT is also able to invoke its Civil Claims jurisdiction (which has unlimited monetary jurisdiction) for residential tenancy matters.

VCAT cannot hear claims for compensation for death, personal injury, or pain and suffering (s 447).

Landlord's breach of duty provisions

If the landlord or agent has committed certain breaches of the RTA or the *tenancy* agreement, the tenant should serve them with a *Breach of Duty Notice* in order to claim compensation (s 208).

The types of breaches for which a notice might be served are discussed above at "Landlord and tenant duties".

> **Note:** A *Breach of Duty Notice* claiming compensation does not have to be served if the tenancy has been terminated. If the tenancy agreement has been terminated, the tenant can make an application for compensation directly to VCAT.

Breach of duty notice

This notice must:

- specify the breach;
- give details of the loss or damage caused by the breach;
- require the landlord to remedy the breach or pay compensation within 14 days;

- state that the landlord must not commit a similar breach again; and
- state that if the notice is not complied with, an application may be made to VCAT.

The notice must be in writing, addressed to the person allegedly in breach of the duty and be signed by the person giving the notice (s 208). The tenant can give this notice in the form of a letter, however given the requirements of (s 208) it is advisable to use the prescribed Breach of Duty Notice form. These forms are available by contacting Consumer Affairs Victoria (see "Advice and contacts", below) and can also be downloaded at www.consumer.vic.gov.au.

It is recommended that the tenant send the Notice by registered mail in case of a dispute about service.

If the landlord does not pay the compensation claimed or comply within 14 days, the tenant may then apply to VCAT for a compensation or compliance order (s 209).

Other breaches

If the landlord or agent has breached the RTA or the *tenancy* agreement but the breach was not of a duty provision (e.g. damage was caused to the tenant's goods during entry by the landlord or their agent), or if the claim is for repayment of moneys overpaid, the tenant may apply to VCAT without first serving any notice (s 210).

However, in some cases it is recommended that the tenant serve a notice on the landlord or agent even if the breach was not of a duty provision. This gives the landlord details of the claim, and an opportunity to agree to payment. The tenant's application to VCAT for compensation must give details of the breach and of the loss or damage caused by the breach (reg 6.28.1(1) VCAT Rules).

Compensation claims by the landlord

The landlord may claim compensation from the tenant if:

- the landlord has suffered loss or damage as a result of a breach of duty under the RTA or a *tenancy* agreement by the tenant; or
- the landlord has paid more to the tenant than required under the tenancy agreement or RTA (ss 209, 210).

Such a claim can be made at any time up to six years after the *alleged* loss or damage occurred.

Defending the claim for compensation

If making a claim for compensation the landlord bears the *onus of proof* and must establish that:

- the tenant breached the *tenancy* agreement or RTA;
- they have sustained loss or damage;
- the loss or damage resulted from the tenant's breach of the *lease* or the RTA; and
- the amount they are claiming is reasonable.

The landlord must provide *evidence* in support of their claim, and must show the tenant or give the tenant copies of any documents or photos they present to VCAT.

While it is the landlord's obligation to prove their claim it is prudent for the **tenant** to provide any evidence that shows:

- they did not breach any duty under the RTA or the tenancy agreement;
- the breach did not cause the loss or damage claimed by the landlord; or
- the amount claimed is excessive/unreasonable in the circumstances.

Landlord to minimise loss

If the tenant agrees that they are liable for some of the landlord's losses, but believe that the amount the landlord is claiming is unreasonable, the tenant should provide *evidence* of this. The landlord has a duty to keep any loss they suffer to a minimum, and if they have not done so, they may not be entitled to claim compensation from the tenant.

Evidence from tenant

If the landlord is claiming for repairs or replacement of property or fixtures, the tenant should get quotations from tradespeople or shops to show that any amount the landlord says they will have to spend (e.g. on replacing carpet, having rooms repainted) is excessive if the tenant believes this to be the case. If the property was damaged or worn before the tenant moved in, the tenant should also point this out and provide *evidence* of this, if available.

The landlord cannot claim the full cost of replacing something that was not new when it was damaged, and VCAT will generally allow for "depreciation" and "fair wear and tear". The landlord's actions in repairing the damage must also be reasonable and in proportion to the amount of damage caused.

The tenant should be prepared to argue about both their responsibility for the damage, and about the amount they should have to pay if VCAT finds that they are responsible.