

Investigation into Office of Housing management of maintenance debts

Submission to the Victorian Ombudsman

18 October 2016

Civil Justice Program – Victoria Legal Aid

© 2016 Victoria Legal Aid. Reproduction without express written permission is prohibited. Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

Disclaimer. This submission includes case examples based on the stories of our clients. For some case examples VLA obtained the consent of the client and de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.

About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. We prioritise tenants who are homeless or at risk of eviction, living with disability (including mental illness), or who are otherwise socially and economically disadvantaged. We provide duty lawyer services daily in the residential tenancies list at the Victorian Civil and Administrative Tribunal (VCAT) in Melbourne and if able to do so on an as needs basis around the state. We also provide limited casework services for eligible tenants with ongoing hearings at VCAT and occasionally assist people seeking judicial review in pursuing appeals to the Supreme Court. VLA is represented on the VCAT Residential Tenancies User Group and the Federation of Community Legal Centre's Tenancy Working Group.

Key contacts

Dan Nicholson

Executive Director, Civil Justice, Access and Equity

Executive Director for the Western Suburbs and Barwon Region

(03) 9269 0698

Dan.Nicholson@vla.vic.gov.au

Damian Stock

Acting Program Manager, Social Inclusion

Civil Justice Program

(03) 9269 0698

Damian.Stock@vla.vic.gov.au

1. Executive Summary

The Victorian Ombudsman has commenced an ‘own motion’ investigation in the Office of Housing’s processes for determining and pursuing maintenance debts against public housing tenants. This submission to the Ombudsman’s investigation is based on VLA’s practice experience assisting disadvantaged tenants.

The Department of Health and Human Services (“DHHS”) current practice in respect of maintenance claims alleges debts, and commences legal proceedings, without assessing whether the debt has arisen as a consequence of a tenant breaching their legal obligations. It is the experience of VLA that DHHS fails to properly take into account the profound disadvantage of many tenants in the public housing system, such as those experiencing family violence or suffering from language or literacy disadvantage. The DHHS MCAT practice may also breach the Victorian Government’s Model Litigant Guidelines.

VLA has several concerns about the current process by which DHHS makes claims against tenants, particularly:

- The poor attendance and participation rates for tenants at VCAT hearings;
- The absence of any direction given by DHHS to tenants to sources of advice and assistance;
- The lack of clarity in letters articulating DHHS claims; and
- The implications of tenancy-related debts for tenants, in terms of future public housing applications and bond loans.

VLA submits that the Ombudsman should seek additional evidence and statistical data for the purposes of this investigation, and sets out suggestions as to the further material to be sought.

2. What is a Maintenance Claim Against Tenant?

The DHHS is the largest landlord in Victoria. DHHS manages public housing stock on behalf of the Director of Housing and lets this housing to disadvantaged Victorians under residential tenancy agreements. When a tenancy ends, DHHS routinely undertakes repairs, renovations and improvements to the property before it is let to new tenants. On some occasions this work takes place during the course of the tenancy.

DHHS has commercial contracts with various private companies who undertake work on DHHS properties across the state. When a tenancy ends these contractors submit an invoice for work done. DHHS logs this invoice, and may generate a Maintenance Claim Against Tenant (“MCAT”). DHHS then forwards the MCAT, together with a letter of demand, to the former tenant. Such letters usually tabulate the claims of DHHS, setting out item codes, a brief description of work done, and the total cost (see example at **Annexure A**).

In VLA’s experience, this process appears to be automated and raises considerable concerns. There appears to be little human intervention in the process of issuing the letters of demand. This can lead to large and inappropriate compensation claims being made against socially and economically disadvantaged former tenants.

VLA understands that on 9 February 2015, DHHS implemented changes to its practice and introduced a new “Tenant Property Damage Operational Guideline”. It remains unclear whether the introduction of this guideline has improved the process of issuing MCATs, or whether deficiencies in the guideline, or inconsistencies in its application, render it ineffective. VLA is continuing to receive referrals of

matters involving MCAT claims, and submits that the new guideline is not an answer to the concerns articulated below, nor a reason for the Ombudsman to discontinue this investigation.

3. Legislative framework underpinning compensation claims by landlords

Under the *Residential Tenancies Act 1997* (Vic) (“RTA”) a landlord may seek compensation from a tenant for any financial loss incurred as a direct result of a breach of the RTA or the tenancy agreement. The RTA and the Standard Form Tenancy Agreement produced by Consumer Affairs Victoria impose certain duties on tenants in regards to their use of the property. Tenants may be liable to repay costs incurred by a landlord when they have failed to take reasonable care to avoid damaging the property,¹ not left the premises in a reasonably clean condition,² or installed fixtures without the consent of the landlord.³ The cause of action giving rise to a compensation claim commences with a landlord being able to prove, on the balance of probabilities, that a tenant has breached one of their duties under the RTA. The Tribunal must then be satisfied that the breach has caused the loss that is claimed, and that the amount is reasonable, taking into account the factors at s 211 of the RTA.

Each claim for compensation requires an individual assessment of the particular circumstances of the tenancy in accordance with the above principles. VLA is concerned that the automated system for issuing MCATs does not provide for a proper assessment of liability on the part of the tenant and DHHS appears as a consequence to be demanding payment in some circumstances without legal justification. A related concern is that it is unclear whether the MCAT process takes into account the constraints on enforceability imposed by the 6-year limitation period under s. 5 of the *Limitation of Actions Act 1958* (Vic).

Director of Housing v Dennaoui (Residential Tenancies) [2013] VCAT 415 (9 April 2013)

Ms Dennaoui resided at a DHHS property at Gladstone Park for several years, but moved out on 19 December 2010. On 6 January 2011 the Broadmeadows Housing office sent out a lengthy MCAT letter containing a list of work items totalling \$9,601.16, and alleged Ms Dennaoui was responsible for the cost of this work. Based on this letter DHHS made an application to VCAT claiming compensation of \$9,601.16. At the same time, DHHS made a second application for compensation for \$4,217.70 which comprised 5 separate MCAT letters dated 25 June 2006, 31 December 2009, 13 May 2010, 29 September 2010 and 23 November 2010. The total amount of these two claims was \$13,818.86.

At the VCAT hearing the Tribunal struck out both applications finding that they were an abuse of process. VCAT found that DHHS had split its claims into two separate applications in order to avoid paying the higher application fee which a claim of more than \$10,000 would have attracted.

4. Family Violence

It is DHHS policy not to pursue tenants for the cost of damage caused by family violence. In VLA’s experience, however, it is common for DHHS to pursue MCAT claims against a tenant which relate to damage caused by their violent partner. VLA is concerned that the automated MCAT system does not enable these considerations to be fully investigated.

¹ RTA s 61.

² RTA s 63.

³ RTA s 64.

The impacts of family violence debts on tenants was discussed in the Report of the Royal Commission into Family Violence.⁴

Director of Housing v Zaki (Residential Tenancies) [2015] VCAT 325 (18 March 2015)

Hanan Zaki lived in a DHHS property in West Footscray for seven years with her son George. During the tenancy George caused damage at the property including kicking holes through walls and damaging carpets. In order to prevent this behaviour Ms Zaki applied for a family violence intervention order, which prevented George from visiting the property or causing damage. One year into the tenancy, George caused damage which led the Director to replace the carpets.

When Ms. Zaki moved out of the property, the Footscray Housing Office issued Mrs Zaki with a \$1,180.69 MCAT. Despite the damage occurring in the context of family violence the Footscray Housing Office proceeded to make an application to VCAT for the \$1,180.69. At the hearing on 3 February 2015 VCAT found that it did not have jurisdiction to assess whether the Director of Housing's decision was consistent with policies on family violence. Given the age and depreciation of the carpets the Tribunal only awarded \$590.34.

Whether DHHS complies with its own policies is not something VCAT has jurisdiction to consider. A common refrain by VCAT Members is that its assessment is based purely on whether a breach of the RTA can be proven, and whether the amount sought as a direct consequence is reasonable, taking into account fair wear and tear, and depreciation. VCAT Members often state that the appropriate action for a tenant alleging non-compliance with DHHS policy is for the tenant to complain internally to DHHS. However, this does not prevent DHHS, like any other landlord, from bringing a claim for compensation based on breaches of the RTA.

5. Breach of Model Litigant Guidelines

The DHHS MCAT practice may breach the Victorian Government's Model Litigant Guidelines. The Victorian Model Litigant Guidelines set standards for how the State and its agencies should behave as a party to legal proceedings. We are concerned that DHHS's current policy statement makes no reference to the Model Litigant Guidelines.

DHHS's conduct in litigating MCATs may breach Model Litigant Guidelines in relation to their duty to act fairly⁵ and consistently in litigation⁶ and particularly to make an early assessment as to prospects of success.⁷ It may also be in breach of the duty to narrow the issues in dispute⁸ and not make another party prove a matter which DHHS already knows to be true.⁹ Lastly the Model Litigant Guidelines require agencies such as DHHS when participating in alternative dispute resolution or settlement negotiations to have authority to settle the matter.¹⁰

Public housing tenants frequently approach the VLA duty lawyer service at VCAT on the day of a hearing seeking advice and assistance. In many cases little negotiation has taken place prior to the hearing. In VLA's experience, housing workers will often arrive at VCAT unwilling or unable to

⁴ *Royal Commission into Family Violence Report 2016*, Volume II, Chapter 9, "A Safe Home", 66-77.

⁵ Model Litigant Guideline 2(a).

⁶ Model Litigant Guideline 2(b).

⁷ Model Litigant Guideline 2(d)(i).

⁸ Model Litigant Guideline 2(g)(iii).

⁹ Model Litigant Guideline 2(g)(i).

¹⁰ Model Litigant Guideline 2(h)(i).

negotiate with the tenant or their representative. Housing workers commonly inform VLA lawyers that they do not have authority to settle the dispute and that they have instructions from management, consistent with policy, that the claim ought to be put before a VCAT Member to determine the tenant's liability for the damage. Even when a tenant makes appropriate concessions and agrees to repay loss suffered as a result of a breach of the RTA, DHHS housing workers commonly state that they require determination by the Tribunal and 'an Order for the file'.

6. Tenant attendance at MCAT VCAT hearings

Poor tenant attendance and participation at VCAT hearings is a persistent problem. VLA has provided detailed submissions outlining the extent of this problem to the Victorian Government's Fairer Safer Housing Review of the Residential Tenancies Act.¹¹ The only published statistic suggests that only 20 per cent of tenants attend their VCAT hearings.¹²

When tenants do not attend their VCAT hearing, DHHS is generally awarded a much larger proportion of their claim than they would if a tenant was present. While the approach is not always consistent, most VCAT Members will generally make inquiries as to the age of the premises for the purposes of assessing depreciation. However, in the absence of a tenant, the Tribunal will generally accept that the tenant has breached a relevant duty in the RTA that has caused the damage, lack of cleanliness or improper modifications that DHHS is alleging requires rectification. Most commonly VCAT is satisfied of the claim on production by DHHS of the quote or invoice for rectification works. Often there is no need for photographs of the damage or state of the property to be produced, as would generally be required in a compensation claim by a private landlord, as a professional tradesperson has attended and assessed that work is required. Without a tenant providing contradictor evidence, the Tribunal will generally accept that the condition of the property is sufficient proof that the tenant must have breached an obligation in the RTA.

Director of Housing v Young [2002] VCAT 227 (11 April 2002)

Debbie Young lived at a DHHS property with Jamie Mitchell. On 18 March 2001 Mr Mitchell vacated the premises due to 'unrelated legal proceedings'. On 17 May 2001 DHHS found that the premises had been abandoned. DHHS was of the view that Ms Young had left the property in a damaged and unmaintained condition, and issued a \$14,247.24 MCAT for work related to 'reglazing windows and locksmiths'. At the VCAT hearing, DHHS adjusted its claim to \$13,678.86.

Unfortunately, Ms Young did not attend her VCAT hearing, and in the absence of any contrary argument VCAT found that DHHS had proved its claim and ordered that Ms Young pay compensation of \$13,678.86.

Had Ms Young attended her hearing she would have had a strong case to argue that reglazing all of the windows is fair wear and tear, and not damage she was responsible for. Ms Young would have further been able to make submissions about depreciation, mitigation and provided an explanation for why she had to abandon the property suddenly without returning her keys.

¹¹ VLA, 'Dispute Resolution' (Submission to the Fairer Safer Housing Review, July 2016) 15-16

<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#residential_tenancies_2016>. See also, Homeless Law 'There's no place like home' (Submission to the

Fairer Safer Housing Review) page 32.

¹² The Hon Justice Ian Ross, *Transforming VCAT* (Discussion Paper, VCAT 2010) 9.

7. Engagement of debt collection agencies for judgement-proof tenants

Tenants often report DHHS's use of debt collection agencies to recover debts associated with MCATs. DHHS's policy says that the Director of Housing reserves the right to engage a debt collection agency if the tenant fails to pay a compensation order.¹³ VLA is concerned that DHHS is utilising private debt collection services, given what it knows of the circumstances of its tenants.

Kathy's experience

Kathy was a tenant living in a DHHS property in Dandenong. She lived there with her three children and her partner James. James was involved in drug trafficking and became increasingly violent towards Kathy. One day while Kathy was away from home, associates of James came to her home and held her children at gun point for several hours.

DHHS were notified by the Police and they intervened removing Kathy's children from her care. DHHS told Kathy that they would not return her children unless she moved away from Melbourne and ended her relationship with James. As a consequence, DHHS offered Kathy a second tenancy outside of Melbourne. When James discovered that Kathy had left him, he went to the property and caused a considerable amount of damage. Police attended and produced a brief incident report labelling it as 'burglary and property damage' noting the context of past family violence by James.

Several years later, in 2014, DHHS issued Kathy with a \$20,558.80 MCAT. The Tenants Union of Victoria was engaged to assist Kathy however negotiations failed to resolve the dispute.

In January 2015 VCAT dismissed the entire claim relating to property damage accepting that Kathy was not responsible for James' conduct. VCAT did however award compensation of \$1,067.85 for cleaning and rubbish removal. Kathy conceded responsibility for this despite the desperate circumstances under which she fled the property.

At the conclusion of the hearing the Dandenong Housing office engaged Recoveries Corp, a private debt collection company. Recoveries Corp sent Kathy threatening letters and harassed her with multiple phone calls and text messages each day. This caused Kathy significant anxiety and stress.

Kathy wrote to Recoveries Corp advising that she was 'judgment proof', and that contact with her should cease. To this day she continues to receive on average two phone calls week demanding payment of the debt.

8. Language used in MCAT letters can be intimidating and unclear

MCAT letters often contain no specific allegations about what the tenant is said to have done or what damage has been caused. Instead the letters contain a vague description of the work the contractor has undertaken. These descriptions can be very unclear. For example, these descriptions can include statements such as:

"GENRWL037 Repair plasterboard 0.01 to 0.1m2 using backing cleats, plasterboard, tape & finishing coat – rate per patch. (THRO) \$258.75"

"GENRC1010 Supply labour – all trades. (KIT) clean diffuser in kitchen \$57.26"

¹³ DHHS Tenant Property Damage operational guidelines, 10.

“GENRGH56 Re-pin cylinder only (THRO) repin remaining doors \$35.28”

““ELECER105 Check entire electrical installation – power \$61.56”

“ELECER162 Remove shade fixed to batten holder or flex drop – Rate per shade. (THRO) Remove light shades throughout \$53.44”

These letters do not set out in any detail what is alleged and, importantly, how this constitutes a breach of the RTA or the tenancy agreement. Consequently, tenants who attend their VCAT hearing are often confused and not in a position to defend the claim. This raises fundamental concerns that tenants are not being afforded procedural fairness.

DHHS, like all other landlords who claim compensation, should be required to set out in detail the allegations about the tenant’s conduct and the extent of the damage caused. They should further identify the provision under the RTA which has allegedly been breached and explain how that has caused financial loss and why the amount is reasonable.

Given the high proportion of public housing tenants who are non-English speaking, have limited education or suffer from literacy issues, it is incumbent on DHHS to use plain English language and make interpreting services available where appropriate. It may be appropriate that DHHS provide professional written translation of critical documents such as letters demanding payment of compensation.

9. Prior debts as a barrier to further applications for public housing and bond loans

DHHS policies prohibit a tenant from applying for the bond loan scheme¹⁴ or public housing¹⁵ unless the tenant agrees to accept responsibility for damage and enter into a repayment plan for debts associated with past tenancies.

VLA is concerned that there may be tenants who are currently excluded from public housing or accessing the bond loan scheme because of a prior debt resulting from an MCAT. VLA is concerned that many of these people may be homeless or at risk of homelessness and may be forced into insecure housing such as rooming houses and other arrangements.

10. MCAT letters do not inform tenants of where they can seek advice.

VLA is concerned that MCAT letters do not encourage or advise tenants to seek independent legal advice. The letters also do not advise tenants that they have a right to dispute the claim at VCAT if they do not agree with it.

All future letters issued by the Director of Housing to their tenants in relation to compensation claims should include a detailed statement of options that are available to a tenant to dispute the claim, and referrals to legal service providers.

¹⁴ Bond Loan Scheme Policy and Procedures Manual, page 17.

¹⁵ Allocations Manual, Chapter 1, page 10.

11. Further information relevant to the Ombudsman's investigation

VLA notes the Ombudsman's powers under the *Ombudsman Act 1973* to compel DHHS and others to provide evidence and compile statistical data for the Ombudsman about the MCAT practice. In our view the following information would be relevant to this investigation:

DHHS tenancies which ended by termination or transfer over the last 10 years:

1. How many resulted in MCATs being issued by DHHS to tenants?
2. How many MCAT invoices were reduced by the Department before applying to VCAT?
3. How many MCATs resulted in payment plans not incorporated into VCAT orders?
4. How many applications were made to VCAT in relation to MCAT debts?
 - 4.1. How many of those resulted in compensation being awarded?
 - 4.2. What is the average amount of compensation claimed?
 - 4.3. How many hearings were attended by tenants the first time the matter was listed?
 - 4.4. What is the average amount of compensation awarded where tenants attended their VCAT hearing?
 - 4.5. What is the average amount of compensation awarded where tenants did not attend?
5. How many of those tenants were contacted by the Department prior to issuing the MCAT letter?
6. How many of those tenants were contacted prior to the Department applying to VCAT?
7. How many reviews have been sought by tenants of VCAT orders in relation to MCAT proceedings?
 - 7.1. How many reviews were granted by the VCAT?
 - 7.2. What was the reduction in the amount ordered by VCAT at the review hearing?
8. How many tenants are currently on payment plans in relation to MCAT debts or VCAT orders in relation to MCAT compensation claims?
 - 8.1 Of these tenants what proportion are in receipt of Centrelink benefits?
9. How much revenue has the Department received from repayment plans associated with MCAT debts and VCAT compensation orders?
10. What is the arrangement with debt collection agencies in relation to collection of these debts –
 - 10.1. Is there a formal agreement?
 - 10.2. Are their protocols and protections?
 - 10.3. What debts or debtors are considered appropriate for referral to a collection agency?
 - 10.4. What percentage of the debt is retained by the debt collection agency?
11. How many debts arising from MCAT proceedings have been assigned to debt collection agencies?
 - 11.1. How many of these debtors are receiving an income support payment from Centrelink (as opposed to an allowance or family payment related to their taxable income)?
 - 11.2. What is the total amount of debts allocated to debt collection agencies?
 - 11.3. What is the total amount that has been recovered by debt collection agencies?
 - 11.4. How much does DHHS pay debt collection agencies each year for enforcement of debts with the department?
12. How many applications for public housing were refused due to an MCAT debt?
13. How many applications for bond loans have been refused due to an MCAT debt?
14. Is DHHS continuing to accept repayments from tenants who have had complaints made who had orders made at VCAT in their absence?