Tenants' Union of Tasmania

Tenancy matters!

The case for transferring tenancy disputes from the Magistrates Court to TASCAT

nipaluna/Hobart, July 2024

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The Tenants' Union of Tasmania wish to acknowledge the Tasmanian Aboriginal community, the palawa/pakana people, who have survived invasion and dispossession, and who continue to maintain their identity, culture, and Aboriginal rights. We pay respect to the palawa/pakana elders past and present.

Executive Summary

The purpose of this paper is to determine whether, with reference to other Australian states and territories, all or part of the jurisdiction over disputes under the *Residential Tenancy Act 1997* should be transferred from the Magistrates Court and the Residential Tenancy Commissioner to the Tasmanian Civil and Administrative Tribunal.

This paper finds that the status quo is not tenable. Parties to residential tenancy disputes are currently subject to inordinate delays in the Magistrates Court, particularly for matters that are considered less urgent. There is a lack of consistency and transparency of decision making both before the Magistrates Court and the Residential Tenancy Commissioner. Parties are dissuaded from seeking justice for a number of reasons, including the daunting nature of the Magistrates Court.

Whilst the stated purpose of the *Residential Tenancy Act 1997* was to provide certainty and clarity to landlords and tenants, we find that it fails in this goal. Relative to the comparable legislation in other jurisdictions it is skeletal, is drafted in such a way as to leave important matters ambiguous, and fails to provide appropriate remedies and processes for dispute resolution.

Ultimately it is recommended that the Magistrates Court's jurisdiction is transferred to the Tasmanian Civil and Administrative Tribunal, with the Residential Tenancy Commissioner to retain their powers to make certain orders and determine certain disputes. In many cases, the Residential Tenancy Commissioner is best placed to provide efficient, cheap and stress-free dispute resolution. We find that if the Residential Tenancy Commissioner's jurisdiction was given to the Tasmanian Civil and Administrative Tribunal it would potentially dissuade parties from seeking justice, it would greatly increase the resources needed to keep the tribunal operating efficiently, and, due to the High Court's decision in *Burns v Corbett* [2018] HCA 15, may *increase* the number of residential tenancy matters on the Magistrates Court's caseload.

We do not recommend that this change is made without a number of concurrent reforms being made to the *Residential Tenancy Act 1997* and to the tribunal. If those recommendations are not adopted, and the jurisdiction is transferred in a fashion that makes the bare-minimum number of changes to the *Residential Tenancy Act 1997* and the Tasmanian Civil and Administrative Tribunal legislation, then transferring the jurisdiction is unlikely to improve outcomes.

1. Background to the Residential Tenancy Act 1997

It is fair to say that Tasmania has taken a slow and steady approach to the regulation of the residential tenancy sector. Prior to the *Residential Tenancy Act 1997* (the "RTA") coming into force in 1998, residential tenancies in Tasmania were governed by the *Landlord and Tenant Act 1935* in conjunction with the common law and individual lease agreements. For both landlords and tenants the law was unclear and inaccessible, reliant on knowledge of case law and the ability to parse the particularly archaic language of the *Landlord and Tenant Act 1935*. If a tenant ignored an eviction notice, the landlord was required to file a writ of summons, a judgment by default, and a writ of possession in the Supreme Court. For tenants in particular, their rights were minimal, poorly articulated, and what rights they had were difficult to enforce. For example, bonds were held by landlords and were rarely returned, at the end of a fixed term lease the landlord had the right to retake possession without first providing notice, and landlords were not required to carry out repairs and maintenance.

To varying degrees, it was a similar state of affairs across the country when the McMahon federal government established the Commission of Inquiry into Poverty in 1972. In its second report (known as the Sackville Report), released in 1975, the commission investigated the intersection between law and poverty in Australia. The commission found the state of residential tenancy law to be gravely deficient in almost all aspects.[1] Procedurally, it was difficult to navigate for both landlords and tenants without legal assistance (though presumably landlords were more likely to have access to such assistance). In terms of substantive rights, tenants had few. The Commission recommended, *inter alia*:[2]

- That disputes between landlords and tenants should be dealt with by specialist residential tenancies boards, rather than courts;
- All rental properties must be fit for human habitation;
- The tenancy boards should be given the power to order landlords to carry out repairs;
- Bonds should be restricted to the equivalent of one month of rent, and lodged with and held by the boards;
- The boards should be given the power to determine disputes over the bond, with landlords bearing the onus of proving any losses attributable to the tenant;

[1] Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, October 1975) 59.
[2] Ibid 59-93.

- The grounds on which a landlord can evict a tenant should be restricted, but the eviction process should be streamlined;
- The board should be given power to grant relief against forfeiture;
- Rent increases should be limited to market rents; and
- All lease agreements should incorporate statutory rights and obligations.

The Australian Housing and Urban Research Institute (AHURI) summarised the Sackville Report as recommending a consumer protection model of residential tenancy law that provided:[3]

1. Prescribed forms, terms, charges and notice periods;
2. Accessible dispute resolution;
3. Market rents; and
4. Ready but orderly eviction.

The Sackville Report largely formed the basis for all residential tenancy legislation that followed across the country, including the RTA. Despite the significant changes prompted by the Sackville Report, residential tenancies in Australia are still "lightly regulated" relative to comparable countries.[4]

Also in 1975, Australia ratified the International Convention on Economic, Social and Cultural Rights, which establishes a right to adequate housing.[5] Something similar has recently been incorporated into Tasmanian law via the *Homes Tasmania Act 2022*, which "recognis[es] that housing is a fundamental human right".[6]

The United Nations Committee on Economic, Social and Cultural Rights has since expanded on what the right entails:[7]

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[3] Chris Martin et al., *Regulation of Residential Tenancies and Impacts on Investment* (Australian Housing and Urban Research Institute Limited, Final Report No. 391, November 2022) 28.
[4] Ibid 6.
[5] United Nations, *Treaty Series*, vol. 993, 3.
[6] *Homes Tasmania Act 2022* s 3(b).
[7] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing* (Art.11(1)), General Comments, 13 December 1991 (Sixth session, 1991), at paragraph 18 as found in Tenants' Union of Queensland response to the Residential Tenancies Authority Tenancies Act Review Policy Review Paper June 2007: The Case for a New Tenancy Tribunal in Queensland – a Legal Argument 2007 84 & 85.

> *Instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.*

And:[8]

> *Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.*

The UNCESC has also provided that:[9]

- The eviction process must be reasonable and proportionate;
- Tenants need to be given access to free legal advice and representation;
- Tenants need to be afforded due process, such as reasonable notice periods;
- Forced evictions should not result in homelessness; and
- The right is to live somewhere in security, peace and dignity.

In response to the Sackville Report, in 1976, the Attorney-General asked the Tasmanian Law Reform Commission to make recommendations regarding reform of residential tenancy law in Tasmania. The recommendations of final report, published in 1978, included:[10]

- "Self-help" remedies should be abolished as much as is possible;
- That a "rentalsman" should be established as part of Consumer Affairs to mediate disputes, as opposed to a residential tenancies board;
- That a specialist residential tenancies tribunal be established to determine disputes;

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[8] Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The Right to Adequate Housing* (Art.11(1)): Forced Evictions, 20 May 1997, (Sixteenth Session, 1997) at para 14 & 15.
[9] Ibid.
[10] Law Reform Commission of Tasmania, *Report and Recommendations on the Common Law and Statute Law in Tasmania Relating to Residential Landlord and Tenant Law* (Report No. 19, 1978) 10-26.

- That the tribunal not be bound by the rules of evidence, but be constituted by Magistrates, or an independent single appointee;
- Landlords should only be able to evict tenants on limited grounds;
- That tenants can dispute eviction via the tribunal, and the tribunal should have discretion whether or not to make the eviction order;
- All eviction notices are filed first with the rentalsman, who allocates a return date with the tribunal, and is able to act as gatekeeper of first instance with respect to the form of the notice;
- Any eviction notice or rental increase given within three months of a tenant complaining about the landlord or attempting to enforce their rights should be presumed to be retaliatory, and the landlord should bear the onus of showing otherwise;
- That local councils inspect rental premises before a tenancy begins in order to ensure that they are fit for human habitation;
- If they are not fit for human habitation, the rent for the premises is to be controlled or fixed;
- If required repairs are not carried out by a landlord within 14 days, the tenant may pay rent to the rentalsman, who is to hold it in trust until the repairs are carried out, or until the tribunal rules that the landlord is not required to carry out the repairs;
- The tribunal should have the power to award compensation in the event that a landlord does not carry out required repairs; and
- Bonds should be limited to the equivalent of three weeks rent and held by the rentalsman until the end of the tenancy.

Despite the report, no residential tenancy legislation followed.

In 1993, the Minister for Consumer Affairs established the Consumer Affairs Advisory Committee to again provide recommendations as to whether and how the residential tenancy law should be reformed. The resulting report was released in 1995.[11] The report identified that:[12]

- The law was confusing, with landlords largely able to dictate the terms of a lease agreement, and tenants lacking clearly articulated rights. The *Landlord and Tenant Act 1935* was not fit

[11] Consumer Affairs Advisory Committee, *Residential Tenancy Law Reform* (Report to the Minister for Consumer Affairs, June 1995).
[12] Ibid 15-38.

for purpose, being primarily concerned with rural rather than residential tenancies, and being drafted in archaic language;

- The only way to ensure certainty and market stability was to enact specific legislation for residential tenancies;
- There were no clear rules for the "management, return and […] retention of bonds", though the report did not recommend the establishment of a centralised authority to hold and disperse all bonds; and
- The dispute resolution was confusing and involved too many potential parties. That in order to reduce delays and costs, as few disputes as possible should require judicial consideration, with matters first going through a structured mediation/conciliation.

The Consumer Affairs Report directly led to the *Residential Tenancy Act 1997*. The second reading speech of the then Residential Tenancy Bill 1997 provides crucial insight into what the Rundle government intended to achieve with the RTA:[13]

> *The need to reform residential tenancy law in Tasmania has been recognised for some years. Both property owners and tenants have argued for a better system of managing residential tenancy arrangements and that existing laws are inadequate in regulating residential tenancy relationships in this State. Few residential tenancy issues are satisfactorily resolved under the existing law and most tensions within the market arise because of the absence of clear rules, and clearly stated rights and responsibilities, for the parties to residential tenancy agreements.*
>
> […]
>
> *Mr Speaker, the approach taken in this bill has been to provide a framework which will enable the parties to residential tenancy agreements to interact within clear and consistent guidelines. From this perspective, this bill does not seek to prescriptively regulate the market and is much less intrusive than similar legislation in most other States and Territories. As a result, the bill does not prescribe the contents of tenancy agreements, or contain schedules*

[13] Tasmania, *Parliamentary Debates*, House of Assembly, 28 November 1997, 131-134 (Ray Groom, Minister for Justice).

or forms that set out the sort of content that must be included, although there are some schedules to the bill, but creates minimum standards for tenancy agreements.

In short, it was intended that the RTA provide to tenants and landlords clarity and certainty with respect to their rights and obligations, without being overly prescriptive with respect to terms and forms. In other words, with reference to the standard Australian tenancy law model identified by AHURI, the RTA was intended to provide accessible dispute resolution, market rents, and ready but orderly termination, but not so much prescribed forms and terms.

It is respectfully suggested that these stated goals are somewhat in tension with each other. To use the Minister's own example, prescribed lease agreements and terms would provide a high degree of certainty and clarity to the parties. It is also suggested that, whilst the RTA did not, and still does not, prescribe a standard form lease agreement, the rights and obligations of landlords and tenants are still largely set by the RTA – freedom of contract is limited. This is because, per section 10(3) of the RTA, the provisions of the RTA form part of every residential tenancy agreement and, per section 15, terms of a residential tenancy agreement that are inconsistent with the RTA are of no effect. As such there is a *de facto* standard form lease agreement – the RTA itself.[14]

The RTA adopted many – but not all – of the recommendations made in the Sackville, Law Reform Commission, and Consumer Affairs reports. Of particular salience is that the Government declined to establish a tribunal to determine disputes. Instead, the Magistrates Court (the "Court") was granted jurisdiction over most disputes. The RTA also established the office of the Residential Tenancy Commissioner (the "RTC"), within the then Office of Consumer Affairs. The Residential Tenancy Commissioner, at that point, was similar to the rentalsman proposed in the 1978 report, with little power to make binding decisions, only having original jurisdiction over bond disputes.

In the years since it was first enacted, the RTA has been expanded, with particularly large reforms passing in 2003 and 2013. Though, relative to the equivalent legislation in other jurisdictions the RTA remains skeletal. The RTA is a mere 28,000 words long, briefer than all its counterparts by at least 7,000 words, and dwarfed by Victoria's 200,000 word *Residential Tenancies Act 1997*.[15]

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[14] *Director of Housing v Parsons* [2019] TASFC 3 per Estcourt J at [46].

[15] Chris Martin et al., *Regulation of Residential Tenancies and Impacts on Investment* (Australian Housing and Urban Research Institute Limited, Final Report No. 391, November 2022) 57.

The respective roles of the Court and the RTC have changed significantly, with the RTC being given original jurisdiction over many disputes.

2. Current division of jurisdiction under the RTA

Currently, the RTA apportions jurisdiction as follows:

Provision of the RTA	**RTC**	**Magistrates Court**
Mediation and conciliation of boarding premises disputes (section 8(1)(c))	Original jurisdiction	
Inconsistent provisions (s16)		Original jurisdiction
Unreasonable rent increases (s23)	Original jurisdiction	Appellate jurisdiction
COVID-19 repayment plan (s24A)	Original jurisdiction	Appellate jurisdiction
Determination of apportionment of security deposits (s29G)	Original jurisdiction	Appellate jurisdiction
Liability to reimburse tenant for repairs (s36)		Original jurisdiction
Order to carry out repairs (s36A)	Original jurisdiction	Appellate jurisdiction
Compliance with smoke alarm provisions (s36H)	Original jurisdiction	
Approval of open fireplaces (s36M(4))	Original jurisdiction	
Exemption from minimum standards (s36P)	Original jurisdiction	
Termination of lease for COVID-19 related hardship (s38A)	Original jurisdiction	Appellate jurisdiction
Order for termination of lease (s41)		Original jurisdiction
Order for vacant possession (s45)		Original jurisdiction
Order declaring abandonment (s47A)		Original jurisdiction
Order permitting sale of abandoned goods (s48(1)(c))		Original jurisdiction
Order to comply with RTA and lease agreement in boarding premises (s48I)	Original jurisdiction	Appellate jurisdiction
Order to comply with provisions relating to database listings (s48ZF)	Original jurisdiction	
Order to ensure premises are secure (s57(1B))		Original jurisdiction
Order to add, alter, or remove a lock or security device (s57(3))		Original jurisdiction

The Magistrates Court of Tasmania is, by way of number of matters dealt with, the largest court in the state. There are four courts, based in Hobart, Launceston, Devonport, and Burnie, with additional less frequent sittings in smaller regional centres across the north of the state. As of April 2024, the court consisted of the Chief Magistrate and 15 full-time Magistrates. Nine of the full-time Magistrates, including the Chief, are based in Hobart, with three in Launceston and two each in Devonport and Burnie.

It has a wide range of jurisdiction, covering, inter alia, residential tenancy disputes, civil claims under $50,000, certain administrative appeals, and coronial inquiries. Most of its workload, however, consists of criminal matters - largely summary offences. Three of the Magistrates specialise in coronial matters, but the others all deal with criminal matters. There are no specialist civil division Magistrates, though some hear more civil matters than others.

The position of the Residential Tenancy Commissioner was established by Part 2 of the RTA. The RTC and their staff operate under the umbrella of Consumer, Building and Occupational Services ("CBOS") (formally Consumer Affairs), part of the Department of Justice.

The responsibilities of the RTC have greatly expanded since the RTA can into force. In 1998, Part 2 provided:

> ***7. Residential Tenancy Commissioner***
>
> *(1) The Minister may appoint a person as the Residential Tenancy Commissioner for the period, not exceeding 5 years, specified in the instrument of appointment.*
>
> *(2) An appointment under subsection (1) is subject to any terms and conditions the Minister determines.*
>
> *(3) The Commissioner may vacate, or be removed from, office in accordance with Schedule 1.*
>
> ***8. General functions and powers of Commissioner***
>
> *(1) The function of the Commissioner is to determine disputes arising in relation to the disbursement of security deposits.*
>
> *(2) The Commissioner may do anything that is necessary or incidental to carry out his or her functions.*

9. Delegation by Commissioner

The Commissioner may delegate to any person any of his or her powers or functions, other than this power of delegation.

Whilst sections 7 and 9 have remained unchanged, section 8 now reads:

8. General functions and powers of Commissioner

(1) The following are the functions of the Commissioner:

(a) to determine disputes arising in relation to the disbursement of security deposits;

(b) to determine disputes in relation to any residential tenancy database;

(c) to act in the mediation or conciliation of any disputes between the parties to residential agreements in relation to boarding premises;

(d) to determine applications made to the Commissioner under section 23 or section 36A ;

(e) other functions conferred on the Commissioner by or under this Act.

(2) The Commissioner may do anything that is necessary or incidental to carry out his or her functions under this Act and, in particular, his or her powers under section 23 , section 36A , section 48I and section 48ZF .

This is the consequence of two things; firstly, a gradual expansion in tenants' rights and remedies, and secondly, a recognition that the Court is not always the most appropriate means by which to resolve tenancy disputes.

The RTC is now vested with most of the decision-making power under the RTA. Primarily, this is due to expediency, which is the overriding consideration in most disputes. For instance, if a tenant's heater has broken down in the middle of winter, they require an order for repairs as quickly as possible. The RTC is also highly accessible – while they have the option of conducting a hearing following an application for an order for repairs, or a review of a rent increase, this does not happen in practise. Instead, applications are done on the papers, through the online MyBond portal in the case of bond disputes, and through email (or post) in the case of everything else. The RTC's application forms are simple, generally only one page. While they have the capacity to charge a filing fee, they at present do not. In many cases, matters are resolved without formal orders needing to be made.

This expediency often comes at the expense of high quality, consistent, and transparent decision making, which is only somewhat alleviated by the capacity to appeal decisions to the Court.

The Court's primary responsibility is to preside over evictions, and attempted evictions. It should not be forgotten that the effect of a vacant possession order is that a tenant is forcibly removed from their home - often against their will and often into homelessness. As such, as the exclusive dominion of the Court, eviction proceedings are subject to a higher level of scrutiny than objectively less consequential matters.

The Court is also given the exclusive power to determine whether particular terms of a lease are inconsistent with the RTA. As this is an evaluative task that requires technical knowledge of the law it naturally falls to the Court.

Orders pertaining to security and locks are also retained by the Court, though it is somewhat unclear as to why. On the face of it, there appears to be little substantive difference between an order to change the locks and an order for repairs, and the former may require just as much, if not more, expediency as the latter.

2.1 Boarding premises powers

Per section 8(1)(c) of the RTA, added in 2003, one of the core functions of the RTC is to act as a mediator/conciliator in disputes between landlords and tenants where the subject of the lease are boarding premises, that is, a room in a larger building, where facilities are shared. Despite this, the RTC has not performed this function at all in the period 2018/19-2022/23.

It is not immediately clear why this is case, as this service is clearly noted on the CBOS website. It may be that the boarding tenants that seek assistance are not wanting negotiation but orders – such as an order for repairs. This theory is undermined by the fact that few boarding tenants have made applications under section 48I, which gives the RTC very broad powers to order compliance under almost any section of the RTA. In the years 2015/16 to 2022/23, only two applications were made under section 48I, and zero orders were granted. When the RTA was amended to cover boarding premises, it was partly justified on the basis that boarding tenants were uniquely vulnerable, as they

were more likely to be from disadvantaged backgrounds.[16] If that is still true, or was ever true, it may be the case that boarding tenants are less likely to seek assistance due to not knowing that it is available, and/or that the process of seeking assistance is inaccessible.

A party aggrieved by a decision made under section 48I of the RTA can appeal to the Court within seven days. This section likely operates similarly to the other appeal provisions – in that the appeal is heard de novo – though it is phrased differently. Unlike in the case of rent increase disputes, it clearly provides that, if it makes an order, the Court is to specify a date from which it takes effect. As far as we are aware, only one appeal has been filed under this provision since 2018/19.

2.2 Determining inconsistent provisions

As argued at 1, the provisions of the RTA function as a de facto standard form lease agreement, and the freedom of the parties to diverge from those provisions is limited. If a term of a lease agreement is inconsistent with the RTA, then the term will be void to the extent of the inconsistency. Either party can apply to the Court for an order declaring that a term of the lease agreement is inconsistent with the RTA. If it is, the Court can modify the term in a manner that cures the inconsistency or can simply declare that the offending term is of no effect.

Whilst disputes over the validity of terms are common, it is unknown whether any applications have been made under this section (if there have, they are few enough to have been lumped into the "other" category in the data provided by the Court). This is likely because the question of the validity of a term only arises as a result of a material dispute that already has its own resolution process – for instance a dispute over whether a term requiring the tenant to fumigate the house at the end of the tenancy will be resolved through a bond dispute, a term that prevents a tenant from having guests will be the subject of a complaint to the RTC under the quiet enjoyment protections, and a term that requires a tenant to clear gutters may be the subject of a vacant possession application. It is unlikely that parties to a tenancy agreement would seek out disputes to litigate prospectively rather than dealing with conflict as it arises (whilst hoping it doesn't arise at all).

2.3 Unreasonable Rent Increases

A landlord can increase the rent in a private rental only if there has been at least 12 months since the previous increase, or the start of the tenancy. The landlord must give the tenant at least 60 days notice

[16] Tasmania, *Parliamentary Debates,* House of Assembly, 17 April 2003, 86-87 (Judy Jackson, Minister for Justice and Industrial Relations).

before the increase can take effect. There is no fixed ceiling on what the rent increase can be – it is not pegged to the Consumer Price Index, nor is it limited to a specific percentage above the current rent. However, the tenant has the right to dispute the rent increase on the basis that it is "unreasonable". The dispute must be made to the RTC within the first 60 days of the notice period (that is, if the landlord gives more than 60 days notice of the increase, the dispute must still be made within the first 60 days of the notice period).

Unlike in the case of a Notice to Vacate that does not provide enough time, there is no saving provision for rent increase notices that fail to provide the full 60 days. However, the RTC has provided that such a notice will not necessarily be defective if the failure to provide proper notice was due to miscalculation or was a genuine error. We respectfully suggest that RTA has not provided any basis, as far as statutory interpretation goes, for this view.

The RTC can approve the rent increase in full, determine that the increase is partly unreasonable and award a partial increase, or find that the increase is completely unreasonable and order that the rent must remain at its present rate for at least a further 12 months.

In determining whether the proposed rent is unreasonable, the RTC must consider the general level of rents for similar properties in the same locality, or similar locality. They are also to have regard to "any other relevant factor". This is distinct from many other jurisdictions, which provide a longer list of factors to take into account, and where the general level of rents is, at least nominally, just one factor that may or may not need to be considered.

In *Muddyman v Nest Property* [2021] TASMC 2, the only published decision discussing unreasonable rent increases under the RTA, the Magistrate largely followed *Swinburne v Puco Pty Ltd* [1995] NSWRT 86. The "general level" of rent is not synonymous with what the property could be rented for on the open market at the time of the increase, as the general level includes existing tenancies, not just new ones. Whether a property is "comparable" to another will be dependent on factors such as number of bedrooms, location, amenities, age, state of repair, quality of fixtures and fittings, whether it is a detached dwelling, apartment, townhouse, or unit, and proximity to desirable services such as public transport, shops, parks, and schools.

"Similar locality" turns on geography and topography, access to transportation, "communal activities", and "residential aggregations". What is meant by the latter two categories, which is not immediately obvious, is not clarified in either *Muddyman* or *Swinburne*.

Muddyman sets a high evidentiary burden for tenants that are attempting to challenge a rent increase. Listings on aggregate sites such as realestate.com.au will not suffice, as they only capture newly advertised market rents, so are not representative of the "general level" of rents. Further, there are often very few listings for rural locations.

Under section 48M(e) of the RTA the Rental Deposit Authority (the "RDA"), which holds all security deposits, is required to collect data on the residential tenancy market. As part of that role, when taking a bond the RDA requires the parties to provide the rent and the address of the premises. While this data is not published on the CBOS website, the RTC relies on it when determining whether a rent increase is unreasonable (this raises issues with natural justice, discussed in detail at 2.5). If *Muddyman* is accepted, though, this data is still not adequate. For old tenancies, it only captures the initial rent, not the present rent. For new tenancies, it, similarly to listing aggregate sites, only captures the current market rate, not the general level, though it more accurately records the actual rent rather than just the advertised rent. But, unlike the listing aggregate sites, it does not in any way record general condition of the property, only the number of bedrooms, so overall it is of limited utility.

By comparison, Consumer Affairs Victoria takes an active role in disputes over rent increases, drafting reports that provide non-binding advice as to how much a property is worth. In the course of putting together a rent report, a representative from Consumer Affairs will physically attend the premises in question and carry out an assessment of the state of repair, amenities and facilities. If the landlord refuses to accept the findings, or the tenant does not agree with the findings, then the tenant can apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order that the proposed rent is excessive. In considering the application, VCAT must take the report into account.

Tasmanian tenants thus seem to be left in position where they must conduct (or commission) a wide-ranging survey of other tenants in their area in order to get a true snapshot of the general level of

rents in their locality. The authors of *Residential Tenancies Law and Practise New South Wales* strongly criticise the decision in *Swinburne* for imposing such an onerous task on tenants:[17]

> *In order for a tenant to discharge his or her onus of proof, even in the relatively benign circumstances of a landlord who presents no evidence on the issue, the tenant must visit other premises in the area and seek and obtain an interview with the occupants of those premises to ascertain the rent level, commencement of occupation date, date of last rent increase etc. The tenant must also seek permission from the occupant to take photographs or inspect the premises. As a single premises is unlikely to constitute an adequate basis of comparison, the tenant must repeat this process several times. If the details collected by the tenant are challenged at the hearing then the obliging occupants of the other premises may have to attend to give evidence or at least make available to the tenant documentary evidence corroborating the tenant's assertions.*

The RTC, in their *Guide to the Residential Tenancy Commissioner* (the "Guide to the RTC"),[18] does not provide any guidance as to what may constitute a relevant factor other than the general level of rents. In fact, it does not make mention of section 23(2)(b) at all. Per *Muddyman*, what constitutes a relevant factor will be dependant on the circumstances of the case. In that matter, the following factors were considered to be relevant (though were not given much weight):

- The charges incurred by the landlord in relation to the premises (such as rates, mortgage, water, and land tax);
- The tenant's rate of income relative to the rent; and
- The tenant's source of income (in this case being a disability support pension).

In unpublished determinations obtained by the TUT in the course of acting for clients, the RTC has taken into account:

- The size of the increase (as opposed to just the resulting rent);
- That the previous increase was also large;

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[17] Allan Anforth et al, *Residential Tenancies Law and Practice New South Wales* (The Federation Press, 8th ed, 2022) 131-132.

[18] Consumer, Building and Occupational Services, *A Guide to the Residential Tenancy Commissioner* (Version 3, October 2019) 19.

- Disruption caused by ongoing building works or other things that impact the use and enjoyment of the premises; and
- Whether the increase is scheduled to take place during the term of a fixed term lease (as the tenant has no grounds to terminate the lease early if the rent is unaffordable).

The RTC has determined that the following factors are not relevant:

- Interruption caused by long-delayed repairs and renovations that have been completed at the time of the making of the application; and
- That previous rent increases were small and consistent (eg $10.00 per annum).

If the RTC does not provide their determination before the rent increase is due to begin, the RTA does not state whether or not the increase is stayed until the determination is made. If the tenant does not pay the increase (which they may not be able to afford) they risk falling into arrears.

After bond determinations and repair order applications, unreasonable rent determinations are the third most common dispute handled by the RTC:

Year	No of applications	Unrea-sonable	Partly un-reasonable	% Partly/ wholly unreason able	Withdrawn	Appealed	Application made out of time
2015/16	9	5*	-	56%	-	-	-
2016/17	17	4*	-	24%	-	-	-
2017/18	28	23*	-	82%	-	-	-
2018/19	33	17*	-	51%	-	-	-
2020/21	17	6	8	82%	1	-	-
2021/22	36	7	21	78%	3	2	3
2022/23	46	4	15	41%	6	0	2
TOTAL	186	-	-	59%	-	-	-

*Not specified whether wholly or partly unreasonable

The number of applications made has significantly grown in the seven-year period where figures are available – there were over five times the number of applications in 2022/23 than there were in 2015/16. 2020/21 can be dismissed as an outlier, as there was a moratorium on rent increases following the COVID-19 pandemic that was only lifted on 1 February 2021. However, this has

coincided with a period of very high rental growth.[19] Now that rents across the state are flat, or dropping slightly,[20] it remains to be seen whether applications will continue to increase or will fall with the market.

There does not appear to be any pattern to the success rate of applications – though overall tenants have had at least a partial victory in almost 60% of applications.

The RTC reports that the 82 applications in 2021/22-2022/23 took on average 21 days each to finalise.

Once an unreasonable rent increase application has been determined, an aggrieved party can lodge an appeal with the Court within 60 days.

The matter will be listed for a directions hearing, then a hearing (in all likelihood) several months later, and will be heard *de novo*.

Until the appeal has been determined, it is not clear what rent the tenant is required to pay. Once an appeal is lodged, the RTC's determination is of no effect. That means that the tenant does not have to pay whatever the RTC has ordered, but the RTA does not state whether they are required to pay, pending the appeal, the full new amount or the previous rent. The RTA does not provide that the rent increase is stayed pending the outcome of the determination or appeal. Nor does it state when the increase, if any, takes effect from once an order is made by the Court – whether it's from the original date that the increase was due to take effect, or the date that the decision is made, or whatever date that the Court determines.

The ACT is only jurisdiction in the country to have a form of rent stabilisation tied to the Consumer Price Index. If a proposed rent increase is more than 110% of CPI, then, if disputed, the landlord bears of the burden of demonstrating that the increase is not unreasonable. If the increase is 110% of CPI or less, then the tenant may still dispute the increase but the onus is reversed. This provides a level of certainty to both tenants and landlords that is lacking in Tasmania and other jurisdictions. As discussed, the evidentiary burden on tenants seeking to dispute rent increases in Tasmania and the

[19] Tenants' Union of Tasmania, *Tasmanian Rents* (December Quarter 2023) 2.
[20] Ibid.

rest of the country is quite onerous. By increasing certainty, the soft cap also potentially reduces the burden on the tribunal. Relative to Tasmania, there are fewer rent increase disputes in the ACT:

	Rent increase disputes 2021/22	**Disputes per 100,000 residents[21]**
ACT	15	3.29
Tasmania	36 (to RTC)	6.30

2.4 COVID-19 powers

The RTC was granted new powers following the outbreak of the COVID-19 pandemic. As (in practise) all RTC matters are already resolved by distance, on the papers, and with a reasonably fast turnaround, they were particularly well suited to handling matters during this tumultuous period. The first power was to make rent repayment plans for people whose income was negatively affected by the COVID-19 induced lockdowns and recession. The second was to terminate a tenancy if the applicant, which could be the tenant or the landlord, was suffering from significant COVID-19 related hardship. Significantly, this is the only instance in which the RTC has been given the power to terminate tenancies, a power which has otherwise only been vested in the Court (and local councils in very limited circumstances).

However, in practise these powers were rarely exercised. There were only three applications for a repayment plan during the COVID-19 emergency period, none of which were granted. One hardship application was made in 2021/22. It was made by a tenant, and the order was granted. The need for these powers was likely diminished by generous welfare and job retention programs from the Commonwealth Government, and, from the state government, lump sum cash payments to rectify rent arrears (also administered by the RTC).

The Court also had jurisdiction to hear appeals of decision made by the RTC under the COVID-19 emergency powers, but no appeals were made during the relevant period.

2.5 Security deposit disputes

The primary role performed by the RTC is to determine bond disputes. Following the termination of a tenancy, the landlord has three days to notify the Rental Deposit Authority whether they intend to claim some, all, or none of the bond. In reality it is unlikely that many claims are lodged that quickly.

[21] Australian Government Centre For Population, *National, state and territory population, March 2022* (26 September 2022) 4.

If a tenant has "broken lease", the landlord cannot know at that point how much loss, if any, they have incurred. If there is damage to the premises, or it is not adequately clean, then it would be difficult to organise quotes that quickly. If they do not intend to claim any of the bond, they may not be in any great rush to release it, as there is no penalty for tardiness. Once the three days has elapsed, the tenant can also make their own claim, though this does not seem to be widely known. Tenants have contacted the TUT weeks after their tenancy has concluded complaining that their landlord has still not approved the return of their bond or made a claim.

There is no cost associated with making a claim, or any penalty associated with making an unreasonable or vexatious claim. As such, landlords are incentivised to make ambit claims.

Once either party has made a claim, which is done through the online portal MyBond, the other is notified, and is asked to either confirm or dispute the claim within 14 days. If the party fails to register a dispute within that 14 day period, the bond is paid out to the claimant.

If the claim is disputed, the matter is referred to the Residential Tenancy Commissioner. Each party is sent notice that all evidence relied upon must be uploaded to MyBond within 10 days. Neither party is given the opportunity to view the other party's evidence before having to submit their own. Whilst the initial claim will include some detail as to what the claim relates, the particulars are often guess work. The parties are able to contact the RTC directly and ask that the other party's evidence be provided, but this is not explicitly stated on the notice. If the other party does not upload their evidence until the end of the 10 days, the party requesting the evidence will also have to seek an extension of time to provide their own evidence. This process is not compliant with principles of natural justice. It is difficult to see why it was adopted, as it is not proscribed by the RTA.

The RTC will then review the decision. According to the CBOS website, this can take up to 30 business days. The TUT has been advised by the RTC that they do not record as a matter of course how long each individual dispute takes to finalise, and thus in order to determine the average length would need to check each file individually, which is cost prohibitive.
How long it takes to make a decision will depend on the amount of evidence, the number of issues in dispute, the complexity of those issues, and how busy the RTC is at that time.

The TUT has taken a small sample of three bond disputes in its possession, each determined in 2022/23 or 2023/24. The first took 54 days from when the tenant's evidence was submitted until the

determination was made, the second 41 days (this case was complex, with a large amount of evidence, multiple legal and factual issues in dispute, and some of the legal questions were novel), and the third 30 days. This is total days, not just working days, and does not take into account that the evidence may have been filed before the 10-day filing period elapsed, or that the landlord may have been granted an extension to file their evidence.

In reaching their decision, the RTC gives primacy to objective documentary evidence such as photos, emails, videos, condition reports and text messages. Statements, such as statutory declarations, are given little weight, particularly if they are made by the party or someone connected to the party. This is not surprising, as the RTC does not have the means (such as cross-examination) to test the credibility of the evidence and the witness, but it can disadvantage tenants who assert that they, for instance, provided notice of the need for repairs (which is not required to be in writing) during an in-person inspection, or seek to rely on a representation made by a real estate agent during a phone call.

The RTC states that they decide each case on its own merits and are not bound by their own previous decisions. There are no published decisions from the Court that discuss how bonds should be determined. On occasion the Court may provide a written decision, but it is only given to the RTC and to the parties. In the TUT's experience, the RTC is generally not receptive to precedent from courts and tribunals from other jurisdictions. Beyond the RTA itself, the only real indication a party has to how a matter will be determined is the Guide to the RTC. For the sake of transparency and consistency this is suboptimal, as it makes it difficult to advise as to how a dispute will be determined.

Even with reference to the Guide to the RTC, the RTC sometimes introduces uncertainty. For instance, in respect to a Notice to Terminate issued by a tenant, the Guide to the RTC provides:[22]

> *In order to reduce vexatious claims of breach on which a notice to terminate relies, a tenant's use of the property must be affected by issues of non-compliance.*
>
> *The consideration of 'reasonableness' is a means to establishing a balance between the interests of an owner and the interests of a tenant.*

[22] Consumer, Building and Occupational Services, *A Guide to the Residential Tenancy Commissioner* (Version 3, October 2019) 22.

> *In determining whether the Tenant's termination is valid, the Commissioner will consider the reasonableness of the Tenant's reliance on the breach.*

Firstly, there is, with respect, nothing in the RTA which supports this interpretation. There are no words in the statute to this effect, the uncertainty it creates is directly contrary to the stated purpose of the legislation, and it seemingly conflicts with the Supreme Court's finding that the termination provisions of the RTA operate as a code.[23]

Secondly, this interpretation is justified on the basis that it reduces vexatious claims, but this appears to be based on an erroneous understanding of what "vexatious" entails, or at least the means do not fit the purpose. A claim will be vexatious if it is "[i]nstituted without sufficient grounds for the purpose of causing trouble or annoyance to the defendant".[24] If the grounds for a notice to terminate are valid within the meaning of the RTA then they are valid, if they are not then they are not, and if they are valid then the motivation of the tenant in issuing the notice is largely irrelevant. Instituting an ill-defined reasonableness threshold manufactures groundless notices out of nothing and does nothing to address motivations - even if they were at all salient.

Finally, the Guide to the RTC does not expand on in what circumstances a tenant's use of the property will be considered to be affected, or any criteria to determine whether or not reliance on the breach will be "reasonable". This makes what is ostensibly, per the RTA, a fairly black and white and straightforward process quite risky for the tenant, as if the RTC finds that it was unreasonable for the tenant to rely on the breach in terminating their lease they are likely to be found liable for the landlord's (potentially quite extensive) rental loss.

Whilst RTC decisions can be appealed to the Court, they are heard *de novo*, meaning that the RTC's legal reasoning is never directly subject to scrutiny. As few matters get appealed, many of those

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[23] *Director of Housing v Parsons* [2019] TASFC 3 per Estcourt J at [37] and [46]; *Logan v Director of Housing* [2004] TASSC 153 at [10]; *Parsons v Director of Housing* [2018] TASSC 62 at [56]; *Director of Housing v Lefevre* [2021] TASSC 33 at [26].

[24] *Aspar Autobarn Cooperative Society and Others v Dovala Pty Ltd and Others* (1987) 74 ALR 550 555, citing the Shorter Oxford Dictionary.

appeals get settled before going to hearing, and, of those that make it to hearing, none of the decisions get published, there is very little practical oversight of the RTC's decision making.

Despite these issues, very few determinations are appealed, and few of those determinations that are appealed are varied:

Year	Disputes determined	Appealed	Varied
2018/19	2448	29 (1.18%)	14 (48%)
2019/20	2551	20 (0.78%)	2 (10%)
2020/21	2107	24 (1.14%)	6 (25%)
2021/22	2048	16 (0.78%)	3 (18.75%)

The RTC have clarified that those determinations that were "varied" include settlements, not just decisions by the Court following a hearing. Of those appeals that were not varied, it is unclear how many were discontinued (and why) and how many went to hearing and were unsuccessful.

If a party is unhappy with how the RTC has determined a bond dispute, they may appeal to the Court within seven days of the last party receiving the determination.

The determination itself states the date that the appeal must be lodged by, though this is not something that can be determined by the RTC in advance. Notice of the determination is given however the party has chosen to interact with MyBond. Normally this will be by email.

Seven days is a very tight turn around to file an appeal. It is likely that, as the RTA operates as a code, the Court cannot extend the legislated timeframes.

The Court's prescribed form used for an appeal asks the appellant to list the reasons that they disagree with the determination, but, because the appeal is heard on a *de novo* basis, the RTC's reasoning in not directly relevant to the appeal. In substance, a bond appeal is a minor civil claim with different paperwork. The reasons listed on the form may help frame the issues, but only indirectly. The respondent has no ability or duty to file a defence (though, per the definition of "claim" found in the *Magistrates Court (Civil Division) Rules 1998*, they nominally do).

Unlike in a normal minor civil claim, the Court does not provide mandatory and free conciliation. Instead, the matter is listed before the court within a month or so. This listing is not expressly stated to be a directions hearing, though, except on the odd occasion where the parties are ready and the Court has enough time, that is what it will be. After eliciting the issues in dispute and how long a hearing will take, the matter is adjourned, often for several months. The Court may also make an order that the parties have to exchange evidence.

Due to the long delays to get to hearing the parties are often willing to negotiate. According to TUT records, of the bond appeals we had carriage of in 2021/22 and 2022/23:

Year	Settled prior to hearing	Went to hearing – tenant successful	Went hearing – landlord successful	Appeal unilaterally discontinued	Unresolved pending hearing	Unresolved pending decision
2021/22	6		1	1		
2022/23	2	2		1	1	2

Of the matters that make it to hearing, all decisions are either delivered *ex tempore*, or are reserved and written but not published. As such there is no published case law on how bonds are to be dispersed, though written decisions are provided to the RTC as well as the parties so there is a degree of direction provided.

2.6 Liability to reimburse tenant

The RTA only allows tenants to engage in self-help in very limited circumstances. If urgent or emergency repairs are required, and the landlord has not organised to carry out those repairs within 24 hours in the case of the former or as soon as practicable in the case of the latter, the tenant may engage a qualified tradesperson to carry out the repairs and restore the effected service, in the case of an urgent repair, or carry out repairs only to the extent that further damage is prevented, in the case of an emergency repair.

If a tenant elects to pursue this remedy, they are able to seek reimbursement from the landlord for the cost of the tradesperson. The tenant must supply the landlord with an invoice, a receipt, and a statement from the tradesperson as to the cause of the need for repair. Once the tenant has complied, the landlord can dispute liability by making an application to the Court. A landlord can only dispute liability on the basis that they were not notified of the need for repair, that the need for

the repair was the result of the tenant breaching their obligations, or that the tenant engaged the tradesperson within 24 hours, if the repair was an urgent repair.

The Court can award the tenant with a total or partial reimbursement, or no reimbursement at all. It is not clear when and why only a partial reimbursement will be awarded, as the permitted grounds of dispute are binary – if the landlord is liable they are liable, if they are not they are not. The RTA does not allow the landlord to, for example, dispute total liability on the basis that the amount charged by the tradesperson was excessive for the work done.

If the landlord fails to dispute their liability to reimburse within 14 days, but also does not actually pay the tenant, then presumably the tenant can file a claim for the liquidated debt. The RTA itself does not set out any recovery or enforcement process.

If there have been any applications under this section they have been placed in the "other" category in the data provided by the Court, so they are at the very least rare. Tenants are reluctant to pursue this remedy, firstly because many cannot afford to, secondly because they are sceptical they will be reimbursed, or thirdly they believe that extracting reimbursement will be an ordeal. While it will take longer, the Tenants' Union generally suggests that tenants instead seek repair orders from the RTC, as it is free and straightforward and does not necessitate incurring short term financial loss.

2.7 Orders for repairs

If a landlord has failed or refused to carry out repairs or maintenance, the tenant can apply to the RTC for an order for repairs. The RTC can make the order if, per section 36A(4):

> *(a) the owner is required under this Division to carry out, or to arrange for the carrying out of, the repairs; and*
> *(b) the repairs are reasonable; and*
> *(c) the repairs are not required because of any fault of the tenant.*

In order to make an application, a tenant is required to fill in a straightforward, one page form, and email or post it to the RTC along with evidence of the issue (in most cases, photos and/or videos) and of the notice given to the landlord (whilst it is not required that this notice be given in writing, it's advisable to have it in an email or text message in order for it be relied upon later). It is not the case that the tenant has to wait until the end of the designated time periods for carrying out repairs

(in the case of general repairs, 28 days) before they can make the application. Section 36A allows the RTC to prescribe a filing fee, but this is not currently required. The RTC states that they will get back to applicants within five business days of the application being filed.

According to the RTC, most applications are resolved – that is, the landlord voluntarily agrees to carry out the repairs – without the RTC needing to issue a formal order:

Year	Applications	Well Founded	Resolved without order	Orders	Social/private	Appealed
2015/16	64	35	31 (89%)	4	0/6	-
2016/17	106	63	59 (94%)	4	0/4	-
2017/18	55	26	22 (85%)	4	0/4	-
2018/19	74	45	35 (78%)	10	0/10	-
2019/20	53	30	27 (90%)	3*	0/3	-
2020/21	64	41	32 (78%)	6*	0/6	-
2021/22	60	34	22 (65%)	12	-	1
2022/23**	84	36	22 (61%)	14	-	1

*Affected by Covid19 amendments which temporarily suspended requirement that landlords carry out general repairs

**10 applications still under investigation at the time statistics were provided

Assuming that the repairs are actually carried out by the landlord, the data speaks well to the persuasive power of the RTC. That that figure has dropped in the last two reporting periods suggests, though, that more stringent enforcement is required to ensure that the repairs are in fact carried out, or that landlords have become more defiant in opposing applications.

If the RTC makes an order, they provide the parties with a written determination stating what the landlord needs to do, with reasons as to why. The landlord is given 60 days to comply, as that is how long they are given to appeal the determination to the Court. This is a potentially very long delay, particularly if the tenant is requesting that urgent or emergency repairs are carried out. The RTA does not provide that, for example, rent automatically partially abates until repairs are carried out or services are restored. If the landlord does not comply with the order within the 60 days, and does not appeal, then they can be, per section 58 of the RTA, fined up to 50 penalty units (currently, $9,750.00).

If the RTC makes, or refuses to make, an order that repairs are carried out, an aggrieved party can appeal to the Court. The form and process of the appeal is very similar to that of bond and unreasonable rent appeals. The appeal must be lodged within 60 days of the RTC making their decision. Given that the order may be made in respect of what the RTA calls "urgent" or "emergency" repairs, 60 days is already a very long period that a tenant may have to wait before repairs are carried out, without even considering the delays that come with Court action. There are few appeals under this section, only five between 2018/19 and 2022/23.

2.8 Smoke Alarms

The RTC has the power to make orders requiring compliance with Part 3A of the RTA, which concerns smoke alarms. The RTC is specifically given the power to enforce any order made as if it had been made by the Court. There is no right to appeal any order made under this section. Only three applications, and three orders, have been made within the reporting period.

Year	Applications	Orders made
2015/16	0	-
2016/17	0	-
2017/18	0	-
2018/19	0	-
2019/20	1	1
2020/21	2	2
2021/22	0	-
2022/23	0	-

2.9 Minimum Standards Exemptions

Part 3B of the RTA sets out the minimum standards of amenity for all rental premises in Tasmania. Curiously, the RTC was not granted any power to enforce the minimum standards, only issue monetary penalties if they are breached. In practise, the threat of a penalty functions as a *de facto* compliance order. The RTC has been given the power to determine applications made by landlords to be exempted from one of more of the minimum requirements. According to the CBOS website, exemptions will be granted where the premises does not technically meet the requirements of the RTA but complies with the underlying intent of the minimum standards, and where the tenant will not be unfairly disadvantaged.

Examples given on the website are: if there are common cooking facilities not located within the premises itself the premises may be exempt from the kitchen requirements, or if the premises is

remote and there is a large amount of double-glazed glass in the living area there may be an exemption from the requirement for window coverings.

If an order is made, the tenant can dispute it.

Year	Applications	Exemptions granted
2015/16	1	1
2016/17	6	6
2017/18	5	5
2018/19	8	8
2019/20	1	1
2020/21	6	3
2021/22	6	4
2022/23	3	1

2.10 Orders for termination

In certain narrow circumstances, either a landlord or a tenant can apply to the Court to have the lease agreement terminated immediately. There is no requirement that the party making the application must first give a notice to vacate or equivalent to the other party, but the threshold for being granted an order is high. The applicant must satisfy the Court that the other party has or is likely to cause the applicant, or an occupant of a property neighbouring the premises, physical injury, or has or is likely to cause serious damage to the premises or neighbouring premises.

In particular, it is difficult to demonstrate that a person is likely to cause personal injury or serious damage; despite the Court's application form suggesting otherwise, mere threats are not enough – the Court must be satisfied that the threats are *likely* to be carried out, that is, more than a 50% chance.[25]

If the applicant satisfies the Court that physical injury, or serious damage, has or is likely to occur, the Court, by way of the word "may" retains a discretion as to whether or not to make the order.[26]

Though termination applications are designed to be dealt with urgently, the Court cannot manufacture time that it does not have. Thus, if an application is opposed, and there are multiple witnesses that need to be examined (as there often are in such cases) it can take months for an

[25] *Community Housing Ltd v O'Toole* [2020] TASMC 12

[26] Ibid

application to be heard. In one case dealt with by the TUT, because the hearing date was so far away, the Magistrate referred the application to conciliation (which resulted in a mutually beneficial settlement).

From the perspective of a landlord there seems to be little benefit in pursuing an order for termination except in cases where there has been an actual physical injury, or damage that is obviously serious. Marginal cases are better pursued through a notice to vacate for substantial nuisance. This is likely one of the reasons why the number of applications is low, along with the conduct that would justify such an application being rare. Section 41 was the only eviction related section of the RTA that was exempt from the operation of the COVID-19 moratorium, however in 2020/21 the number of applications only increased by four over the previous two years:

Year	Statewide	Hobart	Launceston	Devonport	Burnie
2018/19	14	8	2	4	0
2019/20*	14	8	6	0	0
2020/21*	18	10	4	3	1
2021/22	13	8	3	1	1
2022/23	14	10	3	1	0
All	73	44	18	9	2

Though the figures do not specify which applications were made by tenants and which by landlords it is likely that most, if not all, were made by landlords. A tenant can only make an application if the other party to the agreement, being the landlord or their agent, engages in prohibited conduct. A tenant that is, for example, threatened or assaulted by a neighbour has no recourse under the RTA. And, of course, for tenants termination is a remedy of limited utility when, if successful, it leaves them without a home.

2.11 Orders for vacant possession

The Court's predominant – in both senses of the word – role under the RTA is to hear applications for vacant possession:

Year	Statewide	Hobart	Launceston	Devonport	Burnie
2018/19	449	235	147	34	33
2019/20*	295	129	106	28	32
2020/21*	194	97	46	22	29
2021/22	360	178	134	24	24
2022/23	387	222	98	24	43
All	1685	861 (51%)	531 (31.5%)	132 (8%)	161 (9.5%)

***Note**: During the COVID-19 emergency period, which spanned from March 2020 until February 2021, there was a moratorium on all vacant possession orders (that being the case, it is disconcerting that there was only a negligible effect on the number of applications made on the North-West. The Tenants' Union is only aware of one order being made erroneously during this period but did not have a significant physical presence in the region at the time).

Applications for vacant possession are the primary means by which landlords evict tenants through the Court. Before making an application, a landlord must first issue their tenant with a notice to vacate. The notice to vacate will specify why and when the landlord wants the tenant to leave. The reason for the notice must be one of the 15 grounds provided for in section 42 of the RTA. The most common grounds relied upon are breach of lease (including rental arrears), end of fixed term lease, and one of the no fault grounds if the tenancy is not for a fixed period (including sale of property, significant renovations, and change of use). In the case of a breach, the landlord must provide the tenant with at least 14 days notice. In the case of a no-fault eviction, the landlord must give the tenant at least 42 days.

If the notice period has elapsed, and the tenant has not vacated, the landlord must apply to the Court if they want to be able to remove the tenant. Section 45 sets the circumstances in which the Court may make an order for vacant possession:

- A notice to vacate must've been served on the tenant(s);
- The notice must've taken effect;
- The tenant(s) must still have possession of the property;
- The application must've been served on the tenant a reasonable time before the hearing date;
- The notice must provide:
    - The name of the owner;
    - The name of the tenant(s);
    - The address of the property in question;
    - The date the notice was served;
    - The date it takes effect;
    - Details of the reason why it was issued; and
- The reason why the notice was given must be "genuine or just".

The Court must be "satisfied" of each of these matters. There is no room to dispense with any of the requirements on the basis of expediency, nebulous notions of fairness or justice, or the severity of the allegations relative to the triviality of the oversite (for an extreme example, that the notice to vacate does not state the tenant's address but they are in $50,000 rental arrears). If the Court does not carry out the proper evaluative process, then it has failed to exercise its jurisdiction.[27]

This is relatively straightforward in most aspects. With respect to the notice to vacate itself, only the degree of particulars needed to satisfy the "details of the reason" requirement is a regular source of controversy. The Court often relies on *Appleby v Schnell* [2011] TASMC 8, despite its non-binding status. Appleby provides, at [16], that a notice to vacate for a breach must provide enough detail so that a tenant can rectify the breach without having to seek further information from the landlord. In the case of rental arrears, for example, the notice to vacate must specify the amount of arrears as of the date that the notice was served. Though Appleby is not authority for anything beyond that, it is likely that particulars also need to provided even in respect of grounds that can't be "rectified", such as significant renovations, so that a tenant can determine whether the landlord has a *prima facie* right to vacant possession. Landlords and their representatives are often not aware of this requirement, and instead merely replicate the relevant part of section 42, and/or the clause of the lease agreement.

Then there is the requirement that the reason for giving the notice must be "genuine or just". This has been held to require more of the Court than merely acting as a rubber stamp that the reason given on the notice is one of the reasons provided for in section 42 of the RTA.[28] Rather, the Court must consider and evaluate evidence that goes to the "real" reason for the eviction. It has also been held that "genuine or just" should be read conjunctively, that is, as "genuine and just", that genuine means "real" or "authentic", and that "just" means fair in the circumstances.[29] That finding is not binding on the Court, as it was obiter dictum, [30] but the Court has nevertheless followed it.[31] It greatly expands the evaluative task that the Court has to undertake, both in the sense that a wider range of evidence

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[27] *Parsons v Director of Housing* [2018] TASSC 62 at [39]-[41].

[28] *Director of Housing v Parsons* [2019] TASFC 3 per Estcourt J at [39]-[54].

[29] *Parsons v Director of Housing* [2018] TASSC 62 at [57], Blowfield v Centacare Evolve Housing Limited [2024] TASSC 27 at [11].

[30] Obiter remarks of a superior court should be given significant weight, per *Ying v Song* [2009] NSWSC 1344 per Ward J at [19].

[31] *Centacare Evolve Housing Ltd v Denis Leeson* (25 November 2022, M/2022/1393 & M/2022/621) and Housing Choices v Philip Hardman (25 August 2022, M/2022/1257).

will be relevant, and that the Court will have to answer more complicated questions – determining whether the reason for the notice to vacate is "fair in the circumstances" requires a higher level of analysis than determining whether or not the notice to vacate states the name of the tenant.

There is also ongoing uncertainty as to whether, through use of the word "may" in section 45, the Court retains a general discretion to decline to make a vacant possession order, even when otherwise satisfied that the requirements have been met.[32] If there is a general discretion, then that is a further evaluative task that the Court must undertake.

Once the evaluative exercise has taken place, the Court's options are binary – to dismiss the application, or to evict the tenant. There is no middle ground, such as Court-enforceable repayment plans or good behaviour orders.

Often social housing landlords make vacant possession applications without necessarily *wanting* to evict the tenants, rather, it is used as a tactic to scare an otherwise unresponsive or hostile tenant into engaging with the landlord. This may go some way to explaining the disproportionate number of vacant possession applications made by social housing landlords. The majority of the vacant possession applications made in 2022/23 were made by social housing landlords (with 90% of those applications being made by community housing providers) despite only around 28% of rental properties in Tasmania being social housing:[33]

Year	**Private**	**Community**	**Homes Tasmania**
2018/19	289	82	78
2019/20	177	72	46
2020/21	150	34	10
2021/22	197	144	19
2022/23	182	184	21
All	995 (59%)	516 (31%)	174 (10%)

In these situations, when the tenant does make an appearance and does engage, there have been attempts by the parties and Court to craft *ad hoc* orders that at least somewhat function as payment

[32] *Director of Housing v Parsons* [2019] TASFC 3 per Blow CJ at [3]-[4] and Estcourt J at [37], *Director of Housing v Lefevre* [2021] TASSC 33 at [48]-[51], *Logan v Director of Housing* [2004] TASSC 153 at [11].

[33] 'Private Rental Market in Tasmania', *Shelter TAS* (Web Page) <https://sheltertas.org.au/private-rental-market-in-tasmania/>

plans or good behaviour orders, even when the landlord has a *prima facie* right to an eviction order. An example of such an order may be that the application is adjourned *sine die* (indefinitely) but if it is not relisted within a period of two months then it is dismissed in chambers (ie, without the parties needing to go back to Court). This allows time for the tenant to rectify the issue, but also allows the landlord to keep holding the Sword of Damocles above the tenant by retaining the ability to take the matter back to Court in the case of non-compliance, without having to issue another notice to vacate and make another application, with all the costs and delays associated with that.

Jurisdiction	**Payment Plans/Behaviour Orders available**
Tasmania	No
New South Wales	No
Victoria	Yes
Queensland	No
Western Australia	Yes (social housing only)
South Australia	Yes
Australian Capital Territory	Yes
Northern Territory	No

If the Court does decide to make an order for vacant possession the RTA does not specify when the order is to take effect, just that the Court must specify *a* date. This leads to the assumption that the Court retains a discretion as to when the order takes effect. While some Magistrates have expressly disagreed with that view, and there is no explicit precedent to that effect, in practise that is how it operates – the Court asks each party how long they need, and, if there is a disagreement, makes a decision after weighing each party's circumstances. In most cases tenants are given one or two weeks, depending on the Magistrate, but if the tenant is not in breach, and/or the tenant has secured alternative accommodation outside that two week window, the Court is often willing to provide a longer period.

2.12 Guidelines

In addition to the normal reasons for terminating a tenancy, social housing providers are able to issue a notice to vacate when:

- The premises has four or more bedrooms and the tenant is not utilising all of them, and the tenant has been offered alternative premises;
- The premises are equipped with disability modifications and the tenant doesn't need them, and the tenant has been offered alternative premises;

- the tenant exceeds income or assets thresholds; or
- the tenant has not occupied the premises for a period of eight weeks or longer, without the approval of the landlord.

However, the Court cannot make an order for vacant possession based on a notice to vacate issued for one of the above reasons if making the order would cause the tenant "unreasonable financial disadvantage" or "unreasonable social disadvantage". Under section 45(3A) of the RTA, the RTC may make guidelines setting out the circumstances which would constitute unreasonable financial or social disadvantage. The RTC has thus far declined to do so, leaving it to the Court to interpret the section. It is not common for social housing providers to rely on these special grounds, perhaps at least in part due to the ostensible breadth of the protection afforded by section 45(3)(ca).

2.13 Abandonment

Section 47 of the RTA sets out in what circumstances premises will be taken to be abandoned: when the tenant ceases to occupy premises, and no notice to vacate or notice to terminate has been served. It must be read in conjunction with section 46 which concerns early vacation (aka breaking lease) and provides identical criteria except that the tenant must also have given notice that they were vacating. For premises to be abandoned the tenant must have ceased occupancy, with no intention to return, without first giving notice.

Section 47A provides that a landlord "may" seek an order from the Court that premises have been abandoned. Use of the ostensibly discretionary "may", in conjunction with the structure of the RTA (specifically, that the criteria setting out when premises are abandoned does not include that an order has been made, and section 37 does not provide that abandonment must be found by the Court), suggests that landlords are not *required* to seek such an order, but may do in order to provide certainty. That is, once an order has been made, a tenant cannot then assert that the tenancy is still in place, whereas if the landlord elects not to seek an order, and simply retakes possession, they risk the tenant returning and claiming that the tenancy was never validly terminated.

The Court's power to declare abandonment is also in discretionary terms – the court "may" provide vacant possession if satisfied that the property has been abandoned – though it is difficult to imagine circumstances that would justify denying relief if the criteria has otherwise been met.

The RTA does not provide that an application made under section 47A is to be made *ex parte* or establish any special rules for service. As such all applications must be served in compliance with rule 40 of the *Magistrates Court (Civil Division) Rules 1998*. If the tenant has in fact abandoned the premises, and has not provided the landlord with notice, this is not a simple task. "Any other" document in proceedings can be served by affixing it to the front door of the property, but not the application itself (the originating process). Thus, at least ostensibly, the Court almost inevitably has to make an order for substituted service before an order declaring abandonment can be made. Of course, this entails delay which, in most cases, is not good for the (former) tenant, as rental arrears will continue to accrue as long as the tenancy is on foot.

Year	Statewide	Hobart	Launceston	Devonport	Burnie
2018/19	11	7	3	1	0
2019/20*	17	12	2	3	0
2020/21*	15	13	2	0	0
2021/22	8	3	2	2	1
2022/23	6	5	1	0	0
All	57	40	10	6	1

2.14 Abandoned goods

If a tenant abandons personal property after their lease has been terminated then the landlord can dispose of it. The RTA does not define when personal property will be considered to be "abandoned". Generally, abandonment requires some intention to permanently leave. If a tenant signals to a landlord that they intend to recover the goods despite leaving them when the tenancy was terminated, they have not been "abandoned" in the ordinary sense of the word. But, in the case that the tenant signals to the landlord that they intend to recover the property, but makes no effort to organise to do so, it could be said that in an objective sense the property has been abandoned. The nebulous nature of this section creates issues, both of over enthusiast landlords and lackadaisical tenants. Other jurisdictions instead provide a fixed time period in which the landlord must store the property, after which it can be disposed of:

Jurisdiction	Notice to owner of goods required	Valuable goods must be held for defined period	Provision for important documents	Statutory compensation if procedure not followed
Tasmania	No	No	No	No
New South Wales	Yes	Yes (14-28 days or if goods worth >$20,000 as ordered by NCAT)	Yes	Yes
Victoria	Yes	Yes (14 days for goods, 90 days for important documents)	Yes	Yes
Queensland	No	Yes (one month if goods worth more than $1,500)	Yes (must be given to public trustee if not collected within seven days)	Yes
Western Australia	Yes	Yes (60 days)	Yes	Yes
South Australia		Yes (28 days)	Yes	Yes
Australian Capital Territory	Yes	Yes (1-3 months)	Yes	Yes
Northern Territory	Yes	Yes (30 days)	No	Yes

If it is clear that the property has been abandoned, the means by which the property can be disposed of depends on its apparent value. If it has no value, the landlord can simply discard or destroy it. If it has some value, but the apparent value is below the prescribed amount of $300.00, then the landlord can sell it. If the apparent value is above $300.00, then the landlord must apply to the Court for an order permitting the sale of the goods for the best price. The RTA makes no provision for important documents that have no value *per se*, such as passports and birth certificates, or for items that only have significant sentimental value to the owner, such as family photos or heirlooms.

The RTA does not make clear whether the prescribed amount applies to the collective value of the goods left at the premises, or each individual item, but logic would suggest it would be the latter. If it were the former, and the tenant left a car and a bag of rubbish the landlord would be required to seek an order to sell the bag of rubbish.

It is not clear what precisely the Court is required to consider in deciding whether to grant an order under this section. As it only applies to property of some value, it follows that it may be to ensure that the property has in fact been abandoned, and that the landlord is not levying distress against the tenant, or is otherwise unlawfully detaining the goods. The RTA appears to give a lot of weight on the landlord's subjective view of the value of items, which seems likely to result in the landlord downplaying the value of the goods and avoiding the Court, and thus any kind of oversight, entirely.

Once the property has been sold, the proceeds must be used to, firstly, cover any debts owed by the tenant, and secondly, cover the costs of the sale. Any leftovers must be placed in an interest-bearing account for the benefit of the tenant for a period of six months. If it is not claimed by the tenant in that period, it becomes the property of the RTC. According to the RTC, they have never received payment under this section.

There is no specific data as to how many applications have been made under this section, but it is likely to be very few, if any. There is a not insignificant amount of work involved for the landlord for little reward, and, if the property has in fact been abandoned, there is no oversight from the tenant to ensure that the correct procedure is followed.

2.15 Database Compliance

Part 4C of the RTA regulates the use of tenancy databases, where information about tenants is held for the benefit of potential future landlords. Tenants can only be listed on these databases in very specific circumstances – when a breach of the lease by the tenant has caused losses to the landlord that exceeds the bond, or if the tenancy was terminated under section 41 of the RTA. An improper listing risks a fine.

These formal, third-party databases appear to be rarely utilised in Tasmania. Instead, records are mostly kept internally by real estate agents, and references are given verbally. These methods sidestep Part 4C and are more or less unregulated. The informality of the reference process can cause difficulty for tenants as they have no control or right of reply over what their landlord or real estate agent says about them. They may be subject to outright lies (that they breached their agreement when they didn't) or unfairness (such as that the landlord would not rent to them again because they were diligent about having repairs carried out and otherwise willing to enforce their rights) and there is very little that they can do about it – because the contents of the call is kept secret from the tenant

they are unable to, for example, pursue defamation proceedings, which would be an impractical and costly remedy in any case.

Since Part 4C was added to the RTA in 2012 only one application has been made under section 48ZF, which gives the RTC wide powers to make orders if the information held by a database operator is inaccurate. The application was partially successful, in that the database operator had to delete part of the information it held.

2.16 Changing locks

Section 57 of the RTA deals with locks and security of the premises more generally. The Court has retained all jurisdiction under this section – to the extent that the RTC is not even able to issue infringement notices for breaches. A tenant can apply to the Court for an order that the owner ensure that the premises are fitted with such locks and other devices necessary to make the premises secure, and that those locks and other devices are maintained. In the case of the latter power there is cross over with the sections of the RTA that deal with repairs and maintenance generally – it is unclear why this particular category of repair has been siloed off. The Court is also able to, on the application of either a landlord or a tenant, order that a lock or security device can be altered, added, or removed. This is likely to be prompted by the other party adding, altering or removing a lock without their consent, locking them out. However, the court is not able to also order that the party in breach reimburses the applicant for the cost of changing the lock. If the applicant is a landlord they can seek reimbursement through the bond, whereas a tenant applicant would need to file a claim.

The Court has not provided specific figures for the number of applications made under section 57, just a general "other" category, which suggests that the number is very low.

2.17 Infringement notices

There are 49 provisions of the RTA that can lead to a fine if they are breached. In most cases the maximum penalty is 50 penalty units (as of 2023/24, $9,750.00). Regulation 6 of the *Residential Tenancy Regulations 2015* designates 33 of these provisions as "infringement offences". If the RTC determines that a person over the age of 16 has committed an infringement offence, they can be issued with an infringement notice that comes with a penalty of (except in the case of a breach of s 29F(8), which attracts two penalty units) 10 penalty units (as of 2023/24, $1,950.00). The recipient of the infringement notice must pay the fine to the Monetary Penalties Enforcement Service within 28 days, or they can refer the matter to the Court if they do not accept its validity.

The Australian Government's Attorney-General's Department sets out the benefits of using infringement notices for enforcement:[34]

> *Infringement notices are generally issued for minor matters where a high volume of contraventions are expected, such as failing to comply with reporting obligations, failing to respond to a notice or failing to provide information. They provide an effective administrative mechanism to regulate these matters.*

In issuing infringement notices, the RTC can deter prohibited behaviour in a way that is quick and cost effective, at least relative to going to Court. In practise, few notices are issued relative to the number of well-founded complaints:

Financial year	**No. of fines**	**Issues**	**No. referred to Court**	**No. of well-founded complaints (% resulting in fine)**
2015/16	2	1 non-lodgement of bond; 1 repairs	0	39* (5%)
2016/17	2	1 repairs; 1 money other than rent	0	28* (7%)
2017/18	2	1 money other than rent; 1 quiet enjoyment	2	36* (6%)
2018/19	2	1 money other than rent; 1 quiet enjoyment	2	31* (6%)
2019/20	1	Non-lodgement of bond	0	44* (2%)
2020/21	9	3 bonds; 1 cleanliness and good repair; 2 adding, altering or removing locks; 2 not providing keys; 1 failure to comply with orders	0	31 (29%)
2021/22	10	2 money other than rent; 2 bonds; 1 failure to return premises to good repair; 4 quiet enjoyment; 1 right of entry	0	26 (38%)
2022/23	6	4 bond; 2 right of entry	0	14 (43%)

[34] 'Introduction to infringement notices', *Australian Government Attorney-General's Department* (Web Page) < https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers/infringement-notices>

*The data from these years also included well-founded applications made under sections that could not attract a fine, such as unreasonable rent increases and repair orders. The TUT has manually subtracted those numbers in order to arrive at a figure comparable to subsequent years, but, given the large disparity that remains in the percentage of well-founded complaints that result in a fine, the figures may not be precisely accurate.

Even in recent years where the rate of penalties to well-founded complaints has risen, it is still well below 50%. It is difficult to see why enforcement should not be pursued when a complaint is "well-founded" except in exceptional circumstances. Justice Hayne's findings in the Banking Royal Commission, regarding the enforcement culture of ASIC, are instructive:

1. "Negotiation and persuasion, without enforcement, all too readily leads to the perception that compliance is voluntary";[35]
2. "The regulator *must* do whatever can be done to ensure that breach of the law is not profitable"[36]; and
3. "Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences. There are cases where there is good public reason not to seek those consequences. Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment."[37]

2.18 Claims

In addition to applications made under the RTA directly, parties to a residential tenancy agreement can pursue remedies found outside the RTA. Most commonly, though not exclusively, this will take the form of a minor civil claim ($15,000 or less) or a standard civil claim (above $15,000) for a breach or breaches of contract.[38]

[35] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, 2019) vol 1, 424-425.
[36] Ibid 427.
[37] Ibid 432-433
[38] The limit for a minor civil claim was increased in November 2023, after being fixed at $5,000 since 2003.

Under section 17(3)(c) of the RTA, which forms part of every lease agreement made under the RTA, a landlord is entitled to reasonable compensation for all damage and loss caused by a tenant. Such compensation is generally covered by the bond, but if the landlord's claim is particularly large then they might pursue the remainder through a claim.

There is nothing specific in the RTA that permits tenants to seek compensation for breaches by their landlord, nor does it provide a mechanism to pursue remedies such as rent reductions or rent abatement. Tasmania is the only jurisdiction in the country where this is the case:

Jurisdiction	**Rent reductions for loss of amenity, services, etc**	**Statutory Compensation in Residential Tenancy Legislation (limit)**
Tasmania	No	No
New South Wales	Yes (and abatement if all or part of premises uninhabitable, even if the landlord is not at fault)	Yes ($15,000)
Victoria	Yes	Yes ($40,000)
Queensland	Yes	Yes (up to $25,000 in QCAT – can claim higher amounts through courts)
Western Australia	Yes	Yes (up to $10,000 in Magistrates Court, more in higher courts)
South Australia	Yes	Yes (up to $40,000 in SACAT, more in courts)
Australian Capital Territory	Yes	Yes (up to $25,000 in ACAT, more in courts)
Northern Territory	Yes	Yes (no apparent limit)

A tenant may nevertheless seek compensation from their landlord. This may be actual economic losses flowing from the landlord's breach – such as damaged personal property, alternative accommodation costs, or excessive utility bills – but in most cases the loss is non-economic distress and disappointment – such as that the tenant has been without heating over winter, parts of the house have been unusable due to damp and mould, or that the landlord constantly invades their privacy. In the latter cases the tenant is relying on the concurrency in *Young v Chief Executive Officer (Housing)* [2023] HCA 31, which provides that at common law a tenant can claim damages for breaches of their lease that cause distress and disappointment, provided that the breaches relate to

promises to provide comfort, security and enjoyment.[39] Practically, it can be difficult to quantify a loss of this type.

A tenant could also seek damages for personal injury but would have to comply with the *Civil Liability Act 2002*.

All minor civil claims follow the same relaxed rules of evidence and procedure that apply to applications made under the RTA, as detailed at 4.3. In addition, all minor civil claims go to conciliation before they first go before a Magistrate, at no additional charge to the parties.

3. TASCAT

Tasmania was the last jurisdiction in Australia to not have a "super tribunal" – a single tribunal that amalgamates a large number of single-issue decision-making bodies[40] – though it had been the subject of consideration by various governments for almost 20 years by the time the *Tasmanian Civil and Administrative Tribunal Act* (the "TASCAT Act") was passed in 2020,[41] and the tribunal opened in late 2021.

The primary reason to establish a super tribunal is one of economic efficiency – to avoid duplication of costs such as registry staff, facilities, forms, branding, website upkeep and other administrative expenses. Another major benefit relative to the Court, from a financial perspective, is that Magistrates command high wages relative to tribunal members. In 2021/22, wages for Magistrates and Court staff exceeded the entire expenditure of TASCAT.[42]

The super tribunal model also claims to benefit the parties that appear before it, and the classes of people that fall within its jurisdiction. To that end, the TASCAT Act states that the objectives of the tribunal are to:

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[39] The majority joint judgment mostly concerns the right to seek damages found in the Northern Territory's tenancy legislation, which is likely to impact the other jurisdictions that have a statutory compensation schemes but not so much Tasmania.

[40]Rebecca Ananian-Welsh, *CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System* [2020] MelbULawRw 11; (2020) 43(3) Melbourne University Law Review 852.

[41] Tasmania, *Parliamentary Debates*, House of Assembly, 27 August 2020, 33 (Elise Archer, Minister for Justice).

[42]Magistrates Court of Tasmania, *Annual Report 2021-2022* (Report, 2022) 56, Tasmanian Civil and Administrative Tribunal, *Annual Report 2021-2022* (Report, 2022) 13.

- Promote the best principles of administration, including:
    - Independence;
    - Natural justice;
    - Procedural fairness;
    - High quality decision making;
    - Consistent decision making;
    - Transparency and accountability;
- Be easy to find and easy to access;
- Be responsive to the needs of parties, particular those that need assistance;
- Ensure all matters are processed and resolved as quickly as possible without compromising justice;
- Make use of alternative dispute resolution wherever appropriate;
- Keep costs to a minimum, insofar as it is just and appropriate to do so;
- Use straightforward and clear language;
- Use simple and standardised forms;
- Avoid formality and technicality;
- Be flexible, and adjust its procedures to best fit the particular matter or jurisdiction.

A further benefit of having a super tribunal is that it is modular and can expand as the circumstances warrant; it can continue to absorb new areas of jurisdiction under the TASCAT banner and administration.

3.1 Current jurisdiction and makeup

TASCAT is currently an amalgamation of nine pre-existing tribunals:

- The Mental Health Tribunal;
- The Guardianship and Administration Board;
- The Workers Rehabilitation and Compensation Tribunal;
- The Asbestos Compensation Tribunal;
- The Motor Accident Compensation Tribunal;
- The Health Practitioners Tribunal;
- The Anti-Discrimination Tribunal;
- The Resource Management and Planning Appeal Tribunal; and
- The Forest Practices Tribunal.

It is split into two divisions, the Protective Division, which comprises of guardianship and mental health matters, and the General Division, which is everything else – and presumably where residential tenancy matters would fit, if any transition was to take place.

TASCAT is comprised of a hierarchy of members, with the President at its peak, then at least one Deputy President, Senior Members, then finally Ordinary Members. The Deputy President(s), Senior Members and Ordinary Members may be appointed on a full time, part time or sessional basis. Unlike Magistrates, members are appointed for defined terms – the President for seven years, and Deputy Presidents and Senior and Ordinary Members for five years. Once a member has completed a term they can be reappointed.

The President must also be a Magistrate, or eligible to be a Magistrate, and must have at least five years experience as a legal practitioner. Deputy Presidents must also have a minimum of five years experience as legal practitioners. Senior and Ordinary Members may have five years experience as legal practitioners, or some special expertise in an area that the Tribunal has jurisdiction over.

Currently, TASCAT has three Deputy Presidents, five Senior Members, and 87 Ordinary Members. 50 of the Ordinary Members come from non-legal backgrounds.

Relevant issues for consideration

3.2 Potential Workload Increase

Civil matters, which includes tenancy matters, make up only a small percentage of total Magistrates Court business – less than 10% per year on average. Applications under the RTA make up only around 15% of civil matters, and only 1.5% of total court business. "Applications under the RTA" can be distinguished from "tenancy matters" as the latter also includes general civil claims made under the court's original jurisdiction that relate to tenancy agreements. How many civil matters per year relate to residential tenancy agreements is unknown – unfortunately, the Court does not provide detail that granular.

Year	Total lodgements	Civil lodgements	RTA applications	RTA applications as % of total lodgements/civil lodgements
2018/19	32,860	3,424 (10.4%)	525	1.6/15.3
2019/20	31,413	2,545 (8.1%)	372	1.2/14.6
2020/21	29,555	1,807 (6.1%)	281	1.0/15.6
2021/22	29,059	2,153 (7.4%)	434	1.5/20.2
2022/23	30,764	2,544 (8.3%)	454	1.5/17.8

The proportion of applications under the RTA filed in each registry is roughly commensurate with the population of each region:

Year	Hobart	Launceston	Devonport	Burnie
2018/19	280 (53%)	166 (32%)	42 (8%)	37 (7%)
2019/20	180 (48%)	123 (33%)	36 (10%)	33 (9%)
2020/21	155 (55%)	63 (22%)	27 (10%)	36 (13%)
2021/22	214 (49%)	165 (38%)	28 (7%)	27 (6%)
2022/23	267 (59%)	115 (25%)	27 (6%)	45 (10%)
TOTAL	1096 (55.7%)	532 (27.1%)	160 (8.1%)	178 (9.1%)

If TASCAT was given the entire residential tenancy jurisdiction of both the Court and the RTC, it would represent, on current numbers, a significant increase in TASCAT's caseload:

	Matters filed 2021/22
TASCAT Protective Division	2661
TASCAT General Division	1615
Subtotal	**4276**
Magistrates Court (Residential Tenancy)	434
Residential Tenancy Commissioner	2151
Subtotal	**2585**
TOTAL	**6861**

That is, if it is assumed that current numbers remained more or less constant, giving TASCAT the residential tenancy jurisdiction would increase the case load of the general division by 160%, and of the tribunal as a whole by 60%. Residential tenancy matters would constitute 38% of the tribunal's total caseload.

Western Australia aside, all other Australian jurisdictions handle residential tenancy disputes through their super tribunals:

Jurisdiction	**Decision maker**	**Regulator/supplementary decision maker**
Tasmania	Magistrates Court (minor civil)	Residential Tenancy Commissioner (decision maker, enforcement and education)
New South Wales	NSW Civil and Administrative Tribunal (NCAT)	Rental Commissioner (policy and advocacy) & Fair Trading (enforcement and education)
Victoria	Victorian Civil and Administrative Tribunal (VCAT)	Commissioner for Rental Tenancies (policy, education, advice to gov) & Consumer Affairs (enforcement and evidence gathering)
Queensland	Queensland Civil and Administrative Tribunal (QCAT)	Residential Tenancies Authority (conciliation, enforcement and education)
Western Australia	Magistrates Court (minor civil)	Commissioner of Consumer Protection (currently enforcement and education, but expanded role in process of being legislated)
South Australia	South Australian Civil and Administrative Tribunal (SACAT)	Consumer and Business Services (enforcement and education)
Australian Capital Territory	Australian Capital Territory Civil and Administrative Tribunal (ACAT)	None
Northern Territory	Northern Territory Civil and Administrative Tribunal (NTCAT)	Commissioner of Tenancies (enforcement and education, formally had decision making powers similar to RTC)

In all tribunal jurisdictions, residential tenancy matters constitute a large proportion of the tribunals' case load – between one quarter and three fifths:

	Number of Residential Tenancy (RT) applications 2021/22	**RT applications as percentage of court/tribunal matters**	**RT applications per 100,000 residents**	**Percentage of households that rent[43]**
Tasmania	2,532 (Court + resolved RTC)	20.5 (civil only)	443.30 (Court only 75.99)	29
NSW	41,630	59.09	512.05	33
Victoria	39,587	58.1	600.41	29
Queensland	25,908 (QCAT + resolved RTA)	41	489.19 (QCAT only 207.47)	35
Western Australia	7373 (2020/21 figure)	20.5 (civil only)	265.84	28
South Australia	7,336	42.1	404.08	28
ACT	985	26	216.07	28
Northern Territory	468	33.1	186.90	40

It is difficult to say whether the number of applications would increase or decrease following a wholesale change. Looking at other jurisdictions, that tenancy matters are or are not handled by a tribunal does not in and of itself seem to lead to more applications being made. For instance, both in absolute terms and per capita more applications are made in Western Australia than in the ACT or Northern Territory, despite the former handling tenancy matters through a court and the territories through a tribunal (though the number of applications made in Western Australia is still low relative to the tribunal states – with the caveat that post-COVID-19 restriction numbers are not available for Western Australia).

The density of applications made seems to correlate most strongly with overall population more than anything else. Of the tribunal jurisdictions, the number of applications made per 100,000 residents aligns almost exactly with total population, expect at the top of the list where Victoria (the second most populous state) is marginally ahead of NSW (the most populous state). Curiously, there appears

[43] Housing Occupancy and Costs, *Australian Bureau of Statistics* (Web Pages, 25 May 2022) < https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/2019-20#states-and-territories>

to be no relationship between the number of applications made and the proportion of households that rent.

This comparison also fails to account for the differences between the tenancy acts. For instance, the availability of no-fault end of lease evictions is curtailed in the ACT and Victoria, which would logically lead to there being fewer vacant possession applications in those jurisdictions.

If RTC applications are included, the number of applications made in Tasmania per capita is already quite high, below only the three mainland east coast states. It would be higher, but it does not take into account minor civil claims. It is unknown how many tenancy-related minor civil claims there are in Tasmania. If a statutory compensation provision was added to the RTA, a la all the equivalent acts across the country, one would assume that the number of applications made under the RTA would increase, particularly following the decision in Young.

The experiencee of the Northern Territory would suggest that moving from a system of commissioner and court to tribunal only may in fact reduce the number of applications made. Prior to reforms in 2015, the Northern Territory had a similar jurisdictional split to Tasmania, where the Commissioner of Tenancies (the equivalent of the RTC) had the power to determine certain disputes, and the Local Court others. In 2015, both the Commissioner and the Court were stripped of their dispute resolution powers, which were given to NTCAT. The Commissioner retains enforcement powers. In 2013/14, the last full year that the Commissioner of Tenancies and Local Court had jurisdiction, 1,001 applications were made to the commissioner,[44] more than double the number of applications made to NTCAT in 2021/22 before Local Court applications are even considered (historical data for residential tenancy matters in the Local Court is not readily available).

Of course, that is not to say that having a larger number of applications is a positive thing *per se*. It may suggest that parties feel empowered to exercise and enforce their rights, but conversely it may suggest that there is a high rate of conflict between landlord and tenants in a particular jurisdiction, that there are a lot of tenants being evicted, and/or that the legislation is poorly drafted and rights and obligations are unclear.

[44] Northern Territory Consumer Affairs, *Annual Report of the Commissioner of Consumer Affairs 2013-14* (Report, 2014) 26-27.

3.3 Alternatives to Tribunals and Courts

Like in other tribunal jurisdictions, parties to a residential tenancy dispute in Queensland are subject to alternative dispute resolution, where ideally the matter is resolved amicably without going to a full hearing. Unlike other jurisdictions, the ADR is conducted by a specialist tenancy body, the Residential Tenancies Authority, rather than the tribunal itself. Unless a matter is deemed urgent (including, *inter alia*, terminations and evictions, and emergency repairs), a party seeking relief *must* first attempt to conciliate the matter through the Residential Tenancies Authority. The conciliators are not empowered to make decisions, just to facilitate discussions. Conciliations take place over the phone, either as conferences where all parties are on the line, or asynchronously where the conciliator talks to each party one at a time. If the conciliation fails, the conciliator will issue a "notice of unresolved dispute" which is needed to make an application to QCAT.

In favour of such an approach:

- It's free;
- The conciliation is conducted by tenancy specialists;
- It's approachable and accessible;
- There is no need to attend a physical location – all conducted over the phone;
- It avoids the justice system all together;
- It reduces QCAT's caseload.

And against:

- It potentially prolongs disputes – particularly affecting matters that may be urgent but not meet the requirements to go straight to QCAT, such as non-emergency repairs;
- Reliant upon parties acting in good faith;
- Parties may feel pressured to agree to outcomes that don't necessarily reflect their actual rights in the situation;
- Inefficiency of having to explain dispute to Residential Tenancies Authority and QCAT, rather than conciliation and directions being conducted at single appearance;
- Friction of parties needing to make two separate applications to two separate entities.

In 2022/23, the Residential Tenancies Authority conciliated 22,112 disputes.[45] Of those, 76.3% were resolved via the conciliation process.[46] Only 8.3% proceeded to QCAT (the remainder were abandoned).[47] Tenant advocates based in Queensland have expressed to us concern that tenants are pushed into outcomes that they may not agree with, mostly out of a desire to avoid having to go to QCAT.

The Residential Tenancies Authority also carries the responsibility of enforcing the tenancy legislation and providing education to landlord and tenants. In comparison to similar pages provided by similar bodies across the country, its website is particularly user friendly and informative.

In July 2023, NSW's new government announced that they would be appointing a new Rental Commissioner for the state. The Commissioner does not have enforcement powers under the NSWRTA, rather the purpose of the office is to investigate policy issues and formulate solutions, advocate for tenants as a class, and liaise with stakeholders.[48]

Aside from VCAT, Consumer Affairs Victoria is empowered to issue penalties for non-compliance, and issue educational literature for landlords and tenants. It also takes an active role in disputes over rent increases, drafting reports that provide non-binding advice as to how much a property is worth.

4. Issues

4.1 Delays

It is difficult to look past delay as the primary problem with the current model, though mostly only in respect of the Court. Around a third of all civil matters (not just tenancy matters) filed with the court take more than six months to finalise, with over 10% taking more than 12 months (though this constitutes a significant improvement over figures from 2019/20 and before):

Length of time to finalise	**2017/18**	**2018/19**	**2019/20**	**2020/21**	**2021/22**
% > 6 months	47.1	48.3	48.1	41.1	33.6
% > 12+ months	13.1	17.1	18.7	17.1	12.5

[45] Residential Tenancies Authority, *Annual Report 2022-23* (Report, 2023) 18

[46] Ibid.

[47] Ibid 19.

[48] The Premier, Minister for Better Regulation and Fair Trading (NSW), *'New Rental Commissioner to give renters a voice'* (Media Release, 11 July 2023).

It would be unusual for a bond appeal, in particular, to be resolved within six months – especially if the period it takes for the RTC to provide their decision is included. Firstly, the matter is listed for directions hearing, which is generally around a month after the appeal is filed, then it is listed for hearing, which, depending on the Court's availability, can be months later. Given that fixed-term leases in Tasmania are generally for 12 months, it is not inconceivable that a tenant will have entered and exited another tenancy before the bond for their previous tenancy has been dispersed.

Bonds are capped at the equivalent of four weeks of rent. The median weekly rent for a 3-bedroom detached dwelling in Hobart (the most expensive region in the state) is currently $600 – a maximum bond of $2,400.[49] That is around 15 per cent of the limit for a minor civil claim. It is not surprising that bond appeals are not given high priority by the Court, but, for the parties, the bond is not an insubstantial amount of money. For tenants in particular, who are more likely to have a lower income than the general population,[50] the bond can cover some of the costs involved in moving to another rental property – estimated by the Tenants' Union of New South Wales to be around $4,000.00 on average.[51]

Other appeals of RTC decisions encounter similar issues, despite being more obviously urgent. An appeal of an order that a landlord must carry out repairs could leave the tenant without "essential" services such as heating or cooking facilities, or exposed to unsafe premises, for months before it is finalised. Part of the problem is baked into the RTA, as parties (though in practice it is almost always landlords) are given 60 days to file an appeal – a time period so manifestly excessive it is difficult to understand quite what Parliament had in mind when it was legislated. Depending on how long it takes for the RTC to investigate the dispute and make their decision, three months could pass between the tenant making their application for an order for repairs and an appeal being filed with the Court. Then, the parties will likely have to go through the same path as a bond appeal – a directions hearing, then a hearing.

The Court is quick to list eviction applications, and they are generally dealt with on the first appearance. If there is a substantive dispute that cannot be resolved, the matter will be adjourned

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[49] Tenants' Union of Tasmania, *Tasmanian Rents* (December Quarter 2023) 1.

[50] Fred Hanmer and Michelle Marquardt, 'New Insights into the Rental Market', *Reserve Bank of Australia Bulletin* (June 2023) 13.

[51] Tenants' Union of New South Wales, *Eviction, Hardship and the Housing Crisis* (Report, February 2022) 29.

for hearing. Hearing dates will generally be at least a month if not more from the initial listing, though on occasion Magistrates can provide very quick turnaround of a week or less – predominately, it seems, in cases where there is a breach, the breach is significant, and it is unlikely that the tenant has a strong case.

There are potentially some unintentional benefits to this, as it may act to filter out eviction applications that may otherwise have been made – a landlord that is aware of the Court process is unlikely to pursue a case with any room for dispute. This friction may prompt the landlord to look to other possible solutions, such as negotiating with the tenant. But the delay affects cases brought on certain grounds more than others and does not factor in severity and risk. Rent arrears and most end of leases cases are more or less indisputable, and can thus mostly be dealt with summarily, whilst nuisance cases or section 41 applications are generally complex and reliant on witness testimony and thus are likely to be subject to delays even if there is an imminent risk to person or property. There are better and more direct ways of limiting unnecessary evictions than through unintentional and untargeted delays.

The delays do not usually dissuade social housing providers, but private landlords very rarely follow through if their applications are opposed. Two things likely drive this. Firstly, private landlords are generally self-represented or represented by property managers – they do not know how to conduct a hearing, and do not want to incur the cost of retaining a lawyer. Secondly, if the issue in dispute is a question of law, such as whether the notice to vacate is valid, then in most cases the landlord is better off hedging their bets by abandoning the application and starting again, this time in accordance with the law as argued by the respondent.

Bond appeals and other applications tend to be slipped into lists wherever they fit. They are generally listed for 10am or 2:15pm, but there is more often than not a criminal list in the same court at the same time, and that will always take precedence over a minor civil matter. It is not uncommon to be waiting for over an hour for a matter to be called. On occasion, following the completion of the criminal list there may not be enough time to deal with the matter, and it will be adjourned to another date, which may be months away.

Once a matter is heard, the Court may reserve its decision. In the case of evictions it's generally a fairly quick turnaround, but in the case of bonds it can take months, and in one case years, to get a decision.

Case Study

The tenancy agreement between two international students and the landlord went from the start of 2018 until around June 2018. The RTC did not provide a determination of the following bond dispute until 19 October 2018. The tenants lodged an appeal of the RTC's bond determination. The bond was only $460.00. The issues in dispute were novel and relatively complex – whether the tenancy agreement, which was a boarding agreement in a property where the landlord lived some of the time – was covered by the RTA or not.

The matter was listed for directions in late November, and for hearing in March 2019. Only part of the hearing was completed. The matter was then listed for further directions in April, where it was adjourned until September. The tenants then applied to have the matter adjourned again due to travel commitments and it was, to November 2019. The hearing still was not finished in November, and was adjourned again until February 2020, when the evidence was finally completed. The Magistrate then ordered that both parties supply final written submissions (though the landlord failed to comply). The written decision was sent to both parties in July 2023 (the tenants were successful) and has not been published.

Jurisdiction	**Time until hearing/resolution**
Tasmania	1-2 weeks for eviction application, around a month for first directions hearing for all other, often significant further delay before hearing particularly if not urgent.
New South Wales	4-6 weeks, able to apply for urgent application
Victoria	Urgent repairs: 2 days Non-urgent repairs: 7 days Personal or Family Violence: 3 days Urgent eviction: 3-4 weeks Rent arrears: 4 weeks Other eviction: 8 weeks Bond & compensation: 12 weeks In 2021/22: median 7 weeks, 80th percentile 22 weeks
Queensland	Urgent: 5 weeks (Brisbane), 4 (South-East Queensland), 3 weeks (rest of Queensland) Non-urgent (must first go through RTA): 19 weeks (Bris), 7 weeks (SEQ), 5 weeks (rest)
Western Australia	No information
South Australia	Evictions: on average a week to list, 26 days to finalise Complex evictions: 8 days to list, 86 days to finalise Bond/compensation: 32 days to list, 56 days to finalise Internal reviews: 3 days to list, 50 days to finalise

Australian Capital Territory	Average of 62 days from lodgement to finalisation (urgent applications are listed within two weeks of lodgement, non-urgent 2-4 weeks)
Northern Territory	No information (can apply for an emergency hearing)

Case Study

NCAT "aims" to list tenancy matters within 4-6 weeks of the application being filed. They are initially listed for conciliation and hearing, in which at the same appearance there is an attempt to first conciliate the dispute, then, if that is unsuccessful, the matter proceeds to a hearing, often before the same member that conducted the conciliation. If the parties are not ready to hear the matter there and then, or if the issues are complex, then the matter may be adjourned to another day.

Parties can apply to the registry for an urgent hearing if there is a threat to persons or property, or if the applicant would be placed in significant hardship if the application is not dealt with immediately. An application for an urgent hearing must be accompanied by evidence to support the claim of urgency.

The experience in other jurisdictions shows that moving tenancy matters to TASCAT is unlikely to be, in and of itself, a panacea when it comes to delays. With respect to eviction proceedings, the time between the application being filed and finalisation is already very similar in Tasmania to what it is in other jurisdictions, if not quicker, though the time it takes to get a hearing date is very unreliable.

With respect to matters handled by the RTC, based on the numbers from interstate it's unlikely that TASCAT would be able to finalise them faster. For instance, the RTC states that they will provide their determination of a bond dispute within 30 business days, after the 10 day period the parties have to upload their evidence has elapsed – around 50 days (or 7 weeks) in total from when the dispute is registered. That is a shorter period than in all of the other jurisdictions where data is available: Victoria (12 weeks), metro Queensland (7-19 weeks), South Australia (8 weeks) and the ACT (9 weeks).

It is difficult to directly compare the time periods for repair order applications, as, at least according to the RTC, around two-thirds of them are resolved without the need to make an order – which is preferable than having to go through the full process provided that the repairs are in fact caried out. The RTC gets in touch with an applicant within a maximum of five business days after an application is filed. Only in Victoria is the time from filing to "listing" shorter.

The area in which Tasmania compares unfavourably to the tribunal jurisdictions is in non-urgent matters heard by the Court – mostly RTC appeals and minor civil claims. The root cause of these delays is the Court's workload, specifically its criminal caseload, and the (understandable) priority those criminal matters take over non-urgent tenancy matters. It is difficult to see how the Court could reduce these delays absent:

- A reduction in crime, or of criminal prosecutions;
- An expansion of the Court; and/or
- Dedicated civil magistrates being siloed off from the criminal division.

4.2 Access to Justice

Access to justice can be defined as:[52]

> *the affirmative steps necessary to give practical content to the law's guarantee of formal equality before the law. It refers to the need to ameliorate or remove barriers to access and must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.*

Barriers may include:

- Access to legal advice and representation;
- The cost of filing a grievance and/or retaining legal counsel;
- The process of filing a grievance;
- Illiteracy and lack of formal education;
- Technological illiteracy or lack of access to technology;
- Language;
- Mental or physical disability;
- The technical and convoluted nature of the law, including language and procedure;
- The intimidatory nature of court;
- Lost income from to having to attend proceedings;
- Child care;
- Geographical location and access to transport;

[52] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report no. 133, 11 January 2018) 329.

- Asymmetry of resources between parties;
- Retaliation or the threat of retaliation.

These "barriers" could also be conceptualised as the *friction* that one encounters when seeking justice, as they rarely completely block progress, rather they slow things down, they obfuscate, they frustrate and test the determination and resolve of the person pursuing justice. Improving access to justice entails sanding away the friction.

The amount of friction in the way of a tenant, and to a lesser extent a landlord, pursuing justice through the Court is substantial. Less so in the case of matters handled by the RTC, though there is much room for improvement. Some of the friction is built into the RTA, and how it regulates an inherently asymmetrical relationship.

Representation

The Tenants' Union provides advice and representation state-wide, but is less accessible the further away the tenant is from Hobart. In Hobart, as well as providing a duty lawyer service at the Court, tenants can attend the office during designated hours for face-to-face advice, and potentially representation if the case warrants it. In Launceston, the duty lawyer role is performed but face-to-face advice is by appointment only. The TUT has no office on the North-West Coast, so in-person Court appearances and face-to-face advice must be organised in advance. Phone advice is provided from Hobart; tenants can request advice via voice mail message or email.

Advancements in communications technology and Court procedure have ameliorated the TUT's lack of physical presence on the North-West Coast to some extent, but at the same time highlight other barriers. Post COVID-19, the Court has waived the cost of audio and visual links, so tenants on the North-West can be represented from Hobart without too much fuss. But it can often be difficult to exchange evidence and documents with these tenants remotely – many do not have access to a scanner, or struggle to send photos in an email from their phone. The postal service is slow and costs money to utilise.

Filing fees and legal costs

The cost of filing an application under the RTA is inexpensive, even relative to a minor civil claim. All applications made under the RTA to the Court, whether in the Court's original jurisdiction or appeal

jurisdiction, incur a fee of $71.20 to file. For comparison, it costs $127.50 to file a claim for $15,000 or less. Whilst this is ostensibly positive with respect to access, there is an argument that filing fees provide an important function in disincentivising certain applications. The registry is able to waive or reduce the fee even further if the applicant can demonstrate that they cannot afford it – this entails completing a four-page form which requires the applicant to provide granular detail of their fortnightly income and expenses, and any assets.

While, in theory, the Court could award payment of the filing fee to a successful applicant in certain circumstances, and the prescribed general form provides space to request such an order, in practise such awards are rarely, if ever, made. Some canny property managers and landlords have instead managed to recover the filing fee, and other related expenses, through the bond dispute process. The filing fee is tax-deductable for landlords, but not for tenants.

Jurisdiction	**Filing Fees**	**Fees for Impecunious**
Tasmania (Court)	$71.20 (Court) Free (RTC)	Waiver or reduction on application
Tasmania (TASCAT)	NA	Waiver or reduction on application
New South Wales	$58 (natural persons) $116 (corporations)	$15
Victoria	$0-$233.70 depending on nature of application	Free with health care card
Queensland	$90.10-$379.50 depending on nature of application	Free if financial hardship
Western Australia	$74.50	$23.50
South Australia	$85.00	$64.00 (total waiver available in narrow circumstances)
Australian Capital Territory	$83.00 - $1270.00 depending on nature of application and applicant	Free with health care card
Northern Territory	$76.00 - $587.00 depending on nature of application and applicant	Waiver or reduction on application

As discussed, costs are not awarded unless both parties have legal representation (unless the party is only represented in the sense that they are themselves a legal practitioner)[53], or there are "special circumstances" justifying an award. "Special circumstances" may include where a party has been particularly unreasonable or obstinate throughout proceedings.[54]

The Tenants' Union has not been involved in a case where the latter has been raised, and even in the former case it rarely arises.

The Court may also award "compensation" to the defendant/respondent if it finds that the claim/application is vexatious or frivolous. It is unclear whether "compensation" is intended to have a different meaning to "costs".

The RTC is able to charge a fee upon the filing of:

- A bond dispute;
- An unreasonable rent increase application; or
- An application for an order for repairs

But thus far has declined to do so.

Filing applications

Currently, the Court has no online lodgement system. Prior to the COVID-19 pandemic, it was the case that all applications and claims needed to be taken to the registry and filed physically. Since then, the Court has been content to accept lodgement by email, but this is not stated on the Court's website.

As outlined at 4.3, the forms used for tenancy matters are imperfect fits for many of the applications available to the RTA, and are in some cases misleading as to what will be sufficient to ground an application, or what will be the subject of an appeal.

[53] *TasWater v Kitto* [2017] TASMC 6 at [53].
[54] Ibid at [70].

Forms are only downloadable in .docx format, the proprietary file format of Microsoft Word. They are not editable on, for instance, an Apple iPhone, without downloading a third-party app, such as Microsoft Word (which requires a subscription fee) or Google Docs. Even with those programs, editing a .docx document on a smart phone is an unpleasant experience. Most forms require a signature (a requirement that has been removed from the audio/video appearance booking form), so unless an applicant has an electronic signature, they will need to print out a physical copy of the form. This, obviously, requires access to a printer, which someone is unlikely to have if a smartphone is their only personal computer. If the applicant wants to file their application electronically, they will then need access to a scanner to make an electronic copy of the signed form. Alternatively, an applicant can pick up a physical copy of the form from the registry, or from the TUT, however there may be other barriers in the way of getting to these physical locations.

All applications to the RTC must be lodged online or via post. The RTC does not have its own website or branding but utilises the CBOS website. Applications can made through the generic CBOS contact form, which can be used in a mobile browser. There is no upload functionality, so an applicant will likely have to follow up with an email containing their evidence. Alternatively, there are PDF forms for each type of application, each catered towards the application in question. These PDFs are editable using the iPhone's built-in file management software once downloaded, but not in the default internet browser. The forms provide space for a signature, but the RTC will dispense with that requirement if it is impractical for the applicant to comply.

The disbursement of bonds is handled through a separate system, MyBond, which is accessed completely from within an internet browser. It allows parties to pay bonds, lodge disputes, approve claims, and upload evidence. All bond issues are handled through MyBond – there is no supplementary postal system. As such, those tenants (and landlords) that are not technologically literate must seek assistance from a technologically capable relative or friend, or an outside service such as the TUT, Service Tasmania, or their local library or community centre in order to recover their bond.

There is no specific form for complaints that may lead to an infringement notice – such as a failure to meet minimum standards, or a breach of privacy. This can be done through the generic CBOS contact form, or by an email directly to the RTC (but the email address is not well publicised on the CBOS website).

Complaints and applications can also be made over the phone. If the complainant/applicant is not able to access email or use the internet for whatever reason, the RTC will encourage them to go to their local library, or get help from a friend or family member. They can also arrange to post out a hard copy of the relevant form – though this is undesirable if the matter is urgent (such as a repair order application). In cases where none of these options are available, such as when the applicant/complainant is socially and/or physically isolated and illiterate, the RTC will fill out the form for them over the phone, though that does not solve the issue of having to provide documentary evidence.

Indirect costs

Whilst being in the minor civil jurisdiction mostly (but not entirely) eradicates legal costs as a disincentive to seek relief, and as noted filing fees are low, these are not the only expenses a potential litigant must consider. The Court operates during business hours only, so any person that works during those hours will almost inevitably have to forgo work in order to pursue their matter. If they are casual then that is lost income, if they are permanent then they will have to use annual leave, if their employer permits them to use it. This may be manageable if the Court could promise that the matter will be heard when it is scheduled to be heard, but, currently, a party may be waiting at court for two hours only for the matter to be adjourned again to another day, which is another day that they'll have to take off. Similarly, some people care for children and cannot easily organise babysitting if they, for instance, don't live near family, or do not have a relationship with their family. If one party is affected by this and the other isn't, then the unaffected party can use it as leverage to extract a favourable settlement. Tenants are more likely than landlords to be affected by this, as landlords are commonly represented by real estate agents, and in most cases, landlords do not need to be called as witnesses, whereas tenants almost always are.

Again, this is not an issue with matters dealt with by the RTC, as, by virtue of being on the papers, they are asynchronous – a party can prepare and file their case in their own time.

Attending court is not necessarily easy even when a party lives within relatively close proximity – parking in a city centre is expensive, and public transport is unreliable. Being able to attend by distance (that is, from home) could also reduce the intimidatory factor discussed earlier, and may, at least to some extent, reduce the need for parties to organise childcare.

Language

The Court provides free interpreters where a party is unable to understand English, or their English is poor. This relies on the party, or perhaps more likely their lawyer or advocate, contacting the registry and making a booking. If this isn't done the Court is likely to adjourn the matter to another date. As everything said in the Court room has to be repeated by the interpreter, the presence of interpreters can dramatically lengthen proceedings, and can thus be the cause of delays beyond what is standard. This can be mitigated through case management, such as by limiting examination in chief to statements/affidavits, ordering written legal submissions, and proactively intervening in meandering cross examination, but it is to some degree unavoidable if the integrity of proceedings is to be maintained.

Neither the Court nor the RTC provides forms in different languages.

Disabilities

The Court in Hobart is ostensibly equipped with lifts and ramps to cater to people with physical disabilities.

> *Case Study*
>
> A hearing was scheduled in Court 8 at Hobart, which is on a half level and only directly accessible by stairs. One of the tenant's witnesses was in a wheelchair. Ostensibly, court 8 could be accessed by taking the lift up to the mezzanine level, and then a further wheelchair lift down again, but the wheelchair lift was broken. As no other court room was free, she could not give her evidence and the matter had to be adjourned part heard (though it would've had to have been regardless, as the applicant had not yet closed their case).

Mental health issues are more difficult to clearly identify, but it almost goes without saying how conditions such as anxiety, post-traumatic stress disorder, or schizophrenia can impact on a person's willingness or ability to seek justice. The Court has a special diversion list for people with mental health issues that are in the criminal system, but no equivalent for civil matters. The Court also has mental health support staff, but again they exclusively work on criminal matters. The mental health of the tenant is directly relevant to eviction proceedings under the RTA,[55] but even in matters where it is not it can still hinder a person that is seeking justice.

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[55] *Parsons v Director of Housing* [2018] TASSC 62 at [57].

Intimidatory nature of the Court

Though the Court is required to refrain from formality and technicality in matters under the RTA and other minor civil matters, in practise there is little difference from a "normal" matter. The complexity of legal language and procedure is entwined with the purposefully intimidatory nature of the Court – though the Magistrates Court has dispensed with wigs, the Magistrate is still located above and apart from the parties, titles are still formal and deferential, and the Court has recently reintroduced robes for Magistrates. Even in minor civil matters, Magistrates get pointedly annoyed when parties accidentally revert to using first names. It is difficult to quantify the number of potential litigants that are dissuaded from pursuing valid claims because it requires "going to Court". As well as being intimidating, it is seen as a dramatic escalation of the dispute. Even the distinction between civil and criminal matters is not well understood – tenants sometimes express concern that eviction proceedings may "go on their records", and often immigrants worry erroneously that it will affect their visas and citizenship prospects.

By contrast, the RTC handles matters exclusively "on the papers" and remotely (despite having the power to convene hearings in certain circumstances) – so there is no being put on the spot by a Magistrate, no need to comply with formalities, no cross examination, and there are no rules with respect to what form evidence has to take. In comparison with going to Court it is stress free, or at lease as stress free as such matters can be.

Physical Locations

In Hobart, as at the time of publishing, all applications for vacant possession are listed every Monday (or Tuesday if the Monday is a public holiday) at 9:15am, before a rotation of Magistrates. Previously, matters had been heard before a single Magistrate every week, which provided a degree of certainty with respect to procedure and interpretation of the RTA and other relevant law.

In Launceston, there is one listing per week, at 9:30am, but not on a set day. Occasionally there will be no listings on a particular week, or two. The listings rotate between the four Launceston-based Magistrates.

In each of Burnie and Devonport there tends to be one 10:00am list per month.

TASCAT's full time registry is located in Hobart.

Case study

In NSW, an application will be listed at one of the registries of the tribunal, or at a court house in smaller localities. Overall, there are 40 cities, towns, and suburbs with some kind of physical NCAT presence.

Hearings are also conducted in rented office space in Launceston, and conciliation conferences in Devonport.

Case study

The TUT had a wheelchair-bound client in an anti-discrimination matter who had difficulties accessing TASCAT's Launceston location – the access to the lift was not level, and the corridors were not wide enough for him to easily fit through.

Technology

The procedure regarding remote appearances has been relaxed since the pandemic necessitated it, but appearing in person is still the strongly preferred default, and Magistrates are still often reluctant to grant applications to appear by phone or video conference, especially for hearings, unless there are extraordinary reasons for doing so – such as not presently residing in the state or having a physical disability. This is not without reason – it is difficult and frustrating to examine witnesses that cannot be handed documents and may not have all the evidence in front of them. A well-designed electronic case management system, where all paperwork and evidence is uploaded to a central server and can be accessed by all parties and the Court, would mitigate such issues.

Section 82 of the TASCAT Act provides that a party, their representative, and/or a witness or witnesses, may only appear via phone or video call, "if the tribunal considers it appropriate". That is, the default position is that the parties, their representatives, and witnesses must appear in person, and deviation from that position requires the affected party to convince the Tribunal that it would be appropriate.

The Tribunal may also order that a matter can be determined "on the papers", meaning with reference to filed material, and that no physical hearing is needed.

Jurisdiction	Audio/video conferencing	Online Lodgement and Case Management
Tasmania (Court)	Upon application, subject to discretion (fee waived since COVID-19)	Email lodgement
Tasmania (TASCAT)	Upon application, subject to discretion	Email lodgement, online lodgement and case management available for certain matters
New South Wales	Upon application (free)	New lodgement and case management system introduced November 2023
Victoria	Nominally requires application, in practise most matters carried out remotely (free)	Lodgement yes, case management no - new system incoming
Queensland	No application required for direction hearing, application/ tribunal direction required for hearing (free)	In process of being rolled out – currently Brisbane only
Western Australia	Audio at discretion of court, must be accompanied with affidavit explanation if requested for hearing (free)	Yes, and mandatory – also capacity to carry out "eTrials"
South Australia	Application required, generally only granted on basis of location (SACAT in Adelaide only) (free)	Yes
Australian Capital Territory	Tribunal dictates how proceedings are to be conducted, parties can apply to appear in a contrary way (free)	No
Northern Territory	Application required (free)	No, but email lodgement preferred to hard copies

Case Study

In NSW, all residential tenancy applications can be lodged online, through NCAT's web-based portal (a new version of which was launched on 20 November 2023). In 2021-22, 84.4% of applications in the Consumer and Commercial Division were lodged through the online portal. NCAT estimates that it takes about half an hour to fill in an online application, but the page will retain the information for up to three hours (an applicant cannot save and quit and come back later). Parties that regularly appear before the tribunal, such as real estate agencies, social housing providers, and advocates, can register as frequent users, so that the online form is partly pre-filled for every new application.

The relevant filing fese – which are currently $58 for a natural person, $116 for a corporation, and $15 for a person that can demonstrate that they are impecunious – can also be paid electronically through the same portal. Currently, there is no way to upload documents or files through the portal, or otherwise file documents electronically (such as via email). Evidence must be filed at the registry in person or via post.

If a party is unable or unwilling to file their application electronically, a hard copy can be filed at the registry, of which there are seven across Sydney and the main regional centres, or at one of the 253 Service NSW locations across the state.

Once a party has filed their application, they can track listings through the separate eServices online portal.

Barriers in the RTA

Finally, there is only so much that the Court, the RTC, or any other body vested with the jurisdiction over tenancy matters can do to improve access to justice without substantive reform to the RTA. Firstly, at the end of a fixed term tenancy, a landlord can issue their tenant with a notice to vacate for no other reason than that the lease is ending. Secondly, when applying for new tenancies, real estate agents and landlords almost universally require a reference from the applicant's previous landlord or agent. The provider of the reference is not required to put it in writing, and neither the provider nor the recipient is obligated to tell the prospective tenant what was said. In conjunction, these have a chilling effect on tenants seeking justice – 44% of Australian tenants have declined to pursue maintenance issues out of fear of retribution;[56] they do not want to "rock the boat" because they are reliant on the landlord for shelter and a reference. Fears can remain even after a tenancy has concluded if, for instance, the tenant lives in (and wants to stay in) a town where one or two real estate agencies manage a large percentage of the rental properties on the market.

4.3 Rules and procedures

Per regulation 3(b) of the *Magistrates Court (Civil Division) (Minor Civil Claims) Regulations 2013*, all applications and appeals made under the RTA are Minor Civil Claims within the meaning of Part 5 Division 4 of the *Magistrates Court (Civil Division) Act 1992*. Minor civil claims, also known colloquially

[56] Choice, National Shelter & NATO, *Disrupted: The consumer experience of renting in Australia* (Report, 2018).

as small claims, follow a different set of rules and procedures than general civil claims. Specifically, the *Magistrates Court (Civil Division) Act 1992* provides:

- There are no rules of evidence;
- That the Court can take an active role in eliciting evidence, and may call witnesses on its own initiative;
- The proceedings are to take the form of an inquiry, a la the system used in much of Continental Europe,[57] rather than an adversarial contest between the parties;
- The hearing is to be conducted with as little formality and technicality as possible;
- Legal representation is not permitted unless the parties agree or the Court grants leave if satisfied that the party requesting representation would be unfairly disadvantaged if they were not permitted to have representation;
- No costs are awardable unless both parties are represented, or the Court finds that there are special circumstances justifying the award of costs;
- Parties are not estopped from re-litigating the same issues.

The purpose of the minor civil jurisdiction is to emulate some of the ostensible benefits of tribunals - expediency, informality, and lower costs[58] - without having to establish a whole separate body. However, these goals cannot be pursued at the expense of providing procedural fairness and natural justice to the parties.[59]

In practice, the Court generally does as it normally does, that is, conducts an adversarial hearing. At least, it does when at least one of the parties is represented. It is posited that this is due to a confluence of several factors. As the Magistrates have and continue to operate in a primarily adversarial legal system, there is little institutional knowledge as to what exactly an inquisitorial hearing is meant to look like. To that end, the *Magistrates Court (Civil Division) Act 1992* does not provide much assistance. The degree of situational flexibility afforded by s 31AB[60] may in some respects run counter to matters being resolved expediently, as the "ground rules" in any given case first have to be elicited, then explained to the parties – in contrast with the normal rules of civil procedure and evidence which (if both parties are represented) can be taken as a given. As minor

[57] *Stephenson v Bartlett* [2018] TASMC 4 at [46]-[47].
[58] *Burnett v FitzGerald and Browne* [2015] TASSC 51 at [51], Honey v Malbren Pty Ltd [2009] TASSC 44 at [8].
[59] *Streets v Lucas* [2013] TASSC 45 at [25].
[60] Ibid at [32].

civil claims constitute a small part of the Court's workload, and, perhaps evictions aside, are low stakes relative to other parts of its jurisdiction (notably, criminal and child protection matters) it is understandable that a great amount of effort and energy is not going to be spent establishing separate procedure for a small number of minor matters.

In addition to the minor civil claim provisions in the *Magistrates Court (Civil Division) Act 1992*, Court proceedings follow the *Magistrates Court (Civil Division) Rules 1998*. Nominally, all the rules that apply to a claim apply to all applications and appeals made under the RTA. Per *Streets v Lucas*[61] at [31], the civil division rules "sit rather uncomfortably" with the RTA. For instance, strictly speaking the respondent to an application or appeal under the RTA is entitled to a 21 day period to file a defence. Per s 31AB(3A) of the *Magistrates Court (Civil Division) Act 1992*, the Court is able to waive these rules, but this is very rarely done explicitly, rather it is seemingly implied by the nature of the proceedings.

If the *Magistrates Court (Civil Division) Rules 1998* are silent on a particular issue, then the Court can instead follow the *Supreme Court Rules 2000*. Given that the *Magistrates Court (Civil Division) Rules 1998* are made up of 160 rules, compared to the 978 rules that comprise the *Supreme Court Rules 2000*, the Court often defers to the latter. The *Magistrates Court (Civil Division) Rules 1998* have not been amended since 2014.

Presently, the rules of TASCAT, the *Tasmanian Civil and Administrative Tribunal Rules 2021*, are minimal, comprising of only 24 rules. This is largely because (1) many procedural concerns, such as service, are dealt with in the TASCAT Act, and (2) the rules of the former tribunals that comprise TASCAT have largely been retained in order provide continuity for members and practitioners and a smooth transition to the new super tribunal. Per s 7A of the TASCAT Act, if there is a conflict between the TASCAT Act or the rules made under it and the Act and rules of the former tribunal, then the latter prevails to the extent of the inconsistency.

The RTA does not include any procedural rules of its own – it operates within the structures set out in the *Magistrates Court (Civil Division) Act* and *Rules*. Thus, if residential tenancy matters were to be transferred to TASCAT they would be run according to the practises and procedures set out in the

[61] TASSC 45.

TASCAT Act, Rules and Regulations, unless the RTA (or the TASCAT legislation) was amended to provide for special rules for tenancy matters.

TASCAT is not bound by the rules of evidence and may inform itself as it sees fit.

The tribunal has the power to:

- Issue a summons for a person to give evidence, or produce documents;
- Carry out a viewing of property;
- Appoint an expert to assist with proceedings; and
- Authorise a person to take evidence.

Parties

It is often the case that community housing providers do not own the properties that they manage, but instead lease them from Homes Tasmania. They are able to bring proceedings by way of section 16A of the RTA, which provides that the holder of legal estate in premises can assign their rights and responsibilities as owner to a company or person.

Representation

As outlined above, unless the parties agree otherwise, or one party or both are themselves legal practitioners, parties to a minor civil matter do not have the right to legal representation without first seeking the leave of the Court, and that leave may only be granted in instances where the party would be placed at an unfair disadvantage without legal representation.[62]

In practise, Tenants' Union lawyers rarely have had to ask for leave to appear in an application under the RTA, and, in the few instances that they have, it has not been refused. If the landlord has raised it, it has been brushed aside by the Court fairly dismissively. This may be because (1) there is an inherent imbalance between landlords and tenants, so the requisite unfair disadvantage can be taken as a given, and/or (2) the Court prefers to have lawyers dealing with matters as those matters are generally dealt with more efficiently. Unrepresented parties without a legal background often get snagged on irrelevant issues, and/or get caught up in the emotions of the subject matter, and it can be excruciating for the Court to extract salient positions out of both parties. This is compounded at

[62] *TasWater v Kitto* [2017] TASMC 6 at [23].

a hearing, particularly if the Court takes a hands-off approach and runs it like a standard adversarial trial.

In addition to those factors, private landlords are often represented by property managers, who do not have legal training per se but are required to have a working knowledge of the RTA beyond that of a layperson, *prima facie* putting an unrepresented tenant at a disadvantage. Per section 31AD(6) of the *Magistrates Court (Civil Division) Act 1992* they are also required to seek leave to act for a landlord (unless the real estate agency is listed as the applicant) but they rarely, if ever, seek it – not that the Court seems to mind.

By contrast, in matters that are not brought under the RTA, such as a claim following a breach of contract or a tort, whether instigated by the landlord or the tenant, the Court generally does not allow the parties to be represented except at directions. In one instance, the Court justified this on the basis that the property manager acting for the defendant may have special knowledge of the RTA, but not of the law generally.

Per section 98 of the TASCAT Act, parties are entitled to be represented by counsel without first needing to seek leave or meet any other threshold. However, the default position is that parties bear their own costs. Costs may only be awarded if there is frivolity, time-wasting, or bad faith by one of the parties.

By allowing legal representation, the Tribunal can better identify the salient issues to a dispute and deal with them expediently. Often when parties are self-represented a significant amount of the decision maker's time is wasted on irrelevant grievances and explaining procedure. By strictly limiting costs, the parties are incentivised to settle disputes if possible, or at least to cooperate on how the proceedings are run. Simultaneously, the threat of costs cannot be weaponised to smother meritorious claims, and the theoretical prospect of costs will not have a chilling effect on bringing such claims.

Jurisdiction	Legal Representation
Tasmania (Court)	With leave if unfair disadvantage
Tasmania (TASCAT)	Yes
New South Wales	With leave
Victoria	Yes
Queensland	With leave
Western Australia	With leave
South Australia	With leave
Australian Capital Territory	Yes
Northern Territory	Yes

Re-opening matters

If a tenant fails to appear at the listing of a vacant possession application, the Court will conduct a trial, within the context of the application being a minor civil claim, where the Court is able to dispense with the *Magistrates Court (Civil Division) Rules 1998*,[63] and inform itself as it sees fit. That is to say, on the one hand, the Court will not make the order if it is not satisfied of the requirements set out in s 45 of the RTA. On the other hand, the order will be a final judgment within the meaning of the *Magistrates Court (Civil Division) Rules 1998*. The rules do not clearly allow a tenant in that situation to reopen the matter, even if their absence was blameless or otherwise excusable. However, the Supreme Court has held, in *Blowfield v Centacare Evolve Housing Limited*,[64] that an absent tenant can apply to have a final judgment reopened by:

- Relying on r 10, which allows the Court to import the rules of the Supreme Court where the Magistrates Court's rules are silent – in this case r 570(2); and/or
- Relying on the Court's implied jurisdiction to set aside an *ex parte* order.

If TASCAT makes a decision in the absence of one of the parties, the absent party can apply within seven days to have the decision reviewed. The TASCAT Act does not distinguish between "final" and "interlocutory" decisions – all decisions are able to be set aside. An application can be made to have the seven-day period-extended. The tribunal must review the decision if the previously absent party can provide a reasonable excuse for why they were absent. Only one such application can be made by each party in the course of a matter.

[63] Which otherwise apply, per the definition of "claim".
[64] [2024] TASSC 27.

Jurisdiction	Able to reopen matter if party absent when decision made	Time period to instigate application
Tasmania (Court)	Yes	Seven days (r 570(2) of the *Supreme Court Rules 2000*) No time limit (implied jurisdiction)
Tasmania (TASCAT)	Yes	Seven days
New South Wales	Yes (power in s 188(b) of the *Residential Tenancies Act 2010* rather than NCAT legislation)	N/A
Victoria	Yes	14 days
Queensland	Yes	28 days
Western Australia	Default or summary judgment only in rules, but likely also implied power	21 days
South Australia	Yes	Seven days
Australian Capital Territory	Yes	N/A
Northern Territory	Yes	28 days

Extension of time

Per section 115 of the TASCAT Act and rule 11 of the TASCAT Rules the tribunal has a wide discretion to extend (or abridge) any time limit imposed by the TASCAT Act, the TASCAT Rules, or any act which TASCAT has jurisdiction over, even if the relevant time period has already expired.

Forms

The Court has prescribed three forms in relation to matters under the RTA:

1. Form 2 – general application form;
2. Form 3 – notice of appeal;
3. Form 4 – notice of appeal section 24B.

On the face of it, one may logically assume that Form 2 deals with all matters within the Court's original jurisdiction, and Form 3 with all appeals. However, both Form 2 and Form 3 are drafted in such a way to make them awkward fits for certain applications.

Form 2 is primarily designed for applications to terminate the tenancy under sections 41, 45 and 47A of the RTA, which each earn their own tick box, whereas the five other applications that are able to be made directly to the Court are relegated to an "other" box. It includes a tick box to request that

the respondent pay the filing fee, which is almost always ticked, but, as discussed, rarely if ever awarded.

The section of the form that deals with applications under section 41 of the RTA may be somewhat misleading to a prospective applicant, as it indicates that mere threats of physical injury are enough to support a claim when the bar set by section 41 is higher (the other party must be "likely to" cause or permit physical injury).

Form 3 is titled as if it is a general form for all appeals under the RTA, but the form itself makes it clear that it is concerned only with appeals under section 30 of the RTA, which deals with the disbursement of security deposits. The form requests that the appellant state the parts of the RTC's decision that they wish to appeal against, but as the appeals are heard *de novo* the RTC's reasons aren't relevant to the appeal.

Other than Form 4, there is no form for the other appeals for which the Court has jurisdiction under the RTA. An appellant will generally file an edited variation of Form 3 that better aligns with the specific appeal.

Form 2 specifies that any residential tenancy agreement (if written) and any notice to vacate (if relevant) must be attached to the application, whilst Form 3 directs the applicant to attached copies of the RTC's decision and the tenancy agreement (if written). In the case of a Form 2 application, this will almost certainly not be enough evidence to allow the Court to grant the application. Additional evidence, dependant on the basis for the application, will almost always be required – such as, a rent ledger, photos of the property, the condition report, statements from neighbours, written correspondence between the parties, expert evidence, and quotes from tradespeople.

Neither form directs the parties to exchange the evidence they seek to rely on.

Enforcement

If TASCAT makes an order that a party must pay an amount of money to another, the amount becomes a debt due and payable and recoverable through the Magistrates Court or the Supreme Court, depending on the quantum of the order. That is, if the debtor fails to comply with the order of the tribunal, the beneficiary of the order must then lodge a claim for the liquidated debt in the relevant court in order to enforce the tribunal's order.

In all other tribunal jurisdictions, aside from in South Australia (as the TASCAT Act is based on SACAT's enabling legislation), a monetary decision of the tribunal instead becomes a judgment debt or order of the relevant court – meaning that the beneficiary of the order can enforce it immediately through the court's processes (such as by garnishing wages or bank accounts, or seizing and selling property):

Jurisdiction	**Enforcement**
Tasmania (Court)	Magistrates Court
Tasmania (TASCAT)	Monetary orders: Magistrates Court or Supreme Court Non-monetary orders: fine or imprisonment
New South Wales	Court (decision becomes order or judgment debt for purposes of court)
Victoria	Court (decision becomes order or judgment debt for purposes of court)
Queensland	Court (decision becomes order or judgment debt for purposes of court)
Western Australia	Magistrates Court
South Australia	Evictions: SACAT bailiff Monetary: Court (must file new claim – not judgment debt)
Australian Capital Territory	Evictions: ACAT and Australian Federal Police Monetary: Magistrates Court (becomes judgment debt)
Northern Territory	All orders become orders of the Local Court

For orders that are not monetary in nature, the person or entity subject to the order can be imprisoned for up to a year or fined up to 60 penalty units ($11,700) if they fail to comply.

4.4 Federal Jurisdiction

The High Court has ruled, in *Burns v Corbett* [2018] HCA 15, that state tribunals are not able to be vested with judicial power in respect of federal disputes. The primary practical implication of this with respect to residential tenancy matters is that non-courts are unable to hear matters where the landlord is a resident of a different state - as there is little doubt that the making of, for instance, an eviction order is judicial power.[65]

With respect to the current division of powers under the RTA, there is no question that the Court is unaffected. However, it remains unexplored whether, in making bond determinations, repair orders,

[65] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722; *Raschke v Firinauskas* [2018] SACAT 19.

rent increase determinations, and other orders, the RTC is exercising judicial power and therefore is restrained by Burns. The line between administrative and judicial power is fuzzy, and an all-encompassing definition impossible,[66] but some of the factors that suggest judicial power include:

- Determining the existence of a right or obligation;[67]
- Settling an actual existing controversy between defined parties, as opposed to a prospective or theoretical issue;[68]
- That the power and process is coercive rather than consensual;[69]
- That the decision is binding and final (unless appealed);[70]
- The decision determines existing rights rather than creating new ones;[71]
- Determining questions of law.[72]

Viewed with the above criteria in mind, inexhaustive and incomplete as they are, it is difficult to argue against the proposition that the RTC regularly exercises judicial power. In determining bond disputes, in particular, the RTC:

- Determines existing rights and obligations;
- Makes binding and final decisions, subject to appeal;
- Determines questions of law and fact; and
- Exercises coercive power.

In the case of the now lapsed COVID-19 era power to terminate tenancies in the case of hardship, the RTC was almost certainly exercising judicial power.[73]

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[66] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-9; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J.

[67] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 per French CJ and Gageler J, at 566 per Hayne, Crennan, Kiefel and Bell JJ.

[68] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; [1970] ALR 449 per Kitto J.

[69] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 452.

[70] *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

[71] *Rola Co (Aust) Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 203.

[72] Ibid at 213 per Starke J

[73] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722; *Raschke v Firinauskas* [2018] SACAT 19.

If a Federal matter is filed with TASCAT it will transfer the matter to the Court, which does have jurisdiction to hear Federal matters. The Court is to essentially act in the position of the tribunal, with the same rules regarding, *inter alia*, representation, evidence and costs applying.

An applicant must still first file their application to TASCAT, even if they are well aware that it will need to be transferred to the Court. There are then two sources of delay: (1) the transfer process; and (2) the length that matters before the court generally take to finalise compared to a matter before TASCAT.

> *Case Study*
>
> *Of course, NCAT runs into the same Burns v Corbett issue with respect of federal jurisdiction as TASCAT (in fact, it was the subject of that litigation). Like at TASCAT, an applicant that knows they are likely to fall afoul of Burns v Corbett must still first lodge their application with the tribunal. At that point, though, NCAT still provides the parties with alternative dispute resolution, even if it is mutually known that the tribunal doesn't have jurisdiction. In Tasmania, once a matter has been transferred to the Court, the Court can then order TASCAT to carry out ADR.*
>
> *In NSW, if the matter is settled, and the applicant needs to formally enforce it, or if settlement fails and the applicant wants to pursue the matter, the applicant needs to have the matter transferred to a court. Unlike in Tasmania, this process is not automated – the applicant needs to file four or five (depending on whether the matter has settled) separate documents with the court themselves. All NCAT provides is a letter stating that it has declined to hear the matter.*

Jurisdiction	**Federal Matters**
Tasmania (Court)	N/A
Tasmania (TASCAT)	Must make application to TASCAT, TASCAT will transfer to Magistrate's Court
New South Wales	Applicant must lodge transfer to court
Victoria	Applicant must go directly to court, applications lodged with VCAT will be dismissed
Queensland	Tribunal is purportedly a court
Western Australia	N/A
South Australia	Must make application to SACAT, SACAT will transfer to Magistrate's Court
Australian Capital Territory	Not a state
Northern Territory	Not a state

As far as we are aware, there has been no research into where owners of rental premises in Tasmania are from. However, based on other reports we can make an approximate guess. The TUT carried out a study of Airbnb permit-holders in Hobart, finding that 14% of properties were registered to an interstate address and owned by a natural person or persons.[74] AHURI found that, nationwide, 10% of private rental properties are owned by non-residents – though this figure is inflated by Queensland at 13%, with the next two highest jurisdictions being Victoria and New South Wales at 9% (a specific figure for Tasmania was not supplied).[75] We suggest that it is safe to put the figure at approximately 10% of all private rental properties.

If TASCAT is granted the exact jurisdiction that the Court currently has, and demand stays the same, then based on 2022/23 numbers around 24 matters would need to be transferred to the Court each year. If TASCAT is also granted the RTC's jurisdiction, including bonds, then on current numbers around 242 matters per annum would be affected by Burns and would need to be shifted to the Court. If those numbers are in anyway close to accurate, it would lead to the slightly absurd position that the number of residential tenancy matters heard by the Court would only reduce by about 50%, and that the Court would be dealing with *more* bond, repairs, and rent increase disputes than it does now.

The decision in Burns only affects natural persons, it doesn't affect corporations. The RTA provides that an "owner" (aka landlord) is:

> *(a) a person who holds a legal estate in residential premises; and*
> *(b) that person's successors and assigns; and*
> ***(c) an agent of that person; and***
> *(d) a mortgagee who made an application under section 85 of the Land Titles Act 1980 ; and*
> *(e) a mortgagee or encumbrancee who gave or left a notice under section 77 of the Land Titles Act 1980.*

Subsection (c) is of particular interest in respect of Burns, as it would appear to allow property management companies to make applications under the RTA in their own right, rather than merely

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[74] Tenants' Union of Tasmania, *Meet the Hosts. An analysis of short stay accommodation permit data in the Hobart City Council municipality* (Report, 2023) 7.
[75] Chris Martin et al., Regulation of Residential Tenancies and Impacts on Investment (Australian Housing and Urban Research Institute Limited, Final Report No. 391, November 2022) 46.

represent their clients (upon seeking leave under section 31AD(6) of the *Magistrates Court (Civil Division) Act 1992*). With respect to eviction proceedings, practise varies on a regional basis – in Hobart, property managers almost exclusively appear in their capacity as a representative of the person that holds legal estate, rather than as a party, whereas in Launceston and the North-West there is more of a mix (see, for instance, *Living Here Launceston v Bell* [2018] TASMC 1):

	Matters filed by private agent 2022/23	**Matters filed by private landlord 2022/23[76]**
Hobart	12	113
Launceston	24	20
Burnie	10	7
Devonport	10	4

This is likely because a now retired Magistrate, who used to handle all eviction proceedings in Hobart, insisted that all applications were to be made in the name of the owner of the premises, and that practise has persisted – though, as per the above, it is an open question as to whether he was correct.

If the holder of legal estate is represented by a property manager then the property manager is able to accept payment of the bond from the tenant and deposit it with the RDA. The bond is registered as being lodged by the property management company, rather than their client. As such, any appeals of bond determinations that involve a property management company will have that company as a party. The company, if it is a corporation, will not be affected by the decision in Burns.

4.5 Quality and transparency of decision making

The rules of natural justice and procedural fairness apply to all determinations made by the RTC.[77] In a general sense, the process followed by the decision-maker in making the decision must be fair. Specifically, the parties must be given an opportunity to make submissions on any evidence or material that the decision-maker may rely upon, and the decision maker must be free from bias.

The current process followed by the RTC does not comply with the first limb of natural justice, particularly with respect to bond disputes. The default position is that the bond is the tenant's money and will be returned to them, unless agreed otherwise or the landlord can prove that they are entitled

[76] Minimum number, as some applications, such as bond appeals, could be made by either the landlord or tenant but the data provided by the Court does not distinguish.

[77] *Muddyman v Nest Property [2021] TASMC 2* at [11], The Guide to the RTC at 6.

to part or all of it. As such, though it is not stated explicitly in the RTA, in a bond dispute the landlord is essentially the claimant and the tenant the respondent/defendant. Once a bond is in dispute, each party is given 10 days to upload their evidence to MyBond. These periods operate concurrently. That means that the "respondent" tenant is not provided with any opportunity to consider and respond to the claimant landlord's evidence before providing their own.

When a party lodges a claim for their bond, they have to provide a short (that is, character limited) summary as to why they feel they are entitled to the bond. In many cases, this is all a tenant will have to go off when preparing their case. They are shadow boxing against what they assume the case against them will be. Sometimes, the summary provided is incomplete, or misleading, so the tenant will not be given any chance at all to respond to certain claims.

A tenant can ask their landlord to provide them with all the evidence they intend to rely on, but there is nothing in the RTA that compels it. They can request the RTC to provide them with the evidence, and an extension to file their response if the evidence is not lodged until on or around the deadline, but this is not provided for anywhere on MyBond or the CBOS website, and is not an application that can be made through the MyBond portal, rather it must be made via email, through an address that is not publicised on MyBond or the CBOS website. Even if the landlord uploads their evidence before the deadline, the tenant is not able to view it on MyBond.

There is nothing in the RTA that necessitates this approach, though that is not to say that it could not better articulate a fair procedure. Section 29F(3)(b), for instance, states that a dispute of a claim (which will be more often than not made by a tenant) must be accompanied by "any information" in support of the dispute. At this point, the party disputing the claim has only seen a summary of the grounds of the claim – not any of the evidence. Section 29F(6)(b) provides that the RTC must notify all relevant parties that they have a right to make written submissions in relation to the dispute within a specified time, but it does not prescribe that each party must be given the same time period, to operate concurrently. Presumably, this approach has been taken in order to expedite disputes. If each party is given ten days to provide their evidence, that doubles the time it currently takes before the RTC can make their determination. But expediency cannot come at the expense of natural justice, even under schemes where expediency is specifically prioritised – both the provision of the *Magistrates Court (Civil Division) Act 1992* that establishes the minor civil jurisdiction (section 31AB(1)(f)) and the TasCAT Act (section 10(1)(c)) make this clear.

In rent increase disputes, the RTC relies upon bond lodgement data in order to determine the average rent for a locality. This data is not promoted as being publicly accessible,[78] and is not provided to the parties before a determination is made. In *Muddyman*, DCM Daly made clear that this practise is not compatible with natural justice:

> *These are clear circumstances of practical injustice to both parties; because they had no opportunity to consider and deal with the material and the data, the locations, the particular properties referred to or the Commissioner's delegate's conclusions based upon that material. Had the parties had been provided with a summary of the facts revealed by the Commissioner's delegate's investigation, inviting a response, that may have cured much of the unfairness in that situation.*

There have been many instances where a decision of the RTC feels as if it has been grounded not in the words of the RTA and legal principles of statutory interpretation, but in nebulous notions of fairness; that the dispute is being determined with reference to what the RTA *should* say rather than what it does. This approach is best illustrated in the context of notices to terminate, as outlined at 2.5, but it has also been applied in cases with novel facts where there would be, in the view of the RTC, some injustice if the RTA was applied as it is written.

> *Case Study*
> *A tenant broke their lease early as the landlord told them that their lease would not be renewed, and they had been offered social housing. They were told that the offer for social housing would be withdrawn if they did not accept more or less straight away. The landlord claimed the bond to cover rental loss. The RTC found that the landlord had a prima facie right to be compensated but declined to make the award because of the tenant's circumstances.*

Because appeals to the Court are heard *de novo*, any feedback provided to the RTC on the quality of its decision making is merely indirect. That the initial determination may have been made *ultra vires* is not relevant to the appeal. Without direct reviews of the determinations, not just the outcomes but the means of reaching the outcomes, the RTC's approach is tacitly endorsed and there is little reason for them to change tact.

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[78] Though it is available on the Australian Bureau of Statistics' website:<https://data.gov.au/dataset/ds-dga-9d3716ca-3064-4aa2-874d-4c4cae9083af/details?q=bond%20tasmania>

4.6 Appeals

Per section 28(2) of the *Magistrates Court (Civil Division) Act 1992*, a party to a minor civil claim may only appeal to the Supreme Court if:

1. The Court lacked or exceeded jurisdiction;
2. The party was denied natural justice; or
3. The Supreme Court grants leave.

With respect to the circumstances in which the Supreme Court will grant leave, Pearce J in *Burnett v FitzGerald and Browne* [2015] TASSC 51 found, at [51]:

> *The requirement for leave indicates that there should be circumstances which justify the departure from the ordinary rule that there is no appeal. The nature of the jurisdiction appealed from is an important consideration. Appeals from the minor civil division of the Magistrates Court are limited because the purpose of the jurisdiction is for the expeditious and inexpensive disposition of disputes involving small amounts of money without undue formality. The obvious legislative intention is to avoid cost and delay. The legislative intention is defeated if leave is granted to appeal on grounds which involve no obvious error leading to substantial injustice, or no important matter of principle.*

The filing fee for an appeal to the Supreme Court from the Magistrates Court is currently $1,032.40, though it can be waived upon application to the registry.

Any appeal must be initiated within 14 days of the decision being made.

A party to a proceeding in TASCAT can appeal a decision to the Supreme Court, but whether the aggrieved party can appeal on a question of fact, or just a question of law, depends on the Act under which the decision was made.

Per the TASCAT Act, an appeal must be instituted within 30 days of the decision being made, or, if the party requests written reasons, within 30 days of those written reasons being provided. However, the *Supreme Court Rules 2000* provides, at rule 706, that an appeal from a statutory tribunal must be initiated within 21 days of the decision being made.

The orders made by TASCAT are not automatically stayed by virtue of the appeal being instituted, only by the order of the Supreme Court, whether following the application of the aggrieved party or on its own initiative.

The fee is the same as an appeal from the Court - $1,032.40.

> *Case Study*
>
> *Parties to a matter at NCAT have the ability to file an internal appeal of a decision of the tribunal. In the Consumer and Commercial Division, an appeal is by right if it is on a question of law. If it is on a question of fact, leave must be sought, and may be only be granted where the applicant (1) may have suffered a substantial miscarriage of justice because (2) the decision was not fair and equitable, the decision was not consistent with the evidence, or new evidence, that was not available at the time of the original hearing, has come to light. If the decision in question was an eviction order, and a warrant has already been executed in respect of it, then the tenant can only appeal on a question of law.*
>
> *Appeals are heard by an Appeal Panel – though the "panel" may only be one person: the minimum composition of an Appeal Panel is a lone tribunal member that is an Australian Legal Practitioner. Lay tribunal members may also sit on the Appeal Panel, but there must still be at least one Australian Legal Practitioner. The Appeal Panel has the discretion to conduct a de novo hearing if it is warranted, for instance when there is a significant amount of new evidence. Appeal Panel decisions are published unless there is an order in place restricting publication.*

The Appeal Panel is, at least in theory, a useful way of ensuring that tribunal members are accountable for their decisions, and thus that the quality of decision-making is upheld. While aggrieved parties in Tasmania can appeal to the Supreme Court, the decision makers must know that it is very unlikely that they will due to the expense involved, especially in matters like tenancy matters. Without in any way questioning the decision maker's integrity, that must sub-consciously effect their conduct at some level. With that said, the cost of an internal appeal in NSW is still significant, at $486 for an individual and $972 for a corporation.

We spoke to a tenants' advocate service that operates in Victoria, who strongly supported the introduction of an internal appeals panel in VCAT. The service reported that, in its experience, there

is a lack of consistency in decision making across VCAT, and a somewhat lackadaisical approach to applying the law, which could be mitigated if appeals were more accessible and thus more likely.

Jurisdiction	Appeals	Cost for individuals
Tasmania (Court)	Supreme Court	$1,032.40
Tasmania (TASCAT)	Supreme Court	$1,032.40
New South Wales	NCAT Appeal Panel	$486
Victoria	Supreme Court	$796.59 or $2,423.16 (if appealing decision of President or Vice President of VCAT)
Queensland	QCAT Appeal Tribunal or Court of Appeal, depending on whether a legal practitioner or lay member made order	$759.10 (Appeal Tribunal) or $1,606 (Court of Appeal)
Western Australia	Supreme Court	$1,730
South Australia	SACAT Internal Review	$649
Australian Capital Territory	ACAT Appeal Tribunal	$635
Northern Territory	NTCAT Internal Review	$411

4.7 Publishing Decisions

Per rule 111 of the *Magistrates Court (Civil Division) Rules 1998*, at the conclusion of a trial the magistrate must provide reasons for their judgment. The reasons may be given orally or in writing. There is no requirement that a written decision must be published.

Very few decisions made under the RTA, or relate to the RTA, have been published. Below is the complete list of published decisions made by the Magistrates Court since 2002 (ie, published on AUSTLII), and also all appeals made to the Supreme Court, and the Full Court, since the RTA came into force:

Magistrates Court

Case	Topic
Jackson v Gearman [2009] TASMC 4	Service of notice to vacate
Appleby v Schnell [2011] TASMC 8	Form of notice to vacate
Eather v Harrison [2011] TASMC 10	Negligence
Thompson v Madziar [2014] TASMC 1	Exemptions to the RTA – boarding premises
Living Here Launceston v Bell [2018] TASMC 1	Form of notice to vacate
Director of Housing v Gaye [2018] TASMC 5	Whether notice to vacate genuine or just

Community Housing Ltd v O'Toole [2020] TASMC 12	Order for termination – has or is likely to cause physical injury
Muddyman v Nest Property [2021] TASMC 2	Unreasonable rent increase

Supreme Court

Logan v Director of Housing [2004] TASSC 153	Whether court able to grant relief against forfeiture under RTA
King v Director of Housing [2012] TASSC 82	Whether Director of Housing (now Homes Tasmania) decision to evict subject to judicial review (the RTA was not the subject of this case but it concerned a tenancy under the RTA)
Streets v Lucas [2013] TASSC 45	Order for termination – procedure and natural justice
Parsons v Director of Housing [2018] TASSC 62	Whether a notice to vacate was genuine or just
Director of Housing v Lefevre [2021] TASSC 33	Notice to vacate issued after renewal of lease
Blowfield v Centacare Evolve Housing Limited [2024] TASSC 27	Genuine and just, vacant possession orders made *ex parte*

Full Court

King v Director of Housing [2013] TASFC 9	As above
Director of Housing v Parsons [2019] TASFC 3	As above

It is usual for Magistrates to follow each other's decisions, though they are not bound by them.[79] As such, a large body of precedent, even at that lower level, can provide a degree of certainty and reliability to prospective parties and advocates.

There haven't been any decisions published since *Muddyman*, in March 2021 (which was an appeal of an RTC determination made in February 2019). Tenants and landlords that are not parties to specific proceedings do not have access to written decisions at the conclusion of those proceedings unless one of the parties decides to make them public. As these decisions are not widely disseminated, they cannot widely be relied upon in other proceedings, which hinders the development of the law. It is true, of course, that the Court is not bound by its own decisions, but they are highly persuasive and are only diverged from in rare circumstances.[80] For instance, the

[79] *La Macchia and others v Minister for Primary Industry and Environment and another* (1992) 110 ALR 201 at 204.
[80] Ibid.

decision in Appleby v Schnell has been widely cited by the Court, and it (currently) serves as the definitive interpretation of section 44(e) of the RTA.

The RTC provides written determinations in every matter that they handle, but these decisions are not published. The RTC does not accept that it is bound by its own decisions or even the decisions of the Court. When asked what the impact a (non-published) bond appeal decision would have on the way future matters were determined, the RTC's representative replied that:

> *We will continue to determine bond disputes on a case by case basis by assessing the evidence provided by the parties involved. We note the outcome of this appeal and will consider the Magistrates [sic] decision if relevant to similar matters.*

The RTC provides some direction through their Guide to the Residential Tenancy Commissioner. The guide is currently on its third edition, but has not been updated since 2019. Further information is available on the CBOS website, as well as topic-specific fact sheets, but there is no repository of previous decisions that a party can consider and cite.

Case Study

Once NCAT has made a decision, the parties can request that the decision be put into writing. Once the request is made, the tribunal must comply within 28 days. The decision must contain:

- *Findings of fact, with reference to the evidence relied upon in making those finding;*
- *The applicable law and the tribunal's understanding of it; and*
- *The reasoning process that lead the tribunal to its conclusions.*

In order to:[81]

- *promote transparency;*
- *accountability;*
- *confidence in the tribunal; and*
- *educate and provide guidance to the legal profession*

[81] New South Wales Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions*, October 2019, 8.

the tribunal endeavours to publish its written decisions. Despite this stated goal, and the undoubtedly noble and correct rationale underpinning it, few tenancy decisions are published relative to the number of matters that are determined. Of the 209 decisions of the Consumer and Commercial Division that were published in the financial year 2021/22,[82] only 50 were related to tenancy matters – despite 78% of all matters in the division that year being tenancy matters. The Tenants Union of New South Wales has noted the number of tenancy decisions published has declined year over year since 2014, when NCAT was established.[83]

The policy of NCAT is to publish decisions that are "significant" or "representative",[84] but in TUNSW's experience the process for determining whether or not a decision is worthy of publishing is opaque and is not subject to any sort of review process. They suggest that all reasons should be published, or failing that, that a minimum percentage of decisions are published with a more transparent process to determine which decisions warrant publication.

Jurisdiction	**Publishing written decisions**
Tasmania (Court)	At discretion of Court, rare
Tasmania (TASCAT)	At discretion of tribunal, no policy
New South Wales	At discretion of tribunal, stated preference to publish
Victoria	If a decision is written at request of party, it will be published
Queensland	If a decision is written at request of party, it will be published
Western Australia	No rule preventing publication, but Court appears to have policy of not publishing anything
South Australia	At discretion of tribunal, no policy
Australian Capital Territory	At discretion of tribunal, no policy
Northern Territory	Policy of publishing "significant" cases

[82] '2021 New South Wales Civil and Administrative Tribunal – Consumer and Commercial Division Decisions', *AustLII* (Web Page) <https://classic.austlii.edu.au/au/cases/nsw/NSWCATCD/2021/>; '2022 New South Wales Civil and Administrative Tribunal – Consumer and Commercial Division Decisions', *AustLII* (Web Page) <https://classic.austlii.edu.au/au/cases/nsw/NSWCATCD/2022/>.

[83] Tenants' Union of New South Wales, Submissions to New South Wales Law Reform Commission, *Open Justice Review – Court and Tribunal information: access, disclosure and publication* (February 2021) 2.

[84] New South Wales Civil and Administrative Tribunal, *NCAT Policy 2: Publishing Reasons for Decisions*, October 2019, 8.

4.8 Statistics

The Court keeps a record of the parties to a matter, and the nature of the matter (that is, whether it is a bond appeal, or application for vacation possession, etc.), but does not keep, in an easily searchable database, information such as:

- The outcome of the matter, and the particulars of the outcome (such as, in the case of a vacant possession order, how long the Magistrate gave before the order took effect);
- How the outcome was reached, such as following a default in appearance, a hearing, or consent orders;
- How long a matter takes to resolve, and how many times it is adjourned; or
- Whether the parties are represented.

If available, data such as the above would've greatly assisted in the drafting of this paper, and could inform and prompt other reforms to the RTA or justice system.

4.9 Recent reforms in other jurisdictions

Western Australia is the only other jurisdiction in the country where residential tenancy matters are handled through the Magistrates Court rather than the local super tribunal (in this case the State Administrative Tribunal, or SAT), though the SAT does have jurisdiction in respect of commercial tenancies, long-term caravan park residents, and retirement villages. Before the eventual establishment of the SAT in 2005, it was considered by a justice department taskforce in 2002 whether or not the new tribunal should be given jurisdiction over residential tenancy disputes.[85] The taskforce determined that it should not,[86] contrary to an earlier report,[87] for the following reasons:

- Residential tenancy matters involve the enforcement of existing rights – in other words the use of judicial power (though much the same could be said about commercial tenancies, caravan park residencies and retirement villages);[88]

[85] Western Australian Civil And Administrative Review Tribunal Taskforce, *Report On the Establishment Of The State Administrative Tribunal* (Report, May 2002) paragraph 191.
[86] Ibid paragraph 192.
[87] Ibid paragraph 191.
[88] Ibid paragraph 192.

- The court already has significant experience dealing with these matters (though the then Local Court was already earmarked to be replaced with a new Magistrates Court), and already makes use of alternative dispute resolution;[89]
- Residential tenancy disputes are more likely to arise in remote and regional parts of the state, where there is already a court presence;[90] and
- It was assumed that the new Magistrates Court would be flexible in the way it deals with residential tenancy matters.[91]

Since 2019, the WA government has been undertaking a review of the law regarding residential tenancies. One of the issues raised in the consolation paper is whether the magistrates court should retain its current jurisdiction over tenancy matters. The following arguments were made in favour of the change:[92]

- Complete absence of written decisions (that is, there have been zero written decisions by the Magistrates Court in respect of residential tenancy disputes);
- Lack of consistency in decision making (almost certainly closely related to the above);
- The daunting nature of the court environment for parties; and
- The length of proceedings.

And against:

- It costs more to file an application with the SAT than the Magistrates Court (at the time the paper was published, $101.50 compared to $71.70);
- The decision in *Burns v Corbett;* and
- The existing presence of court houses across regional and remote areas, compared with the SAT which is based in Perth and would be reliant on a mix of co-opting those already busy court houses and conducting proceedings remotely via audio and video link.

[89] Ibid paragraph 193.
[90] Ibid paragraph 194.
[91] Ibid paragraph 195.
[92] Consumer Protection Western Australia, *Consultation Regulatory Impact Statement A review of Residential Tenancies Act 1987 (WA)* (Regulatory Impact Statement, December 2019) 108.

The paper also notes that in a previous review of the law it was recommended that the jurisdiction should be transferred, and the government of the day committed to following through with that recommendation, but the change was skittled due to financial issues and strong opposition from regional and rural stakeholders.[93]

In the Residential Tenancies Amendment Bill 2023 that has followed the review, and is due to be considered by parliament in early 2024 (so is subject to change), no jurisdiction is to be transferred from the Magistrates Court to the SAT. Instead, the government has opted to adopt a model similar to Tasmania's; certain decision makings powers, such as determining security deposits, are to be transferred from the Magistrates Court to the commissioner (in this case, the Commissioner of Consumer Protection), with a right of appeal to the court.[94]

In order to mitigate issues of transparency and consistency, the commissioner will publish select deidentified decisions.[95] This is likely to lead to more consistency with respect to how bonds are dispersed, with the large caveat that appeals of those decisions will not be published, but does not provide any assistance with respect to eviction proceedings, which remain exclusively with the Magistrates Court.

The Victorian government has announced reforms to how tenancy matters are handled that, at least at a high level, also look closer to how things currently are in Tasmania. The government plans to introduce an agency called "Rental Dispute Resolution Victoria", which will be a "a one-stop shop for renters, agents and landlords to resolve tenancy disputes over rent, damages, repairs and bonds"[96] because "[parties] shouldn't have to end up at VCAT to have simple repairs done, or to get the money you're owed. VCAT should be a last resort for tenants and landlords, not the first stop."[97] The RDRV will have "have a clear pathway to settle issues in a faster, fairer and cheaper way – freeing up VCAT for more serious or complicated matters."[98] Beyond that, details are not available. By use of the word "settle", the announcement blurb suggests that the new body will be able to conciliate or mediate

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[93] Ibid 113.
[94] Residential Tenancies Amendment Bill 2023 (WA).
[95] Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 November 2023, 6755 (J.N. Carey, Minister for Housing).
[96] Victorian Government, *Victoria's Housing Statement The decade ahead 2024 – 2034* (Policy Statement, 2023) 27.
[97] Ibid.
[98] Ibid.

disputes rather than make final orders, similar perhaps to Queensland's Residential Tenancies Authority, though that may be reading too much into a brief policy statement.

The impetus for change is almost certainly driven by wait times at VCAT for non-urgent matters blowing out to around nine months.[99]

5. RECOMMENDATIONS

In short, the options are to:

1. Maintain the status quo; or
2. Give TASCAT residential tenancy jurisdiction.

If TASCAT is to be given jurisdiction, the question then becomes whether it is given some or all of the residential tenancy jurisdiction, and then in either case, *how*. The reforms could be carried out either in a minimalist fashion, essentially replacing every reference to the Court and/or the RTC in the RTA with TASCAT, or in a way that reinforces and reflects the guiding objectives of the RTA and of TASCAT. We reject the former approach. Without concurrent reform to the RTA, the benefits of transferring the jurisdiction to TASCAT will be limited.

We recommend that TASCAT is given jurisdiction over all residential tenancy disputes currently handled by the Court, including appeals from the RTC, but that recommendation is contingent on substantive changes being made to the RTA and to the TASCAT Act.

We also emphasise that adequate resources need to be allocated to TASCAT and to the RTC so that they can properly carry out their new and existing responsibilities.

Why should the change be made?

If adopted, it is our view that these recommendations would:

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[99] Cait Kelly and Stephanie Convery, *Leaking sewage and no water: Victorian renters' compensation claims stall in tribunal backlog*, *The Guardian* (Online, 18 July 2023) <https://www.theguardian.com/australia-news/2023/jul/18/leaking-sewage-and-no-water-victorian-renters-compensation-claims-stall-in-tribunal-backlog>.

- Further international human rights obligations;
- Improve access to justice;
- Lead to a more timely resolution of disputes;
- Clarify rights and obligations; and
- Provide a more orderly process to resolve disputes.

We are opposed to giving TASCAT the RTC's current jurisdiction for the following reasons:

- That making an application to the RTC is simpler, easier, quicker, cheaper and less stressful than attending TASCAT;
- That the experience in the Northern Territory suggests that such a change may dissuade tenants from enforcing their rights;
- That the RTC's asynchronous process is preferable for most low-level disputes;
- That finalisation times in other jurisdictions' tribunals are still significant for issues such as repairs and bonds; and
- That giving TASCAT the entirety of the RTC's current workload would require a significant boost in resources, including members, registry staff, and physical locations, and may cause finalisation times for all matters to lengthen;
- That, due to *Burns v Corbett*, the Court would potentially end up dealing with more low-level (that is, non-eviction) tenancy matters than it does currently, undermining the impetus behind the change.

That is not to say that the RTC, and the way they handle their current responsibilities, is beyond reproach. Instead, we suggest concurrent changes are made to the RTA and to the RTC to improve the current processes.

5.1 Recommended changes to TASCAT

1.0 Must be given appeals panel/internal review system

All other tribunal jurisdictions, aside from Victoria, have an internal review/appeal system. These provide a low-cost alternative to the Supreme Court, a source of binding precedent on the tribunal, and a check on the quality of the decisions being made by members. It is so no slight on members, particularly lay members, to say that the quality of their decision making is unlikely to be consistently at the level of a magistrate. As such, it is vital that parties have an accessible and

cost-effective path to challenge decisions when, inevitably, errors are made. Per the "A Single Tribunal For Tasmania" Discussion Paper:[100]

> *An internal right of appeal affords parties to a dispute a cost effective option of review of a decision; it can enable the Tribunal to correct any defects in the original decision making without the expense and time of requiring Supreme Court review, and ensures consistency in its own decision making; and its provisions can be drafted to prevent unnecessary or unmeritorious litigation and ensuring appropriate finality in decision making.*
>
> *In summary, close consideration should be had to there being a general right of appeal on any ground, with a requirement for leave to be granted by the President. The President should be vested with a general discretion […] with respect to leave. Likewise, the same flexibility with respect to how ordinary proceedings are heard and determined, should apply to internal appeals. That is – the President can direct the manner in which the appeal will be heard and determined. Consideration should be given to Rules/Regulations being empowered to set time frames for the making of an Internal Appeal leave application, rather than setting it in the enabling Act, if possible.*

We agree with the Discussion Paper that the member presiding over the appeal should have wide discretion to dictate the form that the appeal takes. For instance, if the appeal is prompted by a question of fact, or the discovery of significant new evidence, then the appeal may be conducted *de novo*, whereas if it solely concerns an interpretation of the law then it can be run as a true appeal.

It is recommended that the cost of an appeal/review is set much lower than a Supreme Court appeal. For instance, in NSW the fee for an internal appeal through NCAT ($486) is less than 40% of the cost of filing an appeal with the NSW Supreme Court ($1,297).

1.1 Must have physical locations in Launceston and Northwest, more permissive remote appearance procedure, and flexible hearing schedule

[100] Department of Justice, *A Single Tribunal For Tasmania* (Discussion Paper, September 2015) 117 (edited for clarity).

44.3 per cent of all tenancy matters heard by the Court are filed in Launceston, Burnie and Devonport. 49 per cent of applications for vacant possession are filed in the north of the state. As such, we consider it essential that TASCAT establishes a permanent - and accessible - physical presence in Launceston, and at least one of Burnie and Devonport, if it is to be given jurisdiction under the RTA. As noted at 4.9, the lack of a rural and regional presence appears to be the primary reason why any similar change has been scuttled in Western Australia. Advances in telecommunications can make up some of the shortfall, but is not enough to cover situations where the parties or a party may be technologically illiterate, may not have reliable phone coverage (or reliable enough phone coverage to conduct a video conference call), may not be able to afford the data load of conducting a video conference call (or even phone call, if they are required to ring-in to the tribunal for whatever reason), or may not own a smart phone or personal computer.

To that point, 58.8 per cent of all applications for vacant possession in the North and North West are filed by social housing providers – the respondents in these matters are by definition from a lower socio-economic cohort and are less likely to be literate and have access to expensive technology and data plans.

	Vacant possession applications 2022/23	**Vacant possession applications by social housing providers 2022/23**	**Per centage of vacant possession applications by social housing providers 2022/23**
State wide	387	205	53
Hobart	222	108	48.6
Launceston	98	60	61.2
Burnie	43	27	63
Devonport	24	10	41.7
North and North West Tasmania	165	97	58.8

In addition to physical locations, TASCAT must also instigate a permissive policy regarding audio/video appearances. Rather than a party needing to make an application to appear remotely, the presumption should instead be that a party (or witness) is permitted to appear remotely. In practise, this may involve the registry including a call-in number and/or Zoom/Teams URL on the notices to appear that it sends to the parties. On the day of the listing, the parties may appear physically, over the phone, or over video call, as they prefer, without first needing to notify

the registry. The presumption is just that – the member may dictate that parties or witnesses must appear in person if, for instance, the matter is listed for a complex hearing involving extensive documentary evidence, and there is no great need (such as location or disability) for the party or witness to appear remotely. But, for simple listings, such as directions hearings or most conciliations, a party should be able to appear remotely if they wish to.

TASCAT should also be sensitive to commitments and limitations parties may have, such as school drop off, travel times, work timetables, and childcare. Before the first listing of a matter, the parties should clearly be given the option of contacting TASCAT and asking for the listing be moved. Unless the reasons provided are unreasonable, or cause significant prejudice to the other party, TASCAT should endeavour to acquiesce.

1.2 Must have online case management and lodgement system and helpful website

Currently, the Court allows parties to file court documents via email but does not publicise this anywhere on the Court website, at least as far as we can determine. Instead, parties are ostensibly required to physically attend the registry and lodge physical copies of their forms. And, as mentioned, the Court's forms are not smartphone friendly. In order to improve access to justice, TASCAT should implement an online lodgement system that is smartphone friendly, where a part-finished form can be saved and completed at a later date, and payments can be processed.

In addition, there should be an online case management system where the tribunal provides listings and orders, and where the parties can upload and view evidence and all other relevant documentation. Such a system is vital to the proper functioning of remotely held hearings. And by streamlining discovery it may help reduce delays, particularly if parties are directed to upload evidence on the originating process form and/or the notification of the first listing of the matter.

The TASCAT website should clearly guide the parties as to how to file an application, and what to expect when going to the tribunal. The SACAT, NCAT, VCAT, and QCAT websites, in particular, provide detailed, step-by-step guidance through the process and should be used as a model.

1.3 Must retain hard copy filing ability with clear forms

With that said, for the reasons outlined in recommendation 1.1, alternative filing options must be retained for when electronic filing and case management is not possible or reasonably practical. In NSW, parties are able to lodge NCAT documents through Service NSW locations, as well as

tribunal registries. As Service Tasmania has 27 locations across the state, including in rural and regional arears that do not have a Court presence, let alone TASCAT presence, we recommend that a similar integration is implemented.

The forms used to file an application should be redrafted to better accord with the RTA, and should be made available as hard copies, editable PDFs and editable .doc files.

1.4 Must have policy that all written decisions are published and detailed statistics kept

A large body of precedent gives parties clarity and certainty. It is also likely to assist the tribunal in the long run – as parties will refrain from relitigating legal issues where there are already clear answers. There is presently very little local case law for landlords and tenants, and their advocates, to follow.

Presently, parties are able to request written reasons from the tribunal if they intend to institute an appeal to the Supreme Court, and certain streams (such as Resource and Planning) require the tribunal to provide written reasons, but there is no general entitlement to request written reasons. A provision should be added to the TASCAT Act (or rules) that specifies that a party is entitled to written reasons if they are requested within a certain period of time after judgment is delivered (if the member doesn't do it on their own volition).

We recommended that, if the tribunal goes to the effort to provide written reasons, those written reasons should be published, unless the matter is subject to a suppression order. If the tribunal only takes on the Court's current jurisdiction, this should not be an unreasonable burden.

If an internal appeal process is implemented, all decisions of the appeal panel should be required to be written and published.

In addition, the tribunal should keep detailed information on every application that is filed, such as:

- The nature of the application;
- Whether the application is made by an individual, corporation, or social housing provider;
- Whether the parties are represented; and

- The outcome of the application (eg order made following hearing, application dismissed following hearing, order made by consent).

If an electronic case management system is implemented, this should be relatively straightforward.

1.5 TASCAT must publish guidelines as to how hearings are to be run, and provide that if the guidelines are deviated from the tribunal member is to explain why, and clearly set out the extent and consequences of the deviation.

The absence of strict procedure and emphasis on flexibility in minor civil matters in the Court can often, counterintuitively, result in confusion and delay, as the parties are not sure what they are meant to do and when they are meant to do it, and each Magistrate handles things differently. This can lead to parties missing their chance to adduce evidence or make submissions. TASCAT should issue guidelines, available to members, legal practitioners, and the general public, that sets out how hearings will be conducted.[101] This will assist in ensuring matters are resolved efficiently, and keep things consistent between each member of the tribunal. The guidelines should not be binding, but if a member seeks to divert from them, they should clearly explain (1) why; and (2) the extent of the divergence.

1.6 Must change enforcement provisions to provide that all orders of TASCAT are enforceable in the relevant courts as orders/judgment debts of that court

The TASCAT Act is heavily based on the SACAT legislation and retains the quirk that a monetary order of the tribunal cannot be treated as a judgment debt or order of the relevant court, rather it is a "debt due and payable" to the beneficiary, meaning that the beneficiary must lodge a claim to recover the liquidated debt. This is an unnecessary waste of time and money, for both the beneficiary and the courts. We recommend that TASCAT aligns with the other tribunal jurisdictions, specifying that a monetary order of the tribunal is a judgment debt/order of the applicable court.

With respect to the enforcement of non-monetary orders, the TASCAT Act only provides that failing to comply with a non-monetary order can incur a hefty fine or 12 months imprisonment. If

[101] Tenants' Union of New South Wales, Submission to *Civil and Administrative Tribunal Act 2013 Statutory Review* (July 2019) 18.

TASCAT is given the residential tenancy jurisdiction, a large proportion of the orders it will make are non-monetary: eviction orders. We recommend that rather than relying on the threat of fines and imprisonment to compel behaviour, that either enforcement is carried out through the Court, or that a warrant for possession process is added to the TASCAT Act or rules.

1.7 All tenancy matters first listed for ADR/directions hearing other than section 41 and appeals for urgent/emergency repairs

Though unfortunately the Court cannot provide data on this, in the TUT's experience very few tenancy matters proceed to a hearing, and most bond appeals are settled before getting to hearing. Partly, this is an unintended consequence of it taking so long to get matters to hearing. But it is also the case that many tenancy disputes are eminently resolvable by negotiation. Bond appeals are more or less small claims in practise, and should be treated as such (and, as outlined below, should be expanded to allow counter claim and set off applications by tenants). But even other tenancy matters, such as evictions under section 45, should be subject to ADR. In cases where the tenant is alleged to be fault, such as rental arrears or damage to property, this may allow the parties to negotiate a payment plan or behaviour order (particularly if such orders are formalised in the RTA, as recommended below). If there is no real dispute that the tenant has to vacate, it allows the parties to negotiate when the order will take effect.

Much of the source of delay in the Court currently stems from the need for multiple Court dates, and those dates being set so far apart. In a minor civil claim, the conciliation date is around a month after the defence is filed, then the directions hearing is a month or longer after that, then the hearing date is likely to be months after that. The initial date at TASCAT should be combined ADR and directions hearing in order to minimise the time until finalisation.

1.8 Must provide that in Burns v Corbett matters TASCAT still provides ADR before the matter is transferred to the Court

Presently in matters affected by the decision in Burns v Corbett, the Court can order that TASCAT is to conduct ADR. We recommend that in all tenancy matters that are generally subject to ADR, TASCAT conducts the ADR *before* the matter is transferred to the Court, as is the case in NSW. This will limit the number of matters that need to be transferred to the Court, and likely reduce the time it takes to finalise such matters.

1.9 The residential tenancy jurisdiction must have its own rules in addition to the TASCAT rules

Whilst in most cases the existing TASCAT rules and procedures are adequate, there are instances where the residential tenancy jurisdiction should diverge from them. For instance, the tribunal's general power to extend time frames should be strictly limited to certain applications as otherwise the certainty that the RTA endeavours to provide parties is undermined. The Supreme Court has found that (at least) Part 4 of the RTA is intended to operate as a code,[102] therefore the tribunal should not be able to modify or extend the timeframes and formal requirements regarding the termination of the lease.

Special rules may be appropriate for service, for instance:

- When and if a notice may be served via email;
- How different notices under the RTA may be served (for example, a notice to vacate should be held to a higher standard than notice of a routine inspection);
- That a tenant can serve a landlord by serving documents on the landlord's property manager at the time of the tenancy, whether or not they currently act for them;
- An application for a finding of abandonment need only be affixed to the door of the premises, left in the letterbox, and sent electronically to the tenant.

1.10 Fee structure should reflect "true cost" of application, and should differ depending on nature of applicant

Forced evictions lead to homelessness, and consequently they impose strain on the provision of social services. As such, the state has an interest in keeping forced evictions to a minimum. In addition to mandatory ADR, formalising alternatives to evictions such as payment plans and behaviour orders, and reducing the circumstances where a notice to vacate can be issued, the cost of an application under section 45 should better reflect the social cost of forced evictions and provide an incentive for landlords to pursue alternative options. The ACT has a higher fee for eviction applications and has a far lower rate of applications than NSW.[103]

In most other jurisdictions, and in the Supreme Court, application fees vary depending on whether the applicant is a natural person or a corporation. TASCAT should adopt a similar approach in order to reflect a party's capacity to pay.

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[102] *Director of Housing v Parsons* [2019] TASFC 3 per Estcourt J at [37].

[103] Tenants' Union of New South Wales, Submission to *Civil and Administrative Tribunal Act 2013 Statutory Review* (July 2019) 7-8

For impecunious parties the fee should be waived or heavily reduced. This process should be simplified relative to the current Magistrates Court equivalent, and r 10 of the *Tasmanian Civil and Administrative Tribunal Regulations 2021*. If the Applicant is in possession of evidence of their poverty, for instance a Health Care Card, the waiver/concession rate should be applied automatically. It should only be in the case that the applicant does not have such evidence that they should be required to fill in a form where they itemise their income, assets, and expenses, and can provide additional reasons as to why the fee should be waived or reduced.

5.2 Recommended changes to RTA

Due to its brevity and loose drafting, the RTA has failed to provide the clarity and certainty to parties that was promised when it was first legislated in 1997. It is beyond the scope of this paper to provide a complete review of the RTA. Needless to say, the following is only a sample of the changes needed to provide true clarity and certainty to the parties, equity, and protection to tenants that's in line with Australia's international obligations. Ultimately, it may be the case that a brand-new residential tenancy act is required. In order to maximise the benefits of any move to TASCAT, we recommend that a concurrent "root and branch" review of the RTA is conducted.

2.1 The time period to institute appeals to TASCAT is reduced to 7 days for all appeals

The current time frame of 60 days allowed for parties to appeal an order for repairs and a rent increase is grossly excessive. A tenant may be left without essential services, or be subject to serious danger, for months at a time, if they are granted an order for repairs and the landlord leaves their appeal to the last minute. The time to institute an appeal to TASCAT should be reduced to seven days for all appeals. Depending on the nature of the appeal, a lackadaisical party may apply to TASCAT to extend the time to instigate an appeal if the justice of the case favours it. In the case of bond appeals and rent increase appeals, there is unlikely to be any significant prejudice if the appeal is filed marginally out of time, whereas in the case of urgent or emergency repairs any delay is potentially greatly prejudicial to the tenant's wellbeing.

2.2 The boarding premises general enforcement provision is broadened to all tenancies

The RTC currently has broad powers to enforce the terms of a boarding agreement, but not otherwise. The RTC is, for instance, unable to order that the minimum standards are complied with, or that the tenant's quiet enjoyment of the property is respected, except indirectly by issuing infringement notices. The only remedy provided for in the RTA for tenants in that

situation is to issue a notice to terminate and vacate the premises. It is dependent on the tenant being able to secure alternative premises, which is far easier said than done. Instead, the RTC should be able to order that a party complies with their obligations. This could take the form of a general power, a la s 48I, or could be limited to certain critical provisions, such as the minimum standards and quiet enjoyment. In either case, affected parties should be able to appeal the order (or lack thereof) to TASCAT.

2.3 *That in cases where the RTC considers that there is a significant legal question or a factual dispute that requires a hearing, that the dispute is referred directly to TASCAT (at no cost to the parties)*

There have been occasions where the RTC's legal reasoning has been less than optimal. In cases where the RTC nominally has jurisdiction, but there is a significant and complex legal issue or issues that need to be determined, there is need of precedent, and/or the decision of the RTC is likely to be appealed, the RTC should be able to refer the matter directly to TASCAT.

Further, while there are numerous advantages to the RTC determining matters asynchronously and on the papers, it is a significant disadvantage to parties that are reliant on oral evidence, and do not have documents that corroborate that evidence. Where it is clear to the RTC that a hearing is needed to properly test the evidence, they should be able to refer the matter directly to TASCAT.

2.4 *That appeals to TASCAT may be a "true appeal", a re-hearing, or de novo, depending on the circumstances of the case, as determined by the member*

Further to the above, it is currently the case that often appeals of RTC decisions are prompted by the RTC's interpretation of the law, but because all appeals are heard *de novo* by the Court the RTC's decision is only indirectly reviewed. Rather than carrying out a *de novo* appeal regardless of the circumstances of the case, the tribunal should be given flexibility to dictate the nature of the appeal depending on the crux of the dispute (which can be elucidated during the ADR/directions hearing).

2.5 *That tenants are able to "set off" or counterclaim in a bond dispute*

During a tenancy, it is decidedly not uncommon for a landlord to breach their obligations in a way which results in the tenant(s) suffering loss, whether economic or non-economic. Unlike landlords, tenants do not have a security deposit they can access to recover some or all of those losses, they have to make a separate civil claim. A claim on the bond is, as discussed, essentially

a minor civil claim with a ceiling on what can be recovered. In a normal civil claim, filed in the court, the defendant can make a counterclaim, denying the breaches and alleging their own losses, or a set-off, where some or all of the losses are admitted but are offset by the losses that the claimant has caused the defendant. Particularly as the bond is presumed to be the tenants' money unless proven otherwise, there does not appear to be any great reason, other than complexity, why a tenant cannot seek to set off a claim on their bond.

2.6 *If a tenant's set-off/counterclaim exceeds the value of the bond, or the owner's claim exceeds the value of the bond, then the dispute is sent directly to TASCAT*

The RTC is limited to awarding the quantum of the bond, even if the landlord believes they are owed more. If the landlord is awarded the full bond, and wishes to pursue the remainder, then they are required to pursue a separate civil claim (minor or otherwise), where the same issues may be relitigated. Landlords nevertheless still lodge bond claims larger than the awardable bond. In order to prevent redundant litigation, and to facilitate tenants' ability to counterclaim, in bond disputes where the landlord is claiming more than the bond, and/or where the tenant has lodged a counterclaim, the dispute should be referred directly to TASCAT. The parties should be required to pay the fees associated with a general compensation claim, as that is essentially what it is at that point. An added benefit of this approach would be that the inconvenience of going to TASCAT, and the associated fees, should disincentivise landlords from making unreasonable claims to the bond (such as trying to make the tenant to pay for expensive routine maintenance or renovations, or reflexively opposing notices to terminate irrespective of merit).

2.7 *The RTA is expanded to cover sub-tenants, lodgers, caravan park residents, and others*

Whilst not directly relevant to the subject of this paper, the RTA covers a narrow segment of residential tenants relative to comparable acts in other jurisdictions. Sub-tenants, caravan park residents, many lodgers and certain boarders are largely not protected by the RTA. Their rights and obligations are nebulous, found in both the general law and the Australian Consumer Law. The RTA's abolition of the common law distinction between a licence and a lease does not apply, leading to a great deal of uncertainty, though in practise these renters may as well have no enforceable rights. In needing to resort to these non-standard forms of tenancy, these renters are by definition vulnerable and in need of greater protection. Similar reasoning was marshalled in favour of expanding the RTA to cover most boarding house residents back in 2003.

Both the RTC and TASCAT should be given jurisdiction over these tenancies, though they will need their own bespoke regimes of rights and rules under the RTA, just as boarding tenancies have, to accommodate their quirks relative to a standard residential tenancy.

2.8 *The RTC is given additional jurisdiction to determine whether sub-tenancy refusals are reasonable – assumption of reasonableness, owner bears onus to dispute*

Per s 50(a) of the RTA, a landlord cannot unreasonably refuse a tenant's request to get a sub-tenant. However, there is no mechanism to resolve a conflict between the parties if the landlord refuses consent and the tenant believes the refusal is unreasonable. In that instance the tenant could:

- Seek compensation from the owner for lost income;
- Have the sub-tenant move in without the landlord's consent and dispute the notice to vacate if it is issued; or
- Issue a notice to terminate.

These remedies are impractical, risky, and largely untested.

Instead, the RTC (and TASCAT on appeal) should have the jurisdiction to resolve these disputes. The dispute resolution process should follow the Victorian model for pets. That is, the tenant must give the landlord notice that they intend to add a sub-tenant. If the landlord opposes the tenant's request, they must make an application to the RTC within seven days. The landlord bears the onus of demonstrating that the request is unreasonable. The RTA should include a non-exhaustive list of reasons why a request may be unreasonable (and/or, a non-exhaustive list of reasons why a request won't be unreasonable). If the landlord fails to dispute the request within the requisite timeframe, then consent is assumed and is unretractable.

2.9 *The following owner discretions are made subject to a reasonableness test and are reviewable by the RTC (and appealable to TASCAT) – assumption of reasonableness, owner bears onus to dispute:*

- *Assignment;*
- *Addition of co-tenants;*
- *Minor alterations and additions;*
- *Pets*

Unlike requests to add sub-tenants, the above are subject to the absolute arbitrary discretion of the landlord. They should instead be subject to a similar process as proposed for sub-tenancy requests. The Residential Tenancy Amendment Bill 2024 provides for substantive reform of the RTA as it applies to pets, and a narrow sub-category of minor modifications, but the scope of the reforms should be widened.

2.10 TASCAT given powers to:

- *Order compensation for non-economic loss of enjoyment;*
- *Order compensation for economic losses caused by the other party's breach(es)*
- *Order rent reductions if rent unreasonable, or services/amenities withdrawn or safety and comfort affected as a result of breach;*
- *Order rent abatement in case that premises is partly or wholly uninhabitable – no fault required;*
- *Resolve disputes over liability under section 17;*
- *Order exemplary damages in serious cases*

The RTA is the only residential tenancy legislation in the country that does not provide a mechanism for tenants to secure compensation or a temporary rent reduction. The primary consequences of this are (1) that landlords very rarely offer compensation or rent reductions, as tenants cannot readily cite any entitlement; and (2) there is little financial incentive for landlords to avoid causing their tenants loss, such as by carrying out repairs within the requisite timeframes.[104] Tenants should have an express statutory right to compensation and rent reductions. Per the majority decision in Young,[105] the statutory compensation provisions can be similar to causes of action in common law and equity but not be bound by the same limitations and restrictions.

[104] As a side point, it is recommended that the timeframes for emergency and urgent repairs are clarified so it is readily discernible to the parties whether the landlord is or isn't in breach of their obligations. That this may occasionally cause minor injustices (that repairs may not be carried out quite as quickly, or that a landlord is unable to secure a trade within the time frame despite good faith attempts) is outweighed by the improved level of certainty.

[105] *Young v Chief Executive Officer (Housing)* [2023] HCA 31 per Kiefel CJ, Gageler, Gleeson JJ at [23] – [28].

If no statutory compensation provisions are added to the RTA tenants seeking compensation will still need to need to make a claim in the appropriate court, as TASCAT has no general civil jurisdiction. By adding statutory compensation provisions, the need to give TASCAT general civil jurisdiction, or have the jurisdiction over tenancy disputes split between TASCAT, the courts, and the RTC, is avoided.

The monetary limit for claims made to TASCAT should be set at least the current minor civil limit of $15,000, though it is recommended that it is higher, in line with most other jurisdictions. For the December quarter 2023, the median rent in Tasmania was $445 per week,[106] or $23,140 per year. $15,000 is only 65 per cent of that, meaning that awards in serious, long-term retrospective rent reductions applications (or compensation claims conceptualised as a proportion of weekly rent) would be limited. For landlords, few significant repairs (that may be needed due to the tenant's malicious damage or negligence) will be able to be carried out for $15,000. Any reluctance to give TASCAT members, particularly those of non-legal backgrounds, the power to make large monetary awards can be ameliorated by the implementation of an internal review or appeal system.

The monetary limit can be set in the RTA regulations so it can be increased periodically, in line with inflation. For the rare claims that are higher than that there should be provision in the RTA to apply to the Court or Supreme Court.

Under section 17(3) a landlord has the *prima facie* right be reimbursed for water bills, and be paid reasonable compensation for losses. If a landlord asserts their right to payment under this provision, and the tenant disputes liability (for instance, because the water bill is high as a consequence of the landlord failing to carry out repairs), there is no dispute resolution process. The landlord can either wait until the end of the tenancy and claim the figure from the bond, or can issue the tenant with a notice to vacate under section 42(1)(a). Due to the risk of the latter, tenants often feel pressured to pay money that they may not owe. If a landlord asserts during a tenancy that a tenant is liable to pay an amount under s 17(3), the tenant should be given the right to contest their liability at TASCAT.

[106] Tenants' Union of Tasmania, *Tasmanian Rents* (December Quarter 2023) 1.

It is also recommended that TASCAT is given the power to make awards of exemplary damages in the case of serious breaches, as New Zealand's Tenancy Tribunal is able to.[107] This provides a greater deterrent, both specific and general, against behaviour that significantly interferes with tenants' health, safety, and comfort.

2.11 Part 4 is significantly amended

Part 4 currently neither fulfils the Sackville Report's promise of "ready and orderly" evictions, nor the UNCESCR dictate that forced evictions are *prima facie* incompatible with the covenant and can only be justified in exceptional circumstances. To the first point, the requirement that the reasons for a notice to vacate must be "genuine or just" is not elaborated on at all in the RTA, its meaning and significance is not readily apparent, and will only be made clear through (time consuming, rare, and expensive) litigation. It is not practically possible for a lay landlord to know in advance whether or not the notice to vacate they have issued has been given for "genuine or just" reasons, but if they aren't then their application will fail.

On the other hand, in most cases it is quite easy to get an eviction order, including in cases where there is no fault on the part of the tenant. The RTA needs to treat the deprivation of what is classified by the *Homes Tasmania Act 2022* as a "fundamental right" with a degree of hesitance that is currently absent from the legislation. It is incongruous that, when sentencing a criminal offender, a custodial sentence (that is, a deprivation of liberty) is to be considered by the court only as a last resort,[108] and there are numerous alternatives available,[109] whereas depriving shelter is fairly trivial and the only option open when an application for vacant possession has been properly made out.

In order provide clarity to the parties, to ensure compliance with UNCESCR, and to improve synergy with TASCAT's preference for flexibility, we recommend that:

- *Delete s 42(1)(d)* – s 42(1)(d) allows arbitrary eviction at the end of a fixed term tenancy, which is *prima facie* incompatible with Australia's obligations under UNCESCR. This creates a chilling effect on tenants enforcing their rights – and is likely a large barrier to tenants feeling that they are able to access justice.

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[107] *Residential Tenancies Act 1986* (NZ) section 109.
[108] *R v Vasin* (1985) 39 SASR 45 at 48.
[109] *Sentencing Act 1997* (Tas) ss 7(b) – (i).

- *Specify that the tribunal has discretion as to when an order for vacant possession takes effect* – The RTA should be clear that, once it is accepted that an order is to be made, the tribunal has a discretion as to when it takes effect, if agreement cannot be reached between that parties, and the RTA is to specify the factors that the tribunal is to takes into account, such as:
    - Any ongoing losses or prejudice suffered by the landlord;
    - Whether the tenant is at fault;
    - Whether the tenant (and if applicable, their family) is likely to be made homeless by the order.
- *Delete s 42(1)(b)(i)* – If a landlord is selling their rented property, there is no reason that should be grounds to evict the tenant unless the new owner is going to occupy the premises themselves – in which case they can issue a notice to vacate under s 42(1)(b)(ii).
- *Remove "genuine or just" and replace with explicit protections, defences and alternative orders* – Though s 45(3)(b) provides some bulwark against forced evictions, it is so vague as to be unhelpful in most cases. Instead, the RTA should provide explicitly when a notice to vacate will be invalid, what defences a tenant can raise, and the options that TACAT has:
    - *Provide explicit protection against retaliatory eviction on ACT model* – landlords should be expressly prohibited from evicting a tenant in retaliation for the tenant asserting their rights, or seeking legal advice. This protection should be based on the ACT's model,[110] where once the tenant adduces evidence that they have enforced their rights the onus is on the landlord to positively assert that the notice to vacate was not motived by retaliation. This model was also endorsed in the Tasmanian Law Reform Commission's 1978 report into residential tenancy law.
    - *Provide a list of matters for TASCAT to take into account when determining whether eviction is proportionate in the case of a notice to vacate for breach of tenancy* – Currently, a landlord has a *prima facie* entitlement to an eviction order if a tenant is $1 in arrears. The RTA should provide that TASCAT may only make an eviction order where the alleged misconduct justifies it, and a list of factors that the tribunal can take into account, including; the cause of the breach; the tenant's good faith efforts to rectify the breach; whether the landlord has "clean hands", and if not whether the loss suffered by the tenant is equal to or exceeds the landlord's loss; and whether the tenant is a recalcitrant offender.

[110] *Residential Tenancies Act 1997* (ACT) s 57.

- *Provide that a tenant can raise a defence analogous to estoppel* – the common law and equity prevent a plaintiff from enforcing their ostensible legal rights where they have acted in a way that encourages, or does not discourage, a defendant from forming a certain view and acting on that view. Examples may include where a tenant has a pet, or has made an alteration to the property, without explicit consent but the landlord is aware of it and hasn't raised it during routine inspections, then seeks to enforce the breach through a notice to vacate, or where a landlord or their agent makes unequivocal representations that a tenant's lease will be renewed only to later renege.
- *Allow TASCAT to make order of compliance with agreement (in case of behavioural breach) or set rent repayment plan in lieu of vacant possession order* – Currently, the Court's options under the RTA are binary – make the order or not. There are situations where a tenant's behaviour is not acceptable, but nevertheless does not warrant eviction. In those cases, good behaviour orders and payment orders should be available to TASCAT. This will lead to outcomes that are mutually beneficial. Particularly with respect to social housing matters, many orders are likely to be made by consent. Such flexibility is a good fit for TASCAT, and better complies with the UNCESCR.

2.12 Rent increase section amended to soft cap a la the ACT

Aside from providing tenants with stability and security, a soft cap a la the ACT provides a degree of certainty to all parties and reduces the heavy evidentiary burden that currently falls on tenants to positively demonstrate that a rent increase is unreasonable. It may also reduce the number of unreasonable rent increase disputes.

In addition, the RTA should list some of the "relevant factors" that the RTC/tribunal must consider if a party does choose to lodge a dispute, in order to provide clarity to the parties. The market rate should be just one factor, treated, from a drafting perspective, equally to the others. The list may include:

- Any improvements made by either party to the property;
- The quantum of the increase;
- The length of time since the previous increase, if any;

- Whether or not, prior to the increase, the tenant was paying significantly above or below market rent;
- The market rent for comparable properties;
- The outgoings of both parties;
- The state of repair of the property;
- The quality and utility of any fixtures and furniture supplied with the property.

When an increase is disputed the RTC should make an expert assessment of the value following an in-person inspection, a la Consumer Affairs Victoria, in order to lessen the evidentiary burden on the parties.

2.13 RTA to regulate relationship between joint tenants, and RTC given responsibility to mediate disputes between co-tenants and boarding house residents;

Aside from s 47C, the RTA does not at all attempt to deal with the relationship between joint tenants. Share houses, where multiple tenants share a premises and are co-tenants but are not in a romantic or familial relationship, are a common form of tenure, particularly amongst young people but increasingly also for older demographics. It is not uncommon for intra-tenant conflict to arise – for instance, where one tenant is causing a nuisance, where a single co-tenant tenant has vacated or wants to vacate, where the remaining co-tenants refuse to assist in finding, or refuse to approve, a replacement tenant, or when an outgoing party refuses to transfer the bond. As well as lack of legislation, there is a lack of specialist support. The Tenants' Union is unable to assist in tenant against tenant disputes, and the RTC has no jurisdiction. The RTC should be given the responsibility of mediating disputes between tenants in a lease, and between tenants occupying the same boarding premises.

2.14 Abandoned goods requirements clarified and expanded

Whether or not goods are "abandoned" is in the eye of the beholder. The RTA should be amended to provide that following the lawful termination of a tenancy, if a tenant has left personal possessions at the premises the landlord must give at least 28 days notice (depending on the nature of the item) to the tenant before disposing of it in accordance with the RTA. Special provisions must be made for important documents that do not have any monetary value. A tenant must have statutory recourse if a landlord fails to comply.

2.15 RTC given original jurisdiction over s 57.

The Court currently has exclusive jurisdiction over the removal, modification, and addition of locks, and the RTC has no power to issue infringement notices to landlords that fail to properly secure rental premises. Jurisdiction to make orders and issue infringement notices under s 57 should be given to the RTC, with appeals to TASCAT.

5.3 Recommended changes to the RTC

3.1 Provides natural justice to parties to disputes, by allowing them to see and comment on applications

The RTC must allow parties to a dispute to view and comment on evidence provided by the other party, and materials used by the RTC under its own volitation (such as bond data in rent increase disputes). This could be done, at least in bond disputes, by modifying the MyBond system to allow parties to a dispute to view the materials uploaded by the other party and by giving the respondent party a longer time frame to provide their materials and submissions.

For other matters, it may be worth considering whether the MyBond software can be expanded into a general case management system so in all matters handled by the RTC the parties can upload and view all applications and evidence. Parties could have a user account that "piggie backs" onto their bond lodgement and is open for the length of the tenancy. Accommodation would need to be made for boarding leases, where bonds are not permitted, and the rare standard tenancy where a bond is not required.

Where the RTC knows that it will rely on certain material, such as the bond data in rent increase cases, both parties should be made aware of that on the application form, and provided with a link to that evidence so that they consider and comment on it in their materials.

3.2 All decisions are published

Presently, RTC determinations are provided to the parties only. The only guide to how the RTC will make a decision is the 2019 Guide to the Residential Tenancy Commissioner, and the additional tenancy information on the Consumer, Building and Occupational Services website. As parties cannot rely on and cite prior decisions, the RTC cannot be held to any of the interpretations and principles it sets out. This incentivises sloppy "from the hip" decision

making and means that the enforcement of the RTA lacks clarity. In order to promote transparency, consistency and certainty, the RTC should be required to publish all determinations, absent identifying factors like names and addresses. For similar reasons, the Western Australian tenancy commissioner will be required to do the same once it is granted the power to make determinations. Prior to its jurisdiction being shifted to NTCAT, all of the Northern Territory's commissioner's decisions were published to AUSTLII.

It is also suggested that the RTC issues updates of the Guide to the Residential Tenancy Commissioner on a regular basis, incorporating and citing their own decisions as well as decisions of TASCAT (and the Supreme Court, if any).

6. Post script

We note, however, that most of the prospective gains of the Court relinquishing its jurisdiction could also be attained by:

- The Court having dedicated civil magistrates with dedicated civil lists;
- A refresh of the Court's rules, including regarding representation and costs in minor civil matters, reopening matters, publishing decisions, and audio/video appearances;
- Better adherence to the legislated minor civil provisions;
- Use of ADR in tenancy matters;
- The Court implementing an electronic filing and case management system;
- The Court redrafting its RTA application forms; and
- Implementing all other recommended changes to the RTA and the RTC.

The significant disadvantage of this, relative to moving to TASCAT, would be that the "going to court" intimidation factor would be retained, and there would be no intermediary appeal between the initial decision and the Supreme Court. In favour:

- The Court already has a permanent physical presence outside of Hobart, in Launceston, Devonport, and Burnie, and circuits in regional and rural areas;
- It would be expected that the level of decision making by Magistrates would be higher than that of tribunal members, particularly lay members;
- The Court already has extensive experience dealing with residential tenancy matters;

- The Court is a Chapter III court, so Burns is a non-factor; and
- The Court enforces its own decisions.