

A photograph of a wall and window corner heavily infested with dark, fuzzy mould. The mould is concentrated in the corner and spreads outwards. A blue diagonal graphic element is in the bottom left.

Tenants Victoria

**Response to Inquiry
into Biotoxin-related
Illnesses in Australia**

August 2018

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About Tenants Victoria

Tenants Victoria was founded over 30 years ago to promote and protect the rights of tenants and residents in all forms of residential accommodation in Victoria. We aim to inform and educate tenants about their rights and work for social change to improve conditions for all tenants.

In 1974, a group of disgruntled tenants in Royal Court, Parkville formed a tenants' association to do something about their landlord: Rents were continually rising despite the landlord's failure to carry out repairs. The tenants at Royal Court soon realised that the basic problem was the archaic tenancy laws that still existed in Victoria at the time. They took their story to the media and in the process, raised awareness of tenancy law reform in Victoria. Tenants Victoria was formed as a result of the support and momentum from this brave undertaking.

By the mid-1970s, consumer rights had gained acceptance and the idea that tenants, as consumers, are entitled to basic consumer protection became easier to support in public policy. Once formed, Tenants Victoria – with a number of other community organisations – was instrumental in having the Community Committee on Tenancy Law Reform established, which ultimately led to the Residential Tenancies Act of 1980.

Since its inception, Tenants Victoria has worked continuously to provide advice to as many individual tenants as possible while working towards long-term change for the benefit of all tenants. We successfully campaigned to have caravan park residents included in the 1987 legislation and rooming house residents covered in 1990. After a protracted campaign of more than ten years, an independent Residential Tenancies Bond Authority was established in 1997.

We have assisted more than half a million tenants since that first informal advice service of 30 years ago. The need for basic advice and advocacy for residential tenants is as strong as ever, and we are now assisting more than 16,000 public and private tenants each year.

Renters

According to the Australian Bureau of Statistics (ABS), renters make up almost one-third of all Australian households¹. This is an upward trend, increasing 4.6 percentage points to 30.9 per cent between the 2001 and 2016 Censuses. ABS also reported that 59.0 per cent of apartments and 21.0 per cent of separate houses were rented.

At the same time, the number of owner-occupied households decreased from 71.4 per cent in 2001 to just 67.5 per cent by 2016.

The estimated population in the state of Victoria as of the 2016 Census is 6,244,227. Of the 2,112,702 privately-occupied dwellings recorded, 28.7 per cent were rented. A further 52,242 state housing authority dwellings were also recorded.

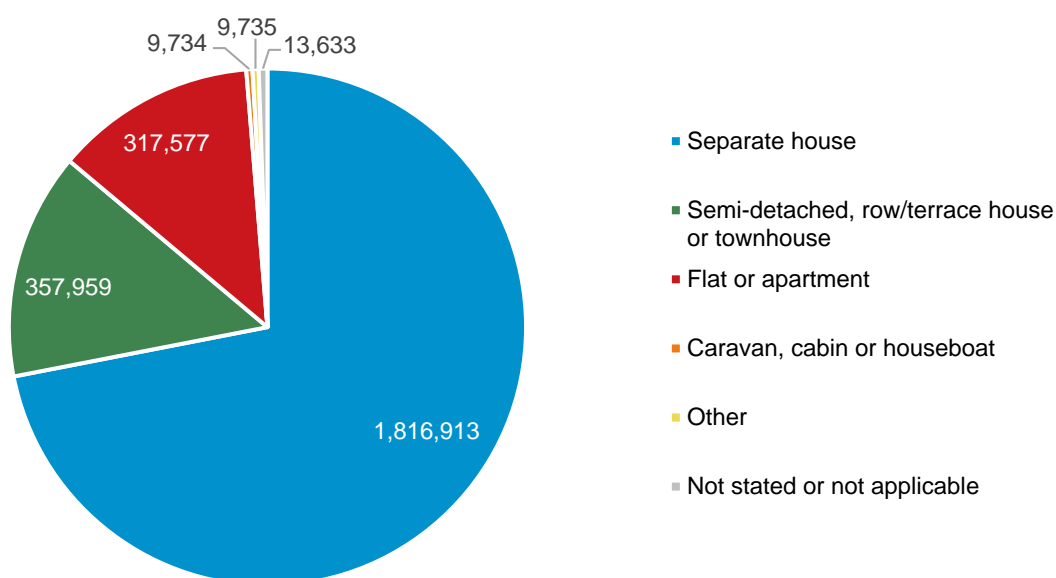


Figure 1: Rented households by dwelling type in Victoria, as reported in the Australian Bureau of Statistics, Census of Population and Housing, 2016.

A diverse market

While renting was once considered a transitional phase in life primarily undertaken by young singles and couples saving up for their first home, the modern day rental market is breaking this stereotype.

One of the fastest growing groups of renters in Australia are the elderly. Between 1996 and 2011, the number of renters aged 55 to 64 years increased by 130 per cent, and renters

¹ Australian Bureau of Statistics, Census of Population and Housing, 2001 and 2016

aged 65+ increased by 88.0 per cent². In Victoria alone, there were 168,819 elderly renters in 2016, almost 60 per cent more than in 2011³.

There are more families with dependent children renting in Victoria than any other household type, with 231,936 single and double parent families renting as of 2016⁴.

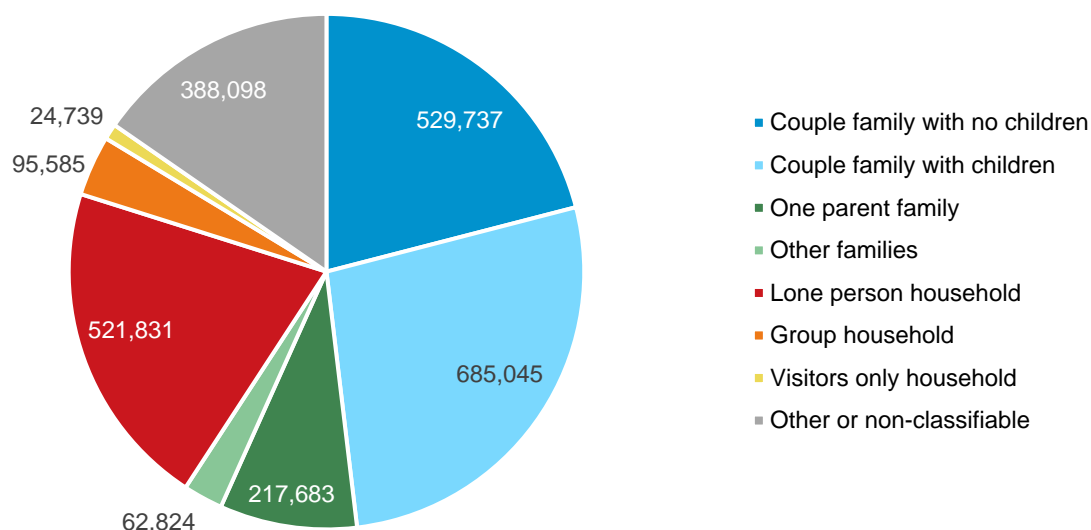


Figure 2: Rented households by family composition in Victoria, as reported in the Australian Bureau of Statistics, Census of Population and Housing, 2016.

There is also an increasing number of culturally and linguistically diverse (CALD) renters. According to the 2016 Census, just 67 per cent of the Australia population was born in Australia. In Victoria, 45.5 per cent of the population identified one or both parents as having been born overseas, and there were 536,633 renters who reported speaking a language other than English at home.

A further 24,143 Victorian renters identified as Aboriginal and/or Torres Strait Islander.

Lifelong renters

The Household, Income and Labour Dynamics in Australia (HILDA) Survey reported that only 10 per cent of renters moved into homeownership between 2013 and 2016 – a decrease of 3.6 per cent from the average reported between 2001 and 2004⁵.

Decreased housing affordability has a significant impact on the rental market: Not only are more people seeking residential tenancies due to their inability to afford to purchase property, rental prices have steadily risen over the years. The median weekly household rent paid in Victoria increased by 75.6 per cent between 2006 and 2016⁶. This stands in

² Australian Bureau of Statistics, Census of Population and Housing, 1996 and 2011

³ Australian Bureau of Statistics, Census of Population and Housing, 2011 and 2016

⁴ Australian Bureau of Statistics, Census of Population and Housing, 2016

⁵ Melbourne Institute of Applied Economic and Social Research, Household Income and Labour Dynamics, Annual Statistical Report of the HILDA Survey, 2018, p. 132

⁶ Australian Bureau of Statistics, Census of Population and Housing, 2006 and 2016

stark contrast to the median weekly household income during the same time period, which increased by just 27.9 per cent.

Retirees face even more challenges with affordability in the rental market. A recent survey of over 4,000 Australian workers conducted by the Australian Services Union found that the median women's superannuation balance immediately prior to retirement was less than \$80,000, estimated to fund less than three years of retirement "even on the most basic living standard"⁷. The survey also indicated that men fared only marginally better, with an average superannuation balance funding an estimated five and a half years.

A Reserve Bank Discussion Paper analysed the effect of increased housing prices, changing demographics and preferences have on the likelihood of buying a first home. It found that:

"...potential First Home Buyers (FHBs) today are less likely to take on a mortgage and purchase a home than those earlier in the 2000s. Our results provide evidence that FHBs are being crowded out of the market by higher housing prices ... That is, people do not appear to be merely delaying the age at which they purchase their first home. In short, 'generation rent' appears to be an important phenomenon that is related to the rise in housing prices rather than a shift in preferences or changing demographics⁸."

Vulnerable tenants

In 2016, 10.4 per cent of rented households in Victoria were reported as being under housing stress – paying equal to or greater than 30 per cent of their household income toward rent.

Those receiving Government benefits by and large fall into this category: A single person on the Newstart allowance receiving the maximum rent assistance has just \$38 per day to spend on housing, food, utilities, transportation and other necessities. Low-income renters are often considered 'unsuitable tenants' by landlords and struggle to find housing as a result, putting them at significant risk of homelessness.

Government and non-government not-for-profit organisations provide social housing to people who are unable to access suitable accommodation in the private market. Social housing includes public housing and community housing.

The Director of Housing is the landlord of Victoria's public housing tenants, with powers to purchase, develop, lease and sell property. The role of the Department of Health and Human Services (DHHS) covers tenant applications, allocation of property to tenants, asset management, procurement and tenancy management.

As at 30 June 2016, 64,663 public housing dwellings were owned and/or managed by the Victorian Government⁹, providing long-term subsidised rental accommodation to low-income, disadvantaged households. DHHS leases some of these premises from private landlords and then on-leases them to its own tenants in addition to premises directly owned by the

⁷ D Hetherington & W Smith, Not So Super, For Women: Superannuation and women's retirement outcomes, July 2017

⁸ John Simon and Tahlee Stone, 'Generation Rent' and the First Step on the Property Ladder', Reserve Bank Discussion Paper, September 2017, <https://www.rba.gov.au/publications/rdp/2017/2017-05/generation-rent-and-the-first-step-on-the-property-ladder.html>

⁹ Managing Victoria's Public Housing Report, Victorian Auditor General, June 2017, vii.

Director of Housing. Reporting on the DHHS management of its housing stock, the Ombudsman¹⁰ stated that:

“Some 165,000 Victorians live in public housing, and another 35,000 households are on the waiting list. Public housing is a hugely important asset for the state, worth around half a billion dollars. Originally designed to support people with low incomes, it now houses some of the state’s most disadvantaged people. Housing allocation processes are sensitive to people with backgrounds of hardship and special needs; as a result, many households have at least one member with a disability, or tenants who have been homeless as a result of family violence.”

Around 19,000 community housing dwellings are owned and/or managed by not-for-profit organisations. Community housing also includes 1,525 properties for low-income Victorians identifying as Aboriginal and Torres Strait Islander.

¹⁰ <https://www.ombudsman.vic.gov.au/Publications/Parliamentary-Reports/Inv-into-mgt-of-maintenance-claims-public-housing>

Mould and Tenancies

Moulds are naturally occurring fungi that reproduce by airborne spores invisible to the naked eye.

The United States Environment Protection Agency (USEPA) warns that indoors mould growth is “*to be avoided*”, noting that there are many types of mould and none will grow without water or moisture. Living indoors produces water vapour through activities such as cooking, washing, cooling and breathing, providing the potential for mould to grow if moisture levels become excessive.

Health implications

Contact with mould or mould spores has been known to cause allergic reactions including immediate or delayed hay fever-type symptoms such as sneezing, runny nose, red eyes, and skin rash (dermatitis). USEPA considers that:

“Allergic reactions to mold are common. Molds can also cause asthma attacks in people with asthma who are allergic to mold. In addition, mold exposure can irritate the eyes, skin, nose, throat, and lungs of both mold allergic and non-allergic people.”¹¹

The relationship between respiratory illness and indoor fungal exposure has been the subject of many studies. In 2002, the European Community Respiratory Health Survey investigated associations between adult asthma and housing characteristics related to dampness, mould exposure and house dust mite levels for over 19,000 participants in 38 study centres. It found a relationship between mould exposure and bronchial responsiveness that was similar among countries in different parts of the world¹². Mould was most strongly linked to older housing (over 10 years old), recent water damage and type of property (e.g properties with a basement).

A Melbourne-based study found a significant influence of fungal and cat allergen exposure on clinical activity of asthma and sensitization in young adults¹³. This study considered fungal exposure and symptoms of respiratory disease of 349 randomly chosen subjects and 136 previously diagnosed with respiratory illness. The study included home visits to sample air, dust and humidity as well as spirometry and skin prick allergen tests. The authors noted:

“...our findings on the influence of ergosterol on sensitization to fungi and clinical activity of asthma are novel. We recommend the use of this marker of indoor fungal

¹¹ U.S. Environmental Protection Agency Office of Air and Radiation, A Brief Guide to Mold and Moisture in Your Home, September, 2010, p 2, <https://www.epa.gov/sites/production/files/2016-10/documents/moldguide12.pdf>

¹² Jan-Paul Zock, PhD,a Deborah Jarvis, MD,b Christina Luczynska, PhD,b Jordi Sunyer, MD,a and Peter Burney, MD,b on behalf of the European Community Respiratory Health Survey, *Housing characteristics, reported mold exposure, and asthma in the European Community Respiratory Health Survey*, Journal of Allergy Clinical Immunology, August, 2002, p.285

¹³ Shyamali Dharmage , Michael Bailey , Joan Raven , Teresa Mitakakis , Anna Cheng , David Guest ,Jennifer Rolland , Andrew Forbes , Francis Thien , Michael Abramson , and E. Haydn Walters, ‘*Current Indoor Allergen Levels of Fungi and Cats, But Not House Dust Mites, Influence Allergy and Asthma in Adults with High Dust Mite Exposure*’, AJRCCM, Vol 164, No.1, July, 2001

exposure in future research. There is a need for further studies, especially of interventions to reduce the mold and cat allergen exposures. From a public health perspective, we would encourage measures to reduce the exposures to fungi and cat allergen in the community. Frequent airing, regular use of kitchen exhaust fans and bedroom ceiling fans, removal of old wall-to-wall carpets, exclusion of pets, frequent vacuuming, and cleaning visible mold patches are identified as potentially effective measures to reduce mold exposure.”

In New Zealand, a study of 1,376 Pacific Island families¹⁴ noted that:

“...studies have shown that exposure to damp, mouldy and cold housing can significantly increase the risk of a number of respiratory symptoms including the common cold and asthma, in addition to non-respiratory problems such as fatigue and poor concentration.”

Another New Zealand-based study of over 6,000 families analysing the links between the home environment and childhood Acute Respiratory Infection hospitalisation in children under five found that in approximately 20 per cent of the households, dampness in the house or heavy condensation in the room where the child slept at night were present quite often, almost always or always, and approximately 13 per cent of the households mould or mildew was reported to be present in the walls or ceilings of the room where the child slept¹⁵.

A common issue for renters

Bio-toxins such as mould and pests are commonly reported occurrences in the rental market. A 2017 report that surveyed 1,005 respondents in private rental housing across Australia found that 20 per cent of respondents had experienced mould that is difficult to remove or reappears, while leaks or flooding were an issue for 21 per cent and pest (cockroaches, moths, ants etc.) were a problem in 27 per cent of cases¹⁶.

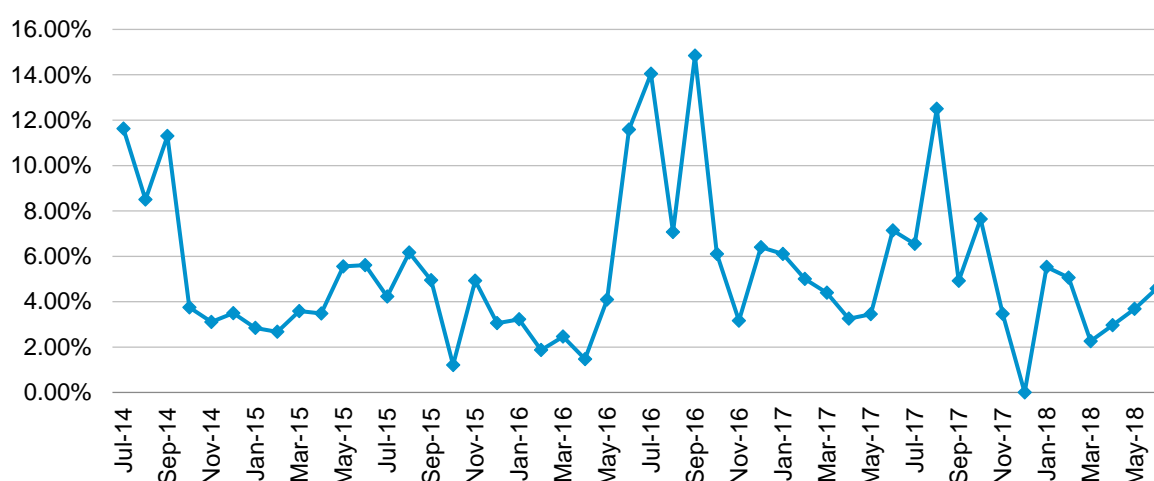


Figure 3: Mould issues as a percentage of total calls to Tenants Union of Tasmania, June 2014 to May 2018.

¹⁴ Sarnia Butler, Maynard Williams, Colin Tukuitonga and Janis Paterson, Problems with damp and cold housing among Pacific families in New Zealand, NZMJ 11 July 2003, Vol 116 No 1177

¹⁵ Sandar Tin Tin , Alistair Woodward, Rajneeta Saraf, Sarah Berry, Polly Atatoa Carr, Susan M. B. Morton and Cameron C. Grant. Internal living environment and respiratory disease in children: findings from the Growing Up in New Zealand longitudinal child cohort study, Environmental Health (2016) 15:120

¹⁶ 'Unsettled: Life in Australia's private rental market', Choice, National shelter, National Association of Tenant Organisations, February, 2017

These statistics are comparable to those reported by organisations who support tenants. The Tenants Union of Tasmania receives significant numbers of queries and advice requests related to mould and damp with significant seasonal variation, generally peaking during the cooler months. Tenants Union of Tasmania advises the mould is a common problem in Tasmania during winter when low temperatures, and fewer hours of sunlight make it more difficult to prevent dampness and condensation. Figures supplied for the past two years show that despite a dry winter in 2015 that may have reduced the volume of calls on this topic, mould remained a significant concern for local tenants.

Tenants Victoria reported similar findings: Our advice was sought in relation to mould and damp by 1155 tenants in the 16/17 financial year, 877 in 17/18 and a further 25 in the first 6 weeks of 18/19. In Tenants Victoria's experience, therefore, it is an extremely common issue faced by tenants, be it in public or private housing.

Matters relating to mouldy conditions in rental properties are heard at the Victorian Civil and Administrative Tribunal (VCAT)¹⁷. Unfortunately, VCAT does not provide written decisions as a matter of course, so it is not possible to gain a complete picture of the prevalence of disputes relating to mould.

¹⁷ A database search of published VCAT decisions in the Residential Tenancy List using the terms mould found over 60 matters featuring mould.

Challenges

There are several contributing factors to the issue of mould in rental properties, with more work to be done at both a state and federal level.

Ageing housing stock

Surprisingly, little statistical information exists in relation to the prevalence of aged housing stock in the private rental sector. That said, it is our experience that many of renters – particularly those from low income households – are living in old housing stock of a poor standard.



CASE STUDY: Neglected social housing



A single mother and her teenaged son live in a public housing dwelling in Melbourne's southeast. Rising damp has caused persistent mould growth throughout the property including on walls, inside cupboards, in the bathroom and on their personal possessions. Her son was hospitalised with a neuro-immune disorder and was subsequently diagnosed with Chronic Inflammatory Response Syndrome (CIRS) as a result of the mould growth in their home. The tenant was also diagnosed with CIRS as well as ulcerative colitis and chronic fatigue.

She repeatedly reported the mould growth to the Office of Housing, but was continually advised by her property manager that mould was "not our problem". When the tenant raised the issue with a public housing maintenance worker who came on-site, she was told, "There is no such thing as mould. You are a silly woman! What would you know about buildings?"

The challenges of Australia's ageing housing stock are no more evident than in the social housing sector, and the importance of investment in social housing has recently been recognised by Victorian Government. The *Homes for Victorians Strategy* (released in March 2017) included methods to improve housing stock and to increase the supply of social housing¹⁸. The strategy underlines the particular importance of better health and safety standards in the social housing sector:

*"Rooming houses provide accommodation to those who have previously been homeless or those who are unable to maintain a regular tenancy. Yet the sector has been ignored for years and many properties fall short of modern standards. In recent years, more stringent regulation has been introduced to ensure that these properties are safe ... This legislation will better protect tenants by helping ensure operators are suitable to run rooming houses and comply with basic hygiene, safety and security standards."*¹⁹

National building codes not up to scratch

Australia has a national building code that provides standards for 10 classes of building²⁰ including residential buildings²¹. The National Construction Code (NCC)²² prescribes technical requirements of building work and replaced the previous state-based system in Victoria in 1993. However, this does not ensure uniformity of building stock across Australia. As then Federal Assistant Minister for Industry, Innovation and Science commented after the Grenfell fire of 2017²³:

"The Federal Government has been in charge of the National Construction Code through the independent Australian Building Construction Board since 1994," Mr Laundy said ... We administer the running of that code, however the enforcement and implementation of it is done at state level ... So that's actually how the system has always operated, due to our federal system of government and state system of government."

Buildings are subject only to the standards that applied at the time of construction or, where a renovation occurs, at time of that change. Relevant building standards are changing over time nationally as the Australian Building and Construction Board (ABCB) develops appropriate industry standards for energy efficiency and alters the National Construction Code 2019 to minimise the risk of condensation in residential buildings in response to feedback from industry and building regulators.

In 2014 the ABCB also published a handbook for architects, designers and builders to minimise risk of condensation and its consequences in buildings²⁴. This guidance notes the effects of relative humidity between indoors and outdoors and temperature on growth of mould and irritants such as dust mites:

¹⁸ <https://www.vic.gov.au/affordablehousing/about.html>

¹⁹ Loc cit, p.41

²⁰ <https://www.abcb.gov.au/Connect/Categories/National-Construction-Code>

²¹ Class 1 buildings are houses, Class 2 are apartments, Class 3 are residential (including rooming houses, short stay, aged care etc.), Class 4 are dwellings within a non-residential building.

<http://www.vba.vic.gov.au/practitioners/building-classification-codes>

²² *The Building Act 1993* (Vic) adopts the Building Code of Australia, comprising Volumes One (and appendices) and Two (including any Victorian additions in Appendix A) of the National Construction Code Series.

²³ <https://www.news.com.au/finance/real-estate/renting/minister-admits-government-has-no-idea-how-many-homes-fitted-with-noncompliant-cladding-amid-messy-review/news-story/5921a224e9ccc420b5d9dcbea8d90ca8>

²⁴ <https://www.abcb.gov.au/Resources/Publications/Education-Training/Condensation-in-Buildings>

“Above 60 per cent relative humidity, problems emerge which can more easily be seen. Moulds and fungus, for example, can develop on surfaces in a building or its contents when spores are present with a sufficient nutrient supply, temperatures stay between 4°C and 40°C and relative humidity rises above 70 per cent at the surface. Left to develop, these organisms can produce toxins and irritants with suspected effects on respiratory health. The first two conditions for growth are easily met because spores are always present in the air and most building materials or furnishings and contents can supply the nutrients. Keeping building occupants comfortable will also ensure that temperatures are amenable for mould, mildew and fungus. These realities require that mould growth be kept in check by controlling relative humidity adjacent to building surfaces. This means minimising water vapour levels and keeping temperatures up at the surfaces since relative humidity depends on both temperature and water vapour concentration. Although air temperature in a room might be at the preferred level, some parts of the walls, floor and ceiling or furnishings can be significantly cooler.”²⁵

This description of retarding mould growth points to the difficulties tenants face in combatting this issue. Many tenants are renting buildings that do not keep water vapour out and/or are not readily heated. If the building can be heated, a lack of insulation means that it is extremely costly for the tenant to maintain appropriate heat and humidity levels to prevent mould growth. Low income tenants including those in social housing may already struggle to pay for their energy consumption. In light of the rising cost of energy for heating, tenants may not be comfortable with simultaneously increasing ventilation (i.e. turning a fan on or keeping windows open) while keeping their heating running.

Enforcement gap

While the NCC is a valuable tool to ensure that renovations of and additions to new building stock are safe and meet minimum standards, the regulation of existing building stock is another story.

Much of Victoria’s building stock is aged, built to earlier standards or without any oversight. Building codes are not retrospective and in the majority of cases for residential buildings in the private rental market, it is only when the building fabric is changed that oversight is required. If no improvements are made to a premises, a private landlord has only the prospect of a potentially poor return on investment as incentive to stop letting unsuitable or unsanitary premises. This market incentive is not enough to change building standards.

Rooming houses, a lower cost form of housing, often exemplify all the worst features of rental accommodation.

Under the Residential Tenancies Act (RTA), a rooming house is a building where one or more rooms are available to rent, and four or more people in total can occupy those rooms. In Victoria, rooming houses are required to be registered to meet minimum standards for privacy, security, safety and amenity. These standards²⁶ include :

²⁵ Op cit, p.27

²⁶Public Health and Wellbeing Regulations 2009 (SR No 178 Of 2009) - Regulation 18 -A proprietor of prescribed accommodation must maintain the prescribed accommodation and all bedrooms, toilets, bathrooms, laundries, kitchens, living rooms and any common areas provided with the accommodation—(a) in good working order; and (b)in a clean, sanitary and hygienic condition; and (c)in a good state of repair. Penalty:20 penalty units
Residential Tenancies (Rooming House Standards) Regulations 2012 (SR No17/2012) (in effect from 31 Mar 2013) r 17 Ventilation prescribes that each habitable room bathroom, shower, toilet and laundry in a house (including terrace) have ventilation to meet Performance Requirement P2.4.5 or Acceptable Construction Practise in Part 3.8.5 of BCA Vol.2, and a in Class 3 building (such as a rooming house) have ventilation to meet Performance Requirements FP4.3, FP 4.4 and FP 4.5 or Deemed to Satisfy Provision in F4.5 of BCA Vol 1.

- residents' windows must have a covering that provides privacy and can be opened and closed by the resident, and
- habitable rooms, bathrooms, shower rooms, toilets and laundries must have ventilation that complies with the relevant Building Code of Australia (section 17 of the Regulations).

In addition, Consumer Affairs Victoria (CAV) recommends that good practice for adequate ventilation is that rooms should either have windows that open to allow enough air into the room, or that an exhaust fan is installed in the ceiling or wall.



CASE STUDY: Poor rooming house standards



A tenant was one of six people living in a four-bedroom rooming house in Melbourne's west. The rooming house was not registered with Consumer Affairs Victoria. The tenant reported that the premises was in a poor state of repair, with several defects and faults requiring urgent repairs. These included a ducted heating that had not been in operation for two years, and severe water damage on the ceiling due to a roof leak resulting in persistent dampness, mould and mildew growth. The tenant was concerned about the health implications of the constant mould growth on the premises. She was also concerned about the risk of structural collapse and the potential for injury.

CAV and the local council have a role in oversight of these premises. The council may inspect a rooming house to see if it meets the standards set out in the *Public Health and Wellbeing Regulations 2009* and penalties apply for failing to keep premises in good condition.

Rooming house proprietors are required to conduct gas safety checks every two years and electrical safety checks five yearly, and maintain records of these for inspection by CAV.

Despite registration requirements, unregistered rooming houses are common. In the 2016-17 financial year, Tenants Victoria's Outreach Program found that 25 per cent of the rooming house addresses visited by outreach workers were not registered with CAV. Some operators continue to operate through a web of sham companies and use 'phoenix companies' to stay ahead of enforcement and avoid penalties.

Unfortunately, the existence of standards and an enforcement regime by itself is useless if enforcement effort is lacking. Tenants Victoria obtained details under freedom of information of the number of infringements of rooming house standards issued by CAV for period 1 July 2014 to 31 December 2017 inclusive. Only 19 infringements had been issued in this three-and-a-half-year period.

New buildings not immune

Tenants Victoria receives complaints about buildings of all ages and types. Faults in new building construction that pre-dispose the premises to mould formation and biotoxins include fixed windows, poor or insufficient mechanical ventilation, poor window seals, non-functioning damp courses, flashing or roof issues resulting in ceiling mould, flooding from balconies or blocked storm water drains, and bathrooms and wet areas with faulty waterproofing leading to dampness in adjoining rooms.



CASE STUDY: New buildings at risk



A tenant has lived in a newer apartment building (built approx. 2003) in Melbourne's inner-west for four years. Multiple structural issues have contributed to persistent black mould growth in the property throughout her tenure including a lack of windows in the ensuite bathroom, an inadequate exhaust fan providing no ventilation, being unable to keep other windows open at most times due to significant noise from the street below, and having windows that produce a significant amount of condensation during the colder months. The tenant has reported persistent black mould growth in the ensuite bathroom and master bedroom along the window frames and on the walls of her bedroom.

When she reported the mould to the owner's corporation, she was instructed to purchase a de-humidifier. In addition to taking this measure, the tenant routinely purchases several moisture absorbing products each month in an effort to prevent further mould growth. As a result of the mould growth and lack of remediation by the owner's corporation, the tenant suffers from constant fatigue and was diagnosed with Chronic Inflammatory Response Syndrome (CIRS) earlier this year. She worries that the large amount of sick leave she has been forced to take from work due to her illness might result in the loss of her job.

The systemic issues and types of problems that can affect new buildings were illustrated by a recent large fire in a new 23 story apartment building in Melbourne. Fire in buildings is, of course, a well-known hazard. Over many years a stringent regulatory regime has been developed to prevent fires, and minimise risk of casualties due to fire and smoke. Despite long experience and knowledge of flammable substances, building techniques and fire behaviour that informs the National Construction Code, investigation of the 2014 Lacrosse fire by a specially constituted taskforce showed that the Code and its enforcement was not effective to prevent a near disaster for approximately 500 people living in the building. Existing enforcement measures did not stop the use of highly dangerous flammable cladding.

The Victorian building certification system (where inspectors are privately contracted by a developer) was also highlighted by the Victorian Cladding Taskforce. The Taskforce received evidence of diminished standards²⁷ and noted the building certifier's conflict of between its income and maintaining best practise. (See *Appendix: Lacrosse Apartment Fire, November 2014*)

If the building regulation does not operate effectively to prevent well-known hazards such as fire, it will not protect residents – especially tenants – from the slower acting, less well understood hazards from mould and biotoxins.

Tenancy legislation lacking protections

The protections in the Australian Consumer Law in relation to supply of services²⁸ may also apply to residential tenancies. In *Pullman v King*²⁹ where the landlord's property manager had provided the tenant with brochures on combatting mould, the tribunal found:

"In this case the misleading and deceptive conduct identified by the tenant is the representation by Ms Chan (estate agent) that the premises did not have a mould problem. In my view the representation was made as to the state of the premises in the knowledge that the reports provided to the landlord concluded that the property was not structurally prone to increased moisture. The conclusion of the reports provided to the landlord was that the mould experienced by previous tenant was as a result of a build-up in condensation in the premises by the tenant ... In those circumstances taking into account the material provided to the tenants in relation to management of condensation and moisture build up in the premises and the special conditions signed by the tenants, in my view there was conduct in breach of s.18 of the ACL".

However, while the general protection of the Australian Consumer Law can be invoked in limited circumstances³⁰, each State and Territory has residential tenancy legislation is intended to cover all of the elements of the relationship between landlord and tenant.

²⁷ "While recent legislative changes mean a building surveyor cannot be appointed directly by the builder, they continue to be appointed by developers, who have a financial incentive to minimise cost and ensure that projects are completed as soon as possible. This commercial relationship aligns the incentives of the building surveyor with the developer rather than the eventual end users of the building." Ibid, p. 25

²⁸ S.3 ACL includes 'any right (including rights in relation to any interests in real or personal property), benefits, privileges or facilities that are or are to be provided, granted or conferred in trade and commerce.

²⁹ [2016] VCAT 82 (18 January 2016). The tribunal was not persuaded that the premises were not reasonably fit for purpose and did not find a breach of s.61(1) ACL.

³⁰ The 2016/17 VCAT annual report shows an increase of 2188% of applications (from 8 to 18)³ in the Residential Tenancies list under "another enabling Act such as Australian Consumer Law and Fair Trading Act", that the report states reflects better data collection. P.57-58.

As a member of the National Association of Tenants Organisations (NATO), Tenants Victoria is aware that for tenants in all jurisdictions, common issues include concerns about insecurity and standards of accommodation (i.e. ability to obtain and retain suitable accommodation, poor amenities, lack of repair), the details of regulation and different standards of enforcement.

This submission will refer to the situation in Victoria. The challenges faced in Victoria from a legislative standpoint include lack of minimum health, safety and energy efficiency standards for rental properties.

No minimum health, safety and energy efficiency standards

Tenants are disproportionately more likely to live in properties of a lower standard, with the most vulnerable and disadvantaged – the young, single parents, people with disabilities and ill health, those with low incomes and without employment, and Indigenous people – being over-represented in poorer quality housing³¹.

Tenants Victoria has long argued that legislated minimum health, safety and energy efficiency standards for rental properties in the state's *Residential Tenancies Act 1997* (RTA) would address many of the issues faced by tenants. These standards should include the prevention of mould formation such as insulation, adequate ventilation, heating and cooling.

Minimum standards have already been established in Tasmania. These include:

- the premises are waterproof,
- the structure is not damp and rotting,
- the premises are clean,
- a fixed form of heating (being a heat pump, wood heater, gas heater, electric heater, or, with approval, an open fire) is located in the living area of the premises,
- unless the owner is a social housing provider, all rooms likely to be used as bedrooms or living rooms are fitted with window coverings,
- all bathrooms, toilets and laundries are fitted with a device that removes air from the room, and
- all rooms must have windows or doors that open to the outside of the premises, or must connect to room that does, and any windows that provide such ventilation must be able to be securely fastened.

The Tasmanian minimum standards were enacted in 2013 and have been gradually phased in from 2015, with completion expected by 1 August, 2018. Standards relating to mechanical ventilation, electricity and heating will be the last to be implemented.

These developments have followed the introduction in New Zealand of insulation statements³² that must be included in all residential tenancy agreements, disclosing whether there is insulation in the rental home, where it is, what type and what condition it is in, giving tenants the ability to make an informed decision regarding rental of the property. From 1 July 2019, ceiling and underfloor insulation will also be mandatory for all rental properties in New Zealand in premises where installation is reasonably practicable.

Minimum standards were recently legislated in Queensland, however the regulations surrounding these standards have yet to be finalised.

³¹ Emma Baker, Laurence H. Lester, Rebecca Bentley & Andrew Beer (2016) Poor housing quality: Prevalence and health effects, *Journal of Prevention & Intervention in the Community*, 44:4, 219-32, DOI: 10.1080/10852352.2016.1197714, p225.

³² <https://www.tenancy.govt.nz/assets/Forms-templates/insulation-statement.pdf>; Level of R-value insulation applicable to housing is dependent on location in NZ's three climatic zones.

Mandating minimum standards is particularly important for vulnerable tenants such as those from low-income households and those receiving government benefits. The market relies on consumer choice; the assumption being that renters will have sufficient choices available to be able to refuse sub-standard properties.

However, the reality is that the rental market lacks affordable housing and there is a high level of competition for lower cost properties. Anglicare Australia's recent Annual Rental Snapshot surveyed 66,424 rental properties advertised for rent on 24 March 2018. It found that only 0.0004 per cent of properties advertised were affordable for someone dependent on the Youth Allowance or Newstart³³. The survey also found that only 406 properties (0.6 per cent) advertised were affordable for someone on a disability pension, and just 2,700 properties (4.1 per cent) were affordable for someone on an aged pension. The lack of choice coupled with increased competition means that landlords have very little incentive to meet socially acceptable health and safety standards for the properties they let.



CASE STUDY: Mushroom growth on the carpets

When a young couple from Melbourne's northeast first moved into their rental property, the hot water unit had burst and flooded the carpeted living room. The property manager promised that this would be fixed and that new carpeting would be installed prior to the tenants moving into the property. Upon moving into the premises, the tenants discovered that cheap carpet tiles had been installed and the floor underneath was still wet. This eventually caused mushrooms to grow out of the carpet. Reports to the property manager were ignored for over a month, with the property manager remarking, "At least the water is clean."

The condition of the rental property throughout her tenancy was poor, including black mould in the bathroom, orange fungi growing out of rotting door frames, flyscreens held on by masking tape, unglazed windows resulting in condensation and mould growth in the colder months, and damp walls with mould that spread onto the tenant's personal possessions and furniture. As the tenants were both on low-incomes and needed to stay in the same area due to work and family commitments, they were unable to find more suitable accommodation for three years.

In the case of energy efficiency, an additional factor is the 'split incentive'. This describes a situation where the costs of improving a house's energy efficiency – for example, through insulation, solar heating, double-glazed windows, etc. – fall on the landlord, but the benefits are received by the tenant through reduced expenditure on energy. As the landlord does not obtain immediate benefits of investment in an energy saving strategy, there is little financial incentive for the landlord to pay for improvements that lead to greater energy efficiency³⁴.

This was reflected in the results of the Australian Bureau of Statistics' 2012 Household Energy Consumption Survey, which found that 84.5 per cent of homeowners and 86.6 per cent of owners with a mortgage had insulation while only 38.5 per cent of households in private rental market had insulation³⁵. As Environment Victoria puts it:

³³ Anglicare Australia, April 2018, 2018 Rental Affordability Snapshot

³⁴ AHURI, Policy Brief, Despite Energy saving upgrades homeowners spend more on power than renters, Oct 2017 <https://www.ahuri.edu.au/policy/ahuri-briefs/despite-energy-saving-upgrades-homeowners-spend-more-on-power-than-renters>; AHURI concluded that homeowners were wealthier and spent more on energy because they were able to do so.

³⁵ ABS, 4670.0 released 24/9/2013 - Household Energy Consumption Survey, Australia: Summary of Results, 2012 <http://www.abs.gov.au/ausstats/abs@.nsf/0/66AC0659BF300142CA257BEF0013D900?OpenDocument>

“Current laws governing repair and maintenance only require landlords to return a property to the condition it was when it was leased. If a property did not have insulation or a fixed heater, there is no obligation under current legislation to provide it ... the generally poor efficiency performance of Victoria’s housing stock means that many homes that are in generally good condition are nevertheless likely to be inefficient. Rental properties are worse than average in terms of efficiency, with much lower rates of basic measures such as insulation in rented versus owner-occupied homes³⁶.”

Urgent vs non-urgent repairs

Under the RTA, landlords have a duty to ensure that the properties they let are kept in good repair³⁷. This also applies to any common areas owned or managed by the landlord. The steps that a tenant can take to rectify any repairs issues and, as a result, the time it takes for these issues to get resolved are largely dependent on whether or not the repair is regarded as urgent³⁸.

Urgent repairs can be classified as any fault or damage that makes the premises unsafe or not secure. This includes but is not limited to a burst water service, flood damage or storm damage, a failure or breakdown in any appliance or fitting provided by the landlord or owner that will result in a large amount of water being wasted. While the landlord is required to remedy urgent repairs immediately, if the landlord does not do so a tenant may either may arrange for their own repairs (reimbursable within 14 days up to \$1,800) or make an application to the Victorian Civil and Administrative Tribunal (VCAT) for a repair order.

Despite evidence indicating that mould can cause significant health issues, repair issues relating to mould are more commonly treated as non-urgent repairs. The onus to prove that the mould reported poses a significant health and safety risk ultimately lies with the tenant. This may include obtaining a mould specialist report and medical tests at the tenant’s cost to determine if the mould is negatively affecting the tenant’s health.

If the tenant is unable to prove that the mould has had a significant negative impact on their health and should, therefore, be classified as an urgent repair, the non-urgent repairs process applies. This process can be extremely onerous and time-consuming.

First, the tenant must provide a notice to the landlord informing them that all repairs listed must be rectified within 14 days of receiving the notice. If the repairs have not been rectified in this time or have not been completed to a satisfactory standard, the tenant can then request an inspection by CAV. The inspector will provide the tenant with a copy of the report describing the repairs required, which the tenant can then use as evidence to lodge an application with VCAT for a repairs order. CAV may also negotiate with the landlord or property manager on behalf of the tenant for the repairs to be completed.

Several additional limitations exist for tenants in regard to their ability to resolve both urgent and non-urgent repairs issues. In the case of urgent repairs, tenants are required to demonstrate the reasonableness of repair cost such as providing several quotations from professional service providers. Undertaking repairs in this way is also dependent on the tenant’s ability to pay and wait for reimbursement. Meanwhile, the tenant is required to continue paying their rent pending reimbursement for repairs costs.

³⁶ Environment Victoria, Bringing Rental Homes up to Scratch: Efficiency Standards to cut Energy Bills and Create Jobs, September, 2017, p.24.

³⁷ S.68 Residential Tenancies Act 1997

³⁸ S.3(1) Residential Tenancies Act 1997 defines these repairs.

Should a landlord fail to reimburse within 14 days, the tenant may apply to VCAT for an order for reimbursement, who may withhold rent due to the landlord in the Rent Special Account. However, this sanction is rarely used in practice.

A lack of understanding and attention

The timeframes legislated for rectifying repairs issues assume that the repair is undertaken correctly and does not require revisiting. However, in many cases where the repair involves mould, a patch-up job is authorised by the landlord when a more comprehensive although more expensive repair would resolve the issue once and for all. Tenants report landlords only cleaning the surface or painting over the mould to make the problem disappear. In some instances, shoddy workmanship, inappropriate materials or methodology mean that tenants must repeatedly seek the same repairs.



CASE STUDY: Inappropriate remediation

A tenant rented a property in the Goldfields region of Victoria for ten months with her young children. Throughout her tenancy, a severe roof leak caused severe black mould growth inside her home on the ceiling, walls, carpet and her personal possessions. When she reported the mould, the property manager sent a contractor to fix the guttering. This did not solve the core reason for the mould growth (the roof leak) and mould continued to grow. The tenant reported the mould several more times during her tenancy. On four occasions, the property manager sent contractors to paint over the mould and water damage rather than ordering professional remediation.

Upon vacating the premises, the tenant and her children were forced to throw away personal possessions including clothes and furniture due to mould and water damage.

The attempt to rid the premises of mould can sometimes have the opposite effect if not undertaken correctly, spreading mould spores from the initial site to other areas of the building.

In the particularly egregious case of *Rogers v Julius*³⁹, the landlord had not acted appropriately on repairs ordered twice previously by the Tribunal including mould remediation, creating a three-year-long problem for the tenant and his family. The tenant was sensitised to mould and other allergens. The Tribunal considered the landlord's "duty imposed at common law to take reasonable care to put and keep rental premises in a safe state of repair" in light of expert witness reports that were divided on the best methods to deal with mould. Proposed remedies included removing visible toxic mould infestation and sanitising the affected areas, proper decontamination of the building to eliminate invisible mould spores and bacteria, replacing exhaust fan in the bathroom, replacing the ensuite bathroom and re-testing for mould readings. The tenant argued that these repairs would not deal with the air quality inside the house, and that the mould treatments were slow and ineffective and created an additional health risk due to airborne mould spores. The tenant hired HEPA filters while renovations were carried out and sought to recover this expense from the landlord. The Tribunal awarded compensation to the tenant, finding that the landlord had failed to effectively remediate the mould and placed the tenants at risk of harm by disturbing and failing to treat and contain the mould.

³⁹ [2017] VCAT 55 (11 January 2017). Premises had rotting floor boards near shower recess, mould growing under the lino and mould growth in the bathroom due to inadequately powered fan.

A landlord or property manager's lack of attention to mould-related issues may reflect a lack of understanding of the health implications of mould and proper remedies for such repairs. Generally, it is Tenants Victoria's experience that responses to tenants requests for repairs of any sort are slow and grudging.

Lack of effective remedies and recourse

A tenant is ultimately at the mercy of the processes for repairs set out in the RTA. For example, a tenant may give notice, allow time for an inspector from CAV to inspect the premises and provide a report and file an application to VCAT for the repairs to be undertaken. While this could potentially be completed within a reasonable timeframe, it is more common for these types of cases to take much longer and for the repairs themselves to take several months to be resolved.

In its plain English advice on mould in the home, the United States Environment Protection Agency (USEPA) states that:

"The key to mold control is moisture control. If mold is a problem in your home, you should clean up the mold promptly and fix the water problem. It is important to dry water-damaged areas and items within 24-48 hours to prevent mold growth⁴⁰."

The tenant is, therefore, suffering the physical disruption and medical effects of living in unsafe premises whilst waiting for repairs to be completed.

Living in unsafe and uncomfortable housing without a definite time frame for rectification or the ability to make changes is stressful and disempowers the tenant. Feeling that they have no alternative, tenants facing these situations will often move to other rooms – such as using a lounge room as a bedroom – or take up offers of respite from friends or family whilst continuing to pay the full rental amount for a partially or wholly uninhabitable property. It has been our experience that in many instances where the repairs process has taken an extended amount of time to be resolved, tenants often break their leases and are subsequently subject to lease-breaking fees or simply move on at the end of their tenancies without the repairs ever having been completed.

A tenant may be entitled to compensation if the tenant suffers inconvenience and/or loss or damage to your goods because the landlord failed to carry out urgent repairs immediately, carry out general repairs within 14 days or maintain the premises in good repair. However, compensation by VCAT is limited to loss under the lease contract. This rental compensation is calculated by reference to the loss of use of the tenanted premises as represented by proportion of the room or rooms makeup of the home and does not extend to compensation for physical injury, aggravation or exacerbation of a pre-existing medical condition⁴¹. A tenant seeking compensation for personal injury is required to take action in tort.

Tenants Victoria is not aware of any cases where tenants pursued compensation for personal injury related to mould or other biotoxins in tort. It is likely that the high cost and difficulties of providing adequate proof and in accessing legal aid are a significant disincentive to tenants wishing to exercise their rights following an injury caused or aggravated by biotoxins.

⁴⁰ Loc Cit, p 2

⁴¹ S 447(2) Residential Tenancies Act prohibits the tribunal making an order requiring payment for death, physical injury or pain and suffering.



CASE STUDY: Feeling powerless



A single mother and her children who lived in a private rental property in Melbourne's west experienced persistent mould growing throughout their household throughout the tenancy, including black and green mould on walls, along skirting boards, inside furniture and on their personal possessions. When they reported the mould, the landlord blamed the mould issues on the tenants and no action was taken to remediate the mould.

The tenants commissioned a mould expert at their own expense. The report confirmed that the mould growth was a result of flaws in the building and provided a detailed list of cleaning and installation tasks to remediate the mould, which the landlord refused to undertake. While the tenants filed a claim at the Victorian Civil and Administrative Tribunal (VCAT) for compensation and was successful, the compensation awarded was far less than the cost of replacing their furniture and personal possessions. The tenants reported feeling bullied throughout the entire ordeal.

High demand on a slow and cumbersome system

In the 2016-17 financial year, 54,551 tenancy matters were lodged with the VCAT. VCAT reported that in the same time period, the 80th percentile of cases were listed within four weeks, compared to their target of six weeks. The vast majority of cases – 88.64 per cent (48,354) – were initiated by landlords or their property managers including the Director of Housing, but only 9.41 per cent (5,135) were initiated by tenants⁴².

It has been our experience that tenants are much less likely than landlords to initiate proceedings. This is due to a number of factors including lack of knowledge of their rights, discomfort with formal proceedings, fear of being blacklisted and being unable to obtain another property, lost wages for time spent at VCAT, and belief that making application will not change their circumstances.

As VCAT provides only general information on the type of applications made, it is not possible to easily differentiate how many cases involved repairs or the number of cases citing mould or other biotoxin-related issues. However, Tenants Victoria regularly receives these types of queries: In the average year, we receive around 10,000 queries and requests

⁴² VCAT Annual Report 2016-17, p.58

for advice, with approximately 1 in 10 queries related to mould. These queries tend to spike during colder months. Due to limited resources to provide telephone information and the closure of the drop-in advice service in July 2017, Tenants Victoria may not be accessible to all those affected and we anticipate that the problem affects many more tenants than reported.

Type of residential tenancies service provided	2012-13	2013-14	2014-15	2015-16	2016-17
Calls answered Residential Tenancies	93,127	90,952	73,791	69,365	69,472
Calls answered Residential Tenancies Bond Authority (RTBA)	95,120	97,309	99,325	90,224	77,847
RentRight app downloads	N/A	10,368	16,591	6567	7780
Bonds lodged	216,400	221,623	228,955	236,971	241,489
Bond repayments	190,100	197,500	203,614	210,963	212,749
Bonds transferred	61,600	60,398	73,639	79,258	89,375
Bonds held	518,098	542,209	567,550	593,558	622,298
Tenants assisted under the Tenancy Advice and Assistance Program	5,003	6,178	6,267	5,758	6,186
Residential Tenancy Repair reports completed	1,177	1,106	936	916	948
Residential Tenancy Goods left behind	4,193	4,130	3,885	3,861	3,531
Residential Tenancy Rental reports completed	1,223	1,052	1,115	1,068	1,234

Figure 4: Consumer Affairs Victoria's role in residential tenancies, as reported in VCAT Annual Report 2016-17.

Property managers play a role

The real estate agents that manage properties on behalf of landlords can be an impediment to tenant's obtaining redress.

Real estate regulation relies on a complaint regime to enforce their agents' duties⁴³. Real estate agents and agents' representatives must⁴⁴:

- act fairly, honestly, in good faith and to the best of their knowledge and ability at all times,
- act in their client's best interests, except if it would be unlawful, unreasonable, improper or against their client's instructions,
- promptly notify a landlord of any breach of a tenancy agreement, unless instructed otherwise by a landlord in writing,
- promptly respond to a tenant's request for maintenance and repairs and notify the tenant of a landlord's response,
- inform the landlord if the landlord's failure to carry out maintenance or repairs would constitute a breach of the agreement or the Residential Tenancies Act 1997, and
- provide advice about the agency's dispute resolution procedure before or as soon as possible after a tenancy agreement is signed.

⁴³ Estate Agents Act 2008, Residential Tenancies Act 1997, Sale of Land Act (1958)

⁴⁴ Estate Agents (Professional Conduct) Regulations 2018 (at 26 May, 2018)

There are no penalties directly attaching to breach of these duties. Rather, they fall under the licensing scheme for real estate agents enforced by Consumer Affairs Victoria. The general provisions of *Australian Consumer Law and Fair Trading Act 2012* must be relied upon to sanction property managers. Alternatively, a tenant may seek to rely on ACLFTA as part of a claim at VCAT against the agent's principal, the landlord. However, it has been our experience that tenants generally avoid making VCAT applications wherever possible, and even where applications are made against them many tenants do not attend. Tenants' concerns about being blacklisted by agents or landlords may also be a factor in failing to hold agents to account.

Despite the duty to act in good faith and to respond promptly to maintenance issues, tenants commonly report property managers ignoring requests for repairs or not passing them onto the landlord. For example, property managers may request that tenants notify them of issues by completing online forms listing the repairs required, however no action is taken following a report. Tenants become increasingly frustrated about lack of response to their reports and are forced to seek the assistance of tenancy advice services such as Tenants Victoria, or seek enforcement of repairs via an application with VCAT.



CASE STUDY: When property managers fail in their duties

A tenant lived in a private rental property in Melbourne's north for several years. A leak underneath the kitchen cupboards resulted in significant mould growth in the kitchen cupboards and walls. The tenant experienced a ranged of health issues relating to the mould growth including asthma symptoms, fatigue and stomach issues. Her ill health led to issues with depression and anxiety.

She repeatedly reported the mould issues to her property manager. After one and a half years, a plumber was finally organised but never showed up to the appointment. The tenant filed a complaint with the Office of Fair Trading against a rent increase after two years of reporting the mould with no resolution, and a damp expert was sent to the property. Soon thereafter, the property manager advised the tenant that they would be remediating the mould problem and the tenant was served with a notice to vacate citing "no specified reason".

Just one week after vacating the property, the tenant discovered that the property had been readvertised with no apparent remediation work having been undertaken.

Real consequences for tenants

The challenges within the rental market have a clear impact on the physical, emotional and financial wellbeing of tenants.

An imbalance of power

Ambiguous tenancy laws pertaining to repairs and the lack of adequate protections, remedies and recourse have bred a culture of fear and acceptance for tenants. According to CHOICE, 21 per cent of respondents reported waiting over a week to receive a response from their landlord or property manager about an urgent repair⁴⁵. For many tenants, even reporting urgent repairs is enough to cause significant stress: One in seven survey respondents reported that they had avoided making a complaint or requesting a repair out of fear of adverse consequences such as eviction or 'blacklisting' (listing on a tenancy database).



CASE STUDY: Consequences for reporting mould

A tenant had lived in the same older private rental property in Melbourne's north for 10 years. During this time, the tenant experienced a range of health issues relating to mould growth in the property's bathrooms and bedrooms resulting from a rising damp issue, including asthma symptoms and chronic lung and sinus infections. In one instance, the tenant had a sinus infection for 18 months that was unable to be treated with conventional medication.

She reported having dealt with 13 different property managers throughout her tenure. Each time she filed a maintenance report for mould remediation, the property manager increased the rent. She was also threatened with eviction on several occasions. The property managers' knowledge about the health implications of mould was minimal and their attitude toward the tenants' requests for mould remediation were met with responses such as, "It's an old property. What do you expect?" and, "You should be grateful that you found a property. Don't complain about things that don't affect your quality of living."

When one of the property managers finally agreed to send a remediation technician to the property, no notice was given to the tenant and the technician showed up unannounced at 6:30am. When the tenant refused the professional entry because she had not expected the visit and could not make alternative arrangements to attend the site, the property manager notified the owner of the property about the tenant's 'refusal' to allow maintenance and refused to work with the tenant to schedule a suitable time for remediation. As a result, the tenant was forced to pay hundreds of dollars for professional remediation out of her own pocket.

⁴⁵ CHOICE, National Shelter & the National Association of Tenancy Organisations, Unsettled: Life in Australia's private rental market, February 2017

One such example is the case of *Maynard v Athinis*⁴⁶, where the landlord issued a notice to vacate to a tenant of five years standing after the tenant took issue with poor repairs undertaken by the landlord. In that instance, the tenant had 'given up' raising repair issues due to inaction by estate agent. The Tribunal found that the landlord was now undertaking repairs that had been requested sometime prior by the tenant but not completed by landlord. In light of the landlord's evidence that he was not clear on his plans for the building, the Tribunal found that the notice to vacate had been issued as retaliation.

Tenants also commonly report receiving rent increases with each request for repairs regardless of whether or not repairs have actually been undertaken, often making them even more reluctant to report maintenance issues.

Adverse health affects

Poor housing conditions have a measurable and statistically significant impact on mental, physical and general health⁴⁷.

One in nine Australians suffer from asthma and asthma is more common in people living in socioeconomically disadvantaged areas⁴⁸. Those living in sub-standard housing are most likely to be socioeconomically disadvantaged and have long-standing illness. In addition, vulnerable groups who are among those most likely to live in poor housing also tend to spend large amounts of time in their homes exposed to potentially hazardous environments.⁴⁹



CASE STUDY: Vulnerable tenants at risk

A single mother on a low income moved into her first rental property in Melbourne's inner-south with her toddler-aged child. Black mould was an ongoing issue from the commencement of her tenancy, growing down the walls, in the carpet and on the tenants' personal possessions including her child's toys. When the tenant would report the mould to her property manager, she was instructed to clean it off with clove oil.

Despite following the property manager's cleaning instructions and purchasing a de-humidifier at her own expense, the mould reappeared and increased throughout the colder months. The tenant and her child experienced multiple illnesses as a result of the mould including ongoing asthma symptoms, sinus infections, tonsillitis and ear infections. Her child was referred to the Royal Children's Hospital for specialist allergy testing and treatment.

Toward the end of her fixed-term lease, the tenant was forced to move out of the property to her parents' house one hour away due to the severity of her child's illness. She was still required to pay rent for several weeks. The property manager eventually let the tenant out of the lease early when they found a new tenant for the property without having undertaken any mould remediation.

⁴⁶ *Maynard v Athinis (Residential Tenancies)* [2017] VCAT 717

⁴⁷ *Ibid*, p229.

⁴⁸ Australian Institute of Health and Welfare, 18 October 2011, Asthma in Australia 2011: with a focus chapter on chronic obstructive pulmonary disease.

⁴⁹ World Health Organisation, *Environmental burden of disease associated with inadequate housing*, 2011

As set out earlier, it has been our experience that the effects of mould in particular are often reported during winter, with tenants reporting increased susceptibility to illness, especially respiratory illness and asthma symptoms.

Tenants affected by water damage and mould can face significant disruption to their normal lives. In the case of *Matthews v Huppert*⁵⁰, the tenants had notified the agent and landlord about damp ceiling in 2014, but it was not repaired. On 28 December 2016, storms caused flooding in while the tenants were away on holidays. The tenants returned three days later and were told by the landlord's agents to treat it as an 'insurance claim' and that it would take some time for anything to happen. The tenants cleaned the premises for five hours. On 2 January 2017, the landlord's contractors removed carpet, inspected the roof and advised there was a hole in the roof and damaged gutter. One of the tenants began to suffer headaches. By 4 January 2017, water was coming out of light fittings in the living room and bedroom. The tenants moved their children to other accommodation on 6 January 2017.

The next day, the tenants' contents insurer assessor advised the house had been contaminated with 'black water which was a risk to the tenants' health, and that they should leave the property and dispose of any of their goods touched by the floodwater. When the tenants informed the estate agent, they were threatened with VCAT proceedings and 28 days' notice wasn't given to terminate the tenancy. A further expert assessment on 19 January 2017, found the property was uninhabitable due to mould, lead paint and black water contamination. The tenants moved out on 24 January 2017, returned keys and formally ended the tenancy on 31 January 2017.

The City of Port Phillip issued a building order stating that the dilapidated stormwater system letting water into the dwelling posed "a danger to the occupants of the building short-term". The tenants moved first to their neighbour's house, then on to stay with family members. They had to use laundromats to wash their clothes. The temporary accommodation was too far away for the children to attend their booked school holiday program, and a grandparent flew from interstate to look after the children. The Tribunal awarded compensation to the tenants.

The inability to have repairs completed in a timely fashion also impacts greatly on the tenant. Many tenants feel powerless and at the mercy of whim of the landlord or property manager. The only way to enforce action is for the tenant to take their complaint to VCAT, however their ability to challenge inaction by landlords and agents can be limited by illness, incapacity or disadvantage. Additionally, asserting the right to have the rented premises kept in good repair can lead to retaliation such a notice to vacate.

Should repairs not be completed, the tenant faces the prospect of remaining in unsatisfactory or dangerous accommodation that continues to cause illness or the difficulty, moving to temporary premises (such as a friend's floor or couch) and considerable expense and inconvenience of finding and moving to other premises.

In the case of *De Silva v Prasangika*⁵¹, tenants who took up residence in 2011 first formally reported a significant roof leak in November 2013, (although the agent had been alerted to the leak in a previous inspection). No action was taken by the landlord to address the issue. In June 2016, the tenants emailed photographs and videos of the leak during rain and surrounding mould to the agent. In the meantime, a bathroom fan failed in January 2015, also causing mould growth.

⁵⁰ *Mathews v Huppert* (Residential Tenancies) [2017] VCAT395

⁵¹ *De Silva v Prasangika* (Residential Tenancies) [2017] VCAT 1042 (14 July 2017)

On 17 June 2016, the tenants again wrote to the agents expressing frustration that they'd been asking for repairs for three years without success, and giving the agents a week to fix to respond to the claim for repairs otherwise they would take the matter to VCAT. A notice to vacate was sent to the tenants the day before the tenant's deadline expired. The tenant succeeded in a VCAT application for 1,035 days' compensation.

When the tenant was asked by the tribunal member why the claim had not been made earlier, he cited ill-health and provided a doctor's certificate.

Recommendations

As renting becomes less of a transitional phase in life, it becomes more important than ever to ensure a tenants' fundamental human right to safe and secure shelter.

Legislated protections and sanctions

Like other bodies representing residential tenants around Australia, Tenants Victoria has long sought changes to the *Residential Tenancies Act 1997* (RTA) to improve tenant access to fairly-priced accommodation of a decent standard.

From June 2015 to late 2016, Consumer Affairs Victoria (CAV) published a series of discussion papers and sought submissions on potential improvements to the RTA. In January 2017, CAV invited public submissions on the 'Heading for Home Residential Tenancies Act Review Options Discussion Paper'.

In October 2017, the Victorian Government announced its intention to amend the RTA in six key areas: Rental security, rent increase control, ability to have pets, faster payments and rental bonds, and modifications⁵². The government has now announced a reform package will be introduced into the Victorian Parliament in 2018 but its passage through the Parliament is uncertain.

Importantly, the reforms include a commitment to mandatory minimum standards for rented premises in Victoria. The detail of the standards would need to be made by regulation at some later stage.

A number of other legislation changes recommended throughout this process might also provide better protection for tenants against mould and other biotoxins.

Minimum health and safety standards for all rental properties

Tenants Victoria considers that too many tenants in Victoria are subject to unhealthy living conditions, and are unable to enforce their rights due to the nature of the remedies available. In addition, tenants often have a justified fear of exercising the rights they do have under the RTA due to the limited nature of their tenure, the ability of landlords to evict for 'no specified reason' and the ability of landlords to increase rent in retaliation for raising repair issues.

The poorly understood concept of 'fair wear and tear' means that tenants may be penalised for the poor condition of ageing premises. These problems exist in a housing market where housing affordability is at an all-time low and as a result, tenants struggle to find affordable rental properties within a reasonable radius of employment, schools and transport.

The sanction of having to move from an existing (albeit unsatisfactory) rental property is significant for tenants. It is expensive and disruptive. Finding a new home is especially onerous for vulnerable tenants such as those from low-income households, single parents, people from culturally and linguistically diverse (CALD) and Indigenous backgrounds and those living with disabilities or mental illness.

⁵² <https://www.vic.gov.au/rentfair.html>

The Commonwealth should lead the development by States and Territories of mandatory uniform minimum rental housing standards to reduce:

- **tenants' exposure to biotoxins, and**
- **the demand on health systems from biotoxin exposure.**

Mandatory minimum standards should be supported by strong compliance regimes in each State and Territory, with significant penalties imposed for breaches of the standards.

Minimum health, safety and energy efficiency standards would provide a simple and effective mechanism for guaranteeing the provision of safe, healthy and energy efficient housing for renters in Victoria and would bridge the existing gaps in the regulation of dwelling standards. Appropriate standards would require **all** rental properties – irrespective of age or character – to:

- be structurally sound, weatherproof, draft-proof, vermin-proof and not pose a fire hazard,
- have a properly functioning electricity connection with electrical safety switches, circuit breakers and adequate electrical outlets in each habitable room,
- have a properly functioning approved gas connection (if available and connected) with regular gas safety checks,
- have a decent level of insulation, ventilation and at least one form of inbuilt heating (in the main living area) in good working order with a maximum energy efficiency,
- have running hot and cold potable water with access to an energy efficient hot water service and fixed water appliances,
- have deadlocks installed on all external doors, and window locks and fly screens on all windows,
- have installed appliances (heaters, hot water systems, ovens, etc.) that are efficient and properly installed, and are periodically tested or serviced, and
- have adequate lighting (preferably natural light) with a basic level of window coverings.

The Australian Building and Construction Board (ABCB), guided by the Council of Australian Governments (COAG) Building Ministers' Forum should be given the task of developing minimum standards for each of Australia's climatic regions to be adopted by States and Territories. Minimum standards should pay particular attention to the need to prevent mould and biotoxin formation in new premises and through renovation of existing buildings.

The regulations should be regularly reviewed and updated to ensure that they continue to apply contemporary knowledge in relation to sustainability and energy efficiency, as well as community expectations.

Mould is an urgent repair

Landlords and property managers do not recognise the dangers of mould and they can be reluctant to make repairs. Delays in undertaking repairs where biotoxins are present is unsafe for tenants.

Tenants' right to make repairs quickly and unilaterally is limited to repairs that are defined as urgent in State and Territory legislation. Strengthening the National Construction Code (NCC) performance standards so that dampness, condensation and mould are actively avoided will, in the long term, change the knowledge and skills of building tradespeople. However, landlords may try to minimise costs by doing their own repairs or using unqualified workers to remedy mould and damp issues.

The Commonwealth should facilitate the standardisation by States and Territories of statutes and regulations relating to repair of rental properties, including:

- **defining mould as an urgent repair,**
- **developing sanctions for failure to complete urgent repairs, ensuring repairs meet reasonable standards, and**
- **ensuring mould is investigated and repaired by appropriately qualified tradespeople.**

While items requiring repairs are contained in State and Territory legislation, the minimum building standards established by ABCB should operate to guide consideration by relevant tribunals and local government of what are considered habitable premises.

Landlord insurance is a common mechanism used by landlords to defray potential expenses, including repairs. Like other forms of insurance, payment is made after the insured's claim is assessed by the insurer. It has been our experience that the landlord's insurance is used as an excuse to delay repairs. Tenants are told that a repair (including repairs due to water damage and mould infestation) cannot be made immediately, or that it is contingent on the landlord's insurer approving a claim, or authorising repairs. The greater the repair expense, the more likely this excuse is. Delays by insurers in approving claims result in tenants remaining in unsuitable/unsafe premises.

The tenant is not party to the insurance contract, so cannot take any concerns to the industry managed, member-based Financial Industry Ombudsman. The Standard Contract protections in the *Insurance Contracts Act 1984* (Commonwealth) currently exclude premises rented as a business⁵³. However, proposals to extend Unfair Contract Laws to insurance contracts for consumers and small business are being considered⁵⁴.

Examples of problematic, unfair contract terms in the context of building insurance include limitations on payments for rebuilding or repair to a price the insurer could obtain (not the actual cost of repair), or requiring the insured to pay an excess before the insurer pays the claim. Proposed changes currently being considered would alter the definition of 'consumer contract' and 'small business contract' to include contracts for the benefit of an individual or small business, but who are not party to the contract or "third party beneficiaries". If these changes widen, the practical application of benefits of voiding unfair contract terms to tenants it is a welcome reform.

The purpose of landlord insurance is to enable the landlord to continue to maintain income by fulfilling the duty to provide premises fit for habitation by tenants. The insurer should not be able to insure premises that are not suitable for rental. Tenants Victoria does not have expertise in insurance contracts, however landlord insurance pre-supposes that the premises are and remain suitable for habitation. Any exclusion of a warranty that premises are tenantable and suitable for occupation is unfair to tenants.

The Commonwealth should amend the Unfair Contracts provisions to include leased residential premises in the definition of home building.

⁵³ Cl.1.3 Insurance Contracts Regulations 2017 "*home building does not include....(l) a building that is let or rented by the insured, as lessor, as a business and is not the principal residence of the insured*"

⁵⁴ Unfair Contract Terms- Insurance Contracts Proposals Paper, <https://treasury.gov.au/consultation/c2018-t284394>

Minimum disclosure statement of building standards

Tenants commonly report that they only have very limited opportunity to inspect properties before deciding to apply for a lease. Property managers open premises for viewing by multiple tenants. A 10-minute walk through inspection before entering a lease does not provide information to tenants about latent defects in the property affecting tenant safety such as damp.

The Victorian Government's commitment in October 2017 to pre-contractual disclosures of asbestos in the rental property is an excellent first step toward giving tenants the ability to select suitable accommodation for themselves and their families.

The Commonwealth should facilitate creation of mandatory uniform disclosures about health and safety matters including asbestos on premises, previous flood damage or mould occurrence and repairs.

Disclosure of any previous flood damage, mould occurrences and leak repairs should be a requirement to ensure prospective tenants receive information vital to protect their health and safety. Instituting this change would more clearly allow the application of Australian Competition Law to sanction false or misleading claims by estate agents or landlords by advertising a premises as fit for habitation where there have been significant issues with water ingress, flood damage and/or mould previously.

Statutory duty of care in building codes

Biotoxins created by mould are a clear danger to the health of the premises' occupants. While landlords have a duty to maintain premises in good repair, this has not been effective to enforce good repair.

Limited accountability of individual tradespeople, builders, developers and building owners, together with lack of knowledge of building systems and effects of repair, means that building occupiers and tenants have no clear method to protect their rights to a safe home.

A model to create this protection already exists in Australian model work health and safety laws. These ensure physical and mental health and safety of workers, by establishing a duty in each State and Territory to maintain a working environment that is safe and without risks to health.⁵⁵

As part of the harmonisation of Australian building legislation and to ensure safety in all residential buildings, the Commonwealth should work with States and Territories to enact a statutory duty of care owed by landlords and real estate agents to occupants of rented residential premises.

The Senate Standing Committee on Economics recommended establishment of a statutory duty of care to protect end users in the residential strata sector⁵⁶, and that State and Territory governments work together to develop this change. Tenants Victoria supports this recommendation. A nationally consistent duty of care would go a long way to enabling building occupiers to enforce their rights to safe secure housing.

⁵⁵ For example, see s.21 *Occupational Health and Safety Act 2004* (Vic)

⁵⁶ Recommendation 8, Interim Report, Aluminium Composite Cladding – Non-Conforming Building Products, Senate Economics References Committee, 6 September, 2017

Improved education for property managers, building professionals and tradespeople

There is currently no mechanism in place to make sure tradespeople, builders, property developers, and real estate agents understand the causes and dangers of condensation, mould and biotoxins in buildings, nor how to best fix these defects.

Altering the NCC by itself will not guarantee improved knowledge of building professionals and tradespeople unless continuing professional practice requirements require it. Architects are required to complete continuing professional development to maintain registration to practice⁵⁷, but this is not yet a requirement for builders in all states⁵⁸.

The Commonwealth should facilitate changes to professional practice requirements to upskill building professionals and tradespeople in emerging or known issues in building, particularly how to prevent or remediate defects such as mould.

The Commonwealth should facilitate changes to continuing professional practice requirements to mandate education for real estate agents and their sub-agents to promote understanding of building faults and remediation methods.

Public research and information

Understanding and knowledge of the effects of living with biotoxins is poor. Property managers and landlords do not recognise the significant risks to health posed by biotoxins. Discomfort due to damp or lack of ventilation is apparent, and tenants report sustained respiratory illness and health effects after exposure to mould.

Without further understanding of the risks biotoxins pose to health, this risk cannot be effectively managed.

A Biotoxins Collaborative Research Centre should be established to develop and promote knowledge into biotoxins and their effects and prevention in buildings, including a focus on:

- **building standards research into the precursors for and conditions to promote mould, and those that prevent mould and biotoxin formation (with a view to revision of the NCC),**
- **building research into structural requirements, building techniques and materials to avoid growth of moulds and development of biotoxins, the best methods to treat mould in commercial and domestic situations (including methods to avoid spreading fungal spores), and**
- **medical research into respiratory and other conditions caused by biotoxins.**

The Department of Health, informed by the research of the Biotoxin CRC, should provide plain English language information to the public on the effects of untreated mould and other household-related biotoxins (i.e. pests) and advice for those likely to be more susceptible to symptoms triggered by mould.

⁵⁷ Architects Accreditation Council of Australia and the Australian Institute of Architects set standards for architect registration, that is regulated by State and Territory Boards.

⁵⁸ For example, the Victorian Building Authority that licences builders, encourages but does not mandate continuing professional development as a requirement for registration.

Appendix

On the evening of 24 November 2014, a fire in the newly constructed 23 level Lacrosse apartment building at Docklands caused an evacuation of all 15 floors of apartments⁵⁹. The fire affected between 450 and 500 people directly. The blaze started on an eighth floor balcony and spread rapidly due to non-compliant combustible external cladding on the concrete building wicking the fire upwards.

The event alarmed the fire brigade, building authorities and the Victorian Government. The near miss of casualties in a rapidly developing residential precinct with many high rise apartment complexes led to investigations by Metropolitan Fire Brigade, Melbourne City Council and the Victorian Cladding Taskforce, which was asked to make recommendations to Government to improve building regulation ⁶⁰.

The Taskforce reported⁶¹ that it was:

“...confronted with considerable and widespread concern at the level of non-compliance with Victorian building and construction regulations beyond cladding. Information was shared by concerned individuals and practitioners of serious defects in the construction of buildings that were not compliant and some that posed health, safety and amenity risks. In many cases, stakeholders advised that matters had been referred to VBA and local governments with little follow up or where the outcome of its enquiries were not communicated ... Generally, there were concerns that cladding was symptomatic of broader underlying levels of noncompliance and a lack of inspection or follow up of other matters required under the NCC including disability access, energy efficiency and amenity issues. Numerous examples were provided to the Taskforce of noncompliant buildings identifying serious fire safety deficiencies, inadequate waterproofing and even black mould in new buildings. Given the fundamental nature of building and fire safety to building regulations we are concerned that levels of auditing and inspection of these other requirements were low.”

The Taskforce stated:

“We support the Senate Committee’s recommendation for state and territory governments to work together to develop a nationally consistent statutory duty of care to protect occupants and consumers in the residential strata sector. A

⁵⁹ Occupancy permit for the 21 storey residential tower was issued in June 2012. MFB Post Incident Analysis, http://www.mfb.vic.gov.au/Media/docs/Post_Incident_Analysis_for_Lacrosse_Docklands_-_25_11_2014%20-%20FINAL-dd61c4b2-61f6-42ed-9411-803cc23e6acc-0.PDF

⁶⁰ The Victorian Cladding Taskforce chaired by Mr Ted Baillieu and Prof John Thwaites comprised representatives from Department of Environment, Land, Water and Planning (DELWP) Department of Health and Human Services (DHHS) Department of Justice and Regulation (DJR) Emergency Management Victoria (EMV) Metropolitan Fire Brigade (MFB) Country Fire Authority (CFA) Municipal Association of Victoria (MAV) Victorian Building Authority (VBA) Victorian Municipal Building Surveyors Group (VMBSG) Worksafe Victoria, supported by a Stakeholder Reference Group comprising Australasian Fire and Emergency Service Authorities Council (AFAC) Australian Institute of Architects (AIA) Australian Institute of Building Surveyors (AIBS) Construction, Forestry, Mining and Electrical Union (CFMEU) Engineers Australia (EA) Housing Industry Association (HIA) Master Builders Association of Victoria (MBAV) National Fire Industry Association (NFIA) Property Council of Australia (PCA).

⁶¹ Interim Report, Victorian Cladding Taskforce, November, 2017, p.27

principles-based and outcome-focused general duty that requires all parties involved in the construction of a building to take reasonably practicable safety measures would be an effective way to ensure that practitioners focus on prevention – where tradespeople may not have the skills to adequately complete works.”⁶²

Despite clear requirements for specific building materials, alarms and prevention measures, Lacrosse was nearly a death trap. Gaps in regulation or enforcement regimes meant that high building standards were a fig leaf and ineffective in preventing danger to residents. The multiple participants in the building industry (developers, owners, builders, surveyors, certifiers, tradespeople) their competing interests and limited responsibility complicated the protection of builder users. The high standards applicable to new buildings do not work unless responsibility for negligent reckless or poor practise can be sheeted home.

Buildings are complex, and changing methods and materials mean that builders and various trades may not be aware of best practice. Knowledge of hazards evolves and standards must be able to keep up with this developing understanding. Buildings are intended to have a long use, and may undergo many amendments over their life.

It is, therefore, important that any changes to building fabric apply the latest and best knowledge to promote safety of occupants. Without continuing professional practice training for tradespeople, builders and surveyors, the public cannot be confident that buildings will remain fit for purpose.

⁶² Ibid, p. 28



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We recognise the Traditional Custodians of the lands throughout Australia, and we respectfully acknowledge their Elders past, present and emerging.

Tenants Victoria would like to thank the renters whose case studies are featured in this report, and the teams at the Tenants Union of Tasmania, the Tenants Union of New South Wales and Tenants Queensland for their contributions and support in developing this submission.