Endanger

Director's Guidelines under the *Residential Tenancies Act 1997*



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1. Purpose

Between 2015 and 2018, the Victorian Government conducted a review of the *Residential Tenancies Act 1997* (the Act), as part of its plan for Fairer, Safer Housing.

In September 2018, the Victorian Parliament passed the *Residential Tenancies Amendment Act 2018* (RTAA) to respond to the outcomes of the review. The RTAA provides for over 130 reforms to the Act to increase protections for renters, while ensuring residential rental providers (RRPs) can still effectively manage their properties.

Of the 130 reforms, five reforms relate to the issuing of guidelines by the Director of Consumer Affairs Victoria (the Director) as follows:

- Guideline 1 – Maintenance
- Guideline 2 – Cleanliness
- Guideline 3 – Damage and fair wear and tear
- Guideline 4 – Urgent repairs
- Guideline 5 – Endanger.

The Director may issue guidelines under section 486 of the Act. The Victorian Civil and Administrative Tribunal (VCAT) must consider the guidelines when determining particular applications made under the Act.

The purpose of the guidelines is to outline the Director's position on compliance and non-compliance with the Act, ensuring greater consistency in VCAT decision making and dispute resolution.

The Act is not prescriptive and does not go into great detail about what the parties' obligations mean in practice. The guidelines summarise relevant case law that may be useful in interpreting the Act and providing practical guidance that parties to a tenancy agreement can rely on when determining how to comply with their duties, facilitating the resolution of unnecessary or protracted disputes.

VCAT must have regard to this guideline when determining an application for a possession order following a notice to vacate under sections 91ZJ (rented premises), 142ZC (rooming house accommodation), 206AR (caravan parks), 207X (residential parks (a park where a Part 4A site is rented)) or 498ZX(1)(b) (specialist disability accommodation (SDA) enrolled accommodation) of the Act.[1] This guideline outlines the issues to be considered when VCAT is interpreting the term 'endanger' when it is considering whether the notice to vacate was validly given.

2. How to read these guidelines

The subject matter of the guidelines is interrelated and often overlaps, for example maintenance issues may result in the need for urgent repairs. Accordingly, the guidelines should be read in conjunction with one another, where appropriate.

[1] Specialist Disability Accommodation (SDA) became a new tenure type regulated under the Act, with the insertion of Part 12A by the *Disability Service Safeguards Act 2018*. Although the Fairer Safer Housing reforms did not provide for SDA, section 498ZZH(1A) (inserted by the *Disability (National Disability Insurance Scheme Transition) Amendment Act 2019*) provides that VCAT must have regard guidelines issued by the Director CAV when determining an application for a possession order which is supported by a notice to vacate.

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This guideline applies to tenancies relating to rented premises, rooming houses, caravan parks, residential parks and SDA enrolled dwellings.[2]

- The term RRP has been used to include rooming house operators, caravan owners, caravan park owners, site owners and SDA providers for simplicity.
- The term *renter* has been used to include rooming house residents, caravan park residents, site tenants and SDA residents for simplicity.

3. Context

One aim of residential tenancies legislation is to balance the renter's right to occupy the rented premises and the safety of the RRP, their agent, neighbours, and others who may be required to enter the premises.

RRPs may give a notice to vacate immediately under section 91ZJ if the renter or their visitor, by act or omission, endangers the safety of neighbours, the RRP or their agent, or their contractor or employee.

The ability to give a notice to vacate immediately is a significant power which puts a renter at risk of homelessness. Courts have therefore traditionally interpreted the legislative power to use this notice narrowly.

Reform 74 of the Fairer, Safer Housing reforms provides that the Director may issue guidelines for interpreting 'endanger', which must be taken into account by VCAT when a possession order is sought following a notice to vacate being given for this reason. The intention of this reform was to provide greater guidance to VCAT, and the greater public, on how and in what circumstances a renter may be found to endanger others. This reform also applies to rooming houses, caravan parks and residential parks (a park where a Part 4A site is rented). Under section 498ZZH(1A) of the Act, VCAT must also have regard to this guideline when determining an application for a possession order in relation to a SDA enrolled dwelling, which is supported by a notice to vacate.

4. The law

4.1 Legislation

Prior to the commencement of the RTAA on 29 March 2021, notices to vacate for danger were given under section 244 of the Act and could only be given in relation to acts or omissions which endangered the safety of occupiers of neighbouring premises.

Section 244 has now been repealed, and notices to vacate for danger are issued under new sections 91ZJ (rented premises), 142ZC (rooming houses), 206AR (caravan parks), 207X (residential parks) and 498ZX(1)(b) (SDA enrolled dwellings).[3]

Section 91ZJ of the Act, and the other relevant sections, provide for the RRP to give a notice to vacate on the basis that the renter or their visitor by act or omission endangers the safety of the RRP, their agent, neighbours, or contractor or employee of the RRP or their agent. The RRP is

[2] SDA became a new tenure type regulated under the RTA, with the insertion of Part 12A by the *Disability Service Safeguards Act 2018* (DSSA). Although the FSH reforms did not provide for SDA, section 498P(3) (inserted by the *Disability (National Disability Insurance Scheme Transition) Amendment Act 2019*) provides that VCAT must have regard guidelines issued by the Director CAV when determining an application for urgent repairs.

[3] Changes to notice to vacate requirements for sections 91ZJ (rented premises), 142ZC (rooming houses), 206AR (caravan parks), 207X (residential parks), 498ZX(1)(b) (SDA enrolled dwellings) arising out of the commencement of the *Residential Tenancies Amendment Act 2018* apply on commencement of the relevant provisions of that Act on 29 March 2021.

not entitled to give a notice to vacate for danger if a notice to leave for serious violence (under section 368 of the Act) has already been given in respect of a renter's or visitor's act or omission.

Under section 330(3) of the Act, VCAT must have regard to any guidelines issued by the Director when determining any application for a possession order which is supported by a notice to vacate given under sections 91ZJ, 142ZC, 206AR or 207X of the Act.

In relation to SDA enrolled dwellings, under section 498ZZH(1A) of the Act, VCAT must have regard to the Director's guidelines when determining an application for a possession order supported by a notice to vacate under section 498ZX of the Act.

4.2 Case law

Most case law on the term 'endanger', within residential tenancies matters, relates to notices to vacate for danger given under section 244 of the Act before commencement of the RTAA on 29 March 2021.

Notices to vacate given under section 244 before 29 March 2021 applied only to rental properties and were limited to acts or omissions which endangered the safety of occupiers of neighbouring premises. From 29 March 2021, section 91ZJ has been expanded to include danger to the RRP, their agent and contractors, however, it expected that a similar interpretation would be applied by the courts.

Additionally, although the case law refers to notices to vacate for danger given to renters under private and public rental agreements, it is expected that the case law will be applicable to rooming houses, caravan parks, residential parks and SDA enrolled dwellings.

The present tense 'endangers' has been interpreted by the Supreme Court of Victoria (the Court) to mean that the conduct must be continuing at the time the notice to vacate was given.[4] The Court was not persuaded to read the requirement as 'the renter had endangered the safety' as this would lead to 'harsh, unfair and absurd results'. The immediate nature of the termination could result in misuse where historical acts or omissions could lead to unrelated evictions.

In other contexts, the courts have referred to the term's ordinary meaning. The Macquarie Dictionary definition of endanger uses phrases such as 'to expose to danger' and 'to put in peril'. Thus, an act 'endangers' life if it 'gives rise to a real or substantial risk to life or threat to life'.[5] The Oxford English Dictionary defines endanger as 'to expose to danger or cause danger to' with danger described as 'liability or exposure to harm or injury; the condition of being exposed to the chance of evil; risk, peril'.[6]

The following examples, from previous VCAT cases, were found to meet the requirements of former section 244 of the Act:

- After a dispute, a renter fired a gun at neighbours in the apartment block and made threats to them. Following the renter's release from police custody, a notice to vacate was served on the basis that the renter was a continuing danger to his neighbours. VCAT was persuaded that the renter's grievance was likely ongoing and he remained a threat to those neighbours.[7] In this case, the notice to vacate was triggered by the discharge of the firearm, however the ongoing nature of the dispute and the renter's aggrieved state presented a continuing danger to the neighbours.

[4] *Director of Housing v Pavletic* [2002] VSC 438

[5] *R v Paranzee* [2008] SASC 245

[6] *Oxford English Dictionary* cited in *NOM v DPP* (2012) 38 VR 618

[7] *Director of Housing v Ingram* [2018] VCAT 754

- The renter was already the subject of an intervention order in favour of a neighbour. Following the making of the intervention order, the renter's visitors harassed the neighbour and graffitied his residence. There was a history of conflict and a threat to kill was made in aggressive terms. In this matter, VCAT was satisfied that the history of the dispute and the continued nature of the renter's threats were sufficient to represent an ongoing danger to the neighbour.[8]
- The renter was verbally abusive, made threats to kill and broke the window of neighbour.[9] VCAT noted that a notice to vacate under this section requires that the RRP show that the renter's conduct causes exposure to harm or risk, and 'that the Tribunal must consider whether there is a real likelihood of the threat being carried out. If there is only a remote or faint possibility of the harm threatened ensuing, threatening conduct by a tenant is unlikely to come within the intended ambit of the section.

While these decisions are not binding, they illustrate how the concept of endanger has been considered and applied by VCAT.

5. Guidance

It is the responsibility of the RRP to give evidence of the danger or risk posed by the renter or their visitor to the other party.

When considering the conduct giving rise to the notice to vacate, the following must be demonstrated:

1. An act or omission which endangers the RRP, their agent, neighbour, or contractor or employee of the RRP or their agent ('the target') which poses a real risk to the health and safety of the target; and
2. That the danger is ongoing at the time the notice to vacate is given.

1. Does the act or omission which endangers a target pose a real risk to the health and safety of the target?

The notice to vacate should specify the acts or omissions which are considered to endanger the target. The nature of the act or omission should be considered in relation to the ordinary meaning of the word 'endanger' and should constitute a real exposure to danger.

Behaviour which is anti-social or a nuisance is not sufficient to constitute a danger to the target.

Behaviour which is limited to threats and intimidation, by itself, will also not be considered to endanger the target. Where threats and intimidation have been aimed at the RRP, their agent, contractor, or employee, this should be addressed through a notice to vacate issued under section 91ZK, 142ZD, 206AS or 207Y of the Act, which provides for 14 days' notice. However, if there is a real likelihood that the threat may be carried out (for example, if it is combined with aggressive behaviour and/or prior actions) then the threat may be considered a danger to the target of the action.

2. Is the danger ongoing at the time the notice to vacate is given?

There must be a temporal connection between the danger and the notice to vacate (i.e., the danger must be ongoing at the time the notice is given).

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[8] *Port Phillip Housing Association Ltd v Handsley* [2017] VCAT 1141

[9] *Director of Housing v M [4] ('DOH v M')* [2002] VCAT 456 (15 April 2002) [56].

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It is possible that a single act or omission may give rise to an ongoing danger, however in most cases, ongoing danger will also take into account whether there is a history of conflict between the renter and the target, and the pattern of behaviour displayed by the renter.

For example:

- A renter who has an episode arising from mental health issues that causes violence or danger to a neighbour may not be considered a continuing danger to the neighbour. If there was only a single incident, the renter's mental state is being managed, and there is not a pattern of behaviour targeting the neighbour, it may be concluded that the danger to the neighbour has passed.
- If a renter commits a violent incident towards a target and there is history of conflict between the parties, it may be concluded that the renter will remain aggrieved and continue to represent a danger to the target.
- If a renter commits a violent incident, which is then followed by ongoing threats and intimidation by the renter's visitor, or where a renter stalks a neighbour, this may present a continuing danger to the target.
- In other cases, if the violence was sufficiently dangerous (for example, the renter stabbed a neighbour or another act of serious violence) this will be sufficient to constitute a continuing danger to the target who may be fearful of potential future interactions.

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