Damage and fair wear and tear

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 under sections 211B and 452 of the Act regarding damage and fair wear and tear.

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.

This guideline applies to all tenure types except for specialist disability accommodation.

- The term *residential rental provider* (RRP) has been used to include rooming house operators, caravan owners, caravan park owners and site owners for simplicity.
- The term *renter* has been used to include rooming house residents, caravan park residents and site tenants for simplicity.

3. Context

Reform 45 of the Fairer, Safer Housing reforms provides that the Director will issue guidelines clarifying the meaning of damage and fair wear and tear. VCAT will be required to have regard to

these guidelines when determining related disputes. This reform applies to rented premises, rooming houses, caravan parks and residential parks (a park where a Part 4A site is rented).

4. The law

4.1 Legislation

Section 61(1) of the Act imposes a duty on renters and their visitors to not intentionally or negligently cause damage to rented premises or any common areas. Section 61(2) provides that for the purposes of subsection (1) 'damage' does not include fair wear and tear caused by a renter or a visitor.

Section 62 provides that a renter who becomes aware of damage to rented premises must, as soon as practicable, advise the RRP in writing of the damage and the nature of the damage.

In contrast, there is no corresponding duty on residents of rooming houses or caravan parks and site tenants or their visitors to not intentionally or negligently cause damage to rented premises or common areas. However, residents and site tenants are obligated to notify the rooming house operator/site owner of any damage, other than fair wear and tear, caused by the resident/site tenant or their visitor. A notice to vacate may be issued based on damage caused by the resident/site tenant. Further, sections 142ZB, 206AQ and 207W of the Act provide that a notice to vacate may be issued to a rooming house/caravan park resident or site tenant if they, or their visitor, whether by act or omission, intentionally or recklessly cause serious damage.

While the Act does not define 'damage', it does distinguish it from 'fair wear and tear', which is deterioration caused by reasonable use and natural forces (section 3 of the Act). The interpretation of fair wear and tear is commonly disputed, particularly at the end of a tenancy when disagreements arise over bond refunds.

4.2 Case law

The courts have defined 'fair wear and tear', also identified as 'reasonable wear and tear', as the reasonable use of the premises by the renter and the ordinary operation of natural forces. In *Haskell v Marlow*, Talbot J provided the following:

> Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from [their] obligation to keep in good repair and condition as to everything which it may be possible to trace ultimately to that defect. [They are] bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.[1]

The issue of fair wear and tear was more recently considered by the Supreme Court of Victoria in *Fenridge Pty Ltd v Retirement Care Australia (Preston) Pty Ltd* [2014] VCS 90. In this case, Hargrave J stated that 'reasonable minds may differ' as to what constitutes fair wear and tear, as compared to damage and that 'each case must depend upon its own facts'.

VCAT has heard many disputes between RRPs and renters over who should pay for repairs at the end of a tenancy. While these decisions are not binding, they illustrate how the concept of fair wear and tear has been considered and applied by VCAT. VCAT has cited fair wear and tear in disallowing or diluting the following claims by RRPs:

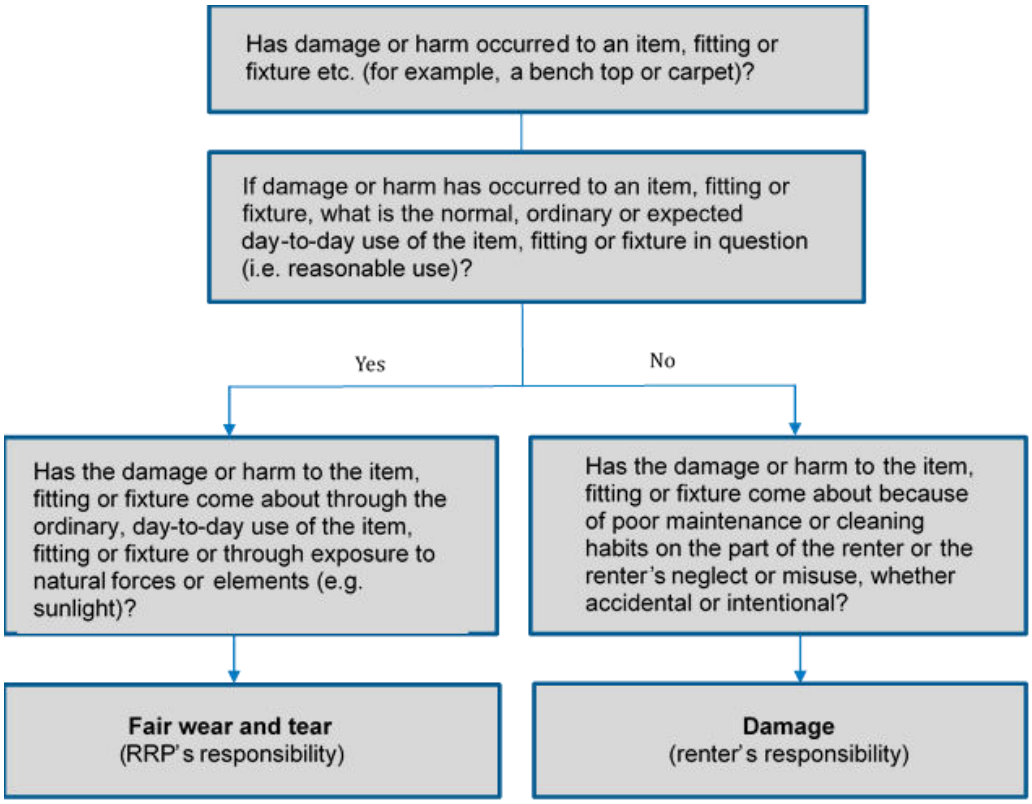
[1] *Haskell v Marlow* [1928] 2 KB 45

- Minor marks and staining on walls where only a limited amount of the claim could be attributed to the renter. VCAT also acknowledged that the woodwork was more likely to chip due to its age.
- A bent wardrobe rail where there was insufficient evidence of misuse by the renter.
- Loose kitchen drawers which were 12 years old and more prone to wear.
- Damaged jet covers in a spa bath where covers were already fatigued.
- Minor scratches to polished floorboards where the floor was polished 12 years ago.[2]
- A minor chip in one laundry tile found to be damaged in the course of 'ordinary living'.[3]
- Chips in slate flooring which was in a poor condition at the start of the tenancy.
- Damage to Ikea bookcases which were at least 8 years old and considered to be 'at the lower end of the range for quality and durability'.[4]

5. Distinguishing between damage and fair wear and tear

Has there been damage to the rental property and is the renter responsible?

When determining a dispute about damage or fair wear and tear to rented premises, the key considerations are outlined below. These considerations also apply to rooming houses, caravan parks and residential parks.



[2] *Theodor v Kelleher* [2018] VCAT 875

[3] *Yan v Mason* [2015] VCAT 1778

[4] *Shaw v Buziuk* [2015] VCAT 240

Depreciation of fixtures and fittings in rental properties

Whether the renter is required to reimburse the RRP for damage will depend on the age of the property and its fittings or fixtures and whether the damage occurred as a result of reasonable use. Fittings and fixtures deteriorate over time. Normal living in a property causes a decline in the standard of that property. The RRP is not entitled to compensation merely because things wear out.[5]

The Residential Tenancies Regulations 2021 regulation 90 prescribes the *ATO Rental Properties 2020 Guide* (the Guide) (available via Rental-properties-2020.pdf (ato.gov.au)) as the depreciation scale for rental properties for the purposes of section 211A(2)(b) of the Act.

VCAT must consider the depreciation scale in the Guide, when determining compensation payable by a renter for the damaged part of the rented premises. The Guide is a useful resource in determining the expected life span of items. A renter who has been in a property for 8 years, for example, could not be expected to pay for the replacement of carpet at the end of the tenancy given carpet is considered to have an 8-year life span.

5.1 Examples

Below are some examples of what may be considered normal fair wear and tear as compared to damage:

Fair wear and tear	Damage
Worn/ faded kitchen bench top	Burns or cuts in the kitchen bench top
Cracks in the wall caused by building movement, or minor marks or scuff marks on the wall	Holes in walls or missing paint due to wall hooks, nails or shelves installed by the renter[6]
Faded curtains or blinds	Curtains or blinds which are stained or ripped
Traffic marks on carpet	Carpet stains caused by burns, overwatered indoor plants, or pets
Scuff marks on a wooden floor	Badly scratched or gouged wooden floors, caused, for example, by dropping something heavy on the floor

5.2 Pet related fair wear and tear

New laws on pets and renting came into effect on 2 March 2020. Prior to this, there were no laws directly covering pets and renting in Victoria. From 2 March 2020, if a renter wishes to keep a pet at rented premises, they should provide the RRP with a completed pet request form for each pet. The new laws do not apply to pets that were already present in the rented premises before 2 March 2020. These laws apply to rented premises only.

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[5] *Garcia v Van Unen (Residential Tenancies)* [2020] VCAT 86

[6] Whilst regulations 26(a)(i) and (ii) of the Regulations provide that a renter may install particular modifications without the consent of the RRP such as wall anchoring devices, picture hooks or screws for wall mounts, shelves or brackets on surfaces (other than exposed brick or concrete walls), a renter is required to restore the rented premises to the same condition they were at the start of a tenancy subject to fair wear and tear. If the renter does not restore the premises, the renter must pay the rental provider the reasonable costs of restoration unless the RRP and renter otherwise agree. Failure to restore rented premises may constitute damage.

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In circumstances where a renter has a pet(s) that was either present in the property prior to 2 March 2020 or where the RRP has consented to the renter keeping a pet(s), any issues at the rented premises caused by the pet(s) should be considered on a case by case basis, in accordance with this guideline.

Below are some examples of what may be considered normal fair wear and tear as compared to damage in relation to pets:

Fair wear and tear	Damage
Worn/faded carpet caused by pet traffic	Carpet stains caused by pet urine
Minor marks or scuff marks on the wall	Claw or bite marks on walls or skirting boards
Scuff marks on a wooden floor	Badly scratched or gouged wooden floors, caused by claws or bite marks

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