



## RESIDENTIAL TENANCIES UPDATE: VCAT decision highlights the importance of landlord insurance

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In 1929, when surrealist painter René Magritte painted a picture which shows a pipe and states "This is not a pipe", little did he know his surrealism would play out in VCAT 90 years later. Indeed, VCAT held that ice pipes left behind by a tenant were in fact sex toys.

20 November 2019

### HOW DOES THE DECISION AFFECT YOU?

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**Landlords cannot change the locks without execution of a warrant of possession by police despite tenant's abandonment of the premises.**

**Landlords must have landlord insurance to protect their residential houses, as the process to evict is complicated, lengthy and costly.**

**That is why Brand Partners strongly recommends a landlord use a managing agent to manage their rental property.**

### BACKGROUND

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The landlord served a notice to vacate, and obtained an order for possession, then a warrant for possession because the tenant refused to leave after the tenancy expired.

Subsequently, having visited the property, the landlord concluded that the tenant had vacated. The landlord approached the local police to execute the warrant of possession. The police advised her that if she reasonably believed the tenant had abandoned the property then she could take possession – as per the words of section 229 of the *Residential Tenancies Act 1997* which states "A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act, obtain or attempt to obtain possession of the rented premises by entering them, whether the entry is

*peaceable or not, unless there are reasonable grounds to believe that the tenant has abandoned the premises.”<sup>1</sup>*

The landlord changed the locks and cleaned out trash including boxes of ice pipes.

The take-away is that VCAT considered this was the wrong approach and that every single of order of possession should be executed by the police pursuant to a warrant and that the landlord should not, under any circumstance, exercise self-help.

## THE ARGUMENTS

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The tenant sought to recover from the landlord:

- costs for damage to her fridge (that she left in the premises) without an electrical report;
- her 14 year-old pug’s vet bill for his breathing problems; and
- legal fees for trying to change her bail conditions relating to drug charges in the amount of \$8,260.

The Landlord sought compensation under section 210 of the Act (amongst other things) for unpaid rent, damage to the property and cost of attending VCAT in the sum of \$56,287.59.

## VCAT’S DECISION

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VCAT determined that changing the locks by the landlord was unlawful possession<sup>2</sup> and that a landlord can only execute a warrant for possession by the police, notwithstanding that the property appeared to be vacant.

The tenant had been charged with trafficking and possession drugs of dependence and ice-pipes for the purposes of sale. Despite the landlord producing a meth report which detected that the premises was contaminated with drugs 10 times over the limit and had quoted a decontamination of \$20,000, and produced photos of used ice-pipes, VCAT held the tenant did not use drugs at the property.<sup>3</sup> Instead, the VCAT member held the tenant ran a business called *Cheekines* where the ice-pipes were not ice pipes but sold as adult-sex toys.<sup>4</sup>

The landlord had endeavoured to follow the process set out in the *Residential Tenancies Act 1997* by issuing firstly a notice to vacate, then upon expiry obtaining an order for possession and then a warrant for possession which had been issued by VCAT. Although these procedural steps had been taken, without notice, VCAT overruled its previous orders and ordered that the landlord deliver the keys of the property to the tenant, even though (a) the tenancy agreement expired, (b) the tenant had not made an application to VCAT for the return of the keys, and (c) the landlord had no notice of the application and did not attend that hearing.

Despite the landlord requesting the tenant to collect her belongings and there being an arranged time for collection, the landlord was held at fault for making it available for collection on the front nature strip.<sup>5</sup> It is important to note that the tenant actually attended the property, watched on as others rummaged through her belongings and did not attempt to collect her belongings.<sup>6</sup> The tenant’s threatening behaviour and failure to comply with

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<sup>1</sup> See here: [http://www5.austlii.edu.au/au/legis/vic/consol\\_act/rta1997207/s229.html](http://www5.austlii.edu.au/au/legis/vic/consol_act/rta1997207/s229.html)

<sup>2</sup> *Hooper v West (Residential Tenancies)* [2019] VCAT 1089 (18 July 2019) [51].

<sup>3</sup> *Ibid* [81-89].

<sup>4</sup> *Ibid* [85].

<sup>5</sup> *Ibid* [34].

<sup>6</sup> *Ibid* [36].

Tribunal orders to vacate the premises when the tenancy came to an end was held not to be relevant.

## **IMPLICATIONS**

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The tenant recovered part of the bond.

It is crucial for landlords to have insurance over rental properties. Our client was covered by insurance notwithstanding VCAT's decision.

## **SO, TO RECAP –STEPS TO OBTAIN POSSESSION OF PROPERTY**

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1. Use the prescribed Notice to vacate of rented premises under the Act and serve it on the tenant. The minimum notice period depends on the reason for eviction. (See sections 244 to 268 of the Act to find your reason to evacuate the tenant.)
2. Should the tenant not vacate the rented premises pursuant to the notice to vacate, apply to the Residential Tenancies List of VCAT for an order for possession of the rented premises pursuant to section 322 of the Act.
3. Remember, this does not allow the landlord to remove the tenant's belongings or forcibly eject the tenant.
4. If the tenant refuses to leave, then proceed to obtain from VCAT a warrant for possession pursuant to section 351 of the Act and provide it to your local police for execution (as per section 355 of the Act).
5. Once the police have executed the warrant, only then may a landlord arrange to change the locks and take possession of the property.

## **FURTHER INFORMATION**

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## **ABOUT BRAND PARTNERS**

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*Our principal goal is to provide the right legal advice to get you to where you need to be. We aim to be an instrumental part of each client's success.*

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