



Research Paper

The potential impacts of low tenant attendance rates at VCAT on eviction proceedings in Victoria.

This paper is partly based on research conducted by Amy Lipow, a La Trobe University law student undertaking study as part of the Public Interest Law Placement at the West Heidelberg Community Legal Service (WHCLS) under the supervision of Jacqui D'Sylva, Community Development Worker for the Tenants' Rights & Law Reform Project funded by the Legal Services Board (2011 – 2014).

WHCLS thanks Amy for her significant contribution to this paper.

WHCLS also acknowledges that this paper was authored primarily by Patrick Warner, WHCLS Lawyer, with the assistance of Louisa Bassini, WHCLS Lawyer and Pierina Morano, WHCLS Principal Lawyer.

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Introduction

As Australia's largest tribunal, VCAT¹ wields significant decision-making powers spanning a vast range of legal areas. From the often highly publicised decisions of the planning and environment list to the less reported but equally important work of the residential tenancies division, VCAT is both a high-volume administrative decision making body as well as a low-cost forum for dispute resolution and adjudication. The stated organisational focus of the Tribunal is to provide easily accessible, fair and efficient justice for all Victorians. To quote VCAT ex-president Justice Kevin Bell, VCAT exists "to fulfil that fundamental objective of providing the community with equal access to justice"².

However, the problem of tenant non-attendance in VCAT's residential tenancies list is a clear indication of the significant challenges that remain in strengthening equal and effective access to justice for many Victorians. The need for further improvement in this area is particularly evident when considering the large percentage of socially disadvantaged and low-income tenants who reside in public or community housing. For many of these tenants, housing stress is often part of a broader "cluster" of legal issues that they are faced with.³ Failure to attend VCAT may not only exacerbate housing stress but also problems associated with health, family, and other life circumstances⁴.

This paper explores the issue of tenant non-attendance at VCAT, with particular regard to VCAT's central role in eviction proceedings and the effect of tenant attendance in altering the legal outcome of such matters. The paper also presents the findings of recent study conducted through observations at VCAT by the West Heidelberg Community Legal Service (WHCLS) (referred to from herein as 'the study') in order to supplement broader discussion of the benefits of VCAT attendance for tenants. The paper is divided into three sections:

1. *Firstly*, the paper addresses the methodology used for the study and acknowledges various limitations to this data;
2. *Secondly*, the paper describes VCAT's role in the eviction process and considers the available data on tenant non-attendance rates at VCAT;
3. *Lastly*, the paper presents the findings of the study conducted by WHCLS and explores these in the broader context of tenant non-attendance at VCAT.

¹ 'Victorian Civil and Administrative Tribunal', referred to here as 'VCAT' or the 'Tribunal'.

² Victorian Civil and Administrative Tribunal, *Annual Report 2007/2008 (2008)* (Bell J).

³ Christine Coumarelos et al, 'Legal Australia-Wide Survey: Legal Need in Australia' *Access to Justice and Legal Needs Vol 7* (2012 Law and Justice Foundation of New South Wales) xiv – xxi.

⁴ Ibid.

1(a) Methodology for VCAT research

A La Trobe University law student on placement with the WHCLS attended three full sitting days in the VCAT residential tenancies list at Heidelberg in April 2013, as well as a further three single days in the residential tenancies list at each of the VCAT venues located in Melbourne, Frankston and Dandenong.

In total, the student observed 77 VCAT hearings in the residential tenancies list over six full sitting days across four different VCAT venues. For each hearing observed, the student noted the following information:

- Date and location of hearing
- Whether tenant attended the hearing
- Applicant type (i.e. tenant or landlord - private/public/community⁵)
- Application type (i.e. what order was being sought)
- Order made by the Tribunal

This information is presented in further detail in an appendix to the paper.

1(b) Limitations

The following major limitations to this paper's research findings are acknowledged:

- Small sample size of only 77 hearings observed, which represents only 0.14% of VCAT cases finalised in the 2012-2013 year⁶;
- Findings do not capture instances where a tenant who failed to attend was subsequently successful in applying for a rehearing⁷, which may in turn have altered the outcome and order(s) made;
- Findings do not include observations from all sitting VCAT venues, and in particular, do not include venues located outside of a typical Magistrates' Court complex such as the Neighbourhood Justice Centre⁸ (NJC);

⁵ 'Community housing' is low-cost housing provided by organisations approved and registered under s 84 of the *Housing Act 1983 (Vic)*. Although community housing organisations have rent-setting policies similar to those of the Department of Human Services (DHS), they are not bound by the DHS policy manual so processes may be less transparent and involve greater discretion.

⁶ Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2013/14 (2014)*. VCAT reports that 56,914 matters were finalised in the Residential Tenancies (RT) list for that year. This figure is taken as there is no available statistic for the number of hearings conducted.

⁷ The *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* allows for applications for matters to be reviewed where the Tribunal is satisfied that the applicant has provided a reasonable excuse for failure to attend: s 120. This is discussed in more detail later in the paper.

- Findings are based on unequal numbers of hearings having been observed in relation to the four VCAT venues sampled.

Accordingly, the findings presented in this paper are not intended to provide an official account of the current rate of tenant attendance in the residential tenancies list at VCAT, or to provide any accurate comparison of the variance in attendance rates between different VCAT venue locations. However, in the absence of any recent reports from VCAT confirming current tenant attendance rates, the data that WHCLS has obtained is relied on to the extent that it shows there are still significant numbers of VCAT hearings that are being finalised in the absence of the respondent tenant.

Also, whilst frequent reference is made to various sections of legislation and the eviction process in general, this paper is not intended to provide the reader with a working knowledge of any aspect of the *Residential Tenancies Act 1997*(Vic) ('RTA'). The laws relating to eviction and other matters dealt with in the residential tenancies list at VCAT can be complex, and further background reading is recommended to supplement the material contained in this paper⁹.

2(a) VCAT's role in the eviction proceedings

In Victoria, to lawfully evict a tenant without their consent a landlord must follow the prescribed three-step process set out in the RTA. Importantly, a key stage in this process requires landlords to apply to VCAT for a 'possession order' to regain possession of the property. A brief description of this three-step eviction process, along with some of VCAT's additional powers in eviction proceedings, is set out below in more detail:

Step One – Notice to Vacate:

The landlord serves a 'Notice to Vacate' ('NTV') on a tenant. This NTV must specify both the date by which the tenant is asked to vacate, as well as the specific statutory reason the landlord has relied on in issuing the notice, e.g. rent arrears, damage to premises. Some types of NTV must also include detailed particulars about facts the landlord has relied on in issuing the notice in order to be valid.¹⁰ It is important to note that the RTA does not create any stand-alone legal obligation for a tenant to comply with the landlord's NTV. Accordingly, once the nominated

⁸ The NJC is located at 241 Wellington Street, Collingwood, and differs significantly from other VCAT venues as it uses a problem-solving approach to community justice by addressing the 'underlying causes of harmful behaviour': www.neighbourhoodjustice.vic.org.au/home/about+us.

⁹ See, eg, www.tuv.org.au/advice/top-5-issues/notices-to-vacate and www.hlp.org.au/housing.

¹⁰ In *Smith v Director of Housing* [2005] VSC 46 it was found that a NTV will only be valid where it has precisely identified, on its face, the alleged facts that constitute the basis of the notice as specified by the relied upon section of the RTA.

vacation date has passed and the tenant is still in the property, a landlord would need to proceed to step two in order to continue the eviction process.

Step Two – VCAT hearing:

The landlord applies to VCAT for a possession order and a subsequent hearing is usually listed at the VCAT venue closest to the rented premises in question. At the time of lodging their application with VCAT, the landlord is also required to serve a copy of the application on any tenant who is a named respondent. The tenant has a right to attend and participate in this hearing, as well as to be represented by a professional advocate if they wish¹¹.

Depending on the type of application, the VCAT member hearing the case will normally need to be satisfied of several key facts before deciding that it is appropriate to make a possession order. The most crucial of these facts is usually whether the landlord's NTV is "valid" at law. Generally speaking, provided an NTV is in the correct form and has been duly served, the validity of a NTV will depend on whether the Tribunal is satisfied that the statutory basis for the eviction on which the landlord seeks to rely is proven. This inquiry can be very complex for some types of NTV and relatively straightforward for others¹². Unless a non-attending tenant has made a prior request for adjournment, hearings will usually proceed in the tenant's absence¹³.

A copy of VCAT's decision is sent to the rented premises so the tenant can learn the outcome of the hearing. If VCAT grants the landlord a possession order and the tenant does not vacate the rented premises, a landlord may then proceed to step three in order to have the tenant removed.

Step Three – warrant of possession:

The landlord uses the VCAT possession order to purchase a warrant of possession from VCAT, which may then be sent to the police station nearest to the rented premises in question. This warrant gives officers the power to enter the rented premises and remove all persons inside, until such time as it expires. In theory, a warrant of possession can be executed as soon as it arrives at the relevant police station, but in practice police officers will normally visit the rented premises to notify any occupants of the warrant and provide prior warning of their intention to execute it. If the tenant refuses to leave a property when asked to do so by police members executing a valid warrant of possession, they can be removed using reasonable force.

¹¹ Under Sch 1, cl 67 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), a tenant has a right to professional advocate representation in a proceeding for a possession order.

¹² A NTV served under s 246 of the *Residential Tenancies Act 1997* (Vic) will only require the landlord to show that a tenant had at least 14 days of rent arrears. In contrast, a NTV served under s 249 of the *Residential Tenancies Act 1997* (Vic) will require a landlord to convince the Tribunal of three separate occasions of tenant behaviour constituting a breach of duty.

¹³ Although s 98 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) binds the Tribunal to the rules of natural justice, there is no automatic right of a party to an adjournment.

Additional VCAT powers in possession order hearings

There are two important discretionary powers VCAT can choose to exercise during possession order hearings, both of which operate in tenants' favour by preventing and delaying eviction. Crucially though, these discretionary powers are only likely to be exercised where a tenant attends the hearing.

Firstly, where the landlord has applied for a possession order on the basis of a tenant's rent arrears¹⁴ and that application is found to be legally valid with the relevant facts proven, VCAT still retains a discretion to adjourn the landlord's application for possession where it is satisfied that arrangements have been or can be made to avoid financial loss to the landlord¹⁵. In practice, VCAT will exercise this power where a tenant is able to demonstrate that they can pay back the arrears amount within a reasonable period of time. These VCAT ordered 'payment plans' are often made with the consent of a landlord, but they can also be made without that consent. If a tenant fails to comply with the arrangement ordered by VCAT, the landlord can quickly re-apply to VCAT seeking possession again, without needing to serve a new NTV.

Secondly, in relation to almost every type of possession order application, VCAT has the power to grant possession to the landlord but postpone the purchase of the warrant of possession for up to a further 30 days¹⁶. These types of postponement orders can be made in situations where the hardship the tenant would suffer if evicted quickly outweighs any hardship the landlord would suffer by delaying proceedings further. Typically, VCAT will exercise this power where the tenant can show they are having serious difficulty arranging alternative accommodation and that failure to postpone proceedings further is likely to result in a risk of homelessness or other significant hardship.

VCAT plays a pivotal role in the eviction process both by determining the lawfulness of a landlord's application for possession, as well as having the power to exercise some additional discretions designed to prevent hardship to a tenant. However, VCAT's ability to effectively perform these functions is limited significantly in situations where a tenant is not present during the hearing.

2(b) Available data on tenant non-attendance at VCAT

At the time of writing (May 2014), there is no information available that accurately captures the current rate of tenant attendance at VCAT. The most recent statistic released by VCAT on this

¹⁴ *Residential Tenancies Act 1997* (Vic) s 246.

¹⁵ *Residential Tenancies Act 1997* (Vic), s 331(1)(b).

¹⁶ *Residential Tenancies Act 1997* (Vic) s 352. However, this section does not apply to NTVs served under ss243-245 of the *Residential Tenancies Act 1997* (Vic).

issue appeared in a 2010 discussion paper, where the tenant non-attendance rate was quoted as being approximately 80%¹⁷. Unfortunately, this statistic was not supported by any correlating data about the types of hearings tenants were failing to attend, the location of these hearings, or the eventual orders VCAT made. Moreover, prior to the release of the 2010 discussion paper, VCAT launched the 'Residential Tenancies SMS Pilot Project' ('SMS project') in 2009 which, for the first time, enabled Tribunal registrars to send both tenants and landlords SMS reminders of their hearings. Whilst it seems likely this initiative would have increased tenant attendance rates to some extent, the pilot project is yet to be formally evaluated and VCAT have not updated the most recent quoted tenant non-attendance rate of 80%.

2(c) Tenant non-attendance at possession order hearings

Despite the lack of up-to-date information noted above, an analysis of available data in relation to VCAT possession order hearings can provide a framework for understanding the potential scope of the issue.

For example, in the 2007-2008 year¹⁸, VCAT's annual report indicates that the Tribunal finalised approximately 60,772 cases in the residential tenancies list. Of this number, approximately 50% (30,386) involved an application for a possession order by a landlord¹⁹, and approximately 27% (8,204) related to a public housing tenancy²⁰. If the tenant non-attendance rate quoted at 80% in 2010 is applied to these figures, it can be estimated that in the 2007-08 period there were approximately 24,308 possession order applications finalised by VCAT in the absence of a tenant, about 6,563 of which related to a public housing tenancy.

It should be noted that an unknown portion of these applications might have been either dismissed or withdrawn, even in the tenant's absence, due to technical errors in the landlord's

¹⁷ The Hon Justice Iain Ross, 'Transforming VCAT' (Discussion Paper, VCAT 2010) 9. The discussion paper includes a comment to this effect but does not provide any statistical data about the types of matters that tenants did not attend, or which locations had the lowest attendance rates etc. Similarly, VCAT's annual reports only provide information regarding the total amount of matters heard in the RT list.

¹⁸ This time period has been selected because it predates the introduction of SMS hearing reminders in 2009, as well as the stated VCAT non-attendance rate of 80%, which appeared in the 2010 discussion paper, above n 20.

¹⁹ Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2007/8* (2008) 23. This figure is based on 41% of applications involving an application for possession order.

²⁰ Ibid. Due to limitations with available data, these calculations are estimates at best. For instance, the report simply states that 50% of all applications received relate to a possession order, and that 27% of applications received are from the Director of Housing. But the number of Director of Housing applications *for possession* might be higher or lower than the figure yielded by using the available information (figure produced is 8,204), because there could be a higher or lower than average concentration of possession order applications where the Director of Housing is the applicant.

application²¹. Yet despite this, it is clearly of concern that such large numbers of important VCAT decisions are being made in the absence of the affected tenant. When this same tenant non-attendance rate of 80% is applied to data from the 2012-2013 VCAT annual report, it can be concluded that approximately 20,428 possession order applications were made in the absence of the tenant in the 2012-13 year. 20% or 4,085 of those applications concerned public housing tenancies²².

As the research findings presented in the next section suggest, despite some improvement since 2010, the majority of VCAT decisions in the residential tenancies list continue to be finalised in the tenant’s absence. This is concerning given that the available evidence also strongly indicates that tenants achieve a better legal outcome when they attend their VCAT hearing.

3(a) VCAT research findings

The table below shows tenant attendance rates for the VCAT hearings observed as part of the student research conducted for this paper. When compared to the stated tenant non-attendance of 80% in 2010, the table indicates a net improvement with the average tenant non-attendance rate across all hearings observed being 67.5%. However, the table also indicates that public housing tenants are far more likely not to attend their VCAT hearing than private tenants, with the public tenant non-attendance rate still hovering around the 80% mark.

TABLE A: TENANT ATTENDANCE RATES

Tenancy type	Number of hearings observed	Number of hearings where tenant present	Tenant non-attendance rate
Public *	29	6	79.3%
Private	48	19	60.4%
Overall (public and private)	77	25	67.5%

²¹ Eg, s 319 of the *Residential Tenancies Act 1997 (Vic)* sets out requirements for a valid NTV. Errors by the landlord in relation to service, notice times and the form of the NTV can lead to the subsequent application being dismissed, even where there may be valid grounds for the NTV to be served.

²² Victorian Civil and Administrative Tribunal, above n 7. Unlike the 2007/08 report, this document does not indicate the number of hearings ‘finalised’, only the amount of applications received. Also, as acknowledged, SMS hearing reminders are likely to have reduced the tenant non-attendance rate between 2010 and 2013, so the estimates given for the 2012-2013 period are likely to be further inflated to some extent. The same general limitations noted above at n 24 also apply to these figures.

*This figure includes one application by a community housing provider²³.

As noted earlier, the information VCAT publishes in its annual reports makes it difficult to ascertain how many tenants who fail to attend their VCAT hearings have a possession order made in their absence. Accordingly, one of the primary objectives of the research conducted for this paper was to gain a clearer picture of how regularly VCAT grants possession orders in a tenant’s absence, and to contrast these instances with hearings that the tenant has attended.

The table below details the number of possession order hearings observed - almost all of which related to rent arrears - and contrasts the outcomes depending on whether the tenant attended, and whether the tenancy was private or public.

TABLE B: COMPARISON OF OUTCOMES FOR ATTENDING AND NON-ATTENDING TENANTS IN POSSESSION ORDER APPLICATIONS:

Tenancy type	Public	Private
PO* hearings observed	24	23
PO hearings where tenant attends	4	9
Instances where tenant attends and PO is made	0	2
Instances where tenant attends and PO <i>not</i> made	4	7***
Instances where tenant doesn’t attend and PO made	15	10
Instances where tenant doesn’t attend and PO <i>not</i> made	5**	4

* ‘PO’ means ‘Possession order’, second step in eviction process.

** This figure includes one application withdrawn by Director of Housing, three applications adjourned by the tenant, and one application dismissed for error.

*** This figure includes one application dismissed for error.

The findings strongly suggest that tenants who attend their VCAT hearing are far more likely to avoid a possession order being made against them. For example, of the 24 possession order

²³ Above n 5.

hearings initiated by the Director of Housing, the tenant was recorded as being present on only 4 occasions, all of which were applications in relation to the tenant's rent arrears. When the tenant was present, VCAT did not make a possession order but instead adjourned the application and gave the tenant an opportunity to repay their arrears pursuant to a payment plan. In contrast, of the 20 possession order hearings initiated by the Director of Housing where the tenant failed to attend, a possession order was made in the tenant's absence on 15 occasions. Of these 15 unattended hearings where a possession order was made, 14 related to the tenant's rent arrears²⁴.

A similar trend applies to the private tenant group. Of the 23 possession order hearings observed, the tenant was present at 9 hearings, 5 of which were applications by the landlord for a possession order on the basis of rent arrears. At all 5 of these hearings where the tenant attended, VCAT ordered an adjournment of the landlord's application and for the tenant to repay the outstanding arrears in the interim. In contrast, of the 14 possession order hearings where the tenant failed to attend, a possession order was made in the tenant's absence on 10 occasions, and all 10 of these unattended hearings related to the tenant's rent arrears.

3(b) Why tenant attendance at VCAT leads to better outcomes for tenants

Case study

Margaret lives with her son in public housing. She has mental health problems, including hoarding, and is the sole carer for her intellectually disabled son. When Margaret was referred to WHCLS, she had failed to attend two separate VCAT hearings. This was because Margaret has difficulty understanding legal documents and was not aware that she needed to attend VCAT as per the notices that she had received.

In her absence, an Order for compliance had been made against Margaret requiring her to address the hoarding at her home, as well as an Order for compensation for around \$4600 for alleged damage at her previous public housing home. Margaret disputed some of the items that were claimed for, but accepted others.

WHCLS assisted Margaret to seek a review of both VCAT hearings. At the review hearing for the Order for compliance, the Tribunal Member heard submissions about why Margaret's home was cluttered and how she intended to resolve this problem. A new, realistic timeframe was

²⁴ The remaining PO hearing of the 15 observed (that was not one of the 14 regarding rent-arrears) related to a breach of compliance order.

negotiated to enable Margaret a better opportunity to address her hoarding issues. With appropriate support, she was able to do this and accordingly comply with the order. This meant that Margaret's tenancy was not jeopardised in the way that it would have been had she failed to comply with an Order of VCAT.

Upon review of the Order for compensation made against Margaret, the Tribunal heard evidence from Margaret and found that some of the items claimed were not Margaret's liability and should be dismissed. The overall compensation amount that Margaret was ordered to pay was lowered by around \$1000. In both of Margaret's matters, she was able to achieve a substantially better outcome when she was able to attend VCAT and present her side of the story. This also made it possible for the underlying causes of Margaret's housing issues to be taken into account, addressed and ultimately resolved.

As the primary body responsible for determining the legality of evictions and exploring alternative options, VCAT is best positioned to weigh up the interests of all parties. However, this function is undoubtedly hindered by the absence of the tenant at eviction proceedings. The evidence presented in part 3(a) above clearly indicates that the Tribunal's role in exercising discretion is greatly diminished where the affected tenant is absent.

There may be several reasons for the trend noted in Table B. Firstly, if a tenant is absent from a hearing where an application for possession is sought for rent arrears, the VCAT member will be unable to ascertain the reason a tenant might have fallen behind in their rent, or to sanction an agreement whereby the tenant agrees to pay any outstanding arrears back to the landlord. Accordingly, the Tribunal cannot form the view, "...that satisfactory arrangements have been or can be made to avoid financial loss to the landlord"²⁵ and will therefore be unable to use its discretionary power under s 331 1(b) of the RTA to dismiss or adjourn the matter. This is despite the RTA making express provision for tenants to avoid eviction where they have the capacity and willingness to repay the arrears in full, even if this may take some time.²⁶

Secondly, whilst almost all of the possession order hearings observed for this paper's research related to rent arrears, there is no reason to doubt that tenants facing different types of possession order applications are also likely to obtain better outcomes by attending their VCAT hearing. The case-study described above serves as a stark example of the vastly different outcome that may result from tenant attendance, not just in eviction proceedings, but in a range of other types of hearing where a tenant is the respondent, such as compensation claims. A tenant in attendance can respond to allegations made against them by their landlord and assist the Tribunal to accurately determine the veracity of the claims.

²⁵ Residential Tenancies Act 1997 (Vic) s 331 1(b).

²⁶ Residential Tenancies Act 1997 (Vic) s 331.

Finally, a tenant's attendance at VCAT may improve the legal outcome that they achieve even in circumstances where a possession order is granted by the Tribunal. Section 352 of the RTA, which provides for the issue of a warrant to be postponed for up to 30 days, can be instrumental in alleviating the housing stress that a tenant may face where eviction is effective immediately. Once again, this discretionary power will only be used if the Tribunal is satisfied that the tenant would otherwise suffer hardship greater than that of the landlord²⁷ - an opinion that is only likely to be formed based on evidence presented by a tenant in attendance.



Conclusion

Tenants, particularly those who reside in public housing, have very low attendance rates for hearings at VCAT. These hearings frequently relate to possession order proceedings – the central legal step required in carrying out an eviction.

The RTA recognises the significance of granting a possession order and expressly provides for the Tribunal to use its discretion to prevent such an order being made, or at least delay its effects²⁸. Importantly though, these provisions require the presence of tenant in order to be practically applied.

The research undertaken by this paper indicates the Tribunal's willingness to use its discretion to prevent or delay an eviction in rent arrears matters where it is able to discuss the matter with an attending tenant and make alternative orders. This is reflected in the significantly contrasting outcomes of possession order hearings where a tenant attends compared to those where they do not.²⁹ Similarly, it can be concluded that possession order proceedings based on allegations of tenant breach of duty will also arrive at a more just outcome when the tenant is present and able to respond to the claims made against them.

Attendance at VCAT is crucial to a tenant resolving their housing related legal problems. Failure to sustain a tenancy may adversely impact a range of other non-legal aspects of a tenant's life,

²⁷ *Residential Tenancies Act 1997* (Vic) s 352 – NB This section does not apply to applications made where the NTV was served under ss243-245: s352(3).

²⁸ *Residential Tenancies Act 1997* (Vic) s352, s331.

²⁹ See Table B.

especially in circumstances where the tenant already experiences social disadvantage and may be at risk of homelessness.³⁰ The research conducted in this paper demonstrates the obvious benefits that higher tenant attendance rates at VCAT would have in sustaining at-risk tenancies. It further underlines the importance of finding ways to improve the inclusivity and accessibility of legal proceedings involving tenants.

References

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Legislation

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³⁰ Christine Coumarelos et al, above n 3, xv