

GREENS LIST

BARRISTERS

COVID-19 and Residential Tenancies

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Amendments to Residential Tenancies law

- ▶ Focuses
 - ▶ Dispute resolution, and
 - ▶ Termination
- ▶ Overview
 - ▶ Legislative history
 - ▶ Part 16 and the Scheme
 - ▶ Rent disputes
 - ▶ Termination
 - ▶ Relief

Legislative History

- ▶ February - March 2020 - COVID.
- ▶ 30 March 2020 - JobKeeper introduced
- ▶ 24 April 2020 - *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic)
 - ▶ *Taken to have commenced at 29 March 2020*
- ▶ 12 May 2020 - Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020
 - ▶ aka The Scheme
- ▶ 22 September 2020 - *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic)
- ▶ 29 September 2020 - original end date
- ▶ 28 March 2021 - End date, if not extended
- ▶ 27 April 2021:
 - ▶ End date, if extended
 - ▶ Commencement of bulk of *Residential Tenancies Amendment Act 2018*

Overview of amendments

- ▶ Omnibus Act inserts new Part 16
 - ▶ Rental freeze
 - ▶ Amends scope for termination and prescribes new procedure
 - ▶ Provides for a Scheme
 - ▶ Scheme has effect despite anything contrary in the Act (ie Henry VIII clauses)
- ▶ Scheme
 - ▶ Dispute resolution via Consumer Affairs Victoria
 - ▶ VCAT referral mechanism
 - ▶ Modifications to the Act

Rent

- ▶ Rent increases are suspended
- ▶ Cannot give notice to propose rent increase
- ▶ Centrepay - landlord must permit payment
- ▶ No blacklisting if non-payment of rent due to *COVID-19 reason*
- ▶ VCAT powers
 - ▶ orders for rent reduction or payment plans

The Scheme

- ▶ Overview - Consumer Affairs Victoria
- ▶ Payment related disputes
 - ▶ Referred to mediation or conciliation
 - ▶ CAV will draw up and register agreement
 - ▶ CAV may make orders
- ▶ Non payment related disputes
 - ▶ Referred to VCAT

Termination by Landlord

- ▶ No notice to vacate
- ▶ May terminate if:
 - ▶ consent,
 - ▶ agreement,
 - ▶ abandonment,
 - ▶ where sub-let (and tenant not in possession),
 - ▶ by merger, by disclaimer,
 - ▶ by the tenant before taking possession, and
 - ▶ by the death of the sole tenant.
- ▶ Otherwise, must make VCAT application
- ▶ Must have CAV referral

VCAT - termination proceedings

- ▶ Is this a matter under s 549(2)?
- ▶ Is the tenant's failure to comply due to a COVID-19 reason?
- ▶ Is it reasonable and proportionate to make a termination order, taking into account certain peoples' interests?
- ▶ What duration for termination order? See s 549(3A) as provided by scheme
- ▶ If a termination order is granted, should VCAT also make possession order?
- ▶ Obtaining possession order at later date

- ▶ General tips:
 - ▶ Must make sure application form refers to the correct section number
 - ▶ Be prepared to address VCAT on every applicable matter
 - ▶ VCAT website lists the section numbers
 - ▶ VCAT website lists the minimum periods for each ground

Termination by tenant

- ▶ The Scheme amends the Act
- ▶ Tenant may give 28 day notice in any case.
 - ▶ Potentially liable for break fees unless conditions in s 546(1) are met.
 - ▶ Includes periodic tenants.
- ▶ Tenant may give 14 day notice if
 - ▶ Suffering severe hardship, or
 - ▶ In response to VCAT termination application.
 - ▶ No liability for break fees, provided conditions in s 546(1) is met.
 - ▶ Includes periodic tenants.
- ▶ May also apply to VCAT to reduce length of agreement

Rent Relief

- ▶ Government will pay \$3,000 directly to landlord/agent
- ▶ Tenant must be eligible:
 - ▶ Registered agreement with Consumer Affairs Victoria
 - ▶ Tenant must have less than \$10,000 in savings (excluding superannuation)
 - ▶ Tenant's income less than \$1,903 per week before tax
 - ▶ Tenant paying more than 30% of their income in rent.
- ▶ Still eligible if previously received \$2,000 grant

The background features abstract green geometric shapes, including triangles and overlapping polygons, in various shades of green, creating a modern and professional look.

Webinar - COVID-19 Omnibus Act 2020, residential tenancies and sales of land

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Outline of Topics

Issues for purchasers arising out of the *COVID-19 Omnibus Act 2020* and the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*

1. Purchase subject to residential leases :
 - a) Non-payment of rent before and after settlement date
 - i. Adjustment at settlement
 - ii. Enforcement after settlement
 - b) rent reduction and payment plans by
 - i. negotiated agreement (voluntary or through CAV)
 - ii. CAV or VCAT order
 - c) abandonment / early termination by agreement or by unilateral or compulsory process under the legislation

Outline (cont.)

2. Purchase with vacant possession:
 - a) tenant remaining in possession
 - b) VCAT application

1(a) Non-payment of rent by tenant at settlement

- ❑ If land is sold subject to a lease under which the tenant falls into default in payment of rent after the day of sale, the position of the purchaser may be affected
- ❑ The tenant might apply to CAV after settlement for relief in the form of a reduced rent and/or a payment plan
- ❑ For a lease, ss 141 and 142 of the *Property Law Act* will have application: the purchaser will become the landlord on the acquisition of the reversion at settlement
- ❑ The purchaser must settle despite non-payment of rent
- ❑ The purchaser may have remedies under the *Australian Consumer Law* for misleading and deceptive conduct if, on the day of sale, the vendor knew that the purchaser had referred a rent dispute to CAV for resolution, or that the purchaser had the benefit of a payment plan, and these known facts were not disclosed to the purchaser

1(a)(i) Adjustment at settlement

- General condition 23 in the LIV August 2019 standard form contract:
 - 23.1 ... [A]ny rent and other income received in respect of the property must be apportioned between the parties on the settlement date and any adjustments paid and received as appropriate.
 - 23.2 The ... rent and other income must be apportioned on the following basis:
 - (a) the vendor is ... entitled to the rent and other income up to and including the day of settlement;
- Rent reduction under a payment plan or CAV/VCAT order: the vendor and purchaser adjust the reduced rent between them in the usual way
- Rent deferral under a payment plan: the purchaser must allow to the vendor and pay when received the portion of the deferred rent attributable to the period up to and including the settlement date

1(a)(ii) Enforcement after settlement

- ❑ Absent a special condition, the vendor has no standing to sue for unpaid rent, including under a payment plan or CAV/VCAT order, once settlement has occurred
 - the payment plan or order operates as a variation of the tenant's rent obligations under the lease
 - the legal right to rent (and therefore to sue for it) passes to the purchaser at settlement under s 141 of the PLA (*Denham Bros Ltd v W Freestone Leasing Pty Ltd* [2004] 1 Qd R 500 (QCA))
 - unless the contract includes a condition assigning to the vendor the legal right to recover unpaid rent accrued as at settlement and notice of that assignment is given to the purchaser (PLA s 134), the vendor has to sue in the name of the purchaser, on the basis that the vendor is entitled to the rent as against the purchaser in equity up to and including the settlement date
- ❑ A special condition should be included in the contract to deal with these matters expressly

1(b)(i) Voluntary negotiated rent reductions

- ❑ Is the purchaser bound by such a rent reduction?
 - As between vendor and purchaser it is suggested: YES, provided the rent reduction is agreed as a variation to the lease and not just a personal payment plan between the parties. A vendor's powers to act as owner of the property and to vary tenancies is suspended generally pending completion of the purchase. (Williams, *Vendor and Purchaser*, 4th ed, [1149]) However, a rent reduction that is necessary to make in the ordinary course of management by a prudent owner of the estate will bind the purchaser. (*Sherwin v Shakspear* (1854) 5 DE G M & G 515, 537)
 - A payment plan that does not vary the lease may not bind the purchaser, but if the purchaser seeks to recover full rent from settlement, the tenant may well just refer the matter to CAV as an “eligible dispute” for mediation or orders under s 540

- ❑ It would be prudent for a vendor faced with a request for a rent reduction from a distressed tenant or forced to mediation when that request is escalated into an “eligible dispute”, to consult the purchaser before agreeing to it

1(b)(ii) Rent reductions ordered by CAV/VCAT

- Is the purchaser bound by such a rent reduction?
 - It would be surprising if not. The reduction in that case takes effect by operation of law pursuant to emergency remedial legislation.
 - Under s 540(2), VCAT may order a reduction in the rent (which in effect will be a variation of the lease by law which will bind the purchaser at settlement).
 - VCAT may also order the tenant to enter into a payment plan (which will be merely personal to the parties to the order).
 - A payment plan may not bind a purchaser, but the only result of refusing to accept it after settlement would be that the tenant would apply for the same order - and almost certainly be granted it.
 - CAV also has wide powers to make orders which probably encompasses those contemplated by s 540.
 - A vendor under a contract who is subject to an application for an order should consider joining the purchaser as “interested party” so that there is no dispute at settlement that the purchaser is bound.

1(c) Abandonment / termination by agreement

- ❑ The position of the purchaser and the vendor at settlement could be difficult if the lease to which the sale is subject is terminated early, eg -
 - tenant abandons the premises, terminates early unilaterally under the legislation or obtains a VCAT order for early termination;
 - landlord accepts an early surrender (by agreement),
 - The vendor (before settlement) and the purchaser (after settlement) may not serve a notice to vacate to terminate the tenancy - the notice to vacate procedure is “suspended” under the temporary COVID-19 legislative regime.

- ❑ If however the tenant does abandon the premises unequivocally or the lease is otherwise terminated early (voluntarily or by VCAT order), then the general law with respect to early vacancy of leased premises will apply.

1(c) Abandonment / termination by agreement

- ❑ The position at general law is established by a number of old English authorities (as explained by Professor Butt in *The Standard Contract for Sale of Land in New South Wales* (2nd ed 1988) 728ff (cf in particular at 730)
 - The vendor should consult the purchaser before accepting a surrender, applying to VCAT for an order for early termination and/or reletting. Generally, the vendor's power to change tenants is suspended pending settlement and the vendor will be liable to compensate the purchaser for loss if a lease is terminated against the purchaser's will.
 - If the purchaser wants the property to be left vacant and is willing to compensate the vendor for the loss of rent [not usually an issue unless there is a long settlement] the vendor should not relet the property.
 - If the purchaser does not agree to compensate for loss of rent, the vendor may relet provided that the lease is on commercial terms no less favourable than under the previous lease and for a market rent. [**“Good luck with this one.”**]
 - If consultation is not possible (eg the purchaser is in default, or is unco-operative and the vendor knows the purchaser is buying the property as a letting proposition) the vendor may relet, and must if not to do so would result in a deterioration of the value of the property. But if the reletting would devalue the premises as compared with leaving it vacant [consult an agent in these COVID-affected times] the vendor has a duty not to relet.

1(c) Abandonment / termination by agreement

- The key here is the vendor's duty not to act in a way which diminishes the value of the property. The best way to avoid disputes with a purchaser at settlement is to consult. There is a duty to re-let if the property's value will deteriorate if left vacant, and a duty not to re-let if the property is worth more vacant. A vendor who does not take steps as required under these duties may not be "ready and able" to settle without compensating the purchaser on the settlement date.
- The vendor's duty is no higher than to do what is commercially prudent to do.
- The purchaser will be bound by the new lease.

1(c) Abandonment / termination by agreement

- If consultation is not possible (eg the purchaser is in default or is unco-operative) and the vendor knows the purchaser is buying the property as a letting proposition, the vendor may relet, and has a duty to do so if to leave the premises vacant would result in a deterioration of the value of the property.
- But if the reletting would devalue the property as compared with leaving it vacant [as could be the case with COVID-19 still affecting the residential tenancy market for the near future] the vendor has a duty not to relet.
- ❑ The key here is the vendor's duty not to act in a way which diminishes the value of the property. Many of the cases establishing these principles are derived from the now discredited analysis of the vendor's and purchaser's interests under the contract as one of trustee and beneficiary (see *Tanwar Enterprises v Cauchi* for the High Court's rejection of this analysis). It is suggested, however, that the principles distilled by Professor Butt are so long-standing that they remain good law, at least until the High Court says otherwise.
- ❑ The purchaser will be bound by any reletting to a new tenant, unless the vendor's failure to act in accordance with duties to relet or not to relet in particular cases means the vendor is not ready and able to complete in accordance with the contract on the due date (*Crnokak v Avifed Pty Ltd* (1991) NSW ConvR 55-560 (Young J))

2 Purchase with vacant possession

- ❑ Where land is sold with vacant possession but the property is tenanted at the day of sale, the COVID-19 legislation can create special issues:
 - Neither the vendor nor the purchaser will be able to treat the premises as abandoned or seek a new tenant until the sitting tenant either clearly abandons the premises once and for all or voluntarily vacates, or VCAT orders that the lease is terminated (either with or without a possession order).
 - The obligation to provide vacant possession is an essential condition of the lease - the risk is therefore on the vendor to remove a sitting tenant before settlement and a purchaser will not be obliged to settle (and may terminate for default) if the tenant remains in possession.
 - Note - as always, an appropriate special condition can manage this risk.

The practical problem in more depth

- ❑ A landlord cannot serve a notice terminating a tenancy during the currency of the COVID-19 legislation (s 544)

- ❑ A landlord can apply to VCAT for an order under s 545(1) terminating the tenancy (and for a possession order at the same time) on the grounds that the landlord has—
 - (i) engaged an agent to sell the rented premises; or
 - (ii) prepared or entered into a contract of sale for the rented premises.

(Section 545(2)(j))

The practical problem

- ❑ VCAT may make the order if, in the circumstances of the particular application, it is reasonable and proportionate having regard to [section 538](#), to make the order taking into account the interests of, and the impact on, each of the following in making the order—
 - (i) the [landlord](#) or mortgagee in respect of the [rented premises](#);
 - (ii) the [tenant](#);
 - (iii) any co-tenants or other [residents](#);
 - (iv) any neighbours or any other person who may be, or who has been, affected by the acts of the [tenant](#).
- ❑ The order is therefore discretionary and -
 - take some time to obtain; and
 - may be refused if VCAT takes the view that the impact on the tenant is more severe than the impact on the landlord of being in default under the contract of sale. [Although, this would not be an insubstantial consideration.]

Managing the impracticalities

- The competing interests between vendor and purchaser are evident
 - if the purchaser defers settlement to await the expiration of the COVID-19 moratorium on lease terminations, the purchaser may lose existing finance approval and have itself terminated a lease of or sold another house in which they live
 - if the purchaser has reduced or no work as a result of COVID, this will prejudice their ability to obtain fresh finance if existing approval lapses while the tenant remains in possession
 - if the purchaser completes with the tenant *in situ*, the purchaser will still need somewhere else to live in the meantime
 - if the vendor defers settlement, they likewise might have trouble financing a purchase of an alternative property if they have signed a contract
- In an ideal world, the problem would be foreseen and managed in advance by -
 - the landlord applying to VCAT and obtain the order - if even with a termination date after the date of a proposed contract - well before entering into the contract of sale; and/or
 - an appropriate special condition allocating the risk in a reasonable and balanced way

Questions