

Residential Tenancies and COVID

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1. This paper will examine broadly the amendments made to the *Residential Tenancies Act 1997* ('RTA') made in response to the COVID-19 pandemic with particular regard to the mechanics of dispute resolution and the current regime for terminating residential tenancies.

Legislative History

2. On 24 April 2020, the *COVID-19 Omnibus (Emergency Measures) Act 2020* received royal assent. It inserted Part 16 (ss 534 – 615) into the *Residential Tenancies Act 1997* ('RTA') which is taken to have commenced on 29 March 2020. It also brought forward the family violence amendments in the *Residential Tenancies Amendment Act 2018* ('the Amendment Act'), while delaying the commencement of the balance of that Act.
3. On 12 May 2020, the Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 ('the Rules') were made. The Regulations introduce the Residential Tenancies Dispute Resolution Scheme ('the Scheme'). They also make many textual modifications to the RTA via a Henry VIII clause in s 606.¹
4. Part 16 was to self-repeal on 29 September 2020 however on 22 September 2020, the *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* ('the Extension Act') was passed. Part 3 of that Act extends the operation of Part 16 to 28 March 2021, with a proviso that it may be extended once more to a date between 28 March 2021 and 27 April 2021.
5. The Extension Act also pushed back the commencement of the Amendment Act to 27 April 2021. These are wide sweeping reforms to the rental landscape following a

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¹ This is where a provision in the enabling legislation permits delegated legislation (eg regulations) to amend statute. They are named as such after the autocratic monarch.

lengthy review, the most important of which is the prescription of minimum standards for premises for which the landlord may be liable to a penalty.²

Amendments to Residential Tenancies Law

6. The amendments apply to; tenancy agreements, residency rights in rooming houses, residency rights in caravan parks, site agreements, and SDA residency agreements. The amendments to each are broadly the same. This paper will refer only to tenancy agreements, Part 16, the Rules and the Scheme.
7. The amendments and the Scheme respond to the obvious consequence of the pandemic; that renters (and to a lesser extent, landlords) have less income. Together, they essentially provide for; a freeze on rental increases, restrictions on terminating the lease, and a new dispute resolution process which directs the parties to mediate the dispute.

Rent

8. The amendments suspend rental increases. Further, during the operation of the amendments, a landlord must not give a notice of a proposed rent increase.³
9. A landlord must permit a tenant to pay via Centrepay;⁴ the bill paying service under Centrelink.
10. If a tenant has breached a tenancy agreement by non-payment of rent, and this was due to a *COVID-19 reason*, a landlord or database operator (ie 'blacklists') must not list personal information about a tenant in a residential tenancy database if they would otherwise have been able to.⁵
11. The Act gives VCAT the power to make orders for rent reduction or payment plans.⁶

The Scheme

² 'Research Note, No. 9' (August 2018) Caley Otter, Department of Parliamentary Services, Parliament of Victoria <<https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13872-residential-tenancies-amendment-bill-2018>>; see also *Residential Tenancies Amendment Act 2018* s 52 (which inserts new section 65A into principal Act).

³ *Residential Tenancies Act 1997* (Vic) s 539(2) ('RTA').

⁴ Ibid s 541.

⁵ Ibid s 596.

⁶ Ibid s 540.

12. The Scheme provides for the assessment and referral of disputes via Consumer Affairs Victoria ('CAV'). By 15 November 2020, CAV had fielded calls from more than 55,000 tenants, landlords, and agents, and had resolved about 14,000 disputes.⁷
13. The Scheme applies to *eligible disputes* which is widely defined and encompasses alleged breaches of tenancy agreements and the *RTA*.⁸ The Scheme differentiates between eligible disputes that are *payment related matters* (and partially payment related), and those that are not payment related. The type of matter will determine which avenue of dispute resolution is taken. Both types of matter must first go to CAV.⁹

Payment related matters

14. Payment related matters, or matters that are partially payment related, are exactly that: anything relating to or including the payment of rent that is or could be the subject of a VCAT order for rent reduction or a payment plan. These are referred for alternative dispute resolution which can be a mediation or conciliation.¹⁰ CAV may determine the dispute itself where fair and reasonable in the circumstances.¹¹
15. If the parties resolve the dispute, CAV will prepare an agreement and will 'register' it.
16. If the parties are unable to resolve the dispute, CAV is afforded powers to make orders. The types of orders are extensive – they can be injunctive, they can order compensation, and they can order that rent be reduced for a specified period.¹² Given that there are no published VCAT cases concerning s 540 (the provision relating to its power to make orders for reduced rent or payment plans), it would appear that CAV has been making these orders.

Non-payment related matters

⁷ Tammy Mills, 'COVID nurse in fight over in-person rental inspection', *The Age* (online 15 November 2020) <<https://www.theage.com.au/national/victoria/covid-nurse-in-fight-over-in-person-rental-inspections-20201111-p56djc.html>>.

⁸ *RTA* s 597.

⁹ *Ibid* s 540, 548(1); Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 r 12 ('Scheme').

¹⁰ Scheme r 16(1).

¹¹ *Ibid* r 16(2).

¹² *Ibid* rr 16-17.

17. Matters that are not payment related matters are referred to VCAT.¹³ In practice, CAV will notify you that it has assessed the dispute as not appropriate for it to resolve.

Termination – general

18. The circumstances in which a tenancy agreement may be terminated have been severely limited by the amendments. Broadly speaking:

- (a) The notice to vacate procedure is suspended; they are not to be given, and any notice given is of no effect.¹⁴ Further, any notice given before 29 March 2020 that specifies a termination date on or after 29 March 2020 is of no effect.¹⁵ This is subject to a series of provisions in the Scheme that modify the *RTA* such that a tenant may give a notice to vacate in certain circumstances.¹⁶
- (b) Tenancy agreements may still be terminated as provided by Part 6 of the Act by; consent, agreement, abandonment, where the premises are 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.¹⁷
- (c) Tenancy agreements may still be terminated under the family violence provisions in s 233A and 233 B.¹⁸ However they may not be terminated by the urgent application for violence procedure in s 374.¹⁹

Termination by landlord

19. The manner by which a landlord can terminate, on grounds other than those listed above, has been replaced by a process requiring a VCAT application made under s 548 following CAV referral. The VCAT website will refer you to CAV. Applicants are informed that VCAT can accept the application without a referral but if you do not have it at the hearing, the hearing will be adjourned.²⁰

¹³ Ibid r 8(1).

¹⁴ *RTA* s 544(1).

¹⁵ Ibid s 614.

¹⁶ Scheme rr 39, 41; *RTA* ss 545, 547

¹⁷ Ibid s 547(1)(b).

¹⁸ Ibid.

¹⁹ Ibid s 548(2).

²⁰ 'Before you apply – Residential tenancy disputes' (Web Page) <<https://www.vcat.vic.gov.au/case-types/residential-tenancies/apply-residential-tenancies>>.

20. In an application for termination, VCAT's decision making process is now as follows:²¹

(a) Is VCAT satisfied of any of the matters in s 549(2)?²²

(b) Where a ground relates to a tenant's failure to comply with an obligation under the tenancy agreement or the *RTA* (including non-payment of rent), was this failure to comply due to a *COVID-19 Reason*?²³

(c) Is it *reasonable and proportionate* to make a termination order?²⁴

21. An application for termination is to be distinguished from possession. In limited situations, the VCAT may make a *possession order* at the same time as a termination order, however it must also ask whether it is reasonable and proportionate to do so.²⁵

22. Currently, applications at VCAT are being heard by telephone. It is important to have all your documents emailed through to VCAT well in advance of the hearing.

What matters are there under s 549(2)?

23. The matters may be broadly categorised as:

(a) matters relating to a tenant's negative conduct including a catch-all for any breach,

(b) landlord-related matters,

(c) where premises unfit for human habitation, and

(d) matters specific to the Director of Housing or a public statutory authority, and other matters

24. The VCAT website has a helpful list setting out each of the heads of dispute and applicable section numbers.²⁶ It is important to state the correct section number and

²¹ *Koh v Thomas (Residential Tenancies)* [2020] VCAT 591, [33].

²² *RTA* s 549(1)(a).

²³ *Ibid* s 549(7).

²⁴ *Ibid* s 549(1)(b).

²⁵ *Ibid* s 549(4).

²⁶ 'Common disputes and section numbers' (Web Page) <<https://www.vcat.vic.gov.au/case-types/residential-tenancies/common-disputes-and-section-numbers>>.

ground because VCAT frequently takes issue with the tenant not having been properly informed of the basis of the application made against them.²⁷

25. *Negative conduct by the tenant*: The matters relevantly include where the tenant has: seriously damaged the premises; endangered the safety of others; threatened or intimidated the landlord or agent; failed to comply with a s 212 order (for breach of duty); permitted the premises' use for an illegal purpose; sub-let without consent; or failed to remove a pet pursuant to an order under s 71E.
26. *Catch-all*: A failure by the tenant to comply with their obligations under the tenancy agreement or the *RTA*, including by not paying rent in circumstances where the tenant could comply without suffering severe hardship.
27. *Landlord matters*:
- (a) If the landlord has sold the premises, or engaged an agent to sell the premises, or
 - (b) if the premises are to be occupied, after the termination date, by the landlord, or the landlord's partner, son, daughter, parent or partner's parent or another person who normally lives with the landlord and is wholly or substantially dependent on the landlord.
28. It is for the landlord to establish the ground to VCAT's satisfaction save for whether the tenant would suffer severe hardship under the 'catch-all' breach ground, as that is a matter for the tenant to establish.²⁸

What is a Covid-19 Reason? Section 537

29. If a ground relates to a tenant's failure to comply with an obligation under the tenancy agreement or the *RTA* (including non-payment of rent) VCAT will ask itself whether the tenant's failure to comply is due to a 'COVID-19 reason'.²⁹
30. A person is taken to be unable to comply with, or it is not reasonably practicable for a person to comply with, a term, provision or obligation because of a COVID-19 reason if—

²⁷ *Smith v Director of Housing* [2005] VSC 46.

²⁸ *Chu v Melbourne Serviced Apartments Pty Ltd (Residential Tenancies)* [2020] VCAT 1187, [76].

²⁹ *RTA* s 549(6).

- (a) the person is unable to comply with, or it is not reasonably practicable for the person to comply with, the term, provision or obligation as a result of the person being ill,³⁰ or
- (b) the person is unable to comply with, or it is not reasonably practicable for the person to comply with, the term, provision or obligation as a result of the person's compliance with any of the following—
 - (i) the exercise of emergency powers by the Chief Health Officer or a person who is an authorised officer under the *Public Health and Wellbeing Act 2008*;
 - (ii) the exercise of public health risk powers by the Chief Health Officer or a person who is an authorised officer under the *Public Health and Wellbeing Act 2008*;
 - (iii) the exercise of a power or the giving of a direction under section 24(2) of the *Emergency Management Act 1986* by the Minister administering that Act;
 - (iv) a recommendation that is publicly announced by the State or made by the Chief Health Officer in relation to the COVID-19 pandemic; or
- (c) the person is unable to comply with, or it is not reasonably practicable for the person to comply with, the term, provision or obligation without suffering severe hardship; or
- (d) the person is unable to comply with, or it is not reasonably practicable for the person to comply with, the term, provision or obligation as a result of any exceptional circumstances in relation to the COVID-19 pandemic.³¹

What is reasonable and proportionate? Section 538

31. There are two aspects to VCAT’s discretion here: the section 538 factors, and the interests and impact on certain people. The legislation says VCAT may make a termination order if satisfied that;

‘in the circumstances of the particular application, it is reasonable and proportionate having regard to section 538, to make the order taking into

³⁰ Scheme r 37.

³¹ RTA s 537.

account the interests of, and the impact on; (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.’³²

32. VCAT *must* have regard to the ten factors set out in s 538 as part of this process.

They are:

- (a) the nature, frequency and duration of the conduct of the tenant including whether the conduct is a recurring breach of obligations under a tenancy agreement;³³
- (b) whether the breach is trivial;
- (c) whether the breach was caused by the conduct of any person other than the tenant;
- (d) whether the tenant has made an application for a family violence safety notice, family violence intervention order, recognised non-local DVO or personal safety intervention order and—
 - (i) if an application has been made, whether a family violence safety notice, family violence intervention order, recognised non-local DVO or personal safety intervention order has been made and whether the notice or order is still in force; and
 - (ii) if a notice or order was made, whether it included an exclusion condition; and
 - (iii) any other matter in relation to family violence or personal violence VCAT considers relevant;
- (e) whether the breach has been remedied as far as is practicable;
- (f) whether the tenant has, or will soon have, capacity to remedy the breach and comply with any obligations under the tenancy agreement, residency right or site agreement, as the case requires;
- (g) the effect of the conduct of the tenant on others as a tenant;

³² Ibid s 549(1)(b).

³³ Scheme r 38 omits “which led to the notice to vacate being given” from the paragraph.

- (h) whether any other order or course of action is reasonably available instead of making the order sought;
 - (i) as the case requires, the behaviour of the landlord or the landlord's agent;
 - (j) any other matter VCAT considers relevant.
33. The factors can be said to fall broadly into two categories: breach-related factors on the one hand, and general factors on the other. There is also the final factor; ‘any other matter the Tribunal considers relevant’. Given that each is a mandatory consideration, practitioners should be prepared to address VCAT on every applicable factor.
34. This is the major battleground of a termination application due to the wide discretion available. Very little guidance can be given other than to say that it is an evaluative exercise, and may ultimately come down to comparing and balancing the relative hardship of landlord and tenant, and/or comparing the severity of making the order against not making the order.³⁴
35. The applicable factors vary widely depending on the ground on which the application is made and the facts of the particular case. For example, in an application on the basis of an intention to sell the property, there is no breach, so only one or two factors may be applicable plus ‘any other relevant matter’.³⁵ In an application on the ground of ‘serious damage’, the fact of the seriousness of the damage (as opposed to non-serious damage) may sufficiently negate ‘triviality’ as a factor.³⁶
36. *Example of balancing exercise:* In *Mikho v Burgess*, Member K Knights considered that a termination order would be overwhelmingly harsher on the tenants and children than the landlord and refused to make a termination order. Factors included the tenant being immunocompromised, proximate to Monash Medical Centre, their choice of living on a certain side of the highway such that the children did not need to cross it to get to school, the landlord owning other investment properties in the same block, and the landlord being unable to substantiate their financial difficulties.³⁷

Termination Order

³⁴ *Struth v Thwaites (Residential Tenancies)* [2020] VCAT 788; *Mikho v Burgess (Residential Tenancies)* [2020] VCAT 691; *Rizio v XEP (Residential Tenancies)* [2020] VCAT 882.

³⁵ *Coppinger v Laskovski (Residential Tenancies)* [2020] VCAT 986.

³⁶ *Reich v Power (Residential Tenancies)* [2020] VCAT 1232.

³⁷ *Mikho v Burgess (Residential Tenancies)* [2020] VCAT 691.

37. Whilst VCAT must specify the date when the tenancy agreement will terminate, the Act does not specify the earliest termination date following an order. The Scheme provides for this as it notionally inserts a new s 549(3A) into the Act. Each of the s 549(2) matters has differing minimums. The VCAT website sets this out.³⁸
38. The minimum is not mandatory; VCAT's discretion extends to providing that the date for the termination order may be a date later than the minimum date. In *Coppinger v Laskovski*, VCAT provided a termination date of 90 days, when 60 was the minimum where the ground was that the landlord had appointed an agent to sell the property. The relevant factor was the tenant's illness which necessitated that any new premises occupied by her would have to be within her former locale so as to continue to attend her medical appointments (thus limiting what was available in the market), and where there was no apparent urgency for the landlord to sell the property.

Possession Order

39. VCAT may also make a possession order at the time of a termination order. The order requires a tenant to vacate rented premises. The order may be made if satisfied it is reasonable and proportionate to do so, taking into account the interests of, and the impact on the landlord and the tenant. Whether it is reasonable and proportionate to do so is a separate question from whether it was reasonable and proportionate to make the termination order.
40. It has been observed that Part 16 'shows a clear legislative intention that, unless the possession order is sought urgently, a tenant should be allowed a reasonable interval between the date of the making of the order and the date upon which possession must be given to the landlord.'³⁹ Without good reason, VCAT would be likely to decline to make a possession order at the same time as making a termination order.
41. In *Struth v Thwaites*⁴⁰ VCAT made a possession order at the same time as making a termination order. It was a question of balance, and both parties' entitlement to certainty. Both parties were under significant hardship: "*The landlords are currently living in a caravan park with genuine concerns about Mrs Struth's health and*

³⁸ 'Changes to residential tenancy laws during COVID-19' (Web Page) <<https://www.vcat.vic.gov.au/case-types/residential-tenancies/residential-tenancy-laws-covid19>>

³⁹ *Coppinger v Laskovski (Residential Tenancies)* [2020] VCAT 986, [7].

⁴⁰ *Struth v Thwaites (Residential Tenancies)* [2020] VCAT 788.

particular vulnerability. They are unable to access their own family home, and they have no alternative accommodation options. The tenant has had her work hours reduced and is home schooling her child". The landlord sought a possession order with effect within 24 hours. The tenant requested 60 days. Both of these requests were considered unreasonable. VCAT gave 30 days, noting that the tenant had made recent applications to rent other premises and was confident of their success.

42. If a tenant does not vacate by the end of the date specified in the termination order, a landlord may apply for a possession order under s 550. The same reasonable and proportionate test is required as with a termination order.⁴¹ There is a discretion as to what date VCAT may set. There is no case law on such an application.

Termination by tenant

43. As stated earlier, the suspension of the notice to vacate procedure was subject to the Scheme. Due to the the Henry VII clause in the Act, the Act and the Scheme must be read together because the state of the law cannot be discerned from looking at the *RTA* alone.

44. As originally drafted, s 545 severely limited the ability of a tenant to terminate. The Scheme has walked back these provisions. The current law may be summarised as follows:

- (a) a tenant, including a tenant under a periodic tenancy, who is suffering severe hardship or has been given notice of a VCAT termination application may give a notice of intention to vacate specifying a termination date not less than 14 days after the date of the notice,⁴² and
- (b) any tenant neither suffering severe hardship nor having been given notice of a VCAT termination application may give a notice of intention to vacate specifying a termination date not less than 28 days after the date of the notice.⁴³

⁴¹ *RTA* s 551.

⁴² Scheme r 39(1).

⁴³ Scheme r 39(1)(a) modifies *RTA* s 545(1) to provide that a notice may be given under s 235 (Part 6 Division 1 Subdivision 3).

45. Pursuant to s 546(1) of the *RTA*, as modified by r 40 of the Scheme, the tenant will not be liable for loss suffered by the landlord for the early termination, or ‘break fees’ if:

(a) the tenant gave a notice of intention to vacate ‘under Subdivision 3 of Division 1 of Part 6’, and

(b) the tenant:

- (i) is suffering severe hardship;
 - (ii) has been given notice of a VCAT termination;
 - (iii) requires special or personal care and needs to vacate the rented premises in order to obtain that care;
 - (iv) has received a written offer of public housing from the Director of Housing;
 - (v) requires temporary crisis accommodation and needs to vacate the rented premises in order to obtain that accommodation; or
 - (vi) is an SDA resident who has been given a notice under section 498DA;
- and

(c) the tenant vacated the premises on or after the termination date specified in the notice.

46. A party to a fixed term tenancy agreement may apply to VCAT to reduce the length of a tenancy agreement (with subsequent variations to the terms of the agreement) however VCAT may only order this if satisfied that the severe hardship which the applicant would suffer if the term of the agreement were not reduced would be greater than the severe hardship which the other party to the agreement would suffer if the term were reduced.⁴⁴ The section is directed to, but not limited to, protected persons and the subjects of family violence intervention orders. Whilst applications must first go through CAV, this is not a payment related matter and so CAV will refer the matter to VCAT. CAV may not make any orders in relation to s 543.⁴⁵

Rental Relief Grant

⁴⁴ Ibid s 543.

⁴⁵ Scheme r 17(2)(b)(i).

47. The Victorian government has established an \$80 million fund to provide rent relief.⁴⁶ Eligible tenants will be able to apply for a grant of \$3,000 which will be paid directly to the agent or landlord. For a tenant to be eligible, they must have;
- (a) registered a revised rental agreement with Consumer Affairs Victoria,
 - (b) have less than \$10,000 in savings (excluding superannuation),
 - (c) have an income of less than \$1,903 per week before tax, and
 - (d) be paying more than 30% of their income in rent.
48. Originally, the grant was for \$2,000, and the threshold was \$5,000 in savings. This was increased on 20 August 2020. If a tenant had received the original \$2,000 grant, and continues to meet the eligibility criteria, the government says it will automatically determine eligibility and will contact the tenant to confirm continued eligibility.
49. Applications must be lodged by 28 March 2021.

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3 December 2020

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⁴⁶ ‘DHHS COVID-19 Rent Relief Grant’ (Web Page) <<https://rentrelief.covid19.dhhs.vic.gov.au/>>; ‘Coronavirus (COVID-19) rent relief grant’ (Web Page) <<https://www.housing.vic.gov.au/help-renting/rentrelief>>.