

SVENSON
BARRISTERS



Renting during COVID-19

An update on residential tenancy laws

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GEMMA CAFARELLA

Overview

1. Introduction to relevant law
2. Termination by landlords
3. Termination by tenants
4. Obligations of landlords and tenants
5. Rent increases
6. Where to next?



RELEVANT LAW

Residential Tenancies Act 1997 (RTA)

- Defines the rights and duties of renters and landlords
- Regulates most aspects of tenancy agreements including:
 - When the landlord can attend the property
 - The process for requesting repairs
 - When renters can be evicted
- Doesn't apply to all housing situations

Does the RTA apply?

The RTA applies to four categories of occupancy

1. Residential tenancy agreements
2. Rooming house agreements
3. Caravan park agreements
4. 'Part 4A' agreements (people who own the dwelling and rent the site)
5. Specialist disability accommodation agreements

Does the RTA apply?

Tenancy agreement can be in writing or oral, express or implied (s 3)

Generally exists where a person pays rent to the landlord in exchange for exclusive possession (Radaich v Smith (1959) 101 CLR 209)

- Look to substance of the agreement, not just labels (Swan v Uecker [2016] VSC 313)
- Requires control of and unencumbered access to the premises (or room)
- Ability to exclude third parties
- Ask - did the parties intend to and actually give the tenant exclusive possession over the premises, in return for consideration?

The RTA is presumed to apply (s 507).



COVID-19 reforms to the RTA

- *COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)*
(Omnibus Act)
 - Part 16
- *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 (Vic)* (**COVID-19 regulations**)
- These must be read together

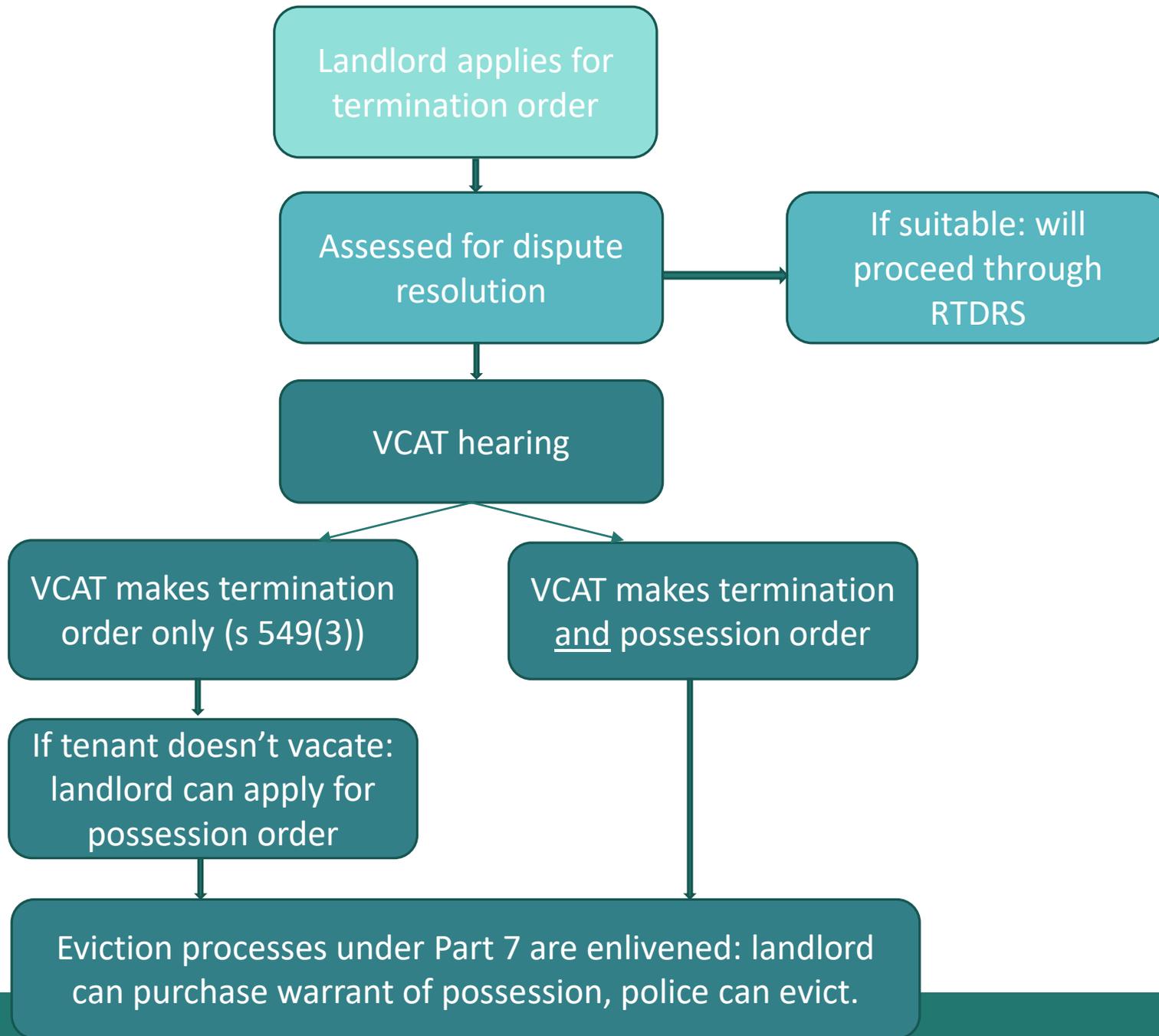


TERMINATION BY LANDLORDS

Process for termination by landlord

Landlords must not give notices to vacate (s 544).

Instead, the first step in termination by a landlord is an application to the Tribunal for a termination order (s 548).



Application for termination order (s 549)

Tribunal must be satisfied that :

1. The ground for eviction has been proved by the landlord (s 549(1)(a));
2. That it is reasonable and proportionate to make the order (s 549(1)(b)); and
3. VCAT cannot make a termination order if a breach that is relied on occurred because of COVID-19 (s 542).

Will the Tribunal make a possession order too?

On hearing an application for a termination order, the Tribunal may:

1. Make a termination order only (s 549(3))

- The order will set a vacate date.
- Minimum time periods for the vacate date are set out in s 549(3A) which is contained in the COVID-19 regulations.
- A termination order alone does not entitle the landlord to possession if the tenant does not vacate by the vacate date.

2. Make a termination order and a possession order (s 549(4))

- The minimum notice periods set in s 549(3A) do not apply
 - The reasonable and proportionate test must be applied in relation to each decision to make a termination and a possession order
- 

Grounds for eviction

Set out in s 549(2)

- Include “fault” and “no fault” grounds
- Does not include non-payment of rent unless the landlord can prove that there is a willful non-payment of rent
- Does not allow eviction for no specified reason
- Some wording has changed – e.g. “endangered” rather than “endangers” in s 549(2)(b)

The landlord must bring evidence to prove the ground

The reasonable and proportionate test

The Tribunal must have regard to:

- **The interests of and impact on:** (s 549(1)(b), 549(4)(b), 551(1)(c)):
 - Landlord or mortgagee
 - The tenant
 - Any co-tenants or other residents
 - Any neighbours or any other person affected by acts of the tenant
- **The mandatory considerations in s 538**, which include:
 - The nature, frequency duration of any conduct;
 - Whether the breach is trivial;
 - Whether the breach has been or will be remedied
 - Whether any other order or course of action is reasonably available instead of making the order sought

The reasonable and proportionate test (cont.)

- An evaluative exercise, requiring consideration of all relevant evidence. Each case turns on its own facts.
- While orders will not be made lightly, it is not the case that they must only be made in exceptional circumstances.
- Rights contained in the Charter may be relevant to the Tribunal's discretion.

- *Salvation Army Housing Victoria v LVM (Residential Tenancies)* [2020]
VCAT 1209

The reasonable and proportionate test (cont.)

Mikho v Burgess [2020] VCAT 691

- Landlord proved the basis for eviction under s 549(2)(o) – that the landlord intended to take occupancy of the property.
- BUT the Tribunal found that making an order of termination would be “overwhelmingly harsher on the tenants and their children than the landlord”.
- Accordingly, it was not reasonable and proportionate to make an order.

COVID-19 reasons

The Tribunal must not make a termination order on the ground that a tenant failed to comply with their obligations if the failure was caused by a COVID-19 reason (s 549(6)).

COVID-19 reasons include:

- Illness (COVID-19 or otherwise)
- Compliance with emergency directions or government recommendations
- Severe hardship
- Exceptional circumstances in relation to the COVID-19 pandemic



TERMINATION BY TENANTS

When can a tenant give a notice of intention to vacate?

Section 545 makes it look like the situations in which tenants can give a notice of intention to vacate are reduced.

545 When a tenant can give notice of intention to vacate—tenancy agreements

(1) A tenant must not give a landlord a notice of intention to vacate rented premises under Subdivision 3 of Division 1 of Part 6 unless—

This is altered by the operation of r 39

When a tenant can give notice of intention to vacate—tenancy agreements

(1) Section 545(1) of the Act operates as if the following modifications were made—

(a) "A tenant must not give a landlord a notice of intention to vacate rented premises under Subdivision 3 of Division 1 of Part 6 unless" were omitted and "In addition to giving a notice of intention to vacate in accordance with Subdivision 3 of Division 1 of Part 6, a tenant may give a landlord a notice of intention to vacate if" were substituted;

When can a tenant give a notice of intention to vacate? (cont)

Tenants' usual capacity to give notice of intention to vacate is preserved.

In addition:

- Tenants can give a reduced notice period of 14 days in some circumstances, including where there is severe hardship.
- Tenants under a fixed term tenancy agreement can utilise these provisions (r 39(2)(b)).



OBLIGATIONS OF LANDLORDS AND TENANTS

Obligations of landlords and tenants

A tenant or landlord who would have otherwise breached a relevant duty or term in a tenancy agreement is **taken to have not breached the term or provision** if it was not reasonably practical to comply because of a COVID-19 reason

- Applies equally to tenants and landlords
- Can include payment of rent
- Could also extend to the duty to maintain the property



RENT INCREASES

Rent increases suspended

Landlords must not increase rent or issue a notice of rent increase (s 539).

Tenants may also seek a rent reduction (s 540).





WHERE TO NEXT?

Where to next?

The amendments are in operation until 28 March 2021, but it can be extended until April 2021 by Order of the Governor in Council (s 615).

It is notionally intended that upon the cessation of the COVID-19 amendments, the original RTA Amendments will come into play.



Questions? Please get in contact

E: Gemma.Cafarella@vicbar.com.au

M: 0413 921 649

Clerks: 9225 7333

