

Limiting Mortgagees' right to possession of rented premises

The *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (**COVID-19 Act**), which commenced on 25 April 2020, has introduced temporary amendments to the *Residential Tenancies Act 1997* (Vic) (**RT Act**). These amendments came into effect on 29 March 2020 and will continue 6 months after the commencement of the COVID-19 Act. Part of the amendments have seen mortgagees' rights to terminate a tenancy agreement in order to obtain a possession order severely limited.¹

No Notices to Vacate

- Section 544 of the COVID-19 Act prohibits a mortgagee from issuing a notice to vacate on tenants.
- Any notice purportedly given is considered to have no effect.
- If a notice to vacate was issued prior to 29 March 2020 section 550(3) prevents a mortgagee from relying upon that notice to apply for a possession order under section 325 of the RT Act.



Termination of a tenancy agreement by VCAT Application

- A mortgagee can no longer terminate a tenancy agreement under section 223 of the RT Act (by notice to vacate).
- A mortgagee must now make an application under section 547 to VCAT to terminate a tenancy agreement.
- The circumstances in which VCAT can terminate a tenancy agreement are limited by section 549(2), which provides that VCAT must be satisfied:
 1. as to any of the matters listed under subsection (2) which includes a tenant intentionally or recklessly causing serious damage to the premises, illegal use of the premises and matters of public safety, violence or danger;²
 2. that in the circumstances it is reasonable and proportionate to make an order taking into account the interests and impact on:
 - a. the landlord or mortgagee;
 - b. the tenant;
 - c. any co-tenants or other residents; and
 - d. any neighbour or other person who may be affected by the acts of the tenant (collectively '**Potential Affected Parties**').
- At the time of granting an order under section 549 VCAT may also make a possession order.
- If a possession order is not made simultaneously, a mortgagee may apply for a possession order under section 550.

What is reasonable and proportionate?

The term 'reasonable and proportionate' has been defined under the COVID-19 Act to limit what VCAT must take into consideration when considering an application to terminate a tenancy agreement and/or for a possession order. This includes:

- the conduct of a tenant;
- the circumstances relating to a breach of obligations under a tenancy agreement including the nature of the breach and the ability to remedy the breach;
- whether the tenant has made an application in relation to domestic or personal violence;
- whether any other order or course of action is reasonably available instead of making the order sought;
- the behaviour of a landlord; and
- any other matter the Tribunal considers relevant.



Position in other jurisdictions as at the date of this update

WA	Adopted legislation which allows a mortgagee to exercise its right to take possession of a premises subject to a tenancy agreement during the declared 'emergency period'. However, the tenancy agreement will continue during this period and the mortgagee will become the landlord. The legislation provides a process to terminate the tenancy agreement once the emergency period has ended.
ACT, NSW, NT, ³ QLD, SA, TAS ⁴	Adopted legislation which gives the government the power to alter provisions of the residential tenancy act including those relating to terminating tenancy agreements and recovering possession of a premises under a residential tenancy agreement.

¹ There are similar amendments to a mortgagee's right to terminate residency rights in rooming houses and caravan parks, site agreements and SD agreements.

² Section 549(2) does not appear to include matters that would generally relate to a mortgagee seeking an order under section 549(1).

³ The NT has made a declaration by notice providing the Tribunal with certain powers to suspend an order for possession if the tenant is suffering from COVID-19 hardship.

⁴ TAS has declared by notice that a residential tenancy agreement may not be terminated within the emergency period if a notice to vacate is served on the tenant by 3 April 2020. There are exceptions to this notice including where the Residential Tenancy Commission orders the lease be terminated where its continuation would cause the tenant or owner severe hardship.



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