

COVID-19 Legislation Amendment (Emergency Measures) Act 2020



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Relevant Provisions

On 24 March 2020 the COVID-19 Legislation Amendment (Emergency Measures) Bill 2020 (“the COVID-19 Act”) passed both houses of the NSW Parliament and received assent on 30 March 2020.

So far as is relevant to retail and residential tenancies, the COVID-19 Act amends the

- Civil and Administrative Tribunal Act 2013
- Residential Tenancies Act 2010 and
- Retail Leases Act 1994

as set out below.

Civil and Administrative Tribunal Act 2013

So far as is relevant to tenancy disputes, the COVID-19 Act amends the Civil and Administrative Tribunal Act to enable:

- regulations to be made that modify time periods for things done in connection with the tribunal (eg applications, appeals) and the practice and procedure of the tribunal,
- the tribunal (and certain courts) to extend periods for doing things in connection with the tribunal.

The provision applies for a prescribed period of 6 months which may be extended by regulations up to 12 months.

Residential Tenancies Act 2010 and Retail Leases Act 1994

The COVID-19 Act inserts a new provision¹ in the Residential Tenancies Act 2010 (“RT Act”), and a commensurate provision² in the Retail Leases Act (“RL Act”) which empowers the making of regulations, for the purposes of responding to the emergency caused by the pandemic,

- to prohibit the recovery of possession of premises by a landlord from a tenant of the premises under the RT Act (or the RL Act as the case may be) in particular circumstances
- to prohibit the termination of a residential tenancy agreement by a landlord under the RT Act (or the RL Act as the case may be) in particular circumstances
- to regulate, or prevent enforcement of another right of a landlord under the RT Act (or the RL Act as the case may be) or an agreement relating to the premises
- to exempt a tenant from the operation of a provision of the RT Act (or the RL Act as the case may be) or any agreement relating to premises

The Minister’s recommendation to the Governor that regulations under s 229 RT Act, or s 87 RL Act, be made, can only be made if Parliament is not currently sitting, and is not likely to sit within 2 weeks after the day the regulations are made, and the regulations are, in the Minister’s opinion, reasonable to protect the health, safety and welfare of tenants or residents under the relevant Act. It is the understanding of the writers that the NSW Parliament is not scheduled to return until September, and, in light of recent

press announcements by the Premier, it would appear likely that such regulations may be imminent. A regulation made under s 229, or under s 87, expires 6 months after the day on which it commences, or an earlier day decided by resolution of either House of Parliament.

Provisions equivalent to s 229 RT Act are also contained in the COVID-19 Act in respect of the Boarding Houses Act 2012, the Residential (Land Lease) Communities Act 2013 and any other Act relating to the leasing of premises or land for residential purposes.

Provisions equivalent to s 87 RL Act are also contained in the COVID-19 Act in respect of the Agricultural Tenancies Act 1990 and any other Act relating to the leasing of premises or land for commercial purposes.

The Authors' Suggestions

The following note contains some suggestions about terms which would be appropriate for the regulations to be promulgated pursuant to the amendments that have been made to the RT Act and the RL Act.

The problem for residential tenancies is different from that for business leases. For the latter it is that closure or the reduction of trade will destroy or reduce the tenant's ability to pay rent and ultimately destroy the tenant's business. There will, perhaps because of the terms of a user covenant in the lease, be a reduction in the number of replacement tenants that could be found. Although there will be many residential tenants who cannot pay their rent, the housing market is such that there may well be plenty of others who can. A real danger, if residential tenancies are terminated, will be an influx of investors who, like shareholders, pick up properties at depressed prices.

The removal of the right to terminate a tenancy or recover possession of the leased premises discriminates against landlords. Under the general law the landlord can terminate a retail lease if the tenant shuts up shop. If it resumes possession there is a surrender by operation of law. Or, in the case of residential premises, it can apply to NCAT for a termination order on the ground of abandonment.³ The COVID-19 Act deprives the landlord of this remedy. In both cases the landlord will lose the rent of the premises and be unable to re-let them to a fresh tenant.

The regulations may also prevent the landlord enforcing its statutory rights against the tenant. This does not prevent the tenant from enforcing its rights. On the contrary, the

amendments empower the regulations to exempt tenants from the obligation of complying with them.

Residential Tenancies

1. We suggest that a bald power to prohibit the landlords from terminating tenancies is a clumsy means for protecting the rights of tenants, and landlords. The grounds under which a landlord can terminate a residential tenancy during the term are the sale of the reversion, breach of the tenancy agreement, non-payment of rent or charges, damage to the premises, the illegal use of the premises, threat, abuse, intimidation, and hardship.⁴ To take s 91, which is used surprisingly often especially in the case of social housing, as an example, what possible causal connection could there be between the COVID-19 virus and the manufacture and sale of drugs?
2. The vital amendment which the regulations should make to the RT Act should be to abolish the landlord's power to terminate a periodical tenancy by the service of a no grounds notice. Periodical tenancies and tenancies at will should be terminable by the landlord, like tenancies for a fixed term, only on specified grounds. ⁵ NCAT already has jurisdiction to refuse to make a termination order for a fixed term tenancy if it is not satisfied that, "the breach is in the circumstances of the case sufficient to justify termination."⁶ The regulation should then make it clear that NCAT can exercise this discretion in relation to periodical tenancies.⁷ The grounds for exercising it should be expanded to include non-payment of rent directly or indirectly caused by the virus. By directly caused, we mean if the tenant's impecuniosity is caused by catching the virus, and indirectly by the loss of income as a result of the economic effects of the virus and governments' attempts to alleviate those effects.
3. Termination for non-payment of rent should not be abolished as a ground for termination. As has been suggested above the regulation could, to make the matter clear, expressly confirm that the circumstance that the breach was caused by the pandemic is to be taken into account by NCAT in exercising its discretion.⁸ It would be a matter of balancing the hardship of the tenant caused by the termination against that caused to the landlord by its refusal. In the absence of a mortgage, a pressing need of the landlord to occupy the premises, or evidence of an offer by a fresh tenant to pay the rent, the discretion would necessarily be exercised in the tenant's favour.
4. Currently either party can terminate a tenancy on the

grounds of hardship.⁹ The COVID-19 Act arguably enables the regulations to deprive landlords of that right, whilst leaving the tenants' right unchanged. The loss of rent may well cause hardship to the landlord. This would be particularly so in the case of self-funded retirees and mortgagors. It is unjust for the tenant to retain that power whilst the landlord is deprived of it. At the very least the regulation should provide that it does not affect the landlord's right to recover possession, or terminate the tenancy, if this would cause it hardship.

Retail Tenancies

An appropriate remedy for retail tenancies would be to empower NCAT to determine, or oversee, a system for the assessment of a market rent, making allowance for the reduction in profitability caused by the pandemic. This jurisdiction would apply to both leases for a term and periodical tenancies, including those resulting from holding over:

1. This would require the replacement, by the regulations, of any rent variation clause in the lease with a statutorily implied provision for market rent review. Any ratchet clause in the lease would be invalidated. The tenant would be entitled to seek an order from NCAT reducing the rent of the leased premises on the basis of a reduction in gross income by reason, direct or indirect, of the virus.¹⁰ The tribunal, or the valuer nominated by it, would be required to take primary account of the difference between the tenant's turnover during the 2019–2020 financial year, and the first 8 months of the 2020–2021 year, and its turnover since 1 March 2020.¹¹ The reduction could continue after the virus has been defeated to give the tenant time for its business to revive. NCAT could have power to order that some or all of the reduction be repaid by the tenant when the regulations expire. The tribunal would also set down a timetable for applications by either party to vary its order if circumstances change.
2. The RL Act does not make any material changes to the general law relating to the termination of fixed term or periodical tenancies. The landlord terminates the former by re-entry or the commencement of termination proceedings, and the latter by notice to quit.¹² However the COVID-19 Act provides for the regulation to prohibit the recovery of possession of premises or termination of retail tenancies "in particular circumstances".¹³ It is submitted that NCAT, when exercising its power to hear such applications, would have the statutory discretion to refuse to terminate a tenancy or restore the landlord to

possession, as well as the equitable jurisdiction to relieve against forfeiture. The regulation could spell out the factors to be taken into account in exercising the discretion.

Other matters

Other matters which do not directly concern the terms of the COVID-19 Act are:

1. We would suggest that the Commonwealth Government should act urgently to repeal pro tanto the disclaimer provisions of the Bankruptcy and Corporations Acts.¹⁴ The RT Act purports to recognise disclaimer as a ground for termination.¹⁵ Query whether this provision of the Act is valid?, Is it inconsistent with the Commonwealth Acts. There are difficulties about the imposition by either government to control on other actions of the mortgagee of a tenancy. The State government could hardly use its power to control tenancies to interfere with the freedom of a mortgagee of tenanted property to exercise its rights in the event of the mortgagor's default.
2. One factor of relevance in the implementation of attempts to deal with the effect of the virus is the capacity of NCAT (and the CATs of other jurisdictions). At the time of writing this note, the writers understand that VCAT, for example, whilst considered an "essential service" has closed all venues, including VCAT Magistrates' Court counters to the public.¹⁶ Non-critical cases listed up to 17 April 2020 are adjourned for "the foreseeable future" and critical cases are being conducted by telephone.¹⁷ The authors are aware of the person who held the position of Chief Assessor under the Motor Accidents Act for 18 years who, when the authority was merged with the Workers' Compensation Commission resigned and became self-employed as an assessor. She is working from home, more or less full time and conducting "hearings" by teleconference. NCAT has instituted a procedure for the filing of documents without personal attendance, and with its less formal proceedings than that of the courts, it may be able to do the same as VCAT.
3. The authors are aware of only one other jurisdiction which has passed legislation, in response to the virus, relevant to landlords and tenants, namely, COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 ("the Tasmanian Act") which empowers the Minister to declare, by notice, that:
 - a lease which is within a class of leases specified in the notice, must not, within the emergency period, be terminated, and

If promulgated the declaration will have effect notwithstanding the provisions of the lease, and any termination, or increase in rent, in contravention of the declaration will be void.

“Emergency period” is defined as the period beginning on 27 March 2020 and ending on the last occurring of:

- 25 July 2020
- a day to which the emergency period is extended by one or more orders under s 3A(1) of the Tasmanian Act
- the day on which an order is made under s 3A(4) of the Tasmanian Act declaring that the emergency period has ended.

No doubt the response of other legislatures to the issue will emerge in the near future. Given that there is a significant degree of similarity in the tenants’ protection Acts of all jurisdictions, we would submit that the suggestions offered above would also apply to those other jurisdictions.

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2nd April 2020.*

1. Section 229 Residential Tenancies Act 2010 – inserted by Sch 2 cl 2.17 COVID-Act.
2. Section 87 Retail Leases Act 2010 – inserted by Sch 2 cl 2.18 COVID-19 Act.
3. RT Act s 107.
4. RT Act ss 86–88, 90–92. See also s 93 discussed below.
5. RT Act s 84.
6. RT Act (NSW) s 87(4)(b).
7. RT Act (NSW) s 87(4)(b).
8. As to the obligation to take something into account see [4.2.330].
9. RT Act ss 93 and 104.
10. See above.
11. As to the obligation to take something into account see [4.2.330].
12. See Pt 2 Ch 6.
13. RL Act s 87(1)(a)–(b).
14. Bankruptcy Act 1966 s 58; Corporations Law 2001 s 474. See [2.6.380] and [2.6.385].
15. RT Act s 81.
16. www.vcat.vic.gov.au/
17. www.vcat.vic.gov.au/news/coronavirus-covid-19-response

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