SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2021 0097

AGNIESZKA MARKIEWICZ — Applicant

v

MARIA CRNJAC — First Respondent

and

PETER CRNJAC — Second Respondent

JUDGES:	EMERTON, SIFRIS JJA and MACAULAY AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	30 September 2021
DATE OF JUDGMENT:	25 October 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 290
JUDGMENT APPEALED FROM:	[2021] VCAT 865 (Quigley J and Deputy President Proctor)

RESIDENTIAL TENANCIES – Pt 16 inserted into *Residential Tenancies Act 1997* (‘*RTA*’) in response to COVID-19 pandemic – Section 542 provided that tenant or landlord who would have breached tenancy agreement taken not to be in breach if failure to comply because of ‘COVID-19 reason’ – Applicant tenant unable to pay full rent because of COVID-19 reason – No agreement between applicant and respondents concerning rent reduction – Pt 16 repealed on 28 March 2021 – Regulation 14 of *COVID-19 Omnibus (Emergency Measures) Transitional Regulations 2021* provided s 542 continued to provide protection for existing breaches until 25 October 2021 – On 29 March 2021, s 91ZM of RTA enacted dealing with notices to vacate and orders for possession for non-payment of rent – Under s 91ZM, respondent landlord issued notice to vacate and obtained order for possession against tenant – Tenant appealed against order for possession – Notwithstanding repeal of pt 16, reg 14 extended protection provided by s 542, restricting operation of s 91ZM in respect of COVID-19 arrears – Tenant protected while reg 14 continues to operate – Appeal allowed – *Residential Tenancies Act 1997* ss 91ZM, 330, 330A, 331, 537 (repealed), 542 (repealed), 548 (repealed), 549 (repealed) – *COVID-19 Omnibus (Emergency Measures) Act 2020* – *COVID-19 Omnibus (Emergency Measures) Transitional Regulations* reg 14.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr R Merkel QC with Ms G Cafarella	Clayton Utz
For the Respondents	Mr R W O'Neill with Mr C F E Dawlings	--

EMERTON JA
SIFRIS JA
MACAULAY AJA:

Introduction[1]

1 In June 2015, the applicant, as tenant, and the respondents, as landlord, entered into a residential tenancy agreement (the 'Tenancy Agreement') in respect of a property in Avondale Heights (the 'Premises'). In 2017, the Tenancy Agreement was renewed for a further fixed period of one year ending in April 2018. Thereafter the tenancy continued under the terms of the Tenancy Agreement as a periodic monthly tenancy, pursuant to which the applicant was required to pay monthly rent. The applicant regularly paid the rent from June 2015 until March 2020. The Premises are and have been the applicant's home since 2015.

2 In April 2020, in response to the severe economic impact of the COVID-19 pandemic, Parliament enacted pt 16 into the *Residential Tenancies Act 1997* ('RTA'). Relevantly, the newly enacted s 542 provided that where a tenant or landlord would otherwise be in breach of their tenancy agreement, they were taken not to be in breach if the failure to comply was because of a 'COVID-19 reason' (as defined in the newly enacted s 537). Part 16, which contained numerous other provisions, as set out below, operated from 29 March 2020 to 28 March 2021 (the 'Emergency Period'). Although pt 16 was repealed on 28 March 2021, reg 14 of the *COVID-19 Omnibus (Emergency Measures) Transitional Regulations 2021* ('Regulations') provided that the protection conferred by s 542 for breaches occurring during the Emergency Period was to continue to have effect in relation to those breaches (but not subsequent breaches) until 25 October 2021[2] (the 'Transition Period').[3]

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1 The introduction and relevant facts, much of which is uncontentious, is taken largely from the applicant's written case.

2 Regulation 14 continues to have force until that date. The regulation was originally due to cease on 26 April 2021 per ss 62 and 64 of the *COVID-19 Omnibus (Emergency Measures) Act 2020*; but that date was extended by six months, to 25 October 2021, by s 9 of the *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020.*

3 During the Emergency Period, the applicant lost almost all of her income as a ride share driver and was only able to pay about half of the rent due. Her inability to pay the full rent due under the Tenancy Agreement was because of ill health and her loss of income caused by the COVID-19 lockdowns and health directions. As a consequence she was unable, or it was not reasonably practicable for her, to pay the full rent without suffering hardship (the 'COVID-19 arrears'). The financial and health position of the applicant was accepted by the Victorian Civil and Administrative Tribunal (the 'Tribunal' or 'VCAT') as constituting a COVID-19 reason. There is no challenge to this finding.

4 At the beginning of May 2020, the rent was $2,216.00 per calendar month. During the period 28 April 2020 to 26 April 2021, the applicant paid one half of the required rental per month. As at 1 April 2021, the applicant's rental arrears totalled $12,587.10 of which $12,312.96 constituted COVID-19 arrears, that is arrears incurred during the Emergency Period because of a COVID-19 reason. Accordingly, the amount of rent owing on that date if the COVID-19 arrears are disregarded was $274.14.

5 On 30 March 2021, two days after the end of the Emergency Period, and notwithstanding the newly made reg 14, the respondents issued a notice to vacate under the newly enacted s 91ZM of the RTA[4] for failure to pay rent, on the basis that the rent owing by the applicant within the preceding 12 month period, as at 1 April 2021, was an amount of at least 14 days rent, namely $12,587.10. Of that amount, $12,312.96 was COVID-19 arrears, that is, arrears incurred during the Emergency Period for a COVID-19 reason.

6 On 26 April 2021, the respondents applied for a possession order under s 330

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[3] Regulation 14 uses the words 'landlord' and 'tenant', as well as the new terminology of 'residential rental provider' and 'renter' as appears in the RTA with effect from 29 March 2021.

[4] This section and others provided a new enforcement regime relating to, amongst other things, the non-payment of rent. The relevant provisions came into effect on 29 March 2021, after the repeal of pt 16.

of the RTA on the basis of the notice to vacate. The applicant opposed the respondents' application to the Tribunal for a possession order based on the notice to vacate, on the basis that:

(a) section 542 and/or reg 14 operated such that the applicant was not in breach of her obligation to pay rent insofar as that rent included the COVID-19 arrears, with the consequence that the amount owing for the purposes of s 91ZM as at 1 April 2021 was $274.14, which was less than the 14 days rental arrears required under s 91ZM for a valid notice to vacate. Accordingly, the Tribunal was not empowered to make a possession order under ss 91ZM and 330(i)(a) of the RTA; or

(b) alternatively, as the COVID-19 arrears were not rent owing, or rent the applicant was under an obligation to pay, the Tribunal was required to take the COVID-19 arrears into account for the purposes of the exercise of its discretion under ss 330, 330A and 331 of the RTA.

7 The Tribunal rejected the applicant's submissions, holding that s 542 and reg 14 did not, for the purposes of s 91ZM, apply to arrears of rent or to the COVID-19 arrears, after the Emergency Period.[5] The Tribunal did however conclude that s 542 and reg 14 afforded the applicant a defence to the respondents' claim for a compensatory or monetary order for the rent outstanding on the basis that for that purpose (but not for the purpose of a possession order) the COVID-19 arrears were not rent owing. Accordingly, the Tribunal made a possession order on 4 August 2021, which was to operate from 3 September 2021. On 3 September 2021, and subject to certain conditions, the Tribunal stayed the order until 4:15 pm on 30 September 2021, or until further order. At the hearing of the application for leave to appeal, the stay was extended until further order.

8 The applicant contends that the Tribunal erred in law, on the grounds set out in its application for leave to appeal. The grounds do not involve a challenge to the Tribunal's factual findings.

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5 *RFY v ACV (Residential Tenancies) (Corrected)* [2021] VCAT 865 (Quigley J and Deputy President Proctor) ('Reasons').

9 For the reasons that follow, we grant leave to appeal and allow the appeal. In our opinion, the Tribunal fell into error in finding that rental owing, although not recoverable as a monetary sum, fell outside the protection provided by s 542 and reg 14 for the purpose of a possession order and that, accordingly, there was no restraint on the operation of s 91ZM of the RTA and the other newly introduced enforcement provisions.

10 The Tribunal dealt with other issues which are not the subject of this application for leave to appeal. Further background facts will be referred to where necessary.

The legislation

Part 16 of the RTA

11 On 25 April 2020, pt 4.1 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (the 'Omnibus Act'), headed 'Temporary measures relating to residential tenancies', amended the RTA by inserting pt 16. Part 16 was headed 'COVID-19 temporary measures' and took effect on 29 March 2020. It was repealed on 28 March 2021.

12 Section 534(1) of the RTA set out the purpose and effect of pt 16 as follows:

> The purpose of this Part is to temporarily change the operation of this Act in response to the COVID-19 pandemic.

13 In summary, pt 16 suspended rent increases (s 539), enabled a tenant to apply for a rent reduction or payment plan (s 540), prohibited a landlord from giving a notice to vacate (s 544), provided for a Dispute Resolution Scheme (Division 8) and prohibited enforcement measures — termination and possession — if there was a breach for a COVID-19 reason. If there was a breach, but not for a COVID-19 reason, enforcement measures were restricted. An application to the Tribunal for an order for termination of a tenancy agreement was necessary and would only be made, where based on the failure to comply with a tenancy agreement, if the tenant could

comply without suffering severe hardship (s 549(2)(i)).

14 The newly enacted s 542 in pt 16 provided that:

> **No breach of duty or term if COVID-19 reason — tenancy agreement**
>
> (1) A tenant or landlord, who would have breached a term of a tenancy agreement or a relevant duty provision but for this section, is taken not to have breached the term or provision if the tenant or landlord was unable to comply with, or it was not reasonably practicable for the tenant or landlord to comply with, that term or provision because of a COVID-19 reason.
>
> (2) In this section— relevant duty provision means section 89 or any provision of Division 5 of Part 2.

15 A 'COVID-19 reason' was set out in s 537. The section is not only relevant to whether there is a breach under s 542 but also for the purpose of precluding an order terminating a tenancy agreement (s 549(6)). Section 537 provided:

> For the purposes of this Part, a person is 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—
>
> (a) the person is ill (whether or not the illness is COVID-19); 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.

16 Section 544 relevantly provided:

> **544 No notices to vacate — tenancy agreements**
>
> (1) A landlord or mortgagee of rented premises must not give a tenant a notice to vacate rented premises … and any notice purportedly given is of no effect.

17 Sections 548 and 549 were, relevantly, in the following terms:

> **548 Application to Tribunal for order to terminate**
>
> (1) Subject to the Residential Tenancies Dispute Resolution Scheme, a landlord under a tenancy agreement or a mortgagee in respect of rented premises may apply to the Tribunal for an order terminating the tenancy agreement.
>
> (2) A landlord must not make an application to the Tribunal to terminate a tenancy agreement under section 374.
>
> (3) A person may also make an application under section 232 if an order terminating the tenancy agreement under section 549 has been made in respect of the premises.
>
> **549 Tribunal may terminate tenancy agreement in certain circumstances**
>
> (1) On an application under section 548, the Tribunal may make an order terminating a tenancy agreement if satisfied—
>
> (a) as to any of the matters set out in subsection (2); and
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> …
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> (2) For the purposes of subsection (1), the matters are—
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> …
>
> (i) that the tenant has failed to comply with the tenant's obligations under the tenancy agreement or the [RTA], including by not paying rent, in circumstances where the tenant could comply with the obligations without suffering severe hardship.

18 Section 549 empowered the Tribunal to make an order terminating a tenancy agreement and a possession order if satisfied of the matters in sub-s (4), including that it was reasonable and proportionate to do so having regard to the interests of and impact on the landlord, the tenant, any co-tenants or other residents, and

neighbours who might be affected by the acts of the tenant. However, sub-s (6) provided:

> The Tribunal must not make an order under subsection (1) on the ground that the tenant has failed to comply with the tenant's obligations under the tenancy agreement or the [RTA], including by not paying rent, if the tenant is unable to comply with, or it is not reasonably practicable for the tenant to comply with, those obligations because of a COVID-19 reason.

19 Part 16 thereby made it impossible to evict a tenant with a COVID-19 reason for non-payment of rent.

20 A further protection was provided in div 7 of pt 16, which dealt with residential tenancies databases. Section 596(1) was in the following terms:

> A landlord or database operator must not list personal information about a person in a residential tenancy database under section 439E if—
>
> (a) the landlord or database operator would, but for this section, be entitled to list the personal information about the person on a database under section 439E; and
>
> (b) the person has only breached the tenancy agreement because of the non-payment of rent; and
>
> (c) the person was unable to comply with the person's obligations to pay the rent because of a COVID-19 reason.

21 In addition, pt 16 established the Residential Tenancies Dispute Resolution Scheme with the intention that landlords and tenants would negotiate changes to tenancy agreements in the difficult circumstances presented by the pandemic and extended lockdowns.

22 The first reading speech[6] for the *COVID-19 Omnibus (Emergency Measures) Bill 2020*, which became the Omnibus Act, included the following:

> **Residential tenancy reforms**
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> The Bill provides for amendments to the [RTA] and related legislation to give effect to the decision by the National Cabinet, announced on 29 March 2020, to declare a temporary moratorium intended to prevent eviction for non-payment of rent where residential tenancies are impacted by severe rental

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6 The speech was ordered to be read a second time immediately after the first reading.

distress due to the COVID-19 pandemic.

The Bill will amend the [RTA] to:

- introduce an alternative termination process to give effect to National Cabinet's decision by ensuring that tenancy agreements are only terminated in specified circumstances during the operation of the declared moratorium;

- suspend rent increases, permit orders for the reduction of rent or payment plans for a specified period, and provide for tenants to end tenancy agreements early without incurring lease break fees and other compensation in certain circumstances;

- establish the office of the Chief Dispute Resolution Officer (CDRO) for resolving disputes arising out of the declared moratorium, and provide for the Director of Consumer Affairs Victoria to appoint an individual to that office; and

- insert an emergency regulation-making power into the RTA to enable the Governor in Council to make relevant regulations, including to prescribe a scheme for the purposes of resolving disputes during the declared moratorium (the Residential Tenancies Dispute Resolution Scheme) and to confer upon and clarify relevant powers of [the Tribunal] and the CDRO, including in relation to the mediation or conciliation of disputes under the [RTA] and the ability to make binding orders on parties to eligible disputes.

Finally, in light of the COVID-19 crisis, the Bill will defer the general commencement of the *Residential Tenancies Amendment Act 2018* (RT Amendment Act) to allow sufficient time for rental stakeholders to prepare for and deal with the implementation of those reforms, but will also bring forward a crucial amendment contained in that Act to protect victims of family violence.

Right not to not be deprived of property other than in accordance with law

As a result of the declared moratorium, the Bill provides for an alternative termination process for tenancy agreements (as well as the other tenure types regulated under the RT Act including residency rights and site agreements). It is now intended that tenancies etc. may only be terminated by VCAT order in certain limited circumstances as specified in the Bill (including where matters of public safety, violence or danger are established, or if a tenant fails to comply with their obligations, such as by not paying rent, in circumstances where they could comply with the obligations without suffering severe hardship). A tenancy may also be terminated by mutual consent, or in certain circumstances following notice by a tenant. The existing provisions under the [RTA] that provide for termination in circumstances of rental arrears will not apply and breaches of agreements or statutory duties, if caused by reasons connected with COVID-19, will not be taken to be breaches during the declared moratorium.

These short-term amendments will affect the proprietary rights and interests of parties to existing agreements. In particular, it is anticipated that the amendments may result in the reduction of rental income for landlords,

> rooming house owners, caravan and caravan-park owners, site owners and specialist disability accommodation providers. They will also be prevented from taking certain steps in [the Tribunal] to enforce otherwise valid contractual and statutory causes of action to recover possession of their property in the case of non-payment of rent.
>
> To the extent that an accrued cause of action may constitute property for the purpose of the Charter, the right not to be deprived of property in section 20 is also arguably engaged by the Bill's suspension of existing notices to vacate and suspension of the alternative procedure for [the Tribunal] to order possession for rent arrears (under existing section 335 of the [RTA]) during the declared moratorium. Because the declared moratorium commenced on 29 March 2020, these provisions have a limited retrospective operation.
>
> I consider any deprivation of property resulting from these amendments to be in accordance with law. These temporary changes to an already significantly regulated sector are provided for by statute, and are clearly and precisely set out in the Bill. Even though the provisions have a narrow field of retrospective operation, I consider that any deprivation they affect is nevertheless in accordance with law
>
> I note also that these amendments are being implemented in the context of an unprecedented public health emergency, in order to mitigate the effects of large-scale rental stress. The scope of the proprietary interests affected by the Bill (being highly specific statutory limitations on the operation of contractual rights and existing statutory mechanisms) is limited and of a temporary duration. The purpose of suspending existing notices to vacate from the commencement of the declared moratorium (and, potentially, extinguishing existing possession order applications that may be before [the Tribunal]) is to ensure the fair and effective operation of the alternative termination process during the declared moratorium.
>
> I am also satisfied that the regulation-making power provided in the Bill will not limit the right in section 20 of the Charter, although I acknowledge in some circumstances regulations made in accordance with this part of the Bill may authorise the deprivation of property. The power to make regulations only arises for certain specified purposes directly relevant to the effective operation of the declared moratorium and the resolution of resulting disputes, and may only be exercised during that time. Further, in line with normal *Subordinate Legislation Act 1994* requirements, the responsible Minister will be required to consider the impact of the regulations on Charter rights when making recommendations to the Governor in Council.[7]

23 The version of the second reading speech for the Bill for the Omnibus Act that was published in *Hansard* included the following:

> *Reforms to support residential tenants and landlords*
>
> The Bill will implement a broad moratorium on residential tenancy evictions,

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7 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 2020, 1191–2 (Daniel Andrews, Premier).

subject to specified exceptions, such as where a tenant is wilfully causing serious damage to premises or is using them for an illegal purpose. While the Government's expectation is that tenants will continue to meet their rental obligations where possible, a tenant may not be evicted for non-payment of rent where they are experiencing financial distress during the moratorium. The moratorium on evictions will be for the six-month period from 29 March 2020 to 26 September 2020. The moratorium recognises the importance of sustaining tenancies and giving tenants and landlords the ability to manage the impacts of COVID-19.

The Bill will amend the [RTA] to include a targeted regulation-making power that will allow the Governor in Council, on recommendation of the responsible Minister, to implement the principles on the residential tenancy moratorium agreed to by National Cabinet. Specifically, the regulation-making power will permit the Governor in Council (acting on the Minister's recommendation) to modify provisions relating to the termination of a tenancy and to enable the establishment of any administrative process to support dispute resolution and appeals during the moratorium.

The regulation-making power will be subject to important limitations. For example the recommendation to the Governor in Council may only:

- override limited Acts and laws related to residential tenancy matters; and

- be made where reasonably required to respond to the COVID-19 pandemic.

…

Rent increases will be suspended during the moratorium and, during this period, tenants cannot be listed on a residential tenancy database for a breach that is related to the impacts of COVID-19. Residential tenancies disputes, including eviction matters, will be referred to a 'single front door' administered by Consumer Affairs Victoria, where landlords and tenants will receive information and support to reach agreements, primarily to reduce rent. Landlords and tenants will be expected to negotiate in good faith. Where parties need additional support, they will be referred to a new specialist mediation service to be provided through the Dispute Settlement Centre of Victoria.

The mediation service will have the ability to make binding orders. If the order is breached, the matter will be referred to the [Tribunal] for hearing. [The Tribunal] will consider the order and the action of the parties since it was made and then determine the dispute accordingly.[8]

24 We note that pt 16 was intended to be repealed six months after its

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[8] Victoria, *Parliamentary Debates*, Legislative Assembly, 23 April 2020, 1197–8 (Daniel Andrews, Premier).

commencement.[9] Its operation, however, was extended to 28 March 2021 by the *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (the 'Extension Act').

25 The first reading speech for the Bill which became the Extension Act included:

> **Extension of Residential Tenancy and Commercial Tenancy Support Measures**
>
> The Bill amends the repeal date of Part 16 of the RTA to extend the operation of the temporary measures introduced by Omnibus Act to 28 March 2021, with an option for further extension to no later than 26 April 2021 if required. These measures are due to expire on 25 October 2020.
>
> The Bill will extend the operation of Part 16 of the RTA which:
>
> - implements a broad moratorium on residential tenancy evictions, subject to specified exceptions, which limits evictions by VCAT order to specified circumstances where it is reasonable and proportionate to terminate the tenancy;
>
> - suspends rent increases, permits orders for the reduction of rent or payment plans for a specified period, and provides for tenants to end tenancy agreements early without incurring lease break fees and other compensation in certain circumstances;
>
> - establishes the office of the Chief Dispute Resolution Officer (CDRO) for resolving disputes arising out of the declared moratorium, and provides for the Director of Consumer Affairs Victoria to appoint an individual to that office; and
>
> - inserts an emergency regulation-making power into the RTA to enable the Governor in Council to make relevant regulations, including to prescribe a scheme for the purposes of resolving disputes during the declared moratorium (the Residential Tenancies Dispute Resolution Scheme) and to confer upon and clarify relevant powers of VCAT and the CDRO, including in relation to the mediation or conciliation of disputes under the RTA and the ability to make binding orders on parties to eligible disputes. The Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020 (the RT Regulations) made under this power will be extended in line with the operation of Part 16.
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> …
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> As outlined in the Statement of Compatibility for the Omnibus Act, the emergency measures included in the Omnibus Act engaged a range of Charter rights. In each instance, I was of the view that any limitation of rights

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9 *COVID-19 Omnibus (Emergency Measures) Act 2000* s 615.

was proportionate and justifiable in the circumstances, which included the need to protect the life and health of Victorians and ensure the ongoing safe and efficient delivery of public services during the COVID-19 pandemic.

Any limitation of rights by the emergency measures in the Omnibus Act was further justifiable due to their temporary nature. These measures were to expire on 25 October 2020, six months from their commencement. I hoped and expected that the measures would not be needed beyond this time. Unfortunately, due to the resurgence of COVID-19 in Victoria, the circumstances that gave rise to the need for the emergency measures in the Omnibus Act continue, and therefore so does their justification.

It remains difficult to predict how long the emergency measures will be needed. The Bill extends these measures for up to six months, until 26 April 2021. This strikes the balance of being fair for both tenants and landlords during the uncertainty of the COVID-19 pandemic. It provides enough time to address the COVID-19 pandemic whilst not extending the measures, and any limitation of human rights, beyond the point that is reasonably justifiable. Therefore, where the Bill temporarily extends emergency measures provided for by the Omnibus Act, I am of the view that, for the reasons outlined in the Statement of Compatibility for the Omnibus Act, these reforms are compatible with the Charter.[10]

26 The version of the second reading speech for the Extension Act published in *Hansard* stated:

Extension of reforms to support residential tenants and landlords

The Bill will extend the support measures for residential tenants and landlords introduced in April this year. These measures include a broad moratorium on residential tenancy evictions, subject to specified exceptions, which limits evictions by VCAT order to specified circumstances where it is reasonable and proportionate to terminate the tenancy; a freeze on rental increases for all residential tenancies; and the establishment of temporary residential tenancies dispute resolution scheme.

The COVID-19 pandemic has significantly disrupted the rental market and there is an ongoing need to support households experiencing rental stress, which will continue after the planned six month duration of the current support measures. The economic conditions that jeopardise tenancies are expected to continue regardless of the continuation of Commonwealth financial support for Victorians. In addition, the public health reasons for limiting unnecessary moves and evictions remain.

The Government had hoped and expected that the temporary measures would not be needed beyond their original intended timeframe.

Unfortunately, due to the resurgence of COVID-19 in Victoria, the circumstances that gave rise to the need for the emergency measures in the

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[10] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 2020, 2005–6 (Melissa Horne).

Omnibus Act continue. As the pandemic has progressed, we have seen more people facing housing and financial stress, with renters particularly hard hit to due to a convergence of factors including their age and employment conditions.

It remains difficult to predict how long these temporary measures will be needed. As announced in August, it was originally envisaged that these measures would be extended initially for a period of just over two months to 31 December 2020. Reflecting the dynamic and uncertain nature of the pandemic and the scale of the subsequent economic recovery, an extension for approximately five months to 28 March 2021 is now proposed. This will provide housing stability in the short term as the State continues to combat the public health crisis — noting the significant risks to public health caused by homelessness in this context — and will provide ongoing support over a more realistic and reasonable economic recovery period.

The extension to 28 March 2021, acknowledges economic recovery will may not be a quick and that vulnerable cohorts, such as renters, will need continued support over a longer horizon as we to move towards a COVID normal. The Bill will also provide a mechanism to extend the measures further to no later than 26 April 2021 if required. The eviction moratoria and freeze on rental increases will continue unchanged. While it is Government's expectation that tenants will continue to meet their rental obligations where possible, a tenant may not be evicted for non-payment of rent where they are experiencing financial distress during the moratorium. However, evictions will still be possible in specified circumstances, subject also to whether it is reasonable and proportionate for eviction to proceed. The continuation of the moratorium recognises the importance of sustaining tenancies, giving tenants and landlords the ability to manage the ongoing impacts of COVID-19. Rent increases will remain suspended during the extension, during this period, tenants cannot be listed on a residential tenancy database for a breach related to the impacts of COVID-19.

The current residential tenancies dispute resolution scheme will also be extended until 28 March 2021. Residential tenancies disputes, including eviction matters, will continue to be referred to a 'single front door' administered by Consumer Affairs Victoria where landlords and tenants will receive information and support to reach agreements, primarily to reduce rent. As of 23 August 2020, the front door service provided by Consumer Affairs Victoria has been contacted more than 79,000 times, with over 97 per cent of those matters closed or referred to [VCAT].

Thousands of Victorian tenants and landlords have also mutually agreed to a rent reduction, with more than 28,000 agreements for reduced rent registered with Consumer Affairs Victoria as of 23 August 2020

The continuation of the dispute resolution scheme and the associated rent reduction processes to 28 March 2021 will ensure that renters have the ability to negotiate and enter into rent reduction agreements to give them financial relief and housing stability in the medium term as the State moves toward economic recovery. Financial supports for landlords to offset reduced rent will also be continued and increased as previously announced.

Where parties need additional support, they will be referred to the to the

> specialist mediation service provided through the Dispute Settlement Centre of Victoria. The mediation service has the ability to make binding orders. If the order is breached, the matter will be referred to the VCAT for hearing. VCAT will consider the order and the action of the parties since it was made and then determine the dispute accordingly.[11]

Regulation 14

27 Regulation 14 was introduced by the *COVID-19 Omnibus (Emergency Measures) Transitional Regulations 2021.* Regulation 14 provides that, notwithstanding the repeal of pt 16, s 542 was to have continued effect in the following way:

> **No breach of duty or term if COVID-19 reason — tenancy agreement**
>
> Despite the repeal of section 542 of the [RTA], a tenant, renter, landlord or residential rental provider who would have breached a term of a tenancy agreement or a relevant duty provision but for section 542 (as in force immediately before its repeal) during the period that section was in operation, is taken, on and after that repeal, not to have breached the term or provision during that period if the tenant, renter, landlord or residential renter provider (as the case may be) was unable to comply with, or it was not reasonably practicable for that entity to comply with, that term or provision because of a COVID-19 reason.

28 Regulation 14 therefore extends the protection that was conferred by s 542 during the period it was in force. It does not extend s 542 to make breaches of tenancy agreements that occur *after* the repeal of s 542 non-breaches, but continues to deem breaches that occurred during the life of s 542 not to be breaches of the relevant tenancy agreement.

29 In this case, the applicant's non-payment of rent, comprising the COVID-19 arrears, occurred during the time that s 542 was in force, that is, during the Emergency Period and not during the Transition Period.

The new regime and s 91ZM

30 On 29 March 2021, the *Residential Tenancies Amendment Act 2018* came into force, amending and updating significant parts of the RTA (for convenience, we shall

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[11] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 2020, 2008–9 (Melissa Horne).

refer to these amendments as the 'new regime'). It inserted s 91ZM in the RTA, which provides for a landlord (now referred to as a 'residential rental provider') to give a tenant (now referred to as a 'renter')[12] a notice to vacate due to the non-payment of rent. Specifically in respect of non-payment of rent, the Tribunal's powers to make a possession order are set out in a number of interlocking provisions: ss 91ZM, 330, 330A and 331. It may do so if, among other matters, the landlord was entitled to give a notice to vacate and it is reasonable and proportionate to make a possession order. Section 330A sets out the factors to which the Tribunal must have regard in assessing whether it is reasonable and proportionate to make a possession order.

31 Termination of a tenancy for repeated non-payment of rent is now regulated by a more structured process. Pursuant to s 91ZM, tenants who receive each of the first four notices to vacate for being 14 days or more in arrears in any 12 month period risk being evicted unless they can pay the arrears, satisfy the terms of a payment plan (where such a plan is imposed by the Tribunal), or demonstrate that it would not otherwise be reasonable or proportionate to end the rental relationship. On the fifth occasion of such a notice, the options of avoiding eviction by payment of the rent or satisfying the terms of a payment plan are not available.

32 The respondents' application for a possession order was made under s 91ZM of the RTA. It was based on a notice to vacate given under the same section, which relevantly provides:

> **91ZM Non-payment of rent**
>
> (1) On the first, second, third and fourth occasion of non-payment of rent—
>
> (a) the [landlord] may give a notice to vacate under this section to the [tenant]; and
>
> (b) if the [tenant] pays the unpaid rent on or before the termination date in the notice under paragraph (a), the notice is of no effect; and

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12 For ease of reference, we shall continue to refer to 'landlords' and 'tenants'.

(c) if the [tenant] does not pay the unpaid rent on or before the termination date in the notice under paragraph (a), the [landlord] may apply to the Tribunal for a possession order; and

(d) on an application for a possession order, if the Tribunal has made an assessment under section 331 in respect of the application, the Tribunal —

(i) may place the [tenant] on a payment plan and adjourn the application for the possession order; or

(ii) may make a possession order.

(2) On the fifth occasion of non-payment of rent—

(a) the [landlord] may give a notice to vacate under this section to the [tenant]; and

(b) the notice given under paragraph (a) remains in effect despite the [tenant] paying the unpaid rent on or before the termination date in the notice; and

(c) the [landlord] may apply to the Tribunal for a possession order after the expiry of the notice under paragraph (a); and

(d) section 331 does not apply to an application under paragraph (c); and

(e) on an application under paragraph (c), the Tribunal may make a possession order.

(3) If the Tribunal places a [tenant] on a payment plan under subsection (1)(d)(i) and the [tenant] complies with the terms of the payment plan and has paid the unpaid rent—

(a) the Tribunal is to dismiss the application for the possession order; and

(b) the residential rental agreement continues despite any notice to vacate that has already been given to the [tenant].

(4) If the Tribunal places a [tenant] on a payment plan under subsection (1)(d)(i) and the [tenant] does not comply with the terms of the payment plan, the Tribunal may make a possession order.

(5) A notice to vacate given under this section must specify a termination date that is not less than 14 days after the date on which the notice is given.

(6) For the purposes of this section, a separate notice to vacate must be given for each separate occasion of non-payment of rent.

(7) In this section—

occasion of non-payment of rent means an occasion where the [tenant]

owes at least 14 days rent within a 12 month period of the residential rental agreement, but does not include any amount owing under a payment plan ordered by the Tribunal;

***12 month period means*—**

(a) the first 12 month period of the residential rental agreement that begins on the first day of the residential rental agreement; or

(b) the second 12 month period of the residential rental agreement, if any, that begins on the day after the end of the first 12 month period of the residential rental agreement; or

(c) any consecutive 12 month period of the residential rental agreement, if any, that begins immediately after the end of the first or a subsequent 12 month period of the residential rental agreement.

33 Section 330 of the RTA relevantly provides:

330 Order of Tribunal

(1) The Tribunal must make a possession order requiring a [tenant] … to vacate rented premises … on the day specified in the order if the Tribunal is satisfied—

(a) in the case of an application where notice to vacate has been given, that—

(i) the [landlord] … was entitled to give the notice; and

(ii) the notice has not been withdrawn; and

…

(c) that the [landlord] … has complied with section 72 of the *Victorian Civil and Administrative Tribunal Act 1998*; and

(d) that the [tenant] … is still in possession of the rented premises … after the termination date specified in the notice to vacate …; and

(f) that in the circumstances of the particular application, it is reasonable and proportionate having regard to section 330A, to make a possession order taking into account the interests of, and the impact on, each of the following in making the possession order—

(i) the [landlord] … ;

(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 or behaviour of the [tenant] … to whom the notice to vacate was given.

34 The new s330(1)(f) of the RTA refers to the new s 330A, which operates with respect to all applications for possession. It makes the requirement in s 330 that the Tribunal 'must make a possession order' subject to the Tribunal determining whether to do so is reasonable and proportionate, with reference to the criteria set out in s 330A:

330A What is reasonable and proportionate?

For the purposes of determining whether it is reasonable and proportionate to make a possession order, the Tribunal must have regard to the following —

(a) the nature, frequency and duration of the conduct of the [tenant], resident or site tenant which led to the notice to vacate being given, including whether the conduct is a recurring breach of obligations under a residential rental agreement, residency right or site agreement;

(b) whether the breach is trivial;

(c) whether the breach was caused by the conduct of any person other than the [tenant], resident or site tenant;

(d) whether the [tenant], resident or site tenant has made an application for a family violence safety notice, family violence intervention order, 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 the Tribunal considers relevant;

(e) whether the breach has been remedied as far as is practicable;

(f) whether the [tenant], resident or site tenant has, or will soon have, capacity to remedy the breach and comply with any obligations under the residential rental agreement, residency right or site agreement, as the case requires;

(g) the effect of the conduct of the [tenant], resident or site tenant on others as a [tenant], resident or site tenant;

(h) whether any other order or course of action is reasonably available

instead of making a possession order;

(i) as the case requires, the behaviour of the [landlord], the provider's agent, the rooming house operator, the caravan park owner, the caravan owner or the site owner;

(j) any other matter the Tribunal considers relevant.

35 Section 331 of the RTA relevantly provides:

331 Order to be dismissed or adjourned in certain circumstances

(1) Subject to subsection (4), the Tribunal may dismiss or adjourn an application for a possession order if—

(a) the application is supported with—

(i) in the case of rented premises, a notice to vacate given under section 91ZM and…

(b) the Tribunal considers that satisfactory arrangements have been or can be made to avoid financial loss to the [landlord] …

(1A) For the purposes of subsection (1)(b), the Tribunal may adjourn the application and—

(a) refer the [tenant] to a financial counselling service or other prescribed services; and

(b) require the service to conduct an assessment of the person's ability to enter into and comply with a payment plan in relation to any outstanding arrears of rent.

(1B) The Tribunal may require the financial counselling service or other prescribed service to provide a report to the Tribunal on the assessment of the ability of the [tenant] to enter into and comply with a payment plan.

(1C) A report under subsection (1B)—

(a) may be made orally or in writing; and

(b) must be made within the time required by the Tribunal.

(2) An adjournment may be on any terms the Tribunal thinks fit, including an order that the [tenant] undergoes an assessment and enters into and complies with a payment plan for the payment of any arrears of rent.

(3) On the resumption of an adjourned hearing, the Tribunal—

(a) may make a possession order if the [tenant] or site tenant has continued to accrue arrears of rent during the adjournment period; and

(b) must dismiss the application if the [tenant] or site tenant—

(i) has paid all the arrears which were the subject of the original application; and

(ii) has accrued no further arrears of rent from the time of the application to the date of resumption of the adjourned hearing.

(4) The Tribunal must dismiss an application for a possession order which is supported with a notice to vacate given under section 91ZM if—

(a) the arrears of rent have been paid by the [tenant] after the [tenant] was given the notice to vacate but before the termination date specified in the notice; and

(b) the notice to vacate is the first, second, third or fourth notice to vacate under section 91ZM given to the [tenant] within a period of 12 months.

Relevant principles of statutory interpretation

36 This appeal involves difficult questions of statutory construction, given the overlapping statutory regimes that are in play: the RTA in its March 2020 form; the emergency amending legislation embodied in the Omnibus Act and the Extension Act; and the new regime, which was introduced at the commencement of the Transition Period. Regulation 14 generates the central complexity in this case in purporting to carry the effect of one part of the repealed emergency legislation forward into the new regime.

37 However, the applicable principles of statutory construction are relatively well established.

38 In *SZTAL v Minister for Immigration and Border Protection*, the High Court (Kiefel CJ, Nettle and Gordon JJ) emphasised the importance of text, context and purpose:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction.

> Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[13]

39 In *Project Blue Sky Inc v Australian Broadcasting Authority*,[14] McHugh, Gummow, Kirby and Hayne JJ also gave guidance with respect to the proper construction of the statutory text, explaining that the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute and emphasising that the meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.[15] Their Honours continued:

> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[16]

40 Section 35 of the *Interpretation of Legislation Act 1984* further expressly provides that in the interpretation of the provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object.

Tribunal's Reasons

41 We have refrained from setting out the facts in detail. There are no challenges to the factual findings made by the Tribunal. The application for leave to appeal relates to, as it must, the legal effect of the legislation and, in particular, whether s 542 and reg 14 restrict the operation of s 91ZM, so far as it provides the gateway to a possession order.

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13 (2017) 262 CLR 362, 368 [14] (citations omitted); [2017] HCA 34.

14 (1998) 194 CLR 355; [1998] HCA 28.

15 Ibid 381 [69] (citations omitted).

16 Ibid 381–2 [70].

42 The Tribunal held that the applicant was unable to comply with the terms of the Tenancy Agreement, in relation to payment of rent, because of a COVID-19 reason. There is no appeal against this finding. The Tribunal said:

> We accept the [applicant's] comprehensive evidence that she was unable to pay the full rent because of three of the four COVID-19 reasons, where only one of the reasons is required to invoke Regulation 14:
>
> a) ill health … , not being COVID-19, (s 537(a));
>
> b) her ability to earn income was severely impacted by the COVID lockdowns health directions, (s 537(b)); and
>
> c) she was unable to comply with, or it is not reasonably practicable for the person to comply with her obligation to pay the full rent without suffering severe hardship, (s 537(c)).
>
> We accept the [applicant] has a long history of punctual full payment of rent. The change from early 2020 was due to one factor: the pandemic and its impact on her health and her ability to earn income. We accept she gave priority to paying as much rent as she could at the expense of other growing debts.[17]

43 Notwithstanding this finding and the continuation by reg 14 of the protection that had been conferred by s 542 until 25 October 2021, the Tribunal held that the respondents were nonetheless entitled to give the notice to vacate to the applicant because of the operation of s 91ZM, which, it held, was unaffected by s 542 and reg 14. The respondents could rely, for the purposes of obtaining a possession order, on the failure to pay rent during the Emergency Period. Such rent was owing, continued to be owing and fell outside the protection provided by s 542 and reg 14, essentially because there was no intention to extinguish the amount owing and, as the protections against termination and possession in pt 16 had been repealed (ss 548 and 549 referred to below), s 91ZM was engaged, solely for the purpose of a possession order, free from such protection.

44 As discussed, s 91ZM, dealing with non-payment of rent, came into operation on 29 March 2021. The Tribunal held, in the case of non-payment of rent on the first, second, third or fourth occasions, that the path to making a possession order was

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17 Reasons [127]–[128].

from s 91ZM to ss 330, 330A and 331. Section 330 provides that the Tribunal must make a possession order if it is satisfied of various matters, mainly of a procedural nature, but also that it is 'in the circumstances … reasonable and proportionate' to make a possession order. Section 330A obliges the Tribunal to have regard to numerous matters in making such determination. Section 331 provides for a range of orders that may be made by the Tribunal.

45 It is necessary to track these stages in order to identify the reasoning of the Tribunal.

46 In relation to s 91ZM, which enables a tenant to apply for a possession order in the case of non-payment of rent, the Tribunal held that reg 14, in retaining s 542, did not operate to restrict the operation of s 91ZM and in particular operated 'such that the [applicant] did not owe at least 14 days rent to the [respondents]'.[18]

47 After referring to the text and context of the relevant provisions and the authorities, the Tribunal concluded as follows:

> We do not accept that section 542 operates such that rent is not owed, as relevant to the giving of a [notice to vacate] under section 91ZM, an essential part of the process by which a [landlord] can obtain a possession order based on rent arrears.
>
> First, if Parliament had intended to continue the protection offered by section 548 and 549, it would not have repealed them. We do not accept that Parliament intended that, with their repeal, section 542 would expand in scope to, in effect, replace those sections when it came to applications for possession based on unpaid rent made from 29 March 2021.
>
> Second, the phrases, 'taken not to have breached the term or provision' and, 'taken, on and after that repeal, not to have breached the term or provision during that period' in Regulation 14 and section 542 do not lead to it being 'irresistibly clear' that Parliament intended the result that the [tenant] does not owe the rent to the [landlord] and so a notice to vacate not be given.
>
> This is in context of the above described section 39 of the [RTA] which says for the purposes of the [RTA], rent under a residential rental agreement accrues from day to day and, subject to section 91ZH, is recoverable or refundable on that basis.
>
> Regulation 14 and section 542 did not provide 'irresistible clearness'

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18 Reasons [148].

> supporting the outcome submitted by the [tenant]; that the [tenant] was taken not to owe the relevant rent to the [landlord]. Rather, what the provisions did achieve in our view, was the protection from eviction for a breach, not involving rent arrears (e.g. the unreported VCAT decision cited above). This construction of the provisions provides the rationale for the Scheme, which has now lapsed.[19]

48 Sections 548 and 549 of the RTA, in operation during the Emergency Period, are in the following terms:

> **548 Application to Tribunal for order to terminate**
>
> (1) Subject to the Residential Tenancies Dispute Resolution Scheme, a landlord under a tenancy agreement or a mortgagee in respect of rented premises may apply to the Tribunal for an order terminating the tenancy agreement.
>
> (2) A landlord must not make an application to the Tribunal to terminate a tenancy agreement under section 374.
>
> (3) A person may also make an application under section 232 if an order terminating the tenancy agreement under section 549 has been made in respect of the premises.
>
> **549 Tribunal may terminate tenancy agreement in certain circumstances**
>
> (1) On an application under section 548, the Tribunal may make an order terminating a tenancy agreement if satisfied—
>
> (a) as to any of the matters set out in subsection (2); and
>
> …
>
> (2) For the purposes of subsection (1), the matters are—
>
> …
>
> (i) that the tenant has failed to comply with the tenant's obligations under the tenancy agreement or the [RTA], including by not paying rent, in circumstances where the tenant could comply with the obligations without suffering severe hardship; …

49 In relation to ss 91ZM and 330, the Tribunal was satisfied that the notice to vacate was validly served, the termination date was accurate, the applicant failed to pay the unpaid rent, the application to the Tribunal for a possession order was made within time, the notice to vacate was not withdrawn, the application to the Tribunal

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[19] Reasons [173]–[177].

was properly served and the tenant was still in possession of the rented premises.

50 The Tribunal then indicated that it would proceed as follows:

> At this point the path of reasoning takes us to section 331 and the issue of whether the Tribunal can be satisfied that satisfactory arrangements can be made to avoid financial loss to the [landlords], before proceeding to section 330(f) and whether it is reasonable and proportionate to make a possession order having regard to the criteria at section 330A.[20]

51 Having found that the financial loss to the respondents was $13,872.45, the Tribunal was not satisfied that satisfactory arrangements could be made to avoid financial loss to the respondents. The Tribunal said:

> The financial loss to the [respondents] on 30 June 2021 was $13,872.45. The [applicant] proposed repayment of arrears by repayments of $50 a week (if not in lockdown) and $10 a week (if in lockdown). Under s 331(1)(b), we do not consider satisfactory arrangements can be made to avoid financial loss to the [respondents].
>
> Th[e] proposed payment plan suggested here at repayments of $50 a week would take 277 weeks, or over five years.
>
> It has been the long held approach of the Tribunal that any repayment plan has to be a reasonable one in the circumstances and that repayments on a payment plan be limited in time and amount to enable the debt to be cleared within a practical and achievable timeframe.
>
> This approach aims to avoid financial loss to [landlords] and provide some certainty of resolution of the debt for both parties. The reasonable timeframe in which rent arrears were to be repaid with respect to private tenancies (as opposed to public and community housing) was often considered in months and well within a year.
>
> It is relatively soon after the Emergency Period, where [landlords] are giving [notices to vacate] and seeking possession orders and where the bulk of arrears have arisen during the Emergency Period. [Tenants] may now be able to reliably make substantial ongoing extra payments such that a tenancy is viable. Given the close proximity to the Emergency Period and the recent lockdown in July 2021, it may be reasonable to order a repayment plan to stretch over a year or perhaps more, but not likely five years.[21]

52 There is no appeal against this finding.

53 In relation to the criteria in s 330A and whether it was reasonable and

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20 Reasons [193].

21 Reasons [222]–[225].

proportionate to make a possession order, the Tribunal said:

> a) with no criticism of the [applicant] intended, she has been unable to pay the full rent owed during the Emergency Period due to financial hardship and has breached her obligation to pay the agreed rent;
>
> b) with over $13,872 owed, the breach is not trivial;
>
> c) the breach is not caused by the conduct of any other person;
>
> d) there were no issues of family violence or personal violence;
>
> e) the [applicant] remedied the potential breach of the obligation to pay the full rent insofar as she was able to;
>
> f) she does not within a reasonable timeframe have the ability to remedy the breach by paying the unpaid rent;
>
> g) there is nothing in the conduct of the [applicant] to criticise here, understanding the challenges she has faced during the pandemic and continues to face;
>
> h) in our view there is no other order or cause of action that is reasonably available instead of making a possession order;
>
> i) concerning the behaviour of the [respondents] and the [real estate agent], we have discussed above that it was unfortunate that the [applicant] did not receive notice that the [respondents] had not agreed to the requested rent reduction until 21 December 2020. However, with the [applicant] having the ability to contact the [real estate agent] to ask why she had not received a response, in the context of the pandemic, we do not view this criterion as materially against making a possession order; and
>
> j) concerning any other matters the Tribunal considers relevant (330A(j)), for completeness, we did not accept there was a rental reduction agreement that the rent be halved. We are also unable to accept that the particular hardship faced by the [applicant] in the circumstances here is a sufficient basis under the relevant provisions of the [RTA] to not make a possession order. Hardship of itself is not a specified criteria and we have taken the circumstances advanced to us into account.[22]

54 In the result, a possession order was made.

Proposed grounds of appeal

55 The proposed grounds of appeal are as follows:

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[22] Reasons [228].

1. The Tribunal erred in law in construing ss 537 and 542 (now repealed) of the [RTA] and/or [reg] 14 of the Regulations as not providing for protection from eviction of a [tenant] by reason of arrears of rental that the [tenant] was unable to pay for a COVID- 19 reason as defined by s 537 of the (now repealed) [RTA] between 29 March 2020 and 28 March 2021.

2. The Tribunal erred in law in concluding that on the proper construction of ss 91ZM, 537 and 542 of the [RTA] and/or [reg] 14 of the Regulations, the arrears of rental for the purposes of the notice to vacate served by the respondents on the applicant on 1 April 2021 totalled $12,587.10 (which included the COVID-19 arrears), rather than $274.14 (being the rental due after the deduction of the COVID-19 arrears), and in then concluding that accordingly the notice to vacate was validly given under s 91ZM of the [RTA].

3. The Tribunal erred in law in concluding that for the purposes of s 91ZM of the [RTA], ss 537 and 542 of the [RTA] and [reg] 14 of the Regulations did not apply to the COVID-19 arrears.

4. Alternatively to Grounds 1–3, the Tribunal:

   (a) having concluded that s 542 of the [RTA] and [reg] 14 of the Regulations operated as a defence to [tenants] to applications under the [RTA] for compensation or a monetary order where there is a requirement to prove or rely on a breach of the tenancy agreement which was due to a COVID-19 reason;

   (b) erred in law in not taking into account that defence, and its conclusion for the purposes of compensation or a monetary order that the non-payment of the COVID-19 arrears was not a breach of the tenancy agreement or rental owing, for the purposes of the exercise of its discretion under ss 330, 330A and 331 of the [RTA].

Proposed grounds 1–3

56 It is convenient to deal with these grounds together as they broadly raise the same legal issue, that is, whether, notwithstanding the repeal of ss 548 and 549, the protection provided by s 542 (continued by reg 14), restricts and controls the operation of s 91ZM and consequential provisions so far as the COVID-19 arrears are concerned.

Applicant's submissions

57 The gravamen of the applicant's case is that the Tribunal, having found that she was unable to pay the COVID-19 arrears for a COVID-19 reason, was required

by s 542 and reg 14 to treat the non-payment of rent as not being a breach of the Tenancy Agreement and the COVID-19 arrears as not owing for the purpose of s 91ZM.

58 The applicant submits that the Tribunal erred in determining that s 542 'did not have any role in protecting tenants from eviction'.[23] According to the applicant, there was no basis for the exclusion of COVID-19 rental arrears from the operation of s 542 to be found in the text, context and purpose of pt 16 or s 542.

59 Rather, the applicant submits, each of the text, context and purpose of pt 16 strongly supports the proposition that s 542 and reg 14 protect a tenant against eviction for non-payment of rent during the Emergency because they provide that there has been no breach of the tenant's obligations under a tenancy agreement.

60 In respect of text, the applicant points to the application of s 542 to 'a term of a tenancy agreement', which means the section operates in respect of any term, including non-payment of rent.

61 In terms of statutory context, the applicant says that ss 537 and 542 operate in circumstances where there is a breach of a term of a tenancy agreement because of a COVID-19 reason. In contrast, the other provisions in div 2 of pt 16 do not depend upon a COVID-19 reason or breach of a tenancy agreement as a condition precedent to the operation of those provisions.

62 Finally, the purpose of pt 16, according to the applicant, was to temporarily change the operation of the RTA in response to the COVID-19 pandemic. The applicant points to statements by the Premier to the effect that tenants may not be evicted for non-payment of rent because of financial distress during the moratorium. According to the applicant, there is no clearer statement of the intention by Parliament to alter the common law or statutory entitlements of landlords than pt 16, and in particular ss 534, 537 and 542.

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[23] Reasons [168].

63 The applicant submits that the Tribunal erred in treating ss 548 and 549 as the sole basis upon which tenants were to be protected from eviction during the Emergency Period. According to the applicant, ss 548 and 549 had separate and distinct roles to s 542. The former sections, it is submitted, provided a mechanism that enabled a landlord to seek a possession order during the Emergency Period in circumstances that did not depend on a breach for a COVID-19 reason. In contrast, s 542 operated, it was submitted, to treat a breach that could give rise to a notice to vacate as not being able to do so if the breach was for a COVID-19 reason.

64 The Tribunal's view that the protection of s 542 was limited to the Emergency Period, would, it was submitted, have the anomalous consequence that all the rent unable to be paid for COVID-19 reasons during the Emergency Period (the COVID-19 arrears) became due and payable on the day the Emergency Period concluded. This is said to make the protection from homelessness and eviction because of the pandemic 'illusory rather than real' and an 'unlikely legislative intention'.

65 The applicant further contends that the Tribunal's conclusion is inconsistent with its later conclusion that s 542, as extended by reg 14, continues to operate as a defence to applications for compensation under the RTA.

66 It follows, according to the applicant, that the Tribunal erred in concluding that the arrears for the purpose of the notice to vacate totalled $12,587.10 (including the COVID-19 arrears) rather than $274.14, and in concluding that the notice to vacate was validly given.

67 The applicant's further submissions will be referred to where relevant.

Respondents' submissions

68 The respondents' primary submission is that the Tribunal's finding that the applicant failed to pay rent due to a COVID-19 reason did not mean that the applicant did not owe at least 14 days rent for the purpose of s 91ZM. The respondents say this distinction is critical — whether rent is owed does not depend

upon a breach of a term of the Tenancy Agreement.

69 The respondents contend that the question of law before the Tribunal and this Court turns on the word 'owes' used in s 91ZM(7) of the RTA. According to the respondents, the language of the statute recognises and adopts the distinction at common law between a debt owing and compensation for a breach of an obligation (such as damages). The respondents also point to s 39 of the RTA, which provides that 'rent under a residential rental agreement accrues from day to day and … is recoverable or refundable on that basis'. The language 'accrual of rent' is said to be consistent with the language of debt.

70 By contrast, the respondents argue, the language of s 542 and reg 14 is the language of obligation. The role of those provisions, it is contended, is to protect persons from a claim of specific performance, compensation or other remedies arising either in contract, the RTA (specifically under pt 5) or another statute.

71 The respondents further submit that during the moratorium period it was not s 542 that provided protection to the applicant to prevent the Tenancy Agreement being terminated. According to the respondents, s 544 was the legislative prohibition on giving notices to vacate, for any reason, during the moratorium. Sections 548 and 549, it is said, provided an exception which would permit termination if the Tribunal was satisfied that there would be no severe hardship to the tenant. This temporary measure bypassed the notice to vacate procedure.

72 The respondents contend that it was Parliament's intention that after s 91ZM commenced on 29 March 2021, notices to vacate could be given by landlords to tenants. In that context, it is argued, reg 14 had no work to do, just as s 542 had no work to do to prevent the giving of notices to vacate. The respondents point to references in the extrinsic materials, for example, to statements that the changes are 'temporary' and 'short-term' and that the effect on proprietary interests is 'limited

and of temporary duration'.[24]

73 The respondents' further submissions will be referred to where relevant.

Analysis

74 This appeal concerns the validity of the notice to vacate given under s 91ZM and the correctness of the Tribunal's decision to make a possession order under the new regime.

75 Section 91ZM came into force in March 2021 at the same time the provisions governing the termination of tenancy agreements and the making of possession orders in pt 16 were repealed and the Emergency Period concluded. Subject to the complexities referred to above, under s 91ZM, upon an 'occasion of non-payment of rent' the landlord may give a notice to vacate and make an application for a possession order, and the Tribunal may make such an order. An 'occasion of non-payment of rent' is where the tenant 'owes' at least a certain amount of rent within a 12 month period.

76 Section 542 was in force during the period the applicant did not pay the full amount of rent and accumulated the COVID-19 arrears. By virtue of reg 14, at the time the possession order was made the protection conferred by s 542 continued to apply in respect of breaches of tenancy agreements that occurred during the Emergency Period.

77 As discussed, the respondents submit that s 542 and reg 14 do not affect the question as to whether rent is 'owing' for the purposes of s 91ZM. They contend that obligation to pay rent was effectively carved out of the protection offered by s 542. For her part, the applicant submits, in effect, that her failure to pay rent during the life of s 542 is to be treated as if it was not a breach of the Tenancy Agreement and there are no monies owing to the respondents as a result of unpaid rent comprising

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[24] See para [22] above.

the COVID-19 arrears.

78 The critical issue in this application for leave to appeal is whether the applicant's failure to pay rent for a COVID-19 reason during the Emergency Period, although strictly a breach of the Tenancy Agreement, was to be taken not to have been a breach pursuant to s 542, and whether, as a result, the COVID-19 arrears did not constitute rent 'owing' for the purpose s 91ZM at the time the notice to vacate was given.

79 Section 542 has to be construed in the context of pt 16 as a whole for, although it continues to have effect in the new regime as a vestige of pt 16, the Omnibus Act is the context in which it was enacted. While it is trite law that the task of statutory construction must begin with a consideration of the text itself and the language which has actually been employed in the text of legislation is the surest guide to legislative intention, the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular, the mischief it is seeking to remedy.[25] In our view, a purposive construction of the provisions of pt 16 is warranted, given the extraordinary and urgent circumstances in which it was enacted.

80 During the Emergency Period, various measures were adopted in order to regulate the relationship between landlord and tenant in light of the financial hardships that would be and were being suffered due to the COVID-19 pandemic. The enactment of pt 16 was seen to be a necessary intervention to address the crisis brought about by the pandemic. The emergency legislation, which was remedial and beneficial in nature, provided tenants, and to a lesser extent landlords, with considerable protections. The central and critical issue in this application for leave to appeal is the nature, extent and duration of that protection, specifically in relation to eviction for the non-payment of rent during the Emergency Period for a COVID-19

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25 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47]; [2009] HCA 41 (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted).

reason.

81 The protections in pt 16 encroached upon the rights and obligations that normally arise in a traditional landlord and tenant relationship. Tenants were protected, in particular, by the following measures:

- The suspension of rent increases (s 539).
- The reduction in rent and the availability of payment plans on application to the Tribunal (s 540).
- The introduction of a dispute resolution scheme (div 8).
- The removal of landlords' entitlement to give a notice to vacate (s 544).
- Restrictions on termination of tenancy agreements and orders for possession (ss 538 and 547–551).

82 In addition, tenants and landlords were encouraged to re-negotiate tenancy agreements and arrangements, having regard to their particular circumstances in the pandemic.

83 It will be recalled that ss 548 and 549, along with ss 550 and 551, permitted the Tribunal to terminate tenancy agreements and make possession orders only in limited and strictly regulated circumstances. Those provisions operated in tandem with s 544, which removed the landlord's ability to give a notice to vacate, and s 542, which limited the consequences of a breach of a tenancy agreement.

84 Greater and specific protection was given to tenants more directly affected by COVID-19. If a tenant was unable to comply with a term or provision of a tenancy agreement for a 'COVID-19 reason' (as defined in s 537), the tenant was 'taken not to have breached' the tenancy agreement (s 542).[26] In addition, pt 16 provided that termination of the tenancy agreement and possession of the premises was prohibited

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[26] See para [15]. This statutory fiction is discussed in more detail below.

in circumstances where the tenant could not comply with, or it was not reasonably practicable for the tenant to comply with, the obligations under the tenancy agreement for a COVID-19 reason (ss 549(6) and 550).

85 Although pt 16 did not expressly provide rent relief by mandating rent reductions or extinguishing the obligation to pay rent in whole or in part, the failure to pay rent did not, as noted, attract the usual consequences (receipt of a notice to vacate, termination of the tenancy agreement and possession of the premises). Some of the rights and obligations of parties to tenancy agreements were effectively suspended and replaced with the measures in pt 16. Landlords and tenants were encouraged to negotiate to find acceptable solutions to the inability of one or both of them to comply with the tenancy agreement.[27] If the parties were unable to find a resolution, the tenant could terminate the tenancy agreement without liability to pay compensation for early termination (ss 545 and 546) and landlords could apply to the Tribunal to terminate the tenancy agreement in certain circumstances (ss 547, 548 and 549). The Tribunal was armed with powers to regulate the relationship between landlord and tenant where it was 'reasonable and proportionate' to do so, having regard to a variety of matters. The ability of parties to enforce the tenancy agreement was removed or considerably 'softened' by these measures.

86 It is tolerably clear from the legislation and the extrinsic material that the rights of landlords were severely restricted during the Emergency Period and, for the reasons that follow, they have remained restricted during the Transition Period in relation to breaches of a tenancy agreement that occurred during the Emergency Period for a COVID-19 reason.

87 Where a tenant was unable to pay rent for a COVID-19 reason, termination of the tenancy agreement and the recovery of possession of the premises was not possible during the Emergency Period, whether or not such failure constituted a

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27 In the second reading speech prior to the enactment of the Extension Act, it is recorded that 'more than 28,000 agreements for reduced rent [have been] registered with Consumer Affairs Victoria as of 23 August 2020'.

breach of a tenancy agreement. Sections 547 to 550 (restricting termination and possession) had an operation apart from s 542. These sections also applied to a failure to pay rent that was not based on a COVID-19 reason. Sections 547 to 550 were repealed at the end of the Emergency Period. Section 542 was also repealed, but the protection that it gave to tenants and landlords during the Emergency Period was extended by reg 14 into the Transition Period. The deemed non-breaches of tenancy agreements during the Emergency Period had to exist through the Transition Period in tandem with the operation of the new regime and, in particular, s 91ZM, which provided for the giving of notices to vacate and the making of possession orders.

88 It was not in dispute that during the Emergency Period and the lifetime of pt 16, the applicant could not be required to pay the COVID-19 arrears. Section 549(6) prohibited the Tribunal from making an order terminating the Tenancy Agreement by reason of the applicant's failure to comply with her obligations under the Tenancy Agreement, including in relation to the payment of rent. Section 542 required a breach of the Tenancy Agreement (whether by the applicant or her landlords) to be treated as though it was not a breach. The Emergency Period ended in March 2021 and pt 16 was repealed, including s 542. However, the deemed non-breaches generated by the operation of s 542 during the Emergency Period were given continued life by reg 14. The Emergency Period having expired and the new regime having been brought into operation, the question arises as to whether, and if so how and when, the applicant's COVID-19 arrears can be recovered. This in turn raises the critical issue in this case, namely, whether the COVID-19 arrears have lost the protection enjoyed during the Emergency Period and may constitute rent now 'owing' under the new regime and s 91ZM.

89 According to the applicant, the effect and consequence of the operation of s 542 during the Emergency Period is that, as there was no breach of a tenancy agreement, rent that was unpaid due to a COVID-19 reason will not be payable at

any stage. She submits that she did not breach the Tenancy Agreement by failing to pay the rent for a COVID-19 reason. If there was no breach, there is, relevantly, no amount of rent owing. The amount of rent unpaid (the COVID-19 arrears), it is contended, will never be an amount 'owing' to the respondents for the purposes of s 91ZM. The applicant further relies on the provisions of the *Interpretation of Legislation Act 1984 ('*IL Act') to protect what she asserts are her accrued rights under pt 16 and s 542. Alternatively, the applicant submits that the COVID-19 arrears may only be payable (and thereby provide a foundation for a notice to vacate) when the protection afforded by s 542 (through reg 14) expires on 25 October 2021.

90 The respondents contend that the COVID-19 arrears constitute a debt owing independently of any breach of the Tenancy Agreement that might have attracted the protection of s 542; a position which, as mentioned below, was at variance with the finding of the Tribunal at [245]. Accordingly, they say that s 542 has no role to play and they were entitled, after 28 March 2021, to use the new procedure to evict tenants for unpaid rent, commencing with issuing a notice to vacate under s 91ZM.

91 We reject the proposition that the applicant's failure to pay rent was not a breach of the Tenancy Agreement. In our opinion, where a tenancy agreement contains an obligation to pay rent, the failure to do so will constitute a breach of that agreement. Indeed, the failure to pay rent will, in most cases, constitute the quintessential breach of a tenancy agreement. It is usually the primary obligation of the tenant. So much was effectively and properly conceded by the respondents' counsel.

92 Following the High Court decision in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*,[28] it has been accepted that contractual principles are fully applicable to lease contracts.[29] The Tenancy Agreement in this case, together with the legislation and

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[28] (1985) 157 CLR 17; [1985] HCA 14.

[29] *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319; [2005] VSCA 139; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; [2008] HCA 10.

the common law, supports the proposition that the applicant's failure to pay the full amount of rent constituted the breach of a term of the Tenancy Agreement.

93 Item 6 of the schedule to the Tenancy Agreement states that the rent is $2,151.00 per calendar month payable on the 26th day of each month. The Tenancy Agreement is the standard residential tenancies lease used by the Real Estate Institute of Victoria. Clauses 39 and 41 are in the following terms:

> The Tenants undertake to pay their rent to the vacating date and delivery of vacant possession. If they are unable to give vacant possession to the subject Property on the vacating date, they agree to indemnify both the Landlord and Moonee Valley Real Estate against any legal action bought against them. The Tenant/s also agree that any variation of their vacating date must be applied for in writing and agreed to by the Landlord or his Agent and if necessary, the next subsequent Tenant of the subject Property.
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> …
>
> Rent is at all times to be paid in advance as agreed upon and stated in the lease. If for any reason whatsoever the Tenant/s finds themselves unable to pay in advance it is their responsibility to contact the rental manager and make arrangements to remedy the situation. Such arrangements once made are to be strictly adhered to.

94 In this case, it was a term of the Tenancy Agreement that the applicant pay the rent in advance. The applicant undertook to do so. Her failure to do so constitutes a relevant breach. The consequences are dealt with in the legislation and it is not necessary to assess whether the breach is a fundamental breach or constitutes the breach of an essential term. Section 542 applies if there is a breach of any term.

95 It is important to note at this stage that, contrary to the respondents' submissions, the Tribunal held that the non-payment of rent did constitute a breach of a term of the Tenancy Agreement for the purpose of s 542.[30] However, notwithstanding such breach, the Tribunal held that the repeal of the provisions protecting the applicant from eviction for the COVID-19 arrears (the repeal of most of pt 16) provided a gateway to a possession order but not a monetary order, as some protective measures (those provided by ss 537 and 542) remained operative to that

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30 Reasons [245].

extent and for that purpose.

96 As we understood the respondents' submissions, they contended that the COVID-19 arrears were a debt *simpliciter* and as such escaped the conceptual framework that underpins s 542. That submission must also be rejected. The cases that distinguish between debt and damages for breach of contract are for the most part consistent with the principle that an indebtedness may and usually does arise out of a breach of contract, a point properly conceded by the respondents' counsel. The submission that 'no breach of the agreement is necessary for rent to be owed' because 'rent is an incident of the [tenant's] possession of the rented premises' and that 'the language of s 542 and Regulation 14 is the language of obligation' is not only contrary to the Tribunal's finding at para 245,[31] but also wrong as a matter of law.

97 Section 596(1)(c) of the RTA restricts the disclosure of personal information in relation to the breach of a 'tenancy agreement because of the non-payment of rent'. This section is within pt 16 and is an indication that the non-payment of rent may constitute a breach of a tenancy agreement. This restriction continued during the Transition Period.[32]

98 The inevitable and intended consequence of s 542 was that the applicant, by failing to pay rent for a COVID-19 reason during the Emergency Period, was *taken* not to be in breach of the Tenancy Agreement. But with what consequence and for how long? Does the obligation to pay the unpaid rent revive at some stage? If so, when? Does the 'taken not to have breached' statutory fiction cease at some stage permitting the landlord to recover the unpaid rent? If so, when?

99 The applicant submits that the COVID-19 arrears are not recoverable by the respondents at any stage because her failure to pay rent during the Emergency Period was not a breach of the Tenancy Agreement and cannot retrospectively be

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31 The respondents have not filed a notice of contention in relation to this point.

32 Regulations, reg 19.

made a breach. Alternatively, she submits that the COVID-19 arrears are not payable before 25 October 2021, when the Transition Period ends. The respondents submit that s 542 and reg 14 cease to provide any protection to the applicant on 25 October 2021, but contend that they were entitled to proceed under the new regime and s 91ZM from the time that it came into force — that is, at the end of the Emergency Period, when pt 16 was repealed — for the purpose of obtaining a possession order.

100 In our opinion, the applicant's alternative submission is correct. By reg 14, the statutory fiction that the applicant has not breached the Tenancy Agreement by incurring the COVID-19 arrears has been extended to 25 October 2021. For so long as the applicant is taken not to have breached the Tenancy Agreement during the Emergency Period, the respondents' ability to bring enforcement proceedings, to the extent that ability relies upon the existence of the COVID-19 arrears, is directly affected. This position is not altered by the coming into force of the new regime and s 91ZM. The reference to rent 'owing' in s 91ZM does not stand outside the statutory fiction, thereby permitting enforcement. For the reasons given, the fact of rent 'owing' is underpinned by and arises out of a breach by the tenant, a breach that is *taken* not to have occurred if it occurred during the Emergency Period.[33] To the extent that this affects the landlords' common law rights, it is irresistibly clear that this was intended and the principle of legality is not offended.

101 Although the applicant contends that s 91ZM is not engaged because no amount is or ever will become owing, whether during or after the Emergency Period and the Transition Period, the applicant also points to the rolled-up nature of the notice to vacate, which she submits is in breach of s 91ZM(6) which requires a separate notice to vacate 'for each separate occasion of non-payment of rent'. Each breach was required to be set out in a separate notice.

102 We consider that there is substance to this argument, but it is unnecessary to

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[33] At present the statutory fiction ends on 25 October 2021.

determine the issue because, in our view, the notice to vacate and the possession order must be set aside in any event.

103 The critical finding and basis for the Tribunal's decision and orders was that the unpaid rent (the COVID-19 arrears) remained owing at all times and that s 542 (and reg 14) did not have the effect that the unpaid rent was not still owing. The Tribunal observed that, during the Emergency Period, protection from eviction was afforded by ss 548 and 549 (and not by s 542) and that s 542 alone did not prevent steps being taken to evict a tenant for non-payment of rent. On the Tribunal's reasoning, after the Emergency Period and upon the repeal of ss 548 and 549, if the rent remained owing it provided the basis for a notice to vacate and ultimately for an order for possession, even though, and perhaps paradoxically, the unpaid rent was not recoverable.

104 The matters relied upon by the Tribunal in holding that, for the purpose of s 91ZM, rent owing does not fall within the statutory fiction in s 542 for eviction purposes (but does so for rent recovery purposes) are set out in its Reasons at paras [174] to [178]. The Tribunal found that because of the repeal of ss 548 and 549, protection from termination of the Tenancy Agreement and possession of the Premises was removed with effect from 29 March 2021. Section 542 could not replace those sections in order to provide the same relief.[34]

105 We do not agree with this reasoning.

106 Sections 548 and 549 (and other sections) applied to both tenants with a COVID-19 reason and those without such reason. At the end of the Emergency Period, the new regime came into operation and termination and possession were to be dealt with under the new provisions. The old provisions (ss 548 and 549) had to be repealed. However, by virtue of reg 14, the protections already conferred by s 542 remained on foot. In our view, the repeal of ss 548 and 549 has no effect on whether

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34 Reasons [174].

there had been a breach of a tenancy agreement within the meaning of s 542. If there was a breach, the fact that the enforcement provisions (ss 548 and 549) were no longer available, with effect from 29 March 2021, is of no consequence. By virtue of reg 14, there continues to be the statutory fiction that if during the Emergency Period the tenant was unable to comply with a term of the tenancy agreement for a COVID-19 reason, the tenant is taken not to have breached the tenancy agreement.

107 The words 'taken not to have breached' are words requiring something to be treated as not being the case when it is in fact the case. They are deeming words and s 542 must be construed like any other deeming provision. In *Wellington Capital Ltd v Australian Securities and Investments Commission*,[35] Gageler J explained that provisions which create a legal fiction are 'not construed to have a legal operation beyond that required to achieve the object of its incorporation'.[36]

108 In *Marshall v Kerr*,[37] Peter Gibson J (with whom Balcombe and Simon Brown LJJ agreed) said:

> For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible, with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent necessary to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.[38]

109 In *DCC Holdings (UK) Limited v Revenue and Customs Commissioners* ('*DCC Holdings*'),[39] Lord Walker referred to the foregoing decision and said:

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35 (2014) 254 CLR 288; [2014] HCA 43.

36 Ibid 314 [51].

37 (1993) 67 TC 56.

38 Ibid 79. The House of Lords reversed the Court of Appeal decision but not on this point. On this point Lord Browne-Wilkinson approved this passage as the correct approach: see [1995] 1 AC 148, 164.

39 [2011] 1 WLR 44; [2010] UKSC 58.

> It appears to me that the observations of Peter Gibson J, approved by Lord Browne-Wilkinson, in *Marshall* indicate that, when considering the extent to which one can 'do some violence to the words' and whether one can 'discard the ordinary meaning', one can, indeed one should, take into account the fact that one is construing a deeming provision. This is not to say that normal principles of construction somehow cease to apply when one is concerned with interpreting a deeming provision; there is no basis in principle or authority for such a proposition. It is more that, by its very nature, a deeming provision involves artificial assumptions. It will frequently be difficult or unrealistic to expect the legislature to be able satisfactorily to [prescribe] the precise limit to the circumstances in which, or the extent to which, the artificial assumptions are to be made.[40]

110 In *Ellison v Sandini Pty Ltd*,[41] the Full Court of the Federal Court of Australia referred to and adopted the statements quoted above.[42]

111 In *DCC Holdings,* Lord Walker referred to the difficulty associated with the precise limits and extent of the artificial assumptions. However, from the extrinsic material and the terms of the legislation (the Omnibus Act and the Extension Act), it is sufficiently clear that, by reason of the operation of s 542, the non-payment of rent during the Emergency Period in breach of the Tenancy Agreement was to be treated as if it were not a breach, so as to prevent the enforcement of the Tenancy Agreement. The fiction of the non-breach in circumstances where there was a COVID-19 reason embraces the notion that the obligation to pay the rent stipulated in the Tenancy Agreement cannot be enforced. If the breach is to be (temporarily) treated as not having occurred (the fiction), the rent is to be taken as (temporarily) not owing (also a fiction). In that fictional world, as a result of the application of the deeming provision, there is no 'occasion of non-payment of rent'.

112 This construction does no violence to the language of s 542 and reflects its beneficial purpose. The effect of the fictional non-breach of the Tenancy Agreement was that enforcement proceedings could not be brought during the Emergency Period. This remains the case while the protection in s 542 is extended. In our view,

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40 Ibid [39].

41 [2018] FCAFC 44.

42 Ibid [209]–[210].

this is an 'indisputable conclusion' brought about by the deeming provision and reg 14.

113 Unlike the Tribunal, we are unable to discern any legislative intention to treat the liability to pay monetary compensation and exposure to eviction differently during the Transition Period. The extended operation of s 542 is the continuation of the moratorium during which a tenant or landlord with a COVID-19 reason is given temporary relief from the consequences of breaching the tenancy agreement during the Emergency Period. In our opinion, an intention to permit eviction during the Transition Period, based upon rental arrears incurred during the Emergency Period where there is 'taken' to have been no breach of the Tenancy Agreement by reason of reg 14, would need to be expressly stated, because it significantly undermines the protection that the legislation (and reg 14) was intended to provide. The object of the emergency measures was (and remains) to provide relief from rent distress and, perhaps more importantly, eviction.

114 The Tribunal found that the phrases 'taken not to have breached the term or provision' and 'taken, on and after that repeal, not to have breached the term or provision during that period' in s 542 and reg 14 respectively, did not make it 'irresistibly clear' that it was intended that any COVID-19 arrears were not owing. As a consequence, a notice to vacate could not be given.

115 Part of this reasoning is undoubtedly correct. We agree that it is not 'irresistibly clear' that the COVID-19 arrears are not 'owing' for all time. For the reasons that follow, we consider that they will fall to be paid at the end of the moratorium, that is, at the end of the Transition Period when the statutory fiction ceases to apply. Any rental arrears incurred during the Emergency Period will then be owing and subject to s 91ZM and the new regime.

116 In this case, the consequence of the continued operation of s 542 is that despite the occasions of non-payment of rent during the Emergency Period (giving rise to the COVID-19 arrears), for the duration of the Transition Period these occasions are

to be taken not to constitute enforceable breaches and the applicant is taken not to have breached the Tenancy Agreement. Consideration of the text, context and purpose of the legislation supports the position, as found by the Tribunal, that during the Emergency Period and Transition Period, there was a temporary suspension of the liability to pay the COVID-19 arrears. But, critically, such consideration also supports the position that enforcement measures, including the making of a possession order, could not be taken during the Emergency Period and the Transition Period, because the non-payment of the COVID-19 arrears was to be taken not to be a breach of the Tenancy Agreement so that, for the duration of that combined period those arrears must be taken not to have been owing.

117 Finally, it is necessary to deal with the applicant's submission that the COVID-19 arrears will never be owing and recoverable because, even though the applicant failed to pay rent in accordance with the Tenancy Agreement, there was no breach. If there was no breach and no amount owing s 91ZM was not and could never be engaged. This position was supported, it was submitted, by s 14(2) of the IL Act.

118 Other than to submit forcefully and repeatedly (no criticism intended) that there was no breach, the applicant did not refer to any provision that supported the proposition that the moratorium on or suspension of breach would endure forever. Rather, the applicant relied on what was contended to be the logical corollary, that is, if conduct constituting a breach was *taken* to not to be in breach, then it must be so for all time. This leap of logic ignores other important countervailing textual and contextual considerations within the legislative scheme to provide the desired temporary relief.

119 It is clear from the extrinsic material that the relief provided to tenants was to be of a limited and temporary duration and any alteration of contractual or property rights or deprivation of property was to be in accordance with the law. In this regard, the first reading speech of the Omnibus Act refers to s 20 of the Charter of Human Rights and Responsibilities and includes the following statement:

> For a deprivation of property to be 'in accordance with the law', the law must be … clear and certain, and must not operate arbitrarily.

120 It is far from clear or certain that any deprivation of property or alteration of contractual rights during the Emergency Period and the Transition Period — such as diminution or loss of rental income — was intended to be a permanent feature of the emergency relief. A temporary loss, suspension or moratorium was clearly contemplated, but not the permanent extinguishment of property rights. This is reinforced by the numerous other measures available to the tenant during the Emergency Period, including the contemplated and expected negotiation with the landlord. This was aimed at minimising any hardship not only during the Emergency Period, but also when the protection ended. If rent that was unpaid for a COVID-19 reason was forgiven or extinguished, there would be no need or incentive to negotiate with the landlord or perhaps engage with the other measures.

121 We are unable to discern any legislative intention to extinguish for all time the tenant's liability to pay rent as agreed. This would effectively go beyond a moratorium or suspension of obligations and involve a confiscation or expropriation of property, which is a consequence that was not, so far as we can tell, intended. In our view, the applicant remains liable to pay the COVID-19 arrears, but subject to the statutory fiction preventing recourse to enforcement mechanisms based on breach of the Tenancy Agreement for so long as the protection conferred by s 542 continues to have effect.

122 Furthermore, the s 542 protection benefits landlords as well as tenants. If a landlord, for a COVID-19 reason, failed to carry out emergency repairs (as required by the lease) and the tenant had to spend her own money making the necessary repairs, it cannot have been the intention of the legislature that the amounts spent by the tenant would never be recoverable against the landlord. If the shoe is placed on the other foot, it is apparent that the fiction in s 542 is a temporary measure, intended to carry tenancies through the difficult period of the pandemic.

123 Having regard to this analysis, the submission that the COVID-19 arrears are

not and will never be owing and recoverable is rejected. Contrary to the applicant's contention, the legislation, properly construed, does not support this proposition.

124 We consider that s 14(2) of the IL Act does not assist the applicant.

125 We do not accept that the repeal of s 542 affected 'rights' that had 'accrued' under that provision so as to enable their enforcement in a court of law. Section 542 requires a breach of an agreement to be treated as if it was not a breach. In the context of the emergency measures in pt 16, it requires a partial suspension of the contractual arrangements binding the parties. That is not a 'right' that 'accrues'. It is a fiction that provides protection against enforcement during the period of a moratorium.

126 Section 14(2) of the IL Act only preserves accrued rights under a statute if there is no contrary intention in the statute. In our view, there is a contrary intention in pt 16. The clear (and contrary) intention of the legislature in enacting pt 16 was that the availability of relief would be limited to the Emergency Period. This was considered to be the relevant and necessary relief. It addressed the perceived problem of economic stress and loss of income for what was understood to be a limited period of time. Furthermore, the temporary arrangements in pt 16 included provision for rents to be renegotiated so that tenants would not fall into rent arrears and find themselves in significant debt at the end of the Emergency Period.

127 Proposed ground 1 must be upheld. For the reasons given, the applicant was and remains until 25 October 2021 protected from eviction in respect of her failure to pay the COVID-19 arrears. The s 91ZM procedure was and remains subject to the restriction contained in s 542 and reg 14.

128 Proposed ground 2 must be upheld in part. To the extent that the proposed ground contends that the COVID-19 arrears can never be taken into account in determining the validity of a notice to vacate, it is without merit for the reasons given. The notice to vacate was not valid because the relevant protection remained operative, not because the COVID-19 arrears are not recoverable and can never be

taken into account.

129 Proposed ground 3 must be upheld. For the reasons given, reg 14 applied and continues to apply to the COVID-19 arrears.

Conclusion and disposition

130 Given our conclusion in relation to proposed grounds 1–3 it is not necessary to deal with proposed ground 4.

131 Accordingly, leave to appeal will be granted and the appeal allowed.

132 The orders of the Tribunal made on 4 August 2021 will be set aside and in lieu thereof there will be an order dismissing the respondents' application of 26 April 2021 for possession of the Premises pursuant to the Act.

Costs

133 On the same date as the filing of her application for leave to appeal, the applicant filed an application for a protective costs order, with supporting affidavits made by the applicant and her legal representative. The respondents notified the Court that they did not oppose the application for a protective costs order.

134 Having read the supporting affidavits, and having considered the matters referred to in s 65C(2A) of the *Civil Procedure Act 2010*, the Court (comprising Emerton and Sifris JJA) was satisfied that:

(a) the proceeding raised significant issues as to the interpretation and application of the RTA and Regulations;

(b) the proceeding would affect a significant number of tenants and landlords;

(c) there was therefore a public interest in the proceeding being heard by the Court of Appeal; and

(d) the applicant would reasonably be unable to pursue the proceeding should the protective costs order not be made.

135 Accordingly, orders were made on the papers, pursuant to s 65C(1) of the *Civil Procedure Act 2010*, s 24 of the *Supreme Court Act 1986* and r 64.38 of the *Supreme Court (General Civil Procedure) Rules 2015*, that each party would bear its own costs of the application for leave to appeal and any appeal.

136 The Court records its gratitude to the counsel and solicitors who acted for the parties pro bono and assisted the Court, and their clients, with submissions of a high quality. The Court also expresses its appreciation to the Tribunal for the thoughtful and helpful way in which it approached the very difficult issues in this matter raised by the parties and, indeed, by the legislation itself.

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