

AUSTRALIAN RESIDENTIAL TENANCIES LAW IN THE COVID-19 PANDEMIC: CONSIDERATIONS OF HOUSING AND PROPERTY RIGHTS

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In response to the COVID-19 pandemic, Australian states and territories implemented eviction moratoriums and measures to vary rent obligations – a remarkable response for jurisdictions that have, for decades, regulated residential landlord-tenant relations on a model of mild consumer protection, market rents and ready termination. This article examines the COVID-19 emergency measures and their implications for tenants’ housing rights, and landlords’ property rights. After reviewing the Australian rental housing system’s structure and legislative framework, the article examines in detail the COVID-19 emergency measures regarding evictions and rents in each state and territory. These vary in form and content, mostly on a pattern of additional protection from eviction for a core ‘hardship’ group, and variation of rents by individual negotiation. The article considers problems in the emergency measures, and points on which enduring reforms may be built, as well as critically appraising the argument that property rights protections limit the scope for reform.

I INTRODUCTION

In March 2020, as the COVID-19 pandemic accelerated, Australians sought to slow transmission of the virus by suppressing economic activity and social intercourse – by staying home. Consequently, jobs were suddenly lost, incomes drastically reduced, and the prospect of widespread rent arrears and evictions heightened.

In response, Australian governments – co-ordinating through the new National Cabinet – launched several policy interventions aimed at the household sector generally and the private rental sector (‘PRS’) specifically. The Federal Government legislated to replace some of the household sector’s lost income, first through a special Coronavirus Supplement to the JobSeeker Payment and

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provision for the release of superannuation savings,¹ and then a wholly new JobKeeper Payment.² It also facilitated Australian banks deferring payments from home and business borrowers for up to six months, through the Reserve Bank of Australia's provision of very low-cost finance to banks, and the Australian Prudential Regulatory Authority's relaxation of requirements regarding impaired loans.³ Then, on 29 March 2020, the National Cabinet announced a six-month moratorium on evictions for residential and commercial tenancies, and encouraged landlords and tenants to negotiate regarding rent payments.⁴

While a 'mandatory code of conduct' was devised relatively quickly for commercial tenancies, implementing eviction moratoriums and rent relief in the rental housing sector proved more contentious. Initial interactions between landlords and tenants after the announcement appear to have been highly variable, with media reports of rent reductions, deferrals, flat refusals, rent increases, and suggestions from agents to tenants that they access their superannuation to pay rent⁵ – at least until they were warned off by the Australian Securities and Investments Commission.⁶ However, within a month of the moratorium announcement, all states and territories had enacted legislative frameworks for temporarily preventing evictions and regulating rents. This is a remarkable event in Australian residential tenancies law, which for decades has been developed by states and territories on a broadly common model of mild consumer protection, with market rents and ready termination.

The present article examines the emergency measures and considers what they mean for tenants' housing rights – in the immediate context of the COVID-19 pandemic, and longer-term developments in Australia's rental housing system – and what they say about the legal and political protection of the property rights of landlords. The article is in three substantive sections. Part II presents an overview of the Australian rental housing system as it was before the COVID-19 pandemic, in terms of its sectors, households, ownership and financial relations, and the legislation governing landlord-tenant legal relations. Next, Part III of the article

1 *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) schs 11, 13, commenced 25 March 2020, with payments commencing 27 April 2020.

2 *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth), commenced 9 April 2020, with payments commencing early May 2020.

3 'Term Funding Facility', *Reserve Bank of Australia* (Web Page) <<https://www.rba.gov.au/mkt-operations/term-funding-facility/overview.html>>; John Lonsdale, 'Treatment of Loans Impacted by Covid-19' (Letter to All Authorised Deposit-taking Institutions, Australian Prudential Regulation Authority, 9 July 2020) <<https://www.apra.gov.au/sites/default/files/2020-07/Letter%20to%20authorised%20deposit-taking%20institutions%20-%20Treatment%20of%20loans%20impacted%20by%20COVID-19.pdf>>.

4 Prime Minister of Australia, 'Press Conference – Australian Parliament House' (Press Conference, 29 March 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-13>>.

5 See, eg, Paul Karp, 'Real Estate Agents Criticised for Suggesting Tenants Consider Using Superannuation to Pay Rent', *The Guardian* (online, 2 April 2020) <<https://www.theguardian.com/australia-news/2020/apr/02/real-estate-agents-criticised-for-suggesting-tenants-consider-using-superannuation-to-pay-rent>>.

6 Tim Mullaly, 'Unlicensed Financial Advice by Real Estate Agents to Tenants' (Letter to Real Estate Institutes, Australia Securities and Investments Commission, 3 April 2020) <<https://download.asic.gov.au/media/5546344/asic-letter-response-to-early-release-of-super-state-rei-3-april-2020.pdf>>.

presents a detailed examination of the emergency measures, particularly regarding evictions and rents. Like the existing laws over which they are temporarily erected, these emergency measures vary substantially in their details, and some jurisdictions have responded more strongly than others. Part IV highlights some common deficiencies and problems in the emergency measures – including through a summary analysis of specially-sourced data on rent variations – as well as some aspects that could be built on to improve tenants’ housing rights permanently. The Part also includes a critical assessment of the argument that tenancy law reform may effect a ‘regulatory taking’ of landlords’ property rights and finds, on almost all points, that there is no legal obstacle to stronger reforms.

II AUSTRALIAN RENTAL HOUSING: AN OVERVIEW

To properly examine the COVID-19 emergency measures it is necessary to first review some of the basic structural features of the rental housing system, and the existing body of law governing landlord-tenant relations. These form the context in which the dual public health and economic emergency of COVID-19 became a housing rights emergency for tenants.

A Rental Housing Sectors, Households, Ownership and Finance

Almost one-third (32%) of Australian households live in rental housing: 27% in privately owned rental housing, and 4.5% in social housing.⁷ The social housing sector divides further into public housing (provided by state and territory housing authorities), community housing and Indigenous housing. The social housing sector has been declining relative to the PRS for decades, and access is highly targeted: in 2019, 98.8% of social housing households were low-income (ie, in the lowest two quintiles of households by income).⁸ The PRS can also be subdivided into a mainstream of ordinary dwellings (houses and apartments), and marginal forms such as residential parks and boarding houses. This article is concerned primarily with the mainstream of the PRS, although occasionally reference will be made to the other sectors.

Households in the mainstream PRS represent a range of household types and incomes. In 2017–18, about one-quarter (26%) were lone persons, while one-third (34%) contained dependent children. Three-quarters (75%) earned their income mainly from employment, and over half (55%) received no income from government payments.⁹ With an average disposable household income of just under \$85,000 per annum (compared with \$94,000 for all households),¹⁰ just over

7 Australian Bureau of Statistics, *Housing Costs and Occupancy 2017-18* (Catalogue No 4130.0, 17 July 2019) table 1.3.

8 Productivity Commission, *Report on Government Services 2020* (Report, 23 January 2020) table 18A.21.

9 Australian Bureau of Statistics, *Household Income and Wealth 2017-18* (Catalogue No 6523.0, 12 July 2020) table 8.3.

10 *Ibid* table 8.1.

half of PRS households were in the lowest 40% of households by income.¹¹ Two-thirds of these low-income renters – so, about one-third of all private renters – were paying more than 30% of their household income in rent, the benchmark for ‘rental stress’.¹² Almost one-third (30%) did not have \$500 in savings that could be accessed in case of emergency.¹³

Private rental housing is mostly owned by other households. In 2015–16 (the most recent analysed data), about 80% of PRS properties were owned by households that each owned four or fewer rental properties, with 38% owned by households with one rental property each.¹⁴ The large majority (84%) of these landlords were working age, with high disposable household incomes: on average, over \$135,000 per annum.¹⁵

In 2017–18, landlord households collected over \$45 billion in rent from PRS renter households.¹⁶ They spent almost \$24 billion in interest, which combined with other costs resulted in 60% of PRS properties operating at a net loss. However, those loss-making landlords had even higher incomes than landlords generally,¹⁷ and were using negative gearing to speculate on making (lightly taxed) capital gains in excess of the (untaxed) income lost to interest. The prevalence of speculative strategies means both landlords and dwellings frequently exit the sector, making the PRS structurally insecure for tenants.¹⁸

B Residential Tenancies Legislation

All Australian states and territories have their own residential tenancies legislation, on a broadly common model with many differences in the details.¹⁹ Its key common features are:

- Prescribed standard forms of agreement, rights and obligations, notice periods;

11 Productivity Commission, *Vulnerable Private Renters: Evidence and Options* (Research Paper, 25 September 2019) 5.

12 *Ibid* 7.

13 *Ibid* 50.

14 Kath Hulse, Margaret Reynolds and Chris Martin, ‘The Everyman Archetype: Discursive Reframing of Private Landlords in the Financialization of Rental Housing’ (2020) 35(6) *Housing Studies* 981, 991. The remaining 20% of PRS dwellings were owned by a category combining households that own five or more properties and non-household landlords (corporations and trusts).

15 *Ibid* 994.

16 Australian Taxation Office, *Taxation Statistics 2017–18* (Report, 17 July 2020) table 26A.

17 On the 2015–16 data analysed by Hulse, Reynolds and Martin (n 14), the average income (before rental losses) for loss-making landlords was 13% higher than profit/neutral landlords, and 72% higher than non-landlords: at 994. These data are for individuals, not households.

18 Chris Martin, ‘Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Terms’ (2018) 7(3) *Property Law Review* 184, 189; Gavin Wood and Rachel Ong, Australian Housing and Urban Research Institute, *Factors Shaping the Decision to Become a Landlord and Retain Rental Investments* (Final Report No 142, 24 February 2010).

19 *Residential Tenancies Act 1997* (ACT) (‘ACT RTA’); *Residential Tenancies Act 2010* (NSW) (‘NSW RTA’); *Residential Tenancies Act 1999* (NT) (‘NT RTA’); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (‘Qld RTRAA’); *Residential Tenancies Act 1995* (SA) (‘SA RTA’); *Residential Tenancy Act 1997* (Tas) (‘Tas RTA’); *Residential Tenancies Act 1997* (Vic) (‘Vic RTA’); *Residential Tenancies Act 1987* (WA) (‘WA RTA’).

- Market rents;
- Ready but orderly termination, including without grounds;
- Accessible dispute resolution by a relatively informal tribunal.

Although generally characterised as a ‘consumer protection’ model, it is also highly attuned to the structure of the rental sector: in particular, the large number of small-holding PRS landlords and their interest in dealing freely with their properties by increasing rents, and using or selling the property for owner-occupied housing. All jurisdictions allow landlords to increase rents after the fixed term of a tenancy, with restrictions only as to frequency (once in 6 or 12 months, depending on the jurisdiction) and where increases are excessive to general market levels.²⁰ All jurisdictions allow landlords to seek to terminate tenancies on prescribed grounds, such as non-payment of rent or some other contractual breach by the tenant, or where the premises are sold with vacant possession. All jurisdictions also allow landlords to seek termination without grounds, but not during the fixed term of a tenancy – and as a matter of practice, fixed terms are kept short, to 6 or 12 months. All jurisdictions allow ‘no-grounds’ termination at the end of a fixed term – although amendments yet to commence in Victoria will allow this only at the end of a first fixed term, not subsequently – and all except Tasmania (and, when its amendments commence, Victoria) allow no-grounds termination where a tenancy has continued past the fixed term.²¹

The specifics of the prescribed grounds, and the notice required for each ground and for no-grounds termination, varies. For example, in New South Wales and Victoria, a landlord can give a termination notice when rent is in arrears 14 days, with a notice period of 14 days, while in Western Australia a seven-day termination notice can be given where rent is one day in arrears, and the subsequent termination application may be determined 21 days after the breach. Regarding no-grounds termination, the amount of notice required varies widely: eg, to terminate a continuing tenancy without grounds in the Northern Territory (‘NT’), 42 days’ notice is required; in New South Wales, 90 days; and in the Australian Capital Territory (‘ACT’), 26 weeks. The discretion afforded to the tribunal in determining termination applications varies too: for example, in no-grounds proceedings in New South Wales, Queensland and Western Australia, the tribunal must terminate (unless satisfied that the proceedings are retaliatory) and only has discretion regarding the date for possession; in other proceedings, and in other jurisdictions, the tribunal has discretion to decline termination, considering various factors and circumstances.²²

20 The NSW *RTA* specifically proscribes consideration of affordability in determining whether a rent increase is excessive: s 44(5)(h).

21 Martin (n 18) 192.

22 See the review of termination provisions at Chris Martin et al, Australian Housing and Urban Research Institute, *Social Housing Legal Responses to Crime and Anti-social Behaviour: Impacts on Vulnerable Families* (Final Report No 314, 13 June 2019) 25–35.

By international comparisons, Australian laws only lightly regulate rents and provide little security for tenants.²³ In these respects Australian laws are also in tension with the right to housing recognised at international law, particularly article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*.²⁴ Over the past 30 years, the right to housing has been the subject of comments and decisions by the United Nations Committee on Economic, Social and Cultural Rights ('UN CESCR') that have elaborated on state obligations to ensure that rent increases are 'in accordance with the principle of affordability',²⁵ that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction',²⁶ and that evictions occur only after accessible legal proceedings to 'ascertain that the measure in question is duly justified', only as a 'last resort', and not to 'render individuals homeless'.²⁷

It is relevant to recount the historical background of Australia's mild consumer protection model of tenancy law. This was first formulated in the 1970s in the report 'Poverty and the Residential Landlord-Tenant Relationship' ('Bradbrook Report'), part of the Australian Government's Commission of Inquiry into Poverty,²⁸ which strongly criticised the patchwork of older less-than-comprehensive statutes and common law that comprised tenancy law at the time. Deliberately turning away from English property law doctrines, the Bradbrook Report instead looked towards then-recent developments in North American tenancy regulation, and principles of consumer protection, for a new model of residential tenancies legislation. It would take a quarter century, but eventually all states and territories enacted legislation on the model (the NT was the last, in 1999). A second wave of reform in the 1990s and 2000s saw most jurisdictions amend or rewrite their legislation, still on the consumer protection model, and extend consumer protection-style regulation to residential parks and boarding houses.²⁹ Prior to the COVID-19 pandemic, states and territories had been in the midst of a third wave of reforms, with some jurisdictions having recently made

23 Chris Martin, Kath Hulse and Hal Pawson, Australian Housing and Urban Research Institute *The Changing Institutions of Private Rental Housing: An International Review* (Final Report No 292, 24 January 2018) 49–55; Kath Hulse, Vivienne Milligan and Hazel Easthope, Australian Housing and Urban Research Institute, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (AHURI Final Report No 170, July 2011).

24 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

25 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights)*, 6th sess, UN ESCOR, UN Doc E/1992/23 (13 December 1991) [8].

26 *Ibid.*

27 Committee on Economic, Social and Cultural Rights, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No 5/2015*, 61st sess, UN Doc E/C.12/61/D/5/2015 (21 July 2017) 11 [15.1]–[15.2] ('*Djazia and Bellili v Spain*'). See also the discussion in Padraic Kenna, 'Introduction' in Padraic Kenna et al (eds), *Loss of Homes and Evictions across Europe: A Comparative Legal and Policy Examination* (Edward Elgar, 2018) 1, 27–9.

28 Adrian J Bradbrook, *Poverty and the Residential Landlord-Tenant Relationship* (Australian Government Publishing Service, 1975) ('Bradbrook Report').

29 Adrian J Bradbrook, 'Residential Tenancies Law: The Second Stage of Reforms' (1998) 20(3) *Sydney Law Review* 402.

amendments (New South Wales, Victoria and the ACT) and some in the process of reviewing their legislation (Queensland, Western Australia and the NT). However, throughout the post-Bradbrook period, reform processes have been almost entirely uncoordinated across jurisdictions.³⁰

The COVID-19 emergency response broke over this wave of reform. When it did, there had been little recent history of co-ordinated approaches to reform, and certainly no recent experience of reforms directed to a dual public health and economic emergency. The nearest precedent for a national emergency response in tenancy law is from 80 years ago: the national regime of rent and eviction controls implemented by the Commonwealth at the outset of the Second World War. Supported by the defence power (*Australian Constitution* section 51(vi)), the *National Security (Landlord and Tenant) Regulations* (Cth) fixed ‘fair rents’³¹ and restricted evictions to certain prescribed grounds. This regime continued to 1948, at which time the Commonwealth considered that the defence power could not much longer support it, and the states enacted their own versions and went their separate ways. Some were shortly repealed, and others continued longer subject to amendments that increasingly narrowed their application and complicated their operation, resulting in the patchwork criticised by Bradbrook.³²

In summary, at the outset of the COVID-19 pandemic Australia’s rental housing sector housed a significant minority of the population, mostly relying on employment incomes to pay rents that were already unaffordable for most low-incomes earners, subject to laws providing readily for termination and eviction. When employment and incomes suddenly collapsed, the risk of sudden, widespread arrears and evictions was high. Despite having little experience of concerted reform or emergency action, states and territories did act – and as will be seen in the next Part, their responses show a few common themes and much variation.

III COVID-19 EMERGENCY RESPONSES IN RESIDENTIAL TENANCIES LAW

This Part of the article focuses on the two major topic areas where the emergency responses made their most significant measures: evictions and rents.

Numerous other aspects of landlord-tenant relations were addressed in the emergency measures, which I will merely note, rather than examine in detail here. These include, in some jurisdictions, additional provision for tenants terminating tenancies early (these provisions will be noted again below in connection with rent variations). Some also temporarily restricted access to the premises by landlords

30 The only exception: an intergovernmental collaboration on nationally consistent provisions for regulating residential tenancy databases: Renee Gastaldon, ‘Towards National Regulation of Residential Tenancy Databases: The Queensland Perspective’ (Research Brief 2011/No 12, Parliamentary Library, Parliament of Queensland, August 2011). Commencing 2003, the last jurisdiction (NT) legislated in 2018.

31 Based on 1939 rents, with allowance for subsequent capital improvements and other expenses.

32 See *Brown v Green* (1951) 84 CLR 285, 289–90 (Dixon, McTiernan, Webb, Fullagar and Kitto JJ) on the history of the Commonwealth’s controls.

and agents, and relieved landlords from some of their obligations. Perhaps most remarkable is the extension of more-or-less tailored forms of the emergency eviction and rent provisions to boarding house residents and other lodgers. Previously, all jurisdictions except the ACT had left at least some of these marginal renters excluded from any legislated housing rights, while others (in particular, residents of boarding houses above a threshold size) could be subject to eviction proceedings outside the purview of the tribunal.³³ Western Australia, in particular, had not had any legislation covering boarders and lodgers prior to their coverage under the emergency provisions.

Examining those provisions – and those applying to residential parks, too – would multiply the task at hand, so the focus is on the mainstream eviction and rent provisions. For the same reason, aspects of the emergency measures that are interesting but not directly relevant to housing rights – such as whether they are enacted in Acts of Parliament (South Australia and Western Australia) or regulations and ministerial declarations relying on ‘Henry VIII’ clauses (New South Wales, Tasmania, Queensland, Victoria, the ACT and the NT) – are also not examined in detail here.

A Enacting the Eviction Moratorium

Before reviewing, in turn, the responses of Australian jurisdictions to the National Cabinet’s 29 March announcement, it should first be noted that two jurisdictions passed emergency legislation in the preceding week. On 25 March 2020, the New South Wales Parliament passed the *COVID-19 Legislation Amendment (Emergency Measures Act) 2020* (NSW), which enhanced regulation-making powers across a range of policy areas. These included rental housing, under an amendment moved by The Greens MPs and supported at the last minute by the Government, with a broad power granted to the Minister for Fair Trading as regards the *Residential Tenancies Act 2010* (NSW) (‘NSW RTA’) and other ‘relevant Acts’,³⁴ to prohibit the termination of tenancy agreements and recovery of possession of premises (sections 229(1)(a)–(b)), and regulate the exercise or enforcement of other rights of landlords (section 229(1)(c)).

Later that week, the Tasmanian Parliament passed the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) (‘Tas COVID-19 Act’), with two sets of provisions relevant to tenancies. One amended the *Residential Tenancy Act 1997* (Tas) (‘Tas RTA’) so that during the 120-day COVID-19 emergency period, landlords could not serve a termination notice on the ground of the tenant’s failure to pay rent (Tas RTA sections 42(1)(a), (4A)), but landlords and tenants in a fixed term agreement could apply to the Residential Tenancies Commissioner for an order terminating the tenancy on the ground that continuing the tenancy would cause ‘severe COVID-19-related hardship’ (section 38A). The second set of provisions empowered the Premier to declare that leases must not be

33 For a brief overview, see Carolyn Sappideen, ‘Boarding Houses’ in Sue Field, Karen Williams and Carolyn Sappideen (eds), *Elder Law: A Guide to Working with Older Australians* (Federation Press, 2018) 127.

34 The *Boarding Houses Act 2012* (NSW) and the *Residential (Land Lease) Communities Act 2013* (NSW).

terminated, nor rents be increased, in circumstances set out by the Premier (Tas *COVID-19 Act* section 22); although the provision's heading refers specifically to 'commercial tenancies' (emphasis added), the Premier would use them the next week to make a declaration for residential tenancies, to implement the eviction moratorium.

1 Tasmania

The first jurisdiction to act after the National Cabinet's 29 March announcement was Tasmania. Having already stopped rent arrears terminations, the Premier's section 22 declaration of 2 April 2020 went wider,³⁵ for 90 days stopping landlords from giving termination notices on all grounds except nuisance and illegal use of the premises (Tas *RTA* section 52), and stopping all termination proceedings by landlords except section 38A hardship applications and already-commenced termination proceedings on the ground that the premises are to be sold. A second declaration on 29 June 2020 extended the emergency period to 30 September 2020,³⁶ and allowed terminations on grounds of sale, major renovation, and the landlord requiring the premises to house themselves or a family member. Subsequent declarations extended it again, to 1 December 2020,³⁷ and then to 31 January 2021.³⁸

Tasmania's moratorium would be the broadest and most complete of the jurisdictions.

2 South Australia

South Australia acted next, passing the *COVID-19 Emergency Response Act 2020* (SA) ('SA *COVID-19 Act*') on 9 April 2020. South Australia's approach to the moratorium is narrower than Tasmania's: for the emergency period, landlords are stopped from giving termination notices for failure to pay rent where the tenant is 'suffering financial hardship because of the COVID-19 pandemic' (section 8(g)); and the South Australian Civil and Administrative Tribunal ('SACAT') is stopped from ordering termination in these cases (section 8(h)). 'Financial hardship' is not defined. Beyond that, the usual grounds for termination remain available, subject to some qualifications on the tribunal's decision-making. In most types of termination proceedings (including no-grounds, end of fixed term, and hardship applications), the Tribunal is directed to have regard to the circumstances of the COVID-19 pandemic, 'including the need to ameliorate the effects of the pandemic in the State and the need to avoid homelessness during such a public health emergency' (sections 8(1)(j), (1)(i)), and where a tenant is suffering financial hardship, the Tribunal may suspend the possession order (section 8(1)(ii)).

35 Tasmania, *Tasmanian Government Gazette*, No 21 961, 3 April 2020.

36 Tasmania, *Tasmanian Government Gazette*, No 22 003, 30 June 2020.

37 Tasmania, *Tasmanian Government Gazette*, No 22 023, 24 September 2020.

38 Tasmania, *Tasmanian Government Gazette*, No 22 039, 30 November 2020.

In September 2020, as the end of the original six-month period neared, South Australia extended the moratorium to 6 February 2021, and in February extended again to 31 May 2021 (SA *COVID-19 Act* section 6(2)).

3 *New South Wales*

New South Wales implemented its moratorium on 14 April 2020, by a regulation (the *Residential Tenancies Amendment (COVID-19) Regulation 2020* (NSW) (amending the *Residential Tenancies Regulation 2019* (NSW)) under its emergency provisions (some elements were later incorporated into the NSW *RTA* on 14 May 2020). The New South Wales measures make further variations, of greater complexity and less complete coverage, on the pattern from Tasmania and South Australia: a set of provisions that applies narrowly to ‘impacted’ households, and a second set of provisions of general application. ‘Impacted’ households are defined according to a threshold: these are households containing a ‘rent-paying member’ who has lost income because of the pandemic (either through loss or reduction of employment, or through being ill, or caring for someone ill, with COVID-19), such that the household’s income is reduced by at least 25% (NSW *RTA* section 228B). For 60 days (ie, to 15 June 2020), landlords were stopped from giving impacted households a termination notice on the ground of failure to pay rent; since then, landlords have been allowed to give termination notices provided they have first ‘participated, in good faith, in a formal rent negotiation process’ and ‘it is fair and reasonable’ to seek termination (*Residential Tenancies Regulation 2019* (NSW) regulation 41C(2)). This process is discussed again below. Where such proceedings come before the NSW Civil and Administrative Tribunal (‘NCAT’), the regulation sets out a list of matters that it may consider in determining whether the ‘good faith’ and ‘fair and reasonable’ qualifications are met (regulation 41C(4)), including ‘the public health objectives of (i) ensuring citizens remain in their homes, and (ii) preventing all avoidable movement of persons’ (regulation 41C(4)(f)).

The second set of provisions applies to impacted and non-impacted tenants. Rather than stopping landlords from giving termination notices, these increase the notice period for termination notices on grounds of breach, and without grounds at the end of a fixed term, to 90 days (regulation 41D) – so, the earliest effective termination date in such notices was 15 October 2020. Termination notices on the grounds of nuisance and illegal use, frustration, and sale of premises, are available as usual for non-impacted tenancies (see regulations 41B and 41C). Social housing tenancies are excluded from the emergency measures altogether (regulation 41A), so all the usual notice periods, grounds and applications for termination remain available with respect to social housing tenants.

In September 2020, New South Wales extended the operation of its emergency measures to 26 March 2021 (regulation 41E).

4 *The ACT*

The ACT’s legislative response was formally similar to New South Wales’: on 8 April 2020, the *COVID-19 Emergency Response Act 2020* (ACT) inserted a new section 156 in the *Residential Tenancies Act 1997* (ACT) (‘ACT *RTA*’) giving

wide powers to the Minister to make declarations prohibiting terminations, changing notice periods and other prescribed time frames, and ‘changing, limiting or preventing the exercise or enforcement of any other right of a lessor’ (section 156(1)(d)). On 21 April 2020 the Minister made the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (ACT) (‘ACT COVID-19 Declaration’), which provides for ‘impacted households’, defined similarly to those in New South Wales but also including persons who have become eligible for JobSeeker or JobKeeper during the emergency (sections 5–6). The ACT’s approach to the moratorium is relatively straightforward: for the declared period, landlords are stopped from giving impacted tenants termination notices on the ground of rent arrears; and the ACT Civil and Administrative Tribunal is similarly stopped from terminating impacted tenancies on that ground (ACT COVID-19 Declaration section 7). Other grounds for termination remain available, as do no-grounds termination notices (ACT COVID-19 Declaration s 8) (although note the ACT’s unusually long 26-week notice period for no-grounds termination). The declaration makes no provision for persons in tenancies not impacted, as defined, by COVID-19. Originally declared for three months, the period was later extended to 22 October 2020 (*Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (ACT) section 6) and again to 31 January 2021 (*Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3)* (ACT) section 7).

5 Western Australia

On 23 April 2020, Western Australia passed the *Residential Tenancies (COVID-19 Response) Act 2020* (WA) (‘WA COVID-19 Act’), a substantial piece of legislation³⁹ that will stand alongside the *Residential Tenancies Act 1987* (WA) (‘WA RTA’) for the emergency period and a further 12 months (WA COVID-19 Act section 66). Like New South Wales, Western Australia makes different provisions for a core group in COVID-related hardship and for tenants generally, and makes outcomes regarding the core group conditional on how well parties participate in rent negotiations, but Western Australia’s is the more complete moratorium. For the six-month emergency period (to 29 September 2020), landlords are stopped from taking termination proceedings for failure to pay rent without first giving a 60-day ‘remedial notice’ for the tenant to pay or enter into a ‘rent repayment agreement’ (section 19(3)(c)), and either party may apply under the Act to the Commissioner for Consumer Affairs to conciliate an agreement (section 19(5)). This has been operationalised as the Residential Tenancies Mandatory Conciliation Service. Where the tenant has failed to pay because of ‘financial hardship due to the economic effects of the COVID-19 pandemic’, the tenancy cannot be terminated on that ground during the emergency period (ie, there is no provision for termination in these circumstances in division 2 of the WA COVID-19 Act). If the tenant fails to pay according to a rent repayment agreement, or fails to co-operate in conciliation, the landlord can give a termination notice after the emergency period; if the matter had been assessed unsuitable for

39 At 76 sections and 62 pages, the Act is half the length of the WA RTA, and longer than the Tas RTA.

conciliation, or if both parties co-operated but could not reach an agreement, notice may be given three months after the emergency period; and if the landlord failed to co-operate to the satisfaction of the Commissioner, no termination notice may be given for the failure to pay (sections 14(5)–(7)). Where a tenant has failed to pay for reasons unrelated to COVID-19, and does not make and pay according to a rent repayment plan, the landlord may give a termination notice during the emergency period (section 19).

For all tenancies, during the emergency period, landlords are stopped from giving termination notices without grounds, and all expiring fixed terms continue (section 12). Other grounds for termination – specifically, sale of the premises, frustration, undue hardship, and serious damage – also remain available but, in most circumstances, applications to the Magistrates Court for termination orders are allowed only after landlords first make submissions to the Residential Tenancies Mandatory Conciliation Service (section 49(2)), which determines whether to accept the matter for mandatory conciliation (section 53). The result is a stronger moratorium for both COVID-affected and unaffected tenants than in New South Wales.

In September 2020, Western Australia extended its moratorium to 28 March 2021 (*Residential Tenancies (COVID-19 Response) Regulations 2020* (WA) regulation 3).

6 Queensland

Also on 23 April 2020, Queensland enacted the *COVID-19 Emergency Response Act 2020* (Qld), with a wide regulation-making power for residential tenancies at section 24, which it used the next day to implement the *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* (Qld). Notably, the development of the Queensland response was subject to a high-profile campaign by the Real Estate Institute of Queensland ('REIQ'), which discouraged the government from implementing its earlier, stronger proposals.⁴⁰ The Regulation's '[moratorium] on evictions' (regulation 8) is narrow: for six months, landlords are stopped from giving termination notices or applying for termination for failure to pay rent 'if the failure relates to the tenant suffering excessive hardship because of the COVID-19 emergency' (regulations 8(1)–(2)). Landlords are also stopped from giving termination notices without grounds to such tenants (regulation 38), and expiring fixed term tenancies continue (regulation 9). Queensland's 'excessive hardship' group is more stringently defined than 'hardship' or 'impacted' tenants in other states: the criteria are being ill with COVID-19, or caring for an ill person, under quarantine, isolating because of vulnerability, subject to a travel restriction, or in employment that is restricted or closed because of a public health direction, and either suffering a 25% loss of

40 Jackie Trad and Mick de Brenni, 'Special COVID-19 Protections for Residential Tenants and Owners' (Joint Statement, Queensland Cabinet, 9 April 2020) <<https://statements.qld.gov.au/statements/89659>>; Real Estate Institute of Queensland, 'The REIQ Achieves More Fair and Balanced Protections for Both Landlords and Tenants' (Media Release, 24 April 2020) <<https://www.reiq.com/wp-content/uploads/2020/05/REIQ-Media-Release-COVID-19-Guidelines-Fair-Balanced-Outcome-24042020.pdf>>.

income or paying more than 30% of their household income in rent (regulation 6). As it removes no-grounds terminations for the excessive hardship group, the Regulation also adds new grounds for termination: that the landlord is preparing the premises for sale (regulation 35); and where the landlord or a family member is to occupy the premises (regulation 37). These new grounds are available with regard to all tenancies (not just those of the ‘excessive hardship’ group) and during fixed terms, reducing the security of tenure fixed terms ordinarily provide – an ironic change in an eviction moratorium.

Queensland’s moratorium expired 29 September 2020, and was not extended; it is the only jurisdiction not to do so.

7 Victoria

The same day as Queensland implemented its regulation, Victoria enacted the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (‘Vic *COVID-19 Act*’), which amended the *Residential Tenancies Act 1998* (Vic) (‘Vic *RTA*’) to include a new part 16, commencing retrospectively from 29 March 2020 (Vic *RTA* section 615). Victoria’s approach to the moratorium is similar to Western Australia’s, and effectively brings all termination proceedings under scrutiny – first by Consumer Affairs Victoria, and then the Victorian Civil and Administrative Tribunal (‘VCAT’) – with higher qualifications required for a termination order. To that end, section 544 of the Vic *COVID-19 Act* stops landlords from giving notices of termination and provides that any notices given are without effect. Section 549 then provides for applications for termination on no fewer than 19 specific grounds, with applications first going under a new Residential Tenancy Dispute Resolution Scheme to Consumer Affairs Victoria (section 548(1)), which assesses the matter’s suitability for alternative dispute resolution under the Scheme.⁴¹ Matters not resolved or not suitable can then go on to the Tribunal for determination. The section 549 termination grounds include causing serious damage (section 549(2)(a)), endangering neighbours (section 549(2)(b)(i)), and failing to comply with obligations – including failing to pay rent in circumstances where the tenant could do so without suffering severe hardship (section 549(2)(h)(i)). This last section is further qualified at section 549(6), which states that the Tribunal must not terminate where a tenant is unable to comply with an obligation (including to pay rent) because of a ‘COVID-19 reason’, which includes being ill, or having to comply instead with a direction from health and emergency authorities (section 537). Where the Victorian approach differs from Western Australia’s is in bringing all (not merely most) termination proceedings under scrutiny, and in not entirely ruling out termination for rent arrears in hardship cases; but both are only a little less complete than Tasmania’s more straightforward moratorium.

41 Applications to the tribunal are made ‘subject to the Residential Tenancy Dispute Resolution Scheme’ (Vic *RTA* s 548(1)), which was implemented on 12 May 2020 by the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* (Vic).

In August 2020, with the state in a second outbreak, Victoria extended its emergency period to 31 December, and in September extended it again to 28 March 2021 (section 615).

8 *The NT*

The NT was last to act, amending on 28 April 2020 the *Residential Tenancies Act 1999* (NT) ('NT *RTA*') to empower the Minister to make 'modification notices' that 'suspend or modify all or part of this Act and regulations made under it' (section 157B(2)(a)). The same day the Minister issued a modification notice that, like most other jurisdictions, makes provisions specific to a 'COVID-19 hardship' group, and provisions of wider application.⁴² The NT's provisions also differentiate between tenancies in existence when the 28 April modification was made, and those commencing afterwards.⁴³ This reflects a concern on the part of the NT Government that controls on evictions and rents regarding existing tenancies may amount to an acquisition of property. This question appears not to have arisen in any other Australian jurisdiction, but was a live issue in contemporary discussions about emergency rent regulation and relief in the United Kingdom and Ireland, and resonates with current themes in property jurisprudence, so I will return to it in more detail in Part IV of the article. The NT's particular concern was that if its response amounted to an acquisition of property other than on just terms, it would be *ultra vires* section 50 of the *Northern Territory (Self-Government) Act 1978* (Cth).⁴⁴ The Government considered the question resolved by providing for less intensive interventions in existing tenancies than new tenancies commencing after 28 April 2020 – and, to be on the safe side, section 157J of the *NT RTA* provides that if the modification notice in fact effects an acquisition of property, a landlord may apply to a court for compensation.

Under the NT Notice, landlords are not stopped from giving termination notices, but tenants who notify their landlords that they are in 'COVID-19 hardship' qualify for a longer period in which arrears may accrue before a termination notice may be given (60 days, rather than the usual 14 days: sections 23(1), 26(1)). 'COVID-19 hardship' is defined as suffering, directly or indirectly because of a government COVID-19 direction, the hardship of paying more than 30% of their household income in rent, or suffering a risk to their health and safety (section 5). Where a landlord applies for termination of an existing tenancy, the Northern Territory Civil and Administrative Tribunal may suspend possession if satisfied that the tenant can pay 30% of their household's income towards rent during the suspension, and pay the outstanding amount at the end of the suspension (section 31(2)); if not, the tenancy will be terminated (section 31(4)). Regarding new tenancies, landlords and tenants in hardship are required to 'make good faith efforts to resolve the breach ... or to negotiate a new rent for the premises' (section 26(3)), and on an application for termination the Tribunal has a freer hand to

42 Northern Territory, *Government Gazette*, No S28, 28 April 2020, 2.

43 *Ibid* 7–8.

44 The *Australian Capital Territory (Self-Government) Act 1988* (Cth) also contains a prohibition on the ACT government making laws for the acquisition of property otherwise than on just terms (s 23(1)(a)), but this is not countenanced in public documents relating to the ACT's law and ministerial declaration.

alleviate hardship: it can suspend termination, or create a new fixed term with reduced or deferred rent (section 29). Aside from the ‘COVID-19 hardship’-specific provisions, the modifications increase for all tenants the notice period for without grounds terminations to 60 days (sections 19(2), 20(2)) – still shorter than the usual period for these notices in some other jurisdictions. Notwithstanding the latitude given to the Tribunal in dealing with hardship in new tenancies, the NT’s measures amount to the weakest ‘moratorium’ of all the jurisdictions. The measures have continued as the NT has extended its public health emergency period, currently to 23 March 2021.⁴⁵

B Enacting Rent Regulation

Australian states’ and territories’ COVID-19 emergency measures address rent payment obligations in a variety of ways. During the emergency period landlords are stopped from increasing rents with regard to all tenancies in Tasmania (Tas *COVID-10 Act* section 22(2) and clause (b) of the declaration),⁴⁶ South Australia (SA *COVID-19 Act* section 8(1)(b)), Victoria (Vic *RTA* section 539(1)) and Western Australia (WA *COVID-19 Act* section 8); in the ACT, rent increases are stopped for ‘impacted’ tenancies only (ACT *COVID-19 Declaration* clause 10). In New South Wales, Queensland and the NT, landlords retain their usual legal ability to increase rents.

Regarding variations to existing rent obligations, including rent reductions, Tasmania, South Australia, the ACT and the NT have encouraged landlords and tenants to negotiate, but make little formal provision for variations. On the other hand, the emergency measures in New South Wales, Queensland, Victoria and Western Australia have established formal frameworks for varying rent payment obligations. However, in these jurisdictions, too, the emphasis is on parties’ negotiating and making their own arrangements, both prior to and in the course of the formal process. No jurisdiction has issued any express guidance as to an appropriate quantum or principle for rent variations – in contrast, the mandatory code for commercial tenancies provides that variations in rent should be proportionate to reductions in tenants’ revenues.⁴⁷

The following examination of each jurisdiction in turn observes features that may affect the position of each party as they approach the variation process. Aside from the provisions of any formal process, these features include new emergency schemes for ‘rent relief’ delivered through land tax rebates and cash payments to landlords, and provisions for tenants in fixed terms tenancies to terminate early –

45 Northern Territory, *Government Gazette*, No S55, 11 December 2020.

46 Tasmania, *Tasmanian Government Gazette*, No 22 003, 30 June 2020.

47 National Cabinet, ‘National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles during COVID-19’ (Code of Conduct, 3 April 2020)
<<https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>>.

by which tenants might negotiate a variation by threatening to take their business elsewhere, or indeed terminate their liability and move out.⁴⁸

1 New South Wales

New South Wales was the first jurisdiction to implement a formal framework for rent variations. The *Residential Tenancies Regulation 2019* (NSW) stipulates a ‘formal rent negotiation process’ prior to termination proceedings for failure to pay rent (regulation 41C(2)(b)), and tasks the process to NSW Fair Trading, by providing that NSW Fair Trading is to advise the NCAT, in subsequent termination proceedings, on parties’ participation in the negotiations and whether they refused ‘a reasonable offer about rent’ (regulation 41C(4)). These references are the extent of the legislative basis of the rent negotiation process, and in practical terms the process has been operationalised by NSW Fair Trading repurposing personnel and procedures from its existing process for minor tenancy complaints. As such the New South Wales *Regulation* provides no guidance as to what a ‘reasonable offer about rent’ might be, nor any power for NSW Fair Trading or the NCAT to make an order that varies rent obligations for impacted tenants. Where an agreement cannot be reached by negotiation, the only course of action provided to the tenant is to apply to the NCAT for orders terminating the tenancy (NSW *RTA* section 228C), apart from any termination proceedings that the landlord may take for failure to pay rent. They may be liable to compensate the landlord, but it is limited to two weeks’ rent (section 228C(5)).

The same week as its legislative response, New South Wales also introduced a land tax rebate for landlords who reduce (not merely defer) rents for ‘impacted’ tenants. The rebate compensates the landlord by matching the reduction, subject to a cap at 50% of the total land tax liability.⁴⁹ On the average liability (according to Australian Taxation Office figures), the maximum rebate would be about \$2,000; however, land tax is paid on few New South Wales rental properties (17%), so it is a weak lever on rent variations.⁵⁰ Unlike most other jurisdictions, New South Wales has not also introduced a cash payment program. The combined result is even less formal and informal guidance than other jurisdictions (except the NT) as to the terms of rent variation agreements.

2 Queensland

Queensland’s framework for rent variations bears the marks of the REIQ’s campaign. The *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* (Qld) contemplates landlords and tenants

48 Generally, a tenant who ends a tenancy during a fixed term other than for the landlord’s breach is themselves in breach and liable to compensate the landlord – potentially for all rent to the end of the fixed term. Most jurisdictions allow applications for early termination on hardship grounds, but this too may be compensable: NSW *RTA* s 104(2); Qld *RTRA* s 310; SA *RTA* s 89(2); Vic *RTA* s 234(3); WA *RTA* s 74(2)(b); ACT *RTA* s 44; NT *RTA* s 99. See also Tas *RTA* s 47B.

49 ‘2020 Land Tax COVID-19 Relief - Guidelines’, *Revenue NSW* (Web Page, 18 January 2021) <<https://www.revenue.nsw.gov.au/news-media-releases/covid-19-tax-relief-measures/2020-land-tax-covid-19-relief-guidelines>>.

50 Author’s estimate, based on land tax deductions reported at Australian Taxation Office (n 16) table 26B.

making ‘tenancy variation agreements’ (regulation 13), which effect ‘a rent reduction for a stated period or a payment plan for unpaid rent’ (regulation 13(1)); the government’s original proposal contemplated rent reductions only, with scope for deferrals (‘payment plans’) added as a concession to the REIQ. The Regulation also provides for either party to apply to Queensland’s Residential Tenancies Authority for conciliation and, where conciliation fails, either party may apply to Queensland Civil and Administrative Tribunal (‘QCAT’) to determine the dispute, with the tribunal empowered to ‘make an order it considers appropriate about the unpaid rent’ (regulation 12(4)). At first glance this provision for determinative orders appears to go further than other jurisdictions with conciliation processes, but there are limitations: regulation 12(1) makes it a prerequisite of conciliation that rent is unpaid and the landlord has given a show cause notice (per regulation 11(5)), and regulation 12(4) stipulates that the order is ‘about the unpaid rent’, so orders about rent obligations and payments in prospect are arguably *ultra vires*.

Queensland’s Regulation deals with early termination in various ways, reflecting a compromise with the REIQ on the government’s original proposal to allow early termination more freely with a cap on compensation. The main provision is similar to New South Wales’: Queensland tenants in excessive hardship must first go through the conciliation process before they can apply for a hardship termination (regulation 42). However, in the most severe cases – where a tenant has lost 75% of their income, and less than \$5,000 saved – the tenant can leave in breach and compensation will be limited to one week’s rent (regulation 44). Queensland has also made special provision for tenants who are unsafe because of domestic violence – whether or not they are also in COVID-related hardship – to terminate their tenancies with seven days’ notice, with supporting evidence affixed, and no liability to compensate the landlord (regulations 21–31). This aligns with the approach taken before the pandemic in New South Wales and Western Australia (NSW *RTA* s 105B; WA *RTA* s 71AB).

Queensland had an early rent relief scheme (3–29 April 2020), commencing before it formulated its legislative response, and before the Commonwealth’s announcement of the JobKeeper payment. Tenants who had lost their jobs and who had been unable to reach a rent variation agreement with their landlord could apply for a payment of four weeks’ rent, capped at \$2,000, paid directly to the landlord.⁵¹ The criterion that the rent had *not* been reduced would tend to discourage landlords from agreeing to variations, and was not emulated in any other schemes. Along with its Regulation, Queensland introduced a New South Wales-style land tax rebate compensating landlords who reduced rents for tenants in hardship, capped at 25% of their land tax liability.⁵² However, land tax is paid on very few Queensland rental properties (just 6%), and on the average liability the maximum rebate would be \$515.⁵³ For a jurisdiction that had proposed relatively strong

51 ‘Apply for a COVID-19 Rental Grant’, *Queensland Government* (Web Page, 27 April 2020) <<https://www.qld.gov.au/housing/renting/rent-assistance/bond-loan/covid19-rental-grant>>.

52 ‘Coronavirus Tax Relief’, *Queensland Government* (Web Page, 2 November 2020) <<https://www.qld.gov.au/environment/land/tax/covid-19>>.

53 Australian Taxation Office (n 16) table 26B.

direction on rent variations, Queensland has in fact applied little guidance or leverage.

3 *Western Australia*

Western Australia's legislation contemplates tenants and landlords making 'rent repayment agreements', 'setting out how part or all of the rent not paid will be paid' (WA *COVID-19 Act* section 27(1)). Like New South Wales, Western Australia has established a conciliation process for the making of agreements, but the legislation is much more detailed and prescribes greater powers to the Commissioner for Consumer Protection and consequences for parties. Where parties cannot conclude an agreement themselves, either may ask for conciliation (section 14(4)), and if the Residential Tenancies Mandatory Conciliation Service takes the matter on, participation by both parties is mandatory – backed by a \$5,000 fine (section 56). Where an agreement is reached, the Commissioner can make an order to give it effect (section 60), but if conciliation fails the Commissioner cannot order a rent reduction; nor can the court in any subsequent proceedings on the failure to pay. However, as noted above, landlords are encouraged to make agreements with tenants in COVID-related hardship by the exclusion of termination proceedings in the emergency period and, if the landlord is uncooperative, afterwards too. There is another small encouragement to negotiate in Western Australia's provisions for tenants to terminate early, which give more latitude than most other jurisdictions: tenants suffering financial hardship can terminate on 21 days' notice without compensation (sections 20(2)–(3)).

Western Australia has also implemented a program of cash payments to landlords who vary (reduce or defer) rents for tenants suffering special hardship.⁵⁴ To be eligible under the first version of the scheme (to 1 December 2020), the tenant must have suffered a reduction in income of 75%, resulting in their rent (at 20 March 2020 – ie, before the variation) being more than 30% of their reduced income, and have less than \$10,000 in savings. The payment is equivalent to four weeks' rent or \$2,000 (whichever is the lesser), and is made to the landlord. However, the program terms state that the payment 'will be set off against the rent otherwise payable'⁵⁵ so the payment benefits the tenant as a credit on the rent account, rather than compensating the landlord. The second version of the scheme (post 1 December 2020) extends to tenants whose rent is in arrears or deferred and who suffered a 50% reduction in income; there is no requirement for a rent variation but the parties are required to agree to a fixed term tenancy of six months from 29 March 2021 (ie, after the emergency period). The payment amount is 75% of the arrears, capped at \$4,000. The second version of the scheme also provides for 'future rent support' for tenants currently receiving Centrelink payments, with less than \$10,000 saved, who enter with their landlord into a new fixed term of six

54 Western Australia does not have a land tax rebate scheme for residential landlords.

55 'Residential Rent Relief Grant Scheme', *Department of Mines, Industry Regulation and Safety, Government of Western Australia* (Web Page, 11 January 2021)
<<https://www.commerce.wa.gov.au/consumer-protection/residential-rent-relief-grant-scheme>>.

months from 29 March 2021 under the which the rent is to increase by at least 5%.⁵⁶

4 Victoria

Victoria's emergency amendments have, like Western Australia's, established a statutory conciliation scheme, including a new statutory office, the Chief Dispute Resolution Officer ('CDRO'); but unlike Western Australia's scheme, Victoria's empowers the CDRO to determine matters not resolved through conciliation by dispute resolution orders (Vic *RTA* section 605; *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020* (Vic) regulation 16(6)). These may include orders to 'reduce the rent payable ... for a specified period' (regulation 17(1)(l)), or 'require a tenant ... to enter into and abide by a payment plan to pay the rent or a reduced amount of rent, and any outstanding arrears' (regulation 17(1)(o)). In limited circumstances, the CDRO may make dispute resolution orders without prior conciliation (regulation 16(2)); in other circumstances they may also decline to make an order, whereupon a tenant may apply to the VCAT for a rent reduction or a rent payment plan (Vic *RTA* sections 540(1)(a)–(b)). The powers of the CDRO and the VCAT mean Victoria is the only jurisdiction to allow tenants a clear right to make an application regarding their rent obligations that may be resolved by an external decision-maker reducing what they may owe in arrears and what they are liable to pay prospectively. It is also the only jurisdiction to attempt to collect data about rent variation agreements on a wide scale, by providing for the registration of all agreements (ie, including those made without conciliation) with Consumer Affairs Victoria. Victoria has made 'suffering severe hardship' a new ground for termination by tenants, with a 14-day notice period.⁵⁷

Victoria has both implemented cash payment and land tax rebate programs. Victorian tenants can apply for the payment where their landlord has agreed to reduce, not defer, the rent and they are still in financial hardship: ie, their household income is less than \$1,903 per week, with less than \$5,000 saved, and the reduced rent is at least 30% of the household income. The amount of the payment is the difference between 30% of the household's income and the (reduced) rent, originally for 26 weeks with a \$2,000 cap, but on the extension of the emergency period it has been increased to 39 weeks and a \$3,000 cap (earlier recipients automatically receive the additional amount). The payment is made to the landlord, but the program stipulates that it is 'a deposit amount to the rental balance and has the same effect as if the tenant had made a rental payment'.⁵⁸ On the one hand, the targeting of households still in rental stress discourages landlords from reducing rents past 30% of the tenants' household income, but on the other

56 Ibid.

57 The Victorian legislation also stopped tenants in continuing agreements from giving a termination notice without grounds: Vic *RTA* s 545. The government subsequently confirmed this was a drafting error, and purported to correct it via clause 39 of the *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*.

58 'Coronavirus (COVID-19) Rent Relief Grant', *Department of Health and Human Services, State Government of Victoria* (Web Page, 11 October 2020) <<https://www.housing.vic.gov.au/help-renting/rentrelief>>.

hand payment is expressly a credit to (reduced) rental account, benefitting the tenant, and not compensation benefitting the landlord.

Victoria also offers landlords who reduce rents a compensatory land tax rebate equal to the amount of the reduction, capped at 25% of the land tax liability. From 20 August 2020, a further rebate of up to 50% of the land tax liability is offered where landlords reduce rents by at least 50% for at least three months during the extended emergency period.⁵⁹ Land tax is paid on just over one-third (37%) of Victorian rental properties; on the average liability, the maximum rebate would just under \$300.⁶⁰

5 Tasmania

Tasmania, with a bar on rent increases and the most complete eviction moratorium of the jurisdictions, made very little formal provision regarding rent variations: no framework is prescribed in its declarations. Beyond the usual provisions regarding early termination, Tasmanian tenants may, like landlords, apply under section 38A of the Tas *RTA* to the Residential Tenancy Commissioner for termination because of ‘severe hardship’.

From 25 May 2020, Tasmania has operated a cash payment program based on Victoria’s, with a significant difference. To be eligible, the tenant must have less than \$5,000 in savings, and the rent must be reduced (not deferred), but still be more than 30% of the tenants’ household income, and the payment (for the amount of the reduction, capped at four weeks’ rent or \$2,000) goes to the landlord. Like the Victorian program, Tasmania’s states that the payment is a credit to the rent account for the tenant.⁶¹

6 South Australia

In South Australia, no formal framework for rent variations has been implemented. However, the SA *COVID-19 Act* makes provision for rent reductions by order of the SACAT in very limited circumstances, where the landlord has sought possession orders (SA *RTA* section 93) and the Tribunal has seen fit to suspend possession because the tenant is suffering COVID-19-related financial hardship (section 8(1)(i)). In a factsheet, SACAT has indicated that such reductions are unlikely:

It is more likely that the parties will agree or SACAT may make an order which reduces a tenant’s rent payments for a short time (eg, until JobKeeper payments commence), but on the understanding that the tenants remain responsible to make

59 State Revenue Office (Vic) ‘Coronavirus Land Tax Relief’ (Web Page, 25 February 2021) <<https://www.sro.vic.gov.au/coronavirus-land-tax-relief>>.

60 Australian Taxation Office (n 16) table 26B.

61 ‘COVID-19 Rent Relief: Landlords and Agents’, *Department of Communities Tasmania, Tasmanian Government* (Fact Sheet, 25 March 2021) <https://web.archive.org/web/20210327062056/https://www.communities.tas.gov.au/_data/assets/pdf_file/0023/154463/V2.0_KOTOC_COVID-19-Rent-Relief-Landlords-and-Agents.pdf>.

up the balance of the rent which would otherwise have been payable, at some date in the future.⁶²

The amendments make no additional provision for tenants to terminate early.

South Australia later implemented two rent relief programs based on other states'. The first is a land tax rebate program like those in New South Wales, Queensland and Victoria. As in other states, land tax is paid on only a minority of rental properties in South Australia (28%), and on the average liability (\$680) the maximum rebate would be just \$170, so it is a weak lever.⁶³ The second program is like Tasmania's cash payments, whereby tenants in hardship can apply for a payment, direct to their landlord, equivalent to the amount of rent reduced, up to \$1,000. However, the program terms state that this is to 'offset the provision of reduced rent to the affected tenant', and may be credited to the rent account, or kept by landlord as compensation, as the parties agree.⁶⁴

7 The ACT

The ACT *COVID-19 Declaration* countenances parties making a 'temporary rent reduction clause' (clause 3(1)), but prescribes no formal process. It does, however, specify that these reductions are not mere deferrals (clause 3(2)(c)). No additional provisions are made for tenants leaving early.

The ACT also implemented a land tax rebate scheme, structured differently from other jurisdictions. ACT landlords who reduce rents for impacted tenants by not less than 25% are eligible for a rebate on their land tax, equivalent to 50% of the amount reduced, to a maximum \$1,300 per quarter.⁶⁵ Notably, land tax applies to almost all rental properties in the ACT. The rebate's structure avoids the limiting effect of the 30% threshold in the cash payment schemes in other jurisdictions, but is (part) compensation to the landlord, not a further benefit for the tenant.

8 The NT

The NT's modifications include no new conciliation process, and contemplate landlords and tenants negotiating new rents only in relation to new (ie, post-28 April 2020) tenancies; there is not even a suggestion that parties to existing tenancies should do such a thing. The NT's modifications allow tenants under new agreements to apply for termination because of hardship, but not under existing agreements; in fact, the modifications exclude 'COVID-19 hardship' from the usual provisions for hardship terminations (at section 99 of the NT *RTA* as

62 'Temporary Changes to the *Residential Tenancies Act 1995* in Response to the 2020 COVID-19 Pandemic', *South Australian Civil and Administrative Tribunal* (Information Sheet) 3 <<http://www.sacat.sa.gov.au/upload/information/fact-sheets-and-guides/Fact%20Sheet-Amendments%20to%20RTA%20for%20COVID%20-%20final%20version.pdf>>.

63 Australian Taxation Office (n 16) table 26B.

64 'Residential Rental Grant Scheme – Second Round', *Department of Treasury and Finance, Government of South Australia* (Web Page) <<https://www.treasury.sa.gov.au/Growing-South-Australia/COVID-19>>.

65 'COVID-19 Assistance', *ACT Revenue Office* (Web Page, 23 December 2020) <<https://www.revenue.act.gov.au/covid-19-assistance>>.

modified by section 28(b) of the Notice).⁶⁶ The NT implemented no rent relief programs.⁶⁷

C Emergency Measures Summary

The details of states' and territories' emergency measures vary greatly, so Table 1 summarises their relative strength by a score for each of the main topic areas examined above. Maximum scores reflect the relative importance of each topic area, from rent variation provisions (scored out of six) through eviction protections for the core COVID-affected group (five), then eviction protections for the wider group (three), and restrictions on rent increases (two). The weighted average scores (out of 10) show the relative overall strength of the measures.

Regarding eviction protections for the core COVID-19 group, a score of five stars would represent a complete moratorium. Tasmania scores four, because it still allows a few grounds for termination. Western Australia and Victoria allow a few more still, so score three. New South Wales, South Australia, Queensland and the ACT score two in the core group, because their moratoriums are limited mostly to rent arrears, and the NT scores one because there remains considerable scope even for rent arrears terminations. Regarding eviction protections for the wider group, Tasmania stopped most grounds (so scores three); Western Australia and Victoria stopped some (so score two); New South Wales, South Australia and the NT stopped few (score one); and Queensland and the ACT stopped none.

Regarding rent increases, a score of two represents a complete ban; one is for a ban only for 'impacted' tenants. For rent variations, a score of six would be a framework that strongly guides negotiations to reduced (not deferred) affordable rents, by determination if not agreement. Victoria scores four because, positively, it provides for conciliated and then determined variations, operates rent relief schemes that clearly allocate benefits to tenants (the credit to the rent account) and to some landlords (the land tax rebate) but, negatively, it still allows deferrals and tends to discourage reductions below 30% of income. Western Australia does not provide for determined variations, and allows deferrals, but has a relatively comprehensive conciliation process and rent relief that benefits tenants, but so scores three. Queensland scores two for its conciliation process and limited provision for determined variation, and some additional scope of early termination. The remainder score one: New South Wales, for its conciliation process; South Australia, for its very limited provision for determined variations and rent relief; Tasmania, for its rent relief scheme; the ACT, for its specification that variations are reductions, and its straightforward relief scheme; and the NT, for its very limited provision for determined variations.

66 Northern Territory, *Government Gazette*, No S28, 28 April 2020, 12–13.

67 The NT does not levy land tax.

Table 1. Emergency measures scored and compared.

	Evictions - core COVID group (5)	Evictions - wider group (3)	Rent increases (2)	Rent variations (6)	Weighted average score (10)
NSW	2	1		1	3
Qld	2			2	3
SA	2	1	2	1	4
Tas	4	3	2	1	6
Vic	3	2	2	4	8
WA	3	2	2	3	7
ACT	2		1	1	3
NT	1	1		1	2

IV HOUSING AND PROPERTY RIGHTS CONSIDERATIONS

Having examined the emergency measures in some detail, this Part of the article draws out their major themes and critically appraises them: where they are deficient or problematic for housing rights, and where there is potential to extend or build on them to advance housing rights in an enduring way. The scope of this appraisal is necessarily limited: at the time of writing there is little available evidence as to the effects of the emergency measures on rates of rental stress, termination and eviction – but some data are available and the preliminary analysis presented here suggests that the issue of rent variations, in particular, may need to be revisited by legislators in a stronger way. For the purposes of making arguments for further reforms, both short- and long-term, the Part also considers the argument that the legal protection of property rights is an obstacle to reform.

A Immediate Problems for Housing Rights

Three features of the emergency measures common across jurisdictions present a set of interlocking problems, both in terms of the particular crisis of COVID-19, and more generally for the right to housing.

First is the time-limited nature of the measures: this relates to the measures' 'emergency' nature, and is a problem to be worked through. As noted above, all jurisdictions except Queensland have extended their measures past the original six-month timeframe into early 2021.⁶⁸ The Commonwealth, too, has extended its income support measures, but at reduced rates, with both the Coronavirus Supplement and JobKeeper due to end entirely by the end of March 2021.⁶⁹ When

68 As noted above, 31 January 2021 for Tasmania and the ACT; 23 March 2021 for the NT; 26 March 2021 for NSW; 28 March 2021 for Victoria and WA; 31 May 2021 for SA.

69 *Social Security (Coronavirus Economic Response – 2020 Measures No. 16) Determination 2020* (Cth) ss 6–9; *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Compilation No. 8)* (Cth) s 5.

these payments are withdrawn, there may be renewed calls for rent variations and protection from eviction.

Timeframe extensions become complicated with the second problematic feature of the emergency measures: the common approach across jurisdictions (except Tasmania) of defining a core COVID-affected group for special protection. The definition of the core group differs between jurisdictions, and in some – particularly those with precise criteria – the definitions may present problems or inequities: for example, in New South Wales a high-income household that suffers a 25% reduction in income for a brief period is ‘impacted’ (there is no criterion as to the duration of the income reduction), while a low-income household that suffers a 20% reduction indefinitely is not. Beyond inequities at the margins of the group, the general approach of sharply differentiated treatment comes with a potential policy problem for compliance, whereby landlords with protected ‘hardship’ tenants may seek to oust them by high-pressure and unlawful means. This is familiar from the rolling back of post-war rent and eviction controls, when protected tenants often became the target of harassment from landlords.⁷⁰ Were the timeframes extended for very long, the compliance risk presented by differentiated treatment would be increased.

Third and most problematic is jurisdictions’ common approach of relying on landlords and tenants to negotiate rent variations – formally assisted by state conciliators, or unassisted. There is a significant question as to whether this approach has effectively relieved rental obligations and, hence, insecurity. This feature of the emergency measures is a larger problem than the other two discussed above, and may make those other two less a problem: that is to say, questions of the differentiated treatment of ‘hardship’ tenancies and duration matter less where landlords can resist actually bearing a cost from hardship tenancies. In particular, the following might be regarded as signs of this resistance: 1) tenants unsuccessfully seeking rent variations; 2) variations that defer, rather than reduce, rents; and 3) tenants terminating tenancies, rather than seeking to continue and negotiate a variation.

As part of a larger research project,⁷¹ the author and colleagues analysed data about rent variations from a range of sources:

- Our own survey of tenants (n = 312), conducted August – October 2020;
- A sample of 200 de-identified rental variation agreements registered in Victoria in April and May 2020, and de-identified outcomes from state conciliation services in New South Wales (all 47 outcomes to end June 2020), Queensland (sample of 195 outcomes to end July 2020) and Western Australia (sample of 203 outcomes to end September 2020);

70 See, eg, tactics such as ‘the machine gun technique’ of rapid successive termination applications, recounted in Peter Clyne, *Practical Guide to Tenancy Law* (Rydges, 1970) 175.

71 Hal Pawson et al, ‘COVID-19: Rental Housing and Homelessness Impacts’ (UNSW-ACOSS Poverty and Inequality Partnership Report No 7, 2021).

- Other surveys and data published by the Australian Bureau of Statistics,⁷² the Australian National University,⁷³ the Australian Housing and Research Institute,⁷⁴ the advocacy group Better Renting,⁷⁵ and the Reserve Bank of Australia.⁷⁶

From the different sources, it appears a significant minority of renters sought a variation: between 17–38%, depending on the source, with ‘success’ rates ranging between 42–73% (such that the proportion who got a variation was between 8–16%).⁷⁷ Aside from significant proportion of renters who requested unsuccessfully – 22% of all renters, in our survey – we also found 24% had been discouraged from asking by fear of negative consequences or feeling of futility.⁷⁸

The different surveys also demonstrate significant proportions of rent variations are mere deferrals: ranging from 16–50% (the author’s own survey finding 37%). Of the sample of variations registered with the Victorian government, 12% were deferrals, with higher rates recorded in the other states’ conciliation outcomes: 36% in New South Wales; 42% in Queensland; and 57% in Western Australia.⁷⁹ These rates may reflect the weak leverage of New South Wales and Queensland’s land tax rebates, and the public advocacy of the Real Estate Institutes of New South Wales and Queensland for deferrals;⁸⁰ Western Australia’s even higher rate may reflect its rent relief scheme’s openness to deferral arrangements, as well the unusual tightening of rental vacancies that occurred during the pandemic there.⁸¹ These sources also indicate that the amounts of rent deferred are substantial: from an average of \$108 per week in Western Australia, up to an average of \$200 per week in New South Wales.⁸²

Faced with the prospect of refusal of a variation request, or mere deferral, termination of a tenancy and moving out may seem the surer way of reducing one’s liability. In our survey, 19% of renters had terminated a tenancy and moved in the

72 Australian Bureau of Statistics, *Household Impacts of COVID-19 Survey* (Catalogue No 4940.0, 14 December 2020) table 8.

73 Nicholas Biddle et al, ‘COVID-19 and Mortgage and Rental Payments: May 2020’ (Report, 30 June 2020).

74 Emma Baker et al, Australian Housing and Urban Research Institute, *Renting in the Time of COVID-19: Understanding the Impacts* (AHURI Final Report No 340, October 2020).

75 Joel Dignam, ‘Rent Due: Renting and Stress during COVID-19’ (Report, Better Renting, August 2020).

76 Richard Evans, Tom Rosewall and Aaron Wong, ‘The Rental Market and COVID-19’ (RBA Bulletin, Reserve Bank of Australia, 17 September 2020).

77 By comparison, loan deferrals data indicate 305,000 landlords had payments deferred at the end of May 2020, equivalent to 12% of rental properties: ‘Temporary Loan Repayment Deferrals due to COVID-19: July 2020’, *Australian Prudential Regulatory Authority* (Web Page, 12 September 2020) <www.apra.gov.au/temporary-loan-repayment-deferrals-due-to-covid-19-september-2020-accessible-version>; Pawson et al (n 71) 43.

78 See Pawson et al (n 71) 80–2, for a detailed discussion of the different sources and figures.

79 Ibid 79.

80 See, eg, Rebecca Hyam and Lexy Hamilton-Smith, ‘Landlords Should Oppose Queensland Government’s Planned Protections for COVID-19 Tenants, Says REIQ’, *ABC News* (online, 15 April 2020) <<https://www.abc.net.au/news/2020-04-15/coronavirus-queensland-rentals-tenants-landlords-covid19/12144418>>; @REINSWnews (Twitter, 16 April 2020, 1:05 pm AEST) <<https://twitter.com/REINSWnews/status/1250621411871211520>>.

81 By contrast, vacancies in eastern states mostly rose or were flat: see Pawson et al (n 71) 37–61.

82 Ibid 79.

period since the eviction moratorium announcement on 29 March 2020. New South Wales rental bond data also show a large increase (17%) in tenancy terminations in the June quarter of 2020 compared to the previous year; the Victorian and Queensland bonds data, however, show no increase on the previous year.⁸³

The data suggest that the reliance on negotiated and conciliated variations has been only weakly protective and, in a significant minority of cases, deferred rental obligations are mounting over the emergency period and may still put tenancies at risk afterwards. Governments might yet be called upon to settle these liabilities, either by payment – which may perversely reward landlords who resisted sharing the losses caused by the crisis – or by legislatively determining that some part of arrears accrued in the emergency are not liable to be paid.

B Potential Advances in Housing Rights

Notwithstanding their problems and deficiencies, the emergency measures also indicate in several respects how Australian residential tenancies laws may be reformed on an enduring basis. These reforms would better reflect the right to housing recognised at international law.

Three common elements of the emergency measures to prevent evictions could be adopted permanently. First, the turn away from no-grounds terminations by landlords – which are suspended in Tasmania, Queensland, Western Australia and Victoria – could be made permanent, with provision made for termination on prescribed, just grounds only. This would bring jurisdictions into line with the requirement, stated by the UN CESCR, that eviction should always be justified.⁸⁴ Furthermore, according to the UN CESCR, eviction is ‘justified’ through external scrutiny of each case, applying the principle that eviction is the last resort. In this regard, too, most jurisdictions have implemented measures that could be made permanent, specifically the invigorated pre-tribunal conciliation processes in New South Wales, Queensland and, especially, Victoria and Western Australia, and the affordance of discretion to tribunals in determining termination proceedings, particularly with directions to consider the need to avoid homelessness (as in New South Wales and South Australia). The permanent extension to boarders and lodgers of the emergency measures’ improved security and scrutiny of termination proceedings would also bring Australian laws more into line with the UN CESCR’s affirmation that security of tenure is the right of all, but that it may vary in degree.

Removing no-grounds termination and improving scrutiny, it might be said, are reforms that could be undertaken without requiring radical change in the structure of the Australian PRS. As observed in Part II(A), most PRS properties are owned by landlords with fewer than four properties, with a significant minority

83 Department of Communities and Justice (NSW), *Rent and Sales: June Quarter 2020* (Report No 133, 7 July 2020); Pawson et al (n 71) 56–88. There are no Western Australian data.

84 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights)* (n 25) [8]; *Djazia and Bellili v Spain* (n 27) [15.1].

owned by single-property owners, primarily interested in transferring property (by sale or own use) in owner-occupation. Grounds such as sale to an owner-occupier, use of premises for one's owning housing, or change of use could be prescribed in place of the current no-grounds provisions, subject to notice periods reflecting the relative priority of these alternative uses, and to scrutiny and discretion in tribunal proceedings so as to avoid injustice and homelessness in individual cases. In this way, removal of no-grounds terminations would improve security without radically reordering PRS structures or the consumer protection model of residential tenancy legislation.⁸⁵

The emergency measures also indicate the potential for a stronger regulatory role regarding rents, although the lessons for enduring reforms in this regard are somewhat more complicated, particularly because of the evident weakness of the rent variation regimes. The prohibition in five jurisdictions on rent increases, too, is obviously a short-term measure, because if it were maintained for a long period differences would open up between current and new tenancies that pose a compliance risk as discussed above. There are numerous international examples of rent regulations that seek to moderate market outcomes, rather than wholly determine rents, and which could be emulated in Australia. Ireland and Germany provide two different examples of rent regulation in countries where, as in Australia, most rental housing is owned privately by other households.⁸⁶ Under Ireland's (post-rent control) *Residential Tenancies Act 2004*, rent increases are capped at 4% per annum in declared to be 'rent pressure zones', where rents for the area are above the national average, and annual rate of increase has been above a threshold rate for four of the past six quarters; currently, rent pressure zones cover most of urban Ireland. In Germany, rent increases are limited according to changes in a 'local reference rent', presented in an instrument known as a *Mietspiegel*, which averages rents under new and existing tenancies in comparable properties over the past four years, effecting a moving anchor for the market. Under recent amendments, municipalities with tight housing markets can also limit new rents to not more than 10% above the *Mietspiegel* rent.⁸⁷

C The Question of Property Rights Protection

Having proposed further reforms to address problems in the emergency measures, and build on their positive aspects, it is appropriate to consider whether property rights considerations represent a legal obstacle for such reforms. This is the question that shaped the emergency response in the NT and contributed to its measures being the weakest in Australia. Here the challenge it poses is scoped – so that it may be set aside, in all respects but one, as a real objection to stronger housing rights reforms.

The argument is that laws regulating evictions and rents – by limiting amounts to be paid in prospect, or by reducing amounts owed in arrears – may at some point

85 See also Martin (n 18).

86 Martin, Hulse and Pawson (n 23) 47.

87 Stefan Kofner, 'Appendix 1: Private Rental Housing in Germany' in Martin, Hulse and Pawson (n 23) 82, 93.

become taking of property, and thereby contravene constitutional and conventional protections against laws that effect acquisition of property other than on just terms. As O'Connor shows, arguments about 'regulatory takings' have been developed in recent years in Australian litigation and political campaigns against environmental regulation, drawing on American jurisprudence and scholarship.⁸⁸ The argument turns on conceiving of property as a bundles of rights that may be conceptually severed, such that the right to clear away vegetation as one pleases, and rights to mine and explore for minerals, is each a property right taken away when a regulation targets and restricts it. Some of those same American sources expressly argue that restrictions on returning possession of premises to landlords, and on charging any amount of rent, are also regulatory takings.⁸⁹ Less remarked on in Australian commentary, but striking a chord with the regulatory takings argument, is the body of European judgments that have held older-style eviction and rent controls contravene constitutional and treaty protections for property rights.⁹⁰

There are several points where this argument falls down as regards tenancy law reform in Australia. The first is with the state legislatures. It is clear that states can legislate to regulate evictions and rents, even to the extent of effecting 'regulatory takings', because their constitutions do not restrict state legislatures from enacting laws for acquisition without compensation.⁹¹ States do have legislation that provides for compensation on just terms for the compulsory acquisition of land, including 'interests in land', and there may be an issue – discussed below – whether the right to recover rent arrears is such an interest; even so, states can also legislate to specifically exclude such a measure from compensation regimes.

It is different for the Commonwealth and the territories – and although the former is not an important tenancy law legislator, the latter are. The *Australian Constitution* prevents the Commonwealth Parliament from making laws for the acquisition of property other than on just terms at section 51(xxxi), and this limitation runs to the statutes made by the Commonwealth Parliament for self-

88 Pamela O'Connor, 'The Changing Paradigm of Property and the Framing of Regulation as a Taking' (2010) 36(2) *Monash University Law Review* 50.

89 Richard A Epstein, 'Rent Control Laws Are Unconstitutional', *Defining Ideas Journal* (Web Page, 10 February 2020) <<https://www.hoover.org/research/rent-control-laws-are-unconstitutional>>.

90 For example, *Blake v Attorney General* [1982] IR 117, where the Supreme Court of Ireland held rent and eviction controls (that for certain controlled premises barred eviction other than for the tenant's breach and a few special grounds, and pegged rents to 1966 levels) contravened 'the general right to transfer, bequeath, and inherit property' at article 43.2 of the *Constitution of Ireland*. See also *Cassar v Malta* (European Court of Human Rights, Fourth Section, Application No 50570/13, 30 January 2018) where the Court held Maltese rent and eviction controls (that for certain controlled premises barred evictions other than for the tenant's breach and limited rents to 40% above 1914 levels) contravened the protection against deprivation of possessions at *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954) art 1, as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998).

91 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

government by the territories.⁹² The limitation also affects laws made under the section 51(vi) defence power,⁹³ which as discussed earlier supported eviction and rent controls during and after the Second World War. Those controls were litigated in several cases before the High Court and never found to be invalid.⁹⁴ Despite being a propitious environment for a section 51(xxxi) argument, none of those challenges argued that the controls effected an acquisition of property.⁹⁵

High Court judgments on section 51(xxxi) suggest at least ‘significant barriers’ to the regulatory takings argument generally, and little to encourage the specific argument that eviction and rent regulations are an acquisition of property.⁹⁶ The High Court has construed ‘property’ broadly – to include specific estates land, property in chattels and choses in action, and ‘innumerate and anomalous interests’⁹⁷ – and the concept of property as a ‘bundle of rights’ has been long accepted,⁹⁸ but the ‘conceptual severance’ on which the regulatory takings argument depends has never had support in majority judgments. Furthermore, the High Court has emphasised that ‘acquisition’ is more than ‘taking’, and distinguished the American jurisprudence on this point:

[I]t is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.⁹⁹

So, the benefit or advantage may go to a person other than the government – say, a tenant – but it must be proprietary.¹⁰⁰

A limitation on prospective rent increases will not satisfy that requirement: as the Full Court of the Federal Court held in *Esposito v Commonwealth* concerning a prospective price for land affected by regulation, ‘[a] hope, or spes, is not a species of property’.¹⁰¹ There is authority, from *Trade Practices Commission v Tooth & Co Ltd*, which involved commercial leases, that a limitation on the termination of a lease will not satisfy the requirement.¹⁰² However, a limitation on

92 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 359 (French CJ), 387–8 (Gummow and Hayne JJ), 419–20 (Kirby J).

93 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

94 *Brown v Green* (1951) 84 CLR 285.

95 The year after the Commonwealth terminated its rent controls, the High Court held in the cases reported together in *R v Foster* (1949) 79 CLR 43 that the defence power could no longer support several other defence regulations, one of which allowed ex-service personnel to take possession, under warrant, of otherwise vacant dwellings and occupy them as tenants. Neither this case, nor the earlier unsuccessful case *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213, argued a contravention of section 51(xxxi).

96 O’Connor (n 88) 65.

97 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *JT International SA v Commonwealth* (2012) 250 CLR 1, 27 [29] (French CJ).

98 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 284 (Rich J); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210.

99 *Commonwealth v Tasmania* (1983) 158 CLR 1, 145 (Mason J).

100 *Jenkins v Commonwealth* (1947) 74 CLR 400; *JT International SA v Commonwealth* (2012) 250 CLR 1, 101 [59].

102 (1979) 142 CLR 397. Gibbs and Mason JJ indicated that requiring a landlord to grant or renew a lease whatever the circumstances would be an acquisition – but if renewed on terms going generally in the market, the fair terms requirement would be satisfied.

the recovery of rent arrears incurred prior to the enactment of the limitation probably would be an acquisition of property, by analogy with the right of action affected in *Georgiadis v Australian & Overseas Telecommunications Corporation*:

‘[A]cquisition’ in s 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law.¹⁰³

It might be argued, specifically with regard to extinguished claims for rent arrears vested in landlords who had refused to reduce rents, when implored to, in a public health and economic crisis, ‘just terms’ are rather less than the full amount of arrears.

V CONCLUSION

From almost the beginning of the COVID-19 pandemic in Australia, there was a strong impulse to protect housing rights, manifested in the National Cabinet’s 29 March announcement of an eviction moratorium. When states and territories turned to the task of implementing the moratorium and associated provisions for rent obligations, that original impulse became in varying degrees complicated, compromised and dissipated, in legislation framed around a longstanding policy of mild consumer protection for tenants, and market rents and ready terminations for landlords. Some common elements in the measures implemented are potentially problematic – the timeframes, the differential treatment, and the reliance on individually negotiated rent variations that leaves outcomes unclear – and this last element especially appears to be producing deferred liabilities and post-emergency eviction risks that may require a further response by governments. However, other elements – the turn away from no-grounds terminations, increased scrutiny of proceedings and consideration of the need to avoid homelessness, and regulatory moderation of market rents – could be retained permanently to better align Australian residential tenancies law with the right to housing.

103 *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ).