

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2023/27056

CATCHWORDS

Application for of the *Residential Tenancies Act 1997* (Vic)– Sections 322(1), 91ZZD possession - end of fixed term residential rental agreement of 5 years or less -reasonable and proportionate to grant possession – section 330A of the Act.

APPLICANTS	Tina Vang Nhat Ming Ngo
RESPONDENTS	Hans Foik Susan Moss
WHERE HELD	Melbourne
BEFORE	Member D Lucas
HEARING TYPE	Hearing
DATE OF HEARINGS	26 September 2023 and 16 October 2023
DATE OF ORDER	30 April 2024
CITATION	Vang v Foik (Residential Tenancies) [2024] VCAT 389

ORDER

VCAT finds:

1. The residential rental agreement was for a fixed term of 6 months or more, but not more than 5 years.
2. Before the end of the term of the residential rental agreement the residential rental provider gave the renters not less than 90 days' notice to vacate under section 91ZZD of the *Residential Tenancies Act 1997*, specifying a termination date that was on or after the date of the end of the residential rental agreement.
3. The notice to vacate was not given in response to the renters exercising their rights under the Act.
4. Having regard to the matters in section 330A of the Act, it is reasonable and proportionate to make a possession order.
5. The residential rental provider is entitled to a possession order in the terms set out below.



VCAT orders:

1. The renters must vacate the rented premises by 17 May 2024.
2. At the request of the person who obtained the possession order and on payment of the prescribed fee the principal registrar of VCAT must issue a warrant of possession to be executed within 14 days after the date of issue. This request may be made after 17 May 2024 and no later than 30 October 2024.

Warning to the renters: If you fail to vacate the rented premises by 17 May 2024 the residential rental provider can request the principal registrar to issue a warrant of possession. You may then be forcibly vacated from the rented premises by a police officer or an authorised person carrying out a warrant of possession.

D. Lucas
Member

APPEARANCES:

For the applicants	Jacob Paola, Danielle Budd Harcourts Judd White
For the respondents	Georgia Wilson, Secondee Lawyer Justice Connect Homeless Law



REASONS

BACKGROUND

- 1 On 6 September 2023, the residential rental providers Ms Tina Vang and Nhat Ming Ngo ('the rental providers') brought an application seeking possession under *Residential Tenancies Act 1997* (Vic) ('the Act') section 91ZZD seeking possession of the grounds of end of fixed term residential rental agreement of between 6 months and 5 years duration.
- 2 The rental agreement was for a fixed term of 12 months, commencing on 5 September 2022 and ending on 5 September 2023.
- 3 The notice to vacate is dated 25 May 2023 and is issued on the form prescribed under *Residential Tenancies Regulations 2021* (Vic), Reg 37. The evidence before the Tribunal is that the notice was sent on 25 May 2023 via Registered Post to Susan Moss ('SM') and Hans Foik ('HV') (collectively, 'the renters'). The notice provided a vacate date of no later than 4 September 2023.
- 4 The notice allows the requisite 90 day period of time, allowing for 5 working days postal receipt.
- 5 The notice states:

I am giving you this notice for the following reason:

Section 91ZZD End of fixed term rental agreement of less than 5 years (60 or 90 days notice)

We have a fixed term residential rental agreement which ends on the termination date. I have decided not to extend this agreement and am giving you notice to vacate the premises at the end of the initial fixed term.

Please identify the duration of the fixed term residential rental agreement: end of fixed term of more than 6 months but less than 5 years

The residential rental provider have a fixed term residential rental agreement with the renters which ends on 4/9/2023.

The residential rental provider decided not to extend this agreement and am giving renters notice to vacate the premises at the end of the initial fixed term which being on 4/9/2023.

- 6 The application to VCAT made on 6 September 2023 states:

On 25 May 2023, a Notice to Vacate (End of Fixed Term Rental Agreement) was issued to the Renters of the Property, requesting that the Renters vacate the Property on or before 4 September 2023.

The Renters to date, have not vacated the Property on or before the due date despite the Notice. They have sighted to me that "they can't find anything" despite me writing a Rental Reference Letter for each of the Renters.



I apply now for Possession of the Property.

- 7 A hearing was conducted initially on 26 September 2023, which was unable to conclude for reasons of time. A further hearing was conducted on 16 October 2023, at the conclusion of which the Tribunal reserved its decision for two reasons. Firstly, the renters had previously requested written reasons for decision. Secondly, the Tribunal directed the rental providers to send to VCAT and to the renters any evidence available concerning proposed demolition plans or works connected with the rented premises, by 23 October 2023. Later on 16 October 2023 evidence of this nature was provided by the rental provider.
- 8 Since that time, each party has provided further written submissions, which are addressed below to the extent that they are relevant to the Tribunal's considerations.

ISSUES

- 9 There are three primary issues:
 - A. Is the notice to vacate valid?
 - B. Was the notice given in response to the renter exercising her rights under the Act?
 - C. Is it reasonable and proportionate to make a possession order?

A. Was the notice given in response to renters' exercising legal rights?
Conclusion: NO

- 10 This was contested by the renters.
- 11 The renters sought to argue that the notice to vacate was of no effect, and the rental providers were entitled to a possession order on the basis that the notice was given in response to the renters giving the rental provider multiple reports regarding 'the breakdown of facilities, fixtures, furniture or equipment provided by the residential rental provider' by way of requests for urgent and non-urgent repairs pursuant to section 72AA of the Act. It was accordingly submitted that the application for a possession order be dismissed because the notice was given in contravention of paragraph 91ZZI(4)(b) of the Act.
- 12 The notice given under section 91ZZD of the Act required no reasons to end a rental agreement at the end of a fixed term. The rental provider accordingly was not obliged to provide one. At the hearing on 16 October 2023 the rental providers were represented by their appointed property managers. At the resumed and final hearing on 16 October 2023, the rental providers were again represented by their property managers.
- 13 In the absence to that point of direct evidence from the rental providers, the Tribunal accordingly brought into the hearing without notice the rental



provider, Mr Ngo, who gave sworn evidence concerning his family's circumstances.

- 14 Mr Ngo gave evidence that his family presently lived in a different part of Melbourne, and their intention was ultimately to resume occupancy of the rented premises in Glen Waverley which was in the geographic zone for schooling considered more beneficial for the children of the rental providers. The intention was to demolish the premises and to rebuild before resuming habitation of the premises. Reference was made to pre-existing permits for demolition in this regard. The rental provider was clear that no consideration was given as to any repair request that may have been made by the renters previously in issuing the notice, which had a separate, family related basis.
- 15 The evidence provided by the rental provider Mr Ngo was spontaneous and persuasive to the Tribunal. The Tribunal is satisfied by any measure of doubt that the rental provider gave the notice to vacate without any ulterior motive and the notice was not given in response to the renters seeking to exercise their rights.
- 16 The Tribunal accordingly finds the notice to vacate dated 25 May 2023 is of full effect and is not rendered ineffective by reference to 91ZZI(4)(b) of the Act.

B. Is the notice legally valid? (Section 91ZZI)

Conclusion: YES

- 17 This matter was not contested.
- 18 The Tribunal is satisfied that the notice meets the formal requirement of notices as prescribed by the Act section 91ZZO (Form of Notice to Vacate). It is:
 - given on the prescribed form;
 - addressed to the renters;
 - signed by the rental providers' authorised agent;
 - specifies the reasons for giving the notice; and
 - specifies the termination date.
- 19 No matters concerning the form of notice are required to be approved by the Director (of Consumer Affairs) for the purposes of 91ZZO(e).
- 20 The notice to vacate is valid in accordance with section 91ZZO of the Act.

C. Is it reasonable and proportionate to award possession? (s. 330A of the Act)

Conclusion: YES.

- 21 This aspect was contested by the renters. The Tribunal has given this matter careful consideration, in view of the legitimate and competing interests expressed and established by each party.



22 Once VCAT is satisfied that the notice to vacate and application are correctly served and valid VCAT must make a possession order if satisfied under section 330(1)(f) of the *the Act* that:

.... in the circumstances of the particular application, it is reasonable and proportionate having regard to section 330A, to make a possession order taking into account **the interests of, and the impact on**, each of the following in making the possession order-

(i) **the residential rental provider**, rooming house operator, caravan park owner, site owner or mortgagee, as the case requires;

(ii) **the renter**, resident or site tenant;

(iii) any co-tenants or co-site tenants or other residents;

(iv) any neighbours or any other person who may be, or who has been affected by, the acts or behaviour of the renter, resident or site tenant to whom the notice to vacate was given.

23 In deciding whether it is reasonable and proportionate to make a possession order the Tribunal must consider the provisions of section 330A of the Act. In this application seeking possession of the premises at the end of the first term of the residential rental agreement, after reviewing all of the subsections a-j of section 330A I find that sub-sections h, i and j are particularly relevant to the issues in this case. That is –

(h) whether any other order or course of action is reasonably available instead of making a possession order;

(i) as the case requires, the behaviour of the residential rental provider, the provider's agent, the rooming house operator, the caravan park owner, the caravan owner or the site owner; and

(j) any other matter the Tribunal considers relevant.

Section 91ZZD and the reason why a residential rental provider wants possession

24 The Tribunal is required to balance the competing interests of both the rental providers and the renters, and the impact on each of them, in determining whether it is reasonable and proportionate to make a possession order.

25 Under section 91ZZD a residential rental provider is entitled to serve the notice to vacate without advising anyone of any proposed forthcoming use of the premises once vacant. However, when as here, the renters have made known to VCAT the reason why they need to stay in the premises, it often behoves a residential rental provider to explain why they want to have the renters removed from the rented premises and what they then intend to do with the property.

26 There are many reasons why a residential rental provider may wish to or need to obtain possession of a premises, and providing this explanation assists the Tribunal in determining whether it is reasonable and proportionate to terminate the residential rental agreement. It may be that the residential rental provider's need for the premises to be returned is greater than the need of the renter to remain. However, it is a matter for the rental provider as to whether

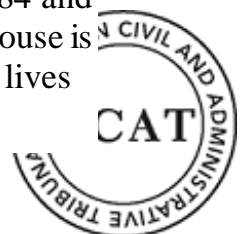


they provide the reason for seeking possession knowing that a failure to do so may result in the Tribunal finding that in exercising the discretion and balancing the interests of the parties, it can only consider the impact on the renter of a possession order, meaning in the majority of cases a decision not to make the order is the most likely outcome.

- 27 VCAT must consider the evidence and arguments put by both sides as to why it is, or is not, reasonable and proportionate to terminate the residential rental agreement, including such things as:
- a. the reasons why the residential rental provider needs possession;
 - b. whether there is any other course of action open to the residential rental provider without making a possession order;
 - c. both the renters' and the residential rental providers' personal situations;
 - d. efforts made by the renters to find alternative accommodation; and
 - e. generally the rental market and economic climate.
- 28 The Tribunal has considered the evidence and submissions of the parties about the competing factual claims and the competing needs of the renters and the residential rental providers as provided in the following.

Renters' submission as to possession not being reasonable & proportionate

- 29 Submissions referred to the Tribunals' role of conducting an evaluation and weighing of imprecise considerations; consideration of whether an order of possession would impose a greater burden upon the renters than is reasonable in view of the impact of the order upon the other party; and the broad scope of what is contemplated by 'the interests of, and the impact on. ... the renter'.
- 30 Specifically, impacts on the renters were outlined in submission dated 22 September 2023 as including:
- (a) the complex physical ill-health of SM who suffers from fibromyalgia and chronic fatigue which causes her chronic pain and discomfort, as well as decreased functional capacity. She also suffers from multiple chemical sensitivities and allergies. The physical and mental burden of moving house within a short period of time would impact her greatly and would be detrimental to her health (medical evidence attached);
 - (b) the financial constraints of SM. Due to SM's medical conditions, her only source of income is the Disability Support Pension. The impact of SM's financial constraints means that it is difficult to locate private rentals in the Glen Waverley area which is close to her elderly parents;
 - (c) SM's care requirements for her elderly parents. SM cares for her 84 and 93 year old parents who live at home with support. Her parents' house is a seven to ten minutes' drive from the property. The further SM lives away from her elderly parents, the less she can provide care;



- (d) HV's employment as a school crossing supervisor at Burwood Heights Primary School. Due to the nature of HV's employment, he has very limited work hours such that the close proximity of the property to the school makes his work viable. The further HV lives away from the property, the less viable his employment becomes;
- (e) the availability of any other accommodation for the renters. The renters have made a diligent and concerted effort to locate alternative accommodation. They have attended 29 inspections and note that there are no similar properties within 15 minutes' drive from SM's elderly parents and HV's employment. The competitive rental market coupled with the financial, medical and personal constraints described above have meant that the renters' considerable efforts have not yet been successful; and
- (f) the renters would be at risk of homelessness if evicted. In light of the difficulty experienced finding alternative accommodation at this time, the renters consider they are at real risk of homeless if evicted.

31 It was submitted that by contrast, the rental providers had not adequately demonstrated the harm they will suffer if possession is not ordered and that the main impact on the rental providers if the possession order were granted would be that they may be afforded the opportunity to secure renters 'who do not ask for repairs'. The renters gave evidence that this was in substance what was communicated to them by one of the property managers in a verbal exchange.

32 On 15 November 2023, the renters further submitted as follows. This refers to an earlier renters' email of 13 November, which is set out below together with the rental providers' responses:

Our writing Monday (13/11/23) that renting to other tenants is a "possibility" was an understatement. If we didn't believe that was the owners' plan, based on their actions and written evidence, we would have neither gone to VCAT to object to the granting of a possession order nor stayed at this address since the hearing.

If the owners had a building permit our situation would be clear and we would leave. We cannot risk our rental reputation. However it is not at all clear when they will have a building permit. Once they get a permit, Monash Council confirmed they will have 12 months within which to put in the footings. This means they could choose to keep renting the property to tenants for much of that time. There is no reason to believe the owners would keep the property vacant if we leave the property as they wish. As mentioned at the hearing (16/10/23), the neighbours were quite surprised when we were moving in as tenants because the owners had spoken with them prior to our lease beginning indicating building would be going ahead soon. At VCAT Mr Ngo spoke as if the demolition works were about to go ahead and it was said that demolition cannot go ahead with "living beings" in the property. The implication was that in remaining at the premises we were holding up their building project, however their building surveyor's 30/8/23 document shows many significant



items needing resolution before any building permit is issued; e.g. including 3. obtaining a builders contract, and 25. a. – f. plans need major alterations to comply. The owners talking up how soon they are building appears to be a repeated theme – to the neighbours and at VCAT.

Our low incomes don't help us secure rental properties so we rely heavily on reputation. This means doing our best to build goodwill. As shown in the supplementary documents of Georgia Wilson's written submission to VCAT (22/9/23), we went out of our way to be reasonable about repairs by waiting 3 months to ask for non-urgent repairs, waiting long periods before asking again, and from the outset offering to do handyman repairs within our scope when they were not our responsibility. We offered this verbally to both David Yang (24/8/22 inspection) and Danielle Budd (5/12/22) and then in writing (on 5/12/22 - S2 in Georgia Wilson's 22/9/23 submission to VCAT supplementary documents). David Yang said (24/8/22 inspection) the owners had hardly set foot in the house as their plans to re-develop meant they had very little interest in it. Despite this, the owners only accepted one of our list of five offers (S2 5/12/23) to carry out handyman repairs for free.

After repairs were repeatedly not completed, and our requests repeatedly politely fobbed off via email, we feared our time here being cut short due to our repair requests. That was another reason we didn't go to VCAT about repairs, along with Susan being fully occupied assisting her elderly parents with their increasing needs (as mentioned in the 16/10/23 hearing). Also, amicable resolution is our preference because of our wish to have relationships based on goodwill. We sought the CAV repairs inspection as we needed to be sure that our requests were reasonable - the response we'd had left us wondering.

The CAV inspector said all electric repairs are urgent repairs, meaning the 3 lights (laundry and 2 external) that have not been working since March or longer are urgent repairs. The owner and agents repeatedly stating at the hearing on 16/10/23 that the various actions they were questioned about were out of "caring" and "courtesy" does not tally with our experience, as evidenced by our written and verbal submissions to VCAT. Caring and courtesy towards us have not been a hallmark of this tenancy.

Danielle's unbidden statement late in the 25/7/23 inspection that "It's an investment property. The owners want tenants who don't ask for repairs." seems to indicate that at the time of that inspection Danielle was unaware both of the owners' intention to re-develop and that it is against the law for owners to give a notice to vacate to tenants because they have exercised their right to ask for repairs. As I (Susan) think I said in the hearing, I was so surprised at her saying it was an investment property that I immediately said about the neighbours saying of the plan to re-develop (even though I felt it wasn't my role to inform her of the owners' intentions). At my saying this, Danielle's face showed total surprise before she said "Maybe that's what they are doing then." That interaction with Danielle was of the ilk that is so unexpected, it sticks in mind.



It's an awkward position we are in. Being renters at the bottom of the rental market often means living with insecure housing, however this is worse. Since receiving the notice to vacate late May, one month after we finally got the house to a "reasonably clean" condition according to the Consumer Affairs Director's definition <https://www.consumer.vic.gov.au/housing/renting/2021-victorian-rental-laws-changes> (Guideline 2 - Cleanliness under the heading *Renting Guidance Publications*, which required very many hours' toil over 7 months and included use of hired professional steam cleaning equipment and our own professional cleaning equipment), we have not replanted the large vegetable patch for the winter, spring or coming growing seasons due to the notice to vacate. It is a loss of use of a feature of this property that we very much appreciate. We enjoyed growing many vegetables over the summer, and saved quite a bit of money too. If among the 34 houses we have now attended for inspections there'd been one that was equivalent to here and was as clean and as repaired as this property now is, we'd have moved. Georgia Wilson advised that providing a list of all rental properties we've attended to inspect was irrelevant to the topic of the hearing so we did not do that, but we have continued to look as we live in suspense.

Rental provers' evidence as to possession being reasonable & proportionate

33 On 20 November 2023, the rental providers wrote to the Tribunal, referring to the previously provided demolition permit number 6324 and Building contract signed 29 June 2023, and added:

As per process and (to) be a kind person to advise the tenant that we will move in so we have served the notice of vacant in May 2023 so they will have time to find another property after the lease is expired however the tenant did not want to move out.

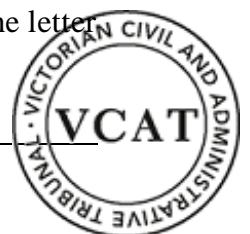
34 The rental providers outlined the following chronology:

1. Notice of vacant: May 2023
2. Application to VCAT: September 2023
3. Hearing 16 October 2023
4. 6 months had by then passed since service of the notice of vacate.

35 The rental providers continued:

I'm so frustrated as this is our property and will be our family home but we could not make a move as the tenant did not want to move out. We are currently paying a lot of interest/mortgage for the property and would like to move in not just keeping paying mortgage but cant stay where we want to be as family home.

Our kid is turning 4. It is very difficult for him to register the school in the area. The worse scenario they stay in current location for prep 1 then after we move to Glen Waverley he has to change the school with all new things to start over again, which is so frustrating for the kid and us as a parent. Please see below email from tenant and I can not believe that they can write the letter like this.



- 36 The rental providers then set out the renters' 13 November 2023 email to VCAT and responded in context.

Renters' assertions (1):

You may already be aware of the following information, but we do not know.

Monash Council Planning department confirmed via telephone today that, to date, no building permit has been issued for either demolition or new construction at 19 Folkestone Rd, Glen Waverley.

Rental providers' response

Attached is demolition permit, the tenant might not get the right information or the information provided to VCAT is not true

Schools require actual residency for enrollment:

<https://www.education.vic.gov.au/Documents/parents/going-to-school/100-point-address-checklist.pdf> and term 1 2024 begins 30/1/24

<https://www.vic.gov.au/school-term-dates-and-holidays-victoria#future-term-dates> 11 weeks from now.

Renters' assertions (2):

Victorian Builders' Association via telephone today described the many factors contributing to delays both before beginning demolition and in carrying out new building constructions as "a perfect storm" for very lengthy delays.

Rental providers' response

I'm not sure how source of information can be verified but this is none of tenant 's business as builders can get the construction very quick. I have been in this industry as project management since 2019 and most of my project starting on time as per building contract and building permit. Also, this is not related to the notice of vacant and our decision to move to Glen Waverley as this is our property.

Renters' assertions (3):

Even though renting to other tenants was not directly discussed at the 16/10/23 hearing, this possibility was implied by the owners' actions: gas compliance works carried out 3/8/23 and 15/8/23 only weeks before the 4/9/23 end of the 12 month tenancy; and Danielle Budd's property inspection 25/7/23, during which she asked if we were moving, and at VCAT Danielle said the purpose of that inspection was to see if [the tenants] were packing up ready to move out. Note that the building surveyor's 30/8/23 document (5 days before 4/9/23) indicates no building related permits had been approved at the time of the 25/7/23 inspection so demolition and building could not go ahead if we left then or now. The owners wishing to rent to other tenants remains a logical possibility.

Rental providers' response



If the VCAT allows me to proceed with the demolition while they are still in the property without intention to move out. I'm happy to proceed with the disconnection/abolishment with gas and electricity then demolished the property straight away as I have been kind enough to give the tenant time more than 6 months to move out. We have demolition permit approval and finance approval for construction. So happy to proceed straight away if VCAT allow me to do so.

CONSIDERATION

- 37 The Tribunal has found above that the rental provider has provided a legally valid notice to vacate under section 91ZZD that is compliant with the formal requirements of 91ZZO.
- 38 The rental provider does not need to demonstrate that they intend to demolish the existing rented premises, or to then build a new home for their family to reside in following demolition, for the purposes of section 91ZZD of the Act.
- 39 However, such evidence is nonetheless relevant to the impact upon the rental providers if possession is not granted.
- 40 The Tribunal is persuaded on the evidence that the rental providers do indeed require possession of the rented premises for the purposes they have expressed and have documented with objective evidence, in the form of a demolition permit and of a building contract, with an ultimate intention to assume occupancy in a newly constructed premises on the site. The assertions of the renters concerning the intentions of the rental providers are in the Tribunal's view speculative at best, and are ultimately unsupported by the balance of the objective evidence at hand. Having heard the evidence of the rental provider, the rental providers' property managers and that of the renters, the Tribunal is not persuaded that the property managers intended to give any indication suggesting that the rental providers were investors who did not like renters who complained about repairs.
- 41 The Tribunal has accordingly concluded on balance that the legal effect of the notice given under section 91ZZD of the Act is sound and section 91ZZI(4) has no present application.

Conclusions on whether it is reasonable and proportionate for possession to be granted

- 42 The Tribunal has accordingly proceeded to assess competing needs on the basis of its acceptance of the factual basis of the rental providers claims to genuinely indent to demolish the rented premises, to rebuild, and to establish a home in the area where they intend for their child to go to school.
- 43 The Tribunal acknowledges the renters' economic circumstances in particular of SM impeding efforts to establish new rental accommodation in the local area, the health needs of SM, the present proximity of SM to elderly parents and HV's present employment.



- 44 Against this, the Tribunal must consider what it finds to be the genuine intention of the rental providers to establish themselves in the area in a newly constructed home in order to be in an area zoned for their preferred school for their young child. The Tribunal accepts this as a genuinely held family-based intention, and further accepts that physical residency in the relevant geographical zone is critical for school enrolment purposes for the young child of the rental provider.
- 45 Ultimately, in balancing competing considerations, the Tribunal considers that the impact on the rental providers if possession is not granted, including on their young child, outweighs the impact on the renters if possession is awarded to the rental providers. Whilst the renters may continue to struggle to find alternative accommodation in their present locality, the Tribunal does not accept that the renters ultimately face a risk of homelessness if their rental property search parameters are broadened beyond their immediately local vicinity.
- 46 The Tribunal gives further weight to the fact now of a 90-day notice having been given the renters dated 25 May 2023, having extended now to a period now of around 12 months, in the context of possession ultimately being reasonable and proportionate.

CONCLUSIONS

- 47 Having determined the grounds for possession to have been made out, the Tribunal concludes on balance that it is reasonable and proportionate for possession orders to be made.

POSTPONEMENT OF WARRANT OF POSSESSION

- 48 Section 352 of the Act entails that VCAT may postpone the issue of the warrant by up to 30 days if the Tribunal is satisfied that the renters would suffer hardship if the issue of the warrant was not postponed and the renters' hardship would be greater than the hardship that the rental providers would suffer because of the postponement.
- 49 Against this, is the period of time since the renters have been formally on notice of the need to vacate, and the regrettable delay in this Tribunal issuing its findings and reasons granting possession to the rental providers. Whilst submission made on behalf of the renters characterise the hardship of further delay on the rental providers as only being "minimal", for the reasons expressed above the Tribunal has not accepted this submission.
- 50 To balance competing hardships, the Tribunal will order that vacant possession be given no later than 17 May 2024.
- 51 VCAT has made the orders set out at the commencement of these reasons.

D. Lucas
Member

