

Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 3)

Disallowable instrument DI2021–216

made under the

Residential Tenancies Act 1997, s 156 (Declaration—COVID-19 emergency response)

Part 1 Preliminary

1 Name of instrument

This instrument is the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 3)*.

2 Commencement

This instrument commences on the day after the notification day.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Expiry

This instrument expires on the earlier of—

- (a) the day the transitional period ends; or
- (b) the day mentioned in the Act, section 156 (3).

4 Revocation

This instrument revokes the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 2)* (DI2021-166).

5 Definitions

In this instrument:

household, in relation to premises the subject of a residential tenancy agreement, means the tenants and any other people living in the premises.

impacted, by the COVID-19 pandemic—see section 7.

impacted household means a household—

- (a) impacted by the COVID-19 pandemic under section 7; or
- (b) a member of which became eligible, on or after 12 August 2021, for payment of—
 - (i) the COVID-19 Disaster Payment from the Commonwealth; or
 - (ii) if the member is a sole trader—the COVID-19 Business Support Grant from the ACT Government.

moratorium period means the period—

- (a) beginning on the notification day; and
- (b) ending—
 - (i) on the day 12 weeks after the notification day; or
 - (ii) if the period is extended under section 6—at the end of the extended period.

transitional period means the period—

- (a) beginning on the day after the moratorium period ends; and
- (b) ending—
 - (i) on the day 12 weeks after the moratorium period ends; or
 - (ii) if the period is extended under section 6—at the end of the extended period.

6 Extension of *moratorium period* and *transitional period*

- (1) The Minister may extend the *moratorium period* mentioned in section 5, for a period of no more than 12 weeks.
- (2) The Minister may extend the *transitional period* mentioned in section 5, for a period of no more than 12 weeks.
- (3) An extension is a notifiable instrument.

7 When is a household *impacted* by COVID-19 pandemic?

- (1) For this instrument, a household is *impacted* by the COVID-19 pandemic if—
 - (a) 1 or more rent-paying household members have stopped earning income, or had a reduction in income, because—
 - (i) the member, or another member, is ill with COVID-19; or
 - (ii) the member has carer responsibilities for a family member who is ill with COVID-19; or
 - (iii) of a law introduced or other measure taken by the Territory, a State or the Commonwealth in response to the COVID-19 pandemic; and

- (b) either—
- (i) the household's weekly gross income is, on or after 12 August 2021, at least 20% less than the household's weekly gross income before the income of any of the rent-paying household members was stopped or reduced; or
 - (ii) a rent-paying household member's weekly gross income is, on or after 12 August 2021, at least 20% less than the member's weekly gross income before 12 August 2021; or
 - (iii) a rent-paying household member's weekly hours of work are, on or after 12 August 2021, 8 or more hours fewer than the member's weekly hours of work before 12 August 2021.

Note *State* includes the Northern Territory (see Legislation Act, dict, pt 1).

- (2) In working out weekly gross income before 12 August 2021 for this section, for a member of a household who has irregular weekly gross income, the person's income is the average of the person's actual weekly gross income in each week income was earned in the 12-week period before 12 August 2021.
- (3) If a household is impacted by the COVID-19 pandemic at any time within the moratorium period, the household is taken to be impacted for the moratorium period.
- (4) In this section:

rent-paying household member, in relation to premises the subject of a residential tenancy agreement, means a member of a household who regularly pays a share of the rent payable under the agreement.

weekly gross income, of a household, means the total of the weekly gross income, including any government payment, received by each rent-paying household member.

Part 2

Protection of households impacted by COVID-19 pandemic—moratorium period

8 Moratorium on termination etc for failure to pay rent

- (1) This section applies to a residential tenancy agreement for premises in which an impacted household lives.
- (2) During the moratorium period, the lessor must not—
 - (a) give a tenant in the household a termination notice because of the tenant's failure to pay rent; or
 - (b) apply for a termination and possession order under the Act—
 - (i) section 49 (Failure to pay rent—termination and possession order); or
 - (ii) section 49B (Failure to comply with payment order); or
 - (c) apply for a payment order under the Act, section 49A (Failure to pay rent—payment order); or
 - (d) apply for a warrant under the Act, section 41 (Warrant—termination and possession order) for the eviction of the tenant because of the tenant's failure to pay rent.
- (3) This section applies—
 - (a) regardless of when the tenant's failure to pay rent happened; and
 - (b) even if a termination notice was given by the lessor to the tenant before the commencement of this part.
- (4) A termination notice given in contravention of this section is void.

9 Existing orders etc for failure to pay rent

- (1) This section applies if—
 - (a) an application for an order in relation to a tenant's failure to pay rent for premises under a residential tenancy agreement has been made to the ACAT and—
 - (i) the application has not yet been decided; or
 - (ii) an order has been made; and
 - (b) the tenant has not vacated the premises; and
 - (c) the tenant is a member of an impacted household who lives in the premises.
- (2) The ACAT must not make any order until after the moratorium period has ended.

(3) However, if an order has been made, the ACAT may, on application by the tenant, suspend the order for a stated period of not more than the moratorium period.

(4) In this section:

order, in relation to a tenant's failure to pay rent means—

- (a) a termination and possession order under the Act, section 49 (Failure to pay rent—termination and possession order); or
- (b) an order under the Act, section 49C (Hearing of application—failure to comply with payment order); or
- (c) a warrant under the Act, section 41 (Warrant—termination and possession order).

suspend, for a warrant under the Act, section 41, means stay.

10 Restriction on rental increases

- (1) This section applies to a residential tenancy agreement for premises in which an impacted household lives.
- (2) Except as provided by this instrument, the lessor may not increase the amount of rent payable under the residential tenancy agreement during the moratorium period.
- (3) This section does not apply if the residential tenancy agreement provides that the amount of rent payable is determined by reference to the income of the person or people responsible for paying the rent under the agreement.

11 Restricted access to premises

- (1) A lessor under a residential tenancy agreement may only physically access the premises—
 - (a) with the tenant's consent; or
 - (b) to do urgent repairs to the premises; or
 - (c) if the lessor applies to the ACAT—in accordance with an order by the ACAT.
- (2) Unless the parties to a residential tenancy agreement otherwise agree or the tenant vacates the premises, any inspection of the premises that the lessor must or may do under the Act or the agreement may only be done by audio-visual or other electronic means without the lessor physically accessing the premises.
- (3) Subsection (2) does not apply if the tenant—
 - (a) has reasonable access to audio-visual or other electronic means to enable the virtual inspection; and
 - (b) unreasonably refuses to provide assistance to the lessor in conducting the virtual inspection.

12 Non-urgent repairs

- (1) For clause 57 of the standard residential tenancy terms, the lessor must do the non-urgent repair within a reasonable period as agreed with the tenant.
- (2) For subsection (1), in deciding what is a reasonable period regard must be had to—
 - (a) the nature of the repair; and
 - (b) the extent of access required to the premises to do the repair; and
 - (c) the hardship suffered by the tenant by the repairs not being done.

Part 3

Protection of households impacted by COVID-19 pandemic—transitional period

13 No termination etc in relation to moratorium arrears in transitional period

- (1) This section applies if—
 - (a) at the end of the moratorium period, a tenant who was a member of an impacted household is in arrears for rent payable under the residential tenancy agreement for the premises in which the household lives (the *moratorium arrears*); and
 - (b) during the transitional period, the tenant pays rent as it becomes payable under the agreement.
- (2) During the transitional period, the lessor must not only because of the moratorium arrears—
 - (a) give the tenant a termination notice; or
 - (b) apply for a termination and possession order under—
 - (i) the Act, section 49 (Failure to pay rent—termination and possession order); or
 - (ii) the Act, section 49B (Failure to comply with payment order); or
 - (c) apply for a payment order under the Act, section 49A (Failure to pay rent—payment order); or
 - (d) apply for a warrant under the Act, section 41 (Warrant—termination and possession order) for the eviction of the tenant.
- (3) A termination notice given in contravention of this section is void.
- (4) To remove any doubt, if a tenant fails to pay rent as it becomes payable under the residential tenancy agreement during the transitional period (the *new breach*), this section does not stop—
 - (a) the lessor giving a tenant a termination notice or exercising any other right against the tenant in relation to the new breach; and
 - (b) if the lessor gives a tenant a termination notice in relation to the new breach—the lessor including the amount of moratorium arrears in the notice; and
 - (c) the ACAT making an order permitted by the Act in relation to—
 - (i) the new breach; or
 - (ii) the moratorium arrears.

Note Before making a termination or possession order for a household that was impacted by the COVID-19 pandemic during the relevant period, the ACAT must first consider making a payment order (see s 20).

14 Reconsideration of orders etc for failure to pay rent

- (1) This section applies if the ACAT suspends an order under section 9 (Existing orders etc for failure to pay rent).
- (2) The tenant may apply to the ACAT to reconsider the order.
- (3) The ACAT may vary or set aside the order if satisfied that—
 - (a) since the order was made, the tenant—
 - (i) has paid part or all of the arrears for rent payable under the residential tenancy agreement; or
 - (ii) is otherwise able to show that the tenant's financial circumstances have improved; and
 - (b) the tenant is reasonably likely to pay future rent as it becomes payable.
- (4) In this section:

order, in relation to a tenant's failure to pay rent means—

 - (a) a termination and possession order under the Act, section 49 (Failure to pay rent—termination and possession order); or
 - (b) an order under the Act, section 49C (Hearing of application—failure to comply with payment order); or
 - (c) a warrant under the Act, section 41 (Warrant—termination and possession order).

suspend, for a warrant under the Act, section 41, means stay.

Part 4

Protection of households impacted by COVID-19 pandemic—moratorium and transitional period

15 Modification of Act, s 8 (1)—rent reduction clause

- (1) For the Act, section 8 (1), the lessor and tenant may agree to include a COVID-19 temporary rent reduction clause in the residential tenancy agreement.
- (2) If the lessor and tenant agree on a COVID-19 temporary rent reduction clause—
 - (a) the reduced rent period (including any extensions) may be for a period longer than the operation of this instrument; and
 - (b) the reversion of the rent payable under the residential tenancy agreement to the original rent is not an increase in the rent under the Act or the agreement; and
 - (c) the amount the rent is reduced by under the agreement between the parties is not arrears of rent or a debt due to the lessor.
- (3) If a rent reduction clause is included in a residential tenancy agreement in a form other than the form set out in subsection (4), the clause is taken to be a COVID-19 temporary rent reduction clause.
- (4) In this section:

COVID-19 temporary rent reduction clause means the following clause:

Temporary reduction of rent because of COVID-19 pandemic

- (1) The parties agree that because of financial hardship suffered by the tenant arising from the COVID-19 pandemic, for the period stated in writing by the parties, the rent payable under the agreement is reduced to an amount stated in writing by the parties.

Note **Writing** includes any way of representing or reproducing words in visible form including email or text message (see Legislation Act, dict, pt 1, def of **writing**).

- (2) The parties may, in writing, extend the period in which rent is reduced for a further stated period if the tenant continues to suffer financial hardship because of the COVID-19 pandemic.

16 Modification of Act, s 8 (1)—rent deferral clause

- (1) For the Act, section 8 (1), the lessor and tenant may agree to include a COVID-19 temporary rent deferral clause in the residential tenancy agreement.
- (2) If the lessor and tenant agree on a COVID-19 temporary rent deferral clause—
 - (a) the deferred rent period (including any extensions) may be for a period longer than the operation of this instrument; and
 - (b) the reversion of the rent payable under the residential tenancy agreement to the original rent is not an increase in the rent under the Act or the agreement; and
 - (c) unless otherwise agreed by the lessor in writing, the amount of deferred rent is arrears of rent and is a debt due to the lessor.
- (3) If a rent deferral clause is included in a residential tenancy agreement other than in the form set out in subsection (4), the clause is taken to be a COVID-19 temporary rent reduction clause.
- (4) In this section:

COVID-19 temporary rent deferral clause means the following clause:

Temporary deferral of rent because of COVID-19 pandemic

- (1) The parties agree that because of financial hardship suffered by the tenant arising from the COVID-19 pandemic, for the period stated in writing by the parties, the rent payable under the agreement is deferred for the period and for the amount stated in writing by the parties.

Note **Writing** includes any way of representing or reproducing words in visible form including email or text message (see Legislation Act, dict, pt 1, def of *writing*).
- (2) The parties may, in writing, extend the period in which rent is deferred for a further stated period if the tenant continues to suffer financial hardship because of the COVID-19 pandemic.
- (3) The parties agree that at the end of the period in which the rent is deferred, the amount of deferred rent is payable to the lessor in accordance with—
 - (a) the arrangements agreed between the parties; or
 - (b) if the parties cannot agree—the terms decided by the ACAT taking into account what is reasonable for both parties.

COVID-19 temporary rent reduction clause—see section 15 (4).

17 Agreement to reduce occupancy fee under occupancy agreement

- (1) This section applies if the parties to an occupancy agreement agree to a reduced occupancy fee for a stated period because of financial hardship suffered by the occupier arising from the COVID-19 pandemic.
- (2) To avoid any doubt, if the parties agree that the occupancy fee payable under the occupancy agreement reverts to the amount payable immediately before the fee was reduced—
 - (a) it is not an increase in the fee for the Act, section 71EG (Occupancy rules, fees, charges and penalties); and
 - (b) the amount the fee is reduced by under the agreement is not arrears or a debt due to the grantor.
- (3) In this section:

occupancy fee means the amount payable by the occupier for the right to occupy the premises.

18 Restriction on listings in residential tenancy database

- (1) A lessor, lessor's agent or database operator must not list personal information about a person in a residential tenancy database in relation to a breach of a residential tenancy agreement during the moratorium period if—
 - (a) the breach was for failure to pay rent under the agreement; and
 - (b) at the time of the breach the person was a member of an impacted household.
- (2) To remove any doubt, subsection (1) applies even if—
 - (a) the moratorium period has ended; or
 - (b) after the moratorium period ends—
 - (i) the tenant remains in arrears for rent payable during the moratorium period; or
 - (ii) the residential tenancy agreement is terminated because of the breach for failing to pay rent in the moratorium period.

19 Termination by tenant in impacted household

- (1) This section applies to a fixed term residential tenancy agreement for premises if the household living in the premises is, at any time in the moratorium period or the transitional period, an impacted household.
- (2) The tenant under the residential tenancy agreement may, by written notice to the lessor, terminate the agreement.

- (3) The tenant must give the lessor—
- (a) at least 3 weeks notice of the termination; and
 - (b) evidence that the tenant was or is a member of an impacted household.

Examples—par (b)

- 1 statutory declaration attesting to status
 - 2 evidence of eligibility for the COVID-19 Disaster Payment from the Commonwealth
 - 3 evidence of eligibility for the COVID-19 Business Support Grant from the ACT government
 - 4 letter from an employer attesting to a change in a tenant’s employment status
 - 5 evidence of a reduction in household income
 - 6 evidence of reduced hours such as copies of work rosters
- (4) The lessor is not entitled to any compensation or break fee under the Act or the agreement in relation to the early termination of the fixed term agreement in accordance with this section.

20 Modification of Act, s 49—payment orders for COVID-19 impacted households

- (1) This section applies if—
- (a) a tenant who was a member of an impacted household during a relevant period failed to pay rent under the residential tenancy agreement for the premises in which the household lived; and
 - (b) the lessor has applied to the ACAT for a termination and possession order under the Act, section 49 (2) in relation to failure to pay rent under the residential tenancy agreement in or after a relevant period.
- (2) Before making a termination or possession order under the Act, section 49, the ACAT must first consider making a payment order under the Act, section 49A.

- (3) In this section:

2020 declaration means—

- (a) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (DI2020-46); or
- (b) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (DI2020-216); or
- (c) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3)* (DI2020-267).

2021 declaration means—

- (a) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021* (DI2021-55); or
- (b) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 2)* (DI2021-166).

impacted household means—

- (a) for the moratorium period under this instrument—an impacted household under this instrument; and
- (b) for a moratorium period under a 2020 declaration—an impacted household under the 2020 declaration; and
- (c) for a transitional period under the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) (DI2020-267)* declaration—an impacted household under DI2020-267; and
- (d) for a transitional period under a 2021 declaration—an impacted household under the 2021 declaration.

relevant period means—

- (a) the moratorium period under this instrument; or
- (b) a moratorium period under a 2020 declaration; or
- (c) a transitional period under—
 - (i) the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) (DI2020-267)*; or
 - (ii) a 2021 declaration.

Part 5

Protection of people subject to quarantine direction

21 Definitions—pt 5

(1) In this part:

quarantine direction, for a person—

- (a) means a requirement under a public health direction for a person to self-isolate or quarantine because they—
 - (i) have, or may have, been infected with COVID-19; or
 - (ii) have, or may have, been in contact, directly or indirectly, with a person who is, or may have been, a source of COVID-19 infection; but

Examples—par (a)

- 1 a direction to self-isolate under the *Public Health (Diagnosed People and Close Contacts) Emergency Direction 2021 (No 2)* (NI2021-500)
- 2 a direction to undertake a period of quarantine under the *Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No 10)* (NI2021-424)

- (b) does not include a general public health direction that generally applies to people to reduce the risk of transmission of COVID-19 infection in the community.

Example—par (b)

a direction to stay at home under the *Public Health (Lockdown Restrictions) Emergency Direction 2021 (No 4)* (NI2021-496)

quarantine period, for a person, means the period for which the person is directed to self-isolate or quarantine under a quarantine direction.

(2) In this section:

COVID-19 declaration means—

- (a) a declaration of a state of emergency under the *Emergencies Act 2004*, section 156 because of the coronavirus disease 2019 (COVID-19); or
- (b) a declaration of an emergency under the *Public Health Act 1997*, section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19).

public health direction means a direction given by the chief health officer under the *Public Health Act 1997*, section 120 in relation to the COVID-19 declaration.

22 Notice to vacate premises in quarantine period

- (1) This section applies if—
 - (a) a tenant under a residential tenancy agreement for premises, or any member of the household of the tenant, is subject to a quarantine direction for a quarantine period; and
 - (b) either—
 - (i) the lessor has issued a notice to vacate the premises that takes effect on a day in the quarantine period; or
 - (ii) the tenant has issued a notice of intention to vacate the premises that takes effect in the quarantine period.
- (2) If subsection (1) (b) (i) applies, the tenant—
 - (a) is not required to vacate the premises in the quarantine period; and
 - (b) must vacate the premises on—
 - (i) the day the tenant nominates to the lessor in writing, being a day not more than 2 weeks after the day the quarantine period ends; or
 - (ii) if the tenant does not nominate a day—the day 2 weeks after the day the quarantine period ends or any later day notified by the lessor.
- (3) If subsection (1) (b) (ii) applies, the tenant may, by written notice given to the lessor in the quarantine period, withdraw the tenant’s notice of intention.

23 ACAT power to suspend certain orders due to direction to quarantine

- (1) This section applies if—
 - (a) a tenant under a residential tenancy agreement for premises, or any member of the household of the tenant, is subject to a quarantine direction for a quarantine period; and
 - (b) a termination order is in place in relation to the premises.
- (2) The tenant may apply to the ACAT to suspend the termination order.
- (3) The ACAT may suspend the termination order if satisfied that the order affects the ability of the tenant, or a member of the tenant’s household, to comply with the quarantine direction for the quarantine period.
- (4) A suspension under subsection (3) applies for the period, of up to 2 weeks after the end of the quarantine period, stated in the suspension.

(5) In this section:

suspend, for a warrant under the Act, section 41 means stay.

termination order, includes the following:

- (a) a termination and possession order under the Act, section 49 (Failure to pay rent—termination and possession order);
- (b) an order under the Act, section 49C (Hearing of application—failure to comply with payment order);
- (c) a warrant under the Act, section 41 (Warrant—termination and possession order);
- (d) any other termination and possession order under the Act.

Shane Rattenbury
Attorney-General
31 August 2021