

2017

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

RESIDENTIAL TENANCIES AMENDMENT BILL 2017

EXPLANATORY STATEMENT

**Presented by
Gordon Ramsay MLA
Attorney-General**

RESIDENTIAL TENANCIES AMENDMENT BILL 2017

This explanatory statement relates to the Residential Tenancies Amendment Bill 2017 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Overview

Purpose of the Bill

Schedule 1 and 2

Residential tenancies in the ACT are regulated by the *Residential Tenancies Act 1997* (RTA). It is not mandatory for an ACT residential landlord (lessor) to receive a bond when entering into a residential tenancy. If a bond is received, it must be lodged with the Territory at the Office of Rental Bonds.

The RTA allows a lessor to accept a guarantee or indemnity as an alternative to a bond. The guarantee or indemnity is a promise to pay the lessor for damages that occur during a tenancy. The guarantee or indemnity is only enforceable to the maximum amount a bond would have been. A guarantee or indemnity is not an insurance product in this context.

The Bill amends the RTA to improve consumer protections for tenants and lessors who enter into a commercial guarantee or indemnity contract. The Government wants all parties to these types of agreements to fully understand the arrangement they are entering into. The amendments do not apply to non-commercial guarantee or indemnity arrangements.

Schedule 1

Schedule 1 establishes that a lessor should not accept a commercial guarantee as an alternative to a bond. Schedule 1 will be taken to have commenced the day the Bill is introduced.

This commencement date means schedule 1 is taken to have effect before it is passed and notified. Section 75A of the *Legislation Act 2001* states that an Act or legislative instrument commences retrospectively if it commences on a day or at a time earlier than the day after its notification day. Section 75B of the *Legislation Act* contemplates that ACT law may operate retrospectively, provided that the law clearly articulates that intention.

The protection against retrospective criminal laws in s 25 of the *Human Rights Act 2004* is not engaged, as the relevant provisions are not criminal in nature.

The common law has a general protection against the retrospective application of law. The purpose of this protection includes fairness, in that it seeks to protect the expectations of those who assume that the quality of their past acts would be assessed on the basis of the law as it then stood. The amendments are justified, as those offering commercial guarantees will be on notice from the date of introduction of these changes. The changes will also not apply to arrangements already in place before introduction of the Bill.

There is no service currently providing commercial guarantees although one provider has publically stated an intention to offer them starting 1 October 2017. The changes need to take immediate effect as the Government is aware that at least one provider is seeking to offer commercial guarantees from 1 October 2017. The Bill will prevent these guarantees being accepted as an alternative to a bond while the Government does further work to regulate guarantees.

Schedule 2

Schedule 2 amends the RTA to allow a lessor to accept a commercial guarantee as an alternative to a bond if the standard guarantee contract is registered. This will replace the previous prohibition on lessors accepting a commercial guarantee that will be established by Schedule 1. A standard guarantee contract is a contract that the provider of a commercial guarantee will use when entering into a commercial guarantee with another person. Schedule 2 establishes the process for a provider of a commercial guarantee contract to apply to the Commissioner for Fair Trading (the Commissioner) for registration. The Commissioner may decide to register the contract, register the contract subject to conditions or refuse to register the contract.

Schedule 2 imposes a 30 day timeframe for the Commissioner to make a decision on registration. During the decision process, the Commissioner may ask the applicant to provide more information.

If a standard guarantee contract is not registered or contains a term that is inconsistent with the registered contract, it is unenforceable against each party to the guarantee to the extent of the inconsistency.

Schedule 2 also expands on the regulation-making power at section 136 of the RTA. A regulation may prescribe grounds for registering, applying a condition to, or refusing to register a commercial guarantee and prescribe matters that must be included in or excluded from a commercial guarantee. A regulation may also prescribe requirements for record keeping about, reporting on and the administration of commercial guarantees.

If a person has registered a standard guarantee contract, a regulation may require this person to give certain information to another person before entering into a commercial guarantee with the other person.

A regulation may be made about amending, renewing, ending or suspending the registration of a standard guarantee contract.

The matters in section 136 are not intended to be an exhaustive list of matters that may be prescribed by regulation.

Schedule 2 also amends the RTA to allow the Minister to determine fees for the RTA. A determination is a disallowable instrument.

Schedule 2 will commence on a date fixed by the Minister.

Schedule 3

Schedule 3 updates the RTA to support electronic lodgement of rental bonds and remove the requirement for signatures on rental bond lodgement forms.

This system will allow for more efficient management of rental bonds. Measures will be put in place to ensure that there are alternative options for those who cannot use electronic lodgement and the Office of Rental Bonds is aware of its obligation to act and make decisions consistently with human rights, including the right to equality (s8, *Human Rights Act 2004* (HRA)).

Schedule 3 will commence on a date fixed by the Minister.

Human rights implications

There are no human rights implications arising from the Bill.

Regulatory impact analysis

The new requirement for registration imposes a burden on providers of commercial guarantees that are an alternative to a bond under the RTA.

However, the benefit to consumers outweighs this cost to industry. The requirement for the Commissioner's approval means that there will be appropriate Government scrutiny of commercial guarantees or indemnities with safeguards for consumers.

The new requirement will strengthen the existing consumer protection framework for commercial guarantees. Those at risk of the most significant harm from commercial guarantees would be those on low incomes and those who may be having trouble accessing the private rental market. The requirement for the Commissioner to approve and register standard contracts for commercial guarantees is a proactive approach to consumer protection, and provides an important safeguard for consumers.

The Bill imposes clear timeframes for the Commissioner to consider applications for registration. These timeframes provide certainty to providers.

The amendments do not impact non-commercial guarantee or indemnity arrangements.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Residential Tenancies Amendment Act 2017*.

Clause 2 Commencement

This clause provides for the commencement of the Act.

The Act, other than schedules 2 and 3 is taken to have commenced on the day the Bill was presented to the Legislative Assembly.

Schedules 2 and 3 commence on a day fixed by the Minister by written notice.

This clause also includes a note referring to section 79 of the Legislation Act, which provides that if a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period. Section 79 of the Legislation Act will only apply to schedule 2. The amendments in Schedule 2 seek to protect the most vulnerable in our community, it is important that the criteria are well developed in consultation with key stakeholders with lived experience.

The clause provides that section 79 of the Legislation Act does not apply to the commencement of schedule 3 and the Minister has 12 months from the day the Act is notified to commence these provisions. This is to allow the electronic system to be operational before the changes commence.

Clause 3 Legislation Amended

This clause identifies the legislation amended by the Bill – the *Residential Tenancies Act 1997*.

Schedule 1 Commercial guarantees – stage 1 amendments

Clause 1.1 Section 15 (4)

This clause substitutes section 15(4) of the RTA.

Section 15 of the RTA provides that when a lessor gives a tenant a right to occupy premises, the lessor can only require or accept a payment from the tenant in the form of rent or a bond.

Section 15(4) provides that a reference to a ‘bond’ includes a reference to a guarantee or indemnity under section 16 of the RTA.

This clause provides that a ‘bond’ will still include to a guarantee or indemnity under section 16 but provides a commercial guarantee cannot be accepted by a lessor as an alternative to a bond.

Clause 1.2 New section 15 (7)

This clause inserts a new section 15(7) into the RTA.

New section 15(7) defines a 'commercial guarantee'. 'Commercial guarantee', in the context of a residential tenancy agreement, means a contract or arrangement between the lessor, the tenant and a third party that is in addition to or in place of a bond. The third party, for a fee, benefit or reward, gives a guarantee or indemnity to the lessor that the tenant will comply with the tenant's obligations under the residential tenancy agreement.

Clause 1.3 Section 16 (2)

This clause substitutes new section 16(2).

New section 16(2) provides that a guarantee or an indemnity is only enforceable against the guarantor or indemnifier in the following circumstances: if it is not a commercial guarantee and if it is provided in addition to a bond, it is enforceable to the extent of the difference between the maximum amount that would have been payable by the tenant as a bond and the amount that is payable by the tenant as a bond. If it is in place of a bond, it is only enforceable to the extent of the maximum amount that would have been payable by the tenant as a bond. The section refers the reader to section 15(7) for the definition of the commercial guarantee.

Schedule 2 Commercial guarantees – stage 2 amendments

Clause 2.1 Section 15 (4) (b)

This clause substitutes section 15(4)(b) of the RTA.

This clause establishes that a 'bond' will still include to a guarantee or indemnity under section 16. However, if the guarantee or indemnity is a commercial guarantee, it can only be accepted as a bond if the commercial guarantee is consistent with a registered standard guarantee contract. This will replace the new section 15(4) inserted by clause 1.1 of schedule 1.

Clause 2.2 Section 15 (7)

New section 15(7) defines a 'registered standard guarantee contract' as a standard guarantee contract registered under new section 104.

Clause 2.3 Section 16 (2) and (3)

Section 16(2) provides that a guarantee or an indemnity is only enforceable against the guarantor or indemnifier in the following circumstances: if it is provided in addition to a bond, it is enforceable to the extent of the difference between the maximum amount that would have been payable by the tenant as a bond and the amount that is payable by the tenant as a bond. If it is in place of a bond, it is only enforceable to the extent of the maximum amount that would have been payable by the tenant as a bond.

This clause adds additional requirements to section 16. New section 16(3) provides that a term of a commercial guarantee is void if it is inconsistent with or is in addition to a term of a registered standard guarantee contract. The standard guarantee contract is registered under new section 104. This is related to the amendment at clause 2.4, which inserts a new part 8 into the RTA and establishes a process for registration of a standard guarantee contract.

New section 16(4) provides that if a regulation requires a commercial guarantee to include a term in the contract, the guarantee is taken to include that term. New section 16(5) provides that if a regulation requires a matter to be excluded from a commercial guarantee, the guarantee is void to the extent that it includes the matter.

New section 16(6) defines a 'registered standard guarantee contract' as a standard guarantee contract registered under new section 104.

Clause 2.4 New part 8

This clause inserts a new part 8, Registration of standard guarantee contract for commercial guarantee, into the RTA.

New section 102 Meaning of *commercial guarantee* and *standard guarantee contract*

New section 102 inserts definitions of 'commercial guarantee' and 'standard guarantee contract' into the RTA. 'Commercial guarantee', in the context of a residential tenancy agreement, means a contract or arrangement between the lessor, the tenant and a third party that is in addition to or in place of a bond. The third party, for a fee, benefit or reward, gives a guarantee or indemnity to the lessor that the tenant will comply with the tenant's obligations under the residential tenancy agreement.

A 'standard guarantee contract' means a form of contract for a commercial guarantee.

New section 103 Application for registration of standard guarantee contract

New section 103 sets out the application process for registering a standard guarantee contract for a commercial guarantee.

A person may apply to the Commissioner for Fair Trading to register a standard guarantee contract for a commercial guarantee. The application must be in writing and include the applicant's contact details. The application must include any information prescribed by regulation.

A fee may be determined under section 134 of the RTA for this application.

New section 104 Commissioner must decide application

New section 104 requires the Commissioner for Fair Trading to make a decision about the registration of a standard guarantee contract within 30 days after the day the application is received.

The Commissioner must decide whether to register the standard guarantee contract, register the standard guarantee contract subject to conditions or refuse to register the standard guarantee contract.

Before making a decision, the Commissioner may ask an applicant to provide further information within a stated time about the applicant or the standard guarantee contract that the Commissioner reasonably needs to decide the application. If the applicant does not provide this information, the Commissioner may refuse to register the standard guarantee contract.

If the Commissioner fails to decide the application within 30 days the Commissioner is taken to have decided to refuse the application.

If the Commissioner refuses to register the standard guarantee contract, or registers the standard guarantee contract subject to conditions, the applicant, or another person whose interests are affected by the decision, may apply to the ACAT for a review of the decision.

New section 105 – Register of standard guarantee contracts

New section 105 requires the Commissioner for Fair Trading to keep a register of standard guarantee contracts. The register must include the business name and the trading name of the person who has registered a standard guarantee contract and any information prescribed by regulation.

The register may include any other information the Commissioner believes will improve consumer protection. The register may be kept in any form, including electronically, that the Commissioner decides.

The Commissioner must make the register available to the public.

The Territory privacy principles (TPPs) in the *Information Privacy Act 2014* apply to the Commissioner. The TPPs deal with the collection, storage and exchange of personal information.

New section 106 – Relationship to Australian Consumer Law (ACT)

New section 106 provides that part 8 and new section 16(3) of the RTA do not affect the operation of the Australian Consumer Law (ACT). Consumers will still be able to seek remedies under the Australian Consumer Law (ACT) for these types of commercial guarantee contracts even if they are unregistered.

Clause 2.5 New section 134

This clause inserts new section 134 into the RTA.

New section 134 provides that the Minister may determine fees for the RTA. A determination is a disallowable instrument.

Clause 2.6 New section 136 (2) (c)

This clause inserts new section 136(2)(c) into the RTA.

This clause adds an additional regulation-making power to section 136. New section 136(2)(c) provides that a regulation may also be made about commercial guarantees.

A regulation may prescribe grounds for registering, applying a condition to, or refusing to register a commercial guarantee. A regulation may prescribe matters that must be included in or excluded from a commercial guarantee. A regulation may also prescribe requirements for record keeping, reporting on and the administration of commercial guarantees.

If a person has registered a standard guarantee contract, a regulation may require this person to give certain information to another person before entering into a commercial guarantee with the other person.

A regulation may be made about amending, renewing, ending or suspending the registration of a standard guarantee contract.

The matters in new section 136(2)(c) are not intended to be an exhaustive list of matters that may be prescribed by regulation.

Clause 2.7 Schedule 1, clause 13 (1)

This clause makes an editorial amendment to clause 13(1) of the Standard residential tenancy terms at schedule 1 of the RTA.

This clause omits the words ‘commissioner *of* fair trading’ and substitutes ‘commissioner *for* fair trading’. This makes the standard terms consistent with other ACT legislation.

Clause 2.8 Dictionary, note 2

This clause amends note 2 of the dictionary in the RTA.

Note 2 provides a list of terms defined by the *Legislation Act 2001* that are relevant to the RTA. This clause adds ‘Australian Consumer Law (ACT)’ to the list of terms.

Clause 2.9 Dictionary, new definition of *commercial guarantee*

This clause amends the dictionary to the RTA.

This clause adds a reference to the definition of ‘commercial guarantee’ at section 102.

Clause 2.10 Dictionary, definition of *commissioner*

This clause omits the definition of ‘commissioner’ in the dictionary.

The RTA refers the Commissioner for Fair Trading and the Housing Commissioner. This editorial amendment has been made for the purposes of clarity, and to avoid any confusion between the roles of the two Commissioners.

Clause 2.11 Dictionary, new definition of *standard guarantee contract*

This clause amends the dictionary to the RTA.

This clause adds a reference to the definition of 'standard guarantee contract' at section 102.

Schedule 3 Rental bond amendments

Clause 3.1 Section 24

This clause amends section 24 of the RTA to reflect the new process that will be introduced with the electronic system.

Clause 3.2 Section 25 heading

This clause amends the heading of section 25 of the RTA to reflect the new process that will be introduced with the electronic system.

Clause 3.3 Section 25

This clause is required as a result of the amendment in clause 3.4 that introduces a notice in accordance with section 25 into section 26 of the RTA as well.

Clause 3.4 Section 26

This clause amends section 26 of the RTA to reflect the new process that will be introduced with the electronic system. This recognises that there will be a number of ways that the Territory acknowledges receipt of the bond, including via a receipt on manual payment, via a remittance advice from the bank on electronic payment and via an update to the electronic system to reflect that the bond money has been paid. In all cases the Territory will issue a notice to both parties in accordance with section 25.

Clause 3.5 Schedule 1, clause 19 (a) and (b)

Clause 3.6 Schedule 1, clause 19 (c)

Clause 3.7 Schedule 1, clause 20 (b), (c) and (d)

Clauses 3.5, 3.6, and 3.7 amend the standard residential tenancy terms in the RTA to reflect the new process that will be introduced with the electronic system.

Clauses 3.5 and 3.7 remove from the standard residential tenancy terms the requirement for signatures to be on a bond lodgement form. These clauses also remove some of the detail about the process for completing and lodging the bond lodgement form and for lodging the bond, which allows for the process to be conducted manually, or electronically in accordance with the *Electronic Transactions Act 2001*.

Clause 3.6 amends clause 19 (c) of the standard residential tenancy terms to accommodate the number of ways that the Territory will acknowledge receipt of the bond, including via a receipt on manual payment, via a remittance advice from the bank on electronic payment and via an update to the electronic system to reflect that the bond money has been paid.

Clause 3.7 also clarifies when the timeframe for the lessor's real estate agent to lodge the bond commences, being either four weeks after receiving the bond or the commencement of the tenancy, whichever is later.