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

RESIDENTIAL TENANCIES AMENDMENT BILL 2018

REVISED EXPLANATORY STATEMENT

**Presented by
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This explanatory statement relates to the Residential Tenancies Amendment Bill 2018 (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

The Bill will amend the *Residential Tenancies Act 1997* to provide an improved framework for residential tenancy agreements. The Bill amends and clarifies provisions which disproportionately affect vulnerable tenants, including social housing tenants. These amendments were developed following the recommendations of the 2016 report on the review of the *Residential Tenancies Act 1997* (RTA).

The Bill also amends the RTA in the area of commercial guarantees. The *Residential Tenancies Amendment Act 2017* (the 2017 Amendment Act) provided that a lessor could not accept a commercial guarantee as an alternative to a rental bond unless the standard guarantee contract is registered, with the process and criteria for registration to be prescribed by regulation. The amendments set out that the 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.

The 2017 Amendment Act provided for delayed commencement of the provisions relating to the registration process. These provisions commenced on a day fixed by the Minister by written notice, with default commencement within 6 months in accordance with section 79 of the *Legislation Act 2001*. This prevented commercial guarantees from being accepted as an alternative to a bond until 7 May 2018, unless commenced earlier.

The 2017 Amendment Act was introduced as an urgent action to protect consumers following an unsolicited approach in the ACT market involving the offer of these new commercial guarantee products and allow the Government the space to develop an appropriate regulatory process.

The reinstatement of the suspension on commercial guarantees will give the Government more time to consider these products in the ACT market. During this time, the Government will undertake further consultation with a wide range of stakeholders.

The Bill proposes the following amendments:

- replace the conditional termination and possession order (CTPO) provisions with a new concept of a payment order
- provide that there is no self-executing component of the new payment order provisions so that a breached order will not automatically end a tenancy
- give the lessor the right to apply for a termination and possession order and a warrant for eviction within 60 days if a breach of a payment order occurs
- provide that if the lessor does not pursue a breach of a payment order within 60 days of the breach occurring, the tenancy continues and the debt remains with the tenancy, with this rule applying to further breaches of the payment order,
- automatically deem CTPOs in force immediately before the payment order provisions commence to be payment orders
- provide that a person may apply to the Commissioner for Fair Trading to register a standard guarantee contract for a commercial guarantee on or after a day declared by the Minister by notifiable instrument.
- any applications for registration of a standard guarantee contract before the day the commercial guarantee amendments commence that have not been decided by the Commissioner or have been refused by the Commissioner are deemed not to have been made. If any contracts have been registered before this date, the registration is deemed to have ended.

The Bill may reduce the need for litigation processes by clarifying and streamlining the former CTPO process. These amendments enhance security of tenure for affected tenants, as their tenancy agreements will no longer be automatically ended in a process which allows a lessor to apply to the Registrar for a warrant for the tenant's eviction.

The amendments to the former CTPO process will commence on a day fixed by the Minister by written notice, with a default commencement of six months from its notification day. The amendments to the commercial guarantee process will commence on the day after the Act's notification day.

Human rights implications

The Bill supports several rights under the *Human Rights Act 2004*.

Right to equality before the law

Section 8 of the *Human Rights Act 2004* provides that 'everyone has the right to equal and effective protection against discrimination on any ground'. This Bill

supports this right by resolving a concern which disproportionately applies to social housing residents.

Social housing tenants generally have lower incomes and may be disproportionately affected by vulnerabilities such as lived experience of disability, health concerns or exposure to family violence. Social housing tenants can include members of culturally and linguistically diverse backgrounds who may face practical barriers accessing services which reduce isolation in the community. By ensuring that payment orders are not self-executing, this Bill resolves a risk that social housing residents may be more likely to be discriminated against due to their accommodation status and associated socio-economic experiences in the community.

Right to protection of the family and children

Section 11 of the *Human Rights Act 2004* provides that ‘the family is the natural and basic group unit of society and is entitled to be protected by society’ and that ‘every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind’. This Bill promotes the protection of the family and children by clearly outlining the processes a lessor must follow to initiate the eviction of a tenant who has breached a payment order. Clear notification of this process provides additional security for families and children as they can be certain in the security of their tenancy and well informed about ways to reduce their risks of eviction.

Right to a fair trial

The Bill supports the right to a fair trial, including the right to have ‘rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing’. By replacing the self-executing CTPOs with a payment order, tenants have more opportunity to participate in the legal process. A lessor must apply to the ACAT for a termination and possession order to be made regarding the affected property. Tenants will be a party to the proceeding before the Tribunal and can participate in the decision-making process regarding their rights and obligations under the Act.

Regulatory impact analysis

The Bill proposes changes to the property rights of lessors who are party to CTPOs. On balance, the benefit to vulnerable tenants in the proposed amendments is considered to be greater than the effect on lessors through changes to property rights.

Under the CTPO provisions, if a tenant failed to pay rent, the tenancy automatically terminated, the lessor became entitled to possession of the premises and all rent payable was payable immediately. Termination occurred even if the delay in paying rent was due to circumstances beyond the tenant’s control such as processing delays for Centrelink payments. The position of the tenant was legally uncertain where the breach of a CTPO had occurred, and the tenant remained in the premises.

In the 2015 ACT Supreme Court decision *Commissioner for Social Housing v Moffat* [2015] ACTSC 4, Master Moffat identified difficulties in statutory interpretation of the CTPO provisions. Master Mossop commented: "...there are conflicting indications in the [RTA] as to the effect of a failure to comply with a CTPO. Some provisions indicate that the tenancy is terminated while others appear to be only consistent with it remaining on foot" and identified a need for statutory amendment.¹

The removal of the self-executing provisions means that the lessor is no longer entitled to immediate possession of the premises if the tenant fails to pay rent under a payment order. However, the provisions have been developed with the purpose of being as consistent with the CTPO process as possible. The process is similar to the application by the lessor for a warrant for eviction under sections 42A and 42B of the RTA, which provide that the application is listed for hearing no earlier than one week after the day notice is given to the tenant, and that if the application is allowed, the ACAT must direct the Registrar to issue a warrant for eviction. Under the proposed amendments, this is now an application for a termination and possession order, but the listing time and direction to issue a warrant remain the same.

Section 42B of the RTA, which will be removed on commencement of the Bill, provides that ACAT hears an application for a warrant for eviction in the event of a breach of a CTPO as if it were an application for a termination and possession order under section 49. Section 49(5) of the RTA provides that ACAT may suspend a termination and possession order for up to three weeks if satisfied that the tenant would suffer significant hardship if the order was not suspended, and this hardship would be greater than the hardship that would be suffered by the lessor if the order was suspended. The Bill maintains this protection in new section 49C.

As discussed above, the proposed changes to the commercial guarantee process will provide time for further consideration of these products.

¹ *Commissioner for Social Housing v Moffat* [2015] ACTSC 4, paras 23 and 71.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Residential Tenancies Amendment Act 2018*.

Clause 2 Commencement

This clause provides that this Act, other than sections 6, 7 and 8, commences on a day fixed by the Minister by written notice.

Sections 6, 7 and 8 propose amendments to the commercial guarantee provisions of the Residential Tenancies Act. These sections commence on the day after this Act's notification day.

The remaining clauses of this Act establish the new payment order process. These provisions to commence on a day nominated by the Minister in a commencement notice. The provisions for a commencement notice are set out in section 77 of the *Legislation Act 2001*.

If the Minister does not commence the payment order provisions six months after the Act is notified on the Legislation Register, then these provisions automatically commence the following day. The provisions for automatic commencement are set out in section 79 of the *Legislation Act 2001*.

Delayed commencement of the payment order provisions provides the opportunity for agencies affected by these to do the necessary implementation work to effectively manage the transitional period outlined in Part 15 of the Bill.

Clause 3 Legislation Amended

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

Clause 4 Sections 41 to 42B

This clause substitutes 41 to 42B of the Act with a new section 41.

This clause is a consequential amendment to changes made by Clause 5. It substitutes section 41 to provide that on application by a lessor, the registrar must issue a warrant for the eviction of a person where ACAT has made a termination and possession order and the person fails to vacate the premises. Section 41 previously referred to an *unconditional* termination and possession order. This section has been revised to reflect that the Bill has removed conditional termination and possession orders (CTPOs) from the Act. This clause also includes a note stating that ACAT must also direct the registrar to issue a warrant for the eviction of a tenant if it makes a termination and possession order under new section 49C.

This clause also removes sections 42 (Conditional orders) 42A (Failure to comply with conditional order) and 42B (Hearing of application) from the Act, as these sections apply to CTPOs.

Clause 5 Section 49

This clause substitutes section 49 of the Act.

This clause inserts a new section 49 into the Act which clarifies the actions ACAT may take when hearing an application for a termination and possession order. It identifies that ACAT may make a termination and possession order, make a payment order or refuse to make an order where the tenant has paid rent that has become payable, is likely to do so in future, and it just and appropriate to refuse to make an order. ACAT may suspend a termination and possession order for a period of up to three weeks where it is satisfied that failure to suspend the order would result in the tenant suffering significant hardship, and this hardship would be greater than that suffered by the lessor if the order were suspended.

New section 49A – Failure to pay rent – payment order

This clause adds new section 49A to the Act. Instead of making a termination and possession order, ACAT may make a payment order.

Payment orders require a tenant to pay the rent or stated part of the rent that has become payable, and future rent as it becomes payable. Where a payment order for part of rent payable has been made, section 49A gives the ACAT the option to make an order requiring the payment of the remaining part.

Payment orders must include an expiration date, which cannot be more than 1 year after the date of the order. The payment order must also state that the lessor can apply for a termination and possession order if the tenant fails to comply with the payment order. The section creates flexibility for tenants and lessors by allowing payment orders to be varied. A variation is permitted if both parties agree to the variation, the variation does not postpone the expiry date of the order, and the ACAT considers it just and appropriate to do so.

New section 49B – Failure to comply with a payment order

This clause adds new section 49B which sets out what happens when a tenant fails to comply with a payment order. Where a tenant fails to comply with a payment order the lessor has a 60 day timeframe to apply to the ACAT for a termination and possession order resulting from the first breach of the lease. This timeframe provides an opportunity for the lessor and tenant to negotiate a resolution to the failed payment, rather than automatically terminating the tenancy agreement. However, the lessor does not have to negotiate a resolution and is entitled to make an application for termination and possession as soon as the order is first breached. Once a lessor has made an application, the Registrar is required to notify the tenant details of the application and subsequent proceedings. The hearing date must be at least 1 week after notice is given to allow the tenant time to prepare and seek legal advice if needed.

In circumstances where the lessor does not apply to the ACAT within the 60 day period, the payment order, residential tenancy agreement and any debt accumulated under the residential tenancy agreement will not be affected by the compliance breach. This removes the self-executing nature of termination and possession orders

and responds to the concerns raised by the ACT Supreme Court in *Commissioner for Social Housing v Moffatt* (2015) ACTSC 4. This section clearly outlines the implications of compliance breaches which reduces complexities for tenants engaging with the residential tenancies scheme.

Section 49C – Hearing of application – failure to comply with payment order

Section 49C outlines the options for ACAT when hearing an application for failure to comply with a payment order. The ACAT may make a termination and possession order or refuse to make a termination and possession order.

If ACAT makes a termination and possession order, ACAT must direct the registrar to issue a warrant for the eviction of the tenant and may make an order to pay any unpaid rent that is payable.

If the ACAT dismisses the application, it may confirm the payment order, make another payment order or set aside the payment order.

New section 49C also provides that ACAT may suspend a termination and possession order for up to three weeks if satisfied that the tenant would suffer significant hardship if the order was not suspended, and this hardship would be greater than the hardship that would be suffered by the lessor if the order was suspended. This maintains a protection available to tenants under former section 42B.

Clause 6 Application for registration of standard guarantee contract

Section 103(1)

This clause amends section 103(1) of the Act.

Section 103(1) provides that a person may apply to the commissioner for fair trading to register a standard guarantee contract for a commercial guarantee. This clause amends this section to provide that a person may apply for registration of a standard guarantee contract for a commercial guarantee on or after a day declared by the Minister.

Clause 7 New section 103(3)

This clause inserts new section 103(3) into the Act and is related to the amendment in clause 6.

New section 103(3) provides that a declaration by the Minister is a notifiable instrument.

Clause 8 Part 15 – Transitional – Residential Tenancies Amendment Act 2018

This clause inserts a new part 15 into the Act.

New part 15 provides for transitional arrangements for CTPOs after the commencement of the payment order provisions, applications for registration of

standard guarantee contracts made before the date declared by the Minister under section 103 and for standard guarantee contracts registered before the date declared by the Minister under section 103.

Section 151 – Meaning of commencement day – pt 15

New section 151 provides that commencement day means the day section 6 of the Residential Tenancies Amendment Act 2018 commences. This is the commencement date for the commercial guarantee provisions (the day after this Act's notification day).

Section 152 – Applications for registration of standard guarantee contract

New section 152 applies if an application for registration of a standard guarantee contract is made to the Commissioner for Fair Trading under section 103 of the Act before the commencement day and the application is not decided by the Commissioner before the commencement day or is refused by the Commissioner. If these circumstances apply, the application is taken not to have been made.

Section 153 – Registered standard guarantee contracts

New section 153 applies if a standard guarantee contract is registered under section 104 of the Act before the commencement day.

On the commencement day, the registration of the standard guarantee contract is taken to have ended. Any commercial guarantee entered into before the commencement day that is consistent with the registered standard guarantee contract is not affected by the ending of the registration.

Section 154 – Expiry – pt 15

New section 154 provides that part 15 expires 12 months after the commencement day. A transitional provision is repealed on its expiry but continues to have effect after its repeal in accordance with section 88 of the Legislation Act.

Clause 9 Section 151

This clause substitutes a new section 151 into the Act. This clause is related to the amendments in clause 8. An additional amendment to section 151 is included in this clause to accommodate the different commencement dates for the payment order and commercial guarantee provisions.

New section 151 provides a definition of 'commencement day' for part 15. New section 151 provides that for sections 152 and 153, the commencement day is the day section 6 of the *Residential Tenancies Amendment Act 2018* commences. These sections relate to the commercial guarantee provisions. For section 154, the commencement day is the day section 4 of the *Residential Tenancies Amendment Act 2018* commences. This section relates to the payment order provisions.

Clause 10 Section 154

This clause substitutes a new section 154 into the Act.

New section 154 provides that a CTPO made under the pre-amendment Act section 49(4), in force immediately before the commencement day, is deemed a payment order under this Act, section 49A.

Section 155 – Expiry – Pt 15

This clause also inserts new section 155 into the Act. New section 155 provides that part 15 expires 12 months after the later of the two commencement days mentioned in paragraphs (a) and (b) of section 151.

Section 155 also includes a note stating that transitional provisions are repealed on expiry but continue to have effect after repeal in accordance with section 88 of the Legislation Act.

Clause 11 Dictionary – definition of a conditional termination and possession order

This clause omits the definition of a conditional termination and possession order from the Act's Dictionary, reflecting the fact that these orders will no longer be issued by the Tribunal.

Clause 12 Dictionary – definition of payment order

This clause inserts a definition of payment order into the Act's dictionary which cross-references section 49A(2) of the Residential Tenancies Amendment Bill 2018. This clause clarifies that a payment order requires a tenant to pay all or part of the rent that has become payable and future rent as it becomes payable on terms the ACAT considers just and appropriate.

This clause reflects the fact that the ACAT will no longer issue conditional termination and possession orders.