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

RESIDENTIAL TENANCIES AMENDMENT BILL 2020

REVISED EXPLANATORY STATEMENT

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

RESIDENTIAL TENANCIES AMENDMENT BILL 2020

This Bill is a significant bill.

This explanatory statement relates to the Residential Tenancies Amendment Bill 2020 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 OF THE BILL

The Bill will amend the *Residential Tenancies Act 1997* (the RTA), the *Human Rights Commission Act 2005* (the HRCA), the *Uncollected Goods Act 1996*, and the *Residential Tenancies Regulation 1998*. The purpose of these amendments is to give effect to specific legislative recommendations from the 2016 review of the RTA which relate to occupancy and share housing in the ACT.

The Bill proposes the following amendments:

- improve protections for occupants by introducing new occupancy principles and by making the occupancy principles a mandatory part of every occupancy agreement;
- clarify the difference between an occupancy agreement and a residential tenancy agreement;
- clarify the application of the occupancy framework to people who reside in residential parks; and
- modernise the legal framework for share housing.

CONSULTATION ON THE PROPOSED APPROACH

This Bill arises from the 2016 review of the RTA. The review sought submissions from the public to inform proposals and guide further consultation with the public, industry, and key stakeholders. Given the complexity of the legal framework for occupancy agreements, a public exposure draft was tabled in the Legislative Assembly on 28 November 2019. This commenced a two-month period of detailed consultation with stakeholders, and members of the public were invited to express their views through the Your Say website.

CONSISTENCY WITH HUMAN RIGHTS

The proposed amendments engage a number of human rights under the *Human Rights Act 2004* (HRA) including:

- a) the right to equality and non-discrimination (sections 8 (2)-(3), HRA); and

- b) the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily - section 12 (a), HRA.

Compatibility of the bill with the right to equality and non-discrimination

The right to equality and non-discrimination is protected by sections 8 (2)-(3) of the HRA. The HRA provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination. 'Discrimination' under the HRA encompasses a distinction based on particular grounds (for example, race, colour or sex), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.¹ However, not every differential treatment will amount to discrimination - it must be linked to a prohibited ground.²

Equality and non-discrimination – Definitions of occupancy and tenancy agreements

The amendments will provide greater clarity in the distinction between a residential tenancy and an occupancy agreement. The effect of this is that some residents in the ACT have the protections of a tenancy agreement, while others will have the lesser protections of an occupancy agreement. This distinction between residential tenancies and occupancy agreements is already drawn under the RTA. The fact that not all residents in the ACT benefit from this proposed amendment does not amount to discrimination on a prohibited ground. If the distinction were linked to a ground of discrimination such as 'other status,' either directly or indirectly, the treatment is nevertheless compatible with the right to equality and non-discrimination. In particular, section 28 of the HRA, sets out the criteria for when human rights including the right to equality and non-discrimination may be reasonably limited such that they are compatible with the HRA. Applying the criteria, the purpose of the distinction between occupancy agreements and residential tenancies is to facilitate a wider range of housing options where a tenancy agreement may either be ill-suited or inappropriate. The measure is of importance as, without this measure, residential tenancy agreements may create an obstacle to the provision of flexible housing and related support services in appropriate circumstances. The current measure, by more clearly defining the distinction between an occupancy agreement and a residential tenancy agreement, will assist to achieve the stated purpose of the measure. The proposed amendments will improve the proportionality of any distinction overall, by increasing the protections contained in occupancy agreements.

¹ International Covenant on Civil and Political Rights (ICCPR) articles 2 and 26; *Althammer v Austria*, United Nations (UN) Human Rights Committee Communication no. 998/01 (2003) [10.2].

² The grounds of discrimination are not specifically or exhaustively defined under the HRA. However, the following examples of discrimination are provided in the HRA: 'race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.'

Under the amendments, a presumption will remain in favour of a residential tenancy agreement in a range of circumstances. Under the proposed definitions, occupancy agreements arise where the agreement seeks to achieve a clearly defined outcome such that any differential treatment between occupants and residential tenants will be based on reasonable and objective criteria. Of further relevance to the proportionality of the measure, is the ability of parties to an agreement that purports to be an occupancy agreement, but that appears to be more in the nature of a residential tenancy agreement, to challenge its status in the ACT Civil and Administrative Tribunal (the Tribunal).

Equality and non-discrimination – exemptions of universities from certain provisions

The Bill includes a number of provisions that apply specifically to occupancy agreements provided by universities. These include:

- an exemption from the requirement to lodge any security deposit taken in respect of occupancy premises with the Territory;
- clarifying that the currently existing university disciplinary requirements and medical leave rules established under statute will not be displaced by the occupancy principles in the event of any inconsistency between the disciplinary requirements or medical leave rules and the occupancy principles;
- requiring parties of occupancy agreements who have a dispute to which to which a university dispute resolution procedure applies to exhaust internal dispute resolution procedures (within a reasonable time) prior to making an application to the Tribunal;
- a clarification that occupancy agreements can be terminated under university disciplinary requirements and medical leave rules and that agreements terminated in these circumstances are not subject to the requirement that the termination is reasonable having regard to the nature of the occupancy agreement; and
- delayed commencement and transitional provisions that apply to education provider occupancy agreements, including universities.

It is noted that the effect of the above outlined provisions is that students living in university accommodation will be subject to different arrangements under the Bill. However, as noted above, not every differential treatment will amount to discrimination, as the measure must be linked either, directly or indirectly, to a prohibited ground of discrimination. University students living in university student accommodation are not expressly a prohibited ground or protected attribute for the purposes of the HRA. While discrimination may occur on the grounds of 'other status', students in student accommodation are also unlikely to be considered as an 'other status' ground of discrimination. Under international human rights law 'other status' has been held to include age, nationality, marital status, disability place of residence within a country and sexual orientation. Although this is a non-exhaustive list, international jurisprudence indicates that 'other status' often relates more to an inherent personal attribute rather than one that is purely circumstantial – it should generally relate more to who the person is not what they do³ or, in this case, the type

³ See, for example, *Swift v Secretary of State for Justice* [2012] EWHC 2000 (QB) [45]-[46] per Eady

of accommodation in which they choose to live. There are exceptions to this approach taking into account the entire circumstances. However, based on this analysis, differential treatment for students living in student accommodation does not engage the right to equality and non-discrimination for the purposes of the HRA. Even, if the right is engaged in relation to a particular group, directly or indirectly, resulting in a potential limitation on the right to equality and non-discrimination, any limits are demonstrably justified as outlined below.

Grounds and purpose for drawing a distinction between occupancies and tenancies - university student accommodation

The standard residential tenancy terms, which apply to all tenancies, are designed to grant a tenant exclusive possession of the premises by limiting the degree of access and control a landlord has over the property and the actions of the tenant. In contrast, the occupancy principles are designed to create greater flexibility, including greater access and control on the part of the grantor to reflect the particular circumstances in which they are being used, or to achieve a particular purpose in the provision of accommodation.

In the case of university student accommodation, there are strong policy reasons for the provision of occupancy agreements rather than tenancy agreements. University student accommodation exists for the purpose of accommodating students while they are studying and, in this context, university accommodation occupancy agreements are inherently connected to the student's enrolment in the university.

University student accommodation is also generally characterised by large multi-user premises that provide a room for the individual resident as well as access to common shared facilities. In addition to providing accommodation facilities, university residences often offer support services such as pastoral care provided by live-in senior residents, social and sporting activities and, in some cases, they also offer academic tutoring. These support services aid in achieving the overarching goal of university accommodation, which is to support a student in their educational and personal development. As such, university accommodation is unlike a residential tenancy in that it is not characterised by exclusive possession and control of the premises, and it also entails the provision of on-site services offered by the grantor that require access by the grantor to deliver.

In providing accommodation which includes many people living in close proximity who utilise common shared facilities, universities (or their contracted providers) also need to be able to have a higher degree of control of the actions of occupants (unlike in a tenancy) in order to manage situations where one student's behaviour impacts on others.

Due to the provision of on-site services, the need to regulate the use of common spaces as well as the need for a higher degree of control in relation to how individuals within the accommodation interact with each other, university student

J. 'Other status' has in some cases been found to be broader than innate, inherent, personal characteristics or identity taking all of the circumstances into account: see *Clift v United Kingdom* [2010] ECHR 1106 (13 July 2010) where the European Court of Human Rights considered the situation of different categories of prisoners.

accommodation is not well suited to a residential tenancy agreement. It is an acknowledgement of all the above factors that this unique form of accommodation offering has been included in the definition of occupancy agreements, rather than requiring that this accommodation be offered under residential tenancy agreements. In other words, for the reasons outlined above, the distinction pursues the legitimate purpose of allowing for suitable accommodation options and associated services which are tailored to the specific environment. The distinction is based on reasonable and objective criteria.

Education Provider Specific Provisions

The education provider specific provisions also serve to ensure that occupancy agreements are able to operate effectively and meet the purpose for which they are used. Occupancy agreements in other contexts can also be drafted to include provisions that reflect the purpose for which they are being used.

The Bill also introduces an additional dispute resolution option for all occupants, including students, in the form of the ability to make an occupancy dispute complaint to the Human Rights Commission (HRC). Students will be able to make an occupancy dispute complaint to the HRC without having first exhausted internal dispute resolution options under university dispute resolution procedures. This provides an additional rights enforcement pathway for occupants.

Compatibility of the bill with the right to privacy, family and home

Section 12 of the HRA protects the right to privacy, family, home or correspondence. Almost all the proposed amendments, whether taken together or in isolation, engage and promote the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Having access to accommodation provides a space for individual tenants and occupants to develop their identity and to have personal security and mental stability. Where residents of a residential premises comprise a family, the proposed amendments also promote protections afforded to families in the ACT under section 11(1) of the HRA.

Right to privacy, family and home - Mandatory occupancy principles

The right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily will be engaged by making the occupancy principles in Part 5A mandatory. Currently, Part 5A requires that grantors 'must have regard' to the principles listed within Part 5A, providing less certainty regarding the ability for occupants to enforce their rights outside of formal legal proceedings, processes which themselves lack clarity regarding the obligations of grantors towards occupants. Mandating these occupancy principles will provide grantors with clarity regarding the minimum requirements owed to occupants, provide occupants with a firmer basis to seek the enforcement of their rights through non-adversarial means, and provide stronger guidance to legal bodies such as the Tribunal to assist in their decision making on formal disputes. These outcomes result in greater protection of

an occupant's privacy, family, home or correspondence by unlawful or arbitrary means through providing clarity regarding when rights under an agreement are interfered with, and a clearer basis for enforcing such entitlements.

Right to privacy, family and home – occupancy dispute complaints

The right to privacy and home will be engaged and promoted by providing occupants with the ability to make an occupancy dispute complaint to the ACT Human Rights Commission (Schedule 1, Part 1.1). In conjunction with the mandating of the occupancy principles, providing direct access to this dispute resolution option will provide occupants with an additional avenue to seek the enforcement of their rights.

Right to privacy, family and home – occupant's access to premises

The right to privacy and home will also be engaged and promoted by the inclusion of the new occupancy principle requiring a grantor to ensure 24-hour access to the premises which is the subject of their occupancy agreement and associated hygiene facilities, and access to communal facilities during reasonable hours having regard to the occupant's individual circumstances (clause 27, proposed new section 71EH). This will assist to ensure that occupants are always provided access to hygiene necessities such as toilets and showers, while ensuring that the use of shared facilities does not adversely impact on other occupants outside of reasonable hours.

Right to privacy, family and home – grantor's access to premises

Proposed section 71EA (1) (j) provides that a grantor may only enter the premises in accordance with proposed section 71EJ or section 71EM. Accordingly, the measure engages and promotes the right to privacy by restricting the grantor's access to the premises. Proposed section 71EJ requires that an occupancy agreement must state when the grantor may enter the premises and the kind of notice and the period of notice the grantor must give the occupant. Section 71EM clarifies that a grantor may enter the premises without consent or notice to confirm if the premises are abandoned, but only after: the occupancy fee has not been paid for three consecutive periods; the grantor has taken all reasonable steps to contact the occupant; and the grantor reasonably believes the occupant has abandoned the premises. Further, a grantor cannot enter premises to confirm abandonment on Sundays, public holidays, or before 8am or after 6pm. By allowing access to the premises in accordance with sections 71EJ or 71EM, the provision of 71EA (1) (j) therefore engages and may limit the right to privacy. However, these are reasonable limitations applying the criteria under section 28 of the HRA. The purpose of the provision is to allow grantors to perform their obligations towards the occupant and other occupants and to protect the legitimate interests of grantors in respect of the premises. Depending on the nature of the occupancy agreement, a grantor's obligations may include, for example, providing services, undertaking inspections or repairs or ensuring safety. That is, performing actions that are important for the purposes of the agreement. Noting that access to the premises may be required to

perform such functions, the provision is rationally connected (that is, effective to achieve) this objective. The provision contains a range of safeguards to protect the occupant and to ensure the provision is a proportionate limitation on the right to privacy, including requiring:

- that the kind and period of notice must be reasonable and proportionate to the outcome sought by the grantor in entering the premises; and
- that the grantor may only enter the premises if the occupancy agreement allows the person to do so and the grantor has given notice in accordance with the agreement (unless it is not practicable to do so).

Accordingly, the measure constitutes a reasonable limitation on the right to privacy and home under section 28 and, as such, is compatible with this right.

Right to privacy, family and home – university rule breach consequence and termination provisions

The right to privacy and home is engaged and may be limited by:

- providing that where a penalty or consequence for breach of an occupancy agreement is imposed under a university discipline or medical leave requirement universities that penalty or consequence can be imposed without being subject to the requirement that it be reasonable and proportionate to the nature of the breach or that it not impose unreasonable hardship on the occupant; and
- providing that university agreements may be terminated under a university disciplinary requirement or medical leave rule (to which the requirement that the termination be reasonable having regard to the nature of the occupancy agreement does not apply).

As noted above, under the HRA, the right to privacy may be subject to permissible limitations provided that the criteria in section 28 of the HRA are met:

Legitimate purpose (section 28 (2) (b))

The university disciplinary rules and medical leave rules are important to the overall functioning and academic and reputational integrity of the universities. They apply to the university's entire student body, not just to students in student accommodation.

The purpose of allowing for the imposition of penalties or consequences under an occupancy agreement or for termination of that agreement where that penalty, consequence or termination arises under a university disciplinary requirement or medical leave rule (regardless of reasonableness or hardship) is to allow for the continued and effective operation of the universities' rules and to avoid inconsistency between statutory provisions. This is more than a measure designed to achieve administrative convenience, it is a measure to support the overall effective functioning of universities.

Rational connection - (section 28 (2) (d))

As noted above, the university disciplinary and medical leave rules apply to the entire student body within the university. The exemption from the occupancy principle requirements with respect to termination has been created to ensure the continuing effective operation of the university as well as to ensure that the rules may be applied across the entire student body equally and without interference from occupancy laws. By providing greater clarity about the scope and limits of occupancy law, the measure is rationally connected to (this is, effective to achieve) the legitimate purpose of supporting the overall effective functioning of universities.

Proportionality (sections 28 (2) (c) and 28 (2) - (e))

The exemption from the requirement that the termination of an occupancy agreement be reasonable having regard to the nature of the occupancy agreement for universities, is not a general exemption for universities and is limited only to circumstances in which termination of the occupancy agreement is required under the university disciplinary or medical leave rules.

This Bill introduces significant protections for university students beyond those that currently exist. These protections apply to students in student accommodation, except where they are inconsistent with university disciplinary or medical leave requirements. It is noted that students in university student accommodation are already subject to university disciplinary requirements and medical leave rules and this Bill does not displace that. Rather the Bill clarifies the interaction with the existing framework operating for universities.

It is also noted that the above exemption in relation to university disciplinary requirements and medical leave rules is limited to the Australian National University and the University of Canberra who house 6000 and 2500 students in their accommodation facilities respectively. While there are some other education providers in the ACT and in respect of which the carve out does not currently apply, these education providers have comparatively small accommodation facilities or do not offer accommodation at all. In this way, the exemptions have been circumscribed to apply as necessary. Other operators would still be able to use their applicable rules to impose penalties or consequences so long as they were reasonable and proportionate and do not impose undue hardship on the student.

The exemption is also the least rights restrictive means of ensuring the continued effective operation of the university disciplinary and medical leave rules. This is because there are significant safeguards imbedded in the rules themselves. These safeguards ensure that any interference with the right to privacy (including termination of an occupancy agreement) based on those rules and procedures constitute a proportionate limitation. It follows that the measure itself is also compatible with the right to privacy and home.

Right to privacy, family and home – abandonment of premises

The right to privacy and home will also be engaged by the amendment providing that a grantor may enter premises during the residential occupancy agreement where the

grantor believes on reasonable grounds that the premises have been abandoned by the occupant (clause 27, proposed new section 71EM). However, this right may be subject to reasonable limitations under section 28 of the HRA. Applying the criteria under section 28, the overarching purpose of the measure is to protect the legitimate interests of grantors in circumstances where they reasonably believe that the premises have been abandoned. In order to ensure that entry without consent is proportionate and not arbitrary in nature, the amendment will require a grantor to satisfy certain requirements in order to enter the premises to ascertain if it has been abandoned. These requirements are that the grantor must be aware of the occupants not having had paid the occupancy fee for at least three consecutive periods, that the grantor has taken all reasonable steps to contact the occupant, and that the grantor reasonably believes that the occupant has abandoned the premises. Further, as an additional safeguard, the amendments will forbid the grantor entry to the premises, notwithstanding the above conditions, on Sundays, public holidays, and before 8am or after 6pm. These amendments represent a proportionate measure to allow grantors to mitigate loss and minimise the potential compensation liability of occupants who abandon premises by ensuring that entry only occurs in circumstances where there is a clear indication that the premises have in fact been abandoned. Accordingly, the measure constitutes a reasonable limitation on the right to privacy and home under section 28 and, as such, is compatible with this right.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the Residential Tenancies Amendment Act 2020.

Clause 2 Commencement

This clause provides that the Bill commences in stages. The Bill (other than schedule 2) commences on a day fixed by the Minister by written notice. If the Bill (other than schedule 2) has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period.

Schedule 2 commences 30 January 2022.

Clause 3 Legislation Amended

This clause provides that the Bill amends the *Residential Tenancies Act 1997* (the RTA), and the *Residential Tenancies Regulation 1998* (the Regulation). The Bill also amends the HRCA and the *Uncollected Goods Act 1996* (the UGA) in schedule 1 of this Bill. The Bill further amends the HRCA and the RTA in schedule 2.

Clause 4 New section 4A

This clause inserts an 'objects clause' into the RTA. An objects clause is a provision that outlines the underlying purposes of the legislation and can be used to resolve

uncertainty and ambiguity. Section 139 of the *Legislation Act 2001* states that an interpretation that would best achieve the purpose of the legislation is to be preferred to any other interpretation. The objects clause will expressly state the purpose of the RTA to aid in its interpretation. The clause does not create new rights or obligations.

This clause also provides an overview of the distinction between a residential tenancy agreement and an occupancy agreement. The RTA aims to define the rights and obligations of tenants and landlords under residential tenancy agreements, while the RTA only sets out the minimum contractual requirements for occupancy agreements in the form of occupancy principles. The minimum contractual requirements for occupancy agreements provide the flexibility for them to be adapted to the wide range of stakeholders who use occupancy agreements.

Clause 5 New section 6AA

This clause inserts a new class of tenant into the RTA: a co-tenant.

‘Share housing’ is an increasingly common way for people to live, especially for students. As residential tenancy law was not developed with the concept of tenants moving in and out of tenancy agreements, the legal status of a resident is often unclear in these circumstances. Currently, a person in a share house might be a co-tenant (either as a joint tenant or as a tenant in common), a sub-tenant, an occupant, or a bare licensee.

This amendment seeks to reduce this ambiguity in the legal relationships that are created in share housing so that the legal framework is simpler, modernised, better reflects community behaviours and expectations, and ensures that those who have a reasonable expectation of the protections of a tenancy are afforded it.

Clause 6 What is a residential tenancy agreement? New section 6A (1)

This clause provides a new definition of a residential tenancy agreement to clarify the difference between it, and an occupancy agreement.

It is the intention that, with only very few exceptions, every person who pays for a right to accommodation as their principal place of residence in the ACT is either a residential tenant or an occupant. The operation of new section 6A and new section 71C (which defines occupancy agreements) is that there is a presumption, in most circumstances, in favour of a residential tenancy unless there are clear reasons not to recognise a tenancy (including that the parties clearly intended not to create a tenancy).

The effect of this new section together with new section 71C is that all people, with very few exceptions, who pay for residential accommodation as their home are entitled to appropriate protections of their use of the residence either as a tenant or, if a clear exception applies, as an occupant.

Clause 7 Section 6A (4), third dot point

This clause removes a cross-reference to a section of the RTA that will be removed by clause 9 (below).

**Clause 8 Certain people given right of occupation not tenants
Section 6E (1) (b)**

This clause removes a section of the RTA which stated that certain people were not tenants. As this contributed to confusion about their status as parties to an occupancy agreement, this section has been removed. This has been replaced by a functional definition of what constitutes an occupancy agreement (see clause 22, new section 71C below).

**Clause 9 Certain kinds of premises mean no residential tenancy agreement
Section 6F**

This clause removes a section of the Act which stated that certain premises meant the residents were not tenants. As this contributed to confusion about the status of the residents as parties to an occupancy agreement, this section has been removed. This has been replaced by a functional definition of what constitutes an occupancy agreement (see clause 22, new section 71C below).

**Clause 10 Rent or bond only
New sections 15 (2) (aa) and (ab)**

This clause makes it clear that landlords must not require or accept any consideration for consenting to a co-tenant leaving or a new co-tenant joining, a residential tenancy agreement.

The RTA prohibits all fees for a residential tenancy agreement other than for rent or bond. This requirement exists in the ACT and other jurisdictions to keep the initial cost of obtaining rental accommodation at a reasonable level and to remove hidden costs, such as 'key money'. Fees in addition to rent and bond disadvantage low income earners.

**Clause 11 Bond release application—lessor's obligations
New section 34 (3)**

This clause clarifies that multiple bond release forms are not required where there is more than one tenant party to a residential tenancy agreement. While this was implied by section 33 of the RTA (only one application may be made for a bond release, unless the director-general gives permission), this clause clarifies the existing law.

**Clause 12 Bond release application—joint application
Section 34A (1) (b)**

This clause updates section 34A (1) (b) to use the term 'co-tenant' in place of 'more than 1 tenant'.

**Clause 13 Bond release application—application by tenant
Section 34B (1) (c)**

This clause updates section 34B (1) (c) to use the term ‘co-tenant’ in place of ‘more than 1 tenant’.

Clause 14 Section 34A (3) (a)

This clause updates section 34A (3) (a) to use the term ‘co-tenant’ in place of ‘more than 1 tenant’.

Clause 15 Section 34B (2) (a)

This clause updates section 34B (2) (a) to use the term ‘co-tenant’ consistently with the above clauses.

Clause 16 New section 34F

This clause empowers the Territory to refer a matter to the Tribunal if a bond release application is made and the names of the tenants in the bond application do not match the names of the tenants on record.

The Territory holds bond moneys on trust for the tenant (RTA, s 27). As tenants move in and out of a tenancy agreement, the registered interest in that bond is not always kept current. Tenants need an efficient and effective way of being able to resolve discrepancies in the bond record, and the Territory needs a way to ensure that bonds are only released to the correct parties.

Where there is such a discrepancy, this new section 34F allows the Territory to refer the matter to the Tribunal so that the Tribunal can determine to whom the bond moneys are to be released.

Clause 17 New part 3A

Facilitating co-tenancies

This clause inserts a new part into the RTA to facilitate share housing.

At common law, the rules around terminating co-tenancies and sub-tenancies are a highly complex mix of property law and contract law. Despite the widespread prevalence of share housing in the ACT, the law does not align with community behaviours or expectations. For example, the identity of the tenants is a fundamental term of a lease, and a change in the composition of tenants—and the way in which the tenants changed—will have implications for the ongoing existence of the lease. If a tenant in a ‘share house’ gives notice to vacate during a periodic tenancy, depending on their specific circumstances and the manner in which they gave notice, it is possible that the existing tenancy has ended and a new tenancy has commenced with new tenants (some of whom were on the previous lease) (see, for example, *ACT Housing v Midgley* [2001] ACTRRT 7). Not only does this make it difficult to track the liabilities and obligations of former tenants, it may impact the ability of landlords to make deductions from the bond as a condition report was not undertaken at the start of the new tenancy.

Currently, there are a range of complexities about the rights and obligations arising under the lease (see, for example, *Hammersmith and Fulham London Borough*

Council v Monk [1991] UKHL 6; *ACT Housing v Midgley* [2001] ACTRRTT 7). The question of legal status under the lease is often not asked until relationships have broken down and respective rights and obligations become a source of conflict (*Lochrin v Jaiswal (Residential Tenancies)* [2018] ACAT 78).

The purpose of the new part 3A of the RTA is to amend the operation of the common law of property and contract so that share housing becomes simpler. It also creates a default position for resolving issues about status within a residential tenancy agreement: the legislative norm is that a tenant will enter into a tenancy agreement as a co-tenant unless the parties clearly intend otherwise.

Leaving a co-tenancy

New section 35A facilitates a co-tenant leaving a tenancy. A co-tenant must seek the consent of the other parties to the tenancy in order to withdraw from the agreement. The leaving co-tenant must provide 21 days' notice in writing to the landlord and any other co-tenants to seek this consent. If the proposed leaving day is during a fixed term, the other parties to the tenancy agreement may withhold consent for any lawful reason. If, on the other hand, the proposed leaving day is not within the fixed period, then other parties to the tenancy agreement must not unreasonably withhold their consent and must seek the approval of the Tribunal for an order to withhold their consent.

This distinction between the models for consent during a fixed term and during a periodic agreement arises because new section 35A is not intended to undermine the operation of a fixed term agreement. Similarly, new section 35A is not intended to bind a tenant to a longer period of notice than they would have had prior to these changes (currently a tenant must provide 21 days' notice to terminate a periodic tenancy). To give effect to this, Tribunal approval is needed in relation to the withholding of consent of the other co-tenants or landlord if the leaving co-tenant proposes to leave during a periodic tenancy, however Tribunal approval is not required in relation to the withholding of consent of the other co-tenants or landlord if the leaving co-tenant proposes to leave during the fixed term of a tenancy. If Tribunal approval to withhold consent for a co-tenant to leave a periodic tenancy is given, nothing in this section prevents that co-tenant from unilaterally terminating the entire tenancy agreement (as they are currently able to do).

New section 35A also ensures that the agreement continues between the landlord and the remaining co-tenants. The leaving co-tenant's rights and obligations under the agreement end, with the result that their liability for the payment of rent will end and their liability for damage to the property will end. These liabilities continue with the remaining tenants, making it clearer for landlords to know against whom they can seek contributions for costs and damages.

Example

Peter, Saffron, and Kelly are co-tenants, and Jasper is their landlord. They have a fixed term tenancy with 8 months still remaining in the fixed term. Kelly would like to leave the tenancy as she would like to accept a job in Queensland. Kelly seeks consent from Peter, Saffron, and Jasper. Any of them may refuse consent for any

lawful reason, and one of them chooses to exercise this right. Peter refuses because he is concerned that he will not be able to afford an increase in his rent.

Kelly applies to the Tribunal for an order that she may leave the tenancy under s 35G (1) (a). the Tribunal directs mediation, and the parties voluntarily come to an agreement that they will consent following a pathway similar to a 'break lease clause' situation, giving Peter and Saffron enough time to find a new tenant to join under s 35C.

Repayment of bond to a leaving co-tenant

New section 35B regularises the repayment of a leaving co-tenant's share of the bond. The RTA strictly regulates how bonds for residential tenancies are managed. Section 21 of the RTA states that the landlord may only require or accept one bond in relation to a residential tenancy agreement. New section 35B operates within this restriction: only one bond is held in relation to the residential tenancy agreement, but who has an interest in that bond may change.

The co-tenants themselves assess any damage attributable to the leaving co-tenant. Within 14 days after the day the leaving co-tenant stops being a party to the residential tenancy, the remaining co-tenants must pay the leaving co-tenant an amount equal to the bond paid by the leaving co-tenant, but may deduct amounts for unpaid rent and for reasonable costs in relation to the premises. As the remaining co-tenants remain liable for all damage to the property (including the damage caused by the leaving co-tenant), this section allows co-tenants to manage those liabilities privately without requiring an additional inspection by the landlord or real estate agent. If there is a dispute about the liabilities of the leaving co-tenant, the co-tenant may apply to the Tribunal to resolve the dispute, even if they have ceased being a party to the residential tenancy agreement.

Joining a co-tenant to an existing co-tenancy

New section 35C facilitates joining a co-tenant to an existing residential tenancy agreement. The section does not apply where the parties clearly intend not to create a co-tenancy—for example, where there is a clear attempt to create a sub-tenancy or where a bare licence was clearly intended. The section does not apply where the premises are a social housing dwelling or crisis accommodation (a separate provision for this kind of tenancy is at section 35E).

Consent assumed if no response within 14 days

An existing tenant must seek the consent of the landlord and any other existing tenant by notice in writing at least 14 days prior to the proposed day the new tenant will join the tenancy. The landlord and any other co-tenant are taken to consent if they do not respond within 14 days after receiving the consent application. This is to ensure that parties don't prevent a new tenant from being joined to the tenancy simply by ignoring the request to add a new tenant to the agreement.

Refusal of consent by another co-tenant

A tenant may refuse consent for any lawful reason. The intention here is that other co-tenants should have a say in who they live with and should not be forced to live with a new co-tenant if they do not wish to.

Tenancy continues with new tenant added

If consent is obtained, the change to the parties will not result in a new tenancy being created. Instead, the existing tenancy continues with the new person becoming a co-tenant. A new condition report is not required with the incoming co-tenant receiving a copy of the existing condition report. The incoming tenant will become liable for damage done to the property by existing or former tenants, and the payment of bond by the new co-tenant is covered by section 35F (below).

Refusal of consent by the landlord

A landlord must not unreasonably refuse consent to the addition of a co-tenant (35C (5)). If the landlord does want to refuse consent, they must refuse in writing and inform the existing tenant and the prospective tenant the reason for refusing consent. Section 35G (3) (discussed below) contains a list of reasons that the Tribunal must consider when deciding if the landlord's refusal to consent was reasonable.

New section 35D applies if an existing tenant has sought the consent required under section 35C (above) but the landlord alone has refused consent (that is, all the existing co-tenants consent, but the landlord does not). Under section 35C, the landlord is not permitted to withhold consent unreasonably and must provide written reasons for withholding consent.

If the existing tenant wants to challenge the landlord's reason to withhold consent, they may apply to the Tribunal for a declaration that the refusal of consent was unreasonable (section 35D). Requiring the landlord to provide written reasons for refusing consent provides the existing co-tenant an opportunity to decide if they wish to challenge the landlord's reason for refusal in the Tribunal. If an application to the Tribunal is made, the written reason for refusal can also be used in evidence at the Tribunal.

Challenging the reasonableness of the landlord's refusal to add a new co-tenant

New section 35D details the process for challenging the landlord's refusal to add a new co-tenant.

If, after receiving the landlord's written reason for refusing the proposed new co-tenant, the existing tenant decides they think the refusal was unreasonable, they can make an application to the Tribunal for a declaration that the refusal was unreasonable.

If the existing tenant makes an application to the Tribunal for an order, the new tenant will become a co-tenant under the residential tenancy agreement on the day that the application to the Tribunal is made.

If the Tribunal finds that the landlord did not act unreasonably in refusing consent the Tribunal can make an order that the new person stop being a party to the residential tenancy agreement. The new person will then cease to be a party to the residential

tenancy agreement on the day the order is made and must leave the premises within 21 days after the order is made. The provisions regarding the bond in section 35B (discussed above) will apply to the person, protecting their interest in having their bond returned. If the Tribunal considers that the landlord's refusal was unreasonable then the new person can remain as a tenant in the property.

Where a new person moves in when the landlord has refused consent, the new person will only be a bare licensee until the existing tenant applies to the Tribunal for an order that the landlord's refusal was unreasonable.

Landlord can still apply for an order about purported assignment or subletting

If the new person moves in when the landlord has refused consent, the landlord may elect to seek an order of the Tribunal under section 54 that the existing tenant has purported to consent to a person to become a co-tenant or assign or sublet the premises in breach of the standard residential tenancy terms. To avoid doubt, section 35D (4) provides a landlord a right to make an application to the Tribunal if the existing tenant has made a declaration application, but they have withdrawn the application or otherwise delayed the Tribunal proceeding. As this right is a streamlined version of the right that already exists under section 54, the intent of this provision is to ensure that section 35D does not prevent a landlord from reasonably protecting their rights with regard to the tenancy.

Example

Rafael, Mai, and Rami are co-tenants, and James is their landlord. They would like Aparna to join the tenancy. Any one of Rafael, Mai, or Rami may seek consent from the others and from James, so Rafael takes on that task. Rafael seeks consent in writing (section 35C (4) (a)) that Aparna will join the tenancy on a day at least 21 days from the date of the request (section 35C (4) (b)).

James must not unreasonably refuse consent (section 35C (5)). Mai and Rami may refuse consent for any lawful reason.

James wishes to refuse consent. He must provide the reason in writing for refusing consent (section 35C(5)(b)). James provides his refusal in writing and says that the reason is because he is worried about overcrowding.

Rafael, Mai, and Rami disagree that the premises would be overcrowded as the property has five bedrooms, two bathrooms, and an ensuite in the master bedroom. Neither Mai nor Rami withhold their consent. If they did, Rafael has no option available to him to make Aparna a tenant.

As Mai and Rami have both consented, Rafael applies to the Tribunal for a declaration under section 35G (1) (c) (i) that James' refusal was unreasonable (s 35D (2)).

On the day that Rafael makes an application to the Tribunal, Aparna becomes a co-tenant (s 35D (3)).

Rafael places evidence before the Tribunal about James' refusal for consent as well as the number of bedrooms in the property and argues that James' refusal of consent was unreasonable. The Tribunal must consider if the premises would become overcrowded if Aparna were to become a co-tenant (section 35G (3) (a)). If the Tribunal considers James' refusal was reasonable, the Tribunal may order that Aparna is to stop being a party to the residential tenancy agreement (s 35G (1) (c) (ii)). If that order is made, Aparna stops being a party to the residential tenancy agreement on the day of the order and must leave the premises (that is, she can no longer use the property as a tenant) within 21 days after the order is made (section 35D (5)).

If the Tribunal considers James' refusal was unreasonable, it can make a declaration to this effect (section 35G (1) (c) (i) and Aparna remains a tenant.

Importantly, if Rafael makes the application to the Tribunal and then withdraws the application, Aparna will remain a tenant. To avoid that problem, James has a right to seek a Tribunal order under section 35G (1) (c) (ii) to ensure that Rafael cannot frustrate the operation of the Act.

Becoming a co-tenant under an existing tenancy agreement in social housing or crisis accommodation.

New section 35E provides a legislative framework for social housing dwellings and crisis accommodation. There are separate processes to be considered for social housing or crisis accommodation, and it is not intended that the new part 3A will provide a separate pathway for people to apply for these forms of accommodation. Instead, it is intended only that, for social housing and crisis accommodation tenancies, the common law rules about the change of parties to a tenancy agreement are amended so that the residential tenancy agreement survives the change of parties where this is intended. Section 35E does not create an additional obligation for a social housing or crisis accommodation provider to respond to a request from an existing tenant to join a new tenant. Section 35E does not create an additional pathway for a decision by a social housing or crisis accommodation provider to be challenged in the Tribunal.

Recognition of the new co-tenant's interest in the bond

New section 35F regularises the method for an incoming co-tenant to gain an interest in the bond being held in relation to the agreement.

Tribunal powers in relation to co-tenancies

New section 35G specifies powers of the Tribunal specific to disputes arising from co-tenancies. The Tribunal, upon application by a co-tenant, is empowered to make an order removing a co-tenant from the tenancy agreement. This power is deliberately out of alignment with the existing power of the Tribunal to terminate a tenancy as it will arise from a dispute between co-tenants rather than as a dispute between a landlord and the tenants. An application to remove a co-tenant from the tenancy agreement might arise if the co-tenant is jeopardising the entire tenancy

agreement through their repeated non-payment of their share of rent or utilities, use of the premises for illegal activities, or repeated intentional damage to the property.

New section 35G also provides the power for the Tribunal to order that the landlord may refuse consent for a co-tenant to leave the agreement or for a new person to join the agreement as a co-tenant.

New section 35G (3) lists the matters that the Tribunal must consider when deciding whether the landlord's refusal to consent to a new tenant was reasonable. A landlord is likely to be reasonably refusing consent if:

- a) the premises would become overcrowded if the new person were to become a co-tenant;
- b) the new person is included on a residential tenancy database;
- c) the new person does not meet a requirement of the tenancy, or is unsuitable having regard to the purpose of the tenancy (for example, a housing support program to support women at risk of homelessness might reasonably refuse to allow a tenant who is not a woman at risk of homelessness to join the tenancy; or a housing support program to support men moving out of prison might reasonably refuse to allow a tenant who is not a man moving out of prison; or a housing support program to support people on humanitarian visas might reasonably refuse to allow a tenant who is not on a humanitarian visa);
or
- d) the tenancy is associated with a person's employment and the new tenant would not be occupying the premises under the terms and conditions of their employment.

As the tenant is making the application, they have an evidentiary burden to demonstrate that the landlord's refusal was unreasonable. It is intended that reasonableness will be evaluated by an objective standard: that there were serious, proper reasons to withhold consent, and that it was not merely whim, personal preference, or a lack of a positive, compelling reason for the landlord to provide consent. It is also intended that the landlord is not permitted to withhold consent in exchange for some other benefit to the landlord (such as an increase in the rent or other change to the tenancy agreement).

Clause 18 Section 54 heading

This clause changes the heading of section 54 of the RTA to align with the introduction of part 3A (clause 17 above).

A heading to a section of an Act is part of the Act (*Legislation Act 2001*, s 126(2)).

Clause 19 Section 54 (1) (a)

This clause clarifies the application of section 54 following the introduction of part 3A (clause 17 above). A tenant breaches the RTA if they purport to change the parties to a tenancy agreement or create a subtenancy except in accordance with the RTA.

Clause 20 Section 54 (1) (b) and (c)

This clause clarifies the application of section 54 in respect of purported assignment or subletting following the introduction of part 3A (clause 17 above).

Clause 21 Section 54 (2)

This clause clarifies the application of section 54 following the introduction of part 3A (clause 17 above).

Clause 22 Section 71C (1)

This clause inserts a new definition of an occupancy agreement into the RTA.

The policy intent is that people should be residential tenants unless there are strong policy reasons not to recognise a tenancy. The definition provides a more functional approach centred on those policy reasons to distinguish a tenancy agreement from an occupancy agreement. It will also make it clear that inconsistency with the standard tenancy terms in the RTA should, in the absence of countervailing reasons, be considered a breach of the landlord's obligations and not a reason in favour of reading an agreement as an occupancy agreement.

The reasons to have an occupancy are:

1. if the person is occupying a room within the grantor's primary place of residence (where they are the owner-occupier).
2. if exclusive possession interferes with legitimate goals to support vulnerable or at-risk residents, such as those where the grantor is required to provide support or assistance.
3. if restrictions on termination of an agreement interferes with legitimate goals to provide accommodation on a needs-basis. For example, there may be good policy reasons not to grant tenancies in respect of short-term refuge and crisis accommodation: accommodation is needs-based rather than a durable solution that should be offered under alternative forms of agreement. For mid-term stay, the RTA already provides a pathway for declared crisis accommodation providers to terminate a tenancy agreement with four weeks' notice (section 36 (1) (k)).
4. if the accommodation is in a residential park;
5. if it is residential accommodation associated with education providers (subject to delayed commencement).

The new definition shifts away from category-based classifications of occupancies to an inquiry about the function and purpose of the agreement. If an agreement purports to be an occupancy agreement but does not match the function and purpose of an occupancy agreement, it is intended that inconsistency with the standard tenancy terms in the RTA should, in the absence of countervailing reasons, be considered a breach of the landlord's obligations, rather than a reason to read an

agreement as an occupancy agreement instead (contrary to the analysis in *Wicks v Hurst-Meyers Charity* [2019] ACAT 92).

A room within the owner's principal place of residence

An agreement to reside in a room within another person's principal place of residence (where they are the owner-occupier) will ordinarily be an occupancy agreement unless the parties have stated that they intend to create a residential tenancy agreement. This is because residential tenancy law should not create an unreasonable burden on a person's right to manage who may stay in their principal place of residence.

Residential accommodation associated with education providers

An agreement to reside in a residential facility associated with, or on the campus of, or provided under an arrangement with an education provider will ordinarily be an occupancy agreement unless the parties have stated that they intend to create a residential tenancy agreement. The term 'education provider' is used to establish consistency with the *Education Act 2004*. Some residential colleges are not on the campus of the university, so this definition has been expanded to clarify the status of those residential colleges. Some residential colleges are operated by third parties, so this definition is also intended, for example, to capture those arrangements where an education provider outsources the management of accommodation.

University student accommodation is generally characterised by large multi-user premises that provide a room for the individual resident as well as access to common shared facilities. In addition to providing accommodation facilities, university residences often offer support services such as pastoral care provided by live-in senior residents, social and sporting activities and, in some cases, they also offer academic tutoring. These support services aid in achieving the overarching goal of university accommodation, which is to support a student in their educational and personal development. As such, university accommodation is unlike a residential tenancy in that it is not characterised by exclusive possession and control of the premises and that it also entails the provision of on-site services offered by the grantor and requiring access by the grantor to deliver.

In providing accommodation which includes many people living in close proximity who utilise common shared facilities, universities (or their contracted providers) also need to be able to have a higher degree of control of the actions of occupants (unlike in a tenancy) in order to manage situations where one student's behaviour impacts on others.

Due to the provision of on-site services, the need to regulate the use of common spaces as well as the need for a higher degree of control in relation to how individuals within the accommodation interact with each other, university student accommodation is not well suited to a residential tenancy agreement. It is in acknowledgement of all the above factors that this unique form of accommodation offering has been included in the definition of occupancy agreements, rather than requiring that this accommodation be offered under residential tenancy agreements.

As with all provisions relating to education providers, this exception will be included in the new Schedule 2, as a new section 71C (1) (b) (ia). It is due to take effect on 30 January 2022.

Dormitories and Boarding Houses

Dormitories and boarding houses are another way for people to reside in the ACT, especially where they have recently relocated and require transitional accommodation, or otherwise require lower-cost accommodation. Despite their ubiquity, there is no clear definition of a boarding house or a dormitory, except that they do not constitute a tenancy. New section 71C (1) (b) (iii) proposes to clarify this by describing the function of a dormitory or boarding house: the exclusive use of a sleeping space in a building with other sleeping spaces, with related access to shared facilities or provision of domestic services. In order to satisfy this definition, the agreement must state that it is an occupancy agreement.

Crisis Accommodation

Occupancy agreements are sometimes used to provide emergency accommodation for people in crisis. A tenancy may not be desirable because tenancy protections might interfere with requirements to seek long-term housing actively, to move out of the premises when no longer eligible for the services provided by the grantor, or to take part in a grantor's case management program. Given the legitimate and rational policy intent of making emergency housing available, these agreements should not be characterised as residential tenancy agreements if they fulfil this function, and the agreement states that it is an occupancy agreement for emergency accommodation for people in crisis. Where a declared crisis accommodation provider wishes to use residential tenancies instead of occupancy agreements, they may do so and utilise the termination provisions section 36 (1) (k).

Housing Support programs

Housing support programs funded by the Territory often require the grantor to have access to the property more regularly than residential tenancy agreements permit. For example, the grantor might provide accommodation as part of a program to provide welfare or health support services. New section 71C (1) (b) (v) proposes to clarify that an agreement to provide accommodation as part of a housing support program will be an occupancy agreement if it states that it is an occupancy agreement for a housing support program.

Accommodation connected to membership of a club

Some clubs and other membership based entities in the ACT provide accommodation to their members. Tenancy law is poorly suited to this form of accommodation as protections against eviction conflict with the resident's requirement to have ongoing membership of the club or entity in order to be eligible for the accommodation. It also conflicts with the club's ability to manage their accommodation stock for the benefit of all members of the club. If the agreement provides accommodation because of membership in a club or other entity, it will be an occupancy agreement if it states that it is an occupancy agreement.

Residential Parks

People who reside in a residential park either reside in a dwelling which they own (such as a manufactured home that they have placed on a site) or they occupy premises owned by the owner of the residential park. In the former case, it is intended that the agreement to occupy a site will be an occupancy agreement. In the latter case, the agreement to occupy the premises will also be an occupancy agreement. This resolves inconsistency and ambiguity about the application of the RTA to these residents. Owners of residential parks and residents may still elect to enter into a residential tenancy by clearly stating that intention (section 6B of the RTA).

Additional Agreements prescribed by legislation

The flexibility and adaptability of occupancy law makes it an attractive option for providing accommodation in the ACT for specific policy goals. The Minister may, by regulation, prescribe additional agreements that will meet the definition of an occupancy agreement.

Clause 23 Section 71C (4) and note

This is a consequential amendment to clause 22 above. It provides definitions of 'housing support program', 'shared facilities', and 'sleeping space'.

Clause 24 New sections 71CA and 71CB

New Section 71CA: Certain agreements not occupancy agreements

This clause states that certain types of agreements are not occupancy agreements. This provides greater clarity about the scope of occupancy agreements and avoids unintended legislative outcomes.

New Section 71CB: Occupancy agreement—Smoke Alarms

This clause inserts a new requirement for a grantor to ensure that premises have smoke alarms installed.

For boarding houses and dormitories, it might not be appropriate for a smoke alarm to be installed in every bedroom. Section 71CB (1) (a) states that the grantor must not enter into an occupancy agreement with an occupant in relation to premises unless smoke alarms are installed for the premises. 'For' in this provision is intended to extend to a smoke alarm that is installed in a hall for the safety of a group of rooms (and not necessarily in each room of the boarding house). Section 71CB (1) (b) states that the smoke alarms and their installation must comply with the requirements prescribed by regulation under section 11B (1) (b).

For the avoidance of doubt, section 71CB (2) states that the grantor's obligation to install smoke alarms and be compliant with regulations does not apply to an agreement for a site-only residential park occupancy agreement, as it is the resident's responsibility to install smoke alarms for their dwelling.

Clause 25 Section 71D heading

This clause is a consequential amendment to clause 26 below.

Clause 26 Section 71D (2)

This clause is intended to prevent ambiguities from arising if an occupant stays in possession of a premises (with the grantor's consent) at the end of an occupancy agreement.

Most forms of occupancy agreements have a requirement that the agreement expressly state that it is an occupancy agreement. If a grantor and occupant mutually agree to continue the agreement following the expiry of an agreement but neglect to enter into a new written agreement, it is intended that the agreement will simply continue as an occupancy agreement with a new end date.

It is also intended that this section will ensure that an occupant who is on a 'periodic' occupancy agreement is still protected by the occupancy principles related to the amount of notice a grantor is required to provide (such as, for example, eight weeks' notice to change an occupancy rule under new section 71EG (2) (a), discussed below).

Clause 27 Section 71E

Mandatory occupancy principles

This clause introduces the mandatory occupancy principles to the RTA, which are further explained by sections 71E – 71EM. Section 71EA (1) (a) states that an occupancy agreement is taken to contain these principles as in force from time to time. This clarifies that the principles currently in force will apply to all existing occupancy agreements and that, should they be updated in future, they will apply to all existing occupancies from the date of the updated provisions commence.

Section 71E states that an occupancy agreement for premises is taken to contain the occupancy principles and may contain rules about occupying the premises and additional terms. The occupancy principles are not terms of the occupancy agreement in the way that the standard residential tenancy terms (schedule 1 of the RTA) are terms of a residential tenancy agreement under section 8. It is intended that the occupancy principles provide enough flexibility to be adapted to the specific needs of each type of occupancy agreement while still providing a minimum level of protection for occupants. For example, it is an occupancy principle that the grantor may enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes. What would constitute a reasonable time on reasonable grounds to enter a boarding room to inspect repairs may be very different from what would constitute a reasonable time on reasonable grounds to do a welfare check on an occupant in emergency accommodation.

An occupancy rule or additional term in an occupancy agreement is void if it is inconsistent with the occupancy principles, the RTA, or another territory law. Of particular note are section 19 of the *Discrimination Act 1991* and section 100 of the *Utilities Act 2000*.

Section 71EA lists the occupancy principles. Most of the occupancy principles are linked to other sections of the RTA, and explanations for those principles are provided with the descriptions for those sections below.

State of the premises

The grantor must provide premises that are reasonably clean, in a reasonable state of repair, and reasonably secure. This corresponds with clause 54 (1) (b)-(d) of the standard terms (schedule 1) for residential tenancy agreements.

Occupancy agreement in writing if term is longer than 6 weeks

The grantor must ensure that the occupancy agreement is in writing if the agreement is for a term longer than six weeks. Some occupancy agreements only come into existence if the agreement states that it is an occupancy agreement and, as such, these agreements will already be in writing. Where an occupancy agreement is for a term shorter than six weeks and the agreement is not in writing, the grantor may comply with any requirement to provide information by giving the occupant the information, in writing, in any other appropriate way before the agreement begins (section 71EA (3)). Examples of this might be through a leaflet or through a poster in a highly visible place in a common area.

Occupancy rules

An occupancy rule must be reasonable and proportionate to the outcome sought by the imposition of the rule (section 71EA (1) (f)). This ‘reasonable and proportionate’ test is adapted from other areas of law including human rights law. It is intended to ensure that the occupancy principles under the RTA are compatible with the HRA. Similarly, penalties or consequences for breaching an occupancy rule must be reasonable and proportionate to the seriousness of the breach of the rule and must not impose unreasonable hardship on the occupant. Section 71EA (1) (g) uses the term ‘penalty or consequence’ to reflect breaches of the rules might not result in a financial penalty but might result in a loss of a privilege or some other restriction to the occupant’s access to shared services. Penalties or consequences that result in termination of the occupancy agreement are not captured by this occupancy principle (termination provisions are instead regulated by section 71EK).

Obligations of occupants towards others on the occupancy premises

An occupant must not behave in a way that detracts from the rights of others (including another occupant) to live and work in the premises in a safe environment, free from harassment or intimidation. Section 71EA (1) (k) makes it clear that each occupant will have obligations to any other occupant within the premises, even though those occupants might not be a party to the same occupancy agreement. Occupants, especially those in emergency accommodation or in housing support programs, may have particular vulnerabilities and a greater need for accommodation that is free from harassment and intimidation. Where co-tenants under a tenancy agreement will be required to apply to the Tribunal for orders to remove a co-tenant in a situation where the relationship has broken down, occupancy agreements might require grantors to have the flexibility to remove an occupant from a premises, or relocate them within the premises, if they are interfering with the rights of another occupant. This provision is similar to the requirement that tenants are not to cause or

permit nuisance or to interfere with the quiet enjoyment of the occupiers of nearby premises (RTA schedule 1 standard term 70).

Vacating occupancy premises

An occupant must vacate the premises at the end of the occupancy agreement. Section 71EA (1) (m) makes it clear that the occupant's obligation to vacate the premises at the end of an occupancy agreement is not affected through issuing notices (as it is with a residential tenancy agreement).

Condition of premises at the end of the occupancy

An occupant must, at the end of the occupancy agreement, ensure that the premises are in substantially the same state of cleanliness and condition the premises were in at the start of the occupancy (allowing for fair wear and tear), and reasonably secure (section 71EA (1) (n)). It is intended that this should be read in alignment with clause 64 of the standard terms.

Site-Only agreements in residential parks

Section 71EA (4) adapts the occupancy principles so that they apply to a site-only agreement in a residential park. As the grantor does not have any property rights over the dwelling, the grantor has an additional requirement to provide reasonable notice to enter an occupant's manufactured or mobile home.

Condition reports

New section 71EB introduces a new requirement for a grantor to provide a condition report to the occupant. The condition report must be provided not later than the day after the occupant takes possession of the premises. The grantor must sign the report and give the occupant a reasonable opportunity to check the content of the condition report, but the occupant is not required to sign the condition report. The consequence of not providing a condition report is provided in subsection (3): if the grantor does not provide a condition report the state of repair or general condition of the premises is taken to be the same at the end of the occupancy agreement as they were at the start of the agreement, unless there is evidence to the contrary.

Requiring the condition report be provided not later than the day after the occupant takes possession of the property allows for some flexibility as to when the condition report is provided in a context where an agreement may be signed some time before the occupant takes possession. The condition report does not have to be provided when the occupancy agreement is first entered into but does need to be provided shortly after the occupant takes possession of the property. For example, in the context of student accommodation, a prospective student may enter into an occupancy agreement for the upcoming academic year. The agreement commences when the parties sign the agreement (section 71D of the RTA). At the time they commence the agreement, the room that they may ultimately have as their own (when they take possession under their agreement) may have another occupant in it. However, once the exiting student has left the accommodation, the accommodation provider can prepare a condition report in time to provide it to the incoming student

at the time that they take possession under the occupancy agreement they have entered into the previously.

Payment of Security Deposits

Section 71EC relates to the occupancy principle about requiring a security deposit to be paid. This section creates three possible outcomes. If the agreement is for 14 days or fewer, then the grantor must not require the occupant to pay a security deposit. If the agreement is for greater than 14 days, then the amount that may be requested is capped at either the amount payable for the first two weeks of the occupancy if the agreement has a term of less than six months, or the amount payable for the first four weeks of the occupancy if the agreement is for six months or longer. This provision provides an incentive for grantors to create occupancy agreements with longer terms as it enables a larger security deposit. As with bonds under residential tenancy agreements, the section restrains a grantor from requiring or accepting more than one security deposit for an occupancy agreement.

Lodgement of security deposits with the Territory

Section 71ED requires a grantor to lodge the security deposit with the Territory. This section requires the Territory to manage the security deposit as if it were a bond under a residential tenancy agreement. This has the effect that an occupant has an increased capacity to dispute a claim against a security deposit by a grantor, as the deposit will be held on trust by the Territory until the dispute is resolved in a process applied from section 35 of the RTA. This provision does not apply to an education provider occupancy agreement (noting that this exemption is subject to delayed commencement see schedule 2, clause [2.5] below).

Deductions from Security Deposits

Section 71EE permits a grantor to deduct from a security deposit certain costs attributable to breaches of the occupancy agreement. This aligns with sections 31(a)-(c) of the RTA.

Receipts for certain payments

Section 71EF relates to the occupancy principle about the requirement of a grantor to provide written receipts for payments made under the occupancy agreement. Under the Australian Consumer Law,⁴ a person must give a consumer a proof of transaction if the person supplies good or services to a consumer and the total price (excluding GST) of the good or services is \$75 or more. Section 71EF is a simplified version of that requirement.

Occupancy rules, fees changes and penalties

Section 71EG relates to the occupancy principle that restricts the ability of grantors to impose occupancy rules, fees, charges, or penalties. This section should be read consistently with the occupancy principle that an occupancy rule must be reasonable

⁴ *Competition and Consumer Act 2010*, sch 2, s 100.

and proportionate to the outcome sought by the imposition of the rule, and the occupancy principle that any penalty or consequence for breaching an occupancy rule must be reasonable and proportionate to the seriousness of the breach of the rule and must not impose unreasonable hardship on the occupant. Section 71EG provides that a grantor will not be permitted to impose occupancy rules, fees, charges, or penalties unless prescribed information is included in the occupancy agreement. This requirement includes prescribed information about fees or charges payable under the agreement for utility costs, including the method for calculating how the fee or charge is calculated. As these rules must be reasonable and proportionate to the outcome sought by the imposition of the rule, it is intended that charges for utility costs have a direct relationship with the actual cost incurred by the grantor.

Section 71EG (2) (a) restricts the grantor's ability to change the occupancy rules. The grantor must provide at least eight weeks prior written notice about changes to the rules. This provides the occupant reasonable time to relocate if the change to the rules is unacceptable to them. If a grantor exercises this right, section 71EG (3) provides the occupant a right to terminate the occupancy agreement. It is intended that the occupant must provide the notice to terminate within the grantor's notice period (that is, within eight weeks) and not that the occupant must vacate within the grantor's notice period.

Section 71EG (2) (b) includes a requirement that a grantor must give reasonable notice about imposing a penalty for breach of an occupancy rule included in the occupancy agreement. It is intended that what is considered reasonable will vary depending upon the nature of the rule and the breach. For a breach which interferes with the safety of another occupant, for example, a very short notice period might be reasonable in the circumstances; whereas a short notice period for the breach of a rule causing inconvenience to other occupants (such as rostered cleaning requirements, for example), would likely be considered unreasonable.

Occupant's access to occupancy premises

Section 71EH relates to the occupancy principle about providing the occupant with quiet enjoyment of the premises. As an occupancy agreement is for the use of a premises as a home, an occupant should be entitled to have access to the shared facilities. For hygiene reasons, an occupant should have 24-hour access to a toilet and a bathroom. Rules restricting access to other shared facilities, such as the kitchen, games room, or outdoor areas, might be, in the circumstances, reasonable. For example, a house rule might restrict access to reasonable hours if the noise interferes with the quiet enjoyment of other occupants. This provision requires grantors to consider the occupant's circumstances and it is intended that what constitutes 'reasonable times' will need to take into account the needs of the individual occupant. For example, individuals who need access to food or medication during the night for medical reasons or individuals who may require access to kitchens when they are observing religious fasting during day light hours.

Information about Dispute Resolution Processes

Section 71EI relates to the occupancy principle which requires grantors to provide information about dispute resolution processes that apply to the occupancy

agreement. It also requires them to provide the contact details of the Legal Aid Commission, the Human Rights Commission, and the Tribunal. This section is intended to ensure that occupants can access legal advice and are aware of options to have disputes resolved. The section also requires the grantor to provide their contact details to the occupant so that the occupant has an address for service in the event of a dispute.

Entry by grantor to occupancy premises

Section 71EJ details when a grantor may enter the premises subject to an occupancy agreement. The grantor has an obligation to ensure that the occupancy agreement states under what circumstances the grantor may enter the premises and, for each circumstance, the kind and period of the notice that the grantor will give. The kind of notice and the period of notice must be reasonable and proportionate to the outcome sought by the grantor entering the premises. It is intended that this clause is read in conjunction with the requirement for premises to be reasonably secure (s 71EA (1) (a) (iii)), the requirement for occupancy rules to be reasonable and proportionate to the outcome sought by the imposition of the rule (s 71EA (1) (f)), and the requirement to provide the occupant with quiet enjoyment of the premises (s 71EA (1) (h)).

Termination of occupancy agreement

Section 71EK relates to the occupancy principle which restricts the ability of parties to terminate an occupancy agreement. This section requires that the grounds for termination of an occupancy agreement be included in the agreement itself, requires a party to provide reasonable notice if they seek to exercise their right of termination under the agreement, and restrains a grantor from terminating an occupancy agreement only because the occupant sought to enforce their rights. The provision makes it clear that the occupancy agreement may only allow a party to terminate the agreement in circumstances that are reasonable having regard to the nature of the occupancy. This protects occupants against arbitrary or otherwise unreasonable terminations of the occupancy agreement. The provision also prohibits retaliatory terminations or evictions.

Warrant for eviction – vacant possession order

Section 71EL empowers the Tribunal to issue a warrant for the eviction of an occupant from premises if the Tribunal has made an order to vacate the premises and the occupant has failed to comply with the order. It corrects an anomaly whereby the Tribunal was able to make an order to vacate the premises but not able to issue a warrant for eviction. The new provision is consistent with the regime for residential tenancy agreements. However, nothing in this provision requires a grantor to apply to the Tribunal for a warrant for eviction. Grantors can still terminate an occupancy agreement without needing to go to the Tribunal.

Abandonment of occupancy premises

Section 71EM provides a right to the grantor to ascertain if the premises subject to an occupancy agreement have been abandoned. The provision only authorises the grantor to enter the premises to confirm whether they have been abandoned. It does not authorise the grantor to take any further steps that are not otherwise authorised

by the RTA. In addition, section 71EM (3) provides that the grantor may only enter the premises at a reasonable time. The grantor must not enter the premises on Sunday, on a public holiday, before 8am or after 6pm. This provision is proposed with the intention of minimising inconvenience to the occupant in the event that the premises have not been abandoned. The provision is similar to section 61A of the RTA, except that this provision includes a higher threshold of the occupancy fee not being paid for at least three consecutive periods. It is intended that a grantor who continues to receive money from the occupant cannot form the belief that the premises have been abandoned.

Clause 28 Sections 71G and 71GA

This clause removes section 71G as there are no standard occupancy agreements.

This clause removes section 71GA as security deposits must now be deposited with the Territory by the grantor.

Clause 29 New part 5B

Occupancy Agreements in Residential Parks

This clause inserts a new part into the RTA to provide additional provisions for occupancy agreements in residential parks.

Section 71H provides the definitions that operate within part 5B of the RTA. Where residential tenancy agreements and occupancy agreements attach to the premises, a person residing in a residential park might own the dwelling but not the site on which the dwelling is erected. A person in a residential park might also have a residential tenancy agreement if the operator of the park owns the dwelling. To avoid the problems that arise from these variations, the RTA attaches requirements to the site agreement such that a resident in a residential park enjoys similar rights to an occupant regarding their access to shared facilities.

Access to shared park facilities

Section 71I states that a tenant or occupant under a residential park agreement must have access at reasonable hours to shared park facilities. Restriction on access might be reasonable if the use at certain hours interferes with the quiet enjoyment of other users of the residential park.

Assignment of interests

Section 71J defines the terms 'assignee' and 'assignor' for the purposes of division 5B.3 so that there is a consistent definition for the following provisions. Division 5B.3 facilitates the assignment of interests in a residential park agreement. This might be done, for example, so that an owner of a manufactured home might sublet a room in their home to another person. An owner of a dwelling might also want to have their partner live with them on a permanent basis. In these cases, the assignor is the original resident and the assignee is the original resident and the new resident together.

Section 71K provides that this assignment may only occur with the consent of the operator of the park. The assignor must provide specified information to the owner of the park when seeking their consent.

Section 71L provides how the operator of the park may give or refuse consent to the request. If the operator does not take any action within 14 days of the request, they are taken to have consented.

Section 71M ensures that the residential park agreement survives the assignment of interests. It prevents a new deposit from being required and ensures that the assignor is still liable for liabilities incurred prior to the assignment.

Sale of manufactured homes and mobile homes

Division 5B.4 of the RTA facilitates the sale of manufactured homes and mobile homes that are owned by residents of residential parks.

Section 71N details the process that must be followed by the owner of the premises and the operator of the park in relation to a sale. The operator of the park is restrained from interfering with the sale of the premises, and the section states some grounds upon which an operator might be taken to have interfered with the sale.

Subsection (5) states that the operator will not be taken to have interfered with the sale only because they imposed reasonable conditions relating to potential buyers entering or remaining in the park that are reasonable in the circumstances (for example, potential buyers arriving very late at night and disrupting other users of the park). It also states that the operator will not be taken to have interfered with the sale only because they reasonably refused to consent to a proposed assignment of the person's interest in the site agreement. This situation might occur if the operator of the park reasonably believes that the premises is not compliant with building standards and would be unsafe for others to live in, or if it presents a risk to other users of the park and the park owner has been initiating processes to effect a removal of the premises.

Section 71O operates where there has been a sale of a premises to another person. If the buyer of the premises has no right to keep the premises on the site, they must remove the premises within 5 days after the completion of the sale or within a longer timeframe if the park operator agrees. This makes it clear to purchasers who do not have a site agreement that the premises must be moved as a matter of priority but creates the flexibility for parties to agree to longer timeframes if this is considered appropriate or necessary.

If the buyer requests it, the operator of the park must not unreasonably refuse to enter into a site agreement with the buyer. This section strikes a balance between the rights of a park operator and a buyer of a premises.

Clause 30 *Meaning of tenancy dispute* **Section 72 (1) (a)**

This clause clarifies that disputes between co-tenants are a form of tenancy dispute.

Clause 32 Section 74

This clause substitutes section 74 as a result of the occupancy principles being mandatory. Substituted section 74 clarifies that an occupant is not required to exhaust their other options under the RTA prior to making a complaint under the *Human Rights Commission Act 2005*.

**Clause 33 Jurisdiction of ACAT under this Act etc
Section 76 (1) (c), except note**

This clause clarifies the jurisdiction of the Tribunal as a result of making the occupancy principles mandatory.

**Clause 34 Extended jurisdiction of ACAT with agreement of parties
Section 78 (1) (a) (iii), except note**

This clause clarifies the jurisdiction of the Tribunal as a result of making the occupancy principles mandatory.

Clause 34A

This clause updates the language in section 83 (d) so that it applies to occupancies as well as tenancies and clarifies that the Tribunal can make orders in relation to the payment of occupancy fees as well as in relation to rent.

Clause 34B

This clause updates the language in section 83 (e) so that it applies to occupancies as well as tenancies and clarifies that the Tribunal can make orders in relation to security deposits taken by grantors in relation to occupancy agreements as well as bonds taken by lessors in relation to tenancies.

**Clause 35 Orders by ACAT
Section 83 (g)**

This clause removes the reference to standard occupancy terms (which do not exist) and updates the reference to occupancy agreements.

Clause 36 Section 83 (j)

This clause provides additional powers to the Tribunal where premises are abandoned and the premises are a manufactured home or a mobile home in a residential park.

Part 1.2 (below) introduces changes to the *Uncollected Goods Act 1996* to streamline the provisions applicable where a mobile home or manufactured home is abandoned. Section 83 (j) is amended to prevent a situation where an operator of a park is required to sell premises that are not fit for human habitation. This provision allows the Tribunal to order the disposal of the premises through, for example, destruction.

Clause 37 Section 127

This clause updates section 127 to align with the terminology used in part 3A.

Clause 38 Section 128

This clause updates section 128 to align with the terminology used in part 3A.

Clause 38A New Part 17

New Part 17 puts in place the transitional arrangements for education providers and their occupancy agreements. New section 158 provides that the occupancy agreement amendments do not apply in relation to education provider occupancy agreements until 30 January 2022.

To remove any doubt, an education provider occupancy agreement is taken not to be a residential tenancy agreement under the existing occupancy agreement provisions.

Noting the length of the delayed commencement provision, this section also creates a regulation making power which creates the flexibility to bring forward the commencement of the provisions applying to education provider occupancy agreements should it be considered necessary or desirable to do so.

New section 159 then states that this part and note 2 to section 71C (1) will both expire on 29 January 2022.

This delayed commencement is included to allow time for the universities to undertake necessary implementation work and to ensure that these new provisions commence in alignment with the timeframes of education providers' standard occupancy agreement, which typically commence at the start of the academic year.

**Clause 39 Standard residential tenancy terms
Schedule 1, new clause 24 (aa)**

This clause updates the standard terms to align with part 3A.

Clause 40 Schedule 1, new clauses 72A and 72B

This clause updates the standard terms to align with part 3A.

Clause 41 Dictionary, note 2

This clause inserts 'human rights commission' as a defined term.

Clause 42 Dictionary, new definitions

This clause makes consequential amendments to the dictionary arising from the above amendments.

Clause 43 Dictionary, definition of *mobile home* and *occupancy principles*

This clause inserts 'mobile home' as a defined term consequential to the above amendments.

This clause also inserts 'occupancy principles' as a defined term consequential to the above amendments.

Clause 44 Dictionary, new definitions

This clause makes consequential amendments to the dictionary arising from the above amendments.

The definition of 'residential park' is intended to include caravan parks, camping grounds, and manufactured home villages, but is not intended to include a backyard in which a caravan or manufactured home is erected.

Clause 45 Dictionary, definition of *standard occupancy terms*

This clause removes the reference to standard occupancy terms, which do not exist.

Clause 46 Section 1B

This clause updates the Residential Tenancies Regulation 1998 to extend the requirements about smoke alarms to premises subject to an occupancy agreement.

As smoke detectors are an important health and safety device, it was considered necessary to ensure that installed smoke detectors comply with an industry standard. For this reason, Australian Standard AS 3786 (Smoke alarms using scattered light, transmitted light or ionization) was chosen.

As this standard is the subject of copyright it cannot be published by way of a notifiable instrument, as would generally be required under Section 47 (6) of the *Legislation Act 2001*. Accordingly, the *Residential Tenancies Regulation 1998* at section 1C, disapplies section 47(6) of the *Legislation Act 2001*. However, the Director-General is required to make a copy of AS 3786 available for inspection by members of the public during ordinary business hours at a place decided by the Director-General. This provides transparency and ensures that the standard is still available to read free of charge by any person affected by or interested in the law.

Schedule 1

Clause [1.1] New section 41A

This clause provides a new right to complain to the ACT Human Rights Commission (the Commission) about an occupancy dispute.

Clause [1.3] (below) states that an occupant under the occupancy agreement may make a complaint to the Commission, and clause [1.5] (below) states that complaints about occupancy disputes can only be made about grantors. The effect of the new section 41A is an occupant may make complaints arising from occupancy agreements about the grantor.

Occupants continue to have existing rights to make complaints to the Commission under other provisions of the HRCA, but those rights depend upon the complaint matching the description of a complaint in section 42 of the HRCA. This new provision means that occupants, as of right, will be able to make complaints to the Commission.

Clause [1.2] New section 42 (1) (g)

This clause is consequential upon clause [1.1] (above) and inserts occupancy disputes into the list of complaints that can be made to the Commissioner.

It creates a new defined term for a complaint about an occupancy dispute: an occupancy dispute complaint.

Clause [1.3] New section 43 (1) (h)

This clause is consequential upon clause [1.1] (above) and states that an occupant may make a complaint to the Commission about an occupancy dispute.

Clause [1.4] New section 45 (2) (ea)

This clause inserts a provision specific to occupancy disputes into the section requiring the Commission to tell the complainant in writing if the Commission decides not to refer the complainant's complaint to conciliation and include an occupancy dispute referral statement in their advice to this effect.

Clause [1.5] New division 4.2C

This clause inserts new division 4.2C, consisting of new sections 53P – 53Y, into the HRCA. Division 4.2C provides access to an enforceable conciliation process which can be used to manage complaints arising from occupancy disputes. This conciliation process is similar to the Commission's current processes for managing discrimination complaints under division 4.2A of the HRCA and for managing complaints by certain older people about retirement villages under division 4.2B of the HRCA.

New section 53P defines the term 'person complained about' and 'occupancy dispute complaint' for the purpose of division 4.2C. For the purposes of division 4.2C, the 'person complained about' means the grantor under an occupancy agreement. The effect of this, in concert with new sections 41A and 43 (1) (h) is that grantors are unable to bring occupancy dispute complaints against occupants.

New section 53Q makes it clear that division 4.2C applies to occupancy dispute complaints.

Where an occupancy dispute complaint is made to the Commission and the Commission decides not to refer the complaint for a conciliation process under division 4.2C, they must provide a written statement to the complainant reflecting this advice and advising the complainant that they can seek to have the Commission refer the complaint to the Tribunal within 60 days, or, after the 60 day period has elapsed, they may individually apply to the Tribunal for the complaint to be heard (an occupancy dispute referral statement). If these circumstances apply, the

Commission must include an occupancy dispute referral statement in its final report about the complaint. New section 53R provides that where the above circumstances apply, and the complainant requires the Commission to refer the complaint to the Tribunal within 60 days of receiving the statement, the Commission must refer the complaint to the Tribunal and advise the parties to the matter, in writing, that the referral has been made. If the Commission refers a complaint to the Tribunal under section 53R, it must close the complaint in accordance with section 78 of the HRCA.

If a complainant fails to have the complaint referred to the Tribunal within 60 days of receiving an occupancy dispute complaint referral statement, new section 53S provides that they may make an application to the Tribunal to have the complaint heard. The Tribunal may grant this application where it is satisfied upon reasonable grounds that exceptional circumstances prevented the complainant from meeting the timeframes for referrals to the Tribunal prescribed in section 53R. If the Tribunal grants an application under section 53S, the complaint is considered to have been referred to the Tribunal.

New sections 53T – 53X outline procedural processes to be followed where a complaint is referred to the Tribunal. Section 53T provides that the Commission may apply to the Tribunal to be joined to the complaint referred. If this application is granted, the parties to the complaint will be the complainant, the person complained about, and the Commission. Section 53U provides that the Tribunal has, and may exercise, the same jurisdiction as provided for in the RTA in proceedings where relief is sought in relation to an occupancy agreement between a grantor and an occupant. Schedule 2 Clause [2.1] New section 53U (2) and (3) in Human Rights Commission Act clarifies that a party to an occupancy dispute does not need to attempt to resolve a dispute under a university dispute resolution procedure before the Tribunal deals with a complaint referred to it under this part. Schedule 2 is subject to delayed commencement.

Section 53V provides guidance about the documents which the Commission can provide to the Tribunal when it refers a complaint to the Tribunal under division 4.2C. Certain documents, such as communications providing evidence of settlement negotiations, will be inadmissible before the Tribunal in accordance with the *Evidence Act 2011*. Section 131 (2) of the *Evidence Act 2011* provides further guidance about circumstances which would allow communications about settlement negotiations to be admitted before the Tribunal.

If a complaint is referred to the Tribunal and it is satisfied that the person complained about has engaged in an unlawful act, new section 53W provides that the Tribunal may make one or more orders in accordance with section 83 of the RTA. In making these orders, new section 53X provides that division 4.2C does additionally restrict the amount of money that the Tribunal may order be paid as a result of the order being made. The existing limitations under the RTA apply.

New section 53Y provides that complainants are not required to make an attempt to resolve a complaint prior to making an occupancy dispute complaint under the HRCA. This recognises that the conciliation process offered under division 4.2C is an optional process which can be utilised by occupants at a time that is right for them.

Clause [1.6] Section 62 (3) (b)

This clause provides that if an occupancy dispute complaint is resolved by conciliation processes conducted by the Commission, the agreement reached is deemed enforceable as if it were an order of the Tribunal. This clause places an obligation on the Commission to provide a copy of the written agreement formed through the conciliation process (conciliation agreement) to the parties to the complaint and the Tribunal. Complainants may seek an order in the ACT Magistrates Court to enforce an order of the Tribunal. Section 71 of the *ACT Civil and Administrative Tribunal Act 2008* provides guidance about the process to be followed to enforce orders which have been made by the Tribunal.

Clause [1.7] Section 78 (2) (d)

This clause provides that the Commission must close occupancy dispute complaints where the complaints have been referred to the Tribunal.

Clause [1.8] New section 82B

This clause provides guidance about the contents of final reports made by the Commission relating to occupancy dispute complaints. All reports must include an occupancy dispute referral statement, unless the complaint has been resolved by a conciliation process under division 4.2C. These requirements are in addition to the other requirements placed upon the Commission for a final report which are detailed within section 81 of the HRCA.

Clause [1.9] New section 88B

This clause inserts a definition of 'occupancy dispute referral statement' into part 4 of the HRCA. Occupancy dispute referral statements must be provided to complainants and included in final reports which close complaints within the Commission where the Commission had decided not to refer the complaint for conciliation under division 4.2C.

Occupancy dispute referral statements must include:

- a statement to the effect that the Commission has closed the complaint;
- a statement advising that the complainant may ask the Commission to refer the complaint to the Tribunal within 60 days of receiving this advice; and
- a statement advising that, if the 60-day period elapses, the complainant may apply to the Tribunal under section 53S for the complaint to be heard.

Clause [1.10] Dictionary, new definitions

This clause inserts relevant definitions into the dictionary. The terms defined are:

- occupancy agreement;
- occupancy dispute;
- occupancy dispute complaint; and
- occupancy dispute referral statement.

Clause [1.11] Dictionary, definition of person complained about

This clause amends the definition of ‘person complained about’ in the dictionary and is consequential upon the amendments in clause [1.5] (above).

Clause [1.12] Section 22 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.13] Section 23 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.14] Section 24 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.15] New section 24A

This clause inserts a new section into the *Uncollected Goods Act 1996* (the UGA) specific to manufactured homes and mobile homes abandoned in residential parks. The UGA categorises uncollected goods according to their value and prescribes the method by which the person in possession of the uncollected good may dispose of it.

This framework creates challenges for operators of residential parks who are in possession of abandoned dwellings. The timeframes contained within the UGA are in addition to timeframes in the RTA for declaring a dwelling to have been abandoned, resulting in significant delays in being able to regain use of the site upon which the dwelling is erected. A strict reading of the UGA entails that a park owner might be required to sell, as a home, a dwelling that is not fit for human habitation.

This clause and the preceding three clauses exempt mobile homes and manufactured homes from the ordinary operation of the UGA. A park operator is required to obtain an order from the Tribunal declaring that the premises has been abandoned. The Tribunal may make an order about how the premises is to be disposed but, if it does not, the operator of the park may dispose of the manufactured home or mobile home by public auction after 14 days from the date of the Tribunal order.

Section 25 of the UGA details the process that must be followed for a public auction of uncollected goods. Section 30 of the UGA states that the possessor may retain various costs from the proceeds of sale, but that any balance remaining must be paid to the Territory.

Clause [1.16] Dictionary, new definition of *mobile home*

This clause is consequential upon clause [1.15] above.

Schedule 2

Schedule 2 contains the delayed amendments relating to education providers and will commence on 30 January 2022.

Part 2.1 *Human Rights Commission Act 2005*

Clause [2.1] New section 53U (2) and (3) in Human Rights Commission Act

Section 53U (2) is inserted into the *Human Rights Commission Act 2005* (the HRCA) to remove any doubt regarding occupancy dispute complaints and their interaction with the Tribunal. It provides that section 73 (2) of the *Residential Tenancies Act* does not require a party to an occupancy agreement to attempt to resolve a dispute under a university dispute resolution procedure before the Tribunal can deal with a complaint referred to it under this division.

Clause [2.2] New section 71C (1) (b) (ia)

This clause defines an occupancy agreement to include an agreement to occupy premises in a residential facility associated with, or on the campus of, or provided under an arrangement with, an education provider. This section nevertheless still permits an agreement to become a residential tenancy agreement if section 6B applies (where it expressly states it is a residential tenancy agreement). Further details of this provision are set out above in the discussion of section 71C (1) (Clause 22).

Clause [2.3] New Section 71EA (1A)

Section 71EA outlines the occupancy principles. Subsection (1) (g) states that any penalty or consequence for breaching the occupancy rules must be reasonable and proportionate and not impose unreasonable hardship on the occupant.

This clause inserts new section 71EA (1A) which provides that subsection (1) (g) does not apply to a penalty or consequence under a university requirement.

This exemption avoids potential inconsistencies between the two statutory regimes where a penalty or consequence arises under the university statutes but could be prevented by the RTA. However, university students will enjoy protection under section 71EA where the penalty or consequence does not arise under a university requirement. This section ensures that the operation of occupancy agreements in relation to student accommodation does not interfere with the university's need to comply with its own statutes, and preserves the integrity of the student disciplinary processes and medical leave rules.

Clause [2.4] New Section 71EA (5), new definition of *university requirement*

This clause is consequential to clause [2.3] and inserts the definition of university requirement.

A university requirement is defined in section 71EA (5) to mean a statute, rule, or policy about student discipline or medical leave made under, or authorised by, the *Australian National University Act 1991* (Cwth) or the *University of Canberra Act 1989*.

Clause [2.5] new section 71ED (1)

This clause amends new section 71ED (1), which requires security deposits payable with respect to an occupancy agreement to be lodged with the Territory.

It provides that security deposits payable under 'education provider occupancy agreements,' are exempt from the requirement to deposit security deposits with the Territory.

Education providers have been exempted from this requirement in acknowledgement that they currently manage thousands of occupancy agreements, many of which commence in the same week, prior to the commencing of a term. Complying with the requirement to lodge security deposits would present a significant administrative burden for these accommodation providers.

The exemption is also provided in acknowledgement that interest from the security deposits contributes to the funding of student services and so continues to be of benefit to the occupants who have made those deposits.

If there is a dispute about deductions from the security deposit at the end of an exempt agreement, an occupant is still able to make an application for the resolution of the dispute to the Tribunal.

Clause [2.6] new section 71ED (5) of education provider occupancy agreement

This clause is consequential to clause [2.7] and inserts the definition of ***education provider occupancy agreement***. This is defined to mean an occupancy agreement in relation to premises in a residential facility associated with, or on the campus of, or provided under an arrangement with, an education provider.

Clause [2.7] new section 71EJ (2) new example 3

This clause inserts an example of permitted entry by a grantor into occupancy premises, related to occupancy agreements with education providers into section 71EJ (2).

Clause [2.8] section 71EK (2), new example

This clause inserts a fourth example into section 71EK (2), of circumstances in which the termination of an occupancy agreement must have regard to the nature of the occupancy.

Clause [2.9] new section 71EK (3A)

Under this section, the requirement that an occupancy agreement may only be terminated under circumstances that are reasonable having regard to the nature of the occupancy does not apply to a termination made under a university requirement.

This section also indicates that an occupancy agreement may also be terminated as permitted or required under a university requirement. That is, university requirements provide additional termination grounds.

This new section avoids potential inconsistencies between the two statutory regimes where the termination of the occupancy agreement arises from the university's statutes but could be prevented by the RTA. However, university students will enjoy

protection under section 71EK where the termination does not arise under a university requirement.

Clause [2.10] New section 71EK (6)

This clause inserts a new section 71EK (6) which indicates that a definition of university requirement is provided at 71EA (5).

Section 71EA (5) provides that a university requirement means a statute, rule, or policy about student discipline or medical leave made under, or authorised by, the *Australian National University Act 1991* (Cwth) or the *University of Canberra Act 1989*.

Clause [2.11] New Section 73 (2) and (3)

This clause amends the definition of an occupancy dispute. The Tribunal has the jurisdiction to hear occupancy disputes. This clause states that an occupancy dispute does not arise for occupancy agreements to which a university dispute resolution procedure applies until the parties have been unable to resolve the dispute within a reasonable time under the university dispute resolution procedure.

The intention of this provision is that students in university accommodation will need to exhaust the university dispute resolution procedure before being able to take the matter to the Tribunal. This is in acknowledgement that universities already have extensive internal dispute resolution processes in place, as required under their statutes. This is subject to the safeguard that a student will not be barred from bringing a matter to the Tribunal if the internal dispute resolution processes are not finalised within a reasonable time.

University students will also have access to conciliation processes under the HRCA (discussed above).

Clause [2.12] New Section 74 (2) and (3)

This clause provides further clarification regarding occupancy disputes under section 73. It means that occupants under an occupancy dispute provided by a university education provider will not need to exhaust internal dispute resolution mechanisms prior to making an occupancy dispute complaint to the Human Rights Commission.

Clause [2.13] Dictionary, new definition of *education provider*

This clause inserts a new definition of 'education provider' as per the *Education Act 2004*, section 9A, table 9A, column 3.