

2020

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

**Residential Tenancies (COVID-19 Emergency Response)
Declaration 2020 (No 2)**

EXPLANATORY STATEMENT

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Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)

OVERVIEW OF THE DECLARATION

The *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (the Declaration) is a disallowable instrument made under section 156 of the *Residential Tenancies Act 1997* (RTA).

The Declaration revokes the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (DI2020-46) (the First Declaration). The new Declaration retains all measures in the First Declaration and introduces an additional measure to allow a COVID-19 impacted household to terminate a fixed-term tenancy agreement without penalty by providing their landlord with 3 weeks' notice.

Earlier in the year, on 29 March 2020, the Prime Minister announced the National Cabinet Decision to implement a 6-month moratorium on evictions for those unable to meet their commitments under a residential tenancy agreement due to the impact of coronavirus (COVID-19).

On 21 April 2020, the Minister made the First Declaration to introduce a moratorium in the ACT for 3 months and included a provision to allow the moratorium period to be extended for a further 3 months.

The Government considers that the measures put in place in the First Declaration remain necessary and important safeguards in the current environment. The Declaration extends the moratorium period for a further 3 months (until 22 October 2020) in line with the ACT Government's public commitment and the National Cabinet Decision.

The moratorium on eviction applies only to those households that have been impacted by COVID-19. Landlords of COVID-19 impacted households are prevented from issuing their tenants with a notice to vacate for rent arrears (or applying for orders from the ACT Civil and Administrative Tribunal (ACAT) as a result of unpaid rent) during the moratorium period.

This Declaration also applies to tenants who have been issued with a notice to vacate, or who have failed to pay rent, prior to the commencement of this Declaration but who fall under the circumstances contemplated in the Declaration.

In line with the National Cabinet Decision to agree to the principle that tenants and landlords should be encouraged and incentivised to agree on rent relief or temporary amendments to the lease, the Declaration also provides that lessors and tenants and grantors and occupants are able to vary existing agreements to allow for temporary rent and occupancy fee reductions, effective immediately, and that there is no impediment to rents reverting to their previous rates after the COVID-19 emergency. The Declaration further prohibits landlords from unilateral rent increases for premises of impacted households during the moratorium period.

This Declaration also prohibits tenants from being added to residential tenancy databases due to a breach of residential tenancy agreements for failure to pay rent during the moratorium period, where the tenant is a member of a COVID-19 impacted household.

Restrictions are also introduced on accessing premises under residential tenancy agreements to undertake physical inspections and non-urgent repairs. These measures are included to assist in observing social distancing measures where possible.

The Declaration further provides that a COVID-19 impacted household may terminate a fixed-term tenancy agreement without penalty by providing a landlord with 3 weeks' notice. Currently, tenants can apply to ACAT to seek early termination of fixed-term tenancies on the basis of severe hardship. This measure will provide an additional support to tenants. To ensure that this measure is not misused by those who are not COVID-19 impacted, safeguards have been included in the relevant provisions so that a tenant is required to provide evidence to their landlord to substantiate their claim.

While the Declaration is not retrospective as to commencement, certain measures in the Declaration have impacts on actions that may have already occurred in accordance with existing requirements under the RTA and residential tenancy agreements (retrospective impact). Specifically, the moratorium to prevent landlords from taking measures to evict COVID-19 impacted households which are in rental arrears will apply even where the household was in rental arrears prior to the commencement of the moratorium period (including where the landlord had previously issued a termination notice, or ACAT had previously made an order in relation to unpaid rent, in respect of the household). This approach is adopted because the effects of COVID-19 may have impacted households' ability to pay rent prior to the moratorium commencing, and because it is also recognised that COVID-19 impacted households may be in a particularly vulnerable situation if forced to seek new rental accommodation while the pandemic is ongoing.

CONSULTATION ON THE PROPOSED APPROACH

In developing the proposed approach including the new measure for terminating fixed-term tenancies, the Justice and Community Safety Directorate either consulted with or considered public comments from the Real Estate Institute of the ACT, the Tenancy Advice Service provided by Legal Aid ACT, the ACT Civil and Administrative Tribunal, Canberra Community Law, Care Financial Counselling Service, the Consumer Law Centre, and the Insurance Council of Australia. This diverse range of stakeholders assisted the Directorate in developing an approach which balances the rights of all parties involved in residential tenancies.

The Directorate also worked with counterparts in other States and Territories who are also implementing the National Cabinet decision to introduce a moratorium on evictions for those in COVID-19 related financial stress. This consultation ensured

that the measures adopted by the ACT are within the scope of the National Cabinet Decision while being adapted to the ACT's rental laws and rental market.

COMPATIBILITY WITH HUMAN RIGHTS

The measures in the Declaration positively engage the right to protection of family and children and the right to privacy in the *Human Rights Act 2004* (HRA).

Enabling parties to a residential tenancy agreement or an occupancy agreement to reduce the rent or occupancy fee payable because of the COVID-19 pandemic, and introducing a moratorium on evictions due to rent arrears for COVID-19 impacted households, promotes the right to protection of family and children in section 11 of the HRA. These measures prevent evictions and work to keep the family unit together during a period of considerable stress, providing time for families to improve their financial situation or consider their alternative options. The measures also promote the right to privacy and home in section 12 of the HRA.

The Declaration also promotes the right to informational privacy which protects the storing, use and sharing of personal and confidential information. Preventing tenants from impacted households from being placed on residential tenancy databases due to a failure to pay rent during the moratorium period protects their privacy and prevents them from later being treated adversely in the rental market because of COVID-19 pressures that were out of their control.

The Declaration also engages and may limit the right to privacy as the definition of a household "impacted" by the COVID-19 pandemic in clause 7, and the early termination by tenants provision in clause 12, may require tenants to provide personal information to their real estate agents or landlords to demonstrate a loss of income and/or that they have been diagnosed with COVID-19 or are caring for someone who has.

This limitation is reasonable and proportionate in accordance with the test in section 28 of the HRA. The measures in the Declaration have an important purpose, which is to mitigate the risk of homelessness arising from financial stress due to the COVID-19 pandemic. The limitation on the right to privacy is necessary, as landlords may reasonably expect tenants to demonstrate that the reason they need to terminate their fixed term tenancies, require a rent reduction or are in arrears is due to the pandemic. This ensures that landlords may otherwise exercise their normal statutory rights under residential tenancy law, if circumstances extraneous to the pandemic permit. There are no other reasonably available and less restrictive alternatives that would not require the tenant to provide personal information to a third party.

CLAUSE NOTES

Clause 1 Name of instrument

This clause is a formal provision setting out the name of the instrument as the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (the Declaration).

Clause 2 Commencement

This clause provides for commencement of the Declaration on the day after its notification day.

The note to this clause explains that the Declaration expires in accordance with section 156 (3) of the *Residential Tenancies Act 1977* (RTA), namely on the day the *Public Health (Emergency) Declaration 2020 (No 1)* ends or, if the Minister considers the effect of the COVID-19 pandemic justifies a later day, a later day notified by the Minister but no later than 3 months after the *Public Health (Emergency) Declaration 2020 (No 1)* ends.

Clause 3 Revocation

This clause revokes a prior instrument, *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (DI2020-46).

Part 2 Temporary reduction in rent or occupancy fees

Clause 4 Modification of s 8 (1)—rent reduction clause

This clause provides that for section 8 (1) of the RTA, the lessor and tenant may agree to include a COVID-19 temporary rent reduction clause in the residential tenancy agreement.

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

Temporary reduction of rent because of COVID-19 pandemic

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

For a COVID-19 temporary rent reduction clause, the reduced rent period (including any extensions) may be for a period longer than the operation of this instrument; the reversion of the rent payable under the residential tenancy agreement to the original rent is not an increase in the rent under the RTA or the agreement; and the amount

the rent is reduced by under the agreement between the parties is not arrears of rent or a debt due to the lessor.

The purpose of this clause is to make clear that parties can agree on a temporary rent reduction and that the usual restrictions under the RTA on rent increases will not prevent the rent from reverting to its original amount following the rent reduction period agreed by the parties. Under COVID-19 temporary rent reduction clause, the amount of lost rent during the rent reduction period does not have to be paid by the tenant after the period ends.

Clause 5 Agreement to reduce occupancy fee under occupancy agreement

This clause applies where parties to an occupancy agreement agree to a reduced occupancy fee for a stated period because of financial hardship suffered by the occupier arising from the COVID-19 pandemic.

This clause provides that if the parties agree that the occupancy fee payable under the occupancy agreement reverts to the amount payable immediately before the fee was reduced, it is not an increase in the fee for the purpose of section 71E(1)(f) of the RTA, and the amount the fee is reduced by under the agreement is not arrears or a debt due to the grantor.

An occupancy fee, in this section, means the amount payable by the occupier for the right to occupy the premises.

The purpose of this clause is to make clear that parties can agree on a temporary reduction in occupancy fees and that the usual restrictions on fee increases will not prevent the fee from reverting to its original amount following the period agreed by the parties. The amount of lost fees during the agreed period does not have to be paid by the occupant after the period ends.

Part 3 Moratorium on terminations, rent increases etc

Clause 6 Definitions—pt 3

This clause defines terms in part 3. The purpose of the definitions in this clause and clause 7 is to ensure that the benefit of the measures in the Declaration is restricted to persons who have been impacted by the COVID-19 pandemic. This ensures that the rights and obligations of landlords and tenants in circumstances extraneous to the COVID-19 pandemic continue unaffected.

'Household' means the tenants and any other people living in premises the subject of a residential tenancy agreement.

'Impacted' by the COVID-19 pandemic is further defined in clause 7.

'Impacted household' means a household 'impacted by the COVID-19 pandemic', or, a household in which a member became eligible for the JobSeeker or JobKeeper

payment from the Commonwealth on or after 20 March 2020. 'Impacted by the COVID-19 pandemic' is defined in clause 7. See further discussion below under clause 7.

'Moratorium period' means the period beginning on 22 April 2020 and ending on 22 October 2020, or, if the period is extended under clause 13, at the end of the extended period.

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

This clause outlines when a household is considered to be impacted by the COVID-19 pandemic for the purpose of the Declaration.

A household is impacted by the COVID-19 pandemic where one or more rent-paying household members have stopped earning income or had a reduction in income either for health-related reasons (because a member of the household is ill with COVID-19 or the rent-paying member has carer responsibilities for a family member ill with COVID-19, whether or not in the same household), or for reasons arising from COVID-19 response measures (whether by the ACT Government or another Australian Government). In addition, the household's gross weekly income must be at least 25% less than the household's gross weekly income before the income of any of the rent-paying household members was stopped or reduced.

In this clause, 'rent-paying household member' means a member of the household who regularly pays a share of the rent payable under the agreement.

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

If this definition is met, the household will be considered an 'impacted household' and the moratorium on termination for failure to pay rent and restriction on rent increases will apply (clause 8 and 11).

As set out in clause 4 above, a household in which a member became eligible for the JobSeeker or JobKeeper payment from the Commonwealth on or after 20 March 2020 will also be considered an 'impacted household' for the purpose of the Declaration and the moratorium on termination for failure to pay rent and restriction on rent increases will apply (clause 8 and 11).

It is anticipated that tenants will be able to show that they are an 'impacted household' (clause 7) through simple evidence, such as, for example:

- proof of eligibility for JobSeeker or JobKeeper payment;
- proof of job termination or stand-down such a letter or email from an employer;

- proof of loss of work hours (such as rosters showing a reduction in hours);
- proof of prior income; or
- a statutory declaration.

Clause 8 Moratorium on termination etc for failure to pay rent

This clause applies to a residential tenancy agreement for premises in which an ‘impacted household’ lives.

During the moratorium period, the lessor must not give a tenant in the household a termination notice because of the tenant’s failure to pay rent. The lessor must also not apply for a termination and possession order under section 49 or section 49B of the RTA; apply for a payment order under section 49A of the RTA; or apply for a warrant under section 41 of the RTA for the eviction of the tenant because of the tenant’s failure to pay rent.

This clause applies regardless of when the tenant’s failure to pay rent happened, and even if a termination notice was given by the lessor to the tenant before the commencement of this part. This clarifies that a termination notice has no effect where given to a tenant before the commencement of this part, provided that the tenant lives in a premises that meets the definition of an impacted household and where the tenant has not vacated the property in accordance with that notice.

Further, a termination notice given in contravention of this clause is void.

This clause (together with clause 9) has the purpose of preventing, for the period the Declaration is in force, the eviction of ‘impacted households’ for failure to pay rent, even if the tenants were in rental arrears prior to the period commencing.

Clause 9 Existing orders etc for failure to pay rent

This clause applies if an application for an order in relation to a tenant’s failure to pay rent for premises under a residential tenancy agreement has been made to the ACAT and the application has not yet been decided; or an order has been made; and the tenant has not yet vacated the premises, and the tenant is a member of an impacted household that live in the premises.

If an order has been made, the ACAT may, upon application by the tenant, suspend the order for a stated period. The period may not be longer than the moratorium period.

If an order has not yet been made on an application, the ACAT must not make any order until after the moratorium period has ended.

The clause clarifies that an ‘order’ in relation to a tenant’s failure to pay rent means: a termination and possession order under section 49 of the RTA, or an order under section 49C of the RTA (hearing of application—failure to comply with payment order), or a warrant under section 41 of the RTA. It further clarifies that ‘suspend’, for a warrant under section 41, means stay.

Clause 10 Restriction on listings in residential tenancy database

This clause prohibits a lessor, lessor’s agent or database operator from listing personal information about a person in a residential tenancy database in relation to a failure to pay rent during the moratorium period, where the person was a member of an impacted household at the time of their failure to pay rent.

This clause applies even if the moratorium period has ended.

This clause also applies if, after the moratorium period ends, the tenant remains in arrears for rent payable during the moratorium period, or the residential tenancy agreement is terminated because of the breach for failing to pay rent in the moratorium period.

Clause 11 Restriction on rental increases

This clause provides that a lessor may not, except as provided for in the Declaration, increase the amount of rent payable under the residential tenancy agreement for premises in which an ‘impacted household’ lives during the moratorium period.

Clause 12 Termination by tenant in impacted household

This clause provides that a tenant who is a member of a COVID-19 impacted household may, during the moratorium period, terminate their fixed term residential tenancy agreement by providing 3 weeks notice.

The clause lists examples of evidence that a tenant may rely on to demonstrate they are a member of a COVID-19 impacted household, they include:

- statutory declaration attesting to status;
- evidence of eligibility for Job Keeper or Job Seeker payments
- a termination or stand-down letter from an employer; and
- evidence of reduction household income due to the COVID-19 restrictions.

The lessor is not entitled to any compensation or break fee under the Act or the agreement in relation to the early termination of the fixed term agreement under this clause.

Clause 13 Extension of moratorium period

This clause provides that the Minister may extend the moratorium period in clause 6 for a period of no more than 3 months. Any extension made is a notifiable instrument.

Part 4 Access to premises

Clause 14 Restricted access to premises

This clause provides that for the period the Declaration is in force, a lessor under a residential tenancy agreement may only physically access the premises: with the tenant's consent; or to do urgent repairs to the premises; or, if the lessor applies to the ACAT, in accordance with an order by the ACAT.

Unless otherwise agreed between the parties to the residential tenancy agreement, or if the tenant vacates the premises, any inspection of the premises that the lessor must or may do under the RTA or the residential tenancy agreement may only be done by audio-visual or other electronic means, without the lessor physically accessing the premises. This measure is to support social distancing. This restriction does not apply where the tenant fails to provide reasonable assistance to the lessor to enable the virtual inspection to be undertaken.

Clause 15 Non-urgent repairs

This clause provides that for clause 57 of the standard residential tenancy terms, the lessor must undertake non-urgent repairs within a reasonable period as agreed with the tenant, rather than the previous 4-week time frame. Instead, it is for the parties to the agreement to agree on a timeframe for non-urgent repairs.

In deciding what is a reasonable period, the parties must have regard to the nature of the repair, the extent of access required to the premises to do the repair, and the hardship suffered by the tenant by the repairs not being done.