

2021

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

**Residential Tenancies (COVID-19 Emergency Response) Declaration 2021
(No 2)**

EXPLANATORY STATEMENT

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Residential Tenancies (COVID-19 Emergency Response) Declaration 2021(No 2)

OVERVIEW OF THE DECLARATION

The *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 2)* (the Declaration) is a disallowable instrument made under section 156 of the *Residential Tenancies Act 1997* (RTA). It is the fifth disallowable instrument made under section 156 of the RTA. The *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 1)* (the First Declaration) and the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (the Second Declaration) implemented a 6-month moratorium on evictions for rental arrears in line with the National Cabinet decision. The *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3)* (the Third Declaration) and the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2021* (the fourth declaration) implemented a post moratorium transitional period. This Declaration extends the payment order measure in the Third and Fourth Declarations until 30 September 2021.

The Declaration continues the measure modifying the operation of section 49 of the RTA so that the ACT Civil and Administrative Tribunal (ACAT) is required to consider the making of a payment order as an alternative to making a termination and possession order for a tenant who was a member of an impacted household during the moratorium period for a further 3 months. It also creates the ability for the Minister to extend the payment order measure for an additional 3 months by notifiable instrument.

This measure will assist impacted households considered by the ACAT as being likely to comply with an arrears repayment plan to sustain their tenancies.

CONSULTATION ON THE PROPOSED APPROACH

In considering whether to extend the transitional measures, the Justice and Community Safety Directorate (the Directorate) consulted with representatives from the Real Estate Institute of the ACT, the Tenancy Advice Service provided by Legal Aid ACT, and Canberra Community Law. This diverse range of stakeholders assisted the Directorate in developing an approach which balances the rights of all parties involved in residential tenancies.

COMPATIBILITY WITH HUMAN RIGHTS

The payment order measure in the Declaration positively engages the right to protection of family and children and the right to privacy in the *Human Rights Act 2004* (HRA) by providing a pathway to prevent evictions and 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 measure also promotes the right to privacy and home in section 12 of the HRA.

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 6, may require tenants to provide personal information to their real estate agents or lessor 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 lessors may reasonably expect tenants to demonstrate the reason they are in arrears due to the pandemic. This ensures that lessors 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

Part 1 Preliminary

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 2021 (No 2)* (the Declaration).

Clause 2 Commencement

This clause provides for commencement of the Declaration on 1 July 2021.

Clause 3 Expiry

The Declaration expires on the earlier of either the day the transitional period ends as defined by clause 3 (2) of the declaration, or the day mentioned in 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 (3) provides that a declaration made by the Minister extending the validity of the instrument beyond 30 September 2021, is a notifiable instrument.

Clause 4 Modification of Act, s 49—payment orders for COVID-19 impacted households

This clause requires ACAT to consider making a payment order for a tenant who was a member of an impacted household during the moratorium period as an alternative to making a termination and possession order. This clause applies in circumstances where a tenant is in rent arrears and a lessor has applied to ACAT for a termination and possession order.

Currently, under sections 49 to 49B of the RTA, although ACAT is able to consider a payment order as an alternative to a termination and possession order in circumstances where a tenant is in rent arrears, it is not essential that they do so. ACAT will still be able to exercise its discretion as to whether making the payment order is appropriate in the circumstances. In circumstances where a tenant is still in arrears from the moratorium period, the measure operates to provide that tenant with a further opportunity to save their tenancy. This is because a payment order allows the tenancy to continue where the tenant pays their rent and a specified amount towards any rental arrears in accordance with the ACAT order. This measure will allow tenants to remain in their homes during a period of considerable financial stress and provides tenants with an additional opportunity to pay their rental debts before facing eviction. Requiring ACAT to consider making payment orders for impacted households sends a strong message that, wherever it is reasonably possible to do so, tenancies should be sustained.

Clause 5 Definitions

This clause defines terms in the instrument. The purpose of the definitions in this clause and clause 6 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 lessors 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 6.

'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 6. See further discussion below under clause 6.

'Moratorium period' means the period beginning on 22 April 2020 and ending on 22 October 2020.

Clause 6 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 provisions relating to payment orders will apply (clause 4).

It is anticipated that tenants will be able to show that they are an 'impacted household' (clause 6) 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.