

Residential Tenancies Amendment Regulation 2022 (No 1)

Subordinate law SL2022–16

made under the

Residential Tenancies Act 1997

EXPLANATORY STATEMENT

This explanatory statement relates to the *Residential Tenancies Amendment Regulation 2022 (No 1)* (the **regulation**) as made by the Executive. It has been prepared to assist the reader of the regulation to help inform any debate on it. It does not form part of the regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

BACKGROUND

Under section 136 of the *Residential Tenancies Act 1997* (the **Act**) the Executive is permitted to make regulations for the Act; including, under section 136 (2) (d) (ii), a regulation to set minimum standards for premises made available for occupation under a residential tenancy agreement.

The ACT Government committed to introducing legislation for staged minimum energy performance requirements for rental properties under Action 4.7 of the ACT Climate Change Strategy (2019-2025) and in the Parliamentary and Governing Agreement for the 10th Australian Capital Territory Legislative Assembly.

OVERVIEW OF THE REGULATION

The purpose of the regulation is to amend the *Residential Tenancies Regulation 1998* to establish a minimum energy efficiency standard for premises made available for occupation under a residential tenancy agreement in the ACT.

The minimum energy efficiency standard sets a minimum standard for ceiling insulation in residential rental properties in the ACT. The standard requires lessors

with rental properties that have no ceiling insulation or ceiling insulation with an R-value of less than R2, to install or upgrade the insulation to ensure the ceiling insulation meets a minimum R-value of R5. The R value is a measure of the thermal performance of the insulation. R5 is the level of ceiling insulation typically installed in new builds in the ACT.

The regulation promotes equity and safety for tenants in the ACT by addressing the split incentive and market failure that results in many tenants living in poor thermally-performing properties. A split incentive occurs where those who incur the costs of an action, in this case energy efficiency upgrades, are not the same as those who receive the benefits. This results in low-income tenants often facing higher energy costs to achieve thermal comfort, while having the least ability to afford these costs. This can lead to severe negative financial, health and well-being impacts.

The minimum ceiling insulation standard is targeted at the worst performing rental properties – those that have an R-value of less than R2. It strengthens tenant protections by requiring lessors to disclose whether their rental premises meet the minimum ceiling insulation standard when they are advertised for rent and prior to the signing of a tenancy agreement. It also ensures that lessors must maintain documentary evidence that demonstrates compliance with the minimum ceiling insulation standard.

REGULATORY IMPACT STATEMENT

Section 34 of the *Legislation Act 2001* requires that if a proposed subordinate law is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement (a **RIS**) to be prepared for the proposed law.

A RIS has been prepared for the regulation and has been published on the Legislation Register, as required under section 19 (1) (k) of the *Legislation Act 2001*. The RIS has also been presented to the Legislative Assembly, as required under section 37 (2) of the *Legislation Act 2001*.

The RIS examines options for a minimum energy efficiency standard for residential rental premises. Of the various options modelled, the recommended option from the impact analysis was a minimum standard for ceiling insulation requiring residential rental premises with ceiling insulation with an R-value of below R2 to install or upgrade to a minimum of R5.

The impact analysis showed that this minimum standard, with a four-year phase-in period, would provide around \$18 million in benefits for the ACT. The analysis also shows that for every dollar spent on the minimum standard, it returns \$1.30 to the community.

CONSULTATION ON THE PROPOSED APPROACH

Consultation with the general community, stakeholders and industry on the proposed approach for the regulation was undertaken in April-May 2021 as part of the RIS analysis and in November-December 2021 to determine community and industry views on the proposed minimum ceiling insulation standard and how it should be implemented. This consultation included workshops with key stakeholder organisations, a consultation paper and two online surveys for tenants and lessors. The views expressed by the community, key stakeholders and industry organisations in these consultations informed the design of the regulation and associated measures.

CONSISTENCY WITH HUMAN RIGHTS

Although not required for regulations, the regulation has been analysed for consistency with the *Human Rights Act 2004* as an additional transparency measure.

Rights engaged

The regulation engages the following rights under the *Human Rights Act 2004*:

- Section 8 (2): Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- Section 8 (3): Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.
- Section 11 (1): Protection of the family and children. The family is the natural and basic group unit of society and is entitled to be protected by society.
- Section 12 (a): Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

Rights promoted

The regulation promotes the right to equality before the law by requiring all rental properties to have a minimum ceiling insulation standard. This promotes the right of all tenants to enjoy their rights without distinction or discrimination and to equal protection of the law, especially for low-income tenants that may live in energy inefficient properties that are expensive to heat and cool while having the least capacity to pay.

The regulation promotes the protection of family and children by improving the conditions of rental properties, including social housing, ensuring that low-income families are entitled to a minimum standard of energy efficiency and thermal comfort.

Rights limited

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 12 (1) of the *Human Rights Act 2004* provides that everyone has the right to not have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The regulation will marginally limit the right of privacy for lessors in relation to their rental properties and correspondence, as it requires the disclosure of documents, records and other forms of information about their properties.

The regulation may also limit the rights of tenants to privacy if insulation installation and any required electrical work is carried out on rental premises to meet the minimum standard during a period of tenant occupation.

2. Legitimate purpose (s 28(2)(b))

The regulation establishes a minimum energy efficiency standard for ceiling insulation in rental properties. This will promote equity for renters, especially those who live in low thermally-performing rental properties. Tenants of these types of properties are disproportionately low-income renters. As a result of the poor thermal performance of their properties, low-income tenants incur higher energy costs while having the least capacity to afford the higher costs.

The regulation will require lessors to disclose whether their rental property is compliant with the minimum standard, or has a valid exemption, when the property is advertised for lease and in the residential tenancy agreement. Lessors will be required to maintain documentary evidence that demonstrates their compliance with the minimum standard, or documentary evidence that substantiates their exemption from the standard; and this documentary evidence must be provided to tenants upon request.

The purpose of these measures is to ensure that lessors comply with the minimum standard, and to protect tenants by requiring that lessors maintain documentary evidence. They give tenants the right to know whether a rental property complies with the minimum standard when it is advertised and before they sign a lease, as well as the right to request the documentary evidence from lessors which substantiates this information.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

The measures in the regulation requiring lessors to disclose information about their rental properties and to hold documentary evidence will assist in achieving compliance with the minimum energy efficiency standard so that renters receive the benefits of improved energy efficiency.

The limitation on the rights of tenants to privacy and home where insulation installation and electrical work is undertaken during their tenancy, is to ensure all rental properties comply with the minimum standard and all required electrical work is undertaken, ensuring tenant safety and that current and future tenants receive the benefits of improved energy efficiency.

4. *Proportionality (s 28(2)(e))*

As there is generally a power imbalance between lessors and tenants in favour of lessors, these measures give greater protections to tenants without unreasonably limiting the rights of lessors.

The regulation does not require lessors to disclose information about a property that is unrelated to the minimum energy efficiency standard, and under the regulation, tenants can only request information that the lessor is required to maintain to demonstrate compliance with the standard or that a valid exemption applies. The measures are not considered unduly burdensome as the documentary evidence would often be maintained by lessors in any case or would not be very costly to obtain, and it is a reasonable expectation for tenants to have the right to know whether a property available for lease is compliant with the minimum standard, and that this compliance is substantiated. Further, lessors are already required to disclose the energy efficiency rating of properties for lease and these measures may be considered a reasonable extension of an existing requirement.

Although a tenant's right to privacy and home may be limited by the regulation if insulation or electrical work is undertaken while they occupy the premises, this work is likely to take no longer than a day, and the regulation also has several safeguards of tenants' rights. Under the regulation, tenants have the right to refuse to have the insulation upgraded. The standard tenancy agreement terms protect the rights of tenants to private enjoyment of the property and apply to lessors making upgrades, meaning that lessors must give notice to tenants to undertake maintenance. These protections for tenants' rights balance the limitation on tenants' right to privacy and home, ensuring proportionality.

CLAUSE NOTES

Clause 1 Name of regulation

Clause 1 names the regulation as the *Residential Tenancies Amendment Regulation 2022 (No 1)*.

Clause 2 Commencement

Clause 2 provides for the commencement of the regulation on 1 April 2023.

Clause 3 Legislation amended

Clause 3 provides that the regulation amends the *Residential Tenancies Regulation 1998*.

Clause 4 New part 1 heading

Clause 4 inserts new Part 1—Preliminary, into the *Residential Tenancies Regulation 1998*.

Clause 5 Section 1AA

Clause 5 substitutes section 1AA in the *Residential Tenancies Regulation 1998*, which includes standard preliminary matters used throughout the ACT statute book.

Clause 6 New part 2 heading

Clause 6 inserts a new heading, **Part 2—General matters**, before section 1A in the *Residential Tenancies Regulation 1998*.

Clause 7 New part 3

Clause 7 inserts new **Part 3—Minimum insulation standard for ceilings** into the *Residential Tenancies Regulation 1998*. The provisions of new part 3 are outlined below.

Part 3 Minimum insulation standard for ceilings

Section 8 Definitions—pt 3

This section provides definitions of terminology used in part 3.

Approved installer

The definition indicates that the requirements to be an *approved installer* are determined under section 15 by the Minister through a notifiable instrument. Section 11 (2) (b) and (c) requires that only approved installers may be used to install or upgrade insulation to comply with the standard.

Ceiling insulation

Defines ***ceiling insulation*** to be insulation intended for use in ceiling spaces in residential premises.

Licensed electrician

Defines a ***licensed electrician*** to be a person who holds a licence as an electrician under the *Construction Occupations (Licensing) Act 2004* or the equivalent in another jurisdiction.

Minimum ceiling insulation standard

Provides a signpost definition to section 10 which describes the minimum standard.

Required area

The definition of ***required area*** is intended to exclude areas of the premises that will not be lived in by tenants, such as garden sheds or garages, from the minimum ceiling insulation standard.

Required ceiling insulation

The definition of ***required ceiling insulation*** operates such that, if a premises does not meet the minimum ceiling insulation standard on the day the regulation commences, insulation to bring the ceiling insulation to an R-value of 5 or more is required to be installed:

- where there is no existing insulation, ceiling insulation of R-value of 5 or more is to be installed;
- where there are existing insulation batts that have an R-value of less than 2, additional batts to bring the combined R-value to 5 or more are to be installed;
- where there is existing non-cellulose loose-fill insulation with an R-value of less than 2, additional non-cellulose loose-fill insulation to bring the combined R-value to 5 or more is to be installed.

The requirement to upgrade to a combined R-value of 5 is a “future proofing” measure to ensure further upgrading will not be necessary if the minimum standard is raised above an R-value of 2 in the future.

The definition also allows for existing insulation with an R-value of less than 2 to be topped up (if assessed as safe to do so) rather than being completely replaced.

Existing cellulose-based loose-fill insulation must be removed where it has an R-value less than 2, as it can be unsafe to top it up.

R-value

The definition of ***R-value*** is the thermal resistance of ceiling insulation as in accordance with AS 48591.1, the Australian Standard for the thermal insulation materials for buildings. The R-value of the ceiling insulation of the premises is the measure used to determine compliance with the minimum ceiling insulation standard.

Law of another jurisdiction

This refers to a law of the Commonwealth or a State (including the Northern Territory) and is used in the definition of ***licensed electrician*** above to allow for the recognition of the licensing of electricians by other jurisdictions.

Section 9 Lessor must tell tenant about ceiling insulation

The effect of new section 9 is to mandate that lessors disclose whether or not the premises meets the minimum ceiling insulation standard, or if applicable, the lessor is to disclose if the premises has a valid exemption.

New section 9 (1) mandates disclosure by lessors or their agent of whether the premises comply with the minimum standard or have a valid exemption when rental premises are advertised for lease.

New section 9 (2) mandates that this information must also be disclosed in the residential tenancy agreement for the premises as a statement explaining whether the premises meet the minimum standard or the reason an exemption applies.

Potential tenants must be given a reasonable time to consider this information before signing a tenancy agreement.

The intention of new section 9 (3) is to require lessors to provide documentary evidence to verify compliance with the minimum ceiling insulation standard, or grounds for any exemption, to tenants at their request.

Section 10 Minimum insulation standard for ceilings—Act, s 136 (2) (d) (ii)

New section 10 sets out the minimum ceiling insulation standard for rental premises in the ACT, which is a minimum energy efficiency standard under the *Residential Tenancies Act 1997*.

This section provides that the minimum ceiling insulation standard requires rental premises to have a minimum ceiling insulation of an R-value of R2 or more.

This section operates together with section 11, to provide that, where lessors are required to upgrade ceiling insulation due to a premises having an R-value of less than R2, the lessor must upgrade the ceiling insulation so that the premises has an R-value of R5 or more, as per the definition of ***required ceiling insulation*** in section 8.

Section 11 Requirement to upgrade ceiling insulation

This section establishes when lessors will be required to ensure their rental property is compliant with the minimum ceiling insulation standard.

The purpose of this section is to provide a progressive timeline, starting from the commencement of the regulation, which sets out when lessors with rental premises with ceiling insulation of an R-value of less than R2, must upgrade the ceiling insulation of the premises to at least R5 to comply with the minimum ceiling insulation standard.

The intention of this section is to implement a “trigger” for compliance with the minimum standard, namely entering into a new tenancy agreement.

A secondary purpose of the section is to ensure that demand for ceiling insulation and installation is staggered over the course of a few years from the commencement of the regulation to spread demand and avoid pressure on the insulation industry.

New section 11 (1) operates in conjunction with new section 11 (2) and the definition of ***required date*** in new section 11 (5) to establish a phased in requirement to upgrade ceiling insulation for rental premises with ceiling insulation less than R2.

New section 11 (1) establishes the threshold for rental premises that must upgrade their ceiling insulation.

Under new section 11 (2), if the threshold requirement in new section 11 (1) is met, and the rental premises have ceiling insulation less than R2, and a residential tenancy agreement is entered into, the lessor must ensure all required electrical work required to comply with the minimum ceiling insulation standard, is undertaken by the required date. The definition of ***required date*** is in new section 11 (5).

New section 11 (2) operates to ensure that if ceiling insulation is to be installed or upgraded in a rental premises to meet the minimum ceiling insulation standard, a licensed electrician must undertake an electrical safety check before any work is undertaken in relation to the ceiling insulation. Thereafter, any issues identified by the licensed electrician must be resolved before the ceiling insulation can be installed or upgraded in the required area. This is to ensure that ceiling insulation can be installed safely and prevent risks to insulation installers, tenants, and the premises.

New section 11 (2) (iv) requires that halogen downlighting be removed and replaced with IC-4 rated LED downlighting, if the halogen downlighting is in an area of the premises where insulation is to be installed or upgraded. However, if the premises with halogen downlighting already meets the minimum ceiling insulation standard, then the halogen downlighting is not required to be removed.

New sections 11 (3) and (4) operate to ensure that, if the cost of works for the safe and effective installation of ceiling insulation would be above a cap (set at \$10,000), then as much ceiling insulation as can safely be installed for \$10,000 (including

required electrical work) is installed in the main living areas of the premises to ensure as much compliance as possible with the minimum ceiling insulation standard.

New section 11 (4) (b) ensures that pre-existing issues with the premises that would require maintenance work regardless of whether ceiling insulation was being installed is not counted in the calculation of the cost of works for the safe and effective installation of ceiling insulation.

New section 11 (5) defines a number of applicable terms such as, ***designated rooms***, ***electrical insulation***, ***IC-4 rated LED downlighting***, ***lower value insulation***, and ***required date***.

The definition of ***lower value insulation*** in new section 11 (5) operates to provide that any type of ceiling insulation with an R-value below R2 must be upgraded to R5 or more. If that insulation is foil-laminated or blow-in cellulose-based insulation, it must be removed, and new insulation installed (as opposed to topped up). The intention is that only foil-laminated or blow-in cellulose-based insulation that is under R2 must be removed and then new insulation be installed. If foil laminated or blow-in cellulose-based insulation is rated R2 or above, it can remain, and the premises meets the standard.

Other types of insulation (not foil laminated and not blow-in cellulose-based) below R2 can either be topped up to meet the minimum standard or removed for new insulation to be installed.

The definition of ***designated rooms*** in new section 11 (5) is to ensure that where ceiling insulation is installed under new section 11 (3), the rooms where insulation is installed are rooms that will mainly be used by tenants to maximise the benefits of the installed insulation.

Under new section 11 (5), the required date, in relation to a residential tenancy agreement, sets out when rental premises will be required to comply with the minimum insulation standard, depending on the date the residential tenancy agreement is entered into. The requirement to comply has been staggered over the course of several years from 1 April 2023 to 30 November 2026 to ensure that the standard is phased in.

Under the definition of the ***required date***, if a residential tenancy agreement is entered into:

- Before 1 April 2023 – For rental properties with tenants who have entered into a residential tenancy agreement before 1 April 2023, and in circumstances where a new agreement is not entered into before 30 November 2026, lessors must upgrade the ceiling insulation to ensure it meets the minimum standard by 30 November 2026.
- Between 1 April 2023 and 30 November 2026 – Lessors have nine months from the day after the agreement was entered into to upgrade the insulation to ensure it meets the minimum standard.

- On or after 1 December 2026 – Lessors have three months from the day after an agreement was entered into to upgrade the ceiling insulation to ensure compliance with the minimum standard.

Paragraph (d), of the definition of ***required date*** provides for when premises subject to a residential tenancy agreement that have an exemption (as allowed under new sections 12 and 13) will be required to comply with the minimum standard depending on the date the exemption stops applying:

- If the exemption stops applying before 1 April 2023 – then lessors must upgrade the insulation to comply with the minimum standard by 30 November 2026, or
- If the exemption stops applying between 1 April 2023 to 30 November 2026 – then lessors have 9 months from the day the exemption stops applying to upgrade the insulation to comply with the minimum standard, or
- If the exemption stops applying on or after 1 December 2026 – then lessors have three months after the day the exemption stops applying to upgrade the insulation to comply with the minimum standard.

Section 12 Exemptions—premises unsuitable for ceiling insulation

New section 12 provides exemptions to the ceiling insulation minimum standard where the installation of ceiling insulation is unsuitable in the premises under a residential tenancy agreement.

New section 12 (a) exempts premises that are registered under the *Heritage Act 2004*, where ceiling insulation installation would compromise the premises' heritage value.

New section 12 (b) operates to exempt premises in a unit under the *Unit Titles Act 2001* that is in a building with 2 or more storeys, and where the required area is located below another unit in the building, as apartment complexes are effectively insulated by the unit above, and frequently would not have sufficient ceiling space or access to install insulation.

New section 12 (c) operates to ensure that required areas in rental premises where it is physically infeasible to install insulation are excluded from the minimum ceiling insulation standard.

Section 13 Exemptions—other reasons

New section 13 provides temporary exemptions for premises from the ceiling insulation minimum standard.

New section 13 should be read with new section 11. In particular, the definition of ***required date*** in new section 11 (5) provides for when rental premises must upgrade their insulation to meet the minimum standard when an exemption stops applying.

New sections 13 (2) and (3) operate to allow the Minister to determine other temporary exemptions from the ceiling insulation minimum standard through a notifiable instrument.

Section 14 Lessor must keep evidence

The intention of this section is to ensure that adequate documentary evidence is maintained by lessors to verify compliance of the premises occupied under a residential tenancy agreement, or to support an exemption, and that this evidence must be provided when requested by tenants, as under section 9 (3).

Section 15 Approved installers

This section allows the Minister to specify the requirements that insulation installers must satisfy to be approved to install ceiling insulation to meet the minimum ceiling insulation standard under the regulation.

The purpose of this is to specify requirements that ensure the safe and effective installation of insulation by installers that have appropriate training.

The Minister may specify these requirements in a notifiable instrument.

Section 16 Disapplication of Legislation Act, s 47 (5) and (6)

This section provides that section 47 (5) and (6) of the *Legislation Act 2001* does not apply to an Australian Standard applied, adopted or incorporated under new part 3.

This removes the requirement for the text of any instrument or standard applied under the regulation to be notified as an instrument on the Legislation Register, as would generally be required under section 47 (6) of the *Legislation Act 2001*.

This is because Australian Standards are subject to copyright, so cannot be published by way of a notifiable instrument. Australian Standards may be purchased at www.standards.org.au and are available for viewing at the National Library of Australia.

Clause 8 New dictionary

This clause inserts the dictionary referred to in new section 1AA into the end of the regulation. The dictionary defines certain terms used in the regulation and includes references to other terms defined elsewhere in the regulation or in the *Legislation Act 2001*.