

Residential Tenancies Amendment Regulation 2023 (No 1)

Subordinate law SL2023–4

made under the

Residential Tenancies Act 1997

EXPLANATORY STATEMENT

This explanatory statement relates to the *Residential Tenancies Amendment Regulation 2023 (No 1)* (the **regulation**) as made by the Executive. It has been prepared to assist the reader of the regulation. 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 19A of the *Residential Tenancies Act 1997* (the **Act**) the Executive is permitted to make regulations, to set minimum housing standards for premises made available for occupation under a residential tenancy agreement in relation to a range of matters including energy efficiency.

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 housing 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

The regulation has been analysed for consistency with the *Human Rights Act 2004* for transparency.

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 meet 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 not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The regulation will marginally limit the right to 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 right to privacy for tenants 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 maintain documentary evidence, in addition to the records required by the Act, that demonstrates their compliance with the minimum standard, or documentary evidence that substantiates their exemption from the standard.

These measures assist to ensure lessors comply with the minimum standard. They protect tenants by requiring lessors to maintain adequate documentary evidence to give tenants the right to know whether a rental property complies with the minimum standard before they sign a lease.

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

The measures in the regulation requiring lessors to hold documentary evidence will assist in achieving compliance with the minimum energy efficiency standard so that tenants 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 maintain records about a property that is unrelated to the minimum energy efficiency standard. Further, the information they are required to maintain is not personal information – it is information that relates to a rental premises. The measures are not considered unduly burdensome as the documentary evidence would often be maintained by lessors in any case. The information is unlikely to be very costly to obtain, and it is a reasonable expectation for tenants to have the right to know whether a property they intend to lease is compliant with the minimum housing 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. Further, the standard residential tenancy require lessors to give notice to tenants 1 week's notice before inspecting the premises to assess whether it complies with the minimum standard or before undertaking or inspecting work undertaken to ensure the premises comply with the minimum standard. These protections for tenant's rights balance the limitation on tenant's 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 2023 (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 Legislation repealed

Clause 4 provides the regulation repeals the *Residential Tenancies Amendment Regulation 2022 (No 1)* (SL2022-16)

Clause 5 New part 1 heading

Clause 5 inserts a new heading ‘Part 1 – Preliminary’.

Clause 6 Section 1AA

Clause 6 substitutes section 1AA to bring the regulation in line with current drafting standards.

Clause 7 New part 2 heading

Clause 7 inserts a new heading, ‘Part 2 – General Matters’, before section 1A.

Clause 8 New part 3

Clause 8 inserts a new Part 3 to deal with minimum housing standards for ceiling insulation. The provisions of new part 3 are outlined below.

Part 3 Minimum housing standards – ceiling insulation standards

Section 8 Definitions—pt 3

This section provides definitions of terminology used in part 3. Explanation of some of the definitions are as follows:

Approved installer

The definition indicates that the requirements to be an *approved installer* are determined under section 13 by the Minister through a notifiable instrument.

Section 10 (2) (b), (c) and (d) requires that only approved installers may be used to install or upgrade insulation to comply with the 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 calculated 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.

Section 9 Minimum housing standard for ceiling insulation—Act, s 19A (1) (b)

Clause 9 sets out the definition for ‘ceiling insulation standard’ for the purposes of part 3.

Section 10 Installing or upgrading ceiling insulation to comply with ceiling insulation standard

New section 10 provides a progressive timeline, starting from the commencement of the regulation, setting 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.

This section implements 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 unsustainable pressure on the insulation industry.

New section 10 (1) operates in conjunction with new section 10 (2) and the definition of required date in new section 10 (5) to establish a phased in requirement to upgrade ceiling insulation for rental premises with ceiling insulation less than R2.

New section 10 (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. The electrician must provide the lessor a required electrical safety report to describe any required electrical work that must be completed prior to installation of 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. Upon completion of any required electrical work, the electrician must provide a completed electrical work report to the lessor and to any approved installer undertaking insulation installation work. The required electrical work must be completed on or before the required date. This is to ensure that ceiling insulation can be installed safely, is documented and prevent risks to insulation installers, tenants, and the premises.

New sections 10 (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 10 (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 10 (5) defines several applicable terms for the purposes of section 10 such as, designated rooms, electrical insulation, IC-4 rated LED downlighting, lower value insulation, required date and required electrical work.

The definition of lower value insulation in new section 10 (5) operates to provide that any type of ceiling insulation with an R-value below R2 must be upgraded to R5 or more. If insulation is foil-laminated or blow-in cellulose-based, 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 10 (5) is to ensure that where ceiling insulation is installed under new section 10 (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 10 (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. This phasing in of the standard is intended to prevent an unsustainable spike in demand for insulation and allow lessors sufficient time to meet the standard.

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

- Before 1 April 2023 – 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. This is to ensure that the requirement to upgrade the insulation cannot be circumvented.

- 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.
- 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.

If an exemption under new section 11 applies, under paragraph (d) of the definition of *required date* premises subject to a residential tenancy agreement 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 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.

The definition of *required electrical work* provides what rectification work is to be performed by a licenced electrician to make the ceiling space safe for the installation of ceiling insulation.

Section 11 Exemptions from complying with ceiling insulation standard

New section 11 provides exemptions to the ceiling insulation minimum standard where:

- it is physically infeasible to install insulation in a required area, including 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.
- the premises are not continuously tenanted in the relevant period.
- The tenant does not want ceiling insulation installed in the premises.
- the premises are registered under the *Heritage Act 2004*, where ceiling insulation installation would compromise the premises' heritage value.
- the premises are a unit under the *Unit Titles Act 2001* that is the top storey of a building and the owners corporation for the building confirm they intend to install insulation to the required areas or refuse permission for the lessor to install required ceiling insulation.
- The lessor intends to demolish all or most of the premises within 2 years of the residential tenancy agreement.

- The tenant is a former owner of the premises and the residential tenancy agreement is 12 months or less.

New sections 11 (2) and (3) operate to allow the Minister to determine other exemptions from complying with the ceiling insulation minimum standard through a notifiable instrument.

Section 12 Lessor must keep records-Act, s19C (c)

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.

Section 13 Approved installers

This section allows the Minister to specify the requirements that insulation installers must satisfy to be approved to install ceiling insulation 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 14 Disapplication of Legislation Act, s 47 (5) and (6)

Ceiling insulation comes in different materials and different thicknesses which have different thermal properties. To ensure consistency in measurement, insulation materials are rated using an R value. The 'R value' is a measure of the thermal performance of insulation and is determined in accordance with a particular Australian Standard (AS- 4859.1 - Materials for the thermal insulation of buildings). To ensure rental premises achieve a particular level of thermal insulation, it was considered necessary to set the minimum standard for ceiling insulation with reference to a particular 'R value'. As the R value for insulation is determined with reference to an Australian Standard, reliance on an Australian Standard is necessary.

Copyright in Australian Standards is owned by Standards Australia, a private organisation. These documents cannot be notified on the Legislation Register without breaching Standards Australia's copyright. As such, the disapplication of section 47 (5) and (6) is necessary in this instance.

This section therefore 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 an Australian Standard applied under the part to be notified as an instrument on the Legislation Register.

However, in disapplying section 47 (5) and (6), it is noted that the organisations that will be engaged to undertake inspections and upgrades to ensure compliance with the minimum standards in the regulation are already required to comply with Australian Standards. As such, they already have a good working knowledge of these documents to provide a report or any document to the lessor (and subsequently, any prospective tenant).

Australian Standards may be purchased at www.standards.org.au and are available at the National Library of Australia. Their availability at the National Library of Australia ensures that community members who are interested in or affected by the application of the Australian Standard can access the standard free of charge.

Clause 9 Dictionary

This clause inserts the dictionary into the end of the regulation. The dictionary defines certain terms used in the regulation.