

2020

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

**Residential Tenancies (COVID-19 Emergency Response)
Declaration 2020 (No 3)**

EXPLANATORY STATEMENT

**Presented by
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Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3)

OVERVIEW OF THE DECLARATION

The *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3)* (the Declaration) is a disallowable instrument made under section 156 of the *Residential Tenancies Act 1997* (RTA).

The Declaration implements a number of transitional measures to provide support to residential tenants and lessors at the end of the COVID-19 eviction moratorium¹. While some of the transitional measures have been extended from the moratorium period, the Declaration implements the following additional measures:

- the operation of section 8 (1) (a) (i) of the RTA is modified so that tenants under a fixed term residential tenancy agreement that began before 6 April 2020 will now gain the benefit of an amendment to the RTA which commenced on 6 April 2020. This limits the amount of rent that a lessor can require in advance to 2 weeks' rent, unless the tenant nominates a longer period;
- a transitional period is implemented which commences at the end of the existing moratorium period on 22 October 2020. The transitional period will provide tenants who were COVID-19 impacted during the moratorium period with a longer timeframe to work towards clearing any rental debt before they could face eviction on the basis of arrears that accrued before or during the moratorium period;
- a tenant may apply to the ACT Civil and Administrative Tribunal (ACAT) to vary or set aside an order made by ACAT before the moratorium period. This measure applies to an order made in relation to a tenant's failure to pay rent for a premises under a residential tenancy agreement where that order was suspended under the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (the First Declaration) or the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (the Second Declaration); and
- modifying the operation of section 49 of the RTA so that 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.

In line with the National Cabinet decision to implement a 6-month moratorium on evictions for rental arrears, the First and Second Declarations implemented a 6-month moratorium period for COVID-19 impacted households until 22 October 2020.² This Declaration implements a transitional period which commences on 23 October 2020 to protect tenants who were COVID-19 impacted during the moratorium period from being evicted for rental arrears accrued before or during the moratorium period. The

¹ The moratorium period was implemented through the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* (the first Declaration) and the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (the Second Declaration).

² Ibid.

transitional period has been implemented in order to ease cost of living pressures for ACT residential tenants who have been impacted by the COVID-19 pandemic and to allow those who have accrued debts during the moratorium with a longer period to address those debts before they will face eviction on the basis of those debts.

Some of the transitional measures that have been extended from the Second Declaration include the COVID-19 temporary rent reduction clause, the restriction on listings in a residential tenancy database and allowing a COVID-19 impacted household to terminate a fixed-term tenancy agreement without penalty by providing their lessor with 3 weeks' notice. The Government considers these measures remain necessary and important safeguards in the current environment.

In order to encourage and incentivise lessors and tenants to agree on rent relief, the Declaration provides that lessors and tenants are able to vary existing agreements to allow for temporary rent reductions and that there is no impediment to rents reverting to their previous rates after the COVID-19 emergency.

The 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.

The Declaration further provides that a COVID-19 impacted household may terminate a fixed-term tenancy agreement during the transitional period without penalty by providing a lessor 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 lessor to substantiate their claim.

CONSULTATION ON THE PROPOSED APPROACH

In developing the proposed approach including the new measures, the Justice and Community Safety Directorate (the Directorate) either consulted with or considered submissions from the Real Estate Institute of the ACT, the Tenancy Advice Service provided by Legal Aid ACT, the Tenants' Union, ACAT, the ACT Human Rights Commission, Canberra Community Law and other ACT Directorates. 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 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).

A number of measures under the Declaration promote the right to protection of family and children in section 11 of the HRA. These measures enable parties to a residential tenancy agreement to reduce the rent payable because of the COVID-19 pandemic, require ACAT to consider payment orders for COVID-19 impacted households and introduce a transitional period to prohibit evictions due to rent arrears accrued before or during the moratorium period for COVID-19 impacted households. 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 8, and the early termination by tenants provision in clause 13, may require tenants to provide personal information to their real estate agents or lessors 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 need to terminate their fixed term tenancies, require a rent reduction or are in arrears is 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 2020 (No 3)* (the Declaration).

Clause 2 Commencement

This clause provides for commencement of the Declaration (other than clause 5) on 23 October 2020.

Clause 5 commences 10 days after the Declaration's notification day.

Clause 3 Expiry

The Declaration expires on the earlier of either the day the transitional period ends (see clause 7) 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 4 Revocation

This clause revokes a prior instrument, the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (DI2020-216) on 23 October 2020. This is because the moratorium period under the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (DI2020-216) expires on 22 October 2020.

Part 2 Rent paid in advance and temporary reduction in rent

Clause 5 Modification of Act, s 8 (1) (a) (i) – amount of rent paid in advance for fixed term agreements

This clause modifies the operation of section 8 (1) (a) (i) of the RTA which provides that changes to the standard residential tenancy terms do not apply to a fixed term tenancy until after the expiry of its term. Section 8 (1) (a) (i) is modified so that tenants under a fixed term residential tenancy agreement that began before 6 April 2020 will now gain the benefit of an amendment to schedule 1, clause 28 introduced to the RTA through the *Residential Tenancies Amendment Act 2020* which commenced on 6 April 2020. Amended Schedule 1 Clause 28 of the RTA limits the amount of rent that a lessor can require in advance to 2 weeks' rent, unless the tenant nominates a longer period.

This means that tenants in fixed term tenancies that began before 6 April 2020 will gain the benefit of this amendment along with those in periodic tenancies or fixed term tenancies that commenced after 6 April 2020.

Pursuant to these amendments, tenants can now only be required to pay two weeks' rent in advance, unless the tenant nominates a longer period (for example, if paying more than two weeks' rent in advance better aligns with a tenant's income cycle). Previously, lessors were able to request one month's rent in advance from tenants. This change means that paying two weeks rent in advance is now the default position. The option to pay more than two weeks in advance would only arise when proactively nominated by the tenant, not at the suggestion or request of the lessor.

To ease cost of living pressures for tenants, this clause provides any tenant in a fixed term tenancy that commenced prior to or after 6 April 2020 with the option to pay two weeks' rent in advance (unless the tenant nominates a longer period). This clause applies to all tenants regardless of whether the tenant has been impacted by the COVID-19 pandemic (as defined in clause 8). The provision has been extended to all tenants due to the widespread economic impacts of the COVID-19 pandemic in the ACT (including high levels of unemployment and underemployment across a range of sectors in the ACT community as well as impacts on sole traders). These impacts have seen many households lose some income, and experience significant cost of living pressures even though they may have not lost sufficient income to meet the definition of impacted household for the purpose of the Declaration. Many tenants are experiencing financial hardship caused by the pandemic and the associated emergency response measures. By smoothing rental payments overtime, this measure may assist to ease those cost of living pressures.

Clause 6 Modification of Act, 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 (that is, it is a genuine reduction, rather than a rent deferral).

The COVID-19 temporary rent reduction clause was included in both the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* and the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)*. The Declaration extends this measure to 31 January 2021 in order to encourage tenants and lessors to negotiate temporary rent reductions where tenants continue to be impacted by COVID-19 response measures. This measure also supports the ACT Government's 3-month extension of the land tax and rates rebate scheme to residential lessors who reduce a tenant's rent by at least 25 percent.

Part 3 Protection of households impacted by COVID-19 pandemic

Clause 7 Definitions—Pt 3

This clause defines terms in part 3. The purpose of the definitions in this clause and clause 8 is to ensure that the benefit of the measures in the Declaration (other than clause 5) 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 8.

'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 8. See further discussion below under clause 8.

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

‘Transitional period’ means the period beginning on 23 October 2020 and ending on 31 January 2021, or, if the period is extended under clause 14, at the end of the extended period.

Clause 8 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 the restriction on termination etc during the transitional period for arrears incurred during the moratorium period, the modification of the RTA in relation to payment orders for impacted households, the restriction on listings in a residential tenancy database and the termination by a tenant in an impacted household will apply (clauses 9, 11, 12 and 13).

As set out in clause 7 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 provisions relating to the restriction on termination etc during the transitional period for arrears incurred during the moratorium period, the modification of the RTA in relation to payment orders for impacted households, the restriction on listings in a residential tenancy database and the termination by a tenant in an impacted household will apply (clauses 9, 11, 12 and 13).

It is anticipated that tenants will be able to show that they are an ‘impacted household’ (clause 8) 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 9 No termination etc in relation to moratorium arrears in transitional period

This clause implements a transitional period which commences at the end of the moratorium period on 22 October 2020. The transitional period will provide tenants who were COVID-19 impacted during the moratorium period with a longer timeframe to work towards clearing any rental debt before they could face eviction on the basis of arrears that accrued before or during the moratorium period. This will provide tenants with more time to recover financially and allow them to enter into a payment plan with their lessors.

A tenant will only be protected from being evicted for rental arrears if the tenant pays their rent as it falls due each payment period during the transitional period. Where tenants are not able to meet rent payments as they fall due during the transitional period, the usual termination provisions in relation to rent arrears under the RTA will apply to the arrears incurred during both the moratorium period and the transitional period.

As set out in clause 7 above, ‘transitional period’ means the period beginning on 23 October 2020 and ending on 31 January 2021, or, if the period is extended under clause 14, at the end of the extended period.

The note to this clause explains that, as set out in clause 11, ACAT must 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. Even in circumstances where a tenant is unable to meet their rent payments as they fall due during the transitional period, the measure (as set out in clause 11) may assist in preventing sustainable residential tenancies from being terminated. This measure will allow tenants to remain in their homes during a period of considerable financial stress and provided tenants with more time to pay their rental debts.

Clause 10 Reconsideration of orders etc for failure to pay rent

This clause applies if before the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* or the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)* (a previous declaration) commenced, the ACAT made an order (the pre-moratorium order) in relation to a tenant’s failure to pay rent for premises under a residential tenancy agreement but then suspended that order under a previous declaration.

This clause allows a tenant to apply to ACAT to vary or set aside the pre-moratorium order. ACAT may vary or set aside the pre-moratorium order if it is satisfied that, since the order was made, the tenant has paid part or all of the rent arrears (or the tenant can otherwise demonstrate that their financial circumstances have improved) and the tenant is reasonably likely to pay future rent as it becomes payable.

In this clause, 'previous declaration' means the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020* or the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2)*.

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 11 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 unable to meet rent payments as they fall due during the transitional period 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. Even in circumstances where a tenant has been unable to meet their rent payments as they fell due during the transitional period, the measure operates to provide that tenant with an 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 12 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 13 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 or the transitional 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 lease' fee under the RTA or the agreement in relation to the early termination of the fixed term agreement under this clause. However, if the tenant owes a rent arrears or property damage debt that arose during the tenancy, this will remain a debt payable to the lessor at the end of the tenancy.

Clause 14 Extension of transitional period

This clause provides that the Minister may extend the transitional period in clause 7 for a period of no more than 3 months. Any extension is made by notifiable instrument.