



ACT
Government

REGULATORY IMPACT STATEMENT

Residential Tenancies Amendment Regulation 2023 (No 1)

SL2023-4

Prepared in accordance with *Legislation Act 2001*, section 35

Shane Rattenbury MLA

Minister for Water, Energy and Emissions Reduction

Overview

This regulatory impact statement (RIS) relates to the Residential Tenancies Amendment Regulation 2023 (No 1) (the regulation). The regulation will enact the requirement for a minimum energy efficiency standard for ceiling insulation in residential rental properties.

Background

Residential rental properties are relatively less energy efficient and insulated than non-rental properties. The result of this difference is that tenants have relatively more costly and less safe living conditions. Tenants and renters:

- have greater impacts on their health in hot and cold weather
- have higher energy costs
- produce increased carbon emissions through higher energy use
- have lower amenity and comfort¹.

Further, the burden of energy inefficient housing with poor thermal performance falls disproportionately on tenants from low-income households, concession card holders, those with a disability, aged tenants, and households with children.

Action 4.7 of the ACT Climate Change Strategy (2019-2025) commits the ACT Government to: ‘introduce legislation for staged minimum energy performance requirements for rental properties’. This was reaffirmed in the 2020 Parliamentary and Governing Agreement for the 10th Legislative Assembly.

Several barriers exist to improving the energy efficiency of rental properties, including split incentives, information asymmetry and market failures. Split incentives are considered the most significant barrier – this problem occurs when the flow of investments and benefits are not properly rationed among the parties to a transaction, impairing investment decisions. As rental providers do not receive any of the direct benefits arising from energy efficiency improvements, they are likely to try to keep down initial costs rather than to install or invest in improvements for rental properties². 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 complexity of these issues means they cannot be addressed solely with programs or policies and regulatory intervention is required.

The *Legislation Act 2001* requires the preparation of a RIS whenever a proposed regulation is likely to impose an appreciable cost on the community, or a part of the community³. An initial RIS examining options to improve energy efficiency in rental properties to meet the Government’s policy objectives and commitments, was prepared by ACIL Allen⁴. It included detailed impact analysis of the various options being considered and discussion of issues around implementation and compliance.

¹ ACIL Allen (2021). Minimum Standards for residential rental properties: Regulation Impact Statement, Canberra, p. 6. This report was prepared for the Environment, Planning and Sustainable Development Directorate.

² ACIL Allen (2021), pp. 17-18.

³ ACT *Legislation Act 2001*, s. 34

⁴ ACIL Allen (2021).

The regulatory policy options formally analysed were:

- a minimum standard for ceiling insulation
- a minimum standard for an energy efficient heater
- a minimum performance standard, for instance, meeting a minimum star rating.

Information required by section 35 of the *Legislation Act 2001*

(a) The Authorising Law

The *Residential Tenancies Act 1997* (the Act) is the authorising law for the proposed regulation. The ACT seeks to balance the interests of the parties to a residential tenancy agreement and to provide a framework for residential tenancy agreements in the ACT. The Act applies to public housing as well as private tenancies. Section 136 (1) of the Act, as amended in 2020, allows for a regulation to be made to require minimum standards for residential rental properties. Section 136 (2) (d) of the Act specifies that a regulation may make provision for minimum standards that relate to the energy efficiency of premises made available under a residential tenancy agreement.

Under the authorising law the regulation will enact a minimum energy efficiency standard for ceiling insulation (the standard) in residential rental properties in the ACT.

(b) Policy objectives of the proposed law

The regulation will address the split incentive and market failure that results in many low-income and vulnerable renters living in poor thermally performing properties, with consequent financial, health and well-being impacts. The Best practice Guide for Regulatory Impact statements notes market failure as sufficient justification for Government intervention⁵. Types of market failures includes externalities where an activity confers spill over benefits or imposes costs on third parties, and information asymmetries, where information is not equally shared, impacting the capacity of one or more parties to make informed decisions. Both of these market failures play out in the rental sector and negatively impact on efforts to improve the energy efficiency of rental properties. Rental providers incur the costs of energy efficiency upgrades, while tenants receive the benefits. Information asymmetries exists because tenants are unable to distinguish properties with high energy efficiency from those with low energy efficiency. Lack of knowledge about energy costs and the thermal performance of a property limits informed choice and leverage for tenants, and limits incentives for rental providers and property managers to focus on and improve energy efficiency in rental properties.

The introduction of the standard for residential rental homes will address these market failures by not only requiring rental providers to upgrade their properties, but also by strengthening 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.

(c) Achieving the policy objectives

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

⁵ https://www.treasury.act.gov.au/data/assets/pdf_file/0011/449894/2003-RIS-guide.pdf.

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

The analysis and economic modelling undertaken by ACIL Allen identified that an R5 ceiling insulation standard would have a positive net value to the ACT community overall. For tenants, R5 ceiling insulation delivers a range of immediate benefits including reduced energy consumption and energy bills as well as longer term health benefits without additional heating or cooling costs. For example, Tenants of insulated homes are half as likely to report respiratory illness symptoms compared to those in uninsulated homes⁶.

(d) Consistency of the proposed law with the authorising law

The regulation is consistent with the authorising law, the *Residential Tenancies Act 1997* (the Act). The objects of the Act under section 4A recognise the importance of stable and secure housing for the people in the ACT. The regulation complies with the objects of the Act; defining the requirements and obligations of tenants and lessors under the standard with respect to the installation of insulation, electrical safety, access to the property, compliance as to whether the property meets the standard and temporary and permanent exemptions.

Under the regulation insulation must be installed by “approved installers.” The regulation provides that the Minister may determine the requirements to be an approved installer by way of a notifiable instrument. The requirement for only approved installers to install insulation will protect tenants and lessors from unfair practices and ensure the safety of tenants, and insulation installers

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 will ensure lessors comply with the minimum standard and gives tenants the right to know whether a rental property complies with the minimum standard before they sign a lease.

The regulation facilitates the availability of stable and secure housing by requiring all rental properties to have a minimum ceiling insulation standard. This will ensure all tenants enjoy their rights without distinction or discrimination.

(e) Inconsistency with the policy objectives of another territory law

The proposed law is not inconsistent with the policy objectives of any other Territory law.

(f) Reasonable alternatives to the proposed law

There is a significant body of evidence that acknowledges the need for regulatory intervention to improve the energy efficiency and thermal performance of rental properties. Policy options that focus only on incentives, programs, and support measures to promote energy efficiency upgrades, invariably favour particular arrangements over others: for example, owner-occupiers over renters. Many energy efficiency activities are simply not available to renters except by request or negotiation with housing providers. Power asymmetry often means renters will not request upgrades due to fear

⁶ ACIL Allen (2021), pp. 12-14.

of rent increases or evictions. This is compounded by the problem of split incentives which means housing providers are unlikely to make the required upgrades without regulatory intervention.

Consultation with the general community, stakeholders, and industry on the proposed approach for the regulation was undertaken in April-May 2021 and in November-December 2021 to determine community and industry views on the proposed minimum ceiling insulation standard and how it should be implemented. There was generally strong support for the need for a standard with 95% of renters surveyed supporting the standard, and 59% of rental providers surveyed also expressing support for the standard. Further the majority of rental providers said they would not increase their rents in response to the standard, or that they would only increase them minimally.⁷

As noted above, alternative policy solutions are unable to address the barriers to energy efficiency improvements in rental properties. Introducing a regulation to enact a minimum standard for ceiling insulation will result in costs for parts of the community, however this is balanced by the positive net value to the ACT community overall, particularly for low income and vulnerable renters. For rental providers these costs are unlikely to have a sizable impact on net rental returns: likely in the order of a fraction of a percentage point over the life of the asset⁸.

(g) brief assessment of the benefits and costs of the proposed law

The impact analysis undertaken by ACIL Allen⁹ demonstrates that implementing a minimum energy efficiency standard, with a four-year phase in period would provide around \$18 million in benefits for the ACT shared across the community. The analysis shows that for every one dollar spent on the minimum standard, it returns \$1.30 to the community

Of the different options modelled, the R5 ceiling insulation standard provides the highest net benefit to tenants — in excess of \$8,300 on average over the life of the upgrade — while leaving rental providers no worse off where they can pass through the costs in full.

For property owners, upgrading ceiling insulation increases the value of their property. Previous separate studies by the Insulation Council Australia New Zealand (ICANZ)¹⁰ found that installation of ceiling insulation with an R-Value of 5 increases a home's energy efficiency rating by 2.3 stars under the Nationwide Home Energy Rating Scheme (NatHERS). The analysis concludes that in the ACT, "the cost of a 2-star improvement through the retrofit of ceiling insulation is of the order of 10% of the expected return on investment (i.e. higher sale price)".

An R5 roof insulation minimum standard across the ACT is expected to save 5,800 petajoules of energy over the period analysed and 289,000 tonnes of greenhouse gas emissions from domestic burning of gas and firewood.

The other two options modelled in the RIS including an energy efficient heating standard and performance energy star rating standard had a negative net present value (i.e., at a societal level the costs exceeded the benefits) and a lower benefit cost-ratio than the ceiling insulation standard.

For a full cost benefits analysis refer to the Regulation Impact Statement prepared by ACIL Allen.¹¹

⁷ ACIL Allen (2021), Appendix F Survey Results.

⁸ ACIL Allen (2021), p. 2.

⁹ ACIL Allen (2021), Chapter 5 Impact Analysis, pp. 35-65.

¹⁰ <http://icanz.org.au/wp-content/uploads/2013/04/ICANZ-CeilingInsulationReport-V04.pdf>

¹¹ https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/1516/3789/3675/211124_ACT_min_std_RIS_rev2331506.1.pdf

(h) Consistency of the proposed law with Scrutiny of Bills Committee Principles

The Standing Committee on Justice and Community Safety's (Legislative Scrutiny Role) Terms of Reference require the Committee to consider whether (among other things) any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly:

- i. is in accord with the general objects of the Act under which it is made;
- ii. unduly trespasses on rights previously established by law;
- iii. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions;
or
- iv. contains matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

An analysis of the proposed law against each of these items follows.

- i. Accordance with the general objects of the Act under which it is made.

The regulation is consistent with the authorising Law. Section 4A of the Act recognises the importance of stable and secure housing for people in the ACT community. The regulation complies with the objects of the Act; defining the requirements and obligations of tenants and lessors under the standard with respect to the installation of insulation, electrical safety, access to the property, compliance as to whether the property meets the standard and temporary and permanent exemptions.

- ii. Unduly trespasses on rights previously established by law.

The nature of the rights affected

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 nature and extent of the limitation

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 requires lessors to maintain documentary evidence that demonstrates their compliance with the minimum standard, or documentary evidence that substantiates their exemption from the standard.

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.

The importance of the purpose of the limitation

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. The regulation requires the documents to be maintained, so a tenant can be informed whether a rental property complies with the minimum standard before they sign a lease, if they choose to request the information from the lessor.

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.

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 lessor's making upgrades, meaning that lessors must give notice to tenants to undertake maintenance. These protections for tenant's rights balance the limitation on tenant's right to privacy and home, ensuring proportionality.

Any less restrictive means available to achieve the purpose the limitation seeks to achieve

No less restrictive means are available to achieve the purpose the limitation seeks to achieve.

The regulation establishes a minimum energy efficiency standard for ceiling insulation in rental properties. The marginal limitation on the right of privacy for lessors in relation to their rental properties and correspondence is required to ensure that tenants can have reasonable confidence that a property complies with the standard and that electrical checks to ensure safety have been undertaken where insulation installation or upgrades were required to meet the standard. 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 there is generally a power and information imbalance between lessors and tenants in favour of lessors, these measures give greater protections to tenants without unreasonably limiting the rights of lessors

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.

iii. Non-reviewable decisions

The Regulation does not create any non-reviewable decisions.

iv. Matters properly dealt with in an Act of the Legislative Assembly

All the provisions within the regulation are appropriate for subordinate legislation.

The regulation will commence on 1 April 2023 and will introduce a minimum energy efficiency standard for ceiling insulation for rental properties under the head of power contained in the Act. Section 136 of the Act allows for a regulation to be made to require minimum standards for residential rental properties that relate to energy efficiency. The regulation is also consistent with the objects of the Act.

The *Residential Tenancies Legislation Amendment Bill 2022* (the Bill) proposes changes to the minimum housing standards provisions in the *Residential Tenancies Act 1997*. The provisions relating to the standard that are not appropriate for subordinate legislation have been introduced to the

Legislative Assembly and will be the subject of debate, including (among many other provisions) mandatory disclosure of compliance with the standard, and the right of the tenant to request records in relation to compliance with the standard.