



**RESIDENTIAL TENANTS  
AFFECTED BY COVID-19  
AND IMPACT ON SALE  
CONTRACTS**



Controversial new laws giving temporary relief to Queensland residential tenants affected by the COVID-19 emergency came into effect on 24 April 2020<sup>i</sup>. The new laws override a number of provisions in the residential tenancies legislation<sup>ii</sup> until 31 December 2020.

The new laws attempt to strike a fair balance between:

- the public health need of avoiding large numbers of people being forced into homelessness or to look for new accommodation while we are all being encouraged to “stay at home”;
- the rights of tenants who may have lost their income due to forced closures or ‘economic hibernation’ or who are suffering from COVID-19;
- the rights of landlords, many of whom are reliant on the rental income to meet their expenses.

The central tenet of the new laws (and the guidelines which support them) is therefore to prevent termination of tenancy agreements where the tenant is experiencing extreme hardship as a result of the COVID-19 emergency and to encourage the parties to reach agreement on rent waivers or deferrals taking into account their respective circumstances.

This article sheds some light on key terms in the legislation and considers the impact these may have on a landlord who intends selling the property.

### Key provisions for residential tenancies

- Moratorium on eviction of tenants suffering from excessive hardship for non-payment of rent
- Prohibition on landlords giving notice to end tenancy agreements without cause during the COVID-19 emergency where the tenant is suffering from excessive hardship
- Landlords to offer to extend fixed term tenancy agreements until 30 September 2020 for tenants suffering from excessive hardship
- Mechanism for rent deferral or waiver to be mediated or determined by QCAT if not agreed by the landlord and tenant
- Limits on rights of access to tenanted properties
- Right for landlords to terminate residential tenancies on 2 months’ notice if they wish (or need) to sell a property with vacant possession

## Who is entitled to the relief?

The key provisions of the regulation apply to tenants who are suffering from **excessive hardship** because of the COVID-19 emergency.

To qualify as suffering from “**excessive hardship**”, a tenant must satisfy two tests. The first relates to the **tenant’s personal circumstances** and the second relates to the **tenant’s financial position**.

### 1. Personal circumstances

The tenant must fall into one of the following categories:

- the tenant or someone under the tenant’s care suffers from COVID-19;
- the tenant is subject to a quarantine direction;
- the tenant’s place of employment is closed, or the business conducted by their employer is restricted, because of a public health direction;
- the tenant is self-isolating because he or she is a vulnerable person, lives with a vulnerable person or is the primary carer for a vulnerable person<sup>iii</sup>;
- the tenant is subject to a restriction on travel which prevents the tenant from working or returning home; or
- the tenant is prevented by the COVID-19 emergency from leaving or returning to Australia.

### 2. Financial circumstances

The second hurdle requires a tenant to show that either:

- the tenants named on the tenancy agreement have suffered a loss of income of 25% or more in their combined incomes; or
- the rent payable by all tenants is 30% or more of their combined incomes.



## Moratorium on evictions

From 29 March 2020 until 29 September 2020 (or any earlier date the government declares the COVID-19 emergency has ended) a landlord will be prevented from issuing a notice to leave or evict a tenant who fails to pay rent as a result of the excessive hardship suffered by the tenant because of the COVID-19 emergency.

Substantial penalties of up to \$5,500 (for individuals) may be imposed on landlords or agents who evict a tenant or coerce or mislead a tenant into leaving the premises in these circumstances.

This does not prevent termination for other reasons (for example, other breaches of the tenancy agreement or sale of the property) and does not apply to a valid notice to leave given before 29 March 2020.

A landlord may require evidence to substantiate a claim of excessive hardship but only to the extent the evidence is similar in nature to the information the landlord required when the residential tenancy agreement was entered into. However, the parties are encouraged to share relevant information to assist in reaching agreement and the RTA or QCAT is entitled to require further evidence if a dispute arises.

Tenants should take note that large penalties will also apply to tenants who provide false or misleading information or who fail to inform a landlord when their circumstances change and they are no longer suffering excessive hardship due to COVID-19.

## Extension of expired agreements

Tenants suffering excessive hardship and whose fixed term residential tenancy agreement is due to end between 24 April 2020 and 29 September 2020 will be given comfort that their landlord will be required to offer an extension of the term to 30 September 2020 (or an earlier date requested by the tenant). The offer must be made before the end of the term.

However this does not apply if a valid notice to leave was issued or other action to terminate the tenancy agreement was taken before 24 April

2020 and does not prevent other termination rights (for example a landlord's right to terminate on sale or a mortgagee's right to possession under the Act).

Also, until the COVID-19 emergency ends<sup>IV</sup>, a landlord must not give a notice to terminate a tenancy without grounds if the tenant is suffering excessive hardship due to the COVID-19 emergency. This will apply to both fixed term tenancies which end during the COVID-19 emergency period and periodic tenancies.

## Rent Relief

Unlike the Mandatory Code for Commercial Tenancies (which is yet to be legislated in Queensland) the Regulation does not prescribe principles for the negotiation of rent relief. However, the Residential Tenancies Practice Guide published by the government offers the following broad principles:

- Parties should try to negotiate a new rent amount that is reasonable and affordable, based on their changed circumstances, as well as any conditions, including whether any rent repayments need to be made and the timeframe for the rent adjustment;
- Typically, an affordable rent is no more than 30% of total household income, but this will depend on individual circumstances;
- Each negotiation should also consider the circumstances of the landlord and any hardship they may be experiencing;
- Parties should make all reasonable attempts to access relevant Federal and State financial relief packages, such as the JobSeeker payment or mortgage relief.

The process set out in the regulation to be followed by a landlord, where rent is unpaid after 7 days is:

- to issue a show cause notice (it is an offence to issue a breach notice to a tenant if the landlord believes or ought to know that the tenant is or

has been suffering excessive hardship because of the COVID-19 emergency);

- if the tenant informs the landlord that the rent is unpaid because the tenant is or has been suffering excessive hardship because of the COVID-19 emergency the landlord may request that the tenant enter into a tenancy variation agreement;
- a tenant and landlord may enter into an agreement for a rent reduction for a stated period or a payment plan for unpaid rent in RTA Form 18d;
- if the landlord and tenant are unable to agree to a tenancy variation agreement either party may refer the dispute to conciliation by the RTA;
- if the tenancy dispute is not resolved through conciliation, either party may apply to the tribunal for an order about the unpaid rent.

It appears the moratorium on evictions continues to apply even where the landlord and tenant have agreed to a rental variation and the tenant fails to pay the new rent (provided the tenant is still suffering excessive hardship and unable to pay the rent as a result of the COVID-19 emergency).

It also remains to be seen whether and to what extent QCAT applies the principles set out in the guidelines as they have no legal effect.

## Early termination by Tenant

The right under the Act for tenants to apply to QCAT for early termination on grounds of excessive hardship has been suspended until mandatory conciliation by the RTA has been conducted and the parties have been unable to reach agreement about rent waiver or deferment.

However, in practical terms, under the Act if a tenant walks away from a tenancy agreement before the end of the fixed term or the expiry of a

notice to leave, the tenant does not have to pay the rent for the remaining period and its liability is limited to paying the reasonable costs incurred by the landlord in reletting the premises. This liability is further limited under the Regulation for tenants whose income has reduced by 75% and who have less than \$5,000 in the bank. For these tenants, the liability (or break fee) will be capped at 1 weeks rent.

## Tenancy Databases

It is an offence to list details of a tenant in a tenancy database for failure to pay rent or the ending of the agreement during the COVID-19 emergency period because the tenant was

suffering excessive hardship because of the COVID-19 emergency or complying with a public health direction.

## Sale of Premises and Family Occupation

Under the Regulation, a new right has been added for a landlord to end a tenancy on 2 months' notice if:

- the landlord has entered into a contract to sell the property with vacant possession; or
- the landlord requires vacant possession to prepare the property for sale.

Prior to the Regulation coming into effect, only periodic tenancies (not fixed term tenancies) could be terminated on the grounds of sale of a property.

The Regulation also provides for further grounds of termination by the landlord where the landlord or a member of the landlord's immediate family needs to occupy the premises. Again at least 2 months' notice is required.

## Access

Some practical access restrictions have been implemented in the interest of the health of parties.

A landlord or agent may not enter premises to conduct inspections or routine repairs or to show prospective buyers if:

- a person at the premises is subject to a quarantine direction;
- the landlord or agent is subject to a quarantine direction; or
- the entry would contravene a public health direction.

A tenant may also refuse entry to the premises if the tenant, or another person staying at the premises, is a vulnerable person.

However tenants must allow a virtual inspections or provide photographs or video of the premises. Exceptions apply in an emergency or if the landlord or agent believes on reasonable grounds that the entry is necessary to protect the premises from imminent or further damage.

The Regulation provides a release for landlords from carrying out certain non-essential repair items where access to the premises is not permitted or tradespeople or supplies are not available.

## Safety measures including domestic violence

The Regulation also contains:

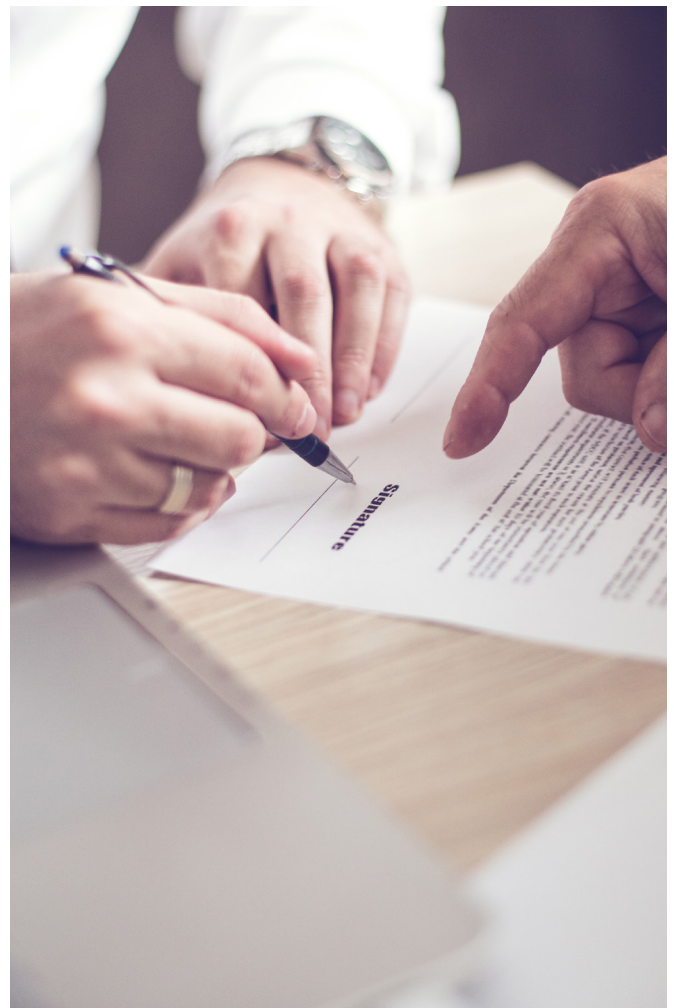
- a right for tenants who believe they can no longer safely continue to occupy premises because of domestic violence committed against them to end their interest in the tenancy agreement on 7 days' notice;
- a right for a tenant to change locks at the premises if the tenant believes it is necessary to protect the tenant or an occupant from domestic violence and engages a qualified tradesperson to change the locks;
- a right for a tenant to terminate an agreement within the first 7 days if the premises are not in good repair or do not comply with a prescribed minimum housing standard; and
- equivalent provisions relating to residents in boarding houses and other shared accommodation.



## Effect on Sale Contracts

The Regulation provides no relief for a seller who inadvertently breaches a sale contract as a result of a requirement in the regulation. A breach could potentially result in the buyer terminating the contract or claiming damages for breach. Sellers should therefore carefully consider the potential impacts of the Regulation before signing a contract to sell a property presently occupied by a residential tenant and where necessary include appropriate special conditions. Potential issues include:

- ability to give vacant possession on settlement (where applicable);
- ability to provide access for inspections as required by the contract;
- ability to agree to future variations of the rent where the tenant is suffering excessive hardship due to the COVID-19 emergency;
- possible rent variations determined by QCAT;
- the tenant vacating the premises early.



<sup>i</sup> *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020*

<sup>ii</sup> *Residential Tenancies and Rooming Accommodation Act 2008*

<sup>iii</sup> A vulnerable person is anyone over 70 or a person over 65 (or 50 if the person is an Aboriginal or Torres Strait Islander) who has an existing health condition or comorbidities

<sup>iv</sup> On expiry of the declared public health emergency under the *Public Health Act 2005*



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Gail prepares and negotiates complicated long-term leasing arrangements and has extensive experience in development agreements and sale contracts. She conducts detailed due diligence investigations, advises on title structuring issues for projects of varying sizes and provides general property advice. Gail also advises on the impact of the personal property securities legislation on property transactions.



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With his impressive knowledge and over 20 years' experience in all aspects of property law, Matthew represents the interests of developers, government organisations, landlords, institutional lenders, fund managers and investors.

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Matthew is the Chair of the Queensland Law Society's Property and Development Law Committee and the Queensland representative of the Law Council of Australia's e-conveyancing working group.

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