

COVID-19 and renting – after 26 March 2021

The NSW government has made significant changes to the legal protections for private tenants who have been financially impacted by COVID-19. As the first set of protections during the Moratorium Period (i.e. 15 April 2020 to 26 March 2021) come to an end, new protections are now available for impacted tenants who had accrued arrears over this Moratorium Period. These new protections are set out in this infosheet and will come into effect for 6 months from 26/3/2021 – 26/9/2021.

Eligibility for protection – Am I a COVID-19 impacted tenant?

A COVID-19 ‘**impacted tenant**’ is defined as a tenant in a **household** (meaning any tenants or other persons living together in the same residential premises), which has had a reduction or loss of work and/or income because of the pandemic AND as a result, **the weekly household income has been reduced by 25%**.

The 25% reduction in household income is assessed on income after tax and is assessed on total household income – not just any one individual in the household.

Your renting household must demonstrate that, any 1 or more rent paying members of the household have:

- (a) lost employment or income as a result of the impact of the COVID-19 pandemic, or
- (b) had a reduction in work hours or income as a result of the impact of the COVID-19 pandemic, or
- (c) had to stop working, or materially reduce the member’s work hours, because of a member’s illness with COVID-19, or a member’s carer responsibilities for a family member ill with COVID-19

AND as a result of the above factors, the weekly household income has been reduced by at least 25% compared to the weekly household income before the occurrence of any of the matters.

To prove eligibility, it is vital for tenants to show evidence that their income reduced by 25% compared to their income before the occurrence of any of the pandemic-related matter/s outlined at (a) to (c) above.

In *Serious v Barlow; Barlow v Serious* [2020] NSWCATCD 3, the NSW Civil and Administrative Tribunal (NCAT) determined that the tenant was not an ‘impacted tenant’.

In this case, the tenants satisfied the Tribunal that they had no income as a result of the impact of the COVID-19 pandemic, but the tenants were not successful in satisfying the Tribunal that their income had decreased by 25% compared to before the pandemic. The parties’ evidence had included the tenant’s bank statements, but these did not show any prior income. The Tribunal found that without any evidence of pre-pandemic income, the tenants did not meet the statutory definition of an ‘impacted tenant’. The result of not meeting this definition was that protections introduced to address the impact of the COVID-19 pandemic did not apply to those tenants, and their tenancy was able to be terminated due to the arrears of rent.

Evictions

Generally, if rent, water usage charges and/or utility charges under a tenancy agreement remain unpaid for 14 days or more, landlords can issue a non-payment termination notice to tenants.

The eviction Moratorium Period between 15 April 2020 and 26 March 2021, protected COVID-19 ‘impacted tenants’ from eviction for failure to pay rent. The Moratorium Period ended on 26 March 2021.

However, if tenants received notices of termination, or if they were involved in Tribunal proceedings on or before 26 March 2021, then these notices and proceedings will continue to be subject to the laws during that time.

From 27 March 2021, ‘impacted tenants’ who accrued rent arrears during the Moratorium Period will have new protections – landlords will only be able to terminate tenancies of ‘impacted tenants’ if the termination is ‘fair and reasonable’ in the circumstances, and:

1. landlords have participated in good faith formal negotiations to enter a repayment plan for arrears, or
2. tenants have failed to comply with a repayment plan for arrears.

Proving that I am a COVID-19 'impacted tenant'

The first step when initiating negotiations for an arrears repayment plan, will involve demonstrating eligibility.

To show your income has been reduced, you can provide pre-COVID-19 bank statements, letters from your employer or any other proof of income.

The Tribunal has a financial impact statement form which you can fill out carefully and attach any relevant material: https://ncat.nsw.gov.au/content/dam/dcj/ctsd/ncat/documents/forms/ccd_form_tenancy_financial_statement_covid19.docx

'Accrued arrears'

Only arrears accrued during the Moratorium Period by an 'impacted tenant', may be subject to a repayment plan under the new laws.

Arrears accrued after 26 March 2021, will not be covered by the new laws concerning repayment plans. For guidance on arrears accrued after 26 March 2021, please see *Factsheet 5: Rent arrears* at tenants.org.au

Repayment plans

A **repayment plan** is defined as a plan to pay back the arrears that specifies the amounts to be paid and the times at which the payments are due.

Landlords are prohibited from serving a termination notice or making a Tribunal application against a tenant for rent arrears if an 'impacted tenant' has agreed to a 'repayment plan' with their landlord/agent and has complied with the terms of the plan. The landlord cannot take you to the Tribunal unless you have failed to make 2 consecutive payments under the agreement.

If an 'impacted tenant' has missed two or more consecutive payments by the relevant deadline under the repayment plan then the landlord can only evict if it is 'fair and reasonable' in the circumstances.

If an impacted tenant does not have a repayment plan then the landlord must not take action to terminate the tenancy unless the termination is fair and reasonable in the circumstances **AND** the landlord has participated in good faith in a '**formal arrears repayment negotiation process**' (facilitated by NSW Fair Trading).

Tenants should keep written records of any repayment plans, proof of repayments made and request updated rent ledgers.

Note: If you have an existing agreement to repay arrears or to waive or defer your rent payments due to COVID-19

– stick to it. These laws do not affect any such agreement you have with your landlord.

What is 'fair and reasonable'?

There are a number of things the Tribunal will consider, when deciding whether the making of a termination order is 'fair and reasonable'. These factors include but are not limited to:

- (a) the steps taken by the landlord and impacted tenant to negotiate a repayment plan,
- (b) the repayments made by the impacted tenant,
- (c) the nature of any financial hardship experienced by the landlord or impacted tenant,
- (d) the availability & affordability of reasonable alternative accommodation for the impacted tenant, and
- (e) any special vulnerability of the impacted tenant.

Negotiation

If you have accrued arrears over the Moratorium Period and do not already have a repayment plan, you should negotiate one with your landlord and use the formal arrears repayment negotiation process by Fair Trading NSW – an outline of the process is here: tenants.org.au/covid19/rent-negotiations

The formal arrears repayment negotiation process is an administrative intervention to facilitate good faith negotiations for repayment plans between landlords and tenants.

Tenants may attempt to negotiate with their landlord privately before accessing the formal negotiation process. In general, 'good faith' negotiation means parties dealing honestly, and fairly with one another to genuinely work towards a mutually beneficial agreement in a timely manner, and should involve a two-way flow of information between parties.

The formal arrears repayment negotiation process through NSW Fair Trading should be utilised by tenants, especially when landlords are not being cooperative, reasonable or negotiating in good faith. Where tenants do not have an existing repayment plan, landlords must participate in formal negotiations before attempting to evict an 'impacted tenant'.

NSW Civil & Administrative Tribunal (NCAT)

If a landlord or agent has applied to the Tribunal for an eviction hearing, you will receive a 'Notice of Conciliation and Hearing' with the date, time and place of the hearing.

If your case is in the Tribunal, see the financial impact statement form here: https://ncat.nsw.gov.au/content/dam/dcj/ctsd/ncat/documents/forms/ccd_form_tenancy_financial_statement_covid19.docx

You should attend the hearing and take all letters, receipts and other evidence to support your case.

If you have a dispute with your landlord and you think they may have breached your tenancy agreement, consider making your own application to the Tribunal for an independent, legally binding decision. Please see *Factsheet 11: NSW Civil and Administrative Tribunal* at tenants.org.au.

The Tribunal has temporarily adjusted its practices and procedures in response to COVID-19. Currently, all stages of hearings are being conducted over the phone, audio-visual link, or **on the papers** (this means a decision will be made based on written evidence filed by parties, without verbal evidence or oral submissions). If you require assistance with your Tribunal matter you can contact your Local Tenants' Advice and Advocacy Service for advice: tenants.org.au/ncatadvice

Ending your tenancy

Tenants may consider ending their tenancy for a number of reasons, for example: if they do not fit within the COVID-19 'impacted tenant' criteria; they have not been able to negotiate a repayment plan, they cannot afford to stay in the premises, or for other reasons.

If tenants are in a periodic agreement (i.e. an ongoing agreement) they can end their tenancy by giving a minimum of 21 days' notice, and leaving by the vacate date in the notice. See also *Factsheet 9: You want to leave* at tenants.org.au.

If tenants are in a fixed-term agreement (i.e. the fixed-term tenancy agreement has not yet expired) tenants may have to pay a break fee or compensation to the landlord for breaking the tenancy agreement early. See *Factsheet 16: Ending a fixed-term tenancy early*.

Tenants may also transfer their legal liability under the tenancy to someone else, but they must do so in writing, and with the landlord's written consent. See *Factsheet 18: Transfer and Sub-letting*.

Tenancy database listings

'Impacted tenants' are protected from being listed on a tenancy database ('blacklisted') for rent arrears or ending a tenancy if:

1. the breach of the residential tenancy agreement arose only from a failure to pay rent or charges, and
2. at the time of the breach, the person was an 'impacted tenant'.

It is important for impacted tenants to ensure that their landlord is aware that they are impacted tenants to prevent being listed on a tenancy database.

No grounds terminations – periodic agreement

If you have accrued arrears during the Moratorium Period, your landlord may not circumvent the protections outlined above by giving you a no-fault termination notice under section 85 of the *Residential Tenancies Act 2010*. Such action is prohibited for 6 months, unless the landlord can demonstrate to the Tribunal that it is fair and reasonable.

Access to your property; moving house

The restrictions on the number of people allowed in a residential premises continually change to reflect the NSW Government public health orders.

If a real estate agent is engaged by a landlord to sell or lease a property, that agent must ensure that an auction, open house or other inspection or viewing of the property is conducted in compliance with a relevant COVID-19 Safety Plan. COVID-19 Safety Plans are used by real estate agencies and other businesses to ensure compliance with government health and safety guidelines during COVID-19. See also <https://www.tenants.org.au/covid19/access>

More information

- Renters' Guide to COVID-19: tenants.org.au/covid19
- Get advice from your local Tenants Advice and Advocacy Service (see phone numbers below)
- Tenants Union advice line: **1800 251 101**
- NSW Fair Trading: **13 32 20**
- Link2Home (for people who are homeless or at risk of becoming homeless): **1800 152 152**

Infosheet updated April 2021

For free tenancy advice, call your local Tenants Advice and Advocacy Service:

SYDNEY:

• Eastern	9386 9147
• Inner	9698 5975
• Inner West	9559 2899
• Northern	9559 2899
• Southern	9787 4679
• South West	4628 1678
• Western	8833 0933

REGIONAL:

• Blue Mountains	4704 0201
• Central Coast	4353 5515
• Hunter	4969 7666
• Illawarra Sth Coast	4274 3475
• Mid Coast	6583 9866
• Northern Rivers	6621 1022
• Northwest NSW	1800 836 268
• Southwest NSW	1300 483 786

ABORIGINAL:

• Sydney	9833 3314
• West NSW	6881 5700
• South NSW	1800 672 185
• North NSW	1800 248 913

WEBSITE: tenants.org.au

NSW FAIR TRADING: 13 32 20

This factsheet is intended as a guide to the law and should not be used as a substitute for legal advice. It applies to people who live in, or are affected by, the law as it applies in New South Wales, Australia. ©Tenants' Union of NSW