

## COVID Impacted Tenants: Obligation to pay or not to pay back Rent

By Robert Yen

Recently many COVID-19 impacted tenants have been demanded to pay back the balance of the rent owed. In the preceding months, tenants and landlords were legally required to have rent negotiations to enable COVID -19 impacted tenants to maintain their tenancies. The failure to record the finer details of any agreements reach bear signification risks to tenants.

The change in the law on residential tenancies in NSW recognises the hardships faced by ‘impacted tenants’.<sup>1</sup> There is an indication that parliament may extend the eviction moratorium after 15 October 2020.<sup>2</sup> There is concern though that a lot more impacted tenants will incur significant amount of debt in the near future.

### Rent Waiver or Rent Deferral

An arrangement for a rent reduction can be made on the condition that the portion of the rent reduced would be paid back at a later date. This is rent deferral. Alternatively, a rent reduction can also be agreed on the basis of a rent waiver. The rent payable under the original residential tenancy agreement has changed to a lesser amount. A rent waiver places no obligation on the tenant to pay back the amount of rent reduced. A rent reduction agreement may also incorporate components of both elements of a rent waiver and a rent deferral component.

Fundamentally, distinguishing the difference between a rent waiver or a rent deferring is critical. Those critical factors will determinate whether a tenant is liable to pay back rent owed or not.

### Rent Arrears

A tenant who fails to pay rent is in breach of the residential tenancy agreement. Assuming that a rent reduction arrangement is a rent waiver is both unwise and dangerous. The payment of rent is an essential term of the residential tenancy agreement.<sup>3</sup>

Without totally removing their right to terminate tenancies for rent arrears, the law requires landlords to engage in rent reduction discussions with their tenants on the basis of good faith before seeking to terminate the tenancy.<sup>4</sup>

NSW Fair Trading can facilitate formal processes for rent reduction negotiations with both landlords and tenants.<sup>5</sup> For the most part, however, it has been left up to landlords or their agents and tenants to work out arrangements.

The law allows landlords to seek orders at the NSW Civil and Administrative Tribunal (NCAT).<sup>6</sup> It is unlikely that NSW Civil and Administrative Tribunal (NCAT) will waive rent arrears for impacted tenants in these circumstance. NCAT does not have powers to so do.

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<sup>1</sup> *Residential Tenancies Act 2010* (NSW) s228B

<sup>2</sup> *Seven News*. 2020. Retrieved from <https://7news.com.au/news/health/covid-19-rent-relief-to-be-extended-in-nsw-c-1337795>

<sup>3</sup> *Residential Tenancies Act 2010* (NSW) s33(1).

<sup>4</sup> *Residential Tenancies Regulations*; clause 41C.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Residential Tenancies Act 2010*; s 187(1)(c).

### **Early Termination – failure to have good faith negotiations**

Early termination of the residential tenancy agreement is an option for tenants who are unsuccessful in their rent negotiations with their landlords. A key factor that NCAT will consider before granting terminating orders is whether the landlord failed to respond to a written request seeking rent reduction or the formal rent negotiation process by NSW Fair Trading.<sup>7</sup> This is a difficult situation but one that will save the tenants from incurring significant rent arrears.

### **Getting Help**

Inner West Tenancy Advice and Advocacy Service (IWTAAS) and the Northern Sydney Area Tenancy Service (NSATS) offer advice and assistance to tenants on all matters in residential tenancy disputes. Tenant's Advocates at IWTAAS and NSATS are available for further advice on rent waiver or rent deferral matters.

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<sup>7</sup> *Residential Tenancies Act 2010* (NSW) s228C(1).