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## **FACT SHEET 5**

# **COMMERCIAL LEASES AND COVID-19 – THE ACT AND REGULATIONS**

**16 JUNE 2020**

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## 1. INTRODUCTION

On 30 March 2020 the *Commercial Tenancies (COVID-19 Response) Act 2020 (Act)* came into effect.

On 7 April 2020 the National Cabinet Mandatory Code of Conduct was announced by the Federal Government (**National Code**).

On 29 May 2020 the State Government published the *Commercial Tenancies (COVID-19 Response) Regulations 2020 (Regulations)* enacting the State's version of the National Code (**Adopted Code**).

The purpose of this fact sheet is to confirm the now finalised scope, operation and application of the Act and Regulations enacting the Adopted Code.

## 2. COMMENCEMENT AND EXPIRY

### 2.1. Emergency Period

The Emergency Period means the period beginning on 30 March 2020 and ending on 29 September 2020 or such date otherwise prescribed by regulations.

### 2.2. The Act

The Act applies to the relevant parties during the Emergency Period.

### 2.3. Adopted Code

The Adopted Code applies to the relevant parties during Emergency Period. Its application is therefore backdated to 30 March and conduct in breach of the Code between 30 March and 29 May is subject to the requirements of the Act and the Adopted Code.

## 3. THE ACT

### 3.1. Who does the Act apply to?

The prohibitions and protections under the Act apply to those who are parties to a Small Commercial Lease.

### 3.2. What is a Small Commercial Lease?

Under section 3 of the Act, there are four categories of Small Commercial Leases:

1. A retail shop lease as defined in section 3(1) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985*; or [**Retail Shop Lease**]
2. A lease where the tenant owns or operates a small business and uses the land or premises that are the subject of the lease for the purpose of carrying on that business; or [**Small Business**]
3. A lease where the tenant is an incorporated association as defined in section 3 of the *Associations Incorporation Act 2015*; or [**Incorporated Association**]
4. Any other lease that is of a class prescribed by regulations. [**Prescribed Lease**]

### 3.3. Retail Shop Lease

The following definitions from the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (Retail Shops Act)* are relevant:

**retail shop lease** means a lease that provides for the occupation of a retail shop, unless —

(a) the retail shop —

- (i) has a lettable area that exceeds 1 000 square metres; and
- (ii) is not of a kind prescribed by the regulations for the purposes of this definition; or

(b) the lease is held by —

- (i) a listed corporation (within the meaning of the *Corporations Act 2001 (Commonwealth)* section 9) that would not be eligible to be incorporated as a proprietary company; or
- (ii) a subsidiary (within the meaning of the *Corporations Act 2001 (Commonwealth)* section 9) of such a corporation; or

(c) the lease is held by —

- (i) a body corporate whose securities are listed on a stock exchange, outside Australia and the external territories, that is a member of the World Federation of Exchanges; or
- (ii) a subsidiary (within the meaning of the *Corporations Act 2001 (Commonwealth)* section 9) of such a body corporate; or

(d) the lease is of a kind that is prescribed by the regulations as exempt from the operation of this Act;

- Regulations: 3AB (a) and (b) – leases held by a corporation listed outside of Australia not caught by the scope of the above (i.e. stock exchange that is not a member of the WFE).

**retail shop** means —

(a) any premises situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; or

(b) any premises not situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a retail business, but does not include any premises excluded by regulation;

**retail business** means —

(a) a business that wholly or predominantly involves the sale of goods by retail; or

(b) a specified business;

- Regulations: 3A – businesses relating to drycleaning, hairdressing, beauty therapy/ treatments, shoe repair, key cutting/ engraving and/ or sale/ rent or video tapes/ DVDs/ electronic games etc. are specified businesses.

**retail shopping centre** means a cluster of premises —

(a) 5 or more of which are used for the carrying on of a retail business; and

(b) all of which —

- (i) have, or upon being leased would have, a common head lessor; or

(ii) comprise lots on a single strata plan under the Strata Titles Act 1985, but, if the premises are in a building with 2 or more floor levels, includes only those levels of the building where a retail business is situated;

Accordingly, a Retail Shop Lease will exist where all of the elements in the below detailed test are satisfied.

#### **Test**

The business is:

- 1) Located in a retail shopping centre or is a retail business;
- 2) The lettable area of the premises is under 1000 square metres; and
- 3) The lease is not held by a listed corporation (in Australia or in a stock exchange outside of Australia that is a member of the World Federation of Exchanges) or subsidiary.

### **3.4. Small Business**

The Act refers to section 3(1) of the *Small Business Development Corporation Act 1983* for the definition of a small business. A lease where the premises is used to carry on a business that satisfies all of the below listed elements will constitute a Small Commercial Lease.

#### **Test 1**

The business is wholly owned and operated by an individual person or by individual persons in partnership, and the business:

- Has a relatively small market share of the relevant market;
- Is personally managed by the owner(s);
- Is not a subsidiary of a larger business or enterprise; and
- Does not form part of a larger business or enterprise.

OR

#### **Test 2**

The business is wholly owned and operated by proprietary company, and the business:

- Has a relatively small market share of the relevant market;
- Is personally managed by the directors of the company;
- Is not a subsidiary of a larger business or enterprise; and
- Does not form part of a larger business or enterprise.

The Small Business Development Commissioner may also deem a business a small business by regulations, but no such deemed small businesses currently exist in the relevant regulations.

### **3.5. Incorporated Association**

If the lease is held by a society, club, institution or body that has been incorporated under the *Associations Incorporation Act 2015* then it will constitute Small Commercial Lease.

### **3.6. Prescribed Lease**

No such lease has been prescribed by the regulations as at 2 June 2020.

### **3.7. How does the Act apply to Small Commercial Leases?**

If a tenant breaches their lease during the Emergency Period (via non-payment of rent or failure to carry on business in accordance with lease), a landlord must not:

- Evict the tenant.
- Terminate the lease.
- Charge interest on any unpaid rent.
- Draw down on security/ guarantee.
- Make a claim for damages.
- Exercise right of re-entry, possession, etc.
- Claim any remedy available to the landlord against the tenant at common law and under written law.
- Increase rent.

## **4. THE ADOPTED CODE**

### **4.1. Who does the Adopted Code apply to?**

The Adopted Code applies to Relevant Small Commercial Leases.

### **4.2. What is a Relevant Small Commercial Lease?**

A Relevant Small Commercial Lease is a Small Commercial Lease where the tenant is an **Eligible Tenant**.

An Eligible Tenant is a tenant whose business:

- Has a turnover of less than \$50 million in the FY ended 2019; and
- Qualifies for JobKeeper or has otherwise experienced a 30% decline in turnover during the Emergency Period.

The following should be noted:

- Franchises will be assessed at the franchisee level and groups will be assessed at the group level.
- A group will exist where the corporation operating the business is a related body corporate under section 50 of the *Corporations Act 2001*.
- There is no actual requirement that an Eligible Tenant actually be a participant in the JobKeeper program.

### **Test 1 – Business/ Franchisee**

The tenant is party to a Small Commercial Lease, and operates a business which:

- Is not subject to a Major Bank Levy;
- Is not an Australian government entity, local government entity or a sovereign entity;
- Has an annual turnover not exceeding \$50 million; and
- Has suffered a 30% decline in turnover as a result of the COVID-19 pandemic.

### **Test 2 - Groups**

The tenant is party to a Small Commercial Lease, and operates a business which:

- Is not subject to a Major Bank Levy;
- Is not an Australian government entity, local government entity or a sovereign entity;
- Is part of a group that has an aggregated turnover not exceeding \$50 million; and
- Has suffered a 30% decline in turnover as a result of the COVID-19 pandemic.

#### **4.3. How does the Adopted Code apply to Relevant Small Commercial Leases?**

##### **PROCEDURE:**

- The tenant **must** make a request for rent relief in writing.
- This request **must** include:
  - A statement by the tenant confirming eligibility criteria (i.e. they are an eligible tenant under a small commercial lease); and
  - Evidence sufficiently confirming the above e.g. information generated from an accounting system.
- Landlords **must** offer rent relief in writing within 14 days or such period otherwise agreed between the parties, and the offer must comply with the principles detailed below.
- Subsequent negotiations must be in accordance with the principles detailed below.
- Any agreement for rent relief arising from subsequent negotiations is given effect by lease variation or any other written agreement.

##### **FURTHER AGREEMENTS:**

- If the financial circumstances of the tenant **materially change** after agreement has been reached, the tenant is entitled to make a further request for rent relief in accordance with the procedure detailed above.
- If the tenant makes a further request for rent relief, the landlord must comply with the procedure detailed above.

## EXISTING AGREEMENTS:

- If the landlord and tenant have varied a lease prior to the publication of the Adopted Code (i.e. **after 30 March but before 29 May**), and the Tenant considers the existing agreement to be less favourable than it would be under the Adopted Code, the tenant may make a request for rent relief in accordance with the procedure detailed above.
- If such a request is made, the landlord must comply with the procedure detailed above.

## PRINCIPLES:

**OVERARCHING** The tenant and landlord **must**:

### OBLIGATIONS:

- Cooperate;
- Act reasonably and in good faith;
- Act in an open, honest and transparent manner; and
- Must provide each other with sufficient and accurate information that is reasonable to provide in the context of negotiations. The parties must not make 'onerous demands' for information.

## RENT RELIEF:

The following principles apply to offering and negotiating rent relief:

- The landlord **must** offer a proportionate reduction, made up of waivers and deferrals; and
- At least 50% of the proportionate reduction **must** consist of waivers.

An offer of rent relief **must** provide for more than a 50% waiver if:

- Failure to provide more than a 50% waiver would compromise the tenant's capacity to fulfil their obligations under the lease; and
- The landlord has the financial capacity to provide this.

In relation to deferrals, the **landlord**:

- **Must** not request payment until either the day the Emergency Period ends or the expiry of the term of the lease (whichever is earlier);
- **Must** amortise the payment over the balance of the term of the lease or a period of not less than 24 months (whichever is greater); and
- **Must** offer the tenant an extension of the term of the lease for a period equivalent to the period for which the rent is deferred on the same terms under the lease immediately before the Emergency Period, **unless**:
  - The lease is a sublease, and the extension would be inconsistent with the head lease; or

- The extension would be inconsistent with any contract/ agreement for lease already entered into by the landlord with a person other than the tenant.

**OUTGOINGS/  
EXPENSES:**

The landlord **must**:

- Consider waiving recovery of outgoings/ expenses payable by the tenant for the part of the Emergency Period that the tenant is unable to conduct their business.

The landlord **may**:

- Reduce provision of services if reasonable in the circumstances or in accordance with reasonable request of the tenant.

If outgoings/ expenses are reduced, the Landlord:

- **Must** not require the tenant to pay the balance or any amount greater than their proportional share of the reduced amount; and
- **Must** reimburse the tenant as soon as possible if they have already paid an amount greater than their proportional share of the reduced outgoings/ expenses.

**SUBLEASES:**

If there is a sublease, and the tenant under the head lease is provided with rent relief, the tenant of the head lease, as landlord of the sublease, must pass on the benefit to the tenant under the sublease.

## 5. CONCLUSION

For all your queries and concerns about the impact of COVID-19 on leases, call Janette Tavelli (0417926155), Michael Sonter (0419 900 299), or another team member on 08 9218 8588.

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