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**FACT SHEET 7**  
**COVID-19 AND LEASES - UPDATE**  
**18 September 2020**

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## 1. Introduction

The purpose of this Fact Sheet is to provide an update on the impact of the recent extension to the Emergency Period as well as guidelines for approaching disputes and non-compliance in light of the extended Emergency Period.

## 2. Extension of Emergency Period

On 10 September 2020, the State Government announced the extension of the Emergency Period from 29 September 2020 to 28 March 2021.

From 30 September, the *Commercial Tenancies (COVID-19 Response) Act 2020 (Act)* and *Commercial Tenancies (COVID-19 Response) Regulations 2020 (Code)* will continue to apply 'only to those tenants who are able to demonstrate ongoing financial hardship as a result of the pandemic.'

These changes will be implemented via regulations.

Ongoing updates can be accessed via <https://www.smallbusiness.wa.gov.au/blog/faqs-covid-19-commercial-tenancy-changes> and <https://www.commerce.wa.gov.au/announcements/wa-extend-covid-19-commercial-tenancy-laws>.

### 2.1. What does this mean for landlords and rent relief?

The regulations have not yet been released by the State Government so at this stage the proposed changes remain unconfirmed. However, we expect the effect of the new changes will mean:

- Tenants will have to reconfirm and prove their eligibility for rent relief from 30 September 2020. The Emergency Period will not equate to an automatic extension of a pre-existing agreement for rent relief.
- Tenants who can demonstrate ongoing financial hardship as a result of the pandemic and who are eligible for JobKeeper will be entitled to rent relief.
- Landlords are prohibited from taking prohibited actions against **eligible** tenants (including exercising rights of termination and eviction) during the Emergency Period for defaults within the Emergency Period.

### Eligible tenants

In order to be **eligible**, the tenant must provide the Landlord with details of loss of turnover on an ongoing basis (month by month) in order to assess and adjust rent relief that is proportionate to a tenant's reduction in turnover.

### 2.2. What should landlords consider ahead of 29 September 2020?

The Code currently requires repayment of deferred rent to commence after the Emergency Period and be amortised over a period of at least 24 months or the balance of the term of the lease (whichever is greater). If the lease has less than 24 months remaining, the landlord must offer the tenant an extension of the lease for the period

of deferred payments. The extension of the lease must be on the same terms and conditions that applied under the small commercial lease immediately before the Emergency Period.

If the tenant is eligible after 29 September 2020 and, as at 28 March 2021, there is less than 24 months left on the lease, the landlord must extend the small commercial lease until at least 30 March 2023 (unless otherwise agreed or otherwise inconsistent with any head lease or agreement with any third party).

This provides landlords with an opportunity to enter into a lease for a further term, with deferred payments paid over the balance of the term of the new lease.

### **2.3. What should landlords do ahead of 29 September 2020?**

At present, there is no positive obligation on the landlord to approach the tenant to discuss or continue the arrangement after 29 September, 2020. Pending publication of the new regulations, landlords may wish to contact tenants and seek confirmation/ proof of their continued eligibility under the JobKeeper Programme.

### **2.4. What does this mean for prohibited actions?**

The Department of Mines, Industry Regulation and Safety has indicated that the protections against prohibited actions that applied to all small commercial leases under the Act will be changed “so that these protections apply only to eligible tenants” from 30 September 2020 until 28 March 2021.

This means that from 30 September 2020 onwards, if a tenant is not eligible for rent relief under the Code and breaches their lease during this time, the landlord will be able to take prohibited actions against the tenant such as exercising their rights of termination and eviction.

At this stage, it remains unconfirmed whether a landlord will be able to take prohibited action against a tenant who committed a breach during the initial Emergency Period while they were an eligible tenant, but is no longer an eligible tenant after 29 September and has failed to remedy the breach.

### **2.5. What about new requests for rent relief?**

Tenants can continue to request rent relief (provided eligibility and other requirements under the Code are met) until 28 March 2021.

### **2.6. What about assistance for landlords?**

The land tax assistance program has been extended in line with the Emergency Period extension. At this stage, the eligibility requirements for the program remain unchanged.

More information can be accessed via <https://www.smallbusiness.wa.gov.au/blog/land-tax-assistance-landlords>.

## **2.7. What about new leases entered into during the Emergency Period?**

At this stage, the Code and the Act apply to eligible leases and tenants during the Emergency Period. There is no express provision for leases entered into during the Emergency Period.

It is unclear whether the new regulations will clarify whether the Code and the Act are applicable to leases entered into during the Emergency Period.

## **3. Disputes and Non-Compliance.**

The below are examples of common disputes that may arise during the Emergency Period and the options available for resolution of the dispute.

### ***3.1. Parties unable to reach agreement for rent relief under the Code.***

Examples of this scenario include breakdown in negotiations, failure to provide sufficient and accurate information and failure to confirm eligibility.

The parties must follow the dispute resolution procedure outlined in paragraph 4.

### ***3.2. Tenant is not an eligible tenant and is in default of its obligations under the Lease.***

The tenant is not under the protections of the Code. The Landlord may take a prohibited action against the tenant. In the Emergency Period, the preferred option for a Landlord claiming, for example non-payment of rent would be an application to the SBDC/SAT.

### ***3.3. Eligible tenant defaults under agreement for rent relief during the Emergency Period.***

The landlord cannot take prohibited action against the eligible Tenant during the Emergency Period. The landlord can:

- Contact the tenant and seek information to substantiate whether the tenant has had a material change in circumstances or experienced a further decline that renders them unable to satisfy obligations under the agreement for rent relief under the Code.
  - If the tenant obliges to this request and:
    - cannot substantiate an adverse and material change in circumstances; the landlord can apply to the SBDC or SAT for resolution (**see paragraph 4**) or commence a prohibited action against the tenant on expiry of the Emergency Period on 28 March 2021.
    - can substantiate an adverse and material change in circumstances, the landlord and tenant should make attempts to renegotiate the agreement for rent relief under the Code.
  - If the tenant does not oblige this request:

- The landlord may issue a default notice, which become enforceable and allow for the commencement of proceedings on expiry of the Emergency Period in on 28 March 2021.
- Alternatively, the landlord can apply to the SBDC/ SAT for orders requiring payment and/ or allowing the landlord to commence a prohibited action against the tenant during the Emergency Period (**see paragraph 4**).

**3.4. Eligible tenant was in default well before the Emergency Period.**

This dispute is outside the scope of the Code and the Act. It is unlikely the tenant will be entitled to the protections under the Act in respect of that specific breach occurring outside of the Emergency Period. The landlord may take prohibited actions against the tenant during the Emergency Period.

**3.5. Eligible tenant breaches lease during Emergency Period but it is unrelated to COVID-19.**

The scope of the Act extends to breaches induced by COVID-19 e.g. non-payment of rent caused by the economic impact of COVID-19, failing to carry on business due to mandatory COVID-19 closures, etc. The Act will not apply to breaches during the Emergency Period that are outside of its scope, and the landlord may take prohibited action in those circumstances.

<b>Emergency Period breaches within the scope of the Act (i.e. prohibited action <u>cannot</u> be taken against these breaches during the Emergency Period)</b>	<b>Emergency Period breaches outside of the scope of the Act (i.e. prohibited action <u>can</u> be taken in response to the breaches during Emergency Period)</b>
<ul style="list-style-type: none"> <li>• Failure to pay rent or any other money payable under lease.</li> <li>• Reduction/ amendment of trading hours;</li> <li>• Act or omission of tenant during the Emergency Period required by written law in response to the COVID-19 pandemic.</li> </ul>	<ul style="list-style-type: none"> <li>• Abandonment of premises;</li> <li>• Breach of permitted use of premises; and</li> <li>• Any other breach of covenant/ term/ condition of the lease that does not fall within the scope of the protected breaches under the Act.</li> </ul>

**4. Dispute Resolution.**

All requests for dispute resolution under the Code and Act must be made before expiry of the Emergency Period.

**Stage 1: Small Business Development Commission (SBDC)**

The landlord or tenant may request alternative dispute resolution (mediation) with the SBDC (s 18 – Act). This is a compulsory pre-requisite to a SAT application, unless neither of the parties make an application to the SBDC and both parties consent to proceed straight to SAT application (s 16 – Act).

Alternatively if the SBDC considers the matter to be inappropriate for alternative dispute resolution or that it is otherwise unreasonable for the parties, the SBDC may issue a section 19 certificate which will allow the parties to proceed to a SAT application.

- An application for assistance can be made to the SBDC over the phone, via email or in person (if COVID-19 gatherings/ social distancing guidelines allow) (**no fee**).
- An adviser will provide general guidance before referring the parties to dispute resolution, where a case manager is appointed (**no fee**).
- If case management does not resolve the dispute, a referral for mediation will be issued.
- One session typically runs for a day and is subsidised (**fee: \$125**).

If the dispute is not resolved at this stage, the SBDC must issue a section 19 certificate, following which the parties may proceed to filing a SAT application.

### **Stage 2: State Administrative Tribunal (SAT)**

Following receipt of a section 19 certificate (or agreement by the parties to bypass the SBDC) either party may apply to SAT to have the dispute determined.

SAT has broad powers to make any orders it considers necessary to resolve the dispute and give effect to the Code and Act, including orders for the waiver or recovery of rent payable under a lease and orders terminating the lease.

SAT can also make orders that the matter be dealt with via compulsory conference, further mediation processes etc.

In resolving a dispute, SAT must consider:

- Financial impact of COVID-19 pandemic on the tenant's business;
- The tenant's capacity to meet their obligations;
- Landlord's financial capacity; and
- Principles of proportionality and fairness and any other Code Principles.

SAT will also consider any comments made by the Commissioner in their section 19 certificate (if applicable).

- The application may be completed and filed online via <https://www.justice.wa.gov.au/SATeForm/SelfAssessment.aspx?Act=198&Section=1085>.
- The section 19 certificate, lease and any notices and documents issued during the Emergency Period must be attached to the application.
- Filing fee: \$0 (half day hearing)

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| <ul style="list-style-type: none"><li>• Following filing of the application, the applicant will be required to serve the application on all relevant parties and a directions hearing will be listed as soon as possible.</li></ul> |
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## 5. Effect of Expiry of the Emergency Period

Unless again extended, the protections and prohibitions provided for by the Code and the Act will expire on 28 March 2021.

The effect of this is considerable.

- The tenant must commence repayment of deferred rent;
- If the remaining term of the lease is less than 24 months, the landlord must offer to vary the lease to allow repayment of the deferred rent to be amortised over at least 24 months;
- Unless the landlord and tenant agreed to rent relief beyond the Emergency Period, the landlord is no longer obliged to negotiate rent relief and the terms of the pre-existing lease can be enforced;
- The parties will not be able to access the dispute resolution framework provided for by the Code and the Act; and
- The landlord's right to take action against breach or default is no longer suspended, and the landlord may exercise any right or remedy against the tenant for any default to breach during the Emergency Period that remains unremedied.

## 6. 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.

*DISCLAIMER: This Fact Sheet was prepared by Integra Legal and we have taken great care to ensure the accuracy of the contents. However, it is written in general terms and you are strongly recommended to seek specific professional advice before taking any action based on the information it contains.*