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## **FACT SHEET 8**

### **COVID-19 AND LEASES – NEW REGULATIONS**

30 September 2020

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## 1. INTRODUCTION

On 26 September 2020, the State Government amended the *Commercial Tenancies (COVID-19 Response) Regulations 2020* (**Regulations**) to provide for an extension of the Emergency Period and amendments to eligibility and obligations under the regime and the *Commercial Tenancies (COVID-19 Response) Act 2020* (**Act**) thereafter.

The purpose of this fact sheet is to summarise the changes and confirm the obligations and responsibilities of landlords and tenants during the extended Emergency Period following release of the updated Regulations.

## 2. DEFINITIONS

**Emergency Period** means the period from 30 March 2020 until 28 March 2021 (extended from 29 September 2020).

**Eligible Tenant** means a tenant under a Small Commercial Lease (as defined in the Act) who is eligible for rent relief under the Regulations during the Emergency Period or part thereof.

**Small Commercial Lease** means a retail shop lease, a lease where the tenant owns or operates a small business, a lease where the tenant is an incorporated association or any other lease prescribed by the Regulations.

## 3. ELIGIBILITY AND OTHER REQUIREMENTS

### Extending Rent Relief Agreements

If an agreement for rent relief expires on or before 29 September 2020, tenants may make a further request for rent relief per the usual process subject to new eligibility and reporting requirements detailed below.

If an agreement for rent relief applies generally to the Emergency Period it will continue to apply, subject to new eligibility and reporting requirements detailed below.

### Small Commercial Lease

The Regulations have prescribed a new category of Small Commercial Leases, being any corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) which is using land or premises that are subject of a commercial lease.

### Turnover Test

The Regulations now expressly confirm that turnover must be calculated on a group level and that a group will exist where there are related bodies corporate as defined in section 9 of the *Corporations Act 2001* (Cth).

### Eligible Tenants

A tenant under a Small Commercial Lease will be an Eligible Tenant during the period beginning on 28 September 2020 and ending on 3 January 2021 if:

- The tenant qualifies for JobKeeper during this period; or
- The tenant does not qualify for JobKeeper during this period but satisfies the relevant turnover test for the months of July, August and September 2020.

A tenant under a Small Commercial Lease will be an Eligible Tenant during the period beginning on 3 January 2021 and ending on 28 March 2021 if:

- The tenant qualifies for JobKeeper during this period; or
- The tenant does not qualify for JobKeeper during this period but satisfies the relevant turnover test for the months of October, November and December 2020.

## Rate of Rent Relief

Unless otherwise agreed by the landlord and the tenant, rent relief must be adjusted from time to time (but not more frequently than monthly) during the Emergency Period in accordance with variations in reduction in the tenant's turnover.

The Regulations provide the following example of this:

*... the tenant was offered rent relief of 60% of the rent payable. If the tenant's reduction in turnover has decreased to 40%, the rent relief should be adjusted downwards by reference to the 40% figure.*

## Obligation for Sufficient and Accurate Information

The Regulations have clarified what 'onerous demands' are by providing the following examples:

1. *A demand to provide future cash flow projections.*
2. *A demand to provide balance sheets, or profit and loss or year to date financials.*
3. *A demand to provide bank balance details or statements.*
4. *A demand that financial information be verified, examined, assured, audited or provided by a third party such as an accountant.*

## Cessation of Eligibility

Where a tenant ceases to be an Eligible Tenant, the Code continues to apply to matters relating to the period during which the tenant was an Eligible Tenant.

## 4. PROHIBITED ACTIONS, BREACH AND INSOLVENCY

Prior to 30 September 2020, under the Act, landlords cannot take 'Prohibited Action' against a tenant under a Small Commercial Lease during the Emergency Period.

**Prohibited Action** means:

- Any right that can be exercised by a landlord in response to breach by tenant if that breach consists of failure to pay money payable under the lease, and any right that can be exercised by a landlord in response to a tenant's failure to carry on business and conduct trade in accordance with the lease.
  - e.g. termination, eviction, damages, forfeiture, possession, requiring payment of interest on unpaid rent, recovery of security, demand on bank guarantee, etc.
- Rent increases other than rent determined by turnover.

Any Prohibited Action that was commenced in the period between 30 March 2020 and 23 April 23 (**Relevant Period**) is stayed/ suspended until the end of the Emergency Period.

## Prohibited Actions On or After 30 September 2020

From 30 September 2020, a landlord can take Prohibited Action against a tenant under a Small Commercial Lease if:

### Category 1

- The tenant is insolvent.<sup>1</sup>

### Category 2

- The tenant is not an Eligible Tenant when the Prohibited Action is taken;
- The Prohibited Action is taken on grounds of breach by tenant during the Emergency Period;
- The breach is a failure to pay rent or any other amount of money payable under the lease;
- The breach is not subject of a dispute initiated under the Act;
- The tenant has not made a request under the Regulations for rent relief in relation to any unpaid money to which the breach relates; and
- The landlord has not granted the tenant a waiver, deferral or reduction in respect of any unpaid money to which the breach relates.

### Category 3

- The tenant is not an Eligible Tenant when the Prohibited Action is taken;
- The Prohibited Action is taken on grounds of breach by tenant during the Emergency Period;
- The tenant is not an Eligible Tenant when the breach occurs; and
- The breach relates to the land or premises that are the subject of the lease, or the business carried on there, not being open for business at hours or times specified in the lease.

However, it should again be noted that the Regulations will apply to matters arising during any time where tenant is an Eligible Tenant i.e. where a tenant ceases to be an Eligible Tenant, the Regulations will still apply to breaches by the tenant when they were an Eligible Tenant.

### **Rent Increases**

If a tenant is no longer an Eligible Tenant on or after 30 September 2020, rent can be increased, or any rent increase commenced during the Relevant Period and subsequently stayed/ suspended is reinstated on the date the tenant is no longer an Eligible Tenant.

### **Prohibited Actions Commenced During the Relevant Period**

A stay/ suspension of a Prohibited Action commenced during the Relevant Period (per s 12 of the Act) ceases in the following circumstances:

### Category 1

- If on 30 September 2020, the tenant is insolvent, on that day; or
- If after 30 September 2020, but before the end of the Emergency Period, the tenant becomes insolvent, on that day.

### Category 2

- If on 30 September 2020, the tenant is no longer an Eligible Tenant, on that day; or
- If after 30 September 2020, but before the end of the Emergency Period, the tenant is no longer an Eligible Tenant, on that day.

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<sup>1</sup> Note *Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020* which have temporarily suspended the ordinary operation of insolvency laws in Australia until **31 December 2020**.

## 5. IMPACT ON LANDLORDS

The combined impact of the above detailed changes is as follows:

- Tenants will need to confirm and substantiate eligibility on 29 September 2020 and again on 3 March 2021.
- While landlords and tenants have to agree on a rate of rent relief, this figure is no longer binding and can be adjusted up to once a month in line with fluctuations in turnover.
- Landlords will be able to take Prohibited Action against tenants in the following circumstances:
  - If the tenant was never an Eligible Tenant;
  - If the tenant ceases to be an Eligible Tenant;
  - If the tenant is insolvent.

## 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.*

