



FACT SHEET 9

COVID-19 AND LEASES

18 January 2021

Integra Legal
Suite 22, Level 2, Trinity Commercial Building
72 St Georges Terrace
PERTH WA 6000

1. INTRODUCTION

This fact sheet follows Fact Sheet No 8 in relation to leases and COVID-19.

The purpose of this fact sheet is to address some of the issues arising from the extension of the Emergency Period and amendments to the *Commercial Tenancies (COVID-19 Response) Regulations 2020 (Regulations)* and the *Commercial Tenancies (COVID-19 Response) Act 2020 (Act)*.

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

If the tenant is eligible after 29 September 2020, do they remain eligible until the end of the Emergency Period? How frequently can eligibility be assessed?

Eligibility can only be assessed quarterly. A tenant will only be an Eligible Tenant for the quarter in which their eligibility was assessed, meaning it does not extend until the end of the Emergency Period. Accordingly, eligibility for any existing agreement for rent relief can be assessed on 28 March 2021 (noting that this is the current end date of the Emergency Period).

However, turnover can be assessed up to once a month to determine the appropriate amount of relief.

If a tenant that was previously ineligible is assessed to be an Eligible Tenant for this period, they may make a written request to the landlord for rent relief. Landlords are required to negotiate in accordance with the Regulations.

4. ISSUES FOR LANDLORDS

What are my rights and obligations if the tenant is insolvent or bankrupt?

Landlords can take prohibited actions against a tenant that is insolvent or bankrupt after 31 December 2020.

From 29 September 2020, the Act no longer protects insolvent or bankrupt tenants that are party to a Small Commercial Lease. Additional changes by the Federal Government to the *Corporations Act 2001 (Cth)* have effectively prevented tenants from declaring bankruptcy and reduced the scope and impact of insolvency laws. In late September, these protections were extended to 31 December 2020.

How do I approach rent reviews and rent increases after the Emergency Period or after the tenant is no longer eligible?

Scenario 1: A rent increase was applied between 30 March and 23 April that was subsequently suspended for the duration of the Emergency Period as a result of the Act.

After 29 September, the rent increase can resume on cessation of the tenant's eligibility or after the Emergency Period ends (whichever is earlier). The amount of increased rent accrued during the period in which it was suspended cannot be recovered.

Scenario 2: The rent review period pursuant to the lease came and went during the Emergency Period and at a time when the tenant was an Eligible Tenant.

The prohibition on rent increases under the Act applies at the time 'when the rent is increased'. This means that the protections and prohibitions under the Act and the Regulations will continue to apply to a tenant in respect when they were eligible in the event they subsequently become ineligible during the Emergency Period. This means that a landlord cannot apply a rent increase pursuant to a rent review period provided for in the lease that has already passed and must wait until the next rent review period under the lease.

When can I issue a default notice and/ or terminate?

Scenario 1: Where a tenant that is an Eligible Tenant defaults on rent relief payments.

A default notice may be issued on an Eligible Tenant that is not meeting rental payments under an agreement for rent relief. However, forfeiture and termination of a lease are prohibited actions under the Act. Therefore, where an Eligible Tenant does not meet rent relief repayments the lease may not be terminated until the conclusion of the Emergency Period on 28 March 2021.

An overview of the process can be found here:

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/covid_19_landlord_breach_process_a.pdf>

Scenario 2: Where a tenant who defaulted on rent relief payments as an Eligible Tenant later becomes an ineligible tenant during the Emergency Period.

A default notice may be issued on the tenant for the rent relief payments that were not met. However, the lease may not be terminated on account of defaults by the tenant while an Eligible Tenant until the conclusion of the Emergency Period.

Scenario 3: Where an ineligible tenant defaults on rent payments during the Emergency Period.

Where a tenant is not an Eligible Tenant and they default on rent payments a landlord may issue a default notice. In accordance with the relevant restrictions the landlord may then issue notice to terminate the lease.

An overview of the process can be found here:

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/covid_19_landlord_breach_process_b.pdf>

Please note the above commentary is based on the current rules and regulations. The State Government is empowered to alter the expiry date of the Emergency Period and may or may not introduce transitional regulations on cessation of the Emergency Period.

Are there any other options available when issues arise?

In many circumstances, the landlord or tenant may apply to the State Administrative Tribunal (SAT) for resolution of the dispute. Please see Fact Sheet 7.

What are my rights and obligations in relation to deferred payments?

As has already been explained our previous fact sheets, where rent has been deferred and there is less than 24 months remaining on the balance of the lease on conclusion of the Emergency Period, the landlord is obliged to offer the tenant an extension of the lease to allow the deferred payments to be

properly amortised over a period of at least 24 months. This extension must be offered on the same terms that applied to the lease immediately before the Emergency Period.

The landlord and tenant can contract out of this requirement and it should be noted that the landlord is not bound by this requirement where there is already an agreement in place for the next tenant or where there is sub-lease arrangement in place.

Landlords and tenants need to carefully consider whether an extension will be necessary, and if so, on what terms, well ahead of the expiry of the Emergency Period.

5. RESOURCES

Further information, updates and frequently asked questions can be accessed via: <https://www.commerce.wa.gov.au/consumer-protection/commercial-tenancies-covid-19-response>.

6. RECENT CASE LAW DEVELOPMENTS

6.1. Western Australia

As of 27 November 2020, approximately 84 applications under the Act have been received by SAT.

McMillan Investments Pty Ltd v Edensilk Pty Ltd [2020]

The tenant sought rent relief under the Act and the Code from the landlord in June 2020. In September 2020, the lease expired before an agreement for rent relief could be reached and while negotiations were ongoing. As a result, the landlord resisted any claims for rent relief from the tenant on the basis that the tenant was no longer a party to any lease under which a dispute under the Regulations could arise. The tenant continued to occupy the premises.

The Tribunal found that the lease had not effectively expired or been terminated because of the operation of the COVID-19 regime to the circumstances. If a tenant's lease expires without rent relief having been successfully negotiated, the Tribunal retains jurisdiction to hear a dispute under the Regulations if the application was made prior to expiry of the lease.

However, the landlord offered the tenant an extension of the lease for a period of 6 months, which the tenant rejected. As a result, the Tribunal found that the lease expired through no fault of the landlord, who ultimately met their obligations under the Act.

6.2. Other States

All Australian states have introduced similar commercial tenancies legislation and regulations to mitigate the impact of COVID-19. Disputes arising from these are helpful in predicting the scope and application of WA Act and Regulations.

The recent NSW Supreme Court decision of *Sneakerboy v Georges Properties Pty Ltd (No 2)* NSWSC 1141 (**Sneakerboy**) is the first instance across all State and Territories that a Supreme Court has applied COVID-19 tenancy relief legislation. The case follows an earlier decision granting relief against forfeiture to commercial tenant Sneakerboy following termination of its lease. It offers insight into how a Western Australian court may rule on the COVID-19 tenancy regime.

Key Findings

- **Reasonable recovery period:** The Court accepted that a reasonable recovery period should be no less than six months after the COVID-19 pandemic period. Subsequent reasonable recovery period will likely be determined on the facts of each case.

- **Post-repeal of legislation:** So long as rent relief negotiations are concluded prior to the repeal of the COVID-19 Leasing Regulation, the negotiated rent relief could continue for the reasonable recovery period.
- **Appropriate period of turnover comparison:** Where the legislation requires businesses to find a turnover comparison period, those with seasonal trade may not necessarily require a 'like for like' monthly comparison. The court emphasised the requirement of 'good faith commercial negotiations', suggesting flexibility on this point.
- **Prohibition on 'prescribed actions':** The court held that the prohibition on prescribed actions could operate after the expiry of the prescribed period. This rule will likely apply to Western Australia's COVID-19 Regime, and our equivalent prohibition on prohibited actions during the emergency period.
- **Timing of negotiations:** Any negotiations not finalised may be affected by the repeal of the COVID-19 Regulation and the repeal of the obligation to negotiate.

7. CONCLUSION

For all your queries and concerns about the impact of COVID-19 on leases, call Janette Tavelli (0417 926 155), 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.