COVID-19: LEASES (COMMERCIAL AND RETAIL) COVID-19 EMERGENCY RESPONSE DECLARATION 2020 - ACT

Date: 25 May 2020

**This information is accurate as of 4:00 P.M. on 20 May 2020 and is subject to change as this situation evolves.*

On 7 April 2020, the National Cabinet issued a Mandatory Code of Conduct (the Code), which imposes a set of good faith leasing principles that apply to certain commercial tenancies experiencing financial stress or hardship because of the COVID-19 pandemic. You can read more about the Code here.

On 11 May 2020, the ACT Government announced its regime to implement the Code via the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020* (the Declaration), which introduces temporary measures for commercial tenants in response to the COVID-19 pandemic.

The Declaration aims to implement the principles included in the Code, with emphasis on the requirement for parties to negotiate in good faith when determining changes to leasing arrangements.

In addition to the Declaration, the ACT Government has issued guidelines for tenants and landlords to consider when undertaking negotiations, and provides some insight into the intent behind the Declaration (Guidelines). While not legally binding, the Guidelines are likely to be of assistance in any negotiation between the parties, and any subsequent mediation process conducted by the Local Business Commissioner.

In this article, we will discuss:

- When does the Declaration apply?
- Who is covered under the Declaration?
- What are the key provisions of the Declaration?
- The relationship between the Declaration and the Rates Relief Package announced for landlords.

WHEN DOES THE DECLARATION APPLY?

The Declaration will apply on and from 1 April 2020 until the day on which the COVID-19 emergency in the ACT is no longer in force or such later day as notified by the Minister (the Prescribed Period).

WHO IS COVERED UNDER THE DECLARATION?

Prescribed Leases

The Declaration applies to "impacted tenants" of "prescribed leases". Prescribed Leases are those to which the *Leases* (*Commercial and Retail*) 2001 (ACT) (Act) applies that were entered into before 7 April 2020. This also includes leases or premises prescribed by regulation that would otherwise not be covered by the Act.

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Impacted tenant

An "impacted tenant" under a Prescribed Lease is one who:

- at any time during the Prescribed Period qualifies for payments under the JobKeeper Scheme
- has a turnover during the 2018-2019 financial year of less than $50 million:
  - if the tenant is a franchisee, the business conducted at the premises or land under the lease
  - if the tenant is member of a corporate group (ie a corporation and all its related bodies) - the group, and
  - in any other case, the business conducted by the tenant.

You can read more about eligibility for the JobKeeper payment in the K&L Gates Tax team's Employer Guide to the JobKeeper Scheme which can be found here.

The Guidelines also note that a tenant will need to provide evidence of the financial impact that COVID-19 had had on turnover. The Guidelines also propose that the method to calculate the reduction in turnover should be that published on the Australian Taxation Office website and be derived from recognised accounting systems. If a tenant has qualified for payments under the JobKeeper Scheme, this will likely be able to confirm a reduction in turnover of 30%, however any greater reduction in turnover will need to be substantiated.

In addition to the financial impact of COVID-19 on the tenant, the impact on the landlord is also to be considered when negotiating the level of rent relief to be offered to a tenant.

Excluded leases

The Declaration will not apply to:

- leases that fall outside the ambit of Act
- an incorporated charitable association that does not carry on a business
- a listed public company or subsidiary of a public company with premises of an area of more than 1000m2
- a warehouse operator with no retail services, or
- leases that were entered into after 7 April 2020.

For leases that are not covered by the Declaration, landlords and tenants may negotiate rent relief, however will not be required to comply with the Declaration (and the Code).

WHAT ARE THE KEY PROVISIONS OF THE DECLARATION?

Prescribed Actions and Prescribed Breaches

A landlord cannot take a "prescribed action" against an impacted tenant in relation to a "prescribed breach" unless the landlord has engaged in good faith negotiations with the tenant.

A "prescribed breach" is the failure by an impacted tenant during the Prescribed Period to:

- pay rent

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- pay outgoings or any other money payable under the lease, or
- operate the business on the premises under the lease during the business hours as required under the lease.

A "prescribed action" means taking action under a lease or seeking orders or issuing proceedings in a court for:

- eviction from the premises
- the exercise of a right of re-entry to the premises
- recovery of premises or land
- distraint of goods on the premises or land (seizure of property in order to obtain payment of rent or other money)
- forfeiture
- damages
- a payment of interest on unpaid rent otherwise payable by the tenant
- recovery of a security bond (whole or part)
- performance of obligations by the tenant or any other person pursuant to a guarantee
- possession
- termination, or
- any other remedy available to the landlord against the tenant at common law or under the law of the ACT.

Good faith negotiations

The Declaration provides that a landlord has engaged in good faith negotiations with an impacted tenant if the landlord negotiates with the tenant having regard to the principles of the Code, having acknowledged financial hardship suffered by a tenant because of the economic impact caused by the COVI-19 pandemic. These principles include the statement that a landlord and tenant are to act openly and honestly in negotiations and provide sufficient and accurate information to achieve the outcomes consistent with the Code.

Enforcement of Leases

A landlord will be able to issue a termination notice to an impacted tenant under the Declaration if:

- the landlord has engaged in good faith negotiations with the tenant, and
- the tenant has committed a prescribed breach during the Prescribed Period.

A landlord will not be prevented from commencing enforcement action against an impacted tenant for an un-remedied breach of the lease that occurred prior to 1 April 2020, and that breach is not a "prescribed breach" (eg failure to maintain the premises).

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Can a tenant terminate the lease?

There is no protection in the Declaration for an impacted tenant which seeks to terminate the lease as a consequence of financial hardship suffered due to COVID-19 without the agreement of the landlord. If a tenant was to terminate the lease for these reasons, then the ordinary provisions of the Act will apply.

What if the landlord and tenant cannot agree?

The Guidelines indicate that the Local Business Commissioner will be available to mediate between the parties. However, the Local Business Commissioner cannot compel the parties to mediate, nor make a binding decision. The Magistrate's Court will not permit proceedings to commence unless a mediation has first taken place. It is also likely that the ACT Government will provide further clarification on the operation of the mediation process, particularly in light of the current mediation process provisions under the Act.

RATES RELIEF PACKAGE FOR LANDLORDS AND THE DECLARATION

The ACT Government has prescribed rates relief for commercial landlords aimed to assist landlords for rates charged after 1 April 2020 for up to six months based on a tiered category system where the commercial building has an unimproved value of $2 million or less:

- Category 1 - businesses partially or not affected. Business tenants should continue to pay rent
- Category 2 - businesses significantly affected (at least 30% reduction in business income) but still operating, and
- Category 3 - businesses who have effectively shut down operations (at least 80% reduction in business income).

For landlords:

- with a Category 2 tenant, assistance will be up to 25% of the rent reduction, capped per quarter at the lesser of $5,000 (or around $380 per week) or total of the quarterly rates bill,
- with a Category 3 tenant, assistance will be 50% of the rent reduction, capped per quarter at the lesser of $8,000 (or around $615 per week) or total of the quarterly rates bill.

The Guidelines indicate that a landlord wishing to access the rates concessions will need to demonstrate that they have undertaken good faith negotiations with tenants relating to agreed rent reductions and leasing arrangements.

Where the commercial building has an unimproved value in excess of $2 million, the landlord can apply for rates concessions, however these will be considered on a case by case basis.

CITY CENTRE MARKETING AND IMPROVEMENT LEVY

As part of its assistance package for businesses in the ACT, the ACT Government has also announced a waiver and deferral of the City Centre Marketing and Improvement Levy (CCMI Levy) during the 2020-2021 financial year to assist commercial property owners in supporting their tenants. Commercial property owners in the city centre

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will only be required to pay 50% of the CCMI Levy for the 2020-2021 financial year, with the payment of the remaining 50% being deferred for six months until February 2021.

SUMMARY

Landlords and tenants financially impacted by COVID-19 should be assessing their options and ensuring that they comply with the requirements for negotiations as set out in the Declaration.

A landlord will need to comply with the principles of the Code for good faith negotiations before taking any enforcement action under leases that are the subject of the Declaration.

Parties that are not subject to the Act or the Declaration may take the usual lawful enforcement actions or undertake negotiations independently.

Landlords will need to follow the Declaration principles in order to access the rates relief package.

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