COVID-19 (AUSTRALIA): WESTERN AUSTRALIA REGULATIONS FOR COMMERCIAL LEASES

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Australia Real Estate Alert

**This information is accurate as of 5:00 P.M. on 19 June 2020 and is subject to change as this situation evolves*.

The *Commercial Tenancies (COVID-19 Response) Act 2020* (WA) (Act) came into effect on 23 April 2020. The Act introduced a first wave of relief for tenants affected by COVID-19 as well as setting the groundwork for the future introduction of a Western Australia (WA) code of commercial leasing conduct.

The Act provides relief such as the moratorium on enforcing lease security and the freeze on rent reviews. You can find more information on the operation of the relief provided under the Act here.

The WA government has now given effect to the second wave of relief for impacted tenants under the *Commercial Tenancies (COVID-19 Response) Regulations 2020* (WA) (Regulations). The Regulations contain WA's Code of Conduct (Code).

Whilst the Code takes up many of the principles set out in the National Cabinet's *Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19*, there are some differences that are unique to WA.

In this article, we will discuss:

- When does the Code apply?
- Who is covered under the Code?
- What are the key provisions of the Code?

PRACTICAL STEP FLOW CHART

If you prefer, you can shortcut through to our Practical Step Flow Chart which is linked here - on new information through simplified flow charts.

Our Practical Step Flow Chart captures for you the key operations and steps under the Act and Code in a simplified chart.

WHEN DOES THE CODE APPLY?

The Code's key provisions came into effect on 30 May 2020. However, the relief measures apply through the "emergency period", which commenced on 30 March 2020 and currently ends on 29 September 2020.

WHO IS COVERED UNDER THE CODE?

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Whilst the Act provides a first wave of relief measures for tenants of "*small commercial leases*", the Code provides an expanded second wave of relief measures for *'eligible tenants'* of *'small commercial leases',* now referred to as tenants under a relevant small commercial lease".

For a lease to be considered a *'relevant small commercial lease'*, the following two essential criteria must be satisfied:

- the lease must be a "*small commercial lease*" under the Act
- the tenant must additionally qualify as an "*eligible tenant*" under the Code.

Small commercial lease

The Act defines a "*small commercial lease*" in the following way:

a retail shop lease as defined in the *Commercial Tenancy (Retail Shops) Agreements Act 1985* section 3(1); or

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 - the term "small business" being defined in the *Small Business Development Corporations Act 1983* (WA) to mean a business undertaking which:

is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the *Corporations Act 2001* of the Commonwealth and which:

has a relatively small share of the market in which it competes;

is managed personally by the owner or owners or directors, as the case requires;

is not a subsidiary of, or does not form part of, a larger business or enterprise;

is declared by the Governor by Order in Council to be a small business for the purposes of this Act (none are currently declared); or

a lease where the tenant is an incorporated association as defined in the *Associations Incorporation Act 2015* section 3; or

any other lease that is of a class prescribed by regulations for the purposes of this definition (of which there are currently none identified).

Eligible tenant

To better qualify as an *'eligible tenant'*, a tenant must meet two criteria.

Firstly, the tenant's turnover in the financial year ending on 30 June 2019 must be less than AUD$50 million.

If the tenant is a franchisee, the franchisee tenant's turnover from the leased premises is measured. If tenant is a company forming part of a corporate group, the turnover is measured for the corporate group's turnover. In any other case turnover is measured for the tenant in respect of the business at the leased premises.

Secondly, the tenant must satisfy one of the following criteria:

- The tenant must qualify for the JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Commonwealth)* section 7. This does not mean they are receiving the JobKeeper payment - just that they must qualify for it.

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- The tenant has, at any time during the emergency period, satisfied the decline in turnover test set out in section 8 of the JobKeeper Rules (which is generally a 30% decline in turnover).

You can read more about the JobKeeper scheme here.

WHAT ARE THE KEY PROVISIONS OF THE CODE?

Overarching obligations of landlords and tenants

The Code establishes overarching obligations for landlord and tenants, which are that they:

- must cooperate
- must act reasonably and in good faith
- must act in an open, honest and transparent manner
- must provide each other with sufficient and accurate information that is reasonable for them to provide in the circumstances for the purposes of the negotiations
- must not make onerous demands for information from each other.

Rent relief

An eligible tenant can apply for rent relief in the emergency period. The Code outlines a process for receiving relief.

Step 1: Application

The eligible tenant must put their request for relief to their landlord in writing.

The request must include a statement that the tenant is eligible for relief under the Code. This statement must be accompanied by sufficient and accurate information, which evidences that the tenant is eligible under the Code.

The tenant must also provide evidence of their reduction in turnover during the emergency period.

Step 2: Offer

If the tenant is eligible for relief, then the landlord must make an offer to grant relief within 14 days of receiving the tenant's request, or in a period of time that is agreed by the tenant and the landlord.

The landlord's offer of relief must be in writing and must comply with the principles discussed in 'Step 3' below.

Step 3: Negotiation

When the tenant receives the offer for relief, the tenant and landlord must negotiate with an aim to provide the tenant with relief.

The Code sets out the following principles for negotiating rent relief:

- An offer for rent relief must apply to the emergency period.
- The rent relief must be at least proportionate to the tenant's reduction in turnover. The Code gives an example where the tenant has a 60% decline in their turnover, the rent relief being at least 60% of the rent payable.

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- Unless otherwise agreed by the parties, the reduction in tenant's turnover is to be calculated using the principles of the decline in the turnover test set out in the JobKeeper scheme rules.
- The rent relief may provide up to 100% relief.
- At least 50% of rent relief offered must be in the form of a waiver of rent, unless otherwise agreed by the landlord and tenant.
- An offer of rent relief must provide for more than 50% of the rent relief to be in the form of a waiver of rent if:
  - the failure to provide more than 50% of the rent relief in the form of a waiver would compromise the tenant's capacity to fulfil the tenant's ongoing obligations under the lease
  - the landlord has the financial capacity to provide more than 50% of the rent relief in the form of a waiver.
- Any relief granted to a tenant must cascade down to sub-tenants.

Step 4: Documenting Agreement

Rent relief is formally provided by the landlord through a variation in the lease or through another written variation between the landlord and tenant.

Step 5: Change in circumstances

If the financial circumstances of an eligible tenant materially changes after a variation to the lease or other agreement has been reached, the tenant may make a further request for rent relief to the landlord under the Code. This would trigger steps 1-4 again.

Payment of deferred rent and extension of term of lease

For any rent that is agreed by the parties to be deferred, the following rules will apply:

Unless the landlord and tenant otherwise agree, deferred rent must be amortised starting on the earlier of:

- the day on which the emergency period ends (currently 29 September 2020)
- the expiry of the term of the lease

and ending on the later of:

- the end of the term of the lease (before any extension under the Code or otherwise)
- 24 months.

The method for repayment is to be agreed between the parties.

The landlord must also offer the tenant an extension of the term of the lease (on the same terms as the existing lease), for a period equivalent to the period for which the rent is deferred.

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Existing agreements and subsequent requests for rent relief

If the landlord and an eligible tenant have already agreed upon a rent relief arrangement before the Code was introduced, and that arrangement is less favourable than the arrangement in the Code, then the tenant can make an application for rent relief under the Code.

Outgoings

Where an eligible tenant under the Code is unable to conduct their business at the leased premises for any part of the emergency period due to COVID-19, the landlord must also consider waiving recovery of any outgoings or other expenses payable by the tenant for the period during which they were unable to conduct their business.

Where any outgoings charged under the lease are reduced for any part of the emergency period, the landlord must not require an eligible tenant to pay any amount of money in respect of outgoings that are greater than the tenant's proportionate share of the reduced outgoing.

If an eligible tenant has already paid to the landlord an amount of money greater than the tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to the tenant.

Resolving disputes

Either the landlord or tenant can apply to the State Administrative Tribunal (SAT) to resolve a 'dispute'. A dispute is defined under the Act as including a dispute under the Code.

However, an application to the SAT cannot be made unless:

- no request has been made by any party to the dispute to the Small Business Commissioner to assist or undertake alternative dispute resolution and the parties agree; or
- the Commissioner issues a certificate (with the effect to allow an application to SAT).

The SAT will have the power to make broad orders including ordering the payment of monies, ordering rent waivers and rent deferrals, and potentially terminating the lease in a 'financial hardship dispute'.

A 'financial hardship dispute' will essentially arise where a tenant fails to pay an amount of rent or other money claiming the failure is due to 'financial hardship' suffered by the tenant as a result of one or more of the following:

- a restriction imposed under a written law in response to the COVID-19 pandemic
- changes in societal behaviour in response to the COVID-19 pandemic; or
- any other consequences of the COVID-19 pandemic.

PRACTICAL STEP FLOW CHART

Click here to view our Practical Step Flow Chart.

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