



**AUSTRALIAN STATE & TERRITORY SUMMARY
ON COVID-19 RESPONSE LEGISLATION
AFFECTING COMMERCIAL LEASES**

Victoria

The Covid-19 Omnibus (Emergency Measures) Act 2020 came into effect on 23 April 2020. The Act allows for regulations to be made to temporarily change existing laws to implement the Code's principles.

Regulations apply to an 'eligible lease', which is all retail and non-retail commercial leases and licences -

- including sub-leases and agreements for lease;
- which may or may not be in writing;
- which must be on foot when the Regulations come into effect;
- under which the tenant is an SME entity and an employer that participates in the JobKeeper scheme.

The Regulations won't apply if the tenant is a group of companies (or is connected with a company) with an aggregate turnover above the prescribed amount. That amount isn't described in the Act but is likely to align with the Code, meaning that the Regulations won't apply to tenants with a combined annual turnover above \$50 million.

Rent Relief

The Regulations provide that the extent of rent relief provided by landlords need not be precisely based on the extent to which the tenant's revenue has reduced (though it is to be taken into account by a landlord in making an offer to the tenant). This is in contrast to some of the other states and the flavour of the Code.

In order to access rent relief, tenants will need to write to their landlords requesting it and confirm that the lease is an eligible lease and that the tenant qualifies for the JobKeeper scheme. It is important that tenants get the wording right in their letters to landlords if they want the protection of the Regulations.

After receiving the tenant's letter, the landlord is then required to make an offer to the tenant within 14 days.

The Regulations provide the following parameters around the offer made by the landlord to the tenant:

- The offer must be for up to 100% of the rent payable under the lease during the operative period (29 March 2020 – 29 September 2020):
- No less than 50% of the rent relief offered by the landlord must be waived (unless the landlord and tenant agree otherwise);
- The offer must take into account the reduction in the tenant's turnover during the relevant period, any waiver given, the viability of the tenant's business going forwards, the landlord's financial ability to offer rent relief, and any reduction to any outgoings charged.

- Landlords and tenants are required to negotiate the exact amount of rent relief in good faith.

Our recommendation is that tenants are proactive in their initial letter requesting rent relief and put forward a figure that is reasonable in the circumstances (which ensures the viability of their business) and with accompanying financials (the landlord will likely request this in any case).

Deferred rent and extensions of the lease term

Tenants will not be required to begin repaying any deferred rent until the earlier of 29 September 2020 or the expiry of the lease. The tenant has the greater of 24 months or the balance of the lease term to pay the deferred rent. It is important to note that if the payment of any rent is deferred, the landlord must offer the tenant an extension to the term equivalent to the period in which the rent is deferred (unless agreed otherwise by the parties).

Supporting documents provided by tenants

The Regulations do not specify the documents or information that landlords may request from their tenants to substantiate the impact of the pandemic. The Victorian Small Business Commission has indicated that a guideline will be issued on the financial information that may be requested by landlords.

Our advice has been, and continues to be, that tenants and landlords should work collaboratively to ensure the viability of both parties going forward. Discussions should be open and honest, and tenants should be transparent with their figures. The Regulations provide that information provided is subject to confidentiality requirements.

A material change to the tenant's circumstances

The Regulations allow tenants to make a further request for rent relief if there is a “material change” during the operative period. It is important to note that “material change” has not been defined in the Regulations but we suspect that it seeks to address a situation where the viability of the tenant's business may be in question again. Landlords will not be required to pass on any further rent waivers in these situations – rent will simply be deferred.

Outgoings

The Regulations require landlords to consider waiving the recovery of any outgoings or other expenses payable by a tenant under a lease for any period in which the tenant is not able to operate their business at the premises during the relevant period (29 March 2020 – 29 September 2020). It is not clear what exactly constitutes an inability to operate but we suspect that it means the complete closure of the business. Restaurants and coffee shops which continue to operate as takeaway businesses likely do not fall into this category.

Tenants' protection from termination of leases

This one is very important. Tenants will only be protected from having their lease terminated for the non-payment of rent if they have written to the landlord requesting rent relief and confirming that they qualify for and participate in the JobKeeper Scheme. This protection is not automatic as it is in some of the other States.

Landlords can be fined up to approximately \$3,600 for terminating a lease, taking possession of a premises, or utilising security provided by a tenant under the lease where a tenant defaults on the payment of rent in circumstances where they are afforded protection from termination under the Regulations.

Acting reasonably and in good faith

The Regulations also provide that all eligible leases are amended to include an obligation for both landlords and tenants to cooperate with one another and act reasonably and in good faith during any discussions whose subject matter relates to the COVID-19 pandemic.

As per the Code, landlords are prevented from increasing rent, charging fees or interest for the non-payment of rent, or terminating leases because tenants close or reduce the hours of their business during the period of 29 March 2020 to 29 September 2020.

New South Wales

The COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) came into effect on 25 March 2020. It allows for regulations to amend legislation including the Retail Leases Act 1994 (NSW) and the Residential Tenancies Act 2019 (NSW) in response to Covid-19. In a nutshell, landlords may be prevented from:

- entering and repossessing premises for defaults;
- terminating leases;
- using bank guarantees or security deposits;
- enforcing a tenant's trading obligation;
- enforcing repair and maintenance obligations during the pandemic period.

Like Victoria, the Act's description of the rights and obligations of landlords and tenants that may be enacted by regulations is broad. In certain circumstances, landlords may be prevented from exercising or enforcing their rights, and tenants may be exempt from the operation of certain laws.

Any regulations made under the Act and in response to Covid-19 will be temporary, with sunset dates of 6 months after they come into effect, unless parliament ends them sooner.

The NSW government made regulations on 24 April 2020. A summary of the Regulations is available [here](#).

Tasmania

Tasmanian Parliament passed the COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas) on 27 March 2020. The Act has a 3 month sunset period which can be extended.

This legislation is not as broad as the NSW equivalent however it does provide that a Minister may declare that a commercial lease cannot be terminated for non-payment of rent during the Covid-19 emergency period. Rent increases may also be paused. The Treasurer can also pause outgoings payments, such as rates, fees, taxes and levies.

Western Australia

Western Australian government passed the Commercial Tenancies (COVID-19 Response) Bill 2020 on 1 April 2020. It will allow for various changes to retail and commercial lease laws during the Covid-19 pandemic period.

The Act will apply to small commercial leases which includes –

- a retail shop lease;
- leases for premises used by the tenant to carry on its small business;
- leases to incorporated associations.

A sunset date of 29 September 2020 is proposed, meaning the Act will only operate for the likely duration of the emergency period.

Unlike the other states and territories, if enacted, the laws could allow tenant's suffering financial hardship to terminate leases on 21 days' notice, even after landlord's have given rent waivers and deferrals.

South Australia

The South Australian Government passed the COVID-19 Emergency Response Bill 2020 on 8 April 2020 which supports the principles of the National Cabinet's Code.

The Act will change commercial tenancy laws in response to Covid-19 and it will also modify the provisions of leases themselves. It has a sunset date of 6 months after the Act's commencement or earlier (as declared by the Minister).

The aim of the Act is to assist tenants suffering financial hardship due to Covid-19. It includes measures that:

- prevent landlords taking certain actions against tenants (e.g. termination, charging interest on unpaid rent, enforcing guarantees, seeking damages) if tenants have breached their leases by:
- not paying rent or outgoings; or

- closing their business or reducing their trading hours.
- prevent rent increases (except turnover rent);
- prevent a landlord from recovering land tax from a tenant; and
- allow parties to apply to the Commissioner for mediation of a dispute.

Queensland

The Queensland government has passed the Covid-19 Emergency Response Bill 2020 which authorises for regulations to be made which may:

- prohibit landlords from repossessing premises;
- prohibit the termination of leases;
- prevent landlords from enforcing certain rights under leases;
- require parties to take into account codes or principles (including the Code) when negotiating or disputing a lease matter;

Regulations have not yet been made but could have a retrospective operation from the Act's commencement date and will expire on 31 December 2020.

Northern Territory

The Northern Territory's Legislative Assembly sat for a special session on 24 April 2020 to respond to Covid-19. The legislation it was proposing to introduce included the Tenancies Legislation Amendment Bill 2020.

We will provide further updates when more information becomes available.

Australian Capital Territory

On 2 April 2020 ACT Parliament passed the Covid-19 Emergency Response Act 2020 which amends the Leases (Commercial and Retail) Act 2001 (ACT). The amendments allow the Minister to make declarations for three months (or longer if extended) in relation to the following matters for the purpose of its Covid-19 response:

- prohibiting the termination of a lease;
- prohibiting the repossession of premises;
- changing any period in which someone must or may do something;
- changing, limiting or preventing the exercise or enforcement of any other right of a landlord;

- exempting a tenant from the application of the Act.

Not all retail and commercial premises are affected by these changes. The ones that are include:

- retail premises less than 1000m²
- premises in shopping centres less than 1000m²
- small commercial premises less than 300m²
- leases to incorporated associations and unincorporated charitable entities;
- childcare centres;
- art galleries;
- gardening supply centres;
- service stations; and
- sports centres.

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