

The National Code of Conduct (**National Code**) was announced by the National Cabinet on 7 April 2020 to provide principles for the granting of relief for small commercial (including retail) tenants suffering financial hardship as a result of the COVID-19 pandemic. The Federal government left it to each Australian state to enact its own legislation implementing the National Code as it saw fit.

The WA government has introduced legislation to implement the National Code which includes the *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)* (**the Act**) as gazetted on 24 April 2020 and the *Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA)* (**Regulations**) as gazetted on 29 May 2020. The Act and the Regulations do not exactly mirror the National Code and together at this time reflect the law in Western Australia concerning the matters covered in the National Code. The WA government also tabled the *Commercial Tenancies (COVID-19 Response) (Early Termination) Bill 2020 (WA)* enabling tenants to terminate leases but that has not been passed and is being held in abeyance to be revisited if the Act and the Regulations do not provide necessary relief.

These legislative changes introduced as a result of the COVID-19 pandemic are broad and impose considerable obligations on landlords and tenants. Importantly, the changes significantly alter the longstanding legal principles which would otherwise apply under small commercial leases.

The Act

Application of the Act

The key provisions of the Act apply during the 'emergency period', which is effectively from 30 March 2020 until at least 29 September 2020 as that date may be extended. The Act therefore applies retrospectively. The Act is repealed at the end of a 12 month period starting when the emergency period ends.

The Act applies to both landlords and tenants in respect of a 'small commercial lease'. A small commercial lease (with "lease" being very broadly defined to include licences, subleases and other occupancy agreements whether or not in writing) refers to:

- a "retail shop lease" under the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*;
- a lease of premises that are used by a tenant who owns or operates a "small business";
- a lease where the tenant is an "incorporated association" under the *Associations Incorporation Act 2015 (WA)*; or
- any other lease prescribed by the Regulations as a small commercial lease.

A "small business" is a business undertaking which is wholly owned or operated by an individual person, a partnership or a proprietary company and which:

- has a relatively small share of the market in which it competes;
- is managed personally by the owners or directors; and
- is not a subsidiary of a larger business or enterprise.

A number of agreements are specifically excluded from the operation of the Act:

- a long stay agreement to which the *Residential Parks (Long-stay Tenants) Act 2006 (WA)* applies;
- a residential tenancy agreement to which the *Residential Tenancies Act, 1987 (WA)* applies;
- a pastoral lease as defined in section 3 of the *Land Administration Act, 1997 (WA)*;
- a mining tenement as defined in section 8 of the *Mining Act, 1978 (WA)*;
- any other lease, sublease, licence or other agreement prescribed by the Regulations as not being covered by the Act.

It is not open to landlords and tenants to contract out of any mandatory provision in the Act. The mandatory provision will override any attempted exclusion. However, there are a number of provisions in the Act which acknowledge the right of the landlord and the tenant to agree different arrangements in respect of specified principles.

Key prohibitions under the Act

During the emergency period, landlords are prohibited from taking certain actions against a tenant who is in breach the tenant's lease by failing to keep premises open or by failing to make rental or other monetary payments (including operating expenses) or by any other act or omission prescribed by the Regulations. The "prohibited actions" include:

- evicting tenants or taking other action to re-enter or repossess the premises;
- terminating the lease;
- claiming damages;

- charging interest on unpaid amounts (including operating expenses); and
- calling on a guarantee or security granted under the lease (including a bank guarantee).

If a landlord takes a prohibited action during the “*relevant period*” (commencing on 30 March 2020 and ending on 24 April 2020) then that action is nevertheless valid and effective. However, to the extent that any prohibited action has not been completed or is ongoing, the action is stayed or suspended until the end of the emergency period.

Landlords are also prohibited from increasing rent during the emergency period. However, this does not apply to rent that is determined by reference to turnover. Further, any increase in rent that was due during the emergency period can be implemented after the emergency period.

Resolution of disputes

The Act makes provision for the parties to a small commercial lease (including a guarantor) to refer a “*dispute*” to the State Administrative Tribunal (**SAT**) for resolution, being any dispute which relates to any matter arising out of or under the operation of the Act. This includes:

- a “code of conduct dispute” (being a dispute arising out of or under any code of conduct adopted by the Regulations (**WA Code**));
- a “financial hardship dispute” which is the occurrence of the following:
 - during the emergency period the tenant has breached a small commercial lease by failing to pay moneys to the landlord under the lease;
 - the landlord claims the breach was not as a result of the tenant suffering “financial hardship”; and
 - the landlord has not granted the tenant a waiver, deferral or reduction in respect of that unpaid money.

“*Financial hardship*” means any financial hardship suffered by the tenant as a result of any one or more of the following:

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

In resolving a financial hardship dispute SAT has a range of powers. SAT also has the power to grant the landlord an order terminating a small commercial lease if SAT is satisfied that the tenant’s breach is not as a result of the tenant suffering financial hardship.

The Act does not in its terms address rent or other relief to tenants under a small commercial lease, and left those matters to be dealt with under the Regulations.

The Regulations

Operation of the Regulations

The substantive provisions of the Regulations (including the WA Code) came into force on 30 May 2020, the day after the Regulations were gazetted. The Regulations adopted the WA Code set out in schedule 1 of the Regulations and applies the WA Code to small commercial leases where the tenant is an “eligible tenant”.

In order to be an “*eligible tenant*” in relation to a small commercial lease under the WA Code, a tenant must:

- in the financial year ending on 30 June 2019 have had a turnover of less than AU\$50 million calculated:
 - if the tenant is a franchisee – the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;
 - if the tenant is a corporation that is a member of a group – the turnover of the “group” (being related bodies corporate as defined in section 9 of the *Corporations Act 2001* (Cth));
 - in any other case- the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;
- and
 - qualify for the JobKeeper Scheme of the Federal government under section 7 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth); and
 - at any time during the emergency period, satisfy the decline in turnover test set out in section 8 of those Rules.

Overarching obligations

The purpose of the WA Code is to set out small commercial lease principles to apply during the COVID-19 pandemic. Those principles require landlords and tenants in negotiations under the WA Code to:

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

- not disclose “protected information” obtained under or in connection with the operation of the WA Code except in the circumstances set out in the WA Code including:
 - with consent;
 - to advisers and financiers who agree to keep it confidential;
 - under a written law;
 - for the purposes of making applications;
 - for the purposes of resolving a dispute; or
 - for the purposes of taking proceedings.

Eligible tenant’s obligation to seek rent relief

A landlord is not obliged to offer rent relief to a tenant. If a tenant is an “eligible tenant” under a small commercial lease, during the emergency period the tenant may submit to the landlord a request for rent relief under the lease. Tenants must make their requests in writing and include:

- a statement by the tenant that the tenant’s lease is a small commercial lease and that the tenant is an eligible tenant in relation to that small commercial lease;
- sufficient and accurate information which evidences the tenant is an “eligible tenant” in relation to a “small commercial lease”; and
- sufficient and accurate information which evidences a reduction in the tenant’s turnover at the land or premises that are the subject of the small commercial lease and which the tenant experienced during the emergency period.

Landlords’ obligations on receipt of a request for relief

On receipt of a request for relief from an eligible tenant (which request meets the requirements of the WA Code) the landlord must offer rent relief in writing to the tenant (which relief must satisfy the requirements of the WA Code) within 14 days after receiving that request, or such other period if any agreed between the landlord and the tenant. Within 7 days thereafter the landlord and the tenant must negotiate, in accordance with the rent relief principles set out in the WA Code, with a view to agreeing the rent relief to apply during the emergency period.

Principles applying to offering and negotiating rent relief

An offer of rent relief from the landlord may relate to up to 100% of the rent, and must:

- apply to the emergency period;
- be at least proportionate to the reduction in the tenant’s turnover that:
 - is associated with the business conducted at the land or the premises that are the subject of the small commercial lease; and
 - the tenant has experienced during the emergency period,

and, unless otherwise agreed between the landlord and the tenant, the reduction must be calculated using the same principles of decline in turnover as are applied in calculating eligibility for the JobKeeper Scheme, but with any appropriate modifications to reflect the above principles

- unless otherwise agreed between the landlord and the tenant, provide not less than 50% of the rent relief by way of waiver;
- provide more than 50% of the rent relief by way of waiver if:
 - failure to do so would compromise the tenant’s capacity to fulfil the tenant’s ongoing obligations under the small commercial lease; and
 - the landlord has financial capacity to provide more than 50% of the rent relief in the form of a waiver of rent;
- if the landlord is a tenant under a head lease, pass on to the subtenant the benefit of any rent relief it receives under the head lease.

Giving effect to rent relief

Rent relief under the WA Code may be given effect to by the landlord and tenant under a small commercial lease by a written variation to the small commercial lease or by any other written agreement between them that gives effect to the rent relief.

Payment of deferred rent and extension of term

If rent relief includes any agreement to defer rent then:

- unless otherwise agreed by the landlord and the tenant in writing:
 - the landlord must not request payment of any part of the deferred rent until the **earlier** of the day on which the emergency period ends and the expiry date of the small commercial lease (before any extension of that lease);
 - the deferred rent is to be amortised (with the method agreed by the landlord and the tenant) over the **greater** of the balance of the term of the small commercial lease and a period of 24 months;
- unless the landlord is a tenant under a head lease and this would be inconsistent with the head lease, the landlord must offer the tenant an extension of the term of the small commercial lease on the same terms and conditions that applied under the small commercial lease immediately before the emergency period for the same period (unless otherwise agreed by the landlord and the tenant in writing) that the rent is deferred.

Existing agreements and subsequent requests for relief

- If the landlord and the tenant under a small commercial lease entered into an agreement to provide any rent relief during the emergency period or any part of it before 30 May 2020 and the tenant is an eligible tenant, the tenant can apply to the landlord for additional rent relief if the tenant believes that the agreed rent relief is less favourable than it would be under the WA Code. The same request, response and other principles apply as set out above apply.

- If, after a rent relief agreement has been entered into under the WA Code the financial circumstances of the tenant change, then the tenant may make a further request for relief. The same request, response and other principles apply as set out above apply.

Recovery of outgoings and other expenses

- If the tenant is an eligible tenant under a small commercial lease and for any part of the emergency period the tenant is not able to trade from the premises under that lease, then:
 - the landlord must consider waiving recovery of any outgoing or other expense payable by the tenant under that lease during that period the tenant is unable to trade.
 - the landlord may cease to provide (or reduce provision of) any service at the land or the premises if it is reasonable to do so in the circumstances or in accordance with a reasonable request of the tenant.
- If any outgoings or expenses in respect of land or premises the subject of a small commercial lease are reduced in respect of the emergency period or any part of it and the tenant is an eligible tenant:
 - the landlord must not require the tenant to pay any greater than the tenant's proportionate share of the reduced outgoing; and
 - if the tenant has already paid a greater amount, the landlord must reimburse the tenant with the excess amount as soon as possible.

If you have any queries regarding these changes, or if you require strategic advice as to how these changes may impact you or your business, please get in touch with us.

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