

On 25 September 2020, the Western Australian (WA) government gazetted the Commercial Tenancies (COVID-19 Response) Amendment Regulations 2020 (WA) (the Amendment Regulations) to amend 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) (the Regulations) as gazetted on 29 May 2020.

Most importantly, and among other things (for example, including a lease held by a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) as a "small commercial lease"), the Amendment Regulations in relation to small commercial leases:

- Extended the emergency period to 28 March 2021
- Inserted new tests for eligibility for relief under the WA Code to apply after 29 September 2020
- Provide some limited exceptions to the prohibitions, imposed by the Act on normal landlord remedies, during the emergency period if the tenant is either insolvent or is an ineligible tenant
- Allow a landlord to increase rent on and after 30 September 2020 if the tenant is not an eligible tenant under the WA Code

This alert should be read together with our previous alert of 5 June 2020, in particular, when considering various defined terms used in this alert.

Eligibility for Relief by a Tenant

Attached is a cheat sheet setting out the main effects the Amendment Regulations have on checking the eligibility of tenants for relief under the WA Code.

The Amendment Regulations make it clear that, if a tenant under a small commercial lease ceases to be an eligible tenant, the WA Code will continue to apply to matters relating to the period during which the tenant was an eligible tenant as if the tenant were still an eligible tenant.

It is important to note that the cheat sheet does not address the extremely complex ATO rules governing eligibility for JobKeeper (which is one of the tests available for eligibility for rent relief under the WA Code).

There are so many alternative tests governing eligibility for JobKeeper, it would be difficult (indeed impossible) to summarise them. They are also incredibly difficult to apply, with variations within each different test depending on the circumstances and this is an exercise for accountants and tax lawyers. Nevertheless, these are a few examples of the alternative tests.

- Business that started after the comparison period started but before 1 March 2020
- Business acquisition or disposal that changes the entity's turnover
- Business restructure that changed the entity's turnover
- Business that has had a substantial increase in turnover
- Business affected by drought or natural disaster
- Business that has an irregular turnover
- Sole trader or small partnership with sickness, injury or leave
- Business that temporarily ceased trading during the relevant comparison period

Prohibited Actions

Section 9 of the Act addresses actions a landlord under a small commercial lease is forbidden from doing during the emergency period. (There is some leeway in section 12 of the Act for actions taken by a landlord between the start of the emergency period on 30 March 2020 and 23 April 2020).

Other than in the circumstances (if any) prescribed by the Regulations for the purposes of section 9, a landlord is forbidden from take prohibited action during the emergency period, on the grounds of a breach by the tenant of a small commercial lease that occurs during the emergency period, if the breach consists of:

- A failure to pay rent or any other amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, landlord's operating expenses)
- The land or premises the subject of the small commercial lease (or the business carried on there) not being open for business at hours or times specified in the small commercial lease
- Any act or omission of a kind prescribed by regulations for the purposes of section 9(c)

Section 10 of the Act makes it clear that certain acts or omissions of a tenant during the emergency period, which are required under a written law in response to the COVID-19 pandemic, are not to be regarded as:

- A breach of a small commercial lease
- Grounds for termination of a small commercial lease
- Grounds for the taking of any prohibited action under, or in respect of, a small commercial lease

Section 11 of the Act adds a further prohibition by providing that rent payable under a small commercial lease (other than turnover rent) cannot be increased during the emergency period. (Note that clause 12(5) of the Act allows a landlord to undertake a scheduled review, but just not put it into effect until after the emergency period. The landlord does not wholly lose its right to the review).

A prohibited action is defined in the Act as meaning action under, or in respect of, a small commercial lease (including seeking orders, or commencing proceedings, in a court or tribunal) for any of the following:

- Eviction of the tenant from the land or premises that are the subject of the small commercial lease
- Exercising a right of re-entry to the land or premises that are the subject of the small commercial lease
- Possession
- Recovery of land
- Dstraint of goods
- Forfeiture
- Termination of the small commercial lease
- Damages
- Requiring a payment of interest on unpaid rent or on any other unpaid amount of money payable by the tenant to the landlord under the small commercial lease (including, without limitation, operating expenses)
- Recovery of the whole or part of any security for the performance of the tenant's obligations under the small commercial lease (including, without limitation, a security bond)
- Performance of obligations by the tenant or any other person under a guarantee given in respect of the small commercial lease (including, without limitation, making a demand on a bank guarantee)
- Any other remedy otherwise available to the landlord against the tenant at common law or under a written law

Under the Amendment Regulations, with effect from and after 30 September 2020, the following circumstances are prescribed exceptions to prohibited actions under a small commercial lease:

- The tenant is insolvent when the prohibited action is taken.

For the purpose of this exemption, insolvent is defined to mean the tenant is:

- In relation to a person, according to section 13D of the Interpretation Act 1984, the person is a bankrupt or a person whose affairs are under insolvency laws
- In relation to a company, the company is a Chapter 5 Body Corporate, as that expression is defined in section 9 of the Corporations Act 2001 (Cth) (i.e. being wound up, or has had a receiver and/or manager appointed to its property, or is under administration, or has executed a deed of company arrangement that has not yet terminated, or has entered into a compromise or arrangement with another person, the administration of which has not yet been terminated)
- A case where all of the following criteria are satisfied:
 - The tenant is not an eligible tenant when the prohibited action is taken (i.e. the tenant does not qualify for rent relief under the WA Code)
 - The prohibited action is taken on the grounds of a breach by the tenant that occurs during the emergency period (whether before, on or after 30 September 2020)
 - The breach relates to payment of money, as referred to in section 9 of the Act
 - The breach is not the subject of a dispute that is being dealt with, but is not yet resolved, under Part 5 of the Act
 - The tenant has not made a request, under the WA Code, for rent relief from the landlord in relation to any unpaid rent to which the breach relates
 - The landlord has not granted the tenant a waiver, deferral or reduction in respect of any unpaid rent, or other unpaid amount of money payable by the tenant to the landlord, to which the breach relates
- A case where all of the following criteria are satisfied:
 - The tenant is not an eligible tenant when the prohibited action is taken (i.e. the tenant does not qualify for rent relief under the WA Code)
 - The prohibited action is taken on the grounds of a breach by the tenant that occurs during the emergency period but on or after 30 September 2020
 - The tenant is not an eligible tenant when the breach occurs
 - The breach is a failure to open for business at the hours or times specified in the small commercial lease, as referred to in section 9(b) of the Act

The Amendment Regulations also amend section 12 of the Act to carry into effect when the above exceptions can be relied upon by the landlord where the issue is the timing of insolvency or ineligibility.

Note: Before looking at the WA Code, the first test is whether the lease is a “small commercial lease” as defined in the WA COVID-Response Act. If not, the WA Code does not apply. Note also that this table does not address the complex and numerous tests and rules concerning entitlement to JobKeeper.

Period Under the WA Code	Eligible Tenant Clause in the WA Code	First Hurdle (Clause 2(1C))	Second Hurdle – Alternative Tests (for Non-NFP – MFP Has 15% Threshold)	Information to Be Provided by the Tenant: Amended Clause 4 of the WA Code	Other Comments
30/3/2020 – 29/5/2020	Clause 2 of the WA code before amended.	< AU\$50 million turnover in FYE 30/6/2019.	<ul style="list-style-type: none"> Tenant qualifies for the JobKeeper scheme during this relevant period: section 7 of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 Cth (Rules); or Tenant did not qualify for the JobKeeper scheme, but at any time during this relevant period, the tenant satisfied the decline in actual GST turnover test (as defined by the ATO): section 8 of the Rules (30% or more decline in sales). <p>ATO: Note this could be a month-on-month comparison of the 2020 month against the same month in 2019.</p>	<ul style="list-style-type: none"> Information concerning the 30% or more reduction in turnover of a business might include “information relating to turnover generated from an accounting system” or a “BAS submitted to the ATO”. There is no need for the tenant to: <ul style="list-style-type: none"> Provide future cash flow projections Provide balance sheets or any P&L financials Provide bank balance details or statements Obtain an accountant’s certificate or otherwise have the figures verified by a third party 	<ul style="list-style-type: none"> Clause 5 deals with what the tenant must do to validly apply for relief and the information to be provided to the landlord in order to get the application process under way. Clause 6 deals with the landlord’s response period (14 days or as otherwise agreed) once a proper application is lodged. Clause 7 sets out the various principles to be applied. <ul style="list-style-type: none"> Clause 7(1) – (3) – System of proportionality of rent relief according to the decline in turnover at the premises during the emergency period. Clause 7(3A) – Adjustments of rent relief may be done periodically (but not more often than monthly) to take into account any variation in the tenant’s reduction over the emergency period as changes to its entitlement occur. Clause 7(4) – Decline in turnover test to be the same used from time to time for calculating the decline in turnover for JobKeeper.
30/5/2020 – 27/9/2020	Clause 2(1) of the WA Code as amended.	< AU\$50 million turnover in FYE 30/6/2019.	<ul style="list-style-type: none"> Tenant qualifies for the JobKeeper scheme during this relevant period: section 7 of the Rules; or Tenant does not qualify for the JobKeeper scheme, but during any time before 28/9/2020, the tenant satisfied the decline in turnover test: section 8 of the Rules. <p>ATO: Note this could be a month-on-month comparison of the 2020 month against the same month in 2019.</p>	As above.	<ul style="list-style-type: none"> Clause 7(5) – An offer of rent relief may be up to 100%. Clause 7(6) – An offer of rent relief must provide a waiver of not less than 50% of the rent relief. Clause 7 (7) – When more than 50% of the reduction must be waived. Clause 8 – A written agreement may be used to give effect to rent relief. Clause 9 – Clause only applies if the parties agree to any deferral. Sets out principles that can be changed by the parties (e.g. a deferral period is to be the greater of the balance of the lease and a period of not less than 24 months. The landlord must offer the tenant an extension of the lease on the same terms as the lease on expiry for a period not less than the deferral period).

Period Under the WA Code	Eligible Tenant Clause in the WA Code	First Hurdle (Clause 2(1C))	Second Hurdle – Alternative Tests (for Non-NFP – MFP Has 15% Threshold)	Information to Be Provided by the Tenant: Amended Clause 4 of the WA Code	Other Comments
28/9/2020 – 3/1/2021	Clause 2(1A) of the WA Code as amended.	< AU\$50 million turnover in FYE 30/6/2019.	<ul style="list-style-type: none"> • Tenant qualifies for the JobKeeper scheme during this relevant period: section 7 of the Rules; or • Tenant does not qualify for the JobKeeper scheme during this relevant period, but nevertheless has a 30% drop in actual GST turnover (as defined by the ATO) in the three months of July, August and September 2020 as against the same September quarter in 2019. <p>Note that this is now a quarterly comparison against the actual turnover of the previous comparable period.</p>	As above.	<ul style="list-style-type: none"> • Clause 10 – Ability for a tenant to re-apply for rent relief if the circumstances of the tenant change (e.g. if a tenant becomes ineligible but then becomes eligible again). • Clause 11 – A landlord must consider waiving recovery of outgoings or other expenses from an eligible tenant for any period during the emergency period that the tenant is not able to conduct its business at the premises. (Note in WA, many businesses were able to continue trading and were not ordered to close down). • Clause 11 (3) – Landlord can reduce services. • Clause 12 – If the landlord gets any reduction in outgoings (e.g. land tax relief), the landlord must pass the saving on to tenants. The landlord is not obliged to apply for land tax relief.
4/1/2021 – 29/3/2021	Clause 2(1) of the WA Code as amended.	< AU\$50 million turnover in FYE 30/6/2019.	<ul style="list-style-type: none"> • Tenant qualifies for the JobKeeper scheme during this relevant period: section 7 of the Rules; or • Tenant does not qualify for the JobKeeper scheme during this relevant period, but nevertheless has a 30% drop in actual GST turnover (as defined by the ATO) during October, November and December 2020 as against the same December quarter in 2019. <p>Note that this is now a quarterly comparison against the actual turnover of the previous comparable period.</p>	As above.	

Period Under the WA Code	Eligible Tenant Clause in the WA Code	First Hurdle (Clause 2(1C))	Second Hurdle – Alternative Tests (for Non-NFP – MFP Has 15% Threshold)	Information to Be Provided by the Tenant: Amended Clause 4 of the WA Code	Other Comments
Notes		Turnover for determining eligibility is generally only at the particular premises, except where the tenant is a member of a corporate group, then it is the turnover of all members of the group.	Turnover for the purpose of determining if the tenant qualifies for the JobKeeper scheme is based on the actual GST turnover of the relevant entity (which, in many cases, will be recorded at G1 on the entity's BAS). Applying the alternative test if the tenant does not qualify for JobKeeper, the relevant turnover is that relating to the business conducted at the premises and can include click and collect if that is what the relevant lease includes as the turnover at the premises.	Only relevant turnover for the purposes of determining the relief is that relating to the business conducted at the premises and can include click and collect if that is what the relevant lease includes as the turnover at the premises.	

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