

Tasmania – Commercial tenancies code of conduct explained

21 August 2020

Frequently asked questions about the commercial tenancies code of conduct in Tasmania

Background and National Code

On 7 April 2020, Prime Minister Scott Morrison announced an industry code of conduct (**National Code**) to address the financial impact of COVID-19 on commercial (including retail, office and logistics) tenancies. Each state and territory was tasked with legislating the National Code as appropriate.

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Frequently Asked Questions

State and territory legislation

1. How has the National Code been adopted into TAS law?

The *COVID-19 Disease Emergency (Commercial Leases) Act 2020 (Tas)* (**the Act**) was introduced in response to the good faith leasing principles agreed to by the National Cabinet on 3 April 2020, set out in the National Code.

The provisions of the Act, except for section 17, came into effect on 3 June 2020 (though some provisions have retrospective operation). Section 17 of the Act was proclaimed to commence on 24 July 2020.

The Act allows the Governor to make regulations for the purposes of the Act in a number of different respects.

The first regulations to be enacted under the Act, the *COVID-19 Disease Emergency (Commercial Leases) Regulations 2020 (Tas)* (the **Regulations**), were introduced on 24 July 2020.

2. What are the key issues dealt with in the TAS Regulations?

The Act and the Regulations set out the following key measures:

- eligibility for rent relief;
- a prohibition on lessors from taking 'prohibited lessor actions';
- a prohibition on punishing lessees for ceasing normal trading;
- a prohibition on increasing rent;
- a process for negotiating the rent payable under the lease;
- a requirement of lessors to pass on reductions in insurance and statutory charges;
- confidentiality obligations; and
- a dispute resolution process.

Pandemic period

3. When will the Regulation operate?

The Act and the Regulations will have effect during the 'financial hardship period', which is the period from 1 April 2020 to 2 June 2021, if not declared earlier by the Treasurer.

Indications have been that the Treasurer will declare the financial hardship period to end on 30 September 2020, however that is not law.

See: s 4 and 31 of the Act

Eligibility criteria

4. What types of leases are eligible?

The Act and the Regulations impact retail and commercial tenancies which are considered 'protected leases'.

Under the Act, a 'protected lease' includes:

- a 'commercial lease', meaning:
 - a lease of premises to which Schedule 1 to the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas)* applies; or
 - a lease of premises occupied, or to be occupied, wholly or predominantly for business purposes, unless any such lease is within a class of leases that are excluded by regulations; and

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- during the financial hardship period, the lessee is or has become:
 - an 'eligible person' (see item 5 below); or
 - a member of a class of persons that is prescribed by regulations,whether or not either of the above criteria cease to apply to the person during the financial hardship period.

Under the Act, a 'protected lease' *does not* include:

- a lease that is within a class of leases prescribed by Regulations; and
- a commercial lease in relation to premises being occupied wholly or predominantly for business purposes by a lessee on behalf of the lessor.

See: s 4, 5 and 9(2) of the Act

5. Who is an eligible person?

Under the Act, a lessee is an 'eligible person' at a time if the time occurs after the person:

- is or becomes:
 - entitled under the *Coronavirus Economic Response Package (Payment and Benefits) Rules 2020 (Cth) (JobKeeper Rules)*, for a JobKeeper payment or becomes qualified, under the JobKeeper Rules, for the JobKeeper scheme; and
 - an 'SME entity' for the purposes of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020 (Cth) (SME Act)*; or
- the person satisfies the criteria prescribed by regulations, even if any of the criteria ceases to apply to the person during the financial hardship period.

'SME entity'

Under the Act, an 'SME entity' is given the same meaning as in section 4 of the SME Act.

For the purposes of the SME Act, an 'SME entity' is defined as an entity that carries on a business or is a non-profit body during the current financial year and one or both of the following apply:

- the entity's annual turnover for the current financial year is likely to be less than \$50 million; or
- the entity carried on a business in the previous financial year, or was a non-profit body during the previous financial year, and its annual turnover for the previous financial year was less than \$50 million.

'Qualifies for the JobKeeper scheme'

A lessee must be entitled to a JobKeeper payment or qualify for the JobKeeper scheme.

To determine whether a lessee qualifies for the JobKeeper scheme for the purposes of the Act and the Regulations, refer to the JobKeeper Rules (in particular, sections 7 and 8).

See: s 6(1) of the Act; s 4 of the SME Act; s 5 of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 (Cth)*; s 7 and 8 of the JobKeeper Rules.

6. Does the Regulation apply to licensees who are in reality lessees?

Yes, provided the licensee satisfies the eligibility criteria set out above.

This is because the definition of 'lease' includes 'an agreement in relation to premises, whether legal or equitable, under which a person grants, or agrees to grant, to another person, a right to occupy (for a term, periodically or at will), whether or not the right is a right of exclusive possession'. This contemplates licences.

Similarly, the definition of 'lessee' means a person who, under the lease, is granted a right to occupy the premises to which the lease relates. This contemplates licensees.

See: s 4(1) of the Act

Definition of turnover and provision of information

7. How is turnover defined?

Turnover is not defined in the Act, as there is no reference to turnover.

For the purposes of determining eligibility as an 'SME entity', the annual turnover of an entity is defined as the total of the following that is earned in the year in the course of the business:

- the proceeds of sales of goods and/or services;
- commission income;
- repair and service income;
- rent, leasing and hiring income;
- government bounties and subsidies;
- interest, royalties and dividends; and
- other operating income,

that is earned in the year in the course of the business.

Further, the Regulations provide a definition of turnover for the purposes of section 17 of the Act (which relates to the prohibition on rental increases – see further detail in item 26 below).

See: s 5(2) of the Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 (Cth); r 4 of the Regulations

8. What information or documentation must a lessee provide to the lessor in order to establish a reduction in turnover?

The Act and the Regulations do not set out the scope of financial information that a lessor is permitted to request from a lessee to establish a reduction in turnover.

We have received practical guidance from the Tasmanian Government (Consumer, Building and Occupational Services) (**Tas Government**) (dated 28 July 2020) on this issue. Due to the variety of commercial leases, the Tas Government considered it impractical to prescribe the relevant financial information that would be considered sufficient in the Act and the Regulations.

Based on the practical guidance, the intention of the Tas Government is that parties should provide evidence of reduction in business and turnover attributable to COVID-19 in the form suitable for the lease agreement, which may include:

- balance sheets;
- cash flow statements;
- quarterly reports;
- bank statements; and
- notices from accountants.

It is anticipated that additional practical guidance will be published by the Tas Government.

Confidentiality requirements

9. Are lessors and lessees protected under the Regulations against disclosing financially sensitive information?

Yes. Under the Act, a person must not divulge or communicate confidential personal information, confidential information relating to business processes or confidential financial information (including information about a prescribed factor in relation to a business) obtained in connection with the operation of the Act.

Several exceptions apply which allow information to be divulged:

- with the consent of the person to whom the information relates; or
- in connection with the administration of the Act; or
- to a person acting in a professional capacity as an adviser; or
- as authorised by the mediation provider or under the *Commercial Arbitration Act 2011* (Tas); or
- for the purposes of legal proceedings; or
- to a police officer, or a law enforcement officer.

If the confidentiality obligations are breached, a civil penalty applies, being a maximum of 300 penalty units for a body corporate (\$51,600) or a maximum of 50 penalty units for an individual (\$8,600).

In addition, parties to a protected lease must not:

- make use of, except for the purposes of negotiations (as set out in the Act), any information provided by the other party to the lease;
- provide to any other person, except:
 - another party to the lease;
 - a court;
 - a person acting in a professional capacity as an adviser to either party;
 - the Mediation Provider; or
 - for the purposes of the application of the *Commercial Arbitration Act 2011* (Tas), to a party to the lease, any information provided by the other party in accordance with negotiations.

See: s 12(1) and 16 of the Act

Application of Leasing Principles

Good faith obligations

10. What is the obligation on a party to act in 'good faith'?

If a request for rent relief is made by a lessee, the parties must renegotiate the rent payable under the lease in good faith.

Unlike the National Code and other jurisdictions, the Act and the Regulations do not impose a general obligation on lessors and lessees to act reasonably and in good faith in all discussions and actions associated with matters to which the Act and the Regulations apply.

However, under the Act, the parties to a protected lease must, during the financial hardship period:

- at the request of another party to the protected lease, provide to the other party information that is accurate and that is sufficient to enable negotiations, on the basis of reliable information, to occur for the purposes of reaching agreements as to the rent payable under the lease (or the rent payable under another commercial lease);
 - provide other information that is reasonably necessary to:
 - allow the other party to conduct negotiations;
 - obtain information in relation to; or
 - apply for, or to enable the determination of eligibility for, financial assistance, or any form of financial accommodation to be obtained from a person or entity;
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- not engage in misleading or deceptive conduct in negotiations relating to the rent payable under the lease, the renewal of the lease, or the exercise by the lessee of an option during the financial hardship period; and
 - not make a representation to another party to the protected lease that the party knows is misleading or deceptive at the time it is made by the party.

See: s 12(1), 12(3) and 18(2) of the Act

Rent relief process

11. What is the process for initiating rent relief?

The Act sets out the framework for lessors and eligible lessees to negotiate rent relief as follows:

- a party to a protected lease must, as soon as possible after the commencement day of the Act (being 3 June 2020), continue to conduct, or enter into and conduct, negotiations during the financial hardship period in relation to the rent payable under the lease;
- a party to a protected lease may request the other party to the lease to renegotiate the rent payable under the lease; and
- a party to a protected lease must, if such request is made, renegotiate in good faith the rent payable under the lease.

See: s 12(1) and 18 of the Act

12. What factors does a lessor need to take into consideration in making a rent relief offer to a lessee?

Negotiations for rent relief must have regard to the individual circumstances of the protected lessee and of the lessor, taking into account such matters as:

- the degree of financial hardship of the lessee and of the lessor;
- whether the lease has expired and the lease is being held over or whether the lease is about to expire;
- whether the lessee, or the lessor, is in administration or receivership or is about to, or reasonably likely to, become insolvent or enter into administration or receivership;
- the leasing principles set out in the National Code; and
- any matters prescribed by Regulations.

As the Act only requires parties to 'have regard' to the National Code's leasing principles, the following requirements of the National Code are not mandatory:

- proportionate rent reductions of up to 100% of the rent payable (in the form of waivers and deferrals);
- rental waivers no less than 50% of the total rental reduction; and
- amortisation of deferrals over the balance of the lease term and for no less than 24 months
- landlords should share the benefits received due to the deferral of loan payments;
- repayment should occur over an extended period of time;
- landlords should seek to waive recovery of any other expenses payable;
- tenants should be able to extend their lease for the equivalent period of any waiver or deferral; and
- no fees/charges/interest should be applied in respect of rental waivers or deferrals.

See: s 12(2) and 18(3) of the Act

13. What types of relief are covered by 'rent relief'?

The Act does not dictate the type of rent relief that a lessor must offer. Nonetheless, as stated above, the Act requires parties to 'have regard' to the leasing principles set out in the National Code. See further detail in item 12 above.

See: s 18(3) of the Act

14. What percentage of the rent relief offered must in the form of a waiver?

The Act does not require lessors to provide a minimum percentage of rent relief in the form of a waiver. The Act only requires parties to 'have regard' to the leasing principles set out in the National Code. See further detail in item 12 above.

See: s 18(3) of the Act

15. Do rent reductions have to be proportionate to the lessee's reduction in trade during the COVID-19 pandemic period?

No, this is not strictly required. The Act only requires parties to 'have regard' to the leasing principles set out in the National Code. See further detail in item 12 above.

See: s 18(3) of the Act

16. Do repayments of rental deferrals by the lessee have to be amortised over a certain period?

No, the Act does not regulate the repayment of rental deferrals. The Act only requires parties to 'have regard' to the leasing principles set out in the National Code. See further detail in item 12 above.

See: s 18(3) of the Act

17. What fees, charges, or interest (if any), can be applied in respect of rental waivers or deferrals?

None.

The definition of 'prohibited lessor action' explicitly prohibits lessors from requiring the payment of interest, or any other fee or charge, on unpaid rent otherwise payable by the lessee, but its application is limited.

See further detail in items 20 and 21 below.

See: s 7(2)(g), 11 and 13 of the Act

Pre-agreed rent relief and subsequent rent relief

18. Can a lessee make more than one request for rent relief?

Yes, but no express right.

Rather, it is implied in the Regulations. However, unless the parties agree otherwise in writing, the parties to a protected lease must not renegotiate the rent payable under the lease within 3 months of an agreement for rent relief being reached, otherwise the protections set out in section 18 of the Act do not apply to the parties.

See: r 5 of the Regulations

19. What happens where the lessor and lessee have already agreed on rent relief prior to the Act coming into force?

The Act and the Regulations are silent in this regard.

However, if a lessor and lessee have already agreed on rent relief, the arrangement should not be affected by the introduction of the Act and the Regulations. To the extent the parties are subject to a protected lease, the parties should be aware of their rights and obligations under the Act and the Regulations.

Notwithstanding the agreement already in place, it may be open to the lessee to make a (further) request for rent relief but, this time, under section 18(1) of the Act and to force a re-negotiation.

It is implied in the Regulations that the lessee is permitted to request subsequent rent relief from the landlord, but rent renegotiations must not occur more frequently than every 3 months.

See further detail in item 18 above.

See: s 18(1) of the Act; r 5 of the Regulations

Prohibited enforcement actions

20. What actions are lessors prohibited from taking?

Lessors are prohibited from taking 'prohibited lessor actions' in certain circumstances (see further detail in item 21 below).

Under the Act, prohibited lessor actions include:

- exercising, or attempting to exercise, in relation to a protected lease, any right, power or remedy, whether under an Act, a law or a term or condition of a protected lease; or
- seeking orders or issuing proceedings in a court in relation to a protected lessee,

during the financial hardship period in connection with any breach of the protected lease by the protected lessee.

The Act, without limiting the generality of the above, explicitly states that a 'prohibited lessor action' includes doing, or attempting to do, any of the following:

- evicting the lessee from the premises to which a protected lease relates;
 - exercising a right of re-entry to the premises to which a protected lease relates;
 - recovering land;
 - distraining goods;
 - seeking forfeiture;
 - seeking or recovering damages;
 - requiring a payment of interest, or any other fee or charge, on unpaid rent otherwise payable by the lessee;
 - recovering the whole or part of a security bond, or bank guarantee, under, or in relation to, the lease;
 - requiring the performance of obligations by the lessee, or any other person, pursuant to a guarantee, or indemnity, relating to the lessee's obligations under the lease;
 - taking possession;
 - terminating the lease; and
 - seeking or applying any other remedy otherwise available to a lessor against a lessee under an Act or the law of Tasmania.
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Note that prohibited lessor actions appear to apply to breaches that occurred prior to the commencement day of the Act (being 3 June 2020) as well as during the financial hardship period.

See: s 7 and 10 of the Act

21. When may a landlord take enforcement action against a tenant?

There is no general prohibition on lessors taking enforcement action against a tenant.

Rather, lessors are not permitted to take a prohibited lessor action against a tenant if the lease is a protected lease and the grounds of breach of the lease during the financial hardship period consist of:

- a failure to pay rent, fees, levies or charges; or
- a failure to meet criteria based on sales performance or another prescribed factor; or
- a failure to pay outgoings that are payable by the lessee to the lessor or another person; or
- the business operating under the lease not being open for business during the hours, or on the days, specified in the lease; or
- any other act or omission of a kind prescribed by regulations.

In addition, any act or omission of a lessee or a lessor in relation to a commercial lease (whether or not it is a protected lease) that, during or before the financial hardship period, is:

- required, in response to the disease or disease-related factors, under the laws of the State or the Commonwealth; or
- reasonably required, in response to the disease or disease-related factors, in order for the lessee or the lessor to comply with the laws of the State or the Commonwealth,

will not, during or after the financial hardship period, amount to a breach of the lease and does not constitute grounds for the taking of any prohibited lessor action by the lessor or the taking of any action by the lessee against the lessor.

Further, if, before the commencement day of the Act (being 3 June 2020), the lessor had taken proceedings in respect of a protected lease, there is a stay on those proceedings until the end of the financial hardship period.

See: s 7, 10, 11 and 13 of the Act

Arrears

22. What obligation do lessors have to lessees under the Act where there are existing (pre COVID-19) arrears or the lessee is in breach of the lease?

A prohibited lessor action includes the taking of any action by the lessor on the grounds of a breach of the lease by the lessee prior to the commencement day of the Act (being 3 June 2020). Refer to items 20 and 21 above.

If, prior to 3 June 2020, a lessor has taken or commenced, but not yet completed or finalised, a prohibited lessor action in relation to a protected lessee, that the lessor would not have been able to undertake or commence during the financial hardship period by virtue of the provisions of the Act, the action, operation or effect, insofar as it remains incomplete or ongoing, must be stayed or suspended until the end of the financial hardship period.

Therefore, if a lessor has commenced or taken any prohibited lessor action in respect of:

- arrears; or
- breaches by the lessee of the lease,

which pre-existed the commencement day of the Act (on 3 June 2020), then any such action must be stayed or suspended until the end of the financial hardship period.

See: s 10 of the Act

Outgoings

23. Is a lessor required to pass on any reduction in outgoings to the lessee?

Yes. If a protected lessee is required by a provision of the protected lease to pay (otherwise than as part of rent) a fixed amount that represents an amount of 'statutory charge'* or insurance premium, and the amount of statutory charge or insurance premium payable by the lessor is reduced, the fixed amount that the protected lessee is required to pay must be reduced in the same proportion as the proportion by which the amount of the statutory charge or insurance premium payable by the lessor has been reduced.

However, parties to a protected lease can agree in writing that the relevant sub-regulation (being regulation 6(1)) does not apply to the protected lease.

*Under the Regulations, 'statutory charge' is defined as:

- land tax, within the meaning of the *Land Tax Act 2000* (Tas);
- rates payable under the *Local Government Act 1993* (Tas); and
- any fee or charge, payable under an Act, that, if it is not paid, becomes, under an Act, a charge on land.

See: r 6 of the Regulations

Security

24. Can a lessor draw on a tenant's security for non-payment of rent?

No, the definition of 'prohibited lessor action' explicitly prohibits lessors from recovering the whole or part of a security bond, or bank guarantee, under, or in relation to, the lease for non-payment of rent.

This prohibition extends to pre COVID-19 arrears, to the extent that any prohibited lessor action commenced or taken by a lessor prior to 3 June 2020 for non-payment of rent must be stayed or suspended until the end of the financial hardship period (see further detail in item 22 above).

See: s 7(2)(h) and 10 of the Act

Lease extension

25. Do lessors need to offer a lease extension to lessees?

Yes. Under the Act, a lessor must, on the request of a protected lessee, extend the period of the lease until the end of the financial hardship period or, if agreed between the parties, a longer period.

Several exceptions apply:

- the protected lease is a sublease and the lease has ceased or will cease to apply before the end of the financial hardship period;
- the lessor has entered into, or agreed to enter into, with another person a lease that is to take effect on the expiry of the lease of the protected lessee; or
- the lessor intends to occupy the premises to which the protected lease relates and there is evidence of the establishment of, or intention to continue, in or from the premises, such a business by the lessor and of the steps taken by the lessor in furtherance of that intention; or
- the circumstances apply as prescribed by regulations.

The extension of the period of the lease must be on terms and conditions that:

- are in accordance with the Act;
- are not less favourable to the lessee than the terms or conditions of the protected lease (as modified by the Act); and
- may be modified as required in order to comply with changes to the law that occurred after the protected lease was entered into.

See: s 15 of the Act

Rent increase freeze

26. Can lessors increase the rent during the COVID-19 pandemic period?

No, the Act prohibits rental increases during, or after, the financial hardship period if that increase is due during the financial hardship period. This effectively prohibits all fixed, consumer price index, market review and other rent increases from coming into effect during the financial hardship period while the lease is a protected lease, unless the parties agree in writing that the relevant sub-section (being section 17(2)) does not apply in relation to that lease.

The Regulations provide an exception for when rent or a component of rent is determined by reference to 'turnover'.

For the purposes of section 17(1) of the Act, turnover includes:

- gross takings;
- gross receipts;
- gross income; and
- any similar concept.

The Regulations set out amounts which, for the purposes of calculating turnover under section 17(1) of the Act, in relation to a protected lease, should not to be included, such as:

- the amount of losses incurred in the resale or disposal of merchandise reasonably and properly purchased from customers as trade-ins in the usual course of business;
- the amount of deposits and instalments that are received on account of lay-bys, hire purchase or credit sales and that are refunded to customers;
- the amount of a refund on a transaction when the proceeds of the transaction have been included as part of turnover; and
- the amount of revenue from online transactions, other than online transactions:
 - where the goods or services concerned are delivered or provided from or at the premises to which the protected lease relates (or a shopping centre of which the premises to which the protected lease relates forms part); or
 - where the transaction takes place while the purchaser is at the premises to which the protected lease relates, whether or not the goods or services concerned are delivered or provided from or at the premises.

See: s 17 of the Act; r 4 of the Regulations

Unpaid rent deferrals

27. Can lessors claim unpaid rent deferrals at the end of a lease?

Yes, parties are only required to 'have regard' to leasing principle 5 of the National Code, which requires that the payment of rental deferrals must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is greater, unless otherwise agreed by the parties.

However, a lessor must, on the request of a protected lessee, extend the period of the lease until the end of the financial hardship period or, if agreed between the parties, a longer period.

See: s 15 and 18 of the Act

Reduced trade

28. Can lessees be penalised for reduced opening hours or cessation of trade?

No, under the Act, a lessor in relation to a protected lease cannot take or continue any 'prohibited lessor action' in respect of any breach by the lessee during the financial hardship period consisting of, amongst other things:

- the business operating under the lease not being open for business during the hours, or on the days, specified in the lease; or
 - an act or omission of a lessee required (or reasonably required), in response to the disease or disease-related factors under the laws of the State or the Commonwealth.
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In addition, the Act explicitly prohibits a lessor in relation to a protected lease from, at any time during or after the end of the financial hardship period:

- exercising, in relation to the protected lessee, any right;
- making any claim;
- having any cause of action or remedy;
- applying any prohibition; or
- levying any penalty,

in respect of the lessee, during all or any part of the financial hardship period:

- ceasing to trade or indicating that it may cease to trade;
- ceasing to carry on a business, trade or profession or indicating that it may cease to carry on a business, trade or profession;
- ceasing to remain open to the public or customers for the purposes of trading or carrying on a trade or profession; or
- indicating that it may cease to remain open to the public or customers for the purposes of trading or carrying on a trade or profession.

See: s 7, 13 and 14 of the Act

Dispute resolution and mediation

29. If a leasing dispute arises, do parties have to attend a mediation?

Not in the first instance.

Parties are required to attempt to resolve any dispute that arises during the financial hardship period or that, in the financial hardship period, relates to a right or obligation under the Act, by direct negotiation.

If this is unsuccessful, either party is able to apply to the mediation provider for mediation of the dispute.

The mediation provider is able to mediate a dispute and require information of the parties.

A civil penalty (max. 200 penalty units for a body corporate (\$33,044) and max. 40 penalty units for an individual (\$6,608.80)) applies for failure to provide such information without reasonable excuse.

A party to a protected lease may, whether or not either party has applied for mediation, seek to have a dispute arbitrated under the *Commercial Arbitration Act 2011* (Tas).

See: Part 6 of the Act (in particular, s 22, 23 and 24)

30. What are the consequences if the lessor or lessee breaches the obligation to negotiate rent relief under the Act and the Regulations?

As set out in item 29 above, if a party breaches their obligations to negotiate rent relief under the Act, the parties must attempt to resolve the dispute by direct negotiation in the first instance.

If this is unsuccessful, either party is able to:

- apply to the mediation provider for mediation of the dispute; or
- seek to have the dispute arbitrated.

See: s 22, 23 and 26 of the Act

31. What happens if the mediation process fails?

A party to a protected lease may, whether or not either party has applied for mediation, seek to have the dispute arbitrated under the *Commercial Arbitration Act 2011* (Tas).

There is debate as to whether a mediation or a court or tribunal can impose a solution other than ordering the parties to negotiate in good faith.

See: s 26 of the Act

Other obligations

32. Does the Act and Regulations impose any other obligations on lessors and lessees?

Yes, a party to a protected lease must bear the party's own costs incurred in the preparation of a lease, or a variation of a lease, for the purposes of a provision of the Act.

See: s 19 of the Act

Lenders/mortgagees

33. Are there any specific rights or obligations for lenders/mortgagees under the Act and Regulations?

No, the Act and the Regulations do not set out specific rights or obligations for lenders/mortgagees.

Ineligible tenants

34. What are the expectations on lessors if the lessee falls outside the Act and Regulations?

The intention of the National Cabinet to apply the Code 'in spirit to all leasing arrangements for affected businesses' is neither reflected nor reinstated in the Act or the Regulations.

Each of the key measures set out in the Act and Regulations are in terms of 'protected leases' only. In fact, the Act states that the provisions of a protected lease are taken to be modified to the extent necessary to give effect to the operation of the Act.

On the basis that the provisions of the Act are intended to only be 'read into' the terms of any protected lease, the Act should not have application to any commercial lease which falls outside of the definition of 'protected lease'.

Therefore, for any other lease which is not a protected lease, any rent relief arrangements become a matter of commercial negotiation between a lessor and lessee.

See: s 9 of the Act

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