

# Western Australia - Commercial tenancies code of conduct explained

21 August 2020

## Frequently asked questions about the commercial tenancies code of conduct in Western Australia

### 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 WA law?

The Act:

The *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)* (**Act**) came into effect in WA on 23 April 2020 (though some provisions have retrospective operation) to establish a legislative framework under which a code of conduct could be adopted as law in WA. The Act, amongst other things, allows the Governor (on recommendation of the Minister for Small Business Development) to make regulations in a number of different respects.

The Regulations:

The first regulations to be enacted under the Act, the *Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA)* (**Regulations**), were introduced on 29 May 2020 to implement the leasing principles set out in the National Code.

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#### 2. What are the key issues dealt with in the WA Act and Regulations?

The Regulations set out the following key measures:

- eligibility for rent relief;
  - a process for rent relief negotiations;
  - overarching obligations to negotiate in good faith;
  - a requirement of landlords to consider waiving recovery of any outgoings or expenses payable by a tenant;
  - a requirement of landlords to extend the term of lease in line with rent relief arrangements; and
  - confidentiality obligations.
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### Pandemic period

#### 3. When will the Regulations operate?

The Regulations will have retrospective operation and the key provisions will have effect during the 'emergency period' which is the period from 30 March 2020 and ending on 29 September 2020 or another day prescribed by regulations. As yet, no other date has been prescribed.

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### Eligibility criteria

#### 4. What types of leases are eligible?

An eligible lease is a lease:

- that is a retail shop lease under the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*;
- of premises that are used by a tenant who owns or operates a small business;
- where the tenant is an incorporated association under the *Associations Incorporation Act 2015 (WA)*; or
- prescribed by regulations (although nothing further has been prescribed).

A 'small business' is defined per the *Small Business Development Corporation Act 1988 (WA)* as a business:

- that:
  - has a relatively small share of the market in which it competes;
  - is managed personally by the owner or directors; and
  - is not a subsidiary of a larger business; or
- that is declared to be a small business (there is currently no separate class of business that has been declared to be a 'small business').

See: *Sch 1 Cl 2 Regs; s 3 Act*

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## 5. Who is an eligible tenant?

An eligible tenant is a tenant who is a tenant of a small commercial lease who had a turnover of less than \$50 million for the financial year ending 30 June 2019 and:

- qualifies for the JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**Rules**); or
- at any time during the emergency period, satisfies the decline in turnover test in section 8 of the Rules.

See: *Sch 1 Cl 2 Regs*

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## 6. Do the Regulations apply to licensees who are in reality tenants?

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

This is because the definition of 'lease' under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) includes licences.

No, for non-retail licences.

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### Definition of turnover and provision of information

## 7. How is turnover defined?

Turnover is defined as:

- for franchisees, it is the turnover of the business conducted at the premises or land concerned;
- for entities that are members of a group (i.e. related bodies corporate), it is the group turnover; and
- in any other case, it is the turnover of the business conducted at the premises or land concerned.

Turnover includes internet sales of goods and services.

See: *Sch 1 Cl 2 Regs*

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## 8. What information or documentation must a tenant provide to the landlord in order to establish a reduction in turnover?

The Regulations set out that an eligible tenant must provide the following information:

- a statement by the tenant that:
  - the tenant's lease is a small commercial lease; and
  - the tenant is an eligible tenant in relation to the small commercial lease;
- sufficient and accurate information evidencing the tenant's eligibility; and
- sufficient and accurate information evidencing that the reduction in the tenant's turnover:
  - is associated with the business conducted under the relevant lease; and
  - has been experienced during the emergency period.

See: *Sch 1 Cl 5 Regs*

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## Confidentiality requirements

### 9. Are landlords and tenants protected under the Regulations against disclosing financially sensitive information?

The Regulations require that 'protected information: divulged in connection with the operation of the Regulations must be kept confidential.

Protected information means:

- the name or contact details of any person other than the landlord or tenant of the relevant lease; and
- information relating to business processes or financial information.

See: *Sch 1 Cl 13 Regs*

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## Application of Leasing Principles

### *Good faith obligations*

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

Parties are under a general obligation to renegotiate in good faith the rent payable under, and other terms of, the commercial lease.

This general obligation requires the parties to negotiate with a spirit of commercial cooperation and willingness, propriety and honesty. Typically, this will require the parties to:

- disclose material facts (keeping in mind their obligations under s 18 of the *Australian Consumer Law*);
- not provide false information in the course of the negotiations;
- not frustrate the negotiation process (such as by refusing to meet, or refusing to provide documents); or
- threatening a future breach of contract.

However, this obligation does not require the parties to ignore their commercial interests or their strict legal rights.

See: *Sch 1 Cl 4 Regs*

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### *Rent relief process*

### 11. What is the process for initiating rent relief?

The Regulations set out the framework for landlords and eligible tenants to negotiate rent relief as follows:

- An eligible tenant may make a request for relief in writing and accompanied by the required information (see question 8 above);
- A landlord must make an offer of rent relief within 14 days of receiving the request; and
- Following the offer, the parties must negotiate to agree on rent relief.

See: *Sch 1 Cl 4 Regs*

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### 12. What factors does a landlord need to take into consideration in making a rent relief offer to a tenant?

Any rent relief offer required to be made by the landlord:

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- must apply to the emergency period;
  - must be at least proportionate to the reduction in tenant's turnover associated with the business that has occurred in the emergency period;
  - must include that at least 50% of the relief offered be in the form of a waiver of rent unless otherwise agreed;
  - must include that more than 50% of the relief offered be in the form of a waiver of rent if:
    - failure to do so would compromise the tenant's capacity to fulfil the tenant's ongoing obligations under the lease; and
    - the landlord has the financial capacity to do so.

See: *Sch 1 Cl 7 Regs*

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

'Rent relief' means any form of relief provided to a tenant in respect of their obligation to pay rent and includes a waiver or deferral of all or a proportion of the rent payable.

See: *Sch 1 Cl 2 Regs*

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

At least 50% unless otherwise agreed and more than 50% where:

- failure to do so would compromise the tenant's capacity to fulfil the tenant's ongoing obligations under the lease; and
- the landlord has the financial capacity to do so.

See: *Sch 1 Cl 7 Regs*

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

Rent relief must be at least proportionate to the tenant's reduction in trade.

See: *Sch 1 Cl 7 Regs*

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

Yes, rent deferrals must be amortised over 24 months or the balance of the lease term (whichever is greater).

See: *Sch 1 Cl 9 Regs*

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

The Act prohibits requiring a payment of interest on unpaid rent or on any unpaid amount of money payable by the tenant to the landlord under the lease.

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See: s 8 Act

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### *Pre-agreed rent relief and subsequent rent relief*

#### **18. Can a tenant make more than one request for rent relief?**

Yes, the tenant may make a further request for rent relief if:

- the financial circumstances of a tenant under materially change after a variation to the lease has been made or an agreement has been reached; or
- an agreement for rent relief was made before the Regulations were enacted and the tenant believes that this existing agreement is less favourable than what would have been provided in accordance with the Regulations.

See: Sch 1 Cl 10 Regs

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#### **19. What happens where the landlord and tenant have already agreed on rent relief prior to the Regulations coming into force?**

The tenant may make a further request for rent relief if the tenant believes that this existing agreement is less favourable than what would have been provided in accordance with the Regulations.

See: Sch 1 Cl 10 Regs

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### *Prohibited enforcement actions*

#### **20. What actions are landlords prohibited from taking?**

Under the Act, a landlord must not take a 'prohibited action' during the emergency period on the grounds of a breach by the tenant of its lease that occurs during the emergency period if the breach consists of:

- failure to pay rent or any other amount of money payable by the tenant to the landlord under the lease;
- the premises not being open for business at hours or times specified in the lease; or
- any act or omission of a kind prescribed by regulations – as yet, nothing further has been prescribed.

A 'prohibited action' means taking action under the provisions of a lease or seeking orders, or commencing proceedings, in a court or tribunal for any of the following:

- eviction of the tenant;
  - exercising a right of re-entry;
  - possession;
  - recovery of land;
  - distraint of goods;
  - forfeiture;
  - termination;
  - 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 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 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 lease (including, without limitation, making a demand on a bank guarantee); and
  - any other remedy otherwise available to the landlord against the tenant at common law or under a written law.
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See: s 8 and 9 Act

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

A landlord may take enforcement action during the emergency period, including any 'prohibited action' against the tenant, if the breach of the lease does not consist of:

- failure to pay rent or any other amount of money payable by the tenant to the landlord under the lease;
- the premises not being open for business at hours or times specified in the lease; or
- any act or omission of a kind prescribed by regulations – as yet, nothing further has been prescribed.

Further to the above, an act or omission of a tenant required under a law of the Commonwealth or the State in response to the COVID-19 pandemic is taken not to amount to a breach of a commercial lease, and does not constitute grounds for termination of the lease or the taking of any prescribed action by the lessor against the lessee.

See: s 9, 10 and 12 of the Act

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### *Arrears*

## 22. What obligation do landlords have to tenants under the Regulations where there are existing (pre COVID-19) arrears or the tenant is in breach of the lease?

None – the Act and Regulations only apply from the start of the emergency period.

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### *Outgoings*

## 23. Is a landlord required to pass on any reduction in outgoings to the tenant?

The landlord must consider waiving recovery of any outgoings or other expense payable by the tenant under the lease for the part of the emergency period that the tenant is not able to conduct their business at the premises.

Any reduction in statutory outgoings received by the landlord must also be passed through to the tenant.

See: Sch 1 cl 11 & 12 Regs

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### *Security*

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

Drawing on a tenant's security amounts to a 'prohibited action'. See questions 20 and 21.

See: s 8 and 9 of the Act

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### *Lease extension*

## 25. Do landlords need to offer a lease extension to tenants?

- Yes, landlords must offer tenants an opportunity to extend the lease for the equivalent period of the rental waiver or deferral.

See: Sch 1 cl 9 Regs

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### ***Rent increase freeze***

#### **26. Can landlords increase the rent during the COVID-19 pandemic period?**

Rents cannot be increased during the emergency period other than rent determined by reference to turnover.

See: s 11 Act

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### ***Unpaid rent deferrals***

#### **27. Can landlords claim unpaid rent deferrals at the end of a lease?**

Yes, however this is subject to the required to extend the lease to allow rent deferrals to be amortised over the great period of 24 months or the balance of the term of the lease.

See: Sch 1 cl 9 Regs

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### ***Reduced trade***

#### **28. Can tenants be penalised for reduced opening hours or cessation of trade?**

No. The Regulations contain a provision that explicitly prohibits a landlord taking any 'prohibited action' against a tenant on the grounds of a breach of a lease during the prescribed period that consists of the business operating under the lease not being open for business during the hours specified in the lease. See question 20 for definition of 'prohibited action'.

See: s 8, 9 of the Act

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### **Dispute resolution and mediation**

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

No, however, if both the tenant and the landlord are a small business, either party may, during the emergency period, request the Small Business Development Commissioner to:

- provide assistance to attempt to resolve the dispute under section 15C of the *Small Business Development Corporation Act 1983*; or
- undertake alternative dispute resolution in respect of the dispute under section 15E of the *Small Business Development Corporation Act 1983*.

However, the parties are also free to attend mediation if they wish even if the landlord is not a small business.

See: s 16 Act

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#### **30. What are the consequences if the landlord or tenant breaches the obligation to negotiate rent relief under the Regulations?**

As set out above, if both the tenant and landlord are a small business, a request can be made to the *Small Business Development Commissioner* as per question 29, otherwise, either party may refer a dispute to the State Administrative Tribunal and seek any of the following orders:

- an order for a party to pay money;
  - injunctive relief;
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- an order for specified rent relief;
  - termination of the lease (only if there is a dispute over the tenant's financial hardship); or
  - any other ancillary order to give effect to the above orders.

There are no civil penalties for compliance.

See: s 16, 17 Act

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### 31. What happens if the mediation process fails?

That parties may seek orders (see above) from the State Administrative Tribunal in the first instance and then pursue the matter through the Courts.

See: s 16 Act

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## Other obligations

### 32. Do the Regulations impose any other obligations on landlords and tenants?

No.

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## Lenders/mortgagees

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

No.

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## Ineligible tenants

### 34. What are the expectations on landlords if the tenant falls outside the Regulations?

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

The objectives of the Regulations are in terms of 'eligible leases' only, which suggests that the Regulations should not have application to any commercial leases which fall outside of the definition of 'eligible lease'.

Therefore, for non-eligible leases, any rent relief arrangements become a matter of commercial negotiation between a landlord and a tenant.

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