
Summary of the *Commercial Tenancy (COVID-19 Response) Regulations 2020 (WA)*

1. Introduction

On 3 April 2020, the National Cabinet developed a set of leasing principles during the COVID-19 Pandemic which were to apply in negotiations regarding relief for tenants.¹ These principles were to be legislated in each State and on 29 May 2020, the *Commercial Tenancy (COVID-19 Response) Regulations 2020 (WA)* (**Regulations**) came into effect in Western Australia. The Regulations set out obligations on landlords to provide certain rent and/or outgoings relief, depending on the circumstances.

The Regulations were made under the *Commercial Tenancy (COVID-19 Response) Act 2020 (WA)* (**Act**), which was passed on 24 April 2020. We previously prepared a summary of the Act, and recommend that this summary is read in conjunction with it – please follow this link to view that summary: [<https://avonlegal.com.au/commercial-tenancy-covid-19-response-act-2020-wa/>].

2. Which leases are subject to the Regulations?

To be subject to these Regulations, the following requirements must be met:

- (a) the lease must be one to which the Act applies² (*see our summary of the Act*) (**Small Commercial Lease**);

and

- (b) the tenant must have a turnover of less than \$50,000,000.00 in the financial year ending 30 June 2019, with this figure being:
- (i) if the tenant is a corporation which is part of a corporate group – the turnover for the entire group;³
- (ii) if the tenant is a franchisee or is not part of a corporate group – the turnover from the business operated from the premises subject to the lease;⁴

and

- (c) the tenant must either:
- (i) qualify for the JobKeeper Scheme;⁵ or
- (ii) meet the ‘decline in turnover test’ under the JobKeeper Scheme anytime during the emergency period,⁶ which is currently 30 March 2020 to 29 September 2020 (**Emergency Period**).

¹ Prime Minister of Australia, ‘Update on Coronavirus Measures’ (Media Statement, 7 April 2020) <<https://www.pm.gov.au/media/update-coronavirus-measures-070420>>.

² *Commercial Tenancies (COVID-19 Response) Act 2020 (WA)* s 3 (definition of ‘small commercial lease’); *Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA)* sch 1 rr 1(2), 2(1).

³ *Commercial Tenancies (COVID-19 Response) Regulations 2020 (WA)* sch 1 r 2(a)(ii).

⁴ *Ibid* sch 1 r 2(a)(i), (iii).

⁵ *Ibid* sch 1 r 2(b)(i).

⁶ *Ibid* sch 1 r 2(b)(ii).

3. Obligations in negotiations

Parties negotiating in relation to the Regulations must:⁷

- (a) cooperate;
- (b) act reasonably and in good faith;
- (c) act in an open, honest and transparent manner;
- (d) provide each party with sufficient accurate information which is reasonable for the purposes of negotiations; and
- (e) not make onerous demands for information.

4. Confidentiality

Confidential information relating to the details of third parties, business processes or financial information which is obtained during negotiations under the Regulations, must not be disclosed to any other party.⁸ Exceptions to this rule include:⁹

- (a) where the other party consents;
- (b) when it is required to be disclosed under law;
- (c) for use in alternative dispute resolution or court proceedings.

5. Rent relief – Tenant’s request

During the Emergency Period, tenants can make a request in writing to their landlord for rent relief.¹⁰ This request must provide:

- (a) a statement that the tenant is an ‘eligible tenant’ (i.e. meets the requirements set out in section 2 above) and the lease is a Small Commercial Lease, with sufficient evidence to support this statement;¹¹ and
- (b) sufficient and accurate information which shows that the tenant’s reduction in turnover:
 - (i) is in relation to the business which is conducted on the premises;¹² and

⁷ Ibid sch 1 r 4.

⁸ Ibid sch 1 r 13(1).

⁹ Ibid sch 1 r 13(2).

¹⁰ Ibid sch 1 r 5 (1)-(2).

¹¹ Ibid sch 1 r 5(2)(a)-(b).

¹² Ibid sch 1 r 5(2)(c)(i).

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- (ii) occurred during the Emergency Period.¹³

6. Rent relief – Landlord’s obligations

Once a landlord has received a request for rent relief which complies with the requirements set out in section 4 above, the landlord must offer rent relief within 14 days, unless the parties have agreed to another deadline.¹⁴

Unless otherwise agreed by the parties, the landlord’s offer must be rent relief in the form of at least:

- (a) a waiver of 50% of the rent;¹⁵ and
- (b) proportionate to the tenant’s reduction in turnover.¹⁶ For example, if the tenant’s reduction in turnover is 60%, then the relief must be for at least 60% of the rent.

Any amount of rent relief over 50% of the rent can be in the form of a payment deferral instead of a waiver, unless:

- (a) not providing the rent relief as a waiver would compromise the tenant’s ability to continue to meet their obligations under the lease;¹⁷ and
- (b) the landlord has the financial capacity to waive more than 50% of the rent.¹⁸

Additionally, in the situation of a sub-lease, the sub-landlord must pass on any rent relief it receives from the head-landlord to the sub-tenant.¹⁹

7. Payment of deferred rent

If a component of the rent relief is for payment to be deferred, then unless agreed otherwise in writing by the parties, the following rules will apply to any agreement.²⁰

- (a) no repayments are to be made prior to either the end of the Emergency Period or the expiry of the lease (whichever occurs first);²¹
- (b) the repayments are to be made over either the remainder of the lease term or a period of at least 2 years (whichever is greater),²² with the parties to agree on how the repayments will be made over that period of time.²³

¹³ Ibid sch 1 r 5(2)(c)(ii).

¹⁴ Ibid sch 1 r 6(1).

¹⁵ Ibid sch 1 r 7(6).

¹⁶ Ibid sch 1 r 7(3).

¹⁷ Ibid sch 1 r 7(7)(a).

¹⁸ Ibid sch 1 r 7(7)(b).

¹⁹ Ibid sch 1 r 7(8).

²⁰ Ibid sch 1 r 9(5).

²¹ Ibid sch 1 r 9(2).

²² Ibid sch 1 r 9(3).

²³ Ibid sch 1 r 9(4).

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8. Extension of lease

If the parties have agreed to defer the payment of rent, then the landlord must offer an extension of lease to the tenant (on the same terms as the original lease),²⁴ for the period of time equivalent to how long the repayment period is if it is longer than the lease term.²⁵ For example, if the parties have agreed to defer the repayment of rent for 2 years and the lease is due to expire in 6 months, then an extension of lease for 1.5 years must be offered.

This requirement does not apply if granting the extension of lease would be inconsistent with:

- (a) a head-lease which the relevant lease falls under;²⁶ or
- (b) another agreement or contract already entered into by the landlord with a third party in relation to the land – such as an agreement to lease.²⁷

9. Additional requests for rent relief

Even when an agreement for rent relief has been entered into, a tenant can request further relief under the Regulations if:

- (a) where the parties entered into an agreement prior to the Regulations – the tenant believes that they would receive a more favourable outcome under the Regulations;²⁸ or
- (b) where the parties entered into an agreement under the Regulations – the tenant's financial circumstances have materially changed since that agreement.²⁹

These further requests for rent relief are to be dealt with by the parties in same way as an initial request for relief under the Regulations.³⁰

10. Relief for outgoings

If during the Emergency Period a tenant is unable to use the premises which are subject to the lease, then the landlord must consider waiving the payment of outgoings by the tenant, for the period which the tenant is unable to use the premises.³¹ The landlord can also cease or reduce the provision of some services to the premises, if it is reasonable to do so or the tenant has requested it.³²

²⁴ Ibid sch 1 r 9(6).

²⁵ Ibid sch 1 r 9(7).

²⁶ Ibid sch 1 r 9(8)(a).

²⁷ Ibid sch 1 r 9(8)(b).

²⁸ Ibid sch 1 r 10(1)-(2).

²⁹ Ibid sch 1 r 10(3).

³⁰ Ibid sch 1 r 10(2)-(3).

³¹ Ibid sch 1 r 11(2).

³² Ibid sch 1 r 11(3).

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If any outgoings in relation to the premises are reduced during the Emergency Period (such as Land Tax), then the landlord must ensure the tenant only pays their proportional share of the amount actually charged.³³ If the tenant has already paid more than their proportional share, the landlord must refund the excess payment as soon as possible.³⁴

11. Conclusion

The Regulations create a new set of rules and requirements for landlords and tenants to follow during the COVID-19 pandemic. Some are quite prescriptive while others can be negotiated between the parties. Whatever the outcome of negotiations may be, the agreement must be formalised in writing or be a variation of the lease to give the parties certainty as to its terms.

Avon Legal can assist in all stages of the processes under the Regulations and Act, including advising on negotiations, preparing an offer and drafting a variation of lease to formalise the agreement.

If you would like assistance with your commercial lease, please contact our office on (08) 9274 1977 today to make an appointment with our experienced Commercial Team.

³³ Ibid sch 1 r 12(2).

³⁴ Ibid sch 1 r 12(3).