

## ***COVID-19: Tasmania's implementation of the national code for commercial tenancies***

**Date:** 28 July 2020

**Source:** [Tasmanian Legislation](#)

### **Abstract:**

It was announced by the Prime Minister on 7 April 2020 that the [National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 \(National Code\)](#) would be given effect in each state and territory through state and territory legislation or regulation. The purpose of the state and territory legislation or regulation is to modify, during the COVID-19 pandemic period, the operation of:

- the provisions of commercial leases (including retail, office and industrial leases); and
- commercial and retail leases legislation,

in the states and territories to provide relief to commercial tenants who are suffering financial hardship as a direct result of the COVID-19 pandemic.

See our update on 9 April 2020 [COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#).

### **Implementation of the National Code in Tasmania**

In Tasmania, the [COVID-19 Disease Emergency \(Commercial Leases\) Act 2020 \(TAS\) \(Act\)](#) received royal assent on 13 May 2020. All of the provisions in the Act, except for section 17 (prohibiting rent increases), commenced on 3 June 2020. Section 17 commenced on 24 July 2020.

The [COVID-19 Disease Emergency \(Commercial Leases\) Regulations 2020 \(TAS\) \(Regulations\)](#) were made on 24 July 2020 (pursuant to section 32 of the Act).

### **Definitions used in the Act and the Regulations**

The following definitions are used in the Act and the Regulations and are explained below:

#### **Protected lease**

A lease is a protected lease if:

- the lease is a commercial lease; and
- at any time during the financial hardship period, the tenant is an eligible person.

#### **Commercial lease**

A commercial lease is:

- a retail lease (being a lease of a premises to which Schedule 1 of the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (TAS) applies); and

- a lease of a premises occupied wholly or predominantly for business purposes (as defined).

A lease includes an agreement in relation to a premises but a right to occupy a premises granted, or agreed to be granted, by a landlord does not have to be a right of exclusive possession.

### **Financial hardship period**

The financial hardship period commences on 1 April 2020 and ends 12 months after 3 June 2020 or earlier if determined by the Treasurer. The [Consumer, Building and Occupation Services](#) website indicates that, at this stage, the financial hardship period should end on 30 September 2020.

### **Eligible person**

A person is an eligible person if the person:

- is entitled to a [jobkeeper payment](#) or qualifies for the [jobkeeper scheme](#); and
- is an SME entity for the purposes of the [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Act 2020 \(Cth\)](#), i.e. an entity which carries on business (or is a non-profit body) and whose annual turnover for the current financial year is likely to be less than \$50 million and/or its annual turnover for the previous financial year was less than \$50 million.

### **Who do the Act and the Regulations apply to?**

The Act and the Regulations apply to a protected lease whether or not:

- it was entered into before or during the financial hardship period; and
- it was entered into pursuant to an option for a further lease or is a renewal of a lease.

A protected lease is deemed to be modified to the extent necessary to give effect to the Act and the Regulations.

### **What do the Act and the Regulations provide in relation to protected leases?**

#### **Actions to be taken by parties during the financial hardship period**

A party:

- must, as soon as possible after 3 June 2020, conduct (or continue to conduct) negotiations during the financial hardship period in relation to the rent payable (or, if requested by the tenant, the renewal of the lease or the exercise by the tenant of an option) during the financial hardship period;
- must not engage in misleading or deceptive conduct in negotiations;
- must, upon request, provide the other party with information that is accurate and sufficient to enable negotiations to occur;
- must, during the financial hardship period, provide the other party with other information that is reasonably necessary to allow the other party to apply for financial assistance;
- must not make use of any of the information provided except for the purposes for which it is provided; and
- subject to exceptions, must not provide to any other person any of the information provided.

The negotiations must be conducted with regard to the individual circumstances of the tenant and of the landlord, taking into account such matters as:

- their degree of financial hardship;

- if the lease has expired and is being held over or if the lease is about to expire; and
- if they are in administration or receivership or are about to, or are reasonably likely to, become insolvent or enter into administration or receivership.

### **Prohibited landlord actions during the financial hardship period**

A landlord cannot, during or after the financial hardship period, take (or continue) any prohibited landlord action on the ground of a breach of the lease by the tenant during the financial hardship period for:

- a failure to pay rent, fees, levies or charges;
- a failure to meet criteria based on sales performance or other prescribed factor;
- a failure to pay outgoings; or
- the business not being open for business during the hours/days specified in the lease.

### **What is a prohibited landlord action?**

A prohibited landlord action means a landlord:

- exercising (or attempting to exercise), any right, power or remedy; or
- seeking orders or issuing proceedings in a court,

during the financial hardship period for a breach by the tenant.

### **Ceasing normal trading during financial hardship period**

If, during the financial hardship period, a tenant ceases to:

- trade;
- carry on a business, trade or profession; or
- remain open to the public or customers,

(which the tenant is required to do under the lease) the landlord, during or after the end of the financial hardship period:

- cannot exercise any right or make any claim;
- does not have a cause of action or any remedy; or
- cannot levy any penalty.

### **Landlords to extend leases during financial hardship period**

During the financial hardship period, a landlord must, at the request of the tenant, extend the period of the lease:

- until the end of the financial hardship period, or, if agreed between the parties, a longer period; and
- on terms and conditions that are in accordance with the Act and are not less favourable to the tenant than the terms or conditions of the lease (as modified by the Act).

This does not apply if:

- the lease is a sublease and the head lease has ceased (or will cease) to apply before the end of the financial hardship period;
- the landlord has entered into, or agreed to enter into, a lease with another person in relation to the leased premises that is to take effect on the expiry of the lease; or

- the landlord intends to occupy the leased premises for the purposes of carrying on the landlord's business.

### **Communication of information**

Subject to certain exceptions, a person must not communicate or divulge confidential information obtained in connection with the operation of the Act. A party to a protected lease must not provide false or misleading information to another party or to the Mediation Provider.

### **Rent not to be increased during financial hardship period**

Unless the parties agree otherwise in writing, any rent increase amount (excluding any rent increase amount determined by reference to turnover) that is payable during the financial hardship period is not payable during or after the financial hardship period if the increase occurs while the lease is a protected lease.

### **Rent to be renegotiated**

A party may request the other party to a lease to renegotiate the rent payable. The other party must, if such a request is made, renegotiate the rent in good faith. Each party must renegotiate the rent having regard to:

- the degree of financial hardship of the parties;
- if the lease has expired and is being held over or if the lease is about to expire;
- if the parties are in administration or receivership or are about to, or reasonably likely to, become insolvent or enter into administration or receivership; and
- the leasing principles in the National Code.

A tenant may waive the application to the tenant of any part of this rent renegotiation obligation.

Unless the parties agree otherwise in writing, the rent cannot be renegotiated if it has already been renegotiated within the previous 3 months.

### **Reduction of statutory charges or insurance premiums**

If:

- a tenant is required to pay to a landlord (otherwise than as part of rent) a fixed amount for a statutory charge (e.g. land tax) or insurance premium payable by the landlord; and
- the amount payable by the landlord is reduced,

then, unless the parties agree otherwise in writing, the fixed amount payable by the tenant must also be proportionately reduced.

### **Prohibited landlord actions taken before 3 June 2020 are suspended**

If, during the period before 3 June 2020:

- a landlord has taken, but not yet completed or finalised, a prohibited landlord action or any other measure in relation to a tenant that the landlord would not have been able to take during the financial hardship period by virtue of the Act; or
- the operation of the terms and conditions of a lease has had an effect contrary to the Act,

the action or effect, insofar as it remains incomplete or ongoing, is suspended until the end of the financial hardship period.

## **Certain acts or omissions are authorised**

An act or omission of a tenant or landlord in relation to a commercial lease (whether or not it is a protected lease) during or before the financial hardship period that is:

- required in response to the COVID-19 pandemic under state or Commonwealth law; or
- reasonably required, in response to the COVID-19 pandemic, in order for the tenant or the landlord to comply with a state or Commonwealth law,

does not, either during or after the financial hardship period, constitute a breach of the lease or grounds for the taking of any prohibited landlord action by the landlord or the taking of any action by the tenant against the landlord.

## **What about disputes?**

### **Parties must first attempt to resolve disputes**

The parties to a lease must first attempt to resolve, by negotiation, a dispute between the parties that:

- arises during the financial hardship period; or
- in the financial hardship period, relates to a right or obligation under the Act.

Mediation under clause 39 of Schedule 1 of the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* (TAS) does not apply.

### **Party may apply for mediation**

A party may apply to the Mediation Provider (i.e. the Director of Consumer Affairs and Fair Trading) (“**Mediation Provider**”) for mediation of a dispute, in relation to issues that arise from the operation of the Act. The Mediation Provider may require a party to provide relevant information.

### **Arbitration**

Whether or not a party has applied for mediation, a party may seek to have a dispute arbitrated under the *Commercial Arbitration Act 2011* (TAS).

### **Parties can resolve a dispute themselves**

Nothing in the Act or the Regulations prevents parties from attempting to resolve a dispute between themselves.

## **Do the Act and the Regulations give full effect to the National Code?**

The Act and the Regulations adopt most of the principles in the National Code (e.g. no rent increases or landlords must pass on the benefit of a reduction in statutory charges) or a variation of the principles (e.g. a party must negotiate the rent payable during the financial hardship period or a landlord must, if requested, extend the lease until the end of the financial hardship period). Further, while some of the principles are not set out expressly (e.g. that landlords must offer rent reductions in the form of waivers and deferrals proportionate to the reduction in the tenants’ trade), rent must be renegotiated having regard to the leasing principles in the National Code. The National Code is therefore required to form part of any rent renegotiations between the parties.

See [COVID-19 and commercial tenancies – guide to the national mandatory code of conduct](#)

## What should Tasmanian landlords and tenants do?

Landlords and tenants under protected leases should ensure that they understand their rights and obligations under the Act and the Regulations. Landlords cannot take certain actions during or after the financial hardship period and must negotiate the rent payable during the financial hardship period. Accordingly, a tenant under a protected lease who is suffering financial hardship as a direct result of the COVID-19 pandemic should seek rent relief from the landlord (if it has not already done so). The parties should do the following:

### Step 1

- Confirm that their lease is a “protected lease” and that the tenant is an “eligible person”.
- Carefully review the Act, the Regulations and the National Code to determine their rights and obligations.
- Endeavour to seek any government relief that may be available, e.g. land tax or rates relief for commercial landlords during the COVID-19 pandemic.

### Step 2

- Communicate and commence negotiations with each other as soon as possible (if they have not already done so).
- Provide each other with information that is accurate and sufficient to evidence each other’s financial circumstances and to enable negotiations to occur (or to allow each party to apply for financial assistance):
  - Tenants should provide evidence that they qualify for the [jobkeeper scheme](#) and are an SME entity. Evidence of turnover could comprise a tenant’s latest set of audited accounts or other independently verified information such as ATO tax information.
  - If evidence of a reduction in turnover is required, accounting systems should be capable of producing this information. The [ATO website](#) also provides a method of calculating a reduction in turnover.
  - Landlords should disclose any financial benefits received, e.g. statutory charges relief, reduction in insurance premiums, etc.
- Have regard to each other’s individual circumstances, including financial hardship. If renegotiating rent, the parties must also have regard to the leasing principles in the National Code.
- Consider if FIRB approval is required for any lease variation or extension (if the tenant is a foreign person). See our update on 30 April 2020 [COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions.](#)

### Step 4

- Ensure that whatever is agreed is documented, preferably in a deed of variation of the lease.
- Apply to the Mediation Provider for mediation of a dispute (if a dispute arises and cannot be resolved between the parties).

## What about leases not covered by the Act or the Regulations?

Parties under leases not covered by the Act or the Regulations can still adopt the principles in the National Code in negotiating amendments to their existing leasing arrangements as it was intended that the principles should apply “in spirit” to all affected businesses. But the Act or the Regulations do not apply to these leases. The parties are not bound by them and cannot benefit from the protection provided by them. These landlords are not obliged to provide relief and may be entitled to charge interest on unpaid rent, draw on the tenants’ securities or even terminate the leases for non-payment of rent.

## Further resources and guidance:

See also the following information provided by Consumer, Building and Occupation Services in Tasmania:

- [Commercial tenancies – Changes to commercial tenancies during COVID-19](#)
- [Tenants with protected commercial leases](#)
- [Landlords with protected commercial leases](#)
- [Commercial lease mediation](#)