

COVID-19: WA implements its own version of the national code of conduct for commercial tenancies

Source: [Western Australia Legislation](#)

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Abstract:

As noted in our update on 7 May 2020 ([COVID-19: WA enacts commercial tenancies legislation but still has to adopt a code fully implementing the national code of conduct](#)), the [Commercial Tenancies \(COVID-19 Response\) Act \(WA\)](#) (“**Act**”), which was assented to on 23 April 2020, provided that regulations may adopt a code of conduct relating to small commercial lease principles during the COVID-19 pandemic. The Act mainly dealt with prohibited actions and the process for resolving disputes during the emergency period (defined below).

WA has now adopted such a code by giving effect to the [Commercial Tenancies \(COVID-19 Response\) Regulations 2020 \(WA\)](#) (“**Code**”).

When does the Code come into effect?

The Code came into effect on 30 May 2020; however, as with the Act, the Code applies to the “emergency period”, which is the period:

- commencing on 30 March 2020; and
- ending on 29 September 2020 (unless another date is prescribed by regulation before 29 September 2020) (“**emergency period**”).

Who does the Code apply to?

The Code applies to **relevant small commercial leases**. A “relevant small commercial lease” is a small commercial lease with an eligible tenant (“**relevant small commercial lease**”).

A **small commercial lease** is:

- a retail shop lease (as defined in s3(1) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA));
- a lease where the tenant owns or operates a small business (as defined in s3(1) of the *Small Business Development Corporations Act 1983* (WA)) (“**small business**”);
- a lease where the tenant is an incorporated association (as defined in s3 of the *Associations Incorporation Act 2015* (WA)); or
- any other lease that is prescribed by regulation (none have been prescribed to date) (“**small commercial lease**”),

An **eligible tenant** is a tenant who:

- has a turnover of less than \$50m in the financial year ending on 30 June 2019; and
- either:
 - qualifies for the [jobkeeper scheme](#) under section 7 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth); or
 - has, at any time during the emergency period, satisfied the *decline in turnover test* in section 8 of those Rules. A tenant will generally satisfy this test if the tenant has experienced a 30% reduction in turnover (or 15% in the case of an ACNC-registered charity) during a month or quarter after 30 March 2020 when compared with the corresponding period in 2019 (“**eligible tenant**”).

Turnover

For the purpose of determining if a tenant has a turnover of less than \$50m, a tenant's turnover is taken to be:

- if the tenant is a franchisee – the turnover of the business conducted by the tenant at the leased premises;
- if the tenant is a corporation that is a member of a group (i.e. related bodies corporate as defined in s9 of the *Corporations Act 2001* (Cth)) – the turnover of the group; and
- in any other case – the turnover of the business conducted by the tenant at the leased premises.

What are the key provisions of the Code?

The Code comprises a code of principles which apply to relevant small commercial leases during the COVID-19 pandemic:

Overarching obligations of landlords and tenants

In negotiating rent relief, a landlord and a tenant under a small commercial lease must:

- cooperate;
- act reasonably and in good faith;
- act in an open, honest and transparent manner;
- provide each other with sufficient and accurate information that is reasonable in the circumstances; and
- not make onerous demands for information from each other.

Tenants request rent relief

A tenant may, during the emergency period, request rent relief from the landlord.

The request must be in writing and be accompanied by:

- a statement by the tenant that the tenant is an eligible tenant under a small commercial lease; and
- sufficient and accurate information evidencing the above and the tenant's reduction in turnover during the emergency period.

Landlords rent relief offer

On receipt of a valid rent relief request from a tenant, a landlord must offer rent relief within:

- 14 days; or
- such other period that is agreed between the parties.

The landlord's offer of rent relief must be:

- in writing; and
- in accordance with the principles set out below.

Parties negotiate rent relief

On receipt by the tenant of the landlord's offer of rent relief, the landlord and the tenant must, in accordance with the principles set out below, negotiate with a view to agreeing the rent relief which is to apply during the emergency period.

Principles which apply to rent relief offers and negotiations

A landlord's offer of rent relief:

- can only apply to the emergency period;
- must be at least proportionate to the tenant's reduction in turnover during the emergency period (calculated using the *decline in turnover test* set out in section 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Commonwealth), unless otherwise agreed by the landlord and the tenant);
- may apply to up to 100% of the rent payable under the lease;
- must provide that at least 50% of the rent relief is in the form of a waiver of rent (unless otherwise agreed by the parties in writing); and
- must provide that more than 50% of the rent relief is in the form of a waiver of rent if:
 - a failure to provide the same would compromise the tenant's capacity to fulfil the tenant's ongoing obligations; and
 - the landlord has the financial capacity to provide the same.

Where there is a head lease

If a landlord receives rent relief under a head lease (as the tenant under that lease), then the landlord must pass on the benefit of the relief to the tenant.

Document may give effect to rent relief

Rent relief may be given effect by:

- a written variation to the lease; or
- any other written agreement between the landlord and the tenant that gives effect to the rent relief, either directly or indirectly.

Deferred rent payments

Unless the landlord and the tenant agree otherwise in writing:

- a landlord must not request payment of any part of deferred rent until the earlier of:
 - the day on which the emergency period ends (presently, 29 September 2020); and
 - the expiry of the term of the lease (before any extension to the term – see below); and
- the payment of deferred must be amortised (the method of repayment is to be agreed between the parties) over the greater of:
 - the balance of the term of the lease; and
 - a period of at least 24 months.

Lease extensions

A landlord must offer a tenant an extension of the term of a lease:

- equivalent to the period for which the rent is deferred (unless the landlord and the tenant agree otherwise in writing); and
- on the same terms and conditions that applied under the lease before the emergency period.

This does not apply if the extension would be inconsistent with:

- a head lease; or
- any contract or other agreement already entered into by the landlord with another person (other than the tenant) that relates to the leased premises.

Tenants request further rent relief

If the financial circumstances of a tenant materially change after an agreement has been reached and given effect:

- the tenant may make a further request to the landlord for rent relief during the emergency period; and
- the tenant and the landlord must follow the process set out above in relation to that request.

Pre 30 May 2020 agreements

If a tenant believes that the rent relief provided under an existing agreement (i.e. an agreement entered into before 30 May 2020) is less favourable than the rent relief that might be provided to the tenant under the Code:

- the tenant may make a request to the landlord for rent relief under the Code; and
- the landlord and the tenant must follow the process set out above in relation to that request.

Landlords cannot recover expenses if tenants unable to trade

If, for any part of the emergency period, a tenant is not able to conduct its business at the leased premises:

- the landlord must consider waiving recovery of any outgoing or other expense payable by the tenant to the landlord for that part of the emergency period; and
- the landlord may cease to provide, or reduce provision of, any service as is reasonable in the circumstances or in accordance with any reasonable request of the tenant.

Landlord must pass on any reductions in outgoings

If any outgoing in relation to a leased premises is reduced for any part of the emergency period, the landlord must not require the tenant to pay any amount that is greater than the tenant's proportional share of the reduced outgoing.

If a tenant has already paid an amount of money greater than the tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to the tenant as soon as possible.

Confidentiality obligations

A landlord or a tenant under a small commercial lease must not, except in certain limited circumstances, disclose protected information (being the name, address or contact details of any person or information relating to business processes or financial information) obtained in connection with the operation of the Code.

Disputes

See our update on 7 May 2020 ([COVID-19: WA enacts commercial tenancies legislation but still has to adopt a code fully implementing the national code of conduct](#)) regarding the resolution of disputes by the [Small Business Commissioner](#) and the [State Administrative Tribunal \(SAT\)](#). The Act sets out the procedures for resolving disputes relating to the Code.

Does the Code give full effect to the national code?

The Act and the Code have adopted most of the key principles contained in the national code (see [COVID-19 and commercial tenancies – guide to the national mandatory code of conduct](#)); however, WA has adopted its own version of the national code in that, unlike the national code, the Code:

- sets out a procedure for seeking and negotiating rent relief, e.g. a landlord must offer rent relief within 14 days of receiving a valid request from a tenant;

- also requires a landlord to waive more than 50% of the rent if a failure to provide the same would compromise the tenant's capacity to fulfil the tenant's ongoing obligations and the landlord has the financial capacity to provide the same;
- deals with head leases, e.g. a landlord must pass on any rent relief it receives under its head lease and a lease extension is not permitted if it is not consistent with a head lease;
- allows tenants to make further requests for rent relief if their financial circumstances materially change (although the term "materially change" has not been defined);
- allows for pre-existing agreements (i.e. agreements entered into before 30 May 2020) to be reviewed under the Code; and
- imposes certain confidentiality obligations on the parties.

The Act applies to "small commercial leases" while the Code applies to "relevant small commercial leases". This means that, while the Code may not apply to a commercial lease (because it does not qualify as a "relevant small commercial lease"), the Act (and the prohibitions contained in the Act) may still apply to that lease if it falls within the definition of a "small commercial lease".

What questions have not been answered by the Code?

- It is not still clear if landlords can take action during the emergency period for:
 - a failure to pay rent or any other amount of money payable under a lease; or
 - businesses not being open for business during the times specified in a lease,

before 30 March 2020, i.e. before the emergency period. But the Act does not appear to prohibit a landlord from:

- taking any such action; or
 - taking action during the emergency period for any other type of breach (except for any act/omission by a tenant which is required by law).
- Under the Act, landlords are prohibited from increasing rent (other than turnover rent) during the emergency period and any rent increase which took place during the period between 30 March 2020 and 23 April 2020 is stayed. But it is still not clear if any rent increases which are due to take place under a lease during the emergency period (i.e. under existing rent review provisions) will be lost or if they will also be stayed until after the emergency period.

Is the early termination bill still before parliament?

As noted in our update on 7 May 2020 ([COVID-19: WA enacts commercial tenancies legislation but still has to adopt a code fully implementing the national code of conduct](#)), a new bill was before the WA parliament, the [Commercial Tenancies \(COVID-19 \(Early Terminations\)\) Bill 2020 \(WA\)](#), which, if passed, will confer a right on "small commercial lease" tenants to terminate their leases during the emergency period if they are in "severe financial hardship" without being required to pay their landlords compensation or damages; however, the Bill has still not progressed past its second reading in the Legislative Assembly on 16 April 2020.

What should landlords and tenants in WA do?

Tenants who are suffering financial hardship as a direct result of the COVID-19 pandemic will benefit from the protection provided by the Act and the Code and should negotiate rent relief arrangements with their landlords in accordance with the Code. Landlords should ensure that they understand their rights and obligations under the Act and the Code.

Step 1

- Determine if their lease is a "small commercial lease" and if the tenant is an "eligible tenant".
- Carefully review the Act and the Code to determine their rights and obligations.

Step 2

- Tenants should submit a written request for rent relief to their landlords. They should provide documents evidencing that they are “eligible tenants” and their reduction in turnover during the emergency period. The Small Business Commissioner has advised that this could include business activity statements (BAS), sales reports from a tenant’s accounting system or a letter from a tenant’s accountant or BAS agent but does not include a profit and loss statement or a balance sheet. Within 14 days of receipt, landlords should offer rent relief.

Step 3

- The parties should negotiate a rent relief agreement in accordance with the Code and, while negotiating, the parties should act reasonably and in good faith. If the tenant is a foreign person, the parties should consider if FIRB approval is required for any agreed lease variation or extension. See our update on 30 April 2020 ([COVID-19: FIRB provides guidance on how the temporary measures will affect lease transactions](#)).

Step 4

- Give effect to the rent relief agreement by a written variation to the lease or other written agreement between the parties.

What about commercial leases not covered by the Act or the Code?

Landlords and tenants under commercial leases that are not covered by the Act or the Code 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 and the Code do not apply to these leases and they cannot benefit from the relief measures or the protection provided by them. They remain subject to the existing law.

See also the following helpful information and templates provided by the WA Small Business Commissioner:

- [FAQs: COVID-19 commercial tenancy changes](#) (22 June 2020).
- [FAQs: Land Tax Assistance for Landlords program](#) (26 June 2020).
- [New commercial tenancy legislative changes](#) (29 May 2020).
- [Template request to landlord](#).