

COVID-19 commercial leases summary – state comparison

30 March 2021

Jurisdictional update

	Date that the Code has been extended to	Have regulations been implemented yet?	If regulations have been implemented, are there any major changes?
Australian Capital Territory	31 January 2021	Yes	<ul style="list-style-type: none"> The new declaration reflects the changes in the requirements of extension 1 of the JobKeeper scheme. As such, the new declaration will only apply to those tenants who qualify for and receive a payment under extension 1 of the JobKeeper scheme from 28 September 2020. The new declaration will not apply to new lease arrangements that have been entered into from 7 April 2020, when the National Cabinet announced states and territories would implement the National Code of Conduct, as parties entering new arrangements from this time would have done so aware of the business conditions they were entering. While not required due to the expiration of the declaration on 31 January 2021, landlords are encouraged to negotiate in good faith before taking action against an impacted tenant for a prescribed breach that occurred while the Code was in force. Applications for commercial rates relief for 1 April 2020 to 31 January 2021 can be made until 31 March 2021.
New South Wales	28 March 2021	Yes	<ul style="list-style-type: none"> The Regulations enacting the Code of Conduct have been repealed. However, a further Regulation has been enacted to preserve protections for tenants who were eligible for rent relief whilst the Regulations were in force. This means that before landlords can take enforcement action against eligible tenants for non-payment of rent during the Prescribed Period, the Landlord must first comply with its obligations under the repealed Regulations. These obligations are to (1) renegotiate the lease with the eligible tenant having regard to the leasing principles in the Code of Conduct (2) mediate (if the parties are unable to reach agreement). Eligible tenants for the Prescribed Period 24 April 2020 – 31 December 2020 are tenants of commercial leases who (1) were eligible for JobKeeper during that period and (2) had turnover of less than \$50 million for the financial year 2018-2019 Eligible tenants for the Prescribed Period 1 January 2021 – 28 March 2021 are tenants of retail leases who (1) were eligible for JobKeeper during that period and (2) had turnover of less than \$5 million for the financial year 2018-2019.
Northern Territory	21 June 2021	Yes	<ul style="list-style-type: none"> No major changes.

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Queensland	30 April 2021	Yes	<ul style="list-style-type: none"> The regulations will expire on the earlier of 30 April 2021 or another day prescribed by the regulations. Previously the regulations were to expire on 3 December 2021. The recent amendments to the regulations are as follows: <ol style="list-style-type: none"> Section 12 of the regulations has been amended so that a landlord under an affected lease must not during or after the response period or extension period (being 29 March 2020 to 31 December 2020) take a prescribed action on the grounds of: <ol style="list-style-type: none"> a failure to pay rent for a period occurring wholly or partly during the response period or extension period; a failure to pay outgoings for a period occurring wholly or partly during the response or extension period; or a tenant not trading during the trading hours required under the lease during the response period or extension period. Section 14 of the regulations has been amended so a party to an affected lease may ask another party to the lease to negotiate any or all of the rent payable during the response period or extension period. This amendment clarifies that the request to negotiate rent only relates to rent payable during the response period or extension period. Section 16 (2 of the regulations) has been amended to clarify that a request to negotiate a further reduction in rent applies to rent payable during the response period or extension period. The amendments mean that a landlord will be prevented, until 30 April 2021, from taking a prescribed action based on a tenant's failure during the response period or extension period. The amendments have not changed the response period or extension period. A landlord can take action for rent and outgoings, failure to trade etc. after 31 December 2020.
South Australia	3 January 2021	Yes	<p>Relevant period</p> <ul style="list-style-type: none"> The regulations have been extended for an additional period commencing on 1 October 2020 and expiring on 3 January 2021 and during this period eligible tenants under commercial leases will continue to benefit from COVID-19 protections (e.g. restrictions in relation to eviction and rights to claim rent relief). <p>Effect on agreement in previous period</p> <ul style="list-style-type: none"> Whilst there are no major changes to the prohibitions, restrictions or procedures, or to the relevant definitions and tests, which apply under the regulations, the amended regulations

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			<p>make it clear that if:</p> <ul style="list-style-type: none"> ○ An agreement by a landlord and tenant was made in the period commencing on 30 March 2020 and expiring on 30 September 2020 (Period 1) (by agreement or pursuant to a mediation by the Small Business Commissioner), or an order of the court was made in Period 1 ○ The original agreement or order has application to a period after the end of Period 1 ○ The tenant is, or is claiming to be, an eligible tenant (i.e. suffering financial hardship due to COVID-19) during the period commencing on 1 October 2020 and expiring on 3 January 2021 (Period 2) <p>then the tenant (or landlord) may apply for a mediation of a dispute that relates to the terms of the original agreement in so far as it relates to Period 2, or may apply to the Court to vary or revoke the original Court order.</p>
Victoria	28 March 2021	Yes	<p>Relevant period</p> <ul style="list-style-type: none"> • The 'relevant period' during which the regulations apply and for which tenants can claim rent relief, was extended until 28 March 2021. <p>Eligible leases</p> <ul style="list-style-type: none"> • The new regulations define the prescribed class of eligible lease as a lease in which the tenant is: <ul style="list-style-type: none"> a) An SME entity b) Is an entity entitled under section 6, 11 or 12A of the JobKeeper rules to a JobKeeper payment • This, in effect, means that a tenant who is actually receiving JobKeeper payments, and meets the other requirements, including being beneath the AU\$50 million turnover threshold which still applies, will have an eligible lease. <p>Rent relief requests</p> <p>The new regulations require that, together with the evidence previously set out in the regulations, a tenant must accompany its rent relief request with:</p> <ul style="list-style-type: none"> • Information that evidences the tenant's stated decline in turnover, including at least one of the following: <ul style="list-style-type: none"> ○ Extracts from the tenant's accounting records

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			<ul style="list-style-type: none"> ○ The tenant's business activity statements relating to the relevant turnover test period ○ Statements issued by an ADI in respect of the tenant's account ○ A statement prepared by a practising accountant <ul style="list-style-type: none"> • Landlords must now offer rent relief that must be, at a minimum, proportional to the decline in the tenant's turnover associated with the premises. <p>Victorian Small Business Commission</p> <p>The Victorian Small Business Commission has been granted new powers to resolve disputes including issuing a certificate that denotes that mediation failed or is unlikely to succeed for a particular dispute which then allows a tenant to apply for a binding order concerning its rent relief request.</p>
Western Australia	28 March 2021	Yes	<p>Small commercial leases</p> <ul style="list-style-type: none"> • A lease to a tenant that is a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) and uses the land or premises that are the subject of the lease for a commercial purpose is now a 'small commercial lease'. <p>Eligible tenants</p> <ul style="list-style-type: none"> • The amendment to the regulations reflects the changes in the requirements of Extension 1 and Extension 2 of the JobKeeper scheme. As such, the amended regulations will only apply to those tenants who qualify for JobKeeper under Extension 1 or extension of the JobKeeper scheme from 28 September 2020 and 4 January 2021 respectively. <p>Ability to take prohibited action against insolvent or not eligible tenants</p> <ul style="list-style-type: none"> • A landlord can take prescribed action on or after 30 September 2020 if: <ul style="list-style-type: none"> ○ The tenant under the small commercial lease is insolvent ○ The tenant under the small commercial lease is: <ul style="list-style-type: none"> ○ Not an eligible tenant at the time the prohibited action is taken ○ The tenant's breach occurs during the emergency period (whether before, on or after 30 September 2020) ○ The breach is failure to pay rent or other moneys under the small commercial lease ○ The breach is not subject to a dispute that is being dealt with under Part 5 of

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- the Commercial Tenancies (COVID-19 Response) Act 2020 (WA)
- The tenant has not made a request for rent relief in relation to the unpaid rent to which the breach relates
- The landlord has not granted a waiver, deferral or reduction in relation to the unpaid rent to which the breach relates
- The tenant under the small commercial lease is:
 - Not an eligible tenant at time of the breach and at the time the prohibited action is taken
 - The breach occurs during the emergency period (whether before, on or after 30 September 2020)
 - The breach is the tenant failing to open for trade during the hours specified in the small commercial lease.
- A stay on prohibited actions pre 30 September 2020 ceases if the tenant is insolvent on or after 30 September 2020.
- A stay on prohibited actions pre 30 September 2020 ceases if the tenant is no longer an eligible tenant.

Rent increases

- On or after 30 September 2020, a landlord can increase rent if the tenant is not an eligible tenant at the time of the rent increase and any stayed rent increase ceases on the day the tenant is no longer an eligible tenant.

Rent relief

- Clarification around what documents a landlord can and cannot request. A landlord can request BAS statements but cannot request third party audited statements.
- Unless otherwise agreed between the landlord and tenant, the rent relief can be adjusted from time to time during the emergency period, but not more frequently than monthly. Adjusted rent relief is to take into account any variation to the reduction in the tenant's turnover. For example, the tenant was offered rent relief of 60% of the rent payable. The tenant's reduction in turnover has improved to 40%, the rent relief should be adjusted by reference to 40%.

Rent Relief after end of Code

- Tenants have an additional 60 days after the code expires to make new or extra rent relief requests for hardship experienced during the emergency period.
- Disputes can be raised by landlords or tenants for 60 days after 28 March 2021.

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Tasmania	31 January 2021	Yes	<p>The financial hardship period has been extended to 31 January 2021 and during this period eligible tenants under commercial leases will continue to benefit from COVID-19 protections (e.g. restrictions in relation to eviction and rights to claim rent relief).</p> <p>Eligibility</p> <p>Leases or licences for:</p> <ul style="list-style-type: none"> • Premises to which Schedule 1 to the Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (TAS) applies. • Premises occupied wholly or predominantly for the carrying on of any business, trade or profession. <p>and where the tenant during the financial hardship period is or has become an eligible person.</p> <p>A tenant is an eligible person if the tenant:</p> <ul style="list-style-type: none"> • Is or becomes entitled to JobKeeper. • Is an SME entity (i.e. the tenant's turnover is AU\$50 million or less). <p>Tenant defaults</p> <ul style="list-style-type: none"> • Any act or omission of the tenant required under a COVID-19 response measure or law of the Commonwealth or the state in response to the COVID-19 emergency will not be taken to amount to a breach and does not constitute grounds for termination or the taking of any prescribed action. <p>Defaults – landlord must not terminate</p> <ul style="list-style-type: none"> • The landlord must not terminate the lease and re-enter the premises if the tenant: <ul style="list-style-type: none"> ○ Fails to pay rent, fees, levies or other charges payable under the lease; ○ Fails to meet criteria based on sales performance, or another factor; ○ Fails to pay outgoings; ○ Fails to open the business during hours or times specified in the lease; and ○ Breaches the lease in a manner that is prescribed by the regulations. • Any prescribed action that a landlord has taken or commenced prior to the commencement date of the Act, but not yet completed, against a tenant is taken to be suspended or stayed until end of the financial hardship period.

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Defaults – landlord can terminate

- Landlords can terminate the lease unless the moratorium against termination set out in the section 'Defaults – landlord cannot terminate' above applies.

Rent increases

- Rent (other than turnover rent) cannot be increased during the emergency period.
- The parties can agree to a rental increase.

Requesting rent relief

- Tenants may request the rent be renegotiated having regard to the leasing principles in the Code of Conduct.

Trading hours

- Landlords cannot terminate the lease, seek damages, and enforce security if the tenant does not open for business during the hours required under the lease.

Ability to call on bank guarantees / security deposits during COVID period for defaults

- A landlord cannot draw on a bank guarantee during the period from 1 April 2020 to 31 January 2021.

Personal guarantees

- A landlord cannot enforce performance by the guarantors under a guarantee during the period from 1 April 2020 to 31 January 2021.

Extension of lease

- Tenants should be provided with the opportunity to extend the lease until the end of the financial hardship period or longer period.

Tribunal or court

- Parties must attempt to resolve any disputes directly between themselves.
- Parties may apply to a mediation provider for mediation or alternatively seek to have the dispute arbitrated.

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