

COVID-19 commercial lease summary – state comparison

12 November 2020

Jurisdictional update summary

	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.
New South Wales	31 December 2020	Yes	<ul style="list-style-type: none"> In order to continue to be eligible for relief under the Code of Conduct for the extended period, tenants must continue to be eligible for JobKeeper under the revised JobKeeper requirements. The moratorium on landlords enforcing the lease (e.g. calling on the tenant's security, terminating the lease) for certain breaches by the tenant occurring during the prescribed period (non-payment of rent, non-payment of outgoings, not opening for business) applies only during the prescribed period (24 April 2020 – 31 December 2020). Previously this was unclear in the regulations. Tenants can make further requests to renegotiate the lease (but only in respect of matters that have not already been negotiated and agreed). Parties must respond to a request to renegotiate within 14 days, i.e. if a tenant requests the landlord to renegotiate the landlord must commence renegotiations within 14 days. The requirement to mediate disputes is limited to leases covered by the Regulation. Previously this was ambiguous and open to interpretation that it applied to all commercial leases.
Northern Territory	No change		
Queensland	31 December 2020	Yes	<ul style="list-style-type: none"> A lease of premises is an affected lease during the extension period only if the lessee under the lease, or an entity mentioned in subsection Section 5 (1)(d) of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response Regulation 2020), is eligible for the JobKeeper scheme for the period starting on 28 September 2020

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			<p>and ending on 4 January 2021.</p> <ul style="list-style-type: none"> A rent reduction for the extension period can be a combination of a waiver and deferral, however, the combination required to be offered by a landlord no longer has to be a minimum 50% waiver. Rent reductions can be any combination of waiver and/or deferral of rent. The inclusion of a new clause 15(2A), which appears to permit landlords to have regard to relief which was negotiated prior the extension period but which included relief for a period of time that fall within the extension period.
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 make it clear that if: <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	26 April 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

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			<p>rent relief, has been extended from 29 September 2020 until 31 December 2020.</p> <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 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 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

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subject of the lease for a commercial purpose is now a 'small commercial lease'.

Eligible tenants

- 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.

Ability to take prohibited action against insolvent or not eligible tenants

- A landlord can take prescribed action on or after 30 September 2020 if:
 - The tenant under the small commercial lease is insolvent
 - The tenant under the small commercial lease is:
 - 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 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

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			<ul style="list-style-type: none"> 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. <p>Rent relief</p> <ul style="list-style-type: none"> 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%.
Tasmania	1 December 2020	Yes	<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 (emergency 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 omissions 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 or re-enter the premises except as permitted if the tenant:

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- Fails to pay rent or other money payable under the lease
- Fails to meet criteria based on sales performance
- Fails to open the business during hours or times specified in the lease
- Breaches the lease in a manner that is yet to be 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 the emergency period ends or such other date that may be declared.

Defaults – landlord can terminate

- Landlords can terminate leases unless the moratorium against termination set out in the section 'Defaults – landlord cannot terminate' 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 1 December 2020, or such other date that may be declared.

Personal guarantees

- A landlord cannot enforce performance by the guarantors under a guarantee during the period from 1 April 2020 to 1 December 2020, or such other date that may be declared.

Extension of lease

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

Tribunal or court

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			<ul style="list-style-type: none">• 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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