



Navigating the Roll Out of the Commercial Leasing Code in the States and Territories

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Includes WA Regulations 2020 Gazetted on 29 May 2020

Includes QLD Regulation 2020 Issued 28 May 2020

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Preamble

This paper considers the practical application of the National Cabinet's Mandatory Code of Conduct – SME Commercial Leasing Principles (the Code) in the States and Territories of Australia during:-

1. The COVID-19 Pandemic Period;
2. The Reasonable Recovery Period (undefined); and
3. Any Rental Waiver and Deferral Period beyond 1 and 2 above if applicable.

It also chronicles, in summary form, the State and Territory enabling Legislation and Regulations to ratify the Code at the date of preparation.

It is emphasised that the paper is intended to provide a useful guide only to the application of the Code throughout Australia as each of the States have ratified various aspects of the Code's Principles very differently.

The lack of common ratification of the Code in the States will present additional challenges for both entities owning and managing investment real estate assets in multiple State and Territory jurisdictions as well as SME franchise tenants leasing space in multiple State and Territory jurisdictions.

The paper has been prepared from the Code itself, as well as State Legislation and Regulation available as at 14 May 2020. Certain States have not yet issued any Regulations to their Legislation (notably Western Australia and Tasmania). We will update this paper once these become available.

Links to the Code as well as the currently available State Legislation and Regulation are provided in the bibliography later herein.

Whilst we have used our best endeavors to accurately detail the practical application of the Code as well as the State and Territory Legislation and Regulation we emphasise that we will not be held liable or responsible for any party's reliance on any of the content herein. No warranties as to accuracy are given. Parties using this paper should confirm the information herein within the Code as well as within the available State and Territory Legislation and Regulations and rely on their own enquiries.

The Codes Principles Restated

The Prime Minister's update on coronavirus measures on 7 April 2020 announced the National Cabinet Mandatory Code of Conduct - SME Commercial Leasing Principles during COVID-19 Pandemic for Commercial Tenancies, including retail, office and industrial tenancies.

The announcement noted that the Code will be given effect through relevant State and Territory Legislation or Regulation.

The Code itself, which is aligned to the Commonwealth Government's JobKeeper eligibility principles for small to medium enterprises (SME's) having turnover of less than \$50 million per annum, imposes a set of good faith leasing principles for application to commercial tenancies.

The key principles included within the Code are as follows:-

Overarching Principles

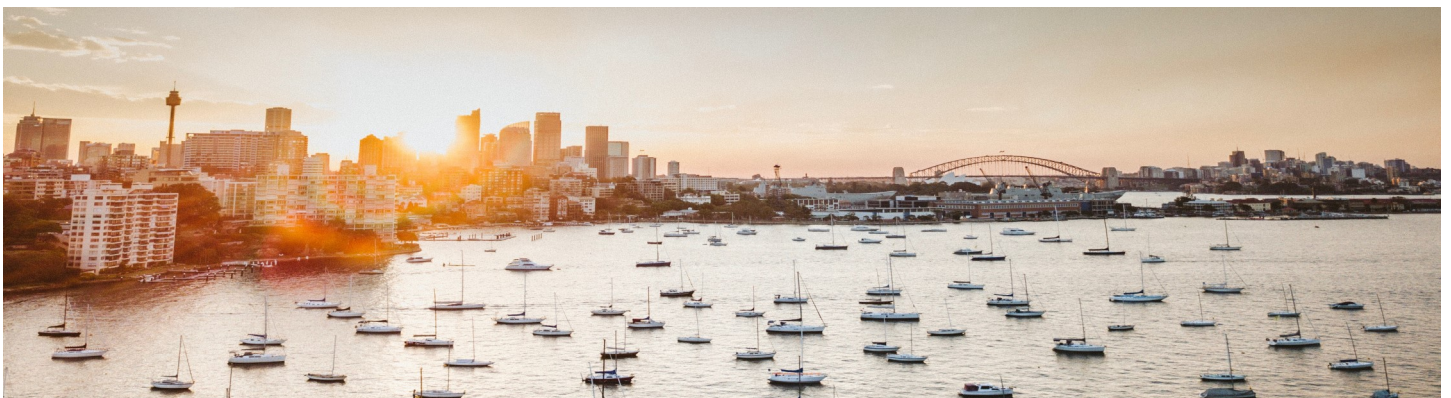
- * Landlords and tenants share a common interest in working together to ensure business continuity;
- * Landlords and tenants will be required to discuss relevant issues and negotiate appropriate temporary leasing arrangements;
- * It is expected that landlords and tenants will negotiate in good faith and act in an open and honest and transparent manner with each other (including the provision of sufficient and accurate information);
- * Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant with specific regard to its revenue, expenses and profitability;
- * The parties to a commercial tenancy are to assist each other in their respective dealings with other stakeholders including governments, utility providers, banks and other financial institutions in order to achieve outcomes consistent with the objectives of the Code;
- * The parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. Landlords are precluded from permanently mitigating this risk in negotiating temporary arrangements envisaged under the Code;
- * All leases are to be dealt with on a case-by-case basis and consider whether the SME tenant has suffered financial hardship as a result of the COVID-19 Pandemic;
- * Factors to be taken into account include the different structures, different periods of tenure, different mechanisms of determining rent and whether or not leases are in arrears or have expired and are in hold over.



Leasing Principles

1. **Landlords are precluded from terminating leases due to non-payment of rent** during the COVID-19 pandemic period (or reasonable subsequent recover period);
2. **Tenants must remain committed to the terms of the lease subject to any amendments to the rental agreement** negotiated under the Code and material failure to abide by substantive terms of the lease will forfeit any protections provided to the tenant under the Code;
3. **Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable** on a case-by-case basis. This will be subject to the tenant's trade reduction during the **COVID-19 pandemic period and any subsequent reasonable recovery period;**
4. **Rental waivers must constitute no less than 50% of the total reduction in rental payable** under the foregoing principle over the COVID-19 pandemic. Rent waivers should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their obligations under the lease agreement. Regard is also to be had to the landlord's financial ability to provide such additional waivers. Tenants may also waive the requirement for a 50% minimum waiver by agreement;
5. **Payments of rental deferrals by the tenant must be amortised over the balance of the lease term or for a period of no less than 24 months, whichever is the greater,** unless otherwise agreed by the parties;
6. **Any reduction in statutory charges such as land tax and council rates or insurance will be passed on to the tenant** in the appropriate proportion applicable under the terms of the lease;
7. **A landlord should seek to share any benefit it receives due to deferral of loan payments provided by a financial institution,** as part of the Australian Bankers Association's COVID-19 response or any other case-by-case deferral of loan repayments offered to other landlords, with the tenant in a proportional manner;
8. **Landlords should seek, where appropriate, to waive recovery of any other expense or outgoing payable by a tenant under the lease term during the period the tenant is not able to trade.** Landlords also reserve the right to reduce services as required in such circumstances;
9. **If negotiated arrangements under the Code necessitate repayment this should occur over an extended period in order to avoid placing undue financial burden on the tenant.** No repayment should commence until the earlier of the COVID-19 pandemic ending, as defined by the Australian Government, or the existing lease expiring and taking into account a reasonable subsequent recovery period;
10. **No fees, interest or other charges should be applied in respect of rent waived** in the various leasing principles, and no fees, charges nor punitive interest may be charged on rental deferrals;
11. **Landlords must not draw on a tenant security for non-payment of rent** whether the security is in the form of a cash bond, bank guarantee or personal guarantee **during the period of the COVID-19 pandemic and/or a reasonable sum subsequent recovery period;**
12. **Tenants should be provided with an opportunity to extend their lease for an equivalent period of the rent waiver and/or deferral period outlined in the Code.** This principle is intended to provide the tenant additional time to trade on existing lease terms during the recovery period after the COVID-19 pandemic concludes;
13. **Landlords agree to a freeze on rent increases except for retail leases based on turnover rent for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant;**
14. Landlords may not apply any prohibition or levy penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

The Commonwealth Code



Key Issues to Note/ Consider Given the different roll out of the Code in the States and Territories

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| <ol style="list-style-type: none"> 1. The States have ratified the Code in different ways; 2. Some have enacted new Legislation and others amended existing Legislation affecting tenancies; 3. Some have only issued regulations to existing Legislation as opposed to enacting new or amending existing legislation; 4. Some have adopted different Tenant or Lessee eligibility principles than those considered in the Code; 5. Most have adopted different definitions and terminology than that which can be interpreted from the Code itself; 6. Most have adopted different start and end dates of the legislation and regulation; | <ol style="list-style-type: none"> 7. Some have adopted different start and end dates for the COVID-19 Period and, in some case the Reasonable Recovery Period; 8. Some have been more prescriptive than others in the application of the mandatory nature of the Code; 9. The extent to which the actual relief principles in the Code have been referred to or adopted varies; and 10. The application of the Waiver and Deferral Principles vary greatly; or have not been referred to at all. <p>All of which creates additional challenges for investment real estate administration and management, not to mention, valuation in the State and Territory jurisdictions of Australia.</p> <p>In any rental relief discussions with tenants it will be necessary to consider the relevant State's Legislative and Regulatory context of the Code's application.</p> |
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It is Perhaps Beneficial to Reflect on the History of Rent Control in Australia

To consider the current circumstances we face with the roll out of the Code with the States and Territories in the context of the history of rent control in Australia, a useful reference is a paper prepared by the New South Wales Parliamentary Research Service dated March 2013. It also includes some references to other rent control history in other States. A link is provided [here](#).

Rent control is not new to the Australian economy.

For example, in New South Wales rent control legislation had been introduced at times of economic shocks post-World War I in 1916, and during the great depression in 1928, 1931, and 1932.

Post-World War II and following the conference of State Premiers on 9 September 1939, the Commonwealth under its then national security legislation introduced the National Security (Fair Rents) Regulations. At the time owing to the concerns of the validity of the Commonwealth regulations New South Wales introduced its own legislation (Fair Rents Act 1939).

There are interesting parallels in the Commonwealth's Code rollout in the States in 2020 (i.e. the Commonwealth has developed the Code or policy which must be validated and ratified in the States because of the Commonwealth's constitutional powers relative to the States).

Following this in New South Wales the Landlord and Tenant Act of 1948 had the objective of continuing rent control in New South Wales in that it sought to provide security of tenure to residential tenants after World War II.

Several NSW Government inquiries (1961, 1988, 1989 and in 2010) had sought to repeal landlord and tenant legislation in NSW as there was a growing view that it was no longer necessary.

Other States of Australia had already repealed landlord and tenancy legislation some time earlier.

This brief discussion on the history of rent control perhaps explains, in part, the rollout of the Commonwealth's Code in the States in 2020.

Obviously, from a Constitutional viewpoint, the Commonwealth is not able to legislate the effect of the Code over the States. It is left to the States to legislate and regulate the application of the Code either by enacting new legislation or aligning it to existing real property legislation.

It is Perhaps Beneficial to Reflect on the History of Rent Control in Australia (continued)

There is a significant difference in 2020 compared to the times that landlord and tenant or rent control legislation was enacted in previous economic shocks which must be a front of mind consideration in 2020.

In 2020 many institutional, Real Estate Investment Trust (REIT), and indeed private owners own real property assets in multiple State and Territory jurisdictions of Australia. At the time of earlier landlord and tenant legislation there was not the same extent of cross border ownership.

From the tenant side there are also numerous national franchise tenants occupying investment real estate particularly shopping centres, but also including offices and industrial premises across state and territory borders. Similarly, there was not the extent of national tenants in earlier times.

Therefore, both landlord and tenant stakeholders are significantly affected by any differences in the application of the Code in the States and Territories whereas, in history, this would not have been the case given perhaps localised ownership of assets and localised tenancies.

What do We Need to Know to Apply the Code?

1. What Legislation applies in my Jurisdiction?
2. Have Regulations issued and do they or do they not require prescriptive adherence to the Code?
3. What are the relevant provisions of the Code that apply to my jurisdictions circumstances?
4. Which Sections of the relevant Act and Regulations need to be considered?
5. Does the Code need to be applied prescriptively in the relevant State or can a Landlord and Tenant negotiate based on the principles of the Code, but outside the Code?
6. Is the SME tenant eligible for the JobKeeper and if so, how will they justify eligibility initially and in on ongoing month to month sense during the COVID-19 Pandemic Period and possibly the undefined Reasonable Recovery Period?
7. What information does the Tenant have to supply the Landlord to justify eligibility in my jurisdiction?
8. What is the amount of any negotiated Waiver and / or Deferral and what are the negotiated start and end dates of the waiver and deferral?
9. Does the Tenant have to extend the lease term certain to cover a) the COVID-19 Pandemic Period; b) the Reasonable Recovery Period; and c) any waiver and deferral period; if a lease expires at any point in time during these periods?

To answer these relevant questions you need to review your jurisdictions Legislation and Regulations.

What is the Relevant Legislation and Regulations in Each of the States?

To consider these questions in State and Territory based application of the Code we have we have prepared a summary of the Legislation and Regulations that have been enacted or issued, as at the 14 May 2020. The Legislative and Regulatory status at 14 May 2020 is as follows:-

The Relevant Legislation and Regulations in NSW

The New South Wales Government has chosen not to create new legislation but to issue regulations under existing legislation and has published the Retail and Other Commercial Leases (COVID-19) Regulation 2021 dated 24 April 2020.

The Regulation is under the Retail Leases Act 1994 and the Conveyancing Act 1919.

The Regulation prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period. The Regulations also require that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct. Importantly retail leases and other commercial leases for "impacted lessees" have been dealt with separately.

An "impacted lessee" is defined at Section 4 of the Retail Leases Act 1994 Regulation and Section 2 of the Conveyancing Act 1919 Regulation. Ostensibly both define an impacted lessee as a lessee which qualifies for the JobKeeper scheme under Section 7 and 8 of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.

The regulations deal with a lessors rights to action against a lessee on the grounds of breach of a commercial lease during the prescribed period consisting of a failure to pay rent, the failure to pay outgoings and in circumstances where the business operating under the lease cannot be opened for the specified hours of the lease.

Apropos the application of the Commonwealth Code the Regulations require that the parties renegotiate the rent payable as well as other terms of a commercial lease having regard to the economic impact of the COVID-19 pandemic and the leasing principles set out in the Code.

New Legislation Enacted: No

New Regulations to Legislation: Yes (Retail Leases Act and Conveyancing Act)

New Bill, Act, Regulation or Code: Retail and Other Commercial Leases (COVID-19) Regulation 2020

Effectuated Acts/ Legislation: Retail Leases Act 1994 & Amendment of Conveyancing Act

Date of Regulation: 24 April 2020

Effective Date: 24 April 2020

End Date: 24 October 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 24 October 2020

Definition of an 'Eligible Tenant': Impacted Lessee with an annual turnover less than \$50 million and eligible for JobKeeper

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1-2, 6, 11

Refers to Code Principles: 3-5, 7-10, 12

Waivers: See Section 7 (4) of Retail and Other Commercial Leases (COVID-19) Regulation 2020

Deferral: See Section 7 (4) of Retail and Other Commercial Leases (COVID-19) Regulation 2020



The Relevant Legislation and Regulations in Victoria



New Legislation Enacted:
Yes

New Regulations to Legislation: Yes

New Bill, Act, Regulation or Code:

COVID-19 Omnibus Emergency Measures (Commercial Leases and Licences) Regulations 2020

Effectuated Acts/ Legislation: COVID-19 Omnibus (Emergency Measures) Act 2020

Date Enacted of Act: 24 April 2020

Date of Regulation: 1 May 2020

Effective Date: 29 March 2020

End Date: 29 September 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 29 September 2020

Definition of an 'Eligible Tenant': 'Eligible Lease' Annual turnover less than \$50 million. Eligible and a participant of JobKeeper

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1, 3-6 & 7-14

No Guidance: 2 & 7

Waivers: See Section 10 (4b) of COVID-19 Omnibus Emergency Measures (Commercial Leases and Licences) Regulations 2020

Deferral: See Section 16 (2b) of COVID-19 Omnibus Emergency Measures (Commercial Leases and Licences) Regulations 2020

The Victorian Government enacted a new piece of legislation known as the COVID-19 Omnibus (Emergency Measures) Act 2020.

The provisions of the Act relating to Regulations temporarily modify laws relating to retail leases and non-retail commercial leases and licences.

These provisions define matters such as a landlord, tenant, eligible lease, non-retail commercial lease or licence, qualifying for the JobKeeper scheme, retail lease and commercial licence.

They also define an SME entity. An eligible lease is defined as a retail or non-retail commercial lease or licence under which an SME tenant who qualifies for the JobKeeper scheme and is a participant in the JobKeeper scheme.

The Act allows the Minister to make regulations under the Crown Land (Reserves) Act 1978, the Land Act 1958, the Property Law Act 1958, the Retail Leases Act 2003, the Settled Land Act 1958 or the Transfer of Land Act 1958 in relation to an eligible lease.

The Victorian Government has also issued the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulation 2020.

These Regulations provide clarity in terms of the application of the Commonwealth's Code including providing further definitions at Section 4, details of exclusion of certain classes of leases, general obligations of landlords and tenants, and from Sections 10 to 16 inclusive, details on rent relief in the form of waivers and deferrals. A requirement for prohibition on rent increases is also referred to.

The Relevant Legislation and Regulations in Queensland (Part A) *Made under— Land Act 1994*

The Queensland Government enacted the COVID-19 Emergency Response Act 2020 on 23 April 2020. Since then Queensland has issued two Regulations. One under the Land Act 1994 and one under the Retail Shop Leases Act 1994 and the COVID-19 Emergency Response Act 2020.

Among the main purposes of the Act at Section 2 the Act is to provide for matters related to residential, retail and prescribed leases affected by the COVID-19 emergency and to support the Queensland rental sector during the COVID-19 emergency period.

Retail leases and other prescribed leases are considered at Part 7 of the Act.

The Act gives regulation making power for retail and other prescribed leases under the Act itself or the Retail Shop Leases Act 1994. (see recent Regulation under COVID-19 Emergency Response Act 2020 and Retail Shop Leases Act 1994.

It notes that the Regulations may prohibit the recovery of possession of premises, prohibit the termination of a relevant lease, regulate or prevent the exercise or enforcement of other rights of lessors of premises under a relevant lease, and require that the parties to a relevant lease have regard to particular matters or principles or a prescribed standard code or other document in negotiating or disputing a matter under or in relation to the relevant lease.

Interestingly the legislation does not refer directly to the application of the Commonwealth Code.

The Act defines a lease to include a lease, sublease, license or other agreement. It also defines premises and a relevant lease as being a retail shop lease under the Retail Shop Leases Act 1994 or lease prescribed by regulation for purposes of the division.

The Queensland Act, under Part 9, is stated to expire on 31 December 2020.

The Queensland Government has also issued the Land (COVID-19 Emergency Response Waiver and Deferral of Rents and Instalments) Regulation 2020.

The purpose of the Regulation (under the Act 1994) is stated to provide for the waiver and deferral of rent and deferral of instalments in response to the COVID-19 emergency.

It is stated to be achieved by providing waiver of the payment of rent for eligible tenures under Part 2 and giving the Minister power under Part 3 to consider waivers and deferrals.

Terms within the Regulation are, unless otherwise stated, deemed to have the same meaning as the Land Regulation 2009.

Further definitions for the waiver of rent for eligible tenancies are set out Part 2.

These definitions include threshold amounts, waived amount, end waiver periods noting that a waiver period for an eligible tenure commences on 1 April 2020 and ends on 30 September 2020 but does not include a period in which the tenure was not or is not in force.

The Queensland Regulation includes a complicated threshold formula for calculation of waivers and further definitions in a dictionary at the rear.

Anyone considering waivers and deferrals of rent within the Queensland jurisdiction should carefully consider the application of the regulations. Further Regulations may issue in Queensland.

A summary of the Queensland Legislation and Regulations is as follows:-



New Legislation
Enacted: Yes

New Regulation to Legislation: No
(Only to the Land Act, which relates to the State owned land)

New Bill, Act, Regulation or Code:
COVID-19 Emergency Response Act 2020
Effected Acts/Legislation: Retail Shop Leases Act 1994

Date Enacted of Act: 23 April 2020
End Date: 31 December 2020
Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 31 December 2020

Definition of an 'Eligible Tenant': 'Relevant Lease' A retail shop lease under the Retail Shop Leases Act 1994; or a lease prescribed by regulation

Leasing Principles specifically addressed in the relevant legislation
Addressed: 1
No Guidance: 2-14

Deferral: See Part 2 and Part 3 of Land (COVID-19 Emergency Response – Waiver and Deferral of Rents and Installments) Regulation 2020 for State owned land. No guidance for privately owned land.

Waivers: See Part 2 and Part 3 of Land (COVID-19 Emergency Response – Waiver and Deferral of Rents and Installments) Regulation 2020 for State owned land. No guidance for privately owned land.

The Relevant Legislation and Regulations in Queensland (Part B) *Made under— COVID-19 Emergency Response Act 2020 & Retail Shop Leases Act 1994*

The Queensland Government enacted the COVID-19 Emergency Response Act 2020 on 23 April 2020. Since then Queensland has issued two Regulations. One under the Land Act 1994 and one under the Retail Shop Leases Act 1994 and the COVID-19 Emergency Response Act 2020.

Among the main purposes of the Act at Section 2 the Act is to provide for matters related to residential, retail and prescribed leases affected by the COVID-19 emergency and to support the Queensland rental sector during the COVID-19 emergency period.

Retail leases and other prescribed leases are considered at Part 7 of the Act.

The Act gives regulation making power for retail and other prescribed leases under the Act itself or the Retail Shop Leases Act 1994. (see recent Regulation under COVID-19 Emergency Response Act 2020 and Retail Shop Leases Act 1994.

It notes that the Regulations may prohibit the recovery of possession of premises, prohibit the termination of a relevant lease, regulate or prevent the exercise or enforcement of other rights of lessors of premises under a relevant lease, and require that the parties to a relevant lease have regard to particular matters or principles or a prescribed standard code or other document in negotiating or disputing a matter under or in relation to the relevant lease.

Interestingly the legislation does not refer directly to the application of the Commonwealth Code.

The Act defines a lease to include a lease, sublease, license or other agreement. It also defines premises and a relevant lease as being a retail shop lease under the Retail Shop Leases Act 1994 or lease prescribed by regulation for purposes of the division.

The Queensland Act, under Part 9, is stated to expire on 31 December 2020.

On the 28th of May 2020, the Queensland Government released the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020, as regulations made under the COVID-19 Emergency Response Act 2020.

The main purposes of the Regulations are to mitigate the effects of the COVID-19 emergency on lessors and lessees under affected leases by giving effect to the good faith principles set out in the National Code and to establish a process for resolving disputes.

The Regulations define an affected lease and the relevant period to which the Regulations apply.

An affected lease requires the lessee under the lease to be classified as a retail shop lease or a prescribed lease, defined as an SME entity and eligible for the JobKeeper scheme.

Part 2 of the Regulation outlines the obligations of lessors and lessees under affected leases, more specifically having regard to the lessor not being able to take prescribed action against the lessee and the terms relating to the waiver and deferment of rent.

Part 3 of the Regulations outlines the process to be guided by when a dispute arises between the lessor and lessee. The Regulation also requires the terms of the dispute to remain confidential.

A summary of the Queensland Legislation and Regulations is as follows:-



New Legislation
Enacted: Yes

New Regulation to Legislation: Yes

New Bill, Act, Regulation or Code: Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020
Effectuated Acts/Legislation: COVID-19 Emergency Response Act 2020

Date Enacted of Act: 23 April 2020
Date of Regulation: 28 May 2020
Effective Date: 29 March 2020
End Date: 30 September 2020
Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 30 September 2020

Definition of an 'Eligible Tenant': 'Affected Lease' means a retail shop lease or prescribed lease and is a SME entity and is eligible for the JobKeeper scheme.
Leasing Principles specifically addressed in the relevant legislation
Addressed: 1-6 & 9-12
No Guidance: 7-8

Deferral: See Section 15 of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

Waivers: See Section 15 of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

The Relevant Legislation and Regulations in Western Australia



New Legislation Enacted: Yes

New Regulations to Legislation:
Yes

New Bill, Act, Regulation or Code: Commercial Tenancies (COVID-19 Response) Regulations 2020

Effected Acts/ Legislation: Commercial Tenancies (COVID-19 Response) Act 2020

Date Enacted of Act: 24 April 2020

Effective Date: 30 March 2020

End Date: 29 September 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 29 September 2020

Definition of an 'Eligible Tenant': Turnover was less than \$50 million in the financial year ending on 30 June 2020 and the tenant qualifies for JobKeeper.

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1, 3-6 & 8-14

No Guidance: 2 & 7

Waivers: See Clause 7 of the Commercial Tenancies (COVID-19 Response) Regulations 2020.

Deferral: See Clause 7 of the Commercial Tenancies (COVID-19 Response) Regulations 2020.

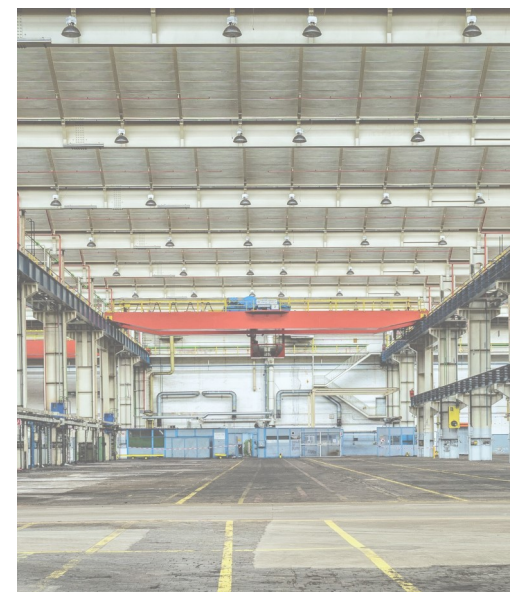
Western Australia enacted the Commercial Tenancies (COVID-19 Response) Act 2020 on 24 April 2020, which was followed by the Commercial Tenancies (COVID-19 Response) Act 2020 released on 29 May 2020.

At Part 2, the Act defines matters such as landlord, lease, premises, rent, small business, small commercial lease which includes a retail shop lease defined in the Commercial Tenancy (Retail Shops) Agreements Act 1985 or a lease where tenant owns or operates a small business or a lease where tenant is an incorporated association under the Associations Incorporations Act 2015.

Part 3 of the Act defines prohibited actions in respect of small commercial leases and related matters which include eviction, recovery of security, termination of small commercial leases. Section 11 of the Act relates to prohibition of rent increases during the emergency. Part 3 defines the Code of Conduct as meaning a code of conduct relating to small commercial lease principles during the COVID-19 pandemic.

Interestingly the Act does not refer specifically to the Commonwealth's Code of Conduct.

The Regulations provide clarity in terms of the application of the Commonwealth Code and provide definitions to the content addressed in the Act. Furthermore, the Regulations provide specific definitions of an Eligible Tenant at Clause 3, the negotiating process and principles applying to offering and negotiating rent relief at Clauses 6 and 7, the payment of deferred rent and extension of the term of a lease at Clause 9, the principles applying to outgoings and other expenses at Clause 11 and the obligation of confidentiality at Clause 13.



The Relevant Legislation and Regulations in South Australia



South Australia enacted the COVID-19 Emergency Response Act 2020 on 9 April 2020. Part 2 of the Act deals with general modifications and provisions applying to commercial leases.

Section 7 states that if a lessee is suffering financial hardship as a result of the COVID-19 Pandemic a lessor cannot take a prescribed action against the lessee on grounds of breach of lease

during the prescribed period consisting of a failure to pay rent, failure to pay outgoings, business not being opened during the hours required by the lease, or an act or omission of a kind prescribed in the Regulations for the purpose of the Act.

The South Australian Legislation includes definitions under Part 2 including business, the commercial lease meaning a retail shop lease is defined in the Retail and Commercial Leases Act 1995 or a lease on the Landlord and Tenant Act 1936 but does not include certain leases.

It also defines matters such as lessee, lessor, outgoings, prescribed action and relevant Act where relevant Act is defined to mean the Real Property Act 1986, the Retail and Commercial Leases Act 1995 and the Landlord and Tenant Act 1936.

The Act also permits the Government to make regulations in circumstances where a person is taken to be suffering financial hardship as a result of the COVID-19 Pandemic for the purposes of tenancy provisions of the Act.

The South Australian Government has also regulated the COVID-19 Emergency Response (Commercial Leases) Regulations 2020 under the Act.

The Regulation discusses Commercial Leases and financial hardship wherein financial hardship is as a result of the COVID-19 Pandemic if the lessee is eligible for, or receiving, a JobKeeper payment in respect of the business of the lessee in their capacity as an employer on their own behalf.

A reduction in turnover of the business of the lessee is referred to in the context of making a determination under the Act as requiring verification by financial records or statements provided by the lessee during a specified period.

The regulation then defines JobKeeper payment as meaning the fortnightly wage subsidy announced by the Prime Minister on 30 March 2020 due to the COVID-19 Pandemic.

A summary of the South Australian Legislation and Regulations is as follows:-

New Legislation Enacted: Yes

New Regulations to Legislation: Yes

New Bill, Act, Regulation or Code: COVID-19 Emergency Response Act 2020
Effectuated Acts/ Legislation: Real Property Act 1886, Retail and Commercial Leases Act 1995 & Landlord and Tenant Act 1936

Date Enacted of Act: 9 April 2020

Date of Regulation: 16 April 2020

Effective Date: 9 April 2020

Definition of an 'Eligible Tenant': 'Financial Hardship' Eligible for JobKeeper payment

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1, 6, 8, 13

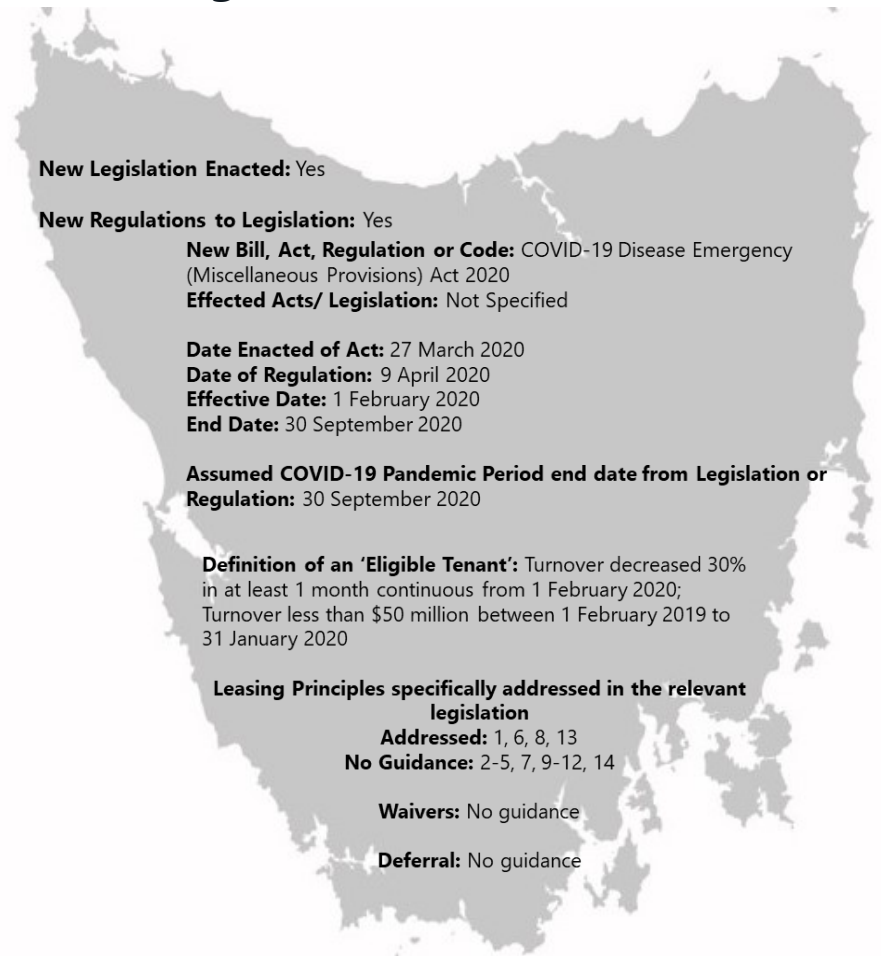
No Guidance: 2-9, 12

Waivers: No guidance

Deferral: No guidance



The Relevant Legislation and Regulations in Tasmania



The Tasmanian Government enacted the COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 on 17 March 2020.

Part 5 of the Act headed Financial Hardship Provisions deals with provisions restricting rent increases or termination of commercial tenancies.

It defines the emergency as having the same meaning as the Tasmanian Residential Tenancy Act 1997 as amended under the Act.

The Act gives the power to the Tasmanian Treasurer to declare certain matters relating to tenancies. The matters which are included are referred to generally and not specifically.

The Act also empowers the Governor to make regulations for the purposes of the Act. The Act, at Schedule 1, refers to Relevant Instruments which include the Fair Trading (Code of Practice) for Retail Tenancies Regulations 2010 and the Land Tax Regulations 2010.

The Tasmanian Premier then, by notice in the Tasmanian Government Gazette on 9 April 2020, declared that, despite any provision of a lease in relation to premises or part premises, if the turnover, in a continuous one month since 1 February 2020 in relation to the carrying on of a business trade or profession by the tenant, has reduced by more than 30% in at least one continuous period since 1 February 2020; and the turnover in relation to any such business trade or profession carried on by the tenant for the period from 1 February 2019 to 31 January 2020 is not more than \$50 million; then the lease in relation to the premises must not be terminated within the emergency period on the grounds of the rent and other moneys due in relation to the premises have not been paid. Also the rent in relation to the premises may not be increased other than by virtue of the rent increasing under the lease because the turnover in relation to such business carried out by the tenant increases.

The Tasmanian Legislation and the gazettal notice therefore does not refer to the Commonwealth Code.

The Relevant Legislation and Regulations in the Northern Territory and Australian Capital Territory

At the date of preparation we have not been able to identify any legislative or regulatory guidance for either the Northern Territory or the Australian Capital Territory.



Adoption of the Leasing Principles

Looking at the detail of the manner in which the States have legislated and regulated rent relief logic and provisions in relation to commercial tenancies, it is clear that the Commonwealth's Code, which was stated to be mandatory, has only been partially adopted by the States. Some have adopted it more so than others.

As the Code comprises a set of principles and the States have or haven't referred to the Code; defined key definitions differently; and where they have actually considered the provisions, adopted them loosely or prescriptively; considering any SME rent relief measures in each State and Territory requires careful consideration of the manner in which the Code Principles have been legislated or regulated in each jurisdiction.

In jurisdictions where there is little direct reference to or application of the Code's principles the Code itself can only be used as a guide to any negotiations with tenants regarding rent relief during the COVID-19 Pandemic Period; the undefined reasonable recovery period; and any waiver or deferral period beyond the pandemic period and recovery period. This will possibly permit a greater degree of flexibility in tenant negotiation in some jurisdictions.



Wishful Thinking? ... In A Perfect World Further Clarification of the Code Would be Beneficial?

Whilst the Code's fundamental Principles are not being criticised it is worthy to comment on a matter that would benefit from clarification in the Code itself to diffuse an element of uncertainty and risk in the Code's application generally.

The issue is the application of the Deferment component of rent relief

The Deferral Principle is the subject of the Code's Principles 3, 5 and 12 which are restated (including our suggested amendments – deletions with strikethrough and additions in red) as follows:-

3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable on a case-by-case basis. This will be subject to the tenant's trade reduction during the COVID-19 pandemic period and any subsequent reasonable recovery period;
5. Payments of rental deferrals by the tenant must be amortised over the balance **of the current or renegotiated lease term. or for a period of no less than 24 months, whichever is the greater, post** Any renegotiated lease term **should include** the COVID-19 Pandemic and Reasonable Recovery Period **as well as the deferral period** unless otherwise agreed by the parties;

The fact that any Deferral may extend beyond a lease term certain and a tenant may have vacated the premises is significantly problematic. In these circumstances the Landlord would become a quasi-unsecured debt provider to a vacated tenant which cannot possibly have been the underlying intent of the Deferral Principle of the Code.

This could simply be rectified if the Commonwealth saw fit to amend Principle 12 as follows:-

12. Tenants should be ~~provided with an opportunity~~ **obligated to** extend ~~its~~ **their** lease for an equivalent period of the rent waiver and/or deferral period outlined in the Code **to obtain the benefit of the Waiver and Deferral Principles.** This principle is intended to provide the tenant additional time to trade on existing ~~or extended~~ lease terms during the recovery period after the COVID-19 pandemic concludes. **It is also intended to keep tenants connected with Landlords and to ensure, where possible, continued building occupancy.**

The Code aligns to JobKeeper which has as a fundamental principal keeping people in jobs and connected to their employer.

In the same way the Code's fundamental principal should be "keeping tenants connected with their landlord/ building and in occupancy with their tenancy."

An amendment along the lines suggested above would go a long way to achieving this and provide further clarity of the application of the Code in the COVID-19 economy.



Is Uniform Application of the Code in the States a Pipe Dream?

To understand the reasons for this paper, the consternation and confusion around the application of the Code, you need to review the COVID-19 emergency State and Territory based legislation, regulations and in one case a Gazettal notice, as well as any other regulations and notices that have issued at the date of writing.

What is available at the date of writing is linked to this paper; as is the Initial Valuation Uncertainty Paper and the Webinar presentation on the subject; and the New South Wales Parliamentary Research Service paper dated March 2013 on the subject of historic rent control.

The matters which have been dealt with in a less than uniform manner and which would benefit from an urgent strategic rethink, include:-

1. Uniform definition of eligibility to apply the Code;
2. Uniformity in State legislative application and legislative framework;
3. Uniformity of State regulations to the legislation;
4. Uniform referencing/ definitions and adoption of the Codes principles in regulations to legislation;
5. Uniform legislative repeal or end dates;
6. Uniform adoption of the "COVID-19 Pandemic period" (start and end date);
7. Uniform estimate of "reasonable recovery period" (start and end date);
8. Uniform reference all of the Commonwealth Code's 14 Principles;
9. If only some of the Code's 14 Principles are referenced, recognition of the Code's other Principles as a default position;
10. Developing and applying uniform Commonwealth and State definitions for inclusion in the Code's State and Territory application in Legislation and Regulation (notwithstanding any existing definition's in current State and Territory Legislation) for the following terms which are drawn from the Code itself as well as State and Territory Legislation and Regulations.

• Amortised;	• Freeze on Rent Increase End Date;	• Lease Extension for Equivalent Period of Waiver and Deferral	• Rental Deferral Period;
• Binding Mediation;	• Freeze on Rent Increases Period Start Date;	• Lease Rent;	• Rental Waiver;
• Cease to Trade;	• Freeze on Rent Increases;	• Not Able to Trade;	• Rental Waiver Period;
• Code;	• Impacted Tenant or Lessee;	• Outgoings;	• Repayment;
• Continuing Rent Adjusted For Waiver And Deferral;	• JobKeeper End Date 27 September 2020;	• Profitability;	• Revenue;
• COVID-19 Pandemic Period;	• JobKeeper Start Date 30 March 2020;	• Proportionate Reduction in Rent;	• SME;
• Deferral Of loan Repayments;	• JobKeeper;	• Proportionate Reduction in Tenants Trade;	• Stakeholders;
• Deferred Rental Amount;	• Landlord Financial Ability to Provide Waivers;	• Punitive Interest;	• Sufficient and Accurate Information;
• Eligible SME Tenant;	• Landlord or Lessor;	• Reasonable Subsequent Recovery Period;	• Temporary Leasing Arrangements;
• Expenses;	• Landlords Financial Ability to Provide Such Waivers;	• Reduce Opening Hours;	• Tenant or Lessee;
• Financial Burden on the Tenant;		• Reduction In Tenant's Trade;	• Tenant Security; and
• Financial Hardship;		• Rental Deferral;	• Waived Rental Amount.

Conclusion

The key take outs of this paper are:-

1. Because the Code hasn't been uniformly endorsed or ratified in the States and Territories close scrutiny of the Legislation and Regulation in each jurisdiction is needed;
2. It may be a pipe dream but we would all benefit from State and Territory uniformity of the Code Principles, its application, definitions and applicable dates;
3. Negotiating and recording rental relief measures (waivers and deferrals) will continue to be a challenge going forward; and
4. Valuation uncertainty and risk may well be heightened by the lack of uniform adoption of the Code in each jurisdiction.



References

Commonwealth Code State Legislation and Regulations

- National Cabinet Mandatory Code of Conduct;
- NSW Parliamentary Research Service - Protected Tenancy History;
- NSW COVID-19 Retail Lease Act Regulation;
- NSW COVID-19 Conveyancing Act Regulation;
- QLD COVID-19 Act;
- QLD COVID-19 Land Act Regulations;
- QLD COVID-19 Retail Shop Leases Act Regulations;
- SA COVID-19 Act;
- SA COVID-19 Regulations;
- TAS COVID-19 Act;
- TAS COVID-19 Gazetted Notice;
- VIC COVID-19 Act;
- VIC COVID-19 Regulations;
- WA COVID-19 Act; and
- WA COVID-19 Regulations.

PFA-PRP Valuation Uncertainty

- PRP-PFA Issues Paper – Dealing with Valuation Uncertainty – Investment Real Estate
- PFA – ShineWing Webinar on Dealing with Valuation Uncertainty;
- PFA – ShineWing Webinar Presentation on Dealing with Valuation Uncertainty; and
- PFA – ShineWing Webinar Poll Results and Extra Questions Answered.

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