

Alert

PROPERTY

COVID-19 Regulations for Commercial Tenancies

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On Friday, 15 May 2020, the *COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020* ('Regulations') were published.

The Regulations are made under the *COVID-19 Emergency Response Act 2020* ('Act') for the purposes of implementing temporary measures that are to apply to many commercial leases arising from circumstances brought about by the COVID-19 pandemic. They also provide mechanisms for dispute resolution and Court orders to be made pertaining to those leases.

The Regulations cover lessors and "affected lessees", and apply during the 'prescribed period'. This period commenced on 30 March 2020 and at this stage will expire on 30 September 2020.

An affected lessee will be a lessee who is suffering financial hardship as a result of the COVID-19 pandemic and has an annual turnover of less than \$50 million. A lessee will be automatically determined to be suffering from financial hardship

if the lessee is eligible for a JobKeeper payment in respect of the business of the lessee. For more information relating to the JobKeeper criteria, please read our previous alert 'Administering the JobKeeper Vaccine for Employers'¹.

Receiving a JobKeeper payment is not a precondition to a lessee being an affected lessee. A lessee will also be considered an affected lessee if the lessee is suffering financial hardship as a result of the COVID-19 pandemic and has a turnover of less than \$50 million (measured as a group if the lessee is part of a group).

The Regulations require the parties to negotiate in good faith the rent payable under a commercial lease having regard to:

- a. the economic impact of the COVID-19 pandemic on the parties;
- b. the provisions of the Act and the Regulations; and

- c. the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* published on 7 April 2020.

Essentially, this is a requirement to negotiate rent relief in line with the Mandatory Code of Conduct. Having regard to the requirements under the Code, there is a requirement for lessors to:

- provide rent relief by way of waivers and deferrals;
- not draw on security provided by their tenants;
- not charge fees, interest or other penalties with respect to waivers and deferrals;
- allow repayments over an extended lease period; and
- pass on benefits or reductions lessors receive in proportionate amounts to lessees.

¹. <https://www.dwfoxtucker.com.au/2020/04/administering-the-jobkeeper-vaccine-for-employers/>

continued overleaf...

Our article 'COVID-19: Mandatory Code for Commercial Tenancies'² published on 17 April 2020, provides our detailed analysis of the Code.

As anticipated, the Regulations also prohibit the lessor from taking 'prescribed actions' against the lessee for a failure to pay rent or other outgoings or failing to open during trading hours specified in the lease. The Regulations provide that during the prescribed period:

- the lessor may not evict a tenant or exercise a right of re-entry or distraint against goods;
- the lessor may not terminate the lease;
- the landlord may not recover a security bond;
- the rent must not be increased unless agreed between the parties;
- the lessor must not require the lessee to pay or reimburse the lessor for land tax; and
- the lessor must pass on any waiver of land tax or land tax relief to the lessee in the form of a waiver of rent payable by the lessee.

The Regulations provide a mechanism for dispute resolution

² <https://www.dwfoxtucker.com.au/2020/04/covid-19-mandatory-code-for-commercial-tenancies/>

whereby a party may apply to the Small Business Commissioner for mediation of a dispute. It is within this mediation process that issues relating to whether a lessee is an "affected lessee", may be resolved. If dispute resolution before the Commissioner fails, then the Commissioner will issue a certificate that will state:

- a. that the mediation has been terminated without resolution; or
- b. that the mediation would not be reasonable in the circumstances; or
- c. that a party to the commercial lease refused to participate, or did not participate in good faith, in mediation.

The next step will then be an application to the Magistrates Court, which can make a determination as to whether or not a lessee is an affected lessee and make binding orders for rent relief. If the Magistrates Court makes an order granting rent relief, then at least 50% of the rent relief must be in the form of a waiver of rent.

Note that the regulations do not apply to a new lease entered into after 30 March 2020 unless arising through an option to extend an existing lease.

For advice regarding any aspect of the Regulations and their application, please contact one of our property experts via the details provided below.



MORE INFO

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