



# Brief summary of Commercial Tenancies (Covid-19 Response) Regulations 2020 incorporating a Code of Conduct for commercial leasing

## The regulations

The Commercial Tenancies (COVID-19 Response) Regulations 2020 (Regulations) together with the *Commercial Tenancies (COVID-19 Response) Act 2020* (the Act) introduce a range of measures to provide for urgent relief for eligible tenants in response to the COVID-19 pandemic.

## The WA Code of Conduct (WA Code)

The WA Code is part of the Regulations and sets out commercial leasing principles for tenants and landlords to follow.

## Purpose

The WA Code requires the parties to a small commercial lease to negotiate temporary variations to the lease, including rent relief, to address the impact of the COVID-19 pandemic.

## Commencement and duration

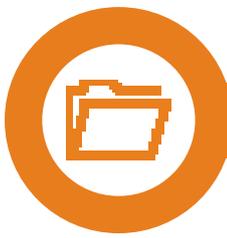
- The Regulations were gazetted on 29 May 2020 and the main parts including the WA Code commenced on 30 May 2020.
- The WA Code applies to small commercial leases **during the emergency period**, which runs for six months from 30 March 2020 to 29 September 2020 unless otherwise extended.

## Compliance

- A landlord and a tenant under a small commercial lease must comply with the WA Code which provides principles for landlords and tenants to follow.

## Rent relief to eligible tenant

- An eligible tenant whose business has been impacted by the COVID-19 pandemic can request rent relief from the landlord. Rent relief can be any form of relief from the eligible tenants obligation to pay rent and includes waivers and deferral of rent payments



### Eligibility

- A tenant under a small commercial lease is an eligible tenant if:
  - the following turnover in the financial year ending on 30 June 2019 was less than \$50 million:
    - (i) if the tenant is a franchisee — the turnover of the business conducted at the leased premises;
    - (ii) if the tenant is a corporation that is a member of a group — the turnover of the group;
    - (iii) in any other case - the turnover of the business conducted by the tenant at the leased premises;
  - and
  - the tenant either qualifies for the JobKeeper scheme or has, at any time during the emergency period satisfied the decline in turnover test set out in the JobKeeper scheme rules.

### Overarching obligations

The WA Code contains overarching obligations that must be followed by the landlord and tenant in their negotiations these are:

- 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 for them to provide in the circumstances for the purposes of the negotiations; and
- not make onerous demands for information from each other.

### What is an example of 'sufficient and accurate information'?

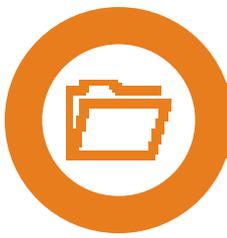
Information evidencing a reduction in turnover of a business might include information relating to turnover generated from an accounting system.

### Rent relief process

The WA code provides a process for rent relief.

- Tenant may request in writing rent relief during emergency period. The request must be accompanied by:
  - a statement that the tenant's lease is a small commercial lease and the tenant is an eligible tenant in relation to the small commercial lease; and
  - sufficient and accurate information that shows
    - the tenant is an eligible tenant; and
    - the reduction in the tenant's turnover experienced during the emergency period.
- Following receiving the tenant's request the landlord must:
  - offer in writing rent relief to the tenant within 14 days of receiving that request or such other reasonable time as agreed; and
  - make the offer in accordance with the principles set out below under the heading 'Principles applying to offering and negotiating rent relief'.

After the tenant receives the landlord's offer the landlord and the tenant must, following the principles set out below under the heading 'Principles applying to offering and negotiating rent relief', negotiate to reach an agreement on the rent relief to apply **during the emergency period**.



### Principles applying to offering and negotiating rent relief

The following principles apply to offers of rent relief and rent relief negotiations between a landlord and a tenant:

- An offer of rent relief:
  - must apply to **the emergency period**;
  - must be at least proportionate to the reduction in the eligible tenant's turnover associated with the business conducted at the leased premises experienced **during the emergency period**;
  - may relate to up to 100% of the rent payable under the small commercial lease;
  - must provide that not less than 50% of the rent relief is to be in the form of a waiver of rent, unless the landlord and tenant otherwise agree in writing. However an offer of rent relief must provide that **more than 50% of the rent relief** is to be in the form of a waiver of rent if:
    - (a) failure to provide more than 50% of waived rent would compromise the tenant's capacity to fulfil their ongoing obligations under their lease; and
    - (b) the landlord has the financial capacity to waive more than 50% of the rent.
- If the landlord is a tenant under a lease (the head lease) any rent relief granted must be passed onto the tenant under the small commercial lease (the sub tenant).

### How is the reduction in turnover calculated for the purpose of rent relief negotiations?

Unless otherwise agreed by the landlord and tenant, the reduction in turnover is calculated using the principles of the "decline in turnover test" set out in the JobKeeper scheme rules (including any relevant alternative decline in turnover test).

### Where can information be obtained on the decline in turnover test set out in the JobKeeper scheme rules?

Information can be found at:

- [Basic test](#)
- [Alternative test](#)

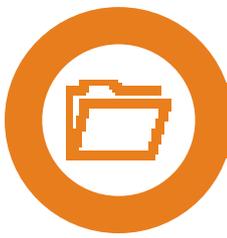
### Effecting rent relief

Rent relief is effected by a written variation to the small commercial lease; or any other written agreement that gives effect to the rent relief.

### Deferred rent

If rent is deferred then unless the landlord and tenant agree otherwise in writing:

- the landlord must not request payment of any part of the deferred rent until the earlier of the following:
  - (a) the day the emergency period ends;
  - (b) expiry of the term of the lease or any extension given under the Regulations or otherwise.
- the landlord and the tenant must vary the small commercial lease so that the tenant must pay the deferred rent to the landlord amortised over the greater of the following:



- (a) the balance of the term of the lease;
- (b) a period of not less than 24 months.

### Deferred rent and extension of lease

If rent is deferred the landlord must offer the tenant an extension of the term of the lease:

- on the same terms and conditions that applied under the lease immediately before the emergency period unless:
  - the landlord and the tenant agree otherwise in writing; or
  - if the landlord is the tenant under a lease (the head lease) of the land or premises that are the subject of the small commercial lease and the extension would be inconsistent with the head lease; or
  - the extension would be inconsistent with any contract or other agreement already entered into by the landlord relating to the leased premises.
- equivalent to the period for which the rent is deferred, unless agreed otherwise in writing.

### Existing agreements and further requests for rent relief

If before the WA Code came into operation the landlord and the tenant entered into an agreement for rent relief to the tenant during the emergency period or any part of the emergency period:

- the tenant can seek to change that agreement if the tenant believes the rent relief provided under the existing agreement is less favourable than rent relief that might be provided under the WA Code; and
- if the tenant makes a request for rent relief the landlord and tenant must follow the same process set out above for rent relief.

A tenant can also make a further request for rent relief to the landlord if the tenant's financial circumstances materially change after an agreement was reached. The same process as the first rent relief request must be followed.

### Principles applying to outgoings and other expenses

- If the eligible tenant for any part of the emergency period cannot conduct their business at the leased premises the landlord:
  - must consider waiving recovery of any outgoing or other expense payable by the tenant for the part of **the emergency period** that the tenant cannot conduct their business; and
  - may cease, or reduce, any service:
    - as is reasonable in the circumstances; or
    - in accordance with any reasonable request of the tenant;
- If outgoings relating to the emergency period or any part of the emergency period are reduced the landlord must:
  - not require the tenant to pay any amount of money related to the outgoing that is greater than the tenant's proportional share of the reduced outgoing payable under the lease.
  - if the eligible tenant has already paid an amount of money greater than the tenant's proportional share of the reduced outgoing reimburse the excess amount as soon as possible.



### Confidential information

- A landlord or tenant must not divulge or communicate protected information obtained in connection with the Regulations unless authorised under the Regulations:
- Protected information is
  - (a) the name, address or contact details of any person (other than the landlord or the tenant); or
  - (b) information relating to business processes or financial information (including information about the trade of a business); and
- Disclosure of protected information is permitted if it is disclosed in good faith in a number of circumstances and under conditions contained in the WA Code including but not limited to a professional adviser or financier and in certain circumstances to the Small Business Commissioner (SBC).

### Dispute resolution

- Disputes are resolved by the State Administrative Tribunal (SAT) but first the parties must try and resolve their dispute through the SBC.
- An application to the SAT to resolve a dispute must be made during the emergency period unless the SBC has issued a certificate.
- From 17 August 2020 no fee will be charged by SAT in relation to issues covered by the *Commercial Tenancies (COVID-19 Response) Act 2020*.

Full details and a link to the legislation and the full code is available on the Department of Mines, Industry Regulation and Safety website [www.dmirs.wa.gov.au/covidcomten](http://www.dmirs.wa.gov.au/covidcomten)