

Commercial Tenancies (COVID-19 Response) Amendment Regulations 2020

SL 2020/176

Made by the Governor in Executive Council.

1. Citation

These regulations are the *Commercial Tenancies (COVID-19 Response) Amendment Regulations 2020*.

2. Commencement

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day after that day.

3. Regulations amended

These regulations amend the *Commercial Tenancies (COVID-19 Response) Regulations 2020*.

4. Regulations 2A to 2D inserted

After regulation 2 insert:

2A. Terms used

In these regulations —

eligible tenant, in relation to a small commercial lease, has the meaning given in Schedule 1 clause 2;

insolvent, in relation to a tenant, means the tenant is —

- (a) according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or
- (b) a Chapter 5 body corporate as defined in the *Corporations Act 2001* (Commonwealth) section 9.

2B. End of emergency period (s. 3)

For the purposes of paragraph (b) of the definition of ***emergency period*** in section 3 of the Act, 28 March 2021 is prescribed.

2C. Prescribed class of small commercial lease (s. 3)

A lease is of a class prescribed for the purposes of paragraph (d) of the definition of *small commercial lease* in section 3 of the Act if the tenant —

- (a) is a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Commonwealth); and
- (b) uses the land or premises that are the subject of the lease for a commercial purpose.

2D. Prescribed circumstances (s. 9)

For the purposes of section 9 of the Act, on and after 30 September 2020, the following circumstances are prescribed —

- (a) the tenant under the small commercial lease is insolvent when the prohibited action is taken;
- (b) a case where —
 - (i) the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the prohibited action is taken; and
 - (ii) the prohibited action is taken on the grounds of a breach by the tenant of the small commercial lease that occurs during the emergency period (whether before, on or after 30 September 2020); and
 - (iii) the breach is of a kind referred to in section 9(a) of the Act; and
 - (iv) the breach is not the subject of a dispute that is being dealt with, but is not yet resolved, under Part 5 of the Act; and
 - (v) the tenant has not made a request, under the adopted code of conduct, for rent relief from the landlord in relation to any unpaid rent to which the breach relates; and
 - (vi) the landlord has not granted the tenant a waiver, deferral or reduction in respect of any unpaid rent, or other unpaid amount of money payable by the tenant to the landlord under the small commercial lease, to which the breach relates;
- (c) a case where —
 - (i) the tenant under the small commercial lease is not an eligible tenant in relation

- to the small commercial lease when the prohibited action is taken; and
- (ii) the prohibited action is taken on the grounds of a breach by the tenant of the small commercial lease that occurs during the emergency period on or after 30 September 2020; and
- (iii) the tenant is not an eligible tenant in relation to the small commercial lease when the breach occurs; and
- (iv) the breach is of a kind referred to in section 9(b) of the Act.

5. Regulation 3 amended

- (1) In regulation 3(1) delete the definition of *eligible tenant*.
- (2) After regulation 3(4) insert:
 - (5) If a tenant under a small commercial lease ceases to be an eligible tenant in relation to the small commercial lease, subregulations (3) and (4) and the adopted code of conduct continue to apply to matters relating to the period during which the tenant was an eligible tenant in relation to the small commercial lease as if the tenant were still an eligible tenant in relation to the small commercial lease.

6. Regulations 4A to 4C inserted

After regulation 4 insert:

4A. Section 11 of Act does not apply if tenant not eligible tenant (s. 23)

For the purposes of section 23 of the Act, on and after 30 September 2020, section 11 of the Act does not apply in a case where the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the rent is increased.

4B. Modified s. 12 of Act applies if tenant insolvent (s. 23)

- (1) For the purposes of section 23 of the Act, on and after 30 September 2020, section 12 of the Act applies as if amended as set out in this regulation to a case where the tenant is insolvent.
- (2) After section 12(4) insert —

- (4A) Despite subsections (3) and (4), a stay or suspension under either of those subsections ceases —
- (a) if on 30 September 2020 the tenant is insolvent — on that day; or
 - (b) if after 30 September 2020, but before the end of the emergency period, the tenant becomes insolvent — on the day on which the tenant becomes insolvent.

4C. Modified s. 12 of Act applies if tenant not eligible tenant (s. 23)

- (1) For the purposes of section 23 of the Act, on and after 30 September 2020, section 12 of the Act applies as if amended as set out in this regulation to a case where the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease.
- (2) After section 12(5) insert:
- (6) Despite subsections (3) and (4), a stay or suspension under either of those subsections ceases —
 - (a) in the case of a prohibited action or other measure stayed or suspended under subsection (3) — on the day on which the prohibited action or other measure stayed or suspended ceases to be a prohibited action or other measure that the landlord is prevented under this Part from taking or commencing; or
 - (b) in the case of an effect stayed or suspended under subsection (4) — on the day on which the effect ceases to be an effect that is contrary to the operation of this Part.
- (7) Despite subsection (5), a stay or suspension under that subsection ceases —
 - (a) if on 30 September 2020 the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease — on that day; or
 - (b) if after 30 September 2020, but before the end of the emergency period, the tenant under the small commercial lease ceases to be an eligible tenant in relation to the small commercial lease — on the day on which the tenant ceases to be an eligible tenant in relation to the small commercial lease.

7. Schedule 1 clause 2 amended

(1) In Schedule 1 clause 2(1):

- (a) delete “A tenant” and insert:

During the period beginning on 30 May 2020 and ending on 27 September 2020 (the *relevant period*), a tenant

- (b) in paragraph (b)(i) delete “section 7; or” and insert:

section 7 during the relevant period; or

- (c) in paragraph (b)(ii) delete “period,” and insert:

period before 28 September 2020,

(2) After Schedule 1 clause 2(1) insert:

- (1A) During the period beginning on 28 September 2020 and ending on 3 January 2021 (the *relevant period*), a tenant under a small commercial lease is an *eligible tenant* in relation to the small commercial lease if —

- (a) the tenant meets the requirements of subclause (1C); and

- (b) the tenant —

- (i) qualifies for the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Commonwealth) during the relevant period; or

- (ii) does not qualify for the jobkeeper scheme during the relevant period, but nevertheless satisfies any test relating to turnover during July, August and September 2020 by which a person can qualify for the jobkeeper scheme during the relevant period.

- (1B) During the period beginning on 4 January 2021 and ending on 28 March 2021 (the *relevant period*), a tenant under a small commercial lease is an *eligible tenant* in relation to the small commercial lease if —

- (a) the tenant meets the requirements of subclause (1C); and

- (b) the tenant —

- (i) qualifies for the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Commonwealth) during the relevant period; or

- (ii) does not qualify for the jobkeeper scheme during the relevant period, but nevertheless satisfies any test relating to turnover during October, November and December 2020 by which a person can qualify for the jobkeeper scheme during the relevant period.
- (1C) For the purposes of subclauses (1A)(a) and (1B)(a), a tenant meets the requirements of this subclause if the following turnover in the financial year ending on 30 June 2020 was less than \$50 000 000 —
 - (a) if the tenant is a franchisee — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;
 - (b) if the tenant is a corporation that is a member of a group — the turnover of the group;
 - (c) in any other case — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease.

- (3) In Schedule 1 clause 2(2) delete “subclause (1)(a)(ii),” and insert:

subclauses (1)(a)(ii) and (1C)(b),

8. Schedule 1 clause 4 amended

- (1) In Schedule 1 clause 4(d) in the example delete “system.” and insert:

system or business activity statements submitted to the Australian Taxation Office.

- (2) At the end of Schedule 1 clause 4 insert:

Examples for this paragraph:

1. A demand to provide future cash flow projections.
2. A demand to provide balance sheets, or profit and loss or year to date financials.
3. A demand to provide bank balance details or statements.
4. A demand that financial information be verified, examined, assured, audited or provided by a third party such as an accountant.

9. Schedule 1 clause 5 amended

In Schedule 1 clause 5(2)(c)(ii) delete “period.” and insert:

period or a relevant part of the emergency period.

10. Schedule 1 clause 7 amended

- (1) In Schedule 1 clause 7(1) delete “that apply to a landlord’s offer of” and insert:

of proportionality that apply in relation to a landlord’s obligation to provide

- (2) Delete Schedule 1 clause 7(4) and insert:

- (3A) Unless otherwise agreed by the landlord and the tenant, the rent relief provided by the landlord must be adjusted from time to time (but not more frequently than monthly) during the emergency period, in accordance with the principle set out in subclause (3), to take into account any variation in the reduction in the tenant’s turnover that the tenant experiences during the emergency period.

Example for this subclause:

In accordance with the example for subclause (3), the tenant was offered rent relief of 60% of the rent payable. If the tenant’s reduction in turnover has decreased to 40%, the rent relief should be adjusted downwards by reference to the 40% figure.

- (4) For the purposes of subclauses (3) and (3A), unless otherwise agreed by the landlord and the tenant, the reduction in the tenant’s turnover is to be calculated using, with such modifications as are appropriate to reflect subclauses (3)(a) and (b) and (3A), the principles, or any updated principles, of any relevant test relating to decline in turnover applicable to the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Commonwealth).

11. Schedule 1 clause 9 amended

- (1) In Schedule 1 clause 9(7) after “must be” insert:

at least

- (2) At the end of Schedule 1 clause 9(7) insert:

Example for this subclause:

If the landlord has granted the tenant a 6-month deferral of rent, the extension offered must be at least 6 months.

12. Schedule 1 clause 10 amended

After Schedule 1 clause 10(3) insert:

- (4) If the rent relief provided under a variation to a small commercial lease, or an agreement, referred to in clause 8 has ended before the end of the emergency period, an eligible tenant in relation to the small commercial lease may, during the emergency period, make a further request for rent relief to the landlord under clause 5.

V. MOLAN, Clerk of the Executive Council.
