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THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020

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EXPLANATORY STATEMENT

Presented by  
Gordon Ramsay MLA

# Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020

## OVERVIEW OF THE DECLARATION

The *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020* (the Declaration) is a disallowable instrument made under section 177 of the *Leases (Commercial and Retail) Act 2001* (the Leases Act).

On 7 April 2020 the Prime Minister announced that National Cabinet had agreed to a mandatory code of conduct for small to medium enterprises (SMEs) commercial leasing principles during COVID-19. The code applies to tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's Job Keeper program, with an annual turnover of up to \$50 million.

The National Code is to be implemented by each State and Territory by way of legislation or regulation, as it sees appropriate.

To implement this measure in the ACT, this Declaration introduces the requirement for good faith negotiations between the landlord and tenant, having regard to the overarching principles and leasing principles set out in the National Code, prior to the landlord terminating the lease or taking adverse action for a prescribed breach.

The Declaration operates where a tenant has been impacted financially by the COVID-19 pandemic and as a consequence, fails to meet certain obligations (including the payment of rent) under their lease agreement. An impacted tenant is a tenant who has qualified for the Commonwealth JobKeeper scheme and has a turnover of less than \$50 million for the 2018-19 financial year.

The Declaration is limited to prescribed breaches committed by the impacted tenant during the prescribed period. These 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, as parties entering new arrangements from this time would have done so aware of the business conditions they were entering. On the basis that the parties to an agreement after that date will have made that commitment with an awareness of the current business context in which they are operating.

The Declaration also applies to any termination notice given to, or prescribed action taken against, an impacted tenant after the Declaration expires, where these actions relate to a prescribed breach by the impacted tenant during the prescribed period.

These measures are temporary. The prescribed period commences on 1 April 2020 and there are several provisions governing when the Declaration must expire. In order to provide certainty to commercial tenancy stakeholders, it is the Government's intention that

the Declaration will expire on 30 September 2020. This date aligns with the ACT Government's commercial rates assistance package.

The Declaration interacts with the ACT's rate assistance package to incentivise commercial landlords to offer rent relief. To receive rates assistance from the ACT Government, commercial landlords are required to negotiate in good faith with their tenants, having regard to the National Code. Commercial property owners will be required to make this statement as part of their application for assistance to the ACT Government. This is an administrative requirement that will need to be met, where applicable, as part of the application for the rates rebate.

The ACT's model meets the intent of the National Code, which recognises the importance of timely good faith negotiations between parties. It also recognises that negotiations must be conducted on a case by case basis and that there is no 'one size fits all' approach to what is appropriate in each circumstance. The National Code recognises this and contemplates parties making alternative commercial arrangements to the Code provisions. Ultimately, negotiations should have regard to the financial position of all parties.

Together with the ACT Government's rates relief for eligible landlords, it creates a strong incentive for landlords and tenants to negotiate and find mutually beneficial outcomes to reflect the reality of current operating conditions and the financial capacities of all parties.

The requirement of a lessor to engage in good faith negotiations with an impacted tenant before taking action in response to a prescribed breach will be supported by the COVID-19 Local Business Commissioner acting as the Commercial Tenancy Mediator. The Commissioner will act as an independent third party to assist lessors and tenants to negotiate a new leasing agreement in good faith having regard to the principles of the National Code.

The ACT Commercial Tenancies Administration Committee has been established to work with stakeholders in the commercial tenancy space. A key function of the Committee is to make lessors aware, at an early stage, of the need to engage in good faith negotiations with the National Code principles before seeking lease termination or other adverse action. This awareness will encourage parties to engage sooner rather than later and will help to avoid the possibility of parties engaging in dialogue only when termination is in prospect.

#### **HUMAN RIGHTS COMPATABILITY**

The measures in the Declaration may engage and potentially limit the right to privacy in the *Human Rights Act 2004* (HRA). There may be circumstances where the tenant who is party to a commercial lease arrangement is an individual rather than a commercial entity. Where an individual is an impacted tenant within the definition in Clause 3 of the Declaration, a tenant may be required to provide sufficient and accurate information (which may include personal information) to their landlord to demonstrate a loss of income. Such information would include qualification under the Commonwealth JobKeeper scheme so as to ensure that the parties can engage in good faith negotiations around leasing arrangements including the possible reduction in rent based on the extent to which the tenant has

suffered a loss of turnover. Exchanging sufficient and accurate information is one of the overarching principles set out in the National Code of Conduct for SME Commercial Leasing Principles.

The requirement in the Declaration that a lessor engages in good faith negotiations with an impacted tenant prior to the landlord being allowed to exercise their right to terminate the lease or taking adverse action for a prescribed breach has an important purpose. It ensures leases cannot be terminated without the parties having had the opportunity to discuss how they can help each other in the current climate. By mandating 'in good faith' negotiations in these circumstances, the Declaration is designed to ensure tenants have the best chance to make it through the COVID-19 period. Exchanging sufficient and accurate information is necessary because landlords may reasonably expect tenants to demonstrate that they are suffering financial hardship because of the economic impact of COVID-19 in the context of engaging in good faith negotiations. It also ensures that there can be a reasonably proportionate response by the landlord to the level of impact of the COVID-19 pandemic experienced by the tenant in their business capacity. The overarching principles represent expectations that lessors and tenants should meet but are not legal obligations. Individual tenants may decide not to share information if it is not necessary for the purposes of engaging in good faith negotiations.

Thus, there is no limitation of the right to privacy because there are no legal requirements for tenants to provide information, and tenants retain control as to what information is to be shared.

## CLAUSE NOTES

### Part 1 Preliminary

#### Clause 1 Name of Instrument

This clause is a formal provision setting out the name of the instrument as the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020* (the Declaration).

#### Clause 2 Commencement

This clause provides for commencement of the Declaration on the day after its notification day.

The note for this clause explains that the instrument expires in accordance with s 177 (3) of the Leases Act.

#### Clause 3 Definitions

This clause defines terms in the Declaration. The purpose of the definitions in this clause is to ensure that the measures in the Declaration are restricted to tenants who have suffered financial hardship as a result of the economic impact of the COVID-19 pandemic. The definitions also set the parameters for the types of breaches by a tenant which are prescribed for the purposes of the Declaration as well as the period in which the prescribed breaches must occur in order to be the subject of this Declaration (Clause 5).

An 'impacted tenant' is tenant who, at any time during the prescribed period, qualifies for the Commonwealth JobKeeper scheme and who has a turnover for the 2018-19 financial year of less than \$50 million. This means the obligations of tenants who have not suffered financial hardship by the COVID-19 pandemic continue unaffected.

Where the tenant is a franchisee in a business, the turnover of less than \$50 million applies to the business conducted at the premises or land under the lease.

Where the tenant is a member of the corporate group, the turnover of less than \$50 million applies to the group.

In any other case, the turnover of less than \$50 million applies to the business conducted by the tenant.

Evidence of annual business turnover of less than \$50 million for the 2018-19 financial year could be provided by an impacted tenant through their latest set of audited accounts or through other independently verified information such as Australian Tax Office information.

'Prescribed breach' is defined as a failure by an impacted tenant to pay rent, outgoings or other amounts due under a prescribed lease or to operate the business during the hours required under that lease. The breaches must have occurred during the prescribed period.

Under the Declaration, a 'prescribed lease' is a lease that was entered into before 7 April 2020. As a result, any leases entered into after this date are not captured by the Declaration. This is because parties who have arrived at a commercial leasing agreement

after that date will have done so with an awareness of the current business climate caused by the COVID-19 pandemic.

‘Prescribed period’ means the period beginning on 1 April 2020 and ending on the first day no COVID-19 emergency is in force or any later day notified by the Minister under section 177(3)(b) of the Leases Act. As a result of this definition, the Declaration applies to certain actions that may have taken place before the day the instrument commences (Clause 5).

The note to this definition explains that if the Minister considers the effect of the COVID-19 pandemic justifies a later day, the Minister may notify a later day (not later than three months) for the expiration of the Declaration. This is in accordance with s 177(3) (b) of the Leases Act.

Clause 3 also contains a number of definitions for the purposes of this clause.

‘Business’ includes a business conducted on a not-for-profit basis. This definition has been included to clarify that businesses conducted by charities and other not-for-profit entities are captured by the Declaration.

‘Corporate group’ means a corporation and all its related bodies corporate.

‘COVID-19 emergency’ forms part of the definition of when a ‘prescribed period’ under the Declaration may end. A COVID-19 emergency is (a) a state of emergency declared under the *Emergencies Act 2004*, section 156 because of the coronavirus disease 2019 (COVID-19) or (b) an emergency declared under the *Public Health Act 1997*, section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19).

‘Lease to which the Act applies’ refers to s 177 (5) of the Leases Act. This provision includes leases which are prescribed under section 12 (2) (a) and (b) of the Leases Act.

‘Related body corporate’ is defined by reference to section 9 of the *Corporations Act 2001* (Cwlth).

The definition of ‘turnover’ in relation to an impacted tenant makes it clear that turnover from internet sales of goods or services is included in the turnover threshold of less than \$50 million.

#### **Clause 4      Meaning of good faith negotiations**

Clauses 6, 7 and 8 of the Declaration impose a requirement on the lessor to engage in good faith negotiations with the impacted tenant before taking certain actions in relation to the lease.

Clause 4 explains what is meant by the term ‘good faith negotiations’. A lessor engages in good faith negotiations if, in acknowledging the financial hardship suffered by the tenant because of the economic impact of the COVID-19 pandemic, they negotiate with the tenant having regard to the overarching principles and leasing principles set out in the code of conduct.

The Declaration therefore requires that lessors engage with the principles in the Code of Conduct. This is defined in Clause 4 as the National Code of Conduct for SME Commercial principles agreed by National Cabinet on 7 April 2020. The code is included in schedule 1 of the instrument.

The note to this Clause explains that the COVID-19 Local Business Commissioner has been appointed by the ACT Government to assist with mediation between the parties to a commercial lease agreement who have been affected by the COVID-19 pandemic.

### **Clause 5      Application**

Clause 5 makes it clear that the Declaration applies to a prescribed breach of a prescribed lease committed by the impacted tenant during the prescribed period (Clause 3). This clause, together with the definition of ‘prescribed period’ in Clause 3, clarifies that the Declaration includes prescribed breaches that were committed before the day the Declaration commences. Together with the definition of ‘prescribed lease’ in Clause 3, this clause clarifies that the Declaration is limited to those leases that have been entered into before 7 April 2020.

Clause 5 applies the Declaration to any termination notice given to, or prescribed action taken against, an impacted tenant by the lessor in relation to a prescribed breach during the prescribed period, including:

- a termination notice given before the Declaration commences or on or after the day the emergency period or instrument ends; and
- any prescribed action taken by the lessor against the tenant in relation to a prescribed breach on or after the day the Declaration expires.

This clause is intended to capture the possibility that a lessor may pursue action against an impacted tenant after the Declaration has ended which nevertheless relates to the impacted tenant’s prescribed breach during the prescribed period.

Clause 5 removes any doubt that nothing in the Declaration prevents a lessor from terminating or taking prescribed action where the tenant agrees to the termination action or the lessor has engaged in good faith negotiations and the tenant surrenders the lease.

‘Prescribed action’ is defined in Clause 8.

### **Clause 6      Lessor must negotiate before giving termination notice for prescribed breaches**

Clause 6 is the first of three clauses which cast a requirement on a lessor to negotiate in good faith with an impacted tenant in the circumstances specified in each clause.

Under Clause 6 a termination notice given by a lessor to an impacted tenant for a prescribed breach will be void unless the lessor has engaged in good faith negotiations with the tenant. The meaning of in good faith negotiations is provide at Clause 4.

### **Clause 7 Existing termination notices for prescribed breaches**

The purpose of Clause 7 is to capture a termination notice that has already been initiated by the lessor before the Declaration commenced which has not been confirmed by the Magistrates Court.

Clause 7 applies where a lessor has given an impacted tenant a termination notice in the period beginning on 1 April 2020 and ending on the day before the Declaration commenced. This is defined in the Declaration as the 'pre-commencement period'.

If the tenant contests the termination under section 122 (2) of the Leases Act or the lessor applies to the Magistrates Court to confirm the termination under s 124 (2) of the Act, then the Magistrates Court must not confirm the termination unless satisfied the lessor has engaged in good faith negotiations with the tenant.

### **Clause 8 Other actions by lessor against tenant**

This Clause prohibits other actions or proceedings which a lessor may pursue against an impacted tenant under a prescribed lease unless the lessor has engaged in good faith negotiations. This Clause reflects that a termination notice is not the only action a lessor may take in relation to a prescribed breach by an impacted tenant.

Clause 8 defines what is meant by a prescribed action. As noted in this Clause, these actions must relate to a prescribed breach in the prescribed period by the impacted tenant under a prescribed lease.