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THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No. 2)

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EXPLANATORY STATEMENT

Presented by  
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# Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No. 2)

## OVERVIEW OF THE DECLARATION

The *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No. 2)* (the new Declaration) is a disallowable instrument made under section 177 of the *Leases (Commercial and Retail) Act 2001* (the Leases Act). The new Declaration revokes the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (DI2020-92)* (the First Declaration).

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

To implement the National Code of Conduct in the ACT, the First Declaration introduced the requirement for good faith negotiations between parties with regard to the overarching principles and leasing principles set out in the National Code of Conduct, prior to a landlord terminating a commercial lease or taking adverse action against an impacted tenant for a prescribed breach.

The new Declaration retains this requirement for landlords to negotiate in good faith with an impacted tenant and reflects the amended operation of the Commonwealth Government's JobKeeper scheme from 28 September 2020.

Initially, the Commonwealth Government's JobKeeper scheme was set to conclude at the end of September 2020. However, on 21 July 2020, the Commonwealth Government announced an extension of the JobKeeper scheme until 28 March 2021. On 7 August 2020 the Commonwealth Government announced new requirements for the extended JobKeeper scheme to operate from 28 September 2020.

From 28 September 2020, businesses and not-for-profits seeking to claim the JobKeeper payment will be required to demonstrate that they have suffered a decline in turnover using actual GST turnover (rather than projected GST turnover). To receive the JobKeeper payment under Extension 1 of the JobKeeper scheme, businesses and not-for-profits will be assessed with reference to their actual GST turnover in the September quarter 2020.

The new Declaration reflects the changes in the requirements of Extension 1 of the JobKeeper scheme. These changes are given effect in the new Declaration through the definition of an "impacted tenant" as a tenant who at any time during the prescribed period:

- qualifies for the JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) as in force on 28 September 2020, and
- has a turnover of less than \$50 million for the 2018-19 financial year.

As such, the new Declaration will only apply to those tenants who qualify for and receive a payment under Extension 1 of the JobKeeper scheme from 28 September 2020.

The new 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. The new Declaration set out the requirement of a landlord to negotiate in good faith with an impacted tenant before taking a prescribed action against that impacted tenant for committing a prescribed breach during the prescribed period.

Due to continued subdued economic activity and continued outbreaks of COVID-19 – particularly in Victoria and NSW, the Government considers that the measures put in place in the First Declaration for an in good faith negotiation remain necessary and provide important safeguards in the current environment.

The new Declaration commences on 28 September 2020. It expires on 31 January 2021 at the latest.

The new Declaration is limited to prescribed breaches committed by the impacted tenant during the prescribed period. The prescribed period commences on 28 September 2020 and ends when the Declaration is no longer in force.

The new 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 of Conduct, as parties entering new arrangements from this time would have done so aware of the business conditions they were entering.

The new 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.

The new Declaration provides protection for former impacted tenants through continued application of the First Declaration. The provisions under the First Declaration will continue to apply in cases where former impacted tenants have committed a prescribed breach during the period beginning on 1 April 2020 and ending on 27 September 2020.

The new Declaration interacts with the ACT's commercial rates 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 of Conduct. Commercial property owners will be required to demonstrate they have negotiated in good faith as part of their application for assistance to the ACT Government. This is an administrative requirement that needs 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 of Conduct, 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 of Conduct 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, the new Declaration 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 is supported by the COVID-19 Local Business Commissioner acting as the Commercial Tenancy Mediator. The Commissioner acts 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 of Conduct.

#### **HUMAN RIGHTS COMPATIBILITY**

The measures in the new Declaration may engage and potentially limit the right to privacy in the *Human Rights Act 2004*. 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 under the new 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 program 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 new 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 new 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.

## **CONSULTATION ON THE PROPOSED APPROACH**

Members of the ACT Commercial Tenancies Administration Committee were consulted in developing the Declaration. That Committee is comprised of industry stakeholders and was established in May 2020 to provide the Government with guidance on the implementation of the National Code of Conduct and to work with stakeholders in the commercial tenancy space.

The Government also consulted other States and Territories who are implementing the National Code of Conduct in light of changes to the Commonwealth's JobKeeper program. This consultation ensures that the measures adopted by the ACT are aligned as far as possible with other jurisdictions.

## 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 (No. 2)* (the Declaration).

#### Clause 2 Commencement

This clause provides for commencement of the Declaration on 28 September 2020.

#### Clause 3 Expiry

This clause outlines the expiry of the Declaration on the earlier of the following:

- either the first day no COVID-19 emergency is in force, or if a later date is notified by the Minister, that later date;
- 31 January 2021.

The note to this clause explains that the Minister may notify a later day (not later than 3 months) under s 177 (3) (b) of the Leases Act if the Minister considers that the effects of the COVID-19 pandemic justify the continued operation of the Declaration. Under paragraph 3(1)(b) of the Declaration this later day cannot be later than 31 January 2021.

#### Clause 4 Revocation

This clause revokes a prior instrument, *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (DI2020-92)*.

#### Clause 5 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.

An 'impacted tenant' is a tenant who, at any time during the prescribed period, qualifies for the Commonwealth JobKeeper program as amended from 28 September 2020, and who has a turnover for the 2018-19 financial year of less than \$50 million. This means the lease 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 a 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 business climate caused by the COVID-19 pandemic.

‘Prescribed period’ means the period the Declaration is in force.

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 5 also contains several definitions for the purposes of this section.

‘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 6      Meaning of good faith negotiations**

Clauses 8 and 9 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 6 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 impacted 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 National Code of Conduct.

The Declaration therefore requires that lessors engage with the principles in the National Code of Conduct. This is defined in Clause 6 as the National Code of Conduct for SME Commercial leasing 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 7      Application**

Clause 7 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 5).

Clause 7 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 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 7 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 9.

#### **Clause 8      Lessor must negotiate before giving termination notice for prescribed breaches**

Clause 8 is the first of two 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 8 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 provided at Clause 6.

#### **Clause 9      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 9 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.

#### **Clause 10 Continued application of repealed declaration**

The purpose of this clause is to provide protection to former impacted tenants. The *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (DI2020-92)* (the repealed declaration) will continue to apply to a prescribed breach that occurred during the period of time that the repealed declaration was in force. The tenant must be an impacted tenant for the purposes of the repealed declaration, but one who is not an impacted tenant from 28 September 2020.

Clause 10 defines a former impacted tenant and provides that the repealed declaration continues to apply to the prescribed breach for former impacted tenants during the period beginning on 1 April 2020 and ending on 27 September 2020.

#### **Schedule 1**

Schedule 1 contains the mandatory code of conduct (the National Code of Conduct) for small to medium enterprises (SMEs) commercial leasing principles during the COVID-19 pandemic as announced by the Prime Minister on 7 April 2020.

The National Code of Conduct applies to SME commercial tenants that are suffering financial stress or hardship as a result of the COVID-19 pandemic, as defined by qualification for the Commonwealth Government's JobKeeper program, and which have an annual turnover of up to \$50 million.