

Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Leader of the House, provide this human rights certificate with respect to the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation), a regulation made under section 23 of the *COVID-19 Emergency Response Act 2020* and section 121 of the *Retail Shop Leases Act 1994*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

On 29 March 2020, the Prime Minister announced that work had begun on a short-term intervention for commercial tenancies and that National Cabinet had agreed to a moratorium on evictions over the next six months for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus.

On 3 April 2020, National Cabinet agreed that states and territories would implement a mandatory code of conduct, including via legislation or regulation as appropriate, for the purpose of imposing a set of good faith leasing principles for application to commercial leases in response to the financial hardship being experienced by some tenants due to business disruption, closures, restrictions on movement and social distancing due to the COVID-19 emergency. The code would apply where the tenant is eligible for the Commonwealth Government's JobKeeper assistance and is a small-medium sized enterprise with up to \$50 million in annual turnover.

Subsequently, on 7 April 2020, the Prime Minister announced the National Cabinet's agreement on the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles* (National Code), to be given effect through legislation or regulation as appropriate.

On 22 April 2020, the Queensland Parliament's Legislative Assembly passed the *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act), which received assent and commenced on 23 April 2020.

Section 2 of the COVID-19 Response Act provides that the main purposes of the Act include to provide for matters related to retail and prescribed leases affected by the COVID-19 emergency.

Part 7 of the COVID-19 Response Act relates to retail leases and other prescribed leases and provides a regulation making power prohibiting the exercise of, or otherwise regulating, rights of lessors and lessees under relevant leases and other agreements relating to the premises. The regulation making power includes a power to require parties to a dispute, or decision-makers deciding a dispute, to have regard to particular matters when negotiating, disputing or deciding a matter or proceeding relating to a relevant lease.

The Regulation will implement the National Cabinet decision in relation to good faith leasing principles set out in the National Code for “affected leases” in Queensland.

Generally, a lease of premises is an “affected lease” under the Regulation if:

- it is a retail shop lease (under the *Retail Shop Leases Act 1994*) or a prescribed lease (a lease, other than a retail shop lease, under which the leased premises are to be wholly or predominantly used for carrying on a business);
- on the commencement, the lease, or an agreement to enter into the lease, is binding on the lessee (whether or not the lease has commenced);
- the lessee under the lease is a small and medium enterprise entity under the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cwlth), section 5; and
- the lessee under the lease, or an entity that is connected with or an affiliate of the lessee and responsible for employing staff for the business carried on at the leased premises, is eligible for the Commonwealth’s JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cwlth) (the Payments and Benefits Rules), sections 7 and 8.

The Regulation:

- does not prevent parties from entering into an agreement that is inconsistent with the obligations of lessors and lessees under part 2 of the Regulation, or affect the validity of an agreement entered into before the commencement, but preserves a party’s right to negotiate a condition of an affected lease;
- requires the lessor and lessee under an affected lease to cooperate and act reasonably and in good faith;
- prohibits a lessor under an affected lease, from taking a prescribed action (such as recovery, termination of possession, charging interest on unpaid rent) on the following grounds occurring wholly or partly during the response period: a failure to pay rent; a failure to pay outgoings; or the business carried on at the leased premises not being open for business during the hours required under the lease;
- prohibits a lessor under an affected lease from increasing the rent payable by the lessee during the response period (except when worked out with reference to turnover);
- provides for how renegotiations of rent payable and other conditions are to be initiated and conducted;
- imposes requirements relating to deferred rent;
- provides that, subject to some exceptions, if rent under the lease is waived or deferred for a period, the lessor must offer the lessee an extension to the term of the lease, for a period equivalent to the period for which rent is waived or deferred, on the same conditions as those contained in the lease (except that the rent payable during the extension must be adjusted for the waiver or deferral) ;

- provides that, if a lessee under an affected lease is unable to operate a business at the premises for any part of the response period because of the COVID-19 emergency, the lessor may cease or reduce any services at the premises;
- imposes an obligation of confidentiality on parties to an affected lease dispute or a small business tenancy dispute (each, an eligible lease dispute) not to disclose protected information, other than in specified circumstances;
- imposes an obligation on parties to cooperate and act reasonably and in good faith in all discussions and actions associated with resolving an eligible lease dispute;
- provides for the Small Business Commissioner to refer eligible lease disputes to mediation and establishes procedures for mediation;
- provides for matters to be considered by a court or tribunal in the hearing and deciding of an eligible lease dispute;
- provides a general exemption for an act or omission, on or after the commencement of the Act, of a lessee under a retail shop lease, a prescribed lease or other small business lease, if the act or omission is required under a COVID-19 response measure or a law of the Commonwealth or another State in response to the COVID-19 emergency; and
- stays or suspends proceedings or actions for prescribed action in relation to affected leases that are started in the pre-commencement period but are unresolved, incomplete or not finalised prior to commencement of the Regulation.

Human Rights Issues

Human rights relevant to subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights that are relevant to the Regulation are the following:

- property rights (section 24); and
- privacy and reputation (section 25).

Consideration of reasonable limits on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Property rights (*Human Rights Act 2019*, section 24): property rights protect the right of all persons to own property (alone or with others) and provide that people have a right not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom.

The Regulation limits the right to property for landlords as it will prevent a landlord under an affected lease from taking a prescribed action for a failure by the lessee to pay rent or outgoings or to trade during the hours required under the lease if the ground happens wholly or partly during the response period. *Prescribed action* includes action under the lease or the starting of a proceeding in a court or tribunal to: recover possession of the premises; evict the lessee; terminate the lease; or exercise a right of re-entry to the premises.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The economic impacts of the COVID-19 emergency are continuing to evolve, and while it is difficult to determine the full magnitude of these impacts, it is likely that there will be long-term effects on the Queensland economy and for the business community. It is therefore necessary to provide the ability to implement responsive measures to relieve the financial stress and anxiety for tenants under affected leases in Queensland.

The Regulation is a responsive measure to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases and to establish a process for resolving disputes about affected leases relating to COVID-19 response measures.

The Regulation will give effect to good faith leasing principles agreed at the National Cabinet level to underpin and govern short-term intervention to aid commercial tenancies in financial distress and unable to meet their lease commitments due to COVID-19 impacts.

Keeping businesses in their places of commercial residence will have flow-on effects for the rest of the economy, especially for those employed by small to medium businesses. Relieving the financial stress and anxiety for tenants under affected leases as a result of the economic impacts of industry and government responses to the COVID-19 emergency is therefore important for the maintenance of Queensland's small and medium business community. Ensuring leasing security, providing relief from financial hardship and promoting resilience for tenants under affected leases in the face of an unprecedented global economic downturn as a result of the COVID-19 emergency is a legitimate objective and proper purpose for limiting human rights.

- (c) the relationship between the limitation to be imposed by the provisions if enacted, and the purpose, including whether the limitation helps to achieve the purpose

The Regulation will achieve the purpose by: imposing an obligation on parties to an affected lease to cooperate and act reasonably and in good faith to mitigate the effect of the COVID-19 emergency on the parties by re-negotiating the rent payable and other conditions of the lease; and providing dispute resolution pathways where the parties are unable to reach an agreement.

Limiting lessor rights to end tenancies and take other prescribed actions is necessary to provide lessees with more certainty about the duration of their tenancy during the COVID-19 emergency. The Regulation does not prevent parties from entering into an agreement that is inconsistent with the obligations of lessors and lessees under part 2 of the Regulation, but preserves a party's right to negotiate a condition of an affected lease.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose

As a result of the speed and severity of the impacts of the COVID-19 emergency and the associated community health measures, there are no practicable alternatives to the Regulation to achieve this objective. A voluntary measure or an awareness-raising program, for example, would be too slow and inconsistent in application.

Where parties to an affected lease are unable to reach an agreement in renegotiating the rent payable and the other conditions of the lease, the dispute resolution provisions in part 3 of the Regulation provide for the parties to mediate the dispute. If the parties cannot reach a settlement agreement, or a party does not comply with a settlement agreement reached at the mediation conference, a party to the lease may apply to the Queensland Civil and Administrative Tribunal or the appropriate court for an order to resolve the dispute, which acts as a further safeguard on the limitation of property rights.

The limitation on human rights is also mitigated by the time-limited operation of the Regulation and will expire on 31 December 2020.

I believe that the adjustments to the respective rights and obligations of lessors and lessees in respect of affected leases under the provisions of the Regulation are the least restrictive and reasonably available ways to achieve the purpose of the Regulation.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, the need to keep businesses in their places of commercial residence and ensure leasing security for lessors in the face of an unprecedented global economic downturn as a result of the COVID-19 emergency is considered to outweigh any impact of a person's human rights identified above.

(f) any other relevant factors

Not applicable.

(a) the nature of the right

Right to privacy and reputation (*Human Rights Act 2019*, section 25): The right to privacy under the *Human Rights Act 2019* protects individuals against unlawful or arbitrary interferences with their privacy. The underlying value of the right to privacy is the 'protect[ion] and enhancement of the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.' The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The right to privacy protects the individual against interference with personal information, data collection and correspondence, as well as with the individual's physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The right to privacy is limited by the Regulation to the extent that parties to affected leases are required to negotiate, in good faith, the terms of the lease and a party to the lease may be required to provide the other party with personal information and information relating to business processes or financial information for the purpose of negotiating or resolving a dispute.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The limitation on the right to privacy is required so that negotiations can be conducted in good faith between the lessor and the lessee under an affected lease. The disclosure of an individual's personal information is required so that both parties can negotiate affected leases based on the financial evidence that the lessee has suffered financial hardship and is unable to meet their lease commitments due to COVID-19 impacts. The information must be true, accurate, correct and not misleading. In this way, the purpose of the limitation helps achieve the overall purpose of the Regulation which is to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases and to establish a process for resolving disputes about affected leases relating to COVID-19 response measures.

- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The Regulation helps to achieve the purpose by requiring the lessee to provide personal and financial information to prove that the lessee is suffering financial hardship as a result of COVID-19 response measures. In this way, the limitation is rationally connected to achieving the purpose stated above.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways of achieving the purpose have been identified. The limitation is required in order for negotiations between the lessor and the lessee to be conducted in good faith where the lessee is required to prove that they have suffered financial hardship as a result of COVID-19 response measures by providing sufficient information that is true, accurate, correct and not misleading.

The Regulation imposes a penalty for disclosure of protected information obtained under or as a result of the Regulation and imposes an obligation on a party to an affected lease not to use information for any purpose other than negotiating or resolving a dispute under the Regulation.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, I consider the benefits that will result for lessees under affected leases when they prove they are suffering financial hardship outweigh the limitation on their right to privacy when having to disclose personal and financial information when proving such hardship.

- (f) any other relevant factors

Not applicable.

Conclusion

I consider that the Regulation is compatible with the *Human Rights Act 2019* because it does not limit, restrict or interfere with certain human rights, but those limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
Attorney-General and Minister for Justice
Leader of the House

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