

# Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment 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) Amendment Regulation 2020* (the Amendment 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 Amendment 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

The *COVID-19 Emergency Response Act 2020* (the Act) provides for a regulation-making power for the implementation of the National Cabinet decision in relation to good faith leasing principles for negotiations between commercial landlords and tenants impacted by the COVID-19 public health emergency.

The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation) gave effect to National Cabinet's agreement to a moratorium on evictions for the non-payment of rent for commercial tenancies 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 Regulation implements the fair leasing principles set out in National Cabinet's *Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19*, for 'affected leases' in Queensland for small-medium sized enterprise (SME) tenants with up to \$50 million in annual turnover who are eligible for the Commonwealth Government's JobKeeper scheme.

The Regulation provides protections for lessees under affected leases (the lessee protections), such that a lessor:

- cannot take prescribed action (e.g. recovery of possession, termination of the lease, eviction of the lessee) for a lessee's failure to pay rent or outgoings or trade for specified hours during the response period;
- must not increase rent during the response period;
- must make an offer of rent relief that:
  - relates to any or all of the rent payable under the lease during the response period;
  - has regard to stated factors such as reduction in turnover; and
  - provides for at least 50% of the rent reduction offered to be in the form of a waiver of rent; and

- subject to some exceptions, must offer the lessee an extension of the lease for the period that the rent has been waived or deferred.

The ‘response period’ is defined as 29 March 2020 to 30 September 2020. The Act and Regulation expire on 31 December 2020.

The parties to an affected lease are not prevented from entering into an agreement that is inconsistent with the provisions of the Regulation.

The Amendment Regulation extends the response period under the Regulation to the period from 1 October 2020 to 31 December 2020 (extension period). For the extension period, lessors and lessees will have rights and obligations that broadly mirror the Regulation as it applies in respect of the current response period (29 March 2020 to 30 September 2020).

The lessee protections are to be modified to: remove the requirement that 50% of the rent reduction offered be by way of waiver for the extension period; recognise negotiations that have already been agreed in respect of reductions in rent payable or other stated conditions of an affected lease in respect of the extension period; and provide that a rent increase arising as a result of a review of rent under the lease during the response period or extension period cannot be given effect until after the end of the extension period (the modifications).

Other consequential amendments will ensure that the confidentiality obligations in respect of protected information apply to the extension period and that the dispute resolution provisions (in part 3 of the Regulation) continue to apply to affected lease disputes which arise in respect of the extension period.

## 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 Amendment 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 to 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 Amendment 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 extension 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. Economic conditions will remain challenging for many businesses, with COVID-19 outbreaks and border restrictions resulting in uncertainty related to cash flows, particularly for SMEs, through the remainder of 2020 and into early 2021. It is therefore necessary to continue to provide responsive measures to relieve the financial stress for tenants under affected leases in Queensland.

The Amendment Regulation is a responsive measure to continue to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases by continuing to make available, for the extension period, a process for resolving disputes about affected leases relating to COVID-19 response measures.

Keeping businesses in their places of commercial residence will have flow-on effects for the rest of the economy, especially for those employed by SMEs. 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 Amendment Regulation will achieve the purpose by extending the response period under the Regulation until 31 December 2020. This will: extend the existing obligations 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 in respect of the extension period; and continue to provide dispute resolution pathways where the parties are unable to reach an agreement.

Limiting lessor rights to end tenancies and take other prescribed actions in respect of the extension period is necessary to provide lessees with certainty about the duration of their tenancy as the COVID-19 emergency continues.

The Amendment 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.

With the exception of rent increases under rent reviews during the response period or extension period which must not be given effect until after the extension period, nothing in the Regulation, as amended, affects the validity of an agreement, or a variation of an affected lease, that is inconsistent with part 2 of the Regulation whether entered into before or after the commencement of the Regulation or the Amendment Regulation.

(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 Amendment Regulation to achieve this objective.

I believe that extending the response period under the Regulation to 31 December 2020 is the least restrictive way to achieve the purpose of the Amendment 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 continuing 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 public health emergency is considered to outweigh any impact on a person's human rights as 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 Amendment Regulation to the extent that, with respect to the extension period, 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 Amendment Regulation which is to extend the response period under the Regulation in order to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases.

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

The Amendment 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 operation 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 who can prove they are suffering financial hardship outweigh the limitation on their right to privacy by having to disclose personal and financial information when proving such hardship.

- (f) any other relevant factors

Not applicable.

## Conclusion

I consider that the Amendment Regulation is compatible with the *Human Rights Act 2019* because it does 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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