

# Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2021

## 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 Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2021* (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* (National Code), 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 established the threshold for SME entities by referencing the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth) (SME Rules), which, at the time the Regulation was made, provided that annual turnover for an SME entity was less than \$50 million.

With effect from 14 November 2020, the Commonwealth amended the SME Rules to increase the annual turnover threshold to be less than \$120 million (increased threshold).

The result of this is that for the six-week period from 14 November 2020 (the date the increased threshold took effect) until 31 December 2020 (the end of the extension period under the Regulation), commercial lessees with an annual turnover between \$50 million and up to \$120 million may be able to satisfy the definition of ‘affected lease’ under the Regulation.

This means that, for the six-week period, more lessees will satisfy the definition of SME entity for the purposes of the Regulation and may seek to take advantage of the lessee protections in the Regulation and right to negotiate rent relief.

The Amendment Regulation amends section 5(5) of the Regulation to clarify that the definition of SME entity is as in force at that time the Regulation was made. This restores the less than \$50 million turnover threshold and will prevent entities with a turnover of \$50 million or more from being able to satisfy the definition of SME entity under 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 Amendment Regulation are property rights (section 24) and the right to a fair hearing (section 31).

### **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.

Clause 3 of the Amendment Regulation amends the definition of SME entity to mean the definition as in force on the commencement of the Regulation. This will restore the application of the Regulation to SME entities with a maximum annual turnover of less than \$50 million. New section 51(2) of the Amendment Regulation (at clause 6, under the new part 5, division 2) provides that, the definition of SME entity in section 5(5) (as amended) applies and is taken to have always applied in working out whether or not a lease of premises is an affected lease.

Taken together, these two amendments will prevent a lessee with annual turnover above \$50 million from being able to take advantage of rights or protections under the Regulation for the period during which the lease held by that lessee that, other than for the commencement of the Amendment Regulation, would have been an affected lease (an ineligible lease).

Clause 6 preserves the effect of disputes or matters that have been resolved prior to the commencement, and provides transitional arrangements for any matters on foot or incomplete at the commencement. In doing so, the clause will limit the property rights of lessees under ineligible leases back to the rights that applied prior to the increased threshold under the SME Rules. The clause also has the effect that a lessor, who may have been prevented from taking a particular action (e.g. eviction or increasing rent) on the basis that the ineligible lease was an affected lease, will no longer be prevented from taking that action. The effect is to restore the rights of the lessor back to rights that applied prior to the increased threshold with respect to the lessee.

**Fair Hearing** (*Human Rights Act 2019*, section 31): The right to a fair hearing states that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The term ‘civil proceeding’ is not defined in the HR Act. It also is to be given an autonomous meaning and includes ‘any legal process for the enforcement, vindication, determination or protection of a civil (as distinct from a criminal) right or obligation’.<sup>1</sup>

The right embraces the right of access to a court or tribunal. This implies that the right to a fair hearing is relevant to restrictions on a person's ability to commence proceedings as well as to restrictions on a person's ability to continue or properly conduct proceedings already commenced. The right is limited by the transitional provisions of the Amendment Regulation which set out, in relation to an ineligible lease, that section 12 (which prohibits the lessor from taking a prescribed action) is taken to have never applied. This means that the lessor is permitted to take an action, that but for the Amendment Regulation, would be a prescribed action under the lease for any of the reasons in section 12(1). Additionally, the transitional provisions provide that an incomplete application to the Queensland Civil and Administrative Tribunal (QCAT) or a court under section 12(3) lapses automatically on commencement of the Amendment Regulation.

(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 meant that it was necessary to provide responsive measures to relieve the financial stress for tenants under affected leases in Queensland to keep businesses in their places of commercial residence. The Regulation was one such measure.

However, the increased threshold results in a situation where the impact on the ordinary property rights of lessors is greater than intended, and as a consequence, some lessees were given increased rights and protections, at the expense of the ordinary property rights of lessors.

The Amendment Regulation responds to the unintended impact of the increased threshold to restore, to the greatest extent possible, the balance between a justifiable response to the COVID-19 emergency as intended by National Cabinet and the impact on the right to property.

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<sup>1</sup> *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221; [2011] VSC 42 at [172]–[173]

Clauses 4 and 6 of the Amendment Regulation have the effect of removing property rights from lessees under ineligible leases and restoring property rights to lessors. Limiting rights of one group to mitigate a greater than anticipated negative impact on the rights of another group is a legitimate objective and proper purpose for limiting human rights.

Clause 6 has the effect of preventing lessees with turnover between \$50 million and up to \$120 million, who had commenced proceedings under the Regulation, from continuing proceedings to assert their increased rights and protections, as a result from the change in the SME Rules. The purpose of the limitation on the right to a fair hearing is also to re-balance the relationship between the property rights of lessors and lessees in accordance with the National Code. Limiting rights of one group to mitigate a greater than anticipated negative impact on the rights of another group 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 restoring the application of the less than \$50 million turnover threshold for lessees to satisfy the definition of SME entity under the Regulation and preventing any future exercise of rights under the Regulation by lessees under ineligible leases. The Amendment Regulation will also preserve the effect of any disputes or other matters that have been completed or finalised prior to the commencement.

With respect to the right to a fair hearing, the Amendment Regulation achieves its purpose by setting out that an incomplete application to the QCAT or a court under section 12(3) lapses on commencement of the Amendment Regulation.

The Amendment Regulation does not prevent parties to ineligible leases from entering into an agreement for rent relief or for the other matter that apply under the Regulation. However, the Amendment Regulation means that any such agreements will be made under negotiations in accordance with ordinary commercial principles, rather than as a result of a limitation on the rights of the lessor.

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

To prevent any further erosion of the rights of lessors under ineligible leases, there are no practicable alternatives to the Amendment Regulation to achieve the objective of restoring the original intent of the Regulation, to the greatest extent possible.

I believe that least restrictive way to achieve the purpose of restoring the intended impact of the Regulation is to make 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 importance of restoring the intended balance of rights between lessors and lessees by preventing any future exercise of rights under the Regulation in respect of ineligible leases and limiting, to the greatest extent possible, the unintended impact on ordinary property rights of lessors is to remove rights from lessees under ineligible leases that arose only from the effect of the increased threshold and to end any processes under the Regulation in respect of ineligible leases that are incomplete or unresolved on the commencement.

- (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.

**SHANNON FENTIMAN MP**  
**Attorney-General and Minister for Justice**  
**Minister for Women and Minister for the Prevention of Domestic and Family Violence**