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**LANDLORD AND TENANT LAW –  
WHAT IS DIFFERENT DURING COVID-19?**

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**TO**

**THE LAW SOCIETY OF SOUTH AUSTRALIA  
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## 1. Expressions used in this paper

- 1.1 "Code" means the Mandatory Code of Conduct issued by the National Cabinet on 7 April 2020.
- 1.2 "Commissioner" means the Small Business Commissioner of SA.
- 1.3 "Court" means the Magistrates Court of South Australia.
- 1.4 "National Cabinet" means the National Cabinet comprising the Prime Minister, State Premiers and Chief Ministers as announced by the Prime Minister on 13 March 2020.
- 1.5 "the Act" means the *COVID-19 Emergency Response Act 2020*.
- 1.6 "the Regulations" means the *COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020*.

## 2. Introduction

- 2.1 The purpose of this paper is to summarise how the Federal and State Government's respective responses to the COVID-19 pandemic have affected commercial leasing in South Australia.
- 2.2 This paper addresses commercial leases only, and does not address:
  - 2.2.1 residential tenancies;
  - 2.2.2 aged care and retirement village arrangements; or
  - 2.2.3 contract law and / or default/debt recovery generally.
- 2.3 This paper also does not attempt to summarise the various declarations and directions that have been issued under the *Emergency Management Act 2004* (SA), other than to note how such directions have substantially affected many Tenants and their businesses.
- 2.4 Finally, it is important to note that the law in this area has been in a constant state of evolution over the past 3 months. National Cabinet initially announced on 29 March 2020 that a 'short term intervention [was] needed for commercial tenancies' and the Code was then released on 7 April 2020. However South Australia's substantive legislative response did not come into effect until 15 May 2020.
- 2.5 As far as I am aware, the law contemplated by the Act and the Regulations is presently untested in the Courts.

- 2.6 Furthermore, the Act provides the State Government with considerable power to amend the Regulations and issue further regulations at any time.
- 2.7 Accordingly, while this paper presents a "snapshot" of the current law, the legal position could continue to evolve and may be different in the near future.

### **3. The effect of the pandemic on Tenants**

As mentioned above, the pandemic and the Government's response to it (in particular the various directions issued under the *Emergency Management Act (2004)*) have affected Tenants in numerous ways. While some Tenants have no doubt benefitted (think Bunnings and toilet paper suppliers), for many Tenants the pandemic has had a negative impact on both turnover and profitability (in some cases disastrously).

I have set out below the more obvious examples of Tenants and their businesses that have been affected.

- 3.1 Tenants directly affected by the ban on international and cross-border travel (travel agents, tourism operators, educational institutions, hotels and motels).
- 3.2 Tenants indirectly affected by the ban on international and cross-border travel (Tenants operating in tourist areas, Tenants associated with national and international sport).
- 3.3 Tenants required to shut down and cease trading completely (licensed premises, theatres and cinemas, gambling outlets, beauty salons, gymnasiums and bootcamps).
- 3.4 Tenants not required to shut down completely, but whose operations have been severely restricted (restaurants and café's limited to take away and home delivery, hairdressers limited by density requirements, retailers limited by social distancing requirements etc).
- 3.5 The sudden demand for certain consumer goods (think certain food and cleaning staples) and "panic buying", resulting in shortages of supply, affecting (after an initial "spike") the turnover of smaller retailers.
- 3.6 Tenants impacted due to social distancing and lock down requirements generally reducing foot traffic and customer numbers (for example, many office workers being required to work from home affecting retail Tenants operating in the CBD and other business precincts).
- 3.7 Tenants affected by the impact of the pandemic on the economy generally (lower consumer confidence, less spending, transactions being cancelled for

uncertainty, negative impact on share market and property returns and values etc).

- 3.8 Tenants making a commercial decision to close or cease trading completely (e.g. Solomon Lew closing numerous outlets, fashion chains shutting completely).

Given all of the above, it was abundantly clear early on that Landlords and Tenants were on a collision course, given the Tenants' ongoing contractual obligations under the Lease, and the pandemic's impact on the Tenants' ability to meet such requirements.

#### **4. The Code**

##### **4.1 Announcement and release**

On 29 March 2020, the Prime Minister announced that "National Cabinet agreed that short-term intervention is needed for commercial tenancies" with a "moratorium on evictions over the next six months for commercial ... tenancies in financial distress" and a "common set of principles...to underpin and govern intervention to aid commercial tenancies". The Code was subsequently released on 7 April 2020.

##### **4.2 What did the Code say and do?**

- 4.2.1 The Code is poorly written, is inconsistent in the expressions that it uses and shows signs of political compromise and having been rushed.
- 4.2.2 Importantly, the Code is not law and is of no legal effect. The Code itself acknowledges that it will be given effect through relevant state and territory legislation.
- 4.2.3 The Code purports to impose a set of "good faith leasing principles" for commercial tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic, as defined by their eligibility for the Commonwealth's JobKeeper program and with an annual turnover of up to \$50,000,000.

#### 4.2.4 The Code:

4.2.4.1 Recognises that all Leases are different and that there is no "one size fits all" solution which can be applied to all Leases.

4.2.4.2 Contemplates that Landlords and Tenant have a common interest to ensure business returns to normal at the end of the pandemic. Accordingly both parties are required to negotiate in good faith to reach appropriate temporary leasing arrangements, including acting in an open honest and transparent manner with each other and providing sufficient and accurate information to achieve their objectives.

4.2.4.3 Requires that the arrangements reached take into account the impact of the COVID-19 pandemic on the Tenant with specific regard to the Tenant's revenue, expenses and profitability with temporary arrangements to be proportionate and appropriate based on the impact of the pandemic plus a "reasonable recovery period".

4.2.5 The Code goes on to detail a series of overarching "Leasing Principles" to be applied as soon as practicable and on a case by case basis. Such Leasing Principles include the following:

4.2.5.1 Landlords not being able to terminate Leases due to non-payment of rent during the pandemic period or a "reasonable subsequent recovery period".

4.2.5.2 Tenants to remain committed to the terms of the Lease (subject to any rent relief arrangement negotiated) with failure by the Tenant to abide to result in forfeiture of any protections under the Code.

4.2.5.3 Landlords to offer Tenants rent relief in the form of rent waivers and deferrals, with such rent relief to be proportionate to the reduction in the Tenant's trade during the pandemic period and a subsequent reasonable recovery period (this is known as the "principle of proportionality").

4.2.5.4 Rent waivers to constitute no less than 50% of the total reduction in rent and should form a greater proportion

where a failure to do so would compromise the Tenants capacity to fulfil their ongoing obligations.

- 4.2.5.5 Deferred rent to be amortised over the balance of the Lease term or 24 months (whichever is greater) unless otherwise agreed, with deferred payments not to begin until the end of the pandemic period and to take into account a "reasonable subsequent recovery period".
- 4.2.5.6 Tenants should be offered an extension of their Lease for any period for which rent is waived or any period that rent is deferred for.
- 4.2.5.7 Any reduction in statutory charges or any other benefit that the Landlord receives (eg. from its bank) should be passed on or otherwise shared with Tenants. Landlords should not pass on outgoings in circumstances where the Tenant cannot trade.
- 4.2.5.8 No fees, interest and other charges should be applied in respect of rent waived or deferred.
- 4.2.5.9 Landlords should freeze rent increases during the pandemic and during any "reasonable subsequent recovery period".
- 4.2.5.10 Landlords to not draw on a Tenant's security during the pandemic or a reasonable subsequent recovery period. Tenants should not be penalised in any respect for reducing opening hours or ceasing to trade.
- 4.2.5.11 State and Territory Governments to implement dispute resolution processes (including binding mediation).
- 4.2.5.12 Industry Code Administration Committee to be established at State level.

### 4.3 Following the release of the Code – what next?

Following the release of the Code, the industry faced a long period of uncertainty while waiting for the South Australian Government to implement its legislative response.

Would the Government pass a law simply stating that the Code (in the form released by National Cabinet) would be law in South Australia? Or would the State Government pass a law that put the Code "into its own language"? Or would the State Government's legislative response not follow the Code and "go its own way" in certain critical respects?

## 5. **The South Australian Government's legislative response**

### 5.1 Initial legislative response

5.1.1 The *Covid-19 Emergency Response Act 2020* ("the Act") came into effect on 9 April 2020. The Act addressed many issues, with Section 7 covering commercial leases.

5.1.2 Section 7 of the Act was substantially amended on 15 May 2020, so the purpose of this paper is not to analyse in detail the (now) historic content of section 7.

5.1.3 However, the following summary is provided.

5.1.3.1 Where the Tenant is suffering "financial hardship" the Act prohibited a Landlord from enforcing the Lease (ie. termination, re-entry, distraint, suing the Tenant or guarantor or calling on any security) following the Tenant breaching the Lease during the "prescribed period" by:

- failing to pay rent;
- failing to pay outgoings;
- failing to have the business open during the hours prescribed in the Lease;
- any other prescribed acts or omissions.

5.1.3.2 If the Tenant is suffering "financial hardship", the rent cannot be increased, nor can land tax be recovered, during the "prescribed period".

5.1.3.3 The "prescribed period" commenced on 30 March 2020 (ie it was retrospective) and was stated to expire on a date fixed by the Minister (but no later than 8 October 2020 (being the date 6 months after section 6 of the Act came into operation)).

5.1.3.4 The expression "financial hardship" was not defined. However, the parties had a right to apply to the Commissioner to mediate and/or determine a dispute over whether the Tenant was suffering financial hardship



(with the parties having a right of appeal to the Court from a Commissioner's determination).

- 5.1.3.5 The Act also provided a mediation process with the Commissioner whereby any party to a commercial lease can seek to resolve a dispute resulting from the Act, or arising from a commercial lease or relating to any matter resulting from the occupation of, or business conducted from, premises pursuant to a commercial lease.
- 5.1.3.6 The Act also stayed or suspended any "prescribed actions" or other enforcement actions where the Tenant was suffering financial hardship and where the Landlord had taken or commenced but not yet completed or finalised the action during the "relevant period" (30 March 2020 to 9 April 2020). Such stay remains in place until the expiry of the prescribed period. Either party to a commercial lease can apply to the Court for orders to mitigate any such action on the grounds the Tenant is suffering financial hardship.
- 5.1.4 The Act did not define the expression "financial hardship". On 16 April 2020, the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* were enacted. Under these regulations, a Tenant will be taken to be suffering "financial hardship" if it is eligible for or receiving payments under the Commonwealth Government's JobKeeper program (although this definition was not exclusive and/or limited to JobKeeper eligibility).
- 5.1.5 Critically, the Act was glaring in what it did not address. In this respect:
  - 5.1.5.1 The Code was not implemented by, or even mentioned in, the Act.
  - 5.1.5.2 There was no mention of rent relief, or even any obligation upon the parties to negotiate rent relief or communicate with each other.
  - 5.1.5.3 Concepts used in the Code such as "SME tenants", "the principle of proportionality" and "reasonable recovery period" were not mentioned in the Act.
  - 5.1.5.4 The \$50M turnover figure, or how the Code contemplated the turnover of a franchisee or a member of a "retail corporate group" would be determined, was not mentioned.

- 5.1.5.5 Apportionment of rent relief between waiver and deferral, the time period for payment of deferred rent and the extension of Tenants' Leases were not mentioned.
- 5.1.6 Little information was available at the time, however it was understood that the South Australian Government had decided that it was not going to be rushed into its substantial legislative approach, and the industry was left with having to "wait and see".
- 5.1.7 Accordingly, and despite the objectives and content of the Code having been released, many Landlords refused to grant rent relief or enter into rent relief agreements until the South Australian Government's full legislative response was revealed.
- 5.1.8 The concern for many Landlords was they may enter into a binding agreement with Tenant only for the State Government to subsequently "move the goal posts".
- 5.1.9 To exacerbate matters, many Tenants during this period were unable (or refusing) to pay rent (noting that Lease terminations had been prohibited under the Act). It was a stressful period for all concerned particularly with the lockdown and many of the restrictions on trade taking effect, but with both Landlords and Tenants still having "bills to pay".
- 5.2 Subsequent legislative response - 15 May 2020
- With effect on 15 May 2020:
- 5.2.1 the Act was substantially amended; and
- 5.2.2 the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* were revoked and the Regulations came into effect.
- 5.3 The Amendment of the Act
- 5.3.1 Section 7 of the Act (which previously contained the substantive law affecting commercial leases) was drastically amended, with all of the above-mentioned law set out in paragraph 5.1 of this paper deleted (and effectively moved into the Regulations – refer 5.4 below).
- 5.3.2 The new section 7 permitted the Governor to make such "regulations as are necessary or expedient for the purpose of mitigating the adverse impacts on a party to, or any other person with an interest in, a commercial lease resulting from the COVID-19 pandemic".
- 5.3.3 I have not set out in this paper the extensive examples of the sorts of regulations which the Governor was permitted to make under the new section 7. However a complete copy of the Act containing that section 7 is annexed to this paper.

5.3.4 Regulations made under the Act were permitted to have a retrospective effect to a day not earlier than 30 March 2020.

#### 5.4 The Regulations

The Regulations came into effect on 15 May 2020 and currently provide the substantive body of law relating to the COVID-19 pandemic and commercial leases.

##### 5.4.1 Objectives<sup>1</sup>

The objectives of the Regulations are, having regard to the Code:

- 5.4.1.1 to implement temporary measures to apply to parties to certain commercial leases related to circumstances brought about by the COVID-19 pandemic; and
- 5.4.1.2 to provide for mechanisms to resolve disputes concerning those leases.

Importantly, while the Regulations make reference to "having regard to" the Code, the Regulations do not implement the Code. In a number of important respects, the Regulations are in fact quite different from the Code.

##### 5.4.2 Application of the Regulations

- 5.4.2.1 The Regulations apply during "the prescribed period"<sup>2</sup>.
- 5.4.2.2 The "prescribed period" means the period beginning on 30 March 2020 and ending on 30 September 2020. That is, the Regulations are temporary in nature. Section 7 of the Act and all Regulations made under it expire on 30 September 2020<sup>3</sup>.

##### 5.4.3 Leases to which the Regulations apply<sup>4</sup>

The Regulations only apply during the prescribed period in relation to "a commercial lease" other than a Lease entered into after the commencement of the prescribed period unless that Lease is:

- a Lease entered into by means of an option to renew or extend the Lease; or
- any other extension or renewal of an existing Lease on the same or substantially similar terms as the existing Lease.

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<sup>1</sup> Regulation 4

<sup>2</sup> Subregulation 5(1)

<sup>3</sup> Refer s6(2a) of the Act

<sup>4</sup> Refer subregulation 5(1) (and refer definitions of "commercial lease" and "business")

Furthermore, the Regulations only apply in relation to a "commercial lease".

A "commercial lease" means:

- A retail shop lease within the meaning of the Retail and Commercial Leases Act 1995;
- A Lease under the Landlord and Tenant Act 1936 including a retail shop lease to which Part 4 of that Act applies (see below note);
- Any other agreement under which a person grants or agrees to grant another person for value a right to occupy premises to carry on a business:
  - whether or not the right is a right of exclusive occupation;
  - whether the agreement is express or implied; and
  - whether the agreement is oral or in writing, or partly oral or partly in writing.

A "commercial lease" does not include a Lease under the *Pastoral Land Management and Conservation Act 1999* or a Lease under the *Crown Land Management Act 2009*.

Note - The reference to a Lease under the *Landlord and Tenant Act* is curious.

A number of sections of the *Landlord and Tenant Act* are of general application to all Leases other than residential tenancies. For example Section 4(1) of the *Landlord and Tenant Act* applies "in every case between a Landlord and Tenant". Furthermore, the expression "retail shop Lease to which Part 4 of that Act applies" appears to be an error as the expression "retail shop lease" is not used in Part 4 of the *Landlord and Tenant Act*.

It is clearly intended that the expression "commercial lease" is to be of broad application. Furthermore, the expression "business" is also broad – being defined to mean any undertaking involving the manufacture, sale or supply of goods and services and includes undertakings which are "not for profit".

Accordingly, one should assume that any particular commercial lease for business purposes is intended to be subject to the Regulations, other than the stated exceptions.

#### 5.4.4 Key concept – What is an "affected lessee"?<sup>5</sup>

The Regulations make a distinction between "an affected lessee" and other (presumably "non-affected") Tenants. Some provisions of the Regulations apply to all Tenants but most only apply if the Tenant is an "affected lessee".

Accordingly, in any matter the first question to ask is whether or not the Tenant is an "affected lessee".

A Tenant is an "affected lessee" if:

- the Tenant is suffering from "financial hardship" as a result of the COVID-19 pandemic; and
- the following turnover in a relevant year (usually FY19) was less than \$50,000,000:
  - If the Tenant is a franchisee – the turnover of the business conducted at the premises the subject of the commercial lease;
  - If the Tenant is a corporation which is a member of a group – the turnover of the group;
  - In any other case – the turnover of the business conducted by the Tenant at the premises the subject of the commercial lease.

Addressing each of these criteria in turn:

##### Financial Hardship

A Tenant will be taken to be suffering from "financial hardship" as a result of the COVID-19 pandemic if the Tenant is eligible for or receiving a JobKeeper payment in respect of the business of the Tenant whether as an employer or on their own behalf.

Again, the above eligibility criteria is not exclusive, and there is nothing saying a Tenant cannot demonstrate that it is in financial hardship by other means, even if it is not eligible for JobKeeper. Consider for example, a Tenant with only a modest reduction in turnover but a substantial decline in profit?

##### Turnover less than \$50M

The Regulations state that turnover of a business includes any turnover derived from internet sales of goods and services.

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<sup>5</sup> Refer subregulation 3(2) – (5)

Furthermore, the Regulations state that corporations constitute a group if they are related body corporates within the meaning of the *Corporations Act 2001* (Cth).

A Court can determine that a Tenant is an "affected lessee"

The parties should also be aware that the Court has an express power under sub-regulation 8(3) to determine whether or not any Tenant is an affected lessee, and can take into account matters such as whether or not the Tenant is eligible for or receiving JobKeeper and any reduction in turnover of the Tenant's business in making that determination.

5.4.5 Restrictions on Landlords<sup>6</sup>

The following restrictions apply to Landlords during the prescribed period but only where the Tenant is an "affected lessee".

- Rent other than turnover rent cannot be increased, unless otherwise agreed between the Landlord and Tenant.<sup>7</sup>

- Land tax cannot be on charged to the Tenant.<sup>8</sup>

Note – The recovery of land tax from the Tenant is illegal in any event if the Lease is subject to the *Retail and Commercial Leases Act 1995*.

- A Landlord cannot take a "prescribed action" against the Tenant on grounds of a breach of the Lease consisting of:
  - a failure to pay rent;
  - a failure to pay outgoings; or
  - the business operating under the Lease not being open during the hours specific in the Lease.<sup>9</sup>
- The above restriction is subject to an important exception<sup>10</sup> in that a Landlord may take a prescribed action in respect of a Tenant's failure to pay rent, if the amount of rent payable under the Lease is, during the prescribed period, either:
  - agreed by the parties under mediation with the Commissioner under Regulation 8; or
  - determined by the Court under Regulation 9.

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<sup>6</sup> Refer subregulation 7

<sup>7</sup> Refer subregulation 7(4)

<sup>8</sup> Refer subregulation 7(5)

<sup>9</sup> Refer subregulation 7(1)

<sup>10</sup> Refer subregulation 7(2)

- A "prescribed action" means taking action under the provisions of the commercial lease or seeking orders or issuing proceedings in a court for any of the following:
  - Evicting the Tenant, re-entering the premises and forfeiting or terminating the Lease;
  - Dstraint of the Tenant's property;
  - Calling on a security bond or bank guarantee;
  - Charging interest for unpaid rent;
  - Suing the Tenant or a guarantor for damages;
  - Any other remedy available to the Landlord at common law or under any other law.

In addition, any act or omission of a Tenant required under any State law in response to the COVID-19 pandemic will not be taken to be a breach of the Lease and will not provide grounds for termination of the Lease or any other prescribed action.<sup>11</sup>

The question often comes up whether the restrictions apply in respect of pre-existing rent or outgoings arrears (ie. arising from prior to 30 March 2020). In my view, the Regulations do not make any distinction in respect of the non-payment of rent or outgoings that are payable either before or after the prescribed period. Having said this, sub-regulation 7(1) is not entirely clearly written and it could be argued on one interpretation that the restrictions only apply to a breach of the Lease occurring during the prescribed period (that is leaving it open to the landlord to terminate for breaches that occurred prior). However, I would consider it a "brave landlord" that sought to terminate a Lease during the prescribed period.

Finally, if the Landlord does receive any land tax relief, then the benefit of that land tax relief must be passed on in the form of a waiver of rent payable by an affected lessee in accordance with the provisions of the relevant land tax relief scheme.<sup>12</sup>

#### 5.4.6 Obligations of the parties to negotiate in good faith<sup>13</sup>

Regulation 6 imposes a specific obligation on all parties to a commercial lease (including any guarantor or any other person with an interest in the Lease) to make a genuine attempt to negotiate in good faith the rent payable under, and the other terms of, the commercial lease during the prescribed period. In such negotiations the parties must have regard to:

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<sup>11</sup> Refer subregulation 7(3)

<sup>12</sup> Refer subregulation 7(7)

<sup>13</sup> Refer Regulation 6

- the economic impacts of the COVID-19 pandemic on the parties to the Lease;
- the provisions of the Act and the Regulations; and
- the provision of the Code.

Importantly, this obligation applies to all commercial leases (not just leases where the Tenant is an "affected lessee") and to both parties (that is, the Tenant is under the same obligation to negotiate in good faith that the Landlord is under).

The obligation to negotiate is not limited to the rent and applies to the "other terms" of the Lease as well (e.g. outgoings and other monies payable).

The parties are obliged to take into account the economic impacts of the COVID-19 pandemic on the parties. That is, the Tenant is just as obliged to take into account the impact of the pandemic on the Landlord as the Landlord is obliged to take into account the impact of the pandemic on the Tenant.

Importantly, the Act does not impose any express obligation on either party to follow or adopt any of the principles of the Code. In particular, there is no mention of the "principle of proportionality" or the "reasonable subsequent recovery period". Provided the parties negotiate in good faith, then the terms of the agreement are up to them. Having said this, the conservative approach (given the obligation to "have regard to" the Code) would be to recommend that your clients follow the principles of the Code unless there is a reason to act otherwise (particularly where the Tenant is an "affected lessee" – refer 5.4.8.5 below, which sets out the factors the Court must take into account when ordering rent relief).

#### 5.4.7 Dispute Resolution – Mediation with the Commissioner<sup>14</sup>

5.4.7.1 Either party to a commercial lease may apply to the Commissioner for mediation of a relevant dispute.<sup>15</sup> Importantly however, a Tenant may only apply for mediation if the Tenant is or is claiming to be an "affected lessee".<sup>16</sup>

5.4.7.2 A "relevant dispute" can include:

- A dispute as to whether or not the Tenant is suffering financial hardship;

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<sup>14</sup> Refer Regulation 8

<sup>15</sup> Refer subregulation 8(1)

<sup>16</sup> Refer subregulation 8(2)



- A dispute in relation to the provision of rent relief including a failure of a party to take part in the negotiation;
- A dispute in relation to issues that have occurred in relation to the pandemic, including from the operation of the Regulations, arising from a commercial lease or relating to any other matter related to the occupation of the premises or to a business conducted from the premises the subject of a commercial lease.

5.4.7.3 The Commissioner may exercise any of the powers and functions of the Commissioner that it can exercise under Part 7 of the *Fair Trading Act 1987*<sup>17</sup>, which includes the power to require persons to answer questions and produce books or documents. Note – exercising this power may be useful in a matter where a party is refusing to provide financial information.

5.4.7.4 It is likely that the majority of disputes will be resolved by mediation. However, if the mediation is unsuccessful then the Commissioner must issue the parties with a certificate stating the names of the parties and the following information.<sup>18</sup>

- If the mediation has failed or is unlikely to resolve the dispute – that the mediation has been terminated without resolution; or
- If a mediation will not be reasonable in the circumstances – that fact; or
- If a party to the commercial lease has refused to participate or did not participate in good faith during mediation – that fact.

5.4.7.6 In any Court proceedings, the certificate issued by the Commissioner will constitute proof in the absence of proof to the contrary of the matter so certified<sup>19</sup>

#### 5.4.8 Mediation fails – The role of the Court<sup>20</sup>

5.4.8.1 A party to a commercial lease can apply to the Court for resolution of a relevant dispute in relation to the

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<sup>17</sup> Refer subregulation 8(3)

<sup>18</sup> Refer subregulation 8(4)

<sup>19</sup> Refer subregulation 9(11)

<sup>20</sup> Refer Regulation 9

commercial lease, but may only do so if the Commissioner has first issued a certificate following the conclusion of a mediation.<sup>21</sup>

5.4.8.2 As advised in paragraph 5.4.4, the Court is specially empowered to make a determination as to whether or not a Tenant is an "affected lessee".<sup>22</sup>

5.4.8.3 If the matter ends up in Court, the Court has a broad power to make any one or more of the following orders:<sup>23</sup>

- An order granting rent relief to an "affected lessee" in relation to the payment of rent under the commercial lease;
- An order requiring the payment of some or all of the rent under a commercial lease be paid into Court until the lease has been performed;
- An order requiring that the rent paid into the Court be paid out and applied as directed by the Court;
- An order to modify the terms and conditions of the Lease in the manner specified in that order;
- An order deferring the payment of rent under an affected lease (which is presumably a lease granted to an "affected lessee") for a period not exceeding 24 months from the day the order is made (including that the Lease may be extended for such period);<sup>24</sup>
- Any other orders that the Court thinks necessary or desirable to resolve a dispute between the parties to a commercial lease;

5.4.8.4 If the Court makes an order providing rent relief to an "affected lessee" under subregulation 9(5)(a), then at least 50% of the rent relief must be in the form of a waiver.<sup>25</sup>

5.4.8.5 In making a rent relief order in respect of an "affected lessee" under subregulation 9(5)(a), the Court must have regard to the following:<sup>26</sup>

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<sup>21</sup> Refer subregulation 9(1) and (2)

<sup>22</sup> Refer subregulation 9(3) and (4)

<sup>23</sup> Refer subregulation 9(5)

<sup>24</sup> Refer subregulations 9(5)(e) and 9(9)

<sup>25</sup> Refer subregulation 9(7)

<sup>26</sup> Refer subregulation 9(8)

- the obligations of the Landlord under the Act, a "relevant Act"<sup>27</sup> and the Regulations;
- the reduction in turnover of the business of the Tenant during the prescribed period;
- whether the Landlord has during the prescribed period agreed to waive recovery of any outgoings or any other expenses payable by the Tenant under the Lease;
- whether a failure to provide rent relief would compromise the Tenant's ability to fulfil the Tenant's ongoing obligations under the Lease including the payment of rent;
- the ability of the Landlord to provide rent relief including any relief provided to the Landlord by a third party in response to the COVID-19 pandemic;
- any reduction by a third party to outgoings in relation to the premises the subject of the Lease; and
- such other matters the Court thinks fit

5.4.8.6 The Court also has the power on application to vary or revoke a previous order made under the Regulations and such other orders at the time.<sup>28</sup>

5.4.8.7 The Court may also vary an agreement entered into between a Landlord and Tenant that varies a lease (including a rent relief agreement) entered into between 30 March 2020 and 15 May 2020, but only in respect of the period falling after 15 May 2020 (ie. any rent relief agreement is quarantined from Court variation in respect of the period 30 March 2020 to 14 May 2020).<sup>29</sup>

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<sup>27</sup> Refer definition of "relevant Act" in the Regulations

<sup>28</sup> Refer subregulation 9(10)

<sup>29</sup> Refer subregulation 9(6)

## 6. **Practical Tips for Lawyers**

- 6.1 Prior to commencing any negotiations or providing any advice, ensure you have satisfied yourself that the Lease in question is a commercial lease which is subject to the Act and the Regulations.
- 6.2 It is also prudent to identify whether or not the Tenant is an 'affected lessee' (regardless of which party you are acting for). Evidence of eligibility for or receipt of JobKeeper payments should be required (when acting for the Landlord) or provided (when acting for the Tenant). In addition, evidence of turnover over in April, May and June (or whatever month in question you are dealing with) compared to the corresponding months in at least the previous two years should be required or provided. Ideally such figures would be supported by BAS statements.
- 6.3 Financial information provided by a Tenant will almost always be more convincing and or have greater credibility if it is provided by the Tenant's accountant with some form of formal certification or sign off.
- 6.4 Both my view, and that of the Commissioner, is that a Landlord is entitled to be provided with turnover / sales figures and BAS statements, but is not entitled to request details of the Tenant's profits and losses. The exception I would make to this position is in circumstances where the Tenant is asserting financial hardship but the Tenant's reduction in turnover has not been sufficient to qualify the Tenant for JobKeeper.
- 6.5 Regardless of which party you are acting for, stress to your client that it has a statutory obligation to negotiate in good faith taking into account the effect of the pandemic on each party and having regard to the Code. Importantly, the obligation to negotiate applies:
  - 6.5.1 to the Tenant as well as to the Landlord; and
  - 6.5.2 applies to both parties regardless of whether they are a "mum and dad" or a multinational.
- 6.6 Rent relief agreements should be clearly documented and signed by both parties including any Tenant guarantor. Importantly rent relief agreements should be clear on the following points:
  - 6.6.1 the period for which rent relief is granted;

- 6.6.2 the extent to which the rent relief is provided as a waiver or a deferral and, if a deferral, the amount of the deferred rent payments and when and for how long they must be made;
  - 6.6.3 if the Lease is to be extended, the extent to which the extension affects:
    - existing rights of renewal; or
    - scheduled rent reviews;
  - 6.6.4 whether the rent relief applies to rent only or if it also applies to other monies payable under the Lease particularly outgoings, cleaning costs, carparking fees, promotion levies, and / or turnover rent;
  - 6.6.5 how a future breach of the Lease will affect the rent relief package;
  - 6.6.6 if the Lease is registered, whether the variation to the Lease effected by the rent relief agreement will be registered on the Certificate of Title;
  - 6.6.7 whether the rent relief granted is fixed for a period of time, or whether such rent relief is to reviewed and/or re-negotiated at particular future times. Alternatively, is the rent relief a fluctuating amount determined by the Tenant's turnover from month to month (with the Tenant having an ongoing monthly obligation to report its turnover in order to calculate the rent relief each month); and
  - 6.6.8 the Tenant should be required to warrant that the information it has provided in support of its request for rent relief is true and correct.
- 6.7 Tenants can display considerable good faith by offering to make some rental payments while rent relief arrangements are being negotiated, provided that in doing so they make it clear that they are not agreeing to any formal arrangement by making a payment. Landlords should demonstrate an appropriate level of gratitude in such circumstances.
- 6.8 The Regulations permit rent increases to occur during the prescribed period but (where the Tenant is an "affected lessee") only if the Landlord and the Tenant agree that the rent increase will occur. Any rent relief agreement should be clear on whether any rent increase scheduled to occur during the prescribed period will occur as and when originally scheduled or whether it take effect at the end of the prescribed period (i.e. on 1 October 2020), or whether there will be no rent increase at all until the next scheduled rent increase falling after the prescribed period.

- 6.9 Although Landlords are restricted from terminating leases for non-payment of rent or outgoings or failing to trade (where the Tenant is an "affected lessee"), there is no restriction on terminating monthly tenancies (i.e. when Tenants are holding over) by the usual one month written notice. There is also no restriction on Leases being terminated or Landlords exercising remedies for other breaches of the Lease by the Tenant.
- 6.10 Landlords that wish, but are unable, to evict Tenants that are affected lessees and have existing arrears and/or are being difficult in negotiations could provide such Tenants with a lenient offer to surrender the Lease (eg no or limited make good, discount on arrears etc). The incentive to the Tenant (in addition to the leniency offered) to accept would be the promise that there will be no leniency shown or delay in the Landlord acting when the restrictions on termination are lifted on 1 October 2020 (at which time the Tenant is likely to have accrued even more significant arrears).
- 6.11 Mediation can be a useful step for either party to take particularly where:
- 6.11.1 one party is refusing to communicate;
  - 6.11.2 one party is refusing to negotiate reasonably;
  - 6.11.3 a Tenant is refusing to provide turnover figures; or
  - 6.11.4 if a Landlord is being too aggressive in the information that it is requiring the Tenant provide.
- The mediation process is free and both parties have an incentive to participate in a mediation, as a certificate from the Commissioner naming a party that has refused to participate or not acted in good faith could produce a substantially negative outcome for that named party should the matter later go to Court. In such circumstances the certificate will constitute proof of the matter certified, in the absence of proof to the contrary.
- 6.12 The other advantage of mediation to the Landlord is that if an agreement on rental is reached during the mediation, then the restrictions on termination do not apply if such agreed rental is subsequently not paid by the Tenant.
- 6.13 Only an "affected lessee" or a Tenant claiming to be an "affected lessee" can apply for mediation. In reality though, the Tenant only has to claim to be an "affected lessee" in order for a matter to be referred to mediation. The Commissioner has advised me that he has no choice but to accept an application for mediation where the Tenant claims to be an "affected lessee", even in matters where it appears that the Tenant is (in all likelihood) not an

affected lessee. Having said this, the Commissioner has wide powers to require production of financial information, so claiming to be an affected lessee should not be done gratuitously or dishonestly.

- 6.14 Like all matters, going to Court is a last but sometimes necessary resort. The entire purpose of the Code, the Act and the Regulations is to encourage parties to negotiate in good faith and to agree to "share the pain" of the COVID-19 pandemic. Although at the time of writing of this paper the new laws are largely untested, it is not difficult to imagine the Court being particularly harsh on a party if the Court forms the view that the party was too hard-nosed and / or uncompromising during negotiations and mediation, and effectively breached its statutory obligations to act in good faith, to have regard to the Code and to have regard to the economic impact of the pandemic on both parties.
- 6.15 Interestingly, if a matter ends up in Court, the Act requires the Court to take into account the Landlord's capacity to provide rent relief when making a rent relief order. Accordingly, Tenants should also make a realistic assessment of their particular Landlord when negotiating (for example, a multinational shopping centre landlord will present entirely differently from a self-funded retiree that lives off of the rent and has no other assets or income).

## 7 **Summary**

This paper is accurate at the time of writing, however as noted previously the law has changed considerably over the past 3 months. It is quite clear that both the National Cabinet and the South Australian Parliament are very much acting in uncharted waters without having had to deal with a situation such as the COVID-19 pandemic previously.

It was originally contemplated that the pandemic period would last for 6 months from 30 March 2020 to 30 September 2020. The Prime Minister contemplated businesses being in hibernation for much of this period.

However as at the time of writing the various health and safety measures implemented by the South Australian Government appear to have headed off the first waiver of the pandemic successfully. Restrictions are already being lifted, and the situation may continue to improve, with matters returning "to normal" sooner than expected. Conversely, conditions may worsen with a "second wave" resulting in the pandemic period being extended and or the laws being changed again and this time in a more prescriptive manner. Care should be taken when acting in a matter to ensure that the up-to-date law is referred to at the relevant time.





## **ANNEXURE 1 – THE CODE**

## **NATIONAL CABINET MANDATORY CODE OF CONDUCT**

### **SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19**

#### **PURPOSE**

The purpose of this Code of Conduct ("the Code") is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper programme.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus ("COVID-19") pandemic.

This Code applies to all 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 JobKeeper programme, with an annual turnover of up to \$50 million (herein referred to as "SME tenants").

The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

#### **PARTIES TO THE CODE**

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation, but aims to complement it during the COVID-19 crisis period.

## OVERARCHING PRINCIPLES

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.
- Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
- The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over." These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this Code is to mitigate the impact of the COVID-19 pandemic on the tenant, due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

### **LEASING PRINCIPLES**

In negotiating and enacting appropriate temporary arrangements under this Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.
5. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.

6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.

7. A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner.

8. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.

9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.

10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.

11. Landlords must not draw on a tenant's security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.

12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in item #2 above. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.

13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.

14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

#### **BINDING MEDIATION**

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or

territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

## **DEFINITIONS**

The following definitions are provided for reference in the application of this Code.

1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.

2. Sufficient and accurate information: this includes information generated from an accounting system, and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused as a direct result of the COVID-19 event.

3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.

4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.

## **CODE ADMINISTRATION COMMITTEE**

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

#### **COMMENCEMENT/EXPIRY**

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19 pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

## APPENDIX I

### EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis
  - ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.
  - At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.
  - Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties
    - So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.
    - Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.
  - The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.



## **ANNEXURE 2 – THE ACT**

South Australia

## COVID-19 Emergency Response Act 2020

An Act to make various temporary modifications of the law of the State in response to the COVID-19 pandemic and for other purposes.

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- B1 Modification of *Development Act 1993*

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##### Part 2—*Environment Protection Act 1993*

- 2 Modification of *Environment Protection Act 1993*

##### Part 2A—*National Electricity (South Australia) Act 1996*

- 2A Modification of *National Electricity (South Australia) Act 1996*

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- 3 Modification of *Parliamentary Committees Act 1991*

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- 3A Modification of *Planning, Development and Infrastructure Act 2016*

##### Part 4—*Public Finance and Audit Act 1987*

- 4 Modification of *Public Finance and Audit Act 1987*

##### Part 5—*South Australian Public Health Act 2011*

- 5 Modification of *South Australian Public Health Act 2011*

#### Legislative history

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**The Parliament of South Australia enacts as follows:**

## **Part 1—Preliminary**

### **1—Short title**

This Act may be cited as the *COVID-19 Emergency Response Act 2020*.

### **2—Commencement**

- (1) Subject to this section, this Act comes into operation on the day on which it is assented to by the Governor.
- (2) Sections 7 to 9 (inclusive) will be taken to have come into operation on 30 March 2020.

### **3—Interpretation**

In this Act, unless the contrary intention appears—

**instrument** includes any document that affects legal rights or obligations;

**relevant declaration** means a declaration under Part 4 Division 3 of the *Emergency Management Act 2004*.

### **4—Application of Act**

It is the intention of the Parliament that this Act apply within the State and outside the State to the full extent of the extraterritorial legislative capacity of the Parliament.

### **5—Interaction with other Acts**

Except as is provided in this Act, this Act is in addition to and does not limit, or derogate from, the provisions of any other Act or law.

### **6—Expiry of Act**

- (1) The Minister—
  - (a) may, by notice in the Gazette, fix a day, or days, on which particular provisions of—
    - (i) Part 2; or
    - (ii) Schedule 1; or
    - (iii) Schedule 2,will expire; and
  - (b) must, by notice in the Gazette, fix a day on which—
    - (i) all provisions of Part 2 (other than section 7, section 10A(5) and (6) and section 20); and
    - (ii) all provisions of Schedule 1; and
    - (iii) all provisions of Schedule 2,will expire (if they have not previously expired in accordance with paragraph (a)); and

- (c) may, by notice in the Gazette, fix a day on which this Act will finally expire.
- (2) The day fixed by the Minister for the purposes of subsection (1)(b) must be—
  - (a) the day on which all relevant declarations relating to the outbreak of the human disease named COVID-19 within South Australia have ceased (provided that the Minister is satisfied that there is no present intention to make a further such declaration); or
  - (b) the day falling 6 months after the commencement of this section, whichever is the earlier.
- (2a) Section 7 and the regulations made under that section will expire on 30 September 2020.
- (3) For the avoidance of doubt (and without derogating from section 16 of the *Acts Interpretation Act 1915*), the expiry of a provision of this Act under this section does not affect the validity or operation of anything done in accordance with the provision before that expiry.

**Note—**

This means, for example, that a contract executed in accordance with any modified requirements under section 16 would remain validly executed even after the expiry of that section.

## Part 2—General modifications

### 7—Provisions applying to commercial leases—regulations

- (1) The Governor may make such regulations as are necessary or expedient for the purposes of mitigating the adverse impacts on a party to, or any other person with an interest in, a commercial lease resulting from the COVID-19 pandemic.
- (2) Without limiting the generality of subsection (1), the regulations may provide for the following:
  - (a) the types or classes of commercial leases to which the regulations may apply;
  - (b) the types of disputes in relation to a commercial lease to which the regulations will apply;
  - (c) modification of the operation of this section or a relevant Act;
  - (d) modification of the operation of a relevant Act consequent on the regulations made under this section;
  - (e) modifying the provisions of a commercial lease or related agreement;
  - (f) the provision of rent relief for a lessee under a commercial lease;
  - (g) exempting a lessee, or a class of lessees, from the operation of a provision of an Act, commercial lease or related agreement;
  - (h) prohibiting or limiting the ability of a lessor to take specified action or seek specified orders or issue proceedings in court under the provisions of a commercial lease or related agreement, or any Act or law;
  - (i) prohibiting or restricting the ability of a lessor to terminate a commercial lease;

- (j) the circumstances in which a lessor may terminate a commercial lease;
- (k) prohibiting, limiting or modifying the exercise or enforcement of the rights of a lessor under a commercial lease or other agreement or under any other Act or law or the common law;
- (l) the circumstances in which a person will be taken to be suffering financial hardship as a result of the COVID-19 pandemic;
- (m) requiring the parties to a commercial lease or any other person with an interest in a commercial lease to have regard to particular matters or principles, or a prescribed standard, code or other document, in negotiating or disputing a matter under or in relation to the commercial lease;
- (n) provision for the regulations to be deemed to form part of a commercial lease;
- (o) imposing obligations on a party to a commercial lease, or any other person with an interest in a commercial lease, including—
  - (i) requiring them to negotiate and agree on modifications to terms and conditions of the commercial lease or a related agreement having regard to specified matters; and
  - (ii) requiring a party to a lease or other person with an interest in a commercial lease to pay a specified amount or give a specified benefit to another party to the lease or person with an interest in a commercial lease;
- (p) a requirement that parties to a commercial lease or any other persons with an interest in a commercial lease who are in dispute in relation to the commercial lease participate in mediation arranged by the Commissioner or a court;
- (q) the conduct of a mediation referred to in paragraph (p), including a requirement for the Commissioner to issue a certificate in respect of the mediation setting out specified matters in relation to the mediation;
- (r) conferring jurisdiction on a court to hear and determine disputes between the parties to a commercial lease or any other persons with an interest in a commercial lease;
- (s) the circumstances in which a party to a commercial lease or any other person with an interest in a commercial lease may or may not apply to a court for determination of a dispute relating to a commercial lease;
- (t) a requirement that a party to a commercial lease or any other person with an interest in a commercial lease who are in dispute in relation to the commercial lease to have a mediation certificate before commencing proceedings in a court in relation to the dispute;
- (u) the orders that a court may make in relation to a dispute relating to a commercial lease;
- (v) a requirement that the Commissioner or a court have regard to particular matters or principles, or a prescribed standard, code or other document, in mediating, conciliating, hearing or deciding a matter or proceeding relating to a commercial lease or a dispute between parties to a commercial lease or any other person with an interest in a commercial lease;

- (w) provisions of a saving or transitional nature consequent on the enactment of this section or the making of any regulation under this section;
  - (x) fines, not exceeding \$10 000, for offences against the regulations;
  - (y) expiation fees, not exceeding \$5 000, for offences against the regulations;
  - (z) facilitation of proof of the commission of offences and other evidentiary matters;
  - (za) any other matter regulating the parties to a commercial lease or any other person with an interest in a commercial lease or the provisions of a commercial lease or related agreement.
- (3) Regulations made under this section may have retrospective effect to a day not earlier than 30 March 2020 and, to avoid doubt, any regulation that has retrospective effect to a particular day will be taken to have always had effect on or after that day.
- (4) The regulations may—
- (a) be of general or limited application; and
  - (b) make different provision according to the circumstances or entities to which they are expressed to apply; and
  - (c) apply or incorporate, wholly or partially and with or without modification, a code, standard, policy or other document prepared or published by the Minister or another specified person or body; and
  - (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister, the Commissioner or any other specified body or person.
- (5) If a code, standard or other document is referred to or incorporated in the regulations—
- (a) a copy of the code, standard or other document must—
    - (i) be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; or
    - (ii) be made available on a website determined by the Minister or Commissioner that is accessible to the public; and
  - (b) evidence of the contents of the code, standard or other document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code, standard or other document.
- (6) Regulations made under this section do not limit or derogate from the ability of the Governor to make regulations under section 19.
- (7) In this section—
- business** means an undertaking (whether or not carried on with a view to profit) involving the manufacture, sale or supply of goods or services;

**commercial lease** means—

- (a) a retail shop lease within the meaning of the *Retail and Commercial Leases Act 1995*; or
- (b) a lease under the *Landlord and Tenant Act 1936*, including a retail shop lease to which Part 4 of that Act applies; or
- (c) any other agreement under which a person grants or agrees to grant another person for value a right to occupy premises for carrying on a business—
  - (i) whether or not the right is a right of exclusive occupation; and
  - (ii) whether the agreement is expressed or implied; and
  - (iii) whether the agreement is oral or in writing, or partly oral and partly in writing,

but does not include—

- (d) a lease under the *Pastoral Land Management and Conservation Act 1989*; or
- (e) a lease under the *Crown Land Management Act 2009*;

**Commissioner** means the person holding or acting in the office of Small Business Commissioner;

**lessee** means the person who has the right to occupy premises under a commercial lease;

**lessor** means the person who grants the right to occupy under a commercial lease;

**party**, to a commercial lease, means the lessor or the lessee under the commercial lease;

**relevant Act** means—

- (a) the *Real Property Act 1886*; and
- (b) the *Retail and Commercial Leases Act 1995*; and
- (c) the *Landlord and Tenant Act 1936*; and
- (d) any other Act in so far as it relates to or affects lessees and lessors in the State.

## 8—Provisions applying to residential tenancies

- (1) Subject to this section, the operation of the *Residential Tenancies Act 1995* is modified as follows:
  - (a) the terms of any residential tenancy agreement will be taken to be modified to such extent necessary to give effect to the modifications made by this section;
  - (b) the landlord must not increase the rent payable under a residential tenancy agreement (whether under section 55 of that Act or otherwise);
  - (c) except where exceptional circumstances exist, an inspection of premises under that Act may only occur by means of audiovisual or other electronic means that do not involve the landlord or an agent of the landlord physically entering the premises (and the tenant must take such steps as are reasonably necessary to enable such an inspection to occur);



- (d) despite any other provision of that Act, or any other Act or law, an act or omission of the tenant required under the laws of the State in response to the COVID-19 pandemic will be taken not to amount to a breach of a residential tenancy agreement or otherwise amount to grounds for termination of the agreement;
- (e) a tenant may have repairs carried out on the premises (in accordance with any agreement with the landlord relating to such repairs) without seeking prior approval (and section 68(3)(e) and (5) of that Act will be taken to apply to costs or compensation incurred by or owing to the tenant accordingly);
- (f) section 78A of that Act will be taken not to apply in respect of—
  - (i) a breach of a residential tenancy agreement consisting of a failure to pay rent where the tenant is suffering financial hardship as a result of the COVID-19 pandemic; or
  - (ii) any act or omission of the tenant required under the laws of the State in response to the COVID-19 pandemic;
- (g) a residential tenancy cannot be terminated under that Act solely on the grounds of a breach of a residential tenancy agreement consisting of a failure to pay rent where the tenant is suffering financial hardship as a result of the COVID-19 pandemic;
- (h) the Tribunal cannot terminate a residential tenancy or make an order for possession of the premises in respect of a breach of a residential tenancy agreement consisting of a failure to pay rent where the tenant is suffering financial hardship as a result of the COVID-19 pandemic;
- (i) on an application under section 89 of that Act relating to financial hardship suffered as a result of the COVID-19 pandemic, the Tribunal may, instead of or in addition to an order terminating the agreement, make such orders as the Tribunal thinks fit;
- (j) on an application under section 89 of that Act, as modified by paragraph (i), the Tribunal must have particular regard to the circumstances of the COVID-19 pandemic (including the need to ameliorate the effects of the pandemic in the State and the need to avoid homelessness during such a public health emergency);
- (k) despite any other Act or law, the Tribunal may, on application or otherwise in proceedings under that Act, make any order it considers appropriate in the circumstances of the COVID-19 pandemic (including an order that specified costs associated with the termination of a residential tenancy agreement be reduced or waived);
- (l) the Tribunal, on an application under section 93 of that Act (whether the application was made before or after the commencement of this section)—
  - (i) must have regard to the circumstances of the COVID-19 pandemic (including the need to ameliorate the effects of the pandemic in the State and the need to avoid homelessness during such a public health emergency); and

- (ii) may, in a case where a tenant is suffering financial hardship as a result of the COVID-19 pandemic, despite section 93(4)(a), suspend the operation of an order under that section for such period, and on such conditions, as the Tribunal thinks fit; and
  - (iii) may, in a case where a tenant is suffering financial hardship as a result of the COVID-19 pandemic, despite section 93(4a), modify a residential tenancy agreement during such a period of suspended operation so as to reduce the tenant's immediate financial obligations under the agreement;
- (m) the Tribunal may, in relation to an order made under section 93(4)(a) of that Act before the commencement of this section, on an application by a tenant or landlord, further suspend the operation of the order for possession if the tenant is suffering financial hardship as a result of the COVID-19 pandemic;
  - (n) the preceding paragraphs will be taken to apply in relation to a rooming house agreement under that Act (where a reference in a preceding paragraph to a provision of that Act will be taken to be a reference to a provision of a corresponding kind under Part 7 of that Act);
  - (o) despite any other Act or law, the Tribunal must not make an order requiring interest to be paid on an amount payable by a tenant under a residential tenancy agreement;
  - (p) despite a provision of any other Act or law, an order of the Tribunal contemplated by a preceding paragraph may have retrospective effect;
  - (q) section 99(4) of that Act does not apply in circumstances where the tenant, or another person lawfully residing in the premises, is self-isolating because they have, or may have, COVID-19;
  - (r) section 115 of that Act will be taken not to apply to an agreement or arrangement required by this section or otherwise required to give effect to this section;
  - (s) the following matters must not be recorded on a residential tenancies database:
    - (i) a matter consisting of, or relating to, a failure to pay rent due where the tenant is suffering financial hardship as a result of the COVID-19 pandemic;
    - (ii) any other matter that the Tribunal orders not to be so recorded;
    - (iii) any other matter prescribed by the regulations.
- (2) A purported termination or other action in contravention of the *Residential Tenancies Act 1995* (as modified by this section) will be taken to be void and of no effect.
  - (3) A provision of the *Residential Tenancies Act 1995* not referred to in a preceding subsection will be taken to be modified to the extent necessary to give effect to the modifications set out in this section.

- (4) The Tribunal may, on application by a landlord or tenant under a residential tenancy agreement (whether or not the agreement is still in force), make such of the following orders as the Tribunal thinks fit:
  - (a) an order modifying or suspending any prescribed order of the Tribunal made during the prescribed period in relation to a residential tenancy period;
  - (b) an order confirming, varying or quashing any prescribed action done, or purportedly done, by a landlord under the *Residential Tenancies Act 1995* in respect of a residential tenancy agreement during the prescribed period;
  - (c) any other order the Tribunal thinks appropriate to address the consequences of the retrospective commencement of this section.
- (5) An application under subsection (4) must be made within 28 days after the commencement of this section (or such longer period as the Tribunal may allow).
- (6) In making orders under this section, the Tribunal must have regard to the intended effect of the operation of this section as it relates to matters of the relevant kind.
- (7) Section 111 of the *Residential Tenancies Act 1995* applies in relation to orders under this section.
- (8) To avoid doubt, the jurisdiction conferred by this section comes within the original jurisdiction of the Tribunal.
- (9) Subject to any regulations under section 20, an order of the Tribunal under this section will be taken to be revoked on the day on which this section expires.
- (10) In this section, a reference to the payment of rent will be taken to include a reference to the payment of an amount relating to water supply and usage.
- (11) A term or phrase used in this section will, unless the contrary intention appears, have the same meaning as in the *Residential Tenancies Act 1995*.
- (12) In this section—

**prescribed order** means an order of the Tribunal made, or having effect, during the prescribed period;

**prescribed action**, by a landlord, means an action taken by the landlord that would, if it occurred after the commencement of this section, contravene the *Residential Tenancies Act 1995* (as modified by this section);

**prescribed period** means the period commencing on 30 March 2020 and ending on the day on which this Act comes into operation.

#### 9—Provisions applying to residential parks

- (1) The operation of the *Residential Parks Act 2007* is modified such that the modifications made by section 8 to the *Residential Tenancies Act 1995* (including, to avoid doubt, the provisions of section 8 relating to the Tribunal) apply in relation to the *Residential Parks Act 2007* as if a reference in that section to a residential tenancy agreement were a reference to a residential park tenancy agreement, residential park site agreement or residential park agreement (as the case requires).
- (2) A purported termination or other action in contravention of the *Residential Parks Act 2007* (as modified by this section) will be taken to be void and of no effect.

- (3) A term or phrase used in this section will, unless the contrary intention appears, have the same meaning as in the *Residential Parks Act 2007*.

#### 10—Provisions applying to supported residential facilities

- (1) Subject to this section, the operation of the *Supported Residential Facilities Act 1992* is modified as follows:
- (a) a proprietor cannot take any other action under that Act for the purpose of terminating a resident contract, where—
    - (i) the grounds for termination are a failure of the resident to pay fees and charges under the resident contract; and
    - (ii) the resident is suffering financial hardship as a result of the COVID-19 pandemic;
  - (b) a proprietor cannot increase fees and charges payable in relation to a resident contract;
  - (c) a resident will be taken not to have breached a term of a resident contract or other agreement by complying with a direction or law relating to the COVID-19 pandemic that applies to or regulates residents of supported residential facilities;
  - (d) a proprietor must not give a notice to a resident under section 39 of that Act that purports to be notice of a proposed termination on grounds of failure to pay fees or charges if the resident is suffering financial hardship as a result of the COVID-19 pandemic;
  - (e) a proprietor cannot make an application under section 43 of that Act in relation to a dispute consisting of a failure to pay fees and charges if the resident is suffering financial hardship as a result of the COVID-19 pandemic (and, to avoid doubt, a licensing authority cannot make orders under that section on an application relating to any other kind of dispute that purports to terminate a resident contract or otherwise require payment of fees and charges in relation to such a resident);
  - (f) the Tribunal must not, on a review under section 44 of that Act, make an order that purports to terminate a resident contract or otherwise require a resident to pay fees and charges to the proprietor if the resident is suffering financial hardship as a result of the COVID-19 pandemic;
  - (g) the operation of section 47 of that Act is modified such that—
    - (i) a visit or attendance by a person will only fall within the ambit of that section if it complies with any direction or law applying to or regulating such visits or attendances; and
    - (ii) a person does not commit an offence under section 47(2) if the person is acting in accordance with a direction or law referred to in subparagraph (i);
  - (h) section 50 of that Act will be taken not to apply to an agreement or arrangement required by this section or otherwise required to give effect to this section;

- (i) except where exceptional circumstances exist, an inspection of a supported residential facility under that Act may only occur by means of audiovisual or other electronic means that do not involve an authorised officer physically entering the premises (and the proprietor and residents must take such steps as are reasonably necessary to enable such an inspection to occur);
  - (j) a proprietor will be taken not to commit an offence against that Act, or breach a term of a licence or resident contract or other agreement, to the extent that an act or omission of the proprietor is reasonably required to give effect to the modification made by this section, or by any direction or law relating to the COVID-19 pandemic that applies to or regulates supported residential facilities;
  - (k) the Tribunal or a licensing authority, in performing a function or exercising a power under that Act, must have regard to the circumstances of the COVID-19 pandemic (including the need to ameliorate the effects of the pandemic in the State and the need to avoid homelessness during such a public health emergency).
- (2) For the purposes of this section, a reference to fees and charges payable in relation to a resident contract will be taken to include a reference to any costs (however described) payable by a resident under the resident contract (whether for accommodation, personal care services or otherwise).
- (3) A term or phrase used in this section will, unless the contrary intention appears, have the same meaning as in the *Supported Residential Facilities Act 1992*.

#### **10A—Provisions relating to certain community visitors**

- (1) A community visitor may perform a function or exercise a power under a prescribed law to visit and inspect premises, or visit a patient, resident or other person contemplated by the prescribed law, by means of audiovisual or other electronic means that do not involve the community visitor physically entering the premises and, in relation to such visits and inspections—
- (a) a requirement under the prescribed law that the community visitor physically attend and inspect premises (however described)—
    - (i) if it is reasonably practicable to comply with the requirement by audiovisual or other electronic means—will be taken to be modified to the extent necessary to give effect to this subsection; or
    - (ii) if it is not reasonably practicable to comply with the requirement by audiovisual or other electronic means—will be taken to be suspended until the expiry of this section); and
  - (b) a requirement under the prescribed law that such visits or inspections be conducted by more than 1 community visitor will be taken to be modified so that the visit or inspection may be conducted by a single community visitor; and
  - (c) a reference in the prescribed law that contemplates a community visitor visiting or otherwise being on premises is to be construed accordingly.

- (2) A community visitor may, in relation to a visit or inspection referred to in subsection (1), give such directions as the community visitor considers reasonably necessary to enable the visit or inspection to occur, including—
- (a) directions requiring a person, or person of a class—
    - (i) to take reasonable steps to facilitate the visit or inspection (including by making equipment of a specified kind available for use in the course of the visit or inspection); or
    - (ii) to grant access to specified parts of the premises, or such parts of the premises as may reasonably be accessed using the relevant audiovisual or other means; or
  - (b) directions requiring a person, or person of a class, to provide the community visitor with access to a specified patient or resident of the premises, or patients or residents of a specified class, and for an appropriate area within the premises to be made available to enable confidential communication with the community visitor.
- (3) A person must not, without reasonable excuse, refuse or fail to comply with a direction under subsection (2).  
Maximum penalty: \$5 000.
- (4) Nothing in this section limits any functions or powers that a community visitor has under a prescribed law in relation to a visit or inspection.
- (5) A community visitor must ensure that the following information is reported on a publicly accessible website and updated on at least a monthly basis:
- (a) the number of visits or inspections by the community visitor that have occurred by audiovisual or other electronic means in accordance with this section;
  - (b) the name and location of any premises subject to such a visit or inspection;
  - (c) the date on which, and time at which, each such visit or inspection occurred;
  - (d) the reasons why each such visit or inspection occurred by audiovisual or other electronic means in accordance with this section;
  - (e) if a visit or inspection by audiovisual or other electronic means in accordance with this section was not possible for any reason—the reasons why such a visit or inspection was not possible.
- (6) A report under subsection (5)—
- (a) must identify, by reference to paragraphs (a) to (d) of the definition of **community visitor** in subsection (7), which category of community visitor the report relates to; and
  - (b) must, in a case where the report relates to a category of community visitor referred to in paragraph (a), (b) or (c) of that definition, be made by the Principal Community Visitor (within the meaning of the Act to which that paragraph relates).

(7) In this section—

**community visitor** means—

- (a) a community visitor within the meaning of the *Mental Health Act 2009*;
- (b) a community visitor within the meaning of the *Disability Services (Community Visitor Scheme) Regulations 2013*;
- (c) a community visitor under the *COVID-19 Emergency Response (Schedule 1) Regulations 2020*;
- (d) the Chief Psychiatrist within the meaning of the *Mental Health Act 2009*;

**prescribed law** means—

- (a) the *Mental Health Act 2009*;
- (b) the *Disability Services (Community Visitor Scheme) Regulations 2013*;
- (c) the *COVID-19 Emergency Response (Schedule 1) Regulations 2020*;
- (d) the *Health Care Act 2008*.

#### **11—Provisions applying in relation to certain water and sewerage charges for sporting clubs**

(1) The operation of the *Water Industry Act 2012*, the *Local Government Act 1999* and any other Act or law prescribed by the regulations (being an Act or law relating to the supply of water, sewerage services or storm water management) is modified as follows:

- (a) the Minister under the relevant Act may, by notice in the Gazette—
  - (i) waive an amount of prescribed costs payable by a specified sporting club, or a sporting club of a specified class (whether incurred before or after the commencement of this section); or
  - (ii) exempt (conditionally or unconditionally) a specified sporting club, or a sporting club of a specified class, from a specified provision of those Acts;
- (b) the regulations under this Act may modify or suspend the operation of any Act or law relating to the supply of water to, the use of sewerage services by, or the management of storm water by, a specified sporting club or sporting clubs of a specified class;
- (c) a term of any contract, agreement or other instrument that is inconsistent with the modifications made by this section will, to the extent of that inconsistency, be of no effect.

(2) In this section—

**prescribed costs** means—

- (a) an amount payable for the supply of water (whether potable or otherwise); or
- (b) an amount payable for the use of sewerage services; or
- (c) an amount payable in relation to storm water management; or
- (d) any other amount of a kind prescribed by the regulations;

*sewerage services* has the same meaning as in the *Water Industry Act 2012*.

## 12—Treasurer's instructions relating to financial and audit requirements

- (1) Subject to subsection (2), the Treasurer may, after consultation with the Auditor-General, issue instructions under section 41 of the *Public Finance and Audit Act 1987* that suspend or modify—
  - (a) any provisions of that Act, regulations under that Act or any other instructions issued under section 41; or
  - (b) any requirements under another Act or law relating to financial reporting or auditing,if satisfied that the suspension or modification is necessary as a result of circumstances brought about by the COVID-19 pandemic (or as a result of any measures taken to address the COVID-19 pandemic) or to provide economic stimulus during and after the COVID-19 pandemic.
- (2) An instruction that modifies or suspends any provision of Part 3 of the *Public Finance and Audit Act 1987* may not be issued pursuant to subsection (1) unless the Auditor-General has certified that the Auditor-General is also satisfied that the suspension or modification is necessary as a result of circumstances brought about by the COVID-19 pandemic (or as a result of any measures taken to address the COVID-19 pandemic) or to provide economic stimulus during and after the COVID-19 pandemic.
- (3) Instructions issued pursuant to this section—
  - (a) may not diminish the powers or protections of the Auditor-General under any Act or law; but
  - (b) may, for example (and without limitation), modify or suspend—
    - (i) requirements under another Act or law relating to annual or other reports where such reports include any financial reporting or are subject to auditing requirements; or
    - (ii) requirements relating to a financial reporting framework or the time at which any auditing is to occur or the time at which or manner in which any financial information or reports are to be provided to any person or body or are to be published or otherwise made available.
- (4) Section 41(6) and (7) of the *Public Finance and Audit Act 1987* do not apply to an instruction issued by the Treasurer pursuant to this section.
- (5) The Auditor-General must prepare a report on instructions issued pursuant to this section and either—
  - (a) annex the report to the Auditor-General's annual report under section 36(1a) of the *Public Finance and Audit Act 1987*; or
  - (b) deliver the report to the President of the Legislative Council and the Speaker of the House of Assembly.



- (6) If the President of the Legislative Council or the Speaker of the House of Assembly is absent at the time the Auditor-General delivers to the Parliament a report under this section, the Clerk of the relevant House will receive the report on behalf of the President or the Speaker (as the case may be) and the report will then be taken to have been delivered to the President or the Speaker.
- (7) The President of the Legislative Council and the Speaker of the House of Assembly must, not later than the first sitting day after a report and other documents have been delivered (or are taken to have been delivered) to the President or the Speaker by the Auditor-General under this Part, lay them before their respective Houses.
- (8) Subject to subsection (9), the Auditor-General must, as soon as is reasonably practicable after a report has been delivered (or is taken to have been delivered) to the President of the Legislative Council and the Speaker of the House of Assembly under this section, publish the report on a website determined by the Auditor-General or in such other manner as the Auditor-General thinks fit.
- (9) If the day immediately following the day on which the report is delivered (or is taken to have been delivered) is a sitting day for either House of the Parliament, the Auditor-General must not publish the report and other documents in accordance with subsection (8) until the report has been laid before a House of the Parliament.
- (10) On the expiry of this section under section 6 all instructions issued by the Treasurer pursuant to this section are taken to be revoked.

### **13—Audits by Auditor-General**

- (1) Subject to any instructions pursuant to section 12, but despite any other Act or law, the Auditor-General may determine to conduct a review, in such manner as the Auditor-General thinks fit, instead of any audit that would (apart from this section) be required to be undertaken by the Auditor-General.
- (2) For the avoidance of doubt—
  - (a) the Auditor-General has, when conducting a review under this section, the same powers as the Auditor-General would have had if an audit were being conducted; and
  - (b) any obligation or duty of a person in connection with the conduct of an audit will be taken to apply equally to the person in connection with the conduct of a review (as if it were an audit) unless the Auditor-General determines otherwise.

### **14—Extension of time limits, terms of appointment etc**

- (1) If, in accordance with an Act or law, or an instrument—
  - (a) anything needs to be done at a particular time or within a particular period; or
  - (b) any appointment or circumstance ceases at a particular time or exists for a particular period; or
  - (c) anything would expire or cease at a particular time or at the end of a particular period,(however expressed), the Governor may, by regulation, postpone that time or extend that period.

- (2) However, the regulations may only—
  - (a) postpone a time at which a particular appointment would cease; or
  - (b) extend a particular appointment; or
  - (c) extend a period, at the end of which a particular appointment would cease, by a maximum period of 6 months.
- (3) Without limiting subsection (1), a postponement or an extension of a period under this section—
  - (a) may be subject to conditions or other limitations; and
  - (b) may be expressed as applying to a particular requirement under an Act or law or to a class of requirements or otherwise in circumstances described in the regulation; and
  - (c) may have the effect of modifying any Act or law or any instrument.

#### **15—Modification of requirements relating to laying of reports before Parliament**

- (1) Despite a provision of this or any other Act, a requirement under an Act that a report or other document (however described) be laid before either or both Houses of Parliament within a specified period will, by force of this section, be modified so that the report or other document is required to be laid before either or both Houses of Parliament (as the case requires) within 7 calendar days after the occurrence of the event that requires the report to be so laid before Parliament.
- (2) A requirement under subsection (1) will, if the Parliament, or the relevant House of Parliament, is not sitting during the 7 day period, be taken to be satisfied by the report or other document being delivered to the President of the Legislative Council or the Speaker of the House of Assembly.
- (3) If the President of the Legislative Council or the Speaker of the House of Assembly is absent at the time a report or other document is to be delivered under subsection (2), the Clerk of the relevant House will receive the report on behalf of the President or the Speaker (as the case may be) and the report will then be taken to have been delivered to the President or the Speaker.
- (4) The Clerk of the relevant House or Houses must, as soon as is reasonably practicable after a report or other document is received under subsection (3), cause the report or other document—
  - (a) to be published on a website determined by the Clerk; and
  - (b) to be distributed (whether electronically or by some other means determined by the Clerk) to each member of the relevant House or to each member of Parliament (as the case requires).
- (5) The President of the Legislative Council and the Speaker of the House of Assembly must, not later than the first sitting day after a report or other document has been delivered (or is taken to have been delivered) to the President or the Speaker under this section, lay them before their respective Houses.

### **16—Requirements relating to documents**

- (1) The Governor may, by regulation, suspend or modify any requirements under an Act or law, or an instrument, relating to the preparation, signing, witnessing, attestation, certification, stamping or other treatment of any document.
- (2) Without limiting subsection (1), a regulation under this section—
  - (a) may be subject to conditions or other limitations; and
  - (b) may be expressed as applying to a particular requirement under an Act or law or to a class of requirements or otherwise in circumstances described in the regulation; and
  - (c) may have the effect of modifying any Act or law or any instrument.

### **17—Meetings in person etc may occur by audiovisual or other means**

- (1) Despite a provision of any other Act or law, a requirement that a meeting occur or that some other transaction take place that requires 2 or more persons to be physically present will be taken to be satisfied if the persons meet, or the transaction takes place, remotely using 1 or more of (including a combination of) the following means of communication:
  - (a) audio visual;
  - (b) audio;
  - (c) any other means of communication prescribed by the regulations for the purposes of this paragraph.
- (2) This section does not apply in circumstances prescribed by the regulations.

### **18—Service**

Except where this Act requires otherwise, a notice or other document required or authorised to be given to or served on a person under this Act may—

- (a) be given to the person personally; or
- (b) be left for the person at the person's place of residence or business with someone apparently over the age of 16 years; or
- (c) be posted to the person at the person's last known place of residence or business; or
- (d) be transmitted by fax or email to a fax number or email address provided by the person (in which case the notice or other document will be taken to have been given or served at the time of transmission); or
- (e) if the person is a company or registered body within the meaning of the *Corporations Act 2001* of the Commonwealth, be served in accordance with that Act.

### **19—Regulations**

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

- (2) Without limiting the generality of subsection (1), the regulations may provide for—
- (a) the circumstances in which a person will be taken to be suffering financial hardship as a result of the COVID-19 pandemic for the purposes of a tenancy provision of this Act; and
  - (c) mitigation of adverse impacts on a party to a lease resulting from the COVID-19 pandemic, including by making provision for any measures to regulate the parties to a lease or the provisions of a lease; and
  - (d) modification of the operation of any provisions of this Act or a relevant Act for a purpose related to any circumstances brought about by the COVID-19 pandemic (or measures taken to address the COVID-19 pandemic) or to economic stimulus during and after the COVID-19 pandemic; and
  - (e) provisions making related modifications to any Act or law consequent on the tenancy provisions of this Act; and
  - (f) modification or suspension of the operation of Schedule 1 or any Act or law relating to the matters dealt with in that Schedule; and
  - (g) a scheme for a community visitor or visitors for the purposes of Schedule 1; and
  - (h) the keeping of records, or the making of any reports to the Minister or another specified person or body, in relation to any matter dealt with by this Act; and
  - (i) provisions of a saving or transitional nature consequent on the enactment of this Act or the making of any regulation under this Act; and
  - (j) fines, not exceeding \$10 000, for offences against the regulations; and
  - (k) expiation fees, not exceeding \$5 000, for offences against the regulations; and
  - (l) facilitation of proof of the commission of offences and other evidentiary matters.
- (3) The regulations may—
- (a) be of general or limited application; and
  - (b) make different provision according to the circumstances or entities to which they are expressed to apply; and
  - (c) apply or incorporate, wholly or partially and with or without modification, a code, standard, policy or other document prepared or published by the Minister or another specified person or body; and
  - (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister, the State Co-ordinator, the Chief Public Health Officer or any other specified body or person.
- (4) If a code, standard or other document is referred to or incorporated in the regulations—
- (a) a copy of the code, standard or other document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and

- (b) evidence of the contents of the code, standard or other document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code, standard or other document.
- (5) On the expiry of a provision of this Act under section 6, all regulations made for the purposes of the provision are taken to be revoked.
- (6) In this section—  
*relevant Act* means the *Landlord and Tenant Act 1936*, the *Real Property Act 1886*, the *Residential Parks Act 2007*, the *Residential Tenancies Act 1995*, the *Retail and Commercial Leases Act 1995*, the *Supported Residential Facilities Act 1992* or any other Act in so far as it relates to or affects landlords and tenants in the State or other residential leases, licences or agreements;  
*tenancy provision* of this Act means sections 8 to 10 (inclusive).

## 20—Savings and transitional matters

- (1) The Governor may make regulations of a savings or transitional nature consequent on the expiry of any provision of this Act under section 6 (or on the revocation of any regulation in accordance with section 19(5)).
- (2) The regulations may—
  - (a) be of general or limited application; and
  - (b) make different provision according to the circumstances or entities to which they are expressed to apply; and
  - (c) apply or incorporate, wholly or partially and with or without modification, a code, standard, policy or other document prepared or published by the Minister or another specified person or body; and
  - (d) provide that any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister, the State Co-ordinator, the Chief Public Health Officer or any other specified body or person.
- (3) If a code, standard or other document is referred to or incorporated in the regulations—
  - (a) a copy of the code, standard or other document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and
  - (b) evidence of the contents of the code, standard or other document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code, standard or other document.
- (4) If—
  - (a) a regulation made under section 14 postpones any time or extends any period; and
  - (b) the regulation is revoked by operation of section 19(5) before that time or before the expiration of that period,

the postponement or extension continues to have effect according to its terms (as in force immediately before the revocation).

#### 21—Disallowance of regulations made under Act

- (1) Despite section 10(3) of the *Subordinate Legislation Act 1978*, all regulations made under this Act must be laid before each House of Parliament on the next sitting day of that House after the regulations are made.
- (2) Except as is provided under subsection (1), nothing in this section limits the operation of the *Subordinate Legislation Act 1978*.
- (3) Where regulations made under this Act are disallowed, the Governor must not, except in accordance with a resolution of the House that disallowed the regulations, remake those regulations, or make regulations that are of the same effect, within 6 months after the day on which the regulations are disallowed.

#### 22—Immunity from liability etc

No civil or criminal liability attaches to the Crown, or to any person acting in good faith, in respect of—

- (a) any acts or omissions in connection with—
  - (i) the exercise or discharge, or purported exercise or discharge, of a power or function under this Act; or
  - (ii) the carrying out, or purported carrying out, of any direction or requirement given or imposed, or purportedly given or imposed, in accordance with this Act; or
- (b) any failure to exercise or discharge a power or function under this Act, in relation to the outbreak of the human disease named COVID-19 within South Australia.

#### 23—Further provisions in Schedules

- (1) Schedule 1 has effect according to its terms (despite any other Act or law) until that Schedule expires in accordance with section 6.
- (2) The operation of a law of the State specified in a provision of Schedule 2 is modified as set out in that provision until that provision expires in accordance with section 6.
- (3) In Schedule 3, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

### Schedule 1—Special provisions relating to detention of certain protected persons during COVID-19 pandemic

#### 1—Interpretation

- (1) In this Schedule—

*Authorising Officer* means the Authorising Officer appointed under clause 5;

*guidelines* means the guidelines published under clause 4, as in force from time to time;

**mentally incapacitated person** means a mentally incapacitated person within the meaning of the *Guardianship and Administration Act 1993*;

**protected person** means—

- (a) a protected person within the meaning of the *Guardianship and Administration Act 1993*; or
- (b) a mentally incapacitated person who is a resident of a supported residential facility; or
- (c) a mentally incapacitated person who is a resident in other supported accommodation of a kind prescribed by the regulations;

**supported residential facility** means a supported residential facility under the *Supported Residential Facilities Act 1992*;

**Tribunal** means the South Australian Civil and Administrative Tribunal established under the *South Australian Civil and Administrative Tribunal Act 2013*.

- (2) For the purposes of this Schedule, a reference to the **guardian** of a person will be taken to include a reference to a person who, under the *Guardianship and Administration Act 1993*, has limited guardianship of the person, provided the accommodation arrangements for the protected persons fall within the responsibility of the guardian.
- (3) For the purposes of this Schedule, a reference to the **usual place of residence** of a protected person—
  - (a) will, in the case of a protected person who is the subject of an order under section 32 of the *Guardianship and Administration Act 1993* that directs that the protected reside at a specified place, be taken to be a reference to that specified place; and
  - (b) will be taken to include a reference to a place at which the protected person is residing on a temporary basis.

**Note—**

For example, a person may temporarily reside in a hospital or rehabilitation facility.

## 2—Detention under Schedule

- (1) Subject to this Schedule, and to any direction of the Authorising Officer or the Tribunal, the detention of a protected person—
  - (a) must comply with the guidelines (including provisions setting out the nature of detention, and any limits on such detention); and
  - (b) may be conditional or unconditional.
- (2) Despite clause 13, or any order of the Tribunal or direction of the Authorising Officer to the contrary, the period during which a protected person can be detained under this clause ceases on the day on which this Schedule expires (and, to avoid doubt, any detention or other restrictions imposed on the protected person under this Schedule must cease no later than that day).
- (3) Any order of the Tribunal, or direction of the Authorising Officer, under this Schedule will be taken to be revoked on the day on which this Schedule expires.

### 3—Interaction with other treatment requirements etc

- (1) Nothing in this Schedule prevents a protected person detained under this Schedule from receiving medical treatment at a place other than the place at which they are so detained.
- (2) The exercise of a function or power under this Schedule will be taken not, of itself, to contravene a treatment plan (however described) relating to a protected person.

### 4—Guidelines

- (1) The Minister may, by notice in the Gazette, publish guidelines for the purposes of this Schedule.
- (2) The Minister may, by subsequent notice in the Gazette, vary, substitute or revoke guidelines published under this clause.
- (3) The Minister must publish any guidelines under this clause on a website determined by the Minister.

### 5—Appointment of Authorising Officer

- (1) The Minister may appoint a person as the *Authorising Officer* for the purposes of this Schedule, being a person (who may be a public servant) who, in the opinion of the Minister, has the appropriate qualifications or experience to perform the functions and exercise the powers conferred on the Authorising Officer under this Schedule.
- (2) The Authorising Officer will be appointed on terms and conditions determined by the Minister.
- (3) The Authorising Officer is subject to the direction and control of the Minister.
- (4) The Authorising Officer must, in performing a function or exercising a power under this Schedule, comply with the guidelines (including guidelines relating to the resolution of an actual or perceived conflict of interest in respect of the Authorising Officer's functions and duties under any other Act or law).
- (5) The functions of the Authorising Officer are—
  - (a) to monitor the operation of this Schedule and ensure that the rights of protected persons who are detained under the Schedule are protected; and
  - (b) such other functions as may be conferred on the Authorising Officer by this Schedule or the regulations, or by the Minister.
- (6) The office of the Authorising Officer becomes vacant if the holder—
  - (a) dies; or
  - (b) completes a term of office and is not reappointed; or
  - (c) resigns by written notice to the Minister; or
  - (d) is convicted of—
    - (i) an indictable offence against the law of this State; or
    - (ii) an offence against the law of this State that is punishable by imprisonment for a term of at least 12 months; or



- (iii) an offence against the law of another jurisdiction that, if committed in this State, would be an offence of a kind referred to in a preceding paragraph; or
  - (e) is sentenced to imprisonment for an offence (whether against a law of this State or another jurisdiction); or
  - (f) is removed from office by the Minister under subclause (7).
- (7) The appointment of the Authorising Officer may be terminated by the Minister on any grounds the Minister thinks fit.

#### **6—Authorising Officer may give directions**

- (1) The Authorising Officer may, by notice in writing, direct that the detention of a protected person under this Schedule cease forthwith, or on a day specified in the notice.
- (2) The Authorising Officer may, by notice in writing, give such other directions as the Authorising Officer considers appropriate for the purposes of this Schedule (including, to avoid doubt, a direction requiring a specified person or body to take specified steps to give effect to a direction under subclause (1)).
- (3) Before giving a direction under this clause, the Authorising Officer must have regard to the circumstances of the COVID-19 pandemic as they exist at the time (including the need to limit the spread of the COVID-19 virus and to ameliorate the effects of the pandemic in the State).
- (4) A person must not, without reasonable excuse, refuse or fail to comply with a direction of the Authorising Officer.

Maximum penalty:

- (a) in the case of a body corporate—\$75 000;
- (b) in the case of a natural person—\$20 000.

Expiation fee:

- (a) in the case of a body corporate—\$5 000;
- (b) in the case of a natural person—\$2 000.

- (5) If a body corporate is guilty of an offence against this clause, each director and the manager of the body corporate are guilty of an offence and liable to the same penalty as is prescribed for the principal offence when committed by a natural person unless the director or the manager (as the case may be) proves that they could not by the exercise of due diligence have prevented the commission of the offence.
- (6) A person may be prosecuted and convicted of an offence under subclause (5) whether or not the body corporate has been prosecuted or convicted of the offence committed by the body corporate.

#### **7—Delegation**

- (1) The Authorising Officer may delegate functions or powers under this Schedule—
  - (a) to the person for the time being holding or acting in a particular office or position; or
  - (b) to any other specified person or body.

- (2) A delegation under this clause—
- (a) must be by instrument in writing; and
  - (b) may be absolute or conditional; and
  - (c) does not derogate from the power of the Authorising Officer to act in any matter; and
  - (d) is revocable at will by the Authorising Officer.

### **8—Authorised officers**

- (1) The following persons are authorised officers for the purposes of this Schedule:
- (a) police officers;
  - (b) authorised officers under the *Emergency Management Act 2004*;
  - (c) a person, or class of persons, authorised by the Minister for the purposes of this Schedule.
- (2) An appointment under subclause (1)(c) may be subject to conditions specified by the Minister.
- (3) An appointment under subclause (1)(c) is, by force of this subclause, revoked on the expiry or repeal of this Schedule.

### **9—Powers of authorised officers to detain protected person etc**

- (1) Subject to this Schedule and the regulations, if an authorised officer reasonably believes that a protected person who is detained under this Schedule is unlawfully at large and that taking action under this clause is appropriate for a purpose related to the COVID-19 pandemic, the authorised officer may take 1 or more of the following actions:
- (a) detain and transport the protected person to—
    - (i) the protected person's usual place of residence; or
    - (ii) a place determined by the authorised officer;
  - (b) direct a person to take specified action to prevent the protected person from being unlawfully at large;
  - (c) remove to a place the authorised officer thinks fit any person who obstructs or threatens to obstruct the exercise of a power under this Schedule;
  - (d) direct, insofar as may be reasonably necessary in the circumstances, any person to assist in the exercise of any power under this clause.
- (2) In exercising a power under this clause, an authorised officer must comply with the guidelines (including, to avoid doubt, in relation to the means by which a protected person may be detained).
- (3) An authorised officer may be assisted by other persons in exercising a power under this clause (and that person must comply with the guidelines).
- (4) Nothing in this clause empowers the placement or detention of a person in—
- (a) a correctional institution or any other place in which persons charged with or convicted of offences may be detained; or

- (b) any part of an approved treatment centre under the *Mental Health Act 2009* that is set aside for the treatment of persons with a mental illness.

**10—Additional powers of guardians during COVID-19 pandemic**

- (1) Subject to this Schedule, a guardian of a protected person may, if the guardian reasonably believes that the protected person is unlawfully at large and to do so is reasonably necessary for a purpose related to the COVID-19 pandemic, do 1 or more of the following:
  - (a) detain, using only such force as is reasonably necessary for the purpose, the protected person if the protected person is in a place other than the protected person's usual place of residence;
  - (b) take the protected person, or cause the protected person to be taken, using only such force as is reasonably necessary for the purpose, to the protected person's usual place of residence;
  - (c) take such other action as may be authorised by the Tribunal (whether on application under this Schedule, the *Guardianship and Administration Act 1993* or another Act).
- (2) In exercising a power under this clause, a guardian must comply with the guidelines (including, to avoid doubt, in relation to the means by which a protected person may be detained).
- (3) A guardian may be assisted by other persons in exercising a power under this clause (and that person must comply with the guidelines).

**11—Certain persons at prescribed premises may detain protected persons during COVID-19 pandemic**

- (1) Subject to this Schedule, a prescribed person in respect of premises at which a protected person usually resides may—
  - (a) with the approval of the guardian of the protected person, or on the authorisation of the Authorising Officer or the Tribunal, take such steps as may be reasonably necessary to detain the protected person at those premises; and
  - (b) take such other action as may be authorised by the Authorising Officer or Tribunal under this Schedule.
- (2) Despite subclause (1), a prescribed person in respect of premises at which a protected person usually resides may detain the protected person at those premises for such period (not exceeding 48 hours) as may be necessary—
  - (a) to contact the guardian of the protected person to obtain approval to detain the protected person; or
  - (b) to apply to the Authorising Officer or Tribunal for authorisation to detain the protected person; or
  - (c) to apply to the Tribunal for advice, direction or approval under clause 18,and the period for which a protected person can be detained under this subclause ceases on such action occurring.

- (3) In exercising a power under this clause, a prescribed person must comply with the guidelines (including, to avoid doubt, in relation to the means by which a protected person may be detained).
- (4) A prescribed person may be assisted by other persons in exercising a power under this clause (and that person must comply with the guidelines).
- (5) In this clause—  
*prescribed person*, in relation to premises at which a protected person usually resides, means—
  - (a) the person in charge of the operation of the premises; or
  - (b) any other person prescribed by the regulations for the purposes of this paragraph.

#### **12—Detention of protected persons where no guardian**

- (1) This clause applies in relation to a protected person who is not under the guardianship of a guardian.
- (2) The Authorising Officer may, on an application under this clause, if satisfied that to do so is appropriate for a purpose related to the COVID-19 pandemic, authorise 1 or more of the following:
  - (a) the detention of a protected person;
  - (b) such other action as the Authorising Officer considers appropriate in the circumstances.
- (3) An authorisation under this clause—
  - (a) must be by written instrument; and
  - (b) may be conditional or unconditional; and
  - (c) may be varied or revoked by the Authorising Officer.
- (4) An authorisation under this clause must not be inconsistent with the guidelines (including, to avoid doubt, in relation to the means by which a protected person may be detained).

#### **13—Duration of detention period**

- (1) Subject to an order of the Tribunal or a direction of the Authorising Officer to the contrary, the maximum period for which a protected person can be detained under this Schedule is 28 days.
- (2) The period for which a protected person can be detained under this Schedule will be taken to cease—
  - (a) in the case where the Authorising Officer gives a direction under clause 6(1)—forthwith or on the day specified in the notice (as the case requires); or
  - (b) if the guardian of the protected person withdraws their approval in relation to a detention under clause 11(1)(a)—on the day approval is withdrawn; or

- (c) in the case where the Authorising Officer gives a direction under clause 12—28 days after the protected person is detained or such earlier day as may be specified by the Authorising Officer under that clause; or
  - (d) in the case where the Authorising Officer orders the period to cease under clause 15 or 16—on the day so ordered; or
  - (e) in the case where the Tribunal orders the period to cease—on the day so ordered; or
  - (f) in any other case—28 days after the protected person is detained.
- (3) Nothing in this Schedule authorises the detention of a protected person after the day on which the period for which a protected person is detained ceases in accordance with this clause.

#### **14—Extension of detention period and other orders by Tribunal**

- (1) The Tribunal may, on an application under this clause, by order, authorise the period for which a protected person is detained under this Schedule to be extended by a specified period.
- (2) The Tribunal may, in relation to an order under subclause (1), by order, authorise the persons from time to time involved in the care of the protected person during the extended period to use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and wellbeing of the protected person.

#### **15—Periodic review of detention by Authorising Officer**

- (1) The Authorising Officer must review the detention of a protected person under this Schedule if the period for which the protected person may be so detained is extended under clause 14 for a period exceeding 28 days.
- (2) On completion of a review, the Authorising Officer must order the period for which a protected person is detained to cease if the Authorising Officer is not satisfied that there are proper grounds for the detention of the protected person to continue.

#### **16—Review by Authorising Officer on application of aggrieved person**

- (1) A person who is aggrieved by a decision to detain a protected person under this Schedule (not being a decision of the Authorising Officer or the Tribunal) is entitled to a review of the circumstances involved in the detention of the protected person.
- (2) An application for review—
  - (a) must be made in a manner and form determined by the Authorising Officer; and
  - (b) must be made within the period determined by the Authorising Officer.
- (3) The Authorising Officer may conduct a review under this clause in any manner that the Authorising Officer considers appropriate.
- (4) On completion of a review under this clause, the Authorising Officer may confirm, vary or reverse the decision under review (including by ordering the period for which a protected person is detained to cease).

- (5) The regulations may make further provision in respect of a review under this clause (including, to avoid doubt, by limiting the kinds of decisions that may be the subject of an application for review).

#### **17—Review of decisions by Tribunal**

- (1) Subject to this clause, the Tribunal is, by force of this clause, conferred with jurisdiction to deal with matters consisting of the review of the following decisions (*reviewable decisions*):
- (a) a decision of a prescribed person to detain a protected person under clause 11, or a decision of a guardian under that clause to grant approval to detain a protected person;
  - (b) a decision of the Authorising Officer under clause 12;
  - (c) any other decision of a kind prescribed by the regulations.
- (2) However, a decision referred to in subclause (1)(a) will only be taken to be a reviewable decision if a review under clause 16 has been conducted in respect of the decision.
- (3) An application for review of a reviewable decision may be made to the Tribunal by a person or persons prescribed by the regulations for the purposes of this subclause.
- (4) An application must be made within 7 days after the applicant receives notice of the results of the relevant review under clause 16 (or such longer period as the Tribunal may allow).

#### **18—Tribunal may give advice, direction or approval**

- (1) The Authorising Officer, a guardian or a prescribed person in relation to prescribed premises may apply to the Tribunal for advice or direction—
- (a) on the exercise of powers under this Schedule; or
  - (b) as to the scope of those powers; or
  - (c) for approval to the taking of any action for which the approval of the Tribunal is required.
- (2) An application under this clause—
- (a) need not be served on any person; and
  - (b) may be determined by the Tribunal in the absence of any person who may be affected by the Tribunal's decision,
- unless the Tribunal directs otherwise.
- (3) A direction given by the Tribunal under this clause is binding on the applicant.

#### **19—Offence to remove protected person from place of detention etc**

A person who, without reasonable excuse, removes a protected person who is being detained in any place under this Schedule from that place, or aids or abets the protected person to leave that place, is guilty of an offence.

Maximum penalty: \$10 000.

Expiation fee: \$1 000.

## Schedule 2—Temporary modification of particular State laws

### Part AA1—*Aboriginal Lands Parliamentary Standing Committee Act 2003*

#### AA1—Modification of *Aboriginal Lands Parliamentary Standing Committee Act 2003*

Part 2 Division 3 of the *Aboriginal Lands Parliamentary Standing Committee Act 2003* applies with the following modification:

After section 12 insert:

#### 12A—Meetings during COVID-19 pandemic

Despite any other provision of this Act—

- (a) a requirement for the Committee to hold any meeting will be taken to be satisfied if the meeting is held remotely using 1 or more of (including a combination of) the following means of communication:
  - (i) audio visual;
  - (ii) audio; and
- (b) a requirement for members of the Committee to attend or be present at any meeting will be taken to be satisfied if—
  - (i) each participating member is able to communicate contemporaneously with each other participating member when making any deliberation, or taking part in any vote, during the meeting; and
  - (ii) when a witness gives oral evidence to the Committee, the members of the Committee constituting a quorum are able to hear the witness contemporaneously and question the witness within the hearing of each other Committee member constituting the quorum.

### Part A1—*Bail Act 1985*

#### A1—Modification of *Bail Act 1985*

The *Bail Act 1985* applies with the following modifications:

- (a) section 10A(2), definition of *prescribed applicant*—after paragraph (ca) insert:

- (cb) an applicant taken into custody on a charge of an aggravated offence against the person if the circumstances alleged to aggravate the offence are those set out in section 5AA(1)(ka) of the *Criminal Law Consolidation Act 1935*; or
- (b) section 10A(2), definition of *prescribed applicant*, (d)—before subparagraph (i) insert:
  - (ai) section 20AA;
  - (bi) section 20AB;
- (c) section 10A(2), definition of *prescribed applicant*, (d)—after subparagraph (ii) insert:
  - (iia) section 169;
  - (iib) section 170;
  - (iic) section 170A;

## **Part B1—Development Act 1993**

### **B1—Modification of Development Act 1993**

The *Development Act 1993* applies with the following modifications:

- (a) section 49(6)—delete "two months" and substitute:  
15 business days
- (b) section 49(7d)—delete "\$4 000 000" and substitute:  
\$10 million

## **Part 1—Emergency Management Act 2004**

### **1—Modification of Emergency Management Act 2004**

The *Emergency Management Act 2004* applies with the following modifications:

- (a) section 17(2)—after "must" insert:  
, as soon as practicable,
- (b) section 17(3)(b)—after "identity card" insert:  
, if one has been issued in accordance with subsection (2) or, if such an identity card has not yet been issued, with such other proof of the person's appointment as an authorised officer as the State Co-ordinator may determine
- (c) section 25(2)—after "but subject to" insert:  
this section and
- (d) section 25(2)(a)—delete "(using such force as is necessary)"
- (e) section 25(3)—delete subsection (3) and substitute:



- (3) The State Co-ordinator (or a delegate of the State Co-ordinator) may give a direction or make a requirement under this section that applies to persons generally throughout the State.
- (4) A direction or requirement of a kind referred to in subsection (3) must be published on a website determined by the State Co-ordinator within 24 hours after it is given or made.
- (5) For the avoidance of doubt—
  - (a) the State Co-ordinator or an authorised officer may exercise or discharge a power or function under this section even if to do so would contravene another law of the State; and
  - (b) the State Co-ordinator or an authorised officer may use such force as is reasonably necessary in the exercise or discharge of a power or function under this section or in ensuring compliance with a direction or requirement under this section; and
  - (c) a direction or requirement given or imposed by the State Co-ordinator or an authorised officer under this section may do any of the following:
    - (i) it may apply to a person, or a class of persons, or in respect of any place or during any period;
    - (ii) it may require or allow a person or a class of persons to act in contravention of another law of the State;
    - (iii) it may affect the lawful rights or obligations of any person or class of persons; and
  - (d) a direction or requirement may be issued in the form of a written instrument or in any other form (including, without limitation, orally, by SMS or email).
- (6) If a direction applies to a class of persons or applies in respect of any place or during any period, the State Co-ordinator, or an authorised officer, may exempt (conditionally or unconditionally) any person or class of persons from the direction.

- (7) The State Co-ordinator must consider the advice of the Chief Public Health Officer before exercising or discharging a power or function under this section that would (conditionally or unconditionally) authorise authorised officers, or authorised officers of a particular class, to provide, direct, require or allow the provision of health goods or services or a particular class of such goods or services.

(ca) after section 25 insert:

**25A—Removal of children**

- (1) Without derogating from section 25, an authorised officer may, for the purpose of ensuring compliance with any direction under that section, remove a child from any premises, place, vehicle or vessel to a place of residence of the child or to a hospital or quarantine facility, as the authorised officer thinks fit (and may, in doing so, use such force as is reasonably necessary).
- (2) In this section—  
*child* means a person under 18 years of age;  
*place of residence* includes, in the case of a child who is in the custody, or under the guardianship, of the Chief Executive under the *Children and Young People (Safety) Act 2017*, any place directed by that Chief Executive.

(f) after section 26A insert:

**26B—No obligation on persons to maintain secrecy**

No obligation to maintain secrecy or other restriction on the disclosure of information applies to a person who is required to disclose information by a direction or requirement issued under section 25, except an obligation or restriction designed to keep the identity of an informant secret.

(fa) section 27A(1), definition of *market participant*—after paragraph (c) insert:

- (d) any person who engages in the transmission or distribution of electricity;

(fb) section 27C(2)(b)—delete paragraph (b) and substitute:

- (b) require a market participant to give any directions of a kind that the market participant may lawfully give (which may include, for example, requiring a market participant to give directions to, or to exercise authority over, another person or body, whether or not that other person or body is also a market participant);

(fc) section 27C—after subsection (2) insert:

- (2a) A direction to a market participant may—
  - (a) require the performance of specific acts or omissions; or
  - (b) require the exercise of specific powers or functions; or
  - (c) require specific outcomes or performance standards.
- (g) section 28(1)—after the penalty provision insert:
  - Expiation fee:
    - (a) in the case of a natural person—\$1 000; or
    - (b) in the case of a body corporate—\$5 000.

## **Part 2—Environment Protection Act 1993**

### **2—Modification of Environment Protection Act 1993**

Section 71A of the *Environment Protection Act 1993* applies with the following modification:

Section 71A(b)—delete paragraph (b) and substitute:

- (b) in any other case—
  - (i) in cash; or
  - (ii) by way of electronic funds transfer to a bank account or credit card account; or
  - (iii) in a manner prescribed by regulation.

## **Part 2A—National Electricity (South Australia) Act 1996**

### **2A—Modification of National Electricity (South Australia) Act 1996**

Part 5 of the *National Electricity (South Australia) Act 1996* applies with the following modification:

After section 15A insert:

#### **15B—Regulations varying rules under the National Electricity Law**

- (1) The Governor may, for the purpose of protecting the reliability and security of the South Australian power system, make regulations modifying the operation of the rules under the National Electricity Law (insofar as they apply as part of the law of South Australia).
- (2) Section 21 of the *COVID-19 Emergency Response Act 2020* applies to a regulation made under this section as if it were a regulation made under that Act.

### **Part 3—Parliamentary Committees Act 1991**

#### **3—Modification of *Parliamentary Committees Act 1991***

- (a) Part 6 Division 1 of the *Parliamentary Committees Act 1991* applies with the following modification:

After section 16A insert:

#### **16AA—Public works—COVID-19 pandemic**

- (1) Section 16A(2) does not apply to a public work—
- (a) if the Governor has, by proclamation, on the recommendation of a Minister, declared that section 16A(2) does not apply to the work; or
  - (b) if—
    - (i) a Minister has advised the Public Works Committee that they are satisfied that the public work is a prescribed public work; and
    - (ii) not less than 5 days has elapsed since the Committee completed its inquiry in relation to the public work; and
    - (iii) no final report of the Committee relating to the public work has been presented to its appointing House or published under subsection (4).
- (2) A Minister may only make a recommendation to the Governor for the purposes of subsection (1)(a) if the Minister is satisfied that—
- (a) the public work is a prescribed public work; and
  - (b) the Public Works Committee has not inquired, or will not be able to inquire, into the work, or has not reported, or will not be able to report, on the work, as required by section 16A(2) within an appropriate timeframe.
- (3) Despite section 16A, a contract may be awarded in relation to a public work that a Minister is satisfied is a prescribed public work without the Public Works Committee having inquired into the work (but nothing in this subsection permits commencement of construction of the public work).

- (4) Section 17(7) does not apply to the Public Works Committee and that Committee may, at any time after it adopts an interim or final report—
- (a) present the report to the Speaker of the House of Assembly; and
  - (b) the Speaker of the House of Assembly may, after consultation with the Committee, authorise the publication of the report prior to its presentation to the House of Assembly.
- (5) In this section—
- prescribed public work* means a public work that is necessary as a result of circumstances brought about by the COVID-19 pandemic (or as a result of any measures taken to address the COVID-19 pandemic) or to provide economic stimulus during and after the COVID-19 pandemic.
- (b) Part 6 Division 2 of the *Parliamentary Committees Act 1991* applies with the following modification:

After section 24 insert:

#### **24A—Meetings during COVID-19 pandemic**

Despite any other provision of this Act—

- (a) a requirement for a committee to hold any meeting will be taken to be satisfied if the meeting is held remotely using 1 or more of (including a combination of) the following means of communication:
  - (i) audio visual;
  - (ii) audio; and
- (b) a requirement for members of a committee to attend or be present at any meeting will be taken to be satisfied if—
  - (i) each participating member is able to communicate contemporaneously with each other participating member when making any deliberation, or taking part in any vote, during the meeting; and

- (ii) when a witness gives oral evidence to the committee, the members of the committee constituting a quorum are able to hear the witness contemporaneously and question the witness within the hearing of each other committee member constituting the quorum.

### **Part 3A—*Planning, Development and Infrastructure Act 2016***

#### **3A—Modification of *Planning, Development and Infrastructure Act 2016***

The *Planning, Development and Infrastructure Act 2016* applies with the following modification:

Section 131(8)—delete "4 weeks" and substitute:

15 business days

### **Part 4—*Public Finance and Audit Act 1987***

#### **4—Modification of *Public Finance and Audit Act 1987***

Section 12 of the *Public Finance and Audit Act 1987* applies with the following modification:

Section 12(2)(a)—delete "three per cent" and substitute:

ten per cent

### **Part 5—*South Australian Public Health Act 2011***

#### **5—Modification of *South Australian Public Health Act 2011***

The *South Australian Public Health Act 2011* applies with the following modifications:

(a) section 66—after subsection (2) insert:

(2a) A direction or requirement under subsection (1) or (2) may be issued in the form of a written instrument or in any other form (including, without limitation, orally, by SMS or email).

(b) section 73(8a)—delete "48" and substitute:

72

(c) section 74(3a)—delete "48" and substitute:

72

(d) section 75(3a)—delete "48" and substitute:

72

(e) section 77(3a)—delete "48" and substitute:

72

- (f) section 77—after subsection (5) insert:
  - (5a) For the purposes of giving effect to an order made under this section in respect of a person, the Chief Public Health Officer or an authorised person may—
    - (a) apprehend and take the person to the place at which the person is to be detained under the order; and
    - (b) restrain the person and otherwise use force in relation to the person as reasonably required in the circumstances; and
    - (c) be assisted by such persons as may be necessary or desirable in the circumstances.
- (g) section 77(6)(b)(i)—delete "48" and substitute:  
72
- (h) section 77(8a)—delete "48" and substitute:  
72
- (i) section 77(8b)(a)—delete "48" and substitute:  
72
- (j) section 77—after subsection (14) insert:
  - (15) In this section—
    - authorised person* means—
      - (a) a police officer; or
      - (b) a person authorised by the Chief Public Health Officer to act as an authorised person under this section.
- (k) section 99(2)—after paragraph (i) insert:
  - (ia) disclosing information in accordance with an authorisation of the Chief Public Health Officer; or

## Legislative history

### Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Legislation amended by principal Act

The *COVID-19 Emergency Response Act 2020* amended the following:

*Emergency Management Act 2004*

*Payroll Tax Act 2009*

*South Australian Public Health Act 2011*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2020	7	<i>COVID-19 Emergency Response Act 2020</i>	9.4.2020	9.4.2020: s 2(1) except ss 7 to 9—30.3.2020: s 2(2)
2020	9	<i>COVID-19 Emergency Response (Bail) Amendment Act 2020</i>	7.5.2020	7.5.2020
2020	14	<b>COVID-19 Emergency Response (Further Measures) Amendment Act 2020</b>	15.5.2020	15.5.2020

### Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	7.5.2020
<b>Pt 1</b>		
s 6		
s 6(1)	amended by 14/2020 s 3(1)	15.5.2020
s 6(2a)	inserted by 14/2020 s 3(2)	15.5.2020
<b>Pt 2</b>		
s 7	substituted by 14/2020 s 4	15.5.2020
s 10A	inserted by 14/2020 s 5	15.5.2020



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s 19		
s 19(2)	(b) deleted by 14/2020 s 6(1)	15.5.2020
s 19(6)		
tenancy provision	amended by 14/2020 s 6(2)	15.5.2020
s 20		
s 20(4)	inserted by 14/2020 s 7	15.5.2020
Sch 2		
Pt AA1	inserted by 14/2020 s 8(1)	15.5.2020
Pt A1	inserted by 9/2020 s 3	7.5.2020
Pt B1	inserted by 14/2020 s 8(2)	15.5.2020
Pt 1		
cl 1	amended by 14/2020 s 8(3), (4)	15.5.2020
Pt 2A	inserted by 14/2020 s 8(5)	15.5.2020
Pt 3		
cl 3	amended by 14/2020 s 8(6)	15.5.2020
Pt 3A	inserted by 14/2020 s 8(7)	15.5.2020
Sch 3	<i>omitted under Legislation Revision and Publication Act 2002</i>	7.5.2020

### Historical versions

7.5.2020



## **ANNEXURE 3 – THE REGULATIONS**

South Australia

## **COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020**

under the *COVID-19 Emergency Response Act 2020*

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#### **Schedule 1—Revocation of *COVID-19 Emergency Response (Commercial Leases) Regulations 2020***

#### **Legislative history**

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### **Part 1—Preliminary**

#### **1—Short title**

These regulations may be cited as the *Covid-19 Emergency Response (Commercial Leases No 2) Regulations 2020*.

#### **2—Commencement**

These regulations come into operation on the day on which section 4 of the *COVID-19 Emergency Response (Further Measures) Amendment Act 2020* comes into operation.

#### **3—Interpretation**

- (1) In these regulations, unless the contrary intention appears—  
*Act* means the *Covid-19 Emergency Response Act 2020*;  
*affected lessee*—see subregulation (2);

**business** means an undertaking (whether or not carried on with a view to profit) involving the manufacture, sale or supply of goods or services;

**commercial lease** means—

- (a) a retail shop lease within the meaning of the *Retail and Commercial Leases Act 1995*; or
- (b) a lease under the *Landlord and Tenant Act 1936*, including a retail shop lease to which Part 4 of that Act applies; or
- (c) any other agreement under which a person grants or agrees to grant another person for value a right to occupy premises for carrying on a business—
  - (i) whether or not the right is a right of exclusive occupation; and
  - (ii) whether the agreement is expressed or implied; and
  - (iii) whether the agreement is oral or in writing, or partly oral and partly in writing,

but does not include—

- (d) a lease under the *Pastoral Land Management and Conservation Act 1989*; or
- (e) a lease under the *Crown Land Management Act 2009*;

**Commissioner** means the person holding or acting in the office of Small Business Commissioner;

**Court** means the Magistrates Court;

**defer**, in relation to rent payable under a commercial lease, means to put off a liability or obligation of a lessee to pay rent to a later day or time than it would otherwise arise;

**JobKeeper payment** means a payment under the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth;

**lessee** means the person who has the right to occupy premises under a commercial lease;

**lessor** means the person who grants the right to occupy premises under a commercial lease;

**outgoings** has the same meaning as in the *Retail and Commercial Leases Act 1995*;

**party** to a commercial lease means the lessor or the lessee under the commercial lease;

**prescribed action** means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court for any of the following:

- (a) eviction of the lessee from premises the subject of the commercial lease;
- (b) exercising a right of re-entry to premises the subject of the commercial lease;
- (c) recovery of land;
- (d) distraint of goods;
- (e) forfeiture;
- (f) damages;
- (g) requiring a payment of interest on unpaid rent otherwise payable by a lessee;

- (h) recovery of the whole or part of a security bond under the commercial lease;
- (i) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease;
- (j) possession;
- (k) termination of the commercial lease;
- (l) any other remedy otherwise available to a lessor against a lessee at common law or under the law of this State;

**prescribed period** means the period—

- (a) beginning on 30 March 2020; and
- (b) ending on 30 September 2020;

**relevant Act** means—

- (a) the *Real Property Act 1886*; and
- (b) the *Retail and Commercial Leases Act 1995*; and
- (c) the *Landlord and Tenant Act 1936*;

**relevant dispute**, in relation to a commercial lease, means—

- (a) a dispute in relation to whether or not, for the purposes of the Act and these regulations, a lessee is suffering financial hardship as a result of the COVID-19 pandemic; or
- (b) a dispute in relation to the provision of rent relief during the prescribed period (including a failure of a party to a lease to take part in a negotiation in respect of the provision of rent relief); or
- (c) a dispute in relation to issues that have occurred in relation to the COVID-19 pandemic—
  - (i) arising from, or related to, the operation of these regulations; or
  - (ii) arising from, or related to, the commercial lease; or
  - (iii) related to any other matter relevant to the occupation of the premises or to a business conducted at the premises the subject of the commercial lease;

**relevant year** means—

- (a) the 2018/2019 financial year; or
- (b) a 12 month period or such lesser period as determined by the Court; or
- (c) a 12 month period or such lesser period determined by the Minister by notice in the Gazette;

**rent relief** means any form of relief in respect of the liability or obligation of a lessee under a commercial lease to pay rent (including waiver or deferral of rent);

**waiver**, in relation to rent payable under a commercial lease, means the extinguishment of a liability or obligation of a lessee to pay rent.

- (2) A lessee is an *affected lessee* if—
  - (a) the lessee is suffering financial hardship as a result of the COVID-19 pandemic; and
  - (b) the following turnover in a relevant year was less than \$50 million:
    - (i) if the lessee is a franchisee—the turnover of the business conducted at the premises the subject of the commercial lease;
    - (ii) if the lessee is a corporation that is a member of a group—the turnover of the group;
    - (iii) in any other case—the turnover of the business conducted by the lessee at the premises the subject of the commercial lease.
- (3) For the purposes of subregulation (2) corporations constitute a group if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (4) To avoid doubt, a reference in these regulations to turnover of a business includes any turnover derived from Internet sales of goods or services.
- (5) For the purposes of these regulations, a lessee will be taken to be suffering financial hardship as a result of the COVID-19 pandemic if the lessee is eligible for, or receiving, a JobKeeper payment in respect of the business of the lessee (whether in their capacity as an employer or on their own behalf).

#### 4—Objectives

The objectives of these regulations are, having regard to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* published on 7 April 2020—

- (a) to implement temporary measures to apply to parties to certain commercial leases related to circumstances brought about by the COVID-19 pandemic; and
- (b) to provide for mechanisms to resolve disputes concerning those leases.

#### 5—Application of regulations

- (1) Despite any provision of a relevant Act, or any other Act or law, the provisions of these regulations apply during the prescribed period in relation to a commercial lease, other than a lease entered into after the commencement of the prescribed period, unless that lease is a lease entered into by means of an option to extend or renew the lease or any other extension or renewal of an existing lease on the same or substantially similar terms as the existing lease.
- (2) The provisions of a commercial lease will be taken to be modified to the extent necessary to give effect to the operation of these regulations.

## Part 2—Provisions relating to parties to commercial leases

### 6—Obligation of parties to commercial leases to negotiate in good faith

The parties to a commercial lease and any guarantor or other person with an interest in the lease must make a genuine attempt to negotiate in good faith the rent payable under, and other terms of, the commercial lease during the prescribed period, having regard to—

- (a) the economic impacts of the COVID-19 pandemic on the parties to the lease; and
- (b) the provisions of the Act and these regulations; and
- (c) the provisions of the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* published on 7 April 2020.

### 7—Prohibitions and restrictions relating to commercial leases

- (1) If a lessee is an affected lessee, a lessor cannot take any prescribed action against the lessee on grounds of a breach of the lease during the prescribed period consisting of—
  - (a) a failure to pay rent; or
  - (b) a failure to pay outgoings; or
  - (c) the business operating under the lease not being open for business during the hours specified in the lease.
- (2) Subregulation (1) does not apply to or in respect of a failure to pay rent if the amount of rent payable under the lease is, during the prescribed period—
  - (a) agreed by the parties under a mediation under regulation 8; or
  - (b) determined by the Court under regulation 9,and the failure to pay rent constitutes a breach of the agreement or order of the Court (as the case may be).
- (3) An act or omission of a lessee required under the laws of the State in response to the COVID-19 pandemic—
  - (a) will be taken not to amount to a breach of a commercial lease; and
  - (b) will not constitute grounds for termination of the commercial lease or the taking of any prescribed action by the lessor against the lessee.
- (4) If, during the prescribed period, a lessee under a commercial lease is an affected lessee, the rent payable under a commercial lease (other than rent or a component of rent determined by reference to turnover) must not, unless otherwise agreed between the lessor and the lessee, be increased.
- (5) A lessor must not, during the prescribed period, require an affected lessee to pay land tax or reimburse the lessor for the payment of land tax in respect of a commercial lease.



- (6) Subregulation (5) does not limit the operation of a term of a commercial lease, or a provision of an Act, that otherwise prohibits the payment of land tax or reimbursement of land tax to a lessor by a lessee.
- (7) If a lessor receives a waiver of land tax or a relief payment under a scheme administered by the Treasurer for the purposes of providing land tax relief to persons suffering financial hardship as a result of the COVID-19 pandemic, the lessor must pass on the benefit of the waiver or relief payment in the form of a waiver of rent payable by an affected lessee under the commercial lease in accordance with the provisions of that scheme.

#### **8—Mediation by Commissioner**

- (1) Subject to subregulation (2), a party to a commercial lease may apply to the Commissioner for mediation of a relevant dispute in relation to a commercial lease.
- (2) A lessee may not apply to the Commissioner for mediation of a relevant dispute in relation to a commercial lease under subregulation (1) unless the lessee is, or is claiming to be, an affected lessee.
- (3) The Commissioner may, in exercising any functions or powers under this regulation in relation to a matter, exercise any of the powers or functions the Commissioner is able to exercise under Part 7 of the *Fair Trading Act 1987* in relation to that matter.
- (4) The Commissioner must issue the parties to a commercial lease the subject of an application under subregulation (1) with a certificate, in the form determined by the Commissioner, stating the names of the parties and—
  - (a) if mediation has failed or is unlikely to resolve the dispute—that the mediation has been terminated without resolution; or
  - (b) if mediation would not be reasonable in the circumstances—that fact; or
  - (c) if a party to the commercial lease refused to participate, or did not participate in good faith, in mediation—that fact.
- (5) To avoid doubt, section 67C of the *Evidence Act 1929* applies in relation to a mediation under this regulation.
- (6) A person must not divulge or communicate personal information, information relating to business processes or financial information obtained in connection with a mediation under this regulation except—
  - (a) with the consent of the person to whom the information relates; or
  - (b) in connection with the administration of the Act and these regulations; or
  - (c) as authorised by the Commissioner; or
  - (d) for the purposes of legal proceedings; or
  - (e) to a police officer or a law enforcement officer of another State, a Territory of the Commonwealth or of the Commonwealth; or
  - (f) as authorised or required by law.

#### **9—Determination of relevant dispute by Court**

- (1) Subject to this regulation, a party to a commercial lease may apply to the Court for resolution of a relevant dispute in relation to a commercial lease.

- (2) A party to a commercial lease may only apply to the Court for resolution of a relevant dispute in relation to a commercial lease if the Commissioner has issued a certificate under regulation 8(4).
- (3) The Court may make a determination as to whether or not a lessee is an affected lessee.
- (4) In making a determination under subregulation (3), the Court may have regard to the following:
  - (a) whether or not the lessee is eligible for, or is receiving, a JobKeeper payment in respect of the business of the lessee (whether in their capacity as an employer or on their own behalf);
  - (b) any reduction in turnover of the business of the lessee (as verified by financial records or statements provided by the lessee) during a specified period as compared with another specified period determined by the Court as being relevant to the circumstances of whether or not the lessee is suffering financial hardship as a result of the COVID-19 pandemic.
- (5) In respect of proceedings under this regulation in relation to a commercial lease, the Court may, subject to this regulation, make 1 or more of the following orders:
  - (a) an order granting rent relief to an affected lessee in relation to payment of rent under the commercial lease;
  - (b) an order requiring the payment of some or all of the rent under a commercial lease into the Court until the lease has been performed;
  - (c) an order requiring that rent paid into the Court be paid out and applied as directed by the Court;
  - (d) an order modifying the terms and conditions of a lease in a manner specified in the order;
  - (e) an order to defer the payment of rent under an affected lease for a specified period not exceeding 24 months from the day on which the order is made;
  - (f) any other orders the Court thinks necessary or desirable to resolve a dispute between the parties to a commercial lease.
- (6) If, during the designated period, the parties to a commercial lease have agreed to vary the terms or modify the operation of the lease (including agreeing to rent relief for the lessee), then an order of the Court may not operate to modify or affect the operation of that agreement insofar as that agreement operated during the designated period (and an order of the Court may, if the Court so determines, operate to modify or affect the operation of that agreement as it purports to operate after the designated period).
- (7) Subject to this regulation, if the Court makes an order under subregulation (5)(a), then at least 50% of the rent relief determined by the Court must be in the form of a waiver of rent.
- (8) In making an order under subregulation (5)(a) the Court must have regard to the following:
  - (a) the obligations of the lessor under the Act, a relevant Act and these regulations;

- (b) the reduction in turnover of the business of the lessee during the prescribed period;
  - (c) whether the lessor has, during the prescribed period, agreed to waive recovery of any outgoings or other expense payable by a lessee under the lease;
  - (d) whether a failure to provide rent relief would compromise the lessee's ability to fulfil the lessee's ongoing obligations under the lease, including the payment of rent;
  - (e) the ability of the lessor to provide rent relief, including any relief provided to the lessor by a third party in response to the COVID-19 pandemic;
  - (f) any reduction by a third party to outgoings in relation to the premises the subject of the lease;
  - (g) any other matter the Court thinks fit.
- (9) Subject to this regulation, if the Court makes an order under subregulation (5)(e), the Court may also make an order extending the term of the lease for the period for which rent is deferred under the order.
- (10) The Court may, at any time, on application by a party to a commercial lease, vary or revoke an order imposed by the Court under this regulation and make such other orders as the Court thinks necessary in the circumstances.
- (11) In any proceedings under this regulation, a certificate issued by the Commissioner under regulation 8(4) will constitute proof, in the absence of proof to the contrary, of the matters so certified.
- (12) In this regulation—
- designated period* means the period—
- (a) beginning on 30 March 2020; and
  - (b) ending on the day on which these regulations come into operation.

#### **10—Prohibition on continuing certain action during prescribed period**

- (1) If a lessee is suffering financial hardship as a result of the COVID-19 pandemic and during the relevant period—
- (a) a lessor has taken or commenced, but not yet completed or finalised, a prescribed action (including a prescribed action that has a periodic or ongoing effect); or
  - (b) a lessor has taken or commenced, but not yet completed or finalised, the performance of any other measure (including a measure that has a periodic or ongoing effect) that the lessor would not have been able to undertake or commence during the prescribed period by virtue of the operation of the Act as in force immediately before these regulations came into operation; or
  - (c) the operation of the terms of a commercial lease has had effect, or has a periodic or ongoing effect, contrary to the operation of the Act as in force immediately before these regulations came into operation,

the action, operation or effect will, insofar as it remains incomplete or ongoing, or has a periodic or ongoing effect, be taken to be stayed or suspended until the end of the prescribed period.

- (2) The Court may, on application by a party to a commercial lease—
- (a) make such orders as it thinks appropriate in the circumstances to mitigate the effect of an action or effect of a matter referred to in subregulation (1), insofar as it has been completed or implemented in whole or in part during the relevant period, on grounds that the lessee has suffered financial hardship as a result of the COVID-19 pandemic; and
  - (b) may make such other orders as it thinks fit.
- (3) In this regulation—
- relevant period* means the period beginning on 30 March 2020 and ending on 9 April 2020.

### **Schedule 1—Revocation of *COVID-19 Emergency Response (Commercial Leases) Regulations 2020***

The *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* (Gazette 16.4.2020 p779) are revoked.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal regulations

Year	No	Reference	Commencement
2020	60	<i>Gazette 15.5.2020 p1383</i>	15.5.2020: r 2