

Establish if the lease is caught by the Commercial Tenancies (COVID-19 Response) Act (CTCR Act)

Does the tenant meet any one of the following 4 criteria (if 'yes', the lease is a 'small commercial lease' and CTCR Act relief measures apply):

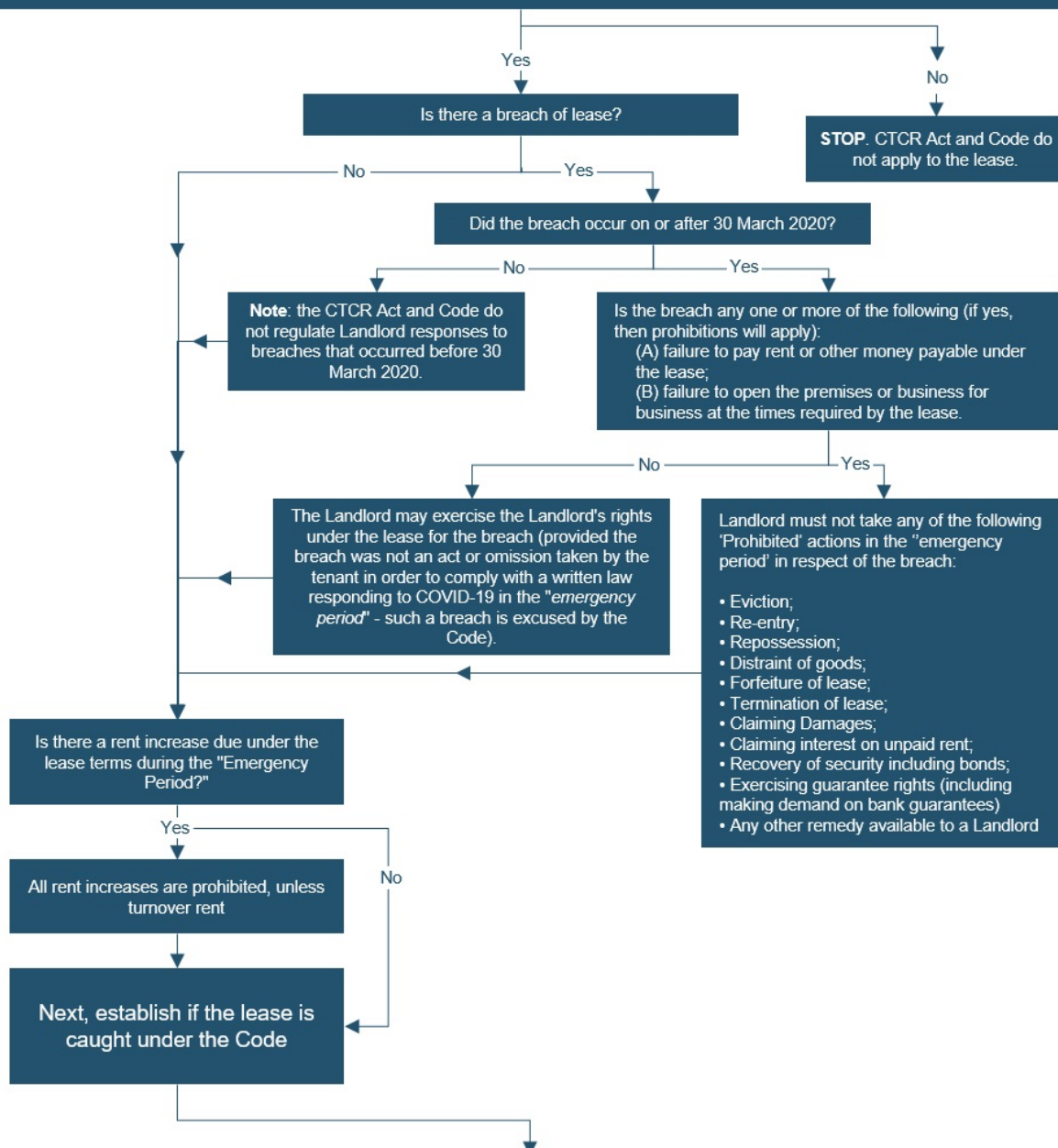
Criteria 1 a retail shop lease as defined in the Commercial Tenancy (Retail Shops) Agreements Act 1985 section 3(1); or

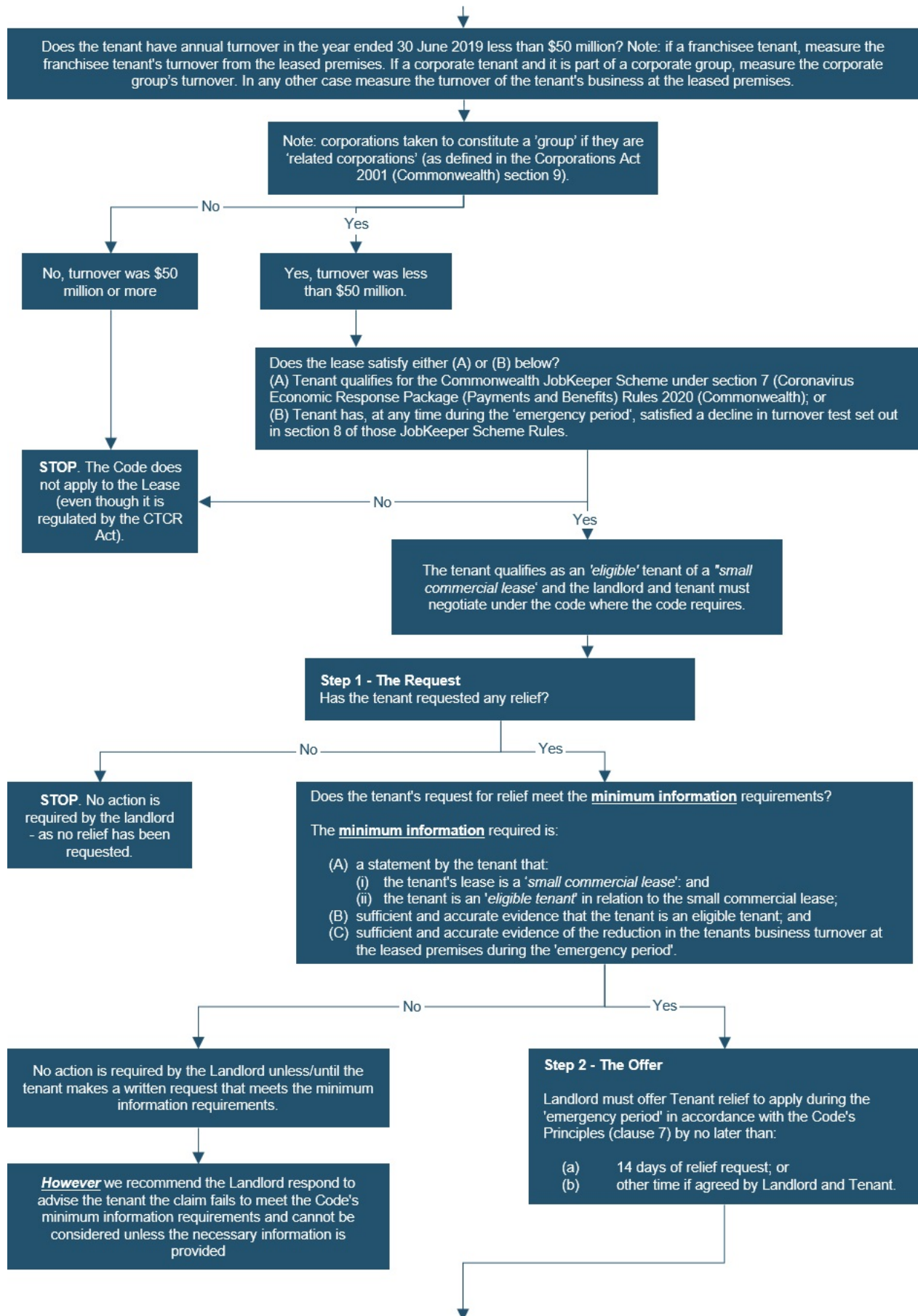
Criteria 2 a small business lease, where the tenant owns or operates a small business and uses the land or leased premises for carrying on that business - where "small business" is defined in the Small Business Development Corporations Act 1983 (WA) to mean a business undertaking which:

- i. is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the Corporations Act 2001 of the Commonwealth and which:
 - A. has a relatively small share of the market in which it competes; and
 - B. is managed personally by the owner or owners or directors, as the case requires; and
 - C. is not a subsidiary of, or does not form part of, a larger business or enterprise; or
- ii. is declared by the Governor to be a 'small business' (none are currently declared); or

Criteria 3 a lease where the tenant is an incorporated association as defined in the Associations Incorporation Act 2015, section 3; or

Criteria 4 any other lease that is of a class prescribed by regulations for the purposes of this definition (although none prescribed currently).





Step 3 - The Negotiation

Landlord and Tenant must then negotiate with a view to agreeing relief to apply during 'emergency period' in accordance with the following Code obligations and principles (Div 2 and 3):

Obligations - The landlord and tenant must each:

- co-operate;
- act reasonably and in good faith;
- act openly, honestly and transparently
- provide sufficient and accurate information that is reasonable in the circumstances of the negotiation
- not make onerous demands for information

Principle 1 - Landlord's offer must apply to the 'emergency period'.

Principle 2 - Landlord's offer must be proportionate to the reduction in tenant's turnover from the leased premises during the 'emergency period' [Code example states a 60% reduction in turnover should result in an offer of at least 60% rent relief.]

Principle 3 - Unless agreed otherwise, the decline in turnover is calculated using the section 8 tests from the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth), with any modifications appropriate to reflect the above Principle 2.

Principle 4 - Rent relief may be up to as much as 100%.

Principle 5 - Unless agreed otherwise, not less than 50% of relieved rent can be by waiver.

Principle 6 - More than 50% of relieved rent must be by waiver if: - by not giving more this would compromise the tenant's capacity to comply with ongoing lease obligations AND the Landlord has the financial capacity to give more than 50% by waiver.

Principle 7 - If the landlord is 'sub lessor' under a 'head lease', any rent relief benefit under the head lease must be passed on to the tenant.

Amortisation Principle - Unless the Landlord and Tenant otherwise agree, deferred rent must be amortised starting on the *earlier of*:

- the day on which the emergency period ends (currently 29 September 2020); and
- the expiry of the term of the lease, and ending on the *later of*:
 - the end of the term of the lease (before any extension under the Code or otherwise); and
 - 24 months.

Extension Principle - The Landlord must (other than with a few exceptions) offer the Tenant an extension of the term of the lease (on the same terms as the existing lease), for a period equivalent to the period for which the rent is deferred.

Is agreement reached by the landlord and tenant?

Yes

Step 4 - Documenting Agreement

Once reached, the agreement must be documented.

No

Is there a 'dispute' about the application of the CTCR Act, the Code, or whether a tenant has failed to pay rent or money as a result of applicable COVID-19 causes

No

Yes

STOP. Cannot start the dispute resolution process under CTCR Act unless there is a 'dispute' that qualifies to be determined under the CTCR Act's dispute resolution process

A party to the 'dispute' may apply to have the 'dispute' determined by SAT (time limits apply) provided that:

- none of the parties has requested the Small Business Commissioner to assist or undertake alternative dispute resolution, and the parties agree to the application to SAT; or
- a certificate has issued from the Small Business Commissioner that alternative dispute resolution is unlikely to resolve the dispute, or would not be reasonable in the circumstances, or has failed.

Optional Process Repeat - Material Change in Tenant's Financial Circumstances

The tenant may request further relief (and so effectively repeat the process) if the tenant's financial circumstances change materially during the 'emergency period'.