

Article Information

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Service: Leasing, Property & Development

Sector: Real Estate

Retail and Commercial Leases: Rent relief under the NSW COVID-19 Regulations

Regulations under the Retail Leases Act 1994 (NSW) and Conveyancing Act 1919 (NSW) give effect to the leasing principles set out in the National Cabinet's 'Mandatory Code of Conduct: SME Commercial Leasing Principles during COVID-19' (Code).

When do the Regulations take effect?

The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (**Retail Regulations**) and Schedule 5 of the *Conveyancing (General) Regulation 2018* (**Commercial Regulations**) (together, **Regulations**) came into effect on 24 April 2020 and each are in force for six months.

The Commercial Regulations mirror the Retail Regulations, except there is a difference in the dispute resolution process.

Which leases do the Regulations apply to?

The Retail Regulations apply to retail shop leases. The Retail Regulations exclude a:

- new lease entered into after 24 April 2020;
- commercial lease within the meaning of Schedule 5 Commercial Regulations; and
- lease under the *Agricultural Tenancies Act 1990* (NSW).

The Commercial Regulations apply to commercial leases, (this includes industrial premises). The Commercial Regulations exclude a:

- lease entered into after 24 April 2020;
- retail shop lease under the *Retail Leases Act 1994* (NSW); and
- lease under the *Agricultural Tenancies Act 1990* (NSW).

The Regulations apply to any extended lease or renewed lease.

Who do the Regulations apply to?

The Regulations apply to an 'impacted lessee'. A lessee is an 'impacted lessee' if the lessee:

- qualifies for the JobKeeper scheme; and
- has less than \$50 million turnover in the 2018/2019 financial year.

Application of Regulation

The Regulations restrict the exercise and enforcement of rights under a lease in relation to circumstances occurring during the 'prescribed period'.

The 'prescribed period' is the period from 24 April 2020 to 24 October 2020.

Lessors prohibitions and restrictions

A lessor must not take any 'prescribed action' against an impacted lessee on the grounds of a breach of lease during the prescribed period due to:

- a failure to pay rent or outgoings; or
- the business under the lease not being open for the trading hours specified in the lease.

Further, a lessor must:

- not increase rent;
- not, after 24 October 2020, take any prescribed action against an impacted lessee due to a failure by the impacted lessee to pay a rent increase; and
- pass on the benefit of any reduction in land tax or other statutory charge or insurance, if the impacted lessee is required under the lease to pay a fixed amount for those charges.

A 'prescribed action' is defined in the Regulations and includes taking action or seeking orders or issuing court or tribunal proceedings to evict the lessee from the premises, exercise a right of re-entry, requiring a payment of interest on or fee or charge in relation to unpaid rent, recovery of a security bond and termination of the lease.

These prohibitions and restrictions adopt for the most part, leasing principles 1, 6, 11, 13 and 14 of the Code.

Obligation to renegotiate rent and other terms of the lease

A party to a lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the lease.

In doing so, the parties must have regard to the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code.

A lessor must not take any 'prescribed action' against an impacted lessee due to failure to pay rent during the prescribed period unless the lessor has renegotiated in good faith the rent payable and other terms of the lease. The parties must have regard to the economic impacts of the COVID-19 pandemic and the leasing principles set out in the Code.

Either the lessor or the impacted lessee may start the negotiation process.

Existing breaches and matters unrelated to the pandemic

The lessor is not prevented from taking action in relation to breaches occurring before or after the prescribed period or for breaches unrelated to the economic impacts of the COVID-19 pandemic (eg damaging property).

For example, if a lessee stopped paying rent before 24 April 2020, a lessor could still take action in relation to this breach.

Dispute resolution

Retail lease

The Retail Regulations extend the dispute resolution processes under the Part 8 of the *Retail Leases Act 1994* (NSW). The Small Business Commissioner acts as the Registrar for Retail Tenancy Disputes and can mediate if:

- a party fails to take part in a renegotiation of rent payable and other terms of a lease;
- there is a dispute regarding rent payable under a lease; or
- there is a dispute concerning the liabilities or obligations of a lease concerning circumstances occurring during the prescribed period.

A retail dispute may not be the subject of proceedings before any court (including a tribunal) unless the Registrar of Retail Tenancy Disputes has certified in writing that mediation has failed to resolve the dispute or the court is otherwise satisfied that mediation is unlikely to resolve the dispute.

Commercial lease

The Commercial Regulations establish the Small Business Commissioner as a mediator for disputes. The lessor may not seek to recover possession of the premises, terminate the lease or exercise or enforce any other right of the lessor until the Small Business Commissioner certifies in writing that mediation offered to be conducted by it has failed to resolve the dispute and give reasons for the failure.

Further proceedings - retail leases and commercial leases

If a dispute progresses to a tribunal or court, the relevant tribunal or court must have regard to the leasing principles set out in the Code when considering whether to make a decision or order for recovery of possession of premises, termination of a lease or exercise or enforcement of any other right of the lessor.

The Regulations give effect to the Code by legislating the key aspects of the Code and referencing in notes the relevant leasing principles. However, the Regulations stop short on legislating the terms of the Code verbatim and there are differences between the Code and the Regulations (eg on the period for the relief). The Regulations and the Code provide a framework for negotiations but ultimately require the parties to negotiate in good faith to develop tailored case-by-case solutions for each lease.