

Article Information

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Commercial Leases: Rent relief under the Queensland COVID-19 Regulations

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Regulations) have now commenced to give effect to the National Cabinet Mandatory Code of Conduct: SME Commercial Leasing principles during COVID-19 (Code).

The Regulations are the law which applies in Queensland enacting the Code, which is a guiding set of principles.

The Regulations are generally consistent with the regulations released in other states.

Application to leases - affected leases

The Regulations apply to retail shop leases and leases of other premises used for carrying on business where:

1. the tenant is an SME entity having turnover of less than \$50mil; and
2. the tenant is eligible for the JobKeeper scheme.

There are exceptions including leases under the Land Act and for farming business.

The calculation of turnover for certain tenants has been clarified as follows:

1. Franchises - if the lease between the franchisor and the franchisee is an affected lease, the agreement between the franchisor and owner of the land is also an affected lease; or
2. Related Tenants - if a group of tenants are affiliated and trade in several different locations then the aggregate turnover of all the tenancies is taken into account.

The Regulations also state that turnover does not include grants or assistance given by government to mitigate the effects of COVID-19.

Time period for relief

The operative period for relief under the Regulations is 29 March 2020 to 30 September 2020. This period is known as the **"response period"**.

The Regulations expire on 31 December 2020 which is after the end of the response period. This allows for unresolved lease disputes to take advantage of the dispute resolution process under the Regulations.

Restrictions on landlord during the response period

In the response period a landlord cannot take a **"prescribed action"** against a tenant of an affected lease for:

1. failure to pay rent or outgoings; or
2. failure to trade.

A prescribed action is defined and includes terminating an affected lease, enforcing rights or drawing down on any security.

What a landlord can do

The Regulations do, however, allow a landlord to take a prescribed action where:

1. a tenant does not comply with a negotiated outcome;
2. there is no genuine attempt at negotiation; or
3. the default is not related to COVID-19.

Deferral on increasing the rent

A landlord cannot increase the rent during the response period. This does not prevent a rental review from taking place during the response period, however the increase in rent cannot start to accrue until the response period ends.

This does not apply to reviews which are tied to turnover.

Process to initiate rent relief

Either party may initiate the negotiation of rent relief and other terms of the lease, which triggers an exchange of information which must be accurate and enable the parties to negotiate in a fair and transparent way. Examples of the information required includes:

1. a statement of the rent relief the initiator is seeking;
2. evidence the tenant is an SME tenant;
3. eligibility for participation in the JobKeeper scheme; and
4. statements about turnover which demonstrate a reduction in turnover against a comparable period.

The landlord's offer

Within 30 days after sufficient information has been received the landlord must make the tenant an offer to reduce the rent and agree any other lease changes.

The landlord's offer must calculate the rent reduction by reference to:

1. the reduction in turnover,
2. the extent to which the tenant has been compromised,
3. the landlord's financial position; and
4. any savings in the pass through of rates, land tax and other government charges;

Whilst other factors have been introduced in the Regulation, the percentage reduction in turnover will be a major factor in determining the percentage rent relief which is offered.

Rent waiver

The Regulations make it clear that of the rent relief which is offered, at least 50 % must be waived.

Extension of the term

The landlord must offer an extension of the term, equal to the period of rent relief unless there is a legal or other impediment to granting the extension (eg, the landlord has already agreed to lease the premises to another tenant).

Existing and future agreements

Many landlords and tenants have already agreed rent relief arrangements.

The Regulations state these arrangements are enforceable, even though the arrangement may be inconsistent with the Regulation.

The parties may continue to make agreements which are inconsistent with the Regulations.

The only qualification is that the parties have a right to conduct further negotiations which must be consistent with the Regulations.

Further negotiations

If an agreement has been reached about rent relief and a ground on which an agreement was made changes in a material way, for example turnover does not increase as anticipated, then either party may seek to negotiate a change to that agreement.

Deferred payments

Any payments the landlord and tenant agree to defer:

1. must not attract interest or any other fee (unless the tenant fails to make a deferred payment when due); and
2. must be amortised over at least 2 years but no more than 3 years (and any amortisation period must not start before the end of the response period).

Security deposits may be held by the landlord until all deferred payments are made. The Regulations are silent on whether other security such as bank guarantees may be held pending payment. Any agreement should allow the landlord to hold its security until all deferred payments are made.

Mediation and dispute resolution

If the parties cannot agree, the Regulations require the parties to mediate the dispute with a mediator appointed by the small business commissioner. If mediation fails, the parties have an eligible lease dispute which is heard in QCAT.

What to do

The Regulations make it clear that an agreement:

1. is enforceable even if it is inconsistent with the Regulations; and
2. is only open to renegotiation if the grounds on which the agreement was made changes in a material way.

We recommend any agreement reached about rent relief be clearly recorded in writing. The assumptions relied on by the parties in reaching that agreement should also be recorded.