

30 April 2020

COVID-19 UPDATE: CODE OF CONDUCT FOR COMMERCIAL TENANCIES

The NSW Government has introduced measures to provide financial relief for commercial tenants impacted by the COVID-19 pandemic.

The [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020](#) and Schedule 5 to the [Conveyancing \(General\) Regulation 2018](#) (the **Regulations**) are now in force in NSW, which give effect to the [National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19](#) (the **Code**).

The Regulations introduce a range of new protections for tenants of commercial and retail leases and limit the power of landlords to take steps to enforce terms of a lease during the period prescribed in the Regulations. Landlords and tenants will also be required to renegotiate the terms of a lease in good faith if the tenant qualifies as an “impacted lessee” under the Regulations.

The Regulations apply in NSW from 24 April 2020 until 24 September 2020 (**COVID-19 Pandemic Period**).

What types of leases are covered by the Regulations?

The Regulations apply to almost all commercial tenancies including retail leases.

The Regulations also exclude several classes of commercial leases, including:

- (a) any agricultural or farming lease entered into under the *Agricultural Tenancies Act 1990*; and
- (b) any lease entered into on or after 24 April 2020.

The Regulations will still apply where a lease comes into existence after 24 April 2020 as a result of an exercise of an option or extension of an existing lease.

When will a tenant be protected by the Regulations?

A tenant must meet the definition of an ‘impacted lessee’ to access the new protections available under the Regulations.

A tenant will be an ‘impacted lessee’ if it qualifies for the JobKeeper scheme. You can read more about the JobKeeper scheme in our article [Understanding the JobKeeper wage subsidy](#).

The tenant must also satisfy one of the following turnover conditions:

- (a) **where the tenant is a franchisee:** the turnover for the business which is carried on at the land or premises which is being leased must have been less than \$50 million in the 2018-19 financial year;
- (b) **where tenant is a corporation which is a member of a group:** the turnover of entire group must have been less than \$50 million in the 2018-19 financial year; or
- (c) **where the tenant is neither a franchisee or a corporation:** the turnover of the business conducted by the tenant must have been less than \$50 million in the 2018-19 financial year.

The Regulations also apply to tenants who carry on not-for-profit businesses, such as registered clubs and charities.

What new protections are available to tenants under the Regulations?

The Regulations place a number of restrictions on the actions that a landlord may take against a tenant take under a commercial tenancy. In summary:

- (a) a landlord cannot take enforcement action against a tenant if the tenant fails to pay rent or outgoings, or if the tenant's business cannot operate during the trading hours ordinarily required under the commercial lease during the "prescribed period" (being the period that is six months commencing on 24 April 2020);
- (b) in most cases, a landlord cannot increase the amount of rent payable under a lease; and
- (c) if, under a lease, the lessee is required to pay a fixed amount to their landlord for land tax, council rates, insurance or any other statutory charge, and the amount of that statutory charge is reduced, the landlord must pass on that reduction to the tenant.

The Regulations define 'enforcement action' broadly to include:

- (a) evicting a tenant;
- (b) exercising a right of re-entry or taking possession of the leased premises;
- (c) recovering the land;
- (d) seizing the tenant's property;
- (e) requirement payment of an interest or fee on unpaid rent;
- (f) recovery of damages; and
- (g) terminating the commercial lease.

A landlord cannot take enforcement action against a lessee that has breached a term of a lease as a result of complying with Commonwealth or State law introduced in response to the COVID-19 pandemic.

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For example, a tenant operates a beauty clinic and the lease specifies that the business must trade between 9am and 9pm from Tuesday to Sunday. The landlord cannot take steps against the tenant if a public health order or direction prevents the tenant from maintaining the required hours of operation.

Is a landlord required to comply with a tenant's request to renegotiate rent and other terms of a commercial lease?

Yes. A landlord cannot take enforcement action against a tenant unless the parties have complied with the procedure for renegotiating in good faith the rent and other terms of the lease.

All renegotiation of the rent and other lease terms must be carried out in accordance with the principles set out under the Code. The principles include the following:

1. **Non-payment of rent:** Landlords cannot terminate a commercial lease if a tenant fails to pay rent during the COVID-19 Pandemic Period. Further, a landlord cannot charge a tenant for interest, or any other fee or charge for the non-payment of rent.
2. **Material failure to abide by substantive terms of lease:** Tenants must continue to abide by the terms of their lease, subject to any amendments agreed to by the parties. A landlord can still terminate a lease if the tenant fails to abide by the substantive terms of the lease.
3. **Rent waivers and deferrals:** Landlords cannot refuse a request from a tenant to waive, reduce or defer the amount of rent payable.
4. **Amount of waiver:** Rent must be reduced by at least 50%. If a tenant has suffered a decline in turnover of more than 50%, any reduction in rent must be proportionate to the tenant's decline in turnover.
5. **Payment of deferred rent:** Where the parties have agreed to defer the amount of rent payable, repayment of the deferred rent must be spread over the balance of the lease term and for a period of at least 24 months. Further, a landlord cannot require a tenant to pay deferred rent prior to the conclusion of the COVID-19 Pandemic Period.
6. **Landlord to pass on relief to tenants:** If a landlord benefits from a reduction in a statutory charge (such as land tax), or if a landlord is receiving the benefit of a mortgage repayment deferral, the landlord must share the benefit of that reduction with the tenant.
7. **Outgoings:** If a tenant is unable to trade, landlords should waive expenses and outgoings payable by the tenant during the period that the tenant is unable to trade.
8. **Bonds and security:** Landlords cannot draw on a tenant's bond or security for non-payment of rent during the COVID-19 Pandemic Period.
9. **Lease extensions:** Landlords should provide tenants with an opportunity to extend the term of a commercial lease for a period equivalent to the period of rent deferral or waiver.
10. **Rent freezes:** Landlords must not increase rent payable during the COVID-19 Pandemic Period. However, this restriction does not apply to commercial tenancies under which turnover rent is payable.

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What if a commercial tenant and landlord cannot reach an agreement?

Under the Code, if tenants and landlords are unable to renegotiate the terms of a commercial lease, both parties must attend mediation before the NSW Small Business Commissioner.

A landlord cannot recover possession of the leased premises, terminate the commercial lease or exercise any other right against a tenant without first obtaining a mediation certificate from the NSW Small Business Commissioner.

What recourse is available to a landlord when a tenant breaches their commercial lease?

As discussed above, the Code significantly restricts a landlord's ability to take enforcement action against a tenant for breaching a commercial lease during the COVID-19 Pandemic Period.

However, tenants are still required to abide by the other terms of the lease, subject to any renegotiated terms. Accordingly, landlords may take enforcement action against a tenant for breach of a term of a lease that does not involve non-payment of rent or outgoings.

For example, a landlord may be able to terminate a lease if the tenant has damaged the premises. A landlord would also be able to take enforcement action against a tenant who fails to vacate at the expiry of a fixed term commercial lease.

Further information

Pigott Stinson regularly advises and acts for both landlords and tenants with respect to commercial and retail leases. If you have any questions regarding the matters raised in this article, please contact [Daniel Fleming](#). For enquiries regarding leases generally, please contact [Brent Wilson](#).

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