



COVID-19 Toolkit [Updated]: Rent payments for commercial, retail and industrial leases

My business operates from commercial premises and we have been forced to shut down due to public health orders related to COVID-19 or its roll-on effects. What can I do about rental payments?

Many of our clients have been, or will be, unable to continue their rental payments due to government mandated restrictions or due to a general decline in their revenue because of COVID-19.

Fortunately, the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020 \(NSW\)](#) came into effect on 24 April 2020 (the **Regulation**) to give effect to the recent National Cabinet Mandatory Code of Conduct - SME Commercial Leasing Principles (the **Code**).

Each state or territory is required to incorporate the Code by similar regulation or legislation in order for it to be effective in that state.

The Regulation

The Regulation:

- applies to commercial retail shop leases by creating a new regulation under the *Retail Leases Act 1994* (NSW); and
- applies to non-retail commercial leases by amending the *Conveyancing (General) Regulation 2018* (NSW).

In summary, the Regulation prevents landlords of commercial leases entered into on or before 24 April 2020 (or later if entered into by way of option, renewal, extension) from exercising or enforcing their rights against an 'impacted lessee' by taking a 'prescribed action' against the impacted lessee during a 'prescribed period':

- **impacted lessee** means a tenant that qualifies for the Jobkeeper Program and has a turnover of less than \$50m;
- **prescribed action** includes evicting the impacted lessee, taking possession or re-entering premises, terminating the commercial lease, or claiming damages or interest on overdue rent payments; and
- **prescribed period** means the period between 24 April 2020 and 24 October 2020, inclusive of those dates.

For example, the Regulation:

- prevents landlords from taking action against tenants for failing to pay rent or outgoings, or to open during the prescribed period;
- prevents landlords from increasing rent (unless rent is determined by turnover);
- prevents landlords from taking action against tenants if they breach the terms of their lease in order to comply with a law (**eg** to comply with government direction or occupational health and safety legislation);
- exempts tenants from paying full land tax, statutory charges or insurance, under their commercial lease terms, if these amounts have been reduced;
- requires the parties, on request of either party, to renegotiate the rent payable and other terms of their lease (having regard to the economic impact of the COVID-19 pandemic and the Code);
- provides that dispute resolution procedures under the *Retail Leases Act 1994* (NSW) extend to retail shop leases, and that lessors of non-retail commercial leases must go through the Small Business Commissioner to resolve a dispute before they can exercise their rights;
- provides that courts and tribunals may have regard to the Code when making an order or decision; and
- provides that landlords are still permitted to take a prescribed action for matters unrelated to the economic impacts of the COVID-19 pandemic.

The Code

The Code was recently published to prompt state legislation (**eg** the Regulations described above) and sets out a number of 'leasing principles' to be adopted by landlords and tenants as soon as possible, such as:

- landlords must not terminate leases due to the non-payment of rent;
- tenants must remain committed to the terms of their lease (including those negotiated under the Code), as a material failure to abide with the substantive terms of their lease will forfeit their protections under the Code;
- landlords must offer tenants proportionate reductions in rent (of up to 100%) based on the reduction in the tenants' trade during COVID-19. This may take the form of non-recoverable waivers of rent (of at least 50%) with the remaining rent being deferred (for a period of at least 24 months). The parties can agree to an alternative commercial arrangement if they wish;
- landlords must pass on reductions in outgoings onto tenants;
- repayments should not commence until the earlier of either the pandemic ending or the existing lease expiring and taking into account a reasonable recovery period;
- landlords must not apply fees, interest or other charges to waived rent;
- landlords must not apply fees, punitive interest or other charges on deferrals;

- landlords must not draw-down on bank guarantees, personal guarantees or bonds during the pandemic or a reasonable recovery period thereafter;
- tenants should be given the opportunity to extend their lease for an equivalent period of the rent waived or deferral period to assist them in recovery; and
- landlords must freeze rental increases (unless rent is calculated by turnover) for the duration of the pandemic and a reasonable recovery period thereafter.

If an agreement cannot be reached, landlords and tenants should be referred to the state or territory retail/commercial leasing dispute resolution process for mediation.

Our Corporate team frequently helps manage a variety of lease negotiations and arrangements on behalf of clients. Contact **Gaurav de Fontgalland** or **Nadine John** if you would like to chat.

Please contact



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