



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. On 7 April 2020, the National Cabinet announced the Mandatory Code of Conduct - SME Commercial Leasing Principles (the **Code**), which imposes good faith leasing principles on landlords and tenants in light of the impacts of COVID-19.

The Code

The Code was published to prompt state legislation (**eg** the Regulations discussed below) 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.

Each state or territory is required to incorporate the Code by similar regulation or legislation for it to be effective in that state. This article will focus on New South Wales and Victoria but will also highlight the regulations or legislation now in place in other Australian states or territories which are largely similar.

New South Wales

In New South Wales (NSW), the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020 \(NSW\)](#) came into effect on 24 April 2020 to give effect to the Code.

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 scheme 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.

Victoria

In Victoria, the [*COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020*](#) (Vic) came into effect on 29 March 2020 and will cease on 29 September 2020.

The regulation was made pursuant to the [*COVID-19 Omnibus \(Emergency Measures\) Act 2020*](#) (Vic). It prescribes similar, yet simpler, procedures than in NSW for how parties to 'eligible leases' (retail lease or non-retail commercial in place on or before the Regulations took effect) should negotiate and seek rent relief. These include:

- **Rent relief:** a tenant must make such request in writing stating that:
 - their lease is an 'eligible lease' (that is not otherwise excluded);
 - they are a SME; and
 - they qualify for the JobKeeper scheme.

Provided the request meets the requirements set out in the regulations, the landlord must offer rent relief to the tenant within 14 days. At least 50% of the total relief must be in the form of a waiver and the total relief must take into account the tenant's reduction in turnover, whether a failure to provide sufficient relief would compromise the tenant's capacity to fulfil their lease obligations, and the landlord's financial ability to offer the relief.

- **Variation of lease:** The new terms may be incorporated by a variation of lease or by any other agreement (**ie** and email should suffice).
- **Prohibition on eviction:** Consistent with the NSW Regulation, the landlord is also prohibited from evicting, re-entering or recovering premises or taking recourse against security (otherwise a penalty of \$3,300 applies), or increasing rent.
- **Extending lease terms:** The landlord must also extend the term for a period equivalent to the period for which rent was deferred and should waive and, at the very least, must reduce outgoings proportionately (and reimburse any overpayments).
- **Other:** The parties must keep information confidential, enable the Small Business Commission to mediate disputes and for Victorian Civil and Administrative Tribunal or a Court to make determinations.

Western Australia

In Western Australia, the [Commercial Tenancies \(COVID-19 Response\) Act 2020](#) (WA) applies to certain small commercial leases and came into effect on 23 April 2020. It:

- prohibits landlords from taking 'prohibited action' during the 'emergency period' (which is applied retrospectively from 30 March 2020 until 29 September 2020); and
- enables regulations to adopt the Code by reference.

Currently, such regulations or a WA specific code have yet to be passed. In the meantime, parties may make an application to the WA Small Business Commissioner or the State Administrative Tribunal to resolve financial hardship disputes.

South Australia

In South Australia, [COVID-19 Emergency Response \(Commercial Leases No 2\) Regulations 2020](#) (SA) came into effect 15 May 2020 and applies to commercial leases (including retail shop leases). It incorporates the Code by reference and prevents landlords from taking 'prescribed action' during the 'prescribed period' (ie between 30 March 2020 and 30 September 2020). These regulations permit mediation by the Small Business Commissioner and allows the SA Magistrates Court to make determinations in relation to disputes.

Queensland

In Queensland, the [Retail Shop Leases and Other Commercial Leases \(COVID-19 Emergency Response\) Regulation 2020](#) (Qld) (**QLD Regulation**) came into effect 28 May 2020 and applies to retail and prescribed leases. It:

- prohibits lessors from taking a 'prescribed action' during the 'response period' (ie between 29 March 2020 to 30 September 2020);
- requires the parties to cooperate;
- requires the lessor to make an offer of reduction in rent within 30 days after the lessor receives sufficient information about the request and that offer must provide no less than 50% of the reduction offered in the form of waiver; and
- provides for the deferral of rent, to be negotiated by agreement, which cannot be repaid until after the response period ceases.

Tasmania

In Tasmania, the [COVID-19 Disease Emergency \(Commercial Leases\) Act 2020](#) (Tas) came into force on 3 June 2020 and applies to commercial leases. It prohibits the lessor from taking a 'prohibited lessor action' during the 'financial hardship period' (ie between 1 April 2020 to 1 April 2021, unless otherwise declared) and rent is to be negotiated in accordance with the Code.

The Act:

- does not require the lease to be entered into before the financial hardship period;
- requires each party to bear their own costs in attending to varying a lease for the purpose of the Act; and

- requires each party to keep disclosed information confidential.

Either party may request for mediation or arbitration should a dispute arise.

The Australian Capital Territory

In the ACT, the [Leases \(Commercial and Retail\) COVID-19 Emergency Response Declaration 2020](#) (ACT) came into effect on 12 May 2020, and applies to leases entered into before 7 April 2020. It prohibits lessors from taking a 'prescribed action' for breaches occurring within the prescribed period (**ie** from 1 April 2020 until further notice) without first engaging in good faith negotiations with the lessee, having regard to the Code.

The Northern Territory

In the NT, the [Business Tenancies COVID-19 Modification Notice 2020](#) (NT) was published on 28 April 2020. It prohibits lessors from terminating leases during the 'emergency period' (defined by the *Tenancies Legislation Amendment Act 2020* (NT) which appears to be between 18 March 2020 to 28 June 2020, unless otherwise notified), unless the lessor has, for a period of 30 business days, made good faith efforts to negotiate with the lessee to allow the lessee to remain in the premises.

Cost orders may be issued against either party depending on:

- the merits of the application;
- the reasonableness of the conduct of the parties; or
- whether the lessee's financial situation was substantially affected by COVID-19.

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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