

On 24 April 2020, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (the Regulation) commenced.

The Regulation amends the current retail leases and conveyancing legislation in New South Wales to give effect to the National Code of Conduct.

Application of the Regulation

The Regulation applies to both retail leases and commercial leases between landlords and “impacted tenants”:

1. Entered into on or before 24 April 2020
2. Entered into after 24 April 2020 if the lease is a result of renewal or extension of an existing lease on the same terms as the existing lease

What is an “impacted tenant”?

An “impacted tenant” is defined under the Regulation to mean a tenant:

1. Who qualifies for the JobKeeper Programme of the Commonwealth government
2. Whose turnover in the 2018-19 financial year was less than AU\$50 million

How is turnover calculated?

The AU\$50 million annual turnover threshold test applies as follows:

1. The turnover test ordinarily applies to the turnover generated from the business conducted by the tenant
2. If the tenant is a franchisee, the turnover test applies to the turnover of the business conducted at the leased premises
3. If the tenant is a company within a corporate group, the turnover test applies in respect of aggregated turnover of the group, rather than of just the tenant entity
4. Turnover will be calculated to include any turnover derived from internet sales of goods or services

Operation of the Regulation

The Regulation commenced on 24 April 2020 and will apply for a period of six months, being the “prescribed period” and does not apply retrospectively.

Overview of the Regulation

Restriction on taking “Prescribed Action”

A landlord is restricted from taking “prescribed action” under a lease against an impacted tenant on the grounds of a breach of the lease for rental and outgoing arrears or failure to keep the business operating under the lease open in accordance with the terms of its lease.

“Prescribed action” is defined to include a full range of actions ordinarily available to a landlord upon breach by a tenant, including termination, eviction, forfeiture, damages, seizure of goods, calling on security or taking action against guarantors.

Obligation on parties to renegotiate rent and other terms in good faith

A landlord is not entitled to unilaterally take “prescribed action” against an impacted tenant where the tenant has failed to pay rent during the prescribed period if:

1. The tenant under a lease is an impacted tenant
2. Any party to the lease submits a request to the other parties to renegotiate the rent and other terms of the lease
3. After receiving the request, the parties do not renegotiate in good faith the rent and other terms of the lease having regard to the economic impacts of the coronavirus disease 2019 (COVID-19) pandemic and the leasing principles under the National Code of Conduct

Restriction on rental increases

A landlord is restricted from increasing the rent payable under the lease of an impacted tenant for the duration of the prescribed period.

Obligation to pass on reductions in statutory charges and insurance costs

A landlord is required to pass on the cost saving of any reduction in statutory charges and insurances payments to an impacted tenant.

Mediation

A landlord is required to submit to mediation by the Small Business Commissioner to resolve any dispute arising from an impacted tenant’s lease (including a failure to agree in relation to the renegotiation of rent) before a landlord can take any action to terminate the lease, recover possession of the premises or exercise or enforce any other right under the lease.

Preservation of Each Party's Rights to Agree and Exercise of Rights

- The Regulation does not prevent the parties from mutually agreeing to take any action in relation to the lease (including termination or the drawdown of security).
- While the parties are required to have regard to the leasing principles set out in the National Code of Conduct, the Regulation does not prevent the parties from reaching agreement, as between themselves, in relation to the terms of the lease.
- The Regulation does not prevent a landlord taking a prescribed action on grounds that are unrelated to the economic impacts of the COVID-19 pandemic.
- The Regulation does not regulate or restrict the information that a landlord may request in order to determine whether the tenant is an impacted tenant provided that such information is requested in good faith and is reasonably necessary for the purpose of making a determination.

Takeaways for Landlords

Landlords should not take unilateral action that is inconsistent with the Regulation.

Upon receipt of a request from a tenant to renegotiate the rent and other lease terms, a landlord should:

1. Ask the tenant to provide such information as is necessary in order to determine whether the tenant is an impacted tenant
2. Review the current terms of the lease to determine the appropriate form of rental relief or how other lease terms can be renegotiated
3. Engage in good faith negotiations with the tenant to reaching agreement on appropriate and mutually agreed commercial terms

Takeaways for Tenants

If the tenant is an impacted tenant, the tenant should submit a request to the landlord to renegotiate the rent and such other terms of the lease, as appropriate to the tenant's circumstances.

The request should:

1. Include sufficient and accurate information in order to evidence that the tenant is an impacted tenant
2. Provide evidence of the reduction of turnover resulting from the COVID-19 pandemic

If you are unsure how the Regulation will impact you, either as a landlord or a tenant, we would be pleased to discuss further with you.

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