

New South Wales – Commercial tenancies code of conduct explained

21 August 2020

Frequently asked questions about the commercial tenancies code of conduct in New South Wales

Background and National Code

On 7 April 2020, Prime Minister Scott Morrison announced an industry code of conduct (**National Code**) to address the financial impact of COVID-19 on commercial (including retail, office and logistics) tenancies. Each state and territory was tasked with legislating the National Code as appropriate.

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Frequently Asked Questions

State and territory legislation

1. How has the National Code been adopted into NSW law?

On 25 March 2020, the NSW Parliament passed the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) (the Act)*. The Act paved the way for the National Code to be implemented into NSW law by making amendments to the *Retail Leases Act 1994 (NSW)* allowing regulations to be made providing for the following:

- prohibiting the recovery of possession of premises by a landlord or owner of premises or land from a tenant of the premises or land under the relevant Act in particular circumstances;
- prohibiting the termination of a lease or tenancy by a landlord or owner of premises or land under the relevant Act in particular circumstances;
- regulating or preventing the exercise or enforcement of another right of a landlord or owner of premises or land under the relevant Act or an agreement relating to the premises or land in particular circumstances; and
- exempting a tenant or tenant, or a class of tenants or tenants, from the operation of a provision of the relevant Act or any agreement relating to the leasing or licensing of premises or land.

On 24 April 2020, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) (the Regulation)* commenced in NSW. The Regulation created new regulations under the *Retail Leases Act 1994 (NSW) (the Retail Regulation)* and amended the existing *Conveyancing General Regulation 2018 (NSW) (the Commercial Regulation)*, with the effect that the Regulation covers both retail and non-retail commercial leases.

The Regulation commenced on 24 April 2020 and lasts for six months (being automatically repealed on 25 October 2020). As stated at the outset of the Regulation, it gives effect to the National Code by:

- prohibiting and regulating the exercise of certain rights of landlords relating to the enforcement of certain leases during the COVID-19 pandemic period, and
- requiring, in response to the COVID-19 pandemic, that landlords and tenants renegotiate the rent and other terms of those leases in good faith having regard to the leasing principles set out in the National Code, before any legal enforcement action of the terms of those commercial leases can be commenced.

On 3 July 2020, the NSW Parliament published amendments to the Regulation (**Amending Regulation**), with the intention of providing further clarity and guidance based on industry lobbying. The amendments include:

- amendments which clarify Parliament's intention that the Regulation apply to impacted lessees not all lessees. For example, clause 6(5) of the Regulation will now refer to an 'impacted lessee' rather than a 'lessee';
- the insertion of new clauses 7(3A) and (3B), which require impacted lessees to provide lessors with a statement to the effect that the lessee is an impacted lessee and evidence that the lessee is an impacted lessee. If the impacted lessee does not provide such a statement and evidence of their impacted lessee status, the lessor is deemed to have complied with these requirements; and
- the insertion of a new clause 11 that clarifies the new evidentiary requirements extend to renegotiations that commenced but were not completed before the amendments commenced. Under the Retail Regulation, the requirements do not extend to a matter for which a retail tenancy claim has been made pursuant to section 71 of the *Retail Leases Act 1994*. Under the Commercial Regulation, they do not extend to proceedings which have commenced in a court.

2. What are the key issues dealt with in the NSW Regulation?

The Regulation sets out the following key measures:

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- tenant's eligibility for rent relief;
 - prohibited actions, which include that landlords:
 - must not increase rent during the six month period;
 - must not terminate leases for the non-payment of rent;
 - must pass on reductions in land tax and statutory charges; and
 - must freeze rent increases.
 - obligation to renegotiate rent and other terms to commercial leases; and
 - mediation and dispute resolution mechanism.
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Pandemic period

3. When will the Regulation operate?

The Regulation will have effect during the 'prescribed period', which is the period from 24 April 2020 to 24 October 2020. It will automatically be repealed on 25 October 2020.

See: r 1 and 12 of the *Retail Regulation* and r 1 and 10 of the *Commercial Regulation*

Eligibility criteria

4. What types of leases are eligible?

Under the Regulation, an eligible lease includes:

- retail shop leases under the *Retail Leases Act 1994* (NSW) (the definition of which includes licences); and
- any agreements regarding the leasing of premises or land for commercial purposes to which the *Conveyancing Act 1919* (NSW) applies.

Under the Regulation, an eligible lease *does not* include:

- leases entered into after 24 April 2020 (but does apply to options or any other extension or renewal of a lease on the same terms as the existing lease); and
- leases under the *Agricultural Tenancies Act 1990* (NSW).

See: r 3 of the *Retail Regulation*, r 1 of the *Commercial Regulation*

5. Who is an eligible tenant?

An eligible tenant is an impacted lessee who:

- qualifies for the JobKeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth); and
- has turnover in the 2018-2019 financial year of less than \$50 million (this includes internet sales).

As noted above, the Amending Regulation now ensures that the terminology 'impacted lessee' is used consistently throughout the Regulation.

Turnover is generally based on the total business of the tenant, except:

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- if the tenant is a member of a corporate group (i.e. companies that are defined as 'related bodies corporate' under the *Corporations Act 2001* (Cth)), turnover is calculated on a group basis; and
 - if the tenant is a franchisee, turnover is based on the business conducted at the premises or land concerned.

See: r 4 of the *Retail Regulation* and r 2 of the *Commercial Regulation* and r 3 of the *Amending Regulation*

6. Does the Regulation apply to licensees who are in reality tenants?

Yes, for retail licences, provided the licensee satisfies the eligibility criteria set out above.

This is because the definition of "commercial lease" includes licences. A "lessee" is also defined as a person that "has the right to occupy premises or land under a commercial lease". A licensee would be captured by this definition, given they would have the right to occupy the premises or land under a commercial lease.

No, for non-retail licences.

See: r 4 of the *Retail Regulation* and r 2 of the *Commercial Regulation*

Definition of turnover and provision of information

7. How is turnover defined?

Turnover is defined as:

- for franchisees, it is the turnover of the business conducted at the premises or land concerned;
- for entities that are members of a group (i.e. related bodies corporate), it is the group turnover; and
- in any other case, it is the turnover of the business conducted at the premises or land concerned.

Turnover includes internet sales of goods and services.

See: r 4 of the *Retail Regulation* and r 2 of the *Commercial Regulation*

8. What information or documentation must a tenant provide to the landlord in order to establish a reduction in turnover?

The Regulation did not initially set out specific documentation requirements.

The Amending Regulation inserted new provisions which require impacted lessees to provide landlords with a statement to the effect that the lessee is an impacted lessee and evidence that the lessee is an impacted lessee. If the impacted lessee does not provide such a statement and evidence of their impacted lessee status, the landlord is deemed to have complied with their requirements to renegotiate the rent and other terms of the lease. The new evidentiary requirements also extend to renegotiations that commenced but were not completed before the Amending Regulations were published. Under the *Retail Regulation*, the requirements do not extend to a matter for which a retail tenancy claim has been made pursuant to section 71 of the *Retail Leases Act 1994*. Under the *Commercial Regulation*, they do not extend to proceedings which have commenced in a court.

The NSW Small Business Commissioner and Service NSW website has stated that in order to prove eligibility, tenants must provide landlords with:

- evidence of eligibility for JobKeeper (or evidence of at least a 30 per cent decline in turnover if the business is not receiving JobKeeper); and
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- tax returns and/or Business Activity Statements to demonstrate an annual turnover less than \$50 million in 2018-19.

Tenants must also provide the details of what rent relief they are requesting. This could include:

- the percentage of rental reduction;
- the amount of this percentage in dollars per month; and
- an outline of how much the reduction the tenant wishes to waive and/or defer.

Tenants must also provide sufficient documentation to show a decline in turnover greater than 30 per cent in order to calculate rent reductions. Landlords should act reasonably and not place onerous requests on tenants for documentation.

See: [NSW Small Business Commissioner, National Code of Conduct for commercial leases in NSW FAQs, Service NSW, Request a commercial tenancy rent reduction \(for tenants\)](#)

Confidentiality requirements

9. Are landlords and tenants protected under the Regulation against disclosing financially sensitive information?

The Regulation is silent on whether parties are protected against the disclosure of financially sensitive information.

However, r 8(1) of the Retail Regulation imports the operation of Part 8 (and section 69) of the *Retail Leases Act 1994* (NSW). As such, in relation to retail leases, statements made and documents provided during the course of mediation are confidential and are not able to be adduced as evidence in legal proceedings.

See: *r 8(1) of the Retail Regulation*

Application of leasing principles

Good faith obligations

10. What is the obligation on a party to act in 'good faith'?

Parties are under a general obligation to renegotiate in good faith the rent payable under, and other terms of, the commercial lease.

This general obligation requires the parties to negotiate with a spirit of commercial cooperation and willingness, propriety and honesty. Typically, this will require the parties to:

- disclose material facts (keeping in mind their obligations under s 18 of the *Australian Consumer Law*);
- not provide false information in the course of the negotiations;
- not frustrate the negotiation process (such as by refusing to meet, or refusing to provide documents); or
- threatening a future breach of contract.

However, this obligation does not require the parties to ignore their commercial interests or their strict legal rights.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

Rent relief process

11. What is the process for initiating rent relief?

The Regulation sets out the framework for landlords and eligible tenants to negotiate rent relief as follows:

- any party to the lease may request the other party to renegotiate the rent payable under, and other terms of, the commercial lease;
- a party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease; and
- new provisions under the Amending Regulation mean that in order to properly initiate rent relief, tenants must provide the landlord with adequate documentation and evidence that they are an 'impacted lessee.' If the impacted lessee fails to provide such information, the landlord will be deemed to have complied with negotiation requirements, and the process for initiating or providing rent relief may be discontinued. The particular documentation and statements that an impacted lessee must provide are outlined in full at question 8 above.

See: r 7 of the Retail Regulation and r 5 of the Commercial Regulation, [NSW Small Business Commissioner, National Code of Conduct for commercial leases in NSW FAQs, Service NSW, Request a commercial tenancy rent reduction \(for tenants\)](#)

12. What factors does a landlord need to take into consideration in making a rent relief offer to a tenant?

The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to:

- the economic impacts of the COVID-19 pandemic; and
- the leasing principles set out in the National Code (principles 3-5, 7-10 and 12 are highlighted).

As the Regulation only requires parties to 'have regard' to the National Code's leasing principles, the following requirements of the National Code are not mandatory:

- proportionate rent reductions of up to 100% of the rent payable (in the form of waivers and deferrals);
- rental waivers no less than 50% of the total rental reduction; and
- amortisation of deferrals over the balance of the lease term and for no less than 24 months
- landlords should share the benefits received due to the deferral of loan payments;
- repayment should occur over an extended period of time;
- landlords should seek to waive recovery of any other expenses payable;
- tenants should be able to extend their lease for the equivalent period of any waiver or deferral; and
- no fees/charges/interest should be applied in respect of rental waivers or deferrals.

See: r 7(4) and 9 of the Retail Regulation and r 5(4) and 7 of the Commercial Regulation

13. What types of relief are covered by 'rent relief'?

The Regulation does not dictate the type of rent relief that a landlord must offer. Nonetheless, as stated above, the Regulation requires parties to 'have regard' to the leasing principles set out under the National Code.

As mentioned above, under the National Code, the leasing principles that deal with rent relief stipulate:

- proportionate rent reductions of up to 100% of the rent payable (in the form of waivers and deferrals);
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- rental waivers no less than 50% of the total rental reduction; and
 - amortisation of deferrals over the balance of the lease term and for no less than 24 months
 - landlords should share the benefits received due to the deferral of loan payments;
 - repayment should occur over an extended period of time;
 - landlords should seek to waive recovery of any other expenses payable;
 - tenants should be able to extend their lease for the equivalent period of any waiver or deferral; and
 - no fees/charges/interest should be applied in respect of rental waivers or deferrals.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

14. What percentage of the rent relief offered must in the form of a waiver?

As above.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

15. Do rent reductions have to be proportionate to the tenant's reduction in trade during the COVID-19 pandemic period?

As above.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

16. Do repayments of rental deferrals by the tenant have to be amortised over a certain period?

As above.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

Lease extension

17. Do landlords need to offer a lease extension to tenants?

As above.

See: *r 7 of the Retail Regulation and r 5 of the Commercial Regulation*

18. What fees, charges, or interest (if any), can be applied in respect of rental waivers or deferrals?

As above.

The definition of prescribed action also explicitly prohibits landlords from requiring the payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant. There are a number of exceptions, which allow landlords to take prescribed action. These are set out below.

See: r 3 and 7 of the Retail Regulation and r 1 and 5 of the Commercial Regulation

Pre-agreed rent relief and subsequent rent relief

19. Can a tenant make more than one request for rent relief?

The Regulation is silent on whether a tenant can make more than one request for rent relief.

20. What happens where the landlord and tenant have already agreed on rent relief prior to the Regulation coming into force?

If parties have already agreed to rent relief, it will not be affected insofar as parties are able to agree to take any action in relation to a commercial lease (including action that is otherwise prohibited).

See: r 3 and 7 of the Retail Regulation and r 1 and 5 of the Commercial Regulation

Prohibited enforcement actions

21. What actions are landlords prohibited from taking?

Landlords are prohibited from taking 'prescribed action'. Prescribed action means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following:

- eviction of the tenant from premises or land the subject of the lease;
- exercising a right of re-entry to premises or land the subject of the lease;
- recovery of the premises or land;
- distraint of goods;
- forfeiture;
- damages;
- requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant;
- recovery of the whole or part of a security bond under the lease;
- performance of obligations by the tenant or any other person pursuant to a guarantee under the lease;
- possession;
- termination of the lease; and
- any other remedy otherwise available to a landlord against a tenant at common law or under the law of NSW.

See: r 3 of the Retail Regulation and r 1 of the Commercial Regulation

22. When may a landlord take enforcement action against a tenant?

There are three exceptions to the prohibitions on prescribed action:

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- a landlord may take or continue any prescribed action against an impacted tenant for a failure to pay rent during the prescribed period, if they have first renegotiated with the tenant the rent payable, and other terms of, a commercial lease, based on the requirements of the Regulation. As noted above, if the tenant does not comply with new evidentiary requirements for proving their entitlement to rent relief, the landlord will be taken to have complied with their obligations to negotiate with the tenant;
 - a landlord can take prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. For example, the Regulation notes that landlord's may terminate a lease if the tenant has breached the lease by damaging the premises or fails to vacate the premises at end of the term; and
 - landlords and tenants can agree to take any action in relation to a commercial lease (including the landlord taking any prescribed action or the parties agreeing to terminate the commercial lease).

Further to the above, an act or omission of a tenant required under a law of the Commonwealth or the State in response to the COVID-19 pandemic is taken not to amount to a breach of a commercial lease, and does not constitute grounds for termination of the lease or the taking of any prescribed action by the lessor against the lessee.

See: r 6, 7 and 10 of the Retail Regulation and r 4, 5 and 8 of the Commercial Regulation

Arrears

23. What obligation do landlords have to tenants under the Regulation where there are existing (pre COVID-19) arrears or the tenant is in breach of the lease?

As noted above, nothing in the Regulation prevents a landlord from taking prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic. As an example, the Regulation notes that landlord's may terminate a lease if the tenant has breached the lease by damaging the premises or fails to vacate the premises at end of the term.

See: r 10 of the Retail Regulation and r 8 of the Commercial Regulation

Outgoings

24. Is a landlord required to pass on any reduction in outgoings to the tenant?

If a tenant is required to pay land tax or any other statutory charge under the lease (such as local council rates) or insurance payable by a landlord and the amount of the land tax or other statutory charge or insurance payable is reduced, the tenant is exempted from the operation of the provision to the extent of the reduction.

See: r 6(4) of the Retail Regulation, r 4(4) of the Commercial Regulations

Security

25. Can a landlord draw on a tenant's security for non-payment of rent?

Landlords are prohibited from taking certain prescribed action, including recovering the whole or part of a security bond under the lease. Nonetheless, this is subject to the exemptions outlined above. For example, a landlord may draw on a tenant's security for the non-payment of rent in the following circumstances:

- where they have first renegotiated the rent payable, and other terms of, a commercial lease with the tenant, based on the requirements of the Regulation;
 - where they are drawing on the security for a breach not related to the economic impacts of the COVID-19 pandemic. For example, for pre-existing arrears; and
 - where the landlord and tenant agree to the landlords drawing on the tenant's security.
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See: r 6, 7 and 10 of the Retail Regulation and r 4, 5 and 8 of the Commercial Regulation

Rent increase freeze

26. Can landlords increase the rent during the COVID-19 pandemic period?

The Regulation prohibits rent increases for impacted tenants during the prescribed period. This effectively suspends all fixed, consumer price index, market review and other rent increases from coming into effect during the prescribed period, but does provide an exception when rent or a component of rent is determined by reference to turnover.

See: r 6(2) and 6(3) of the Retail Regulation and r 4(2) and 4(3) of the Commercial Regulation

Unpaid rent deferrals

27. Can landlords claim unpaid rent deferrals at the end of a lease?

Yes. As stated above, parties are only required to 'have regard' to leasing principle 5 of the National Code, which requires that the payment of rental deferrals must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is greater, unless otherwise agreed by the parties.

See: r 7 of the Retail Regulation and r 5 of the Commercial Regulation

Reduced trade

28. Can tenants be penalised for reduced opening hours or cessation of trade?

No. The Regulation contains a provision that explicitly prohibits a landlord taking any 'prescribed action' against a tenant on the grounds of a breach of a lease during the prescribed period that consists of the business operating under the lease not being open for business during the hours specified in the lease.

As outlined above, 'prescribed' action is defined to include:

- eviction of the tenant from premises or land the subject of the lease;
- exercising a right of re-entry to premises or land the subject of the lease;
- recovery of the premises or land;
- distraint of goods;
- forfeiture;
- damages;
- requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a tenant;
- recovery of the whole or part of a security bond under the lease;
- performance of obligations by the tenant or any other person pursuant to a guarantee under the lease;
- possession;
- termination of the lease; and
- any other remedy otherwise available to a landlord against a tenant at common law or under the law of NSW.

There are a limited number of exceptions, which allow a landlord to take prescribed action against a tenant. These include where the breach is not related to the economic impacts of COVID-19, the landlord and tenant have agreed that the landlord may take the prescribed action and where the landlord has attempted to engage in the negotiation process in relation to rent relief that is set out under the Regulation, but this has failed.

See: r 3, 6, 7 and 10 of the Retail Regulation and r 1, 4, 5 and 8 of the Commercial Regulation

Dispute resolution and mediation

29. If a leasing dispute arises, do parties have to attend a mediation?

Yes. However, the Regulation sets out a slightly different process for retail and non-retail leases.

- Under the Retail Regulation, Part 8 of the *Retail Leases Act 1994* operates where the dispute concerns a retail tenancy and the parties must first seek to mediate the matter with the Small Business Commissioner.
- Under the Commercial Regulation, the Small Business Commissioner NSW is to convene a mediation and the parties must first seek to mediate the matter.

See: r 8 of Retail Regulation and r 6 of the Commercial Regulation

30. What happens if the mediation process fails?

Yes. However, the process is slightly different for retail and non-retail leases.

- Under the Retail Regulation, if mediation fails under Part 8, the Registrar will issue a certificate of failed mediation and the matter can then be referred for determination as necessary in the NSW Civil and Administrative Tribunal.
- Under the Commercial Regulation, if mediation fails to resolve the dispute, the Small Business Commissioner must certify in writing that mediation has failed to resolve the dispute and give reasons for the failure. After this certificate has been given, a landlord can then seek to exercise its rights under the lease to terminate the commercial lease, seek to recover possession of the premises or land and exercise or enforce any other right of the landlord under the lease.

See: r 8 of Retail Regulation and r 6 of the Commercial Regulation

31. What are the consequences if the landlord or tenant breaches the obligation to negotiate rent relief under the Regulation?

As set out above, if a party breaches their obligations under to negotiate rent relief under the Regulation, a party can seek mediation in the first instance. Where the landlord and tenant are unable to reach an agreement through this process, the parties can pursue action through the NSW Civil and Administrative Tribunal or the civil courts.

There are no civil penalties for non-compliance.

See: r 8 of Retail Regulation and r 6 of the Commercial Regulation

Other obligations

32. Does the Regulation impose any other obligations on landlords and tenants?

Unlike some other jurisdictions, in NSW there are no additional obligations imposed on a landlord and tenant over and above what is described here and in our National Compendium.

Lenders/mortgagees

33. Are there any specific rights or obligations for lenders/mortgagees under the Regulation?

No, the regulation does not set out specific rights or obligations for lenders/mortgagees.

Ineligible tenants

34. What are the expectations on landlords if the tenant falls outside the Regulation?

The intention of the National Cabinet to apply the National Code 'in spirit to all leasing arrangements for affected businesses' is neither reflected nor reinstated in the Regulations.

The objectives of the Regulations are in terms of 'eligible leases' only, which suggests that the Regulations should not have application to any commercial leases which fall outside of the definition of 'eligible lease'.

Therefore, for non-eligible leases, any rent relief arrangements become a matter of commercial negotiation between a landlord and a tenant.

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