

South Australia - Commercial tenancies code of conduct explained

21 August 2020

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

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 SA law?

On 9 April 2020, the *COVID-19 Emergency Response Act 2020 (SA)* (**the Act**) came into effect, followed by the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020 (SA)* on 16 April 2020. The National Code was not implemented by (or mentioned in) the Act or the initial regulations.

On 15 May 2020, the Act was amended by the *COVID-19 Emergency Response (Further Measures) Amendment Bill 2020*, allowing regulations to be made as are necessary or expedient for the purpose of mitigating the adverse impacts on a party to, or any other person with an interest in, a commercial lease resulting from the COVID-19 pandemic.

Also on 15 May 2020, the *COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 (SA)* (**Regulations**) came into effect, and the initial regulations revoked. The Regulations are taken to have come into operation on 30 March 2020 (i.e. apply retrospectively) and will expire on 9 October 2020.

Having regard to the National Code, the objectives of the Regulations are as follows:

- to implement temporary measures to apply to parties to certain commercial leases related to circumstances brought about by the COVID-19 pandemic; and
 - to provide for mechanisms to resolve disputes concerning those leases.
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2. What are the key issues dealt with in the SA Regulations?

The Regulations set out the following key measures:

- eligibility for rent relief;
 - overarching obligations to negotiate in good faith;
 - prohibited actions, which include that landlords:
 - must not increase rent during the prescribed period (refer below);
 - must not terminate leases for the non-payment of rent or outgoings; and
 - must not require payment or reimbursement of land tax;
 - must pass on reductions in land tax;
 - obligation to renegotiate rent and other terms of commercial leases; and
 - mediation and dispute resolution mechanisms.
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Pandemic period

3. When will the Regulations operate?

The Regulations will have effect during the 'prescribed period', which is the period from 30 March 2020 to 30 September 2020.

See: *r 3(1) and 5(1) of the Regulations*

Eligibility criteria

4. What types of leases are eligible?

Under the Regulations, an eligible lease is a 'commercial lease', being:

- retail shop lease under the *Retail and Commercial Leases Act 1995 (SA)*;
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- a lease under the *Landlord and Tenant Act 1936* (SA); and
 - any other agreement for value for the right to occupy premises for carrying on a business:
 - whether or not the right is a right of exclusive occupation;
 - whether the agreement is express or implied; or
 - whether the agreement is oral or in writing (or partly oral and partly in writing).

Under the Regulations, a commercial lease *does not* include:

- a lease under the *Pastoral Land Management and Conservation Act 1989* (SA); or
- a lease under the *Crown Land Management Act 2009* (SA).

Further, the Regulations will not apply to a commercial lease entered into after the commencement of the prescribed period (31 March 2020), unless that lease is:

- entered into by means of an option to extend or renew the lease; or
- any other extension or renewal of an existing lease on the same or substantially similar terms as the existing lease.

See: *r 3 and 5(1) of the Regulations*

5. Who is an eligible tenant?

An eligible tenant is an 'affected lessee' who:

- is suffering financial hardship as a result of the COVID-19 pandemic; and
- has a turnover in the relevant year of less than \$50 million.

A tenant will be taken to be suffering financial hardship as a result of the COVID-19 pandemic if the tenant is eligible for, or receiving, a JobKeeper payment in respect of the business of the tenant (whether in their capacity as an employer or on their own behalf).

Turnover in a relevant year will be assessed as follows:

- if the tenant is a franchisee —the turnover of the business conducted at the premises the subject of the commercial lease;
- if the tenant is a corporation that is a member of a group (i.e. related bodies corporate) — the turnover of the group; and
- in any other case — the turnover of the business conducted by the tenant at the premises the subject of the commercial lease.

Turnover includes internet sales of goods and services.

The Magistrates Court (**Court**) may make a determination as to whether or not a tenant is an affected lessee and in making such a determination may have regard to:

- whether or not the tenant is eligible for, or receiving, a JobKeeper payment in respect of the business of the tenant (whether in their capacity as an employer or on their own behalf); and
- any reduction in turnover of the business of the tenant (as verified by financial records or statements provided by the tenant) during a specified period as compared with another specified period determined by the Court as being relevant to the circumstances of whether or not a tenant is suffering financial hardship as a result of the COVID-19 pandemic.

See: *r 3(2)-(5) and 9(3)-(4) of the Regulations*

6. Do the Regulations apply to licensees who are in reality tenants?

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

This is because the definition of a 'commercial lease' includes any other agreement for value for the right to occupy premises for carrying on a business. 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.

See: *r 3(1) of the Regulations*

Definition of turnover and provision of information

7. How is turnover defined?

Turnover is not defined in the Regulations, other than to expressly include Internet sales of goods or services.

See: *r 3(4) of the Regulations*

For the purposes of assessing if a tenant is an affected lessee, turnover in a 'relevant year' is calculated as follows:

- if the tenant is a franchisee — the turnover of the business conducted at the premises the subject of the commercial lease;
- if the tenant is a corporation that is a member of a group (i.e. related bodies corporate) — the turnover of the group; and
- in any other case — the turnover of the business conducted by the tenant at the premises the subject of the commercial lease.

'Relevant year' is defined as:

- the 2018/19 financial year; or
- a 12 month period or such lesser period as determined by the Court; or
- a 12 month period or such lesser period determined by the Minister by notice in the Gazette.

See: *r 3(1) and 3(2)(b) of the Regulations*

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

The Regulations do not set out the scope of financial information that a landlord is permitted to request from a tenant to establish a reduction in turnover.

The SA Small Business Commissioner (**SBC**) has published a COVID-19 Guidance Note (**Guidance Note**) which provides guidance as to the scope of financial information that the SBC believes a landlord is permitted to request under the Regulations. The Guidance Note suggests that in order to prove eligibility, tenants should provide landlords with:

- turnover sales information (as evidence of the tenant's sales/revenue decline). In shopping centres there is the option to require the provision of turnover information;
- JobKeeper information (as evidence of the tenant's financial distress);
- BAS Statements (as evidence of the turnover of the tenant's business); and
- any business insurance held (as evidence of any entitlement to payment for interruption to the tenant's business).

The Guidance Note suggests that a landlord may not require from the tenant:

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- profit and loss information; and
 - information such as bank statements and trust account information (in the SBC's view this is not relevant to the landlord as all banks have committed to a six month deferral and/or providing short term loans to businesses. That said, a tenant may wish to provide this information if they believe it will assist negotiations).

See: [COVID-19 Guidance Note – Commercial Information "Requests" by Commercial Lessors](#)

Confidentiality requirements

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

A person must not divulge or communicate personal information, information relating to business processes or financial information obtained in connection with a mediation under the Regulations, except for:

- with the consent of the person to whom the information relates;
- in connection with the administration of the Act and Regulations;
- as authorised by the SBC;
- for the purposes of legal proceedings;
- to a police officer or a law enforcement officer; or
- as authorised or required by law.

See: *r 8(6) of the Regulations*

Application of Leasing Principles

Good faith obligations

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

The parties to a commercial lease are under a specific obligation to negotiate in good faith the rent payable under, and other terms of, the commercial lease during the prescribed period having regard to:

- the economic impacts of the COVID-19 pandemic on the parties to the lease;
- the provisions of the Act and the Regulations; and
- the provisions of the National Code.

The obligation to act in good faith applies to both the landlord and tenant (as well as any guarantor or any person with an interest in the lease) and all commercial leases (not just leases where the tenant is an 'affected lessee').

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 6 of the Regulations*

Rent relief process

11. What is the process for initiating rent relief?

The Regulations do not dictate a process for initiating rent relief, however, as above, there must be a genuine attempt by the parties to negotiate in good faith the rent payable under, and other terms of, the commercial lease during the prescribed period.

See: r 6 of the Regulations

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

As above, parties are to negotiate the rent payable under, and other terms of, the commercial lease having regard to:

- the economic impacts of the COVID-19 pandemic on the parties to the lease;
- the provisions of the Act and the Regulations; and
- the provisions of the National Code.

As the Regulations only require parties to 'have regard' to the provisions of the National Code, 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;
- 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.

However, the Court, when making an order for rent relief for an 'affected lessee', must have regard to the following:

- the reduction in turnover of the business of the tenant during the prescribed period;
- the obligations of the landlord under the Act, the *Real Property Act 1886 (SA)*, the *Retail and Commercial Leases Act 1995 (SA)* and the *Landlord and Tenant Act 1936 (SA)* and the Regulations;
- whether the landlord has, during the prescribed period, agreed to waive recovery of any outgoings or other expense payable by a tenant under the lease;
- whether a failure to provide rent relief would compromise the tenant's ability to fulfil the tenant's ongoing obligations under the lease, including the payment of rent;
- the ability of the landlord to provide rent relief, including any relief provided to the landlord by a third party in response to the COVID-19 pandemic;
- any reduction by a third party to outgoings in relation to the premises the subject of the lease; and
- any other matter the Court thinks fit.

See: r 6 and 9(5) of the Regulations

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

Rent relief is defined as follows:

"any form of relief in respect of the liability or obligation of a tenant under a commercial lease to pay rent (including waiver or deferral of rent)".

See: *r 3(1) of the Regulations*

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

There is no strict requirement that a certain percentage of the rent relief offered by a landlord must be in the form of a waiver, however if the Court makes an order providing rent relief to an affected lessee, at least 50% of the rent relief must in the form of a waiver of rent.

See: *r 9(7) of the Regulations*

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

There is no strict requirement that a landlord must offer a rent reduction which proportionate to the reduction in the tenant's trade during the prescribed period.

Nonetheless, the Regulations do require the parties to negotiate the rent payable under, and other terms of, their lease having regard to, inter alia, the provisions of the National Code, and proportionate rent reduction based on the reduction in the tenant's trade during the prescribed period is one of the leasing principles of the National Code.

Additionally, in making an order granting rent relief to an affected lessee, the Court must have regard to, inter alia, the reduction in turnover of the business of the tenant during the prescribed period.

See: *r 6 and r 9(8)(b) of the Regulations*

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

There is no strict requirement that repayments of rental deferrals by the tenant have to be amortised over a certain period. However, the Regulations empower the Court to make an order to defer payment of rent under an affected lease for a specified period not exceeding 24 months from the day on which the order is made.

See: *r 9(5)(e) of the Regulations*

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

If a tenant is an affected lessee, a landlord cannot take any prescribed action (including payment of interest on unpaid rent otherwise payable by a tenant) against the tenant on grounds of a breach of the lease during the prescribed period consisting of:

- a failure to pay rent; or
- a failure to pay outgoings; or
- the business operating under the lease not being open for business during the hours specified in the lease.

The above does not apply to or in respect of a failure to pay rent if the amount of rent payable under the lease is, during the prescribed period:

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- agreed by the parties under a mediation under regulation 8; or
 - determined by the Court under regulation 9,

and the failure to pay rent constitutes a breach of the agreement or order of the Court (as the case may be).

See: *r 7(1)-(2) of the Regulations*

Pre-agreed rent relief and subsequent rent relief

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

The Regulations are silent on whether a tenant can make more than one request for rent relief, however, regulation 6 requires the parties to negotiate the rent payable during the prescribed period. Additionally, under regulation 9(10) the Court may, on application by a party, vary or revoke an order made under regulation 9.

See: *r 9 of the Regulations*

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

If between 30 March 2020 and 15 May 2020 (**designated period**) the parties to a commercial lease have agreed to modify the operation of the lease (including agreeing to rent relief), then an order of the Court may not operate to modify or affect that agreement in respect of its operation during the designated period, but may, modify or affect the operation of that agreement after the designated period.

See: *r 9(6) and 9(12) of the Regulations*

Prohibited enforcement actions

20. 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 for any of the following:

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

See: *r 3(1) of the Regulations*

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

A landlord under a commercial lease may take any prescribed action against a tenant, unless the tenant is an affected lessee and the grounds of breach of the lease during the prescribed period consist of:

- a failure to pay rent; or
- a failure to pay outgoings; or
- the business operating under the lease not being open for business during the hours specified in the lease.

However, the prohibition against prescribed action does not apply to or in respect of a failure to pay rent if the amount of rent payable under the lease is, during the prescribed period:

- agreed by the parties under a mediation under the Regulations; or
- determined by the Court under the Regulations,

and the failure to pay rent constitutes a breach of the agreement or order of the Court (as the case may be).

Further, an act or omission of a tenant under the laws of SA in response to the COVID-19 pandemic will not constitute grounds for taking any prescribed action against a tenant.

See: *r 7(1)-(3) of the Regulations*

Arrears

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

Any prescribed action taken during the period between 30 March 2020 and 9 April 2020 (inclusive) against a tenant suffering financial hardship as a result of the COVID-19 pandemic will be stayed or suspended until the end of the prescribed period (30 September 2020).

Otherwise, there is no express right or restriction in the Regulations in respect of enforcement action against tenants for pre COVID-19 arrears or breaches of leases (prior to 30 March 2020).

However, landlords should be aware that there is ambiguity in the drafting of regulation 7(1). It is arguable that the Regulations do not make any distinction in respect of the non-payment of rent or outgoings that are payable either before (i.e. prior to 30 March 2020) or during the prescribed period. If this interpretation is correct, a landlord would be prevented from taking enforcement action against a tenant for pre COVID-19 arrears or breaches of leases (prior to 30 March 2020). There are also reputational issues for a landlord to consider in respect of enforcement action against tenants for pre COVID-19 arrears or breaches of leases (prior to 30 March 2020).

As noted in Item 21 above, there is nothing in the Regulations which prevent a landlord from taking prescribed action against a tenant on grounds of a breach of lease, other than a failure to pay rent/outgoings or to operate the business during the hours specified in the lease during the prescribed period. In other words, a landlord may take enforcement action against a tenant for other breaches, such as damaging the premises or failing to vacate the premises at the end of the term.

See: *r 10(1) of the Regulations*

Outgoings

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

The Regulations state that a landlord must not, during the prescribed period, require an affected lessee to pay land tax or reimburse the landlord for the payment of land tax in respect of a commercial lease (noting that this is already prohibited if the lease is subject to the *Retail and Commercial Leases Act 1995* (SA)).

If a landlord receives a waiver of land tax or a relief payment under a scheme administered by the Treasurer for the purposes of providing land tax relief to persons suffering financial hardship as a result of the COVID-19 pandemic, the landlord must pass on the benefit of the waiver or relief payment in the form of a waiver of rent payable by an affected lessee under the commercial lease in accordance with the provisions of that scheme.

There is no strict requirement in respect of other statutory charges, however, as above, the Regulations require parties to 'have regard' to the provisions of the National Code.

See: r 6, 7(5) and 7(7) of the Regulations

Security

24. 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 and the performance of obligations by the tenant or any other person pursuant to a guarantee under the lease.

Nonetheless, this is subject to the exemptions outlined in Item 21 above. For example, a landlord may draw on a tenant's security for the non-payment of rent where, during the prescribed period, the rent payable has been:

- agreed by the parties under a mediation under regulation 8; or
- determined by the Court under regulation 9,

and the failure to pay rent constitutes a breach of the agreement or order of the Court (as the case may be).

Also refer to comments in Item 22 above regarding enforcement action for other breaches of leases.

See: r 7(1)-(2) of the Regulations

Lease extension

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

There is no strict requirement that landlord must offer to extend a lease for the equivalent period of rental waiver or deferral. However, in making an order to defer the payment of rent under an affected lease for a period not exceeding 24 months a Court may also make an order extending the term of the lease for the period for which the rent is deferred under the order.

See: r 6 and r 8(9) of the Regulations

Rent increase freeze

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

The Regulations prohibit rent increases for affected lessees during the prescribed period. This effectively suspends all fixed, consumer price index, market review and other rent increases (other than rent or a component of rent determined by reference to turnover) from coming into effect during the prescribed period, however the parties can agree that this does not apply.

See: r 7(4) of the Regulations

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.

The Regulations empower the Court to make an order to defer payment of rent under an affected lease for a specified period not exceeding 24 months from the day on which the order is made.

See: 6 and r 9(5)(e) of the Regulations

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 who is an affected lessee, 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.

Further, an act or omission of a tenant under the laws of SA in response to the COVID-19 pandemic will not constitute grounds for taking any prescribed action against a tenant.

See: r 6, 7(1) and 7(3) of the Regulations

Dispute resolution and mediation

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

No, but a party to a commercial lease may apply to the SBC for mediation of a 'relevant dispute' which includes a dispute in relation to the provision of rent relief during the prescribed period.

A tenant may not apply to the SBC unless it is, or is claiming to be, an affected lessee.

The SBC may exercise any powers or functions the SBC is able to exercise under Part 7 of the *Fair Trading Act 1987* (SA), including the power to answer questions or produce books or documents.

See: r 3(1) and 8 of the Regulations

30. What happens if the mediation process fails?

If the mediation process fails, the SBC must issue the parties with a certificate stating the names of the parties and:

- if mediation has failed or is unlikely to resolve the dispute—that the mediation has been terminated without resolution; or
- if mediation would not be reasonable in the circumstances—that fact; or
- if a party refused to participate, or did not participate in good faith, in mediation—that fact.

A party to a commercial lease may apply to the Court for resolution of a 'relevant dispute' in relation to a commercial lease, but may only do so if the SBC has issued a certificate as above.

See: r 8(4) and 9(2) of the Regulations

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

As set out above, if a party breaches their obligations under to negotiate rent relief under the Regulations, 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 Court.

There are no civil penalties for non-compliance.

See: *r 8 and 9 of the Regulations*

Other obligations

32. Do the Regulations impose any other obligations on landlords and tenants?

Unlike some other jurisdictions, in SA 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 Regulations?

Regulation 6 imposes good faith obligations on 'any guarantor or other person with an interest in the lease' in respect of the rent relief negotiations. This could apply to lenders/mortgagees.

See: *r 6 of the Regulations*

Ineligible tenants

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

The good faith negotiations under regulation 6 apply to all commercial leases (not just leases where the tenant is an 'affected lessee'), however it would appear that the Court may be limited to granting rent relief to affected lessees only.

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