

COVID-19: South Australia enacts further commercial tenancies legislation

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Source: [South Australian Legislation](#)

Abstract:

We reported in our update on 1 May 2020 ([COVID-19: South Australia implements part of the national code of conduct for commercial tenancies](#)) that South Australia had introduced emergency legislation partly implementing the [National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 \(National Code\)](#), namely:

- the *COVID-19 Emergency Response Act 2020 (SA) (Act)* on 9 April 2020; and
- the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020 (SA) (Old Regulations)* on 16 April 2020.

Further legislation

On 15 May 2020, South Australia enacted further legislation dealing with commercial leases, namely:

- the *COVID-19 Emergency Response (Further Measures) Amendment Act 2020 (Amending Act)*; and
- the *COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020 (SA) (Regulations)*.

The Amending Act replaces the commercial leases provision in the Act with a new provision allowing the Governor to make such regulations as are necessary for the purposes of mitigating the adverse impacts on a party to a commercial lease resulting from the COVID-19 pandemic.

The Regulations revoke the Old Regulations and generally contain the commercial leases provisions previously contained in the Act and the Old Regulations; however, they have been revised to incorporate further principles from the National Code and more detailed provisions regarding the resolution of disputes through the [Small Business Commissioner](#) and the [Magistrates Court](#).

When do the Regulations apply?

The Regulations have retrospective application and apply to commercial leases during the period commencing on 30 March 2020 and ending on 30 September 2020 (**prescribed period**).

What is a commercial lease under the Regulations?

A commercial lease is:

- a retail shop lease under the *Retail and Commercial Leases Act 1995 (SA)*;
- a lease under the *Landlord and Tenant Act 1936 (SA)*; or
- any other agreement under which a person grants or agrees to grant another person for value a right to occupy a premises for the carrying on of a business (whether or not the right is a

right of exclusive occupation, the agreement is expressed or implied or the agreement is oral or in writing),

which was entered into before 30 March 2020 but which 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) (**commercial lease**)

The Regulations do **not** apply to a commercial lease which is entered into after 30 March 2020 unless that lease is an extension or renewal of an existing lease on the same or substantially similar terms as the existing lease.

Commercial leases deemed to incorporate Regulations

A commercial lease is taken to be modified to the extent necessary to give effect to the operation of the Regulations.

Who is an affected lessee?

Certain provisions in the Regulations apply to “affected lessees” under commercial leases. A tenant is an “affected lessee” if:

- the tenant is suffering financial hardship as a result of the COVID-19 pandemic (i.e. if the tenant is eligible for, or receiving, a [JobKeeper](#) payment); and
- the following turnover (which includes any turnover derived from internet sales) in the 2018/2019 financial year (or a 12 month period or such lesser period as determined by the Magistrates Court or the Minister) is less than \$50 million:
 - if the tenant is a franchisee – the turnover of the business conducted at the leased premises;
 - if the tenant is a corporation that is a member of a group (i.e. related bodies corporate within the meaning of the *Corporations Act 2001* (Cth)) – the turnover of the group; and
 - in any other case – the turnover of the business conducted by the tenant at the leased premises (**affected lessee**).

What do the Regulations provide?

The Regulation provides as follows:

Parties must attempt to negotiate in good faith

The parties to a commercial lease (and any guarantor or other person with an interest in the lease) must make a genuine attempt to negotiate in good faith the rent payable under the lease and the other terms of the lease during the prescribed period, having regard to:

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

Prohibition on prescribed actions by landlord

A landlord cannot take action under a commercial lease or seek orders or issue proceedings in a court for:

- eviction of the tenant from the leased premises;

- exercising a right of re-entry to the leased premises;
- recovery of land;
- distraint of goods;
- forfeiture;
- damages;
- requiring a payment of interest on unpaid rent;
- recovery of the whole or part of a security bond;
- performance of obligations by the tenant or any other person pursuant to a guarantee under the commercial lease;
- possession;
- termination of the commercial lease; or
- any other remedy otherwise available to a landlord against a tenant at common law or under the law of South Australia (**prescribed action**),

against an affected lessee for a breach of the commercial lease during the prescribed period for:

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

The above does not apply to a failure to pay the rent agreed by the parties during the prescribed period under a mediation (see below) or as determined by the Magistrates Court (see below) and it constitutes a breach of the mediation agreement or Court order. In that situation, a landlord is not prohibited from taking a prescribed action.

Acts or omissions required by law

A tenant's act or omission required under South Australia law in response to the COVID-19 pandemic is not a breach of a commercial lease and is not grounds for termination of the lease or the taking of any prescribed action by the landlord against the tenant, e.g. mandatory trade restrictions imposed by the South Australian government.

No rent increases

Unless otherwise agreed between the landlord and the tenant, a landlord cannot increase the rent payable by an affected lessee under a commercial lease (other than turnover rent) during the prescribed period.

No land tax payable

A landlord cannot, during the prescribed period, require an affected lessee under a commercial lease to pay land tax (or to reimburse the landlord for the payment of land tax).

Landlord must pass on land tax relief

If a landlord receives land tax relief or a land tax waiver as a result of the COVID-19 pandemic, the landlord must pass on the benefit (in the form of a rent waiver) to an affected lessee under a commercial lease.

Mediation

A party to a commercial lease may apply to the [Small Business Commissioner](#) for mediation of a "relevant dispute" in relation to a commercial lease.

A tenant can only make such an application if the tenant is an affected lessee.

A “relevant dispute” means a dispute about:

- if a tenant is suffering financial hardship as a result of the COVID-19 pandemic;
- the provision of rent relief during the prescribed period (including a failure of a party to take part in a rent relief negotiation); or
- issues that have occurred in relation to the COVID-19 pandemic (**relevant dispute**).

Commissioner must issue a certificate

The [Small Business Commissioner](#) must issue the parties with a certificate stating that:

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

Confidential information

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

- with the consent of the person to whom the information relates;
- in connection with the administration of the Act and the Regulations;
- as authorised by the Small Business Commissioner;
- for the purposes of legal proceedings;
- to a police officer or a law enforcement officer of another State, of a Territory or of the Commonwealth; or
- as authorised or required by law.

Determination by the Magistrates Court

If the Small Business Commissioner has issued a certificate (see above), a party to a commercial lease may apply to the [Magistrates Court](#) for resolution of a relevant dispute in relation to a commercial lease.

Determination regarding a tenant being an affected lessee

The Magistrates Court may make a determination as to whether or not a tenant is an affected lessee, having regard to:

- if the tenant is eligible for, or is receiving, a [JobKeeper](#) payment; and
- any reduction in turnover of the tenant’s business (as verified by financial records or statements provided by the tenant) during a specified period as compared with another specified period.

Orders by the Magistrates Court

The Magistrates Court may make an order:

- granting rent relief (which includes a waiver or deferral of rent) to an affected lessee provided at least 50% of the rent relief is in the form of a waiver of rent, having regard to:
 - the landlord’s obligations;
 - the reduction in turnover of the tenant’s business during the prescribed period;
 - if the landlord has, during the prescribed period, agreed to waive recovery of any out-goings or other expenses payable by a tenant;

- if 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 leased premises; and
- any other matter the Court thinks fit;
- requiring the payment of some or all of the rent into the Court;
- requiring that rent paid into the Court be paid out and applied as directed by the Court;
- modifying the terms and conditions of a lease;
- deferring the payment of rent for a specified period not exceeding 24 months (the Court may also make an order extending the term of the lease for the deferred rent period); or
- that the Court thinks necessary or desirable to resolve a dispute.

Court can modify pre-15 May 2020 agreements

If, during the period beginning on 30 March 2020 and ending on 15 May 2020 (the commencement date of the Regulations), the parties to a commercial lease agreed to vary the terms of the lease (including rent relief), the Court may not modify the operation of that agreement insofar as that agreement operated during that period but the Court may modify the operation of that agreement as it purports to operate after 15 May 2020.

Suspension of incomplete actions taken between 30 March 2020 and 9 April 2020

If, during the period beginning on 30 March 2020 and ending on 9 April 2020 (the commencement date of the Act), a landlord took, but did not complete, a prescribed action against a tenant who is suffering financial hardship as a result of the COVID-19 pandemic, the action is, insofar as it remains incomplete, suspended until the end of the prescribed period (i.e. until 30 September 2020).

Do the Regulations give full effect to the National Code?

The Regulations incorporate most of the principles in the National Code; however, there are some variations in the Regulations:

- **Rent reductions:** landlords are not expressly required to offer rent reductions, by way of waivers (at least 50%) and deferrals or to offer lease extensions for rent waivers and deferrals. Instead, the parties to a commercial lease, in negotiating, must have regard to the National Code. But the Magistrates Court may make orders granting rent relief (which includes waivers and deferrals) in which case at least 50% of the rent relief must be in the form of a waiver.
- **Rent reductions proportionate to trade reductions:** landlords are not expressly required to offer tenants rent reductions proportionate to the tenants' reductions in trade during the COVID-19 pandemic period. Instead, in negotiating, the parties are required to have regard to the economic impacts of the COVID-19 pandemic on the parties. But, if making a rent relief order, the Magistrates Court must have regard to the reduction in turnover of a tenant's business during the prescribed period (in addition to other factors).
- **Reasonable recovery period:** there is no provision for any "reasonable recovery period". Instead, the Regulations apply to a fixed prescribed period (i.e. from 30 March 2020 to 30 September 2020).
- **Landlords' financial situation:** the parties are required to have regard to the economic impacts of the COVID-19 pandemic on the parties when negotiating which means that a landlord's financial situation can be taken into account. The National Code does not require the parties to have regard to a landlord's financial situation (except in the case of rent waivers greater than 50%).
- **Passing on benefits:** landlords are not expressly required to pass on the benefit of loan payment deferrals or any reduction in statutory charges or insurance costs (the Regulations only deal with land tax — see above).

- **Outgoings:** landlords are not expressly required to waive recovery of any outgoings (or other expenses) payable by a tenant during the period that the tenant is not able to trade. But, if making a rent relief order, the Magistrates Court must have regard to any such waivers.
- **Rent deferrals:** the Magistrates Court may make an order deferring the payment of rent for a period not exceeding 24 months. The National Code requires the payment of rent deferrals to be amortised over a period of at least 24 months.

See our summary of the National Code in our update on 9 April 2020 ([COVID-19 – National Cabinet approves a mandatory code of conduct for commercial tenancies](#)).

What issues arise from the Regulations?

- **Breaches before the prescribed period:** it is not clear if landlords can take prescribed actions for breaches before the prescribed period, i.e. before 30 March 2020, or for other breaches (i.e. other than for the non-payment of rent/outgoings or for not being open for business) during the prescribed period.
- **Agreements made before 15 May 2020:** given that the Magistrates Court can modify agreements made by parties before 15 May 2020, any such agreements should probably be reviewed so as to comply with the Regulations (unless the parties agree otherwise).
- **Leases entered into after 30 March 2020:** the Regulations do not apply to commercial leases entered into after 30 March 2020 unless such a lease is an extension or renewal of an existing lease on the same or substantially similar terms as the existing lease. Given that the expression “substantially similar terms” is not defined, it may be difficult to determine if the Regulations apply to an extended or renewed lease entered into after 30 March 2020.
- **Prescribed actions for failure to pay negotiated rent:** a landlord can take a prescribed action against a tenant during the prescribed period for a failure to pay the rent agreed by the parties under a mediation or as determined by the Magistrates Court. But it would appear that the same does not apply to any reduced rent agreed between the parties in negotiations.
- **Rent reviews during prescribed period:** landlords cannot increase the rent payable by an affected lessee under a commercial lease (other than turnover rent) during the prescribed period. But it is not clear if any rent increases which are due to take place during the prescribed period are lost or suspended until after the prescribed period. Landlords may wish to take this into account in negotiating rent relief agreements.
- **Dispute resolution for non-affected lessees:** the obligation on parties to a commercial lease to negotiate does not only apply to affected lessees. But, if a dispute arises, it is not possible for a tenant other than an affected lessee (or a tenant claiming to be an affected lessee) to apply under the Regulations to the [Small Business Commissioner](#) for mediation or for an order from the [Magistrates Court](#).
- **Lease securities for deferred rent:** given that deferred rent may end up being paid after a lease has ended, landlords may wish to consider what lease securities (bank guarantees, etc.) they will hold during that period.

See our update on 22 April 2020 ([COVID-19 and commercial tenancies — questions raised by the mandatory code and what's next for landlords and tenants](#)).

What should landlords and tenants do now?

Eligible commercial tenants in South Australia who are suffering financial hardship as a direct result of the COVID-19 pandemic can seek relief from their landlords (if they have not already done so); however, both parties should ensure that they understand their rights and obligations under the Regulations and that they comply with all of the requirements of the Regulations. Accordingly, the parties to a commercial lease should:

Step 1

- determine if the Regulations apply to their commercial lease;
- determine if the tenant is an affected lessee (as defined);

- carefully review:
 - the Regulations to determine their rights and obligations; and
 - the principles in the National Code (as the Regulations require the parties to negotiate having regard to the National Code);

Step 2

- communicate and commence negotiations “in good faith” with each other as soon as possible (if they have not already done so). Tenants should provide to their landlords:
 - information evidencing that they are eligible for, or receiving, a [JobKeeper](#) payment; and
 - reasonable financial information evidencing the tenant’s turnover in the 2018/2019 financial year and the tenant’s reduction in turnover during the prescribed period. If this financial information is not provided, then landlords should request it (as the Magistrates Court is required to have regard to the tenant’s reduction in turnover in making a determination or order). See the Small Commissioner’s [Covid-19 Guidance Note – commercial information “requests” by commercial lessors](#);
- if the tenant is a foreign person, consider if FIRB approval is required for any agreed lease variation or extension. See our update on 30 April 2020 ([COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions](#)); and

Step 3

- ensure that whatever is agreed is formally documented to avoid any disputes at a later date, preferably in a deed of variation.

What about commercial leases not covered by the Regulations?

Landlords and tenants under commercial leases that are not covered by the Regulations can still adopt the principles in the National Code in negotiating amendments to their existing leasing arrangements as it was intended that the principles should apply “in spirit” to all affected businesses. But the Regulations do not apply to these leases and they cannot benefit from the relief measures or the protection provided by the Regulations. They remain subject to the existing law.

See also the following helpful information from the Small Business Commissioner:

- [Essential Information for Lessees and Lessors dealing with COVID-19](#)
- [Land Tax Relief Package to Assist Landlords and Tenants](#)
- [Covid-19 Guidance Note – commercial information “requests” by commercial lessors](#) (which sets out what information should not be sought by landlords)