

COVID-19: NSW gives effect to the national code of conduct for commercial tenancies

Source: [NSW Legislation](#)

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Abstract:

It was announced by the Prime Minister on 7 April 2020 that the national mandatory code of conduct for commercial tenancies affected by the COVID-19 pandemic (**Code of Conduct**) would be given effect in each state and territory through state and territory legislation or regulation. This state and territory legislation or regulation will, during the COVID-19 pandemic period, modify the operation of:

- the provisions of commercial leases (including retail, office and industrial leases); and
- state and territory legislation relating to commercial and retail leases,

to provide relief to commercial tenants suffering financial stress or hardship as a direct result of the COVID-19 pandemic. See our update on 9 April 2020 ([COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#)),

A retail and commercial tenancies regulation commences in New South Wales

The [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020](#) (NSW) (**Regulation**) commenced on 24 April 2020 giving effect to the Code of Conduct in New South Wales. The Regulation is made under the *Retail Leases Act 1994* (NSW) and the *Conveyancing Act 1919* (NSW).

The “explanatory note” on the Regulation states that it:

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

How long will the Regulation be in operation?

The Regulation commenced on 24 April 2020 and will be automatically repealed after 6 months, i.e. on 25 October 2020.

So what does the Regulation do?

It regulates the exercise or enforcement of rights under a commercial lease in relation to circumstances occurring during a 6-month period, commencing on 24 April 2020 and ending on 24 October 2020 (“**prescribed period**”). It does not apply retrospectively.

A “**commercial lease**” is defined as being a retail shop lease (as defined in the *Retail Leases Act 1994* (NSW) and which may include a licence) or a commercial lease (governed by the *Conveyancing Act 1919* (NSW)), but does **not** include:

- a lease entered into after 24 April 2020 (excluding the extension or renewal of an existing lease on the same terms as the existing lease); or
- a lease under the *Agricultural Tenancies Act 1990* (NSW).

What does the Regulation prohibit or restrict?

The Regulation imposes certain prohibitions and restrictions on landlords with regard to “impacted tenants” under commercial leases.

An “impacted tenant” is defined as being a tenant:

- who qualifies for the [jobkeeper scheme](#) (e.g. its turnover has dropped by at least 30%); and
- whose turnover in the 2018–2019 financial year was less than \$50 million (“**impacted tenant**”).

“Turnover” (which includes any turnover derived from internet sales of goods or services) is defined as the turnover of the business conducted by the tenant. If the tenant is a franchisee, the turnover comprises the business conducted at the 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 comprises the turnover of the group.

- **No prescribed actions**

A landlord cannot take any action against an impacted tenant under the provisions of a commercial lease or seek orders or issue proceedings in a court or tribunal for:

- eviction of the tenant;
- exercising a right of re-entry;
- recovery of the premises;
- retaining goods;
- forfeiture;
- damages;
- requiring a payment of interest on, or a fee or charge related to, 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;
- possession;
- termination; or
- any other remedy otherwise available to a landlord at common law or under NSW law,

(“**prescribed action**”) for a breach of the 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.

- **No rent increases**

If, during the prescribed period, a tenant under a commercial lease is an impacted tenant, the landlord cannot:

- increase the rent (other than turnover rent) during the prescribed period; and
- after the prescribed period is over (i.e. after 24 October 2020), take any prescribed action against the tenant for a breach of the lease for a failure to pay the rent increase amount which would have been otherwise payable during the prescribed period.

- **Pass on any reduction in statutory charges or insurance costs**

If an impacted tenant is required to pay a fixed amount of the land tax or any other statutory charge (e.g. council rates) or insurance payable by a landlord, then the landlord must pass on a proportionate amount of any reduction in the amount(s) payable by the landlord.

- **Parties can still make their own agreement**

The above does not prevent a landlord and an impacted tenant from agreeing to the parties taking any action in relation to the commercial lease (e.g. the landlord taking any prescribed action or the parties agreeing to terminate the lease).

- **Required act or omission not a breach**

An act or omission of a tenant (being an impacted tenant or otherwise) required under a Commonwealth or a NSW law in response to the COVID-19 pandemic does not constitute:

- a breach of a commercial lease; or
- grounds for termination of the commercial lease or the taking of any prescribed action by the landlord against the tenant.

Obligation to renegotiate

Before a landlord under a commercial lease takes or continues any prescribed action against an impacted tenant for a breach for failure to pay rent during the prescribed period, the landlord must firstly comply with the following:

- A party to the lease may request the other parties to renegotiate the rent payable and any other terms of the lease.
- A party to the lease must, if requested, renegotiate in good faith the rent payable and any other terms of the lease.
- The parties must renegotiate the rent payable and any other terms of the lease having regard to:
 - the economic impacts of the COVID-19 pandemic; and
 - the leasing principles set out in the Code of Conduct (see [COVID-19 and commercial tenancies — guide to the national mandatory code of conduct](#)).

This regulation effectively obliges a landlord to renegotiate before taking a prescribed action against an impacted tenant.

Dispute resolution

- **Retail shop leases:** An “impacted commercial lease dispute” will be treated as a retail tenancy dispute and must be resolved in accordance with the dispute resolution procedures set out in Part 8 of the *Retail Leases Act 1994* (NSW).

An “impacted commercial lease dispute” is any dispute concerning the liabilities or obligations (including any obligation to pay money) during the prescribed period under a commercial lease to which an impacted tenant is a party and includes a dispute regarding a renegotiation (or a failure to take part in a renegotiation) of the rent payable.

This means that such a dispute must be referred to the [Small Business Commissioner](#) for mediation and the Small Business Commissioner must certify in writing that mediation has failed

to resolve the dispute (and provide reasons for that failure) before any legal proceedings can be commenced,

- **Commercial leases** (i.e. commercial, office and industrial leases): A landlord cannot:
 - seek to recover possession of the premises;
 - terminate the lease; or
 - exercise or enforce any other right,

unless the [Small Business Commissioner](#) has firstly certified in writing that mediation has failed to resolve the dispute (and provide reasons for that failure), whether or not the tenant is an “impacted tenant”.

NCAT and court consideration of Code of Conduct leasing principles

[NSW Civil and Administrative Tribunal \(NCAT\)](#) and any court, when making a decision or order relating to:

- the recovery of possession of a premises from a tenant;
- the termination of a commercial lease by a tenant; or
- the exercise or enforcement of another right of a tenant,

must have regard to the leasing principles set out in the Code of Conduct.

Landlords can still take action for non-COVID-19 pandemic related reasons

The Regulation does not prevent a landlord from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic, e.g. if a tenant fails to vacate a premises following the expiry of a fixed term commercial lease or for the non-payment of rent before the prescribed period and which is not related to the economic impacts of the COVID-19 pandemic.

Does the Regulation give full effect to the Code of Conduct?

Yes, the Regulation gives full effect to the Code. It even states in the explanatory note to the Regulation that the object of the Regulation is “to give effect to” the Code of Conduct and most of the regulations in the Regulation refer to the relevant leasing principles in the Code of Conduct.

However, other than the prohibitions and obligations noted above, the Regulation does not specifically set out all of the leasing principles in the Code of Conduct and require parties to comply with them. Instead, the Regulation requires parties to renegotiate the rent payable and any other terms of the commercial lease having regard to the leasing principles in the Code of Conduct. The notes in the obligation to renegotiate regulation even refer to the some of the principles and, in particular, to the principle requiring landlords to offer rent reductions, by way of a waiver or a deferral, proportionate to the reduction in the tenant’s trade.

The Regulation also requires NCAT and any court to have regard to the leasing principles in the Code of Conduct when making certain decisions or orders.

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

Any issues arise from the Regulation?

- Tenants who have entered into leases after 24 April 2020 or who are currently negotiating a new lease (other than extension or renewal leases – see above) will not be protected by the Regulation.

- Any arrangements already agreed before 24 April 2020 will have to be reviewed to ensure that they comply with the Regulation (unless the parties agree otherwise).
- Even if a rent review is scheduled to take place during the prescribed period, the landlord cannot increase the rent during the prescribed period and cannot, after the prescribed period, seek to recover the rent increase amount which would otherwise have been payable during the prescribed period.
- Any renegotiations between the parties require them to have regard to the economic impacts of the COVID-19 pandemic and the leasing principles in the Code of Conduct and, as noted above, one of the said principles requires landlords to offer rent reductions proportionate to the reduction in a tenant's trade; however the Regulation does not specify what information a landlord may require from a tenant in order to verify the tenant's financial situation (e.g. that the tenant is an "impacted tenant"). The Code only requires each party to provide "sufficient and accurate information", which is defined to include information generated from an accounting system, and information provided to and/or received from a financial institution. This lack of specificity or guidance in the Regulation regarding what financial information should be provided and how it should be provided could complicate and potentially delay the negotiation process. Landlords may seek detailed financial and accounting information while tenants may not want to share confidential information about their businesses with their landlords.
- As noted above, many of the principles in the Code of Conduct are not specifically imposed on landlords in the Regulation. Instead, the parties are only required to renegotiate "in good faith" and "having regard to" these leasing principles.
- Other than the general requirement that renegotiations must have regard to the economic impacts of the COVID-19 pandemic and the Code of Conduct (which requires a landlord's financial situation to be taken into consideration in the context of a rent waiver greater than 50% of total rent reductions), the Regulation does not appear to provide any specific protection for landlords who are suffering financial hardship as a consequence of the COVID-19 pandemic.

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?

Impacted tenants (as defined) who are suffering financial stress or hardship as a direct result of the COVID-19 pandemic can now seek relief from their landlords (if they have not already done so); however, both parties need to ensure that they understand their rights and obligations under the Regulation and that they comply with all of the requirements of the Regulation. Accordingly, parties should immediately:

- determine if their lease is a commercial lease (as defined) and if the tenant is an impacted tenant (as defined);
- carefully review:
 - the Regulation to determine their rights and obligations;
 - the terms of their lease; and
 - the Code of Conduct (see [COVID-19 and commercial tenancies — guide to the national mandatory code of conduct](#));
- communicate and commence renegotiations "in good faith" as soon as possible (if they have not already done so). Tenants should request their landlords to renegotiate the rent or other terms of the lease, as is appropriate. Landlords should note that they cannot take any prescribed action against tenants unless they have firstly renegotiated "in good faith" (having regard to the economic impacts of the COVID-19 pandemic and the leasing principles in the Code of Conduct). Impacted tenants should provide to their landlords:
 - information evidencing that they qualify for the [jobkeeper scheme](#); and
 - reasonable financial information evidencing their turnover and their reduction in turnover as a consequence of the COVID-19 pandemic so that their landlords can verify their financial situation. If this financial information is not provided, then landlords should request it;

- if the tenant is a foreign person, consider if FIRB approval is required for any agreed lease extension. See our update on 30 April 2020 ([COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions](#)); and
- formally document (and register, if applicable) whatever is agreed to avoid any disputes at a later date and to ensure that it is binding on the parties going forward, preferably in a deed of variation.

Given the number of disputes that will come before the Small Business Commissioner, there are likely to be delays in the resolution of any disputes which are referred for mediation.

The parties should also note that the Regulation does not prevent:

- the parties from reaching their own mutually beneficial agreement in relation to the commercial lease; and
- a landlord from taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic.

What about leases not covered by the Regulation?

These landlords and tenants can still adopt the principles in the Code of Conduct 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 Regulation does not apply to these leases and the parties cannot benefit from the protection provided by the Regulation. These leases remain subject to the existing law. Landlords are not obliged to provide relief and may be entitled to charge interest on unpaid rent, draw on tenants’ securities or even terminate leases for non-payment of rent.