

## ***COVID-19: Queensland gives effect to the national code of conduct for commercial tenancies***

**Date:** 18 June 2020

**Source:** [Queensland legislation](#)

### **Abstract:**

It was announced by the Prime Minister on 7 April 2020 that the [National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 \(Code of Conduct\)](#) would be given effect in each state and territory through state and territory legislation or regulation. The 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](#)),

### **Commercial tenancies regulation released in Queensland**

On 28 May 2020, the Queensland government released the [Retail Shop Leases and Other Commercial Leases \(COVID-19 Emergency Response\) Regulation 2020 \(QLD\)\(Regulation\)](#). The Regulation was made under s23 of the [COVID-19 Emergency Response Act \(QLD\)\(Act\)](#). The purpose of the Regulation is to:

- mitigate the effects of the COVID-19 pandemic on landlords and tenants by giving effect to the good faith leasing principles set out in the Code of Conduct; and
- to establish a process for resolving disputes.

### **When does the Regulation come into operation?**

The Regulation commenced on 28 May 2020 and expires on 31 December 2020 (as per s23(6) of the [COVID-19 Emergency Response Act \(QLD\)](#)).

Some of the provisions refer to a “response period” which is defined as being the period:

- starting on 29 March 2020; and
- ending on 30 September 2020 (“**response period**”).

### **Who does the Regulation apply to?**

The Regulation applies to “affected leases”. A lease is an “**affected lease**” if:

- it is a retail shop lease or a lease, other than a retail shop lease, under which the leased premises are wholly or predominantly used for the carrying on of a business (which includes non-profit entities);

- on 28 May 2020, the lease (or an agreement to enter into the lease) is binding on the tenant, even if the lease has not yet commenced;
- the tenant is an SME entity (as defined in s5 of the [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Rules 2020 \(CTH\)](#)), noting that:
  - an entity is an SME entity if it carries on business (or is a non-profit body) and its annual turnover for the current financial year is likely to be less than \$50m and/or its annual turnover for the previous financial year was less than \$50m;
  - the annual turnover of the tenant is taken to be the annual turnover of the business carried on by the tenant at the leased premises or, if the tenant is an entity connected with (s328-125 *Income Tax Assessment Act 1997* (CTH)), or an affiliate of (s328-130 *Income Tax Assessment Act 1997* (CTH)) another entity, the aggregate annual turnover of the entities;
  - an entity that is a franchisee is not connected with, or an affiliate of, the franchisor merely because the entity is a franchisee;
  - turnover includes income earned from internet sales but does not include any assistance given by the Commonwealth, Queensland or local governments to mitigate the effects of the COVID-19 pandemic; and
- the tenant (or an entity that is connected with, or an affiliate of, the tenant and who is involved in employing staff for the business carried on at the leased premises) is eligible for the [jobkeeper scheme](#),

but does **not** include:

- a farming business lease under schedule 1 of the *Farm Business Debt Mediation Act 2017* (QLD); or
- a lease, permit, licence or sublease under the *Land Act 1994* (QLD)(subject to certain exclusions).

## What does the Regulation provide?

The Regulation provides as follows:

### No prescribed actions by landlords

A landlord under an affected lease cannot take action for:

- recovery of possession;
- termination of the lease;
- eviction of the tenant;
- exercising a right of re-entry to premises;
- seizure of any property;
- forfeiture;
- damages;
- the payment of interest on unpaid rent or outgoings;
- a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;
- the performance of an obligation by the tenant or another person under a guarantee under the lease; or
- exercising or enforcing another right by the landlord under the lease,

(a “**prescribed action**”) for:

- a failure by the tenant to pay rent during the response period;
- a failure by the tenant to pay outgoings during the response period; or
- the business carried on at the leased premises by the tenant not being open for business during the hours required under the lease during the response period.

However, a landlord is not prohibited from taking a prescribed action:

- if acting in accordance with:
  - a variation of the lease made under the Regulation;
  - a settlement agreement entered into between the parties about the payment of rent or outgoings or the business not being open for business during the required hours; or
  - an order of a court or tribunal; or
- if, despite a genuine attempt by the landlord to negotiate rent payable and other conditions of the lease under the Regulation, the tenant has substantially failed to comply with the tenant's obligations under the Regulation regarding the negotiations (see below); or
- on a ground that is not related to the effects of the COVID-19 pandemic.

### **Tenant may seek order requiring a landlord to comply**

A tenant under an affected lease may apply to Queensland Civil and Administrative Tribunal (**QCAT**) (or a court with jurisdiction) for an order requiring the landlord not to take a prescribed action.

### **Landlords cannot increase rent**

A landlord under an affected lease cannot increase the rent (excluding turnover rent) payable by the tenant during the response period.

### **Landlords can give effect to rent increases after the response period**

If an affected lease provides for a review of the rent during the response period, the landlord may review the rent but cannot give effect to an increase in the rent until the response period ends. After the response period ends, the landlord cannot take a prescribed action against the tenant for a failure to pay the increased amount during the response period, i.e. the rent increase cannot start until 1 October 2020.

### **Parties must renegotiate**

A party to an affected lease may, in writing, ask another party to the lease to negotiate the rent and other conditions of the lease.

After the request is made, the parties must, as soon as practicable, give each other information relating to the request that is:

- true, accurate, correct and not misleading; and
- sufficient to enable the parties to negotiate in a fair and transparent way ("**sufficient information**").

The Regulation provides examples of sufficient information:

- A clear statement about the terms of the lease that the person making the request is seeking to renegotiate.
- A statement by the tenant demonstrating why the lease is an affected lease, accompanied by supporting information and evidence, including:
  - accurate financial information or statements about the turnover of the tenant's business;
  - information evidencing that the tenant is an SME entity (as defined above), having regard to any entities connected with or affiliated to the tenant;
  - evidence of the tenant's eligibility for the jobkeeper scheme; and
  - information about any steps that the tenant has taken to mitigate the effects of the COVID-19 pandemic on the tenant's business, including the details of any assistance being received from the Commonwealth, Queensland or local governments.

The parties must then renegotiate the relevant conditions of the lease in compliance with the below requirements.

Within 30 days of receiving sufficient information, the landlord must offer the tenant a rent reduction and any proposed changes to other conditions in the lease.

The offer must:

- relate to any or all of the rent payable under the affected lease during the response period;
- provide that at least 50% of the rent reduction is to be in the form of a **rent waiver**;
- have regard to:
  - all of the circumstances of the tenant and the affected lease, including the reduction in turnover of the business carried on at the leased premises during the response period;
  - the extent to which a failure to reduce the rent would compromise the tenant's ability to comply with the tenant's obligations under the lease, including the payment of rent;
  - the landlord's financial position, including any COVID-19 financial relief provided to the landlord; and
  - if a tenant is required to pay an amount for land tax, local government rates, statutory charges, insurance premiums or other outgoings – any reduction in, or waiver of, the amount payable.

On receiving the landlord's offer, the landlord and the tenant must cooperate and act reasonably and in good faith in negotiating a rent reduction for the response period, including any conditions relating to the rent reduction.

The negotiated rent reduction and conditions may be given effect by a variation to the lease or an agreement between the parties.

### **Further rent negotiations**

A party may ask another party to an affected lease to negotiate a further rent reduction during the response period if, after a rent reduction is agreed, a ground on which the agreement is based changes in a material way, e.g. the tenant's turnover has not increased as significantly as anticipated or the tenant's income decreases substantially. The same procedure as set out above applies except that a landlord is not required to offer a minimum 50% rent waiver.

### **Deferred rent**

The parties can agree to defer the payment of rent; however, any agreement to defer the payment of rent:

- cannot require the payment of the deferred rent to start until the day after the end of the response period, i.e. from 1 October 2020;
- must require the payment of the deferred rent to be amortised, using a method agreed between the parties, over a period of at least 2 years but no more than 3 years; and
- cannot require the tenant to pay interest (or any other fee or charge) on the deferred rent, unless the tenant fails to comply with the condition(s) on which the rent is deferred, e.g. a tenant does not make a deferred payment when due under the agreement.

A landlord may continue to hold any security deposit until the deferred rent has been paid. If the landlord continues to hold it after the lease ends, the landlord holds it under the conditions of the lease (which applied before the lease ended).

### **Extending the lease**

If the rent under an affected lease is waived or deferred for a period:

- the landlord must offer the tenant an extension to the term of the lease on the same conditions as those contained in the lease except that the rent payable during the extension must be adjusted for the waiver or deferral; and
- the extension must be equivalent to the period for which rent is waived or deferred.

But the lease extension obligation does not apply to a landlord:

- who is subject to an existing legal obligation that is inconsistent with the extension obligation; or
- who intends to use the leased premises for a commercial purpose.

### **Lessor may reduce services for leased premises**

If a tenant under an affected lease is unable to operate a business at the leased premises for any part of the response period because of the COVID-19 pandemic, the landlord may cease or reduce any service at the premises:

- to the extent it is reasonable in the circumstances; and
- subject to any reasonable request by the tenant.

### **Parties can still enter into their own agreement**

The Regulation does not prevent the parties entering into an agreement which is not consistent with the Regulation, even if it was entered into before the commencement of the Regulation; however, despite anything contained in an agreement, a party can still seek to negotiate a condition of an affected lease under the Regulation.

### **Parties must cooperate**

A landlord and a tenant under an affected lease must cooperate and act reasonably and in good faith in all discussions and actions associated with mitigating the effect of the COVID-19 pandemic on the parties.

### **Dispute resolution**

The Regulation sets up a process for resolving “**eligible lease disputes**”, being:

- affected lease disputes; and
- small business tenancy disputes (a small business is a business carried on by a sole trader or a business employing fewer than 20 full-time employees).

Although the response period ends on 30 September 2020, the dispute resolution will remain in place until 31 December 2020 (when the Regulation expires).

### **Parties may use alternative ways to resolve a dispute**

The parties to an eligible lease dispute can use a dispute resolution process other than the one set out in the Regulation.

### **Parties can choose mediation over procedure in lease**

A party to an affected lease or a small business lease can start mediation under the Regulation even if the party’s lease requires or permits a dispute to be dealt with using a particular procedure and the party has not complied with that procedure.

### **Retail shop leases**

If an eligible lease dispute arises in relation to a retail shop lease, the Regulation applies to the dispute and not Part 8 of the *Retail Shop Leases Act 1994* (NSW). If a retail tenancy dispute has already

started but not been resolved before 28 May 2020, Part 8 will continue to apply; however, it does not prevent a party from deciding to apply the Regulation to the dispute.

### **Must firstly attempt to resolve the dispute**

Before starting mediation under the Regulation for an eligible lease dispute, the parties must:

- firstly attempt to resolve the dispute; and
- in doing so, cooperate and act reasonably and in good faith in all discussions and actions.

### **Giving dispute notice**

A party to an eligible lease dispute may give notice of the dispute to the [Queensland Small Business Commissioner](#) and, as soon as practicable after receiving the notice, the small business commissioner must:

- accept the notice and, as soon as practicable after acceptance, arrange a mediation conference; or
- dismiss the notice, if the commissioner considers that the notice:
  - does not relate to an eligible lease dispute;
  - is frivolous or vexatious; or
  - has not been given in good faith.

### **Settlement agreement**

If the parties to the eligible lease dispute reach an agreement at the mediation conference, the agreement (“**settlement agreement**”) must be recorded in writing and signed by the parties. It can provide that the agreement is to be given effect by a variation to the lease (capable of registration, if required).

### **Applying to QCAT**

A party to an eligible lease dispute may apply to QCAT for an order to resolve the dispute if:

- the parties to the dispute cannot reach a settlement agreement;
- a party to the dispute does not attend the mediation conference for the dispute and does not have a reasonable excuse;
- the dispute is not settled within 30 days after the dispute notice is given to the small business commissioner; or
- a party to a settlement agreement claims that another party has not complied with the agreement within the period stated in it or, if no period is stated, within 14 days after the agreement is signed,

and:

- no more than 6 months has elapsed since:
  - the affected lease or small business lease ended; or
  - the last day that the tenant was required, under an agreement, to pay deferred rent.

### **No breach for complying with COVID-19 response measures**

An act or omission of a tenant under an affected lease or a small business lease is not a breach of the lease and does not constitute grounds for termination or the taking of any prescribed action by the landlord if:

- it occurs on or after 23 April 2020; and
- it is required under a COVID-19 response measure or a law of the Commonwealth or another State in response to the COVID-19 pandemic.

### **Suspension of prior disputes and prescribed actions**

Any proceeding for a lease dispute started or prescribed action taken by a landlord between 29 March 2020 and 28 May 2020 which has not been resolved or completed by 28 May 2020 is suspended until the response period ends.

## Confidentiality

A party to an eligible lease dispute must not disclose protected information (i.e. personal information or business processes or financial information) obtained as a result of the operation of the Regulation, other than:

- with the consent of the person to whom the information relates;
- to a professional advisor or financier who agrees to keep the information confidential;
- to the extent the information is available to the public;
- as authorised by the [Queensland Small Business Commissioner](#); or
- as authorised by law.

A party to an eligible lease dispute must not use protected information for any purpose other than for negotiating or resolving the eligible lease dispute.

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

The Regulation generally gives effect to the Code of Conduct. As noted above, section 3 states that one of the main purposes of the Regulation is to give effect to the good faith leasing principles set out in the Code of Conduct; however, there are a few variations from the Code of Conduct, in that the Regulation:

- does not provide for a “reasonable recovery period” after the end of the COVID-19 pandemic. Instead, the relief applies to a fixed “response period” (i.e. from 29 March 2020 to 30 September 2020);
- does not require a landlord to offer a rent reduction proportionate to the reduction in the tenant’s trade. Instead, in making an offer, a landlord must “have regard to” the reduction in turnover of the business carried on at the leased premises during the response period in addition to other factors such as the landlord’s financial position;
- permits a party to try and negotiate a further rent reduction during the response period;
- allows the parties to an eligible lease dispute to use a dispute resolution process other than the one set out in the Regulation. The Code of Conduct requires the parties to refer a dispute for binding nomination; and
- requires the deferred rent to be amortised over a maximum period of 3 years. The Code of Conduct requires the payment of deferred rent to be amortised over the greater of the remainder of the lease term and a period of at least 24 months.

See [COVID-19 and commercial tenancies – guide to the national mandatory code of conduct](#)

## Any issues arise from the Regulation?

- Leases entered into after 28 May 2020 are not protected by the Regulation.
- The Regulation does not prohibit a landlord from taking a prescribed action for the non-payment of rent or outgoings relating to a period before the response period, i.e. before 29 March 2020, for any breach (other than a failure to pay rent or outgoings or to remain open) during the response period, on a ground that is not related to the effects of the COVID-19 pandemic or if the tenant has substantially failed to comply with the tenant’s obligations to negotiate.
- The Regulation provides that a landlord may continue to hold any security deposit until the deferred rent has been paid; however, it does not refer to any other types of security, e.g. a bank guarantee. If a bank guarantee is held, the landlord should negotiate that it can continue to hold the bank guarantee until the deferred rent is paid. The landlord should also ensure that the bank guarantee does not expire until after the deferral period.
- The Regulation allows a party to ask another party to an affected lease to negotiate a further rent reduction during the response period if a ground changes in a material way. But it does not allow a party (e.g. a landlord) to ask another party (e.g. a tenant) to negotiate a rent increase on the same basis, e.g. if a tenant’s turnover begins to increase more significantly

than anticipated before the end of the response period. The term “material way” is also not defined.

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?

Queensland tenants under affected leases who are suffering financial hardship as a direct result of the COVID-19 pandemic can now seek relief from their landlords (if they have not already done so). Their landlords are also prohibited from taking certain prescribed actions; 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:

- determine if their lease is an affected lease;
- carefully review the Regulation to determine their rights and obligations;
- communicate and commence negotiations with each other as soon as possible (if they have not already done so);
- as soon as practicable, provide each other with sufficient information (e.g. a tenant should provide information evidencing that it is an SME entity and eligible for the [jobkeeper scheme](#)), noting that a landlord must offer a tenant a rent reduction and any proposed changes to other conditions in the lease within 30 days of receiving sufficient information;
- cooperate and act reasonably and in good faith in all discussions and actions (tenants should note that a landlord is not prohibited from taking a prescribed action if a tenant has substantially failed to comply with the tenant’s obligations under the Regulation regarding the negotiations);
- if the tenant is a foreign person, consider if FIRB approval is required for any lease extension. See our update on 30 April 2020 ([COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions](#));
- ensure that whatever is agreed is given effect by a variation to the lease or an agreement between the parties (noting that the disclosure requirements of Part 5 of the *Retail Shop Leases Act 1994* (QLD) do not apply to a variation to a retail lease); and
- note that the Regulation does not prevent the parties from entering into an agreement which is not consistent with the Regulation (existing non-consistent agreements are also not affected).

## What about leases that are not “affected leases”?

Landlords and tenants under leases that are not affected leases 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 they cannot benefit from the protection provided by the Regulation. They remain subject to the existing law.