

COVID-19: South Australia implements part of the national code of conduct for commercial tenancies

Source: [South Australian Legislation](#)

Date: 1 May 2020

As noted in our update on 9 April 2020 ([COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#)), 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 implemented in each state and territory through state and territory legislation. This legislation will, during the COVID-19 pandemic, 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.

Legislation implemented in South Australia

The South Australian government has now enacted:

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

When does the Act take effect?

The Act takes effect from 30 March 2020.

How long will the Act and the Regulations be in operation?

The Act and the Regulations will only be in operation for a limited period of time (defined as the “**prescribed period**” in the Act):

- commencing on 30 March 2020; and
- expiring on a date fixed by the Minister (by notice in the Gazette), being the earlier of:
 - the date on which all relevant declarations relating to the COVID-19 pandemic within South Australia have ceased; and
 - 9 October 2020.

What do the Act and the Regulations provide?

Prohibited actions

If a tenant under a commercial lease (which includes a retail, office and industrial lease) is suffering financial hardship as a result of the COVID-19 pandemic, a landlord cannot take any action under the commercial lease or seek orders or issue proceedings in a court for any of the following:

- eviction of the tenant from the premises;
- exercising a right of re-entry to 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,

on the grounds of a breach of the lease consisting of:

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

during the prescribed period.

- **What if a landlord has already taken action between 30 March 2020 (the date from which the Act takes effect) and 9 April 2020 (the date the Act was enacted)?**

If the action is incomplete, it will effectively be put on hold. The Act provides that, if a tenant is suffering financial hardship as a result of the COVID-19 pandemic and, during the period 30 March 2020 to 9 April 2020:

- the landlord has taken action but not yet completed that action;
- the landlord has taken, but not yet completed, the performance of any other measure that the landlord would not have been able to undertake during the prescribed period by virtue of the Act; or
- the operation of the terms of the commercial lease has had effect contrary to the operation of the Act,

the action, operation or effect will, insofar as it remains incomplete, be taken to be stayed or suspended until the end of the prescribed period.

- **No action or termination for tenants' acts or omissions required by law**

Any act/omission of a tenant required under South Australian law in response to the COVID-19 pandemic will not be a breach of a commercial lease or constitute grounds for termination or for the landlord to take any action against the tenant, e.g. if a business cannot trade because of trade restrictions imposed by the South Australian government in response to the COVID-19 pandemic.

- **No rent increases**

Unless otherwise agreed between the landlord and the tenant, a landlord must not increase the rent payable under a commercial lease (other than turnover rent) if, during the prescribed period, the tenant is suffering financial hardship as a result of COVID-19.

- **No land tax**

A landlord must not, during the prescribed period, require a tenant who is suffering financial hardship as a result of the COVID-19 pandemic to pay land tax (or reimburse the landlord for the payment of land tax) in respect of a commercial lease.

- **Suffering financial hardship**

The Regulations provide that a tenant is taken to be suffering financial hardship as a result of COVID-19 for the purpose of the Act and the Regulations if the tenant is eligible for, or receiving, a [JobKeeper payment](#) in respect of its business; however, a party to a commercial lease may apply to the [Small Business Commissioner](#) for a determination as to whether or not the tenant is suffering financial hardship as a result of the COVID-19 pandemic. The Regulations provide that the Small Business Commissioner must have regard to:

- whether or not the tenant is eligible for, or receiving, a JobKeeper payment in relation to its business; and

- any reduction in turnover of the business of the tenant (as verified by financial records or statements from the tenant) during a specified period as compared with another specified period determined by the Small Business Commissioner.

The Prime Minister stated that the Code of Conduct applies to commercial tenants who have an annual turnover of less than \$50m; however, this turnover threshold does not appear to form part of the criteria under the Regulations for determining if a tenant is suffering financial hardship as a result of COVID-19.

- **Mediation**

A party to a commercial lease may also apply to the [Small Business Commissioner](#) for mediation of a dispute:

- as to whether or not the tenant is suffering financial hardship as a result of the COVID-19 pandemic (a right of appeal lies to the Magistrates Court); or
- in relation to issues that have arisen in relation to the COVID-19 pandemic arising from the Act, the commercial lease or any other matter relevant to the occupation of the premises or to a business conducted at the premises.

- **Confidential information**

A person must not divulge or communicate personal information, information relating to business processes or financial information (including information about the turnover of a business) obtained in connection with the operation of the Act except:

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

Do the Act and the Regulations fully implement the Code of Conduct?

No. They do not give effect to all of the leasing principles set out in the Code of Conduct. 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](#)).

What leasing principles in the Code of Conduct are not given effect?

The Act and the Regulations do not:

- require landlords to offer proportionate rent reductions, by way of a waiver or a deferral;
- provide for any “reasonable recovery period”;
- require landlords to pass on the benefit of loan payment deferrals or any reduction in statutory charges or insurance costs (the Act only deals with land tax – see above); or
- require tenants to comply with the terms of their commercial leases (subject to any agreed amendments).

What else is not dealt with by the Act or the Regulations?

The Act or the Regulations do not state if a landlord can take action during the prescribed period for:

- the non-payment of rent or outgoings; or
- not being open for business during the hours specified in the lease,

before 30 March 2020, i.e. before the COVID-19 pandemic period; however, the Act or the Regulations do not appear to prohibit the landlord from:

- taking any such action; or
- taking action for any other type of breach (except for any act/omission required by law).

In this regard, 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](#)).