

# ***Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020***

Explanatory notes for SL 2020 No. 79

Made under the

*COVID-19 Emergency Response Act 2020*  
*Retail Shop Leases Act 1994*

## **General Outline**

Short Title

*Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020*

## **Authorising law**

Section 23 of the *COVID-19 Emergency Response Act 2020* and section 121 of the *Retail Shop Leases Act 1994*.

## **Policy objectives and the reasons for them**

On 29 March 2020, the Prime Minister announced that work had begun on a short-term intervention for commercial tenancies and that National Cabinet had agreed to a moratorium on evictions over the next six months for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus.

On 3 April 2020, National Cabinet agreed that states and territories would implement a mandatory code of conduct, including via legislation or regulation as appropriate, for the purpose of imposing a set of good faith leasing principles for application to commercial leases in response to the financial hardship being experienced by some tenants due to business disruption, closures, restrictions on movement and social distancing due to the COVID-19 emergency. The code would apply where the tenant is eligible for the Commonwealth Government's JobKeeper assistance and is a small-medium sized enterprise with up to \$50 million in annual turnover. Subsequently, on 7 April 2020, the Prime Minister announced the National Cabinet's agreement on the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles* (National Code), to be given effect through legislation or regulation as appropriate.

On 23 April 2020, the *COVID-19 Emergency Response Act 2020* (the Act), which provides for regulations to be made to implement the good faith leasing principles, received assent. The Act also established a temporary Small Business Commissioner to undertake small business advocacy and administer a mediation process for affected lease disputes and small business tenancy disputes.

The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation) will implement the National Cabinet decision in relation to good faith leasing principles set out in the National Code for “affected leases” in Queensland.

Generally, a lease of premises is an “affected lease” under the Regulation if:

- it is a retail shop lease (under the *Retail Shop Leases Act 1994*) or a prescribed lease (a lease, other than a retail shop lease, under which the leased premises are to be wholly or predominantly used for carrying on a business);
- on the commencement, the lease, or an agreement to enter into the lease, is binding on the lessee (whether or not the lease has commenced);
- the lessee under the lease is a small and medium enterprise entity under the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cwlth), section 5; and
- the lessee under the lease, or an entity that is connected with or an affiliate of the lessee and responsible for employing staff for the business carried on at the leased premises, is eligible for the Commonwealth’s JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cwlth), sections 7 and 8.

The Regulation:

- does not prevent parties from entering into an agreement that is inconsistent with the obligations of lessors and lessees under part 2 of the Regulation, or affect the validity of an agreement entered into before the commencement, but preserves a party’s right to negotiate a condition of an affected lease;
- requires the lessor and lessee under an affected lease to cooperate and act reasonably and in good faith;
- prohibits a lessor under an affected lease, from taking a prescribed action (such as recovery, termination of possession, charging interest on unpaid rent) on the following grounds occurring wholly or partly during the response period: a failure to pay rent; a failure to pay outgoings; or the business carried on at the leased premises not being open for business during the hours required under the lease;
- prohibits a lessor under an affected lease from increasing the rent payable by the lessee during the response period (except when worked out with reference to turnover);
- provides for how renegotiations of rent payable and other conditions are to be initiated and conducted;
- imposes requirements relating to deferred rent;

- provides that, subject to some exceptions, if rent under the lease is waived or deferred for a period, the lessor must offer the lessee an extension to the term of the lease, for a period equivalent to the period for which rent is waived or deferred, 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);
- provides that, if a lessee under an affected lease is unable to operate a business at the premises for any part of the response period because of the COVID-19 emergency, the lessor may cease or reduce any services at the premises;
- imposes an obligation of confidentiality on parties to an affected lease dispute or a small business tenancy dispute (each, an eligible lease dispute) not to disclose protected information, other than in specified circumstances;
- imposes an obligation on parties to cooperate and act reasonably and in good faith in all discussions and actions associated with resolving an eligible lease dispute;
- provides for the Small Business Commissioner to refer eligible lease disputes to mediation and establishes procedures for mediation;
- provides for matters to be considered by a court or tribunal in the hearing and deciding of an eligible lease dispute;
- provides a general exemption for an act or omission, on or after the commencement of the Act, of a lessee under a retail shop lease, a prescribed lease or other small business lease, if the act or omission is required under a COVID-19 response measure or a law of the Commonwealth or another State in response to the COVID-19 emergency; and
- stays or suspends proceedings or actions for prescribed action in relation to affected leases that are started in the pre-commencement period but are unresolved, incomplete or not finalised prior to commencement of the Regulation.

## **Achievement of policy objectives**

The policy objective is achieved by the making of the Regulation.

## **Consistency with policy objectives of authorising law**

The Regulation is consistent with the policy objectives of the authorising law.

## **Inconsistency with policy objectives of other legislation**

The authorising law allows the Regulation “to be inconsistent with an Act or law, other than the *Human Rights Act 2019*, to the extent necessary to achieve a purpose of the regulation and this Act”.

## **Benefits and costs of implementation**

The benefit of the Regulation is that it will protect lessees under affected leases from prescribed action during the response period, facilitate the renegotiation of these leases according to good faith leasing principles and provide the framework for dispute resolution when agreement cannot be reached. There will be costs for the State in facilitating dispute resolution and in terms of the resources of Queensland Civil and

Administrative Tribunal and the courts for matters that cannot be successfully mediated.

The Regulation will provide small businesses with a pathway for resolving tenancy disputes via a single point of contact that is connected to pre-mediation support service provided by the Small Business Commissioner. This will increase the likelihood of disputes being resolved earlier, avoiding protracted negotiation and additional costs for small business.

### **Consistency with fundamental legislative principles**

The Regulation potentially breaches the fundamental legislative principles to the extent that it impacts the rights and liberties of individuals (section 4(2)(a) *Legislative Standards Act 1992*) by interfering with and overriding the legal rights of landlords under current legislation and lease arrangements through the implementation of the National Cabinet decision in relation to good faith leasing principles.

Overriding landlords ordinary property rights is justified by the need to respond to the financial hardship being experienced by some tenants due to closures and restrictions on movement and social distancing which the COVID-19 emergency has caused (and will continue to cause) and to provide a fair sharing of the burden of the emergency between landlords and tenants.

### **Consultation**

Key industry and legal stakeholders (the Property Council of Australia (Qld), the Urban Development Institute of Australia, the National Retailers Association, the Australian Retailers Association, the Pharmacy Guild of Australia, the Chamber of Commerce and Industry Queensland, the Shopping Centre Council of Australia, the Queensland Tourism Industry Council, the Queensland Law Society, the Real Estate Institute of Queensland and the Small Business Champion) have been consulted on a draft of the Regulation.

The Queensland Productivity Commission was not consulted regarding the Regulation. In the urgent circumstances, a regulatory impact assessment has not been conducted.

Comments made by stakeholders were taken into account in the drafting of the Regulation.