

Retail and Other Commercial Leases (COVID-19) Regulation 2021 (NSW)

and

National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19

27 August 2021

TOPIC	REQUIREMENT	REFERENCE	COMMENT	
Period of time	The Regulation applies from 13 July 2021 to 13 January 2022 ('prescribed period').	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 2 and clause 10</p> <p>Clause 3 (definition of 'prescribed period')</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 1 definition of 'prescribed period'</p> <p>Schedule 5, clause 7</p>	<p>Code</p> <p>Purpose section</p>	<p>The Code stated that it will apply for the duration of the 'COVID-19 pandemic period', defined by the Commonwealth Government.</p> <p>The Regulation amends the operative period of the Code in NSW <u>to six months from 13 July 2021 to 13 January 2022.</u></p>
Class/type of leases	<p>Retail leases and commercial leases except:</p> <ul style="list-style-type: none"> Leases entered into on or after 26 June 2021 (except leases 	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 3 definition of</p>	<p>Code</p> <p>Purpose section</p>	<p>The Regulation applies to commercial leases generally – retail, office, industrial and other classes of commercial leases.</p> <p>Does not apply agricultural leases.</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT
	<p>pursuant to an option to renew or other renewal or extension on the same terms).</p> <ul style="list-style-type: none"> Leases under the Agricultural Tenancies Act 1990. 	<p>'commercial lease'.</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 1 definition of 'commercial lease'</p>	<p>Does not apply to residential leases.</p> <p>Does not apply to leases entered into on or after 26 June 2021, except option leases and other renewals or extensions on the same terms.</p>
Financial criteria	<p>The Regulation applies to small to medium enterprise tenants ('SME Tenants') who meet both of the following criteria:</p> <ul style="list-style-type: none"> Eligible for the 2021 COVID-19 Micro-business Grant, the 2021 COVID-19 Business Grant, or the 2021 JobSaver Payment). Annual turnover of less than AU\$50 million for the 2020-2021 financial year. 	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 4 meaning of 'impacted lessee'</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 2 meaning of 'impacted lessee'</p>	<p>Code</p> <p>Purpose section</p> <p>The Regulation only applies to 'impacted lessees'.</p> <p>The NSW Government small business grants have been inserted in lieu of the commonwealth government's JobKeeper program, which is no longer on foot.</p> <p>The eligibility criteria for the grants differs depending on the grant.</p> <p>The Regulation does not apply to leases where the tenant is not an impacted lessee. Parties to those leases are free to negotiate terms outside the scope of the Code and landlords are not required to comply with the Code with regard to those tenants.</p>
Provision of information by tenants	<p>The impacted lessee must give the lessor:</p> <ul style="list-style-type: none"> a statement that it is an impacted lessee; and evidence that it is an impacted lessee 	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6A</p> <p><i>Other commercial leases:</i></p> <p>Clause 4A</p>	<p>Code</p> <p>Overarching principles</p> <p>Tenants must give landlords evidence that they qualify as 'impacted lessees'.</p> <p>The type and amount of evidence required is not specified. This has been an issue in many negotiations.</p>
Rent increases	<p>Rent (other than turnover rent) must not be increased during the prescribed period.</p>	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6B</p>	<p>Code</p> <p>Leasing Principle 13</p> <p>Moratorium on rent increases during the prescribed period, except in relation to turnover rent.</p> <p>Accordingly, landlords cannot:</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT
		<p><i>Other commercial leases:</i></p> <p>Clause 4B</p>	<ul style="list-style-type: none"> Apply any base rent increases due during the prescribed period (e.g. annual fixed percentage increase or CPI increase or increase due to market review). Enforce non-payment of such rent increases after the prescribed period (i.e. by drawing on the tenant's security for the amount of the increase and/or terminating the lease on the basis of the non-payment). <p>The moratorium applies during the prescribed period. This differs to the Code, which states that the moratorium extends to a subsequent reasonable recovery period.</p>
<p>Enforcement of lease</p>	<p>A lessor must not take any 'prescribed action' against an 'impacted lessee' in respect of any 'prescribed breaches' of the lease occurring during the 'prescribed period', unless:</p> <ul style="list-style-type: none"> the matter has been referred to mediation and the Registrar has certified that mediation has failed to resolve the dispute; and if the lessee has requested renegotiation of the lease, the lessor has complied with clause 6D. 	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6C(1) and clause 3 (definitions of 'prescribed action' and 'prescribed breaches')</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4C(1) and clause 1 (definitions of 'prescribed action' and 'prescribed breaches')</p>	<p>Code</p> <p>Leasing Principle 1</p> <p>Leasing Principle 2</p> <p>During the 'prescribed period' landlords must renegotiate the lease (see below for details) and attempt mediation before taking 'prescribed actions' against 'prescribed breaches' of the lease.</p> <p>'prescribed period' is 13 July 2021 to 13 January 2022.</p> <p>'prescribed actions' are drawing on the tenant's security and/or terminating the lease.</p> <p>'prescribed breaches' are non-payment of rent or outgoings or not opening for business occurring during the 'prescribed period'.</p> <p>Accordingly, landlords may still enforce the lease in respect of all other breaches by the tenant without having to comply with the Regulation, such as:</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT
			<ul style="list-style-type: none"> damaging the premises any breaches occurring before the 'prescribed period' (i.e. non-payment of rent before 13 July 2021). <p>Accordingly, tenants must:</p> <ul style="list-style-type: none"> comply with all their other obligations under the lease; and remedy any pre-13 July 2021 breaches, <p>otherwise, the landlord may exercise its rights to draw on the security and/or terminate the lease in respect of those breaches, without having to comply with the Regulation.</p> <p>The Regulation is materially different to the Code, as landlords are not prevented from terminating leases for the prescribed breaches. The requirement is to first renegotiate the lease and mediate.</p>
Tenants can “contract out” of the protections	<p>The parties can agree to take any action in relation to the lease, including the lessor taking any 'prescribed action' or terminating the lease by agreement.</p>	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6C(2)</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4C(2)</p>	<p>Code</p> <p>Not applicable</p> <p>The tenant can agree to the landlord taking any prescribed action (i.e. drawing on the tenant's security and/or terminating the lease).</p>
Renegotiation of the lease	<p>Any party to the lease may request to renegotiate the rent and any other terms of the lease.</p>	<p>Regulation</p> <p><i>Retail leases:</i></p>	<p>Code</p> <p>Leasing Principles 3-5,</p> <p>Any party to the lease (i.e. the landlord, the tenant or the guarantor) may request to renegotiate the lease.</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT
	<p>A party can make a second or subsequent request, provided the request:</p> <ul style="list-style-type: none"> is made during the 'prescribed period'; and does not relate to rent or outgoings for a period that rent or outgoings have already been renegotiated. <p>If requested to negotiate, a party must:</p> <ul style="list-style-type: none"> renegotiate in good faith commence renegotiations within 14 days of request. <p>The parties must renegotiate having regard to:</p> <ul style="list-style-type: none"> the economic impacts of the COVID-19 pandemic. the Leasing Principles in the Code. <p>If the 'impacted lessee' does not comply with this clause or clause 6A, the lessor is taken to have complied.</p> <p>Renegotiation commenced but not concluded before the expiry of the 'prescribed period' may be continued after the 'prescribed period'.</p>	<p>Clause 6D</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4D</p>	<p>7-10 and 12</p> <p>The request can relate to any term of the lease.</p> <p>Multiple requests to renegotiate can be made, but only one renegotiation per period of time.</p> <p>All requests to renegotiate must be made during the 'prescribed period'.</p> <p>If requested to renegotiate, the landlord or tenant (as applicable) must:</p> <ul style="list-style-type: none"> renegotiate in good faith commence the renegotiations within 14 days of request. <p>The parties must negotiate on the basis of the relevant Leasing Principles in the Code (see below for details).</p> <p>If the tenant does not comply with this clause or clause 6A (providing evidence that the tenant is an 'impacted lessee'), the landlord is not required to renegotiate/renegotiate any further with the tenant.</p> <p>Negotiations do not need to be completed during the 'prescribed period' but they must be commenced during the 'prescribed period'.</p>
<p>Proportionate rent relief</p>	<p>Landlords must offer tenants reductions in rent:</p> <ul style="list-style-type: none"> In the form of waivers and deferrals. Up to 100%. 	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6D(4)</p> <p><i>Other commercial</i></p>	<p>Code</p> <p>Leasing Principle 3</p> <p>A proportionality principle applies to determining the amount of rent relief, with reference to the reduction in the tenant's turnover during the COVID-19 pandemic.</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT
	<ul style="list-style-type: none"> Proportionate based on the reduction in the tenant's trade during the COVID-19 pandemic period and subsequent reasonable recovery period. On a case by case basis. 	<i>leases:</i> Schedule 5, clause 4D(4)	Appendix 1 to the Code provides examples of the proportionality principle. For example, a 60% loss in turnover would result in at least 60% cash flow relief. The rent relief amount must include a reasonable subsequent recovery period for the tenant after the COVID-19 pandemic.
Rent waivers	At least 50% of the total rent relief amount must be provided as a waiver. A higher proportion than 50% must be waived if 50% would compromise the tenant's capacity to fulfil their ongoing obligations under the lease. Any higher proportion must have regard to the landlord's financial capacity to provide the additional waiver amount.	Regulation <i>Retail leases:</i> Clause 6D(4) <i>Other commercial leases:</i> Schedule 5, clause 4D(4)	Code Leasing Principle 4 Minimum of 50% of the rent relief amount provided as a waiver. The balance deferred as set out in Leasing Principle 5. More than 50% may be required to be waived on a case by case basis but having regard to the landlord's capacity.
Rent deferrals	<u>Leasing Principle 5:</u> The balance of the rent relief amount that is not waived must be provided as a deferral, amortised over: <ul style="list-style-type: none"> the balance of the term of the lease; or 24 months, whichever is the greater period of time. <u>Leasing Principle 9:</u> The repayment period should not commence until the earlier of: <ul style="list-style-type: none"> the end of the COVID19-pandemic; and 	Regulation <i>Retail leases:</i> Clause 6D(4) <i>Other commercial leases:</i> Schedule 5, clause 4D(4)	Code Leasing Principles 5 and 9 <u>Leasing Principle 5:</u> Minimum 50% rent waiver with the balance deferred and amortised. The deferral period is a minimum of 24 months. So, if the lease expires sooner, the repayments would continue after expiry up to 24 months in total. <u>Leasing Principle 9:</u> Repayments not to commence until after the COVID-19 pandemic is over, unless the lease expires earlier in which case the repayments can commence upon expiry. The length of the repayments period to take into account a reasonable subsequent recovery period for the

TOPIC	REQUIREMENT	REFERENCE	COMMENT
	<ul style="list-style-type: none"> the expiry of the lease, <p>taking into account a reasonable subsequent recovery period.</p>		tenant.
Extension of Lease Term	Tenants should be provided with the opportunity to extend the lease for an equivalent period of the rent waiver/rent deferral period.	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6D(4)</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4D(4)</p>	<p>Code</p> <p>Leasing Principle 12</p> <p>Extension of the lease term in order for the tenant to be able to trade during the recovery period.</p> <p>This appears to be intended to apply to leases that expire in the shorter term/before the end of the recovery period, to enable the tenant to trade from the premises during the recovery period in order to fund the repayments.</p>
Reductions in statutory outgoings	For tenants who pay statutory outgoings (such as land tax and council rates), the amount payable is reduced to the extent of any reduction received by the landlord.	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6D(4)</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4D(4)</p>	<p>Code</p> <p>Leasing Principle 6</p> <p>There is conflict between Leasing Principle 6 and the land tax rebate. Leasing Principle 6 provides that reduction in statutory outgoings should be passed onto the tenant. However, the purpose of the land tax rebate is to provide some compensation to the landlord for reducing the rent.</p>
Non-statutory outgoings	Landlords should where appropriate seek to waive recovery of other outgoings from tenants who are unable to trade. Landlords may reduce services as required in these circumstances.	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 6D(4)</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 4D(4)</p>	<p>Code</p> <p>Leasing Principle 8</p> <p>Waiver by landlords of on-charging discretionary outgoings may be required for tenants who have been forced to close, where appropriate. Landlords may reduce services to closed tenants (thus reducing outgoings expenditure).</p>
Landlord loan repayments deferrals	Landlords should seek to share with tenants any benefit they receive due to deferral of loan repayments, in a proportionate manner.	<p>Regulation</p> <p><i>Retail leases:</i></p>	<p>Code</p> <p>Leasing Principle 7</p> <p>For a period of time in 2020, there was a deferral of loan repayments for six months for landlords with facilities up to AU\$10 million, who undertook to their</p>

TOPIC	REQUIREMENT	REFERENCE	COMMENT	
		Clause 6D(4) <i>Other commercial leases:</i> Schedule 5, clause 4D(4)	lender not to terminate leases for non-payment of rent due to COVID-19. Deferred payments will be capitalised. This reduced expenditure for the landlord should be shared with tenants proportionately.	
Fees, charges, interests, etc. on rent relief amounts	No fees, interest or charges should be applied to amounts of rent waived or deferred.	Regulation <i>Retail leases:</i> Clause 6D(4) <i>Other commercial leases:</i> Schedule 5, clause 4D(4)	Code Leasing Principle 10	No fees, interest or charges on rent waived and/or deferred.
COVID-19 pandemic laws override the lease	An act or omission by an ‘impacted lessee’ that is required under law due to the COVID-19 pandemic is not a breach of the lease.	Regulation <i>Retail leases:</i> Clause 6E <i>Other commercial leases:</i> Schedule 5, clause 4E	Code Leasing Principle 14	If a tenant takes action as required by law due to the COVID-19 pandemic, this will not be a breach of the lease. For example, if the tenant closes the premises because it is required to by government order, this will not be a breach of any obligation in the lease to open for business. Therefore, the landlord could not take any prescribed action (i.e. draw on the tenant’s security and/or terminate the lease) for the tenant closing the premises.
Breaches of lease not related to the COVID-19 pandemic	The Regulation does not prevent a lessor taking prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic.	Regulation Retail leases: Clause 7 <i>Other commercial leases:</i> Schedule 5, clause 5	Code Leasing Principle 2	The restrictions on landlords taking action against tenants for breaches of the lease only applies to the specified breaches (non-payment of rent or outgoings or not opening for business) occurring during the ‘prescribed period’. Accordingly, landlords may still take action in respect of all other breaches of the lease by the tenant, for example:

TOPIC	REQUIREMENT	REFERENCE	COMMENT	COMMENT
				<ul style="list-style-type: none"> • Damage to the premises. • Failure to make good and vacate the premises at the end of the lease term.
Mediation	<p>Part 8 of the Retail Leases Act applies to an 'impacted commercial lease dispute' as if it were a retail tenancy dispute within the meaning of that Part.</p> <p>'impacted commercial lease dispute' is a dispute about a 'prescribed breach' of an 'impacted lease'.</p>	<p>Regulation</p> <p>Clause 8</p>	<p>Code</p> <p>Binding Mediation Section.</p>	<p>See comments above under the Enforcement of lease section.</p>
Equity and Common Law	<p>The Regulation does not exclude the existing rules of equity and common law in respect of 'prescribed action' taken by a landlord.</p>	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 9</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 6</p>	<p>Code</p> <p>Not applicable.</p>	<p>The existing rules of equity and common law continue to apply to enforcement of the lease by the landlord (i.e. drawing on the tenant's security and/or terminating the lease).</p> <p>For example, relief against forfeiture (which gives the tribunal/court broad discretion to prevent a landlord from terminating a lease on grounds of equity and fairness).</p>
End date of the Regulation	<p>The Regulation is repealed six months after it commences.</p>	<p>Regulation</p> <p><i>Retail leases:</i></p> <p>Clause 10</p> <p><i>Other commercial leases:</i></p> <p>Schedule 5, clause 7.</p>	<p>Code</p> <p>Purpose section.</p>	<p>The Regulation commenced on 14 July 2021 and is in force for a period of 6 months to 15 January 2022.</p>

Implementation of actions in compliance with the Code will involve case by case judgments as well as an overall commercial strategy. For assistance, please contact Dentons to discuss.



Leigh Wilson

Special Counsel, Sydney

D +61 2 9931 4976

Email: leigh.wilson@dentons.com

© 2021 Dentons. All rights reserved. Attorney Advertising. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. The contents of this document are general in nature and not designed to provide legal or other advice. You should obtain legal advice before action based on its content.