

COVID-19 commercial lease disputes — What about me? It isn't fair.

COVID-19 restrictive measures have impacted landlords and tenants in commercial lease disputes to varying degrees.

This guide clarifies the impact of The Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) and carves out the current dispute resolution pathway.

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This article is intended to help commercial landlords and tenants who do not know how to resolve their commercial lease disputes and are not aware of their rights, obligations or the framework.

The framework

On 24 April 2020, the *NSW Retail and Other Commercial Leases (COVID-19) Regulation 2020* ('**COVID-19 Leasing Regulations**') commenced.

The COVID-19 Leasing Regulations give effect to the National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19 ('**National Code of Conduct**') adopted by the National Cabinet on 7 April 2020 by:

1. Regulating the rights of lessors – relating to the enforcement of certain commercial leases during the COVID-19 pandemic period.
2. Requiring renegotiation – lessors and lessees must renegotiate the rent and other terms of those affected commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

Key terms

1. Prescribed period – means from 24 April to 24 October 2020.
2. Impacted lessee – A lessee is an impacted lessee if they have:
 - a. Qualified for Job Keeper; AND have

b. Less than \$50 million turnover – the following turnover in the 2018–2019 financial year was less than \$50 million:

- i. if the lessee is a franchisee – the turnover of the business conducted at the premises or land concerned
- ii. if the lessee is a corporation that is a member of a group – the turnover of the group
- iii. in any other case – the turnover of the business conducted by the lessee.

c. Corporations constitute a group if they are related bodies corporate within the meaning of the *Corporations Act 2001* (Cth).

3. 'Commercial lease' means any agreement to which the Act applies relating to the leasing of premises or land for commercial purposes, but does not include:
 - a. a lease entered into after 24 April 2020, but not a lease entered into by means of an option to extend or renew the lease, or any other extension or renewal of an existing lease on the same terms as the existing lease.
 - b. a lease under the *Agricultural Tenancies Act 1990*.
4. 'Prescribed action' means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal.^[1]

The challenge

The challenge for commercial leasing tenants and landlords is navigating which restrictions apply, which do not, and understanding where their lease dispute falls.

A starting point is whether the tenant is an 'impacted lessee'.

COVID-19 leasing regulations table – during the prescribed period

Regs	Description	<\$50m turnover 18-19 and JobKeeper qualified	>\$50m turnover 18-19	Excluded category
S6(1)	Cannot take prescribed action	Applies	Does not apply	Does not apply
S6(2)	Cannot increase rent	Applies	Does not apply	Does not apply

S6(4)	Pass on tax and statutory reductions	Applies	Does not apply	Does not apply
S6(5)	COVID-19 pandemic action or omissions are not a breach of a commercial lease	Applies	Applies	Applies
S6(6)	Nothing prevents lessor and lessee agreeing to the parties taking any action in relation to the commercial lease	Applies	Applies	Applies
S7(1)	Lessor must not take or continue any prescribed action for failure to pay rent	Applies	Does not apply	Does not apply
S7(2)	Either party can initiate the renegotiation process	Applies	Does not apply	Does not apply
S7(3)	A party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease.	Applies	Applies	Does not apply
S7(4)	Parties are to renegotiate in good faith the rent payable under, and other terms of, the commercial lease having regard to the economic impact of COVID-19 and leasing principles in the National Code of Conduct.	Applies	Applies	Unclear
S8	Dispute resolution options in Part 8 <i>Retail Leasing Act</i> extend to impacted	Applies	Lessor restricted on exercising	Does not apply

	commercial lease disputes as if retail tenancy dispute		some rights until obtaining a certificate from the Small Business Commissioner that mediation failed.	
S8	Impacted commercial lease disputes must be submitted to mediation before proceedings can be taken	Applies	Applies to some lessor rights	Does not apply
S9	Tribunal and court to consider National Code of Conduct leasing principles	Applies	Applies	Applies

Key concepts to understand

5. Dispute Resolution

a. No retail tenancy dispute proceedings until mediation has been certified; s 68 of the Act.[2]

b. Mediation certification requirement extends to impacted commercial lease dispute; s 6 in new Schedule 5 of the *Conveyancing (General) Regulations* now requires the Small Business Commissioner to certify that mediation has failed before the lessor can:

- i. seek to recover possession of premises or land under the commercial lease
- ii. terminate the commercial lease
- iii. exercise or enforce any other right of the lessor under the lease.

c. Self-represented tenants look to utilise the Office of Fair Trading and Small Business Commissioner, however, represented businesses want to explore all alternative dispute resolution options to facilitate a commercial outcome that appreciates their specific circumstances.

d. The tribunal and courts will give regard to the National Code of Conduct in its decision-making process.

6. **Prohibited action and restrictions to commercial leases**

a. Cannot take prescribed action – If a lessee is an impacted lessee, a lessor must not take any prescribed action against the lessee on the grounds of a breach of the commercial lease during the prescribed period consisting of:

- i. a failure to pay rent, or
- ii. a failure to pay outgoings, or
- iii. the business operating under the lease not being open for business during the hours specified in the lease.

b. Exclusion – This does not prevent a lessor and lessee agreeing to the parties taking any action in relation to the commercial lease (including the lessor taking any prescribed action or the parties agreeing to terminate the commercial lease).

7. **Obligation to renegotiate rent before prescribed action**

a. Lessor must renegotiate rent first – Lessors under commercial leases must not take or continue any prescribed action against an impacted lessee on grounds of a breach of the commercial lease, consisting of a failure to pay rent during the prescribed period, unless the lessor has renegotiated in good faith in compliance with the regulations.

b. Either party can initiate the renegotiation process – If an impacted lessee is a party to a commercial lease, any party to the lease may request the other parties to renegotiate the rent payable under, and other terms of, the commercial lease. You do not need to wait for the other party.

c. You must renegotiate in good faith – A party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease.

d. Consider economic impacts and National Code of Conduct – The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct; ([The CCLCC The COVID-19 Commercial Leasing Code of Conduct](#)).

8. **What is excluded?**

- a. Non-COVID-19 related matters.[3]
- b. Rules of Equity and Common Law.[3]

9. **How long for?**

Six Months – 24 April 2020 to 24 October 2020, at which point it is repealed.

Three-step guide to resolve commercial lease disputes

1. Prepare documentation – Liaise with your accountant and book keeper to prepare your financial disclosure documentation and consider your JobKeeper options (qualifying for JobKeeper).
2. Know your dispute resolution options – Discuss your short term, long term and best alternative strategy with your solicitor and /or mediator, understand your market and your industry, and obtain independent financial and taxation advice to ensure that it is feasible ([COVID-19 – Where to for Landlords and Tenants](#)).
3. Be proactive – Either party can initiate the good faith renegotiation processes and/or alternative dispute resolution options. Resolution Institute can assist with finding a suitable mediator.

Resources

1. [COVID-19 – Where to for Landlords and Tenants](#);
2. [The Retail and Other Commercial Leases \(COVID-19\) Regulation 2020 \(NSW\) - What does it mean for Landlords and Tenants in Commercial Lease Disputes?](#)
3. [Small Business Commissioner, NSW](#).

If you would like to attend a webinar or workshop on this topic or other Covid-19 business dispute-related issues of interest, please send your EOIs to communications@resolution.institute