

# Commercial leases and COVID-19 FAQs

Updated 29 March 2021

Answers to commonly asked questions from small business tenants and lessors about the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020 \(No 3\)](#) (the Regulation).

## Overview of commercial leasing changes

### What actions has the Government taken on commercial leases?

On 24 April 2020, the NSW Government enacted the *Retail and Other Commercial Leases (COVID-19) Regulation* (the Regulation) to implement National Cabinet's [Code of Conduct](#) for commercial tenancies ("the Code of Conduct").

The Regulation put in place temporary measures to share the economic impacts of the COVID-19 pandemic between commercial property owners and tenants. The Regulation initially applied for a period of six months but was extended in line with the Commonwealth Government's JobKeeper program.

Protections under the Regulation will lapse on 28 March 2021 in line with the end of JobKeeper.

### What is the effect of the amendments to the *Retail Leases Act 1994*?

The NSW Government recently passed amendments to the *Retail Leases Act* as part of the [COVID-19 Recovery Bill 2021](#) to make sure that even after the Regulation lapses, eligible tenants will still be protected in relation to circumstances arising during the prescribed period under the Regulation (e.g. 24 April 2020 to 28 March 2021).

This means that even after 28 March 2021, a property owner will not, for example, be able to evict an eligible tenant because they were unable to pay their rent due to COVID-19 during the prescribed period unless they have first renegotiated rent and attempted mediation.

The amendment will not impact property owners' rights in relation to circumstances arising after the prescribed period.

### Are there any protections for tenants after 28 March 2021?

The Government has introduced legislation to amend the [Retail Leases Act 1994](#) to preserve the protections in the Regulation for circumstances arising during the prescribed period.

This means that lessors of impacted tenants cannot take a prescribed action for circumstances arising during the prescribed period unless they have renegotiated rent and attempted mediation.

For example, if a tenant was an impacted tenant under the *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (No 1)* and missed a rent payment sometime during

the prescribed period of 24 April to 23 October 2020, their lessor is required to negotiate rent relief and, if negotiations fail, attend mediation before taking a prescribed action for a failure to pay rent.

This amendment does not impact lessor's rights in relation to breaches of the lease that occur after the prescribed period.

### **Can a tenant and property owner still negotiate rent relief?**

If parties are still negotiating under the previous Regulation, they can finish their negotiation.

If a tenant was previously eligible under the Regulation, a property owner cannot take a prescribed action for circumstances occurring during the period in which the tenant was eligible unless they have first renegotiated rent and attempted mediation.

Regardless of whether the Regulation applies, tenants and property owners can still negotiate rent relief and apply for mediation if negotiations stall.

### **What are the prescribed actions?**

Part 1 of the Regulation sets out a list of 'prescribed actions'. This includes (but is not limited to):

- evicting the tenant;
- exercising a right of re-entry to the premises;
- recovering the premises;
- recovering a security bond; and
- terminating the lease.

A lessor can take a prescribed action for a breach by an impacted tenant for the reasons below, only if the lessor has first complied with their obligations under the rent relief and mediation clauses of the Regulation:

- failure to pay rent
- failure to pay outgoings
- the business operating under the lease not being open for business during the hours specified in the lease.

Property owners should seek legal advice before considering taking a prescribed action for a breach in the prescribed period.

### **When is the prescribed period?**

The prescribed period refers to the time in which a tenant is eligible for the protections under the Regulation. There are three prescribed periods:

Time Period	Eligibility	Evidence Required
First Prescribed Period	A commercial (retail, office, or industrial) tenant with:	Tenants must provide their property owner with:

<p>(24 April – 23 October 2020)</p>	<ul style="list-style-type: none"> <li>• an annual turnover of less than \$50 million in 2018-19; and</li> <li>• a 30 per cent decline in turnover compared with a corresponding month or quarter in 2019 (or 15 per cent for not-for-profits)</li> </ul>	<ul style="list-style-type: none"> <li>• Tax returns and/or Business Activity Statements to demonstrate an annual turnover less than \$50 million in 2018-19; and</li> <li>• Evidence they're receiving JobKeeper payments up to 28 September 2020 (or evidence of at least a 30 per cent decline in turnover compared with a corresponding month or quarter in 2019 – or 15 per cent for not-for-profits).</li> </ul>
<p>Second prescribed period (24 October – 31 December 2020)</p>	<p>A commercial (retail, office, or industrial) tenant with:</p> <ul style="list-style-type: none"> <li>• an annual turnover of less than \$50 million in 2018-19; and</li> <li>• a 30 per cent decline in turnover in the September quarter, (July, August, September) relative to a comparable period in 2019 based on actual GST turnover rather than projected GST turnover (or 15 per cent decline for not-for-profits).</li> </ul>	<p>Tenants must provide their property owner with:</p> <ul style="list-style-type: none"> <li>• Tax returns and/or Business Activity Statements to demonstrate an annual turnover less than \$50 million in 2018-19; and</li> <li>• Evidence they're receiving JobKeeper payments from 28 September 2020 (or evidence of at least a 30 per cent decline in turnover in the September quarter if the business is not receiving JobKeeper – or 15 per cent for not-for-profits).</li> </ul>
<p>Third prescribed period (1 January – 28 March 2021)</p>	<p>A commercial tenant with:</p> <ul style="list-style-type: none"> <li>• a retail shop lease;</li> <li>• an annual turnover less than \$5 million in 2018-19; and</li> <li>• a 30 per cent decline in turnover in the December quarter, (October, November, December) relative to a comparable period in 2019 based on actual GST turnover rather than projected GST turnover (or 15 per cent decline for not-for-profits).</li> </ul> <p>The eligible entity and decline in turnover tests are the same as the tests for JobKeeper 3.0 which apply from 4 January – 28 March 2021.</p>	<p>Tenants must provide their property owner with:</p> <ul style="list-style-type: none"> <li>• Tax returns and/or Business Activity Statements to demonstrate an annual turnover less than <u>\$5 million</u> in 2018-19; and</li> <li>• Evidence they're receiving JobKeeper payments from 4 January 2021 (or evidence of at least a 30 per cent decline in turnover in the December quarter if the business is not receiving JobKeeper – or 15 per cent for not-for-profits).</li> </ul>

A retail shop lease is a lease covered by the *Retail Leases Act 1994* (the Act). The types of shops covered are listed in Schedule 1 of the Act and include everything you would expect to see in high street retail such as: clothing retailers, hairdressers, butchers, beauticians, cafés and restaurants, newsagencies, and travel agencies. It also includes business in a retail shopping centre.

Some shops are excluded, such as large shops of more than 1,000 square metres, as well as some premises (listed in Schedule 1A to the Act) that do not need real people to provide services (such as vending machines and ATMs).

Property owners and tenants may need to get their own legal advice if they are unsure whether their tenancy is classified as a retail shop lease.

Tenants should also provide property owners with sufficient documentation to demonstrate actual decline in turnover to calculate rent reduction. Property owners should act reasonably and not place onerous requests on tenants for documentation.

### **Why has the Government not extended protections past 28 March 2021?**

The Regulation was intended as short-term intervention to cushion commercial tenants from the sudden economic shock caused by the health response to the COVID-19 pandemic.

Since then, economic conditions have improved, and the public health orders have eased.

The Government will continue to assist small businesses through our focus on supporting the ongoing economic recovery. The 2020-21 NSW Budget includes the following measures for small business:

- Increasing the payroll tax threshold from \$1 million to \$1.2 million and reducing the payroll tax rate from 5.45 per cent to 4.85 per cent
- Providing businesses that do not pay payroll tax with a \$1,500 digital voucher to help with the cost of government fees and charges
- Creating a new 'Dine & Discover NSW' program that allows every adult resident up to \$100 in digital vouchers to spend on eating out and entertainment at restaurants, visitor sites and cultural attractions
- Continuing Business Connect, so more businesses can continue to get advice to navigate the challenges of COVID-19
- Continuing to provide mediation services through the NSW Small Business Commission to support parties to a commercial lease.

More information on budget initiatives is available at: [www.budget.nsw.gov.au/](http://www.budget.nsw.gov.au/)

### **What happens if we cannot reach a rent relief agreement?**

The Small Business Commission's Mediation Services team can support parties to resolve disputes in a cost-effective and non-adversarial way. Any COVID-19 related application for mediation through the Small Business Commission will be assigned a case manager and treated as a high priority.

Under the Regulation, it is compulsory for commercial property owners and tenants to undertake mediation before pursuing certain claims in the civil courts, if the claim relates to a breach of the lease that occurred during the prescribed period.

For urgent matters such as a threatened or actual “lock-out” (attempted eviction, re-entry, or repossession) interim arrangements can be sought through the court system.

### **What does it mean to enter into “mediation” to renegotiate rent?**

Commercial property owners and eligible tenants should work together to renegotiate rent and other lease terms.

It is in the interests of all parties to negotiate a mutually beneficial outcome.

Where property owners and eligible tenants are unable to do this, they must attend mediation through the Small Business Commission, before pursuing certain claims in the civil courts. Interim arrangements for urgent matters involving a threatened or actual “lock-out” (attempted eviction, re-entry, or repossession), can be sought through NSW Civil and Administrative Tribunal or the Supreme Court.

The mediator cannot impose any outcome. However, if a mediation is successful, parties can enter a binding arrangement, such as a deed.

The Small Business Commission’s mediation service supports parties to resolve disputes in a cost-effective and non-adversarial way. Find out more information about mediation, visit <https://www.smallbusiness.nsw.gov.au/get-help/disputes/how-does-mediation-work>

### **What support is available to property owners?**

The NSW Government understands the extension could place additional pressure on property owners, however, we are trying to share the load more evenly during these challenging times and ensure the economy can recover when restrictions are lifted.

An eligible property owner that has provided rent reductions between 1 April 2020 and 28 March 2021, to eligible tenants experiencing financial distress due to the pandemic, may be eligible for land tax relief of up to 50 per cent for the 2020 land tax year, and up to 25 per cent for the 2021 land tax year.

The relief available includes:

- Land tax relief of up to 25 per cent on the land leased for the 2020 land tax year, for rent reductions provided to commercial or residential tenants from 1 April 2020 to 30 September 2020.
- Land tax relief of up to 25 per cent on the land leased for the 2020 land tax year, for rent reductions provided to commercial or residential tenants from 1 October 2020 to 31 December 2020.
- Land tax relief of up to 25 per cent on the land leased for the 2021 land tax year, for rent reductions provided to retail tenants with annual turnover less than \$5 million, from 1 January 2021 to 28 March 2021.

Land tax concessions are applied to any unpaid land tax notices and refunds will be issued for any payments already made.