

South Australia

COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020

under the *COVID-19 Emergency Response Act 2020*

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Legislative history

Part 1—Preliminary

1—Short title

These regulations may be cited as the *Covid-19 Emergency Response (Commercial Leases No 2) Regulations 2020*.

3—Interpretation

- (1) In these regulations, unless the contrary intention appears—

Act means the *Covid-19 Emergency Response Act 2020*;

affected lessee—see subregulation (2);

applicable prescribed period means the period of time that corresponds to all prescribed periods during which a lessee of a commercial lease is an affected lessee;

business means an undertaking (whether or not carried on with a view to profit) involving the manufacture, sale or supply of goods or services;

commercial lease means—

- (a) a retail shop lease within the meaning of the *Retail and Commercial Leases Act 1995*; or

- (b) a lease under the *Landlord and Tenant Act 1936*, including a retail shop lease to which Part 4 of that Act applies; or
- (c) any other agreement under which a person grants or agrees to grant another person for value a right to occupy premises for carrying on a business—
 - (i) whether or not the right is a right of exclusive occupation; and
 - (ii) whether the agreement is expressed or implied; and
 - (iii) whether the agreement is oral or in writing, or partly oral and partly in writing,

but does not include—

- (d) a lease under the *Pastoral Land Management and Conservation Act 1989*; or
- (e) a lease under the *Crown Land Management Act 2009*;

Commissioner means the person holding or acting in the office of Small Business Commissioner;

Court means the Magistrates Court;

defer, in relation to rent payable under a commercial lease, means to put off a liability or obligation of a lessee to pay rent to a later day or time than it would otherwise arise;

JobKeeper payment means a payment under the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth, as in force from time to time;

lessee means the person who has the right to occupy premises under a commercial lease;

lessor means the person who grants the right to occupy premises under a commercial lease;

outgoings has the same meaning as in the *Retail and Commercial Leases Act 1995*;

party to a commercial lease means the lessor or the lessee under the commercial lease;

period 1 means the period beginning on 30 March 2020 and ending on 30 September 2020;

period 2 means the period beginning on 1 October 2020 and ending on 3 January 2021;

prescribed action means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court for any of the following:

- (a) eviction of the lessee from premises the subject of the commercial lease;
- (b) exercising a right of re-entry to premises the subject of the commercial lease;
- (c) recovery of land;
- (d) distraint of goods;
- (e) forfeiture;
- (f) damages;
- (g) requiring a payment of interest on unpaid rent otherwise payable by a lessee;
- (h) recovery of the whole or part of a security bond under the commercial lease;

- (i) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease;
- (j) possession;
- (k) termination of the commercial lease;
- (l) any other remedy otherwise available to a lessor against a lessee at common law or under the law of this State;

prescribed period means 1 or both of the following:

- (a) period 1;
- (b) period 2;

relevant Act means—

- (a) the *Real Property Act 1886*; and
- (b) the *Retail and Commercial Leases Act 1995*; and
- (c) the *Landlord and Tenant Act 1936*;

relevant dispute, in relation to a commercial lease, means—

- (a) a dispute in relation to whether or not, for the purposes of the Act and these regulations, a lessee is suffering financial hardship as a result of the COVID-19 pandemic; or
- (b) a dispute in relation to the provision of rent relief during the applicable prescribed period (including a failure of a party to a lease to take part in a negotiation in respect of the provision of rent relief); or
- (c) a dispute in relation to issues that have occurred in relation to the COVID-19 pandemic—
 - (i) arising from, or related to, the operation of these regulations; or
 - (ii) arising from, or related to, the commercial lease; or
 - (iii) related to any other matter relevant to the occupation of the premises or to a business conducted at the premises the subject of the commercial lease;

relevant year means—

- (a) the 2018/2019 financial year; or
- (b) a 12 month period or such lesser period as determined by the Court; or
- (c) a 12 month period or such lesser period determined by the Minister by notice in the Gazette;

rent relief means any form of relief in respect of the liability or obligation of a lessee under a commercial lease to pay rent (including waiver or deferral of rent);

waiver, in relation to rent payable under a commercial lease, means the extinguishment of a liability or obligation of a lessee to pay rent.

- (2) A lessee is an **affected lessee** if—
 - (a) the lessee is suffering financial hardship as a result of the COVID-19 pandemic; and

- (b) the following turnover in a relevant year was less than \$50 million:
 - (i) if the lessee is a franchisee—the turnover of the business conducted at the premises the subject of the commercial lease;
 - (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 at the premises the subject of the commercial lease.
- (3) For the purposes of subregulation (2) corporations constitute a group if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (4) To avoid doubt, a reference in these regulations to turnover of a business includes any turnover derived from Internet sales of goods or services.
- (5) For the purposes of these regulations, a lessee will be taken to be suffering financial hardship as a result of the COVID-19 pandemic if the lessee is eligible for, or receiving, a JobKeeper payment in respect of the business of the lessee (whether in their capacity as an employer or on their own behalf).

4—Objectives

The objectives of these regulations are, having regard to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* published on 7 April 2020—

- (a) to implement temporary measures to apply to parties to certain commercial leases related to circumstances brought about by the COVID-19 pandemic; and
- (b) to provide for mechanisms to resolve disputes concerning those leases.

5—Application of regulations

- (1) Despite any provision of a relevant Act, or any other Act or law, the provisions of these regulations apply during the applicable prescribed period in relation to a commercial lease, other than a lease entered into after 30 March 2020, unless that lease is 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 or substantially similar terms as the existing lease.
- (2) The provisions of a commercial lease will be taken to be modified to the extent necessary to give effect to the operation of these regulations.

Part 2—Provisions relating to parties to commercial leases

6—Obligation of parties to commercial leases to negotiate in good faith

The parties to a commercial lease and any guarantor or other person with an interest in the lease must make a genuine attempt to negotiate in good faith the rent payable under, and other terms of, the commercial lease during the applicable prescribed period, having regard to—

- (a) the economic impacts of the COVID-19 pandemic on the parties to the lease; and

- (b) the provisions of the Act and these regulations; and
- (c) the provisions of the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* published on 7 April 2020.

7—Prohibitions and restrictions relating to commercial leases

- (1) If a lessee is an affected lessee, a lessor cannot take any prescribed action against the lessee on grounds of a breach of the lease during the applicable prescribed period consisting of—
 - (a) a failure to pay rent; or
 - (b) a failure to pay outgoings; or
 - (c) the business operating under the lease not being open for business during the hours specified in the lease.
- (1a) To avoid doubt, nothing in subregulation (1) prevents a lessor from taking a prescribed action against a lessee in respect of a breach of a commercial lease that occurred—
 - (a) in the case of a lessee who is an affected lessee in period 1—before the commencement of period 1; or
 - (b) in the case of a lessee who is an affected lessee in period 2 but who was not an affected lessee in period 1—before the commencement of period 2.
- (2) Subregulation (1) does not apply to or in respect of a failure to pay rent if the amount of rent payable under the lease is, during the applicable prescribed period—
 - (a) agreed by the parties under a mediation under regulation 8; or
 - (b) determined by the Court under regulation 9,and the failure to pay rent constitutes a breach of the agreement or order of the Court (as the case may be).
- (2a) Subregulation (2) does not apply to, or in respect of, a failure to pay rent that constitutes a breach of an agreement under a mediation under regulation 8, or an order of the Court under regulation 9 (as the case requires), made before the end of period 1 in respect of that period if—
 - (a) the agreement or order relates to the payment of rent in respect of a period that occurs after, or extends beyond, the end of period 1; and
 - (b) the breach of the agreement or order of the Court occurs in relation to the operation of that agreement or order in period 2 (in so far as it applies to that period); and
 - (c) the lessee is an affected lessee in period 2.
- (3) An act or omission of a lessee required under the laws of the State in response to the COVID-19 pandemic—
 - (a) will be taken not to amount to a breach of a commercial lease; and
 - (b) will not constitute grounds for termination of the commercial lease or the taking of any prescribed action by the lessor against the lessee.

- (4) If, during a prescribed period (or periods), a lessee under a commercial lease is an affected lessee, the rent payable under a commercial lease (other than rent or a component of rent determined by reference to turnover) must not, unless otherwise agreed between the lessor and the lessee, be increased.
- (5) A lessor must not, during the applicable prescribed period, require an affected lessee to pay land tax or reimburse the lessor for the payment of land tax in respect of a commercial lease.
- (6) Subregulation (5) does not limit the operation of a term of a commercial lease, or a provision of an Act, that otherwise prohibits the payment of land tax or reimbursement of land tax to a lessor by a lessee.
- (7) If a lessor receives a waiver of land tax or a relief payment under a scheme administered by the Treasurer for the purposes of providing land tax relief to persons suffering financial hardship as a result of the COVID-19 pandemic, the lessor must pass on the benefit of the waiver or relief payment in the form of a waiver of rent payable by an affected lessee under the commercial lease in accordance with the provisions of that scheme.

8—Mediation by Commissioner

- (1) Subject to subregulation (2), a party to a commercial lease may apply to the Commissioner for mediation of a relevant dispute in relation to a commercial lease.
- (2) A lessee may not apply to the Commissioner for mediation of a relevant dispute in relation to a commercial lease under subregulation (1) unless the lessee is, or is claiming to be, an affected lessee.
- (2a) If the parties to a commercial lease entered into an agreement (the *initial agreement*) as contemplated by these regulations (whether under a mediation or otherwise) before the end of period 1 in relation to that period, and that agreement applies, or purports to apply, in respect of a period that occurs after, or extends beyond, the end of period 1, a party to a commercial lease may, despite the terms of that agreement, apply to the Commissioner under this regulation for mediation of a relevant dispute that relates to the terms of the initial agreement in so far as the terms apply in relation to period 2, provided that the lessee under the lease is, or is claiming to be, an affected lessee in period 2.
- (2b) Nothing in subregulation (2a), including any agreement reached under a subsequent mediation, may affect the operation of the initial agreement in so far as it applies in respect of period 1.
- (3) The Commissioner may, in exercising any functions or powers under this regulation in relation to a matter, exercise any of the powers or functions the Commissioner is able to exercise under Part 7 of the *Fair Trading Act 1987* in relation to that matter.
- (4) The Commissioner must issue the parties to a commercial lease the subject of an application under subregulation (1) or (2a) with a certificate, in the form determined by the Commissioner, stating the names of the parties and—
 - (a) if mediation has failed or is unlikely to resolve the dispute—that the mediation has been terminated without resolution; or
 - (b) if mediation would not be reasonable in the circumstances—that fact; or

- (c) if a party to the commercial lease refused to participate, or did not participate in good faith, in mediation—that fact.
- (5) To avoid doubt, section 67C of the *Evidence Act 1929* applies in relation to a mediation under this regulation.
- (6) A person must not divulge or communicate personal information, information relating to business processes or financial information obtained in connection with a mediation under this regulation except—
 - (a) with the consent of the person to whom the information relates; or
 - (b) in connection with the administration of the Act and these regulations; or
 - (c) as authorised by the Commissioner; or
 - (d) for the purposes of legal proceedings; or
 - (e) to a police officer or a law enforcement officer of another State, a Territory of the Commonwealth or of the Commonwealth; or
 - (f) as authorised or required by law.

9—Determination of relevant dispute by Court

- (1) Subject to this regulation, a party to a commercial lease may apply to the Court for resolution of a relevant dispute in relation to a commercial lease.
- (2) A party to a commercial lease may only apply to the Court for resolution of a relevant dispute in relation to a commercial lease if the Commissioner has issued a certificate under regulation 8(4).
- (3) The Court may make a determination as to whether or not a lessee is an affected lessee.
- (4) In making a determination under subregulation (3), the Court may have regard to the following:
 - (a) whether or not the lessee is eligible for, or is receiving, a JobKeeper payment in respect of the business of the lessee (whether in their capacity as an employer or on their own behalf);
 - (b) any reduction in turnover of the business of the lessee (as verified by financial records or statements provided by the lessee) during a specified period as compared with another specified period determined by the Court as being relevant to the circumstances of whether or not the lessee is suffering financial hardship as a result of the COVID-19 pandemic.
- (5) In respect of proceedings under this regulation in relation to a commercial lease, the Court may, subject to this regulation, make 1 or more of the following orders:
 - (a) an order granting rent relief to an affected lessee in relation to payment of rent under the commercial lease;
 - (b) an order requiring the payment of some or all of the rent under a commercial lease into the Court until the lease has been performed;
 - (c) an order requiring that rent paid into the Court be paid out and applied as directed by the Court;

- (d) an order modifying the terms and conditions of a lease in a manner specified in the order;
 - (e) an order to defer the payment of rent under a commercial lease for a specified period not exceeding 24 months from the day on which the order is made;
 - (ea) an order varying, revoking or substituting an agreement, or the terms of an agreement, entered into by the parties to the commercial lease as contemplated by these regulations (provided that where the variation, revocation or substitution of the agreement, or the terms of the agreement, relates to deferral of payment of rent, the period for which payment is deferred does not exceed 24 months from the day on which the order is made);
 - (f) any other orders the Court thinks necessary or desirable to resolve a dispute between the parties to a commercial lease.
- (6) If, during the designated period, the parties to a commercial lease have agreed to vary the terms or modify the operation of the lease (including agreeing to rent relief for the lessee), then an order of the Court may not operate to modify or affect the operation of that agreement insofar as that agreement operated during the designated period (and an order of the Court may, if the Court so determines, operate to modify or affect the operation of that agreement as it purports to operate after the designated period).
- (7) Subject to this regulation, if the Court makes an order under subregulation (5)(a), or (ea) where the variation, revocation or substitution of the agreement, or the terms of the agreement, relate to the granting of rent relief to an affected lessee, then at least 50% of the rent relief determined by the Court must be in the form of a waiver of rent.
- (8) In making an order under subregulation (5)(a), or (ea) where the variation, revocation or substitution of the agreement, or the terms of the agreement, relate to the granting of rent relief to an affected lessee, the Court must have regard to the following:
- (a) the obligations of the lessor under the Act, a relevant Act and these regulations;
 - (b) the reduction in turnover of the business of the lessee during the applicable prescribed period;
 - (c) whether the lessor has, during the applicable prescribed period, agreed to waive recovery of any outgoings or other expense payable by a lessee under the lease;
 - (d) whether a failure to provide rent relief would compromise the lessee's ability to fulfil the lessee's ongoing obligations under the lease, including the payment of rent;
 - (e) the ability of the lessor to provide rent relief, including any relief provided to the lessor by a third party in response to the COVID-19 pandemic;
 - (f) any reduction by a third party to outgoings in relation to the premises the subject of the lease;
 - (g) any other matter the Court thinks fit.

- (9) Subject to this regulation, if the Court makes an order under subregulation (5)(e), or (ea) where the variation, revocation or substitution of the agreement, or the terms of the agreement, relates to the deferral of payment of rent, the Court may also make an order extending the term of the lease for the period for which rent is deferred under the order.
- (10) The Court may, at any time, on application by a party to a commercial lease, vary or revoke an order imposed by the Court under this regulation and make such other orders as the Court thinks necessary in the circumstances.
- (10a) To avoid doubt, and without limiting the operation of subregulation (10), if a lessee under a commercial lease is, or is claiming to be, an affected lessee with respect to period 2, then a party to the lease may apply to the Court under subregulation (10) for an order to vary or revoke an order made by the Court in period 1 under this regulation if that order applies, or purports to apply, in respect of a period that occurs after, or extends beyond, the end of period 1.
- (11) In any proceedings under this regulation, a certificate issued by the Commissioner under regulation 8(4) will constitute proof, in the absence of proof to the contrary, of the matters so certified.
- (12) In this regulation—
- designated period* means the period—
- (a) beginning on 30 March 2020; and
 - (b) ending on the day on which these regulations come into operation.

10—Prohibition on continuing certain action during prescribed period

- (1) If a lessee is suffering financial hardship as a result of the COVID-19 pandemic and during the relevant period—
- (a) a lessor has taken or commenced, but not yet completed or finalised, a prescribed action (including a prescribed action that has a periodic or ongoing effect); or
 - (b) a lessor has taken or commenced, but not yet completed or finalised, the performance of any other measure (including a measure that has a periodic or ongoing effect) that the lessor would not have been able to undertake or commence during a prescribed period by virtue of the operation of the Act as in force immediately before these regulations came into operation; or
 - (c) the operation of the terms of a commercial lease has had effect, or has a periodic or ongoing effect, contrary to the operation of the Act as in force immediately before these regulations came into operation,

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

- (2) The Court may, on application by a party to a commercial lease—
- (a) make such orders as it thinks appropriate in the circumstances to mitigate the effect of an action or effect of a matter referred to in subregulation (1), insofar as it has been completed or implemented in whole or in part during the relevant period, on grounds that the lessee has suffered financial hardship as a result of the COVID-19 pandemic; and
 - (b) may make such other orders as it thinks fit.

- (3) In this regulation—

relevant period means the period beginning on 30 March 2020 and ending on 9 April 2020.

11—Expiry of regulations

These regulations will expire on 3 January 2021.

Legislative history

Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Legislation revoked by principal regulations

The *COVID-19 Emergency Response (Commercial Leases No 2) Regulations 2020* revoked the following:

COVID-19 Emergency Response (Commercial Leases) Regulations 2020

Principal regulations and variations

New entries appear in bold.

Year	No	Reference	Commencement
2020	60	<i>Gazette 15.5.2020 p1383</i>	15.5.2020: r 2
2020	282	<i>Gazette 25.9.2020 p4735</i>	1.10.2020: r 2

Provisions varied

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Pt 1		
<i>r 2</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	<i>1.10.2020</i>
r 3		
r 3(1)		
applicable prescribed period	inserted by 282/2020 r 4(1)	1.10.2020
JobKeeper payment	varied by 282/2020 r 4(2)	1.10.2020
period 1	inserted by 282/2020 r 4(3)	1.10.2020
period 2	inserted by 282/2020 r 4(3)	1.10.2020
prescribed period	substituted by 282/2020 r 4(4)	1.10.2020
relevant dispute	varied by 282/2020 r 4(5)	1.10.2020
r 5		
r 5(1)	varied by 282/2020 r 5(1), (2)	1.10.2020
Pt 2		
r 6	varied by 282/2020 r 6	1.10.2020
r 7		
r 7(1)	varied by 282/2020 r 7(1)	1.10.2020
r 7(1a)	inserted by 282/2020 r 7(2)	1.10.2020

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r 7(2)	varied by 282/2020 r 7(3)	1.10.2020
r 7(2a)	inserted by 282/2020 r 7(4)	1.10.2020
r 7(4)	varied by 282/2020 r 7(5)	1.10.2020
r 7(5)	varied by 282/2020 r 7(6)	1.10.2020
r 8		
r 8(2a) & (2b)	inserted by 282/2020 r 8(1)	1.10.2020
r 8(4)	varied by 282/2020 r 8(2)	1.10.2020
r 9		
r 9(5)	varied by 282/2020 r 9(1), (2)	1.10.2020
r 9(7)	varied by 282/2020 r 9(3)	1.10.2020
r 9(8)	varied by 282/2020 r 9(4)—(6)	1.10.2020
r 9(9)	varied by 282/2020 r 9(7)	1.10.2020
r 9(10a)	inserted by 282/2020 r 9(8)	1.10.2020
r 10		
r 10(1)	varied by 282/2020 r 10(1), (2)	1.10.2020
r 11	inserted by 282/2020 r 11	1.10.2020
Sch 1	<i>omitted under Legislation Revision and Publication Act 2002</i>	1.10.2020