

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

Explanatory notes for SL 2020 No. 234

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) Amendment Regulation 2020*

### **Authorising law**

Section 23 of the *COVID-19 Emergency Response Act 2020*

Section 121 of the *Retail Shop Leases Act 1994*

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

The *COVID-19 Emergency Response Act 2020* (the Act) provides for a regulation-making power for the implementation of the National Cabinet decision in relation to good faith leasing principles for negotiations between commercial landlords and tenants impacted by the COVID-19 public health emergency.

The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation) gave effect to National Cabinet's agreement to a moratorium on evictions for the non-payment of rent for commercial tenancies 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 Regulation implements the fair leasing principles set out in National Cabinet's *Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19*, for 'affected leases' in Queensland for small-medium sized enterprise (SME) tenants with up to \$50 million in annual turnover who are eligible for the Commonwealth Government's JobKeeper scheme.

The Regulation provides protections for lessees under affected leases (the lessee protections), such that a lessor:

- cannot take prescribed action (e.g. recovery of possession, termination of the lease, eviction of the lessee) for a lessee's failure to pay rent or outgoings or trade for specified hours during the response period;
- must not increase rent during the response period;
- must make an offer of rent relief that:
  - relates to any or all of the rent payable under the lease during the response period;
  - has regard to stated factors such as reduction in turnover; and
  - provides for at least 50% of the rent reduction offered to be in the form of a waiver of rent; and
- subject to some exceptions, must offer the lessee an extension of the lease for the period that the rent has been waived or deferred.

The 'response period' is defined as 29 March 2020 to 30 September 2020. The Act and Regulation expire on 31 December 2020.

The parties to an affected lease are not prevented from entering into an agreement that is inconsistent with the provisions of the Regulation.

The Government has announced that the response period under the Regulation is to be extended to the period from 1 October 2020 to 31 December 2020 (extension period). For the extension period, lessors and lessees will have rights and obligations that broadly mirror the Regulation as it applies in respect of the current response period (29 March 2020 to 30 September 2020).

The lessee protections are to be modified to: remove the requirement that 50% of the rent reduction offered be by way of waiver for the extension period; recognise negotiations that have already been agreed in respect of reductions in rent payable or other stated conditions of an affected lease in respect of the extension period; and provide that a rent increase arising as a result of a review of rent under the lease during the response period or extension period cannot be given effect until after the end of the extension period (the modifications).

The purposes of the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020* (Amendment Regulation) are to extend the response period under the Regulation until 31 December 2020 and make the modifications for the extension period.

## **Achievement of policy objectives**

The Amendment Regulation extends the response period for the lessee protections under the Regulation for the period from 1 October 2020 to 31 December 2020 and makes the modifications to those protections for the extension period.

Other consequential amendments will ensure that the confidentiality obligations in respect of protected information apply to the extension period and that the dispute resolution provisions (in part 3 of the Regulation) continue to apply to affected lease disputes which arise in respect of the extension period.

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

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

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

The Act allows the Amendment 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”.

## **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objectives.

## **Benefits and costs of implementation**

The benefits of the Amendment Regulation are that it will protect lessees under affected leases from prescribed action during the extension 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 through the Small Business Commissioner and in terms of the resources of the Queensland Civil and Administrative Tribunal and the courts for matters that cannot be successfully mediated.

## **Consistency with fundamental legislative principles**

The Regulation was made as an emergency response measure to the COVID-19 public health emergency and will expire on 31 December 2020. The explanatory notes for the Regulation stated that overriding landlords’ ordinary property rights was justified on the basis of 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. Extending the response period for a further three months can be similarly justified in the prevailing economic conditions.

## **Consultation**

Key industry and legal stakeholders (the Property Council of Australia (Qld), the Urban Development Institute of Australia, the National Retail Association, the Australian Retailers Association, the Chamber of Commerce and Industry Queensland, the Shopping Centre Council of Australia, the Queensland Tourism Industry Council, the Queensland Law Society, and the Real Estate Institute of Queensland) were consulted on a draft of the Amendment Regulation.

The Queensland Productivity Commission was not consulted regarding the Amendment 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 Amendment Regulation.