

# ***Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2021***

Explanatory notes for SL 2021 No. 7

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 2021*

### **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.

On 28 May 2020, the Governor in Council made the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation). 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* (National Code), 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 established the threshold for SME entities by referencing the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth) (SME Rules), which, at the time the Regulation was made, provided that annual turnover for an SME entity was less than \$50 million.

With effect from 14 November 2020, the Commonwealth amended the SME Rules to increase the annual turnover threshold to be less than \$120 million (increased threshold).

The result of this is, that for the six-week period from 14 November 2020 (the date the increased threshold took effect) until 31 December 2020 (the end of the extension period under the Regulation), commercial lessees with an annual turnover between \$50 million and \$120 million may be able to satisfy the definition of 'affected lease' and seek to take advantage of the lessee protections and seek rent relief under the Regulation.

The policy objective of the *Retail Shop Leases and Other Commercial leases (COVID-19 Emergency Response) Amendment Regulation 2021* (the Amendment Regulation) is to restore the less than \$50 million turnover threshold for SME entities under the Regulation, while allowing any dispute or other matter for a lease held by an SME entity above that threshold that had been finalised or resolved prior to commencement of the Amendment Regulation to be unaffected.

## **Achievement of policy objectives**

The Amendment Regulation amends section 5(5) of the Regulation to clarify that the definition of SME entity is as in force at that time the Regulation was made. This restores the less than \$50 million turnover threshold and will prevent entities with a turnover of \$50 million or more from being able to satisfy the definition of SME entity under the Regulation.

For a lease that, but for the Amendment Regulation, would have been an affected lease (ineligible lease), disputes or other matters finalised or resolved in accordance with the law prior to the commencement of the Amendment Regulation will not be affected.

The Amendment Regulation also provides that particular provisions of the Regulation are taken to have never applied such that some actions are taken to have lapsed or have been withdrawn. In addition, lessors who may have been prevented from taking specific actions (e.g. eviction, increasing rent) with respect to an ineligible lease during the six-week period will no longer be prevented from taking such actions.

Transitional provisions in new part 5, division 2, inserted by the Amendment Regulation provide that the less than \$50 million threshold applies, and is taken to have always applied, for working out whether or not a lease of premises is an affected lease under the Regulation.

In addition, transitional provisions set out that, in relation to an ineligible lease:

- a. section 12 (which prohibits the lessor from taking a prescribed action) is taken to have never applied, which means that the lessor is permitted to take a prescribed action under the lease for any of the reasons in section 12(1) and an incomplete application to the Queensland Civil and Administrative Tribunal or a court under section 12(3) lapses on commencement;
- b. section 13 (which prohibits the lessor from increasing the rent) is taken never to have applied, which means the lessor is not prevented from increasing the rent under the lease and may be able to take action for the lessee's failure to pay the increase;
- c. an offer of rent relief, if any, that was made under section 15 is taken to have lapsed unless the offer was accepted before commencement;
- d. if a dispute notice was given under section 26 (for mediation through the Office of the Queensland Small Business Commissioner) in relation to the lease, the notice is taken to be withdrawn on the commencement; and
- e. section 20 (which protects the confidentiality of protected information) continues to apply to protected information obtained by a party under the Regulation before the commencement.

## **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 benefit of the Amendment Regulation is that it will restore the intended threshold of less than \$50 million in annual turnover for SME entities to satisfy the definition of affected lease during the period from 14 November 2020 until 31 December 2020, in accordance with the National Cabinet decision and the expressed policy intention when the Regulation was made.

There are no cost implications for the Government anticipated in proceeding with the Amendment Regulation. Additional costs that may have arisen had ineligible leases continued to be within the scope within the regulation will be avoided.

## **Consistency with fundamental legislative principles**

The explanatory notes for the Regulation stated that overriding lessors' ordinary property rights is justified on the basis of the need to respond to the financial hardship being experienced by some lessees 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 lessors and lessees. The extension of the response period to 31 December 2020 was justified on similar grounds.

The Regulation was made to implement that National Code and reflect a fair sharing of the rights of lessors and SME lessees with a turnover of less than \$50 million.

The Amendment Regulation will prevent SMEs entities from exercising any rights under the Regulation in respect of the period from 14 November 2020 to 31 December 2020 if the entity had annual turnover of \$50 million or more. This breaches fundamental legislative principles (FLPs) because, by taking away rights, it does not have sufficient regard to the rights and liberties of individuals.

The Amendment Regulation also breaches FLPs because it adversely affects rights and liberties retrospectively by providing that the less than \$50 million turnover threshold is taken to have always applied and by making transitional provisions that treat particular incomplete actions under the Regulation in relation to ineligible leases as having lapsed or taken to be withdrawn on the commencement.

This is justified in that it restores the intended position under the National Code.

## **Consultation**

The Queensland Law Society was consulted on a draft of the Amendment Regulation and raised no issues.

The Queensland Productivity Commission was consulted. In the urgent circumstances, a full regulatory impact assessment has not been conducted.