



NSW IMPLEMENTS NATIONAL CABINET CODE OF CONDUCT: *Retail and Other Commercial Leases (COVID-19) Regulation 2020*

The National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19, introduced on 7 April 2020, has been officially implemented through NSW legislation effective from 24 April 2020.

The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (“the Regulation”) has been made under the *Retail Leases Act 1994* and also amends the *Conveyancing (General) Regulation 2018*. The aim of the Regulation is to give effect to the National Cabinet Code of Conduct, prohibiting and regulating the exercise of certain rights of lessors of some commercial leases and requiring the renegotiation of rent and other terms in accordance with the Code of Conduct leasing principles.

The Regulation, as it applies to the *Retail Leases Act 1994*, defines a commercial lease as a “retail shop lease”. “Impacted lessees” are those eligible for the JobKeeper scheme with turnover in the 2018-2019 financial year less than \$50 million (reg 4).

The Regulation essentially adopts all the leasing principles that are in the National Code of Conduct, including the obligation to renegotiate rent in good faith, considering the economic impacts of the COVID-19 pandemic and the leasing principles in the Code of Conduct. Lessors must not take any prescribed action against an impacted lessee due to breach of the commercial lease involving a failure to pay rent, outgoings or the business not being open for business during the hours specified in the lease due to the COVID-19 pandemic (reg 6), adopting leasing principles 1, 11 and 14 in the National Code of Conduct. “Prescribed action” involves taking action under the provisions of a commercial lease or seeking orders or commencing proceedings in a Court or Tribunal for, amongst other remedies, eviction of a lessee,

exercising a right of re-entry, recovery of premises or land, damages or recovery of whole or part of a security bond under a lease (reg 3). There is to be no rent increase for impacted lessees (apart from leases where rent is determined by turnover) (reg 6(2)).

Schedule 1 of the *Regulation* inserts a Schedule 5 into the *Conveyancing (General) Regulation 2018*, adopting the Code of Conduct in the same way for leasing of premises or land for commercial purposes (applying the Code of Conduct to non-retail commercial leases). The Code of Conduct does not apply to leases under the *Agricultural Tenancies Act 1990* (NSW) or leases entered into after the commencement of this Regulation, except those entered into through an exercise of an option to extend or renew an existing lease. This Regulation will be repealed 6 months after 24 April 2020, the date of commencement, unless an earlier day is decided by Parliament.

DID YOU KNOW?

Under the National Cabinet Mandatory Code of Conduct for commercial tenancies, a landlord must not terminate a lease for failure to pay rent during the COVID-19 pandemic period or reasonable subsequent recovery period.