

The legislation:

- On the 15th of May 2020, the **COVID-19 Emergency Response (Commercial Leases No 2) Regulation 2020 ('Regulations')** were published.
- For reference, the Regulations may be found [here](#)
- These regulations stemmed from the *COVID-19 Emergency Response Act* which includes the *Further Measures Amendment Act 2020*
- All of these laws and regulations are governed nationally by the principles of the 'National Cabinet Mandatory Code of Conduct For COVID-19' ('Code'). The Code came into effect nationally on the 3rd of April 2020 and will stay in place until the JobKeeper scheme is completed
- The Code can be found [here](#)

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Why are these regulations necessary?

Enforced shutdowns and social distancing requirements have meant that a significant number of businesses are unable to operate as normal, creating financial instability for many. Implemented by the South Australian government, the Regulations are temporary measures that deal with commercial leases during this difficult time. The Regulations will be valid until **30 September 2020**.

What do the regulations achieve?

In line with the Code, the Regulations require parties to engage in a 'genuine attempt to negotiate' terms of a commercial lease under Part 2 (6). The Regulations specify discussions of rent payable as an example here. It is important, and a requirement, under the Regulations, to consider the economic impacts of COVID-19 on the parties of the commercial lease when engaging in these good faith negotiations.

The Regulations also align with the Code in that the lessor who is a party to a commercial lease is prohibited from taking certain 'prescribed actions' against the lessee for certain breaches of the lease such as a failure to pay rent. The prescribed actions are extensive, but some examples of these include, evicting tenants, terminating the lease, and increasing rent. In general, they aim to protect lessees that have been affected financially by the pandemic. The provisions prohibiting landlords from taking 'prescribed action' do not apply if the failure to pay rent will result in a breach of any agreement arising from a mediation or order of the Magistrates Court providing relief to an affected lessee.

Importantly, the Regulations also include mechanisms for dispute resolutions, for when the negotiations cannot be successfully resolved between parties independently. The first mechanism for alternative dispute resolution is a mediation with the Small Business Commissioner. Beyond this, the Magistrates Court can make decisions regarding the status of a party as an 'affected lessee'.

Who does this apply to?

The above prohibition on 'prescribed actions' can only apply if the tenant is an 'affected lessee' under the Code. An 'affected lessee' is a lessee that:

1. Has an annual turnover of up to \$50 Million.
2. Has suffered financial hardship due to the COVID-19 pandemic.

• Note: If eligible for the JobKeeper Payment the lessee is automatically deemed 'affected'.