



Commercial rent during COVID-19: how does the freeze on increases work?

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The economic consequences of Australia's response to COVID-19, for both owners and occupiers of commercial and retail properties, have been extremely negative. As a result, on 7 April 2020, the National Cabinet released National Cabinet Mandatory Code of Conduct - SME Commercial Leasing Principles During Covid-19 ("**the Code**"), to govern commercial, industrial and retail tenancies affected by the pandemic.

This article addresses a freeze on rental increases during the pandemic. For other issues related to rent during this period, you should read our article "Paying your commercial rent during COVID-19".

NSW puts the National Cabinet principles into law

New South Wales put the principles of the Code into law on 24 April 2020, with the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020](#) ("**the Regulation**").

The Regulation provides that if:

- a Lessee is an "**impacted Lessee**", defined in clause 4 of the Regulation as a Lessee which qualifies for JobKeeper (under sections 7 and 8 of the Commonwealth Government's Coronavirus Economic Response Package (Payments and Benefits) Rules 2020); and
- had a turnover of less than \$50 million in the 2018-2019 financial year,

a Lessor, under clause 6(2) of the Regulation, is not permitted to increase rent (such as where there is a rent review clause in a Lease permitting a rental increase) during the "**prescribed period**".

Freeze on rent increases from 24 April to 24 October 2020

The prescribed period is defined in the regulation as a period of 6 months after the day on which the Regulation commenced; that is a period from 24 April 2020 to 24 October 2020.

Clause 6 of the Regulation is based upon paragraph 13 of the Code, which states that:

“13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant”.

As a result of the Regulation, rent **may not be increased** for any Lessee which is an “impacted Lessee” between 24 April 2020 and 24 October 2020.

The Code and Regulation do not provide any guidance in relation to whether a Lease review provision in a Lease may be retrospective, so once the prescribed period has ended, a rent increase may be calculated from the date on which the rent increase was to take place during the prescribed period.

Commentary in the legal community indicates that the preferred view is that any increase which was to occur during the prescribed period, may only be applied from 25 October 2020 (again, subject to any variation by state and federal governments) to future rental payments.

Get help from a commercial lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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