



Summary:

1. If a Queensland business has suffered a reduction in turnover due to COVID-19 during the response or extension period, Power may be eligible to negotiate rent relief with the lessor under the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (the Regulation).
2. The Regulation sets out Queensland's arrangements for small and medium-size enterprise commercial leases affected by COVID-19. Under the Regulation the lessor cannot take a prescribed action¹ against a lessee with an affected lease for not paying rent.²
3. The Regulation requires that the lessee and lessor must cooperate and act responsibly and in good faith to mitigate the impact of the COVID-19 emergency.³

¹ 9 What is a prescribed action

A prescribed action is an action under a lease or another agreement relating to leased premises, or the starting of a proceeding in a court or tribunal, for any of the following in relation to the lease or other agreement—

- (a) recovery of possession;
- (b) termination of the lease;
- (c) eviction of the lessee;
- (d) exercising a right of re-entry to premises;
- (e) seizure of any property, including for the purpose of securing payment of rent;
- (f) forfeiture;
- (g) damages;
- (h) the payment of interest on, or a fee or charge relating to, unpaid rent or outgoings;
- (i) a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;
- (j) the performance of an obligation by the lessee or another person under a guarantee under the lease;
- (k) exercising or enforcing another right by the lessor under the lease or other agreement relating to the leased premises.

² 12 Lessor under affected lease must not take prescribed action during response period

(1) A lessor under an affected lease must not take a prescribed action on any of the following grounds—

- (a) a failure to pay rent for a period occurring wholly or partly during the response period;
- (b) a failure to pay outgoings for a period occurring wholly or partly during the response period;
- (c) the business carried on at the leased premises not being open for business during the hours required under the lease during the response period.

(2) However, subsection

(1) does not prevent the lessor taking a prescribed action—

- (a) in accordance with—
 - (i) a variation of the lease made under division 3; or
 - (ii) a settlement agreement or other agreement between the lessor and lessee entered into about a matter mentioned in subsection (1)(a), (b) or (c); or
 - (iii) an order of a court or tribunal; or
 - (b) if, despite a genuine attempt by the lessor to negotiate rent payable and other conditions of the lease under division 3, the lessee has substantially failed to comply with the lessee's obligations under that division in relation to the negotiations; or
 - (c) on a ground that is not related to the effects of the COVID-19 emergency.
- (3) The lessee under the affected lease may apply to QCAT or a court with jurisdiction to hear the matter for an order requiring the lessor to comply with subsection (1).

(4) Also—

- (a) if the lessee mentioned in subsection (3) is a franchisor who is the lessee of the premises occupied by the franchisee, the application may be made jointly with the franchisee; and
 - (b) if the lessee mentioned in subsection (3) is a franchisee and the franchisor is the lessee of the premises occupied by the franchisee, the franchisor may apply to have the lessor of the premises joined in the matter.
- (5) In the proceeding, QCAT or a court may—
- (a) make any order it considers appropriate; and
 - (b) award costs against the lessor or the lessee in the proceeding.

The Regulation section 12. NB that section 13 states that the lessor must not increase rent.

³ 11 Parties to affected lease must cooperate The lessor and lessee under an affected lease must cooperate and act reasonably and in good faith in all discussions and actions associated with—

- (a) mitigating the effect of the COVID-19 emergency on the parties to the lease; and
- (b) other matters to which this part applies

Note that a mediator or court may have regard to whether or not a lessor or lessee under an affected lease has complied with this section in a proceeding relating to an affected lease.



4. The Regulation defines a prescribed action as an action under a lease or another agreement relating to leased premises, or the starting of a proceeding in a court or tribunal, for any of the following in relation to the lease or other agreement:
- a. Recovery of possession;
 - b. Termination of the lease;
 - c. Eviction of the lessee;
 - d. Exercising a right of re-entry to premises;
 - e. Seizure of any property, including for the purpose of securing payment of rent;
 - f. Forfeiture;
 - g. Damages;
 - h. The payment of interest on, or a fee or charge relating to, unpaid rent or outgoings;
 - i. A claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;
 - j. The performance of an obligation by the lessee or another person under a guarantee under the lease;
 - k. Exercising or enforcing another right by the lessor under the lease or other agreement relating to the leased premises.

Criteria:

5. To be eligible for rent relief assistance under the Regulation, Power must have an affected lease. It will be an affected lease if it meets the following criteria:⁴
- It is a retail shop lease or prescribed lease (a lease, other than a retail shop lease, where the leased premises are wholly or predominantly used for carrying on a business). Power's lease will likely be a prescribed lease.

⁴ 5 Meaning of affected lease

(1) A lease of premises is an affected lease if—

(a) it is—

(i) a retail shop lease; or

(ii) a prescribed lease; and

(b) on the commencement the lease, or an agreement to enter into the lease, is binding on the lessee, whether or not the lease has commenced; and

(c) the lessee under the lease is an SME entity; and

(d) the lessee under the lease, or an entity that is connected with, or an affiliate of, the lessee responsible for, or involved in, employing staff for the business carried on at the leased premises, is eligible for the JobKeeper scheme.

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



- It was current and binding on the lessee on 28 May 2020. This includes any form of lease, sub-lease, license or other agreement to occupy premises (e.g. month-to-month, verbal etc) all of which are considered binding on the lessee.
- The lessee under the lease is a small and medium enterprise (SME entity) that carried on a business (or non-profit activity) in the current financial year and had a turnover that was:
 - less than \$50 million for the 2019–20 financial year
 - and/or
 - likely to be less than \$50 million for the 2020–21 financial year.
- The lessee under the lease is eligible for, but not necessarily enrolled in, the JobKeeper Payment scheme (specifically, for the response period: the lessee meets rules 7 and 8 of the scheme, for the extension period: is eligible for the scheme for the period starting on 28 September 2020 and ending on 4 January 2021).⁵

⁵ Rule 7: 'When an entity qualifies for the JobKeeper scheme';

(1) For the purposes of paragraphs 6(1)(b) and 11(1)(c), an entity qualifies for the JobKeeper scheme at a time if:

- (a) on 1 March 2020, the entity carried on a business in Australia, or was a non-profit body that pursued its objectives principally in Australia; and
- (b) the entity has satisfied the decline in turnover test at or before the time (see section 8).

Note: Qualifying entities must report monthly turnover information to the Commissioner for the duration of the scheme: see section 16.

Exceptions

(2) However, an entity does not qualify for the JobKeeper scheme at a time if:

- (a) an amount of levy under the Major Bank Levy Act 2017 was imposed for any quarter ending before 1 March 2020 on:

- (i) the entity; or
- (ii) if the entity is a member of a consolidated group—another member of the group; or
- (b) the entity is an Australian government agency; or
- (c) the entity is a local governing body; or
- (d) the entity is wholly owned by an entity covered by paragraph (b) or (c); or
- (e) the entity is a sovereign entity; or
- (f) if the entity is a company—a liquidator or provisional liquidator has been appointed in relation to the company; or
- (g) if the entity is an individual—a trustee in bankruptcy has been appointed to the individual's property.

Rule 8: 'Decline in turnover test'

Basic test

(1) An entity satisfies the decline in turnover test at a time (the test time) if:

- (a) the entity's projected GST turnover for a turnover test period in which the test time occurs falls short of the entity's current GST turnover for a relevant comparison period (the comparison turnover); and
- (b) the shortfall, expressed as a percentage of the comparison turnover, equals or exceeds the specified percentage for the entity (see subsection (2)).

Note 1: See subsection (7) for the meanings of turnover test period and relevant comparison period.

Note 2: Current GST turnover and projected GST turnover are modified for the purposes of this section: see subsection (8).

Note 3: For provisions about contrived schemes, see section 19 of the Act.

Example: Patrick Enterprises assesses its eligibility for JobKeeper payments on 6 April 2020 based on a projected GST turnover for April 2020 of \$6 million. It considers that the comparable period is the month of April 2019 for which it had a current GST turnover of \$10 million. The April 2020 turnover falls short of the April 2019 turnover by \$4 million, which is 40% of the April 2019 turnover. This exceeds the specified percentage, so the decline in turnover test is satisfied.

(2) The specified percentage for an entity is:

- (a) if the lower threshold applies to the entity (see subsection (3))—15%; or
- (b) if the higher threshold applies to the entity (see subsection (4))—50%; or
- (c) otherwise—30%.

(3) For the purposes of paragraph (2)(a), the lower threshold applies to an entity if the entity is an ACNC-registered charity other than:

- (a) an entity that is a Table A provider (within the meaning of the Higher Education Support Act 2003) or a Table B provider (within the meaning of that Act); or
- (b) a school.

Note: Paragraph (b) affects only non-government schools, as government schools do not qualify for the JobKeeper scheme because of paragraphs 7(2)(b) to (d).

(4) For the purposes of paragraph (2)(b), the higher threshold applies to an entity if:

- (a) the lower threshold does not apply to the entity (see subsection (3)); and

(b) either:

- (i) the entity's aggregated turnover for the income year in which the test time referred to in subsection (1) occurs is likely to exceed \$1 billion; or
- (ii) the entity's aggregated turnover for the previous income year exceeds \$1 billion.

Alternative test

(5) An entity also satisfies the decline in turnover test if:

- (a) an alternative decline in turnover test determined by the Commissioner under subsection (6) applies to the entity; and
- (b) the entity satisfies the alternative test.



Negotiations:

6. The Regulation outlines the process for lessees and lessors to negotiate the rent and other stated conditions of an affected lease during the response or extension period. Both parties are required to cooperate and act reasonably in good faith in all discussions and actions to mitigate the effect of COVID-19.⁶ There are consequences if either party does not make a genuine effort to negotiate.

7. The Queensland Small Business Commissioner (QSBC) considers the following to be examples of acting in 'good faith':
 - Parties responding to each other's requests, even if the response is that they view the request as unreasonable (with an explanation as to why they have that view);
 - Being honest and providing information that is accurate;
 - Following the statements and recommendations of the QSBC;
 - A lessor applying for reductions in outgoings (e.g. land tax relief) if available so that a lessee can benefit from that reduction;
 - A lessee submitting information to the lessor which confirms their eligibility for the JobKeeper Payment scheme including the turnover figures they used and the periods they compared;

(6) The Commissioner may, by legislative instrument, determine that an alternative decline in turnover test applies to a class of entities, if the Commissioner is satisfied that there is not an appropriate relevant comparison period for the purpose of an entity in the class of entities satisfying the decline in turnover test under subsection (1).

(7) For the purposes of this section:

(a) the turnover test period must be:

(i) a calendar month that ends after 30 March 2020 and before 1 October 2020; or

(ii) a quarter that starts on 1 April 2020 or 1 July 2020; and

(b) the relevant comparison period must be the period in 2019 that corresponds to the turnover test period.

Modifications relating to GST turnover

(8) In calculating an entity's current GST turnover, and projected GST turnover, for a period for the purposes of this section and section 16 the following apply:

(a) sections 188-15 and 188-20 of the GST Act apply as if a reference to a month were a reference to the period;

(b) subsections 188-15(2) and 188-20(2) of that Act (about members of GST groups) are to be disregarded;

(c) for calculating current GST turnover:

(i) subsection 188-15(1) of that Act is to be applied at the end of the period; and

(ii) subsection 188-15(1) of that Act has effect as if the reference in that subsection to "or are likely to make, during the 12 months ending at the end of that month," were instead a reference to "during that period";

(d) for calculating projected GST turnover—subsection 188-20(1) of that Act has effect as if the reference in that subsection to "during that month and the next 11 months" were instead a reference to "during that period";

(e) each external Territory is treated as forming part of the indirect tax zone (within the meaning of that Act);

(f) for an entity that is a deductible gift recipient—each gift described in an applicable item of the table in section 30-15 of the Income Tax Assessment Act 1997 and received, or likely to be received, by the entity in the period (other than from an associate) results in the following treatment:

(i) the entity is treated as making, or as likely to make (as the case requires), a supply in the period for consideration;

(ii) the value (within the meaning of the GST Act) of the supply is treated as being equal to the amount of the gift (if the gift is money) or the market value of the gift (if the gift is not money);

(g) for an entity that is an ACNC-registered charity (other than a deductible gift recipient)—each gift received, or likely to be received, by the entity in the period (other than from an associate) also results in the treatment set out in paragraph (f) if the gift is:

(i) a gift of money; or

(ii) a gift of property with a market value of more than \$5,000; or

(iii) a gift of listed Australian shares.

⁶ 11 Parties to affected lease must cooperate.



- A lessee providing the receipt from the Australian Taxation Office (ATO) demonstrating eligibility for the JobKeeper scheme;
 - A lessee or lessor willing to share, in a proportionate, measured manner the financial risk and cash flow impact during the COVID-19 period;
 - Cooperating and acting reasonably in actions and discussions relating to affected lease negotiations;
 - Cooperating and acting reasonably in actions and discussions relating to disputes.
8. The Queensland Small Business Commissioner considers the following as examples of not acting in 'good faith':
- A lessor or lessee demanding an unreasonable amount of information;
 - Harassing, intimidating or assaulting the other party;
 - Making onerous requests for documentation (especially if it involves paying a fee);
 - Refusing to respond to a reasonable request for information;
 - A lessor failing to make an offer in response to a lessee's request to negotiate;
 - A lessee refusing to share information about their eligibility for JobKeeper;
 - A lessee refusing to share information to substantiate a decline in turnover;
 - A lessor not passing on any reductions in outgoings;
 - A lessee or lessor agreeing to mediation but then not participating;
 - Not making a genuine attempt to negotiate an affected lease;
 - Not making a genuine attempt to resolve an eligible lease dispute;
 - Not cooperating and acting reasonably in actions and discussions relating to disputes.
9. The regulation sets out five (5) phases that lessees and lessors should follow when negotiation:⁷

⁷ 14 Parties must renegotiate rent payable and other conditions

(1) A party (the initiator) to an affected lease may, in writing, ask another party to the lease to negotiate the rent payable under, and other stated conditions of, the lease.

(2) After the initiator's request is made, the parties must, as soon as practicable, give each other information relating to the request that is—

(a) true, accurate, correct and not misleading; and

(b) sufficient to enable the parties to negotiate in a fair and transparent way.

Examples of sufficient information—

- a clear statement about the terms of the lease the initiator is seeking to negotiate



1. *Ask to negotiate*

The initiator to an affected lease may, in writing, ask another party to the lease to negotiate the rent payable under, and other stated conditions of, the lease.⁸

2. *Share information*

After the above request is made, parties must, as soon as practicable give each other information relating to the request that is true, accurate, correct and not misleading; and sufficient to enable the parties to negotiate in a fair and transparent way.⁹

3. *Lessor makes offer*

Within thirty (30) days after a party receives sufficient information about a request under section 14(2) above, the lessor must offer the lessee a reduction in the amount of rent payable under the lease, and any proposed changes to other stated conditions.¹⁰

4. *Negotiate*

In receiving the lessor's offer, the lessee and lessor must cooperate and act reasonably and in good faith in negotiating a reduction in the amount of rent payable under the lease for the response period or extension period, including any conditions

• a statement by the lessee that demonstrates why the lease is an affected lease, accompanied by supporting information and evidence, including—

- accurate financial information or statements about the turnover of the lessee's business
- information demonstrating that the lessee is an SME entity under section 5, having regard to any entities that the lessee is connected with, or an affiliate of
- evidence of the lessee's eligibility for, or participation in, the JobKeeper scheme
- information about any steps the lessee has taken to mitigate the effects of the COVID-19 emergency on the lessee's business, including the details of any assistance being received by the lessee from the Commonwealth, State or a local government
- in relation to a franchisor—information about any concession or benefit provided to or by the franchisor in relation to rent or outgoings for the premises occupied by the franchisee, and any undertakings to pass those concessions or benefits on to the franchisee

(3) The parties to the affected lease must—

- (a) negotiate the conditions of the lease the subject of the initiator's request; and
- (b) comply with section 15.

⁸ 14 Parties must renegotiate rent payable and other conditions

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¹⁰ 15 Negotiating rent payable and other conditions

(1) Within 30 days after a party receives sufficient information about a request under section 14(2), the lessor must offer the lessee a reduction in the amount of rent payable under the lease, and any proposed changes to other stated conditions.

(2) The offer must—

- (a) relate to any or all of the rent payable under the affected lease during the response period; and
- (b) provide for no less than 50% of the rent reduction offered to be in the form of a waiver of rent; and
- (c) have regard to—

- (i) all the circumstances of the lessee and the affected lease, including the reduction in turnover of the business carried on at the leased premises during the response period; and

- (ii) the extent to which a failure to reduce the rent payable under the lease would compromise the lessee's ability to comply with the lessee's obligations under the lease, including the payment of rent; and

- (iii) the lessor's financial position, including any financial relief provided to the lessor as a COVID-19 response measure; and

- (iv) if a portion of rent or another amount payable under the lease represents an amount for land tax, local government rates, statutory charges, insurance premiums or other outgoings—any reduction in, or waiver of, the amount payable.

(3) On receiving the lessor's offer, the lessee and lessor must cooperate and act reasonably and in good faith in negotiating a reduction in the amount of rent payable under the lease for the response period, including any conditions relating to the reduction in rent. (4) The reduction in rent and any conditions relating to the reduction in rent may be given effect by—

- (a) a variation to the lease; or

- (b) another agreement between the parties that gives effect to the matters agreed to under subsection (3).



relating to the reduction in rent.¹¹ The reduction and any conditions relating to the reduction may be given effect by a variation to the lease; or another agreement between the parties that gives effect to the matters agreed to under the negotiations. Note that nothing in section 15 of the Regulation requires any portion of an offer of rent reduction in relation to the extension period to be in the form of a waiver of rent.¹²

5. *Record the Agreement*

The agreement should include:

- That the agreement is made under the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020;
- When the agreement starts and finishes (including the months of the response period and/or extension period that it relates to);
- The amount and arrangements of the rent reduction (e.g. waivers, deferrals, timing);
- The arrangements for repaying any deferred rent (e.g. when repayments start, the amount and frequency of the repayments, and the final repayment date);
- Any changes to other lease conditions (e.g. outgoings, services, lease term);
- If the agreement will be reviewed (e.g. who will review it, how, when and based on what information); and
- What happens if either party does not uphold their part of the agreement.

Legal Action:

10. The Regulation provides for Dispute Resolution under Part 3¹³.
11. If the lessor takes a prescribed action during this time, Power can apply directly to QCAT under Division 5¹⁴ of The Regulation.

¹¹ 15 Negotiating rent payable and other conditions

¹² 15 Negotiating rent payable and other conditions

¹³ Part 3 Dispute resolution

¹⁴ Division 5 QCAT proceedings