



Western Australia

## **Commercial Tenancies (COVID-19 Response) Regulations 2020**

Compare between:

[30 May 2020, 00-a0-00] and [26 Sep 2020, 00-b0-00]



## Commercial Tenancies (COVID-19 Response) Regulations 2020

### 1. Citation

These regulations are the *Commercial Tenancies (COVID-19 Response) Regulations 2020*.

### 2. Commencement

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day after that day.

### ~~3. Adopted code of conduct (s. 13)~~

#### ~~(1)2A. Terms used~~

In ~~this regulation~~ these regulations —

*eligible tenant*, in relation to a small commercial lease, has the meaning given in Schedule 1 clause 2;

*insolvent*, in relation to a tenant, means the tenant is —

- (a) according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; or
- (b) a Chapter 5 body corporate as defined in the *Corporations Act 2001* (Commonwealth) section 9.

[Regulation 2A inserted: SL 2020/176 r. 4.]

r. 2B

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**2B. End of emergency period (s. 3)**

For the purposes of paragraph (b) of the definition of *emergency period* in section 3 of the Act, 28 March 2021 is prescribed.

[Regulation 2B inserted: SL 2020/176 r. 4.]

**2C. Prescribed class of small commercial lease (s. 3)**

A lease is of a class prescribed for the purposes of paragraph (d) of the definition of *small commercial lease* in section 3 of the Act if the tenant —

- (a) is a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Commonwealth); and
- (b) uses the land or premises that are the subject of the lease for a commercial purpose.

[Regulation 2C inserted: SL 2020/176 r. 4.]

**2D. Prescribed circumstances (s. 9)**

For the purposes of section 9 of the Act, on and after 30 September 2020, the following circumstances are prescribed —

- (a) the tenant under the small commercial lease is insolvent when the prohibited action is taken;
- (b) a case where —
  - (i) the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the prohibited action is taken; and
  - (ii) the prohibited action is taken on the grounds of a breach by the tenant of the small commercial lease that occurs during the emergency period (whether before, on or after 30 September 2020); and

- (iii) the breach is of a kind referred to in section 9(a) of the Act; and
  - (iv) the breach is not the subject of a dispute that is being dealt with, but is not yet resolved, under Part 5 of the Act; and
  - (v) the tenant has not made a request, under the adopted code of conduct, for rent relief from the landlord in relation to any unpaid rent to which the breach relates; and
  - (vi) the landlord has not granted the tenant a waiver, deferral or reduction in respect of any unpaid rent, or other unpaid amount of money payable by the tenant to the landlord under the small commercial lease, to which the breach relates;
- (c) a case where —
- (i) the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the prohibited action is taken; and
  - (ii) the prohibited action is taken on the grounds of a breach by the tenant of the small commercial lease that occurs during the emergency period on or after 30 September 2020; and
  - (iii) the tenant is not an eligible tenant in relation to the small commercial lease when the breach occurs; and
  - (iv) the breach is of a kind referred to in section 9(b) of the Act.

*[Regulation 2D inserted: SL 2020/176 r. 4.]*

**3. Adopted code of conduct (s. 13)**

(1) In this regulation —

***relevant small commercial lease*** means a small commercial lease where the tenant is an eligible tenant in relation to the small commercial lease.

(2) For the purposes of section 13(2) of the Act, the code of conduct set out in Schedule 1 is adopted.

(3) The adopted code of conduct applies to the following —

- (a) a small commercial lease that is a relevant small commercial lease;
- (b) a person who is a landlord under a relevant small commercial lease;
- (c) a person who is a tenant under a relevant small commercial lease.

(4) The following persons must comply with the adopted code of conduct —

- (a) a person who is a landlord under a relevant small commercial lease;
- (b) a person who is a tenant under a relevant small commercial lease.

(5) If a tenant under a small commercial lease ceases to be an eligible tenant in relation to the small commercial lease, subregulations (3) and (4) and the adopted code of conduct continue to apply to matters relating to the period during which the tenant was an eligible tenant in relation to the small commercial lease as if the tenant were still an eligible tenant in relation to the small commercial lease.

[Regulation 3 amended: SL 2020/176 r. 5.]

**4. Copies of applications under s. 16(1) of Act (s. 16(6))**

For the purposes of section 16(6) of the Act, a copy of the application —

- (a) must be given within 5 days after the day on which it is accepted by the executive officer of the Tribunal; and
- (b) may be given in the following ways —
  - (i) in accordance with the *State Administrative Tribunal Rules 2004* rule 26(3);
  - (ii) by email to the email address (if any) that the person to whom it is given has provided for the purpose of receiving notices or other correspondence in relation to the lease to which the application relates.

**4A. Section 11 of Act does not apply if tenant not eligible tenant (s. 23)**

For the purposes of section 23 of the Act, on and after 30 September 2020, section 11 of the Act does not apply in a case where the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease when the rent is increased.

[Regulation 4A inserted: SL 2020/176 r. 6.]

**4B. Modified s. 12 of Act applies if tenant insolvent (s. 23)**

(1) For the purposes of section 23 of the Act, on and after 30 September 2020, section 12 of the Act applies as if amended as set out in this regulation to a case where the tenant is insolvent.

(2) After section 12(4) insert —

(4A) Despite subsections (3) and (4), a stay or suspension under either of those subsections ceases —

r. 4C

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- (a) if on 30 September 2020 the tenant is insolvent — on that day; or
- (b) if after 30 September 2020, but before the end of the emergency period, the tenant becomes insolvent — on the day on which the tenant becomes insolvent.

[Regulation 4B inserted: SL 2020/176 r. 6.]

**4C. Modified s. 12 of Act applies if tenant not eligible tenant (s. 23)**

(1) For the purposes of section 23 of the Act, on and after 30 September 2020, section 12 of the Act applies as if amended as set out in this regulation to a case where the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease.

(2) After section 12(5) insert:

(6) Despite subsections (3) and (4), a stay or suspension under either of those subsections ceases —

(a) in the case of a prohibited action or other measure stayed or suspended under subsection (3) — on the day on which the prohibited action or other measure stayed or suspended ceases to be a prohibited action or other measure that the landlord is prevented under this Part from taking or commencing; or

(b) in the case of an effect stayed or suspended under subsection (4) — on the day on which the effect ceases to be an effect that is contrary to the operation of this Part.

(7) Despite subsection (5), a stay or suspension under that subsection ceases —



- (a) if on 30 September 2020 the tenant under the small commercial lease is not an eligible tenant in relation to the small commercial lease — on that day; or
- (b) if after 30 September 2020, but before the end of the emergency period, the tenant under the small commercial lease ceases to be an eligible tenant in relation to the small commercial lease — on the day on which the tenant ceases to be an eligible tenant in relation to the small commercial lease.

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*[Regulation 4C inserted: SL 2020/176 r. 6.]*

**5. Section 17(5)(b) of Act does not apply in certain cases (s. 23)**

For the purposes of section 23 of the Act, section 17(5)(b) of the Act does not apply in a case where the State Administrative Tribunal considers it appropriate to make another type of order that is to the advantage of the tenant in order to resolve or determine the dispute or the proceedings.

## Schedule 1 — Code of conduct

[r. 3(2)]

### Division 1 — Terms used

#### 1. Terms used

(1) In this Code —

*Act* means the *Commercial Tenancies (COVID-19 Response) Act 2020*;

*dispute* has the meaning given in section 14(1) of the Act;

*eligible tenant*, in relation to a small commercial lease, has the meaning given in clause 2;

*outgoings*, in relation to the land or premises that are the subject of a small commercial lease —

- (a) means expenses of the landlord in operating, repairing or maintaining —
  - (i) the building or area in which the land or premises are located; or
  - (ii) the area owned by the landlord and used in association with the building or area in which the land or premises are located;

and

- (b) includes —
  - (i) rates, taxes, levies, premiums or charges payable by the landlord; and
  - (ii) in the case of a retail shop lease — the landlord's operating expenses;

*protected information* means —

- (a) the name, address or contact details of any person (other than the landlord or the tenant under the small commercial lease); or
- (b) information relating to business processes or financial information (including information about the trade of a business);

*rent relief* —

- (a) means any form of relief provided to a tenant in respect of the tenant's obligation to pay rent under a small commercial lease; and
  - (b) includes the following —
    - (i) a waiver by the landlord of all, or a portion of, rent that would otherwise be payable under the small commercial lease;
    - (ii) the deferral of the payment of all, or a portion of, rent that would otherwise be payable under the small commercial lease on a particular date to a later date.
- (2) A term has the same meaning in this Code as it has in the Act, unless the contrary intention appears in this Code.

**2. Eligible tenants**

~~(1)~~ **A (1)** During the period beginning on 30 May 2020 and ending on 27 September 2020 (the *relevant period*), a tenant under a small commercial lease is an *eligible tenant* in relation to the small commercial lease if —

- (a) the following turnover in the financial year ending on 30 June 2019 was less than \$50 000 000 —
    - (i) if the tenant is a franchisee — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;
    - (ii) if the tenant is a corporation that is a member of a group — the turnover of the group;
    - (iii) in any other case — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;
- and
- (b) the tenant —
    - (i) qualifies for the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments*

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cl. 2

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*and Benefits) Rules 2020 (Commonwealth) section 7*  
during the relevant period; or

- (ii) has, at any time during the emergency period before 28 September 2020, satisfied the decline in turnover test set out in section 8 of those Rules.

(1A) During the period beginning on 28 September 2020 and ending on 3 January 2021 (the *relevant period*), a tenant under a small commercial lease is an *eligible tenant* in relation to the small commercial lease if —

(a) the tenant meets the requirements of subclause (1C); and

(b) the tenant —

(i) qualifies for the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Commonwealth) during the relevant period*; or

(ii) does not qualify for the jobkeeper scheme during the relevant period, but nevertheless satisfies any test relating to turnover during July, August and September 2020 by which a person can qualify for the jobkeeper scheme during the relevant period.

(1B) During the period beginning on 4 January 2021 and ending on 28 March 2021 (the *relevant period*), a tenant under a small commercial lease is an *eligible tenant* in relation to the small commercial lease if —

(a) the tenant meets the requirements of subclause (1C); and

(b) the tenant —

(i) qualifies for the jobkeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Commonwealth) during the relevant period*; or

(ii) does not qualify for the jobkeeper scheme during the relevant period, but nevertheless satisfies any test relating to turnover during October, November and December 2020 by which a person can qualify for the jobkeeper scheme during the relevant period.

(1C) For the purposes of subclauses (1A)(a) and (1B)(a), a tenant meets the requirements of this subclause if the following turnover in the financial year ending on 30 June 2020 was less than \$50 000 000 —

(a) if the tenant is a franchisee — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease;

(b) if the tenant is a corporation that is a member of a group — the turnover of the group;

(c) in any other case — the turnover of the business conducted by the tenant at the land or premises that are the subject of the small commercial lease.

- (2) For the purposes of ~~subclause~~subclauses (1)(a)(ii) and (1C)(b), corporations constitute a group if they are related bodies corporate (as defined in the *Corporations Act 2001* (Commonwealth) section 9).

[Clause 2 amended: SL 2020/176 r. 7.]

## **Division 2 — Purpose and overarching obligations of landlords and tenants**

### **3. Purpose**

This Code sets out small commercial lease principles during the COVID-19 pandemic.

### **4. Overarching obligations of landlords and tenants**

In negotiations for the purposes of this Code, the landlord and the tenant under a small commercial lease —

- (a) must cooperate; and
- (b) must act reasonably and in good faith; and
- (c) must act in an open, honest and transparent manner; and
- (d) must provide each other with sufficient and accurate information that is reasonable for them to provide in the circumstances for the purposes of the negotiations; and

Example for this paragraph:

Information evidencing a reduction in turnover of a business might include information relating to turnover generated from an accounting

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system [or business activity statements submitted to the Australian Taxation Office.](#)

- (e) must not make onerous demands for information from each other.

[Examples for this paragraph:](#)

1. [A demand to provide future cash flow projections.](#)
2. [A demand to provide balance sheets, or profit and loss or year to date financials.](#)
3. [A demand to provide bank balance details or statements.](#)
4. [A demand that financial information be verified, examined, assured, audited or provided by a third party such as an accountant.](#)

[\[Clause 4 amended: SL 2020/176 r. 8.\]](#)

**Division 3 — Principles applying to rent relief**

**5. Requesting rent relief**

- (1) A tenant under a small commercial lease who is an eligible tenant in relation to the small commercial lease may, during the emergency period, request rent relief from the landlord under the small commercial lease.
- (2) The request must be in writing and be accompanied by the following —
  - (a) a statement by the tenant that —
    - (i) the tenant’s lease is a small commercial lease; and
    - (ii) the tenant is an eligible tenant in relation to the small commercial lease;
  - (b) sufficient and accurate information that evidences that the tenant is an eligible tenant in relation to the small commercial lease;
  - (c) sufficient and accurate information that evidences the reduction in the tenant’s turnover that —
    - (i) is associated with the business conducted at the land or premises that are subject of the small commercial lease; and

- (ii) the tenant has experienced during the emergency period ~~or a relevant part of the emergency period.~~

*[Clause 5 amended: SL 2020/176 r. 9.]*

**6. Offering and negotiating rent relief**

- (1) On receipt of a request for rent relief from an eligible tenant that meets the requirements of clause 5(2), a landlord must offer rent relief to the eligible tenant within —
  - (a) 14 days after receiving the request; or
  - (b) such other period that is agreed between the landlord and the tenant.
- (2) A landlord's offer of rent relief under subclause (1) must be —
  - (a) in writing; and
  - (b) in accordance with the principles set out in clause 7.
- (3) Following receipt of the landlord's offer of rent relief by the tenant, the landlord and the tenant must, in accordance with the principles set out in clause 7, negotiate with a view to agreeing on rent relief to apply during the emergency period.

**7. Principles applying to offering and negotiating rent relief**

- (1) This clause sets out principles of proportionality that apply in relation to a landlord's ~~offer of~~ obligation to provide rent relief and negotiations between a landlord and a tenant in relation to rent relief.
- (2) An offer of rent relief must apply to the emergency period.
- (3) Rent relief offered by the landlord must be at least proportionate to the reduction in the tenant's turnover that —
  - (a) is associated with the business conducted at the land or premises that are the subject of the small commercial lease; and
  - (b) the tenant has experienced during the emergency period.

Example for this subclause:

If the tenant has experienced a 60% reduction in turnover, the rent relief offered should be at least 60% of the rent payable.

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(3A) Unless otherwise agreed by the landlord and the tenant, the rent relief provided by the landlord must be adjusted from time to time (but not more frequently than monthly) during the emergency period, in accordance with the principle set out in subclause (3), to take into account any variation in the reduction in the tenant's turnover that the tenant experiences during the emergency period.

Example for this subclause:

In accordance with the example for subclause (3), the tenant was offered rent relief of 60% of the rent payable. If the tenant's reduction in turnover has decreased to 40%, the rent relief should be adjusted downwards by reference to the 40% figure.

- (4) For the purposes of ~~subclause~~ subclauses (3) and (3A), unless otherwise agreed by the landlord and the tenant, the reduction in the tenant's turnover is to be calculated using with such modifications as are appropriate to reflect subclauses (3)(a) and (b) and (3A), the principles, or any updated principles, of the any relevant test relating to decline in turnover test set out in applicable to the jobkeeper scheme under the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Commonwealth) section 8 (including any relevant alternative decline in turnover test determined under that section) with such modifications as are appropriate to reflect subclause (3)(a) and (b).
- (5) An offer of rent relief may relate to up to 100% of the rent payable under the small commercial lease.
- (6) An offer of rent relief must provide that not less than 50% of the rent relief is to be in the form of a waiver of rent, unless the landlord and tenant otherwise agree in writing.
- (7) An offer of rent relief must provide that more than 50% of the rent relief is to be in the form of a waiver of rent if —
- (a) failure to provide more than 50% of the rent relief in the form of a waiver of rent would compromise the tenant's capacity to fulfil the tenant's ongoing obligations under the small commercial lease; and
  - (b) the landlord has the financial capacity to provide more than 50% of the rent relief in the form of a waiver of rent.



- (8) If the landlord is a tenant under a lease (the *head lease*) of the land or premises that are the subject of the small commercial lease and the landlord, as the tenant, is provided rent relief under the head lease, the landlord must pass on the benefit of the rent relief to the tenant under the small commercial lease.

[\*\[Clause 7 amended: SL 2020/176 r. 10.\]\*](#)

**8. Giving effect to rent relief**

Rent relief under this Code may be given effect by the landlord and the tenant under a small commercial lease by —

- (a) a written variation to the small commercial lease; or
- (b) any other written agreement between the landlord and the tenant that gives effect to the rent relief, either directly or indirectly.

**9. Payment of deferred rent and extension of term of lease**

- (1) This clause applies if rent payable under a small commercial lease is deferred by variation to the small commercial lease or an agreement referred to in clause 8.
- (2) The landlord must not request payment of any part of the deferred rent until the earlier of the following —
  - (a) the day on which the emergency period ends;
  - (b) expiry of the term of the small commercial lease (before any extension to the term under subclause (6) or otherwise).
- (3) The landlord and the tenant must vary the small commercial lease, or otherwise agree, so that the tenant must pay the deferred rent to the landlord amortised over the greater of the following —
  - (a) the balance of the term of the small commercial lease;
  - (b) a period of not less than 24 months.
- (4) The method by which the deferred rent is amortised for the purposes of subclause (3) is to be agreed by the landlord and the tenant.
- (5) Subclauses (2) and (3) do not apply if the landlord and the tenant agree otherwise in writing.

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- (6) Subject to subclause (8), the landlord must offer the tenant an extension of the term of the small commercial lease on the same terms and conditions that applied under the small commercial lease immediately before the emergency period.
- (7) The extension offered under subclause (6) must be at least equivalent to the period for which the rent is deferred, unless the landlord and the tenant agree otherwise in writing.

Example for this subclause:

If the landlord has granted the tenant a 6-month deferral of rent, the extension offered must be at least 6 months.

- (8) Subclause (6) does not apply if —
  - (a) the landlord is the tenant under a lease (the *head lease*) of the land or premises that are the subject of the small commercial lease and the extension would be inconsistent with the head lease; or
  - (b) the extension would be inconsistent with any contract or other agreement already entered into by the landlord with another person (other than the tenant) that relates to the land or premises that are the subject of the lease (including an agreement to lease the land or premises to the other person).

[Clause 9 amended: SL 2020/176 r. 11.]

**10. Existing agreements and subsequent requests for rent relief**

- (1) Subclause (2) applies if, before this Code was adopted under the Act —
  - (a) the landlord and the tenant under a small commercial lease entered into an agreement to vary the small commercial lease, or entered into any other agreement, so as to provide rent relief during the emergency period or any part of the emergency period (the *existing agreement*); and
  - (b) the tenant is an eligible tenant in relation to the small commercial lease.
- (2) If the tenant believes that the rent relief provided under the existing agreement is less favourable than rent relief that might be provided to the tenant in accordance with this Code —

- (a) the tenant may make a request for rent relief to the landlord under clause 5; and
  - (b) if the tenant makes a request — the landlord and the tenant must follow the process set out in clause 6 in relation to that request.
- (3) If the financial circumstances of an eligible tenant in relation to a small commercial lease materially change after a variation to the small commercial lease or an agreement has been reached as referred to in clause 8 —
- (a) the tenant may make a further request for rent relief to the landlord under clause 5; and
  - (b) if the tenant makes a further request — the landlord and the tenant must follow the process set out in clause 6 in relation to that request.

(4) [If the rent relief provided under a variation to a small commercial lease, or an agreement, referred to in clause 8 has ended before the end of the emergency period, an eligible tenant in relation to the small commercial lease may, during the emergency period, make a further request for rent relief to the landlord under clause 5.](#)

*[Clause 10 amended: SL 2020/176 r. 12.]*

#### **Division 4 — Principles applying to outgoings and other expenses**

##### **11. Recovery of outgoings and other expenses**

- (1) This clause applies if —
- (a) the tenant under a small commercial lease is an eligible tenant in relation to the small commercial lease; and
  - (b) for any part of the emergency period, the tenant is not able to conduct their business at the land or premises that are the subject of the small commercial lease.
- (2) The landlord under the small commercial lease must consider waiving recovery of any outgoing or other expense payable by the tenant to the landlord under the small commercial lease for the part of the emergency period that the tenant is not able to conduct their business at the land or premises.

- (3) The landlord may cease to provide, or reduce provision of, any service at the land or premises —
  - (a) as is reasonable in the circumstances; or
  - (b) in accordance with any reasonable request of the tenant.

**12. Reduction in outgoings**

- (1) This clause applies if —
  - (a) any outgoings charged, imposed or levied in relation to the land or premises that are the subject of a small commercial lease are reduced in respect of the emergency period or any part of the emergency period; and
  - (b) the tenant under the small commercial lease is an eligible tenant in relation to the small commercial lease.
- (2) The landlord under the small commercial lease must not require the tenant to pay any amount of money in respect of the outgoing that is greater than the tenant's proportional share of the reduced outgoing payable under the lease.
- (3) If the tenant under the small commercial lease has already paid to the landlord under the lease an amount of money greater than the tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to the tenant as soon as possible.

**Division 5 — Obligation of confidentiality**

**13. Confidentiality**

- (1) A landlord or a tenant under a small commercial lease must not, directly or indirectly, disclose protected information obtained under or in connection with the operation of this Code unless the disclosure is authorised under subclause (2).
- (2) For the purposes of subclause (1), the disclosure of protected information is authorised if it is disclosed in good faith in any of the following circumstances —
  - (a) with the consent of the person to whom the information relates;
  - (b) to a professional adviser who agrees to keep it confidential;

- (c) to an actual or prospective financier who agrees to keep it confidential;
- (d) under a written law;
- (e) for the purposes of making a request under section 18 of the Act;
- (f) for the purposes of resolving a dispute with the assistance of the Commissioner (as defined in section 14(1) of the Act);
- (g) for the purposes of an alternative dispute resolution proceeding under the *Small Business Development Corporation Act 1983* in respect of a dispute;
- (h) for the purposes of making an application under section 16(1) of the Act;
- (i) for the purposes of proceedings under the Act in the State Administrative Tribunal;
- (j) for the purposes of proceedings in a court.

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## Notes

This is a compilation of the *Commercial Tenancies (COVID-19 Response) Regulations 2020*—[and includes amendments made by other written laws](#). For provisions that have come into operation see the compilation table.

### Compilation table

<b>Citation</b>	<b>Published</b>	<b>Commencement</b>
<i>Commercial Tenancies (COVID-19 Response) Regulations 2020</i>	SL 2020/68 29 May 2020	r. 1 and 2: 29 May 2020 (see r. 2(a)); Regulations other than r. 1 and 2: 30 May 2020 (see r. 2(b))
<a href="#">Commercial Tenancies (COVID-19 Response) Amendment Regulations 2020</a>	<a href="#">SL 2020/176</a> <a href="#">25 Sep 2020</a>	<a href="#">r. 1 and 2: 25 Sep 2020</a> (see r. 2(a)); <a href="#">Regulations other than r. 1 and 2:</a> <a href="#">26 Sep 2020 (see r. 2(b))</a>