



New South Wales

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

under the

Retail Leases Act 1994

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Retail Leases Act 1994*.

DAMIEN TUDEHOPE, MLC
Minister for Finance and Small Business

Explanatory note

The object of this Regulation is to give effect to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted by the National Cabinet on 7 April 2020. In particular, the Regulation—

- (a) prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and
- (b) requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

This Regulation is made under the *Retail Leases Act 1994*, including sections 85 (the general regulation-making power) and 87 and under section 202 (the general regulation-making power) of the *Conveyancing Act 1919*.

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*—namely, matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.

This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

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

under the

Retail Leases Act 1994

1 Name of Regulation

This Regulation is the *Retail and Other Commercial Leases (COVID-19) Regulation 2020*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

3 Definitions

(1) In this Regulation—

business means an undertaking (whether or not carried on with a view to profit) involving the manufacture, sale or supply of goods or services.

commercial lease means a retail shop lease, but does not include the following—

- (a) a lease entered into after the commencement of this Regulation, but not a lease entered into by means of an option to extend or renew the lease or any other extension or renewal of an existing lease on the same terms as the existing lease,
- (b) a lease under the *Agricultural Tenancies Act 1990*,
- (c) a commercial lease within the meaning of Schedule 5 to the *Conveyancing (General) Regulation 2018*.

impacted lessee—see clause 4.

lessee means the person who has the right to occupy premises or land under a commercial lease.

lessor means the person who grants the right to occupy premises or land under a commercial lease.

National Code of Conduct means the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted on 7 April 2020.

Note. The *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* can be accessed at <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-of-conduct-sme-commercial-leasing-principles.pdf>

prescribed action means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following—

- (a) eviction of the lessee from premises or land the subject of the commercial lease,
- (b) exercising a right of re-entry to premises or land the subject of the commercial lease,

- (c) recovery of the premises or land,
- (d) distraint of goods,
- (e) forfeiture,
- (f) damages,
- (g) requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee,
- (h) recovery of the whole or part of a security bond under the commercial lease,
- (i) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease,
- (j) possession,
- (k) termination of the commercial lease,
- (l) any other remedy otherwise available to a lessor against a lessee at common law or under the law of this State.

prescribed period means the period ending at the end of the day that is 6 months after the day on which this Regulation commences.

the Act means the *Retail Leases Act 1994*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

- (2) Notes included in this Regulation do not form part of this Regulation.

4 Meaning of “impacted lessee”

- (1) A lessee is an **impacted lessee** if—
 - (a) the lessee qualifies for the jobkeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth, and
 - (b) the following turnover in the 2018–2019 financial year was less than \$50 million—
 - (i) if the lessee is a franchisee—the turnover of the business conducted at the premises or land concerned,
 - (ii) if the lessee 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 lessee.
- (2) To avoid doubt, in this clause, **turnover** of a business includes any turnover derived from internet sales of goods or services.
- (3) In this clause, corporations constitute a **group** if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

5 Application of Regulation

This Regulation applies to the exercise or enforcement of rights under a commercial lease in relation to circumstances occurring during the prescribed period.

6 Prohibitions and restrictions relating to commercial leases

- (1) If a lessee is an impacted lessee, a lessor must not take any prescribed action against the lessee on the grounds of a breach of the commercial lease during the prescribed period consisting of—
 - (a) a failure to pay rent, or
 - (b) a failure to pay outgoings, or

- (c) the business operating under the lease not being open for business during the hours specified in the lease.

Note. See leasing principles No. 1, 11 and 14 in the National Code of Conduct.

- (2) If, during the prescribed period, a lessee under a commercial lease is an impacted lessee, the rent payable under the commercial lease (other than rent or a component of rent determined by reference to turnover) must not be increased.

Note. See leasing principle No. 13 in the National Code of Conduct.

- (3) If, during the prescribed period, a lessee under a commercial lease was an impacted lessee, a lessor must not, after the prescribed period, take any prescribed action against the lessee on the grounds of a breach of the commercial lease consisting of a failure to pay an amount equivalent to or representing the rent increase amount referred to in subclause (2).

Note. See leasing principle No. 13 in the National Code of Conduct.

- (4) If an impacted lessee is required by a provision of a commercial lease to pay a fixed amount that represents an amount of land tax or any other statutory charge (such as local council rates) or insurance payable by a lessor and the amount of the land tax or other statutory charge or insurance payable is reduced, the impacted lessee is exempted from the operation of the provision to the extent of the reduction.

Note. See leasing principle No. 6 in the National Code of Conduct.

- (5) An act or omission of a lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic—

- (a) is taken not to amount to a breach of a commercial lease, and
(b) does not constitute grounds for termination of the lease or the taking of any prescribed action by the lessor against the lessee.

- (6) Nothing in this clause prevents a lessor and lessee agreeing to the parties taking any action in relation to the commercial lease (including the lessor taking any prescribed action or the parties agreeing to terminate the commercial lease).

7 Obligation to renegotiate rent and other terms of commercial leases before prescribed action

- (1) A lessor under a commercial lease must not take or continue any prescribed action against an impacted lessee on grounds of a breach of the commercial lease consisting of a failure to pay rent during the prescribed period unless the lessor has complied with this clause.

Note. This clause does not prevent parties to a commercial lease coming to agreements relating to the lease. For example, an impacted lessee may voluntarily agree to pay full rent during the prescribed period. The clause prevents the lessor taking unilateral prescribed action without complying with the requirements set out in subclauses (2)–(4).

- (2) If an impacted lessee is a party to a commercial lease, any party to the lease may request the other parties to renegotiate the rent payable under, and other terms of, the commercial lease.

- (3) A party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease.

- (4) The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to—

- (a) the economic impacts of the COVID-19 pandemic, and
(b) the leasing principles set out in the National Code of Conduct.

Note. See leasing principles No. 3–5, 7–10 and 12 in the National Code of Conduct.

In particular, leasing principle No. 3 in the National Code of Conduct requires landlords to offer rent reductions, in the form of waivers or deferrals of rent, proportionate to lessees' reductions in turnover.

8 Dispute resolution

- (1) To avoid doubt, Part 8 (Dispute resolution) of the Act extends to an impacted commercial lease dispute as if it were a retail tenancy dispute within the meaning of that Part.
- (2) In this clause, *impacted commercial lease dispute* means any dispute concerning the liabilities or obligations (including any obligation to pay money) under a commercial lease to which an impacted lessee is a party, being liabilities or obligations which arose under the commercial lease concerning circumstances occurring during the prescribed period and includes a dispute regarding a renegotiation (or a failure to take part in a renegotiation) of rent payable under the commercial lease under clause 7.

9 Tribunal and court consideration of National Code of Conduct leasing principles

The Tribunal and any court, when considering whether to make a decision or order relating to any of the following, is to have regard to the leasing principles set out in the National Code of Conduct—

- (a) the recovery of possession of premises or land from a lessee,
- (b) the termination of a commercial lease by a lessor,
- (c) the exercise or enforcement of another right of a lessor of premises or land.

10 Lessor action for non-COVID-19 pandemic related reasons

Nothing in this Regulation prevents a lessor taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic.

Note. For example, a lessor may terminate a commercial lease if the lessee has breached the lease by damaging the premises concerned or may take action if a lessee fails to vacate premises following the expiry of a fixed term commercial lease.

See leasing principle No. 2 in the National Code of Conduct.

11 Equity and law preserved

Nothing in this Regulation excludes the rules of equity and of common law from applying to the determination of a dispute concerning—

- (a) the recovery of possession of premises or land from a lessee, or
- (b) the termination of a commercial lease by a lessor, or
- (c) the exercise or enforcement of another right of a lessor of premises or land.

12 Repeal

This Regulation is repealed on the day that is 6 months after the day on which it commences.

Note. See section 87(4) of the *Retail Leases Act 1994* regarding the duration of regulations made under Part 11 (Response to COVID-19 pandemic) of that Act.

Schedule 1 Amendment of Conveyancing (General) Regulation 2018

Schedule 5

Insert after Schedule 4—

Schedule 5 Commercial leases—COVID-19 pandemic special provisions

1 Definitions

In this Schedule—

business means an undertaking (whether or not carried on with a view to profit) involving the manufacture, sale or supply of goods or services.

commercial lease means any agreement to which the Act applies relating to the leasing of premises or land for commercial purposes, but does not include the following—

- (a) a lease entered into after the commencement of this Schedule, but not a lease entered into by means of an option to extend or renew the lease or any other extension or renewal of an existing lease on the same terms as the existing lease,
- (b) a retail shop lease under the *Retail Leases Act 1994*,
- (c) a lease under the *Agricultural Tenancies Act 1990*.

impacted lessee—see clause 2.

lessee means the person who has the right to occupy premises or land under a commercial lease.

lessor means the person who grants the right to occupy premises or land under a commercial lease.

National Code of Conduct means the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted on 7 April 2020.

Note. The *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* can be accessed at <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-of-conduct-sme-commercial-leasing-principles.pdf>

prescribed action means taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following—

- (a) eviction of the lessee from premises or land the subject of the commercial lease,
- (b) exercising a right of re-entry to premises or land the subject of the commercial lease,
- (c) recovery of the premises or land,
- (d) distraint of goods,
- (e) forfeiture,
- (f) damages,
- (g) requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee,
- (h) recovery of the whole or part of a security bond under the commercial lease,

- (i) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease,
- (j) possession,
- (k) termination of the commercial lease,
- (l) any other remedy otherwise available to a lessor against a lessee at common law or under the law of this State.

prescribed period means the period ending at the end of the day that is 6 months after the day on which the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* commences.

2 Meaning of “impacted lessee”

- (1) A lessee is an **impacted lessee** if—
 - (a) the lessee qualifies for the jobkeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth, and
 - (b) the following turnover in the 2018–2019 financial year was less than \$50 million—
 - (i) if the lessee is a franchisee—the turnover of the business conducted at the premises or land concerned,
 - (ii) if the lessee 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 lessee.
- (2) To avoid doubt, in this clause, **turnover** of a business includes any turnover derived from internet sales of goods or services.
- (3) In this clause, corporations constitute a **group** if they are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

3 Application of Schedule

This Schedule applies to the exercise or enforcement of rights under a commercial lease in relation to circumstances occurring during the prescribed period.

4 Prohibitions and restrictions relating to commercial leases

- (1) If a lessee is an impacted lessee, a lessor must not take any prescribed action against the lessee on the grounds of a breach of the commercial lease during the prescribed period consisting of—
 - (a) a failure to pay rent, or
 - (b) a failure to pay outgoings, or
 - (c) the business operating under the lease not being open for business during the hours specified in the lease.

Note. See leasing principles No. 1, 11 and 14 in the National Code of Conduct.

- (2) If, during the prescribed period, a lessee under a commercial lease is an impacted lessee, the rent payable under the commercial lease (other than rent or a component of rent determined by reference to turnover) must not be increased.

Note. See leasing principle No. 13 in the National Code of Conduct.

- (3) If, during the prescribed period, a lessee under a commercial lease was an impacted lessee, a lessor must not, after the prescribed period, take any prescribed action against the lessee on the grounds of a breach of the commercial lease consisting of a failure to pay an amount equivalent to or representing the rent increase amount referred to in subclause (2).
Note. See leasing principle No. 13 in the National Code of Conduct.
- (4) If an impacted lessee is required by a provision of a commercial lease to pay a fixed amount that represents an amount of land tax or any other statutory charge (such as local council rates) or insurance payable by a lessor and the amount of the land tax or other statutory charge or insurance payable is reduced, the impacted lessee is exempted from the operation of the provision to the extent of the reduction.
Note. See leasing principle No. 6 in the National Code of Conduct.
- (5) An act or omission of a lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic—
 - (a) is taken not to amount to a breach of a commercial lease, and
 - (b) does not constitute grounds for termination of the lease or the taking of any prescribed action by the lessor against the lessee.
- (6) Nothing in this clause prevents a lessor and lessee agreeing to the parties taking any action in relation to the commercial lease (including the lessor taking any prescribed action or the parties agreeing to terminate the commercial lease).

5 Obligation to renegotiate rent and other terms of commercial leases before prescribed action

- (1) A lessor under a commercial lease must not take or continue any prescribed action against an impacted lessee on grounds of a breach of the commercial lease consisting of a failure to pay rent during the prescribed period unless the lessor has complied with this clause.
Note. This clause does not prevent parties to a commercial lease coming to agreements relating to the lease. For example, an impacted lessee may voluntarily agree to pay full rent during the prescribed period. The clause prevents the lessor taking unilateral prescribed action without complying with the requirements set out in subclauses (2)–(4).
- (2) If an impacted lessee is a party to a commercial lease, any party to the lease may request the other parties to renegotiate the rent payable under, and other terms of, the commercial lease.
- (3) A party to a commercial lease must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease.
- (4) The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to—
 - (a) the economic impacts of the COVID-19 pandemic, and
 - (b) the leasing principles set out in the National Code of Conduct.**Note.** See leasing principles No. 3–5, 7–10 and 12 in the National Code of Conduct. In particular, leasing principle No. 3 in the National Code of Conduct requires landlords to offer rent reductions, in the form of waivers or deferrals of rent, proportionate to lessees' reductions in turnover.

6 Disputes must be submitted to mediation before proceedings can be taken

A lessor must not do any one or more of the following unless and until the Small Business Commissioner has certified in writing that mediation offered

to be conducted by the Small Business Commissioner has failed to resolve the dispute and given reasons for the failure—

- (a) seek to recover possession of premises or land under the commercial lease,
- (b) terminate the commercial lease,
- (c) exercise or enforce any other right of the lessor under the lease.

7 Court consideration of National Code of Conduct leasing principles

A court, when considering whether to make a decision or order relating to any of the following, is to have regard to the leasing principles set out in the National Code of Conduct—

- (a) the recovery of possession of premises or land from a lessee,
- (b) the termination of a commercial lease by a lessor,
- (c) the exercise or enforcement of another right of a lessor of premises or land.

8 Lessor action for non-COVID-19 pandemic related reasons

Nothing in this Schedule prevents a lessor taking a prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic.

Note. For example, a lessor may terminate a commercial lease if the lessee has breached the lease by damaging the premises concerned or may take action if a lessee fails to vacate premises following the expiry of a fixed term commercial lease.

See leasing principle No. 2 in the National Code of Conduct.

9 Equity and law preserved

Nothing in this Schedule excludes the rules of equity and of common law from applying to the determination of a dispute concerning—

- (a) the recovery of possession of premises or land from a lessee, or
- (b) the termination of a commercial lease by a lessor, or
- (c) the exercise or enforcement of another right of a lessor of premises or land.

10 Repeal of Schedule

This Schedule is repealed on the day that is 6 months after the day on which it commences.

Note. Section 87(4) of the *Retail Leases Act 1994* regarding the duration of regulations made under Part 11 (Response to COVID-19 pandemic) of that Act.