



New South Wales

Retail and Other Commercial Leases (COVID-19) Regulation 2022

under the

Retail Leases Act 1994

His Excellency the Lieutenant-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

Explanatory note

The object of this Regulation is to limit the exercise of certain rights by a lessor under retail and certain other commercial leases for a breach of the lease if—

- (a) the lessee is a business that, due to the impact of the COVID-19 pandemic, qualified for certain grants, and
- (b) the breach is a prescribed breach that occurs between 13 July 2021 and 13 March 2022.

Before exercising the right, the lessor must try to resolve the breach using mediation.

This Regulation is made under—

- (a) the *Retail Leases Act 1994*, including sections 85, the general regulation-making power, and 87, and
- (b) the *Conveyancing Act 1919*, section 202, the general regulation-making power.

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

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Retail and Other Commercial Leases (COVID-19) Regulation 2022

under the

Retail Leases Act 1994

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Retail and Other Commercial Leases (COVID-19) Regulation 2022*.

2 Commencement

This Regulation commences on 13 January 2022 and is required to be published on the NSW legislation website.

3 Definitions

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 on or after 26 June 2021, but not—
 - (i) a lease entered into by an option to extend or renew the lease, or
 - (ii) 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 the *Conveyancing (General) Regulation 2018*, Schedule 5.

group, for a corporation, means the corporation and all corporations that are related bodies corporates of the corporation.

impacted lease means a commercial lease to which an impacted lessee is a party.

impacted lessee—see section 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 Code of Conduct 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 breach of an impacted lease means—

- (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.

prescribed period means the period commencing at the beginning of 13 July 2021 and ending at the end of 13 March 2022.

related body corporate has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

the Act means the *Retail Leases Act 1994*.

turnover of a business includes any turnover derived from internet sales of goods or services.

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

4 Meaning of “impacted lessee”

A lessee is an **impacted lessee** if—

- (a) the lessee qualifies for 1 or more of the following, or would qualify but for a COVID-19 Disaster Payment made to the lessee by the Commonwealth—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 COVID-19 Business Grant,
 - (iii) 2021 JobSaver Payment, and
- (b) the following turnover in the 2020–2021 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.

5 Application of Regulation

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

Part 2 Impacted leases

6 Application of Part

This Part applies if, at any time during the prescribed period, a lessee is an impacted lessee.

7 Provision of information

- (1) An impacted lessee must give the lessor the following information about the impacted lease—
 - (a) a statement to the effect that the lessee is an impacted lessee,
 - (b) evidence that the lessee is an impacted lessee.
- (2) The information—
 - (a) may be given before, or as soon as practicable after, a prescribed breach occurs, and
 - (b) must be given within a reasonable time after it is requested by the lessor.
- (3) The lessor may request the information under this section at any time if the information is reasonably required to ensure that the lessee continues to be an impacted lessee, but may not request the information more than once every 2 weeks.

8 Obligation to not increase rent

The rent payable under an impacted lease must not be increased during the prescribed period, other than rent or a component of rent determined by reference to turnover.

9 Compulsory mediation

- (1) A lessor must not take prescribed action against an impacted lessee on the grounds of a prescribed breach of the impacted lease that has occurred during the prescribed period unless—
 - (a) the matter has been referred for mediation under the Act, Part 8, Division 2, and the Registrar has certified in writing that the mediation has failed to resolve the dispute, and
 - (b) if the lessee has requested a renegotiation under section 10, the lessor has complied with that section.
- (2) Nothing in this section prevents a lessor and impacted lessee agreeing to action, including prescribed action, being taken in relation to the impacted lease without mediation or without complying with section 10.

10 Obligation to renegotiate

- (1) A party to an impacted lease may request that the other parties renegotiate the rent payable under, and other terms of, the impacted lease.
- (2) A party to the impacted lease may make a second or subsequent request under subsection (1), but, unless the parties otherwise agree, an impacted lessee may make a second or subsequent request only if the request—
 - (a) is made during the prescribed period, and
 - (b) does not relate to rent or outgoings for a period for which the rent or outgoings have already been reduced, waived or deferred following a renegotiation under this section unless the lessee ceases to be an impacted lessee during the period.
- (3) A party to an impacted lease must, if requested under this section—

- (a) renegotiate in good faith the rent payable under, and other terms of, the impacted lease, and
 - (b) commence renegotiations within—
 - (i) 14 days of receiving the request, or
 - (ii) another period agreed to by the parties.
- (4) The parties must renegotiate the rent payable under, and other terms of, the impacted lease taking into consideration—
 - (a) the economic impacts of the COVID-19 pandemic, and
 - (b) the leasing principles set out in the National Code of Conduct.
- (5) When renegotiating the rent payable—
 - (a) a grant or payment referred to in section 4(1)(a) that is made to a lessee must be treated as if it were part of the trade or turnover of the lessee, and
 - (b) a lessor is not required to reduce rent for periods when the lessee is not an impacted lessee, and
 - (c) a lessor is entitled to provide that a negotiated rent reduction will not apply at times during which the lessee ceases to be an impacted lessee.
- (6) For the purposes of subsection (5)(b) and (c), after 30 November 2021, a lessee is taken to be an impacted lessee if—
 - (a) the lessee would have qualified for 1 of the following were it still to be available—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 JobSaver Payment, and
 - (b) the following turnover in relation to the lessee in the 2020–2021 financial year was less than \$5 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) otherwise—the turnover of the business conducted by the lessee.
- (7) If the impacted lessee does not comply with subsections (3) or (4) or section 7, the lessor is taken to have complied with this section.
- (8) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after the expiry.

11 Actions required by law are not breaches

An act or omission of an impacted 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 the impacted lease to which the impacted lessee is a party, and
- (b) does not constitute grounds for termination of the impacted lease or the taking of any prescribed action by the lessor against the impacted lessee.

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

Nothing in this Regulation prevents a lessor taking 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.

Part 3 Miscellaneous

13 Dispute resolution

- (1) The Act, Part 8 extends to an impacted commercial lease dispute as if it were a retail tenancy dispute within the meaning of that Part.
- (2) In this section—
impacted commercial lease dispute means a dispute about a prescribed breach of an impacted lease as referred to in the *Conveyancing (General) Regulation 2018*, Schedule 5, clause 7(1).

14 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.

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

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

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

16 Repeals

- (1) The following are repealed—
 - (a) the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*,
 - (b) the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2021*.
- (2) This Regulation is repealed at the end of the day that is 6 months after the day on which the Regulation commences, except as provided for in subsection (2).
Note. See section 87(4) of the Act regarding the duration of regulations made under Part 11 (Response to COVID-19 pandemic) of the Act.
- (3) Schedule 1 of this Regulation is repealed on the day that is one day after the day on which this Regulation commences.

Schedule 1 Amendment of Conveyancing (General) Regulation 2018

Schedule 5

Omit the Schedule. Insert instead—

Schedule 5 Commercial leases—COVID-19 pandemic special provisions

Part 1 Preliminary

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 on or after 26 June 2021, but not—
 - (i) a lease entered into by an option to extend or renew the lease, or
 - (ii) 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*.

group, for a corporation, means the corporation and all corporations that are related bodies corporates of the corporation.

impacted lease means a commercial lease to which an impacted lessee is a party.

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 Code of Conduct 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 breach of an impacted lease means—

- (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.

prescribed period means the period commencing at the beginning of 13 July 2021 and ending at the end of 13 March 2022.

related body corporate has the same meaning as in the *Corporations Act 2001* of the Commonwealth.

turnover of a business includes any turnover derived from internet sales of goods or services.

2 Meaning of “impacted lessee”

A lessee is an **impacted lessee** if—

- (a) the lessee qualifies for 1 or more of the following, or would qualify but for a COVID-19 Disaster Payment made to the lessee by the Commonwealth—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 COVID-19 Business Grant,
 - (iii) 2021 JobSaver Payment, and
- (b) the following turnover in the 2020–2021 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.

3 Application of Schedule

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

Part 2 Impacted leases

4 Application of Part

This Part applies if, at any time during the prescribed period, a lessee is an impacted lessee.

5 Provision of information

- (1) An impacted lessee must give the lessor the following information about the impacted lease—
 - (a) a statement to the effect that the lessee is an impacted lessee,
 - (b) evidence that the lessee is an impacted lessee.
- (2) The information—
 - (a) may be given before, or as soon as practicable after, a prescribed breach occurs, and
 - (b) must be given within a reasonable time after it is requested by the lessor.
- (3) The lessor may request the information under this clause at any time if the information is reasonably required to ensure that the lessee continues to be an impacted lessee, but may not request the information more than once every 2 weeks.

6 Obligation to not increase rent

The rent payable under the impacted lease must not be increased during the prescribed period, other than rent or a component of rent determined by reference to turnover.

7 Compulsory mediation

- (1) A lessor must not take prescribed action against an impacted lessee on the grounds of a prescribed breach of the impacted lease that has occurred during the prescribed period unless—
 - (a) the matter has been referred for mediation under the *Retail Leases Act 1994*, Part 8, Division 2, and the Registrar of Retail Tenancy Disputes has certified in writing that the mediation has failed to resolve the dispute, and
 - (b) if the lessee has requested a renegotiation under clause 8, the lessor has complied with that clause.
- (2) Nothing in this clause prevents a lessor and impacted lessee agreeing to action, including prescribed action, being taken in relation to the impacted lease without mediation or without complying with clause 8.

8 Obligation to renegotiate

- (1) A party to an impacted lease may request that the other parties renegotiate the rent payable under, and other terms of, the impacted lease.
- (2) A party to the impacted lease may make a second or subsequent request under subclause (1), but, unless the parties otherwise agree, an impacted lessee may make a second or subsequent request only if the request—
 - (a) is made during the prescribed period, and
 - (b) does not relate to rent or outgoings for a period for which the rent or outgoings have already been reduced, waived or deferred following a

- renegotiation under this clause unless the lessee ceases to be an impacted lessee during the period.
- (3) A party to an impacted lease must, if requested under this clause—
 - (a) renegotiate in good faith the rent payable under, and other terms of, the impacted lease, and
 - (b) commence renegotiations within—
 - (i) 14 days of receiving the request, or
 - (ii) another period agreed to by the parties.
 - (4) The parties must renegotiate the rent payable under, and other terms of, the impacted lease taking into consideration—
 - (a) the economic impacts of the COVID-19 pandemic, and
 - (b) the leasing principles set out in the National Code of Conduct.
 - (5) When renegotiating the rent payable—
 - (a) a grant or payment referred to in clause 2(1)(a) that is made to a lessee must be treated as if it were part of the trade or turnover of the lessee, and
 - (b) a lessor is not required to reduce rent for periods when the lessee is not an impacted lessee, and
 - (c) a lessor is entitled to provide that a negotiated rent reduction will not apply at times during which the lessee ceases to be an impacted lessee.
 - (6) For the purposes of subclause (5)(b) and (c), after 30 November 2021, a lessee is taken to be an impacted lessee if—
 - (a) the lessee would have qualified for 1 of the following were it still to be available—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 JobSaver Payment, and
 - (b) the following turnover in relation to the lessee in the 2020–2021 financial year was less than \$5 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) otherwise—the turnover of the business conducted by the lessee.
 - (7) If the impacted lessee does not comply with subclauses (3) or (4) or clause 5, the lessor is taken to have complied with this clause.
 - (8) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after the expiry.

9 Actions required by law are not breaches

An act or omission of an impacted 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 the impacted lease to which the impacted lessee is a party, and
- (b) does not constitute grounds for termination of the impacted lease or the taking of any prescribed action by the lessor against the impacted lessee.

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

Nothing in this Schedule prevents a lessor taking 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.

Part 3 Miscellaneous

11 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.

12 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, must consider the leasing principles set out in the National Code of Conduct—

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

13 Repeal of Schedule

This Schedule is repealed at the end of the day that is 6 months after the day on which this Schedule 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.