



New South Wales

Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 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 repeal and remake, with amendments, the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* to extend prohibitions and requirements in relation to the exercise of certain rights of lessors under retail leases during the COVID-19 pandemic period until the end of 28 March 2021.

Some amendments are also made to Schedule 5 to the *Conveyancing (General) Regulation 2018* to ensure provisions relating to impacted leases are consistent.

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 (No 3) 2020

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 (No 3) 2020*.

2 Commencement

This Regulation commences at the beginning of 1 January 2021 and is required to be 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 on or after 24 April 2020, but not—
 - (i) a lease entered into by means of 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 Schedule 5 to the *Conveyancing (General) Regulation 2018*.

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

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-ofconduct-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 beginning on the commencement of the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* and ending at the end of 28 March 2021.

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, 8, 8A and 8B 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 \$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) in any other case—the turnover of the business conducted by the lessee.

Note 1. See amendments made to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth by the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020* of the Commonwealth.

Note 2. For a lessee who was an impacted lessee during the period from 24 April to 31 December 2020 but does not meet the definition of impacted lessee under this clause—see clause 14.

- (2) From the commencement of this Regulation until 4 January 2021, a lessee is not, despite subclause (1), an impacted lessee unless the lessee would also be an impacted lessee after 4 January 2021.

Note. The eligibility test for the jobkeeper scheme will change on 4 January 2021. Subclause (2) ensures the new eligibility requirements will apply from the commencement of this Regulation.

(3) In this clause—

group of corporations means corporations that are related bodies corporate within the meaning of the *Corporations Act 2001* of the Commonwealth.

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

5 Application of Regulation

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

Part 2 Impacted leases

6 Prohibitions and restrictions relating to impacted leases

- (1) This clause applies if, during the prescribed period, a lessee is an impacted lessee.
- (2) 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.
Note. See leasing principle No. 13 in the National Code of Conduct.
- (3) A lessor must not, after the prescribed period, take prescribed action against the impacted lessee on the grounds of a breach of the impacted 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 an impacted 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 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 prescribed action by the lessor against the impacted lessee.
- (6) Nothing in this clause prevents anything being done with the agreement of the lessor and impacted lessee.

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

- (1) A lessor must not take prescribed action against the impacted lessee on the grounds of a breach of the impacted lease occurring during the prescribed period consisting of any of the following unless the lessor has complied with any obligations imposed on the lessor by this clause and clause 8—
 - (a) a failure to pay rent,
 - (b) a failure to pay outgoings,
 - (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) A party to an impacted lease may request the other parties to renegotiate the rent payable under, and other terms of, the impacted lease.
- (3) A party to the impacted lease may make a second or subsequent request under subclause (2), 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.

- (4) 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.
- (5) An impacted lessee must give the lessor the following in respect of 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.
- (6) The parties are to renegotiate the rent payable under, and other terms of, the impacted 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.
- (7) If the impacted lessee does not comply with subclauses (4)–(6), the lessor is taken to have complied with this clause.
- (8) Nothing in this clause prevents a lessor and impacted lessee agreeing to the parties taking action in relation to the impacted lease, including the lessor taking prescribed action or the parties agreeing to terminate the impacted lease.
- (9) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after that expiry.

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 a dispute concerning the liabilities or obligations, including any obligation to pay money, under an impacted lease, being liabilities or obligations which arose under the impacted 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 impacted 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 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.

10 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

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 Repeals

- (1) The *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* is repealed.
- (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 subclause (3).
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 to this Regulation is repealed on the day that is one day after the day on which this Regulation commences.

13 Savings

- (1) Any act, matter or thing that, immediately before the repeal of the repealed Regulation, had effect under that Regulation continues to have effect under this Regulation.
- (2) To avoid doubt, a renegotiation under clause 7 of the repealed Regulation, that was commenced but not concluded before the commencement of this Regulation, may be continued and concluded under clause 7 of this Regulation.
- (3) In this clause—
repealed Regulation means the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.

14 Savings provision—impacted lessees

- (1) A reference in this Regulation to an impacted lessee extends to a person who was an impacted lessee under a repealed Regulation in relation to a breach of the impacted lease that occurred at any time during which the repealed Regulation was in force.
- (2) To avoid doubt, a person who was an impacted lessee within the meaning of a repealed Regulation at any time during which the repealed Regulation was in force is taken to be an impacted lessee for the whole of the period during which the repealed Regulation was in force.
- (3) In this clause—
repealed Regulation means the following—
 - (a) the *Retail and Other Commercial Leases (COVID-19) Regulation 2020*,
 - (b) the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.

Schedule 1 Amendment of Conveyancing (General) Regulation 2018

[1] Schedule 5 Commercial leases—COVID-19 pandemic special provisions

Omit clause 4(2).

[2] Schedule 5, clause 4(7)

Omit the subclause. Insert instead—

- (7) Nothing in this clause prevents anything being done with the agreement of the lessor and impacted lessee.

[3] Schedule 5, clause 5(1)

Omit the subclause. Insert instead—

- (1) A lessor must not take prescribed action against the impacted lessee on the grounds of a breach of the impacted lease occurring during the prescribed period consisting of any of the following unless the lessor has complied with any obligations imposed on the lessor by this clause and clause 6—
- (a) a failure to pay rent,
 - (b) a failure to pay outgoings,
 - (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.

[4] Schedule 5, clause 5(7A)

Insert after clause 5(7)—

- (7A) Nothing in this clause prevents a lessor and impacted lessee agreeing to the parties taking action in relation to the impacted lease, including the lessor taking prescribed action or the parties agreeing to terminate the impacted lease.

[5] Schedule 5, clause 5, note

Omit the note.