

# Retail and Other Commercial Leases (COVID-19) Regulation 2021

[2021-379]



New South Wales

## Status Information

### Currency of version

Repealed version for 1 December 2021 to 12 January 2022 (accessed 3 May 2024 at 3:06)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Repeal**

This Regulation was repealed by sec 16(1)(a) of the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2022](#) with effect from 13.1.2022.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

File last modified 13 January 2022

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New South Wales

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# Retail and Other Commercial Leases (COVID-19) Regulation 2021



New South Wales

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*.

### 2 Commencement

This Regulation commences on the day on which it is 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 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 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 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 Code of Conduct 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 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 January 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”**

(1) 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.

(2), (3) (Repealed)

#### **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.

#### **6A Provision of information**

- (1) An impacted lessee must give the lessor the following information 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.
- (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.

#### **6B 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.

#### **6C 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 clause 6D, 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 6D.

**6D 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.
- (4A) When renegotiating the rent payable—
  - (a) a grant or payment referred to in clause 4(1)(a) that is made to a lessee is to 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.
- (4B) For the purposes of subclause (4A)(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.
- (5) If the impacted lessee does not comply with subclauses (3) or (4) or clause 6A, the lessor is taken to have complied with this clause.
- (6) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after the expiry.

#### **6E 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.

#### **7 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**

#### **8 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 clause—

***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 4C(1).

## **9 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.

## **9A 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.

## **10 Repeals**

- (1) 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 (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.

- (2) Schedule 1 of this Regulation is repealed on the day that is one day after the day on which this Regulation commences.

## **Schedule 1 (Repealed)**