

9.7 Retail & Other Commercial Leases (COVID-19) Amendment Regulation NSW 2021

REPORT BY THE MANAGER PROPERTY AND REVENUE AND PROPERTY OFFICER
TO 13 OCTOBER 2021 ORDINARY MEETING
GOV400087, COU500044, PUB600025

RECOMMENDATION

That Council:

1. **receive the report by the Manager Property and Revenue and Property Officer on the enacted Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021;**
2. **authorise the General Manager to receive, negotiate, determine and approve all commercial or retail rent relief offers that meet the eligibility criteria in accordance with the *Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 (NSW)* during the period between 13 July 2021 and 13 January 2022; and**
3. **receive further reports documenting the amounts waived by the General Manager during the prescribed period between 13 July 2021 and 13 January 2022.**

Executive summary

The purpose of this Report is to inform Council of its obligation in accordance with *The Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021* (the Regulation) to provide rent relief to its commercial or retail tenants who have been impacted by the COVID-19 pandemic and who qualify for this relief; and to seek Council's resolution to delegate the negotiation, determination and approval of the relief in accordance with the Regulation, to the General Manager.

The Regulation is attached to this report as Attachment 1.

The relief is to be negotiated between the parties and negotiations are governed by the Regulation and the *National Code of Conduct for commercial tenancies – leasing principles* (the Code).

The Code is attached to this Report as Attachment 2.

The period this Regulation applies to is 13 July 2021 to 13 January 2022 – a period of 6 months.

Disclosure of Interest

Nil.

Detailed report

The COVID-19 pandemic has created a health and economic crisis globally and unfortunately this extends to the communities and local economy of the Mid-Western Region. Key industries of

tourism, hospitality and retail have been most significantly impacted to date as a result of emergency orders imposed by the government to reduce the risk and severity of the pandemic. It is important to note that the flow on impact of reductions in income and expenditure will ultimately impact the broader local economy.

On 14 July 2021, the NSW Government enacted the Regulation. Amendments passed on 13 August 2021 provided even greater protections to impacted tenants by reinstating National Cabinet's Code.

The Regulation requires landlords to renegotiate rent having regard to the Code. This requires landlords to provide rent relief in proportion with tenant's decline in turnover. Of the rent relief provided, at least 50 per cent must be in the form of a waiver, and the balance a deferral.

The eligibility criteria and the possible rent reductions and/or waivers allowable are;

Eligibility

- A commercial or retail tenant will be eligible for the rent relief protections if their business has annual turnover of less than \$50 million and is eligible for any of the following supports: the 2021 COVID-19 Micro-business Grant, 2021 COVID-19 Business Grant or the 2021 *JobSaver* Payment. Additionally, businesses that would have been eligible for one of these supports if they had not received the Commonwealth COVID-19 Disaster Payment are also eligible.
- Generally, businesses that have experienced a decline in turnover of at least 30 per cent due to the public health orders will be eligible. Not-for-profits must have at least a 15 per cent decline, corresponding with their eligibility under the *JobSaver* payment.

What rent reductions must property owners provide?

- Under the Regulation, property owners must renegotiate rent with eligible tenants in good faith having regard to the leasing principles in the Code and the economic impact of the COVID-19 pandemic.
- Under the leasing principles, property owners are required to reduce rent in proportion to the tenant's decline in turnover. This means if a tenant has experienced a 40 per cent decline in turnover due to COVID-19, then the property owner must provide a 40 per cent reduction in rent.
- As a default position, at least 50 per cent of any rent relief must be in the form of a rent waiver with the remainder a rent deferral. Any deferred rent must be paid back over the balance of the lease or for a period of no less than 24 months, whichever is greater.

Tenants should provide evidence of their decline in turnover to Council to enable the calculation of the appropriate rent reduction. Evidence could include a Business Activity Statement or an accountant's letter.

Council's commercial property consist of various property portfolios that may qualify for the rent relief as prescribed by the Regulation and Code.

To date, a number of tenants have requested rental relief.

Community Plan implications

Theme	Building a Strong Local Economy
Goal	A prosperous and diversified economy
Strategy	Support the attraction and retention of a diverse range of businesses and industries

Strategic implications

Council Strategies

Community Plan Towards 2030.

Council Policies

Not Applicable.

Legislation

The *Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 (NSW)* reintroduced the *National Code of Conduct for commercial tenancies – leasing principles* mandating rent relief for eligible tenants impacted by COVID-19.

Local Government Act 1993.

Financial implications

The legislation allows a property owner to request fortnightly evidence of losses and then calculate rent relief based on the information provided. Therefore, the financial implications of the rent relief cannot be quantified at the present time as they are calculated on the basis of fluctuating fortnightly or monthly impact on individual businesses.

Commercial rent revenue was around \$600,000 last financial year. The amount of relief should be no more than \$300,000 (6 month period of application) – maximum. It is likely to be materially less than this.

The period this Regulation applies to is 13 July 2021 to 13 January 2022 – a period of 6 months.

Budget variations will be processed through Monthly Budget reporting or Quarterly Budget Reviews, as appropriate.

Associated Risks

Council is required by the Regulation and the Code to negotiate rent relief for commercial and retail tenants. There is a genuine risk that the businesses will not be able to pay rent in the short term and may not survive at all in the long term. Should a tenant/operator no longer be able to pay rent and given the uncertainty in the current environment, there will be limited capacity to attract another tenant.

If delegation for rent waivers is not provided to the General Manager as recommended by this Report, there is a risk that undue stress may apply to tenants with time delays around reporting to Council, particularly with the Caretaker period coming into action on the 4 November. Further, there is risk that Council will not meet legislation requirements as listed in this report.

DIANE SAWYERS
MANAGER PROPERTY AND REVENUE

LEONIE JOHNSON
CHIEF FINANCIAL OFFICER

27 September 2021

- Attachments:*
1. Retail and Other Commercial Leases (Covid 19) Amendment Regulation 2021.
 2. National Code of Conduct for Commercial Tenancies 2020.
 3. Retail and Other Commercial Leases (Covid 19) Regulation.

APPROVED FOR SUBMISSION:

BRAD CAM
GENERAL MANAGER



New South Wales

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

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 *Retail and Other Commercial Leases (COVID-19) Regulation 2021* and the *Conveyancing (General) Regulation 2018*, Schedule 5 provide protections for certain commercial lessees (*impacted lessees*) where related businesses have had a fall in turnover due to lockdowns in New South Wales.

The object of this Regulation is to extend those protections as follows—

- (a) to extend the prescribed period, which began on 13 July 2021, until 13 January 2022,
- (b) to prohibit a lessor increasing rent during the prescribed period if the lessee is an impacted lessee,
- (c) to require an impacted lessee to give the lessor evidence that the lessee is an impacted lessee,
- (d) to require lessors and impacted lessees to renegotiate rent and other terms of the lease if 1 party requests the renegotiation,
- (e) to require a renegotiation to be conducted in good faith with consideration being given to the leasing principles set out in the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* (the *National Principles*),
- (f) to require a lessor to do the following before taking action in relation to certain breaches of the lease occurring during the prescribed period—
 - (i) to attempt to mediate the dispute with the impacted lessee, and
 - (ii) to engage in a renegotiation if required,
- (g) to provide that actions an impacted lessee takes to comply with a law are not breaches of a commercial lease,
- (h) to require a court or tribunal to consider the National Principles when considering whether to make certain orders or decisions relating to commercial leases.

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 who administers the *Conveyancing Act 1919*.

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Explanatory note

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]

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

under the

Retail Leases Act 1994

1 Name of Regulation

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

2 Commencement

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

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 1 Amendment of Retail and Other Commercial Leases (COVID-19) Regulation 2021

Schedule 1 Amendment of Retail and Other Commercial Leases (COVID-19) Regulation 2021

[1] Clause 3 Definitions

Insert in alphabetical order—

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>

[2] Clause 3, definition of “prescribed period”

Omit “20 August 2021”. Insert instead “13 January 2022”.

[3] Clause 4 Meaning of “impacted lessee”

Omit clause 4(1)(a). Insert instead—

- (a) the lessee qualifies for 1 or more of the following—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 COVID-19 Business Grant,
 - (iii) 2021 JobSaver Payment, and

[4] Clauses 6–6E

Omit clause 6. Insert instead—

6 Application of Part

This Part applies if, 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.

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—

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 1 Amendment of Retail and Other Commercial Leases (COVID-19) Regulation 2021

- (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.
- (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) 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.

[5] Part 3, heading

Move heading to after clause 7.

[6] Clause 8 Dispute resolution

Omit “clause 4(2)” from clause 8(2), definition of *impacted commercial lease dispute*.

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 1 Amendment of Retail and Other Commercial Leases (COVID-19) Regulation 2021

Insert instead “clause 4C(1)”.

[7] Clause 9A

Insert after clause 9—

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.

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 2 Amendment of Conveyancing (General) Regulation 2018

Schedule 2 Amendment of Conveyancing (General) Regulation 2018

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

Insert in alphabetical order in clause 1—

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>

[2] Schedule 5, clause 1, definition of “prescribed period”

Omit “20 August 2021”. Insert instead “13 January 2022”.

[3] Schedule 5, clause 2(1)(a)

Omit the paragraph. Insert instead—

- (a) the lessee qualifies for 1 or more of the following—
 - (i) 2021 COVID-19 Micro-business Grant,
 - (ii) 2021 COVID-19 Business Grant,
 - (iii) 2021 JobSaver Payment, and

[4] Schedule 5, clauses 4–4E

Omit clause 4. Insert instead—

4 Application of Part

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

4A 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.

4B 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.

4C 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—

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 2 Amendment of Conveyancing (General) Regulation 2018

- (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 4D, 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 4D.

4D 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.
- (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) If the impacted lessee does not comply with subclauses (3) or (4) or clause 4A, 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.

4E 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.

[5] Schedule 5, clause 6A

Insert after clause 6—

Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 [NSW]
Schedule 2 Amendment of Conveyancing (General) Regulation 2018

6A 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.

National Code of Conduct for commercial tenancies - leasing principles

In negotiating and enacting appropriate temporary arrangements under the Code of Conduct, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.

5. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.
6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.
7. A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner.
8. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.
9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.
10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.
11. Landlords must not draw on a tenant's security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.
12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in item #2 above. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.
13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.
14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

Tags

COVID-19

Date

07 May 2020

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National Code of Conduct for commercial tenancies - leasing principles

In negotiating and enacting appropriate temporary arrangements under the Code of Conduct, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive

terms of their lease will forfeit any protections provided to the tenant under this Code.

3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under “definitions,” below) of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant’s trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant’s capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord’s financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.
5. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.
6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.
7. A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association’s COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner.
8. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.
9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.
10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.
11. Landlords must not draw on a tenant’s security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.
12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in item #2 above. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.

13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.
14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

Tags

- [COVID-19](#)

Date

07 May 2020



New South Wales

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

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 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 qualifies for certain grants due to the impact of the COVID-19 pandemic, and
- (b) the breach is a prescribed breach that occurs between 13 July 2021 and 20 August 2021.

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, being the Minister administering the *Conveyancing Act 1919*.

Retail and Other Commercial Leases (COVID-19) Regulation 2021 [NSW]
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Retail and Other Commercial Leases (COVID-19) Regulation 2021 [NSW]
Part 1 Preliminary

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

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 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.

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.

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,

Retail and Other Commercial Leases (COVID-19) Regulation 2021 [NSW]
Part 1 Preliminary

- (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 20 August 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.

4 Meaning of “impacted lessee”

- (1) A lessee is an **impacted lessee** if—
 - (a) the lessee qualifies for 1 or more of the following grants—
 - (i) Micro-business COVID-19 Support Grant,
 - (ii) COVID-19 NSW Business Grant,
 - (iii) Job Saver Grant, 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) 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 an impacted lease in relation to a prescribed breach of the lease 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 lessor must not take prescribed action against the impacted lessee on the grounds of a prescribed breach of the impacted lease occurring during the prescribed period unless—
 - (a) the matter has been referred for mediation under the Act, Part 8, Division 2, and
 - (b) the Registrar has certified in writing that the mediation has failed to resolve the dispute.
- (3) 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.
- (4) The information—
 - (a) may be given before, or as soon as practicable after, the prescribed breach occurs, and
 - (b) must be given within a reasonable time after it is requested by the lessor.
- (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 any prescribed action by the lessor against the impacted lessee.
- (6) 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.

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.

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 4(2).

Retail and Other Commercial Leases (COVID-19) Regulation 2021 [NSW]
Part 3 Miscellaneous

Part 3 Miscellaneous

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.

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.

Retail and Other Commercial Leases (COVID-19) Regulation 2021 [NSW]
Schedule 1 Amendment of Conveyancing (General) Regulation 2018

Schedule 1 Amendment of Conveyancing (General) Regulation 2018

Schedule 5

Insert after Schedule 4—

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 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 retail shop lease under the *Retail Leases Act 1994*,
- (c) a lease under the *Agricultural Tenancies Act 1990*.

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.

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,

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- (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 20 August 2021.

2 Meaning of “impacted lessee”

- (1) A lessee is an **impacted lessee** if—
 - (a) the lessee qualifies for 1 or more of the following grants—
 - (i) Micro-business COVID-19 Support Grant,
 - (ii) COVID-19 NSW Business Grant,
 - (iii) Job Saver Grant, 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) 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 an impacted lease in relation to a prescribed breach of the lease occurring during the prescribed period.

Part 2 Impacted leases

4 Prohibitions and restrictions relating to impacted leases

- (1) This clause applies if, during the prescribed period, a lessee is an impacted lessee.
- (2) The lessor must not take prescribed action against the impacted lessee on the grounds of a prescribed breach of the impacted lease occurring during the prescribed period unless—

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- (a) the matter has been referred for mediation under the *Retail Leases Act 1994*, Part 8, Division 2, and
 - (b) the Registrar of Retail Tenancy Disputes has certified in writing that the mediation has failed to resolve the dispute.
- (3) 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.
- (4) The information—
- (a) may be given before, or as soon as practicable after, the prescribed breach occurs, and
 - (b) must be given within a reasonable time after it is requested by the lessor.
- (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 any prescribed action by the lessor against the impacted lessee.
- (6) 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 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

6 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.

7 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.