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*.

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# 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.

# 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-ofconduct-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—

(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***.

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.

# 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-ofconduct-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—

(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—

### 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.