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*.

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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,

(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 1or 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).

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.

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,

(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 1or 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—

(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.