

8.25. Managing Rent Relief Requests from Council Tenants Due to COVID-19

AUTHOR: Albert Lo, Manager Property Assets

ENDORSED BY: Duncan Mitchell, Director Engineering Services

ATTACHMENTS:

1. National Cabinet Mandatory Code of Conduct [8.25.1 - 7 pages]
2. Retail and Other Commercial Leases - COVID-19 Regulation No 2 2020 [8.25.2 - 12 pages]

PURPOSE:

This report is recommending that North Sydney Council should adopt the National Cabinet Mandatory Code of Conduct – Small to Medium Enterprise (SME) Commercial Leasing Principles During COVID-19 and the NSW governments “Retail and Other Commercial Leases (COVID-19) Regulation 2020” for managing rental waivers and rental deferrals for Council’s Property portfolio – refer to attachments.

EXECUTIVE SUMMARY:

In response to the COVID-19 pandemic, which was announced by World Health Organisation on 11 March 2020, North Sydney Council created and adopted a Policy in relation to “Waiving Charges during Novel Coronavirus (COVID-19)” on 27 March 2020. The Policy identifies support and/or waivers of lease fees or charges that Council will provide to Council’s lessees and licensees impacted by the Government response to COVID-19 – particularly those impacted by enforced closures of their business.

In accordance with the adopted Council Policy on “Waiving Charges during COVID-19”, rental waivers have been applied to the following businesses and community groups in North Sydney from 1 April 2020:

- Outdoor Dining operators (Licence Holders)
- Recreational and Sporting facilities
- Community (Not for profit) groups
- Cafe and Restaurant operators

This report is now recommending that Council adopt the National Cabinet Mandatory Code of Conduct – Small to Medium Enterprise (SME) Commercial Leasing Principles During COVID-19 and the NSW governments “Retail and Other Commercial Leases (COVID-19) Regulation 2020”. This Regulation commenced on 24 April 2020 when it was published on the NSW legislation website and initially ended after 6 months on 24 October 2020. On 23 September 2020, the NSW Government Treasurer announced that the Regulation will be extended to 31 December 2020. It is more than likely that this

end date of 31 December 2020 may be further extended to be in line with the Federal Government's JobKeeper extension to 31 March 2021. On 17 November 2020, the NSW Government has announced through a media release that a temporary extension to 28 March 2021 of the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles *for retail tenants only* with an annual turnover of less than \$5 million will be granted. The Federal Government is yet to announce the date changes to the National Code of Conduct will be made.

It is prudent and logical for Council to now adopt this approach as it will ensure consistency with the State and Federal Codes and Regulations.

FINANCIAL IMPLICATIONS:

The total estimated financial loss due to rental waivers for the 6 months from July to December 2020 is around \$677,440. The financial loss to Council would be similar if Council did not adopt the Federal Code as it is not forecast that businesses will significantly recover and be able to pay Council rent during the same period.

Using the same estimates and projection, the total estimated annual reduction in rental income from Council's Property Portfolio for 2020/21 will be about \$1.35 million.

Note: On 17 November 2020, the NSW Government has announced through a media release that a temporary extension to 28 March 2021 of the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles *for retail tenants only* with an annual turnover of less than \$5 million will be granted. This will also have an impact on rental income from Council's Property Portfolio.

RECOMMENDATION:

- 1. THAT** the National Cabinet Mandatory Code of Conduct – Small to Medium Enterprise (SME) Commercial Leasing Principles During COVID-19 be adopted by North Sydney Council for managing rental waivers and rental deferrals for Council's Property portfolio.
- 2. THAT** in the event that the NSW Governments "Retail and other Commercial Leases (COVID-19) Regulation (No 2) 2020 is extended beyond 31 December 2020, Council should also match the extension period for rent relief until the prescribed period ends.
- 3. THAT** Council notes the financial impacts of the rental waivers and the rental deferral amounts on Council's Property portfolio revenue as detailed in this report.
- 4. THAT** delegated authority be given to the General Manager to approve or not approve the rental waivers and the rental deferrals for Council's tenants and licence holders when applications are received from Council's Property Department.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

2. Our Built Infrastructure

2.1 Infrastructure and assets meet community needs

BACKGROUND

In response to the COVID-19 pandemic, which was announced by World Health Organisation on 11 March 2020, North Sydney Council created and adopted a Policy in relation to “Waiving Charges during Novel Coronavirus (COVID-19)” on 27 March 2020.

The Policy identifies support and/or waivers of lease fees or charges that Council will provide to Council’s lessees and licensees impacted by the Government response to COVID-19 – particularly those impacted by enforced closures of their business.

At Federal Government level, the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 was adopted by the National Cabinet on 7 April 2020. The Mandatory Code of Conduct came into effect in NSW as the Retail and Other Commercial Leases (COVID-19) Regulation 2020. This Regulation commenced on 24 April 2020 when it was published on the NSW legislation website and initially ended after 6 months on 24 October 2020.

On 23 September 2020, the NSW Government Treasurer announced through a media release that the Regulation will be extended to 31 December 2020. The Retail Leases (COVID-19) Regulation (No. 2) 2020 was published on 23 October 2020 with a prescribed period until 31 December 2020. On 17 November 2020, NSW Government has announced through their media release that a temporary extension to 28 March 2021 of the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles *for retail tenants only* with an annual turnover of less than \$5 million.

The Regulations do not apply to new leases entered into after 24 April 2020 with the exception to an option to renew, or the extension / renewal of an existing lease on the same terms.

NSW - Retail and Other Commercial Leases (COVID-19) Regulation 2020 (No. 2):

In summary the objective of this Regulation is to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until the end of 31 December 2020. 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.

In general the requirements and obligations of the Regulation are as follows:

- (a) Prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and
- (b) Requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

The National Code of Conduct as covered in the Regulation provided various leasing principles including the following main ones:

- Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period;
- Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under the Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code;
- Landlords must not draw on a tenant's security for the non-payment of rent during the period of COVID-19 pandemic;
- Landlords and tenants will negotiate in good faith on temporary leasing arrangements;
- Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals, based on the reduction in the tenant's trade income during COVID-19 pandemic period; and
- Rental waivers must constitute no less than 50% of the total reduction in rent with the remaining in rent deferral.

CONSULTATION REQUIREMENTS

Community engagement is not required.

DETAIL

Under the Retail and Other Commercial Leases (COVID-19) Regulation 2020, an “impacted lessee” is defined as:

- A lessee who qualifies for the JobKeeper scheme of the Commonwealth Government
- A small to medium enterprise (SME) with a turnover in the 2018-19 financial year less than 50 million

To qualify for the Federal Government’s JobKeeper scheme, the business must have a turnover loss of more than 30% during the COVID-19 pandemic period compared to a corresponding period in 2019.

In accordance with Council’s own policy on “Waiving Charges during COVID-19”, rental waivers have been applied to the following businesses and community groups from 1 April 2020 due to forced closure of services:

- Outdoor Dining operators
- Recreational and Sporting facilities
- Community (Not for profit) groups
- Cafe and Restaurant operators

With the reduction of new COVID-19 cases in NSW, the State Government has recently relaxed the forced closures and restrictions imposed on restaurants and outdoor eating areas as well as the restrictions imposed on Recreational and Community group premises.

Based on Council’s Policy “Waiving Charges during COVID-19”, four months' rent free has been given to Outdoor Dining, Not-for-profit Community Groups, Café and Restaurant operators from 1 April 2020 to 31 July 2020 – they are required to start paying rent from 1 August 2020; while five months' rent free has been provided to Recreational groups until 31 August 2020 – they are required to pay rent from 1 September 2020.

The following table (prepared by Colliers International) shows the amount of rent waiver Council has already given to our tenants from April 2020 to August 2020 – a total of \$755,605 during that period.

Table 1. Amount of rent waiver Council has given to our tenants from April - August

Category	Total Relief already given as per Council Waiving Charges Covid-19 Policy
Cafes/Restaurants	421,776.80
Commercial Retail	-
Outdoor Dining	238,078.70
Roads	-
Public Land	-
Licences	-
Commercial	-
Community Housing	-
Residential	3,249.99
Community Centres	13,313.29
Recreational	75,852.96
Community Centres	3,333.32
Total	755,605.06

In recent months, further rent relief requests were received from various Council's lessees and licensees through enquiries with Council's Property Management Agents - Colliers International and Council's Property Department. It is prudent and logical to adopt the principles of the National Code of Conduct as they contain specific details of how the rent relief should be given in the form of rental waiver and rental deferral. This will be applicable on the subsequent period after Council's Waiving Charges during COVID-19 Policy has been applied. This approach will ensure consistency with the State and Federal Codes and Regulations.

It is therefore recommended that the National Code of Conduct be applied for the period detailed as follows:

1. Restaurants and Café, Outdoor Dining: from 1 August 2020 to 31 December 2020
2. Not-for-profit Community Groups: from 1 August 2020 to 31 December 2020
3. Recreational Groups: from 1 September 2020 to 31 December 2020
4. Retail /Commercial/ Others: from 1 April 2020 to 31 December 2020

In the event that the Retail and other Commercial Leases (COVID-19) Regulation (No. 2) 2020 is extended beyond 31 December 2020, it is recommended that the National Code of Conduct for rent relief be applied for the extended period until the prescribed period ends.

Also similar to Council's "Waiving Charges during COVID-19 Policy", the National Code of Conduct stipulates that the rent relief in the form of rent waivers and rent deferrals will have to be determined based on the tenants' reduction in their trade income during the COVID-19 pandemic period. To establish the percentage reduction in turnover, the tenants must submit their Business Activity Statement (BAS) in 2020,

which are then compared to the corresponding period of BAS in 2019. Without this financial information in the form of BAS statements comparing 2020 with 2019, Council will not be able to process rent relief requests.

In accordance with the Code of Conduct, the rent waiver is recommended to be 50% of the tenants turnover loss, while the rest of the 50% will be given as a rent deferral.

The repayment period will be according to the Leasing Principles contained in the Code of Conduct, or subject to agreement between parties on a case-by-case basis taking into consideration of the lease expiry date.

The estimated financial impacts due to rent waivers for the 6 months from July 2020 to December 2020 is \$677,440 – refer to the table below. This estimated amount will be updated in future reports as more accurate information becomes available.

Table 2. Percentage of tenants not paying rent to Council and estimated cost impacts to Council’s property portfolio revenue to December 31.

Category	Proportion of tenants NOT paying any rents /fees between June to September 2020 period	Estimated financial loss due to rental waivers from July to December 2020
Cafés / Restaurants	41.2%	\$220,410
Retail	42.9%	\$34,780
Outdoor Dining	22.9%	\$71,270
Commercial	50.0%	\$243,910
Residential	37.5%	\$6,200
Recreational	33.3%	\$96,380
Community Centres	40.0%	\$4,490
TOTAL		\$677,440

It is noted that a significant percentage of Council’s tenants (on average 30%) are currently not paying rents for the June to September 2020 period – Refer to Table 2 above which provides the breakdown across the property portfolio of the % of tenants not currently paying rent to Council. It is believed most of the tenants are waiting to ascertain what Council will further offer in terms of rent relief during the COVID-19 pandemic period.

Rent relief agreements including details of rent waiver and rent deferrals will be prepared by Council’s Property Management Consultants Colliers International and Council’s Property Department for the General Manager to approve or not approve under delegation. Both parties will need to sign the agreements before they will be implemented.

NATIONAL CABINET MANDATORY CODE OF CONDUCT

SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

PURPOSE

The purpose of this Code of Conduct (“the Code”) is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government’s JobKeeper programme.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus (“COVID-19”) pandemic.

This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government’s JobKeeper programme, with an annual turnover of up to \$50 million (herein referred to as “SME tenants”).

The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

PARTIES TO THE CODE

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation, but aims to complement it during the COVID-19 crisis period.

OVERARCHING PRINCIPLES

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.
- Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
- The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over." These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this Code is to mitigate the impact of the COVID-19 pandemic on the tenant, due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

LEASING PRINCIPLES

In negotiating and enacting appropriate temporary arrangements under this Code, 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.

BINDING MEDIATION

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or

territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

DEFINITIONS

The following definitions are provided for reference in the application of this Code.

1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.

2. Sufficient and accurate information: this includes information generated from an accounting system, and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused as a direct result of the COVID-19 event.

3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.

4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.

CODE ADMINISTRATION COMMITTEE

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

COMMENCEMENT/EXPIRY

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19 pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

APPENDIX I

EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis
 - ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.
 - At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.
 - Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties
 - So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.
 - Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.
 - The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.



New South Wales

Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 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 2020* to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until the end of 31 December 2020.

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*.

Published LW 23 October 2020 (2020 No 633)

Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 [NSW]
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Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020

under the

Retail Leases Act 1994

1 Name of Regulation

This Regulation is the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.

2 Commencement

This Regulation commences on 24 October 2020 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 31 December 2020.

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 \$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.

Note. 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. For a lessee who was an impacted lessee during the period from 24 April to 23 October 2020 but does not meet the definition of impacted lessee under this clause—see clause 14.

- (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 circumstances occurring during the prescribed period.

6 Prohibitions and restrictions relating to impacted leases

- (1) This clause applies if, during the prescribed period, a lessee is an impacted lessee.
- (2) During the prescribed period, 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—
 - (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.

Note. See leasing principles No. 1, 11 and 14 in the National Code of Conduct.

- (3) 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.

- (4) A lessor must not, after the prescribed period, take any 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 (3).

Note. See leasing principle No. 13 in the National Code of Conduct.

- (5) 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.

- (6) 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) 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 Obligation to renegotiate rent and other terms of impacted leases before prescribed action

- (1) A lessor under an impacted lease must not take or continue prescribed action against the impacted lessee on grounds of a breach of the impacted lease consisting of a failure to pay rent during the prescribed period unless the lessor has complied with this clause.

Note. This clause does not prevent parties to an impacted lease coming to agreements relating to the lease. For example, an impacted lessee may voluntarily agree to pay full rent during the prescribed period. The clause prevents the lessor taking unilateral prescribed action without complying with the requirements set out in subclauses (2)–(6).

- (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.

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- (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 for a period for which rent has 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) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after that expiry.
- Note.** This clause applies only in relation to breaches of impacted leases consisting of a failure to pay rent during the prescribed period, being 24 April 2020 to 31 December 2020.

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.

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 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 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 the repealed Regulation in relation to a breach of the impacted lease that occurred at any time during the first prescribed period.
- (2) To avoid doubt, a person who was an impacted lessee within the meaning of the repealed Regulation at any time during the first prescribed period is taken to be an impacted lessee for the whole of the first prescribed period.
- (3) In this clause—
first prescribed period means the period from 24 April to 23 October 2020.
repealed Regulation means the *Retail and Other Commercial Leases (COVID-19) Regulation 2020*.

Schedule 1 Amendment of Conveyancing (General) Regulation 2018

Schedule 5

Omit the Schedule. Insert instead—

Schedule 5 Commercial leases—COVID-19 pandemic special provisions

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 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 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.

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-of-conduct-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—

- (i) eviction of the lessee from premises or land the subject of the commercial lease,
- (ii) exercising a right of re-entry to premises or land the subject of the commercial lease,
- (iii) recovery of the premises or land,
- (iv) distraint of goods,
- (v) forfeiture,
- (vi) damages,

- (vii) requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee,
- (viii) recovery of the whole or part of a security bond under the commercial lease,
- (ix) performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease,
- (x) possession,
- (xi) termination of the commercial lease,
- (xii) 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 31 December 2020.

2 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 \$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.

Note. 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. For a lessee who was an impacted lessee during the period from 24 April to 23 October 2020 but does not meet the definition of impacted lessee under this clause—see clause 12.

- (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 circumstances occurring during the prescribed period.

4 Prohibitions and restrictions relating to impacted leases

- (1) This clause applies if, during the prescribed period, a lessee is an impacted lessee.
- (2) During the prescribed period, 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—

- (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.

Note. See leasing principles No. 1, 11 and 14 in the National Code of Conduct.

- (3) 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.

- (4) A lessor must not, after the prescribed period, take any 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 (3).

Note. See leasing principle No. 13 in the National Code of Conduct.

- (5) 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.

- (6) 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) 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 Obligation to renegotiate rent and other terms of impacted leases before prescribed action

- (1) A lessor under an impacted lease must not take or continue prescribed action against the impacted lessee on grounds of a breach of the impacted lease consisting of a failure to pay rent during the prescribed period unless the lessor has complied with this clause.

Note. This clause does not prevent parties to an impacted lease coming to agreements relating to the lease. For example, an impacted lessee may voluntarily agree to pay full rent during the prescribed period. The clause prevents the lessor taking unilateral prescribed action without complying with the requirements set out in subclauses (2)–(6).

- (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 for a period for which rent has 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) To avoid doubt, a renegotiation commenced but not concluded before the expiry of the prescribed period may be continued and concluded after that expiry.
- Note.** This clause applies only in relation to breaches of impacted leases consisting of a failure to pay rent during the prescribed period, being 24 April 2020 to 31 December 2020.

6 Disputes must be submitted to mediation before proceedings can be taken

A lessor must not do any one or more of the following unless and until the Small Business Commissioner has certified in writing that mediation offered to be conducted by the Small Business Commissioner has failed to resolve the dispute and given reasons for the failure—

- (a) seek to recover possession of premises or land under the impacted lease,
- (b) terminate the impacted lease,
- (c) exercise or enforce any other right of the lessor under the impacted lease.

7 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, 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.

8 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.

9 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.

10 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.

11 Saving

- (1) Any act, matter or thing that, immediately before the substitution of this Schedule by the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*, had effect under the substituted Schedule continues to have effect under this Schedule.
- (2) To avoid doubt, a renegotiation under clause 5 of the substituted Schedule, that was commenced but not concluded before that substitution, may be continued and concluded under clause 5 of this Schedule.
- (3) In this clause—
substituted Schedule means Schedule 5 to this Regulation as in force immediately before its substitution by the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.

12 Savings provision—impacted lessees

- (1) A reference in this Schedule to an impacted lessee extends to a person who was an impacted lessee under the substituted Schedule in relation to a breach of the impacted lease that occurred at any time during the first prescribed period.
- (2) To avoid doubt, a person who was an impacted lessee within the meaning of the substituted Schedule at any time during the first prescribed period is taken to be an impacted lessee for the whole of that prescribed period.
- (3) In this clause—
first prescribed period means the period from 24 April to 23 October 2020.
substituted Schedule means Schedule 5 to this Regulation as in force immediately before its substitution by the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.