COVID-19: (AUSTRALIA) AMENDMENTS TO NSW REGULATIONS FOR COMMERCIAL LEASES

Date: 14 July 2020

**This information is accurate as of 5:00 P.M. on Friday 10 July and is subject to change as this situation evolves.*

In a previous alert (click here), we addressed the National Code of Conduct. On 24 April 2020, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (Regulation) commenced, giving effect to the Code in New South Wales. You can also read more about the Regulation in our previous alert which can be found here.

As a result of uncertainties with respect to the application of the Regulation, the New South Wales Government has now introduced the Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2020 (Amendment Regulation), which amends and clarifies certain clauses of the Regulation. The Amendment Regulation commenced on 3 July 2020.

In this article, we will discuss the key changes made by the Amendment Regulation.

EVIDENCE REQUIRED FROM IMPACTED LESSEES

The majority of the clauses in the Regulation apply to commercial leases where the tenant is an "impacted lessee". An impacted lessee is a tenant who:

- qualifies for the Commonwealth JobKeeper scheme
- had turnover for the 2018-2019 financial year of less than AUD50 million.

The Regulation, in its original form, did not impose any requirement for the tenant to provide evidence to demonstrate that it meets the above criteria and is an impacted lessee. This has resulted in landlords adopting varying approaches, and tension emerging between landlords and tenants regarding what evidence the tenant needs to provide.

The Amendment Regulation inserts a new clause into the Regulation that requires impacted lessees to give the landlord the following in respect of the impacted lease:

- a statement to the effect that the lessee is an impacted lessee
- evidence that the lessee is an impacted lessee.

If the tenant fails to provide the above information, the landlord is taken to have complied with the obligation to renegotiate rent and other terms of the commercial lease and is permitted to take prescribed action against the tenant. This amendment extends to renegotiations that have commenced but are not complete before 3 July 2020.

While this clarifies that tenants must provide evidence, it does not provide any guidance regarding the level of evidence that is required to demonstrate that a tenant is an impacted lessee. Generally speaking, the tension

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emerging between landlords and tenants does not relate to whether the tenant is required to provide evidence, but rather relates to what level of evidence the tenant is required to provide. The Amendment Regulation does little to assist in resolving tension of this kind.

OBLIGATION TO RENEGOTIATE RENT AND OTHER TERMS

The Regulation, in its original form, contained a clause that imposed an obligation on all parties to a commercial lease (if requested by the other) to renegotiate the rent payable under, and other terms of, the commercial lease. The parties were required to renegotiate having regard to the Code, which provides that its principles should apply in spirit to all leasing arrangements for affected businesses having fair regard to their size and financial structure.

As the relevant clause of the Regulation was not limited to impacted lessees and required reference to the Code, it was understood that all landlords under commercial leases were required to renegotiate in good faith irrespective of whether the tenant was an impacted lessee.

The Amendment Regulation has introduced the concept of an "impacted lease" in order for this provision to apply. An impacted lease is a commercial lease to which an impacted lessee is a party. This amendment extends to renegotiations that have commenced but are not complete before 3 July 2020, meaning that landlords who are currently negotiating with tenants who have not established that they are an impacted lessee are not required to proceed with such negotiations. Nor are landlords required to enter into new negotiations with tenants who are not impacted lessees.

AGREEMENTS BETWEEN THE PARTIES

The Regulation, in its original form, contained a clause that provided that a lessor and "lessee" are not prevented from agreeing to take any action in relation to a commercial lease (including the lessor taking any prescribed action or the parties agreeing to terminate the commercial lease).

As this clause was not limited to impacted lessees, it was understood that it applied to all agreements under commercial leases irrespective of whether the tenant was an impacted lessee. The Amendment Regulation has made changes that limit the application of this clause to leases where the tenant is an impacted lessee.

This change does not have any material effect as tenants who are not impacted lessees remain free to agree to take any action in relation to their commercial lease. Instead, this change creates some consistency and clarifies that despite the previously inconsistent references to "lessee" and "impacted lessee" the Regulation is intended only to govern agreements under commercial leases where the tenant is an impacted lessee.

FUTURE LAW PROTECTIONS

The Regulation in its original form contained a clause which provided that, where a "lessee" is required to do or omit to do something pursuant to a law of the Commonwealth or the State that is brought into existence in response to COVID-19, such act or omission:

- will not be a breach of a commercial lease
- does not constitute grounds for termination or the taking of any prescribed action by the lessor against the "lessee".

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As this clause was not limited to impacted lessees, it was understood that the future law protections applied to all tenants irrespective of whether they were impacted lessees. The Amendment Regulation has made changes that limit the application of the future law protections to leases where the tenant is an impacted lessee.

While the implications of this clause are unclear until such future laws are implemented, practically speaking we expect that this would most likely apply in circumstances where premises are ordered to close and, as a result, tenants cannot trade or meet other obligations under their commercial leases where physical access to premises is required.

As a result of the Amendment Regulation, if a tenant who is not an impacted lessee does or omits to do something pursuant to a law of the Commonwealth or the State that is brought into existence in response to COVID-19, that tenant is not afforded any protection and the act or omission may amount to a breach of the commercial lease.

This is a curious position for the State to adopt.

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