COVID-19: (AUSTRALIA) NSW GOVERNMENT UPDATED RETAIL AND OTHER COMMERCIAL LEASES – SEPTEMBER UPDATE

Date: 30 September 2021

**This information is accurate as of 12:00pm Monday 27 September 2021 and is subject to change as this situation evolves.*

On 25 August 2021, we issued an update regarding recent changes. The alert below provides an updated summary of the current state of the key components of the Regulation.

The NSW Government has recently updated the *Retail and Other Commercial Leases (COVID-19) Regulation 2021* (the Regulation) to provide additional protections for lessees to impacted leases amidst the disruption caused by the COVID-19 pandemic. The updated Regulation has imposed additional obligations upon lessors, similar to what were imposed during the worst of the economic impacts felt by the pandemic in 2020. It applies to breaches committed by lessees who are considered 'impacted lessees' at any time between 13 July 2021 and 13 January 2022. The Regulation was amended on 24 September 2021.

Set out below is a summary of the current state of the key components of the Regulation.

WHAT ARE THE RELEVANT DATES?

The Regulation came into effect on 13 August 2021 and will be repealed on 15 January 2022.

It applies to retail leases and also amends the Conveyancing (General) Regulation 2018 to impose similar obligations on lessors and lessees of commercial premises.

TO WHICH LEASES DOES THE REGULATION APPLY?

The Regulation applies to retail and other commercial leases to which an 'impacted lessee' is a party, other than:

- a lease entered on or after 26 June 2021 (except by way of renewals/options or other extensions/renewals on the same terms as the existing lease); or
- a lease under the Agricultural Tenancies Act 1990.

Impacted lessees are businesses with less than AU$50 million turnover for the 2020-2021 financial year, and which qualify for one or more of the following grants:

- the 2021 COVID-19 Micro-business Grant;
- the 2021 COVID-19 Business Grant; or
- the 2021 JobSaver Payment,

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or would qualify but for a COVID-19 Disaster Payment made to the lessee by the Commonwealth.

The AU$50 million turnover limit is determined as follows:

- where the lessee is a franchisee – the turnover of the business conducted at the premises or the land concerned;
- where the lessee is a corporation that is a member of a group – the turnover of the group; and
- in any other case – the turnover of the business conducted by the lessee.

COMPULSORY MEDIATION OBLIGATION

A lessor must not take any 'prescribed action' against a lessee who has committed a prescribed breach unless:

- the matter has first been referred for mediation, and the Registrar of Retail Tenancy Disputes has certified in writing that the mediation has failed to resolve the dispute; and
- if the lessee has requested a renegotiation under the Regulation, the lessor has complied with that obligation.

If the lessor and lessee both agree to waive the obligations to renegotiate or attempt mediation, prescribed actions may be taken in relation to impacted leases without undertaking these steps.

WHAT IS A PRESCRIBED BREACH?

A prescribed breach of an impacted lease means:

- a failure to pay rent; or
- a failure to pay outgoings; or
- the business operating under the lease not being open for business during the hours specified in the lease.

WHAT IS A PRESCRIBED ACTION?

A prescribed action means taking action under the terms of a commercial lease in pursuit of:

- eviction of the lessee from premises or land the subject of the commercial lease;
- exercising a right of re-entry to premises or land the subject of the commercial lease;
- recovery of the premises or land;
- distraint of goods;
- forfeiture;
- damages;
- interest payments on or fees related to unpaid rent owed by the lessee;

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- recovering all or part of a security bond under the commercial lease;
- the lessee performing obligations pursuant to a guarantee under the commercial lease;
- possession;
- termination of the commercial lease; or
- any other remedy otherwise available to a lessor against a lessee under common law or statute.

CAN THE LESSOR TAKE ACTION ON OTHER GROUNDS?

Yes. The Regulation states that lessors will not be prevented from taking prescribed actions on grounds which are not related to the economic impacts of the COVID-19 pandemic.

For example, a lessor will not be able to terminate a commercial lease if an impacted lessee has been unable to pay rent due to financial downturn as a result of COVID-19 restrictions. However, a lessor will be able to terminate a commercial lease if the lessee has committed a breach by damaging the premises.

IMPACTED LESSEES' OBLIGATIONS UNDER THE REGULATION

Lessees must provide the lessor with a statement indicating that they are an impacted lessee (being eligible for the aforementioned grants due to impacts suffered by COVID-19 restrictions, and having a turnover of less than AU$50 million), and evidence to this effect.

The statement and evidence must be given within a reasonable time after it is requested by the lessor. They may be given either before, or as soon as practicably after, a prescribed breach occurs.

The lessor may request the provision of this statement or evidence at any time if it is reasonably required to ensure that the lessor continues to be an impacted lessee. This information may not be requested more than once every two weeks.

OBLIGATION TO NOT INCREASE RENT

The Regulation has introduced an obligation which requires that the rent payable under an impacted lease must not be increased during the prescribed period (being between 13 July 2021 and 20 August 2021), other than rent or a component of rent determined by reference to turnover.

OBLIGATION TO RENEGOTIATE

Parties to an impacted lease may request that the other parties renegotiate the rent payable under, and other terms of, the impacted lease.

Within 14 days of receiving the request (or as otherwise agreed between the parties), the party who receives a request to renegotiate must renegotiate in good faith the rent payable and other terms of the impacted lease. In this renegotiation, the parties must consider the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct.

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In these renegotiations, the grants necessary to qualify a lessee as an impacted lessee are to be treated as if they were part of its trade or turnover. A lessor is not required to reduce rent for periods when the lessee is not an impacted lessee, and may provide that negotiated rent reductions will not apply during these periods.

A second, separate renegotiation request may be made by the impacted lessee during the prescribed period so long as it doesn't relate to rent or outgoings for a period for which the rent or outgoings have already been reduced, waived or deferred following a prior renegotiation under the Regulation, unless the lessee ceases to be an impacted lessee during the period.

WHAT ARE THE KEY COMPONENTS OF THE NATIONAL CODE OF CONDUCT?

During COVID-19 the National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles seeks to impose good faith leasing principles for application to commercial tenancies amidst the commercial disruption and economic impacts caused by the COVID-19 pandemic.

Among other requirements, under the Code of Conduct:

- Lessors must offer lessees proportionate reductions in rent payable in the forms of waiver and deferrals, up to 100 percent of the amount ordinarily payable, which must be calculated on a case-by-case basis according to the reduction in the lessee's trade during the COVID-19 pandemic period and subsequent reasonable recovery period; and
- Of these reductions, at least 50 percent must come in the form of a waiver, and the balance of the reduction in the form of a deferral, which 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 or waived by the lessee).

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