Article Information

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NSW Lockdown 2021: New COVID-19 Commercial and Retail Leasing Regulations

The Retail and Other Commercial Leases (COVID-19) Regulation 2021 and amendments to the Conveyancing (General) Regulation 2018 (together, Regulations) commenced on 14 July 2021 and are in force for six months.

In light of the NSW lockdown, new regulations have been introduced to provide limited protection to commercial and retail lessees. Primarily, the Regulations prevent a lessor terminating a lease for a lessee's non-payment of rent and outgoings or failure to trade during core trading hours.

However, unlike the previous COVID-19 leasing regulations, the Regulations do not require the parties to grant rent relief or renegotiate the terms of the commercial or retail lease having regard to the National Code of Conduct.

When do the Regulations take effect?

The *Retail and Other Commercial Leases (COVID-19) Regulation 2021* (**Retail Regulations**) and amendments to Schedule 5 of the *Conveyancing (General) Regulation 2018* (**Commercial Regulations**) came into effect on 14 July 2021 and each are in force for six months.

The Commercial Regulations mirror the Retail Regulations.

Which leases do the Regulations apply to?

The Retail Regulations apply to retail shop leases. The Retail Regulations exclude a:

- new lease entered into after 26 June 2021;
- commercial lease within the meaning of Schedule 5 Commercial Regulations; and
- lease under the *Agricultural Tenancies Act 1990* (NSW).

The Commercial Regulations apply to commercial leases, (this includes industrial premises). The Commercial Regulations exclude a:

- new lease entered into after 26 June 2021;
- retail shop lease under the *Retail Leases Act 1994* (NSW); and
- lease under the *Agricultural Tenancies Act 1990* (NSW).

The Regulations apply to any lease extended or renewed after 26 June 2021.

Who do the Regulations apply to?

The Regulations apply to an 'impacted lessee'. A lessee is an 'impacted lessee' if the lessee:

- qualifies for one or more of the following grants:
    - micro-business COVID-19 Support Grant;
    - COVID-19 NSW Business Grant; or
    - Job Saver Grant; and

- has less than $50 million turnover in the 2020/2021 financial year.

Application of Regulation

The Regulations apply 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'.

The 'prescribed period' is 13 July 2021 to 20 August 2021.

A 'prescribed breach' of an impacted lease means:

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

Lessor prohibitions and restrictions

A lessor must not take any 'prescribed action' against an impacted lessee on the grounds of a 'prescribed breach' of the impacted lease occurring during the 'prescribed period' unless:

- the matter has been referred for mediation under Part 8, Division 2 of the *Retail Leases Act 1994* (NSW); and
- the Registrar has certified in writing that the mediation has failed to resolve the dispute.

The mediation process under the Retail Leases Act applies to impacted leases under both the Retail Regulations and the Commercial Regulations.

A 'prescribed action' includes actions such as evicting the lessee from the premises, exercising a right of re-entry, requiring payment of interest on unpaid rent and terminating the lease.

Lessee's requirements to provide information

An impacted lessee must give the lessor the following information in respect of the impacted lessee:

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

The information must be given:

- before, or as soon as practicable after, the prescribed breach occurs; and
- within a reasonable time after it is requested by the lessor.

Existing breaches and matters unrelated to the pandemic

The lessor may take a prescribed action for a breach unrelated to the economic impacts of the COVID-19 pandemic (eg damaging property or subleasing without consent).

Lessees which are unable to trade during the NSW lockdown will welcome the protection offered under the Regulations. However, for many lessees, the protection will be too limited. Many lessees will be bearing the cost of repaying rent deferrals granted under the previous COVID-19 leasing regulations in addition to existing rent obligations.

On the other hand, lessors will be relieved to see that they are not required to grant rent waivers or deferrals under the Regulations.