COVID-19: NSW publishes a further commercial tenancies regulation on 3 July 2020

Source: NSW Legislation

Date: 8 July 2020

Abstract:

Further to our update on 26 May 2020 (COVID-19: NSW gives effect to the national code of conduct for commercial tenancies), NSW has published a further regulation on 3 July 2020, the *Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2020* (NSW) (**Further Regulation**), the stated objects of which are:

- to clarify that landlords are prohibited from taking certain action against impacted tenants of commercial leases;
- to require impacted tenants to give landlords a statement to the effect that the tenant is an impacted lessee and evidence that the tenant is an impacted tenant; and
- to clarify the application of certain clauses to impacted tenants.

The Further Regulation amends the existing regulation, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (**Regulation**), which commenced on 24 April 2020.

As noted in the above update, a "commercial lease" is defined in the Regulation as being:

- a retail shop lease (as defined in the *Retail Leases Act 1994* (NSW) and which may include a licence); or
- a commercial lease (governed by the *Conveyancing Act 1919* (NSW)),

but does **not** include:

- a lease entered into after 24 April 2020 (excluding the extension or renewal of an existing lease on the same terms as the existing lease); or
- a lease under the *Agricultural Tenancies Act 1990* (NSW) ("**commercial lease**").

An "impacted tenant" is defined as being a tenant:

- who qualifies for the jobkeeper scheme (e.g. its turnover has dropped by at least 30%); and
- whose turnover in the 2018–2019 financial year was less than $50 million ("**impacted tenant**").

When does the Further Regulation commence?

The Further Regulation (which amends the Regulation) commences on 3 July 2020. The Regulation is in place for 6 months, commencing on 24 April 2020 and ending on 23 October 2020.

What are the keys provisions of the Further Regulation?

It amends the Regulation to provide as follows:

Required act or omission not a breach

An act or omission of an impacted tenant which is required under a Commonwealth or a NSW law in response to the COVID-19 pandemic does not constitute:

- a breach of the commercial lease to which the impacted tenant is a party; or
- grounds for termination of the commercial lease or the taking of any prescribed action (as defined in the above update) by the landlord against the impacted tenant.

Previously, this provision in the Regulation was not limited to impacted tenants. It applied to all tenants.

Obligation to renegotiate before prescribed action

A landlord must, if requested, renegotiate in good faith the rent payable under, and any other terms of, a commercial lease to which an impacted tenant is a party before taking or continuing any prescribed action against the impacted tenant for a breach for failure to pay rent during the prescribed period (i.e from 24 April 2020 to 23 October 2020 ("**prescribed period**")). The impacted tenant must give to the landlord:

- a statement to the effect that the tenant is an impacted tenant; and
- evidence that the tenant is an impacted tenant,

and, if the impacted tenant does not provide the same, the landlord will be taken to have to complied with its obligation to renegotiate before taking or continuing any prescribed action.

The amendment:

- makes it clear that the obligation to renegotiate only applies to a commercial lease to which an impacted tenant is a party;
- imposes this new obligation on an impacted tenant to provide evidence to the landlord that the tenant is an impacted tenant before the landlord is obliged to renegotiate; and
- applies to renegotiations which have commenced but which have not been completed before 3 July 2020.

Landlords can still take action for non-COVID-19 pandemic related reasons

A landlord can still take a prescribed action against an impacted tenant under a commercial lease on grounds not related to the economic impacts of the COVID-19 pandemic, e.g. if a tenant fails to vacate a premises following the expiry of a fixed term commercial lease.

The Further Regulation has removed the note in this provision which stated: "See leasing principle No.2 in the National Code of Conduct". Leasing principle no.2 in the national code provides that a material failure by a tenant to comply with the substantive terms of its lease (subject to any agreed amendments) will forfeit any protections provided to the tenant under the code.

What the Further Regulation does not affect

The amendment requiring an impacted tenant to provide evidence that the tenant is an impacted tenant does not affect a matter for which a retail tenancy claim has been made under s71 of the *Retail Leases Act 1994* (NSW) or for which proceedings have already commenced in a court.

What should landlords and tenants in NSW do now?

Impacted tenants who are suffering financial hardship as a direct result of the COVID-19 pandemic can benefit from the protection provided by the Regulation (as amended) and should seek relief from

their landlords (if they have not already done so). Landlords are prohibited from taking prescribed actions for certain breaches during the prescribed period and should understand their obligations under the Regulation. They should note that they cannot take any prescribed action against an impacted tenant under a commercial lease for failure to pay rent during the prescribed period unless they have (if requested) renegotiated in good faith the rent payable under, and any other terms of, the commercial lease.

Step 1

- Determine if their lease is a "commercial lease" (as defined) and if the tenant is an "impacted tenant" (as defined).
- Carefully review the Regulation (as amended by the Further Regulation), the terms of their lease and the national code (see COVID-19 and commercial tenancies — guide to the national mandatory code of conduct) to determine their rights and obligations.

Step 2

- Impacted tenants should request their landlords to renegotiate the rent under, and other terms of, the commercial lease. They should provide to their landlords a statement to the effect that they are impacted tenants and evidence that they are impacted tenants noting that, if they do not provide the same, landlords are deemed to have complied with their renegotiation obligations. Tenants should provide:
    - evidence that they qualify for the jobkeeper scheme (Service NSW suggests that tenants provide evidence of enrolment with the ATO for the jobkeeper scheme or provide evidence of a drop in turnover due to COVID-19, e.g. comparable bank statements, comparable monthly or quarterly Business Activity Statements (BAS) or information from the tenant's accounting system); and
    - evidence of their turnover in the 2018–2019 financial year (Service NSW suggests that tenants provide a tax return or Business Activity Statements (BAS)).

Step 3

- The parties should renegotiate "in good faith", noting that the Regulation does not prevent them from reaching their own mutually beneficial agreement in relation to the commercial lease. If the tenant is a foreign person, the parties should consider if FIRB approval is required for any agreed lease variation or extension. See our update on 30 April 2020 (COVID-19: FIRB provides guidance on how the temporary measures will affect lease transactions).

Step 4

- The parties should formally document (and register, if applicable) whatever is agreed to avoid any disputes at a later date and to ensure that it is binding on the parties going forward, preferably in a deed of variation of the lease.

See also the following additional helpful information from the following government agencies:

- NSW Small Business Commissioner: Commercial leases and COVID-19 FAQs
- Service NSW: Get started on negotiating a commercial lease with your landlord (for tenants)
- Service NSW: Negotiate a commercial tenancy with a tenant (for landlords)
- Service NSW: Land tax relief to support commercial leasing (for landlords)