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COVID-19 LEASING UPDATE: THE RE-INTRODUCTION OF MANDATORY RELIEF IN NSW

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As advised in our [last update](#), on 14 July 2021 the NSW Government introduced new COVID-19 regulations in the form of the *Retail and Other Commercial Leases (COVID-19) Regulation 2021 (NSW)* (**July Regulations**). In their as-made form, the July Regulations:

- applied to tenants (whether commercial or retail) whose turnover was less than \$50 million in the 2020-2021 financial year provided they also qualified for at least one of the Micro-business COVID-19 Support Grant, the COVID-19 NSW Business Grant or the Job Saver Grant;
- prohibited landlords from taking prescribed actions against impacted lessees without having attended mediation; and
- were set to apply for just shy of 6 weeks, being the period from 13 July 2021 to 20 August 2021.

Importantly, the July Regulations did ***not*** mandate that landlords must provide rent relief to “impacted lessees”.

However, on 13 August 2021, the July Regulations were amended by the *Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021 (NSW)* (**Amending Regulations**).

The changes introduced by the Amending Regulations extend the protections afforded to “impacted lessees” under the July Regulations by (amongst other things):

- lengthening the prescribed period so that it will now expire on 13 January 2022, not 20 August 2021;
- re-introducing mandated relief – if a party to an impacted lease (being a lease with an “impacted lessee”) so requests, the parties must renegotiate rent and other terms of the lease in good faith having regard to:
 - the economic impacts of the COVID-19 pandemic experienced by the impacted lessee; and
 - the National Cabinet Mandatory Code of Conduct — SME Commercial Leasing Principles During COVID-19 (**Leasing Principles**), being the Code of Conduct introduced by the Federal Government in April 2020; and
- imposing a freeze on rental increases under impacted leases during the “prescribed period”.



As a result of the introduction of the Amending Regulations, the July Regulations are now relatively similar to the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 (NSW) (2020 Regulations)*, which is no longer in force.

We set out below a detailed analysis of the changes implemented by the Amending Regulations, their effects on the July Regulations and the impacts for landlords and impacted lessees.

NSW Government's Land Tax Relief Regime – the NSW Government's land tax relief measures introduced in July 2021 at the same time as the July Regulations continue to apply. These are a separate and independent regime to the Regulations, which are discussed later in this article.

1. Format of the Amending Regulations

As set out above, the Amending Regulations vary the July Regulations and comprise two distinct components:

- those regulations that relate to retail leases (**Retail Regulation or RR**); and
- those regulations that relate to commercial leases (contained in Schedule 5 of the *Conveyancing (General) Regulation 2018* (NSW) (**Commercial Regulation or CR**).

Other than the type of lease, the RR and CR (together referred to as the **Regulations**) are almost identical.

The Retail Regulation and Commercial Regulation each regulate the actions a landlord may take in respect of certain prescribed breaches that occur between 13 July 2021 and 13 January 2022 (**Prescribed Period**) and, as a result of the changes implemented by the Amending Regulation, now require that parties to an impacted lease renegotiate the rent and other terms of the lease.

2. Key definitions amended by the Amending Regulations

As mentioned above, the Amending Regulations amend the expiry date of the Prescribed Period from 20 August 2021 to 13 January 2022. [RR 4 & CR 2]

The definitions in the Retail Regulation and Commercial Regulation are otherwise largely unchanged from the as-made form of the July Regulations.

3. Application of Regulation to tenants and leases

- (a) The Regulations apply to a tenant that both:
- (i) qualifies for one or more of the following:
 - (A) 2021 Micro-business COVID-19 Support Grant;
 - (B) 2021 COVID-19 NSW Business Grant;
 - (C) 2021 Job Saver Payment; and
 - (ii) has a turnover (including that derived from the internet sales of goods or services) in the 2020-2021 financial year of less than \$50 million (for franchises and corporate groups, this is assessed in the same way that it was assessed under the 2020 Regulations).



If the above criteria are satisfied, the tenant is an “impacted lessee” for the purposes of the Regulations (**Impacted Lessee**). [RR 4 & CR 2]

- (b) The July Regulations require an Impacted Lessee to provide the landlord with both a statement that the tenant is an Impacted Lessee and evidence to that effect.

This information must be given before, or as soon as practicable after, a breach occurs and must be given within a reasonable timeframe after the landlord requests it. [RR 6A & CR 4A]

- (c) The Regulations do not specify the nature of the evidence that must be provided. A major hurdle under the 2020 Regulations has been obtaining information from tenants in order to determine a tenant’s eligibility for relief and the extent of the tenant’s entitlement to relief.

- (d) The Regulations apply to Impacted Lessees under a “commercial lease”, which is defined as:

- (i) for the purposes of the CR, a lease that is governed by the *Conveyancing Act 1919* (NSW), which excludes residential leases, retail leases and all licences; and
- (ii) for the purposes of the RR, a lease governed by the *Retail Leases Act 1994* (NSW), which would include an occupation licence (but excludes a car parking or storage licence).

- (e) Under both the CR and the RR, the term “commercial lease” does not include:

- (i) a lease entered into on or after 26 June 2021, unless it is:
 - (A) a lease entered into by means of an option to extend or renew the lease; or
 - (B) any other extension or renewal of an existing lease on the same terms as the exiting lease; and
- (ii) a lease under the *Agricultural Tenancies Act 1990* (NSW).

4. Rent Relief, Prohibitions, Restrictions and Mediation

- (a) **Prescribed Breach:** If the tenant is an Impacted Lessee, a landlord cannot, during the Prescribed Period, take a Prescribed Action in respect of a “Prescribed Breach” unless the parties have first attended mediation. A Prescribed Breach is:

- (i) failure to pay rent;
- (ii) failure to pay outgoings; or
- (iii) failure to open for business during the trading hours specified in the lease.

[RR 3 & 6C and CR 1 & 4C]

- (b) **Prescribed Action:** The term “Prescribed Action” has the same meaning as under the 2020 Regulations and includes:

- (i) terminating a lease, evicting a tenant, recovering possession of the premises;
- (ii) charging interest for unpaid rent,
- (iii) calling on security including bank guarantees, or enforcement of a guarantee;
- (iv) recovering damages; and



(v) any other remedy available at common law or under the law of the State of NSW.

[RR 3 and CR 1]

- (c) **Rent increases:** The rent payable under an Impacted Lease must not be increased during the Prescribed Period (other than turnover rent, which may be increased).

Similarly to the 2020 Regulations, the rent may be increased after the Prescribed Period to take account of a rent review that was scheduled to occur during the Prescribed Period, however the amount equivalent to the rent increase that was foregone during the Prescribed Period cannot be recovered by the landlord.

Note that although the July Regulations did not include a freeze on rental increases when introduced, as the Amending Regulations specify that the rent under an Impacted Lease must not be increased during the Prescribed Period, this freeze is intended to apply on and from 13 July 2021 (notwithstanding the introduction of the amendment on 13 August 2021). Therefore, any rent increase applied under the terms of an Impacted Lease after 13 July 2021 must be reversed (and any necessary credit should be applied to the tenant's ledger). [RR 6B and CR 4B]

- (d) **Obligation to Renegotiate:** This is the key change introduced by the Amending Regulations.

If a party to an Impacted Lease asks the other party to renegotiate the rent and other terms of an Impacted Lease, the parties must do so in good faith. [RR 6D(1) and CR 4D(1)]

Negotiations must commence within 14 days of the other party receiving the request to negotiate (or such other period as is agreed between the parties). [RR 6D(3) and CR 4D(3)]

Negotiations must take into account the economic impacts of the COVID-19 pandemic and the Leasing Principles. [RR 6D(4) and CR 4D(4)]

Rent relief must be in the form of rent waivers and deferrals proportionate to a tenant's reduction in turnover. This is because the Regulations mandate that in renegotiating the rent and other terms regard must be had to the Leasing Principles and the Leasing Principles clearly mandate rent relief by way of a combination of waivers and deferrals by reference to the tenant's reduction in turnover (unless the parties have negotiated otherwise).

A party may make more than one request to renegotiate an Impacted Lease due to the effects of COVID-19 during the Prescribed Period, but they are not entitled to seek further relief in respect of a period for which they have already received relief. [RR 6D(2) and CR 4D(2)]

5. If a party will not comply

The drafting introduced by the Amending Regulations make clear that a landlord's obligation to renegotiate the rent and other terms of the Impacted Lease will have been complied with if an Impacted Lessee does not:

- (i) negotiate in good faith and commence those negotiations within 14 days of being requested to do so (or such other period of time agreed between the parties);
- (ii) negotiate taking into account the economic impacts of COVID-19 and the Leasing Principles; or
- (iii) provide a statement that they are an Impacted Lessee and evidence thereof, within a reasonable time after the landlord requests it.



[RR 6D(5) and CR 4D(5)]

However, it is important to note that even if a landlord is deemed to have complied with its obligation to renegotiate, the Regulations make clear that a landlord's right to take a Prescribed Action would remain subject to compulsory mediation, as further explained below under "Mediation". [RR 6C and CR 4C].

The landlord's right to take action for breaches prior to the Prescribed Period and/or for Prescribed Actions unrelated to COVID-19 are preserved without change, as is the right of the parties to expressly agree that a landlord may take a Prescribed Action. [RR 7 and CR 5]

6. Other New Prohibitions, Restrictions and Mediation

(a) **Mediation:** Prescribed Actions in respect of Prescribed Breaches during the Prescribed Period are permitted only if:

- (i) the matter has been referred to mediation and the Small Business Commissioner has certified in writing that the mediation has failed to resolve the dispute; and
- (ii) if the Impacted Lessee has asked to renegotiate the rent payable under, and other terms of the Impacted Lease, the Landlord has complied with its obligation to do so under the Amending Regulations (or is taken to have complied with this obligation, as per point 5 above).

Part (ii) is a new obligation, introduced by the Amending Regulations that was not a requirement under the as-made July Regulations. [RR 6C and CR 4C]

(b) **Courts / Tribunals to consider Leasing Principles:** Similarly to the 2020 Regulations, a court or tribunal must have regard to the Leasing Principles when making a decision in relation to a landlord's application to:

- (i) seek to recover possession of premises or land under the Impacted Lease;
- (ii) terminate the commercial Impacted Lease; or
- (iii) exercise or enforce any other right under the Impacted Lease.

[RR 9A and CR 6A]

7. NSW Government's Land Tax Relief Regime

The NSW Government's land tax relief measures introduced in July 2021 at the same time as the July Regulations continue to apply.

This is a separate and independent regime to the Regulations, with the relief measures applying where a landowner provides a reduction in rent between 1 July 2021 and 31 December 2021 to an eligible tenant under a retail, commercial, office, industrial or residential lease.

A landowner is able to claim relief up to an amount equal to 100% of the landowner's 2021 land tax bill for any taxable parcel of land where rent reductions have been given to eligible tenants who occupy that land. To qualify, there must be no obligation to repay the reduced/waived rent at a later date.

Therefore, available relief will be equal to the total rent reduction (or waiver) provided to all eligible tenants **capped** at the landowner's total land tax liability for the 2021 year.

For the purposes of the land tax relief regime, an eligible tenant is:

- (i) in respect of a commercial, retail or industrial lease, a tenant who qualifies as an Impacted Lessee under the July Regulations, except that the turnover test for franchisees is different under the land tax relief regime – under the land tax relief regime, a franchisee's turnover (like any lessee's turnover) is calculated by reference to *all commercial activities* of the franchisee, whereas under the Regulations a franchisee's turnover is calculated by reference to *the business conducted by the franchisee from the premises*; and
- (ii) in respect of a residential lease, a tenant who has lost 25% or more of household income due to COVID-19.

The land tax relief is given by way of a payment made under section 5.7 of the *Government Sector Finance Act 2018* (NSW), which is an act of grace payment. Therefore, the relief is not seen as a reduction of a landowner's land tax liability but rather a payment to the landowner on account of the rent relief provided by the owner.

The Revenue NSW guidelines in respect of the land tax relief can be found here be found here:

<https://www.revenue.nsw.gov.au/news-media-releases/covid-19-tax-relief-measures/2021-land-tax-covid-19-relief-guidelines-jul-dec>

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