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New South Wales Government Reactivates the Logic of Some of the Aspects of the Commonwealth's 2020 Commercial Lease Code



Greg Preston, *Preston
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comments on its effect:

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This morning the New South Wales Government made further regulations to affect the logic of the 2020 Commonwealth Commercial Lease Code given the current COVID-19 lockdown in Sydney.

The New South Wales Government has made similar regulations to the 2020 regulations (with some notable changes) by re-establishing the Retail and Other Commercial Leases (COVID-19) Regulation 2021.

What follows herein is a brief summary of the key points from the re-established Regulations and we note that any parties considering negotiations between landlords and tenants should apprise themselves of the detail of the re-established Regulations which are linked above.

When we wrote and presented extensively on the subject in 2020, we did not think we would be faced with the concept of landlord funded economic stimulus for commercial real estate after the regulations expired again. The new Regulations don't appear to go as far as good faith negotiation and rental waivers and deferrals are excluded, but they prevent certain tenant breach actions by lessors or landlords.

Each of the States of Australia limited either the statutory effect or regulatory effect of the 2020 Commonwealth Code in time with expiry dates.

As previously the object of the Regulation is to limit the rights of landlords or lessors under the retail and other commercial leases for breach of lease by impacted lessees because of the COVID-19 pandemic.

Any breach of lease which is a prescribed breach is covered by the Regulation if it occurs between 13 July 2021 and 20 August 2021 which appears to limit the effect of the regulation until 20 August 2021, despite the fact that the Regulation automatically repeals six months after the day on which the Regulation commences.



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The key points of the regulation are as follows:-

- The Regulation commences 13 July 2021 for breaches that occur up to 20 August 2021;
- The Regulation is made under the Retail Leases Act 1994 and the Conveyancing Act 1919;
- A Commercial Lease is defined under the Regulation as a retail shop lease but excludes leases entered into on or after 26 June 2021, but not leases entered into by means of options and leases in other specific circumstances;
- An Impacted Lease means a commercial lease of premises occupied by an Impacted Lessee;
- An Impacted lessee means a lessee which qualifies for one or more of the following grants; a Micro business COVID-19 Support Grant; a COVID-19 NSW Business Grant; or a Job Saver Grant (this previously linked to the Commonwealth's Jobkeeper program);
- An Impacted Lessee also means a lessee whose turnover for 2020-2021 financial year was less than \$50 million and if a franchisee only the turnover of the business conducted at the premises or if the lessee is a corporation and that member as a group the turnover of the group is less than \$50 million;
- Turnover includes both internet sales as well as sales generally;
- Prescribed Action means taking action under the provisions of the commercial lease or seeking orders or issuing proceedings in a court or tribunal for a number of reasons including, inter alia, eviction of the lessee; exercising a right of re-entry; recovery of the premises or land; distraint of goods; entering into possession and termination of the commercial lease;

The Regulation requires that a Lessor must not take a Prescribed Action against an Impacted Lessee during the Prescribed Period unless the matter has been referred to mediation and the Registrar has certified in writing that the mediation has failed to resolve the dispute.



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Impacted Lessees must give the Lessor certain information in respect of any Impacted Lease which includes a statement to the effect that the lessee is an impacted lessee and evidence that the lessee is an impacted lessee. The information is to be given before or as soon as practical after any prescribed breach.

The regulation also includes dispute resolution provisions.

Importantly nothing prevents a landlord from taking action against a tenant on grounds not related to the economic impacts of the COVID-19 Pandemic.

The Regulation does not appear to speak of the 2020 Commonwealth Commercial Leasing Code nor does it appear to consider the concept of Rental Waivers or Rental Deferrals in the way that it did under Section 7 (4) of the previous 2020 Regulation.

In preparing our valuations and providing property management services we will be mindful of the new Regulation and make enquiries of the impact of the current COVID-19 pandemic on affected leases and tenancies.

Our previous papers and presentations are linked [Here](#).

Greg Preston



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