

LEASES IN THE WAKE OF COVID-19

RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION 2020

A new Regulation under the Retail Leases Act has been made in response to the economic disruption caused by the COVID-19 Pandemic. The regulation relies on a National Code of Conduct published by the National Cabinet and supported by a state-based Industry Code Administration Committee.

The Regulation aims to protect Lessees at a time of uncertainty and economic turmoil, but in so doing significantly restricts the ability of Lessors (Landlords) to rely on existing lease terms in certain situations.

WHICH LEASES DOES THIS APPLY TO?

The Regulation applies to leases where the Lessee is “impacted”.

A Lessee is ‘impacted’ if they qualify for the JobKeeper Scheme and their turnover in the 2018-19 financial year was less than \$50 million. For many retail and commercial leases in Sydney, if the Lessee qualifies for the JobKeeper Scheme, then their turnover has reduced by at least 30%.

The National Code of Conduct provides that both parties must be open, honest and transparent and provide sufficient and accurate information from an accounting system (or information provided to a financial institution) within the context of negotiations to achieve outcomes consistent with the Code. An impacted lessee must give the lessor the following in respect of the impacted lease:

- (a) a statement to the effect that the lessee is an impacted lessee,
- (b) evidence that the lessee is an impacted lessee.

WHEN DOES IT APPLY?

For only six months from 24 April 2020 to 25 October 2020.

MY LESSEE HAS BEEN IS IMPACTED, NOW WHAT?

If your Lessee is impacted, then you must not take any “prescribed action” against them for a breach relating to:

- (a) A failure to pay rent;
- (b) A failure to pay outgoings; or
- (c) The business not being open for business during the hours specified in the Lease.

In addition, you are unable to increase the rent payable by an impacted Lessee.

WHAT IS A PRESCRIBED ACTION?

If your impacted Lessee fails to pay rent, then you cannot do any of the following (unless you and the Lessee agree):

- Evict the Lessee from the premises, or exercise a right of re-entry to the premises;
- Recover the premises;
- Require a payment of interest;
- Recover any or all of the security bond paid by the Lessee;
- Terminate the Lease; or
- Seek any other remedy available to Lessors generally.

WHAT ABOUT RENT – CAN WE NEGOTIATE?

The Regulation does provide that either party to the Lease may request the other party to renegotiate the rent payable under the Lease. If so requested, you must renegotiate in good faith. If you are required to renegotiate, you must consider:

- The economic impacts of COVID-19;
- Leasing Principles set out in the National Code of Conduct.

THE NATIONAL CODE OF CONDUCT

The National Code of Conduct sets out a series of principles that apply to commercial and retail leases.

The purpose of these principles is to aid the management of cashflow for SME Lessees and Lessors, on a proportionate basis and applies to all Lessees who are eligible for the JobKeeper payment.

The principles include:

- Lessees must remain committed to the terms of their Lease;
- Lessors must offer proportionate reductions in rent (in the form of waivers and deferrals), based on the reduction in the Lessee's trade during the COVID-19 pandemic period and afterwards during the recovery period;
- Waivers of rent must constitute no less than 50% of the total reduction in rent payable unless the parties agree;
- Payment of rent deferrals by the Lessee must be amortised over the balance of the Lease term and for no less than two years (whichever is the greater);
- If a Lessor receives a benefit by way of a deferral of loan repayments, then this should be shared with the Lessee in a proportionate manner; and
- The Lessee should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral so that they have additional time to trade on the existing lease terms.

WHAT HAPPENS IF I DO NOT COMPLY WITH THE REGULATIONS?

Lessees can take you to the Tribunal or a Court to stop you from exercising rights under the lease, if the exercise would be in breach of the regulations. The Lessee could commence an action in NCAT – the NSW Civil and Administrative Tribunal (even for a commercial lease as the new regulations bring those disputes within the tribunal’s jurisdiction).

Alternatively, the Lessee could commence proceedings in the Supreme Court seeking an injunction on an urgent basis for what is called ‘relief from forfeiture’. Responding to these urgent actions are very costly and often amount to far more than the rent at stake.

Crucially, however, in most cases the dispute must be mediated and in relevant cases the attempt at mediation must be recorded by the Small Business Commissioner before further proceedings are commenced.

Any Court or Tribunal that is asked to consider the effect of the regulations will have regard to the National Code of Conduct – so even if the principle is not explicitly stated in the regulations, the principles should still be used to guide your negotiations to avoid dispute.

Moreover, even though as a landlord prescribed actions are permitted if they don’t relate to non-COVID-19 pandemic related reasons – for example, if a lessee has damaged your property and you terminate their lease – you still run the risk of a tenant taking you to Court if the circumstances (as they so often are) contain ambiguity or if negotiations above have broken down or are not carefully documented.

As the circumstances of each lease and tenancy will differ and this is a rapidly evolving area of the law, it is vital you seek formal legal advice before acting on the preceding information.

DUNN LEGAL offers tele-conferences and video-conferences by Zoom or Skype which can be booked online at www.dunnlegal.com.au or by phoning 9997-3255 or by emailing dl@dunnlegal.com.au



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