



Covid-19 Emergency Measures and the Impact on Residential, Retail & Commercial Tenancies in NSW

COVID-19 Legislation Amendment (Emergency Measures) Bill 2020 (NSW)

The recent outbreak of Covid-19 pandemic in Australia has forced businesses and individuals to navigate through the constantly changing realm of advice and guidelines provided by the government, be it federal or state. With the implementation of the operation of “essential services only”, this would no doubt lead to a lot of retail spaces sitting idle as they close their business and the shocking increase in unemployment rate may cause residential tenants to struggle with payment of rents.

On 25 March 2020, both Houses of Parliament in New South Wales (**NSW**) have passed the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020 (Covid-19 Act)*. This is an emergency measure to amend various existing NSW legislation to reduce the impact of the Covid-19 pandemic.

In reference to tenancies, the *Covid-19 Act* provides government with temporary regulation-making power in relation to *Residential Tenancies Act 2010 (NSW)*, *Retail Leases Act 1994 (NSW)* and other tenancy related legislations, including commercial leases (**Tenancy Acts**) for the purpose of responding to the public health emergency caused by Covid-19. This will specifically affect residential, retail and commercial tenancies, such as prohibiting landlords from terminating a lease or to take other actions to the detriment of a tenant. Although the *Covid-19 Act* has yet to receive assent, it likely will as it is to reasonably ensure the protection of the health, safety and welfare of tenants or residents.

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At this time, the *Covid-19 Act* merely provides the power to make such regulations, the substantial effects are not enforced yet, unless specific regulations are made under this head of power. If the regulation-making power is exercised, the regulations will stop landlords in these regards:

Possible Introductions Affecting Residential, Retail & Commercial Tenants

- **Prohibiting recovery of possession:** Landlords would not be able to enter and take possession for defaults. So, the regulation may ban rental evictions or foreclosures during the Covid-19 pandemic. However, it is unknown whether the defaults would be limited to circumstances of this pandemic, or whether it extends to previous defaults as well.
- **No termination of tenancy agreements:** Landlords would not be able to terminate the tenancy agreements such as residential tenancy agreements, retail or commercial leases, occupancy agreements or site agreements in particular circumstances. It is unknown at this point what those particular circumstances constitute until the government introduces the regulation.
- **Limitations on landlord's enforcement rights:** Landlords would not be able to rely on their enforcement rights under the Tenancy Acts and tenancy agreements. This would impact a landlord's rights substantially in the following effect:
 - Landlords cannot call on a bank guarantee or any other security or deposit provided by the tenant;
 - Landlords cannot call on a personal guarantee under a lease;
 - Landlords cannot enforce the trading hours and obligations;
 - Landlords cannot rely on make good provisions and repair and maintenance obligations; and
 - Landlords cannot enforce any other contractual rights in the tenancy agreement.
- **Exempting tenants from obligations:** Tenants, or a class of tenants, would be exempted from the operation of the Tenancy Acts and any tenancy agreement. Importantly, this could mean a rent freeze in favour of tenants as they are exempt from the obligation to pay rent, outgoings and other monies arising legislatively or contractually.

The Minister can recommend the abovementioned regulations if Parliament is not currently sitting and is unlikely to sit within two weeks of making the regulation and if the Minister opine that these regulations are reasonable to protect the health, safety and welfare of tenants. Given that NSW State Parliament has adjourned sitting until September 2020, the Minister will have power to make recommendations to the Governor about the proposed regulations.

Importantly, the *Covid-19 Act* does not provide any coverage for protecting landlords from the multiplier effects through the supply chain caused by this pandemic. This means in addition to potential restrictions in favour of tenants limiting landlords' rights to possession, termination and more importantly rent, landlords would still be obliged to satisfy their obligations in payment of rates, land taxes and mortgages. However, on 24 March 2020, Prime Minister Scott Morrison did address that he would further clarify the impact of the supply chain as a whole, including landlords rights.

As this is a temporary emergency measure, if regulations were introduced to the Tenancy Acts pursuant to the *Covid-19 Act*, the regulations would have a sunset date of either 6 months after commencement of the regulation or an earlier date decided by Parliament.

Given that the Covid-19 pandemic is constantly changing our legal and economic landscape, the team at Construction Legal is continuously staying up to date with current news and is prepared to assist you with better and commercial outcomes.

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