

Article Information

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Retail and commercial leases: Amendments to the NSW COVID-19 regulations

The Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 and the amendments to Schedule 5 of the Conveyancing (General) Regulation 2018 (together, New Regulations) commenced on 24 October 2020 and each are in force for six months.

The New Regulations extend and amend the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (Retail Regulations) and Schedule 5 of the Conveyancing (General) Regulation 2018 (together, **Previous Regulations**).

Key changes in the New Regulations are as follows.

- The 'prescribed period' is extended until 31 December 2020.
- A party to an impacted lease may make a further request during the prescribed period to renegotiate rent payable and other terms under an impacted lease but cannot renegotiate a previously agreed rent waiver or deferral.
- If a request to renegotiate is made, parties must commence renegotiations within 14 days of receiving the request or another period agreed to by the parties.
- The definition of an 'impacted lessee' now takes into account the amendments made to JobKeeper in September 2020 - a lessee must now satisfy the 'actual decline in turnover test' and comparison in turnover must be for the same comparison period in 2019 and 2020.
- However, there are savings provisions so that an 'impacted lessee' under the Previous Regulations will continue to be recognised as an impacted lessee during the 'prescribed period' under the Previous Regulations - that is, 24 April 2020 to 23 October 2020 (**First Prescribed Period**).
- The effect is a lessor cannot take a 'prescribed action' (eg terminate the lease) against a lessee who was an 'impacted lessee' under the Previous Regulations for a specified breach occurring during the First Prescribed Period, even if that lessee is no longer an impacted lessee under the New Regulations. The specified breaches that lessees have protection from are non-payment of rent, non-payment of outgoings or failure to open during specified hours. A lessor may only take a 'prescribed action' for a specified breach if the lessor has complied with the obligation to renegotiate rent and other terms of impacted leases.
- Further, renegotiations of rent for the First Prescribed Period that commenced but were not concluded before the start of the New Regulations may be continued and concluded under the New Regulations, even if the lessee is no longer an impacted lessee under the New Regulations.
- Renegotiations that commenced but are not concluded before 31 December 2020 may be continued and concluded after 31 December 2020.

The New Regulations have clarified some points but uncertainty remains for parties negotiating rent under the COVID-19 leasing regime. The stricter turnover test will be welcomed by lessors - calculation of turnover reduction presented many difficulties under the Previous Regulations. The defined period to commence negotiations will be welcomed by lessees and should encourage prompt resolution of negotiations.