

Article Information

Author: Margot King, Samantha Gou
Service: Leasing, Property & Development
Sector: Real Estate

Further update to the NSW COVID-19 Leasing Regulations

The Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020 and amendments to Schedule 5 of the Conveyancing (General) Regulation 2018 (together, the Regulations) commenced on 1 January 2021. The Regulations extend COVID-19 protections for retail leases to 28 March 2021 but toughened the test for whether a lessee is an 'impacted lessee'. The protections for commercial leases ended on 31 December 2020.

Overview of the Regulations

The Regulations:

- repealed the Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020;
- introduced the Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020 (**Retail Regulations No 3**), which commenced on 1 January 2021; and
- amended Schedule 5 of the Conveyancing (General) Regulation 2018, for consistency with some of the amendments in the Retail Regulations No 3.

Retail Leases

The principle changes for retail leases are as follows.

1. The 'prescribed period' is extended until 28 March 2021.
2. The eligibility requirements for lessees have been made more difficult. A lessee is only an 'impacted lessee' if:
 - the lessee's turnover in the 2018/2019 financial year was less than \$5 million (under the previous regulations, the threshold was \$50 million); and
 - the lessee meets the new eligibility requirements to the JobKeeper scheme introduced on 4 January 2021.
3. There are savings provisions - a lessor is still prevented from taking a 'prescribed action' against a lessee for a breach occurring during a previous prescribed period, if the lessee was an 'impacted lessee' during the relevant previous prescribed period. The 'impacted lessee' eligibility requirements were different under each of the two repealed regulations.
4. The Retail Regulations No 3 clarify that 'prescribed actions' are permitted if the lessor has attempted:
 - to renegotiate rent and other terms of the lease; and
 - mediation but the mediation has failed to resolve the dispute (and the Small Business Commissioner has certified this in writing and provided reasons).

Commercial Leases

The changes for commercial leases mirror those for retail leases described in paragraph 4 above and certain other minor amendments in the Retail Regulations No 3. Importantly, the prescribed period for commercial leases was **not** extended, so there is no longer any prohibition on lessors taking prescribed actions against lessees for breaches occurring from 1 January 2021.

Lessors of commercial premises are now free to take action for a breach occurring after 31 December 2020.

Lessors of retail premises will need to reassess whether a lessee is still an 'impacted lessee' under the new test and may

need to further renegotiate rent with an impacted lessee for 1 January 2021 to 28 March 2021.

