

Article Information

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Clarifying Amendments to the Retail and Commercial Leases COVID-19 Regulations (NSW)

The Retail and Other Commercial Leases (COVID-19) Regulation 2020 (Retail Regulations) and Schedule 5 of the Conveyancing (General) Regulation 2018 (Commercial Regulations) (together, Regulations) have been amended to clarify two points that were unclear. The amendments commenced on 3 July 2020.

What are the key amendments?

The changes clarify that:

- the Regulations only offer protection to 'impacted lessees'; and
- the obligation to renegotiate rent before a lessor may take a 'prescribed action' only applies in the case of an 'impacted lease'.

An impacted lease is a lease to which an impacted lessee is a party. Previously, there was a potential interpretation of the Regulations that any lessee could request rent relief.

The changes also set out the documents that a lessee must give to the lessor to establish eligibility as an impacted lessee. Impacted lessees must provide to the lessor:

- a statement to the effect that the lessee is an impacted lessee; and
- evidence that the lessee is an impacted lessee.

If the lessee does not give these documents to the lessor, the lessor is taken to have complied with the obligation to renegotiate rent. Once the lessor has complied with the obligation to renegotiate rent, the lessor is free to take or continue a 'prescribed action' against the impacted lessee, eg evicting an impacted lessee that has failed to pay rent due to the economic impacts of the COVID-19 pandemic.

If the lessor has not fulfilled the obligation to renegotiate rent, the lessor is restricted from taking a prescribed action against an impacted lessee for failure to pay rent or outgoings or failure to open according to the hours set out in the lease. Prescribed actions include exercising a right of re-entry, recovery under any security bond and terminating the lease. Nothing prevents a lessor taking a prescribed action against a lessee on grounds unrelated to the economic impacts of the COVID-19 pandemic.

Impact of the changes to the Regulations

The Regulations still do not specify exactly what documents constitute evidence that the lessee is an 'impacted lessee' (an 'impacted lessee' is a lessee that qualifies for the JobKeeper scheme with turnover in the 18/19 financial year of less than \$50 million).

The types of documents that parties have been using to establish eligibility include notices from the Australian Tax Office confirming JobKeeper enrolment and accounting records signed by an accountant. Note however that a lessee only needs to 'qualify' for JobKeeper, they do not necessarily need to be *enrolled* in JobKeeper. A lessee may not necessarily have Australian Tax Office correspondence and will need to find an alternative document to prove eligibility for the JobKeeper scheme (eg a letter from their accountant).

Although these amendments do clarify two aspects of the Regulations that were unclear, practical application of the Regulations remains challenging in these difficult times.