



# COVID-19 Moratorium for Retail and Commercial Leases

## Executive Summary

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The *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (No 3)* (**Regulation 3**) expired on 28 March 2021, impacting protection offered to tenants of retail and commercial leases throughout COVID-19.

This regulation protected tenants of 'commercial' shop leases from claims by landlords for overdue rent or COVID-19 related breaches during the period of 24 April 2020 to 28 March 2021 (**Moratorium Period**).

**Those protections no longer apply to tenants under a commercial lease, thereby allowing landlords to commence recovery action for unpaid rent from 1 January 2021.**

The position is however different for retail leases as the government has enacted protection for them via [section 88](#) into the *Retail Leases Act 1994 (NSW)* (**Act**). The effect of section 88 is to allow the effect of Regulation 3 to continue to apply to retail leases.

## NSW Regulatory Framework - Understanding Regulation (No 3)

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By way of background, on 24 April 2020, the NSW Government introduced the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (**Regulation 1**) to prevent landlords from taking legal action against tenants for breach of their leases.

On 24 October 2020, **Regulation 2** was introduced which extended the period of protection until 31 December 2020 for impacted lessees.

Thereafter, on 1 January 2021, **Regulation 3** was introduced which further extended the protection period for retail leases until 28 March 2021.

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Recently, on 28 March 2021, section 88 of the Act was enacted to ensure protection for retail shop tenants for breaches arising during the Moratorium Period continues (subject to the application and eligibility requirements of the various regulations). However, importantly, there will be no protection for retail tenants for any NEW breaches occurring on and from 29 March 2021.

The table summarises the application of the various Regulations that are now in operation:

Prescribed Period	Relevant Dates	Can the Landlord take legal action?	
		Commercial Lease	Retail Lease
Reg 1	24/04/2020 to 23/10/2020	No	No
Reg 2	24/10/2020 to 31/12/2020	No	No
Reg 3	01/01/2021 to 28/03/2021	Yes, but landlord cannot take action for any breaches arising from Prescribed Period 1 and 2 against 'impacted lessee'.	No
After 28 March 2021	29/03/2021 – indefinitely	Yes, but landlord cannot take action for any breaches arising from Prescribed Period 1 and 2 against 'impacted lessee'.	Yes, but landlord cannot take action for any breaches arising from Prescribed Period 1, 2 and/or 3 against 'impacted lessee'.

## Obligations for Landlords – Retail Leases

In addition to the extensions under section 88 of the Act, Regulation 2 and Regulation 3 includes a 'savings provision' in section 14. This prevents landlords from taking certain 'prescribed actions' against 'impacted lessees' for breaches occurring during a previous 'prescribed period'. This means that tenants who breached their leases during the first, second and third prescribed periods of the previous Regulations, continue to receive the protections under Regulation 3 and the extension under section 88 of the Act. Under Regulation 3, an '**impacted lessee**' eligible for such protection is defined as a tenant who qualified for the Commonwealth Job Keeper Scheme and had a turnover in 2018/19 of less than \$5 million.

Under Regulation 3, the 'prescribed actions' that landlords are prevented from taking against these tenants include actions for eviction, recovery of the premises or security bond, termination of the lease or any other remedy legally available to the landlord in NSW. However, it is important to note that, a landlord is only entitled to take any of these actions where the landlord has attempted to renegotiate in good faith or mediate via the Small Business Commission and the mediation fails to resolve the dispute.

## Concluding Remarks

In short, only tenants of Retail Leases will continue to be afforded protections from claims by landlords for overdue rent or other breaches occurring during the Moratorium Period, insofar as Regulation 3 remains applicable to them. Nevertheless, landlords may take action against tenants for breaches arising from 29 March 2021, pursuant to the standard rules in place before COVID-19.

Please contact [Construction Legal](#) for more information or advice in relation to the matters discussed above.

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