

# Facts and Questions

## COVID-19 Commercial & Retail Regulations

*Updated 28 April 2022*

### 1. What COVID-19 legislation is relevant?

- On 14 March 2022, the *Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2022* commences. This regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (“the **Retail Leases Regulation**”), as well as the [Conveyancing \(General\) Regulation 2018 \(NSW\)](#) (“the **Commercial Leases Regulation**”). The changes to the Commercial Leases Regulation are identical to those for the Retail Leases Regulation, and for the purposes of this document, the amendments to each Regulation will be collectively referred to as “**the Regulation**”.

### 2. Which leases are covered by the Regulation?

- Commercial and retail leases entered into before 26 June 2021 or options, renewals or extensions of a lease on the same terms on or after this date.
- A lease under the *Agricultural Tenancies Act 1990* is excluded from the Regulation.

### 3. How long does the moratorium go for?

- The prescribed period for commercial and retail properties began on 13 July 2021 and will now end at 11:59pm on 30 June 2022, unless extended further by the Government.
- However, the Retail Leases Regulations may contain saving and transitional provisions and will continue to apply, even after their repeal date, to things in relation to a retail lease which occurred while the lease met the definition of an “impacted lease”.

#### **4. A tenant has advised that they cannot pay their rent. What should I do next?**

- Ask the tenant to complete REINSW's Rent Payment Proposal Form located [here](#) (for commercial tenants), so the lessor/agent can determine whether, at any time during the prescribed period, the tenant is, or was, an "[impacted lessee](#)" as defined in the Regulation.

#### **5. How do I determine if a tenant is an "[impacted lessee](#)"?**

- A tenant will be an "[impacted lessee](#)" if they are eligible for one or more of the following:
  - the 2021 COVID-19 Micro-business Grant,
  - the 2021 COVID-19 Business Grant,
  - the 2021 JobSaver Payment, or
  - 2022 Small Business Support Program.

**AND** if their turnover (including internet sales) from 2020-2021 financial year was less than \$5 million (previously this was \$50 million).

- For franchisees this amount is based on the premises' or land's turnover and for members of a corporate group – the group's turnover.
- A tenant will also be an "[impacted lessee](#)" for the purpose of renegotiating rent under an [impacted lease](#) (refer to FAQs 10 and 11 below) after 30 November 2021, if they would have been eligible to receive either the 2021 COVID-19 Micro-business Grant or the 2021 JobSaver Payment and their turnover (including internet sales) for the 2020-2021 financial year was less than \$5 million.

#### **6. I have a tenant stating that they are an "[impacted lessee](#)", however, they are refusing to provide proof to support this claim. What do I do?**

- You should send them a letter requesting the supporting documents using REINSW's template letter addressed to the tenant who has not provided

supporting documents. Click [here](#) to locate the template letter for commercial tenants.

- An [impacted lessee](#) must give the lessor a statement to the effect that the lessee is an [impacted lessee](#) and evidence that the lessee is an impacted lessee before or as soon as practicable after the breach and within a reasonable time of this information being requested by the lessor.
- If the lessee fails to provide a statement and evidence to support their assertion that they are an "[impacted lessee](#)", the lessor will be taken to have complied with its obligations to renegotiate the terms of the lease.

#### **7. How do I know if an impacted tenant continues to be an impacted tenant or has ceased to be one?**

- The lessor may make a request for "reasonably required" information up to once a fortnight to establish that a tenant continues to be an "[impacted lessee](#)". The reasonably required information includes a statement to the effect, or evidence, that the tenant is an [impacted lessee](#).

#### **8. What steps do I take if a tenant has stopped paying rent or is paying a reduced amount of rent without the lessor's consent?**

- You should send the tenant a letter reminding them that there has been no change to their obligation to pay rent under the lease and that they are still required to pay the full amount of rent in accordance with the terms of the lease until such time as the matter is mediated or the parties otherwise agree.
- You should use REINSW's template letter that has been prepared for this scenario, which can be found on REINSW's website [here](#) (for commercial tenants).

**9. I have a tenant who is not an “[impacted lessee](#)” who has stopped paying rent or is paying a reduced amount of rent without the lessor’s consent. What do I do?**

- If you are satisfied that the tenant is not an “[impacted lessee](#)”, you can follow the usual process for a breach of a commercial or retail lease for rental arrears.
- Given the reduction in scope of the definition of “impacted lessee”, you may find that a previously “impacted lessee” is no longer considered one and that you may take “prescribed action” against that lessee.

**10. What do I do if a party to the [impacted lease](#) wants to renegotiate the rent or other term of the lease?**

- If a lessee to an [impacted lease](#) requests that the lessor renegotiates the rent or other terms of the lease, then the parties must renegotiate those terms:
  - in good faith, and
  - commence those negotiations within 14 days of receiving the request (unless another period is agreed to by the parties).
- A lessor is not required to undertake a renegotiation of rent for a “prescribed breach” of an “impacted lease” that occurs after 13 March 2022.
- The parties must renegotiate taking into consideration:
  - the economic impacts of the COVID-19 pandemic, and
  - the leasing principles set out in the [National Code of Conduct](#).
- Refer to FAQ 5 above for the definition of an “[impacted lessee](#)” after 30 November 2021, for the purpose of rent renegotiations.

**11. What must the parties do when renegotiating rent?**

- When the parties renegotiate rent:
  - they should include, as part of the tenant’s turnover, payments made to the tenant under the 2021 COVID-19 Micro-business Grant, 2021

COVID-19 Business Grant, 2021 JobSaver Payment or a Commonwealth COVID-19 Disaster Payment; and

- the landlord need not provide rent reduction to the tenant for periods in which they were not an “[impacted lessee](#)” and may specify that should the tenant no longer be an “[impacted lessee](#)” the rent reduction that the parties negotiate will not apply. Refer to FAQ 5 above for the definition of an “[impacted lessee](#)” after 30 November 2021, for the purpose of rent renegotiations.

**12. In considering requests to vary the rental payments, what provisions of the [National Code of Conduct](#) apply?**

- The Code provides that lessors must offer lessees proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable based on the reduction in the lessee’s trade during the pandemic period and a subsequent reasonable recovery period.
- Rental waivers must constitute no less than 50% of the total reduction in rent payments.
- Regard must also be had to the lessor’s financial ability to provide such additional waivers.
- Tenants may waive the requirement for a 50% minimum waiver by agreement.
- Payment of rental deferrals by the lessee must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.

**13. Can a lessee make more than 1 request to renegotiate the terms of the lease?**

- A lessee may make more than one request to renegotiate the lease **provided that:**
  - any further request is made before the end of the “prescribed period”, and

- the further request does not relate to rent or outgoings for a period for which the rent or outgoings have already been reduced, waived or deferred following a previous renegotiation unless, during the period, the tenant no longer qualifies as an [“impacted lessee”](#).
- Please note, however, that a lessor is not required to renegotiate rent for a “prescribed breach” of an “impacted lease” that occurs after 13 March 2022.

**14. What if the parties can’t agree on the renegotiated lease terms?**

- If the parties are unable to reach an agreement you should follow the mediation process in [Part 8, Division 2 of the Retail Leases Act 1994 \(NSW\)](#).

**15. What if the lessee fails to renegotiate in good faith??**

- In these circumstances, the lessor will be taken to have complied with its obligations to renegotiate the terms of the lease.

**16. What if the lessee fails to renegotiate taking into consideration the leasing principles set out in the [National Code of Conduct](#)?**

- In these circumstances, the lessor will be taken to have complied with its obligations to renegotiate the terms of the lease.

**17. Is there a circumstance when I can take prescribed action against an [impacted lessee](#)?**

- Unless the parties agree otherwise, during the prescribed period, you cannot take “prescribed action” (ie. eviction, right of re-entry, recovery of premises or land, distraint of goods, forfeiture, damages, payment of interest, recovery of the security bond, performance, possession,

termination or another remedy at common law or NSW State law) against the [impacted lessee](#) unless:

- the Registrar of Retail Tenancy Disputes has given you a written certificate stating that the mediation did not resolve, and
- if the lessee requested a renegotiation of the lease, the lessor has complied with its obligations to renegotiate under the Regulation provided that it does not relate to a “prescribed breach” that occurs after 13 March 2022.

**18. What action can I take against an “[impacted lessee](#)” for breaches other than a failure to pay rent?**

- This prescribed period only applies to breaches arising from a failure to pay rent or outgoings or where a breach was caused by a business being closed for the hours stated in the lease.
- You can still take action against a tenant for other breaches of the lease.

**19. In accordance with the legislation, a lessor and [impacted lessee](#) have agreed to a rent reduction and waiver. How do I best document this new arrangement?**

- The lessor should seek instruction from their solicitor in drawing up a deed of variation. If the fixed term agreement plus options exceeds 3 years, the lessor should also make enquiries as to registering that deed on title annexed to the lease agreement.

**20. Can I increase the rent payable by the lessee?**

- Yes, from 13 March 2022, you may increase the rent payable by a lessee, even during the “prescribed period”.

**21. Are payments received under the 2021 COVID-19 Micro Business Grant, 2021 COVID-19 Business Grant and 2021**

## **JobSaver Payment to be included as part of the tenant's trade in 2021?**

- Yes. The [Retail and Other Commercial Leases \(COVID-19\) Regulation 2022 \(NSW\)](#) provides that the parties should include, as part of the lessee's turnover, payments made to the lessee under the 2021 COVID-19 Micro-business Grant, 2021 COVID-19 Business Grant, 2021 JobSaver Payment or the 2022 Small Business Support Program.
- However, please note that the 2021 COVID-19 Micro-Business Grant closed on 30 November 2021. Applications for the 2021 COVID-19 Business Grant has also closed.
- For more information, please refer to the OSBC's FAQs online [here](#).

## **22. What comparison period should be used to determine the rent reduction in tenant's trade during the COVID-19 pandemic period and subsequent reasonable recovery period?**

- While the [Retail and Other Commercial Leases \(COVID-19\) Regulation 2022 \(NSW\)](#) does not prescribe a particular period, the OSBC recommends initially basing these calculations on the period used by the tenant to show their eligibility for the 2021 COVID-19 Micro Business Grant, 2021 COVID-19 Business Grant and 2021 JobSaver Payment.
- However, parties can also reach an agreement about the comparison period they wish to use. We suggest seeking legal advice about this matter.
- Importantly, and irrespective of the comparison timeframe ultimately decided upon by the parties, the tenant should provide the landlord with evidence of their turnover decline (eg. BAS, accountant's letter) to allow the parties to appropriately calculate a reduction of the rent.
- For more information, please refer to these [online FAQs](#).