

Article Information

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Commercial Leases: Rent relief under the Victorian COVID-19 Regulations

The much anticipated COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Regulations) came into force on 1 May 2020.

It broadly adopts the leasing principles set out in the National Cabinet's 'Mandatory Code of Conduct: SME Commercial Leasing Principles during COVID-19' (**Code**). However, certain key leasing principles in the Code have not been adopted.

The keys points that landlords and tenants need to know:

When do the Regulations take effect?

The Regulations operate retrospectively from 29 March 2020 and remain in operation until 29 September 2020. This period is defined in the Regulations as the '*Relevant Period*'.

The good news for landlords is that the Regulations do not define or refer to the term '*reasonable subsequent recovery period*', which was used throughout the Code, so landlords are not obliged to offer rent relief beyond 29 September 2020.

Who do the Regulations apply to?

The Regulations only apply to an 'eligible lease'.

Broadly, an 'eligible lease' means a retail lease, a commercial lease or a commercial licence that is in effect at the time the Regulations commenced (i.e. 29 March 2020), where:

1. the tenant is an SME entity (meaning, it is likely to have an annual turnover for FY 2019/20 less than \$50million and/or had an annual turnover for FY 2018/19 less than \$50million). If the tenant is connected to another entity or has an affiliate entity, the relevant turnover figure is the aggregate turnover; and
2. the tenant is an employer who qualifies for, and participates in, the JobKeeper scheme. Therefore, being qualified for the JobKeeper scheme is not enough. The tenant needs to participate in the scheme.

Agricultural leases are expressly excluded from the Regulations.

Regulations binding

Most of the regulations are stated as to be taken to form part of the lease and are therefore, binding on the landlord and tenant under the lease. In particular, there is an overarching obligation on the landlord and the tenant to co-operate and act reasonably and in good faith in all discussions and actions under the Regulations. A breach of these regulations will constitute a breach of the 'eligible lease'.

However, for some regulations, a landlord and tenant can agree that the regulation does not apply, allowing them to agree on an alternative arrangement.

How a tenant requests rent relief

The tenant must initiate the rent relief process by giving the landlord a written request for rent relief. This means a landlord need not do anything until it receives the tenant's written request.

The tenant's written request for rent relief must be accompanied by:

- a statement that their lease is an 'eligible lease'; and
- information evidencing that the tenant:
 - is an SME entity; and
 - qualifies for, and participates in, the JobKeeper scheme.

The Regulations do not give any guidance on what financial information the tenant needs to provide the landlord. It is anticipated that the Small Business Commissioner will set out a guideline on the financial information to be provided.

The landlord's rent relief offer

Regulation 10 sets out what the landlord must do when they receive the tenant's written request for rent relief, and what factors need to be taken into account when making the rent relief:

- the landlord has 14 days after receiving the tenant's request, to offer rent relief. The 14 days period can be extended by agreement;
- the landlord's rent relief offer must be based on all circumstances of the 'eligible lease', and:
 - relate to the rent payable under the lease during the Relevant Period;
 - at least 50% of the rent relief must be offered as a rent waiver, but the parties can agree otherwise. Unless the parties agree otherwise, this means where the landlord offers both a rent waiver and rent deferral, at least 50% must be rent waiver (note: the 50% rent waiver only applies to the tenant's first rent relief request).
 - take into account factors such as:
 - the reduction in the tenant's turnover;
 - any waiver of outgoings for any period where the tenant cannot operate their business;
 - the tenant's capacity to meet the lease obligations;
 - the landlord's financial capacity to offer the rent relief; and
 - any reduction to any outgoings such as rates and land tax.

Importantly, the proportionality principle under the Code has not been adopted in the Regulations. Therefore, whilst the reduction in the tenant's turnover is a factor to take into account, the rent relief offered by the landlord does not have to be proportionate to the reduction in the tenant's trade as a result of COVID-19.

Other landlord considerations

The landlords:

- must *consider* waiving outgoings for any part of the Relevant Period that the tenant is not able to operate their business. It is, therefore, not mandatory to give the tenant the waiver, but the landlord has an obligation to act reasonably and in good faith;
- must pass onto the tenant the benefit of any outgoing reductions the landlord receives;
- must not increase the rent payable under the lease during the Relevant Period (unless rent is turnover rent), but the parties can contract out of this. Although it is not clear, the prohibition seems to relate only to the Relevant Period and therefore, does not prevent a landlord from carrying out the rent increase after the expiry of the Relevant Period.

Rent deferral

Landlords should be aware that rent deferrals will have the following significant consequences:

- The landlord must *offer* to extend the term of the 'eligible lease' equal to the period for which rent is deferred, unless the parties agree otherwise. For example, if 3 months rent is deferred, the landlord must offer to extend the term by 3 months. This will have the most consequence where the lease is due to expire.
- The tenant is allowed to pay the deferred rent by equal instalments over the *greater* of the balance of the term of the 'eligible lease' (including any extensions to that term), and a minimum 24 months. This means the tenant's payment obligations may extend beyond the expiry date of the lease.
- The tenant does not have to start paying the deferred rent until the *earlier* of the expiry of the Relevant Period (i.e. 29 September 2020), and the expiry of the term of the 'eligible lease', excluding any extensions to that term.
- The landlord must not charge interest or any other fee in relation to any payment of deferred rent.

Dispute resolution

After the tenant receives the landlord's rent relief offer, the tenant and the landlord must negotiate in good faith. Where the parties cannot reach agreement on the rent relief to be provided, or to matters relating to the Regulations, either party can refer the dispute to the Small Business Commissioner for mediation. If agreement cannot be reached at mediation, either party can commence proceedings in VCAT or a Court to determine the dispute.

Where rent relief is agreed

Where the landlord and tenant have agreed on the terms of the rent relief, the Regulations state that it may be effected by way of a variation to the lease or a separate agreement.

Further rent relief

If a tenant's financial circumstances materially change, even after a rent relief agreement has been made, the tenant may make a further request to the landlord for additional rent relief. The rent relief process outlined in regulation 10 must be followed, but the landlord is no longer required to offer the 50% rent waiver.

Tenant's change in trading hours

The tenant is not in breach if the tenant reduces its trading hours, or closes the premises and ceases to carry out any business at the premises during the Relevant Period. Interestingly, the Regulations do not specify that the reduction in trading hours or closure of the premises must be directly related to COVID-19.

Therefore, where the tenant reduces its trading hours or closes the premises during the Relevant Period, regardless of whether it is related to COVID-19, the landlord must not:

- evict the tenant;
- re-enter the premises; or
- enforce the security for non-payment of rent.

The security includes a bond, security deposit, indemnity or guarantee.

Prohibitions on landlords

The tenant will not be in breach for non-payment of rent during the Relevant Period *only* if the tenant:

- complies with the rent relief process during the Relevant Period (i.e. making a compliant rent relief request and negotiating with the landlord in good faith); or
- after concluding the rent relief process and the parties having agreed on the rent relief terms, the tenant complies with its obligation to pay any rent required under the rent relief agreement.

Provided the tenant complies with the above obligations, the landlord must not:

- evict the tenant;
- re-enter the premises; or
- enforce any security for non-payment of rent.

Penalties will apply if the landlord breaches any of these statutory prohibitions.

Confidential information

The landlord and tenant must not disclose the personal information of any person (other than the landlord or tenant) or information relation to business processes or financial information (including information about the trade of the business) obtained under or in connection with the Regulations. However, the landlord or tenant is not in breach of this regulation if the information is disclosed in certain circumstances such as to a professional advisor or a financier, or as authorized by the Small Business Commissioner, or for the purposes of court proceedings.

What tenants should do:

Tenants under an 'eligible lease':

- must start the rent relief process by making the request in writing accompanied by the required statement and information; and
- should check that the landlord's rent relief offer complies with the Regulations, including whether at least 50% of the rent relief is in the form of a rent waiver, and in the case of a rent deferral, whether a corresponding extension

to the term of the lease is also offered.

What landlords should do:

Where the landlord has received the tenant's written request for rent relief, the landlord:

- should check that the tenant's written request and accompanying information complies with the Regulations;
- provide the tenant with the terms of the rent relief offer within 14 days of the tenant's written request, or seek the tenant's consent to extend the 14 days period;
- ensure the landlord's rent relief offer complies with the Regulations; and
- consider the practical consequences with any offer to defer rent.