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*Changes in eligibility for relief for lessees*

**Commercial Tenancy Relief Scheme Regulations 2022** (S.R. 4/2022) ("Regulations"):

Background:

A series of old regulations made during 2020 and 2021 extended the operation of commercial tenancy relief schemes until 15 January 2022. The detail of the older relief schemes is discussed in our Leases Circulars of May, September, December 2020 and September 2021, copies of which can be found at <http://www.andrewgray.com.au/Leases.html>

The new Regulations came into force on 16 January 2022 and there are some 67 pages of complexity. For that reason, reference should be made to the Regulations themselves which can be found at <https://www.legislation.vic.gov.au/as-made/statutory-rules/commercial-tenancy-relief-scheme-regulations-2022>

Highlights:

- Frankly, there are few save that yet again, for the fifth time in two years, lessors get a bad deal from our Victorian Government which doesn't really seem to care less about commercial real estate investors;
- Largely, the new Regulations in many ways, mirror the September 2021 Regulations;
- A lessee must make application to a lessor for relief prior to 15 March 2022 in order to gain any relief for the period 16 January 2022 to 15 March 2022;
- Rent reviews which increase rent between 16 January 2022 and 15 March 2022 are permanently stayed (lost) but, a market rent review may not necessarily increase rent.

"Eligible Leases" and "Eligible Tenants":

The Regulations operate only in respect of *eligible leases*. An *eligible lease* is one which:

- Was in place on 16 January 2022; and
- Does not fall within a myriad of exclusions (see the Regulations); and
- The lessee is an *eligible tenant*.

An *eligible tenant* is a lessee which must be:

- A SME entity who does not fall within the countless exclusion classes (see the Regulations); and
- Carrying on business on 16 January 2022 (including a not for profit entity); and
- Satisfies the *Decline in Turnover Test* during a *Turnover Test Period* meaning a turnover decline of at least 30% below *Comparison Turnover*.

Care needs to be taken as *Comparison Turnover* can be tested by a number of *Comparison Turnover* tests which vary markedly, but is broadly defined as meaning turnover for GST purposes, includes state government COVID relief but, excludes federal government grants and includes all a lessee's turnover, not just turnover from particular premises.

The most common turnover comparison test will be by comparison of a lessee's turnover in January 2022, with January 2020. There are a number of alternative methods available.

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What a lessor must offer:

A lessor must now offer *eligible lessees*, who satisfy the *Decline in Turnover Test* during a *Turnover Test Period* rent relief from:

- 16 January 2022 to 15 March 2022 if the lessee's request and provision of prescribed evidence occurs prior to 15 March 2022; or
- From the date of the lessee's application until 15 March 2022 if the lessee's request and provision of evidence takes place after 16 January 2022;

in the form of *minimum relief* proportional to the lessee's decline in turnover of which, 50% of the relief is in the form of a rent waiver and the balance in the form of deferred rent with equal instalments of deferred rent commencing no earlier than 15 March 2022 and payable over a period of not less than two years or, the balance of the current term of a lease, whichever is the longer. The Regulations require a lessor to take into account "*other circumstances*" (in addition to the financial evidence), in determining a lessee's application for rent relief. A lease is automatically extended for the term of deferred rent.

Other provisions:

The context of the new Regulations are purposefully, broadly summarised here. In many ways, the new Regulations mirror the September 2021 Regulations but reference should always be made to the actual Regulations.

Limitations of this circular:

This circular is intended to provide a short summary only of new Regulations and does not purport to provide legal or other advice or, to be an exhaustive analysis of the Regulations.

Andrew Gray or Leah Holmes of our office are happy to provide further advice.

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Expressions in italics used in this Circular are defined or other terms, used in the Regulations.