
The world (as we knew it) has changed with the advent of the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*

The new Act and Regulations:

Background

On 23 April 2020, the Victorian Parliament in a hastily convened sitting, passed the *COVID-19 Omnibus (Emergency Measures) Act 2020* ("Act"). Part 2.2. of the Act closely follows the Federal Government's *Mandatory Code of Conduct SME Leasing Principles* announced a fortnight earlier. On 1 May 2020, without formal announcement or fanfare, the Victorian Government then made the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* ("Regulations") which were deemed to commence operation on 29 March 2020. It is important to note that both the Act and Regulations apply to leases and licences, including sub-leases and sub-licences.

The operation of the Regulations hinges on the definition of "eligible lease" as defined in Section 13 of the Act. The definition is critically important to a proper understanding of the Regulations which now apply until 29 September 2020. They could well be extended bearing in mind that the economic effects of the current pandemic will inure well past September 2020, regardless of new infection rates. It would be a fool's paradise to pretend that the world as we knew it, will return to economic normality on a fixed date.

What is an "eligible lease"?

Section 13 of the Act says an *eligible lease* is a retail or non-retail commercial lease or licence in effect on 1 May 2020 in respect of which, the lessee:

- Is an SME entity (generally under \$50M turnover); and
- Is an employer who qualifies for the Federal Government's JobSeeker scheme; and
- Is a participant in the Federal Government's JobSeeker scheme.

There are certain "group entity", "aggregated turnover" and "lessor control" exemptions in Section 13(3) of the Act.

There is a separate definition of *non-retail commercial lease* in Section 14 of the Act – simply, a non-retail, commercial lease save for certain farming and other exemptions which are set out in the Regulations.

The balance of this Newsletter deals only with eligible leases.

Overarching obligations

Consistent with the Federal Government's Mandatory Code, there is an obligation set out in Regulation 8 for lessors and lessees to *cooperate and act reasonably and in good faith*.

No breach for non-payment of rent

No breach occurs of an eligible lease if:

- A lessee requests in writing, rent relief during the relevant period from a lessor and provides information to satisfy the eligible lease test – see Regulations 9 and 10.

The *relevant period* for the purposes of rent relief is 29 March 2020 to 29 September 2020.

The contents of this circular are by way of general advice only and do not take in to account the circumstances of individual transactions or, the relationship between lessors and lessees in particular situations. As such the content of this circular should be regarded as general advice only and not intended to constitute the provision of legal or other advice. Accordingly, we take no responsibility for loss and damage (howsoever arising) as a consequence of persons acting on the content of this circular without first seeking our professional advice

But:

The lessor's responsibilities

"Rent relief" is defined in the Regulations as *"any form of relief provided to a tenant in respect of the obligation under an eligible lease to pay rent, including a waiver, reduction, remission or deferral of rent"*. The expression does not refer to the gross rental payable under a lease.

The lessor must offer rent relief within 14 days of the receipt of a lessee's request (or other agreed time) and the lessor must offer no less than 50% of rent relief by way of *waiver* during the relevant period but, can offer up to 100% taking in to account:

- Reduction in lessee's turnover;
- Any *waiver* of outgoings by the lessor;
- Any refusal would jeopardise a lessee's ongoing obligation pursuant to a lease;
- Lessor's financial ability to offer relief and any relief afforded by a lessor's lender; and
- Any reduction in outgoings granted by a statutory authority (land tax is an obvious example).

Note carefully, the use of the term "waiver" as opposed to "deferral". A lessor can also defer rent which is not waived.

There must be negotiation in good faith between lessor and lessee with a view to agreement on rent relief. The parties can agree to rent relief by variation of lease or another method.

A lessee by virtue of Regulation 11, can make subsequent, further applications for rent relief.

No rent increases

Unless lessor and lessee both agree, a lessor is not to implement a rent increase during the relevant period unless rent is determined by turnover. However, Regulation 12(3) is unclear as to whether the turnover exemption applies if the rent is partly fixed and partly determined by turnover.

No eviction or re-entry

Regulations 9(2) and (3) prohibit eviction and re-entry by a lessor if a lessee requests rent relief and, imposes substantial penalties for non-compliance.

Deferred rent and automatic lease extensions

If rent is deferred by agreement (as opposed to being "waived"), a lessor must offer an extension of a lease for a further term equivalent to the period for which rent is deferred unless lessor and lessee agree otherwise – see Regulation 13.

Regulation 16 prohibits a lessor from requesting payment of deferred rent until the earlier of expiry of the relevant period (29 September 2020) or, the expiry of any extended term of a lease by the application of Regulation 13 but, payment of deferred rent is amortised over the greater of:

- The term of a lease as extended by Regulation 13; and
- A period of no less than two years,

unless lessor and lessee agree otherwise in writing. No interest or added costs can be applied by a lessor to deferred rent.

Lessees can reduce trading hours

A lessor cannot compel a tenant to maintain trading hours or evict or take action against a lessee for failure to maintain minimum trading hours or a reduction in opening hours. Regulation 18 imposes harsh penalties on lessors who attempt to do so or attempt to use security deposits to recover rent shortfalls.

Outgoings treated no differently to rent

A lessor is obliged to "consider" waiving outgoings for the period of time in which a lessee cannot operate from premises - see Regulation 14(2). A lessor can reduce the provision of a lessor's service to premises in any period in which a lessee cannot operate from premises - see Regulation 14(3). A good example is common area cleaning provided by a lessor when premises may be closed.

If outgoings are reduced by a lessor, a lessee is only liable for its proportional share of reduced outgoings and any excess paid by a lessee to a lessor must be refunded by a lessor – see Regulation 15.

Disputes – and, there will be many

Part 6 of the Regulations deals comprehensively with dispute resolution mechanisms. Any dispute (which doubtless will initially arise over the application of Regulation 10), can be referred either by lessor or lessee to the Small Business Commissioner who will mediate the dispute. Neither a court or VCAT can determine a dispute until such time as the SBC issues a certificate to the effect that mediation has failed to resolve a dispute or is unlikely to resolve a dispute.

Lessor's land tax relief

The Commissioner of State Revenue has recently announced a 25% discount in land tax for 2020 for lessors whose properties cannot be leased or lessors who have provided rent relief to tenants. Claiming land tax relief from the SRO requires passing on to the SRO of what would otherwise be considered as confidential information of a lessee. Despite other confidentiality provisions in the Regulations (Regulation 19), Regulation 24 states that lessors may provide a lessee's information (provided for the purpose of Regulation 10), to the SRO for the purposes of the SRO assessing a lessor's land tax relief.

Limitations of this Circular

This Circular is intended to provide a short summary only of the Regulations and does not purport to provide legal or other advice or, to be an exhaustive analysis of the Regulations. We have only focused on the more important parts of the Regulations as they affect both lessors and lessees. Reference should always be made to the actual legislation.

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

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