
Both lessors and lessees must observe strict time periods

Commercial Tenancy Relief Scheme Regulations 2021: ("Regulations")

Background:

A series of old regulations made during 2020 extended the operation of commercial tenancy relief schemes until 28 March 2021. The detail of the older relief regimes is discussed in our Leases Circulars of May, September and December 2020, copies of which can be found at <http://www.andrewgray.com.au/Leases.html>

On 24 August 2021 the new Regulations came into force. There are some 74 pages of the new Regulations and, they are complex. No meaningful attempt here could serve as a useful summary of the complex and often conflicting provisions of the Regulations. Reference should be made to the Regulations themselves which can be found at:

<https://www.legislation.vic.gov.au/in-force/statutory-rules/commercial-tenancy-relief-scheme-regulations-2021/001>

Highlights:

- Lessees can receive more than the *minimum relief* if they can prove *other circumstances* – by way of example, a lessee's premises (which would otherwise be permitted to open), are closed for a period of time as a Tier 1 Covid Infection Site;
- A lessee must make application to a lessor for relief prior to 30 September 2021 in order to gain any relief for the period 28 July to 30 September 2021;
- The Minister for Small Business indicated (in her Press Release of 10 August 2021), that lessees who did not comply with prior relief arrangements, would not be eligible for relief under the Regulations. However, that Ministerial pronouncement has not materialised in the Regulations;
- A lessee must submit further information to a lessor for reassessment by 31 October 2021;
- A lessee is deemed to accept a lessor's first offer unless the lessee makes application to the Victorian Small Business Commissioner ("VSBC") within 14 days of receipt of a first offer; and
- Rent reviews which increase rent between 28 July 2021 and 15 January 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 28 July 2021; 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 28 July 2021 (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*.

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Care needs to be taken as *Comparison Turnover* can be tested by a number of *Comparison Turnover* tests which vary markedly, some of which have a dependence on JobKeeper scheme in their application, while others do not. Refer to the actual Regulations for a complete list of alternative methods.

"Turnover":

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 three months' turnover (of the lessee's choosing), between 1 April and 30 September 2021, with the same three months in 2019. There are a large number of alternative methods available.

How a Lessee asks for Relief:

A lessee who is an eligible tenant who satisfies the *decline in turnover test* makes a written request to a lessor and within 14 days of making that request must supply the lessor with the following evidence:

- That the lease is an *eligible lease*;
- That the lease is not an excluded lease (grouped as part of a larger entity, agricultural leases, related parties and many other prescribed classes);
- Setting out the lessee's decline in turnover;
- At least one of:
 - Extracts from accounting records;
 - BAS Statements;
 - Authorised Deposit Taking Institution statements of the lessee's account; or
 - A statement prepared by a practising accountant;which evidences the lessee's decline in *Comparison Turnover* as a percentage is calculated in accordance with the *decline in turnover test*; and
- A Statutory Declaration stating that the information provided is true.

But, we would urge our lessor clients to seek as much supporting material as possible from a lessee given (in our experience at least), the seemingly simple ability of lessees to scam lessors with only one form of financial evidence. Lessors should be vigilant in terms of what may be presented to them and to the extent reasonably possible, test that material.

If the information is not provided by a lessee within 14 days of a request for relief, the request lapses. Only three requests for relief can be allowed to lapse before a lessee loses the opportunity to seek any rent relief under the Regulations.

What a lessor must offer:

A lessor must now offer *eligible lessees*, rent relief from:

- 28 July 2021 to 15 January 2022 if the lessee's request and provision of evidence occurs prior to 30 September 2021; or
- From the date of the lessee's application until 15 January 2022 if the lessee's request and provision of evidence takes place after 30 September 2021;

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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 January 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. How VCAT and the courts will consider such other circumstances, remains to be seen.

A lease is automatically extended for the term of deferred rent. By way of example, if rent is deferred for six months, the term of a lease is extended automatically for six months.

Outgoings are an interesting issue given that the Regulations require a lessor to "*consider waiving*" of outgoings. There is a recent VCAT decision where the Tribunal found a lessee to be entitled to a complete waiver of all outgoings for the period of rent relief. That decision was made in connection with the 2020 regulations which used precisely the same terminology – "consider waiving". Where a lease is a gross lease or inclusive of outgoings, rent relief must be offered inclusive of outgoings.

Reassessment:

A lessee must prior to 31 October 2021 provide reassessment material to a lessor if a lessee commenced to trade prior to 1 April 2021, made application to a lessor for relief prior to 30 September 2021 and an agreement as to rent relief has been made. The reassessment provisions are complex – refer to the actual Regulations.

Agreement between lessor and lessee is deemed to exist where:

- A lessor has offered *minimum relief* requirements even though there is no agreement by the lessee to the lessor's offer within 14 days receipt of that offer; and
- A lessee has not referred its application to the VSBC for assistance.

The deemed agreement provisions in the Regulations represent a substantial departure from prior regimes and may avoid scandalous delays seen in the past as practised by many lessees.

The review process of the VSBC and VCAT where there is no agreement:

The jurisdiction of the VSBC and subsequently VCAT is enlivened once there is no agreement by the lessee with the lessor's offer of relief or, the refusal of a lessor to offer relief. Initially, the VSBC can mediate the dispute which is a pre-condition to either party taking a dispute to VCAT. If a lessor refuses to participate in the VSBC process, the VSBC may make binding orders against a lessor.

Other important provisions:

- A lessee can make more than one application for relief, albeit with some difficulty given time factors involved;
- Lessees with deferred rent agreements pursuant to the 2020 regulations who are *eligible tenants* under the new Regulations, can suspend old deferral arrangements until 15 January 2022;
- Lessors are prohibited from imposing rent increases in respect of eligible leases between 28 July 2021 and 15 January 2022. Lessors are prohibited (for good) from recovery of increases in rental in respect of *eligible leases* between those dates; and
- Lessors cannot recover against lessee's guarantors to defeat the spirit and intent of the Regulations.



LEASES CIRCULAR

NEW LEASING REGULATIONS

September 2021

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. Reference should always be made to the actual 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.

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