

1. *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020*; and
2. *Retail Leases Amendment Act 2020*

COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020: ("ExtensionAct")

Background

On 23 April 2020, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020* ("First Act") and the Victorian Government then made the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* ("Old Regulations") which were deemed to commence operation on 29 March 2020. It is important to note that both the First Act and Old Regulations applied to leases and licences, including sub-leases and sub-licences. The detail of the First Act and Old Regulations is discussed in our Leases Circular of May 2020 a copy of which can be obtained from <http://www.andrewgray.com.au/Leases.html>

The operation of the Old Regulations hinges on the definition of "eligible lease" as defined in Section 13 of the First Act. The definition is critically important to a proper understanding of the Old Regulations which applied until 29 September 2020 and new Regulations, yet to be made.

The Extension Act commenced on 23 September 2020 and extends the operation of the First Act and the Old Regulations until 26 April 2021 but with changes which rely heavily on new Regulations yet to be made by the Victorian Government at the time of writing. Whilst the Extension Act deals with both commercial and residential tenancies, we deal only with commercial tenancies (both retail and non-retail) in this Circular.

Changes made by the Extension Act to the First Act and Old Regulations:

In the absence of new Regulations (and we are all waiting on them to be made), it is difficult to fully describe the changes but the major amendments are as follows:

- The Extension Act re-defines *eligible lease* to mean a lease (or licence) in effect on the commencement day of the Old Regulations (29 March 2020) or, a lease of a kind prescribed by new Regulations;
- To allow flexibility in terms of any future Federal Government eligibility changes, the definitions of *qualifies for the jobkeeper scheme* and *SME entity* have been repealed;
- A new definition of *specified rent relief* has been added meaning "a waiver or deferral of rent payable under and eligible lease". There is no substantive change here and outgoings appear to remain unaffected;
- Regulations will, hopefully in the near future, be made and will cover matters including:
 - Orders (presumably) made by the Small Business Commissioner (although this is unclear at this stage) directing lessors to give specified rent relief;
 - The content of lessees' applications to lessors for rent relief including documents and statutory declarations to be included;

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- Preconditions to be met before rent relief applications can be made to lessors;
 - Enforcement of binding orders by VCAT and preconditions to enforcement; and
 - The ability of VCAT to review, amend or revoke a binding order.

In summary

Sadly, the Extension Act has commenced operation but, in the absence of enabling Regulations, which will assist in understanding its true nature and effect.

Suffice to say that the present regime with "new teeth" continues until 26 April 2021. It follows that lessors will be obliged to give further, substantial rent relief until at least 26 April 2021 in the present form as regulated by the First Act and Old Regulations. If they do not, then the "binding order" provisions of the new Regulations may force them to.

When the new Regulations are made, we will issue another circular dealing with them.

Retail Leases Amendment Act 2020: ("Amendment Act")

Background

The Amendment Act amends the *Retail Leases Act 2003* ("Original Act") and as such applies only to *retail leases* as defined and addresses four issues:

1. Certainty as to who pays for the costs of installation, repair, servicing and inspection of essential safety measures as defined by Section 251 of the *Building Act 1993*. In that regard, a Presidential Opinion was delivered in 2015 by the (then) President of VCAT to the effect that lessees were not responsible for meeting those costs. The Presidential Opinion did not have the force of law but since 2015, has been considered as highly persuasive;
2. New Disclosure Statement requirements;
3. Provision of further information by lessors to lessees prior to lessees exercising options to take a further term or terms in a lease and the introduction of a cooling off period to allow a lessee to change its mind after having exercised an option; and
4. Return of lessee's security deposits.

Effective date of the amendments

Amendments dealing with essential safety measures and lessee's security deposits commence operation on 23 September 2020 and apply to all retail leases entered into whether before or after that date. The balance of the amendments dealing with new disclosure and option provisions operate from 1 October 2020 and generally apply even if they relate to renewal of a retail lease which was entered into before the amendments commenced.

Amendments relating to options under existing retail leases come into operation on 1 October 2020 unless the last day for a lessee's exercise of option is less than three months from that date.

Essential safety measures

The Amending Act amends Section 251 of the *Building Act 1993* to provide that an occupier of premises cannot recover expenditure relating to essential safety measures from an owner of premises if the occupier (lessee) has agreed to bear those costs which, a lessee may well have agreed to in a lease.

Essential safety measures are now included in the definition of "outgoings" in Section 3 of the Original Act in recognition of the new situation where lessees can agree to bear certain costs of those measures. However, Section 41(1) of the Original Act has been amended to void any provision in a lease where a lessee is required to pay capital costs except, under Section 41(2) for repairs or maintenance to essential safety measures which a lessee has agreed (in a lease) to pay.

A lessor and lessee can now agree that a lessee pay for the repairs or maintenance to essential safety measures under Section 52 of the Original Act. But, that agreement cannot displace a lessor's obligation to have those measures in place as required by Section 251 of the *Building Act 1993*. Section 52(7) of the Original Act now makes it clear that a lessor remains responsible for the capital costs and installation of essential safety measures.

The Amending Act addresses and clarifies the confusion created by the 2015 VCAT Presidential Opinion.

New Disclosure Statement requirements

The Amending Act changes the timeframe in which Disclosure Statements are to be provided to a lessee to 14 days prior to entering into a retail lease and imposes a new requirement that a copy of the proposed lease also be provided which includes the rent and term of the lease. The Original Act simply provided a Disclosure Statement be given to a lessee seven days prior to execution of a lease. Any changes between an initial and subsequent Disclosure Statement and lease must also be provided at least 14 days prior to a lessee's execution of a retail lease. Unfortunate penalties apply to lessors for non-compliance with these new provisions which substantially amend Section 17 of the Original Act.

New option provisions

Here is where the murky waters start to appear. The Amending Act now introduces new and novel concepts which throw decades of leasing law and practice into unfathomable depths of the ocean and will leave many lessors wondering why they bother to own retail investment property. Most of the new matters dealing with renewal of retail leases were not dealt with in the Original Act. The Amending Act introduces abject uncertainty to what we knew as a simple concept of a lessee exercising an option to take a further term. The law was then certain. As a consequence of the Amending Act, it is far from certain now. The highlights include:

- Disclosure Statements to lessees who exercise options setting out changes to prior Disclosure Statements;
- The duty of lessors to provide lessees with written notice to exercise an option three months prior to the exercise date, which includes the date by which the option is to be exercised, the first year's rent under any renewed lease, the availability of "early rent review provisions" and (again), any changes to a prior Disclosure Statement provided to a lessee;
- If not provided within three months prior to an exercise date, the exercise date is automatically extended to three months after provision of the lessor's notice to exercise option;

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- A new Section 28A to the Original Act now provides that a lessee can request an early rent review and if that review produces a rental less than the rent payable in the last year of a present term, the lower rent is deemed to be payable for the first year of the renewed term;
 - If a lessee does not request an early rent review, and the new rent stated in the lessor's notice to exercise option is less than the rent payable in the last year of a present term, the lower rent is deemed to be payable for the first year of the renewed term;
 - A lessee has 28 days from provision of the lessor's notice to exercise option in which to request an early rent review but, only if the lease provides for rent to market rental for the first year of a renewed term. The market rental provisions of Section 37 of the Original Act remain unchanged;
 - An option must be exercised by a lessee by the later of:
 - The last date for exercise in a lease; or
 - 14 days after the lessee is notified of the new market rent for the first year of the renewed term if early rent review is requested;
 - If a lessee exercises the right to early rent review and the early rent review produces a rental higher than the last year of the previous term, the lessee has 14 days after receipt of the proposed rental determination to renew the lease. If the lessee does not renew the lease, the lease can be automatically extended by up to three months to allow the parties to make alternative arrangements. A lease will then be at end;
 - If the rental is lower, the lower rent is payable for the first year of the renewed term;
 - But, a new Section 28B provides a lessee who exercises an option and has not requested an early rent review, with a 14 day cooling off period which, if exercised, means:
 - a renewed term will not apply;
 - a lease is automatically extended by 14 days subject to any contrary agreement between lessor and lessee; and
 - if the lessee exercises the cooling off right, it cannot again change its mind.

In summary, lessees now appear to have greater rights than lessors in terms of lease renewal. Nothing is certain any longer as a consequence of the Amending Act.

Return of lessee's security deposits

In its present form, Section 24(1)(d) of the *Retail Leases Act 2003*, required security deposits to be returned "as soon as practicable" after the end of a lease. The Amendment Act changes that requirement to "within 30 days" of the end of a lease.

Important advice to lessors and lessors' agents

The new provisions dealing with options require lessors (or their agents) to establish and maintain active diary systems which ensure they do not lose track of the important dates by which steps must be implemented in accordance with the Amending Act. Our lessor clients should note that we do not and will not maintain those systems for them.

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Limitations of this circular

This circular is intended to provide a short summary only of new legislation and does not purport to provide legal or other advice or, to be an exhaustive analysis of the legislation. We have only focused on the more important parts of the new legislation 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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