
New Regulations commence 29 September 2020

COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendment Regulations 2020: ("Regulations")

Background

The COVID-19 Omnibus (Emergency Measures) Commercial Leases and Licences) Regulations 2020 ("Old Regulations") granted a regime of rent waiver and/or deferral in respect of *eligible leases*. The new Regulations extend the operation of the Old Regulations until 31 December 2020, modify eligible lease requirements, empower the Small Business Commissioner to make binding orders regarding rent relief and give jurisdiction to VCAT to review, amend or enforce binding orders. It is impossible to summarise the Regulations in any circular and given they are some 43 pages in length, reference should be made to the actual legislation which can be found at <https://www.legislation.vic.gov.au/asmade/statutory-rules/covid-19-omnibus-emergency-measures-commercial-leases-and-licences-0>. The detail of the enabling Act and Old Regulations is discussed in our Leases Circulars of May and September 2020 copies of which can be obtained from <http://www.andrewgray.com.au/Leases.html>

Confusion over dates

The enabling Act, the *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* has extended the operation of its predecessor Act until 26 April 2020. However, the Old Regulations are extended only until 31 December 2020. There may (or may not) be further extensions.

Outgoings moratorium and definition changes

Regulation 9 of the Old Regulations limited the no breach of an *eligible lease* concept to non-payment of rent. The Regulations now extend that concept of no breach to include non-payment of outgoings. A number of definitions in the Old Regulations have been replaced with new definitions which take their meaning from the Federal Government's JobKeeper legislation. The important changes and new definitions are inserted in respect of *actual decline in turnover test*, *jobkeeper payment*, *SME entity* and *turnover test period*.

Eligible leases and the application for relief process

The Old Regulations operated only in respect of *eligible leases*. The Regulations extend that definition to include a retail or non-retail lease to an *SME entity* which is also entitled to a *jobkeeper payment*. JobKeeper payments are excluded from the definition of *turnover*.

To request rent relief a lessee must now provide a lessor (under Regulation 10 as amended), with a statement:

- 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 prescribed classes);
- Setting out the lessee's decline in turnover associated with the premises (and no other premises);
- The ATO's JobKeeper application receipt number together with the ATO's most recent JobKeeper notice;
- 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

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which evidences the lessee's decline in turnover as a percentage is calculated in accordance with the *actual decline in turnover test*.

What a lessor must offer

A lessor must now offer eligible lessees, rent relief from the date of a lessee's application until 31 December 2020 which at a minimum, is proportional to the decline in a lessee's turnover associated with the premises. The nature of rent relief has not changed and at least 50% of rent relief must be by way of waiver. Where a lease is a gross lease or inclusive of outgoings, rent relief must be offered inclusive of outgoings. A lessor cannot request payment of deferred rent until 31 December 2020 and deferred rent is interest free. Any subsequent application for relief by a lessee must also follow the Regulation 10 process set out above.

Expanded Small Business Commission role

Under the Old Regulations, the Small Business Commissioner ("SBC") had a limited role. This has now been greatly expanded to the point of the SBC being granted quasi-judicial powers, a potentially lethal concept! Under Regulation 20, the SBC can mediate an *eligible lease* dispute concerning rent relief. Regulation 20 sets out a convoluted timetable for both lessor and lessee to provide dispute notices, information and responses in formats published on the SBC's website.

If ultimately, mediation by the SBC fails, or a party does not engage in the process in good faith, the SBC can issue a Regulation 20A Certificate.

Binding orders to be made by the SBC

A lessee can apply to the SBC for a binding order pursuant to Regulation 21A if a Regulation 20A Certificate has been issued. In addition, a lessee can also make an application to VCAT or a court in relation to an eligible lease dispute provided a Regulation 20A Certificate has been issued.

If an application is made by a lessee for a binding order, the application is served by the SBC on the lessor, who has five business days to respond to the SBC. The SBC can thereafter, make a binding order "on the papers" without any form of hearing. A truly dangerous concept! Binding orders must give specified rent relief by waiver or deferral of rent from the date of a lessee's request, until 31 December 2020. Binding orders can be amended or revoked by the SBC.

If one accepts that VCAT undertakes judicial functions (and we make no comment on that hypothesis), it thankfully has a supervisory role over the SBC's binding order process. VCAT can amend, revoke or affirm a binding order made by the SBC. If a lessor refuses to comply with a binding order, VCAT can also enforce a binding order.

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.

ANDREW GRAY & ASSOCIATES

(03) 9707 5255
aga@andrewgray.com.au
www.andrewgray.com.au

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