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# Victorian Commercial Tenancy Relief Scheme alert

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Regulations amending the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (Principal Regulations) were passed on (and take effect from) 29 September 2020 (Amending Regulations).<sup>1</sup>

The release of the Amending Regulations follows the earlier amendment of the enabling legislation.<sup>2</sup> The key rights and responsibilities of landlords and tenants are detailed in the Regulations as opposed to the enabling legislation.

## Key changes

1. Extension of the 'relevant period' from 29 September 2020 to 31 December 2020.
2. Landlord's offer of rent relief must be at least proportional to the tenant's reduction in turnover and must apply to the period commencing on the date of the tenant's request for relief and ending on 31 December 2020.
3. Deletion of the requirement for a landlord's offer of rent relief to have regard to the landlord's financial ability to provide relief.
4. Clarification regarding the evidence tenants must provide to support rent relief claims and that a tenant's reduction in turnover must be associated solely with the premises.
5. Removal of the requirement for a tenant to be an 'employer' to qualify for relief.
6. Tenants may request further rent relief if the relief provided to date was not proportional to the tenant's reduction in turnover OR did not extend to 31 December 2020 OR the tenant's financial circumstances have materially changed. The further relief will only apply from the date of the tenant's subsequent request.
7. Deferred rent cannot be required to be repaid before 31 December 2020 (including under existing agreements).
8. Tenants may apply to the Small Business Commission (SBC) for a binding order for a landlord to provide specified rent relief.

## Extension of relevant period

Whilst the enabling legislation has been extended from 29 September 2020 to 26 April 2021, the 'relevant period' is only extended to 31 December 2020 (**Relevant Period**). The fact that the enabling legislation has been extended beyond this date suggests that further extensions to the Relevant Period are not out of the question.

No substantive amendments are made to the actions which are prohibited during the Relevant Period. The extension of the Relevant Period is of most relevance to the requirement for landlords to offer rent relief during this period.

### Eligible lease requirements

The Amending Regulations introduce the below definition of 'eligible lease':

"an eligible lease is a retail lease or a non-retail commercial lease or licence under which the tenant –

(a) is an SME entity; and

(b) is an entity entitled under section 6, 11 or 12A of the JobKeeper rules<sup>3</sup> to a JobKeeper payment<sup>4</sup>"

There is no longer a requirement for the tenant to be an 'employer', which means that sole traders, partnerships and trusts may qualify for relief (along with companies which are not an employer).

<sup>1</sup> The full title of the Amending Regulations is the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020* (Vic). References to "Regulations" in this article are to the Principal Regulations as amended by the Amending Regulations.

<sup>2</sup> The *COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic) received royal assent on 22 September 2020 and amends the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).

<sup>3</sup> "JobKeeper rules" means the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth).

<sup>4</sup> "JobKeeper payment" means a JobKeeper payment payable to an entity under section 14 of the JobKeeper rules.

The reference to the tenant being entitled to a JobKeeper payment should be read as a reference to the tenant participating in the JobKeeper scheme. This is clarified by the amendments made to regulation 10 in relation to the information tenants are required to provide when requesting rent relief (discussed below).

There remains a requirement for the lease to:

- be a retail lease or a non-retail commercial lease or licence; and
- be in effect on 29 March 2020 (being the date the Principal Regulations came into operation).

## Rent relief

### Information required to be provided by tenants

The Amending Regulations provide useful clarification regarding the information tenants are required to provide when requesting rent relief.

In addition to a statement that the lease is an eligible lease (and is not excluded from the operation of the Regulations) and information evidencing that the tenant is an SME entity, tenants are now also required to provide:

- a statement setting out the tenant's decline in turnover that is associated with the premises (and no other premises); and
- information evidencing that the tenant is entitled to a JobKeeper payment, including:
  - the receipt number issued by the Commissioner of Taxation when the tenant elected to participate in the JobKeeper scheme; and
  - a copy of the tenant's most recent notice under the JobKeeper rules to the Commissioner of Taxation.

The repeated references within the Amending Regulations to 'turnover that is associated with the premises' suggests that landlords will not be able to take into account turnover from internet sales when assessing the tenant's decline in turnover and that the turnover from other premises leased by the tenant (whether higher or lower) must also be disregarded.

### Evidence supporting decline in turnover

The tenant's stated decline in turnover is required to be:

- expressed as a whole percentage;
- calculated consistently with the actual decline in turnover test applying to the tenant relating to the most recent turnover test period applying to the tenant;<sup>5</sup>
- supported by evidence of the stated decline in turnover, including at least one of the following:
  - extracts from the tenant's accounting records;
  - the tenant's business activity statements relating to the relevant turnover test period;
  - statements issued by an ADI in respect of the tenant's account; and
  - a statement prepared by a practising accountant.

The Amending Regulations clarify that for the purpose of calculating 'turnover', a coronavirus economic response payment does not constitute turnover.

### Landlord's offer of rent relief

Arguably the most significant changes introduced by the Amending Regulations are the changes made to regulation 10(4) regarding offers of rent relief made by landlords.

A landlord's offer is now required to:

- apply to the period starting on the date of the tenant's request and ending on 31 December 2020. Previously, the offer was required to apply to the Relevant Period (which commenced on 29 March 2020 and, prior to the Amending Regulations, expired on 29 September 2020); and
- at a **minimum**, be proportional to the decline in the tenant's turnover associated with the premises.

The previous requirement for the landlord's offer to take into account the landlord's financial ability to offer rent relief has also been deleted, however, the requirement to have regard to 'all the circumstances of the eligible lease' remains.

These are substantive changes which have the potential to significantly impact landlords who are already struggling financially. For the reasons discussed below, landlords who have already reached agreement with tenants regarding rent relief at a level that is less than the tenant's reduction in turnover may be exposed to claims for further relief.



<sup>5</sup> Actual decline in turnover test' and 'turnover test period' have the meaning given in section 4 of the JobKeeper rules.

## Subsequent rent relief

Regulation 11 has been substantially amended and now provides that where an eligible lease has been varied or an agreement has been reached regarding rent relief and:

- subsequently the tenant's financial circumstances have materially changed; or
- the variation or agreement was made prior to 29 September 2020 and does not provide rent relief that is, as a minimum, proportional to the decline in the tenant's turnover associated with the premises; or
- the rent relief provided to the tenant does not apply to the whole of the period commencing on the date the tenant requested rent relief and ending on 31 December 2020,

the tenant may request further rent relief.

It is important to note that:

- the above criteria are alternatives and a tenant will only need to demonstrate that one of the criteria have been met to request further rent relief; and
- a landlord's offer of subsequent rent relief will only need to relate to the period between the date of the tenant's request and 31 December 2020. For this reason there will likely be a significant number of requests received by landlords in the coming days and weeks.

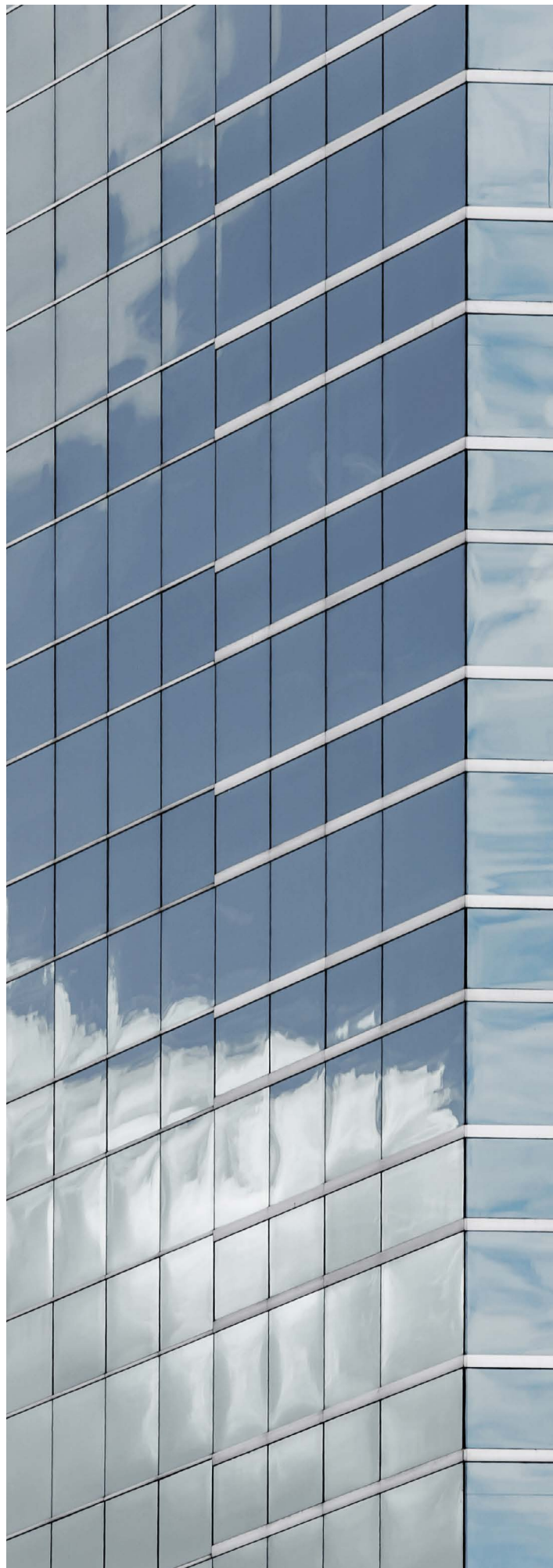
There remains no guidance in the Amending Regulations regarding what constitutes a "material change" in financial circumstances.

## Repayment of deferred rent

Regulation 16 has been amended to provide that landlords cannot request repayment of deferred rent until 31 December 2020. Previously, landlords could not require repayment of deferred rent before the earlier of expiry of the Relevant Period and expiry of the term of the lease. Importantly, this amendment will apply to rent deferred pursuant to an agreement entered into prior to 29 September 2020.

Landlords and tenants who have reached agreements involving deferred rent, the repayment of which is to commence between 29 September 2020 and 31 December 2020, should take note of this change and will need to postpone any such deferred rent payments until at least 31 December 2020.

No changes have been made to regulation 16(b) which requires deferred rent to be repaid over the greater of the balance of the term of the eligible lease and 24 months.



## Additional clarifications

Whilst less substantive than the changes discussed above, the Amending Regulations also provide the following useful clarifications regarding previous ambiguities in the Principal Regulations.

- A tenant under an eligible lease will not be in breach of a provision of the eligible lease that relates to the payment of rent or outgoings if the tenant does not pay the required rent or outgoings, provided that during the Relevant Period the tenant:
  - complies with regulations 10(1) to (5); and
  - pays the reduced rent or outgoings which has been agreed with the landlord.

Previously the regulation referred only to rent and made no mention of outgoings.

- The restriction on landlords under eligible leases:
  - evicting a tenant;
  - re-entering or otherwise recovering possession of the premises; and
  - having recourse to security relating to the non-payment of rent,

only relates to action taken by the landlord on grounds of non-payment of rent or outgoings. In other words, landlords would not be prevented from evicting a tenant or re-entering the premises due to a fundamental breach of the lease other than non-payment of rent or outgoings.

- Regulation 18 has been amended to clarify that a tenant will not be in breach of a provision of an eligible lease 'that relates to the opening hours of the business they carry out at the premises' if they reduce opening hours or close the premises during the Relevant Period. This is a useful clarification and means that tenants cannot rely on this regulation to avoid other obligations they may have under the lease (such as cleaning or maintenance).
- If a tenant ceases to be entitled to a JobKeeper payment and there is an existing agreement (or binding order) in place regarding rent relief, for so long as the agreement or order applies regulations 9, 12, 14, 15 and 18 will continue to apply.

## Dispute resolution

Extensive amendments have been made to Part 6 of the Regulations in relation to the referral of disputes to the SBC and the ability for the SBC to issue binding orders. The key changes made in this regard are:

- A tenant under an eligible lease may apply to the SBC for a binding order if:
  - the parties have failed reach agreement regarding rent relief;
  - the SBC has issued a certificate stating that mediation has either failed, or is unlikely, to resolve the dispute; and
  - the tenant has not commenced VCAT or court proceedings in relation to the dispute.
- The SBC must not hold any form of hearing for an application for a binding order (ie the SBC's decision will be made on the basis of the materials submitted by the parties).
- The SBC must make a binding order if is satisfied that "it is fair and reasonable in all the circumstances" to do so (and provided the relevant procedural requirements have been complied with and neither party has commenced VCAT or court proceedings regarding the dispute).
- Binding orders must comply with regulation 10(4), specify the rent relief required to be provided by the landlord and include the SBC's reasons for ordering the specified rent relief.
- Within 14 days after the SBC makes a decision to issue a binding order (or dismiss an application for a binding order) either party to the dispute may apply to VCAT for review of the SBC's decision. An application for review stays the operation of the binding order unless VCAT orders otherwise.
- Tenants may apply to VCAT for a determination of whether a landlord has complied with a binding order.

A number of procedural requirements relating to the seeking of binding orders as well as challenging binding orders are included in the Amending Regulations and parties to any eligible lease dispute should ensure these requirements (including timeframes) and strictly complied with.

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