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Food for thought



The Impact of COVID-19 on the Legal Obligations of Parties in Property Transactions

Tuesday 2 June 2020 | 1 CPD Hour

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1 CPD Hour |

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Presenter Profiles

Chair - Jamie McCallum, Senior Associate, Harwood Andrews

Jamie McCallum is a property lawyer at Harwood Andrews, and became a LIV Accredited Property Law Specialist in 2019. Jamie's property practice is quite broad, but mainly covers commercial, industrial, and farming property transactions, leases, subdivision and development work, adverse possession, easements, restrictive covenants and general law matters.



Speaker - David Lloyd, Barrister, Victorian Bar

David Lloyd is a barrister of more than 22 years' standing practising exclusively in the field of property law. He has been a member of the Property Committee of the LIV for over 25 years. He is a co-author of Sale of Land Act Victoria which was published by Thompson Reuters in October 2015 and one of three authors of the standard contract of sale of land co-published by the LIV and the REIV. He is also a regular presenter at conferences and seminars and has written many articles for the Law Institute Journal.



Speaker - Sam Hopper, Barrister, Victorian Bar

Sam is one of the Victorian Bar's leading retail and commercial leasing and property lawyers.

He regularly appears in the Supreme and County Courts and the Victorian Civil and Administrative Tribunal, and advises in the following areas:

- retail and commercial leasing disputes
- valuation and rental determination cases
- sale of land disputes
- easements and laneway disputes
- restrictive covenants



Impacts on the sale and purchase of land

Presenter: David Lloyd, Barrister, Victorian Bar

Compliance: Substantive Law

The Impact of COVID-19 on the Legal Obligations of Parties in Property Transactions

Presenter:

- David Lloyd, Barrister, Victorian Bar

Recent legislation and regulations

- *COVID-19 Omnibus (Emergency Measures) Act 2020*
- *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*
- *Residential Tenancies (COVID-19 Emergency Measures) Regulations 2020*
- *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*
- None of these statutory instruments directly addresses the sale of land generally, or contracts for the sale of land

On-line auctions

- *Sale of Land Act 1962*, section 41(1)(b)
- *Sale of Land (Public Auction) Regulations 2014*, regulation 7
- Requirements designed for traditional style auctions
- eBay style on-line bidding
- On-line auctions via Zoom or similar technology



Electronic signing & exchange of contracts

- *Sale of Land Act 1962*, section 32(2)
- LIV/REIV contract of sale of land, general condition 1
- *Instruments Act 1958*, s 126(2)
- *Electronic Transactions (Victoria) Act 2000*, Part 2A (sections 14A to 14E)
- *COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*, Part 2 Division 3 – “remote” witnessing



Electronic signing & exchange of contracts (cont.)

- LIV “COVID-19 Guidance on witnessing documents electronically” (9 April 2020 version – update expected shortly)



Potential settlement difficulties

- Pre-settlement physical inspection
- Delay in finance due to lenders being busy or short-staffed
- Re-valuation of property & loan to valuation ratio (LVR)
- Liability of lender to purchaser where approval is conditional
- Electronic completion through PEXA



Sale subject to lease or tenancy – rent

- Vendor's entitlement to reduce rent

Sherwin v Shakspeare (1854) 5 De G. M. & G 517; 43 ER 970: where necessary to align rent with that of comparable properties in the area, and in the ordinary course of management by a prudent owner

- Is the purchaser bound ?
- Position of tenant as against purchaser
- Effect of *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*, regulation 10
- Ability of vendor to recover unpaid rent after settlement



Sale subject to lease or tenancy – rent (cont.)

- *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*, regulation 10(6): an agreement to waive or defer payment of rent does not affect the “demise” but rather the mode or manner of performance, hence a deed of variation of lease is not required



Sale subject to lease or tenancy – term

- Abandonment of premises by tenant
- Landlord's obligation to re-let:
Egmont v Smith (1877) LR 6 ChD 469
- Is the purchaser bound ?
- Surrender by agreement
- Statutory extension of term - *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*, regulation 13



Questions?



The Impact of COVID-19 on the Legal Obligations of Parties in Property Transactions

Presenter: Samuel Hopper, Barrister, Victorian Bar

Compliance: Substantive Law

Notes for presentation to the Law Institute of Victoria

Legislative responses to COVID-19 for landlords and tenants of commercial leases

Sam Hopper, barrister

2 June 2020

1. The scheme regulating COVID-19 rent relief for commercial and retail tenancies consists of:
 - (a) National Cabinet Mandatory Code of Conduct SME Commercial Leasing Principles During COVID-19 (the **Code**);
 - (b) *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (the **Act**); and
 - (c) *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (the **Regulations**).

Supporting materials

2. A comprehensive summary of the scheme has been published by the LIV in its guideline available here:
<https://protect-au.mimecast.com/s/wrP6Czvknynhw98Vwi4Ek3u?domain=liv.asn.au>
3. The Office of the Small Business Commission has also published a FAQ factsheet that is available here: <https://www.vsbcb.vic.gov.au/fact-sheets-and-resources/faqs/>
4. Any relevant developments are posted on my blog at www.samhopperbarrister.com as soon as they come to hand.

The Code – basic outline

5. The Code was published by the National Cabinet and sets out a series of principles to be given effect to on a state-by-state basis.
6. The basic scheme of the Code is that:

- (a) it applies to tenants or groups with a turnover of under \$50M;
 - (b) landlords cannot terminate leases for non-payment of rent or a failure to trade, or call on securities during the pandemic;
 - (c) tenants are to be given rent relief proportionate to the downturn in their trade, half of which was a waiver and half was a deferred for 24 months or the balance of the lease term (whichever is longer); and
 - (d) if the parties cannot reach agreement, they are to mediate.
7. The Code is not law. However, it was referred to in the second reading speech to the Act, so may be relevant to the interpretation of the Act and the Regulations.

The Act – basic outline

8. The Act has the following key features:
- (a) It is '*facilitating*' legislation that allows regulations to be created to give effect to the Code;
 - (b) it commences retrospectively on 29 March 2020 and sunsets on 29 September 2020; and
 - (c) it allows the creation of regulations that:
 - i. apply to SME entities (ie entities that have a group turnover of under \$50M);
 - ii. apply to leases that were in effect on 29 March 2020 and the tenant of which is a '*eligible for*' and '*a participant in*' JobKeeper; and
 - iii. apply to leases and licences (capturing franchisee outlet licences and shared office spaces).

Regulations – basic outline

9. The Regulations do not mirror the Code entirely. They have the following key features:
- (a) they apply from 29 March to 29 September 2020 to leases and licences that are in effect on 29 March 2020;
 - (b) they apply to tenants with a turnover or group turnover of less than \$50M (regs 5, 6 and 7). You may need specialist advice on the application of the group provisions. Consider approaching a tax lawyer;
 - (c) both parties are required to approach their dealings under the Regulations reasonably and in good faith (reg 8);
 - (d) if the tenant makes its application for rent relief and otherwise complied with reg 10 (which includes an obligation to negotiate in good faith) then the landlord is prohibited from terminating the lease or calling on tenant's securities during the period of the Regulations and can be fined if it does (reg 9);
 - (e) the tenant must make an application in writing for rent relief that is accompanied by certain information (reg 10(1) and (2), discussed further below);
 - (f) the landlord has 14 days (or longer as agreed in writing) to provide an offer of rent relief (reg 10(3));
 - (g) the landlord's offer of rent relief must comply with certain requirements, including waiving some rent and deferring some rent (reg 10(4), discussed further below);
 - (h) the parties must then negotiate in good faith (reg 10(5));
 - (i) if the tenant's financial circumstances materially change it can ask for more rent relief, but the landlord is not required to offer to waive any rent (reg 11);

- (j) rent increases during the period 29 March to 29 September 2020 are prohibited (reg 12);
- (k) if the landlord and tenant agree on a deferral of rent, then the term of the lease must be extended by the period of the deferral (reg 13). It is not clear how this will affect options;
- (l) the landlord must '*consider*' waiving recovery of outgoings for any period in which the tenant is not able to operate its business and the landlord can reduce services provided to the tenant over that period (reg 14);
- (m) if outgoings charged to the landlord are reduced, then the landlord must pass on that reduction (reg 15);
- (n) deferred rent must be paid over the balance of the lease term (before any extension under reg 13) or 24 months, whichever is longer (reg 16);
- (o) landlords cannot charge interest or other fees for any deferred payments (reg 17);
- (p) a tenant is not in breach of a lease if it closes or reduces its trading hours during the period 29 March to 29 September 2020 and the landlord is prohibited from terminating the lease or having recourse to the tenant's security, and may be fined if it does (reg 18);
- (q) any information provided under the Regulations is confidential (reg 19);
- (r) if the landlord and tenant cannot agree on rent relief, then they must mediate at the Office of the Small Business Commission (reg 20); and
- (s) the dispute resolution provisions in Division 4 of Part 10 the *Retail Leases Act 2003 (Vic)* are mirrored in the Regulations, save that VCAT does not have exclusive jurisdiction (reg 22). Generally, the parties need to get a certificate from the Small Business Commission before they can litigate.

Issue 1: remedies available in litigation

10. Most of these cases will be resolved by a combination of goodwill, the pressure of mediation and commercial pressure created by the prohibition on termination for non-payment of rent under reg 9.
11. However, for those that do not settle, we do not yet know what remedies are available in litigation under the Act and the Regulations.
12. Regulation 22 states that:
 - (2) *In making an order in a proceeding relating to an eligible lease dispute, VCAT must also have regard to—*
 - (a) *the matters set out in regulation 10(4)(d); and*
 - (b) *any certificate issued by the Small Business Commission under regulation 23(1) that mediation under this Part has failed, or is unlikely to resolve the dispute.*
13. Section 91 of the *Retail Leases Act 2003 (Vic)*, which is contained in Division 4 of Part 10, states that:

91 Orders the Tribunal can make

- (1) *The Tribunal may, in a proceeding under this Part, make one or more orders—*
 - (a) *requiring a party to do, or not to do, anything including to provide specified facilities, services, fixtures or fittings under a retail premises lease or to return specified fixtures or fittings to another party; or*
 - (b) *requiring a party to pay money, by way of restitution or compensation or otherwise, to a specified person; or*
 - (c) *rectifying a retail premises lease or other document; or*

(d) *granting recovery of possession of the retail premises to the landlord;*
or

(e) *requiring anything else to be done that it—*

(i) *is empowered to require to be done under this Act or the
Victorian Civil and Administrative Tribunal Act 1998; or*

(ii) *considers necessary or desirable to resolve the matter
concerned.*

(2) *In ordering the payment of a sum of money by a party, the Tribunal
may order the payment of interest on that sum by the party at the rate
fixed from time to time under section 2 of the Penalty Interests Rates
Act 1983 or at any lesser rate it thinks appropriate.*

14. it is unclear whether:

(a) the Court or Tribunal is limited to a form of judicial review, where it could:

i. find that the landlord has not made a compliant offer of rent relief or
that the parties are not acting reasonably and in good faith; and

ii. an order that the landlord make a compliant offer and/or the parties
negotiate in good faith; or

(b) the Court or Tribunal can undertake a form of merits review in which it can
substitute its own assessment of a compliant offer of rent relief.

15. *'Judicial review'* could lead to a merry-go-round of non-compliant offers or bad faith
negotiations.

16. *'Merits review'* could lead to parties being stuck with an unsatisfactory commercial
outcome.

17. We may hear from either Government or the Courts or the Tribunal about this in due
course.

Issue 2: what does the landlord need to offer?

18. Regulation 10(4) states that (footnote and emphasis added):

- (4) *A landlord's offer of rent relief under subregulation (3) **must be based on all the circumstances of the eligible lease and—***
 - (a) *relate to up to 100% of the rent payable under the eligible lease during the relevant period; and*
 - (b) *provide that no less than 50% of the rent relief offered by the landlord must be in the form of a waiver of rent, unless a landlord and a tenant otherwise agree in writing; and*
 - (c) *apply to the relevant period¹; and*
 - (d) *take into account—*
 - (i) ***the reduction in a tenant's turnover associated with the premises during the relevant period; and***
 - (ii) *any waiver given pursuant to regulation 14(2); and*
 - (iii) ***whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the eligible lease, including the payment of rent; and***
 - (iv) ***a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic; and***

¹ *relevant period* means the period—

- (a) commencing on 29 March 2020; and
- (b) ending on 29 September 2020;

(v) *any reduction to any outgoings charged, imposed or levied in relation to the premises.*

19. We do not yet know precisely what a compliant or non-compliant offer looks like, but we can say that:

- (a) the landlord must offer a percentage of rent relief, have of which is waiver. The other half probably must be deferral;
- (b) unlike the Code, the Regulations do not require the landlord's offer of rent relief to relate directly to the downturn in the tenant's trade;
- (c) the landlord's offer must be '*based on all the circumstances of the lease*' and '*take into account*' the items set out in 10(4)(d). That appears to include the both the tenant's and the landlord's financial positions;
- (d) it must apply to the whole period 29 March to 29 September 2020;
- (e) it must offer to extend the lease by six months; and
- (f) it must comply with the obligation to act reasonably and in good faith.

20. Beyond that, each offer will vary case-by-case.

21. This presents an opportunity for landlord's lawyers to sit down with their clients and formulate the best offer that they can, while also complying with those obligations. That will require judgement on the part of the landlord and its lawyers. It will also require the landlord to have regard to the information that the tenant provides to it.

22. The challenge for lawyers is to assist their clients to make the best offer they can that takes account of all the required considerations and cannot be set aside as non-compliant in subsequent litigation.

23. Importantly, the information that the tenant chooses to provide the landlord will affect the offers that the landlord can make because the offer must '*have regard to*' the tenant's circumstances.

Issues 3: what information does the tenant need to provide to the landlord

24. Reg 10 states that:

- (1) A tenant under an eligible lease may request rent relief from the landlord under the eligible lease.*
- (2) A request under subregulation (1) must be in writing and be accompanied by—*
 - (a) a statement by the tenant that the tenant's lease is an eligible lease and the lease is not excluded from the operation of these Regulations under section 13(3) of the Act; and*
 - (b) information that evidences that the tenant—*
 - (i) is an SME entity; and*
 - (ii) qualifies for, and is a participant in, the jobkeeper scheme.*

25. The Regulations do not otherwise detail what information the tenant must provide to the landlord.

26. The Small Business Commission's FAQ states that:

What turnover information is appropriate for a landlord to request from the tenant to help inform their offer of rent relief?

A landlord can ask the tenant for information:

- *extracted from an accounting system*
- *extracted from BAS*
- *provided to a financial institution.*

What turnover information is not appropriate for a landlord to request from a tenant to help inform their offer of rent relief?

A landlord should not:

- *request future cash flow projections*
- *request balance sheets, profit and loss or year to date financials*
- *request the tenant's bank balance*
- *require the financial information to be verified, examined, assured, audited or provided by a third party such as an accountant*

- *require an accountant to provide a letter of comfort or similar on the financial information.*

27. It is not clear at this stage what weight a court or the Tribunal will attach to that information as it is not contained in the Regulations.
28. The Government may publish more information to assist on this issue (or may amend the Regulations) and there may be a decision from VCAT on this question in due course. I will post any further information on my blog as it comes to hand.
29. In the meantime, in my view:
 - (a) the only information a tenant is required to provide is the information required by regulation 10(2);
 - (b) there is nothing in the Regulations preventing a landlord from requesting financial information from a tenant, but the tenant is not required to provide financials;
 - (c) however, the landlord's offer under reg 10(4) must '*take into account*':
 - (a) the reduction in the tenant's turnover and the impact of rent relief on the tenant's ability to pay the rent and keep trading under reg 10(4)(d)(i) and (iii); and
 - (b) the landlord's ability to offer rent relief under reg 10(4)(iv);
 - (d) consequently, it is prudent for the tenant to provide at least some financial information. If it does not, then the landlord has no information to '*have regard to*' under reg 10(4)(d)(i) and (iii), but it can still have regard to its financial circumstances under reg 10(4)(d)(iv);
 - (e) the question of what information to provide will vary on a case-by-case basis. However, I suggest the following guiding principles:
 - (a) the tenant should provide information about the downturn in its revenue to provide information to satisfy reg 10(4)(d)(i);

- (b) the more cash and credit it has available, the less information it will want to disclose to the landlord under reg 10(4)(d)(iii) and the more it will want to rely on the relationship between the downturn in trade and rent relief in the Code (and any other official publications that suggest that tenants are only required to provide turnover figures);
- (c) on the other hand, the less information it provides about its financial position, the more it looks like it has access to funds and pay the rent, so there is a fine balancing act at this point; and
- (d) the aim is to provide to the landlord information to which it must have regard in regs 10(4)(d)(i) and (iii) which make it hard for the landlord to make a low-ball compliant offer; and
- (f) the ultimate decision about what information to provide is a matter of commercial judgment in light of the available information about the tenant and the landlord. The provision and interpretation of information by tenants presents an opportunity for lawyers on both sides to add value for their client's by applying their judgment in assessing that information.

Issue 4: what about entities over the \$50M threshold?

- 30. The Regulations do not apply to an entity or group with a turnover above \$50M.
- 31. In that case, the parties have the usual commercial levers to negotiate with, ie the landlord needs the tenant and the tenant needs the landlord.
- 32. Also, the Code states that parties are expected to comply with '*the spirit of the Code*'. It is unclear what this means or how it could be given effect. There is a possibility that it might form part of an unconscionable conduct claim, but it is unclear at this stage what that would look like.

Additional Materials

Live Chat : COVID-19 Q&A – Tenancy Reforms

Presenters:

- Jamie Bedelis, Principal, Bedelis Lawyers
- Malwina Peacock, Managing Legal Counsel, Vicinity Centres
- Samuel Hopper, Barrister, Victorian Bar

 #LIVEvents

LEGISLATIVE FRAMEWORK

- Common Law doctrine of Frustration / Force Majeure
- National Cabinet Mandatory Code of Conduct SME Commercial Leasing Principles During COVID-19
(available [here](#))
- COVID-19 Omnibus (Emergency Measures) Act 2020 - Overarching & Leasing Principles
(available [here](#))
- COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 – ‘commercial tenancy relief scheme’
(available [here](#))

❖ **Section 13** of the Act 'Meaning of eligible lease'

(1) An **eligible lease** is a retail lease or a non-retail commercial lease or licence --

(a) that is in effect on the day the first regulations made under section 15 come into operation; and

(b) under which the tenant is, on or after the commencement of the first regulations made under section 15 –

(i) an **SME entity**; and

(ii) an employer who qualifies for the **jobkeeper scheme** and is a participant in the jobkeeper scheme

➤ **The Act - Section 12 – Definitions**

'SME entity' - has the same meaning as in section 4 of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package Act 2020) (Cth)*.

➤ **Guarantee Act –**

Section 5 - Meaning of SME entity

(1) For the purposes of the definition of SME entity in section 4 of the Act, an entity is an SME entity at a time in a financial year (the current year) if:

(a) the entity carries on a business in the current year, or is a non-profit body during the current year; and

(b) one or both of the following applies:

(i) the entity's annual turnover for the current year is likely to be less than \$50 million;

(ii) the entity carried on a business in the financial year (the previous year) before the current year, or was a non-profit body during the previous year, and its annual turnover for the previous year was less than \$50 million.

Employers (including non-for-profits) will be eligible for the subsidy if:

- their business has a turnover of less than \$1 billion and their turnover has fallen by more than 30 percent; or
- their business has a turnover of \$1 billion or more and their turnover has fallen by more than 50 per cent;
- 15% fall in turnover (for ACNC-registered charities other than universities and schools); and
- the business is not subject to the Major Bank Levy.

To establish that a business has faced a 30% (or 50%) fall in their turnover, most businesses would be expected to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier.

If the business cannot satisfy the 30% turnover test, the First Commissioner has the discretion to consider additional information including when the business turnover is typically highly variable. This test may allow the Commission to consider additional information such as budgeted, information, cashflow projects bad debt write-offs and redundancy costs.

NOTE: [LIV Guide to COVID-19 Government Stimulus & Support packages.](#)

❖ The Act:

- **‘relevant period’** – commencing on 29 March 2020 to 29 September 2020
- **‘Turnover’** – section 12 of the Act, the things set out in section 5(2)(a) to (g) of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020*

❖ **Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020**

➤ S.4 'Definitions'

'**annual turnover**' has the meaning given by subsection 5(2)

'**relevant period**' – commencing on 29 March 2020 ending on 29 September 2020

➤ S. 5(2) '**Meaning of annual turnover**'

(2) The annual turnover of an entity for a financial year is the total of the following that is earned in the year in the course of the business:

- (a) the proceeds of sales of goods and/or services;
- (b) commission income;
- (c) repair and service income;
- (d) rent, leasing and hiring income;
- (e) government bounties and subsidies;
- (f) interest, royalties and dividends;
- (g) other operating income.

Leases Excluded

❖ Regulations Section 6:

Section 6 - Prescribed excluded classes of lease:

- (a) agricultural, pastoral, horticultural or apicultural activities;
- (b) poultry farming, dairy farming, aquaculture, tree-farming or any business that consists of the cultivation of soils, the gathering of crops or rearing of livestock;
- (c) Grazing, including agistment;
- (d) An activity prescribed for the purposes of paragraph (c) of the definition of **farming operation** in section 3 of the *Farm Debt Mediation Act 2011*

❖ Reg.7 – 'Prescribed group, relationship or connection'

- S.13(3)(a) & (b) of the Act prescribed leases are excluded
- Def. of 'prescribed group' linked to s 328-125 & s 328-130 of ITAA 1997 (Cth).

❖ Regulation 10 – Rent Relief (request)

- (1) A tenant under an eligible lease may request rent relief from the landlord under the eligible lease.
- (2) A request under subregulation (1) must be in writing and be accompanied by—
 - (a) a statement by the tenant that the tenant's lease is an eligible lease and the lease is not excluded from the operation of these Regulations under section 13(3) of the Act: and
 - (b) information that evidences that the tenant—
 - (i) is an SME entity; and
 - (ii) qualifies for, and is a participant in, the jobkeeper scheme.
- (3) On receipt of a tenant's request under subregulation (1) which conforms with subregulation (2), a landlord must offer rent relief to the tenant under an eligible lease within –
 - (a) 14 days after receiving that request; or
 - (b) a different time frame as agreed between the landlord and the tenant in writing.

- (4) A landlord's offer of rent relief under subregulation (3) must be based on all the circumstances of the eligible lease and –
 - (a) relate to up to 100% of the rent payable under the eligible lease during the relevant period; and
 - (b) provide that no less than 50% of the rent relief offered by the landlord must be in the form of a waiver of rent, unless a landlord; and
 - (c) apply to the relevant period; and
 - (d) take into account –
 - (i) the reduction in a tenant's turnover associated with the premises during the relevant period; and
 - (ii) any waiver given pursuant to regulation 14(2); and
 - (iii) whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the eligible lease, including the payment of rent; and

- (iv) a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic; and
- (v) any reduction to any outgoings charged, imposed or levied in relation to the premises.
- (5) Following receipt of a landlord's offer by a tenant, the tenant and the landlord **must negotiate in good faith with a view to agreeing** on the rent relief to apply during the relevant period.
- (6) Rent relief under this regulation may be given effect by the landlord and tenant by –
 - (a) a variation to the eligible lease; or
 - (b) any other agreement between them that gives effect to the rent relief, either directly or indirectly.

Notes:

- 2. If any of the rent payable under an eligible lease has been waived under a variation to the eligible lease or under another agreement between the landlord and tenant that gives effect to the rent relief, either directly or indirectly, a landlord will be bound by that variation or agreement and will not be able to subsequently make any claim for payment of the waived part of the rent.

❖ **Regulation 13 – Extension of Term**

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) If the payment of any rent is deferred by variation of an eligible lease or an agreement mentioned under regulation 10(6), the landlord under the eligible lease must offer the tenant under the eligible an extension to the term of their eligible lease on the same terms and conditions that applied under the eligible lease before the commencement of these Regulations.
- (3) The extension offered under subregulation (2) must be equivalent to the period for which rent is deferred, unless a landlord and a tenant agree in writing that this regulation does not apply to their eligible lease.

Note:

An eligible lease is taken to provide as set out in this regulation and, as such, it forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

❖ **Regulation 18 – Tenant may reduce business hours or cease business during the relevant period**

- (1) A tenant under an eligible lease is not in breach of the eligible lease if, during the relevant period they –
- (a) reduce the opening hours of the business they carry out at the premises; or
 - (b) close the premises and cease to carry out any business at the premises.
- **Reg.18(2)** – landlord must not evict or attempt to evict a tenant
 - **Reg.18(3)** – landlord must not re-enter or otherwise recover, or attempt to re-enter or recover.....
 - **Reg.18(4)** – landlord must not have recourse, or attempt to have recourse to any security relating the non-payment of rent

Penalty: 20 penalty units for breaching Reg.18

- “**security**” – means anything provided by the tenant or any other person securing the performance of a tenant's obligation under an eligible lease, including a bond, security deposit, indemnity or guarantee
- S.13(3) Exclusion: Prescribed group of companies that is excluded from the Regulations is defined by reference to ss 328-125 and 328-130 of the [Income Tax Assessment Act 1997 \(Cth\)](#)
- All eligible leases are amended to impose an obligation to cooperate and act reasonably in good faith in discussions and actions associated with matters to which the Regulations apply;
- A tenant is only entitled to protection from termination for non-payment of rent if it makes a request in accordance with Regulation 10.
- Reg.19 Landlords and tenants must not divulge or communicate personal, business process or financial information obtained under or in connection with the Regulations (save in specified circumstances).
- A regime for mediation is created that mirrors the regime under the RLA. Parties can choose to go to either VCAT or the Court once a mediation certificate has been produced. Reg.'s 20 – 23
- Reg.10(4)(d) ‘take into account’ – interpretation analogous to rental determinations in administrative law.

VBSC Compulsory Mediation – Part 6

[Commercial \(including retail\) tenants and landlords](#) – VSBC media release

The Victorian Small Business Commission (VSBC) is providing small businesses with fast access to help in resolving a range of disputes that could arise during the coronavirus (COVID- 19) crisis period.

Help includes assistance early on, often just over the phone, and where disputes can't be resolved this way, access to a mediation service that works.

Victorian Small Business Commissioner Judy O'Connell said she has seen an increase in commercial tenants and landlords contacting the VSBC over situations where the tenant is having a lot of difficulty paying rent

Under Victoria's commercial tenancy relief scheme, the VSBC is providing advice and help to resolve retail leasing disputes through its mediation service.

If you would like to discuss your commercial tenancy situation please email the Victorian Small Business Commission at enquiries@vsbc.vic.gov.au or call 13 8722

VSBC - FAQs guidance on the operation of the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Vic).

‘turnover information’ – what is it

[Commercial tenancy relief scheme – support for tenants and landlords in response to coronavirus \(COVID-19\) FAQs.](#)

The FAQs address many the important questions that practitioners are asking about the Regulations. All practitioners dealing with applications for rent relief (whether for a landlord or a tenant) should be familiar with the FAQs and should consider providing them to their clients.

What turnover information is not appropriate for a landlord to request from a tenant to help inform their offer of rent relief?

A landlord should not:

- request future cash flow projections
- request balance sheets, profit and loss or year to date financials
- request the tenant's bank balance
- require the financial information to be verified, examined, assured, audited or provided by a third party such as an accountant
- require an accountant to provide a letter of comfort or similar on the financial information.

What turnover information is appropriate for a landlord to request from the tenant to help inform their offer of rent relief?

A landlord can ask the tenant for information:

- extracted from an accounting system
- extracted from BAS
- provided to a financial institution.

Q&A

We value your feedback

A SurveyMonkey link has now been placed in the chat box and will also be emailed to you later today. Please take a moment to provide your feedback for today's program so we can continue to improve on CPD offerings.

Thank you for your attention



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Guidance on COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020

Version 1– Issued 21 May 2020

This document has been prepared as guidance for LIV members to respond to issues arising from COVID-19 and may be amended from time to time to respond to changes in government policy or address new issues.

LIV acknowledges the FAQs prepared by the Victorian Small Business Commission on 'Commercial tenancy relief scheme – support for tenants and landlords in response to coronavirus (COVID-19) FAQs', which were further developed in consultation with LIV's Property and Environmental Law Section's Leases Committee.

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Guidance on COVID-19 – SME Commercial Tenancy Relief Scheme

1. Introduction

This guide is designed to provide practical guidance to legal practitioners on the Victorian commercial tenancy rent relief scheme which applies to certain Small to Medium Enterprises (**SME**).

The legislative scheme introduced by the Victorian Government creates temporary relief for eligible tenants to lessen the significant negative impact the COVID-19 pandemic has had on SME's turnover and trade.

Legal practitioners are encouraged to examine their own individual circumstances in order to obtain rent relief introduced by the commercial tenancy rent relief scheme.

2. Emergency Legislation

[National Cabinet Mandatory Code of Conduct SME Commercial Leasing Principles During COVID-19](#) (**Mandatory Code of Conduct**), announced by Prime Minister on 7 April 2020, applies to commercial leases of eligible SME tenants.

[COVID-19 Omnibus \(Emergency Measures\) Act 2020](#) (**the Act**), enabling legislation providing regulation making power pursuant to s 15¹. Eligible SME entities will be entitled to receive rent relief in the form of either waivers and/or deferrals.

[COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020](#) (**Commercial Leases and Licences Regulations**) introduces temporary measures for landlords and tenants to manage the effect of the COVID-19 pandemic has had on a SME's turnover, including a mechanism for resolving disputes by mediation through the Victorian Small Business Commission (**VSBC**).

¹ COVID-19 Omnibus (Emergency Measures) Act 2020 Part 2.2, s 15 'Regulations modifying law relating to certain retail leases and non-retail commercial leases and licences'.

Key Features

- a six-month prohibition on commercial tenancy evictions for non-payment of rent for SME's with an annual turnover under \$50 million that have experienced a 30% reduction in turnover.
- rent relief for tenants for the relevant period beginning commencing on **29 March 2020** and ending on **29 September 2020**² (the relevant period).
- a rental waiver and/or deferral payment negotiated between the landlord and tenant.
- a freeze on rent increases during the relevant period for commercial tenants.
- a compulsory mediation service for commercial tenants and landlords to support good faith negotiations.
- The Government has also introduced land tax relief to commercial or industrial landlords who provide rent relief to their tenants. For commercial landlords to be eligible for land tax relief:
 - the property must be rented to a tenant with an annual turnover of up to \$50 million; and
 - the tenant must be eligible for the Commonwealth Government's JobKeeper Payment.

For further information please refer to:

SRO – [Land tax announcement 'Tax relief for landlords and businesses](#).

SBV – [Economic Survival and Jobs Package \(Apply for the Business Support Fund\)](#).

ATO – [JobKeeper payment](#)³ | [JobKeeper – Eligible employers](#)⁴.

Treasury – [JobKeeper payment](#) | [JobKeeper Payment FAQs](#)

² COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020, Reg 4 'Definitions'

³ Above n 2

⁴ If employers qualify for JobKeeper payments for the first fortnight because your turnover has declined by the relevant amount, you remain eligible and do not need to keep testing turnover in following months. However, you will have ongoing monthly reporting requirements

3. The Mandatory Code of Conduct

“The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.”⁵

The Mandatory Code of Conduct applies to all SME entities that are suffering “financial stress or hardship”⁶ (as defined under the code), as a result of the loss in turnover caused by the COVID-19 pandemic, where the tenant:

- a) is eligible for the Commonwealth Government’s JobKeeper scheme⁷; and
 - b) has an annual turnover of up to \$50 million⁸.
- (referred to as a ‘**SME entity**’).

SME tenants who are eligible for the JobKeeper payment automatically qualify for the commercial tenancy rent relief scheme under the Mandatory Code of Conduct.

Overarching Principles

The Mandatory Code of Conduct introduces ‘good faith’ negotiation principles which apply to commercial, retail, and industrial tenants. Most importantly the code recognises that ‘landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities’. Therefore, in order to meet the objectives set out in the Mandatory Code of Conduct, landlords and tenants are required to act in an ‘open, honest and transparent manner’ and provide sufficient and accurate information whilst negotiating in good faith⁹.

⁵ National Cabinet Mandatory Code of Conduct SME Commercial Leasing Principles During COVID-19 retrieved from <<https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>>

⁶ National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19, p 5 ‘Definitions’ - Financial stress or hardship is the inability of a tenant (whether individual, business or company), to generate sufficient revenue that causes the tenant to be unable to meet its financial and / or contractual commitments as a result of the COVID-19 pandemic.

⁷ For further information on JobKeeper scheme see: [LIV Guide to COVID-19 Government Stimulus & Support packages](#) |

“To establish that a business has faced a 30% (or 50%) fall in their turnover, most businesses would be expected to establish that their turnover has fallen in the relevant month or three months (depending on the natural activity statement reporting period of that business) relative to their turnover a year earlier.

If the business cannot satisfy the 30% turnover test, the First Commissioner has the discretion to consider additional information including when the business turnover is typically highly variable. This test may allow the Commission to consider additional information such as budgeted, information, cashflow projects bad debt write-offs and redundancy costs.”

⁸ For further information on calculating turnover see: [ATO ‘Applying the turnover test & FAQ’s](#)

⁹ Despite not binding in Victoria, the Mandatory Code of Conduct is referred to in Clause 15 Second Reading Speech of the COVID-19 Omnibus (Emergency Measures) Act 2020 (available [here](#)) and may be persuasive on the basis of [s. 35A Interpretation of Legislation Act 1984](#) (Vic).

Practitioners may implement the overarching principles during good faith negotiations, and/or utilise those principles in subsequent mediations held with the VSBC before proceeding to the Victorian Civil and Administrative Tribunal (**VCAT**) or Court.

All commercial leases must be dealt with on a case-by-case basis.

Leasing Principles

The Mandatory Code of Conduct sets out 14 leasing principles which are as follows:

1. landlords must not terminate a lease for non-payment of rent over the subsequent recovery period or during the pandemic period;
2. tenants must comply with the terms of the lease. A material failure of a tenant to comply with the substantive terms of the lease will forfeit any protections afforded under by the Mandatory Code of Conduct;
3. landlord's must offer tenants proportionate rent relief in the form of waivers and/or deferrals of up to 100% of the rent payable, based on the reduction in the tenant's trade during the COVID-19 pandemic period and the subsequent recovery period. **Any amount of rent relief provided in the form of waiver may not be recovered by the landlord over the term of the lease.**
4. rental waivers must constitute no less than 50% of the total rent reduction of the rent payable over the COVID-19 pandemic period. Tenant's may waive the 50% waiver requirement by agreement. Parties must have regard to the landlord's financial ability to provide additional waivers.

 "Waiver and deferral: includes any form of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any such commercial outcome of agreement reached between the parties.¹⁰"
5. rent deferrals must be amortized over the greater of either, the balance of the lease term or 24 months.
6. any reduction in statutory charges (e.g. land tax) or insurance will be passed on to the tenant in the appropriate proportion applicable under the lease terms.
7. landlord's should seek to share any benefit the landlord receives due to a deferral of loan repayments provided by a financial institution, in a proportionate manner with the tenant.

¹⁰ Above n 5, Leasing Principle 3

8. landlords should seek to waive recovery of any other expense, or outgoing payable by a tenant under the lease terms, where appropriate, including the period the tenant is not able to trade.
9. where negotiated arrangements are completed in accordance with the Mandatory Code of Conduct which necessitate repayment of deferred rent, this should occur over an extended lease period in order to avoid any undue financial burden on the tenant. Deferred rent repayments should not commence until the earlier of the COVID-19 pandemic ending, or the existing lease expiring, whilst taking into account a reasonable subsequent recovery period.
10. no fees, interest or other charges should be applied with respect to the waved rent, and no fees, charges or punitive interest may be charged on deferrals.
11. landlords must not draw on a tenant's security for the non-payment of rent during the pandemic period, or the subsequent recovery period.
12. the tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period.
13. landlords agree to a freeze on rent increases for the duration of the COVID-19 pandemic period and a subsequent reasonable recovery period, except for retail leases based on turnover rent (unless otherwise agreed); and
14. landlords may not apply any prohibition on, or levy any penalties, if tenants reduce opening hours or cease to trade due during the COVID-19 pandemic.

Rent relief offered by the landlord in accordance with the leasing principles outlined in the Mandatory Code of Conduct must be proportionate¹¹ to the SME's loss of turnover, and also provide the tenant a reasonable recovery period to reimburse to the landlord the deferred rent payment. Deferred rent may be recovered either over the balance of the lease term or amortized for a period of no less than 24 months (whichever is the greater), unless otherwise agreed by the parties.

Where landlords and tenants cannot reach agreement on leasing arrangements the matter should be referred to the Victorian Small Business Commissions mediation process, before legal proceedings can be commenced (subject to some exceptions).

¹¹ Above n 5, Leasing Principle 4.

See Definition n 4 – "Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme".

Landlords and tenants must not use the mediation process to prolong and/or frustrate amicable resolution of any disputes.

4. Commercial Leases and Licenses Regulations

The Commercial Leases and Licenses Regulations are distinct from the Mandatory Code of Conduct. Landlords and tenants may have regard to the code during negotiations but are ultimately not bound by the code. For example, the leasing principle of proportionate rent relief¹² is not explicitly stated in the Commercial Leases and Licenses Regulations.

Eligibility Requirements

Eligible leases are retail and non-retail commercial leases (including licences and sub-licences), where a tenant/licensee is¹³:

1. an SME entity; and
2. qualifies for the ATO JobKeeper scheme.

An SME entity is an entity which satisfies the criteria set out in the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package Act 2020)* (Cth)¹⁴. The entity (including not-profit entities) must carry on a business and either had an annual turnover of less than \$50 million in the previous financial year or anticipates annual turnover of less than \$50 million in the current financial year¹⁵.

This eligibility is particularly crucial for start-up SME entities who have not traded for a 12 month period and therefore, may not be eligible for the JobKeeper scheme for the financial year that they apply¹⁶.

The 'annual turnover' of an entity for a financial year is the total of the following earned, during the course of business¹⁷:

- (a) the proceeds of sales of goods and/or services;
- (b) commission income;
- (c) repair and service income;
- (d) rent, leasing and hiring income;
- (e) government bounties and subsidies;

¹² Above n 10

¹³ COVID-19 Omnibus (Emergency Measures) Act 2020, s 13(1)(b)(i) & (ii).

¹⁴ *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package Act 2020)* (Cth), s 5

¹⁵ Ibid

¹⁶ See further Above n 7

¹⁷ Above n 13, s 5(2)

- (f) interest, royalties and dividends;
- (g) other operating income.

The LIV refers to the guidance published by the Victorian Small Business Commission on the recommended financial disclosure tenants should provide to landlords upon request. For more information see [VSBC - 'Commercial tenancy relief scheme – support for tenants and landlords in response to coronavirus \(COVID-19\) FAQs'](#)

Excluded Leases

The following commercial leases are excluded under the Commercial Leases and Licences Regulations:

1. Regulation 6 'Prescribed excluded classes of lease'¹⁸;
2. Farming and various farming activities and operations. Agricultural, pastoral, horticultural and various other agricultural activities¹⁹; and
3. Section 13(3)(a) and (b) of the Act, a tenant that is a prescribed group that is connected within the meaning of ss 328-125 and 328-130 of the *Income Tax Assessment Act 1997* (Cth)²⁰.

Commercial Tenancy Relief Scheme (CTRS)

Tenant's request

In order to obtain relief in accordance with CTRS, tenants must first request rent relief from the landlord²¹. The request must:

- be in writing;
- be accompanied by a statement that the tenant's lease is an eligible lease (and not an excluded lease under the Act),
- include information that evidences that the tenant is an SME entity and qualifies for, and is a participant in, the JobKeeper scheme²².

¹⁸ Above n 13, s 13(3)(a) – (c)

¹⁹ *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*, Reg 6(a) – (d)

²⁰ Above n 2, Reg.7

²¹ Above n 2, Reg.10(3)

²² Above n 2, Reg.10(2)(b)

Landlord's offer

Once the rent relief request has been made, the landlord must offer rent relief to the tenant (under an eligible lease) within 14 days, or a different timeframe by agreement.

The landlord's offer of rent relief must be based on all the circumstances of the lease and must²³:

- (a) include an offer of rent relief to up to 100% under the eligible lease;
- (b) provide that no less than 50% of the rent relief offered must be in the form of a waiver, unless otherwise agreed between the landlord and tenant; and
- (c) apply during the relevant period²⁴.

Rent relief negotiations between the parties must not only consider the financial impact the COVID-19 pandemic has had on the tenant's turnover but also the landlord's financial circumstances to offer adequate rent relief to the tenant. The rent relief offered by the landlord must take into account²⁵:

- (i) the reduction in a tenant's turnover associated with the premises during the relevant period;
- (ii) any waiver of outgoings provided by the landlord;
- (iii) whether a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations under the eligible lease, including the payment of rent;
- (iv) a landlord's financial ability to offer rent relief, including rent relief provided to a landlord by any of its lenders in response to the COVID-19 pandemic;
- (v) any reductions to any outgoings charged, imposed or levied in relation to the premises.

Following receipt of a landlord's offer, the parties must negotiate in good faith with a view to agreeing on the rent relief applied to the relevant period²⁶.

²³ Above n 2, Reg 10(4)(a)-(c)

²⁴ Above n 2.

²⁵ Above n 2, Reg 10(4)(d)(i)-(iv)

²⁶ Above n 2, Reg.10(5)

General obligations

Non-payment of rent

A tenant under an eligible lease will not be in breach of its lease for non-payment of rent, during the relevant period²⁷, only if the tenant has:

- requested rent relief in writing;
- provided the landlord with a statement that the lease is an eligible lease;
- provided information which evidences that the tenant is an SME entity and is a participant in the JobKeeper scheme; and
- negotiates in good faith with a view to agreeing on rent relief to apply during the relevant period²⁸.

Extension of Term & Deferral of Rent

If payment of rent is deferred, the landlord must offer the tenant an extension to the lease equivalent to the period that the rent is deferred²⁹.

Consequently, an extension to the term of the lease must be equivalent to the period during which the rent is not paid by the tenant³⁰. For example, if rent is deferred over a six month period, and amortized over a 24 months period³¹, the tenant is entitled to an additional six month extension on the lease term (being the deferred period for which rent was not paid by the tenant). Otherwise, parties may agree to a longer extension term³².

Any rent relief offered, can be brought into operation by either a variation of lease, or any other agreement between the landlord and tenant either directly or indirectly³³.

Reduction in Outgoings

The landlord must consider waiving recovery of any outgoing or other expense payable by a tenant under the lease for any part of the relevant period that the tenant is not able to trade³⁴.

²⁷ Above n 2, Reg 4 Definition: “**relevant period**” means the period – (a) commencing on 29 March 2020; and (b) ending on 29 September 2020

²⁸ Above n 2, Reg 9(1)(a) & (b)

²⁹ Above n 2, Reg 13

³⁰ Above n 2, Reg 16(2)(b)

³¹ Above n 2, Reg 16(2)(b)(ii)

³² Above n 2, Reg 13(3) and 16(4)

³³ Above n 2, Reg 10(6)

³⁴ Above n 2, Reg 14(2) & Reg 15

Therefore, a reduction in payment of the landlords outgoings, payable by the tenant under the lease, must be passed proportionally to the tenant³⁵.

In the event that the tenant is not able to operate their business, a landlord may cease to provide, or reduce the provision of, any service to the leased premises if reasonable to do so in the circumstances or the tenant makes a reasonable request³⁶.

Rent reviews and increases

A landlord is not entitled to increase the rent throughout the relevant period, without the tenant's consent³⁷.

However, this prohibition does not apply to rent that is increased by reference to volume of trade of a tenant's business, known as 'turnover rent'. Additionally, this does not apply where any variation to the lease is agreed by reference to a tenant's reduction in revenue.

Tenant trading hours

The tenant is not in breach of the lease if during the relevant period,³⁸ the tenant reduces the trading hours of the business or ceases trading and closes the premises.

The landlord must not, or must not purport or attempt to:

- terminate a lease;
- take possession, re-enter or otherwise recover the premises; or
- have recourse to any security³⁹ held on behalf of the tenant, either as a result of the non-payment of rent or due to the reduction in trading hours during the relevant period⁴⁰.

A breach of any of the above is an offence under the Commercial Leases and Licenses Regulations punishable by a maximum penalty of 20 penalty units⁴¹.

³⁵ Above n 2, Reg 15

³⁶ Above n 2, Reg 14(2)

³⁷ Above n 2, Reg 12.

³⁸ Above n 2

³⁹ Above n 2, Reg 4 Definition: "**security** – means anything provided by a tenant or any other person securing the performance of a tenant's obligations under an eligible lease, including a bond, security deposit, indemnity or guarantee."

⁴⁰ Above n 2, Reg.18(2) – (4)

⁴¹ Ibid

No fees, interest, or other charges⁴².

A landlord must not require a tenant under an eligible lease to pay interest, or any other fee or charge in relation to any payment of rent deferred by variation to the eligible lease, or any other agreement.

Subsequent rent relief

If the tenant's financial circumstances 'materially change'⁴³ after a variation to the lease is completed, the tenant may make a further request to the landlord for subsequent rent relief.

The legislative process under the CTRS⁴⁴ applies to negotiations for further rent relief, however, the landlord is not required to offer another 50% rent relief waiver in respect of any reduced rent subsequently offered.

Confidentiality

The parties must not divulge or communicate protected information⁴⁵ obtained under or in connection with the operation of the Commercial Leases and Licenses Regulations (subject to certain exemptions)⁴⁶.

Dispute Resolution⁴⁷

Should parties be unable to negotiate an agreement, their dispute may be referred to the VSBC under the Commercial Leases and Licenses Regulations⁴⁸. The mediations conducted are analogous to those mediations conducted by the VSBC under the *Retail Leases Act 2003* (Vic)⁴⁹.

⁴² Above n 2, Reg 17

⁴³ Above n 2, Reg.11

⁴⁴ Above n 2, Reg 10

⁴⁵ Above n 2, Reg 19(3) **protected information** means – (a) personal information; or (b) information relating to business processes or financial information (including information about the trade of a business).

⁴⁶ Above n 2, Reg 19

⁴⁷ Above n 2, Part 6

⁴⁸ Above n 2, Reg 20

⁴⁹ *Retail Leases Act 2003*, Division 3

In the event a dispute cannot be resolved by mediation, a landlord or tenant can apply to the VCAT or a Court to determine the dispute⁵⁰. Before issuing proceedings, unresolved matters must be certified by the Victorian Small Business Commission that the mediation has either failed, or is unlikely to resolve⁵¹.

The VSBC is providing guidance and advice in relation to the CTRS and can help to resolve retail leasing disputes through its mediation service. If you would like to discuss your commercial tenancy situation, please email the VSBC at enquiries@vsbc.vic.gov.au or call 13 8722⁵².

5. Deed of Variation

Any agreement that is reached between the landlord and tenant pursuant to the CTRS should be documented by a deed variation to the lease⁵³. It is critical that any variation of the lease be documented.

The main reasons for this is:

- so parties are clear as to what was agreed between the landlord and tenant to ensure that parties are fully aware of their obligations, including what rent relief was applied for the relevant period and/or the rent deferral payment made by the tenant over a subsequent recovery period.
- to avoid future disputes about the agreed terms. Negotiations can often be lengthy and develop overtime, involving numerous communications between the parties and/or their legal representatives. An agreement avoids a potential dispute and possible litigation.
- it will provide clarity and guidance for any future incoming tenant or landlord who purchases the property before rent relief is repaid.

Practitioners are reminded where a lease is extended by a deed of variation, the variation must not merely extend the expiration date of the lease, but must grant (demise) an extended term of the lease to the tenant. Should the lease include Guarantor(s), the Guarantor(s) should also be party to the Variation of Lease.

⁵⁰ Above n 2, Reg 23

⁵¹ Above n 2, Reg 23(2) & Reg 23(2)(b) – or has sought, and been granted leave from the Supreme Court to commence proceedings in relation to the dispute

⁵² For further information see: VSBC '[Commercial \(including retail\) tenants and landlords – Responding to coronavirus \(COVID-19\)](#)'

⁵³ Above n 2, Reg 10(6)(a)



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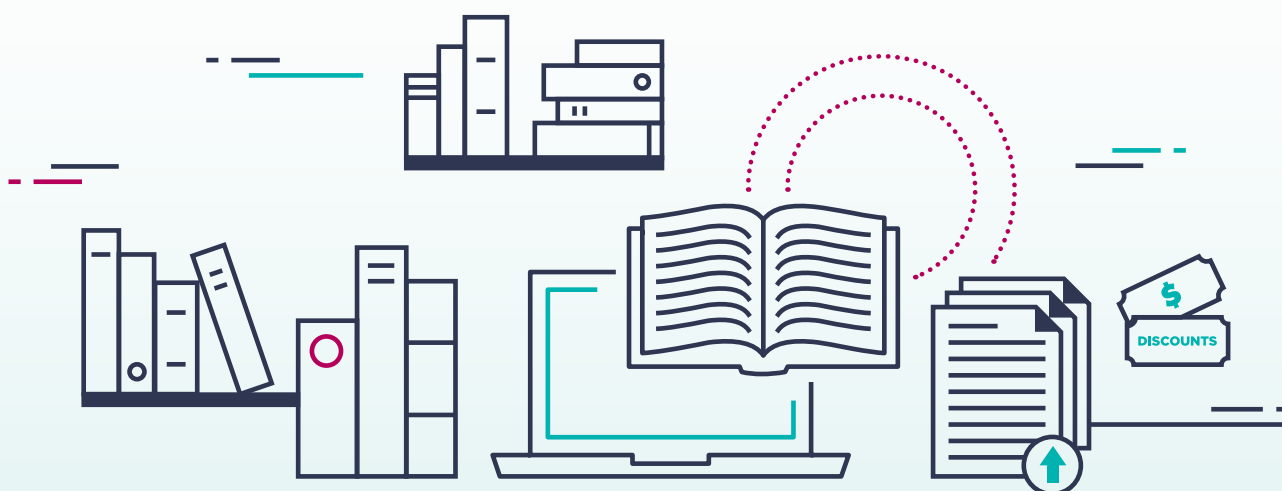
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