

## **COVID-19: Victoria implements the national code of conduct for commercial tenancies**

Date: 14 May 2020

Source: [Victorian Legislation](#)

### **Abstract:**

It was announced by the Prime Minister on 7 April 2020 that the national mandatory code of conduct for commercial tenancies affected by the COVID-19 pandemic (**Code of Conduct**) would be given effect in each state and territory through state and territory legislation. This legislation will, during the COVID-19 pandemic period, modify the operation of:

- the provisions of commercial leases (including retail, office and industrial leases); and
- state and territory legislation relating to commercial and retail leases,

to provide relief to commercial tenants suffering financial stress or hardship as a direct result of the COVID-19 pandemic. See our update on 9 April 2020 ([COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#)),

### **Commercial tenancies regulations made in Victoria**

On 1 May 2020, pursuant to s15 of the [COVID-19 Omnibus \(Emergency Measures\) Act 2020 \(Vic\) \(Act\)](#), the Victorian government gave effect to the Code of Conduct in Victoria by making the [COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020 \(Vic\) \(Regulations\)](#).

### **When do Regulations come into operation?**

The Regulations commence (retrospectively) on 29 March 2020 and expire on 29 September 2020 (“**relevant period**”).

### **Who do the Regulations apply to?**

The Regulations apply to “eligible leases”. An “**eligible lease**” is defined under the Act as:

- a retail lease (including a sub-lease or an agreement for a lease or sub-lease);
- a non-retail commercial lease (being a lease (including a sub-lease or an agreement for a lease or sub-lease) of a premises under which the premises are let for the sole or predominant purpose of carrying on a business); or
- a commercial licence (being a licence, sub-licence or agreement for a licence or sub-licence under which a person has the right to occupy, non-exclusively, a part of a premises for the sole or predominant purpose of carrying on a business),

that is **in effect on 29 March 2020** and under which the tenant:

- is a SME entity, i.e. an entity which carries on a business (or is a non-profit body) whose annual turnover in the current financial year is likely to be less than \$50m or whose annual turnover in the previous financial year was less than \$50m (see s4 of the *Guarantee of Lending to*

*Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020* (Cth)); and

- an employer who qualifies for and is a participant in the federal government's [jobkeeper scheme](#) (e.g. the tenant has experienced a 30% drop in turnover (or 15% in the case of an ACNC-registered charity)),

but does **not** include:

- such a lease where the tenant is a member of a prescribed group of entities within the meaning of *section 328–125 of the Income Tax Assessment Act 1997* (Cth) which have an aggregate group turnover exceeding \$50m; or
- such a lease where the tenant has a relationship or connection with another entity which is its affiliate within the meaning of *section 328–130 of the Income Tax Assessment Act 1997* (Cth) and the aggregate turnover of the tenant and that affiliate exceeds \$50m.

“Turnover” is defined as the things earned or received by an entity in the most recent financial year (see s5(2)(a)-(g) of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth)).

### **Regulations deemed to form part of an eligible lease**

Some of the Regulations (8, 12, 13, 14, 15, 16, 17 and 19) expressly state that an eligible lease is taken to provide as out in these Regulations. This means that these Regulations are deemed to form part of the lease, a breach of which would be a breach of the lease.

### **What do the Regulations provide?**

The Regulations provide as follows:

#### **Work cooperatively and in good faith**

A landlord and a tenant must cooperate and act reasonably and in good faith in all discussions and actions associated with matters to which the Regulations apply.

#### **Prohibited action for non-payment of rent during the relevant period**

If a tenant does not pay the rent during the relevant period:

- the tenant is not in breach of the lease;
- the landlord cannot evict (or attempt to evict) the tenant;
- the landlord cannot re-enter or otherwise recover (or attempt to re-enter or otherwise recover) the premises; and
- the landlord cannot have recourse (or attempt to have recourse) to any security relating to the non-payment of rent, e.g. security bond, guarantee, etc.,

provided the tenant:

- complies with the prescribed rent relief procedure (see below) during the relevant period; or
- pays, during the relevant period, the rent agreed in the rent relief agreement.

#### **Tenant may reduce business hours or cease business during relevant period**

If, during the relevant period, a tenant reduces its business' opening hours or closes the premises and ceases to carry out any business at the premises:

- the tenant is not in breach of the lease;
- the landlord cannot evict (or attempt to evict) the tenant;
- the landlord cannot re-enter or otherwise recover (or attempt to re-enter or otherwise recover) the premises; and
- the landlord cannot have recourse (or attempt to have recourse) to any security relating to the non-payment of rent, e.g. security bond, guarantee, etc.

### **Rent relief procedure**

A tenant may request rent relief from the landlord in the following way:

- The request from the tenant must be in writing and be accompanied by:
  - a statement by the tenant that the tenant's lease is an eligible lease (as defined); and
  - information that evidences that the tenant:
    - is an SME entity; and
    - qualifies for, and is a participant in, the [jobkeeper scheme](#).
- On receipt of a (completed) request, a landlord must offer rent relief to the tenant within 14 days (unless a different timeframe is agreed in writing).
- A landlord's offer of rent relief must be based on all the circumstances of the lease and:
  - relate to up to 100% of the rent payable during the relevant period;
  - provide for at least 50% of the rent relief to be in the form of a waiver of rent (unless the parties agree otherwise in writing);
  - apply to the relevant period; and
  - take into account:
    - the reduction in a tenant's turnover during the relevant period;
    - any waiver given by the landlord regarding the recovery of any outgoing or other expense payable by the tenant (see below);
    - if a failure to offer sufficient rent relief would compromise a tenant's capacity to fulfil the tenant's ongoing obligations (including the payment of rent);
    - 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
    - any reduction to any outgoings charged, imposed or levied in relation to the premises (see below).
- Following receipt of a landlord's offer, 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.
- The rent relief may be given effect by a variation to the lease or any other agreement.
- A landlord will not be able to subsequently make a claim for payment of any waived rent.

### **Further subsequent rent relief**

If a tenant's financial circumstances "materially change" after an agreement has been reached, the tenant may make a further rent relief request and the same procedure (as set out above) must be followed; however, the 50% waiver requirement does not apply.

### **No rent increases**

A landlord cannot increase the rent payable at any time during the relevant period (excluding turnover rent under a retail lease) unless the parties agree otherwise in writing.

### **Recovery of outgoings or expenses**

For any part of the relevant period that a tenant is not able to operate its business at the premises:

- a landlord must consider waiving recovery of any outgoing or other expense payable by the tenant; and

- the landlord may cease to provide, or reduce provision of, any service (e.g. cleaning services) as is reasonable and in accordance with any reasonable request from the tenant.

### **Reduction in outgoings**

If any outgoings charged, imposed or levied in relation to the premises (e.g. land tax) are reduced:

- a landlord can only require a tenant to pay its proportional share of the reduced outgoing; and
- if a tenant has already paid a greater amount, the landlord must reimburse the excess amount to the tenant as soon as possible.

### **Term extension (if rent deferred)**

If any rent deferral is agreed between the parties, the landlord must offer to extend the term of the lease on the same terms and conditions that applied under the lease and for a period equivalent to the period during which the rent is deferred (unless the parties agree otherwise in writing).

### **Payment of deferred rent**

If any rent deferral is agreed between the parties:

- the landlord cannot require payment of any part of the deferred rent until the earlier of:
  - the expiry of the relevant period (i.e. 29 September 2020); and
  - the expiry of the term of the lease (before any extension – see above); and
- the payment of the deferred rent must be amortised (the method is to be agreed by the parties) over the greater of:
  - the balance of the term of the lease (including any extension – see above); and
  - a period of at least 24 months,

unless the parties agree otherwise in writing.

### **No fees, interest or charges on deferred rent**

A landlord cannot require a tenant to pay interest or any other fee or charge on any deferred rent.

### **Confidentiality of information**

A landlord or tenant must not divulge or communicate protected information (i.e. personal information or information relating to business processes or financial information) except:

- with the consent of the person to whom the information relates;
- to a professional adviser who agrees to keep it confidential;
- to an actual or prospective financier who agrees to keep it confidential;
- as authorised by the [Victorian Small Business Commission](#);
- as authorised under law; or
- for the purposes of any proceeding in a court or tribunal.

However, if applying for certain tax relief measures, a landlord may give the statement and information provided by a tenant (with its request for rent relief) to the Commissioner of State Revenue.

### **Referral of dispute for mediation by VSBC**

A landlord or a tenant may refer a dispute to the [Victorian Small Business Commission \(VSBC\)](#) for mediation but must not use mediation to prolong or frustrate reaching an agreement. They may be represented by legal practitioners but a mediator can meet them without their legal practitioners.

## Determination by VCAT or a court

- If the VSBC certifies in writing that mediation has failed, or is unlikely to resolve the dispute, a dispute may be referred to the [Victorian Civil and Administrative Tribunal \(VCAT\)](#) or to a court (other than the Supreme Court).
- An dispute may only be referred to the Supreme Court if:
  - the VSBC certifies as above in writing; or
  - the landlord or tenant seek, and the Supreme Court grants, leave to commence Supreme Court proceedings.

## Do the Regulations give full effect to the Code of Conduct?

It appears that Victoria has implemented its own modified version of the Code of Conduct, in that:

- a tenant must be an employer who qualifies for and is a participant in the [jobkeeper scheme](#) in order to benefit from the protection of the Regulations. The Code of Conduct only requires a tenant to be “eligible” for the scheme;
- there is no “reasonable recovery period”. Instead, the Regulations apply to a fixed “relevant period” (i.e. from 29 March 2020 to 29 September 2020);
- unlike the Code of Conduct, the Regulations do not require a landlord to offer a rent reduction proportionate to the reduction in the tenant’s trade. Instead, in offering rent relief, the landlord must “take into account” the reduction in the tenant’s turnover associated with the premises (and other matters). This allows other factors to be taken into account such as the landlord’s own financial situation. The reference to the “premises” is also presumably to distinguish this turnover from the turnover not associated with the premises, e.g. online sales;
- rent deferrals are not required. The Code of Conduct requires landlords to offer rent reductions, by way of a waiver or a deferral;
- landlords are only required to offer lease extensions for any rent deferrals. The Code of Conduct requires landlords to offer lease extensions for any rent waivers or rent deferrals;
- a landlord cannot terminate a lease for non-payment of rent if a tenant complies with the rent relief procedure or pays the reduced rent (in the rent relief agreement). The Code of Conduct contains a blanket prohibition on landlords terminating leases for non-payment of rent;
- a tenant is allowed to make a subsequent relief request (although a 50% waiver is not required);
- the waiver for outgoings or expenses would only seem to be limited to the operation of the tenant’s business “at the premises”, i.e. not its business online; and
- a landlord or a tenant may refer a dispute to the VSBC for mediation. The Code of Conduct requires the parties to refer a dispute for binding nomination.

See our summary of the Code of Conduct in our update on 9 April 2020 ([COVID-19 – National Cabinet approves a mandatory code of conduct for commercial tenancies](#)).

## What issues arise from the Regulations?

- Tenants who have entered into leases after 29 March 2020 will not be able to seek rent relief (which presumably includes leases entered into pursuant to options in eligible leases).
- Given that the Regulations take effect from 29 March 2020, any arrangements already agreed before 1 May 2020 will have to be reviewed so as to comply with the Regulations (unless the parties agree otherwise).
- As noted above, it would appear that a tenant will be in breach if a tenant stops paying the rent and does not comply with the rent relief procedure or does not pay the reduced rent in the rent relief agreement during the relevant period.
- It is not clear if landlords can take action for breaches before the relevant period, i.e. before 29 March 2020, or for other breaches (i.e. other than for non-payment of rent or reducing business hours/ceasing business) during the relevant period.
- While a landlord is required to take into account a tenant’s reduction in turnover in offering rent relief, a tenant is only required, in making the request, to provide information evidencing

that it is an SME entity and that it qualifies for, and is a participant in, the [jobkeeper scheme](#). The nature and extent of the required evidence is also not clear. Accordingly, unless provided by a tenant, it is likely that a landlord will have to request this “turnover” information.

- Given that deferred rent may end up being paid after a lease has ended, landlords may wish to consider what lease securities (bank guarantees, etc.) they will hold during that period.
- Unlike a tenant, a landlord cannot request a change if its financial circumstances “materially change” after an agreement is reached. The term “materially change” is also not defined.
- It is not clear if any rent increases which are due to take place during the relevant period (i.e. under existing rent review provisions) will be lost or simply stayed until after the relevant period. Landlords may wish to take this into account in negotiating rent relief agreements.
- A landlord is not required to waive outgoings or expenses. It is only required to “consider” it. It is also not clear if “not being able to operate” is limited to government orders or if it includes a situation where it is a tenant’s choice not to operate.
- There is no time period within which disputes must be referred to the VSBC but, given the number of disputes that are likely to come before the VSBC, parties should refer disputes without delay.

See our update on 22 April 2020 ([COVID-19 and commercial tenancies — questions raised by the mandatory code and what’s next for landlords and tenants](#)).

### What should landlords and tenants do now?

Eligible Victorian tenants who are suffering financial stress or hardship as a direct result of the COVID-19 pandemic can now seek rent relief from their landlords (if they have not already done so); however, both parties need to ensure that they understand their rights and obligations under the Regulations and that they comply with all of the requirements of the Regulations. Accordingly, parties should immediately:

- determine if their lease is an “eligible lease”;
- carefully review the Regulations to determine their rights and obligations;
- communicate and commence negotiations with each other as soon as possible (if they have not already done so). Tenants should note that, if they require relief, then they have to request the relief and will not be protected by the Regulations (e.g. for non-payment of rent) unless they comply with the rent relief procedure during the relevant period. Tenants should provide to their landlords:
  - information evidencing that they are SME entities and qualify for, and are participants in, the [jobkeeper scheme](#); and
  - for efficiency, reasonable financial information evidencing their reduction in turnover. If this financial information is not provided, then landlords should request it (as landlords are required to take this into account in making a rent relief offer);
- if the tenant is a foreign person, consider if FIRB approval is required for any agreed lease extension. See our update on 30 April 2020 ([COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions](#)); and
- ensure that whatever is agreed is formally documented to avoid any disputes at a later date, preferably in a deed of variation. Any waived rent cannot subsequently be claimed back by a landlord.

### What about non eligible leases?

Landlords and tenants under non eligible leases can still adopt the principles in the Code of Conduct in negotiating amendments to their existing leasing arrangements as it was intended that the principles should apply “in spirit” to all affected businesses. But the Regulations do not apply to these leases and they cannot benefit from the protection provided by the Regulations. They remain subject to the existing law.