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

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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 15<sup>1</sup>. 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**).

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<sup>1</sup> 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**<sup>2</sup> (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](#)<sup>3</sup> | [JobKeeper – Eligible employers](#)<sup>4</sup>.

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

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

<sup>3</sup> Above n 2

<sup>4</sup> 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.”<sup>5</sup>*

The Mandatory Code of Conduct applies to all SME entities that are suffering “financial stress or hardship”<sup>6</sup> (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 scheme<sup>7</sup>; and
  - b) has an annual turnover of up to \$50 million<sup>8</sup>.
- (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 faith<sup>9</sup>.

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<sup>5</sup> 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>>

<sup>6</sup> 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.

<sup>7</sup> 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.”

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

<sup>9</sup> 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.<sup>10</sup>”
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.

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<sup>10</sup> 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 proportionate<sup>11</sup> 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).

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<sup>11</sup> 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 relief<sup>12</sup> 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 is<sup>13</sup>:

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)<sup>14</sup>. 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 year<sup>15</sup>.

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 apply<sup>16</sup>.

The '*annual turnover*' of an entity for a financial year is the total of the following earned, during the course of business<sup>17</sup>:

- (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;

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<sup>12</sup> Above n 10

<sup>13</sup> *COVID-19 Omnibus (Emergency Measures) Act 2020*, s 13(1)(b)(i) & (ii).

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

<sup>15</sup> *Ibid*

<sup>16</sup> See further Above n 7

<sup>17</sup> 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'<sup>18</sup>;
2. Farming and various farming activities and operations. Agricultural, pastoral, horticultural and various other agricultural activities<sup>19</sup>; 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)*<sup>20</sup>.

### 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 landlord<sup>21</sup>. 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 scheme<sup>22</sup>.

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<sup>18</sup> Above n 13, s 13(3)(a) – (c)

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

<sup>20</sup> Above n 2, Reg.7

<sup>21</sup> Above n 2, Reg.10(3)

<sup>22</sup> 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 must<sup>23</sup>:

- (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 period<sup>24</sup>.

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 account<sup>25</sup>:

- (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 period<sup>26</sup>.

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<sup>23</sup> Above n 2, Reg 10(4)(a)-(c)

<sup>24</sup> Above n 2.

<sup>25</sup> Above n 2, Reg 10(4)(d)(i)-(iv)

<sup>26</sup> 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 period<sup>27</sup>, 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 period<sup>28</sup>.

### 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 deferred<sup>29</sup>.

Consequently, an extension to the term of the lease must be equivalent to the period during which the rent is not paid by the tenant<sup>30</sup>. For example, if rent is deferred over a six month period, and amortized over a 24 months period<sup>31</sup>, 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 term<sup>32</sup>.

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 indirectly<sup>33</sup>.

### 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 trade<sup>34</sup>.

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

<sup>28</sup> Above n 2, Reg 9(1)(a) & (b)

<sup>29</sup> Above n 2, Reg 13

<sup>30</sup> Above n 2, Reg 16(2)(b)

<sup>31</sup> Above n 2, Reg 16(2)(b)(ii)

<sup>32</sup> Above n 2, Reg 13(3) and 16(4)

<sup>33</sup> Above n 2, Reg 10(6)

<sup>34</sup> 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 tenant<sup>35</sup>.

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 request<sup>36</sup>.

### Rent reviews and increases

A landlord is not entitled to increase the rent throughout the relevant period, without the tenant's consent<sup>37</sup>.

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,<sup>38</sup> 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 security<sup>39</sup> 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 period<sup>40</sup>.

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 units<sup>41</sup>.

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<sup>35</sup> Above n 2, Reg 15

<sup>36</sup> Above n 2, Reg 14(2)

<sup>37</sup> Above n 2, Reg 12.

<sup>38</sup> Above n 2

<sup>39</sup> 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."

<sup>40</sup> Above n 2, Reg.18(2) – (4)

<sup>41</sup> Ibid

### No fees, interest, or other charges<sup>42</sup>.

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'<sup>43</sup> 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 CTRS<sup>44</sup> 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 information<sup>45</sup> obtained under or in connection with the operation of the Commercial Leases and Licenses Regulations (subject to certain exemptions)<sup>46</sup>.

### Dispute Resolution<sup>47</sup>

Should parties be unable to negotiate an agreement, their dispute may be referred to the VSBC under the Commercial Leases and Licenses Regulations<sup>48</sup>. The mediations conducted are analogous to those mediations conducted by the VSBC under the *Retail Leases Act 2003* (Vic)<sup>49</sup>.

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<sup>42</sup> Above n 2, Reg 17

<sup>43</sup> Above n 2, Reg.11

<sup>44</sup> Above n 2, Reg 10

<sup>45</sup> 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).

<sup>46</sup> Above n 2, Reg 19

<sup>47</sup> Above n 2, Part 6

<sup>48</sup> Above n 2, Reg 20

<sup>49</sup> *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 dispute<sup>50</sup>. Before issuing proceedings, unresolved matters must be certified by the Victorian Small Business Commission that the mediation has either failed, or is unlikely to resolve<sup>51</sup>.

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](mailto:enquiries@vsbc.vic.gov.au) or call 13 8722<sup>52</sup>.

## 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 lease<sup>53</sup>. 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.

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<sup>50</sup> Above n 2, Reg 23

<sup>51</sup> 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

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

<sup>53</sup> Above n 2, Reg 10(6)(a)



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