

LEGAL BULLETIN



COVID -19 AND COMMERCIAL LEASES- NEW REGULATIONS

In our last Legal Bulletin, we discussed the release of the COVID -19 Omnibus (emergency measures) Act 2020 (“**the Act**”) as it applied in relation to the commercial leasing Code (“**the Code**”). The Act fell short of providing the necessary detail on how the Code was to apply in Victoria. These details were to be provided by regulations made under section 15 of the Act (“**the Regulations**”). These regulations have now released, allowing us to advise on how the Code is to operate in relation to commercial tenancies.

The purpose of this bulletin is to summarise the impact of the Regulations. As we outline below, there are some important differences between what is stated in the Code and what is now made law by the Regulations.

*As discussed further below, it is important for Landlords and Tenants impacted by the Act and the Regulations to enter into a **written Variation of the lease** to give legal effect to the rent relief available [see regulation 10(6)].*

ELIGIBILITY

The first step for a commercial Landlord or Tenant is to determine whether the Regulations will apply (“**Eligible lease**”).

For yours to be an Eligible Lease: -

- (a) the Tenant’s annual turnover:
 - i. in the Financial Year ending 30 June 2019 must have been less than **\$50m**; and/or

- ii. in the current Financial Year is likely to be less than \$50m.

- (b) alternatively, if the Tenant is part of a **prescribed group of companies**, the aggregate turnover of that group must not exceed \$50m; and
- (c) the Tenant must be both eligible for **and**, further, participating in the **JobKeeper program**. (ie including a drop off of turnover of 30% or more in a previous period).

A commercial lease will not be eligible if the premises is wholly or predominantly used for:

- (a) Agricultural, pastoral, horticultural, or apicultural activities;
- (b) Farming (poultry, dairy, tree or aquaculture), cultivation of soils, crops or livestock; or
- (c) Grazing or agistment.

If the Tenant to your lease is a **franchisee** or a member of a **corporate group**, we suggest that you contact us for more specific advice as to whether your is an Eligible lease

APPLICATION

Whereas the Code suggested that the new laws would apply for a ‘Pandemic Period’ of 6 months plus a ‘reasonable recovery period’, the Act applies to mandate rent relief for the period from **29 March 2020 to 29 September 2020** (“**relevant period**”). There is no mention whatsoever in the Act or the Regulations for any period outside of this term.

Unless the parties agree otherwise, the usual terms of the lease shall apply to any period before and after the relevant period.



LEGAL BULLETIN



REQUEST FOR RENT RELIEF

It should be noted that the Regulations do not automatically entitle a Tenant to rent relief – instead, the Tenant must request rent relief from the Landlord. When making this request, the Tenant must:

- (a) Provide a statement that the lease is an eligible lease within the meaning of the legislation;
- (b) Provide evidence that the Tenant qualifies for and is a participant in the JobKeeper scheme. Noting the requirements of the JobKeeper program, this will include evidence regarding the financial performance of the Tenant's business – the Landlord must treat this information as confidential. **Please note** that the Regulations do not specify what financial information has to be provided by the Tenant to the Landlord and this is something that the government may provide further direction and guidance in the weeks ahead.

Once the Landlord receives the request, they must make an offer of rent relief to the Tenant within **14 days**. Given this, the new law contemplates the Landlord making the first offer of rent relief – of course, the parties may choose to take a different approach to their negotiation.

OFFERING RENT RELIEF

The Regulations depart significantly from the Code on this question - whereas the Code held that Landlords must offer "*proportionate reductions in rent payable... based on the reduction in the Tenant's trade*"; the Regulations state that reduction of the Tenant's turnover will be just one of a number

of factors which the Landlord must take into account when offering rent relief.

The **other factors** that the Landlord must take into account are:

- (a) any waiver of any outgoings that the Landlord offers the Tenant;
- (b) the Tenant's ability to comply with the lease if sufficient rent relief is not provided – this promises to be a contentious point as Tenants may look to rely on this requirement for rent relief which exceeds the drop-off in their turnover;
- (c) the Landlord's ability to offer rent relief (including any relief that the Landlord has received from its lenders) – this is a significant departure from the Code as it means that the Landlord's financial position will be relevant to the amount of rent relief offered; and
- (d) any reduction in outgoings that are charged to the Landlord.

Further, the Landlord must only consider the reduced turnover of the Tenant that is **associated with the premises**. As such, if some or all of the Tenant's turnover is generated from another premises, this may not be relevant – we anticipate that this will lead to disputes and uncertainty where a Tenant holds (for example) eligible leases for both (1) manufacturing and (2) retail premises with different Landlords.

Rent relief can be up to 100% of the rent payable during the relevant period. Where rent is reduced:

- (a) **50%** of the reduced rent shall be **waived**; and



LEGAL BULLETIN



- (b) **50%** of the reduced rent shall be **deferred**.

Unless the parties agree otherwise:

- (a) rent will be reduced for the relevant period (ie 29 March to 29 September 2020);
- (b) the Tenant must commence repayment of any deferred rent on 29 September 2020 (or the expiry of the lease if earlier); and
- (c) the deferred rent must be repaid, free of interest, over the remainder of the lease term (or 24 months if longer).

CHANGES IN THE TENANT'S FINANCIAL POSITION DURING THE RELEVANT PERIOD

An issue that was not addressed in the Code is the rights and obligations of the parties if a Tenant's turnover worsens after the rent relief has been agreed.

In these circumstances, the Regulations allow for **subsequent rent relief** if a Tenant's circumstances "materially changed" during the relevant period. What is a 'material change' is not defined, however where any subsequent rent relief is agreed, the Landlord is obliged only to offer a **deferral** of this sum, and not a waiver. Given this, Tenants should consider when to request rent relief from the Landlord, as the first agreement may be the best one that they can get.

It should also be noted that if a **Tenant's position improves** (or a Landlord's position worsens), there is no corresponding right for the Landlord to decrease the rent relief – given this, Landlords should be careful to look ahead when negotiating rent relief.

Because these issues are not dealt with in the Regulations, we recommend that there be an appropriate clause in the Variation of Lease Agreement to address these circumstances and to accommodate any possible unfavorable circumstances to both the Landlord and the Tenant.

SCHEDULED RENT INCREASES

Unless the parties agree otherwise, no scheduled rent increase can occur between 29 March and 29 September 2020. While the Regulations are silent on this question, we understand that any such scheduled increase will be delayed until after 29 September 2020, rather than waived altogether.

Considering the above, we note that the Regulations do not prevent rent **decreases**. As such, it appears that:

- (a) if a market review is scheduled during this period; and
- (b) a valuer is engaged to determine the market rent in accordance with the lease; and
- (c) the valuer determines that the rent should decrease; then
- (d) it appears that this decrease will be binding and will apply as per the lease.

Parties should keep this in mind when negotiating rent relief.

EXTENSION OF THE LEASE TERM

The Regulations state that where rent relief is granted, the Landlord must (unless the parties agree otherwise) offer the Tenant an extension to the current lease term for a period



LEGAL BULLETIN



which is equal to the rent deferral period (in most cases this will be 6 months).

The Regulations also state that the Tenant must (unless the Landlord agrees) accept or reject the entire extension that is offered – ie, if the Landlord offers a 6-month extension, the Tenant cannot elect to take a 3-month extension without the Landlord’s approval.

ISSUES WITH OUTGOINGS & EXPENSES

The Regulations hold that a Landlord “*must consider*” waiving its right to recover outgoings or expenses in respect of any period during which the Tenant is “*not able to operate their business from the premises*”. While the waiver of any outgoings and expenses may be taken into consideration in the reduction of rent: -

- (a) it is not clear what is meant by ‘*must consider*’. For example, can the Landlord, having considered this matter, refuse to waive these outgoings without reasonable grounds?
- (b) it is not clear what is meant by a Tenant being ‘*not able to operate their business*’. Does this mean that the Tenant must have been required to close their business by law, or does this include those Tenants who have chosen to close when they could have stayed open?

The Regulations also hold that where the Landlord benefits from any reduction in outgoings (for example discounted Council Rates), they must pass that reduction on the Tenant. If the Tenant has paid that outgoing in advance, the Landlord must refund the relevant portion to the Tenant ASAP.

HOW TO APPROACH YOUR NEGOTIATIONS

The outcome of any negotiation should be a written agreement that addresses each of the requirements of the new laws, as well as any other issues that are important to the parties.

As each of the key aspects of the Regulations are negotiable, Landlords and Tenants should consider the following questions before starting discussions with the other party:

- (a) when should the rent relief start and finish?
- (b) by what % should the rent be reduced?
- (c) of the reduced rent, what % should be waived and what % deferred?
- (d) do you want the current lease term to be extended? If so, by how much?
- (e) how have the Landlord’s financial circumstances been affected by the coronavirus?
- (f) has the Landlord benefited from any reduced or refunded outgoings?
- (g) when is the next rental increase scheduled?
- (h) has the Tenant been keeping up to date with rent? If not, how will then catch up?

MEDIATION

If the Landlord and Tenant cannot reach agreement either party may apply for mediation of the dispute through the Victorian Small Business Commissioner.

LEGAL BULLETIN



At Hill Legal, we expect that many negotiations will require mediation - given this, parties should not delay in making an application for mediation and would be well advised to considering taking this step at the first sign of a dispute to avoid delay.

HOW CAN HILL LEGAL HELP YOU?

At Hill Legal, we are marshalling our staff and resources to assist Landlords and Tenants with issues concerning these new laws and the parties' negotiations. We will be making available, via an online webform, a low-cost "Deed of Variation of Lease" so that you can implement the rent relief and other agreements that concern your lease.

If Landlords and Tenants can reach an agreement without our assistance, they can put these agreements into legal effect by completing these documents online.

If parties cannot reach agreement, Hill Legal can assist through advice and representation in respect of your negotiations or at any mediation.

We also note that the Regulations do not address defaults that had occurred before the start of the pandemic, or the commencement of the relevant period. If such a default had occurred, we suggest that you contact us to discuss and obtain advice about the options that are available to you.

The regulations and the Code are silent on who pays the costs associated with the variation of the lease. Typically, however, most leases would enable the costs of varying the lease under the Code to be a cost associated with any "default or variation of the lease" and therefore recoverable from the Tenant. Accordingly, at Hill Legal, we believe

that these costs should be minimised as much as possible for the benefit of both parties.

WHAT SHOULD YOU DO NOW?

If you are the Landlord or Tenant of a commercial lease you should take steps to formalise a written agreement to implement the operation of the Code and the Regulations.

In addition to the above questions, the below information should be gathered, as it will be required to complete a semi-customised Deed of Variation of Lease.

Tenants should also gather evidence of their reduced turnover due to the pandemic.

Tenants who want to enjoy the benefits of the Code will need to be eligible for and have applied for JobKeeper assistance – evidence of this should also be gathered.

If you have started negotiations and there is any dispute, consider applying for mediation at the VSBC now, to avoid waiting.

If you require Hill Legal's assistance, we will ask you to provide us with each of the following documents, so please locate these as soon as possible:

- (a) Copy of the lease;
- (b) Copy of personal guarantees & indemnities that are provided under the lease;
- (c) Copy of any documents (Deeds, letters, etc.) by which the lease has been varied, transferred, or assigned since its commencement.



LEGAL BULLETIN



LEASE DETAILS	
Commencement Date of the current lease term	
Expiry date of current lease term	
Current rent amount per month (exclusive of GST)	
On what date is rent next scheduled to be increased?	
By what method is rent next scheduled to be reviewed?	
Number of options to renew the lease which are available to the Tenant	
Name of the Landlord	
Name of the Tenant	
Identity the Tenant's guarantor (if any)	

COVID-19 CONSIDERATIONS	
Has the Tenant closed their doors for any period of the pandemic?	
By what % has the Tenant's trade decreased since the pandemic began?	
Is the Tenant participating in the JobKeeper scheme?	
Has the Landlord received any reduction or refund of statutory charges (such as council rates, water rates, or land tax) or insurance changes in respect of the premises as?	
How has the Landlord's financial position been impacted by the coronavirus?	
Is the Tenant a Franchisee or a member of a corporate group?	

OTHER CONSIDERATIONS	
Is the Tenant in arrears of rent?	
Is the Tenant in arrears of any other payments due under the lease?	
Was the Tenant in default of the lease before 29 March?	



May 2020

LEGAL BULLETIN



A handwritten signature in black ink, appearing to read 'Ryan Doll'.

Ryan Doll

Commercial Lawyer, Hill Legal

A handwritten signature in black ink, appearing to read 'Chris Hill'.



LL.B; B.Juris; Dip.FP; CFP; TEP; LIV Accredited Specialist; SMSF Specialist Advisor™

**Principal
Hill Legal
Lawyers and Consultants**

Disclaimer

The material contained in this publication is general reading only information and does not constitute advice on the subject matter. While every effort has been made to ensure accuracy, you should not rely on the information provided without seeking professional specialist SMSF advice on your individual needs and circumstances and the relevance and appropriateness of the ideas and strategies mentioned. No representation is given, warranty made or responsibility taken as to the accuracy, timeliness or completeness of any information or recommendation contained in this publication and Hill Legal, Lawyers and Consultants will not be liable to the reader in contract or tort (including for negligence) or otherwise for any loss or damage arising as a result of the reader acting upon any such information or recommendation.



Hill Legal
Lawyers and Consultants

