

**Authorised Version**  
**COVID-19 Omnibus (Emergency Measures)**  
**(Commercial Leases and Licences)**  
**Regulations 2020**  
**S.R. No. 31/2020**

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## **Authorised Version**

STATUTORY RULES 2020

S.R. No. 31/2020

*COVID-19 Omnibus (Emergency Measures) Act 2020*

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

The Governor in Council makes the following Regulations:

Dated: 1 May 2020

Responsible Minister:

ADEM SOMYUREK  
Minister for Small Business

CLAIRE CHISHOLM  
Clerk of the Executive Council

## **Part 1—Preliminary**

### **1 Objectives**

The objectives of these Regulations are—

- (a) to implement temporary measures to apply to tenants and landlords under certain eligible leases to mitigate the effect of measures taken in response to the COVID-19 pandemic; and
- (b) to implement mechanisms to resolve disputes concerning eligible leases.

## 2 Authorising provision

These Regulations are made under section 15 of the **COVID-19 Omnibus (Emergency Measures) Act 2020**.

## 3 Commencement

These Regulations are taken to have come into operation on 29 March 2020.

## 4 Definitions

In these Regulations—

***Commissioner of State Revenue*** means the Commissioner within the meaning of the **Taxation Administration Act 1997**;

***eligible lease dispute***—see regulation 20;

***outgoings*** means a landlord's outgoings on account of any of the following—

- (a) the expenses attributable to the operation, maintenance or repair of—
  - (i) the building or area in which the premises are located or any other building or area owned by a landlord and used in association with the building or area in which the premises are located; or
  - (ii) in the case of premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;
- (b) rates, taxes, levies, premiums or charges payable by a landlord because a landlord is—

- (i) the owner or occupier of a building or area referred to in paragraph (a) or of the land on which such a building is erected or such area is located; or
- (ii) the supplier of a taxable supply, within the meaning of the A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth, in respect of any such building, area or land;

***premises*** means the premises under an eligible lease;

***relevant period*** means the period—

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

***rent***, in relation to an eligible lease that is a commercial licence, includes the licence fee payable under that licence;

***rent relief*** means any form of relief provided to a tenant in respect of the obligation under an eligible lease to pay rent, including a waiver, reduction, remission or deferral of rent;

***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;

***the Act*** means the **COVID-19 Omnibus (Emergency Measures) Act 2020**.

## **5 Prescribed turnover**

For the purposes of the definition of ***turnover*** in 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 of the Commonwealth earned or received by an entity in the most recent financial year are prescribed as turnover.

## **6 Prescribed excluded classes of lease**

For the purposes of section 13(2) of the Act, an eligible lease does not include a retail lease or a non-retail commercial lease or licence under which the premises may be used wholly or predominantly for any of the following activities—

- (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) any activity prescribed for the purposes of paragraph (c) of the definition of *farming operation* in section 3 of the **Farm Debt Mediation Act 2011**.

## **7 Prescribed group, relationship or connection**

- (1) For the purposes of section 13(3)(a) of the Act—
  - (a) a prescribed group is a tenant that is connected, within the meaning of section 328–125 of the Income Tax Assessment Act 1997 of the Commonwealth, with another entity or other entities; and
  - (b) \$50 million is the prescribed amount.

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- (2) For the purposes of section 13(3)(b) of the Act—
- (a) there is a prescribed relationship or connection between a tenant and another entity or other entities if the entity is an affiliate, or the entities are affiliates, within the meaning of section 328–130 of the Income Tax Assessment Act 1997 of the Commonwealth of the tenant; and
  - (b) \$50 million is the prescribed amount.

## **Part 2—General obligation on landlords and tenants**

### **8 Landlords and tenants must work cooperatively**

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) A landlord and tenant under an eligible lease must cooperate and act reasonably and in good faith in all discussions and actions associated with matters to which these Regulations apply.

#### **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.



## **Part 3—Rent, outgoings and other expenses**

### **9 Non-payment of rent during relevant period**

- (1) A tenant under an eligible lease is not in breach of the eligible lease if they do not pay the amount of rent required to be paid under the eligible lease during the relevant period and only if they—
- (a) comply with regulation 10(1) to (5) during the relevant period; or

**Note**

A tenant under an eligible lease will also need to comply with regulation 10(1) to (5) during the relevant period every time they request rent relief in the circumstances provided for under regulation 11.

- (b) during the relevant period, pay an amount of rent in accordance with—
- (i) any variation to the eligible lease mentioned in regulation 10(6)(a); or
- (ii) any other agreement mentioned in regulation 10(6)(b).

**Note**

An eligible lease has effect subject to subregulation (1)—see section 17(1) of the Act.

- (2) A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease to whom subregulation (1) applies.

Penalty: 20 penalty units.

- (3) A landlord under an eligible lease must not re-enter or otherwise recover, or attempt to re-enter or otherwise recover, the premises under an eligible lease if the tenant under the eligible lease is a tenant to whom subregulation (1) applies.

Penalty: 20 penalty units.

- (4) A landlord under an eligible lease must not have recourse, or attempt to have recourse, to any security relating the non-payment of rent under an eligible lease by a tenant under the eligible lease if the tenant is a tenant to whom subregulation (1) applies.

Penalty: 20 penalty units.

#### **10 Rent relief**

- (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—

Part 3—Rent, outgoings and other expenses

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- (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 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**

- 1 An eligible lease has effect subject to this regulation—see section 17(1) of the Act.
- 2 If any part 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.

**11 Subsequent rent relief**

- (1) If the financial circumstances of a tenant under an eligible lease materially change after a variation to the eligible lease has been made or an agreement has been reached as mentioned in regulation 10(6)—
  - (a) the tenant may make a further request to the landlord under that lease for rent relief under regulation 10; and
  - (b) subject to subregulation (2), the landlord and the tenant must follow the process set out in regulation 10 in relation to that request.
- (2) A landlord's offer of rent relief need not comply with regulation 10(4)(b).

**Note**

An eligible lease has effect subject to this regulation—see section 17(1) of the Act.

**12 Prohibition on rent increases**

- (1) An eligible lease is taken to provide as set out in this regulation.

- (2) A landlord under an eligible lease must not increase the rent payable under the lease at any time during the relevant period, unless the landlord and the tenant under the eligible lease agree in writing that this regulation does not apply to their eligible lease.
- (3) Subregulation (2) does not apply to a retail lease to the extent that it provides for rent to be determined by reference to the volume of trade of a tenant's business.

**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.

**13 Extension of the 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 lease 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.

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

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) A landlord under an eligible lease must consider waiving recovery of any outgoing or other expense payable by a tenant under the eligible lease for any part of the relevant period that the tenant is not able to operate their business at the premises.
- (3) If a tenant under an eligible lease is not able to operate their business at the premises for any part of the relevant period, the landlord may cease to provide, or reduce provision of, any service at the premises—
  - (a) as is reasonable in the circumstances; and
  - (b) in accordance with any reasonable request of the tenant.

#### **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.

#### **15 Reduction in outgoings**

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) If any outgoings charged, imposed or levied in relation to the premises are reduced—
  - (a) a landlord under an eligible lease must not require a tenant under the lease to pay any amount in respect of that outgoing that is greater than a tenant's proportional share of the reduced outgoing payable under the lease; and

- (b) if a tenant under an eligible lease has already paid to a landlord under the lease an amount greater than a tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to a tenant as soon as possible.

**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.

**16 Payment of deferred rent**

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) If any rent is deferred by variation to the eligible lease or an agreement as mentioned under regulation 10(6)—
  - (a) a landlord under the lease must not request payment of any part of the deferred rent until the earlier of—
    - (i) expiry of the relevant period; and
    - (ii) expiry of the term of the eligible lease (before any extension as provided under regulation 13 or otherwise); and
  - (b) a landlord and tenant must vary the eligible lease or otherwise agree so that tenant must pay the deferred rent to the landlord amortised over the greater of—
    - (i) the balance of the term of the eligible lease, including any extension to that term, as provided under regulation 13 or otherwise; and
    - (ii) a period of no less than 24 months.

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- (3) The method by which the deferred rent is amortised for the purposes of subregulation (2) is to be agreed to by the landlord and tenant.
- (4) Subregulation (2) does not apply if a landlord and a tenant agree otherwise in writing.

**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.

**17 No fees, interest or charges**

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) A landlord under the eligible lease must not require a tenant under the 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 an agreement mentioned under regulation 10(6).

**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.



## **Part 4—Change in trading hours**

### **18 Tenant may reduce business hours or cease business during 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.

#### **Note**

An eligible lease has effect subject to subregulation (1)—see section 17(1) of the Act.

- (2) A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease to whom subregulation (1) applies.

Penalty: 20 penalty units.

- (3) A landlord under an eligible lease must not re-enter or otherwise recover, or attempt to re-enter or otherwise recover, the premises under an eligible lease if the tenant under the eligible lease is a tenant to whom subregulation (1) applies.

Penalty: 20 penalty units.

- (4) A landlord under an eligible lease must not have recourse, or attempt to have recourse, to any security relating the non-payment of rent under an eligible lease by a tenant under the eligible lease if the tenant is a tenant to whom subregulation (1) applies.

Penalty: 20 penalty units.

## Part 5—Other obligations

### 19 Confidentiality of information

- (1) An eligible lease is taken to provide as set out in this regulation.
- (2) A landlord or tenant under an eligible lease must not divulge or communicate protected information obtained under or in connection with the operation of these Regulations except—
  - (a) with the consent of the person to whom the information relates; or
  - (b) to a professional adviser who agrees to keep it confidential; or
  - (c) to an actual or prospective financier who agrees to keep it confidential; or
  - (d) as authorised by the Small Business Commission; or
  - (e) as authorised under law; or

**Example**

See regulation 24.

- (f) for the purposes of any proceeding in a court or tribunal.
- (3) In this regulation—

***personal information*** means the name, address and contact details of any person (other than the landlord or tenant);

***protected information*** means—

- (a) personal information; or
- (b) information relating to business processes or financial information (including information about the trade of a business).

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Part 5—Other obligations

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**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.

## **Part 6—Dispute resolution**

### **Division 1—Mediation of eligible lease disputes by Small Business Commission**

#### **20 Referral of eligible lease dispute for mediation by Small Business Commission**

- (1) A landlord or a tenant under an eligible lease may refer a dispute about the terms of the eligible lease arising in relation to a matter to which these Regulations apply (an *eligible lease dispute*) to the Small Business Commission for mediation.
- (2) A referral under subregulation (1) must be in writing.
- (3) The Small Business Commission may, in relation to an eligible lease dispute, perform or exercise any of the functions or powers that the Commission has under the applicable mediation provisions in relation to the eligible lease dispute, and for that purpose, the applicable mediation provisions apply in relation to the eligible lease dispute as if—
  - (a) a reference in the applicable mediation provisions to a retail tenancy dispute were a reference to an eligible lease dispute; and
  - (b) a reference in the applicable mediation provisions to a retail premises lease were a reference to an eligible lease; and
  - (c) a reference in the applicable mediation provisions to a retail premises were a reference to the premises.
- (4) Mediation under this section is not limited to formal mediation procedures. Mediation extends to preliminary assistance in dispute resolution,

such as the giving of advice designed to ensure that—

- (a) the landlord and the tenant are fully aware of their rights and obligations; and
  - (b) there is full and open communication between the landlord and the tenant concerning the matter.
- (5) In referring a dispute under subregulation (1), the parties must not use mediation to prolong or frustrate reaching an agreement.
- (6) In this regulation—

*applicable mediation provisions* means the following provisions under the **Retail Leases Act 2003**, to the extent that they apply to the conduct of a mediation—

- (a) section 84(2), (3) and (4);
- (b) Division 3 of Part 10.

## **21 Legal representation**

- (1) A landlord or tenant may be represented by a legal practitioner in a mediation of an eligible dispute under regulation 20.
- (2) However, the mediator may, if they consider it appropriate to do so, meet with the landlord or the tenant (alone or together with the other party) without their legal practitioners who represent them being present.

## **Division 2—Determination of eligible lease disputes by VCAT or court**

### **22 Jurisdiction of VCAT**

- (1) Subject to regulation 23, Division 4 of Part 10 of the **Retail Leases Act 2003** (other than section 89(4)) applies to an eligible lease dispute referred

to the Small Business Commission under these Regulations as if—

- (a) a reference in that Division to a retail tenancy dispute were a reference to an eligible lease dispute; and
  - (b) a reference in that Division to a retail premises lease were a reference to an eligible lease.
- (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.

### **23 Determination by VCAT or a court**

- (1) An eligible lease dispute may only be the subject of a proceeding in VCAT or a court (other than the Supreme Court) if the Small Business Commission has certified in writing that mediation under Division 1 has failed, or is unlikely to resolve the dispute.
- (2) An eligible lease dispute may only be the subject of a proceeding in the Supreme Court if—
  - (a) the Small Business Commission has certified in writing that mediation has failed, or is unlikely to resolve the dispute; or
  - (b) the landlord or tenant, as the case requires, has sought, and the Supreme Court has granted, leave to commence a proceeding in relation to the dispute.

- (3) Subregulations (1) and (2) do not—
- (a) apply to a proceeding for an order in the nature of an injunction; or
  - (b) affect the validity of any decision made by VCAT or a court.
- (4) To avoid doubt, nothing in this Part prevents a dispute from being dealt with through a compulsory conference, mediation or any other alternative dispute resolution process under—
- (a) the **Civil Procedure Act 2010**; or
  - (b) rules of court made by the Supreme Court or any practice direction applying to a proceeding in that court; or
  - (c) rules of court made by the County Court or any practice direction applying to a proceeding in that court; or
  - (d) rules of court made by the Magistrates' Court or any practice direction applying to a proceeding in that court; or
  - (e) rules within the meaning of the **Victorian Civil and Administrative Tribunal Act 1998** and any practice direction applying to a proceeding in VCAT.

## **Part 7—General**

### **24 Information given by tenant in rent relief request may be used by landlord for applying for tax relief**

- (1) A landlord under an eligible lease may give the statement and information under regulation 10(2) given to the landlord by a tenant under the lease to the Commissioner of State Revenue for the purpose of applying to be eligible for a tax relief measure in relation to any tax paid or required to be paid by the landlord in relation to the premises.
- (2) In this regulation—

*tax relief measure* has the same meaning as in Part 9A of the **Taxation Administration Act 1997**.

### **25 Expiry of these Regulations**

These Regulations expire on 29 September 2020.

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