

Authorised Version

COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020

S.R. No. 107/2020

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Authorised Version

STATUTORY RULES 2020

S.R. No. 107/2020

COVID-19 Omnibus (Emergency Measures) Act 2020

COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020

The Governor in Council makes the following Regulations:

Dated: 29 September 2020

Responsible Minister:

JAALA PULFORD
Minister for Small Business

CLAIRE CHISHOLM
Clerk of the Executive Council

1 Objectives

The objective of these Regulations is to amend the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020—

- (a) to extend the operation of those Regulations;
and
- (b) to prescribe the eligible lease requirements;
and
- (c) to modify the operation of certain provisions relating to rent relief; and
- (d) to empower the Small Business Commission to make orders directing landlords under eligible leases to give or agree to give

specified rent relief to tenants under eligible leases; and

- (e) to confer jurisdiction on VCAT to enforce orders referred to in paragraph (d).

2 Authorising provision

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

3 Principal Regulations

In these Regulations, the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020¹ are called the Principal Regulations.

4 Definitions

- (1) In regulation 4 of the Principal Regulations **insert** the following definitions—

"actual decline in turnover test has the same meaning as in section 4 of the jobkeeper rules;

binding order has the same meaning as in section 15(1)(na) of the Act;

business activity statement means a statement, in the form approved by the Commissioner of Taxation under section 388-50 of Schedule 1 to the Taxation Administration Act 1953 of the Commonwealth, that sets out the liabilities, obligations and entitlements under a BAS provision (within the meaning of the Income Tax Assessment Act 1997 of the Commonwealth) of a business;

business day means a day that is not—

- (a) a Saturday or a Sunday; or

- (b) a day that is appointed as a public holiday or a public half-holiday throughout the whole of Victoria under the **Public Holidays Act 1993**;

Commissioner of Taxation means the Commissioner within the meaning of the Taxation Administration Act 1953 of the Commonwealth;

dispute notice—see regulation 20(2A);

jobkeeper payment has the same meaning as in section 4 of the jobkeeper rules;

jobkeeper rules means the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 of the Commonwealth;

practising accountant means a person who—

- (a) is registered as a company auditor by the Australian Securities and Investments Commission; or
- (b) is a Member of CPA Australia or Chartered Accountants Australia and New Zealand; or
- (c) has attained the status of Member or Fellow of either the Institute of Public Accountants or the Association of Taxation and Management Accountants; or
- (d) has attained the status of Fellow of the National Tax & Accountants' Association Limited;

regulation 20A certificate—see regulation 20A;

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 of the
Commonwealth;

turnover test period has the same meaning as in
section 4 of the jobkeeper rules;".

- (2) In regulation 4 of the Principal Regulations, at the
foot of the definition of *eligible lease dispute*
insert—

"Note

See also regulation 21S, under which eligible lease disputes
can have matters severed, or be divided into separate
matters, each of which is to be taken to be a distinct *eligible
lease dispute*".

- (3) In regulation 4 of the Principal Regulations, in the
definition of *relevant period*, in paragraph (b), for
"29 September" **substitute** "31 December".
- (4) In regulation 4 of the Principal Regulations, in the
definition of *rent relief*, for "waiver, reduction,
remission or deferral of rent" **substitute** "specified
rent relief or a reduction or remission of rent".

5 New regulation 4A inserted

After regulation 4 of the Principal Regulations
insert—

"4A Prescribed eligible lease

For the purposes of section 13(1)(a) of the
Act, an eligible lease is a retail lease or a
non-retail commercial lease or licence under
which the tenant—

- (a) is an SME entity; and
- (b) is an entity entitled under section 6, 11
or 12A of the jobkeeper rules to a
jobkeeper payment."

6 Prescribed turnover

At the end of regulation 5 of the Principal Regulations **insert**—

"(2) To avoid doubt, for the purposes of the definition of *turnover* in section 12 of the Act, a coronavirus economic response payment is not turnover.

(3) In this regulation—

coronavirus economic response payment

has the same meaning as in section 6 of the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 of the Commonwealth."

7 Non-payment of rent or outgoings during relevant period

(1) In the heading to regulation 9 of the Principal Regulations, after "**Non-payment of rent**" **insert** "**or outgoings**".

(2) In regulation 9(1) of the Principal Regulations—

(a) after "in breach of" **insert** "any provision of";

(b) after "the eligible lease" (where first occurring) **insert** "that relates to payment of rent or outgoings";

(c) after "the amount of rent" **insert** "or outgoings";

(d) in paragraph (b), after "an amount of rent" **insert** "or outgoings".

(3) In regulation 9(2) of the Principal Regulations, for "to whom" **substitute** "because of non-payment of rent or outgoings if".

- (4) In regulation 9(3) of the Principal Regulations, for "if the tenant under the eligible lease is a tenant to whom" **substitute** "because of non-payment of rent or outgoings if".
- (5) In regulation 9(4) of the Principal Regulations—
- (a) after "relating" **insert** "to";
 - (b) for "if the tenant is a tenant to whom" **substitute** "because of non-payment of rent or outgoings if".

8 Rent relief

- (1) In regulation 10(2) of the Principal Regulations—
- (a) for paragraph (a) **substitute**—
 - "(a) a statement from the tenant—
 - (i) that the tenant's lease is an eligible lease; and
 - (ii) that the lease is not excluded from the operation of these Regulations under section 13(3) of the Act; and
 - (iii) setting out the tenant's decline in turnover that is associated with the premises (and no other premises); and";
 - (b) for paragraph (b)(ii) **substitute**—
 - "(ii) is an entity entitled under section 6, 11 or 12A of the jobkeeper rules to a jobkeeper payment, including—
 - (A) the receipt number issued by the Commissioner of Taxation when the tenant elected to participate in the jobkeeper scheme; and

- (B) a copy of the tenant's most recent notice under the jobkeeper rules to the Commissioner of Taxation;";
- (c) after paragraph (b) **insert**—
- "(c) information that evidences the tenant's stated decline in turnover, including at least one of the following—
- (i) extracts from the tenant's accounting records;
 - (ii) the tenant's business activity statements relating to the relevant turnover test period;
 - (iii) statements issued by an ADI in respect of the tenant's account;
 - (iv) a statement prepared by a practising accountant."

(2) After regulation 10(2) of the Principal Regulations **insert**—

"(2A) For the purposes of subregulation (2)(a)(iii), the tenant's decline in turnover must be—

 - (a) expressed as a whole percentage; and
 - (b) calculated consistently with the actual decline in turnover test applying to the tenant relating to the most recent turnover test period applying to the tenant.

Note

Actual decline in turnover test and turnover test period are defined in regulation 4.

(3) In regulation 10(4) of the Principal Regulations—

 - (a) in paragraph (a), for "the relevant period" **substitute** "the period starting on the date of

- the tenant's request under subregulation (1) and ending on 31 December 2020";
- (b) after paragraph (b) **insert**—
- "(ba) be, at a minimum, proportional to the decline in the tenant's turnover associated with the premises consistent with the requirements mentioned in subregulation (2)(a)(iii); and";
- (c) in paragraph (c), for "relevant period" **substitute** "period starting on the date of the tenant's request under subregulation (1) and ending on 31 December 2020"; and
- (d) paragraphs (d)(i) and (iv) are **revoked**.
- (4) After regulation 10(4) of the Principal Regulations **insert**—
- "(4A) To avoid doubt, if the rent charged under an eligible lease is inclusive of outgoings chargeable to the tenant with respect to the premises, the landlord must offer rent relief under subregulation (4) with respect to the rent payable inclusive of outgoings.".
- (5) In regulation 10(5) of the Principal Regulations, for "the relevant period" **substitute** "the period starting on the date of the tenant's request under subregulation (1) and ending on 31 December 2020".

9 New regulation 11 substituted

For regulation 11 of the Principal Regulations **substitute**—

"11 Subsequent rent relief

- (1) This regulation applies if a variation to an eligible lease has been made or an agreement has been reached as mentioned in regulation 10(6) and—

- (a) subsequently, the financial circumstances of a tenant under the eligible lease materially change; or
 - (b) the variation or agreement—
 - (i) was made prior to the commencement of regulation 10(4)(ba); and
 - (ii) does not comply with regulation 10(4)(ba); or
 - (c) the specified rent relief does not apply to the whole of the period starting on the date of the tenant's request under regulation 10(1) and ending on 31 December 2020.
- (2) The tenant may make a further request to the landlord under that lease for rent relief under regulation 10.
- (3) The landlord and the tenant must follow the process set out in regulation 10 in relation to that request.

Note

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

10 Payment of deferred rent

- (1) For regulation 16(2)(a) of the Principal Regulations **substitute**—
- "(a) a landlord under the lease must not request payment of any part of the deferred rent until 31 December 2020; and"
- (2) After regulation 16(4) of the Principal Regulations **insert**—
- "(5) To avoid doubt, subregulation (2) as amended by regulation 10(1) of the COVID-19 Omnibus (Emergency Measures)

(Commercial Leases and Licences)
Miscellaneous Amendments Regulations
2020 applies to any rent deferred by
variation to the eligible lease or an
agreement as mentioned under regulation
10(6) before the commencement of those
Regulations."

11 No fees, interest or charges

For regulation 17(2) of the Principal Regulations
substitute—

- "(2) A landlord under an eligible lease must not
require a tenant under the lease to pay
interest or any other fee or charge in relation
to the any payment of rent deferred—
- (a) by variation to the eligible lease or an
agreement mentioned under regulation
10(6); or
 - (b) in compliance with a binding order or
an order of a court or VCAT."

12 Tenant may reduce business hours or cease trading during relevant period

- (1) In regulation 18(1) of the Principal Regulations—
- (a) after "in breach of" **insert** "any provision
of";
 - (b) after "the eligible lease" **insert** "that relates
to the opening hours of the business they
carry out at the premises".
- (2) In regulation 18(2) of the Principal Regulations,
for "to whom subregulation (1) applies"
substitute "because the tenant under the eligible
lease has taken an action mentioned in
subregulation (1)(a) or (b)".
- (3) In regulation 18(3) of the Principal Regulations,
for "if the tenant under the eligible lease is a

tenant to whom subregulation (1) applies"
substitute "because the tenant has taken an action
mentioned in subregulation (1)(a) or (b)".

- (4) In regulation 18(4) of the Principal Regulations—
- (a) after "relating" **insert** "to";
 - (b) for "if the tenant is a tenant to whom
subregulation (1) applies", **substitute**
"because the tenant has taken an action
mentioned in subregulation (1)(a) or (b)".

13 Referral of eligible lease dispute for mediation by Small Business Commission

- (1) For regulation 20(2) of the Principal Regulations
substitute—

"(2) A referral under subregulation (1) must be in
writing and—

(a) in a form approved by the Small
Business Commission; and

(b) accompanied by—

- (i) if the dispute relates to the tenant's
request for rent relief under
regulation 10, the statement and
all other evidence given to the
landlord by the tenant under
regulation 10(2), including the
written request for rent relief; and

Note

Subsequent rent relief requests are made
under regulation 10—see regulation
11(2).

- (ii) all relevant correspondence
between the landlord and the
tenant and related materials; and
- (iii) the contact details of the other
party, including their postal

- address and telephone number;
and
- (iv) any other material requested by
the Small Business Commission.
- (2A) The Small Business Commission must give
written notice of a referral under
subregulation (1) (a *dispute notice*)—
- (a) to the tenant, if referred by the landlord;
and
- (b) to the landlord, if referred by the tenant.
- (2B) A dispute notice must—
- (a) specify the time within which the
landlord or tenant must provide a
response to the dispute notice under
subregulation (2C); and
- (b) state the consequences of responding to
the dispute notice in compliance with
subregulation (2C) as set out under
subregulation (2D); and
- (c) state the consequences of failing to
respond to the dispute notice as set out
under subregulation (2E); and
- (d) state the consequences of responding to
the dispute notice not in compliance
with subregulation (2C) as set out under
subregulation (2E); and
- (e) specify the form of response required
by the Small Business Commission.
- (2C) On receipt of a dispute notice, a landlord or
tenant must respond to the Small Business
Commission in the form required by the
Small Business Commission within 10
business days after receiving the dispute
notice.

(2D) If the landlord responds to the dispute notice in conformity with subregulation (2C), the Small Business Commission must arrange for the eligible lease dispute to be the subject of mediation under subregulation (3).

(2E) If the landlord—

(a) does not respond to the dispute notice;
or

(b) responds to the dispute notice within the timeframe set under subregulation (2C), but that response does not conform with the other requirements under subregulation (2C); or

(c) responds to the dispute notice outside of the timeframe set under subregulation (2C), whether or not that response conformed with the formality requirements under subregulation (2C)—

the Small Business Commission may, no earlier than 10 business days after the landlord receives the dispute notice arrange, for the eligible lease dispute to be the subject of mediation or issue a regulation 20A certificate."

(2) After regulation 20(5) of the Principal Regulations **insert**—

"(5A) The Small Business Commission must take reasonable steps to ensure that the forms referred to in subregulation (2)(a), (2B)(e) and (2C) are published on the Commission's website."

14 New regulation 20A inserted

After regulation 20 of the Principal Regulations
insert—

"20A Regulation 20A certificate

- (1) The Small Business Commission may certify in writing that mediation under this Part has failed, or is unlikely, to resolve the eligible lease dispute (a *regulation 20A certificate*).
- (2) Without limiting subregulation (1), the Small Business Commission may issue a regulation 20A certificate if the Small Business Commission is of the view that the landlord has not engaged in the mediation process in good faith.
- (3) A regulation 20A certificate must contain a statement about whether a landlord has—
 - (a) failed to respond to the dispute notice in the form required under regulation 20(2C); or
 - (b) not engaged in mediation in good faith in the opinion of the Small Business Commission."

15 Legal representation

In regulation 21(1) of the Principal Regulations,
after "eligible" **insert** "lease".

16 New Divisions 1A, 1B, 1C and 1D of Part 6 inserted

After Division 1 in Part 6 of the Principal
Regulations **insert—**

**"Division 1A—Binding orders for rent
relief made by Small Business
Commission**

21A Application for binding order

- (1) A person who is a tenant under an eligible lease in respect of which there is an eligible lease dispute may apply to the Small Business Commission for a binding order if—
 - (a) the dispute relates to a tenant's request for rent relief under regulation 10; and

Note

Subsequent rent relief requests are made under regulation 10—see regulation 11(2).

 - (b) the Small Business Commission has issued a regulation 20A certificate to the landlord and tenant in respect of the dispute; and
 - (c) the regulation 20A certificate includes a statement under either regulation 20A(3)(a) or (b); and
 - (d) the tenant has not commenced proceedings in VCAT or a court in relation to the dispute.
- (2) An application under subregulation (1) must be—
 - (a) in writing; and
 - (b) in the form specified by the Small Business Commission; and

- (c) accompanied by—
 - (i) all relevant correspondence and other materials referred to in regulation 20(2)(b) that the tenant has not previously provided to the Small Business Commission under that provision; and
 - (ii) the other material specified by the Small Business Commission.
- (3) An application under subregulation (1) may be accompanied by a written submission to the Small Business Commission.
- (4) The Small Business Commission must take reasonable steps to ensure that the information referred to in subregulation (5) is published on the Commission's website.
- (5) The information that must be published is—
 - (a) the form, specified by the Small Business Commission under subregulation (2)(b), of an application for a binding order; and
 - (b) the material, specified by the Small Business Commission under subregulation (2)(c)(ii), that is to accompany an application for a binding order.
- (6) Nothing in this regulation prevents a tenant referred to in subregulation (1) from commencing proceedings in VCAT or a court in relation to an eligible lease dispute referred to in that subregulation.

21B Notice of application for binding order

- (1) As soon as practicable after receiving an application under regulation 21A the Small Business Commission must give the material

referred to in subregulation (2) to the person who is the landlord under the lease to which the application relates.

- (2) The material that the Small Business Commission must give to the landlord is—
- (a) written notice of the application under regulation 21A, setting out—
 - (i) the landlord's rights to provide further information under subregulation (3); and
 - (ii) the effect of regulation 21E(3)(b); and
 - (iii) the process that the Small Business Commission will follow under this Division; and
 - (b) a copy of the correspondence and material referred to in regulation 21A(2)(c) that accompanied the application; and
 - (c) a copy of the material referred to in regulation 20(2)(b) that accompanied the referral made under regulation 20 in respect of the eligible lease dispute.
- (3) Within 5 business days after receiving the material, the landlord may give the Small Business Commission—
- (a) any material that the landlord considers the tenant has failed to provide under regulation 20(2)(b) or 21A(2)(c); and
 - (b) a written submission.

21C Small Business Commission may request further information

- (1) For the purposes of considering an application under regulation 21A, the Small Business Commission may—
 - (a) request the landlord or the tenant to provide further material; and
 - (b) request the tenant to provide evidence that they have taken reasonable steps and have acted in good faith to seek to agree the rent relief with the landlord.
- (2) The Small Business Commission may—
 - (a) specify a period for compliance with a request under subregulation (1)(a) or (b); and
 - (b) extend that time if asked to do so by the person to whom the request is made.

21D No hearings for applications for binding orders

The Small Business Commission must not hold any form of hearing for an application for a binding order.

21E Decision to make a binding order

- (1) On an application under regulation 21A, the Small Business Commission must make a binding order that complies with regulations 21F and 21G if—
 - (a) notice has been given to the landlord under regulation 21B; and
 - (b) neither the tenant nor the landlord has commenced proceedings in VCAT or a court in relation to the eligible lease dispute to which the application relates; and

- (c) the Small Business Commission is satisfied that—
 - (i) the application complies with regulation 21A; and
 - (ii) it is fair and reasonable in all the circumstances to make the binding order.
- (2) Otherwise, the Small Business Commission must dismiss the application.
- (3) In deciding whether to make a binding order, the Small Business Commission—
 - (a) must have regard to the written submissions, correspondence, evidence and other material provided by either the tenant or the landlord in accordance with—
 - (i) regulation 21A(2)(c), 21A(3) or 21B(3); or
 - (ii) a request under regulation 21C(1)(a) or (b); and
 - (b) may have regard to submissions or other material provided by the landlord outside the period referred to in regulation 21B(3) if the Commission considers it is appropriate to do so; and
 - (c) may have regard to evidence or other material provided by the tenant or the landlord on a request under regulation 21C(1)(a) or (b), but outside the period applying to that request, if the Commission considers it is appropriate to do so.

- (4) For the purposes of subregulation (3)(c), the period applying to a request is—
 - (a) the period specified for compliance with that request under regulation 21C(2)(a); or
 - (b) if that period is extended under regulation 21C(2)(b), the extended period.
- (5) If the Small Business Commission dismisses an application under subregulation (2), the Small Business Commission must give notice to the landlord and the tenant in writing within 5 business days after dismissing the application.

21F Binding orders

- (1) A binding order must be in writing and must state that—
 - (a) the Small Business Commission is of the opinion that the landlord has—
 - (i) failed to respond to a dispute notice in the form required under regulation 20(2C); or
 - (ii) not engaged in mediation in good faith; and
 - (b) the Small Business Commission has issued a regulation 20A certificate in relation to the tenant's request for rent relief under regulation 10; and

Note

Subsequent rent relief requests are made under regulation 10—see regulation 11(2).

- (c) neither the tenant nor the landlord has commenced proceedings in VCAT or a

court in relation to the eligible lease
dispute; and

- (d) the direction to the landlord to give or agree to give specified rent relief in accordance with regulation 21G; and
 - (e) the reasons for ordering the specified rent relief.
- (2) If the Small Business Commission makes a binding order, the Small Business Commission must—
- (a) keep a copy of the binding order until 3 years after the expiration of these Regulations; and
 - (b) give a copy of the binding order to the landlord and the tenant within 5 business days after making the binding order.

Note

The **Electronic Transactions (Victoria) Act 2000** deals with matters relating to keeping and giving electronic documents.

- (3) A binding order comes into effect immediately after a copy of it is given to the landlord.

21G What a binding order may require

- (1) A direction to give or agree to give specified rent relief set out in a binding order must comply with regulation 10(4) as if the direction were an offer of rent relief.
- (2) A direction in a binding order to give, or agree to give, specified rent relief may require the landlord to do either or both of the following things—

- (a) waive part or all of the rent payable under an eligible lease from the date of the tenant's request for rent relief in respect of which the application for a binding order was made to 31 December 2020; and
 - (b) defer payment of part of the rent payable under an eligible lease from the date of the tenant's request for rent relief in respect of which the application for a binding order was made to 31 December 2020, so that the 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.
- (3) A binding order may also specify the method by which rent deferred as described in subregulation (2)(b) is amortised.

21H Cessation of binding order process

- (1) If a tenant has made an application under regulation 21A, but the Small Business Commission has not yet determined that application, the landlord and the tenant may jointly notify the Small Business Commission that they have agreed on the rent relief and a binding order is no longer required.
- (2) On receipt of a notice under subregulation (1) from both the landlord and the tenant, the

Small Business Commission must dismiss the application that was made under regulation 21A.

- (3) If the Small Business Commission dismisses an application under subregulation (2), the Small Business Commission must give notice to both the landlord and the tenant within 5 business days after doing so.

Division 1B—Amendment of binding order

21I Application for amendment or revocation of binding order

- (1) A person who is a tenant or a landlord under an eligible lease in respect of which a binding order has been made may apply to the Small Business Commission for an amendment to, or revocation of, that order.
- (2) An application under subregulation (1) must be in writing.

21J Small Business Commission may dismiss application in certain circumstances

- (1) If the Small Business Commission determines that an application under regulation 21I does not have sufficient merit to justify further consideration, the Commission may dismiss the application.
- (2) If the Small Business Commission dismisses an application under subregulation (1), the Commission must give notice to both the landlord and the tenant within 5 business days after doing so.

21K Small Business Commission may propose amendment on its own initiative

- (1) If, other than on an application under regulation 21I, the Small Business Commission considers that a binding order ought to be amended, the Small Business Commission may, in accordance with regulation 21L, propose that the amendment be made.
- (2) Unless exceptional circumstances apply, the Small Business Commission must not propose an amendment other than an amendment to correct—
 - (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) a material miscalculation of figures; or
 - (d) a material mistake in the description of a person, thing or matter referred to in the order; or
 - (e) a defect of form.

21L Small Business Commission to give notice if amendment or revocation is to be considered

- (1) If the Small Business Commission receives an application under regulation 21I and does not dismiss that application under regulation 21J, the Commission must give notice of the application to—
 - (a) if the application was made by the tenant—the landlord; or
 - (b) if the application was made by the landlord—the tenant.

- (2) The Small Business Commission must give a notice under subregulation (1) as soon as practicable after receiving the application.
- (3) If the Small Business Commission proposes an amendment to a binding order under regulation 21K, the Commission must give notice of the proposal to the tenant and the landlord.
- (4) A notice under subregulation (1) or (3) must set out—
 - (a) the person's right to provide a written submission under subregulation (5); and
 - (b) the effect of regulation 21O(3)(b); and
 - (c) the process that the Small Business Commission will follow under this Division.
- (5) Within 5 business days after receiving the notice, the person to whom it is given may give to the Small Business Commission a written submission regarding the application or proposal.

21M Small Business Commission may request further information

- (1) For the purposes of considering an application under regulation 21I or a proposal under regulation 21K, the Small Business Commission may request the landlord or the tenant provide further material.
- (2) The Small Business Commission may—
 - (a) specify a period for compliance with a request under subregulation (1); and

- (b) extend that time if asked to do so by the person to whom the request is made.

21N No hearings for applications to amend or revoke binding orders

The Small Business Commission must not hold any form of hearing for an application for an amendment to, or the revocation of, a binding order.

21O Amending or revoking a binding order

- (1) On an application under regulation 21I, the Small Business Commission may decide to—
 - (a) grant the application and amend or revoke the binding order in respect of which it is made; or
 - (b) dismiss the application.
- (2) Following the proposal of an amendment in accordance with regulation 21K, the Small Business Commission may decide to make, or not to make, the proposed amendment.
- (3) In deciding whether to grant the application, or to make the proposed amendment, the Small Business Commission—
 - (a) must have regard to—
 - (i) a submission given in accordance with regulation 21L(5); and
 - (ii) material given in accordance with a request under regulation 21M(1); and
 - (b) may have regard to a submission given outside the period referred to in regulation 21L(5) if the Commission considers it is appropriate to do so; and

- (c) may have regard to material given on a request under regulation 21M(1), but outside the period applying to that request, if the Commission considers it is appropriate to do so; and
- (d) may consider any other matter the Commission considers relevant, including whether the binding order contains—
 - (i) a clerical mistake; or
 - (ii) an error arising from an accidental slip or omission; or
 - (iii) a material miscalculation of figures; or
 - (iv) a material mistake in the description of a person, thing or matter referred to in the order; or
 - (v) a defect of form.
- (4) For the purposes of subregulation (3)(c), the period applying to a request is—
 - (a) the period specified for compliance with that request under regulation 21M(2)(a); or
 - (b) if that period is extended under regulation 21M(2)(b), the extended period.
- (5) An amendment to, or the revocation of, a binding order takes effect immediately after a copy of the amended order, or notice of the revocation, is given to the landlord under regulation 21P.

**21P Notice of amendment or revocation of
binding order**

If the Small Business Commission amends or revokes a binding order under regulation 21O, the Small Business Commission must give a copy of the amended order, or notice of the revocation, to both the landlord and the tenant within 5 business days after amending or revoking the order.

Note

The **Electronic Transactions (Victoria) Act 2000** deals with matters relating to keeping and giving electronic documents.

Division 1C—Review by VCAT

21Q Applications for review by VCAT

- (1) A landlord or a tenant under an eligible lease may apply to VCAT for review of any of the following—
 - (a) a decision under regulation 21E(1) to make a binding order in respect of that lease;
 - (b) a decision under regulation 21E(2) to dismiss an application for a binding order in respect of that lease;
 - (c) a decision under regulation 21J(1) to dismiss an application for an amendment to or the revocation of, a binding order made in respect of that lease;
 - (d) a decision under regulation 21O(1)(a) to grant an application for an amendment to, or the revocation of, a binding order made in respect of that lease;

- (e) a decision under regulation 21O(1)(b) to dismiss an application for an amendment to, or the revocation of, a binding order made in respect of that lease;
 - (f) a decision under regulation 21O(2) to make, or not to make, an amendment to a binding order made in respect of that lease.
- (2) An application for review under subregulation (1) must be made within 14 days after the Small Business Commission makes the decision.
 - (3) In addition to any other parties, the tenant and the landlord are parties to the review.
 - (4) In considering an application for review under subregulation (1), VCAT must have regard to the matters set out in regulation 22(2).
 - (5) An application for review of a decision under regulation 21E(1) to make a binding order stays the operation of the binding order unless VCAT orders otherwise.

21R Breach of binding orders

- (1) A person—
 - (a) who is a tenant under an eligible lease in respect of which a binding order is made; and
 - (b) who considers that the landlord has not complied with the binding order—may apply to VCAT for a determination of whether the landlord has complied with the binding order.

- (2) In addition to any other parties, the landlord is a party to the proceeding.
- (3) On an application under subregulation (1), VCAT—
 - (a) must determine whether the landlord has complied with the binding order; and
 - (b) may make any orders that VCAT considers appropriate, including—
 - (i) an order requiring the landlord to comply with the binding order; and
 - (ii) an order amending the binding order.

Division 1D—Other matters

21S Severing, dividing or combining matters in eligible lease disputes

- (1) If an eligible lease dispute is referred to the Small Business Commission under regulation 20, and it relates to more than one matter, the Small Business Commission may do either of the following things at any time before a proceeding is commenced in VCAT or a court in relation to the dispute—
 - (a) sever from the eligible lease dispute any matter that the Small Business Commission decides mediation is unlikely to resolve; or
 - (b) divide the eligible lease dispute into 2 or more matters, if it is convenient to resolve them separately.
- (2) If more than one eligible lease dispute in relation to the same or related facts and

circumstances is referred to the Small Business Commission under regulation 20, the Commission may—

- (a) determine that the disputes constitute one eligible lease dispute; and
 - (b) determine which of the referrals is to be taken to be a referral of that one dispute.
- (3) If an application under regulation 21A for a binding order is made in respect of an eligible lease dispute that relates to more than rent relief, the Small Business Commission may sever that other matter from the eligible lease dispute.
- (4) If the Small Business Commission decides to take any action under subregulation (1) or (2) or (3), the Small Business Commission must give both the landlord and the tenant written notice of the decision within 5 business days
- (5) If the Small Business Commission severs any matter from an eligible lease dispute under subregulation (1)(a) or (3), for all purposes—
- (a) the eligible lease dispute is taken not to include that matter; and
 - (b) the severed matter is taken to be a distinct eligible lease dispute that is the subject of its own referral or application (as the case requires).

Note

Regulation 20A authorises the issuing of certificates in respect of eligible lease disputes. This includes those that arise because of severance in accordance with subregulation (1)(a) or (3).

- (6) If the Small Business Commission severs or divides an eligible lease dispute into 2 or more matters under subregulation (6), for all purposes, each of those matters is taken to be a distinct eligible lease dispute.

Note

Regulation 20A authorises the issuing of certificates in respect of eligible lease disputes. This includes those that arise because of division in accordance with subregulation (2).

21T Evidentiary status of statements made during mediation and binding order process

- (1) Evidence of anything said or done by a person specified in subregulation (2), in the course of doing a thing specified in subregulation (3), is not admissible in any proceeding before VCAT or in any other legal proceeding except as set out in subregulations (4) and (5).
- (2) Subregulation (1) applies to—
- (a) a person who is—
 - (i) a landlord under an eligible lease;
or
 - (ii) a tenant under an eligible lease; or
 - (iii) legally representing a landlord or tenant in mediation; or
 - (iv) employed or engaged by the Small Business Commission; and
 - (b) the Small Business Commission.
- (3) Subregulation (1) applies to things done in the course of—

- (a) referring an eligible lease dispute to the Small Business Commission under regulation 20 for mediation; or
 - (b) exercising a function, power or right under Division 1 in relation to an eligible lease dispute referred under regulation 20; or
 - (c) a mediation of an eligible lease dispute referred under regulation 20; or
 - (d) applying for a binding order, or amendment or revocation of a binding order; or
 - (e) responding to, or providing further information, evidence, submissions or other material in relation to, an application for a binding order, or for amendment or revocation of a binding order.
- (4) Evidence referred to in subregulation (1) is admissible in a proceeding referred to in that subregulation if—
- (a) it is evidence of a written communication from the Small Business Commission to a landlord or a tenant; or
 - (b) both the landlord and the tenant agree in writing to the giving of the evidence; or
 - (c) VCAT or the court hearing the proceeding otherwise orders, having regard to the interests of justice and fairness.
- (5) Nothing in this regulation prevents the use of any information or document disclosed in a mediation or binding order process for the

purposes of deciding whether a binding order may be made, amended or set aside.

- (6) A binding order is admissible as evidence in any proceedings at VCAT or in a court.

21U Giving notices—general

- (1) A notice or other document to be given to a person under the Act or these Regulations by the Small Business Commission must be given—
- (a) by delivering it personally to the person; or
 - (b) by leaving it at the person's usual or last known place of residence or business with a person apparently over the age of 16 years and apparently residing or employed at that place; or
 - (c) by sending it to the person by post addressed to the person's usual or last known place of residence or business; or
 - (d) if the person is a corporation—
 - (i) by sending it by post to the registered office in Victoria of the corporation; or
 - (ii) by giving it to a person who is an officer of the corporation who is authorised to accept service of notices and who is employed at the registered office of the corporation; or
 - (e) by electronic communication in accordance with the **Electronic Transactions (Victoria) Act 2000**.

- (2) If a notice or other document is to be given to a landlord under this Part, in addition to the methods set out in subregulation (1), the notice or document may be given—
- (a) by delivering it to the landlord or to the landlord's agent or to the person who usually collects the rent; or
 - (b) by sending it by post addressed—
 - (i) to the landlord at the landlord's address for service of documents; or
 - (ii) to the landlord's agent at the agent's usual place of business; or
 - (c) by giving it to a person employed in the office of the landlord's agent.

21V No restriction on section 19(1)(c) of the Act

To avoid doubt, nothing in this Part is intended to restrict the Small Business Commission's function under section 19(1)(c) of the Act to commence proceedings for offences against regulations made under section 15."

17 Jurisdiction of VCAT

- (1) At the foot of regulation 22(1) of the Principal Regulations **insert**—

"Note

This regulation only applies if the eligible lease is a retail lease—see section 15(1)(o) of the Act, under which this regulation is made."

- (2) In regulation 22(2) of the Principal Regulations—
- (a) in paragraph (b), after "any" **insert** "regulation 20A";

- (b) in paragraph (b), for "under regulation 23(1) that mediation under this Part has failed, or is unlikely to resolve the dispute." **substitute** "; and"; and
- (c) after paragraph (b) **insert**—
 - "(c) any binding order made by the Small Business Commission under regulation 21E in relation to the dispute; and
 - (d) if such a binding order has been made by the Small Business Commission, the reasons for ordering the specified rent relief in the binding order; and
 - (e) any evidence of the conduct of the landlord and the tenant since the binding order came into effect; and
 - (f) the statement included in the binding order under regulation 21F(1)(a)."

18 Determination by VCAT or court

- (1) In regulation 23(1) of the Principal Regulations, for "certified in writing that mediation under Division 1 has failed, or is unlikely to resolve the dispute" **substitute** "issued a regulation 20A certificate in respect of the dispute".
- (2) In regulation 23(2)(a) of the Principal Regulations, for "certified in writing that mediation has failed, or is unlikely to resolve the dispute" **substitute** "issued a regulation 20A certificate in respect of the dispute".

19 New Division 1 heading inserted into Part 7

Before regulation 24 of the Principal Regulations **insert**—

"Division 1—Information disclosure".

20 New Division 2 of Part 7 inserted

After regulation 24 of the Principal Regulations
insert—

"Division 2—Savings provisions

24A Definitions

In this Division—

agreement relating to rent relief means—

- (a) an eligible lease varied as mentioned in regulation 10(6)(a);
or
- (b) an agreement mentioned in regulation 10(6)(b) under which a tenant under an eligible lease is given rent relief; or
- (c) an eligible lease varied to give a tenant under an eligible lease rent relief, or an agreement under which a tenant under an eligible lease is given rent relief entered into by the tenant and landlord, as a consequence of a mediation under Division 1 of Part 6;

amending Regulations means the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020;

applicable lease means a retail lease or a non-retail commercial lease or licence;

applicable order means—

- (a) a binding order; or

- (b) an order of a court or VCAT directing the landlord to give, or to agree to give, a tenant under an eligible lease rent relief.

24B Effect of subsequent ineligibility for jobkeeper scheme on rent relief arrangements that are in place

- (1) This regulation applies if on or after the commencement of the amending Regulations—
 - (a) a tenant under an eligible lease ceases to be an entity entitled to a jobkeeper payment under section 6, 11 or 12A of the jobkeeper rules; and
 - (b) an agreement relating to rent relief or an applicable order applies.
- (2) Despite anything to the contrary in these Regulations, while the agreement relating to rent relief or an applicable order applies, regulations 9, 12, 14, 15 and 18 continue to apply to the tenant's applicable lease, and for the purposes of these Regulations, the applicable lease is an eligible lease.

24C Effect of subsequent ineligibility for jobkeeper scheme—unresolved requests for rent relief

- (1) This regulation applies if—
 - (a) before, on or after the commencement of the amending Regulations a tenant under an eligible lease makes a request under regulation 10; and

Note

Subsequent rent relief requests are made under regulation 10—see regulation 11(2).

- (b) before there is any agreement relating to rent relief under which the tenant may be given rent relief, or an applicable order that applies, the tenant under the eligible lease ceases to be entitled to a jobkeeper payment under section 6, 11 or 12A of the jobkeeper rules.
- (2) Despite anything to the contrary in these Regulations, on and after the commencement of the amending Regulations the tenant's applicable lease is an eligible lease for the purposes of these Regulations until an agreement relating to rent relief entered into by the tenant ceases to apply or an applicable order is revoked, as the case requires.
- (3) To avoid doubt, regulation 24B applies to an applicable lease referred to in subregulation (2) on and after an agreement relating to rent relief or applicable order referred to in that subregulation applies to the tenant.

24D Continued application of certain obligations after non-application of agreements relating to rent relief

- (1) This regulation applies if on or after the commencement of the amending Regulations—
 - (a) a tenant under an eligible lease ceases to be an entity entitled to a jobkeeper payment under section 6, 11 or 12A of the jobkeeper rules; and
 - (b) an agreement relating to rent relief under which the tenant is given rent relief applies.
- (2) Despite anything to the contrary in these Regulations, regulations 13, 16 and 17

continue to apply with respect to any rent deferred under the agreement relating to rent relief until the tenant's applicable lease ceases to apply, and for the purposes of these Regulations, the applicable lease is an eligible lease.

24E Certain non-rent relief related rights and obligations continue after ineligibility for jobkeeper scheme

- (1) This regulation applies if on or after the commencement of the amending Regulations a tenant under an eligible lease ceases to be an entity entitled to a jobkeeper payment under section 6, 11 or 12A of the jobkeeper rules.
- (2) Despite anything to the contrary in these Regulations, on and after the commencement of the amending Regulations and until the tenant's applicable lease ceases to apply, regulations 19 and 24 continue to apply to the applicable lease, and for the purposes of these Regulations, the applicable lease is an eligible lease."

21 New Division 3 heading inserted into Part 7

Before regulation 25 of the Principal Regulations
insert—

"Division 3—Expiry".

22 Expiry of these Regulations

In regulation 25 of the Principal Regulations, for "29 September", **substitute** "31 December".

COVID-19 Omnibus (Emergency Measures) (Commercial Leases and
Licences) Miscellaneous Amendments Regulations 2020
S.R. No. 107/2020

Endnotes

Endnotes

¹ Reg. 3: S.R. No. 31/2020.