



COVID-19 – Leasing – Further Update

Current as at 31 August 2021

New Commercial Tenancy Relief Scheme

The Commercial Tenancy Relief Scheme Regulations 2021 (the “**Regulations**”) were passed on 24 August 2021, backdated to be effective from 28 July 2021.

We have outlined here the Regulations’ application. If you have any specific concerns or questions, please do not hesitate to contact our office to discuss.

Eligibility

The Regulations are only available to a tenant:

- where there is an Eligible Lease;
- who is an Eligible Tenant; and
- satisfies the Decline in Turnover Test.

Eligible Lease

An Eligible Lease is a lease that is in effect on 28 July 2021 and the lease is not for agricultural use.

Eligible Tenant

An Eligible Tenant must:

- Have carried on business as at 28 July 2021
- Be an SME entity with turnover of less than \$50m
- Not be a listed corporation, government agency or trustee in bankruptcy

Decline in Turnover Test

To satisfy the Decline in Turnover Test, the turnover must be 30% less in the Turnover Test Period compared to the Comparison Turnover, depending on date of commencement of trading, as follows:

Date of commencement of trading	Turnover test period	Comparison turnover
Before 1 April 2019	Any 3 consecutive calendar months between 1 April 2021 and 30 September 2021	The sum of the corresponding 3 calendar months in 2019
Between 1 April 2019 to 31 March 2020	Any 3 consecutive calendar months between 1 April 2021 and 30 September 2021	The sum of the tenant's turnover for each whole month after the tenant commenced trading and before 1 April 2020 divided by the number of whole months of trade multiplied by 3*

Between 1 April 2020 to 31 March 2021	Any 3 consecutive calendar months between 1 April 2021 and 30 September 2021	The sum of the tenant's turnover for each whole month after the tenant commenced trading and before 31 July 2021 divided by the number of whole months of trade multiplied by 3*
On or after 1 April 2021	As agreed between the tenant and the landlord in good faith	The sum of turnover from the date that the tenant began trading to 31 July, divided by the number of days the tenant was trading and multiplied by 92*

**certain calendar months may be excluded if the tenant is qualified for the ATO's Bushfire 2019-20 lodgement and payment deferrals or received Drought Help concession.*

There are also various alternative comparison turnover tests related to business acquisition or disposal, business restructure, substantial increase in turnover, affected by drought or natural disaster, irregular turnover, sole trader or small partnership with sickness, injury or leave or temporarily ceased trading.

Turnover is determined in the same way as GST turnover which includes any turnover from all forms of sales including internet sales but does not include any grant or financial assistance provided by the government.

Rent Relief

If a tenant satisfies the Eligibility criteria, the tenant should request in writing rent relief from the landlord, details of how the tenant is an Eligible Tenant and how the Decline in Turnover Test is satisfied.

Within 14 days from the rent relief request, the tenant must also provide evidence to the landlord to substantiate eligibility, including any extracts from accounting records, business activity statements, statements issued by an ADI or statement prepared by a practising accountant for the relevant periods.

It is important to note that if the evidence is not provided within the 14 days period, the rent relief request will be treated to have lapsed. If the tenant allows 3 rent relief requests to lapse, the tenant will be barred from making any further request for rent relief.

A landlord will be required to offer rent relief within 14 days after receiving the evidence unless otherwise agreed with the tenant in writing. The landlord's offer must include:

- Rent relief to be at least proportional to the tenant's decline in turnover;
- At least 50% of the rent relief is provided in the form of waiver with the balance to be deferred;
- Take into account any part payments of rent and other relevant circumstances

The Rent Relief allowed is dependent on when the rent relief request is made:

- Request made on or before 30 September 2021, rent relief may be available for the period 28 July 2021 to 15 January 2022; or
- Request made after 30 September 2021, rent relief will only be available from the date of the request to 15 January 2022

As such, it is paramount that any rent relief request is made **before 30 September 2021**.

The parties are required to negotiate in good faith with a view to agreeing on the rent relief.

If a tenant does not accept the landlord's offer for rent relief and has not referred the matter to the Victorian Small Business Commission ("VSBC") within 14 days after receiving the landlord's offer, the tenant is deemed to have accepted the landlord's offer, provided that the landlord's offer meets the Regulations' requirements. Accordingly, it is expected that the VSBC will be extremely busy.

Reassessment of Rent Relief

If the request for rent relief was by 30 September 2021 and the tenant began trading before 1 April 2021, there is a mandatory reassessment of rent relief:

- The tenant must provide information for the reassessment by 31 October 2021;
- Any change in turnover will be adjusted for the remainder of the rent relief period;
- If a tenant fails to provide the reassessment information by 31 October 2021, the tenant will lose their entitlement to rent relief from 31 October 2021, unless otherwise agreed or if the tenant is unable to trade due to sickness, injury or natural disaster.

Rent increase

The landlord must not increase rent under an Eligible Lease for the period of 28 July 2021 to 15 January 2021, unless otherwise agreed. Rent reviews are voided.

Dispute Resolution

The Regulations allow any dispute to be referred to the VSBC for mediation purposes. VSBC is empowered to issue a binding order or certificate in order to refer the matter to VCAT or the Courts.

If you have any queries regarding your lease, Scott Legal can assist landlords and tenants with guidance, negotiation and drafting agreements for rent relief.

This article contains comments of a general nature and is not intended to be relied upon. No responsibility will be accepted by the author for any loss arising from reliance on this article. Legal advice should be sought in respect to your specific circumstances.

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