



COVID-19 tenancy checklist

Introduction

This checklist is a reference tool for practitioners advising on rent relief for landlords or tenants. It gives an overview of key rights and obligations under the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 as amended*.

Any application for rent relief after 29 September 2020 only applies from the date of a compliant request so tenants should act quickly.

Use the checklist to make sure you don't miss any of the crucial steps or obligations and to help you refer to the relevant legislation and provisions. The checklist is not exhaustive, and practitioners must familiarise themselves with the legislative framework.

Resources for practitioners

- **The Omnibus Act:** [COVID-19 Omnibus \(Emergency Measures\) Act 2020](#)
- **The Omnibus Leases Rules:** [COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020](#)
- **Amendments:** *The original regulations were amended by the [COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Miscellaneous Amendments Regulations 2020](#)
- **JobKeeper Rules:** [Coronavirus Economic Response Package \(Payments and Benefits\) Rules 2020](#)
- **Cwlth Act:** [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Act 2020](#)
- **Cwlth Rules:** [Guarantee of Lending to Small and Medium Enterprises \(Coronavirus Economic Response Package\) Rules 2020](#)
- Law institute of Victoria (LIV) [Guidance on COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020](#).
- [FAQs](#) prepared by the Victorian Small Business Commission (VSBC) on 'Commercial tenancy relief scheme



Rent relief checklist

- The tenant has an eligible lease:
 - it is a retail lease as defined in the Retail Leases Act 2003 (Vic) OR non-retail commercial lease and licence as defined in sections 12 and 14 of the Omnibus Act.
 - the lease was in effect at 29 March 2020
 - the tenant is a SME entity as defined in s.4 of the Cwlth Act and r.5 of the Cwlth Rules – aggregate turnover last FY <\$50M or current FY likely to be <\$50M
 - the tenant is not in a prescribed group of entities in s.13(3) of the Omnibus Act and r.6 of Omnibus Leases Rules – farming and various farming activities and operations
 - the tenant is entitled to JobKeeper payments under sections 6, 11 and 12A of the JobKeeper Rules - includes sole traders.

- Request for rent relief is in writing, including:
 - a statement that the tenant's lease is an eligible lease.
 - a statement setting out the tenant's decline in turnover, expressed as a whole percentage, associated with the premises and no other premises
 - evidence that the tenant is an SME
 - evidence that the tenant is entitled to the JobKeeper payment including:
 - receipt number issued by the Commissioner of Taxation when the tenant elected to participate in the JobKeeper scheme (r.10(2)(b)(ii)(A))
 - a copy of the tenant's most recent notice under the JobKeeper rules to the Commissioner of Taxation (r.10(2)(b)(ii)(B))
 - evidence that the tenant has had a decline in the tenant's turnover associated with the premises, including one of the following:
 - extracts from the tenant's accounting records
 - the tenant's business activity statements relating to the relevant turnover test period
 - statements issued by an ADI in respect of the tenant's account
 - a statement prepared by a practising accountant (r. 10(2)(c)).

- Landlord's offer of rent relief is made within 14 days of written request for relief unless otherwise agreed (r.10(3)).



- Landlord considered the following matters when assessing the application for rent relief:
- any waiver given to the tenant for payment of outgoings or expenses from 29 March due to non-operation of the tenant's business (r.10(4)(d)(ii))
 - whether the tenant's capacity to fulfil their ongoing obligations under the lease would be compromised if sufficient rent relief was not offered (r.10(4)(d)(iii))
 - any reduction in outgoings charged, imposed or levied relating to the premises (r.10(4)(d)(v)).
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- Landlords offer is:
- based on all the circumstances of the eligible lease (r. 10(4))
 - relates to up to 100% of the rent payable under the eligible lease from when the tenant requests the rent relief to 31 December 2020
 - provides at least 50% of the rent relief is waived or as otherwise agreed and the remaining portion is rent deferral or reduction
 - applies to the period starting on the date of the tenant's request for rent relief and ends on 31 December 2020
 - at a minimum, proportional to the decline in the tenant's turnover associated with the premises.
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- The tenant and landlord negotiated the rent relief in good faith (r.10(5)).
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- The landlord's or tenant's mortgagee's consent to the variation of lease is considered and obtained if necessary.
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- The landlord's or tenant's insurer's consent to the variation of lease is considered and obtained if necessary.
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- The landlord is advised to seek [land tax relief](#) to compensate for any relief granted to the tenant.
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- Who pays the legal costs?
- Regulation 17 suggests the landlord cannot ask the tenant to pay legal costs as there is a prohibition on a landlord requiring a tenant to pay interest or any other fee or charge in relation to any payment of rent deferred
 - The requirement to negotiate in good faith may affect legal cost allocation.
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- The agreed rent relief is documented in a deed of variation of lease.
OR
- Agreement is not reached.



Application to the Small Business Commissioner where agreement is not reached

An application is made to the [Small Business Commissioner](#) via the website to mediate the dispute about rent relief (r.20). The following information is included:

- the tenant's statement pursuant to r.10(2)(b) and written request for rent relief
- all evidence given to the landlord by the tenant
- all relevant correspondence about the dispute
- contact details of the other party.

OR

Dispute notice received.

Response to the dispute notice is made within 10 business days (r.20(2C)).

Mediation date is arranged (r.20(2D) or (2E)).

Further information requested by the Small Business Commissioner is provided (r.21C).

Dispute resolved.

OR

Dispute not resolved and the Small Business Commissioner certifies that the mediation has failed or is unlikely to resolve (r.20A).

Application for binding order

Advise tenant of the options to either:

- make an application for a binding order for rent relief from the Small Business Commissioner (r.21A), or
 - commence proceedings in VCAT or a court.
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Binding orders received

Advise client about applying to amend or revoke the orders (r.21O) or apply to VCAT to review the orders (r.21Q).



Protections for tenant

- Any deferred rent must not be required to be paid back before 31 December 2020 in accordance with the amendments, previously 29 September 2020 (r.16(2)). This applies retrospectively to pre-30 September rent relief agreements (r.16(5)).

- Original lease is extended for the length of time the rent is deferred (r.13).

- The eligible lease is varied to require the deferred rent to be amortised over the great of:
 - the balance of the term of the lease or
 - at least 24 months (r.16(2)(b)).

- A tenant under an eligible lease may make an additional rent relief request if:
 - their financial circumstances have materially adversely changed (r.11(1)(a))
 - a previous rent relief agreement reached was not, at a minimum, proportional to the decline in the tenant's turnover associated with the premises (r.11(1)(b)(ii))
 - the agreed rent relief does not apply to the period ending 31 December 2020 (r.11(1)(b)(i)).

- If a tenant under an eligible lease has applied for rent relief in accordance with regulation 10(1) – (5) and paid rent or outgoings in accordance with any varied lease:
 - the tenant will not be in breach of lease for non-payment of rent or outgoings between 29 March and 31 December 2020 (r.9(1)), Note that the Amendments provide that a tenant under an eligible lease is now not in breach of its lease if it fails to pay outgoings in addition to non-payment of rent;
 - their landlord must not evict or attempt to evict them (r.9(2))
 - their landlord must not re-enter or attempt to re-enter their premises (r.9(3))
 - their landlord must not try to or claim any security relating to non-payment of rent or outgoings under the eligible lease (r.9(4)).

- A landlord under an eligible lease cannot increase the rent between 20 March 2020 and 31 December 2020 without the tenants consent even if the lease allows for an increase in that time other than rent referable to volume of trade (r.12).

- If a tenant under an eligible lease has reduced their trading hours or closed their business:
 - the tenant is not in breach of their lease (r.18(1))
 - their landlord must not evict or attempt to evict them (r.18(2))
 - their landlord must not re-enter or attempt to re-enter their premises (r.18(3))
 - their landlord must not try to or claim any security relating to non-payment of rent under the eligible lease (r.18(4)).



- A landlord under an eligible lease:
 - must not require the tenant to pay an amount for outgoings that are greater than a tenant's proportional share of any reduced outgoings and reimburse the tenant if they have already paid too much (r.15)
 - must consider waiving recovery of any outgoings or other expenses payable by a tenant during the period the tenant is not able to operate their business at the premises (r.14(2)).
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