



Rent relief mechanism now enshrined in Victorian law

Tips for negotiating between landlords and tenants

Following the publication of the National Cabinet's Mandatory Code of Conduct for Commercial Leasing (**the Code**), the Victorian Government has recently introduced a commercial tenancy relief scheme (**the Scheme**) to assist tenants and landlords in alleviating financial hardship as a result of COVID-19. The Scheme is set out partly in the Covid-19 Omnibus (Emergency Measures) Act 2020 (Vic) (**the Omnibus Act**) but largely in the Covid-19 Omnibus (Emergency Measures) (Commercial Leases and License) Regulations 2020 (Vic) (**Omnibus Regulations**).

What tenants are eligible for the Scheme?

The Omnibus Act provides that the following criteria must be satisfied for a tenant to seek rental relief:

- a) the lease must be a retail lease or licence or a non-retail commercial lease or licence;
- b) the tenant under the lease (including a sub-tenant) must have an annual turnover of less than \$50 million; and
- c) the tenant must qualify for or be participating in the JobKeeper scheme.

We suggest that, whether you are a landlord or a tenant, you review the requirements in section 13 of the Omnibus Act to confirm whether or not your lease is subject to the Scheme. You should seek further legal advice if you are unsure.

What are the steps involved?

Step 1 – A tenant must apply for rent relief from their landlord in writing

In order to satisfy the formal requirements of the Omnibus Regulations, a request to a landlord from a tenant for rent relief must:

1. be in writing (noting an email will suffice);
2. include a statement that the lease is an eligible lease;
3. include evidence that the tenant's annual turnover is under \$50 million; and
4. must include evidence that the tenant qualifies for or is a participant in the Jobkeeper scheme.

Once a valid request for relief is made by a tenant, a landlord cannot evict, reoccupy or have recourse to any security deposit due to the tenant failing to pay any rent during the relevant period.

Step 2 – Provide further information

Although not a requirement of the Omnibus Regulations, a tenant should also include sufficient information to evidence the amount of their downturn (including their predicted downturn in turnover) during 1 April 2020 to 29 September 2020. This will be similar to the information used to determine applicability for the Jobkeeper scheme, such as a comparison of monthly turnover with the equivalent month/period in 2019.

At this stage, there is no obligation on tenants to provide bank statements or profit and loss statements: their obligation is to evidence their downturn in turnover, not profitability or whether or not they are solvent. However, tenants might be asked to demonstrate 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.

A landlord may be required to demonstrate its own financial ability to offer (or deny) rent relief, including any relief provided to it by any of its lenders as a response to the COVID-19 pandemic. Also, any reduction in statutory charges (e.g. land tax, council rates) or insurance must be passed on to the tenant in the appropriate proportion applicable under the terms of the lease. A landlord should seek to share any benefit it receives due to deferral of loan payments with the tenant in a proportionate manner.

Step 3 – Negotiate a rent concession

Unless otherwise agreed:

1. A landlord has 14 days upon receiving a request from a tenant to then offer the tenant rent relief.
2. The offer must be in proportion to the tenant's downturn in trade.
3. The offer must provide that no less than 50% of the rent relief must be in the form of a waiver of rent.
4. Any agreed deferral of rent is to be repaid over 24 months (commencing 1 October 2020) or the balance of the lease term, whichever is the longer.

Step 4 – Formalise your agreement in writing.

If agreement is reached between a landlord and a tenant, it should be documented in a written memorandum, ideally via a formal deed of variation. An exchange of letters, especially from a letting agent, is not sufficient as it is arguably unenforceable in formally varying the terms of the lease. Peer Legal has a template deed of variation that it is happy to make available to existing clients at no cost upon request. New clients can utilise the fixed fee package outlined below.

Step 5 - What if agreement can't be reached?

If no agreement is reached (such as because a landlord does not provide an offer within 14 days of receiving a request), then an application can be lodged by either party with the Victorian Small Business Commissioner (VSBC) for a mediation. A mediation will be conducted by an independent mediator via telephone or video conference.

If an agreement still cannot be reached following the mediation, then either party can apply to VCAT or to the courts for a decision on their dispute.

It is likely that both the SBC (VSBC) and commercial leasing lists at VCAT will become quickly clogged with applications and we would strongly suggest that landlords and tenants seek to reach agreement without resorting to such processes. If not, they should look to activate the mediation process as soon as possible.

Peer Legal's property team is experienced in both drafting and negotiating commercial lease agreements and mediating leasing disputes, including at the Small Business Commissioner.

Due to the Covid-19 crisis, we are offering a fixed fee leasing package of \$550 to any eligible tenants which includes a landlord negotiation letter template; a lease variation deed template and an advice from us setting out a further explanation of rights and obligations under the Scheme. For certain businesses with a down-turn of more than 80%, we are also offering assistance on a pro-bono basis.

Whether you are a landlord or a tenant, do not hesitate to contact us if you require more considered and individualised advice.



For more information contact:

Peter Moran
Principal

Phone: + 61 3 9067 6800
Mobile: +61 410 622 856
peter@peerlegal.com.au
www.peerlegal.com.au



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www.peerlegal.com.au

Peer Legal
Level 2, 287 Collins Street
Melbourne VIC 3000