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Chair & Speakers

RON COHEN:	PRINCIPAL (CHAIR)
ROB OXLEY:	PRINCIPAL
NAFSIKA PALBAS:	SENIOR ASSOCIATE
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Changes to the Commercial Tenancy Relief Scheme

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

ROB OXLEY PRINCIPAL

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Purpose of the amendments

- Extend the operation of existing (principal) Regulations.
- Prescribe 'eligible lease' requirements.
- Amend rent relief provisions.
- Empower the Small Business Commission (**SBC**) to make 'binding orders' for rent relief.
- Prescribe VCAT with the ability to enforce SBC orders.

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Key Changes

- Moratorium on termination of leases for non-payment of rent extended from 29 September 2020 to 31 December 2020.
- Moratorium on termination of leases extended to include *non- payment of outgoings*.
- Deferred rental payments to commence *after* 31 December 2020.
- A tenant's entitlement to rent relief can only start from the date it makes its request rent relief.
- Request for rent relief must include prescribed documents.
- Any referral to the SBC must now be in the prescribed form.

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Request for rent relief

- Must be in writing and accompanied by a statement from the tenant:
  - that the tenant's lease is an 'eligible lease'; and
  - that the lease is not excluded from the operation of these Regulations under section 13(3) of the COVID-19 Omnibus (Emergency Measures) Act 2020; and
  - setting out the tenant's decline in turnover that is *associated with the premises (and no other premises)*.

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Request for rent relief (continued)

Request must include information that evidences:

- the tenant is an SME entity;
- the tenant is an entity entitled to a jobkeeper payment, including—
  - the receipt number issued by the Commissioner of Taxation when the tenant elected to participate in the jobkeeper scheme; and
  - a copy of the tenant's most recent notice under the jobkeeper rules to the Commissioner of Taxation;
- the tenant's stated decline in turnover, including *at least one* of the following
  - extracts from the tenant's accounting records;
  - the tenant's BAS relating to the relevant turnover test period;
  - statements issued by an ADI in respect of the tenant's account; and
  - a statement prepared by a practising accountant.

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Landlord's response to a *compliant* request for rent relief

- A landlord's offer of rent relief must be made within 14 days (or timeframe agreed with tenant) and must
  - relate to up to 100% of the rent payable under the eligible lease during the period *starting on the date of the tenant's request* and ending on 31 December 2020; and
  - 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
  - be, at a *minimum*, proportional to the decline in the tenant's turnover associated with the premises; and
  - apply to the period *starting on the date of the tenant's request* and ending on 31 December 2020.

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Landlord's response to a *compliant* request for rent relief

Example of a response to a request for rent relief:

- Tenant provides evidence of a 40% decline in turnover.
- Landlord must offer as a minimum 40% rent relief of which at least 20% must be a waiver of rent.
- Remaining 20% could be deferral of rent payable (commencing after 31 December 2020) or a reduction or remission of rent.

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Subsequent rent relief

Tenant may make a *further* request to the landlord under that lease for rent relief if:

- an agreement for rent relief is reached and the tenant's financial circumstances materially change; or
- agreement was made prior to 29 September 2020 and the rent relief does not as a minimum reflect the tenant's decline in turnover; or
- the specified rent relief does not apply to the whole of the period starting on the date of the tenant's request and ending on 31 December 2020.

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Referring a dispute to the SBC

- Referral can be made either by a landlord or tenant;
- Referral must be in the prescribed form;
- Must be accompanied with:
  - All evidence and information previously given to the landlord by the tenant; and
  - All relevant correspondence between landlord and tenant; and
  - Parties' contact details.
- SBC serves a 'dispute notice' on the landlord/tenant
- dispute will proceed to mediation

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Referring a dispute to the SBC (continued)

If mediation fails SBC issues a Regulation 20A certificate, which must record whether the landlord has:

- failed to respond to the dispute notice; or
- failed to engage in the mediation process in good faith in the SBC's opinion.

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Application for Binding Order for rent relief

- Application can be made by tenant only (not landlord).
- Tenant can apply if:
  - Landlord failed to respond to dispute notice or failed to engage in mediation process in good faith (in SBC's opinion); and
  - No VCAT proceedings on foot.
- If an application is made, the SBC can require a landlord to:
  - waive part or all of the rent payable under the lease from the date of the tenant's request to the landlord to 31 December 2020;
  - defer payment of part of the rent payable.

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Retail Leases Act Changes

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Retail Leases Amendment Act

Key Changes

- Essential Safety Measures (ESM).
- Return of Security Deposits.
- Disclosure Requirements for a New Lease and Renewal of Lease.
- Early Rent Review and Cooling off Period on Renewal of Lease.

ESM changes apply from 23 September 2020. All other changes apply from 1 October 2020 (unless noted otherwise).

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Essential Safety Measures (ESM)

Previous position	New position
Influenced by Justice Garde's 2015 VCAT advisory opinion: • retail landlord must pay ESM costs and could not pass onto a tenant; • retail landlord could, at its own expense, agree with the tenant to meet some ESM obligations; and • retail landlord could not claim as recoverable outgoings costs of compliance with certain ESM repair and maintenance obligations.	• ESM recovery by landlords from tenants now permitted if provided for in the retail Lease. • Changes are retrospective and apply from 23 September 2020 for existing leases where tenants have already agreed to pay for ESM costs. ESM costs cannot be backdated before 23 September 2020.

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Return of Security Deposits

Previous position	New position
Must return the security deposit *as soon as practicable* after the lease ends if the tenant has performed all of their obligations.	• Must return the security deposit *within 30 days* after the lease ends if the tenant has performed all of their obligations under the Lease (including make good). • Applies to new and existing leases from 1 October 2020. • Applies to cash security deposits and Bank Guarantees.

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Disclosure Requirements – *New Lease*

Previous position	New position
• Landlord must provide proposed Lease and Disclosure Statement *at least 7 days* before entering into a retail lease.	• Landlord must provide proposed Lease and Disclosure Statement *at least 14 days* before entering into a retail lease. Proposed lease must *include* particulars of the tenant, rent and term. • If landlord doesn't comply Lease is deemed to start 14 days *after the Disclosure Statement and proposed Lease are given to the tenant*.

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Disclosure Requirements – *New Lease*

Previous position	New position
• Not mandatory under the RLA, however may be done as part of the negotiations. Common status quo of landlords and agents to provide a blank pro forma/precedent lease at negotiation stage.	• If changes are made to the proposed Lease, a landlord is obligated to notify the tenant of the changes when the updated lease is given (i.e. marked-up document or cover letter setting out changes).
• No penalty.	• Penalties – 50 penalty units for individuals ($8,261.50) and 250 penalty units for a company ($41,305).
• If Lease is *'substantially'* in accordance with AFL, new Disclosure Statement not required when Lease is entered into.	• Deletion of *'substantially'* – new Disclosure Statement required if Lease not in accordance with AFL.

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Disclosure Requirements – *Renewal of Lease*

Previous position	New position
• Landlord to give the tenant written notice of the last date that an option to renew can be exercised *at least 6 months and no more than 12 months.*	• Time period reduced to *3 months prior to the last date to exercise*.
• Not applicable. • Disclosure Statement on Renewal of Lease was brief and didn't require specific disclosure of outgoings (notwithstanding section 47 of the RLA which requires annual outgoings statements to be provided). However noting that landlord or agents/property managers may have separately provided annual outgoings statements.	• Landlord's written notice must include: o Any changes to the most recent disclosure statement provided to the tenant (other than any changes in rent), i.e. changes in outgoings*; and o Date by which the option to renew must be exercised; o Rent payable for the first 12 months of the renewed term; o Availability of an early rent review; o Availability of a cooling off period.

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Disclosure Requirements – *Renewal of Lease*

Previous position	New position
• If the landlord *fails to give written notice of option exercise*, the retail lease is taken to provide that the date after which the option is no longer exercisable is instead *6 months* after the landlord notifies the tenant.	• If the landlord *fails to give the tenant all of the information required**, the retail lease is taken to provide that the date after which the option is no longer exercisable is instead *3 months* after the landlord notifies the tenant.
• If that date is after the lease term ends, the lease continues until that date (on the same terms and conditions as applied immediately prior).	• If that date is after lease ends, lease continues (on the same T&C's as applied immediately prior, *subject to s 28(2A) and (2B)*) *unless the landlord and tenant otherwise agree*. **Existing leases:** • *New DS doesn't apply if there are less than 21 days before current term ends. • *New info on landlord renewal notice doesn't apply if there are less than 3 months before last date that the option may be exercised.

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Early Rent Review – *Renewal of Lease*

Previous position	New position
• No legislative right to early market review.	• Right to request early market rent review within 28 days after receiving the landlord's written notice of option to renew (together with **all required information**).
• No landlord obligation to notify.	• Landlord obligation to notify of the availability of the right to an early market rent review (in landlord's written notice of option to renew).
• Section 37 RLA applied currently for market rent reviews.	• If tenant requests an early rent review, ordinary RLA market rent review provisions apply (section 37 RLA).

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Early Rent Review – *Renewal of Lease*

Previous position	New position
• Tenant must notify landlord in writing if it exercises its option before the last date that the option to renew may be exercised.	• No change. • If a valuer determines the current market rent, the time for the tenant to renew is extended until 14 days after the rent is determined. The lease term is extended (on the same T&C's, unless the landlord and tenant agree otherwise). • If the tenant does not renew, the term of the lease will be extended to end 3 months after the tenant's amended last date to exercise option (to allow landlords and tenants time to make alternate arrangements).

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Cooling off Period – *Renewal of Lease*

Previous position	New position
• No cooling off rights.	• Tenant has cooling off rights on exercise of option for renewal of lease.
• Exercise of option for renewal of lease binding.	• If a tenant exercises its option without requesting an early rent review, the tenant has a 14-day cooling off period in which it can notify the landlord that it doesn't wish to renew. Gives tenant an 'exit strategy' provided validly exercised. • If the tenant cools off, the term of lease is extended by 14 days, lease has not (and is taken not to have been) renewed and the tenant is not able to exercise its option to renew.

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Key Takeaways

- Landlords / agents / property managers:
  - **ESM –** review if existing retail leases allow for recovery of ESM costs. If not, ensure part of future negotiations for new lease or renewal of lease.
  - **Security Deposit** – promptly assess prior to lease expiry if the tenant has or will comply with its lease obligations and whether any dispute or issues are anticipated.
  - **Disclosure Requirements for a New Lease** – review retail leasing portfolio to ensure all current and future negotiations of new leases are compliant. Allow sufficient time for negotiations to ensure compliance with the new 14-day deadline of providing an actual lease (not just a precedent / blank pro forma) and Disclosure Statement.
  - **Disclosure Requirements for a Renewal of Lease** – ensure renewal notifications are compliant and include the expanded Disclosure Statement.

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Key Takeaways (Continued)

- Tenants:
  - **ESM** – review if existing retail leases allow for recovery of ESM costs. If not, be aware of when negotiating a new lease or renewal of lease.
  - **Security Deposit** – ensure compliance with all lease obligations at lease end (including make good) and be aware of 30-day timeframe.
  - **Disclosure Requirements for a New Lease and Renewal of Lease** – be aware of the changes and become familiar with your early rent review and cooling off rights.

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Any Questions?

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