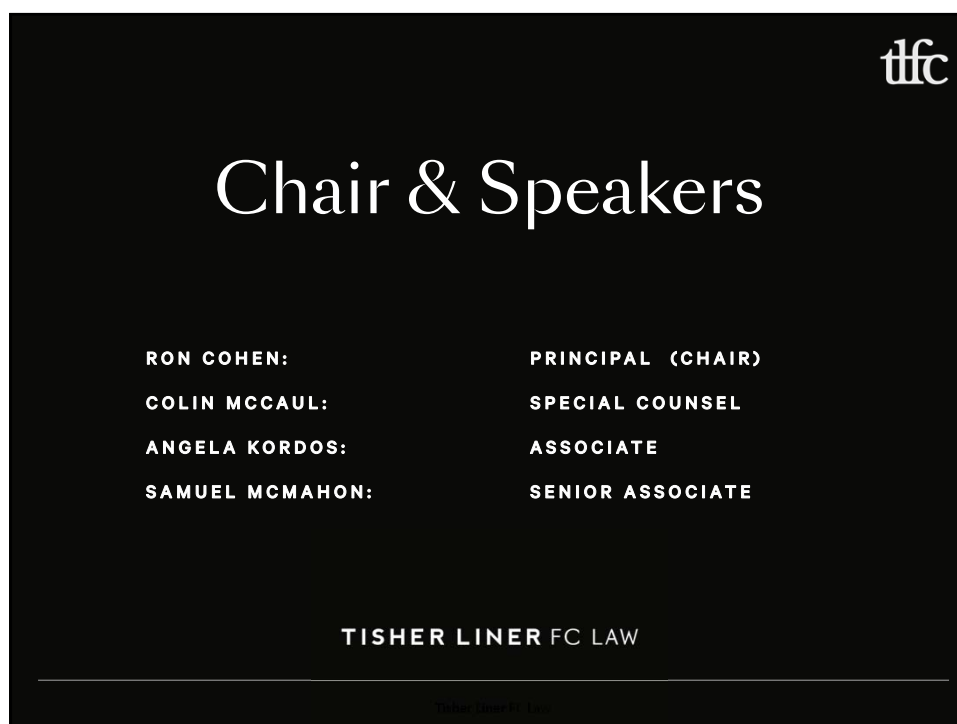




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# National Cabinet Mandatory Code of Conduct (SME Commercial Leasing principles during COVID-19)



- Framework for good faith leasing principles to apply to commercial tenancies during COVID; and
  - Applies to "SME tenants", with annual turnover of up to \$50,000,000 who qualify for Job-Keeper Programme.
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# Victorian Legislation



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# Victorian Legislation



- On 24 April 2020 the Covid-19 Omnibus (Emergency Measures) Act 2020 was passed by the Victorian Government;
  - The Covid-19 Omnibus (Emergency Measures) (Commercial Leases and Licenses) Regulations 2020 (**Regulations**) were then passed on 1 May 2020;
  - The Regulations applied retrospectively from 29 March 2020 until 29 September 2020;
  - The Regulations required the Tenant to make a written request for relief including confirmation that a lease was an "eligible lease";
  - Landlord precluded from evicting tenant;
  - Landlord precluded from accessing any security deposit/bank guarantee;
  - Landlord precluded from increasing rent;
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# Victorian Legislation (cont.)



- Any rent relief offered was to include a rent waiver of 50 per cent (with no mention of whether the remainder was to be a deferral);
  - Any disputes were to be referred to the Small Business Commissioner;
  - Landlord must offer to extend the Lease by period that rent has been deferred;
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## Victorian Legislation (cont.)



### "Amending Regulations 1"

- First extension from 29 September 2020 to 31 December 2020;
  - Any new application for relief only applied from the date a compliant request was made;
  - Landlord's inability to terminate for non-payment of rent was extended to include non-payment of outgoings (subject in both cases to the Tenant having complied with the Regulations);
  - The supporting evidence that a Tenant had to provide with an application was amended to include evidence of the Tenant's participation in the Jobkeeper Scheme along with evidence of the Tenant's reduction in turnover for the premises only;
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## Victorian Legislation (cont.)



- The Landlord's offer of relief was at a minimum to be proportionate to the Tenant's decline in turnover associated with the premises;
  - There was also the deletion of the provision that the Landlord's offer must take into account a Landlord's financial ability to offer relief;
  - The recovery of deferred rent was extended to 31 December 2020 at the earliest;
  - The SBC was entitled to make binding Orders for rent relief;
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# Victorian Legislation (cont.)



## "Amending Regulations 2"

- Further extension of the Regulations from 1 January 2021 to 28 March 2021;
  - Continued the effect of the first amendment to the Regulations by the Amending Regulations 1;
  - The recovery of deferred rent was extended to 28 March 2021 at the earliest;
  - Any new application for relief only applied from the date a compliant request for rent relief was made.
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# Expiration of CTRS – What's next:



- Tenant no longer entitled to request rent relief after 28 March 2021 and no longer entitled to receive Job-Keeper;
  - Landlords can now increase rent (but unlikely to be able retrospectively claim any increase during the relevant period);
  - Deferred rent plus normal rent now payable – noting the minimum 24 month period;
  - Landlord may enforce its rights under the lease;
  - Does tenant have right to terminate lease early?;
  - Retail Leases Act disputes still need to be mediated;
  - What happens if lease ends before deferred rent is paid?;
  - Leases may have been extended by operation of the CTRS legislation;
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# Notices of Default

ANGELA KORDOS

ASSOCIATE

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## Notice of Default

- CTRS moratorium on evictions; restrictions on charging penalty interest and calling on security;
- Limited circumstances in which you could issue a notice of default;
- Recent case law
  - *Filomeno Nominees Pty Ltd v Crown Group Pty Ltd* (Building and Property) [2021] VCAT 81
  - *PS Market Pty Ltd v Brijcam Nominees Pty Ltd* (Building and Property) [2020] VCAT 1468
- What happens from here? The CTRS is now at an end. Landlords are keen to issue notices to recalcitrant tenants;
- A landlord may terminate a lease by re-entry or forfeiture if the tenant fails to remedy a breach (e.g. arrears of rent) within 14 days after being given a notice of default under section 146 (1) of the *Property Law Act*;
- A section 146 notice may not be required at all if rent is outstanding. While many leases do give this power, many others do not;
- The period fixed under section 146 is “the period not less than 14 days fixed by the lease”;

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## Notice of Default (cont.)



- Keep a record of service of the section 146 notice;
  - Check the lease and undertake service by several different means if practicable;
  - Time for compliance with a section 146 notice runs from the date it is served, not the date of the notice. These may be the same date, or they may not be;
  - Don't resort to self-help before the notice has actually expired;
  - Do not include ambit claims;
  - Commercial considerations;
  - No guarantee as to state and condition and no opportunity for tenant to 'make good' if landlord re-enters and forfeits – may be commercially important to the landlord;
  - Mitigation of loss – if lease intact, rent accrues as a debt. If lease is terminated, tenant will be exposed to liability for damages and landlord will be required to mitigate those damages.
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## Does tenant have right to terminate lease early?



- Section 64 of the *Retail Leases Act* requires landlords to give at least 6 months' notice, but no more than 12 months' notice, of the landlord's intentions in relation to a lease which is to expire without any further options;
  - The tenant may have both an "exit strategy" and the ability to effectively remain in the premises for an extended period of time.
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# Self-help re-entry and forfeiture

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# Self-help re-entry and forfeiture

- Once the lock-out is ready to occur, the landlord may use no more than reasonable force to re-enter and take possession (normally formalised by changing the locks). It is therefore best practice to wait until the premises is unattended.
  - Once re-entry is effected, best practice is to put up prominent notices announcing the re-entry and forfeiture of the lease, and leaving a contact number if there are any enquiries. This is primarily to alert people (such as locksmiths) whom the tenant may attempt to use to regain access to the premises;
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## Self-help re-entry and forfeiture (cont.)



- In some cases, it may be considered necessary to hire a security guard to prevent attempts to regain access. If so, this is likely to be a sunk cost and not recoverable from the tenant unless you have compelling proof of an imminent attempt (or repeated attempts) by the tenant to force its way back in;
  - In some leases there will be a clause providing that, upon termination any of the tenant's possessions should be deemed abandoned and the landlord empowered to dispose of them or sell them at its option;
  - If the lease does not have this clause, the tenant's fixtures and fittings under the lease remain the tenant's property and the tenant is entitled to collect them upon reasonable request. If the tenant does not, there may be the need to put the goods into storage.
  - Mitigation of loss – once re-entry has been effected, reasonable steps must be taken promptly to attempt to re-let the premises.
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## Recovery of arrears and compensation



- Retail lease claims (with exceptions for claims against guarantors) must generally be brought in VCAT. In VCAT retail lease disputes, costs are virtually never awarded – not even if the lease says that they are recoverable.
  - For this reason, it may be preferable to sue the guarantors alone in a court – and courts generally award costs.
  - There is a risk, however, if you commence a proceeding against a guarantor in a court, and the guarantor alleges there is an unresolved dispute between the tenant and the landlord, for example, about compensation for limited use of the premises, or an unresolved dispute about rent relief. In such a case, the court may dismiss the claim and require you to sue in VCAT instead.
  - If you think there may be an unresolved dispute, therefore, it may be safer to sue in VCAT in the first place.
  - On the other hand, in situations where the tenant is in liquidation, you are safe suing the guarantors in court because in that case the guarantors will be unable to bring the tenant into the dispute.
  - Mediation with the Small Business Commissioner is a prerequisite for commencing a VCAT claim (but not a court claim).
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# Small Business Commissioner Mediations



- Mediation is a forum designed to see if the parties can resolve their dispute on a voluntary, agreed basis, to avoid the need for a contested claim, whether in VCAT or a court.
- Mediation is a compulsory first step before commencing a retail lease claim in VCAT (with certain limited exceptions). However, it can be used even where it is not compulsory, as an effort to reach a resolution of the claim.
- The mediator will act as a go-between to try to broker agreement between the parties. The parties may have legal representatives at a mediation, or they may not.
- The mediator cannot force a result. This means that, generally, a compromise will be necessary from both sides if the mediation is to reach a result.
- The Small Business Commissioner does not only have jurisdiction to resolve retail lease disputes. It can also resolve small business disputes generally under section 5(2)(e) of the *Small Business Commission Act 2017*. Accordingly, if a particular lease is not a retail lease, this does not rule out a Small Business Commissioner mediation. There is no statutory definition of "small business". This phrase therefore takes its ordinary English meaning.

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## Any Questions?

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*Disclaimer: The information contained in this document is of a general nature and for information purposes only. It is not intended to address individual circumstances and is therefore not intended to be relied upon as binding legal advice.*

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