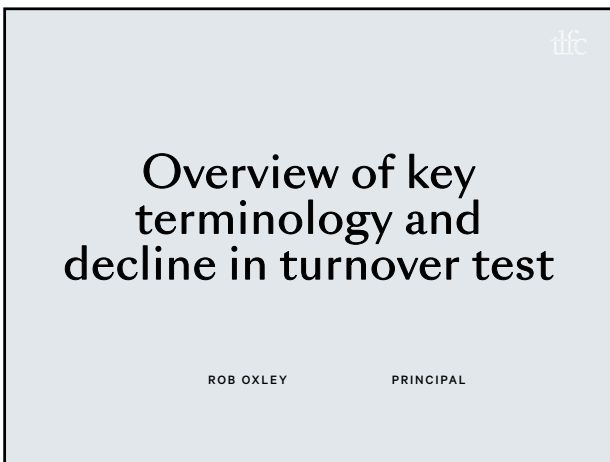




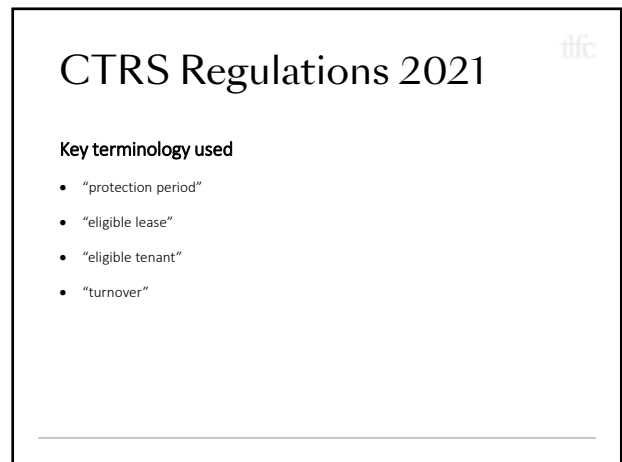
1



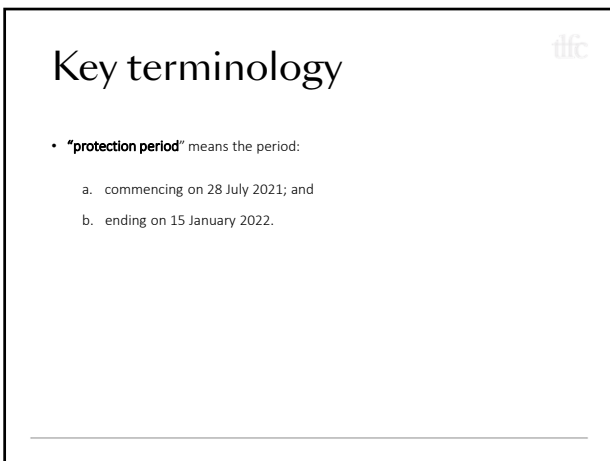
2



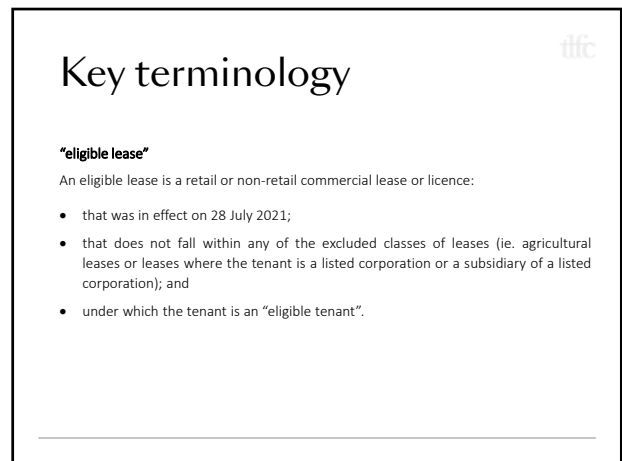
3



4



5



6

## Key terminology tffc

An **"eligible tenant"** is a tenant that:

- as at 28 July 2021 carried on a business in Australia;
- is an **SME entity** (turnover in FY 2021 of less than \$50m or if not trading for all of FY 2021, its annual turnover for FY2022 is likely to be less than \$50m);
- does not fall within any of the excluded classes of "eligible tenants" (these include government agencies; local governing bodies; a company in liquidation or bankrupt individuals); and
- satisfies the **"decline in turnover test"**.

7

## Decline in turnover test tffc

To satisfy the decline in turnover test, a tenant must be able to demonstrate that its **turnover** for the **turnover test period** is at least 30% lower than its **comparison turnover**.

**Key terms**

- **"turnover"**
- **"turnover test period"**
- **"comparison turnover"**

8

## Comparison turnover test periods tffc

Tenant started trading	Comparison turnover	Turnover test period
Before 1 April 2019	Tenant's choice of three consecutive months between 1 April 2019 and 30 September 2019	Three consecutive months between 1 April 2021 and 30 September 2021 to match the months chosen for the comparison period
1 April 2019 to 31 March 2020 (Pre-pandemic)	<b>Average monthly turnover of trading up to 31 March 2020, expanded to create a quarterly figure</b> If the tenant started trading between 1 April 2019 and 31 March 2020 (inclusive), the tenant's comparison turnover is calculated by taking the sum of the tenant's turnover for each whole month after the tenant commenced trading and before 31 March 2020 divided by the number of whole months of trade multiplied by three.	Three consecutive months between 1 April 2021 and 30 September 2021
1 April 2020 to 31 March 2021 (During the pandemic)	<b>Average monthly turnover of trading up to 31 March 2021, expanded to create a quarterly figure</b> If the tenant started trading between 1 April 2020 and 31 March 2021 (inclusive), the tenant's comparison turnover is calculated by taking the sum of the tenant's turnover for each whole month after the tenant started trading and before 31 July 2021 divided by the number of whole months of trade multiplied by three.	Three consecutive months between 1 April 2021 and 30 September 2021
1 April 2021 to now (During the pandemic)	<b>Average daily turnover of trading up to 31 July 2021, expanded to create quarterly figure</b> If the tenant started trading after 30 March 2021, the tenant's comparison turnover is calculated by using the tenant's turnover from the date that the tenant started trading to 31 July 2021, divided by the number of days the tenant was trading and multiplied by 92.	Parties to agree current quarterly figure to use or equivalent

Source: Victorian Small Business Commission

9

## Alternative comparison turnover methods tffc

- The **tenant's business was acquired or disposed of** on or after the relevant comparison period and before the applicable turnover test period and the acquisition or disposal changed the tenant's comparison turnover;
- The tenant's business was **restructured** on or after the relevant comparison period and before the applicable turnover test period and the restructure changed the tenant's turnover;
- The tenant has had a **substantial increase in turnover** before the applicable turnover test period;
- The tenant's business was **affected by drought or natural disaster** which changed the tenant's turnover;
- The tenant's **business has irregular turnover**;
- The tenant is a sole trade or a small partnership that has no employees and the tenant did not work during that part of the relevant comparison period due to **sickness, injury or leave which affected the tenant's turnover**;
- The tenant's business temporarily **ceased trading** during the relevant comparison period **due to an event outside of the ordinary course of business**.

10

## Applying for/ negotiating rent relief tffc

ANGELA KORDOS      SENIOR ASSOCIATE

11

## Key dates tffc

- Tenant under an eligible lease makes a request **on or before** 30 September 2021, it can seek rent relief retrospectively from 28 July 2021 up to 15 January 2022 (which is what we refer to as the "Protection Period").
- If a tenant under an eligible lease makes a request from 1 October 2021, it will only be entitled to rent relief from the date of submitting a valid, compliant application up to 15 January 2022.

This means that:

- If the tenant makes a compliant request on or before 30 September 2021, the rent relief period will be 28 July 2021 – 15 January 2022 (noting there is a mandatory reassessment on 31 October 2021 which we will discuss shortly);
- If the tenant makes its application after 30 September 2021 (i.e. 1 October 2021 or thereafter), the rent relief period will commence on the date of the tenant's request until 15 January 2022. This is quite crucial; a delay in making a rent relief request could mean an eligible tenant loses over 2 months of rent relief that would otherwise have been capable of being backdated.

12

## Tenant's request for rent relief

tffc

- The Tenant needs to provide a written request accompanied by a statement and evidence confirming that
  - a. The tenant is an eligible tenant; and
  - b. That the tenant satisfies the decline in turnover test. The tenant must provide details of the turnover test period, comparison period, and decline. The tenant must also set out the reduction in rent the tenant considers would satisfy the minimum requirements for a compliant rent relief offer to be made by the landlord.
- Details of "other circumstances"
- Information that evidences turnover figures, either:
  - An extract from the tenant's accounting records;
  - The tenant's business activity statements;
  - A statement issued by an ADI (authorised deposit taking institution); and
  - A statement prepared by a practising accountant.
- Tenant must also provide a statutory declaration
- Tenant must provide the required information and evidence within 14 days after making the request
- Tenant can only allow 3 requests to lapse.

13

## Landlord's offer for rent relief

tffc

- The landlord's offer for rent relief must be made within 14 days
- The offer:
  - Must be in writing;
  - Must relate to up to 100% of the rent payable under the lease during the applicable rent relief period; and
  - Must at a minimum be proportional to the tenant's decline in turnover
- Deemed acceptance after 15 days

14

## Waiver

tffc

- The rent relief must at a minimum be proportional to the tenant's decline in turnover
- No less than 50% of the rent relief must be offered in the form of a waiver unless the parties otherwise agree in writing.
- E.g. if a tenant under an eligible lease has a 40% decline in turnover, the landlord must offer rent relief equivalent to 40% of the rent. Of that 40%, at least half must be by way of waiver. So that tenant would be entitled to at a minimum 20% waiver of rent, with the balance to be deferred.

15

## Deferral

tffc

- Any deferral of rent must be
  - taken in equal instalments commencing not earlier than 15 January 2022, for the period that is the greater of:
    - two years; or
    - the balance of the length of the term of the lease.
- Where part of the rent relief offered is by way of rent deferral, the landlord must offer the tenant an extension to the term of the lease equivalent to the period for which rent is deferred.
- Can a landlord hold a security deposit or bank guarantee until the deferred rent has been paid?
- What about deferred rents and contracts of sale?

16

## Postponement of 2020 deferrals

tffc

- If a tenant under an eligible lease has been granted rent relief, the landlord must freeze any deferred rent that would have been payable under the old Regulations.
- Applies in relation to deferred rents arising under existing leases continuing on foot, and to previous leases of the same premises
- E.g. if a tenant received rent relief last year under the old Regulations, and the rent relief included an agreement to pay certain deferred rents, even if deferred rent payments have already commenced, they must be frozen and cannot be collected until after 15 January 2022.

17

## Outgoings and expenses

tffc

- A landlord under an eligible lease must consider waiving recovery of any outgoing or other expense payable by a tenant under the eligible lease, for any part of the protection period that the tenant is not able to operate their business at the premises.
- As was the case under the previous Scheme, if the rent under an eligible lease is a gross, outgoings-inclusive rent, then the rent relief offered must be inclusive of outgoings.
- If the landlord receives a reduction in outgoings from any authority, it must pass the benefit of that reduction on to the tenant.

18

## Trading

tffc

- If during the protection period the tenant reduces its opening hours or closes the premises, the tenant is not in breach of any provision of their eligible lease that relates to the opening hours of the business they carry out at the premises.
- Moratorium on evictions, cannot have recourse to security

19

## Prohibition on rent increases

tffc

- If a lease is an eligible lease, rent cannot be increased during the protected period, and any such increase that would otherwise have applied, and such review is "voided and can never be claimed by the landlord".
- This applies to eligible leases irrespective of whether the tenant has requested rent relief
- The prohibition could have a significant and cumulative impact on future rents.

20

## Moratorium on evictions

tffc

A landlord under an eligible lease cannot take steps to evict a tenant, re-enter the premises or have recourse to any security provided by a tenant during the protection period if:

- Before a rent relief agreement is reached, the tenant has made a complaint request for rent relief and is otherwise paying a proportion of its rent equal to the rent that would otherwise be due having regard to the decline in turnover; OR
- The tenant has entered into a rent relief agreement with the landlord and is complying with the agreed payment terms; OR
- Irrespective of whether a request for rent relief has been made, the tenant is unable to trade as a result of:
  - Sickness or injury affecting the tenant, its officers or employees; or
  - A natural disaster affecting the premises.

**What happens if a landlord under an eligible lease takes steps to evict a tenant, re-enter the premises or have recourse to any security?**

21

## Reassessment date

tffc

- Mandatory check in point if a rent relief request was made prior to 30 September 2021.
- The reassessment information provided by the tenant must include:
  - Turnover for the reassessment turnover test period, being the quarter ending 30 September 2021;
  - Comparison turnover; and
  - Details of the change in turnover, which is calculated as the difference between the two figures, expressed as a percentage.
- The alternate methods are available if relevant to your circumstances.
- Statutory declaration needed

22

## Can I surrender my lease?

tffc

- The parties are at liberty to commercially negotiate to end their lease early (whether an eligible lease or not).
- Remember a lease is a binding document
- Reach out for tailored legal advice

23

## Disputes

tffc

ROB OXLEY

PRINCIPAL

24

## Dispute resolution

tffc

- The dispute resolution provisions in the Regulations are largely unchanged from the 2020 CTRS Regulations.
- Either a landlord or tenant may apply to the Small Business Commission (**SBC**) for a mediation.
- Any referral to the SBC must be:
  - in writing and in the appropriate form approved by the SBC; and
  - accompanied by all relevant documentation as provided for in the Regulations.
- If the landlord or tenant does not respond to the dispute notice ten (10) business days after being served (or fails to adequately respond), the SBC may:
  - arrange for the eligible lease dispute to be the subject of a mediation; or
  - issue a Regulation 41 certificate which may include a statement that the landlord or tenant has not engaged in the mediation process in good faith.

25

## Binding orders made by SBC

tffc

- An application for binding order can still only be made by a tenant, not a landlord.
- Similar to the provisions on the previous version of the Regulations.
- To apply for a binding order, the tenant must be able to establish that:
  - The dispute relates to a rent relief request made in accordance with Regulation 27;
  - The SBC has issued a Regulation 41 certificate which records that the landlord has:
    - failed to respond at all or sufficiently to the dispute notice; or
    - not engaged in mediation in good faith in the opinion of the SBC
  - The tenant has not commenced a VCAT proceeding in relation to the dispute.
- The Regulations set out a process and procedure for making a binding order and process to apply to VCAT for a review of a binding order.

26

## Any Questions?

tffc

**RON COHEN:** [RCOHEN@TLFC.COM.AU](mailto:RCOHEN@TLFC.COM.AU)  
**ROB OXLEY:** [ROXLEY@TLFC.COM.AU](mailto:ROXLEY@TLFC.COM.AU)  
**ANGELA KORDOS:** [AKORDOS@TLFC.COM.AU](mailto:AKORDOS@TLFC.COM.AU)

*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.*

TISHER LINER FC LAW

27