

FAQs

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

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VERSION: 1

DATE: 07/05/2020



REIV

Common Questions re the Emergency Measures (Commercial Leases and Licences)

- [The Regulations](#)
- For the latest updates, tools and resources, visit reiv.com.au/covid-19. You may also like to join the [REIV Facebook Group](#) to assist Members during the Pandemic

A. Overview

- Relevant Period: 29 March 2020 to 29 September 2020
- Regulation 8: Landlords and tenants must work together cooperatively and act reasonably and in good faith in all discussions and actions to which the Regulations apply.
- The tenant must comply with regulations 10(1) to (5) during the relevant period every time they request a rent relief;
- A rent relief application must be in writing and accompanied by:
 - a. A statement by the tenant that the tenant's lease is an eligible lease, and
 - b. Is an SME, and
 - c. The tenant qualifies for, and is a participant in, the JobKeeper scheme.
- On receipt of a tenant's request which conforms, a landlord must offer rent relief within;
 - a. 14 days after receiving that request, or
 - b. A different time frame as agreed between the landlord and tenant in writing.
- A landlord's offer of rent relief must be based on all the circumstances of the eligible lease and;
 - a. Relate to up to 100% of the rent payable under the eligible lease during the period; and
 - b. 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 tenant otherwise agree in writing; and
 - c. Apply to the relevant period, and
 - d. Take into account:
 - The reduction in a tenant's turnover associated with the premises during the relevant period; and
 - Any waiver of outgoings given to the tenant by the landlord.

- 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 repayment of rent; and
 - A landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic; and
 - Any reduction to any outgoings charged, imposed or levied in relation to the premises.
- Following receipt of a landlord's offer by a tenant, the tenant and landlord must negotiate in good faith with a view to agreeing on the rent relief to apply during the relevant period.

B. Eligibility

Q. What is considered rental hardship / What is the definition of "Impacted by Covid"?

A. The Code, legislation and regulations assume SME tenants which are eligible for the JobKeeper scheme are automatically considered to be in financial stress or hardship if it has experienced at least 30% reduction in turnover in comparison to similar period in the prior year as a direct result of the COVID-19 pandemic.

Q: "As we understand the business / tenant must qualify for and be participating in the job keeper program. If they do not qualify or not participating in that program does that mean the code does not apply and its business as usual, that is they must meet all their obligations under the lease? How is this done in a practical sense where evictions are banned?"

A: If the tenant does not qualify for JobKeeper then the Code, legislation and regulations will not apply to them. As such, the landlord may still increase rents or evict the tenant for non-payment of rent as usual. Evictions are only banned for tenants that meet the eligibility criteria set out in the legislation.

Q. What if tenant has shut down completely and they are having difficulty applying for job keeper as they are just two partners running a travel agency and their accountant has told them they can't apply for job keeper yet are seeking relief

A: Section 13 (1)(ii) of the enabling legislation states that for a tenant to be eligible for the protections of the Code, it must be "an employer who qualifies for the JobKeeper Scheme and is a participant in the JobKeeper Scheme". Our understanding is that JobKeeper has been updated to allow 1 partner in a partnership to be eligible for the JobKeeper programme.

Q. If a commercial tenant was able to continue operating, but chose to close during this period...would they be eligible for reduction on rent if they did apply for the job keeper?

A: Yes, tenants that apply and qualify for JobKeeper and have a turnover of less than \$50 million will be eligible for rental relief as set out in the Code, legislation and Regulations.

Q. What about a new lease that has commenced since April 3 does it come under the code?

A: The legislation expressly excludes leases that commence on or after the date of commencement of the Regulations which are 29 March 2020.

C. Negotiating a lease

Q. Can you please clarify the difference between rent deferrals and reductions and what that means for landlords/tenants?

A: Rent deferral means the rent is deferred (delayed) for a specified time frame as agreed by the tenant and landlord and will be repaid by the tenant at a later time.

Reduction means the rent has been reduced for a specified period of time as agreed by the landlord and tenant and there is no expectation that it will be repaid by the tenant.

Q. What other proof does a tenant need to provide agent/landlord if they are 100% restricted from trading? as per Directions 5?

A: Tenants should provide landlords copies of their monthly accounts, business activity statements, bank account statements etc which show their current levels of income.

Q. "We have seen demands from Landlords to Commercial Tenants like this: --
"... we require that the following information be provided to substantiate your claim of 90% downturn in revenue.

- a. Your last three quarters of your Business Activity Statement.
- b. Verified cash flow statement applicable for the past 6 months, to date (must be provided and verified by your accountant)"

Can the Tenant refuse to provide such information and argue that such request amounts to unconscionable conduct and failing to abide by the Code of Conduct and only provide the same information as is required to be provided to the ATO to substantiate decreases in turnover?"

A: While the Code states that Landlords and tenants will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code, little detail has been provided as to exactly what financial information can be requested from tenants. We anticipate that there will be guidance provided shortly from the Office of Small Business Commissioner on the provision of financial information.

Q. Is there any further information/guidance on calculating loss of revenue for SMEs?

A: The Code states that Landlords and tenants will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code. This includes information generated from an accounting system, and information provided to and/or received from a financial institution. We anticipate that there will be guidance provided shortly from the Office of Small Business Commissioner on the provision of financial information.

Q. Can the REIV send us a mathematical calculation regarding a commercial tenant on (say) \$100,000 rent p.a. with a turnover loss of (say) 60%?

A: There is an example calculation in the REIV Fact Sheet on Commercial Leasing Principles - COVID-19 which is available on the [REIV website, click here](#).

Q. Not all owners can afford to waive rent. Is there anywhere in the covid-19 legislation that states that any deferred rent remains as a debt to be repaid in future?

Yes, Regulation 16 Payment of deferred rent:

Regulation 16(2) (a)

A landlord under the lease must not request payment of any part of the deferred rent until the earlier of –

- a. Expiry of the relevant period, and*
 - b. Expiry of the term of the legible lease (before any extension as provided under Regulation 13 the landlord under the eligible lease must offer the tenant under the eligible lease an extension to the term of their eligible lease on the same terms and conditions that applied under the eligible lease before the commencement of these Regulations. (3) The extension offered under sub regulation (2) must be equivalent to the period for which rent is deferred, unless a landlord and a tenant agree in writing that this regulation does not apply to their eligible lease, and*
- A landlord and tenant must vary the eligible lease or otherwise agree so that the tenant must pay the deferred rent to the landlord amortised over the greater of –*
 - a. The balance of the term of the lease including any extension to that term and*
 - b. A period of no less than 24 months*

Q. Are outgoings payable under the code (commercial)? Are outgoings payable by the tenant?

A: Regulation 14 states that “Landlords must consider waiving recovery of any outgoing or other expense payable by a tenant for any part of the relevant period that the tenant is not able to operate their business in the premises.” So, it seems that if the tenant has ceased trading then outgoings should also cease. If the tenant is still trading, then we believe that they should continue to pay outgoings.

Q. Are outgoings considered in the deferral/waiver deals?

A: The Regulations are not clear on whether outgoings are deferred or waived. Ultimately it will need to be a negotiated position.

Q. Is 50% deduction compulsory for commercial landlord if the tenant can prove income decreases?

A: Provided that a tenant meets the eligibility criteria (eligible for JobKeeper & turnover less than \$50 million), the landlord is only expected to reduce the tenant's rental in proportion to the reduction in the tenant's turnover on account of COVID-19. This could be as little as 30% or as much as 100%. Of that reduction, at least 50% must be waived and the remained is to be repaid over the balance of the lease or 2 years whichever is the longest.

Q. Is the Owner obligated to agree to any reduction in Mediation?

A: It is advisable to come to an agreement otherwise the matter may be escalated to VCAT if the SBC certifies that mediation under Division 1 has failed or is unlikely to resolve the dispute.

Q Who makes the request for mediation for rent reduction if it can't be agreed? Wouldn't it be the tenant if they are the ones asking? and not the agent?

A: Part 6 Dispute Resolution Division 1 Mediation of eligible lease disputes by Small Business Commission Regulation 20 (1) A landlord or tenant under an eligible lease may refer a dispute about the terms of the eligible lease arising in relation to a matter to which these Regulations apply (an eligible lease dispute) to the Small Business Commission for mediation.

Q. What is the best way in dealing with tenants that are slow or not interested in responding to questions raised?

A: We suggest that you first try the usual telephone calls, letters or emails. No doubt, some situations will require the landlord's solicitor to become involved. Ultimately, the only remaining course of action is to seek a binding mediation at the Victorian Small Business Commissioner.

Q. Can a commercial tenant still be locked out if they have not negotiated or responded to a section 146 notice?

A: The Regulations prevent any landlord from locking out a tenant for non-payment of rental or outgoings during the COVID-19 pandemic period provided that they have requested rent relief in accordance with the Regulations and provided that they are paying the rent in accordance with the new agreement. We are unsure at this stage if this would apply to S146 notices issued prior to 29 March 2020.

Q What if the Commercial outgoings were issued pre-end of March and they are now using COVID19 as the reason they cannot pay. I still think that is a separate issue, thoughts?

A: The Regulations are effective from 29 March 2020 which means that tenants will not be eligible for a discount on rent or outgoings payable prior to that date. There is no doubt that some tenants were struggling prior to COVID-19 which has now made things worse for them.

Q. With commercial tenancies, the reduction is based on the monthly revenue reduction so assessed monthly?

A: The Code & regulations are not clear on how this will work. It will come down to a negotiated position between the landlord and tenant either on a month by month basis or on a quarterly basis. We have sought clarification from the Government on this issue.

Q. Does a landlord have a right to insist rent is paid up to date prior to rent relief negotiations commencing?

A: We do not believe that the landlord has such a right, however, it could be used as a negotiating tactic to bring the tenant's rent and outgoings up to date.

Q. For a gym or sports centre 100% lockout by government order?

A: Gyms and other businesses that are closed due to Government orders will not be required to pay rental while they are closed. Once they open, rents should flow again to landlords, but it may take some time for a gym to reach a level by which it can pay full rent again. Any reduction in rents need to be treated as 50% waiver/50% deferral.

Q. Will the job keeper form display the client's turnover?

A: No, the JobKeeper application form only confirms that the tenant has applied for the JobKeeper subsidy. Turnover records will have to be requested from the tenant in the form of accounts or Business Activity Statements.

Q. If a Commercial Lease has been entered into after 29/03/2020, does the rent reduction and eviction proceedings still apply in-full? As in, if a new tenant moved into a property on 14/04/2020 and their next rent is due on 14/05, are they still eligible for a rent reduction, given that their affordability may have been proven under false pretence?

A: The Regulations exclude any leases that commence after 29 March 2020. Such leases will not automatically be afforded protections under the legislation and Regulations. However, if a business is severely affected by the COVID-19 pandemic under such a lease then ultimately there should be negotiation between the landlord and tenant. The Office of the Small Business Commissioner has stated that they will still mediate matters where the legislation and Regulations do not apply.

Q What kind of questions are asked for the landlord if it goes to mediation & what info do we have provide on behalf of the owner?

A: No case has been brought to mediation to date that the REIV is aware of. A case manager from the Office of Small Business Commissioner will contact all parties prior to the mediation and detail the types of information required for the mediation.

Q. How will mediation work for landlords that have no access to technology (this is a very large group of self-funded retirees) can it be done over the telephone sbc with landlord?

A: The response will depend on the mediator's approach and what the mediator may consider appropriate under the circumstances.

D. Rent increases

Q. Commercial rent increases that are put on hold. Is it to be skipped or simply delayed till after end Sept?

A: We are unsure of this at the moment and we have sought further guidance on this matter from the Government.

Q. In relation to annual increases already written into commercial leases - they remain?

A: The Regulations prevent any rent increase already written into leases to be able to be implemented for the 6-month period unless agreed otherwise by the parties. We are seeking clarification on whether they can be deferred until after the COVID-19 pandemic is over or whether they will be lost to the landlord.

Q. If Commercial Tenant is not protected by the code can their rent be increased in line with their lease conditions?

A: Any leases for properties that do not meet the requirements of an eligible lease under S13 of the enabling legislation are not afforded the protection of the Code as implemented by the Regulations. As such, the landlord may increase the rent in line with their lease if they choose to do so.

Q. If there is an agreement between Landlord and Tenant to a rent reduction, is there a form which needs to be completed? Or just put the agreement in writing?

A: The negotiation process between the landlord / landlord's agent and tenant must be documented in writing. It is recommended a 'Deed of Variation' should be drafted by the landlord's solicitor. A [template has been developed by the REIV](#) for assistance.

E. Agent Remuneration/Tax relief for landlords

Q. How will agents be paid when commercial tenants aren't paying rent, therefore no fees are being collected?

A: Agents should be speaking to their landlord clients on how they are to be remunerated especially where the tenant is paying no rental for a period of time. We suggest that at a minimum you ask to be paid your usual management fee as if the rent had not been adjusted. You should ensure that you have any agreements with your landlord clients appropriately documented.

If you wish to change your commission structure, you must comply with S 49A of the Estate Agents Act 1980 amongst other matters.

Q. Will a new authority have to be signed if management fees stay the same, but rent is reduced?

A: No, you will base your commission on rent collected. Our Management Authorities state that we collect Management Fees on rent monies "collected", not on rents "due".

Q. Will the land tax relief of 25% to the property owner apply for a rent deferment or a rent reduction only? How and who will apply the land tax claims? Landlord or the Agency?

A: It remains the landlord's obligation to apply for land tax claim to the [State Revenue Office](#)

Q. For landlords who cannot lease their property are they also entitled to a land tax reduction?

A: If your property is not rented -

- *the property must be available for lease/rent*
- *a tenant for the property cannot be secured because of the coronavirus pandemic.*

While the Victorian Government may settle further conditions for eligibility, the landlord can apply for coronavirus land tax relief if you he/she meet these general criteria.

Source: [SRO](#)

If your property is not tenanted

- *The date when the property became available for rent.*
- *Description of how the coronavirus pandemic has impacted your ability to secure a tenant.*
- *The advertised rental amount and date of advertisement (if applicable).*
- *Copy of the property advertisement, for example via screenshot from online media or PDF (if applicable).*
- *Exclusive managing and leasing authority agreement with the real estate agent or property manager (if applicable).*
- *Anything else that can support your claim.*

F. Breaking a lease

Q. For some (retail lease) sole traders, the COVID-19 pandemic has severely impacted their business, such that the losses sustained cannot be recouped even when the economy opens again. Is there an option for the sole trader to “get-out” (Terminate or Surrender) of the Lease without the Landlord pursuing them into bankruptcy, given that nearly all leases have clauses similar to this one: *“Termination by the landlord ends this lease, but the landlord retains the right to sue the tenant for unpaid money of for damages (including damages for the loss of the benefits that the landlord would have received if the lease had continued for the full term) for breached of its obligations under the lease.”*

We understand that Victorian MP Fiona Patten is seeking to advance this with Parliament. We think that this is a commendable initiative and one that we would like to see REIV advance as well. Does the REIV support this and will it give support"

A: Leasing Principle 2 requires the tenants to remain committed to the terms of their lease subject to any amendments negotiated under the code. This is a key principle because the aim of the Code is to see tenants and landlords emerge after COVID-19 with the lease in place and both parties in a position to carry on. The REIV does not support any legislation which permits the tenant to walk away from their commitments under a lease. Despite the Code and any legislation, a landlord and tenant are always free to negotiate an orderly surrender of the lease if that suits both parties. We anticipate that this will be the case for many landlords and tenants over the next few months.

Q. I have a hairdresser who stopped trading on the 29th of March and will not pay rent or outgoings and will not negotiate. We have issued a section 146, but how far can we go apart from going to SBCV.

A: If a tenant refuses to negotiate then the only real course of action is to seek free binding mediation at the Office of Small Business Commissioner. If that fails, then you will need to proceed to VCAT to have the dispute determined.

G. Other

Q. If the laws have not been finalised, can we still send out default notices and vacate notices to commercial tenants?

A: The enabling laws have been enacted and the Regulations which set out the detail of how the Code will apply in Victoria have now been released. Default or vacate notices relating to arrears of rent or outgoings cannot be served on tenants that request rent relief in accordance with the Regulations..

Q Does the commercial code cease 29 September, or could it be extended?

A: The enabling legislation for the Commercial Code of Conduct has a sunset clause that is 6 months after its commencement. The Government could of course extend this is needed by updating the legislation.