

Authorised Version

**Commercial Tenancy Relief Scheme
Regulations 2021**

S.R. No. 103/2021

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Authorised Version

STATUTORY RULES 2021

S.R. No. 103/2021

Commercial Tenancy Relief Scheme Act 2021

Commercial Tenancy Relief Scheme Regulations 2021

The Governor in Council, on the recommendation of the Minister for Small Business, makes the following Regulations:

Dated: 24 August 2021

Responsible Minister:

JAALA PULFORD
Minister for Small Business

ALEXANDRA DEBELJAKOVIC
Clerk of the Executive Council

Part 1—Preliminary

1 Objectives

The objectives of these Regulations are—

- (a) to implement temporary measures to apply to tenants and landlords under eligible leases under the **Commercial Tenancy Relief Scheme Act 2021** to mitigate the effect of measures taken in response to the COVID-19 pandemic; and
- (b) to implement mechanisms to resolve disputes concerning eligible leases.

2 Authorising provision

These Regulations are made under section 7 of the **Commercial Tenancy Relief Scheme Act 2021**.

3 Commencement

These Regulations are taken to have come into operation on 28 July 2021.

4 Definitions

In these Regulations—

ACNC-registered charity has the meaning given by the GST Act;

alternative comparison turnover means the turnover calculated by an applicable alternative comparison turnover method;

alternative comparison turnover method means an alternative method of calculating comparison turnover set out in Division 5 of Part 2;

ATO means the Australian Taxation Office;

business activity statement means a statement, in the form approved by the Commissioner of Taxation under section 388-50 of Schedule 1 to the Taxation Administration Act 1953 of the Commonwealth, that sets out the liabilities, obligations and entitlements under a BAS provision (within the meaning of the Income Tax Assessment Act 1997 of the Commonwealth) of a business;

business day means a day that is not—

- (a) a Saturday or a Sunday; or
- (b) a day that is appointed as a public holiday or a public half-holiday throughout the whole of Victoria under the **Public Holidays Act 1993**;

change in turnover—see regulation 29(2)(d);

Commissioner of State Revenue means the Commissioner within the meaning of the **Taxation Administration Act 1997**;

Commissioner of Taxation means the Commissioner within the meaning of the Taxation Administration Act 1953 of the Commonwealth;

comparison turnover—see regulation 14;

decline in turnover test—see regulation 12;

dispute notice—see regulation 40(3);

Drought Help concessions means any concessions given by the ATO where drought has caused financial difficulty and any Disaster Recovery Funding Arrangements 2018 of the Commonwealth assistance measures;

eligible lease dispute—see regulation 40;

Note

See also regulation 61 under which eligible lease disputes can have matters severed, or be divided into separate matters, each of which is to be taken to be a distinct eligible lease dispute.

eligible tenant—see regulation 9;

GST Act means A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth;

non-profit body has the same meaning as in section 23-15 of the GST Act;

Note

The term non-profit body is not defined in the GST Act. However, this definition ensures that the meaning of the term in this regulation does not diverge from the meaning of the term in section 23-15 of that Act.

outgoings means a landlord's outgoings on account of any of the following—

- (a) the expenses attributable to the operation, maintenance or repair of—
 - (i) the building or area in which the premises are located or any other building or area owned by a landlord and used in association with the building or area in which the premises are located; or
 - (ii) in the case of premises in a retail shopping centre, any building in the centre or any areas used in association with a building in the centre;
- (b) rates, taxes, levies, premiums or charges payable by a landlord because a landlord is—
 - (i) the owner or occupier of a building or area referred to in paragraph (a) or of the land on which such a building is erected or such area is located; or
 - (ii) the supplier of a taxable supply, within the meaning of the GST Act, in respect of any such building, area or land;

practising accountant means a person who—

- (a) is registered as a company auditor by the Australian Securities and Investments Commission; or
- (b) is a Member of CPA Australia or Chartered Accountants Australia and New Zealand; or

(c) has attained the status of Member or Fellow of either the Institute of Public Accountants or the Association of Taxation and Management Accountants; or

(d) has attained the status of Fellow of the National Tax & Accountants' Association Limited;

premises means the premises under an eligible lease;

protection period means the period—

(a) commencing on 28 July 2021; and

(b) ending on 15 January 2022;

reassessment date means 31 October 2021;

regulation 41 certificate means a certificate issued by the Small Business Commission under regulation 41;

relevant comparison period—see regulation 15(1);

rent, in relation to an eligible lease that is a commercial licence, includes the licence fee payable under that licence;

rent relief means any form of relief provided to a tenant in respect of the obligation under an eligible lease to pay rent, including a specified rent relief or a reduction or remission of rent;

rent relief agreement means any agreement between a landlord and a tenant under an eligible lease regarding the rent relief to apply during the rent relief period in relation to an eligible lease, including by—

(a) a variation to the eligible lease; or

- (b) an agreement made, or deemed to be made, between the landlord and the tenant under regulation 27; or
- (c) an agreement varied between the landlord and the tenant under regulation 30; or
- (d) an agreement made in compliance with a binding order or an order of a court or VCAT;

rent relief period means the period—

- (a) commencing as set out in regulation 28; and
- (b) ending on 15 January 2022;

school has the meaning given by the GST Act;

security means anything provided by a tenant or any other person securing the performance of a tenant's obligations under an eligible lease, including a bond, security deposit, indemnity or guarantee;

small partnership is a partnership as defined in subsection 995 1(1) of the Income Tax Assessment Act 1997 of the Commonwealth with 4 or fewer individual partners;

SME entity—see regulation 10;

Table A provider has the same meaning as in the Higher Education Support Act 2003 of the Commonwealth;

Table B provider has the same meaning as in the Higher Education Support Act 2003 of the Commonwealth;

the Act means the **Commercial Tenancy Relief Scheme Act 2021**;

turnover means the current GST turnover within the meaning of the GST Act as modified under regulation 11 plus all Victorian government COVID-19 business support grants received by the tenant during the relevant period;

turnover test period—see regulation 13;

Victorian government COVID-19 business support grant means any grant or financial assistance payment provided by the Victorian government to a tenant to mitigate the effects of the COVID-19 pandemic on that tenant and that could be used by the tenant for the payment of business expenses including rent.

Part 2—Eligibility

Division 1—Eligible lease

5 Prescribed eligible lease—general

- (1) For the purposes of section 5(1) of the Act, an eligible lease is a retail lease or a non-retail commercial lease or licence—
 - (a) that is in effect on 28 July 2021; and
 - (b) under which the tenant is an eligible tenant; and
 - (c) is not excluded under regulation 7 or 8.
- (2) If, after 28 July 2021, the landlord and the tenant under an eligible lease enter into a new retail lease or a non-retail commercial lease or licence by either—
 - (a) the landlord or the tenant exercising an option to extend or renew that eligible lease; or
 - (b) otherwise varying, extending or renewing that eligible lease on substantially the same terms as the eligible lease—

the new retail lease or a non-retail commercial lease or licence is deemed to be a continuation of the eligible lease in effect on 28 July 2021, for the purpose of these Regulations, as varied, extended or renewed.

6 Prescribed eligible lease—change in trading hours protection

In the circumstances set out in regulation 38 only, for the purposes of section 5(1) of the Act, a lease that meets the requirements of regulation 5(1) is prescribed as an eligible lease and the tenant does not need to satisfy the decline in turnover test to be an eligible tenant.

Note

See also regulation 9(2).

7 Prescribed excluded class of lease—agriculture

For the purposes of section 5(2) of the Act, an eligible lease does not include a retail lease or a non-retail commercial lease or licence under which the premises may be used wholly or predominantly for any of the following activities—

- (a) agricultural, pastoral, horticultural or apicultural activities;
- (b) poultry farming, dairy farming, aquaculture, tree-farming or any business that consists of the cultivation of soils, the gathering of crops or rearing of livestock;
- (c) grazing, including agistment;
- (d) any activity prescribed for the purposes of paragraph (c) of the definition of *farming operation* in section 3 of the **Farm Debt Mediation Act 2011**.

8 Prescribed excluded class of lease—listed corporation

- (1) For the purposes of section 5(2) of the Act, an eligible lease does not include a retail lease or a non-retail commercial lease or licence under which the tenant is—
 - (a) a listed corporation; or
 - (b) a body corporate, company or corporation whose securities are listed on a stock exchange outside Australia and the external territories; or
 - (c) a subsidiary of—
 - (i) a listed corporation; or

- (ii) a body corporate, company or corporation described in paragraph (b).
- (2) Unless otherwise defined in regulation 4, an expression used in this regulation that is defined in the Corporations Act has the same meaning in this regulation as it has in the Corporations Act.

Division 2—Eligible tenant

9 Meaning of *eligible tenant*

- (1) For the purposes of regulation 5(1)(b), a tenant is an *eligible tenant* if the tenant—
 - (a) is an entity that, as at 28 July 2021—
 - (i) carried on a business in Australia; or
 - (ii) was a non-profit body that pursued its objectives principally in Australia; or
 - (iii) was a deductible gift recipient that was, or operated, a public fund covered by item 9.1.1 (developing country relief funds) or item 9.1.2 (developed country disaster relief funds) of the table in subsection 30.80(1) of the Income Tax Assessment Act 1997 of the Commonwealth; and
 - (b) is an SME entity; and
 - (c) satisfies the decline in turnover test as set out at regulation 12; and
 - (d) is not excluded because the tenant is a tenant to whom regulation 8 applies or is a tenant referred to in subregulation (3).
- (2) For the purposes of regulation 6, a tenant is an eligible tenant if the tenant fulfils the criteria set out in subregulation (1)(a), (b) and (d).

- (3) Despite subregulation (1), a tenant under the retail lease or a non-retail commercial lease or licence is not an eligible tenant if—
- (a) an amount of levy under the Major Bank Levy Act 2017 of the Commonwealth was imposed for any quarter ending before 1 July 2021 on—
 - (i) the tenant; or
 - (ii) if the tenant is a member of a consolidated group—another member of the group; or
 - (b) the tenant is an Australian government agency; or
 - (c) the tenant is a local governing body; or
 - (d) the tenant is wholly owned by an entity referred to in paragraph (b) or (c); or
 - (e) the tenant is a sovereign entity, or would be a sovereign entity if subparagraphs 880.15(c)(ii) and (iii) of the Income Tax Assessment Act 1997 of the Commonwealth were disregarded; or
 - (f) if the tenant is a company—a liquidator or provisional liquidator has been appointed in relation to the company; or
 - (g) if the tenant is an individual—a trustee in bankruptcy has been appointed to the individual's property; or
 - (h) the tenant is connected with another entity or other entities, and the aggregated turnover of that group of entities—
 - (i) in the financial year ending 30 June 2021 exceeded \$50 million; or

- (ii) if the tenant did not carry on a business for the whole of the financial year ending 30 June 2021, for the financial year ending 30 June 2022 is likely to be more than \$50 million; or
- (i) the tenant is an affiliate of another entity or other entities, and the aggregated turnover of the tenant and the other entity or entities—
 - (i) in the financial year ending 30 June 2021 exceeded \$50 million; or
 - (ii) if the tenant did not carry on a business for the whole of the financial year ending 30 June 2021, for the financial year ending 30 June 2022 is likely to be more than \$50 million.
- (4) Unless otherwise defined in regulation 4, an expression used in this regulation that is defined in the Income Tax Assessment Act 1997 of the Commonwealth has the same meaning in this regulation as it has in that Act.

Division 3—SME entity

10 Meaning of *SME entity*

A tenant is an *SME entity* if, in the current financial year, the tenant is either a non-profit body or carries on a business and—

- (a) in the financial year ending 30 June 2021, the tenant was either a non-profit body or carried on a business and its annual turnover for that year was less than \$50 million; or
- (b) the tenant did not carry on a business or was not a non-profit body for the whole of the financial year ending 30 June 2021 and the tenant's annual turnover for the financial year

ending 30 June 2022 is likely to be less than \$50 million.

Division 4—Decline in turnover

11 Modifications relating to *turnover*

- (1) For the purposes of the definition of *turnover* in regulation 4, in calculating the turnover for a period, for the purposes of these Regulations, the following apply—
 - (a) section 188-15 of the GST Act apply as if a reference to a month were a reference to the period;
 - (b) subsection 188-15(2) of the GST Act (about members of GST groups) is to be disregarded;
 - (c) for calculating turnover—
 - (i) subsection 188-15(1) of the GST Act is to be applied at the end of the period; and
 - (ii) subsection 188-15(1) of the GST Act has effect as if the reference in that subsection to ", or are likely to make, during the 12 months ending at the end of that month," were instead a reference to "during that period";
 - (d) each external Territory is treated as forming part of the indirect tax zone within the meaning of the GST Act;
 - (e) for an entity that is a Table A provider or a Table B provider—subsection 9-17(3) of the GST Act is to be disregarded in its application to a payment covered by an appropriation under the Higher Education Support Act 2003 of the Commonwealth or

the Australian Research Council Act 2001 of the Commonwealth;

- (f) for an entity that is a deductible gift recipient—each gift described in an applicable item of the table in section 30-15 of the Income Tax Assessment Act 1997 of the Commonwealth and received, or likely to be received, by the entity in the period (other than from an associate) results in the following treatment—
- (i) the entity is treated as making, or as likely to make (as the case requires), a supply in the period for consideration;
 - (ii) the value (within the meaning of the GST Act) of the supply is treated as being equal to the amount of the gift (if the gift is money) or the market value of the gift (if the gift is not money);
- (g) for an entity that is an ACNC-registered charity (other than a deductible gift recipient)—each gift received, or likely to be received, by the entity in the period (other than from an associate) also results in the treatment set out in paragraph (f) if the gift is—
- (i) a gift of money; or
 - (ii) a gift of property with a market value of more than \$5000; or
 - (iii) a gift of listed Australian shares;
- (h) for an entity that is an ACNC-registered charity (other than a Table A provider, a Table B provider, or a school)—a supply made by the entity is to be disregarded, if—

- (i) the consideration for the supply is provided by an Australian government agency, a local governing body, the United Nations, or an agency of the United Nations; and
 - (ii) the ACNC-registered charity elects for this subregulation to apply.
- (2) To avoid doubt, turnover includes any turnover derived from Internet sales of goods and services.
- (3) To avoid doubt, turnover does not include any grant or financial assistance payment provided to a tenant by the Commonwealth to mitigate the effects of the COVID-19 pandemic on the tenant.

12 Meaning of *decline in turnover test*

For the purposes of regulation 9(1)(c), a tenant satisfies the *decline in turnover test* if—

- (a) the tenant's turnover for the turnover test period falls short of the tenant's comparison turnover; and
- (b) the shortfall, expressed as a percentage of the comparison turnover (the *decline in turnover*), equals or exceeds—
 - (i) for an ACNC-registered charity, other than a Table A provider, Table B provider, or a school, 15%; or
 - (ii) for all other entities, 30%.

Note

Paragraph (b)(i) affects only non-government schools, as government schools are not eligible tenants because of regulation 9(3)(b).

13 Meaning of *turnover test period*

- (1) For the purpose of regulation 12(a), the *turnover test period* is, if the tenant began trading (whether or not at the premises)—
 - (a) before 1 April 2021, at the tenant's election, a consecutive 3 month period between 1 April 2021 and 30 September 2021 (inclusive), commencing on the first day of a month; or
 - (b) on or after 1 April 2021, the period agreed in accordance with subregulation (2).
- (2) For the purposes of subregulation (1)(b), the tenant and the landlord must negotiate in good faith to agree on the turnover test period to apply for the purpose of this regulation.
- (3) For the purpose of regulation 29(2)(a), the *turnover test period* is the quarter ending on 30 September 2021.

14 Meaning of *comparison turnover*

- (1) The *comparison turnover* is—
 - (a) the tenant's turnover for the relevant comparison period; or
 - (b) if an alternative comparison turnover applies to the tenant, as calculated in accordance with the applicable alternative comparison turnover.
- (2) If more than one alternative comparison turnover applies to the tenant, the tenant may choose the alternative comparison turnover that applies for the purpose of subregulation (1)(b).

15 Meaning of *relevant comparison period*

- (1) For the purpose of regulation 14(1)(a), the ***relevant comparison period*** is the 3 month period in 2019 corresponding to the 3 month period elected by the tenant under regulation 13(1)(a).

Note

If the tenant began trading (whether or not at the premises) on or after 1 April 2019, the alternative comparison turnover method at regulation 16 applies instead.

- (2) For the purpose of regulation 29(2)(b), the ***relevant comparison period*** is, if the tenant began trading (whether or not at the premises)—
- (a) before 1 July 2019, the quarter ending on 30 September 2019; or
 - (b) between 1 July 2019 and 31 March 2021 (inclusive), the quarter ending on 30 June 2021.

Division 5—Alternative comparison turnover methods

16 Alternative comparison turnover—business began trading on or after 1 April 2019

- (1) This regulation applies if a tenant began trading (whether or not at the premises) on or after 1 April 2019.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated in accordance with subregulation (3), (4) or (5), as applicable.

- (3) If the tenant began 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 1 April 2020 divided by the number of whole months of trade multiplied by 3.
- (4) If the tenant began 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 commenced trading and before 31 July 2021 divided by the number of whole months of trade multiplied by 3.
- (5) If the tenant began trading after 31 March 2021, the tenant's comparison turnover is calculated by using the tenant's turnover from the date that the tenant began trading to 31 July, divided by the number of days the tenant was trading and multiplied by 92.
- (6) For the purposes of subregulations (3), (4) and (5), if the tenant—
 - (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals, then the tenant may exclude the calendar months covered by the Bushfires 2019–20 lodgment and payment deferrals from the calculation, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions, then the tenant may exclude the months covered by the Drought Help concessions from the calculation, unless the months covered by the concession are the only months available.

17 Alternative comparison turnover—business acquisition or disposal that changed the tenant's comparison turnover

- (1) This regulation applies if—
 - (a) there was an acquisition or disposal of part of a tenant's business on or after, the start of the relevant comparison period and before the applicable turnover test period; and
 - (b) the acquisition or disposal changed the tenant's comparison turnover.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated by taking the tenant's turnover from the month immediately after the month in which the acquisition or disposal occurred and multiplying it by 3.
- (3) For the purposes of subregulation (2), if there is no whole month after the acquisition or disposal and before the applicable turnover test period, then the month immediately before the applicable turnover test period should be used.
- (4) For the purposes of subregulation (2), if the tenant—
 - (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals, then the tenant may exclude the calendar months covered by the Bushfires 2019–20 lodgment and payment deferrals and use the nearest month before or after the acquisition or disposal as appropriate, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions, then the tenant may exclude the months covered by the Drought Help concessions and use the nearest month before or after the acquisition or disposal as appropriate, unless the months

covered by the concession are the only months available.

18 Alternative comparison turnover—business restructure that changed the tenant's comparison turnover

- (1) This regulation applies if—
 - (a) there was a restructure of a tenant's business, or part thereof, on or after the start of the relevant comparison period and before the applicable turnover test period; and
 - (b) the restructure changed the tenant's turnover.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated by taking the tenant's turnover from the month immediately after the month in which a restructure occurred and multiplying it by 3.
- (3) For the purposes of subregulation (2), if there is no whole month after the restructure and before the applicable turnover test period, then the month immediately before the applicable turnover test period should be used.
- (4) For the purposes of subregulation (2), if the tenant—
 - (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals, then the tenant may exclude the calendar months covered by the Bushfires 2019–20 lodgment and payment deferrals and use the nearest month before or after the restructure as appropriate, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions, then the tenant may exclude the months covered by the Drought Help concessions and use the

nearest month before or after the restructure as appropriate, unless the months covered by the concession are the only months available.

19 Alternative comparison turnover—tenant has substantial increase in turnover

- (1) This regulation applies if a tenant had an increase in the tenant's turnover of—
 - (a) 50% or more in the 12 months immediately before the applicable turnover test period; or
 - (b) 25% or more in the 6 months immediately before the applicable turnover test period; or
 - (c) 12.5% or more in the 3 months immediately before the applicable turnover test period.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is the tenant's turnover in the 3 months immediately before the applicable turnover test period.
- (3) For the purposes of subregulation (2) if the tenant—
 - (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals, then the tenant may use the 3 month period before the Bushfires 2019–20 lodgment and payment deferrals commenced to calculate the 3 months' turnover; or
 - (b) received Drought Help concessions, then the tenant may use the 3 month period before this concession commenced to calculate the 3 months' turnover.

20 Alternative comparison turnover—business affected by drought or natural disaster

- (1) This regulation applies if—
 - (a) a tenant conducted business or some of the business in a declared drought zone or a declared natural disaster zone during the relevant comparison period; and
 - (b) the drought or natural disaster changed the tenant's turnover.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is equal to the tenant's turnover for the same period in the year immediately before the declaration of the drought zone or natural disaster zone.

21 Alternative comparison turnover—business has irregular turnover

- (1) This regulation applies if—
 - (a) for the consecutive 3 month periods within the 12 months immediately before the applicable turnover test period, the lowest of a tenant's turnover for any of those 3 month periods is no more than 50% of the highest of the tenant's turnover for any other of those 3 month periods; and
 - (b) the tenant's turnover is not cyclical.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated by multiplying the tenant's average monthly turnover by 3.
- (3) For the purpose of subregulation (2), the tenant's average monthly turnover is calculated by adding the tenant's turnover for each whole month in the 12 months immediately before the applicable turnover test period divided by that number of whole months.

- (4) For the purposes of subregulation (3), if the tenant—
- (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals, then the tenant may exclude the calendar months covered by the Bushfires 2019–20 lodgment and payment deferrals from the calculation, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions, then the tenant may exclude the months covered by the Drought Help concessions from the calculation, unless the months covered by the concession are the only months available.

22 Alternative comparison turnover—sole trader or small partnership with sickness, injury or leave

- (1) This regulation applies if—
- (a) a tenant is a sole trader or small partnership that has no employees; and
 - (b) the sole trader or at least one of the partners did not work for all or part of the relevant comparison period due to sickness, injury or leave; and
 - (c) the tenant's turnover was affected by the sole trader or partner not working for all or part of that period.
- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated by taking the tenant's turnover from the month immediately before the month in which the sole trader or partner did not work due to sickness, injury or leave and multiplying it by 3.

- (3) For the purposes of subregulation (2), if the tenant—
- (a) qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals in the month immediately before the month in which the sickness, injury or leave occurred, then the tenant may use the nearest month before the months covered by the Bushfires 2019–20 lodgment and payment deferrals, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions in the month immediately before the month in which the sickness, injury or leave occurred, the tenant may use the nearest month before the months covered by the Drought Help concessions, unless the months covered by the concession are the only months available.

23 Alternative comparison turnover—tenant temporarily ceased trading during the relevant comparison period

- (1) This regulation applies if—
- (a) a tenant's business had temporarily ceased trading due to an event or circumstances outside the ordinary course of the tenant's business; and
 - (b) trading temporarily ceased for a week or more; and
 - (c) some or all of the relevant comparison period occurred during the time in which the tenant's business had temporarily ceased trading; and
 - (d) the tenant's business resumed trading before 28 July 2021.

- (2) For the purpose of regulation 14(1)(b), a tenant's comparison turnover is to be calculated by using, at the tenant's election, one of the following formulas—
- (a) adding the tenant's turnover in the 3 months immediately before the month in which the business temporarily ceased trading; or
 - (b) using the tenant's turnover for the same period in the year immediately before the business temporarily ceased trading.
- (3) For the purposes of subregulation (2), if the tenant—
- (a) qualified for the ATO's Bushfires 2019-20 lodgment and payment deferrals, then the tenant may exclude the months covered by the Bushfires 2019-20 lodgment and payment deferrals and use the nearest month before or after the period, quarter or month as appropriate, unless the months covered by the concession are the only months available; or
 - (b) received Drought Help concessions, then the tenant may exclude the months covered by the Drought Help concessions and use the nearest month before or after the period, quarter or month as appropriate, unless the months covered by the concession are the only months available.

Part 3—General obligations on landlords and tenants

24 Landlords and tenants must work cooperatively

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulation (2).
- (2) A landlord and tenant under an eligible lease must cooperate and act reasonably and in good faith in all discussions and actions associated with matters to which these Regulations apply.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

25 Offence to provide false or misleading information

In providing any document or information under these Regulations, a landlord or a tenant under an eligible lease must not—

- (a) give information or make a statement that the landlord or the tenant knows or has reason to believe to be false or misleading; or
- (b) produce a document that the landlord or the tenant knows or has reason to believe to be false or misleading without indicating the respect in which it is false or misleading and, if practicable, providing correct information.

Penalty: 20 penalty units.

Part 4—Rent, outgoings and other expenses

Division 1—Rent relief

26 Non-payment of rent or outgoings during protection period

- (1) A tenant under an eligible lease is not in breach of any provision of the eligible lease that relates to payment of rent or outgoings if the tenant does not pay the amount of rent or outgoings required to be paid under the eligible lease during the protection period but only if—
- (a) before a rent relief agreement is made, the tenant—
 - (i) makes a request to the landlord for rent relief under regulation 27(1) and in accordance with regulation 27(2) and that request has not lapsed; and
 - (ii) continues to pay a portion of the rent due under the eligible lease, equal to the rent due reduced by the same percentage as the tenant's decline in turnover as set out in the statement accompanying the tenant's request for rent relief; or
 - (b) if a rent relief agreement has been made, the tenant pays the amount of rent and outgoings in accordance with that rent relief agreement; or
 - (c) one of the following circumstances apply—
 - (i) the tenant is unable to trade as a result of sickness or injury affecting the tenant, its officers or employees;
 - (ii) the tenant is unable to trade as a result of natural disaster affecting the tenant or the premises.

- (2) A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease because of non-payment of rent or outgoings if the tenant under the eligible lease has taken an action referred to in subregulation (1)(a) or (b) or subregulation (1)(c) applies.

Penalty: 20 penalty units.

- (3) A landlord under an eligible lease must not re-enter or otherwise recover, or attempt to re-enter or otherwise recover, the premises under an eligible lease because of non-payment of rent or outgoings if the tenant under the eligible lease has taken an action referred to in subregulation (1)(a) or (b) or subregulation (1)(c) applies.

Penalty: 20 penalty units.

- (4) A landlord under an eligible lease must not have recourse, or attempt to have recourse, to any security relating to the non-payment of rent under an eligible lease by a tenant under the eligible lease because of non-payment of rent or outgoings if the tenant under the eligible lease has taken an action referred to in subregulation (1)(a) or (b) or subregulation (1)(c) applies.

Penalty: 20 penalty units.

- (5) To avoid doubt, a landlord under an eligible lease is not prohibited from taking any action described in subregulation (2), (3) or (4) for a reason not expressly prohibited by this regulation or regulation 38.

27 Rent relief

- (1) A tenant under an eligible lease may request rent relief from the landlord under the eligible lease.
- (2) A request under subregulation (1) must be in writing and be accompanied by a statement from the tenant—

- (a) that the tenant is an eligible tenant; and
- (b) that the tenant satisfies the decline in turnover test, including setting out—
 - (i) the tenant's turnover for the turnover test period, including the turnover test period used; and
 - (ii) the tenant's comparison turnover, including stating whether the relevant comparison period or a specific alternative turnover method was used; and
 - (iii) if an alternative comparison turnover method was used, how the comparison turnover was calculated; and
 - (iv) the tenant's decline in turnover; and
 - (v) the reduction in rent that would satisfy the minimum requirements of an offer under subregulation (8); and
 - (vi) any other circumstances that the tenant would like the landlord to consider in making an offer under subregulation (8)(d)(ii).
- (3) Within 14 days after making a request under subregulation (1), the tenant must provide information to the landlord that evidences the turnover figures contained in the statement under subregulation (2), including at least one of the following—
 - (a) extracts from the tenant's accounting records;
 - (b) the tenant's business activity statements;
 - (c) statements issued by an ADI in respect of the tenant's account;

(d) a statement prepared by a practising accountant—

and include a statutory declaration made by the tenant or an authorised officer of the tenant, stating that the tenant is an eligible tenant and that the information provided by the tenant under this subregulation and subregulation (2) is true to the best of the tenant's knowledge and belief.

- (4) If a tenant does not comply with subregulation (3) within 14 days after making the request under subregulation (1), the tenant's request for rent relief lapses.
- (5) Subject to subregulation (6), if a tenant's request for rent relief lapses, the tenant may make a new request for rent relief under subregulation (1).
- (6) If a tenant allows 3 requests for rent relief to lapse, the tenant cannot make a further request for rent relief under subregulation (1).
- (7) On receipt of a tenant's request under subregulation (1) which complies with subregulations (2) and (3), a landlord must offer rent relief to the tenant under an eligible lease within—
- (a) 14 days after receiving the evidence required under subregulation (3); or
 - (b) a different time frame as agreed between the landlord and the tenant in writing.
- (8) A landlord's offer of rent relief under subregulation (7) must be in writing and—
- (a) relate to up to 100% of the rent payable under the eligible lease during the rent relief period; and
 - (b) at a minimum, be proportional to the tenant's decline in turnover; and

- (c) 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
- (d) take into account—
 - (i) part payments of rent under regulation 26(1)(a)(ii); and
 - (ii) any other circumstances that the tenant would like the landlord to consider as stated in the tenant's request under subregulation (2)(b)(vi).
- (9) To avoid doubt, if the rent charged under an eligible lease is inclusive of outgoings chargeable to the tenant with respect to the premises, the landlord must offer rent relief under subregulation (8) with respect to the rent payable inclusive of outgoings.
- (10) Following receipt of a landlord's offer by a tenant, the tenant and the landlord must negotiate in good faith with a view to agreeing on the rent relief to apply during the rent relief period.
- (11) On the date that is 15 days after the tenant receives the landlord's offer of rent relief, the tenant is deemed to have accepted the landlord's offer and a rent relief agreement is deemed to have been made accordingly if—
 - (a) the landlord and the tenant have not agreed on a rent relief agreement; and
 - (b) the tenant has not referred the matter to the Small Business Commission under regulation 40; and
 - (c) the landlord's offer of rent relief complies with the minimum requirements in subregulation (8).

- (12) Rent relief under this regulation may be given effect by the landlord and tenant by—
- (a) a variation to the eligible lease; or
 - (b) any other agreement between them that gives effect to the rent relief, either directly or indirectly.

Notes

- 1 An eligible lease has effect subject to this regulation—see section 8(1) of the Act.
- 2 If any part of the rent payable under an eligible lease has been waived under a variation to the eligible lease or under another agreement between the landlord and tenant that gives effect to the rent relief, either directly or indirectly, a landlord will be bound by that variation or agreement and will not be able to subsequently make any claim for payment of the waived part of the rent.

28 Meaning of *rent relief period*

For the purpose of the definition of *rent relief period* in regulation 4, the rent relief period commences if the tenant satisfies all of the following—

- (a) makes a request to the landlord for rent relief under regulation 27(1); and
- (b) the tenant's request for rent relief is in accordance with regulation 27(2); and
- (c) provides the required evidence under regulation 27(3)—

on the date that is—

- (d) on or before 30 September 2021, 28 July 2021; or
- (e) after 30 September 2021, the date of the tenant's request for rent relief.

29 Mandatory reassessment of rent relief agreement

- (1) This regulation applies if—
 - (a) a rent relief agreement has been made; and
 - (b) the date of the tenant's request for rent relief was on or before 30 September 2021; and
 - (c) the tenant began trading before 1 April 2021.
- (2) A tenant must provide to the landlord, in writing, the following information by the reassessment date—
 - (a) the tenant's turnover for the turnover test period, including the turnover test period used;
 - (b) the tenant's comparison turnover, including stating whether the relevant comparison period or a specific alternative comparison turnover method was used, and if so, which calculation by reference to its regulation number;
 - (c) if an alternative comparison turnover method was used, how the comparison turnover was calculated;
 - (d) the *change in turnover* calculated as the difference between the tenant's turnover for the turnover test period and the tenant's comparison turnover, expressed as a percentage of the tenant's comparison turnover—

and include a statutory declaration made by the tenant or an authorised officer of the tenant, stating that the tenant is an eligible tenant and that the information provided by the tenant under this subregulation is true to the best of the tenant's knowledge and belief.

(3) If the tenant—

- (a) used an alternative comparison turnover method for the purpose of regulation 14(1)(b); and
- (b) the criteria for that alternative comparison turnover method also apply to the relevant comparison period for the purpose of this regulation—

the tenant must use that same alternative comparison turnover method to calculate the alternative comparison turnover for the purpose of subregulation (2).

- (4) If the tenant's change in turnover differs from the tenant's decline in turnover, then with effect from the reassessment date, any part of a rent relief agreement that is based on the tenant's decline in turnover is deemed to be adjusted for the remainder of the rent relief period so that it is instead based on the tenant's change in turnover.
- (5) Subject to subregulation (6), if a tenant does not provide the information required by subregulation (2) within the time required by that subregulation, the tenant's rent relief agreement no longer applies to the extent that it relates to any waiver of rent only from the reassessment date.
- (6) A tenant's rent relief agreement continues to apply, despite the tenant not providing the information required by subregulation (2) if one of the following circumstances apply—
 - (a) the tenant is unable to trade as a result of sickness of injury; affecting the tenant, its officers or employees;

- (b) the tenant is unable to trade as a result of natural disaster affecting the tenant or the premises;
- (c) the parties agree that the rent relief agreement will continue to apply.

30 Subsequent rent relief

- (1) This regulation applies if a rent relief agreement has been made and subsequently the financial circumstances of a tenant under the eligible lease materially change.
- (2) The tenant may make a further request to the landlord under that lease for rent relief under regulation 27.
- (3) The landlord and the tenant must follow the process set out in regulation 27 in relation to that further request.
- (4) Any new rent relief agreement applies in substitution for the original rent relief agreement.

Note

An eligible lease has effect subject to this regulation—see section 8(1) of the Act.

31 Extension of the term

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulations (2) and (3).
- (2) If the payment of any rent is deferred by a rent relief agreement, the landlord under the eligible lease must offer the tenant under the eligible lease an extension to the term of their eligible lease otherwise on the same terms that applied under the eligible lease before 28 July 2021.
- (3) The extension offered under subregulation (2) must be equivalent to the period for which rent is deferred, unless a landlord and a tenant agree in

writing in relation to their eligible lease that the extension offer does not need to be equivalent to the period for which rent is deferred.

Example

If 3 months' rent is deferred, 3 months must be added to the term of the eligible lease.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

32 Payment of deferred rent

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulations (2) and (3).
- (2) Unless a landlord and tenant otherwise agree in writing, if any rent is deferred by a rent relief agreement—
 - (a) a landlord under the eligible lease must not request payment of any part of the deferred rent until after 15 January 2022; and
 - (b) the eligible lease is deemed to be varied so that tenant must pay the deferred rent to the landlord amortised over the greater of—
 - (i) the balance of the term of the eligible lease, including any extension to that term, as provided under regulation 31 or otherwise; and
 - (ii) a period of no less than 24 months.
- (3) The method by which the deferred rent is amortised for the purposes of subregulation (2) is to be in equal amounts, unless otherwise agreed to by the landlord and tenant.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

33 Further deferral of rent under a 2020 lease

(1) If—

- (a) rent payable under a 2020 lease was deferred under the COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020¹; and
- (b) the eligible lease is—
 - (i) the same as the 2020 lease; or
 - (ii) in substance a renewal, extension or replacement of that 2020 lease; and
- (c) a tenant has requested rent relief from the landlord under regulation 27—

any part of that deferred rent payable during the rent relief period is further deferred in accordance with subregulation (2), unless the landlord and a tenant agree otherwise in writing.

(2) If any rent is deferred under subregulation (1)—

- (a) a landlord under the eligible lease must not request payment of any part of the further deferred rent until after 15 January 2022; and
- (b) after 15 January 2022, the tenant must resume paying the deferred rent to the landlord in the same instalments and frequency as agreed between the landlord and the tenant when the rent was deferred under the 2020 lease.

(3) The landlord must not require the tenant to pay interest or any other fee or charge in relation to rent further deferred by this regulation.

- (4) Any agreement between the landlord and the tenant in relation to the payment of that deferred rent is deemed to be varied in accordance with subregulation (1).

34 No fees, interest or charges

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulation (2).
- (2) A landlord under an eligible lease must not require a tenant under the lease to pay interest or any other fee or charge in relation to rent deferred by a rent relief agreement.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

Division 2—General protections and obligations

35 Prohibition on rent increases

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulations (2), (3) and (4).
- (2) A landlord under an eligible lease must not increase the rent payable under the lease at any time during the protection period, unless the landlord and the tenant under the eligible lease agree in writing that in relation to their eligible lease, the rent can be increased during the protection period.
- (3) If an eligible lease provides on one or more dates during the protection period for—
- (a) an increase in rent; or

- (b) a review of the rent payable under the eligible lease that would increase the rent payable—

that review is voided and may never be claimed by the landlord.

- (4) Subregulations (2) and (3) do not apply to an eligible lease to the extent that it provides for rent to be determined by reference to the volume of trade of a tenant's business.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

36 Recovery of outgoings or expenses

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulations (2) and (3).
- (2) 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.
- (3) If a tenant under an eligible lease is not able to operate their business at the premises for any part of the protection period, the landlord may cease to provide, or reduce provision of, any service at the premises—
- (a) as is reasonable in the circumstances; or
- (b) in accordance with any reasonable request of the tenant.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

37 Reduction in outgoings

- (1) An eligible lease is deemed to include as part of the lease the term set out in subregulation (2).
- (2) If any outgoings charged, imposed or levied in relation to the premises are reduced—
 - (a) a landlord under an eligible lease must not require a tenant under the lease to pay any amount in respect of that outgoing that is greater than a tenant's proportional share of the reduced outgoing payable under the lease; and
 - (b) if a tenant under an eligible lease has already paid to a landlord under the lease an amount greater than a tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to a tenant as soon as possible.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

Part 5—Change in trading hours

38 Tenant may reduce business hours or cease business during protection period

- (1) A tenant under an eligible lease is not in breach of any provision of the eligible lease that relates to the opening hours of the business they carry out at the premises if, during the protection period, they—
- (a) reduce the opening hours of the business they carry out at the premises; or
 - (b) close the premises and cease to carry out any business at the premises.

Note

An eligible lease has effect subject to this regulation—see section 8(1) of the Act.

- (2) A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease because the tenant under the eligible lease has taken an action referred to in subregulation (1)(a) or (b).

Penalty: 20 penalty units.

- (3) A landlord under an eligible lease must not re-enter or otherwise recover, or attempt to re-enter or otherwise recover, the premises under an eligible lease because the tenant has taken an action referred to in subregulation (1)(a) or (b).

Penalty: 20 penalty units.

- (4) A landlord under an eligible lease must not have recourse, or attempt to have recourse, to any security relating to the non-payment of rent under an eligible lease by a tenant under the eligible lease because the tenant has taken an action referred to in subregulation (1)(a) or (b).

Penalty: 20 penalty units.

Part 6—Other obligations

39 Confidentiality of information

- (1) An eligible lease is deemed to include as part of the lease the terms set out in this regulation.
- (2) A landlord or tenant under an eligible lease must not divulge or communicate protected information obtained under or in connection with the operation of these Regulations except—
 - (a) with the consent of the person to whom the information relates; or
 - (b) to a professional adviser who agrees to keep it confidential; or
 - (c) to an actual or prospective financier who agrees to keep it confidential; or
 - (d) as authorised by the Small Business Commission; or
 - (e) as authorised under law; or

Example

As authorised by regulation 67.

- (f) for the purposes of any proceeding in a court or tribunal; or
 - (g) as provided for in subregulation (3).
- (3) A landlord or a tenant under an eligible lease may give the statement and information under regulations 27(2) and 29(2) to any Commonwealth or State government entity for the purpose of applying to be eligible, in relation to the premises, for—
 - (a) a tax relief measure in relation to any tax paid or required to be paid by the landlord; or

(b) any government grant to mitigate the effects of the COVID-19 pandemic.

(4) In this regulation—

personal information means the name, address and contact details of any person (other than the landlord or tenant);

protected information means—

- (a) personal information; or
- (b) information relating to business processes or financial information, including information about the trade of a business;

tax relief measure has the same meaning as in Part 9A of the **Taxation Administration Act 1997**.

Note

Section 8(1)(a) of the Act provides that an eligible lease has effect subject to these Regulations. The term as set out in this regulation forms part of the eligible lease and a landlord and tenant under the eligible lease must observe it.

Part 7—Dispute resolution

Division 1—Mediation of eligible lease disputes by Small Business Commission

40 Referral of eligible lease dispute for mediation by Small Business Commission

- (1) A landlord or a tenant under an eligible lease may refer a dispute about any matter relating to an eligible lease arising in relation to a matter to which these Regulations apply (an *eligible lease dispute*) to the Small Business Commission for mediation.
- (2) A referral under subregulation (1) must be in writing and—
 - (a) be in a form approved by the Small Business Commission; and
 - (b) be accompanied by—
 - (i) if the dispute relates to the tenant's request for rent relief under regulation 27 or 30, the tenant's written request for rent relief and all other materials given to the landlord by the tenant under regulation 27; and

Note

Subsequent rent relief requests are made under regulation 30—see regulation 30(2).

- (ii) if the dispute relates to the mandatory reassessment of a rent relief agreement under regulation 29, the tenant's written information and all other materials given to the landlord by the tenant under that regulation; and
 - (iii) all relevant correspondence between the landlord and the tenant and related materials; and

- (iv) the contact details of the other party, including their postal address and telephone number; and
 - (v) any other material requested by the Small Business Commission; and
 - (c) may be accompanied by evidence of, or a written submission about, the conduct of the landlord and the tenant with respect to any rent relief under a 2020 lease with each other.
- (3) The Small Business Commission must give written notice of a referral under subregulation (1) (a *dispute notice*)—
- (a) to the tenant, if referred by the landlord; and
 - (b) to the landlord, if referred by the tenant.
- (4) A dispute notice must—
- (a) specify the time within which the landlord or tenant must provide a response to the dispute notice under subregulation (5); and
 - (b) state the consequences of responding to the dispute notice in compliance with subregulation (5); and
 - (c) state the consequences of failing to respond to the dispute notice as set out in subregulation (6); and
 - (d) state the consequences of responding to the dispute notice not in compliance with subregulation (5) as set out in subregulation (6).
- (5) On receipt of a dispute notice, a landlord or tenant must respond to the Small Business Commission within 10 business days after receiving the dispute notice.

- (6) If the landlord or the tenant—
- (a) does not respond to the dispute notice; or
 - (b) in the view of the Small Business Commission, does not sufficiently respond to the dispute notice; or
 - (c) responds to the dispute notice outside of the timeframe set under subregulation (5)—
- the Small Business Commission, not earlier than 10 business days after the landlord or the tenant receives the dispute notice, may arrange for the eligible lease dispute to be the subject of mediation or issue a regulation 41 certificate.
- (7) Mediation under this regulation is not limited to formal mediation procedures and extends to preliminary assistance in dispute resolution, such as the giving of advice designed to ensure that—
- (a) the landlord and the tenant are fully aware of their rights and obligations; and
 - (b) there is full and open communication between the landlord and the tenant concerning the matter.
- (8) In referring a dispute under subregulation (1), the parties must not use mediation to prolong or frustrate reaching an agreement.
- (9) The Small Business Commission must take reasonable steps to ensure that the form referred to in subregulation (2)(a) is published on the Commission's website.

41 Regulation 41 certificate

- (1) The Small Business Commission may certify that mediation under this Part has failed, or is unlikely, to resolve the eligible lease dispute (*a regulation 41 certificate*).

- (2) Without limiting subregulation (1), the Small Business Commission may issue a regulation 41 certificate if the Small Business Commission is of the view that either the landlord or the tenant has not engaged in the mediation process in good faith.
- (3) A regulation 41 certificate may contain a statement about whether a landlord or the tenant has—
 - (a) failed to respond to or to sufficiently respond to the dispute notice under regulation 40(5);
or
 - (b) not engaged in mediation in good faith in the opinion of the Small Business Commission.

42 Legal representation

- (1) A landlord or tenant may be represented by a legal practitioner in a mediation of an eligible lease dispute under regulation 40.
- (2) Despite subregulation (1), if a mediator considers it appropriate to do so, the mediator may meet with the landlord or the tenant (alone or together with the other party) without their legal practitioners who represent them being present.

Division 2—Binding orders for rent relief made by Small Business Commission

43 Application for binding order

- (1) A person who is a tenant under an eligible lease in respect of which there is an eligible lease dispute may apply to the Small Business Commission for a binding order if—

- (a) the dispute relates to a tenant's request for rent relief under regulation 27; and

Note

Subsequent rent relief requests are made under regulation 30—see regulation 30(2).

- (b) the Small Business Commission has issued a regulation 41 certificate to the landlord and tenant in respect of the dispute; and
 - (c) the regulation 41 certificate includes a statement under either regulation 41(3)(a) or (b); and
 - (d) the tenant has not commenced a proceeding in VCAT or a court in relation to the dispute.
- (2) An application under subregulation (1) must be—
- (a) in writing; and
 - (b) in the form specified by the Small Business Commission; and
 - (c) accompanied by—
 - (i) all relevant correspondence and other materials referred to in regulation 40(2)(b) that the tenant has not previously provided to the Small Business Commission under that regulation; and
 - (ii) the other material specified by the Small Business Commission.
- (3) An application under subregulation (1) may be accompanied by a written submission to the Small Business Commission.
- (4) The Small Business Commission must take reasonable steps to ensure that the following information is published on the Commission's website—

- (a) the form of an application for a binding order specified by the Small Business Commission under subregulation (2)(b); and
 - (b) the material that is to accompany an application for a binding order specified by the Small Business Commission under subregulation (2)(c)(ii).
- (5) Nothing in this regulation prevents a tenant referred to in subregulation (1) from commencing a proceeding in VCAT or a court in relation to an eligible lease dispute referred to in that subregulation.

44 Notice of application for binding order

- (1) As soon as practicable after receiving an application under regulation 43 for a binding order, the Small Business Commission must give the material referred to in subregulation (2) to the person who is the landlord under the eligible lease to which the application relates.
- (2) The material that the Small Business Commission must give to the landlord is—
 - (a) written notice of the application for a binding order, setting out—
 - (i) the landlord's rights to provide further information under subregulation (3); and
 - (ii) the effect of regulation 47(3)(b); and
 - (iii) the process that the Small Business Commission will follow under this Division; and
 - (b) a copy of the correspondence and material referred to in regulation 43(2)(c) that accompanied the application; and

- (c) a copy of the material referred to in regulation 40(2)(b) that accompanied the referral made under that regulation in respect of the eligible lease dispute.
- (3) Within 5 business days after receiving the material, the landlord may give the Small Business Commission—
 - (a) any material that the landlord considers the tenant has failed to provide under regulation 40(2)(b) or 43(2)(c); and
 - (b) a written submission.

45 Small Business Commission may request further information

- (1) For the purposes of considering an application for a binding order under regulation 43, the Small Business Commission may—
 - (a) request the landlord or the tenant to provide further material; and
 - (b) request the tenant to provide evidence that they have taken reasonable steps and have acted in good faith to seek to agree the rent relief with the landlord.
- (2) The Small Business Commission may—
 - (a) specify a period for compliance with a request under subregulation (1)(a) or (b); and
 - (b) extend that time if asked to do so by the person to whom the request is made.

46 No hearings for applications for binding orders

The Small Business Commission must not hold any form of hearing for an application for a binding order.

47 Decision to make a binding order

- (1) On an application for a binding order under regulation 43, the Small Business Commission must make a binding order that complies with regulations 48 and 49 if—
 - (a) notice has been given to the landlord under regulation 44; and
 - (b) neither the tenant nor the landlord has commenced a proceeding in VCAT or a court in relation to the eligible lease dispute to which the application relates; and
 - (c) the Small Business Commission is satisfied that—
 - (i) the application complies with regulation 43; and
 - (ii) it is fair and reasonable in all the circumstances to make the binding order.
- (2) If subregulation (1) does not apply, the Small Business Commission must dismiss the application.
- (3) In deciding whether to make a binding order, the Small Business Commission—
 - (a) must have regard to the written submissions, correspondence, evidence and other material provided by either the tenant or the landlord in accordance with—
 - (i) regulation 43(2)(c), 43(3) or 44(3); or
 - (ii) a request under regulation 45(1)(a) or (b); and
 - (b) may have regard to submissions or other material provided by the landlord outside the period referred to in regulation 44(3) if the

Commission considers it is appropriate to do so; and

- (c) may have regard to evidence or other material provided by the tenant or the landlord on a request under regulation 45(1)(a) or (b), but outside the period applying to that request, if the Commission considers it is appropriate to do so; and
 - (d) may have regard to any evidence of the conduct of the landlord and the tenant with respect to any rent relief under a 2020 lease with each other.
- (4) For the purposes of subregulation (3)(c), the period applying to a request is—
- (a) the period specified for compliance with that request under regulation 45(2)(a); or
 - (b) if that period is extended under regulation 45(2)(b), the extended period.
- (5) If the Small Business Commission dismisses an application under subregulation (2), the Small Business Commission must give written notice to the landlord and the tenant within 5 business days after dismissing the application.

48 Binding orders

- (1) A binding order must be in writing and must state—
- (a) that the Small Business Commission is of the opinion that the landlord has—
 - (i) failed to respond to a dispute notice in the time required under regulation 40(5); or
 - (ii) not engaged in mediation in good faith; and

- (b) that the Small Business Commission has issued a regulation 41 certificate in relation to the tenant's request for rent relief under regulation 27; and

Note

Subsequent rent relief requests are made under regulation 30—see regulation 30(2).

- (c) that neither the tenant nor the landlord has commenced a proceeding in VCAT or a court in relation to the eligible lease dispute; and
 - (d) the direction to the landlord to give or agree to give specified rent relief in accordance with regulation 49; and
 - (e) the reasons for ordering the specified rent relief.
- (2) If the Small Business Commission makes a binding order, the Small Business Commission must—
- (a) keep a copy of the binding order until 3 years after the revocation of these Regulations; and
 - (b) give a copy of the binding order to the landlord and the tenant within 5 business days after making the binding order.

Note

The **Electronic Transactions (Victoria) Act 2000** deals with matters relating to keeping and giving electronic documents.

- (3) A binding order comes into effect immediately after a copy of it is given to the landlord.

49 What a binding order may require

- (1) A direction to give, or agree to give, specified rent relief set out in a binding order must comply with regulation 27(8) as if the direction were an offer of rent relief.
- (2) A direction in a binding order to give, or agree to give, specified rent relief may require the landlord to do either or both of the following—
 - (a) waive part or all of the rent payable under an eligible lease for the rent relief period;
 - (b) defer payment of part of the rent payable under an eligible lease for the rent relief period, so that the tenant must pay the deferred rent to the landlord amortised over the greater of—
 - (i) the balance of the term of the eligible lease, including any extension to that term, as provided under regulation 31 or otherwise; and
 - (ii) a period of no less than 24 months.
- (3) A binding order may also specify the method by which rent deferred as referred to in subregulation (2)(b) is amortised.

50 Cessation of binding order process

- (1) If a tenant has made an application for a binding order under regulation 43, but the Small Business Commission has not yet determined that application, the landlord and the tenant may jointly notify the Small Business Commission that they have agreed on the rent relief and a binding order is no longer required.
- (2) On receipt of a notice under subregulation (1) from both the landlord and the tenant, the Small Business Commission must dismiss the application for the binding order.

- (3) If the Small Business Commission dismisses an application under subregulation (2), the Small Business Commission must give written notice to both the landlord and the tenant within 5 business days after doing so.

Division 3—Amendment of binding order

51 Application for amendment or revocation of binding order

- (1) A person who is a tenant or a landlord under an eligible lease in respect of which a binding order has been made may apply to the Small Business Commission for an amendment to, or revocation of, that order.
- (2) An application under subregulation (1) must be in writing.

52 Small Business Commission may dismiss application in certain circumstances

- (1) If the Small Business Commission determines that an application to amend or revoke a binding order under regulation 51 does not have sufficient merit to justify further consideration, the Commission may dismiss the application.
- (2) If the Small Business Commission dismisses an application under subregulation (1), the Commission must give written notice to both the landlord and the tenant within 5 business days after doing so.

53 Small Business Commission may propose amendment on its own initiative

- (1) If, other than on an application under regulation 51, the Small Business Commission considers that a binding order ought to be amended, the Small Business Commission, on its own initiative and in accordance with

regulation 54, may propose that the amendment be made.

- (2) Unless exceptional circumstances apply, the Small Business Commission must not propose an amendment other than an amendment to correct—
- (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) a material miscalculation of figures; or
 - (d) a material mistake in the description of a person, thing or matter referred to in the order; or
 - (e) a defect of form.

54 Small Business Commission to give notice if amendment or revocation is to be considered

- (1) If the Small Business Commission receives an application to amend or revoke a binding order under regulation 51 and does not dismiss that application under regulation 52, the Commission must give notice of the application to—
- (a) if the application was made by the tenant—the landlord; or
 - (b) if the application was made by the landlord—the tenant.
- (2) The Small Business Commission must give a notice under subregulation (1) as soon as practicable after receiving the application.
- (3) If the Small Business Commission proposes an amendment to a binding order on its own initiative under regulation 53, the Commission must give notice of the proposal to the tenant and the landlord.

- (4) A notice under subregulation (1) or (3) must set out—
 - (a) the person's right to provide a written submission under subregulation (5); and
 - (b) the effect of regulation 57(3)(b); and
 - (c) the process that the Small Business Commission will follow under this Division.
- (5) Within 5 business days after receiving the notice, the person to whom it is given may give to the Small Business Commission a written submission regarding the application or proposal.

55 Small Business Commission may request further information

- (1) For the purposes of considering an application to amend or revoke a binding order under regulation 51 or an own initiative proposal under regulation 53, the Small Business Commission may request the landlord or the tenant to provide further material.
- (2) The Small Business Commission may—
 - (a) specify a period for compliance with a request under subregulation (1); and
 - (b) extend that time if asked to do so by the person to whom the request is made.

56 No hearings for applications to amend or revoke binding orders

The Small Business Commission must not hold any form of hearing for an application for an amendment to, or the revocation of, a binding order.

57 Amending or revoking a binding order

- (1) On an application under regulation 51, the Small Business Commission may decide to—
 - (a) grant the application and amend or revoke the binding order in respect of which it is made; or
 - (b) dismiss the application.
- (2) Following the proposal of an own initiative amendment in accordance with regulation 53, the Small Business Commission may decide to make, or not to make, the proposed amendment.
- (3) In deciding whether to grant the application, or to make the proposed amendment, the Small Business Commission—
 - (a) must have regard to—
 - (i) a submission given in accordance with regulation 54(5); and
 - (ii) material given in accordance with a request under regulation 55(1); and
 - (b) may have regard to a submission given outside the period referred to in regulation 54(5) if the Commission considers it is appropriate to do so; and
 - (c) may have regard to material given on a request under regulation 55(1), but outside the period applying to that request, if the Commission considers it is appropriate to do so; and
 - (d) may consider any other matter the Commission considers relevant, including whether the binding order contains—
 - (i) a clerical mistake; or

- (ii) an error arising from an accidental slip or omission; or
 - (iii) a material miscalculation of figures; or
 - (iv) a material mistake in the description of a person, thing or matter referred to in the order; or
 - (v) a defect of form.
- (4) For the purposes of subregulation (3)(c), the period applying to a request is—
- (a) the period specified for compliance with that request under regulation 55(2)(a); or
 - (b) if that period is extended under regulation 55(2)(b), the extended period.
- (5) An amendment to, or the revocation of, a binding order takes effect immediately after a copy of the amended order, or notice of the revocation, is given to the landlord under regulation 58.

58 Notice of amendment or revocation of binding order

If the Small Business Commission amends or revokes a binding order under regulation 57, the Small Business Commission must give a copy of the amended order, or notice of the revocation, to both the landlord and the tenant within 5 business days after amending or revoking the order.

Note

The **Electronic Transactions (Victoria) Act 2000** deals with matters relating to keeping and giving electronic documents.

Division 4—Review by VCAT

59 Applications for review by VCAT

- (1) A landlord or a tenant under an eligible lease may apply to VCAT for review of any of the following—

- (a) a decision under regulation 47(1) to make a binding order in respect of that lease;
 - (b) a decision under regulation 47(2) to dismiss an application for a binding order in respect of that lease;
 - (c) a decision under regulation 52(1) to dismiss an application for an amendment to or the revocation of, a binding order made in respect of that lease;
 - (d) a decision under regulation 57(1)(a) to grant an application for an amendment to, or the revocation of, a binding order made in respect of that lease;
 - (e) a decision under regulation 57(1)(b) to dismiss an application for an amendment to, or the revocation of, a binding order made in respect of that lease;
 - (f) a decision under regulation 57(2) to make, or not to make, an amendment to a binding order made in respect of that lease.
- (2) An application for review under subregulation (1) must be made within 14 days after the Small Business Commission makes the decision.
 - (3) In addition to any other parties, the tenant and the landlord are parties to the review.
 - (4) In considering an application for review under subregulation (1), VCAT must have regard to the matters set out in regulation 64(2).
 - (5) An application for review of a decision under regulation 47(1) to make a binding order stays the operation of the binding order, unless VCAT orders otherwise.

60 Contravention of binding orders

- (1) A person—
 - (a) who is a tenant under an eligible lease in respect of which a binding order is made; and
 - (b) who considers that the landlord has not complied with the binding order—

may apply to VCAT for a determination of whether the landlord has complied with the binding order.
- (2) In addition to any other parties, the landlord is a party to the proceeding.
- (3) On an application under subregulation (1), VCAT—
 - (a) must determine whether the landlord has complied with the binding order; and
 - (b) may make any orders that VCAT considers appropriate, including—
 - (i) an order requiring the landlord to comply with the binding order; and
 - (ii) an order amending the binding order.

Division 5—Other matters

61 Severing, dividing or combining matters in eligible lease disputes

- (1) If an eligible lease dispute is referred to the Small Business Commission under regulation 40, and it relates to more than one matter, the Small Business Commission may do either of the following at any time before a proceeding is commenced in VCAT or a court in relation to the dispute—

- (a) sever from the eligible lease dispute any matter that the Small Business Commission decides mediation is unlikely to resolve;
 - (b) divide the eligible lease dispute into 2 or more matters, if it is convenient to resolve them separately.
- (2) If more than one eligible lease dispute in relation to the same or related facts and circumstances is referred to the Small Business Commission under regulation 40, the Commission may—
 - (a) determine that the disputes constitute one eligible lease dispute; and
 - (b) determine which of the referrals is to be taken to be a referral of that one dispute.
- (3) If an application under regulation 43 for a binding order is made in respect of an eligible lease dispute that relates to more than rent relief, the Small Business Commission may sever that other matter from the eligible lease dispute.
- (4) If the Small Business Commission decides to take any action under subregulation (1), (2) or (3), the Small Business Commission must give both the landlord and the tenant written notice of the decision within 5 business days.
- (5) If the Small Business Commission severs any matter from an eligible lease dispute under subregulation (1)(a) or (3), for all purposes—
 - (a) the eligible lease dispute is taken not to include that matter; and
 - (b) the severed matter is taken to be a distinct eligible lease dispute that is the subject of its own referral or application (as the case requires).

Note

Regulation 41 authorises the issuing of certificates in respect of eligible lease disputes. This includes those that arise because of severance in accordance with subregulation (1)(a) or (3).

- (6) If the Small Business Commission severs or divides an eligible lease dispute into 2 or more matters, for all purposes, each of those matters is taken to be a distinct eligible lease dispute.

Note

Regulation 41 authorises the issuing of certificates in respect of eligible lease disputes. This includes those that arise because of division in accordance with subregulation (1)(b).

62 Evidentiary status of statements made during mediation and binding order process

- (1) Evidence of anything said or done by a person specified in subregulation (2) in the course of doing a thing specified in subregulation (3) is not admissible in any proceeding before VCAT or in any other legal proceeding except as set out in subregulations (4) and (5).
- (2) For the purpose of subregulation (1), the following persons are specified—
- (a) a person who is—
- (i) a landlord under an eligible lease; or
 - (ii) a tenant under an eligible lease; or
 - (iii) legally representing a landlord or tenant in mediation; or
 - (iv) employed or engaged by the Small Business Commission; and
- (b) the Small Business Commission.

- (3) For the purpose of subregulation (1), the specified things are things done in the course of—
- (a) referring an eligible lease dispute to the Small Business Commission under regulation 40 for mediation; or
 - (b) exercising a function, power or right under Division 1 in relation to an eligible lease dispute referred under regulation 40; or
 - (c) a mediation of an eligible lease dispute referred under regulation 40.
- (4) For the purpose of subregulation (1), evidence is admissible in a proceeding referred to in that subregulation if—
- (a) it is evidence of a written communication from the Small Business Commission to a landlord or a tenant; or
 - (b) both the landlord and the tenant agree in writing to the giving of the evidence; or
 - (c) VCAT or the court hearing the proceeding otherwise orders, having regard to the interests of justice and fairness.
- (5) Nothing in this regulation prevents the use of any information or document disclosed in a mediation for the purposes of deciding whether a binding order may be made, amended or set aside.

63 Part does not restrict section 10(1)(c) of the Act

To avoid doubt, nothing in this Part restricts the Small Business Commission's function under section 10(1)(c) of the Act to commence any proceedings for offences against regulations made under section 7 of the Act.

Division 6—Determination of eligible lease disputes by VCAT or a court

64 Jurisdiction of VCAT

- (1) Subject to regulation 65, Division 4 of Part 10 of the **Retail Leases Act 2003** (other than section 89(4)) applies to an eligible lease dispute referred to the Small Business Commission under these Regulations as if—
 - (a) a reference in that Division to a retail premises lease were a reference to an eligible lease; and
 - (b) a reference in that Division to a retail tenancy dispute were a reference to an eligible lease dispute; and
 - (c) a reference in that Division to a retail premises lease were a reference to an eligible lease.
- (2) In making an order in a proceeding relating to an eligible lease dispute, VCAT must also have regard to—
 - (a) the matters set out in regulation 27(8)(d); and
 - (b) any regulation 41 certificate issued by the Small Business Commission; and
 - (c) any binding order made by the Small Business Commission under regulation 47 in relation to the dispute; and
 - (d) if a binding order has been made by the Small Business Commission, the reasons for ordering the specified rent relief in the binding order; and
 - (e) any evidence of the conduct of the landlord and the tenant since the binding order came into effect; and

- (f) the statement included in the binding order under regulation 48(1)(a); and
- (g) any evidence of the conduct of the landlord and the tenant with respect to any rent relief under a 2020 lease with each other.

65 Determination by VCAT or a court

- (1) An eligible lease dispute may only be the subject of a proceeding in VCAT or a court (other than the Supreme Court) if the Small Business Commission has issued a regulation 41 certificate in respect of the dispute.
- (2) An eligible lease dispute may only be the subject of a proceeding in the Supreme Court if—
 - (a) the Small Business Commission has issued a regulation 41 certificate in respect of the dispute; or
 - (b) the landlord or tenant, as the case requires, has applied to the Supreme Court for leave to commence the proceeding and the Supreme Court has granted leave to commence the proceeding in relation to the dispute.
- (3) Subregulations (1) and (2) do not—
 - (a) apply to a proceeding for an order in the nature of an injunction; or
 - (b) affect the validity of any decision made by VCAT or a court.
- (4) To avoid doubt, nothing in this Part prevents a dispute from being dealt with through a compulsory conference, mediation or any other alternative dispute resolution process under—
 - (a) the **Civil Procedure Act 2010**; or
 - (b) rules of court of the Supreme Court or any practice direction applying to a proceeding in that court; or

- (c) rules of court of the County Court or any practice direction applying to a proceeding in that court; or
- (d) rules of court of the Magistrates' Court or any practice direction applying to a proceeding in that court; or
- (e) rules within the meaning of the **Victorian Civil and Administrative Tribunal Act 1998** and any practice direction applying to a proceeding in VCAT.

Part 8—General

Division 1—Other matters

66 Indemnities

A provision in an eligible lease or an agreement or security related to an eligible lease is void to the extent that it purports to indemnify, or require the tenant or provider of the security to indemnify, the landlord against any action, liability, penalty, claim or demand for or to which the landlord would be liable or subject except for the effect of these Regulations.

67 Giving notices—general

- (1) A notice or other document to be given to a person under the Act or these Regulations by the Small Business Commission must be given—
 - (a) by delivering it personally to the person; or
 - (b) by leaving it at the person's usual or last known place of residence or business with a person apparently over the age of 16 years and apparently residing or employed at that place; or
 - (c) by sending it to the person by post addressed to the person's usual or last known place of residence or business; or
 - (d) if the person is a corporation—
 - (i) by sending it by post to the registered office in Victoria of the corporation; or
 - (ii) by giving it to a person who is an officer of the corporation who is authorised to accept service of notices and who is employed at the registered office of the corporation; or

- (e) by electronic communication in accordance with the **Electronic Transactions (Victoria) Act 2000**.
- (2) If a notice or other document is to be given to a landlord under these Regulations, in addition to the methods set out in subregulation (1), the notice or document may be given—
- (a) by delivering it to the landlord or to the landlord's agent or to the person who usually collects the rent; or
 - (b) by sending it by post addressed—
 - (i) to the landlord at the landlord's address for service of documents; or
 - (ii) to the landlord's agent at the agent's usual place of business; or
 - (iii) by giving it to a person employed in the office of the landlord's agent.

Division 2—Revocation of these Regulations

68 Revocation of these Regulations

These Regulations are **revoked** on 16 January 2022.

Endnotes

¹ Reg. 33: S.R. No. 31/2020 as amended by S.R. Nos 107/2020, 147/2020 and 10/2021.

Penalty Units

These Regulations provide for penalties by reference to penalty units within the meaning of section 110 of the **Sentencing Act 1991**. The amount of the penalty is to be calculated, in accordance with section 7 of the **Monetary Units Act 2004**, by multiplying the number of penalty units applicable by the value of a penalty unit.

The value of a penalty unit for the financial year commencing 1 July 2021 is \$181.74.

The amount of the calculated penalty may be rounded to the nearest dollar.

The value of a penalty unit for future financial years is to be fixed by the Treasurer under section 5 of the **Monetary Units Act 2004**. The value of a penalty unit for a financial year must be published in the Government Gazette and a Victorian newspaper before 1 June in the preceding financial year.