Around the Nation: Victoria

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COVID-19 AND EMERGENCY REGULATIONS

A Century Ago

It goes without saying that 2020 has been an extraordinary year and nothing like the year we all would have anticipated and hoped for. The longer-term effects are yet to play out – whether by way of individual and community health, the economy, dispute resolution and in many other ways. Not to diminish the significance and pain of the current crisis it invites reflecting on the dislocation of a century ago when the "Spanish flu" pandemic raged through the world, including Australia, following World War I. The dislocation of the community in Victoria is evident in a variety of regulations which make chillingly familiar reading now in the *Victoria Government Gazette* from 1919 to 1921 – and it was not only the "Spanish flu"! For example, the *Influenza Emergency Regulations 1919* (Vic) prohibited any assembly "for a common purpose (ostensible or otherwise) within any enclosed building or place whether public or private in numbers exceeding twenty at any one time". There were some exceptions provided for as long as "a mask of an approved kind" was worn at all times. These prohibitions applied to persons in an "infected area", which was defined as meaning "any area within a radius of fifteen miles from any house, building or place wherein a case of Influenza has occurred", as reported by a medical practitioner or, ominously, the Registrar of Births and Deaths. Later in 1919 orders were made under the *Health Act 1915* (Vic) closing race courses and trotting tracks together with billiard rooms and halls. Shortly afterwards the *Influenza Emergency Regulations 1919 (No 2)* (Vic) closed "[e]very bar on any registered club or licensed victualler's premises within a distance of fifteen miles of … [the GPO]". These restrictions were reaffirmed and extended significantly, for example in the closure of places of entertainment and all bars and hotels, by the *Consolidated Influenza Regulations 1919* (Vic). Unfortunately there were even more and varied restrictions introduced a short time later by the *Regulations Relating to the Prevention of the Infectious Disease, Diptheria 1920* and then the *Regulations Relating to Small Pox 1921*. As we know now, after a brief respite in the 1920s life was not easy in the decades which followed as the Great Depression and World War II followed.

Emergency Measures Today

As then the public health and economic issues are now of critical importance. The health measures taken in Victoria are reminiscent of a century ago. It is, however, some of the measures taken to ameliorate the economic effects in relation to commercial leases and licences to which attention is directed in the present context.

Victoria made the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) in May 2020, under the emergency powers conferred by the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (*Omnibus Act*). This legislation conferred very extensive powers indeed for the Government to transcend an extensive range of legislative provisions across the board – Henry VIII clauses en masse! As the UK Parliament website notes:

> "Henry VIII clauses" are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.
>
> The Lords Delegated Powers and Regulatory Reform Committee pays particular attention to any proposal in a bill to use a Henry VIII clause because of the way it shifts power to the Executive.
>
> The expression is a reference to King Henry VIII's supposed preference for legislating directly by proclamation rather than through Parliament.

The operation of these regulations was limited in time, with an expiry date of 29 September 2020. Following a perceived need to extend the time for operation of these regulations and to address a number of issues that had arisen with respect to the operation and extent of the regulations the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments*

Regulations 2020 were made at the end of September, just before the expiry of the original regulations. The regulations as amended were due to expire on 31 December 2020, but have been extended to 28 March 2021. The regulations made in May are, for convenience, referred to as "the regulations" and those made in September as "the amending regulations".

The regulations, together with the amending regulations, deal with a range of matters, including rent relief and proportionality, closure or reduction of tenant's business, termination of leases and recovery of possession and dispute resolution. It is to some broader issues of particular importance which arise under these regulations that attention is now directed, rather that any close analysis of all their provisions.

The regulations and the amending regulations envisage the parties to an "eligible lease" being able to seek remedies from the Victorian Civil and Administrative Tribunal (VCAT) or a court if they are unable to reach agreement as to the terms of rent relief under these regulations. The expression "eligible lease" is defined in the *Omnibus Act* as "a retail or a non-retail commercial lease or licence, or a retail lease or a non-retail commercial lease or licence of a specified class" that is prescribed or was in effect when the regulations first came into operation.[1] The amending regulations exclude various classes of lease, including a range of agricultural, pastoral, farming, horticultural and apicultural activities.[2]

Regulation 9 restrains, and effectively prevents, eviction or re-entry for non-payment of rent where rent relief has been obtained under reg 10. The critical provisions of reg 10, which deals with rent relief, are the provisions of reg 10(4)(d) of the regulations, which contained the following provisions:[3]

> **10 Rent relief**
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> …
>
> (4) A landlord's offer of rent relief under subregulation (3) must be based on all the circumstances of the eligible lease and –
>
> …
>
> (d) take into account –
>
> (i) the reduction in a tenant's turnover associated with the premises during the relevant period; and
> (ii) any waiver given pursuant to regulation 14(2); and
> (iii) 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 the payment of rent; and
> (iv) 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
> (v) any reduction to any outgoings charged, imposed or levied in relation to the premises.

Paragraphs 10(4)(d)(i) and (iv) were revoked by the amending regulations. Revocation of the latter provision has raised questions in relation to equality of treatment as between landlords and tenants.

Regulation 20(1), in its definition of "eligible lease dispute", casts the jurisdiction of VCAT or a court very broadly for the purposes of the regulations. The substantive and determinative potential of this jurisdiction does, however, depend upon which provisions of the Regulations a party may be seeking to enforce and, particularly, the way in which the obligations, if any, under a particular regulation are cast.

In considering the approach and operation of reg 10 – Rent relief – it is important to consider the manner in which other matters are dealt with in the regulations and the potential for substantive relief in terms of their provisions.

At the outset, it is important to observe the manner in which these provisions are formulated in the regulations and whether they are prefaced by the words: "An eligible lease is taken to provide as set out

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[1] *Commercial and Residential Tenancies Legislation Amendment (Extension) Act 2020* (Vic) s 4; substituting a new s 13 (1) in the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).

[2] *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020* (Vic) reg 6; and see *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020*, reg 7 with respect to certain commercial exclusions.

[3] "Rent" now includes outgoings where rent is charged under an "eligible lease" inclusive of outgoings (see reg 10(4A) inserted by *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020* (Vic) reg 8(3)).

in this regulation". This formulation is used extensively in the provisions of the *Retail Leases Act 2003* (Vic) and its effect is to "write in" to the provisions of the relevant lease – as lease terms – the provisions of the particular statutory provision. So in relation to the regulations, each of the following has, by this formulation, the effect of introducing into the provisions of an "eligible lease" the terms set out in each of these regulations. Moreover, it follows from the nature of the regulations and their statutory mandate that these provisions transcend and override any contrary express provisions of "eligible lease". These regulations are as follows –

- Prohibition on rent increases (reg 12);
- Extension of the term (reg 13);
- Recovery of outgoings or expenses (reg 14);
- Reduction in outgoings (reg 15);
- Payment of deferred rent (reg 16);
- No fees, interest or charges (reg 17); and
- Confidentiality of information (reg 19).

The provisions of reg 18 – tenant may reduce business hours or cease business during relevant period – are in the same vein as the regulations to which reference has been made, though given its subject matter, it is not introduced by the "taken to provide" formulation as appears in sub-regulation of these other regulations. Regulation 10 is, as indicated, an "outlier" in this formulation and structure in that it does not purport to "write in" any provisions in an "eligible lease". Rather is prefaced by reg 10(1) that: "A tenant under an eligible lease may request rent relief from the landlord under the eligible lease."

It should also be observed that there is also an additional "writing in" provision in reg 8 which provides that landlords and tenants must work cooperatively. Its substantive provisions are in reg 8(2) where the provision, effectively "written in" the eligible lease as a term is that:

> 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.

There is, of course, ongoing debate on the implication of "good faith" obligations in contracts and leases and the effect of these provisions in any event. It is not necessary to take that issue further now, save to observe the obvious that such an obligation depends on all the circumstances and being inherently somewhat nebulous may to some extent be illusory in the extent of protection it may provide to a party.

Many of the provisions within regs 12–19 do provide a basis for determinative dispute resolution insofar as the provisions they "write in" lend themselves to enforcement or declaratory relief on the basis that they have or have not been observed. However, their utility or effect in providing real and substantive remedies can only be assessed by careful consideration of their provisions. For example, reg 13 – Extension of the term – would enable an order by VCAT or a court that a landlord must offer the tenant a renewed term in accordance with the terms of the eligible lease which would have been the position before the commencement of the Regulations. Regulation 14 – Recovery of outgoings or expenses – is not so clear in terms of a determinative, substantive remedy. The provisions of reg 14(2) is prefaced merely on the basis that the landlord "must consider waiving recovery" and reg 14(3) provides that the landlord "may cease" to provide provision of any services at the premises. Provisions of this nature do not lend themselves to substantive, determinative, relief.

Turning to the operation of reg 10, it seems that the main causes of action that might arise from its provisions would be based on allegations that the landlord has not provided to the tenant an offer of rent relief that complies with reg 10(4) and that either party has failed or refused to act reasonably and negotiate in good faith. The difficulty that existed with the formulation of these provisions and the causes of action that may arise were that VCAT or a court could only declare that either the landlord's offer did not comply with reg 10(4) or that the parties have not acted reasonably and, or alternatively, negotiated in good faith. This means that the only "substantive" order available as a result of the proceedings would have been be that the landlord has not made a compliant offer and, possibly, also that the parties have not negotiated in good faith.[4] There does not appear to have been any basis for VCAT or a court

[4] See *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd* [2020] NSWSC 996; *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd (No 2)* [2020] NSWSC 1141.

even to order the landlord to make a fresh offer as there is no lease provision for the making of such an offer "written in" to the lease terms under reg 10, as discussed. There is no "free floating" jurisdiction to order what amounts to "specific performance" in the absence of the existence of any term to be "specifically performed".

Critically, under the provisions of reg 10, as originally made, neither VCAT nor a court could substitute its own assessment of a reasonable offer of rent relief; and on the basis of such assessment determine and thus resolve the actual dispute between the parties. The same applies to a greater or lesser extent to the causes of action that may arise under regs 13–17 and 19. Regulation 18, on the other hand, lends itself to declaratory relief by VCAT or a court which would have substantive effects of various kinds, depending on which sub-regulation the relief is sought, a matter which is considered in more detail.

In contrast to the provisions of the regulations to which reference has been made, the *Commercial Tenancies (COVID-19 Response (Early Termination)) Act 2020* (WA) takes a quite different approach. Section 17 of the Act, empowers the State Administrative Tribunal to make substantive determinations in similar circumstances in the following terms:

> **17. Tribunal's powers to make orders**
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> (1) In this section –
>
> ***specified***, in relation to an order, means specified in the order.
>
> (2) Without limiting any power to make an order that is conferred by the *State Administrative Tribunal Act 2004*, in proceedings under this Act the Tribunal may make any order that it considers appropriate to resolve the dispute or proceedings.
>
> (3) Without limitation, the orders that can be made by the Tribunal include the following –
>
> (a) an order that requires a party to the proceedings to pay money to a specified person;
>
> (b) an order for a party to the proceedings to do, or refrain from doing, any specified thing;
>
> (c) if the proceedings relate to a code of conduct dispute – any order that the Tribunal considers appropriate to give effect to the approved code of conduct including, without limitation, 1 or both of the following –
>
> (i) an order that a specified amount of rent payable under the lease to which the dispute relates be waived for a specified period;
>
> (ii) an order that a specified amount of rent payable under the lease to which the dispute relates be deferred and paid in a specified timeframe;
>
> (d) if the proceedings relate to a financial hardship dispute – an order terminating the small commercial lease;
>
> (e) an order dismissing the proceedings;
>
> (f) any ancillary order that the Tribunal considers necessary for the purpose of enabling an order under this section to have full effect.
>
> (4) In making an order in proceedings under this Act relating to a code of conduct dispute, the Tribunal must have regard to –
>
> (a) the financial impact of the COVID-19 pandemic on the tenant's business and capacity to meet the tenant's obligations under the lease; and
>
> (b) the landlord's financial capacity; and
>
> (c) the principles of proportionality and fairness, and any other relevant principles, set out in the adopted code of conduct.
>
> (5) In proceedings relating to a financial hardship dispute, the Tribunal –
>
> (a) cannot make an order under subsection (3)(d), or any other order to the disadvantage of the tenant, unless satisfied that the tenant's breach was not a result of the tenant suffering financial hardship; and
>
> (b) must make an order under subsection (3)(e) if satisfied that the tenant's breach was a result of the tenant suffering financial hardship.
>
> (6) In making an order in any proceedings under this Act, including an order under the *State Administrative Tribunal Act 2004* section 87(2), the Tribunal may have regard to a certificate issued under section 19 that relates to the proceedings.
>
> (7) An order of the Tribunal requiring any thing to be done or discontinued may fix the time within which that thing is to be done or discontinued, as the case may be.
>
> (8) In proceedings under this Act, the Tribunal may allow any equitable claim or defence, and give any equitable remedy, that the Supreme Court may allow or give.

If VCAT and the courts had been vested with a power in similar terms, thereby allowing them to conduct a form of merits review of the landlord's offer of rent relief and to substitute its own assessment of an appropriate offer from the landlord and make orders accordingly determinative and final resolution of the substance of the dispute would be achieved. The same approach would also have facilitated final and substantive determination of any matters arising under regs 13–17 and 19, for the reasons indicated.

The provisions with respect to the closure or reduction of tenant's business are to be found in reg 18. Its provisions contain significant penalties for non-compliance:

> **18 Tenant may reduce business hours or cease business during relevant 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 relevant 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
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> An eligible lease has effect subject to subregulation (1)—see section 17(1) of the Act.
>
> (2) A landlord under an eligible lease must not evict or attempt to evict a tenant under the eligible lease [to whom subregulation (1) applies] *because the tenant has taken an action mentioned 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 if the tenant under the eligible lease is a tenant [to whom subregulation (1) applies] *because the tenant has taken an action mentioned 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 the non-payment of rent under an eligible lease by a tenant under the eligible lease if the tenant is a tenant [to whom subregulation (1) applies] *because the tenant has taken an action mentioned in subregulation (1)(a) or (b).*
>
> Penalty: 20 penalty units.

The amendments made by the amending regulations are indicated in italics (with the former provisions in square brackets).

The prohibitions on a landlord evicting or attempting to evict a tenant in these circumstances, seeking to re-enter or otherwise recover the premises or to have recourse to any security relating to non-payment of rent is dependent upon the occurrence of one or other of the circumstances provided for in reg 18(1). The difficulty with the formulation of the triggering circumstances set out in these provisions is that it is not clear whether the reduction of hours or the closure of the premises or the ceasing to carry on any business need be the result of mandatory requirements under Victorian law or whether these circumstances may flow from other matters such as the lack of viability of the business due to the emergency situation, the concern of the tenant for the safety of employees or, indeed, of their own safety or other factors. The changes made by the amending regulations do not address this or the issues arising with respect to reg 18.

Additionally, the triggering circumstances are not qualified in terms of the tenant taking reasonable steps in those respects, and nor is there any indication of any requirement that the tenant seek to mitigate any reduction of business hours or cessation of business, such as providing online or take-away services, or otherwise changing the nature of the business.

Most people living through these COVID-19 pandemic times in Victoria would be well familiar with restaurants and food retailers closing on premises service and moving to delivered services, distanced pre-order selling and take-away service of food and beverages. There are many examples of changes in business activity occurring – an example being a Geelong gin distiller moving from gin production to production and selling of hand sanitiser.

At the outset it should be observed that reg 18 does not expressly provide that the tenant must act reasonably in whatever it decides to do with respect to the business. So, on the plain reading of these provisions, if reg 18(1) is applicable – for any reason – the provisions of regs 18(2)–(4) are applicable. It follows that the prohibitions on the landlord acting to take proceedings for breach of the lease provisions – presumably for breach of the permitted use and carry on business covenants – are enlivened and

recovery of possession and the taking advantage of securities prevented. But where does this leave the tenant in relation to the rent?

The question of rent relief under reg 10, particularly reg 10(4), has already been considered and the observation made that there is nothing in these provisions which expressly addresses the issue of mitigation by a tenant seeking rent relief. There is a strong argument that how the tenant has acted with respect to trading hours, business closure or diversification are matters properly to be considered in relation to the application and operation of the reg 10 provisions but no guidance in this respect is given in this or other provisions of the regulations.

The problem is that, even if the view is taken that the reasonableness or otherwise of the tenant's actions are matters relevant to the operation of reg 10, there is no means or venue provided by the regulations to determine whether tenant's mitigation issues arise or are relevant in particular circumstances. As no provision is made for a court or tribunal, such as VCAT, to have substantive, determinative, jurisdiction tenant's mitigation issues[5] will have every potential to be an unresolvable point of difference between landlords and tenants in respect of the possible application of the rent relief provisions of reg 10. The result may be the negation of any provision of rent relief under these provisions – and possibly fruitless litigation which presently cannot lead to substantive relief. It does, however, appear possible that the Small Business Commission may have regard to tenant's mitigation issues in deciding whether to make a binding order on a tenant's application for rent relief on the basis of the provisions of reg 21E (which was inserted by the amending regulations). Nevertheless, there is no specific requirement that these issues be considered in this process nor guidance as to the manner of their consideration.

In the event that an eligible lease is terminated for the reasons other than those prohibited by reg 18(1), it is not clear what the position of the parties might be and, particularly, the extent of any liability to which they may be subject. Additionally, it is not clear how the prohibition in reg 18(1) may relate to or be "disentangled" from breaches of other lease covenants (or even tenant's repudiation) where the tenant has not indicated its position or communicated with the landlord – and perhaps even simply "walked" from the premises – so as to enable a landlord to proceed to recover the premises without running the risk of penalties under regs 18(2)–(4). It also follows that uncertainties in relation to rent relief or deferral under regs 10, 11 or 16 increase this difficulty.

Part 6 of the Regulations makes specific provision for dispute resolution. Division 1 of this Part in the regulations as made originally contained provisions for mediation of eligible lease disputes by the Small Business Commission. Division 2 of this Part makes provision for determination of eligible lease disputes by VCAT or a court. These provisions were substantially amended and expanded by the amending regulations, particularly with the introduction of a new set of comprehensive provisions – Div 1A – Binding orders for rent relief made by Small Business Commission. Unless otherwise indicated references to provisions in this part are to provisions in force under the amending regulations.

It is not necessary to say anything further at this stage in relation to reg 20, which contains detailed provisions with respect to mediation by the Small Business Commission. Rather, the critical provisions in the present context are regs 22 and 23, which make provision for the jurisdiction of VCAT and the determination by VCAT or a court, respectively, of an eligible lease dispute.

Regulation 23(1) provides that 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 certified in writing that mediation under Div 1 of Pt 6 has failed or is unlikely to resolve the dispute (see reg 20A). This "gateway" provision is very much in line with the present dispute resolution arrangements under the *Retail Leases Act 2003* (Vic). The remainder of reg 23 – regs 23(2)–(4) – contains more detailed provisions with respect to the process of determination of the dispute. Significantly, provision is made in reg 23(4), for the avoidance of doubt, clarifying that the regulations do not preclude compulsory conferencing, mediation or any other alternative dispute resolution process in VCAT or the courts. To this extent the provisions of Pt 6 of the Regulations are unremarkable and would satisfactorily underpin

[5] See the *Commercial Tenancies (COVID-19 Response (Early Termination)) Act 2020* (WA) empowering the State Administrative Tribunal to make substantive, determinative, orders, as set out in my earlier memorandum.

a determinative dispute resolution process of any kind which is likely to arise in the present context; such as, for example, in accordance with provisions akin to the determinative powers conferred on the Western Australian State Tribunal, to which reference has been made. This is, however, not the approach of Pt 6 as it now stands.

Division 1A of Pt 6 contains provisions for the making of "Binding orders for rent relief by the Small Business Commission" (see regs 21A–21H). Provision is also made for amending a binding order (Div 1B, regs 21I–21P) and applications for review of a binding order by VCAT (Div 1C, regs 21Q–21R). This approach is a radical departure from the non-adjudicative mediation regime in the hands of the Small Business Commission which has applied in the retail leases context since the Small Business Commissioner role was established 17 years or so ago.

The binding order process is only available where there is an "eligible lease" dispute which relates to a tenant's request for rent relief under reg 10, where there is a reg 20A certificate stating either that the landlord failed to respond to a dispute notice or did not engage in good faith in the opinion of the Small Business Commission and the tenant has not commenced proceedings in VCAT or a court (see reg 21A). The application will proceed on the basis of correspondence and other material that may be requested of the parties by the Small Business Commission (see regs 21B and 21C). Regulation 21D provides that the Small Business Commission "must not hold any form of hearing". Regulation 21E requires the making of a binding order if various procedural requirements are satisfied and where the Small Business Commission is satisfied the "it is fair and reasonable in all the circumstances to make the binding order (see reg 21E, particularly reg 21E(1)(c)(ii)).[6] There is a requirement to provide reasons for the making of a binding order, though having regard to the requirements specified in reg 21F it would seem that only brief reasons are contemplated.

A binding order to a landlord to provide rent relief may be made within the parameters prescribed in reg 21G. Provision is made for review of a binding order by VCAT on application by a landlord or a tenant (see reg 21Q). Whether the introduction of a regime which might be regarded as something in the nature of a "med-arb" will enhance dispute resolution in this field or inhibit the free flow of information, views and positions that would be expected to occur in a conventional mediation format remains to be seen. The availability of recourse to VCAT or a court under reg 23 may not ameliorate any adverse effects of the introduction of this determinative procedure in the hands of the Small Business Commission as the VCAT jurisdiction conferred under reg 22 now requires VCAT to have regard to any binding order, the reasons for its making and the subsequent conduct of the parties. These requirements do not apply to any court proceedings which, in any event, will suffer from the lack of any basis for making determinative decisions in relation to rent relief issues having regard to the issues arising with respect to reg 10, to which reference has been made.

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[6] Compare *Commercial Arbitration Act 2011* (Vic) s 28; see *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* (2011) 38 VR 394.