Victoria – Commercial tenancies code of conduct explained

21 August 2020

Frequently asked questions about the commercial tenancies code of conduct in Victoria

Background and National Code

On 7 April 2020, Prime Minister Scott Morrison announced an industry code of conduct (**National Code**) to address the financial impact of COVID-19 on commercial (including retail, office and logistics) tenancies. Each state and territory was tasked with legislating the National Code as appropriate.

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Frequently Asked Questions

State and territory legislation

1. How has the National Code been adopted into VIC law?

The *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) (**the Act**) came into effect on 25 April 2020 (but applies from 29 March 2020 - see item 3 below). The Act establishes a legislative framework under which the leasing principles set out in the National Code could be adopted as law in Victoria. Importantly, the Act makes temporary amendments to certain Acts (including the *Retail Leases Act 2003* (Vic)), modifies the application of the law of Victoria in certain respects and temporarily empowers the making of regulations for the purpose of responding to the COVID-19 pandemic.

The Act allows the Governor in Council, on the recommendation of the Minister for Small Business, to make regulations for or with respect to, amongst other things:

- prohibiting the termination of an eligible lease;
- changing any period under an eligible lease or statutory period under the relevant Act in which someone must or may do something;
- changing or limiting any other right of a landlord under an eligible lease or the relevant Act;
- exempting a landlord or tenant under an eligible lease from having to comply with an eligible lease or the relevant Act;
- modifying the operation of an eligible lease or an agreement related to an eligible lease;
- extending the period during which the eligible lease is in effect;
- deeming a provision of the regulations as forming part of an eligible lease;
- imposing new obligations on landlords or tenants under an eligible lease, including requiring them to negotiate amendments to an eligible lease; or
- any matter or thing required or permitted to be prescribed or necessary to be prescribed to give effect to the provisions of the Act which deal with commercial leases and licences.

Any regulations which are made under the Act may have retrospective effect to a day not earlier than 29 March 2020.

On 1 May 2020, the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (**the Regulations**) were introduced in Victoria.

The Regulations give effect to the leasing principles set out in the National Code by:

- implementing temporary measures to apply to tenants and landlords under certain 'eligible leases' (see further detail in item 4 below) to mitigate the effect of measures taken in response to the COVID-19 pandemic; and
- implementing mechanisms to resolve disputes concerning eligible leases.

The Regulations are taken to have come into operation on 29 March 2020 and last for six months (being set to expire on 29 September 2020).

2. What are the key issues dealt with in the VIC Regulations?

The Regulations set out the following key measures:

- eligibility for rent relief;
- overarching obligations to negotiate in good faith;
- a process for rent relief applications and negotiations;
- a requirement of landlords not to increase rent for the relevant period in the absence of an agreement with the tenant;
- a requirement of landlords to offer an extension to the term of lease in line with deferred rent arrangements;
- a requirement of landlords to consider waiving recovery of any outgoings or expenses payable by a tenant;
- a requirement of landlords to pass on to the tenant any reduction in outgoings charged to the tenant under the lease, in the appropriate proportion;
- a requirement of landlords to not take enforcement action in certain circumstances;

- confidentiality obligations; and
- dispute resolution.

Pandemic period

3. When will the Regulation operate?

The Regulations will have effect during the relevant period which is the period from 29 March 2020 to 29 September 2020.

The Regulations will expire on 29 September 2020 and will automatically be revoked on 24 October 2020.

If the Minister for Small Business wishes to create new regulations under the Act, the Minister may recommend to the Governor in Council that further regulations be made only if:

- the Minister is of the opinion that the regulations to be made are reasonably necessary for responding to the COVID-19 pandemic; and
- the Minister for Small Business consults with the Minister for Jobs, Innovation and Trade before making the recommendation.

Under the Act, the Governor in Council has a broad regulation-making power to, on the recommendation of the Minister for Small Business, make regulations for and with respect to 'any matter or thing required or permitted to be prescribed or necessary to be prescribed' to give effect to the provisions of the Act which deal with commercial leases and licences.

See further detail on the regulation-making power under the Act in item 1 above.

See: r 3, 4 and 25 of the Regulations; s 15(1)(p), 15(5), 16 and 22 of the Act

Eligibility crtieria

4. What types of leases are eligible?

The Act sets out the eligibility requirements for a lease to be considered an 'eligible lease'.

Under the Act, an eligible lease includes a 'retail lease' (being a lease of retail premises within the meaning of the *Retail Leases Act 2003* (Vic)) or a 'non-retail commercial lease or licence' (being a lease of premises under which the premises are let for the sole or predominant purpose of carrying on a business at the premises or a commercial licence):

- which is in effect on the day the first regulations made under the Act are introduced (being 1 May 2020); and
- under which the tenant is, on or after the commencement of the first regulations made under the Act (being 29 March 2020):
  - an 'SME entity' (has an annual turnover of less than $50 million); and
  - an employer who both qualifies for and is a participant in the Commonwealth Government's JobKeeper programme.

The Regulations set out the leases which are excluded from the application of the Act and the Regulations.

Under the Regulations, an eligible lease does *not* include:

- any retail lease, non-retail commercial lease or licence under which the premises may be used wholly or predominantly for agricultural, pastoral, horticultural, poultry farming, dairy farming, grazing or other farming activities; and
- leases under which the tenant is 'connected with' or an 'affiliate' of one or more entities (within the meaning of sections 328-125 and 328-130 the *Income Tax Assessment Act 1997* (Cth), respectively) and the aggregate turnover of the group of entities exceeds $50 million.

See: s 12, 13 and 14 of the Act; r 6 and 7 of the Regulations

5. Who is an eligible tenant?

An eligible tenant is a tenant that, on or after the commencement of the first regulations made under the Act (being 29 March 2020) is:

- an 'SME entity'; and
- an employer who both qualifies for and is a participant in the Commonwealth Government's JobKeeper programme,

which is not excluded from the application of the Act under the Regulations.

'SME entity'

Under the Act, an 'SME entity' is given the same meaning as in section 4 of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020* (Cth) (**SME Act**).

For the purposes of the SME Act, an 'SME entity' is defined as an entity that carries on a business or is a non-profit body during the current financial year and one or both of the following apply:

- the entity's annual turnover for the current financial year is likely to be less than $50 million; or
- the entity carried on a business in the previous financial year, or was a non-profit body during the previous financial year, and its annual turnover for the previous financial year was less than $50 million.

For the definition of 'annual turnover', see item 7 below.

'Qualifies for the JobKeeper scheme'

Under the Act, a tenant must both qualify for and participate in the JobKeeper scheme.

To determine whether a tenant 'qualifies for the JobKeeper scheme' for the purposes of the Act and the Regulations, refer to the *Coronavirus Economic Response Package (Payment and Benefits) Rules 2020* (Cth) (**JobKeeper Rules**) (in particular, sections 7 and 8).

Excluded tenants

The Regulations state that a tenant will not be considered to be a 'tenant under an eligible lease' if it is:

- 'connected with'; or
- an 'affiliate' of,

one or more entities (within the meaning of sections 328-125 and 328-130 the *Income Tax Assessment Act 1997* (Cth), respectively) and the aggregate turnover of the group of entities exceeds $50 million.

See: s 12 and 13 of the Act; r 7 of the Regulations; s 4 of the SME Act; s 5 of the Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 (Cth); s 789GC of the Fair Work Act 2009 (Cth); s 7 and 8 of the JobKeeper Rules.

6. Does the Regulation apply to licensees who are in reality tenants?

Yes, the Act and the Regulations apply to commercial licences, provided the licence qualifies as an 'eligible lease' (and, therefore, the licensee satisfies the criteria set out above).

This is because:

- the definition of 'non-retail commercial lease or licence' includes a commercial licence; and
- the definition of 'tenant' includes the licensee (or sub-licensee) of a commercial licence.

See: s 12, 13 and 14(1)(b) of the Act

Definition of turnover and provision of information

7. How is turnover defined?

Turnover is defined as the total of the following that is earned in the year in the course of the business:

- the proceeds of sales of goods and/or services;
- commission income;
- repair and service income;
- rent, leasing and hiring income;
- government bounties and subsidies;
- interest, royalties and dividends; and
- other operating income.

See: s 12 of the Act; s 5(2) of the Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020 (Cth)

8. What information or documentation must a tenant provide to the landlord in order to establish a reduction in turnover?

The Regulations do not set out the scope of financial information that a landlord is permitted to request from a tenant to establish a reduction in turnover.

A landlord's offer of rent relief must be based on all the circumstances of the eligible lease (see further detail in item 12 below) and take into account, amongst other things:

- the reduction in a tenant's turnover associated with the premises during the relevant period; and
- 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.

The Victorian Small Business Commission (**VSBC**) has published FAQs (**VSBC FAQs**) which provide some guidance as to the scope of financial information that the VSBC believes a landlord is permitted to request under the Regulations.

The VSBC FAQs suggest that a landlord may ask the tenant for information:

- extracted from an accounting system;
- extracted from BAS; or
- provided to a financial institution.

The VSBC FAQs suggest that a landlord may not require from the tenant:

- future cash flow projections;
- balance sheets, profit and loss or year to date financials;
- the tenant's bank balance;
- the financial information to be verified, examined, assured, audited or provided by a third party such as an accountant;
- an accountant to provide a letter of comfort or similar on the financial information; or
- financial information for periods other than the relevant period.

The VSBC FAQs suggest that what a landlord can request is significantly narrower than what might be suggested by the Regulations. It should be noted that the VSBC FAQs are not legally binding but should be used for the purposes of practical guidance only.

See: s 10 of the Regulations; https://www.vsbc.vic.gov.au/fact-sheets-and-resources/faqs/

Confidentiality requirements

9. Are landlords and tenants protected under the Regulations against disclosing financially sensitive information?

Yes.

A landlord and tenant under an eligible lease must not divulge or communicate any personal information or information relating to the business processes or financial information (including information about trade of a business) of the other party which is obtained through the course of negotiations.

However, disclosure is permitted in certain limited circumstances, such as:

- with the consent of the person to whom the information relates;
- to a professional adviser who agrees to keep it confidential;
- to an actual or prospective financier who agrees to keep it confidential; or
- as authorised by the VSBC, under law or for the purposes of any proceeding in a court or tribunal.

See: r 19 of the Regulations

Application of Leasing Principles

Good faith obligations

10. What is the obligation on a party to act in 'good faith'?

A landlord and a tenant under an eligible lease must, in all discussions and actions associated with matters to which the Regulations apply:

- cooperate;
- act reasonably; and
- act in good faith.

This general obligation is deemed to form part of the eligible lease and, therefore, a landlord and tenant under an eligible lease must observe it.

This general obligation requires the parties to negotiate with a spirit of commercial cooperation and willingness, propriety and honesty. Typically, this will require the parties to:

- disclose material facts (keeping in mind their obligations under s 18 of the *Australian Consumer Law*);
- not provide false information in the course of the negotiations;
- not frustrate the negotiation process (such as by refusing to meet, or refusing to provide documents); or
- threatening a future breach of contract.

However, this obligation does not require the parties to ignore their commercial interests or their strict legal rights.

See: r 8 of the Regulations

Rent relief process

11. What is the process for initiating rent relief?

The Regulations set out the framework for landlords and tenants under eligible leases to negotiate rent relief.

The process must be initiated by the tenant and is as follows:

- a tenant under an eligible lease may request rent relief from the landlord, which must be:
  - in writing; and

  - accompanied by:
    - a statement that the tenant's lease is an eligible lease, which is not excluded by the Regulations; and
    - information that evidences that the tenant is an 'SME entity', which both qualifies for and is a participant in the JobKeeper scheme;
- on receipt of a tenant's request (which complies with the above), the landlord must offer rent relief to the tenant within:
  - 14 days after receiving that request; or
  - a different timeframe as agreed between the parties in writing;
- the landlord's offer must be based on all the circumstances of the lease and:
  - relate to up to 100% of the rent payable under the lease during the relevant period;
  - provide no less than 50% of the rent relief in the form of a waiver of rent, unless the landlord and tenant agree otherwise in writing;
  - apply to the relevant period; and
  - take into account a number of factors (see further detail in item 12 below);
- following receipt of a landlord's offer by the tenant, the tenant and the landlord must negotiate in good faith with a view to agreeing on the rent relief to apply during the relevant period; and
- rent relief may be given effect by the parties by way of:
  - a variation to the eligible lease; or
  - any other agreement between them that gives effect to the rent relief, either directly or indirectly.

See: r 10 of the Regulations

12. What factors does a landlord need to take into consideration in making a rent relief offer to a tenant?

A landlord's offer of rent relief offer must take into account:

- the reduction in a tenant's turnover associated with the premises during the relevant period;
- any waiver given in respect of outgoings or other expenses payable under the lease;
- 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;
- a landlord's financial ability to offer rent relief, including any relief provided to a landlord by any of its lenders as a response to the COVID-19 pandemic; and
- any reduction to any outgoings charged, imposed or levied in relation to the premises.

See: r 10(4) of the Regulations

13. What types of relief are covered by 'rent relief'?

'Rent relief' means any form of relief provided to a tenant in respect of their obligation to pay rent and includes a:

- waiver of rent;
- reduction of rent;
- remission of rent; or
- deferral of rent.

See: r 4 of the Regulations

14. What percentage of the rent relief offered must in the form of a waiver?

A landlord's offer of rent relief must provide no less than 50% of the relief offered in the form of a waiver, unless the landlord and tenant agree otherwise in writing.

The requirement does not apply in respect of any subsequent rent relief arrangements (see further detail in item 18 below).

See: r 10(4)(b) of the Regulations

15. Do rent reductions have to be proportionate to the tenant's reduction in trade during the COVID-19 pandemic period?

No.

There is no strict requirement that the rent relief offered by a landlord must be proportionate to the tenant's reduction in turnover which is experienced during the relevant period.

Rather, it is a factor to be taken into account by the landlord when it makes an offer of rent relief to the tenant.

See additional factors in item 12 above.

This view is supported by the VSBC FAQs.

See: r 10(4)(d)(i) of the Regulations

16. Do repayments of rental deferrals by the tenant have to be amortised over a certain period?

Yes, unless the landlord and tenant agree otherwise in writing:

- a landlord must permit the tenant to pay the deferred rent over, the greater of:
  - the balance of the term of the lease (including any extension to that term as contemplated by the Regulations); or
  - a period of no less than 24 months; and
- a landlord must not request any part of the deferred rent until, the earlier of:
  - 29 September 2020; or
  - the expiry of the term of the eligible lease (before any extension is applied).

The method by which the deferred rent is amortised is to be agreed to by the landlord and tenant.

See: r 16 of the Regulations

17. What fees, charges, or interest (if any), can be applied in respect of rental waivers or deferrals?

A landlord under an eligible lease must not require a tenant to pay interest, or any other fee or charge, in relation to any payment of rent deferred by variation to the eligible lease or any other agreement reached in relation to rent relief.

See: r 17 of the Regulations

Pre-agreed rent relief and subsequent rent relief

18. Can a tenant make more than one request for rent relief?

Yes.

If the financial circumstances of a tenant under an eligible lease 'materially change'* after a variation to the eligible lease has been made or an agreement has been reached relating to rent relief, the tenant may make a further request to the landlord under that lease for rent relief and follow the same process outlined in item 11 above.

However, a landlord's subsequent offer of rent relief is not required to provide at least 50% of the rent relief in the form of a waiver.

The VSBC FAQs suggest that, for the purposes of the Regulations:

- 'materially change' should be interpreted as where the financial circumstances of a tenant 'deteriorate' after a variation has been made to the lease or other agreement related to rent relief has been reached; and
- if a tenant's business improves during the relevant period, it is not the Government's intent that a new negotiation is required.

It should be noted that the VSBC FAQs are not legally binding and should be used for the purposes of practical guidance only.

See: r 11 of the Regulations; https://www.vsbc.vic.gov.au/fact-sheets-and-resources/faqs/

19. What happens where the landlord and tenant have already agreed on rent relief prior to the Regulations coming into force?

The Regulations are silent in this regard.

On a strict reading of the Regulations, it may be open to the tenant to make a (further) request for rent relief but, this time, under regulation 10(2) of the Regulations and to force a re-negotiation.

However, the tenant could also seek further rent relief on the basis of a material change of financial circumstances under Regulation 11.

See further detail in item 18 above.

See: r 11 of the Regulations

Prohibited enforcement actions

20. What actions are landlords prohibited from taking?

A landlord must not:

- have recourse, or attempt to have recourse, to any security;
- re-enter or otherwise recover, or attempt to re-enter or otherwise recover, the premises; or
- evict, or attempt to evict, a tenant,

in certain circumstances (see further detail in item 21 below).

A civil penalty of 20 penalty units ($3,304.40) applies for non-compliance.

See: r 9 and 18 of the Regulations

21. When may a landlord take enforcement action against a tenant?

A landlord may take enforcement action against a tenant during the relevant period, *unless*:

- the tenant is a tenant under an eligible lease; and

- the grounds of breach of the lease consist of the tenant, during the relevant period:
  - failing to pay the amount of rent required to be paid under the lease;
  - reducing the opening hours of the business carried out at the premises; or
  - closing the premises and ceasing to carry out any business at the premises.

The prohibition against taking enforcement action for non-payment of rent only applies if, during the relevant period:

- the tenant has applied under Regulation 10(2) for rent relief and complies with that process and any agreement entered into; *and**
- pays the amount of rent agreed under Regulation 10 in accordance with:
  - the variation to the eligible lease; or
  - any other agreement between the landlord and tenant.

*Note: the word 'or' appears in the Regulations. We consider this to be an error and it should be read 'and'.

A civil penalty of 20 penalty units ($3,304.40) applies for non-compliance.

See: r 9 and 18 of the Regulations

Arrears

22. What obligation do landlords have to tenants under the Regulations where there are existing (pre COVID-19) arrears or the tenant is in breach of the lease?

A landlord is able to take enforcement action against a tenant in circumstances other than those listed in item 21 above.

The Regulations do not place a general prohibition on landlords from taking enforcement action against a tenant during the relevant period where the tenant is in breach of the lease. Rather, a landlord is restricted from taking enforcement action on the grounds of certain breaches, such as where the tenant reduces opening hours of the business (see further detail in item 21 above).

In addition, a tenant is only deemed not to be in breach of the eligible lease for non-payment of rent for the duration of the relevant period (in certain circumstances - see further detail in item 21 above). Therefore, a landlord is able to seek payment of any existing or pre COVID-19 arrears.

See: r 9 and 18 of the Regulations

Outgoings

23. Is a landlord required to pass on any reduction in outgoings to the tenant?

Yes, if any outgoings charged, imposed or levied in relation to the premises are reduced (such as local council rates), a landlord under an eligible lease must not require the tenant 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.

If the tenant has already paid to the landlord an amount greater than the tenant's proportional share of the reduced outgoing, the landlord must reimburse the excess amount to the tenant as soon as possible.

See: r 15 of the Regulations

Security

24. Can a landlord draw on a tenant's security for non-payment of rent?

No, a landlord is not permitted to, have recourse, or attempt to have recourse, to any security for non-payment of rent during the relevant period.

However, the tenant is only protected if, during the relevant period:

- the tenant has applied under Regulation 10(2) for rent relief and complies with that process and any agreement entered into; *and**

- pays the amount of rent agreed under Regulation 10 in accordance with:
  - the variation to the eligible lease; or
  - any other agreement between the landlord and tenant.

*Note: the word 'or' appears in the Regulations. We consider this to be an error and it should be read 'and'.

A civil penalty of 20 penalty units ($3,304.40) applies for non-compliance.

See: r 9 of the Regulations

Lease extension

25. Do landlords need to offer a lease extension to tenants?

Yes, if an arrangement for rent relief has been agreed between a landlord and tenant, the landlord must offer the tenant an extension to the term of the eligible lease which is, unless the landlord and tenant agree in writing that the relevant regulation (being Regulation 13) does not apply to their eligible lease:

- equivalent to the period for which the rent is deferred; and
- on the same terms and conditions that applied under the eligible lease prior to 29 March 2020.

See: r 13 of the Regulations

Rent increase freeze

26. Can landlords increase the rent during the COVID-19 pandemic period?

No, the Regulations prohibit rental increases during the relevant period, unless the landlord and the tenant agree in writing that the relevant regulation (being Regulation 12) does not apply to their eligible lease.

This effectively suspends all fixed, consumer price index, market review and other rent increases from coming into effect during the relevant period if the lease is an eligible lease, but does provide an exception for retail leases to the extent they provide for rent to be determined by reference to the volume of trade of a tenant's business (turnover / percentage rent).

See: r 12 of the Regulations

Unpaid rent deferrals

27. Can landlords claim unpaid rent deferrals at the end of a lease?

Yes, the Regulations do not expressly prohibit the landlord from claiming any unpaid rent deferrals at the end of the lease.

See: r 9 of the Regulations

Reduced trade

28. Can tenants be penalised for reduced opening hours or cessation of trade?

No, a tenant is deemed to not be in breach of the eligible lease if, during the relevant period, the tenant:

- reduces the opening hours of the business carried out at the premises; or
- closes the premises and ceases to carry out any business at the premises.

If, for the above reasons, the landlord:

- has recourse, or attempt to have recourse, to any security;
- re-enters or otherwise recovers, or attempt to re-enter or otherwise recover, the premises; or

- evicts, or attempt to evict, a tenant,

a civil penalty of 20 penalty units ($3,304.40) applies.

See: r 18 of the Regulations

Dispute resolution and mediation

29. If a leasing dispute arises, do parties have to attend a mediation?

The mediation regime under the Regulations mirrors the regime under the Dispute Resolution sections (Part 10) of the *Retail Leases Act 2003* (Vic). That is, an eligible lease dispute (being a dispute about the terms of the eligible lease arising in relation to a matter to which the Regulations apply) must first be referred to the VSBC for mediation before a party can commence a proceeding in VCAT or a Court.

An eligible lease dispute may only be the subject of a proceeding in VCAT or a court (other than the Supreme Court) if VSBC has certified in writing that mediation has failed, or is unlikely to resolve the dispute, or the landlord or tenant has sought, and the Supreme Court has granted, leave to commence a proceeding in relation to the dispute.

VSBC will facilitate a mediation but will not compel an outcome.

Mediation 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:

- the landlord and the tenant are fully aware of their rights and obligations; and
- there is full and open communication between the landlord and the tenant concerning the matter.

A landlord or tenant may be represented by a legal practitioner in a mediation of an eligible dispute under Regulation 20. However, the mediator may, if they consider it appropriate to do so, meet with the landlord or the tenant (alone or together with the other party) without their legal practitioners who represent them being present.

See: Part 6 of the Regulations

30. What are the consequences if the landlord or tenant breaches the obligation to negotiate rent relief under the Regulations?

If the landlord or the tenant do not comply with the requirements set out in the Regulations to negotiate rent relief, application can be made to the VSBC under the dispute resolution provisions under Regulation 20.

See further detail in item 29 above.

See: Part 6 of the Regulations

31. What happens if the mediation process fails?

If a mediation fails, a dispute can be referred to a tribunal or court.

Parties can choose to go to either VCAT or the Court to have the dispute under the Regulations determined – VCAT does not have exclusive jurisdiction of the eligible lease dispute – unlike a retail lease dispute.

If parties go to VCAT, section 92 of the *Retail Leases Act 2003* (Vic) would apply which provides for each party to bear its own costs.

In making an order in a proceeding relating to an eligible lease dispute, VCAT must have regard to:

- the matters set out in Regulation 10(4)(d) (see further detail in item 12 above); and
- any certificate issued by the Small Business Commission under Regulation 23(1) that mediation under Part 6 of the Regulations has failed, or is unlikely to resolve the dispute.

There is debate as to whether a mediation or a court or tribunal can impose a solution other than ordering the parties to negotiate in good faith.

See: Part 6 of the Regulations

Other obligations

32. Do the Regulations impose any other obligations on landlords and tenants?

Yes, a landlord under an eligible lease must consider waiving recovery of any outgoing or other expense payable by the tenant for any part of the relevant period that the tenant is not able to operate its business.

Similarly, if the tenant is not able to operate its business at the premises for any part of the relevant period, the landlord may cease to provide, or reduce the provision of, any service at the premises:

- as is reasonable in the circumstances; and
- in accordance with any reasonable request of the tenant.

See: r 14 of the Regulations

Lenders/mortgagees

33. Are there any specific rights or obligations for lenders/mortgagees under the Regulations?

No, the Act and the Regulations do not set out specific rights or obligations for lenders/mortgagees.

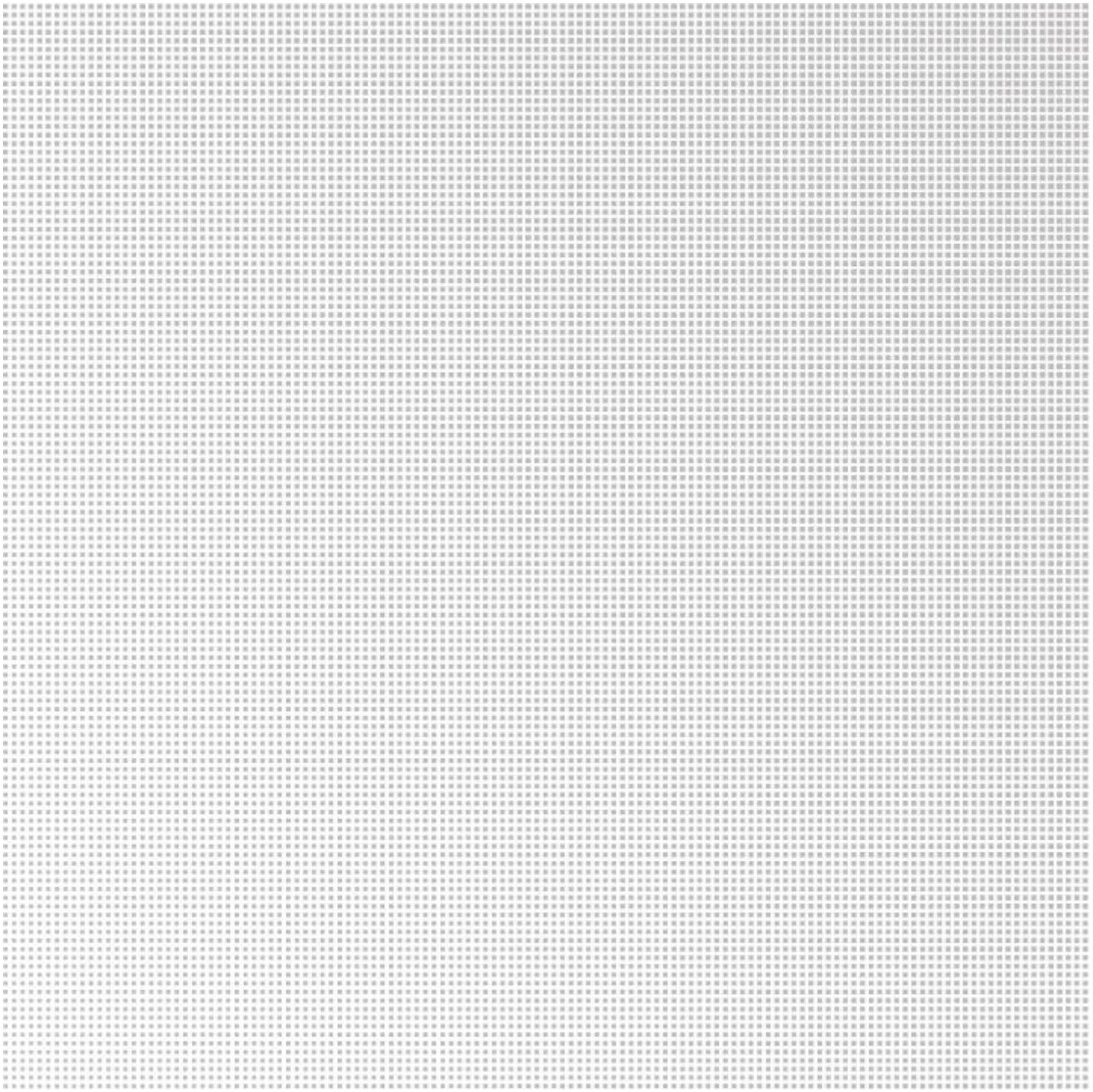
Ineligible tenants

34. What are the expectations on landlords if the tenant falls outside the Regulations?

The intention of the National Cabinet to apply the National Code 'in spirit to all leasing arrangements for affected businesses' is neither reflected nor reinstated in the Regulations.

The objectives of the Regulations are in terms of 'eligible leases' only, which suggests that the Regulations should not have application to any commercial leases which fall outside of the definition of 'eligible lease'.

Therefore, for non-eligible leases, any rent relief arrangements become a matter of commercial negotiation between a landlord and a tenant.



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