

MAY 2021

## PROPERTY INSIGHTS

# VALUER AND RETAIL LEASES UPDATE: NOTICE TO TENANT OF LAST DATE TO EXERCISE OPTION



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### In brief

A landlord should check as to whether it has provided the required notice under section 28(1A) of the *Retail Leases Act 2003* (Vic) (the Act). A notice provided in the past may not be sufficient and a new notice may need to be given.

### What you need to know

A new section 28(1A) notice under the Act should be given to a tenant, where there is a retail premises lease in effect, unless the last date to exercise the option to renew the lease was prior to 31 December 2020.

### Background

Under section 28 of the Act, as amended by the *Retail Leases Amendment Act 2020* (Vic) (Amending Act) (which came into force on 1 October 2020), where a lease contains an option for a further term, a landlord is required to give to a tenant certain information at least three months before the option to renew the lease may be exercised, including the last date to exercise the option to renew the lease for a further term.

Section 28 of the *Retail Leases Act 2003* (Vic) (prior to the Amending Act) provided that notice of the last date to exercise an option must be given to a tenant at least six months and not more than 12 months before that date.

But, what if a lease was in place prior to the commencement of the Amending Act? Section 125 of the Act provides as follows:

*The amendments made to this Act by section 12 of the Retail Leases Amendment Act 2020, apply to a retail premises lease entered into and in operation immediately before the day on which that section comes into operation (unless there are less than three months before the last date that the option to renew the lease may be exercised).*

Section 12 of the Amending Act provides for certain information to be provided to the tenant as per section 28 of the Act, including the last date that the tenant is required to exercise an option for a further term (where the lease contains a further term).

So, if there was a retail lease in place prior to 1 October 2020, which contains an option for a further term and the last date to exercise the option is after 31 December 2020, then the new section 28(1A) applies. This means that a landlord is required to comply with section 28(1A) of the Act and may need to again notify the tenant of the last date to exercise the option for the further term, at least three months before that date, as well as provide the other information under section 28 of the Act.

### Conclusion

Landlords should ensure that the correct notice is given to a tenant under a retail lease.

# CAN'T STACK THE SYSTEM: CAR STACKERS AND TANDEM PARKING TARGETED UNDER NEW CONGESTION LEVY RULING



By Nicola Carnevale  
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On 1 February 2021, the Commissioner of State Revenue released ruling CL-001 in respect of parking spaces for multiple motor vehicles.

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## Congestion Levy

The State Revenue Office (of Victoria) imposes a levy on certain public and private carparks within delineated areas, namely, the Melbourne CBD, inner north and south of the CBD (see congestion levy map for further details).

For public car parks, the owner and operator of the public carpark are liable for payment of the levy. For private car parks, the owner of the carpark is liable for payment of the levy.

Where the carpark is rented or licensed to another party, the agreement between the owner of the carpark and the occupying party will govern who is liable for payment of the congestion levy.

The following are exempt from the congestion levy, car parking spaces:

- ▶ exclusively used as residential parking;
- ▶ exclusively used by guests for hotels or apartments;
- ▶ exclusively used for maintenance services or as loading bays;
- ▶ exclusively used, without charge, as visitor parking (for example, parking spaces for clients of a clinic or office);
- ▶ exclusively used as hospital visitor parking;
- ▶ owned or operated by municipal councils, religious bodies, charitable or public benevolent institutions, hospitals, universities, libraries and museums, except where a fee is charged for use of the parking space;
- ▶ owned by a consulate, a consular officer, employee or family member residing in the same house as that person;
- ▶ used exclusively for emergency vehicles;
- ▶ provided, without charge, for a particular event and not available at other time for parking;
- ▶ exclusively used for disabled parking;
- ▶ exclusively used by employees working shifts in a business that operates 24 hours a day on weekdays, except those spaces used by employees working regular hours in the business;

- ▶ exclusively used for the overnight parking of fleet vehicles;
- ▶ exclusively used for displaying or storing vehicles for sale or hire;
- ▶ at Melbourne and Olympic parks; and
- ▶ within 200 metres of the Yarra Park Reserve and at Melbourne Zoo; and
- ▶ land owned by the Abbotsford Convent Foundation.

## Ruling CL-001

Generally, the congestion levy is levied on each delineated carparking space.

Ruling CL-001 deals with carparking spaces that can accommodate more than one vehicle. The maximum number of cars that can be accommodated in the car parking space will each be levied for that space.[1]

For example, if a car-stacker system is used for a carparking space to accommodate two cars, then that car parking space will be levied as two car parking spaces for the purposes of calculating the congestion levy.

Further, if there is a tandem parking space that can accommodate two cars (nose-to-tail), then that car parking space will also be levied as two car parking spaces for the purposes of calculating the congestion levy.

The Ruling applies retrospectively (for five years).[2]

## Concluding Comments

Landlords with carparks in buildings in the congestion levy zones (or nearby) should include clauses in their leases or licences relating to the carparking spaces to allow the landlord to pass along the charges related to the congestion levy.

If particular circumstances are not covered by the above exemptions or ruling CL-001, then owners and operators may consider applying for a private ruling from the State Revenue Office.

[1] <https://www.sro.vic.gov.au/legislation/congestion-levy-parking-space-multiple-motor-vehicles>

[2] <https://www.sro.vic.gov.au/legislation/assessments-and-periods-retrospectivity>

# REMINDER: LAND TAX RELIEF DEADLINE LOOMS



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## In brief

As outlined in an earlier article, the enactment of the *State Taxation Acts Amendments (Relief Measures) Bill*, provides that the Treasurer may direct the Commissioner of State Revenue to give effect to emergency tax relief measures as announced by the State Government.

As part of its Economic Survival Package the Victorian Government announced land tax relief for eligible landowners for 2020 and 2021, including landlords who provided rent relief to tenants impacted by the coronavirus pandemic.

This article serves as a reminder to eligible landowners of the deadlines for these land tax relief measures.

## What you need to know

Eligible landowners were required to apply for land tax relief for all categories for 2020 by midnight on 31 March 2021 and for 2021 by 30 June 2021.

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The measures announced for 2020 for eligible landowners include:

- ▶ Payment deferral of their remaining land tax assessments for 2020; and
- ▶ Land tax reduction of 25% or 50% and deferral for landlords (including those with properties with multiple tenancies and commercial owner-occupiers).

The measures announced for 2021 for eligible landowners include:

- ▶ Land tax reduction of 25% and deferral for landlords of the remaining 2021 assessments (including those with properties that have multiple tenancies and commercial owner-occupiers); and
- ▶ A waiver of Vacant residential land tax for 2021 if the Melbourne residential property was vacant for more than six months in 2020.

Eligible landowners may defer the remainder of their 2021 land tax assessment until 30 November 2021 including any remaining 2020 land tax assessment, which was previously deferred until 31 March 2021.

### Next steps

To access the above-mentioned land tax relief measures, landowners will need to satisfy the eligibility criteria for each of the relevant measures. Information regarding the eligibility requirements can be accessed on the State Revenue Office website. Applications can also be made through the State Revenue website portal before the closure dates.

Please note that at the time of writing this article, applications for commercial landlords of properties with a single tenancy and owner-occupiers for 2021 are currently not open and are expected to be available via My Land Tax on 12 April 2021 and 26 April 2021, respectively.

## THE BEGINNING OF THE END: FAQs FROM LANDLORDS AND TENANTS REGARDING COVID-19 RENT RELIEF



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One year on from our first COVID-19 Leasing FAQ article, the issues may be different, however, ongoing questions regarding what tenants and landlords should do in certain circumstances still remain. With the COVID-19 Omnibus (Emergency Measures) (Leases and Licences) Regulations 2020 (Vic) (Regulations) set to expire on 28 March 2021, landlords and tenants are looking forward and considering their next steps and options in respect of their lease and licence arrangements.

We have outlined the key issues below.

### Agreements for rent relief

#### 1. What should tenants do to ensure that they are compliant with the Regulations?

Tenants must ensure that they have applied each time for each extension of the rent relief period (once for each of the following periods: from 29 March 2020 to 29 September 2020, then for 30 September 2020 to 31 December 2020 and again for 1 January 2021 to 28 March 2021).

It is important for tenants to ensure that they have provided their landlord with all of the necessary information, documents and evidence to satisfy the requirements under the Regulations. Tenants should bear in mind that this is not what their landlord has requested from them but what is required of them under the Regulations.

If tenants have not applied for rent relief for each of these periods, or are unsure if their applications have been compliant with the Regulations, then the tenant should seek legal advice in respect of formally applying for rent relief for these periods.

If you are unsure if an application for rent relief is compliant with the Regulations, see here.

#### 2. What rights are available for tenants that cannot comply with their obligations under their lease arrangements?

Many landlords and tenants reached agreements in respect of rent relief for the rent relief period (29 March 2020 to 28 March 2021, for those eligible tenants) or part of that relevant period.

Certain tenants have re-negotiated the rent at the time of the Regulations being extended (29 September 2020 and 22 December 2020). Whilst certain other tenants have taken the opportunity to re-open negotiations with their landlords where their financial circumstances and ability to comply with the agreement or the lease have been impacted (under regulations 11).

If you are a tenant whose business circumstances have substantially changed since the agreement for rent relief was reached, then you should seek advice from a lawyer in respect of your rights to re-open those negotiations before 28 March 2021 (or otherwise as soon as possible).

*3. What happens if the landlord and tenant have not reached an agreement for rent relief?*

As of late, we have seen that certain parties (both landlords and tenants) have been dragging their feet in respect of reaching an agreement for rent relief.

Landlords and tenants who are in the position where they cannot reach agreement with the other party should lodge an Application with the Victorian Small Business Commission (VSBC) to have the matter mediated.

If the landlord does not continue to act in good faith and cooperate with the mediation process, there is a provision for the VSBC to provide binding orders (in certain circumstances) or issue a certificate allowing the tenant to initiate proceedings in the Victorian Civil and Administrative Tribunal (VCAT).

Landlords and tenants in this circumstance should seek legal advice in order to determine how best to proceed.

*4. We have reached agreement on rent relief, what now?*

Parties must ensure that they are clearly documenting the agreement between the parties for rent relief. The changes to the lease effectively vary the terms of the lease and the agreement reached will likely affect each parties' rights moving forward for the balance of the term of the lease.

In most circumstances a lease is a five or more-year relationship between the parties. Even in circumstances where the tenant plans to sell its business in the future, the terms of the lease and the rent relief agreement will impact on any sale of the business.

Especially where the rent relief agreement extends the current term of the lease or requires repayment of any deferred rent beyond the expiry date (which is less common), the parties should be sure to have sought legal advice to ensure compliance with the Retail Leases Act 2003 (Vic) (if applicable) and any issues with default.

**Security under the lease**

*5. What happens if the lease comes to an end before the repayment of deferred rent has been completed?*

In many circumstances, the term of the lease may have been extended so that the obligation to pay deferred rent ends at the same time as the term of the lease. However, certain parties that wish to end the lease earlier due to the economic impact of the COVID-19 pandemic on the tenant's business have agreed to end the lease earlier (or at the time of its natural expiry). In these circumstances the obligation to pay deferred rent will not have been completed at the end of the lease.

In these circumstances, the landlord will want to hold onto the security under the lease, so that it can draw on the security deposit, or bank guarantee if the tenant does not comply with its obligation to pay the balance of the deferred rent.

Both tenants and landlords should also be aware of the recent amendment to the Retail Leases Act 2003 (Vic), where landlords must return any security to the tenant within 30 days of the expiration of the lease, if the tenant has complied with its obligations under the lease.

The Regulations do not specifically deal with this issue. Parties should be sure to carefully consider the drafting the variation to the lease, or the rent relief agreement.

Tenants should be aware that the funds provided by way of the security deposit or bank guarantee may not be released, until it has paid all of the deferred rent to the landlord. Where the security amount is greater than the balance of the deferred rent, tenants may consider

paying the balance of the deferred rent more promptly in order for the security amount to be released earlier.

Landlords should ensure that the lease and / or any variation to the lease that documents the rent relief agreement allows for the landlord to maintain the security until the tenant has complied with its obligations under the lease.

**Landlord re-entry and defaults under the lease**

*6. The Landlord has re-entered the premises or provided a default notice, what next?*

If the tenant has not complied with its obligations under the lease or the agreement for rent relief, the landlord may issue a default notice (or in the case of non-payment of rent, in certain circumstances) re-enter the premises.

We expect that defaults will increase substantially following the end of the moratorium on evictions (currently ending 28 March 2021).

Tenants should seek advice from a lawyer in order to determine if the landlord has validly exercised its rights of re-entry.

Landlords should also take care in exercising re-entry rights, as tenants may pursue landlords for loss and damage caused by unlawful re-entry.

Landlords should engage a lawyer to draft the re-entry or default notice to ensure compliance with the lease and the legislation.

**Concluding Comments**

VCAT has recently heard a number of cases dealing with parties that have been unable to reach agreement on rent relief. In most instances, VCAT has found in favour of the landlord, stating that tenants should not be afforded the protections of the Regulations if it has not validly applied for rent relief.

That being said there has not yet been a Supreme Court case in Victoria and a number of matters at VCAT and other Courts have not yet been decided.

Landlords and tenants should seek legal advice in order to assist with balancing the fact that this legislation is still being tested by the Courts and the fact that parties need to reach agreement now in order to get back to business.



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