

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION.**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

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**17.1 MELTON COUNTRY CLUB - RENT RELIEF****Author: Maree Stellini - Senior Legal Officer****Presenter: Kel Tori - Chief Executive Officer****PURPOSE OF REPORT**

To provide legal advice as to Essendon Football Club's request for rent relief in respect of the leased premises situated at 28 – 30 Reserve Road, Melton known as the Melton Country Club.

**RECOMMENDATION:**

That Council receive and note the report.

**Motion**

Crs Abboushi/Kesic

That:

1. Council receive and note the report;
2. this report and minutes be attached to a report item in the open section of the agenda for the Council meeting to be held on Monday 21 December 2020.

CARRIED

Cr Abboushi called for a division thereby setting aside the vote.

**For:**

Crs Abboushi, Carli, Deeming, Kesic, Majdlik, Ramsey, Shannon, Turner and Vandenberg

**Against:**

Nil

The Mayor declared the Motion CARRIED

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**REPORT****1. Executive Summary**

Essendon Football Club (the Tenant) currently leases the premises situated at 28-30 Reserve Road, Melton known as the Melton Country Club. By way of a letter dated 1 September 2020, the Tenant sought rent relief for the period 29 March 2020 to 31 December 2020.

At its Ordinary Meeting of Council on 14 September 2020, Council resolved to obtain external independent legal advice in respect of the Tenant's eligibility for rent relief in accordance with the *COVID-19 Omnibus (Emergency Measures) Act 2020* and the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020*.

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION.**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

External independent legal advice has been sought and received, a copy of which is set out at **Appendix 1**. In accordance with the legal advice, the CEO has directed that rent relief be provided to the Tenant for the period 29 March – 29 September 2020 in the form of a 50% rent waiver and a 50% deferral of rent.

**2. Background/Issues**

The Tenant leases the premises situated at 28-30 Reserve Road, Melton known as the Melton Country Club (the leased premises). The current lease commenced on 1 December 2018 and is in its initial term of 4 years (with a remaining five further term options of five years each).

By way of letter dated 1 September 2020, the Tenant formally requested that Council consider providing rent relief as a direct result that the COVID-19 pandemic was having on their business including the Victorian restrictions requiring the closure of the leased premises.

The Tenant's request sought rent relief in the form of a 50% rent waiver and a 50% deferral of rent payable for the period 9 March 2020 to 31 December 2020.

Relevant legislation

As at the time of the 14 September 2020 Ordinary Meeting, the relevant legislation in operation was the *COVID-19 Omnibus (Emergency Measures) Act 2020* (the Act) and the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (the Regulations). With, the COVID-19 Commercial and Residential Tenancies Legislation Amendment (Extension) Bill 2020 recently passing its third reading in the Legislative Assembly which proposed to extend the Regulations to 26 April 2021.

A broad summary of the Regulations is set out in the 14 September 2020 Council Report.

The COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020 (Amended Regulations) came into operation on 29 September 2020.

Following the introduction of the Amended Regulations, the requirements for rent relief now covers two separate time periods:

1. 29 March 2020 to 29 September 2020 which is covered by the Regulations; and
2. 30 September 2020 to 31 December 2020 which is covered by the Amended Regulations.

The eligibility requirements under the Amended Regulations are substantially similar to those set out in the Regulations however, key differences are as follows:

- For the period 30 September 2020 to 31 December 2020, the Tenant (same as any other tenant) would be required to make a new application;
- additional information must be provided in an application for rent relief including the requirement to provide supporting documentation as to eligibility and decline in turnover such as:
  - o its jobkeeper receipt number (Amended Regulation 10(2)(b)(ii)(A)) and copy of a tenant's most recent notice under the jobkeeper rules to the Commissioner of Taxation (Amended Regulation 10(2)(b)(ii)(B));
  - o extracts from the tenant's accounting records (Amended Regulation 10(2)(c)(i)) or a statement prepared by a practising accountant (Amended Regulation 10(2)(c)(iv)).

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION.**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

---

- an entitlement to rent relief will only enliven from the date that a compliant application is lodged. Unlike under the Regulations, there is no provision for rent relief to apply for the period prior to the date of an application.

*Eligibility for rent relief*

At its Ordinary Meeting of Council of 14 September 2020, Council resolved to seek independent external legal advice as to the Tenant's eligibility for rent relief including whether the Tenant had complied with its obligations pursuant to the Regulations. A copy of the legal advice from Maddocks Lawyers is set out at **Appendix 1**.

Broadly, the legal advice provides that in accordance with the Regulations, the Tenant will be a SME entity at any time (not confined to the 1 July to 30 June financial year) that it determines its annual turnover is likely to be less than \$50million. Whilst, the Tenant made its application for rent relief citing 'Government guidelines', confirming it was an SME entity and a participant in JobSeeker, their application did not specifically state that it was not an 'excluded lease'.

The legal advice summarises that Council could refuse the Tenant's application on a technical non-compliance however, Council in making a decision must take into account a number of factors. This includes; Council's good faith obligations (Regulation 8), Model Litigant rules, Council's request for further information to the Tenant and Council's overall approach to providing rent relief to all of its tenants.

Finally, the legal view is that it would be reasonable and appropriate for Council to grant rent relief to the Tenant on the merits of their application and in accordance with the Regulations.

Following receipt and in accordance with the legal advice, the CEO wrote to the Tenant advising that rent relief would be provided for the period 29 March – 29 September 2020 in the form of a 50% rent waiver and a 50% deferral of rent.

The Tenant has foreshadowed that they may submit a further application for rent relief which Council as the landlord must consider pursuant to the Amended Regulations. As at the date of writing this report, no application has yet been received.

**3. Council and Wellbeing Plan Reference and Policy Reference**

The Melton City Council 2017-2021 Council and Wellbeing Plan references:

5. A high performing organisation demonstrating leadership and advocacy: An organisation operating with innovation, transparency, accountability and sustainability
  - 5.3 *Effective civic leadership, advocacy, partnerships and good governance.*

**4. Financial Considerations**

The current lease provides for a monthly rent of \$24,947.36 inclusive of GST.

In accordance with the legal advice, a rent waiver and rent deferral has been provided to the Tenant for the period 29 March 2020 to 29 September 2020. The rent waiver is in the total amount of \$74,838.

Commencing 1 January 2021, the rental invoices will include an adjustment for the deferred rent in the amount of \$6,236.50. This amount will be added to the monthly figure over twelve months through to 31 December 2021 and the total adjusted rental income for 1 January 2021 – 1 December 2021, will be \$31,183.86 per month including GST.

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION.**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

---

**5. Consultation/Public Submissions**

Not applicable.

**6. Risk Analysis**

The legal view found that Council would find it difficult to reject the Tenant's application when factoring in Council's obligations as outlined above.

**7. Options**

Council has the option to

1. Adopt the recommendation as set out.

**LIST OF APPENDICES**

1. Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020

**Email Letter****Maddocks**Lawyers  
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DX 259 Melbourne

<b>From</b> Guy O'Connor	<b>Date</b> 12 October 2020	
<b>Direct</b> 03 9258 3522	<b>Email</b> guy.oconnor@maddocks.com.au	
<b>To</b> Maree Stellini <b>And to</b>	<b>Organisation</b> Melton City Council	<b>Email</b> mareest@melton.vic.gov.au legalservices@melton.vic.gov.au

Our Ref GOC:7859797

Dear Maree

**Request for advice - Rent relief eligibility: Essendon Football Club**

We refer to your emails dated 22 September, 2020 and 29 September 2020 and our subsequent telephone conversation in which you requested advice regarding the eligibility of Essendon Football Club (EFC) to rent relief under its lease with Council.

**1. Summary**

- 1.1 EFC is a SME entity for the purpose of the Regulations and the Amended Regulations if at any time during its current financial year it expects its annual turnover to be less than \$40 million. EFC's eligibility for rent relief arises from the date that it determined that, as a consequence of Covid or other factors, its annual turnover was likely to be less than \$50 million
- 1.2 The EFC Rent Relief Request does not strictly comply with the requirements of regulation 10 of the Regulations. Subject to 1.3, on that basis, Council could refuse any request for rent relief for the period 29 March 2020 to 29 September 2020. However, for the reasons in 1.3, EFC may challenge any refusal as being a breach of Council's obligations under the regulations to co-operate and act in good faith.
- 1.3 The requirement under the Regulations for Council to co-operate and act in good faith may prevent Council from refusing any request for rent relief for the period 29 March 2020 to 29 September 2020 solely on the basis that the EFC Rent Relief Request does not strictly comply with the requirements of regulation 10 of the Regulations. This risk is increased in circumstances where Council has requested additional information from EFC and has not raised any objection to the form of the EFC Rent Relief Request.
- 1.4 In our view, it would be reasonable and appropriate for Council to determine whether to grant rent relief to EFC on the merits of EFC's claim and the principles in the Regulations, notwithstanding the EFC Rent Relief Request did not strictly comply with the requirements of regulation 10 of the Regulations.

[7859797: 27848807\_1]

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**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020



Maddocks

- 1.5 If EFC wishes to make a request for rent relief for the period 29 September 2020 to 31 December 2020, EFC will need to make a new request under regulation 10 of the Amended Regulations.

**2. Background**

- 2.1 On 2 September 2020, EFC sent an email to Council attaching a letter dated 1 September 2020, confirming that EFC was currently accessing Jobkeeper and requesting 'in line with government guidelines' rent relief that is proportionate to EFC's reduction in turnover being a 50% waiver and a 50% deferral of rent for the period 29 March 2020 to 31 December 2020 (**Rent Relief Request**).
- 2.2 On 7 September 2020, Council's CEO emailed EFC requesting that EFC confirm that EFC was a SME and in receipt of Jobkeeper (**Request for Further Information**).
- 2.3 On 9 September 2020, EFC emailed Council's CEO confirming that EFC was registered for and in receipt of Jobkeeper, and that for the current financial year ending 31 October 2020, EFC would report an annual turnover of \$40 million (**EFC Response**).

**3. Rent Relief Regulations**

The requirements for providing rent relief to tenants is set out in the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Regulations)*. In accordance with the Victorian Government announcement of an extension to the rent relief provisions available to tenants beyond the initial expiry date of 29 September, up to 31 December 2020, the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Miscellaneous Amendments Regulations 2020 (Amended Regulations)* came into force on 29 September 2020.

As a consequence of the introduction of the Amended Regulations, the requirements for rent relief now cover 2 separate time periods:

- 29 March 2020 to 29 September 2020 which is covered by the Regulations; and
- 30 September 2020 to 31 December 2020 which is covered by the Amended Regulations.

**4. Eligibility for rent relief**

The Regulations set out the requirements for a tenant to be eligible for rent relief. The eligibility requirements under the Amended Regulations are substantially similar.

To be eligible for rent relief under the Regulations and the Amended Regulations, the lease to EFC must be an 'eligible lease'. In order to be an 'eligible lease, the following items must be satisfied:

1. The lease must have been entered into prior to 29 March 2020. The lease to Essendon Football Club satisfies this requirement.
2. The tenant must be an entity with an annual turnover of less than \$50 million per annum. Section 13(1)(b) of the *COVID-19 Omnibus (Emergency Measures) Act 2020 (the Act)*, confirms that an eligible lease includes a tenant which is, on or after the commencement of the Regulations, an SME entity.

An SME entity is defined by reference to section 4 of the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Response Package) Act 2020 (Cth)*. Section 5 of the regulations made under that Act defines an entity to be a SME entity if at any time in a financial year (the **current year**), the entity's annual turnover for the current year is likely to be less than \$50 million. In our view, this applies to any time during the tenant's financial year, and not 1 July to 30 June.



**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020



Maddocks

Regulation 7 of the Regulations provides that in determining whether an entity is a SME entity, the annual revenue of all entities with which the tenant is connected or affiliated for the purposes of section 328-125 or 328-130 of the *Income Tax Assessment Act 1997* (Cth) are to be aggregated when determining whether or not the \$50 million threshold is exceeded.

3. The tenant must be a participant in the Jobkeeper scheme. The Rent Relief request and the EFC Response both confirm that EFC is registered for, and in receipt of, Jobkeeper.
4. The tenant must make a formal application for rent relief under regulation 10 of the Regulations.

**5. Is Essendon Football Club an SME entity?**

As a consequence of the definition of SME entity in the Act:

1. EFC will be a SME entity at any time that its annual turnover is likely to be less than \$50 million – this can occur at any time during a financial year, and can be based on a predicted anticipated turnover reduction. In this case, EFC could determine at any time prior to the end of its financial year that as a consequence of Covid or other factors, its annual turnover is likely to be less than \$50M ie it could have made that assessment in March when the Covid implications were first known. It does not need to wait for the end of its financial year, or until its actual turnover has reduced below \$50M before it can qualify as a SME entity for the purposes of the Regulations.

The statement by EFC in the EFC Response that its annual turnover for the current financial year ending 31 October 2020 will be less than \$40 million, satisfies the requirements for EFC to be a SME.

2. EFC can seek rent relief under the Regulations as from the date that it satisfies the requirements of an eligible lease ie the date that it satisfies it is a participant in Jobkeeper and that its annual turnover is likely to be less than \$50M. If that was the case at 29 March, rent relief can be applied for as from that date. Otherwise, it will be from the date that EFC satisfied both of those requirements. EFC cannot claim rent relief under the Regulations for a period occurring before both requirements of an eligible lease is satisfied.

Accordingly, EFC should be asked to clarify whether in the absence of Covid it expected its turnover in its current financial year to be greater than \$50 million, and if so, when it determined that its turnover for its current financial year would be less than \$50 million. That date is critical for determining the date from which EFC may be entitled to rent relief under the Regulations.

3. In determining the annual turnover of EFC, the annual revenue of all entities with which EFC is connected or affiliated for the purposes of section 328-125 or 328-130 of the *Income Tax Assessment Act 1997* (Cth) are to be aggregated when determining whether or not the \$50 million threshold is exceeded.

As noted below, confirmation by EFC that EFC is not excluded from being an eligible lease because of this aggregation provision is a requirement of an application for rent relief under regulation 10(2)(a) of the Regulations.

Accordingly, as long as its annual turnover (and that of any connected or affiliated entities) is likely to be less than \$50 million, EFC will satisfy the requirements for a SME entity under section 13(3)(a) of the Act and regulations 7(1) (a) and (b) and (2)(a) and (b) of the Regulations.

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020



Maddocks

**6. Has Essendon Football Club made an application for rent relief in accordance with the Regulations?**

Under regulation 10(1) and (2) of the Regulations, a request for rent relief by a tenant under an eligible lease must be in writing and be accompanied by:

1. A statement by the tenant that the tenant's lease is an eligible lease and is not excluded from the operation of the Regulations under section 13(3) of the Act; and
2. Information that evidences that the tenant:
  - Is an SME entity; and
  - Qualifies for, and is a participant in, the Jobkeeper scheme.

A landlord's requirement to make an offer of rent relief only arises after receipt of a request for rent relief by the tenant which complies with the requirements of regulation 10(1) and (2) of the Regulations.

The Rent Relief Request does not strictly comply with the requirements of regulation 10(2) of the Regulations because it does not include the statement or information required to be provided under regulation 10(2) of the Regulations, namely that EFC is a SME entity and is not excluded from the operation of the Regulations under section 13(3) of the Act. Accordingly, subject to our comments below, EFC has not made a valid application for rent relief as required by the Regulations.

As a consequence of the Amended Regulations, if a valid application for rent relief as required by the Regulations has not been made prior to 29 September 2020, EFC is not eligible to claim rent relief for the period 29 March 2020 to 31 December 2020.

**7. Has Essendon Football Club made an application for rent relief in accordance with the Amended Regulations?**

EFC could still make an application under the Amended Regulations for the period from 29 September 2020 up to 31 December 2020, but that would require a new application to be made in accordance with the requirements of the Amended Regulations. The Amended Regulations impose additional information requirements to be provided in an application for rent relief. In addition, any entitlement to rent relief under the Amended Regulations only applies from the date that an application complying with the requirements of the Amended regulations is lodged. Unlike under the Regulations, there is no provision for rent relief to apply for the period prior to the date that a complying application for rent relief is lodged by the tenant.

The Rent Relief request does not comply with the requirements of the Amended Regulations. Accordingly, if EFC is seeking rent relief for the period post 29 September 2020, EFC must lodge a new application for rent relief which complies with the requirements of Regulation 10 of the Amended Regulations. As noted above, any entitlement to rent relief will only apply as from the date that the further application is lodged in accordance with the requirements of the Amended Regulations.

**8. Information required to evidence that the lease is an eligible lease**

This has been an area of discussion, and the Small Business Commissioner had issued guidelines regarding what information was sufficient to confirm that a lease was an 'eligible lease' and entitled to rent relief under the Regulations. The Amended Regulations now spell out in more detail the evidence which a tenant is required to supply.

Consistent with the Amended Regulations, it would be appropriate for Council to require:



**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020



Maddocks

1. The provision of the receipt number issued by the ATO when EFC elected to participate in the Jobkeeper scheme and a copy of EFC's most recent notice under the Jobkeeper rules (for the period post 29 September) to the ATO;
2. Evidence supporting the fact that EFC is a SME entity and that its annual turnover is likely to be less than \$50M. That evidence could be provided by one or more of the following methods:
  - EFC's business activity statements;
  - Extracts from EFC's accounting records;
  - A statement prepared by a practising accountant.

This is all information that the Amended Regulations prescribe as being required to be provided to demonstrate a decline in turnover. The same information is appropriate for determining qualification as a SME entity.

**9. Can Council refuse rent relief due to a failure to comply with the requirements of Regulation 10**

Under both the Regulations and the Amended Regulations, the onus is on the tenant to make the request for rent relief in compliance with the requirements of Regulation 10. However, the Regulations also impose an obligation on the landlord and tenant to cooperate and act reasonably and in good faith in all discussions and actions associated with the rent relief measures.

While on a strict legal basis Council could refuse the application for rent relief on the basis that EFC has not strictly complied with the requirements of Regulation 10, EFC might argue that to do so is a breach of good faith by the Council, especially if Council has not advised EFC that its Rent Relief Request did not comply with Regulation 10. This argument is strengthened by the fact that Council issued a Request for Further Information and that EFC provided the EFC Response in respect to that request.

It is not clear whether such an argument would be successful, given it is EFC's obligation to comply with the requirements of Regulation 10 if it wishes to make an application for rent relief. EFC is a large and sophisticated entity which would find it difficult to argue that it was not aware of the strict requirements under the Regulations.

However, Council, as an entity to whom the Model Litigant rules apply, would also find it difficult to rely on a technical non-compliance with the Regulations to reject any claim for rent relief to which EFC would otherwise be entitled under the Regulations. The obligation to co-operate and act in good faith would also make it difficult for Council to rely on EFC's non-compliance with the Regulations where Council had sought the Request for Further Information, and had put the EFC Rent Relief Request to a formal meeting of Council for consideration.

The fact that as a consequence of the Amended Regulations, if a valid application for rent relief as required by the Regulations has not been made prior to 29 September 2020, EFC is not eligible to claim rent relief for the period 29 March 2020 to 31 December 2020 will also be a valid consideration in determining whether Council has acted in good faith.

For the reasons noted above, in our view, it would be reasonable and appropriate for Council to determine whether to grant rent relief to EFC on the merits of EFC's claim and the principles in the Regulations, notwithstanding the EFC Rent Relief Request did not strictly comply with the requirements of regulation 10 of the Regulations.

**10. Obligations of Council if the Regulations do not apply**

Although the National Cabinet Mandatory Code (Code) provided that the provisions of the Code should be applied in spirit to all businesses, the Victorian Act, Regulations and Amended Regulations only apply to leases which are eligible leases under the Regulations and the Amended Regulations. There is no legal requirement for Council to provide rent relief to a tenant which is not an 'eligible

**FOI EXEMPT AND NOT AVAILABLE FOR PUBLIC INSPECTION**

MINUTES OF THE MEETING OF COUNCIL

30 NOVEMBER 2020

Item 19.1 Melton Country Club - Rent Relief

Appendix 1 Maddocks legal advice - Rent relief eligibility Essendon Football Club - dated 12 October 2020

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lease' under the Regulations, or does not otherwise meet the criteria for rent relief under the Regulations or the Amended Regulations eg because the tenant has not complied with Regulation 10.

However, in our experience, consistent with the principles in the Code, many landlords (including other councils and statutory bodies) have provided rent relief to tenants in circumstances where the lease is not an eligible lease under the Regulations or the Amended Regulations. Because this approach is consistent with the provisions of the Code, and is also consistent with the requirement of Council to act in good faith under the Regulations and the Amended Regulations, Council would be unlikely to be criticised for providing relief to tenants using the principles in the Regulations and Amended Regulations as a guide even where that rent relief was provided to a tenant or tenants which were not eligible leases.

This would be on the basis that Council took a uniform approach to providing rent relief to all of its tenants. Council would be open to criticism if it granted rent relief using the Regulations and Amended Regulations as a guide to some tenants who were not eligible leases but not to others.

**General**

Please do not hesitate to contact me if you have any comments or queries.

Yours faithfully

Guy O'Connor  
Partner