

Commercial Leasing Update – 15 May 2020

Impact of the COVID-19 Emergency Response Act 2020 (and its Regulations) ("Act")

1. Commencement and duration

This temporary Act commenced on 30 March 2020 and expires on 30 September 2020 ("**the Prescribed Period**").

2. Applicability and "affected lessees"

2.1 The Act applies to all commercial leases entered into on or before 30 March 2020 (as well as subsequent renewals of such leases) but excluding those under the Pastoral Land Management and Conservation Act 1989 or the Crown Land Management Act 2009.

2.2 Some parts of the Act only apply if the Tenant is an "affected lessee". An "**affected lessee**" is a Tenant:

- (a) suffering "financial hardship" as a result of the COVID-19 pandemic; and
- (b) with turnover during the 2018/2019 financial year (or such other 12 month or lesser period determined by the Magistrates Court or the Minister) less than \$50M:
 - (i) from the premises, for a franchisee;
 - (ii) for the corporate group, if the Tenant is a corporation and a member of such group;
 - (iii) from the premises, in all other cases.

A Tenant is deemed to be suffering "financial hardship" if it is eligible for the Commonwealth's JobKeeper program (but arguably may be able to demonstrate "financial hardship" by other means).

If a dispute ends up in the Magistrates Court (refer 5. below), the Court can determine that a Tenant is an "affected lessee", regardless of whether or not the Tenant is eligible for Jobkeeper and based upon any reduction in the turnover of the Tenant's business (i.e. not necessarily at least 30%).

3. Restrictions on Landlords

During the Prescribed Period and provided the Tenant is an "affected lessee":

- 3.1 the rent (except turnover rent) cannot be increased, unless otherwise agreed between the Landlord and Tenant;
- 3.2 land tax cannot be on-charged to Tenants;
- 3.3 if the Tenant breaches an obligation under the lease to pay rent or outgoings, or to trade for certain hours, the Landlord cannot enforce that breach (unless such breach is of either a agreement reached in mediation or a Court order – refer 5. below) including that it cannot:
 - (a) re-enter the premises or terminate the lease;
 - (b) distrain for unpaid rent;
 - (c) call on a security bond or bank guarantee;
 - (d) charge interest; or
 - (e) sue the Tenant or a guarantor for damages.

4. Rent relief

- 4.1 The parties to a commercial lease (and any guarantor) must make a genuine attempt to negotiate in good faith the rent payable under, and other terms of, the lease during the Prescribed Period, having regard to the economic impacts of the COVID-19 pandemic on the parties, the provisions of the Act and the provisions of the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19* published on 7 April 2020.
- 4.2 There are no rules or principles specified for such negotiations other than that internet sales of goods and services are to be included in a Tenant's calculation of its turnover and that the parties must negotiate having regard to the matters specified in 4.1 above. In addition, in negotiations where the Tenant is an "**affected lessee**", we recommend that the parties also have regard to the same factors that the Magistrates Court must have regard to when making a 'rent relief order' (refer 5.5 below) as well as those restrictions and conditions that apply to certain orders that the Court can make (refer 5.4(a) and (b) below).
- 4.3 If the Landlord receives a waiver of land tax or relief payment, it must pass on the benefit of such waiver or relief payment in the form of a waiver of rent payable by an "affected lessee" under the commercial lease (in accordance with the relevant Government scheme).

5. Dispute Resolution

- 5.1 In the event the parties to a commercial lease cannot reach agreement on the provision of rent relief during the Prescribed Period or any other related matter under the lease (including a refusal to pay rent or a refusal to negotiate), a party can apply to the Small Business Commissioner ("**SBC**") for mediation (except that a Tenant cannot apply for mediation unless the Tenant is or is claiming to be an "**affected lessee**").
- 5.2 The SBC must issue the parties to a commercial lease the subject of a mediation application with a certificate stating the names of the parties and (as applicable): (1) if the mediation has terminated without resolution; or (2) if the mediation would not be reasonable in the circumstances; or (3) if a party to the mediation refused to participate or did not participate in good faith.

- 5.3 A party can apply to the Magistrates Court for resolution of the dispute, but only if the SBC has first issued to the parties the certificate referred to in 5.2 above.
- 5.4 The Magistrates Court has a wide discretion to make whatever orders it deems fit including varying any of the Lease covenants, requiring rent under a Lease be paid into Court and varying, revoking and/or replacing previously made Court orders. Furthermore, if the Tenant is an "**affected lessee**", the orders may include:
- (a) granting rent relief, which must include at least 50% of the rent relief as a waiver; and
 - (b) deferring the payment of rent for a period not exceeding 24 months from the date of the order, which order may also include extending the term of the lease for the period for which rent is deferred.
- 5.5 When making a rent relief order (only) in respect of an "**affected lessee**", the Magistrates Court must have regard to the following:
- (a) the obligations of the Landlord under the Act and other applicable legislation;
 - (b) the Tenant's reduction in turnover during the Prescribed Period;
 - (c) whether the Landlord has agreed to waive recovery of any outgoing or other expense payable by the Tenant during the Prescribed Period;
 - (d) whether a failure to provide rent relief would compromise the Tenant's ability to fulfil its ongoing obligations under the lease, including the payment of rent;
 - (e) the ability of the Landlord to provide rent relief, including any relief provided to the Landlord by a third party in response to the pandemic;
 - (f) any reduction by a third party to outgoings in relation to the leased premises;
 - (g) any other matter the Court thinks fit.
- 5.6 Rent relief agreements entered into between 30 March 2020 and 15 May 2020 can be modified by the Magistrates Court but only in respect of the period falling after 15 May 2020.

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