

Commercial Leasing Update – 25 September 2020 SA COVID-19 leasing laws extended to 3 January 2021

The State Government has extended the COVID-19 Commercial Leasing Regulations from 30 September 2020 to 3 January 2021.

Our updated summary of the extended laws are **attached**, with some key points detailed below.

1. Obligations (and restrictions) extended

- 1.1 The obligation on both parties to negotiate the rent and other terms of the Lease continues until 3 January 2021 for *all* commercial leases entered into on or before 30 March 2020 (and renewals of those leases).
- 1.2 The moratoriums on Landlords terminating/enforcing Leases, recovering land tax and increasing the rent are also extended to 3 January 2021, where the Tenant is (and remains) an "affected lessee".
- 1.3 With effect from 1 October 2020, a variation to the Regulations makes it clear that a Landlord can enforce a breach of a rent or outgoings covenant occurring before 30 March 2020.

2. Practical Tips

- 2.1 With changes to the Commonwealth Government's JobKeeper program taking effect from 28 September 2020, many Tenants that were "affected lessees" will no longer be "affected lessees" on and following 1 October 2020. Landlords/property managers should require Tenants demonstrate they are in fact still an "affected lessee" (for example, before agreeing to not review the rent).
- 2.2 Our recommend approach to rent reviews is that any rent increase scheduled to occur between 1 April 2020 and 30 September 2020 should now be applied (if not already done) and included in monthly invoices. A credit or adjustment can later be applied if the Tenant demonstrates they are still an "affected lessee". A similar approach should be taken in respect of rent reviews scheduled to occur between 1 October 2020 and 3 January 2021.
- 2.3 Tenants that are "affected lessees" may seek to vary/re-negotiate existing rent relief agreements through mediation with the Small Business Commissioner in respect of the arrangements that were agreed to apply for any period on or after 1 October 2020. Landlords/property managers should be mindful of this, particularly when seeking to enforce existing rent relief agreements by which rent that was payable prior to 30 September was agreed to be deferred to a time falling after 1 October 2020.

If you have any queries or would like assistance with any commercial property matter, then please do not hesitate to contact us.

David Hopkins and David Dew

Directors

Brown & Associates Commercial Lawyers

Emails: dhopkins@brownies.com.au and ddew@brownies.com.au

25 September 2020

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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 was due to expire on 30 September 2020 ("**Prescribed Period 1**"). On 22 September 2020, the Regulations under the Act were extended for the period 1 October 2020 to 3 January 2021 ("**Prescribed Period 2**").

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 applicable 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 an 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.

With effect on and from 1 October 2020, a variation to the Regulations under the Act makes it clear that the restrictions in 3.3 above do not apply in respect of unpaid rent or outgoings payable before 30 March 2020.

*If the said agreement reached at mediation or a Court order was entered into or made during Prescribed Period 1 and includes the payment of rent in Prescribed Period 2 and the Tenant is an "affected lessee" in Prescribed Period 2 and the Tenant breaches such agreement or Court order during Prescribed Period 2, the Landlord cannot enforce that breach.

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 applicable 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 5.6 below) as well as those restrictions and conditions that apply to certain orders that the Court can make (refer 5.5(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 applicable 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 Rent relief agreements between parties during Prescribed Period 1 (negotiated or mediated) are protected. However, if a Tenant is or is claiming to be an "affected lessee" in Prescribed Period 2, they can apply to the SBC for mediation regarding that part of the rent relief

agreement that extends into Prescribed Period 2 (e.g. deferred rent from Prescribed Period 1 that is payable in Prescribed Period 2).

- 5.3 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.
- 5.4 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 5.3 above.
- 5.5 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.
- 5.6 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 applicable Prescribed Period;
 - (c) whether the Landlord has agreed to waive recovery of any outgoing or other expense payable by the Tenant during the applicable 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.
- 5.7 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.

David Hopkins and David Dew

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Brown & Associates Commercial Lawyers

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