



Government Intervention for Commercial Leases

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On Sunday 29 March 2020 the federal government took a step that is seldom seen – the possible rewrite of commercial lease terms to endeavour to manage the impacts of COVID-19.

This event is so significant that it changes everyone's focus. The freedom to bargain is under watch – courts seldom interfere in contracts and rewrite them and apart from consumer protections afforded to tenants under retail lease legislation, little is mandated for commercial leases. And assuredly, the proposals put forward are a long way from settled. All tenants would love a mandatory rent holiday. They come easily when landlords are incentivising the start of the lease bargain. Yet the consequences of a mass number of commercial lease vacancies is too frightening to imagine. The streets are already ghostly and building foyers echo silence and the spectre of the home office may just be an everlasting one.

National Cabinet Announcement

In a press conference held on 29 March 2020 the Prime Minister made certain announcements, taking further action to protect Australian lives and keep Australia functioning. National Cabinet agreed short-term intervention is necessary for commercial tenancies, this includes a moratorium on rent evictions due to non-payment of rent. Tenants,

landlords and financial institutions are being encouraged to attempt to work through matters together. The following common set of principles were agreed by National Cabinet and endorsed by Treasurers underpinning and governing intervention by the federal government:

- a short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial



tenancies impacted by severe rental distress due to coronavirus;

- tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease;
- the reduction or waiver of rental payment for a defined period for impacted tenants;
- the ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress;
- commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus;
- landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements; and
- cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.¹

The National Cabinet is meeting again today to deliberate further.

ABA Support

Since the announcement by the federal government, the Australian Banking Association has announced that Australia's banks will extend the six month deferral of loans (with total business loan facilities up to \$10 million), building on the ABA's Small Business Relief Package, to 30,000 more businesses across the country.² The ABA stated the following:

"The new measures will apply in all sectors of the economy, and on an opt-in basis, under the conditions that:

- *For commercial property landlords, they provide an undertaking to the bank that for the period of the interest capitalisation, they will not terminate leases or evict current tenants for rent arrears as a result of COVID-19*
- *the customer has advised that its business is affected by COVID-19*
- *the customer was current in terms of existing facilities 90 days prior to applying*
- *interest is capitalised – meaning either the term of the loan is extended or payments are increased after the deferral period."*

It is understood that loan facilities over \$10 million will be considered on a case by case basis. During this period banks have also agreed to not enforce business loans for non-financial breaches of the loan contract (such as changes in valuations).

The Property Council of Australia has welcomed the decision by the ABA, however comments that further consideration needs to be given to land tax relief and businesses that have finance from offshore or private entities.³

But what about ...

These announcements are welcome news. However what does this really mean for those in a landlord/tenant relationship? There may be other reasons why tenants have not paid their rent; is COVID-19 going to give them the opportunity to obtain a moratorium on action? Will a landlord be able to call on a security it holds for breaches that pre-date COVID-19 or even take steps to terminate the lease in those circumstances?

Terminations for financial hardship may disguise other issues and the landlord's position must be taken into account. Even



debt-free landlords have responsibilities to meet financial obligations – pay property expenses, maintain buildings as safe places and provide returns to investors, many of whom will be members of superannuation companies.

As these matters are considered, specific attention will need to be given to the meaning of “financial hardship” and whether COVID-19 is the underlying cause of such hardship.

It's easy to sympathise with the decision-makers trying to anticipate all scenarios. No matter how broadly this is addressed, exceptions are to be expected. We expect further details will emerge before long in answer to some, if not all, of these questions.

When considering that the capital value of a commercial premises is based on its rental stream, the government's actions are sensible. They are part of the hibernation ethos that has evolved. Just as the government is trying to protect jobs and keep the employee and employer relationship intact, it is equally trying to protect the relationship between tenant and landlord, preserving what it can, without seeing yields and values heavily

impacted by wholesale terminations or actions by landlords unfairly evicting non-performing tenants.

We are watching this closely, but noting that as leases are generally governed by state jurisdiction, the nuts and bolts holding a new regime intact will likely have to be bought by individual states who will have to deal with the on-ground issues. Let's hope that they, in concert with the federal government and other stakeholders, will find an easy way through the maze.

This will be especially difficult for tenants and landlords who may not already enjoy good relations and it will be a test for objectivity, balance and succour.

To discuss your situation or seek advice about your options, please contact one of our experienced property lawyers.

If you want to discuss any property matters, please contact:

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¹ The Hon Scott Morrison MP, 'National Cabinet Statement' (Media Statement 29 March 2020) <<https://www.pm.gov.au/media/national-cabinet-statement>>.

² Australian Banking Association 2020, *Banks to help commercial landlords who help tenants through COVID19*, accessed 30 March 2020, <<https://www.aus-banking.org.au/banks-to-help-commercial-landlords-who-help-tenants/>>.

³ Property Council of Australia 2020, *Bank provide welcome support for commercial landlords to help tenants*, accessed 30 March 2020 <https://www.property-council.com.au/Web/Content/Media_Release/National/2020/Banks_provide_welcome_support_for_commercial_landlords_to_help_tenants.aspx>.