

Article Information

Author: Adam Rinaldi

Service: Property Transactions

Sector: Real Estate

Commercial tenancy relief amidst further lockdowns - What are your obligations as a landlord and tenant?

In this opinion piece, Adam Rinaldi (Partner) considers the current status of COVID-19 relief legislation in South Australia and identifies critical considerations to enable both commercial tenants and landlords to mitigate the impact that forced lockdowns may have on them financially.

The recent mandated lock down in South Australia has brought the issue of rental relief back to the fore with many small businesses (particularly those operating in retail and hospitality) feeling the financial pressure in consequence.

As it presently stands:

1. South Australia does not have a current legislative framework requiring landlords to provide (or negotiate arrangements for) rental relief to commercial tenants (having regard to the principles stipulated in the Code of Conduct);
2. the prescribed moratoria imposed on landlords in relation to enforcement action under commercial leases in South Australia ended on 3 January 2021 (being the expiry date of the COVID-19 regulations affecting commercial leases). Consequently, landlords are no longer prohibited by the COVID-19 relief legislation from enforcing their rights under a commercial lease, subject to any agreed rent relief commitments or court orders arising from disputes prosecuted under the expired regulations; and
3. tenants no longer have the ability to rely upon a legislative framework which in effect gave them a right to renegotiate rent and other terms of their lease without such conduct resulting in a repudiatory breach or giving rise to any other adverse consequences for a tenant.

Nevertheless, these are exceptional times and arguments may still be asserted by tenants for relief arising from the impact of COVID-19 restrictions on their leasing arrangements. Further, the expiry of the regulations will not affect the validity or operation of any unresolved court related dispute determination process arising under the expired regulations and initiated prior to 3 January 2021.

The proposition that tenants are entitled to the benefit of a “subsequent reasonable recovery period” after the expiry of the relevant prescribed period to enable a tenant’s trade to recover (which has been considered by courts across the country in the context of rental relief and the continuity of the moratoria against enforcement action) lacks relevance in South Australia in view of the timeframe which has lapsed since the COVID-19 regulations affecting commercial tenancies ended on 3 January 2021.

The proposition is predicated on the existence of the primary principle in the Code of Conduct that any rent relief arrangement must extend to any “subsequent reasonable recovery period” after the pandemic period. The proposition was tried in the decision of *Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd* [2020] NSWSC 996. In that case, the NSW Supreme Court held that rent relief could continue for a reasonable recovery period after the expiry of the prescribed period in the NSW COVID-19 Regulation provided an agreement is reached prior to the expiry of such period. However, the proposition is yet to be tried or tested in SA and the decision of *Sneakerboy* is yet to be authoritatively relied upon by South Australian courts and is therefore lacking precedential value in SA.

It would come as no surprise to see the re-introduction of a safety net for tenants in some iteration if COVID-19 continues to thwart the operations of businesses in South Australia given the current status quo and diminishing relief presently

available to tenants (both at a federal and state level).

Commercial landlords are grappling with the prospect of having to contend with increasing incentives arising by virtue of hybrid working trends and greater levels of subleasing stock being presented to market. Landlords are presently being forced to proactively market free rents, fitout contributions and early access to attract quality tenants in a declining market and it is unlikely incentives will soften any time soon given the uncertainty of there being further mandated lockdowns until such time as critical vaccination targets have been met.

The relationship between landlords and tenants is symbiotic and an amicable landlord/tenant relationship is essential to ensure the viability of a tenancy as we navigate through uncharted waters. For that reason, the following recommendations are important to preserve this essential relationship:

1. avoid emotional confrontations (with frustration, fear and anxiety being natural emotions in periods of uncertainty) and collaborate to create the best long-term solution;
2. ensure empathy on both sides with recognition that landlords have to contend with meeting financial commitments with the ability to do so significantly strained where rent is not able to be collected and tenants may experience significant business interruption in consequence of mandated closures;
3. honest and transparent communications about financial position and performance is necessary to build an awareness and understanding of what will be required to achieve a suitable recovery for both parties; and
4. regular communication is essential to develop sound strategy and responses to evolving and unpredictable circumstances.

Those involved in the real estate sector should be prepared for further disruption and should start by identifying the scope of their obligations under their lease agreements and the risks (and opportunities) which may be presented if contractual obligations are severely impacted. Landlords should review and consider the security arrangements under their leases and implement an action plan if obligations which are secured cannot be performed. If a tenant attempts to re-negotiate a lease, landlords should maintain records of critical communications and correspondence to justify actions if disputes later arise. It is important for landlords to ensure that they do not communicate, or make promises to reduce rent, in a manner which may give effect to an estoppel against the landlord or prevent the landlord from requiring rent to be paid in the manner prescribed in the lease and other obligations to be complied with by their tenant.