

Article Information

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Recent Amendments to the COVID-19 Emergency Response Act 2020 (SA): An essential summary for commercial tenants and landlords

On 12 May 2020 the State Government introduced the COVID-19 Emergency Response (Further Measures) Amendment Bill 2020 (Bill) into the South Australian Parliament.

The Bill has passed the House of Assembly (but is yet to pass the Legislative Council). Amendments to the Bill are being finalised so the commentary below is subject to any amendments which may be made.

The Bill (once passed through both houses of Parliament and received royal assent) will amend the provisions of the *COVID-19 Emergency Response Act 2020* (SA) (**Act**) which presently applies to commercial leases. In essence, the Bill inserts provisions into the Act to allow regulations to be created modifying the provisions of, and the parties rights and obligations under, a commercial lease. The Act provides that:

- the Governor will have the power to make regulations for the purposes of mitigating the adverse impacts on a party to, or any other person with an interest in, a commercial lease resulting from the COVID-19 pandemic – this amendment to the Act provides a flexible framework to enable the Government to implement policies affecting commercial leases in an expedient manner by regulation to respond to developments arising in connection with the COVID-19 pandemic;
- the regulations may have retrospective effect albeit to a day not earlier than 30 March 2020;
- the regulations may apply or incorporate (wholly or partially) a code (which does not rule out the possibility of further regulations being implemented to incorporate (wholly or partially) the leasing principles prescribed in the National Cabinet's Mandatory Code of Conduct).

Accompanying the Bill are the *COVID-19 Emergency Response (Commercial Leases No.2) Regulations 2020* (**Regulations**). The objectives of the Regulations are to implement temporary measures to apply to parties to certain commercial leases related to circumstances brought about by the COVID-19 pandemic and to provide for mechanisms to resolve disputes concerning those leases.

The Regulations come into force and effect on the date that the Bill comes into operation.

We also comment as follows with respect to the Regulations:

- For the most part, the operative provisions applying to commercial leases under the Act have been removed from the Act and included in the Regulations with some modifications and enhancements (refer to comments below).
- The Regulations include a new obligation on landlords and tenants to negotiate in good faith appropriate relief during the “prescribed period” (refer to definition below) having regard to the economic impacts of the COVID-19 pandemic on the parties to the lease. There is no waiver/deferment of this process and the requirement applies to all commercial leases whether or not the tenant is an “affected lessee” (refer to definition below). If a dispute arises, the landlord or tenant may apply to the Small Business Commissioner for mediation. If the mediation fails then either landlord and tenant may apply to the Magistrates Court for a resolution. We comment further on the dispute resolution process below.
- The Regulations apply during the “*prescribed period*” being the period commencing on 30 March 2020 and expiring on 30 September 2020 (i.e. retrospective application).
- The Regulations contain provisions prohibiting a landlord from taking “prescribed action” if the tenant breaches its

lease on account of a failure to pay rent or outgoings or a failure to comply with the keep open for trade covenant during the prescribed period - **however, these provisions only apply to benefit an “affected lessee” (i.e. a tenant suffering financial hardship as a result of the COVID-19 pandemic with turnover less than \$50M)** whereas under the present version of the Act these provisions apply to protect all tenants privy to a commercial lease.

In other words, landlords are no longer prohibited from taking “prescribed action” and taking enforcement action for a breach of the obligation to pay rent or outgoings against a tenant with turnover of \$50M or more (with company group turnover being a relevant consideration);

- The provisions prohibiting landlords from taking “prescribed action” do not apply if the failure to pay rent will result in a breach of any agreement arising from a mediation or order of the Magistrates Court providing relief to an affected lessee.
- An act or omission of a tenant under the laws of South Australia in response to the COVID-19 pandemic will not be taken to amount to a breach of any commercial lease. As a result of this, tenants will not be treated as being in breach of their lease where they are not able to comply with the keep open for trade covenant as a consequence of a government mandated forced closure.
- Landlords are also prohibited from (where the tenant is an “affected lessee”):
 - increasing rent (other than turnover rent) unless otherwise agreed between the landlord and tenant; and
 - recovering land tax.
- The parties must attempt to resolve “relevant disputes” by mediation in the first instance. Legal proceedings may only be initiated by a party to a “relevant dispute” in the Magistrates Court if the parties have not been able to resolve their dispute through mediation. A relevant dispute includes:
 - a dispute as to whether a tenant is suffering financial hardship as a result of the COVID-19 pandemic;
 - a dispute in relation to the provision of rent relief during the prescribed period; or
 - disputes in relation to issues that have occurred in relation to the COVID-19 pandemic arising from or related to the operation of the Regulations, the commercial lease or any other matter relevant to the occupation of the premises or business conducted at the premises the subject of the commercial lease.
- In resolving any dispute, the Magistrates Court will not have the power or authority to modify or affect any agreement entered into between the landlord and tenant which varies or modifies the operation of a lease insofar as that agreement operates during the designated period (30 March 2020 to the date that the regulations come into operation which is to be determined) – a Magistrate will have the power to vary the operation of any agreement which varies or modifies the operation of a lease after this period.
- **The Magistrates Court now has the power to issue an order granting rent relief to an “affected lessee” in relation to payment under a commercial lease** and in making such order must have regard to:
 - the obligations of the landlord under the Act, a relevant Act and the Regulations;
 - the reduction in turnover of the tenant during the prescribed period;
 - whether the landlord has, during the prescribed period, agreed to waive recovery of any outgoings or other expense payable by a tenant under the lease;
 - whether a failure to provide rent relief would compromise the tenant’s ability to fulfil the tenant’s ongoing obligations under the lease, including the payment of rent;
 - the ability of the landlord to provide rent relief, including any relief provided to the landlord by a third party in response to the COVID-19 pandemic;
 - any reduction by a third party to outgoings in relation to the premises the subject of the lease;
 - any other matter the Magistrates Court thinks fit.

There is no specific reference to the concept of “proportionality” (as contained in the Code of Conduct) in determining an appropriate rent relief remedy (albeit there would be nothing precluding a Magistrate from applying this concept in practice if the Magistrate thought that this would be appropriate in the circumstances).

- If the Magistrates Court makes an order granting rent relief to an “affected lessee” then at least 50% of the rent relief must be in the form of a waiver. This principle is derived from the Code of Conduct.
- The term “financial hardship” has not been defined in the Bill. However, the Regulations provide that a tenant will be suffering financial hardship as a result of the COVID-19 pandemic if the tenant is eligible for, or receiving, a JobKeeper payment.
- The term “turnover” is not defined in the Act or Bill and is relevant to determining whether a tenant has the protection of the provisions prohibiting landlords from taking “prescribed action” (refer to comments above regarding “affected lessee”). Any reduction in *turnover* of the business of the tenant must also be considered by a Magistrate in determining whether or not a tenant is suffering financial hardship as a result of the COVID-19 pandemic when resolving a “relevant dispute”.

The absence of a definition for turnover creates some uncertainty. However, the Regulations make it clear that turnover

will include turnover derived from Internet sales of goods and services. This will mean that where a tenant experiences a significant “bricks and mortar” trading impact, but stable or even increased online turnover, the online turnover must be allowed for in the determination of turnover which is relevant to any assessment of financial hardship.

The Regulations provide a more balanced framework from a landlord’s perspective as a result of the implementation of the following initiatives:

- the introduction of the concept of “affected lessee” in the context of “prescribed action” allows landlords to take enforcement action against larger corporate tenants that do not pay their rent as and when due and payable;
- **any rent repayment period ordered by the Magistrates Court will have a *maximum* of 24 months, rather than the minimum 24 month period originally proposed by National Cabinet;**
- if parties to a commercial lease have already agreed to rent relief, this will not be affected insofar as it operates during the designated period (March 30 to the day the Regulations come into operation).

However, it is not clear:

- what matters a Magistrate would be expected to consider in determining (and the appropriateness of a Magistrate to intervene with respect to) a “relevant dispute” which does not involve an “affected lessee”;
- whether a tenant (not comprising an affected lessee) would be able to prosecute a “relevant dispute” to stay the execution of any other legal proceedings instituted by a landlord to enforce a breach of a lease where such enforcement action is not prohibited under Act (and associated regulations).

We will continue to keep you updated as to the status of the Bill.