Article Information

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Amendments to COVID-19 commercial lease regulations – South Australia

The South Australian Government has introduced the COVID-19 Emergency Response (Expiry and Rent) Amendment Bill 2020 (Bill) which has passed the House of Assembly and is expected to pass the Legislative Council when Parliament next sits (being in the week commencing 22 September 2020).

The *COVID-19 Emergency Response (Commercial Leases No. 2) (Prescribed Period) Variation Regulations 2020* (**New Regulations**) will be implemented upon passage of Bill.

The New Regulations amend the *COVID-19 Emergency Response (Commercial Leases No.2) Regulations 2020* (**Regulations**) and have extended the "prescribed period" to 3 January 2021 which will in essence extend the period for compliance of the following requirements:

- the obligation imposed on landlords and tenants to negotiate in good faith the rent payable under a commercial lease (refer to regulation 6 of the Regulations);
- the restrictions imposed on landlords from taking enforcement action for certain breaches of a commercial lease (refer to regulation 7(1) of the Regulations); and
- the prohibitions imposed on landlords increasing rent (other than turnover rent) and recovering land tax (refer to regulations 7(4) and 7(5) of the Regulations).

Subject to certain temporal requirements, the New Regulations also introduce provisions which restrict landlords from:

- taking enforcement action against an "affected lessee" (essentially being a tenant of a commercial lease that is receiving the JobKeeper payment or otherwise suffering financial hardship as a result of the COVID-19 pandemic with annual turnover less than $50M) in connection with a breach of an agreement entered into under a mediation of a "relevant dispute" if the agreement relates to the payment of rent beyond 30 September 2020; and
- enforcing any order of the Magistrates Court relating to any "relevant dispute" if the order relates to the payment of rent beyond 30 September 2020 .

There are also provisions in the New Regulations which provide that a rent relief agreement entered into before 30 September 2020 (which may have been the outcome of a good faith negotiation or mediation) may be subject to a mediation (or further mediation, as the case may be) if the rent relief agreement applies in respect of a period that extends beyond 30 September 2020 and the mediation is initiated to resolve a "relevant dispute" (which includes a dispute pertaining to issues that have occurred in relation to the COVID-19 pandemic arising from or related to a commercial lease). This provides scope for existing agreements to be renegotiated (subject to certain temporal requirements) and reduces the incentive for tenants to honour their existing COVID-19 rent relief obligations (which are ultimately designed to benefit the tenant and have resulted in landlords making compromises on their contractual entitlements).

The Magistrates Court is also delegated broader powers to make orders revoking existing COVID-19 rent relief agreements.

The Bill will extend the Regulations until 28 March 2021 to align with the Commonwealth JobKeeper scheme. This will mean that the regimes in the Regulations applying to mediation and court determination of a "relevant dispute" (which includes a dispute pertaining to issues that have occurred in relation to the COVID-19 pandemic arising from or related to

a commercial lease) will be extended until 28 March 2021. This provides considerable scope for tenants to continue to agitate landlords for further rent and financial relief if they continue to be affected by the COVID-19 pandemic beyond 3 January 2021.

The implementation of the Regulations has been administratively costly and burdensome for landlords. The fact that normal contract remedies have been suspended has translated into some perverse behaviour being displayed by some tenants, including some very large and well capitalised businesses not eligible for support under the code, but which have nonetheless declared they will stop paying their rent. In essence, the State Government has shown an unwillingness to recognise the financial challenges of landlords and evidenced its preparedness to implement policy which will result in landlords disproportionately absorbing the cost of the economic recovery.

To top this off, the recent decision of *Sneakerboy v Georges Properties Pty Ltd (No 2)* [2020] NSWSC 1141 (*Sneakerboy*) may also be relied upon by tenants to argue that relief should extend beyond the "prescribed period" and apply over a "subsequent recovery period" which the court held (on the particular facts of the case) should be no less than 6 months.

The present legislative framework and recent case law referred to above provides uncertainty for landlords. It is recommended that rent relief arrangements, and the temporal requirements associated with them, be structured in a manner to mitigate the risk of such arrangements being renegotiated or revoked. The commentary above also stresses the importance of documenting rent relief arrangements with sufficient certainty and in a manner which will preclude (to the fullest extent permitted at law) the tenant from having two bites of the cherry.