

CORONAVIRUS AND LEASES – WHAT HAPPENS WHEN YOU CAN'T PAY THE RENT?

Rental Relief Explained

By Fiona Yiend. 31 March 2020

As the ‘new normal’ caused by the coronavirus pandemic begins to bite, businesses are facing many challenges, including paying the rent. Businesses need to be aware of all their options as they navigate through this period. One way that business may be able to survive is to obtain rental relief. While things are moving very quickly, this guide summarises the options available and relief implemented to date for commercial leases.

What is the “usual” position?

Commercial leases are a very particular type of contract, as they deal with rights to real property. In many ways they are different to all other types of business contracts, and as a result there are some peculiarities to leases that don't occur in other contracts. Leases are also highly standardised. While there are differences between individual leases, the rights and obligations under most leases are very similar.

Leases give businesses the right to occupy premises for a fixed period of time (fixed term), provided they pay the landlord rent and outgoings.

So, what happens when you can't pay the rent?

The usual position is that if you can't pay the rent you have breached the lease and the landlord can evict you. As a lease is for a fixed term, you are still liable for the rent that would have been paid until the end of the term, however now it's a debt owed to the landlord and you have no premises.

The landlord does need to use reasonable efforts to get someone else into the property to pay rent, which will reduce your liability, but the principle is that the landlord is entitled to the rent that was agreed for the term and at the end of the day should receive that amount of rent (whether from you, a new tenant or a combination of both).

It is this outcome that drives all the subletting and assignment of leases you see in commercial leases. The usual way to “get out of a lease” is to work with real estate agents to find someone to take over the obligations under the lease.

In these times of business closures, work from home and economic hardship, finding someone to take over your lease is not a viable option. This is why relief for commercial leases is such an issue.

Can I use force majeure and frustration?

You will recently have seen a lot of discussion on the doctrine of frustration and force majeure. In the context of leasing these are not usually helpful.

Force majeure is a contractual right that has to be included in the lease to give you any rights. For the majority, if not all leases, this right is not included. Leases do not usually contain a force majeure clause. There are usually some clauses that deal with the circumstances of destruction of the premises but this would not apply to consequences of COVID-19.

Frustration on the other hand is a common law principle and does not need to be included in the lease to be available to you. The doctrine of frustration works to terminate a contract in the event some intervening event makes the obligations under the contract radically different to when the contract was entered into. In the lease context, frustration generally occurs where the property is destroyed (provided through no fault of the parties and there is no provision to deal with this in the lease), where the property becomes uninhabitable, where the use of the property becomes unlawful, or the property is compulsorily acquired.

If a business merely follows government guidelines and requires its employees to work from home (even if such guidelines become mandatory), frustration is unlikely to apply. If there is a mandatory and prolonged closure (for example, this may happen to pubs and licensed venues), there could be a possible argument for frustration, but this is a somewhat uncharted legal territory.

For an update on the application of force majeure and the doctrine of frustration on other contracts see Source's articles on our [COVID-19 Response page](#).

What legal relief is available?

In the first instance is it important to identify the type of lease you have.

Commercial leases are separated into two different types. Your general commercial leases are for an office, warehouse or factory; retail leases are for retail shops in shopping centres and streets. If you are unsure, all retail leases should actually state they are retail lease on them.

The second thing to identify is the location of the premises. While we hope that the relief in relation to leases will be standardised across the country, the regulation of leases is a state responsibility, so the necessary legislation will be state-specific.

The principles of relief

On 29 March the National Cabinet announced that relief would be provided in relation to leases. They strongly encouraged landlords and tenants to engage with each other and outlined the following principles to assist commercial tenancies:

- Reduction or waiver of rent payments for a defined period for impacted tenants;
- Rights to terminate leases or seek mediation/conciliation in circumstances of financial distress;
- An obligation to pass down relief provided to commercial property owners to tenants;
- Tenants and landlords who aren't significantly impacted by Covid-19 are expected to honour their lease agreements;
- The cost of relief is to be shared across landlords, tenants and banks.

Details of what this actually means haven't been ironed out yet. At the National Cabinet meeting on 30 March 2020, it was agreed to consider commercial and residential tenancies at the next National Cabinet meeting on 3 April 2020.

So, what is the NSW Covid-19 Legislative Amendment (Emergency Measures) Act 2020?

Based on information from the National Cabinet, NSW and WA have been tasked with taking the lead on sorting out the details for rental relief. As part of this process NSW has enacted the *Covid-19 Legislative Amendment (Emergency Measures) Act 2020 (Emergency Measures Act)*.

The Emergency Measures Act provides a framework for relief for **retail leases**, but it does not actually provide that relief. Rather the Emergency Measures Act provides that regulations can be passed which may prohibit a landlord from:

- Evicting a tenant;
- Terminating a lease;
- Enforcing or exercising its rights under statute or under its agreement with the tenant.

Without the actual regulations being made, the specifics of the relief simply aren't known. The Emergency Measures Act applies to retail leases, however these are broadly defined, and application could be extended to commercial lease depending on what the regulations say. Again, at this stage we don't know if they will.

The only thing that is clear is that the relief contained in the regulations will apply for a maximum of six months from the date the regulations commence.

Other relief that's available?

The Australian Banking Association (**ABA**) has announced amendments to its Small Business Relief Package, which will assist tenants in need. Under the relief, businesses with loans of up to \$10 million may seek to defer repayments of loans for six months. In a boon for tenants, the relief is conditional on the landlord providing an



undertaking to the bank that for the period of deferred repayments they will not terminate leases or evict current tenants for rental arrears as a result of COVID-19.

The relief is subject to certain conditions, however it applies to all sectors of the economy.

What should you do if you can't pay the rent?

With the situation changing daily the key here is good and open communication between landlord and tenants. The message from the government here is strong and sensible – work together with your landlord to agree on a plan that will ensure that at the end of this crisis, your business can continue as a going concern and the landlord still has a rent-paying tenant.

Need help?

We are always happy to help with advising on your contracts. Contact [Fiona Yiend](#) if your business needs assistance.

Check out other COVID-19 Employer Response resources on the Source website: <https://www.sourcelegal.com.au/covid-19-response/>