COVID-19: (AUSTRALIA) LANDLORDS AND TENANTS

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Real Estate Alert

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**This information is accurate as of 6.00 pm Thursday 19 March 2020 and is subject to change as this situation evolves.*

As we move deeper into both voluntary and state-mandated social distancing in response to COVID-19, businesses are being hit hard, and the NSW Business Chamber has called for landlords to be as "sympathetic as humanly possible"[1] towards tenants facing significant business interruption. We are already seeing larger retail landlords offering concessions to retailers in the form of rent relief[2], a trend almost certain to continue in an already strained retail sector.

In this Insight we will provide some answers to the most frequently asked questions we have received from landlords since the onset of this pandemic.

1. HOW DO LEASES DEAL WITH STATE-MANDATED SHUTDOWNS, AND WHEN CAN LANDLORDS VALIDLY LIMIT ACCESS TO TENANTS?

Most leases do not include broad ranging provisions regarding cessation of operations. Usually leases will contain provisions to address damage or destruction to a building or premises that renders the tenant's business inoperable. This is reflective of the landlord's fundamental obligation to provide the premises, from which a business is operating. However, to the extent other factors impact tenants' ability to operate, this would usually be addressed as a business risk of the tenants.

For retail landlords it is important to note that actions taken to limit access to retail premises must be reasonable, and in response to either an emergency situation or statutory duty. Section 34 of the *Retail Leases Act 1994* (NSW) allows tenants to seek reasonable compensation where landlords take various actions inhibiting customer-flow to retail shops, except where the landlord's actions are a reasonable response to:

- an emergency situation, or
- in compliance with any duty imposed by or under an Act or resulting from a requirement imposed by a public or local authority acting under the authority of an Act.

As for industrial and commercial leases, the scope of rights and obligations in emergency situations will turn on the drafting of the respective leases.

2. HOW CAN BUSINESS INTERRUPTION INSURANCE RESPOND TO SHUT-DOWNS?

Some leases will require tenants to maintain business interruption insurance in respect of their business. Where such insurance is in place, the extent of that insurance coverage to COVID-19-related disruption is a separate question entirely.

Many policies include general exclusions for losses relating to quarantinable diseases, or may cover infection within the premises itself, but not infection in the wider community. Cover may extend to disruptions to critical supplies from overseas, or a sudden drop-off in trade due to specific border closures. This will of course depend on the scope and wording of the policy itself, and tenants must seek advice on how their policies may respond to losses related to COVID-19.

3. SOME CONTRACTS REFER TO *FORCE MAJEURE*, BUT DOES SUCH A THING EXIST IN A LEASE? WOULD A PANDEMIC BE COVERED IN THE DEFINITION OF SUCH AN EVENT?

There is much talk in the current climate of the application of *force majeure* clauses in contracts, and where such clauses are not included, whether certain agreements are not impossible to perform due to the pandemic.

For parties who have entered into Agreements for Lease or other arrangements where lease commencement is predicated on the completion of works or other events, such agreements may contain mechanisms for extensions of time or other recourse if a *force majeure* event occurs. The scope of such provisions will depend entirely on the drafting of the *force majeure* clause, and the events classified as *force majeure* in that document.

The concept is less applicable (if at all) to leases that are already on foot, particularly as leases confer not only contractual rights and obligations, but an estate in land. There is therefore very little scope to argue that leases are frustrated by the outbreak of the pandemic, but each transaction must be considered on its contractual terms.

4. DO LANDLORDS AND TENANTS HAVE AN OBLIGATION TO REPORT SUSPECTED CASES OF INFECTION TO ONE ANOTHER?

All stakeholders need to be aware of and comply with all healthcare directives and orders made under the *Public Health Act 2010* (NSW) and equivalent legislation in other jurisdictions.

Now is the time for landlords of multi-premises buildings (eg a shopping centres, industrial complexes, commercial office buildings) to look at their building or centre rules, and ensure that protocols are in place to mitigate risk in the event of an outbreak in the complex. This may include directives around cleaning, waste removal, social distancing and the reporting of confirmed cases.

Some leases will contain express obligations around reporting of infectious disease. Most leases will require tenants to comply with the building rules issued by landlords from time to time. Such rules may already have processes for reporting infectious diseases, or can be updated and re-issued by landlords (in accordance with any processes in the lease) to set out the risk mitigation and reporting strategies appropriate for that complex.

Notes:
[1] NSW Business Chamber spokesperson Damian Kelly quoted by the Sydney Morning Herald, Paige Cockburn 18 March 2020 https://www.abc.net.au/news/2020-03-19/coronavirus-forces-sydney-cafe-to-fire-four-staff-in-week/12068288
[2] https://www.realcommercial.com.au/news/covid-19-scentre-group-offers-rent-lifeline-to-mall-retailers

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