

Australia: Landlord and Tenant considerations through the coronavirus outbreak

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The recent outbreak of COVID-19 worldwide has seen countries, communities, businesses and individuals being forced to navigate through a myriad of advice in assessing the risk of the outbreak and putting in place risk management measures to deal with the outbreak. The potential business disruption from the outbreak cannot be underestimated at any level.

We consider below some scenarios relevant to landlords and tenants in light of the COVID-19 outbreak.

1. Do landlords or tenants have any reporting obligations under their leases?

It is common to see leases include a provision dealing with infectious disease.

From a tenant's perspective, these clauses usually require a tenant to give prompt notice of an infectious disease to a landlord (whether it has actually occurred or whether there is a reasonable ground of it occurring) and also comply with all requirements of a landlord in relation to the infectious disease.

Tenant obligations may also extend to a tenant being required to:

- report the infectious disease to the relevant authority and give them all necessary notices and other information required to the relevant authority; and
- comply with all directions of that authority, usually at a tenant's cost, including thoroughly fumigating the premises.

Landlords and tenants may also be caught generally under provisions requiring adherence to health and safety procedures, or where there are specific obligations not to cause any harm to, or expose anyone to, any health and safety risks.

A failure to comply with clauses of this nature, could result in a party being in breach of the lease, potentially giving one party the right to terminate the lease and claim applicable damages.

Landlords and tenants should prudently consider their lease documents to ensure compliance. Likewise, given the current outbreak, clauses of this nature should be carefully considered and drafted from both sides in new leases. Certainly it would not be far-fetched at this point to see infectious disease clauses specifically linked to rent abatements and the like given the other scenarios we address below.

2. What if a landlord decides to close the building or shopping centre to prevent the spread of COVID-19?

It is quite usual for a lease to contain a clause in a tenant's favour allowing a tenant a reduction in rent (and other payments required under the lease) if a tenant cannot reasonably access or use the premises.

The relevance of a clause of this nature, and the extent a tenant may rely on it, will depend on the specific wording of the clause. For example, many typical rent abatement clauses are linked to specified damage making the building inaccessible or unfit for occupation, which is a stretch from the building simply being closed/locked due to threat of disease.

If this scenario applied to the closure of a retail shopping centre, the provisions of the retail legislation in the relevant jurisdiction may come into play in terms of rent relief and other protections for retail tenants, depending on the extent to which the landlord has acted reasonably in deciding to close the centre (or parts of the centre), and whether the closure or restricted access is due to a lawful direction or requirement of a government authority.

Another consideration in this case is whether there is any right for a tenant to claim against a landlord for derogation from the grant and/or breach of quiet enjoyment.

3. What if a tenant decides to shut up shop due to spread of COVID-19?

With the exception of an express provision in a lease permitting a tenant to cease trade/operations and close its premises/store in the event of an outbreak such as COVID-19, it would be difficult for a tenant to establish such a right, particularly if demanded together with rent relief for the period of closure.

In relation to a retail shopping centre lease, it is likely that a tenant's unilateral decision to close the premises would see a tenant breaching its obligations in the lease in relation to trade and keeping the premises open, stocked, staffed during specific centre hours.

This scenario presents a different position in a commercial lease environment as the 'trade' and physical shopfront element is not relevant. It is also more generally accepted that employees in a commercial office environment are able to work in an agile manner, meaning, for many businesses,

this scenario would not necessarily affect a landlord so long as rent and other payments were still forthcoming. That said, it would be highly unlikely that a tenant could rely on any claim for rental relief from a landlord in this situation.

4. What if a landlord is forced to quarantine or close a building or shopping centre on directions from a government authority?

In this extreme, but not unlikely situation, the affected parties should consider whether the lease makes provision for a force majeure event and whether the closing of the building/centre as a result of the outbreak falls within the common law protection offered because of the occurrence of such an event.

Broadly speaking, force majeure events are unexpected circumstances outside of a contracting party's reasonable control that, having arisen, prevent it from performing its contractual obligations.

Further, while difficult to establish, if a contract becomes impossible to perform as a consequence of the COVID-19 outbreak, there may be the option for a party to argue that the lease has been frustrated and should therefore be brought to an end.

Practical Steps

Given the daily developments of COVID-19 in Australia, landlords and tenants should be checking their lease documents and thinking about what current actions may be required, and preparing for any future actions as developments in the outbreak progress. At the same time, clauses dealing with infectious disease, harm to health, access and abatement of rent should be carefully considered in the drafting of new leases.

Discussion in the market has been heavily focused on the need for businesses to review their insurance policies to ascertain whether loss of rents/business interruption losses will be recoverable. Now is the time for landlords and tenants to undertake this review.

Norton Rose Fulbright's global teams are actively advising clients in relation to the COVID-19 outbreak. Please do not hesitate to get in touch with us if your business has been affected or if you would like us to provide advice on or assist with any of the steps set out above.

Contacts



Michael French
Partner, Brisbane
Tel +61 7 3414 2252
michael.french@nortonrosefulbright.com



Adrian Jones
Partner, Melbourne
Tel +61 3 8686 6070
adrian.jones@nortonrosefulbright.com



Tom Young
Partner, Brisbane
Tel +61 7 3414 2845
tom.young@nortonrosefulbright.com



Andrea Rezos
Partner, Perth
Tel +61 8 6212 3406
andrea.rezos@nortonrosefulbright.com



Michael McKee
Partner, Sydney
Tel +61 2 9330 8696
michael.mckee@nortonrosefulbright.com



Justin Lucas
Partner, Melbourne
Tel +61 3 8686 6251
justin.lucas@nortonrosefulbright.com



Deanne Ogilvie
Partner, Sydney
Tel +61 2 9330 8564
deanne.ogilvie@nortonrosefulbright.com



Matthew Derrick
Partner, Brisbane
Tel +61 7 3414 2820
matthew.derrick@nortonrosefulbright.com



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