

COVID-19: PRESSURE POINTS: NSW EMERGENCY MEASURES - COMMERCIAL LANDLORD BRIEFING (AUSTRALIA)

30 March 2020 | Australia

Legal Briefings - By **Nicholas Cowie and Allison Cavanagh**

On 29 March the National Cabinet agreed the principles that will underpin relief for commercial tenancies in response to the COVID-19 Pandemic. This comes after the passing by the NSW legislative Council and Legislative Assembly of the COVID-19 Legislative Amendment (Emergency Measures) Act 2020 (**Act**) on 25 March 2020. Below, we discuss what the National Cabinet announcement means for commercial tenancies and what the ACT means for retail tenancies.

I AM A COMMERCIAL LANDLORD, WHAT DID THE NATIONAL CABINET AGREE?

The National Cabinet agreed to a **moratorium on evictions over the next 6 months for commercial tenancies in financial distress** as a result of the COVID-19 Pandemic.

The National Cabinet also agreed principles to assist commercial tenancies as follows:

1. the reduction or waiver of rent payments for a defined period for impacted tenants;
2. the ability for tenants to terminate leases/and or seek mediation or conciliation on financial distress grounds;
3. commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused

by COVID-19;

4. landlords and tenants not significantly affected by COVID-19 are expected to honour their lease and rental agreements; and
5. cost-sharing or deferral of losses between landlords and tenants and banks, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.

The National Cabinet is encouraging landlords and financial institutions to sit down and seek common solutions to ensure the continued viability of effected businesses. For example today the Australian Banking Association announced a measure to defer repayments for many landlords on condition that an undertaking not to terminate tenancies or evict current tenants for rent arrears as a result of coronavirus impacts is provided. More on that to follow.

The National Cabinet will meet again on Monday 30 March 2020 and we will provide a further update as more information, legislation and regulations come to hand.

I AM A RETAIL LANDLORD OR TENANT, HOW DOES THE ACT AFFECT ME?

The Act gives the Minister the power to make regulations that affect a retail landlord's current statutory rights. The Act does not by itself make any changes to a landlord's rights. The Act amends the Retail Leases Act 1994 NSW to give the Minister power to make regulations which may prohibit a landlord:

1. **taking back possession of a premises from a tenant;**
2. **terminating a lease;**
3. **exercising or enforcing their statutory rights or rights under an agreement between the parties.**

CATEGORY 3 ABOVE SEEMS PRETTY WIDE, WHAT WOULD IT INCLUDE?

A regulation may be created that stops a landlord from enforcing or exercising its rights under statute or under its agreement with the tenant. We anticipate any regulation once made will provide more specific details. Generally speaking a regulation made under this umbrella could include prohibiting a landlord from:

1. recovering rent and outgoings from a tenant;

2. issuing termination notices to the tenant following default in payment of rent; or
3. enforcing a tenant's repair and maintenance obligations.

Whether other landlord rights, such as relocation and demolition, will be affected remains to be seen.

OK SO THE DEVIL IS IN THE DETAIL, WHEN WILL WE KNOW WHAT EXACTLY THESE REGULATIONS SAY?

At the time of writing no regulations have been introduced. The situation is quite fluid and is linked to Commonwealth and State discussions around putting businesses into "hibernation" for the duration of the COVID-19 crisis. We will provide an update once the regulations are published and suggest that landlords and stakeholders seek up to date advice before acting.

HOW LONG WILL A REGULATION (ONCE MADE) LAST FOR?

The regulations will last for 6 months from the date the regulations commence. The regulations may be terminated earlier by a resolution of either house of parliament in NSW.

WHEN THE 6 MONTHS IS UP, WHAT THEN?

For now, this is an unknown as the Act is silent on what happens once the regulations come to an end. Further detail may accompany the regulations when made but that cannot be guaranteed.

DOES THE ACT AFFECT MY OBLIGATIONS AS A RETAIL LANDLORD?

The Act does not by itself change a landlord's obligations either under the Retail Leases Act 1994 NSW or its agreement with the tenant. This will change when the regulations are released.

ANYTHING ELSE I NEED TO KNOW AS A RETAIL LANDLORD?

Supermarkets if they choose to do so and provided that they are staffed by people who freely elect to work on that date are now permitted to trade on Good Friday, Easter Sunday and Anzac Day 2020.

I AM A LANDLORD OR TENANT OF A COMMERCIAL PREMISES: AM I AFFECTED BY THE ACT?

The definition of a 'relevant Act' for the purposes of the Act specifically includes the Retail Leases Act 1994 NSW but also includes "*any other Act relating to the leasing of premises or land for commercial purposes*". As at the time of writing it is unclear if leases of commercial premises will be affected by future regulations.

If you have any questions regarding the Act or any aspect of your role as landlord in the current difficult times, please contact your usual HSF contact or any member of the [HSF Real Estate team](#).

[More on navigating the COVID-19 outbreak](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



NICHOLAS COWIE
PARTNER, SYDNEY

+61 2 9225 5551
Nicholas.Cowie@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close