



17 April 2020 – “Part 2”

Commercial & Legal provide this further alert for REISA members to assist agents, property managers, landlords and tenants to obtain a greater understanding of the current state of the Law, and what they can be doing right now.

This is our “**Part 2**” alert, and continues from the first member alert issued on 9th April 2020.

Code of Conduct – Update on SA Law

On 9th April 2020, the *COVID-19 Emergency Response Act 2020 (SA)* (“**Act**”) came into effect.

This Act makes various temporary modifications to existing SA legislation including in relation to commercial leases.

The mandatory Code of Conduct which is to be implemented by each State and Territory nationally is not directly provided for in the Act, and is expected to be addressed within the Regulations of the Act.

On 16th April 2020, the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* came into effect. However these Regulations, so far, only contain limited provisions which essentially deal with:

- What is considered as financial hardship for a tenant; and
- What the Commissioner must have regard to when making a determination as to whether a tenant has suffered financial hardship.

We note that in order for a tenant to be eligible for the protections provided by the Act, the tenant must establish that they are suffering financial hardship as a result of COVID-19.

We continue to await the introduction of further Regulations that, it is expected, will set out the detailed provisions relating to the mandatory Code of Conduct.

Additional Practical Implications to Consider

The **Commercial and Industrial Committee** within REISA have been meeting (now) on a weekly basis to discuss the impact they are seeing on the market and strategies on how to best manage the commercial tenancies of their member’s landlords and tenants.

Whilst it would be ideal to have all members present in those meetings, that is not practical, however as a next best option we have set out below some of the key discussion points that may be of assistance to all members in navigating through these troubled waters.

Landlords will now more than ever, be relying upon the quality of their relationship with their tenants (where applicable) and the relationship as between the Agent / Property Manager and the tenant.

When will the Code of Conduct become law in SA?

We are having almost daily discussions with the Small Business Commissioner of the Office of Consumer Affairs, Mr John Chapman on this very point. At this stage we are informed that the SA regulations that will adopt the principles as set out in the Code of Conduct (which we caution may contain SA specific differences to the Code of Conduct) are imminent, however there is no target date and there is likely to be almost little notice, if any, provided before they are enacted.

Will these new regulations be retrospective?

We have been advised that the principles of the Code of Conduct, once introduced via SA regulations, will not be retrospective. Rather it will be a scoping document relating to the adoption of conduct for landlord and tenant, and the powers of the Commissioner to resolve disputes. We do, however, draw your attention to the provisions of sec 7 of the Act which have now been deemed to have taken effect on 30 March 2020 (pertaining to restrictions on landlords).

What about overdue March or April rents?

Until such time as the principles as set out in the Code are adopted via the SA regulations, the Lease remains the contractual agreement which the parties must observe. Whilst the current Act imposes restrictions on how a landlord may deal with a tenant in arrears, there is not yet a mandatory obligation to comply with the Code of Conduct for rent relief negotiations. We understand the Commissioner has suggested that he would be applying this thinking should tenants disregard their Lease and not pay their rent in the meantime.

Looking at March rents in particular, in most cases these were due on 1 March 2020 and it is widely accepted amongst industry professionals that March rents would generally not qualify for rent relief discussion.

Looking at April rents, whilst these were technically due on 1 April 2020, parties should accept that the proposed Code of Conduct was somewhat announced at this time and the national JobKeeper Payment Scheme (which is the main determining factor of financial hardship for a tenant) will apply in April. That said, at this point there is nothing to stop a landlord from insisting on payment of April rent without a mandatory obligation to provide relief. However should a landlord know that its tenant has suffered financial hardship, it is the view of industry professionals that some form of rent relief should be provided for April.

Should parties enter into agreements for rent relief now?

It is our view that entering into binding legal agreements should not occur before the Code of Conduct is mandated in South Australia through the expected Regulations to come shortly.

Notwithstanding this view, parties may enter into binding agreements now (and many have done so already), though they run the risk of negotiating different outcomes to those anticipated by the Code and quite possibly being forced to reconsider terms again once the Regulations come into force.

Should tenants start applying for rent relief now?

It is our view that tenants who consider they have suffered financial hardship, and in particular expect they'll be entitled to the JobKeeper Payment Scheme, should be allowed to put their case forward now for rent relief and other requests.

The gathering of these requests from tenants, with their supporting information, will take some time to collate and consider and discuss with landlords. There is no reason why this process cannot start now and this will save time in reaching and documenting agreements once the Code is mandated.

The benefit of starting these discussions now is that this may also alleviate some of the anxiety felt by tenants, who thus far may have been asking for rent relief and have not been able to receive any clear answers or direction.

REISA is working with the **Commercial and Industrial Committee** to develop a template that tenants may use, as an application form, when making their formal requests for rent relief.

A copy of this template is now available to all REISA members.

Should I tell all tenants to apply for rent relief?

It has already been raised by agents and landlords that, in some cases, property managers have issued generic communication to all tenants with respect to how they propose to deal with claims for rent relief.

It is our view that property managers should only discuss rent relief processes with those tenants who have sought the rent relief.

Do I need to be mindful of disputes?

Yes! It is expected that not all landlords and tenants will reach agreement on rent relief.

In such cases, keeping a clear record of tenant requests (and their supporting material) and landlord responses will be vital, when parties are putting forward their position before the Commissioner.

Actions by REISA

With the assistance of Commercial & Legal and the **Commercial and Industrial Committee**, REISA has focussed on the following key points to assist its members and the commercial leasing industry as a whole.

- Weekly discussions of experienced industry professionals to share their views on the market and how to deal with issues we are all facing.
- Regular discussions with the Small Business Commissioner to share industry views and influence outcomes.
- Lobbying of State Government bodies in order to provide additional assistance and financial relief to landlords who comply with the Code and provide their tenants rent relief. This financial assistance could be in the form of:
 - Additional Land Tax relief (and waivers, not deferrals).
 - Council Rate relief.
 - Other financial compensation.

- Preparation of a template Rent Relief Application Form that members are welcome to adopt and provide to their tenants in order to streamline process.
- Preparation of a template Rent Relief Agreement that members will be entitled to use to document 'simple' rent relief agreements (to be released once the Code is mandated).

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Documenting Lease Variations

Commercial & Legal are working with REISA to develop a short-form agreement that may be used by REISA members for documenting 'simple' agreed rent relief measures.

In many circumstances there will be no alternative but to have a proper drafted Deed of Lease Variation prepared by a party's solicitor. In such cases, we acknowledge that Agents / Property Managers will want to streamline their processes and costs.

Commercial & Legal are offering Deeds of Lease Variations prepared specifically for COVID-19 negotiations, as follows:

- *Affordable and Fixed Price* – \$400 + GST (may vary for complex cases).
- *Streamlined Process* – Instruction Sheet available to submit once terms are agreed.
- *No Complications* – 1 point of contact for all your variations to keep your process efficient and simplified.
- *Property Expertise* – Knowledge that the lease variation is being handled by one of Adelaide's leading Property Law Firms.

For more information or to seek assistance, please contact **Graham Hall**, **Andrew Dunccliff** or **Elias Farah**; or alternatively, call our office on (08) 8206 8444 to find out more information.



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