



COVID-19 – LEGAL IMPACTS ON REAL ESTATE

Unfortunately, COVID-19 has played havoc again in South Australia, and it is therefore important to remember that, just like before, this pandemic continues to have far reaching implications on existing and future contractual obligations of all persons involved in real estate – be they vendors, purchasers, landlords, tenants, or respective agents.

Whilst the lockdown in South Australia will end ahead of schedule, the recent “Parafield Cluster” is a timely reminder that our industry remains susceptible to further outbreaks.

We have noted some important updates below which address legal impacts on settlements, the important use of the COVID-19 special condition available, and the likely increase in rent relief requests again.

Impact On Settlements During Second Wave

Our firm has been inundated with questions through our Conveyancing and Property Law Team around the occurrence of settlements during this time, in particular ‘Will my property still be able to settle’ and ‘I cannot meet the date now, what will happen’?

We firstly would like to note that now majority of settlements are now carried out electronically, and that most conveyancers and solicitors have remote access to PEXA.

PEXA will allow your clients conveyancers to continue to undertake your clients’ conveyancing online, from their home office, through their secure e-conveyancing service.

However whilst the platform allows settlements to take place, the impact of lockdowns and restrictions will still impact settlements which are reliant upon finance (i.e. mortgage documentation) and parties who need to arrange removalists etc.

Should any property settlement be impacted by the recent second wave of COVID-19, now or in the near future, you will need to turn to your sale contract to identify whether a COVID-19 Special Condition was included. Back in April, our firm had drafted this particular special condition for The Real Estate Institute of SA, The Law Society of SA and the Australian Institute of Conveyancers. This special condition has also been used for the Auctioneers and Appraisers Association. Failing such inclusion, there is little (if any) scope to lawfully delay settlement or deal with any household contamination, other than by mutual agreement of the parties.

COVID-19 Special Condition For Sale Contracts

We are aware of a number of situations that have come to light during this lockdown where parties are insisting on settlements occurring despite vacant possession being impossible and/or mortgage documents not being able to be signed with the current COVID-19 restrictions.

Unfortunately, there is no particular allowance within the *COVID Emergency Response Act* that provides assistance on this point with property contracts.

Majority of notice periods within all sales contracts are short, some being 3 business days before settlement and 10 business days after settlement. The COVID-19 special conditions, drafted by Commercial & Legal, extend these time periods, which will assist parties in navigating settlements during this period of lockdown.

Whilst we are aware that many have reduced the use of this COVID-19 Special Condition in the past couple of months, it is important now that agents continue to make use of these special conditions. The special conditions continue to be relevant, and remain to support sellers and buyers and keep transactions on track which may be affected due to COVID-19.

In the event of delay to settlement where parties are not willing to agree to the COVID-19 Special Conditions and/or this has been omitted as part of the Contract, our recommendation (and the only legal position available at this time) is to negotiate in good faith between the parties to extend the date of settlement and have the parties enter into an addendum.

COVID-19 Commercial Leasing Arrangements

Our firm have issued a number of alerts to industry bodies regarding the implications of COVID-19 on commercial leasing. In particular, the effect of the *COVID-19 Emergency Response Act 2020* (SA) ("**Act**") and the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* ("**Regulations**").

The Act and Regulations were initially meant to apply up until 30 September 2020, however this date was recently extended until **3 January 2021** in the first instance, with the possibility of it being extended further until **28 March 2021**, in line with the extension to JobKeeper and JobSeeker initiatives.

The Act and Regulations impose an obligation on the parties to a commercial lease to negotiate in good faith regarding rent payable, having regard to the 14 principles set out in the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19* ("**Code of Conduct**").

The Code of Conduct prevents Landlords from terminating commercial leases for non-payment of rent and provides that Landlords must offer reductions in rent (as waivers and/or deferrals) proportionate to the Tenant's reduction in trade. The principals set out in the Code of Conduct took legal effect in South Australia via the Act and the Regulations.

These rent-relief arrangements were extremely popular at the onset of COVID-19. Many of these arrangements came to an end as businesses found their feet again once South Australia's COVID-19 cases began to decline and disappeared entirely for three months. It may have been considered that COVID-19 rent-relief arrangements were a thing of the past.

However, in light of the recent restrictions placed on all South Australians by the South Australian Government, there is widespread concern that many businesses will once again suffer a reduction in trade as a result of COVID-19.

At the present time (until at least 3 January 2021), Landlords remain obligated under the Act and Regulations to negotiate rental relief arrangements where tenants can establish that they are an "affected tenant" as defined in the Regulations. The newly imposed government

restrictions will impact businesses and negotiations and the need for documenting such arrangements will re-emerge. Parties to such commercial leases will need to re-consider their current rental arrangements.

As a result of the rapid change to the state of affairs in South Australia, we acknowledge that Agents/Property Managers and Landlords will be looking for advice as to existing (and new) commercial leases and in particular leases where Tenants experience a dramatic reduction in trade.

We encourage you to seek legal assistance if you or your clients need advice on any aspect of the COVID-19 legislation in relation to commercial leasing. We are offering COVID-19 Deeds of Variation for affordable fixed price of **\$400.00 + GST** (which may be increased for complex matters).

To contact our team, email [**legal@commercialandlegal.com.au**](mailto:legal@commercialandlegal.com.au) or contact **08 8206 8444**.

