

## Issues facing Tenants: Covid-19

**I**n these uncertain times, many of our clients are looking for answers, insights and solutions to the issues raised by COVID-19.

As businesses prepare for a range of scenarios, including those mandated by Government directives, we consider a major concern facing tenants today.

**As a tenant, what are my rights under my lease? Will my lease allow me to terminate because of the COVID-19 pandemic?**

Answer: Unlikely

Right to terminate: Although each lease will contain different terms, leases rarely contain an express right for a tenant to terminate a lease.

Force majeure: In Australia, there is no common law doctrine of 'force majeure'. A tenant can only rely on this doctrine if their lease contains a force majeure clause. This is rare in commercial leases.

Breach of quiet enjoyment: Tenants may consider terminating their lease on the basis that the landlord has failed to provide 'quiet enjoyment'. If such failure is due to a Government mandated shutdown, courts are unlikely to view such closure as a breach of the landlord's 'quiet enjoyment' obligation.

Frustration: Frustration brings a contract to an end. This occurs where, through no fault of either party, an intervening event makes performance of the contract impossible or radically different.

Tenants may argue that a Government ban on occupation of, or trading from, the premises frustrates the lease. Courts however, have been reluctant to enforce this doctrine in circumstances of a temporary change (eg short-term closure). It is therefore likely the lease will continue during any short-term period of forced closure.

**Can I stop paying rent?**

Answer: No, but that doesn't mean you don't have options

Non-payment of rent: This will most likely amount to a breach of the lease and entitle the landlord to terminate and seek damages.

Rent abatement for inability to access premises: Most leases will contain provisions for rent abatement under certain circumstances. These typically relate to situations where the centre or premises have been damaged or destroyed. It is therefore unlikely that these provisions will be able to be relied upon by a tenant to support a claim for rent abatement.

Commercially: From a commercial perspective however, landlords are acutely aware in these challenging times of the difficulties they may face in replacing the tenant if they adopt an 'aggressive' approach, such as terminating the lease.

Tenants should consider strategically approaching landlords for an initial discussion to explore options for relief or assistance.

**If I am forced to close my premises due to a Government directive, will I be in breach of my lease?**

Answer: No

Most leases contain an obligation for a tenant to keep their premises open. It is unlikely this obligation can be enforced where the Government orders or mandates closure. This is because leases will most likely also contain a provision requiring a tenant to comply with laws and Government directives.

This would likely trump any other conflicting tenant obligation.

**Time to check your lease terms**

The above information is provided on a general basis only. Now more than ever, the specific terms of each lease are critical and should be reviewed carefully.

Businesses of all sizes are facing unprecedented challenges in light of the outbreak of COVID-19. We can see and feel the pressures and stresses that our clients face. We are here to help in any way we can and encourage tenants to contact us to clarify their contractual rights under their leases.

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