

Worrall Moss Martin News

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Commercial Leases and COVID-19

With the unprecedented social and economic restrictions imposed by the Federal and State Governments in response to the COVID-19 pandemic, it was inevitable that a legislative regime would be implemented to protect and enable the continuation of commercial leases, a core pillar of Australia's economy.

It is vital that both commercial Landlords (also known as 'Lessors') and Tenants (also known as 'Lessees') are aware of the fundamental changes to the Landlord and Tenant relationship following from the implementation of emergency measures by the Federal Government and the Tasmanian Government, or else they will find themselves in breach of the law and, potentially, subject to significant penalties.

The National Cabinet Mandatory Code of Conduct: On 7 April 2020, the National Cabinet implemented the National Cabinet Mandatory Code of Conduct ('the Code'), a guiding framework of good faith principles to regulate the commercial Landlord and Tenant relationship.

- The Code was established to provide an overarching and consistent legislative and regulatory regime for the states and territories to apply in adopting their own state and territory-based legislation.
- The core aim of the Code is to ensure that vulnerable commercial Tenants subject to reduced cashflow arising from the pandemic, are protected and that measures are implemented, on a case by case basis, to enable commercial lease arrangements to continue despite the economic downturn. Landlords and Tenants are expected to negotiate in good faith and to share in the impact of reduced cashflow by reducing, waiving and/or deferring rent and other lease payments.

Prohibition on Landlords from Terminating Commercial Leases: On 9 April 2020, following the implementation of the Code, the Tasmanian Government issued a Notice pursuant to section 22 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tasmania) ('the Notice') which was to prohibit Landlords from terminating commercial leases on the basis of the non-payment of rent or other lease payments where a Tenant's turnover had been reduced, due to the pandemic, by more than 30% in a continuous one month period since 1 February 2020.

- The Notice was only a temporary measure until the more comprehensive legislative framework was implemented in the form of the *COVID-19 Disease Emergency (Commercial Leases) Act 2020* (Tasmania) ('the Act') which came into force on 13 May 2020.
- Despite both the Federal Government and the Tasmanian Government stating that the objective of the new legislative and regulatory framework is to 'share' the financial risk and burden of the pandemic between Landlords and Tenants, the Act and the Code are, in reality, significantly in favour of Tenants.

Are All Commercial Leases Covered? In short, no. Only commercial leases where the Tenant has a turnover of less than \$50 million per annum, and is eligible for the JobKeeper program (even though they may not have applied for it), fall under the scope of the Act and the Code. Leases that meet this definition are known as 'protected leases'.

The Act is to apply to all protected leases for the duration of the 'financial hardship period' which means the period between 1 April 2020 and the date that the Government declares the period is over. If no declaration is made, then the period ends 12 months after 1 April 2020.

Does the Act or the Code Apply? Tenants and Landlords need to be familiar with both. Although the Act is the core legislative instrument in Tasmania, it adopts parts of the Code throughout. A good starting point is to read the Code, which provides an overarching guide as to the principles and purposes for which the Act has been implemented.

- The Code can be found [here](#).
- The Act can be found [here](#).

How do the Code and the Act Affect the Traditional Landlord and Tenant Relationship?

Parties to a protected lease are obliged, now that the Act has commenced, to begin negotiations to implement arrangements for the duration of the financial hardship period which will enable the lease to continue and for the Tenant to continue trading.

A good starting point is to approach any negotiations in good faith as required by the Act and the Code. Parties are expected to first attempt to reach agreements between themselves. If they are unable to reach agreement, then a party may apply for the dispute to be heard and decided by a mediator.

A Landlord, for the duration of the financial hardship period, and for any period after, cannot terminate the lease, take possession of the premises, recover damages, draw upon any security deposit or bank guarantee or undertake the other actions set out in section 7 of the Act, in response to a breach by a Tenant of a Lease during the financial hardship period, which concerns, primarily:

- the failure to pay rent or other payments under the lease including outgoings;
- failure to meet turnover or sales-based performance criteria; or
- failure to be open for business during the days and times specified in the lease.

A Tenant is otherwise required to comply with the terms of a lease, and whether the Landlord could terminate a lease or take other prohibited actions for other breaches will depend entirely upon a case by case assessment of the Tenant's conduct. A Landlord would be wise to first seek advice in every instance.

If a lease is to expire during the financial hardship period then, if the Tenant requests, the Landlord must extend the term of the lease until the expiration of the financial hardship period.

How are Rent and Other Costs to be Negotiated? The parties are required to act in good faith and to provide each other with information that is both accurate and sufficient for negotiating reduced rent. They must not carry out any misleading or deceptive conduct.

Rent cannot be increased, unless agreed to by the Tenant, and it must be reduced proportionally to a Tenant's reduction in cashflow and all the circumstances of the lease and the business of the Tenant.

Rent must be negotiated both by undertaking an assessment of the Tenant's financial position, based on the various provisions of the Code, with the process including the following (also explained in the example below):

- the rent reductions must involve both waivers and deferrals, and be proportionate to the Tenant's loss in cashflow up to 100% of the rent payable. This means that, if the Tenant's cashflow is zero, then the rent must be reduced to zero;
- complete waivers (where the Tenant is not required to pay now or into the future) must constitute at least 50% of the reduction with deferrals (where the Tenant is to repay at a later date) being the remainder;
- the Tenant's payment of the deferrals must be amortised over the balance of the lease term and for a period of not less than 24 months. This means that, if the term of the Lease is less than 24 months, then the Tenant must be offered an extension to the term to allow them reasonable opportunity to repay the deferred rent;
- outgoings and other expenses are expected to be treated in the same manner as rent but Landlords are expected to waive recovery of outgoings or other expenses under the lease where the Tenant is not able to trade;
- no interest or other fees can be charged by the Landlord for deferred rent; and
- rent increases are frozen for the financial hardship period and any reasonable subsequent recovery period.

An example of the negotiation of a reduction where the rent under a lease is \$3,000.00 per month and the Tenant experiences a 50% reduction in trade is as follows:

- the rent would be reduced to \$1,500.00 per month and the Tenant is expected to still pay this amount;
- at least 50% of the remaining amount (i.e. \$750.00) must be a permanent waiver that cannot be recovered;
- the remaining \$750.00 can then be deferred and paid over the balance of the lease term for a period of at least 24 months, unless otherwise agreed to by the parties;
- if rent is deferred, then the Tenant must be offered an extension of the lease, if required, to cover the 24 months that they will repay the deferred rent; and
- repayments can only begin after the end of the COVID-19 emergency period.

The commercial Landlord and Tenant relationship is constantly changing during the COVID-19 pandemic, with further regulations likely to be implemented. It is important that both Landlord and Tenants receive legal advice so that they are not subject to fines or other penalties for failing to comply with the new legislative regime.

How Can We Help? Worrall Moss Martin Lawyers has specialist skills and experience in commercial law, and can help you with any enquiries about your rights and obligations, as either Tenant or Landlord. We can also assist you to negotiate arrangements, and document these arrangements. Please contact our Commercial and Property lawyers ([Peter Worrall](#) or [David Bailey](#)) if you, or your client, need expert advice and guidance.

Key Questions to Consider When Making a Power of Attorney

Estate Planning is not just about completing a Will. It is important that you consider, and plan for, what will happen, and who will control your financial affairs, whilst you are still alive, but incapable of making decisions for yourself.

In [Issue 11](#), we discussed Enduring Powers of Attorney generally in the context of the proposal by the Commonwealth Government to introduce a National Enduring Power of Attorney Register. Although we understand that the national register is still being pursued, we thought it useful to provide guidance about important matters that should be considered when making, or considering making, a Power of Attorney.

What Type of Power of Attorney Do You Need: Although the term 'Power of Attorney' is used interchangeably, there are a number of types of Powers of Attorney.

- **An Enduring Power of Attorney** is made where a person appoints one or more people to make financial decisions for them and **intends** for the powers granted to the Attorney to continue if they become incapable (either temporarily or permanently) of giving instructions or managing their own affairs, for example due to mental incapacity. Enduring Powers of Attorney can also be drafted to operate while a person retains mental capacity (subject to the direction of the person making the Power of Attorney). Enduring Powers of Attorney are the most common form of Power of Attorney and should be considered a vital part of every estate plan.
- **A General (Non-Enduring) Power of Attorney** is made where a person appoints one or more people to make financial decisions for them and **does not intend** for the powers to continue if they become incapable (either temporarily or permanently) of giving instructions or managing their own affairs, for example due to mental incapacity. General (Non-Enduring) Powers of Attorney are often used for a specific purpose and for a fixed period of time, for example to appoint another person to run a business while the business owner is overseas.
- **A Specific (or Limited) Enduring Power of Attorney** is often made where a person wishes for an Attorney to only have the authority to do a certain task or tasks. Examples can include to sell a property or to act on their behalf in a particular negotiation or business venture.
- **A Company Power of Attorney.** The *Corporations Act 2001* (Commonwealth) grants a company the legal capacity and powers of an individual. As a consequence, a company can (subject to any restrictions in the rules (or constitution) of the Company) make a Power of Attorney that appoints and grants an Attorney powers to exercise director powers and make necessary company decisions (subject to the *Corporations Act 2001* (Commonwealth) and any directions/restrictions in the Company Power of Attorney).

Importantly, a person can have more than one Power of Attorney (of any type) in place at any one time and each Power of Attorney (regardless of the type) can impose limits/restrictions on the powers of the Attorney and/or require certain actions of an Attorney (for example a reporting or consultation requirement).

Who Should You Appoint as Your Attorney: The legal requirements about who can be appointed as an Attorney are that the person must be over the age of 18 years and must have legal capacity (that is, not be bankrupt or lack mental capacity). Non-legal considerations of who should be appointed as an Attorney include that it should be a person who:

- is trustworthy;
- is familiar with your circumstances, wishes and preferences;
- understands (or would be able to quickly attain an understanding of) your financial affairs;
- is decisive;
- is capable and has sufficient time and ability to manage your financial affairs; and
- is able to make rational decisions in circumstances of conflict.

Should You Appoint a Substitute Attorney: Yes. One of the biggest failures of Powers of Attorney is the failure to appoint a substitute Attorney. In many instances a client will arrive with a statutory form Enduring Power of Attorney (or other form) that appoints their spouse as Attorney. When asked who they would want to manage their financial affairs if their spouse (or first appointed Attorney) was unable, most people have a preference and are not comfortable with the concept of the Guardianship & Administration Board (in Tasmania) appointing someone (and in particular with the concept that the Public Trustee may be appointed).

Can You Appoint More Than One Person as Your Attorney: Yes. You can choose one or several people to act as your Attorney. If more than one person is appointed, then the Power of Attorney document needs to provide for how those persons may make decisions as between themselves. For example, you may wish to provide that your Attorneys only act jointly (together), or that some Attorneys can act severally (on their own), whereas others must only act jointly with that person.

Can Your Attorney Charge for Acting: An Attorney (including a lawyer, accountant or financial advisor) is only entitled to be paid if they are expressly authorised to do so in the Power of Attorney.

What Powers Does an Attorney Have: The powers given to an Attorney, unless limited or restricted in the Power of Attorney, are quite broad and usually grant a power 'to, on my behalf, do anything that I may lawfully authorise an attorney to do'. This includes signing on their behalf, accessing their bank accounts and selling their property.

In exercising their powers, an Attorney must: take into account any wishes expressed to them in the Power of Attorney, in writing or directly by the person who appointed them; comply with any restrictions or directions; act in good faith; unless expressly authorised, not enter into any transactions that involve a conflict of interest; and exercise their powers as Attorney to protect the interests of the person who appointed them.

Examples of specific powers that you may wish to consider (depending on your circumstances) including in a Power of Attorney are:

- **A Power to Confirm Benefits on People.** This would allow the Attorney to convey benefits (including financial support) to others, for example spouses or other family members, who may need support after you lose the capacity to manage your own finances. Unless the Enduring Power of Attorney authorises this, there is a general prohibition in legislation against it (other than in limited cases for low value gifts such as Christmas or birthday presents);
- **Powers Deriving From Membership of a Superannuation Fund.** This would allow the Attorney to exercise your rights as a member of any superannuation fund. It is now common for superannuation funds to refuse to deal with an Attorney unless there is a specific

power in the Enduring Power of Attorney allowing the Attorney to make decisions and exercise powers relating to superannuation; and

- **Powers Over Digital Assets.** This would allow the Attorney to use, access, modify, control, delete, assign or transfer your digital assets, including emails, digital music, digital photographs, digital videos, digital books, digital documents, social network accounts and online memberships.

How Can We Help? Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and succession law, and can help you with any enquiries about Powers of Attorney.

Please contact our Estate Planning & Trusts lawyers ([Peter Worrall](#), [Kimberley Martin](#), [Casey Goodman](#) or [Ashleigh Furminger](#)) if you, or your client, need expert advice and guidance about preparing a comprehensive estate plan, including a Power of Attorney.

Thank you to Our Clients and Staff

Worrall Moss Martin Lawyers remains fully operational and able to continue to assist you with your legal needs. With restrictions having moved to Stage 2 on 5 June 2020, we confirm that our office remains open by appointment.

We remain mindful and responsive to matters arising from COVID-19. Further details about the changes we have implemented can be found [here](#).

We thank our clients and staff for their ongoing patience, support and adaptability in these unprecedented times.

Peter Worrall, Kate Moss and Kimberley Martin

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Further Information

Our Website

A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

Contributions

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at info@pwl.com.au

Caution

This newsletter contains material for general educational purposes and is not designed to be advice to any particular person about their own affairs as it does not take into account the circumstances of the reader as an individual. It is recommended that appropriate professional advice be obtained by each reader so that reliance can be taken upon that advice.

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