



FACT SHEET

Leases and COVID-19

Integra Legal
Suite 22, Level 2, Trinity Commercial Building
72 St Georges Terrace
PERTH WA 6000

1. INTRODUCTION

Ongoing economic disruption caused by the COVID-19 situation is already impacting lease arrangements. The purpose of this fact sheet is to:

- Provide information in relation to compliance and breach of mandated restrictions;
- Alert landlords to issues that may arise under a lease where a business has been affected by COVID-19;
- Inform landlords of their rights and obligations under a lease and at law in circumstances where a business has been affected by COVID-19; and
- Suggest some commercial solutions.

2. CURRENT MANDATED RESTRICTIONS

As at 24 March 2020, the following relevant government mandated restrictions (**Directions**) are in place:

2.1. Mass Gatherings Directions (No 2)

Pursuant to section 157(1)(k) and 190(1)(p) of the *Public Health Act 2016* (WA), mass gatherings are prohibited indefinitely. A mass gathering refers to:

- Any gathering of 100 or more persons in a single undivided indoor space;
- Any gathering of 500 or more persons in a single undivided outdoor space; and
- Any indoor or outdoor gathering not providing at least 4 square metres for each person.

Any person who **owns**, **controls** or **operates** a premises in Western Australia must not **allow**, **permit** or **organise** a mass gathering on that premises. This includes landlords, tenants/ business owners and arguably managers.

Violation of this direction without reasonable excuse is an offence punishable by a fine of up to \$20,000 for individuals and \$100,000 for bodies corporate.

2.2. Closure of Certain Places of Business, Worship and Entertainment Directions

Pursuant to section 71 of the *Emergency Management Act 2005* (WA), affected places are to be closed for a period commencing 12noon on 23 March 2020 and ending midnight on 13 April 2020, although the state government has indicated that these closures could be in place for at least 6 months.

An affected place refers to:

- Pubs, restaurants and cafes (other than to the extent of takeaway);
- Hotels (other than to the extent that it provides accommodations and takeaway);
- Bars, nightclubs, casinos, and any other licensed venue (excluding bottle shops);

- Cinemas and any other entertainment venue;
- Gyms and indoor sporting centres; and
- Places of worship (other than for the purpose of a wedding or funeral, with limited numbers).

Every **owner, occupier** or **person apparently in charge** of the affected place who does not abide by this direction commits an offence punishable by a fine of up to \$50,000 for individuals and \$250,000 for bodies corporate. Again, this includes landlords, tenants/ business owners and arguably managers.

2.3. Breach of Directions

We note the following:

- The Gatherings Directions apply to any person who **owns, controls** or **operates** a premises in Western Australia.
- The Closure Directions apply to every **owner, occupier** or **person apparently in charge** of the affected place who does not abide by this direction.

This means that the Directions are applicable to landlords as well as tenants/ business owners; **a landlord cannot knowingly permit, allow or otherwise facilitate an offence under the Directions** and faces the same penalty as a tenant/ business owner.

2.4. Landlord's Obligations

Landlords should take reasonable steps to ensure compliance, and contact the tenant/ business owner to:

- Confirm if the relevant premises and/ or tenant's business is an affected place;
- Confirm if the relevant premises and/ or tenant's business is subject to gatherings restrictions;
- Discuss and consider what action should be taken to ensure the tenant's business can lawfully continue on the premises, if at all; and
- Ensure ongoing compliance of the tenant.

Landlords should be actively communicating with tenants to ensure a consistent and uniform understanding of each party's obligations.

3. RELEVANT LEASE PROVISIONS

The following are examples of relevant lease provisions to consider.

3.1. Common Areas

Landlords should identify any common areas that are subject to their control and identify if compliance with the Directions requires:

- Modification or alteration of a common area;
- Closing all or any portion of a common area;
- Policing or monitoring of the common area;
- Enforcement of new rules in the common area.

Our standard lease provides that the landlord maintains control over common areas and expressly reserve the right to commence any of the activities detailed above, at any time, so long as they are reasonable and within the interest of the tenant, landlord and premises as a whole. However, as a matter of practicality, ensuring ongoing compliance with the Directions in common areas will require cooperation between landlords and tenants.

Landlords should review relevant leases and identify any limitations, exclusions, restrictions or notice requirements that may impede any of the above detailed activities.

Landlords should also consider if any of the above detailed activities will restrict access or interfere with a tenant's access and right to quiet enjoyment (e.g. where the Directions require the closure of an elevator, and the tenant's business is located on a floor that is primarily accessible via elevator).

If compliance with the Directions may potentially interfere with a tenant's accessibility or right to quiet enjoyment, please call us to assist in assessing the landlord's exposure to any claims and discuss potential solutions.

3.2. Indemnity and Risk

Our standard lease provides that, in the event a tenant commits an offence and incurs financial penalty under the Directions, a landlord is indemnified by the tenant, provided the tenant's offence was not a result of negligence or unlawful activity by the landlord.

In these circumstances, it is important that landlords carefully review relevant leases and confirm that the relevant indemnity clause(s) will provide protection in these circumstances.

3.3. Insurance

In the event of closures, restrictions and COVID-19 related circumstances otherwise causing financial difficulty for landlords, landlords may be able to obtain insurance relief.

Landlords should contact insurers/ brokers, and:

1. Obtain a copy of the relevant policy(s);

2. Obtain a copy of the relevant policy schedule(s);
3. Inspect the schedule and policy and ascertain if there is current coverage for business interruption and/or business interruption caused by:
 - a. Contagious or infectious disease; or
 - b. Closure of a business property by a public authority; and
4. Check for any exclusions.

Should you require assistance in interpreting policy coverage and assessing eligibility, director, Michael Sonter of the Insurance Team at Integra Legal is available to assist.

3.4. Voluntary Closures

Landlords who are contemplating voluntary closure of their premises need to consider the following:

- A tenant has the right to quiet enjoyment of the premises;
- If closure of the premises is not mandated, a closure will interfere with the tenant's right to quiet enjoyment;
- A closure that has not been mandated may place a landlord in breach of the lease.

3.5. Termination of Leases

Given the uncertainty as to when the economic disruption and restrictions caused by COVID-19 will subside, it is necessary for landlords to review relevant leases and be aware of the clauses and/ or circumstances under which a lease may be brought to an end.

3.5.1. Force Majeure Clauses

A force majeure clause typically enables termination or suspension of a lease without liability in circumstances where performance under the lease has become impossible or impracticable due to:

- Events beyond the reasonable control of the parties; or
- An 'act of god' or 'act of nature'.

Our standard lease terms do not include a force majeure clause.

Landlords should review relevant leases and confirm that there is no force majeure clause. As there is no standard definition of force majeure, if such a clause exists in your lease, careful review will be required in order to confirm if disruption caused by COVID-19 will necessarily trigger this clause.

3.5.2. Frustration

If there is no force majeure clause, a lease may still be brought to an end on the basis of the common law doctrine of frustration. A contract is frustrated when circumstances arise, not through default of either party, that make performance impossible, impracticable, or something that is radically and fundamentally different to what was initially contemplated by the parties to the contract.

The High Court has not authoritatively determined whether the doctrine of frustration is available to leases, however, the general judicial consensus in WA is that frustration is available for leases but is extremely difficult to prove and rarely relied upon.

Landlords should consider the potential scenarios tenants are likely to find themselves at present and in the near future which may give rise to frustration.

Consider the following examples:

1. A day care centre is unable to pay rent or voluntarily closes due to declined economic activity owing to disruption caused by COVID-19 (**Scenario One**);
2. A hair salon is intermittently unable to conduct trade, occupy the premises and pay rent owing to contact tracing identifying potential COVID-19 exposure at the salon requiring the mandated self-isolation of the staff and causing temporary closure of the business (**Scenario Two**);
3. A restaurant is forced to close pursuant to the Directions (**Scenario Three**).

Scenario One

A tenant who may lawfully continue trade under the Directions cannot look to the doctrine of frustration. This is because frustration does not occur where performance under a lease has become more onerous or expensive.

So long as the day care centre is permitted to occupy the premises pursuant to the lease, financial hardship, no matter how severe and unprecedented the causes of such hardship are, will not amount to frustration.

Scenario Two

As government mandated self-isolation measures do not directly affect the subject matter of a lease (being the premises), a tenant cannot rely on the doctrine of frustration in these circumstances.

So long as the hair salon can still lawfully occupy the premises and operate their business, it does not matter that the hair salon is unable to do so because of mandated self-isolation causing staff shortages.

Scenario Three

A tenant may be able to make a clear case for frustration where they are directly affected by the Directions. In this scenario, occupation of the premises and sole permitted use under the lease has become an offence. Accordingly, performance under the lease becomes impossible, or at the very least, the burden of performance becomes so

onerous and fundamentally different to what was originally contemplated by the parties, the doctrine of frustration is necessarily triggered.

However, the following issues need to be considered:

- A lease will not be frustrated where the intervening event is only temporary or transient.
- Whether or not an intervening event is temporary and/ or transient is relative to the term of the lease.

As a general rule, short leases are more likely to be frustrated than long term leases.

At this point in time, the Directions are set to remain in force for a period of at least 4 weeks and thus unlikely to amount to frustration in these circumstances.

4. OPTIONS FOR RELIEF

As at 25 March 2020, the following options for relief are available:

4.1. Small Businesses

The state and federal governments have enacted various stimulus package including but not limited to tax rebates for small businesses and unsecured loans of up to \$250,000 for small to medium businesses with repayments deferred for the first 6 months.

4.2. Mortgage Relief

Most banks have released various support and relief packages for their customers, including options for mortgage deferral.

4.3. Rental Assistance

The State Government is expected to announce a support package in relation to tenancy and rents in the coming days.

We recommend contacting relevant institutions and authorities in order to assess your eligibility, and contacting your tenants and encouraging them to do the same. It is in the interests of both parties to communicate and cooperate in accessing relief wherever possible, in order to maximise the benefits of this relief and keep business going.

5. COMMERCIAL SOLUTIONS

At this point in time, it is impossible to predict when mandated restrictions will be lifted and normal economic activity will resume.

We recommend landlords contact tenants and:

- a) Notify them of their responsibilities under the Directions;

- b) Notify them of their obligations under the lease; and
- c) Discuss any potential frameworks for rent assistance in the event of continued closures and restrictions.

We have prepared a generic written message to tenants for use by landlords. Call us and we can provide a copy to you.

As a general rule, landlords should maintain frequent and open communications with tenants and be prepared to discuss options. Given the current economic climate, it is in both parties' interest to negotiate and cooperate where possible.

One example of a potential framework for rent assistance is as follows:

- a) The landlord grants the tenant a full or partial reduction in rent and/ or other payments for the period during which the tenant's business is unable to conduct trade or such period otherwise agreed by the parties (**Reduction Period**); and
- b) The total value of the reduction over the course of the Reduction Period are added to the end of the lease as additional tenure, not a balloon payment.

E.g. A tenant pays \$5,000 per month in rent under the lease. The tenant is forced to close for 2 months. The landlord grants a rent-free period for the entire duration of the closure, making the total value of the reduction period \$10,000. At the time of the lease's expiry, the tenant is paying \$6,000 per month. The \$10,000 is added to the end of the lease as an additional 7 weeks.

6. CALL US

For all your queries and concerns about leases and COVID-19, call Janette Tavelli (0417926155), Michael Sonter (0419 900 299), or other team member on 08 9218 8588.

***DISCLAIMER:** This Fact Sheet was prepared by Integra Legal and we have taken great care to ensure the accuracy of the contents. However, it is written in general terms and you are strongly recommended to seek specific professional advice before taking any action based on the information it contains.*