

# Tenants are shutting down businesses and telling me that they cannot pay rent, what does this mean for me as a landlord?

## Government Imposed Business Closures - Landlord Position

*In the current global climate an increasing number of queries are arising as a result of landlord and tenant relationships and the impact Covid-19 will have. We have summarised key queries below with general information detailing Redchip's view. **Please note that each situation is different and specific advice must be sought with regard to the particular facts at hand.***

| Key Point                                                                             | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| Can a tenant terminate the lease or avoid performance in reliance of 'Force Majeure'? | <p>A tenant <i>may</i> be entitled to terminate the lease or avoid performance if the lease contains a force majeure (or equivalent) clause, however this type of provision is <u>not</u> contained in most commercial leases.</p> <p>Force majeure is a legal concept whereby an unforeseen circumstance prevents the tenant from fulfilling its obligations under the lease. A force majeure clause permits a party to either terminate or suspend their obligations under the lease, provided the trigger event is out of the control of the parties (e.g. a natural disaster or in this case Covid-19).</p> <p>The general law does not give any rights for force majeure – that is, this legal concept only applies if there is a specific force majeure clause in your lease.</p> <p>Accordingly, under most leases your tenant <b>cannot</b> rely upon Covid-19 as a force majeure event to allow them to stop paying rent.</p> |
| Can a tenant cease making payments under the lease?                                   | <p>As a general concept, Government imposed business closures do not strictly entitle a tenant to cease making payments under a lease, nor grant a right of termination. This will however affect a Tenant's income stream, which in turn, is highly likely to impact payment ability.</p> <p>There may be underlying factors that a tenant could seek to rely upon (e.g. existing premises issues or disputes with you about other matters), however these need to be assessed on a case by case basis.</p> <p>Our view is that on most occasions landlords must take a commercial approach with tenants to ensure the relationship remains intact for when the current situation comes to an end and business trade goes back to normal stop.</p>                                                                                                                                                                                    |

| Key Point                                                                  | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| Can a landlord close areas of a building/centre as a result of a pandemic? | <p>You <i>may</i> be entitled to close parts of a building or centre (such as common areas), however compensation provisions could apply. Such closures could technically breach the covenant made with the tenant to grant quiet enjoyment, however most leases contain provisions whereby a landlord is permitted to undertake closures if directed or required by law.</p> <p>By the same reasoning, a tenant is <u>not</u> required to carry on trade from the premises in the event of a Government imposed business closure.</p> <p>The <i>Retail Shop Leases Act 1994</i> (Qld) provides for payment of compensation to tenants in the event of restricted access (and alike), however emergency and statutory compliance situations are excluded from these compensation requirements. These exclusions are likely to apply to the current circumstances.</p> |
| Can a tenant be compelled to trade?                                        | No, a tenant cannot be compelled to trade from the Premises, depending on the lease terms, if their business is subject to a Government imposed business closure direction.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Can insurance cover loss of profit or rent?                                | Insurance policies may provide for certain claims to be made. Seek advice from your insurance broker for clarification.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| What are the consequences of liquidation/administration /bankruptcy?       | <p>Liquidation and administration applies to companies. Bankruptcy applies to individual persons.</p> <p>If a tenant enters into administration, liquidation or bankruptcy during the lease, this can have significant consequences for the lease and the premises including the lease being terminated early.</p> <p>Liquidation, administration or bankruptcy can also be the end result of the default process, if a tenant has failed to pay rent or other monies. Whilst this avenue may allow you to recover money you are owed, it may not be the best outcome for parties involved as assets of the tenant (and any guarantors) may have already been dispersed to pay other debt. You need to consider the practical outcomes of liquidation or bankruptcy before taking action.</p>                                                                         |
| Can landlords call upon security bond to replenish unpaid rent?            | Yes, you can call upon security bonds if a tenant fails to make payments under the lease, provided you follow the correct procedure under the lease. Bank guarantees are the best security to hold in this situation as this type of security arguably sits outside of liquidation/bankruptcy. Cash bonds may be at risk of falling into the 'pool' of money to be utilised towards other tenant debt.                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| If there is a mortgagee over the property, can payment relief be sought?   | Mortgagees may permit relief under their mortgage. If this occurs, it may aid in deciding whether relief can be passed on to the tenant.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Does a landlord have to grant rent relief?                                 | <p>You are <u>not</u> required to grant any form of rent relief to a tenant.</p> <p>Practically, however, rent relief may be in the interest of maintaining an ongoing relationship with the tenant once business is back to normal.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| What type of rent relief proposal can be considered?                       | The majority of tenant requests are likely to be rent relief based. There is room to negotiate the exact terms of any relief granted.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

| Key Point                                                     | Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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|                                                               | <p>You should consider the following when speaking with tenants around relief:</p> <ul style="list-style-type: none"> <li>(a) defining set relief periods;</li> <li>(b) permitting early end triggers for a rent relief period (e.g. notice by the Government lifting imposed business closure);</li> <li>(c) calling on security bonds and allowing a tenant time to replenish the security bond following Government imposed business closures being lifted;</li> <li>(d) allowing rent relief, however, apportioning the relieved amount over the balance of the lease following the end of the relief period; and</li> <li>(e) extending the lease for the same period of time that rent relief is granted.</li> </ul> |
| <p><b>How should rent relief proposals be documented?</b></p> | <p>Letters signed by both parties could be utilised, however, the best course of action is for a short deed to be drafted, especially where a more complex rent relief option is contemplated. Please contact us if you would like us to assist in preparing this document for you.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                    |

**Disclaimer**

All material contained in this document is delivered by way of general comment only. No material should be accepted as authoritative advice and anyone wishing to act upon material contained in this document should first contact Redchip for properly considered professional advice, which takes into account specific situations. The material detailed above is subject to any specific provisions contained in your lease documents.