

## NEGOTIATING WITH YOUR LANDLORD AND / OR TENANT DURING COVID-19



COVID-19 has certainly brought the tourism and hospitality sectors to a standstill. The South Australian Tourism Commission (SATC) is focused on supporting businesses and partners to not only get through the crisis but rebound strongly once the recovery process commences.

A series of fact sheets, written by Deloitte for the SATC have been developed to build capability and resilience in South Australia's tourism and hospitality industries.

Each fact sheet is organised under three key themes - *respond*, *recover* and *thrive* - with the aim of ensuring that businesses are ready to welcome visitors as soon as travel restrictions are lifted.

Liquidity is a major issue for the tourism industry. As a result, businesses are considering what is our landlord strategy and how can we negotiate with them?

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### GOVERNMENT'S TEMPORARY MORATORIUM ON EVICTION

On 30 March 2020, the Australian Government announced a measure that will put evictions on hold over the next 6 months for commercial and residential tenancies who are unable to meet their rental commitments due to the impact of COVID-19.

### NATIONAL CABINET MANDATORY CODE OF CONDUCT

On 7 April 2020, the National Cabinet agreed to a mandatory Code of Conduct ("the Code") for commercial tenancies to be implemented by the states and territories for the next 6 months ("COVID-19 pandemic period"). The Code is to apply to tenancies where the tenant is eligible for the Commonwealth Government's JobKeeper program and has an annual turnover of up to \$50 million. The principles of the code are designed to apply in spirit to all leasing arrangements for affected businesses. The Code has not yet been legislated in South Australia.

### THE AUSTRALIAN GOVERNMENT, TOGETHER WITH THE STATES AND TERRITORIES, HAVE AGREED ON A COMMON SET OF PRINCIPLES:

- A short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus.
- Tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease.
- The reduction or waiver of rental payment for a defined period for impacted tenants.
- The ability for tenants to terminate leases and or seek mediation or conciliation on the grounds of financial distress.
- Commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus.
- Landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements.
- Cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance

### THE AUSTRALIAN GOVERNMENT, TOGETHER WITH THE STATES AND TERRITORIES, HAVE AGREED ON A COMMON SET OF PRINCIPLES TO BE LEGISLATED BY EACH INDIVIDUAL STATE AND TERRITORY:

- Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period.
- Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable.
  - Rental waivers must constitute no less than 50% of the total reduction payable.
  - Rental deferrals must constitute no more than 50% of the total reduction payable and be amortised over the balance of the lease term and for no less than 24 months.
- Landlords should seek to share any reductions or benefits in statutory charges or loan repayments with the tenant in a proportionate manner.
- Landlords must not draw on a tenant's security for the non-payment of rent during the period of the COVID-19 pandemic period.
- Landlords agree to a freeze on rent increase (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic period.

## STATE GOVERNMENT'S COVID-19 EMERGENCY RESPONSE ACT

On 8 April 2020, the South Australian Government passed the COVID-19 Emergency Response Act 2020 ("the Act") which provides further measures for commercial leases. The Act legislates a number, but not all, of the principles outlined in the National Cabinet Mandatory Code of Conduct for commercial leases.

### **THE ACT LEGISLATES FOR UP TO 6 MONTHS THE FOLLOWING PROVISIONS FOR COMMERCIAL LEASES, IF THE TENANT IS SUFFERING FINANCIAL HARDSHIP AS A RESULT OF THE COVID-19 PANDEMIC:**

- If a tenant is unable to pay rent, outgoings or operate as specified in the lease, a landlord cannot take any action against the tenant to evict, recover damages or bonds, or terminate the commercial lease.
- Rent payable under a commercial lease (other than retail leases based on turnover) must not increase, unless otherwise agreed between the tenant and the landlord.
- Landlords must not, during the COVID-19 pandemic period, require a tenant to pay or reimburse land tax in respect of a commercial lease.
- Parties to a commercial lease may apply to the Small Business Commissioner for a mediation of a dispute or determination as to whether a tenant is suffering financial hardship as a result of the COVID-19 pandemic.
- The principle of rent reductions by way of waivers and deferrals raised in the National Cabinet Code of Conduct for commercial leases has not yet been legislated in South Australia.

## SOUTH AUSTRALIAN JOBS RESCUE PACKAGE

As part of the Jobs Rescue Package announced by the South Australian Government, further relief will be provided specifically to tourism businesses in the form of:

- Licence fee waivers for commercial tour operators for 6 months from 1 April 2020, and;
- Rent waivers for properties leased on Crown Land.

### **LANDLORD & TENANT NEGOTIATION CONSIDERATIONS**

A negotiated reduction in occupancy costs could enable commercial viability, decreasing the likelihood of property vacancies and increasing the likelihood of lease renewals.

### **BUSINESSES MAY CONSIDER THE FOLLOWING:**

- Request of rent relief (full or partial) from the landlord
- Disable direct debits to preserve and control cash

#### **Other lease related requests:**

- Early surrender of the lease
- Reduction in future rent to lease expiry
- Reduction in make good costs (an obligation to reinstate the premises to a specified condition)

### **LANDLORDS CAN CONSIDER PROVIDING THE FOLLOWING ASSISTANCE:**

- Switching off weekly arrears letters
- Providing rent relief / abatements to tenants
- Check on bank guarantee positions / liaise with their financiers
- Continue with services such as cleaning

### **THERE ARE SPECIFIC NEGOTIATION STRATEGIES/LEVERS THAT CAN BE UTILISED FOR LANDLORD NEGOTIATION:**

#### **Businesses inability to pay:**

- It would be necessary to prove that business are unable to sustain rents through the forecast period in order to secure rent relief from the landlord. It will benefit a tenant's negotiation to be transparent about occupancy costs as a percentage of sales, net profit of the business and even short-term cash forecasts.
- Demonstrate other measures the business is taking to ensure viability during the period. For example, accessing the JobKeeper initiative to preserve staff, reducing expenses in other areas and implementing cash control measures.
- Seek to use the Government's moratorium on eviction for non-payment of rent.

#### **Decision to keep or close premises:**

- Consideration should be given to closing low contribution-margin or low profitability tenancies. The expected total loss of keeping the tenancy going through the hibernation period should be weighed against the exit costs.

#### **Tenure of lease (extension of lease to secure tenancy in core premises):**

- Rent reduction could be traded-off in the short term for a commitment over the longer term.
- For tenancies that may require a refurbishment for renewal, the business could request the refurbishment be delayed for 12 months into the

new lease term.

#### **Number of tenancies:**

- A business that has a number of tenancies with the one landlord could use its potential increased bargaining power to seek relief for unprofitable tenancies. This would benefit the business and the wider group of tenancies.

#### **Determination of metrics**

- Reduce gross occupancy costs to a level consistent with an agreed mechanism. For example, discounts, abatements, rebates, and rental escalation freeze.
- Lower base rent with a turnover rent clause.

#### **Change mechanism**

- Make lease changes through a side letter rather than a variation of lease.



## RECOVER - LEARN AND EMERGE STRONGER

Successfully negotiating rent relief could be crucial to business viability through the affected timeframe. Business viability through this time will mutually benefit both tenant and landlord in the longer term. It is not in the interest of landlords to have vacancies or discontinuation of leases. A successful negotiation will relieve financial burden to allow a business to return to profitability as the industry and broader economy recovers. The sooner the tenant can recover, the sooner they can revert to paying full occupancy costs to landlords.



## THRIVE - PREPARE FOR THE NEXT NORMAL

Actions taken to respond and recover from this crisis over the next 3 to 6 months will equip businesses with the experience and knowledge to come out as strong as possible in future business cycles. The cost control measures, increased scrutiny of forecasts, and improved monitoring of cash will improve ongoing financial performance. Further, a successful landlord negotiation through this time, which includes frequent communication and transparency of information, will benefit the long-term landlord-tenant relationship.



## WHERE DO I GO FOR MORE INFORMATION?

[Australian Government's Temporary Moratorium on Eviction](#)

[Government's Mandatory Code of Conduct](#)

[State Government's COVID-19 Emergency Response Act](#)

[State Government's Fee and Rent Relief For Nature-Based Tourism Businesses](#)

South Australian Tourism Commission (SATC) has engaged Deloitte to provide business support to the South Australian tourism industry following the COVID-19 pandemic.

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This fact sheet is current as at 03 July 2020 and does not address changes subsequent to this date.

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