
Negotiating rental adjustments in a Covid-19 world

Hits and tips for landlords and tenants

Both landlords and tenants are set to suffer financial hardship as a result of the COVID-19 lockdown. Tenants are suffering from loss of business revenue and may not have enough cash available to meet their full rental obligations. Landlords are suffering from cash shortfalls where tenants have stopped paying rent. They may be struggling to meet their own financial obligations as a result.

While the government has announced relief for tenants, the relief is limited. Landlords will not be permitted to evict tenants for the next six months. This relief does not currently extend to reducing or delaying rental payments due by tenants. These obligations continue, as do any financial penalties for late payments present in the lease agreement. Tenants may find themselves with an even larger debt than they imagine if late payment penalties are applied.

If you need help:

we are happy to offer landlords and tenants a free 30-minute consultation to assist you in preparing for rental negotiations.

Contact:

Nicole Davidson
Principal

Nicole Davidson Negotiation
nicole@nicole davidson negotiation.com.au
+61 403 523 700



Relief for landlords largely comes in the form of banks offering deferred loan payments. While that may ease the immediate pressure, it does mean that interest continues to accrue and compound. Depending on how long the lockdown lasts, the compounding nature of this could cost landlords significant amounts.

From a legal perspective, lots has been written about *force majeure* and frustration as possible legal avenues to assist tenants managing their liabilities under leases. There is no simple answer for landlords and tenants about whether these will apply and each case would need to be considered separately to determine whether the circumstances would amount to a frustration. This would come at great cost to both the landlord and the tenant. And as Alex Bannister of Lander & Rogers points out, “the last time the High Court looked at the issue was in 1926!” so there is great deal of uncertainty.

This is a situation where skilled negotiation is required. Where the parties cannot resolve the issue by negotiation, mediation will be a good option to quickly and effectively resolve the dispute. It will also allow the parties to be more creative with the outcomes they agree to than the courts could be.

In order to assist landlords and tenants in the negotiation process, I have provided the following areas to think about.

Look at things from both sides

Articles on this issue have tended to be very one sided. Either they focus on the loss of revenue and livelihood to tenants, demanding the rent relief is provided or they focus on the fact that landlords also have financing obligations to meet or rely on the rental income for their livelihood. I am yet to see a balanced article in this space. Whether you are the landlord or the tenant, it pays to understand the situation from both sides. The table below suggests some questions you could be asking to build this understanding.



Tenants should ask:

- Who is the landlord – is it an individual, a small business or a large corporate?
- What other properties does the landlord hold and how significant is rental income as part of their portfolio?
- What is the interest bill related to the property?
- Does the landlord rely on the rental payments as a sole source of income?

Landlords should ask:

- What is the impact of COVID-19 on the tenant's business?
- Is the business still open?
- Is it operating remotely out of a home office?
- What percentage of revenue has been lost?
- How quickly can the business recover once lockdown ceases?

Focus on common interests

While both sides of the rental situation are difficult, it is likely that there are common interests of both the landlord and tenant which can facilitate a negotiated outcome. Understanding the longer term goals of both parties will assist this. Generally, all landlords and tenants will share a common interest in getting things “back to normal” as quickly as possible after lockdowns are lifted.

Back to normal may be best met by finding a way to keep tenants in place through the lockdown period. It is likely there will be a glut of properties available for rent once this period closes and there is a risk to landlords of being left with a vacant property for some time.

At the same time, while the tenant may be able to obtain another property relatively easily after lockdown, they should consider the interruption to their business of a relocation and the additional costs (such as fit-out) which may be required if they move premises.

Understand the alternatives

Both parties need to enter the negotiation with a clear understanding of what their situation looks like in the event of not reaching an agreement with the landlord. Unfortunately, uncertainty is the only certain alternative at this point. We have no word from government on any financial incentives. As mentioned above, it is not clear how the courts would view the current situation in terms of relieving the tenants of their contractual obligations. We do know that a litigated solution is going to be expensive and time consuming.

The only way to get certainty at this point is to negotiate a solution. This negotiated outcome can also build in contingencies. For example, the agreement could state that if the government introduces financial compensation to either party down the track, there will be appropriate adjustments to the rental payments under the agreement.

Prepare (and share) the data

It is very easy for either party to assert that their business has suffered as a result of COVID-19. If you can present your information to the other side in a clear and meaningful way, you will have more chance they will believe you. This may include things like sharing revenue details, agreements made with banks, etc.

You may want to consider whether a confidentiality agreement is required for this purpose. If the negotiation takes place in the context of a mediation, confidentiality is built in to the process. This means that the other side won't be able to use information given to them in the course of the mediation in future litigation. There are some limitations on this so, if it is a big concern to you, please seek advice from your lawyer.

What to do now

The key consideration for being able to negotiate an acceptable solution to the problems is keeping a relationship which facilitates rather than hinders the conversation. Demonstrating a willingness to co-operate with the other side will assist here. Once parties feel the other side is not co-operating, they can go into defensive mode. This ramps up the tension and decreases trust, making it less likely the parties will get to agreement without assistance.

For tenants

If you are wanting to keep your lease on foot but looking for interim rent relief, consider making part payments to the landlord rather than no payment at all. It is very easy for tenants to say "I am prepared to pay something." But why would the landlord trust you if no money has actually been transferred?

For landlords

Try to avoid getting too legalistic straight away. Consult your lawyer and explore whether delaying taking action will harm you in any way. If possible though, avoid sending the tenants letters from lawyers which may increase their anxiety and push them into a more defensive, less open position. Be prepared to have a conversation.