



## Précis Paper

### Negotiating Leases in the Time of COVID-19

Abstract – Property experts at Coleman Greig in Parramatta, Principal Lawyers Andrew Grima and Dean Claughton discuss their experience of the changing climate of commercial leases for tenants and landlords during COVID-19.

#### **Discussion Includes**

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## Précis Paper

### Negotiating Leases in the Time of COVID-19

1. In this edition of BenchTV, Andrew Grima (Principal Lawyer) and Dean Claughton (Principal Lawyer) discuss the changing world for property lawyers in the shifting sands of 2020.

#### The first weeks

2. February was about delays — people couldn't meet deadlines for fit outs or supply deadlines. It was about what was going on overseas.
3. Then March happened. Clients wanted to know what they could do to get out of their leases or claim rental relief. Everyone was asking about force majeure. It's fairly well established now that COVID-19 was not a force majeure, not an act of God. This was not about damage, it's about an economic shock.
4. Property isn't governed by the federal government, it's governed by the states and territories.
5. Fateful Monday 23 March when it was announced shops and gyms were to close at noon.

#### National Code of Conduct

6. The Code was a hopeful wish list — more of a framework or guide. The underlying principle was how to negotiate in good faith how to get through this very difficult time.
7. It was about proportionality, about how much your turnover had fallen. It had a limited application – you had to have a turnover under \$50 million. It would be given a life along with the JobKeeper program itself.
8. Tenants were entitled to negotiate relief and the relief had to be in the form of waiver and deferral. At least 50 per cent of the relief had to be waiver – the minimum time to pay back the deferral was 24 months. The Code was not clear on how long you were entitled to relief. It didn't say when you had to start paying the deferral back. The big gap was what information needed to be supplied. If you can't agree, it has to go to mediation. It didn't discriminate across asset classes.
9. Only land tax has been reduced in response to COVID-19.
10. April was a holding pattern. It wasn't binding but it was there as a guide until legislated.
11. It was up in the air how the Regulations would relate to the Code.

#### NSW Regulation

12. Effectively the Code was enacted in the Regulations. The Regulations applied from 24 April with an automatic repeal clause six months after in October.
13. While JobKeeper has been extended there's been no announcement on extending the Regulations.

14. The critical definition is 'impacted lessee'. There is still the threshold test of \$50 million dollars in turnover. But you've also got to be eligible for JobKeeper. One issue is the grouping provisions of related companies.
15. What information to provide to prove loss of turnover is still being debated.

#### Tenant and landlord views

16. Tenants don't want to supply too much information.
17. The Regulations only talk about proving a fall in turnover. Supply the bank statements.
18. Landlords want to see everything they can to get their deferral money back.

#### July 3 Amendment

19. Before 3 July there was no real obligation on the tenant to supply financial information in a timely manner.
20. The Amendment said that if tenants don't supply what you're asking for, then the act doesn't apply to them and you can treat it as a normal default. Tenants start to fall outside the Regulations.
21. The Regulations talk about prescribed actions. If tenants haven't given statement that they're an impacted lessee and documents showing they are impacted it brings it to a head.

#### Examples of cases

22. The Regulations don't apply to non-COVID-19 acts. The case of a monthly tenancy – the act does allow for the termination of monthly tenancies.
23. If the parties don't agree, then it's compulsory mediation.
24. The legislation is clear that it doesn't excuse existing breaches, such as failure to repair.
25. It doesn't matter what lease it is – whether it's a shop, office, warehouse, the mediation process is the same. It's the same form you fill out. It's a 2-page form. The mediation fee is \$750 for 5 hours of mediation. You don't have to tell the other side you're applying for mediation. The other side has to accept it.
26. In another case, acting for the landlord. The tenant was self-represented. Lodging an application for mediation prompted more beneficial negotiations and the mediation was cancelled.
27. Often it has landed at 15 per cent relief on rent. You see 50 per cent waiver, 50 per cent deferral and the deferral is paid in 3 or 6 months over a period of time. This is documented in a deed, very rarely in a variation of terms. Or done by exchange of letters.
28. The fine print from the landlords can rule out any future form of relief. What if a second wave happens next year?

- 29. Sub-leases and licence to occupiers – you may have an office space or warehouse. You have to be careful on sub-leasing, you have to get your landlord's consent.
- 30. Working from home is having an impact on commercial leasing sector generally.
- 31. See further information on the Coleman Greig website COVID-19 blog.
- 32. An issue is if a tenant has a six-month lease but has 2 years to pay back the deferral. Once the tenant leaves, they're not going to want to pay back the deferral. These issues will come up post Covid. The issue will come when tenants walk away.

### Improving the Regulations

- 33. A lot of tenants fall outside the regime. They need to widen the reach of how the relief is applied.
- 34. In an ideal world, change the regime to reflect reality. With tenants in a retail mall set up – is rent more aligned to turnover? We need to look at the *Retail Leases Act*.
- 35. It's one thing to say what if the tenants don't supply the information. But what if the landlord stonewalls? That's not covered. Put in a date when if not supplied it progresses to mediation.
- 36. Information on what's to be supplied is critical. Just like pro forma leases, have a pro forma deed.

### Foreign Investment Review Board changes

- 37. A foreign investor is over 20 per cent shareholding of an overseas entity or person.
- 38. Now we have to go through the process for FIRB approval. It's an extra step and expense.
- 39. You can't enter a lease without the FIRB approval. It's initial term plus option they look at. It can be an office, it could be a little coffee shop.
- 40. Some tricks of the trade — Under the old regime, you had to get approval both when you sign the heads of agreement and the final lease. Under the new regime, if you have signed the substance of the agreement before 29 March, you still have to put your application in but you get an exemption letter. You get your fee back. Another kind of exemption is where you're leasing from a government body. It's exempt. You get your exemption letter. You have to lodge your fee when you make your application but you get your fee back.
- 41. The process of application through the portal is described.

### Sneakerboy

- 42. The events just predated the COVID-19 Regulations. Relief at the moment is probably easier to obtain. They were granted relief against forfeiture.

## **BIOGRAPHY**

### Andrew Grima

Principal Lawyer, Coleman Greig, Parramatta

Andrew has significant experience and expertise in all facets of retail and commercial leasing, including assisting and advising both landlords and tenants in their negotiations, drafting leases and other related transactions, assignments, surrenders and enforcement of obligations. Andrew also has extensive experience in design and construct leasing projects.

Andrew has acted for clients across a range of industries with regard to leases for premises of various sizes including national franchisors, retailers and distributors, local subsidiaries of foreign companies, ASX listed companies, local councils, government departments and government related entities, universities and SMEs. He is particularly well known in the Greater Western Sydney region, including Penrith and the Blue Mountains where Andrew has strong connections within the local community.

In addition to his legal and economics and accountancy degrees, Andrew is a graduate of the Australian Institute of Company Directors and has a sound understanding of the financial and governance issues affecting companies. Andrew also has experience in commercial securities and has acted on behalf of major clients such as financial institutions, a listed pharmaceutical company and numerous manufacturing and supply companies with regard to drafting and registering securities and related transactions.

### Dean Cloughton

Principal Lawyer, Coleman Greig, Parramatta

Dean Cloughton joined the Property and Finance Team at Coleman Greig in 2011 after working for a commercial and litigation firm in the Sydney CBD.

At Coleman Greig, the primary focus of Dean's practice is in the areas of leasing and commercial property conveyancing, encompassing all aspects of retail, commercial and industrial leasing for both landlords and tenants, together with acting for both vendors and purchasers in commercial conveyancing transactions. Dean is responsible for drafting and negotiating leases, settling disputes, completing transactions in relation to the assignment and surrender of leases and assisting clients through the purchase/sale of commercial property.

## **BIBLIOGRAPHY**

### Focus Case

*Sneakerboy v Georges Properties Pty Ltd* [2020] NSWSC 996

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/construction/benchmark\\_05-08-2020\\_construction.pdf](https://benchmarkinc.com.au/benchmark/construction/benchmark_05-08-2020_construction.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/173a31829778d67ddce506c7>

## Legislation

National Cabinet Mandatory Code of Conduct — SME Commercial Leasing Principles During COVID-19 (the Code)

*Retail and Other Commercial Leases (COVID-19-19) Regulation 2020* (the Regulations)

*Retail Leases Act 1994 No 46* (NSW)