Lockdown Blues

Now that the lockdown is no more than a distant memory I thought we could take the time to reflect on 2021.

The year started with a memorable bang, when Uncle Donald's fan club stormed Capitol Hill in early January.

But what you may not remember is that we were able to watch that drama together in the pub, on the big screen, because this was one of the few occasions when we weren't locked down. It's just a shame that we somehow forgot to import some vaccines, while the beer was cold.

In Sydney, the wheels fell off in June, and the gold-standard State went from hero to zero. And that's when things started to get real in Melbourne.

I knew it was getting real, because in the typo of the pandemic, one of my colleagues emailed to advise that he could not travel to Melbourne, because he did not want to risk getting caught in another lickdown.

Nobody wanted that.

In terms of legislated responses, both NSW and Vic introduced new regulations to accord tenants rent-relief during the pandemic period. Like the 2020 National Code response, these regulations impose regulated financial hardship on landlords, to support the commercial hardship experienced by tenants, in consequence of the government's decision to impose trading restrictions. Put bluntly, landlords have been required to underwrite the tenants trading risk.

In my experience, landlords have generally accepted these impositions and got on with things. In the main, landlords and tenants have worked sensibly together, made the best of a bad thing, and worked out acceptable compromises.

Of course, some tenants have recorded record profit during the pandemic. Landlords tend to get a bit twitchy when those tenants put their hands out for rent relief.

It is interesting to compare the detail of the 2021 regulation adopted in NSW and Vic. It says something about the administration of retail lease legislation in those jurisdictions, and in Australia generally.

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You will recall that in 2020 Vic introduced (into a crowded field) some of the most idiotic provisions ever seen in retail lease legislation.

It legislated to introduce a 14 day mandatory disclosure period, even if the parties to the retail lease were sentient, legally represented, experienced, knowledgeable, and were in a hurry. In other words, the provision doesn't help the tenants it is supposed to serve, it fouls them up.

And then Vic legislated that on a renewal, not only did the landlord have to serve a Disclosure Statement on the tenant, it also had to set out the changes from the previous Disclosure Statement. Why? The tenant is thinking about entering into a lease in the future, not in the past. If the tenant knows what is coming up, why does the tenant need to know what happened historically? Particularly, when the tenant actually lived that history. The requirement does no more than impose additional useless administrative burden on the landlord.

So coming out of that stable, I suppose it is not surprising that the Vic regulation is over-engineered.

Both NSW and Vic provide a mechanism for rent-relief and a moratorium on enforcement rights in the period from July 2021 to January 2022: [NSW from 13 July 2021 to 13 January 2022; Vic from 28 July 2021 to 15 January 2022].

The NSW regulation takes 10 sections, and is done in 5 pages. Vic runs to 68 sections over 70 excruciating pages.

Interestingly, despite its comparative brevity, the NSW regulation seems to provide better outcomes for tenants. For instance, the protection period in NSW is longer than in Vic, by approximately 2 weeks, and by adopting the National Code principles, NSW leaves room for a reasonable recovery period. Vic provides for a hard landing.

In addition, the Vic regulation kicks more tenants into touch. It excludes listed companies and their subsidiaries, which can still qualify in NSW, if their turnover was under $50m and they qualify for the available Government support packages.

But what is truly infuriating is that the two jurisdictions manage to regulate the same thing so differently.

The Vic regulation takes 13 pages to work out how to satisfy the "decline in turnover" test. The NSW regulation doesn't mention it. The NSW regulation piggy-backs the National Code principles: the Vic regulation doesn't mention them.

The NSW regulation suspends rent uplifts during the prescribed period (s6B). The Vic regulation, at least on one view, obliterates a rent uplift that would have occurred during the prescribed period (s35). This is a brutal, and gratuitous swipe at the landlord.

It is living proof of the legal maxim "better to be lucky than good". Victorian landlords whose rent review dates fall in the first half of the year, get their rent reviews unaffected. Landlords who have the rent reviews in the second half have their long-term returns permanently eroded. And it is not just the diminution in rental income. More painful is the damage done to valuations based on capitalising the lower rental income.

Not only that, but the Vic tenant has a statutory right under s31 to extend the term of the lease for the length of any deferral period, which could be for 24 months after the end of the term. It is arguable that the extension of the term under this provision amounts to a “renewal” of the lease under s9 of the RLA. Remember the discussion above about the requirement to serve a copy of the Disclosure Statement showing changes from the previous Disclosure Statement? So the landlord has to lose its rent review, perpetuate the consequences of that loss for a further 2 years AND prepare and serve the most idiotic document human ingenuity has yet devised.

Talk about kicking a dog when its down.

Apart from the above issues, my main complaint about the Vic regulation is the additional administrative burden it imposes on landlords. It takes 2 days, and you need to be a Rhodes scholar, to navigate the Victorian masterpiece. It is regulation designed to impose significant financial hardship on landlords, who themselves are already doing it tough. And those landlords are now required to hire extra staff and incur additional legal cost, just to administer the medicine they are required to take.

And even worse, national landlords have to stop and think about which State they’re in, every time a rent relief application crosses the desk. If it is a portfolio deal for a national tenant you need to hire a team of consultants in order to make the deal apply consistently across the 2 States. Just once, you would think the States could collaborate just a little, and enact something that was even remotely consistent.

It makes me pray there will never be another cockdown.

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