

9 April 2020 Newsletter

COMMERCIAL LEASES AND THE CORONAVIRUS PANDEMIC

The coronavirus pandemic has had a significant impact on many businesses in a number of different ways.

Amongst other things, the coronavirus pandemic has had a significant impact upon commercial leases and it has led to uncertainty regarding the legal position of landlords and tenants.

To remove that uncertainty, the Prime Minister Scott Morrison introduced the National Cabinet Mandatory Code of Conduct (**Code**) on 7 April 2020.

A copy of the Code is **attached** with this Newsletter for your information.

The terms of the Code will be legislated and regulated by each state and territory government.

Paragraphs 2 and 3 under the heading "Purpose" in the Code provide as follows:

"These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a

proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus ("COVID-19") pandemic.

This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's JobKeeper programme, with an annual turnover of up to \$50 million (herein referred to as "SME tenants")." Further details will be available once the State governments enact legislation to reflect the Code."

For the Code to apply, either the landlord or tenant must be eligible for the JobKeeper payment and they must have a turnover of AUD\$50million or less.

The Code imposes a series of good faith leasing principles on landlords and tenants in commercial leases.

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Some of those principles are that:

- Landlords must not terminate a lease due to the non-payment of rent by tenants during the period of the coronavirus pandemic.
- Landlords must not draw on a tenant's security (for example landlords cannot call on a bank guarantee to cover the shortfall in rental payments by tenants).
- Tenants must remain committed to the terms of the lease and the failure to do so, may result in tenants forfeiting any protections provided to them under the Code.
- Landlords must offer rental reductions to tenants by way of waivers and deferrals. The rental reductions will be based on the reduction in the tenant's trade during the coronavirus pandemic period and the following recovery period.
- Landlords may receive benefits from their financial institutions (for example, the deferral of loan payments) and in those cases, those benefits should be shared with tenants.

Example of Rent Waivers and Deferrals

At the end of the Code, there is a very useful example of how the rent waivers and deferrals will work under the Code.

“EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- *Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis that is a 60% loss in turnover would result in a guaranteed 60% cash flow relief.*
- *At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.*
- *Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties*
- *So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.*
- *Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.*
- *The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.”*

Important Considerations

Although the Code sets out the framework which will apply to commercial leasing, the precise details will be contained in the legislation passed by the NSW State Government for this purpose.

After the NSW State Government has passed the required legislation, we will provide a summary of that legislation.

We anticipate that this legislation will affect many clubs.

For example, there are a number of clubs which lease their premises from third parties.

Additionally, this will affect clubs who lease parts of their premises to third parties and those clubs who operate commercial buildings.

Accordingly, we strongly recommend clubs obtain legal advice regarding their commercial leasing arrangements to, amongst other things, ensure:

- the club fully understands the proposed variations to the leasing arrangements and their current and future effect; and
- the proposed variations to those arrangements comply with the Code and the relevant legislation.

Further Information and Contact Details

If you wish to discuss the contents of this Newsletter or would like us to review your commercial leasing arrangement, please contact any member of the Clubs team on 8251 7777 or by email:

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