

Corporate & Commercial Insights

National Code of Conduct for SME Commercial Leases during COVID-19

On Tuesday 7 April 2020, the National Cabinet agreed upon a mandatory rent relief code of conduct for commercial leases (**the Code**) to be legislated by state and territory governments. The Code provides a framework for landlords and tenants to negotiate individual arrangements based on the effects of the COVID-19 pandemic.

The Code will have effect from the dates to be specified in the relevant state and territory legislation. Arrangements made under the Code will apply for the duration of the COVID-19 pandemic and a reasonable recovery period.

The Code will apply to all commercial leases (including retail, office and industrial) where the tenant:

- has less than \$50 million in annual turnover; and
- is eligible for the JobKeeper wage subsidy scheme.

The annual turnover figure is applied to individual franchisees where a business is a franchise, but with respect to retail corporate groups, the turnover figure is applied to the whole group rather than the individual business. JobKeeper eligibility requires the business to have experienced a 30% reduction in turnover in the relevant reporting period relative to their turnover a year earlier.

There will be a freeze on rent increases (except for retail leases where the rent is based on turnover), and the following will be prohibited:

- termination for non-payment of rent;
- penalties for reduction in opening hours or ceasing trade due to the pandemic; and
- landlords drawing on deposits and bond for the non-payment of rent.

Landlords must offer tenants proportionate reductions in rent payable of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period. At least 50% of any rent reduction must be in the form of a rent waiver that is non-recoverable over the term of the lease, however this requirement may be waived by agreement between the landlord and tenant.

If the rent relief is provided in the form of a deferral or waiver period, landlords should allow tenants to extend the lease based on this period.

Landlords should also pass on any reduction in land tax or rates to the tenant (if the tenant is responsible for payment of these outgoings) and should also seek to share any relief received from a deferral in loan payments to banks in a proportionate manner.

Tenants are still expected to honour the terms of their leases, subject to any arrangements made under the Code. Failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under the Code.

Where landlords and tenants cannot agree upon leasing arrangements as the result of the COVID-19 pandemic, the matter should be referred to applicable state or territory retail or commercial dispute resolution processes.

Both tenants and landlords should keep in mind the overarching principles behind the code, particularly the requirements to negotiate in good faith and to provide sufficient and accurate information in the course of negotiations.

Any arrangements need to be considered on a case-by-case basis with regards to the specific effects of COVID-19 on the business and lease, and should be well documented to provide as much clarity as possible. While the Code does provide tenants with additional bargaining power, they should ensure that they fully understand the terms of any arrangements entered into, and are aware of their continuing obligations under their lease.

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