



CONSIDERATIONS REGARDING LEASE OBLIGATIONS DURING COVID-19 (CURRENT AS AT 14 APRIL 2020)

1 OVERVIEW

- 1.1 It is no secret that the current Covid-19 pandemic is having significant financial impacts on both landlords and tenants alike and that those impacts will likely continue for some time into the future.
- 1.2 The Federal Government is encouraging landlords and tenants, particularly those who are parties to non-residential leases, to negotiate between themselves to come to an agreement regarding any amendments required to the parties' current obligations under a lease, in light of the impacts of Covid-19. In fact, they have now implemented a code of conduct (the **Code of Conduct**) which came into effect from 3 April 2020 which imposes a set of 'good faith' principles which will apply to negotiations between landlords and tenants, once it is adopted into the relevant State and Territory legislature. We have **attached** a copy of the Code of Conduct to this document for your reference. The goal of entering into a 'lease deal' is to distribute the financial impact between the parties in a fair and equitable manner, in light of the specific circumstances that apply to those parties and the relevant lease/s.
- 1.3 As a brief overview, a few of the main principles of the Code of Conduct include (but are not limited to):
- (1) that the parties should act in good faith and be open and transparent in working together to reach an appropriate deal taking into account all of the relevant factors;
 - (2) landlords cannot terminate a lease due to non-payment of rent by the tenant and are required to offer tenants reductions/waivers/deferrals of rent and other expenses;
 - (3) landlords must not draw on security (i.e. bank guarantee or security bond) for non-payment of rent; and
 - (4) tenants should remain committed to their lease and the new arrangements following an agreed deal.
- 1.4 Unfortunately, despite the implementation of the Code of Conduct, our Firm is still receiving feedback that:
- (1) some landlords are reluctant to have these conversations with their tenants, because they are adopting a 'wait and see' approach, in relation to hypothetical support that may be offered by the Federal Government and/or legislation 'officially' implementing the Code of Conduct; and
 - (2) some tenants are simply ceasing to comply with their lease obligations (eg. stopping paying rent) on the incorrect assumption that there will be no legal ramifications for doing this, as a result of the current circumstances.
- 1.5 It is our Firm's view that the above approaches are the incorrect ones to adopt, for the following reasons:
- (1) the Government may release little or no specific package/decreed around leasing and even if they do, it is difficult to predict the timeframes/criteria/eligibility for any such initiative, so taking control of the situation is really the best thing that both parties can do at the moment. Even a week of uncertainty is a long time in the current environment;
 - (2) it is generating significant 'bad will' between the parties, who are obviously in positions where they need to know what is happening with their rent and other obligations, in order to plan for the ongoing viability of their businesses; and

- (3) workable deals agreed to by both parties will obviously achieve far better outcomes for everyone involved. It seems painfully obvious to our Firm that if landlords fail to engage with tenants or implement the principles outlined in the Code of Conduct, then their tenants will simply stop paying their rent. Practically, landlords have very little ability to enforce their rights in the current climate, so this option is easier than ever for tenants to take. From a legal perspective, it is our view that landlords won't necessarily be able to enforce their rights under the lease to recover money owed etc. as it is likely that the Courts will impose a far higher onus on landlords to have attempted to mitigate their loss during this event. Eg. if a landlord fails to negotiate a reduced rent with a tenant and in response the tenant stops paying rent, it is our view that it may not be as simple as it has been in the past for the landlord to recover the amounts owed, as they will not be able to demonstrate that they made any attempts to mitigate their loss, especially in circumstances where the Federal Government has basically told them that they have to as is evident in the Code of Conduct. Similarly, tenants who 'stick their heads in the sand' and don't engage with their landlords to work out a viable plan for both parties will equally expose themselves to significant financial and legal liability in the future.
- 1.6 Consequently, it is our professional recommendation that all parties make a concerted effort now to negotiate viable agreements in relation to their leases.
- 1.7 Any agreement reached between the parties should be documented and include a term making the deal subject to change, so that when either the State or Federal Governments introduce new initiatives, measures and/or legislation that would significantly impact (either positively or negatively) either party's position under the agreement. In this respect, the parties can be reassured that they won't, 'miss out' on any future benefits, if they come to an agreement sooner rather than later.

2 CONSIDERATIONS FOR LANDLORDS

- 2.1 In considering what arrangements would be reasonable to agree with their tenants, we recommend that landlords give consideration to all of the principles contained within the Code of Conduct, but particularly focus on the following factors:
- (1) has your tenant been genuinely effected by the pandemic? This one is obvious for tenants who operate restaurants and cafes, gym and fitness venues, wedding and event venues etc. However, there are other businesses who might derive a large portion of their revenue from these types of businesses, who may also be indirectly effected in a significant manner. However, not all businesses have been impacted by Covid-19, so do not feel that you necessarily have to reach an agreement (or that the agreement needs to be as generous) for those businesses who have been largely unaffected. Remember that it is important not to make assumptions in this regard – you need to speak with your tenant and find out honestly if they have been effected;
 - (2) has your tenant always been a 'good tenant' (eg. paid rent on time, maintained the property) prior to the pandemic? If so, then it might be worth rewarding that goodwill by working with them during these hard times;
 - (3) did your tenant operate a successful business from the premises prior to the pandemic? If so, and if they believe that they have the ability to 'ride out' this current period, then the sensible long-term approach would be to work with them, so that you can retain them as a tenant long-term. The length of time that it will take for the leasing market to 'bounce back' after the height of pandemic is completely unknown, so you need to consider whether working with a tenant now is better than having an empty tenancy for months or years into the future;
 - (4) do you own the property outright or is it financed? If you own the property outright, you arguably could have a far-higher onus to assist your tenant, as the financial impact to you is lower;
 - (5) if the property is financed, can you place your loan repayments on hold? If you can, then you should consider if doing so would allow you more flexibility in offering assistance to your tenants. This may not always be an 'easy answer' however, with many banks only delaying payments and compounding interest, which if you were to take up, could

impact the viability of the property long-term. This is particularly relevant to high-value properties, where the interest payments are significant; and

- (6) there may be other initiatives announced by the State or Federal Government in the coming weeks or months, in addition to the new legislation to be implemented, including waiving or discounting land tax, rates, water etc. For landlords who don't pass these costs onto tenants, this may be relevant to your decision to temporarily lower or suspend rent payments.

3 CONSIDERATIONS FOR TENANTS

3.1 In considering what arrangements would be reasonable to agree with their landlords, we recommend that tenants give consideration to the following factors:

- (1) familiarise yourself with the obligations of landlords imposed by the Code of Conduct, this will help you to effectively negotiate with the landlord as you will be well informed of both yours and the landlord's obligations under the Code of Conduct. This will make it clear to the landlord that you are up to date with the most recent developments and are well aware of your rights and their obligations under the Code of Conduct;
- (2) has your business been impacted by the pandemic and if so, to what extent? If your business has experienced minimal or no impacts, don't use this as an opportunity to 'try it on' with your landlord in an attempt to get a reduced rent. If you haven't been impacted yet, but you think you will be in the coming months (for example, if your business gets paid in arrears for work that you have done in the past months, you may not have experienced significant financial loss as yet, but know that you will in over the coming months, due to current work having 'dried up'), then contact your landlord now to keep them updated and start the conversation. Don't wait and then ring your landlord on the day that rent is due and tell them you don't have the money to pay;
- (3) are you utilising all of your efforts and resources to attempt to diversify your business and service offerings during this time? For example, restaurants who are now offering takeaway etc. It is important that if you are asking your landlord to go without some of their rent, that you are still genuinely using all of your best efforts to generate an income from the business. Explain to your landlord what your business is doing in this regard, so that they can appreciate your efforts;
- (4) work out what you can actually afford to pay. Rent is an 'essential' business cost, so you should be reducing or cutting all of your non-essential costs prior to asking for changes to your rent. Speak to your accountant to work out what you can cut out of your budget for the next six months, to help you get through this time. You should also contact any larger service providers (who might be less impacted) to see if you can negotiate discounts or altered payments terms. Try not to do this if your service providers are also 'Mum and Dad' business owners who might also be struggling during these times;
- (5) have you obtained advice from your accountant and legal advisor on decisions that you can make that will improve your financial position, especially around employees? There is a lot of information to navigate in this space at the moment, so it is important that you have knowledgeable professionals to help you navigate it and help you make the right decisions that could keep your business alive;
- (6) think about what other non-financial incentives that you could offer to your landlord. For example, you might agree to extend your lease term or increase the rent that you can pay, once business goes back to normal. If your business offers a service or product that your landlord could benefit from, you could offer them a 'contra' arrangement. For example, if you run a motel, you might offer your landlord free accommodation in your best room, whenever they like! If you are you a beautician, maybe your landlord would love a free facial once per month, after this is all over. Get creative;
- (7) don't assume that your landlord is a 'rich tycoon' who can afford to give you free rent until the pandemic passes. Many landlords are small-scale 'Mum and Dad' investors who have been hit hard too and even larger landlord entities might be facing significant

hardship during these times, as a result of interest costs and other financial impacts. It is up to everyone to work together to help each other through these times.

4 SUMMARY AND NEXT STEPS

- 4.1 Once you have considered the above matters, reach out to your landlord/tenant, whichever applies to you, and start the discussion. Feel free to send the other party this document along with a copy of the Code of Conduct, so that they can benefit from its guidance and see where you are coming from.
- 4.2 You should then submit a formal proposal to the other party for their consideration. We have prepared a Coronavirus Lease Negotiation Document (available on our website) to assist parties in this regard.
- 4.3 Once you have reached agreement (happy days!), then we strongly recommend that the agreement is appropriately documented, to ensure that it is legally binding. At EL, we appreciate that parties don't necessarily have the financial resources to engage lawyers to do this at the moment, so we have prepared a Coronavirus Deed of Variation of Lease Template (available on our website), which parties can use to document their agreement.
- 4.4 If your lease is registered on the Property Title, you should seek guidance from our EL Team before using the Deed, to ensure that it will be applicable for your lease.
- 4.5 Finally, if the other party refuses to negotiate an agreement, then it is extremely important that you document all of your efforts to attempt to contact them and reach agreement, to ensure you can rely on these efforts in any future legal dispute. We recommend that you contact our team for further advice if you find yourself in this situation.
- 4.6 EL will be keeping a close eye on this situation as it develops and will ensure that our resources stay up to date as any further steps are taken by the State or Federal Government, including the implementation of legislation. So we recommend that you regularly check back to our coronavirus resource centre to ensure that you are using the most up to date information.

NATIONAL CABINET MANDATORY CODE OF CONDUCT

SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

PURPOSE

The purpose of this Code of Conduct (“the Code”) is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government’s JobKeeper programme.

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”).

The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

PARTIES TO THE CODE

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation, but aims to complement it during the COVID-19 crisis period.

OVERARCHING PRINCIPLES

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- Landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- Landlords and tenants will act in an open, honest and transparent manner, and will each provide sufficient and accurate information within the context of negotiations to achieve outcomes consistent with this Code.
- Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses, and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
- The Parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic; whether the tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over." These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this Code is to mitigate the impact of the COVID-19 pandemic on the tenant, due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

LEASING PRINCIPLES

In negotiating and enacting appropriate temporary arrangements under this Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) 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.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.
5. Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.

6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.

7. A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner.

8. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.

9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and taking into account a reasonable subsequent recovery period.

10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5 above.

11. Landlords must not draw on a tenant's security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.

12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in item #2 above. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes.

13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.

14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

BINDING MEDIATION

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or

territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

DEFINITIONS

The following definitions are provided for reference in the application of this Code.

1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.
2. Sufficient and accurate information: this includes information generated from an accounting system, and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused as a direct result of the COVID-19 event.
3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.
4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.

CODE ADMINISTRATION COMMITTEE

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

COMMENCEMENT/EXPIRY

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19 pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

APPENDIX I

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
 - ie. 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.