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**FACT SHEET (NO 3)**  
**UPDATE – COVID-19 AND LEASES**

**8 APRIL 2020**

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## 1. INTRODUCTION

This fact sheet follows on from our previous fact sheets in relation to leases and COVID-19 (**Fact Sheet (No 1)**) and businesses and COVID-19 (**Fact Sheet (No 2)**).

The purpose of this fact sheet (**Fact Sheet (No 3)**) is to provide an update on recently announced National Cabinet Mandatory Code of Conduct released by the Federal Government on 7 April 2020 (**Code**) in relation to commercial and retail leases.

The Code may be found here <<https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>>.

### 1.1. Commencement and Expiry

Pending State enactment, the Code comes into effect from 3 April 2020 and remains in effect for the period during which the JobKeeper programme remains in operation (currently 6 months to September 2020) (**COVID-19 Pandemic Period**).

However, it should be noted that some of the below obligations are mandatory for the COVID-19 Pandemic Period and the 'reasonable subsequent recovery period' which periods can be changed and/or extended by the State and Federal Government.

These periods are not defined and it is unclear whether cessation of the JobKeeper programme will necessarily discharge such obligations.

### 1.2. State Operation

Following enactment by the State Government, the Code will not supersede state legislation, even where the State Government has modified or amended the Code's application.

## 2. PURPOSE

The purpose of the Code is to:

- Maintain and balance the relationship between landlord and tenant;
- Provide for tailored, appropriate and case-by-case solutions to leases adversely affected by the COVID-19 pandemic; and
- Ensure business continuity and mitigate the adverse economic impact of COVID-19.

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### 3. CRITERIA FOR ACCESS TO RELIEF

This Code is only applicable to small and medium enterprises satisfying certain criteria, including suffering financial stress or hardship, annual turnover of less than \$50 million and meeting eligibility criteria of the JobKeeper programme, being a 30% decrease in turnover.

Please note the \$50 million threshold will be applied to **franchises at the franchisee level** and to **retail corporate groups at the group level**. It is likely therefore that any tenant falling in this category will not be eligible.

The flowchart accompanying this fact sheet is useful in determining the eligibility and requirements of tenants under the Code.

### 4. OBLIGATIONS OF THE PARTIES

The Code requires landlords and tenants to whom this Code is applicable to engage in negotiations and discussions to agree temporary lease arrangements in light of the COVID-19 pandemic in accordance with good faith leasing principles under the Code.

### 5. TENANT'S OBLIGATIONS

A tenant must:

- **Remain committed to the terms of their lease.**
  - Any material failure to abide by substantive terms of their lease will forfeit any protections offered under the Code.
  - A tenant who engages in a voluntary closure (i.e. closure that is not directly mandated or indirectly mandated through inability to ensure compliance) may forfeit their protection under the Code.
- **Provide sufficient and accurate information when negotiating under the Code.**
  - Sufficient and accurate information means information generated from an accounting system and information provided or received from a financial institution in the context of negotiating lease arrangements under the Code and to substantiate eligibility and decreased turnover.
- **Pay outgoings notwithstanding rent reduction.**
  - However, a landlord should seek to waiver recovery of outgoings where possible.
- **Assist the landlord in any dealings with stakeholders.**
  - This includes dealings with government bodies, utility companies and banks in the context of negotiating lease arrangements under the Code.

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## 6. LANDLORD'S OBLIGATIONS

A landlord must:

- Not terminate a lease due to non-payment of rent during the COVID-19 Pandemic Period and reasonable subsequent recovery period.
- Offer a tenant a proportionate reduction in rent payable (**Proportionate Reduction**) comprising waived rent (**Waiver**) and deferred rent payments (**Deferral**) COVID-19 Pandemic Period and reasonable subsequent recovery period.
- Pass on any reduction in statutory charges to a tenant.
  - This includes land tax, council rates and insurance, and should be passed on in the proportion applicable under the terms of the lease.
- Waive recovery of outgoings if 'appropriate' during the period the tenant is unable to trade.
  - A landlord reserves the right to reduce services as required in the circumstances.
- Not charge fees, interest or apply any penalty on the tenant in relation to arranged repayment, Waiver or Deferral.
- Not draw on a tenant's security for non-payment of rent, including cash bond, bank guarantee or personal guarantee during the COVID-19 Pandemic Period and reasonable subsequent recovery period.
- Offer a tenant an option to extend its lease for a period equivalent to the period in which a Waiver or Deferral operates.
- Agree to a freeze on rent increases (excluding turnover leases) for the duration of the COVID-19 Pandemic Period and reasonable subsequent recovery period.
- Not apply any prohibition or penalty if a tenant reduces opening hours or ceases trade as a result of the COVID-19 pandemic (**Continued Trade**).

## 7. CALCULATING PROPORTIONATE REDUCTION

A Proportionate Reduction is a percentage reduction in rent that is equivalent to the percentage reduction in a tenant's business (turnover) and is to be offered by way of Waiver and Deferral. A Proportionate Reduction may be up to 100% in circumstances where a tenant's turnover has decreased by 100%.

Please see the **enclosed** Proportionate Reduction Calculator for assistance in calculating Proportionate Reduction.

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### **7.1. Waiver**

Waived rent making up Proportionate Reduction cannot be recovered by the Landlord.

**At least 50%** of a Proportionate Reduction **must comprise of a Waiver**

### **7.2. Deferral**

Deferred payment of rent can only be recovered after COVID-19 Pandemic Period and reasonable subsequent recovery period and must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is greater, and despite the expiry of the lease.

## **8. MUTUAL AGREEMENT & ENFORCEMENT**

A landlord and tenant may mutually agree to a lease arrangement with terms in contravention of the Code.

Disputes and non-compliance under the Code can be referred to the relevant state authority typically dealing with such disputes (i.e. Small Business Commissioner) for **binding mediation**.

## **9. TRICKY SITUATIONS AND POTENTIAL PROBLEMS**

### **9.1. Pre-COVID-19 Pandemic Period**

The Code does not protect default, breach and other issues arising under leases that occurred prior to the COVID-19 Pandemic Period or arising during the COVID-19 Pandemic Period that are not directly a result of the COVID-19 pandemic.

Arguably, tenants already in default prior to the COVID-19 Pandemic Period do not have access to benefits of the Code.

### **9.2. Continued Trade**

The Code prohibits landlords from penalising tenants who have ceased trade as a result of the COVID-19 pandemic. Landlords should consider the following potential scenarios:

#### ***Scenario 1***

A restaurant closes down due to State Government Directions which directly mandate closure of restaurants.

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### **Scenario 2**

State Health Department tracing has revealed a person infected with COVID-19 has attended upon a retail store and that retail store subsequently closes down for 3 weeks due to absence of staff, the staff being required to self-isolate for 2 weeks.

### **Scenario 3**

A takeaway café closes down because the premises area is not large enough to accommodate the required amount of staff for operation of the business in compliance with social distancing measures and Directions relating to mass gatherings.

### **Scenario 4**

A retail store not affected by Government Directions voluntarily closes down due to decreased foot traffic or personal health concerns or for any other reason.

Arguably, only in Scenario 4 will the tenant forfeit its protection under the Code.

## **10. CONCLUSION**

We will seek to keep you updated on changes as they occur. For specific advice on the application of the Code to a particular tenancy or queries and concerns about the impact of COVID-19 on your business or lease, call Janette Tavelli (0417926155), Michael Sonter (0419 900 299), or another of our team members on 08 92118 8588.

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