

Negotiating the Commercial Lease Code in the States & Territories

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Preamble

Practical application of the National Cabinet's Mandatory Code of Conduct – SME Commercial Leasing Principles (the Code) in the States and Territories of Australia during:-

1. The COVID-19 Pandemic Period;
2. The Reasonable Recovery Period (undefined); and
3. Any Rental Waiver and Deferral Period beyond 1 and 2 above if applicable.

It also chronicles and links the State and Territory enabling Legislation and Regulations to ratify the Code

The Code aligns to JobKeeper which has as a fundamental principal keeping people in jobs and connected to their employer.

In the same way the Code's fundamental principal should be “keeping tenants connected with their landlord/ building and in occupancy with their tenancy.”

The Commonwealth Code



Key Issues to Note/ Consider given the different roll out of the Code in the States and Territories

1. The States have ratified the Code in different ways;
2. Some have new Legislationothers have amended existing Legislation;
3. Some have only issued regulations to existing Legislationothers have enacted legislation;
4. Some have adopted different Tenant eligibility principles than those considered in the Code;
5. Most have adopted different definitions and terminology than the Code;
6. Most have adopted different start and end dates of the legislation and regulation;
7. Some have adopted different start and end dates for the COVID-19 Period and, in some case the Reasonable Recovery Period;

Key Issues to Note/ Consider Given the different roll out of the Code in the States and Territories continued.

8. Some have been more prescriptive than others in the application of the mandatory nature of the Code;
 9. The extent to which the actual relief principles in the Code have been referred to or adopted varies; and
 10. The application of the Waiver and Deferral Principles vary greatly; or have not been referred to at all.
- All of which creates additional challenges for investment real estate administration and management
 - In any rental relief discussions with tenants it will be necessary to consider the relevant State's Legislative and Regulatory context of the Code's application.

What do We Need to Know to Apply the Code?

1. What Legislation and regulations apply in my Jurisdiction?
2. What are the relevant provisions of the Code that apply to my jurisdiction's circumstances?
3. Which Sections of the relevant Act and Regulations need to be considered?
4. Does the Code need to be applied prescriptively in the relevant State or can a Landlord and Tenant negotiate based on the principles of the Code, but outside the Code?
5. Is the SME tenant eligible for the JobKeeper and if so, how will they justify eligibility initially and in on ongoing month to month sense during the COVID-19 Pandemic Period and possibly the undefined Reasonable Recovery Period?
6. What information does the Tenant have to supply the Landlord to justify eligibility in my jurisdiction?
7. What is the amount of any negotiated Waiver and / or Deferral and what are the negotiated start and end dates of the waiver and deferral?
8. Does the Tenant have to extend the lease term certain to cover a) the COVID-19 Pandemic Period; b) the Reasonable Recovery Period; and c) any waiver and deferral period; if a lease expires at any point in time during these periods?

To answer these relevant questions you need to review your jurisdiction's Legislation and Regulations.

Relevant Legislation and Regulations in NSW



New Legislation Enacted: No

New Regulations to Legislation: Yes (Retail Leases Act and Conveyancing Act)

New Bill, Act, Regulation or Code: Retail and Other Commercial Leases (COVID-19) Regulation 2020

Effectuated Acts/ Legislation: Retail Leases Act 1994 & Amendment of Conveyancing Act

Date of Regulation: 24 April 2020

Effective Date: 24 April 2020

End Date: 24 October 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 24 October 2020

Definition of an 'Eligible Tenant': Impacted Lessee with an annual turnover less than \$50 million and eligible for JobKeeper

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1-2, 6, 11

Refers to Code Principles: 3-5, 7-10, 12

Waivers: See Section 7 (4) of Retail and Other Commercial Leases (COVID-19) Regulation 2020

Deferral: See Section 7 (4) of Retail and Other Commercial Leases (COVID-19) Regulation 2020

Relevant Legislation and Regulations in VIC



New Legislation Enacted:
Yes

New Regulations to Legislation: Yes

New Bill, Act, Regulation or Code:

COVID-19 Omnibus Emergency Measures (Commercial Leases and Licenses) Regulations 2020

Effected Acts/ Legislation: COVID-19 Omnibus (Emergency Measures) Act 2020

Date Enacted of Act: 24 April 2020

Date of Regulation: 1 May 2020

Effective Date: 29 March 2020

End Date: 29 September 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 29 September 2020

Definition of an 'Eligible Tenant': 'Eligible Lease' Annual turnover less than \$50 million. Eligible and a participant of JobKeeper

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1, 3-6 & 7-14

No Guidance: 2 & 7

Waivers: See Section 10 (4b) of COVID-19 Omnibus Emergency Measures (Commercial Leases and Licenses) Regulations 2020

Deferral: See Section 16 (2b) of COVID-19 Omnibus Emergency Measures (Commercial Leases and Licenses) Regulations 2020

Relevant Legislation and Regulations in QLD

*Part A – Made under –
Land Act 1994*



Relevant Legislation and Regulations in QLD

*Part B – Made under –
COVID-19 Emergency
Response Act 2020 & Retail
Shop Leases Act 1994*

A grey silhouette map of Queensland. Text is overlaid on the map, providing details about new legislation and regulations in the state.

New Legislation Enacted: Yes

New Regulation to Legislation: Yes

New Bill, Act, Regulation or Code: Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

Effectuated Acts/Legislation: COVID-19 Emergency Response Act 2020

Date Enacted of Act: 23 April 2020
Date of Regulation: 28 May 2020
Effective Date: 29 March 2020
End Date: 30 September 2020
Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 30 September 2020

Definition of an 'Eligible Tenant': 'Affected Lease' means a retail shop lease or prescribed lease and is a SME entity and is eligible for the JobKeeper scheme.

Leasing Principles specifically addressed in the relevant legislation
Addressed: 1-6 & 9-12
No Guidance: 7-8

Deferral: See Section 15 of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

Waivers: See Section 15 of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020

Relevant Legislation and Regulations in WA



Relevant Legislation and Regulations in SA

New Legislation Enacted: Yes

New Regulations to Legislation: Yes

New Bill, Act, Regulation or Code: COVID-19 Emergency Response Act 2020

Effected Acts/ Legislation: Real Property Act 1886, Retail and Commercial Leases Act 1995 & Landlord and Tenant Act 1936

Date Enacted of Act: 9 April 2020
Date of Regulation: 16 April 2020
Effective Date: 9 April 2020

Definition of an 'Eligible Tenant': 'Financial Hardship' Eligible for JobKeeper payment

Leasing Principles specifically addressed in the relevant legislation
Addressed: 1, 6, 8, 13
No Guidance: 2-9, 12

Waivers: No guidance
Deferral: No guidance



Relevant Legislation and Regulations in TAS



New Legislation Enacted: Yes

New Regulations to Legislation: Yes

End Date: 30 September

New Bill, Act, Regulation or Code: COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020

Effected Acts/ Legislation: Not Specified

Date Enacted of Act: 27 March 2020

Date of Regulation: 9 April 2020

Effective Date: 1 February 2020

Assumed COVID-19 Pandemic Period end date from Legislation or Regulation: 30 September 2020

Definition of an 'Eligible Tenant': Turnover decreased 30% in at least 1 month continuous from 1 February 2020; Turnover less than \$50 million between 1 February 2019 to 31 January 2020

Leasing Principles specifically addressed in the relevant legislation

Addressed: 1, 6, 8, 13

No Guidance: 2-5, 7, 9-12, 14

Waivers: No guidance

Deferral: No guidance

Wishful Thinking? ... In A Perfect World Further Clarification of the Code Would be Beneficial?

Whilst the Code's fundamental Principles are not being criticised it is worthy to comment on a matter that would benefit from clarification in the Code itself to diffuse an element of uncertainty and risk in the Code's application generally.

The issue is the application of the Deferment component of rent relief

The Deferral Principle is the subject of the Code's Principles 3, 5 and 12 which are restated (including our suggested amendments – deletions with strikethrough and additions in red) as follows:-

3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals of up to 100% of the amount ordinarily payable on a case-by-case basis. This will be subject to the tenant's trade reduction during the COVID-19 pandemic period and any subsequent reasonable recovery period;
5. Payments of rental deferrals by the tenant must be amortised over the balance **of the current or renegotiated** lease term. ~~or for a period of no less than 24 months, whichever is the greater, post~~ **Any renegotiated lease term** should include the COVID-19 Pandemic and Reasonable Recovery Period **as well as the deferral period** unless otherwise agreed by the parties;

Wishful Thinking? ... In A Perfect World Further Clarification of the Code Would be Beneficial? continued

The fact that any Deferral may extend beyond a lease term certain and a tenant may have vacated the premises is significantly problematic. In these circumstances the Landlord would become a quasi-unsecured debt provider to a vacated tenant which cannot possibly have been the underlying intent of the Deferral Principle of the Code.

This could simply be rectified if the Commonwealth saw fit to amend Principle 12 as follows:-

12. Tenants should be ~~provided with an opportunity~~ **obligated** to extend its **their** lease **term certain** for an equivalent period of the rent waiver and/or deferral period outlined in the Code **to obtain the benefit of the Waiver and Deferral Principles**. This principle is intended to provide the tenant additional time to trade on existing **or extended** lease terms during the recovery period after the COVID-19 pandemic concludes. **It is also intended to keep tenants connected with Landlords and to ensure, where possible, continued building occupancy.**

The Code aligns to JobKeeper which has as a fundamental principal keeping people in jobs and connected to their employer.

In the same way the Code's fundamental principal should be "keeping tenants connected with their landlord/ building and in occupancy with their tenancy."

An amendment along the lines suggested above would go a long way to providing further clarity of the application of the Code in the COVID-19 economy.

Is Uniform Application of the Code in the States a Pipe Dream?

To understand the reasons for this paper, the consternation and confusion around the application of the Code, you need to review the COVID-19 emergency State and Territory based legislation, regulations and in one case a Gazettal notice, as well as any other regulations and notices that have issued at the date of writing.

What is available at the date of writing is linked to this paper; as is the Initial Valuation Uncertainty Paper and the Webinar presentation on the subject; and the New South Wales Parliamentary Research Service paper dated March 2013 on the subject of historic rent control.

The matters which have been dealt with in a less than uniform manner and which would benefit from an urgent strategic rethink, include:-

1. Uniform definition of eligibility to apply the Code;
2. Uniformity in State legislative application and legislative framework;
3. Uniformity of State regulations to the legislation;
4. Uniform referencing/ definitions and adoption of the Codes principles in regulations to legislation;
5. Uniform legislative repeal or end dates;
6. Uniform adoption of the “COVID-19 Pandemic period” (start and end date);
7. Uniform estimate of “reasonable recovery period” (start and end date);
8. Uniform reference all of the Commonwealth Code’s 14 Principles;
9. If only some of the Code’s 14 Principles are referenced, recognition of the Code’s other Principles as a default position;
10. Developing and applying uniform Commonwealth and State definitions for inclusion in the Code’s State and Territory application in Legislation and Regulation (notwithstanding any existing definition’s in current State and Territory Legislation) for the following terms which are drawn from the Code itself as well as State and Territory Legislation and Regulations.

Sources/ Links

References

Commonwealth Code State Legislation and Regulations

- National Cabinet Mandatory Code of Conduct;
- NSW Parliamentary Research Service - Protected Tenancy History;
- NSW COVID-19 Retail Lease Act Regulation;
- NSW COVID-19 Conveyancing Act Regulation;
- QLD COVID-19 Act;
- QLD COVID-19 Regulation;
- SA COVID-19 Act;
- SA COVID-19 Regulations;
- TAS COVID-19 Act;
- TAS COVID-19 Gazetted Notice;
- VIC COVID-19 Act;
- VIC COVID-19 Regulations;
- WA COVID-19 Act; and
- WA COVID-19 Regulations.

PFA-PRP Valuation Uncertainty

- PRP-PFA Issues Paper – Dealing with Valuation Uncertainty –Investment Real Estate
- PFA – ShineWing Webinar on Dealing with Valuation Uncertainty;
- PFA – ShineWing Webinar Presentation on Dealing with Valuation Uncertainty; and
- PFA – ShineWing Webinar Poll Results and Extra Questions Answered.

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