Overview

 

*“The Government has announced a range of measures to assist commercial tenants.”*

The Government has announced a range of measures to help renters. This includes a temporary hold on evictions and a mandatory code of conduct for commercial tenancies to support small and medium sized enterprises (SMEs) affected by coronavirus.

There are two measures to assist, they are:

• a hold on evictions for commercial tenants;

• a code of conduct for commercial tenancies.

Hold on evictions for commercial tenants

Evictions will be put on hold over the next six (6) months for commercial tenants in financial distress, who are unable to meet their commitments due to the impact of the coronavirus.

Code of conduct for commercial tenancies

A mandatory code of conduct **(Code of Conduct)** has been introduced which attempts to set out “good faith leasing” principles for commercial tenancies for the following sectors:

• retail;

• office; and

• industrial.

The Code of Conduct only applies to tenants that are:

• a small to medium sized business with an annual turnover of up to $50 million;

• eligible for the JobKeeper Payment[[1]](#footnote-1).

How it works?

Rent reductions will be based on the tenant’s decline in turnover to ensure that the burden is shared between landlords and tenants.

The policy includes a mutual obligation requirement on the small and medium sized businesses and not-for-profit tenants to continue to engage their employees through the JobKeeper Payment where eligible, and if applicable, provide rent relief to their subtenants.

Australian and foreign banks, along with other financial institutions operating in Australia, are expected to support landlords and tenants with appropriate flexibility as they work to implement the mandatory Code.

The Government is also waiving rents for all its small and medium enterprises and not-for-profit tenants within its owned and leased property across Australia.

The code and its principles will be implemented and regulated by your relevant state or territory.

14 Code of Conduct Principles

The principles are:

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.

**Conclusion**

We assist landlords and tenants negotiate a fair outcome regarding their commercial tenancies during this uncertain time.

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*DISCALIMER: This publication is intended for your information and interest only. It is not intended to be comprehensive, and does not constitute and must not be relied on as legal advice. You must seek specific advice tailored to your circumstances.*

1. BDO Australia have produced an excellent article about the eligibility requirements for the scheme: [click here](https://www.bdo.com.au/en-au/insights/tax/business-tools/the-jobkeeper-payments-scheme-eligibility?utm_term=JOBKEEPER%20PAYMENTS%20SCHEME%20ELIGIBILITY%20GUIDE&utm_campaign=BDO%20Technical%20Update%20-%20JobKeeper%20Payments%20Scheme%20Eligibility&utm_content=email&utm_source=Act-On+Software&utm_medium=email&cm_mmc=Act-On%20Software-_-email-_-BDO%20Technical%20Update%20-%20JobKeeper%20Payments%20Scheme%20Eligibility-_-JOBKEEPER%20PAYMENTS%20SCHEME%20ELIGIBILITY%20GUIDE). [↑](#footnote-ref-1)