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Commercial and Rental Leases New Laws during COVID-19 Crisis

Here is a summary of the new laws that came into effect on 24 April 2020 regarding Commercial & Retail Leases.

The following relates to both **retail leases** and all **commercial leases**.

Which tenants qualify?

Tenants must:

1. Qualify for the JobKeeper scheme under *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*; AND
2. Their turnover for FY2018-2019 was **less** than \$50 million.
 - a. Franchisee – turnover is the business conducted at the premises concerned.
 - b. Company that is part of a group – turnover of the group.
 - c. In any other case – the turnover of the business conducted by the tenant.

What CAN'T Landlords do

If a tenant qualifies, the landlord cannot:

1. Evict the tenant;
2. Exercise a right of re-entry to the premises;
3. Recover the premises;
4. Seize any tenants' goods;
5. Seek forfeiture, damages, possession, any other remedy available from the tenant;
6. Require the tenant to pay interest on, or a fee or charge related to unpaid rent;
7. Recovery the whole or part of the security bond;
8. Act on any personal guarantee under the Lease;
9. Terminate the Lease;

Principal: **Greg Martin**
BA LLB

10. Increase the rent payable (there is an exception where the rent is tied to turnover);
11. Require the tenant to pay more than what the landlord is paying regarding land tax or any other statutory charges or insurance premiums (even if the Lease allows them to);

on the following breaches by the Tenant (during the 6 month period):

- A. Failing to pay rent;
- B. Failing to pay outgoings; or
- C. The tenant is not open during the hours specified in the lease.

This is effective from 24 April 2020 to 24 October 2020 (6 months).

After the period, the landlord also cannot take any action against the tenant for failing to pay any increases in rent payable (where it was able to be increased under the lease).

Obligation to renegotiate rent and other terms of the lease

Any party to the Lease can request the other parties to renegotiate the rent payable under the Lease.

The other party must renegotiate in good faith the rent payable, having regard to:

- A. The economic impacts of the COVID-19 pandemic; and
- B. The lease principles set out in the National Code of Conduct (see below).

National Code of Conduct

In summary, the following principles should be applied on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during this period.
2. Tenants must remain committed to the terms of their lease. Failure to do so may mean that the tenant forfeits its protection under this code.
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, based on the reduction in the tenant's trade during the period and a subsequent reasonable recovery period.
4. **Rental waivers** must be **no less than 50%** of the total reduction in rent payable under principle #3 and should be greater than 50% where failure to do so would compromise the tenant's capacity to fulfill their obligations under the lease. The Landlord's position must also be considered and the tenants may waive the requirement for a 50% minimum waiver.

5. **Rental deferrals** must be amortised over the balance of the lease term and for a period no less than 24 months (whichever is greater), unless otherwise agreed.
6. Any reductions in statutory charges and insurances must be passed on to the tenant.
7. Landlords should share any benefit it receives due to deferral of loan payments offered.
8. Landlords should seek to waive recovery of any outgoings by the tenant during the period the tenant is not able to trade. Landlords can reduce services as required as well.
9. If any agreement requires repayment of rent / outgoings, this should occur over an extended period so not to place undue financial burden on the tenant.
10. No fees, interest or other charges should be applied in relation to rent waived or deferred.
11. Landlords must not draw on a tenant's security for non-payment of rent.
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.
13. Landlords **must** freeze rent increase.
14. Landlords **must** not apply any prohibition or levy any penalties if the tenant reduces operating hours or ceases to trade.

Attached is the *National Code of Conduct*.

What the law does not do

This law does not:

1. Stop the Landlord from coming to a mutual agreement with the Tenant regarding the Lease.
2. Prevent the Landlord exercising its right under the Lease on grounds not related to COVID-19.

Any arrangements that you make, should be in **writing** to avoid any issues later on.