

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

The following information is only of a general nature and should not be taken as professional advice.

UPDATE 9 | Commercial Tenancies Code

The Commercial Tenancies Code covers the relationship between commercial landlords and tenants during the pandemic.

Commercial Tenancies Code

The Commercial Tenancies Code might be the lifeline you need. It will hopefully make you stronger when negotiating with your landlord while you can't pay the full rent.

In this episode Scott McKenzie of [Velocity Legal](#) in Melbourne will walk you through the 14 principles of the Code

Here is what we learned but please listen in as Scott explain all this much better than we ever could.

To listen while you drive, walk or work, just access the episode through a free podcast app on your mobile phone.

Commercial Tenancies Code

The Commercial Tenancies Code (Code) was issued on 7 April 2020. It is not law yet as such but a directive to states and territories to amend their laws accordingly. The relationship between landlords and tenants is mainly governed by state law. Hence this federal directive to the states.

States and territories are working on implementing the Code into their legislation with high priority.

The Code is to operate for the period that the Commonwealth JobKeeper program remains operational.

Eligibility

If the Code is implemented as drafted, it will apply to commercial leases where the tenant is eligible for the JobKeeper program and has a turnover of \$50 million or less per annum. Tenants who meet these two conditions are deemed to be in a position of financial distress.

Call To Arms

The Code also appeals to landlords of large commercial tenancies – not covered by the Code since exceeding \$50m turnover – by stating,

“The Parties to this Code concur that during the COVID-19 pandemic period... the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses”.

What all this exactly means is unclear.

Principles

There are 14 principles in the Code that landlords and tenants should refer to in their negotiations.

Principle # 1

Landlords must not terminate a lease due to non-payment of rent during the pandemic period, or reasonable subsequent recovery period.

So your landlord can't evict you for being unable to pay your rent during the COVID-19 lockdown.

Principle # 2

Tenants must remain committed to the terms of their lease, subject to any temporary arrangements negotiated with their landlords, and failure to uphold key terms of their lease will forfeit their protection under the Code.

This one is for the landlords. Tenants don't get a free Get-Out-Of-Jail card. The other terms of the conditions of the lease agreement still apply, even though payment of the lease is an issue.

But this principle is also the most dangerous for tenants. This principle can give landlords an 'excuse' (for lack of a better word) to terminate the lease.

Principle # 3

Landlords must offer tenants proportionate rent reductions in the form of waivers and deferrals (such as deferral/reductions of payments and pausing or hibernating the lease), based on the reduction in the particular tenant's trade during the pandemic. The landlord should not try to recoup any amount waived over the term of the lease.

So whatever debt is forgiven, stays forgiven.

Principle # 4

At least 50% of the total reduction in rent payable by a tenant during the pandemic period must be in the form of rental waivers, and should constitute a greater proportion in cases where failure to do so would compromise the tenant's capacity to fulfill their ongoing lease obligations.

Tenants must also consider the landlord's financial ability to provide these additional waivers, and may waive the 50% requirement by agreement.

So basically be nice to each other. Help each other out here. If the landlord is struggling while the tenant is still strong despite everything, then don't push the landlord into a default. Your next landlord might be worse.

Principle # 5

If the parties agree to rental deferrals, and unless otherwise agreed by the parties, payments of deferred amounts must be amortised over the greater of the remaining lease term; or 24 months.

So deferred rent won't become due straight away the moment you open the doors again.

Principle # 6

Landlords must pass to the tenant any reductions in statutory charges (e.g. land tax and council rates), in an appropriate proportion with regards to the terms of the lease.

So first establish what costs the landlords is passing on to you per lease agreement. Then assess whether the landlord might have received a reduction of these costs that they should pass on to you.

Principle # 7

If a financial institution provides a benefit to the landlord (e.g. deferral of loan payments), the landlord should seek to share the benefit with the tenant.

This one will be hard to push through in practice. It is difficult to know what concessions your landlord receives from their bank.

Principle # 8

Landlords should seek to waive recovery of expenses and outgoings from tenants during periods in which a tenant is unable to trade due to the pandemic. However, in such circumstances landlords will also reserve the right to reduce services as required.

Take cleaning as an example. During the lockdown, the landlord should not charge for cleaning, but then of course can also cancel the cleaning crew.

Principle # 9

If a party will be required to make repayments under a temporary arrangement, the repayments should occur over an extended period so as to avoid placing additional financial burden on the tenant; and not commence until either: the pandemic ends; or the existing lease expires (taking into account a reasonable subsequent recovery period).

So if you agree repayments with your landlord, those repayments should not become due during the crisis.

Principle # 10

Landlords should not apply any fees, interest, charges, or punitive interest to any waiver or deferral of rent.

If you are late paying rent, your landlord shouldn't charge you interest or penalties during lockdown.

Principle # 11

During the pandemic period, and a reasonable recovery period afterwards, landlords must not draw on any security provided by a tenant – whether in the form of a cash bond, bank guarantee or personal guarantee.

Your landlord can't use your bond or similar to make up late rent while we are still in lockdown.

Principle # 12

If the parties agree to a rent waiver and/or deferral period, the tenant should be provided with an opportunity to extend the lease for an equivalent period to provide additional time to trade during the recovery period after the pandemic concludes.

So during lockdown you should be able to extend your lease for some time so you don't have to move during lockdown.

Principle # 13

Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the pandemic and a reasonable recovery period, unless otherwise agreed between the parties.

There should be no rent increases during lockdown.

Principle # 14

During the pandemic, landlords must not levy any penalties against a tenant that reduces their opening hours or ceases to trade, and must not take steps to prevent the tenant from doing so.

You should suffer no penalties if you decide to close your business without a government order to do so.

Case By Case

The Code requires a case-by-case assessment, considering factors such as how rent is calculated per the lease agreement and whether the tenant has suffered financial hardship due to the pandemic or is in external administration and whether the tenant's lease has expired, or is soon to expire.

And last but not least, whatever you negotiate and agree on, make sure you properly document it.

MORE

[Jobkeeper Rules](#)

[COVID-19 Stimulus Review](#)

[Jobkeeper Payment](#)

Disclaimer: *Tax Talks does not provide financial or tax advice. All information on Tax Talks is of a general nature only and might no longer be up to date or correct. You should seek professional accredited tax and financial advice when considering whether the information is suitable to your or your client's circumstances.*

The information above is for general information only and should not be taken as constituting professional advice from Tax Talks. We are not a financial, legal or tax adviser. You should consider seeking independent legal, financial, taxation or other advice to check how the above information relates to your unique circumstances.