



CHANGES TO ASSIST COVID-19 AFFECTED COMMERCIAL AND RESIDENTIAL TENANCIES

Author: Nikhil Narayan

Commercial Tenancies

On 7 April 2020 the National Cabinet announced a new Code of Conduct (“**Code**”) to be legislated by the State and Territory governments in an effort to relieve pressure on retail, commercial and industrial tenants during the Coronavirus (“**COVID-19**”) period. The new measures are intended to facilitate good faith negotiations between tenants and landlords due to the economic impact that the virus is having on tenants.

The Code applies to tenants which:

1. are experiencing financial distress;
2. have an annual turnover of \$50 million dollars or less; and
3. are an eligible business under the Federal Government’s JobKeeper Program (i.e. have suffered a 30% drop in turnover).

The Code is not intended to override the State and Territories tenancy laws, but to operate concurrently with them during the pandemic and a reasonable subsequent recovery period.

The relevant principles that are to be adhered to by landlords and tenants during negotiations are:

1. The parties negotiate in good faith with a view to ensuring business continuity and the resumption of normal trading activities at the end of the COVID-19 period.
2. Landlords cannot terminate a lease due to non-payment of rent during the COVID-19 pandemic or subsequent recovery period.
3. Notwithstanding the landlord’s restriction on termination, a tenant is not absolved from following the terms of the lease. A tenant that fails to follow the essential terms of the lease forfeits any protection available to the tenant under the Code.
4. A Landlord must offer tenants proportionate reductions in their rent in the form of waivers and deferrals of up to 100% of the amount which would ordinarily be payable by the tenant to the landlord.
5. Rental waivers given by the Landlord must be no less than 50% of the total rent reduction amount being offered by the landlord through a waiver or deferral.
6. The tenant must be allowed to gradually repay any deferred repayments over the remaining term of the lease, or over 24 months, whichever is greater unless otherwise agreed by the parties.
7. No fees, interest or other charges should be applied to any waived rent amount.
8. Where appropriate Landlords should seek to waive recovery of any other expense (or outgoing payable) during the period of time that the tenant is unable to trade.
9. If the parties do negotiate repayments under this code, the tenant must be allowed to make those repayments over an extended time to ease the financial hardship on the tenant. No repayments should occur until the Government has indicated the pandemic period has ended or the existing lease has expired.
10. The landlord will be required to pass on any reduction in statutory charges (e.g. land tax, council rates, water rates) to the tenant in the appropriate proportion applicable under the lease.
11. Landlords should also seek to share any benefit they receive due to deferral of loan repayments they receive from a financial institution.
12. Landlords must not draw on any security deposit, bond or bank guarantee or personal guarantee during the COVID-19 pandemic period.
13. Tenants should be provided with the opportunity to extend their leases for a period equivalent to the period of any rent waiver or deferral to enable them to trade on their existing lease terms during the recovery period after the COVID-19 pandemic period.
14. Landlords agree to a freeze on all rent increases excluding those which are calculated based on turnover rent.
15. The landlord must not impose any penalty on the tenant if they cease trading or reduce trading hours due to the COVID-19 pandemic.

If the landlord and tenant are unable to reach agreement on variations to the terms of their lease then they are directed to refer the matter for mediation through the applicable dispute resolution process in each jurisdiction. Dispute resolution procedures must not be used to frustrate the negotiation of amicable terms between the parties.

The Code of Conduct will expire on 24 October 2020, unless extended.

Residential Tenancies

On 13 April 2020 the NSW Government announced new support measures intended to assist residential tenants during COVID-19. The new measures are similar to the commercial tenancy Code of Conduct as it requires good faith negotiations and restricts forced evictions. Accompanying these measures is a financial relief package in the form of tax waivers and rebates.

There is a 6 month moratorium on forced evictions due to failure to pay rental arrears for those financially disadvantaged by COVID-19. Landlords seeking to evict their tenants must make an application to the NSW Civil and Administrative Tribunal (NCAT).

However, there is currently a 60 day moratorium on applications to the NCAT seeking to evict tenants. This also extends to finalising existing eviction applications. During this time landlords and tenants are expected to engage in good faith negotiations over rental arrears.

These measures apply to households which contain one more rent paying members which:

1. have lost employment or income due to COVID-19 business closures or stand-downs, or
2. have had to stop working or reduce work hours due to illness with COVID-19 or due to COVID-19 carer responsibilities for household or family members, and
3. the above factors result in a household income (inclusive of any government assistance) that is reduced by 25% or more.

The relevant principles that are to be followed by landlords and tenants during negotiations are:

1. After the 60 day moratorium when applications to evict tenants will be heard by NCAT, a forced eviction will only occur if the tribunal is satisfied that negotiations have occurred in good faith and have concluded;
2. Evictions unrelated to rental arrears are also on hold to minimise housing disruption;
3. Terminations due to fixed or periodic leases ending, or other rental agreement breaches now require a minimum 90 day notice pursuant to the Residential Tenancies Act;
4. Tenants are protected from being blacklisted for rental agreement breaches resulting from COVID-19 impacts;
5. Landlords may seek to recover their property due to their own hardship. Similarly, tenants may terminate a fixed term tenancy on the basis of hardship; and
6. Any unpaid rent will accrue as arrears during the COVID-19 period.

In addition to the new measures, the NSW Government has committed approximately \$220 million into the residential sector to assist in rent reductions. Landlords are eligible for up to 25% reductions in land tax if the saving is passed on to the tenant. Eligible landlords must show that they:

1. Own the land used for business or residential purposes;
2. The land is currently being leased to a residential tenant, or a business tenant with an annual turnover of up to \$50 million, who can demonstrate financial distress resulting from COVID-19; and
3. Rent of the affected tenant will be reduced by at least as much as the tax reduction.

The 60 day moratorium on eviction applications to NCAT ends on 15 June 2020. The remaining measures will end on 15 October 2020, unless extended.

ClarkeKann is happy to assist if you are having difficulty in negotiations. Please contact [John Gray](mailto:John.Gray@clarkekann.com.au) on 02 8235 1205 for further information.