COVID-19: (AUSTRALIA) TOP 10 PRINCIPLES - NATIONAL CODE SET TO MANDATE PRINCIPLES FOR COMMERCIAL RENT RELIEF

Date: 9 April 2020

By: Will Grinter

**This information is accurate as of 9.00am Thursday 9 April 2020 and is subject to change as this situation evolves.*

The Prime Minister announced on 7 April 2020 details of the foreshadowed National Cabinet Mandatory Code of Conduct for commercial leases **(Code)**.

The new Code will take effect in all states and territories from a date following 3 April 2020, with the dates to be defined by each jurisdiction. It will then continue to apply during the period the Commonwealth JobKeeper program remains operational and potentially also extend to cover a reasonable subsequent "recovery period".

The Code will be mandatory and is a key plank in the Morrison Government's plans to 'hibernate' Australian business, with the stated aim to help preserve capacity for a COVID-19 economic recovery phase.

There is no doubt the new Code represents an extraordinary interjection of law on the private contractual rights of landlords and tenants under leases, though especially the rights of landlords.

It will apply to tenants who are eligible as JobKeeper participants and have an annual turnover of less than $50 million (**Applicable Tenants**) and landlords of Applicable Tenants (**Applicable Landlords**).

The $50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

Applicable Tenants and Applicable Landlords will be required to carry on 'good faith' discussions in a process designed to secure minimum levels of rent deferral and waiver.

The 'discussions' will be back-stopped by a binding mediation process.

In return, Applicable Tenants must 'honour the lease'. However as a practical matter the requirement to 'honour the lease' appears to be effectively only a restatement of the Applicable Tenant's already existing legal obligations under its lease (now with an applicable combined mixture of rent deferral and waiver).

The Code contains no obligations on banks and financiers to join with Applicable Landlords and Applicable Tenants in the negotiations mandated under the Code.

We anticipate the States and Territories will continue to develop further jurisdiction specific rules and capacity to deliver the mandated mediation under the Code.

Further announcements of additional relief for landlords on land tax and rates are also expected (on the basis the savings for landlords will be required to be passed on to tenants).

©2005-2026 K&L Gates LLP. All Rights Reserved.

It is possible any tax and rate relief which becomes available may apply more broadly than to just to the landlords finding themselves subject to the Code.

Separate to compliance with the Code, all landlords whether they are subject to the Code or not, should stay focussed on assessing steps available to prepare for and mitigate against tenant insolvency risks. For example an often missed mitigation step is the maintenance of proper landlord PPS registration, described in the article "*How Poor PPSA Hygiene Risks Landlord Exposure in Corporate Tenant Insolvencies*".

Over 2,400 years ago Hippocrates wrote - "For extreme diseases, extreme methods of cure, as to restriction, are most suitable." Remarkably Hippocrates' words appear as apt today as ever to describe the COVID-19 impacted Australian economy and its 'cures'.

Top 10 Principles

We expect the 'top 10' Code leasing principles will be (of 14 listed leasing principles):

1. Applicable Landlords must not terminate relevant leases for rent breaches during the COVID-19 period or its 'reasonable recovery period';
2. Rent waiver and deferral (potentially totalling up to 100% of rent) must be offered on a basis proportionate to the Applicable Tenant's turnover reduction during the COVID-19 period and its 'reasonable recovery period'.
3. Waivers must be at least 50% of the rent relief, unless agreed by Applicable Tenants.
4. Any recoupment of deferred rent will be amortised over the greater of the remaining lease period and 24 months. This means if an Applicable Tenant has six months left on their lease, they will still have 24 months to pay any deferred rent.
5. Applicable Tenants 'should' be offered an extension of the term for the equivalent period rent is being waived and/or deferred.
6. Applicable Tenants' security cannot be drawn during the COVID-19 period and its 'reasonable recovery period'.
7. Applicable Landlords 'should' where 'appropriate seek to waive recovery of … outgoings' during the period the tenant is unable to trade.
8. Rent review increases (other than turnover rent) are frozen in the COVID-19 period and its 'reasonable recovery period'.
9. Landlords may not apply any prohibition or levy any penalties if tenant reduce opening hours or cease to trade due to the COVID-19 pandemic
10. Tenants must remain committed to the terms of their lease, subject to any amendments to their leases negotiated under the Code. Material failure to abide by the substantive terms of their lease will forfeit any protections provided to the tenant under the Code.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



WILL GRINTER
PARTNER

MELBOURNE
+61.3.9640.4411
WILL.GRINTER@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.