

Paying your commercial rent during COVID-19

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This content has now been superseded.

View the latest information here: "NSW regulations for commercial leases during COVID-19. Landlord and tenant obligations and rights."

The NSW Government introduced further changes (by regulations) in relation to commercial leases during the coronavirus period. These are currently in place until October 2020.

Commercial leases are certainly a hot topic at the moment for landlords and tenants alike. The Federal Government has now passed its mandatory code of conduct and the NSW State Government is in the process of finalising its legislation which supports the code for NSW lease transactions.

We will update this article as conditions and laws change.

The Federal Government mandatory code of conduct

The National Cabinet met on 7 April 2020 and the Federal Government subsequently announced that a mandatory code will be legislated and regulated, as appropriate, in each State and Territory.

Scott Morrison has confirmed the terms as outlined below and has further said that landlords will be required to reduce rent proportionate to the trading reduction in the tenant's business through a combination of a waiver of rent and a deferral of rent over the course of the pandemic.

The waivers of rent must account for at least 50% of the reduction in the rental provided to the tenant during the pandemic period and deferrals must be covered over the balance of the lease term and in a period of not less than 12 months.

"If the lease term goes for three years, you can amortise the cost of the lease of the rental deferral over that three-year period, after the end of the pandemic period.

But if the lease only has another six months to run, the tenant would have a minimum of 12 months after the pandemic period in order to catch up on the deferrals of the rental payments" Mr Morrison said.

Mr Morrison has also indicated that he expects the banks to "come to the table" and provide support to landlords.

Primary concepts of the code of conduct

The eligibility is linked to the tenant being eligible for the JobKeeper assistance and being a small or medium-sized enterprise (less than $50 million turnover per annum).

The general principles are:

- If the tenant can pay the rent, the rent needs to be paid.
- Where the tenant is under financial distress, the tenant and landlord should negotiate a mutually agreed outcome.
- The rent reductions should be based proportionately on the decline in the turnover of the tenant.
- There will be a prohibition on:
  - terminating the lease for non-payment of rent;
  - penalties for tenants who stop trading or reduce opening hours;
  - landlords passing land tax on to the tenant; and
  - landlords charging interest on unpaid rent.
- There will be a freeze on rent increases.
- A landlord will be prevented from making a claim on a bank guarantee or security deposit provided by the tenant.

Self-managed superannuation funds

Whilst a lot is being said about commercial leases generally, the area that may have some concern is where your self-managed superannuation fund is the landlord for the premises from which you operate your business.

Apart from this recent development with the mandatory code of conduct, trustees of self-managed superannuation funds also need to consider the attitude of the ATO when your self-managed superannuation fund negotiates a deal with your business operating from the premises. We will provide further on this in a separate blog.

State land tax relief

The State Government is introducing a support package by way of land tax relief. The general terms are:

- If the lease is of property for use for business purposes,
- The tenant can demonstrate financial distress resulting from COVID 19 (similar to that for qualifying for the JobKeeper eligibility), and
- The landlord reduces the rent for the tenant by at least the same amount as the land tax reduction

then the landlord will qualify for a 25% reduction in land tax for the 2020 Land Tax year.

NSW Revenue is currently working on streamlining the application process but has yet to announce that process.

The New South Wales Government input

The government has passed emergency legislation entitling the Minister to recommend regulations relating to:

- eviction;
- termination of tenancy;
- enforcing of other rights of a landlord; and
- exempting a tenant from certain statutory provisions.

The emergency legislation generally permits the Minister to make the regulations under the *Retail Leases Act and the Residential Tenancies Act* (amongst various other Acts).

Commercial and industrial leases do not fall under those Acts but the emergency legislation also enables regulations under "any other Act relating to leasing of premises or land for commercial purposes".

The Government has yet to pass the legislation although it aims to do so shortly.

Watch this space

This is an ongoing area which is going to have significant effect for landlords and tenants. We will continue to update this article whenever new information comes to hand.

Document any agreement you come to between landlord and tenant

Even if mutual agreement can be reached between a landlord and tenant, it is very important that it be properly documented to avoid any misunderstanding later. For example, there is a lot of talk about a "rent holiday" - but does that mean there is no rent

payable during the holiday or is the rent deferred until after the holiday has ended?

Get help from a commercial lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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