



NSW regulations for commercial leases during COVID-19. Landlord and tenant obligations and rights.

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We previously wrote about [commercial leases and the Federal Government Code of Conduct, back in April 2020](#). Since that time, the NSW State Government has passed its legislation which supports the code for NSW lease transactions. This article will cover the primary concepts of the Code of Conduct, State land tax relief and the NSW Government legislation related to rent reduction and waivers, eviction, termination of tenancy and more.

We will continue to 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. [A copy of the Code is available here](#).

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. And the critical advice is that any changes to the lease arrangement need to be clearly documented and commercially reasonable.

State land tax relief

The State Government has introduced 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 for any period between 1 April 2020 and 30 September 2020 and the reduced rent is not required to be paid back later,

then the landlord may qualify for a reduction of up to 25% in land tax for the 2020 land tax year. The landlord can also obtain a deferral of payment.

[You can apply on-line to NSW Revenue here.](#)

The New South Wales Government input

The government has now passed regulations relating to:

- rent reduction;
- rent waivers;
- eviction;
- termination of a tenancy; and
- enforcing other rights of a landlord.

The regulations apply until October 2020.

There are various principles to be applied under the Code of Conduct

- No termination of lease for non-payment of rent during the pandemic;
- Tenants must remain committed to the lease generally;
- Landlords must offer tenant's proportionate reductions in rent in the form of waivers and/or deferrals, having regard to reduction in the tenant's trade during the pandemic;
- Rental waivers must constitute no less than 50% of total rent reduction and should be a greater proportion in cases where failure to do so would compromise the tenant's capacity to fulfil their lease obligations;
- Payment of rental deferral by the tenant must be amortised over the balance of the lease term or no less than 24 months, whichever is the greater;
- Any reduction in charges, such as land tax and council rates or insurance, are to be passed on to the tenant in an appropriate proportion;
- A landlord should seek to share any benefit it receives by way of deferral of loan payments with the tenant;
- Landlords should seek to waive recovery of other expenses payable by the tenant during the period the tenant is not able to trade;
- Any arrangements necessitating repayment at a later date should occur over an extended period to avoid placing undue financial burden on the tenant;
- No fees, interest or other charges should be applied to any rental waivers or deferrals;
- The landlord must not draw on the bond or bank guarantee during the pandemic;
- The tenant should be provided an opportunity to extend the lease for a period equivalent to the rent waiver and/or deferral; and
- Rent increases are to be frozen during the period of the pandemic.

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 is that a rent waiver (and not later recoverable) or a deferral (for payment at a later time)?

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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