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Commercial Tenancy Code

On Tuesday 7 April the National Cabinet has agreed on a mandatory commercial tenancy code for any business who has a turnover of \$50 million or less and who is also eligible for the JobKeeper program. Under the code Landlords are prohibited from terminating leases or calling on the tenant's security.

The scheme will implement a combination of **rental waivers** and **rental deferrals** for commercial tenants. Landlords will be required to reduce leases in proportion to the reduction in the Tenant's business revenue.

The waiver is the reduction in the rent payable and has to be a minimum of 50% of the percentage decline in the revenue of the business. This does not have to be repaid.

The deferral, that is the rental payments that will need to be made at a later date, must be spread over the remaining time on the Lease or a minimum of twenty-four months, whichever is the greater at the end of the pandemic.

If a tenant has less than twenty-four months on the Lease, for example three months, they would still have at least two years to make any deferred rent payment.

There will be a binding Mediation Amendment code rolled out in each State and Territory to deal with any disagreements.

Let's give three examples of how this code may apply keeping in mind that legislation specific to NSW is yet to be signed into effect.

Example 1

Johnny runs a fruit and vegetable shop at a large shopping centre. He has seen a decline in trade due to the lessening numbers of people attending the shopping centre. The decline has been approximately 20%.

Johnny is not eligible for JobKeeper but would like to talk to his Landlord about a reduction in rent.

In Johnny's case the code would not be applicable to him and any negotiation will need to be done directly with the Landlord and subject to the existing Lease.

Address

208, 16 Wurrook Circuit,
Caringbah NSW 2229

P.O Box 2475
Taren Point NSW 2229

Contact

andrew@courtaaccounting.com.au

+61 (02) 9524 1538

0418 478 789





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Example 2

Marky Mark runs a gym. Marky Mark has had to shut his gym due to the Coronavirus crisis.

Marky Mark has started offering online programs which means his revenue has not decreased by 100% but has decreased by 70%. Marky Mark pays \$10,000 a month in rent for his gym.

Under the code, Marky Mark will be entitled to pay the Landlord \$3,000 per month during the “hibernation” period. Once the “hibernation” period has ended, Marky Mark will be required to pay back the deferred amount i.e. 50% of the reduction to the Landlord over a period of no less than twenty-four months. In Marky Mark’s case this being \$3,500.

Example 3

Anna runs a childcare centre. Anna’s revenue has dropped by 50% due to the Coronavirus crisis.

Anna is entitled during the period of “hibernation” to pay her Landlord only 50% of the rent.

Anna currently pays \$20,000 per month and is therefore only required to pay \$10,000 per month during the hibernation period.

After the hibernation has ended, Anna will be required to pay \$5,000 per month that was deferred over a period of not less than twenty-four months.

As an example, if the hibernation period goes for six months, her waived rent would be \$30,000, her deferred amount would also be \$30,000. Upon resumption of normal trade she may repay her rent as follows:

- \$20,000 per month plus the deferred amount over a period of twenty-four months being \$1,250 per month, so that she pays \$21,250 per month.

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To conclude

In relation to all the above examples we believe it is imperative that any agreement reached be in writing and signed by both parties so that all parties have a document to rely on in the future.

Our recommendation is that this is done by way of a Deed of Amendment to the Lease or an Agreement to Vary the Lease.

We advise you to discuss these options with your solicitor or property manager.

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