

A small green plus sign icon with a white outline, positioned to the left of the main title.

COVID-19 National Cabinet Mandatory Code of Conduct (Commercial and Retail Leases) - Bulletin 1

Hicksons Property, Planning & Construction Team

16 April 2020



COVID-19 National Cabinet Mandatory Code of Conduct (Commercial and Retail Leases) - Bulletin 1



The bulletin covers the following:

- [Legal Enforceability of the Code](#)
- [Tenancies to which the Code applies](#)
- Leasing principles as governed by the Code as at 7 April 2020
 - [Rent Reduction](#)
 - [Rental Increases](#)
 - [Outgoings \(Council rates, water, land tax\)](#)
 - [Non-payment of rent](#)
 - [Breaches of other lease terms](#)
 - [Exercise of Options and extension of Lease Term](#)
 - [Lessor's Mortgage repayments](#)
 - [Disputes](#)
 - [Other issues](#)
 - [Foreign Investment Review Board \(FIRB\) Rules](#)
- [Disclaimer](#)
- [About Hicksons](#)
- [Hicksons Strategic Vision](#)
- [Key Contacts](#)



COVID-19 National Cabinet Mandatory Code of Conduct (Commercial and Retail Leases) - Bulletin 1



We all know, the recent spread of COVID-19 in Australia has brought unprecedented and complex challenges to commercial and retail Landlords. This rapidly evolving crisis has caused considerable stress to Landlords, particularly with regards to corresponding with and responding to tenants in financial hardship due to the crisis, as well as dealing with their own financial considerations.

Accordingly, we have prepared this bulletin comparing Landlords' leasing obligations before the crisis with them under the National Cabinet Mandatory Code of Conduct ("**the Code**") published on 7 April 2020. This information is not to be taken as legal advice. As clarification evolves, we will issue further bulletins. We invite our clients to feel welcome to share our bulletins if that will help someone navigate the changes as they happen.

Legal Enforceability of the Code

We note that the Code will be given legal effect in NSW by yet-to-be-passed regulation. We will further update you when regulations are passed. Nevertheless, these Codes should be taken as guiding principles by a landlord assessing what they may and may not do with regards to Tenants.

We further note that the provisions of the Code are intended to apply for as long as the JobKeeper programme is operational, for the duration of the crisis, as well as during a reasonable period of recovery post-crisis ("**the COVID-19 period**").

Generally speaking, the Code sets out a common-sense approach. It asks all parties to approach leasing negotiations in good faith, to act in an open, honest and collaborative manner to ensure business continuity during this difficult time. The Code recognises that parties should be afforded some flexibility so that the arrangements will appropriately reflect the nature of the premises and the impact of COVID-19 on the tenant's business and turnover.

Tenancies to which the Code applies

It is important to note that the Code only applies to Tenants who operate an eligible business for the purpose of the Commonwealth Government's JobKeeper programme, being Tenants with annual turnover up to \$50 million. The 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.



Leasing principles as governed by the Code as at 7 April 2020

The Code sets out the following Leasing Principles:

| # | Issue | Pre-COVID-19 | The Code (as of 7 April 2020) |
|----|-------------------------|---|---|
| 1. | Rent Reduction | By negotiation between parties, but no obligation to give any rent reduction unless required under terms of lease or related agreement such as an incentive deed. | <ul style="list-style-type: none"> Landlords must offer Tenants rent reductions in the form of a waiver (release Tenants of obligation to pay rent) or deferral (delay obligation to pay rent) of up to 100% of rent payable during COVID-19 period. This is to be based on the reduction in the Tenants' trade during the COVID-19 period. Rent waivers must constitute no less than 50% of the rent reduced under the arrangement referred to above. However, the Tenants may agree to a smaller proportion than 50% waiver. Nevertheless, the parties in negotiating should also have regard to the Landlords' financial capacity to waive rent. The repayment of the deferred rent by the Tenants must be amortised over the longer of the following periods: <ul style="list-style-type: none"> - end of the term of the lease; or - 24 months from the deferral unless otherwise agreed by the parties. No fees, interest or other charges should be applied with respect to rent waived above and no fees, charges nor punitive interest may be charged on deferrals above. |
| 2. | Rental Increases | By method and frequency prescribed by terms of the lease. | Landlords to agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 period, notwithstanding any arrangements between the Landlords and the Tenants. |



Leasing principles as governed by the Code as at 7 April 2020

| # | Issue | Pre-COVID-19 | The Code (as of 7 April 2020) |
|----|---|---|---|
| 3. | Outgoings (Council rates, water, land tax) | Tenants must reimburse Landlords for all rates and taxes if required under the terms of the lease. | <ul style="list-style-type: none"> Any reduction in statutory charges (e.g. land tax, council rates) or insurance to be passed on to the Tenants in the appropriate proportion applicable under the terms of the lease. Landlords should where appropriate seek to waive recovery of any other expense (or outgoing payable) by a Tenant, under lease terms, during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances. |
| 4. | Non-payment of rent | <p>Landlords may draw on bank guarantee or other security held by Landlords to pay for arrears of rent.</p> <p>Landlords may evict Tenants after issuing sufficient default notice.</p> | <ul style="list-style-type: none"> Landlords must not draw on a tenant's security for the non-payment of rent (be this a cash bond, bank guarantee or personal guarantee) during the COVID-19 period. Landlord may not terminate lease due to non-payment of rent during COVID-19 period. |
| 5. | Breaches of other lease terms | The Tenant must abide by the terms of the lease. | <p>The Code does not modify the Tenants' non-rent related obligations under the lease, particularly substantive terms such as the requirement that the Tenants use the premises for the permitted use only.</p> <p>The Code does not protect a Tenant for breaches of substantive terms of the lease.</p> |



Leasing principles as governed by the Code as at 7 April 2020

| # | Issue | Pre-COVID-19 | The Code (as of 7 April 2020) |
|----|--|--|---|
| 6. | Exercise of Options and extension of Lease Term | <p>If a Tenant has not exercised the Option strictly according to the lease terms, the right to exercise the Option lapses.</p> <p>Any other extension of the lease term is to be by agreement between the parties.</p> | <p>The Tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period.</p> |
| 7. | Lessor's Mortgage repayments | | <p>A Landlord should seek to share any benefit it receives due to deferral of loan payments with the Tenant "in a proportionate manner".</p> |
| 8. | Disputes | <p>The usual dispute resolution methods apply including mediation and civil litigation.</p> | <p>Where Landlords and Tenants cannot reach agreement on leasing arrangements as a result of COVID-19, the matter should be referred and subjected to a commercial binding leasing dispute resolution process.</p> |
| 9. | Other issues | <p>Trading Hours</p> <ul style="list-style-type: none">• Tenants must trade all hours prescribed to trade for under the terms of the lease. <p>Other repayments by Tenants to Landlords</p> <ul style="list-style-type: none">• Repayments should be made to the Landlords within the time prescribed under the terms of the lease or as otherwise agreed. | <p>Trading Hours</p> <ul style="list-style-type: none">• Landlords may not apply any prohibition or levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 period. <p>Other repayments by the Tenants to Landlords</p> <ul style="list-style-type: none">• No repayment should commence until the earlier of the COVID-19 period ending or the existing lease expiring. |



Leasing principles as governed by the Code as at 7 April 2020

| # | Issue | Pre-COVID-19 | The Code (as of 7 April 2020) |
|-----|---|---|--|
| 10. | Foreign Investment Review Board (FIRB) Rules | Foreign Tenants had to get approval from FIRB before entering into lease agreements if the term would be five years or more and the rent over the course of the lease would be \$275 million or more. | As of 29 March 2020, Foreign Tenants are now required to get approval from FIRB for entering into any lease agreement with a term of five years or more, regardless of the rent to be paid over the course of the lease. |

Disclaimer

The above information is general in nature and not to be relied on as legal advice. It is not intended to be an exhaustive list of all legal issues that may be relevant to businesses arising because of the COVID-19 pandemic. The information is current as at **7 April 2020**, but may change with the rapidly developing events.

As we stated above, the Code will be given legal effect by the regulations which are still yet to be made by NSW as of 7 April 2020. We will keep you updated of any developments.

About Hicksons

Hicksons is a commercial law firm that helps government, organisations and individuals throughout Australia and in Asia create sustainable value by delivering legal and commercial advice, services and solutions.

Hicksons Strategic Vision

By 2025, we will be regarded by our clients and our people as leaders for the provision of legal and business advisory services. As leaders, we will be an attractive workplace where high performers choose us over our competitors because they know we will be respected and rewarded for their efforts, and provided with opportunities to grow, enabling them to achieve their career ambitions.

Key Contacts

Please do not hesitate to contact Anne Sandeman or Siew Tong if you have any questions on the above or any legal issues that have arisen due to the crisis.

Stay safe and healthy.



Anne Sandeman

Partner

P +61 2 9293 5418

E Anne.Sandeman@hicksons.com.au



Siew Tong

Partner

P +61 2 9293 5458

E Siew.KengTong@hicksons.com.au

“Hicksons have proven themselves to be highly dependable and responsive on a range of property matters, including highly complex matters. Their ability to turnaround work quickly without compromising quality, while meeting agreed budgets and keeping us informed throughout the process contributes to the efficiency of the Department’s property transactions.”

Roger Millot, Manager Property, NSWDoE



SYDNEY

T +61 2 9293 5311 F +61 2 9264 4790

One International Towers Sydney
Level 24, 100 Barangaroo Avenue
Barangaroo NSW 2000 / DX 309 Sydney

NEWCASTLE

T +61 2 4907 5600 F +61 2 4907 5633

Level 1, 31 Darby Street
Newcastle NSW 2300 / DX 7809 Newcastle

CANBERRA

T +61 2 6243 3644 F +61 2 9264 4790

Level 9, 2 Phillip Law Street
Canberra ACT 2601

MELBOURNE

T +61 3 9607 8212 F +61 2 9264 4790

Level 40, 140 William Street
Melbourne VIC 3000

BRISBANE

T +61 7 3181 4368 F +61 2 9264 4790

Level 27, Santos Place, 32 Turbot Street
Brisbane QLD 4000

www.hicksons.com.au

Liability limited by a Scheme approved under Professional Standards Legislation