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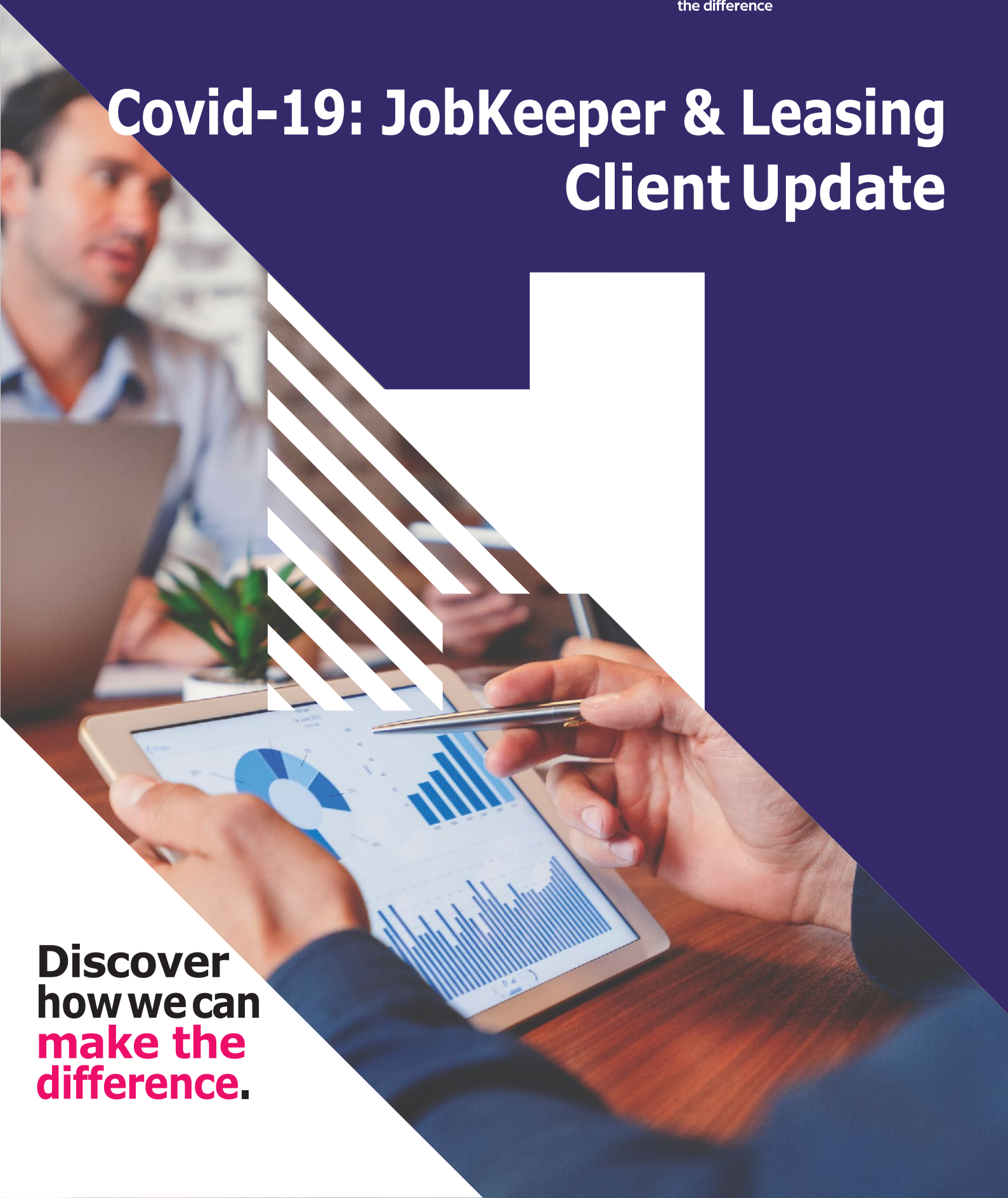
Covid-19: JobKeeper & Leasing Client Update



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There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know" - US Secretary of State Donald Rumsfield

Clearly, we are in uncertain and unprecedented times.

In this Client update we cover the more recent COVID-19 support packages for Business including:

- JobKeeper payments;
- JobKeeper – industrial relations changes and
- Leasing code of conduct for commercial tenancies.

This information is current as at Saturday 10 April 2020.

These issues are complex and the next steps will be heavily dependent on your circumstances. Please contact us at Newton & Henry Pty Ltd to discuss the implications. Our contact details are included on page 17 below.

JobKeeper payments

The Legislation to introduce the $130 Billion JobKeeper wage subsidy scheme to operate for the next six months was introduced to Parliament on Wednesday 8 April 2020. However, the Legislation merely creates the framework for the JobKeeper scheme, with the specific rules to be prescribed by the Treasurer and The Commissioner of Taxation.

The first tranche of these Rules, which largely mirror the earlier Fact Sheets on the Treasurer's website, was released over the Easter Break. No doubt refinements will follow.

Whilst there are some nuances in these Rules as they apply to entities that are part of a group which has aggregated turnover in excess of $1 billion and to not-for-profit entities, we have contained our comments below to for-profit business entities with turnover under $1 billion.

Eligible Employers

The starting point for considering if JobKeeper benefits will flow is the profile of the employer and whether the employer has suffered a turnover downturn of at least 30% as result of COVID-19.

Several considerations arise in the application of this test:

- The test is conducted at an 'entity' is level. Some of the earlier literature referred to a 'business' having a turnover decline of 30% or more, the Rules make it quite clear that it is the turnover of the 'entity' that needs to be tested.

  On this basis, some entities within larger groups may qualify as eligible employers whereas others may not. However, if an entity has two distinct business lines, the test is conducted in aggregate rather than being applied to each separate business.

- The turnover decline needs to be present in connection with any 'jobkeeper fortnight'. The 'jobkeeper fortnight' commences on 30 March 2020 and ends on 13 April 2020. Each separate subsequent fortnightly period represents an individual 'jobkeeper fortnight'. This means that:

    - An entity that does not initially qualify for the decline in turnover test, may subsequently benefit from the JobKeeper arrangements if it later satisfies the test at the end of later fortnight. However, in this instance, the benefit will only be available on a prospective basis.

    - Once a business qualifies for the job keeper payment, its qualification is deemed to continue to the end of the scheme. That is, whilst there are reporting obligations to the Commissioner for Taxation for those participating the scheme, and these reporting obligation will include information on turnover, provided that the original turnover downturn was correctly calculated, subsequent changes in turnover will not remove the business from the scheme.

- More generally, turnover will be tested by reference to the Business Activity Statement lodged for a month ending 31st March 2020 or later, or a quarter commencing on or after 1 April 2020, compared to that reported for the same period last year.

- Businesses can predict the turnover for such periods where it is not yet known (ie. for the April to June 2020 quarter). It is not expected that penalties will be applied where there has been a bona fide attempt to calculate such turnover and it subsequently transpires that there was no entitlement. We presume, however, that future entitlements would be lost and there is a risk of there being a requirement to repay amount received, along with the general interest charge, which employers would not be able to recover from their employees.

- The above calculations are clearly complicated where entities are part of the GST group or lodge their GST return annually. The fact sheets previously released by Treasury indicated that this would be a matter for consideration, however no guidance has yet been provided.

- The Commissioner for Taxation will have a discretion to allow entities to qualify for JobKeeper where there is no relevant comparison to the prior year. Examples of this may be businesses that did not operate at this time last year and/or businesses where other factors would mean that a prior year comparison does not give a true reflection of the impact of the COVID-19 downturn.

The other key requirements are:

- the entity needs to have been carrying on a business as at 1 March 2020;
- the entity has registered for the JobKeeper scheme before the end of the JobKeeper fortnight (or by 30 April 2020 if later). Registration can be found at the link below. Online application processes are expected to follow the initial registration: https://www.ato.gov.au/Job-keeper-payment/
- The employer has advised employees, and collected agreement from them, that they are participating in the JobKeeper scheme.

Eligible employees

An employer is only entitled to a JobKeeper payment for a person for a fortnight if the person is an Eligible Employee. This reflects that the payment is a wage subsidy and is intended to help employers to continue paying their employees during this period of downturn.

An Eligible Employee of an employer for a JobKeeper fortnight is a person who satisfies the following requirements:

- On 1 March 2020:
  - the person was aged 16 years or over;
  - the person was an employee other than a casual employee of the employer, or was a long term casual employee of the employer; and the person was an Australian resident (within the meaning of section 7 of the Social Security Act 1991), or was a resident of Australia for the purposes of the Income Tax Assessment Act 1936 and was the holder of a Subclass 444 (Special Category) visa.
- At any time during the fortnight:
  - the person is an employee of the employer. Employees who resign or are terminated are no longer employees who will benefit from the scheme.
  - the person is not excluded from being an eligible employee. The exclusions relate to recipients of parental leave pay and dad and partner pay under the Paid Parental Leave Act 2010, and specified recipients of workers' compensation. Employees on employer funded parental lead can still be eligible employees.

- The employees have provided a notice to their employer agreeing:
    - to be nominated by the employer as an eligible employee under the JobKeeper scheme as the employer with which the employee will participate in the JobKeeper scheme;
    - that they confirm they have not agreed to be nominated by another employer; and
    - that they do not have permanent employment with another employer if they are employed as a casual employee with this employer.

The Rules provide some flexibility in regards to the 1 March 2020 employment date for any changes in ownership of a business and movement of employees within the same wholly-owned group, This should mean that employees are not disadvantaged if these events, which are ordinarily beyond their control, occur.

Employees are paid a minimum wage

Underpinning the Policy settings of JobKeeper is that it should provide a minimum wage of $1,500 per fortnight.

Where employees receive more than this wage in any fortnight, the employer, subject to other conditions being met, is entitled to be reimbursed $1,500 per fortnight for such employees. It is important to note that the JobKeeper program does not allow employers to pay less than the relevant award or industrial agreement rate for the work actually undertaken, even if this is more than $1,500 per fortnight.

However, if eligible employees receive less than $1,500 in a fortnight then the employer will not receive anything from the JobKeeper program in respect of that employee for that fortnight.

It therefore follows, that in order to receive an entitlement, employers must ensure that each employee is paid the minimum of $1,500 per fortnight.

The first fortnight ended on 12 April 2020.

Self-employed and shareholders, partners and beneficiaries

On a very limited basis, the JobKeeper concessions are extended to self-employed persons and to shareholders, partners and beneficiaries who are remunerated for their labour by way of dividends and distributions.

The main additional limitation in this regard is that regardless of the size of the relevant entity, the JobKeeper benefit can only be claimed in respect of only one nominated shareholder, partner or beneficiary.

Other practical implications

On initial consideration of the Rules and supporting Legislation, we make the following observations as to other practical considerations:

- Payments made to employees that may be subject to JobKeeper reimbursement do not change their nature in regards to PAYG withholding obligations. Therefore, all payments made to employees including any top up in order to bring the employee to JobKeeper minimum, is subject to normal PAYG.

- The $1,500 minimum can be satisfied by pre-existing salary packaging components.

- Superannuation will continue to apply to all payments made to employees. The only exception being that no SGC liability will arise if superannuation is not paid in connection with any 'top up" payment to bring an employee's minimum wage to $1,500 per fortnight.

- The Rules do not contemplate arrangements where labour is provided other than by employees (except for the above comment in regards to self-employed, partnerships etc) of the entity.

  Therefore, it seems that labour acquired via labour hire agreements, be they external with a third party labour hire company or internal agreements within the corporate group, would seem to put the employees outside of the JobKeeper payment at least in connection with the labour user. Whether or not the labour hire entity itself qualifies for job keeper would depend upon its own turnover position.

- There are extensive anti-avoidance mechanisms within the legislation that enables recovery of any overpaid job keeper amounts from the employer, and in some instances also from the employee if they are complicit in the relevant action.

- There are important cash flow implications to be considered. It is not anticipated that the first JobKeeper payment will flow to employers until early May 2020. After this, payments will flow monthly within 14 days of the end of the relevant month.

- The Commissioner for Taxation is entitled to apply the JobKeeper payment against the entity's running balance account, and therefore it could be absorbed against other taxation obligations of the employer.

Industrial relations changes

The Fair Work Act 2009 (FWA) was amended to support the implementation of the JobKeeper wage subsidy scheme.

The amendments apply to employers who have qualified for the JobKeeper scheme (Eligible Employer) and their Eligible Employees. Once an employer has qualified for the JobKeeper scheme, the new provisions enable:

- employers to make temporary and partial stand downs in certain circumstances;
- employers to temporarily alter employees' usual duties and locations of work in certain circumstances; and
- employers and employees to agree on altering an employee's days and times of work and use of annual leave in certain circumstances

These rights and obligations will allow greater flexibility by enhancing an Eligible Employer's ability to unilaterally change certain working arrangements of Eligible Employees.

All JobKeeper amendments to the FWA will apply until 28 September 2020. The existing rights and obligations under the FWA continue to apply to employers and employees who do not qualify for the JobKeeper scheme. The following is a summary of the changes to the FWA in relation to the JobKeeper scheme.

JobKeeper enabling stand downs

An Eligible Employer will be entitled to issue a '*JobKeeper enabling stand down direction'* to Eligible Employees during a period to:

- Not work on days on which the employee would usually work;
- Work fewer hours on days that the employee would usually work; or
- Work overall a reduced number of hours (including not work at all).

A number of specific requirements apply for these stand downs, including that the Eligible Employee cannot be usefully employed for their normal days or hours of work because of changes to business attributable to the COVID-19 pandemic or the Government initiatives regarding COVID-19 (such as an enforceable government direction).

A JobKeeper enabling stand down direction must be in writing. Employers also need to:

- make sure the direction is reasonable in the circumstances, including considering the employee's caring responsibilities;
- notify their employees and consult their employees or their representatives at least 3 days before issuing the direction unless the employee agrees to a shorter timeframe; and
- keep a written record of the consultation.

During a JobKeeper enabling stand down period, an Eligible Employer will also be required to meet an 'hourly rate of pay guaranteee' by paying at least the same hourly rate that the Eligible Employee would have received, on a pro rata basis.

The right to issue a JobKeeper enabling stand down direction is separate to the existing stand down right in the FWA, and will apply in a broader range of circumstances. If an Eligible Employer does reduce an Eligible Employee's hours, it will need to monitor that the employee continues to receive their normal rate of pay on a pro-rata basis.

Direction to change usual duties or work location

An Eligible Employer can direct an employee to change their duties and work location. This includes working from home or from a different location. These directions are also referred to as 'JobKeeper enabling directions'. Employers need to make sure:

- the direction is reasonable, including considering the employee's caring responsibilities;
- the modified duties are within the employee's skill and competency, and the employee has the required licences or qualifications;
- the duties are safe considering the nature and spread of coronavirus;
- the duties are reasonably within scope of the business's operations; and
- any new location is within a reasonable travelling distance.

As with other actions under these changes, any direction must be in writing and employers must notify their employees and consult with them or their representatives at least 3 days before issuing the direction, unless the employee agrees to a shorter timeframe. They also need to keep a written record of the consultation.

An employee's hourly base pay rate cannot be reduced as a result of a JobKeeper enabling direction.

Eligible Employers will need to monitor any potential change in coverage to ensure that they do not inadvertently trigger an underpayment of wages when different duties are performed, given the hourly rate of pay guarantee.

Agreement to work different days and times

The new provisions enable Eligible Employers and Eligible Employees to agree for the employee to perform their usual duties on different days or times than usual. Employers need to make sure that:

- performance of the duties on different days or at different times is safe considering the nature and spread of COVID-19, and is reasonably within scope of employer's business operations; and

- the employee's usual work hours aren't reduced, as reducing work hours would require a JobKeeper enabling stand down direction.

An Eligible Employee must not unreasonably refuse such a request.

Agreement to take annual leave

The new provisions enable:

- an Eligible Employer to request that an Eligible Employee take paid annual leave, providing they keep a balance of at least 2 weeks; and

- an Eligible Employer and an Eligible Employee to agree to the employee taking annual leave at half their usual pay rate.

Employees on annual leave continue to accrue leave and their service continues for the purposes of redundancy and pay in lieu of notice.

An Eligible Employee must not unreasonably refuse such a request.

Interaction with minimum entitlements

These new provisions don't reduce minimum pay rates and other monetary entitlements under the FWA, award or enterprise agreement in relation to work that continues to be performed.

This means that:

- if an employer partially stands down an employee, the employee needs to be paid their correct base pay rate for the work they're still performing; and

- if an employer changes an employee's duties, the employer must pay the employee the higher of:
    - the base pay rate that applies to their previous duties, or
    - the base pay rate that applies to the new duties the employee is performing

Disputes

The Fair Work Commission (the Commission) has the power to hear disputes and make orders about the new JobKeeper provisions under the FWA. Employees, employers, employee and employer organisations, can apply to the Commission to deal with a dispute.

The Fair Work Ombudsman can enforce provisions relating to the JobKeeper scheme that are about ensuring minimum wages and conditions.

Commercial leasing principles during COVID-19

The committee of National Cabinet have now released a set of commercial principles dealing with commercial leasing during the COVID-19 pandemic in order to create an environment in which the financial risk and cashflow impact during the COVID-19 period is shared between landlords and tenants.

These principles are subject to the passage of legislation within each State.

The principles are based upon ensuring that landlords and tenants act in good faith and generally apply to entities where the tenant has an annual turnover of up to $50 million. This turnover is assessed at the franchisee level for franchises, however at the group level for conglomerate groups.

Whilst the commercial principles are reasonably clear, and in the event of a dispute the Code established clear arbitration rights, the parties are still free to make an alternative commercial arrangement to this formula if that is their wish.

Leasing principles

In negotiating and enacting appropriate temporary arrangements under the Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

- Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period);
- Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant;
- Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the COVID-19 pandemic period and a subsequent reasonable recovery period.

Such rental waivers must constitute:

- no less than 50% of the total reduction by way of reduced rent, not to be recovered subsequently; and
- payment of the balance by way of rental deferrals by the tenant to be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater;

- Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease;
- A landlord should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers Association's COVID-19 response, or any other case-by-case deferral of loan repayments offered to other Landlords, with the tenant in a proportionate manner;
- 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;
- If negotiated arrangements under the Code necessitate repayment, this should occur over an extended period in order to avoid placing an undue financial burden on the tenant. No repayment should commence until the earlier of the COVID-19 pandemic ending (as defined by the Australian Government) or the existing lease expiring, and considering a reasonable subsequent recovery period;
- No fees, interest or other charges should be applied with respect to rent waived and no fees, charges nor punitive interest may be charged on deferrals;
- 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 period of the COVID-19 pandemic and/or a reasonable subsequent recovery period;
- The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period. This is intended to provide the tenant additional time to trade, on existing lease terms, during the recovery period after the COVID-19 pandemic concludes;
- Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant; and

- Landlords may not apply any prohibition or levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

Financial stress and hardship

A precondition of the application of these rules is that the tenant is subject to stress or hardship arising from their inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments.

Tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress.

Proportionality

The Code is based on a notion of "Proportionality" – that is, a sharing of the cost of the COVID-19 downturn between the tenant and the landlord.

The National Cabinet document has the following example of practical variations reflecting the application of the principle of proportionality:

> "*Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis:*
>
> *ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.*
>
> *At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.*
>
> *Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties*
>
> *So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.*
>
> *Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis*"

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