8 May 2020

The Hon Vickie Chapman MP
Attorney-General
GPO Box 464
ADELAIDE SA  5001

By email: agd@agd.sa.gov.au

Dear Ms Attorney

The National Cabinet Mandatory Code of Conduct “SME Commercial Leasing Principles during COVID-19” and “COVID-19 Emergency Response Act” and related declarations


2. The Society notes the purpose of the Code is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government’s JobKeeper programme.

3. While the Society understands a number of measures have been introduced under the COVID-19 Emergency Response Act 2020 (“the Act”) it considers that the current measures do not make any provision for rent relief to a tenant who is suffering financial hardship due to the COVID-19 pandemic. Similarly, there is no direction given for relief from the obligation to make payment of outgoings.

4. The Society is seeking urgent consideration by the Government to introduce such provisions into South Australian law, together with the underlying principles envisaged by the Code. The Society provides further comment below as informed by its Property Committee.

Measures currently in place in SA

5. The Society notes the Act was introduced to make various temporary modifications of the law of the State in response to the COVID-19 pandemic. The Act makes a number of amendments to commercial leasing arrangements to deal with hardship issues arising from the COVID-19 pandemic.

6. Section 7(3) of the Act provides where a tenant under a commercial lease is suffering financial hardship as a result of the COVID-19 pandemic a landlord cannot during the prescribed period
take action for breach of a lease where there is a failure to pay rent, a failure to pay outgoings, or other identified breaches. Similarly, under Section 7(16) a landlord cannot evict a tenant, terminate the lease or take any other action for breach of the lease or make a claim upon a security bond or supporting personal guarantee.

7. Section 7(5) of the Act stipulates during the prescribed period a landlord cannot increase the rent where the tenant is suffering financial hardship as a result of the COVID-19 pandemic. The Act also provides that Small Business Commissioner (SBC) can mediate upon a dispute as to whether a lessee is suffering financial hardship as a result of the COVID-19 pandemic, and can also be asked to make a determination upon this.²

8. In addition, the COVID-19 Emergency (Commercial Leases) Regulations 2020 (“the Regulations”), made under the Act, provide some guidance as to when a lessee is considered to be suffering financial hardship due to the COVID-19 pandemic (see Regulation 4). This can be established where, for example, the lessee is eligible for or is in receipt of the Commonwealth Government JobKeeper allowance.

9. However, as noted above, neither the Act nor the Regulations make any provision for, or give direction for rent relief to a tenant who is suffering financial hardship due to the COVID-19 pandemic. Also, there is no direction given for relief from the obligation to make payment of outgoings. The Society notes the Code is intended to come into effect in all States and Territories after 3 April 2020, and for this to operate for the period during which the Commonwealth JobKeeper program remains operational. While, it is stated that it is for each individual jurisdiction to adopt the Code, including the extent to which it will do so, the Society strongly suggests that the code is adopted in South Australia.

Adoption of the Code in SA

10. The Society understands that many landlords and tenants have addressed the issue of hardship brought about by the various impacts of the response to the COVID-19 pandemic, and have made arrangements to document the outcome of their discussions.

11. However, the Society is also informed by Members of its Property Committee, that many legal practitioners have encountered situations in which the parties will not negotiate other than upon a chosen position (including landlord refusals to give any relief and tenants demanding a full waiver of rent) or simply, cannot agree upon an acceptable outcome, no matter how hard they negotiate. This results in frustration not only for the parties, but also their legal and other advisors.

12. It is noted the Code, amongst other principles, requires:

   12.1 landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals 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;

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² See section 7(8) of the COVID-19 Emergency Response Act 2020 (SA)
12.2 the rental waivers must constitute not less than 50% of the total reduction in rent payable over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable where a failure to allow this will compromise the tenant’s capacity to fulfil the ongoing obligations under the lease agreement;

12.3 the parties are required to have regard to the landlord’s financial ability to provide additional waiver to the 50% requirement;

12.4 nevertheless, a tenant can waive the requirement for a 50% minimum waiver by agreement (presumably in writing);

12.5 the rent deferred (as distinct to the portion waived) must be amortised over the balance of the lease term or a period of not less than 24 months, whichever is greater (however, the parties can agree otherwise, and again the Society suggests this must be in writing);

12.6 a reduction in statutory charges (e.g. land tax – and the Society acknowledges the Government has already indicated legislation in this regard will be introduced – and Council rates) or insurance costs will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease;

12.7 where negotiated arrangements (in accordance with the Code) necessitate repayment this should occur over an extended period in order to avoid placing an undue financial burden on the tenant, with no repayment to commence until the earlier of the COVID-19 pandemic ending or the existing lease expiring, and in addition, taking into account a reasonable subsequent recovery period;

12.8 no fees, interest or other charges should be applied with respect to rent waived nor should fees, charges or punitive interest be charged on deferrals;

12.9 landlords must not claim on a tenant’s security for the non-payment of rent whether this be a cash bond, bank guarantee or personal guarantee during the period of the COVID-19 pandemic and a reasonable subsequent recovery period (the Society notes Section 7(16) of the Response Act makes mention of security bonds and personal guarantees, but it is felt this needs to be more expansive so as to also prohibit calls on “bank guarantees”);

12.10 the tenant should be provided with an opportunity to extend the lease for an equivalent period of the rent waiver and/or deferral period so as to allow an additional time to trade on existing lease terms, during the recovery period after the COVID-19 pandemic concludes;

12.11 tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under the Code – a material failure to abide by substantive terms of lease will forfeit any protections provided to the tenant under the Mandatory Code.

13. The Society notes the provisions of the Code noted above are not exhaustive, and further acknowledges that some principles set out in the Code have already been adopted in the Act.
Clear direction required in SA

14. In general, the stipulations in the Code which provide for monetary relief, are not part of South Australian Law. This adds to the stress and risk for tenants who already suffer financial hardship in consequence of the COVID-19 pandemic and are not able to conclude an arrangement for relief.

15. The Society also considers the parties to a commercial lease will be assisted by clear direction upon:

15.1 the need to enter into a written record where the landlord and tenant extend the lease to enable a recovery period, whether this be by mutual agreement or by application of the minimum terms of the Mandatory Code;

15.2 where there is a variation of the term of lease as aforesaid, a clear direction whether the landlord in a lease regulated by the *Retail and Commercial Leases Act 1995* must or must not serve a Section 12 Disclosure Statement (the Law Society recommends the landlord not be burdened by this requirement given the purpose of such a statement is to make known to the tenant the essential financial elements of a lease whereas the negotiation which results in the relief is essentially upon such matters such that there will be no failure to disclose a misstatement such as to cause prejudice to the tenant as referred to in the case of Farooqi and *Farooqi v Mazzochetti and Mazzocchetti* [1998] SASC 6619);

15.3 a direction as to when it is that such relief is to apply, including a clear indication if this is to have retrospective application, and if so, as from when, given:

15.3.1 in South Australia the Act provides that Section 7 is to operate as from 30 March 2020;

15.3.2 the Code states the leasing and relief principles therein are to apply as from 3 April 2020;

15.3.3 any legislation or regulation to introduce the terms of the Mandatory Code will be assented or proclaimed subsequent to the aforesaid dates;

15.4 a direction where a tenant enters external administration a landlord not be prevented from making a call on a bank guarantee where there is no bar to doing so pursuant to the Corporations Act 2001 (Cth);

15.5 clarification that the relief also applies to underlease and sub-tenancy arrangements pursuant to the types of leases identified in Section 7(16) of the Response Act, and also, licence arrangements whether these be granted under a lease, tenancy, underlease or sub-tenancy arrangement.

16. Notwithstanding Parliament has provided for certain relief for lessees of commercial leases, this does not extend so far as to grant relief from the payment of rent and outgoings as suggested by the Code, nor the further clarifications outlined above.
17. Members have expressed to the Society their considerable frustration brought about due to the lack of binding directives and requirements where tenants suffering hardship as a result of the pandemic are unable to secure relief from their landlords. Further where discussions do commence, these often fail to achieve agreement by reason of one or both parties seeking to include an outcome which falls outside of the principles contained in the Code.

18. The Society considers the Code not only sets out principles and outcomes which are balanced and fair, but also, add certainty to what it is that tenants and landlords must work towards in order to agree an outcome consistent with the minimum leasing principles.

19. The Society further considers it is necessary to introduce into South Australian law the leasing principles and monetary relief (some of which are referred to above) contained in the Code with a requirement for the agreed outcome to be in writing, and where agreement cannot be concluded, the matter be referred for mediation and determination in the manner provided for in the Act and the Regulations.

The Society would be grateful for your urgent consideration of these matters and would be pleased to provide further advice as to the nature of the legislative amendments required.

Yours sincerely

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