



The Talking Law Podcast

Episode 105 – Tips in negotiating commercial leases under the new COVID-19 Mandatory Code of Conduct

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Transcript

Joanna: Hi, it's Joanna Oakey here and welcome back to Talking Law a podcast proudly brought to you by our commercial legal practice Aspect Legal. Now, today we have an episode for you that is very topical and current. It's all about tips in negotiating commercial leases under the new COVID mandatory Code of Conduct for commercial leases, and so this is particularly relevant right at the moment as the new mandatory Code of Conduct has now been legislated in each state and territory in Australia, and tenants who are dealing with landlords who haven't yet provided rent relief might find some tips in this episode quite useful. We also in this episode, cover tips for landlords as well. So this is really useful listening for both commercial tenants and landlords in order to understand how to deal with this new mandatory code of conduct for this COVID period. And in order to talk about this, we have onboard one of our fabulous lawyers from Aspect Legal, Jo Wright, so without further ado, here we go.

Joanna: Hi, Jo. Welcome on to the show today.

Jo Wright: Hi, how are you?

Joanna: Great. I am fabulous. It's really good to have you on the show. So, for our listeners, what we're doing today is we're just having a general discussion about negotiations under the mandatory code. What's the full name Jo? You're the one who's more across this than I am.

Jo Wright: Yeah. So it's the national cabinet management code of conduct and it relates to commercial leases.

Joanna: Yeah. And, and there's been, you know, generally speaking, a lot of information that has been released by numbers of law firms and by accountants and, you know, through the media as a whole about the code itself. And in fact, the the lead up to the code, and then we had the issue between the code coming out and then it being legislated in each state. So that was a bit of a hold up and really has only probably come through and I think it's like the last week or so I think was in New South Wales was at the 12th of May, I think, when it was finally legislated.

Jo Wright: Yeah, each state and territory has done that and it was only recently done.

Joanna: Yeah, that's one thing to understand what the basis behind the code was. And we of course, we all understand the issues facing businesses through this COVID period. But it's another thing to see how this is actually playing out in reality. So what I think what you wanted to do today for our listeners is talk about what we've seen at the moment in relation to the negotiations between landlords and tenants, and sort of come back to what the rights are of tenants under this code and you know, give some tips where issues might be occurring. So very topical right for these time I guess right?

Jo Wright: Yeah, absolutely. And I guess it's also it's not only about the rights for tenants, but also landlords as well. I guess that's one thing is that the whole mandatory Code of Conduct is set up to establish a fair playing field and to sort of spread the risk and spread the impact across both the tenant and the landlord. So why tenants Definitely have rights under this. It's also not just a walk in the park for them and puts all the owners and landlords. Landlords do have rights as well under this. And that's something that we can chat about in terms of what landlords need to look for in terms of their own protection.

Joanna: Great. Okay. All right. So let's maybe start with the good, the bad and the ugly. So let's talk about, you know, when it goes well, what what have we seen? What have we seen in the more smooth cases that we've been a part of?

Jo Wright: Yes, I've seen some great outcomes where the landlord has taken the initiative and knowing that their tenants have pretty much had to suspend their operations. And they have been tenants that have been impacted by the shutdown early on. They were either gyms or similar types of operations to gyms where they couldn't operate so they have to close down and basically had no income coming in. So the landlord took it upon themselves and offered rent abatement for the month of April. And then that was to be offered on a month to month basis based on what was happening at the time.

And I guess one thing to note is that this was put in place when at the beginning of the shutdown, and now that we're sort of coming out of that, then I think some of the initiatives put in place by landlords were put in place for a short term for a month and then let's see what's happening in a month's time and see what's reopening. So I've noticed that I've seen that those landlords that were a bit proactive in trying to help their tenants offered a rent abatement for the first month and then has offered it again for May, I guess we'll have to wait

and see what is being offered for June given that some businesses are reopening. But under the mandatory code, there needs to be a rent reduction proportionate to the decline in turnover. So there might have been, I guess we'll wait and see because the rent amount was 100% whereas moving forward, it might not be perhaps if operations can start, but operations are slow in coming back.

Joanna: Well, and of course, where we're sitting right at the moment. So we were recording at the end of May, June still haven't opened. So that's an example of the type of business that's really coming right at the end of the businesses that have been allowed to start to open.

Jo Wright: And I guess one other note about that about the good stories is that and one of the things that underlines the whole mandatory code is that the negotiations are premised on the fact that it's a long term relationship, and it's about safeguarding that business and that business relationship moving forward, as opposed to a knee jerk reaction of well, you know, this tenant can't pay the rent so I'm going to take more of a sippy I guess measure off it's about recognizing Well, this tenants here for a long term and the tenant I guess, the ones that I've seen the landlord because often the rent payment, they've asked that In return, the tenant makes a commitment to stay committed to that lease, you know?

Joanna: Yeah, I guess it is really an option and perhaps what we'll do is we'll step out what some of the elements are that are covered by the code. But but in general terms, generally it's about rent reduction, either through deferrals or waivers, and or abatement. But it's also about landlords not being able to kick out the tenants who haven't been paying so there's sort of those two elements within what is, well certainly there's more in the code, but that's sort of generally the two elements. And we'll go through that in a moment. But I think the other thing to bear in mind here is exactly what you're talking about he in terms of the long term commitment for both parties together.

It's about a long term relationship together, but it's also sometimes about whether or not their tenant will actually even make it through. Because, you know, there's a lot of businesses clearly at the moment who have potential solvency issues. And so landlords need to take the long term view, not just for how are they setting up the relationship for the future but are they creating a situation where their tenants are less likely to even make it through?

So, I mean, that's a very serious side, but it's very real side of where we are right now. I think that, you know, particularly for organizations or businesses that have been forced into total shutdown, but certainly there's many other businesses that maybe aren't in total shutdown, but still, you know, have been impacted heavily by COVID, where they might also be facing some real solvency issues that you know, that landlords need to take into account because we, I guess, you know, you talked about the positives and reactions, but we've also seen negatives, there's been a lot of landlords really dragging their feet. And so maybe if you can talk about what you've seen on that side, as well, Jo.

Jo Wright: Yeah, I've seen landlords almost ignoring the fact that there's the monetary code in place, and ignoring the fact that there are obligations on them to negotiate in good faith and to recognize the hardship that their tenants are experiencing. And I think some of it might be a bit of a fee base that will, that's gonna place a financial burden on them.

Joanna: Yeah, well, absolutely. I guess they're trying to ride it out as far as they can only thing that I hope that the tenant's business turns around. And the whole requirement falls away, potentially, you know, maybe that's some part of the thinking.

Jo Wright: Exactly. And I have seen that in that almost, there's been a delay in negotiations. And I guess maybe we hope that we have taken a much shorter path in terms of the health side of this issue. And maybe that's given them hope to think, Oh, well, I'll hold out and I won't negotiate anything because perhaps businesses will pick up and then this won't be an issue and I won't have to deal with it. And I have seen issues where it seems that there's been a bit of a verbal discussion and then no written agreements or the hurdles have come at the written agreement stage where then an agreement is being drafted and then it's been sent and then it's like, oh, that's not what we agreed to or no, I'm not signing this. And this is not what I want. So I think that one tip is to, perhaps, for listeners to think about that even though there's the monetary code, and even though they've got the lease on foot it is still necessary to have something. And it can be very short to document what has been agreed between the landlord and the tenant to reflect these. And it's also I think that landlords have been a bit hesitant and maybe take for granted that tenants aren't as maybe legally savvy or as savvy across legislation to know what the changes are, because there's been a lot of changes that have come in place in the last month or so with COVID that some landlords have reacted quickly when they've been prompted or remind them to review their obligations under the mandatory code, and then they've come to the party. Yeah. So I think that they kind of sometimes just maybe try it on a little bit to see what they can get away with.

Joanna: Yeah. And I guess that's sometimes the benefit. And you know, some of our clients have been able to negotiate these areas on their own, which is just great. You know, it's great if they can do that, but sometimes it just it really does require the landlord's understanding that the tenants are taking this seriously and someone is looking at it, who understands what the obligations are for the landlords and the rights of the tenant.

Jo Wright: Yes. Also those nuances in terms of what is the rent abatement? Or does that then extend my lease by the amount of time that the abatement for and those kind of details that on the surface sounds great. I don't have to pay my rent for a month. But then what are the catches that come with it and knowing you know, what can and can't be negotiated is really helpful for attendance.

Joanna: Yeah, and knowing what you don't have to agree to in order to get the abatement, so I think that's a really important one. So just really quickly, maybe if you can just quickly go through what is it that the code says, I guess we've talked about in summary, but just really quickly, if you can just talk about what it provides?

Jo Wright: Yeah. So there's a couple of overarching principles into the code. And mostly it starts off that they both that it is designed to give a level playing field to say that there's a common interest between the landlord and the tenant working together to come to an outcome that is reasonable for both that they are able to negotiate in good faith. So while it sets out the principles and sort of like a benchmark, then it is open to the parties to be open to negotiate differences under those principles, as long as they negotiate in good faith, while there has to be an ability for their landlord to give rent relief, it also then, it has to be proportionate to the impact that COVID is having on the business. So there is an obligation on the business to be able to show or the tenant to be able to show the impact that COVID has had on their business. And that is, you know, there have to be an eligible business under the job keeper program, they have to be able to show the decline in revenue that hedge. So it's not just that every business during this period can get rent relief, they need to actually show the impact that COVID has been having on their business.

Joanna: Yeah. Okay. Wonderful. And so and I guess there's also that other element, as we said, in relation to restraining your landlords from enforcing termination rights.

Jo Wright: Absolutely. So there is the ability that if they don't, they can't evict someone for not paying the rent during this period. And there is also the ability for tenants to get a relief in terms of land tax if land tax is part of their outgoings under the commercial lease. Then a landlord can apply for a land tax concession of up to 25% of the 2020 calendar year land tax are not payable and this is in the subtitles, but they have to pass that savings on to the tenant if the tenants responsibility to pay the land tax outgoings and landlords can also apply for three months deferral on any outstanding land tax amounts. And that will also then be applied to tenants.

Joanna: So what if landlords just aren't coming to the party? What rights do tenants have? What steps should they be taking?

Jo Wright: Well, initially they should be seeking legal advice in terms of setting out what the situation is, I guess they need to understand if they made all the criteria under the mandatory code. In terms of meeting the eligibility under the job keeper program and suffering declining their revenue, then they need to be able to lead to be seeking legal advice in terms of what their rights are, and to be able to start from a negotiation point with the landlords. Yeah. And that's the first point that they should be doing and seeing if that prompts can then get the landlord coming to the party.

Joanna: Yeah, absolutely. Okay. How about we give some tips here tips for a well, I guess we just talked about tips for tenants. What about tips for landlords? Is there anything that they should be thinking about to protect their position?

Jo Wright: Yeah, absolutely. So for landlords, they need to be aware that, I guess what their obligations are, but they also need to know that there is an eligibility criteria under the mandatory code and not all tenants are eligible to seek these rent reliefs. And so if they do have a tenant that has not suffered under the COVID shutdown, or hasn't suffered enough to be eligible for the Jobkeeper program, or doesn't meet the criteria, then they don't have to negotiate the written waiver. They don't have to pass on the savings that they're getting from land tax. So that's something that they need to be mindful of, but it's not just a flat rule for all tenancies. The other tip is that you relates to tenancies that were entered into before the the shutdown. So that's something else to keep in mind that it doesn't also alleviate any breaches that may have happened before the shutdown as well.

Joanna: Okay, alright, which is an important thing to consider. And perhaps it's also a consideration. You know, there's been a lot said in media about various organizations, large organizations, just simply telling the landlords that they're going to stop paying rent, but there is a requirement under the code for parties to act in good faith and they might, you know, I guess one of the tips for tenants is you might potentially be creating an issue for yourself if you are failing to pay rent, so you've just got to be careful about making those steps without fully considering what you might be creating as a situation for yourself.

Jo Wright: That's absolutely right. And any relief is supposed to be proportionate to the impact that they've had in their business. So they can't be seeking 100% rent reduction when they haven't had 100% shut down, for example, and they also can't just stop paying rent and without negotiating, and, you know, having that discussion with their landlord, and they also, like, as we've said earlier in this conversation, that it is all about looking at long term and why something might seem like a win right now in the short term, then there will be foreign effects for the long term relationship, but there were, say owning that property, or if they want to seek a rent renewal, then they need to have that in mind in terms of how I guess the negotiations go at this point.

Joanna: Yeah, but don't just take it lying down. You need to be proactive, and you need to be quick, you know, landlords obviously, have sort of, I guess, a reason for trying to move slowly. So as a tenant, you really, you know, you're within your rights to try and ensure that landlords aren't moving slowly.

Jo Wright: Exactly. I guess that's where you know, if the landlords not going to pay in that discussion. And and they can't physically, they can't afford to pay the rent, then they know that they are protected and can't be evicted by not paying the rent.

Joanna: Yeah, but just be careful before you take that step. Yeah, you know, seek a bit of advice before going down that path. So one of the other element that has come up recently in me thinking about this topic, we do a lot of business sale and acquisition here has been more thing impact for buyers from your due diligence perspective, as well. Now in looking at purchasing businesses or shares in companies, I think there's all sorts of questions that now need to be looked at really closely in terms of the extent to which tenants may have set up so vendors may have set up rent deferrals or other elements that might impact what the original written lease says. So I think these are things you know, if you're looking at buying a business You really need to be aware of this is a risk for a while. So I think there's some flow on effects like that as well.

Jo Wright: Absolutely. I mean, they need through that due diligence process, you know, that all the information in terms of any discussions or negotiations that have been had provided to them, and they're aware of, you know, any side agreements that have happened, whether they've been formalized in their actual recent agreements, or letter or whether they've just been agreed through email negotiations. And, you know, they need to know where their tendency that they're acquiring the responsibility for who's going to actually extend. You know, beyond what there lease says.

Joanna: Absolutely.

Jo Wright: Or there's rent obligations associated with that. So yeah, definitely.

Joanna: Great. Okay. Well, look, I think we've given a really good overview of this topic today. There's obviously a lot to consider both for landlords and for tenants. Of course, if you're a bit confused about this area, then all you need to do is get in contact and Jo or any of our other fabulous legal eagles at Aspect Legal can help to assist you whether you're sitting on the side of the landlord or side as the tenant. But look, Jo, I just want to say a massive thank you for coming onto the show today to chat about this very, very topical area.

Jo Wright: Thanks very much. It's been a pleasure. Thank you.

Joanna: That's it for this episode of Talking Law, all about tips in negotiating commercial leases under the new COVID mandatory code of conduct. I really hope you found the information that Jo and I talked about today, useful and relevant. And of course, if you'd like to get more details about what we talked about, then all you have to do is go over to our website at talkinglaw.com.au and click on this episode there you'll be able to get a free download of the transcript if you're one of those people who really likes to well read things in finer detail there you'll also be able to contact Jo Wright or our other legal Eagles at Aspect Legal if you have issues at the moment in relation to negotiating commercial leases in this coven period and we can help you out we act for both tenants and for landlords and we have a free initial discussion available on our website. So once again to get to that all you have to do is go to talkinglaw.com.au or the website of Aspect Legal at www.aspectlegal.com.au and set yourself a calendar appointment for a free discussion. Well that's it thank you so much for

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