Summary of National Cabinet Mandatory Code of Conduct for SME Commercial Leasing Principles during COVID-19

Key points:

1. The purpose is to impose a set of mandatory "good faith leasing principles" for qualifying tenants (but the government wants it to apply "in spirit" to all tenancies). Effect is going to be given through state and territory legislation (so wait and see what actually come out in the legislation!!). The intention remains though that landlords and tenants come to bespoke arrangements, guided by the principles.

2. It only applies where a tenant is eligible for the JobKeeper program (i.e. less than $50 million annual turnover and a third of revenue gone). A lot of the code is intended to tie into the JobKeeper program.

3. The most interesting principles:

    a.   landlord's cannot terminate for non-payment of rent;

    b.   if a tenant does not comply with its lease terms it forfeits the protection of the code;

    c.   proportionality is the key - the rent reduction/waiver/deferral must be proportionate to the reduction in tenant trade. Rent waiver must constitute 50% of the reduction in rent payable. Usually there would be a reasonable subsequent recovery period. Landlord's should seek to waive recovery of outgoings where appropriate;

    d.   the benefit a landlord gets from a deferral of loan payments should be shared with the tenant;

    e.   no interest or fees should be charged on rent deferrals;

    f.   landlord must not draw on tenant's security for no payment of rent; and

    g.   tenant should be provided with an opportunity to extend lease for the deferral period/rent waiver period.

4. Where agreement can't be reached there is binding mediation.

5. It's not retrospective (or doesn't seem like it will be) - will come into effect from a date following April 3. Goes for as long as the JobKeeper program goes for.

6. It's loose, it doesn't offer much for landlords who will need to rely on the banks to come to the party, it doesn't really speak to what happens after COVID is done - wait for the NSW legislation.