

WELCOME

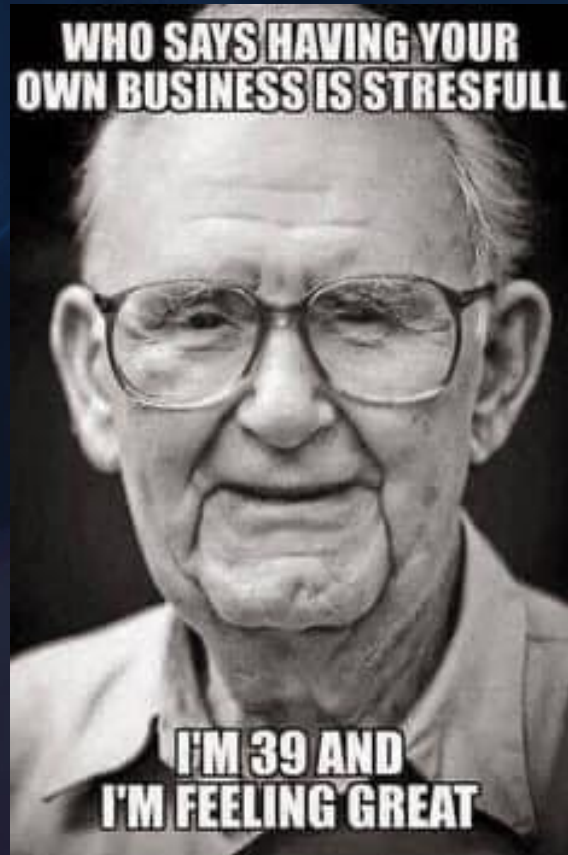
WELCOME TO THE

**SCHOOL
of HARD
KNOCKS**



FOR STRESSED BUSINESS PEOPLE
+ RELUCTANT ENTREPRENEURS

WELCOME



AGENDA

- 1. JobKeeper Scheme – eligibility and ‘enabling directions’**
- 2. Changes to Modern Awards**
- 3. Health and Safety**
- 4. Commercial Tenancies**

PRESENTERS



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COVID-19 LEGAL UPDATE

Disclaimer

The guidance in this presentation is of a general nature only as of 7 May 2020 and should not be relied upon as legal advice.

Any legal matters affecting you should be discussed specifically with a lawyer.

Liability limited by a scheme approved under Professional Standards Legislation.

JOBKEEPER SCHEME

Introduction and Eligibility

1. Carried on a business or not-for-profit enterprise at 1 March 2020
2. Employed at least one “eligible employee” at 1 March 2020
3. The eligible employees being claimed for are still employed
4. 30% fall in turnover, if < \$1b annual aggregated turnover (or 15% fall for charities registered with ACNC)

NB Ineligible employers – e.g. in liquidation or bankruptcy, foreign-owned employers

JOBKEEPER SCHEME

Introduction and Eligibility

Eligible Employees:

- Full time, part time or fixed term (not casuals, unless employed on regular, systemic basis for at least 12 months)
- 18 or over (16 or 17 may be eligible prior to 11 May if independent or not undertaking full time study)
- Australian resident at 1 March 2020
- Not receiving government parental leave, Dad and partner pay, or workers compensation
- Must agree to be nominated – to avoid more than one employer claiming for them

Does not include employees who were employed after 1 March or left employment before 1 March

JOBKEEPER SCHEME

Introduction and Eligibility

- Based on actual or likely sales for the same period 12 months ago
- Monthly or quarterly
- Reasonable estimates/forecasts will be acceptable
- Can use cash or accruals basis – but must be the same for both periods
- Aggregated turnover – includes affiliated and connected entities

JOBKEEPER SCHEME

JobKeeper Enabling Directions

Only available to employers in the JK Scheme.

In effect until 28 September 2020.

Employer can direct:

1. Reduction in days or hours i.e. *partial* stand down
2. Change in usual duties
3. Change in location of work

JOBKEEPER SCHEME

JobKeeper Enabling Directions

Employer can request:

1. Changes to usual days/times of work
2. Taking annual leave (provided at least 2 weeks remaining)
3. Taking twice the amount of annual leave at half pay

Employee must not unreasonably refuse.

JOBKEEPER SCHEME

JobKeeper Enabling Directions

General requirements:

- Employer must be eligible for JK Scheme and be eligible to receive JK payments for that particular employee
- The directions or requests must be attributable to COVID-19
- The directions or requests must be reasonable
- The employer must give the employee at least 3 days' notice in writing of intention to give a direction
- The employer must consult with the employee before giving a direction (and keep written record)
- Any direction given must be in writing.

MODERN AWARDS

Modern Awards

Updates to most Modern Awards:

- Up to two weeks unpaid leave if employee is required by government or medical authorities, or are advised by their medical practitioner, to self-isolate, and this prevents them from being able to work
- Employers and employees can agree in writing to take twice as much annual leave at half pay (similar to JK provisions)

HEALTH & SAFETY

Guidelines for Workplaces

Industry-specific guidelines introduced this week:

www.safeworkaustralia.gov.au



safe work australia

HEALTH & SAFETY

Best Practice Suggestions

Consider:

- **Good cleaning and hygiene practices**
- **Minimise face to face meetings and avoid large meetings**
- **Flexible start/finish times; working from home where possible**
- **Policies regarding sick leave and evidence requirements, and for return to work**

TENANCIES

National Cabinet Mandatory Code of Conduct

- The National Cabinet issued principles intended to balance the interest of landlords and tenant in a lease involving SME tenants (being those tenants with a turnover below \$50 million) (referred to as 'the Code').
- The basis of the Code is for Landlords and Tenants to negotiate mutually acceptable arrangements that work through their particular circumstances – intended to be open, honest and transparent with the view of reaching a temporary change to leasing arrangements that takes into account the impact of COVID-19 on the Tenant (including addressing a recovery period) and the circumstances of the Lease.
- Legislation and Regulations have now been passed to apply the Code in Victoria with an applicable period of 29 March to 29 September 2020 – COVID-19 Omnibus (Emergency Measures) Act 2020 and Covid-19 Omnibus (Emergency Measures) (Commercial Leases and Licenses) Regulations 2020

TENANCIES

Eligibility

The Code is intended to apply to all tenant businesses that are eligible for (and a participant in) the Commonwealth Government's Jobkeeper Programme and are SME Tenants with turnover below \$50 million. The criteria for the JobKeeper Programme are those businesses with either:

- A turnover of less than \$1 billion who have (or will have) their turnover fall by 30% or more; or
- A turnover of more than \$1 billion who have (or will have) their turnover fall by 50% or more.

Note that where a consolidated reporting group has a turnover of less than \$1 billion, then each business within that group can be considered separately for the purposes of this criteria. Note also that charities registered with the Australian Charities and Not-for-Profit Commission would also be considered eligible if they have (or will have) their turnover fall by 15%.

TENANCIES

The Code

In negotiating temporary lease arrangements under the Code, the government has directed that the following principles should be applied on a case by case basis and as soon as practicable (Note: Legislation and Regulations will have legal operative effect and the Code as a part of the interpretation of that):

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. 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 under this Code.

TENANCIES

- 3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (a waiver being the Landlord granting a whole or partial rent free component and a deferral being the Landlord deferring payment or all or part of the rent to a later date in line with the Code) 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.**
- 4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 over the COVID-19 pandemic period and should constitute a greater proportion of the total reduction in rent payable in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.**

TENANCIES

5. **Payment of rental deferrals by the tenant must be amortised over the balance of the lease term and for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties.**
6. **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.**
7. **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 Banking 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.**

TENANCIES

8. 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.
9. If negotiated arrangements under this 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 taking into account a reasonable subsequent recovery period.
10. No fees, interest or other charges should be applied with respect to rent waived in principles #3 and #4 and no fees, charges nor punitive interest may be charged on deferrals in principles #3, #4 and #5.

TENANCIES

- 11. 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.**
- 12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period outlined in principle #2. 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.**
- 13. 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.**
- 14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.**

TENANCIES

What you should know about the Legislation?

- **Covers Leases and Licenses (including sub-leases and sub-licenses)**
- **Eligibility (s.13): SME which is an employer that qualifies for and is a participant in Job Keeper Scheme and turnover is under \$50 million**
- **Note that leases can be excluded from eligibility if they are part of a bigger group (either directly or in terms of control) and the group exceeds the limit**
- **The legislation allows broad powers for regulations to be passed to alter the commercial bargain between Landlords and Tenants**
- **Small Business Commission given the function to facilitate resolution of dispute by mediation**

TENANCIES

What you should know about the Regulations?

- **Relevant period in the regulations: 29 March to 29 September 2020**
- **Proportionality of loss of turnover to rent relief in the Code is not replicated in the Regulations**
- **Turnover Definition – Beyond just sales; Corporate Groups**
- **Agricultural leases and licenses excluded**
- **Regulation 9 - Moratorium on termination limited to non-payment during relevant period provided Tenant has complied with rent relief process – Penalties apply**
- **Rent Relief Process – Tenant request, Landlord offer, Negotiations**

TENANCIES

- **Factors for Relief must 'take into account':**
 - a) Reduction in Tenant turnover during the relevant period;
 - b) Any waiver of outgoings granted by the Landlord;
 - c) Whether a failure to offer sufficient rent relief compromises a tenant's capacity to fulfil ongoing lease obligations;
 - d) Landlord's capacity to offer relief (including any Covid relief the Landlord has received; and
 - e) Any reduction in outgoings charged to the Premises.
- **Documentation**
- **Subsequent Rent Relief – Material change in financial circumstances**
- **Prohibition on rent increases during relevant period**
- **Extension of Term – Landlord must offer extension equal to deferral period**

TENANCIES

- **Outgoings – Landlord must consider where Tenant is not able to operate**
- **Payment of deferred rent – Extension assumed and 24 month period**
- **Landlord not to recover costs, interest, fees or charges relating to deferred rent**
- **Reduction of hours and Closure of Premises protected in relevant period**
- **Small Business Commissioner Mediation**
- **VCAT & Court if no resolution at mediation**

TENANCIES

Victorian State Government Commercial Tenancy Relief

The Victorian State Government announced on 15 April 2020 further commercial tenancy relief measures to assist Landlords and Tenants in resolving a response to COVID-19 in the form of land tax relief

The government will grant Land Tax relief for Landlords who provide rent relief for Tenants – 25% discount on land tax for 2020 (provided rent relief is equal to or exceeds this) and a deferral of the balance until March 2021.

Relevant Information and How to Apply:

<https://www.sro.vic.gov.au/land-tax/claim-coronavirus-land-tax-relief>

Information submitted by the Tenant for rent relief negotiations is assumed in the Regulations to be used for the Landlord's application for this relief.

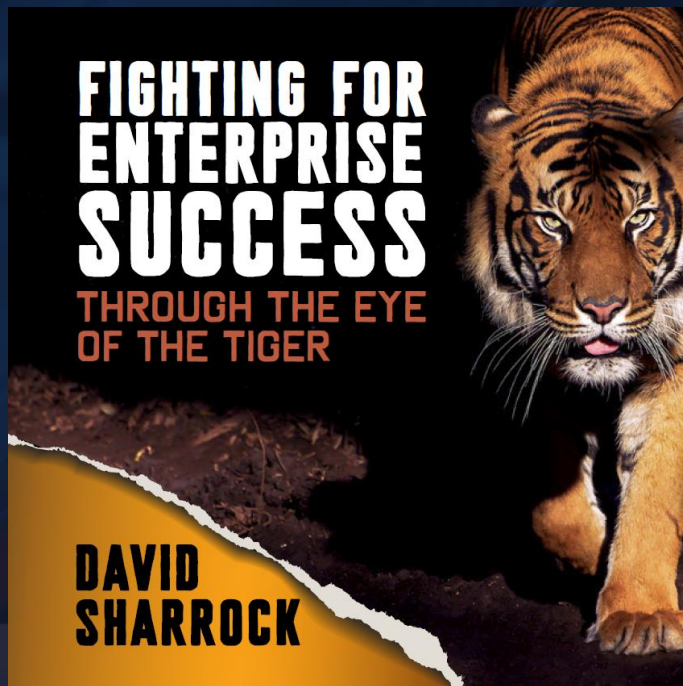
TENANCIES

Tips & Traps

- Be aware that the Lease remains binding between Landlord and Tenant with any agreed changes intended to be operative as a temporary variation of lease
- Agreements made to date are still effective
- If parties cannot agree, then the dispute is to be referred to the Office of the Small Business Commissioner for mediation but ultimate resolution is still VCAT or the Courts
- Ambiguity on evidence required to be provided by a Tenant still exists
- Interpretation of Legislation, Regulations and the Code only provide a guide not a solution – Parties have to engage commercially

Q&A

Remember: “Always look at your business through the eye of the tiger and you never know what might leap out at you!”



Fighting For Enterprise Success: Through the Eye of the Tiger

By David Sharrock

www.fightingforenterprisesuccess.com



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