



Legal Issues Coping with COVID-19



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- » Employment & Workplace Issues – Stephen Curtain
- » Commercial Tenancy – Sarah Ward
- » Migration Issues – Chong Quaik

- » Questions

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Stephen Curtain

COVID-19 CRISIS

EMPLOYMENT & WORKPLACE ISSUES



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Fair Work Act amended

- » Act amended to support introduction of the JobKeeper Scheme on 20 March 2020
- » Applications commence today
 - Must be in by 30 April to receive payments for April
- » Scheme ends on 28 September 2020
- » Changes are also being sought to provide for more flexibility in awards

Changes to Fair Work Act

- » Qualifying employers can give Directions:
 1. reducing an employee's hours or days of work
 2. changing an employee's usual duties
 3. changing an employee's place of work
- » Such employers may also agree with employees
 - for changes in days and times without reduction
 - for accrued leave to be taken or for double leave to be taken on half pay

Employers who can give Directions

- » Qualifying employers must be:
 - A national system employer
 - qualify for the Jobkeeper scheme
 - be entitled to Jobkeeper payments for the employee to whom the direction is given
- » JobKeeper payment \$1500 per fortnight pre tax
 - employer must pay employee and be reimbursed

Employers who qualify for Jobkeeper

- » Had a decline in turnover
 - of 30% if turnover less than \$1 bil
 - of 50% if turnover more than \$1 bil; and
- » Employ at least one eligible employee on 1 March 2020
- » “Employers” includes sole traders, directors and shareholders not employed but actively involved in the business

Eligible employees

- » Employees for Jobseeker payments must:
 - be at least 16 and Australian resident
 - not be receiving Government parental or like leave pay
 - not be totally incapacitated/on workers' compensation
 - not otherwise be employed

1. Directions enabling reduced hours

- » Qualifying employers can direct an employee to:
 - not work on days the employee would normally work;
 - work for a lesser period on a day employee would normally work; or
 - work a reduced number of hours
- » Employer cannot unreasonably refuse employee's request to work a second job or training

Prerequisites – Standdown Direction

- » Employer must qualify for JobKeeper for that employee when direction given
- » Employee cannot be usefully employed for normal hours due to Covid-19 crisis
- » Implementation of the Direction must be safe
- » Direction does not apply if employee is on authorised paid or unpaid leave

Prerequisites – Standdown Direction

- » Employer must give written notice of the direction
 - 3 days or such other time as the employee agrees
- » Consult with employee about the direction before giving it

Minimum payment guarantee

- » Employee is entitled to the greater of:
 - \$1500 per fortnight pre tax
 - the amount payable in respect of the hours worked including:
 - incentive based payments
 - loadings
 - overtime and penalty rates
 - leave payments

Hourly rate of pay guarantee

- » Employee's base rate of pay must be no less than the amount paid before Direction.
- » So is the higher of:
 - rate being received when Direction given
 - rate applicable to the duties being performed
- » Base rate is the rate payable for ordinary hours without additional allowances, loadings or penalties

Accrual of entitlements during Standdown

- » Leave entitlements accrue as though Direction not given
- » Entitlement to redundancy pay and notice unaffected by Direction

2. Direction to change usual duties

- » Changed duties must be within the employee's skill and competence
- » Employee must have the required licences, qualifications to perform the new duties
- » Duties must be within the usual scope of the employer's business operations
- » Must be safe for the employee to perform them
- » Employer entitled to JobKeeper payments for it

3. Direction to change location

- » Location (including home) must be suitable and safe
- » Employee must not be required to travel too far
- » Performance at the location must be within the scope of the employer's operations
- » Employer entitled to JobKeeper payment for it

Rules re Directions as to change in duties and locations

- » Direction does not apply if not reasonable
- » Employer must believe that Direction necessary to retain one or more employees
 - on reasonable grounds
- » Employer must give written notice of the direction
 - 3 days or such other time as the employee agrees
 - consult with employee about the direction before giving it

4. Agreements re days and times

- » Qualifying employers entitled to JobSeeker payment for the particular employee can request employee to:
 - work on different days
 - work at different times than ordinary hours
 - when change does not involve reduction in number of hours worked
- » Employee must not unreasonably refuse

Prerequisites for agreement

- » Performance of the duties must be safe; and
- » Duties must be reasonably within the scope of the employer's business
- » Agreement must be recorded in writing

5. Agreements re leave

- » Qualifying employers can request employees to:
 - take paid annual leave – leaving at least 2 weeks
 - take twice their leave at half pay
- » Employee cannot unreasonably refuse request to take annual leave
- » Agreement must be recorded in writing
- » Leave continues to accrue
- » Period included for redundancy and notice

Award changes and pandemic leave

- » 99 awards have been changed inserting a new temporary schedule including:
 - 2 weeks unpaid pandemic leave
 - Ability to take twice the annual leave at half pay
- » Affected awards include:
 - Clerks - Private sector, commercial sales, aged care, general retail, metal industry, nurses etc

Pandemic leave

- » Available to employees prevented from working due to:
 - being required to isolate by govt or medical authorities
 - Govt measures in response to the pandemic

Pandemic leave

- » Available in full immediately to full time, part time and casual employees – accrual not required
- » All eligible employees are entitled to the 2 weeks
- » Paid leave does not have to be used before it
- » Leave must be started before 30 June
- » Does not affect other leave
- » Counts as service for accrual purposes

Pandemic leave

- » Employees must as soon as possible
 - advise employer they are taking the leave and the reason for it
 - how long they expect to be absent
- » Employers can require evidence to demonstrate the need for the leave

Adverse action

- » Employers should be careful to follow requirements to avoid claims of discrimination
 - opening up General Protections claims on the basis that adverse action has been taken against the employee as a result of a direction

Employees working from home

- » Before requesting an employee to work from home consider the terms of any employment contract, policy, award or enterprise agreement
- » Home must be safe – OH&S laws apply
- » Employees can be required to continue recording their hours
- » Employees remain obliged to comply with reasonable lawful directions at home



Sarah Ward

COVID-19 CRISIS COMMERCIAL TENANCY



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NATIONAL CABINET MANDATORY CODE OF CONDUCT SME Commercial Leasing Principles During COVID-19

» **What is it?**

- A mandatory code that will be legislated by each State and Territory.

» **Purpose?**

- To impose a set of good faith principles that apply to negotiating amendments to existing commercial tenancy lease arrangements during the COVID-19 pandemic.

» **Object?**

- Sharing the impact of COVID-19 to balance the interests between Landlords and Tenants.

» Commences?

- The Code will be given effect by legislation from a date following 3 April 2020.

» Duration?

- The period during which the JobKeeper program remains operational. The JobKeeper Payment will currently be available until 27 September 2020.

Who does it apply to?

- » The Code applies to small and medium sized businesses. There are criteria that a Tenant must satisfy for the Code to apply. These are:
 1. The Tenant is suffering financial stress or hardship as a result of the COVID-19 pandemic. If a Tenant is eligible for JobKeeper payments, they are automatically eligible; and
 2. The Tenant has an annual turnover of up to \$50 million.

What is in the Code?

It includes **overarching principles** that recognise that Landlords and Tenants:

- » share a common interest of working together and to keep leases on-foot after the end of the pandemic;
- » are required to negotiate temporary leasing arrangements;
- » should be open, honest and transparent in negotiations and negotiate in good faith;

All leases should be negotiated on a case-by-case basis.

The code is a set of **14 leasing principles**

Landlord's Obligations

Landlord's existing rights under a lease are restricted including:

- » Termination for non-payment of rent is prohibited (*Principle 1*). This is during the pandemic period or a reasonable recover period.
- » No fees, interest or other charges apply to waived or deferred rent. (*Principle 10*).
- » Can't use security for non-payment of rent (*Principle 11*).

Landlord's must offer Tenants

- » Proportionate rent reductions in the form of waivers and deferrals (Principle 3).
- » These reductions are based on the reduction of the Tenant's trade during the pandemic period plus a reasonable recovery period.
- » Any reduction of statutory charges and insurance must be passed onto the tenant (Principle 6).

Landlord's must offer Tenants

- » A minimum of 2 years to repay any deferred payments (or the length of the lease whichever is greater) (Principle 5).
- » Repayment not to commence until end of COVID-19 pandemic or the end of the lease & taking into account a reasonable recovery period.
- » An opportunity to extend the lease term by the period of rent waiver/deferral period (Principle 12).

Landlord's must offer Tenants

- » Freeze on rent increases (except for retail leases based on turnover rent) – for COVID-19 pandemic period plus reasonable recovery period. (Principle 13)
- » Other benefits received by the Landlord's should be shared (e.g. deferral of loan payments) (Principle 7).
 - Waive other expenses (e.g. Outgoings) where appropriate during period tenant is not able to trade (Principle 8).
 - No penalty for reducing hours or ceasing trade (Principle 14).

Tenant's obligations

- » Tenant's must remain committed to the terms of their lease subject to amendments negotiated.
- » Tenant's will lose the protection of the Code if they don't comply with the terms of their lease. (Principle 2).

Rent Waivers/Deferrals

- » Rental waivers must be no less than 50% of the total reduction.
- » Tenant's can waive the 50% requirement by agreement.
- » It should be greater than 50% where the Tenant would not be able to fulfil its obligations under the lease agreement, but regard should be given to the Landlord's financial ability to do this.

(Principle 4)

Updates - VIC

- » Temporary prohibition on commercial tenancy evictions for non-payment of rent (for businesses with an annual turnover of under \$50 million that have experienced a 30% reduction in turnover due to COVID-19 – commencing 29 March 2020);
- » A freeze on rent increases for 6 months;
- » Rental waivers or deferrals proportionate to income reduction;
- » A mediation service for tenants and landlords to support fair tenancy negotiations.
- » Land tax relief

If agreement can't be reached?

- » Binding mediation – anticipated that mediations will be conducted by the Small Business commissioner in Victoria.



Chong Quaik

COVID-19 CRISIS MIGRATION ISSUES



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Introduction

- » Changes to the migration law and policies affecting the Temporary Visa Holders.
- » Focus on 4 main visa subclasses:
 - A. New COVID-19 visa (subclass 408) – special event
 - B. Visitors and Tourists (subclass 600) – applying for a new visa
 - C. International students (subclass 500) – relaxation of work limitation
 - D. Temporary Work visa (subclasses 457 and 482) – concessions on sponsorship obligations and visa conditions
- » + Inbound travel ban.

COVID-19 Visa (Subclass 408)

» 4 April 2020

- a new visa Subclass 408 (Temporary Activity – Australian Government Endorsed Event stream) visa was introduced.

» Purposes

- Provide a pathway for eligible temporary visa holders who are required to depart Australia but for COVID-19 pandemic, unable to depart Australia.
- Implement a measure to respond to workforce shortages during the COVID-19 pandemic in relation to critical areas incl. agriculture, aged care and disability care, child care and public health.

COVID-19 Visa

» Definition

- COVID-19 pandemic - the pandemic declared by the World Health Organisation on 11 March 2020, caused by the coronavirus COVID-19.

» The main requirements for visa are:

- The person is onshore;
- Unable to depart Australia because of the COVID-19 pandemic;
- Work in critical sectors incl. agriculture, aged care and public health;
- Unable to apply for any other temporary visa;
- Can only apply – within 28 days before or after visa expiry

COVID-19 Visa

- » Visa of the last resort?
 - » 3 main criteria
 - work in critical sectors,
 - unable to apply for other TV,
 - and can only apply within 28 days before visa expiry or becoming unlawful
- will limit its scope of application. Not a wide range of people can qualify.
- » Cost? - Free of Charge.

Visitor visa (sc600)

- » If you can, depart Australia before your visa expires.
- » If cannot depart as planned (travel restriction, non-availability of flight etc) must apply for a new visa before expiry of current visa.
- » If visitor visa has a 'No Further Stay' condition (8503, 8534, 8535), must request a waiver of this condition before you can lodge a new visitor visa application.

Visitor

- » Grounds for a waiver of a 'No Further Stay' condition:
 - Since the grant of your visitor visa, compassionate and compelling circumstances have developed; and
 - These circumstances have resulted in a major change to your circumstances.
 - Given the queue, advisable to apply 2 months before expiry.

International Students

- » International students are expected to rely on family support, part-time work where available and their own savings to sustain themselves in Australia.
- » Work restrictions:
 - Permitted to work a maximum of 40 hours per fortnight.

International Students

- » However, students who work to support the supply of essential goods and services for Australians as follows are given temporary relaxation of this working hours limitation.
 - Enrolled in a nursing course and can undertake work to support healthcare as directed by health officials, or
 - Employed since 1 March 2020:
 - a) in the aged care sector
 - b) by registered supermarkets (terminate from 1 May 2020)
- » For those students who are in financial hardship, what concessions are given to them?

International Students

- » In their student visa application, international students must demonstrate that they can support themselves completely in their first year.
- » Only holders of student visas who have been here for 12 months or more who are unable to meet immediate living expenses can apply to access up to \$10,000 of their Australian superannuation this financial year.
- » Further, the Government will also be flexible in cases where COVID-19 has prevented international students from complying with their visa conditions (e.g. meet course requirement, not being able attend classes).

Work Permits (sc457 & 482)

- » Subclass 457 or 482 visas and their working hours
 - DHA has indicated that Subclass 457 and 482 visas are given concessions.
 - Sponsors will be able to reduce working hours of their sponsored employees without them breaching their obligations.
 - Employees can be stood down and not be in breach of their visa conditions.
 - Neither will be subject to sanctions.
 - When the employee applies for sc186 visa later, he/she will have to revert back to the original visa conditions including be paid the prescribed salary on a full-time basis.

Work Permits

Do's & Don'ts

1. Reduce working hours – from full time to part time
 - Provided...
 - a) the pro-rata hourly rate of the approved salary (as per the nomination) does not decrease;
 - b) the role and duties performed remain as per the nominated occupation.
 - c) Unable to access superannuation

Work Permits

2. Stand down

- If an employee is stood down (has their working hour reduced to 0 hour), he/she is considered to continue to be under employment of the sponsor/employer notwithstanding that he/she is not going to work or getting a salary;
- If stood down, can apply to access superannuation of up to \$10,000 this financial year.

Work Permits

3. Lay off / terminate employment

- If an employee is sacked
 - He/she must find another sponsor, and lodge a new nomination, or
 - Apply for another visa (e.g. student visa), or
 - Depart Australia within 60 days.
- A sponsor is obligated to pay reasonable travel cost for the employee and family, or if the employee has disappeared into community, the cost of locating the employee and sending him/her home.

Work Permits

- » Moving forward, it is predicted to be more difficult to be granted work visa with the exception of nursing and medical.
- » Many local Australian citizens and permanent residents have lost or will be losing their jobs due to the economic impacts of COVID-19.
- » There will be more Australians who are able to fill job vacancies.

Work Permits

4. Can employer reduce salary?

- Not covered by the concessions announced by the Government.
- If both agree, still need to apply for a new nomination and visa application, provided the salary is still the market rate and above the threshold of \$53,900 pa (Temporary Skilled Migration Income Threshold).
- Harder to pass labour market testing (advertising)
- New application would attract an additional Skilling Australian Fund levy.

Work Permits

5. Can employee perform work outside the nominated occupation within the business?
 - Breach of conditions 8107 and 8607:
 - Visa holders are limited to working only in their nominated occupations;
 - Sponsors are in breach of their obligations for failing to ensure workers work only in their nominated occupations.
 - If found doing so, subject to sanctions to sponsor employees in future.

Work Permits

6. If an employee was sent overseas to work and is stranded there...
 - May not constitute breach of visa conditions, if the job duties include overseas travels (e.g. import-export manager) and nature of the work is possible for employee to work remotely.
 - Better solution is to apply for exemption for him/her to return to Australia despite the current travel ban to Australia.

Travel ban to Australia & exemptions

Travel Bans:

- » Aust has closed its borders to all non-citizens and non-permanent residents.
- » The entry ban takes effect from 20 March 2020, with exemptions only for Australian citizens, PRs and their immediate family members ie spouses, dependent children and legal guardians.
- » Immediate family members who have a visa must fill in a COVID-19 enquiry form online and apply for approval.

Travel ban to Australia & exemptions

Exemption:

- » Travellers who have a compassionate or compelling reason to travel to Australia will need to have an exemption from the Australian Border Force Commissioner.

Travel ban to Australia & exemptions

- » ABF Commissioner may consider an additional exemption in relation to the travel ban for:
 - foreign guests invited by the Australian Government to assist in the COVID-19 response or whose entry would be in the national interest;
 - critical medical services, including air ambulance and delivery of supplies, that regularly arrive into Australia from international ports;
 - people with critical skills (e.g. medical specialists, engineers, marine pilots and crews);
 - case-by-case exceptions for humanitarian or compassionate reasons.

Travel ban to Australia & exemptions

Quarantine:

- » All travellers arriving in Australia must undertake a mandatory 14-day quarantine at designated facilities (eg. a hotel), in their airport of arrival.
- » This includes TVH who are granted exemption by ABF Commissioner.

Questions



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