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Office of the President

20 April 2020

Our ref: KB-ADR

Chris Mountford
Queensland Executive Director
Property Council of Australia
6/300 Queen St
Brisbane City QLD 4000

By email: [redacted] & [redacted]

Dear Mr Mountford

**Dispute Resolution under Commercial Leasing Code of Conduct**

We refer to your correspondence with Toby Boys, Chair of our Alternative Dispute Resolution Committee (**ADR Committee**), in respect of a process for the dispute resolution required by the recently announced Commercial Leasing Code of Conduct (**Code**) in response to the COVID-19 pandemic.

The Code provides for "binding mediation" of disputes about temporary lease terms. The Code is yet to be given effect to in Queensland and we do not know what, if any, process is being drafted to give effect to its requirements.

The ADR Committee has drafted the **enclosed** proposal for how this process could work, including outlining the issues that should be considered in design and implementation. The document represents our initial thoughts and can be refined once further issues are identified and further detail is released by government.

In providing this document we note the following:

1. As stated in the document, Queensland Law Society (**QLS**) does not, at this time, take a position on whether mandating binding mediation is the right policy approach, having regard to all of the current circumstances. It may be that after further consideration of the issues by our policy committees, and further details being made available by Government, QLS makes a separate submission to Government on this point.

2. In addition to this document, there are other critical issues that will need to be determined to give proper effect to the Code, including the details of who qualifies to take part in this process. Such a test requires clear guidance on what a tenant needs to demonstrate to the landlord. Any lack of clarity and certainty on eligibility of the party will likely give rise to further disputes and increase costs and delays.

3. Government will also need to ensure that this Code is able to intersect with existing industry codes, such as the Franchising Code, which already have established dispute resolution processes in place.

We would be pleased to receive any feedback on our proposal, including any anticipated practical difficulties. The document has been briefly reviewed by our Property and Development Law and Franchising Law policy committees, but given the limited time available, we anticipate that there will be further input from these committees as the proposals are progressed.

We understand that you are planning to consult with the State Government in respect of the Code and how it is to be applied in Queensland. We are happy for you to use this document in your consultations and reference your consultation with QLS. We also intend to raise these issues with Government, together with other concerns with the Code.

Should you require any further information, please do not hesitate to contact Kate Brodnik, Senior Policy Solicitor, by phone on 07 3842 5958 or email to k.brodnik@qls.com.au.

Yours faithfully

Luke Murphy
**President**

Queensland Law Society

# QLS submission in relation to dispute resolution under the Commercial Lease Code of Conduct

On 7 April 2020, the Prime Minster announced the Commercial Leasing Code of Conduct[1] in response to the economic downturn caused by the Coronavirus pandemic. The Code is to be given effect through relevant State and Territory regulation as appropriate.

The Code requires landlords and tenants to negotiate in good faith to agree on temporary arrangements. The stated objective of the Code is to share, in a proportionate, measured manner, the financial risk and cash flow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

The Code provides:

> *"Where landlords and tenants cannot reach agreement on leasing arrangements, the matter should be referred and subjected (by either party) to applicable state or territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable".*

Assuming the Queensland State Government intends to implement the binding mediation process envisaged by the Code, how is that best achieved? We have set out some options and considerations below[2].

**Binding mediation**

The term "binding mediation" is not defined, but ordinarily refers to an alternative dispute resolution (**ADR**) process in which an independent person (or "neutral person") firstly assists the parties to negotiate and resolve issues in dispute. If the parties cannot agree the independent person will then make a binding decision or determination about those matters which remain in dispute. Sometimes there will be two independent persons – one to conduct the mediation and another person to conduct the determination.

Binding mediation has at least the following advantages:

1. The parties remain in control of the outcome of the settlement of the dispute until such time, and to the extent, that they are unable to reach agreement. Binding mediation gives the parties more autonomy compared to other binding processes (such as litigation, arbitration, expert determination and adjudication). In those other binding processes parties can make submissions, but ultimately the independent party makes a determination of all issues in dispute;

2. Unlike mediation, in which there is no resolution unless the parties agree on all aspects, binding mediation will bring about the resolution of all issues in dispute because an independent person will make a determination in respect to those matters that cannot be agreed. The parties may not be happy with the ultimate outcome, but at least the matter will be resolved; and

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[1] https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf

[2] This submission considers the *process* which may be used to undertake binding mediation. This paper does not consider matters such as enforceability or validity of the Code, its interaction with other Codes (such as the Franchising Code, which includes mediation of franchising matters, often including leasing disputes). Further this submissions does not consider who or what types of disputes will be eligible to access the binding mediation processes envisaged by the Code. Those are, however, matters that would need to be considered by the State Government.

3. If properly managed, it can be more efficient than other processes such as litigation and arbitration which can take many months or years to reach finality.

Binding mediation, however, has some draw-backs which need to be kept in mind when designing the system to be applied:

1. Mediation works best when the mediator can have candid confidential conversations with the parties in private sessions. Those sessions allow the parties and mediator to understand the parties' interests and priorities, which then allow the mediator to help guide the parties towards resolution. The most common complaint with binding mediation is that, because the mediation is held before the determination of the remaining unresolved issues, parties may be reluctant to "open up" to the mediator in confidential discussions knowing that the mediator will be called upon to decide any unresolved issues at the end of the day. For example, a party may be reluctant to tell the mediator what they would be willing to accept on a particular point if they know the mediator might use that information against them (consciously or otherwise) when making a determination on that point if it cannot be resolved.

2. Another common complaint is that the mediator, either consciously or subconsciously, forms a bias for or against a party during the course of the mediation, which then unfairly influences their decision making process when determining unresolved issues.

3. A further common complaint from binding mediation processes could be that the independent person is a very skilled mediator, but does not have the requisite skills, temperament or training to make a considered binding determination.

Those concerns may be more a perception rather than reality, though. Further, there may be mechanisms or processes to assist in mitigating against these concerns, for example:

1. Appointing two independent persons - one for mediation and another for the determination. However, that is likely to add to the cost and reduce the timeliness of the process;

2. Adopting a "hybrid" mediation/determination process in which there is a single independent person who is appointed, but the independent person prepares their binding determination *before* conducting the mediation. The determination would be kept confidential by the independent person and only revealed to the parties in the event that they were unable to agree on some points (and only revealed to the extent of the "unresolved terms"). However, that process may become too unwieldy and complicated, particularly if the independent person's determination would be different or altered in some way because of the matters that have been agreed between the parties (considering that the terms of agreements may be interlinked).

**What are the options for a Dispute Resolution System (DRS)?**

The context of the Code is important. The financial impact of the Coronavirus pandemic is severe and urgent. Many tenants have been forced to shut by law, while many others are suffering dramatic decline in revenue due to the economic downturn. Landlords are also required, by reason of tenant financial position and/or the requirements of the Code, to write-down revenue. The circumstances demand a process that is fast, fair and final.

In light of those matters, the QLS would suggest that the Queensland State Government consider a DRS which has the following features:

**The process**

1. Rules for the DRS: The DRS should be governed by rules which deal with the matters set out in this memo. Those rules should be binding on the parties, the appointing body and the independent person panel members.

2. An efficient system for referring and responding to a dispute: The DRS should allow either tenants or landlords (or both) to refer their dispute to a central body, such as the Queensland Civil and Administrative Tribunal (**QCAT**) using a relatively simple and easily accessible referral document.

3. The information that would be required for a referral form (at a minimum) is the following:

   (a) The full names of the landlord, tenant, any sub-tenant and any guarantors under the lease – this will allow records to be kept and for the independent person to conduct a conflict search (see below);

   (b) Contact details of the representatives of the parties, including any legal or financial advisers who have been involved;

   (c) Evidence that the lease dispute qualifies for this process (whatever those final criteria may be);

   (d) Provide a copy of the lease and any written communications in relation to the dispute;

   (e) Provide a summary of the key issues in dispute – this could include "drop-down" options about common issues that will arise in these disputes (such as amounts and timing of rental payments and outgoings);

   (f) Stricter requirements may be imposed, such as the requirement for a referring party to identify:

      (i) what terms of the lease are in dispute or sought to be negotiated;

      (ii) the nature of the dispute or matter sought to be negotiated in respect to each term;

      (iii) what outcome the referring party wants.[3]

4. The DRS should require a respondent (or respondents[4]) to provide similar information in response to the referral notice, within a set timeframe. The respondent should also identify in its response any "extra matters" that it wishes to deal with in the process, including providing similar information listed above in respect to those "extra matters".

5. Consideration will need to be given as to how to approach a situation in which the respondent does not provide a response to the referral notice in sufficient time (see suggested timeframes below) or does not provide a sufficient response. An option may be to ensure that there is evidence that the referral notice came to the attention of the respondent, and a warning notice given, before the process proceeds straight to binding determination. In that event, the

[3] See for example similar requirements under sub-clause 14(2) of the *Competition and Consumer (Industry Code—Sugar) Regulations 2017*

[4] For example, a referral may be made by a sub-tenant (e.g. franchisee) in which case the respondents should be both the landlord and the head-lessor (i.e. franchisor)

independent person would be required to make a decision about all matters in dispute, as identified in the referral notice.

6. Appropriate confidentiality and privacy measures should be established and maintained. Parties may provide highly commercially sensitive information which must be kept securely by both the administrating body and the panel members.

7. An intake process: The DRS will require the referral body (such as QCAT) to have sufficient resources to allow referral forms to be processed and for there to be efficient communication with the referral party and "other parties" to the dispute.

8. That will include sufficient personnel who are able to collect relevant information that has not been provided with the referral form and may include "administrative tasks" such as checking availability.

9. Appointment of the independent person (or persons): The DRS will require the following:

   (a) A panel of sufficiently qualified persons who are ready, willing and able to act as independent persons in the dispute. There are some important points to note in regards to the panel, so we have addressed that under the heading "*Personnel*" below;

   (b) A method of appointment and communication between the appointing body and the panel members. Some points on this:

      (i) Consideration will need to be given as to how a particular person is to be appointed. The QLS suggests that, rather than sending out an email to the whole panel with acceptances being on a "first come, first served" basis, the appointing body should nominate the proposed independent person for appointment based on a combination of availability and experience and endeavour to share appointments amongst the panel members. Location of the mediator should not be an issue at first, because mediations are likely to be by videoconference or teleconference, but that may be a consideration if and when physical distancing requirements are eased;

      (ii) the parties should not be able to "mediator shop" – in other words, the parties should not be permitted to request a change to the appointed mediator unless there is a legitimate concern such as a conflict of interest.

   (c) The appointed person should be independent of the parties to the dispute so as to maintain neutrality and avoid concerns about bias. Each mediator will therefore need to be able to conduct a conflict search and confirm that they have no prior relationship with the parties to the dispute. If the independent person does have some prior relationship, that fact must be referred to the appointing body, and the appointing body must either appoint a new mediator or at least give each party the option to "veto" that appointment due to the conflict. The veto of a party should remain confidential to the appointing body and the relevant party to avoid embarrassment and concerns about retribution.

   (d) The independent person (or persons) must be able to conduct the binding mediation process via a videoconferencing or teleconferencing process, due to physical distancing constraints. That should not be problematic due to the wide-spread availability of those systems.

10. Timeframes: The DRS should include some mandatory timeframes for the process to be conducted. For example[5]:

    (a) the respondent must respond to the referral form within 5 business days of being notified of the referral (and, possibly, another 2-3 business days following a notice from the appointing body that no response has been received or that the response is inadequate in a material respect);

    (b) the appointing body will appoint an independent person and notify the parties of the appointment within 2 business days of receipt of the respondent's response form;

    (c) the mediation will take place within a further 10 business days;

    (d) the binding determination will take place within a further 10 business days;

    (e) the independent person (or persons) will provide their report to the appointing body within 2 business days of completion of the relevant process.

11. Costs:

    (a) Cost considerations will no doubt be heightened in the current economic climate and considering the circumstances in which mediations are taking place.

    (b) In mediations conducted under the Retail Shop Leases Act, the mediator costs (and associated costs, such as venue) are borne by QCAT, whereas the parties bear their own costs of attending the mediation, including legal costs.

    (c) Consideration will need to be given as to whether the costs of the binding mediation (mediator/independent mediator and associated facilities) are to be borne solely by the parties or by the State (wholly or at least in part). Payment of costs by the State may have the effect of:

        (i) removing costs of the independent person as a barrier to referral, thereby encouraging parties to refer their matter to dispute resolution; and

        (ii) encouraging each party to consider the "efficient use" of resources such as legal advisers and experts including business advisors which may be relevant in assessing the impact of the pandemic on a particular business.

    (d) It may be argued that lawyers should be excluded from the process, in order to encourage parties to save on costs and not allow one party who has representation to "out gun" or bully their opponent. However, experience shows that, if properly managed, legal representatives often play a beneficial and important role in assisting the parties to reach resolution and assist the independent person to conduct the process and make a binding determination in relation to any unresolved terms. The QLS recommends that lawyers be permitted as of right to participate in the process.

12. The mediated process:

    (a) The DRS should allow the independent person (in this context, named "the mediator") to give binding directions in relation to matters such as:

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[5] Consideration will need to be given as to whether the timeframes are achievable, having regard to consultation with likely users.

(i) when the mediation sessions will be conducted, and the process for those sessions to be conducted (e.g. videoconference or teleconference), provided that the mediator has sought input from the parties on those matters;

(ii) what documentation is required, or permitted, to be provided to the mediator and/or the other party before the mediation. In that regard, the DRS may specify that each party is required to provide a list of terms that they wish the other party to agree to at the mediation;

(iii) who may, or may not, attend the mediation (and in that regard, we note the matters below about legal representation).

(b) Before the mediation, and immediately prior to the opening joint meeting, the independent person should explain to the parties the following minimum matters:

(i) that the first step in the process is to conduct a mediation, whereby the parties will provide opening statements about the key issues in dispute, followed by discussion about those key issues, generating possible options for resolution, negotiation and drafting of any resolution;

(ii) that the independent person intends to use a combination of joint meetings and private meetings to work through those stages (including how that will work with the videoconferencing or teleconferencing system);

(iii) that the mediation process is confidential to the parties and, further, that discussions in private sessions will be confidential between the independent person and the relevant party to that session;

(iv) importantly, that if any matter that has been raised at the mediation remains in dispute at the end of the mediation process, the independent person (or another person – see more on that under "Personnel") is required to make a binding determination about that matter in dispute.

(c) These matters are standard in ordinary mediation process, other than the final point regarding binding determination of matters not in dispute. Therefore, the QLS suggests that the panel consist of experienced, National Accredited Mediators (see further on that under "Personnel").

(d) There are some important matters to be considered in regards to the process:

(i) Are the mediators required to ensure that the parties have negotiated some minimum terms? In other words, will the mediator only deal with those matters brought to the table by the parties or ensure that the parties have reached agreement on other things they have not considered? If the latter, what are those matters – a checklist should be provided and both the appointing body and the independent person should "warn" the parties that they will be required to deal with all of those matters;

(ii) While the mediator will be "in charge" of the process and take steps to ensure the process is fair and each party is negotiating freely and not under duress, a question remains as to whether the mediator has a role to play in ensuring some minimum standards are met? For example will it be the mediator's role to ensure that the parties comply with the Code? The QLS does not encourage that approach:

(A) firstly, compliance with the Code should primarily be a matter for each party, not the mediator (who should be concentrating on the *process*, not the content of the negotiation);

(B) secondly, the mediator may not have the relevant information or training to properly determine whether or not the Code is being complied with;

(C) thirdly, tasking the mediator with the role of ensuring Code compliance may detract from the integrity of the mediation which has at its heart the notion of party autonomy in the terms of resolution, notwithstanding the binding nature imposed.

(iii) Are there any reporting requirements? For example, in most panel mediation schemes (such as mediations conducted under the Franchising Code), mediators are required to provide a report which simply identifies the matter, the parties and whether the mediation was successful or not. The appointing body and/or the mediator should identify to the parties what reports (if any) will need to be submitted at the completion of the mediation.

(iv) The DRS should include provisions which indemnify the mediator from liability arising from or connected with the conduct of the mediation. This is required to encourage panel participation and avoid collateral attacks by dissatisfied participants.

(v) Is the mediation "without prejudice" such that evidence of what was discussed at the mediation cannot be admitted as evidence in subsequent legal proceedings (such as a review of the decision)? Note here that if there is only one independent person to conduct the mediation and the determination, it may not be possible for the discussions at mediation to be truly "without prejudice" to the subsequent determination process. That could only be realistically achieved by the appointment of two independent persons – one to conduct the mediation and another to conduct the binding determination.

13. <u>The binding determination process</u>:

(a) The DRS should include a process whereby the dispute is transitioned from the mediation to the binding determination:

(i) If there is only one independent person this may be as simple as the person giving oral and/or written notice to the parties that he or she has formed the view that the mediation is at an end, that certain matters remain unresolved and that those matters will now be the subject of binding determination;

(ii) if there are two independent persons (one to conduct the mediation and another to conduct the determination):

(A) the rules will need to provide for a referral from one person to the next, including what information is required to be provided by the mediator. This may include, for example, a report by the mediator which identifies what matters have been agreed by the parties, what matters are not agreed and a summary of the parties' positions in respect to those unresolved matters;

(B) another option to consider is that the second independent person (who is appointed to undertake the binding determination, if that is required), may be

able to attend the joint sessions of the mediation to hear directly what information is being exchanged between the parties in those sessions. However, in order to avoid the concern about potential bias in the decision-making process, the second independent person should not attend the private sessions with the mediator.

(b) The DRS should state that the independent person is required to only decide the terms or matters that remain in dispute following the mediation. In other words, the parties are not permitted to raise a new matter at the determination stage for the first time. This will ensure that parties will seek to resolve all matters in dispute at mediation before the independent person is called upon to decide the unresolved matters.

(c) The DRS should specify that the independent person has authority to determine matters such as:

(i) whether, and if so, what written or oral submissions are required to be made or a party is entitle to make, including the form or length of those submissions;

(ii) that the independent person may (not must) take into account any submissions made by a party.

(d) It may be that an existing set of rules, from an appropriate industry body, may be adopted to be used in the DRS.[6]

(e) The DRS should consider and identify other important matters such as the following:

(i) the extent to which, and the manner in which, the independent person is required to take into account or implement the Code requirements or guidance. It may appear that the obvious answer is "yes", but careful consideration will need to be given as to how that is to be implemented by the independent person;

(ii) whether the independent person is required, or otherwise entitled, to take into account submissions by any person who is not a party to the dispute – for example, should the independent person be required or entitled to take into account submissions made by industry representative groups – or should the independent person only be entitled to take into account submissions made by the parties? It may be that the parties lack sufficient knowledge or resources to make submissions in relation to all matters, so it may be desirable from a policy perspective that the independent person can take into account submissions or guidance from recognised bodies on those matters;

(iii) Whether the DRS should include a term that the independent person must not determine a term that would result in the acquisition of property otherwise than on just terms[7] (see in paragraph 51(xxxi) of the Constitution;

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[6] Subject to agreement from the relevant body. See for example the QLS Model Clause for Expert Determination (http://www.qls.com.au/files/407cf709-83b3-4224-9394-9fd500f89d6c/model-clause-expert-determination.pdf), the Resolution Institute Expert Determination Rules (https://www.resolution.institute/documents/item/1845), the Australian Disputes Centre Rules for Expert Determination (https://www.disputescentre.com.au/adc-rules-for-expert-determination/) and others

[7] See in paragraph 51(xxxi) of the Constitution and clause 15 of the Sugar Code for example

(iv) Whether there will be any avenue for review or appeal from the determination (and if so, on what grounds).[8] QLS strongly recommends that some mechanism for review being included;

(v) How does the binding nature of the DRS under the Code interact with the Franchising Code (which provides for non-binding mediations) in cases involving landlords, franchisors and franchisees who may be in dispute about both their franchise agreement and the lease?

**Personnel**

14. An important consideration is, who should be appointed to the panel of independent persons?

15. It is unrealistic (and probably undesirable) for the panel to consist of people who have no experience in the commercial leasing industry and therefore no pre-existing experience or persuasions. However, the DRS should strive to have a balance of independent people who have experience with both tenants and landlords, or alternatively that the panel have a balanced mix of tenant and landlord associated members.

16. It is desirable that the panel have diversity in relation to matters such as age, gender and race. It is equally desirable to have panel members who are financially literate, considering that most (if not all) of the disputes will involve consideration of financial hardship issues.

17. For mediations:

    (a) ideally each independent person should be an accredited mediator under the National Mediation Accreditation System (NMAS);[9]

    (b) However, there are many qualified and experienced mediators who are not accredited under NMAS and, because of the likely high volume of work associated with the Code and the need for sufficient panel members, the DRS should probably allow for panel members to be appointed by the appointing body (at its discretion) based on a set of criteria.

18. For determinations, ideally the independent person will have undertaken training in Expert Determination and/or Arbitration, or otherwise have sufficient skills and training which would enable them to conduct determinations. Examples may be lawyers with a minimum of 5 years qualification experience in leasing law and/or litigation or recognised property industry experts. Again, the DRS should include criteria for selection.

19. As suggested above, another important consideration is whether there will be one or two independent persons appointed. Some matters to consider are:

    (a) whether the panel members have sufficient skills and experience to conduct both mediations and binding determinations;

    (b) some potential panel members may feel that they have the relevant skills and experience to conduct one, but not the other, process. In that case, it may assist panel membership to allow panel members to select whether they are available to be appointed to conduct mediations, binding determinations or both;

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[8] Note, for example, that there are limited grounds of review adjudication determinations made under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld)

[9] See the National Mediator Accreditation System information at https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf

(c) what would be the extra costs associated with the appointment of two independent persons, and if so, whether sufficient benefit is derived from that extra cost;

(d) whether having a separate (and smaller) group of individuals to conduct binding determinations may result in more consistency in the approach and outcomes achieved. For example, there may be more consistency and less variance in decided outcomes from a group of 10 persons than there would be from a group of 20 persons by reason of the fact that one person would be deciding more matters and would presumably take a consistent approach to particular types of disputed terms.