

21 April 2020

Our ref: LP-MC

Hon Yvette D'Ath MP  
Attorney-General and Minister for Justice  
GPO Box 149  
Brisbane Qld 4001  
By email: [REDACTED]

Dear Attorney

### **Commercial Leasing Code of Conduct**

We refer to the Commercial Leasing Code of Conduct (**Code**) which was recently announced by the National Cabinet in response to the COVID-19 pandemic.

Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

A number of our policy committees have been considering the implementation of the Code and its possible impact on affected parties.

We understand that the State Government is working to implement this Code in Queensland. The Code itself does not address a number of issues that should be considered further.

QLS would be pleased to consult with government on any legislation, including subordinate legislation which gives effect to, and provides further detail on, the principles set out in the Code, including to address the following issues.

#### **1. Implementation**

QLS acknowledges and supports the efforts of the National Cabinet in devising a pathway to address the severe economic impacts faced by many in the community as a result of COVID-19, including in the context of commercial leases. However, whilst the good faith principles in the Code are commendable, they do not provide for the same level certainly as one finds in legislation. There is significant detail not contained in the Code that should be included in legislation including subordinate legislation to ensure that the obligations of all parties are certain and clear.

Government should additionally develop interpretive guides and other assistance material for affected parties. In doing so, we urge the Government to consult with relevant stakeholders,

## Commercial Leasing Code of Conduct

including QLS, to ensure legal and practical issues are addressed and there are no unintended consequences, for example, arising from lack of clarity.

The need for this clarity and certainty is heightened as the Code stipulates that it is to be given retrospective effect from a date following 3 April 2020. Given that the Code has been announced by the National Cabinet, and parties have been already trying to apply the principles of the Code in their negotiations, we consider that the Code should be given effect from this time but, as is the case for any retrospective application of the law, we are cognisant of the risks associated with altering parties' existing rights. The transitional provisions need to be drafted with caution and a regard to all the relevant factors, so that parties can understand how the scheme is to be applied to their particular circumstances.

### 2. Eligibility and coverage

The Code provides:

*This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's JobKeeper programme, with an annual turnover of up to \$50 million (herein referred to as "SME tenants").*

*The \$50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).*

QLS does not comment on whether the eligibility criteria is appropriate, other than our recommendation below in relation to charities and not-for-profit organisations. This is generally a policy question for government. We acknowledge that the eligibility for the JobKeeper programme has been publically discussed for several weeks and thus it may be accepted by the community now as a reasonable measure of eligibility for assistance. As stated, any criteria must be clearly articulated.

Moreover, the process (including requirements for documentation and evidence) by which someone demonstrates eligibility needs to be addressed in any regulation or guide. Clear guidelines are critical here as any lack of clarity and certainty about the eligibility of the party will likely give rise to further disputes and increase costs and delays.

Further, the Code needs to be implemented in a way that is flexible enough to apply to those people/businesses not in formal landlord/tenant relationship but who are nonetheless involved in the leasing arrangements. For example, the rights and obligations a franchisor (who may hold the head lease) and its franchisee tenant (who may have a license to occupy or a sublease) will need to be considered. If the intent of the Code is to assist the parties to commercial leases then these relationships will need to be accommodated in the Code's application.

### 3. Charities and not-for-profits in Queensland

QLS seeks that consideration be given to removing the \$50 million annual turnover threshold for charities and not for profit organisations. QLS highlights that as the detail of the

## Commercial Leasing Code of Conduct

JobKeeper package was developed, more particular rules were developed for charities including no less advantageous treatment for large charities.

QLS commends a similar approach including the non-application of the \$50M turnover test for charities and not-for-profits as the detail of the adoption of the Code into Queensland law is considered by the Queensland parliament, for the following reasons:

- Charities and not-for-profits have unique and often tied funding arrangements and as a result, often limited ability to redirect funds within an organisation. These financial restraints mean that charities and not-for-profits with an annual turnover exceeding \$50 million may in fact be experiencing significant financial stress or hardship as a result of the COVID-19 pandemic.
- Overall, the QLS is supportive of the land tax relief package for the wider business community and acknowledges the incentive this offers private landlords to pass on rent concessions, including to charity and not-for-profit tenants.

However, the benefits are diminished in instances where charities are landlords and derive rental income. Most charities are exempt from paying land tax in Queensland even in relation to properties they lease to others for income generation purposes and will receive no benefit from land tax relief. Those charities (regardless of annual turnover) will be required to grant rent concessions to commercial tenants that meet the eligibility criteria for the mandatory Code and charities that otherwise opt into the principles on a good faith basis, regardless of whether the landlord charity has a land tax saving to pass on.

### 4. Binding mediation

The Code provides for "binding mediation" of disputes about temporary lease terms. While no process has yet been outlined, we consider that such a concept is flawed and contrary to the central tenet of mediation, which is that parties to a dispute reach agreement. However, we accept that these are critical times where parties are suffering unexpected issues which require timely resolution.

QLS has many members who are experienced mediators and arbitrators who would be pleased to assist in developing an effective dispute resolution process.

In short, we suggest that the framework ultimately implemented should provide for mediation with a referral process for short-form arbitration if the mediation does not result in a resolution of the issues. Our members have been involved in matters under the Sugar Code<sup>1</sup> and consider a similar framework could be adopted here.

Any process will also need to have regard to existing industry codes, such as the Franchising Code, which already have established dispute resolution processes in place.

However, if the Government's preference is to introduce the binding mediation suggested in the Code, QLS strongly recommends that there be a clear review process available to parties.

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<sup>1</sup> *Competition and Consumer (Industry Code-Sugar) Regulations 2017*

## **Commercial Leasing Code of Conduct**

### **5. Code Administration Committee**

We note that the Code will be supported by a state-based Industry Code Administration Committee, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests. QLS would welcome the opportunity to take part in this Committee or otherwise provide advice and feedback on how the Code is operating.

Should you require any further information, please do not hesitate to contact our Legal Policy Team, by phone on 07 3842 5930 or email to [policy@qls.com.au](mailto:policy@qls.com.au).

Yours faithfully

A black rectangular redaction box covering the signature of Luke Murphy. A blue ink scribble is visible to the right of the box.

Luke Murphy  
**President**