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WELCOME

LOCKDOWN 2.0

*Legal Tips
for your
Business or Organisation*

WELCOME



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AGENDA

1. JobKeeper Scheme

- Eligibility
- Extension and Changes
- JobKeeper Enabling Directions
- Disputes

2. Modern Awards

3. Employment Questions

AGENDA

- 5. Recap of Lease Protections**
- 6. Regulation 11 - Subsequent Rent Relief**
- 7. Commercial Lease Questions**
- 8. Q&A**

LOCKDOWN 2.0

LEGAL TIPS FOR YOUR BUSINESS OR ORGANISATION

Disclaimer

The guidance in this presentation is of a general nature only as of 22 July 2020 and should not be relied upon as legal advice.

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

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JOBKEEPER SCHEME

A quick refresher on existing eligibility

1. **Employer carried on a business or not-for-profit enterprise at 1 March 2020**
2. **Employer experienced 30% fall in turnover, if < \$1b annual aggregated turnover (15% fall for charities)**
3. **As at 1 March 2020, the employee was a full time or part time employee, or a casual employee working for 12 months on a regular and systematic basis**
4. **The employee was an Australian resident as at 1 March 2020**

JOBKEEPER SCHEME

From the PM's press release - from 28 September 2020

- 1. JobKeeper extended until 28 March 2021**
- 2. Employers will need to re-assess eligibility for the December quarter against their actual June and September turnover, and their eligibility in the March 2021 quarter against their December 2020 quarter turnover**
- 3. The pay rates will be scaled back:**

Date	Full rate per fortnight	Less than 20hrs worked per fortnight rate
28 September 2020 to 3 January 2021	\$1,200	\$750
4 January 2021 to 28 March 2021	\$1,000	\$650

JOBKEEPER SCHEME

From the PM's press release - from 28 September 2020

- 4. It appears that there is no change to employee eligibility – therefore it appears JobKeeper will only be available to existing eligible employees, and not to any new permanent employees or casual employees that might otherwise have qualified after 1 March 2020**

JOBKEEPER SCHEME

JobKeeper Enabling Directions

Employer can direct employees that are participating in the JK Scheme:

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

In effect until 28 September 2020 – *possibly to be extended.*

The JobKeeper provisions of the Fair Work Act override provisions in Awards, Enterprise Agreements and employment contracts

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 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.

JOBKEEPER SCHEME

JobKeeper Disputes

The Fair Work Commission has the power to deal with JobKeeper disputes

Key areas of dispute

- Employees refusing employer's request to take annual leave
- Employees disputing stand down directions and reduction in hours
E.g. *Allen Jones v Live Events Australia Pty Ltd* [2020] FWC 3469]

MODERN AWARDS

Modern Awards

Updates to most Modern Awards:

- Originally the Fair Work Commission amended most Awards to provide for:
 - 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)
- However, these amendments expired on 30 June 2020. The Fair Work Commission has extended the provisions for some (but not all) Awards for varying lengths of time

EMPLOYMENT QUESTIONS

Question 1

We have JobKeeper employees who are calling in unwell. However, we know that they are working a second job. What are our options, and can we give shifts to other JobKeeper employees who are more reliable.

- Employers need to be very careful when dealing with any employee who says that they are unwell
- Require unwell employees to provide a medical certificate or other evidence that they were in fact unwell and unable to work
- If you have evidence that an employee called is unwell but they were working another job that day, that would ordinarily be grounds for disciplinary action

EMPLOYMENT QUESTIONS

Question 2

The ATO declined our client's JobKeeper application because the client had not submitted their 2019 tax return. Could we challenge that decision?

- For a sole trader to be eligible for JobKeeper, the rule is that they must have:
 - Held an ABN as at 12 March 2020; and
 - Lodged a 2018-19 income tax return by 12 March 2020, or have lodged an activity statement or GST return for a tax period that started after 1 July 2018 and ended before 12 March 2020.
- ATO does have discretion to grant an extension of time

EMPLOYMENT QUESTIONS

Question 3

A number of our employees are deemed by their doctor to be in 'the high risk category' for an adverse response to their health should they contract Covid-19. This also creates fear for these employees. What is the organisation's legal obligations and options to manage those deemed high risk category employees?

- Occupational Health and Safety Act 2004 (Vic)
- Compliance with health directives
- Practical measures – can employees work from home?
- Can you utilise JobKeeper as a safety net?
- Take care not to unlawfully discriminate
- Annual leave or unpaid leave
- Personal leave can only be taken if the employee is unwell
- Each business or organisation will be different

COMMERCIAL LEASES

Recap of Lease Protections

1. The Code
2. Covid-19 Omnibus (Emergency Measures) Act 2020
 - a) Leases and Licenses Covered
 - b) Eligible Lease Definition –
 - Lease in effect when regulations came into operation (29 March 2020);
 - SME entity (turnover under \$50 million);
 - Qualifies for and is a Participant in JobKeeper (Some exclusions apply –Corporate Groups, Agricultural Leases/Licenses)
 - c) Small Business Commissioner Function

COMMERCIAL LEASES

Recap of Lease Protections

3. **Covid-19 Omnibus (Emergency Measures)(Commercial Leases and Licenses) Regulations 2020**
 - a. **Protection period – 29 March 2020 to 29 September 2020**
 - b. **Tenant protected from breach if eligible and complying with regulations**
 - **Written request for relief**
 - **Confirmation of being an eligible lease**
 - **SME Entity**
 - **JobKeeper**
 - **Negotiations in Good Faith**
 - c. **Waiver and Deferral**
 - d. **Subsequent Rent Relief – Discussed Below**
 - e. **Prohibition of Rent Increases**
 - f. **Extension of Term**
 - g. **Outgoings – Landlord ‘must consider’ if Tenant is ‘not able to operate’ their business at the Premises. Any relief received by the Landlord to be passed on – Land Tax, Council Rates, etc.**
4. **Commercial Tenancy Relief Scheme – Policy Guidelines**
5. **Small Business Commissioner FAQs**

What if you have already reached an agreement but did not factor in a second wave? What now?

Regulation 11 – Subsequent rent relief

1. If the financial circumstances of a tenant under an eligible lease materially change after a variation to the eligible lease has been made or an agreement has been reached as mentioned in regulation 10(6)—
 - a) the tenant may make a further request to the landlord under that lease for rent relief under regulation 10; and
 - b) subject to subregulation (2), the landlord and the tenant must follow the process set out in regulation 10 in relation to that request.
2. A landlord's offer of rent relief need not comply with regulation 10(4)(b).

Key Concepts:

- Eligible Lease – Note JobKeeper reforms
- Material Change
- Evidence Issue – Note Policy Guidelines
- Relief Request Process – Note a Landlord is no longer required to provide a 50% waiver component (Regulation 10(4)(b))

COMMERCIAL LEASES

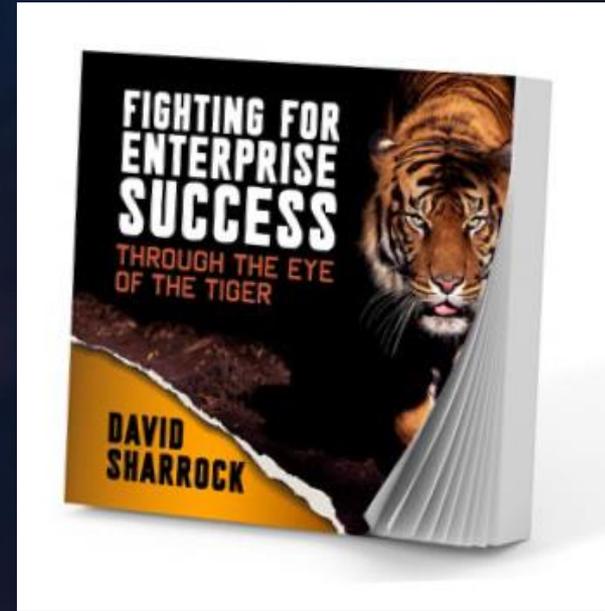
Questions

- 1. What is the impact of the Covid-19 Commercial Tenancy Rent Relief Scheme on Market Rent Reviews? What if the Market Review Date was prior to the Protection Period? What if it is during the Protection Period? At what point is the review effective and what happens going forward as the Protection Period ends?**
- 2. With the second wave, what is the current status of things for Landlords and Tenant?**
- 3. Is there any difference in the rent relief rights if you are the Tenant of a retail shopping centre?**
- 4. Can a Landlord require the Tenant to provide actual trade figures for April to June when considering a request for further rent relief from July to September? Can a Landlord use the April to June figures to assess relief rather than a July 2020 to July 2019 comparison? What happens if the Tenant has traded better or worse than what was anticipated? Can the rent relief agreed be scaled back or increased just after it was agreed?**
- 5. If you have agreed on one lot of rent relief, is the Landlord bound by the Code for any further request for relief?**

Q&A

Fighting For Enterprise Success: Through the Eye of the Tiger

By David Sharrock



www.fightingforenterprisesuccess.com

Special 30% Discount Offer for attendees:
Email kristen@sharrockpitman.com.au

THANK YOU



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