

On 7 April 2020, the National Cabinet announced that the states and territories will legislate a mandatory Code of Conduct for commercial tenants (the Code). The Code provides a set of “good faith” leasing principles for application between commercial landlords and tenants who have an annual turnover of up to AU\$50 million and are eligible for the Commonwealth government’s JobKeeper programme.

The Code is intended to enable a consistent national approach for landlords and tenants to share in a proportionate manner the financial risk and cash flow impact resulting from the significant business interruption due to COVID-19.

The Code will apply for the period during which the Commonwealth government’s JobKeeper programme remains operational.

The Code is to be introduced through legislation or regulation by state and territory governments. At the time of writing, the Code is yet to be legislated or regulated by the states and territories.

### Overview of Leasing Principles

The Code formalises principles to be adopted in negotiating arrangements to existing commercial leases due to commercial disruption arising from industry and government responses to COVID-19. These principles are set out below:

- Landlords are prohibited from terminating leases due to non-payment of rent during the COVID-19 period (or reasonable subsequent recovery period).
  - Tenants must remain committed to the terms of their lease, subject to any amendments to their rental arrangements negotiated under the Code. A tenant’s material failure to comply with the substantive terms of their lease will forfeit any protections provided to the tenant under the Code.
  - Landlords should offer tenants appropriate cash flow relief, in the form of waivers and deferrals, of up to 100% of rent ordinarily payable under the lease, on a case-by-case basis, on the basis that the relief should be directly proportionate to the reduction of turnover experienced by the tenant during the COVID-19 period.
  - Rental waivers must constitute no less than 50% of the total reduction in rent payable 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 lease obligations.
- In determining the rental waiver, the parties must have regard to the landlord’s financial ability to provide any additional waivers. A tenant may agree to waive the requirement for a 50% minimum waiver.
- Payment of rent deferrals should 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.
  - Any reduction in statutory charges (e.g. land tax or council rates) or insurance received to the benefit of the landlord must be passed onto the tenant in the appropriate proportion applicable under the terms of the lease.
  - Landlords should seek to share any benefit it receives due to deferral of loan payments, provided by a financial institution as part of the Australian Bankers 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.
  - 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. A landlord may reserve the right to reduce services as required in such circumstances.
  - If negotiated arrangements under the Code necessitate repayment, repayment 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.
  - Landlords must not charge fees, interest or other charges in respect to any rent waiver or deferral under the Code.
  - 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 COVID-19 period and/or a reasonable subsequent recovery period.
  - The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or rent deferral period.
  - Landlords agree to freeze rent increases (except for retail leases based on turnover rent) for the duration of COVID-19 and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.
  - Landlords may not apply any prohibition or levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

## Does the Code Apply to Me?

The Code applies to all small and medium enterprise commercial tenants that:

- Are eligible for the Commonwealth government's JobKeeper programme
- Have an annual turnover of up to AU\$50 million, noting that the AU\$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)

If the Code applies, landlords and tenants must negotiate in good faith to ensure that they are complying with the principles of the Code and reach agreement regarding any rent relief.

The Code does not apply:

- If a tenant has not experienced a reduction in business turnover
- To variations to lease agreements, which have been entered into voluntarily before the commencement of the Code

For tenancies that do not fall within the Code, landlords and tenants will be free to negotiate at their own discretion any commercial arrangements in relation to rental relief (if any).

## Failure to Reach an Agreement

Where a landlord and tenant cannot reach an agreement on leasing arrangements (as a direct result of COVID-19), the matter should be referred by either party to applicable state or territory commercial leasing dispute resolution processes for binding mediation, including small business commissioners/ombudsmen.

## Takeaways for Tenants

If you are a tenant wishing to obtain rental relief and the Code applies to you, before making contact with your landlord you should make sure that you have sufficient and accurate information available to provide to the landlord in order to:

- Evidence that the Code applies to your tenancy; that is, you:
  - Are eligible for the Commonwealth Government's JobKeeper programme
  - Have an annual turnover of up to AU\$50 million
- Evidence the reduction of turnover experienced during the COVID-19 period in the form of information generated from an accounting system and/or information provided to and/or received from a financial institution

## Takeaways for Landlords

Upon receipt of a request from a tenant for rent relief, a landlord should:

- Ask the tenant to provide such information as is necessary in order to determine:
  - Whether the Code applies to the tenancy
  - The percentage of the reduction in turnover experienced by the tenant having regard to the previous quarter and year's accounts
- Review the current terms of the lease and lease term to determine the appropriate form of rental relief
- Consider the landlord's financial ability to agree to rental relief and engage with its financier/s in relation to the waiver or deferral of rent

If you are unsure how the Mandatory Code of Conduct will impact you, please reach out to your regular contact in our Real Estate team who will be able to assist you further.

## Contacts



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