



COVID-19 and the Code of Conduct for Leases and Tenancies

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Since our earlier [e-alerts](#), National Cabinet agreed to a Code of Conduct to apply to commercial tenancies. This will be mandatory for businesses with a turnover of less than \$50 million that satisfy the eligibility criteria under the JobKeeper subsidy program (SME tenants).

These are the overarching principles:

1. Landlords and tenants share a common interest in working together, to ensure business continuity and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period.
2. Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements and to work towards achieving mutually satisfactory outcomes.
3. Landlords and tenants will negotiate in good faith.
4. Landlords and tenants will act in an open, honest and transparent manner and will each provide sufficient and accurate information



within the context of negotiations to achieve outcomes consistent with the Code.

5. Any agreed arrangements will take into account the impact of the COVID-19 pandemic on the tenant, with specific regard to its revenue, expenses and profitability. Such arrangements will be proportionate and appropriate based on the impact of the COVID-19 pandemic and a reasonable recovery period.
6. The parties will assist each other in their respective dealings with other stakeholders including governments, utility companies and banks/other financial institutions to achieve outcomes consistent with the objectives of the Code.
7. All premises and commercial arrangements are different; it is not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the Competition and Consumer Act 2010.
8. The parties will take into account the fact that the risk of default on commercial leases is ultimately (and already) borne by the landlord. The landlord must not seek to permanently reduce this risk in negotiating temporary arrangements envisaged under the Code.
9. All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic, whether the lease term has ended or will expire soon and whether the tenant is in administration or receivership.
10. Leases have different structures, different periods of tenure and different mechanisms for determining rent. Rent may already be in arrears.

These factors should also be taken into account in formulating any temporary arrangements in line with the Code.

The objective of the Code is to mitigate the impact of the COVID-19 pandemic on the tenant. Due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.¹

The States and Territories will be tasked with implementing and legislating the Code of Conduct by complementing existing legislation during the COVID-19 period. New South Wales has already implemented changes under the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) affecting a broad range of leases including retail, residential and rural leases.

State and Territory governments are also looking to provide the equivalent of a 3-month land tax waiver and deferral with landlords to pass on those benefits.

The Prime Minister has called on landlords and tenants to share the burden by employing a proportionality principle in their negotiations.² Reflecting the tenant's turnover reduction in a rental waiver (refer to Appendix I of the Code for examples), extending the lease to reflect the time a tenant is forced to close their doors or agreeing on a different rate of rent for the entire term of the lease are all possible solutions that will apply differently to each lease as agreed to by the landlord and their tenant.

Ultimately, best outcomes are achieved by landlords and tenants working together and negotiating in good faith.

The Code does not apply to tenants that have not experienced a reduction in business turnover and are not eligible for the JobKeeper program. These tenants must continue to pay their rent. The Code of Conduct is intended to address the



challenges faced by small and medium commercial tenancies unable to satisfy the terms of their leasing arrangements.

Leasing Principles

The Code sets out 14 leasing principles to be applied as soon as possible, including:

1. Landlords must not terminate leases due to non-payment of rent during the pandemic period or a reasonable recovery period;
2. Subject to any agreed amendments to leases, tenants must stay committed to their lease obligations as material failures to comply may result in a forfeiture of protections provided by the Code;
3. As noted above, landlords must offer rental reductions (in the form of waiver or deferral) proportionate to the tenant's business downturn. In the case of a deferral, interest and other charges cannot be charged to the tenant;
4. Landlords are encouraged to waive payment of outgoings by a tenant while the tenant is unable to trade. In turn the landlord may reduce the services provided;
5. Tenants should be given the opportunity to extend their leases to for a period equivalent to any rent waiver or deferral period;
6. Reductions in statutory charges or insurance will be proportionately passed on to the tenant where appropriate under the terms of the lease. Landlords should also seek to share the benefit it may receive from the deferral of loan repayments provided by financial institutions;
7. Rent increases are frozen during the COVID-19 and recovery period, except for retail tenants whose rent

is based on turnover;

8. Landlords must not draw on a tenant's security during the pandemic period or for a reasonable subsequent recovery period for non-payment of rent;
9. No fees, punitive interest or charges should be applied by landlords with respect to waivers or rent deferrals as they may apply in each case;
10. Tenants must not be penalised for reducing operating hours during the pandemic period.

The PM has stated that "The Code provides a proportionate and measured burden share between the two parties while still allowing tenants and landlords to agree to tailored, bespoke and appropriate temporary arrangements that take account of their particular circumstances".³ Not everyone agrees though that the Code will lead to a measured burden, but instead will leave landlords to foot the bill for their tenants, which may lead some landlords "to go bust".⁴

Having said this, the National Cabinet has stated it expects financial institutions to help landlords and tenants through the implementation of the code. This does not mean that financial institutions will accept the burden without requiring full repayment of loans at some later date. On the contrary. It also does not deal with landlords who are debt-free.

These remarkable ideals are welcomed especially as they become law, but the situation on the ground may look somewhat different at present.

Although landlords and tenants are expected, by law, to negotiate in good faith, some tenants are attempting to take advantage of the situation by pursuing significant rent-free periods with seemingly no consideration for the



impact this would have on the landlord. On the other hand, some landlords are refusing to negotiate with tenants. There are bound to be disagreements. And establishing a failure to act in good faith will be very difficult. Protecting one's own interests does not establish bad faith and has been held by the courts to be entirely reasonable where a proprietary interest is involved. The issue cannot just be about money- paying rent or not paying rent- which appears to be the most immediate concern of the Code.

For parties unable to reach an agreement, the matter should be referred by either party to the applicable mediation or dispute resolution service, e.g. QCAT. This will lead to significant wait times for parties to have their dispute mediated. QCAT and other dispute resolution forums are already under significant strain and are under resourced. However, the mediation process must not be relied on by either landlord or tenant to prolong the negotiations or frustrate an amicable resolution.

Conclusion

The objective of the Code is laudable and endeavours to provide guidance and certainty. Landlords may be forgiven for reading the Code as tenant sensitive.

And there are some practical issues: If a tenant's rent is deferred, how will that tenant have the ability to repay later? Recovery could take months, even beyond the original lease term. Must the parties extend the term? Would it be acting in bad faith to refuse to do so? A business is unlikely to double its revenue to play rent catch up which puts both parties at risk.

It is easy to be critical, but that is how it should be. The one thing that COVID-19 has generated is an almost universal acceptance that we must do the things that government is telling us to do. While there can be no quibble about that on the health front, one thing that COVID-19 should not do is reduce our ability to debate and think about all of the things that now affect us. Being a landlord or a tenant is only one of those things that requires critical examination, albeit a crucial one for the property industry and the lawyers who service that industry.

The Code of Conduct is fully set out [here](#).

To discuss your situation or seek advice about your options, please contact one of our experienced property lawyers.

If you want to discuss any property matters, please contact:

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¹ For a full explanation see National Cabinet Mandatory Code of Conduct, SME Commercial Leasing Principles during COVID-19.

² The Hon Scott Morrison MP, 'Press Conference – Australian Parliament House, ACT' (Transcript 3 April 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-030420>>.

³ The Hon Scott Morrison MP, 'Update on coronavirus measures' (Media Statement 7 April 2020) <<https://www.pm.gov.au/media/update-coronavirus-measures-070420>>.

⁴ ABC, Scott Morrison announces rent relief package for commercial tenants affected by coronavirus (accessed 7 April 2020) <<https://www.abc.net.au/news/2020-04-07/scott-morrison-commercial-tenants-coronavirus-measures/12129178>>.