

NATIONAL CABINET MANDATORY CODE OF CONDUCT

SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

The government has announced measures to provide rent relief for certain commercial tenants during the COVID-19 pandemic period and a reasonable subsequent recovery period via a mandatory Code of Conduct (the Code).

The purpose of the Code is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper programme.

Commencement/Expiry

This Code comes into effect in all states and territories from a date following 3 April 2020, to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational (currently to 27 September 2020).

A qualifying commercial tenant is:

- A business (including not-for-profits) that satisfies the Code's annual turnover threshold (up to \$50 million) and is an 'eligible business' under the JobKeeper legislation;
- Is suffering financial stress or hardship as a result of the COVID-19 pandemic

Turnover threshold

The Code states that 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).

Financial stress or hardship is defined as:

- an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments
- tenants under the \$50 million turnover threshold and which are also eligible for the JobKeeper payment are automatically considered to be in financial stress or hardship)

PROPORTION OF RENT RELIEF

An example of how the principle of proportionality is as follows:

- A qualifying tenant experiencing a 60% loss in turnover from the COVID-19 pandemic should be expected to receive a 60% rent relief outcome; and
- Other leasing principles would mandate that
 - At least half of this relief is provided as rent waiver; and
 - Up to half could be through a rent deferral, with this to be recouped over at least 24 months (but in a manner that is negotiated by the parties)

The Code's principles

Overarching principles

- Common interest to ensure business continuity;
- Requirement to negotiate;
- Good faith;
- Transparency, including provision of sufficient and accurate information;
- Agreed arrangements will take into account the COVID-19 impacts on the tenant, with specific regard to its revenue, expenses, and profitability;
- Assist each other with other stakeholders including governments, utility companies and financial institutions in order to achieve outcomes consistent with the objectives of this Code;
- All premises and their commercial arrangements are different therefore a collective industry position is not possible. Application, constraints and the spirit of the Competition and Consumer Act is recognised;
- The landlord already bears the rent default risk. The landlord must therefore not seek to permanently mitigate this risk in negotiating temporary arrangements;
- Consider factors such as whether the lease has expired or will soon; and whether the tenant is in administration or receivership;
- Additional factors to consider: Leases have different structures, periods and mechanisms for determining rent. Leases may already be in arrears, or have expired and be in 'hold-over';
- Due regard should be given to whether the tenant is in administration or receivership, and the application of the Code modified accordingly.

Leasing principles

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (PP) or reasonable subsequent recovery period (RP).
2. Tenants must remain committed to lease terms, subject to any re-negotiation under the Code. Material failure to abide by substantive terms will forfeit any protections.
3. Landlords must offer tenants proportionate reductions in rent in the form of rent waivers and rent deferrals of up to 100% of the amount ordinarily payable, on a case-by-case basis, based on the reduction in the tenant's trade during the PP and RP.
4. Rental waivers must constitute not less than 50% of the total reduction in rent payable under principle #3 above over the PP. Tenants may agree to disregard the requirement for a 50% minimum waiver.
5. Rental deferrals must be amortised over the greater of the balance of the lease term and a period of at least 24 months, unless otherwise agreed by the parties.
6. Any reduction in statutory charges (e.g. land tax, council rates) or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease.
7. A landlord should seek to share proportionately with the tenant any benefit it receives due to deferral of loan repayments provided by a financial institution as part of the Australian Banking Association's COVID-19 response, or any other case-by-case deferral of loan repayments.
8. Landlords should where appropriate, waive recovery of other expenses/outgoings payable by a tenant during the period the tenant is not able to trade. Landlords reserve the right to reduce services as required in such circumstances.

9. If negotiated arrangements under this Code necessitate repayment, this should occur over an extended period. No repayment should commence until the earlier of the PP ending or the existing lease expiring and taking into account a RP.
10. No fees, interest or charges should be applied with respect to rent waived in principles #3 and #4 above and no fees, charges nor punitive interest may be charged on rent deferrals in principles #3, #4 and #5 above.
11. Landlords must not draw on a tenant's security for the non-payment of rent during the period of the PP and/or a RP.
12. The tenant should be provided with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period. This is intended to provide the tenant additional time to trade, on existing lease terms, during the RP.
13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the PP and a RP.
14. 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.