

Fact Sheet on Commercial Leasing Principles - COVID-19

Mandatory Code of Conduct: SME
Commercial Leasing Principles during
COVID-19 (Code) for small/medium
enterprise tenants.

A brief summary of the Code which
imposes a set of good faith leasing
principles in relation to commercial leases
(including retail, office and industrial).

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Fact Sheet on Commercial Leasing Principles - COVID-19

The National Cabinet has released the *'Mandatory Code of Conduct: SME Commercial Leasing Principles during COVID-19'* ("**Code**") for small/medium enterprise tenants. The Code imposes a set of good faith leasing principles for application to commercial leases (including retail, office and industrial) where a tenant is suffering financial stress or hardship as a result of the commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus ("COVID-19") pandemic.

The Code will be given effect through relevant state and territory legislation or regulation as appropriate. The Code is not intended to supersede such legislation but aims to complement it during the COVID-19 crisis period.

This document provides a brief summary of the [Code](#) and therefore should not be relied on as a substitute for reading the Code.

Objective

The objective of the Code is to share in a proportionate, measured manner, the financial risk and cash flow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords. The Code encourages negotiations be conducted on a case by case basis and that parties will agree to tailored and bespoke arrangements taking into account their particular circumstances.

Eligibility Criteria

The Code **applies to all commercial tenancies** (including retail, office and industrial).

To be eligible for the Code protections, the tenant must be:

- a business eligible for the JobKeeper program;
- have a turnover of less than \$50 million; and
- have a 30% or greater reduction in turnover.

The Code expects that even if tenants do not meet the eligibility criteria, the Code should apply "in spirit" to all leasing arrangements for affected businesses.

Principle of Proportionality

Landlords **must offer tenants proportionate reductions in rent payable** in the form of:

- waivers; and
- deferrals;

of up to 100% of the amount ordinarily payable based on the reduction of the tenant's trade during the COVID-19 period and a subsequent reasonable recovery period. The duration of the rent relief is to be consistent with the period of disruption to the business effected by the COVID-19 pandemic.

Qualifying tenants are to be provided with cash flow relief in proportion to their loss of turnover they have experienced from the COVID-19 crisis. i.e. a 60% loss in turnover would result in a guaranteed 60% cash flow relief (rental reduction) under the Code.

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How is rent assistance to be provided?

Rental waivers **must** constitute no less than 50% of the total reduction in rent payable over the COVID-19 pandemic period 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 ongoing obligations under the lease.

This means that 50% of the agreed reduced rental amount for the period of the COVID-19 pandemic should be waived by the landlord and is not to be repaid by the tenant. Meanwhile, the other half is to be deferred for future repayment by the tenant in accordance with the [Code](#).

Tenants may waive the requirement for a 50% minimum rent waiver by agreement with their landlord.

Are outgoings and other charges payable during the term of the lease?

Landlords are expected to:

- proportionately pass on to the tenant any reduction in statutory charges e.g. land tax and rates;
- share any benefit it receives due to a deferral of loan payments it receives with the tenant in a proportionate manner;
- waive recovery of outgoings or other expenses where appropriate during the period the tenant is not able to trade. However, the Landlord may reduce services as required in such circumstances.

When do tenants have to repay the deferred rent?

Payment of rental deferrals by the tenant must be amortised over the balance of the lease term or for a period of no less than 24 months, whichever is the greater, unless otherwise agreed by the parties. Repayments should not commence until the earlier of:

- COVID-19 pandemic ending (as defined by the Australian Government) or
- the existing lease expiring and taking into account a reasonable subsequent recovery period.

Landlord's right to information.

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.

Can tenants exit the Lease?

Subject to any amendments to the lease agreement negotiated under the Code, tenants must remain committed to the terms of the lease. The tenant will forfeit any protections provided under the Code, if it fails to materially comply with the substantive terms of the lease.

Prohibitions under the Code

Landlords are prohibited from the following actions:

- Termination of leases for non-payment of rent;
- Increasing rents during the COVID-19 pandemic period (other than for retail leases with turnover rents);
- Making a claim on a tenant's bank guarantee or security deposit for non-payment of rent;
- Charging penalties for tenants who stop trading or reduce opening hours; and
- Charging interest on unpaid rent or outgoings.

Tenant to be provided with an opportunity to extend the lease

A 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 recovery period after the COVID-19 pandemic concludes.

Binding Mediation

Where landlords and tenants cannot reach agreement on leasing arrangements, the matter should be referred by either party to the applicable state retail/commercial leasing dispute resolution process for binding mediation.

Example

Tenant states/proves their turnover has fallen by 60% as a result of the COVID-19 pandemic.

The current rental is \$10,000 per month.

The rent payable by the tenant for the duration of the COVID-19 pandemic will be reduced proportionately by 60% thereby reducing the rent payable during this period to \$4,000 per month.

The total rent reduction = \$6,000 per month.

At least 50% of that reduction (\$3,000 per month) must be waived by the landlord and is not recoverable from the tenant in the future.

The remaining \$3,000 month is deferred rent and will be repayable by the tenant, in addition to the tenant's normal monthly rental, over the balance of the lease term or over the next 24 months, whichever is the greater.