



L A W Y E R S

COVID-19: Guide to the Mandatory Code of Conduct regarding Commercial Leasing

Version 1 – 13 April 2020

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Introduction

The National Cabinet has, on 7 April 2020, released a mandatory code of conduct in relation to commercial leasing (**Code**). It imposes a set of good faith leasing principles applicable to negotiations in relation to relevant commercial tenancies (including retail, industrial and office tenancies) to deal with the impacts of COVID-19. A copy of the Code is attached as Schedule 1.

The Code is to be implemented by legislation or regulation in each of the states and territories.

This guide is intended to aid landlords, tenant and others in understanding the applicability of the Code and what obligations it imposes and address a variety of questions that arise.

Parts 1 to 3 address the details of the Code. Parts 4 to 7 deal with queries and considerations for those applying the Code. Part 8 deals with the enforcement process.

Preliminary Comments

The Code advocates case-by-case treatment and bespoke deals which are to take into account a non-exclusive list of factors. As each situation will be different, the Code provides guidance and minimum requirements and obligations without being overly prescriptive.

On that basis, landlords and tenants need to carefully consider their specific situations and how the Code applies to them.

As the Code is yet to be “fleshed out” in the form of legislation and the drafting is somewhat imprecise (and sometime contradictory), many assumptions about its applicability are necessary, as is evident in this guide. Following passing of legislation regarding the Code, some of the uncertainty will hopefully be resolved.

Further Assistance

As always – please call us if you have any queries arising out of this Guide or if you are facing any unique situations in your business that you would like to work through.

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Important Note:

Until the Code is passed into law, assumptions will need to be made about the extent to which the Code is implemented in the relevant states and territories. Certain aspects may be expanded, altered or reduced depending upon the specific of the legislation or regulation. Accordingly, it will be important to review the particular legislation once released to verify the effect outlined below.

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Summary

To whom does the Code apply? (See Part 1)

- retail, industrial, office tenants (and subtenants):
 - turnover \leq \$50 million
 - suffering financial stress or hardship as a result of COVID-19 impacts
- includes tenants holding over
- landlords of those tenants
- turnover $>$ \$50m
- less than 30% reduction in turnover
- residential tenants
- new leases entered in after commencement of Code

How is turnover assessed? (See Part 1.2)

- group level for corporate groups
- franchisee level for franchises

When does the Code apply? (See Part 2)

- during the COVID-19 pandemic; and
- in respect of some elements, a reasonable recovery period thereafter

What does the Code require? (See Part 3.1)

- good faith negotiation
- disclosure of sufficient and accurate information
- reductions in rent proportionate to impacts upon turnover
- 50% or more of rent reduction to be in the form of waiver
- landlords to pass through savings
- compliance with lease obligations (as varied by Code)

What does the Code prohibit? (See Part 3.2)

- termination of leases for non-payment of rent
- drawing upon security
- rent increases
- interest and penalties re rent reductions
- penalties for reduced trading

Detail and Analysis

1. APPLICABILITY OF THE CODE – WHO

1.1 To whom does the Code apply?

The Code is mandatory in respect of tenancies suffering financial stress or hardship as a result of COVID-19, with an annual turnover of up to \$50 million.

All types of commercial tenancies are potentially included – retail, industrial, office, and sectors such as health, education, caregiving (eg childcare), hotel accommodation, entertainment and others.

A tenant will be suffering “financial stress or hardship” if it is unable to generate sufficient revenue as a result of the COVID-19 pandemic (including due to government restrictions) that causes the tenant to be unable to meet its financial or contractual commitments.

A tenant will be automatically deemed to be suffering financial stress or hardship if it is eligible for the JobKeeper payment – that is, it has experienced a 30% or more reduction in turnover over a minimum one-month period to the comparable month last year.

Accordingly, the Code also applies to landlords of those tenants (and by extension, their managers and agents).

While not specified, presumably where a party’s day-to-day expenses exceed their revenue, this will constitute the tenant “being unable to meet its financial or contractual commitments”. However, it remains to be seen whether parties which have an ability to call upon existing financial reserves or dispose of capital in order to meet obligations will be covered by the Code.

1.2 How is turnover assessed for the purposes of the Code?

Presumably the turnover of an entity is to be assessed pre-COVID-19.

Turnover is not necessarily assessed on a “tenancy” basis.

The turnover of a retail group will be assessed at the group level. Accordingly, a business with multiple tenancies will have the turnover from those tenancies aggregated for the purpose of the assessment.

It is not clear whether this means that a retail group that includes multiple business units (or brands) will have the turnover of all those units aggregated. This is also unclear in the JobKeeper-related legislation released to date.

On the one hand, the financial strength of the entire group is relevant. On the other, if the business units are operated as separate financial businesses under separate corporate entities, it would seem inappropriate to require one business to subsidise the other. Entities may need to wait for the legislation to be passed for this to be clarified. Alternatively, a business unit may be content to rely upon the “grunt” that being part of a larger conglomerate gives it in any negotiations, and accordingly negotiate without seeking to rely upon the Code.

In respect of franchised tenancies, the turnover threshold will be assessed at the franchisee level. So where arrangements are set up through a franchise arrangement, the Code may apply to the franchisee, but not franchisor-operated stores or stores where the franchisor holds the lease and sub-leases (or licences operation of the business) to the franchisee.

Similar quirks apply in relation to sub-leased premises – where the landlord may not be entitled to the benefit of the Code in respect of the head landlord, but is obliged to comply with the Code in respect of any sub-tenant.

Finally, where a premises is “licensed” to a tenant, as is generally the case, if the licence is effectively a lease in all but name, there is a strong argument that the Code will apply to the licensed premises if it would have applied to the tenancy had it been leased.

1.3 To whom does the Code not apply?

The Code is **not mandatory** in respect of tenancies who do not meet the turnover / financial stress criteria (detailed in Parts 1.1 and 1.2).

Accordingly, businesses whose annual turnover is above \$50 million, or to whom the turnover reduction caused by COVID-19 have been less than 30% in turnover are not subject of the Code.

However, the government has noted that the principles of the Code should apply in spirit to all leasing transactions.

It can be expected that the Code will act as a reference point for parties to whom it does not apply, in a similar way to the way in which some retail tenancy legislation has informed market expectations regarding more general retail leasing arrangements.

Parties to whom the Code does not apply may wish to voluntarily and bilaterally adopt the Code in negotiations given it may increase the efficiency of negotiations. But it may be preferable for such parties to agree to follow generally the principles of the Code without necessarily being bound by it, so that there is additional flexibility to the measures and arrangements that are implemented.

Parties voluntarily adopting the Code will not likely be able to obtain the assistance of the relevant industry code administration or small business commission in respect of mediation and enforcement.

The Code only applies to existing leases. Accordingly, to the extent that any new leases are entered into during the pandemic period, they will fall outside the operation of the Code.

The Code does not apply to residential tenancies.

2. APPLICABILITY OF THE CODE – WHEN

2.1 Commencement

At this stage, the Code is only a set of principles that are yet to be given the effect of law.

Each state or territory will need to pass legislation to give effect to those principles, before the arrangements become binding in those states and territories.

It is not clear whether any such legislation will have any retrospective effect. Generally, legislation only applies from the date upon which it is passed, unless there is a good reason to depart from that principle. Accordingly, I expect that the legislation will only be binding from the date it is passed.

Leasing negotiations (apart from retail leasing) are largely unregulated throughout Australia. So there is a largely “clean slate” for the anticipated legislation and it can be expected that the states and territories will likely work together on developing consistent legislation, given the benefits consistency may have and the perceived urgent nature of the laws.

Given the existence of legislation regarding leasing in the jurisdictions, some divergence of drafting may be expected.

2.2 Expiry

The Code is temporary in nature. It states that the principles are to apply “during the COVID-19 pandemic period”, being when the JobKeeper programme is applicable.

However, the Code also states that certain arrangements are intended to be applicable during a subsequent reasonable recovery period.

On that basis, different obligations under the Code may cease at different times – with arrangements negotiated to be “grandfathered”.

This means that there may be an incentive for parties wanting to take advantage of the Code to finalise negotiations during the pandemic period.

Legislation will need to deal with ongoing disputes or mediations not resolved by the end of the pandemic period – unless the government considers that the market will efficiently resolve such matters once the COVID-19 pandemic has come to an end.

The meaning of “reasonable recovery period” is not clear but will presumably take into account the length of the pandemic period, and the depth of the economic impact. This might vary from tenant to tenant and between industry sectors.

3. HOW DOES THE CODE APPLY?

3.1 What are parties’ obligations under the Code?

(a) *Good faith negotiation*

The Code requires good faith negotiations – in essence, negotiating honestly and genuinely in an attempt to reach an agreement, with regard to the legitimate interests of the other party.

(b) *Proportionate reduction in rent*

A key element of the Code is the requirement to reduce rent payments based on the reduction in the tenant’s trade. In simplistic terms, an X% decrease in trade would equate to an X% decrease in rent. Determining what appropriate reduction percentage is likely to be a complex matter, and considerations in this regard are dealt with further, below in Part 4.

Of the percentage decrease in rent, at least 50% of that amount is waived (no requirement to repay) with the balance able to be “deferred”. To the extent rent is deferred, it is then to be paid, in addition to rent otherwise payable, over the greater of:

- the balance of the term (following the end of the pandemic period); or
- 24 months.

The Code provides that the proportion waived should be higher where necessary to ensure the tenant’s capacity to fulfil their ongoing obligations under the lease. In other words, to the extent a deferral of rent will result in excess pressure on a tenant at a later date, waiver is preferred.

This also needs to be balanced against the **landlord’s** financial ability to grant the waivers. There will be cases where the rental income is essential for the landlord, eg where the property occupied is used to generate income for a retired person who relies upon those funds to pay daily living expenses. All landlords have ongoing financial obligations and to varying degrees rely upon the income from their leases to meet those obligations.

(c) *Disclosure of information*

One of the overarching principles of the Code is that parties will provide each other with “sufficient and accurate information” to facilitate negotiations.

The relevant information is primarily revenue / turnover figures from the relevant tenancy. However, other data may also be relevant, including data from other tenancies, expenses and profitability.

For many businesses there is some genuine and fitting sensitivity about such information. Accordingly, to the extent that any such data is provided, it would be prudent to ensure that the landlord agrees to keep the information confidential and destroy the information when it is no longer needed for the purposes of the lease.

Tenants must ensure that the data they provide is reasonably accurate, and not misleading or deceptive. The Code suggests that providing data sourced from accounting systems or bank statements would be appropriate.

Tenants seeking relief based on the immediate impacts may wish to consider providing “raw data” to support an initial claim, with reconciliations to be undertaken once that data is verified.

Disclosure obligations also apply to landlords. Landlords may need to provide information regarding reduced costs and taxes, concessions received, customer numbers (where available) and the landlord’s financial position and capacity to grant rent reductions.

(d) *Pass through savings*

The Code requires that landlords pass through savings or concessions obtained by the landlord to the tenant. This includes savings related to:

- reductions in land tax and council rates;
- reduced insurance premiums;
- reduced services being provided by the landlord given the reduced use of facilities; and
- financing arrangements, for example, where banks defer loan re-payments.

These savings are to be passed on in “the appropriate proportion applicable under the terms of the lease”. Presumably this is a reference to the proportion of outgoings that a tenant generally bears, where the lease is a net lease (the tenant pays rent plus a contribution to outgoings).

Where a tenant occupies under a gross lease (where there is no separate contribution to outgoings), savings should still be passed on in the form of a rental reduction to the extent of the savings.

The benefit of a bank deferring loan repayments may be difficult to calculate, given the liability to pay remains and may continue well after the expiry of any lease.

(e) *Opportunities for lease extensions*

A landlord “should” provide a tenant with an opportunity to extend its lease for an equivalent period of the rent waiver and/or deferral period.

This purports to give the tenant additional time to trade, on the existing lease terms, during the recovery period after the pandemic ends.

An option is generally something regarded as a benefit for a tenant, whereas an automatically extended term would more likely benefit a landlord.

Accordingly, tenants should consider this proposal carefully in the context of the existing terms of their lease. Tenants might prefer to obtain an option to extend the lease that is

exercisable following the end of the pandemic (closer to the expiry of their lease), rather than take up such an opportunity at the time of negotiations. This reflects the fact that the property market may well be depressed at the end of lease, and a tenant may prefer to negotiate a new lease at updated market rentals.

(f) *Compliance with lease*

Except as negotiated under the Code, tenants “must remain committed to the terms of their lease”. This language is unusual, but presumably it reflects the fact that parties are already obliged to comply with the terms of their leases.

A material failure by a tenant to abide by substantive terms of their lease will forfeit the protections provided to the tenant under the Code – that is, landlord conduct otherwise prohibited under the Code (see below in Part 3.2) will be permitted.

3.2 What does the Code prohibit?

(a) *Termination*

Landlords must not terminate leases “due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period)”.

This would seem to be applicable even in relation to agreed reduced rental payments.

The prohibition does not appear to apply to non-payment of in respect of a period prior to the COVID-19 pandemic period. Accordingly, to the extent that tenants have not paid rent prior to the commencement of the protections, landlords may be able to seek payment or threaten termination.

The prohibition also does not expressly apply to outgoings. It remains to be seen whether legislation will define “rent” to more broadly apply to rent and outgoings.

(b) *Draw upon security*

Landlords are not entitled to draw upon bank guarantees, security deposits or enforce personal guarantees in the event of non-payment of rent during the pandemic period.

As with termination rights, the Code does not expressly reference outgoings, and applies in respect of non-payment “during the COVID-19 pandemic and/or a reasonable subsequent recovery period”.

This prohibition upon drawing upon security will reduce one of the arrangements that landlords and tenants had been discussing prior to the release of the Code. However, it would not prevent a landlord from reducing the total security held to enable a tenant to access those funds.

(c) *Rent increases*

Rents are “frozen” during the COVID-19 pandemic (and a reasonable subsequent recovery period) such that rent increases will not be permitted.

The concept of a rent “freeze” would seem to imply that landlords are not entitled (following the end of the pandemic) to recalculate rents to accelerate them to the levels they would have been but for arrangements under the Code.

(d) *Interest and penalties*

Landlords may not charge fees, interest or other charges in respect rent which is waived.

By contrast, the Code does allow interest to be charged in respect of deferred rental amounts, provided that interest is not “punitive”. Accordingly, any interest must relate only to the cost of the deferral, and not constitute penalty or default interest.

(e) *Penalties for reduced trading hours*

Landlords are not permitted to impose penalties or prohibit tenants from reducing opening hours or ceasing to trade due to COVID-19.

4. MEASURING THE IMPACT

4.1 Calculations of turnover reductions

A large part of negotiations will revolve around establishing the impact of COVID-19 upon a tenant’s business. This may be a complex task.

While some parties will be willing to opt for the efficiency of estimating the impact based simply on turnover figures, other parties may wish to drill further into the data.

It is unlikely it would be sufficient for parties to simply examine the months prior to the emergence of COVID-19 to determine what the impact.

Sometimes it will be appropriate to compare this year’s turnover data to the turnover data from the same time last year, to identify the impact. But such an approach may ignore the basic trend for the relevant business. For a business whose performance was trending upwards, such an approach would underestimate the impact.

Likewise, landlords may feel sceptical about tenants who have been seen to struggle for some time pointing to COVID-19 as the reason for decline.

4.2 Revenue is not profit

A decline in turnover will not likely align with a decline in profit. While rental costs tend to be a significant part of a tenant’s expenses, they are only one part. A material decline in turnover may completely absorb any profitability, particularly in circumstances where other costs (eg supply and delivery costs) may be increasing.

If this is the case, then disclosing further data regarding expense and even profitability may be in the tenant’s long-term interest.

In this context, some businesses are of such a nature that it is possible for operations continue during COVID-19 in a reduced capacity. For example, a café may be able to sell take away coffee; or a logistics company may continue to operate despite much lower volumes.

Further, some are doing so to keep their clients serviced and their employees employed. In such circumstances, tenants need to make it clear that they are “mitigating their losses” and should not be “penalised” for doing so by being charged rent that reflects either the extent of use of their premises or their turnover without reference to these considerations.

In these circumstances, a reduction in rental which aligns with the reduction in turnover might not be fair and reasonable, and it will be incumbent upon tenants to make this clear to landlords.

5. TYPE OF RENT REDUCTIONS – WAIVERS & DEFERRALS

5.1 Waiver or Deferral

The Code requires at least half of any rent reduction to be in the form of a waiver. The balance may be in the form of a deferral.

The Code notes that other arrangements may also be considered to constitute deferral, including “pausing and/or hibernating leases” – i.e. effectively suspending leasing arrangements during the pandemic period.

Waivers must not be recouped over the term of the lease.

The extent to which deferral is appropriate depends upon the extent to which a tenant will be able to pay increased rent upon return to “normality”.

For some tenants, the end of COVID-19 restrictions will result in activity at levels above normal baseline business as a result of pent up demand. Such increased activity can be seen as akin to the increased activity occurring at the beginning of COVID-19 arising out of panic buying and preparation for lockdown restrictions. For such tenants, deferral of part of the rent reduction may be appropriate.

For other tenants, given the nature of their business, lost income cannot truly be recaptured. This is partly because there are physical / capacity limits on the extent of the service that the tenant can provide or because where demand is not satisfied at the relevant time the demand evaporates.

Where spending is largely discretionary this will often be the case – for example many health services, entertainment, restaurants and holiday services.

Further, COVID-19 impacts may in fact result in lower ongoing demand – because the economic downturn results in a reduced market for the goods or services.

These arguments should be considered in any discussions regarding the extent to which rent payments are deferred.

Deferral of payments will often simply be kicking the can further down the road – delaying the financial pain until a later date and accordingly may not be a viable solution. It is important that both landlords and tenants recognise that agreeing arrangements which are unsustainable upon a return to normality will simply cause longer term problems.

5.2 Repayment of deferred rental

The timing of repayment of deferred rent creates some additional challenges.

If a tenant has ongoing obligations to repay deferred rent which extend beyond the term of the lease to a time the tenant is no longer in occupation, a landlord’s leverage in the event of failure to pay is significantly reduced. I anticipate that this may result in landlords seeking to hold bank guarantees until the deferred rent is repaid, or otherwise seeking further or additional security from tenants.

6. OTHER MATTERS

6.1 Holding over

Tenants who are holding over also have the benefit of the Code. However, their bargaining power may be less since their commitment to the tenancy is limited, and arrangements to repay over an extended period are not able to be secured as easily (see Part 5.2 above).

This may result in landlords' offers to monthly tenants being lower, or possibly conditional upon such tenants signing up to new arrangements.

Tenants are not prohibited from terminating their leases, and doing so may be preferable in some cases.

Landlords are not prohibited from ending monthly tenancies under the Code, since doing so is not a "termination" but rather bring to an end the period of overholding. That said, landlords are likely to prefer to have a tenant who is paying some rent, rather than a vacant premises, given the difficulty with sourcing a new tenant in the current climate.

6.2 Administration / receivership

The Code suggests that the Code will apply to tenants in administration or receivership.

Such tenants are unlikely to be given significant leeway by landlords given their existing situation, unless there is a clear and likely successful recovery plan.

7. FORMALISING ARRANGEMENTS

Parties will have different approaches to the extent to and manner in which they choose to document arrangements.

To ensure any agreements are binding, they should be in writing and signed by a party with sufficient authority to bind the relevant entity. The language of arrangements should reflect the language of the lease and the Code, and deal with consequential effects – for example, how rent reviews post COVID-19 will deal with rent waivers and reductions and what happens if impacts are deeper or shallower than anticipated.

Many agreements will effectively be variations to existing leases. This means parties will need to be conscious of the potential need for:

- registration;
- mortgagee consent;
- Foreign Investment Review Board consent (given recent changes to FIRB requirements to deal with COVID-19);
- compliance with any applicable retail tenancy legislation.

Parties may choose to enter into side deeds regarding the arrangements. In that case, parties will need to be cognisant of the risk that a side deed may not bind future parties without their express agreement.

Ensuring appropriate tax structuring of arrangements – from the perspective of both the tenant and the landlord – is also important to avoid unintended consequences.

8. ENFORCEMENT

Where landlords and tenants cannot reach agreement, either party may refer the matter for mediation for binding mediation.

The Code provides that landlords and tenant must not use mediation processes to prolong or frustrate the facilitation of amicable outcomes.

It remains to be seen whether the relevant mediation bodies (for example the Small Business Commissioner in Victoria) will be available to mediate matters between parties who voluntarily submit to the Code.

9. CONCLUSION

Landlords and tenants now have additional certainty regarding how to proceed with their leases.

However, while the Code provides significant guidance for landlords and tenants, there remains many unanswered questions.

Some of these questions will be answered by the enactment of legislation. Other questions will likely be resolved as part of negotiations, as market forces (subject to the restrictions imposed by the Code) result in preferred approaches and outcomes being developed.

It will be important for landlords and tenants to properly consider the issues that arise, rather than rushing forward to a binding solution which may not be appropriate in the longer term.

Schedule 1 – National Cabinet Mandatory Code of Conduct

NATIONAL CABINET MANDATORY CODE OF CONDUCT

SME COMMERCIAL LEASING PRINCIPLES DURING COVID-19

PURPOSE

The purpose of this Code of Conduct (“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.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus (“COVID-19”) pandemic.

This Code applies to all tenancies that are suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government’s JobKeeper programme, with an annual turnover of up to \$50 million (herein referred to as “SME tenants”).

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).

The Parties to this Code concur that during the COVID-19 pandemic period, as defined by the period during which the JobKeeper programme is operational, the principles of this Code should nevertheless apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.

Appendix I gives examples of proportionate solutions that may be agreed under this Code, and forms part of the overall Code.

The Code has been developed to enable both a consistent national approach and timely, efficient application given the rapid and severe commercial impact of official responses to the COVID-19 pandemic.

PARTIES TO THE CODE

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.

OVERARCHING PRINCIPLES

The objective of the Code is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords.

It is intended that landlords will agree tailored, bespoke and appropriate temporary arrangements for each SME tenant, taking into account their particular circumstances on a case-by-case basis.

The following overarching principles of this Code will apply in guiding such arrangements:

- 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.
- Landlords and tenants will be required to discuss relevant issues, to negotiate appropriate temporary leasing arrangements, and to work towards achieving mutually satisfactory outcomes.
- Landlords and tenants will negotiate in good faith.
- 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 this Code.
- 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 plus a reasonable recovery period.
- The Parties will assist each other in their respective dealings with other stakeholders including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of this Code.
- All premises are different, as are their commercial arrangements; it is therefore 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.
- 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 mitigate this risk in negotiating temporary arrangements envisaged under this Code.

- 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 tenant's lease has expired or is soon to expire; and whether the tenant is in administration or receivership.
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over." These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
- As the objective of this 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.

LEASING PRINCIPLES

In negotiating and enacting appropriate temporary arrangements under this Code, the following leasing principles should be applied as soon as practicable on a case-by-case basis:

1. Landlords must not terminate leases due to non-payment of rent during the COVID-19 pandemic period (or reasonable subsequent recovery period).
2. Tenants must remain committed to the terms of their lease, subject to any amendments to their rental agreement negotiated under this Code. Material failure to abide by substantive terms of their lease will forfeit any protections provided to the tenant under this Code.
3. Landlords must offer tenants proportionate reductions in rent payable in the form of waivers and deferrals (as outlined under "definitions," below) 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 COVID-19 pandemic period and a subsequent reasonable recovery period.
4. Rental waivers must constitute no less than 50% of the total reduction in rent payable under principle #3 above 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 agreement. Regard must also be had to the Landlord's financial ability to provide such additional waivers. Tenants may waive the requirement for a 50% minimum waiver by agreement.
5. Payment of rental deferrals by the tenant must 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.

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 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.

8. 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. 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 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.

10. No fees, interest or other 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 deferrals in principles #3, #4 and #5 above.

11. 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 period of the COVID-19 pandemic and/or a reasonable subsequent recovery period.

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 outlined in item #2 above. 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.

13. Landlords agree to a freeze on rent increases (except for retail leases based on turnover rent) for the duration of the COVID-19 pandemic and a reasonable subsequent recovery period, notwithstanding any arrangements between the landlord and the tenant.

14. Landlords may not apply any prohibition on levy any penalties if tenants reduce opening hours or cease to trade due to the COVID-19 pandemic.

BINDING MEDIATION

Where landlords and tenants cannot reach agreement on leasing arrangements (as a direct result of the COVID-19 pandemic), the matter should be referred and subjected (by either party) to applicable state or

territory retail/commercial leasing dispute resolution processes for binding mediation, including Small Business Commissioners/Champions/Ombudsmen where applicable.

Landlords and tenants must not use mediation processes to prolong or frustrate the facilitation of amicable resolution outcomes.

DEFINITIONS

The following definitions are provided for reference in the application of this Code.

1. Financial Stress or Hardship: an individual, business or company's inability to generate sufficient revenue as a direct result of the COVID-19 pandemic (including government-mandated trading restrictions) that causes the tenant to be unable to meet its financial and/or contractual (including retail leasing) commitments. SME tenants which are eligible for the federal government's JobKeeper payment are automatically considered to be in financial distress under this Code.
2. Sufficient and accurate information: this includes information generated from an accounting system, and information provided to and/or received from a financial institution, that impacts the timeliness of the Parties making decisions with regard to the financial stress caused as a direct result of the COVID-19 event.
3. Waiver and deferral: any reference to waiver and deferral may also be interpreted to include other forms of agreed variations to existing leases (such as deferral, pausing and/or hibernating the lease), or any other such commercial outcome of agreements reached between the parties. Any amount of reduction provided by a waiver may not be recouped by the Landlord over the term of the lease.
4. Proportionate: the amount of rent relief proportionate to the reduction in trade as a result of the COVID-19 pandemic plus a subsequent reasonable recovery period, consistent with assessments undertaken for eligibility for the Commonwealth's JobKeeper programme.

CODE ADMINISTRATION COMMITTEE

This Code will be supported by state based Industry Code Administration Committees, comprising representatives from relevant industry bodies representing landlord, tenant and SME interests, with an Independent Chair appointed by the relevant State/Territory Government.

Committee members' roles will be to (1) promote awareness of the Code; (2) encourage application of the Code; (3) encourage its application by the broader retail industry; and (4) monitor the operation of the Code.

The Committee should meet at least fortnightly, and may communicate and meet via email, telephone calls, or video conferencing.

No formal minutes will be taken; however, the Committee will document key action items and outcomes of each meeting.

The Committee may invite advisers, upon agreement by all Committee members, to assist on specific issues in the course of discharging their obligations under this section.

COMMENCEMENT/EXPIRY

This Code comes into effect in all states and territories from a date following 3 April 2020 (being the date that National Cabinet agreed to a set of principles to guide the Code to govern commercial tenancies as affected by the COVID-19 pandemic) to be defined by each jurisdiction, for the period during which the Commonwealth JobKeeper program remains operational.

APPENDIX I

EXAMPLES OF THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

The following scenarios are examples only, noting the circumstance of each landlord, SME tenant and lease are different, and are subject to negotiation and agreement in good faith.

Examples of practical variations reflecting the application of the principle of proportionality may include, but are not limited to:

- Qualifying tenants would be provided with cash flow relief in proportion to the loss of turnover they have experienced from the COVID-19 crisis
 - ie. a 60% loss in turnover would result in a guaranteed 60% cash flow relief.
 - At a minimum, half is provided as rent free/rent waiver for the proportion of which the qualifying tenant's revenue has fallen.
 - Up to half could be through a deferral of rent, with this to be recouped over at least 24 months in a manner that is negotiated by the parties
 - So if the tenant's revenue has fallen by 100%, then at least 50% of total cash flow relief is rent free/rent waiver and the remainder is a rent deferral. If the qualifying tenant's revenue has fallen by 30%, then at least 15% of total cash flow relief is rent free/rent waiver and the remainder is rent deferral.
 - Care should be taken to ensure that any repayment of the deferred rent does not compromise the ability of the affected SME tenant to recover from the crisis.
 - The parties would be free to make an alternative commercial arrangement to this formula if that is their wish.