

COVID-19: the ACT's declaration implementing the national code for commercial tenancies

Date: 13 July 2020

Source: [ACT Legislation Register](#) and the [ACT's government's COVID-19 website](#)

Abstract:

It was announced by the Prime Minister on 7 April 2020 that the [National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 \(National Code\)](#) would be given effect in each state and territory through state and territory legislation or regulation. This legislation or regulation modifies, during the COVID-19 pandemic period, the operation of:

- the provisions of commercial leases (including retail, office and industrial leases); and
- commercial and retail leases legislation in the states and territories,

to provide relief to commercial tenants suffering financial hardship as a direct result of the COVID-19 pandemic. See our update on 9 April 2020 ([COVID-19 — National Cabinet approves a mandatory code of conduct for commercial tenancies](#)).

Commercial and retail tenancies declaration in the ACT

The ACT government has implemented the National Code by means of the [Leases \(Commercial and Retail\) COVID-19 Emergency Response Declaration 2020 \(ACT\) \(Declaration\)](#). It was made by the Attorney General on 11 May 2020 and came into effect on 12 May 2020. It is a disallowable instrument (DI2020-92) made pursuant to section 177 of the *Leases (Commercial and Retail) Act 2001 (ACT)(Act)*(which was inserted by the *COVID-19 Emergency Response Act 2020 (ACT)*).

How long will the Declaration be in operation?

The Declaration:

- commenced on 12 May 2020; and
- expires on the first day that no COVID-19 emergency is in force in the ACT or a day not later than 3 months after that date if notified by the Minister (under the section 177(3)(b) of the Act).

However, it applies to the “prescribed period” which commenced on 1 April 2020 and ends on the same date as the Declaration expires (“**prescribed period**”).

Who does the Declaration apply to?

The Declaration applies to:

- an impacted tenant who commits a prescribed breach of a prescribed lease during the prescribed period; and
- a landlord who gives a termination notice to, or takes a prescribed action against, an impacted tenant for a prescribed breach during the prescribed period, including:

- a termination notice given before 12 May 2020 or after the day that the Declaration expires; and
- any prescribed action taken by a landlord against a tenant in relation to a prescribed breach after the day that the Declaration expires.

See the definitions of the above terms below:

Impacted tenant

An impacted tenant is a tenant under a prescribed lease who:

- at any time during the prescribed period qualifies for the [jobkeeper scheme](#); and
- has a turnover (which includes turnover from internet sales) for the 2018-2019 financial year of less than \$50 million for:
 - if the tenant is a franchisee in a business – the business conducted at the leased premises;
 - if the tenant is a member of a corporate group (a corporation and all its related bodies corporate) – the group; and
 - in any other case – the business conducted by the tenant (“**impacted tenant**”).

Business includes business conducted on a not for profit basis.

Prescribed breach

A prescribed breach is a failure by an impacted tenant during the prescribed period:

- to pay rent;
- to pay outgoings or other amounts due under the lease; or
- to operate the business on the leased premises during the hours required under the lease (“**prescribed breach**”).

Prescribed lease

A prescribed lease is a lease:

- to which the Act applies (see section 12 and section 177(5) of the Act – it includes a lease prescribed under sections 12(2)(a) and (b) of the Act); and
- that was entered into before 7 April 2020 (“**prescribed lease**”).

Prescribed action

A prescribed action is an action taken by a landlord against an impacted tenant for:

- eviction of the tenant from the leased premises;
- exercise of a right of re-entry to the leased premises;
- recovery of the leased premises;
- distraint of goods on the leased premises;
- forfeiture;
- damages;
- requiring payment of penalty interest, fees or charges on unpaid rent;
- recovery of the whole or part of a security bond;
- performance of the obligations by the tenant or of the tenant’s guarantor;
- possession of the leased premises; or
- any other remedy otherwise available against the tenant under a law of the ACT (“**prescribed action**”).

So what does the Declaration provide?

The Declaration provides as follows:

Landlords must negotiate before giving termination notices for prescribed breaches

A landlord must not give a termination notice to an impacted tenant for a prescribed breach unless the landlord has engaged in good faith negotiations with the tenant. Otherwise, the termination notice is void.

A landlord is deemed to have engaged in “good faith negotiations” with an impacted tenant if the landlord, in acknowledging the financial hardship suffered by the tenant because of the economic impact of COVID-19, negotiates with the tenant having regard to the overarching principles and leasing principles set out in the National Code. The parties are therefore required to have regard to the principles in the National Code. See [COVID-19 and commercial tenancies – guide to the national mandatory code of conduct](#).

Termination notices from 1 April 2020 to 11 May 2020 for prescribed breaches

If:

- a landlord has given an impacted tenant a termination notice during the period commencing on 1 April 2020 and ending on 11 May 2020 for a prescribed breach; and
- either the tenant contests the termination under section 122(2) of the Act or the landlord applies to the Magistrates Court for confirmation of the termination under section 124(2) of the Act,

the Magistrates Court must not confirm the termination unless satisfied that the landlord has engaged in good faith negotiations with the impacted tenant.

Landlords must negotiate before taking prescribed action for prescribed breaches

A landlord must not take any prescribed action against an impacted tenant for a prescribed breach unless the landlord has engaged in good faith negotiations with the tenant.

Impacted tenant can agree to termination or prescribed action

A landlord can give a termination notice or take a prescribed action against an impacted tenant if:

- the tenant agrees to the termination or action; or
- the landlord has engaged in good faith negotiations with the tenant and the tenant surrenders the lease.

Does the Declaration give full effect to the National Code?

Yes, the Declaration gives full effect to the National Code; however, the principles in the National Code are not set out expressly in the Declaration, e.g. it does not expressly state that landlords are prohibited from terminating leases for non-payment of rent or that landlords are required to offer rent reductions in the form of waivers and deferrals. Instead, landlords are required to engage in good faith negotiations with tenants, having regard to the overarching principles and leasing principles in the National Code, before giving any termination notices or taking any prescribed actions for prescribed breaches. The National Code must therefore form part of any negotiations between the parties and negotiations must take place before landlords take any actions for prescribed breaches.

See [COVID-19 and commercial tenancies – guide to the national mandatory code of conduct](#)

Any issues arise from the Declaration?

- The Declaration does not apply to leases:
 - where the lettable area of the leased premises is greater than 1000m² and the tenant is a listed public company or a subsidiary of a listed public company; or
 - entered into from 7 April 2020.
- The Declaration applies to prescribed breaches before 12 May 2020 (i.e. from 1 April 2020 and during the prescribed period).
- The Declaration will apply to any termination notices given to impacted tenants or to prescribed actions taken against impacted tenants after the expiry date of the Declaration if they relate to prescribed breaches during the prescribed period.
- It appears that the Declaration does not prevent a landlord from taking action against an impacted tenant for a breach before the prescribed period, i.e. before 1 April, or for a breach other than a prescribed breach during the prescribed period (i.e. for breaches other than a failure to pay rent or other amounts or to operate the business during the required hours).
- The Declaration does set out how negotiations are to be carried out between the parties.
- A party to an agreement entered into before 12 May 2020 may be able to seek to have it renegotiated if it does not comply with the Declaration.
- The Declaration does not set out how disputes are to be resolved; however, please see below under “ACT government’s guidance notes”.

ACT government’s guidance notes

In June 2020, the ACT government released [guidance notes](#) to landlords and tenants on the ACT government’s approach to the implementation of the National Code in the ACT (“**guidance notes**”). They provide guidance on the Declaration and include answers to frequently asked questions. They note the following:

Declaration’s expiration date

- It is the ACT government’s intention that the Declaration will expire on 30 September 2020 (in line with the timeframe for the ending of the ACT government’s rates rebate scheme).

Good faith negotiations

Good faith negotiations are expected to involve:

- a tenant providing evidence of financial hardship (e.g. JobKeeper payment receipts evidencing a reduction in turnover of at least 30%);
- a landlord providing evidence of its financial position;
- negotiations taking place, having regard to the principles in the National Code;
- if agreement is reached – the resolution being documented and the new arrangements being put in place; and
- if agreement is not reached – either party seeking mediation.

The matter should only proceed to the Magistrates Court for determination if the matter cannot be resolved through mediation.

Mediation

The Local Business Commissioner, Mr Brendan Smyth, has been appointed by the ACT government to act as the Commercial Tenancy Mediator. He acts as an independent third party to assist landlords and tenants in negotiating between themselves, in good faith, amendments to their existing leasing arrangements, having regard to the overarching principles and leasing principles in the National Code. This service provided by the Commissioner is voluntary, free and confidential; however, the Commissioner cannot:

- compel parties to attend mediation;
- give binding advice; or
- make a decision on the matter.

His actions are also not reviewable by the ACT Civil and Administrative Tribunal.

Magistrates Court

If a landlord and a tenant cannot reach a resolution through mediation, the [Magistrates Court](#) will determine if the landlord has participated in good faith negotiations, having regard to the National Code, before making any order. Accordingly, it appears that a dispute must go through mediation before proceeding to the Magistrates Court for a determination.

Termination by tenants

If a tenant endeavours to terminate its lease after negotiations, the Declaration will not, at that point, provide further protection to the tenant.

What should landlords and tenants in the ACT do?

Impacted tenants under prescribed leases in the ACT who are suffering financial hardship as a direct result of the COVID-19 pandemic should seek relief from their landlords (if they have not already done so). Landlords are required to engage in good faith negotiations with impacted tenants before giving any termination notices or taking any prescribed actions for prescribed breaches during the prescribed period. Landlords should also endeavour to seek any government support that may be available to commercial landlords during the COVID-19 pandemic. Both parties need to ensure that they understand their rights and obligations under the Declaration and that they comply with all of the requirements of the Declaration. Accordingly, parties should do the following:

Step 1

- Determine if their lease is a “prescribed lease” and if the tenant is an “impacted tenant”.
- Carefully review the Regulation, the National Code and the guidance notes to determine their rights and obligations.

Step 2

- Communicate and commence negotiations “in good faith” with each other as soon as possible (if they have not already done so), having regard to the overarching principles and leasing principles in the National Code.
- Tenants should provide evidence that they qualify for the [jobkeeper scheme](#) and that they had a turnover of less than \$50 million for the 2018-2019 financial year. The Guidelines note that:
 - evidence of turnover could comprise a tenant’s latest set of audited accounts or other independently verified information such as ATO tax information; and
 - the [ATO website](#) provides a method of calculating a reduction in turnover and that recognised accounting systems should be capable of producing information which evidences the reduction in turnover. A letter from a tenant’s accountant asserting that the tenant has experienced a reduction in turnover is unlikely to be adequate.
- Landlords should also disclose any financial benefits received, e.g. statutory charges relief, loan payment deferrals, etc.
- If the tenant is a foreign person, the parties should consider if FIRB approval is required for any lease variation or extension. See our update on 30 April 2020 ([COVID-19 — FIRB provides guidance on how the temporary measures will affect lease transactions](#))

Step 4

- Ensure that whatever is agreed is documented, preferably in a deed of variation of the lease.

What about leases not covered by the Declaration?

Landlords and tenants under leases that are not covered by the Declaration can still adopt the principles in the National Code in negotiating amendments to their existing leasing arrangements as it was intended that the principles should apply “in spirit” to all affected businesses. But the Declaration does not apply to these leases. The parties are not bound by it and cannot benefit from the protection provided by it. These landlords are not obliged to provide relief and may be entitled to charge interest on unpaid rent, draw on the tenants’ securities or even terminate the leases for non-payment of rent.

See also:

- the [ACT government response on commercial tenancies – Guidance notes to tenants and lessors](#) (June 2020);
- the [COVID-19 commercial tenancies and owner-operated businesses fact sheet](#);
- the ACT’s government’s COVID-19 website for information on [commercial tenancies](#); and
- the ACT Revenue Office website for information on the [commercial rates rebate scheme](#) which applies to certain commercial landlords who have provided rent relief to their commercial tenants due to COVID-19.